 DOI: *https://doij.org/10.10000/IJLMH.113104*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

Rethinking Defence of Alibi: A Lesser Evidential Burden on Defendant? Abubakar Sale v State (2016) 3 NWLR (Pt. 1499) 392 Examined.

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ABSTRACT

A defendant that raises a defence of Alibi has the evidential burden to prove where he was at the time of the crime which is the subject matter of the charge or information. It is critical that the defendant at the earliest opportunity gives particulars of the Alibi to the police so that they can investigate. To what extent is the suspect/defendant required to supply particulars? What constitutes particulars? Are there circumstances when the requirement for particulars will be said to be complied with even though the suspect in his extra-judicial statement did not apparently make a 'full disclosure'? The nature and extent of particulars to be given by the suspect/defendant are examined in view of several decisions of courts and the recent decision of the Supreme Court on the evidential burden on the defendant who raises a defence of Alibi. A comparative study of other jurisdictions is undertaken to see if there are advancements in this area of criminal litigation. This is the subject of the decision of the Supreme Court in the case of Abubakar Sale v State (2016) 3 NWLR (Pt. 1499) 392 under review.

Keywords: *Alibi; Evidential Burden of Proof; Legal Burden of Proof; Ingredients of Alibi.*

I. INTRODUCTION

A defence open to a defendant in the course of a criminal trial is *Alibi*.[3] *Alibi* means that the defendant is somewhere other than where the prosecution says he was at the time of the commission of the offence making it impossible for him to have committed or participated in the commission of the offence for which he is charged. Before a defendant can properly rely on this defence, it must be raised at the earliest opportunity when the defendant is confronted with the commission of the offence so that the police can investigate the *alibi*. This may be at

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[3] See *Umani v State* [1988] 1 NWLR (Pt 70) 274, *Attah v State* [2010] 10 NWLR (Pt 1201) 190, *Okosi v State* (1989) 1 NWLR (Pt 100) 642

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the time of making the extra-judicial statement to the police. The suspect must provide enough particulars: of the place, he was at the time of the commission of the offence, those he was with and other material facts. This is an evidential burden on the defendant. It is not enough to merely state that he was not at the scene of the crime alleged. He must go further to give the names of persons who can testify that he was elsewhere other than the *locus delicti,*[4] and therefore it was practically impossible to connect him with the offence charged in view of space, time and place. This is because, by its nature, a defence of *alibi* is a combined defence of lack of *actus reus* and *mens rea*.[5] It is only where the defendant has supplied the particulars will the burden shift to the prosecution to investigate the *alibi.*[6] If the story of the defendant is conflicting, there is no such burden.[7]

A successful defence of an *alibi* will result in the acquittal of the defendant. [8] Hence the prosecution must not lightly disregard the defence, especially where the defendant has provided necessary particulars and discharged its evidential burden of proof.[9]

What is the nature of the particulars to be supplied by a suspect to warrant investigation of the *alibi* by the police or prosecution? In other words, to what extent will the defendant be required to discharge the evidential burden of proof? What are sufficient particulars to be furnished by the defendant? Are there circumstances when the defendant fails to provide particulars, he will still be able to raise the defence of *alibi*? This is the crux of the decision of the Supreme Court in *Abubakar Sale v State*.[10] It will be shown that in a few exceptional cases, the evidential burden may be discharged by the defendant with minimal evidence in his extra-judicial statement. In that case, the burden is on the prosecution to go further in its inquiry. Otherwise, the defendant may be given the benefit of the doubt.

II. FACTS OF THE CASE OF ABUBAKAR SALE V STATE

The material facts for the purpose of this review were that the appellant and two others were arraigned at the High Court of Zamfara State. Gusau on a two-count charge of Conspiracy to Rob and Armed Robbery. The appellant and the other accused persons were alleged to have entered the house of PW2 and at gunpoint, robbed him of his money and that of his wives. The robbers escaped but were later arrested. The extra-judicial statements of the appellants were

[4] See *State v Azeez* (2005) 8 NWLR (Pt. 927) 312, *Ozaki v State* (1990) 1 NWLR (Pt. 124) 92.
[5] *Ukwunneyi v State* (1989) 4 NWLR (Pt. 114) 131 @ 144E-F per Karibi-Whyte, JSC.
[6] *State v Odomo* (2018) LPELR 46339.
[7] *Okosi v State* (1989) 1 NWLR (Pt100) 642 @ 660.
[8] *Ukwennenyi v State* (1989) NWLR (Pt. 114) 131, (1989) LPELR 3353.
[9] *Ifeanyi Chukwu v State* (1996) 7 NWLR (Pt. 463) 686, *Yanor v State* (1965) NMLR 337.
[10] (2006) 3 NWLR (Pt. 1499) 392

tendered in evidence during the trial and admitted as Exhibits A and A1. At the end of the trial, the 3rd accused was discharged and acquitted while the appellant and the 1st accused were convicted and sentenced to death.

