



Trinity Term
[2026] UKSC 28
On appeal from: [2025] EWCA Crim 38

JUDGMENT

R v Sheikh and others (Respondents)

before

Lord Reed, President

Lord Lloyd-Jones

Lord Burrows

Lady Rose

Lady Simler

**JUDGMENT GIVEN ON
27 July 2026**

Heard on 25 June 2026

Appellant
Robert Smith KC
Matthew Donkin KC
(Instructed by Crown Prosecution Service)

First Respondent – Shagufa Sheikh
Sam Green KC
Conor Quinn
(Instructed by Haider Solicitors, Halifax)

Second Respondent – Khalid Sheikh
Abdul Iqbal KC
Gerald Hendron
(Instructed by Haider Solicitors, Halifax)

Third Respondent – Shabnam Sheikh
Alistair MacDonald KC
Kitty Colley
(Instructed by Qamar Solicitors, Dewsbury)

Fourth Respondent – Asgar Sheikh
Michelle Colborne KC
Simeon Evans
(Instructed by Ashmans Solicitors, Dewsbury)

LORD LLOYD-JONES (with whom Lord Reed, Lord Burrows, Lady Rose and Lady Simler agree):

1. On 18 December 2023 the respondents were all convicted at Leeds Crown Court, before Lambert J and a jury, of offences of causing or allowing a vulnerable adult to suffer serious physical harm, contrary to section 5, Domestic Violence, Crime and Victims Act 2004 as amended by Domestic Violence, Crime and Victims (Amendment) Act 2012 (“DVCVA 2004”). This appeal concerns the effect of section 5(1)(d)(iii) which requires that the unlawful act which causes death or serious physical harm occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen.

Factual background

2. The victim of the offences contrary to section 5 DVCVA 2004 was Ambreen Fatima Sheikh (“Ambreen”), a woman of 30 years of age. She was born on 22 January 1985 in the Islamic Republic of Pakistan. On 3 May 2014, while still living in Pakistan, she entered into an arranged marriage with Asgar Sheikh, who lived with his mother and father and his brother and sister at 15 Clara Street, a mid-terrace house in Huddersfield, West Yorkshire.

3. The family structure was as follows. Khalid Majid Sheikh was the father of the three children of the family. Shabnam Shahzadi Sheikh was the mother of the three children of the family. Shagufa Yasmin Sheikh was their daughter. Asgar Hussain Sheikh was their older son. Sakalyne Sheikh was their younger son.

4. On 13 May 2014, Ambreen applied to the British High Commission in Islamabad for entry clearance to the United Kingdom as the spouse of Asgar Sheikh. This was granted on 10 November 2014. Ambreen arrived in the United Kingdom on 16 November 2014 and thenceforth, until her admission to hospital, lived with the respondents and Sakalyne Sheikh at 15 Clara Street.

5. Shabnam Sheikh suffered from diabetes, for which she had been prescribed anti-diabetic medicines, which, from 17 October 2012, included glimepiride. By 23 June 2014 Shabnam Sheikh was being prescribed 6mg glimepiride per day in the form of 2mg and 4mg tablets. Apart from Shabnam Sheikh, none of the respondents had been diagnosed at this time with diabetes, nor had Sakalyne Sheikh. Ambreen was not diabetic.

6. At 01:12 on 1 August 2015 Shagufa Sheikh made an emergency call to the ambulance service in which she reported that Ambreen could not breathe properly and an emergency ambulance was needed. In response to the call, an ambulance arrived at 15 Clara Street at 01:31. The ambulance personnel were admitted by Asgar Sheikh, who

showed them into a bedroom where Ambreen was lying in bed. Shagufa Sheikh and Shabnam Sheikh were in the bedroom; Sakalyne Sheikh was in an adjoining room; Khalid Sheikh was not in the property.

7. Ambreen was unconscious and unresponsive with a Glasgow Coma Scale Score of 4. Her breathing was very noisy. A decision was made to transport her to hospital.

8. On admission to hospital at 02:05, Ambreen was found to be in a very serious condition. She had a high temperature and was deeply unconscious. A CT head scan revealed generalised swelling of the brain. Her Glasgow Coma Scale Score was assessed as being 7 and her breathing was abnormal. During 1 August, a decision was made to conduct a lumbar puncture with a view to confirming or excluding the presence of infection in the cerebro-spinal [per Oxford ED / Black's Medical Dictionary] fluid, meningitis having been on the list of differential diagnoses. For these purposes the nursing staff rolled her over so that her back was exposed in order that a doctor could conduct the procedure. Once her back was exposed it revealed the presence of a very severe lesion over the sacrum which measured 10 inches by 4 inches ("the sacral lesion"). The skin was black with raw exposed subcutaneous tissue at the edges. The hospital authorities reported the condition of their patient to the police. Because it was considered that Ambreen might not survive, the police asked a Home Office pathologist and a plastic surgeon to examine her body. Other lesions and marks were noted. These included a lesion to the right ear, scattered lesions over her back and what appeared to be pressure marks to the toes and one of her heels. Radiographs revealed the presence of a lung infection, consistent with her high temperature on admission. The infection was caused by inhaling gastric content while Ambreen was unconscious and thereby unable to protect her airway. The results of the lumbar puncture excluded infection as an explanation for the brain injury.

9. Ambreen had not sought any medical attention for the sacral lesion, nor had any been obtained for her, whether from a general practitioner or from a hospital. The lesion must have been very painful, and the other members of the household must all have been aware of Ambreen's condition.

10. The police searched the property inside and outside 15 Clara Street. They recovered, from a wheelie bin at the rear of the house, a pair of trousers which had been worn by Ambreen. The trousers smelled strongly of urine and contained black particulate debris from the sacral lesion. They were stained with a "bleached" appearance over an area which corresponded with the site of the sacral lesion. The police recovered a pillowcase from the bin which was stained with vomit, urine and dilute blood, which had emanated from Ambreen. In a ground floor room, the police found a false fur bed throw which was lying underneath unconnected items. The throw was stained with urine and dilute blood which had emanated from Ambreen. A pair of trousers which she had been wearing when the ambulance personnel entered the bedroom were seized by the police and scientifically analysed. They were clean and devoid of any urine, vomit or blood staining.

