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*Judgment: approved by the court for handing down (subject to editorial corrections) **	*Delivered:* **22/09/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

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THE KING

v

LIAM WHORISKEY

_____

Mr O'Donoghue KC with Mr Devine BL (instructed by Gillen and Co, Solicitors) for the Applicant
Mr MacCreanor KC with Ms Chasemore BL (instructed by Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Sir Paul Maguire and McFarland J

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SIR PAUL MAGUIRE (*delivering the judgment of the court*)

Introduction

[1] The court has before it an application by Liam Whoriskey for leave to appeal against conviction and sentence, such leave having been refused by O'Hara J on 27 May 2020.

[2] On 16 October 2019 the applicant was convicted at Londonderry Crown Court before His Honour Judge Babington ("the judge") and a jury of two offences:

(a) An offence of manslaughter in respect of the death of Kayden McGuinness, a child aged 3½ years at the time of his death; and

(b) An offence of cruelty to the same child, but on a date one month prior to the child's death, contrary to section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968.

[3] The cruelty consisted of a wilful assault on the child in a manner likely to cause him unnecessary injury to health.

[4] On 16 December 2019 the applicant was sentenced in respect of the matters for which he had been convicted. In respect of (a) above, he was sentenced to a term of imprisonment of 13 years whereas in respect of (b) above he was sentenced to a consecutive term of two years. In total, therefore, the sentence imposed on the applicant was one of 15 years' imprisonment.

[5] The applicant has renewed his applications in relation to conviction and sentence to this court. At the end of the hearing of these matters the court announced that the applicant's application in respect of each aspect was dismissed. The court indicated that it would, at a later date, provide its reasons in writing which, by this judgment, it will now proceed to do.

The Charges

[6] The applicant was originally charged as follows:

(i) Murder, contrary to common law, on a date unknown between 16 and 17 September 2017.

(ii) Causing or allowing the death of a child, contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. This was an alternative to the original count (i) above.

(iii) Cruelty to a child, contrary to section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968. This related to events which allegedly occurred on 15 August 2017.

(iv) Cruelty to a child, contrary to section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968.

[7] In respect of count 1, at the trial the charge of murder, in effect, was reduced to one of manslaughter. This was the upshot of an application at the end of the Crown case by the defence that in respect of the murder charge the applicant had no case to answer. Nonetheless, the manslaughter charge which replaced the murder charge was contested. In respect of this offence the applicant was ultimately found guilty.

[8] As count 2 was an alternative to the original count 1 and as the jury found the applicant guilty on a manslaughter charge, as just referred to, no verdict in respect of that charge was sought or received.

[9] In respect of count 3, the applicant was found guilty by the jury.

[10] Finally, in respect of count 4, the applicant was found not guilty by or on the direction of the judge, as a result of submissions made by the defence at the end of the prosecution case. In respect of this charge it had been alleged that the applicant had been responsible for a specific injury to the child allegedly received some weeks before his death. However, the judge was persuaded at the close of the prosecution case that there was insufficient evidence in respect of this episode for the case to go to the jury.

[11] In respect of the findings of guilty above, the jury took approximately two hours of deliberation following a trial which lasted in the region of three and half weeks. Moreover, the jury were unanimous in their findings.

The Grounds of Appeal

[12] The grounds of appeal have been added to over time. There were seven original grounds which were compiled by the applicant's counsel who represented him at the trial. However, at a later date, his trial counsel were replaced by the counsel who represented him in this court. These counsel added three new grounds of appeal, grounds 8, 9 and 10.

[13] The grounds of appeal before this court can be summarised as follows:

(i) Grounds 1-3 relate to a photograph album described as "Exhibit 6" which contained, *inter alia,* photographs of the dead child. These were provided to the jury by the prosecution at the opening of the trial. It is claimed that these photographs:

   (a) Served no purpose other than to excite prejudice against the applicant.

   (b) They were not "best evidence" in circumstances where there was three dimensional imaging available.

   (c) Their prejudicial effect outweighed any suggested probative value.

(ii) Ground 4 related to the judge's decision in respect of an application made to him by the prosecution to adduce bad character evidence. This related to two previous convictions of the applicant which were said to evidence, together with his behaviour in respect of a child, "O", a propensity, on the applicant's part, to violence.

(iii) Ground 5 asserted that it was against the weight of the evidence for the jury to conclude that a nasal injury sustained by the deceased on 15 August 2017 was inflicted by the applicant.

(iv) Ground 6 related to what was complained to be a decision of the judge to permit the jury to rely on medical evidence as being capable of establishing perpetrator identification.

(v) Ground 7 was in the terms that it was against the weight of the evidence "for the jury to be permitted to rely on the medical evidence presented by the prosecution as being capable of establishing perpetrator identification."

The three "new grounds" were:

(vi) Ground 8, to the effect that the judge failed to direct the jury sufficiently, or at all, as to the ingredients of the offence of manslaughter.

(vii) Ground 9 which claimed that the judge had failed to direct the jury sufficiently, or at all, as to the fact that the case against the applicant was a circumstantial case or "as to the primary facts or as to the inferences that it was open to the jury to draw from those primary facts."

(viii) Ground 10 related to the proposition that the sentence in respect of manslaughter that that been imposed on the applicant was manifestly excessive and wrong in principle.

The Factual Background – General Summary

[14] The trial of the applicant lasted some three and half weeks and involved the evidence of many witnesses, including the expert evidence of in the region of five medical witnesses. In what follows, the court will offer a necessarily general summary relating to the main issues which dominated the proceedings. While the court has considered all of the materials placed before it, it is not feasible to set out here the discussion on every issue which arose. In approaching its summary, the court has been substantially guided by the judge's review of the facts and the evidence which, so far as it goes, has not been the subject of challenge and which has been accepted by the parties as an accurate review of the evidence.

[15] Erin McLaughlin ("the mother") resided at all material times, for the purpose of this case, at a Northern Ireland Housing Executive flat at 2B Columbcille Court, Derry. She lived there with her two children. The eldest of the two was Kayden McGuinness who, at the relevant time, was aged in or about 3½ years, having been born on 25 March 2014. The mother's second child was a baby girl, called "S." S was born in April 2017.

[16] The flat had two bedrooms and was situated on the first floor of a block of flats. The mother and S occupied one of the bedrooms while Kayden occupied the other. The flat's state of repair was poor with, in particular, the handle to Kayden's bedroom being broken so that it had to be kept effectively in a locked position when

Kayden was in it. To open it seems to have involved manipulation of the broken lock with a knife.

[17] Kayden suffered from disabilities and at the relevant time was being assessed for autism.

[18] The applicant was not the father of either of Erin's children. He had begun a relationship with Erin in or about February 2017, not long before S's birth. The relationship between the two therefore began when Erin was expecting S. It was in July/August 2017 that the applicant moved in with Erin, sharing a bedroom with Erin and, later, S.

[19] The applicant had a child of his own with a lady called Toni Connor, but their relationship had sometime before broken up.

[20] At the material time, for the purposes of this judgment, the applicant was in full-time employment working in the catering industry. Erin remained at home with the children. A week before the death of Kayden, Erin and the applicant decided to get engaged.

[21] It appears that Kayden was not an easy child to manage. His talking was very limited and he appeared to have been hyperactive. While he was primarily looked after by Erin, the applicant, on occasions, helped out and took over, which had the benefit of giving Erin a rest.

[22] A number of incidents involving Kayden were adduced in evidence by the prosecution at the hearing.

[23] First of all was an incident which occurred on 15 August 2017. This incident later gave rise to the conviction of the applicant in respect of count 3. Erin had been out at her father's house and Kayden was being looked after by the applicant. While at her father's house, Erin received a phone call from the applicant. She was told that he had heard Kayden crying in his bedroom and had gone to the bedroom to investigate. When he entered the room, he could see that the child had brought toys onto the bed beside him. In the applicant's account, Kayden was alleged to have dropped a small toy which hit him in the face. This allegedly had caused a red mark at the bridge of the child's nose. From the applicant's description the mother's impression was that the injury caused was not serious. When she returned home that evening the child was in bed and it was not until the following morning that she got the chance to see the injury in day light. On that morning the applicant had already left for work. What the mother said she saw was that the child had a swollen nose and two black eyes. She was alarmed by this, and immediately rang the applicant at his workplace. She told him to get back to the flat and explain to her what had happened. She also took a photograph of the injuries on the child's face. This was later available at the trial and was seen by the jury. Once the applicant had returned home that morning he maintained to Erin that the child's injuries were

caused as already described with a small toy car falling on him and, in particular, he denied that he had done anything wrong.

