

Monday 8 December 2003

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Woolf of Barnes)

MR JUSTICE GIBBS

and

MR JUSTICE FULFORD

R E G I N A

- v -

STEPHEN CLAYTON BOLLUM

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(Official Shorthand Writers to the Court)

MR M DAVIES appeared on behalf of THE APPELLANT

MR P H THOMAS QC appeared on behalf of THE CROWN

J U D G M E N T

(As Approved by the Court)

Monday 8 December 2003

THE LORD CHIEF JUSTICE: I will ask Mr Justice Fulford to give the judgment of the court.

MR JUSTICE FULFORD:

Introduction

1. Alex Jones was born on 2 February 2001. Her mother, Carrie-Ann Jones, and the appellant, Stephen Clayton Bollom, began a relationship and became partners in February or March 2002. On 6 July 2002 Alex, then 17 months old, was taken by her grandmother to the casualty department of the Moriston Hospital, Swansea, where it was found that she was suffering from non-accidental bruising and abrasions to her body, arms and legs.
2. The appellant and Carrie-Ann Jones were arrested on 7 July 2002. They were charged on the same day after they had been interviewed. During the interviews they both denied any responsibility for these injuries or that they had neglected this child. The indictment in its final form, and as left to the jury, included three counts against the appellant as follows:

Count 1: Causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861.

Count 2: Inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act.

Count 5: Assault occasioning actual bodily harm contrary to section 47 of the Offences against the Person Act 1861.

3. We note at the outset that the jury were directed that they could only convict the appellant of one of those offences since they were alternatives, and that they should consider them in descending order of gravity.

4. Carrie-Ann Jones was charged with a single offence, set out at count 4 of the indictment, that of cruelty to a person under the age of 16, contrary to section 1(1) of the Children and Young Persons Act 1933. The particulars of the allegation were that she wilfully neglected her daughter in a manner likely to cause unnecessary suffering or injury to health. The jury were directed to acquit the appellant of a like charge, the particulars of which were that he had wilfully assaulted and ill-treated Alex Rees-Jones in a manner likely to cause unnecessary suffering or injury to health.

5. During the course of a trial before Her Honour Judge Eleri-Rees and a jury in the Crown Court at Swansea between 28 October and 1 November 2002 it was the case for the prosecution that the appellant had caused the injuries at some time between the evening of 5 July and the morning of 6 July 2002 whilst he was staying with Carrie-Ann and Alex Jones at his parents' home.

6. It was accepted by the appellant that these were non-accidental injuries. Consequently the main issues for the jury to consider were whether they were sure that the appellant was the assailant, and, if he was, which of the three counts truly reflected his criminality.

7. The case against Carrie-Ann Jones was that she had delayed seeking proper medical attention for her child.

8. During the trial both the appellant and Carrie-Ann Jones accused a friend of theirs, Stuart McGregor, of inflicting the injuries.

9. The jury unanimously convicted the appellant of count 1, causing grievous bodily harm with intent, and acquitted Carrie-Ann Jones of count 4. The appellant was sentenced to four years' imprisonment.

10. The appellant now appeals against his conviction by leave of the single judge. The grounds of appeal are as follows:

Ground 1

The learned judge erred in rejecting the submission made at the close of the prosecution case as regards counts 1 and 2. In particular it is suggested that the court incorrectly permitted the jury to consider whether the injuries constituted grievous bodily harm.

Ground 2

The learned judge should have directed the jury that they could return an alternative charge of occasioning actual bodily harm as a direct alternative to count 2.

Ground 3

The learned judge, when directing the jury as to the law, should not have created the impression that Alex Jones' age was a determining factor.

Ground 4

There was a failure by the parties during the trial to address properly the ages of the bruises; whether they formed groups, and the sequence in which they were inflicted. It is submitted that the jury were misled by this failure, which was in turn compounded by a direction by the learned judge that bruising cannot be dated.

Ground 5

The admission, so it is said, by Carrie-Ann Jones since the trial that she and not the appellant was responsible for the injuries renders the conviction unsafe.

