



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR267/2024

In the matter between:

**THULANI
APPELLANT**
and

SENZO

NXUMALO

THE STATE

RESPONDENT

ORDER

On appeal from: the Ezakheni Regional court (sitting as the trial court):

1. The appeal against conviction is dismissed.
 2. The appeal against sentence is upheld.
 3. The court *a quo*'s order is set aside and replaced with the following order:
 'Count 1: The appellant is sentenced to 15 years imprisonment.
 Count 2: The appellant is sentenced to life imprisonment.
 The sentence in count 1 is ordered to run concurrently with the sentence in count 2.
 In terms of s 103 (1) of Act 60 of 2000, the appellant is declared unfit to possess a firearm'.
 4. The sentence is antedated to 24 May 2024.
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JUDGMENT

Delivered on.

Jikela J (Z P Nkosi J) concurring:

Introduction

[1] This is an appeal against both the conviction and sentence imposed on the appellant by the court *a quo*. On 30 June 2021, the appellant, a 26-year-old male, was convicted on two counts of rape, committed on different occasions and against different complainants. He had been charged with contravening s 3 read with sections 1, 2, 50, 56(1), 57, 58, 59, 60 and 61, and s 51(1) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') read with Part I of Schedule 2 of the CLAA. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977 ('the CPA') on both counts, The matter now serves before us by way of an automatic right of appeal.

[2] The court *a quo* based its findings of guilt primarily on the evidence of the two complainants, corroborated by the medico legal reports arising from their clinical examinations, as well as the results of the DNA analysis. The appellant pleaded not guilty to the charges and elected not to furnish a plea explanation.

Grounds of appeal

[3] The grounds of appeal may be summarised as follows:

- (a) That the court *a quo* misdirected itself in finding that the State had proved the guilt of the appellant beyond reasonable doubt.
- (b) That the court *a quo* misdirected itself by allowing the State an opportunity to present DNA evidence, which evidence was not discovered timeously, but only presented during the State's case, in violation of the appellant's rights in terms of ss 35(3)(a), (d), (f) and (i) of the Constitution.
- (c) That the court *a quo* misdirected itself in finding that the provisions of s 51(1), read with Part I of Schedule 2 of the CLAA apply in the case of the appellant and thereby sentencing him to life imprisonment.

[4] At the hearing of the appeal, Mr *Mthembu*, on behalf of the appellant, submitted that the State was unduly permitted to investigate and procure DNA results in the midst of its case, which, he argued, occasioned undue delays in the finalisation of the trial. More critically, it was contended that the appellant was deprived of his right to a fair trial in that he was not adequately apprised of the case he was required to meet. He further submitted that the complainants were unreliable witnesses whose testimonies could not be safely relied upon, and that, in the circumstances, there was no proper basis upon which the court *a quo* could have found that the State had proved its case beyond a reasonable doubt.

[5] Conversely, Mr *Sishi*, on behalf of the respondent, submitted that both complainants were personally acquainted with the appellant. Their testimonies were coherent, consistent, and corroborated by the positive DNA link connecting the appellant to the offences. It was further submitted that the appellant elected not to apply for the recall of the complainants or any other State witness for purposes of challenging the DNA evidence through cross-examination. In addition, it was contended that the trial, which was finalised within a period of seven months, cannot be regarded as protracted, having regard to the ordinary turnaround period for trials in the regional court.

Issues for determination

[6] Three issues arise for determination in this appeal. The first is whether the State's reliance on the DNA results midway through the presentation of its case, infringed the appellant's right to be informed of the charge and the case he had to meet, thereby resulting in an unfair trial. The second is whether the State was entitled, in the circumstances of this matter, to invoke the provisions of s 51(1) of the CLAA. The third is whether the sentence imposed is disproportionate to the offences of which the appellant stands convicted.

