IN THE SUPREME COURT OF THE UNITED KINGDOM

UKSC/2025/0070

ON APPEAL FROM HIS MAJESTY'S COURT OF APPEAL OF ENGLAND AND WALES [CRIMINAL DIVISION]

MACUR L.J., GARNHAM J., HIS HONOUR JUDGE MENARY K.C.

[2025] EWCA Crim 38; [2025] 1 W.L.R. 2924

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

(ON BEHALF OF HIS MAJESTY)

Appellant

-and-

SHAGUFA SHEIKH

First Respondent

KHALID SHEIKH

Second Respondent

SHABNAM SHEIKH

Third Respondent

ASGAR SHEIKH

Fourth Respondent

APPELLANT'S WRITTEN CASE

The Domestic Violence Crime and Victims Act 2004 (as amended by the Domestic Violence Crime and Victims (Amendment) Act 2012) has been abbreviated throughout to 'DVCVA.'

Throughout the Written Case Ambreen Sheikh (and any reference to a 'victim') is referred to as 'V' thereby adopting the terminology of the DVCVA.

The Appellant's Case is cross referenced as follows: to the Key Documents Bundle as **[KDB page….]** *and to the Main Hearing Bundle as* **[MHB page….]**. *Where paragraph numbers are cross- referenced to documents or authorities they are shown throughout as* **'§….'**

The Appellant's Case in Summary

1. This Appeal is concerned with the construction of the words in section 5 (1) (d) (iii) DVCVA **[*MHB page 533*]** "the act occurred in circumstances of the kind that D foresaw or ought to have foreseen."

2. "The act" means an unlawful act which has caused death or serious physical harm to the victim of the offence; an "unlawful act" is defined as one that "constitutes an offence" (see section 5 (1) (a) and section 5 (5) (a)). Section 5 (6) further defines "act" as one which "includes a course of conduct and also includes omission."

3. The offence is described in the crossheading to this part of the DVCVA as "causing or allowing a child or vulnerable adult to die or suffer serious physical harm." The offence is expressed in the form of alternatives in section 5 (1) (d) ("caused") and in section 5 (1) (d) (i) to (iii) (failing to take reasonable steps to protect V) but the Prosecution is not required to prove whether it is the first alternative or the second that applies (section 5 (2)). Section 5 therefore accommodates circumstances in which the Prosecution cannot prove which of two or more persons in the same household as V caused the death or serious physical harm.

4. Where the Prosecution cannot prove who caused the death or serious physical harm the jury will invariably need to be directed in respect of both alternatives. For the purposes of the second alternative, there are three key elements of section 5 (1) (d) DVCVA which the prosecution is required to prove:

(i) Awareness on the part of the defendant, at the time of "the act", of a significant risk of serious physical harm being caused to V by the unlawful act of a member of the same household as V (section 5 (1) (d) (i)).

(ii) Failure to take such steps as the defendant could reasonably have been expected to take to protect V from that risk (section 5 (1) (d) (ii)).

(iii) "The act" occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen (section 5 (1) (d) (iii)).

5. The jury found that the extremely severe and painful caustic burn which was suffered by V ("the sacral injury") was unlawfully and deliberately inflicted on V by one or more members of the same household. That finding was sufficient on the facts of this case, as the jury found, to prove awareness on the part of the Respondents, that at the time of "the act", there was a "significant risk" of serious physical harm being caused to V for the purposes of section 5 (1) (d) (i).

6. The Respondents failed to take such steps as they could reasonably have been expected to take to protect V from that risk (section 5 (1) (d) (ii). The jury were entitled to, and did so find.

7. The Court of Appeal held (CACD Judgment at §41), **[*KDB and MHB page 104*]** that the submission made on behalf of the Respondents at the close of the Prosecution's case, that there was 'no case to answer' in respect of section 5 (1) (d) (iii), should have succeeded, since:

"….the administration of a minimal quantity of glimepiride, even if established to be with unlawful intent, was so utterly different from the infliction of the sacral injury that had occurred shortly beforehand and which the prosecution relied upon as giving rise to the foreseeable risk of serious physical harm, that we doubt that a reasonable jury properly directed could conclude that it occurred "in circumstances of the kind that D foresaw or ought to have foreseen." "

8. It is not disputed by the Appellant that "the act" was "utterly different" to the unlawful act which resulted in the infliction of the sacral injury. Further, there was no evidence that any of the Respondents foresaw or ought to have foreseen that the drug glimepiride would be unlawfully administered to V, and thereby to result in a hypoglycaemic coma, this being the most likely cause of V's severe brain damage. The Appellant's case is however dependent upon a broad and purposeful construction of section 5 (1) (d) (iii), whereby the words "circumstances of the kind" should be construed as including all the circumstances which existed in the context in which the "act" was committed and which the Respondents foresaw or ought to have foreseen. It is not "the act" which must be proved to have been foreseen; the requirement of

actual or constructive foresight is directed to “circumstances of the kind” in which “the act” occurred.

9. On the facts of this case, the ‘circumstances’ included evidence that by the time “the act” occurred a general *animus* towards V existed on the part of one or more of the members of the household; in addition, one or more of them, to the knowledge of all of them, had unlawfully inflicted the sacral injury upon V by using some form of caustic agent; V had also suffered traumatic damage to her right ear which may have been caused by the same caustic agent. The jury was reminded of each of these separate circumstances in the Summing-Up.

10. This combination of circumstances was sufficient for a jury, properly directed, to find proved that the “act” occurred in “circumstances of the kind” that the Respondents foresaw or ought to have foreseen. At the least, the Respondents “ought to have foreseen” that further serious physical harm might be inflicted on V, regardless of the method used to achieve that result, given their proven awareness of the risk of serious physical harm at the time of “the act.”

11. The Court of Appeal’s judgment is dependent upon a narrow construction of the meaning of the words “circumstances of the kind”. The Appellant submits that the Court of Appeal should have approached the meaning of “circumstances of the kind” as one which included <u>all</u> the circumstances arising within the factual context in which the “act” occurred. The absence of knowledge or foresight that a member of the household would administer a quantity of glimepiride to V in order to cause V further serious physical harm and that that was an act which was “utterly different” to the infliction of the caustic burn, was only one feature of those circumstances. In reaching its conclusion, the Court of Appeal attached undue weight to the method by which “the act” was occasioned and whereby serious physical harm was inflicted upon V, rather than the whole factual context in which “the act” occurred; being context which included all of the relevant events which preceded and accompanied “the act”. The Court of Appeal’s judgment was unduly focused upon the fact that the Respondents could not be proved to have had actual or constructive foresight of the type of “act” and/or how the serious physical harm to V was inflicted, rather than all the circumstances in which “the act” occurred, although the Court acknowledged (CACD Judgment at §34) **[*KDB and MHB page 102*]** the accuracy of the proposition in the 17th edition of Smith, Hogan and Ormerod’s Criminal Law at page 687 **[*MHB page 824*]** “….the focus must remain on the circumstances in which the death or GBH arose and not on the precise nature of the injury.”

12. In rejecting the submissions made on behalf of the Respondents at the close of the Prosecution's case, the trial Judge correctly adopted a broad and purposive construction of section 5 (1) (d) (iii), and identified a number of facts from which a reasonable jury, properly directed, could find that "the act" occurred in circumstances which the Respondents, at the very least, "ought to have foreseen" (Ruling at §42) **[*KDB and MHB page 123*].** The Court of Appeal was in error in concluding that the submission of 'no case to answer' should have succeeded.

