

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

FIRST RESPONDENT'S WRITTEN CASE

PRIMARY SUBMISSION

1. The requirement that “*the act occurred in circumstances of the kind that the D foresaw or ought to have foreseen*” should not be construed so 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. Such an interpretation would mean that section 5(1)(d)(iii) served no purpose because it would provide no practical additional safeguard.
2. The Court of Appeal’s reasoning about the otiose nature of s.5(1)(d)(iii) if the Appellant’s interpretation is correct is unimpeachable. Macur LJ said at [31]:

“However, we cannot accept Mr Smith’s submission, and one that Lambert J apparently adopted in paras 39 and 41 of her ruling, that “circumstances of the kind” will necessarily encapsulate all and any serious harm caused or inflicted by any unlawful means if it occurs within the domestic setting. We agree with Mr Green and Mr Iqbal, that if Mr Smith is right on this point, s.5(1)(d)(iii) becomes otiose, for by this stage of their deliberations the jury will already have determined that the unlawful act has occurred to a vulnerable victim by a member of D’s household and so, within a domestic setting.”

3. Either the words at s.5(1)(d)(iii) add something or they add nothing. We submit that on the Appellant’s analysis, they add nothing. This is aptly demonstrated by the fact that the Appellant contends that where a defendant becomes aware of the risk required to satisfy section 5 (1)(d)(i) so as to give rise to the duty to take reasonable steps to protect the victim (the safeguard contained within 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." (Appellant's Written Case, paragraph 14). This comes close to asserting a presumption that once the matters to be established under section 5(1)(d)(i) and (ii) have been proved to the jury's satisfaction, it will follow inexorably that the ingredient under section 5(1)(d)(iii) will have also been established "*other than in wholly exceptional circumstances*".

4. It is submitted that the Court of Appeal's judgment was not dependent upon a narrow construction of the meaning of the words "*circumstances of the kind*", nor did it attach excessive weight to the method by which "*the act*" was occasioned. The Court of Appeal made it clear that section 5(1)(d)(iii) did not require foresight of the method used to cause the harm (see paragraph 35 of the judgment). The method is merely part of the circumstances of the kind in which the harm occurred. Those circumstances include a consideration of the desired outcome of the act and accordingly, section 5(1)(d)(iii) could be satisfied even if the act that caused the harm was different in nature to that which gave rise to the risk of harm. The Court of Appeal's interpretation of "*circumstances of the kind*" was not therefore unduly focussed on the type of "*act*".
5. The correct interpretation of section 5(1)(d)(iii) requires the focus to be on all the circumstances in which the harm occurred, which means that it cannot be satisfied solely by reference to the risk of harm that was already present in the household (see paragraphs 31 - 34 of the judgment of the Court of Appeal). It is not enough therefore for a risk of general violence in a domestic setting to enable any unlawful act that occurred within that setting automatically to satisfy section 5(1)(d)(iii). The Appellant contends that "*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."*" (Appellant's Written Case, paragraph 10). Whilst this may be

correct, it is insufficient to satisfy section 5(1)(d)(iii) because the kind of circumstances in which further serious physical harm was occasioned must also have been foreseeable.

THE CORRECT INTERPRETATION OF SECTION 5(1)

6. Reading section 5(1) in its entirety limits the scope of secondary liability to those who:

- i. Are members of the same household as the V (section 5(1)(a)(i) + (b)),
- ii. Had frequent contact with them (section 5(1)(a)(ii) + (b)),
- iii. Ought to have been aware that they were at significant risk of being caused serious physical harm by any unlawful act (section 5(1)(d)(i)),
- iv. Failed to take such steps that they could reasonably be expected to take to protect the V from that risk (section 5(1)(d)(ii); and
- v. Ought to have foreseen the circumstances of the kind in which the unlawful act that actually caused the harm occurred (section 5(1)(d)(iii)).

7. Section 5(1)(d)(i) and (ii) are therefore concerned with the awareness of the risk of serious physical harm and the reasonable steps expected to be taken to protect against this risk, whereas section 5(1)(d)(iii) relates to the actual act that caused the harm and the circumstances in which it occurred. They are three distinct and separate ingredients of the offence with inbuilt safeguards. The foresight required to satisfy section 5(1)(d)(iii) is not just a realisation that the risk of harm may eventuate. More is required. The '*kind*' of circumstances in which the risk eventuated must also have been foreseeable.

