

RAPE RE-DEFINED

A SUMMARY OF THE NEW COMBATING OF RAPE BILL

2000

Last week the National Assembly passed the long-awaited Combating of Rape Bill, which will soon go before the National Council. Here Dianne Hubbard of the Legal Assistance Centre summarises the key provisions of the bill.

The Combating of Rape Bill completely redefines rape. What was formerly “unlawful sexual intercourse with a woman without her consent” will now be a “sexual act” committed under “coercive circumstances”.

There are several advantages to this new definition. Firstly, it is gender-neutral, recognising the reality that men and boys can be raped. Secondly, it covers a range of intimate sexual acts, instead of being confined to sexual intercourse alone. Thirdly, it moves the legal emphasis away from absence of consent by the complainant, to focus on the use of force or intimidation by the perpetrator. Fourthly, the definition no longer excludes rape within marriage.

Some men have found this removal of the “marital rape exemption” to be controversial, fearing a rash of charges by wives against their husbands. But the experience of other countries indicates that charges of rape within marriage are rare. Namibian studies show that rapes within marriage can be extremely brutal. For example, one woman told researchers how her husband tried to rape her with a broomstick after hitting her repeatedly. Another woman who was brutally beaten by her husband described how he raped her in front of her children, in a pool of her own blood. Who would seriously argue that wives in situations such as these should not be able to lay a charge of rape?

“Coercive circumstances” in the new bill include the use of force or threats of force. They also include situations where the complainant has been unlawfully detained, or is unable to make a decision or communicate unwillingness because of being disabled, drunk, drugged or asleep. A recent addition to the list of “coercive circumstances” is where the presence of more than one person is used to intimidate the complainant, to give full coverage to all forms of gang rape. As a result of the new emphasis on the actions of the accused, rape complainants should no longer feel that *they* are the ones who are being put on trial.

The new law also gives greater protection against the sexual abuse of children. Under the existing law, the age at which children are considered capable of giving meaningful consent to sexual intercourse is 12 for girls, and 7 for boys. Under the new bill, rape occurs whenever a sexual act is committed with a boy or a girl under the age of 14, by someone who is more than three years older. The age of 14 is a logical choice, as this is the age at which children are presumed to understand the difference between right and wrong if they are charged with committing a crime. A companion piece of legislation will amend the Combating of Immoral Practices Act to give additional protection to boys and girls under the age of 16, where there is sexual contact with someone more than three years older.

Another significant aspect of the new law is that it provides stiff minimum sentences for rapists. Depending on the circumstances of the rape, the minimum sentence for a first offence is five, ten or fifteen years. A second offence is punishable by a minimum sentence of 10, 20 or 45 years. The highest sentences will apply to gang rapes, rapes of young children or elderly persons, and rapes where a

weapon is used or where the complainant suffers particularly serious harm. Rapists who know that they are infected with a serious sexually-transmitted disease such as HIV will also receive the heaviest sentences, along with rapists who take advantage of a position of trust or authority (such as rapes involving family members, or teachers and their students).

The court will have the power to depart from the minimum sentences only where there are “substantial and compelling circumstances” which would justify more lenient treatment. The minimum sentences will not apply to young offenders under the age of 18.

The new law also provides stiffer bail conditions. It will ensure that the victim has an opportunity to inform the court of any threats from the accused *before* bail is considered. Rape complainants must be notified if the accused rapist is released on bail, and no accused rapist out on bail is allowed to have any contact with the complainant. Women’s groups proposed that the possession of firearms or other dangerous weapons while on bail should be automatically forbidden, but this proposal was not incorporated into the final bill, leaving decisions on firearms to the discretion of the presiding officer.

In addition to the provisions on bail, the new law sets forth clear duties for police and prosecutors. These duties will help to ensure that all information relevant to a bail application is placed before the court. They are also designed to make the trial process less traumatic for the complainant, by making sure that the prosecutor informs the complainant what to expect in court.

The new law will protect rape victims from irrelevant questions about their sexual history. Evidence about the complainant’s sexual reputation will not be admissible under any circumstances. Evidence about the complainant’s previous sexual conduct or experience with the accused or with any other person will be admissible only on certain limited grounds. For example, the accused will be allowed to lead evidence that pregnancy, semen, disease or injury which is being attributed to the alleged rape actually had its source in another sexual encounter. The accused will also be allowed to lead evidence of sexual history in any case where failure to do so would hamper the accused’s defence so fundamentally as to amount to a violation of constitutional rights.

A new provision adds corresponding rules about previous sexual offences by the accused. Evidence of such previous offences is not admissible at all under existing law, but will be admissible in future whenever its relevance is stronger than its potential for unfair prejudice to the accused.

Another welcome aspect of the new bill is the protection it gives to the privacy of the rape complainant. Courts will be automatically closed to the public during rape trials, and there are stiff penalties for revealing the identity of rape complainants in the press from the time the offence is committed.

The original bill contained several provisions aimed at reducing the trauma of court testimony for child witnesses. These have now been moved to a separate piece of legislation, which is expected to come before Parliament hot on the heels of the rape bill. The move is appropriate because the proposed techniques -- such as the use of screens and closed circuit televisions to prevent the witness from having to look directly at the accused -- will apply in all criminal cases and not just to rapes.

Concerned groups such as the Multimedia Campaign on Violence Against Women and Children have greeted the new bill with praise. The current version of the bill was amended substantially to take into account concerns put forward by interested parties to the Parliamentary Committee on Human Resources. This

committee has been applauded for its sensitivity to NGO input and its ability to achieve workable compromises on contentious points.

There are high hopes that the Combating of Rape Bill will become law before the current Parliament leaves office, in time to be a proud part of the record of Namibia's first ten years of independence.

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