MISSING FORENSIC VIDEOS AND FAIR TRIAL REMEDIES UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA

by

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Abstract

The new Indian criminal procedure entails the audio-visual recording of certain investigations, but a recording duty can only lead to a fair trial in a scenario where non-compliance triggers a judicial reaction. In this article, I look at the case of incomplete recordings of searches, seizures, and forensic collections of evidence under the Bharatiya Nagarik Suraksha Sanhita 2023. Using doctrinal analysis of the legislation together with the Supreme Court rulings regarding disclosure, electronic evidence, and investigative errors, the article unpacks the three issues that are often intermixed in conversations on digital investigation: the applicability of the duty to record, admissibility and reliability of the available recording, and the remedy in case of unrecorded material. The article makes the case that forcing the accused to prove what the non-existent or hidden video would have revealed is impossible where the State was in control of creating and preserving the evidence. A defendant identifying a relevant recording obligation and an important matter of dispute should create an obligation upon the prosecution to explain the state of the recording. Courts may then examine whether there was a failure, damage, partiality in the process, or intentional withholding of the recording, alternative sources of evidence and its implications. This proposal does not equate all violations of such recording obligations with automatic exclusion or acquittal. Moreover, victims and witnesses are also protected through controlled access to private recordings. The main innovation in the proposed legal framework

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lies in a practical concept of evidential prejudice that preserves the burden of proof on the prosecution and makes statutory recording obligations effective.

Keywords: Criminal procedure; BNSS; forensic videography; disclosure; fair trial; electronic evidence; adverse inference

1 Introduction

Recovery footage may be the factor that determines whether a trial judge is allowed to examine the prosecution's version of events regarding the discovery of the incriminating article. The lack of the recovery footage presents a challenging procedural issue. The first problem with this is that, if the burden is on the accused to show that there was contradiction, the procedure will depend on information provided by the footage. The second problem is that an equipment malfunction could allow for exclusion of reliable evidence.

The Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS) makes this matter of great urgency at once. Section 105 mandates audio-visual recording of searches and seizures falling under its ambit and prompt transmission to a designated magistrate. Section 185 makes separate provisions for recording searches by the police. Section 176(3) provides for forensic presence and video recording in cases where the offence is punishable with seven years' imprisonment or more, on a State notification system.

According to this article, there exists a duty to explain the situation regarding the status of the investigative recording in question. When the defense shows that there is an existing statutory duty and the actual dispute about the event in question, then the prosecution has the responsibility to say why there is footage and how it can be accessed. In this regard, the suggested duty involves the access to information controlled by the state. However, this duty does not put the ultimate burden of proof on the defendant.

Contribution of the article:

Distinguishing evidential dispute and bias as a result of loss of an opportunity to check investigation.

Recording will provide the opportunity for checking of an account in the future. Violation of recording obligation will deprive one of this opportunity.

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Judicial evaluation must take into consideration the loss of this opportunity, but must not presume fabrication by police or innocence of the accused on this ground.

2 Method Scope and Research Questions

The approach is doctrinal and normative. The paper considers the BNSS, as well as the law called the Bharatiya Sakshya Adhiniyam 2023 or BSA, in relation to judgments on criminal disclosure, confidential electronic documents, undisclosed CCTV recordings, and the ramifications of illegal investigation. The primary sources of law are official statutory documents and judgments. Material from the Bureau of Police Research and Development is employed to consider operational guidance, not law or judgment.

The three questions that guide the discussion include; when does a recording obligation exist? What is the way to tell the difference between a file which fails to meet the requirements of admissibility and a file that is non-existent in its entirety? What is the way to ensure participation in the trial when the state has control of the recording process? The theory is explained using hypothetical examples. It is not claimed how well other states comply.

21 November 2026 marks the legal deadline. There is no presumption that the commencement date of section 176(3) applies consistently to all States. Its applicability in a particular case depends on establishing the notice, territorial issues, and stage of proceedings. Both BNSS and BSA savings provisions need to be considered; the timing of a hearing alone does not resolve the issue of procedure and evidence for a pending case.[1]

The first topic covered is the video material concerning the official search, seizure, and forensics collection. Private surveillance footage is used here just as an analogy concerning the hidden evidence. Body-camera programs, statement records, and interceptions add more topics not considered in this article. The exclusion of these topics gives an opportunity to consider a particular procedural mistake rather than treat any police-made digital information as equivalent legally.

