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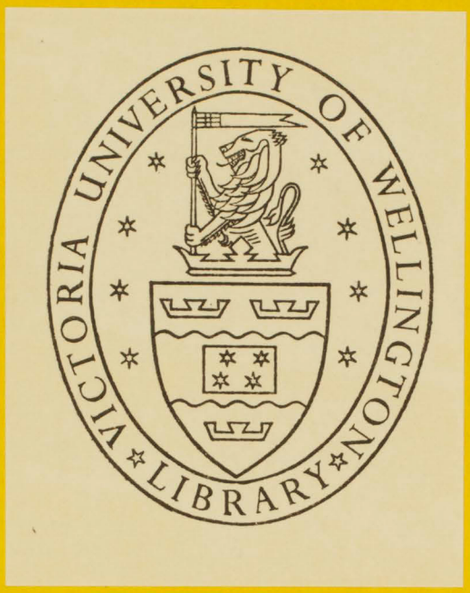
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s.367A: "SPRUNG ALIBIS" SEIZED FROM DEFENCE WEAPONRY

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at the Victoria University of Wellington

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s.367A: "SPRUNG ALIBIS" SEIZED FROM DEFENCE WEAPONRY

PART I: THE UNSATISFACTORY NATURE OF THE "SPRUNG ALIBI"

1. The Banham Murder Trial

An alibi [1] can be one of the most simple, yet effective, means of destroying a prosecution case. It will usually terminate proceedings at an early stage as in the case of an alibi tendered at the time of arrest. Prior to 1973 however, it often would not appear until the Court proceedings, where it would be "sprung" on the prosecution without warning and often with drastic effects upon their case.

On the morning of 21st February 1963 the body of a murdered Nelson taxi-driver was discovered on the roadside near Hope, a township a few miles out of Nelson. On 4th February 1964, the trial began in the Wellington Supreme Court of Maurice Albert Davis, charged with the murder of Peter Carthew Banham: R v. Davis [2] or as it came to be known, "The Banham Murder Trial". Between the date of the murder and the date of trial was conducted one of the most comprehensive enquiries by the New Zealand Police. Enquiries and interviews were made throughout New Zealand and at the early stages of investigation there were no fewer than fourteen members of the C.I.B. engaged full-time. Detectives were often working seven days a week, fourteen hours a day, conducting the 5,000 interviews that were estimated to have been made in the Nelson district alone[3].

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1 " 'Alibi' is a Latin adverb meaning 'elsewhere or at another place' and if evidence for an accused that he was not present at a place at the time an offence was there committed is accepted by a jury, he is said to have established an alibi" R v. Foll (1957) 21 W.W.R. 481, per Montague, J.A., at p.491.

2 [1964] N.Z.L.R. 417: this reported part of the case deals only with an application before the Supreme Court for a change of venue.

3 Detective Inspector Knapp's estimation in response to a question posed by the defence in the Magistrate's Court hearing in Nelson.

In terms of money involved, man hours expended, and resources employed, the conviction of Davis that followed about a year later was to mark a triumph for the New Zealand investigatory process [4].

> "This investigation will go on record as one of the outstanding cases in police history. The crime proved to be most difficult and complex and it represents an outstanding example of tenacious and intensive investigation by the police, who worked as a team with the valuable aid of the Department of Scientific and Industrial Research, pathologists, business firms, the press, and last but not least, the people of Nelson." [5]

Yet this triumph might well have been bitter disappointment. In what was described as "a sensational development in the trial", [6] the accused made at the eleventh hour [7] an unbelievable unsworn statement from the dock [8]. He said:

> "I cannot tell you who killed Peter Banham any more than the Police can but I do know something - what is more the Police know it too - and that is this: there is a man McDonald in Sydney who has been convicted of murder, who has killed four people all involving attacking a victim with a knife, who at his trial his defence was that he was insane at the time he did it. The jury rejected his defence and found him guilty of murder. In August last this man confessed to killing Peter Banham at Nelson and the Police know it. The Police also know that he was in New Zealand and in the Wellington area at the time of Peter Banham's death and they cannot show that he was not in Nelson at the time that he says he was. I have been advised that his evidence cannot be brought at this trial. I ask you to remember these things when you consider my position. I repeat I did not injure nor did I kill or have anything to do with Peter Banham's death.

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4 For an account of the exhaustive and often frustrating enquiries undertaken by the police, and coverage of the lengthy and involved trial that followed in Wellington, see Pursuit of Justice: A Triumph of New Zealand Detection by J.D. McGilvary, a reporter covering the case.

5 The then Commissioner of Police, Mr C.L. Spencer, quoted by McGilvary at page 13.

6 Pursuit of Justice, ante, at p.183.

7 Late in the afternoon of 11th February 1964, the day before he was subsequently convicted and sentenced.

8 In the notes of evidence Barrowclough C.J. stressed his reluctance to have this statement placed on record, but did so only on the request of counsel.

In R. v. Sherrif (1903) 20 Cox 334, Darling J. held that a defendant's unsworn statement must be made before the counsel for the prosecution sums up the case and before his own counsel addresses the Court. If this were the correct approach, Barrowclough C.J. ought not to have permitted the statement to be made at all.

I am completely innocent of this charge."[9]

Were the implications inherent in this unsworn statement to be carried to their ultimate logical extension[10], it would seem that a reasonable doubt would be aroused in the minds of jurymen. The criminal law demands proof beyond any reasonable doubt of murder. An acquittal of the accused at this late stage of the case would have been totally unacceptable - not merely for those whose close attention had been focused on the case for nearly a year, but moreover totally unacceptable from such wider points of view as the waste of taxpayers' money.

At 9 a.m. on the day following the making of the unsworn statement the prosecution were able to adduce evidence from six witnesses which effectively rebutted any implications raised by the accused's unsworn statement.[11] The Police in this case were fortunate in that they had previously made investigations about this man McDonald as claimed by Davis, and were thus able to produce six witnesses at such short notice.[12] They had in fact submitted their findings about McDonald to the accused's counsel prior to the trial.

