

Admissibility of Digital Evidence in Court: In Light of Changes in Bangladesh Evidence Law

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ABSTRACT

The advent of the digital era has brought great changes in the legal field, particularly concerning the gathering, presentation, and admissibility of evidence in courtrooms. Digital evidence, encompassing everything from emails and social media posts to data stored on cloud servers, is increasingly pivotal in both civil and criminal cases. However, the admissibility of such evidence poses unique challenges, including issues of authenticity, integrity, and reliability. This paper explores the legal framework governing the admissibility of digital evidence, with a focus on the standards and procedures established by courts to ensure its reliability. It critically examines the role of evidence Regulatory protocols, the application of reliability criteria, and the implications of data tampering and cybercrime on the evidentiary process. It also explores loopholes by government officials such as the preservation of digital evidence and the potential for data manipulation. As well, by evaluating case studies and legal structures in Bangladesh, and comparing them with international practices, this study sheds light on the present state of digital evidence admissibility and suggests improvements to legal procedures to more effectively address the complexities associated with digital evidence.

Key Words: Digital Evidence; Electronic Evidence; Admissibility; Legislative Changes; Legal Framework; Authenticity; Data Manipulation; Evidence Preservation; Loopholes; Legal Precedent.

INTRODUCTION

In Bangladesh, children begin to grasp the concept of evidence from an early age through peer interactions and disputes, demanding "shakkhi or proman" (witness or proof) to support the claims of others. This fundamental understanding carries over to formal Settings, where the law of evidence plays a crucial role in guiding judicial institutions, operating within the "veil of ignorance" and relying solely on the facts and arguments presented to ensure justice, and fairness and strive for equality. Consequently, both civil suits and criminal cases require the role of evidence, allowing the finder of fact to make informed decisions based on the evidence presented. So, in the quest for Justice, evidence stands as the pillar of that edifice of legal truth. With the progress of science and technology, the lifestyle of people all over the world has changed remarkably. As the world enters the digital era, laws are also needed to be tailored according to these modern changes. Given the Bangladesh government's 'Digital Bangladesh' declaration and its efforts to transform the vision of a 'Smart Bangladesh' by 2041, it is imperative for the state to establish a digital judiciary that can handle digital matters.

The main goal of this article is to analyze the changes in the law of evidence related to the admissibility of digital evidence in Bangladesh and to propose strategies for enhancing the legal framework. Additionally, the article acknowledges the significant growth in Bangladesh's science and technology sectors, which has played a crucial role in combating crime and ensuring public safety through technological innovations.

Based on challenges, the goal is expressed through the following clear objectives:

1. Examine the relevance of digital evidence in court proceedings and explore recent changes related to its

admissibility in Bangladesh.

2. Analyze case studies and precedents from Bangladeshi courts to understand the treatment and admission of digital evidence, highlighting both successful approaches and challenges.
3. Identify challenges and barriers faced in the admissibility of digital evidence in Bangladeshi courts, such as issues related to authentication, reliability, and procedural requirements, and propose measures to address, as well as rectify the identified loopholes in the legal framework concerning digital evidence.

CONCEPT OF EVIDENCE

Did you know the term 'Digital Evidence' has two separate parts that carry significant meaning? One is 'digital' & the other is 'evidence'. The word 'digital' is all about information technology, creating, saving, & processing data. On the flip side, in the legal world, evidence means relevant objects or facts that can be presented in court to establish the truth of a contested fact under investigation. The term "evidence" originates from the Latin word "Evidentia", meaning "the state of being evident or clear".

DEFINITION

In general, "Evidence" refers to the collection of facts or information that is used to determine if a belief or claim is accurate or valid.

According to Taylor, evidence means and includes all facts except arguments, which tend to prove or disprove any matter that is under inquiry in judicial proceedings.

According to the Oxford English Dictionary, the word 'evidence' means "the available body of facts or information indicating whether a belief or proposition is true or valid".

As per the provision of the Evidence Act, 1872, 'evidence' means and includes-

- (a) All statements which the Court permits or requires to be made before it by witnesses or oral evidence;
- (b) All documents produced for the inspection of the Court or documentary evidence

Thus, Digital evidence refers to any info, data, or document you put before a Court during a trial to prove or disprove something.