Ad Conviction

Count 1

[7] Ms M[...], the complainant in count 1, testified that she knew the complainant in count 2 as they once lodged at the same residence. On 12 June 2022, after

leaving Big Deal Tavern at about 4.15 am, she encountered the appellant, whom she knew as 'Nunuza', accompanied by two men. As they all lived at the same residence, she walked home with them, and on arrival they proceeded to the appellant's room, where his mother opened the door, whereafter the appellant locked the door and forcefully instructed the complainant to undress herself and lie down in the presence of his mother and a young boy. She complied with the instruction as the appellant had threatened to slap her, and she was afraid of him. She undressed herself and the appellant proceeded to remove his trousers and underpants and had sexual intercourse with her against her will. When the appellant finished, he fell asleep. She managed to rise and requested the appellant's sister to hand her the key, which had been placed beneath the appellant's pillow. Having unlocked the door, she left the room accompanied by the appellant's sister, who advised her to lay charges against the appellant. Thereafter, she proceeded to her home where she reported the incident to her aunt.

[8] She subsequently reported the matter to the police, who recorded her statement. The police conveyed her to the hospital, where she was examined by Dr Xaba on 12 June 2022. A J88 medico legal report was subsequently completed, in which the doctor recorded that there were no bruises or injuries noted. A thick whitish discharge was noted around the cervix. The complainant's underwear was collected for forensic analysis.

[9] During cross examination, the complainant testified that she had intended to proceed to the appellant's room in order to wake the appellant's sister so that they could continue consuming alcohol together. She stated that she was afraid of the appellant as he had once assaulted her. Further, she was now even more afraid of him because the people in the appellant's room did not intervene on her behalf.

Count 2

[10] Ms S[...], the complainant in count 2, testified that on 4 November 2022, she was with her friend, Ms S[...] N[...], at Esibayeni Tavern. They later went to Natalasia, where they met two men known to Ms N[...]. After Ms N[...] left, the complainant joined the men in searching for her without success. The men suggested proceeding to Ms N[...]’s residence, as they lived in the same area. On the way, the appellant,

whom she knew as 'Nunuza,' struck her with an open hand, dragged her to his residence, and pushed her into a room, causing her to fall. The appellant instructed the complainant to undress; when she refused, he forced himself upon her, undressing her and thereafter penetrating her vagina with his penis. He ejaculated, and once he had finished, the appellant stood up and went outside to his friends. The complainant followed him and while she was outside the room, the appellant's mother approached her to enquire about the noise she had heard emanating from the yard.

[11] Ms S[...] reported to the appellant's mother that the appellant had raped her. The appellant handed the complainant a jug of water and forced her to wash her vagina in the presence of his mother and his friends. She complied, because the appellant assaulted her with an open hand, forcing her to wash. Indeed, she washed, thereafter the appellant went away with his friends. Meanwhile, the appellant's mother forcefully pulled her into the room where an elderly woman slept with young children and locked her inside.

[12] Ms S[...] managed to escape with the assistance of the children who opened the door for her to leave. She proceeded to the police station, where she laid a charge of rape against the appellant. At the time, she was still somewhat under the influence of alcohol. The following morning, the police recorded her statement and accompanied her to the appellant's residence. The appellant was arrested by the police on the road near his home. Thereafter, Ms S[...] was taken to the hospital for a medical examination, during which a doctor attended to her and compiled a J88 report. The doctor's findings and conclusions were that a whitish, clear stingy discharge was noted in the vagina, the cervix and posterior vagina wall. A 1.5 cm long superficial tear was noted, and there was no active bleeding. The doctor concluded by noting that there were signs of injury on the posterior vagina wall near the entrance.

[13] Dr Nyathikazi testified and confirmed that she examined Ms S[...], and she further confirmed her findings and conclusions as recorded above.

Further evidence for the State

[14] The State led evidence of at least two witnesses, who testified to the collection of buccal samples from the appellant, vaginal swabs, and crime kits from the hospital, and also how these exhibits were sealed and transmitted to the laboratory for analysis. These witnesses were Constable Ngwenya and Sergeant Ntsele. Further, the chain evidence of receipt of exhibits at the laboratory was presented by way of undisputed affidavits. Warrant Officer Masilo testified about how he received the exhibits and how he performed the analysis of the samples and the outcome thereof.

