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Case Nos: 202401244 B2  
202401245 B2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT DERBY**  
**HIS HONOUR JUDGE HURST**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/04/2024

**Before :**

**LORD JUSTICE WILLIAM DAVIS**  
**MR JUSTICE MORRIS**  
and  
**HIS HONOUR JUDGE PETER JOHNSON**

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**Between :**

**REX**  
**- and -**  
**ATT**  
**BWY**

**Appellant**  
  
**First Respondent**  
**Second Respondent**

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**Vanessa Marshall KC and Dawn Pritchard (instructed by The Crown Prosecution Service)**  
**for the Appellant**

**Mark McDonald and Sadaf Etemadi (instructed by Bhandal Law Limited) for the First**  
**Respondent**

**Stuart Lody (instructed by The Johnson Partnership) for the Second Respondent**

Hearing date : 18 April 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on Wednesday 8 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## LORD JUSTICE WILLIAM DAVIS :

### Introduction

1. In February and March 2024 two individuals stood trial in the Crown Court at Derby on a single count of causing or allowing serious physical harm to a child contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004 (as amended). We shall refer to the defendants as ATT and BMY. The child has the protection of an order pursuant to section 45A of the Youth Justice and Criminal Evidence Act 1999. We shall refer to him as H.
2. At the close of the prosecution case both defendants submitted that the prosecution had failed to establish a case for them to answer. Written and oral submissions were considered by the trial judge on 27 and 28 March 2024. He took time to consider his decision. On 2 April 2024 the judge ruled that there was no case to answer in respect of both defendants. The prosecution applied for an adjournment to consider whether they wished to appeal against the terminating ruling pursuant to section 58 of the Criminal Justice Act 2003. That application was granted. On 3 April 2024 the prosecution notified the court of their intention to appeal. They gave the undertaking in relation to acquittal pursuant to section 58(8) of the 2003 Act. The judge did not grant the prosecution leave to appeal but ordered an expedited hearing before this court.
3. The prosecution applied for leave to appeal to this court. We gave leave to appeal. There was some debate as to the correct test for granting leave. Did the prosecution have to show a seriously arguable case (*B* [2008] EWCA Crim 1144) or was it sufficient to show that it was in the interests of justice that the appeal be heard (*A* [2008] EWCA Crim 2186)? On a proper reading of *A* the circumstances with which it was concerned were relatively unusual. In any event, the legal framework applicable at the time *A* was decided was changed by statutory amendment which came into force in July 2008. *B* related to a challenge to the exercise of a discretion by the judge. For the prosecution to succeed they had to demonstrate that the ruling was one which it was not reasonable for the judge to have made. In those circumstances a seriously arguable case that the judge was wrong had to be established.
4. Section 67 of the 2003 Act establishes the jurisdiction of this court to reverse a ruling of the judge in the Crown Court:

The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—

  - (a) that the ruling was wrong in law,
  - (b) that the ruling involved an error of law or principle, or
  - (c) that the ruling was a ruling that it was not reasonable for the judge to have made.
5. In this case the prosecution argued both that there was an error of law by the judge and that the ruling was not one reasonably open to the judge. In relation to the former argument we considered that an interests of justice test should be applied. All parties

agreed this test was met. We were satisfied that the more conventional test would apply to the latter argument. The defendants as respondents to the proposed appeal argued that it was not met and that we should not give leave. However, we concluded that it would be artificial to attempt to separate the issue of leave. Thus, we gave leave on all grounds.

6. The prosecution were represented by Vanessa Marshall KC and Dawn Pritchard. ATT was represented by Mark McDonald and Sataf Etemadi. BMY was represented by Stuart Lody. All had appeared in the court below. We were assisted by detailed written and oral submissions from all counsel. At the conclusion of the hearing on 18 April 2024 we announced that the appeal was dismissed. We confirmed the ruling of the trial judge that neither defendant had a case to answer. Pursuant to section 61(7) of the 2003 Act we ordered the acquittal of both defendants. We said that we would give reasons for our decision in writing at a later date. These are our reasons.

