



Neutral Citation Number: [2024] EWCA Civ 1261

Case No: CA-2024-001909

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT CHELMSFORD
Her Honour Judge Shanks
CM23C50009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 October 2024

Before:

LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

H (Children: Uncertain Perpetrator: Lies)

Chris Barnes (instructed by **Miles & Partners LLP**) for the **Appellant Mother**
Christopher Poole (instructed by **Essex County Council Legal Services**)
for the **Respondent Local Authority**
Damian Stuart (instructed by **Garrods Law LLP**) for the **Respondent Father**
Kelly Webb (instructed by **Sternberg Reed LLP**) for the **Respondent Children by their**
Children’s Guardian
The Intervenor appeared in person

Hearing date: 16 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:*Introduction*

1. The appeal arises from a fact-finding hearing in care proceedings relating to three children. They began after the youngest child suffered bruising and fractures on at least two occasions. The hearing took place over seven days before Her Honour Judge Shanks. She had 5000 pages of evidence, five hours of recorded material, oral evidence from eight witnesses and submission from the parties. She reserved her decision and gave an oral judgment on 12 July 2024. The proceedings are now continuing to a welfare decision.
2. The background is that the children's parents separated in January 2022, with the father leaving. In March 2022, the intervenor moved into the home as the mother's partner. The injuries to the youngest child occurred in the period May/June 2022. The children were removed and are now living with a paternal aunt and uncle.
3. Having heard expert medical evidence, the judge found that the injuries were inflicted and she made findings about their timings. She ultimately excluded the father and the oldest child as being responsible for the injuries. There is no challenge to those conclusions.
4. The remaining issue, and the focus of the appeal, was whether the judge could identify either the mother or the intervenor as the perpetrator. Both had the opportunity to have caused the injuries and neither had any unusual forensic history or alerting characteristics. Unfortunately, they both told a number of lies during the course of the investigation, including a pretence that they had separated in 2023, when in fact their relationship had continued until shortly before the hearing in May 2024. The mother's case was that she had not caused the injuries and that, if they were inflicted and not caused by the father or the eldest child, they must have been caused by the intervenor. He denied responsibility. The other parties (the local authority, the father and the Guardian) alleged that the injuries were inflicted but did not seek to identify a particular perpetrator.
5. The judge concluded that she could not make a finding on the balance of probabilities and she placed the mother and the intervenor in the pool of perpetrators. The mother appeals from that conclusion on three grounds:
 - (1) Failure to undertake a proper analysis of the identified lies.
 - (2) Failure to apply the correct approach, or undertake the analysis necessary, to seek to identify the perpetrator.
 - (3) Failure to identify the intervenor as perpetrator as being contrary to the weight of the evidence.
6. When granting permission to appeal, Baker LJ expressed reservations about the third ground, which invited this court to substitute a finding against the intervenor. That prospect, which would only arise if we were persuaded that the appeal should be allowed, faces obvious difficulties and it was not pressed.

7. For the reasons given below, I do not accept the criticisms of the judge's treatment of lies, or of the quality of her analysis in relation to identification of a perpetrator. From what we have seen of the evidence (a fraction of what the judge saw), it is clear why she found herself unable to identify the person responsible for the injuries.

The judgment

8. The judge introduced the case at [1-10], described the history at [11-24] and [35-43], addressed the law at [25-34] and [44-46], and set out the medical evidence and the lay evidence at [46-71] and [72-147]. She then turned to her analysis of whether the injuries were inflicted ones [148-159] and the question of whether she could identify the perpetrator [160-182]. In the course of the last passage she focused on the position of the intervenor [168-174] and of the mother [175-180].
9. This overview of the judgment shows that the judge approached her task in a methodical manner. Her judgment, at 21 pages, was an efficient distillation of the mass of information before the court, during which she identified the matters that she considered to be important. Her observations about the evidence are found throughout the judgment and it is to be read as a whole.
10. As to the parts of the decision that have received attention on appeal, the judge recorded that the mother admitted lying to a health visitor on the day before the child's admission to hospital, by asking her not to visit because the family had a sickness bug. The mother explained this lie as being because she was concerned about what the health visitor would think about the bruising and because she had not done some paperwork. The judge found that it was a deliberate lie to deceive the health visitor because the mother did not want there to be any investigation into the bruising.
11. In a seventh statement in October 2023 the mother set out her 'revised position' about the cause of the injuries. She said that in the light of further police disclosure she had concluded that the intervenor must be responsible and that they had separated, with him leaving her home. In her eighth statement, filed after the intervenor had disclosed ongoing contact, she accepted that they had continued their relationship from before the time of her seventh statement until May 2024, meeting up and changing their means of communicating from WhatsApp to Telegram so that messages were not traceable. The judge described that as a significant lie and deception and she rejected the mother's account that it could be explained as being the result of an emotional struggle to separate from the intervenor. She described each lie as being "a lie to deceive".
12. As to the intervenor, the judge found that he knew that professionals were being misled about his relationship with the mother. She did not accept his evidence that he had used cocaine just once, and found that he had minimised his use. She found his evidence about the last fracture unsatisfactory in some respects.
13. More broadly, in the course of thirteen paragraphs the judge reviewed a range of factors that might be said to point one way or the other as between the mother and the intervenor. In each case she noted evidence of good qualities and also evidence of stresses of different kinds. Having done so, she stated her conclusion:

