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Case Nos: CAO 2025 00641 B3
CAO 2025 01303

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT STOKE-ON-TRENT
His Honour Judge Graeme Smith
T2021/17008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2026

Before:

LORD JUSTICE MALES
MR JUSTICE CHOUDHURY

and

THIS HONOUR JUDGE RICHARD MARKS KC
(THE COMMON SERJEANT OF LONDON)

Between:

REX

Respondent

- and -

(1) CGA

Appellants

(2) ZFX

Robin Howat for CGA
Caroline Harris for ZFX
Earl Pinnock for the Crown

Hearing date: 18 March 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 27 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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An order has been made has been made under section 4(2) of the Contempt of Court Act 1981 prohibiting any publication which may identify the appellants until the conclusion of the retrial ordered by the court. However, this judgment may be published referring to the appellants by the random letters referred to in the heading.

Further, the victim in this case, referred to in the judgment as C, is a child under the age of 18. Accordingly the publication of information leading to her identification is prohibited by section 45 of the Youth Justice and Criminal Evidence Act near 1999 until she reaches the age of 18.

LORD JUSTICE MALES:

1. This is an appeal against the appellants' convictions for causing grievous bodily harm with intent. The ground of appeal is that the verdicts are inexplicable and irrational because the jury convicted both appellants of causing the same injuries when it was never the prosecution case that the injuries caused were the result of a joint enterprise between them.
2. At the conclusion of the hearing we announced our decision that the appeal of both appellants would be allowed and gave further directions. This judgment sets out our reasons for these conclusions.
3. The victim in this case, to whom we will refer as C, is a child under the age of 18. Accordingly the publication of information leading to her identification is prohibited by section 45 of the Youth Justice and Criminal Evidence Act 1999 until she reaches the age of 18. However the names of the appellants, who are her parents, may be published once the retrial referred to below has been concluded. Meanwhile, we have anonymised the appellants in this judgment.
4. The appellants are CGA, a male now aged 33, and ZFX, a female now aged 28. In 2016 they began a relationship which led to the birth of a daughter, C, in February 2018. ZFX already had a daughter from a previous relationship who lived with them, as well as other children.

The injuries

5. On 24th May 2018, when C was three months old, she was taken to the Royal Stoke University Hospital, where she was examined by a consultant community paediatrician. She was found to have what were described as "significant bruises and constellations of bruises". There were approximately 17 bruise patterns all over C's body, face and head. The paediatrician concluded that "overall the pattern of injuries to C suggests repeated deliberate physical abuse of a most serious and dangerous nature".
6. C was scanned and an eye examination was undertaken. The results were that C was found to have suffered the following injuries:
 - (1) burst blood vessels in both eyes;
 - (2) a fracture at the junction of the left tibia and the knee;
 - (3) a fracture at the junction of the left tibia and the ankle;
 - (4) a large fracture of the left parietal skull bone;
 - (5) a possible second left parietal skull bone fracture;
 - (6) contusion of the brain, where local haemorrhage had led to the development of a cyst;
 - (7) a clavicle fracture; and
 - (8) a right forearm fracture.
7. We were told that C has made a complete recovery from these injuries and that, fortunately, there will be no permanent physical damage.
8. A consultant paediatric radiologist estimated that the clavicle injury was between two and seven weeks old, the forearm fracture about two weeks old, the ankle and knee injuries up to two weeks old, and the skull fracture just a few days old. He estimated that these injuries

had been caused in between three and five separate events. He said that the head trauma and the leg injuries could have been caused in a single shaking incident and that the injuries suffered could not be explained by the account given by the parents in interview. They were typical of injuries seen in cases of suspected physical abuse. The bruises were likely to have been caused within the previous two weeks.

9. None of this evidence was challenged at the trial.
10. However, neither appellant had sought medical assistance for C. She was only taken to hospital after social services and the police were contacted.