### **The factual background**

7. The defendants lived in Derby. The male defendant, BWY, did not live permanently with the female defendant, ATT, but he stayed often at the family home. They had a baby boy (to whom we shall refer as H) born on 4 December 2017. ATT had two other very young children living at the house of whom BWY was not the father. BWY also had another very young child by a different relationship. That child did not live at the house occupied by ATT and the other children. In early 2018 ATT was aged 21. BWY was only 17.
8. On Sunday 4 March 2018 at 8.47 p.m. H arrived at Derby Royal Hospital in an ambulance following a 111 call made at 7.57 p.m. by a cousin of ATT in which the cousin said that H was unwell. He had not been himself all day, wanted to sleep, was not feeding and was limp and floppy. A paramedic attended first and found H to be unresponsive. ATT said he had been like it all day. Her cousin said he had been unwell for a few days. Symptoms indicated raised inter-cranial blood pressure and/or bleed on the brain. An ambulance was called immediately. During the journey to hospital, ATT said H had been in this state ‘since yesterday’, and that he had had 3 episodes of shaking which she thought looked like a fit. She said his arms and legs that were shaking. This had happened between 12 and 1 o’clock the day before for 10 minutes. There had been two similar episodes thereafter lasting 5 minutes on one occasion and 3 or 4 minutes on another.
9. On arrival at hospital, H had red marks down his left thigh and a mark on his lower right leg. ATT said that she didn’t know what they were. She pointed out marks around his neck. On further examination at the hospital H was noted to be having seizures. A CT scan showed bleeding beneath the skull on the surface of the brain. There was bruising and swelling of the brain and damage to the white and grey matter of the brain. Given H’s age it was suspected that the injuries were non-accidental. The police were called. ATT was arrested on suspicion of causing grievous bodily harm. On arrest, she said ‘What about the dad of the baby. I haven’t hurt my baby’. BWY was arrested at home at about the same time.
10. A full body examination of H on 5 March 2018 revealed a number of marks on his body. Some of these had not been seen by the medical professionals who saw H the previous evening. The medical opinion was that 10 of these marks were traumatic in

nature and could not have been caused by H himself. One mark on his neck was consistent with a forceful pinch. The marks were thought to have been caused within the last few days. The consultant who examined H on 5 March 2018 considered that in general terms H looked well cared for and that he showed good growth and was not malnourished.

11. The injuries sustained by H were later considered and reviewed by an independent paediatric consultant, Dr Debelle. He did not examine H. Rather, he reviewed all the contemporaneous medical records. He said that a baby of H's age would not be able to do anything to self-inflict injury save for superficial scratches. He considered that marks to H's arms (which had not been apparent on the evening of 4 March 2018) were consistent with gripping injuries. The marks on H's legs (which had been seen by the defendants on the morning of 4 March 2018) were described as akin to excoriation i.e. an abrasion or scratch rather than a bruise.
12. Further brain scans showed an evolving extensive brain injury with bleeding at various sites. There were no fractures or any other evidence of impact injury to the head. The long term consequences for H's health were catastrophic.
13. The likely cause of H's brain injuries was severe shaking to and fro. It was the opinion of an independent paediatric neuroradiologist that H would have been unlikely to behave normally at any time following his injuries. The injury had been caused between about 1 hour and 2 days before the CT scan carried out on H's arrival at hospital. While it was unlikely, 3 days before could not be ruled out. It was most likely that there had been a single incident of shaking. The marks on the arms may have been the result of the grip needed to shake H with the force needed to cause the brain injuries.
14. When interviewed by the police on 5 March 2018, both ATT and BWT denied causing any injury to H. They said that they did not know how his injuries had occurred.
15. The police conducted an investigation into H's wellbeing in the run up to his hospital admission. The health visitor with responsibility for H visited the family home regularly. She found the family to be chaotic with three very young children in the home. ATT was said to lack positive parenting skills but she was receptive to visits from professionals. There were no concerns about the state of the house. There were appropriate sleeping arrangements for the children. She felt that ATT was not in tune with the emotional needs of children. She had some concerns about H: his weight and low-feeding; slight nappy rash; H being left propped up against a cushion. She had no concerns regarding the physical health or physical harm of the children. She believed their basic needs were being met.
16. The social worker who had had contact with the family explained that social services were involved as a result of ATT having previously been a victim of domestic violence. She confirmed that the house was always clean, that she was always allowed access to the property and to the children and that there were no concerns regarding physical harm. She had concerns about lack of supervision of the children and a lack of emotional warmth on the part of both ATT and BWY. Following a visit on 27 February, she decided to increase visits to once a week. There was a meeting planned at which consideration would be given to taking the children into care. That was

because ATT had allowed H to be looked after in someone else's house which was contrary to what had been agreed between ATT and the social worker. In addition, the social worker was concerned that one of ATT's other children had been in the same clothes one morning as the child had been wearing the previous day and had not had breakfast.

