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2017/05688/C4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Friday 21st June 2019

B e f o r e:

LORD JUSTICE MALES

MRS JUSTICE SIMLER DBE

and

MR JUSTICE MURRAY

_____

R E G I N A

- v -

JATINDER SINGH MANN

_____

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Mr O Greenhall appeared on behalf of the Appellant

Mr A Evansappeared on behalf of the Crown

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J U D G M E N T

(Approved)

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Friday 21 st June 2019

LORD JUSTICE MALES: I shall ask Mrs Justice Simler to give the judgment of the court.

MRS JUSTICE SIMLER:

Introduction

1. On 27th November 2017, in the Crown Court at Isleworth before His Honour Judge Moore and a jury, the appellant, Jatinder Mann, was convicted of dangerous driving. On 1st December 2017, he was sentenced to twelve months' imprisonment and disqualified from driving for three years and until he passed an extended re-test.

2. He appeals against his conviction for dangerous driving by leave of the full court.

3. The single ground of appeal is that the judge failed to direct the jury on the proper approach to take to any rejection of the appellant's alibi defence and that, accordingly, his conviction is unsafe.

The facts

4. The facts may be summarised as follows. At about 12.30am on 29th March 2017, police officers were patrolling in the Hounslow area in an unmarked police car. They saw a silver coloured Alpha Romeo car, registration number WV11 VRX, being driven dangerously on two separate occasions. On the first occasion, the car mounted

the kerb and then drove off at speeds between 60mph and 100mph in a 30mph zone. On that occasion, neither officer could identify the driver; nor were they able to give the registration number of the car, although a description of the passenger was given.

5. A little later, at about 1.50am, two different officers, Police Sergeant Creek and Police Sergeant Sparks, were driving another police car when they saw an Alpha Romeo car being driven on Hanworth Road. The car stopped. The officers approached it and sought to detain its occupants. PS Creek later described the passenger window as wound down about two to three inches, or "a third of the way". He was later to give evidence at trial that he had a clear and unobstructed view of both men and recognised the driver of the car as the appellant. He had seen him, he said, approximately ten times over a period of seven or eight years, and had seen him two and a half weeks previously, on 10th March, when he had stopped him in the same car because it had a defective tail light.

6. On 29th March, during the incident with which we are concerned, having been observed in this way by PS Creek, the driver lifted his hands but then suddenly drove off. The car was then driven through red lights, travelling at about 80mph, forcing a lorry driver to brake sharply. The driver of the Alpha Romeo appeared desperate not to be caught. The officers decided that it was too dangerous to continue the pursuit in those circumstances and lost sight of the car.

7. The appellant was arrested the following morning. In interview he said he had borrowed the car from a friend called Kay. He said that he used it until about three or four o'clock that afternoon (28th March) and left it parked up. Later, he went to a party in Harrow. However, he declined to provide police with details about where exactly he was, or to give the names of others who were present, who could support his alibi. He denied being the driver of the car at all material times on 29th March. When charged, he said "I'm going to have a look for CCTV".

<u>The trial</u>

8. In due course, the critical issue for the jury at trial was whether they could be sure that the appellant was the driver of the car in question. There was no dispute that the driving was dangerous once the vehicle left the scene on Hanworth Road.

9. The evidence of PS Creek was central to the prosecution's case on that issue. At trial his evidence was that this was a recognition case. He said he had seen the appellant ten times over the previous seven to eight years, although before the incident on 10th March 2017 he had not seen the appellant for about a year. He described what happened on 10th March, when the same Alpha Romeo car had been stopped because of a defective tail light. The car pulled up on the driveway of the appellant's home address. Safety lights were triggered and came on. Officers approached the car and the appellant, who was sitting in the driver's seat, lowered the window a short distance. The appellant did not get out of the car on police direction and, as a result, the window was smashed by police and the appellant was extracted with force from the vehicle. No charges in fact resulted from that incident.

10. PS Creek gave evidence that, after that, he did not see the appellant until 29th March 2017. In cross-examination about the events of 29th March, he maintained he did not associate the appellant with the vehicle as a result of what had occurred on 10th March and was not listening particularly to radio communication suggesting that the appellant was driving an Alpha Romeo car that evening. He denied he had already formed the opinion that it was the appellant who was driving the vehicle when it was stopped in Hanworth Road. PS Creek maintained he saw the driver looking directly at him from a distance of one to one and a half metres, and maintained sight of the driver for a period of approximately 40 seconds to one minute. He said he had an excellent view of the driver and the only reason he did not provide details of his clothing in the statement he made within four hours of the incident, was that he knew and recognised the driver. He said the driver was the appellant, Jatinder Mann.

