TAB 4A

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Alibi: To Call or Not to Call

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ALIBI: TO CALL OR NOT TO CALL

By Patrick McCann and Tala Khoury

"The judge said, son, what is your alibi
If you were somewhere else, then you won't have to die"
The Long Black Veil: Traditional folk song

Introduction

The following paper is intended as a non-critical overview of the law relating to the defence of alibi, a defence that is often misunderstood and misapplied, despite the fact that it has been around for hundreds of years. The unique aspect of alibi is that it is the one constitutionally approved intrusion into the accused's right to silence. Attached to the defence is a duty to disclose defence evidence and for the accused to testify and defend the alibi. Perhaps because it is an exception to the right to silence, the courts have tended to narrowly construe what constitutes an alibi in law which, in turn, triggers disclosure and testamentary obligations.

Meaning of Alibi

The alibi defence is a creature of the common law with a long history in our criminal law system. The word "alibi" is Latin for "elsewhere." When advancing such a defence, the accused is arguing the impossibility of culpability, having been elsewhere at the time of the crime. By raising an alibi defence, the accused shifts the focus from the Crown's facts, to a completely new set of facts, which gives the defence "a fresh and untrammelled start." By its very nature, the alibi defence raises the risk of perjured evidence, as it is easy to prepare such evidence in advance.[1]

Lawyers and judges often conflate alibi evidence with exculpatory evidence. True alibi evidence must be "entirely divorced from the main factual issues surrounding the *corpus delicti*."[2] The type of evidence often mistakenly characterized as alibi evidence is where the defence admits to

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[1] *R v Wright*, 2009 ONCA 623 at para 19 [*Wright*].
[2] *R v Cleghorn*, [1995] 3 SCR 175 at para 22 [*Cleghorn*].

some involvement in the relevant events but denies any involvement in the crime alleged.[3] For example, admitting that the accused was with the perpetrators of a robbery, but was not at the scene of the robbery at the time or admitting that the accused was in the car when the crime was committed, but was not the driver.[4]

Alibi evidence must go to the final issue of guilt or innocence.[5] If the evidence shows a limited opportunity to commit the offence, the evidence is not dispositive of the issue of guilt or innocence and is thus not an alibi defence.[6] In *R v Hill*, the indictment included a charge of conspiracy committed over an entire month. The Crown led evidence of two conversations on two separate days where the accused was alleged to have conspired with other witnesses to commit arson. The accused led evidence that he was elsewhere when the alleged conversations took place. The Supreme Court of Canada held that this is not an alibi defence because the accused's evidence could only demonstrate that the conversations did not take place on the day that the witnesses said they did, but not that they could never have taken place.[7]

Investigating the Alibi

When notified of an alibi defence, counsel should immediately investigate the alibi. When meeting with alibi witnesses, defence counsel should assess the credibility of the witnesses and the likelihood that the defence will succeed. It is advisable that defence counsel obtain recorded, and preferably sworn, statements from alibi witnesses at these meetings. The shorter the timeframe between the laying of the charges and the recorded alibi statements, the less likely the Crown will be able to suggest that the witnesses' memories have faded or that a witness has had ample time to concoct her evidence. These recorded statements will, of course, also help in refreshing the witnesses' memory before trial. Counsel should also attempt to fortify the alibi by attempting to locate supporting documentary evidence such as credit card receipts, cell phone records or electronic work access records.

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[3] *Wright*, *supra* note 1 at para 22.
[4] *Wright*, *supra* note 1; *R v Rawn*, 2015 ONCA 396.
[5] *R v Hill*, [1995] 102 CCC (3d) 469 (ONCA) [*Hill*].
[6] *R v Tomlinson*, 2014 ONCA 158 at paras 55-56.
[7] *Hill*, *supra* note 5.

Timely Disclosure

The law requires an accused who pleads an alibi defence to give timely disclosure of the defence to the Crown. Such a disclosure should be made in a sufficiently particularized form and at a sufficiently early time to permit the police to meaningfully investigate the alibi. If these requirements are not met, the trier of fact may draw an adverse inference from the delay in disclosure, thus lessening the weight accorded to the defence. This is a rule of expediency to guard against the fact that alibi evidence can easily be fabricated.[8] If the Crown is given sufficient time to meaningfully investigate, the trier of fact may not draw an adverse inference and the timing of the disclosure should not be commented on.[9]

Although there is no obligation to give disclosure at the earliest possible moment, there is no clear and fast rule as to the time required to permit the police sufficient time to undergo a meaningful investigation. Courts have ruled that the obligation has been met where the defence was disclosed at the close of a preliminary inquiry and even three weeks before trial.[10] It is important to note that the obligation of timely disclosure is satisfied if a third party, and not the accused or her counsel, makes the disclosure to the police.[11] Furthermore, if the alibi witness is part of the investigation, and known to the police, the defence need not disclose the alibi defence.[12]

When the defence discloses the alibi, it is suggested that counsel provide the names of the alibi witnesses and a short summary of their proposed evidence to meet the disclosure obligation. However, may not be advisable to disclose the alibi witnesses' addresses or phone numbers in order to minimise the possibility that the police will use intimidation tactics to scare off the witnesses. Instead, defence counsel can invite the police to interview the alibi witnesses in counsel's presence.

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[8] *R v Noble*, [1997] 1 SCR 874 at para 111 [*Noble*]; *Cleghorn*, *supra* note 2 at para 4n

[9] *R v Parrington* (1985), 20 CCC (3d) 184 (ONCA) at 187-188 [*Parrington*]; *Noble*, *supra* note 8 at para 111; *Cleghorn*, *supra* note 2 at para 4.

[10] *R v Parrington*, *supra* note 9; *R v Thorne*, 2007 BSCS 784.