The interviews

11. On 26th May 2018 (so now almost eight years ago) the appellants were arrested and interviewed. They suggested that the injuries must have been caused either by their dog or by C's elder half-sister, who was about 21 months old at the time, in rough play. Those possible explanations were comprehensively debunked by the expert evidence at the trial and have not been persisted in.
12. CGA said in his interview that he had not seen any bruises on C's body apart possibly from some that were by her knee. He admitted, however, that he had probably bathed C on the day the police attended. If that was so, he could not have been unaware of her injuries.
13. ZFX said that she was only aware of bruises to C's face and that she was not aware of the bruises to the rest of her body. As those bruises were clearly visible, and she was the regular nappy changer, that could not have been true either.
14. Subsequently, ZFX contacted the police and a second interview took place. On this occasion she said that CGA had told her on two occasions that he had hit C's head accidentally, once when he was washing her in the bath and once on a door. She said that he had rejected her suggestion to take C to see a doctor. She maintained that she had not seen the extent of C's bruises until the police and social services had arrived, and reiterated that the dog was probably responsible for some of the bruising.

The indictment

15. The appellants were charged on an indictment which contained separate counts in relation to each of the injuries. That is to say, there were separate counts relating to each of the skull, the left clavicle, the right forearm, the left ankle and knee, and the bruises. Each appellant was the subject of separate counts relating to each of these injuries. There was no count in which they were charged jointly with causing any of the injuries.
16. Counts 1 to 14 were counts against CGA. With the exception of the bruises, in the case of each injury the principal count was causing grievous bodily harm with intent contrary to section 18 of the Offences Against the Person Act 1861, with alternative counts under section 20 and under section 5 of the Domestic Violence, Crime and Victims Act 2004, as amended by section 1 of the Domestic Violence, Crime and Victims (Amendment) Act 2012.

17. This latter provision makes it an offence, in summary and without attempting a comprehensive definition, to cause or allow a child to suffer serious physical harm in circumstances where the defendant is either the person whose act causes such harm or was aware of the risk of such harm being caused by a member of the same household as the child and failed to take reasonable steps to protect the child from such harm. It enables proceedings to be brought when the prosecution is unable to prove which of two defendants caused the injuries and there is no evidence that they acted jointly, in circumstances where, if the particular defendant was not the perpetrator, they knew or ought to have known about the risk of serious harm being caused by the other defendant. As originally enacted in 2004 the section was limited to a case of causing or allowing the death of a child, but this was extended by the 2012 Act to cover serious physical harm not resulting in death.
18. So far as the bruises were concerned, the injuries were less serious and the charge was one of assault occasioning actual bodily harm contrary to section 47.
19. Counts 15 to 23 of the trial indictment were counts against ZFX. They followed the same pattern, save that there were no counts under section 5 of the 2004 Act. That was because, as the jury were told, ZFX had already pleaded guilty to causing or allowing C to suffer serious physical harm at a pre-trial hearing which took place as long ago as 19th February 2021.

The trial

20. The trial took place in the Crown Court at Stoke-on-Trent before His Honour Judge Graeme Smith in January 2025. It was a retrial because the initial trial had to be aborted part way through.
21. The prosecution case, as opened to the jury, was that the appellants intentionally caused C to suffer really serious injuries. However, the prosecution did not advance a positive case as to which of the appellants had inflicted the injuries. They did canvass the possibility that some of the injuries had been caused by CGA and others had been caused by ZFX, and in that sense advanced a case that both appellants had caused the injuries. However, although this was canvassed as a possibility, the prosecution did not at any stage of the trial identify which injuries they said had been caused by CGA and which by ZFX and were not in a position to do so. But if this was a serious possibility, it would have been essential for the prosecution to prove which appellant was responsible for which injuries because of the way in which the indictment had been drafted, which required the jury to return separate verdicts in relation to each of the injuries and each of the appellants.
22. The prosecution did pose the possibly rhetorical question whether each appellant was as callous as the other. But they did not suggest that the appellants had in any way acted together to cause any of the injuries, or that either of them had assisted or encouraged the other to do so. Nor was any such suggestion put to the appellants in cross examination when they each gave evidence.
23. The prosecution adduced evidence from ZFX's mother, who had reported C's injuries to social services. Until then, neither parent had sought medical assistance for C, although it seems impossible that neither of them was unaware of her injuries. ZFX's mother said that her daughter had told her that CGA was controlling, possessive and violent towards her,

though she herself had never seen any such violence and had never seen CGA being violent towards C.

