Neutral Citation Number: [2025] EWCA Crim 38

Case No: 202400225 B1; 202400226 B1; 202400232 B1; 202400235 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEEDS
Mrs Justice Lambert
T20227775

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2025

Before :

LADY JUSTICE MACUR
MR JUSTICE GARNHAM
and
HIS HONOUR JUDGE MENARY KC
(Recorder of Liverpool)

- -

Between :

REX	**Respondent**
- and -	
(1) SHAGUFA SHEIKH	**Appellants**
(2) KHALID SHEIKH	
(3) SHABNAM SHEIKH	
(4) ASGAR SHEIKH	

- -
- -

Robert Smith KC & Matthew Donkin (instructed by **Crown Prosecution Service**) for the **Respondent**
Sam Green KC & Conor Quinn (instructed by **Haider Solicitors, Halifax**) for the **First Appellant**
Abdul Iqbal KC & Gerald Hendron (instructed by **Haider Solicitors, Halifax**) for the **Second Appellant**
Alistair MacDonald KC & Kitty Colley (instructed by **Qamar's Solicitors, Dewsbury**) for the **Third Appellant**
Simeon Evans (instructed by **Ashmans Solicitors, Dewsbury**) for the **Fourth Appellant**

Hearing dates: 4 December 2024

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Approved Judgment

This judgment was handed down remotely at 9.30am on 23 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Macur LJ :

Introduction

1. This is the judgment in the conjoined appeals of Asgar Sheikh ("Asgar"), Shabnam Sheikh ("Shabnam"), Khalid Sheikh ("Khalid") and Shagufa Sheikh ("Shagufa") against their convictions on 18 December 2023 for causing or allowing a vulnerable adult to suffer serious physical harm contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. ("DVCVA")

2. The victim of the serious physical harm is Ambreen Sheikh. She survives now in a persistent vegetative state. She is married to Asgar. His parents are Shabnam and Khalid. Shagufa is his sister.

3. The focus of the appeal is upon the construction of section 5(1)(c) and (d) of the DVCVA. It is argued that the trial judge, Lambert J, misconstrued section 5 so as to lead her into error in rejecting the submissions of no case to answer made on behalf of the four named appellants or, alternatively, that it led her subsequently to fail to direct the jury appropriately as to its application to the facts.

4. As a secondary issue, it is argued on behalf of Shagufa, that Lambert J erred in rejecting the further submission made on her behalf, that no reasonable jury properly directed would be entitled to find that Shagufa, whose mental age was 10 years 11 months, could have been expected to take steps to protect a vulnerable person in her household from the risk of harm.

5. Mr Simeon Evans appears on behalf of Asgar; Mr MacDonald KC and Ms Colley appear on behalf of Shabnam; Mr Iqbal KC and Mr Hendron appear on behalf of Khalid; Mr Green KC and Mr Quinn appear on behalf of Shagufa.

6. Mr Robert Smith KC, leading Mr Donkin, appears for the respondent prosecution.

The legislation

7. Section 5 of DVCVA provides:

> "(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 (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.
>
> (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….
>
> (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 …

Relevant facts in brief

8. The appellants did not give evidence at trial but challenged the evidence which suggested Ambreen was vulnerable, that she had suffered a non-accidental injury or that they had harboured hostile intent towards her. Nevertheless, their counsel agree that the summary which follows comprises the relevant facts for the purpose of the appeal and none seek to renew their applications in relation to any evidential issues raised in the respective submissions of no case to answer upon which the single judge refused leave.

9. Ambreen was a "vulnerable adult" due to her limited command of the English language, her lack of financial independence, her inability to protect herself from the hostile environment within her husband's family home, and her isolation from the wider community. All appellants were members of the same household and had frequent contact with Ambreen. One of them deliberately inflicted the caustic burn to her lower back prior to an event that led to her suffering serious bodily harm. The appellants who were not responsible for the burn were, or should have been, aware that it had been caused and that this unlawful act indicated that she was at significant risk of serious bodily harm by the further unlawful act of another member of the household.

