Neutral Citation Number: [2021] EWCA Crim 122

Case No: 202001148 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT BRADFORD
MR JUSTICE GOSS
T20197206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2021

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE WHIPPLE DBE
and
MR JUSTICE FORDHAM

- -

Between :

Robert WAINWRIGHT	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr Adam Kane QC (instructed by **Harris Solicitors**) for the **Appellant**
Mr Richard Wright QC & Mr Simon Clegg (instructed by **CPS Appeals Unit, Special Crime Division**) for the **Respondent**

Hearing dates : 26th January2021

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Approved Judgment

Lord Justice Fulford V.P. :

Introduction

1. On 10 March 2020, in the Crown Court at Bradford (Goss J), the applicant (now aged 27) was convicted of murder (count 1).

2. On 11 March 2020 he was sentenced to life imprisonment and the period of 25 years, less 245 days spent on remand, was specified as the minimum term under section 269(2) Criminal Justice Act 2003.

3. He had various co-accused. Raheel Khan and Suleman Khan were convicted on count 1. Shoaib Shafiq and Kalim Hussain were convicted on count 3 (assisting an offender). Junaid Hussain and Stephen Queeney were acquitted on count 1 and count 2 (manslaughter).

4. The present application for leave to appeal against conviction has been referred to the full court by the Registrar.

5. The central points taken on behalf of the applicant are that the directions by the judge under section 34 Criminal Justice and Public Order Act 1994 ("section 34") and *R v Lucas* [1981] Q.B. 720; (1981) 73 Cr App R should not both have been given and that each was in any event inadequate. It is submitted the judge should have given a (full) *Lucas* direction.

The Facts

6. In the early hours of 1 July 2019, after a call from a member of the public, police officers discovered the body of Mohammed Feazan Ayaz ("Fizzy") naked at the side of a road in the Allerton area of Bradford. He was 20 years old and he was formally pronounced dead at 4.40 am.

7. A post-mortem examination revealed that the deceased had been subject to multiple blunt force impacts to the face and head. He had deep bruising to his scalp, extensive soft tissue bruising to the face, two black eyes, bruising to his ears, multiple lacerations on his face and in his mouth, a large laceration to his forehead consistent with having been hit with a blunt object, and a patterned injury to the forehead that could have been caused by the sole of a shoe stamping on him. There were incised wounds, inflicted by a sharp object such as a knife or piece of glass. The deceased had bruising to his testicles, consistent with having been forcefully kicked. There was bruising to the anal margin, as if an object had been forced into his anus. A hard white substance – molten plastic – was found on the deceased's back and buttocks. The blows to Mohammed Ayaz's head had led to bleeding inside the brain and, in due course, to his death.

8. The circumstances in which these terrible injuries had been inflicted can be shortly described. During the evening the night before (30 June 2019), Mohammed Ayaz had been with two friends when he had received a call from Raheel Khan ("Rally"). He was asked to deliver some water, cigarettes and cannabis to Raheel Khan's business unit (Unit 2, Denholme Business Centre). He was dropped off at the unit at 8.32 pm.

9. Raheel Khan had been running a Class A drug supply operation from the business unit. CCTV film footage was recovered from the Business Centre. Although the equipment did not cover the inside of Unit 2, significant aspects of what occurred outside the building were filmed.

10. The footage showed the arrival of Mohammed Ayaz, by which time Raheel Khan, Suleman Khan, Akaash Rafiq, Junaid Hussain and the applicant were already present. Akaash Rafiq is an outstanding suspect who has not yet been located by police. Mohammed Ayaz remained inside Unit 2 until 10.15 pm when he was filmed coming out of the building. He was unsteady on his feet and he collided with various walls. Given what happened thereafter, he regrettably walked back in the direction of Unit 2, and he was filmed being attacked by Suleman Khan and dragged back inside the unit.