8. It is submitted that section 5(1)(d)(iii) must create an additional hurdle for the Prosecution to overcome, which would not be surmounted just because a D was part of the V's household, saw them frequently, and ought to have been aware that they were at risk of serious harm by the unlawful act of a member of the same household.
9. It is submitted that this hurdle is the requirement that the First Respondent ought to have foreseen, not just that the V was at risk of serious injury from the unlawful act, which caused the harm (that's the requirement of s.(1)(d)(i)), but the '*kind*' of circumstances in which the act that caused the injury occurred.
10. The jury in this case therefore had to be able to conclude in what kind of circumstances the V was rendered unconscious. If that is not possible, how could they ever be sure that the First Respondent ought to have foreseen those circumstances?
11. One must begin by considering what is meant by "*circumstances*" in the context of this section.
12. As an ordinary English word, a "*circumstance*" is commonly understood to be "a factor or aspect of a situation that affects or qualifies an action or process, such as its time, place, manner, or cause" and "*circumstances*" can be defined as the prevailing conditions under which a person or thing acts or behaves. (These formulations have been culled directly from the Oxford English Dictionary as reflecting what the First Respondent contends is the ordinary meaning of the word in the context in which it appears in the legislation.)
13. The question is then - what factors, aspects of the situation, or prevailing conditions are relevant to the act that caused the serious physical harm?

14. It is submitted that they include:

- i. the relationship to the perpetrator
- ii. the access that the perpetrator had to the V
- iii. the risk of harm that existed
- iv. the condition of the perpetrator (e.g. state of inebriation)
- v. the mindset of the perpetrator (e.g. desire or mood)
- vi. the location of the act
- vii. the mechanism of the act.

15. Those are all relevant circumstances.

16. The next step is to consider which ones can be included within the definition of "*circumstances of the kind*" in the context of s.5(1)(d)(iii).

17. It is submitted that the first three cannot be included within the kind of circumstances envisaged by s.5(1)(d)(iii) because they must already have been proven to exist prior to a consideration of this subsection.

18. Therefore, of the factors listed above, section 5(1)(d)(iii) can only relate to:

- i. The condition of the perpetrator (e.g. state of inebriation).
- ii. The mindset of the perpetrator (e.g. desire or mood).
- iii. The location of the act.
- iv. The mechanism of the act.

19. All of the above circumstances ought to be considered in order to decide whether the kind of circumstances in which the act occurred were foreseeable.

20. In this case, the condition of the perpetrator was unknown and was not therefore foreseeable, the mindset of the perpetrator was unknown and was not therefore foreseeable, and the mechanism of the act was “*utterly different*” (per Macur LJ at [41]) to anything that had occurred before and was not therefore foreseeable. All that is left is the mere fact that “the act” occurred in the family home, which no reasonable jury could have concluded was sufficient by itself, (considering the absence of any evidence of the other three relevant circumstances), to be sure section 5(1)(d)(iii) was satisfied.

THE JUDGEMENT OF THE COURT OF APPEAL

21. Notwithstanding the Appellant’s complaint about Macur LJ’s judgment, the Court of Appeal in fact interpreted “circumstances of the kind” broadly but were not satisfied that the phrase should be interpreted so broadly as to remove its role as a safeguard to be given due weight. At [33] Macur LJ said:

“We are satisfied that the offence contrary to s.5 of the DVACA was not, and must not, be so widely interpreted as to undermine the safeguards in s.5(1)(d)(iii), all of which must be given due weight.”

22. The Court of Appeal’s nuanced view on this was underlined in the two paragraphs that followed, [34] and [35]:

“[34] Our view is corroborated by the changed commentary in the 17th edn of Smith, Hogan, and Ormerod’s Criminal Law and which now, correctly in our view, poses the questions: ‘But what of cases in which D2 foresaw D1 might punch, but D1 poisons? What of the situation where D1 usually kicks V but, on this occasion, caused GBH by dangerous driving at V. It is submitted that the focus must remain on the circumstances in which the death or GBH arose and not on the precise nature of the injury. It may be, for example, that the ‘circumstances’ that are relevant are that D1 usually inflicts injury when D1 is drunk, or when V refuses to do as they are told.’”

[35] However, in this latter regard, we cavil at the example given in ch.15.4.7 of the 17th ed suggesting that a non-perpetrating 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”. It appears to us that it is liable to be seized upon by defendants and relied upon as an argument that “circumstances of the kind” are to be interpreted dependent only upon the situation which existed at the time of the previous insult, namely X’s sobriety, rather than, for example the extent of his previous maladaptive behaviour towards an infant who would not be soothed. That is, though the act be different in nature, they were committed with the same desired outcome in mind. This is not to interpret “the circumstances” too loosely. It will, of course, be a matter for the jury, or the judge on a submission of no case to answer, to have regard to all the evidence and all the circumstances.”

23. In other words, the perpetrator’s mindset (e.g. desire) might be a “circumstance” of which the accused ought to have been aware even though his/her condition (e.g. sobriety as opposed to intoxication) had changed. For example, if the “causer” of the harm was known to use any and all forms of unlawful intervention to quieten a crying baby, those would be circumstances the kind of which the “allower” arguably ought to have foreseen.