13. The construction which the trial Judge placed on section 5 (1) (d) (iii) in her Ruling at §31 to §42 **[*KDB and MHB page 118*]** was one which reflected the intention of Parliament. The language, which required proof that "the act occurred in circumstances of the kind that D foresaw or ought to have foreseen," when read with sections 5 and 6 DVCVA, does not support the narrow construction implicit in the Court of Appeal's judgment; nor does the context in which sections 5 and 6 DVCVA were enacted. Internal aids to construction and admissible external aids support the construction adopted by the trial Judge and contended for on the part of the Appellant.

14. The Appellant further contends that a broad and purposive construction of the words in section 5 (1) (d) (iii) DVCVA, results in the conclusion that once a defendant is proved to have had actual or constructive awareness of a significant risk of serious physical harm being caused to V by a member of the same household as V (section 5 (1) (d) (i)), any "act" (i.e. one which is unlawful and causes serious physical harm) which is perpetrated in the context of domestic violence against the same victim, will be one which has occurred in circumstances which at least "ought to have been foreseen" by a defendant. While not every violent and unlawful act will lead to actual or constructive awareness that V is at significant risk of serious physical harm, where a defendant becomes aware of such a risk (section 5 (1) (d) (i)) so as to give rise to the duty to take reasonable steps to protect the victim (section 5 (1) (d) (ii)) it is difficult to contemplate circumstances in which the possibility of an unlawful act causing serious physical harm would be outside the scope of a defendant's constructive foresight when it occurs in a domestic setting, other than in wholly exceptional circumstances. The Certified Point should therefore be answered in the affirmative.

15. The trial Judge properly left the issue of which of the facts were sufficient to prove actual or constructive foresight for the purposes of section 5 (1) (d) (iii), as one for the jury to

determine (Summing-Up Part One Page 5 B-C) **[*MHB page 202*].** This was, as *dicta* in earlier decisions of the Court of Appeal suggest, supremely a question for the jury.

16. The Court of Appeal made a number of criticisms of the approach of the Prosecution and of the Trial Judge, which were adverse to the Appellant's case (CACD Judgment at §36, §38, §39 and §42 **[*KDB and MHB page 103 et seq*]** and see §1.7 (iii) to (v) of the Grounds of Appeal to the Supreme Court) **[*MHB page 130*].** These remain unresolved, since the Court of Appeal's judgment does not state whether the Court considered that these would be sufficient to render the convictions unsafe had the trial Judge been correct to allow the case to go to the jury. The Appellant submits that if the Certified Point is answered in the affirmative, with judgment on the statutory construction point resolved in the Appellant's favour, the Supreme Court must itself reach a judgment on these issues in so far as they may affect the outcome of the appeal, alternatively, should order that the case be remitted to the Court of Appeal for their decision in accordance with Rule 32 (1) (b) Rules of the Supreme Court; it would then be for the Court of Appeal to determine whether the convictions are nonetheless unsafe and for the Supreme Court thereafter to make all necessary final orders in this appeal.

Structure of the Appellant's Case

17. The Appellant's Written Case is structured as follows:

17.1 The legislation – the DVCVA 2004 and the Amending Act of 2012.

17.2 Statutory Interpretation of section 5 (1) (d) (iii) DVCVA.

1.3 Statutory construction of section 5 (1) (d) (iii) – Internal Aids to Construction.

17.4 Statutory construction of section 5 (1) (d) (iii) – External Aids to Construction.

17.5 Conclusions – Construction of section 5 (1) (d) (iii) DVCVA.

17.6 The Trial Judge's Ruling.

17.7 The Certified Point of Law

17.8 Summary of the Appellant's Reasons why the Certified Point should be answered in the affirmative.

17.9 Unresolved Issues in the judgment of the Court of Appeal.

The Legislation – the DVCVA 2004 and the amending Act of 2012 [MHB page 532].

18. On 15 November 2004, the DVCVA received Royal Assent. Among a range of other provisions, Parliament enacted an entirely new type of offence in section 5, that of 'causing or allowing' the death of a child or a vulnerable adult, and introduced a novel procedure in section 6, which, among other provisions, required the deferral of submissions of 'no case to answer' to a point in the trial at which all of the evidence was complete, rather than at the close of the prosecution case, but only where charges of murder or manslaughter were laid in the same Indictment. On 08 March 2012, the offence was extended by the Domestic Violence Crime and Victims (Amendment) Act 2012 to include 'causing or allowing' a child or vulnerable adult to suffer serious physical harm by amending section 5 and adding section 6A. Consequently, this Prosecution was brought under the terms of the Act as amended, V being a vulnerable adult who has survived the unlawful act.

Statutory Interpretation of section 5 (1) (d) (iii) DVCVA

19. The words in section 5 (1) (d) (iii) must be read in context since their meaning is derived from their context: see *Regina (on the application of O) v Secretary of State for the Home Department* [2023] AC 255 at §§29 – 31 (Lord Hodge) **[*MHB page 781*]** and at §§59 – 67 and §73 (Lady Arden) **[*MHB page 787*]** and *Regina (On the Application of Quintavelle) v Secretary of State for Health* [2003] 2 AC 687 per Lord Bingham at §§7 – 8 **[*MHB page 794*]:**

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

20. The purposes for which sections 5 and 6 DVCVA were enacted was to provide for criminal responsibility in circumstances where there has been a breach of the duty to protect the most vulnerable members of society from death or serious physical harm committed by members of the same household in circumstances where existing legislation and common law principles were insufficient to afford the necessary protection. The statute provides that parents or carers of children, or carers of vulnerable adults (where they are members of the same household as the child or vulnerable adult), may be held criminally responsible for death or serious physical

harm in circumstances where the identity of the perpetrator(s) is not capable of being proved and where a positive duty to protect the vulnerable victim is implicit in the relationship. Safeguards in the legislation limit the scope of a defendant's responsibility; these being designed to impose criminal responsibility only in situations in which a defendant is proved to have had actual or constructive awareness of a significant risk of serious physical harm being caused to V by the unlawful act of a member of the same household at the time of the act which causes death or serious physical harm; and only where a defendant could reasonably have been expected to take steps to protect the victim; and only then when possessed of actual or constructive foresight of the circumstances in which death or serious physical harm has occurred. The legislation was intended to address a significant *lacuna* in the criminal law by which it was not possible for the prosecution to prove who the actual perpetrator within the family structure was, and where parents or carers either chose to remain silent or denied knowledge of the circumstances during any police investigation.

Statutory construction of section 5 (1) (d) (iii) – Internal Aids to Construction.

21. The terms in which sections 5 and 6 DVCVA were drafted point to the conclusion that Parliament has chosen to modify established common law principles in the criminal law in order to achieve the purpose of the legislation. Lord Diplock said that criminal enactments: "fall to be construed in the light of general principles of English law so well established that it is the practice of parliamentary draftsmen to leave them unexpressed in criminal statutes, on the confident assumption that a court of law will treat those principles as intended by Parliament to be applicable to the particular offence unless expressly modified or excluded" (*Regina v Miller* [1983] 2 A.C. 161 at 174 – not copied).

