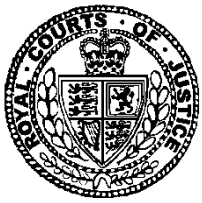

Neutral Citation Number: [2025] EWCA Crim 8

Case No: 202301252 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
Mrs Justice McGowan
T20217029

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2025

Before :

LORD JUSTICE EDIS
MR JUSTICE BRYAN
and
HIS HONOUR JUDGE DEAN KC
Honorary Recorder of Manchester, sitting as a judge of the Court of Appeal Criminal Division

- -

Between :

ASAD BHATTI	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Edward Henry KC (assigned by the Registrar) for the **Appellant**
Timothy Hunter (instructed by **CPS Counter Terrorism Division**) for the **Respondent**

Hearing date : 20 December 2024

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Edis:

1. This is an appeal against conviction with leave of the full court, in which two grounds are argued. They both concern the legal directions to the jury given by the judge in the summing up.

2. The appellant was convicted of five counts on an Indictment which arose from the discovery of explosive chemicals and other things in premises occupied by him. The Indictment was as follows:

   i) Count 1: possessing explosives contrary to section 4(1) of the Explosive Substances Act 1883. This alleged that the appellant had explosive substances, namely hexamine, charcoal, potassium nitrate (in two places), sulphur, glycerine, nitric acid (in two places), and sulphuric acid under such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession or under his control for a lawful object.

   ii) Count 2: possessing explosives contrary to section 4(1) of the Explosive Substances Act 1883. This alleged that the appellant had explosive substances, namely three circuit boards under such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession or under his control for a lawful object.

   iii) Count 3: making explosives contrary to section 4(1) of the Explosive Substances Act 1883. This alleged that the appellant made explosive substances, namely two improvised explosive devices, explosive mixtures containing nitrate, nitroglycerine.

iv) Count 4: possession for terrorist purposes contrary to section 57(1) of the Terrorism Act 2000. This alleged that the appellant had in his possession five handbooks or manuals with instructions on making explosive devices in circumstances which give rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

v) Count 5: possession for terrorist purposes contrary to section 57(1) of the Terrorism Act 2000. This alleged that the appellant had in his possession materials itemised in counts 1-3 in circumstances which give rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism. Those materials are here described as "chemicals, electronic equipment, improvised detonators and explosive mixtures".

3. He received an extended determinate sentence of 12 years, comprising a custodial period of 8 years and an extended licence period of 4 years. There is no appeal against sentence.

4. There was no issue at trial as to the possession of the items listed in counts 1, 2, 4 and 5 and making of the items listed in count 3. It was also quite clear that the circumstances of the possession and making were such as to generate the reasonable suspicion identified as an element of the offences in section 4(1) of the Explosive Substances Act and section 57 of the Terrorism Act. The question for the jury on counts 1-3, therefore, was whether the appellant could show, as required by section 4(1), that he had made the items or had them in his possession or under his control for a lawful object. On counts 4 and 5 the

question, by reason of section 57(2) and 118(2) of the Terrorism Act 2000, was whether the prosecution could prove to the criminal standard that his possession of the items was for a purpose connected with the commission, preparation or instigation of an act of terrorism.

5. No criticism is made of the way in which the judge directed the jury as to the elements of the offences or the different burdens and standards of proof which applied. It is important, however, to identify the issues in the trial in this way at the outset because the two grounds of appeal argued before us by Mr. Edward Henry KC relate to directions given to the jury about (1) the significance of lies told by the appellant to the police in interviews; and (2) the relevance of evidence that the appellant had never applied for a certificate from the police that he was a fit person to acquire, or acquire and keep, explosives. We shall call these Grounds 1 and 2.

6. The evidence which is the subject of Ground 2 was placed before the jury in agreed facts which read as follows:-

> "28. The acquisition and keeping of explosives was controlled up until 31 September 2014 by the Control of Explosives Regulations 1991, and from 1 October 2014 by the Explosives Regulations 2014. Under both Regulations no person may acquire, or acquire and keep, explosives, including explosive articles (defined '*as an article containing one or more explosive substances*') and explosive substances (defined as '*a substance or preparation […] which is —(a) capable by chemical reaction in itself of producing gas at such a temperature and pressure and at such a speed as could cause damage to surroundings; or (b) designed to produce an effect by heat, light, sound, gas or smoke, or a combination of these as a result of a non-detonative, self-sustaining, exothermic chemical reaction'*) without a certificate that they are a fit person to acquire, or acquire and keep, explosives. The Firearms and Explosives Licensing Supervisor for Surrey Police has no record of the defendant applying for a certificate to acquire, or acquire and keep, explosives under the 2014 Regulations.

