

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 228



No. 202301956 B4

Royal Courts of Justice

Wednesday, 14 February 2024

Before:

LADY JUSTICE WHIPPLE
MRS JUSTICE STACEY
HIS HONOUR JUDGE PICTON

REGINA
V
SAQUAB HUSSAIN

**REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992**

Computer-aided Transcript prepared from the Stenographic Notes of
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MR S. SPENCE appeared on behalf of the Appellant.
MS K. MELLY KC appeared on behalf of the Respondent.

J U D G M E N T

NOTE – THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

LADY JUSTICE WHIPPLE:

Reporting Restrictions

- 1 The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.
- 2 Further, this judgment is subject to an order made pursuant to s. 4(2) of the Contempt of Court Act 1981 postponing publication of any report of these proceedings until the conclusion of the re-trial in order to avoid a substantial risk of prejudice to the administration of justice.

Introduction

- 3 On 5 December 2022, following a trial at Bradford Crown Court before HHJ Mansell KC, the appellant (who was then 44 years old) was convicted of one count of rape, which was Count 18 on the indictment. He was acquitted of Count 17, another allegation of rape.
- 4 On 13 October 2023, before a different judge, HHJ Gibson, he was sentenced to a term of imprisonment of seven years and six months and the usual ancillary orders were made. No issue arises today in relation to sentence.
- 5 The appellant now appeals against his conviction with leave of the single judge, Cotter J, which is limited to grounds 3 and 4 of the original grounds. The single judge extended time for this appeal and granted a certificate for counsel, Mr Spence, who has appeared before us today and to whom we are grateful.
- 6 The case concerned an alleged sexual exploitation of the complainant, to whom I shall refer at some points in this judgment as "RS", by a number of men in the Halifax area of West Yorkshire. Due to the number of males involved, three separate trials took place in order to try all of the defendants. The appellant's trial was the second of the three trials that took place. He stood trial with eight co-accused, all facing charges of rape or conspiracy to rape. Of those eight, three were acquitted and five were convicted and sentenced to terms of imprisonment.

The Facts

- 7 In a number of Achieving Best Evidence interviews between 15 July 2016 and 11 March 2021 RS, who was then aged 30, stated that when she was younger, her father physically and verbally abused her and, as a result, when she was 12 or 13 years old, she decided to spend as much time out of the house as possible. She was spending a lot of time with her friend Sophie at Sophie's home address in Bradford. RS started to truant from school. She subsequently started to spend a lot of time with Asian men, drinking and

smoking cannabis and then having sexual intercourse with them. Her parents reported her missing and social services became involved. This resulted in her being placed into foster care. When her friend Sophie moved to Halifax, RS continued to spend time with Sophie and the males they met in the area.

- 8 RS stated that she had met the appellant through a male named Sajid Raja who was otherwise known as "Sid". This was another man who was alleged to have sexually abused her, although he was deceased by the time of the trial. She said that Sid used to purchase drugs from the appellant. During that period of time RS said she was drinking heavily, but she was not sure whether she was intoxicated on the occasion that she met the appellant. She said that Sid had disappeared for a period of time and the appellant had given her the impression that he, the appellant, would look after her.
- 9 The appellant took RS to his home address. She thought it was his mother's address and recalled that he had to sneak her inside so they didn't wake up his family members. She said that he took her upstairs to the bedroom, grabbed hold of her, kissed her and put her on the bed. RS said that he vaginally raped her. She could not recall whether he had ejaculated or whether he had worn a condom. She said he was around 5'9" tall, slim built and had a curtain hairstyle. She stated that she did not want to have sexual intercourse with the appellant, but was scared to refuse as she did not know how Sid would have reacted.
- 10 RS stated that she kept diaries setting out her interactions with the males. She noted down various details, including but not limited to where she had been, who she had spent time with had and their car registration numbers. In relation to the appellant, her diary contained two entries on 10 December 2003 and 27 July 2004. These were Counts 17 and 18 on the indictment. The complainant would have been 14 and a half on the first occasion and 15 years old on the second occasion. Although she could not recall the second occasion, she concluded that as it had been recorded in her diary she must have had sex with the appellant on two occasions.
- 11 She described the appellant's address to the police officers who subsequently drove her around the area. She was able to point out the property, noting in particular a sticker in one of the windows. She said that as well as being linked to Sid the appellant was also linked to a male named Patrick Lynch.
- 12 She attended a video identification procedure on 20 May 2019 and positively identified the appellant.
- 13 She stated that seeing news reports in relation to other cases involving historical sexual offending gave her the confidence to report the allegations. She felt that her disclosures would now be taken seriously by the police.
- 14 The subsequent police investigation showed that in 2004 the appellant was linked to the address that had been picked out by the complainant. It also had links to both Sid and Patrick Lynch.
- 15 The appellant was arrested. He was interviewed on five occasions between January 2019 and April 2021. In his first interview he provided a prepared statement denying the allegations. In his fourth interview he provided a prepared statement in which he confirmed he had been able to reflect upon matters and could confirm that he did not know the complainant. He stated that he had only just seen images and he referred to his first police interview. He stated that the complainant was the girlfriend of a local man named Sid. He had called her a "dirty bitch" because she was having an affair with Sid, a married man. He thought the allegations had been made against him due to that incident. He stated

that he had travelled quite a lot during 2003 and 2004, including to Pakistan. He answered "no comment" to all of the questions that were put to him.

