



## A Critical Analysis on Telephone Tapping Conversation

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Received 27<sup>th</sup> September 2013, revised 7<sup>th</sup> October 2013, accepted 17<sup>th</sup> November 2013

### Abstract

In India, one side the technology is growing up as well as the crime rate also growing up concurrently by committing the cyber crimes. The judiciary has itself has given the liberty to the informants with regard to tapping of calls. Even though the conversation has recorded illegally and without consent of any of party, that evidence is permitting the court as evidence. Under Constitution of India, the every citizen has the right to live in dignity and privacy. The government and courts are not considering about privacy when the conversation recorded without consent of the person. It seems that the government and judiciary itself encouraging indirectly to informant to commit the crime. The Legislative members have enacted Information Technology Act with regard to prohibition of unauthorized recording and procedure of tapping the conversations. But the court has not decided any cases on the provisions of Information Technology Act with regard to infringement of privacy and prohibition of tapping calls by informant.

**Keywords:** Information technology, tapping, telephone tapping conversation, electronic record evidence.

### Introduction

From the decades there is a contradiction on the proposition of tape recorded conversations. After the enactment of legislations also, the investigating officers, police and people trapping the call records without consent of the party and without sanction of the concern authority. The Supreme Court has clearly stated that the telephone conversation should be recorded with the sanction of the Ministry of Home Affairs and concern authorities to that it is admissible as evidence in the Court of Law and if there is no sanction from the authorities it is violation of Article 21 of Indian Constitution. The person who has recorded the conversation without sanction of authorities and without consent of the parties it can be admissible in the Court of Law, unless it is permitted according to the procedure established by law.

Telephone - Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to sold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of subrosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by authorities of the day<sup>1</sup>.

According to section 2 (r) of Information Technology Act, speaks about the "electronic", it means that, the electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device and Under section 2 (t) of Information Technology Act speaks about that, 'electronic record' means data, record or data

generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. The evidence in any manner it may be in written or oral or tape record conversation it would be admissible under section 3 of Evidence Act<sup>2</sup>.

According to Section 5(2) of the Information Technology Act permits the interception of messages in accordance with the provisions of the said section. The first step under "Section 5(2) of the IT Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the IT Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of i. sovereignty and integrity of India, ii. the security of the State, iii. friendly relations with foreign States, iv. public order or v. for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then they said authority may pass the order for interception of messages by recording reasons in writing for doing so." If the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interests of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person<sup>3</sup>.

It is settled law that rendering a tape-recorded conversation can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on with the conversation or even of the statement of a person who deposes that he overheard the conversation between the two persons and what they actually stated had been tape-recorded. The tape-recorded conversation can only be used as corroborative evidence of such conversation deposed to by any of the parties to the conversation<sup>4</sup>.

In US, settled proposition is that, before recording of tape conversation, the person should take one of the party<sup>5</sup> consent who has involved in the conversation then only it can be admissible in the Court of Law. Robert B. Gilbreath and Curtis L. Cukjati in their paper discussed that, under both Texas and federal law, a person may ordinarily tape record a conversation if at least one to the conversation consents<sup>6</sup>, the other participants in the conversation need not be advised of the taping. For example, it is legal to tape one's own telephone conversation with another without telling the other person. On the hand, it is illegal, for example for a husband to tape record his wife's conversation on the couple's home phone with her alleged paramour if neither the wife nor the paramour consent to the taping. And it might be illegal, for example, for an investigator making a secret videotape of a personal injury claimant to record any audible conversations between the claimant and another. Videotapes are a simultaneous audio and video recording of events<sup>7</sup>.

According to section 3 of Information Technology Act<sup>8</sup>, speaks about that, authentication of electronic record, but it is not relied up by the courts, just the court observe ring that there is an collaborative evidence or not, if there is collaborative evidence, the evidence is permissible as evidence Court of Law. According to section 4 of IT Act<sup>9</sup>, speaks about the Legal recognition of electronic records. It is true that, the electronic records are admissible under the section 65 of Indian Evidence Act, but however if the recorded was tampered then it won't be admissible in Court of Law. There are lots of confusions on the IT Act; the Act has itself given the benefit to the accused. Because it's not possible to follow the procedure while the evidence procuring.

According to the IT Act, the person who has recorded the electronic conversation, he should give the acknowledgment of that recorded<sup>10</sup>. The originator and receiver should disclose the time and place of when the electronic recorder has received<sup>11</sup>. If the whole procedure followed prescribed in the Act, then the whole case will be gone, there is no doubt. Some times it's happened that, the originator will not record deliberately the conversation, it will be recorded unincidentally. However various High Courts and Supreme Court held that, the conversation is admissible even though obtained illegally.