What is Digital Evidence or Electronic Evidence?

In this article, we are mainly dealing with the type of evidence known as 'electronic evidence' or 'digital evidence,' which is sometimes also referred to as 'computer evidence.' The term 'digital' is widely used in electronics and includes information that is stored and transmitted in digital form, which can later be presented in court.

So, we can say that digital evidence refers to any information or data that exists in digital form—whether stored, transmitted, or processed—that can be utilized in legal cases, investigations, or resolving disputes. This includes a wide range of digital sources such as emails, text messages, social media posts, computer files, metadata, and other forms of electronic communication and storage. Digital evidence is collected and analyzed in a forensically sound manner to maintain its integrity and reliability for use in court or other legal contexts.

ADMISSIBILITY OF DIGITAL EVIDENCE IN BANGLADESH

In the 21st century, a technological revolution gripped not only Bangladesh but also the entire world and we are completely dependent on digital devices. However, now we are in that generation where the use of technical devices is no longer restricted to established organizations or institutions but is available to every individual with

the swipe of a finger. Due to the expansion of digital technology and its transformative impact on contemporary society, the pattern of crime has also changed. Individuals are now committing crimes using digital technology. Consequently, it has been essential to make digital records admissible as evidence in both civil and criminal matters in Bangladesh. Bangladesh has enacted several legal provisions to introduce and accommodate digital evidence, But In 2022, amendments to the Evidence Act were made to allow digital records to be admitted in court.

In the following discussion, we will elaborate on the changes in the law of evidence regarding the admissibility of digital evidence in Bangladesh. Before moving to the main focus, we would like to mention a few case studies where preceding judgments have influenced digital evidence.

Preceding Judgments Influencing Digital Evidence:

A significant milestone in the country's judicial history was the acceptance of recording evidence on magnetic tapes in the case of Mrs. Khaleda Akter vs. State, which took place well before the amendment of the Evidence Act. Similarly, video footage was admitted as evidence in the Biswajit murder case, reflecting an increasing recognition of the validity of digital evidence. Moreover, in the Razu murder case at the Sylhet Metropolitan Judge Court, a mobile video played a crucial role as evidence, thereby expanding the interpretation of the definition of "Document" in the Evidence Act of 1872. In the Nusrat murder case, the court acknowledged the relevance and admissibility of digital evidence. Furthermore, there are many cases where digital evidence has played a key role in ensuring justice. Mentionable in this regard, Abrar Murder Case (2019), and Rifat Murder Case (2020), CCTV footage was used in the trial as substantial evidence that helped in identifying and convicting the accused.

A. Admissibility of Digital Evidence Under the Scheme of The Evidence (Amendment) Act, 2022 :

The Evidence (Amendment) Act, 2022 is crafted in accordance with present-day technology. The Government has amended The Evidence Act, 1872, introducing substantial changes Intended to ease the acceptance of digital evidence in court. The Evidence (Amendment) Bill, 2022 was tabled on August 31, 2022, and subsequently enacted into law on November 3, 2022. The Evidence (Amendment) Act, 2022, has incorporated several provisions focusing on digital evidence. The digital evidence-related changes occurred in Section 3, Section 17, Section 22A, Section 34,35,36,39, Section 65A, Section 65B, Section 67A, Section 73A, Section 81A, Section 85A, Section 85B, Section 85C, Section 88A, and Section 90A.

The amendment to section 3 of the Act introduces several significant updates. Digital records are now recognized as documents, and the term 'digital' is included in the definition of evidence, expanding the scope to encompass digital formats.

New definitions are provided for terms such as 'digital signature,' 'digital signature certificate,' and 'certifying authority,' which clarifies the framework for digital documentation and authentication. Additionally, materials like blood, semen, DNA, fingerprints, and similar substances are now acknowledged as essential for establishing connections between offenses, victims, and offenders.

The amendment updates various sections to include the term 'digital record,' such as sections 17, 34, 35, 36, and 39. Section 22A specifies that oral admissions of digital evidence are inadmissible unless the authenticity of the digital record is questioned. Sections 67A and 47A mandate that the digital signature of the subscriber must be proven in court, and if there is doubt, the certifying authority may be consulted.

