



## RESEARCH PAPER

### Legal Aspects of Evidence Collected by Modern Devices: A Case Study

<sup>1</sup> Muhammad Hassan Zia      <sup>2</sup> Alvina Ali

1. Assistant Professor, Department of Law, University of the Punjab Gujranwala Campus, Gujranwala, Punjab, Pakistan
2. Visiting Lecturer, Department of Law, University of the Punjab, Gujranwala Campus, Gujranwala, Punjab, Pakistan

PAPER INFO	ABSTRACT
<p><b>Received:</b> July 22, 2021</p> <p><b>Accepted:</b> October 21, 2021</p> <p><b>Online:</b> October 24, 2021</p> <p><b>Keywords:</b> DNA Profiling, Finger Prints, , Telephone Calls, Video Tape</p> <p><b>*Corresponding Author:</b></p> <p>hassanzia@pu gc.edu.pk</p>	<p>This paper is a qualitative research of different case laws dealing with modern technological evidence. Courts were required to adopt new methods, techniques and devices obtained through advancement of science without affecting the original intention of law. Because of modern technology, a benefit could be taken from said technology to preserve evidences and to assist proceedings of the Court in the dispensation of justice in modern times. Owing to the scientific and technological advancements the admissibility of audio and visual proofs has grown doubtful. No doubt modern evidence assist the court in reaching out to the just decision but at the same time certain criteria need to be laid down which must be satisfied to consider such evidence admissible. Different Case laws are discussed here to show how the cases were resolved on the basis of technological evidence and when and why such evidence have been rejected by the court, if it did. Moreover, legal practices developed in various countries allow our Courts to record evidence through video conferencing. The Honorable Supreme Court of Pakistan directed that in appropriate cases statement of juvenile rape victims and other cases of sensitive nature must be recorded through video conferencing to avoid inconvenience for them to come to the Court. Nevertheless, it has some problems. The most important among them is the identification of the witness and an assurance that he is not being prompted when his statement is recorded. In this paper protocols that are necessary to follow while examining witness through video link are discussed</p>

## Introduction

Criminal justice has entered into a new era of forensic evidence. For the dispensation of justice, it is the duty of the courts to keep pace with new technologies that are available by the advancement of science. Court must adopt a dynamic approach to employ scientific methodologies to reach out a culprit in the new era of forensics. Art. 164 of QSO has efficiently accommodated the modern techniques to be saved and preserved which was not available earlier certainly, the approach must be in accord with the statutory safeguards so as to exclude possibility of prejudice to the accused, certainly entitled to fair trial wherein law and justice are found at speaking terms. By adopting those new methods,

Court would be in a better position to serve advancement of cause of justice, to do fair play between the parties and to make proceedings more transparent. The admissibility of evidence collected through modern devices becomes doubtful because of the advancement in the fields of science. Tampering with such types of evidences is longer difficult. This puts a serious question on their acceptability as evidence in the court of law and therefore must be tested in the forensic laboratory before validating it as a proof. This paper is divided in two sections. In first section, the researchers describe the legal framework that take cognizance of forensic evidence along with the protocols need to be followed while recording evidence through video link and in the second part the admissibility of evidence collected through modern devices is discussed.

### **Hypothesis**

In this paper researchers explore the availability of advanced technology that has influenced the court's proceedings. There is always a gap between advancement of people and development of law. With the change in times there is always a need to make certain amendments in the existing laws and to create new ones to fit the social needs. In this paper researchers analyze different case laws where the modern evidence based on technology were accepted or rejected by the court owing to the careful scrutiny and the criterion laid down for such consideration.

