



## ALIBI - As a Defence or Fact?

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‘**A**libi’ is a Latin term which means “elsewhere”. Black’s Law Dictionary defines alibi as, “*A defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time. The fact or state of having been elsewhere when an offence was committed.*”

If an accused claims to have been at a particular place other than the scene of crime, at the time of the crime, evidence in support of an alibi has to be adduced. This poses a question as to whether an alibi is a defence or an evidentiary fact. In finding an answer to the question it is necessary to consider the statutes relevant to alibi along with the decided cases on the subject.

### **Statutory Provisions Relevant to the Plea of Alibi**

**Section 3** of the Evidence Ordinance defines a “fact” so as to mean and include,

“(a) any thing, state of things, or relation of things capable of being perceived by the senses;  
(b) any mental condition of which any person is conscious.”

Further, **Section 11** of the Evidence Ordinance sets out where facts not otherwise relevant are relevant, thus;

“(a) if they are inconsistent with any fact in issue or relevant fact:

*(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”*

**Illustrations (a) and (b)** to Section 11 explain it more fully.

Illustration (a) states where the question is whether ‘A’ committed a crime at Colombo on a certain day, the fact that ‘A’ was in Galle on that day is relevant. That at the time the crime was committed ‘A’ was at a distance from the place where it was committed which would render it highly improbable though not impossible that he committed it, is relevant as well.

Illustration (b) is to the effect that when the question is whether ‘A’ committed a crime, in circumstances where either ‘A’, ‘B’, ‘C’, or ‘D’ could have committed the crime, every fact which shows that the crime could have been committed by no one else and that it was not committed by either ‘B’, ‘C’, or ‘D’, is relevant.

**Section 103** of the Evidence Ordinance is applicable when considering the “burden of proof regarding a particular fact”. Section 103 reads;

*“The burden of proof as to any particular fact lies **on that person who wishes the court to believe in its existence**, unless it is provided by any law that the proof of the fact shall lie on any particular person.”* (emphasis added).

One of the illustrations to Section 103 delineates what the burden of proof as to alibi is;

*“B’ wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.”*

The **Code of Criminal Procedure (Amendment) Act No. 14 of 2005** added a new section on “Notice of Alibi” as follows;

**“Section 126A (1)** *No person shall be entitled during a trial on*

*indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has-*

**(a)** *stated such fact to the police at the time of his making his statement during the investigation; or*

**(b)** *stated such fact at any time during the preliminary inquiry; or*

**(c)** *raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:*

*Provided however, the Court may, if it is of opinion that the accused has **adduced reasons** which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.*

**(2)** *The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.*

**(3)** *For the purposes of this section “**evidence in support of an alibi**” means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission.”*

By virtue of Section 126A a new requirement has been set out that a person seeking to rely on an alibi at a trial on indictment in the High Court, should



have given notice of such fact, either in his statement to the police, or at any time during the preliminary inquiry, or at any time 14 days prior to the commencement of the trial. It has been further required that such notice of alibi should have contained all information as to the time and place where he claims to have been as well as details as to persons, if any, who may furnish evidence in support of his alibi. Although there was no such necessity prior to the enactment of the said Section 126A, it is obvious that the English practice which is a salient factor was taken into consideration and adopted.

Section 11 of the then **Criminal Justices Act** of the United Kingdom set out that if a defendant claims to have been in a particular place at the time of the crime, evidence in support of an Alibi may only be given if the defendant has supplied particulars of it to the prosecution not later than seven days after committal, unless the crown court considers that there was a valid reason for not supplying them within that time period.

Subsequently, Section 74(1) and 74(5) of **Criminal Procedure and Investigation Act of 1996** repealed the above requirement and provided for a scheme of more general disclosure of the defense case.

The circumstances that the plea of Alibi was not taken up at the very first stage would be relevant where the evidence is of a doubtful character. For example, if it was sought to prove that the defendant was out of the country throughout the entire period covered, mere indication that he was not present is not evidence in support. However, where evidence of Alibi is based on documentary evidence, the omission to raise the plea at the first stage would not matter.

A plea of alibi is most often substantiated by a witness who is not the defendant. The witness will normally claim that the defendant was with him at the time of the alleged offence at a location other than the scene of crime. In such an event the Alibi

witness will open himself to questions regarding his need to lie on behalf of the defendant and his reliability or character may be called into question.

### **Alibi in Case Law**

A definition for alibi can be found in ***Gunapala and Others v. The Republic of Sri Lanka– 1994 (3) SLR 180*** where it was held that “*An alibi is the plea of an accused person that he was elsewhere at the time of the alleged criminal act. It is an **evidentiary fact** by which it is sought to create a doubt whether the accused was present at the time the offence was committed.*”

The nature of evidence that can be considered as an alibi was explained in ***Fernando and 5 Others v. The State – 2011 (1) SLR 383*** in the following manner. “*Evidence in support of the defence of Alibi is evidence that tends to show that by reason of the presence that ten of an accused (1) at a particular place (2) in a particular area at a particular time the accused was not or was unlikely to have been at the place where the offence is alleged to have been committed at the time of the alleged commission.*”

The judgments that have dealt with alibi have consistently distinguished alibi as an “evidentiary fact” rather than a “exception to criminal liability.” In ***The King v. Marshall – 51 NLR 157*** it was held that “*An alibi is not an exception to criminal liability<sup>1</sup> like a plea of private defence or grave and sudden provocation.*” which position was quoted with approval in ***Gunapala*** (*supra*). In ***Lionel alias Hitchikolla and another v. The Attorney General -1988 (1) SLR 4*** an Alibi was recognized as “*basically an **evidentiary fact** that casts doubt onto the prosecution’s case. It is a claim of innocence by reason of not being present at the scene*

<sup>1</sup> The General Exceptions to Criminal liability are set out in Section 69-99 in Chapter IV of the Penal Code.

during the alleged crime.” (emphasis added). A similar view was expressed in **Fernando and 5 others v. The State** (supra) “An Alibi is not an exception to criminal liability, like a plea of private defense or grave and sudden provocation. It is nothing more than an evidentiary fact which like other facts relied on by an Accused and must be weighed in the scale against the case of the prosecution.”