Case at Trial

- 16 The prosecution case was that the appellant had raped RS as alleged and that he had deliberately targeted her due to her vulnerabilities with the aim of using her for sexual purposes. RS was not mature nor sufficiently aware of the circumstances in which the appellant wanted to have sex with her in order to truly consent to sexual activity with him.
- 17 To prove the case against him, the prosecution relied on the following. First, evidence of RS in relation to the allegations and the fact that she had positively identified the appellant at a video identification procedure. Second, evidence which was read from RS' sister in relation to the family circumstances, the fact that RS used to go missing regularly and that on numerous occasions Pakistani men aged between 20 and 50 years old would come to the house and tried to encourage RS to come out with them. Third, evidence from RS's foster carers in relation to the fact that while RS lived with them between December 2003 and May 2004, RS would constantly run away from their home. There was permanent contact with the police and social services and Asian males would frequently come to the address asking to see the complainant. Four, the appellant's failure to mention facts in his interview, namely, the fact that he was he said in Pakistan on 10 December 2003 and 27 July 2004. Five, agreed facts in relation to RS' drive around with the police and the fact that she identified the home addresses linked to Patrick Lynch and the appellant. Six, evidence from the officer in the case answering the appellant's defence case to the effect that the Pakistan consulate did not have the facility to check visas that had been used and UK Border Force could not help either, as they only kept records for ten years; and that steps were taken to try to speak with the male who had found the travel documentation for the appellant. The officer in the case also gave evidence that a man named Saquab Hussain was stopped in a vehicle shortly before 1.00am on 14 December 2003 although no date of birth was available for this male.
- 18 The defence case was one of mistaken identity and alibi. The appellant gave evidence in which he stated that he could not have had sexual intercourse with RS on either of the occasions charged because he was in Pakistan at both times. The appellant explained that when he was younger he had been in trouble and he had a number of previous convictions for different offences, including but not limited to driving and drug-related offences. He subsequently attained his driving licence and obtained employment as an HGV driver, was married and had three children.
- 19 He knew Sajid Raja, referred to as "Sid", as Sid lived a few doors away from his home address. The appellant denied that he was his friend and denied ever selling drugs to him. He denied knowing RS and denied having sex with her. He said that his nephew Tariq had a certain hairstyle and spent more time at his home address than he did.
- 20 The appellant stated that he had answered no comment to the questions put in the interview as a result of his solicitor's advice and, in a subsequent interview, having been shown pictures of RS, he provided a prepared statement setting out the abuse that he had shouted at her. He considered that she was breaking up Sid's family. He thought this could be the reason why she had made allegations against him. He said that he had tried to find records to show that his passport had been stamped in Pakistan. His old passport had been stolen during a burglary and he said he could only find copies or photocopies of his visa. He maintained that he had been out of the country on the dates that the incidents were alleged to have taken place. He stated that the telephone number attributed to him in RS' diary was incorrect. This was not his correct telephone number.

21 At trial he subsequently recalled his evidence as by that time he had found more documentation from Pakistan. His cousin had been able to obtain his travel bag at his ex-wife's house. The appellant produced photocopies of his passport and stated these not only showed his visa but also the stamps showing entry and exit from Pakistan: 10 December 2003 to 2 January 2004 and then 14 January 2004 until either 7th or 27 August 2004. He said he had taken the copies as the authorities requested them for his subsequent trips to Pakistan. He maintained that he was not in the country on the dates alleged by the complainant. He maintained in cross-examination that these were genuine documents. He denied that he was the male that had been stopped by the police on 14 December 2003. He stated that he had a common name and he said that it could not have been him because he was on that date in Pakistan.

22 He also relied on the following:

1. Photographs of himself and Tariq showing their respective haircuts at the time of the alleged incidents and photographs of the family home.
2. Documentary evidence being, namely his marriage certificate dated 20 June 2004, the death certificate for his grandfather, Ackah Hussain, dated 16 June 2004 and his two visas on 10 October 2003 and 12 June 2004, both of which would have allowed him to remain on Pakistan for six months.
3. Evidence from his mother Safia Begum in relation to the layout of the family home, the fact that Tariq lived with them for a period time before she asked him to leave, that Tariq too had a curtain hairstyle whilst the appellant had long hair which he wore in a ponytail and that the telephone number in question was Tariq's telephone number.

