Neutral Citation Number: **[2021] EWCA Crim 1311**

Case No: B3/2021/00061

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
The Crown Court at Manchester
H.H. Judge Field Q.C.
T20187090

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th August 2021

Before:

THE VICE-PRESIDENT COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE FULFORD)
and
MR JUSTICE GOOSE
and
SIR RODERICK EVANS

- -

Between:

PETER CHILVERS	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

PATRICK O'CONNOR Q.C. (assigned by the Registrar) for the **APPELLANT**
ROBERT HALL (instructed by The Crown Prosecution Service) for the **RESPONDENT**

Hearing date: 12 August 2021

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Approved Judgment

Judgment Approved by the court for handing down.

Lord Justice Fulford VP :

Introduction

1. On 1 November 2019, in the Crown Court at Manchester before Judge Field Q.C. and a jury, the applicant (now aged 35) was convicted of three offences, as follows:

> "Count 1
>
> Statement of Offence
>
> Controlling or Coercive Behaviour in an Intimate or Family Relationship, contrary to section 76 (1) and (11) of the Serious Crime Act 2015.
>
> Particulars of Offence
>
> Peter Ross Chilvers, between the 29th day of December 2015 and the 27th day of August 2017, at a time when he was personally connected to Magdalena Lesicka, repeatedly engaged in behaviour towards Magdalena Lesicka that was controlling or coercive, namely:
>
> i) Using or threatening physical violence,
> ii) Forcing her to eat his hair,
> iii) Controlling and dictating forceful and/or degrading sexual acts,
> iv) Threatening to prevent her access to her only child, James,
> v) Using verbally abusive or demeaning names,
> vi) Belittling her with reference to her family, friends and job,
> vii) Making intrusive enquiries and demands for information from her regarding her whereabouts or persons that she had contact with,
> viii) Isolating her and restricting her access to her friends, and,
> ix) Controlling and restricting her finances,
>
> which had a serious effect on Magdalena Lesicka, namely that it caused Magdalena Lesicka to fear, on at least two occasions, that violence will be used against Magdalena Lesicka or caused Magdalena Lesicka serious alarm or distress which had a substantial adverse effect on Magdalena Lesicka's day-to-day activities, at a time when he knew or ought to have known that the behaviour will have a serious effect on Magdalena Lesicka.
>
> Count 7
>
> Statement of Offence
>
> Assault Occasioning Actual Bodily Harm, contrary to section 47 of the Offences Against the Person Act 1861.
>
> Particulars of Offence

> Peter Ross Chilvers, on the 18th day of August 2017, assaulted Magdalena Lesicka thereby occasioning her actual bodily harm [Sitting on her and putting his knees on her arms at Wincham].
>
> Count 8
>
> Statement of Offence
>
> Damaging Property, contrary to section 1(1) of the Criminal Damage Act 1971.
>
> Particulars of Offence
>
> Peter Ross Chilvers, on the 18th day of August 2017, without lawful excuse, damaged a mobile telephone belonging to Magdalena Lesicka, intending to destroy or damage such property or being reckless as to whether such property would be destroyed or damaged [Throwing her phone on floor at Beaford Road]."

2. On 19 December 2019 the applicant was sentenced to 18 months' imprisonment on count 1 with concurrent sentences of three months and one month respectively on counts 7 and 8.

3. He was acquitted of two counts of rape (counts 2 and 6), assault by penetration (count 3), and three counts of assault occasioning actual bodily harm (counts 4, 5 and 7).

4. An application for leave to appeal against sentence was refused by the single judge and was not renewed to the full court.

5. The applicant now applies for an extension of time (approximately 1 year and 1 month) for leave to appeal against conviction (count 1 only), the single judge having referred the applications to the full court and having granted a representation order to Mr Patrick O'Connor Q.C. (who did not appear below). The application for an extension of time is essentially advanced on the basis that the point of law taken on this application was not considered by the applicant's previous representatives and once he received the advice from Mr O'Connor the application has been advanced with due diligence, including making the *McCook* enquiries. The sole but important issue that is raised is whether the conviction on count 1 is unsafe by reason of the absence in the summing up of a *Brown* direction.

The Facts

6. The applicant was a professional pilot. The complainant, Magdalena Lesicka, was a Ryanair cabin crew member. They first met at a bar in Germany on the occasion of her 24th birthday party in November 2010. They began a sexual relationship towards the end of that year and in 2011 they moved into a flat together in Germany, sharing expenses equally. In the early stages it was, in the main, a good relationship. There was, however, an isolated incident in 2011 when the applicant was extremely drunk and the following morning he became very angry, shouting at the complainant and slamming doors. Although the complainant eventually apologised to the applicant, she was uncertain as to what she had done wrong.

7. In May 2011 the applicant transferred from Germany to England and the complainant followed him in September of that year. They resumed living together. At the end of 2011 they rented a rural cottage in Delamere. The complainant had little money for socialising

and felt somewhat restricted, often ending up doing things that the applicant wanted to do rather than pursuing her own interests. She had, however, come to accept this situation. She considered leaving at one stage to take up a posting in Majorca but the applicant dissuaded her from taking this step.

8. The complainant alleged that from 2012 onwards the applicant began to exhibit controlling and coercive behaviour (this was not a criminal offence until 29 December 2015, which explains the start date of the offence under count 1). She alleged he would make her eat his hair which, over time, became an habitual occurrence. When she told him she did not want to do this, he would say, "*If you loved me you would eat it*." (see count 1(ii)).

9. In the mornings he would sometimes slap her on the face with his penis and he would pull her head towards him and slap her again. She thought that this was just "*kinky behaviour*" which he enjoyed. She indicated that she did not like what he was doing but he prevented her moving away by holding her head or her hair. She never told him in terms to desist, and over time she grew to accept what occurred. This behaviour developed, however, into forced oral sex on his unwashed penis which, again, she did not like but considered that it was something she had to endure (see count 1(i) and /or (iii) and/or count 2).

10. The applicant had a habit of squeezing her breasts and twisting her nipples. Sometimes this was done with affection but often he caused her pain and he did not desist when she said that it was hurting her (see count 1(iii)).

11. We stand aside from the chronology for a moment to note that it was alleged that the applicant behaved in this fashion throughout the course of their relationship, although the frequency of these events varied. Sometimes he exhibited possessive and jealous behaviour, and there were, for instance, two incidents in different public houses when she had been looking at other men who were behaving in an amusing fashion which led to a critical reaction on the applicant's part. Indeed, on the second occasion he aggressively rebuked her. This shocked her and when she attempted to leave the public house, he stopped her by cornering her and he began punching the wall above her head. He later blamed her for provoking this behaviour. He behaved in a similar manner throughout the remainder of their relationship, and there was a particular incident in 2017 when he trapped her against a wall and punched a door frame close to her head (see count 1(i)).

12. Returning to the chronological narrative, notwithstanding these difficult events, when the complainant realised the applicant was considering proposing marriage, she took the initiative and proposed to him at the end of February 2012. He happily accepted and subsequently bought her an engagement ring and a wedding venue in Poland was booked. She later, however, informed him that her marriage proposal was just a joke.