> 29. The manufacture of explosives was controlled up until 31 September 2014 by the Manufacture and Storage of Explosives Regulations 2005, and by the Explosives Regulations 2014. Under both regulatory regimes no person may manufacture explosives (defined similarly to the above) unless that person holds a licence for that manufacture and complies with the conditions of that licence. However, under both regulatory regimes that does not apply to the manufacture of explosives for the purpose of laboratory analysis, testing, demonstration, or experimentation (but not for practical use or supply) where the total quantity of explosives manufactured at any one time does not exceed 100 grams, but any person who does so still requires a certificate to acquire, or acquire and keep, those explosives where such a certificate is otherwise required."

The facts

7. On 29 December 2020 the appellant attended a computer shop with his laptop which needed to be repaired. The owner of the shop told him to leave the laptop with him and he would investigate what was wrong. The appellant was initially reluctant, but agreed to leave the device. He told the shop owner not to look at the data on it. The shop owner removed the hard drive, connected files to the recovery PC in the shop and used software to copy files from the failing hard drive. Unusually the process ran slowly, causing the owner to look at the files being copied and he noticed that some of the file names included the words 'explosions' and appeared to relate to explosives. He contacted the police on 31 December.

8. On 1 January 2021 police attended the shop, seized the hard drive, took a forensic image of the hard drive and then returned it to the shop shortly after. On 4 January, the shop owner contacted the appellant and told him the laptop had been repaired and was ready for collection.

9. In the meantime, police had begun to examine the copy of the laptop and noted a number of documents of concern, including: documents referring to RDX

(which is an explosive used in military applications), nitro-glycerine, and dynamite; a sub-folder titled 'Books on Explosives' which included a PDF titled 'Uncle Fester – Home Workshop Explosives' and 'The Preparatory Manual of Explosives". Other documents saved related to the manufacture of improvised explosive devices and a guide to making an explosive device, which included a description of nitro-glycerine and referred to a 'cell phone detonator' or remote electronic detonator. Another sub-folder included an incomplete power point presentation entitled 'The Art of the Sniper' which was apparently to include sections on 'bolt v semi-automatic', the silencer', 'the bullet' and 'factors which influence the shot'.

10. There was an 'Explosives' Business' folder which was part of a wider folder structure titled 'The Chikki Moe Pack'. One of the documents there, which had been compiled by the appellant and he had called 'The Mu'min's Handbook' had been created in October 2013 and password protected. The document was unfinished, and the contents included a number of sections on Islam and was to include sections on 'Jihad and Martyrdom', 'a simple guide to explosives', 'hand to hand combat' and 'handguns and sniper rifles'. One of the sections was entitled 'The Munaafiqun' (The Hypocrites) and contained content such as:-

> "There is an allegiance between kaafirs and Hypocrites worldwide and they work together to weaken Allah's deen through creating a systematic method of taking decision power away from true believers and placing it in the hands of the Hypocrites. This is being done in all areas Business, education, religious teaching. It is not unusual to find The kaafirs directly regulating the affairs of the Ummah and they are well acquainted with the teachings of Islam.
>
> The Evil human beings who work with the army of Satan, these include corrupt heads of Governments, Black Magicians, Religious Scholars from among the Munaafiqun, the

> Munaafiqun in general, and all others who work with these people…"

11. This content was followed by a section detailing how to shoot a handgun and sniper training "in the name of Allah, the beneficent, the merciful" and ballistics. The primary explosives section included instructions on how to manufacture nitro-glycerine which appeared to have been taken from the Uncle Fester book. There were also instructions on how to create RDX, PETN and how to create an improvised detonation system for nitro-glycerine.

12. Some of the material identified in count 4 was selected from the material recovered from the computer.

13. On 8 January 2021 the appellant was arrested at his home address and an urgent initial interview was conducted in the police car to ensure the safety of those due to enter his premises. He was asked whether there was anything in his house that might harm others, such as firearms, ammunition or explosives. The appellant said there were no firearms and no explosives and nothing in his address to make explosives. He was asked whether he had any such things "at any address" and he said "No". This was later shown to be untrue and was one of the lies which were the subject of the direction criticised in Ground 1. In fact, he had a lockup storage container, not far away, where such things were found.

14. The appellant's house was searched. The following items of note were found in his bedroom: a number of USB devices, a bullet shell, a quantity of shell casings, wireless adaptors, a piece of metal tube and two wires, a circuit board, metal tubes, a threaded bolt, a matchbox containing razor and shavings, further equipment such as small metal balls and springs, two hard drives, keys and

electronic fobs, three laptops, a National Rifle Association card and certificates, a BB pistol and a machete. It was not unlawful to possess these last two items in the appellant's home.

15. The circuit board recovered from his home was later examined and found to be a functional home-made switching circuit which could be operated remotely. A timer would be triggered remotely by placing a call to a mobile phone attached to one of the resistors in the circuit. When called, the screen illuminated, the light produced armed the circuit for approximately 60 seconds and once that time had elapsed, the circuit would deactivate, but it could be re-armed by making a further call. When armed, the circuit would fire if a call was placed to a second mobile phone attached to the other resistor in the circuit and a current would then be supplied to the output wires, which could operate a device or load attached to them.

