Neutral Citation Number: [2021] EWCA Crim 1013

Case No: 202003151 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROYDON CROWN COURT
HER HONOUR JUDGE A ROBINSON
T20207111

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2021

Before :

LORD JUSTICE FULFORD, VICE-PRESIDENT OF THE CACD
MRS JUSTICE EADY
and
MRS JUSTICE STACEY

- -

Between :

KENNETH PITCHER	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

MR T MOLONEY QC and MR R BHASIN (instructed by **Edwards Duthie Shamash**) for the **Appellant**
MR H DAVIES QC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 15 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14:00 on 8 July 2021.

Mrs Justice Eady:

Introduction

1. On 18 November 2020, at Croydon Crown Court, the applicant (then aged 51) was convicted, on a majority verdict of 11 to 1, of the murder of John Kennett. He was sentenced the same day to life imprisonment with a tariff of 14 years, less the 224 days he had spent on remand.

2. Applying for permission to appeal against his conviction, the applicant contends the trial judge erred in providing the jury with a "lies" direction in respect of the prosecution witness, Sebastian Wierzchowski, and that this misdirection rendered the applicant's conviction unsafe.

3. Considering this matter on the papers, the single judge directed that it be listed before the full court as a rolled-up hearing. After receiving the parties' oral submissions, we reserved our decision. In now handing down this Judgment, we thank all counsel for the concision and focus of their arguments, which assisted in clarifying the issues to be determined on the appeal.

The Factual Background

4. The applicant and John Kennett had been good friends. They had lost touch but the friendship resumed when Mr Kennett, having separated from his wife, moved to live with his son, Alfie Kennett, in the area where the applicant lived. They socialised, drank and took drugs together. As at December 2019, the applicant considered there was no-one closer to him than John Kennett.

5. Mr Kennett was also good friends with Sebastian Wierzchowski; they had known each other for some years. When Mr Wierzchowski needed somewhere to live, at Mr Kennett's suggestion, it was arranged that he would move in to lodge with the applicant. Otherwise, the applicant had no personal friendship with Mr Wierzchowski.

6. The relationship between the applicant and Mr Kennett was not, however, without incident. Relevantly, on 6 November 2019, an ambulance was called to the applicant's house where Mr Kennett was found lying on the floor of the applicant's upstairs bedroom, unresponsive but breathing. The evidence of the paramedic who attended on that occasion was that initially the applicant was not forthcoming as to what had happened and it was only when he was pressed that he explained Mr Kennett had suffered a heroin overdose. The applicant's evidence was that he had given this information when he called the emergency services and he pointed out that he had also taken heroin that evening and was in shock when the ambulance arrived. In any event, he explained to the attending paramedics that he had injected 15 millilitres of heroin into Mr Kennett at his request, Mr Kennett not being used to taking heroin intravenously.

7. The paramedics were able to bring Mr Kennett around but wanted to take him to hospital for further observation. Mr Kennett refused and stayed in the applicant's room. The applicant's evidence was that, shortly afterwards, Mr Kennett started to cough and got a nosebleed and the applicant passed him a jug, into which Mr Kennett bled and spat. The applicant said Mr Kennett cleaned his fingers with a wet wipe, which the

applicant also used to clean some blood off the jug. He also explained that there was a sponge in his room which he had used to clean away his own blood when he was injecting heroin. After Mr Kennett was killed, all these items were considered as part of the forensic examination of the house and the applicant's explanation as to how his and Mr Kennett's blood and DNA came to be on these things was part of the evidence in the trial.

8. Going on to the events of 23 December 2019, which is when Mr Kennett was killed, in the afternoon that day the applicant and Mr Kennett had gone together to Cash Converters in Croydon to retrieve the applicant's television. Mr Kennett was using a mobility scooter or wheelchair that belonged to the applicant, but left it in Croydon and the applicant was angry about this and, when he returned home, told Mr Wierzchowski about it, calling Mr Kennett a "*wanker*". A short while later, however, Mr Kennett came to the house, apologised and the applicant seemed to accept that and let him in.