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9 The unsworn statement also contained references to the accused's injured hand. The full statement and its effect upon the Court proceedings is reproduced in Pursuit of Justice, ante, Chapter 25.

10 i.e. were the Police in fact aware that someone else had committed the murder, but were of malice aforethought proceeding against a man whom they knew to be innocent.

11 It was shown that McDonald had been at work in Wellington both on 20th February 1963 and the day after; that there was no means whereby he could have travelled to and from Nelson between those two days.

12 Ironically it was the change of venue for the trial from Nelson to Wellington that also helped the prosecution in this regard.

Although not strictly speaking an alibi, the unsworn statement made by Davis exposed acutely the undesirable nature not only of the unsworn statement itself, but also of the "sprung alibi". Normally the only possiblity open to a prosecutor caught unprepared by either of these being offered at trial was to seek an adjournment. But with a jury fully empanelled a judge could not neglect the personal inconvenience to jurymen by extending what might already be a lengthy trial. It is suggested that both the unsworn statement and the "sprung" alibi served no other purpose than to introduce needless elements of uncertainty into the criminal trial.

2. Reform Proposed in U.K.

Concurrent with the investigations being made into the Banham murder case, the English Criminal Law Revision Committee were making a close examination of the law relating to alibis.[13] The Committee were clearly on the opinion that there was "a strong case for amending the law so as to deprive accused persons of the privilege of keeping back a defence of alibi until the last moment".[14] Accordingly their principal recommendation as regards alibis was that:[15]

> "at ~~the~~ a trial on indictment the accused should not without the leave of the Court be able to adduce evidence in support of an alibi unless he gives particulars of the alibi during or at the end of the committal proceedings or else by written notice to the solicitor for the prosecutor not later than seven days after the end of the proceedings."

The Committee's proposed amendment was subsequently incorporated into English Law as s.11 of the Criminal Justice Act 1967 (U.K.).

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13 Criminal Law Revision Committee, Ninth Report (Cmnd. 3145) para's 31-44. The Report was presented to Parliament in November 1966.

14 Ibid., at para. 34.

15 Ibid, at para. 36.

Defences of the old common law rule[16] put forward to the Criminal Law Revision Committee were four-fold:-

(i) It was argued that there was no substantial need for change - that the occurrence of alibis in the criminal Courts was insufficient to warrant such an extensive change in the laws.[17]

It would as a matter of common sense seem that an alibi checked by the prosecution and found to be true would effectively bring an end to criminal proceedings. This avoids unnecessary expense and moreover consumption of valuable Court time. Only in those cases where there is a dispute by the prosecution as to the validity of an alibi tendered ought the issue ever appear in Court and in that context as a substantive issue with relevant submissions prepared by both parties. It is therefore suggested that the mandatory giving of prior notice of an alibi would further the above process and indirectly lead to a <u>further</u> diminution of the appearance of alibis in our Courtrooms.

With respect, I am unable to see that rarity of appearance is a valid defence of the "sprung alibi". If such an argument was of universal validity against change in the criminal law, then reformers would find themselves in a difficult position and the

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16 That an accused need not disclose his alibi prior to the trial.

17 This argument was revived in New Zealand by the Hon. F.D. O'Flynn, Q.C., who went so far as to say that in all his years defending criminal prosecutions he had <u>never</u> used an alibi in its strictest sense as a mean of defending his client: (1973) 384 N.Z.P.D. 2573.

already slow process of law reform would virtually grind to a halt. "If we are to accept that a mischief is to be remedied only when the mischief occurs, the implications for our system of law should be obvious." [18] "Sprung alibis" existed as an unsatisfactory [19] element of our criminal law and while not having appeared very often, need never have appeared at all.

(ii) In any event, it was stressed, the prosecution and the judge can comment on the failure of the accused to mention an alibi earlier.

The judge could invite the jury, in considering the weight which they should give to evidence of an alibi, to take into consideration the fact that the accused, by not mentioning it beforehand, has deprived the prosecution of the opportunity to investigate it. [20] But it had to be made clear to the jury that the accused has the right not to mention his defence beforehand, and the summing up could not suggest that the failure to mention the alibi is itself evidence against the accused.[21]

> "The non-disclosure of an alibi has always been open to comment (R. v. Littleboy) and this should be a sufficient sanction although it does not appear to have been followed widely in practice. The Society considers on balance that the law should be left as it is." [22]

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18 Ibid., at p.2574.

19 See [1968] 31 M.L.R. at 22.

20 R. v. Littleboy [1934] 2 K.B. 408; 24 Cr. App. R. 192.

21 R. v. Ryan (1964) 50 Cr. App. R. 144; R. v. Hoare (1966) 50 Cr. App. R. 166.

22 From submissions by the New Zealand Law Society on clauses 10 and 11 of the Crimes Amendment Bill 1973.

Yet no amount of adverse comment in some situations will be as destructive as conclusive evidence in rebuttal. It is the "reasonable doubt" raised in the minds of jurymen that must be extinguished. Facts, it is suggested, are more likely to achieve this than adverse comment.[23]

(iii) It was argued that there is nothing so special about alibi defences as to justify making an exception, in respect of them, to the general rule that the defence are not obliged to disclose their case to the prosecution.

This argument presupposes that the general rule, from which it derives, is in all respects a sound one. A distinction can be drawn between a defence argument based on a point of law and one based on an alibi. In the former instance strict adherence to the characteristics of the adversary system will best insure a valid precedent is established; but in the latter case, the defence claim is based on a question of fact relevant only to the two parties to the action - the validity of the alibi might best be determined by informal co-operation by the parties prior to the trial.

(iv) It was also contended that the accused, especially if he is in custody, may have difficulty in finding a witness to a good alibi in time to comply with the requirement of giving notice and that in any event there are practical difficulties about the police interviewing alibi witnesses.