22. The modifications of principle incorporated in sections 5 and 6 DVCVA support the conclusion that the legislation is to be given a broad and purposive construction. They are as follows:

(i) An unlawful act is defined by section 5 (5) DVCVA as one that constitutes an offence and by section 5 (6) an "act" includes both a course of conduct and an omission. Thus, the definition of an 'act' extends to gross negligence manslaughter (*Rex v Fartun Jamal* [2026] EWCA Crim 135) **[*MHB page 756*]** and to certain offences of neglect pursuant to section 1 Children and Young Persons Act 1933 **[*MHB page 587*].** If a defendant neglects V and owes to V a duty of care and is responsible for gross negligence manslaughter (a crime of omission), members of the same household may become criminally liable under section 5 if the provisions of section 5 (1) (d) (i) to (iii) are satisfied. The definition of an "act" has been employed in the widest possible terms in order to embrace circumstances in which V suffers death or serious physical harm and extends the conventional meaning of an "act" in the criminal law since, as a general rule, offences of homicide or offences against the person cannot be caused by an omission to act in the absence of a duty to do so. Properly construed therefore, the provisions of section 5 (1) (d) (iii) include not only an omission to act but also a history of continuing violence.

(ii) Other provisions of the Act involve a departure from the ordinary principles of criminal liability at common law. Both awareness of the risk (section 5 (1) (d) (i)) and foresight of the circumstances in which the "act" occurred (section 5 (1) (d) (iii)) are concepts which have been substantially widened by the terms "or ought to have been aware" and "or ought to have foreseen" by introducing an objective assessment by the jury of the relevant state of mind of a defendant, whereas constructive foresight of consequences in the criminal law (aside from statute) is confined to one of the elements of the offence of gross negligence manslaughter. It follows that conventional principles of the common law have been expressly modified by Parliament in the language employed by sections 5 (1) (d) (i) and (iii), by extending the scope of both 'awareness' and 'foresight' to permit a jury to consider a defendant's awareness of risk and foresight of circumstances on an objective basis.

(iii) By section 5 (2), in another departure from established principles, the prosecution is relieved from the obligation of proving whether D caused the death or serious physical harm in question or whether he or she, with the necessary awareness and foresight, failed to take such steps as he or she could reasonably have been expected to take to protect V from the significant risk of serious physical harm - see *Regina v McCarney* [2015] NICA 27 at §§29 – §36 **[*MHB page 703*]** (a decision of the Court of Appeal of Northern Ireland), which is authority for the proposition that "causing or allowing" is one offence, not alternatives - see the judgment of the Court at §36 **[*MHB page 705*].**

"The fact the prosecution cannot or is not obliged to prove the defendant committed the unlawful act is strong support for the view that the intention behind section 5 was to create an offence of which he could be convicted, despite the fact that it could not be proved that he committed the unlawful act."

See also the observations of the Court of Appeal in *Rex v ATT, BWY* [2025] K.B. 225 at §47 [***MHB page 752***]: "Were it otherwise, the purpose of the legislation would be frustrated."

23. Section 5 DVCVA was supplemented by new procedural provisions. These are incorporated in section 6 (cases of death) and by the amending Act, in section 6A (cases of serious physical harm). Sections 6 and 6A impose three procedural provisions by which Parliament has modified existing common law rules of procedure but only where the Indictment also contains charges of murder or manslaughter (section 6) or a relevant offence (section 6A). These are:

(i) Preventing a case from being dismissed pursuant to paragraph 2 of schedule 3 to the Crime and Disorder Act 1988 (Applications to dismiss pre-arraignment) – where murder, manslaughter or a "relevant offence" lie on the Indictment, unless the section 5 DVCVA case is also dismissed (sections 6 (3) and 6A (4)).

(ii) Preventing an application to withdraw the case from the jury before the completion of all the evidence in situations in which murder or manslaughter (section 6 (4)) or a relevant offence (section 6A (5)) lie on the Indictment.

(iii) Permitting the drawing of inferences from silence or refusal to answer questions (sections 6 (2) and 6A (3)).

24. These provisions, enshrined within the Statute, demonstrate that Parliament intended to depart from existing common law principles and standard principles of interpretation in order to widen the elements of the section 5 offence and to avoid a narrow construction of the circumstances in which criminal responsibility may be established where children and vulnerable adults are killed or seriously harmed in a domestic setting.

25. Parliament chose not to confine foresight to mere 'circumstances.' Had section 5 (1) (d) (iii) read: "the act occurred in circumstances which D foresaw or ought to have foreseen" the scope of a defendant's foresight, even constructive, would have been narrower. The introduction of the words "of the kind" has served to introduce a broad approach to the circumstances in which "the act" occurred and which must be proved to have been within the actual or constructive foresight of a defendant.

26. One of the Court of Appeal's reasons for rejecting the Appellant's submissions (CACD Judgment at §31) [***KDB and MHB page 102***] was that if "circumstances of the kind" encapsulates all and any serious harm caused or inflicted by any unlawful means if it occurs within the domestic setting, such a conclusion would render section 5 (1) (d) (iii) "otiose" since

by this stage of a jury's deliberations, the jury will already have determined that the unlawful act occurred to a vulnerable victim by a member of 'V's' household (note a transcription error in the judgment – read 'V' for 'D' – see section 5 (1) (a) (i)). The Appellant takes issue with this conclusion for two reasons:

(i) The wording of the 'second alternative' means of committing the offence incorporates three safeguards designed to prevent an unreasonable burden of criminal responsibility being imposed upon members of the same household as V who might otherwise be convicted of failing to act to protect V. The combination of sections 5 (1) (d) (i) (ii) and (iii) separately serve that purpose. Awareness of the risk is a distinct concept to that of foresight of the circumstances in which "the act" occurred; the former requires proof of an actual or constructive realisation that a significant risk of serious physical harm to V exists at the time of "the act" whereas actual or constructive foresight of the kind of circumstances in which the act occurred involves a realisation that the risk may eventuate. The concept of 'reasonableness' in section 5 (1) (d) (ii) accommodates a wide range of possible circumstances in which a member of the same household may be powerless to intervene or to take action, for example when a defendant is also being subjected to violence. The Law Commission considered it prudent to introduce these safeguards in its draft Bill **[*MHB page 517*]** as did the Government and in respect of section 5 (1) (d) (iii), recognising that there may be cases in which the other elements of section 5 are satisfied, but that section 5 (1) (d) (iii) is not (as the Judge concluded at §40 of her Ruling) **[*KDB and MHB page 122*].**

(ii) By section 5 (1) (d) (iii) Parliament has made provision for circumstances which may fall outside the scope of a defendant's actual or constructive foresight. This was a reasonable and necessary step in the context of the legislation.

Statutory construction of section 5 (1) (d) (iii) – External Aids to Construction

27. The Appellant submits that the conditions which permit relaxation of the general rule in *Pepper v Hart* are met for the purposes of this appeal. The words 'circumstances of the kind" in section 5 (1) (d) (iii) have not been defined in the DVCVA by Parliament in terms of their scope or limitations, and conflicting academic commentary illustrates the difficulty in construing Parliament's intention, whereas the Parliamentary Statements made by Government Ministers during the passage of the Bill are clear and unequivocal – see *R (On the Application*

of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions) [2001] A.C. 349 at pages 397 – 400 **[*MHB page 797*].**

28. The task of determining the legislative purpose of this part of the DVCVA and construing the meaning of the words in section 5 (1) (d) (iii) is assisted by examining admissible external aids to construction. This section will address the following, all of which are publicly available and there can be no obstacle to admissibility on that ground:

(i) The state of the law at the time the 2004 Act was passed and the work of the Law Commission.

