CRIMINAL PROCEEDINGS IN A SOUTH AFRICAN RAPE CASE

Written by Tayla Clemo

The Justice Desk
A Human Rights NPO

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The following booklet will attempt to empower you with important information on criminal proceedings relating to rape cases in South Africa.

Once you have reported a rape and the police have investigated the case, they will send the docket to the National Prosecuting Authority (referred to as the "NPA") which consists of prosecutors. The NPA must decide whether the state will prosecute the case, in other words, whether they will take the case on.

A prosecutor can only work with what is accessible in terms of the evidence and case laid out. The prosecutor can decide to go forward with the case based on a lack of evidence, witness statements, or if they are not of the opinion that the allegations made were true.

As a survivor this may seem harsh as every case should be taken on. However, the justice system is overflowing with criminal cases and the NPA are overloaded with work. This is why it is important to preserve evidence but also to know that each case is given individual attention and prosecutors use their discretion to take all aspects into account. If the NPA decide to take on your case, the case will be presented to court to decide whether or not the accused should be convicted of a sexual offence.

NPA

The National Prosecuting Authority is a government entity which ensures justice for the victims of crime, by prosecuting without fear, favour and prejudice and, by working with their partners and the public, to solve and prevent crime.

Please make sure you read our South African Guide to Reporting Rape

BAIL APPLICATION

What is bail? Bail is the release of the accused on condition of a certain payment amount. The Constitution provides rights for an accused. An accused has a right to apply for bail. The accused will have to show good reasons in the interests of justice why the court should grant bail. Each case is treated differently on its own merits. The accused will appear in court a few times before the actual trial takes place. An accused is entitled to obtain legal representation and should be made aware of this right before or during the bail application.

The prosecutor will argue why it is in the best interests of justice and the public that the accused does not receive bail. The prosecutor will argue aggravating circumstances against the accused. What does this mean? The prosecutor will have to argue that the accused is violent, that there are other charges against them at the same time.

The court will take into account the following factors:

- Whether the accused is likely to attend all the court hearings if bail is granted and if there are options for the accused to run away. An example would be whether the accused has family in another country or whether the accused has a valid passport.
- Whether the accused is a danger to society and others around them.
- Whether the accused is likely to commit another crime while on bail.
- Whether the accused will interfere with the case by intimidating witnesses or destroying evidence.
- The court will take into account personal circumstances like whether the accused is a first time offender.
- The court will weigh up whether granting bail will or will not defeat the interests of justice.

BAIL APPLICATION cont.

An accused will have to make a case ensuring the court of various factors stated above to allow the court to make an informed decision. The complainant may choose to attend the bail application but will not be forced to be there. The prosecutor may also ask the court to grant bail on certain conditions. These conditions can include enforcing the accused to reside somewhere specific, reside with someone specific and that witnesses must not be intimidated or interfered with. If the bail conditions are not complied with, the bail will be terminated and the accused will go straight to prison.

Take note that the bail conditions have become harsher to prevent the amount of rape crimes committed daily. If the prosecutor is able to show the court that the accused knew that they were HIV positive at the time of the rape, the presiding officer (also referred to as a judge) is unlikely to grant bail and is likely to implement a life sentence.

THE PLEA

What is a plea?

A formal statement by or on behalf of a defendant or prisoner, stating guilt or innocence in response to a charge, offering an allegation of fact, or claiming that a point of law should apply.

There are two ways in which the accused can plead. The accused can admit to committing the sexual offence in which the accused will plead guilty. If the accused has legal representation, the legal representative will hand up a statement admitting to a plea of "guilty'. The presiding officer will ensure that the accused is voluntarily providing their statement and that they admit to all elements of the offence. If the plea is accepted the proceedings will move to sentencing.

If the accused pleads not guilty to the sexual offence committed, the case will then go to trial so that the presiding officer is presented with both cases.

THE TRIAL

What is the trial for? The trial is a hearing of the case so that the presiding officer can be presented with evidence, witness testimony and can establish whether the accused is guilty of the offence. The prosecutor will start their case and the survivor would act as a witness for the prosecution. In terms of the law, the survivor is also allowed to give testimony over a camera if they feel traumatized testifying in front of the accused.

How does the proceedings in a trial work?