[24] The photograph, it appears, was later posted on Facebook. In September, after the child's death, it came to the attention of a social worker who gave evidence at the trial. She told the jury about her reaction to seeing the photograph and how, in agreement with other social workers, it was decided to print it off and pass it to the police for investigation.

[25] In the course of the trial, evidence was given by the applicant's employer about a conversation which had allegedly occurred between her and the applicant, at their workplace, in or about the time of the above described injuries to the child from the toy car being received. The applicant asked her the question "how do you know if a wean has a broken nose?" The context was that he had told her that "Kayden had fallen and hit his nose."

[26] At the hearing, when the Assistant State Pathologist was giving evidence, he was asked by prosecution counsel, about the photograph referred to above. The following exchange occurred:

> "Q. Did you subsequently receive an A4 sized photograph of [the child Kayden]?
>
> A. Yes.
>
> Q. And can I ask you what your conclusions were in relation to that …?
>
> A. The photograph is of a young boy with fading bruising on the bridge of the nose and extending on to inner aspects of both the right and left upper eyelids, but more to the left…
>
> … bruising is … as a result of blunt force trauma and the injury noted could have been sustained as a result of a fall against a hard surface or a blow. It is impossible to differentiate the mechanism – the precise mechanism of injury."

[27] In the course of cross-examination defence counsel probed the answers offered by this witness. He was asked – could [the injuries] have been caused by a toy falling on the nose?

[28] The witness's response was that it "would have had to be a very heavy toy … or a toy thrown at a child."

[29] The next incident which the court will refer to allegedly occurred on 16 September 2017. This incident concerned Kayden being taken by the applicant into the centre of Derry on a Saturday morning, leaving the child's mother and S at home.

[30] The applicant and Kayden, it appears, were away from home for a period of around one hour and in that time they had visited a shopping centre (the Richmond Centre) and a number of shops (in particular, a shop called, Cash Convertors). What had given rise to controversy relevant to the proceedings before the court was the way in which during this outing it is alleged that Kayden had been treated by the applicant.

[31] At the trial a number of witnesses had been called to give evidence about what had occurred and, in addition, CCTV evidence was available and was seen by the jury. The route taken by the two was traced in evidence as was events along the way.

[32] In respect of these matters the applicant ultimately faced no charge but what occurred that morning was important from the point of view of establishing the applicant's approach to how he could cope with Kayden and how later that day matters developed, or may have developed, in respect of the treatment of Kayden which, in the prosecution case, led to the events which give rise to the jury finding the applicant guilty of the manslaughter of Kayden just hours later.

[33] In essence, the applicant's case was that as regards the Saturday morning walk the child was difficult to handle and that this had led to problems: the child had pushed shelves in Carphone Warehouse; had behaved difficultly while in Cash Convertors; and had swung his bag while in that shop striking an old woman. These events had led to the applicant, once home, commenting to Erin that he would not take the child out again.

[34] On the other hand, there was evidence via the CCTV footage which the police investigation had uncovered and which was seen by the jury, which portrayed a different picture. In particular, this evidence showed the applicant hold the child roughly and at one point the child being on the floor in one of the shops and being pulled by the applicant back to his feet. A witness had given evidence who was a sales assistant at Cash Convertors. He said he had become aware of the child crying and he saw the applicant approaching him. At this point the child had become more and more restless. This caused the applicant to tell the child to shut up and stand up. The child, it appeared, from the evidence of this witness, continued to cry which caused the applicant to change his tone and become angrier, swearing at him "shut up you fucking wee bastard, why can't you grow up." The applicant was then alleged to have grabbed Kayden by the hood and lifted him in this manner off the floor an action which the witness described as "sick." The witness said "you wouldn't lift an animal like that never mind a child." When confronted with what had happened, the witness was challenged as to why he did not intervene. His

response was that he regretted not doing so and was ashamed of himself for not intervening. Another witness also gave evidence about these events in Cash Convertors. He said he saw the child in the shop but he saw nothing untoward. He said the relationship between the boy and the applicant was like a normal father and son relationship and that he did not hear the applicant engage in foul abuse. This witness did, however, refer to the child crying and he did not recall the child being on the floor of the shop notwithstanding that the CCTV pictures, if appears, clearly showed this.

[35] As the judge remarked in his summing up it was for the jury to draw its own conclusions from the evidence especially as the evidence of the two witnesses who gave their accounts of what had happened in Cash Converters was in some ways diametrically opposed.

[36] The circumstances leading later to the death of Kayden appear to have effectively begun on the afternoon of 16 September 2017 in the aftermath of the applicant and the child returning from their walk in the centre of the city.

[37] It is worthwhile to piece together, at least in general terms, the basic sequence of events that afternoon and evening. In essence, what transpired was as follows:

(a) At our about 4-5pm two sisters of Erin and two nieces visited the flat. It appears that during their visit Kayden behaved normally and engaged in dancing.

(b) One of Erin's sisters suggested that Erin should go out that evening to their father's house. Apparently, it had been usual for members of the family to meet up at their father's on a Saturday evening though, subsequent to S's birth Erin had not done this for some time. The applicant, it further appears, was supportive of the notion that she should go out for a change and ultimately Erin decided to go out.

(c) After the other family members had left, Erin began to prepare for her going out and she seems to have been the person who sought to put Kayden to bed. This was around 1830 hours and involved a process of her heating the child's bottle and taking him, together with various toys, to his bedroom and kissing him good night. This appears to have taken place, though she (Erin) thought that some aspects of the process were unusual, for example, the child normally participated in counting down of the process by which the bottle was warmed in the microwave but on this occasion he did not do so. In a similar way, moreover, Kayden did not react to his mother when she was going out of the room. In these regards, Erin thought Kayden's behaviour was strange and "weird", but she attributed this to him being tired given the busy day which had unfolded.

(d) At the time the mother left the child, she was of the clear view that there were no marks to his face and no other injuries to him that could be detected. Indeed, the applicant gave similar evidence.

(e) Erin had a taxi booked for around 7pm and left at that time leaving the two children under the responsibility of the applicant: Kayden, who was in or about his bed in one bedroom and S in the other bedroom.

(f) In fact, Erin's evidence was that she went to her father's house where she met up with other family members.

(g) After being in the father's house it was Erin's evidence that she went to a bar for a short time before returning to the father's house.

(h) When she returned to the father's house Erin did not, however, stay there as she had met up with a girlfriend in the bar and had later gone with her to a man called Nathan McGlocklan's house in Drumcliff Gardens. There she had a few more drinks, perhaps too many.

(i) As it turned out, Erin allegedly fell asleep and stayed overnight with two others and Nathan at the latter's house.

(j) As there had been difficulty in her getting through by telephone to the applicant's house in the course of the Saturday evening, partly owing to her phone going out of charge, it was not until the Sunday morning that she got a call from her sister, Kira, regarding Kayden. This, of course, involved communication to her of the death of Kayden. Needless to say, she was very upset by this news and she walked home to the flat immediately, which was only a short distance away.

(l) After Erin had gone out to go to her father's house the applicant appears to have checked Kayden in his bedroom. Nothing untoward, it appears, was noted by him and he decided to settle down to have a few drinks and to watch a movie on television. This was just after 1900 hours. Subsequent to this the applicant did not check on Kayden's welfare until around 9:30 hours on the following morning.

(m) On the Saturday evening/Sunday morning it is clear that the applicant drank in the region of 4½ tins of Guinness and had fallen to sleep on a couch in the living room. At one stage, he urinated on himself.

(n) The applicant on the Sunday morning seems to have awoken after 9.00 hrs. Ordinarily, Kayden would have been up between 7-8 am. On this morning, however, the applicant did not check him until close to 10.00 hrs. When checked it appears that the child did not respond despite the applicant trying

to revive him. Indeed, the child's body in his bed was cold and the applicant was of the view that he was dead.

