



# Technological Update to the Criminal Codes – Essential Use of Audio-Visual Technology

Chinmay

Research Scholar, PhD Programme, Department of Law, University of Delhi, Delhi.

## ARTICLE INFO

**Key Words:** ACriminal Justice System, Reforms, Electronic Communication, Audio-Visual Technology, Bharatiya Nagrik Suraksha Sanhita 2023 and Criminal Procedure Code.

doi: 10.48165/mslj.2024.1.1.6

## ABSTRACT

India witnessed a watershed moment and created history when on July 01, 2024 it introduced new criminal codes with an objective and intention to reform and upgrade its criminal justice system. The Indian Ministry of Home Affairs declared the implementation of the three new criminal statutes, namely *Bhartiya Nagrik Suraksha Sanhita, 2023*, *Bharatiya Nyaya Sanhita, 2023*, and *Bhartiya Sakshya Adhinyam, 2023*, enforced on July 1, 2024. The British era Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act, respectively were thus repealed by the new codes. The prime objective of the new codes is to modernise and substitute the outdated colonial laws by prioritising the implementation of justice with a victim-centred approach. They also aim to enhance national security and introduce reviews of digital/electronic evidence as key aspects of these laws. The bill introduced in parliament included a statement of objects and reasons that criticised the CrPC for several issues, including delays in delivering justice, complex procedures, a large backlog of cases, low conviction rates, and inadequate use of technology and forensic methods. The BNSS strives to alleviate such problems. This article examines a specific goal of the BNSS, which aims to enhance and speed up the justice delivery system through the compulsory integration of electronic communication and audio-visual technologies in different legal procedures. The article is divided into three parts. Prior to conclusion the Part 1 introduces the concept note of the Article and lays the foundation of the article. Thereafter, Part 2 draws a comparative insight between provisions of the CrPC and the BNSS on the use of audio-video technology. Part 3 provides an in depth analysis of the newly added provisions related to the use of audio-video technology. This research aims to provide clarity on the newly added provisions and becomes relevant for the policy makers, the investigating agencies, lawyers and other stakeholders.

<sup>\*</sup>Corresponding author.

E-mail address: Chinmay (chinmay@law.du.ac.in)

Received 07.12.2023; Accepted 28.03.2024

Copyright @ Maharaja Surajmal Institute Law Journal (<https://acspublisher.com/journals/index.php/mslj>)

## INTRODUCTION

The criminal justice system of India has witnessed prominent changes over the years. After gaining independence the Law Commission of India suggested a comprehensive overhaul to the Code of Criminal Procedure, 1898, which originally governed the system, paving the way for Code of Criminal Procedure, 1973 (“CrPC”). The Code modernised the justice system and improved procedural efficiency.

The Government of India, with the same objective and intent to modernise and upgrade the criminal legislations, answering the calls from all the corners of the nation to reform the codes, introduced the Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”) on August 11, 2023, which would supersede the CrPC as the new criminal procedural law.<sup>1</sup> The bill, as introduced in the parliament, contained pertinent statements of objects and reasons, which criticised the CrPC on various issues *inter alia* delays in delivery of justice, complicated procedures, humongous backlog of cases, poor conviction rates, and suboptimal use of technology and forensic methods.<sup>2</sup> The BNSS endeavours to mitigate such issues.

This article examines a specific goal of the BNSS, which aims to enhance and speed up the justice delivery system through the compulsory integration of electronic communication and audio-visual technologies in different legal procedures. The definition clause under BNSS Section 2 under its clause (1) (a) defines “audio-video electronic means” as the utilisation of communication devices

<sup>1</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023. Act No. 46 of 2023.

<sup>2</sup> Bill No. 122 of 2023 introduced in the *Lok Sabha* on 09.08.2023 enshrines pertinent aims, objectives and reasons.

for activities such as videoconferencing, recording identification processes, search and seizure, evidence transmission, and other purposes specified by the state government through rules. The article is divided into three parts. Part I introduces the concept note of the Article and lays the foundation of the article. Thereafter, Part II draws a comparative insight between provisions of the CrPC and the BNSS on the utilisation of audio video technology. Finally, before concluding, the Part III provides an in-depth analysis of the newly added provisions related to the utilisation of audio video technology and brings into perspective the elements gathered from the comparative insights. This research aims to provide clarity on the newly added provisions and becomes relevant for the policy makers, the investigating agencies, lawyers and other stakeholders.