### **Material and Methods**

In this paper, doctrinal legal research method is used. Under this study analytical research method is applied to present and portray different declarations of the court based on the technological evidence. Data is collected from textbooks, articles in law journals, case laws, statutes and other relevant sources. It is observed that owing to advancement in modern technology amendments have been made in statutory laws to accept technological evidence though under certain conditions

### **Legal Framework**

Scientific progress has moved Criminal justice into the new era of forensic evidence. Articles 46-A, 164 and 59 of the Qanun-e-Shahadat Order, 1984 refer to these changes that have taken place over the last few decades. Circumstances never perjure and forensically verifiable incriminatory information, in appropriate situations, can aptly provide requisite corroboration, earlier solicited through old means. Article 164 of Qanun-e-Shahadat, 1984 is reproduced as under:- "Production of evidence that has become available because of modern devices, etc

In such cases as the Court may consider appropriate, the Court may allow to produce any evidence that may have become available because of modern devices or techniques."

This provision of law has provided an extensive apparatus to keep record of visual, audio sonic and biological evidences. Moreover it adds other means on the basis of information capable to establish or negate any fact in issue, certainly subject to integrity of the procedure/process, duly qualified in the case. Because of modern technology, a benefit

could be taken from said technology to preserve evidence and proceedings of the Court in modern devices. Control of the gadget would be with the Presiding Officer who could pause or get it paused at any time while recording evidence that would stop recording inadmissible evidence which would then not become the part of the record and it would not violate provisions of Articles 131 & 133 of Qanun e-Shahadat, 1984.

### **Protocol**

The Lahore High Court through Letter No.2045/MIT/HC/2017 dated 27.1.2017 directed all trial courts in the Punjab to record evidence of magistrates through modern devices. Therefore, whenever in the course of an inquiry, a trial or other proceedings, a witness is required to be examined through video link the following protocols should be observed:

(i) The video conferencing should be held at the place approved by the Court.

(ii) If the witness is in Pakistan, a commission should be issued to the Magistrate of the first class under section 503 or 506 of the Code to facilitate and supervise the process as hereinafter mentioned.

(iii) If the witness resides in any country with which Pakistan has reciprocal arrangements, a commission as aforesaid should be issued to such Court or Judge having authority in this behalf as may have been specified in terms of subsection (2-B) of section 503 Cr.P.C. However, where no such arrangements exist, the statement of the witness must be recorded in Pakistan Embassy/High Commission or Consulate or, if the Court permits, in a Notary's office in the presence of an officer of that Embassy/High Commission or Consulate or the Notary, as the case may be.

(iv) The judge, magistrate, officer of the Pakistan Embassy/High Commission, Consulate or Notary, as the case may be, must ensure that the witness is alone at the time of video conference and is not coached, tutored or prompted and he must submit his certificate to this effect to the Court.

(v) Before examination of the witness under audio-video link starts he must submit to the judge, magistrate, officer of the Pakistan Embassy/High Commission, Consulate or Notary, as the case may be, his original identity card, passport, driving license or other document to prove his identity along with an affidavit (signed and thumb marked) which is attested and verified before a judge or a notary indicating that the witness is truly the same person being shown on the screen. The said identification document and affidavit must be shown on the screen to the other side and the officer concerned must forward a copy of these papers duly attested by him in a sealed cover to the Court (for which expenses must be paid to him in advance) which must make it part of the record.

(vi) Sooner the identification is complete, the oath has to be administered to the witness by using the media channel according to the Oaths Act, 1873, or any other law that is in force.

(vii) The witness should, as far as possible, be analyzed during the working hours of the Courts in Pakistan.

(viii) The proceedings must be conducted, as much as practically possible and without any interference and no adjournment should be granted unless the Court thinks that it is extremely necessary to meet the ends of justice.

(ix) The Court must provide to the witness copies of any documents that he may be entitled to demand under any law for the time being in force.

(x) The Court must record any objections related to the material, representation of witness on the screen and the points raised during the proceedings whether they be mechanical or manual.

(xi) Deposition of the witness either in the question-answer form or in the narrative form must be reduced to writing by the Court and must be read over to the witness and if possible his digital signature must be obtained as a proof of its correctness. After that the Presiding Officer must also sign it and make the same part of record.

(xii) The visual must be recorded at the Court's end, secured with the seal of the Court and made part of the record.

(xiii) If a video link fails during the proceedings, the Court may adjourn the proceedings or make such other order as it may deem appropriate.