The trial

11. The trial of the respondents took place before Lambert J and a jury at the Crown Court at Leeds, between 4 October 2023 and 18 December 2023.

12. The respondents were charged, with Sakalyne Sheikh, on an indictment which contained eight counts. Counts 1 to 5 charged each of them, separately, with an offence of “causing or allowing ... a vulnerable adult to ... suffer serious physical harm” contrary to section 5 (1) of the DVCVA 2004. Count 6 charged all five defendants with an offence of conspiracy to pervert the course of public justice. Count 7 charged Shagufa Sheikh and Shabnam Sheikh with an offence of “doing acts tending and intended to pervert the course of public justice”. Count 8 charged Asgar Sheikh with a similar offence to that charged in count 7. The charges in counts 6 to 8 arose out of the same facts.

13. The prosecution case in relation to the offences charged in counts 1 to 5 of the indictment was that Ambreen sustained serious physical harm in the form of a severe injury to the brain which rendered her deeply unconscious. The most likely cause of the brain injury was a hypoglycaemic coma resulting from the ingestion of a small amount of glimepiride. A very small amount of glimepiride can cause a non-diabetic person to enter a coma, a matter of which Shabnam Sheikh had been warned by a medical practitioner on a number of occasions in the presence of Shagufa Sheikh. Ambreen has never recovered consciousness and remains alive, in a vegetative state, with a reduced life expectancy and requires constant support and care.

14. At the conclusion of the prosecution’s case, the respondents made submissions directed to the issue of whether no reasonable jury, properly directed, could convict the respondents in respect of counts 1 to 5. Khalid Sheikh (with Sakalyne Sheikh) made a similar submission in respect of count 6 of the indictment. Lambert J rejected these submissions and gave reasons contained in a written ruling. The respondents (and Sakalyne Sheikh) did not give evidence. One medical expert witness, Mr Burge, a plastic surgeon, was called on behalf of Shagufa Sheikh.

15. On 18 December 2023, the respondents were convicted of the offences with which they were charged. The fifth defendant, Sakalyne Sheikh, was acquitted of the DVCVA 2004 offence charged in count 4 but was convicted of the offence of conspiracy to pervert the course of public justice, the subject of count 6. All five defendants were convicted on count 6. Shagufa Sheikh and Shabnam Sheikh were convicted on count 7 of offences of “doing acts tending and intended to pervert the course of public justice”. Asgar Sheikh was convicted on count 8 of an offence of “doing acts tending and intended to pervert the course of public justice”.

16. The respondents entered Notices of Appeal in respect of their convictions on counts 1, 2, 3 and 5. Their appeals were focused upon the correct interpretation of section 5(1)(d)(iii) DVCVA 2004 and its application to the facts of the case. They contended that Lambert J had been in error in refusing their applications that the DVCVA 2004 charges should be withdrawn from the jury. The respondents contended that the “unlawful act” relied upon by the prosecution as having caused serious physical harm to the victim was, if proved, not one which “occurred in circumstances of the kind” that the respondents had foreseen or ought to have foreseen.

17. On 23 January 2025 the Court of Appeal delivered judgment ([2025] EWCA Crim 38; [2025] 1 WLR 2924) and concluded that the respondents’ submissions in respect of the DVCVA 2004 charges should have succeeded. The court also concluded that even if Lambert J did not err in rejecting the submission of no case to answer, the summing-up was tainted by too broad an interpretation that Lambert J had given to section 5(1)(d)(iii) DVCVA 2004. The court allowed the appeals and quashed the convictions.

18. On 26 March 2025 the Court of Appeal certified that the following point of law of general public importance was involved in the decision to allow the appeals and refused leave to appeal to the Supreme Court:

“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.”

19. On 28 November 2025 the Supreme Court granted the appellant permission to appeal.

The legislation

20. The Domestic Violence, Crime and Victims Act 2004 created in section 5 a novel offence of “causing or allowing” the death of a child or a vulnerable adult and, in section 6, modified rules of procedure. In 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.”

21. Section 5 of the DVCVA 2004 provides in material part:

“(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.

(3) If D was not the mother or father of V–

(a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused the death or serious physical harm;

(b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.

(4) For the purposes of this section—

(a) a person is to be regarded as a ‘member’ of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;

(b) where V lived in different households at different times, ‘the same household as V’ refers to the household in which V was living at the time of the act that caused the death or serious physical harm.

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

(a) constitutes an offence, or

(b) would constitute an offence but for being the act of—

(i) a person under the age of ten, or

(ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

(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;

‘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.

(7) A person guilty of an offence under this section of causing or allowing a person's death is liable—

(a) on conviction on indictment in England and Wales, to imprisonment for life or to a fine, or to both;

(b) on conviction on indictment in Northern Ireland, to imprisonment for a term not exceeding 14 years or to a fine, or to both.

(8) A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable—

(a) on conviction on indictment in England and Wales, to imprisonment for a term not exceeding 14 years or to a fine, or to both;

(b) on conviction on indictment in Northern Ireland, to imprisonment for a term not exceeding 10 years or to a fine, or to both.”

22. The legislation was enacted to remedy a specific mischief arising from the position at common law whereby 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 (*R v Abbott and Abbott* [1955] 2 QB 497, per Lord Goddard CJ at p 503; *R v Lane and Lane* (1986) 82 Cr App R 5 per Croom-Johnson LJ at p 18; *R v Bellman* [1989] AC 836, p 849; *R v Aston and Mason* (1992) 94 Cr App R 180; *R v Strudwick* (1994) 99 Cr App R 326). In April 2003 the Law Commission published its Consultative Report, *Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)* (Law Com No 279) in which it sought to address “a problem which has been recognised for many years by judges, academics and practitioners, and which has been highlighted by the press” (para 1.1). It provided the following example:

“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.”

It continued (at para 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.”