10. At 1.12am on Saturday 1st August 2015, Shagufa called an ambulance in the presence of Asgar, Shabnam, and her younger brother (who was also indicted upon but acquitted of the section 5 charge). She stated that Ambreen had been unwell for two days and was not conscious, could not open her eyes, could not breathe properly but was making noises, and had not eaten ("only been drinking water, glucose and stuff like that"). Although she was not diabetic, they had been checking her sugar and blood pressure as

her sugar levels were fluctuating. Ambreen had taken some pills (possibly that morning) and had not awoken since. Later, Shagufa said that she thought Ambreen may have taken two paracetamol tablets because she had a pain in her leg. She said, "My mum was here, and she told me that she had pain two or three days ago, normal, she was awake and walking along and she took paracetamol for three days and today she didn't wake up. She's just been like this".

11. At 1.31am, paramedics arrived. Shagufa (who may have been translating what Shabnam was saying from Punjabi into English) said that Ambreen stopped talking to the appellants at midnight and thereafter became less responsive, but changed this to 1am when asked why it had taken so long to call an ambulance. Shagufa said that Ambreen had suffered headaches for the preceding three days, was unwell and had spent most of the day in bed but had spoken to those who checked on her.

12. The paramedics found Ambreen's glucose levels were normal, she had low oxygen and a raised temperature. When they asked about an ear injury, which was later diagnosed as a caustic burn, they were told that it had been sore for a few days. They administered oxygen through a nasal airway which required suctioning. A cannula was also inserted. At no stage did Ambreen show signs of response. She was taken to hospital.

13. On her admission to hospital, it was noted that Ambreen appeared emaciated and neglected: she had matted hair, was malnourished, underweight, unkempt, and soiled. She was intubated and found to have a very high white cell count. She was severely dehydrated. A CT scan of her head showed abnormalities of her eye and generalised swelling of her brain. A lumbar puncture was considered and, when rolling her over to administer the same, the caustic burn lesion over her sacrum was discovered. This and the caustic burn to the right ear and marks to her heels and toes raised safeguarding concerns.

14. Expert opinion dated the sacral injury as first in time. It is highly likely that a day or two thereafter Ambreen had ingested glimepiride, prescribed to Shabnam as an anti-diabetic drug, which induced hypoglycaemia leading to diabetic coma and during which time she aspirated gastrointestinal fluid into her lungs. She suffered hypoxic-ischaemic brain damage resulting in her now persistent vegetative state.

15. When speaking to medical staff Asgar denied knowledge of the sacral lesion. Shagufa and Shabnam were present at the time he did so and made no comment.

16. When police attended the appellants' property on 2nd August, they noted an odour of urine from the bedroom adjacent to where Ambreen had been when the paramedics arrived. Officers also located the complainant's urine soiled clothing and bedding in a bin and a similarly stained bed cover under a tarpaulin in a downstairs room.

17. The prosecution could not prove who in the household had caused the serious injury to Ambreen's sacrum or who may have caused her lapse into unconsciousness. All appellants were therefore indicted as secondary parties, vicariously responsible for the perpetration of the unlawful act in terms of 'allowing the serious bodily harm of a vulnerable person.'

Ruling on submission of no case to answer.

18. As indicated in [8] above, counsel for the appellants mounted a combined and vigorous root and branch 'half time' challenge to the prosecution case in relation to the section 5 offence. Whilst the focus of this appeal is on the point of statutory construction, the single judge, sensibly in our view, did not restrict leave so as to exclude consideration of whether the evidence, taken at its highest, would entitle a reasonable jury properly directed to conclude that they were sure that the glimepiride was deliberately administered to Ambreen with nefarious intent and after the sacral injury had been inflicted or ,if so, that it was an unlawful act committed 'in circumstances of the kind' that were or ought to have been foreseeable to other members of the household.