11. Evidence of what happened inside Unit 2 is derived from video clips recovered from the mobile telephone of Raheel Khan. These showed that Mohammed Ayaz was stripped naked, tortured and humiliated. In one section of the film he begged to be allowed to die. Other footage shows the applicant pouring liquid over the victim after he had been choked to unconsciousness and at 11.13 pm the applicant urinated on him.

12. His body was removed from the business unit wrapped in a sheet just after 2 am on 1 July 2019 when Raheel Khan, Akaash Rafiq and the applicant dragged Mohammed Ayaz outside and lifted his body into a car.

13. On the basis, *inter alia*, of this sequence of events, the prosecution alleged that the applicant had participated with his co-accused in the attack on Mohammed Ayaz in the Unit, intending to cause him at least really serious bodily injury.

14. The appellant suggested that he worked for Raheel Khan's drug dealing business and was paid £500 per week. He answered the telephone and organised street deals. As regards the present events, the applicant's case at trial – in contrast to his position when interviewed (see [17] below) – involved his acceptance that he was at the business unit during these events. He maintained he had been asleep, certainly for part of the incident. He did not realise Mohammed Ayaz was going to be attacked. He had been involved in dragging him back into the business unit after he had been attacked by Suleman Khan. He poured water on the victim to bring him round after he had been subjected to a choke hold. Although he maintained that during the attack, he was in another room arranging drug deals on the telephone, he admitted that when he entered the main room he was instructed to assault Mohammed Ayaz. He urinated on the victim, having refused to hit him. The matters summarised above constituted, on his account, the extent of his involvement in the attack. After the assault, he cleaned up the scene using a mop, as one of his jobs was to keep the business unit clean. The deceased's body was wrapped in a sheet and the applicant helped carry it and place it in a car. He believed Mohammed Ayaz was alive at this stage but he was unaware of what was going to happen to him.

15. Raheel Khan gave evidence in which he admitted using violence on the victim, whilst denying intending to cause him really serious harm. Suleman Khan also testified and accepted he used violence on Mohammed Ayaz, but maintained that this was under compulsion and in any event he had not intended to cause really serious harm. He gave evidence that the applicant punched and kicked Mohammed Ayaz and inserted a mop into his anus.

16. Junaid Hussain, Stephen Queeney, Shaoib Shafiq and Kalim Hussain did not give evidence.

The Grounds of Appeal: the *Lucas* and section 34 directions

17. During his first interview under caution on 8 July 2019, the applicant said he had not been present at the scene or involved in the assault on the deceased. He claimed he had not assisted in moving the body or in cleaning the Unit. When shown some of the film footage summarised above, he said he had been mistaken for his twin brother. At trial, the applicant accepted he had lied to the police during this first interview. He gave an explanation for his lies as being, first, that he did not consider the police would believe him because of his past relationship with them, and second, he said he had not wanted to be labelled a grass, since he was fearful of how such a person is viewed in prison. Furthermore, he suggested his consumption of cannabis had affected his memory of these events.

18. During his second interview under caution on 9 July 2019, the applicant did not answer any of the questions. At trial, he said this was because he had received legal advice to remain silent.

19. In submissions by Mr Kane Q.C. to the judge as to the legal directions that should be included in the summing up, it was contended on the applicant's behalf that it was inappropriate for the jury to be directed that it was open to them to draw an adverse inference from the applicant's failure to mention facts in interview, which he later relied upon in his evidence pursuant to section 34. It was suggested that a section 34 direction should not be given, and if a choice needed to be made, it was more appropriate to give a Lucas direction. It was suggested that otherwise there was a risk of a proliferation of directions as to inferences that would be unhelpful for the jury.

20. The prosecution submitted that the judge should only give a section 34 direction. It was submitted that this would be consistent with the course that was to be taken in Suleman Khan's case, and it encapsulated the applicant's position as to why he had not mentioned his true defence in interview.

21. Section 34, as relevant, provides:

> "**Effect of accused's failure to mention facts when questioned or charged.**
>
> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> […]
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—
>
> […]

> (d) the court or jury, in determining whether the accused is guilty of the offence charged,
>
> may draw such inferences from the failure as appear proper."