(ii) Statements on behalf of the Government during the passage of the Government's Bill through the House of Lords (Hansard).

(iii) Explanatory Notes to the Act and Home Office / Ministry of Justice Circulars.

(iv) The existing case law at the time of the Court of Appeal's decision.

(v) Academic Commentary and the treatment of factual examples in the academic commentary by the Court of Appeal in the instant case.

The state of the law at the time the 2004 Act was passed and the work of the Law Commission.

29. As a general principle, Parliament intends that an enactment should remedy a particular mischief. The reason for implementing legislation is almost invariably to change the existing law in order to remedy a perceived defect in it. The perceived defect in the law which resulted in sections 5 and 6 DVCVA was the impact of the common law rule that where two or more persons are charged with a criminal offence and the prosecution is unable to prove which one was responsible for the commission of the offence, in circumstances where they cannot be proved to have acted in concert, both must be acquitted. This perceived defect in the law formed the incentive for the work of the Law Commission in relation to the deaths of children in the care of their parents or carers, supported by evidence from organisations such as the NSPCC, leading to the publication of the Commission's Reports in 2003.

30. The starting point is to understand the state of the law at the time the 2004 Act was passed. In April 2003 the Law Commission published its Consultative Report (Law Com No 279) entitled *'Children: Their Non-Accidental Death or Serious Injury (Criminal Trials) A*

Consultative Report.' The Introduction to the Report at §1.1 and §1.2 [***MHB page 317***] addressed the following perceived defect in the law:

> "1.1 The proposals in this consultative report are intended to address a problem which has been recognised for many years by judges, academics and practitioners, and which has been highlighted by the press. It can be exemplified at its most intractable in the following situation:
>
> A child is cared for by two people (both parents, or a parent and another person). The child dies and medical evidence suggests that the death occurred as a result of ill-treatment. It is not clear which of the two carers is directly responsible for the ill-treatment which caused death. It is clear that at least one of the carers is guilty of a very serious criminal offence but it is possible that the ill-treatment occurred while one carer was asleep, or out of the room.
>
> 1.2 As the law stands, as a result of the Court of Appeal's ruling in Lane and Lane it is likely that such a trial would not proceed beyond a defence submission of 'no case to answer'. As a result, neither parent can be convicted, and one or other parent, or both, might well have literally 'got away with murder'. It should be remembered that even though one parent may not have struck the fatal blow or blows, he or she may be culpable either through having participated in the killing actively or by failing to protect the child. In many cases of this type it is difficult, or impossible, to prove this beyond reasonable doubt, and therefore neither parent can be convicted."

31. The evidence received by the Law Commission demonstrated that in cases involving children many of them were not being pursued in the absence of an ability to prove the identity of the actual perpetrator, despite the reported prevalence of this type of offending.

32. The common law rule is of long standing. In *Regina v Abbott and Abbott* [1955] 2 Q.B. 497 at page 503 [***MHB page 304]*** Lord Goddard C.J., delivering the judgment of the Court of Appeal, stated the principle to be as follows:

> "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case."

33. In *Regina v Lane and Lane* (1986) 82 Cr App R 5 at page 18 [***MHB page 307 and at 315***] Croom-Johnson L.J. observed that the result of the rule was that a serious crime committed by someone must go unpunished. The victim was a 22-month-old child who had suffered brain injury, possibly from shaking, and a fracture of the skull, and had died from her injuries in circumstances in which her natural mother and the co-defendant stood accused of manslaughter and an offence of 'child cruelty' contrary to section 1 (1) of the Children and Young Persons Act 1933. Applying *Abbott and Abbott,* the Court quashed the convictions for manslaughter which had been based upon a misdirection that joint participation could be inferred from the general circumstances arising from the joint custody and care of the child at the material time:

"It is importing into the law relating to proof of manslaughter a new test. It is converting the general responsibility for custody and care into actual presence at the time when the blow was struck, even though on the acknowledged facts there were substantial periods when only one of them was present. Evidence of general custody and care does not establish presence; it is only a step towards proof. Failure to give an acceptable explanation of what happened does not fill the gap in the evidence. In any event, failure to give an acceptable explanation may be due to one or more of any number of reasons."

34. This general principle was applied by the House of Lords in *R v Bellman* [1989] A.C. 836 (at page 849) and convictions were quashed in cases such as *R v Aston and Mason* (1992) 94 Cr. App. R. 180 and *R v Strudwick* (1994) 99 Cr. App. R. 326 (these authorities are not copied since the principle is firmly established in law).

35. The current (Seventeenth) edition of Smith, Hogan and Ormerod's 'Criminal Law', at page 207 (not copied), states the principle as follows, and includes a reference to section 5 DVCVA:

"If all that can be proved is that the principal offence was committed *either* by P1 *or* by P2, both must be acquitted. Only if it can be proved that the one who did not commit the crime as principal must have assisted/encouraged or procured (as accessory) the other to commit it can both be convicted……….The case of the parent or carer of the child/vulnerable adult who dies or suffers serious injury in their household is now governed by an exceptional procedure under the Domestic Violence, Crime and Victims Act 2004 and 2012, but the general principle remains: if all that can be proved is that the offence was committed by *either* the first or second defendant, both must be acquitted."

36. The Law Commission addressed the scale of the problem in terms of the difficulty in pursuing prosecutions for non-accidental fatal and serious injury to children at §2.1 - §2.12 of its Consultative Report (Part II 'The Extent of the Problem') [***MHB page 341***] citing evidence and contributions received from Judges, academics, practitioners and research groups:

"…. there is near universal recognition that the problem is extremely serious and that reform is necessary ……. 2.11 We conclude, therefore, that there is ample evidence from disparate sources that the present rules of evidence and procedure which apply in criminal trials represent a significant obstacle to the effective investigation into and identification and punishment of those who are guilty of the most serious offences against the most vulnerable members of society. Furthermore, the alternative offences, for which the present rules and procedures do permit convictions, do not appear satisfactorily to reflect the responsibility for the death of a child either through the label by which guilt of the offence attaches to the conduct or in the severity of the penalties available."

"….2.12 This is not a situation about which there can be any complacency. In subsequent Parts of this report we consider the impact of international obligations upon the State both to ensure fair trials and to protect the fundamental human rights of, amongst others, children. The present unhappy state of affairs calls into question whether we have currently achieved a correct balance between these different, often competing, rights. It is our view that we should carefully examine our present laws and procedures to see whether their present configuration may be changed to achieve a better balance between the right of a defendant to a fair trial and the duty upon the State to protect the fundamental rights of children who are victims, by having an effective system for identifying and punishing those who have attacked and, often, killed them."

37. On 06 August 2003 the Law Commission agreed the terms of its final report (Law Com No 282) [***MHB page 432***] entitled 'Children: Their Non-Accidental Injury or Death (Criminal Trials)'. The Law Commission's Report included a recommendation that a new offence should be created of 'Failure to Protect a Child' and provided a draft Bill as Appendix A [***MHB page 517].***

38. The terms of the Law Commission's draft Bill were substantially modified in the Government's draft Bill as presented to Parliament [***MHB page 530***]. The Law Commission's draft Bill was designed to embrace circumstances in which a child has suffered serious harm derived from ill treatment within a wide range of offences and included the following, which

was proposed as section 2 (1) (c): "the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated."