The Facts

11. Before considering those five grounds of appeal it is necessary to review the facts in a little detail. Because of the relationship between her mother and the appellant, Alex Jones naturally spent time with the appellant. The prosecution relied on two previous incidents when it was said that the appellant had been insensitive towards the child and had treated her in a rough and uncaring manner by throwing cushions and firing a toy gun at her. The evidence as to these incidents was inconsistent. There was a dispute as to exactly what had happened, and particularly whether the appellant had truly behaved inappropriately. In addition by way of relevant background, there was evidence from a number of witnesses that Alex clung to her mother and seemed wary of many adults.

12. It is important to note that during the afternoon of 5 July, Carrie-Ann Jones' grandmother, Pamela Jones, looked after Alex. When she changed her nappies she did not notice any cuts or bruises. She recalled that at some stage Alex got her leg stuck down a drain. She thought that incident might have caused bruising, but not cuts.

13. Turning to the other events on 5 July, although there were some differences as to timings, it was accepted that Carrie-

Ann Jones arrived at the appellant's house in the car of a friend, Dai Roberts. She had left Alex with her grandmother and had gone to the appellant's home to collect her belongings because she thought their relationship was at an end. Indeed, the appellant said that he had sent a text message to her to this effect. However, they apparently resolved their differences and from midday a group that included the appellant, Carrie-Ann Jones, Dai Roberts, Paul Dobbs and Stuart McGregor spent time together. All of them, bar Dai Roberts who was driving, were drinking cider. They watched television, played Frisbee in the park, and at about five o'clock Dai Roberts drove Carrie-Ann Jones to collect Alex. On their return, the drinking continued.

14. Dai Roberts' evidence was that at about 6pm when he was downstairs with Dobbs and McGregor, and Carrie-Ann Jones was in the lavatory, and whilst the appellant was upstairs with Alex, he heard what he described as a "pretty loud thud". Thereafter the child screamed for ten to twenty minutes. When the baby was brought downstairs, she was still crying and appeared to be in pain. For a while she resisted being touched by the appellant. The appellant, according to Roberts, said that he had dropped Alex after she had been swinging her arms about. Carrie-Ann Jones eventually consoled the child. By the time Dai Roberts left with Dobbs at about 7.20pm, Carrie-Ann Jones was "a bit tipsy" but was in good spirits, and the appellant had had a few drinks.
15. Paul Dobbs said that when Alex arrived she followed Carrie-Ann Jones about. She was afraid of strangers and did not want to leave her mother. He gave evidence that at one point Alex came downstairs crying, accompanied by either the appellant or Carrie-Ann Jones. He described Carrie-Ann as being drunk when he left with Stuart McGregor and Dai Roberts at between 7.00 and 7.30pm. He said Carrie-Ann had been crying at about 6.45pm and that is why they left.
16. Stuart McGregor was described by the learned judge as being a very nervous and unclear witness who was difficult to follow. He had known the appellant for a number of years, and Carrie-Ann and Alex Jones for a couple of months. He also described Alex as clinging to her mother and being wary of men. He said that Alex had been perfectly happy until at the end of the evening there was a bit of commotion and Carrie-Ann was shouting. The appellant came downstairs and Carrie-Ann ran upstairs in an emotional state. McGregor had become intoxicated during the evening. As a result of this incident he left the house together with Roberts and Dobbs. The appellant, according to this witness, said that he had dropped Alex, whom McGregor heard crying. McGregor denied having been alone with Alex at any stage during the course of that day or during the evening.
17. Accordingly, a number of adults who had had a substantial amount to drink were with this child during the course of the late afternoon and early evening.
18. On the following day Carrie-Ann Jones telephoned Dai Roberts and asked him if he would take her to her own house to collect some nappies. Once there and whilst Carrie-Ann was changing Alex's nappy, his evidence was that he noticed that she had cuts, bruises and finger-marks on her stomach. Although Carrie-Ann said that she did not know what had happened, it was Roberts' impression that the injuries had not taken her fully by surprise. However, he agreed that whereas she had been calm before seeing the injuries, she was distracted afterwards and seemed anxious to get back to see the appellant.
19. Carrie-Ann Jones' mother, Lynette Williams, said that on 6 July between 10am and 1pm her daughter telephoned her. She was upset. She said that Alex had cuts and bruises and that she did not know what had happened. She wanted to go to the hospital. Later, when Mrs Williams went to collect her, she found Carrie-Ann to be very upset, repeating that she did not know how the injuries had been caused.
20. It should be stressed that there was no suggestion during the case that Carrie-Ann Jones ever ill-treated her daughter. To the contrary, Stephen Hoolihan said that she was protective of Alex, and Pamela Jones said that she was an excellent and protective mother who cared for her child. The particulars of the allegation against Carrie-Ann Jones were, as we have already set out, that she delayed in seeking medical attention for Alex; it was not suggested she had caused any of these injuries.
21. The consultant paediatrician Mr O'Hagan saw Alex at the Singleton Hospital. He found:
 - (a) bruises over her left lower limb, left and right arm and the upper aspect of her abdomen;
 - (b) two circular bruises on her tummy that had a ring-like centre;
 - (c) three purple bruises in a line on the left forearm, each measuring 2cm by 1cm;
 - (d) severe bruising to the legs with purple elliptical bruising, one above the other, and another ring-like area inside the bruise measuring 3cm by 1cm; there was a semi-circular crescent-like abrasion on one leg;
 - (e) an area above the knee where the skin was broken with five crescent-like abrasions that were 0.5cm in size; and
 - (f) bruising on the forearm.Mr O'Hagan stated that it was not possible to date the bruising, save that a dark red bruise on the left thigh and others on the right forearm might have been older bruises, in particular because the red diffuse bruise may not have come out in one to four hours.

