BAIL IN CASES OF GENDER-BASED VIOLENCE

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This is the first in a series of articles by the Legal Assistance Centre commenting on legal points in the recent Cabinet plan for combating gender-based violence.

"1. The Criminal Procedure Act of 1977 should be amended, in order to tighten the requirements for bail in cases of gender-based violence."

In his national address on 21 February 2014 introducing measures to curb gender-based violence in Namibia, President Hifikenpunye Pohamba said that the men committing crimes against women and girls were depriving them of their constitutional right to life (Art 6). We could not agree more; gender-based violence ranks as one of Namibia's most serious human rights violations.

However, measures to tighten bail requirements must also be considered with an eye on the Constitution – which guarantees that all persons charged with a criminal offence shall be presumed innocent until proven guilty (Art 12) and that no person shall be subject to arbitrary detention (Art 11).

Although it is tempting to assume that anyone who is arrested is probably guilty, it is a Constitutional requirement that a person can be convicted of a crime only after a fair trial (Art 12). Anyone charged with a crime that they did not commit will appreciate the importance of this rule. Shortly after Independence, the High Court of Namibia stated that this presumption of innocence means that "an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment".[1]

The bail provisions in Namibia's Criminal Procedure Act have already been amended to tighten bail proceedings in respect of certain serious crimes, including rape and murder. In such cases, the law currently states that even where there is no likelihood that the accused will abscond or interfere with state witnesses if released on bail, the court may still deny bail if "it is in the interest of the public or the administration of justice" that the accused be kept in custody pending trial.

This amendment was discussed in a 2007 rape case, where the High Court noted that these amendments reflect public concern over the escalation of crime, noting that "it is only an individual who is living in a hole and does not come out of the hole, even for a brief moment, who cannot see that sexual assault of women and child girls is a serious concern to all and sundry…". This case went on to emphasise that courts "must make a serious effort" to give effect to the amended provisions on bail.[2]

Thus, the granting of bail is already subject to serious consideration in the case of serious crimes.

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[1] *S v Acheson* 1991 NR 1 (HC) at 19D-F.
[2] *S v Gasaeb* 2007 (1) NR 310 (HC).

Furthermore, the Criminal Procedure Act has already been amended to give victims of rape or domestic violence the right to provide information, directly or indirectly, about any fears of harm or intimidation which the court should consider before making a decision on bail, and to make submissions on any particular bail conditions which should be imposed.

If a person accused of rape is released on bail, there must be an automatic bail condition prohibiting any contact with the victim.

If the crime was a domestic violence offence, the court must impose a specified set of bail conditions unless there are special circumstances which make them inappropriate: a prohibition on contact with the victim, an order prohibiting the possession of any firearm or other specified weapon, and an order that the accused continue to provide maintenance to the victim and any dependents at the same or greater level as before the arrest.

If an accused person who is out on bail fails to observe any bail condition, the court can cancel the bail and confine the accused – provided that victims inform the prosecutor of the problem so that action can be initiated.

It would probably be unconstitutional to rule out bail completely for specific crimes. In Botswana, a complete prohibition on bail in rape cases was struck down on constitutional grounds by the country's highest court in 2002. It was argued that the bail provisions in question were in the public interest because they were aimed at reducing the high rate of rape in Botswana. The Court disagreed, stating that "depriving a person of his liberty merely because he is alleged to have committed rape - not, it must be stressed, because he is found guilty of it" - cannot possibly reduce the crime rate. Complete denial of bail might have some possible deterrent effect, but the Court found that the goal of deterrence was already better served by severe mandatory punishments for persons who are *convicted* of rape (such as those in place in Namibia).

The Botswana Court noted that personal liberty "is one of the most basic of human rights in a democratic society and its deprivation or curtailment must occur only within the most narrow of confines". It concluded that public interest in reducing crime does not outweigh concerns about infringing the right of personal freedom on the mere allegation that an offence has been committed. The Court cautioned that keeping accused persons in custody for long periods without the possibility of bail could become, in effect, a system of preventative detention.[3]

Future changes to Namibia's bail law should ideally provide a more specific list of factors which courts should consider in deciding whether to grant bail and under what conditions. Namibia should also be holding speedier trials in cases of serious crime. This could improve conviction rates, give quicker closure to crime victims and their families, and reduce the period in which bail is a concern.

Gender-based violence is a serious problem in Namibia, and offenders should be penalised to the fullest extent of the law – but within the parameters of our Constitution.

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[3] *State v Marapo* (2002) AHRLR 58 (BwCA 2002); see also *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).