The following part examines the application of this term in criminal proceedings and compares it to the procedure followed under the CrPC. A Comparative insight is drawn with the help of the table presented below which summarises the stages of investigation and trial under BNSS where audio-video technology is used and further the corresponding stages are compared to those under the Code of Criminal Procedure (CrPC).

## PROVISIONS OF THE CRPC AND THE BNSS ON THE USE OF Audio-Video Technology

The table below presents a summary of the stages of investigation and trial under BNSS where audio-video technology is used. The corresponding stages are compared under the Code of Criminal Procedure (CrPC).

S. No.	Provision	Incorporating Audio Visual Technology	
		BNSS	CrPC
1	Section 105 “Recording of Search and Seizure through audio video electronic means”  Section 185 Search by Police Officer	Activities of searching and seizure comprising the making of seizure memo “shall be recorded through any audio video electronic means preferably by a cell phone”  S. 185 (2) Proviso “.....the search conducted under this section shall be recorded through audio- video electronic means preferably by mobile phone.”	Corresponding provision in CrPC are Sections 165 and S. 105 which pertain to “search by Police Officer” and “power of police officers to seize property”. These sections do not provide for incorporating any audio - video electronic means while conducting a search or seizure.

S. No.	Provision	Incorporating Audio Visual Technology	
		BNSS	CrPC
2	<p>Section 176 “Procedure for Investigation”</p> <p>S. 176 (1) Proviso</p> <p>S. 176 (3) Collection of forensic evidence by a forensic expert.</p>	<p>“.....in relation to rape victims... statemnet may be recorded through an audio video electronic means including mobile phone”</p> <p>Section 176 (3) enables a police officer to, in cases of offences punishable by seven years or more, ....ask a forensic expert to visit the place for collection of forensic evidence and the section essentially requires the collection process to be recorded on a mobile phone or other electronic device.</p>	<p>The corresponding section in CrPC is Section 157 with the same “Procedure for Investigation” as the marginal note. The proviso related to teh recording of statements of a rape victime is not provided under Section 157. Though it is important to note that the Section 161 gives scope to the investigating officer for recording a statement given to him by using audio video technique. (Section 180 BNSS categorically retains this scope)</p> <p>The scope of videography is also enshrined in S. 154 CrPC which is obserevd to have been retained in the corresponding section of BNSS namely Section 173.</p> <p>The Provision related to the recording of the forensic evidence while its collection cannot be located in the Section 157 which corespondingly relates to the relevant section under BNSS dealing with “procedure for Investigation”</p>
3	<p>Section 183 “Recording of Confessions and Statements”</p> <p>Section 186 (6) Provides for recording of statements of victims in certain offences as prescribed thereunder. The proviso mandates that the statement shall be recorded in case the person (victim) giving the statement, is temporarily/ permanently menatlly or physically disabled.</p>	<p>The proviso mandates the recording of statements in the said cases through audio- video means by mobile phone preferably.</p>	<p>The coresponding provision under CrPC is Section 164 (5A) under the proviso of which mandatory videography/ recording is mentioned.</p>
4	<p>Section 54 “Identification of person Arrested”</p> <p>The section deals with identification of an arrested person by another person also known as the Test Identification Parade (TIP). In case the person (witness) called for identification is disabled physically or mentally then the TIP..... shall be mandatorily recorded by any audio video electronic means.</p>	<p>The provision mandatorily enshrines audio video recording in the said cases.</p>	<p>The corresponding provision in the CrPC is Section 54A which also provides for mandatory videography/ recording in the said cases.</p>

The table given above provides a comparative insight of some of the important provisions that enshrine the utilisation of audio video electronic means in different stages of investigation. Other important provisions of the BNSS which provide for the nature, scope and use of audio video means for different tasks include Section 2 (1) which defines the term “audio video electronic means”,

Section 154 which provides for the scope of appearance in the court through audio video electronic means, Section 180 talks about examination of witness by police, Section 183 (1) provides for the scope of audio video recording of confession statements, similarly Explanation II to section 187 also provides for use audio video electronic means. Further Section 251 which deals with charge farming by

the magistrate now provides that the magistrate after framing the charges can read and explain them to the accused audio video electronic means. Similarly sections 253, 262, 265 and 266 also provide for the use of audio video electronic means. Another important section, section 308 provides for taking of evidence in the presence of the accused. It also provides for mandatory recording of the taking of evidence in case the presence of the accused is dispensed with and the evidence is being taken in presence of his lawyer. Similarly other important sections of the BNSS viz. 310, 336, 355, 356, 392, 530 also provides for the scope and use of audio video electronic means.