24. There was also evidence from a police officer who had attended on 24th May 2018 that, as C's nappy was being changed and the bruising on her leg and hip was obvious, ZFX had started to cry and said that she was scared of CGA.
25. There was also evidence of messages exchanged between the appellants. In one of these, ZFX had said that the "little shit" was crying again, although she was to say in her evidence that this was not a reference to C. In another, CGA had expressed frustration at being left alone with C, saying "I just feel so down all the time, I need help babe, I can't do it on me own" and threatening to leave C alone in their home because he was desperate to go out.
26. When he gave evidence, CGA denied that he had caused C's injuries. He said that he had previously been a Class A drug addict, but that at the time of C's birth he was only taking cannabis. He agreed that there had been arguments with ZFX, but denied using any violence. He said that when they argued, each of them gave as good as they got, and that there had been occasions when each of them had left the other one. He said that he had bathed and changed C, but only once or twice as this was generally done by ZFX, the last occasion when he had bathed her being about a week before social services and the police were called in. He said that the only time when he might have injured C was when he had accidentally banged her head on the tap when he was bathing her and again on a door, but he did not believe that these incidents could have caused the injuries. He said that he had never lost his temper with C and had never seen ZFX hurt C, although C's older half sister was always pinching and kicking her. He did not believe that the sister or the dog had caused the injuries.
27. In cross examination CGA admitted that he had seen bruises on C when he was bathing her, shortly before the police and social services arrived. Initially he said that ZFX had told him that she had taken C to the doctor, but he later had to agree that this could not be right, and he said that he did not know why ZFX had not taken C to the doctor. He denied ever preventing her from doing this.
28. In her evidence ZFX said that there were times when CGA would abuse her and call her names, and that there was also physical violence when CGA would throw things at her, slap her and punch her. She said that CGA had told her about the two accidents when C's head had been banged, but that she did not take C to the doctor because C was not crying and CGA had said that she would be all right. She said that it was CGA who bathed C once a week. There were times when she left C alone with CGA for several hours, but never overnight.
29. In cross-examination she accepted that she had seen the bruises on C, but said that she had been scared to do anything because of CGA. She accepted that she had told lies in interview but said that she had been scared. She accepted also that she had lied to her mother when saying that CGA would not allow her mother to see C. She said that she had never seen CGA being violent to C but believed that he must have caused the injuries because she had not.
30. The position, therefore, was that an innocent explanation for the injuries was ruled out, that each appellant denied causing the injuries and, at least by implication, was suggesting that

the other had caused them, and that there were times when each of them had been alone with C when the injuries could have been caused. However, neither appellant said that they had seen the other causing these injuries. The bruising on C, if not the other injuries, were there to be seen when C was bathed or changed, while the injuries on her face were obvious. So both of the appellants must at least have been aware of the bruises, but neither of them had sought medical assistance for C.

The summing up and route to verdict

31. In accordance with modern practice, the judge's summing up was in two parts. First he provided legal directions, which followed a written document which had been provided to all counsel in advance and was provided for the jury to follow. These included standard directions on the burden and standard of proof, the need to consider each count separately and not necessarily to reach the same verdict on each count, and the way in which some of the counts were alternatives which would not arise for consideration if the jury were to convict on an earlier and more serious count.
32. Dealing with the most serious section 18 counts, the judge explained that there was no dispute about the seriousness of the injuries and no suggestion that any of the injuries was caused lawfully. Therefore, on each count, the jury would need to ask itself three questions:
 - (1) Are we sure that the defendant in question caused the injury in question to C?
 - (2) Are we sure that he or she did so maliciously, i.e. not accidentally, and
 - (3) Are we sure that the defendant in question intended to cause grievous bodily harm to C?
33. The judge gave similar directions in relation to the alternative counts, as well as a direction as to what would be needed to prove CGA's guilt on the causing or allowing counts under section 5 of the 2004 Act, reminding the jury that there was no need for them to consider this offence so far as ZFX was concerned as she had already pleaded guilty.
34. The judge also provided the jury with a route to verdict, which had also been provided to counsel in advance. This document grouped the various counts by reference to the injuries suffered and dealt separately with each of the appellants. Thus, in relation to the skull fracture which was the subject of counts 1 to 3, the first question for the jury to consider was whether they were sure that CGA had caused this fracture in a way which was not accidental; if so, they were directed to go on to consider his intention. If their answers to those questions did not result in a conviction under either section 18 or section 20, they were directed to go on to consider the offence under section 5 of the 2004 Act.
35. The same structure was adopted in relation to the other counts against CGA.
36. After dealing with the counts against CGA, the route to verdict turned to the counts alleged against ZFX. This followed the same structure as in the case of CGA. Thus it dealt first with the skull fracture and then with the other injuries, beginning in each case with the question whether the jury was sure that ZFX had caused the injury in question in a way which was not accidental.