22. Mr O'Hagan was of the view that these injuries could not have been caused accidentally, and that Alex had been subjected to repeated jabbing of the skin with a hollow, cylindrical object; those circular injuries may have been apparent straight away. Some of the injuries could have been the result of fingertip pressure and the cuts would have been immediately apparent.
23. Mr O'Hagan said that when these injuries were inflicted Alex would have been terrified, screaming and crying. Apart from keeping an eye on the bruising to ensure that it did not become infected, no other treatment was necessary.
24. The appellant gave evidence. He agreed that he had dropped Alex at some stage, although he had no memory of doing so. He said that he had felt guilty and had tried to console the child, who appeared shocked but after about fifteen minutes returned to being fine. He recalled Carrie-Ann Jones and McGregor looking for £10 that had been lost. Roberts and Dobbs left at about 7.30pm and at approximately 8pm Alex was put to bed. At one stage Carrie-Ann went to check on Alex. She said that she had found blood around her mouth and got a tissue for her, but since she was teething this did not cause concern.
25. According to the appellant around 10pm McGregor said that he was going to leave, unusually for him because he was often difficult to get rid of. He walked Carrie-Ann down to the shop and then he went on his way home. Thereafter, at about 6am Carrie-Ann brought Alex into their bed. She was crying but not overly so. He went and spent the rest of the night in the spare room. He woke at about 11am and he noticed that unusually Alex was not making a noise. Carrie-Ann came in and said that she was going with Roberts to collect some nappies. About an hour later she returned. She was hysterical and, according to the appellant, showed him the injuries. He said that he had not seen anything like it, and that he felt shocked and sick.
26. As regards his own responsibility, the appellant said to the jury that he might have bruised Alex's leg when he dropped her, but that he had not caused any other injury. He had not seen anything like these injuries, which made him feel shocked and sick.
27. The appellant decided that McGregor was responsible for the injuries when he discovered that McGregor had lied in his statement by claiming he left at 7.45pm. According to the appellant, he had left much later. Also McGregor had stated that he had previously baby-sat for Alex, which the appellant maintained was untrue.
28. Carrie-Ann Jones in evidence stated that the appellant had a brilliant relationship with Alex. She thought that Roberts and Dobbs had left by the time Alex was put to bed. Although McGregor was asked to stay the night, he left saying that he was feeling ill. Carrie-Ann checked on Alex at about 10.30pm and noticed a little blood around her mouth, she thought the result of teething. Apart from a little moaning at about 2am, she did not hear the child until 6am and she brought her into their bed. When she took off Alex's trousers she noticed a faint bruise that she thought may have been caused at her grandmother's the day before. By 9am she had seen the cuts and bruises on Alex's leg, but had not checked the rest of her body as she thought they had been caused by a fall at her grandmother's house.
29. Carrie-Ann saw the injuries properly at her house when Roberts came with her to obtain some nappies. She took Alex to the appellant and she showed him the injuries. His reaction was to say that she should call an ambulance. Her reaction was that she was scared because she feared that Alex would be taken from her.
30. Carrie-Ann in evidence also said that she thought that Alex had been attacked by McGregor, once she discovered that he had told lies in his statement. However, she was unable to explain how she did not hear an assault by McGregor as and when it happened, given that the child must have cried very loudly.