## IN-DEPTH ANALYSIS OF THE NEWLY ADDED PROVISIONS IN THE BNSS PERTAINING TO THE AUDIO-VISUAL TECHNOLOGY

### 1. Search and Seizure

The BNSS implements a significant advancement in search and seizure protocols through the official and obligatory utilisation of audio-visual and electronic methods to document the process, including the creation of a comprehensive inventory of all confiscated goods, preferably using a mobile device. This criterion is applicable even to searches carried out in the absence of a warrant.<sup>3</sup> Importantly, it is necessary to promptly transmit the recording to the Magistrate.<sup>4</sup> The *Two Hundred Forty-Seventh Report of the Parliamentary Standing Committee on the Bhartiya Nagrik Suraksha Sanhita, 2023*, suggested that video recording of search and seizure activities should be conducted to ensure transparency and compliance with safeguarding protocols.

Primarily this provision pertains to two situations: firstly, all searches and seizures carried out under *Chapter VII of the BNSS*, which include procedures to compel the production of objects; and secondly, searches done by police personnel during investigations under provision 185.

Section 105 specifically pertains to searches conducted on premises, although it does not extend to searches of individuals or the confiscation of objects from their person. Recording audio-visual footage is not necessary when a police officer conducts a search based on the belief that a suspect is within a premises, or while searching those in control of or residing in that premises under Section 44 of

the BNSS. Furthermore, it is crucial to note that the provision does not extend to the search of individuals who have been arrested, as specified in Section 49 of the BNSS.

From a theoretical standpoint, this is a beneficial advancement that has the potential to deter unlawful search and seizure, evidence tampering, and the planting of evidence. Although audio-video technology was introduced in this aspect of criminal investigation to achieve a balance between transparency and safeguarding the rights of the accused, there is a potential issue. Video recordings of an individual signing a seizure memo could be interpreted as self-incriminating evidence, which may infringe upon the right against self-incrimination.

Transparency, as suggested by the Standing Committee, has the capacity to discourage the creation of false evidence and guarantee adherence to protections that mandate the appearance of impartial witnesses. Therefore, given the potential for evidence tampering and abuse of police authority, the requirement of audio-video recording in search and seizure processes is a laudable and much appreciated addition.

According to Section 105, it is required that the audio-video recording of the search be quickly presented to either the *District Magistrate, Sub-divisional Magistrate, or Judicial Magistrate of First Class*. As per *Section 103*, which details the protocol for carrying out searches and seizures, sub-sections (6) and (7) specify that the individual occupying the premises being searched, or the person being searched, shall be given a copy of the seizure memorandum. Furthermore, although Section 105 specifically relates to the “search of a place or taking possession of any property,” it should also include searches of individuals who are suspected of hiding pertinent things under Section 103(3).

The BNSS and its inclusion, although a positive step, do not offer clear guidelines regarding the rights of individuals to access audio-video recordings or the proper procedures for conducting such recordings. The legislative gap pertains to the clarity on the aspects such as what specific equipment to be used, camera placement, resolution, recording duration, and the inclusion of timestamps. These uncertainties may raise concerns about the privacy and rights of individuals who are subjected to search and seizure. Further the silence on these aspects may create hindrances due to varied interpretations.

### 2. Evidence Collection

According to Section 176(3) the gathering of forensic evidence at crime scenes for offences that carry a punishment of seven or more years in prison, the process must

<sup>3</sup> Section 185, *Bharatiya Nagarik Suraksha Sanhita 2023*, (Corresponding Section 165 of CrPC)

<sup>4</sup>Section 105, *Bharatiya Nagarik Suraksha Sanhita 2023*.



be recorded on camera by a police officer. Additionally, it permits the States without forensic facilities to use the services of some other State. In addition, according to Section 176(1) of the BNSS, it is permissible to record audio and video of statements made during police investigations, which includes disclosure statements made by both accused individuals and witnesses. This provision, similar to Section 161 of the CrPC (preserved in Section 180 of the BNSS), acts as an essential protection against possible torture and coercion during interrogations while in custody.