11. The appellant gave evidence at trial. He accepted he was driving the same silver Alpha Romeo car on 10th March 2017 and that he stopped on the driveway of his address. He accepted that officers approached the car and said words to the effect: “Take the keys out and get out of the car”. The appellant said the approach of the officers caused alarm and distress to him. For that reason, he did not get out of the vehicle. He agreed that the window was smashed and he was removed from the car.

12. The appellant maintained he was not the driver of the Alpha Romeo in the early hours of 29th March. He said, consistently with what he had said in interview, that he had used the car during the day and had left it at the back of the house where he was then living. A cousin had visited him from Canada, and he was to meet that cousin at a party at a friend’s house in Harrow. He had not been to the Harrow address before. He was picked up in the evening to go to the party and subsequently left the party in a cab to return home at 6am. On his return, he did not check where the Alpha Romeo car was and did not know who had been driving it. He said that the owner of the car also had a set of keys.

13. He said he was angry during the police interview, since he had done nothing wrong. He accepted that he had met the officers, PS Creek and PS Sparks, previously. No witnesses were called in support of his alibi. It was his case that the identification of him as the driver was mistaken and that the overall circumstances in which that identification took place were poor since it took place at night and the officer was looking through a small gap into the window of a darkened car for but a short period of time. Moreover, in view of police radio communication immediately before that identification, he said the officer was primed to misidentify the driver as the appellant.

<u>The summing up</u>

14. In summing up the case to the jury, having dealt with directions on the burden and standard of proof, the judge warned the jury that the case depended on the correctness of the identification or recognition evidence given by PS Creek that the appellant was the driver of the Alpha Romeo car that evening. He said:

”… I must warn you of the special need for caution before convicting a defendant in reliance on the evidence of recognition. It is a very particular type of evidence and you have to be extraordinarily careful with it, because a

witness can be convinced in their own mind that the recognition is correct and therefore they will be a convincing witness, 'I'm a hundred per cent certain, I'm absolutely certain it's him'. Those are the sort of phrases but, nevertheless, he may be mistaken. Mistakes can be made in relation to recognition.

So, that is why you need to examine very carefully the circumstances in which the identification was made, how long did the person say that they saw the defendant, at what distance, and in what light? Any obstruction of the view? Had the witnesses seen, for example, the person before? If so, how often? Had he any special reason for remembering and what is the difference in time between the alleged recognition and the name going on to the police computer basically? Were there any particular discrepancies or differences?

Clearly, here you have got a recognition at night and it does not matter what anybody says about lighting, night time identification is more problematic undoubtedly than a daytime recognition. This is not a case of a window being the whole way down. This was looking through a short area, I think about, what was it, two or three inches? Of course, conversely, the officer said, 'I'd seen him on [the] 10th, two or three weeks previously', though he had not seen him in the intervening time. So, those are all factors that you have got to take into account and how long, because it is a short time.

You must be very, very careful about it, and I urge special caution in a case of recognition. It is not just this case, but in all cases because mistakes have been made in the past."

15. In relation to the appellant's alibi evidence, the judge noted the fact that no detailed evidence or information was provided by the appellant. He then said:

"It is very important that you understand the following. A person can say whatever he wants in an interview but he does not have to prove the case in any way at all. It is for the prosecution. This case rests exclusively on the prosecution making you sure. Many times people will want to bring witnesses, and witnesses just do not want to come to court and it is as simple as that, and if you are thinking that way, you are thinking in the wrong way. The question you must always be pointing yourself is: 'Am I satisfied so that I am sure' that the prosecution have made you sure that this was Jatinder Mann? It is quite a high burden.

…

So, I repeat, it is for the prosecution to prove the case, it is not for the [appellant] in any way to bring alibis."

16. The judge summarised the defence case as follows:

"[The appellant], he said that it [the Alpha Romeo] was owned by a friend called Kay. He was trying to sell it. He was driving it around. He buys and sells cars. He said, 'I was on the driveway on [the] 10th.' He said quite simply that there was not a disagreement, but strong language used. Whether that be right or not, he says he was scared.

On [the] 29th, he said, 'I was using it that day up until about three to four'. He parked it at the back. He had lost his mobile and that he thinks that Kay basically had the vehicle because he had been parked up, that is [the appellant] had been parked up, and he went to a party at Harrow.

He was cross-examined. He said that the officers were aggressive. In interview he says quite simply that he was, I think, admitting that he was being not overly helpful but he had gone to Harrow and he accepted [we] would not hear any witnesses because, quite simply, they really do not want to get involved. It is as simple as that, and that is the case.