(o) The applicant decided to seek assistance from a neighbour, a Mr Deery. He insisted that the police should be called. The applicant spoke to a police telephone operator and within a short time (about 10 minutes) the police and paramedics arrived. The child was lying on the bed with the back of his head to the left side facing the wall. There was foam coming from his mouth and significant bruising could be seen to the right side of his face. His right ear lobe had a cut and there were no signs of life. No pulse could be found.

(p) Subsequently, the applicant, while accepting that no-one else had entered he flat to his knowledge after Erin has left it on the Saturday evening, and that he had seen no injuries to child at the time the mother had left on the Saturday evening, could give no account of how Kayden had died.

The Medical Evidence

[38] There was a considerable volume of medical evidence adduced in the course of the trial. Without objection or challenge, it was summarised by the judge to the jury in his summing up.

[39] As the judge explained to the jury, it was not unusual for such expert evidence to be called but it was important that it was viewed in its proper perspective as there to assist with regard to the medical aspects of the case as part of the evidence in the case as a whole.

[40] As the judge put it:

> "You are entitled and would, no doubt, wish to have regard to this evidence and to the opinions expressed by the experts when coming to your own conclusions about the medical aspects of the case. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of an expert or indeed experts, you do not have to act upon it."

[41] In what follows, we will set out the main points arising from the evidence of the medical experts together with reference to some particular points which the judge drew the jury's attention to. While the court has considered the range of medical evidence put before it, it will confine itself to concentrating on the broad picture which emerged. The following is relevant in this regard:

(i) Dr Amanda Burns was the forensic medical officer who had been the first medical person called to the scene. The central feature of her evidence related to the extensive bruising she observed on the child when she arrived at

12.15pm on the Sunday morning. Thereafter, she was present to 2pm. During this period, she took photographs and in her evidence she pointed out the various injuries to the jury together with measurements and a discussion of the source of the injuries sustained. She indicated that to her the injuries looked recent. In particular, she referred to the timeframe in respect of the child's injuries and his ensuing death. In her evidence, she accepted that it was difficult to determine when the child's injuries had been received. She thought it could have been within 24 hours of death but it also could have been within 48–72 hours. She agreed it was possible that the deceased could have suffered the trauma either on the Friday or Saturday evenings. Overall, she was of the view that it was difficult to put a specific time on an issue of this sort. In her opinion the child had not died of natural causes though she had been basing herself on visual inspection.

(ii) Dr Ingram, was the deputy State Pathologist for Northern Ireland who carried out an extensive autopsy over a number of days with the assistance of a range of others, beginning on the Sunday evening, 17 September 2017. Internal as well as external examinations were carried out, all of which led to a considered commentary in respect of the death. In its most material part, he summed up in the following way:

> "There were multiple injuries on his body, mostly bruises, and most of which were on his face and scalp. There was also some on the limbs and trunk. On the face there were four bruises on the right cheek, including a large bruise on the centre of the cheek. There were three bruises on the left hand side of the forehead, up to seven bruises on the left cheek and a further bruise on the under-surface of the chin. There was a small laceration, or tear, on the lobule of the right ear. There were also at least fifteen bruises on the scalp. These bruises were to the naked eye, and using the microscope, of a broadly similar age. They were all less than a few days old and quite possibly less than that. These injuries were caused by blunt force trauma to the head. As a result of one, or more, of these blows to the head, a thin film of bleeding, of a type known as subdural haemorrhage, had developed over the surface and the brain had become swollen, termed cerebral odema. The combination of the subdural haemorrhage and cerebral oedema is indicative of severe blunt force trauma of the head and it was this which was responsible for this boy's death. Death however is unlikely to have been immediate.
>
> Whilst it is not uncommon for young children of this age to sustain injuries from knocks and falls, the multiplicity

> of injuries in this case and their pattern and distribution clearly indicates that they were non-accidentally sustained and were the result of his being assaulted, possibly repeatedly over a period of time. The multiple bruises on the scalp associated with the underlying injury to the brain, were due to his having been struck repeatedly on the head, possibility by punching. Similarly, the bruising on the right cheek and on the under-surface of the chin could have been caused by blows from a fist.
>
> The post-mortem examination also revealed bruising within the muscles and soft tissue adjacent to the bony spine in the chest."

Later, by way of general summary, Dr Ingram said:

> "Thus, in summary this young boy had sustained a large number of bruises caused by blunt force trauma to his face and head undoubtedly as a result of non-accidental injury. As a result of the blows to the head there had been bleeding over the surface of the brain which had also become swollen. It was the effects of the head injury which were the cause of his death."

In discussing Dr Ingram's evidence in his charge to the jury, the judge referred to Dr Ingram's view that the bruising was all of a similar age. As the judge explained:

> "He was asked that if this had occurred on the Friday would he have survived [to the following day], to which the answer was no. He was also asked whether if the injuries had been received 48 hours prior to death would he have survived during this period, to which the answer was also no. Finally, he was asked whether the injuries could have been received after 7pm on the Saturday, to which the answer was that this was "entirely plausible." Under cross examination, he was unable to say with any certainty when the brain swelling began or reached its maximum. In re-examination, he was asked could the child's injuries have been sustained during the evening of the Saturday and the morning of the Sunday. He replied that there was nothing to go against this."

(iii) The evidence of Professor Al-Surraj, a consultant neuro-pathologist from King's College Hospital in London, was that it was less likely in this case that

the child's bleeding occurred beyond 48 hours prior to death. When asked about whether it may have occurred after 7pm on the Friday, his reply was that this was a likely scenario and that it would be less likely to be older than that. He later made the point that cerebral oedema in children could be caused by minor trauma.

(iv) Dr Mulligan, the assistant State Pathologist in the Republic of Ireland, gave evidence. She remarked that many of her findings were similar to those of Dr Ingram. She accepted that the injuries to the child were most likely non-accidental injuries which she thought may have arisen from minor blunt force trauma to the head, resulting in cerebral odema. In her view, the injuries raised the possibility of the child being grabbed on the head. She agreed with Dr Ingram that at least moderate force would have been involved. She said that it was not possible to determine with any certainty (1) the exact time period during which the bruising was sustained or (2) whether the bruises were sustained in one or more incidents. The cause of death, she said, was cerebral odema.

(v) Another neuro-pathologist, Dr Farrell, also gave evidence. He said that he was satisfied that the child had died from head injuries which were entirely consistent with being non-accidental. Swelling of the brain caused by trauma was, he thought, the cause of death. He said that there were not many bruises to the brain and there were no fractures. However, a number of blows (or such like) could cause the swelling. He said he could not exclude a combination of blows but he was unable to say when the brain swelling began. He agreed with the other experts that age determination of bruising was extremely difficult and he had no contrary observations in respect of the various time frames suggested *viz* 24 to 48 hours or less. He was dealing with an inexact science. Dr Farrell said that any alteration of behaviour can be evidence of concussion and that tiredness can be part of concussion. He agreed with the suggestion put by counsel for the prosecution that it was not plausible that the trauma occurred 48 hours before death and he thought that trauma from 7pm onwards on the Saturday was entirely plausible though it might be before this time. He thought that children can have a delayed onset of swelling whilst they were suffering concussion.

[42] Overall, there appeared to be general agreement between the experts that it was not possible to identify a specific time of death.

The Appellate Test

[43] This court, in its recent decision in *R v Hegarty* [2022] NICA 13, has considered the proper approach to be taken when it has before it the issue of the safety of a verdict. In that decision, it confirms and sets out the following principles taken from the well-known case of *R v Pollock* [2014] NICA 34 at paragraph [32]:

"(i) The court should concentrate on the single and simple question: does it think that the verdict is unsafe?

(ii) This exercise does not involve trying the case again. Rather, it requires the court, where conviction has followed trial and no fresh evidence is being introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

(iii) The court should eschew speculation as to what may have influenced the jury or judge to its verdict.

(iv) 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 reasonable analysis of the evidence, it should allow the appeal."

Photographs – Grounds 1, 2 and 3

[44] These grounds of appeal relates to a booklet of photographs which was given the Exhibit number 6.