In India after the verdict of PUCL, the Supreme Court and High Courts held that, even the parties and concern authority is not

necessary for recording of tape conversation and it would be admissible<sup>12</sup> in the court of Law and the conversation is relevant to the matters in issue, there is identification of the voice<sup>13</sup> and thirdly, the accuracy of the tape-recorded conversation is proved by eliminating the possibility of erasing the tape-recorder<sup>14</sup>. The tape-recorded conversation is, therefore, a relevant fact under section 8 of the Evidence Act and is admissible under s. 7 of the Evidence Act; unless the conversation is tampered<sup>15</sup> then it would not be admissible<sup>16</sup>. It is that the Judge has discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence<sup>17</sup>. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified<sup>18</sup> and to corroborate the evidence of witnesses who had stated that such a conversation had taken place<sup>19</sup>. The accuracy of the recording was not proved, and the voices were also not properly identified. In the circumstances, the court concluded that it would not be safe to rely on the tape-recorded conversation as corroborating the evidence of the prosecution witness<sup>20</sup>. In few the court held that if tape recorded without the consent of parties then it would not be admissible in Court of Law<sup>21</sup>. If there is no corroboration evidence<sup>22</sup> to the tape-recorded conversation it would not<sup>23</sup> be admissible<sup>24</sup>.

In Rayala M. Bhuvaneswari vs Nagaphanender Rayala<sup>25</sup>, the court point out that "Can a person record or tape a conversation of his or her spouse" It also shows that a person, who is party to the conversation, when the conversation is between spouses, can tape the conversation. But, a person cannot tape the conversation of a spouse while he or she is talking to other people, and more specifically to a paramour.

The Supreme Court while interpreting Section 3 of the Evidence Act and Section 2(t) of the Information Technology Act held that a compact disc containing recording of a telephone conversation could be valid evidence. The Court further held that electronically recorded conversation is admissible evidence provided the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. A CD recording of a relevant conversation is comparable to a photograph of a relevant incident<sup>26</sup>.

In Ram Singh<sup>27</sup>, a case arising from an election trial the Court examined the question of admissibility of tape recorded conversations under the relevant provisions of the Indian Evidence Act. The Court lay down that a tape recorded statement would be admissible in evidence subject to the following conditions. "Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded<sup>28</sup> statement may be stated as follows: i. The voice of the speaker must be duly identified by the maker of the record or by other who recognize his voice. In other words, it manifestly follows as a logical corollary that in the first condition for the admissibility

of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker. ii. The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial. iii. Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible. iv. The statement must be relevant according to the rules of Evidence Act. v. The recorded cassette must be carefully sealed and kept in a safe or official custody. vi. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

In *R vs. Stevenson*<sup>29</sup> too the Court was dealing with a tape recorded conversation in a criminal case. In regard to the admissibility of the tape recorded conversation the court observed as follows:

*"Just as in the case of photographs in a criminal trial the original un-retouched negatives have to be retained in strict custody so in my views should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document is a criminal burden of proof beyond reasonable doubt, in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original-is not the primary and the best evidence -that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence. In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible."*

In *State Of Maharashtra vs Prakash Vishnurao Mane*<sup>30</sup>, the Supreme Court further observed after discussing various decisions relating to tape-recording having due regard to the decisions referred to above, it is clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146(1), Exception 2 to Section 153 and Section 155(3) of the Evidence Act.

In *Regina v. Maqsood Ali*<sup>31</sup>, It was held in that case that the Court would not lay down any exhaustive set of rules by which admissibility of such evidence could be judged, for it always had to be regarded with caution and assessed in the light of all the circumstances of each particular case and that but for the fact that the tape-recorder was a mechanical device, it was no different from an eavesdropper. It was also decided that since the defendants in that case were not in custody and no caution was required, the use of the tape-recorder could not be said to operate unfairly against them; the method of taking the tape-recording could not affect its admissibility which still remained a matter for the discretion of the Judge.

In *People's Union for Civil Liberties (PUCL) v. Union of India*<sup>32</sup>, while deciding a Public Interest Litigation under Article 32 of the Constitution of India, 1950 the Supreme Court while considering the scope and object of Section 5 (2) of the Telegraph Act 1885 in detail and while observing that telephone-tapping is a serious invasion of an individual's privacy held that the right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution of India, 1950. It was further held that though the question whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case, the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as right to privacy and therefore telephone-tapping would infract Article 21 of the Constitution of India, 1950 unless it is permitted according to the procedure established by law. Since no Rules had been prescribed by the Government specifying the procedure to be followed, the Supreme Court framed guidelines to be followed before tapping of telephonic conversation. These guidelines have been substantially incorporated into the Indian Telegraph Rules in 2007. Rule 419A stipulates the authorities from whom permission must be obtained for tapping, the manner in which such permission is to be granted and the safeguards to be observed while tapping communication. The Rule stipulates that any order permitting tapping of communication would lapse (unless renewed) in two months. In no case would tapping be permissible beyond 180 days. The Rule further requires all records of tapping to be destroyed after a period of two months from the lapse of the period of interception<sup>33</sup>.

In *Mahabir Prasad Verma V. Dr. Surinder Kaur*<sup>34</sup>, the court held that tape-recorded evidence is corroborative evidence and in absence of deposition or conversation, such evidence cannot be relied.