23. The Law Commission noted (at para 2.11) that there was ample evidence that the present rules of evidence and procedure which applied in criminal trials represented “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”. It concluded (at para 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.”

24. On 15 September 2003 the Law Commission published its final report *Children: Their Non-Accidental Injury or Death (Criminal Trials)* (Law Comm No 282) which recommended the creation of a new offence and provided a draft Bill. That draft Bill was substantially modified during its course through Parliament. The result was section 5 DVCVA 2004 in its original form. It created an offence which could be committed in either of two alternative ways: either causing or allowing a child or vulnerable adult to die or suffer serious physical harm. The prosecution does not have to prove which alternative applies (section 5(2)).

25. Section 5 displays a number of modifications of conventional common law principles, helpfully identified by Mr Robert Smith KC on behalf of the Director of Public Prosecutions (“the appellant”).

(1) An unlawful act is defined by section 5(5) as one that constitutes an offence. By section 5(6) an “act” includes both a course of conduct and an omission. As a result, the definition of an “act” extends to gross negligence manslaughter (*R v Fartun Jamal* [2026] EWCA Crim 135) and to certain offences of neglect pursuant to section 1, Children and Young Persons Act 1933.

(2) 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 substantially widened by the terms “or ought to have been aware” and “or ought to have foreseen” respectively. They introduce an objective assessment by the jury of the relevant state of mind of a defendant.

(3) The prosecution is not required to prove whether a defendant 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 the victim from the significant risk of serious physical harm (*R v McCarney* [2015] NICA 27 at paras 29–36).

- (4) Section 5 was supplemented with new procedural provisions in sections 6 and 6A.

Respective cases in the Crown Court

26. The prosecution case in the Crown Court was that the unlawful act which resulted in serious physical harm to Ambreen and which therefore formed the basis of the offence charged was the administration of glimepiride. The family members' awareness of a significant risk of serious physical harm was alleged to arise from the sacral lesion on Ambreen's back. The sacral lesion was caused by the unlawful and deliberate application of some form of caustic substance to the body of Ambreen which had taken place a number of days before she sustained the brain injury which was also caused unlawfully (the latter therefore being "the unlawful act"). The prosecution could not prove who had been responsible for inflicting either of these injuries but asserted that they were caused by one or more of the defendants. Consequently, the prosecution presented its case against the respondents and Sakalyne Sheikh on the basis that each defendant had "caused or allowed" the serious physical harm arising from the unlawful act. The prosecution was not required to prove which of these alternatives applied (section 5(2) DVCVA 2004). The elements of the prosecution's case against each of the respondents (and Sakalyne Sheikh) were as follows:

- (1) Ambreen was a "vulnerable adult" within the meaning of section 5(6) DVCVA 2004.
- (2) The unlawful act was caused by one or more of the defendants and amounted to serious physical harm. While the precise mechanism by which the injury to the brain was caused could not be proved with certainty, it was likely to have been due to hypoglycaemia, resulting from ingestion of the anti-diabetic agent glimepiride.
- (3) The onus was on the prosecution to prove that if the cause of the brain injury was the ingestion of glimepiride it had not been ingested accidentally or by Ambreen's own deliberate and voluntary act. For such purposes the prosecution relied upon the evidence that neither Ambreen nor any of the defendants had sought medical help for the sacral lesion, together with the evidence which had been adduced in support of counts 6, 7 and 8.
- (4) The defendants were all members of the "same household" as Ambreen, and each of them had "frequent contact" with her (section 5(1)(a)(i) and (ii) DVCVA 2004).

(5) At the time of the unlawful act there was a significant risk (“the risk”) of serious physical harm being caused to Ambreen by the unlawful act of such a person (section 5(1)(c) DVCVA 2004).

(6) The defendants were or ought to have been aware of the risk. The prosecution contended, as a matter of inference from the circumstances, that each defendant was aware that the sacral lesion had been inflicted unlawfully by one or more of them. The prosecution acknowledged that it was “critical” to the prosecution’s case to prove that the sacral lesion had been inflicted prior to the unlawful act, as evidence of actual or constructive awareness of the risk for the purposes of section 5(1)(d)(i) DVCVA.

(7) The defendants had failed to take any steps to protect Ambreen from the risk in circumstances in which they could reasonably have been expected to do so (section 5(1)(d)(ii) DVCVA 2004).

(8) The unlawful act occurred “in circumstances of the kind” that the defendants foresaw or ought to have foreseen (section 5(1)(d)(iii) DVCVA 2004). The prosecution contended that the subsection should be construed broadly, that the jury was required to consider all the circumstances and not just whether a defendant had actual or constructive foresight of the act or type of act which resulted in the serious physical harm.

27. The respondents presented their respective cases in common with each other and contended that, for the following reasons, the prosecution had failed to prove their case on counts 1 to 5 of the indictment:

(1) The prosecution had not proved that Ambreen was a “vulnerable adult” within the meaning of section 5(6) DVCVA 2004.

(2) If it was proved that the brain injury which Ambreen sustained was not due to natural causes and, as asserted by the prosecution, that it was caused by the ingestion of glimepiride, the prosecution had failed to prove that she did not ingest the drug accidentally or deliberately and voluntarily. Since one 2mg tablet of glimepiride would be sufficient to induce a hypoglycaemic coma in a non-diabetic, the amount ingested may not have been any greater and there was a realistic possibility that the drug had been consumed accidentally.

(3) The sacral lesion was not a caustic burn but was a pressure sore which was caused by Ambreen lying inert because of the brain injury which had rendered her unconscious. Consequently, the prosecution had failed to prove that the sacral

lesion was caused before Ambreen suffered the brain injury and there was therefore no evidence of any antecedent event which could have created an awareness of the risk for the purposes of section 5(1)(d)(i) DVCVA 2004.

(4) Section 5(1)(d)(i) DVCVA 2004 should be construed strictly so as to mean that a defendant must be proved to have had actual or constructive awareness of a risk of serious physical harm being caused by an unlawful act which falls within the same category as the antecedent events which led to the awareness of the risk. Consequently, on a correct construction of section 5(1)(d)(i) DVCVA 2004, if the unlawful act was committed by any other means, a defendant could not be proved to have had the necessary awareness of the risk.