9. The three men then spent the rest of the afternoon and early evening in the applicant's house. Although it was common ground that they drank and smoked crack together, the evidence of the applicant and Mr Wierzchowski differed as to how things then proceeded.

10. Mr Wierzchowski said that he had gone to his bedroom, leaving the applicant and Mr Kennett in the living room, both rooms being on the ground floor. He said he watched films on his 'phone, with the volume turned up, but, shortly before 9 pm, heard the noise of a door opening and, opening his bedroom door, saw the applicant dragging Mr Kennett outside. He asked what was happening and the applicant said it was ok, but he should call an ambulance.

11. On the applicant's account at trial, the evening had proceeded differently. The three of them had stayed in the living room, drinking, taking drugs, and playing draughts, although there had been some dispute between Mr Kennett and Mr Wierzchowski about paying for the drugs. The applicant had gone upstairs to use the toilet, and when he returned downstairs, Mr Kennett was slouched awkwardly on the couch and there was blood. He asked what had happened and Mr Wierzchowski told him that he had stabbed Mr Kennett. The applicant said he thought Mr Kennett was only stabbed in his leg so told Mr Wierzchowski that they should take him to the hospital as it was just around the corner. He said they both tried to help Mr Kennett out of the house, taking an arm each, but he was too heavy, so the applicant told Mr Wierzchowski to call an ambulance.

12. As for what happened next, it was common ground that both men had told lies when initially describing to others what had happened to Mr Kennett.

13. Mr Wierzchowski had called for an ambulance but told the operator he had found a man lying in the street bleeding; he gave no indication that he knew the victim. In his evidence at trial, Mr Wierzchowski said he could not remember this and had to be reminded by listening to the recording. When then asked why he had lied to the operator, he replied "*I don't know why I said that*"; when the point was pursued, he added "*Too many beers? I don't know*".

14. Although Mr Wierzchowski had gone back into the house, the applicant had stayed in the street with Mr Kennett, telling a passer-by that this was his mate who had knocked

on his door, saying he had been stabbed. Then, when the ambulance crew arrived at approximately 9:19 p.m., the applicant was found apparently trying to rouse Mr Kennett, shaking him and asking him his name; when asked what had happened, he said that the man had knocked on his front door before he stumbled and fell to the ground. The applicant told the paramedics that the man had been stabbed and was bleeding but when asked how he knew that (it was too dark for the paramedics to tell whether there was any blood and initially they could not see any wounds), he became angry and defensive and went back into the house.

15. The paramedics tried to assist Mr Kennett into the ambulance but he collapsed and was found to have no radial pulse. His clothes were cut off and it was apparent he had a stab wound to his left thigh, a wound to his left chest, minor lacerations to the front left shoulder and bruising to the right side of his face around his eye and cheekbone and the right side of his mouth, and his trousers were soaked with blood.

16. When the police arrived they spoke to the applicant outside his house. It was the prosecution's case that he was trying to make sure the police did not enter the house, where they would see a lot of blood from Mr Kennett's injuries; the applicant said he went outside because his dogs were barking inside. In any event, the applicant again suggested he did not know the injured man, who he said had knocked at his door and then fallen down. A short while later, Mr Kennett's son arrived and asked the applicant what had happened; he said the applicant told him his father had been "*stabbed up*" by "*the dealer*" (that is, the person they bought drugs from). It was the applicant's case that he had in fact said it was by "*Seb*" and that Mr Kennett's son had previously told the police that he had said "*Ted*", which it was suggested he had mistaken for "*Seb*". Alfie Kennett's evidence was, however, that the applicant had said neither Seb or Ted but "*the dealer*" and if he had used the name "*Ted*" it would only have been because he understood that was the name of the dealer.

17. As the paramedics were trying to treat Mr Kennett, the applicant was told to go back inside, although he still took an interest in what was happening and was seen looking out from his upstairs bedroom window.

18. At 9:49 p.m. Mr Kennett was pronounced dead. A post-mortem was carried out on 24 December 2019. The cause of death was stated to be multiple incised wounds and blunt-force trauma to the head causing brain injury.

