Neutral Citation No. [2015] NICA 27 | *Ref:* **HIG9591**

Judgment: approved by the Court for handing down | *Delivered:* **08/05/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BARRY McCARNEY

Applicant

Before: HIGGINS LJ, COGHLIN LJ and HORNER J

HIGGINS LJ (delivering the judgment of the Court)

[1] Following a trial before Stephens J and a jury at the Crown Court sitting at Dungannon, the applicant was convicted of the murder of Millie Martin (Count 1), causing grievous bodily harm to Millie Martin contrary to section 18 of the Offences against the Person Act 1861 (Count 4) and of sexual assault on Millie Martin, a child under 13 years of age contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008 (Count 7). He was sentenced to imprisonment for life and it was ordered that he serve a minimum of 25 years imprisonment before being considered for release. Leave to appeal was refused by the single judge and he renews his application to this court.

[2] The trial commenced before Stephens J and a jury on 2 October 2012. There were two accused, the applicant and Millie's mother Rachel Martin. The original Bill of Indictment against the applicant contained four counts – Murder, Causing the death of a child, Sexual assault of a child and Causing grievous bodily harm. Millie Martin's mother Rachel Martin faced two counts on the same indictment – Allowing the death of a child and Cruelty to a child. These counts represented the charges preferred on the direction of the Public Prosecution Service and on which the applicant was committed for trial on 28 February 2011. During the course of the trial two further counts were added against the applicant. The Bill of Indictment that was considered by the jury at the conclusion of the trial was as follows.

"**FIRST COUNT**

STATEMENT OF OFFENCE

Murder, contrary to Common Law.

PARTICULARS OF OFFENCE

BARRY McCARNEY, on the 11th day of December 2009 in the County Court Division of Fermanagh and Tyrone, murdered Millie Martin.

SECOND COUNT

STATEMENT OF OFFENCE

Causing The Death of A Child or Vulnerable Person (Caused By Own Act) contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004.

PARTICULARS OF OFFENCE

BARRY McCARNEY, on the 11th day of December 2009, in the County Court Division of Fermanagh and Tyrone, a child namely Millie Martin having died as a result of an unlawful act caused by you, you were at the time of the act a member of the same household and had frequent contact with Millie Martin and at that time there was a significant risk of serious physical harm being caused to Millie Martin by the said unlawful act.

THIRD COUNT

STATEMENT OF OFFENCE

Sexual Assault of Child Under 13 by Penetration (Offences After 01/02/09), contrary to Article 13 of the Sexual Offences (NI) Order 2008.

PATICULAR OF OFFENCE

BARRY McCARNEY, between the 8th day of December 2009 and the 11th day of December 2009, in the County Court Division of Fermanagh and Tyrone,

intentionally penetrated sexually the vagina of Millie Martin, a child under 13 years with a part of your body or anything else.

FOURTH COUNT

STATEMENT OF OFFENCE

Grievous Bodily Harm With Intent, contrary to Section 18 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

BARRY McCARNEY, between the 1st day of November 2009 and the 11th day of December 2009, in the County Court Division of Fermanagh and Tyrone, unlawfully and maliciously caused grievous bodily harm to Millie Martin with intent to do her grievous bodily harm.

RACHAEL MARTIN is charged with the following offences:

FIFTH COUNT

STATEMENT OF OFFENCE

Allowing The Death Of A Child Or Vulnerable Person (Failing to Protect From Risk), contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004.

PARTICULARS OF OFFENCE

RACHAEL MARTIN, on the 11th day of December 2009, in the County Court Division of Fermanagh and Tyrone, a child namely Millie Martin having died as a result of an unlawful act, were at the time of the act a member of the same household and had frequent contact with Millie Martin and at that time there was a significant risk of serious physical harm being caused to Millie Martin by the said unlawful act and you were or ought to have been aware of the risk and failed to take such steps as you could reasonably have been expected to take to protect the child from that

risk and the act occurred in circumstances of the kind that you foresaw or ought to have foreseen.

SIXTH COUNT

STATEMENT OF OFFENCE

Cruelty To Children, contrary to Section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968.

PARTICULARS OF OFFENCE

RACHAEL MARTIN, on dates between the 1st day of September 2009 and the 12th day of December 2009, in the County Court Division of Fermanagh and Tyrone, being a person who had attained the age of sixteen years and having the custody, charge or care of Millie Martin, a child or young person under that age, wilfully neglected the said Millie Martin in a manner likely to cause her unnecessary suffering or injury to health.

SEVENTH COUNT

STATEMENT OF OFFENCE

Sexual assault of a child under 13 contrary to Article 14(1) of the Sexual Offences (Northern Ireland) Order 2008.

PARTICULARS OF OFFENCE

BARRY McCARNEY, between the 8th of December 2009 and the 11th of December 2009 being then a person aged 18 or over, intentionally sexually touched Millie Martin, then a child under the age of 13 years.

EIGHTH COUNT

STATEMENT OF OFFENCE

Assault Occasioning Actual Bodily Harm, contrary to Section 47 of the Offences Against the Person Act 1861.

PARTICULARS OF OFFENCE

BARRY McCARNEY, between the 8th day of December 2009 and the 11th day of December 2009, in the County Court Division of Fermanagh and Tyrone, assaulted Millie Martin thereby occasioning her actual bodily harm."

[3] Rachel Martin was acquitted of Counts 5 and 6. The applicant was convicted on Counts 1, 4 and 7, found not guilty on Count 3 and no verdict was entered on Counts 2 and 8 as a result of the convictions on Counts 1 and 4. Counts 1 and 2 were alleged to have occurred on 11 December 2009, the date of Millie's death. Counts 3, 7 and 8 against the applicant were alleged to have occurred between 8 and 11 December 2009. Count 4 against the applicant was alleged to have occurred between 1 November 2009 and 11 December 2009. Count 5 against Rachel Martin was alleged to have occurred on 11 December 2009 and Count 6 against Rachel Martin was alleged to have occurred on dates between 1 September and 12 December 2009.

[4] Counts 2 and 5 were contrary to Section 5 of the Domestic Violence, Crime and Victims Act 2004. Simply put Count 2 as drafted alleged that Millie died as a result of an unlawful act caused by the applicant in circumstances in which there was a risk of serious physical harm being caused to Millie and Count 5 alleged that Millie died as a result of an unlawful act and that Rachel Martin failed to protect Millie from a risk of serious physical harm from the alleged unlawful act of which she was aware. This dichotomy between Counts 2 and 5 in the context of Section 5 of the 2004 Act lay at the heart of this application for leave to appeal.

[5] Millie Martin was born on 5 September 2008. She was certified dead at 1547 on Friday 11 December 2009 following the withdrawal of artificial ventilation. She was then aged one year, three months and 6 days. Her mother Rachel Martin was born on 26 November 1984 and at the date of Millie's death was 25 years of age. From February 2009 Millie lived with her mother at 16 Glebe Park, Enniskillen, County Fermanagh. Rachel Martin was employed two days per week in an office at her maternal grandmother's house and brought Millie with her to that address. The applicant resided with Rachel Martin's father Edward Martin. By the time of Millie's first birthday, 5 September 2009, Rachel Martin and the applicant were in a relationship. He was then thirty years of age. At the end of September or beginning of October 2009 he moved into 16 Glebe Park to live with Millie and her mother.

[6] On Thursday 10 December 2009 both Rachel Martin and the applicant were present downstairs in 16, Glebe Park, with Millie. Around 8pm Rachel Martin put Millie to bed upstairs. On returning downstairs she left the house

and went to a local shop to purchase chocolate biscuits for the applicant. The journey there and back would have taken somewhere in the region of six minutes. There was CCTV footage of her presence in the shop at this time. Around 8.30pm the applicant appeared at the front door of Patrick Breen's house in Glebe Park, with Millie in his arms looking for a means to get to the local hospital. Patrick Breen agreed to take him in his car. As Mr Breen drove out of his driveway the car driven by Rachel Martin passed on its return journey. The applicant identified the car but told Mr Breen to drive on to the hospital. On the way to the hospital in the car the applicant was observed slapping the child's face. Mr Breen told him to stop. Mr Breen left the applicant and the child at the hospital entrance and the applicant brought the child into the hospital where she was examined by medical staff. The time was then between 8.35–8.40 pm. Millie was unconscious, unresponsive, her stomach was bloated and her pupils were fixed and dilated indicating trauma to the head and there were retinal haemorrhages in both eyes. Millie had suffered a grievous injury to the back of her head which had been inflicted a short time before her arrival at hospital. Her mother arrived at the hospital a short time later having been alerted by the applicant by phone. CCTV recorded the movements and appearance of the applicant and Rachel Martin at various times and locations within the hospital. In addition to the head injury the doctors at Erne Hospital in Enniskillen found injuries to her genitalia suggestive of some form of sexual assault. This finding was reported to the police and social services and led to the arrest of the applicant some hours later. Around 0200 on 11 December 2009 Millie was transferred to the Royal Victoria Hospital in Belfast where she was certified dead later that day.

[7] At the conclusion of the prosecution case Ms McDermott QC made an application to the trial judge that Count 2 in the indictment be quashed as it was not an offence known to law. The prosecution resisted this application not just on the basis that the offence was grounded in Section 5 of the 2004 Act but also that it was too late to make an application to quash a count as such an application should be made before the commencement of the trial. In a ruling given on 13 November 2011 the trial judge was minded to permit Count 2 to be redrafted. However on 15 November he reconsidered that decision. The outcome was that he declined to quash count 2 or amend it. An application that there was no case to answer on Count 3 (sexual assault by penetration) was made. This application was acceded to on the basis that Professor Crane, the State Pathologist, had agreed in cross-examination that it was possible that the injuries to the genitalia had been caused by a punch with the legs apart. As a result of this decision Counts 7 and 8 were added to the indictment to reflect the allegation of sexual assault (without penetration) or assault occasioning actual bodily harm. An application was also made that there was no case to answer in respect of Count 4 (grievous bodily harm resulting in fractured ribs) on the basis that there was no evidence that the fractures were caused by the applicant. This application was refused in a ruling given on 14 November 2011 that there

was evidence pointing towards the applicant as the perpetrator. An application was then made to stay the proceedings as an abuse of process. It was submitted that the investigating police had wrongly and unfairly targeted the applicant as the perpetrator when there was no evidence which of them injured the child. It was submitted that both should have been charged with causing or allowing the death of the child. The framing of the indictment had created an imbalance in the trial and the full range of the Section 5 offence was denied to the jury. This application to stay the proceedings was dismissed in a ruling given on 19 November 2011. An application was then made that there was no case to answer in respect of Count 2. This was refused in a ruling given on 19 November 2011. In this ruling the trial judge delivered the outcome of the application and reserved his detailed reasons until later in the trial. He considered that the circumstances arising from the evidence should be considered by the jury. No application that there was no case to answer was made in respect of Count 1 (Murder). The applicant did not give evidence and the trial judge delivered the usual allocution under the Criminal Evidence (Northern Ireland) Order 1988 in respect of adverse inferences which could be drawn by the jury resulting from that decision. The applicant's co-accused gave evidence in the course of which she denied that she had injured the child in any way. The effect of her evidence was that the only other person who could have injured the child was the applicant as no other person was present in 16 Glebe Park. On 4 December 2011 at the conclusion of his summing up the trial judge referred to the direction application in respect of Count 2 and informed counsel that he had in his summing up referred sequentially to all the circumstances in the case which caused him to refuse the application and said that he could if necessary read it all again if Ms McDermott QC wished him to do so. She replied that there was no requirement that he should do so.

[8] The Grounds of Appeal are –

> "The appellant's convictions are, and each of them is, unsafe in that:
>
> 1. The trial of the appellant was unfair in that the indictment he faced included allegations of murder (Count 1) and causing the death of a child or vulnerable person (Count 2). The latter was purported by the prosecution to be, and erroneously accepted by the learned trial judge as, an offence contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004 ('the 2004' Act). As a consequence of section 7(4) of the 2004 Act the appellant was therefore precluded, in breach of the presumption of innocence at common law and section 6 of the Human Rights Act 1998 read together with

article 6(2) ECHR, from applying for a direction of no case to answer in respect of the allegation of murder at the close of the prosecution case. Section 5 of the 2004 Act however instead created an offence of causing or allowing the death of a child or vulnerable adult, which the Court of Appeal in England and Wales has recognised (R v Ikram and Parveen) [2008] EWCA Crim 586 at [46]–[47] was introduced to address the 'which of you did it?' problem identified in the Law Commission Report: Children: their Non-Accidental Death or Serious Injury (Criminal Trials). The inclusion of count 2 in a case not contended by the prosecution to be a 'which of you did it?' case unfairly afforded the prosecution a procedural advantage, and constituted a manipulation of the trial process.

2. The learned trial judge erred in refusing an application to have quashed count 2 on the indictment (causing the death of a child or vulnerable person) and thereafter erred in refusing an application for a direction of no case to answer in respect of that count, wrongly concluding that such an application in the present case did (sic) not to be granted on application of the principles set out by the Court of Appeal in England and Wales in R v Lane and Lane (1986) 82 Cr App R 5. This was so in circumstances of which the learned trial judge observed after the close of the prosecution case that: 'The verdicts that should be available to the jury under Section 5 on the evidence in respect of both of the accused are that they each caused or allowed the death of Millie' [transcript 13 November 2012: page 21, lines 11–14].

3. The learned trial judge failed to direct the jury to consider the possibility that both accused had given untruthful accounts to police in interview of events within 16 Glebe Park on the evening of 10 December 2009, but instead expressly directed the jury that one must be lying: the jury consequently did not receive the careful directions said by the Court of Appeal in England and Wales to be required for each of four possibilities identified in R v S and C [1996] Crim L R 346 (joint enterprise/injury inflicted by A

alone/injury inflicted by B alone/not possible to be sure by whom injury inflicted.

4. The learned trial judge erred in declining to direct the jury about manslaughter as an alternative verdict to murder, inconsistently with reasoning expressed by the court in respect of count 2 [transcript, 13 November 2012: page 18, line 21 – page 19, line 5], and notwithstanding the statutory recognition of manslaughter as such alternative in section 6(4) of the Criminal Law Act (Northern Ireland) Act 1967.

5. Further to the above or in the alternative, having declined to direct the jury about manslaughter, the learned trial judge directed the jury about the mens rea of murder in terms that blurred the distinction between murder and manslaughter, indicating that the requisite intention may have been formed in a sudden 'loss of control' (alluding directly to the language of Parliament in the replacement of the common law defence of provocation with the partial defence to murder introduced by section 54 of the Coroners and Justice Act 2009).