37. After the judge had given these and other legal directions, counsel made their closing speeches. The prosecution speech emphasised that neither appellant had done anything to obtain medical help for C. Counsel referred to evidence that ZFX must have been aware of the injuries, particularly the bruises, but had done nothing to sound any alarm and had pretended not to know about them when the police and social services attended. He suggested that she was not in fear of CGA and that this was invented to obscure her responsibility for C's injuries. He suggested that CGA had the opportunity to inflict the injuries as he spent considerable time alone with C, was clearly not coping, and took his frustration with the situation out on her. He invited the jury to conclude that both appellants were guilty of the section 18 allegations and said that they were blaming each other when in fact they were both responsible. However, there was no explanation of how the prosecution actually put the case as to which of the appellants had caused which injuries or, if both were guilty, how the injuries had actually been inflicted.
38. The judge then completed his summing up with a summary of the evidence.

The verdicts

39. After they had been in retirement for a little over eight hours, the jury were able to return unanimous verdicts on counts 1 and 13. On count 1 they found CGA guilty of causing the skull fracture with intent, contrary to section 18. On count 13 they found him guilty of causing actual bodily harm (the bruises).
40. The judge then gave a majority direction and, on the following day, the jury returned their remaining verdicts. So far as the left clavicle, right forearm and left ankle and knee injuries were concerned, they found both appellants guilty of causing grievous bodily harm with intent (counts 4, 7 and 10 in the case of CGA; counts 17, 19 and 21 in the case of ZFX). They also found ZFX guilty of the section 18 offence of causing the injury to C's skull and the section 47 offence of assault occasioning actual bodily harm (the bruising). In each case these further verdicts were by a majority, in most cases by 10 to 2 but in some cases by 11 to 1.
41. As a result of the guilty verdicts under section 18, no verdicts were taken on the alternative counts under section 20 or, in the case of CGA, under section 5 of the 2004 Act.

The appeal

42. ZFX now appeals against her convictions with the leave of the single judge. CGA needs an extension of time in which to appeal. The position in his case is that trial counsel did not consider that there were arguable grounds of appeal until he became aware of the grounds drafted by counsel for ZFX. Having become aware of these, he sought (and Mr Robin Howat, who has taken over from him now seeks) to run the same argument on the basis that the issues are closely connected and that both appeals should stand or fall together. We grant the necessary extension and we grant leave to appeal.
43. Ms Caroline Harris submitted on behalf of ZFX that the verdicts are inexplicable and irrational and that the convictions are therefore unsafe. It was never the prosecution case that the injuries or any of them were caused by the appellants acting together or by one of them with the encouragement of the other. Rather, the only way in which the prosecution

had suggested that both appellants could be guilty under section 18 was if one of them had caused some injuries and the other had caused the other injuries at a different time or times. The judge had given directions in accordance with the way in which the prosecution had put the case, but the jury had departed from this for reasons which were unknown. It was unclear how the jury had reached their verdicts. In his sentencing remarks, the judge had said that although the prosecution did not advance a case of joint enterprise, that must have been the jury's conclusion.