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23 One is again reminded of the pathetic figure of Davis speaking from the dock.

Any practical difficulties the police might suffer in investigating an alibi they have been given prior notice of might well have been practical impossibilities if not sprung on the prosecution until the time of trial.

3. Reform Proposed in New Zealand

A section analagous to s.11 of the Criminal Justice Act 1967 (U.K.) did not become law in New Zealand until 1973.[24] The Bill containing the amendment was referred to the Statutes Revision Committee to whom particular concern was expressed by the New Zealand Law Society to the effect that:

> "if this provision is adopted and the prosecution acts on the notice given to investigate the particulars given, the prosecution should be required either to make available to the defence copies of all statements obtained by them when investigating the alibi, excluding statements not directly relevant to it, and also the names of witnesses interviewed by the police from whom statements have not been taken, or to give notice to the defence of when the Police will be interviewing the alibi witnesses, with defence counsel having the right to be present at such interview. The Society understands that an undertaking has been given by the Home Office in England[25] that the Crown will give such notice in cases where alibis are involved." [26]

At the time of writing, General Instructions to the Police, pursuant to s.30 of the Police Act 1958, are being drafted. A final copy of these instructions was not available, but their substance will likely include these provisions:

> "1.(a) Alibi witnesses whose particulars have been advised in accordance with section 367A are not to be interviewed by the Police except at the request of the Crown Prosecutor.

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24 s.11 of the Crimes Amendment Act 1973 inserted a new s.367A into the Crimes Act 1961.

25 This was the recommendation made by the Criminal Law Revision Committee when similar concern was expressed to it: Cmnd. 3145, para. 40. But see [1975] Crim. L.R. at p.1.

26 Quoted by the Minister of Justice: (1973) 384 N.Z.P.D. 2371.

(b) Whether or not the Crown Prosecutor has requested that alibi witnesses be interviewed, inquiries shall not be made of persons other than those whose particulars have been supplied to confirm or rebut evidence in support of an alibi. The result of these inquiries is to be forwarded to the Crown Prosecutor.

2. When the Crown Prosecutor requests that alibi witnesses whose particulars have been supplied be interviewed, the following procedure is to be adopted:

(a) The defence solicitor should be told of the proposed interview and given a reasonable opportunity to be present.

(b) When an accused is not represented an endeavour should be made to ensure the witness is interviewed in the presence of some independent person not being a member of the Police.

(c) When the defence solicitor is not present at the interview and so requests, a copy of a witness's signed statement taken at any such interview is to be made available to him through the Crown Prosecutor.

3. Particulars of and statements from witnesses interviewed for the purpose of rebutting evidence of an alibi witness should only be made available to the defence at the request of the Crown Prosecutor." 26a

When speaking to the 2nd Reading of the Amendment Bill, the Minister of Justice stated uncategorically that: [27]

"the intent of the section is to ensure that the prosecution is not taken by surprise by an alibi which it may not be able to investigate and, if appropriate, rebut, and the change is therefore designed to avoid as far as possible the introduction of false alibis into criminal trials in the Supreme Court."

This intention was stated more simply by the Criminal Law Revision Committee: [28]

"We believe that it will contribute substantially to the breaking down of false alibis if notice of an alibi has to be given in advance."

26a From a draft of the Instructions submitted by the Police Legal Section.

27 Ibid, at p.2570

28 Cmnd. 3145, para. 35.

The legislative intent behind s.367A of the Crimes Act can thus be stated to be:

(a) to effectively toll the death bells of the sprung alibi;

(b) to restrict the occurrence of false alibis by enabling the police to investigate the alibi before evidence of it is given.

PART II: THE LEGISLATIVE CHANGES

1. An end to the Unsworn Statement

s.266A of the Crimes Act 1961 [29] states that:

"(1) No accused person shall be entitled to make an unsworn statement of fact at his trial.

(2) Nothing in this section shall limit the provisions of s.369 of this Act."

This amendment ended a long-standing anomaly in our criminal trial, the unacceptable effects of which were demonstrated by R. v. Davis.

> "This archaic rule originates from the time when the accused himself could not give evidence in his own defence. It was not until towards the end of last century that the accused was given that right. For a long time he had the right to make an unsworn statement because he could not give evidence himself. When the law was changed to allow him to give evidence, [30] this provision should have been abolished." [31]

While placing handicaps on the prosecution, the unsworn statement nevertheless attracted many advantages of formal evidence.

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29 As inserted by s.5(1) of the Crimes Amendment Act 1966. See also s.3 of the Summary Proceedings Amendment Act 1973.

30 By s.2 of the Criminal Evidence Act 1889.

31 Hon. J.R. Hanan (Minister of Justice) introducing the 1966 Amendment into Parliament. (1966) 346 N.Z.P.D., pp. 490-491.

> "Where a defendant makes an unsworn statement from the dock, the judge need not read out the statement to the jury, but he should remind them of it and tell them that though it is not sworn evidence which can be the subject of cross-examination, nevertheless they can attach to it such weight as they think fit and should take it into consideration in deciding whether the prosecution have proved their case." 32

One advantage for the prosecution was that the unsworn statement could not be the subject of cross-examination; [33] but it would seem that unless prepared for the unsworn statement, a right to cross-examine would be of little value to the prosecution in any case.

Another advantage to the accused of the unsworn statement was that it did not give rise to a right of reply by the prosecution and possibly the all-important "last word" to the jury. [34]

2. No Right of Reply in any Case

s.367(3) [35] now states that:

> "After the closing address (if any) on behalf of the prosecution the accused or his counsel may make a closing address to the jury and the prosecution shall have no right of reply in any case."

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32 R. v. Frost and Hale (1964) Cr. App. R. 284, per Parker L.C.J. at 291; and see R. v. Perry and Pledger [1920] N.Z.L.R. 21.