(5) Since section 5(1)(d)(iii) DVCVA 2004 required proof that the unlawful act occurred in “circumstances of the kind” that the defendant foresaw or ought to have foreseen, and the administration of glimepiride was a wholly different set of circumstances to those which involved the application of a caustic substance to Ambreen’s body, then on a correct construction of section 5(1)(d)(iii) DVCVA 2004, the act of administering one or more tablets of glimepiride did not occur in “circumstances of the kind” that any defendant foresaw or ought to have foreseen.

The ruling on submission of no case

28. At the close of the prosecution case Lambert J delivered a ruling rejecting the submissions of no case to answer made on behalf of the respondents and Sakalyne Sheikh. She held:

(1) There was sufficient evidence on which a reasonable jury could conclude that Ambreen was a vulnerable adult.

(2) There was sufficient evidence on which a reasonable jury could conclude that the serious physical harm suffered by Ambreen was caused by an unlawful act. In particular, a reasonable jury could properly exclude accidental or deliberate self-administration of the anti-diabetic medicine.

(3) There was sufficient evidence on which a reasonable jury could conclude that the sacral injury was due to the application of a caustic alkaline chemical and that it was inflicted before the administration of glimepiride.

(4) Lambert J rejected the submission that the use of the definite article in section 5(1)(d)(i) meant that the risk of which the defendants ought to have been

aware was the risk of the unlawful act, that is either the specific unlawful act itself or an unlawful act falling into the same offence category as that which was foreseen or foreseeable. Lambert J observed that if the intention had been to confine liability to cases where the defendant had or ought to have foreseen the precise unlawful act which was in due course done, the offence would be a very narrow one indeed.

(5) The substantive conditions imposed by section 5(1)(d)(i) and (ii) – awareness of the risk and failure to take reasonable steps to protect the victim from the risk – were relatively straightforward and there was evidence on which a reasonable jury properly directed could conclude that they were satisfied in this case.

(6) So far as section 5(1)(d)(iii) was concerned, Lambert J emphasised three points. First, it was the circumstances rather than the unlawful act which must be of the kind that the defendant foresaw or ought to have foreseen. Secondly, the provision required only that the act occurred in circumstances “of the kind” that the defendant foresaw or ought to have foreseen. The circumstances did not have to be identical. Thirdly, this broad interpretation of section 5(1)(d)(iii) reflected the fact that offences of this sort tended to take place in private. Applying this construction, she was satisfied that there was sufficient evidence upon which a reasonable jury could conclude that the unlawful act occurred in foreseen or foreseeable circumstances.

The summing up and verdicts

29. Lambert J summed up to the jury in terms which closely reflected the language of the statute. The summing up is considered in greater detail below.

30. The respondents were convicted of the offences contrary to section 5 with which they were charged. Sakalyne Sheikh was acquitted of the offence contrary to section 5 with which he was charged.

The judgment of the Court of Appeal

31. On appeal, the Court of Appeal quashed the respondents’ convictions for offences contrary to section 5.

32. The Court of Appeal concluded that the statutory construction adopted by Lambert J in respect of section 5(1)(d)(i) DVCVA 2004 was correct and that the emphasis was

upon the reasonable foreseeability of the risk, thereby rejecting the respondents' submissions on this point (at paras 28 to 30).

33. The Court of Appeal rejected the prosecution submission 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 and concluded that if the prosecution was correct in this respect section 5(1)(d)(iii) would become otiose (at para 31).

34. The Court of Appeal considered that the submission of “no case to answer” regarding counts 1 to 5 (charging offences contrary to section 5) 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 the court doubted that a reasonable jury properly directed could conclude that it “occurred in circumstances of the kind that D foresaw or ought to have foreseen” (at para 41).

35. The Court of Appeal observed that, even if it had concluded that Lambert J did not err in rejecting the submission of “no case to answer”, the summing up was tainted by too broad an interpretation given by Lambert J to section 5(1)(d)(iii) DVCVA 2004 and it did not sufficiently assist the jury (paras 39 and 42).

36. The Court of Appeal also commented adversely upon the following aspects of the prosecution's case and Lambert J's ruling:

(1) The case against the appellants was riddled with evidential difficulties (para 36).

(2) The direction to the jury needed to address each possible causative act of commission where one or other of a number of specified unnatural and necessarily unlawful acts occurred to cause death or serious physical injury (para 37).

(3) Section 24 of the Offences against the Person Act 1861 (maliciously administering poison etc with intent to injure) was engaged and the judge should have specifically addressed the question of intent (paras 38 and 42).

(4) There was nothing in the judge's ruling to indicate that she had regard to the expert evidence given at trial that glimepiride appears only “very, very rarely” as a weapon given deliberately to cause an overdose and hypoglycaemia (para 39).

The scope and effect of section 5(1)(d)(iii)

37. Section 5 DVCVA 2004 as amended creates an offence of “causing or allowing a child or vulnerable adult to die or suffer serious physical harm”. The offence may be committed in alternative ways. It is committed if a defendant (“D”) causes a child or vulnerable adult (“V”) to die or suffer serious physical harm (section 5(1)(d)) or if D allows V to die or suffer serious physical harm (section 5(1)(d)(i)–(iii)). The section is intended to provide for situations 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. As a result, and as already stated, the prosecution is not required to prove whether the first or the second alternative applies (section 5(2)). To establish the second alternative the prosecution must prove:

- (1) At the time of the act which caused death or serious physical harm to V, D was or ought to have been aware 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));
- (2) D failed to take such steps as D could reasonably have been expected to take to protect V from that risk (section 5(1)(d)(ii)); and
- (3) The act occurred in circumstances of the kind that D foresaw or ought to have foreseen (section 5(1)(d)(iii)).