[45] The booklet consisted of 41 photographs taken by a police photographer on or about 17 September 2017 at the first floor flat, 2B Columbcille Court, Derry.

[46] While there was a wide range of materials contained in the booklet of photographs the controversy which has arisen is primarily based on a series of photographs depicting the deceased boy in bed within his bedroom. What is shown, in effect, is Kayden in his bed covered, save for his head and upper chest, by a bed blanket. The scene depicted is broadly as he was found dead on the morning of Sunday 17 September 2017. A number of the photographs show the injuries received by the child especially to the head and face and to a lesser extent, his body. The extent of his injuries undoubtedly is eye catching and these photographs are, to a degree, shocking at first sight. The question which stands out to an observer considering these photographs is how the child could have obtained or sustained such injuries.

[47] Many of the photographs also show the chaotic nature of the flat. Toys were everywhere in the bedroom in which Kayden lay but also elsewhere in the flat. The different parts of the flat are photographed, including the second bedroom in which Kayden's sister, mother and the applicant slept and the kitchen and bathroom.

[48] In Kayden's bedroom the damaged nature of the door handle is shown. A knife is to be seen lying on the floor nearby which may have been the implement used to open the door, after Kayden had gone to bed, the following morning just prior to 10am.

[49] When the prosecution opened the case, it introduced two booklets of photographs to the jury. Only booklet six is controversial for the purpose of the present proceedings.

[50] In particular, Crown Counsel in the course of opening, asked the jury to look at a number of individual photographs. It is not necessary to set these out seriatim.

[51] Prior to the opening by Crown Counsel, it appears that there had been a discussion about the introduction of Exhibit 6 before the jury. In the course of this discussion counsel for the applicant opposed this course. He argued that such a course was not necessary as other witnesses were available and could be called to deal with the condition of the deceased as found and he further argued that the photographs would only have the effect of exciting prejudice against the applicant. In particular, it was asserted that a statement in the form of results of body mapping was available from an expert and that this would suffice when considered in the context of the range of other expert opinion which was available. Adopting this approach would, he argued, obviate the need to cause distress to members of the jury while enabling the discussion of causation of the deceased's death to proceed. No additional benefit, it was argued, would flow from the photographs of the deceased's injuries, as depicted in the album of photographs, being the subject of display to the jury. The best evidence lay elsewhere in the evidence of the experts.

[52] The judge retired to consider these points but he ultimately decided, as reflected in a short judgment, that Exhibit 6 should go before the jury, as the jury were entitled to "know everything" about the case and to have sight of the injuries which the photographs capture.

[53] In the context of the discourse in the present appeal there was discussion about the correct legal framework which should govern the approach to be adopted by the court in considering this issue. In this regard, there appeared to be a measure of agreement between counsel that the true position was that it was open to the judge to admit the evidence in dispute but that in his discretion and by reason of the requirements of fairness pursuant to Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, it was open to the judge, if he saw fit, to exclude the photographs.

[54] However, it was further accepted by counsel on both sides that this type of evidence would ordinarily be admitted unless the judge chose, on the application of defence counsel, not to do so. In this regard, it was further accepted that the appeal

court would normally be slow to interfere with the exercise of the judge's discretion save in a very clear case.

[55] On this issue the view of this court is that we do not consider that the judge, on the facts of this case, acted outside the boundaries of the discretion which he possessed. Indeed, we all are of the opinion that each of us would not have excluded the photographs from being seen by the jury. This is, in our view, because it is unavoidable that the jury should be able to see for itself the photographs which depict the child's condition in the immediate aftermath of the discovery of his death. While it is accepted that expert evidence about the child's condition could be given and may well be helpful to the jury, the best evidence, as the judge remarked, was evidence which could bring home the reality of what had occurred and, in this case, that was to be found in these photographs.

[56] We do not accept that the jury seeing the photographs would excite prejudice against the applicant or would gratuitously disable him from being able to make the best defence he could. In our view, the jury had a vital function to perform and there will be cases where part of that function will involve it seeing materials, including photographs, which though at times difficult to look at, aid the jury's understanding of the evidence and the implications which arise from it, even if at a later stage, there will be a variety of experts who may be able to provide and convey their views of the situation. In short, we do not consider that in this case any unfairness arose by reason of the jury seeing the photographs of the deceased, as they did.

[57] The court also takes into account that when considering an issue of this nature it should not ignore that the judge, as occurred in this case, is able to ensure that any evidence of this nature is viewed by the jury in its correct context. In this case the judge, in his summing up, was anxious to drive home to the jury that it must act without fear or favour and on the basis of the evidence alone, avoiding any possible risk of the jury failing to have regard to the limits of the evidence provided from whatever source it derived.

The admission of bad character evidence – Ground 4

[58] The terms in which this aspect of the applicant's appeal is put are as follows:

> "4. The learned trial judge was wrong or wrongly exercised his discretion to adduce bad character evidence under Article 6(1)(d) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 relating to two previous convictions for AOABH and common assault involving adult victims recorded against the applicant as evidence of a propensity in the circumstances of this trial to be violent towards a child."

[59] The first of the convictions above arose out of events which happened on 24 December 2013. It led to the applicant being convicted on 12 August 2014 of AOABH, criminal damage and possession of an offensive weapon.

[60] The second arose out of events which happened on 14 August 2015. It led to the applicant being convicted on 6 April 2016 of common assault.

[61] On the date of the last conviction the applicant was made the subject of a restraining order which took effect on 8 April 2016. The order prohibited the applicant from intimidating, harassing, pestering, threatening, or molesting a former partner, Toni Connor, with whom he had a child, O, then aged about 3 years and 5 months.

[62] In the context of the prosecution's application to allow bad character evidence to be adduced, a substantial volume of written material was placed before the court. This included such matters as the Notice of Intention to adduce evidence of the defendant's bad character; an extract from a PSNI domestic abuse history report regarding Toni Connor and the applicant; a copy of the restraining order, referred to above; and the following statements from witnesses:

(i) A statement from Toni Connor dated 14 January 2014;

(ii) A statement from James Maguire dated 27 January 2014;

(iii) A statement from Toni Connor dated 10 July 2014;

(iv) A further statement from Toni Connor dated 14 August 2015; and

(v) A statement from Jack Bozzaard dated 16 August 2015.

[63] The thrust of the above materials related to the relationship which had existed between Toni Connor and the applicant. Their relationship led to the birth of a child, O, in or about November 2012. Their relationship appears to have ended around January 2014.

[64] While there was more than a single ground initially put forward for the admission of all of this evidence by the prosecution as bad character evidence, by the time the judge had heard and considered the application, together with the applicant's opposition to it, the only aspect of it which was successful related to Article 6(1)(d) of the legislation which was to be read with Article 8. In particular, the judge rejected a series of grounds upon which the application had been based, which included attempts to rely on grounds 6 (c), (f) and (g). The court sees no reason to go into these, save that it offers the remark that the judge plainly carefully considered all of the material put before him.

[65] Concerning the successful ground within the legislative scheme, the relevant provisions are as follows:

> "**Article 6 – Defendant's bad character**
>
> 6.—(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> …
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> …
>
> (2) Articles 7 to 11 contain provisions supplementing paragraph (1).
>
> (3) The court must not admit evidence under paragraph (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.
>
> **8. Matter in issue between the defendant and the prosecution**
>
> 8.—(1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include—
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
>
> …

(2) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged."

…

[66] For the sake of completeness, the court will also draw attention to the provisions found in Article 30 of the 2004 Order which deals with the court's general discretion to exclude evidence. At paragraph (1) it states:

"30.—(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Part prejudices—

(a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (exclusion of unfair evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

The Judge's Ruling

[67] Following the hearing of the bad character application before the judge on 3 October 2019 the judge gave his ruling the next day, 4 October 2019.

[68] As already noted he rejected arguments based on 6(1)(c), (f) and (g).