33 The validity of the unsworn statement could be tested if the prosecution could put prior convictions in cross-examination. By abolishing the unsworn statement and at the same time allowing the Judge to comment on the accused's failure to give evidence places the accused in a dilemma - see Adams, Criminal Law and Practice in New Zealand, (2nd Ed.), para. 2957.

34 By s.367(3) and (4) of the Crimes Act 1961, prior to the 1966 Amendment.

35 As substituted by s.6 of Crimes Amendment Act 1966.

Thus:

> "the prosecution in a criminal trial may sum up to the jury, but having done so the defence has the right to the last say before the jury in every case; that is whether evidence is or is not called for the defence, or whether the Attorney-General or the Solicitor-General appears, which are normally exceptions to the rule. It does not matter what the circumstances are, the defending counsel or the accused shall have the last say before the jury." 36

The final address to the jury prior to summing up is clearly a crucial one and it is only consistent with the notion that an accused is innocent until proven guilty that this right should go to the accused in every case.

3. Notice of Alibi Required

s.367A of the Crimes Act [37] enacts that:

"(1) On the trial of any accused person who has been committed for trial, he shall not without the leave of the Court adduce evidence in support of an alibi unless, before the expiry of 14 days after the date on which he is so committed he has given notice of particulars of the alibi.

(2) Without prejudice to subsection (1) of this section, the accused shall not without the leave of the Court call any other person to give evidence in support of an alibi unless -

(a) The notice under that subsection includes the name and address of the witness or, if the name or address is not known to the accused when he gives the notice, any information in his possession that might be of material assistance in finding the witness:

(b) If the name or the address is not included in the notice, the Court is satisfied that before giving the notice the accused took all reasonable steps to ensure that the name or address would be ascertained, and that after giving the notice he continued to take all such steps:

(c) If the name or the address is not included in the notice, but the accused subsequently discovers the name or address or receives other information that might be of material assistance in finding the witness he forthwith gives notice of the name, address, or other information, as the case may require:

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36 (1966) 381 N.Z.P.D. 491.

37 As inserted by s.11 of the Crimes Amendment Act 1973. The section is virtually a replica of s.11 of the Criminal Justice Act 1967 (U.K.).

(d) If the accused is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, he forthwith gives notice of any such information which is in his possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) The Court shall not refuse leave under this section if it appears to the Court that the accused was not given notice, in accordance with section 168A of the Summary Proceedings Act 1957, of the requirements of this section.

(4) Any evidence tendered to disprove an alibi may, subject to any directions by the Court as to the time when it is to be given, be given before or after evidence is given in support of the alibi.

(5) Any notice purporting to be given under this section on behalf of the accused by his counsel or solicitor shall unless the contrary is proved, be deemed to be given with the authority of the accused.

(6) A notice under subsection (1) of this section shall either be given in Court during or at the end of the preliminary hearing before the Magistrate's Court or be given in writing to the prosecutor; and a notice under paragraph (c) or paragraph (d) of subsection (2) of this section shall be given in writing to the prosecutor.

(7) A notice to the prosecutor under this section shall be given -

(a) In the case of a prosecution on behalf of the Crown, by delivering it to a Crown solicitor, or by leaving it at his office, or by sending it by registered letter addressed to him at his office:

(b) In the case of a private prosecutor represented by counsel, by delivering it to such counsel, or by leaving it at his office, or by sending it by registered letter addressed to him at his office:

(c) In the case of a private prosecutor not represented by counsel, by delivering it to him, or by leaving it for him at his place of residence with a member of his family living with him and appearing to be of or over the age of 18 years, or by sending it by registered letter addressed to him at his last known or usual place of residence or at his place of business.

(8) In this section, the expression 'evidence in support of an alibi' means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he 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 section does not attempt to lay down what particulars of the proposed alibi have to be given.

> "What will be sufficient particulars of the alibi will depend on the circumstances, but they will in any event include particulars of the place where the accused intends to prove that he was and the time. Owing to the definition of 'evidence in support of an alibi' in clause 3(7) [38] the accused will have to give notice of an alibi which consists of saying that he was at a place not at the time of the offence but at a time which makes it impossible or difficult for him to have been at the place of the offence when it was committed." 39

"Evidence in support of an alibi" as defined will also include the case where the accused himself gives evidence as the only witness to the alibi: R. v. Jackson and Robertson.[40] Jackson was accused of robbery. At the end of the prosecution case it emerged that Jackson would be called to give evidence on his own behalf that at the time the robbery took place he was elsewhere. The prosecution objected on the ground that notice had not been served within the prescribed period. The defence counsel contended that no such notice was necessary as the defence had no intention to call witnesses other than the accused himself to testify as to his whereabouts at the material time; that "evidence in support of an alibi" refers only to witnesses other than to the defendant himself.

If this argument were acceptable, it would clearly have grave implications on the effectiveness of s.367A. Cusack J. had little difficulty in dismissing it:

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38 I.e., in subs.(8) of the N.Z. ~~Act.~~ section.

39 Cmnd. 3145, paragraph 36.

40 [1973] Crim. L.R. 356

> "It seems to me that there is a clear distinction between subsection 1 and subsection 2. Subsection 1 deals with evidence tending to show that the defendant was elsewhere at a particular time. That, in my opinion, includes evidence which he himself may give. Subsection 2 deals with evidence given by other persons of whom the statutory details are necessary. I therefore find that subsection 1 applies when it is sought by a defendant, albeit he calls no witnesses in support, to prove that he was elsewhere at the material time. It follows that notice of alibi should have been given in this case." 41

The period for giving notice was extended from the seven days of the English statute to one of fourteen days in s.367A(1) of our Act at the instance of the New Zealand Law Society. "The time of seven days allowed for giving notice is not adequate and should be extended to at least fourteen days. A time limit of one week throws an unduly heavy burden on the defence which will be particularly serious in the case of legally aided defendants." 42

At the committal proceedings, the accused must be given written notice that if his intended defence is an alibi, he must comply with the giving of notice requirement of s.367A. 43 Failure to comply with this forewarning requirement will automatically permit the accused to adduce evidence in support of an alibi notwithstanding his failure to give prior notice. 44

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41 Ibid., at 357.