The court is to presume the genuineness of digital Gazettes, Agreements, Records, and Signatures under sections 81A, 85A, 85B, and 85C unless proven otherwise. Conversely, sections 88A, 89A, and 90A state that digital communication, physical or forensic evidence, and digital records older than five years may not be admissible directly. These changes are designed to modernize evidence laws and integrate both digital and physical evidence handling.

Regarding the admissibility of digital evidence, the newly inserted Sections 65A and 65B are crucial authorities.

In this portion of the Amendment, there will be a comprehensive analysis of the recent amendments concerning the admission of digital evidence.

Section 65A :

The newly inserted section 65A states that the contents of digital records may be proved in accordance with the provisions of section 65B. This section refers to section 65B as the mechanism for proving digital records. Thus, it does not explain how a piece of digital record can be admissible in court proceedings; instead, it refers to section 65B for the purpose of admissibility of digital records.

Section 65B :

Through its five subsections, allows the admissibility of secondary copies in the form of computer outputs such as printouts or data copied on electronic or magnetic media. All of these five subsections are critically analyzed below :

Sub-section (1) has twofold significance; firstly, it recognizes digital records as documents, and secondly, makes these documents admissible as evidence. It says that the document shall be admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or any fact stated therein is admissible as direct evidence.

Thus, the mentioned information cannot be considered a document unless the same fulfills the conditions imposed in this section.

Sub-section (2) sets the conditions in respect of the computer output, which are as follows:

- a) The computer output was generated during regular use for storing or processing information by the person in lawful control.
- b) The information was consistently input into the computer as part of routine business operations.
- c) Throughout the period, the computer was operational, and any downtime did not compromise the digital record's accuracy.
- d) The digital record's information was derived from the preceding information so fed.

Sub-section (3) describes the computers which shall constitute a single computer for the purpose of this section-

- a) By a combination of computers operating during the period; or
- b) By different computers operating in succession during that period; or
- c) Through different sequences of computers operating consecutively during that time period; or
- d) In any other manner involving the successive operation, in any order, of one or more computers over that period; or
- e) In any other manner involving the successive operation, in any order, of one or more computers and one or more combinations of computers over that period.

Sub-section (4) sets forth the conditions for a certificate needed to ensure the admissibility of digital evidence under this section. The section sets the pursuant particulars for the certificate;

- a) Identification of the electronic file in which the declaration is contained;
- b) Description of the process by which the electronic record was created;

- c) Provision of details regarding the device used to produce the album;
- d) Management of the applicable terms and conditions as specified in section 65B (2) of the Evidence Act; and
- e) Signed by an individual holding an official position related to the device's operation;
- f) A statement affirming that the contents of the certificate are to the best of the knowledge and belief of the person making the declaration.

For instance, in drug cases where a chemical examination is necessary to determine if a substance is a drug, a Digital Forensic Examination is similarly required to validate digital evidence. In this process, the Investigating Authority with expertise in technology will play a crucial role.

B. Admissibility of Digital Evidence under the Scheme of Other Laws:

The Evidence Act of 1872 is the primary statute in Bangladesh that governs the admissibility of relevance of Evidence in courts. Apart From the law, there are various other laws, under which digital evidence is admissible.

Such as Section 16 of the Speedy Trial Tribunal Act 2002, Section 87 of the Information and Communication Technology Act 2006, section 21 of the Anti-terrorism Act 2009, section 6 of the Pornography Control Act, 2012, section 58 of the Digital Security Act, 2018 furnishes the scope of bringing digital evidence in the Court.

Relevant legal provisions, where digital evidence is admissible, are at a glance:

Table 1: Sections of Special law related to Digital Evidence

Related Laws	Provisions
The Speedy Trial tribunal Act, 2002	16
The Information and Communication Technology Act, 2006	6,7
The Anti-Terrorism Act, 2009	21
The Pornography Control Act, 2012	6
The Digital Security Act, 2018	58
The Ain Sringkhola Bighnokari Aporadh Ain, 2002	14
The Bangladesh Telecommunication Amendment Act, 2010	

The Digital Security Act, 2018 ensures that any forensic evidence produced or obtained under the Act is admissible in court.