13. At the end of 2012 she took a job in Dubai for six months whilst the applicant remained in the United Kingdom, although they continued to meet over that period when their schedules coincided. The result of one such meeting in Dublin was that the complainant became pregnant. They agreed that the pregnancy should be terminated.

14. In August 2013 she returned to this country and once again lived with the applicant, first in Stoke-on-Trent and later in Lyme. She was employed by Cross Country Trains based in Manchester. Although the applicant became increasingly short-tempered with the complainant there were, nevertheless, occasions on which she instigated sex with him in an effort to revive their relationship, particularly since the applicant told her that the lack

of a sexual liaison between them was the reason for the deterioration in the relationship. He nonetheless continued to abuse her, both verbally and physically, in the ways already described. This was particularly demonstrated on a road trip they took together around Europe in January 2014 during which there were constant rows. This led her to question the future of their relationship and they eventually split up towards the end of 2014, an event that was more the applicant's initiative than hers. The complainant moved to a flat in Redditch whilst the applicant commenced a relationship with another woman.

15. Before separating, the complainant once again became pregnant and in September 2015 she gave birth to their son, James. She informed the applicant of the pregnancy whilst he was in New Zealand in January 2015. He was unhappy to learn this news; indeed, he became angry and very abusive. He accused her of trying to ruin his life and told her to have a termination. There were daily telephone calls and messages in this vein whilst he was in New Zealand. Upon his return to the United Kingdom in February 2015, he made it clear that he resented her but reluctantly accepted her decision to proceed with the pregnancy. He drew up a contract as to the manner in which he wanted the child to be raised to which she agreed. She was reassured that he wanted to play a role in the child's upbringing.

16. They resumed living together in Redditch following his return to the United Kingdom, albeit the applicant commenced a relationship with a work colleague, Lisa Spencer. The complainant was aware of this liaison.

17. In May 2015 the applicant was promoted to captain, and he was posted to Lanzarote where he was living at the time of James's birth. The complainant alleged that his demeanour entirely changed as a result of his promotion. He became arrogant, snobbish and unpleasant. He continuously belittled her, calling her a "*trolley dolly*". Their relationship continued to be "*up and down*" with the applicant switching between being loving and resentful. He demonstrated a lack of interest following the birth of their son, and she was made to feel unwanted when, together with James, she moved to Lanzarote. There was an occasion when he violently assaulted her after she woke him whilst using a breast pump during the night. He pushed her against the fridge and placed his hands around her neck. Otherwise, he continued to force her to perform oral sex upon him, thereby choking her, and he penetrated her vagina with his penis whilst she was asleep. It was during this period that she first downloaded a dating "*app*" because, as she suggested, she wanted someone with whom to talk who did not make her feel worthless.

18. On 29 December 2015 section 76 of the Serious Crime Act 2015 came into force, criminalising controlling and coercive behaviour.

19. The applicant and the complainant returned to the UK temporarily in April 2016 to celebrate the applicant's 30th birthday. There was a dispute between them on his birthday because the complainant was late in picking him up from Manchester Airport due to heavy traffic.

20. In May 2016 they holidayed together in Italy but argued after the complainant discovered further messages from Lisa Spencer. She nonetheless returned to Lanzarote with the applicant, until her period of maternity leave ended in July or August 2016, whereon she returned to the United Kingdom and lived in rented accommodation at Beaford, Road. The applicant contributed significantly to her resettlement costs. He stayed with her frequently when he travelled to the United Kingdom in the course of his employment.

21. The applicant's posting in Lanzarote came to an end in early 2017 and he returned to this country. He spent significant time at the complainant's home in Beaford Road which was convenient for Manchester Airport. In May 2017 he purchased a house in Wincham. About this time the complainant joined an internet dating site and had a brief relationship with another man. She alleged that the applicant continued to act in a controlling and coercive way during this period. In July 2017 she extended the tenancy on Beaford Road after the initial 12-month period expired.

22. On 21 July 2017, having found further evidence, she confronted the applicant with his continuing his relationship with Lisa Spencer. She invited her mother to come to the United Kingdom from Poland. She discovered that she was once again pregnant and immediately began to make enquiries with abortion clinics with a view to a termination. It was around this time that she revealed the physical and emotional abuse that had occurred to work colleagues, describing that she had been suffering at his hands. On 27 July 2017, however, the applicant asked her to move in with him. She ultimately agreed to this step and on 1 August 2017 her mother returned to Poland.

23. On 14 August 2017 the applicant contacted solicitors to draw up a cohabitation agreement, the terms of which were that the complainant would pay him £400 each calendar month to live with him in Wincham and that she would have no claim over his house or the equity therein.

24. The complainant made secret arrangements to secure a termination of her pregnancy, informing one of the clinics she contacted that she did not want to bring a child into a broken home. She cancelled her initial appointment for a termination after the applicant became aware it was to happen. The procedure, nonetheless, took place on 15 August 2017. She alleged that when she subsequently informed the applicant, he became very angry and subjected her to sexual, physical, and verbal abuse. This, she alleged, continued through to 18 August 2017, when he assaulted her and bruised her arms (count 7). On the same day, she confronted the applicant about Lisa Spencer's possible transfer to Manchester. In response, he smashed her telephone on the floor (count 8).

25. Following this incident, on 24 August 2017 the complainant contacted Women's Aid. She informed them that she had been physically abused by the applicant but denied any suggestion of sexual abuse or control. She was assessed as being at medium risk and was advised, amongst other matters, to inform the police as to what had occurred. She subsequently informed a representative of Women's Aid of the events underpinning the count 7 incident. She revealed, additionally, that the applicant had made threats to kill her if she took James away, that he controlled everything that she did and he examined her phone and emails. She made similar disclosures to work colleagues and friends.

26. Following the call to Women's Aid, the complainant contacted the police and two officers attended at the house and took an account from her. She told them that the applicant was controlling and had assaulted her in the past. She said that he would pinch her body in public, causing her bruising. She informed them of the 30th birthday incident and said that the applicant had abused her for three hours, which included pushing her head forcibly against the car window. She informed them of the incident on 18 August 2017, indicating that the applicant had straddled her and sat on her chest thereby preventing her from breathing. He had caused bruising to her arms whilst he knelt on her. The officer took photographs of the injuries. She reported that he had smashed her telephone and had threatened to kill her. At about this time, the complainant searched online for self-defence equipment.

27. On 23 August 2017, the complainant recorded a telephone call with the applicant whilst he and James were in the Lake District with his parents. She complained, amongst other matters, about him threatening her and sitting on her. In response, he repeatedly accused her of lying, an accusation she eventually accepted. There were further recorded calls on the 26 August 2017. These involved a torrent of abuse from the applicant directed at the complainant, followed by benign requests for her to make him dinner and to do his ironing.

28. On the night of 26 August 2017, after the applicant had returned from the Lake District, he left James with the complainant. That night she killed James and attempted to take her own life. The applicant came to her aid and took her to hospital. She was later detained under the Mental Health Act and diagnosed with dissociative disorder with dissociative amnesia. She subsequently pleaded guilty to the manslaughter of her son on the basis of diminished responsibility. She was sentenced to 15 years' imprisonment.