6. The learned trial judge erred by virtue of reliance placed on specimen directions, and in doing so failed adequately to tailor his directions to the jury to the circumstances of the present case: in particular, the directions of the learned trial judge included insufficient warning to the jury of the need for caution in respect of the evidence of the appellant's co-accused in the particular circumstances of the present case (in which the prosecution in closing the case – in direct contrast to opening the case – accepted that both accused had the opportunity to commit the offence).

7. The trial of the appellant was unfair, being founded upon a prosecution process that improperly involved only the appellant as a suspect in the murder of the victim, despite the evidential position at all times disclosing a pool of potential perpetrators of at least two: as a consequence, lines of inquiry pointing away from the appellant were not properly

investigated, the nature and extent of information made available to the appellant by way of disclosure was adversely affected, and the appellant's ability fairly to mount a defence was compromised.

8. Having offered to the jury a factually inaccurate description of the appellant's police interviews at the conclusion of his charge, the learned trial judge unfairly and improperly declined to correct that inaccuracy on the basis that the charge would be unbalanced by such a correction: as a consequence, the jury retired with an inaccurate account of the appellant's police interviews as the final factual matter on which they had been addressed.

9. The learned trial judge erred in refusing applications of directions of no case to answer in respect of murder (count 1), causing the death of a child or vulnerable person (count 2) and causing grievous bodily harm with intent (count 4). Those applications fell to be determined in accordance with Galbraith [1981] 1 WLR 1039 at 1042 B–D, applied in accordance with the recent decision of the Court of Appeal in England and Wales in R v Goddard and Fallick [2012] EWCA Crim 1756 (delivered 27 July 2012): accordingly, the determination of whether there was a case to answer involved the rejection of all realistic possibilities consistent with innocence, and a reasonable jury could not reach such a conclusion in respect of count 1, 2 or 4 on the evidence at the close of the prosecution case.

10. The learned trial judge directed the jury in respect of background evidence concerning injuries not alleged in the indictment to have been caused by the accused in a manner using that evidence as propensity evidence (or at least as important explanatory evidence) against the accused, despite no application to adduce such bad character evidence having been made: see Lee [2012] EWCA Crim 316 at [19].

11. The appellant's trial was rendered unfair by the failure of the prosecution to correct a false

> impression created by the evidence of the appellant's co-accused, who expressly stated that she was not violent: the prosecution was in possession of medical records relating to the co-accused including reference to admitted violence within the home (and only prosecution evidence may be admitted by virtue of article 6(1)(f) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004)."

[9] Ms McDermott QC and Mr Sayers appeared on behalf of the applicant and Mr Murphy QC and Mr Reid appeared on behalf of the prosecution. We are grateful to all counsel for their helpful written and oral submissions in this appeal.

[10] It was submitted on behalf of the applicant before this court that the inclusion of Count 2 in the indictment (Causing the death of a child contrary to section 5 of the 2004 Act) created a situation in which the applicant could not, for a variety of reasons, receive a fair trial. It was submitted that the manner in which Count 2 was drafted and then used in the trial was not in accordance with the law. Section 5 was amended to apply to cases of serious physical injury as well as the death of a child or vulnerable adult but these amendments are not relevant to this application.

[11] The relevant sections of the Domestic Violence and Crime and Victims Act 2004 provide –

> "Causing or allowing the death of a child or vulnerable adult
>
> 5 The offence
>
> (1) A person ("D") is guilty of an offence if—
>
> (a) a child or vulnerable adult ("V") dies [or suffers serious physical harm] as a result of the unlawful act of a person who—
>
> (i) was a member of the same household as V, and
>
> (ii) had frequent contact with him,
>
> (b) D was such a person at the time of that act,

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

(d) either D was the person whose act caused *V's death* [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 *V's death* [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 *V's death* [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 on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

[(8) A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine, or to both.]

7. Evidence and procedure: Northern Ireland

(1) Subsections (2) to (4) apply where a person ("the defendant") is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death ("the section 5 offence").

(2) Where by virtue of Article 4(4) of the Criminal Evidence (Northern Ireland) Order 1988 (SI 1988/1987 (NI 20)) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty—

(a) of murder or manslaughter, or

(b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,

even if there would otherwise be no case for him to answer in relation to that offence.

(3) Where a magistrates' court is considering under Article 37 of the Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981/1675 (NI 26)) whether to commit the defendant for trial for the offence of murder or manslaughter, if there is sufficient evidence to put him upon trial for the section 5 offence there is deemed to be sufficient evidence to put him upon trial for the offence of murder or manslaughter.

(4) At the defendant's trial the question whether there is a case to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).

> (5) An offence under section 5 is an offence of homicide for the purposes of the following provisions—
>
> Article 17 of the Criminal Justice (Children) (Northern Ireland) Order 1998 (IS 1998/1504 (NI 9)) (mode of trial of child for indictable offence);
>
> Article 32 of that Order (power and duty to remit children to youth courts for sentence)."

[12] Section 6 and 6A made provision relating to evidence and procedure in England Wales in cases involving Section 5 of the 2004 Act. Section 7 made similar provision for evidence and procedure in Northern Ireland for such cases and section 8 made provision for courts martial.

[13] The origin of these provisions in the 2004 Act lie in a number of reports by the Law Commission and the National Society for the Protection of Children. Following on from its Consultative Report No 279 the Law Commission published in September 2003 its Report No 282 entitled "Children: their non-accidental death or serious injury (criminal trials). In the Autumn of 2003 the National Society published its report "Which of you did it?". The Law Commission made various recommendations but the draft Bill presented to Parliament differed significantly. The amendments to the law as envisaged in the various reports and the legislation provisions passed by Parliament were intended to deal with the type of situation which had arisen in a number of cases in which a child had been killed in a household and the prosecution was unable to establish which other person present or resident in the same household at the relevant time was responsible in law for the child's death. The classic situation was that which arose in R v Lane and Lane (1986) 82 Cr App R 5. In allowing the appeal the Court highlighted the legal dilemma which arose –

> "The evidence against each appellant, taken separately, at the end of the prosecution's case did not establish his or her presence at the time when the child was injured, whenever that was, or any participation. Neither had made any admission; both had denied taking part in any injury; both had told lies but lies which did not lead to the inference of that defendant's presence. The conclusion therefore is that the learned judge ought to have ruled in favour of the appellants on their submission of no case to answer."

[14] This dilemma required some resolution and Sections 5 to 8 of the 2004 Act was Parliament's response to it.

[15] Ms McDermott's submission can be summarised as follows. Section 5 of the 2004 Act created an offence of causing or allowing the death of a child not two separate offences of causing the death of a child or allowing the death of a child. This offence of causing or allowing would be available where the prosecution was unable to prove which of those persons present in the household was responsible for the death of the child, thus ensuring that those who were present in the household, which would include the guilty party, would not escape criminal responsibility. It did not create an offence of causing the death of a child. Count 2 in the indictment as drafted was not an offence known to law. Its inclusion had serious procedural consequences for the applicant and his trial. It postponed the time at which the trial judge should consider whether there was a case for the applicant to answer on the prosecution evidence from the end of the prosecution case to the close of all the evidence. If Count 2 had not been included then the applicant could have applied for a direction of not guilty at the end of the prosecution case on the basis that the evidence adduced by the prosecution was insufficient to establish a case against him which he had to answer. This was not open to him due to the inclusion of Count 2. This postponement of the time at which the applicant could apply that the prosecution had failed to prove a case to answer, was inconsistent with the established and recognised burden of proof in criminal trials as well as the presumption of innocence and the accused's right to silence. It was in conflict with the decision of the European Court of Human Rights in UK v Murray (1996) 22 EHRR 29 where it was held that an adverse inference could only be drawn where the prosecution had established a case that called for an explanation from the accused. The procedure envisaged by Section 7 permitted an accused to be convicted of murder where no prima facie case against him has been adduced. As a consequence of this the applicant did not receive a fair trial and the conviction was thereby rendered unsafe. By including Count 2 (causing the death simpliciter) the prosecution had assumed the burden of proving that it was the applicant who had caused the death. This was akin to unlawful act manslaughter and the inclusion of both Counts 1 and 2 had the effect of altering the trial process. The trial judge had declined to leave manslaughter to the jury yet in advising the jury about the intent necessary for murder had told them that it could be formed in sudden loss of control, adopting the legislative language of manslaughter by provocation. The application for a direction in respect of Count 2 fell to be determined in accordance with the law as it stood before the 2004 Act, that is in accordance with R v Lane and Lane. In his ruling refusing the application the judge stated that "the verdicts that should be available to the jury under Section 5 on the evidence in respect of both of the accused are that they each caused or allowed the death of Millie". It was submitted by Ms McDermott that the judge erred in his ruling. As this was a case of circumstantial evidence the test in R v Galbraith should have been applied in accordance with R v Goddard and Fallick [2012]

EWCA Crim 1756 whereby the decision whether there is case to answer involves the rejection of all realistic possibilities consistent with innocence. In rejecting the application the trial judge relied on that part of his summing up in which he identified for the jury the various circumstances relied on by the prosecution. He did not state how he had reached the decision that the jury could reject all reasonable possibilities consistent with innocence. The evidence did not exclude the co-accused as the perpetrator as the prosecution could not prove that the injuries were caused when she was at the shop. Similarly the Judge's rejection of the application for a direction in respect of Count 4 (rib fractures some weeks before death) should have been approached on the same R v Goddard and Fallick basis. In any event the absence of evidence of injury before the applicant commenced his relationship with Rachel Martin was not evidence that no injury had occurred beforehand – see R v S and C [1996] Crim Law Review 346 – and was insufficient to remove the case from the scope of R v Lane and Lane. The trial judge directed the jury that one of the accused must be lying and directed them to consider the relative likelihood of their accounts measured one against the other. This left open the possibility that the jury might arrive at a conclusion not based on whether they were satisfied beyond reasonable doubt of the guilt of each accused in respect of the offences alleged in the indictment. He did not direct the jury that both may have given untruthful accounts to the police. Although the prosecution opened the case on the basis that the applicant caused the death of the child, in closing they accepted that each of the accused had the opportunity to do so. There was a rush to judgment in the investigation that the applicant was the guilty party. No attempt was made to pursue lines of inquiry that someone other than the applicant was involved. The child's mother was treated as a witness and it was only much later that she was interviewed under caution in respect of the Section 5 offence on which she was indicted. Her evidence required to be treated with caution not just because she might be protecting herself from conviction of the Section 5 offence or other offences not charged, but protecting her position in respect of pending care proceedings. Thus a simple specimen direction that she might be more concerned with protecting herself than telling the truth was not sufficient in the circumstances. She claimed that she was not violent. The prosecution were aware that a representative of the Fermanagh CAT had written to her GP informing him that she was "now aware of her drinking making her violent towards her boyfriend and breaking things in the home". (This did not refer to the applicant but an earlier relationship). The prosecution failed to correct the false impression thereby created and given to the jury. Evidence was adduced by the prosecution of other injuries suffered by the child, apart from the rib fractures. There were no counts on the indictment relating to these. However the jury was directed in a manner to suggest that they were part of a campaign of inflicted injury by the applicant. They constituted bad character evidence and no application for leave to admit them in evidence was made by the prosecution. The evidence at the end of the prosecution case did not amount to a prima facie case against the applicant and

he should have been granted a direction on all counts. The inclusion of Count 2 skewed the trial process such that the trial was unfair and the resulting convictions were unsafe.

[16] Mr Murphy QC submitted that Count 2 was properly included in the indictment. Unlike Count 1 it did not require an intent to commit an offence and the jury were informed that it was to deal with circumstances in which a death is caused by a person regularly in a household and against whom it is alleged has responsibility for that death by reason of an unlawful act of some kind. The evidence showed that from the birth of the child until the arrival of the applicant on the scene no injury to the child was noticed and no concerns were expressed by anyone including various health professionals who had contact with the child. The injuries to the ribs and abdomen were not outwardly noticeable. When the child suffered the burn to her right index finger on 4 December 2009 the mother took her to the hospital. The evidence was that the child was playing happily before being put to bed at 8pm. The injuries that caused her death were inflicted a short time before she arrived at the hospital. The applicant was the last person with the child before she was injured. The evidence of injury to the genitalia was, according to the State Pathologist, consistent with the insertion of a penis or a finger (though in cross-examination he said it was possible it was caused by a punch). This circumstantial evidence raised a strong prima facie case against the applicant and did not admit of a reasonable possibility that it was someone else. The evidence relating to the other injuries was background evidence to the principal charges and not bad character evidence. The prosecution case against the mother was that she had turned a blind eye to what was going on. The trial judge warned the jury to treat her evidence with caution and the jury can have had no doubt what the issues were in relation to her evidence. The letter to the GP about the mother's drinking had been disclosed to the defence before trial and did not become an issue and was not referred to at the trial. If an application had been made that there was no case to answer in respect of Count 1(murder) it would have been refused for the same reasons given for rejecting the application in respect of Count 2.

[17] The heading to Section 5 of the 2004 Act is in Italics (unlike the other Sections) and states "Causing or allowing the death of a child or vulnerable adult". It is followed by the words "5 The offence". The words "allowing the death of a child" do not appear in the body of the Section. Rather they are shorthand for "failing to take steps to protect a child" in the circumstances outlined in sub-section (1)(d)(i) – (iii). This is the first case in Northern Ireland in which a person has been indicted on charges under Section 5 of the 2004 Act. This legislation has been used in England and Wales on a number of occasions. It is not always clear from the reports of these cases exactly how the charges under Section 5 have been framed.

[18] In R v Akinrele [2010] EWCA Crim 2972 (Thomas LJ presiding) the child's death was caused in March 2006. Both parents were present when the child went floppy. A was the father. They were initially indicted for causing or allowing the death contrary to Section 5. The trial of this indictment was abandoned when the mother changed her position relating to the father's treatment of the child. In March 2008 both were then charged with murder. There were concurrent proceedings in the Family Division in which Parker J was unable to decide who had caused the injuries, but was satisfied that both had lied. A second trial commenced in March 2009. The mother changed her defence again and this trial was abandoned. A third trial commenced in September 2009. According to paragraph 2 of the judgment they were charged with murder and other offences including causing or allowing the death of a child contrary to section 5. There was late service of a report suggesting that the child suffered from brittle bone disease. A was found guilty of murder and the mother was acquitted of murder and of causing the death of the child. At some stage she had "pleaded guilty to the offence under section 5 of the 2004 Act of allowing the death of a child" (paragraph 2). The appeal was concerned with allegations of bias on the part of the trial judge, complaints about a lack of balance in his summing up and about the credibility of the mother. It would appear that the mother pleaded guilty to allowing the death of the child and this plea was not accepted and that a count of either causing, or causing or allowing, the death of the child was left to the jury and she was acquitted of that count.