17. A friend of ATT had had H to stay overnight on two occasions. She had seen ATT pick H out of the Moses basket on a few occasions by his baby grow, with one hand. She said that, on the last occasion she had seen this happen, BWY had had a go at her and told her to stop. However, she explained that when ATT picked up H by the baby grow, his head was supported and was slowly rocked. She spoke of 'prop feeding' i.e. with H propped against a cushion with his bottle left in his mouth. This was occasional, not for very long, and only when ATT had to tend to her other children. The friend described ATT as a good mother.
18. On 2 March 2018 the health visitor made an unplanned home visit to ATT who was at home with all three children. Once awake, H was alert and responsive. The health visitor was pleased with his weight. ATT said he was feeding well. The other children then became fractious. Whilst ATT sorted out their issues, she propped H up on the sofa with his back against cushions. She then picked up H. The health visitor saw BWY on this visit. She was told that BWY would be looking after H the following day. She saw no marks on H other than nappy rash.
19. On the following evening a number of friends visited the family home before going out with ATT. One friend held H. He appeared to be well. ATT went out leaving H in BWY's care. Whilst ATT was out, BWY contacted someone he knew about providing him with some cannabis. That person came to the house at around 9.00 p.m. She saw H who, whilst she was there, was crying as if he was fighting for breath. She said to BWY that this was not right. BWY picked up H. He then telephoned ATT. He told ATT to come home as there was something wrong with H. The cannabis supplier, who left before ATT came home, saw no injuries on H.
20. The only evidence of events on 4 March prior to the 111 call came from what ATT and BWY said in interview. ATT said she and BWY had woken in the morning. H was lying in his Moses basket. He looked pale so they gave him a bath to warm him up. They noticed marks on his legs and neck. ATT said that BWY had to go to work. By the evening H wasn't interested in his bottle. He was dribbling out of his mouth. He was not crying at all. Then his eyes started going funny. This was the point at which the 111 call was made.
21. On two dates in February 2018 (15 February and 21 February) ATT sent texts to BWY about the children. On 15 February she complained that her daughter was "an evil little bitch", that her elder son had "trashed my living room up" and that H "wouldn't stop cry". On 21 February she said inter alia "I can't cope with these all 3 crying at the same time and can't attend to all 3 at once none of them will shut up".

### **The judge's ruling**

22. Before rehearsing the facts, the trial judge set out the core of the argument put on behalf of both defendants as follows. The offence with which they were charged required proof of a significant risk of serious physical harm being caused to H. The

evidence did not establish that risk. There were two bases for this submission. First, as a matter of statutory construction the risk was one which had to exist prior to and independently of the event causing the serious physical harm in fact suffered by H. The prosecution could not rely on the risk created by the act of causing the serious physical harm which was the basis of the alleged offence. Second, the prosecution on the evidence had failed to establish a risk of serious physical harm being caused by either defendant.

23. The judge then reviewed in brief the evidence of what kind of parents ATT and BWY were in a general sense. He referred to the evidence of the health visitor, the social worker, the various friends and the texts sent by ATT. His conclusion was that the evidence showed ATT and BWY to be “hard working if stressed parents who kept their children clean and well fed in a tidy house”.
24. His review of the medical evidence was much more extensive. He was concerned particularly with the evidence of the medical witnesses who described the marks on H’s body. His conclusion was that the evidence was sufficient to establish inflicted injuries to the body. However, the injuries were not such as could be described as sufficiently serious to justify a charge of inflicting really serious harm. He noted that in the authorities cited to him the previous injuries had been much more serious i.e. fractures or deliberate starvation of the child. Moreover, the evidence was that the marks to the arm were not observed on the evening of 4 March when H arrived at the hospital. The inevitable inference from that was that the marks were not there to be seen by the defendants. The judge said that, if those marks occurred at the time of the shaking injury, they could not support the proposition that there was a significant risk of serious physical harm. He concluded that, in any event, the presence of the various marks was insufficient to support a safe conclusion by the jury that there was a risk of serious physical harm. Whilst H ought not to have had those marks on his body, they were not of sufficient gravity to establish a significant risk of really serious harm being caused to H.
25. The judge then returned to the issue of poor parenting. He said that the matters relied on by the prosecution went to the inability of ATT to cope with three very young children and the emotional and developmental needs of those children. No reasonable jury could conclude that they created any risk of serious physical harm.
26. At that point in his ruling the judge turned to an argument which had not been raised initially by the prosecution. It was only after the hearing on 27 March 2024 that further written submissions were submitted by the prosecution in relation to the proposition that the significant risk of serious physical harm had to exist prior to the act which in fact caused such harm. Until that point, the prosecution submission had been that, on the facts which a reasonable jury could find proved, there was a pre-existing risk of serious physical harm. The further submission was that, in relation to the person who *caused* the serious harm suffered by H, it was unnecessary to establish a pre-existing risk. The significant risk of serious physical harm then would be proved by the conduct which caused the harm so long as the conduct carried with it the necessary risk.
27. The judge rejected the prosecution’s further submission as to the correct interpretation of section 5 of the 2004 Act. He concluded that the defendants’ argument in relation to the significant risk was correct. He relied on the words of the statute, on what was

said by this court in *Ikram* [2008] EWCA Crim 586 when approving the route to verdict adopted by the trial judge in that case and on the content of the Ministry of Justice circular issued in 2012. He said that the argument also foundered because the prosecution were not able to say which of the defendants caused the serious physical harm. Thus, the jury would have to consider each defendant as someone who *allowed* the harm.