(xiv) In case of perjury the Court would be competent to proceed not only against the witness who gave false evidence but against the person who abetted it.

(xv) Unless the Court directs otherwise, the expenses for the arrangements should be borne by the applicant who wants this facility. The same should be deposited with the Court in advance.

(xvi) The Court may put such other conditions and issue directions as may be required in the circumstances of a case to meet the ends of justice and attain the object.

(xvii) The Court may at any time vary or revoke a direction/ permission for examination of a witness on video link.

(xviii) The Court must not make a direction for examining a witness on video link if:

(a) the needed services are not available or if it is not possible to make them available practically.

(b) The Court gleans that the witness can provide statement more efficiently in the courtroom, or

(c) The Court perceives that there are chances of direction getting unfair to any one of the parties.

(d) The Court doubts that the person for whom the direction is required may not provide the evidence or may not make the submission (Munawar Hussain and another v The State, [2020] )

## **Admissibility of Evidences Collected Through Modern Devices**

### **Audio Tape Evidence**

Admissibility of audios and videos as evidence in the court of law has been a recurrent issue in multiple cases and we record some of them here chronologically. In the case of Islamic Republic of Pakistan v. Abdul Wali Khan PLD [1976] SC 57, the Hon'ble Supreme Court laid down that tape records speeches of the N.A.P. leaders were authentic. The officer who recorded the tape was produced and the tapes were played in the Court. The officer also recognized voice of the speaker therefore court found no reason to reject those reports. It was also laid down that

“The learned amicus curiae have also conceded that such tape records are admissible in evidence and that they have been so admitted by the Courts in this Country.”

In the case of R.V. Maqsood Ali [1965] (2) AER 464, the court had to face the question: "Is a tape-recording as such admissible in evidence, as a matter of law?" and for this purpose the observation in Mills Case 1962 (2) AER 298 and the decision of High Court of Judiciary in Hopes Case 1960 Scots Law Times 264 were resorted to and it was decided that the evidence of the police officer was held admissible as he had listened to the tape-recording. It was noted by the court that it was high time for the court to state its views on the matter which needs most attention. Since photographs were held admissible by the court as a proof and now that there are devices for recording the conversations therefore court sees no difference between the photograph and tape-recordings. It was also made clear by the court that such recording are admissible in all circumstances but

“it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape-recording is admissible in evidence.”

However the court further postulated that caution was required to regard such evidence and must be analyzed in the light of all circumstances. (The Court laid at p. 469).

### **Video Recording or Footage**

After necessary amendment in Qanun-e-Shahadat and by insertion of Article-164 of Qanun-e-Shahadat, it has been postulated that the evidence gathered through technological devices is admissible as a valid piece of evidence (Babar Ahmad versus The State, [2017]). In the case of Ammar Yasir Ali v The State [2013] PCr.LJ 783 it has been clarified that CCTV cannot be merely taken as evidence until its authenticity has been established. According to the conditions described earlier it is mandatory that the person who recorded the conversation must be examined by the prosecution. In the present case the person who recorded the video did not intend to show his identity and at the same time the investigating officer did not find anything visible or identifiable in the video. Therefore it was decided upon that this video could not be taken as reliable evidence. In Asfandyar and another v Kamran and another [2016] SCMR, 2084 the records of the case show that the petitioner wanted to produce the C.C.T.V footage which is surely acceptable under

Article 164, of QSO 1984 but at the same time the adverse party also reserves the right to cross-examine the witness. Therefore the person who prepared the video from the CCTV footage must be produced in the court. Any video or document cannot be accepted as evidence unless it has been proven strictly according to the provisions contained in the QSO, 1984. Just producing a CCTV footage as evidence is not sufficient unless and until it has been proved to be genuine.