The Grounds of Appeal

31. Against that background we turn, therefore, to the five grounds of appeal. We will consider the fifth ground of appeal first because we have heard evidence in support of this ground, and that evidence is marginally relevant to one of the matters that we consider to be of significance as regards the directions in law in relation to the injuries.

The Fifth Ground of Appeal

32. This ground of appeal is founded on a statement made by Carrie-Ann Jones after the trial, dated 25 November 2002, following a note handed in by Miss Jones to the learned Judge, after the appellant had been convicted and during defence counsel's mitigation, in which she attempted to take responsibility for what had occurred. It is suggested in the grounds of appeal that in the statement of 25 November Miss Jones admitted that she and not the appellant was responsible for the injuries and that in the result the conviction is unsafe. It is instructive to analyse what is set out at the relevant part of the statement. The allegation against McGregor has seemingly disappeared. Instead, Carrie-Ann Jones states:

"At about 10.30-10.45, shortly after Stuart had left, I went upstairs because Alex was crying. She was in the spare bed. She was sitting up and she wouldn't stop crying. There was a marker pen on the cupboard beside the bed. It didn't have an end to it. I can remember that I grabbed the pen and can remember that I jabbed the pen once into her leg somewhere on the front of her shin. I am now aware that there were three marks but I can only remember jabbing her once with the pen. I then grabbed her arm and laid her down on the bed. I then covered her body with the duvet. She was moaning and I then began to cry because I felt so bad at what I'd done."

33. Miss Jones maintained in the statement that in the early morning of 6 July, at around 6am, when she saw the bruise on Alex's knee, she thought it must have occurred when she had been at her grandmother's home. However, when she saw the full extent of the injuries later in the morning, after 11.00, when she was changing Alex's nappies in the company of Roberts, she was appalled and could not believe what she saw. At the end of the statement Miss Jones stated:

"I am deeply ashamed, disgusted and appalled at myself. I could not stand back and let Clayton go to prison knowing I had done this. He is innocent of these allegations."

34. We observe immediately that this is not an admission by Miss Jones of causing these injuries to Alex, save insofar as she claimed that she jabbed a marker pen once into the child's leg by the front of the shin, and additionally we note that this statement was written at a time that Carrie-Ann Jones sent a series of letters to the appellant expressing her strong feelings for him.

35. This limited admission of wrongdoing was retracted during a meeting with a senior social worker, Christine Johns, on 10 April 2003 after Miss Jones had ended her relationship with the appellant two months previously. During this meeting Miss Jones said she had never harmed Alex and would never do so. She continued to maintain the appellant was not responsible for inflicting these injuries.

36. Miss Jones gave short evidence before us. Essentially she told this court that the letter and the witness statement made in November 2002 are not true, and she has never injured her child. She maintained she made this false admission in the belief it would assist the appellant and because, if she took responsibility, she would only receive a community penalty.

37. Accordingly the account given by Miss Jones has varied substantially. During her interviews on arrest she was unable to say who she believed was responsible for these injuries. At trial she said she thought Stuart McGregor was responsible, but she had only formed this view when she concluded that he had told lies in his witness statement. She agreed she had not heard any screaming or crying at a time that would coincide with him having been the assailant. In November 2002, whilst clearly missing the appellant, she wrote a statement, now withdrawn, in which she said she had jabbed a marker pen once into the child's leg.