[19] In R v Ikram and Parveen [2009] 1 WLR 1418, 2008 EWCA Crim 586 a child T was found dead with multiple injuries on 6 September 2006 when he was 16 months old. The cause of death was pulmonary fat embolism arising from a fractured femur. He was living with Ikram, his father, and Parveen. The post mortem examination revealed 21 separate injuries less than 48 hours old and there was compelling evidence that the injuries were the result of deliberate and repeated violence. During part of the period when the injuries were sustained, and twelve hours before death, the father was out shopping for two to two and a half hours around 4am, and Parveen was in all night. Both maintained in evidence that they did not know how the fractured femur was sustained. Count 1 alleged murder against both and Counts 2 and 3 charged each separately with causing or allowing T's death. The particulars of Counts 2 and 3 were similar and followed the terms of Section 5 and alleged that each defendant either caused T's death or failed to take steps to protect him. The prosecution's primary case at trial was that Parveen caused the fatal injury but that both were involved and that the father allowed it to occur. Alternatively the death was due to the action of one or the other of them, but whichever it was the other should have appreciated the danger and thereby allowed the death. After the close of all the evidence the prosecution decided not to proceed with the murder charge against the father. On behalf of the other defendant Parveen it was contended that the murder charge must fail against her also,

because there was insufficient evidence that it was she, rather than the father, who had caused the fatal injury. In addition it was alleged that the decision by the prosecution not to proceed with the murder charge against the father was an abuse of process. The trial judge accepted that the prosecution decision were entitled not to proceed further with the murder charge against the father and rejected the submission that their decision was an abuse of process. Parveen then provided her legal advisers with a new account of her relationship with the father and the circumstances of the leg fractures and counsel applied to recall her. This application was rejected and the trial proceeded to conclusion. The jury acquitted Parveen of murder and manslaughter and convicted both defendants of Causing or Allowing T's death. Both appealed on the basis that the trial judge had failed to directed the jury adequately on the terms of Section 5. In dismissing the appeals on 19 March 2008 the President of the Queen's Bench Division (Judge LJ) observed at paragraph 49 that Section 6(4) (in Northern Ireland S 7(4)) did not prohibit a submission of no case to answer where this is appropriate, it merely postponed it and at paragraph 56 stated that the purpose of the procedural changes introduced by the 2004 Act was that all the evidence should be completed before the question whether there is a case to answer is to be addressed. He continued –

> "57. We must next address the grounds of appeal based on criticisms of the summing up. They arise in part from the structure of the language which creates an offence which, in many of the factual situations in which it might arise, are already covered by different limbs of the law of murder and manslaughter, that is, taking it in shorthand, causing death by an unlawful act or through negligence allowing death to occur. Moreover, as this prosecution demonstrates, the statutory offence may well be included in an indictment in which the death of the child is also charged as murder/manslaughter.
>
> 58. The starting point is that section 5 of the 2004 Act creates a new, self-contained offence. The judge directed the jury that the statutory offence meant that it was not necessary for the Crown to prove which of the two potential culprits were responsible for the physical actions which culminated in this child's death. He also rightly pointed out that whatever the position of the Crown in relation to the count of murder/manslaughter against the first defendant, if the jury thought it possible that he, rather than the second defendant, was in fact responsible for the fatal injury, she was to be acquitted of

murder/manslaughter. He then directed the jury about the possible alternative routes to conviction for causing or allowing the death of a child.

59. It is submitted that in relation to the second possible route to conviction, that is allowing the death to happen, the judge failed to direct the jury that the defendant whose case was being considered could not be convicted unless the prosecution established that the statutory ingredients for the offence obtained at the time when the unlawful act which occasioned the child's death took place. The judge is criticised by Mr Mendelle QC, in an argument adopted by Mr Davis, for failing to address critical evidential issues, in that he failed to identify when the significant risk of serious physical harm first arose, how the defendant whose case was being considered by the jury should have been aware of the risk of serious physical harm from the unlawful act, and what reasonable steps the defendant in question failed to take.

60. These criticisms are not well founded. It is true that some judges might have sought to assist the jury by dividing the summing up so that each of these issues, the evidence and the relevant arguments, were addressed in different compartments. What Judge Loraine-Smith did was to provide the jury with very clear directions in writing entitled 'steps to verdict'. Having dealt with murder and manslaughter as it affected the second defendant, the text came to the count of causing or allowing the death of the child. It reads, at para 10:

> 'To establish this offence against a particular defendant, the [Crown] must prove so that you are sure of the following elements.
>
> (i) Talha died as a result of the unlawful act of the defendant who
>
> (ii) was a member of the same household as Talha when this act occurred, and

(iii) had frequent contact with Talha, and

(iv) at that time there was a significant risk of serious physical harm being caused to Talha by that unlawful act.

or

(v) Talha died as a result of an unlawful act of the other defendant

(vi) that both defendants were members of the same household as Talha, when this act occurred, and

(vii) both defendants had frequent contact with Talha and

(viii) at that time there was a significant risk of serious physical harm being caused to Talha by that unlawful act and

(ix) a defendant failed to take such steps as he/she could reasonably have been expected to take to protect Talha from the risk and

(x) the unlawful act occurred in circumstances that a defendant foresaw or ought to have foreseen.'

61. This analysis of the ingredients of the offence was accurate. The 'steps to verdict' then continued by pointing out that for this purpose the Crown asserted that either defendant caused Talha's death and that the other allowed it to happen, but that the Crown were not required to prove which way round this was. The text ended:

'The following questions arise:

(i) did Talha die as a result of the unlawful act of at least one of the defendants?

(ii) at that time was there a significant risk of serious physical harm being caused to him by the unlawful act of at least one of them?

(iii) would the other have been aware of the risk in (ii) above or ought he/she to have been aware of it?

(iv) did the other fail to take such steps as he/she could reasonably have been expected to take to protect Talha from the risk?

(v) did the act causing death occur in circumstances that the other foresaw or ought to have foreseen?'"

[our emphasis]

[20] If the Crown cannot assert that either defendant caused the death and the other allowed it to happen then there would be no need for a Section 5 offence to be included in the indictment.

[21] In January 2007 a man named Khan was convicted of the murder of his wife, Phullan. She died after a severe beating by him which was one of several she sustained. She was 19 years of age and a stranger in England and a vulnerable adult. In February 2008 several members of the Khan household were convicted of allowing the death of Khan's wife contrary to Section 5. They included Khan's mother, his sister and two cousins. The prosecution case was that it must have been apparent to all three that the deceased had been and was being subjected to serious physical violence. Each member of the household said in evidence that if they had been aware of violence they would have done everything in their power to stop it. Three of those convicted appealed against their convictions. The case is reported as R v Khan, Naureen & Hussain [2009] 1 Cr App R 28. The grounds of appeal related to the accuracy of the summing up relating to the medical evidence and the directions which should be given to

the jury relating to the proof necessary to establish the offence contrary to section 5. In dismissing the appeals Lord Judge LCJ, in a judgment dated December 2009, provided some useful comments on Sections 5 and 6 of the 2004 Act.

> "22. One purpose of the 2004 Act is well understood. It addressed evidential and procedural problems which arose when a child was injured or killed by one or other of the only individuals who had access to it at the relevant time. The difficulty was summarised by the Law Commission Report Children: Their Non-Accidental Death, or Serious Injury (Criminal Trials) ((2003) Law Com. No.282; HC 1054), at para.2:
>
> > '[In many cases]… it cannot be proved which of two or more defendants was directly responsible for the offence and it cannot be proved that whichever defendant was not directly responsible must have been guilty as an accomplice…
> >
> > The present law is that there is no prima facie case against either and therefore both defendants must be acquitted at the conclusion of the prosecution case.'
>
> However, in addition to what we may describe as important changes to the evidential principles which applied in this type of case, the 2004 Act created a new offence based on a positive duty on members of the same household to protect children or vulnerable adults from serious physical harm. The extent of this protective duty, and the circumstances in which criminal liability for its non-performance may arise are defined by s.5 of the 2004 Act." [my emphasis]

[22] It is noteworthy that no objection appears to have been taken to the wording of the charge as drafted in the indictment which according to the report was 'allowing the death of a child' only. Lord Judge stated that the 2004 Act created a new offence based on a positive duty to protect children or vulnerable adults. No such duty or offence existed before. By contrast causing the death of a child would normally lead to a charge of murder or

manslaughter. Lord Judge said nothing about causing the death of a child. He continued -

> "26. The 2004 Act is not embarking on the impossible task of dissipating misery and unhappiness. Its objective is to protect those whose ability to protect themselves is impaired. In agreement with the judge, however, we do not rule out the possibility that an adult who is utterly dependent on others, even if physically young and apparently fit, may fall within the protective ambit of the 2004 Act. The case here proceeded on the basis that the protective provisions of the 2004 Act did not arise for consideration before the major attack on the deceased some three weeks before her death. The issue whether she was indeed vulnerable after that attack was rightly left to the jury, but if the facts had been different, we should not have ruled out the possibility that the jury might have inferred that she was already a vulnerable adult for the purposes of the 2004 Act before she sustained the violent injuries inflicted on her in the first violent attack three weeks before her death. However, in this particular case the prosecution would, on the evidence, have faced difficulty in establishing that the deceased was exposed to a significant risk of serious physical harm before that attack, and in demonstrating that any one of these appellants fell within the ambit of awareness and foresight prescribed by s.5(1)(d). The case was exclusively concerned with direct physical violence sustained by the deceased. In another case, the question whether the victim could protect himself or herself from 'abuse or neglect' might well arise in relation to an individual in Sabia's situation.
> ……..
>
> 28. The pool of potential defendants is defined by s.5(1)(a) and (b). Membership of a household is explained in terms which make it a question of fact. For present purposes every adult living in Phullan's household was a member of it, including her husband and her younger son. Interestingly the protective duty does not extend to individuals who have general "responsibility" for the relevant child. Section 1 of the Children and Young Persons Act 1933 covers a wider

> spectrum of individuals than the present Act. Thus this legislation does not apply to visitors to the household who have caring responsibilities for the eventual victim, and have frequent contact with him or her, but who are not, and cannot begin to be described as, members of the same household. There is a further condition that, in any event, even when membership of the same household is established, frequent contact between the defendant and the eventual victim is also required."

[23] In R v Hopkinson [2014] 1 Cr App R 3 2013 EWCA Crim 795 the defendants were the mother and father of an infant child who died from a brain injury probably as a result of violent shaking by either of them or both. Each blamed the other, but there was evidence that whichever it was the other ought to have been aware that the child was at risk of serious harm from the other and did not intervene. They were charged with causing or allowing the death of the child contrary to Section 5. Anticipating difficulties in sentencing if both were convicted of the Section 5 offence the trial judge directed the jury to return a special verdict, that is which of them had caused the death and which had allowed. The prosecution had opposed this direction on the basis that there was no reliable evidence about which of the defendants had caused the fatal injuries. The jury returned a special verdict in respect of the mother that she had caused the death of the child. Amid allegations of jury intimidation the jury were then discharged from delivering a verdict in respect of the father. The trial judge expressed himself deeply concerned about the safety of the special verdict against the mother and certified the case as fit for appeal. The mother's appeal was allowed as the verdict was flawed by the events which led to the discharge of the jury. A retrial was ordered. The Court of Appeal, Lord Judge LCJ presiding, directed that in the new trial verdicts should be sought on the basis of the indictment as drafted, that is the offence of causing or allowing the death, without any reference to special verdicts. He commented -

> "22. This appeal also serves to highlight the problems of seeking special verdicts from juries. There will be occasions (very rare) where in the context of a trial for murder, where the alternative defences include, for example, diminished responsibility, loss of control, and lack of the necessary intent, the judge may think it advisable to seek a special verdict. But even in the context of a murder trial a special verdict should continue to be a rarity.

> 23. Without suggesting that we are entitled in this court to abolish the special verdict procedure, we have offered a shorthand way of suggesting that we do not expect special verdicts to be sought in other cases; and, at least, that the taking of special verdicts has fallen into virtual desuetude. In particular, it is inappropriate for a special verdict to be sought in the context of the legislation in s.5 of the 2004 Act which was deliberately created just because of the inevitable difficulties of proving which of two defendants was responsible for the infliction of fatal injuries on a child when there are no other candidates and neither defendant appears to be willing to tell the truth about the incident.
>
> 24. In the new trial, the verdicts should be sought on the basis of the indictment without any reference whatever to any special verdicts. The jury will make up their own minds whether the case against either of the defendants has been proved on the basis of the evidence that they will hear at the forthcoming trial.
>
> 25. The appeal against conviction will be allowed and the conviction quashed. The defendant will be retried on the original count in the indictment. A fresh indictment will be served. She will be re-arraigned on the fresh indictment within one month." [our emphasis]

[24] The original count was 'causing or allowing the death of a child'. The fact that it was deemed inappropriate to seek a special verdict (that is whether she caused or allowed) in a Section 5 offence suggests that the offence is not divisible and is in fact 'causing or allowing'.

[25] The manner in which section 5 has been used in England and Wales can also be seen in several reported cases of appeals against sentence. In R v Liu and Tan [2007] 2 Cr App R (S) 12 L was charged with the murder of T's wife. All three lived together, L being T's mistress. T's wife was treated like a slave. L's plea of guilty to manslaughter was accepted. The cause of death was stab wounds inflicted by L. T pleaded guilty to causing or allowing the death of his wife. Laws LJ, giving the judgment of the court dismissing the appeals against sentences of 9 years and 6 years respectively, observed -

> "1. These applicants faced an indictment containing four counts. Count 1 charged Su Hua Liu,

> to whom we will refer as Liu, with the murder of Shaowei He, to whom we will refer as May. Count 2 charged Liu with inflicting grievous bodily harm on May with intent. Count 3 charged Lun Xi Tan, to whom we will refer as Tan, with causing or allowing the death of a vulnerable person, namely May. The statutory offence charged in count 3 was created by s.5 of the Domestic Violence, Crime and Victims Act 2004. It appears that this case represents the first occasion on which the legislation has been used in relation to a vulnerable adult victim. Count 4 charged Tan with the manslaughter of May.
>
> …….
>
> 23. The facts of this case must turn the stomach of any humane person. We note that the maximum sentence for the new offence under s.5 of the 2004 Act is 14 years. Tan received six. All these sentences are richly deserved. Neither applicant received a day too long. These applications lack any scintilla of merit and are refused."