The appellant appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the trial court. He further appealed to the Supreme Court.

One of the issues formulated for determination by the appellant was: whether the lower court was wrong to have affirmed the decision of the trial court that the appellant did not furnish sufficient particulars of his *alibi* and as such his defence of *alibi* failed. The Appellant's counsel submitted on this issue that the appellant furnished the police with enough particulars to investigate the defence of the *alibi* raised but the police were not interested in investigating the same. In response to the defence of *alibi* raised, counsel for the respondent argued that the appellant in his extra-judicial statement Exhibits A and A1 did not give sufficient particulars to enable the police to investigate the alleged *alibi* and that he did not state with whom he was or what he was doing, to enable the police to investigate his so-called *alibi* with a view to finding out the truth or otherwise of the claim. In the said statement, (Exhibits A and A1) appellant said: 'I can remember that on 18th February 2003, I did not travel to Gunmi via Zamfara State. I was in my town Zongo'. Counsel urged the court to hold that the prosecution had adduced sufficient and acceptable evidence which fixed the appellant not only at the scene of the crime but as one of the two persons who robbed PW2 and his family.[11]

III. DECISION OF THE SUPREME COURT

The Court in allowing the appeal on this issue held that there was nothing on record to show that the *alibi* was investigated. The appellant was illiterate and therefore could not be expected to know the requirements of the law as it relates to *alibi.* The police that took his statement should have made effort to elicit more information to enable them to investigate the *alibi*. In the circumstance of the appellant being illiterate, he had discharged the evidential burden of proof on him to introduce the defence. The failure to ask further questions and investigate, cast doubt on the prosecution's case. The appeal was allowed and the appellant was discharged and acquitted.[12]

Ogunbiyi, JSC in the leading judgment stated as follows:[13]

> "The foregoing submission, in other words, questions the insufficiency of

[11] Ibid 416-417.
[12] Ibid 418
[13] Ibid 418 paras C-G

particulars for the police to investigate the *alibi* raised. As rightly submitted by the appellant's counsel, it is not borne out on the record that the said *alibi* in question was ever investigated by the police. There is also no indication that the police did inquire more on the facts stated by the appellant in his extra-judicial statement to enable them to investigate the defence raised. It is on record on page 169 that the appellant testified as DW2 and he spoke Hausa. The Investigating Police Officer (IPO) was PW1 who in his evidence testified that he did administer words of caution to the appellant and recorded his statement in Hausa language but translated same into English. (Exhibits A and A1).

It is obvious therefore that the police were clearly aware that the appellant, who could not write his statement was illiterate and therefore could not be expected to know the requirements of the law as it relates to *alibi*. The police, who should have known better, did not also make an effort to elicit such information as they would require to investigate the *alibi*. It was sufficient that the appellant did introduce the defence with his little knowledge. The failure of the police to investigate the truth or otherwise of the appellant's *alibi* has cast veritable doubt on the reliability of the case for the prosecution which ought to be resolved in favour of the appellant". (Underlining mine for emphasis)".

IV. REVIEW

The evidential burden of proof is on the defendant who raises the defence of *alibi*.[14] This is because where he was at the material time is a matter within his knowledge. He is required to furnish details and particulars of his whereabouts that the police can investigate.[15] Once the defendant discharges the evidential burden of proof, the onus shifts to the prosecution to disprove it.[16] This evidential burden of proof is however different from the legal burden of proof[17]. The legal burden of proof is always on the prosecution to prove the guilt of the defendant beyond reasonable doubt[18] as the defendant does not bear the burden of proving his

[14] By the combined reading of sessions 137, 139 (1), 140 Evidence Act 2011, the evidential burden will be discharged on a balance of probability. Once the defendant has successfully raised the defence the burden shifts to the prosecution to disprove the *alibi*. This is in contrast with the general burden of proof on the prosecution which never shifts under s 135 (3). See *Agim Sunday v State* (2014) LPELR 24251.
[15] *Agim Sunday v State* (2014) LPELR 2425.
[16] *See Gabriel Daudu v State* (2018) LPELR 43637.
[17] See section 131 Evidence Act 2011 as amended.
[18] *Ofordike v State* (2019) 5 NWLR (Pt. 1666) 395 at 413; *Ogie v State (*2017) 16 NWLR (Pt. 1591) 287 at 298.

innocence[19]. The legal burden of proof does not shift[20].