19. About 20 minutes after Mr Kennett had been pronounced dead, the police again spoke to the applicant, this time inside his house. There they saw a lot of blood in the hallway and on a duvet on the sofa. The applicant at this point accepted that he knew Mr Kennett and said he had let him in when he had knocked at the door, with "*blood everywhere*". In his evidence at trial, the applicant said he had told this lie because he was "*keeping up with what Seb said*", that his lies were to protect Mr Wierzchowski, and because he would generally not tell the police things.

20. The applicant was arrested and taken to the police station where he suffered a cardiac arrest due to a methadone overdose. He was then interviewed by the police on his discharge from hospital, on 29 December, but answered "*no comment*" to all questions.

21. As for Mr Wierzchowski, his evidence was that after the ambulance arrived he had gone back into the house, taken his passport and 'phone and "*escaped*" through the back

door, saying he was scared of the applicant. Mr Wierzchowski stayed away until, on 25 or 26 December, he was told that the police were looking for him and he then contacted the police – he said at a time when he was very drunk – and said that he could help them as he had seen a person get stabbed.

22. Subsequently, Mr Wierzchowski was questioned by the police. It was accepted that he had given an untruthful statement in his first interview, on 27 December 2019; he said that was because he "*was scared*", although he could not explain why. He was again interviewed on 30 December and gave a pre-prepared statement that was different to the statement he had given in the first interview. Later, in a further interview on 8 May 2020, Mr Wierzchowski said his statement of 30 December gave the true account; he said he was more comfortable at the second interview but he could not explain why.

23. Subsequent examination of the house found a serrated edged knife in the applicant's bedroom, under a DVD cover. Although no blood was found on it, expert evidence was adduced at trial to the effect that it was possible that this was the knife used to stab Mr Kennett. Expert evidence also confirmed that most of the wounds might not have left blood on the knife, but it was likely that the wound to the thigh would have done. Moreover, had the knife in the applicant's bedroom been used, it would be expected that blood would have been trapped by the serrated edge, which would not have been removed merely by wiping it. No other knife was found that could have been used in the attack and it was the applicant's case that this made it more likely that Mr Wierzchowski had taken the knife with him when he left the house that evening.

24. A jug with Mr Kennett's blood on and inside it was also found in the applicant's room, along with a blood-stained sponge, a cloth and a pillow-case. There was also a wet wipe which had Mr Kennett's blood on it and DNA from the applicant. It was the applicant's case at trial that the blood on and in the jug, and on the wet wipe, resulted from Mr Kennett's nosebleed after his overdose on 6 November 2019.

25. A number of blood-stained items of clothing were found in the house that appeared to be those worn by the applicant on the evening in question, although he had taken some of them off after his initial conversation with the police. There was evidence that staining on the applicant's clothing was consistent with his having been in direct contact with a man bleeding heavily. There was also extensive blood staining to his trainers, consistent with his having stood or walked in wet blood, and staining to the sleeves of a jacket the applicant had put on after he no longer had any contact with Mr Kennett. It was the prosecution case that this was all consistent with the applicant having been the person who stabbed Mr Kennett and with his clothing becoming stained by his close contact with Mr Kennett and with his subsequent attempts to clean up the blood afterwards.

26. In contrast, no bloodstaining was found on Mr Wierzchowski's clothes, save staining to lower inner aspect of both legs of his jeans; the evidence was that this was not splashed blood but transfer staining, which could have got there either from contact with a direct source of wet blood, or by contact with something that was wet with blood, as might occur if blood from the hall had been picked up on Mr Wierzchowski's shoes and then transferred to the lower part of his trousers.

27. When asked at trial why his clothing should be covered in Mr Kennett's blood when Mr Wierzchowski's clothes were not similarly stained, the applicant said: "*Because it*

was John's side that was bleeding that was leaning on me." It was further suggested to the applicant that it was unwise to move Mr Kennett if he was bleeding, and he responded*: "He'd been stabbed in the leg. I didn't think it was life-threatening.*" The applicant had, however, never suggested that Mr Wierzchowski told him he had stabbed Mr Kennett in the leg and he later gave evidence that he had not seen any stab wounds; as the judge observed in her summing up, that was potentially significant evidence against the applicant.