28. The further submissions also drew the judge's attention to *Bollom* [2003] EWCA Crim 2846. It was said that *Bollom* established that the seriousness of an injury would vary depending on the victim. What might not be really serious for a grown adult would fit that description in the case of a baby. The judge accepted the proposition set out in *Bollom*. However, he noted the gravity of the injury in that case. It was summarised in the judgment in *Bollom*: "...these injuries were spread over the whole of [the baby'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." He was satisfied that the injuries visible on H's body fell far short of really serious harm.
29. On 3 April 2024 there was a hearing at which the judge considered the prosecution's application for leave to appeal. In the course of submissions on that issue, Mr Lody referred to the fact that the full ruling handed down by the judge the day before had not referred specifically to "prop feeding" and "one or two other things". This was in the context of his argument that leave to appeal should not be granted because the judge had assessed the available evidence and had concluded that no reasonable jury could be sure of guilt on the basis of that evidence. It was a conclusion reasonably open to him. Mr Lody's submission was that the omission of specific matters in an otherwise detailed ruling could not undermine the ruling.
30. The judge in his supplementary ruling, in relation to leave to appeal, addressed further specific issues. In relation to "prop feeding" he said it had occurred. In interview ATT had admitted doing this on one occasion. Other witnesses had said that it happened more often. The judge also referred to what he called "hand-bagging". This was a reference to ATT occasionally picking up H by lifting with one hand on the front of his baby grow. It had been thought initially that a prosecution witness had seen ATT doing this without supporting H's head. In evidence the witness said that there was always support to the head. Moreover, in his interview BWY also referred to ATT routinely picking up H by holding his baby grow though he was silent about the head being unsupported. The judge said that, although he had not expressly dealt with this evidence in his original ruling, he remained of the view that nothing in the parenting of either defendant gave rise to the risk required by section 5 of the 2004 Act.

### **The submissions on appeal**

31. The prosecution's case in relation to the proper construction of section 5 of the 2004 Act was that the significant risk of serious physical harm to the child or vulnerable person did not have to be a pre-existing risk if the defendant was the person who caused the serious physical harm constituting the offence. The judge's ruling to the contrary failed to take account of the passages in Blackstones Criminal Practice 2024 at B1.93 and B1.102 which supported that proposition. The judge also misinterpreted the Ministry of Justice Circular which he cited in his ruling. Moreover, the judge



failed to take account of an earlier Home Office Circular which supported the construction contended for by the prosecution. The judge was wrong to rely on observations in *Ikram* as providing support for his interpretation. The prosecution argued that the offence in Section 5 was a single offence. It was not necessary for them to prove what role a defendant played. Were it otherwise, the whole purpose of section 5 would be defeated.

32. The prosecution submitted that, even if the judge's conclusion that a pre-existing risk of serious physical harm was required, the evidence called by the prosecution was sufficient to allow a reasonable jury properly directed to conclude that such a risk had been demonstrated. The poor parenting of ATT, her dangerous handling of H and the various marks on H's body taken together established that H was at significant risk of serious physical harm. In the light of *Bollom* the evidence of marks on his body showed that H had already suffered serious physical harm before the event which led to his brain injury.
33. On behalf of ATT and BWY it was argued that the judge was correct in determining that the significant risk of serious physical harm in section 5 of the 2004 Act could not be the risk occasioned by the act causing the serious physical harm which constituted the offence. The judge applied the relevant principle of statutory interpretation. Words that are reasonably capable of only one meaning must be given that meaning unless it would lead to an absurd result. In this instance there was no proper basis on which to avoid a literal reading of the legislation.
34. The defendants' case was that the evidence adduced by the prosecution was insufficient to allow a reasonable jury properly directed to be satisfied that there was a risk of serious physical harm to H prior to the point at which the trauma which caused the brain injury occurred. Their parenting was adequate given their circumstances. It did not demonstrate any significant risk of harm to H. The marks on H visible prior to his admission to hospital were relatively superficial. The reliance on *Bollom* by the prosecution was misconceived.