[26] In R v Stephens and Mujuru [2007] 2 Cr App R 26 M lived with her four and a half month old daughter A, and her partner S who committed a serious assault on A for which neither he nor M sought medical treatment. Some weeks later on 9 May 2005 S was left alone at home to look after A while M went to work. On the afternoon of that date he left the child and went to the home of a former girlfriend where he assaulted her. He then went to a police station where he told police that he wanted to be arrested for beating up and trying to kill his former partner. He was arrested for causing grievous bodily harm and while on the way to hospital for treatment for his own injuries he told police that he had left a five month old baby alone at his girlfriend's flat. The police traced M to her place of work and brought her to the flat where A was found dead in her cot. A's death was due to a severe blow to her head alleged to have been inflicted by S. The post mortem revealed a healed fracture of the humerus and an old head injury and a recent head injury indicated by a fresh bruise under the skin of the scalp and severe bilateral fresh retinal and perineural haemorrhages. The pathologist concluded that the child's death had been caused by an injury to the brain resulting from a severe blow to the head. The bruising to the scalp indicated a forceful impact against a hard flat surface as if she had been picked up and swung against it. S and M were jointly indicted on various charges. S was found guilty inter alia of murder arising out of the death of A and with causing A grievous bodily harm with intent in respect of the fractured humerus. M was found guilty of one count of cruelty relating to the failure to obtain medical treatment for A's fractured humerus and one count of

causing or allowing the death of a child. She appealed conviction on the latter count on grounds related to the correct interpretation of Section 5(1) of the 2004 Act. S did not appeal against conviction but appealed against the tariff imposed in connection with the life sentence. M was interviewed initially as a witness and there was an issue about the admissibility of those interviews. The substance of the case against her was that she was aware that S had injured A in the past and that he posed a risk to A of significant serious harm. The judge directed the jury that significant in the context of Section 5 mean more than minimal. Much of the appeal concerned whether this interpretation was correct. The Court of Appeal, Moore-Bick LJ presiding, held that the judge was wrong to tell the jury that significant means more than minimal. He should have told them to give the word its ordinary meaning, following Lord Reid in Brutus v Cozens. He continued –

> "32. However, it does not follow that the conviction must therefore be regarded as unsafe. At the close of the prosecution case there was evidence before the jury capable of supporting a finding that Stephens had killed A by striking her head against a hard object or surface and that there was a very real risk that he might cause her serious physical harm, either deliberately or as the result of some minor act of violence intended to harm her in a less serious way. There was also evidence before the jury capable of supporting a finding that Miss Mujuru knew that Stephens had broken A's arm, or had good reason to think that he might have done so, and that she was, or ought to have been, aware that there was a significant risk that he might deliberately harm A again. If they made those findings, the jury could go on to find that by leaving A in his care while she went to work Miss Mujuru failed to take such steps as she could reasonably have been expected to take to protect her. In our view, therefore, the judge was right to reject the submission of "No case to answer" and leave the case to the jury. Moreover, this was not, in our view, a borderline case so far as the nature and magnitude of the risk to A was concerned. There was powerful evidence that Stephens did represent a considerable risk to the child: not only the broken arm, but also the other injuries discovered at the post mortem and his behaviour towards Y. There may have been more room for argument about Miss Mujuru's awareness of the nature and gravity of that risk, but we do not think that by directing the jury that "significant"

> meant "more than minimal" the judge created a real danger of their convicting her when they would not otherwise have done so. We are satisfied in the light of the evidence as a whole that the conviction in this case is safe and that the appeal must be dismissed."

[27] It is clear that there was no suggestion that M had caused the death of A yet the charged she faced was one of 'causing or allowing the death of A' and no objection or comment was made as to the appropriateness of that charge in the factual context of the case. Her appeal and the appeal of S against the tariff were dismissed.

[28] R v Owen [2009] EWCA Crim 2259 was an appeal against an indeterminate sentence imposed following conviction of an offence of causing or allowing the death of a child. The child was 17 months old. About five weeks before his death the appellant moved into the household which was the home of his brother and his brother's girlfriend. Between October 2006 and July 2007 the child presented at the doctor's surgery or hospital with bruising to various parts of his body and other minor injuries. After his death he was found to have significant recent non-accidental injuries which caused or contributed to his death. The three adults were indicted for murder, manslaughter and causing or allowing the death of a child. The case against the appellant was one of neglect and failure to protect and not of any physical violence. It was plain at the end of the evidence that neither murder nor manslaughter could be made out against this appellant and the judge withdrew those counts from the jury. The jury were unable to resolve the question of who had inflicted these malicious injuries and as a result none of the defendants was convicted of murder or manslaughter. However all the defendants were convicted of the offence of causing or allowing the death of the child contrary to Section 5. In allowing the appeal against the indeterminate sentence for public protection the Vice President Hughes LJ made some observations about the Section 5 offence.

> "1. This applicant was one of three people convicted by a jury of the relatively new offence of causing or allowing the death of a child, contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004
>
> 9. ….. As the Lord Chief Justice made clear in *Ikram & Parveen [2008] 2 Cr.App.R 24* at 347, this offence spans a very wide range of misconduct. At its upper end, where what is involved is causing the death of the child, it may very well be close to the offence of manslaughter. At the lower end, where it is allowing rather than causing the death, it may be little more

> than the lack of will in a dominated weak person who fails to stand out for the sake of the child against what he or she knows is going on. What is certainly clear is that the essence of this offence in many cases will be a culpable failure to protect the child from others rather than the use of physical violence oneself. That failure may be more or less culpable according to the circumstances of the principal perpetrator and of the second defendant.
>
> 10. It follows, and it is important to recognise, that the defendant was convicted on the basis that his guilt consisted in failing to do something about what was happening to the child at the hands of someone else. That was the basis of the conviction and the judge correctly passed sentence on that basis." (our emphasis)

[29] There is a clear recognition in this case that Section 5 creates one offence of causing or allowing which offence spans a wide range of misconduct. A similar understanding can be seen in R v Vestuto [2010] 2 Cr App R (S) 108. This was an appeal against a sentence of six years imprisonment following a plea of guilty to the offence of causing or allowing the death of a child aged 18 months contrary to Section 5 and cruelty to another child aged 3 years. The appellant was the child's mother and she had administered to the children an anti-depressant with sedative effects in order to calm them down and to make them sleep for her own selfish reasons. Her basis of plea to the offence of causing or allowing the death of a child, which was accepted, was that she intended no harm but was aware that her actions were wrong and risky. It is clear that the actions of the appellant caused the death of the child, yet no issue appears to have been taken as to the nature of the offence to which she pleaded guilty, namely causing or allowing the death of a child. In giving the judgment of the court Hallett LJ referred to R v Ikram and said -

> "25. Miss Forshall attempted to assist the Court by referring us to a number of decisions of cases of poisoning of children or of cruelty to children, but she frankly conceded that they are essentially all fact specific. She provided for us the decision in *Ikram (Abid) [2008] EWCA Crim 586; [2008] 2 Cr. App. R. (S.) 114* (p.37), in which Sir Igor Judge (as he then was) President of the Queen's Bench Division, described the association between the new offence of causing the death of a child under s.5 and offences of manslaughter. The President observed that there is a

> clear link between the new offence and offences of manslaughter and the general approach to sentencing in manslaughter cases provides useful assistance to the court when considering a sentencing decision after conviction of a s.5 offence." (our emphasis)

See paragraphs 57 – 59 of the judgment of Judge LJ in R v Ikram quoted at paragraph 19 above.

[30] Blackstone's Guide to the 2004 Act states that the legislation is not limited to the type of situation which arose in R v Lane and Lane. It can be used when only one person is charged. The offences are aimed at a death which occurs in a domestic setting and it is impossible for the authorities to assert with any certainty who is culpable and culpability is thus extended.

[31] Smith and Hogan Criminal Law states that the offence in Section 5 applies to the second defendant who fails to protect as well as to the first defendant who actually kills. The actus reus of the offence is committed by a defendant's act or omission which caused the death or a defendant's failure to take such steps to protect the child or vulnerable adult.

[32] Archbold Criminal Pleading Evidence and Practice provides at 19 – 164 a precedent for an indictment alleging a section 5 offence. The Statement of Offence is 'Causing or allowing the death of a child' and the relevant Particulars of Offence are that the defendant 'either caused the death …. or …. failed to take steps …… to protect'.

[33] When the Bill was progressing through Parliament an attempt was made to amend the clause that became section 5 in order to clarify whether the offence was intended to comprise causing the death of the child or simply a failure to prevent it. According to a Research Paper referred to by Ms McDermott this was rejected on the basis that it would be contrary to the approach of the clause. The relevant section of the Research Paper is headed – A single indivisible offence."

[34] The interpretation of a statute depends primarily on the language used taking into consideration the purpose for which the statute was passed. The heading to section 5 is 'Causing or allowing the death of a child or a vulnerable adult' and is, as observed earlier, in italics. The word 'allowing' does not appear in the body of section 5. That heading in italics is the shorthand description of the offence. The heading is followed by a sub-heading entitled 'The offence' in the singular. This is followed by Section 5(1) which provides that a person is guilty of an offence in either of two factual circumstances listed in Section 5(d). These are that either the defendant was the person whose act caused the death of the child or the defendant failed to take steps to protect the child. Section 5(2)

provides that the prosecution does not have to prove whether it is the first or the second of the two alternatives that applies. The fact the prosecution do not have to prove which of the alternatives applies strongly supports the interpretation that a single offence was created namely 'causing or allowing the death of a child'. If the prosecution do not have to prove either causing or allowing, then it has to prove something else for a person to be guilty of an offence under the section. That something else must be 'causing or allowing the death of a child.'

[35] Section 5(3) provides that if the defendant is not the mother or father of the child he 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 of the child. If the section created only the offence of 'causing or allowing' one would have expected section 5(3) to read 'may not be charged with the offence under this section'. Similarly section 5(7) refers to 'an offence under this section'. The use of the word 'an offence' in section 5(3) and (7), rather than 'the offence' is consistent with other criminal statutes which create one offence. In addition only one maximum penalty was created – see Section 5(7). There is a significant factual difference between causing the death of a child and allowing it to happen such that different maximum sentences would usually be imposed by Parliament. Section 7(3) provides that where a magistrate's court is considering whether to commit the defendant for trial for an offence of murder or manslaughter, if there is sufficient evidence to commit him for trial for the section 5 offence there is deemed to be sufficient evidence to put him on trial for murder or manslaughter. If the section 5 offence was solely one of causing the death of a child, which is by virtue of Section 5(5) already a criminal offence which in a case of death would be murder or manslaughter, there would appear to be no reason for this deeming provision.

[36] Section 5 only applies where the child dies as a result of the unlawful act of a person who was a member of the same household as the child. Section 5(5) provides that the unlawful act must be one which constitutes an offence and section 5(6) states that the 'act' includes a course of conduct and also omission. Therefore the unlawful act is a criminal offence in itself. That offence would normally be prosecuted but for whatever reason cannot be prosecuted in the particular case. The reason for that must be that the prosecution cannot prove the defendant committed the unlawful act. The fact the prosecution cannot or is not obliged to prove the defendant committed the unlawful act is strong support for the view that the intention behind section 5 was to create an offence of which he could be convicted, despite the fact that it could not be proved that he committed the unlawful act. That offence must be the 'either or' offence, of 'causing or allowing the death of a child'. But did it create any other offence?

[37] The Statement of Offence in Count 2 in the indictment alleged 'Causing the death of a child or vulnerable person (caused by own act) contrary to

Section 5'. The words in brackets do not appear in the section. They appear to be there to highlight the allegation that it was the applicant's own act which caused the death. The Particulars of the Offence allege that the child died 'as a result of an unlawful act caused by you.' Did section 5 create such an offence? The unlawful act is already an offence and there is no imperative to create a new one. The prosecution argue that no intent is required for Count 2. But if the unlawful act constitutes an offence then it follows that the offence must involve either a specific intent (for example murder) or a basic intent (for example manslaughter). There is nothing in the language of section 5 to suggest the creation of a new offence of 'causing the death of a child'.

[38] R v Khan, Naureen and Hussain apart, the cases in which section 5 has been used tend to support the interpretation that section 5 created an offence of 'Causing or allowing the death of a child'. For the purposes of this application we do not need to decide whether it also created an offence of 'allowing the death of a child'. If it did, it does not follow that it also created an offence of 'causing the death of a child'.

[39] Therefore at the close of the prosecution case the trial judge should have withdrawn Count 2 from the jury. In the event he directed the jury that if they found the applicant guilty of Count 1 they did not need to consider Count 2. Therefore we are not concerned with any finding in respect of Count 2 but the effect its inclusion in the indictment had on the conduct and progress of the trial.

[40] Ms McDermott submits that in the absence of Count 2 she would have been permitted to make an application at the close of the prosecution case that the applicant did not have a case to answer on count 1. As Count 2 remained on the indictment and as the applicant was a person charged with murder and an offence under section 5 in respect of the same death and in the same proceedings, the evidential and procedural provisions of Section 7 applied. These provisions had the effect of postponing the time at which the question whether there is a case to answer on the charge of murder or manslaughter, from the end of the prosecution case until the close of all the evidence. The applicant did not give evidence but Rachel Martin did and called other evidence. It is not suggested that she gave any evidence against the applicant which was material to Count 1, other than to deny that she had injured the child. Thus the case against the applicant (inferences from silence apart) was the same at the close of all the evidence as it was at the end of the prosecution case. Therefore the issue is whether the evidence adduced by the prosecution established a case against the applicant on Count 1 (murder) which he was required to answer. No application was made to the trial judge that there was no case to answer on Count 1 but such an application was made in respect of Count 2 which was framed as causing the death of the child, as well as an application in relation to counts 3 and 4. The issue in respect of Count 3 was

whether rape by penetration could be left to the jury in view of the evidence of Professor Crane that it was possible a punch caused the injuries to the genitalia. The issue on Count 4 was essentially the same as count 2 – whether there was sufficient evidence to justify a case to answer.