[11] *Cleghorn*, *supra* note 2 at para 4.

[12] *Wright*, *supra* note 1 at para 23.

Interplay of Rule of Timely Disclosure with the Right to Silence

There are two points at which the common law rules on the alibi defence clash with the accused's constitutional right to silence. First, as discussed above, a trier of fact may assign less weight to an alibi defence if it is not disclosed in a timely manner before trial. This common law rule is an exception to the *Charter*-protected right to silence and presumption of innocence. This was an historical compromise struck to counter the risk of fabricated alibi evidence and has been accepted as constitutional.[13] Second, a trier of fact may draw an adverse inference when the accused chooses not to testify and thereby avoids subjecting her alibi to cross-examination. As Sopinka J held in *Noble*:

> While in general the failure to testify cannot be used to assess credibility of witnesses (see *Schwartz*, supra), in the case where the defence of alibi is advanced, the trier of fact may draw an adverse inference from the failure of the accused to testify and subject him- or herself to cross-examination. While it must be conceded that this exception does undermine to a limited extent the presumption of innocence and the right to silence, it has a long and uniform history pre-dating the Charter and must be taken to have been incorporated into the principles of fundamental justice in s. 7.[14]

Concocted Alibi

The case law differentiates between a finding that the alibi is untrue and a finding of fabrication. Mere disbelief in an alibi, for whatever reason, has no evidentiary value; it does not allow the trier of fact to infer that the alibi was fabricated nor is the disbelief determinative of guilt.[15] The trier of fact may only find an alibi fabricated if there is extrinsic independent evidence that can support a reasonable inference of deliberate fabrication and the accused's participation in that fabrication.[16] Evidence that simply contradicts the alibi evidence or supports an inference that the accused falsely testified does not meet the threshold of independent evidence.[17] However, it

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[13] *Ibid* at para 20.

[14] *Noble, supra,* note 8 at para 113

[15] *R v Hibbert*, 2002 SCC 39 at para 67 [*Hibbert*].

[16] *R v Maracle*, [2006] 206 CCC (3d) 36 (ONCA) at para 11; *R v Roy*, 1996 CanLII 10226 at para 5.

[17] *R v O'Connor*, [2002] 170 CCC (3d) 365 (ONCA) at paras 21 and 23 [*O'Connor*]; *R v Baltovich*, [2004] 191 CCC (3d) 289 (ONCA) at para 97.

has been held that evidence from a witness that the accused asked her to misstate the accused's whereabouts at the time of the crime is sufficiently extrinsic to allow a finding of fabrication.[18]

If the trier of fact concludes that the alibi evidence has been fabricated or concocted, an adverse inference as to the accused's consciousness of guilt may be drawn. But even in that case, a finding of fabrication is not determinative of guilt.[19] The trier of fact may not draw an adverse inference where there is evidence that alibi witnesses have participated in deceit and fabrication but no independent extrinsic evidence that the accused had knowledge or approved of the fabrication.[20]

A proper instruction to the jury is essential to distinguish between the definition and effects of a falsified alibi and a fabricated alibi. The case law suggests including instructions to the jury that emphasize that it is the attempt to deceive rather than the failed alibi that supports an inference of consciousness of guilt.[21] In that way a conclusion of fabrication by the accused is dealt with in a manner similar to evidence of consciousness of guilt. The authorities also recommend that a trial judge instruct the jury on what type of evidence constitutes independent extrinsic evidence of fabrication.[22]

Rebuttal Evidence

The Crown has a right to call evidence in reply when it could not have known in advance that the accused would testify, the contents of the accused's testimony,[23] or the contents of an alibi witness's testimony.[24] The rebuttal evidence must go to the material points of the alibi.[25] In *Latour*, the accused testified that he had never been to the jewellery store that he had allegedly robbed on June 26. In reply evidence, the Crown called a jewellery store clerk who testified that the accused had been to the store on a date other than the date of the robbery. The Court found

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[18] *R v Pollock*, [2004] 187 CCC (3d) 213 at para 155.
[19] *Hibbert*, *supra* note 15 at para 67.
[20] *Ibid* at paras 57-58, 61-63 and 67.
[21] *Ibid* at para 67.
[22] *O'Connor*, *supra* note 17 at para 38.
[23] *R v Lawes*, [1997] 3 SCR 694 at para 1.
[24] *R v Vickerson*, [2005] 199 CCC (3d) 165 at para 54 [*Vickerson*].
[25] *Latour v The Queen*, [1978] 1 SCR 361 at 366.

that the rebuttal evidence went to a collateral fact (whether he had ever been to the store) and was thus improper.[26]

On the other hand, in *Vickerson*, the defence called an alibi witness who confirmed that the accused was with him at a cottage at the time of the crime based on his independent recollection of missing his cousin's birthday party that same weekend. In cross-examination, the alibi witness could not spell his cousin's last name or stipulate his address. The Court allowed the Crown to call the investigator in reply to show that neither the alibi witness nor his cousin were listed on any driver's license databases or telephone directories, thereby suggesting that both their identities were fictitious[27]

Conclusion

An alibi can vary from one which simply relies on the accused's unsupported evidence that he was elsewhere to one which is compellingly supported by documentary or electronic evidence. On a practical level, presenting an alibi defence can be extremely effective if its credibility is established or, on the other hand, completely devastating if it collapses and is shown to be fabricated. It is important therefore to properly assess its reliability before advancing it. A well authenticated alibi is likely to be a ticket to acquittal for an accused. However, at least in a jury trial, despite the requirement of an instruction that a fabricated alibi is not determinative of guilt, that will inevitably be the result.

[26] *Ibid* at 366-367.
[27] *Vickerson*, *supra* note 24 at paras 48-49 and 54.