### **Discussion – statutory interpretation**

35. As originally enacted section 5 of the Domestic Violence, Crime and Victims Act 2004 created the offence of causing or allowing *the death* of a child or vulnerable adult. It was introduced with the intention of dealing with a situation that could arise when a child or vulnerable adult suffered an unlawful death. In such a case it might be proved that one or more of a small group of people living in the same household as the victim caused the death, but not which of them. That would mean that there was no case to answer in relation to any member of the household for either murder or manslaughter. There had been a number of cases where injustice had occurred. Members of a household accused of the death of a child or vulnerable adult had avoided conviction of any offence by remaining silent or by blaming each other.
36. The relevant parts of section 5 in its original form read as follows:

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

(a) a child or vulnerable adult (“V”) dies 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 V's death 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.

“Serious physical harm” was defined as harm amounting to grievous bodily harm for the purposes of the Offences against the Person Act 1861.

37. The explanatory notes in relation section 5(1)(c) were in these terms:

“The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The offence will not apply if the victim died of a single blow when there was no previous history of abuse, nor any reason to suspect a risk.”

Although the 2004 Explanatory Notes did not form any part of the legislative scheme, the proposition that the serious physical harm of which there had to be a risk could not be coterminous with the serious physical harm which led to death was clear from the words of the section. Section 5(1)(c) stipulated that “at that time” (the time of the causing of the harm which led to death) “there was a significant risk of serious physical harm” i.e. the risk was in existence before the act causing death. This interpretation is confirmed by the wording of section 5(1)(d)(i)/(ii). That sub-section provides for liability on the part of a person who allowed the death where that person has actual or constructive knowledge of the risk of serious physical harm mentioned in section 5(1)(c) yet failed to take reasonable steps to protect the child or vulnerable person from the risk. Such a person could not be in a position to take any steps to protect the victim from the risk of harm if that risk only arose at the point at which the fatal act was committed. The words “the risk mentioned in paragraph (c)” are critical in this respect.

38. Section 5 was intended to capture both those who had caused a death and those who had allowed the death. Whether an individual was the person who caused the death or the person who allowed it would depend on the available evidence. Section 5(2) meant that the prosecution did not have to prove into which category a defendant fell. That did not mean that the meaning of section 5(1)(c) could vary depending on the jury's view of the role of the defendant. Whatever the defendant's alleged role, the meaning was the same. The elements in paragraphs (a) to (c) of section 5(1) had to be proved in every case. Were it otherwise, the element in paragraph (c) would have been applied specifically only to a person who allowed the death. It was in order to avoid injustice of a different kind to the one at which the new offence was directed that the prosecution had to prove a history within the household which showed the risk of serious physical harm to the child or vulnerable adult.
39. The correct interpretation of section 5(1)(c) as originally enacted was never the subject of consideration by this court. The common position was that one or more individuals were charged with murder or manslaughter. The indictment would include a count of causing or allowing the death of the victim either as an alternative or as the sole charge against another member of the household. The factual position in reported cases, such as *Ikram* to which the judge referred, was that the victim had suffered significant injury in the past whether caused by a deliberate act or gross neglect. If the jury were satisfied that the relevant defendant had unlawfully killed the victim but they were not sure that this occurred in the context of a pre-existing significant risk of serious physical harm, that defendant would not escape liability because they would be guilty of murder or manslaughter.
40. In 2012 the Act was amended. By amendment the offence under section 5 was extended. The relevant parts now read:
- (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.

41. The explanatory notes to the 2012 amending legislation (“the 2012 Explanatory Notes”) relating to section 5(1)(c) were as follows:

“The extended offence will...apply only where the victim was at significant risk of serious physical harm (section 5(1)(c) of the 2004 Act). The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. The extended offence will not apply if there was no previous history of abuse, nor any reason to suspect a risk.”

It can be seen that the final sentence of the explanation for the sub-section was not in precisely the same terms as it had been in 2004. It did not specifically exclude a “a single blow” causing serious physical harm. However it maintained the position that the offence would not apply in the absence of a previous history of abuse or a reason to suspect a risk of serious physical harm, and that the risk would be “likely” to be demonstrated by a history of violence.

42. The Ministry of Justice Circular 2012/03 which was issued at the time of the amendment to the 2004 Act was in similar terms to the 2012 Explanatory Notes. It read as follows, the second sentence being highlighted in the Circular:

“The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. **The extended offence will not apply if there was no previous history of abuse, nor any reason to suspect a risk.** Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse.”