29. The matters set out above were summarised by the judge during the course of the summing up. In addition, the Crown relied in opening and in evidence on the additional following matters that occurred after section 76 of the Serious Crime Act 2015 came into force:

    i) The applicant would often grab the applicant's arm when they disagreed, pulling her towards him so that she was forced to look him in the eye. There were occasions when he strangled her, including during sex, when he would put his hands around her neck to the point where she could not breathe and was forced to take his hands away. Following this he would laugh at her. He would call her "*sheep*" and, although this began as a joke, he latterly started calling himself "*sheep owner*". Whilst in Lanzarote her maternity leave income was paid into his father's bank account and she had to ask the applicant for money (see count 1 (i), (iii), (v), (ix)).

    ii) The applicant belittled the complainant about her job, family, and friends, and he accessed her Facebook account without her permission and left abusive messages (see count 1(v) and (vi)).

    iii) On the occasion of the applicant's birthday on 22 April 2016, referred to above, when she was late in collecting the applicant from the airport, he verbally abused her over the telephone, calling her names like "*selfish bitch*" and "*selfish cunt*" and telling her it was his "*special day*". Later, when in the car together, the verbal abuse continued. She wanted to sit in the back of the car with James who had not been changed or fed. The applicant would not allow her to do so and grabbed her hair and banged her head against the window and shouted in her ear (see count 1(i) and (v)).

    iv) On holiday in Italy in May 2016 she tried to talk calmly to the applicant when she discovered further messages on his phone from Lisa Spencer. While she was considering returning to the United Kingdom, he threatened that he would kill her if she took James away from him. From this point he started to say that she was using James as a weapon against him. He appeared to be under the impression that she wanted to take James to Poland and, entirely out-of-the-blue, he threatened to kill her if she ran and hid from him (see count 1(i)).

    v) The type of threat set out in the preceding subparagraph became a regular occurrence, one that tended to be made without any real reason or cause. She believed and was fearful of these threats. He threatened her that if there was a court

contest over the custody of James, he would use his money and his lawyers to ensure that she never saw her son again (see count 1(iv)).

vi) In August 2016 the applicant made a significant financial contribution to allow the complainant to resettle in the United Kingdom at Beaford Road. He continually reminded her that it was a loan that needed to be repaid, even though he made a minimal contribution to the costs of raising James. Her position was made worse by the fact that her car had to be registered in the name of the applicant's mother which gave him greater control over her (see count 1 (ix)).

vii) Although in 2017 they slept separately, he would come into her room and "*help himself to* [her] *body*". She was affectionate towards him but she did not initiate sex (see count 1(iii)).

30. It is unnecessary for the purposes of this decision to rehearse the evidence relating to the counts on which the applicant was acquitted.

31. The applicant was of previous good character. In two interviews with the police, he consistently denied that he had abused or assaulted the complainant.

32. It was the prosecution case, therefore, that the complainant had given a truthful account as to the applicant being a controlling bully who assaulted her sexually and physically, intimidated her, and abused her psychologically and financially to maintain power and control over her.

33. The defence case was that the complainant had given a dishonest and misleading account in which she had deliberately tried to create a false impression. It was alleged that she was a vengeful, duplicitous, calculating, manipulative, controlling and deceitful liar whose motive was to seek revenge upon the applicant. It was said that she had falsely portrayed herself as a victim. The applicant's evidence, therefore, was in stark contrast to that of the complainant. He denied he had abused her at any stage during their relationship. He said he was delighted at her marriage proposal but did not immediately tell his parents as he knew they would be disappointed because they did not like the way that the complainant treated him, given their plans continually changed on her whim. The complainant, for her part, was annoyed that he did not tell his parents.

34. Her posting to Dubai was a surprise and he felt betrayed. An argument ensued during which she told him that her proposal of marriage was just a joke. He found this very hurtful but was nevertheless desperate to continue the engagement. He was happy when she returned to the United Kingdom after 6 months. At this stage, the relationship was initially good but it started to deteriorate the longer she was unemployed. He attached significant importance to their sexual relationship which he considered was in decline by late 2014. He began the affair with Lisa Spencer, which he regretted, in the summer of 2014.

35. After he was accepted for training as a captain, he decided to end the relationship with the complainant, despite still being in love with her, as he had had a difficult time emotionally and he did not want to be distracted from his training. He did not view the complainant as a life-partner or as being sufficiently stable to be a mother. They remained living together for convenience and, on his account, they considered themselves to be single. There were, nevertheless, occasions on which they had sexual relations, which she instigated and which led to her for a second time becoming pregnant. He suspected that she had done this deliberately to lock him in the relationship, but he decided, nonetheless, to get back

together with her. He felt trapped.

36. His continued relationship with Spencer made the complainant unhappy. She shouted at him and threatened that he would not see their baby. They had a pleasant holiday in 2015 in Lanzarote and he was excited about becoming a father. He was very happy at the arrival of his son and he was a loving father. The complainant and James came to live with him in Lanzarote and their life as a family was very enjoyable. The complainant never suggested that she was lonely. There was no physical or sexual abuse and, therefore, the allegations of the complainant were simply invented. He did not engage in financial mistreatment of the complainant, and she had a card that gave her access to his bank account.

37. On his 30th birthday, he was slightly angry about the complainant being late to pick him up and an argument ensued, but he did not bang her head against the car window or shout abuse. In May 2016 on holiday in Italy she found out he was still seeing Lisa Spencer and confronted him. She ultimately threatened him with returning to Poland if he did not stop seeing her.

38. Upon his return to the United Kingdom in 2017 the relationship continued in much the same way. Between January and May he stayed at the Beaford Road property where they slept in the same bed, contrary to the complainant's evidence, but one or other would often sleep in the spare room if they had to get up early. The sexual side of their relationship was, however, sparse. He denied that he would just wander into the bedroom where she was sleeping and demand sex. He was aware of her use of dating websites about which she was indiscrete.

39. On 21 July 2017 the complainant discovered that his relationship with Lisa Spencer remained ongoing. He flew to Malta the same day and thereafter he contacted the complainant numerous times by telephone because he had become increasingly frantic that she was planning to take James out of the country. They spoke on 23 July 2017 when he tried to persuade her to make the Wincham house her home. On the 26 July 2017 they once again argued; the complainant shrieked at him and threatened that he would never again see his son. He did not cause her injury on that or any other occasion. After an hour or so they resolved matters and things went well until, on 6 August 2017, he found out that she was considering having an abortion, a revelation which greatly upset him. She promised him that she would not have a termination and for the next few days there was harmony.

40. He was extremely upset at Beaford Road on 18 August 2017 when the complainant casually informed him that there was to be "*no baby*". He cried throughout the remainder of the day. She refused to explain why she had taken this step of having an abortion. They stayed together for the entire day. He denied that he ever pinned her down or sat on her chest causing bruising (count 7). The complainant, additionally, on 18 August 2017 became very agitated when she discovered that Lisa Spencer had transferred to Manchester. At one stage she thrust her phone in his face; he instinctively grabbed it and then threw it aside (count 8). He immediately apologised and later they made up and engaged in consensual anal sex (the complainant was unable to have vaginal sex following the abortion).

