

CRIMINAL LAW UPDATE



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***Lucas* directions and Section 34**

The Court of Appeal has recently re-visited the circumstances in which a Judge should give both a Lucas direction on lies told by the defendant and an adverse inference direction on failure to mention, in interview, facts later relied on by the defendant under section 34 of the Criminal Justice and Public Order Act 1994.

In *Rana* [2007] EWCA Crim 2261, the Court of Appeal had deprecated the practice of giving both directions out of an abundance of caution. While both may be considered appropriate in the correct circumstances, and there is a considerable overlap between the two, the best approach is to choose which of the two directions is most appropriate to the facts of a particular case and modify it to meet the particular circumstances of that case; see Auld LJ at paragraph 11.

In *Hackett* [2011] EWCA Crim 380, the trial Judge was faced with the following situation. The Appellant was charged with attempted arson. In his interview with the police, he did not accept that he had visited a petrol station or bought petrol. In a statement made several weeks later he said that he had been to the petrol station and that he had bought petrol and that the purpose of buying the petrol was to put into a strimmer. He said that he had not mentioned this in interview because, to do so, would have involved an admission of drink-driving. The Court of Appeal held that this was a case for a section 34 direction and not a *Lucas* direction. The jury should have been directed that they could draw an adverse inference from the failure of the Appellant to have mentioned in his first interview the reason why he had bought the petrol. The section 34 direction should have been modified by an additional direction that they should not draw an adverse inference if they thought that the explanation for not mentioning it in the first interview (namely the 'drink driving' admission) might have been true. There was no need, in those circumstances, to add a *Lucas* direction.

Now in *Wainwright* [2021] EWCA Crim 122, the Court of Appeal has now approved a situation in which both directions were given by the trial Judge. Mr Wainwright was convicted of murder. In his first interview, he said that he had not been present at the scene nor had he assaulted the deceased. At trial he accepted that he had lied in that interview. He explained his lies by saying that he did not trust the police to believe him because of his past relationship with them, that he did not wish to be labelled a 'grass' by implicating others and that he had

consumed cannabis affecting his recollection of events. In his second interview, he did not answer any questions. He explained this by saying that he was acting on legal advice. At trial, the Defence contended that the Judge should give a *Lucas* direction, the Prosecution that the Judge should give a section 34 direction. In the event, the Judge gave both directions. The rationale for giving both directions was this – the defendant’s explanation for the lies and for the failure to mention matters when questioned were different. The Court of Appeal in *Wainwright* stressed that it was not seeking to dilute the guidance given in *Rana* and *Hackett* – when it is feasible and convenient to do so, it is preferable to combine both directions (paragraph 32). Whatever course is adopted, the Court must ensure that the core protections necessary in both directions are covered (paragraph 33). When there is a difference between the explanation for the lie and the explanation for the failure to mention (as was the case with Mr Wainwright), it is critical that the Judge reminds the jury that there may be reasons for the lies which are not connected with guilt of the offences charged. The Judge explained why the lies told by Mr Wainwright might support the Prosecution case; in that it suggested that there was an agreement between the defendant and his co-accused to deny involvement in order to protect themselves. He then balanced that with a *Lucas* direction to the effect that telling lies is not necessarily evidence of guilt and the reasons for that. Equally, it was not a case in which a section 34 direction was otiose, for example where an adverse inference could only be drawn once guilt was established. If the jury was sure that his explanation for why he had not mentioned his presence at the scene was untrue, they were entitled to use this as some evidence in support of the fact that he was involved in the joint enterprise attack, intending the victim at least really serious bodily harm.

Wainwright offers some welcome corrective to the tendency which may have developed in which Judges will not give both a *Lucas* direction and a section 34 direction. While the law remains that simplicity dictates that one direction should be given where possible, there are circumstances in which both are required. When both directions are given, the jury should receive them at the same time in order to be able to appreciate the connection between them.

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