43. However, section 5(1) was only amended so as to add serious physical harm to a victim. No other changes were made to the substance of the section. The meaning of section 5(1)(c) did not alter. The proper interpretation of that paragraph in section 5(1) remained the same as we have explained above. Each element in (a) to (c) had to be proved whether the allegation was causing or allowing a death or causing or allowing serious physical harm. The absence of any reference to “a single blow” in the 2012 Explanatory Notes to the Act as amended was of no significance. The important words – “...The extended offence will not apply if there was no previous history of abuse, nor any reason to suspect a risk” – are the same in both the 2004 Explanatory Notes and the 2012 Explanatory Notes.

44. As we have explained, the prosecution relied in the court below and before us on passages in Blackstones Criminal Practice 2024. Paragraph B1.102 reads:

**“Directions on Offence** The offence is designed to combat difficulties of proof, but it will be a challenging task to explain to juries precisely what it is that they must be satisfied of...Essentially, the jury must be satisfied that D (being a member of the same household etc.) *either* caused the victim's death by D's own unlawful act (carrying a significant risk of serious physical harm) *or, if not*, that D failed to take steps that D could reasonably have been expected to take to protect V from the risk of such harm from an unlawful act by another member of the same household and D ought to have both been aware of the significant risk and to have foreseen the circumstances in which the unlawful act occurred. The circumstances need only be of the same kind as, and need not be identical to, those which should have been foreseen (*Khan (Uzma)* [2009] EWCA Crim 2, where it was also said (at [36]) that 'generally speaking a direction framed in accordance with the statute pre-empts any criticism'). See also *Ikram* [2008] EWCA Crim 586 (at [62]) for an example of 'a helpful way of directing a jury about the ingredients of the offence'.”

45. With respect to the editors of Blackstone, if they intended to say that the significant risk of serious physical harm could arise from the unlawful act constituting the offence, we disagree with that proposition. At paragraph B1.93 they set out a draft indictment for the offence. The particulars read as follows (emphasis added):

“A, on or about the ... day of..., being a member of the same household as a child [or vulnerable adult] V and having frequent contact with him, fell into one or other of the following alternatives, it being immaterial, and unnecessary to prove, which one it was, that is to say that

*either* he caused the death of V as a result of his (A's) own unlawful act which carried a significant risk of serious physical harm being caused to V,

*or, alternatively*, he failed to take such steps as he could reasonably have been expected to take to protect V from the significant risk of serious physical harm from the unlawful act which caused V's death, the unlawful act having been committed in this alternative not by A but by another person who was a member of the same household as V and who had frequent contact with V, the significant risk in this alternative being one which A was aware of or ought to have been aware of and the other's unlawful act occurring in circumstances of the kind which A foresaw or ought to have foreseen.”

46. For the reasons we already have given, we do not agree that those particulars reflect the statutory definition of the offence. It is of significance that the particulars of

offence in the indictment charging ATT and BWY were in different terms, namely:

“...between the 2nd day of March 2018 and the 4th day of March 2018 having been a person who was a member of the same household as and had frequent contact with (H), a child who suffered serious harm between those dates as a result of the unlawful act of such a person, and there having been at that time a significant risk of serious physical harm being caused to (H) by the unlawful act of such a person, either (a) caused serious injury to (H) by his own unlawful act or (b) was or ought to have been aware of that risk, and failed to take such steps as he could reasonably have been expected to take to protect (H) from the risk, the unlawful act having occurred in circumstances of the kind that he foresaw or ought to have foreseen.”

In our view those particulars properly set out the offence which the prosecution had to prove. It was not challenging for the prosecution to explain what the elements of the offence were or what they had to prove.

47. The provision which might be thought to create a challenge for the prosecution and, in turn, for a jury is section 5(2). We consider that the provision is a function of the purpose of the legislation. It was introduced to cater for situations where someone (usually a very young child) had been unlawfully killed or seriously injured and the two adults in the house were silent or blamed each other. The prosecution are not required to prove who killed or seriously injured the victim. Were it otherwise, the purpose of the legislation would be frustrated. The prosecution would be in the same position as if a substantive offence of unlawful killing or inflicting injury had been charged. In a prosecution pursuant to section 5 they can present the case on the basis that someone must have unlawfully killed the victim, that it had to have been one of the two adults and that the adult not directly responsible for the killing allowed it. Whether the jury will be in a position to identify the person who caused the death or the serious injury will depend on the evidence. It will not matter if the evidence does not permit them to do so.
48. We asked what the position was in this case. Was the prosecution in a position to submit to the jury on the evidence as it stood at the conclusion of their case that one or other of the defendants had caused the serious brain injury suffered by H? Ms Marshall said that the prosecution could not say with any certainty which defendant had caused the brain injury. She said that the finger pointed at ATT. As she conceded, this would not be sufficient for a reasonable jury properly directed to find that ATT was the person whose act caused the relevant injury. In those circumstances, we conclude that the jury would not have been able to put either defendant within the first limb of section 5(1)(d). Therefore, on the facts the jury would have been required to find that the prosecution had, in respect of each defendant at least satisfied the requirements in the second part of section 5(1)(d). Those requirements inevitably involved a significant risk of serious physical harm in existence prior to the infliction of the injury reflected in the offence. Even if the prosecution submission in relation to the elements of the offence applicable to a person who caused the injury were correct (which we are satisfied it was not), on the facts of this case it would not avail them.