19. Lambert J's ruling on the statutory construction of section 5 succinctly delineated the appellants' arguments which she then roundly rejected in terms:

> "31. The defendants make two submissions arising from their construction of section 5. Both arise from the fact that the antecedent injury putting the defendants on notice of the risk to Ambreen of serious physical injury was the infliction of the caustic burn to her sacral region which was a wholly different type of unlawful act to that which caused the serious physical injury, the administration of anti-diabetic medication. It is submitted that the difference in nature between those two acts leads to difficulties for the Crown at this stage.
>
> 32. Mr Green, who argued this point on behalf of all defendants, focussed initially on section 5(1)(d)(iii) and the need for the act to occur in "circumstances of the kind" that the defendants foresaw or ought to have foreseen. He argued that the application of a caustic substance to Ambreen's lower back amounted to a wholly different set of circumstances to those relevant to the administration of anti-diabetic medication. When pressed as to the meaning of "circumstances" in this context, he referred to the preparations for the unlawful acts: the obtaining or mixing of the poison compared with the application of a toxic burning substance to Ambreen's back.
>
> 33. Having had the opportunity to reflect upon Mr Smith's submissions, he revised his argument to focus upon subsections 5(1)(a) and 5(1)(c) and, in particular, the use of the phrase: "the unlawful act." Mr Green submits that the draftsman's use of the definite article here is significant. It was deliberately employed to make clear that the risk of which the defendants ought to have been aware in sub-paragraph (d)(i) 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. In this case the unlawful act was the administration of glimepiride, and this was an offence which fell into a different category (the administration of a noxious substance), so could not have been foreseen by a person who knew of the application of a caustic agent to Ambreen's sacrum.

34. The 2004 Act created a new offence, which has the effect of imposing a positive duty on members of the same household to protect children or vulnerable adults from serious physical harm and death. Section 5(1) defines the extent of the protective duty and the circumstances in which criminal liability may arise. Underpinning both sets of Mr Green's submissions is the argument that, absent his interpretation of the subsection, the offence created is unacceptably wide and some further limitation is required to keep the offence within appropriate bounds. I do not agree. In my judgement, the limits on liability are to be found in the plain words Parliament used. There is no need to impose further limitations not apparent on the face of the provision and it would be wrong to do so.

34. On the plain words of section 5(1), the range of those potentially liable is limited to those who were members of the same household and had frequent contact with the victim (section 5(1) and (2)). It is an essential element of liability that, at the time of the unlawful act, there existed (objectively) a "significant risk" of "serious physical harm" being caused to the victim by the unlawful act of a person in this limited group. If it cannot be shown that the defendant caused the death or serious physical harm, the defendant must also have actual or constructive knowledge of this risk and must have failed to take reasonable steps (judged by reference to the characteristics of the defendant) to protect the victim from the risk. Sub-paragraph (d)(iii) limits the scope for liability yet further by requiring that the circumstances in which the act occurred were "of the kind" that the defendant foresaw or ought to have foreseen. These are the ways in which Parliament chose to circumscribe the parameters of the offence.

35. I am unable to accept that the use of the definite article in section 5(1)(c) carries the implication for which Mr Green contends. 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. That is, no doubt, why Mr Green felt constrained to accept that the offence would be committed if the unlawful act fell into the same "offence category". But such a limitation would pose a series of difficult definitional problems. What exactly is an "offence category"? What if the unlawful act could potentially fall into more than one offence category? What if it is proved that the death or serious physical harm was caused by an unlawful act, but the precise act (and therefore the offence category) cannot be identified? If Parliament had intended to limit the scope of the offence in the way suggested by Mr Green, it would no doubt have had to consider these and other definitional issues. As it is, there is nothing in the language Parliament used in section 5(1)(c) to

suggest that it had in mind the concept of an "offence category." On a natural reading of that paragraph, Parliament was content that it was enough that there was a significant risk of serious physical harm being caused to the victim by any unlawful act, subject to paragraph (d) being satisfied.