[15] The State presented an affidavit deposed to by Mrs Y van der Merwe, a member of the South African Police Service stationed at the Biology Section of the Forensic Science Laboratory in Pretoria, where she serves as a senior forensic analyst. In her affidavit, she confirmed that she had analysed the DNA samples in respect of Ladysmith case numbers 185/06/22 and 109/11/22. The samples, which bore the names of the appellant and the two complainants and were allocated unique reference numbers, were subjected to forensic analysis. From the results thereof, Mrs van der Merwe concluded that the DNA profile of the appellant was positively linked to the specimen samples obtained from both complainants.

Appellant's version at the trial

[16] The appellant testified that he knew the complainant in count 1, Ms M[...]. She was a friend of his sister. Ms M[...] used to visit his sister at his home. On 12 June 2022, Ms M[...] arrived at his home at about 2.00 am heavily intoxicated and in the company of two males that occupy a rented room at his home. The complainant proceeded straight to his sister's room, which she shares with his mother. She knocked at the door and shouted for his sister to open the door. The appellant was asleep in his room, which was closer to his sister's room and was woken up by the noise made by the complainant. He stood up to peep through his window and confirmed that it was the complainant who had been shouting. The appellant reprimanded her for making a noise whilst his mother was asleep. The appellant testified that the complainant was highly intoxicated to the extent that she did not appreciate the wrongfulness of her conduct, instead, she became disrespectful to the appellant. The appellant slapped her with an open hand and that caused her to leave the appellant's premises. The following day, on Sunday, the appellant was arrested

by the police on allegations that he had raped the complainant.

[17] In respect of count 2, the appellant testified that the complainant in count 2, Ms S[...] is a friend of the complainant in count 1. The two complainants frequently visited his sister at his home, and it was during these visits that he became acquainted with Ms S[...]. The appellant denied meeting with Ms S[...] either at the tavern, or at his home. He further denied that he raped her or that he had sexual intercourse with her.

[18] The appellant could not offer any satisfactory response to the positive DNA results in respect of both complainants except to state that there was prevailing animosity between him and the investigating officer investigating the charges in count 1. During cross examination, the appellant was unable to explain how his semen could have been found on both complainants, if he did not have sexual intercourse with them.

Analysis

[19] A court of appeal would not readily interfere with the factual findings of a trial court unless there is evidence of a clear misdirection.¹

[20] The J88 reports for both complainants reflect that samples were taken from them for a DNA analysis. Similarly, specimen were obtained from the appellant, to which he consented. It is of no consequence that the State sought to pursue the analysis after the appellant had pleaded, particularly given the well-known backlog in the processing of DNA samples, which frequently causes delays in the finalisation of criminal trials. In this matter, the appellant elected not to disclose the basis of his not guilty plea, leaving the State to prove every element of its case. The late procurement of the DNA results appears to have been prompted by the State's obligation to leave no stone unturned. In my view, the court *a quo* exercised its discretion judiciously in granting the State a postponement to secure the DNA results.

¹ *S v Monyane and Others* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 15.

[21] Their presentation was in the interests of justice, as negative results would have exonerated the appellant. It would have been an injustice to disallow a request for postponement to obtain DNA results in a case where DNA samples had been taken and transmitted to the forensic laboratory. I am unable to appreciate what would cause the appellant, whose defence to the charges was a bare denial, not to anticipate that the State would rely on DNA evidence in rape allegations. In my view, the appellant's challenges in this regard are consequential to the apparent shortcomings of his legal team in trial preparations.

[22] There are several stages to trial preparation, one of which is to ascertain precisely what must be proven, by whom and to what standard that proof must be provided. Given that it was common cause to the parties that DNA samples had been obtained and transmitted to the forensic laboratory, those representing the appellant ought to have adequately prepared for the DNA evidence and not capitalize on the technicality of the timing of its production.