**Discussion – judge’s ruling on the facts**

49. Ms Marshall’s oral submissions concentrated on her argument that the judge erred in his conclusion that no reasonable jury could be satisfied that there was a pre-existing risk of serious physical harm to H being caused by the unlawful act of someone within the household. We have set out already the essence of her submissions on this issue. She relied on two features of the evidence. First, the marks which were apparent on H’s legs and on his neck to ATT and BWY by the morning of 4 March 2018 indicated some kind of trauma. They could not have been self-inflicted given H’s age. Although the marks may not have been serious in themselves, they had to be judged against the fact that H was only 3 months old. In a baby of his age, inflicted marks were a clear indication that H had suffered some kind of injury at the hand of someone. Any kind of injury to a baby gave risk to a significant risk of serious physical harm. Second, the evidence of the health visitor and the social worker demonstrated poor parenting on the part of the adults who had care of H and ATT’s other two children. The evidence of “prop feeding” and of the way H was picked up by his baby grow indicated dangerous handling of him by ATT. Given his age, such handling amounted to an unlawful assault which gave risk to a significant risk of serious physical harm. Ms Marshall’s overall submission was that all that evidence in combination together established the risk required by section 5(1)(c).
50. It is necessary for the purposes of this argument to remind ourselves of what was said in *B* at [19]:

“When the judge has exercised his discretion or made his judgment for the purposes of and in the course of a criminal trial, the very fact that he has had carefully to balance conflicting considerations will almost inevitably mean that he might reasonably have reached a different, or the opposite conclusion to the one he did reach. Leave to appeal under [section 67](#) of the 2003 Act will not be given by this court unless it is seriously arguable, not that the discretionary jurisdiction might have been exercised differently, but that it was unreasonable for it to have been exercised in the way that it was.”

There will be cases where a judge makes a judgment as to the sufficiency of the evidence in relation to which another judge reasonably could have reached a different conclusion. The mere fact that this is the position will not provide the basis for a successful appeal whether by the prosecution on a terminating ruling or by the defence after conviction.

51. We are not satisfied that the judge fell into error in concluding that the evidence of a significant risk of serious physical harm was insufficient to be left to the jury. Leaving aside the prop feeding and picking up H by his baby grow, the evidence of so-called poor parenting was provided by the health visitor and the social worker. The prosecution pointed to: the generally chaotic household; ATT’s lack of positive parenting skills and of emotional warmth; temper tantrums on the part of one of the older children; the existence of an agreement between ATT and the social services department relating to such matters as the need for supervision of the children and the use of cannabis in the house. It would have been reasonable to expect that, had either

of those witnesses considered that any of those matters gave rise to a significant risk of serious physical harm, they would have said so in their evidence and they would have done something urgently to protect H. The judge determined that none of the parenting issues gave rise to a risk of any physical harm, let alone serious physical harm. We judge that he was entitled to come to that view. Although he did not express himself precisely in this way, the poor parenting, such as it was, could not be used in combination with other factors since it gave rise to no risk of physical harm. A combination of factors of itself is of no consequence unless each factor is of some probative value.

