IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A141/2017

In the matter between:

A B Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 9 JUNE 2017

GAMBLE et FORTUIN JJ:

INTRODUCTION

[1] Late at night on Monday, 4 August 2014 a young girl (whom we shall refer to as "KS") was examined by the medical staff of the Rape Crisis Centre at the Karl Bremer Hospital in Bellville. She was 7 ½ years old at the time, weighed 21 kg and was described as being of small stature. The examination was conducted by Dr

Celeste de Vaal, an experienced forensic specialist who regularly conducted examinations of trauma and rape victims.

[2] The doctor took a detailed history from KS who had been brought into the Centre by two police officers. Her examination of the child revealed severe injuries of the genitalia, which included abrasions and lacerations, an injury to the inside of her mouth and bruises to her head, face and upper back. Dr de Vaal concluded that the child had probably been penetrated sexually, both vaginally and orally, and had also been subjected to a series of physical assaults.

[3] At the time that KS was being examined, her mother and the appellant were both in police custody. The appellant was subsequently charged with two counts of sexual penetration of KS in terms of s3 of the Criminal Law Amendment (Sexual Offences and Related Matters) Act, 32 of 2007 and one count of sexual violation in contravention of s5(1) of the same Act, to which he later pleaded not guilty. The appellant appeared before the Regional Court in Parow and in October 2016 was convicted on all three counts. The three convictions were taken as one for purposes of sentence and the appellant was sentenced to life imprisonment. It was also directed that his name should be recorded in the Register of Sexual Offenders. The appellant appeals now against conviction and sentence.

[4] For the sake of completeness, we record that the child's mother was subsequently charged with assault and the statutory failure to take steps to address the ongoing sexual molestation of KS and was herself convicted of such offences and sentenced to 10 years imprisonment which was conditionally suspended for five years.

THE EVIDENCE BEFORE THE TRIAL COURT

[5] KS testified before the trial court with the assistance of an intermediary in terms of s170A(1) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). Because of the distress which KS experienced during her testimony it was spread over two court days, a fortnight apart. The trial court also heard the evidence of KS's mother ("ES"), Dr de Vaal and YJ, an aunt of KS and sister of ES, who lived a short distance away in the same street, and in whose care KS had been placed after the arrest of her mother.

[6] The evidence revealed that KS, ES and an unnamed son shared a bedroom in a maisonette in Kraaifontein with the appellant, his wife and their three married children. The appellant's wife (LB) is also a sister of ES. On the ground floor of the flat were the kitchen, bathroom and living room, while there were two bedrooms on the upper level. The appellant, it seems, was the only person in the home who was gainfully employed.

[7] KS described three independent events of sexual molestation by the appellant, all of them during the evening and in his bedroom. Although the charge sheet broadly describes the period that the crimes were committed as "*during 2014* ", the evidence suggests that the incidents probably took place in June/July of that year, with the last incident having occurred over the first weekend in August and immediately prior to the examination of KS by the doctor.

[8] The first event described by KS was in support of count 1. She related how the appellant had placed his hand over her underwear and fondled her vagina. She had no difficulty in describing the incident to the regional court.

[9] The second event involved an act of sexual penetration of the vagina and of the mouth, as was alleged in count 2. That event appears to have been accompanied by ejaculation on the part of the appellant since the child's mother testified that at the time she inspected her daughter's underwear and found a yellowish discharge thereon shortly after the incident had occurred. KS described this act of sexual penetration through use of the vernacular phrase "*hy het met my oulik gemaak",* which, as the regional magistrate pointed out, is a phrase commonly used by young children in her court to describe sexual intercourse. In relation to the third event, KS described how the appellant penetrated her vagina with his penis and she complained that it had been painful.

[10] The testimony of the child as to the acts of sexual penetration, while understandably conveyed in simple terms, is more than adequately corroborated by the medical evidence of fresh tears to the hymen and *labia majora* as well as bruising of those areas. In addition, the doctor found a tear to the *"frenulum"* (which apparently is a membrane located on the inside of the upper lip). This was said to confirm the probability of oral penetration of the child prior to the examination, although not immediately before it since there was found to be a degree of healing of the injury which had set in.