To what extent has this authority expanded the frontiers on the evidential burden of proof on the defendant? In other words, what is the significance of this authority? It is our deduction from this case that where an illiterate in making an extra judicial statement merely states that he was not at the *locus delicti*, the police officer taking the statement must ask for further particulars-where he was at the time, and whom he was with at the material time. Unlike previous authorities considered in this article, where the general position is that the suspect must give full particulars, that burden is less in cases of illiterate suspects. The moment he mentions that he was elsewhere other than the scene of the crime, he has discharged the evidential burden. According to Honourable Justice Ogunbiyi, as an illiterate, he is not expected to know the requirements of the law as it relates to *alibi*.[21]

It is our opinion that this 'lesser' evidential burden should not only apply to illiterate suspects. A literate suspect should also benefit from it. After all, how many suspects 'know the requirements of the law as it relates to *alibi*'? It is argued that as soon as a suspect raises the defence of *alibi* in his extra-judicial statement whether literate or illiterate and fails to provide particulars, the investigating police officer should prompt him to furnish the particulars even if he has to make a further statement. Where after being asked to furnish the particulars he defaults, the police would have discharged its responsibility with no further obligation to carry out any investigation. The protection afforded to an illiterate should also be afforded to all suspects. The scale of justice should be even.

V. DEFENCE OF ALIBI IN OTHER JURISDICTIONS

Under the International Criminal Law, the applicability, enforceability, and admissibility of the defence of alibi vary from one country to the other as created by statute and case laws. These rules make provisions for the condition precedents to be fulfilled by the defendant before the alibi defence will avail him including the time within which to make the disclosure and or give notice of a possible alibi defence and the sufficiency of the information contained in the notice. In this segment of this research work, the researchers will attempt to discuss most countries' alibi rules in no definitive order of restrictiveness and restrictions. In most foreign jurisdictions there has been the codification of the requirement of notification alibi defence prior to trial to enable the prosecutor to have ample opportunity to investigate the alibi.

[19] See section 36 (5) 1999 Constitution of the Federal Republic of Nigeria.
[20] *Federal Republic of Nigeria v Umeh* (2019) 7 NWLR (Pt. 1670) 40 at 47 S.C; Section 135 (1) Evidence Act 2011 as amended.
[21] *Sale v State* (2016) 3 NWLR (Pt. 1499) 392 at 418 paras F.

VI. CANADIAN EXPERIENCE

In **Canada,** a Common Law country in order to constitute an alibi defence, the evidence must be determinative of the final issue of guilt or innocence in that it is impracticable for the defendant to have committed the act being somewhere else at the time the offence was committed.[22] The implication of this is that there must be no likelihood of a window of opportunity.[23] Once it is properly raised, the Crown or the prosecution must disprove it beyond a reasonable doubt.[24]

The position of the law in Canada is that the alibi defence must be disclosed timely before trial so that Police can investigate the alleged facts according to the Supreme Court locus classicus case of ***Russell v The King***.[25] This is the exact position in the Nigerian Criminal Justice System. The only difference is that whereas in Nigeria, it is imperative that it be disclosed upon arrest, while in Canada it should be disclosed sufficiently close to trial with sufficient particulars to enable the Crown to investigate. Furthermore, in ***R v Letourneau***[26] the court established the two major important requirements regarding the issue of leading alibi defence in Canada;

(a) The adequacy of the alibi defence,[27]

(b) The timeliness of the disclosure of the defence.[28]

It is submitted that there may still be the possibility of the defence leading evidence in the course of the trial about the alibi where it failed to disclose the same properly. The only disadvantage is that the court or trier of fact may place lesser weight on the alibi defence since the prosecution or Police were not afforded the opportunity to investigate the alleged facts.[29] In some instances as recently held by the Canadian Supreme Court affirming the decision of the Court of Appeal of British Columbia, where it is established that the defendant lied in its alibi defence statement, the court will infer evidence of guilt of the alleged offence without relying on independent evidence used to reject the alibi.[30]