44. Mr Robin Howat (who was not trial counsel) for CGA echoed these submissions, submitting that the verdicts make no sense. The only explanation for them is one of joint enterprise, but there was simply no evidence to suggest this; nor did the prosecution put their case on this basis.
45. For the prosecution Mr Earl Pinnock acknowledged that the prosecution was unable at the trial to advance a positive case of joint enterprise and that the jury were asked to consider whether one or other appellant was responsible for all of the injuries, or alternatively whether one was responsible for some and the other for the rest. He referred also to what was said in closing, which we have already summarised.
46. Mr Pinnock submitted that although the prosecution did not and could not put the case on a joint enterprise basis, the guilty verdicts against both appellants are not necessarily inconsistent. In his respondent's notice, he submitted that the jury were entitled to reach the conclusion that the appellants were acting together if they chose to do so. In his skeleton argument and in oral argument, however, he submitted that the injuries were or may have been sustained on several occasions over a period, and that it was sufficient for both appellants to be convicted if the jury was sure that each appellant inflicted unlawful violence within the relevant period that caused or materially contributed to the injury charged, so that the injuries could have been caused in this way by both appellants, each acting individually as a principal offender, in which case both appellants would be guilty. He went on to submit that even if the verdicts are inconsistent, they are not necessarily unsafe and refers to the case of *R v Fanning* [2016] EWCA Crim 550, which endorsed the approach to inconsistent verdicts taken in *R v Durante* [1972] 3 All ER.

Decision

47. The circumstances in which this court will allow an appeal on the basis that the jury has returned inconsistent verdicts were considered in *Fanning*. In such a case, there is a burden on an appellant to satisfy this court that the two verdicts cannot stand together, meaning that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the two guilty verdicts in question. This court explained that further elaboration of this test is unnecessary and should be avoided. As this formulation of the test makes clear, however, the question whether verdicts are inconsistent is not to be answered in the abstract, but by reference to the facts and issues in the case. Thus in *R v Green* [2005] EWCA Crim 2513, where this test was applied, this court said at paragraph 8 that "it is clearly necessary in this case to look at how the case was opened, how the evidence emerged and how at the end of the hearing the case was presented to the jury before we can turn to the two ways in which the Crown now contend that the verdicts can be reconciled".

48. In *Green* the appellant was convicted of murder and his co-defendant, a man called Scott, was acquitted of both murder and manslaughter. Although such verdicts are not intrinsically inconsistent, the case had been opened by the prosecution on the basis that the killing was a joint enterprise, whichever of the defendants had used the fatal knife, but that all the evidence suggested that this had been Scott. The case was never presented by the prosecution on the basis that the appellant was the wielder of the knife, albeit that this possibility was never formally closed off. On appeal the prosecution suggested two ways in which the verdicts could have been reconciled, either (1) on the basis that it was after all the appellant who had stabbed the victim or (2) because even if Scott had wielded the knife, he may not have had the requisite intent for murder but the jury had been satisfied that the appellant as an accessory did have that intent.

49. This court rejected those attempts to sustain the guilty verdict:

‘34. [Counsel’s] suggestions do show that the verdicts cannot be described as logically inconsistent. However, the attempted reconciliation does not properly take into account the evidence and the manner in which the case was presented to the jury. As we have demonstrated, the evidence overall was consistent with Scott having been the wielder of the knife and so having stabbed the deceased. In those circumstances, it is impossible to understand how the jury could rationally have decided that the appellant had the necessary intent to establish murder whereas Scott did not. ...

35. In the circumstances, we are satisfied that, while not at least in theory to be regarded as logically inconsistent, the verdicts were ones which no reasonable jury who had applied their minds properly to the facts of the case could reach. In other words, we regard the conviction of the appellant on Count 1 as unsafe. ...’

50. Sometimes the issue of inconsistency will arise when a defendant is convicted on one count and acquitted on another, or when one defendant is convicted and a co-defendant is acquitted, in circumstances where as a matter of strict logic the counts ought to stand and fall together. In such a case this court may be reluctant to conclude that the verdicts are inconsistent, recognising the constitutional position of the jury and the fact that criminal trials have a dynamic which is not always a matter of strict logic. Nevertheless, as *Green* shows, if the verdicts are inconsistent with the way in which the case has been presented to the jury, they may be unsafe even if, as a matter of strict logic, they are not necessarily inconsistent with each other.

51. In the present case a different kind of inconsistency arises in that both appellants were convicted of causing injuries which, in accordance with the way in which the case was presented to the jury, could in the case of each injury only have been inflicted by one or other of the appellants. Nevertheless the same approach to the issue of inconsistency must be applied.