38. The present appeal turns on the scope and effect of section 5(1)(d)(iii).

39. For the appellant, Mr Robert Smith makes a submission which may conveniently be considered in two parts. First, he submits that a broad and purposive construction of section 5(1)(d)(iii) should be adopted under which the words “circumstances of the kind” should be construed as including all the circumstances which existed in the context of which the act was committed and which D foresaw or ought to have foreseen. He submits that it is not the act which must be proved to have been foreseen or which ought to have been foreseen. The requirement of actual or constructive foresight is directed to circumstances of the kind in which the act occurred.

40. Secondly, the appellant further submits that a broad and purposive construction of the words in section 5(1)(d)(iii) leads to the conclusion that, absent wholly exceptional circumstances, once D 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” (ie 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 D. The appellant submits:

“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 full implications of this submission are explained later in the appellant’s written case. The appellant submits that 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 that is known to have been perpetrated against V by a member of the same household. The appellant submits that an absence of at least constructive foresight of the kind of circumstances in which the act occurred is difficult to envisage. This submission on behalf of the appellant is reflected in the certified point of law before the Supreme Court.

41. The respondents submit that the words “the act occurred in circumstances of the kind that D foresaw or ought to have foreseen” in section 5(1)(d)(iii) should not be construed so broadly 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. They submit that such a reading would mean that section 5(1)(d)(iii) serves no purpose because it would confer no practical additional safeguard for the defendant. The appellant’s case, the respondents submit, 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”. They submit that 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. The actual or constructive awareness of a risk of general violence in a domestic setting should not mean that any unlawful act occurring within that setting automatically satisfies section 5(1)(d)(iii). The respondents point to the appellant’s contention 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. The respondents observe that, while 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.

42. There is considerable force in the respondents' submissions in response to the second part of the appellant's submission. Section 5(1)(d)(iii) is clearly intended to provide additional protection for D over and above that afforded by section 5(1)(d)(i) and (ii). The appellant's second submission, if accepted, would render section 5(1)(d)(iii) otiose. This was the point made by the Court of Appeal (at para 31):

“... 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 [for the first respondent] and Mr Iqbal [for the second respondent], 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.”

(I should note in passing that I do not agree that Lambert J adopted this approach in her ruling.) The Court of Appeal went on to approve the following passage in *Smith, Hogan and Ormerod's Criminal Law*, 17th ed (2024), para 15.4.4 which makes the point most effectively:

“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).”

43. Before a jury can convict a defendant of the offence under section 5 on the alternative basis of “allowing a child or vulnerable adult to die or suffer serious physical harm” the prosecution must prove to the criminal standard the three matters set out in section 5(1)(d). Section 5(1)(d)(i) is concerned with actual or constructive awareness of the risk of serious physical harm. Section 5(1)(d)(ii) is concerned with the reasonable steps expected to be taken to protect against this risk. Section 5(1)(d)(iii) is concerned with the circumstances in which the act that caused the harm and forms the basis of the charge occurred.

44. I consider that the approach to section 5(1)(d)(iii) adopted by Lambert J in her ruling on the submissions of no case to answer was entirely correct. She correctly emphasised the importance of concentrating on the precise language used by Parliament.

(1) First, the focus is not on the act but on the circumstances in which the act occurred. As Lambert J pointed out (at para 37 of her ruling), Parliament could have chosen to limit liability by requiring D to have actual or constructive foresight of the act or kind of act which led to death or serious physical harm. Instead, it is the circumstances which must be of the kind that D foresaw or ought to have foreseen. In this regard, the judge observed that she did not accept (at least in the unqualified terms in which it was stated) a statement in *Smith, Hogan and Ormerod's Criminal Law*, 16th ed (2021), para 15.4.4, that section 5(1)(d)(iii) “means that 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 also disapproved of this statement at para 29.) As Lambert J observed, there may be cases where a poisoning takes place in circumstances which are of a different kind from those that were or ought to have been foreseen on the basis of a prior assault, but the focus must always be on the circumstances, not the unlawful act or kind of act.

(2) Secondly, the reference to “circumstances of the kind” is significant. The legislation requires only that the act occurred in circumstances of the kind that D foresaw or ought to have foreseen. The circumstances do not have to be identical (see *R v Uzma Khan* [2009] EWCA Crim 2; [2009] 1 WLR 2036 per Lord Judge CJ at para 39). As Lambert J explained in her ruling (at para 38), in some cases the risk of harm that D is expected to foresee may be limited to certain kinds of circumstances, eg where a member of the household is intoxicated or where a distressed infant cries for a long period of time. In other cases, the risk of harm that D is expected to foresee may be present whenever V is alone with a member or members of the household, in which case section 5(1)(d)(iii) will be satisfied if the unlawful act occurs in that context.

(3) Thirdly, it is important not to lose sight of the object and purpose of the legislation and the mischief at which this unusual offence was addressed. As Lambert J explained at para 39 of her ruling, offences of this sort committed against children and vulnerable adults tend to take place in private where the precise circumstances are not known and cannot be inferred. The members of the family may decline to give any explanation as to how the injury occurred or how antecedent injuries apparent from a medical examination occurred or they may all give the same innocent explanation. To require 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. There is nothing in the wording of section 5(1)(d)(iii) which requires proof of some link or some degree of correspondence or likeness between the

circumstances that create the awareness of risk and the unlawful act to which the risk gave rise. The requirement is simply that D was or ought to have been aware of the risk and that the unlawful act occurred in circumstances of the kind that D foresaw or ought to have foreseen. As a result, a broad interpretation of section 5(1)(d)(iii) is required.

45. It does not follow, however, that no regard should be paid to the nature of the act or the mechanism of infliction of harm. Depending on the facts of each case, the boundary between an act and the circumstances in which it took place may not be precise and may on occasion be difficult to draw. Furthermore, it will sometimes be artificial to attempt to consider the circumstances while excluding the nature of the act or the mechanism of infliction of harm. Indeed, it was common ground among all parties before us that the nature of the act and the mechanism of infliction of harm are matters which may properly be taken into account as part of the circumstances referred to in section 5(1)(d)(iii). It must, however, be emphasised that the focus of section 5(1)(d)(iii) is not on the foreseeability of the act but on the foreseeability of the circumstances in which it occurred. In particular, a difference in the mechanism of infliction of harm will not necessarily be determinative of whether section 5(1)(d)(iii) is satisfied. In the present case, the fact that the antecedent act was “utterly different” from the unlawful act which caused the 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).