The Case at Trial

28. It was the prosecution case that the applicant was responsible for stabbing Mr Kennett and that, when he did so, he had intended to kill him or cause him serious injury. Although the prosecution placed reliance on the evidence of Mr Wierzchowski, it was accepted he had told lies at different points in the history of the investigation. It was the prosecution's contention, however, that proof of its case did not depend on Mr Wierzchowski's evidence. Notwithstanding his lies, the evidence taken as a whole demonstrated that he was not responsible for killing Mr Kennett hence the decision not to charge him in spite of his having initially been treated as a suspect.

29. The applicant's case at trial, in contrast, was that although he had not witnessed Mr Wierzchowski attacking Mr Kennett, and although he (the applicant) had lied repeatedly (and in different ways, according to context and audience), the inevitable inference was that Mr Wierzchowski was the person who had killed Mr Kennett.

The Judge's Directions on Lies

30. As is customary, following the conclusion of the evidence, the judge provided draft legal directions, which she discussed with counsel. These were largely uncontentious save for the lies direction she proposed in respect of Mr Wierzchowski.

31. As we have recorded, it was common ground that both the applicant and Mr Wierzchowski had told lies at the scene, and both admitted in evidence to doing so. There was no issue with the judge giving a *Lucas* direction (*R v Lucas* [1981] QB 720) as to how the jury should consider the lies told by the applicant and no criticism was, or is, made of her direction in that regard. The judge also proposed, however, to give a lies direction in respect of Mr Wierzchowski. This course was supported by the prosecution but resisted by counsel for the applicant, who objected to the proposed direction on the basis that it impermissibly drew an equivalence between the position of the prosecution witness and that of the defendant. It was also seen as inviting the jury to speculate as to possible reasons why Mr Wierzchowski may have lied, when he had not provided any explanation in his evidence.

32. The judge ruled that, in this case, a direction in relation to the lies told by Mr Wierzchowski was not only appropriate but necessary. Accordingly, under the heading "*Lies*", she directed the jury, firstly in respect of the applicant and then in respect of Mr Wierzchowski, in the following terms (referring to the prosecution and the defence/defendant as "P" and "D", respectively, and to Mr Kennett and Mr Wierzchowski by their initials):

> "24. P says that D lied repeatedly at the scene: he gave the paramedic the impression he did not know JK, he told [the

passer-by] McCleary-Collins JK had knocked on his door and said he'd been stabbed, he initially told PC Carvey he found JK on the street, he told Alfie Kennett it happened on the street and the drug dealer did it, then he told police JK knocked on the door and when D came out JK fell down, and finally when the police spoke to him in the house he said that JK came into the house already injured. P says that supports their case that he was also lying when he gave evidence and is guilty of the offence with which he is now charged. However, before you can take into account any lies told in support of P's case you have to be satisfied about two matters.

25. First, you must be sure that D deliberately lied. Second, you must be sure that D did not lie for an innocent reason. The mere fact that he lied is not in itself evidence of guilt. A D may lie for many reasons which are innocent in the sense that they do not denote guilt, for example to conceal some disgraceful conduct short of commission of the offence or out of panic or confusion. His evidence is that he accepts lying to the police and public (though not the paramedics) and that he did so in order not to be a 'grass' and to protect SW. If you think that is or may be true or that there is or may be an alternative innocent explanation for the lies then take no notice of them. Only if you are sure D did not lie for an innocent reason can the lies be regarded as providing any support for Ps case. You must not convict wholly or mainly on the strength of any lies but you may take them into account as some additional support for P's case

26. SW also accepted lying: he gave the 999 operator the impression he did not know JK, he told police on the phone he saw a person get stabbed, in his first prepared statement made after arrest he said he was out of the house buying beer and came back to find JK and D on the street and he repeated that version of events in his second interview. In evidence he said he did not know why he said what he did in the 999 call, he was panicking; he could not remember what he said to police on the phone; at the police station he did not know why he lied in his prepared statement and second interview.