41. On 21 August 2017 he went to the Lake District with James. The following day there were a series of text messages in which the complainant accused him for the first time of mistreatment. She was, he said, thereby manufacturing evidence although he did not understand the purpose of her doing so. He decided to install the recording "*app*" on his

telephone in order to record their calls as it was clear to him that she was trying to build some kind of case against him.

42. He said he had never spoken to anybody in the way he spoke to the complainant during those telephone calls. They need to be viewed, he suggested, in the context of the abortion, the false allegations that she had made against him, her lies and the apparent case she was constructing against him. It seemed to him that she was about to take James and to leave. As a result, he behaved in this way. It was, he maintained, totally out of character.

43. It has been necessary to set out these facts in some detail, as they are of considerable relevance to the single issue taken on this application, to which we now turn.

The Grounds of Appeal

44. In outline, Mr O'Connor submits that the conviction on count 1 is unsafe by reason of the absence of a *Brown* direction (*R v Brown* (1984) 79 Cr App R 115), which is to the effect that when a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough in order to establish the ingredient that any one of them is proved but it must be proved to the satisfaction of the whole jury. Mr O'Connor contends that the particulars of count 1 epitomise the circumstances when a direction of this kind is necessary. Indeed, he suggests that the burden and standard of proof were fatally compromised in the absence of a direction requiring that each member of the jury needed to be sure of the same element or elements of the behaviour alleged. The conviction was potentially based upon a wide variety of permutations of factual findings without the jury having achieved unanimity on any of the individual particulars. It is highlighted that the count spanned 20 months and nine disparate kinds of behaviour, some of which contained "*internal alternatives*". Finally, by way of outline, it is emphasised that there was a high likelihood that the jury rejected many of the complainant's allegations given the acquittals on counts 2 – 7. Neither prosecution nor defence counsel at trial considered that a *Brown* direction was necessary or appropriate.

45. The judge directed the jury as follows (reflecting typed legal directions he had provided to them):

> "Count 1 on the indictment concerns an allegation that the defendant committed an offence contrary to section 76 of the Serious Crime Act 2015. This provision came into force on 29th December 2015; therefore you should focus on the defendant's behaviour after that date. That is why the period referred to in Count 1 is between 29th December 2015 and 27th August 2017. To put these dates into context, Magdalena Lesicka and the defendant were living in Lanzarote on 29th December 2015, James having been born on 4th September that year. Magdalena Lesicka returned to the UK towards the end of her maternity leave in about August 2016 and commenced her tenancy at 8 Beaford Road. The defendant returned to the UK in January 2017.
>
> Now, before you can find the defendant guilty of Count 1 the prosecution must make you sure about the following: first, that between 29th December 2015 -- I said the 26th, it is actually 27th, there is a typo there but I do not suppose it matters greatly -- between 29th December 2015 and 27th August 2017 the defendant engaged in controlling or coercive behaviour towards Magdalena Lesicka; second, that he did so repeatedly or continuously; thirdly, that the defendant Magdalena Lesicka were personally connected; fourthly, that the defendant's behaviour had a

serious effect upon her; and, fifthly, that the defendant knew or ought to have known that his behaviour would have a serious effect upon her.

Now, as for controlling behaviour, well, that is an ordinary term, it is a part of ordinary language; it requires no additional definition from me. Coercive behaviour, ladies and gentlemen, is behaviour that involves one person forcing or compelling another to do or not to do something or to act or not to act in a certain way. Examples of coercive behaviour include the use of violence, threats and intimidation. The defendant's behaviour could be described as controlling or coercive if it was behaviour that was designed or intended to force or compel Magdalena Lesicka to behave in a particular way herself or to maintain control over her.

The prosecution alleges that the defendant used psychological, physical, sexual and financial abuse to maintain power and control over Magdalena Lesicka; whether he did so will be for you to decide. In Count 1 -- and we can see this from the indictment -- the prosecution identifies a number of examples; that is subparagraphs 1 to 9, starting with using or threatening physical violence and then at nine controlling or restricting her finances. Those are examples of controlling or coercive behaviour which the prosecution says the defendant is guilty of.

You do not, however, have to be sure about each and every aspect of the behaviour. You may, for example, be sure about some aspects but unsure about others. You do not have to be sure about all of them. What you must be sure about, however, is that the defendant's behaviour during the relevant period amounted to controlling or coercive behaviour and that he behaved in that way repeatedly or continuously. The defence case, of course, is that the defendant did not use controlling or coercive behaviour and in particular he did not act in any of the ways alleged in Count 1.

Now, to answer the question that you will ask yourselves: "Are we sure that the defendant engaged repeatedly or continuously in controlling or coercive behaviour," you will need to consider all of his behaviour during the relevant period and the relevant period is that period in the indictment between 29th December 2015 and 27th August 2017. This behaviour includes the behaviour that is relevant to the individual offences referred to in the other counts, that is Counts 2 to 8 of the indictment.

Having considered all of his behaviour you must then ask first of all whether you are sure that any of that behaviour was controlling or coercive behaviour and if it was whether you are sure that he, the defendant, engaged in such behaviour either continuously or repeatedly. Now, insofar as those words are concerned continuously and repeatedly are ordinary English words, they have no special legal meaning.

You will remember that one of the things you have to be sure about is that the defendant and Magdalena Lesicka were personally connected and that is what the next paragraph refers to. There is no question that Magdalena Lesicka and the defendant were personally connected; they had been in an intimate personal relationship for some considerable time by 29th December 2015 and they had a child together. You may therefore be sure that they were personally connected.

Now, if you are sure that the defendant continuously or repeatedly engaged in controlling or coercive behaviour towards Magdalena Lesicka you must then consider whether the defendant's behaviour had a serious effect upon her. The law says that the defendant's behaviour had a serious effect upon Magdalena Lesicka if you are sure of either of the next two things. So either (a) the behaviour caused Magdalena Lesicka to fear on at least two occasions that violence would be used against her. Examples of such behaviour, subject to you being sure that the defendant acted in this way, might be when the defendant threatened to kill her or when he grabbed her in the kitchen doorway and started banging the doorframe above her head, which are two of the allegations that she made. So you either have to be sure of that, that is behaviour on at least two occasions caused her to fear that violence would be used against her, or that his behaviour caused her serious alarm and distress which had a substantial adverse effect upon her usual day-to-day activities.

Now, in this context substantial means of real significance. Therefore you must be sure that the behaviour caused her serious alarm or distress and that it had an adverse effect upon her day-to-day activities that was of real significance. You must consider all of the evidence relating to how Magdalena Lesicka responded to the defendant's behaviour and I will come to that evidence when I summarise the evidence in the second part of the summing-up.

Whether the defendant knew that his behaviour would have a serious effect upon Magdalena Lesicka by causing her to fear that violence would be used against her or by causing her serious alarm and distress that had a substantial adverse effect upon her day-to-day activities is a question of fact for you to decide. If you are not sure that he did know, however, you must go on to consider whether he ought to have known and to decide upon this issue you must ask whether you are sure that an ordinary, reasonable man knowing what the defendant had said or done would know that the behaviour would have a serious effect upon Magdalena Lesicka.