46. On this reading section 5(1)(d)(iii) is not otiose. On the contrary it will often play an important role and afford valuable protection to D. The risk of serious physical harm of which D was or ought to have been aware (section 5(1)(c); 5(1)(d)(i)) may be limited to certain kinds of circumstances, for example where the perpetrator is intoxicated or an infant victim is distressed for a prolonged period of time. Section 5(1)(d)(iii) will protect D where the act occurred in circumstances of the kind which were not foreseen or foreseeable by D.

47. The Court of Appeal began its consideration of section 5(1)(d)(iii), as stated above, by disapproving (at para 29) the statement in *Smith, Hogan and Ormerod's Criminal Law*, 16th ed, para 15.4.4, that section 5(1)(d)(iii) means that D2 who foresees that D1 might use violence by punching V cannot be convicted if D1 kills or seriously injures V by poisoning. While the Court of Appeal agreed that section 5(1)(d)(iii) does restrict the offence by inserting a safeguard against any unlawful act vicariously incriminating a non-perpetrating D, in its view the assertion in the example provided went too far in adopting a generic characterisation of unlawful acts as illustrative of “circumstances of a kind”. Similarly, the Court of Appeal cited with approval (at para 34) the following statement from the 17th edition of *Smith, Hogan and Ormerod's Criminal Law* at para 15.4.4:

“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 added by the Court of Appeal.)

The Court of Appeal went further (at para 35 of its judgment):

“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.”

48. I agree with the Court of Appeal’s analysis up to that point. However, when it came to apply the provision to the facts of the present case, the Court of Appeal (at para 41) departed from its stated approach and fell into error. It said:

“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.”

As the appellant points out, the example given by the Court of Appeal in the last sentence of para 41 highlights its error in relying upon comparison of the means by which the chemical agent was used to cause both the antecedent injury and the unlawful act, rather than any wider circumstances.

49. As indicated above, there may in situations such as this be no clearly defined boundary between the “act” and the “circumstance of the kind” referred to in section 5(1)(d)(iii). In particular, the manner of infliction of the antecedent injury and that of the injury caused by the “act” are capable of being part of the “circumstances of the kind”. However, the relevant “circumstances of the kind” are not restricted to these matters. The problem with the reasoning of the Court of Appeal at para 41 of its judgment, set out above, is that it considers the means or method of infliction of injury to the exclusion of all other considerations and, in doing so, it takes an unduly narrow view of “circumstances of the kind” in section 5(1)(d)(iii). In its view, the fact that the mechanism of injury was “utterly different” in the two cases was dispositive of the issue. Furthermore, the Court of Appeal erred in substituting its own view for that of the jury on what was essentially a matter for the jury when it was not entitled to do so.

50. The prosecution case at the trial was that the “circumstances” included the following matters. First, there was evidence that by the time the act occurred a general hostility towards Ambreen existed on the part of one or more of the members of the household. Secondly, one or more of them, to the knowledge of all of them, had unlawfully inflicted the sacral injury upon Ambreen by using some form of caustic agent. Thirdly, it also relied on evidence that Ambreen had suffered traumatic damage to her right ear which may have been caused by the same caustic agent. Fourthly, there was evidence that she had been seriously neglected. She was emaciated and dehydrated. She had been left lying in terrible conditions and there had been substantial delay in seeking medical assistance.

51. In her ruling on the submissions of no case to answer, Lambert J correctly analysed the effect of section 5(1)(d)(iii). (See paras 28(6) and 44 above.) She went on (at para 41) to consider the judgment in *R v Uzma Khan* where Lord Judge CJ had observed (at para 40) that the judge in that case, to underline the importance attached to foresight of the kind of violence which resulted in death, was entitled to explain the distinction between direct personal violence as opposed to violence inflicted with a potentially fatal weapon. Lambert J correctly considered that this was not inconsistent with her approach in the present case. The observation as to the type of violence had to be read in the light of Lord Judge's further observation (at para 40) that if that was too restrictive a direction, it was to the advantage of the appellants and that he could anticipate cases in which such a direction would indeed be over-advantageous to a defendant. Lambert J then applied her analysis to the prosecution case and concluded that there was sufficient evidence upon which a jury could conclude that the unlawful act occurred in foreseen or foreseeable circumstances. In particular, she referred (at para 42 of her ruling) to the following matters:

“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 judgement the circumstances were of a kind which, if not foreseen, were foreseeable.”

On this basis she refused the applications based on section 5. For the reasons stated above, she was right to do so. In the circumstances of this case, and in particular in the light of the earlier injury, Lambert J correctly considered that there was evidence on which the jury could conclude that the administration of the drug occurred in circumstances of the kind that were or ought to have been foreseen. This was pre-eminently a matter for the jury.

52. The Court of Appeal went on to state (at para 42) that even if it had concluded that Lambert J did not err in rejecting the submission of no case, it would nevertheless have found that the summing up was tainted by the too broad interpretation that Lambert J had given to section 5(1)(d)(iii). While it considered that she directed the jury correctly upon the route to verdict in accordance with “the chronological statutory scheme of section 5(1)(d)(i) to (iii) as required”, in its view the summing up did not sufficiently assist the jury as to how they should approach the task in hand. In particular, the Court of Appeal observed (at para 37) that to enable the jury to consider, if they were to find that a non-perpetrating defendant was aware that there was a significant risk of serious physical harm, whether that defendant had failed to take steps that it was reasonable for them to

take, called for “an intricate and evidentially tailored direction in relation to all components of section 5(1)(d)”. These criticisms are unfounded.