27. The fact that SW lied means you will want to consider his evidence very carefully and with caution. However, the fact he lied before does not automatically mean his account of the incident in evidence is untrue. As with D, he may have lied for reasons which are innocent in the sense that they do not mean he assaulted JK, including, for example, because he feared he would be considered guilty by virtue of his presence at the scene. Take into account his lies and any reasons for them. To the extent that you are sure what he said in evidence is true, you may take it into account in support of P's case."

33. Save for this direction relating to Mr Wierzchowski's lies, no issue was taken with the judge's directions or, indeed, to her summing up. In particular, we note that the judge gave very clear directions to the jury as to the burden and standard of proof and as to the need to avoid speculation.

The Appeal and the Applicant's Submissions in Support

34. The applicant contends that the trial judge erred in providing the jury with a lies direction in respect of Mr Wierzchowski, and that this error renders his conviction unsafe. Acknowledging that directions must be tailored to the circumstances of the case, Mr Moloney QC observes that the origins, and meaning, of a *Lucas* direction are to be found in the rules relating to corroboration of evidence against a defendant (see *Lucas* at pp 724C-724H); it provides a protection for a defendant when the prosecution relies upon lies as supporting evidence of the defendant's guilt. In oral submissions, Mr Moloney accepted that there might be other contexts in which a *Lucas* direction would be appropriate but contends that the circumstances must still be such that the court is required to make a finding of fact against the individual who is the subject of the direction (as, we observe, might be the case at fact-finding hearing in family law proceedings, where a judicial self-direction on lies may be considered appropriate; see *Re H-C (Children)* [2016] EWCA Civ 136, per McFarlane LJ at paragraphs 97-100).

35. In the present case, although the applicant had contended that Mr Wierzchowski was to blame for the killing, and the jury could conclude that he had lied to hide his guilt, that was an issue that could only go to Mr Wierzchowski's credibility as a witness who implicated the applicant as the murderer of Mr Kennett. The applicant had no burden of proof in respect of Mr Wierzchowski's involvement; what was in issue was whether what he was saying about the applicant was true, or might not be true, and the jury ought appropriately to have been directed (as with any witness) only that it was to consider or reject his account in the light of his lies. In particular, Mr Moloney objected to the third sentence of paragraph 27 of the judge's written directions, which he contended drew a false equivalence between Mr Wierzchowski and the applicant. As Mr Wierzchowski was merely a witness and not a co-defendant, the jury was not required to be sure that he had stabbed Mr Kennett and was never in a position where it might have found him guilty; no special direction of the *Lucas* type was required.

36. Moreover, Mr Wierzchowski had never said he told lies because he feared he would be considered guilty by his presence at the scene, yet the judge expressly invited the jury to consider that as a reason why he may have told lies. The judge also directed the jury to take into account any reasons for Mr Wierzchowski's lies, but he had advanced no reasons, despite being asked why he lied; the jury was being invited to speculate and to look for an innocent reason for the lies when Mr Wierzchowski had been unable to advance such explanation. Yet further, with the direction as to the lies of the witness immediately following that in respect of the applicant, the jury would inevitably have been left confused as to how it was to assess Mr Wierzchowski's evidence and as part of the evaluation of the case against the applicant.

37. In the premises, the applicant says that the safety of his conviction is fundamentally undermined.

The Prosecution Case

38. For the prosecution, Mr Davies QC contended that, in the unusual, fact-specific matrix in which the issue arose, the lies direction given by the judge in respect of Mr Wierzchowski's evidence was necessary, appropriate and entirely justified and, in any event, the applicant' conviction was safe.

39. Accepting that the *Lucas* lies direction had its origins in the consideration of what is, or is not, capable of amounting to corroboration, Mr Davies submits that the "*forbidden reasoning*" (see *R v Middleton* [2001] Crim L.R. 251, at paragraph 19), which it was intended to prevent, can arise in any case where there is a risk that a jury will infer, without appropriate process of reflection, that the liar is guilty of the offence.