3 Different Recording Duties and Different Legal Questions

Section 105 does not employ any wording of a voluntary best practice. It instructs the recording of the process of search or seizure of property in accordance with the chapter concerned or Section 185, which includes the making of seizure lists and attestation of witnesses. It also

[1] BNSS, s 531(2)(a); Bharatiya Sakshya Adhiniyam 2023 (BSA), s 170(2).

provides for sending the record without further delay to the District Magistrate, Sub-Divisional Magistrate or Judicial Magistrate of First Class. The statutory subject of the record, therefore, is the process and not just an image of an object already exhibited by the police.

The section 176(3), however, is of a different format altogether. With respect to the offences listed, it makes the inspection by a forensic expert conditional on evidence collection and videography of the process. The obligation begins from the date of notification by the State Government during the prescribed five-year period. The proviso takes care of any lack of forensic facilities by way of notification to use the facilities of another State.

Lack of laboratory facilities and non-videography of an otherwise qualifying search are not one and the same thing.

Three questions arise from a legal perspective: the first is applicability, where one determines whether there existed a statutory obligation for the event; the second is compliance, where one determines what was recorded and communicated; and finally, evidential use, where one establishes whether an existing recording is admissible and its weight. The determination of whether an existing recording is admissible before establishing whether a recording of the event exists addresses the third question too soon.

Guidance by the Bureau of Police Research & Development, with regard to operational aspects, takes into account the distinct roles of first responders and forensic teams, and links the issue of recording with the certification of electronic evidence. Guidance of such nature may assist in terms of training and documentation. However, it does not replace the statutory conditions or develop an exclusionary rule that is not set forth by Parliament.

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4 The Recording Must Be Both Authentic and Relevant

The video might be authentic but still incomplete. The video might be an accurate representation of the police officers who have the knife but do not contain any information about the cupboard where it was allegedly found. While it is true that the file is authentic, the truthfulness of all propositions presented about its recovery cannot necessarily be determined by this fact alone.

BSA Sections 61-63 deal with electronic documents and evidence about them. BSA Section 63 provides the conditions applicable to the computer output that it regulates and mandates the required certificate in case that avenue is relied upon. This section's Schedule contains information about the source and hash values. What evidential avenue is employed has to be

determined on the facts. This article does not make the presumption that all electronic documents are proved in the same way irrespective of the form in which they are produce.

Hash comparison is helpful in analyzing if the digitally captured content has been altered at any stage. It does not prove the fact that the camera has captured the entire incident, that the time of the clock was correct, or that the object was not already positioned prior to the recording process. The certificate cannot produce what was never made.

The BNSS police report requirements contain the chronological custody chain for an electronic device. This provision gives statutory linkages between the digital evidence and its chain of custody. For investigation video recordings, the court ought to consider the capture origin, transfer history, and linkage between the copy in possession and the copy provided in evidence. These are some suggested approaches to examining the evidence, and not a claim that the statute defines all technical fields in a universal video recording register.

5 Disclosure Must Begin with Knowledge That a Record Exists

It is impossible for the lawyer to ask for a particular file without having knowledge as to whether such a file was actually produced by the investigators. As a result, selective indexing is a way through which participation can be hindered despite the existence of the document production process. The accused person can get seizure memo and forensic report, yet not aware of failed efforts to record, further clips or even an existing file in the device.

Manoj v State of Madhya Pradesh case law has established that there is an obligation for the prosecution to provide a list of all materials, statements, documents, physical evidence and exhibits that have not been utilized in investigations, and such obligation should be enforced by trial courts. This decision implies that there should be transparency regarding investigation materials. It does not imply, however, that all items on a list of unused material should automatically be reproduced.

The statutory framework for document production for police report cases is provided by Section 230 BNSS, taken in conjunction with the material submitted in accordance with Section 193. A recording that the prosecution wishes to rely upon must be dealt with in the appropriate disclosure process. Where the investigators have material footage that they do not wish to rely upon, there is a second issue. The issue of unused material stops selection from rendering it invisible.

The present article suggests that the index of the investigation recording should contain the identification of the event which has been recorded, the source of the record, its overall period of time and current holder. The record should be classified whether it is used or not, retained and not used, inaccessible or never produced at all. There is no necessity for such an index to reveal intimate information about the victim. Its only aim is to let the public know about the record and its processing

6 Missing Evidence and the Limits of Existing Analogies

The case of Tomaso Bruno v State of Uttar Pradesh highlights the importance of non-disclosure of CCTV footage when it comes to a circumstantial case. In this case, the Supreme Court gave more weightage to non-disclosure of the available footage than just any other investigative oversight. Here, the point is that it's like a missed chance of verifying the truthfulness of a story.

