

**IN THE COURT OF APPEAL**  
**APPELATE JURISDICTION**

**CRIMINAL APPEAL NO. AAU 120 of 2014**  
**(High Court HAC 31 of 2014)**

**BETWEEN** : **BALBIR SINGH**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **Chandra JA**

**Counsel** : **Mr. J. Savou for the Appellant**  
**Mr. M.D. Korovou for the Respondent**

**Date of Hearing** : **10 February 2016**

**Date of Ruling** : **26 February 2016**

**RULING**

1. This is an application for leave to appeal out of time made pursuant to section 21(1) (b) and (c) and section 26 of the Court of Appeal Act (Cap.12) against conviction and sentence by the Appellant who was found guilty after trial of raping a 7 year old girl at her home. He was sentenced to 14 years, 6 months and 20 days imprisonment with a non-parole period of 13 years.

2. In his notice of appeal the following grounds were set out as grounds of appeal:

*“Against Conviction*

1. *The learned trial Judge erred in law and in fact by allowing the trial to continue, when there was no DNA report available, causing substantial prejudice to the Appellant.*
2. *The learned Trial Judge erred in law and in fact when he did not direct himself and the assessors that the prosecution witness no. 2 would have implicated the Appellant in avenge.*
3. *The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that the opinion and evidence given by the doctor does not confirm the guilt of the Appellant.*
4. *The learned Trial Judge erred in law and in fact when he failed to direct himself and the assessors that there may be more than one operative cause for the hymen not to be intact.*

*Against Sentence*

1. *The learned Trial Judge erred in principle and also erred in exercising his sentencing discretion to the extent that the non-parole period is too close to the head sentence which conflicts with the provision of section 27 of the Prison and Correction Service Act 2006.*

**Submissions Regarding a Timely Appeal**

3. Both parties filed written submissions and at the hearing they relied on the submissions they had filed.
4. The written submissions were filed on behalf of the Appellant, on the basis of an application for leave to appeal out of time. The Applicant had been sentenced on 21 August 2014 and he in his affidavit filed with the application seeking leave to appeal out of time had stated that by letter dated 9<sup>th</sup> September 2014 he had applied to the Court of Appeal to appeal against the conviction and sentence and he had handed over the letter to the Corrections Services on the same day. On inquiring from the Correction Services he had been informed that his application had been misplaced.

5. The Respondent in their submissions stated that since the Applicant had applied to appeal against his conviction and sentence in time that the Respondent was not contesting that issue. Therefore this application would be dealt with as an application for leave to appeal within time.

### **Consideration of the Grounds of Appeal**

6. Section 21(1)(b) of the Court of Appeal Act (Cap.12) requires leave of the Court as the grounds of appeal raise questions of mixed fact and law or questions of fact alone. The test for granting leave to appeal against conviction is whether the grounds raise arguable points to be considered by the Court of Appeal. In terms of Section 21(1)(c) grounds of appeal against sentence requires the Court's leave, and it has to be considered whether there is an error in sentencing which is arguable.
7. The Applicant's first ground of appeal is regarding the relevance of DNA evidence. The submission has been made that the learned trial Judge erred in proceeding to trial when there was no DNA Report. The prosecution had presented the evidence that was available to them to establish their case. The evidence of the prosecution witness had been that the DNA report was not yet available. The learned trial Judge had referred to this matter in his summing up. This was a matter which was not relied upon by the prosecution and the defence during the trial. If the defence considered that to be an important matter and vital for the defence, they could have made an application to have an adjournment to consider the submitting of the DNA report. They had failed to do so. In these circumstances, this ground of appeal has no merit and is not arguable.
8. The second ground of appeal relates to the evidence of the mother of the victim. The learned trial Judge summarized the evidence of the mother to the Assessors. The Applicant whilst giving evidence at the trial had stated that there was displeasure between him and the victim's mother and that she was not happy about his staying in their house. The conduct of the mother regarding the incident, her reactions and the displeasure

between her and the Applicant are matters which the Assessors would have been directed on by the learned trial Judge. It is arguable as to whether the directions of the learned trial Judge regarding the evidence of the victim's mother and the accused was adequate in those circumstances. Therefore leave is granted on this ground.

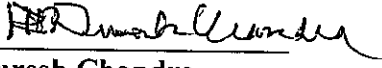
9. The 3<sup>rd</sup> and 4<sup>th</sup> grounds relate to medical evidence. The Respondents concede that ground 3 is arguable and that consequently, would leave the 4<sup>th</sup> ground too to be argued. The main complaint of the Applicant is that the learned trial Judge having summed up to the Assessors the details of the medical examination given by the Doctor in her evidence had directed them to consider whether that evidence confirmed the evidence of the victim, and that the Assessors were not directed further as to how they should consider such evidence in relation to the guilt of the accused. As to whether the direction of the learned trial Judge in the summing up was adequate, when considering the entirety of the medical evidence together with the evidence of the victim and her mother is arguable and therefore leave is granted.
  
10. The ground of appeal regarding sentence is that the non-parole period is too close to the head sentence as it conflicts with the provisions of section 27 of the Prison and Correction Act 2006. The setting of a non-parole period in consequence of Section 18(1) of the Sentencing and Penalties Decree 2009 is within the discretion of the trial Judge. The effect of section 27 of the Prison and Correction Act is more of an administrative act to determine the date of release of the offender. In **Paula Tora v The State** CAV 11 of 2015 the Supreme Court at paragraph [12] stated thus:

*“[12] In terms of section 18(1) of the Sentencing and Penalties Decree, a court which sentences an accused for a term of imprisonment exceeding two years, must fix a period during which the offender is not eligible to be released on parole, unless considering the nature of the offence or the past history of the offender, it considers fixing a non-parole period appropriate. In fixing a non-parole period, the sentencing court must be mindful of the provisions of*

*section 27 of the Corrections Service Act so as to avoid any conflict.” (Emphasis added).*

11. In view of the above observation of the Supreme Court I would grant leave on the ground regarding sentence for the Full Court to consider in relation to the fixing of the non-parole period when sentencing the Applicant.
12. For the reasons set out above, leave to appeal is granted on Grounds 2, 3 and 4 regarding conviction and on the ground urged regarding sentence.



  
Suresh Chandra  
JUSTICE OF APPEAL