16. On one of the USB drives recovered a document titled 'Business Project 27/10/2020' was found. It contained a 123 page document titled 'A complete guide to making an explosive device' and its introduction stated that the purpose of the document was to create a 'rough design and business plan for setting up an industrial blasting business'. The document emphasised the need to avoid ordering large amounts of a key component of an 'industrial blasting business' to avoid arousing suspicion. This document was one of those listed in count 4.

17. Police discovered that the appellant had taken out a contract for a 28 foot storage container and moved belongings to the unit in March 2019. This was searched by police between 10 and 12 January 2021 and a suitcase found. Items were found inside the suitcase including: digital scales, crocodile clips, resistors, two

hard drives fixed together, circuit boards, and a book entitled 'the Preparatory Manual of Explosives'. This book was listed in count 4. There was a bag containing syringes and pipettes, pestle and mortar wire wool, and a number of substances which were later listed in count 1 as explosive substances.

18. A cardboard freight box was also discovered which contained a laptop, safety goggles and component parts. A second suitcase found towards the rear of the unit contained lab equipment and glass pipette bottles, a document entitled 'how to make a sample of nitro-glycerine', a bottle labelled 70 per cent nitric acid, a bottle labelled glycerine, a bottle labelled 5 per cent bicarbonate solution, a bottle labelled saturated salt solution, a bottle labelled 98 per cent sulfuric acid and a padded envelope containing a number of packets containing powder labelled with initials such as 'KN' and 'BP10'. Further assorted bolts, wires, cables, circuit boards and component parts were also found in a cardboard box.

19. A cardboard box contained an improvised explosive device which an expert later described as a pipe bomb, and an improvised detonator.

20. The appellant was interviewed at the police station on several occasions from 8th to 19th January. During the interviews he told the police that he had not created explosives and did not have any nitro-glycerine. It was later accepted that one of the glass flasks contained nitro-glycerine, the appellant having made it himself. These interviews contained multiple lies of this kind, which were the subject of the direction given by the judge which is criticised in Ground 1. Interspersed among the lies are repeated and forceful denials of being a terrorist.

21. Following chemical analysis of the powders and liquids found during the search of the appellant's property, the following were identified:-

i) Hexamine – a chemical fuel that could be used as a starting ingredient in the manufacture of some explosive compositions, such as RDX and HMTD (hexamethylene triperoxide diamine). These are significant primary explosives.

ii) Charcoal – which, in addition to its innocuous uses, could also be used to form an explosive composition if combined correctly with a suitable oxidiser.

iii) Potassium Nitrate – which, in addition to being used as a fertiliser, could be used as an oxidiser to form an explosive when combined with a fuel such as charcoal. It was also one of the ingredients of the explosive 'black powder' and could be used in the manufacture of nitric acid.

iv) The powder labelled 'KN' was potassium nitrate.

v) Bottles containing nitric acid – which could be used in the manufacture of fertilisers and as a specialist cleaning agent, and was also one of the ingredients for the manufacture of high explosives RDX and Nitro-glycerine. Other ingredients for making this explosive substance, namely glycerine, and sulphuric acid were also found.

22. There was an issue at trial, on which each side called expert evidence, as to whether the appellant is autistic. It is not suggested that this is relevant to either of the issues which we are required to consider.

The defence case

23. The defence case was that the appellant had the items lawfully for the purposes of interest, experiment and self-education, and had an ambition to start an explosives business, whether in the United Kingdom, or Pakistan. He did not possess any of the items for terrorist purposes and his various writings on Islam and conspiracy theories that were found on his computer were not connected with his interest in explosives. Due to his autism and thus his systemising and obsessional traits, he had gone into matters in the depth and manner he had. He had no link to any terrorist person or activity.

24. The appellant gave evidence that he was not a terrorist and had no connection to terrorism. He was not writing the documents and accumulating the materials to assist or guide others and there was no evidence that he had sent messages to anybody else about it. He came to the UK from Pakistan as a child. He had a lifelong interest in chemistry and engineering. When younger he abused alcohol and drugs, however in 2000 he visited a mosque and his life changed. He concentrated on his career, stopped drinking and taking drugs. One of his jobs involved looking for explosive devices at Gatwick. He also started a business selling suits.

25. As part of his interest in chemistry and explosives, the appellant said that he became interested in designing a new blasting cap. However, in 2016 he got a new contract and stopped his experimentation. There were entries in the prosecution timeline in 2020 because he was searching to find pictures of a block of RDX and cell phones to update a business project document. He updated his business plan in relation to blast caps as part of the research. He was also looking at different rifle calibres and comparisons between explosives as

part of the project and due to his interest in rifles, having joined the National Rifle Association at Bisley. In November 2020 he looked into buying nitric acid in or from Pakistan as he was considering setting up his business in Pakistan. He had not realised until then that a licence was needed to buy nitric acid.