[11] However, the most devastating corroboration of the child's version is to be found in the evidence of her mother who admitted to the trial court that she was

aware of ongoing sexual harassment by the appellant of her daughter. ES said that on more than one occasion she caught the appellant *in flagrante delicto:* once when she encountered him forcing the child to fondle him and another, on a Sunday afternoon, while he was seated on his bed, with his trousers around his ankles and KS facing him between his legs. (On that occasion the stained underwear of the child was retrieved by ES and this therefore accords with the circumstances surrounding count 2). The alarmingly indifferent response of the mother (perhaps concerned about losing the sole breadwinner in the house) was to admonish the appellant or to complain to his wife, LB, and his adult son.

[12] Regarding the incident which immediately preceded the medical examination by Dr de Vaal, ES related to the trial court how, on the evening of 2 August 2014 (a Saturday) she became suspicious when the child was again upstairs and did not respond to her calls to come down. As she went upstairs, said ES, she saw her daughter just standing there. When LB asked KS to go out and buy electricity for the home, the child refused. ES said this infuriated her and she laid into her daughter with a shoe, hitting her several times in the face. She also threw KS to the ground and trampled her. The injuries sustained in this assault are more than adequately corroborated in the J88.

[13] It does not appear from the record just how KS landed up in the care of her aunt, YJ, but the suggestion seems to be that a woman identified only as “W”, a neighbour of ES and someone in whom she had confided earlier about the appellant’s misconduct, must have alerted the police after ES went to W on the Sunday afternoon asking for ointment to treat the child’s wounds. That night, said the mother, ES slept

over at another sister of her's (YS), who also lived nearby. ES said that she and the appellant were arrested by the police at her house during the course of the Monday.

CORROBORATION

[14] We are required to approach the evidence of KS with caution, firstly because she is a single witness, and, secondly because she is a young child[1]. We are satisfied that the evidence of ES corroborates a pattern of regular sexual molestation of the child by the appellant, which she admitted she condoned and for which she was subsequently convicted and sentenced[2]. Further, her evidence places KS in the immediate proximity of the appellant on the Saturday evening (i.e. count 3) just before she was assaulted by her mother.

[15] The trial court also heard the evidence of YJ who testified that the child had confided in her earlier in the year, probably in June 2014, that the appellant had sexually penetrated her ("*oulik gemaak").*This evidence would be admissible as the first report in relation to the first incident of sexual penetration (count 2 and the second event referred to by the child). YS also testified how KS arrived at her house on the Monday and confided in her about an act of oral sexual penetration perpetrated by the appellant on her on the previous Sunday (3 August). Shortly thereafter the police arrived and took KS off to Karl Bremer Hospital. This remark on the part of ES was

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[1] R v Manda 1951 (3) SA 158 (A) at 163; Woji v Santam Insurance Co.Ltd 1981 (1) SA 1020 (A) at 1028; S v Mathebula 1996 (2) SACR 231 (T) at 234g – j.

[2] Although there is no direct evidence of the conviction it would appear as if ES was convicted, *inter alia*, of a contravention of s54(1)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

provisionally received by the trial court as a first report in regard to the most recent event.

[16] The version of the child as told to Dr de Vaal on the Monday night was recorded in shorthand as follows on the J88 medical report which the doctor completed contemporaneously with her physical examination:

> "*Brought in by 2 police officers – mom & uncle arrested. Alleged while back she was forced to have oral sex (with) uncle – had to suck his penis while he molested her vaginally. Then Saturday uncle raped her – told mum who scolded her then and said stay out of her uncle's room. Today her mother then assaulted her physically as well face, head and stepped on her. Soiled clothes, only has nightgown on and shoes."*

The J88 also records that the child was found to be *"very shy and fearful".*

[17] The version of the appellant was a simple denial in relation to all issues and he could advance no reason whatsoever as to why the child might have wrongly implicated him. This conundrum must be considered in light of the fact that the appellant was regarded by the child with a significant degree of trust, much like that of a grandfather. He said that the child was well-disposed to him and that he sometimes helped her with her homework. There was clearly no basis for antipathy on the part of the child towards the appellant.

