

Alibi

Legislation

590A Notice of alibi

- (1) An accused person shall not upon the person's trial on indictment, without the leave of the court, adduce evidence in support of an alibi unless, before the expiration of the prescribed period, the person gives notice of particulars of the alibi.
- (2) An accused person shall not upon the person's trial on indictment, without the leave of the court, call any other person to give evidence in support of an alibi unless—
 - (a) the notice under subsection (1) includes the name and address of the person or, if the name or address is not known to the accused person at the time the accused person gives the notice, any information in the accused person's possession that may be of material assistance in locating the person; or
 - (b) where the name or address is not included in the notice, the court is satisfied that the accused person, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained; or
 - (c) where the name or address is not included in the notice and the accused person subsequently discovers the name or address or receives other information that may be of material assistance in locating the person, the accused person gives notice forthwith of the name, address or, as the case may be, other information; or
 - (d) where the accused person is notified by or on behalf of the director of public prosecutions that the person has not been traced by the name or located at the address given, the accused person gives notice forthwith of any information then in the accused person's possession or subsequently received by the accused person that may be of material assistance in locating the person.
- (3) The court shall not refuse leave under this section if it appears to the court that the accused person was not, upon the accused person's committal for trial, informed by the justices of the requirements of this section.
- (4) Evidence tendered to disprove an alibi may, subject to a direction by the court, be given before or after evidence is given in support of the alibi.
- (5) A notice purporting to be given under this section on behalf of the accused person by the person's solicitor shall, until the contrary is

proved, be deemed to be given with the authority of the accused person.

- (6) A notice under this section—
- (a) shall be in writing; and
 - (b) shall be given to the director of public prosecutions; and
 - (c) shall be duly given if it is delivered to or left at the Office of the Director of Public Prosecutions or sent by certified mail addressed to the director of public prosecutions at the director's office.
- (7) In this section—

evidence in support of an alibi means evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

the prescribed period means the period of 14 days after the date of the committal for trial of the accused person.

Commentary

A defendant may wish to claim that they were with others, or at another place, when the relevant offence was committed. In other words, they may wish to lead evidence of alibi. However, “alibi” is a word with a potentially pejorative connotation and is best avoided.

Generally, a defendant is not permitted to lead “alibi” evidence without first notifying the prosecution that they intend to do so, thereby allowing the prosecution to investigate the alibi.

If the alibi turns out to be false, then it may be used by the prosecution in the case against the defendant.

There is no burden on a defendant to “prove” that they were not present when the offence was committed. It is for the prosecution to negate alibi.

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. However, see also *Watts v R* (1980) 71 Cr App R 136 which cautioned that the prosecution should carefully consider such a course of action before embarking on it.

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](#); and 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.

Suggested Direction

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 prosecution to prove, beyond reasonable doubt, that the defendant was present at the time and place when the offence was committed.

Where the word alibi has been used at trial, the following direction may be given (see *R v Conder*, [CA No 39 of 1999, 20 July 1999](#), per Thomas JA [28].)

You should be careful to avoid any prejudice that might subconsciously attach to the word 'alibi'. It would be wrong to think 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.