It is interesting to note that in the BNSS, the term ‘videography’ is used to describe the process of recording the collection of *forensic evidence* and gathering information from vulnerable victim-informants by the police. In other sections of the BNSS, the term ‘audio-video’ is used. For instance, audio recording is mandated for statements of victims under Section 173(1), ensuring transparency in forensic evidence collection under Section 176(3). Most provisions specify the use of cell phones for audio-video recording, but Section 176(3) specifically requires ‘videography’ using a mobile phone for documenting the forensic evidence collection process. The BNSS grants the Court or the relevant police officer the power to enforce the production of electronic communication and devices that hold digital evidence from individuals who possess them.

The author believes that producing original devices can guarantee the authenticity of digital evidence and help investigators recover deleted evidence. However, this practice also raises concerns about potential manipulation and misuse by authorities who have unrestricted access, which can violate the *right to privacy*<sup>5</sup>.

### 3. Electronic Communication Transmission

Recording electronic communication through audio-video involves the process of collecting and preserving the transmission of electronic messages, such as emails, SMS, or instant chats, in real-time. This approach allows law enforcement to collect evidence, surveil illegal behaviour, and maintain the principles of justice while also honouring privacy and legal entitlements. It offers significant observations on digital exchanges and can aid in establishing facts, revealing motives, and bolstering the prosecution’s case in court.

There can be multiple other applications of Electronic communications apart from serving merely as a means to report information to the police for the registration of the FIR. The BNSS formally approves the use of elec-

tronic techniques, including as popular instant messaging programs like WhatsApp<sup>6</sup>, for delivering summons. This service will be recognised as legally acceptable<sup>7</sup>. The State Government is responsible for establishing regulations that define the format of electronic communication and the procedure for delivering summons using electronic communication. Similarly, upon the submission of a charge sheet or complaint, the investigating authority is permitted to furnish electronic records, such as the police report.<sup>8</sup> Section 530 specifically stipulates that all trials, enquiries, and proceedings can be conducted using electronic mode, employing electronic communications or audio-video electronic methods. This means that all range of duties such as issuing, serving, and carrying out summons and warrants; questioning complainants and witnesses; documenting evidence in investigations and trials; and overseeing all appellate or other legal procedures can be conducted using electronic modes. The recommendation of the Parliamentary Standing Committee to contemplate the use of audio video recording of evidence during trials is adhered to and the suggestion that it is crucial to explore such methods for collecting evidence is also taken care of. Nevertheless, the Committee advised exercising prudence and suggested the inclusion of audio-video recording of evidence in the Clause. This should be done with appropriate measures in place to guarantee its dependability and credibility during court processes.

### 4. Audio-Visual Means to Record Confessions and Statements

The Indian criminal justice system is pertinently challenged by the cases of custodial violence. Using audio-visual techniques to document witness testimonies has the potential to reduce incidents of custodial assault by making the process and stakeholders accountable to the judiciary. Presently, there is a prevailing discontentment with the condition of the criminal justice system, wherein investigations frequently entail substantial endeavours by law enforcement to extract confessions or statements from suspects. One crucial step to tackle the problem of custodial assault during police investigations is to enforce the use of video recordings when individuals are being interrogated. Before the enactment of the BNSS, Section 161 of the CrPC required individuals under examination to provide truthful answers to all enquiries, excluding those

<sup>6</sup> Amar Singh v. Sanjeev Kumar 2023 (PHC) 969. Order on May 26, 2023.

<sup>7</sup> Sections 64, 68 *Bharatiya Nagrik Suraksha Sanhita 2023*

<sup>8</sup> Section 230, 231 *Bharatiya Nagrik Suraksha Sanhita 2023*

<sup>5</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

that could potentially implicate them or expose them to punishment.

The *Code of Criminal Procedure (Amendment) Act, 2008* added a provision to *Section 161(3)* which allows for the recording of statements by audio-video technological methods. The use of ‘may’ in S.161(1), S.161(3), and S.161(3) proviso suggests that the police officer has the option to choose whether or not to document or record the statement of the witnesses.<sup>9</sup> In its 41st Report, the Law Commission advised against making this criterion mandatory due to the excessive and unjustifiable burden it would impose on the investigating officer.