[69] His concentration was therefore on the argument presented to the court based on 6(1)(d). In respect of this he said by way of general summary:

> "The application under 6(1)(d) – the prosecution seek to adduce evidence of the defendant's previous convictions and also alleged misconduct which it is said shows the defendant had a propensity to behave violently, to indulge in aggressive behaviour and lose control within a domestic setting. The convictions are in 2014 and 2016 and relate to incidents in 2013 and 2016. The alleged misconduct is contained within a statement of Toni Connor dated 22 September 2017. It is clear that the convictions arose out of domestic matters and that they relate to matters occurring between the defendant and a previous partner."

[70] Later in his ruling the judge addresses questions which he considered arose. He said:

> "*Hanson* sets out how courts should approach such applications, firstly, does the history of such convictions, or in this case, as well as misconduct, establish a propensity to commit offences of the kind charged in the instant case? It is clear to my mind the answer to that is yes.
>
> Secondly, does propensity make it more likely that the defendant committed the offences charged? Potentially, yes, but that will be up to the jury once they hear the evidence and receive the appropriate directions.
>
> Thirdly, is it unjust to rely on the convictions and misconduct of the same description or category, and further will the proceedings be unfair if they are admitted? I do not consider it would be unfair.
>
> [Counsel for the defence], quite properly reminds me of the provisions in Article 6(3) which gives to the court an obligation to consider whether the admission of such evidence would have such an adverse effect on the fairness of the proceedings, and if that be the case, the court should not admit it. I have given appropriate consideration to that in coming to my conclusion.

> A direction will be given to the jury in due course as to how to deal with this evidence. It deals only with a defendant's propensity to commit such offences, those of violence and will be subject to further direction in relation to the medical evidence in this case.
>
> As far as the evidence of Toni Connor is concerned the jury will have to be satisfied that it is true beyond reasonable doubt before they can use it and an appropriate direction will be given to that effect."

[71] In a passage imparting his overall view, the judge indicated that he was:

> "satisfied that not only is the evidence important to the case as a whole and further that without it the evidence before the jury would not be complete … the previous character and propensity of the defendant is highly relevant. He was the only person in the flat with the deceased apart from a very young baby, S. It must be remembered that the defendant was also drinking and had, indeed, urinated on himself before falling asleep or whilst asleep. I therefore grant the application in relation to the previous convictions as set out in the application to be approved by an agreed summary in papers provided to the court, that is in relation to the convictions.
>
> I also allow Ms Connor to give evidence in relation to the matters set out in her deposition and, in particular, those matters set out in paragraphs 2(a) to 2(g) of the prosecution's application."

[72] Paragraphs 2(a) to 2(g) of Toni Connor's deposition assists understanding of the court's order and read as follows:

> "The prosecution seek to adduce the following specific evidence in the statement:
>
> a. The first time Liam was violent to me … he had been drinking.
>
> b. The only way he could express that was when he was drinking and got angry. He would get angry after a few drinks that's when he let it all come out. When Liam was drinking he would go from 0-60 in a instance and the slightest thing would set him off.

c. I would never leave him alone with O.

d. One thing was if Liam was watching TV he would get mad at the wean for playing around him when he was trying to listen to the TV. He would have shouted at him 'Fuck up and shut up.' It was frustration at the wean for making noise.

e. I only ever would give O a light tap to stop him doing something Liam would also discipline him. His slaps were too heavy for my liking. He would slap him on the hand or the leg but it would be too heavy and I noticed that it was leaving red marks on O…to me this was just too much.

f. He would then aggressively go into O's face and say things about me like 'your mummy is a slut.'

g. When he had a drink you always had to watch what you said because I was scared to have a conversation in case he would fly off the handle, he would be shouting at me drunk I would say the wean is upstairs, he would say he didn't give a fuck about the wean."

[73] In fact, as events transpired, what occurred was that a number of agreements between the parties were made for the adduction of evidence in written form. However, it is clear that the key players – the applicant and Toni Connor – later both gave evidence before the jury and were, of course, subject to cross-examination. Finally, there is no dispute between parties that the judge in his summing up, true to his word, carefully directed the jury about how they should treat the bad character evidence that was placed before them.

[74] In the course of the applicant's submissions before this court it was suggested that the judge's ruling was flawed and that his conviction should be set aside on this basis. It was argued, in particular, that the issue of propensity, upon which the judge relied, was, on a correct view, not relevant to the trial but that, in any event, the material admitted as bad character evidence did not, in fact, demonstrate propensity. The suggestion was made that insofar as propensity might be relevant that was based on alleged behaviour directed at adults, not children. The material available, in other words, did not embrace or demonstrate a propensity to assault a child: it simply did not go this far. In this regard, any red marks on O could be properly viewed as no more than the outcome of chastisement and in that context both Toni and the applicant had acted similarly. This was a long way away from someone assaulting a child while in a bad temper. Likewise shouting at a child or acting aggressively to a child would not amount to propensity, even if at the time

alcohol had been consumed, in the absence of the use of violence to the child. Thus, a propensity to behave violently even when intoxicated would be insufficient to demonstrate propensity. While it was accepted that there was evidence that on the night of 16-17 September 2017 the applicant may have consumed 4½ cans of Guinness, it was suggested that there was no evidence that he was drunk or not in control of his faculties.

[75] While we have considered the above arguments carefully, in our estimation the judge was acting well within the ambit of his authority when he reached the conclusions encapsulated at paragraphs [69] et seq above. There was, in our opinion, more than sufficient evidence to raise serious concern that the applicant was (and is) a person who could rise to acts of violence, including domestic violence. His convictions alone showed this and, as is so often the case, his consumption of alcohol appears to have been a factor in several of the instances of loss of control and aggression, though his tendencies to misbehaviour cannot alone be linked to this factor. It appears that even in such an apparently innocuous situation as him watching the television he could "get mad" by the presence of a young child playing in the vicinity leading to his shouting and abusing the child.

[76] In our opinion, no complaint can legitimately be made of how the judge went about his task of determining whether to grant the application before him to admit bad character evidence. He correctly referred to the well-known case of *Hanson* [2005] 1 WLR 3169, which is directed at the issue of propensity, and applied carefully the tests referred to in that case at paragraph [7]. In these circumstances this court will bear in mind that, as stated in *Hanson* at paragraph [15]: the Court of Appeal "will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably."

[77] Finally, we reject the view that the bad character evidence admitted by the judge was not relevant to the issues in the trial and/or did not demonstrate propensity. It seems to us that it is clear that there existed a key issue which the judge had correctly identified. This was that the applicant was a person who had a propensity to violence and to engage in aggressive behaviour within a domestic setting. If this was correct, or was a tenable position for him to adopt, it is difficult to see how this could be other than important evidence in respect of a case such as this one, where the applicant was on the face of events in charge of a very young child, who was later found dead, and where, on any view, he appears to have, in all probability through the consumption of alcohol, failed conscientiously to attend to the child's welfare at the level of checking him regularly.

[78] This court also rejects the argument made before it that any propensity for violence which was relevant existed only in respect of violence to adults rather than a child. In our view, this point overlooks the fact that the events which have allegedly occurred in this case arise out of a domestic setting and, on the evidence available, involve all of those who populate that setting, including children.

Domestic violence, in short form, hurts adult partners and children alike, and the judge's analysis in this regard, in our view, is not flawed.

[79] This court dismisses this ground of challenge.

The nasal injury - Ground 5

[80] The terms in which this ground of appeal is set out are short and to the point. It is stated that "it was against the weight of the evidence for the jury to conclude that a nasal injury sustained by the deceased on 15 August 2017 was inflicted by the applicant."

[81] This plainly relates to the jury's finding of guilt in respect of the original charge 3 on the indictment.

[82] It is not necessary for the court to say any more about the context in which this charge arose as the court has already set it out earlier in this judgment.

[83] Before this court, this ground attracted only a fleeting reference from counsel for the applicant.

[84] The court is of the view that it can detect no point of substance which could possibly lead to the applicant's conviction on ground 3 being set aside. What is evident is that the jury's conclusion in respect of this issue depended on how it resolved and/or reconciled the different positions adopted by the prosecution, on the one hand, and the defence on the other. The jury saw and heard the relevant witnesses in support of the different positions. It then had to come to a decision which inevitably involved a judgement of fact, applying the normal burden and standard of proof. It seems to us that their conclusion cannot be impeached in this court. The matter was simply one for the jury and turned on the evidence the jury accepted. If they believed the applicant or thought his version might possibly be true they should not have convicted. They were, however, entitled to reject the applicant's account and accept the prosecution case.