[18] In her testimony ES confirmed that the appellant was the only breadwinner in the house (aside from social grants received by her in respect of the

children) and her implication of him in these events was tantamount to economic suicide for her and the family. Significantly, the appellant could not explain away the damning evidence of ES regarding the number of occasions in which she caught him in compromising positions with the child. We consider that there is one particularly curious aspect of the appellant's evidence. He testified that on the Sunday (3 August) he phoned his employer to inform him that he would not be in on the Monday, citing a bad headache as the reason. Perhaps he realised then that he had gone too far and that the long arm of the law was about to extend its reach to him?

[19] Be that as it may, the denial of the appellant stands in stark contrast to the overwhelming totality of evidence against him. When the various pieces of the puzzle are put together the State's case is drawn into sufficiently sharp focus that the appellant's version simply cannot carry the day[3]. In our view, the trial court correctly rejected his evidence in the circumstances as not being reasonably possibly true.

[20] Given that the court was dealing with the evidence of a young child, as we have said, it is axiomatic that her testimony had to be approached with the utmost caution. There are some contradictions here and there as to what happened exactly and when, and there may be instances which she related which were not covered by the charges. But once the State's evidence is viewed holistically there can be little doubt that the child's version is properly corroborated in all material respects in accordance with the principles applicable in the cases already referred to.

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[3] S v Van der Meyden 1999 (2) SA 79 (W) at 82C-E; S v Mbuli 2003 (1) SACR 97 at 110e; Trainor v S [2003] 1 All SA 435 (SCA) at [9].

ADMISSIBLE EVIDENCE?

[21] On appeal, Mr Theunissen argued on behalf of the appellant that the evidence of the child had been irregularly taken by the regional magistrate, that she had not been properly cautioned in terms of the relevant provisions of the CPA and that there was therefore no admissible evidence from KS on the record. We now deal with that argument.

[22] The record reflects that before KS gave evidence the court was asked to make a ruling in terms of s170A(1) of the CPA that her evidence could be adduced through the intercession of an intermediary. The defence did not object thereto and after considering the qualifications and experience of the proposed intermediary an order was duly granted. Thereafter, KS gave evidence *in camera.*

[23] She was asked in some detail by the regional magistrate, through the intermediary, what grade she was in at school and how old she was. Her replies that she was in Gr 3 and was then nine years old were factually correct. Then she was asked some questions aimed at establishing whether she could distinguish right from wrong. There were no difficulties with her replies in that regard either. The regional magistrate then remarked as follows:

> "*HOF: Die Hof is tevrede dat die getuie die verskil verstaan tussen 'n waarheid en die leuen. Sy word dan verklaar 'n bevoegde getuie*[4]*……*

[4] *"The court is satisfied that the witness understands the difference between a (sic) truth and the (sic) lie. She is thus declared to be a competent witness."*

HOF: Ek waarsku nou vir jou jy moet net die waarheid praat, niks anders nie net die waarheid, verstaan jy dit?[5]*.....*

GETUIE: Ja."

[24] Mr Theunissen argued that this admonition from the court was not sufficient to render KS's testimony admissible as evidence. Relying on the Full Bench decision in this Division in Bessick [6], counsel submitted that the failure of the regional magistrate to specifically ask KS whether she understood what the concept of an "***oath"*** embraced was fatal to the admissibility of her evidence. He suggested that such a direct enquiry was an obligatory first step to be undertaken by the court before establishing whether the witness could distinguish between right and wrong. Counsel argued that absent this enquiry, the witness could not be permitted to deliver unsworn evidence in terms of s164 of the CPA.