Statements obtained under Section 161 of the CrPC, regardless of their form (written, audio-video, or electronic), are universally recognised as inadmissible evidence in Court. In the case of *V.K. Sharma v. State of Uttarakhand*<sup>10</sup>, it was ruled that statements recorded under Section 161 of the CrPC can only be used to show contradictions as defined in Section 145 of the Indian Evidence Act, 1872<sup>11</sup>. Additionally, the prosecution can also use these statements to cross-examine or re-examine witnesses. The new legislation does not mandate the use of audio-visual means for capturing confessions and remarks before a magistrate. Proviso 1 to Section 183 of the BNSS contains the word ‘may’, which indicates that the magistrate has the authority to decide whether or not to use audio-visual methods to capture confessions and statements. Section 180 of the BNSS also permits the police to record statements made by witnesses by audio-video means, however this is ultimately up to the discretion of the police.

The primary purpose of permitting audio and video recording of witness testimony is to preserve the authenticity and genuineness of statements.<sup>12</sup> Utilising modern methods for collecting data also aids in safeguarding relevant and crucial information pertaining to the case. There are multiple benefits to capturing witness testimony in video or audio format, mostly because it creates a durable and permanent record of the witness’s statement.<sup>13</sup> The IO cannot be charged with torture or cruel treatment of the witness unless

there is solid evidence to back up these claims. This also deters authorities from using incorrect ways to get statements from witnesses during interrogation<sup>14</sup>. Additionally, when an individual willingly confesses to a fact or acknowledges their involvement in a criminal act, it becomes more straightforward to establish evidence in a court of law by documenting the witness’s confession using audio-video or other electronic means enabling more thorough examination.

Furthermore, certain recordings can be employed at a later time to educate and exemplify the proper protocols for investigation and interrogation to rookie officers.

It is crucial to mention that the BNSS does not include the established safeguard of audio-video recording of statements and confessions made before the magistrate, thereby excluding a significant procedural protection.<sup>15</sup> The audio-visual recording of statements made in front of a magistrate is an essential safeguard, particularly for victims of sexual assault.<sup>16</sup> The objective was to mitigate the risk of evidence loss due to intimidation or coercion, which could lead to witnesses recanting their testimony or becoming uncooperative.

## 5. Audio-Visual Means In Other Stages Of Investigation

Section 54 of the BNSS mandates the audio-video recording of Test Identification Parades (TIPs), although this requirement especially applies when the person identifying the arrested individual has a mental or physical disability. Section 251(2) of the BNSS permits the utilisation of audio-video methods to convey and clarify charges to the accused. Section 254 of the BNSS allows the use of audio-video technological methods to record the deposition of evidence or testimonies made by witnesses, police officers, public servants, or specialists in Sessions proceedings. Section 265 and Section 266 both allow for the trial of warrant cases. These sections also provide the use of electronic methods to examine witnesses at a certain location, which will be determined and announced by the State Government.

Section 308 of the BNSS grants authority to conduct the interrogation of the accused using electronic methods, specifically by utilising audio-video conferencing facilities available in any location approved by the State

<sup>9</sup> *Pakala Narayan Swamy v. Emperor* AIR 1939 P.C. 47

<sup>10</sup> (2015) 9 SCC OnLine 588

<sup>11</sup> *Sharad Chandra v. State of Rajasthan*, MANU/RH/2207/2015 (RHC)

<sup>12</sup> *Sube Singh v. State of Haryana*, 2006 (3) SCC 178, 23

<sup>13</sup> Thomas P. Sullivan, Electronic, ‘Electronic Recording of Custodial Interrogations: Everybody Wins’ 1129 *The Journal of Criminal Law and Criminology*, (Northwestern University School of Law July 2005)

<sup>14</sup> *Id. at 1128*

<sup>15</sup> Section 183 *Bharatiya Nagrik Suraksha Sanhita 2023*.

<sup>16</sup> *Ramesh Kumar v. State of Delhi*, C.R.L.A. 395/2000.

Government. This decision aligns with the legal principles that have continually supported the use of video conferencing in legal processes, highlighting its effectiveness and practicality.