[41] It was submitted that the test to be applied whether there was a case to answer at the close of the prosecution evidence should be the same as that approved of in R v Goddard and Fallick [2012] EWCA Crim 1756, also a case of circumstantial evidence. In that case a conviction for conspiracy to rape a male child was based on text messages sent by F and found on G's mobile phone and on indecent images of children found on F's laptop. There were no messages from F to G. The defence case was that there was no agreement to rape a child and that the text message conversation represented a fantasy from which each derived sexual pleasure and that there was never any intention to carry out any such plan. G and F had never met and had done nothing to further any plan of rape and were arrested three years after the messages. A submission at the close of the prosecution case that the appellants had no case to answer was refused. The first ground of appeal was that this application should have been granted. It was common ground that no steps had been taken to commit a criminal act namely the rape of a child. It was also common ground that the prosecution had to prove that at the time of the agreement (assuming there was one) that each defendant intended in fact to carry out the unlawful plan, that there was no direct evidence of such an intention on the part of either defendant and that such an intention could only be inferred from other facts which were proved. At paragraph 29 of the judgment Aikens LJ stated that the issue for the judge was, (assuming there was an agreement) whether there was sufficient evidence that a jury, properly directed, could infer on the part of each defendant an intention to carry out the agreement. At paragraphs 30ff he referred to passages from the judgments of Laws LJ in R v Hedgcock and others [2007] EWCA Crim 3486 and Moses LJ in R v Jabber [2006] EWCA Crim 2694 and how they had been considered in R v Darnley [2012] EWCA Crim 1148, in which Elias LJ delivered the judgment of the Court. In Darnley the appellant was convicted of burglary of a dwelling house in which was found a handkerchief containing a DNA profile the major part of which matched that of the appellant and a minor profile of two other unknown persons. An application was made that the defendant had no case to answer as the handkerchief contained the DNA of two others and a jury could not therefore be sure of his guilt. On appeal it was submitted that the trial judge was wrong to reject that submission. It was contended that the DNA evidence did not entitle the jury to reject all realistic explanations consistent with innocence. The DNA evidence showed that two others may be the culprits in which case the appellant would be innocent. In Godard and Fallick Aikens LJ commented -

> "34. Elias LJ gave the judgment of the court. At [18] he referred to the statement of Moses LJ in Jabber, at

[21] of that case that "…to draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence". He also referred to the statement of Laws LJ in Hedgcock at [21] set out above. Elias LJ stated, at [19], that when a judge is considering a submission of no case to answer, those "tests" (our quotation marks) should not be substituted for the classic test in Galbraith.

35. Elias LJ commented that Moses LJ, in Jabber, plainly did not intend to depart from the traditional test. Then, having made further quotations from the judgment of Moses LJ in Jabber, Elias LJ continued, at [21]:

> '…we think that the focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application. Of course, if the judge is satisfied that even on the view of the facts most favourable to the prosecution no reasonable jury could convict, then the case must be stopped. As Moses LJ points out [in Jabber] that conclusion will necessarily involve accepting that not all realistic possibilities consistent with innocence can be excluded. It does not, however, follow that the tests are equally appropriate or that either can be adopted by a trial judge'.

36. We think that the legal position can be summarised as follows: (1) in all cases where a judge

> is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in Galbraith. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury.
>
> 37. Thus, in the present case, the vital question for the judge to consider was whether a reasonable jury could be entitled to infer, on one possible view of the prosecution evidence, that it was sure that each of the defendants intended to carry out the agreement to rape a male child under 13. However, it is plain, as Mr Price was prepared to accept, that this specific issue was neither identified nor dealt with by the judge either at the dismissal application or at the submission of no case to answer. Therefore, as counsel accepted before us, we have to examine the evidence, as adduced by the prosecution, to see whether or not there was evidence from which a reasonable jury could infer (on one possible view of that evidence) that each of the defendants intended to carry out the agreement to rape a male child under 13."

[42] Ms McDermott QC relied on the passage of the judgment of Aiken LJ at paragraph 36 above and submitted that this rather that the traditional test in R v Galbraith was the proper approach for a judge to adopt in a case involving circumstantial evidence.

[43] Whether R v Goddard and Fallick and paragraph 36 superseded the long standing and classic test set out in R v Galbraith was considered in the Court of

Appeal in England and Wales in R v Wassab Khan in which the five appellants were granted leave to argue whether there was sufficient evidence to justify a conviction for conspiracy to murder rather than conspiracy to cause grievous bodily harm, the trial judge having rejected a submission of no case to answer on the conspiracy to murder charge. There was ample evidence of a conspiracy; the issue was whether it was conspiracy to murder or to cause grievous bodily harm. The prosecution conceded, on the evidence, that there was a possibility that at the last minute the gunman changed his mind and aimed at the victim's legs rather than his head or a vital organ and thereby to maim rather than to kill. However the prosecution maintained that the conspiracy all along had been to kill. The submission that there was no case to answer was on the basis that no reasonable jury, properly directed, could be sure there was a plan to kill rather than to maim. Counsel on behalf of the appellants accepted that the test on a submission of no case was that established in R v Galbraith. However it was submitted that the application of the test required something else in a case founded on circumstantial evidence. Hallett LJ giving the judgment of the Court summarised counsel's submissions at paragraph 13.

> "13. However he submitted the test required something of a gloss in that the evidence was circumstantial and the jury was invited to draw inferences from primary facts as to what the conspirators had agreed. Where a jury is invited to convict on the basis of inferences, counsel argued, they should be directed that they may only draw an inference of guilt if no other inference is realistically possible."

[44] Hallett LJ then stated that counsel placed reliance on R v Goddard and Fallick and in particular on paragraph 36 quoted above which she then quoted. She then quoted a passage in R v Darnley to which their attention had been drawn by counsel on behalf of the Crown.

> "As we have said, we think that the focus should be on the traditional question, namely whether there was evidence on which a jury, properly directed, could infer guilt. It is an easier test, not least because it focuses on what a reasonable jury could do rather than what it could not do. Reasonable juries may differ because the assessment of the facts is not simply a logical exercise and different views may reasonably be taken about the weight to be given to potentially relevant evidence. The judge must be alive to that when considering a half-time application. Of course, if the judge is satisfied that even on the view

> of the facts most favourable to the prosecution no reasonable jury could convict, then the case should be stopped."

Hallett LJ continued –

> "16. We too prefer the approach suggested by Elias LJ in Darnley. In our judgment, there is a danger of over analysing the test to be applied. It is essential to focus on the traditional question whether or not there is evidence (taking the prosecution case at its highest) upon which a reasonable jury, properly directed, could infer guilt. If any elaboration is required, about which we have our doubts, the question on the facts here would be: taking the prosecution case at its highest, was there evidence upon which a reasonable jury, properly directed, could properly infer a conspiracy to kill and reject a conspiracy to cause grievous bodily harm as a realistic possibility? This is in effect the question Holroyde J posed for himself."

[45] Hallett LJ then considered the opposing arguments as to whether the conspiracy was to kill or to cause grievous bodily harm. Counsel on behalf of the appellants submitted that the prosecution case that it was a conspiracy to murder was 'an improbable theory'. Hallett LJ stated that this was a classic case for a jury to consider and for the judge to have withdrawn it would have been to usurp the function of the jury. Hallett LH concluded at paragraph 22 that "a reasonable jury, properly directed, would have been entitled, properly, to reject conspiracy to cause grievous bodily harm as a realistic possibility" and the appeals were dismissed.

[46] In R v Saleh (2012) EWCA Crim 484 a case concerning proceeds of crime the key issue was whether prosecution could make the jury sure that the appellant knew or suspected that a bag he handled contained criminal property. It was submitted that the case should have been withdrawn from the jury. Gross LJ giving the judgment of the court commented on the test in Galbraith and the drawing of inferences in a case of circumstantial evidence.

> "35. We need to say something, if only briefly, as to the law. The Galbraith test is of course so well known that it requires no elaboration. The time to judge a submission of no case to answer is at the time it is made. The court therefore needs to assess the state of evidence at that time, not how it developed thereafter. This is so for the well-established reason that if a

submission of no case to answer is justified, then a defendant should not be exposed to the risk of the case going further.

36. So far as concerns the drawing of inferences, we were helpfully referred by Mr Perry to the case of Teper v The Crown (1952) AC 480. We were likewise helpfully referred by Mr Davies to eh authority of Morgan & Ors (1993) Crim L R 870. We put the matter shortly ourselves.

37. When drawing inferences caution needs to be exercised. Moreover, when a case depends on circumstantial evidence, great care must be taken before drawing an inference of the accused's guilt, to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

38 In Teper, at page 489, there is the well-known passage in the judgment of Lord Normand:

> 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house 'put my cup, the silver cup, in the sack's mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

39. However, and here we saw force in Mr Davies's submission, it is, with respect, too simplistic to say that if at a stage of submission of no

case to answer it is level pegging, therefore the case must be withdrawn from the jury.

40. The care to be taken before drawing inferences is the same whether at the submission stage or at the stage when the jury comes to consider its verdict. However, it is necessary to keep well in mind that at the stage of the submission, the question to be asked is whether the inferences, properly considered with care, are such as are capable of permitting a properly directed jury to come to a verdict of guilty. If they are, then subject to any other considerations, the case will or may be fit to be left to the jury. What need not be decided, at the stage of a submission of no case to answer, is that the jury must go on to convict. It is sufficient if there is a proper foundation for a properly directed jury to be capable of going on to convict.

41. Ultimately we did not understand these principles to be in dispute — but it is worth citing the passage to which Mr Davies drew our attention, as he tells us that the authority does not feature in Archbold and the point is one that arises in a number of cases. The passage, from Morgan (supra), reads as follows:

> 'The Court's attention had been drawn by the appellant's counsel to the case of Moore (August 20, 1992) in which the Court had commented obiter; 'It may be helpful for the judge to address specifically the question whether the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn by the prosecution. If the proved facts do not exclude all other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct.' The case of Moore was, on its facts, quite plainly one in which the submission of no case should have been allowed. The passage upon which reliance had been placed was obiter and

was founded on a passage in the speech of Lord Morris in McGreevy v DPP 1973 1 WLR 276 at 285A, which was, however, clearly not directed to the function of the trial judge when a submission of no case was made to him at the close of the prosecution case but to the role of the jury when they came to discharge their duty of returning a true verdict. At the close of the prosecution case, when a submission of no case is made to the judge, it was not his function to decide the case for himself or to ask himself whether the evidence was such that he would feel sure of guilt. Cases were left to the jury because there was evidence fit for the jury to consider and upon which a jury properly directed could return a verdict of guilty. Cases in which the evidence was circumstantial were not in a special category; many cases involved consideration both of direct and circumstantial evidence. Taken literally, the words relied on from the judgment in Moore would seem to suggest that, where the evidence was purely circumstantial, the judge ought only to leave the case to the jury if the evidence was such as to convince him of guilt and if, following the case being left to the jury, the verdict of acquittal could thereafter be said to be perverse. That could not have been the meaning intended by the Court of Appeal and the passage was not one from which assistance could really be derived in the present case. If there was an inference of guilt which it was reasonably open to the jury to draw then the case could properly be left to the jury, notwithstanding that there might have been an inference, or other inferences, consistent with innocence. It was the jury's task to see whether the inference

> of guilt was one which they were sure could properly be drawn. For the judge to withdraw the case from the jury simply because at the close of the prosecution case all other inferences had not been excluded would be to usurp the jury's task.'
>
> 42. We have anxiously considered the rival submissions against this background of law. We readily accept from Mr Perry that there were undoubted weaknesses in the Crown case. Those were, if we may say so, most helpfully emphasised by him today. But overall, and with respect to those contentions this morning, we are satisfied that the judge was entitled to leave this case to the jury."

[47] R v Younis Masih (2015) EWCA Crim 477 was a case of circumstantial evidence in which the defence to murder was that the deceased fell to his death by accident. At paragraph 3 Pitchford LJ posed the essential question in the appeal.

> "The essential question
>
> 3. The prosecution case was based upon circumstantial evidence. There is no dispute between the appellant and the respondent as to the correct approach in law to a submission of no case to answer when all the critical evidence is indirect and inferential. The ultimate question for the trial judge is: Could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?
>
> It is agreed that in a circumstantial case it is a necessary step in the analysis of the evidence and its effect to ask: Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?
>
> Matters of assessment and weight of the evidence are for the jury and not for the judge. Since the judge is concerned with the sufficiency of evidence and not with the ultimate decision the question is not whether all juries or any particular jury or the judge would draw the inference of guilt from the evidence adduced but whether a reasonable jury could draw

> the inference of guilt. These propositions are derived without contention from the decisions of this court in Galbraith [1981] 1 WLR 1039, Jabber [2006] EWCA Crim 2694 (approved by the Privy Council in *Goring* [2008] UKPC 56 at paragraph 22), Hedgcock, Dyer and Mayers [2007] EWCA Crim 3486, Darnley [2012] EWCA Crim 1148 and G and F [2012] EWCA Crim 1756." (our emphasis)

The judgment then considered the factual circumstances and at paragraph 21 set out the reasonable alternative to an unlawful act that had to be excluded.

> "The reasonably possible alternative to deliberate, unlawful action by the appellant was accident. It was this possibility that the circumstantial evidence was required to exclude before the appellant could be convicted of murder. The issue for the judge was whether on the evidence a reasonable jury could safely exclude the possibility of accident and draw the inference of guilt so that they were sure."

The Court then referred to several features of the evidence that clearly troubled them and concluded that the case should have been withdrawn from the jury because the jury could not safely exclude the possibility that the deceased's death was an accident and therefore the conviction was unsafe.

[48] We agree with Hallett LJ that at the close of the prosecution case if an application is made that there is no case to answer the test remains that laid down in R v Galbraith. That is whether there is evidence upon which a reasonable jury could infer that the defendant is guilty. In the context of this case that would necessarily involve a consideration whether the applicant or any other person was guilty. In applying the test of reasonable doubt if the jury were satisfied that the applicant was guilty that would necessarily involve a finding that it was not a realistic possibility that someone else was. If there was a gloss on the Galbraith test, which we do not accept, the question would be whether a reasonable jury properly directed would be entitled to reject as a realistic possibility that someone other than the applicant was involved. In framing it in that way it seems to us that this amounts to the same test as whether there is evidence on which a reasonable jury could infer that the applicant was guilty beyond a reasonable doubt. In adopting Aikens LJ at paragraph 36 in his ruling on Counts 3 and 4 the trial judge may be said to have gone further than he required in relation to point 2, but in reality point 3 accurately sums up the Galbraith test which was applicable.

[49] The case against the applicant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well know passage from the judgment of Pollock CB in R v Exall 1866 4 F& F :

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

[50] In R v Meehan & Ors (unreported Belfast Crown Court) Carswell J as he then was referred to circumstantial evidence in that case on which the prosecution relied as "a multi-stranded skein of facts". In the appeal from that decision the Court of Appeal rejected the contention that the court must scrutinise each individual piece of evidence and reject those of insufficient weight. At p.31 Hutton LCJ said:

> "Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength it should not be incorporated into the rope. ….. We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an

> individual strand it may lack strength, and that, when woven together with other strands, it may constitute a case of great strength."

[51] In any case that depends, as this case does, on circumstantial evidence it is imperative to consider the nature of the evidence and to scrutinise it with care. As Carswell J said in R v Meehan & Others:

> "It has to be evaluated with the correct amount of circumspection. Where it points in one direction only, it can be a highly convincing method of proof. It is necessary, however, to beware of the possibility that it may be laying a false trail. It is incumbent upon the Crown to establish that the evidence points beyond reasonable doubt to one conclusion only, and in the process to rule out all other reasonably tenable possibilities which may be consistent with the evidence."

