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Types of Evidence: Critical Analysis on Admissibility of Secondary Oral Evidence

MAITREYI SHISHIR[1]

ABSTRACT

The presentation of evidence is one of the most crucial parts of a case proceeding – it can make or break the case. Evidence in a case can be classified in several manners that have defined criteria under the law. Each mannerism that it is produced in has a different set of rules which decide the procedure of how the court shall verify it. Evidence can be differentiated in many manners. One such manner would be Primary and Secondary Evidence which is based on the fact of whether the evidence was received or made available directly or indirectly. The other manner would be Oral and Documentary evidence, which is based on how the evidence is available, i.e., through any witness stating it to or through written or stored data. Primary Evidence is always given more emphasis and value in comparison to Secondary Evidence. Documentary evidence is fairly easier to establish in the court as compared to Oral Evidence. This makes the admissibility of Secondary Oral Evidence very difficult to understand. However, there are certain situations when they are considered admissible in a court of law. This paper shall focus on understanding Primary and Secondary evidence while focusing on the admissibility of Secondary Oral Evidence.

I. INTRODUCTION

Evidence is the most crucial element in any dispute. It acts as a guiding light while solving any case. This is so because no case can be brought to conclusion in court without proper facts. But when two parties come up with fundamentally different facts, the court needs to find out who is speaking the truth. Through the existence of 'evidence', the court can figure out which side has the better weightage of truth and can find out the actual resolution to the dispute. However, let us first understand what does the term 'evidence' means. The origin of the term evidence can be traced back to the Latin word, 'evidera'. It means, "to ascertain, to prove, to discover clarity or to show clearly"[2]. These are proofs that could be in a written or non - written format that make us understand the real issue between the parties. Such proof can be brought in various manners, that could be tangible or intangible and can include written documents, oral

[1] Author is a student at Symbiosis Law School Hyderabad, India.
[2] Abhinav Prakash, Law of Evidence (Universal Law Publishing Co. Pvt. Ltd.)

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statements, or even digital recordings.

When we look into what evidence means under Indian law, it includes any sort of communication made in the court of law by any witness that is allowed by the court, to have a better understanding of the matter in conflict. Such communications can be made orally in the court or can be submitted to the court in the form of files or electronic recordings etc. For better inspection. The main goal of evidence is to help the judges in coming up with the right solution and ascertaining which narrative is true as compared to another. It helps in reducing the confusion amongst the minds of the judges. Therefore, the "Indian Evidence Act"[3] came into being to explain the right procedure of procuring and presenting evidence in the court of law.

A common misconception that exists is that evidence law is substantive and that it helps in understanding what Evidence is. However, in reality, the law with relation to evidence helps in understanding the right, legal and lawful procedure of extracting evidence and that evidence law helps in understanding rather what cannot be considered as evidence rather than what can be. One should also be careful while using the term 'evidence' and 'proof' interchangeably. In colloquial terms, they are used as one or the same. However, 'evidence' is used to 'prove' something.

The main two key requirements, therefore, which need to be check to be called as a piece of evidence include:

i. The fact should have some relation with the matter-in-conflict that shall interest the court; and

ii. The fact should be of a value that helps the court in resolving the matter – in - conflict

There consists of two types of evidence: Primary Evidence and Secondary Evidence. "Primary Evidence refers to the original document in itself."[3] "Secondary Evidence on the other hand refers to such an evidence that is used when the Primary Evidence does not exist and the absence for which is known."[4] Section 3 of the Act[5] talks about Oral Evidence. This means a piece of evidence that is stated by any witness in the court of law, when permission is provided by the court, or when it is a requirement for the procedure.

II. TYPES OF EVIDENCE

The types of evidences available can be categorized in different manners. Types of evidence could include differentiation based on whom they were derived from or ascertained for such as if through the eye witness, then a Personal Evidence, if through an expert, then Opinion

[3] Indian Evidence Act of 1872

Evidence; or if to ascertain one's image amongst the general public, then Character Witness. However, one of the key ways through which Evidence is differentiated is through its source. This way it is differentiated amongst Primary Evidence and Secondary Evidence.

