Neutral Citation No: [2025] NICA 48 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **KIN12843** *ICOS No:* *Delivered:* **03/10/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

AD

Ms McDermott KC with Mr Bacon (instructed by Collins Solicitors) for the Appellant
Ms Walsh KC (instructed by the Public Prosecution Service) for the Crown

---

Before: Keegan LCJ, Kinney J and McLaughlin J

KINNEY J (*delivering the judgment of the court*)

Introduction

We have anonymised the appellant's name to protect the identity of the infant child who was the victim in this case. The appellant will appear as the cipher AD. His co-accused will appear as BE and the child as L.

[1] This is an application for leave to appeal the sentence imposed by His Honour Judge Devlin ("the judge") on 26 August 2025. The appellant was charged with five counts on the bill of indictment including two counts of grievous bodily harm, two counts of causing or allowing a child to suffer serious physical harm, contrary to section 5(1) of the Domestic Violence Crime and Victims Act 2004 and one count of wilful ill-treatment and neglect of L. The appellant pleaded not guilty to all counts at arraignment. Shortly before the trial was due to begin the prosecution indicated that it did not propose to proceed with counts one, three, four and five on the bill of indictment. The appellant was then rearraigned and pleaded guilty to the remaining count of causing or allowing a child to suffer serious physical harm contrary to section 5(1) of the Domestic Violence Crime and Victims Act 2004. He was sentenced to a determinate custodial sentence of 14 months. The appellant maintains the sentence was wrong in principle and manifestly excessive. The single judge refused leave.

Factual background

[2] The victim in this case is a young child, L, who is the daughter of the appellant and his co-defendant, BE. BE was also charged with the section 5(1) offence, also pleaded guilty and received the same sentence. L was taken to hospital on 10 June 2019 by her parents who had reported a swelling to her left leg. L was born on 4 April 2019 and, therefore, was approximately two months old when presented to hospital. Appropriate investigations were carried out by clinicians which revealed a fracture. As a result, further examinations and skeletal surveys were carried out. Injuries to L included fractures to her distal right tibia, upper proximal left tibia, fractures to 10 ribs, left distal femur, the right clavicle and the left radius. A further three fractures which appeared to have been of more recent origin were noted as well, being the distal right femur, the upper proximal right tibia and the lower distal left tibia. Swelling and bruising were also noted on L's admission to hospital. Sadly, she also sustained brain injuries. Medical opinion before the sentencing court differed as to whether the brain injuries were caused on one or two occasions. The judge in his sentencing remarks accepted that the brain injury was likely to have been caused during an episode which also resulted in fractures and was not a separate episode of inflicted harm.

Judges' sentencing remarks

[3] The judge provided very comprehensive and detailed sentencing remarks. The judge had the benefit of submissions from counsel in the case. He also had the benefit of extensive medical evidence which he recited in some detail. He referred to the subsequent police investigation and the involvement of social services. He noted that there had been a party at the house of the appellant's mother on 8 June, two days before L was presented to hospital. A cousin who was at the party recalled that both the appellant and his partner took L upstairs to change her nappy and she recalled hearing L squealing from the upstairs room. She was sufficiently disturbed to comment about the noise and she felt that the crying that she heard was not normal.

[4] At initial interviews with police and social services neither the appellant or his co-defendant could provide any explanation for the injuries. They denied any drug misuse. Subsequently the appellant disclosed that L had fallen out of bed a few days before her presentation to hospital and he had been too scared to tell anyone. Both parties also informed social services that they regularly smoked cannabis whilst caring for L. They asserted that they smoked the cannabis whenever L was settled in the evening. The medical experts discounted any fall from a bed as being a possible cause of L's injuries.

[5] The judge noted an absence of sentencing authorities for this offence. He referred to *R v SD* (unreported, 10 August 2021, TRE11550) which was a case from the Northern Ireland Court of Appeal. He noted that it was a very different case to this case. The injuries were significantly less serious and were inflicted in a single incident of violence. The mother in that case was not considered by the prosecution to be the perpetrator of the injuries. She was initially sentenced to 16 months imprisonment by

the Crown Court. By the time the matter came before the Court of Appeal she had served five months in custody and made significant progress in efforts to turn her life around. In those circumstances the Court of Appeal substituted a sentence of 18 months' probation.

[6] The judge also referred to the English Court of Appeal case of *R v Nemet and Rapasi* [2018] EWCA Crim 2195. The judge considered this case to be comparable at least in terms of the extent of injuries, albeit the English case did not include any brain injury. The starting point taken in that case was three years. The judge referred to the English Sentencing Council Guidelines. He did not purport to follow the Guidelines but did appropriately utilise some of the aggravating and mitigating features identified in the guidance. The judge properly concentrated on the issues of culpability and harm. Neither defendant accepted causing the injuries to L and the appellant in this case gave an entirely unsatisfactory exculpatory explanation. Not only were the injuries sustained on more than one occasion but there was some delay in the appellant seeking access to medical assistance. The judge observed that, taking into account the nature and extent of the injuries, it was difficult to understand how the appellant and his partner would not have noticed something seriously amiss with their young baby.

