80/76

COURT OF APPEAL (ENGLAND)

R v SULLIVAN

Salmon LJ, Phillimore and Nield JJ

1 June 1970 — [1971] 1 QB 253; [1970] 2 All ER 681; [1970] 3 WLR 210; 134 JP 583; 114 Sol Jo 664; 54 Cr App R 389

EVIDENCE – ALIBI EVIDENCE – PARTICULARS NOT GIVEN WITHIN "PRESCRIBED PERIOD" – LAPSE OF PRESCRIBED PERIOD GENERALLY NOT IN ITSELF GROUND FOR REFUSING TO ADMIT – WHETHER COURT IN ERROR IN REFUSING TO ADMIT ALIBI EVIDENCE: *CRIMINAL JUSTICE ACT* 1967 (UK), s11(8).

The appellant was charged at the Quarter Sessions with dangerous driving and did not challenge the prosecution's evidence but claimed he was not driving the subject car and that it was not his car and relied on alibi evidence. The appellant had failed to give notice of alibi within the prescribed period. Counsel for the prosecution argued that one of the primary purposes of the requirement to give notice was that the defendant should have a limited time in which to exercise their ingenuity for the purpose of inventing an alibi. The Chairman accepted that argument and refused permission to call the alibi witnesses on the ground that the information supplied in the notice was given too late.

[Ed note: The English Legislation for alibi evidence was virtually reproduced in the Victorian *Crimes Act* 1976 – Act 8870 Section 4, which inserted the relevant Sections 399A and 399B into the *Crimes Act* 1958,and sub-s6A & 6B of s59 in addition to (da), (db),(dc) of sub-s(1) of s78 of the *Magistrates (Summary Proceedings) Act* 1975). However, the "prescribed period" for the notice is ten days in Victoria.]

HELD: Appeal allowed. Conviction quashed.

1. Where particulars of evidence relating to an alibi have not been given within the period prescribed by s11(8) of the *Criminal Justice Act* 1967, the discretion of the court of trial with regard to allowing or prohibiting the evidence to be given at the trial must be exercised judicially. The mere fact that the necessary information was not given within the prescribed period (seven days) does not by itself, as a general rule, justify the court in refusing permission for the evidence to be called.

2. If the case for the prosecution was that the information contained in the particulars of evidence given was spurious, they should call evidence to that effect.

***Semble*, the prosecution may waive compliance with the requirements of the statute, e.g. by obtaining an adjournment for the purpose of investigating the information.**

SALMON LJ: *[After stating the facts which are sufficiently indicated in that part of the judgment reproduced below, the Lord Justice continued:]* … 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 the 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 realised 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. The mere fact that the necessary information has not been given within the seven days does not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for the evidence to be called. This Act introduced a most salutary provision into the criminal law for the purpose of seeing that justice should be done. In the past some defendants had at the last moment produced seemingly reputable witnesses to speak to an alibi and thereby secured an acquittal. Subsequently, it was discovered that these seemingly respectable witnesses were, in fact, entirely disreputable and that their evidence had been entirely false. Therefore, so that the Crown might have an adequate opportunity of making inquiries as to the character and antecedents of the proposed alibi witnesses and also of investigating the story which they proposed to tell, this section was enacted.

It is, however, very important that the safeguards contained in the Act shall be observed before the evidence of alibi witnesses is excluded. From the evidence which was before the court at the time when the Chairman was asked to rule whether or not he would allow the alibi evidence to be called, it appeared that all the particulars required by the section had been supplied by the appellant's solicitors to the prosecuting solicitor in their letter of June 11, 1969. It must be remembered that when the case was first called on for trial on June 11, the prosecution applied for an adjournment until July 1 for the purpose of investigating the information contained in the letter of June 11. That application was granted. In these circumstances this Court considers that it was indefensible to refuse permission to call the witnesses on July 1 on the sole ground that the statutory information was not given until June 11. If it was called late, then the delay was waived by the prosecution when they asked for an adjournment until July 1 so that they might investigate the information. In any event it is plain that, the appellant being unrepresented until June 9, it would be very difficult, if not impossible, to hold that the information supplied on June 11 was supplied so late that the delay in supplying it could justify the court exercising its discretion so as to refuse permission to call the alibi witnesses – especially as the prosecution had been given the time for which they had asked in order to investigate the information.

On the face of the only evidence before the Chairman, this Court has no hesitation in concluding that the Chairman wrongly exercised his discretion in excluding the alibi evidence on the ground which he gave, namely, that it had been supplied too late.

The case, however, is disquieting for these reasons. Mr Leach, who has given the Court the greatest possible assistance, tells us, on instructions, that the first witness referred to in the Letter of June 11 was approached by the police and an appointment was made to see him, which he did not keep. Then another appointment was made for him to see the police, which again he did not keep. Mr Leash's instructions are that as far as the second witness, Mr Sheppard, is concerned, the address given was the address where he had formerly lived with his wife, that he had parted from his wife and could not be traced. As far as the third witness is concerned, Mr Leach's instructions are that the address given was an entirely fictitious address. Mr Leach is also instructed that the police notified the appellant through his solicitors that they had been unable to trace or to interview any of the three alibi witnesses mentioned in the Letter of June 11 and asked for further information, but that they were met with a blank refusal by the appellant's solicitors to give any further information.

If, on the issue whether or not permission should be given to call alibi witnesses, the case for the prosecution was that the information contained in the Letter of June 11 was spurious or useless, the prosecution should have called evidence to that effect. This would have given the defence the opportunity of cross-examining the witnesses who came to say that Mr Robinson had to keep an appointment with the police, and the witnesses who claimed that Mr Sheppard could not be traced and that Mr Fleming's supposed address was fictitious. Moreover, it would have given the defence an opportunity of testing by cross-examination the very serious allegation which was made against the appellant's solicitors, namely, that they point-blank refused to give any further information, even after they had been told that the information in their Letter of June 11 was wrong. Not only would the defence have had an opportunity of testing the evidence of the prosecution, but they would also have had an opportunity of calling evidence of their own to refute the allegations being made by the prosecution.

This section of the Act of 1967 takes away what was formerly an absolute right of a defendant to call evidence to support an alibi. It took that right away for good reason, but it protected the defence by making sure that the defence could be deprived of that right only in the circumstances specified by the statute.

In this case the appellant's solicitors wrote the Letter of June 11 which, on the face of it, gave the information required by the statute. If the Crown desired to exclude the alibi evidence on the ground that the information given in the Letter of June 31 was wrong, it was essential, in the view of this Court, that the prosecution should prove that that information was wrong. There was a vague suggestion that some of the information was inaccurate, but no attempt was made to call any evidence to prove that it was. Indeed, the submission by the prosecution was quite different. It rested on the rather bizarre contention that, although the trial had been postponed from June 11 to July 1 at the request of the prosecution to enable them to have an opportunity

of investigating the information, the fact that the information was given on June 11 put it so far outside the seven-day period contemplated by the statute that, on that ground alone, the court was justified in exercising its discretion to refuse leave to call the alibi evidence.

Clearly, that decision cannot possibly be supported and it was on that ground alone that the court decided to exclude the alibi evidence. As already indicated, the case is somewhat disquieting because, one cannot help being left with the suspicion that, if the case for the prosecution had been differently conducted and the evidence to which I have referred had been called, it may be – we express no view whether it would have been so – that the prosecution could have proved that the information was indeed inadequate.

However that may be, there was no evidence before the court to the effect that the information was inadequate. In these circumstances and for these reasons this Court has come to the conclusion that the appeal must be allowed and the conviction quashed.