In Canada, the alibi defence is deemed to be an exception to the right to silence as the defendant and or suspect during the investigation is not ordinarily under compulsion to divulge any

[22] *R v MR* (2005), 195 CCC (3d) 26; [2005] OJ No 883 (QL) at para 29 (CA).
[23] *R v TWC*, [2006] OJ No 1513 (QL); 209 OAC 119 at paras 2 (CA); See generally, Burchill J, 'Alibi evidence: Responsibility for disclosure and investigation' Vol. 41, Issue 3, Manitoba Law Journal, CanLIIDocs202.
[24] *R v Allen*, 2017 MBCA 88 at para 8.
[25] (1936) 67 C.C.C 28 at 32; *R v Cleghorn* (1995) 100 C.C.C 393.
[26] (1994) 87 C.C.C (2d) 13 at 62; *R v Cleghorn* (1995) 100 C.C.C 393.
[27] (1993) CanLII 843 (BC CA).
[28] *R.* v. *Dunbar and Logan* (1982) CanLII 3324 (ON CA), 68 C.C.C.
[29] *R v P (MB)*, [1994] 1 SCR 555 at 580; This was reaffirmed in *R v S(R.J)*, [1995] 1 SCR 451 at 517.
[30] *R v Clifford* [2017] 1 SCR 164; cf *R v Hibbert*, [2002] 2 SCR 445 at 62–63.

statement to the Police.[31] However, in the case of a potential alibi defence, if it is not disclosed early enough before trial with sufficient particulars the trier of fact could draw an adverse inference on the evidence as a result of the pre-trial silence of the defendant. The essence of this is to guard against the fabrication of evidence by the defence especially when the Crown ought to have been given the opportunity to investigate the alibi.[32] In **R v Ford**[33] the Canadian Court of Appeal held that for the alibi defence to be investigated the crown requires the following from the defence:

a) Full particulars of the defence including the time, place, and names of any witnesses;

b) Disclosure at a time when an investigation may uncover something.

VII. SCOTLAND'STLAND EXPERIENCE

In **Scotland**, an alibi is considered as a Special defence. Special defences are criminal defences that must be disclosed by the defendant to the Prosecution before the commencement of the trial to enable adequate investigation.[34] Further examples of Special defences include incrimination (alleging someone else committed the crime), coercion, automatism, self-defence, consent (under some circumstances) and other mental disorder defences and once established it results in a complete acquittal. Accordingly, in solemn proceedings in Scotland[35], the position is that the requirement for notice must be fulfilled by the defendant by notifying the prosecution of a possible alibi defence with sufficient particulars during diet which is regarded as pre-trial proceedings before the commencement of the trial. **Section 89 of the Criminal Procedure Scotland Act**[36] provides as follows:

> "(1) Subject to subsection (2) below, where the accused has lodged a plea of special defence, the clerk of the court shall, after informing the jury, in accordance with section 88(5) of this Act, of the charge against the accused, and before administering the oath, read to the jury the plea of special defence.
>
> (2)Where the presiding judge on cause shown so directs, the plea of special defence shall not be read over to the jury in accordance with subsection (1)

[31] This is the same position in Nigeria according to section 35 (2) 1999 Constitution as amended.
[32] *Vézeau v The Queen*, [1977] 2 SCR 277 [*Vézeau*] .
[33] (1993), 78 CCC (3d) 481.
[34] See section 89 of the Criminal Procedure Scotland Act 1995; See https://www.legislation.gov.uk/ukpga/1995/46/section/89 accessed 30 March 2022 by 7:10am.
[35] These are proceedings by way of an indictment of more serious criminal offences before a judge and jury of 15 persons.
[36] Supra note 29.

above; and in any such case the judge shall inform the jury of the lodging of the plea and of the general nature of the special defence.

(3)Copies of a plea of special defence shall be provided for each member of the jury."

This notice must be given at ***least 10 days*** before the commencement of the trial. The jury will further be informed of the special defence immediately after the indictment has been read and each juror in the case is given a copy of the accused's notice of alibi. Where disclosure is made at this stage, the Crown prosecutor known as *Procurator fiscal* must ensure that the Police investigate the alibi before continuing with the trial diet at a later date. On Notice of the special defenses requirements, **section 149B of the Act**[37] provides:

"(1) It is not competent for an accused in a summary prosecution to found on a defence to which this subsection applies unless—

(a) Notice of the defence has been given to the prosecutor in accordance with subsection (5) below; or

(b)The court, on cause shown, allows the accused to be found on the defence despite the failure so to give notice of it.