So just to recap […], there are two things that you have to decide. First: "Are we sure that the defendant knew that his behaviour would have a serious effect?" So you are looking at what he knew personally. If you are not sure that he did know then you must consider whether an ordinary, reasonable man -- that is somebody else looking at the situation -- whether an ordinary, reasonable man knowing what the defendant had said or done would know that the behaviour would have a serious effect upon Magdalena Lesicka.

You have heard during the trial evidence that during the course of his relationship with Magdalena Lesicka but before 29th December 2015 (a) that the defendant would belittle her and demean her actions, for example he would say that whatever she wanted to do was stupid; (b) the defendant would be verbally abusive and verbally threatening towards her; (c) he forced her to eat his hair; (d) he would regularly slap her face with his penis and would subject her to other sexual abuse; (e) he would squeeze her breasts, twist her nipples and pinch her painfully; and (f) he was physically violent, for example he pinned her to the bed on his birthday in 2015 and he pushed her against the fridge and strangled her in Lanzarote.

Now, the prosecution says that these are all examples of controlling and coercive behaviour and that this is relevant evidence even though these things occurred

> before 29th December 2015. The defendant denies that he behaved abusively or violently towards Magdalena Lesicka during this period.
>
> You will need to consider this evidence, that is the evidence of what happened before 29th December, carefully. If you conclude that the defendant did not behave in any of these ways before 29th December 2015 or that he may not have behaved like that then you should ignore it, that is all of the evidence before 29th December. If you are sure, however, that he behaved in one or more of these ways and, two, that his behaviour was controlling or coercive, this may be relevant evidence to show that he had a tendency to behave like that and thus support the prosecution case that he did so after 29th December 2015, because it may show that he was more likely to behave in the way that the prosecution says that he behaved.
>
> If you are sure that the defendant had a tendency to behave in a controlling or coercive manner then you are entitled to take account of the way in which he behaved prior to 29th December 2015 together with Magdalena Lesicka's evidence about the way he behaved after that date when deciding whether he is guilty of Count 1. But you must not convict him either wholly or mainly because of the way in which he behaved before that date; indeed, you may only convict the defendant of Count 1 if you are sure that he behaved in that way after 29th December 2015."

46. We need not set out the judge's later summary of these directions in the summing up, given he remained consistent as to the approach the jury needed to adopt.

47. The principal foundations for Mr O'Connor's submissions are to be found in his interpretation of the *ratio decidendi* of a number of earlier decisions that are binding on this court. It is necessary to consider each of the relevant cases in some detail.

48. The first in time is *Brown*, albeit it followed earlier authority. As Eveleigh LJ set out at the outset of the judgment, the case involved the following critical contention (as described at page 116):

> "The prosecution case against the appellant was that he fraudulently induced four persons to enter into agreements for acquiring shares in a company and fraudulently attempted to induce another to do so, by making statements all of which he knew to be misleading. Each count contained particulars of a number of different statements relied on by the prosecution as constituting the inducement. Count 6 provides a typical example, *viz.*:
>
> **"Statement of offence**
> *Fraudulently inducing investment of money* contrary to Section 13(1)(a) of the Prevention of Fraud (Investments) Act 1958 .
>
> **Particulars of offence**
> *Kevin Brown* on the 11th day of August 1980 fraudulently induced Peter Robert Cheesman to enter into an agreement for acquiring 50 shares at a total purchase price of £20,000 in Manteo Personnel Services Limited by stating that:
>
> > (1) The company was then manned by a full complement of experienced staff, was rapidly expanding and was then in a position to show further growth in line with projections prepared by the said Peter Robert Cheesman.

> (2) The assets of the company included a Data Word Processor, a mini computer and a Building Society investment of £12,065.
> (3) There had been no material change in the position or prospects of the company since the 28th February 1980 which had not been disclosed to the said Peter Robert Cheesman during the course of negotiations.
> (4) The company was absolutely entitled to all the assets described in the Balance Sheet relating to the company's affairs as at the 28th February 1980 and that they were the company's unencumbered property.
> (5) He the said Kevin Brown was not aware of any fact or circumstance relating to the business or affairs of the company which might if disclosed be reasonably expected to affect the decision of the said Peter Robert Cheesman to acquire the said 50 shares
>
> all of which statements […] the said Kevin Brown then knew to be misleading false or deceptive."

49. The central observation to be made as regards the decision in *Brown* is that, as just set out, under each count a number of matters were specified as constituting one of the ingredients of the offence but any one of them was capable of establishing that ingredient. In those circumstances, it was enough to establish the ingredient that any one of them was proved so long as the entire jury were sure of this conclusion (subject to a majority direction). The court explained that although the jury needed to be "*agreed as to an essential element of the offence*", they do not need, conversely, to be "*agreed as to the parts of the evidence which lead them to the conclusion that the ingredients of the offence have been made out*". Against that background, the *ratio decidendi* of the decision in *Brown* was shortly summarised by Eveleigh LJ as follows at page 117:

> "Counsel for the appellant was correct in his submission that it is a fundamental principle that in arriving at their verdict the jury must be agreed that every single ingredient necessary to constitute the offence has been established. The false statement is an essential ingredient."

And at page 119:

> "In a case such as that with which we are now dealing, the following principles apply: 1. Each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). 2. However, where a number of matters are specified in the charge as together constituting one ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but (because of the first principle above) any such matter must be proved to the satisfaction of the whole jury. The jury should be directed accordingly, and it should be made clear to them as well that they should all be satisfied that the statement upon which they are agreed was an inducement as alleged."

50. In *Brown*, therefore, each of the five different statements that were particularised in the example count (count 6) and relied on by the prosecution were said individually to constitute the inducement which was an essential ingredient of the fraud. In those

circumstances, the jury needed to be directed that they should all be satisfied that the statement upon which they are agreed was an inducement as alleged.

51. We note in passing that the decision in *Brown* was considered in *R v Giannetto* [1997] 1 Cr App R 1 (see [57] below for more detailed consideration), when this court (*per* Kennedy LJ) observed:

> "[…] the decision in *Brown's* case seems to us merely to beg the question as to what really were the essential elements of the offence which had to be proved, bearing in mind that the law has never required individual jurors to agree about everything. In *Brown's* case the prosecution may well have relied on several different pieces of evidence and several different arguments to support the contention that a particular statement was misleading, false or deceptive. The jurors may have been divided as to which pieces of evidence and which arguments they found compelling, but that would be of no consequence provided all concluded (albeit for different reasons) that one particular statement set out in the charge was misleading, false or deceptive."

52. In *R. v More* 1987 1 WLR 1578, the House of Lords resisted a request to review whether *Brown* was correctly decided, on the basis that the case before them was not an appropriate vehicle to undertake that exercise. Lord Ackner, in a speech with which the other members of the Appeal Committee agreed, observed at page 1584:

> "It is […] essential that a jury be directed in a manner that is easily comprehensible and devoid of unnecessary complications. Whether or not a particular direction adequately expresses to the jury the obligation of the prosecution to prove to the jury's satisfaction each ingredient of the offence must depend essentially upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence."