39. At §6.27 of the Report **[*MHB page 490*]** the Law Commission explained its reasoning for the draft of this clause as follows:

> "……This will provide protection in cases in which the person responsible ought to have anticipated, for example, an assault by an abusive separated parent to whom the child is sent on an errand but where, in fact, the child is assaulted in the street on his way by neighbourhood bullies about whom there is no reason to suppose the responsible person should have been aware. We are concerned that the person responsible should be at risk for those things of which he or she was aware, or ought to have been aware, and which have come about. We do not believe that such a person should be liable where what occurred was the commission of the same category of offence but where its commission was not, nor could have been, reasonably foreseen. The offence requires, therefore, that the circumstances are of the kind which the responsible person anticipated or ought to have done."

40. The Government revised the wording of Section 2 of the Law Commission's draft, while preserving its import, and presented to Parliament a Bill which extended to causing or allowing the death of a vulnerable adult as well as a child. While it is arguable that section 5 (1) (d) (iii) may be surplusage in the context of section 5 (1) (d) (i) and that both the Law Commission and the Parliamentary draftsman could have achieved the same result from the combination of section 5 (1) (d) (i) and (ii) alone, it seems clear from the Law Commission's example and the statements on behalf of the Government in the House of Lords during the passage of the Bill, that the object was to provide safeguards against conviction by those who lacked foresight, for whatever reason, and that a distinction between 'awareness' and 'foresight' was designed to achieve that end (see CACD Judgment at §31 **[*KDB and MHB page 102*]** and the Trial Judge's Ruling at §40 **[*KDB and MHB page 122*].**

Statements on behalf of the Government during the passage of the Government's Bill through the House of Lords.

41. The Domestic Violence Crime and Victims Bill was introduced by the Government in the House of Lords on 01 December 2003. After its second reading on 02 December 2003, it was

sent to Grand Committee. It completed its passage through the Lords and was introduced into the Commons on 29 March 2004.

42. On 09 March 2004, during the passage of the Government's Bill through the House of Lords, Baroness Scotland, Minister of State at the Home Office, made the following statements on behalf of the Government during debate:

(Hansard 1149) **[*MHB page 546*]** "The new offence is intended to extend responsibility for the welfare of the young and vulnerable to household members who have frequent contact with the victim. That reflects our belief that we all have a clear responsibility to take action if we are members of a household in which abuse and neglect takes place and if we have frequent contact with the person at risk from serious harm. If we are aware of a risk or in a position where we should be aware of a risk and we do nothing then we may indeed be held responsible for the harm which ensues. The offence should leave no one in any doubt about their responsibilities and that we intend to hold them to those responsibilities."

(Hansard 1158) **[*MHB page 554*]** "We do not of course envisage that a member of the household who could not have reasonably foreseen the risk would be caught by this offence. For example, it may be that an elderly grandmother in the household was too confused to recognise and act on any sign of risk. But I do not think that such a case would fall within the offence. It would be difficult to argue that in her circumstances the confused grandmother could have foreseen the risk, much less ought to have done so.

The words "or ought to have foreseen" are very important to the operation of the offence……Whether someone did indeed foresee a danger is very difficult to prove. But that they "ought to have foreseen" it, that they were in a position and had such information that a reasonable person would have foreseen the harm, that can be proved. To limit the offence to those who did not in fact foresee the harm, and can be proved to have foreseen the harm, would leave a very significant loophole. We also have to face the fact that many individuals in those circumstances say nothing at all.

We should remember too that we are talking about "a significant risk of serious physical harm". That is quite a high threshold. The signs of that risk would be very evident. In many cases, the risk of harm is all too evident from previous harm that a member of the household has inflicted on the child or on others. In some cases we know about, the child or vulnerable person has awful and very obvious signs of previous abuse, sometimes inflicted over a long period. I do not think that we are putting an unacceptable burden on the defendant to recognise that risk in these circumstances and to take whatever steps he could reasonably have been expected to take to protect the victim from the risk."

(Hansard 1163) [***MHB page 559***] "The offence will change the way in which we view responsibility within a domestic setting and the way in which we deal with it in the criminal law. It makes it clear that it is not acceptable to be a member of a household in close contact with a vulnerable person, knowing that they are at significant risk, and do nothing. It is not an acceptable position for a parent—no matter how vulnerable or fearful they are for themselves—to do nothing for a child who is at risk. The offence of child cruelty or neglect is based partly on this principle: that to stand by and do nothing is not acceptable."

"The new offence will make that position even clearer. It makes the responsibility bite on all members of the household who have frequent contact with the child or vulnerable adult and who are, or should be, aware of the risk to it of serious harm. We think that this is right morally and as a matter of law. It is right that people in this position should be liable to prosecution and, indeed, that prosecution should normally take place if the case is made out."

43. The draft Government Bill, as amended in Standing Committee, was in the same terms in respect of sections 5 and 6 as finally enacted. In drafting section 5 (1) (d) (iii) the draftsman in part adopted and in part changed section 2 (1) (d) in the Law Commission's draft Bill [***MHB page 518]*** which read: "the offence is committed in circumstances of the kind that R anticipated or ought to have anticipated", by substituting the words "the act occurred in circumstances that D foresaw or ought to have foreseen."

44. The new offence of 'causing or allowing the death of a child or vulnerable adult' was enacted as section 5 of The Domestic Violence, Crime and Victims Act 2004, and received the Royal Assent on 15 November 2004. Sections 5 and 6 came into force on 21 March 2005.

Explanatory Notes to the Act and Home Office / Ministry of Justice Circulars

45. On 04 March 2005 the Ministry of Justice issued a Circular in relation to the Act as a whole [***MHB page 614***]. The purpose of the Circular was to provide guidance to those working in the criminal justice system on the provisions of sections 5 and 6 DVCVA. The Circular was expressed to be for Guidance only.

46. The Explanatory Notes to the Act [***MHB page 591***] (which do not form part of the Act and have not been endorsed by Parliament) provided:

(i) §6: "The provisions on a new offence on causing or allowing the death of a child or vulnerable adult follow on from the Law Commission proposals in their Report published in September 2003 "Children: their non-accidental death or serious injury (criminal trials) No 282, together with their earlier Consultative Report No 279 and the Report by the National Society for the Protection of Children, "Which of you did it?" published in Autumn 2003. These reports contain a detailed analysis of the problems encountered in the law at present. However, the new offence is designed to protect vulnerable adults as well as children and the approach taken to its formulation is also different in other ways.

(ii) §25: "…The offence only applies to members of the household who had frequent contact with the victim and could therefore be reasonably expected both to be aware of any risk to the victim, and to have a duty to protect him from harm."

(iii) §26: "The household member must have failed to take reasonable steps to protect the victim. What will constitute "reasonable steps" will depend on the circumstances of the person and their relationship to the victim."

(iv) §27: "The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The offence will not apply if the victim died of a single blow when there was no previous history of abuse, nor any reason to suspect a risk. Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse. They will therefore not be guilty of the new offence, even where it is clear that one of them is guilty of a homicide offence."