[25] The provisions of s164(1) of the CPA are to the following effect:

*"**When unsworn or unaffirmed evidence admissible***

164*(1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."*

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[5] *"I now warn you that you must speak only the truth and nothing but the truth, do you understand that?"*

[6] S v Bessick [2012] ZAWCHC 248 (29 May 2012)

[26] That section is to be considered in conjunction with s162(1) which reads as follows:

"***Witness to be examined under oath***

162*(1) Subject to the provisions of sections 163* [7] *and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:-*

'I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'

[27] S164 has been the subject of quite considerable judicial comment over the years, including judgments by the Supreme Court of Appeal[8] and various Provincial Divisions[9]. It bears mention that those cases deal with the import of the section in question before its amendment in 2007 when the words "*from ignorance arising from youth, defective education or other cause"* appeared after the word "*who*" and before the words *"is found"* in the first line thereof. *Hiemstra* [10] points out that in its current form the section is accordingly of wider application than before and "*(t)he*

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[7] S163 provides for a witness to make an affirmation to solemnly swear to speak the truth in circumstances where s/he objects to taking the oath.

[8] S v B 2003(1) SACR 52 (SCA); Director of Public Prosecutions, KwaZulu Natal v Mekka 2003(2) SACR 1 (SCA);

[9] S v Stefaans 1999(1) SACR 182 (C); S v Vumazonke 2000(1) SACR 619 (C); S v Malinga 2002(1) SACR 615 (N); S v Williams 2010 (1) SA 493 (ECG).

[10] Hiemstra's Criminal Procedure at 22-48

court can now make a finding that a witness does not understand the oath on any basis."

[28] The preferred approach in relation to the procedure to be adopted by a trial court before applying s164 was summarised as follows by Streicher JA in Mekka :

> *[11] The fact that the magistrate, after having established the age of the complainant, proceeded to enquire whether she understood the difference between truth and lies and then warned her to tell the truth is, in my view, a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath. In her additional reasons the magistrate confirms that to have been the case. The magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from the youthfulness, did not understand the nature and import of the oath. The magistrate saw and heard the complainant and this Court is in no position to question the correctness of her finding.*
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> *[12] The respondent submitted that the trial court also had to enquire whether the complainant understood the difference between truth and falsehood. Whether such an enquiry need be held is a question that was not decided in S v B[11] and need not be decided in this case, as it is clear that the magistrate conducted such an enquiry. The complainant said that she understood the difference and that one got punished if one were to tell a lie, thereby indicating that she knew that it was wrong to tell a lie. It was the basis*

[11] See footnote 7 above.

of these answers that the magistrate concluded, as she was in my view entitled to do, that the complainant understood the difference between truth and falsehood.

[13] It follows that the magistrate did not commit an irregularity by allowing the complainant to testify after having warned her to tell the truth."

[29] In *Williams*, Chetty J made the following observations in relation to the facts before that court:

"[9] When the complainant was called upon to testify, the uncontroverted evidence of Ms Phillips[12]*, that the complainant had the intellectual capacity to differentiate between the truth and falsehood, had already been led and must obviously have weighed heavily with the judge. Consequently it is axiomatic that the judge's admonishment, that the complainant speak the truth, flowed directly from his conviction that, by reason of her youth, the complainant did not understand the nature and import of the oath. Experience shows that even in cases where witnesses are much older than the complainant the word 'oath' remains a nebulous concept, whereas the invocation to speak the truth is more readily appreciated and understood. The transcript demonstrates unequivocally that the judge was satisfied that the complainant comprehended the difference between truth and falsehood, and his admonishment that she speak the truth was in my view sufficient to render complainant's evidence admissible."*

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[12] A social worker who had interviewed the complainant prior to the hearing with a view to recommending the use of an intermediary in adducing the child's evidence.