[7] The judge then considered aggravating and mitigating features. The aggravating features he found included the range of injuries involved, that they were sustained in more than one incident and the appellant's consumption of drugs whilst caring for an infant. In mitigation the judge took into account the appellant's plea of guilty which came at a relatively late stage and after prosecution review. The judge took the view that the appellant in this case, although he had a criminal record, should be treated as having an effectively clear record. The judge specifically took into account the appellant's youth and immaturity and that there was evidence of remorse albeit this was qualified in the appellant's case.

[8] The judge made it clear that neither defendant would be sentenced on the basis of actually causing the injuries, but equally neither defendant could expect to be sentenced on the basis that they had no responsibility for the injuries sustained. Each was sentenced for allowing or enabling the perpetrator to act as they ultimately did. The judge also indicated that he would not make any distinction between the two defendants.

[9] The judge noted the English case of *R v Ikram and Parveen* ([2008] 2 Cr App RS 114) where the court stated:

> "Wherever the case may fall in terms of the culpability of the perpetrator, a conviction of the section 5 offence means it has been established that the defendant who failed to protect the victim either appreciated or ought to have appreciated that there was a significant risk that the victim would endure serious harm at the hands of the ultimate

perpetrator, in circumstances which that defendant foresaw or ought to have foreseen."

[10] The judge in this case assessed the culpability of each of the defendants as moderate. In reaching that conclusion the judge referred to the causation of the injuries involved, the use of significant force and the number of incidents. The judge also considered the issue of harm and assessed the level of harm as serious. Finally, the judge noted that each of the defendants had been assessed by the Probation Board as presenting a medium risk of reoffending. The judge took as a starting point for the appellant, a sentence of 20 months custody and reduced this in light of his guilty plea to a sentence of 14 months.

The law

[11] Section 5 of the Domestic Violence, Crime and Victims Act 2004 provides:

"**The offence**

(1) A person ("D") is guilty of an offence if –

(a) a child or vulnerable adult ("V") dies as a result of the unlawful act of a person who –

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

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

(d) either D was the person whose act caused V's death or –

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen."

[12] The appellant referred the court to *Smith, Hogan and Ormerod's Criminal Law* (17th Edition), and specifically paragraph 15.4.7 where the authors state that the *mens rea* of the offence is one of negligence since the fault on a defendant's part, if they are not the direct cause of the death or serious injury, is a question of whether they ought to have been aware of the risk. The death or serious injury must have occurred in the circumstances of the kind that the defendant ought to have foreseen.

[13] In *R v Hopkinson* [2013] EWCA Crim 795, mentioned in *Smith Hogan and Ormerod*, the Court of Appeal held that there should not be a special verdict requested of a jury which specifies whether the conviction is for causing or allowing. The court said this was especially inappropriate as the offence was created in order to address the difficulty of proving which of two is responsible when there are no other possible candidates.

[14] In *Ikram* at para [69] the court said:

> "Whichever defendant deliberately fractured Tahla's femur, the other allowed it to occur without taking steps to give Talha appropriate protection from awful, foreseeable violence. Neither was to be sentenced as the perpetrator; both were to be sentenced for allowing the perpetrator to act as he did."

[15] In *Nemet*, the Court of Appeal commented on the nature of the section 5 offence. At para [33] the court said:

> "In the present case, the judge had presided over the trial. He acknowledged that he could not say which of the offenders had actually carried out the assault, a particular difficulty before the passing of section 5 of the DVCVA. However, that was not a necessary finding in the light of the offence charged.
>
> 34. There had been a series of assaults. The crime charged under section 5 was, to precis the particulars of the offence, that being aware or in a position where they ought to be aware of the risk of serious physical harm they had failed to take reasonable steps to avoid the harm caused by the unlawful acts that were foreseeable or which ought to have been foreseen. The judge had indicated clearly those factors which are relevant to his assessment of the seriousness of the crime, not the least of which there was the absence of apparent long-term harm to the child."

Grounds of appeal

[16] The appellant seeks leave to appeal against the sentence imposed on the following grounds:

(i) The judge erred in his assessing the appellant's culpability as moderate;

(ii) The sentence was wrong in principle as he failed to give any weight to the pre-sentence report, the report of Dr Pollock or rehabilitation; and

(iii) In relation to exceptionality, the judge failed to appreciate the effect on the child of both parents being imprisoned.