Sections 6 and 7 of the Information and Communication Technology Act, 2006, legally acknowledge electronic records and electronic signatures as legally valid.

Section 21 of the Anti-Terrorism Act, 2009, which was inserted in 2013, provides that conversations on social media, as well as photos or videos related to any offense, may be admissible in court.

The Pornography Control Act, 2012, recognizes all forms of electronic devices in Section 6 of the Act.

Section 14 of the Ain Sringkhola Bighnokari Aporadh Ain, 2002, permits the use of photographs, video recordings, tape recordings, and disks as evidence in court for proving any offense under this Act.

Tampering with or manipulating electronic evidence is punishable by law, including under Section 211 of the Penal Code and Section 58 of the Digital Security Act, 2018.

The Bangladesh Telecommunication Act, 2001, was amended in 2010 to include special provisions for ensuring the security of the country. It specifies that, regardless of existing rules, telephone calls may be intercepted and recorded for a period of time concerning state protection and public order. However, only detective agencies, national security agencies, and investigating agencies are authorized to do so.

Thus, the preceding legal authorities convey the idea that, besides the Evidence Act of 1872, there are several other statutes through which digital evidence can be brought before the court. Here are two notable cases resolved under special laws where digital evidence played a crucial role:

Case - 1

Ayesha Siddiqa Minni v State (Case No 47253/2019, GR No 214/2019)

Facts:

Rifat Sharif, an internet service provider, was murdered on June 26, 2019, in Barguna town, Bangladesh. He was attacked with sharp weapons by Sabbir Hossain Nayan alias Nayan Bond, Rifat Farazi, and others, in front of his wife, Ayesha Siddika Minni. A video of the attack went viral, initially showing Minni appearing to try to save her husband. However, investigations later revealed she was the mastermind behind the attack. Rifat succumbed to his injuries at Barishal Sher-E-Bangla Medical College Hospital. Dulal Sharif, Rifat's father, filed a murder case, and 24 people, including Minni, were charged.

Issue:

The central issue was whether the evidence, including video footage, witness testimonies, and forensic reports, was sufficient to establish the guilt of the accused. Key considerations included:

- The authenticity and implications of the viral video showing the attack.
- The credibility of witness testimonies and their alignment with physical evidence.
- The forensic evidence detailing Rifat's injuries.
- The role and intentions of Ayesha Siddika Minni and other accused in the crime.
- The rationale behind acquitting some of the accused.

Judgment:

On September 30, 2020, the District and Sessions Judge of Barguna sentenced six individuals, including Ayesha Siddika Minni, to death for their involvement in Rifat Sharif's murder. Minni was convicted under sections 34 and 302 of the Penal Code. Four other accused were acquitted. The judgment was based on substantial evidence, including video footage, witness testimonies, and forensic reports, which collectively established the involvement and culpability of the accused in the premeditated murder.

Case - 2

The State vs. 25 accused, including members of Bangladesh Chhatra League (2019)

Facts:

Abrar Fahad, a second-year student at the Bangladesh University of Engineering and Technology (BUET), was murdered on October 6, 2019. He was tortured and killed by members of the Bangladesh Chhatra League (BCL) in a university dormitory. The violence was allegedly in response to Fahad's Facebook posts criticizing government policies. His body was found on the dormitory staircase the next morning. After the brutal killing of Abrar Fahad, his father Barkatullah later filed a murder case with Chawkbazar Police Station. The case was

later transferred to the speedy trial tribunal, allowing a plea from Abrar's father.

Issue:

The key issue was whether the digital evidence, alongside other forms of evidence, was sufficient to prove the guilt of the accused beyond a reasonable doubt. Crucial aspects of digital evidence included:

Facebook Posts: Fahad's posts, which were allegedly the motive for his murder, had to be authenticated and proven to be the cause of the attack.

Mobile Data: Records from the accused's mobile phones, including call logs and text messages, were scrutinized to establish connections between them and the crime.

Digital Forensics: The examination of digital devices for any evidence related to the planning or execution of the crime was crucial. This included the analysis of devices used by the accused to identify relevant digital footprints.