42 From the submissions of the New Zealand Law Society to the Statutes Revision Committee on clauses 10 and 11 of the Crimes Amendment Bill, 1973.

43 s.168A of the Summary Proceedings Act 1957, as inserted by s.12 of the Crimes Amendment Act, 1973.

44 s.367A(4) of Crimes Act, 1961.

The making of provision for giving notice of alibi raises the question of the ability of the prosecution to adduce evidence to rebut an alibi if the defence in fact put it forward. In general all the evidence for the prosecution has to be directed to the proof of the charge made in the indictment; it is a matter for the discretion of the Court whether to allow the rebutting evidence or not. [45]

> "Obviously it would be wrong for the prosecution to hold back evidence merely in order to put it forward with more telling effect after the defence had completed their case. On the other hand, when alibi has been put forward, even if notice of it has been given, it may be more appropriate and convenient that the evidence to destroy it should be given after the case for the defence and in rebuttal. For the prosecution may not know for certain that the defence will be put forward, and it may be confusing for the jury to call evidence to refute something which they have not yet heard alleged, especially as this may involve issues separate from the main issue... We have no doubt that in general the Court's powers are and will remain sufficient to enable them to secure that justice is done in this respect. But lest it should be argued that their power to allow evidence to rebut a defence depends on the inability of the prosecution to foresee the defence and that, notice of the alibi having been given, this condition will not be satisfied [46] clause 3(3) [47] provides that the giving of a notice shall not prevent the Court from receiving evidence in rebuttal of evidence given in support of an alibi." [48]

s.367A(4) therefore states that "any evidence tendered to disprove an alibi may, subject to any directions by the Court as to the time when it is to be given, be given before or after evidence is given in support of the alibi."

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45 R. v. Owen [1952] 2 Q.B. 362; R. v. Flynn (1957) 42 Cr. App. R.15.

46 An apparent suggestion made by Lord Goddard C.J. in R. v. Flynn (1957) Cr. App. R. 15 a pp. 18-19.

47 s.367A(4) Crimes Act, 1961.

48 Cmnd. 3145, paragraph 41.

Where information given in accordance with s.367A(2) is alleged by the Crown to be spurious or useless, they should call evidence to that effect. This would not only give the defence the opportunity of cross-examining the witnesses brought forward by the Crown, but would also give them the opportunity of calling evidence of their own to refute any allegations being made by the Crown.[49]

PART III: s.367A IN PRACTICE

1. Discretion to Admit

It is to be hoped that the discretion to admit alibi evidence notwithstanding non-compliance with the requirement to give notice will be liberally exercised to ensure that the interests of an accused are not unduly prejudiced in certain circumstances.

One such circumstance, it is suggested, would be an excessive delay in obtaining legal aid: R. v. Sullivan.[50]

On April 10, 1969, the accused was committed for trial on a charge of dangerous driving, the trial date being fixed as June 11. The accused did not obtain legal aid until June 9, when his solicitor wrote to the prosecution informing them that the defence was an alibi, but the particulars of the alibi witnesses were not given until June 11, the date of the trial. When the case was called for trial on June 11, the Crown asked for an adjournment until July, for the purpose of investigating the alibi, and were granted such an adjournment. At the trial the Crown objected to the alibi

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49 R. v. Sullivan [1971] 1 Q.B. 253, per Salmon L.J. at 259.

50 Ibid.

evidence being introduced on the ground that s.11(1) had not been complied with.

This objection was accepted by the trial judge and the accused was subsequently convicted.

On appeal, the Court of Appeal [51] were of the opinion that the exercise of discretion against admission had been wrong, and that the evidence ought to have been admitted. [52]

> "In the view of this Court the period of seven days was inserted in the Act because normally (although, of course, by no means always) a trial comes on within a reasonably short time after the termination of committal proceedings. Therefore, if the prosecution obtain the information within the seven days, it gives them time in which to investigate the information. The legislature, however, fully realized that there may be circumstances when it would not be possible to give the information or when there may be some reason why the information is not given within the seven days, but, nevertheless, justice demands that the alibi evidence shall be heard at the trial.
>
> The Court has a discretion to allow alibi witnesses to be called in such circumstances. That discretion must be exercised judicially." 53

In this instance all the relevant information was in the hands of the prosecution at the date of trial. "If it was given late, then the delay was waived by the Crown when they asked for an adjournment until July, so that they might investigate the information." [54] Although this reasoning would appear to be the basis of the decision, it is submitted that more emphasis ought to have been placed by the

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51 Salmon and Phillimore L.JJ., Nield J.

52 Conviction quashed. It seems that had the prosecution simply allowed the alibi evidence to be adduced, then called evidence in rebuttal, the result may have been different: see the observations to that effect of Salmon L.J. at 259-260.

53 Ibid, at p.258. per Salmon L.J.

54 Ibid, at pp. 258-9.

Court on the delay in obtaining legal aid as being one such circumstance where "justice demands that the alibi evidence shall be heard at the trial." It was that delay which would seem to have been the cause of the non-compliance with s.11(1). [55]

2. "Evidence in Support of an Alibi"

If the whereabouts of the accused at an alternative time to that stated on the depositions is called into question at trial, should an alibi in that circumstance be subject to the restrictions of s.367A(1)? The answer would appear to be no: R. v. Lewis (Albert Roy). [56]

The accused was charged with receiving stolen postal orders. At the committal proceedings the case for the prosecution was directed to showing that the defendant had received physical possession of the property on Wednesday, February 14. However, at the trial an issue arose as to whether or not the accused was driving a car used in connection with part of the stolen property on the following Friday. [57] The accused wished to tender alibi evidence relating to his whereabouts on the Friday, but the trial judge ruled that this was not permissible since the requirements of s.11(1) had not been met.