40. Although there was no authority on the question of the use of such a direction in relation to a witness (rather than a defendant), that was because the issue would not normally arise: a jury would not normally be invited to conclude that the lies of a prosecution witness were indicative of the liar's own guilt in relation to the crime in question. Given that the applicant was putting a positive case that the lies of Mr Wierzchowski were indicative of his guilt, a case-specific direction had been required.

41. As for the explanation for lying given in evidence, Mr Wierzchowski was not a witness who was able to articulate his reasons for lying, but the jury was still entitled to step back and consider the position more generally and the judge did not err in directing the jury accordingly.

Discussion and Conclusions

42. Any summing up must be tailored to provide practical assistance in relation to the issues that arise in a particular case and must be fair to both the prosecution and the defence. In *R v Lawrence* [1982] AC 510 at 519, HL, Lord Hailsham LC said:

> "A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

Lord Hailsham's guidance provides a helpful touchstone as we approach the submissions made in relation to the direction in issue in this case.

43. The present appeal concerns a direction given to the jury regarding lies; a direction that has led to not infrequent appeals to this court, although not, so far as we are aware, in relation to lies told by a non-defendant witness.

44. As regards the position of a defendant, the lies direction approved in *R v Lucas* [1981] QB 720 arose from circumstances in which the defendant's lies were relied on as corroboration of his guilt. Although lies told by a defendant will not, on their own,

make a positive case of any crime (*R v Strudwick* (1994) 99 Cr App R 326, per Farquharson LJ at p 331), as Lord Lane CJ observed in *Lucas* (at p 724D):

> "It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew if he told the truth he would be sealing his fate."

45. In *Lucas* it was held that, to be capable of amounting to corroboration, the defendant's lie must:

> "… first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lied must a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie …" (per Lord Lane CJ at p 724F)

46. These conditions are now standardly encapsulated in a three-point "*Lucas*" direction, such that a jury will be told that a defendant's lie may be probative of guilt but will only be capable of supporting other evidence against that defendant if the jury is sure that: (1) it is shown, by other evidence in the case, to be a deliberate untruth, not arising from confusion or mistake; (2) it relates to a material issue; and (3) it was not told for a reason advanced by or on behalf of the defendant, or for some other reason arising from the evidence, which does not point to the defendant's guilt (and see the *Crown Court Compendium* Part I, [16-3]).

47. As to when such a direction is necessary, in *R v Goodway* (1994) 98 Cr App R 11, it was stated that:

> "… a *Lucas* direction should be given, save where it is otiose …, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt." (per Lord Taylor CJ at p 17)

48. The approach in *Goodway* drew on the dictum of Lord Devlin in *Broadhurst v R* [1964] AC 441, at p 457, as follows:

> "It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly convict him without more ado. It is the duty of the judge to make clear to them that this is not so… [If] upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially whether there are reasons other than guilt that might account for untruthfulness."

49. That is not to say, however, that a *Lucas* direction is required in every case where the jury may conclude that the defendant has told lies; as explained in *R v Burge and Pegg* [1996] 1 Cr App R 163:

> "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. …
>
> …
>
> Adapting words used by Professor Birch in the Criminal Law Review [1994] Crim.L.R 683, our view is that the direction on lies approved in *Goodway* comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt. Normally prosecuting counsel will have identified and sought to prove a particular lie on a material issue which is alleged to be explicable only on the basis of a consciousness of guilt on the defendant's part. This is, as Professor Birch says, a very specific prosecution tactic, quite distinct from the run of the mill case in which the defence case is contradicted by the evidence of prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict. the defendant's account is untrue and indeed deliberately and knowingly false." (per Kennedy LJ at p 172D-G)

50. Thus, a *Lucas* direction is required where the defendant's lies are relied on by the prosecution, or might be used by the jury, as supportive of the evidence said to establish the defendant's guilt. The direction is not required, however, where the prosecution merely points to those lies as going to the defendant's credit: in such cases, the fact that the defendant is a liar will go only to the jury's evaluation of the weight to be given to his evidence, his lies are not being relied upon as corroborative evidence of the fact of his guilt.