26. He accepted buying the items in the early part of the timeline and that he had made nitro-glycerine. He did not tell the police that he thought it was legal when interviewed because he thought the police were trying to get him into trouble. He accepted making black powder as part of his blasting cap experimentation. He had purchased a hexamine package, but had not opened it. He did not make RDX and had not made dynamite and did not have the items needed for it.

27. The expert was wrong to describe his blasting cap as a pipe bomb. Whilst he accepted the glass flask contained nitro-glycerine, which he had made, he did not accept that it was dangerous and that it would explode. The small glass test tube containing powder was designed to prevent wires making contact in a metal tube. He accepted that he purchased chemicals that were capable of being mixed to create explosives, along with various products to go with them, and had made circuit boards that were capable of working, such as the one in his bedroom. His texts and documents were how he approached the world and interest in his religion.

The relevant directions

28. The judge distributed her written directions on law in the conventional way prior to counsel's speeches. She then delivered them orally and in writing and speeches followed. In that document, she did not deal either with lies told by

the appellant in interview (Ground 1) or with the significance of the evidence at [6] above (Ground 2).

29. We will set out the directions we are required to consider in full.

Lies

30. They are, first, the lies direction:-

> "So you know that when he was arrested, as is standard practice in cases there is what's called an urgent interview because the police don't want to walk into a room or a lock-up or anything else if there's a trip wire or if there's a batch of chemicals bubbling away on a Bunsen burner and so they want to know that there's no immediate danger to the officers who are going to search and so that's why you have that two page interview. You have the video recording which I suspect is done on somebody's telephone, which isn't brilliant quality, but you have the transcript (tab 13).
>
> The Prosecution say this is significant. You can see him, you can hear him; it's entirely a matter for you as to whether he's panicking. You may think he's not a panicker actually, but frankly that's my comment and you ignore it completely if you think I'm wrong or you accept it if you agree with it. But here we are; he's being interviewed. He's told by the Detective Sergeant what's going to happen to him – he's going to be taken to the police station. And he's told it's an urgent interview to determine whether or not there's anything in the house that's going to harm people. So he's asked, 'What firearms, firearms parts or ammunition do you have at your address?' and his answer is, 'What, real firearms?' You've seen from the photograph there's a thing that looks like a gun which is not a real firearm on the desk in the room and there's an agreed fact to deal with it. And so he says, 'What, real firearms?' The policeman says, 'Yes' and he says, 'None.' 'Okay, and what explosive parts or items do you have at your address?' 'None.' 'Are there any that are hidden away in your address?' 'What, explosives?' 'Yes; or anything to make explosives?' 'No.' Now it's up to you whether or not that's a lie and he should have said the circuit board, the detonation device – a matter for you.
>
> Members of the jury, if you think the content of that interview is important, take it into account, but please bear in mind he has just been arrested, this is happening the back of the car in clearly urgent circumstances – the police want to know what's in the

house; they want to know if it's safe for them, for the neighbours, for the rest of the family. So consider those answers against that background.

He comes on to be interviewed in due course and by the time he's being interviewed he has a solicitor with him. You know that the interviews start on 8 January and they move on to the 9th and to the 12th. So he's interviewed a number of times over those days. There's breaks. He has a series of matters to deal with and the interviews continue after the 12th onto the 19th. But we're going to look at primarily is what happens on page 27 and this is the point, you'll remember, Mr Henry asked Mr Bhatti about and then Mr Hunter went back to it in cross-examination.

On page 27 towards the top of the page you can see a line that starts, 'In a blasting cap' and Mr Bhatti says he hadn't created explosives; he didn't have nitro-glycerine anywhere. These were just notes. He described it as a dangerous product that could only really be made in lab conditions. He had in his own mind because he believed he had created nitro-glycerine, he had created explosives and that is a lie. On page 30 he is asked about whether or not he had made the device that we were looking at, you'll remember DRT118, and he was asked about whether he had put black powder into that device, if he put anything that was explosive into that and you'll see he describes how he'd made it, how the wires connected, how there are different designs; that he'd done it, he hadn't gone back to it and over onto the next page he talks about it being 'a work in progress'.