### **Requirement for Proving Audio and Video Tape**

In *Ishtiaq Ahmed Mirza and 2 others versus Federation of Pakistan and others* [2019] PLD Supreme Court, 675 declared that an audio tape or the video to be accepted in the court as evidence there are certain requirements which can be listed as under:

- \* For an audio or video tape to be considered admissible as evidence its genuineness needs to be established. It has to be proved that tape has not been tampered or doctored with.
- \* The provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007 allow the acceptance of a forensic report made by an analyst of the Punjab Forensic Science Agency.
- \* Under Article 164 of the Qanun-e-Shahadat Order, 1984 it depends on demand and need of the court to allow the evidence to be produced in audio or visual form.
- \* The audio tape or video must be produced as evidence in accordance to the law of evidence.
- \*The chances to tamper the evidence have to be ruled out by maintaining the accuracy of the recording. Whether it is direct or circumstantial the authenticity has to be proved in the court.
- \* The video or the audio used as evidence in the court must be an actual record of the event as and when it happened.
- \* The person who recorded the conversation or made the video must be produced in the court.
- \* The audio or video tape must be produced in the court by the person who recorded it himself.
- \* These evidences must be played in the court.
- \* The print of the video must be clear and viewable; also the audio that is played in the court must be clearly audible.
- \* The person who recorded the audio or video must be able to recognize the voice of the speaker.
- \* Someone else other than the person who recorded the video or the audio may also testify to overhearing the conversation.

- \* The persons shown in the video and the voices of the people speaking in the audio must be clearly identified.
- \* After the tape has been prepared and till its production in the court it must be kept in the safe custody.
- \* It has to be made sure that the transcript for the video or the audio is prepared independently under strict supervision and controlled environment.
- \* The person who records the audio or the video must be a professional performing his job of recording and recording must not be a part of a certain trap being laid down to procure the evidence.
- \* The source from where the audio or the audio has been made available must be disclosed to the court.
- \* The person who produces the audio or video recording in the court must also disclose the date when he acquired the tape.
- \* The delayed proof may be looked at with suspicion. The audio or video recording must be produced in the court at the right time.
- \* The person who intends to produce audio or video tape as evidence must file a formal application in the court.

### **Compact Disc**

In *Sikandar Ali Lashari versus The State and another* [2016] YLR 62, Trial Court tried a case in which capital punishment could be awarded, if the charge was proved on the basis of evidence collected through compact Disc. In this case Trial Court refused to supply the copy of CD and USB, which was not only against the mandate and command of Arts.4 & 10-A of the Constitution but also in violation of norms of administration of justice. Findings of the Trial Court were perverse and misconstrued. Once the court allows the applicant to get the transcript of CD and USB then it becomes the undeniable right of the accused to acquire CD or USB for his defence. Unless done so he cannot defend himself on the basis of the transcripts provided to him. -Denial of said items amounted to dearth and scarcity of right to a fair trial. No substantial or conceivable rationale, was given in the impugned order to deny the copy of CD and USB. In *Muhammad Sadiq alias Husnain and others v. The State and others* [2016] P Cr. L J 1390, one of the accused persons admitted in front of media that he was involved in a bomb blast. He also took names of his partners. This confession was converted into CD and was handed over to SHO. Moreover it was taken into possession by recovery memo and was also played in the High Court. Considering Article, 164 Qanun-e-Shahadat, 1984, evidence collected through modern device was acceptable and admissible in the Court. Two persons accused in the recording were scrutinized and charges against them were proven through admissible evidence. Therefore they convicted and sentenced and there was no ground to interfere in that decision.

## **Polygraph Test**

Polygraph test, a modern forensic method to unearth truth could establish a person's capacity to lie, however, findings thereof, could not be equated with admission of guilt (Husnain Mustafa v. The State and another, [2019]). A polygraph instrument is based on the assumption that while dealing with matters that hold personal significance for the people, they intend to fear while lying about them. The stress reaction caused due to lying activates autonomic nervous system (Wilcox, 2000). This polygraph instrument collects physiological data from three systems in human body. This analysis is typically based upon three steps: a pre-test interview, a chart collection phase and a test data analysis phase. The pre-test phase deals with developing a familiarity with the test, a discussion of questions to be asked is carried out. In chart collection phase questions are asked in mixed order and physiological indices are recorded with 'yes' or 'no' replies. Changes in the physiological values makes polygraphist conclude whether the examinee has been replying honestly or not (Wilcox, 2000). It is observed that polygraph test has been unacceptable in all over the world whether it be USA, Europe, Canada or Australia, therefore it will not be safe to accept such a test in Pakistan to hold witness to crimes as murder. In Pakistan the case titled "Muhammad Asif v. State" reported as [2008] MLD 1385, the polygraph test was mentioned as an unreliable source and not to be relied upon in criminal offences. Similarly, In United States v. Scheffer (523, U.S. 303 (1998)), it is held that polygraph test can only be used as another opinion and it does not enjoy the admissibility like other witnesses involving facts as; fingerprints or