However, the current dilemma is not confined to the above analogy. There could indeed be privately taken evidence. The statutorily mandated investigative evidence is meant to have been produced since it is the law that mandates the process to provide independent verification. In cases where the police never bother to start filming at all, then there would have been no evidence that would have needed to be suppressed in the first place.

Section 119 of the BSA and its illustrative case law about evidence that has been withheld constitute grounds for the drawing of any relevant adverse inferences. However, it is important for the judge to clarify the difference between lack of creation and subsequent withholding and the reasons for selecting the particular inference. The poor-quality recording cannot be used as evidence of each accusation raised by the defence.

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The article does not use the analysis provided by Tomaso Bruno regarding the electronic-proof channels as an alternative to the text currently contained in the BSA. It also does not suggest that the case decided upon remedies under provisions that were passed years after the decision. The former provides reasoning regarding the evaluation of evidence, while the latter provides new recording obligations.

7 Why Automatic Exclusion Is an Incomplete Answer

In the Indian law of evidence, there is no such universal principle as all illegally seized things should be considered as inadmissible. Pooran Mal forms an essential part of the context, whereas State of Punjab v Baldev Singh highlights the importance of paying heed to the specific statutory

exclusionary rule, rather than mechanically applying a general principle regarding admissibility of evidence. None of these cases directly answers the question on the consequences of the absence of the BNSS recording.

The traditional rule regarding investigation irregularities propounded by H.N. Rishbud also differentiates between a breach and its consequences on the ultimate trial process. While taking into account the seriousness of miscarriage of justice, the rule accepts that early detection of any irregularity is an opportunity to set things right. This distinction applies to video evidence too, since an early order for preservation can result in the recovery of evidence that would otherwise be lost by the time it is reviewed for prejudice.

An automatic acquittal system would ignore the independent evidences and the victim's interests. An automatic harmlessness system would make the recording requirement an optional process in practice. The proper analysis would be to find out for what purpose the recording was made, how the defect impaired the purpose and whether there is enough independent evidence for proper adjudication. The conclusion must still relate to the prosecution's burden of proof beyond reasonable doubt.

Modern judicial handling further underscores the practical importance of the matter. In the case of Shadab v. State of Uttar Pradesh, the Allahabad High Court has dealt with the non-recording of the purported recovery during the bail proceedings, and has made some directions in relation to adherence to section 105 and the relevant State rules. A bail order and some administrative directions do not make a universal rule of exclusion in the trials.

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8 A Structured Duty to Account for Missing Footage

The starting point is a low threshold of defence. The accused must specify the investigative occurrence, what makes the recording obligation arise and the issue of fact in dispute. For instance, it can be disputed by the accused that an object had been taken out of a specific room during a covered investigation. The threshold should not involve a description of the unseen video content. This would make the protection least available when the video evidence is wholly under the control of the state.

If this is achieved, the prosecution must give a specific account regarding the status. It must tell the court whether an attempt to record has been made, the creation of a file, and who owned the file and what happened to the part of the file that is missing. Relevant supporting evidence can

include the malfunction report, transfer confirmation, or retention entry. This has been suggested as a procedural requirement, not a statutory shift of burden of proof.

This classification of the problem depends on its category. The non-creation category describes the situation where no recording relevant to the case was made at all. The incomplete capture category refers to a recording which existed, but failed to capture some important aspect of the events. Loss refers to a missing document which used to exist, and withholding to a document which exists, but was not submitted.

The court must then identify the proportionate next step to take, whether production, secured inspection, technical analysis, or evidentiary hearing for a loss determination. This should be recorded as being a proportionate response. The blanket request for all policing devices may be unnecessary if the one custodian can produce the relevant file. On the other hand, the blanket claim of technical challenge should not close down an investigation where a receipt confirms that a full recording has been received into official custody.

9 Prejudice Must Include the Lost Opportunity to Verify

The traditional inquiry in ordinary prejudice cases as to whether the evidence left would alone suffice to prove the case is important. However, there is also the protection of the process whereby one can test the process through which the evidence left was obtained. If there is no video of the recovery process and it is solely relied upon by those who recovered the evidence, then the loss of the video could be an issue for the defense.

The analysis suggested can be said to have four parts: the significance of the omission, the State's ability to control the documentation and storage, the reason for the failure, and the sufficiency of other evidence. A missing portion of the videotape relating to the preparation of a seizure list may carry different implications from a missing portion relating to the discovery itself. It all depends on what precisely is in dispute. Courts must focus on the particular question involved.