On pages 37 and 39, again he is asked about making explosives and denies ever having done it. The important point about this, ladies and gentlemen, is to make sure that you get this in context. If somebody is guilty and they are asked, 'Did you do it?' and they say, 'No' that's a lie. If somebody is guilty and they are asked, 'Did you go to such and such a road on the day?' and that's the place where the offence was committed and they say, 'No' and they did; that's a lie. Now lies like that might help you to decide whether or not the person is guilty because they are lying about what they have done and that might, if they are denying something because they know it was an offence that might help you decide. But equally, ladies and gentlemen, you have to look and see the whole context because people can tell deliberate lies for reasons that aren't necessarily proof of guilt and one of the examples that is often trotted out in cases is this: somebody might lie about being in a particular place not because they're guilty, but because they don't want their partner to find out that they were there to see their other girlfriend, other boyfriend, whatever it may be. Or a person might lie about driving without a driving licence when actually it doesn't important; what's important is they were driving to do the bank robbery. Those are

> silly examples, I recognise, but they are human everyday examples of why somebody might not tell the truth – deliberately not tell the truth in a certain circumstance.
>
> So when you come to look at these different replies which are described as lies, look at the question, look at the answer. When Mr Bhatti says, 'When they asked me if there was anything at any other address I thought they meant another house and so I didn't tell them about the lock-up.' If that's right or that might be right, then please don't spend any time worrying about that answer. If you think that he didn't really have a very good grasp of what he was being asked in the back of the police car, again either because of the circumstances etc, don't worry about that. But both sides in this case accept the lie on page 27 about, 'Did you ever make explosives?' was a deliberate lie. Mr Bhatti couldn't quite get himself to say it was a lie, but he did say it wasn't the truth. So look at that and think about that. The Prosecution say it's important because he is lying about something because he knew that he'd created an explosive; he knew that it was dangerous and believed it to be dangerous and he had done it for a terrorist or in connection with a terrorist purpose and so when he was asked about it he lied, rather than simply say, 'Yes actually, I did make a tiny amount of nitro-glycerine in my bedroom. It was all part of my experimentation. It took me I think nine hours [inaudible] to do it, but at the end of it I thought "gosh, this is dangerous, I'm going to bury it in the garden".' Now he didn't say that and he lied. Is the lie something you can rely on to help you decide that the Prosecution has proved its case – that' up to you to decide –but it is important to remember that sometimes people tell a deliberate lie for a reason that isn't necessarily supportive of guilt and so, as I say, the examples I've given you are silly ones, but I'm trying to take them as far away from this case as I possibly can. Apply your own reasoning to that and make your own decisions about it. Both sides accept it's important. The Prosecution say it can help you as part of the picture that establishes his guilt. The Defence, no it's not; it's capable of an innocent explanation."

31. After that direction was given, Mr. Henry, in the absence of the jury, invited the judge to revisit it. It had not been shown to counsel before it was delivered, although there had been some discussion of whether a lies direction was required. He was quite entitled to raise his concerns, which the judge considered and decided were without substance. She did not return to this direction in the presence of the jury.

The absence of a certificate

32. This direction was also given in the oral section of the summing up after speeches. It also was not shared with counsel in draft although there was, again, some discussion about what might be said. The judge said this:-

> "……you know from the almost impenetrable agreed fact that was read to you yesterday about the requirements to have a licence to buy certain chemicals or certain explosive substances that it was a regulatory requirement to have a licence to buy some of these things after 2014 – before 2014 and he didn't have a licence. Now he tells you in evidence and in interview that he didn't know he needed a licence. He never knew he needed a licence. The Prosecution say that this may be evidence that helps you because he didn't apply for a licence because he didn't want, as it were, the authorities to know what he was doing. Now that's entirely up to you. You may when looking at the obsessive interest in obtaining a Firearm Certificate think here is the man who does want to do those sorts of things right in respect of firearms and his possession or acquisition of firearms in the future. Is that relevant when it comes to the chemicals or is it simply an irrelevant point because he didn't know what the regulations required? It's entirely a matter for you. Ladies and gentlemen, when you look at those regulations you might not be altogether surprised that somebody wouldn't know what they needed to get and it may be having considered that, you think it's a point that doesn't help you one way or the other."

The grounds of appeal

33. Leave was granted by the full court to argue two grounds:-

i) The court gave an inadequate direction about lies told by the defendant, that did not include the possibility that he had lied out of guilt or shame regarding less serious behaviour to bolster a genuine defence. When this deficiency was drawn to the attention of the court, the court declined to revise the original direction compounding the original error.

ii) The court erred in concluding that the defendant's breach of the certification requirements prescribed by the regulatory regime regarding explosives was admissible. This exposed the defendant to the risk of wrongful conviction on a flawed basis as the direction the court gave could not assuage the mischief created by this ruling.

34. These grounds were said to be linked in the application for leave, and the full court directed a further document explaining why this is so. The link remains evanescent.

Ground 2: discussion and decision

35. The full court granted leave with greater enthusiasm on Ground 1 than on Ground 2, and was influenced by the suggestion that they were linked. If that were true it might be a reason for granting leave on an otherwise unarguable ground.