You have got to look at this ID through the window and you have got to be satisfied so that you are sure. If you are not sure, it has gone all right? It is only if you are sure [that] you will then go on to consider the driving, and, as I say, suspicion is not sufficient. You have to be sure."

17. At the end of the summing-up, counsel for the appellant sought a “lies direction” in relation to any rejection of the appellant’s alibi. Mr Greenhall, who appeared on behalf of the appellant at trial as he does on this appeal, submitted that the jury should be directed by the judge that if they did not accept the appellant’s account that he was in Harrow, they must be very careful to ensure that they do not assume that necessarily supports the identification in any way.

18. Having heard submissions on the point, the judge declined to give such a direction and ultimately gave the jury no direction as to the approach they should take if they rejected the appellant’s alibi. That, of course, is the basis of this appeal.

The legal principles

19. It is common ground that the law relating to a defendant’s lies was dealt with by this court in *R v Goodway [1998] Cr App R 11* , where it was held that a full *Lucas* direction should be given whenever lies are relied upon by the prosecution, or might be used by the jury to support evidence of guilt, as opposed to merely reflecting on the defendant’s credibility.

20. Following *Goodway*, in *R v Burge and Pegg [1996] 1 Cr App R 163* , this court drew attention to the large number of recent appeals in which it had been contended that a *Lucas* direction had not been given when it should have been. This court emphasised that the warning is not required in every case in which a defendant has given evidence, even if the jury might conclude that some of the evidence might have contained lies. The *Lucas* warning is necessary only in a case where there is a danger that the jury might regard a finding that the defendant told lies as probative of his guilt of the offence which they are considering. How far a direction may be necessary inevitably depends on the circumstances of the case; but such a direction is not inevitably or invariably required. The court identified that such a direction would usually be required, however, where the defence raised was one of alibi.

21. *Burge and Pegg* was followed by *R v Harron [1996] Cr App R 581* . In *Harron*, this court held that a *Lucas* direction is not required, even in an alibi case, if there is no distinction between the issue of guilt and the issue of lies. *Harron* was a case where the victim knew the defendant who had just assaulted him. At trial, the defendant denied the assault and said he was elsewhere at the time. Following conviction, the challenge on appeal was to the judge’s failure to direct the jury that if they rejected the alibi evidence, they ought not to conclude from such rejection that the defendant was necessarily guilty. It was argued that the judge should have warned the jury that alibis are sometimes fabricated for reasons other than an attempt to cover up guilt.

22. This court dismissed the appeal. It held that, in a case where evidence of witnesses for the Crown on essential matters which must be established as true to justify a finding of guilt is in direct and irreconcilable conflict with the evidence for the defence, the jury must, as a matter of logic and common sense, decide whether the Crown's witnesses are telling the truth. A conclusion that they are will necessarily involve a conclusion that the defendant is lying. The issue of lies is, therefore, not a matter which the jury has to take into account separately from the central issue in the case, and a *Lucas* direction is not necessary in those circumstances. The court held that the need for a *Lucas* direction would only arise where, on some collateral matter and due to some change in evidence or account by the defendant, there is scope for drawing an inference of guilt from the fact that the defendant had on an earlier occasion told lies or had on some collateral matter told lies at trial. To put the point another way, if there is no risk that a jury might follow a line of reasoning that the telling of lies equals guilt, there should, in the normal course of events, be no need for a *Lucas* direction. As a matter of common sense, where there is no basis for rejecting an alibi, except as a consequence of accepting the evidence of identification given by a prosecution witness that the defendant is the perpetrator of the crime, there is unlikely to be any necessity for a *Lucas* direction.

The appeal

23. The single ground of appeal is that fairness required a careful direction to the jury on the consequences of rejecting the appellant's alibi defence here; and that the failure to give such a direction gave rise to a clear danger that the jury might follow the impermissible reasoning that the appellant had advanced a false alibi and this necessarily supported the Crown's case.

24. Mr Greenhall submits that the direction was necessary here for two main reasons. First, it was necessary given the manner in which the Crown's case was advanced, namely by way of direct attack on the appellant's alibi. He submits it was a major plank of the Crown's case against the appellant that there was no support for his alibi defence. This was advanced independently of the Crown's positive case in relation to PS Creek's purported identification of the appellant at the scene. That meant a lies direction was necessary. Secondly, and for those reasons, this was not a case where it could be said that the rejection of the explanation given by the appellant necessarily left the jury with no choice but to convict as a matter of logic.