“181. So when I consider, can I identify the perpetrator of the injuries, I cannot say whether it was [the intervenor] or whether it was [the mother]. Both are in the pool of perpetrators. It was one of them. There is evidence which has not been put before the court. I cannot say who the perpetrator was.”

14. The judge refused permission to appeal. She observed that “The lies identified were relevant to the issue of perpetrator” and that “I may not have referenced *Re A* but my pool finding was arrived by applying the test (unvarnished) of the simple balance of probabilities.”

Ground 1: Lies

15. The judge directed herself about lies, based on long-established authority:

“29. The evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their reliability and credibility. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them.

30. It is common for witnesses in these cases to lie in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons such as shame, misplaced loyalty, panic, fear and distress and the fact that a witness has lied about some matters does not mean that he or she has lied about everything.”

16. At [44-45], she directly cited from this court’s decisions in *Re H-C (Children)* [2016] EWCA Civ 136, [2016] 4 WLR 85, per McFarlane LJ at [99-100], and *Re A, B and C (Children)* [2021] EWCA Civ 451, [2022] 1 FLR 329, per Macur LJ at [58]. The passage from *H-C* reads:

“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.

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.”

The passage from *Re A, B and C* reads:

“58. ... 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."

17. Having undertaken this exercise, the judge concluded:

"46. I give myself that Lucas direction now, lest I omit to do so later on in the judgment."
18. Despite the judge's copious self-direction, Mr Barnes argues that she subsequently failed to identify the relevance of the mother's lies to the issue of perpetration or explain how far those lies led to her ultimate findings. Her statements that they were 'lies to deceive' and that they were relevant to perpetration were insufficient. On proper application of the authorities, the court was bound to find that the mother's lies were of no real significance for the issue of perpetration while those of the intervenor (including one not explored by the judge concerning an earlier occasion when he had sole care of the child for a couple of hours) were of real relevance.
19. I do not accept that the judge approached this issue incorrectly or that her analysis was inadequate. She was obliged to exercise an overview of the totality of the evidence: *Re T* [2004] EWCA Civ 558, [2004] 2 FLR 838 at [33] and to survey a wide canvas, including a detailed history of the parties' lives, their relationship and their interaction with professionals: *Re U, Re B* [2004] EWCA Civ 567 [2004] 2 FLR 263, [2004] 3 WLR 753, [2005] Fam 134 at [26]. In that context, she understandably found the lies to the health visitor and to the court to be significant. Their relevance was clear. One lie involved shielding a child with bruising from a professional at an important point in the chronology and another took the form of sustained collusion between the two adults who had had day-to-day care. The judge did not deploy them in order to make a positive finding, but in part-explanation of why she found herself unable to identify a single perpetrator. Beyond identifying their relevance and significance, and considering the explanations offered by the mother, she was not required to do more.
20. Lies, where they are admitted or alleged, will form just one part of the overall evidence in family proceedings. The underlying purpose of the *Lucas* direction is to ensure that proven lies are assessed with a sense of proportion. In relation to welfare, it has been said that they should not be allowed to hijack the case (*Re Y* [2013] EWCA Civ 1337 per Macur LJ at [7(4)]) and, as I put it in *Re K (Children: Placement Orders)* [2020] EWCA (Civ) 1503, [2021] 2 FLR 275, [2022] 4 WLR at [29], that the link between lies and welfare must be spelled out.
21. The same discipline applies to fact-finding. The court's view of a witness's overall credibility and reliability will naturally contribute to its evaluation of whether it can accept their evidence on the critical issues. If it concludes that lies have been told, it will consider what weight, if any, should be given to that aspect of the matter, after due consideration of any explanations that have been offered. That is part of the normal process of sifting and weighing the evidence, and explaining the result. The family courts encounter many forms of bad behaviour and they are used to assessing

their true significance for the issue in hand. There is no special rule of evidence for lies.