[52] The approach to circumstantial evidence was considered in R v McGreevy (1973) 1 AER 503, an appeal from this jurisdiction to the House of Lords. At p 508 Lord Morris referred to the summing up of Alderson B to a jury at Liverpool Assizes and said:

> "He told them that the case was 'made up of circumstances entirely and that before they could find the prisoner guilty they must be satisfied -'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'
>
> He also pointed out to the jury, to quote from the report, the proness of the human mind to look for (and often slightly to distort) the facts in order to establish a proposition while forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest inasmuch as it destroyed the hypothesis of guilt."

Later at p 509c he said:

> "In Plomp v The Queen. Dixon CJ referred to -

> `the rule that you cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances'."

He cited the following words:

> "In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed."

[53] Thus in a case that depends on circumstantial evidence a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together. If there is evidence proved which undermines the prosecution case that the perpetrator was the accused then that is more potent than all the other circumstances. But that issue is left to the jury.

[54] Thus the issue for this court is whether the prosecution evidence in respect of Counts 2 and 4 (and by implication Count 1) was such that a jury properly directed could infer beyond a reasonable doubt that the applicant was guilty. If not, then the trial judge should have stopped the case. If there was such evidence, then the continuation of the trial was justified. This involves an assessment of the evidence adduced by the prosecution which the judge set out as the 'circumstances' in his summing up to the jury and on which he relied, with counsel's agreement, for his ruling. Ms McDermott QC was critical of the judge for not stating how he had reached the conclusion that the jury could reject all reasonable possibilities consistent with innocence, in reality the possibility that Rachel Martin was the guilty party. By implication that conclusion was reached by his ruling that the circumstances proved in evidence established a prima facie case. Was he correct that a prima facie case had been established?

[55] The prosecution case was that prior to September 2009 Millie's life was normal and uneventful, that she was well cared for by her mother and without evidence of any injury. From September 2009 this situation changed. The judge

in his summing up described the events or incidents that characterised that change as a series of circumstances. I refer to them in summary form. In October 2009 Millie sustained an injury to her right ear. There was evidence that this was more consistent with a slap than a fall against some object. At the end of October 2009 a bump to the top of her forehead was noticed and on inquiry it was suggested that the applicant 'jumped in' with an explanation that she had walked into the leg of a table. The applicant told the police in interview that he recalled an occasion he heard a thump from upstairs and he and the child's mother went up and found her 'out cold sleeping' and that she had an injury to the centre of her forehead described as a bump. In November 2009 a bruise to her right ear was noticed. At the end of November a bump was noticed on her forehead. Within the last few weeks of Millie's life Mrs Graham notice a fingertip bruise on the right side of her chest. On 4 December there was an injury to her right index finger, the first joint being described as pure white. When her mother was asked about it and before she could answer, the applicant said that the child had put her finger in a candle. The applicant told the police in interview that he saw the child in the living room put her hand into the candle. The mother was in the kitchen at the time. Millie was taken to hospital on the same date in relation to the injury and again on 5 December. She was seen again by the GP Dr Jentsch on 9 December when the burn had become infected. The GP advised that she be referred back to casualty but this did not happen. Dr Ward stated that this injury 'did not add up' and on 8 December 2009 she noticed three small bruises on her chest and a bruise or yellow mark on the outer lip of the labia. When Millie was examined by Dr McBrooke at the Erne Hospital on the night of 10 December 2009 it was noted that there was bruising to the genitals involving the mons pubis, and the labia minora and majora. These findings led to the arrest of the applicant. The post-mortem examination carried out by the State Pathologist Professor Crane found there was swelling and recent bruising at the entrance to the vagina and a small tear in the vaginal lining. In his commentary on his findings Professor Crane stated that the child had been recently sexually assaulted and the injuries to her genitalia were consistent with the attempted insertion of a hard object such as a finger or erect adult penis. In cross-examination by Ms McDermott QC he agreed that it was a reasonable possibility that they were caused by a punch. However they were caused her legs would have to have been parted at the time. The post mortem also revealed seven ribs fractures, six to the front and one to the back which, according to Professor Malcolm an expert at ageing such fractures, had been inflicted between three and a half weeks and five weeks before her death. These were non-accidental injuries caused by compression and squeezing trauma and would have required significant force. Count 4 in the indictment referred to these injuries. In addition the post mortem revealed a further twenty one rib fractures of which seven were less than ten days old and fourteen less than seven days old. There was evidence of the child wincing on being lifted. The post-mortem examination also revealed injuries to the abdomen caused by forceful blows on at least two occasions. Some of the

injuries were weeks old and some more recent, but more likely earlier than the injuries which caused her death. These injuries if untreated would have been fatal. The symptoms which Millie exhibited during the day of Thursday 10 December 2009 (drowsy, heavy looking, one eye partly closed and eyes runny) could have been caused by sustaining the abdominal injuries on Wednesday night. There was evidence that the applicant left work early on the morning of 10 December 2009 complaining that he had been sick, but no evidence of that was found. He returned to the house. He sought to persuade Rachel Martin to leave the child with him rather than take her with her to Mrs Graham's where she worked part-time. The applicant told the police in interview that Millie was playing with a burger box in the living room before being taken up to bed by her mother. He described Rachel Martin as in good enough form before taking her up and in good form when she came down. She was in her pyjamas. They kissed for a while and then she put her jeans on and went out for Kit-Kat at his request. He went upstairs to the toilet. On coming out he walked over to Millie's room, opened the door and looked in and saw her take a big gasp. He waited for another but it did not come. He picked her up and gave her a 'wee shake'. He put two fingers down her throat and hit her on the back. He took downstairs to the kitchen where he laid her on the floor, put two fingers down again to clear out mucous and blood and then blew into her mouth, she let out a gasp, he pumped her chest then grabbed her and ran to the neighbours and was taken to the hospital. On leaving the neighbour's house they saw another car and the applicant said it was the child's mother, but to drive on. At the hospital the first medic was a paediatric who found no obvious sign of life. The applicant was described as distressed and agitated. He was asked what happened and he replied 'I don't know, I found her like this'. The medical evidence was that Millie sustained a severe non-accidental traumatic inflicted head injury which caused her death by severe swelling of the brain. The person who inflicted the injury would have known immediately that she was unconscious. The trauma caused retinal haemorrhages which would have led to rapid if not immediate loss of vision. The haemorrhages had occurred within the previous 72 hours and there was evidence that the child's vision was normal on the morning and evening of 10 December 2009. Professor Crane found bruising to the back of the head and it was his evidence that blunt force had been applied on at least one occasion to the back of the head. It was more likely that she was held and the head was impacted against a hard object rather than she was hit with an object. She sustained this head injury a short time before she was admitted to hospital. Professor Crane also found a faint purple bruise at the centre of her forehead and also twenty bruises under the skin on the right side of the head, the same side as the bruising to the right ear noticed earlier. Three dimensional images of the body were taken and these revealed four clusters of bruising on the chest and abdomen, also bruising on the spine, the labia and her elbows, the latter of which had the symmetry of gripping. CCTV footage showed Rachel Martin arriving at the shop to make her purchase. Her appearance was calm which was contrasted with the CCTV

footage of her at the Erne Hospital. CCTV footage of the applicant at the hospital showed that he did not come forward immediately to console the child's mother. He looked at the door when she arrived and then moved to one side. One witness described his body language being as if there had been a disagreement between them. Prior to the child's admission to hospital she was in the care of both the applicant and Rachel Martin but immediately prior in the sole care of the applicant.

[56] R v Galbraith lays down guidelines that should inform a trial judge in the event of an application at the close of the prosecution case that the defendant does not have a case to answer. While the principles are well known they are worth repeating. If there is no evidence that the crime alleged has been committed by the defendant, the case should be stopped. If there is some evidence but it is of a tenuous character, i.e. because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case; (b) where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. In the latter instance the important words are 'on one possible view of the facts' and 'a jury'. It is implicit in that passage that other views may exist, all of which are for the jury to consider. It is important to remember the situation which gave rise to the guidance issued in R v Galbraith.

[57] Prior to Galbraith doubts had been expressed about the proper approach to be adopted by the trial judge at the close of the prosecution case. There were two schools of thought. One, that the judge should stop the case if he was of the view that it would be unsafe for the jury to convict and the second, that a judge should only stop a case if there was no evidence upon which a jury properly directed could properly convict. The first arose from a practice, adopted after the introduction of the Criminal Appeal Act 1966, of inviting a judge at the close of the prosecution evidence to say that it would be unsafe for the jury to convict on the prosecution evidence. The Court of Appeal doubted the wisdom of this approach principally because it involved the judge applying his own views as to the weight to be given to the prosecution evidence. Lord Lane LCJ giving the judgment of the court said -

> "There is however a more solid reason for doubting the wisdom of this test. If a judge is obliged to consider whether a conviction would be "unsafe" or "unsatisfactory," he can scarcely be blamed if he

> applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery, C.J., in Barker (1977) 65 Cr.App.R. 287, said was clearly not permissible: "… even if the judge (our emphasis) had taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks the witness is lying. To do that is to usurp the functions of the jury." Although this was a case where no submission was in fact made, the principle is unaffected."

[58] The separate functions of the judge and jury was further underlined in McGreevy v DPP [1973] 57 Cr App R 42 in which Lord Morris of Borth-y-Gest said at page 431 –

> "The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the Judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

[59] If and in so far as the decision in Godard and Fallick is at variance with Galbraith we should follow the latter. Thus the question is whether one possible view of the facts summarised above provides evidence upon which a jury could

properly conclude that the applicant was guilty on Count 1. The answer to that question is clearly yes. While the judge did not reach such a conclusion in respect of Count 1 as he was not asked to do so, he did however do so in respect of Count 2 which was framed as causing the death of the child. Count 2 was in effect no different from Count 1. If he had been asked to rule on Count 1 he would have reached the same conclusion as he reached on Count 2. Therefore we are satisfied that a prima facie case was established in respect of Count 1 and that the trial judge would have so found if an application had been made based on Count 1 as it had on Count 2.

[60] The applicant did not give evidence. He was properly advised as to the consequences of that decision. His co-accused Rachel Martin did give evidence in the course of which she denied that she had injured the child. Other medical evidence was called on behalf of Rachel Martin. It was at this stage that the various applications referred to above were made and ruled upon. Following speeches the trial judge summed up the case over several days. No criticism is made of how he dealt with the issue of circumstantial evidence. However the Third Ground of appeal is that the Judge erred in failing to direct the jury about the possibility that the accounts given by both accused were untruthful and that the jury did not receive the type of direction approved of in R v C and S (1996) Cr LR 346. In that case the defendants were indicted for causing grievous bodily harm with intent (Count 1) and a variety of assaults to the child over a period of three months (Count 2). S was the child's mother and C her cohabitee. Each denied the offences and blamed the other. The prosecution were unable to prove which of the two inflicted the injuries on the child and in relation to count 2, when they occurred and whether one only was present when they did occur. A submission of no case to answer by both defendants was rejected without reasons. The jury convicted S but acquitted C of Count 1 and convicted both on Count 2. On appeals against conviction it was submitted that there was no case to answer on either count in the indictment and that the judge had failed to sum up the case adequately regarding separate verdicts and separate defences. In allowing the appeals it was held that the judge should have acceded to the submission of no case in respect of count 2 as the prosecution could not prove in whose charge the child was when the assault occurred. The same could not be said in relation to Count 1 when S was present at all times and it was a proper inference that she assaulted the child or was a party to it occurring. However the summing-up on count 1 did not make clear the four possible approaches the jury could take – that it was a joint enterprise; that C alone inflicted the injuries when S was asleep; that S alone assaulted the child while C was asleep or out of the house, or that the jury could not be sure which of the two assaulted the child and therefore both must be acquitted. The last possibility was mentioned by the judge as an afterthought and a proper direction on circumstantial evidence was not given. It is a cardinal rule in relation to summing up a case to a jury that the trial judge should tailor his summing-up to the specific circumstances of the case. It is clear from the factual

situation in R v S and C that the case required a careful direction on the various possibilities mentioned above. In the instant case it was the prosecution case that the applicant was the perpetrator. The factual situation did not require a direction that both of them must be lying. The direction of the trial judge that one of them must be lying was consonant with the case made by both the prosecution and the defence. It was not part of the applicant's case that she was or might be lying. That one of them must have been lying was plainly obvious.

[61] Grounds 4 and 5 allege that the trial judge erred in not leaving manslaughter to the jury as an alternative verdict and that in directing the jury on the intent required for murder he 'blurred the distinction' between murder and manslaughter. There was no factual basis upon which the trial judge should have left manslaughter to the jury in view of the medical evidence relating to Millie's injuries. The direction to the jury that intent could be formed in an instant is both factually and legally correct.

[62] Ground 6 alleges that the trial judge failed to tailor his directions to the jury on the particular circumstances of the case and relied on specimen directions and in particular failed to give sufficient warning to the jury of the need for caution in their approach to the evidence of the Rachel Martin the co-accused. These general criticisms of the trial judge's summing-up are not borne out in a careful reading of the entire summing-up. In particular when dealing with the evidence of the co-accused the trial judge did caution the jury more than once about the care required when considering the evidence of the co-accused. He directed the jury to examine her evidence with 'particular care' and warned them about the risk that she 'may have been more concerned with protecting herself than speaking the truth'. We consider that the jury were left in no doubt as to the care required in considering her evidence.

[63] Ground 7 alleges that the trial of the applicant was unfair as the investigation which preceded it involved only the applicant as a suspect when there was a pool of two suspects. Investigators have to follow the evidence as it emerges. The arrest of the applicant followed the disclosure by the medical team at the Erne Hospital that there were injuries to the child's genitalia indicative of a sexual assault whether by penetration or otherwise. Only at a later stage was the co-accused interviewed under caution. This issue, that it was unfair to put the applicant on trial, underpinned the application to the learned trial judge that he should stay the proceedings as an abuse of process. In his ruling given on 19 November 2012 the trial judge concluded that the police view of the applicant as a suspect was within the permissible range of views available to them as the investigation unfolded. We agree with the trial judge's conclusion on that issue. The trial judge also concluded that the prosecution of the applicant did not offend the Court's sense of injustice nor undermine public confidence in the criminal justice system, a necessary conclusion for an abuse of process application to succeed. We agree with that conclusion also. The conduct

of the investigation was examined before the jury who were well aware of the suggestions made by the defence in respect of it. It appears to be the case however, as stated by the prosecution, that this issue was on the periphery of the trial itself. Once the trial judge ruled that it was not an abuse of process for the case to proceed, the only remaining issue was whether the actual trial of the applicant was conducted fairly. We are satisfied that it was.

[64] Ground 8 was not pursued at the hearing of the appeal and Ground 9 was dealt with above.

