



BAIL
IN CASES OF
RAPE
AND
DOMESTIC
VIOLENCE



LEGAL ASSISTANCE CENTRE

WHAT IS BAIL?

Bail is the conditional release of a person charged with a criminal offence. To be released, the accused person must provide a money deposit (or the promise of a money deposit) and promise to attend court at a later date.

When a person has been arrested and charged with a crime, the police must bring him before a magistrate or a judge in court as soon as possible. This should happen within 48 hours. The magistrate or judge must decide if the accused person should remain in jail until the trial or if he should be released on bail.

Being “free on bail” is not really the same as being free. The accused person is allowed to live in society until the trial is over, but he *must* still attend court on the day of the trial.

The magistrate or judge will often set conditions that the accused person must follow during his release. These conditions last until the trial is finished. If the accused person is found guilty at trial and not sentenced immediately, the magistrate or judge may reconsider bail or the bail conditions at that time.

A person charged with a crime is referred to as an “accused”. This person has not yet been found guilty or not guilty. An accused can be a man or a woman. We talk about men as the accused in this booklet because most reported rapes are committed by men.



A person who has been the victim of rape or domestic violence is called the "complainant".



WHY GIVE BAIL?

Some people think that a person who has been accused of rape or domestic violence should not be given bail. But being accused of a crime is not the same thing as being guilty of a crime.

For example, there could be a case of mistaken identity. Witnesses can make mistakes. Also, there are often two sides to a story. If a man pushes a woman, it might look like an assault, but if he pushed her to stop her from stabbing him, then he may have a defence to the charge. A court may decide that he is innocent.



Being denied bail is a serious hardship for the accused person. There is often a long period of time between the arrest and the trial. The courts are very busy and trials are scheduled months in advance. It also takes time for the lawyers to prepare the case and notify witnesses. An accused may spend months or even years in custody if he does not get bail.

The time the accused spends in jail waiting for the trial may be longer than the time he would spend in jail if he were found guilty of the crime. During this time, his family may suffer, and he could lose his job and home.

The Constitution of Namibia says that all persons are innocent until proven guilty. This means that accused persons should normally be free to live in the community and continue their lives until the trial is finished. Keeping accused persons in jail before the trial is a harsh measure that should be used only in situations where they may run away, interfere with witnesses, or be a danger to other people.



HOW DOES BAIL WORK?

There are two requirements for bail:

1. The accused pays money or promises to pay money.
2. The magistrate or judge sets conditions.

The amount that the accused must pay will be different in each case. It might be \$200 or \$2000, depending on the situation. The payment of money is meant to ensure that the accused person returns to court. If the accused attends the trial, the government returns the money. If the accused does not attend the trial, the government keeps the money. (If the accused does not attend the trial, the police will also search for him and arrest him.)



The bail amount must be high enough to be taken seriously. But it must not be so high that the accused cannot afford to pay it. If bail is set unrealistically high, it has the same effect as denying bail.

The magistrate or judge sets conditions on bail to monitor the accused and to keep the community safe. Conditions are rules that the accused must promise to follow in exchange for his release. Here are some examples of common bail conditions:

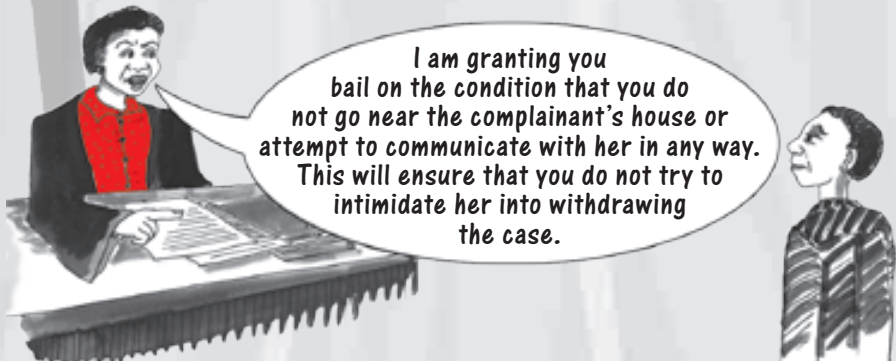
- The accused must report at a specific time and place to a person in authority (such as a police station). This may be each day, each week or each month.
- The accused may not go to a specific place, for example the home where the complainant is living.
- The accused may not communicate with any witnesses in the trial.
- The accused must be supervised by a probation officer.

There can also be other conditions.

In cases of rape, the court **MUST** add conditions to make sure that the accused will not make contact with the complainant.

In cases of domestic violence, the court **MUST** add these conditions, unless there are special circumstances:

- The accused may not have any contact with the complainant.
- The accused may not have a firearm or other specified weapon.
- The accused must provide financial support for the complainant or any children at the same level as before the arrest. (This applies only where the accused already has a legal duty to maintain these dependants. For example, the accused could be ordered to pay maintenance for children or a wife, but not for a girlfriend.)



WHAT HAPPENS AT A BAIL HEARING?

The government employs lawyers called prosecutors. Prosecutors represent the government in criminal matters. The prosecutor is not the complainant's lawyer, but the prosecutor has a duty to represent the complainant's interests during the bail hearing.

The prosecutor will ask the magistrate or judge to decide whether or not the accused should receive bail. The prosecutor will recommend either that the accused must stay in jail, or suggest bail conditions if the accused is released.

If the accused has a lawyer, that lawyer will attend the hearing. The accused's lawyer will tell the magistrate or judge why bail should be granted and suggest what conditions should be set. For example, the accused's lawyer might argue for bail by saying that the accused has a job or is supporting a family.