52. The prosecution seek to sustain the convictions of both appellants in the present case in three ways. In our judgment, however, none of the ways in which they seek to do so are consistent with the way in which the case was put at trial and with the judge’s directions

and the route to verdict. Nor do they have any sound foundation in the evidence. In those circumstances we have no doubt that the convictions are unsafe.

53. The first possibility suggested by the prosecution (on appeal but not at the trial) is that the jury concluded that the appellants were acting together in some form of joint enterprise. We note that this was the judge's interpretation of the verdicts, as he explained in his sentencing remarks. This was the only way in which the prosecution sought to uphold the convictions in the respondent's notice. But the prosecution had never put its case in this way, accepting that it was not in a position to do so. Moreover, the judge did not explain to the jury what would be needed for a conviction on this basis, or the ways in which liability as joint principals or the secondary liability of one appellant as an accessory to an offence committed by the other might arise. Those requirements are set out and explained in sections 7-2 to 7-4 of the Crown Court Compendium. A careful direction is necessary, tailored to the evidence. No such direction was given in this case because this was not how the prosecution put its case. Moreover, there was in this case no evidence at all that the appellants were acting together, either as joint principals with both parties inflicting injuries on C or as principal and accessory with one of them inflicting injuries with the assistance or encouragement of the other. Nothing at all was said in closing speeches or in the judge's summing up to suggest that a conviction on this basis could be consistent with the evidence. If this is what the jury concluded, it must be a matter of complete speculation how they arrived at their conclusion. No reasonable jury who had applied their minds to the facts of the case could have done so.
54. The second possibility, canvassed in the prosecution's skeleton argument and in oral argument, is that some injuries were caused by one appellant, and others were caused by the other appellant, although the prosecution did not (and still do not) have any case as to which injuries were caused by which appellant. This is an entirely speculative case. Moreover, it is inconsistent with the way in which the indictment was framed, which required the jury to reach a conclusion as to the individual who had caused each of the distinct injuries. In any event the jury did not convict CGA of causing some injuries and ZFX of causing others. They convicted both appellants of causing all of the injuries. So this possibility is itself inconsistent with the jury's verdicts.
55. The third possibility is that each appellant, acting individually as a principal, made a material contribution to the injuries. In oral argument this was the prosecution's principal explanation for the verdicts. However, there was no evidence that any particular fracture was caused by distinct blows on more than one separate occasion and no support for such a theory in the expert evidence. On the contrary, the evidence was that the entirety of C's injuries could have been caused in as few as between three and five incidents, while the unchallenged evidence of the paediatric radiologist Dr Owen Arthurs was that the injury to C's skull was caused by a single direct impact. So the suggestion that both appellants made a material contribution to some (let alone all) of the injuries, a theory which was never raised by the prosecution and was not the subject of any direction by the judge, is contrary to the unchallenged evidence. Mr Pinnock recognised that this would be so in the case of some injuries, but suggested that it was a possible basis for the jury's verdicts in other cases. We reject the suggestion. It too is entirely speculative and would not be a safe basis for any of the jury's verdicts.
56. The basis on which the jury was required to consider this case was clearly set out in the route to verdict. They had to consider, in the case of each injury, whether they were sure

that the injury had been caused by CGA or by ZFX. There was no basis on which they could conclude that the same injury had been caused by both appellants on different occasions.

57. In the result, although the injuries to C must have been caused by one or other of the appellants, there was no evidence which would have enabled the jury to be sure which of them had caused the injuries, no basis in the evidence for a conclusion that some injuries had been caused by CGA and others by ZFX, and no tenable basis for a conclusion that both of them had done so. In those circumstances the jury could not rationally have found both appellants guilty of causing all of the injuries.
58. Accordingly the convictions of causing grievous bodily harm with intent cannot stand and must be quashed. The same applies to the section 47 assault.
59. It was for precisely this kind of situation that section 5 of the 2004 Act was enacted. That section enables both defendants who are members of the same household to be convicted when the jury cannot be sure which of them inflicted serious injury on a child or vulnerable adult, but can be sure in the case of each defendant that if they were not themselves the perpetrator, they were aware or ought to have been aware of the risk of such injury and failed to take reasonable steps to protect the child from the risk. On the material which we have seen, the evidence that CGA was at least guilty of an offence under this section was strong, but in the event (and rightly) no verdicts on these counts were taken because of his conviction on the section 18 offences. ZFX, of course, had pleaded guilty to the section 5 counts.