Consideration

[17] The appellant argues that the trial judge was in error when he assessed the appellant's culpability as moderate/medium rather than low. The appellant had to be sentenced on the basis of allowing the harm to the child rather than causing the harm. The appellant submitted that the *mens rea* for the offending is one of negligence and is a question of what the appellant ought to have foreseen. The appellant argues that he falls to be dealt with at the lowest end of the spectrum for culpability and that there was no evidence to indicate otherwise. The appellant argues that the fact that significant force was used in causing the injuries does not increase the appellant's culpability. Within the medical opinions before the court were statements that, in respect of some at least of the injuries, a person who was not present when they were inflicted would be unlikely to be aware of significant injury having been sustained. The appellant also referred to the number of incidents relied upon by the judge. In the judge's own assessment that may be no more than two. The appellant should not be sentenced in respect of an offence which he has not admitted. The appellant argued that the *mens rea* of negligence was not reflected in the judge's consideration.

[18] It is common case that the appellant was sentenced not for causing serious physical harm but for allowing serious physical harm to a child where he ought to have been aware of the risk and failed to take such steps as he could reasonably have been expected to take to protect the child from that risk.

[19] The test is clearly an objective one. The defendant's personal circumstances will be relevant in determining what he could reasonably be expected to do. The section 5 offence is further nuanced because the risk the appellant ought to have been aware of must be a significant one relating to serious injury. The appellant pleaded guilty to the section 5 offence and the only concession made by the prosecution and acknowledged by the trial judge was that this was not a case of causing the injuries but one where the appellant allowed the injuries. There was no other basis of plea put forward.

[20] What the authorities demonstrate is that offences under section 5 are intensely fact specific. In applying the objective test required of the section the jury will have to

be cognisant of the characteristics of the individual defendant. It will have to take into account the factual matrix surrounding the offending in order to determine what is reasonable to expect of the particular defendant and what are the reasonable steps the particular defendant should take. So the protective steps expected of, for example a victim of domestic abuse or modern slavery, may be different to that of other defendants and the jury may conclude that such a person's failure was reasonable in the circumstances (see *Khan* [2009] EWCA Crim 2 at para 33).

[21] However, the issues surrounding the objective test do not apply in a case where the defendant has pleaded guilty to the offence. The appellant in this case acknowledged that he ought to have been aware of a risk of serious injuries occurring to his child which had to occur in circumstances of a kind that the appellant ought to have foreseen. The appellant by his plea explicitly accepts that he failed to take such steps as could reasonably be expected of him to protect the child.

[22] Turning then to the personal circumstances of the appellant there is no medical evidence regarding the particular vulnerabilities of the appellant. The height of the case made for vulnerabilities is Dr Pollock's report. The appellant told Dr Pollock initially that he was not taking drugs but subsequently admitted ongoing cannabis use. Dr Pollock noted that the appellant was prescribed medication for depression and anxiety. The appellant expressed situational stress associated with these proceedings. Dr Pollock assessed the appellant's cognitive functioning as intact and there was no evidence or any signs or symptoms suggestive of a psychotic process or acute mental illness. The appellant told Dr Pollock that he was not aware of the injuries to his daughter and blamed his ex-partner. He continued to voice his own belief that he and his ex-partner acted swiftly and appropriately when any health concerns were identified. He also told Dr Pollock that he had never experienced psychological difficulties until he was told of the injuries to his daughter. At paragraph 12.3.10 Dr Pollock said:

> "In summary, assessment did not establish that personality dysfunction or disorder was identified to be present as a factor that might significantly influence the father's conduct as a parent."

[23] Further information regarding the appellant was contained in the presentence report.

[24] The probation officer noted that the appellant was serving a combination order comprising two years' probation and 60 hours community service at the time of his interview. The order was imposed in December 2024 for the offences of harassment and threatening or abusive behaviour which occurred on 16 September 2023, sometime after the offences in this case. A two-year restraining order was also imposed. The appellant had entered into a new relationship. He reported a positive childhood but more recently suffered from anxiety and depression. He continued to use drugs and was referred to the community addiction team. The appellant

described himself as "a silly young parent." He confirmed both he and his then partner used cannabis daily and did not consider that to be a problem. He continued to maintain his explanation of the injuries to the baby and believed her fall off the bed had caused the injuries. When asked about the long-term impact on L he said that there were no long-term effects of her injuries. The author said the appellant presented as naïve regarding the impact on the victim. The probation officer noted that given the extent of the injuries to L it was difficult to comprehend that the appellant was unaware of what his child was experiencing. The author also noted that the appellant was not doing work under his existing probation order and there were concerns about his motivation to sustain engagement in the long term. He was assessed as a medium likelihood of reoffending but not as posing a significant risk of serious harm.