22. A full direction in accordance with *Lucas* is usually given by the judge whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant's credibility. This direction is to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant (but cannot of itself prove guilt) if the jury are satisfied that the lie was deliberate, it related to a material issue and the motive for the lie must be a realisation of guilt and fear for the truth. The jury need to be directed that there may be reasons for the lies which are not connected with guilt of the offences charged. In this context, the jury should, in appropriate cases, be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Put in summary form only, a *Lucas* direction is usually not necessary if there is no distinction between the issue of guilt and the issue of lies. But it is necessary when on some collateral matter, and due to some change in evidence or account by the defendant, there is scope for drawing an inference of guilt from the fact that the defendant had told lies (see *R v Wilsher* [2021] EWCA Crim 121 [at 57].)

23. In the event, the judge gave both directions. They were delivered on 3 March 2020 at the same time and were in the following terms:

> "[…] The defence say that these convictions are relevant as to what he says his reasons were for lying to the police in his first interview on the 8th of July, and by way of explanation, for not wanting to be a grass and remaining silent in the second interview on the following day, agreed fact 66, and the records of his interview are in s.23 of your bundle.
>
> In his evidence he accepted that he told untruths when he was interviewed by the police; in other words, lies. His reason, he said, was that this was just the relationship that he has and had with the police since he was young, every time he speaks to a policeman he just goes quiet. He also didn't want to identify anyone, because he didn't want to be labelled a grass, being fearful of how a grass is viewed in a prison community.
>
> Well, he did lie in his first interview. In brief summary, and it is no more than a summary for you can read the interviews for yourselves again, he said he was not involved in the death, he did not assist in moving the body or cleaning, he had no information about what had happened and was telling the truth. He said he was with his missus, or sofa surfing, and had no contact with anyone involved in the murder. He might have been at the business centre between 7 and 10 p.m. on the 30th of June, but he didn't have any phone contact. When he was confronted with the CCTV footage he said that this was his brother (Inaudible) to be seen and not him, and he accepted as I have said in his evidence to you that he had deliberately lied. He thought that Stephen Queeney had got rid of the CCTV and everyone else would be confident that he would not "Spill the beans", to use his phrase.
>
> The prosecution case, that it was in furtherance of the agreement to say nothing about involvement in the incident that was reached with Raheel Khan and Suleman Khan that he'd told these lies, seeking to protect themselves -- that's all

three of them -- and others in what happened when he told the lies. The prosecution say that this was the reason for his lying, and not the reason that he has told you.

The fact that someone tells a lie, or lies is not necessarily evidence of guilt; sometimes a defendant will lie for some reason other than his guilt of the crime of which he is accused. He said, as I have reminded you, he lied because he, in effect, didn't want to be labelled a grass. If you are sure that the reasons he gives were not the reason for his lies, then you may use his lies as evidence for support of the prosecution case, but he should not be convicted, wholly or mainly, on the basis of a finding that he has lied.

In his evidence to you he, like Suleman Khan, also relies on something that he never mentioned when he was interviewed. He admitted his presence and taking some role in the events surrounding the violence, albeit essentially limited to urinating on Mohammed Feazan Ayaz, as I shall remind you, but he says he only did so because he was, or felt compelled to act as he did.

So, what I said to you in relation to Suleman Khan about your being entitled to draw an inference adverse to him by reason of his failure to mention this fact also applies in his case, if you are satisfied that those criteria entitle you to draw an inference that I have reminded you of a few minutes ago are met.

He too, like Suleman Khan, in relation to his silence in his second interview -- he did of course answer questions in the first interview, albeit untruthfully -- now says he had received legal advice not to answer questions, which he acted on. In his case as well, therefore, if you accept his evidence that he was so advised, it does not automatically prevent you from drawing any conclusion from his silence, provided the criteria to which I have referred are met."

