TESTIMONY THROUGH SKYPE PROMOTES BEST INTEREST OF JUSTICE

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Abstract - Courts are gradually adopting new technologies to enhance and strengthen the administration of justice system. An emerging area with respect to promoting justice is the use of skype for the purpose of giving testimony in the event of security concerns on accused or witness and remoteness of their location. Initially, testimony through skype was only recognized by the judiciary. Recent development in law recognizes the testimony through skype, yet there are technical defects in its implementation. The main objective of this study is to identify, how testimony through skype promotes best interest of justice and to identify the technical deficiencies in implementation. Further, it is desired to suggest recommendations to overcome the defects. The black letter approach is utilized for this study.In this paper it objectifies to provide the importance of testimony through skype in court proceedings, to afford legal regulations, judicial recognition of using skype for court proceedings, to identify the loopholes in the existing legal framework and to give recommendations.

Key Words: testimony, skype, best interest of justice

I. INTRODUCTION

The use of Skype technology offers a great advantage in recording statements of witnesses who cannot attend court due to security concerns and remoteness of their location. This paper focuses on how Skype could use in order to promote best interest of justice. Law has to be amended time to time in order to get the benefit of technological advancement. Initially, Sri Lankan courts did not recognize computer-based evidences for court proceedings. But with Evidence (Special Provision) Act No.04 of 1995 accepts computer evidence as an admissible evidence before court.[1]

Former secretary to the ministry of justice, Kamalini De Silva stated that ministry is willing to provide courts with any technical support needs to promote the best interest of justice.[2] As a result, Witness Protection Bill was presented to the parliament by Minister of Justice Rauff Hakeem. The bill was passed by the parliament and it came into operation in 13th of March 2015[3]. It provided the legal regulations for testimony through Skype who cannot attend to court due to security concerns and remoteness of their location.

A witness plays an imperativepart in concluding the verdict of any case. Sometimes witnesses may face difficulty to attend to court to give evidence due to security concerns or remoteness of their location.In such instance, if their testimony or statement not produce before court that would negatively impact on court process of ascertainment of truth. This is not what law stands for. Therefore, measure has to be taken to promote best interest of justice by avoiding such difficulties. This paper focuses on whether testimony through Skype would promote best interest of justice by giving access to witnesses who have security concerns or remoteness of their location.

The first part of the paper discusses the importance of testimony through Skype in court proceedings, second part discusses the legal regulations in relation to use of Skype with special reference to Assistance to and Witness Protection Act, third part focuses on judicial recognition of using Skype for court proceedings, fourth part discusses the loopholes and technical issues on Sri Lankan law on testimony through Skype and the final part gives recommendations for effective use of Skype in recording evidence.

[1]Evidence (Special Provision) Act, Section 5

[2]Nadia Fazlulhaq, 'Skyped Evidence Set to Revolutionise Courts' Sundaytimes (01 December, 2013)

[3]Witness Protection Act 2015 s 2 (1)

II. IMPORTANCE OF TESTIMONY THROUGH SKYPE IN COURT PROCEEDINGS

There are two issues which debilitate the best interest of justice. Namely, security concerns on accused or witness and remoteness of their location.When a matter is highly relied upon a witness testimony, there will be an immense threat on such person.

Hence, it's very important to ensure the safety of victim of the crime and witnessesand to give access to them connect with court. Samayan and six others were killed while them carrying from Kalutara Prison to Kaduwela Magistrate courts.[4] With the killing of Samayan, valuable information with regard to the offences he committed and others who involved was also buried with him.

Also there are cases where foreigners have become witnesses in a crime, when they were in Sri Lanka and cases which they want to file in our courts. However, there is a long delay in our court proceedings and it takes years to conclude a case. Therefore, foreigner may not be able to stay in the country for such long period of time. Hence, most of them decide to not to file an action and bear the unjust caused to them, due to the remoteness of their location which debilitate the best interest of justice. If Skype used to record evidence they could give evidence from wherever they are.

III. LEGAL REGULATIONS

Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 Act specified that,

> "if it be in the best interest of justice and is found necessary: —
>
> (a) as a measure of protection to be afforded to a victim of crime or witness; or
>
> (b) on grounds of expediency,

Record any evidence or a statement of such victim of crime or witness, by securing such testimony or statement without his personal attendance before such Court, Commission or law enforcement authority through technical means by which contemporaneous or near contemporaneous audio-visual linkage between the Court, the Commission or the law enforcement authority, and any other location (hereinafter referred to as the "remote location") within Sri Lanka, from where such person testifies or makes the statement, could be established.[5] In other words it stated Skype should use to record evidence if it is necessary to promote best interest of justice.

The Act allows testimony through Skype under two conditions. Firstly, court has to satisfy audio-visual linkage is technically accurate and reliable.[6] Secondly, judicial or public officer appoint by the court has to be in presence of the remote location where the victim of crime or witness seeks to make the statement.[7] Evidence shall record only if the above conditions are satisfied. Likewise Act specified that the procedure for testimony through Skype.[8] Section 33(2) and (3) limits the application of this provision only in special occasions where it is essential for the best interest of justice.

IV. JUDICIAL RECOGNITION

Testimony through Skype has been judicially recognized in countries such as, Sri Lanka, Fiji Island[9], Australia[10], UK[11], USA[12], India and Canada.

