

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

SECOND RESPONDENT'S WRITTEN CASE

1. The certified point of law and the Second Respondent's overarching submission.

1. On 26 March 2025 the Court of Appeal Criminal Division ("CACD") certified on the application of the prosecution that a point of law of general public importance was involved in the decision of the CACD (Macur LJ, Garnham J, HHJ Menary KC) of 23 January 2025, namely:

"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."

2. References in this document to paragraph numbers of the Appellant's written case are references to the "APPELLANT'S WRITTEN CASE" dated 30 April 2026.

3. It is the principal and overarching submission of the Second Respondent that the CACD's interpretation and construction of section 5(1)(d)(iii) of the Domestic Violence, Crime and Victims Act 2004 ("DVCVA 2004") is irreproachable.

4. Accordingly, the requirement that the act that caused death or serious physical harm "*occurred in circumstances of the kind that D foresaw or ought to have foreseen*" [section 5(1)(d)(iii) of DVCVA 2004] 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.

5. The interpretation contended for by the Appellant would mean that section 5(1)(d)(iii) effectively serves no purpose and becomes redundant because it provides no additional safeguard as was plainly intended by Parliament.

2. Section 5 DVCVA 2004 and section 5(1)(d)(iii) particularly.

6. Section 5 Domestic Violence, Crime and Victims Act 2004 provides as follows insofar as relevant for these purposes (our emphasis):

"5. The offence

(1) A person ("D") is guilty of an offence if—

(a) a child or vulnerable adult ("V") dies or suffers serious physical harm as a result of the unlawful act of a person who—

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

(d) either D was the person whose act caused the death or serious physical harm or—

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

(2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

.....

(5) For the purposes of this section an "unlawful" act is one that—

(a) constitutes an offence,

.....

(6) In this section—

"act" includes a course of conduct and also includes omission;

"child" means a person under the age of 16;

"serious" harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (c. 100);

“vulnerable adult” means 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.”

3. The CACD’s conclusions as to the statutory construction of section 5(1)(d)(iii) DVCVA.

7. If a jury is considering section 5(1)(d)(iii) in respect of a non-perpetrator of the death or serious physical harm, they will inevitably have already concluded to the criminal standard that:

- i. A child or vulnerable adult (“V”) died or suffered serious physical harm as a result of the unlawful act of a person (“D”) who was a member of the same household as V [section 5(1)(a)(i)]; AND
- ii. D had frequent contact with V [section 5(1)(a)(ii)]; AND
- iii. At the time (of death of V or serious physical harm to V) there was a significant risk of serious physical harm being caused to V by the unlawful act of a member of the same household who had frequent contact with V [section 5(1)(c)]; AND
- iv. D was, or ought to have been, aware of the risk mentioned in section 5(1)(c) [section 5(1)(d)(i)]; AND
- v. D failed to take such steps as he could reasonably have been expected to take to protect V from the risk [section 5(1)(d)(ii)].

8. The CACD at paragraphs 31 to 35 of its judgment variously agreed with, rejected, or cast doubt on extracts of relevant commentary from *chapter 15.4.4 of Smith, Hogan, and Ormerod’s Criminal Law 16th edition* and revised commentary in the *17th edition* of the same leading academic textbook.

9. However, the CACD correctly, unambiguously and plainly stated the critical question to be determined was whether the facts of the instant case (on the prosecution case, causing a serious sacral burn through application of some caustic substance¹ followed at some later stage by serious physical harm by poisoning by medication²) satisfied section 5(1)(d)(iii) DVCVA as “*occurring in circumstances of the kind that D foresaw or ought to have foreseen*”.

¹ The initial injury that led to the “*significant risk of serious physical harm*” within section 5(1)(c) DVCVA.

² The injury that satisfied section 5(1)(a) DVCVA.

10. The CACD concluded at paragraph 31 of its judgment simply that *on the facts of this particular case* section 5(1)(d)(iii) DVCVA was not satisfied. The CACD rejected the general submission pursued by the Crown at trial and before the CACD that “*circumstances of the kind*” was capable of being satisfied simply by the serious physical harm ultimately being caused in the same domestic setting as the original caustic burn:

“31. However, we cannot accept Mr Smith’s submission, and one that Lambert J apparently adopted in paragraphs [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, section 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.”

11. The above analysis is entirely consistent with the commentary in the 17th edition of *Smith, Hogan and Ormerod’s Criminal Law* and the need not to interpret “*circumstances of the kind*” within section 5(1)(d)(iii) too widely.