53. In *R v Smith* [1997] 1 Cr App R 14, the appellant was convicted of affray, contrary to section 3(1) of the Public Order Act 1986 (namely, that he had used or threatened unlawful violence towards another and his conduct was such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety). The offence occurred during a party. Although the prosecution initially relied on events which had taken place outside the house as the basis for establishing the count, the recorder referred to incidents both inside and outside the house when summing up the case to the jury. The appellant appealed against conviction on the ground that the recorder should have directed the jury that either the events inside the house or those outside the house constituted the offence. In allowing the appeal, Lord Bingham CJ indicated (at page 17):

> "It is essential in considering this submission to bear in mind the nature of the offence of affray. It typically involves a group of people who may well be shouting, struggling, threatening, waving weapons, throwing objects, exchanging and threatening blows and so on. Again, typically it involves a continuous course of conduct, the criminal character of which depends on the general nature and effect of the conduct as a whole and not on particular incidents and events which may take place in the course of it. Where reliance is placed on such a continuous course of conduct it is not necessary for the Crown to identify and prove particular incidents. To require such proof would deprive section 3(1) of the 1986

> Act of its intended effect, and deprive law-abiding citizens of the protection which this provision intends that they should enjoy. It would be asking the impossible to require a jury of twelve men and women to be satisfied beyond reasonable doubt that each or any incident in an indiscriminate mêlée such as constitutes the typical affray was proved to the requisite standard.
>
> Different considerations may, however, arise where the conduct which is alleged to constitute an affray is not continuous but falls into separate sequences. The character of the conduct relied on in each sequence may in such a case be quite different and so may the effect on persons who are (or might hypothetically be) present at the scene. The possibility then arises that half the jury may be persuaded that the first sequence amounted to an affray and the second did not, and the other half of the jury may be persuaded that the second sequence amounted to an affray and the first did not. The result would then be that there was no unanimous jury verdict in support of conviction based on either sequence."

54. We would stress that in the context of the issue raised in the present case, it is of note that if there are distinct and separate sequences during an affray, this involves the jury making more than one decision, *viz*.: i) whether the particular sequence occurred as the prosecution alleged and ii) the impact of what occurred on those present, or potentially present, at the scene. There would need to be certainty as to both elements as regards each separate sequence. As described by Lord Bingham, the court should avoid a lack of unanimity as regards the two sequences and, we would stress in light of the matters just set out, it would be critical for the prosecution to prove that the defendant used or threatened unlawful violence towards another during a particular sequence and his conduct in the course of that sequence was such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety.

55. In *R v Mitchell* (1994) 26 HLR 394; [1994] Crim LR 66, the appellant was charged with an offence contrary to section 1 (3A) of the Protection from Eviction Act 1977 which provides:

> "(3A) … the Landlord of a residential occupier or an agent of the Landlord shall be guilty of an offence if—
> (a) he does acts likely to interfere with the peace or comfort of a residential occupier or member of his household, or
> (b) …
> and … he knows or has reasonable cause to believe that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises."

56. It was alleged that the appellant had on various dates "… *threatened Mr Hans Kohlbacher with violence and eviction and assaulted him, commenced building works in the said premises but never completed the same and changed the locks to the premises*". The judge ruled that it was unnecessary to direct the jury that they all had to be sure as to the particular act so long as they were sure that by his acts he had committed the offence. This court decided that the judge should have directed the jury that they needed to be unanimous as to the proof of the ingredient relied upon to found their verdict of guilty (*e.g.* acts of violence, a failure to complete the building works or changing the locks).

The court, having reviewed various authorities set out the following principles at page 400 (*per* Swinton Thomas J):

> "(1) Where a number of different matters are set out in a single count, the judge should consider whether he should give the jury a direction that they must all be agreed upon the particular ingredient which they rely upon to find the defendant guilty of the offence charged (*Brown*) (see above).
>
> (2) That such a direction will be necessary only in comparatively rare cases. In the great majority of cases, particularly cases alleging dishonesty and cases where the allegations stand or fall together, such a direction will not be necessary. It is of first importance that directions to the jury should not be over burdened with unnecessary warnings and directions which serve only to confuse them. (*Price* 1991 Crim LR 465 and *More* (see above).
>
> (3) However, in an appropriate case where there is a realistic danger that the jury might not appreciate that they must all be agreed on the particular ingredient on which they rely to found their verdict of guilty on the count, and might return a verdict of guilty as charged on the basis that some of them found one ingredient proved and others found another ingredient proved, so that they were not unanimous as to the ingredient which proved the offence, a direction should be given that they must be unanimous as to the proof of that ingredient. (*Lord Ackner in More* (see above))."

57. The appellant in *R v Giannetto* (see [51] above) was charged with the murder of his wife. The Crown's case was that he had either murdered her himself or secured someone else to do so, but it was not possible to demonstrate which of the two options had occurred. The judge did not direct the jury that they needed to be unanimous as to one or other of the two competing alternatives. This court held that pursuant to section 8 of the Accessories and Abettors Act 1861, if the prosecution was unable to say for good reason whether the defendant had done more than to encourage, it was open to the Crown to invite the jury as a whole to find that at the least the defendant had encouraged. Kennedy LJ set out the court's conclusions as follows at page 8:

> "Having considered the authorities with some care we are satisfied that in the circumstances of this case the trial judge was right not to direct the jury that before they could convict they must all be satisfied either that the appellant killed his wife or that he got someone else to do so. They were entitled to convict if they were all satisfied that if he was not the killer he at least encouraged the killing, and accordingly this ground of appeal fails.
>
> There are two cardinal principles. The first is that the jury must be agreed upon the basis on which they find a defendant guilty. The second is that a defendant must know what case he has to meet. When the Crown allege, fair and square, that on the evidence, the defendant must have committed the offence either as principal or as secondary offender, and make it equally clear that they cannot say which, the *basis* on which the jury must be unanimous is that the defendant, having the necessary *mens rea*, by whatever means caused the result which is criminalised by the law. The Crown is not required to specify the means, because the legal definition of the crime does not require it; and the defendant knows perfectly well what case he has to meet. Of course, if (as will very often be so)

> the Crown nail their colours to a particular mast, their case will, generally, have to be established in the terms in which it is put. […]"

58. Kennedy LJ also observed at page 7:

> "In an article in the 1988 Criminal Law Review Professor Smith considered the English authorities, and concluded that the principle stated in *Brown* applies "when the prosecution allege more than one factual basis for the crime charged and it is not possible to say 'if it was not the one then it must have been the other'" *[1988] Crim.L.R. 344.* If in any given case the factual basis of the crime charged is in reality coterminous with an essential element or ingredient of the offence then we can accept without difficulty Professor Smith's formulation, and in relation to the facts of the present case it was possible to say, plainly and the prosecution did say, that if the appellant was not himself the killer, then he instigated the offence."