[65] Ground 10 relates to the evidence about different marks and bruises on Millie person which were noticed after the relationship between the applicant and Miss Martin commenced and which were not the subject of any charge in the indictment. It was contended on behalf of the applicant that this evidence was in reality bad character evidence (either as evidence of propensity or of an explanatory nature) and as such should have the subject of an application to admit bad character evidence under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004). It was contended on behalf of the prosecution that this evidence was part of the background to the death of Millie and part of the background of injuries in the context of the developing relationship between the applicant and Rachel Martin. This evidence was admitted at trial without objection by the defence. For the purposes of the 2004 Order, evidence of bad character is evidence of misconduct on his part other than evidence which has to do with the alleged facts of the offence with which the defendant is charged (see Article 3 of the 2004 Order). Important explanatory evidence is evidence without which the jury would find it impossible or difficult to properly understand other evidence in the case (see Article 7 of the 2004 Order). We do not consider this evidence falls into either category in the 2004 Order and an application under the 2004 Order was not necessary. This was background evidence as the prosecution submitted.

[66] It was submitted by Ms McDermott QC that the learned trial judge misdirected the jury about the nature and cause of the injuries to the child's genitalia and that this misdirection was such as to render unsafe all the verdicts of the jury. The passage in summing up to which we were specifically referred was at page 699 of the transcript where the judge stated –

> "You will recollect the evidence of Professor Crane that his view was that it was much more likely to have been caused by some form of direct sexual interference, an attempt for something to be inserted in the vagina. However he accepted a reasonable possibility that Millie's vagina was not penetrated, but rather that the injury to Millie's genital (sic) was

> caused by blunt force trauma, that is a punch to the genital area."

[67] Ms McDermott's submission was that as Professor Crane had accepted that it was reasonably possible that the injuries to the genitalia may not have been caused by penetration that the jury should have been directed to disregard any suggestion that the injuries were so caused. Although this was a case of circumstantial evidence in which some strands of the evidence may be stronger than others, each strand must be proved to the criminal standard. Reliance was placed on the New Zealand case of Thomas v The Queen [1972] NZLR 34 at 36 in which the Court stated that "the jury may draw rational inferences from facts which it finds to have been proved". It was submitted that in a criminal trial 'proved' can only mean proved beyond a reasonable doubt.

[68] The sentence relied on above is a quotation from the summing-up of Henry J (the trial judge) in the case of Thomas. It is worth quoting the remainder of the passage from which it is drawn.

> " …the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find a verdict of guilty by this process of reasoning….. Now whilst each piece of evidence must be carefully examined , because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive judgment on each item or by asking what does that by itself prove or does it prove guilt. That is not the process at all. It is the cumulative effect. It is a consideration of the totality of the circumstances that is important."

[69] This passage was upheld by the Court of Appeal in New Zealand. North J giving the judgment of the Court said –

> "The evidence for the Crown was the means whereby the prosecution sought to establish those facts as an end result. It is the totality of that narrative to which the formula 'beyond a reasonable doubt applies' and in our opinion any departure from the approach adopted by Henry J in the present case would lead only to confusion and uncertainty. So far as we can see Henry J followed the approach of Chief Baron Pollock when he summed-up to a jury in the well-known case of R v Exall [1886] 176 ER 850."

[70] These passages were quoted with approval in this Court in R v Meehan & Oths [1991] 6 NIJB 1 at 32 when it rejected the submission counsel on behalf of the appellant Meehan that in a case involving circumstantial evidence each strand of the evidence must be tested individually and if it was not of sufficient strength it should not be incorporated in the rope. Hutton LCJ said –

> "It is of course clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and that, when woven together with other strands, it may constitute a case of great strength."

[71] The sentence on which the applicant relies was stated in the context of a circumstantial evidence case. The instant case involves circumstantial evidence which was related principally to the identity of the perpetrator. It might bear on the identity of the perpetrator whether the sexual assault, about which all the experts were in agreement, also involved penetration. In that context it is important to consider the totality of the evidence about the injuries to the genitalia.

[72] The passage in the summing up in the instant case to which we were referred was preceded by a summary of evidence from medical personnel at the Erne Hospital. The judge mentioned the following matters to the jury (which I have paraphrased).

> "Dr McBrooke …. then noticed that Milie's genital area was quite bruised. ….she has produced exhibit 119 which illustrates what she saw …multiple bruises and small …. Petechiae on the mons pubis. … The bruises were blue and purple in colour. The other bruising which she gave evidence about was in the labia majora and the labia minora and these have to be opened by hand to see these areas and she described how there was bruising and pin-pricks in these areas as well. Dr Mackin … examined Millie's vagina visually and saw the mons pubis…. He saw … a 3 cm by 0.7 cm bruise on the left inner lip of the labia minora which is red, there were petechiae within that bruise. Bleeding to the labia minora, some bruising or swelling around the urethra, some red purple bruising to the vestibule just below where the labia meet. Rd purple bruising and selling ove the

> perianal body. …. Dr Guz …..noticed bruising in the pubis and in the femoral area. The statement of Dr Akbar Hussain was read…..he noticed bruising to the child's genital area. The bruising was between red and purple in colour, dark pink and looked very fresh. You will recollect the evidence of Professor Crane etc. " (See above)

[73] The passage was followed by quotation of other evidence given by Professor Crane about these injuries. The trial judge said –

> "He also said: "I think to injure the genitalia and particularly to get bruising internally then the blow would have to be directed in that very, if you like, relatively small confined area. An area that would under ordinary circumstances be protected to some extent by the legs and the thighs. And therefore it would seem to me that to direct a blow into that area the legs would have to have been parted". He also said that the genital bruising would require a much more directed and localised injury requiring the legs to be opened. Dr Ward, in her evidence said that: (a) it was a serious injury. You will recollect that there was not only bruising but a tear to the vaginal wall. (b) that for blunt force trauma the legs would require to be splayed when that injury place."

[74] In his evidence in chief Professor Crane summarised his findings of the post-mortem examination in the course of which he described the injuries he found to the genitalia in these terms –

> "She had also been recently sexually assaulted. There was swelling and recent bruising at the entrance to the vagina and a small tear in the delicate internal vaginal lining. These injuries would be consistent with the attempted insertion of a hard object such as a finger or erect adult penis. It is unlikely that full penetration of the vagina had occurred. There was no evidence of injury to the anus."

Ms McDermott QC cross-examined Professor Crane about his findings:

> "Q. Yes, I will come on to ask you about that slightly later, Professor. As you have been good enough to narrow the area in the way that you have,

may I also narrow it in saying, and you know this, of course, that Dr Canter accepts that sexual abuse to the genital area is a possibility in this case and also it is her opinion that non-sexual blunt force trauma, such as a punch to the genital area itself is another possibility?

A. A punch to the genital area I think is a possibility.
Yes, I wouldn't disagree with that.
…….

Q. You wouldn't disagree. When you were conducting your post-mortem examination did you consider that possibility or did you not have it in mind?

A. I suppose I didn't have it in mind to the extent that the fact that there was genital injury to me, I suppose, equated with a sexual assault, the fact that there had been trauma to the genital area. What is difficult to determine precisely, of course, is how that injury occurred. In other words, how the assault occurred. I have given some possible mechanisms. You have put another one to me, Ms McDermott, and I would say that that is possible as well.

Q. When you say possible, reasonably possible?

A. It is, yes."

[75] Later Ms McDermott asked Professor Crane about the laceration in the vaginal wall and whether there was blood in the laceration.

"Q. Blood in the laceration?

A. It appeared to be a recent injury and there was bruising around it. There wasn't any bleeding at the time that I was conducting the post-mortem examination.

Q. But bleeding in the sense that there was -- was there a red line indicating the laceration?

A. What had happened was that there was a tear, a superficial tear in the delicate lining of the vagina. That is what I saw.

Q. Yes. To take you back to what I was asking you earlier on this morning when you accepted the reasonable possibility that the genital injuries had been caused by blunt force, if I may so put it, non-sexual trauma to that area, that injury could have been caused in that way as well, couldn't it?

A. Yes, it could."

[76] Professor Crane was then re-examined by prosecuting counsel Mr Murphy QC. The following exchange took place –

"Re-Examined by Mr Murphy (Cont'd)

Q. Professor Crane, you dealt with the injuries to the genital area. My learned friend Ms McDermott asked you if you accepted that those injuries could be the result of a blow and I think you said that they could; is that right?

A. That's correct.

Q. If it was a blow do you have any view about what position the child would have been in, in terms of its legs and whether it would have had a nappy on or off?

A. I think to injure the genitalia and particularly to get bruising internally, then the blow would have to be directed in that very, if you like, relatively small confined area, an area that would, under ordinary circumstances, be protected to some extent by the legs and by the thighs and therefore it would seem to me that to direct a blow into that area the legs would have to have been parted. Now that doesn't go for the bruising above the genital area. That could be sustained simply by a blow to the area we call the suprapubic area and the area overlying the front part of the pelvic bone; a blow just directed to the lower part of the abdomen could cause bruising there but I think that the genital bruising would require a much

more directed and localised injury requiring the legs to be opened. Clearly if the child had a nappy on then anything overlying the area of the body where the blow is sustained will offer some protection and a nappy would offer some protection. Therefore, if the blow to the area was sustained with the nappy on it would indicate it would require greater force than had the area been exposed and the blow was directed on to the skin surface.

Q. So while accepting that a blow could cause those injuries what is your preferred opinion?

A. I have indicated that I couldn't exclude the possibility that those injuries were caused by a blow. It seems to me, however, that they are much more likely to have been caused by some form of direct sexual interference, an attempt for something to be inserted into the vagina. That to me is much more likely.

Q. You talked earlier about Dr Canter's view at the joint meeting in relation to these injuries but, aside from Dr Canter, what was the agreed position regarding these injuries?

A. Dr Herron, who was at the meeting, didn't express any opinion at all. Being a neuropathologist he felt that was outwith his area of expertise. But the other experts, the forensic medical officer Dr Farnan and Dr Ward and myself, it was our view that these injuries were those that would be seen as a result of sexual assault."

[77] The first point to note is that the judge accurately informed the jury as to the evidence of Professor Crane about these injuries. The original indictment contained a count alleging sexual assault by penetration (Count 3). At the conclusion of the prosecution case the trial judge acceded to an application (perhaps generously to the defence) that in view of Professor Crane's evidence that it was a reasonable possibility that the injuries to the genitalia were caused by blunt force trauma such as a punch, that there was no case to answer on Count 3. The indictment was amended to include a count of sexual assault of a child (Count 7). It is in respect of that count that the evidence of Professor Crane has to be considered. All the evidence above supports the suggestion of a sexual assault whether by a punch or penetration or both. The issue for the jury was

how those injuries occurred. The trial judge accurately summed up the important elements of Professor Crane's evidence about this. There was no necessity to withdraw any reference to penetration. It would have been open to the jury to have rejected the suggestion that the legs were parted and a punch delivered as being an extremely unlikely or highly impossible scenario and concluded like Professor Crane that it was much more likely that the injuries, particularly the internal injury were the result of a sexual assault which involved a degree of penetration. In considering Count 7 (sexual assault) they had to be satisfied beyond a reasonable doubt that a sexual assault had occurred. To have withdrawn Professor Crane's evidence about penetration might have led to confusion in the mind of the jury. There was no misdirection by the trial judge.

[78] In Ground 12 of the Notice of Appeal it is contended that Section 7 of the 2004 Act was incompatible with Article 6 ECHR and the Court was requested to make a declaration of incompatibility in accordance with Section 4 of the Human Rights Act 1998. On 4 March 2014 this Court issued a Notice of Incompatibility to, inter alia, the Crown Solicitors for Northern Ireland, to which the Ministry of Justice (England and Wales) responded by way of a written skeleton argument. The applicant's contention as set out in the Notice is –

> "Section 7 of the 2004 Act is incompatible with a defendant's right to a fair hearing in accordance with Article 6 ECHR, in that the evidential and procedural provisions applicable to trial on an indictment charging an offence of murder or manslaughter and an offence under Section 5 of the 2004 Act in respect of the same death (which include the postponement of consideration of whether there is a case to answer on the charge of murder or manslaughter until the close of all the evidence, and provision for the drawing of adverse inferences from a failure to give evidence or refusal to answer a question in determining whether the defendant is guilty of murder or manslaughter, even if there would otherwise be no case for the defendant to answer in relation to that offence) are inconsistent with the burden of proof, presumption of innocence , and right to silence: such principles require that it is for the prosecution to establish that the defendant has a case to answer in respect of an alleged offence, and that neither the defendant's evidence nor an adverse inference from a failure to give evidence may be used to establish that case to answer."

[79] In addition it was contended that the application of Section 7 in the applicant's trial led to the applicant not receiving a fair trial, contrary to Article 6 of the ECHR. Thus Article 6 had to be considered at two different levels.

[80] It was submitted that three fundamental principles of the criminal law are guaranteed by Article 6. These are that the burden of proof lies on the prosecution, that a person is presumed innocent until the contrary is proved according to law, and that a person has the right to remain silent and not to incriminate himself. It was submitted that the operation of Section 7 of the 2004 Act infringes each of these rights in different ways. In postponing the time at which an application that the accused does not have a case to answer until after all the evidence has been given leaves open the possibility that the accused, if he does not give evidence, will be convicted solely or mainly because he exercised his right to remain silent. The postponement has the further effect of shifting the burden of proof away from the prosecution and on to the defence when the onus, in a criminal trial in which the prosecution are seeking to establish guilt of a criminal offence, remains throughout on the prosecution. In particular, the onus and presumption applicable in respect of counts of murder and manslaughter, move to the defence through the application of Section 7. In addition Section 7 permits account to be taken of evidence called by the defence in order to determine whether the defendant has a case to answer on the murder/manslaughter offence. The principles relating to the burden of proof and the presumption of innocence are predicated on the prosecution producing evidence in order to establish guilt and not the defence. Even if there is a case to answer on the Section 5 offence this should not preclude a submission of no case to answer on another and different offence, in this instance murder and manslaughter. The inability of the defendant to submit that there is no case to answer has the effect that the defendant has to address the question whether to give evidence or not on the basis that a case to answer has been established on the Section 5 offence but not on the murder and/or manslaughter offence.

[81] Drawing on these general criticisms it was submitted of behalf of the applicant that the application of Section 7 in his trial rendered the trial unfair. He was tried for an offence not known to law, count 2. The inclusion of this count had the effect of precluding an application at the conclusion of the prosecution evidence that the prosecution had failed to establish a case against him that he had to answer. He was required to respond to the allocution administered under Article 4(2) of the Criminal Evidence (NI) 1988, whether to give evidence or not, without knowing whether the prosecution had established a case to answer in respect of Count 1. If the prosecution failed to establish a prima facie case he was entitled to an acquittal at the direction of the trial judge. It was submitted that it is not a sufficient answer to hold now that a prima facie case was established when he was unlawfully deprived of the right to apply to

the trial judge for a reasoned ruling whether the prosecution had established such a case for him to answer.