36. Ground 2 is, in truth, hopeless as the full court suspected it might be. After hearing full argument from both sides we unhesitatingly dismiss it. The evidence was obviously admissible for the reason indicated by the judge in her direction to the jury. The appellant's case was that he wanted to make and research explosive substances for a lawful purpose. He understands that there are or are likely to be regulatory regimes in this area, as evidenced by his knowledge of the licensing system for firearms. So why not apply for a certificate? The jury might conclude that this was because he did not want to let the authorities know what he was doing because in fact he did not have a lawful purpose.

37. Mr. Henry KC before us sensibly accepted that the evidence was admissible but criticised the direction because it did not direct the jury that a lawful purpose would not become unlawful simply because of the lack of the required certificate.

38. It is unnecessary to consider that submission because the effect of the last few words of the judge's direction was to deprive the evidence of any importance in the case. In effect, she told them to ignore it, which is more favourable to the appellant than the direction for which Mr. Henry contends.

Ground 1: lies

Introduction

39. The law relating to the proper direction to be given to a jury in a case where it is alleged that a defendant has told a deliberate lie in relation to a material issue is not entirely clear. It is, however, well settled in authority, which is binding on us that there are circumstances where a judge is required to give a direction the essence of which is in three parts (in a formulation taken from *Phipson on Evidence* (20th Ed) 36-37):-

> "A lie can strengthen the evidence against the accused only if the jury is satisfied first, that the lie is deliberate; second, that it relates to a material issue; and third, that the motive for the lie is the realisation of guilt, bearing in mind that some people lie in an attempt to bolster a just cause, or out of shame, or through a wish to conceal disgraceful behaviour."

40. This might be thought to be common sense. In *R v. Middleton* [2001] Crim LR 251, and No. 9904593 W3 23 March 2020, Judge LJ, in an illuminating judgment, emphasised the simplicity of the concept. He identified the point of

the direction as being to guard against an "inadmissible chain of reasoning", by the jury, namely that telling lies means that the accused must be guilty. He said:

> "Just as the jury should be warned, for example, not to misuse use their knowledge of a defendant's previous convictions, so when the defendant has lied, in order to avoid the prohibited reasoning, the jury will often need to be warned -- perhaps more accurately, reminded -- of the reality, namely that an innocent defendant may sometimes lie and that the inference of guilt does not automatically follow."

41. His reference to the jury being "reminded" of this reality originates from the insight that it is not only lawyers and judges who can appreciate that a lie may not necessarily be told because the teller of it is guilty of the charge being determined. Because it is a matter of common sense and experience, most jurors will understand this perfectly well. In a trial where this is a live issue, it will have been explored in evidence and in closing submissions and the jury will be aware of the arguments they have to consider. This is relevant in this court because we are concerned with the safety of the conviction, rather than simply the technical accuracy of a direction.

42. The need for this direction was formulated as a rule of law in *R v. Lucas* [1981] QB 720 when it was necessary to define, as a matter of law, the circumstances in which a lie told by a defendant could corroborate the evidence of an accomplice. The reason the appeal was allowed in *Lucas* was that the judge gave an erroneous direction that lies told by a defendant in evidence, which were neither admitted nor proved by independent evidence, could amount to corroboration. That was, in those days, a very significant misdirection.

43. The last of the corroboration rules and warning requirements were abolished by the Criminal Justice and Public Order Act 1994 ss.32 and 33. S.34 of the same

Act made a further very substantial change in the law, permitting adverse inferences to be drawn from a failure by an accused to mention when interviewed under caution facts relied upon in court. Because of the right to silence and the privilege against self-incrimination this change has generated a direction which must be given where such adverse inferences are sought. This has some elements in common with the lies direction, but exists for a different purpose. It is designed to confine the adverse inference to its proper ambit and to focus on the credibility of the matters advanced in evidence at trial but not mentioned in interview under caution.

44. It might once have been arguable that the abolition of the old law on corroboration in the 1994 Act rendered the *Lucas* direction obsolete, but this is not the course the law has taken. The Act came into force on 10 April 1995. On 14 March 1995 this court in *R v. Burge and Pegg* [1996] 1 Cr. App. R. 163 at 171 examined the authorities and made it clear that the principle in *Lucas* extends to "non-corroboration cases", see also *R v. Richens* (1994) 98 Cr App R 43 at page 51, per Lord Taylor CJ, and *R v. Goodway* (1994) 98 Cr App R 11 at page 17. These decisions have been followed countless times in this and other common law jurisdictions since and represent the law which trial judges must apply.

45. The law is clear that such a direction is required in certain cases, although it is not always clear which cases require it and which do not. Experience shows that skilled defence counsel may sometimes discourage such directions in which the judge tells the jury that lies can, in certain circumstances, support the prosecution case. A rehearsal of the lies told by a defendant in the written part

of the legal directions is not something which is necessarily helpful to the defence case.