59. In *R. v Jones (Douglas Leary) The Times, 17 February 1999, CA (Crim Div)* it was held that so long as the jury were unanimous that the defendant was guilty of manslaughter in that they were sure that he had committed an unlawful act which had caused the victim's death, there was no need for them to agree on the basis for the verdict. It was stressed that in all cases the court should approach the issue with a measure of realism and common sense.

60. In *R v Boreman* [2000] 2 Cr App R 17 it was indicated that when, in the context of a killing, there were two possible means by which it had been effected, which comprised completely different acts happening at different times, the jury should be directed that they ought to be unanimous on which act led them to the decision to convict. The judge left the case to the jury on two bases: death by injuries that had been inflicted and death by fire. At page 28 Otton LJ expressed some concern over the lack of clarity as to when a *Brown* direction is required:

> "[…] the law is not as clear as it should be in determining when a *Brown* direction is required. The principle is that each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction). It is thus necessary to determine what are the ingredients of a particular offence. A comparison between the cases of *Smith* and *Giannetto* (above) discloses the practical difficulty in answering that question in an individual case. When is a method of committing an offence an ingredient of the offence and when is it only the means by which the offence is committed? In murder, the ingredient in question, the *actus reus*, is that the defendant by his deliberate act kills the deceased. It may be said that it should not matter in the present case whether the jury was split on the precise manner in which a defendant killed the deceased. Provided they are unanimous that the defendant, with the requisite intent, had killed the victim, why should it matter that some were sure it was by inflicting grievous bodily harm and others sure it was by setting the fire? However, applying the second principle enunciated in *Brown*, it seems to us that where the two possible means by which the killing is effected comprise completely different acts, happening at different times, it can properly be said that the jury ought to be unanimous on which act leads them to the decision to convict.

61. This issue again arose in the context of a murder charge when the case was left to the jury on the alternative bases of a karate kick and a punch in the case of *R v Leslie Joseph Carr* [2000] 2 Cr App R 149. Lord Bingham CJ observed at page 157 F:

> "[…] if the case was to be left to the jury on the alternative bases of a karate kick or a punch, it was necessary for the judge to direct the jury very carefully indeed on the differences between these two forms of assault and the different defences applicable to each and, in particular in relation to the punch, the exercise of reasonable force. It was necessary to make plain that, if the jury were satisfied that the crucial blow was a kick, the issue was one of identification; and if the crucial blow was a punch, the issue was one of self-defence on which a careful and precisely tailored direction was in our judgment necessary."

62. In *R v D* [2001] 1 Cr.App.R. 13, page 194, the appellant was charged with six counts of indecency during which five different types of indecency were alleged to have occurred on various occasions spanning a number of years, although the complainant only averred that "*more than one*" of them featured on any given occasion. This court held that in this case of indecent assault the Crown was obliged to make clear the nature of the act or acts relied upon as amounting (a) to an assault and (b) to indecency (see [20]). Potter LJ concluded at [22] that:

> "[…] the vice of not directing the jury as to the need for them to conclude *unanimously* that at least one of the types of conduct relied on had occurred on a particular occasion was twofold. First, it represented a failure by the judge to approach the matter on the basis of *Brown*, when he had himself raised the need to do so. Secondly, it opened up the possibility of a conviction on one or more counts when not only might juror A and juror B have differed in their view as to what occurred on the particular occasion represented by the count, but the view of juror A as to what had in fact occurred might, at least in principle, relate to a time or occasion different from that on which the view of juror B was based."

63. It is clear from the authorities set out above that the jury must be agreed that every ingredient necessary to constitute the offence has been established. This court has, nonetheless, repeatedly stated, and we yet again emphasise, that a *Brown* direction is only necessary in comparatively rare situations. It is confined to those cases when, first, there is an appreciable danger that, when the jury in deciding whether they are agreed on the matter that constitutes the relevant ingredient of the offence, some may convict having found a particular matter proved as constituting the ingredient whilst others may find a wholly different matter or different matters proved as constituting the ingredient. Therefore, when the factual bases of the crime charged (*e.g.* as set out in the particulars) are, in reality, individually coterminous with an essential element or ingredient of the offence, then it appears it is necessary for a *Brown* direction to be given (see Kennedy LJ in *Giannetto* at [58] above). Examples of this situation, as already described, are to be found in *Brown*, *Smith*, *Mitchell*, *Boreman*, *Carr* and *D*. This, it is to be emphasised, does not require each juror to follow the same route through the evidence to reach the decision that a particular ingredient is made out. Second, a *Brown* direction should be given when two distinct events or incidents are alleged, either of which constitutes the ingredient of the offence charged (see *Smith* at [53] and *Boreman* at [60]). Third, a *Brown* direction

should be given when two different means of committing the offence may give rise to different defences (see *Carr* at [61] above).

64. However, when the individual particulars are not said to be coterminous with an essential element or ingredient of the offence and when the individual particulars do not involve different defences, a direction in accordance with *Brown* is unnecessary. By way of example, in *R v Sinha* [1995] Crim LR 68 the defendant (a doctor) was charged with doing acts tending or intended to pervert the course of public justice when he altered a patient's computerised therapy records who had died following the prescription of drugs. It was alleged on appeal that the judge had erred in not directing the jury that they needed to agree which of several different judicial proceedings – the coroner's inquest, a civil action or criminal proceedings – the defendant's acts tended and were intended to pervert. This court held, dismissing the appeal, that if there was more than one possible type of proceedings which might ensue, if the act done might mislead the Court in any or all of those proceeding, and it was proved that the defendant intended to mislead in any proceedings which might ensue, that of itself would be sufficient to justify conviction.

65. Similarly, as demonstrated in *R v Ibrahima* [2005] EWCA Crim 1436, the direction need not be given in a case involving an intent to supply controlled drugs when the jury could convict on the basis of either social supply to a named friend or commercial supply in a nightclub, without having to agree on which it was. Keene LJ, having considered the principles established in *R v Mitchell*, observed:

> "18. It seems to this court that the present case does not come into that category (*viz.* as established by *Boreman* or *Carr*), nor does it fall within the third principle enunciated in *Mitchell*. The particulars of offence here alleged, and only had to allege, that the appellant possessed the tablets "with intent to supply to another". That was the ingredient which had to be proved. The jury did not have to be satisfied as to the identity of the intended recipient, nor as to whether it was to be carried out on a commercial basis or not. The necessary ingredient of the offence, apart from possession, was the intent to supply to another. That would be sufficient. The jury had to be sure that that mental element on the part of the appellant existed at the relevant time, but in our judgment they did not have to be satisfied beyond that."