On appeal it was conceded by the Crown that this ruling was wrong. In affirming this, Widgery L.J. laid down two propositions; [58]

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55 The reason for the delay in obtaining legal aid is not discussed in the judgment.

56 [1969] 2 Q.B. 1 (C.A.).

57 Had he been the driver, that would have justified an alternative receiving charge under s.4(7) of the Criminal Law Act 1967(U.K.).

58 Ibid, at p.6.

> "... first, that the only evidence in support of an alibi to which section [367A] applies is evidence relative to the whereabouts of the defendant at the time when the crime is alleged to have been committed. Evidence relative to his whereabouts on another occasion is not subject to the restrictions of the section, however significant that evidence may be to the issues of the case. Thus if the defendant is charged with a robbery which is alleged to have been committed on a Monday, and part of the evidence against him is that he was seen on the Tuesday driving a van which contained the stolen goods, he may tender evidence of alibi relating to the Tuesday without giving notice under the section.
>
> Secondly, the defendant is required to give notice of alibi under the section within seven days of the end of the proceedings before the examining justices, and if a question arises as to the place or date at or on which the offence is alleged to have been committed for the purpose of [s.367A(8)], this question must be resolved on the material then available to the defendant, namely the committal charges and the depositions. At the trial the prosecution may seek to put the case in a different way or upon different charges, but this cannot create any new duty on the defendant to give notice of an alibi."

These are propositions based on fairness and common sense, yet the likelihood still exists that an accused will take advantage of this anomaly and tender a false alibi, despite the intention of the legislature that the section should eradicate the incidence of false alibis. It is submitted that the satisfactory solution would be for the judge to exercise his discretion and grant an appropriate adjournment where required.[59]

3. Comment on Failure to Mention Alibi at time of Arrest

Prior to the 1973 Crimes Amendment, where an accused failed to mention an alibi before his trial, it was clearly within the bounds of propriety for the judge to comment adversely on that failure.[60] Although much of this area of comment is now largely historical, the question is focused on whether or not a judge ought to comment

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59 Cmnd. 3145, para. 37.

60 R. v. Littleboy, supra, n.20.

on the accused's failure to mention an alibi at the time of his arrest, even though he subsequently gave notice in accordance with s.367A.

This question came before the Court of Appeal in R. v. Lewis.[61] Lewis had been convicted of the theft of petrol by the Recorder of the Bristol Crown Court. Although he refused to say anything when questioned at the time of his arrest, he later gave notice in due form of an intended alibi. In summing up to the jury the Recorder had included the following statement:[62]

> "It is a matter for you entirely, but you might think that if you have a real alibi, the sensible thing to do would be at some stage to say to the police: 'Look, go round and see so-and-so and ask him where I was last night.' There would be no chance for anybody to make up a story, and if the police go round and find respectable people who say: 'Yes, he was here at this time,' obviously that would be the end of the case, there would be no charge, and you would not be here today. But neither of them did that. Neither said 'Go and see so-and-so, they will tell you where I was last night.' They did of course after the Magistrate's Court proceedings give notices which they handed in, because until a particular Act was passed the defence were entitled to spring alibis by surprise upon the prosecution and there was no chance to check them, but they have now to give notice." 63

In the eyes of the Court, that comment was capable of one interpretation only:

> "Well, members of the jury, you might have thought that if this alibi be true, he would have mentioned straight-away when he was at the police station that he was at the place where be subsequently said in his notice of alibi that he was at the time." 63

The Court were clearly of the opinion that such adverse comment in this context is inappropriate. If it were justifiable, then "notwithstanding what Parliament has said in [s.367A(6)], that a

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61 (1973) 57 Cr. App. R. 860; [1973] Crim. L.R. 576.

62 Ibid., at p.864.

63 Ibid., at p.865, per Roskill L.J.

notice of alibi need not be given before the time specified in that section, nonetheless a judge might make a comment which amounted to a matter of criticism of the defendant that he had not given the notice of alibi earlier than the time which Parliament has laid down. With the greatest respect to the Recorder, that seems to this Court to be entirely wrong. The comment was one which the Recorder ought not to have made." [64] Also the comment in this situation was inconsistent with the accused's right to silence pursuant to the caution given to him at the time of his arrest that he was under no obligation to say anything. [65]

Upon review of a long line of authority on the matter, Roskill L.J. was undecided as to what comment might be appropriate in these circumstances. He concluded that "If and so long as there is a doubt what the proper limits are those concerned with this problem would be well advised to bear in mind... that it may be better to make no comment at all." [66]

Judges caught in the dilemma of whether they ought to comment in this situation or not may well be rescued by statute, if reforms of the law relating to criminal evidence as suggested by the Criminal Law Revision Committee [67] are added to our statute books. Their proposal relevant here was that "the law should be amended so that, if the accused has failed, when being interrogated by anyone charged with the duty of investigating officer or charging offenders, to mention a fact which he afterwards relies on at the committal

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64 Ibid.

65 R. v. Sullivan (1967) 51 Cr. App. R.102 applied.

66 Supra, n.61 at p.869, adopting a statement by Humphreys J. in R. v. Tune (1944) 29 Cr. App. R. 162, at 165 - "If nothing is said by way of comment by the presiding judge, no point can be raised."