[23] The criticism levelled against the court a quo for allowing the DNA evidence to be introduced mid-trial is therefore wholly unfounded.

[24] It is trite that DNA is circumstantial evidence. It is not direct evidence that a crime has been committed or by whom. In dealing with circumstantial evidence, the two cardinal rules of logic as set out in *R v Blom*² should be borne in mind namely:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[25] The court in *S v Reddy*³ stated that in assessing circumstantial evidence, 'One needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.'

² *R v Blom* 1939 AD 188 at 202-203.

³ *S v Reddy and others* 1996 (2) SACR 1 (A) at 8C-D.

[26] In *S v SB*,⁴ the Supreme Court of Appeal (SCA) stated that the evidence that the

‘STR profile of an accused person matches that of a sample taken at the scene, or can be included therein, is circumstantial evidence. The weight thereof depends on a number of factors. These include:

- (i) The establishment of the chain evidence, i.e. that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
- (ii) The proper functioning of the machines and equipment used to produce the electropherograms.
- (iii) The acceptability of the interpretation of the electropherograms.
- (iv) The probability of such a match or inclusion in the particular circumstances.
- (v) The other evidence in the case.’

[27] It appears from the record that the court *a quo* carefully considered all relevant factors and the legal principles set out above before accepting the DNA evidence. These included whether the samples were properly collected from the complainants and the appellant, whether the chain of evidence remained intact without risk of contamination, and whether the analysis was conducted in accordance with proper scientific protocols and accurately interpreted. I am satisfied that the chain of evidence regarding the collection, sealing, safekeeping, transmission, and receipt of the samples at the forensic laboratory effectively rules out any tampering or alteration, as alleged by the appellant. In the circumstances, the court *a quo* correctly found that the DNA evidence created a compelling inference of guilt, which was further corroborated by the testimony of the complainants and Dr Nyathikazi.

[28] In the circumstances, I find that the court *a quo* did not misdirect itself in concluding that the State had proved the guilt of the appellant beyond reasonable doubt.

Ad sentence

The correct sentencing regime

⁴ *S v SB* [2013] ZASCA 115; 2014 (1) SACR 66 (SCA) para 18.

[29] It must be remembered at this point that the accused committed two the crimes on different dates, namely, one on 12 June 2022, and the other on 4 November 2022. The reason for this is that the CLAA was amended on 5 August 2022, thus two legislative regimes in terms of sentencing apply. The importance of this observation lies in the principle that an accused may only be subjected to the punishment applicable at the time of the commission of the offence. Regrettably, the issue of the amendment was not addressed in the court *a quo*, and I became aware of this omission only during the preparation of this judgment. The Constitutional Court in *Phaahla v Minister of Justice and Correctional Services and Another*⁵ held that parole forms part of the punishment, and that the relevant date for determining parole eligibility is the date of the offence. This accords with s 35(3)(n) of the Constitution, which entitles an accused to the benefit of the least severe punishment where the applicable regime has changed between the date of the offence and the date of sentencing. This position was subsequently reaffirmed by the Constitutional Court in *S v Senwedi*,⁶ which held as follows:

'It is well established in our law that criminal liability arises on the date when the particular crime is committed, and not when a person is either convicted or sentenced. Similarly, the concomitant penalty for that crime is to be determined in relation to that date, subject to the benefit conferred by s 35(3)(n) of the Constitution, which guarantees the least severe sentence if punishment was changed between the time of the commission of the offence and the date of sentencing. In *Phaahla* this court explained that "punishment, and parole eligibility, should be determined by the date of commission of the offence" An increase in penalty will ordinarily not operate with retrospective effect in circumstances where that added sanction did not apply at the time when the offence was committed. This is a necessary corollary of the principle of legality, that no court may impose a sentence more severe than the sentence legally permitted at the time of the commission of the relevant crime (*nulla poena sine lege*). In this case there was no increase in penalty between the time of the commission of the crime and the time of sentencing. However, a penalty was applied that was not statutorily permitted at the time of sentencing.' (Footnotes omitted.)