The direction in this case

46. In this case, the judge did give a direction about lies. The lies were told on two occasions. In the safety interview the appellant denied having any explosive materials in his home address and in any "other address". This was not true, and it was suggested that he may have said this because he was panicking, and because he did not appreciate that his lock-up container was an "address". He denied that he deliberately lied. The second occasion involves a number of lies told during the long series of interviews under caution. Here he denied that he had ever made any explosives or explosive devices. It was agreed by counsel on both sides that these were deliberate lies. We asked during the hearing what the appellant's explanation for telling these lies had been and Mr. Timothy Hunter who appeared for the prosecution told us that it was "not entirely clear". Mr. Henry checked his notes of evidence and told us that the appellant had said that he was "worried that the police were trying to trap him or get him into trouble", which could amount to an explanation for why he lied. The judge did not tell the jury what the explanation had been. She referred to the evidence of the appellant on this subject by reminding them that had not accepted that he had lied, but had accepted that what he said was not the truth.

47. In respect of the safety interview the judge directed the jury that if they were not sure it was a deliberate lie, they should ignore it. In respect of the lies under caution, she did not give this direction because of the way the case was argued

by defence counsel who accepted that the lies were deliberate. The first element of the required direction is therefore present where it was relevant.

48. It was clear that the lies went to a material issue. The appellant was dishonestly denying the possession and manufacture of explosive substances and devices. This second element of the required direction goes without saying given the nature of the issue in the case and the subject matter of the lies. The line between a case where the lies are sufficiently material to require a direction and a case where they are so central to the issue of guilt or innocence that they do not is not always clear. That this line exists is clear from, among other cases, *R v. Goodway* which approved and followed a New Zealand decision in *Dehar* [1969] N.Z.L.R. 763 in which the following appeared:-

> "We do not say that in every case in which lies are put forward in aid of the Crown case to reinforce the other evidence it is always necessary for the trial judge to give any specific form of direction. How far a direction is necessary will depend upon circumstances. There may be cases where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic."

49. It is not necessary for us to decide whether this was such a case because the judge did give a *Lucas* direction. It was certainly not necessary for the judge to include in her direction a requirement that the jury had to be satisfied that the lies concerned a material issue, because it was self-evident that they did.

50. In counts 1-3 the appellant bore the burden of proving a lawful object or purpose for the possession and manufacture. His credibility was central to his prospect of success in that endeavour. The burden and standard were different in respect of counts 4 and 5, as the judge correctly directed the jury, but the issue was the same and the appellant's credibility of cardinal importance.

51. The need for a *Lucas* direction in a case where the defendant bears the burden of proving a defence, and has told lies, is an issue we do not need to address in this case because there were also counts where the prosecution bore the burden of disproving the defence.

52. The third element of the direction, that there must be no innocent reason for the lies which were therefore told out of a realisation of guilt is the part which prevents the jury from adopting an "inadmissible chain of reasoning", identified in *R v. Middleton*. The direction by the judge in this case achieves that objective. It contains the phrase: "sometimes people tell a deliberate lie for a reason that isn't necessarily supportive of guilt". She used examples of situations where people might lie for a reason which is "innocent" in the sense that the lie was not told to conceal guilt in respect of the offence charged. She described the examples as "silly" and said that she had deliberately chosen to use examples far from the facts of the present case.

53. Mr. Henry submits that the judge should have gone further and directed the jury that the lies may have been told for a reason which was "innocent" in that the appellant was principally motivated by a concern to rebut the suggestion that he was a terrorist. He may genuinely have been innocent of any terrorist purpose and lied because he thought no-one would believe him about that if they found the explosive substances, devices, and literature.

54. When this was put to the judge after the direction had been given, this exchange took place in the absence of the jury:-

> MR HENRY: In my respectful submission, the lies direction could be, as it were, considered exceptionable as it now stands because of that because they might throw the baby out with the

> bath water by lumping the explosives and the terrorism together when there is a respectable argument that he lied because he is not a terrorist.
>
> JUSTICE MCGOWAN: He did not say that, did he?
>
> MR HENRY: Well, my Lady, he did because he knew that he was not a terrorist and he said that. He did say that.
>
> JUSTICE MCGOWAN: He did not say, 'I lied about making nitro-glycerine because although it was a lie, I didn't want to lead the officers to the conclusion that I was a terrorist.'
>
> MR HENRY: No, but he said, my Lady, that he knew he had not done anything terrorist related and he thought that it would get him into trouble if he admitted that he had made explosives. That is clear –
>
> JUSTICE MCGOWAN: And that is what I said, Mr Henry.

55. There was then some further discussion from which it appears that the appellant had said different things at different times in his evidence on this subject. We have referred at [46] above to a submission that a particular piece of evidence *could* have amounted to a reason why he lied. The judge concluded that he had failed to make a clear case on this issue and declined to make it clear for him. Where a defendant, expertly represented, has given evidence over a long period of time and been asked in chief and in cross-examination why he told lies, and failed to explain clearly what his reason was, he cannot, as a matter of right, demand that the judge should improve that evidence.