47. Sections 5 and 6 DVCVA were amended by the Domestic Violence Crime and Victims (Amendment) Act 2012 which extended the provisions of section 5 to a child or vulnerable adult who suffers serious physical harm. On 08 March 2012 the amending Act received Royal Assent and came into force on 02 July 2012. Explanatory Notes to the amending legislation were issued [***MHB page 636***] and on 29 June 2012 the Ministry of Justice issued Circular No 2012/03 [***MHB page 641***]. On 28 June 2022 the Act was further amended to increase the maximum sentence of imprisonment for causing or allowing death to one of imprisonment for life.

The existing case law at the time of the Court of Appeal's decision

48. The existing case law in connection with section 5 DVCVA, which preceded the Court of Appeal's decision in the instant case, stressed the importance of the jury's role in determining the facts rather than attempting, as a matter of law, to define the scope of the circumstances which would or might fall within a defendant's actual or constructive foresight. The reasons for that are clear from the judgments in these cases, the Court of Appeal having expressly stated that once the statutory provisions are explained to the jury by the conventional 'route to verdict', the question of whether or not the terms of section 5 (1) (d) (i) (ii) and (iii) were satisfied was a question of fact for the jury to determine.

49. On 19 March 2008 the Court of Appeal (Sir Igor Judge P., Gross and Blair JJ) delivered judgment in *Regina v Ikram and another* / [2009] 1 W.L.R. 1419 / [2008] EWCA Crim 586 **[*MHB page 670*]**.

Both defendants were convicted of "causing or allowing" the death of a 16-month-old child who had been the subject of multiple inflicted injuries and who died as a consequence of a pulmonary embolism resulting from a fracture of the left femur. The judgment was primarily concerned with the provisions of section 6 DVCVA by which Parliament had introduced the unique evidential and procedural provisions which were intended to address the problem identified by the Law Commission arising from the line of authority culminating in *Regina v Lane and Lane.* The Court approved, at §63 and §64 of the judgment **[*MHB page 671*]** the trial judge's approach in terms of directing the jury in relation to proof of the elements of the offence: "….on analysis, provided the Judge gave the jury accurate directions in law….the different limbs of the submission on behalf of the defendants were truly jury questions…..The issue was left fairly and squarely to the jury."

50. On 16 January 2009 the Court of Appeal (Lord Judge C. J., Forbes and Slade JJ) delivered judgment in *Regina v Uzma Khan, Naureen and Hussain* / [2009] 1 W.L.R. 2036 / [2009] EWCA Crim 2 **[*MHB page 674*].** The single Judge had granted leave to appeal against conviction *"on the basis that the 2004 Act was a relatively untravelled and complex area of law."* The Court having referred to the evidential and procedural problems arising from the common law rule and referred to by the Law Commission, the judgment included the following at §22 **[*MHB page 679*]:**

"…..in addition to what we may describe as important changes to the evidential principles which applied in this type of case, the Act created a new offence based on a positive duty on members of the same household to protect children or vulnerable adults from serious harm. The extent of this protective duty, and the circumstances in which criminal liability for its non-performance may arise are defined by section 5 of the Act."

The judgment included a review of the provisions contained in section 5 (1) DVCVA and addressed the ground of appeal founded upon section 5 (1) (d) (iii) and the Judge's direction to the jury at §39 and §40 of the judgment, as follows:

"39. The act or conduct resulting in death must occur in circumstances *of the kind* which was foreseen or ought to have been foreseen by the defendants. They need not be *identical*…Although ultimately a jury question …….40….the Judge distinguished between personal violence represented by a course of violent conduct, and death caused by a lethal weapon, such as a knife or gun, when neither had been used or threatened in the course of earlier violence……To underline the importance attached to foresight of the kind of violence which resulted in death, he was further entitled to explain the distinction between direct personal violence as opposed to violence inflicted with a potentially fatal weapon. If that was too restrictive a direction, it was to the advantage of the appellants, and we can anticipate cases in which such a direction would indeed be over advantageous to a defendant. We need not address that question further in this judgment. In any event, by following the language of the statute as he did, the judge produced an impeccable direction of law."

51. These two decisions explain what the Appellant will submit is the correct approach to a practical problem, since the judgment of the Court of Appeal in the instant case does not purport to define the scope of "circumstances of the kind" in respect of which the defendant must have had actual or constructive foresight before a conviction can ensue; neither do the earlier two authorities. The Appellant submits that there are sound reasons for this, since any attempt to define these words with any degree of precision would be an elusive exercise. Each case must turn upon its own facts and the facts are for a properly directed jury to determine, always assuming that there is sufficient evidence to go to the jury.

52. It is submitted on behalf of the Appellant that there will obviously be cases in which a Judge should accede to an application to withdraw the case from the jury but such cases should not be dependent upon distinctions between the method employed to inflict antecedent serious physical harm and that which is involved in committing "the act." It is significant, the Appellant submits, that the Court of Appeal, in *Regina v Khan*, recognised that distinctions between direct personal violence and violence inflicted with a potentially fatal weapon might be too restrictive

a direction, and if so, it was to the advantage of the Appellants in their trial (see §41 of the Trial Judge's Ruling) **[*KDB and MHB page 122*].**

53. In the Court of Appeal's judgment in *Regina v Uddin* [2017] 1 W.L.R. 4739 at § 32 **[*MHB page 730 and 736*]** the Court expressed the conclusion that the DVCVA imposed a "new and positive duty on members of the same household to protect from serious harm children or vulnerable adults." The Court also observed, at §49 of the judgment, that "There is nothing undesirable as a matter of law or social policy in holding to account someone in the position of this defendant….." The Appeal involved the question of whether V was a "vulnerable adult," a term defined by section 5 (6) as "….a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age, or otherwise." The Court of Appeal concluded at §34 and §35 of the judgment, that in construing Parliament's intention (without recourse to external aids to construction) categories into which V might fall are not to be construed *ejusdem generis*, since the words "or otherwise" distinguish the circumstances in question from the categories that precede them and therefore permit a wide range of circumstances to be considered by a jury in determining whether V falls within the definition of a vulnerable adult.

54. What emerges from the decisions in *Ikram, Khan* and *Uddin* is that Parliament intended that a broad and purposive construction should be applied to the provisions of section 5 (1) (d) (i) to (iii), and that the resolution of the issues in section 5 are supremely questions of fact for the jury.

Academic Commentary and reference to factual examples in the commentary by the Court of Appeal in the instant case.

55. In the instant case the Court of Appeal addressed the examples of "circumstances" in the context of section 5 (1) (d) (iii) which are to be found in the leading academic commentary on the criminal law:

(i) The Court of Appeal disagreed at §29 of the judgment **[*KDB and MHB page 102*]** with the commentary in Chapter 15.4.4 of the 16th edition of Smith, Hogan and Ormerod's Criminal Law (published in 2021) **[*MHB page 828*]** which read: "…D2 who foresees that D1 might use violence by punching V cannot be convicted if D1 kills or seriously injures V by poisoning." The Court of Appeal said: "We agree that section 5 (1) (d) (iii) does restrict the offence by inserting a safeguard against any unlawful act vicariously incriminating a nonperpetrating D. But the assertion in the example provided goes too far in adopting a generic characterisation of unlawful acts as illustrative of "circumstances of a kind." "

(ii) The 17th edition (published in 2024) **[*MHB page 816*]** did not include the above proposition as advanced in the 16th edition, but the Court of Appeal disagreed at §35 of the judgment **[*KDB and MHB page 103*]** with the example provided therein: D "who is aware that X has previously shaken D's baby, V, violently when X is drunk, might not be guilty if X caused V's death or serious injury by, for example, dipping V's dummy in methadone to stop V's incessant crying when X was sober and trying to work." The Court of Appeal preferred the approach of "previous maladaptive behaviour towards an infant who would not be soothed."

