

LONGER PRISON SENTENCES FOR GBV: WILL THEY HELP?

by Dianne Hubbard

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

“3. The Ministry of Justice is directed to introduce legislation aimed at imposing longer prison sentences to persons who are convicted and sentenced of gender-based violence offences.”

People who are convicted of gender-based violence should certainly be severely punished, and in general it seems that they are. However, harsher sentences alone will not curb gender-based violence—they must be supplemented with more holistic reforms of the criminal justice system.

Prior to Independence, there were cases where some convicted rapists received fines or wholly suspended sentences. The Combating of Rape Act 8 of 2000 attempts to overcome such leniency by imposing a graduated set of minimum sentences for rape where the offenders are adults.

For the most serious category of rape, the minimum sentence is 15 years for a first offence and 45 years for a subsequent offence. This applies where the victim suffers particularly grievous harm, where the perpetrator used a weapon and in cases of gang rape. It also applies where the victim is under the age of 13 or “exceptionally vulnerable” because of age, or where the victim is a child and the perpetrator is a parent or another person in a position of authority over the child. This category of sentence also applies if the perpetrator knew at the time of the rape that he or she was HIV positive or had a serious sexually transmitted disease.

The minimum sentence is 10 years for a first offence and 20 years for a subsequent offence if the rape was committed by means of physical force, threats of physical force or unlawfully detaining the victim.

In all other circumstances, the minimum sentence is 5 years for a first offence and 10 years for a subsequent offence.

The court has the power to impose sentences below these minimums only where there are substantial and compelling circumstances which would justify a lesser punishment.

The maximum sentence for a rape is life imprisonment.

Forms of rape	Minimum Sentence: First Offence	Minimum Sentence: Subsequent Offence
Rape	5	10
Rape + actual or threatened physical force or unlawful detention	10	20
Rape + “grievous bodily or mental harm” or other specified aggravating factors	15	45

A study completed by the Legal Assistance Centre in 2006 indicated that the minimum sentences were being correctly applied in practice, although courts often treated the minimum sentences as being ceilings instead of floors – especially the heavier minimums of 10 and 15 years.

In more recent years, the courts seem to be imposing either the minimum sentences or slightly heavier sentences in most rape cases. However, press reports show sentences as high as an effective 90 years for convictions on multiple counts of rape, and sentences in excess of 40 or 50 years for rape-murders.

The Law Reform and Development Commission (LRDC) has proposed increasing the minimum sentences for rape, raising the first offence minimums to 10, 15 and 20 years respectively, with the repeat offence minimums being set at 20, 30 and 45 years respectively. The LRDC has also proposed that the highest category of minimum sentence should be imposed in cases where the victim is “exceptionally vulnerable” because of a mental or physical disability, or for any other reason.

There are no minimum sentences for other forms of gender-based violence. The maximum sentence for the most serious forms of GBV – those involving rape or murder – is life imprisonment. An examination of reported cases shows that 30- to 40-year sentences for gender-based murders (which some refer to as “passion killings”) are not uncommon in Namibia.

The Domestic Violence Act 4 of 2003 contains special procedures on sentencing for crimes which occur in the context of a domestic relationship. It requires that the court allow the victim, or the victim’s next of kin, a chance to give input on sentencing - including views about the crime, the perpetrator and the need for restitution.

In practice, many judicial officers are treating the fact that a crime occurred in a domestic context as an aggravating factor when it comes to sentencing. As far back as 2007, the High Court made a strong statement on this point, saying that sentences must take into account the need “to root out the evil of domestic violence and violence against women” and reflect the courts’ commitment to the constitutional values of “human dignity and equality between men and women”, sending out a “clear and unequivocal message” that “crimes involving domestic violence will not be tolerated and that sentences will be appropriately severe”.¹

These sentiments have since often been echoed. For example, a 2011 High Court case, where a 28-year sentence of imprisonment was imposed on a man who killed his girlfriend by stabbing her 26 times, stated that “robust sentences should be imposed to stem the tide of deaths as a result of domestic violence”.²

However, the hope that stiffer sentences will aid in the prevention of gender-based violence does not seem to be bearing fruit, as the courts have realised. One judge commented, rather despairingly, in a 2011 case which imposed a 45-year sentence for the murder of a cohabiting partner, that “in spite of the heavy sentences we impose, those who perpetrate these heinous crimes seem to devise ways of raising the bar of brutality”.³

¹ *S v Bohitile* 2007 (1) NR 137 (HC).

² *S v Gabriel* (CC 17/2010) [2011] NAHC 45 (23 February 2011).

³ *S v Basson* (CC 23/2010) [2011] NAHC 186 (1 July 2011).

This case provided a clear statement of the courts' conundrum: "These crimes truly evoke a sense of collective helplessness in the national psyche: On the one hand it seems the severe sentences the courts impose have no deterrent effect, while on the other hand a relaxation in the severe-penalty regime raises the real risk of loss of the public's confidence in the court's resolve to protect society from violent criminals....

"In order to maintain a balance between the high incidence of violence against the vulnerable, especially women and children, and society's demand for justice, very long terms of imprisonment for such crimes must be the norm – only to be deviated from in exceptional circumstances. If that were not the case, there is, I apprehend, a real risk of vigilantism and lynch-justice if one listens to the chorus of public despair at the incidence of violent crime in Namibia."⁴

The evidence suggests that courts have been heeding the overwhelming call from the public for stiffer sentences for GBV. Thus, it would make more sense now to tackle the harder and less visible issues in the realm of criminal justice - such as providing more support to victims to reduce case withdrawals and improving police and prosecutorial services to increase conviction rates.

Punishment is important, but we must not kid ourselves that this will be the key to prevention.