It is well settled that tape-records of speeches are documents as defined in S. 3 of the Evidence Act and stand on no different footing than photographs. (See *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra*<sup>35</sup>, There is also no doubt that the new techniques and devices are the order of the day. Audio and videotape technology has emerged as a powerful medium through which a first-hand information about an event can be

gathered and in a given situation may prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and alterations by transposition, excision, etc. which may be difficult to detect and therefore, such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasized that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence<sup>36</sup>."

In *Manindra Nath v. Biswanath*<sup>37</sup>, the Calcutta High Court had to consider whether a defendant was entitled to adduce in evidence a previous statement of the plaintiff and recorded on the tape to contradict the plaintiff's evidence given before the Court and held that, the tape-recorded conversation was admissible in evidence and the previous statement recorded therein could be used to contradict the evidence given before the court. After referring to *Rup Chand's Case* (2) the Court observed at p. 192 "If the plaintiff, while he is in the witness box, makes a statement which is at variance with a statement previously made by him, the plaintiff may be asked whether he made such previous statement and if he denies having made the previous statement, such previous statement may be proved by the defendant.

### Recording interviews and phone conversation

The Press shall not tape-recorded anyone's conversation without that person's knowledge or consent, except where the recording is necessary to protect the journalist in a legal action, or for other compelling good reason.

The Press shall, prior to publication, delete offensive epithets used by a person whose statements are being reported.

Intrusion through photography into moments of personal grief shall be avoided. However, photography of victims of accidents or natural calamity may be in larger public interest<sup>38</sup>.

### Taking Samples is not violation of Article 20(3) of Indian Constitution

It was settled law that, taking the voice samples is not violation of Art.20 (3) of Indian Constitution. It will not be protect the accused for avoid of giving voice samples. In *Rakesh Bisht v Central Bureau of Investigation*<sup>39</sup>, the court came to conclusion that, the lending of voice samples for the limited purpose of identification so as to compare the same with the tape recorded telephonic conversation would not be in violation of the provisions of Article 20(3) of the Constitution of India, 1950. For this proposition, the learned Special Judge relied upon the decision of the Supreme Court in the case of

*State of Bombay Vs. Kathi Kalu Oghad*<sup>40</sup>, as well as the decision of the Bombay High Court in the case of *Central Bureau of Investigation Vs. Abdul Karim Ladsab Telgi and others*<sup>41</sup>, Considering these decisions, the learned Special Judge allowed the application moved on behalf of the CBI and directed the Jail Superintendent to allow the prosecution to take the voice specimens of the accused persons. In *A. R. Periyasamy v G. Karunakaran*<sup>42</sup>, the court points out the decision in *Rup Chand v. Mahabir Parshad and another*<sup>43</sup>, wherein it is observed as follows:

"The record of a conversation appearing on a tape-recorder cannot be regarded as a statement "in writing or reduced into writing". The record which appears on a tape-recorder cannot fall within the ambit of the definition of "writing" as given in Section 3(65), General Clauses Act, 1897. The expression "writing" appearing in Section 145 refers to the tangible object that Appeals to the sense of sight and that which is susceptible of being reproduced by printing, lithography, photography, etc. It is not wide enough to include a statement appearing on a tape which can be reproduced through the mechanism of a tape-recorder."

The court held that, the tape recorded conversation was admissible in evidence. There was no unlawful or irregular method in obtaining the recording of the conversation. There was no violation of either Article 20(3) or Article 21 of the Constitution of India, 1950<sup>44</sup>.

In *Mr. Prof M Varaprasada Rao vs Cbi*, the commission held that, the accused can seek the information (tape record conversations) under RTI<sup>45</sup>. According to section 6(1) of Right to Information Act provides that A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed. Even during the course of investigation the police have recorded any statements or tape record conversation it can be seek under RTI Act<sup>46</sup>.

According to Section 86 and 87 of IT Act, the central government has the power to make the rules for recording of electronic conversations and have the power to remove the difficulties in the Act.

According to Chapter-11 of IT Act, speaks about the punishments relating to Tamper, erase of electronic records. But however the sections are not effective. If the person violates the privacy of others, the person is liable for punishment<sup>47</sup>, but it's not happening under the IT Act. However there are no cases under the IT Act with regard to violation of privacy. If the person deliberately or accidentally breach the confidentially matter or privacy, the person is liable for which may extend to 2 years or which may extend to 1 lak or with both<sup>48</sup>.

## Conclusion

According to above discussion, tapping of telephone conversation is necessary evidence to the parties to come out with conclusion from the case, but due to this they are violating the rights of the persons. It is necessary for Central Government to frame the guidelines for avoiding the contraventions on tapping telephone conversations. The Courts strictly implements the law enacted by the legislatures for not violating the rights of the persons. The person who is going to tap the conversation, he/she should be intimates the authorities prior to tapping the conversation with regard to commitment of offence by the accused and that conversation should not be tampered or erased by the informant. After having the powers also, the central government is not making the guidelines with regard to tapping, due to this everyone taking the law in their hands, sometimes it leads to problems. According to Section 90 of IT Act, the state government also has the powers to make the guidelines on tapping conversation; it does not mean that, the central government only can make the guidelines.

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