36. In a case where the defendant did not himself or herself cause the death of serious physical harm, section 5(1)(d) imposes three substantive conditions. (i) and (ii) are relatively straightforward. For the reasons I have already given, there is evidence upon which a jury properly directed could conclude that they are satisfied in this case. The defendants must have known of the injury inflicted to Ambreen's lower back. Even if they had not seen it for themselves, it would have been very painful and caused Ambreen distress which doubtless she would have exhibited. The fact of this injury would or should have put the defendants on notice of the significant risk of further serious physical harm being inflicted.

37. Sub paragraph d(iii) requires that "the act occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen". Mr Green submits that this requirement cannot be satisfied here, where the risk was established by the application of a caustic substance, but the unlawful act was the administration of a drug. In my judgement, a close focus on the language used by Parliament is again necessary. There are three points to note. First, Parliament could have chosen to limit liability by requiring the defendant to have actual or constructive foresight of the act or kind of act which led to death or serious physical harm. It did not. Instead, it required focus on the circumstances in which the act occurred. It is those circumstances, rather than the unlawful act, which must be of the kind that the defendant foresaw or ought to have foreseen. For this reason, I do not accept (at least in the unqualified terms in which it is stated) that the conclusion expressed in Smith & Hogan, upon which Mr Green initially placed reliance is apt, namely, that paragraph (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". Of course, 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.

38. Secondly, Parliament was careful to require only that the act occurred in circumstances "of the kind" that the defendant foresaw or ought to have foreseen. As the court observed in Khan at [39] the circumstances do not have to be identical. In some cases, the risk of harm that the defendant is expected to foresee may be limited to certain kinds of circumstance – e.g. when

members of the household are intoxicated, when a child cries for a long period etc. In other cases, the risk of harm may be present whenever a child or vulnerable adult is alone with members of the household. In that case, paragraph (d)(iii) will be satisfied, provided that the unlawful act occurs in that context.

39. Thirdly, this broad interpretation of paragraph (d)(iii) reflects the fact that 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. A construction which in every case requires 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.

40. It follows from the above that I do not accept that, on this construction, the protection afforded by paragraph (d)(iii) to the defendant is rendered nugatory. The jury must still be sure that the unlawful act occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen. On the construction I have adopted, there will still be cases where the other elements of section 5 are satisfied, but paragraph (d)(iii) is not.

41. I see nothing in my construction of the provision which is at odds with the judgment in Khan where at paragraph [40], the court observed that the trial judge had, in his directions, "sufficiently linked the violent incident on the night when Sabia died with the earlier violent occasions in the context of the risk of serious physical harm of which the jury had to be satisfied." As I have said, the existence of a risk of serious physical harm is a pre-requisite for criminal liability under this provision. The court's further observations concerning the judge's approach to "foresight of the type of violence" must be seen in the context of those observations possibly having been "too restrictive" a direction and one which was "over-advantageous to the defendant."

42. Applying this construction, I am satisfied that there is sufficient evidence upon which a jury could, in this case, conclude that the unlawful act occurred in foreseen or foreseeable circumstances. 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. I therefore

> refuse the defendants' applications based upon their construction of section 5.

20. In respect of Shagufa's mental capacity to take reasonable steps to protect Ambreen from the risk of harm, Lambert J summarised Mr Green's submission to be that "the rationale contained within subsection 3(b) implies that it is mental capacity and not merely physical age that is determinative in deciding what steps the defendant could reasonably be expected to take to protect a victim from the risk of harm." She rejected this as a proposition saying:

> "50. I do not accept Mr Green's construction of the subsection. Had Parliament intended to limit liability by prohibiting the charging of a person over the age of 16 with an intellectual function equivalent to a child under that age then the provision would have been drafted to reflect this intention in clear terms. As it is, the rationale for the prohibition on charging young people under the age of 16 years is set out in 3(b): such a person under the age of 16 could not be expected to take steps to protect the victim even from a known risk of harm. This is perfectly explicable as a child aged under 16 years living in the same household as the perpetrator and victim would not be likely to have the influence within the household nor the physical nor moral nor possibly legal capacity to take action to protect the victim. The provision is perfectly intelligible, and it does not bear the meaning attributed to it by Mr Green."