23 The issue for the jury was whether the appellant had raped the complainant as alleged.

Summing Up

24 In summing-up the case to the jury the judge said this:

"Count 17, are we sure that on a date between 31 January and 31 December 2003, Saquab Hussain had sexual intercourse with RS? Remember, this was before the change in the law on 1 May, that's why it's phrased slightly differently, but I've made it clear in brackets that means exactly the same as it does on other counts. In other words, intentionally penetrated her vagina with his penis. If you're not sure-- if you're not sure he's been correctly identified and you think he may have been elsewhere in Pakistan, then you will, of course, find him not guilty. If you are sure, then you go to question two. Are we sure that RS did not consent to the penetration? If no, not guilty; if yes, go to question three. Are we sure that Saquab Hussain either knew that RS was not consenting or was reckless as to whether she was consenting? It's a slightly different test as I directed you before."

25 A similar direction was given in relation to Count 18.

26 Earlier, the judge directed the jury in relation to the three defendants who had failed to mention in interview what they had subsequently relied on as part of their defence. The appellant was one of those three, because he had failed fully to mention his alibi, namely that he was in Pakistan, at the time of his interviews. The judge gave a direction under s. 34 of the Criminal Justice and Public Order Act 1994 (failure to mention something in interview) in fairly standard terms, ending with the following words:

"Furthermore, you should not convict the defendant ... just because or even mainly because he chose not to mention this aspect of his defence. Remember that the burden of proving the case against the defendant remains on the prosecution throughout."

Grounds of appeal

27 Permission has been granted to advance grounds 3 and 4 which are as follows:

“3. The judge failed to properly direct the jury as to the approach that they should take if they rejected the appellant's alibi, namely that they should not convict him solely on the basis that his alibi was false.

4. The judge failed to give a lies direction to the jury for them to apply if they rejected the appellant's alibi. The direction was given in relation to the co-accused Ali and the lies that he had said in interview. However, the jury should have been told that they should also apply this direction to false alibi.”

28 By his perfected grounds, Ms Spence argues that the judge ought to have directed the jury regarding their approach to the provision of a false alibi and to have given a *Lucas*¹ (lies) direction in respect of it quoting the passage from the Crown Court Compendium which is in the following terms (cf Chapter 18.2, paragraph 3, June 2023 release):

"Where D relies on an alibi, it is for the Crown to disprove the alibi to the criminal standard ... If the alibi is demonstrably false, then that fact alone does not entitle the jury to convict. The jury should, where appropriate, be reminded that an alibi is sometimes invented to bolster a genuine defence... A lies direction may be needed."

29 Mr Spence notes that a lies direction was given in relation to one of the appellant's co-defendants, Zulficar Ali, in respect of his lies in interview. He submits that the jury would not have understood that the same approach should apply if they rejected the appellant's alibi as untrue.

30 In oral submissions, Mr Spence concentrated on the absence of any safeguard for the appellant in relation to the way in which the jury could deal with the evidence of alibi, if they concluded his alibi was indeed untrue.

Grounds of opposition

31 The prosecution lodged a respondent's notice and grounds of opposition in which they submitted that the judge properly directed the jury that if they rejected the appellant's alibi, they should not convict him solely on the basis of this: the judge set out a route to verdict for the jury and reminded them that the burden of proof remained on the prosecution throughout. Accordingly, the jury were properly directed.

32 Further, they say that a lies direction was not necessary in this case. The prosecution had not demonstrated the appellant had lied about his alibi, nor had he admitted such. He had failed to mention his alibi in his police interview and, therefore, if anything, this was a case for a s.34 direction which was discussed with the trial judge and given.

33 Yet further, they note that trial counsel did not request a lies direction at the time; it would have undermined the defence case for the judge to have given such a direction and so was against the appellant's interests at trial. Alternatively, if the judge had given a lies direction

¹ *R v Lucas* (1981) 73 Cr App R 159, CA

in addition to the s 34 direction, there was a risk that it would have done more harm than good by overcomplicating the case for the jury.

34 Alternatively and in any event, they say that the judge's direction was sufficient.

35 In oral submissions today, Ms Melly, with commendable succinctness, has confirmed her resistance to this appeal and stressed the lack of any need for a lies direction in the particular circumstances which presented themselves at trial.