- The prosecutor will start. The prosecutor will present evidence that the accused committed the sexual offence. NOTE THIS IS WHERE NO WASHING AND KEEPING YOUR CLOTHING PLAYS A BIG ROLE. The survivor will be called up as a witness to testify. You will have to share the details of the sexual offence.
- The medical practitioner who examined the survivor and the investigating police officer will then testify in court.
- ·The prosecution will finish presenting their case and then it will be the accused's legal representative that will need to present the accused's case before the court.
- The same process will take place. The accused's legal representative will present the accused's case and will have witnesses testifying in favour of the accused.
- Then the accused's legal representative will cross examine the survivor. What does this mean? The legal representative will be entitled to ask the survivor questions of the incident. This is a very intimidating process for the survivor and the survivor will not be shown in a good light. However, remember the job of the accused's legal representative is to convince the court that the accused did not commit the sexual offence. (KEEP STRONG AS THE SURVIVOR, YOU ARE SEEKING JUSTICE AND HAVE A RIGHT TO).
- ·Take note an accused may represent themselves.
- The presiding officer will hear both cases presented and can request that more information must be obtained in order to make a decision which may lead to postponement of the court trial.
- The presiding officer will make the final decision whether the accused is guilty of committing the sexual offence.

Often we hear that a case has to be presented beyond reasonable doubt, what does this mean? It must be clear to the court through evidence and both cases presented, that the accused committed the sexual offence without any doubt existing. If doubt exists, the presiding officer will convict the accused on a lesser charge like sexual assault rather than rape.

SENTENCING

The sentencing part of the process is to determine the punishment the accused will receive. The types of punishment in which an accused can receive can include a sentence of imprisonment, payment of a fine, or enforcing an accused to undergo a sexual offender's treatment program.
The court when sentencing must take into account:

- The nature and seriousness of the offence.
- The personal circumstances of the offender (age, previous convictions, charges).
- The interests of the community.

The minimum sentence for a sexual offence such as rape is 10 years imprisonment for a first time offender and 15 years imprisonment for a second time offender. If you are continuous offender, you can face 20 years imprisonment or a life sentence. A life sentence would be 25 years imprisonment which can be given to offenders under certain circumstances as well as an offender that raped a child under 16 years of age, a mentally disabled person or if the accused was HIV positive at the time they committed the offence and was aware of their status. The prosecutor will present a case raising aggravating circumstances to influence the court's decision to provide a harsher sentence for the accused.

The reason we continue to make mention of building a solid case and preserving evidence comes down to the sentencing of the accused. We want justice for all survivors but a survivor needs to be aware that a presiding officer may give the accused a lesser sentence because they are of the opinion that substantial evidence and a compelling case was not presented.

PRESCRIPTION FOR CRIMINAL CASE

What is prescription?

Prescription refers to time period in which a survivor may institute legal proceedings against the offender. In terms of Section 18 of Criminal Procedure Act, as amended by the Sexual Offence Act, the crime of rape never prescribes. This means that you can report the rape any time (even if it happened many, many years ago). Your right to report a rape never 'expires'. In regards to other forms of sexual assault, the prescription is 20 years after the date that the sexual assault took place.

> *Your right to report a rape never 'expires'.*

PRIVATE PROSECUTION

In terms of South African law, if you do not want a prosecutor to institute legal proceedings against the offender, you have a right to employ a legal representative to prosecute a criminal case.

This would be referred to as a private prosecution. A state prosecution and a private prosecution will work in the same way and the same law and procedures will apply.

CIVIL PROCEDURE

Besides having the criminal justice system to rely on, a survivor is also able to rely on the civil justice system.

What is the civil justice system?

This is a system where the survivor can sue the offender for damages which is monetary compensation for losses. The losses you could sue for is hospital or medical expenses, loss of income and pain and suffering. What is important to remember is that the offender should have money if you are suing for a claim of damages.

What will the survivor need to prove for a damages claim? The survivor will need to prove that the sexual offence committed against the survivor amounted to unfair discrimination based on gender, sex, sexual orientation.

Before instituting a damages claim, seek help from an attorney because all allegations in a civil case need to be proved and comply with the requirements in terms of the type of claim being instituted against the offender.

In terms of the Prescription Act, civil cases must be instituted against the offender within a 3 year period from the date the offence was committed. If it is a child case and the matter is instituting civil processes on behalf of the child who was raped, prescription will occur 3 years from the date at which the child realises the offence that arose from the sexual offence being committed.

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