(2) Subsection (1) above applies—

(a) To a special defence;

(b) To a defence which may be made out by leading evidence calculated to exculpate the accused by incriminating a co-accused;

(c)To a defence of automatism or coercion;

(d) In a prosecution for an offence to which section 288C of this Act applies, to a defence of consent.

(2A)Subsection (1) does not apply where—

(a)The accused lodges a defence statement under section 125 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13),

(b)The statement is lodged—

(i)Where an intermediate diet is to be held, at or before the diet, or

[37] Criminal Procedure Scotland Act 1995.

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(ii)Where such a diet is not to be held, no later than 10 clear days before the trial diet, and

(c)the accused's defence consists of or includes a defence to which that subsection applies.**]**

(3)In subsection (2)(d) above, the reference to a defence of consent is a reference to the defence which is stated by reference to the complainer's consent to the act which is the subject matter of the charge or the accused's belief as to that consent.

(4)In subsection (3) above, "complainer" has the same meaning as in section 274 of this Act.

(5)Notice of defence is given in accordance with this subsection if it is given—

(a)where an intermediate diet is to be held, at or before that diet; or

(b)Where such a diet is not to be held, no later than 10 clear days before the trial diet,

together with the particulars mentioned in subsection (6) below.

(6)The particulars are—

(a)In relation to a defence of alibi, particulars as to time and place; and

(b)in relation to that or any other defence, particulars of the witnesses who may be called to give evidence in support of the defence.

(7)Where notice of a defence to which subsection (1) above applies is given to the prosecutor, the prosecutor is entitled to an adjournment of the case.

(8)The entitlement to an adjournment under subsection (7) above may be exercised whether or not—

(a)The notice was given in accordance with subsection (5) above;

(b)The entitlement could have been exercised at an earlier diet.**]**

VIII. AUSTRALIAN EXPERIENCE

The locus classicus case on the condition precedent to raise the defence of alibi in Australia is the case of ***Petty and Maiden v Queen***[38], where Brennan J. of the High Court historically made

[38] [1991] HCA 34 at para 6, 173 CLR 95.

known the case law position on the issue in Australia when the court held;

> "Even where an accused proposes to raise an alibi, there is no common law duty to give the Crown notice of the alibi."

Continuing, the court held further:

> "Unless [the accused] was under a duty to inform the Crown before the trial that he proposed to raise a 'defence' … it was impermissible to draw an adverse inference from the raising of the defence at a stage of the trial which left the Crown with insufficient time to investigate it fully. A criminal trial is a prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so far as it reasonably can, any "defence" which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof: *Shaw v The Queen* (1952) 85 CLR 365, at pp 379-380. The Crown obtains no assistance in discharging that onus by pointing to some omission on the part of an accused to facilitate the presentation of the Crown's case or to some difficulty encountered by the Crown in adducing rebuttal evidence that an accused could have alleviated by earlier notice."

The decision above informed the position in most Australian States to adopt uniform rules relating to the requirement for the disclosure of alibi as contained in **section 190 of the Victoria Criminal Procedure Act 2009**[39] which provides inter alia:

> "190. Alibi evidence
>
> (1) An accused must not, without leave of the court-
>
> (a) Give evidence personally; or

[39] *Criminal Procedure Act 2009* (Vic), s 190. See also New South Wales *Criminal Procedure Act 1986* (NSW), s 150 "notice of alibi."; See section 405A Crimes Act 1900.

(b) Adduce evidence from another witness-

in support of an alibi unless the accused has given notice of alibi within the period referred to in subsection (2).

(2) A notice of alibi must be given by serving the notice on the DPP [Director of Public Prosecutions] within 14 days after-

(a) The day on which the accused was committed for trial on the charge to which the alibi relates; or

(b) If paragraph (a) does not apply, the day on which the accused received a copy of the indictment.

(3) A notice of alibi must be served in accordance with section 392.