67 In their Eleventh Report (Cmnd. 4991), especially paras. 28-52.

proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them." [68] The Committee explicitly stated their intention that this reform apply to alibi situations [69] as occurred in R. v. Lewis. [70]

As to argument raised against the reform that it would be "unfair", the Committee commented that "this is a matter of opinion and we disagree." [71] Whether or not the Judge invites them to, the jurors must inevitably draw their own inferences on the accused's failure to mention his alibi at the time of arrest. Situations where such inferences are clearly unjustified are hard to imagine. In R. v. Lewis [72] the jury clearly disbelieved the alibi, yet on the basis of nothing more than a technicality of the law relating to evidence a criminal was "let off". "It is indeed a strange and irrational rule (that) precludes the judge from saying what the jury must have been saying to themselves." [73]

Until appropriate legislative changes are made, it would seem that New Zealand judges will be bound by the long line of authority [74] to the effect that a judge is not entitled in any circumstances to suggest to a jury when a man refuses to answer any questions after

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68 Ibid., at para. 32.

69 Ibid., at para 33.

70 Supra, n.61.

71 Cmnd. 4991, para. 31.

72 Supra, n.61.

73 See [1973] Crim. L.R. 576, at p.577.

74 R. v. Leckey [1944] K.B. 80; R. v. Davis (1959) 43 Cr. App. R. 215; R. v. Ryan (1964) Cr. App. R. 144; R. v. Hoare [1966] 1 W.L.R. 762; R. v. Sullivan (1967) 51 Cr. App. R. 102.

having been cautioned, that, if he were innocent, it is likely that he would have answered the questions. While this rule in no way assists the innocent, it unduly gives advantage to the guilty. Will it take another R. v. Davis situation before reforms are effected?

4. Introduction of an alibi notice as part of the prosecution case

Where there is any inconsistency in a notice of alibi served that can be brought out by evidence in Court, it will clearly be advantageous to the prosecution to produce the notice itself as evidence in Court, and allow it to become the subject of adverse comment. Such an inconsistency is the failure to call a witness or any of the witnesses named in the alibi: R. V. Brigden. [75]

The accused had given an alibi notice, but none of the persons named in it was called at the trial. At first instance the prosecution were given leave to put the notice in evidence. [76] The trial judge commented adversely on the accused's failure to call the named witnesses and the accused was subsequently convicted. The defendant applied to the Court of Appeal for leave to appeal on the ground that the prosecution should not have been given leave to include the alibi notice as evidence, and that the judge's comment was too strong.

The Court of Appeal [77] refused the application stating that there was no reason why the prosecution should not make the alibi notice part of their case.

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75 [1973] Crim. L.R. 579.

76 Presumably the rule in Frost (1839) 4 St. T. (N.S.) 85 had been satisfied.

77 Roskill L.J. and Stocker J.

With respect, it is submitted that the Court of Appeal in this case went beyond the legislative intent of s.367A, that intent being to prevent the occurrence of sprung alibis by enabling the prosecution to be prepared; if the alibi does not appear at the trial, then even though the prosecution may have been prepared for it, it should be the end of the matter. There was no intent on the part of the legislature to provide the prosecution in appropriate circumstances with a substantive part of their evidence. Alibis are, and it is suggested ought to remain, a defence only.

The justification for the Court of Appeal's ruling appears to be that if the accused's failure to call a witness has a perfectly innocent explanation, then he will have ample opportunity to explain that innocence when the notice of alibi is adduced as evidence. However this explanation will invariably involve the very reason why he decided not to call the witness. There may be many understandable, though perhaps not justifiable reasons, why an accused may not decide to call an alibi witness.[78] For example, A and B travel to Palmerston North in B's car one weekend. On Monday morning stolen goods are found in A's car. A gives notice of an alibi, naming B as his witness. Prior to trial, however, B tells A he heard A say to his 18 year old son on the Friday - "Here, you can use my car this weekend." A, innocent of the charge, may decide not to call B in fear that his evidence

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78 Similarly where the accused elects not to call himself as a witness: The King v. Mareo [1946] N.Z.L.R. 600: "... the reasons for not calling an accused person to give evidence may be legion, and some of the reasons may be very cogent." per Myers C.J. at page 677.

in Court may lead to suggestions that his son was involved. Equally he will find his attempted explanation for his failure to call B an embarrassment. One lie might lead to another, yet "silly little games" that might result will have no connection to A's alleged guilt whatsoever.

It is conceded however that there ought to be exceptions in extreme cases to this proposal that alibi notices should not be adduced as part of the prosecution case. The exception readily brought to mind is notice given of a false alibi or one containing false information.[79] Here it is submitted that the judge should exercise sparingly his general discretion to ensure that the trial is conducted fairly, and permit the notice to be adduced as being evidence probative of the accused's guilt; let the accused explain the giving notice of a false alibi in a formal notice. It would be inconsistent with the secondary legislative intent behind s.367A that it contribute substantially to the breaking down of the incidence of false alibis if an accused were able to serve them with impunity.

On this question of comment on a discrepancy between the notice and the defence put forward or on the omission of the defence to call on alibi witness indicated in the notice, the Criminal Law Revision Committee felt statutory provisions clearly inappropriate.[80] "The matter can safely be left to the control of the Courts in the exercise of their general power ... to ensure that the trial is conducted fairly."[80] As already suggested, it is to be hoped that this general power will be exercised in favour of the accused so that the occurrence of an alibi notice in the prosecution case will be

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79 Another possibility, it is suggested, would be a defence at trial inconsistent with the alibi notice.

80 Cmnd. 3145, para. 42.

very rare. This lends support to the view that it is in the accused's best interests to serve notice to the prosecution in accordance with s.367A(2) of all possible witnesses to his alibi. By so doing he would not only receive the added benefits of extensive police facilities for enquiry (if he is innocent of the charge), but he would so do without fear of adverse comment from the judge if he subsequently decides to omit some of the witnesses from his case.

5. Offences of a continuing nature

An alibi situation difficult to include within the definition in s.367A(8) arose in R. v. Hassan.[81]

The accused Hassan had been convicted on a count which alleged that on July 29, 1968 and other days between that date and August 21, 1968, in the City of Cardiff he lived on the earnings of a prostitute. On August 20, 1968 the police raided the prostitutes flat and claimed they saw Hassan leaving through the window. At the trial Hassan sought to call and give evidence that he was elsewhere on August 20, but the judge refused to admit this evidence because no notice of it had been given under s.367A.