24. However, these directions relating to the applicant cannot be viewed in isolation. There had been a section 34 direction on three prior occasions during the summing up in the context of two of the applicant's co-accused.

First, on 25 February 2020:

(**Raheel Khan**) "Now, as part of his defence, Raheel Khan has admitted using violence himself on Mohammed Feazan Ayaz, but he has also relied upon some things that he did not mention when he was questioned; namely, the role of Suleman Khan in the violence, by kicking him after he had been dragged into the unit, striking him on the head with a bottle and inserting a bottle into his anus. The reason he gave for this in his evidence to you for not having mentioned these matters, was that he wasn't wanting to implicate anyone else; he only wanted to talk about himself in the interviews.

The prosecution say that the reason was because he was actually engaged in a damage limitation exercise, and acting in furtherance of the agreement that they, he and his fellow defendants, had reached that none of them would say anything, and certainly not anything that implicated anyone else.

> His failure to mention these matters may, in the words of the caution that you heard is given to every suspect when they are being interviewed, harm his defence. This is because you may draw the conclusion from his failure to mention the facts in interview that he now mentions, that he has tailored his account to seek to divert responsibility from himself and attribute it to others as part of his defence to the charge of murder. You may only draw that conclusion if you think it is a fair and proper conclusion, and you are satisfied about three things:
>
> First, that when he was interviewed he could reasonably have been expected to mention these facts that he now mentions.
>
> Second, that the only sensible explanation for his failure to mention the facts, is that he had no answer at the time to explain his and the role of others, or none that would stands up to scrutiny.
>
> Third, apart from his failure to mention these facts, the prosecution case as put to him in interview was so strong that it clearly called for an answer by him.
>
> Now, if you do draw the conclusion to which I have said you may come, it is entirely for you whether you do or not, you must not convict him, wholly or mainly, on the strength of it. You may, however, take it into account as some additional support for the prosecution's case when deciding when his evidence about these facts is true."

Second, later on 25 February 2020:

> (**Suleman Khan**) "As part of his defence Sully, Suleman Khan, has also relied upon some things that he did not mention when he was questioned. Namely, that he had video-recorded some of the events in the unit relating to Mohammed Feazan Ayaz and himself abused him, but that he had only done this because he was compelled to do so and that he didn't want to harm him in any way, or to cause him any harm.
>
> Now, his failure to mention any of this may, as I directed you in relation to Raheel Khan, harm his defence. This is because you may draw the conclusion from his failure to mention these facts in interview, that he has now tailored his account to seek to divert responsibility from himself onto others, and of course to deal with the evidence that is incontrovertible; namely, what is to be seen on the videos themselves.
>
> You only draw that conclusion if you are satisfied that those criteria to which I referred about your drawing such an inference are met, and I repeat, if you do draw that conclusion you must not convict him wholly or mainly on the strength of it, but you may take it into account as some additional support for the prosecution's case and when deciding whether the defendant's evidence about these facts is true.
>
> He has also given evidence that he did not answer questions on the advice of his legal representative. What is said between a solicitor and his client is confidential, and you are not entitled to know what that advice was. If you accept his evidence that he was so advised, that is obviously an important consideration, but it does not automatically prevent you from drawing any conclusion from his failure to

> mention those matters to which I have referred; bear in mind that a person given legal advice has the choice whether to accept it, or reject it. He was warned that any failure to mention facts which he later relied on at trial might harm his defence.
>
> He said that a second reason that he did not answer questions was that he was scared; he didn't want to be a grass, someone might turn up at his house. He said that he was prepared to give names in the trial, because he had seen what other people were saying about him and he had decided to tell the truth. Under cross-examination by Mr Wright, he accepted that he could have told the police what he knew, and it was his decision to remain silent."