The Parliamentary Standing Committee expressed reservations about the cited portions of the BNSS, which permit the use of audio-video technology methods to capture a witness's testimony. This section offers the potential for remote recording of testimony, which may present difficulties concerning openness, equity, and the fundamental notion of an "open court." Such recording of evidence poses a possible threat to the accessibility of the proceedings and the integrity of the trial. It is important to shed some light on a few landmark judgments to contextualise the discussion at hand. In the significant case of *State of Maharashtra v. Dr. Praful B. Desai*,<sup>17</sup> The esteemed Supreme Court of India examined the acceptability of evidence presented through video conferencing, interpreting Section 273 of the Criminal Procedure Code (CrPC) to encompass both actual and virtual presence. The Court emphasised that "presence" as defined in this clause includes virtual presence, which enables real-time interaction and observation of witnesses, thereby satisfying the procedural criteria. The Court, in its wisdom, considered both the rights of the accused and the importance of uncovering the truth. It made a clear distinction between video conferencing and virtual reality, highlighting that video conferencing allows for genuine, immediate connection. The text discussed the feasibility of examining witnesses through a commission under Sections 284 and 285 of the Criminal Procedure Code (CrPC) when it is not possible for them to attend in person. The ruling recognised video conferencing as a proficient means to document evidence, guaranteeing procedural equity while capitalising on contemporary technology.

In the case of *Grid Corporation of Orissa Ltd. v. AES Corporation*<sup>18</sup>, the Supreme Court determined that utilising electronic media and remote conferencing for consultation is more than sufficient for relevant decision-making purposes. The Court specified that arbitrators are not obligated to convene or engage in collective discussions at a physical location, unless explicitly mandated by legislation or the governing contractual agreement. The ruling affirmed that the selection of a presiding arbitrator is lawful if it occurs following sufficient deliberation, is effectively communicated, and does not necessitate previous notification to the concerned parties. This method is consistent with established international practices in commercial arbitration, which aim to enhance convenience and cost-effectiveness. In another landmark case of *Amitabh*

*Bagchi v. Ena Bagchi*,<sup>19</sup> the Calcutta High Court approved the utilisation of video conferencing to record evidence. The court highlighted the advantages of this method, such as its cost-effectiveness and its potential to avoid delays in the administration of justice. The Court endorsed the Supreme Court's perspective that technological innovations should be employed to enhance the efficiency and accessibility of judicial procedures. Video conferencing is considered a crucial component of electronic evidence, as stated in Sections 65A and 65B of the Evidence Act. It enables the Court to carry out its duties more efficiently and reduces the need for unnecessary delays and expenses.

The above instances categorically indicate the courts' endeavours to embrace the evidence presented by modern technologies and scientific principles, highlighting the significance of scientific techniques in the identification of criminal activities. The Courts have time and again requested legislative modifications to implement a problem-solving methodology significantly based on scientific evidence, relevant data and relevant technologies in criminal proceedings in order to efficiently handle the workload of investigators and judges. Section 308 enables the modernisation of the judicial process by promoting efficiency, accessibility, and procedural justice through the utilisation of contemporary technology, thereby empowering individuals involved in the legal system. Further the examples collectively show that the court has consistently supported the use of video conferencing and electronic methods in legal procedures for a long time.

## 6. Admissibility As Evidence Of Electronic Records

It has been seen that there has been a discrepancy in judicial viewpoints concerning the procedural prerequisites for accepting electronic records as evidence. Section 63 of the new Evidence Act implements substantial changes in the process of accepting electronic records, similar to Sections 65A and 65B of the Indian Evidence Act, 1932 ("IEA"). Section 2(c) broadens the scope of 'documents' to encompass 'electronic or digital records', so promoting consistency throughout the requirements. At this juncture it is crucial to understand the jurisprudential evolution at the helm of the top most courts in India which underscored a progressive approach towards the admission of electronic evidence, particularly audio-video recordings, in legal proceedings.

It is crucial to first understand the two fundamental rulings in this regard which considered Sections 65A and