DNA. Pithily it was formulated that polygraphs are meant to measure deception and may be suitable for intelligence agencies but their admissibility is subject to the discretion of the trial judge.

## **Telephone Calls**

In Mian Khalid Perviz- v. The State through Special Prosecutor ANF and another [2021] S C M R 522, Court declared that Mere production of CDR data without transcripts of the calls or end to end audio recording could not be considered/used as evidence worth reliance. Besides the call transcripts, it should also be established on the record that callers on both the ends were the same persons whose calls data was being used in evidence. These evidences have increased the convenience on one hand to serve justice but at the same time advancement in science and technology has increased the chances to taper the evidence. Therefore extra care needs to be taken to analyze these types of evidence. In Insaf and another Versus The State [2021] Y L R 338, Bail application was refused. Prosecution case was that when the train stopped for some reason, the accused persons entered in the train and snatched cash, mobile phones, etc from the complainants. Investigating Officer had obtained call data record of the snatched mobile phones which showed that the SIMs registered in the name of certain accused persons were used in the said phones. Other accused persons were found to be in possession of the snatched mobile phones. Accused persons had also produced the robbed cash. Accused persons did not deny the registration of SIMs in their names. Complainants was not on inimical terms with the accused persons. Sufficient material was available on record to connect the accused persons with the commission of alleged offences. SMS and other such medium of modern devices are acceptable as the evidence all over the world. However it comes under the same conditions



described for the audio and video tapes (Munas Parveen v Additional Sessions Judge/Ex-Officio Justice of Peace, Shorkot and others, [2015] )

### **Finger Printing**

Finger printing is expert evidence based on the fact that ridges of one's fingers don't match with that of other's. It is definite evidence and is acceptable worldwide. In Bahader Khan v. The State and another [2012] P Cr. L J 24 Courts declared that finger prints are universally acceptable but this evidence also comes with its queries. They can show the presence of the person at the crime scene and may also show involvement in crime but in the absence of the other evidence they tend to become questionable. For instance, where did the finger prints come from? In whose presence they were taken? Could they be collected in the absence of the concerned persons? These all are valid questions attached to this evidence. In case of absence of clear answers to these queries and considering the chances available to the investigating agency of fabricating the evidence then only finger prints cannot be taken as a satisfactory proof to convict the accused. Finger Print Expert has given the positive report about the thumb-impression of petitioner suffice it to say that such report has not been tendered into the evidence; the expert was not examined for the purpose of enabling the petitioner to have an opportunity to cross-examine him, therefore, such report has no legal value (Mst. Rasool Bibi through Legal Heirs Versus Additional District Judge, Sialkot and another, [2006]).

### **DNA Profiling**

DNA analysis at PFSA has proved revolutionary in absolving the innocent and also in finding the real criminal. In the case of *Ali Haider alias papu v Jameel Hussain and others* [2021] PLD 362, the punishments decided by the trial court, including death penalty, were upheld. The DNA test reports of the samples from the body of deceased and the accused supported the court to decide the case. In the case of *Muhammad Mushtaq v The State and others* [2020] M L D 588 Convictions and sentences awarded to the accused by the trial court, were maintained. The Clothes of victim were sent for Chemical Analysis and DNA by Lady Medical Officer. Report of the Chemical Examiner showed that her clothes were stained with semen. Semen found on victim's clothes and shalwar of accused was of the group of accused. The observation report of the lady Medical Officer was also crucially significant for this case. DNA profiling has been quite significant for the recent famous case of Zainab rape and murder. More than a thousand of the males of that locality were tested for DNA match and on the basis of match Imran Ali – the culprit was identified. He was condemned to death by the court and was executed in 2019.