(4) A notice of alibi must contain…"

The requirements above have now been abridged and can be seen in **Rule 4.11 and Form 6-4E of Victoria's *Supreme Court (Criminal Procedure) Rules 2008*** and a similar notice of alibi for Country Court is found in ***Rule 2.07 of the County Court Criminal Procedure Rules 2009***.[40]

IX. THE UNITED STATES EXPERIENCE

In the United States of America, the position on the requirements for Alibi disclosure varies from State to State. The first Alibi Act was adopted in the state of Michigan in 1927.[41] This enactment served as a model for other States and accordingly between 1934 and 1942 majority of other states enacted their statute. Most states have codified the common law rules regarding Alibi disclosure by legislating that the defence at least within 10-14 prior to trial must in writing notify the prosecution and with sufficient particularity to permit the authorities to investigate including the name and address of any potential witnesses. Furthermore, failure to give notice of alibi may result in it being ruled either inadmissible or carrying an adverse inference.

The importance of enacting alibi legislation was observed as far back as 1920 by Professor Millar of the Northwestern University School of law[42] when he stated:

> "That the manufactured alibi is one of the main avenues for the escape of the guilty needs no demonstration. Moreover, the amount of perjury that is

[40] Supreme Court (Criminal Procedure) Rules 2008, SR No 12/2008; County Court Criminal Procedure Rules 2009, SR No 181/2009.
[41] (1954) "Criminal Law: Statutory Regulation of Alibi Defense Through Notice Requirements," *Indiana Law Journal*: Vol. 30: Iss. 1, Article 6. Available at: https://www.repository.law.indiana.edu/ilj/vol30/iss1/6
[42] Millar R.W 'The Modernization of Criminal Procedure' (1920) 11 **J.** CRIM. L. & Criminology 344, 350

> annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked, and the
>
> fabricated alibi rendered most difficult if the accused were to be required to give the prosecution such notice of the intended defence as would enable it to confirm or refute the accused's assertation."

In the State of **Louisiana**, the Criminal Code[43] on notice of alibi provides as follows:

> "A. Upon written demand of the district attorney stating the time, date, and place at which the alleged offence was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the district attorney a written notice of his intention to offer a defence of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offence and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.
>
> B. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the district attorney shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offence and any other witnesses to be relied on to rebut the testimony of any of the defendant's alibi witnesses…"

In this State, the Code requires the defendant upon written demand given to him by the district attorney to compulsorily serve within ten days, or at such different time as the court may direct, upon the district attorney a written notice of his intention to offer a defence of alibi stating the specific place or places at which the defendant claims to have been at the time of the alleged offence and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

In the State of **Utah**, a defendant who intends to rely on an alibi defence must file and serve on the prosecution at least ten (10) days before the trial. The court may in deserving circumstances enlarge the time within which the defendant may serve the notice. The notice shall contain sufficient particulars of the place, time, and persons (witnesses) whom the defendant will rely upon to establish the defence. Of interest in this law is that the prosecution is expected to not

[43] Louisiana Code of Criminal Procedure Tit. XXIV. Art. 727

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later than five (5) days after the receipt of the alibi notice or such other time as the court may allow, file and serve on the prosecution list of witnesses and their addresses by which the prosecution proposes to contradict the alibi defence. Again, failure to comply with the provisions of this law will empower the court to exclude the alibi evidence, though the defendant may testify in his defence on the alibi he cannot call witnesses. It should also be noted that from the provisions of the law the court may waive compliance with these provisions.

In the State of **New York**, there is a distinction between arraignment and trial commencement. Here, the people are to activate the service of any possible alibi defence by the defendant by serving upon the defence counsel not more than twenty (20) days after arraignment and filing same in court a demand for the defence to notify the people of such alibi defence. Furthermore, the defendant is required to respond and serve the people and file the same in court within a period of eight (8) days of the service of the demand on him with particulars of such defence.[44] In deserving circumstances upon good cause shown the court may extend the time for service of the notices. Upon service on the People by the defence of particulars of alibi, the People shall not later than ten (10) days serve on the defence, and file same in court the list of witnesses and their residential addresses the People will rely upon to rebut the defence. Upon good cause shown, the court may extend the time for the People. Again, failure to serve the above-demanded notice by the defence or a witness whose name was not hitherto submitted in the notice is called; it may lead to the exclusion of such testimony by the court.