51. In *R v Middleton* [2001] Crim L.R. 251, the Court of Appeal characterised the *Lucas* direction as an aid to the jury's approach to the evidence, observing:

> "18. … People do not always tell the truth. Laudable as it may be to do so, whatever the circumstances, they do not, or cannot, always bring themselves to face up to reality. Innocent people sometimes tell lies even when by doing so they create or reinforce the suspicion of guilt. In short, therefore, while lying is often resorted to by the guilty to hide and conceal the truth, the innocent can sometimes misguidedly react to a problem, or postpone facing up to it or attempt to deflect ill-founded suspicion, or fortify their defence by telling lies. …"

Thus, it was:

> "19. The purpose of giving the Lucas direction, as with many others intended to assist a jury with its proper approach to issues of evidence, is to avoid the risk that they may adopt what in different contexts Professor Sir John Smith described in his commentary on R. v. Smith [1995] Crim.L.R. 940, as "forbidden reasoning", and Lord Hailsham described in *Director of Public Prosecutions v. Boardman* [1975] A.C. 421, at page 453, as "an inadmissible chain of reasoning."
>
> 20. In the present context this, in short, is to assume that lying demonstrates, and is consistent only with, a desire to conceal guilt, or, putting it another way, to jump from the conclusion that the defendant has lied to the further conclusion that he must therefore be guilty. That is an understandable inference a jury may sometimes draw from evidence about lies told by a defendant. However, as we know, on their own lies do not prove guilt, and they may sometimes be told by defendants who are indeed innocent."

52. In circumstances where a defendant's lies might be used by the jury as corroboration of guilt, the *Lucas* direction therefore seeks to promote a coherent process of reasoning: adopting that reasoning, a jury will know that, even if satisfied that the defendant has lied on a particular issue, it must not jump to the conclusion that he is guilty; it will need to consider whether there are potential explanations for the lies other than guilt and should not convict wholly or mainly on the strength of those lies.

53. The present appeal poses the question why a similar process of reasoning should not be required in the case of a non-defendant witness, whose (admitted) lies are relied upon by the defence as demonstrating that it is, in fact, the witness who is guilty of the crime for which the defendant is on trial. In such circumstances, is there not similarly a need for a direction that guards against a chain of reasoning that might ignore the fact that there may be entirely innocent explanations for the lies told by that witness?

54. In our judgement, the answer to that question is nuanced. As the applicant observes, the witness in such a case is not in the same position as the defendant: he is not on trial and cannot be found guilty of the offence in question. There is not the same requirement, in relation to the position of that witness, to make sure that the lies in question are not used to bridge what would otherwise be a gap in the case against the liar. That, plainly, is very different to the position in relation to a defendant. That said, where (as here) the defendant relies on the fact that a prosecution witness has lied as evidence that that witness is himself guilty of the offence, then the judge may well take the view that it is necessary to direct the jury to consider whether there might be some other explanation for those lies. The direction, however, is one that goes to the jury's evaluation of the weight to be given to the evidence of that witness. Although the jury might conclude that the lies told by the witness are indicative of his (rather than the defendant's) guilt, in terms of their function of trying the accused that conclusion can only go to his credit, the reliability of the prosecution evidence overall and whether the jury are sure that the defendant is guilty of the offence he faces. As part of the trial process in England and Wales, the jury will not have been invited to consider whether to make a specific finding of fact against the witness.