[85] We dismiss this ground of appeal.

Issues decided against the weight of the evidence – Grounds 6 and 7

[86] These two grounds of appeal can be taken together.

[87] In respect of the first it is alleged that:

> "6. It was against the weight of the evidence for the Learned Trial Judge at the end of the case to conclude or permit the jury to rely on the medical evidence presented

> by the prosecution as being capable of establishing perpetrator identification."

[88] In respect of the second it is alleged that:

> "7. It was against the weight of the evidence in failing to identify a time of death for the Jury to be permitted to rely on the medical evidence presented by the prosecution as being capable of establishing perpetrator identification."

[89] The case made by the applicant in his skeleton argument in essence was that as there was not an established time of death there was a reasonable possibility that the blunt force trauma which had such catastrophic consequences causative of death may have occurred at a time when the applicant did not have sole care of the deceased. Moreover, it was submitted that the medical evidence did not "singularly point to the applicant as the individual responsible for an unlawful act resulting in the unintended death of the deceased." Finally, the introduction of the photographs at the outset of the trial, showing the deceased lying dead on his bed, had a prejudicial effect on the proceedings in that it caused the significance of the medical evidence to be lost.

[90] Before this court it was indicated that these grounds of challenge continued to be pursued but it seemed to the court that there was at the least a subtle change in that increasingly the grounds of challenge seemed to shift from the points already expressed above to the invocation of the more recently introduced ground of challenge relating to steps to be taken by the trial judge where he was dealing with circumstantial evidence, which the court will deal with as arising under Ground 9 of the supplementary notice of appeal.

[91] As far as these two grounds of appeal are concerned, we are of the view that there is no basis which has been disclosed which comes close to supporting the view that either of these grounds have any prospect of success.

[92] The court has no reason not to accept the analysis offered by the judge in his summing up (referred to at paragraphs [38]-[40] above) concerning the role of the medical expert in a case such as this. The function of such witnesses is to assist the jury in their task but conclusions as to what weight to give to the variety of points which may emerge, especially when there are, as here, a whole series of witnesses, is very much reserved to the jury who, must judge the evidence in the round, having regard to all of it. This applies just as much to the consideration of questions about the time of death and the dating of bruising as it applies to other issues.

[93] The matter, we consider, was put in a compelling way by the Single Judge (O'Hara J) when he refused leave in respect of these grounds. He said:

> "It is well known that doctors cannot say how long old bruising is in this type of case. Accordingly, the prosecution case could never be that the blows which led to the bruising and to the bleeding in the brain occurred at 8pm or 10pm or midnight or at any given time. That must all have been explained to the jury. The applicant's case however was that he was unaware of any injury to Kayden at 7pm on 16 September when Kayden was put to bed. Simply put, Kayden had no visible bruises at that point but in the morning when he was found dead he was covered in bruising. In these circumstances, it was entirely open to the jury to conclude that the injuries were inflicted by the applicant while he was left in charge of Kayden. I can see no conflict between that verdict and the medical evidence which was before the jury. The medical evidence did not say that the bruising *must* have been inflicted before 7am on the 16th. While it did say that it might have been so inflicted before 7pm on the 16th, that does not require a judge to withdraw the case from the jury. If the jury had heard the evidence which it accepted might possibly have been true about Kayden sustaining injuries before 7pm it would have been bound to acquit but that just is not the case here."

[94] In short, it is for the jury to determine how to evaluate the evidence before them.

[95] The suggestion made, on the applicant's behalf, that there was no proof of non-accidental injury, we consider, is not well made and does not withstand scrutiny in the context of a review of the medical evidence as a whole, where the use of such language appears at various points.

[96] Nor, in our opinion, is there any proven substance to the contention that there may have been a failure on the judge's part to alert the jury to the issue of whether the child had been acting weirdly.

[97] Finally, the court has already ruled against the applicant in respect of the admission of the album of photographs referred to as exhibit 6. We find that there is nothing in the references in respect of the present issue which requires the court to re-assess the position it has already adopted.

[98] We dismiss both these grounds of appeal.

Failure of the Judge to direct the jury as to the offence of manslaughter – Ground 8 - and failure to direct the jury as to the fact that the case against him was a circumstantial case – Ground 9

[99] The above issues are at the centre of the supplementary grounds of appeal. In its full form Ground 8 reads:

> "The LTJ failed to direct the jury sufficiently or at all as to the ingredients of the offence of manslaughter."

Ground 9 reads:

> "The LTJ failed to direct the jury sufficiently or at all as to the fact that the case against the applicant was a circumstantial case; or as to the primary facts or as to the inferences that it was open to the jury to draw from those primary facts."

[100] This court makes clear from the outset that in the aftermath of the delivery of the judge's summing up at the end of the trial, there was no requisition made by either the applicant or the prosecution in respect of any alleged deficiency in respect of it. Indeed, this remained the position even after the applicant's trial counsel had settled his notice of appeal and his grounds of appeal against conviction in November 2019.

[101] It was not until September 2021 after the current counsel representing the applicant had been appointed that these new supplementary grounds emerged.

[102] The purpose of the legal facility to requisition a judge in the aftermath of his charge to the jury (or before if the charge is delivered over different days) is to facilitate, so far as possible, the judge being able to correct any error of substance or omission on his part prior to the jury retiring. Where there is no requisition in respect of a given point, especially an important or fundamental point, this will normally indicate that the respective legal representatives are content with the accuracy and completeness of what the judge has said. In these circumstances, it will usually follow that if a point is taken in this court which has not been preceded by a requisition in respect of what had been said or not said at the time the charge was given, this will tend to indicate that it is likely that those, solicitors and counsel, who were involved at the time considered that the judge had done enough and had acted properly. This, it seems to us, ought usually to be at least the starting point from which to consider the matter, as has been indicated by this court in other cases, the most recent of which is that of *R v RD* [2021] NICA 60 at [15] – [17].

[103] In respect of these grounds of appeal counsel's attack centred on the alleged failure of the judge to explain the ingredients of unlawful act manslaughter to the jury and an alleged failure by the judge to explain to the jury that the case against the

applicant was a circumstantial one. There were, it was claimed, no "meaningful directions" on these issues. The court could not, therefore, "consider the charge to the jury to be in any way adequate." Accordingly, the convictions were unsafe.

[104] While the judge had made reference in his charge to the existence of the manslaughter charge he had not, it was submitted, included in it anything "to focus the minds of the jury on the need for an assault to have occurred … the causative effect of which was to cause death."

[105] There was, additionally, no direct evidence to prove who had caused the injuries to the child so that the Crown case was, it was said, both inferential and circumstantial.

[106] In support of these submissions, the following cases were cited in the applicant's skeleton argument:

(a) *R v Lawrence* [1982] AC 510 where at page 519 of the report the following was stated from the speech of Lord Hailsham:

> "The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light … A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course, it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts."

(b) *R v Mowatt* [1968] QB 421 where Diplock LJ is quoted as saying at page 421:

> "The function of a summing up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the issues of fact on which they must make up their minds in order to determine whether the accused is guilty of a particular offence."

(c) *DPP v Kilbourne* [1973] AC 729 where it was stated by Lord Simon at page 758 that circumstantial evidence works by cumulatively, in geometrical progression, eliminating other possibilities.

(d) In similar vein, there was reference to the words of Pollock CB in *R v Exall* (1866) 4 F & F page 929 where he said:

> "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."

(e) In *Teper v The Queen* [1952] AC 480 Lord Normand said at page 489:

> "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."

[107] It was also suggested, on the basis of text book references, that though circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, a view which had also been expressed by Lord Normand in *Teper* (at page 489).

[108] In the applicant's written submissions, the case of *McGreevy v DPP* [1973] 1 WLR 276 was acknowledged as relevant. As this was a Northern Ireland appeal heard before the House of Lords, which had not been overruled, it plainly is of some importance. In this case the appellant had been found guilty of a murder which was if not exclusively, substantially, based on circumstantial evidence. The point of law which had been certified for the House of Lords raised the issue of whether at a criminal trial with a jury, in a case in which the case against the accused depended wholly or substantially on circumstantial evidence, it was the duty of the trial judge not only to tell the jury that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any reasonable conclusion.