The appeal

21. As in the Court below, Mr Green KC has led the submissions on the point of statutory construction before us. Mr Iqbal KC has amplified his support. Mr MacDonald KC and Mr Evans adopt their submissions. Mr Smith KC endorses Lambert J's ruling in its entirety.

22. Mr Green argues that section 5(1)(d)(i) of DVCVA must be strictly construed to mean that the defendant ("D"), who was not the perpetrator of <u>the</u> unlawful act referred to in section 5(1)(c) must be proved to have been, or ought to have been, aware of the significant risk of such harm being caused to the victim ("V") by <u>the</u> unlawful act which resulted in V's death or serious harm. That is, he stresses the definite article 'the' and the parsing of section 5(1)(c) which associates the significant risk with the unlawful act. He does not go so far to say that a non-perpetrator D did or should have foreseen the precise modus operandi of the unlawful act, but rather the 'category of offence'. Therefore, if non-perpetrator D was or should have been aware of the risk of serious harm created by a physical assault, then regardless of how a subsequent physical assault which led to serious physical harm was occasioned, whether by fist, or feet or 'conventional' weapon and whatever the manner in which it was carried out, whether by blow, or incision or smothering, section 5(1)(d)(i) would be satisfied. However, if the unlawful act was committed by any other means, for example by the administration of a noxious substance or gross neglect, then this would not incriminate a non-perpetrating D pursuant to section 5 of the DVCVA, for the risk created by that type of unlawful act was not reasonably foreseeable.

23. Alternatively, Mr Green, relies upon subsection (1)(d)(iii). He submits that whilst there was evidence upon which the jury would be entitled to conclude that Ambreen had been unlawfully assaulted to cause the caustic burn to her back, and that the appellants were aware of the same, the subsequent ingestion of glimepiride, was of such a different character to the physical assault that it could not reasonably have been in the appellants' contemplation to lead them to take steps to protect V from such harm for it did not occur in 'circumstances of the kind' that were reasonably foreseeable. See *R v Khan (Uzma), Naureen and Hussain* [2009] 1 Cr App. R.28 at [36] and [39].

24. Mr Iqbal's submissions concentrated upon the interplay of subsections 5(1)(d)(i), (ii) and (iii). That is, he argues that the prosecution must establish the nature of the objectively foreseeable risk for the jury to assess whether a non-perpetrating D had taken such steps as it was reasonable for s/he to take, and in order to consider whether the unlawful act occurred "in circumstances of the kind that D foresaw or ought to have foreseen".

25. Mr Smith challenges Mr Green's interpretation of section 5(1)(d)(i) which focuses upon 'the unlawful act' as opposed to 'the risk of serious physical harm', and of subsection (1)(d)(iii) which focuses upon 'the act' as opposed to 'the circumstances'. Mr Smith submits that all that must be proved is that the act occurred in a domestic setting. He says that the offence created by section 5 of the DVCVA is necessarily and intentionally widely drawn in relation to culpability, for the obvious purpose to punish those who abuse the vulnerable in a domestic setting, subject only to the necessary statutory safeguards provided in subsection (1)(d). That is, if antecedent events to the unlawful act leading to death or serious physical injury establishes a foreseeable significant risk of serious harm, then regardless of the nature of the unlawful act, criminal liability may be established, if it occurs in 'the circumstances' of the domestic setting. The last unlawful act did not need to be "identical" to the unlawful behaviour that had gone before.

26. Mr Smith iterates that the prosecution case against these appellants was focused upon the infliction of "gratuitous" serious physical harm in the form of an extensive caustic burn, which self-evidently demonstrated a deliberate intention to cause serious physical harm by one or more members of that household and of which each one of the defendants was aware by the time the unlawful act resulting in the primary head injury was caused. Whether the 'circumstances' were of 'a kind' was for the jury to evaluate.; see Khan at [39]

27. Mr Quinn has taken the lead in arguing ground 2 as it concerns Shagufa. As indicated above, she did not give evidence, but it was an agreed fact that she had been diagnosed as of extremely low intellectual capacity with a mental age of 10 years 11 months. Mr Quinn did not submit that this characteristic protected her from prosecution, but rather that Lambert J should have upheld Shagufa's additional submission of no case to answer since no reasonable jury properly directed could have found her capable of taking steps that were reasonable to protect Ambreen; see *Khan* [33].