[30] Mr *Mthembu* submitted in his heads of argument that the application of life imprisonment as explained by the court *a quo* was based on a misunderstanding of

⁵ *Phaahla v Minister of Justice and Correctional Services and Another* [2019] ZACC 18; 2019 (2) SACR 88 (CC) para 70.

⁶ *S v Senwedi* [2021] ZACC 12; 2022 (1) SACR 229 (CC) para 19.

the provisions of s 51(1) of the CLAA as there was no basis for the State to rely on these provisions where the appellant was charged with the rapes of adult females. It is apparent that both counsel did not fully appreciate that the court *a quo*, and now this court, is dealing with two distinct sentencing regimes. This much is borne out by their arguments as presented before us and in their written submissions. It is therefore necessary to address this issue to ensure that an appropriate sentence is ultimately imposed. Further, this court has the power to reconsider sentence afresh where necessary⁷ and is empowered to interfere with sentence where the circumstances justify it particularly when interfering with the prescribed minimum sentence.⁸

[31] Section 51(1) of the CLAA provides as follows:

‘Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.’

[32] Part I of Schedule 2, before the amendment that took effect on 5 August 2022 provided as follows:

‘Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) when committed-

. . .

(iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions.’

[33] After the amendment of 5 August 2022, Part I of Schedule 2 now provides:

‘Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) when committed-

. . .

(iii) by the accused who-

(aa) . . .

⁷ *S v Rabie* 1975 (4) SA 855 (A) at 857C–F.

⁸ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

- (bb) has been convicted by the trial court of two or more offences of rape or the offences of rape and compelled rape,
irrespective of-
- (aaa) . . .
- (bbb) the date of the commission of any such offence of which the accused has so been convicted;
- (ccc) . . .
- (ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim.'

[34] Before us, at the hearing, the appellant submitted that, the application of life imprisonment as explained to the appellant by the *Court a quo* was a misdirection. Although the charge sheet refers to s 51(1) read with Part 1 of Schedule 2 of the CLAA, but there is nothing substantiating reliance on s 51(1). The appellant ought to have been warned of the application of minimum sentence of 10 years imprisonment in respect of count 1 and 15 years imprisonment in respect of count 2 on the basis that both complainants in the matter were adults at the time of the incidents and that the State referred to one incident for each complainant, and lastly that the complainants did not suffer any grievous bodily harm.

[35] The respondent argued that there was no misdirection by the court *a quo* in sentencing the appellant to a life imprisonment on both counts, both counts attracted the minimum prescribed sentence under s51(1), Part I(a)(iii)(bbb) or (ddd) of Schedule 2 of the CLAA. The State relied on the amended provisions of the CLAA for both counts.

Discussion

[36] Part III of Schedule 2, before the amendment of 5 August 2022, provided:
'Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I.'

What originally appeared under Part III of Schedule 2 was moved to Part II of Schedule 2, thus increasing the sentences for rape.

[37] *Du Toit*⁹ summarises the issue of what is the appropriate sentence where an accused or appellant is charged with two unrelated counts of rape, i.e. there are two different complainants and the offences were committed on two different dates, as follows:

'Before the latest amendment of item (a)(iii) of Part I of Schedule 2 by s 15 of Act 12 of 2021 (wef 5 August 2022), this item referred, inter alia, to rape "by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions . . .". The words "such convictions" used in item (a)(iii) refer to convictions prior to the proceedings and convictions in a particular trial (*S v Masenya* 2018 (1) SACR 407 (GP) at [10]). In *S v Mthanti* 2024 (1) SACR 335 (SCA) the appellant had been convicted of, inter alia, two counts of rape. The first occurred in June 2014, and the second in August 2014. The trial court sentenced him to life imprisonment, on the basis that he had not yet been sentenced on the first charge when he committed the second. This, the Supreme Court of Appeal held (at [18]), was a misdirection, as the appellant had not yet been *convicted* of the first charge when he committed the second (at [17]; see also *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at [20]; *S v M* 2007 (2) SACR 60 (W))'

[38] Considering the relevant provisions of the CLAA, prior and after the amendment, it seems to me that the appellant ought to have been sentenced on count 1 in terms of s 51(2)(b). By reason of the conviction, in count 1, count 2 attracts the prescribed sentence of life imprisonment.