Third, on 3 March 2020 when the summing up resumed the judge repeated this direction in relation to **Suleman Khan**, and he amplified the third direction as follows (the additional wording is reflected in the italicised passages):

> "[…]
>
> You only draw that conclusion if you are satisfied that those criteria to which I referred about your drawing such an inference are met, and *the conclusion – that the criteria that have to be met I remind you, because it is a week since I told you what those criteria were. First, that when he was interviewed he could reasonably have been expected to mention these facts. Second, that the only sensible explanation for his failure to mention the facts is that he had no answer at the time to explain his and the role of others, or none that could stand up to scrutiny. And third, that apart from his failure to mention those facts, the prosecution case as put to him in interview was so strong that it clearly called for an answer by him.*
>
> *As I said to you in relation to Raheel Khan you* - if you do draw *a conclusion adverse to him in respect of this,* you must not convict him wholly or mainly on the strength of it, but you may take it into account as some additional support for the prosecution's case and when deciding whether the defendant's evidence about these facts is true*, or not*.
>
> […]"

The directions in relation to the applicant were, as set out above, on 3 March 2020 and are to be found on six pages in the transcript after the repeated directions in relation to Suleman Khan. That is the context for the judge's reference to "*what I said to you in relation to Suleman Khan*" and "*a few minutes ago*".

25. In support of this application, Mr Kane, in outline, submits that the judge should not have adopted the course that he did in relation to the applicant and that, in any event, the terms of the *Lucas* and the section 34 directions as given by the judge were deficient. The directions were excessively truncated and failed to provide the protections that should accompany them. It is submitted that the applicant had advanced a case that depended upon the jury accepting that his account in evidence was or may be true. He denied sharing the joint enterprise intent to kill or to cause really serious bodily harm and he asserted that what he did (in particular urinating on the deceased) was the least harmful action open to him, given the situation in which he found himself. His credibility was central to the jury's

consideration of this case, and it is submitted the judge's directions undermined his account to an extent that means his conviction is unsafe.

26. In light of the authorities to which we will turn in a moment, it is suggested that this was an "*either/or*" case, and the judge should either have given a *Lucas* or a section 34 direction, but not both. It is highlighted that the prosecution had not taken the applicant, item by item, through the various elements of this defence on which he relied at trial but had failed to mention in interview. Furthermore, it is argued that the authorities tend to indicate that it is not appropriate to give a section 34 direction as regards facts that are accepted to be true. In this context, the applicant suggests it was common ground (bearing in mind the film footage) that he had been at the Unit, he urinated on the deceased and he helped dispose of his body. In these circumstances, it is contended that the section 34 direction could "*only apply to his denial of participation*" which was something the appellant had always accepted, following his first interview. Therefore, the section 34 inference was little more than a comment on or a restatement of the ultimate issue. Finally, it is argued that the section 34 direction was lacking in necessary detail, in that the judge failed to specify any of the particular matters relied upon and what were said to be the steps the jury needed to follow in examining the lies or omissions, along with the limited use to which they might be put.

27. As to the *Lucas* direction, it is submitted that this was the appropriate direction: the lies were admitted and that the appellant had on any view misrepresented the position as regards his involvement. Critically, it is contended that the judge only gave a truncated direction, omitting vital aspects of the protection which are inherent in a full rehearsal of the matters that are conventionally brought to the attention of the jury.

Discussion

28. This court has previously addressed the situation when a section 34 and a *Lucas* direction are given in the course of the same summing up. Given the arguments raised on this application, the useful starting point is *R v Hackett* [2011] EWCA Crim 380; [2011] 2 Cr App R 3, which was summarised in *R v Spottiswood* [2019] EWCA Crim 949 [41] as follows:

> "41. Hackett concerned the alleged involvement by that appellant in a bomb attack. The court focused on the denial by the appellant when first interviewed that he had visited a petrol station to buy petrol at a highly relevant time, albeit that in a later interview he admitted that this had occurred. He suggested that he had purchased the petrol to use in a strimmer. In Hackett the two directions related to the trip to the petrol station which, it was accepted, had occurred. In those circumstances, the sole issue in this context was the failure on the part of Hackett to mention in the first interview the purpose of travelling to the petrol station, namely, to buy petrol for the strimmer. Against that factual background, the Court of Appeal (in *Hackett*) explained:
>
> > "25. ... A section 34 direction invites the jury to draw an adverse inference as to the truth of a fact relied upon by the defence from the defendant's failure to mention it earlier without reasonable explanation. The adverse inference is that the fact is the product of more recent invention and false. By way of contrast, the purpose of a Lucas direction is to protect a defendant by reminding the jury that lies may be told for a number of innocent reasons, such as in order to bolster a true defence; they should not jump to the conclusion that because the defendant lied he is guilty.