Judgment:

On December 8, 2021, Dhaka Speedy Trial Tribunal-1 convicted 25 individuals in the Abrar Fahad murder case. The court sentenced 20 of the accused to death and 5 to life imprisonment. The judgment heavily relied on digital evidence which included the verification of Facebook Posts, Mobile Records, and Forensic Analysis.

The above-discussed two cases are among the most famous cases in Bangladesh, and in these two cases, video footage took a vital place as digital evidence toward its fair judgment and reliability in proving the guilt of the accused. These judgments indicate that, before digital evidence was incorporated into the Evidence Act, other laws were essential and effective in managing and validating digital evidence.

GLOBAL TREATMENT OF ADMISSIBILITY OF DIGITAL EVIDENCE

In many countries, the admissibility of digital evidence is regulated by laws related to the admission of evidence in court. These laws typically outline the conditions that must be met in order for digital evidence to be considered admissible. In the pursuant subheadings, such laws of a few countries are discussed.

A. United States

In the United States, digital evidence must comply with the Federal Rules of Evidence, which govern its admissibility in court. These rules require digital evidence to be relevant to the case, authentic (proven to be what it claims to be), and not excluded under any other rule of evidence. Specifically, Rule 902(11) allows certain electronic evidence to be self-authenticating if certified by a custodian of records. The US legal system generally applies traditional evidentiary standards to digital evidence without imposing additional specific criteria, thus accommodating technological advancements while maintaining rigorous standards of admissibility.

B. United Kingdom

Before the enactment of the Civil Evidence Act 1995 in the UK, the admissibility of digital evidence was limited by traditional rules like the best evidence rule and hearsay. The Act introduced specific provisions for computer-generated evidence in civil proceedings. Section 69 of the Act states that such evidence is admissible if it's shown to be produced in the course of its ordinary use or that its input was such that it should produce an accurate record. There is a rebuttable presumption of accuracy unless the challenges and strict adherence to statutory requirements are necessary for its admissibility in court.

C. France

In France, the admissibility of digital evidence is governed by the Code de Procedure Penale. This legal framework mandates that digital evidence must be produced according to specific procedural requirements to

ensure its reliability, relevance, and authenticity in court. Article 11 of the Code outlines these criteria, emphasizing the need for proper documentation and adherence to legal standards throughout the process of gathering and presenting digital evidence.

D. Bhutan

Bhutan's Evidence Act of 2005 defines evidence broadly to include electronic records, ensuring that electronic documents, including signatures, are admissible unless their security or integrity is contested. Section 63 of the Act provides for the admissibility of electronic documents to the same extent as non-electronic documents, with the burden of proof resting on those challenging their authenticity or integrity. This inclusive definition allows for the acceptance of digital evidence in legal proceedings, aligning with modern technological advancements.

E. Zanzibar

In Zanzibar, The Evidence Act of 2016 introduces specific definitions and procedures for the admissibility of digital evidence. Section 3 of the Act defines terms like "computer," "electronic document," and "electronic records," reflecting advancements in technology within legal proceedings. This Act aligns with similar legislative efforts in neighboring regions, establishing clear guidelines for handling digital evidence in court to ensure consistency and reliability.

Furthermore, section 72 and section 73 offer a special procedure for the admissibility of the digital evidence and the procedure is quite similar to the inserted in Bangladesh under Sections 65A and 65B of the Evidence Act, 1872.

CHALLENGES

1. The Evidence (Amendment) Act, 2022 has mirrored the Indian amendment, which can be considered ancient compared to the fast pace of technological advancement.
2. The Evidence Act, 1872 in Bangladesh now includes provisions for digital evidence. Although collecting digital evidence is usually straightforward, ensuring its security against breaches, cyber-attacks, and tampering remains a significant challenge.
3. The misuse of the law by government officials can jeopardize the preservation of incriminating digital evidence, complicating its protection under this Act.
4. Frequent transfers of experts lead to under-utilization of their skills, and Many Thanas (police stations) in Bangladesh lack experts to handle digital evidence-related matters.
5. Emerging technologies like Deep Fake are posing major challenges in authenticating digital video evidence.

Among the mentioned challenges, the misuse of the law by public servants is a significant loophole in the context of digital evidence. It raises questions about the authenticity and reliability of evidence, which can lead to critical flaws in the justice process:

Data Manipulation: Public servants may alter or distort digital evidence, which compromises the evidence's credibility and the fairness of the judicial process.