56. The Court of Appeal recognised in its judgment that all cases will be fact specific and provided the Court's own example at §41 of the judgment **[*KDB and MHB page 104*]:** "In this case, for example, if Ambreen had been forced to ingest a caustic agent such as caused her sacral injury, then the misuse of the same or similar caustic agent could be evidence from which a reasonable jury may properly conclude that the act had been "committed in circumstances of the kind" that the defendants foresaw or ought to have foreseen."

57. The Court's approach to these various examples is illustrative of the difficulty in attempting to determine the meaning of the words "circumstances of the kind." Arguably, this part of the Court of Appeal's judgment and the change in emphasis in academic commentary does not serve the interests of clarity in the criminal law; in particular, the judgment of the Court of Appeal, in its treatment of these examples, does not provide practical assistance to trial judges in directing juries or who may be required to rule on submissions of 'no case to answer.'

58. While the use of examples may be helpful in order to test the practical limits of any particular point of law, those limits have not been sufficiently defined by these examples. The examples referred to by the Court of Appeal (see sub-paragraphs (i) and (ii) above) arguably involve parallels with the facts of the instant case since the unlawful act of poisoning is unquestionably "utterly different" to the act of punching, and the unlawful act of drugging with methadone is equally distinct from the act of shaking, and yet the Court of Appeal recognised that in both instances the facts used to illustrate these examples might be sufficient for section 5 (1) (d) (iii) to be proved. It is submitted that the Court of Appeal was correct in attaching significance to "previous maladaptive behaviour" towards V but erred in confining its decision in the instant case to the absence of foresight of the means by which "the act" was committed. Similarly, the example used in §41 of the Court's judgment **[*MHB page 104*]** serves

to attribute foresight on the basis of the unlawful application of the same corrosive agent as that which was used to inflict antecedent injury, but by a method which may very well be argued, in those circumstances, as unforeseen when applying the Court of Appeal's approach to the facts of the instant case.

Conclusions – construction of section 5 (1) (d) (iii) DVCVA

59. It is submitted on behalf of the Appellant that the use of conventional aids to construction, including the context in which sections 5, 6 and 6A DVCVA were enacted, leads to the conclusion that Parliament intended that a broad and purposeful construction should be applied to section 5 (1) (d) (i) and (iii), with the result that "circumstances of the kind" will include <u>all</u> the circumstances proved to have arisen within the context in which "the act" was committed, for the purposes of determining whether or not, at the very least, constructive foresight has been proved. In summary therefore:

(i) Sections 5 and 6 DVCVA were enacted in order to address the perceived defect in the law arising from the rule enunciated by the Law Commission and derived from the line of authority which included *Regina v Abbott and Abbott* and *Regina v Lane and Lane*. Parliament addressed the problem, in part, by sections 6 and 6A DVCVA, although the procedure introduced by those sections does not address a situation in which an Indictment does not also contain a substantive offence of homicide or a 'relevant offence'.

(ii) Parliament intended that the legislation should impose a positive duty on members of the same household as V to take reasonable steps to protect a child or vulnerable adult where a defendant becomes aware that there is a significant risk that that child or adult may be subjected to serious physical harm by a member of the same household - see *Regina v Uzma Khan, Naureen and Hussain* at §22 **[*MHB page 674*]** and *Regina v Uddin* at §32 **[*MHB page 730*]** and *Regina v Ikram* at §67 **[*MHB page 671*]**.

(iii) To restrict the limits of actual or constructive foresight of the circumstances in which "the act" occurred, as the Court of Appeal in the instant case has done, by relying upon foresight of a correspondence between the type of antecedent act giving rise to awareness of the risk and "the act" itself, and particularly where a range of other circumstances exist which it would be open for a jury to consider in deciding whether section 5 (1) (d) (iii) was proved, would be to defeat the purpose of the legislation.

60. Further, on the particular facts of this case it was necessary for the Prosecution to rely upon the antecedent sacral injury in order to prove awareness on the part of the Respondents of a significant risk of serious physical harm to V at the time of "the act." The Prosecution's stated position at trial was that it was critical to proof of the Prosecution's case against the Respondents that the sacral injury predated "the act" since otherwise there would be no evidence to support a finding that the Respondents were aware or ought to have been aware of a significant risk of serious physical harm to V at the time of "the act" (section 5 (1) (d) (i)). This was an approach which was expressly approved by the Court of Appeal in *Rex v ATT, BWY* at §59 of the judgment **[*MHB page 754*]** (although this remains qualified by the decision in *Rex v Fartun Jamal* [2026] EWCA Crim 135 at §40 of the judgment) **[*MHB page 768*]** and was consistent with §27 of the Explanatory Notes to the DVCVA issued in 2004 **[*MHB page 594*].** In *Rex v Fartun Jamal,* the Court of Appeal, in a case which involved entirely different facts, delivered its judgment on the connected issue of the construction of section 5 (1) (c) DVCVA and concluded at §57 - §58 of the judgment **[*MHB page 773*]** that the events giving rise to awareness of the significant risk of serious physical harm may be entirely coterminous with "the act" causing serious physical harm. An important distinction between these two cases is that the prosecution in *Rex v Fartun Jamal* was mounted in relation to a single person, with no other person being involved, in a situation which came close to, but fell short of, the common law offence of gross negligence manslaughter. Without debating the issue of whether or not the DVCVA was designed for a case involving only one culpable person, the Appellant points to the fact that since the events which may give rise to awareness of the significant risk of serious physical harm to a victim may, in different circumstances, be coterminous with "the act", distinctions between the antecedent event and "the act", such as constituted the Court of Appeal's reasoning in the instant case, may also serve to indicate that in many factual situations, that is too restrictive an approach to section 5 (1) (d) (iii).

61. For all of the above reasons, the Appellant submits that Parliament intended that a broad and purposive construction should be applied to the provisions of section 5 as a whole, including the definition provisions, and that as a result, the fact that, in the instant case, "the act" was "utterly different" to the unlawful act which caused the sacral injury was only one of the circumstances which the jury was entitled to take into account in deciding whether actual or constructive foresight was proved for the purposes of section 5 (1) (d) (iii); but it was not one which should have displaced the relevance of all the remaining circumstances. The jury was entitled to take the distinction between the two events into account since all of the facts

were for them to decide, but that would not serve to displace the evidential value for the jury of the remaining circumstances which formed the whole factual context in which "the act" occurred.

62. The Appellant therefore contends that Parliament intended that the words "the act occurred in circumstances of the kind" require the jury to take account of <u>all</u> the circumstances arising in the factual context in which the "act" occurred and that it is for the jury to determine what those circumstances are. A jury may, for example, attach very real significance to a defendant's awareness of the nature of previous acts of violence towards V and that a defendant, possessed of that knowledge, may be found to have foreseen or ought to have foreseen that some further serious physical harm might be caused to V, regardless of the form which it ultimately takes or the means by which it is achieved.