12. The CACD stated at paragraph 34 of its judgment in clear and plain terms its endorsement of the commentary in the 17th edition of *Smith, Hogan, and Ormerod’s Criminal Law* that the focus for the purposes of section 5(1)(d)(iii) DVCVA must be the *circumstances* in which the death or serious physical harm arose and *not* on the *precise nature of the injury*:

“34. Our view is corroborated by the changed commentary in the 17th edition 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.” (Emphasis provided).“

13. The CACD expressly at paragraph 41 of its judgment dealt in plain and clear terms with the possibility that section 5(1)(d)(iii) *might* be satisfied where, for example, there was a closer link between the caustic burn and the poisoning that led to serious physical harm (by for example the injured person being forced to drink the same caustic substance that caused the caustic burn):

“41.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.”

14. The CACD judgment at paragraph 35 is careful to make clear that, although (as ever) cases will be fact-specific, the term “*circumstances of the kind*” must not be too narrowly interpreted by, for example, focussing solely or mainly upon the situation which existed at the time of the previous insult (that led to the actual or constructive knowledge of a significant risk of serious physical harm being caused to V):

“35. However, in this latter regard, we cavil at the example given in chapter 15.4.7 of the 17th edition 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.”

4. The effect of the “broad and purposeful” construction of section 5(1)(d)(iii) contended for by the Appellant.

15. The ingredient within section 5(1)(d)(iii) of the section 5 DVCVA 2004 offence means that the act resulting in death or serious physical harm must occur in “*circumstances of the kind*” which were foreseen or ought to have been foreseen by D.

16. Parliament plainly intended that there should be an additional evidential requirement for the section 5 offence to be complete beyond D being aware (actually or constructively) of the risk of serious physical harm to the alleged victim (“V”) [the section 5(1)(d)(i) requirement].

17. It is acknowledged that the circumstances need not be identical and that whether or not

circumstances are of the “*same kind*” is ultimately a question for the jury³.

18. The Appellant’s contention at paragraph 14 of the Appellant’s written case is that “*a broad and purposive construction*” of 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.

19. The Appellant therefore further contends at paragraph 14 of the Appellant’s written case that “*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.*”

20. It is submitted that such a construction of section 5(1)(d)(iii) would make that section redundant and thereby otiose. That cannot have been the intention of parliament.

21. “*Circumstance*” is defined in the Cambridge Dictionary (Cambridge University Press) as “*a fact or event that makes a situation the way it is*”.

22. It is submitted that “*circumstances of the kind*” in this context is therefore a phrase used to describe a specific situation, event, or context by highlighting that it shares similar characteristics, nature, or key features with another previous set of circumstances.

23. The additional safeguard that section 5(1)(d)(iii) provides (and which Parliament plainly intended it should provide) before the section 5 DVCVA 2004 offence is complete is aptly illustrated by a consideration of the facts of the instant case as heard at trial.

24. The insurmountable hurdle for the prosecution at trial on the facts of this case was that, taking the Crown’s case at its highest, if the jury was sure that the initial sacral injury (leading to the section 5(1)(c) actual or constructive knowledge) was a caustic burn and that the later initial brain injury (the section 5(1)(a) ingredient) was caused by ingestion of glimepiride (whether surreptitiously or by force), then these mechanisms of injury are plainly not injuries caused in “*circumstances of the same kind*”.

25. It is submitted that the prosecution must prove the *kind of circumstances in which* the

³ See **R -v- Khan, Naureen and Hussain [2009] EWCA Crim 2** cited in the commentary at Archbold 2026, paragraph 19-170.

ultimate serious physical harm or death occurred.

26. Relevant aspects of section 5(1) of the Act (my emphasis) are:

“(c) at that time there was a **significant risk of serious physical harm being caused to V by the unlawful act of such a person**, and

(d) either D was the person whose act caused the death or serious physical harm or—

(i) **D was**, or ought to have been, **aware of the risk mentioned in paragraph (c)**,

(ii) **D failed to take such steps as he could reasonably have been expected to take to protect V from the risk**, and

(iii) **the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.**”

27. It is submitted that the construction of section 5(1) of the Act necessarily means there must be an inter-relationship between the factors in sub-sections (c), (d)(i), d(ii) and d(iii).

28. The prosecution submission at the close of its case at trial was that the prosecution evidence was sufficient to establish within usual Galbraith principles that:

- i. The sacral injury was the first injury;
- ii. The sacral injury was a caustic injury;
- iii. The initial brain injury was caused by forced (or surreptitious) ingestion of glimepiride.

29. Plainly a criminal act such as the application of a caustic substance to the skin is a very different criminal act to the criminal act of poisoning by adulteration of food by glimepiride or forced ingestion of glimepiride.

30. The CACD concluded at paragraph 41 of its judgment that “*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*”. The Appellant at paragraph 8 of the Appellant’s written case does not dispute this conclusion.

31. The Second Respondent submits that Parliament could not conceivably have set out to impose a duty upon a household member to take *all* steps to protect another member of the same household.