<sup>17</sup> AIR 2003 SC 2053

<sup>18</sup> AIR 2002 SC 3435

<sup>19</sup> AIR 2005 CAL 11



65B of the Indian Evidence Act (IEA) to be explanatory in nature, enabling the application of general rules such as Sections 63 and 65 of the IEA to electronic data. The saga starts with the case of *N.C.T. of Delhi v. Navjot Sandhu @ Afsan Guru*<sup>20</sup>, in which the Supreme Court recognised the importance of electronic records, including mobile phone data, in legal processes, even if there is not strict compliance with Section 65B of the Evidence Act. This acknowledgement represented a fundamental milestone in comprehending the probative significance of digital recordings. Subsequently, the *Shafhi Mohammad v State of Himachal Pradesh*<sup>21</sup> case examined the wider application of audio-video records in investigations and legal actions. The Court acknowledged the possible usefulness of such recordings in crime scene investigations, but also emphasised the difficulties related to the deployment of these recordings in different states due to institutional and infra-structural obstacles. In contrast, the environment changed significantly after the landmark decision in *Anvar P.V. v. P.K. Basheer*<sup>22</sup> when the Supreme Court emphasised the obligatory need for a Section 65B(4) certificate in order to admit electronic evidence. This verdict established a strict criterion to guarantee the genuineness and dependability of electronic records, thereby strengthening procedural soundness. Nevertheless, the Court deemed S. 65A and 65B IEA to be a full set of rules that regulate electronic data. As a result, rigorous compliance with Section 65B IEA is required for the acceptance of such records.

Categorically the esteemed Supreme Court in the case of *Mohd. Arif alias Ashfaq v. State (NCT of Delhi)*<sup>23</sup>, analysed several previous cases such as *Anvar P.V. v. P.K. Basheer*, *Tomaso Bruno v. State of U.P.*<sup>24</sup>, and *Shafhi Mohammad v. State of H.P.* and considered the differing opinions on the acceptability of electronic evidence. As a result, the court ruled that electronic evidence must be accompanied by a certificate as per Section 65-B(4) to guarantee its genuineness and reliability. The reason for this strict requirement is to protect against tampering and ensure the trustworthiness of electronic evidence, which is susceptible to manipulation or alteration. Further in the case of *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal*<sup>25</sup>, the Supreme Court ultimately settled the dispute in favour of the latter interpretation. Specifically, the Court reaffirmed that Section 65B is mandatory for electronic records and emphasised the importance of following its procedural

requirements, such as obtaining certification for electronic evidence.

## 7. Accessibility Concerns of the Audio-Video Recording During Investigation

It cannot be gainsaid that if the accused, in addition to the witnesses and victims, are also given access to the audio-video recordings, they can act as a powerful safeguard throughout investigations, in addition to the witnesses and victim-informants. With this information at their disposal, everyone could verify the police's assertions about following or not following procedural protections throughout the inquiry. It would appear that the Section 230 BNSS, which states that the police report and any other relevant papers, such as statements or confessions, must be given to the accused and, if the victim has legal representation, to the victim as well, has a wide scope, which may encompass requirements for audio-video recordings. However, the provision of audio-video recordings is not made clear in the clause.

Digital and electronic records can sufficiently be included under the broad definition of “document” in Section 230 of the BNSS. Section 230 of the CrPC adds to Section 207 by making it clear that electronic documents must be supplied. It gives the Magistrate the authority to electronically send copies of any papers that are considered to be relatively large. In addition, anyone can visit the Court or have a legal representative do it for them to view these records. However, since there is no clear legislative mandate for the production of audio-video recordings, the victim and the accused may have to rely on the Magistrate's or police officials' discretion to gain access to these evidence materials. Further, the often considered thin line difference between concepts like “audio-video recording” and “videography,” which are used interchangeably by the BNSS, remain unclear. Whether “audio-video” recording requires both video and audio or permits the recording of just one or the other (only audio or only video) is still up for debate. Likewise, the BNSS's use of the word “videography” may lead some to believe that it refers exclusively to visual recording, leaving out any audio that may accompany it.

The BNSS does not specifically require the use of designated technology for recording purposes, although mobile phones do provide police officers with easy accessibility during investigations. Thus, without clear instructions, the term “cell phone” or “mobile phone” in the law can be taken to mean the personal phones of investigators.

There are valid worries about investigators using personal communication devices to collect audio and video.

<sup>20</sup> Criminal Appeal No. 373-375 (2004)

<sup>21</sup> (CRL) No. 2302 (2017)

<sup>22</sup> AIR 2015 SC 180

<sup>23</sup> (2023) 3 SCC 654

<sup>24</sup> (2015) 7 SCC 178

<sup>25</sup> (2020) 7 SCC 1



Changes, additions, and accidental corruption can happen to electronic records due to human error or digital degradation that isn't deliberate. When individuals use their own devices to record crucial evidence, these risks become much more pronounced.

When the initial recordings are taken on personal communication devices, the risk of abuse and unlawful distribution of sensitive evidence, including statements captured under Sections 176(1) and 183(6), is increased. Not only that, but it would be far more difficult to establish the integrity of and maintain a proper chain of custody for an electronic record that originated from a personal communication device, since these devices are constantly with the investigating police officers, which increases the risk of possible tampering or unauthorised access.