[109] In a speech given by Lord Morris, with which the other members of the House agreed, it was held that no such special direction was required.

[110] At page 285 of the report Lord Morris expressed his conclusion as follows:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can

> readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond reasonable doubt unless they wholly rejected and exclude the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally, a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond reasonable doubt.
>
> In my view, it would be undesirable to lay down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt."

[111] As the judge later put it:

> "There should be no set formulae which must be used by a learned judge" (page 286).

[112] The *McGreevy* case has been applied in a range of cases subsequently, including by the England and Wales Court of Appeal in the case of *R v Kelly* [2015] EWCA Crim 817. It has also been applied in this jurisdiction in such cases as *R v O'Neill* [1997] 9 BNIL 16; *R v Marcus* [2013] NICA 66; *R v McCarney* [2015] NICA 27 and, in the unreported case of *R v Anderson* [1995], also a judgment of this court.

In *O'Neill*, Nicholson LJ said that:

> "there is no obligation on the judge to direct a jury in some special form, provided that it is made clear to the jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt."

Girvan LJ in *Marcus* at paragraph [32], in similar vein, spoke of the:

> "real issue" being "whether, having regard to the facts of this particular case, [the judge] was required to give the classic direction appropriate to cases that are essentially dependent upon circumstantial evidence. Provided that the fundamental requirements as to the burden and standard of proof are effectively dealt with, ultimately, the particular form of the directions to the jury always remains a matter for the trial judge, to be crafted in accordance with the specific circumstances and facts of each case."

What the judge said in his charge

[113] The judge's charge runs to some 32 pages. Most of these, inevitably, were taken up with a review of the evidence and a reminder to the jury of the evidence given before them.

[114] At the outset of the charge the judge referred to the role of the jury. His comments included the following:

> "Decisions about the facts of this case are for you and you alone to decide."
>
> "You will have to decide what actually happened at the time of the events about which you have heard so much."
>
> "You do so by having regard to the whole of the evidence in the case and forming your own judgment on it and, in particular, as to the reliability or otherwise of the witnesses whose evidence is in dispute or appears to be in dispute."
>
> "You must decide only on the evidence that has been placed before you and you are entitled to come to common sense conclusions based on the evidence you accept as being reliable."
>
> "You must not speculate on the evidence which might have been."
>
> "You must clear your mind of any sympathy or prejudice for or against the prosecution or defence."
>
> "You must also put out of your mind any sympathy for Kayden's family and Kayden."

> "This has been a very emotional case for all involved included … yourselves."
>
> " … you decide the case on the evidence in an objective and dispassionate way."
>
> " … deal with the case according to the evidence."
>
> "The facts of the case are your responsibility."
>
> "It's your duty to act on your own views."
>
> "The prosecution must prove the defendant is guilty beyond a reasonable doubt."
>
> "The defence does not have to prove that he is innocent, the defendant does not have to prove anything at all."
>
> "The standard of proof … is guilt beyond reasonable doubt…proof which leaves you firmly convinced of his guilt."
>
> "If you think that there is a real possibility that he is not guilty you must give him the benefit of the doubt and find him not guilty on that charge, if you are not sure, your decision must be not guilty."
>
> "What you have to prove is that the body of material facts which make up the particular charge against the defendant … in order that the defendant can be convicted of manslaughter you must be satisfied beyond reasonable doubt that sometime between 16 and 17 September 2017 he perpetrated an unlawful act or acts which caused the death of Kayden."

Guidance

[115] We consider that we should refer to sources of guidance in this area.

[116] As regards the ingredients of unlawful act manslaughter there is a passage in Archbold which is worthy of quotation. It is at 19-11 of the 2022 edition and reads:

> "Involuntary manslaughter is unlawful killing without intent to kill or cause grievous bodily harm … The difficulty is to identify the elements which may make the

killing unlawful … There are two classes of involuntary manslaughter namely 'unlawful act' manslaughter and manslaughter by gross negligence involving a breach of duty …

In respect of manslaughter arising from the unlawful act of the accused, the following propositions appear to be established:

(a) the killing must be the result of the accused's unlawful act though not his unlawful omission.

(b) the unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, risk of some harm resulting therefrom, albeit not serious harm.

(c) it is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm; the mens rea required is that appropriate to the unlawful act in question.

(d) 'harm' means physical harm."

[117] As regards the issue of how a judge should direct a jury in a circumstantial case, the most recent advice is that found in Part 1 of the Crown Court Compendium (August 2021). The most salient directions are found at paragraphs 8, 9, and 10:

"8. In a case in which there is both direct and circumstantial evidence, the jury should be directed as follows:

(1) Some of the evidence on which the prosecution rely is direct evidence. Briefly summarise the direct evidence.

(2) The prosecution also rely on what is sometimes described as circumstantial evidence. This means different strands of evidence no one of which proves that D is guilty but which, the prosecution say, when taken together and with other evidence prove the case against D. Briefly summarise the circumstantial evidence, and the conclusions which the prosecution say are to be drawn from it.

(3) See paragraph 9 below:

9. In a case in which the only evidence is circumstantial, the jury should be directed as follows:

   (1) In some cases there is direct evidence that a defendant is guilty, for example, evidence from an eye witness who saw the defendant committing the crime, or a confession from the defendant that he/she committed it.

   (2) In other cases however, including this one, there is no direct evidence and the prosecution rely on (what is sometimes referred to as) circumstantial evidence. That means different strands of evidence which do not directly prove that D is guilty but which do, say the prosecution, prove that D is guilty when they are drawn together.

   (3) Briefly summarise the circumstantial evidence and the conclusions which the prosecution say are to be drawn from it.

   (4) See also paragraph 9 below.

10. In a case involving any circumstantial evidence, the jury should be directed as follows:

   (1) Briefly summarise any evidence and/or argument relied on by the defence to rebut the circumstantial evidence and/or the conclusions which the prosecution contend are to be drawn from it.

   (2) The jury should therefore examine each of the strands of circumstantial evidence relied on by the prosecution, decide which if any they accept and which if any they do not, and decide what fair and reasonable conclusions can be drawn from any evidence that they do accept.

(3) However, the jury must not speculate or guess or make theories about matters which in their view are not proved by any evidence.

(4) It is for the jury to decide, having weighed up all the evidence put before them, whether the prosecution have made them sure that D is guilty."

[118] The Northern Ireland Bench Book, though somewhat dated, also contains useful material in respect of cases involving circumstantial evidence. Of particular interest are the following passages:

"(a) Circumstantial evidence, on the other hand, simply means that the prosecution relies upon evidence of various circumstances relating to the crime which, when taken together, establish the guilt of the defendant because the only conclusion to be drawn from the evidence is that it was the defendant who committed the crime.

(b) It is not necessary for the evidence to provide an answer to all the questions raised in the case. You may think that it would be an unusual case indeed in which a jury can say "We now know everything there is to know about the case." Nor is it necessary that each fact upon which the prosecution relies, taken individually, prove that the defendant is guilty. You must decide whether all of the evidence has proved the case against him.

(c) However, circumstantial evidence must be examined with great care for a number of reasons. First, such evidence could be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and often to slightly distrust) facts in order to establish a prosecution, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant."

The court's assessment

[119] In respect of ground 8, the court is not convinced that there is substance to it. We consider that it must have been obvious to the jury what its function was is respect of the charge of manslaughter and what they needed to direct their minds to. While the judge's charge dealt specifically with this issue briefly, the words used, we consider, must be read within the overall context of the information available to the jury.

[120] The jury was told in simple terms what they had to look for *viz* the existence or otherwise of the perpetration of an unlawful act or acts which caused Kayden's death. After three and a half weeks of hearing evidence, it may be inferred that the jury would not have had difficulty in understanding that the unlawful act being searched for was linked to actions on the part of the applicant which may have been responsible for the condition in which the deceased was found. It cannot be doubted that the jurors will have been aware (from the medical evidence and from other evidence) that the injuries sustained by Kayden arose from physical harm and, as non-accidental injuries, the actions giving rise to them could not be other that creating the risk of harm to the child in a manner that all sober and reasonable persons would recognise.