The Court of Appeal [82] allowed an appeal by the accused, holding that the evidence sought to be admitted was not "evidence in support of an alibi" within the meaning of s.367A(8):

> "What does appear to this Court to be a conclusive point is that the statutory definition of the phrase 'evidence in support of an alibi' does appear to envisage an offence which necessarily involves the accused being at a particular place at a particular time." 83

81 [1970] 1 Q.B. 423.

82 Edmund Davies and Fenton Atkinson L.JJ., Shaw J.

83 Ibid., at page 428.

In other words, the Court of Appeal took the view that this was not an alibi because even if the evidence were true, he might still be guilty of the charge. This evidence was merely part of the defence case, not an alibi.

But it seems s.367A(1) will still have to be complied with where the "alibi" evidence covers the whole of the period when the crime was alleged to have been committed:

> "There may be difficulties regarding the giving of notice of alibi in relation to offences of a continuing nature. Nevertheless there are arguments for holding that the mischief sought to be cured by the statutory provision might well exist in relation to such offences." 84

Thus Hassan would presumably have been alleging an alibi within the meaning of s.367A(8) if he had tendered evidence that he was in Paris throughout the whole period between July 29, 1968 and August 21, 1968. [85]

6. Negative Evidence: not covered by s.367A(8)?

If the accused at trial simply states "I wasn't there" and adduces evidence to support that claim, does such evidence come within the meaning of "evidence in support of an alibi"? On a strict interpretation of the language of s.367A(8) the answer is no: R. v. Gibbs. [86] Gibbs was charged with taking and driving away a motor car. The prosecution adduced evidence that he was the driver of the car when it was stopped by the police. Yet at the trial Gibbs wished to put forward two witnesses who claimed they were the only persons present in the car when it was stopped by the police, although he had not complied with s.367A(2)(a). Goodall J. held that since this evidence was not within the meaning of "evidence in

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84 Ibid, at page 428, per Edmund Davies L.J. He gave as an example an alleged nuisance.

85 As suggested by a legal commentator - ss [1970] Crim. L.R. 153.

86 [1974] Crim. L.R. 474.

support of an alibi", it was thus not subject to the requirements of s.367A(1). The witnesses, therefore, were entitled to be heard.

Goodall J. was drawn inextricably to this conclusion by the language of s.367A(8). To be "evidence in support of an alibi", it must be "evidence tending to show that, by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not ...".[87] R. v. Gibbs, it is submitted, points to a potentially important drafting inadequacy of s.367A(8) - clearly the accused was alleging an alibi. There had not been such investigations prior to trial in this case as there were in "the Banham murder trial"; yet the unsworn statement made in this case might well have produced the same effect as an alibi, even though not referring to Gibbs's own whereabouts. To allow an accused to "spring" evidence to the effect that "I wasn't there" upon the Court would be contrary to the intent of s.367A, since such evidence, it is argued, amounts to an alibi. This anomaly can only be remedied by an appropriate amendment to s.367A(8). A suggested amendment might read:

> "(8) In this section, the expression 'evidence in support of an alibi' means evidence tending to show that 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 its alleged commission, whether by reason of his presence at a particular place or in a particular area at a particular time, or otherwise."

7. 14 days grace?

The average period between committal proceedings and trial date is three weeks. Normally, therefore, the statutory period for the giving of notice of alibi will have elapsed. But it is not unlikely that an accused's trial will come up within fourteen days after

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87 Emphasis supplied.

committal proceedings. Whereas formerly an accused in that position would only "spring" an alibi on the Court at the risk of adverse comment, it is now at least arguable that until the fourteen days have expired, an accused can spring alibis with impunity for the reason that he ought not to be criticised for not having given notice sooner than required by the legislation.[88] Clearly this argument is likewise contrary to the spirit of s.367A, and it is hoped that judges will exercise their general powers already referred to accordingly. To ensure certainty however, statutory modification is desirable. A possibility might be:

> "367A(1) On the trial of an accused person who has been committed for trial, he shall not without the leave of the Court adduce evidence in support of an alibi unless, before the date of his trial or before the expiry of 14 days after the date on which he is so committed, whichever is is the earlier, he has given notice of particulars of the alibi."

PART IV: CONCLUSION

It would be Utopian legislation that claimed to be above fault or even criticism. s.367A is above neither, and this paper has attempted to set them out. Nevertheless the effect of the section has been to withdraw from the criminal trial an unwarranted advantage to the accused. s.367A, it is submitted, provides a laudable innovation to our criminal law.

After all, it is not merely the accused who has an interest in seeing that the trial is conducted fairly. Society also has a vested interest. The fairest trial must be one that is conducted on the sound basis of the true facts. The purpose of the "sprung alibi" however, was often to conceal the true facts by preventing any attempted disclosure of them by the prosecution. This only served

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88 c.f. R. v. Lewis op. cit., n.61.

to weigh the odds unjustifiably in favour of the accused: "The criminal trial should be a fairly conducted inquiry into the truth, not a forensic game." [89] s.367A can be nothing but consistent with this proposition.

There are in any case adequate safeguards provided by s.367A(1) to protect the all-important interests of the accused. It is difficult to conceive an alternative argument against destruction of the "sprung alibi", other than the argument that it would be in derogation of the accused's best interests. It is suggested however that the only "best" interests at stake would be those of the would-be giver of false alibis:

> "If the alibi be true, there can be no sensible objection to the disclosure in advance of the witnesses' names. If the alibi be false, no doubt there is a very understandable objection from the accused's point of view, but hardly from the public point of view." 90

89 Ante, n.19.

90 Ante, n.28.

L Co COOK, G.M. S.367A. "Sprung alibis" seized from defence weaponry.