Discussion

28. We have little hesitation in rejecting Mr Green's arguments on the construction of section 5(1)(d)(i). Section 5(1) defines the offence and, read in its entirety as is clearly intended, indicates the scope of principal and secondary liability. It is a sine qua non of

the offence that 'the unlawful act' which leads to death or serious physical harm has already occurred; see subsection (1)(a). Subsection (1)(d) (i) – (iii) are applicable to 'secondary', non-perpetrating, Ds'. Subsections (1)(d)(i) and (1)(d)(ii) specifically refer to 'the risk' referred to in section 5(1)(c), which is 'the risk of serious physical harm.' It is subsection 1(d)(iii) which delineates a non-perpetrating D's culpability by reference to the 'circumstances' in which the risk has been realised, and whether it is 'of a kind' We agree with Mr Smith, the emphasis in section 5(1)(d)(i) is upon the reasonable foreseeability of the risk of further serious physical harm, or death, being occasioned to V, based upon the fact of previous unlawful conduct by a member of the same household. We also agree with him that section 5(1) (d)(iii) focuses on 'circumstances' and not 'category of offence'.

29. The real question in this case is the construction of section 5(1)(d)(iii). As did Lambert J, we respectfully disagree with the commentary in chapter 15.4.4 of Smith, Hogan, and Ormerod's Criminal Law 16th edition, that subsection 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." We agree that section 5(1)(d)(iii) does restrict the offence by inserting a safeguard against any unlawful act vicariously incriminating a non-perpetrating D. But the assertion in the example provided goes too far in adopting a generic characterisation of unlawful acts as illustrative of 'circumstances of a kind'.

30. Therefore, up to this point, we agree in all material respects with Lambert J's statutory construction of section 5.

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.

32. Our view happens to accord with the view expressed in the 17th edition of Smith, Hogan and Ormerod's Criminal Law, and which we specifically endorse, 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). "

33. We are satisfied that the offence contrary to section 5 of the DVACA 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.

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)

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.

Application of the law to the facts in this case.

36. The case against the appellants was riddled with evidential difficulties. In opening the prosecution case to the jury, Mr Smith acknowledged that none of the medical expert witnesses were certain as to precise causation of Ambreen's hypoxic 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 (a prescription drug to counteract the effects of diabetes). The other possible mechanism was interruption of vascular flow by manual pressure. Mr Smith asserted that it was unnecessary for the prosecution to prove the exact mechanism, only that it was as the result of an unlawful act.

37. Although it is initially disconcerting to see reference to the civil standard of proof in relation to establishing 'the unlawful act', we do accept that it will be possible to mount a prosecution of a section 5 DVCVA charge on the basis that one or other of a specified unnatural and, necessarily, unlawful act occurred to cause death or serious bodily harm if that be proved to the criminal standard. This must certainly be so in terms of a course of conduct or acts of omission. However, to enable the jury to consider, if they 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, will call for an intricate and evidentially tailored direction in relation to all components of subsection 5(1)(d). If, as in this case it was arguably one act or the other, and not a cumulative course of conduct, that has led to death or serious injury, then the direction will need to address each possible causative act of commission.

38. The criminal offence of administering a poison or other noxious substance contrary to section 24 of the Offences Against the Persons Act 1861 requires the intent to injure, aggrieve, or annoy. We note that Lambert J's ruling at paragraphs [13] to [18] responded to the question of whether there was "sufficient evidence that Ambreen's serious physical harm was caused by an unlawful act?" by reference only to whether there was evidence which would entitle the jury to conclude that one or more of the

defendants had administered the glimepiride to Ambreen. It did not address the question as to the circumstances in which they did so.