> 26. But ... it may well be unnecessary to give both directions. If the factual context of the case is such that the defendant is entitled to the protection of a Lucas direction then that protection can be incorporated in the section 34 direction. If a defendant gives an explanation for his failure to mention a fact and the same explanation for what is contended to be a lie then that explanation can and should be incorporated into the section 34 direction. Unless the jury rejects that explanation then it cannot draw an inference adverse to the defendant. Unless the jury rejects the defendant's explanation for his lie it will have little, if any, significance. If the jury takes the view that the defendant's explanation for telling the lie may be true, its only significance will be as to credibility and, generally, it will be of no use to draw to the jury's attention that limited utility. On the contrary, directing the jury as to both the effect of section 34 and lies is likely to complicate and confuse.""

29. It is important to note that in *Spottiswood* the court went on to observe at [42] "*The circumstances of the instant case are to a material extent different to the situation which faced the court in Hackett. The judge in the trial with which we are concerned gave the two directions in relation to what he was entitled to view as issues that were (at least partially) distinct*". The lies direction in *Spottiswood* related to the accused's wholesale denial in interview of knowing anything about the circumstances of the offence; that was an admitted lie which, standing alone, would properly merit a direction in accordance with *Lucas*. In contrast, the section 34 direction concerned the defendant's emerging account as to what he said had occurred, leading to the death of the victim. In relation to that detailed account, it was necessary to direct the jury that it was open to them to draw the adverse inference that these suggested facts had not been mentioned earlier because they were the product of recent invention and they were false. Similarly, in the present case the two issues were clearly interrelated but the explanations for the lies in interview and the accused's explanation for his failure to mention in interview any of the circumstances he set out in his defence statement and in his evidence were not the same. The explanation for the lies in the first interview were his previous relationship with the police and his fears of being viewed as a grass. His explanation as to his failure to mention in the second interview matters later relied on was that he was following the advice of his lawyer.

30. In the context of the current application, these differences undoubtedly justified the judge giving separate directions. They were appropriately delivered at the same time in order for the jury to understand the relationship between them. Indeed, a single combined direction could potentially have been complicated and confusing.

31. We stress the observation by Auld LJ in *R v Rana* [2007] EWCA Crim 2261 that these decisions are in every case a matter for judgment by the trial judge, bearing in mind the context and the precise issues in play in the case (see [11]). Furthermore, it needs to be remembered that the court in *Hackett* was dealing with a very particular set of circumstances. The court was concerned with a "*straightforward situation*": where a defendant had failed to mention matters on which he later relied, by telling in interview what was contended to be a lie, and by giving "**the same explanation**" for his failure to mention a fact **and** for what was contended to be a lie (*Hackett* at [26]). There was no "*no-comment*" interview, with or without legal advice. There were no directions in relation to co-defendants. Indeed, no *Lucas* direction or component was appropriate: the nature of the alleged lie and the implications for the defendant's guilt meant "*there was no warrant for protecting the defendant from the consequences of his lie*" (see [28]).

Clearly in the "*straightforward situation*" described above, a single direction – appropriately modified, if necessary, to "*combine* [..] *the Lucas and section 34 directions*" – will be preferable (see *Spottiswood* at [45] and the Compendium Part 1 December 2020 at page 16-9, paragraph 12). Having said that, it will be a matter for the judge to decide whether to give two separate directions or to incorporate the section 34 and the *Lucas* considerations into a single direction, depending on the facts and the circumstances of the case. Since this is a matter essentially for the judge to determine, in the absence of demonstrable unfairness, whether the judge gives a separate or a dual direction is, in either case, unlikely to found a sustainable ground of appeal.