38. That latter account, even if accepted, fails to explain the vast majority of the injuries. It was given during a clearly emotional time for Miss Jones, and it is inconsistent with the overall picture provided by the evidence that she is a good mother who has a strong relationship with her daughter. We are wholly satisfied it was no more than a misguided attempt to assist the appellant, and once their relationship changed Miss Jones saw the folly in pursuing a false and improbable account.

39. However, this evidence does have some relevance to our conclusions on the directions given to the jury as regards the injuries, in the context of the first and third grounds of appeal.

The Second Ground of Appeal

40. It is suggested that the learned judge should have directed the jury they could return a verdict of assault occasioning actual bodily harm as a direct alternative to count 2. We can see no force in this argument. At page 9B the learned judge directed the jury as follows:

"If you are not sure the injuries amounted to really serious harm to Alex you will return a verdict of not guilty to counts 1 and 2 and then you can go on directly to consider count 5."

Count 2, the charge under section 20, is self-evidently more serious than count 5, assault occasioning actual bodily harm contrary to section 47. The former alleges grievous bodily harm, the latter a less serious form of bodily harm. With offences charged as alternatives, it is conventional, fair and wholly logical to require the jury to consider them in descending order of gravity, against the background that they will be aware, at the latest, by the commencement of their deliberations of the various alternative verdicts available to them. A jury, therefore, should be directed to reach a verdict on the most serious charge first, and they will only be required to turn their attention to the lesser charges if they have acquitted the defendant of the gravest.

41. The learned judge's directions in this regard were impeccable. This ground is without merit.

The Fourth Ground of Appeal

42. As we have already rehearsed, the appellant submits there was a failure by the parties during the trial to address properly the age of the bruises, whether they formed groups, and the sequence in which they were inflicted. It is submitted the jury were misled by this failure, which was in turn compounded by a direction by the learned judge that bruising cannot be dated.

43. We have already reminded ourselves of the unchallenged evidence that during the afternoon of the day with which we are concerned, Pamela Jones, when she changed Alex's nappies, did not see any cuts or bruises. She did recall at some stage Alex got her leg stuck down a drain and she thought this incident might have caused bruising but not cuts. Apart from that possible injury, none of the extensive injuries seen the next morning were present during the afternoon of 5 July.

44. During his evidence, the paediatrician Mr O'Hagan was extremely careful when he explained the extent to which the injuries could be aged. He singled out the dark red-coloured bruise on the left thigh and the bruises on the right forearm which he said may have been older, because of their different colour, but he added, in this context, that bruises cannot be dated. The learned judge reminded the jury of this evidence and it is this direction that is criticised before us. Returning to the evidence given at trial, Mr O'Hagan said the circular injuries would have been apparent straightaway and the red ones, the diffuse bruising, may not have become apparent for between one to four hours. The cuts, naturally, would have been apparent immediately and the child must have been bleeding.
45. It is suggested that Mr O'Hagan should have been asked whether the marks could have been grouped in sequence to show they may have been sustained at different times or by different mechanisms.
46. In the light of the appellant's case at trial, we do not accept this criticism as being valid; nor do we accept that for these particular injuries this area of evidence could have been rendered more certain. The appellant seeks to rely on additional evidence in this regard, which we have considered. First, he has submitted a passage from a book from Professor Mason entitled *Forensic Medicine for Lawyers* in which the learned professor sets out, perfectly correctly, that sometimes it is possible to generalise about the respective ages of certain bruises, particularly when viewed in the context of their ageing over a number of days or a week. However, this exercise always depends on the facts of the particular case. Here the injuries were all seen together for the first time on 6 July, close to when they must have been inflicted. Mr O'Hagan said it was possible that some of the bruises were a few hours older than others. Professor Mason has not seen the injuries in this case or the photographs, whereas Mr O'Hagan has analysed both.
47. Next, the appellant seeks to rely on the evidence of Dr Baden Powell, a consultant pathologist. Dr Baden Powell has seen the hospital notes, the statements in the case and photocopies of the original photographs of Alex. He agrees these injuries were non-accidental, and he also agrees it is not possible to time the infliction of the injuries in relation to each other or to place them in sequence. The furthest he can go is to say the abrasions and marks on the left shin, upper abdomen, lower left thigh were all fresh and as at the time they were photographed were consistent with having been inflicted within one or two days. His evidence demonstrates there is no foundation for the suggestion that Professor Mason or any other expert could have taken the matter further than Mr O'Hagan, or improved on this evidence.
48. Criticism is made of the lawyers representing the appellant at trial for having failed to investigate this area of evidence. Quite apart from the matters we have just set out, the flaw in this argument is that at trial the appellant and Carrie-Ann Jones sought to blame McGregor for these injuries. Given that was their joint case, there would have been no advantage to the appellant in further exploring the possibility of the injuries having been caused at different times. Indeed it was convenient for his case that all of these injuries were inflicted by McGregor during one incident that evening.
49. In our judgment, the possibility that these injuries were caused at different times is an issue which relates solely to the directions the learned judge gave the jury as regards the first and third grounds of appeal, to which we now turn.