53. In summing up Lambert J reminded the jury that it was critical to the prosecution case that the sacral injury occurred before the glimepiride tablets were given because, according to the prosecution case, it was the act of putting the caustic substance on Ambreen’s lower back and the injury which it caused, which created the significant risk of serious physical harm being caused by one of the defendants by the subsequent unlawful act, and the awareness of that risk by each of the defendants. If the prosecution had not made the jury sure that the sacral injury occurred before the administration of glimepiride, they must find all defendants not guilty of the section 5 offence. She continued, in terms reflecting the statute:

“The prosecution also need to make you sure that the defendant whose case you are considering was either the person who administered the glimepiride – so either the person who gave Ambreen the tablet – or, if he or she was not the person who gave Ambreen the tablet, he or she was aware of the sacral injury and was aware, or ought to have been aware, of the significant risk that Ambreen might suffer serious physical harm as a result of the unlawful act of another one of the defendants; and in addition, failed to take such steps as he or she could reasonably be expected to take to protect Ambreen from the risk; and the administration of the glimepiride tablets occurred in circumstances of the kind that the defendant whose case you are considering either foresaw or should have foreseen.”

54. Lambert J then directed the jury that when considering whether each defendant failed to take such steps as he or she could reasonably be expected to take they must consider those matters from the perspective of the defendant in question. Each defendant’s circumstances should include their age, intellectual ability, gender and position within the family. She continued:

“It is a matter for you to determine the circumstances in which the glimepiride was administered, and you should do this by taking into account all of the evidence. You should then determine whether you are sure that the defendant whose case you are considering foresaw those kind of circumstances, or ought to have done so ...”

55. The judge then summarised the prosecution and defence cases for the benefit of the jury. In summarising the prosecution case she explained:

“The prosecution says that, by the time Ambreen came to suffer irreversible brain damage, she was a vulnerable adult, and this is because she was unable to protect herself from violence, abuse or neglect. She had become vulnerable because she was, by this time, isolated within 15 Clara Street and dependent upon the defendants for her welfare, her existence and her life. The Crown say she had no friends, she had no money, she had no job, her passport was in Shagufa’s bedroom, and her relatives were threatened with violence and chased from the house when they came to see her on 11 July.

The prosecution also says that, if it proves that the sacral injury was inflicted before Ambreen lost consciousness, then that is further evidence that Ambreen was vulnerable and that she was unable to protect herself and unable to seek medical help.

The prosecution says that the brain damage which Ambreen suffered was unlawfully and deliberately caused by one or more of the defendants as a result of administering to her, or causing her to ingest, or to take, some form of antidiabetic agent which was, in all probability, the drug glimepiride. Although it is impossible to be categoric about the mechanism of injury, the prosecution say that the overwhelming evidence favours glimepiride as being the cause of Ambreen’s brain injury. Although there may have been some additional brain damage caused by Ambreen aspirating saliva or stomach contents, this was a direct consequence of her deeply unconscious state. Glimepiride was available at 15 Clara Street at the time having been part of Shabnam Sheikh’s regular prescriptions, and the administration of that antidiabetic agent resulted in hypoglycaemia – or low blood sugar, as we now know that word means – and in consequence, profound and irreversible brain damage from which Ambreen will not recover. The injuries to her brain constitute serious physical harm.

It is the prosecution case that, some days before the brain injury was sustained, one of the defendants inflicted the sacral injury, the consequences of which must have been known to everyone in that house. The sacral injury took the form, the prosecution submit, of a caustic burn which must have been very painful

and so the other defendants must have been aware of Ambreen's condition. No help was sought. The prosecution say that there can only be one credible explanation for that failure, and that is that they each knew that Ambreen's sacral injury had been inflicted unlawfully and deliberately by one or more of the members of that household, and that is the explanation why no medical help was called.

As a result of that injury, the prosecution's case is that, in respect of those defendants who are not the perpetrators, the remaining defendants were aware of, or certainly ought to have been aware, that Ambreen was, from then onwards, facing a significant risk of further serious physical harm at the hands of one or more of the members of the household. At some stage after the sacral injury was inflicted and before she suffered the brain injury, she also suffered, say the prosecution, traumatic damage to her right ear which was caused by the same chemical agent which caused the sacral injury. The defendants must have foreseen, or certainly ought to have foreseen, the risk of further physical injury. It was a repetition of serious physical harm which had been inflicted on Ambreen as part of a pattern of on-going physical violence and abuse already demonstrated by the sacral injury and the injury to her right ear.

The defendants who were not the perpetrators did nothing to protect Ambreen from this on-going risk of which they were all aware and certainly ought to have been. No medical assistance was sought, nor was the matter reported to the police. These, say the prosecution, are steps which the defendants could, and should, reasonably have taken."

56. The judge then provided the jury with a fair summary of the case for each defendant.

57. The judge provided the jury with a "Route to Verdict". Question 5 once again reflected the language of the statute:

"Question 5: 'Are we sure that the defendant whose case we are considering either (a) unlawfully caused the physical harm which Ambreen suffered—'

If ‘yes’, you must find the defendant whose case you are considering guilty of the offence. If not, then go to (b) to (d) and ask yourselves whether you are sure that the defendant whose case you are considering (b) was aware, or ought to have been aware, of the significant risk of serious physical harm to Ambreen by the unlawful act; and failed to take such steps as he or she could reasonably have been expected to take to protect Ambreen from the risk; and the unlawful act occurred in circumstances of the kind that the defendant whose case you are considering foresaw, or ought to have foreseen.

If your answers to any of the questions in (b) to (d) is ‘no’, then you must find the defendant whose case you are considering not guilty. If your answers to (b) to (d) above are all ‘yes’, then you must find the defendant whose case you are considering guilty of this offence.”

58. In considering the criticisms made by the Court of Appeal of the judge’s summing up, it is important to bear in mind that nobody in the present appeal has at any point suggested that the words “circumstances of the kind” in section 5(1)(d)(iii) bear a meaning other than their ordinary meaning. As a result, it was not for the judge to interpret and define the words of the statute for the benefit of the jury. Rather “[i]t is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved” (*Brutus v Cozens* [1973] AC 854 per Lord Reid at p 861 C–F). In the present case that was the role of the jury. It was not necessary for the judge to rule, as a matter of law, what the words mean. Indeed, it would have been wrong for the judge to attempt to do so. As Lord Reid observed (at p 861G):

“No doubt the court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.”