Alternative evidence has to be considered independently as well as its ability to address the same issue. The testimony of a civilian who witnessed the entire recovery will prove relevant. A forensic report naming the substance may help determine its components but will fail to resolve the location of recovery or from whom the substance was recovered. A laboratory report cannot resolve such a defense by virtue of being scientific.

Importantly, no necessity for the accused to present an alternative story in order to challenge the prosecution case is required. If there is a failure to show beyond a reasonable doubt that some material was recovered, it could influence the decision regardless of whether the evidence has been suppressed in bad faith. On the other hand, in situations where the reason for the failure is thoroughly explored and independent proof is provided of the disputed fact, its significance will be reduced.

10 Graduated Remedies and Their Proper Limits

The least obtrusive action is the preservation and status order at an early stage. The courts must take actions even before the normal retention period or further use of the device makes the retrieval difficult. If the file exists, then the inspection or disclosure could remedy the harm done. An investigation could solve the problem of a contested transfer or mysterious interruption.

Where this is no way to remedy the damage, then the court must assess the appropriateness of a permissible adverse inference and the proposition at stake. An appropriate adverse inference could cast doubt on an unwarranted story of recovery without demonstrating fabrication of all of the facts of the case by the police. The court must also clarify how much weight it is giving to any recording that still survives. The accurate recording of a few moments is still proof of what it is, despite its proponent's story.

If the error results in part of the prosecution's case not being proved, then the standard burden of proof will give the remedy. An acquittal when faced with such a situation results because of the absence of proof of guilt and not due to some automatic rule that a camera malfunction equals a guilty verdict. A plea of exclusion needs to show which legal basis the plea is based on. Judges should not use weight as exclusion without saying so.

Police accountability constitutes a different route of redress. Disciplinary proceedings may be necessary in accordance with the rules in place and the rulings of the courts, but punishing the policeman does not in itself compensate for the lack of participation by the defence. Similarly, a fair trial can take place in spite of conduct that requires a different response. Separation of remedial approaches makes it possible for courts to do both.

11 Privacy Resources and Implementation

It is possible that the recording obligations might reveal the inside of houses, medical data, and identity of vulnerable persons. Thus, any provision for access to a fair trial should necessarily

include arrangements for the protection of victims and witnesses. In P Gopalkrishnan v State of Kerala case, the Supreme Court viewed the data contained in the memory card as documentary evidence in the course of discussion on controlled access and privacy issues in a case of sexual offence.

In the case of investigational videos, proportionate measures could involve a supervised inspection, a visit by a defence expert, viewing copies or a redacted version together with preservation of the master in its original form. The redaction should not exclude the disputed event or limit context-based scrutiny of that event. The restrictions should explain precisely what is restricted, why it is necessary to do so and how the defence can nevertheless test the evidence in question.

Constraints on resources should also not be overlooked. The absence of the device, immediate danger or dead battery may provide an explanation for an individual case of failure to use the recording capability. The explanation should be contemporaneous whenever possible and analyzed in light of the situation. Safety comes first in emergency situations over the need to record, but the fact that there is an emergency situation should not always be the explanation used.

The evaluation of an institution must not reward the quantity of uploads without assessing completeness and retrievability. An upload which is small and not pertinent could meet the criteria of an administrative evaluation while failing to meet the criteria of the statute. Pilot testing must assess accessibility, proper indexing of the process and appropriate response to defence requests. No numbers are cited for any nation in this regard. These are proposed criteria for evaluation based on usefulness for adjudication rather than file creation.

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12 Conclusion

The BNSS ensures that certain investigative procedures become observable in a manner that may safeguard a fair prosecution and legitimate defence. Such hope relies upon much more than the mere installation of cameras or the verification of existing records. The court needs to first identify the relevant duty, establish the nature of the record, and then assess the effect of any missing records on the disputed issue of evidence. The process of forensic documentation should never be mixed up with other kinds of recording requirements.

The imposition of a structured obligation to explain why the footage is not accounted for provides a limited response to the issue of non-compliance. This is because it involves giving an

account by the institution in possession of the evidence, acknowledging that the defense missed the chance to check the footage, and providing for different kinds of relief depending on the circumstances. This does not involve the presumption that anything has been falsified and does not provide any automatic acquittal. The underlying idea is that there should be a statutory record of the conduct of the investigation that can be scrutinized.

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