The First and Third Ground of Appeal

50. These two grounds are inextricably linked and it is convenient to consider them together. As already set out, the first ground raises the question of whether the learned judge should have acceded to the submission made at the close of the prosecution case, directed at counts 1 and 2, that these injuries did not constitute grievous bodily harm, caused to or inflicted upon Alex respectively. The third ground is that the learned judge, when directing the jury as to the law as rehearsed hereafter, should not have created the impression that the child's age was a determining factor.
51. We rehearsed the medical evidence in detail earlier in the course of this judgment and we have had the advantage of viewing the photographs. These injuries were spread over the whole of Alex's body from the chest down to the bottom of the left leg. Accordingly, as found on this child they were extensive and in places they covered large areas, particularly around the left knee.
52. Mr Davies, on behalf of the appellant, at paragraph 9 of his Advice and orally before us, submits that the injuries should be assessed without reference to the particular victim. He suggests the age, health or any other particular factors relating to the person harmed should be ignored when deciding whether the injuries amounted to really serious harm. We are unable to accept that proposition. To use this case as an example, these injuries on a 6 foot adult in the fullness of health would be less serious than on, for instance, an elderly or unwell person, on someone who was physically or psychiatrically vulnerable or, as here, on a very young child. In deciding whether injuries are grievous, an assessment has to be made of, amongst other things, the effect of the harm on the particular individual. We have no doubt that in determining the gravity of these injuries, it was necessary to consider them in their real context.
53. The next issue is whether, approached in that way, these injuries could properly be considered by a jury as grievous. The House of Lords has emphasised "grievous bodily harm" should be given its ordinary and natural meaning, that of really serious bodily harm, and other definitions should be resisted: *DPP v Smith* [1961] AC 290. The ambit of grievous bodily harm is therefore potentially wide, as is demonstrated by the inclusion, for instance, of psychiatric injury: *R v Ireland*; *R v Burstow* [1998] AC 147. The prosecution do not have to prove that the harm was life-threatening, dangerous or permanent: *R v Ashman* (1858) 1 F&F 88. Moreover, there is no requirement in law that the victim should require treatment or that the harm should extend beyond soft tissue damage. In this context, the appellant seeks to rely before this court on the statement of Dr Baden Powell, who did not give evidence at trial and

who expresses the view that the injuries were all superficial in that they would heal spontaneously and would be most unlikely to leave any permanent damage. But as we have just observed, there is no pre-condition to a finding that the injuries amounted to grievous bodily harm, that the victim should require treatment or the harm would have lasting consequences. In those circumstances the statement of Dr Baden Powell adds nothing as regards this issue to the evidence before the court at trial. In our judgment, the learned judge was right to leave this decision to the jury so they could apply the standards of society as a whole in assessing the harm done to this young child. These injuries were sufficiently numerous and extensive to justify the jury's conclusion that they constituted grievous bodily harm. Apart from one matter addressed hereafter, the direction the learned judge gave to the jury in this regard, set out at page 6H, was balanced and appropriate:

"Now there is no definitive list of what amounts to serious harm; you have to look at the evidence and you have to decide. It is a question of fact for you to decide. The prosecution rely of course on what the paediatrician has said about Alex's injuries, the photographs and what you have heard and seen of the injuries. You may consider the number of bruises, their location, their size, the cuts and of course you may consider Alex's age."