Primary Evidence in the simplest manner can be defined as such a piece of evidence that the court decides on receiving first. Primary evidence Is defined under "Section 62 of the Indian Evidence Act"[4]. According to the definition, primary evidence includes all such documents which are produced in the court of law to prove a fact. This includes every document that is "executed in several parts as well as counterpart"[5].

A lot of times, when a document is produced in the court as primary evidence, each party involved in the case wants the whole document with them for their convenience. When such a circumstance takes place, each party is given the document by typing it out as many times as the parties involved, and by getting the approval of each party on each of such document through a seal or a sign. In such a case, any of this document can be produced as primary evidence. It was held in a case, that in cases of a partition deed every such copy created shall be treated as an original and not as secondary or duplicate evidence[6]. A lot of times when such a document is produced in a court as primary evidence, only some parties involved want the whole document with them for their convenience. When such circumstances take place each party that has requested the document shall get the document. Even in such circumstances, other documents shall be considered Primary in nature for the parties executing it and Secondary in nature for the parties who do not. For the same, it was held in a case where the party who asked for the document to be executed in counter received a Xerox copy that shall be deemed as Primary evidence. However, if the party against who such evidence is used wants to, he/she can file an issue with regards to the genuineness for the same.[7]

We can therefore conclude that when any primary evidence is requested by the parties in the court for their convenience, any such print, photographs, or lithography, each shall be considered as Primary Evidence. Even if two documents are created at the same time and executed and testified, only one of them shall be considered as primary evidence which has not been derived from any form of copying mechanisms, such as Xerox, etc. The testator of any such document cannot, by the use of the term 'true copy', term it as primary evidence.

Explanation 2 of the section talks about the 'uniform process' through which multiple primary

[4] Section 62 of the Indian Evidence Act, 1872
[5] Supra
[6] State Bank of Travancore v. Velayudhan Pillai Bhaskaran Nair, AIR 1996 Ker 32
[7] Bhagwanji and Kalyanji v. Punjabhai Hajabhai Rathod, AIR 2007 Guj 88

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evidence can be made of one primary evidence. This means that when different numbers of a document are made through the help of lithographs, prints or photographs uniformly, they shall be considered primary evidence. However, if multiple copies of a document are made, they shall be considered as Secondary Evidence.

There are many instances for the same. It was considered to be under the head of explanation (2) when several copies of a certificate were made, that was with regards to the condition of a rape victim as primary evidence.[8] In a certain case, several duplicates of a police diary existed through duplication. When copies were created out of such police diary, in the same manner through which the duplicates were created initially, it was considered as evidence, primary in nature.[9] Finally, in a certain case, the accused try to plea himself of charges of submission of duplicate visas after being paid. He stated that since such documents were photocopies, they would amount as evidence of secondary nature. However, the court held that even when the documents incriminating him is a photocopy, it shall be considered as primary evidence. [10]

The next type of major evidence is Secondary Evidence. Secondary evidence can be understood as any evidence which could not clear the criteria of primary evidence. They are provided in the court of law when primary evidence is not available.

What constitutes Secondary Evidence? It can include copies of an original document derived through a mechanical process, copies that are certified, copies that are created using the original document, counterparts of a document (for those parties who have not executed it for themselves), or audio records of an original document. It was also held in a leading case, that when a copy of any original document is submitted to a court, and there exists no opposition towards its evidentiary value, later on, it cannot be questioned in the Appeal Court. This is so because when the documents are brought in, and no objection exists, it is believed that the document is truthful in value.[11]

What is meant by a copy that is certified was defined under "Section 76"[12]. A copy that is certified means a copy of an original document that does not have to be proved anymore because it has been sworn to be true by a witness. The witness agrees that he has compared the original document with that of the copy and knows that it is correct. Copies of Sale deeds were accepted to be as secondary evidence after checking in with a vendor or vendee of its rightness

[8] Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702
[9] Rajesh Rai v. State of Sikkim [2002 Cr LJ 1385 (sik)
[10] Nakul Kohli v. State [2010 Cr LJ 4536 (Delhi)]
[11] Chimnaji Govind Godbole v. Dinkar Dhondev Godbole [1886 (11) Bom 320]
[12] Section 76, Indian Evidence Act, 1872