Dishonesty: They might create falsified versions of evidence or misrepresent the original information, contradicting the true circumstances and enabling deceit within the justice system.

Control: Controlling the system, public servants can influence the flow and processing of evidence, hindering the truth's revelation and potentially obstructing justice.

The recent murder of Abu Sayed in the quota reform movement (Quota Andolon) in Bangladesh is a significant example of the misuse of law by government officials and raises important questions about the admissibility of

digital evidence.

On July 16, Abu Sayed, a student of the English Department at Begum Rokeya University in Rangpur, was killed by police gun blasts in broad daylight. The bullets struck him from his neck to his thigh. Video footage clearly shows the police shooting Sayed, and he posed no apparent threat to law enforcement. However, contradicting what is clear as daylight, the police have presented a different story in the First Information Report (FIR) they prepared. According to it, Sayed's death was caused by bullets fired and brickbats thrown by the protesters. The video of the police shooting Sayed spread widely in national media and went viral on social media. Multiple footage shows that during the 'complete shutdown' program of the quota reform protesters on July 16, the police shot Sayed from close range in front of Begum Rokeya University in Rangpur. Sayed was holding a stick with one hand and had his arms wide open. He fell to the ground shortly after the gunshots. The head of the Forensic Medicine Department at Rangpur Medical College Hospital, Rajibul Islam, confirmed to "Prothom Alo" that Sayed had shotgun pellet wounds and died from internal bleeding.

In an attempt to cover up the incident, the police arrested a 16-year-old boy Alfie Shahriar Mahim for the murder of Abu Sayed. Mahim, a first-year student at Rangpur Police Lines School and College, is nearly 16 years and 10 months old according to his birth certificate. Despite the clear evidence that Sayed was killed by police gun blasts, this young student was made an accused in the murder case. After spending 13 days in custody, Mahim was granted bail.

Given the clear evidence that Sayed was killed by police gunfire, how was this young student implicated in the murder case?

What's more, it is important to note that the **Biswajit murder case**, faced challenges in authenticating the evidence presented in court. Furthermore, in the **Sagar-Runi murder case**, allegations arose concerning the negligent destruction of evidence by journalists during their professional duties.

In light of the incident mentioned, it is still questionable how effectively digital evidence will be used in ensuring justice in the context of Bangladesh.

SUGGESTIONS

In light of these considerations, recent legal reforms have been particularly focused on ensuring the admissibility of electronic evidence. As digital device usage increases worldwide, implementing the following suggestions can help address challenges related to the admissibility of digital evidence:

1. The Drafting Committee needs to address AI advancements and challenges like deep fakes, with skilled experts required to authenticate digital evidence.
2. To adequately prepare for the fourth industrial revolution in courts, ICT specialists, lawmakers, and law professors must collaborate to avoid judicial errors.
3. There should be dedicated and specific positions for these experts in both Thanas (police stations) and Courts, with provisions that allow transfers only within those specific roles if required by the authorities.
4. Courts face challenges in securely transporting and storing electronic evidence due to infrastructure limitations. Protection against alteration and proper storage conditions are crucial.
5. To prevent misuse by public servants, impose reasonable restrictions under the ICT Act, 2006, and Digital Security Act, 2018 to protect user rights.

CONCLUSION

Despite recent amendments to the Evidence Act, Some more specific and ongoing minor issues remain unresolved. To address these and all the above-mentioned issues and ensure the law is well-equipped to meet the

challenges of the modern era, the Law Commission, Law Ministry, and legislature should establish a research committee comprising lawyers, judges, law professors, and experts in medicine, forensic science, technology, and communication would be crucial. While some legal experts may argue that the amendment of the act concerning digital evidence was either unnecessary or excessive, it can also be asserted that codified laws backed by precedents can bring about solely advantages and apparently pose no harm. In spite of its flaws, the amendment has succeeded in clarifying the admission of digital and forensic evidence in courts, which will undoubtedly expedite the judicial process. The updates to Bangladesh's Evidence Act are a step towards better handling digital evidence, but further improvements are needed to effectively address evolving technological and legal challenges. It is hoped that the government will recognize these flaws and address them appropriately.

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