25. Further, Mr Greenhall contends that the failure to give the necessary *Lucas* lies direction in this case rendered the appellant's conviction unsafe because the Crown's positive case on identification was weak. It relied on a single identifying witness in circumstances where the identification was poor: it was made at night, in a fast-moving situation, through a small gap in a window into a darkened car, and across a person sitting in the passenger seat; the driver was observed for a short time only; the identifying witness was unable to give any details of the clothing or other facial features of the driver; the identifying witness did not know the appellant well, having seen him a total of ten times over a period of seven or eight years; and, in any event, Mr Greenhall submits, he was primed to misidentify the appellant on the basis that his name had been circulated as the person associated with the vehicle being driven dangerously prior to the stop. In such circumstances, the impact on the jury of the failure to give a lies direction cannot be discounted and the conviction, he submits, is unsafe.

26. Against those submissions, on behalf of the Crown, Mr Alun Evans submits that there were no circumstances that required the judge to give a warning about a false alibi; nor was there anything in the manner in which the

Crown's case was advanced that led to such a direction being necessary in this case. To the contrary, he submits that, consistent with the burden on the prosecution to disprove any alibi, the appellant was cross-examined on his alibi when he gave that evidence. That was necessary, since in interview he gave positive answers to questions asked and those answers required testing. But ultimately Mr Evans submits that the case turned on the reliability and acceptance by the jury of PS Creek's identification or recognition evidence. That evidence directly contradicted the defence case. In such circumstances, the prosecution was entitled and correct to say that, to the extent that the two sides were in conflict, the appellant's account of his alibi, as given in interview and in court on oath, was untrue. Accordingly, no direction was necessary. This was a case where rejection of the appellant's alibi would likely lead to the conclusion that the appellant was guilty. Furthermore, and in any event, Mr Evans submits that the conviction is not unsafe here. He relies on the clear evidence given by PS Creek as to the events of 29th March and that this was identification by way of recognition. Moreover, he relies on the similarity of the circumstances of events that occurred on 10th March, some two and a half weeks earlier. He submits that PS Creek was not shaken in cross-examination, did not accept that he had been primed to provide the name of the appellant, and gave clear and compelling evidence that the appellant was the driver of the Alpha Romeo car on 29th March.

Discussion and conclusion

27. We have reflected on the submissions made by both sides in this case. The central question for the jury was to determine whether or not they could be sure that PS Creek's identification of the appellant as the driver in the early hours of 29th March was accurate and reliable and enabled them to be sure that he was the driver of the car at the material time. The judge gave a clear *Turnbull* direction in that regard. We can see no basis on which it can be argued that lies, as a separately or specifically identifiable feature of this case, either played any part in the way the prosecution put the case, or constituted a matter which the jury might have taken into account separately from their determination of the central question we have just identified.

28. In our judgment, either the identification by PS Creek was accurate and reliable so that the jury could be sure that the appellant was the driver of the motor car on 29th March and accordingly the appellant could not be telling the truth about being at a party in Harrow at the material time, or the evidence of PS Creek could not be relied on in this way, in which case the question of alibi was irrelevant. We do not consider that in the circumstances of this case, if the jury rejected the appellant's evidence that he was at a party in Harrow on the night of the offence, it would have assisted them to be told that there might be reasons why he had invented his alibi. The judge had directed them clearly and carefully that they had to be sure that the prosecution witness, PS Creek, was correct in his identification of the appellant as the driver of the car at the material time.

29. The prosecution case rested on whether or not the jury accepted the identification or recognition evidence. Accordingly there was no room for any risk that the jury might follow a line of reasoning that the telling of lies equalled guilt. In other words, there was no basis for rejecting the alibi defence advanced by the appellant, except as a consequence of accepting the identification given by PS Creek that he was indeed the driver of the car when it was stopped on Hanworth Road and subsequently drove off. Since the purpose of a *Lucas* direction is to guard against the forbidden line of reasoning that the telling of lies equals guilt, it follows in this case, there being no such risk, that there was no need for such a direction.

30. Even had we reached the conclusion that a *Lucas* lies direction should have been given, it does not inevitably

follow that the conviction is unsafe. This is not a case that turned on simple identification evidence. Rather, this was identification by way of recognition. PS Creek saw the driver at close proximity for a period of 40 seconds to one minute. He had an unobstructed view. He recognised him as the man he had sought to detain on 10th March in the same car. The evidence was strong and it was maintained throughout the cross-examination. We are not therefore persuaded that, even had the jury been directed that alibis are sometimes falsely put forward to bolster an honest defence, it could have affected their decision in this case.

31. Accordingly, we are not satisfied that the conviction is unsafe. The appeal fails and is therefore dismissed.

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