22. I would therefore make one observation about the description of good practice in *Re A, B and C*. At [58(iii)] it is said that the court should seek to identify the basis on which it can be determined that the only explanation for the lie(s) is guilt. That draws on the slightly different jury direction in the Crown Court Compendium at 16-3, which requires that a lie is only capable of supporting other evidence against a defendant if the jury are sure that 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.
23. Relying on a literal reading of *Re A, B and C*, Mr Barnes further argues that the court is required to exclude a lie from consideration altogether in any case where it cannot be satisfied (to whatever standard) that the only explanation for it is to conceal guilt. I do not accept that submission. There will be some cases where the ultimate finding is so critically dependent on the assessment of a particular lie – cf. *H-C* at [99] – that the court may out of caution wish to direct itself in accordance with *Re A, B and C*. However, in the normal run of cases, a direction of that austerity is neither necessary nor appropriate. It will be sufficient for the judge to recall that the true significance of a lie must be carefully assessed, for all the well-known reasons noted by the judge in the present case. A general exclusionary rule, exclusively directed at lies, would be inconsistent with the duty on the court to consider all the evidence. Once it has done that, its conclusion in an individual case may be that the lie was told to conceal guilt, but that is a conclusion, not a test. Wherever a lie is found to be relevant to the fact-finding exercise for some other good reason, that element of the evidence should be factored in. Any other approach would hamper the court in carrying out its important assessment of credibility and its evaluation of particular issues of fact. There is no indication that judges are in fact approaching matters in a restrictive way, but the issue has arisen on this appeal and we have therefore addressed it.
24. So far as concerns the present case, the judge was entitled to take account of the lies told by both adults in her overall survey of the evidence. She was not required to ignore them unless the only explanation for them was guilt. Indeed, one highly significant deception (the false separation) was maintained, for whatever motive, by both possible perpetrators. That illustrates the artificiality of a rule requiring the court to ignore a lie unless it unmistakably demonstrated guilty knowledge on the part of the one who had caused the injuries.

Ground 2: Uncertain Perpetrator

25. Here, Mr Barnes makes two submissions. The first is the parties had addressed the judge about *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, [2019] 1 WLR 4440, and *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348, [2023] 1 WLR 1743, but she only referenced the earlier case in judgment. The later case contains a minor refinement, dispensing with the guidance that judges need not strain to make findings. Mr Barnes described this as a minor error, but it was not even that. The judge confirmed that she had applied the 'unvarnished' approach recommended in *Re A* and there is no indication that she did otherwise.

26. The broader submission is that the judge did not sufficiently analyse the evidence that pointed for and against each of the two adults as being responsible for the injuries, and that in this respect the judgment was significantly lacking. In his skeleton argument, Mr Barnes identified some thirty elements of the evidence or argument which, he argues, were not properly taken into account and which should have led the judge to make a finding against the intervenor alone.
27. Although it was fully and persuasively argued by Mr Barnes, I do not accept this argument. As I have already noted, the judgment is a distillation of a mass of evidence, from which the judge chose elements that she considered significant. The fact that she did not alight on a particular argument or piece of evidence is unobjectionable. Further to that, an analysis of Mr Barnes' list shows that almost all of the matters were in fact mentioned during the course of the judgment. Taken overall, the judge carried out the essential task, which was to consider each individual separately in order to determine whether they could be found on the balance of probabilities, to be the perpetrator. Given that neither individual was reliably truthful and that one or both knew a great deal more than they were prepared to say, the judge's conclusion was clearly open to her and is unassailable on appeal.
28. The argument on ground 3 merged into ground 2. The judge was not bound to find the intervenor responsible and, had the appeal succeeded on other grounds, we could only have ordered a rehearing. But for the reasons given, I would dismiss the appeal.

Lord Justice Moylan:

29. I agree.
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