32. We stress, however, that we do not seek in any sense to dilute the guidance provided in *Rana* and in *Hackett*, to the effect that when it is feasible and convenient it is preferable to combine the two directions. As Auld LJ observed in *Rana* at [11]:

> "[…] (the) authorities indicate the considerable potential for overlap between a lies direction and a section 34 direction, where both may be considered appropriate. They also indicate how a court should approach the matter. The choice between one or another and as to how to deal with it, by way of modification or otherwise, are in every case a matter for judgment of the trial judge according to the circumstances and the precise issues in play in the case. It seems to us, given the way in which thinking has developed […], that, whilst, in any particular case, both may be appropriate, or one may be slightly more appropriate than the other, it is unhelpful to a jury to be given both directions out of an over-abundance of caution. We consider that the better course is to select the one or other that seems to be the more appropriate to the case and, if necessary, as the judge did here, modify it to meet the particular circumstances."

33. Whichever course is adopted, the judge must ensure that the core protections necessary for both directions are covered. For lies that may support the prosecution case, it is necessary to direct that there may be reasons for the lies which are not connected with guilt of the offences charged. In this regard, in *Lucas*, Lord Lane C.J. observed at page 724 that "*The jury should* ***in appropriate cases*** *be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family"* (our emphasis). Although setting out these three distinct potential explanations for the lie or lies is often a useful way of illustrating why a lie may not be supportive of guilt, a formula of this kind, as Lord Lane stated, should (only) be used in "*appropriate cases*". The examples given in *Lucas* are not a magic formula that must be deployed in every case regardless of the circumstances, and sometimes referring to them may be misleading. For instance, shame may be an irrelevant consideration, or the accused may not have any relevant family connections. Instead, the judge must concentrate particularly on any explanation that has been given for the lie and direct the jury, as just set out, that they need to consider whether there may have been an "*innocent*" reason for the lie, using general examples if that will assist. We stress, therefore, that whenever there is a difference between the reason for the lies in interview and the failure to mention something on which the defendant has relied in court, it is critical that the judge reminds the jury that there may be reasons for the lies which are not connected with guilt of the offences charged.

34. For the protections relevant to section 34, the judge must direct the jury that the prosecution's case at the relevant time should clearly have called for an answer and that they need to be sure there was no sensible explanation for the failure by the accused other than that he or she had no answer at the time or none that would stand up to scrutiny.

Furthermore, they should only draw an adverse inference if it is fair and proper and, in any case, they must not convict the accused wholly or mainly on the strength of it.

35. In this case, we consider that the judge dealt with the position entirely fairly. He explained to the jury why the lie in the first interview was said to be supportive of the prosecution's case, namely that there was a suggested agreement between the applicant, Raheel Khan and Suleman Khan to deny any involvement in the incident in order to protect themselves. The judge thereafter directed the jury that the fact that someone tells a lie is not necessarily evidence of guilt, and that sometimes a defendant will lie for some reason other than his guilt of the crime of which he is accused. He reminded the jury why the applicant told the jury he had lied, because of his enduring relationship with the police which has the result that that every time he speaks to a policeman "*he just goes quiet*" and because he did not want to be "*labelled a grass*". The judge directed the jury that if they were sure that the explanation he had given were not the reason for his lies, then it was open to them to use his lies as evidence supporting the prosecution case, but he should not be convicted, wholly or mainly, on the basis of a finding that he has lied. Contrary to the submissions of Mr Kane Q.C. for the applicant, we consider that this provided all of the protections that were necessary, and that further elaboration would potentially have been unnecessary or confusing.