X. THE UNITED KINGDOM (ENGLAND AND WALES) EXPERIENCE

The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011[45] stipulates the time limits within which the defendant may make his disclosure of an Alibi defence. Accordingly, when this disclosure is made it is important that the prosecution should investigate any potential alibi evidence prior to the commencement of trial. The Act provides for 28 days' time limits for compulsory disclosure in *Crown Court* proceedings and 14 days' time limits for voluntary disclosure in Magistrates' Court proceedings, from the day on which the Prosecutor complies or purports to comply with the initial duty to disclose.[46] This is further underscored by the ***Criminal Justice Act***.[47] The consequences of non-disclosure within the required time are that it attracts the risk of comment

[44] *The People of the State of New York, v. Franklin Rodriguez* M-2626 [1st Dept 2003 | M-2626 | N.Y.
[45] See section 5 to 6E of the Criminal Procedure and Investigations Act 1996.
[46] See section 2 of the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 2011.
[47] See section 11 of the Criminal Justice Act 1967.

and adverse inferences from the jurors or the court[48] but it will not affect the calling of the witness whose name was not disclosed.[49]

Under the Disclosure Manual[50]prior to the commencement of the trial or during committal proceedings, the (Crown) prosecution is required to trigger the defence disclosure of alibi defence by serving on the defence an initial notice containing all information/evidence whether abandoned or not with which the Crown will rely on in the proceedings. Upon receipt, the defendant is required by law to disclose any potential alibi defence together with full disclosure of all particulars to enable investigation[51].

XI. THE INDIAN EXPERIENCE

In India, the Indian Penal Code does not specifically provide for the special defence of alibi. However, it is recognized as a rule of evidence in section 11 of the Indian Evidence Act[52] which relates to facts not otherwise relevant becoming relevant for being consistent with facts in the issue. Consequently, combining this with section 103 of the Indian Evidence Act on the evidential burden of proof of particular facts, the burden lies on a defendant who wishes to rely on an alibi to raise same at the preliminary stage durian ng investigation or preliminary hearing because it is not the same as self-defence. Where the defence fails to establish the defence of alibi, the prosecution is not absolved from its duty of proving the same by positive evidence.

XII. CONCLUSION

Though the defence of Alibi appears to depart from the general norm that a defendant in a criminal case cannot be compelled to disclose the nature of his defence in the form of an advance pleading as the duty remains that of the prosecution to prove the guilt of the defendant beyond a reasonable doubt without the help of advance notice of defendant's defence. It is submitted that the case of ***Abubakar Sale v State*** is another refreshing departure from the legion of authorities which places an evidential burden of proof on the defendant raising a defence of *alibi* without considering the peculiarities and circumstances of the defendant. This authority has taken into consideration the fact that a suspect may be illiterate. It is recommended that this principle should be extended to all suspects in that literate suspects may not understand the intricate requirements and particulars of an alibi defence.[53] Courts should apply this authority

[48] See section 11(5) of the Criminal Procedure and Investigations Act 1996.
[49] See section 11 (15) CPIA 1996; *R (Tinnion) v Reading Crown Court* (2010) R.T.R 24, DC.
[50] See https://www.cps.gov.uk/legal-guidance/disclosure-manual accessed 30 March 2022 by 7:25am.
[51] See Disclosure Manual Chapter 15 on defence disclosure; See https://www.cps.gov.uk/legal-guidance/disclosure-manual-chapter-15-defence-disclosure accessed 30 March 2022 by 07:30am.
[52] Indian Evidence Act 1872; See *Binay Kumar Singh V The State of Bihar* (1997) 1SCC 283.
[53] This is not to say that ignorance of the law is an excused. What is argued is that the suspect must be guided to

in appropriate cases[54] and counsel for defendants should also take advantage of this authority. The police should be further trained to appreciate the duties on them when a defendant in their custody whether oral or in writing discloses a potential alibi defence.

Finally, it is further recommended that there should be the codification of the Alibi defence as we have in the foreign jurisdictions considered in this work. The National Assembly and State Houses of Assembly must as a matter of urgency enact laws to reflect the minimum number of days within which an alibi defence must be disclosed and the contents of the information or particulars to be disclosed by the Defendant and his counsel to the Police or other law enforcement agencies before the commencement of the trial.

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comply with requirements of particulars to meet the law on *alibi*. See *EFCC v Fayose* (2018) LPELR 44132.

[54] This is a binding precedent for lower courts based on the doctrine of *stare decisis*. See *Equitorial Trust Bank Ltd v Agada* (2016) LPELR 40792, *Bogoro Local Government Council v Kyauta* (2017) LPELR 43296, *FRN v Saraki* (2017) LPELR 43392, *Umar v APC* (2018) 18 NWLR (Pt. 1650) 139.

 [ISSN 2581-5369]