[25] The injuries to this very young child were both serious and wide ranging. She suffered almost 20 different fractures of various bones in her body along with significant bruising and a brain injury. The offending behaviour happened on more than one occasion and so there was a continuing opportunity for the appellant to take the steps which could reasonably be expected of him to protect the child. The appellant did not accept either in the police interview or in his presentence report any responsibility or culpability. Although he ultimately pleaded to the section 5 offence he did not do so at the first opportunity.

[26] It was expressly accepted on behalf of the appellant that the issue of culpability sits on a spectrum ranging from someone witnessing injuries actually being inflicted through to a lower culpability of someone who ought to have been aware of a risk and failed to take reasonable steps. The appellant contends that he should have been dealt with at this lower end of the notional spectrum as there was no evidence to indicate otherwise.

[27] It is our view that this is not a case where the appellant can simply say he did not know what was happening and could not be expected to know. By his plea he has confirmed that he knew or ought to have known of the risk but he failed to take reasonable steps to prevent harm. Looking at the spectrum of culpability it is, in our view, appropriate to consider the nature and extent of the injuries, the fact that they were inflicted on more than one occasion and the evidence from the cousin at the party two nights before L was presented to the hospital where she described hearing a baby crying and describing the crying as not normal. There was also some delay in the appellant seeking medical assistance for his baby daughter. The judge commented that it was difficult to understand how two parents habitually dealing with their baby on a daily basis over many weeks could have failed to notice something seriously amiss about the behaviour and demeanour of the child either in advance or well in advance of when they say they finally did. It is difficult to disagree with that comment. The appellant also belatedly accepted his chronic and prolific drug use during the time he was caring for L. He asserted that he provided daily care for her. The degree of force used to inflict injuries must also be relevant in assessing the likely level of knowledge and awareness of an appellant who has accepted that he has failed

to take appropriate steps to protect the baby from foreseen risk. It is not just appropriate but essential that the judge looked at the entire factual matrix in arriving at his conclusion on culpability.

[28] The appellant has raised the question of *mens rea* for this offence. However, there is no argument in real terms in this case about whether the appellant possessed the requisite *mens rea* as is of course demonstrated by his plea. That is because the real question for the judge to determine was where the appellant's culpability fell on a spectrum and the fact that the judge did not enter into a discourse on the appropriate *mens rea* for the offence is of little relevance. The reference to negligence therefore does not assist the appellant.

[29] The appellant has argued that the only evidence against him was his own admission. Regardless of how the plea was made the appellant has accepted that he committed the offence, yet much of his time in police interview and with the probation officer was used to minimise if not absolve himself of responsibility. We are satisfied that the judge properly applied his mind to the question of culpability and was entitled to find that the level of culpability was in the moderate bracket.

[30] The appellant has argued that the judge failed to give any weight to the presentence report or the report of Dr Pollock. Neither assertion bears closer analysis. There is clear reference to both Dr Pollock's report and the pre-sentence report by the judge. It would have been helpful if the judge had been more explicit in his reference to the pre-sentence report in his otherwise very detailed sentencing remarks. However, he clearly references it in his remarks when he considers the appellant's attempt to provide an explanation to the probation officer for the injuries which is refuted by the available medical evidence, the appellant's acceptance of cannabis use when caring for L and his inability to accept greater responsibility in his caring role. The judge also references the probation officer's assessment of the appellant's medium risk of further offending.

[31] Finally the appellant argues that in relation to exceptionality, the judge failed to appreciate the effect on the child of both parents being imprisoned. In this regard the appellant has referred to the remarkable recovery made by L to date. She is now placed with her paternal grandmother in a kinship placement. The appellant and BE enjoyed supervised visits before their sentencing. L is still young and is not aware of the offences against her. The appellant argued that the judge should have considered exceptional circumstances to exist which warranted suspension of a custodial sentence or the imposition of a non-custodial sentence. The appellant argues that his personal characteristics, his youth and his background should have led the court to allow the appellant's existing probation order to continue.

[32] Exceptional circumstances are a matter for the trial judge to consider. In this case we find little to demonstrate exceptional circumstances exist. There is no evidence of exceptional vulnerability of this appellant. As pointed out by this court previously, where the safety of the most vulnerable in our society is concerned the

personal problems of the accused will frequently carry little weight. The judge in this case recognised the appellant's relative youth and immaturity in his sentencing remarks and, in our view, in the sentence ultimately passed. The appellant may be young and immature but he still took steps to avoid responsibility and culpability both in police interview and again even after his plea had been entered to the probation officer. There is no evidence of any cognitive impairment on the part of the appellant. He was not the primary carer for the baby before his conviction and will not be the primary carer thereafter. His relationship now is more limited because of his offending. There is no disproportionate effect on the child that would require a non-custodial sentence in this case.

[33] The judge took the full range of relevant factors into account in arriving at his conclusions. We are satisfied that the sentence imposed by the judge is entirely within the appropriate range and is not open to criticism. We grant leave to appeal but dismiss this appeal.