56. Mr. Henry relies on *Richens* which was a case where the issue was whether the defendant was guilty of murder or of manslaughter by reason of provocation. The court said:-

> "The point is that the jury should be alerted to the fact that. before they can treat lies as tending towards the proof of guilt of the offence charged. they must be sure that there is not some possible explanation for the lies which destroys their potentially probative effect. Applying that concept to the present case. could the jury be sure that attempts to conceal the killing and lies were

> inconsistent with the appellant's case that he had killed as a result of provocation. and pointed to murder.
>
> It seems to us that counsel for the appellant is correct when he submits that one has only to pose the question in that way to appreciate that in this case the jury would have concluded that they could not treat the lies as probative of murder rather than manslaughter."

57. At first sight, this appears to be authority for the proposition that on the facts of that case the jury should have been directed that the lies told by the accused before trial were equally consistent with his being guilty of manslaughter by reason of provocation rather than murder, and therefore irrelevant. It is true that immediately after this passage the court suggested that some form of *Lucas* direction should have been given. This may have been because although the lies may not have been capable evidentially of supporting the prosecution case, they were still relevant to the credibility of the defendant's evidence at trial. That is not generally the subject of a *Lucas* direction. What is clear in *Richens* is that whatever direction would have been ideal, the direction actually given by the judge was very unhelpful and inappropriately damaging to the defence case. Further, the lies were told (it would seem) during the police interviews. Since the coming into force of the 1994 Act the focus at trial would be on the fact that he had failed to mention when questioned any of the matters on which he relied at trial and an adverse inference direction would be considered, perhaps in the form approved in *R v. Spottiswood* [2019] EWCA Crim 949. *Richens* was certainly rightly decided, but its reasoning on this issue (the conviction was quashed on other grounds as well) may not entirely transfer into the modern era.

58. The *Lucas* direction is usually thought of as favourable to the accused, because it protects against the "inadmissible chain of reasoning", whereas the section 34 direction that in certain circumstances an adverse inference can be drawn where the

accused has failed to mention matters now relied on is thought to be less so. In the present case, the lies told also amounted to failures to mention the matters relied upon at trial. These matters were not only unmentioned, but actively concealed. The judge could have decided to deal with the matter by way of an adverse inference direction in the *Spottiswood* form, but this would, overall, have been less favourable to the appellant than the direction which she gave. The focus shifts from the evidential significance of past lies to the truthfulness of the current account.

59. We therefore dismiss the appeal on Ground 1. We hold that the direction about the significance of lies was adequate, and that it would actually have been open to the judge to give a less favourable direction than she did. The convictions are therefore safe.

Practice Note

60. This part of this judgment concerns only the manner in which, and the time at which, any lies direction should be given. Its content is the subject of extensive guidance in, principally, the Crown Court Compendium. We do not seek to repeat any of that.

61. We consider, with respect to the judge, that the lies direction could have been clearer and structured in a way which would have avoided this appeal. That would have been achieved if it had been reduced to writing and shared with counsel before it was delivered. The judge did follow this process with the majority of the legal directions which were given before speeches. They are elegant, accurate and complete. Lies directions and section 34 adverse inference directions are among those directions which must respond to the way in which the parties put their cases to the jury. This can be done by asking counsel how they propose to address the jury and giving the directions with the other legal directions before speeches, or by

waiting for speeches and designing the directions in the light of what is said. Either approach may be appropriate in a given case. In a very complex case the latter course may be more appropriate, but it is ultimately a matter for the trial judge. If the directions are given after speeches, they can be discussed in outline before speeches and finalised afterwards. Whenever the discussion takes place it should be clear that it is the role of the prosecution to decide what lies to rely on or adverse inferences to seek, and not that of the judge. The judge's role is to consider those submissions and draft appropriate directions about them. There are many circumstances where judges need to give further legal directions after speeches, and they should not be inhibited from doing so where the need arises.

62. Any further legal directions after speeches should be drafted and discussed with counsel before the second part of the summing up is delivered. In the Crown Court now there is always pressure of time because of the need to process cases as efficiently as possible. This had been a long trial and there were no doubt additional time pressures of the kind which develop during long trials. There was an obvious concern to get the jury into retirement as soon as possible, and a desire to proceed with expedition is laudable. We are very alive to the practical problems which arise in managing cases at trial, and we are not critical of the judge for the course she felt obliged to take. We would, however, suggest that if legal directions are given after speeches they should be given in writing and dealt with in the same way as the other legal directions. This has the added benefit that all legal directions appear to have the same status, and there is a clear distinction between authoritative directions of law, in writing, and everything else, given orally. It is clear that the modern practice of giving legal directions in writing is the right one and has many benefits. Its one drawback is that it sometimes takes longer than the old way of doing things.