In the case of *Karnail Singh v. State of Haryana*<sup>26</sup>, the court in India discussed the changing function of mobile phones and wireless networks in police investigations, taking into account these factors and worries. Officers may now obtain vital information quickly and efficiently, regardless of their location, thanks to technology, which has a profound effect on law enforcement tactics. Because of this new technology, the rules that require the official registration of data obtained through mobile phones (Sections 41(2) and 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985) are being rethought.

The court highlighted the fact that these prohibitions could impede necessary emergency responses, like avoiding the destruction or removal of evidence, if strictly adhered to. Particularly in drug trafficking instances, it warned against letting procedural restrictions be used as an excuse to acquit major perpetrators. As an alternative, the court proposed reading these provisions as discretionary safeguards against lawlessness. In view of recent technology developments that allow for immediate communication and action by police personnel, the Court acknowledged the need to strike a balance between legislative compliance and practical exigencies in law enforcement operations.

## SUGGESTIONS

The incorporation of video conferencing and electronic communications is expected to enhance the efficiency, accessibility, and cost-effectiveness of the criminal justice system. It facilitates remote participation, enables the swift exchange of information, and supports timely and equitable justice delivery. The BNSS outlines electronic communication as the transfer of written, verbal, pictorial, or

video information using devices such as telephones, computers, and cameras. Moreover, this signifies a proactive effort to enhance public confidence in the criminal justice system and the methods used by the police for investigation. This policy promotes transparency and openness by making sure that interrogations and statement recordings are accessible to the Courts, moving away from hidden procedures. The prime objective of the new codes is to modernise and substitute the outdated colonial laws by prioritising the implementation of justice with a victim-centred approach. They also aim to enhance national security and introduce reviews of digital/electronic evidence as key aspects of these laws. The bill introduced in parliament included a statement of objects and reasons that criticised the CrPC for several issues, including delays in delivering justice, complex procedures, a large backlog of cases, low conviction rates, and inadequate use of technology and forensic methods. The BNSS strives to alleviate such problems. The bringing of the new codes is indeed a watershed moment towards a direction of reforming the criminal justice system and answering the long awaited demands to make the justice delivery system efficient and making the scaffolding of rule of law, justice and fairness more strong. However there are certain challenges in its incorporation.

- The changes are welcomed however they raise the demand for overhauling of infrastructure and other updates to logistics and human resource to create more dexterous manpower in order to fundamentally achieve the objective of the reforms. The main challenges as noted in incorporating audio-video technology in investigations are equipment unavailability and lack of skilled tech savvy individuals. It is suggested that the stakeholders and policy makers work in this regard.
- There is an immediate need for thorough rules that specify requirements for the quality of recording equipment to be utilised.
- In addition, it is imperative to establish guidelines in order to create resilient systems and infrastructure for the secure storage and transmission of electronic evidence.
- Sensitize and create awareness among the relevant stakeholders to balance their approaches in dispensation of justice and do away with rigid hyper-technical approaches.

## CONCLUSION

The article examined a specific goal of the BNSS, which aims to enhance and speed up the justice delivery system through the compulsory integration of electronic communication and audio-visual technologies in different

<sup>26</sup>(2009) 3 SCC (Cri) 887

legal procedures. The article introduced the concept note of the Article and lays the foundation of the article. Thereafter, Part 2 draws a comparative insight between provisions of the CrPC and the BNSS on the use of audio-video technology. Part 3 provides an in depth analysis of the newly added provisions related to the use of audio-video technology. Further the article also shed light on some of the important judgements in which the Court recognized the necessity of balancing statutory compliance with practical exigencies in law enforcement operations, particularly in light of technological advancements that facilitate instantaneous communication and action by police officers. Thus the hypertechnical

approach should not be followed and a balanced approach shall be adopted. These rules would assist guarantee that the recorded evidence is sufficiently safeguarded against unauthorised access, erasure, or corruption. Striking a balance between leveraging technology for efficiency and maintaining core legal values, such as transparent court processes, is crucial for preserving public trust in the justice system and shall always remain the objective of the stakeholders involved in the justice delivery system. This research aims to provide clarity on the newly added provisions and becomes relevant for the policy makers, the investigating agencies, lawyers and other stakeholders.