66. In a case involving dangerous driving, *R v Budniak* [2009] EWCA Crim 1611, the prosecution relied on the allegation that the applicant was driving too fast in poor wet weather conditions and that his rear tyres were in poor condition. In refusing the application for leave to appeal when a *Brown* direction had not been given, Burnett J stated:

> "6. A direction of the sort requested in this case is required in those rare cases in which there is a real possibility that the jury might not appreciate that they must all be agreed on the particular matter on which they rely to found their guilty verdict. It is important, in our judgment, to remember that the matter upon which the jury here needed to agree was whether the applicant's driving was dangerous. It is difficult to envisage circumstances in which a Brown direction would be properly called for in a case of dangerous driving. That is because […] the jury's task is to evaluate the driving in question and decide whether it was dangerous in the light of all the evidence.
>
> […]

> 8. There are many circumstances in which driving might be stigmatised as dangerous because of, at least in part, the condition of the vehicle. In the course of argument, examples were canvassed, which included having defective or broken windscreen wipers or defective lights. The possibilities are legion. Another obvious one would be circumstances in which it were suggested that a car was overloaded, and the overloading together with the manner of driving might be thought dangerous.
>
> 9. The reality in a case of this sort was that there was no doubt as to the cause of the loss of control. It was a combination of speed, the adverse weather conditions and the bald tyres. The question for the jury, looking at the evidence in the round, was directed towards the question of culpability."

67. Another example of this approach is to be found in *R v Hancock* [1996] 2 Cr App R 554, in which case the appellants were charged with conspiracy to defraud in the context of the operation of a company. The particulars of the offence alleged that the appellants had conspired to defraud people who were or became agents of the company, listing 10 different dishonest and false representations or concealments. The appellants were convicted and appealed against their convictions on the ground that the judge had erred in failing to direct the jury that they should reach unanimity or an acceptable majority upon at least one of the particulars set out in the count. In dismissing the appeal, Stuart Smith LJ set out at page 559:

> "The question therefore is whether each of the particulars in the count constitute an essential ingredient of the offence charged, such that if any one of the particulars was proved the accused is guilty of the offence. Or as Mr Farrer Q.C. (the respondent's counsel) put it: is there a real risk of different jurors convicting of different offences encompassed within the single count? The answer in our judgment is plainly "No". The essential ingredients of the offence of conspiracy to defraud, or what the Crown had to prove to establish the *actus reus* of the offence is that each of the accused has entered into an agreement to defraud the agents. It was necessary to prove that there was an agreement to act dishonestly to prejudice the agents and that each of the accused was party to that agreement.
>
> Since the case of *Landy* (1981) 72 Cr.App.R. 237; [1981] 1 W.L.R. 355, in a case where conspiracy to defraud is alleged, the Crown are required to set out sufficient particulars of the offence to enable the defence and the judge to know precisely, and on the face of the indictment itself, the nature of the prosecution case and to stop the prosecution shifting their ground during the course of the case. But simply because particulars of an offence are given does not mean that those particulars are an essential ingredient of the offence. In a case such as this the particulars do no more than specify the nature of the case the prosecution seek to prove and the principal overt acts upon which they rely to invite the jury to infer that there was a dishonest agreement and that a particular defendant was a party to it."

68. Furthermore, when alternative specified allegations relate to one of the ingredients of the offence, a *Brown* direction is unnecessary if there are "*minor differences between the facts alleged and the evidence given by various witnesses*" (per Lord Bingham C.J. in *Carr* at page 158 G). Additionally, if the allegations form part of a continuing course of conduct

(*e.g.* cruelty to a child as described in *R v Young* (1993) 97 Cr App R 280) a *Brown* direction need not be given. As Latham J indicated in *Young* at page 287, the decision in *Brown* "*does not mean that in every case the jury must agree on the specific evidence that leads them to find a defendant guilty. In the present type of case, members of the jury may well differ as to the emphasis to place on different incidents in what is, after all, an allegation of a course of conduct. Provided that overall they are unanimous that cruelty in the sense alleged by the prosecution has been established, that is sufficient*."

69. Unless the incident involves different "*sequences*" in the sense described in *Smith* (see [53] above), the various means of committing an offence will not lead to the need for a *Brown* direction. By way of example, in *R v Asquith and others* [1995] 1 Cr App R 492, the appellant and his companions were alleged to have acted together to damage a police car with the intention to endanger life by the damage they were intending to do contrary to section 1(2) of the Criminal Damage Act 1971. It was alleged the appellant had been involved in damaging a police vehicle by throwing items at it and ramming it. Lord Taylor C.J. observed "[t]*hat was a single course of conduct of which hurling missiles and ramming were the method used. The defence had nothing to do with distinguishing one of these methods from another. It was simply to challenge proof of identity. At the end of the case, therefore, although the prosecution had to prove all the ingredients necessary, the issue for the jury was whether the appellant was proved to have been the driver of the car. In these circumstances, we consider that it would have involved unnecessarily complicating the directions to the jury and making them less easily comprehensible to draw fine distinctions between the different methods adopted by those in the Fiesta when the only issue was whether the appellant was one of those."*

70. The decision in *Giannetto*, set out above at [51], [57] and [58] demonstrates that when a jury is considering two alternatives and they are unanimous that if it was not one then it was the other, there is no requirement that they need to be unanimous as to which of the alternatives.

71. In our judgment, the present case is at considerable distance from the circumstances of *Brown*, *Smith*, *Mitchell*, *Boreman*, *Carr* and *D*. The *actus reus* of the offence in count 1 was the applicant's repeated engagement in behaviour towards Magdalena Lesicka that was controlling or coercive. The nine particulars were simply examples of how that coercive behaviour was manifested, to assist the jury in understanding the nature of the case the applicant had to meet. The individual particulars were not each suggested to be coterminous with the *actus reus*. There was no realistic danger, therefore, that the jury might not have appreciated that they must all be agreed on the particular ingredient (*viz.* the *actus reus*) on which they relied to found their verdict of guilty on count 1, and might return a verdict of guilty on the basis that some of them found one *actus reus* and others found another *actus reus* proved, with the result that they were not unanimous as to the ingredients which established the charge. The jury's task was to evaluate the entirety of the behaviour in question and decide whether it was controlling or coercive in the light of all the evidence. It was not necessary for the jury to be agreed as to the parts of the evidence which led them to the conclusion that the *actus reus* of the offence had been made out. We stress this was not a case when two or more distinct events or incidents were alleged, either or any of which constituted the *actus reus* of the offence. Instead, it involved an assessment by the jury of the cumulative impact of the undoubtedly diverse evidence of controlling and coercive behaviour. There were not two or more different means of committing the offence which may have given rise to different defences, since the defence of the applicant was that the entirety of the allegations against him were simply untrue.

72. To summarise, therefore, the jury did not have to be unanimous as to which particular kind or kinds of controlling or coercive behaviour they were satisfied had been established. The relevant ingredient of the offence – the *actus reus* – was the applicant's repeated engagement in behaviour towards Magdalena Lesicka that was controlling or coercive. That finding would have been sufficient. Simply because particulars of the offence in count 1 had been provided did not mean that those particulars were individually an essential ingredient of the offence. Instead, they did no more than indicate the nature of the case the prosecution sought to prove and they were a summary of the kinds of principal overt acts upon which the Crown relied.

73. Mr O'Connor accepts that if the judge was correct not to give a *Brown* direction, then there is no separate criticism to be made of the terms in which the summing up was delivered. Indeed, it is accepted that it was (aside from the *Brown* issue) an impeccable summation. In the result, this ground of appeal, attractively and persuasively argued by Mr O'Connor, fails. Given the issue was clearly arguable, we grant the extension of time and leave, and we dismiss the appeal.