[30] It will be observed that in both of these *dicta* there was no procedural requirement that the court should first enquire of the witness whether she understood what the '*oath'* was. It was left up to the court to assess whether this was probable or not. In *Bessick,* Henney J made the following observation (with reference to cases such as *S v B, Mekka* and *Williams)* as to the advisable approach:

> "*[19] 'n Formele ondersoek hoewel wenslik, om vas te stel of 'n getuie oor die vermoee beskik om die eed of bevestiging te begryp, is nie nodig nie. Indien 'n hof 'n mening vorm uit omringende omstandighede dat 'n getuie nie die aard en betekenis van die eed begryp nie, kan die hof die getuie waarsku"* [13].

[31] In the circumstances, we are of the view that the approach advocated by counsel for the appellant places the bar too high. Having considered the approach of the regional magistrate in this case, we are of the view that she obviously satisfied herself as to the inability of KS to formally take the oath and correctly applied the provisions of s164; thereby ensuring that the evidence deposed to was inadmissible as such. Most importantly, as demonstrated in para 23 above, the trial court formally admonished the witness to speak the truth as required by that section of the CPA.

CONCLUDING REMARKS ON THE MERITS

[32] Having satisfied ourselves that there was admissible evidence from the complainant on record, we are of the view that such evidence (properly corroborated

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[13] *"While a formal enquiry is preferable to establish whether a witness has the capacity to understand the oath or affirmation, it is not strictly necessary. In the event that the court forms the opinion from the surrounding circumstances that a witness does not understand the nature and extent of the oath, it can warn the witness."*

in the various respects referred to) conclusively established the guilt of the appellant on each of the 3 counts. The appeal against conviction can therefore not succeed.

SENTENCE

[33] When sentencing the appellant, the regional magistrate was confronted with two convictions (on counts 2 and 3) that each attracted compulsory minimum sentences of life imprisonment in terms of the so-called minimum sentencing legislation, in that the victim was a person under 16 years of age.[14] On count 1 there was no minimum or prescribed sentence.

[34] Against this statutory background the regional magistrate decided not to impose individual sentences on each count but rather to treat the 3 counts as one for the purposes of sentence and to impose the ultimate sentence, having found that there were no substantial and compelling reasons to deviate from the prescribed minimum. While this approach is permissible in appropriate circumstances, it is not the preferred route where there is a clear distinction in time to be drawn between the particular offences in respect whereof the offender has been convicted.[15]

[35] In *Kruger*[16] Shongwe JA restated the approach:

> *"[10] It is said to be undesirable to impose a global sentence where there are multiple different counts (S v Immelman 1978(3) SA 726 (A) at*

[14] S51(1) read with Schedule 2 Part1 of the Criminal Law Amendment Act 105 of 1997.

[15] SS Terblanche A Guide to Sentencing in South Africa , 3rd ed at 202;

[16] S v Kruger 2012(1) SACR 369 (SCA)

728E-729A). However, the practice of taking more than one count together for purposes of sentence is neither sanctioned nor prohibited by law. In S v Young 1977 (1) SA 602 (A) at 610 E-H Trollip JA said:

> 'Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

[36] In *Swart* [17] the Supreme Court of Appeal interfered with the composite sentence imposed in the court *a quo* and directed that separate sentences should be imposed for each offence in circumstances where the victim had been raped on two occasions about four hours apart. In the present case the three counts were distinguishable in terms of time (they were clearly days apart) and we are of the view that the underlying principle of individual sentencing should therefore have applied.

[37] From the record it seems to us as if the regional magistrate attempted to counter the cumulative effect of consecutive sentences on each of the counts by imposing a single sentence of life imprisonment. While she was permitted to adopt that approach we consider that it was undesirable having regard to the circumstances at hand.