Dealing with the word “inconsistence” in Section 11 of the Evidence Ordinance

in **Jayatissa V. Hon Attorney General – 2010 (1) SLR 279** the court held that it indicates the “*physical impossibility of the co-existence of two facts at any given time.*”

### **The Burden of Proof in establishing an Alibi**

The jurisprudence on the burden of proof in establishing an alibi has developed on the foundational distinction that the plea of alibi is an evidentiary fact rather than an exception to criminal liability.

Proceeding on the said basis, in **Banda and others v. Attorney General-1999 (3) SLR 168** the court commented on **whom** the burden of proof shall lie where there was a plea of alibi; “*Once a plea of Alibi is put forward there is no evidentiary burden on the Accused to prove his innocence. The burden always rests on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but was in fact present at the time of the Criminal Act.*” Emphasizing that “*A direction to the jury that an alibi must be proved on a balance of probability is a misdirection on the law in regard to the burden of proof and an error in law causing grave prejudice to the accused.*” In **Gunapala and Others v. The Republic of Sri Lanka** (supra) Ismail J. held that

“*In a case where the defence is that of an alibi an accused person has no burden as such of establishing any fact to any degree of probability.*”

Along the same vein, in **Jayatissa** (supra) it was held that “*There is no burden of proof on the Accused to prove a plea of alibi. Section 105 of the Evidence Ordinance has no application. Evidence of alibi has merely to be weighted in the balance with the prosecution evidence.*” By the position that Section 105 of the Evidence Ordinance which deals with the “burden of proving that the case of the accused comes within exceptions” is not applicable in the event of a plea of alibi it is evident that alibi is a fact, rather than a defence, which in turn means that the burden lies on the prosecution to establish that the accused was in fact at the scene of crime at the time material.

The point at which it can be said that the prosecution’s case is beyond reasonable doubt was made out in **The King v. H. R. S. Fernando – 48 NLR 249**] “*...in a case in which he (the accused) pleads an alibi, if he creates a sufficient doubt in the minds of the Jury as to whether he was present or not, or as to whether he did the act or not, or as to whether he had the necessary mens rea or not the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case.*”

Similarly, in **The King v. Marshall** (supra) the court had the following to say regarding as to **when** an accused who pleads an alibi is entitled to be acquitted. “*An alibi is nothing more than an evidentiary fact, which like other facts relied on by an accused, must be weighed in the scale against the case of the prosecution. If sufficient doubt is created in the minds of the jury as to whether the accused was present at the scene at the time the offence*



was committed, then the prosecution has not established its case beyond reasonable doubt, and the accused is entitled to be acquitted.” Chief Justice J. A. N. De Silva in **Jayatissa v. AG** (*supra*) stating that “when the defence sets up an alibi, the prosecution is entitled to lead evidence in rebuttal” went on to comment on how a reasonable doubt could be created; “When an Accused takes up an alibi as a defence, three positions could arise;

(a) If the evidence is not believed the alibi fails,

(b) If the evidence is believed, it succeeds,

(c) If the alibi evidence is neither believed nor disbelieved, but would create a reasonable doubt as to the prosecution case on identity, the Accused is entitled to get the benefit of the doubt.”

It was further observed that “A false alibi will weaken the defence case and strengthen the prosecution case.”

Further, in the case of **K. D. Yehonis Singho, Appellant, And The Queen, Respondent – 67 NLR 8** it was held that “the omission to direct the jury on the intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction on a necessary point and constituted a misdirection.”

The manner in which the jury should be directed by the Trial Judge when alibi was taken up in a dock statement was commented on at length in **Mannar Mannan v. The Republic of Sri Lanka – 1990 (1) SLR 280**. Although it was concluded that a reasonable jury properly directed would have reached the same conclusion that was in appeal before the Supreme Court, the failure of the Trial judge to direct the jury that it was sufficient for the appellant to

secure an acquittal if the statement from the dock raised a reasonable doubt, was considered a misdirection.

Certain useful fundamentals to be mindful of when an alibi is set up as a defence were listed out in **Jayatissa v. AG** (*supra*)

“(a) If an alibi is established by unsuspected testimony, that will be satisfactory and conclusive.

(b) An alibi should cover the time of the alleged offence so as to exclude the Accused’s presence at the crime scene at the relevant time.

(c) The credibility of an alibi is greatly enhanced, if it was set up at the time the accusation was first made and was constantly maintained. If it is taken up belatedly—the effect of the alibi will be less.

(d) An alibi can be falsified by mistaken identity and the difference of

time in the clocks. A few minutes will make all the difference.”

## Conclusion

The answer to the question of whether alibi is a defence or a fact can be derived from the above statutory provisions and case law. It is well-established from judicial precedent that alibi is an evidentiary fact. From this basic distinction it follows that the burden of establishing that the accused was in fact present at the scene of crime at the material time rests on the prosecution. The accused, by a plea of alibi, merely creates a doubt as to his presence, which doubt must be eliminated by the prosecution if a conviction is to be secured.

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