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by checking in the information of the transaction. [13]

What is meant by copies derived through the mechanical process was defined under "Section 63 (2)"[14]. It can be understood through the language and illustrations provided under the section, that a document shall only be considered as admissible when it can be seen that the copy of the document has been created through such a machine that it shall not include any defects, inaccuracy, or untruth. Copies of copies that are available at a registration office are also included as admissible secondary evidence. It can be easily summarized that any document when photocopies should be considered valid as secondary evidence after checking that the original document was correct and that the copy has been compared with the original. When there exists an absence of an original document to compare, the value of the evidence goes down to low.[15]

Clause (3) talks about copies made of an original document. It considers it admissible under Secondary Evidence. This means that when a copy is made of a copy, without verifying or comparing it with an original document, it shall not be considered for admissibility in the court.[16] This also means that the definition excludes any document which is a translation of the original document.[17] It is also established that any draft of an original document cannot be considered as admissible evidence unless, as held by the Kerala High Court, it is proved that the final document was prepared without making any amendments to the draft.[18] It was also further held by the Allahabad High Court.[19]

According to (5), it can be derived that when Oral details of a document are being stated, but there exists no actual original document to refer to, it cannot be considered admissible.[20] This however does not imply that any witness who shows up with regards to any document should have read the document. He could have also looked into the content of the documents, may have had someone else explain the document, and shall have seen the document physically. Orally, a written document can be considered admissible if a copy of the document which is certified is present or if any witness who was present during the execution is present.[21] The Supreme Court has therefore been following a few guidelines w. r. t. voice recordings as a manner in which voice recordings are recorded. If such recordings are proved to be true, and

[13] K Shivalingaiah v. B V Chandrashekara Gowda [AIR 1993 Kant 29]
[14] Section 63 (2), Indian Evidence Act, 1872
[15] J Patel & Co. V. National Federation of Industrial Co-op Ltd. [AIR 1996 Cal 253]
[16] Mahadev Royal v. Virabasava Royal [1948 (50) Bom LR 638 PC]
[17] Muhammad Suleman v. Hari Ram [1936 (21) Lah 363
[18] P Kunhammad v. Moosankutty [AIR 1972 Ker 76]
[19] Lachcho v. Dwari Mal [AIR 1986 All 303]
[20] Kanayala v. Pyarabai [1882 (7) Bom 139]
[21] Veerappa v. Md. Attavullah [1951 Hyd 74]

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not to have been tampered with, then there remains no issue in admitting it as evidence.[22]

It was held that if there exists a document that is invalid due to being inquietly stamped, it can be made valid by paying the paying amount for the same.[2324] When it comes to voice recordings in the form of ex. Cassettes, it was stated that if the cassette was in the custody of the police enforcements, along with clear identification of voices, it can be considered as admissible evidence.[25]

Evidence, however, that is being obtained through Newspapers is deemed to be Hearsay evidence by the Supreme Court. Their admissibility and reliability are very low on the scale. Such evidence cannot be deemed as the truth unless proved to the court. Such reliability is even under question when there remains no opposition from the party at the supposed accusing ends. This is one of the major reasons why no case can be filed against jail authorities on the mistreatment of prisoners based on reports made by various newspapers.[26]

However, even after so much deliberation, the High Court of Allahabad stated that the section w. r. t the secondary evidence was not exhaustive and could include more evidences as per the discretion of the court. This leaves the section open-ended and gives a wider scope to the parties and the court of law.[27]

III. ORAL EVIDENCE

Oral evidence has been defined under "Section 3 and Section 59 of the Act"[28]. It can be understood that all such statements that the court wants or allows a person to state, which has some relevance with the court is known as Oral Evidence. Such statements may be are communicated orally or by any other communication medium like sign language, etc. Such evidences can be used to prove anything in the court of law unless it is concerning a document. However, documents also get proved through oral statements in cases that come under secondary evidence.[29]

When we look into the admissibility or Oral Evidence, it is to be understood that when the statements stated are verified and checked by the court of law, then they stand alone are worthy of being admissible in the court of law.[30] It is a well-established rule of law that documentary