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[17] S v Swart 2000(2) SA 566 (SCA) at [26]-[27]

[38] There were a number of different considerations to be taken into account by the trial court. Firstly, the method may present difficulties on appeal should one or more of the convictions be set aside. Secondly, the legislature has seen it fit to prescribe minimum sentences of life imprisonment for the sexual penetration of a minor. It is in our view appropriate that each offence be dealt with individually, particularly because the court must assess whether substantial and compelling circumstances to avoid the ultimate sentence have been established in respect of each contravention. Thirdly, the sentence on count one has to be distinguished from those on counts two and three in light of the fact that the contravention is less grave than those on the other counts. Fourthly, it is important from the point of view of both deterrence and retribution that society perceives that individual criminal acts are treated accordingly.

[39] When considering the cumulative effect of the sentences imposed it is important to bear in mind that our law contains an adequate safety mechanism to ensure that an accused who is sentenced to life imprisonment, in addition to other sentences, will not be sentenced in an unfair and unjust manner. This safety mechanism is contained in subsections 39(2)(a)(i) and (ii) of the Correctional Services Act, 111 of 1998 which direct that all finite sentences are to be served concurrently with any life sentence and, further, that multiple life sentences shall run concurrently. Sentencing the appellant respectively for each of the convictions would therefore not result in one of the life sentences being extended.

[40] As we have already indicated, it is most important in our view that the sentencing court must ensure that the eventual sentence is a competent one for each

of the convictions. The sentence imposed should therefore reflect the seriousness of each of the crimes of which the perpetrator has been convicted. The facts before us are that the appellant was convicted on two separate counts of rape, each of which singularly creates the possibility of the imposition of a life sentence. In addition to this, he was convicted on a count of sexual violation. In our view, the sentence imposed should reflect this. In this regard we refer to the following *dictum* of Mpati AJA in <u>*Swart*</u>

> "*[26]…Die vonnis deur die Verhoorhof opgele ten opsigte van hierdie aanklagte moet vervang word met 'n vonnis wat ek as toepaslik beskou. Om hierdie doel te bereik, meen ek dat dit gerade sal wees om 'n afsonderlike vonnis op te le ten minste vir die tweede verkragting…"*

We are in complete agreement with this sentiment.

[41] In this matter the appellant sexually violated the helpless complainant on a number of occasions. Each and every violation of this child amounted to a separate crime and the failure to sentence the appellant separately on each such crime will not, in our view, sufficiently highlight the court's abhorrance of these crimes. It will send the wrong message to the public. This court has an obligation to reflect on the heinous nature of the crimes and in particular the fact that they occurred repetitively within the sanctuary of the home – a place where the victim was entitled to feel safe in the hands of those she trusted. Sentencing the appellant to only one life sentence will therefore not reflect the seriousness with which this court considers these and similar crimes: crimes which destroyed the the childhood of this complainant. She will always carry the scars of what the appellant did to her and she will also always have to live

with the knowledge that those adults who were supposed to love and protect her, allowed this to happen. This court has no option but to pronounce appropriately on these crimes by sentencing the appellant correctly.

[42] In the circumstances, we are not satisfied that the magistrate correctly sentenced the appellant and in the interest of justice, we will interfere by replacing the sentence imposed with the sentences set out below.

ORDER OF COURT

A. The appeal against the convictions is dismissed and the convictions of the regional magistrate are hereby confirmed.

B. The sentence imposed by the regional magistrate is hereby set aside and replaced with the following :

"The accused is sentenced as follows:

Count 1, 5 years imprisonment;

Count 2, Life imprisonment;

Count 3, *Life imprisonment*."

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GAMBLE, J

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FORTUIN, J

JUDGES	**:**	Gamble J *et* Fortuin J
JUGDMENT DELIVERED BY	:	Gamble J
FOR APPELLANT	**:**	Adv. D N Theunissen
INSTRUCTED BY	:	Legal Aid SA - Cape Town
FOR RESPONDENT	**:**	Adv. K Pillay
INSTRUCTED BY	**:**	Director of Public Prosecutions – Cape Town
DATE OF HEARING	**:**	26 May 2017
DATE OF JUDGMENT (Reasons)	**:**	9 June 2017