39. In particular, there is nothing in the ruling which indicates that Lambert J had regard to the evidence of Professor Pinkey, a professor of diabetics, and Professor Ferner, a consultant physician and clinical pharmacologist, which she subsequently summed up to the jury, to the effect that: glimepiride "very, very rarely" appears in world clinical literature as "a weapon or something which is given deliberately to cause an overdose and hypoglycaemia"; and, that only a small amount may cause "catastrophic results" in a thin young woman with a BMI of 18, such as Ambreen. We conclude that she did not do so because she had erroneously accepted the prosecution submission that 'circumstances of the kind' was to be broadly interpreted; see paragraph [31] above.

40. We acknowledge the perilous state of Ambreen, whom the evidence suggests was previously a healthy, confident and vivacious young woman until living in ruinous domestic circumstances with the appellants, one of whom was responsible for what must have been an excruciatingly painful injury to her sacral region shortly before her lapse into unconsciousness. There is no issue but that the evidence of the appellants' delay in seeking medical assistance and concealing the circumstances of her lapse into unconsciousness entitled the jury to conclude that the appellants had conspired to pervert the course of justice and there is no appeal against their convictions in this respect. Nevertheless, we are not confident, as Lambert J appeared to be, either that it would be reasonable for the jury to conclude that delay in seeking medical assistance indicated malicious intent in the administration of glimepiride, or, more particularly that the fact of the sacral injury meant that the subsequent administration of medication was intended to achieve the same end of 'humiliating' Ambreen. We fail to see what the circumstantial evidence was that could reasonably lead to this latter inference; see paragraph [39] above.

41. We are persuaded that, in the particular circumstances of this case, the submission of no case to answer as regards the counts of causing or allowing the serious physical harm of a vulnerable person should have succeeded; the administration of a minimal quantity of glimepiride, even if established to be with unlawful intent, was so utterly different from the infliction of the sacral injury that had occurred shortly beforehand and which the prosecution relied upon as giving rise to the foreseeable risk of serious physical harm, that we doubt that a reasonable jury properly directed could conclude that it occurred "in circumstances of the kind that D foresaw or ought to have foreseen" . We stress that we do not thereby suggest that a defendant will necessarily escape liability if the act which gives rise to the foreseeable risk is of a 'different category' to that which causes the victim's subsequent death or serious harm. All cases will be fact specific. In this case, for example, if Ambreen had been forced to ingest a caustic agent such as caused her sacral injury, then the misuse of the same or similar caustic agent could be evidence from which a reasonable jury may properly conclude that the act had been committed 'in circumstances of the kind' that the defendants foresaw or ought to have foreseen.

42. But even if we had concluded that Lambert J did not err in rejecting the half time submission, we would nevertheless have found that the summing up was tainted by the too broad interpretation that Lambert J had given to subsection 5(1)(d)(iii). That is, Lambert J 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, but the summing

up did not sufficiently assist the jury as to how they should approach the task in hand; see paragraph [37] above. That is, we consider that the judge should have specifically addressed the question of intent in the administration of a noxious substance on the basis that the jury did find one of the appellants to have administered the glimepiride by reference to the expert evidence and also that even if they were sure that glimepiride had been administered with the requisite intent that they should not necessarily find that it was "in the circumstances of the kind that D foresaw or ought to have foreseen" only because it had occurred within the domestic setting.

43. In the circumstances, there is strictly no need for us to deal with Ground 2 as it relates to Shagufa but we do so in deference to Mr Quinn's submissions on the point. However, we do so in short order. We agree with Mr Smith, that the evidence of Shagufa's psychological diagnosis was not the only evidence of her ability to take steps to protect Ambreen from the risk of harm. Shagufa had been capable of telephoning the emergency services to call an ambulance. She had provided information of Ambreen's circumstances to medical staff, whether or not as the mouthpiece of her parents. Whether she would have the ability and or capacity to take steps and had taken them as far as was reasonable to do so was quintessentially a jury question.

Conclusion

44. We allow the appeals against conviction on counts 1, 2, 3 and 5 of the indictment.