32. The Second Respondent advances the following analysis:

- i. The prosecution case was that the caustic sacral burn meant there was at all times after that point a significant risk of serious physical harm being caused to V by the unlawful act of a member of the household [section 5(1)(c)];
- ii. The prosecution case was that the existence of a caustic sacral burn was known to the Second Respondent;
- iii. The prosecution case was that this knowledge on the part of the Second Respondent meant he was aware of the ongoing risk of serious physical harm being caused to Ambreen [section 5(1)(d)(i)];
- iv. If sections 5(1)(c) and 5(1)(d)(i) are satisfied, then section 5(1)(d)(ii) imposes a duty upon the Second Respondent to *"take such steps as he could reasonably have been expected to take to protect (Ambreen) from the risk"*;
- v. The risk of poisoning is very far removed (thereby "utterly different") from the risk of physical assault by a caustic substance;
- vi. Therefore the act of poisoning by glimepiride did not occur *"in circumstances of the kind that D foresaw or ought to have foreseen"* [section 5(1)(d)(iii)].
- vii. The fact that section 5(1)(d)(ii) of the Act imposes an objective standard upon a member of the same household to take *"such steps as he could reasonably have been expected to take"* to protect another member of the same household means that there must be some relationship between the risk that the Second Respondent was (or ought to have been) aware of and how the serious physical harm was ultimately caused;
- viii. If this was not the correct position, then the objective test within section 5(1)(d)(ii) would be meaningless.

33. In these circumstances, it was necessary for the prosecution to adduce sufficient evidence for a jury, taking the prosecution case at its highest, to be entitled to properly (i.e. safely) conclude that the Second Respondent ought to have foreseen a risk of poisoning and the *"kind of circumstances"* in which that poisoning might occur.

34. It is submitted the Second Respondent cannot be criminally culpable for failing to take steps to prevent an act that he could not have reasonably been expected to foresee.

35. The fact that section 5(1)(d)(ii) places an objective test on the steps that the Second Respondent ought to take to protect Ambreen supports this analysis.

36. There was no safe basis for the jury to conclude so as to be sure that the poisoning of Ambreen occurred in circumstances of the kind the Second Respondent foresaw or ought to have foreseen.

37. It is for this reason that the submission of no case to answer should have been upheld.

38. The effect of the overly broad interpretation and construction of section 5(1)(d)(iii) contended for by the Appellant would, in the above circumstances, be to provide no additional safeguard as it was intended to do in such cases.

39. It is submitted that the judgment of the CACD at paragraph 31 of its judgment is plainly irreproachable and faultless insofar as it concluded that upon the Appellant's contentions "*section 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.*"

40. The CACD judgment appropriately identified and gauged the correct approach to the words "*circumstances of the kind*". The correct construction of section 5(1)(d)(iii) of the Act adopted by the CACD accords with the academic commentary expressed in the 17th edition of Smith, Hogan and Ormerod's Criminal Law⁴, namely:

"Care must be taken to avoid the circumstances being interpreted too loosely. It is not, it is submitted, enough that the prosecution can say that the circumstances are of a 'kind' which involves general violence towards V in the domestic context such that any unlawful act that causes serious injury to V in that setting is capable of being one that D2 ought to have foreseen (even if the act itself was of a wholly unforeseeable kind)."

41. The CACD's conclusion at paragraph 33 that "*the offence contrary to section 5 of the DVCA was not, and must not, be so widely interpreted as to undermine the safeguards in section 5(1)(d)(iii), all of which must be given due weight*" is also irreproachable.

42. Accordingly it is submitted that the CACD has comprehensively considered and dealt with the correct construction of and approach to the words "*circumstances of the kind*" as it pertains to section 5(1)(d)(iii) DVCVA. The CACD's conclusions in this regard are irreproachable.

43. The construction of section 5(1)(d)(iii) contended for by the Appellant is therefore far too broad.

44. At paragraph 67(iv) of the Appellant's written case it is contended that "*once an*

⁴ Paragraph 32 of the CACD judgment.

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". This contention is not disputed by the Second Respondent. This, however, relates principally to section 5(1)(d)(i) of the Act.

45. The assertion by the Appellant (in support of a "*broad and purposeful construction*" of section 5(1)(d)(iii)) at paragraph 14 of the Appellant's written case that "*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*" does in effect render section 5(1)(d)(iii) effectively redundant.

46. The Appellant's construction that is contended for would entirely negate the intention of Parliament in enacting section 5(1)(d)(iii).

5. Conclusion.

47. The Second Respondent submits:

- i. The CACD's conclusions as to the interpretation of and construction of section 5(1)(d)(iii) of the Act are irreproachable;
- ii. Accordingly the CACD's conclusions as to the incorrect approach of the trial judge to the submission of no case to answer are also irreproachable;
- iii. The wide and broad construction of section 5(1)(d)(iii) that is contended for by the Appellant would make that section otiose and redundant;
- iv. The construction of section 5(1)(d)(iii) that is contended for by the Appellant would entirely negate the intention of Parliament in enacting that section.

48. Accordingly the Second Respondent submits that the certified question should be answered in the negative.

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