[121] In short, the court has no hesitation in accepting that the language of the judge was sufficient to communicate, on the facts of this case, the necessary elements described at paragraph 19-11 of Archbold set out above. In addition, it could not be said that the judge's charge did not make clear where the burden and standard of proof lay and the plain need for the prosecution to prove their case beyond reasonable doubt.

[122] In respect of ground 9, it is the view of the court that it would have been desirable for the judge to have specifically addressed to the jury the points suggested in such texts as the Crown Court Compendium and the Northern Ireland Bench Book – for example – the judge did not summarise those aspects of the evidence based on circumstantial, as opposed to other factors; did not outline the conclusions which might be drawn from this; and did not seek to highlight alleged points of inconsistency relied on by the defence, though it has to be said, such points as there were could hardly be described as strong points. At the same time, we find ourselves broadly in agreement with what Lord Morris said in *McGreevy* about the common sense of juries. We are in no serious doubt that the jury in this case will have been well aware of the need for it only to convict in circumstances in which they are satisfied beyond reasonable doubt that the defendant is guilty. But equally we are not in doubt that (as put by Lord Morris) "a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say they were satisfied of guilt beyond reasonable doubt." Issues concerning the child's behaviour just before his mother left to go out on the Saturday evening described by the judge to the jury when summing up spoke largely for themselves as did the

absence of any evidence that the child was viewed as being in an injured state prior to his mother leaving to go out. Additionally, there was no suggestion that after the mother had left the house, someone else had somehow gained entrance to the flat. The judge had in his charge clearly stated to the jury that:

> "If … you think that there is a real possibility that [the defendant] is not guilty, you must give him the benefit of the doubt and find him not guilty on that charge."

[123] Overall, we are of the opinion that while there were failures on the part of the judge to follow the guidance which the above documents contain, such would not be sufficient for the court to hold that this ground of appeal is made out with the consequence that the applicant's conviction in relation to ground 9 should be overturned.

The appellate test applied

[124] At this stage of the judgment the court will stand back from its conclusions in relation to the particular grounds which have formed part of the grounds of appeal (save for ground 10 which is concerned with the issue of sentence) and will apply the appellate test as set out at paragraph [43] above.

[125] We have asked ourselves whether the verdict arrived at in this case is unsafe.

[126] In considering this issue we take account of the fact that this is not a case of fresh evidence being admitted on appeal. Thus, we should examine the evidence given at trial and gauge the safety of the verdict against the background that the appellate exercise does not involve trying the whole case.

[127] In addition, we also remind ourselves that it is not for us to speculate as to what may have influenced the jury to its verdict.

[128] We must ask ourselves whether the court has a significant sense of unease about the correctness of the verdict.

[129] We bear in mind that while the trial lasted for three and a half weeks, the jury were able to arrive at their unanimous verdict within a short period.

[130] In approaching this exercise the court has carefully borne in mind the totality of the evidence but it will indicate that there were two transcripts which, in particular, have been of assistance and which merit specific mention.

[131] Firstly, the court has read with considerable interest the speeches of counsel which followed the completion of the evidence in the case. These speeches were substantial and considered. They revealed areas of agreement and disagreement. In short, they will have conveyed to the jury the full picture of each side's case. The

jury will not have been left in any doubt about the analysis underpinning each side's submissions. In particular, it is clear that the prosecution was relying on the accumulation of facts – step by step – which, in their submission led inexorably to the conclusion that there must be a finding of guilt against the applicant. Needless to say, in the speech on behalf of the applicant, there was strong resistance to the prosecution's contentions. But, in our opinion, it is overwhelmingly clear that the jury will have been exposed to detailed expositions of the methodology involved in the building (or the demolition) of a case which is mainly if not entirely based on circumstantial evidence leading, in the case of the prosecution, to what Crown counsel described as an "inevitable" conclusion – the only conclusion - that could be reached. When these speeches are taken into account together with the judge's charge, it seems to us that the jury could have been in no or little doubt about the task it had to perform and the factors relevant to its performance.

[132] The second transcript which the court has found particularly useful is that which contained the submissions of counsel in respect of the applicant's application at the end of the Crown evidence of no case to answer in respect of (a) the murder charge and (b) count 4 on the indictment.

[133] This transcript records each side's submissions, which of course were made in the absence of the jury, but it is clear from these that the case being presented on behalf of the applicant contained a variety of statements by counsel for the applicant which are of more than passing interest and which shed light on the way in which the issue of manslaughter, at this stage not a feature of the indictment, came to supersede the murder charge as count 1 on the indictment.

[134] These included a plain statement of acceptance that the child's fatal injuries were non-accidental; likewise a clear statement that there was a prima facie case against the accused in respect of the death of the child and hence of manslaughter; and an acceptance that, at the time of the application, the prosecution had established that there was an unlawful act which has caused the injuries to the child which resulted in his death. Notably, there is a clear expression by the applicant's counsel that what was being sought was the replacement of the murder charge by a charge of manslaughter, which is a step which ultimately the judge agreed to.

[135] In the court's opinion, the above references all tend to show that even if the court had reached a different view in respect of grounds 8 and 9 than those expressed above, nonetheless it would, in the light of these transcripts, have reached the view that the appellate test would not have been satisfied and that the verdict on these grounds should stand.

[136] For the sake of completeness the court will also indicate that in respect of the other grounds of appeal which have been discussed above the same approach with the same result applies.

[137] This is not a case where the court has been left with a significant sense of unease.

The appeal against sentence

[138] The sentencing in this case occurred on 16 December 2019. As already noted at paragraph [4] above, the applicant received a sentence of 13 years in respect of the offence of manslaughter and a sentence of two years (consecutively) in respect of count 3.

[139] The case under this head as made before the court requires a short explanation. This ground when initially put forward was based on a proposition, which was wrong, namely that the judge had sentenced the applicant in respect of count 1 – the manslaughter count – to 15 years' imprisonment. This was factually incorrect as the sentence on this count was in fact one of 13 years.

[140] This was important because the applicant's initial suggestion had been that he should have received a sentence in the region of 12 years in respect of ground 1 and that the sentence of 15 years was outside the range of a reasonable sentence.

[141] When it became clear that in fact on count 1 he was sentenced to 13 years it was accepted that the difference between a possible sentence of 12 years and one of 13 years was not sufficient to make this ground tenable.

[142] The applicant however changed tack and rather than abandon this aspect of the appeal has now revised it on the basis that instead of being sentenced for the offence of manslaughter, which is what he was convicted of, he should have been sentenced on the basis of what originally had been an alternative to the murder charge in the unrevised indictment, namely what had initially been count 2, which, the court was told, had a maximum sentence of 14 years.

[143] If this approach is taken it is suggested that the applicant should had received a sentence substantially lower than the maximum sentence of 14 years.

[144] We consider there is no proper basis for adopting the approach the applicant has suggested and we are of the firm view that the judge was acting entirely properly in sentencing the applicant for manslaughter, which has a maximum sentence of life imprisonment.

[145] That there is no basis for adopting the 'new' approach above, we consider, is firmly based on the fact that it was the applicant's trial counsel who had secured the removal of the murder charge *inter alia* on the express basis that it ought to be replaced by a manslaughter charge, as in fact occurred. At the time this occurred, there was no suggestion that the murder charge was being re-placed by the old count 2. Equally, it is clear that at the date of sentencing there was no question but that he was being sentenced in respect of his conviction for manslaughter and

separately for the finding of guilt under count 3. The old count 2, had not been pursued before the jury and played no part in the sentencing exercise.

[146] In these circumstances, the court has no hesitation in holding that the sentencing for manslaughter was well within the range of discretion open to the sentencing judge and that the old count 2 had no relevance to this exercise. The sentence, in short, was not manifestly excessive or wrong in principle.

[147] No issue was taken in respect of the sentencing in respect of count 3.

[148] We therefore dismiss this ground of appeal as being without merit.

Conclusion

[149] Overall, we find no merit in the grounds of appeal as a whole and, additionally, we are of the opinion that the convictions of the applicant are safe. We refuse leave to appeal in these circumstances.