(In this regard the learned judge made a mistake of two months in the child's age, saying that she was fifteen months. We do not consider this to be significant.)

"Look at all the evidence. If you look at the individual cuts and bruises, you may think they would not merit, individually, the description of 'really serious harm'. But you can look at the totality of the injuries and then consider whether together they amount to really serious harm. It is a question of fact for you and, as you know, it is a matter of dispute. Bear this in mind. Any deliberate attack on a baby is a serious matter. What you have to decide is whether in this particular case the end result was serious injury to Alex. If you are not sure the injuries amounted to really serious harm to Alex you will return a verdict of not guilty to counts 1 and 2 and then you can go on directly to consider count 5."

54. However what does give us cause for concern is that the learned judge failed to go on to direct the jury they had to be sure these injuries were caused as part of one continuous course of conduct constituting a single assault rather than during distinct and separate assaults. Given this case depended on circumstantial evidence and there was no direct evidence as to how the injuries were inflicted, this was a real rather than a fanciful issue. These injuries could have occurred at any time over a number of hours, when, as we have observed, this child was alone in the house with a number of adults, who were mostly in various stages of intoxication. In addition, before the jury both defendants blamed Stuart McGregor. The prosecution for their part blamed the appellant. Accordingly at trial there were cross-allegations with two people being accused, yet the learned judge never directed the jury that they must be sure that Stuart McGregor was not responsible for these injuries, or some of them, before they could convict the appellant. The closest the learned judge came to a direction of this kind was at page 6C when she posed rhetorically to the jury the question: "Who inflicted these injuries?"

55. In our judgment therefore, it was incumbent on the learned judge to direct the jury that they had to be sure not only that these injuries, viewed collectively, constituted grievous bodily harm, but also they had been inflicted as part of one assault rather than on different occasions as a part of separate assaults. The learned judge failed to give this latter direction, and as a result, particularly given the lack of direct evidence against the appellant, in our judgment the conviction under count 1 is unsafe. Without in any way retreating from our earlier conclusions as to her evidence, we are fortified in this view by the fact that Carrie - Ann Jones raised the possibility, in her written evidence, that some of the injuries may have been caused at different times and possibly by different people. Even though we rejected her evidence in this regard, her statement served to underline the need for a careful direction by the trial judge on this issue. These are difficult cases, in which there are sometimes powerful reasons for witnesses to lie, both as to who injured a young child and whether more than one person was responsible. It is critical, therefore, that juries are directed that they must be sure not only of the unlawful involvement of the defendant in the harm, but additionally that his responsibility for the injuries, whether as a principal or by way of a joint venture, was such as to make him guilty of causing or inflicting grievous bodily harm.

56. Mr Thomas QC, who appears for the respondent on this appeal, submits that this failure by the learned judge in relation to counts 1 and 2 was cured by the directions to the jury on count 5.

57. We are not persuaded by those submissions, not least because the learned judge did not at that stage give the jury a direction of the kind we have just set out in relation to the injuries.

Conclusions

58. The evidence before the jury, and particularly that of Dai Roberts, strongly supported the prosecution's case that at least some of these injuries were inflicted by the appellant when he was upstairs alone with Alex. Her sustained crying is wholly consistent with some harm having been caused by him at that stage. Despite the appellant's attempt to blame Stuart McGregor, the jury were undoubtedly sure the appellant had caused at least some injury to this young child; that decision was clearly open to them on the evidence.

59. Accordingly, in light of our conclusions as regards count 1 and, by the same reasoning, its alternative, count 2, the proper course in this case is to quash the conviction on count 1 and to substitute a conviction for assault occasioning actual bodily harm. To that extent and for those reasons this appeal against conviction is allowed. As my Lord the

Lord Chief Justice has already indicated, in those circumstances we reduce the sentence to twelve months' imprisonment.

SMITH BERNAL