[22] R v. Daye [1908 KB 333]
[23] Kundan Mal v. Nand Kishore [AIR 1994 Raj 1]
[24] Swaran Singh v. Narinder Kaur [AIR 2002 P&H 40]
[25] K S Mohan v. Sandhya Mohan [AIR 1993 Mad 59]
[26] Sudha Gupta v. State of Madhya Pradesh [1999 Cr LJ 1742 (MP)]
[27] Indian Overseas Bank v. Trioka Textiles Industries [AIR 2007 Bom 24]
[28] Section 3, Section 59; Indian Evidence Act 1872
[29] RATAN LAL & DHIRAJ LAL, THE LAW OF EVIDENCE (Lexis Nexis 27th)
[30] P Ram Reddy v. Land Acquisition Officer [1995 (2) SCC 305]

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evidence is considered as the best evidence. When there exists a conflict between documentary evidence and oral evidence, greater importance is given to the former as the latter can be misinterpreted easily.

It can be understood through "Section 60"[31] that when oral evidence is produced, it out to be direct in nature. When any witness is present during an event, he cannot recall everything he views to precision. However, what he believes as the truth to his best is of an acceptable degree. His statements shall be considered true unless there remains a doubt due to a contrary existence of facts.

IV. SECONDARY ORAL EVIDENCE: WHEN ADMISSIBLE?

Oral evidence that is secondary in nature broadly consists of two categories. The first category would include, as mentioned before, any oral account of a document that a person may have read on its own or which may have been read out to that person. The second category includes any oral account which a person may have heard from another person, who would be the primary witness. For instance, when A witnesses the murder of B, and he comes and tells C about it, the statement given by C in the court of law would be considered as Secondary Oral Evidence.

Now, secondary oral evidences could be of many types. The most important of all is *Hearsay Evidence*. Hearsay in colloquial terms means anything which is done or written or spoken. When looking at its meaning in legal terminology, it means any evidence whose value or credibility does not lie completely on the person stating it but also involves the credibility of others. In layman's terms, it would mean a person who was not present at the scenario, however, heard of it from any primary witness. Such evidence cannot be taken under oath or can be cross-questioned as the person stating it has not himself witnessed the event but has only heard what another person has witnessed. However, this does not mean that these grounds are the only reason why they are not admissible.

The reasons behind why hearsay evidence is not accounted as admissible include the mere fact that the basis of hearsay evidence can lead to police taking far–off the investigation. Due to a lack of personal involvement during the situation, it is very weak in nature. It becomes difficult to accept the existence of a fact by it. Finally, the fact that lack of oath leads to a high chance of fraud makes the evidence highly untrustworthy, making it inadmissible. In instances where the statement that was communicated was hearsay in nature and the person who originated the

[31] Section 60, Indian Evidence Act, 1872

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information states otherwise, in such a case the evidence is excluded under the provisions for Hearsay.

In general, the court does not accept second–hand information. This is because when any evidence is stated to the court by a witness, it is done under oath to signify that such person holds personal liability to every statement he has admitted. This means that every statement he mentions in the court, he should with the responsibility that he holds to any mistake or untruth of it. It can therefore be said that any statement, i. e. with regards to any statement heard or any document read shall only be considered when it is brought in with responsibility.[32] An instance for the same could be, in a case, the witness clearly stated that she had seen and noticed that the demised wife was suffering in her marriage, abuse and cruelty. The witness also stated that she had observed marks of injury on the body of the wife. In the case, the statement of the witness was not dismissed on the grounds of being hearsay and was admitted.[33]

The rule of Hearsay however has an exclusion under "Section 6"[34]. According to this section, if any evidence has been closely monitored and has variously verified its worthiness, then it can be admitted.[35] Admission is also an exception to the rule of Hearsay. This is so because though admission is hearsay in nature, it is the best evidence.[36]

Admission refers to any statement, which can be communicated both orally or in a documentary format, which is referred to any fact or issue that is of importance to a case, made by any party to the case, and agent of such party to the case, the legal representative of such a party to the case, an independent person interested with the case, the person with whom the party to the case have derived interest from, the person who is liable or necessary for the case, or any person who has been referred to by the party. Any statement made by such people is admissible except when a legal representative makes the statement before taking in hold the position of being a representative, or; any statement made by an independent person interested in the case when he wasn't interested, or; any statement made person with whom the party to the case have derived interest from when the interest was not being derived.

