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Pro Bono

INFORMATION ABOUT NAMIBIA'S LAW ON ...

Rape and the Duty to Protect Persons with Disabilities

ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.

People with severe mental or physical disabilities can be particularly vulnerable members of society – and as a result of this vulnerability, they can sadly become targets for abuse.

Persons who care for children or adults with mental incapacities have a legal duty to protect them from harm – including rape. In Namibia, there have been two relatively-recent court cases that demonstrate this.

A 2011 High Court case considered the conviction of a man for the rape of a child who was mentally-incapacitated. The victim was a 16-year-old girl with the mental capacity of a 2- or 3-year-old child, as a result of brain damage from an illness she suffered at an early age.

The girl was normally in the care of her grandmother, but responsibility for her care was temporarily transferred to a family friend, “Mr X”, who agreed to take her for a ride in his car as a treat. He knew of her mental incapacity and accepted the responsibility to take care of her. During the drive, he engaged in certain sexual acts with the girl. However, his version of events was that she was the one who initiated and continued the sexual contact.

The Court found that “Mr X” was in a protective relationship with the victim when he temporarily took charge of her, meaning that he had a duty to take positive action if she behaved in a way that was harmful to her interests without realizing what she was doing. So even if it was true that she initiated the sexual contact, he had a duty to stop her or to remove himself from the situation. His failure to do so was sufficient to justify a conviction for rape.

Another High Court case decided in 2012 dealt with a claim for damages arising from the rape of another child with mental incapacities. The child was 17 years old, but she had the mental capacity of a pre-schooler. She was enrolled in a school for persons with mental disabilities. The child’s grandmother, who was also her guardian, had called the hostel superintendent to request that the girl remain in the hostel over the weekend. The superintendent agreed, but then allowed the girl to

spend the weekend at the home of a woman who worked at the hostel. While staying at the woman's house, the girl was raped by the woman's boyfriend, who also happened to be a teacher at the girl's school.

The Court found that the hostel superintendent had a duty of care towards the girl and was negligent in letting her leave the hostel. The government ministry that administered the school was required to pay damages to both the girl and the grandmother for the trauma that occurred as a result of the rape.

The current law on rape in Namibia is the Combating of Rape Act. It defines rape as a sexual act committed under coercive circumstances. The Act provides explanations of both "sexual acts" and "coercive circumstances".

One coercive circumstance is where the victim is affected by permanent or temporary physical or mental incapacity to the point that he or she cannot understand what is happening, or is unable to communicate unwillingness to take part in a sexual act.

This Act sets minimum penalties for convictions for rape. The most serious forms of rape attract the highest minimum sentences – 15 years in prison for a first offence, and 45 years for a subsequent offence. These highest minimum sentences apply to certain specified circumstances where the victim was especially vulnerable - but this list of situations does not include vulnerability due to mental or physical disability.

The list of circumstances which trigger the highest penalties includes situations where the rape victim was under age 18 and the perpetrator was the victim's parent, guardian, caretaker or someone else in a position of trust or authority over the victim. This classification would cover the circumstances in the two recent court cases discussed here, but they would provide no help in other situations involving the rape of persons with mental or physical disabilities.

The Combating of Rape Act could be amended to improve the protection of people with disabilities, including harsher penalties for the rape of such persons. Taking sexual advantage of someone who is mentally or physically incapacitated should surely rank as one of the most despicable forms of rape. Rape of persons with physical or mental disabilities which prevent them from understanding what is happening or removing themselves from the situation should warrant the highest category of punishment.

The law should send out a message that society protects vulnerable children and adults from abuse, and that those who care for people with incapacitating disabilities have a duty to provide a high degree of protection.