24. Having acknowledged that the Prosecution case had been “riddled with evidential difficulties” (per Macur LJ at [36]) the Court of Appeal then turned its attention to the evidence relating to the specific mechanism by which the Prosecution alleged the V had probably been put in her comatose state at [39]:

“In particular, there is nothing in the ruling which indicates that Lambert J had regard to the evidence of Professor Pinkey, a professor of diabetics, and Professor Ferner, a consultant physician and clinical pharmacologist, which she subsequently

summed up to the jury, to the effect that: glimepiride “very, very rarely” appears in world clinical literature as “a weapon or something which is given deliberately to cause an overdose and hypoglycaemia”; and, that only a small amount may cause “catastrophic results” in a thin young woman with a BMI of 18, such as Ambreen. We conclude that she did not do so because she had erroneously accepted the prosecution submission that “circumstances of the kind” was to be broadly interpreted; see [31] above.”

25. Macur LJ went on to characterise the precursor injury and the mechanism by which that injury was inflicted as “utterly different” from the administration of glimepiride at [41]:

“We are persuaded that, in the particular circumstances of this case, the submission of no case to answer as regards the counts of causing or allowing the serious physical harm of a vulnerable person should have succeeded; 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”. We stress that we do not thereby suggest that a defendant will necessarily escape liability if the act which gives rise to the foreseeable risk is of a “different category” to that which causes the victim’s subsequent death or serious harm. All cases will be fact specific. 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.”

26. The significance of the mechanism by which “the act” was occasioned in this case is that, as per paragraph 39 of the judgement of the Court of Appeal (see paragraph 24 above), there is an insufficient evidential basis to

conclude that the sacral injury was inflicted with the same desired outcome as the administration of glimepiride. The only common factor between the circumstances in which the sacral injury and the administration of glimepiride were inflicted, is that both appear to have occurred within the family home. Without more, it is difficult to see how the fact that the perpetrator causes an externally inflicted injury with a caustic agent could rationally be said to be the same kind of circumstances as the surreptitious administration of a poisonous drug, the effects of which are unforeseeable to anyone without specialist medical knowledge in the field of diabetology, simply because it happened at home. Moreover, it is difficult to see how the First Respondent, with an undisputed mental age of 10 years 11 months (on the basis of an assessment by a clinical psychologist) could be fixed with constructive foresight of such circumstances.

27. The Court of Appeal found that Lambert J fell into error by adopting too broad an interpretation of “*circumstances of the kind*” that will “*necessarily encapsulate all and any serious harm caused or inflicted by any unlawful means if it occurs within the domestic setting.*” It is submitted that the Court of Appeal was correct to conclude that such an interpretation rendered section 5(1)(d)(iii) otiose.

28. The Court of Appeal correctly concluded that, if the words of s.5(1)(d)(iii) were to be given substance beyond what the Prosecution had already proved by the time the jury got to it, then a properly directed reasonable jury could not have convicted and therefore, the submission of no case to answer should have been allowed.

CONCLUSION

29. Without sufficient evidence of the same desired outcome or condition of the perpetrator, in circumstances where the act that gave rise to the risk of harm was so “*utterly different*” to that which caused the harm, it is submitted that the Court of Appeal was correct to conclude that the case should have been withdrawn from the jury. How the harm was inflicted is part of the circumstances in which it occurred. When deciding whether a D foresaw those kinds of circumstances, the nature of the act that gave rise to the risk of this harm occurring is a relevant consideration. It is submitted that the Court of Appeal was also correct to have regard to the evidence that glimepiride was only very, very rarely referred to in the world literature as a weapon to cause hypoglycaemia and, that only a small amount may cause catastrophic results (paragraph 31 of the judgement of the Court of Appeal). That is a relevant consideration when determining whether the D ought to have foreseen its use in such a way.

30. At paragraph 67 of their Written Case, the Appellant contends that 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 a risk of significant physical harm being caused to V, 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. It is submitted that even if that is correct, it is insufficient to satisfy section 5(1)(d)(iii) because it would mean that this subsection served no purpose as it would provide no practical additional safeguard. Section 5 only applies if 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. These are the safeguards provided by Section 5(1)(a)(i) and (d)(i). Section 5(1)(d)(iii) must provide an additional safeguard, which demands a consideration of all of the circumstances in

which the harm occurred, including, how the harm was inflicted, any similarity between this and how the act that gave rise to the risk of harm was inflicted, the desired outcome of the harm, and the condition of the perpetrator at the time the harm was inflicted.

31. On the facts of this case, the Court of Appeal found that no reasonable jury could have concluded that the act which caused the harm to the V occurred in circumstances that ought to have been foreseeable. It is submitted that this finding focused upon the correct interpretation of section 5(1)(d)(iii) by considering the entirety of the circumstances of the case. The focus was clearly not restricted to the unlawful act itself, or the category of that act. This is demonstrated by the fact that it included a consideration of the desired outcome of the act.

32. Evidential sufficiency was a question of law for the Court of Appeal, just as it was for the judge at the trial. The Court of Appeal determined that Lambert J had got it wrong. This was not the operation of some impermissible substitutionary approach. It was simply the Court of Appeal deciding that Lambert J erred in law in finding that there was a case to answer.

12th May 2026

SAM GREEN KC

CONOR QUINN

Adopted by:

ALISTAIR MACDONALD KC and KITTY COLLEY
[counsel for the Third Respondent]