The Supreme Court has also held that the Dying Declaration is a form of exception to the rule of Hearsay. Dying Declaration also has to be, however, verified and only held important if they have a rationale connection with the facts provided in the case previously.[37] It can be

[32] Sharad Birdichand Sarda v. State of Maharshtra [AIR 1984 SC 1622]
[33] State of Maharashtra v. Vasant Shankar Mhasane [1993 Cr LJ 1134 (Bon)]
[34] Section 6, Indian Evidence Act 1872
[35] Javed Alam v. State [2009 (8) SCALE 68]
[36] ABHINAV PRAKASH, LAW OF EVIDENCE (Universal Law Publishing Co. Pvt. Ltd.)
[37] Nairan Singh v. State of Haryana [AIR 2004 SC 1616]

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categorized under the 32nd Section of the Act. This also includes other cases when the statement shall not be dismissed on the rule of Hearsay but shall be considered as relevant. This includes any statement made by a person during his day to day business; any statement made by a person which reflects his interests or any act he had done earlier of which would make him liable for a criminal or civil suit; any statement made by the person which reflects his view on public interest; any statement that signifies the existence of any new relation, be it by blood, marriage or adoption; or any statement with regards to a family matter or dispute.

Hearsay exceptions also include any statement that was given by a person to an authorized person, but passed away, ceased to be capable of stating in the court again, or was kept off by an adverse party during the case and therefore cannot be called for cross-question.[38] Statements also entered into an account book, electronic included shall become important when required by the court but shall however not be admissible solely.[39] Finally, any entry in a public register, etc. by any person on such public duty or task assigned by such public duty shall become relevant.[40]

The next type of Secondary Oral Evidence shall include any evidence given by an *accomplice as a witness*. An accomplice can be stated to be "any person who participates, encourages or advises the criminal in the commission of a crime"[41]. It is stated that an accomplice is a reliable witness and that his statements can be admissible if they corroborate with the facts of the case.

An approver can also be a witness in any case. Approver refers to any accomplice who has been granted a pardon under Section 306.[42] His statements are also considered to be admissible under the court of law like any other witness except that it is seen with greater suspicion. His statements have to be corroborated, however.[43]

Police witness can be referred to any general public person who is requested by the police to be a part of a crime to help in easier detection of the criminal. It was held that any conviction can be easily based on the statement of a police witness as they are also competent under the law.[44]

The statements of a police witness, accomplice as a witness, and approver may come as Secondary evidence as they may not always participate in the crime but may hear through

[38] Section 33, Indian Evidence Act 1872
[39] Section 34, Indian Evidence Act 1872
[40] Section 35, Indian Evidence Act 1872
[41] Section 133, Indian Evidence Act 1872
[42] Section 306, Code of Criminal Procedure
[43] Suresh Chandra Bahri v. State of Bihar [13th July 1994]
[44] Frank Ezenwa v. State (Delhi) [9th May, 2019]

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fellow members the criminating part of any plan, etc.

Finally, a *Stock witness* cannot be said to be a reliable witness and therefore his statements are not admissible. The stock witnessed are trained by the police to be available anytime for their services. These statements are not admissible in a court of law.[45]

V. CONCLUSION

Evidence is a tool of law used to find the ends of a case in a faster and accurate manner. The Evidence Law has formed rules through which such evidence can be admissible in the court and what type of evidence cannot be admissible. The two most major way of dividing evidence is Primary and Secondary form of Evidence. While the former deals with any evidence in its true form, the latter talks about evidence that are a copy or are heard by another party. Therefore, the former has more rates of admissibility as compared to the latter. Oral evidence refers to any evidence that is stated in the court of law by the way of words or any other form of language that helps in communication. Secondary Oral evidence can be said to be any evidence that a witness may provide by listening to a third party. While Hearsay has a very low chance of getting recognized, other evidence collected through police witness, etc. have a high chance of being admissible if they corroborate the facts.

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[45] Kashmir Singh v. Narcotics Control Bureau [18th August, 2006]

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