### **Conclusion**

If the increase in the modern technology has opened ways of new crimes for evil geniuses it has also widened the horizons for investigators. Digital evidence provide new source of information. Now the locations can be traced, SMS and mobile data are scrutinized, call records can be retrieved and social accounts can be accessed to investigate the case. These are some of the ways technology has helped in the investigation. With the passage of time and advancement in the digital world these type of evidence will become essential part of investigation. Pakistan's legal regime needs to labor over the admissibility of scientific evidence as these evidence come with many if and but therefore their

procedure needs to be followed carefully. Law enforcement agencies must get proper trainings for this purpose.

## **References**

- Ali Haider alias papu v. Jameel Hussain and others [2021] PLD ,p.362,
- Asfandyar and another v. Kamran and another [2016] SCMR, p. 2084.
- Ammar Yasir Ali v. The State [2013] PCr.LJ , p. 783
- Akhtar Ali Ghowada v. The State [2015] M L D,p. 1661
- Babar Ahmad v. The State [2017] YLR, p. 153
- Bahader Khan v. The State and another---2012 P Cr. L J,p. 24
- Ghulam Abbas v. The State and another—[2013] P Cr. L J, p.1402
- Hopes Case Scots Law Times[1960],p 264
- Husnain Mustafa v. The State and another [2019] S C M R , p.1914
- Hakim Ali Bhatt v. Qazi Abdul Hakim and others [1986] C L C, p. 1784
- Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others--- P L D 2019  
Supreme Court, p. 675
- Islamic Republic of Pakistan v. Abdul Wali Khan PLD [1976] SC, p.57.
- Insaf and another v. The State [2021] Y L R, p . 338
- Muhammad Asif v. State [ 2008] MLD, p. 1385,
- Muhammad Sadiq alias Husnain and others v. The State and others [2016] P Cr. L J, p. 1390
- Mills Case [1962] AER 2 298
- Muhammad Jawad Hamid and another v. Mian Muhammad Nawaz Sharif and others, [2019]  
P CR. L J, p. 665
- Munawar Hussain and another v The State [2020] P Cr. L J, p.1184
- Mian Khalid Perviz- v. The State through Special Prosecutor ANF and another- 2021] S C M  
R, p. 522
- Mst. Rasool Bibi v. Additional District Judge, Sialkot and another P L D 2006 Lahore, p. 181
- Muhammad Mushtaq v. The State and others [2020] M L D, p. 588
- Munas Parveen v Additional Sessions Judge/ Shorkot and others PLD [2015] Lahore 231
- N. Shri Rama Reddy v. Shri V.V. Giri AIR [1971] SC, p.1162.

Oaths Act, 1873

Punjab Forensic Science Agency Act, 2007

Punjab Witness Protection Act, 2018,

Qanun-e-Shahadat Order, 1984

R.M. Malkani v. State of Maharashtra AIR 1973 SC , p.157.

R.V. Maqsd Ali [1965] AER (2) 464

Shaikh Aijazur Rehman v. The State (NAB) through Director-General (NAB) and another [2006] P L D, p. 629

Shahid Zafar and Others v. The State [ 2015] P Cr. L J, p.628.

S. Pralap Lenjh v. State of Punjab AIR [1964] SC ,p.72.

Sikandar Ali Lashari v.The State and another [ 2016] YLR 62,

United States v. Scheffer [1998] 523, U.S. 303 .

Wilcox, D. & Collins, N. (2020). Polygraph: The Use of Polygraphy in the Assessment and Treatment of Sex Offenders in the UK *European Polygraph* 14(2) 55-62. DOI: 10.2478/EP-2020-0019

Yousuf Ali Ismail Nagrea v. State of Maharashtra AIR [1968], SC p.147

Zakir Hussain v.The State [2017] P Cr. L J, p. 757