The prosecutor will tell the judge or magistrate about the crime the person is accused of committing. The prosecutor will provide important information, such as whether the accused knows the complainant, how serious the complainant's injuries are or whether the accused has threatened any witnesses.

The complainant has a right to give information to the prosecutor for the bail hearing. For example, the complainant should tell the police or the prosecutor if the accused made any threats. The complainant should say if she has some reason to be afraid if the accused is released on bail. This information will be taken into consideration. The prosecutor has a duty to make sure that the complainant has given the police or the prosecutor all important information about the crime before the bail hearing.

I was raped, but I am afraid to report the crime to the police. The man who raped me said that he would kill me if I did. And he knows where I live.

Don't be afraid! If he made threats like that, he is unlikely to get bail.

Even if he is set free on bail to wait for the trial, the court will make an order saying that he is not allowed to come anywhere near you during that time.



The magistrate or judge may ask for more information from the prosecutor, or from the accused's lawyer. The magistrate or judge may want to hear witnesses to get more facts before making a decision. The police officer who is investigating the case will often be a witness at a bail hearing.

WHAT ARE THE RIGHTS OF THE COMPLAINANT?

The complainant has the right to attend the bail hearing, to make sure that the magistrate or judge gets all the relevant information.

In rape cases, the police have a duty to inform the complainant of the court date for the bail hearing. A complainant also has the right to ask the prosecutor to present relevant information or evidence at the bail hearing.

If the complainant decides not to attend the bail hearing, the prosecutor has a duty to tell that complainant if the accused is released on bail, and about any bail conditions that were imposed.

WHAT SHOULD YOU DO IF YOU THINK THAT THE ACCUSED MIGHT THREATEN YOU OR HURT YOU IF HE GETS OUT ON BAIL?

If the accused has ever threatened you, or if you are afraid that he will hurt you again, you must tell the police. If you are afraid, you must tell the police why you are afraid. Let the police know if the accused has any weapons. Let the police know what places the accused should not be allowed to go. For example, if the accused knows where you work, he should not be allowed to go there. This is important information that the judge or magistrate will want to hear before deciding whether to release the accused on bail.

If you were not advised of the bail hearing in advance, or not given an opportunity to tell the police or prosecutor your concerns, contact the prosecutor's office and speak to them about this.

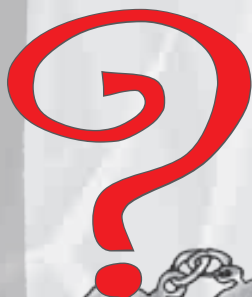
If you laid a charge in a rape case or a domestic violence case, the bail conditions should include a condition saying that the accused may not have any contact with you – if there is no bail condition on this, you should speak to the prosecutor about your concerns.



He followed me for weeks before the rape. I saw him watching my house.

You might be in danger if he gets out on bail. We must make sure that the court hears about this.

HOW DOES THE MAGISTRATE OR JUDGE DECIDE WHETHER TO RELEASE AN ACCUSED PERSON ON BAIL?



The judge or magistrate will consider the personal circumstances of the accused, the circumstances of the crime and other relevant information before making a decision about bail.

The accused person should not be released on bail if there is evidence that he is likely to do any of these things:



- endanger the safety of the public or any particular person
- undermine public peace or security
- commit a serious offence
- try to influence or intimidate witnesses or conceal or destroy evidence.

The accused person should not be released on bail if there is evidence that he will probably not attend court or follow the bail conditions.

In cases of rape, the accused must convince the court that he should be released. In the most serious cases of rape, such as gang rape or the rape of a child, the accused must show there are exceptional circumstances why he should be released.

WHAT SHOULD YOU DO IF THE ACCUSED DOES NOT FOLLOW THE BAIL CONDITIONS?

If you know that an accused person is not following the bail conditions, you should go to the police to report this as soon as possible. It is best to tell the original police officer from your case. Make sure you have the names and contact information of any witnesses who saw that the bail conditions were not met if they cannot come with you to the police station.



My boyfriend hit me, so I laid a charge against him. He is out on bail, but the magistrate said that he must not come near me. Last night he came to my house and threatened me! What should I do?

You must tell the police right away! They may need witnesses. If the neighbours saw your boyfriend or heard his threats, tell the police how to contact them.

The police must inform the prosecutor straight away. The prosecutor will decide whether or not the breach is serious enough to have the accused arrested. If he is arrested, he will have to come to court. The magistrate or judge will decide if he actually violated the bail conditions.

If there was a violation of the bail conditions, the magistrate or judge can cancel the bail. The money paid for the bail will be given to the government. The accused may also be charged with a criminal offence just for violating the bail conditions. The punishment for that could be a fine or imprisonment for up to a year.

If you made a complaint to the police and the person who violated the bail conditions is not arrested, contact the police station to find out what is happening. It may be that the prosecutor has decided not to act because the violation was not too serious. If that is the case, ask for the reason for this decision. In other cases, it may be that the police cannot locate the accused to arrest him. You may be able to help them with that.

CAN BAIL BE CANCELLED IN OTHER CIRCUMSTANCES?

Even if the accused follows all the bail conditions, bail may still be cancelled. This might happen if the accused did something that was not specifically forbidden but is still a threat or a problem, such as:

- the accused interferes with or threatens witnesses – for example, if the accused asks the complainant to withdraw the criminal charge;
- the accused poses a threat to the safety of the public or a particular person – for example, if the accused has threatened the complainant or a member of the complainant's family;
- there is evidence to show that the accused will not attend the trial – for example, if someone has information that the accused is planning to leave Namibia;
- the accused presented false information at the original bail hearing – for example, if the accused said that he had never been arrested for a similar crime and then some previous convictions come to light.

All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

Namibian Constitution, Article 12(1)(d)



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