The Trial Judge's Ruling

63. The trial Judge's approach to the construction of section 5 (1) (d) (iii) involved an accurate portrayal of the factual context in which "the act" occurred – see §42 of the Ruling **[*KDB and MHB page 124*].**

"On the Crown's case the unlawful act occurred in a domestic context when Ambreen was alone in the household with some or all of the defendants. The unlawful act took place after an earlier incident in which she had been injured and humiliated by the application of a caustic agent to her lower back and bottom. The unlawful act which led to Ambreen's brain damage was a further injury in a similar context to the earlier injury. In my judgment the circumstances were of a kind which, if not foreseen, were foreseeable."

64. It is noteworthy that Lambert J did not attempt to define for the jury what might, in this case, amount to "circumstances of the kind" – see the Summing-Up at page 5B **[*MHB page 202*].** Instead, the Judge directed the jury in clear terms by reference to the statutory provisions, and in so doing, the Judge adopted the approach which had been endorsed in a passage from the judgment delivered by the Lord Chief Justice in *Regina v Ikram* at §62 - §64 **[*MHB page 671*].** This was supremely a question for the jury, and the Judge's approach, having rejected the submissions on behalf of the Respondents, was entirely in line with that guidance. The Judge reminded the jury of the evidence, which included all the "circumstances" in which "the act" occurred.

65. The trial Judge gave the following reasons in her Ruling at §34 and §37 - §40 **[*KDB and MHB page 120*]** which serve to support the broad and purposive construction for which the Appellants contend:

(i) The 2004 Act created a new offence, which has the effect of imposing a positive duty on members of the same household to protect children or vulnerable adults from serious physical harm and death. The limits on liability are to be found in the plain words Parliament used. There is no need to impose further limitations not apparent on the face of the provisions and it would be wrong to do so - §34.

(ii) Parliament chose to circumscribe the limits of the offence by section 5 (1) (d) (iii) - §34.

(iii) The Judge ruled: that a clear focus on the language used by Parliament was necessary and that Parliament could have chosen to limit liability by requiring the defendant to have actual or constructive foresight of the act or kind of act which led to death or serious physical harm. It did not. Instead, it required focus on the circumstances in which the act occurred. It is these circumstances rather than the unlawful act which must be of the kind that the defendant foresaw or ought to have foreseen – §37.

(iv) Parliament was careful to require only that the act occurred in circumstances "of the kind" that the defendant foresaw or ought to have foreseen. As the Court said in *Khan*, the circumstances do not have to be identical. Section 5 (1) (d) (iii) will be satisfied provided that the unlawful act occurs in the particular context – §38.

(v) A construction which requires in every case a precise correspondence between the circumstances of the conduct establishing the risk of harm and those of the unlawful act would unduly limit the protective scope of the offence – §39.

(vi) The protection afforded by section 5 (1) (d) (iii) is not thereby rendered nugatory. There will still be cases where the other elements of section 5 are established but paragraph (d) (iii) is not - §40.

Summary of the Appellant's Reasons why the Certified Point should be answered in the affirmative

66. The Certified Point (Order on the Application for Leave to Appeal to the Supreme Court) [***KDB and MHB page 106 et seq***] is as follows: "Whether, section 5 (1) (d) (iii) of the Domestic Violence Crime and Victims Act 2004, which provides, as one of the conditions of criminal liability, that "the act occurred in circumstances of the kind that D foresaw or ought to have foreseen", should be construed broadly so as to include any deliberate and harmful act occurring in the context of previous domestic violence that is known to have been perpetrated against the victim within the same household."

67. The Appellant submits that for the following reasons, the Certified Point should be answered in the affirmative.

(i) The requirement of proof of actual or constructive foresight by a defendant of the kind of circumstances in which "the act" occurred is not constrained by the words employed in section 5 (1) (d) (iii) by a requirement to prove a degree of correspondence between antecedent events which serve to create an awareness of the risk of such harm and "the act" which gives rise to it. Section 5 (1) (d) (iii) is focused upon the "circumstances" and not "the act."

(ii) Admissible aids to construction help to define the purpose of this legislation and support the conclusion that the words in section 5 (1) (d) (iii) are to be construed broadly. The purpose of sections 5 and 6 was to impose a positive duty on parents and carers to protect the most vulnerable members of society by imposing criminal responsibility in novel circumstances, whereas a narrow construction would defeat the purpose for which sections 5 and 6 were enacted.

(iii) The intention of Parliament in enacting section 5 (1) (d) (iii) was that the jury's function was to consider <u>all</u> the circumstances which arose within the context in which "the act" occurred, without limitation, and would include those which accompanied and preceded it.

(iv) A powerful factual component in these situations will be that the jury must first be satisfied that the defendant had actual or constructive awareness, at the time of "the act", that there was a significant risk of serious physical harm being caused to V by a member of the same household (section 5 (1) (d) (i)). Once a defendant is proved to have been aware of such a risk at the time when "the act" occurs, it would follow that the perceived risk will have eventuated. Similarly, once an antecedent act of physical violence by a member of the same household is proved to have given rise to actual or constructive awareness of the risk, it is difficult to envisage circumstances in which there would not be at least constructive foresight that a member of the household may cause further serious physical harm to V.

(v) Consequently, section 5 (1) (d) (iii) should be construed broadly, so as to include any deliberate and harmful act which occurs in the context of previous violence perpetrated against V by a member of the same household; an absence of at least constructive foresight of the kind of circumstances in which the act occurred are difficult to envisage.

68. For all these reasons, the Appellant submits that the Certified Point should be answered in the affirmative and the Appeal allowed.

Unresolved Issues in the Judgement of the Court of Appeal

69. The judgment of the Court of Appeal included a number of points by way of criticism of the Trial Judge's Ruling and the Prosecution's approach to the case (CACD Judgment at §36, §38, §39 and §42) **[*KDB and MHB page 103*].** In delivering its judgment, the Court of Appeal did not state whether these criticisms, whether singly or in combination, would be sufficient to render the convictions unsafe in the event that the Court of Appeal was in error in concluding that the submission on behalf of the Respondents should have succeeded. Further, during the oral argument in the Court of Appeal, neither counsel for the Prosecution nor for the Respondents, were invited to make submissions on these points, which have been addressed by the Appellant in §1.7 (iii) to (v) of the Appellant's Application for Permission to Appeal – Part 1 - Grounds of Appeal **[*MHB page 130*].**

70. In the event that the Certified Point is answered in the affirmative, the question arises of whether the Supreme Court considers that it should hear argument on these issues before finally determining the appeal or whether, pursuant to Rule 32 (1) (b) Rules of the Supreme Court any of these matters should be remitted to the Court of Appeal for Counsel for the Appellant and the Respondents to provide further written and oral submissions in relation to the safety of the conviction. If the Certified Point is answered in the negative and the appeal is dismissed, the issue does not arise.

71. The issues to which the Court of Appeal's criticisms were directed were not grounds relied upon by way of appeal in the Court of Appeal; the Court of Appeal was not therefore referring

in its judgment to grounds of appeal which were not determined by that Court. The House of Lords considered different circumstances in *Regina v Mandair* [1995] 1 A.C. 208 (Head Note and extract from the judgment only) **[*MHB page 840*]** whereby the Court of Appeal had determined only one of a number of grounds of appeal and the Court's decision on that ground had been reversed by the Court of Appeal.

72. The Appellant submits that for reasons set out in the Grounds of Appeal to the Supreme Court, if the Certified Point is answered in the affirmative, the criticisms made by the Court of Appeal can be effectively answered and resolved in the Appellant's favour by the Supreme Court, rather than by remitting them.

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30 April 2026