LIES AND LUCAS IN THE FAMILY COURT

Just because a person lies about one thing it does not automatically follow that they are lying about everything. This is the perhaps obvious rationale which has informed judges and tribunals charged with the responsibility of fact-finding hearings for many years but at least since the seminal court of appeal authority in ***R v Lucas*** [1981] QB 720

In ***Re A, B and C (Children)*** [2021] EWCA Civ 451, a recent decision in the Court of Appeal, the court took the opportunity to emphasise the fact that this rationale applies just as much to the fact finding process in family proceedings as in all other proceedings and moreover required a refined analysis of the relevance of a person's dishonesty about aspects of the case or their life to the question as to whether or not they are lying about the central facts in issue in the case.

The background to the case can be stated shortly. An adolescent boy aged 15 years was accused of sexual assault of another much younger child in the extended family. He denied the allegations in their entirety. Care proceedings commenced in relation to that child and her siblings with a view to establishing whether the assaults had taken place. The evidence before the court included the complainant's allegations made to the police and to others and the contents of her ABE interview. She did not give oral evidence. The boy who was accused of the assault did give oral evidence to the court and had given answers in his police interview. The court at first instance found the allegations had been proved to the requisite standard. As part of the judge's assessment of the credibility of the allegations significant reliance was placed upon the lack of credibility of the older boy's evidence in the witness box. This led the Judge to reject this denial of being the perpetrator of the alleged sexual abuse which she based upon her assessment that he had lied in the witness box about certain aspects of his evidence. The Judge found five separate instances when the boy had invented things these are set out at paragraphs 26-28 of the Judgment of the Court of Appeal. The Judge found that the only explanation for these lies was his guilt.

Within the body of the Judgment the Judge had given herself a direction in accordance with the principles in ***R v Lucas*** [1981] QB 720. It was described by the Court of Appeal as having been given in formulaic terms as follows:

> *"that people lie for all sorts of reasons, including shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure and the fact that somebody lies about one thing does not mean it actually did or did not happen and / or that they have lied about everything".*

Macur LJ sitting in the Court of Appeal made this observation about this formulation at paragraph 54 onwards:

> *But this formulation leaves open the question: how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact? In my view, the answer is provided by the terms of the entire "Lucas‟ direction as given, when necessary, in criminal trials.*

She then went on to set out extracts from the Crown Court compendium and case law as follows

> "Chapter 16-3, paragraphs 1 and 2 of the December 2020 Crown Court Compendium, provides a useful legal summary:
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> > *"1. A defendant's lie", whether made before the trial or in the course of evidence or both, may be probative of guilt. A lie is only capable of supporting other evidence against D if the jury are sure that: (1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake; (2) it relates to a significant issue; (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D"s guilt. 2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D"s lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt. ..."*
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> > 56. In Re H-C (Children) [2016] EWCA Civ 136 @ [99], McFarlane LJ, as he then was said:
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> > *"99 In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.*
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> > *100 ... In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."*

57. "To be clear, and as I indicate above, a "Lucas direction" will not be called for in every family case in which a party or intervenor is challenging the factual case alleged against them and, in my opinion, should not be included in the judgment as a tick box exercise. If the issue for the tribunal to decide is whether to believe X or Y on the central issue/s, and the evidence is clearly one way then there will be no need to address credibility in general. However, if the tribunal looks to find support for their view, it must caution itself against treating what it finds to be an established propensity to dishonesty as determinative of guilt for the reasons the Recorder gave in [40]. Conversely, an established propensity to honesty will not always equate with the witness's reliability of recall on a particular issue."

In an important passage the judge stated as follows:

58. "That a tribunal's Lucas self-direction is formulaic, and incomplete is unlikely to determine an appeal, but the danger lies in its potential to distract from the proper application of its principles. In these circumstances, I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis , or itself determines, that such a direction is called for, to seek Counsel's submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction

will remain the same, but they must be tailored to the facts and circumstances of the witness before the court."

Therefore, it can be seen that whilst it is of course open to the court to reject a witnesses' evidence on the basis that they are lying about peripheral or non-material matters, it will be incumbent upon the court to demonstrate that it has weighed up the issues to which the lies relate and on what basis it can be determined that the only explanation for the lie is guilt. In other words, to set out how the lies are relevant to the credibility of the witness on the central issues in the case.

A further interesting aspect of this Judgment relates to the considerations of children giving oral evidence in family proceedings. Everyone is familiar with the principles of ***Re W*** [2010] UKSC 12. Macur LJ made the following observations at paragraphs 50-51.

51. *"It is pertinent to observe that there can be a significant difference between fact finding hearings in the civil and family courts. In the former, the tribunal determines the dispute upon an assessment of the witnesses' evidence which, if challenged, is subject to oral cross examination. It is possible in such circumstances for the judge to decide the issue on the basis of their assessment of the witnesses and the evidence they prefer, subject to the burden and standard of proof. In the family jurisdiction, there are many cases which involve challenge to a child complainant's allegations of sexual abuse, but in which the child is rarely, and too rarely in my view, called to give evidence despite their competence and in light of the decision in Re W [2010] UKSC 12. In these cases, there is often an absence of independent direct or forensic evidence that supports the case.*
52. *No doubt the continued roll out of section 28 of the Youth Justice and Child Evidence Act 1999, which commenced in 2019 and enables the pre-recording of the cross examination of, amongst others, a child witness will equally benefit the family courts, as it will and has done in the criminal courts. However, in the meantime the tribunal must balance the evidence of a child complainant, which is not directly challenged in cross examination, against the evidence of the alleged perpetrator whose evidence invariably is".*

The court has highlighted the significant difference between how the evidence of a complainant is dealt with in the criminal court compared to the family court and in the view of Macur LJ children are too rarely required to give evidence in family cases. In the light of these comments practitioners need to be alive to the fact that Re W does not create a blanket ban on children giving evidence and that the imperative to place the best evidence before the court should be carefully considered on a case-by-case basis with consideration as to whether special measures such as pre-recording the cross examination can be deployed to enable meaningful challenge to be made to the account.

In addition to this Macur LJ observed that in relation to an alleged perpetrator who is a child giving oral evidence that *“if D, or anyone of his age had declined to give evidence and be cross examined, then but for special considerations of educational special needs, mental or physical disability, or other good reason, it would be open to a judge to draw an adverse inference after the witness had been given due warning as to the consequences of a party or intervenor of failing to do so”* – which may well have a bearing on the decision as to whether or not an older child should be required to give oral evidence without drawing an adverse inference.

Andrew Bagchi QC and Anna Lavelle appeared as counsel for the appellant in *ABC* and practice from 1GC Family Law.