36. As regards section 34, the judge gave somewhat more expanded directions when dealing with the cases of Raheel Khan and Suleman Khan, to which he expressly referred the jury when dealing with the applicant. The judge set out that the applicant had not revealed when interviewed that he had been involved in the incident, *viz.* he had been present for part of the attack and he urinated on the victim, he assisted in moving the body and he cleaned the Unit afterwards. The judge directed the jury that they were entitled to draw an adverse inference by reason of failure to mention these factors, applying the following generic approach:

> "First, that when he was interviewed, he could reasonably have been expected to mention these facts that he now mentions.
>
> Second, that the only sensible explanation for his failure to mention the facts, is that he had no answer at the time to explain his and the role of others, or none that would stands up to scrutiny.
>
> Third, apart from his failure to mention these facts, the prosecution case as put to him in interview was so strong that it clearly called for an answer by him."

37. The judge directed the jury that if they reached that conclusion, they should not convict him, wholly or mainly, on the strength of it. Instead, it provided some additional support for the prosecution's case when deciding whether his evidence about these facts was true. The judge set out the explanation the applicant gave for his silence in the second interview, to the effect that he had received legal advice not to answer questions, which he acted on. The judge properly directed the jury that even if this explanation was correct, it did not automatically prevent them from drawing an adverse inference from his silence because a person given legal advice has the choice whether to accept it or reject it. The applicant had been warned that any failure to mention facts which he later relied on at trial might harm his defence. Again, we consider this was a wholly correct direction and that it was unnecessary for the judge to repeat the entirety of the requirements when he addressed the same issue in the individual cases of the applicant, Raheel Khan and Suleman Khan. He

referred to "*what I said to you in relation to Suleman Khan about your being entitled to draw an inference adverse to him by reason of his failure to mention …*" including "*those criteria*", of which he rightly said the jury had been reminded "*a few minutes ago*".

38. This was not a case in which a section 34 direction was unnecessary, in that this was not a situation when an adverse inference could only be drawn after guilt had been established. Instead, if the jury were sure his explanation for not mentioning his presence at the Unit during the interview was untrue, they could use this conclusion as some support when deciding whether they were sure that he had been involved in the joint enterprise attack, intending the victim at least really serious bodily harm.

39. It follows that, on analysis, we consider the judge's decision to give separate directions was entirely sustainable and that they were wholly appropriate in their terms. What the judge did was to address the lies and section 34 aspects of the applicant's first interview (when the applicant had failed, by telling lies, to mention the "*limited coerced role*" on which he later relied) (see example 3 in the Compendium Part I, page 16-9 paragraph 12) and to address the section 34 aspects of the applicant's second interview (no-comment, with legal advice).

40. It is worth having in mind, as the judge clearly did, that the jury had been given section 34 directions in respect of Suleman Khan (who raised a defence involving a "*limited coerced role*" having given no-comment interviews with legal advice) and Raheel Khan (who raised a defence involving matters not mentioned in his interviews, but this was not said to be a failure to mention matters by telling admitted or demonstrated lies). The judge needed to give appropriate directions which provided clarity and avoided confusion, in the context of directions given in the case of the co-defendants.

41. Finally, the fact that the prosecution was advocating only a section 34 direction and the defence only a *Lucas* direction did not make this an either/or case. This was a matter for the judge to decide and the course he adopted was entirely sustainable.

42. These grounds of appeal are without proper foundation and we dismiss this application.

Postscript

43. With respect to the experienced trial judge, we highlight two matters to be borne in mind for future cases, albeit they have no effect on the outcome of the present application:

    a) The judge set out the burden of the directions in law in writing for the jury's assistance in a commendably clear manner. It would have assisted if the generic elements of the section 34 direction, along with the *Lucas* direction as regards the applicant, had been included in the written directions, notwithstanding the fact that they were introduced into the summing up at a later stage than the other directions.

    b) The judge seemingly overlooked that he had indicated that his proposed directions on these two issues would be provided to counsel in written form in advance. This would have assisted in addressing any concerns as to the approach to be taken, albeit, as set out above, we consider the judge dealt with the matter in a wholly appropriate manner.