59. In the present case Lambert J acted entirely correctly in directing the jury in the terms of the statute. As Lord Judge observed in relation to the predecessor to section 5(1)(d)(iii) in *R v Uzma Khan* (at paras 36 and 40), generally speaking a direction framed in accordance with the statute pre-empts any criticism. Any attempt to paraphrase or elaborate upon the meaning of the words in section 5(1)(d)(iii) would have been

unhelpful. Similarly, it would have been unhelpful to invite the jury to consider different hypothetical examples. What was required was a focus on the application of the words of the statute in their ordinary meaning to the facts as found by the jury. That was precisely what the directions of Lambert J provided.

Further criticisms of the judge

60. The Court of Appeal made further criticisms of the judge. However, none of these matters was relied upon as a ground of appeal before the Court of Appeal or by way of respondent's notice on the appeal to this court. Furthermore, although these matters were addressed by Mr Donkin KC, on behalf of the appellant in his oral submissions, none of the respondents' counsel sought to address us on these points. In these circumstances, these matters can be addressed relatively briefly.

61. First, the Court of Appeal observed (at paras 36 to 37) that the case against the defendants was riddled with evidential difficulties. The prosecution had opened the case on the basis that none of the medical expert witnesses was certain as to the precise causation of Ambreen's hypoxic brain injury, save that it did not result from natural causes, but on the balance of probabilities it was due to hypoglycaemia caused by her ingestion of glimepiride. The other possible mechanism was interruption of vascular flow by manual pressure. The prosecution case was that it was unnecessary to show the precise mechanism, only that it was as a result of an unlawful act. The Court of Appeal, while observing that it was initially disconcerting to see reference to the civil standard of proof in relation to establishing the unlawful act, accepted that it was possible to mount a prosecution under section 5 on the basis that one or other of a number of specified unnatural and unlawful acts occurred to cause death or serious bodily harm if that be proved to the criminal standard. However, it considered that where, as in this case, it was either one act or the other that has led to death or serious injury, the direction would need to address each possible causative act of commission.

62. The prosecution case was supported by the expert evidence adduced by the prosecution at the trial. That evidence was that while the precise cause of Ambreen's unconsciousness and brain damage was not capable of being identified it was probable that it was due to a hypoglycaemic coma caused by an anti-diabetic drug. Alternatively, it was possible that it was caused by manual obstruction of arterial blood flow. Whatever the precise cause, it was not due to any naturally occurring disease process. Further damage to the brain was caused by the obstruction of the airways after Ambreen had become profoundly unconscious. The prosecution case was that whatever the precise cause it was due to a deliberate and unlawful act on the part of one of the defendants. If the cause was a drug induced hypoglycaemia, accidental ingestion or deliberate self-ingestion could be ruled out because of the circumstances in which the defendants had attempted to conceal the victim's condition. That matter resulted in their convictions for conspiracy to pervert the course of public justice.

63. There is no substance in this criticism. The alternative possible causes were fairly presented to the jury in the summing up.

64. Secondly, the Court of Appeal drew attention (at para 38) to the criminal offence of administering a poison or other noxious substance contrary to section 24 of the Offences against the Person Act 1861 and (at para 42) criticised the judge for failing specifically to address the question of administration of a noxious substance. In fact, section 24 of the Offences against the Person Act 1861 was not an issue at the trial. An unlawful act for the purposes of section 5(1)(a) and (c) is defined by section 5(5)(a) as one which constitutes an offence. The deliberate administration of a harmful agent with intent to cause the victim some physical harm is an offence. The matter was sufficiently addressed in the summing up and route to verdict.

65. Thirdly, the Court of Appeal observed (at para 39) that nothing in the judge's ruling indicated that she had 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" appeared 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. The Court of Appeal concluded that Lambert J had not done so because she had erroneously accepted the prosecution submission that "circumstances of the kind" was to be broadly interpreted. Here it referred back to para 31 of its judgment, set out at para 42 above. The Court of Appeal appears to have considered this relevant to its conclusions in relation to foresight for the purposes of section 5(1)(d)(iii). In fact the judge observed at para 5 of her ruling on the submissions of no case to answer that it was the prosecution case that only a small quantity of the drug (8mgs – 12mgs or less, perhaps two or three tablets only) would be required to cause profound hypoglycaemia in a non-diabetic person. However, the rarity of the drug's unlawful administration to another was not an issue which could have any bearing on the issue of foresight for the purposes of section 5(1)(d)(iii), since the necessary foresight was not of the unlawful act but of the kind of circumstances in which it occurred.

Conclusion

66. For these reasons I consider that

- (1) Lambert J was correct to dismiss the submissions of no case to answer on counts 1 to 5;
- (2) Lambert J did not misdirect the jury in relation to counts 1 to 5.

67. I would set aside the order of the Court of Appeal allowing the appeals against conviction of the respondents on counts 1 to 3 and 5 and reinstate those convictions.

68. Section 33(2) of the Criminal Appeal Act 1968 makes it a condition of granting permission to appeal to the Supreme Court that the Court of Appeal has certified that a point of law of general public importance is involved in the decision. For reasons which will be apparent from this judgment, I consider that the question certified by the Court of Appeal does not adequately address the real issues in this appeal. However, this court is not confined to considering only the certified point of law (*R v Hayes* [2025] UKSC 29, [2025] 1 WLR 3553, per Lord Leggatt at paras 42–43). During the course of argument Mr Robert Smith helpfully proposed the following alternative which I gratefully adopt.

“Where, as on the facts of this case, an act causing serious physical harm to a vulnerable adult was (to employ the Court of Appeal’s term) utterly different from the antecedent violence inflicted on the victim, is that necessarily fatal to the requirement of foresight in section 5(1)(d)(iii)?”

I would answer the question in the negative.