Alternative verdict

60. We have considered whether in the case of CGA we should substitute a verdict of guilty on the section 5 offence under the 2004 Act for the convictions under section 18 of the 1861 Act. Section 3 of the Criminal Appeal Act 1968 provides that:

‘(1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.

(2) The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.’

61. However, the prosecution did not invite us to take this course and, in circumstances where the factual basis of the jury’s conviction of CGA under section 18 is unclear, we would not have exercised this power even assuming that it is available on the facts of this case.

Retrial

62. The prosecution asked us to order a retrial on all counts, in view of the seriousness of the injuries inflicted on a helpless baby. We accept that there must be a retrial of CGA on the counts of causing or allowing C to suffer serious physical harm under section 5 of the 2004 Act, notwithstanding that the trial in the Crown Court was itself a retrial and what is now the very considerable age of the events in question. Sensibly, Mr Howat could not resist this.
63. However, it would not be in the interests of justice to order a retrial of either appellant on the counts under sections 18, 20 and 47 of the Offences Against the Person Act 1861. As Mr Pinnock realistically acknowledged, the evidence at any retrial would be no better than the evidence which was available at the trial. Accordingly, there would not be evidence on which the jury could safely conclude that either of the appellants was responsible for inflicting the injuries, or on which they could both be safely convicted in accordance with any of the theories on which the prosecution sought to uphold their convictions.

The sentencing of ZFX

64. Because we are quashing the convictions of both appellants on the section 18 counts, ZFX now falls to be sentenced for the section 5 offences of causing or allowing serious injury to which she has pleaded guilty. The judge imposed a sentence of five years imprisonment for the section 18 offences and no separate penalty for the section 5 offence. Strictly, however, because the section 5 offences were alternatives to the section 18 offences, ZFX should not have been sentenced for these offences at all, and these counts should have been directed to lie on the file (*R v Ismail* [2019] EWCA Crim 290, paras 23 to 25). We therefore quash the sentence of no separate penalty.
65. Now that the section 18 convictions have been quashed, this court would have power pursuant to section 4 of the Criminal Appeal Act to pass sentence on ZFX for the section 5 offences, provided that the sentence imposed did not exceed the sentence of five years' imprisonment imposed for the section 18 offences. Ms Harris invited us to exercise that power, having regard to the period of over 10 months of her sentence for the section 18 offences which ZFX has so far served and the fact that her guilty pleas were entered more than five years ago. In our view, however, it is preferable that sentencing of ZFX should await the conclusion of the retrial of CGA.
66. Although we have received no submissions about this, we note for the benefit of the sentencing court that it appears to us, as at present advised, that the time spent serving the sentence for the section 18 offences will not count automatically towards any sentence imposed for the section 5 offences.

Bail

67. Alternatively Ms Harris applied for ZFX to be released on bail. ZFX was on unconditional bail throughout the period awaiting trial and this application was not opposed by the prosecution. Accordingly we make the order as requested. This does not represent any indication of what her sentence should be, which will be a matter for the Crown Court.
68. The position concerning CGA is less straightforward, as he absconded during the trial for which he received a sentence of one month, which was concurrent to the sentence of six

years and six months imposed for the section 18 offence. We direct that any application for bail in his case should be made to the Crown Court.

Conclusion

69. In summary, therefore:

- (1) ZFX's appeal is allowed and her convictions under sections 18 and 47 are quashed.
- (2) We extend the time for CGA's appeal, grant leave, allow the appeal and quash his convictions under sections 18 and 47.
- (3) CGA must be retried in the Crown Court on the causing or allowing counts but not the section 18/20/47 counts.
- (4) The application for ZFX to be retried on the section 18/20/47 counts is refused.
- (5) ZFX must be sentenced in the Crown Court on the causing or allowing counts to which she has pleaded guilty on conclusion of the retrial of CGA.
- (6) ZFX is granted unconditional bail.
- (7) Any application for bail by CGA must be made to the Crown Court.