Case law

36 We have been referred to a number of authorities. There is no dispute about the applicable legal principles. This court emphasised in *R v Burge, R v Pegg* [1996] 1 Cr App R 163 that a *Lucas* direction is not required in every case in which a defendant gives evidence about a number of matters and the jury may conclude, in relation to some matters at least, that he has been telling lies:

"The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering" (per Kennedy J at p.7 of the print-out).

37 Further, in the ordinary case where a jury is asked to consider whether an innocent explanation given by the appellant is true, then the general direction about the burden and standard burden of proof is likely to be sufficient (ibid p.7).

38 We accept the court in that case considered that where an alibi was put forward that might be the sort of case where a *Lucas* direction might be given (ibid p.8); but the court went on to say this:

"If a *Lucas* direction is given where there is no need for such a direction (as in a normal case where there is a straightforward conflict of evidence) it will add complexity and do more harm than good. (Ibid p.8).

39 The court suggested that the trial judge should discuss any such direction with counsel and that this court "would be very slow to interfere with the exercise of the judge's discretion." (Ibid p 8).

40 Two cases illustrate this approach at work. The first is *R v Harron* [1996] 2 Cr App R 457 where the Court of Appeal (Beldam LJ giving the leading judgment) held that a lies direction to the effect there might be a reason the appellant had invented a false alibi would not have assisted the jury: see p.7 and 8 of the print-out.

41 In *R v LW* [2018] EWCA Crim 1986 the Court of Appeal (Thirwall LJ giving the leading judgment) identified the question as being whether something said which the jury are sure was a lie may be explained by something other than the appellant's guilt; in a case which turns on the jury's assessment of the credibility of the complainant and the defendant about the events in question, there is ordinarily no need for a lies direction: see paras 14 and 15.

42 That approach also finds support in the more recent case of *R v Wainwright* [2021] EWCA Crim 122 at para.31 per Fulford LJ where it was held that the decisions whether to give a lies direction or a s.34 direction or both:

"... are in every case a matter for the trial judge bearing in mind the context and the precise issues in play in the case."

- 43 Finally, we mention *R v Lesley* [1996] 1 Cr App R 39, cited by the judge in granting leave to appeal. In that case, the conviction was quashed because the judge failed to give a lies direction, considered to be necessary on the particular facts of that case: see p.46F per Henry LJ.
- 44 This case law is reflected in the Compendium, particularly in the passage on which Mr Spence relies (see paragraph 28 above citing from Chapter 18.2, paragraph 3). This makes clear that it is not in every alibi case that a *Lucas* direction is required. It is only in appropriate cases that thought should be given to whether the jury would benefit from it.

Discussion

- 45 We turn then to this case. The judge told the jury that if they were sure that the appellant had been correctly identified by RS, then the jury had to go on to questions two and three on the route to verdict. In our judgment, this guarded sufficiently against the mischief of concern to Mr Spence: the jury could only be sure that the appellant had been correctly identified if they were sure that the alibi was false, in other words, if they found that the appellant was lying; if that was where they got to, then on the judge's direction, they had to consider whether the discrete elements of the offence were made out; in other words, they could not convict solely or mainly on the basis of their conclusion that he had lied about his alibi, rather they had to be satisfied that the prosecution had proved the elements of the offence. The route to verdict, which was clear and helpful, was a valuable reminder to the jury of the need to focus on the elements of offence, as distinct from the fact (if they found it to be so) that the appellant had lied about his alibi.
- 46 In any event, we do not consider that this was a case where a lies direction was required. We note, as before, that counsel at trial did not seek an alibi direction and there can be little wonder that he did not because such a direction would have risked undermining the defence by suggesting the possibility that the alibi was not true. Further, given the dynamics of this trial, with the appellant's late production of evidence supporting his alibi, it does not surprise us that no one at the time thought to raise the possibility of such a direction.
- 47 Yet further and in any event, the judge had given a s.34 direction which had warned the jury they should not use his failure to mention his alibi in interview as the sole and/or main basis of conviction. It was unnecessary to give a lies direction as well. If it had been given, there was a risk that it would have confused the jury. The Court in *Wainwright* emphasised that the decision about how to direct the jury in this sort of case depends on the judge's feel for the case and is a matter for the judge's discretion.
- 48 In summing-up the case was left to the jury in a straightforward way without the complication of a lies direction. That that was understandable. That approach was adopted by all present at trial. It cannot now be criticised.
- 49 Even if we are wrong about that, we are satisfied this conviction was safe. Standing back, we note that the evidence against the appellant was cogent and the case against him was strong. The complainant's identification of the appellant was based on a variety of different strands of evidence supported in different ways, which we have already outlined. Even if we had thought that there was an oversight by the judge in failing to give a lies direction, it would have made no difference to the outcome.
- 50 In those circumstances, this appeal is dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited**
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital*

This transcript has been approved by the Judge.