55. Whilst we therefore agree with the applicant that, in relation to the lies of a non-defendant witness, a *Lucas* direction is inapposite, we can also see that custom-built directions (per *Lawrence*) may require that specific guidance is given in such cases so that the jury does not wrongly exclude the possibility that the witness may have lied for reasons other than (as the defendant has suggested) his own guilt in respect of the offence in issue. Where, as here, the lies told by a non-defendant witness have taken on a particular relevance to the issues to be determined, the need to ensure that the jury adopts a coherent process of reasoning - allowing that there may be entirely innocent explanations for those lies - can extend to that witness, albeit that this will be in relation to the evaluation of the creditworthiness of his evidence rather than as potential corroboration of his guilt. Ultimately, the jury is simply being directed to guard against assuming that the fact that the witness has lied about one matter must mean that he has lied about something else; the direction, however, may need to be custom-built to address the reason why that has a particular relevance in the case.

56. In our judgement, this is what the judge's direction did in these proceedings. Although we can see that it might have been better if no equivalence had been drawn between the case of the applicant and that of Mr Wierzchowski ("*As with D, he may have lied …*"), we do not consider that this would have given rise to any confusion in the jury's collective mind. In both her written directions and her oral summing-up, the judge made clear that the burden of proof remained on the prosecution throughout, to the criminal standard. That clarity of approach was reinforced by the full *Lucas* direction given in respect of the lies told by the applicant. A differently worded direction was then provided in relation to the lies of Mr Wierzchowski. The applicant cannot object to the first two sentences of that direction; as Mr Moloney acknowledged in oral argument, that guidance goes to the issue of Mr Wierzchowski's credit and is entirely apposite. Ensuring that the bespoke direction given relating to Mr Wierzchowski's lies was issue-relevant, the judge then reminded the jury that the witness may have lied for reasons that were innocent, that is, in the sense that he did not assault Mr Kennett. No suggestion was thereby made that any burden had shifted to the applicant or that the jury should only reject Mr Wierzchowski's evidence if they were sure that his lies demonstrated that his account was untrue. Indeed, as the judge's direction then went on to make clear, it was only "*to the extent that you are sure what [Mr Wierzchowski] said in evidence is true, [that] you may take it into account in support of [the prosecution's] case*".

57. Our conclusion in this regard is not undermined by the placement of the lies direction in respect of Mr Wierzchowski as following immediately after the full *Lucas* direction given in relation to the applicant. Although we can see that a judge will need to take care that the position of a direction of this nature does not lead to a confusion between the case of a defendant and that of a witness, we are satisfied that there was no risk of this in the present case. First, because the directions are differently worded and are clearly crafted to the particular circumstances of each individual. Second, because the guidance provided by the judge in relation to lies has to be read in the context of her very clear, earlier directions relating to the burden and standard of proof.

58. The applicant further objects to the judge's suggestion that the jury might consider there was an innocent explanation for Mr Wierzchowski's lies – in particular, that he may have lied because he feared he would be considered guilty by virtue of his presence at the scene - notwithstanding his failure to articulate such a reason in evidence. We do

not, however, consider that any arguable objection can arise in this regard. The judge was doing no more than asking the jury to use its collective common sense when reviewing the totality of the evidence. In the particular circumstances of this case – where either the applicant or Mr Wierzchowski had to be responsible for the assault on Mr Kennett – it was not mere speculation to consider whether Mr Wierzchowski's lies might have arisen from a fear of being considered guilty by virtue of his presence at the scene; that was an entirely obvious inference the jury might be permitted to draw from the evidence.

59. We are, therefore, satisfied that the judge did not err in the direction given to the jury regarding the lies told by Mr Wierzchowski. Whilst we consider that the appeal gives rise to an arguable question as to whether the direction, in the form adopted in this case, drew a false equivalence between the way in which the jury was to approach the lies told by the applicant and those told by this prosecution witness, we are confident that no substantive misdirection arose. Although it would have been better to avoid any suggestion of comparison ("*As with D, …*"), the direction – read as a whole and in the context of the earlier directions on the burden and standard of proof – clearly and unobjectionably explained the coherent process of reasoning the jury was to adopt when evaluating the evidence of the witness as part of its assessment of his credibility. In the circumstances, the jury was properly directed as to its task and there can be no question as to the safety of the applicant's conviction.

Disposal

60. We therefore allow the application for permission but, for all the reasons we have given, duly dismiss this appeal.