[82] A further criticism was that, an application having been made in respect of Count 2, no detailed reasoned ruling was given by the trial judge in response to it. Furthermore the procedure following from the inclusion of Count 2 permitted adverse inferences to be drawn from defence evidence when the establishment of a case to answer, permitting adverse inferences to be drawn, relates to a case based on prosecution evidence and not defence evidence. Where the drawing of adverse inferences from the failure of the defendant to give evidence is permitted it requires very careful direction from the trial judge to the jury about the nature of the inferences that can be drawn and the weight that can be attached to them and the trial judge did not do so or do so adequately.

[83] Section 3 of the Human Rights Act 1998 provides that so far as it is possible to do so legislation must be read and given effect in a way which is compatible with rights under the ECHR. Article 6 of the Convention states:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[84] Article 6 creates no right to make a submission of no case to answer whether at the close of the prosecution case or any other time in a criminal trial. Article 4 of the Criminal Evidence (NI) Order 1988 permits a judge or jury to draw such inferences from a defendant's failure to give evidence as appears proper. In Murray v UK the European Court held that this provision was not contrary to the Convention.

> "45. Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aim of Article 6.
>
> 46. The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context "improper compulsion". What is at stake in the present case is whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain

conditions, his silence may be used, is always to be regarded as 'improper compulsion'.

47. On the one hand, it is self-evident that is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative. It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government has pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

48. As regards the degree of compulsion involved in the present case, it is recalled that the applicant was in fact able to remain silent. Notwithstanding the repeated warnings as to the possibility that inferences might be drawn from his silence, he did not make any statements to the police and did not give evidence during his trial.

Moreover under Article 4(5) of the Order he remained a non-compellable witness (see para. 27 above). Thus

> his insistence in maintaining silence throughout the proceedings did not amount to a criminal offence or contempt of court. Furthermore, as has been stressed in national court decisions, silence, in itself, cannot be regarded as an indication of guilt."

[85] Thus the European Court approved of the drawing of inferences from silences in situations which clearly called for an explanation from the defendant. Murray was a trial by judge alone. In Condron v UK [2001] 31 EHRR 1 the Court held that leaving to a jury whether to draw adverse inferences from the silence of the accused was not incompatible with Article 6 provided the jury were directed correctly as to the circumstances in which they could draw such an adverse inference. In that case the jury were not directed sufficiently as to the explanations given by the defendants as to why they had remained silent during interview by the police and accordingly they had not received a fair trial. Thus the directions to the jury by a trial judge's are critical. In R v Cowan [1996] QB 373 the Court of Appeal in England and Wales laid down the directions which should be given to a jury where they are invited to consider adverse inferences from the decision of the defendant not to give evidence. The Court of Appeal in Northern Ireland has stated that these directions should be followed by trial judges in this jurisdiction – see inter alia R v O'Donnell [2010] EWCA 1. Thus the concern that a jury might convict wholly or mainly on the silence of an accused can be avoided by a careful direction from the trial judge that they may not do so.

[86] The changes in evidence and procedure brought about by Section 7 apply only in certain circumstances. They were introduced to deal with a particular difficulty arising from the death of vulnerable persons, often children, in a domestic setting. Article 2 of the ECHR enjoins states to provide, by laws, suitable protection for every person's right to life. That protection extends to an appropriate investigation into a person's death, which includes the criminal process when an offence is suspected. Section 5 created the new offence of causing or allowing the death of a child. Section 7(1) provides that where a person is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death, then the procedural changes effected by Section 7(2) to (4) apply. The application of the changes is dependent on the existence of a section 5 charge. Section 7(4) provides that where a person remains charged with a Section 5 offence (and an offence of murder or manslaughter) the question whether there is a case to answer is not to be considered before the close of all the evidence. If the defendant ceases to be charged with a Section 5 offence, for example as a result of the prosecution being unable to establish a prima facie case in respect of that offence at the close of the prosecution evidence, then the question whether there is a case to answer in respect of the murder or manslaughter charge may be considered at the end of the prosecution evidence. Section 7(2)

provides that if a court or jury would be permitted under Article 4 of the Criminal Evidence (NI) Order 1988 to draw an adverse inference from the failure of the defendant to give evidence in relation to the Section 5 charge, then the court or jury would also be entitled to draw such inferences in respect of the murder or manslaughter charge even though there would otherwise be no case for him to answer in respect of the murder or manslaughter charge. A prima facie case in respect of the Section 5 charge would require prima facie evidence of the death of a child as a result of an unlawful act which constituted an offence and that the unlawful act was that of the defendant who was a member of the same household as the child or had frequent contact with him (the causing element of Section 5), or the defendant was aware or ought to have been aware of a significant risk of serious physical harm to the child and failed to take steps to protect the child from the risk of such foreseeable harm (the allowing element of Section 5). Thus prima facie evidence that the defendant caused or allowed the death of the child is required. It is in those circumstances only that the two procedural changes effected by Section 7 apply. If the court or jury can draw an adverse inference in respect of the Section 5 offence of causing or allowing the death of a child then they can draw such an inference in respect of the murder or manslaughter charge. The defendant's rights to remain silent or give evidence remain. If there is a case to answer in respect of the Section 5 offence then the question whether there is a case to answer in respect of the murder or manslaughter charge is deferred to the close of all the evidence. The legislation does not prevent an application that there is no case to answer it merely postpones consideration of the question until later in the trial process. Those changes in procedure in order to establish the circumstances in which a child (or other vulnerable person) died are not incompatible with any of the rights established in Article 6 nor are they inconsistent with the burden of proof remaining with the prosecution, the presumption of innocence until proved guilty, or the defendant's right to remain silent and not incriminate himself. Therefore we decline to make a declaration that Section 7 of the 2004 Act is incompatible with the European Convention on Human Rights or any law derived from it.

[87] The second aspect of this part of the applicant's case was that the effect of the inclusion of an offence contrary to Section 5 of the 2004 and what flowed from it, was to cause the applicant's trial to be unfair contrary to Article 6 ECHR. The same arguments submitted in respect of the incompatibility point were advanced on this ground also. In particular it was alleged that unfairness arose from

> "i. the alteration in the normal trial process whereby the applicant was unable to make an application of no case to answer in respect of Count 1 (murder) ;

ii. that the applicant was denied a fair procedure whereby he could respond to the allocution delivered by the Judge in accordance with Article 4 of the Criminal Evidence (NI) Order 1988, whether to give evidence or not, from an informed position aware of the nature and strength of the prosecution case in circumstances where he was the first named accused in the indictment;

iii. that the directions of the trial judge to the jury on the drawing of inferences from the applicant's failure to give evidence which are regarded by the European Court as critical were deficient;

iv. that no detailed reasoned ruling was given by the trial judge in response to the application for a direction in respect of Count 2."

A separate point was raised relating to the failure of the prosecution to correct a false impression relating to the character of the co-accused. We consider that the prosecution fulfilled their obligations relating to this by their disclosure to the defence. It was then a matter of the defence how they dealt with that. In the event no reference was made to it. We consider no unfairness arises in relation to this.

[88] Article 6 of the ECHR is entitled 'Right to a fair trial' and lists the minimum rights guaranteed to fulfil that entitlement. It is not suggested that any of these rights were breached in the trial of the applicant. The applicant was made aware of the nature of the case against him, he had time to prepare his defence, was granted free legal aid which provided him with the services of experienced senior counsel, junior counsel and a solicitor who were able to examine the prosecution witnesses during the course of the trial. Many different countries are signatories to the European Convention each with their own legal system which define the nature of a criminal offence, make provision for the mode of trial and procedure to be followed and provide rules for the admissibility of evidence. Most European criminal trials are inquisitorial in their procedure rather than adversarial. Article 6 does not specify any particular mode of trial; it caters for a broad spectrum. Thus the question is not whether the applicant's trial was unfair in accordance with Article 6 but whether it was intrinsically unfair as a result of the effect of Section 7 of the 2004 Act. Section 7 does not prohibit an application that there is no case to answer, it postpones consideration of it. While an application was made in respect of Count 2 (causing the death), initially that it should be quashed as wrong in law and later

that there was no case to answer in respect of it, no application was made that there was no case to answer in respect of Count 1 (murder) nor was an application made that there was no case to answer in respect of a Section 5 offence, detailed as Count 2 in the indictment. We understand this to reflect the strength of the prosecution evidence at the close of the prosecution case. Parliament has decided that there should be a minimal alteration in the trial process in circumstances in which vulnerable persons die in a domestic setting and those living in the same household who either caused the death or allowed it to occur are on trial, in order to assist in establishing the truth of what occurred. We do not consider this alteration where applied in a criminal trial is intrinsically unfair, particularly where it requires a prima facie case that the accused either caused or allowed the death of the child or vulnerable person. The inclusion of Count 2 in the indictment, wrongly drawn under Section 5, distracted counsel on behalf of the applicant about the nature and type of applications she was entitled to make after the close of the prosecution case. However if Count 2 had been correctly drawn there was clearly a case to answer in respect of it. If Count 2 had not been included in the indictment there was equally a case to answer on Count 1 (murder) as we have found above. In those circumstances we do not consider that any issue of unfairness arises from the inclusion of Count 2 as drafted. At the end of the prosecution case the applicant can have been in no doubt as to the nature and strength of the prosecution evidence given in court. It was in relation to that evidence that the applicant had to decide whether to give evidence or not. The procedure under Section 7 did not alter in any way the nature and strength of that evidence. It had no bearing on the decision whether to give evidence. The applicant did not give evidence and the trial judge was entitled to direct the jury about the inferences they could draw from that decision. He did so in accordance with Article 4 of the 1988 Order following the Crown Book specimen directions. In particular he advised the jury that they could only draw adverse inferences if the prosecution's case clearly called for an answer by the applicant and if they thought it was fair and proper so to do. There was no misdirection by the trial judge and no fault in the manner in which he did so direct the jury.

[89] The trial judge gave no detailed ruling in respect of the application in respect of Count 2. Instead he relied on the circumstances which he spelt out in detail to the jury in his summing up. Not every judge would have adopted that procedure. But in circumstances in which this procedure was adopted and acquiesced in by counsel and where his reasoning is apparent from the short ruling read with the detailed summing up we do not consider any unfairness arises. On the contrary a fair reading of the transcript demonstrates that the judge was scrupulous in ensuring that the applicant received a fair trial in what was a difficult case for all involved.

[90] The proper approach to an allegation that a trial was unfair contrary to Article 6 can be seen in a recent decision of the European Court The case of

O'Donnell referred to in paragraph 85 above was appealed to the European Court of Human Rights and judgment delivered on 7 April 2015. In that appeal the applicant complained that his trial was unfair on two grounds. Firstly that the trial judge's ruling under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 (as to the desirability of his giving evidence) was improper and unfair because the trial judge had erred in refusing to admit the evidence of a psychologist to demonstrate that the applicant was suggestible. Secondly, that the trial judge's direction to the jury in respect of adverse inferences was flawed in that he should have directed the jury that they should not draw any adverse inferences unless they considered that there was a case to answer. In relation to the first ground the Court of Appeal in this jurisdiction accepted that the evidence of the psychologist was admissible but that the portion of the evidence relied on did not touch on suggestibility and would have had no material effect and did not render the trial unfair. On this aspect of the appeal the European Court stated at paragraph 53 -

> "1. Turning to trial judge's refusal to allow Dr Davies to give evidence concerning the conclusions he had reached from watching the excluded interview tapes, the trial judge reasoned that, once the interview tapes were excluded from evidence, they were excluded from evidence for all purposes (see paragraph 15 above). The Court of Appeal accepted that the videotapes were in fact admissible to demonstrate how the applicant expressed himself and to demonstrate that he was suggestible. However, it concluded that, since the portion of the videotape on which the applicant wished to rely did not touch on suggestibility, the omission of the evidence would not have had any material effect on the trial judge's decision (see paragraph 24 above). This part of the applicant's argument is therefore weak. In any event, as this Court has frequently reiterated, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-95, ECHR 2006-IX)."

In relation to the second issue the European Court (like the Court of Appeal) did not consider this omission rendered the trial judge's summing up to be deficient. It commented -

> "2. In the present case the trial judge did not invite the jury to consider firstly whether the prosecution case was so strong that it called for an answer before directing them that they could draw an adverse inference from the applicant's failure to testify. This clearly reflected the judge's view that the evidence against the applicant was sufficiently strong that such an approach was not required. The Court of Appeal considered that the absence of this direction did not render the trial unfair or the conviction unsafe (see paragraph 26 above).
>
> 3. In England and Wales, trial judges in their summing up were required to direct juries that they had to find that there was a case to answer on the prosecution evidence before drawing an adverse inference (see paragraph 30 above). The practice in Northern Ireland changed only after the Court of Appeal's judgment in the present case (see paragraph 32 above). However, at the relevant time in Northern Ireland, the judge could give the "case-to-answer" instruction at his or her discretion based on the weight of the prosecution's evidence (see paragraph 29 above). In the present case, and in light of the strength of the incriminating evidence against the applicant, the trial judge in the exercise of his discretion did not consider such a direction to the jury to be necessary. In the Court's view this did not render his summing up deficient in any way for the purposes of Article 6 § 1."

It can be seen from this case that not every omission will render a trial unfair. The Court has to consider the trial as a whole and the strength of the evidence in the case. In this instant appeal we do not consider that any of the matters relied on by the applicant rendered his trial for the murder of Millie Martin to have been unfair. In particular the incorrect inclusion of Count 2 and the resultant deferral of the time when an application that there was no case to answer could be considered, in the context of the trial for murder as a whole, did not render that trial unfair. As we have observed the trial judge was scrupulous to ensure the applicant received a fair trial. In particular in his summing up he set out all the material evidence and the case that was made on behalf of the applicant. The jury could have been under no misapprehension as to the issues in the case and the nature of his defence. We reject this ground of appeal.

[91] Section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe and shall dismiss such an appeal in any other case. In R v Pollock [2004] NICA 34 Kerr LCJ analysed Section 2(1), various authorities and the approach of the Court of Appeal in an appeal against conviction. At paragraph 32 of the judgment he set out the principles that could be distilled from the authorities.

> "32. The following principles may be distilled from these materials: -
>
> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[92] We adopt this approach. The central argument presented on behalf of the applicant related to the incorrect inclusion of Count 2 and its effect on the timing of an application that there was no case to answer (which in fact was never made in relation to Count 1, Murder). We have carefully examined all the evidence in this appeal. In particular we have considered the incorrect inclusion of Count 2 and its effect in deferring the consideration of whether there was a case to answer and are not persuaded that the verdicts in this case are thereby unsafe nor do we have any sense of unease about their correctness. We grant leave to appeal, treat the hearing of the application as the hearing of the appeal and dismiss the appeal.