KHURAM SHAIKH'S CASE: In famous Khuram Shaikh's case with the assistance of Attorney Generals department, Colombo High Court decided to use Skype to record evidence from witnesses who were in overseas.[13] Thereby, Christopher Stooksbury who saw the incident give evidence via Skype from Canada.[14] With his valuable statement accused was convicted for the offence of murder.

FRANCISCA DIEDA CASE: In another case Colombo Fort Magistrate ThilinaGamage has ordered to record evidence from the first witness of the case Francisca Dieda,[15] and court ordered to record evidence under the supervision of an independent observer attached to the University of Colombo School of Computing.

[4]ThilankaKanakarathna and S. Thantriarachchi, 'Prison bus shot at, Samayan and six others killed ' DailyMirror (27 February, 2017)

[5]Ibid
[6]Witness Protection Act, Section 31 (2)
[7]ibid
[8]Witness Protection Act, Section 33
[9]PeniLotawa vs. The State, Criminal Appeal No. AAU0091 of 2011
[10]People v. Novak, 41 Misc. 3d 733, 734 - 735, 971 N.Y.S.2d 197 (2013).
[11]Polanski v Conde Nast Publications Ltd [2005] UKHL 10 (HL)
[12]State of Florida v. George Zimmerman No. 5D13–1233
[13]Fazlulhaq N, ' Skyped Evidence Set to Revolutionise Courts ' Sunday Times (http://www.sundaytimes.lk, 01 December 2013)
[14]Wilkinson D, 'Full horror of how Khuram Shaikh was murdered as he tried to help others' Manchester Evening News (http://www.manchestereveningnews.co.uk/news, 21 April 2017)
[15]Colombo Page, 'Sri Lankan court to record evidence using Skype ' (Internet Newspaper 2014) <http://www.colombopage.com/archive_14A/Feb26_1393420672CH.php> accessed 18 October 2017
[16]Colombo Page, 'Sri Lankan court to record evidence using Skype ' (Internet Newspaper 2014) <http://www.colombopage.com/archive_14A/Feb26_1393420672CH.php> accessed 18 October 2017

V.LOOPHOLES AND TECHNICAL ISSUES ON SRI LANKAN LAW ON TESTIMONY THROUGH SKYPE

The major issues of the testimony through Skype are the reliability and security concerns. Especially for countries which follow adversarial system, reliability of the witness is a major concern. Unlike in physical presence of the witness, it is difficult to assess whether witness telling the truth or not. Because the court can only observe the witness who is givingevidenceinside the square of the camera focal point.[17]

In the Memogate Scandal, the Judicial Commission of Pakistan allow testimony through Skype. Justice Isa said, "It is the responsibility of the government to ensure a good link,"[18]

Mr. Abeyaratne further pointed out some issues related to use of Skype in court proceedings. One is the lack of technical knowledge by the lawyers. Not all the lawyers are familiar with IT and IT law. Therefore lawyers and even the judges would face difficulties in using Skype in the court proceedings. In most of the instances judges would reluctant to use Skype due to lack of knowledge over it.[19]

VI. RECOMMENDATIONS

It is a must to have guidelines on preparing the Courtroom for Skype and Preparing the Witness to Testify through Skype.

Therefore, it is recommended to draft set of guidelines on preparing the courtroom for Skype. Further, it is important to have the surrounding with suitable network fundamentals. The most important aspect is the connection speed and it is important to set out minimum download and upload speed in the court room. Otherwise there will be lot of connection failures which ultimately question the authenticity of the evidence.

Moreover, it is recommended to promote IT law among the lawyers and judges and to make them more tech-savvy.[20]

[17]Fazlulhaq N, ' Skyped Evidence Set to Revolutionise Courts ' Sunday Times (http://www.sundaytimes.lk, 01 December 2013)
[18]Hameed U, 'The Importance Of E-Court Protocols For Skype Testimony' (2016) <http://courtingthelaw.com/2016/08/10/commentary/the-importance-of-e-court-protocols-for-skype-testimony/> accessed 18 October 2017
[19]ibid
[20]Fazlulhaq N, ' Skyped Evidence Set to Revolutionise Courts ' Sunday Times (http://www.sundaytimes.lk, 01 December 2013)

VII. CONCLUSION

Although our courts initially reluctant to use technology in court proceedings, with the enactment of Evidence (Special Provisions) Act and Witness Protection Act, recognize the computer based evidence as admissible before courts. This is a big step taken towards promoting better interest of justice. Using Skype to record evidence was practicing in many developed countries in the world to enhance the justice. By following this technical advancement for better justice, our law also accepts testimony through Skype. Purpose of this legal recognition is clearly stated in the Witness Protection Act, to promote best interest of justice. Testimony through Skype is allowed on two specific occasions; for the protection of witness and remoteness of the location of the witness. Even before the Act passes, courts had used Skype to record evidence via Skype such as in famous Khuram Shaikh case. Although the law has been now strengthen with the legal recognition of Skype, it is important to note that mere recognition was not achieved the desired outcome of promoting best interest of justice. Our law has been not specific on the use of Skype for testimony as it creates many practical difficulties on its application. Therefore it is important to set out guidelines specifying the manner to use Skype. Apart from those technical difficulties in our law, there are some general issues of using Skype for testimony; reliability and security concerns. This issue has been pointed out in many cases and scholars with their arguments.

In conclusion researcher admitsthat the statement of "giving evidence by Skype is preferable to giving no evidence at all"[21]. Therefore, it is believed that testimony through Skype Promotes Best Interest of Justice. Further, it is recommended to enact guidelines to enhance the effective use of Skype for testimony.

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