[39] In considering the appropriate sentence, the court *a quo* considered the appellant's personal circumstances that he was 28 years old, single, with two minor children both of them are in the care and custody of their respective mothers. The appellant has had no contribution to their livelihood; he is unemployed with the highest level of education being grade 5 and had in the past 6 years been convicted and sentenced for housebreaking with intent to steal and theft and was sentenced to three years imprisonment.

[40] The most aggravating factor in the case of the appellant was that he raped the complainants knowing that he was HIV positive and did not use protection.

⁹ SS Terblanche *Du Toit: Commentary on the Criminal Procedure Act* (Revision Service 74, January 2025) at ch28-p18D-8D.

[41] The court *a quo* had regard to the probation officer's report, which detailed the appellant's personal circumstances and the profound impact of the rape on Ms S[...], the complainant in count 2. Although no stand-alone victim impact statement was presented, the report records that Ms S[...] remained deeply traumatised by the assault, during which the appellant dragged her to his room and raped her. Her ordeal was compounded when the appellant's mother confined her in the appellant's home, leaving her fearful of walking alone in public spaces. The complainant in count 1 could not be traced despite the information furnished to the probation officer.

[42] In the end, the court *a quo* found no substantial and compelling circumstances in the case of the appellant warranting a deviation from the prescribed minimum sentence of life imprisonment. I agree with this finding as far as it relates to count 2. Considering the facts of the case the seriousness of the offences, the interests of justice and of society, the personal circumstances of the appellant would fade into the background.¹⁰

[43] In conclusion, and for the reasons set out above, I am satisfied that the court *a quo* misdirected itself in imposing a life sentence on count 1¹¹. However, in respect of count 2, and having regard to the conviction on count 1, the imposition of a life sentence is justified. Interference with sentence is therefore warranted, only on count 1, particularly in view of the effect of the CLAA amendment, which had already come into force prior to the commission of the rape in count 2.

[44] In the result, the appellant has had partial success in this appeal. However, there is no change to the effective term of imprisonment that the appellant shall serve.

Order

¹⁰ *S v Vilakazi* [2008] ZASCA 87; 2009 (1) SACR 552 (SCA) para 58.

¹¹ The sentence to be considered will be the appropriate sentence before the CLAA was amended. The new sentence that I consider will be in terms of s51 (2) (b), read with the proviso in s51, of the CLAA, as this court must consider what the appropriate sentence the Regional court would have given in the circumstances.

[45] In light of the foregoing, the following order is granted:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The court *a quo*'s order is set aside and replaced with the following order:

‘Count 1: The appellant is sentenced to 15 years imprisonment.

Count 2: The appellant is sentenced to life imprisonment.

The sentence in count 1 is ordered to run concurrently with the sentence in count 2.

In terms of s 103 (1) of Act 60 of 2000, the appellant is declared unfit to possess a firearm’.

4. The sentence is antedated to 24 May 2024.

Jikela J

I agree,

Z.P Nkosi DJP

Appearances

Counsel for the appellant: Mr SB Mthembu
Instructed by: Legal Aid South Africa
187 Hoosen Haffeejee St, Pietermaritzburg, 3201
Tel: [033 394 2190](tel:0333942190)

Counsel for the respondent: Mr M Sishi
Instructed by: The Director of Public Prosecutions
286 Pietermaritz St, Pietermaritzburg, 3201
Tel: [033 392 8700](tel:0333928700)

Date of hearing: 29 August 2025
Date of judgment: 19 September 2025