52. Before the judge the prosecution placed reliance on the content of the text messages sent by ATT in the days and weeks prior to H suffering serious injury. It was said that these showed the situation in which ATT found herself and the reason why she could have shaken H in anger and/or frustration. We consider that this evidence was a further example of something which had no true probative value in respect of establishing a risk of serious physical harm. It may be that it was in part the basis for saying that the finger pointed at ATT. But that would mean that it was evidence which could support other evidence that ATT caused the brain injury. It could not assist in proving a pre-existing risk.
53. Ms Marshall criticised the judge for failing in the ruling he handed down on 2 April 2024 to deal with prop feeding and picking up H by his baby grow. She argued that this fundamentally undermined his conclusion. She also pointed to the fact that the judge's review of the evidence on these topics was inadequate in that the evidence of the activities was more extensive than he rehearsed in his supplementary ruling. If the judge had failed in the first instance to refer to behaviour by ATT which demonstrated the use of physical force towards H or at least recklessness in relation to H's safety, this might have called into question his conclusion as to the risk of serious physical harm. We do not consider that prop feeding or picking H up by his baby grow fell into this category of behaviour. When dealing with these issues in his supplementary ruling, the judge made sufficient reference to the relevant evidence even if he did not set it out to its fullest extent. A judge is not required to rehearse the entirety of the evidence on any given topic so long as it is clear that he had the relevant factual issues in mind. The judge said that prop feeding and picking up H by his baby grow did not alter the view he had already expressed. For the reasons we have given, the judge did not act unreasonably when he came to that conclusion.
54. A reasonable jury could have been sure that there were some marks on H's body – his legs and his neck – which preceded whatever unlawful act was committed to cause the brain injury. Those marks were seen on the morning of 4 March i.e. 12 hours before the 111 call. A reasonable jury could have been satisfied that the marks constituted evidence of some form of inflicted injury. Before the judge the argument concentrated on the nature of that inflicted injury. In the written response to the defence submission of no case to answer, it was submitted by the prosecution that the marks seen by the defendants and later assessed by medical experts amounted to serious bodily harm. The further written submissions from the prosecution to which we have referred in which *Bollom* was cited expanded on this proposition. We agree with the judge's conclusion that the visible injuries to H could not amount to serious bodily harm. In *Bollom* the appellant argued that the seriousness of harm must be



assessed without reference to the particular victim. The court disagreed with that proposition saying at [52]:

“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.”

55. The judgment in *Bollom* does no more than to require the seriousness of any injury to be assessed in context. The judge here noted the injuries sustained by the victim in *Bollom* which were very much more serious than the marks found on H. He was entitled to conclude that, notwithstanding H’s age and vulnerability, no reasonable jury would find that they amounted to serious physical harm.
56. Moreover, had the judge’s ruling simply addressed the question of how the visible marks were to be categorised, it would not have dealt with the relevant issue for the jury. That issue was whether the presence of inflicted marks of *any* kind on a very young baby established a significant risk of serious physical harm being caused by an unlawful act. The judge determined that the marks were insufficient to support a safe conclusion by the jury that such a risk existed. He emphasised that the risk had to be “significant”. He referred to *Stephens and Mujuru* [2007] EWCA Crim 1249 where the trial judge had directed the jury that this meant more than minimal. This court held that this was a misdirection. The word “significant” is an ordinary English word which will be readily understood by a jury. The refinement introduced by the trial judge was in error. On the facts in *Stephens* the misdirection was not material because there was good evidence that the person who inflicted the injury presented a considerable risk to the child. The judge also referred to what had been said by a government minister during the passage of what became the 2004 Act through Parliament, this reference being taken from the report of and commentary on *Stephens* in the Criminal Law Review:

"We should remember too that we are talking about "a significant risk of serious physical harm'. That is quite a high threshold. The signs of that risk would be very evident. In many cases, the risk of harm is all too evident from previous harm that a member of the household has inflicted on the child or on others."

57. The judge accepted that H was so young that he should not have had any injuries or marks on him. But he said that the injuries were not of sufficient gravity to establish the risk required by section 5(1)(c). Where such a risk is established, it places a very heavy burden on the relevant member of the household. It should not be found to exist unless there is clear evidence to support it. It was after taking all of those matters into account that the judge reached the view that no reasonable jury properly directed could find that the marks apparent on the morning of 4 March 2018 gave rise to the required risk.

58. In our view the judge's conclusion on this issue was one reasonably open to him: the test in section 67(c) of the 2004 Act is not met. We acknowledge that any unexplained injury to a small baby must raise concern. But that is not the same as a significant risk of serious physical harm. Here the judge was concerned principally with marks to H's legs described as excoriation. There was no frank bruising. He was entitled to find that a reasonable jury properly directed could not be satisfied that those marks established the required risk.

### **Conclusion**

59. We have no doubt that the requirement under section 5(1)(c) for a pre-existing risk of serious physical harm applies whether the person charged with an offence pursuant to section 5 of the 2004 Act is alleged to have caused the injury or to have allowed the injury. On the facts of this case, the jury could only have regarded whichever defendant whose case they were considering as someone who allowed the injury. In those circumstances, the need for a pre-existing risk is clear.
60. The judge's conclusion that a reasonable jury properly directed could not be satisfied that there was a significant risk of serious physical harm from the unlawful act of a member of the household was open to him on the entirety of the evidence as it stood at the conclusion of the prosecution case.