

Alibi¹

The defence is that the defendant was not at the place of the crime when it was allegedly committed but was instead somewhere else. As it is for the prosecution to prove the guilt of the defendant, it is for the prosecution² to prove, beyond reasonable doubt, that the defendant was present at the time and place when the offence was committed.³

¹ Alibi is a word with a potentially pejorative connotation and is best avoided. Where the word is used during the trial by lawyers, it may be necessary to add a direction to the effect that: **You should be careful to avoid any prejudice that might subconsciously attach to the word ‘alibi’. It would be wrong to that that describing a defendant’s claim that he was not present when the offence was committed as an ‘alibi’ carries with it any suggestion that the claim is deserving of special scrutiny.** cf *R v Conder*, [CA No 39 of 1999, 20 July 1999](#), per Thomas JA [28].

² The prosecution may tender the notice of alibi in the Crown case. See *R v Rossborough* ([1985](#)) [81 Cr App R 139](#). In *R v Heuston* ([1996](#)) [90 A Crim R 213](#), Gleeson CJ noted at 217 that the actions of the prosecutor in tendering a notice of alibi as part of the Crown case was neither unusual nor irregular. See also *Watts v R* ([1980](#)) [71 Cr App R 136](#) which cautions that the prosecutor should carefully consider that course of action before embarking on it.

³ This instruction is concerned with circumstances where the defendant’s presence is an essential ingredient of the offence charged. Where the jury might use their rejection of an alibi either as an implied admission of guilt, or as corroborating the complainant’s testimony, the jury should be given a direction in conformity with *Edwards v The Queen* ([1993](#)) [178 CLR 193](#); see *R v J (No 2)* [[1998](#)] [3 VR 602](#) at 631; *Graham* ([2000](#)) [116 A Crim R 108](#). See Benchbook 48.1. In *Dyers v The Queen* ([2002](#)) [210 CLR 285](#) the High Court held it would be a misdirection to give a *Jones v Dunkel* direction in an alibi case if the defendant failed to call witnesses in support of that alibi.