



Review of Juvenile and GBV Cases

Attorney General's Office

Burao, Togdheer Region

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Introduction

In April 2015, Horizon spent a few days with the prosecutor specializing in GBV and juvenile cases at the Attorney General's Office in Burao and reviewed six recent cases:

1. Attempted rape, Ina Madoobe, December 2014
2. Abusing religion in Abdullah Noori, March 2015
3. Extortion in Burao, March 2015
4. Gang rape in Hodan Qaylo village, March 2015
5. Gang rape of a mentally ill girl in October village, September 2014
6. Unnatural offences committed with violence in Ceelgooni village, March 2015

The review consisted of access to case files and interviews with the prosecutor. This report provides a summary of the reviewed cases, observations on the prosecution and recommendations for future training.

1. Attempted Rape, Ina Madoobe, December 2014

Case Summary

On 11 December 2014, the defendant, a 15 year-old boy was caught attempting to rape a 12 year-old girl in Ina Madoobe. Two witnesses heard her screaming and witnessed the defendant without his trousers on, struggling with the victim on the ground. On 25 December 2014, the defendant was charged with acts of lust committed with violence (Article 399 Penal Code).

Evidence

The police interviewed the victim, three witnesses and the accused. The victim's account was that at 3:30pm on 11 December 2014, she went to collect charcoal. She met the accused and he asked her to have sex with him. She refused, and resisted, but he removed their clothing and tried to have sex with her. Two men came to help her before the accused penetrated her. Witnesses 1, 2 and 3 heard screaming nearby. They found the accused and victim without any clothes on. They chased after the accused and caught him. The victim was crying and screaming.

In his statement to the police, the accused denied trying to rape the victim but said that she had consented. Before anything could happen, two men came.

The victim underwent a medical examination on 13 December 2014. No physical bruising or injuries on body were found. The victim had customary FGM which was still closed.

Outcome

At the first hearing in the Regional Court on 27 December 2014, the Regional Court judge and the parties in the case agreed that since the accused was underage the case should be solved outside of court. In making this decision, the judge and prosecutor took into account the age of the accused, that he did not commit the act and they proposed to the families that they reach a settlement. The parties agreed to pay \$1000 compensation to the victim's family. No further action was taken.

Analysis

It is suggested that this case was wrongly charged as acts of lust committed with violence (Article 399 Penal Code), and should have been charged as the more serious crime of rape (Article 398)

with Article 17 (attempt). Article 399 carries a sentence of 1-5 years, while rape carries a much higher sentence of 5-15 years imprisonment. In these circumstances there is nothing to prevent a prosecutor from pursuing a prosecution under both Article 398 and 399. It is observed that this is not currently common practice among AGO prosecutors, but it may increase the AGO's effective prosecution of gender-based violence crimes.

Charging the accused with the lesser offence contributed to the judge and prosecutor's subsequent decision not to pursue the prosecution. There is no written decision not to pursue the prosecution and therefore no written record of the reasons for that decision. The allegation involved a 12 year-old girl, a factor which should have been taken into account, as well as the effect of the crime on her. While it is important that judges and prosecutors consider the age of a defendant in deciding whether to pursue a criminal prosecution, in the present case, the judge and prosecutor arguably came to the wrong decision. The accused is 15 years old and should be held criminally responsible for a serious offence in accordance with the provisions of the Juvenile Justice Law 2007.

The evidence in the case consists of statements given by the victim, three witnesses and the defendant, and the medical report. The statements were brief and lacked detail, however, the case arguably had a realistic prospect of conviction.

In September 2014, the Attorney General issued a directive to all Deputy Attorney Generals urging them not to allow out of court settlements in rape cases "in order to ensure that the law is upheld and justice is met all through the country." Arguably, this case consists of precisely those circumstances the Attorney General wishes to prevent.

2. Abusing religion in Abdullah Noori, March 2015

Background

The defendant is 16 years old. His father is dead and he has recently dropped out of school. On two previous occasions, his mother has brought parental disobedience cases against her son due to his disobedience and dropping out of school. In both cases, the police brought the first instance reports to the prosecutor but he declined to prosecute him. The prosecutor mediated the disputes between the mother and the son to keep the case out of the criminal justice system. On one occasion, at the prosecutor's request, the police held the boy in the police station for four to five days as punishment.

Case Summary

The allegation is that on 18 March 2015, at around 7 p.m. in Abdullah Noori the defendant abused his mother's religion. He was charged with Article 313 of the Penal Code (Bringing the Religion of the State into Contempt). In his police interview the defendant said he had an argument with his sister because he wanted money. He did not abuse his mother or her religion.

Court Process

The case was heard at the District Court. The Deputy Attorney General brought three witnesses: the victim (the defendant's mother), the defendant's sister, and another relative. The victim testified that her son has stopped going to school. He regularly abused her, her religion and Allah. On this occasion, she was at home with her son, daughter and another relative. Her son became angry, he kicked over the porridge she had prepared and abused her religion and Allah. The defendant's sister testified that her brother abused his mother and religion, saying "Fuck your religion." The third witness testified that the defendant came home and asked what was for dinner. He then abused

the victim and her religion. The defendant was not legally represented. He was not given an opportunity to speak in court.

Judgment

On 21 March 2015 the District Court Judge sentenced the defendant to one-year imprisonment for abusing religion under Article 313 of the Penal Code. There is no written record of the judgment and no record of which judge heard the case. No appeal has been lodged.

Analysis

The DAG who prosecuted this case was absent during our visit. The prosecutor responsible for prosecuting juvenile cases was not involved in this case, despite the defendant's youth. The prosecutor knows the defendant and his mother and has previously interceded to settle alleged parental disobedience outside of the court process. Arguably, this is a case that could have been dealt by the Attorney General's Office outside of the criminal justice system. The use of police custody as an extra-judicial punishment, although common practice, is a concerning feature of this case.

The notable concerns in this case relate to the court procedure, rather than prosecutorial practice. The defendant is 16 years old and a child, according to the JIL. At trial, there were three eyewitnesses who testified that the defendant abused his mother's religion.

The defendant was not provided with the safeguards set out in the JIL and the Criminal Procedure Code – the right to express himself in judicial proceedings, the right for his views to be considered by the court – which are guaranteed to all children appearing in court under Somaliland law. Nor did the judge provide the defendant with a lawyer, thereby failing to fulfill his responsibility under Articles 9 and 14 JIL. There was no preliminary hearing in the case at which the judge is legally bound to establish whether the matter can be diverted (Article 59 JIL), no support to the child during the court process (Article 76) and no explanation of the proceedings (Article 77).

Article 313 carries a maximum punishment of two years imprisonment. There is no written judgment and therefore no record of the judge's reasons for deciding a one-year sentence in this case.

3. Extortion in Burao, March 2015

Case Summary

There were 13 defendants in this case, one is 18 years old, the rest are 15-17 years old. The allegation is that the defendants made counterfeit tickets ordering any person driving a bugaj from another areas to pay a fine of 5,000 Somaliland Shillings. On 26 March 2015 at around 7 a.m. the defendants stopped the victim, a bugaj driver, and demanded that he pay the 5,000 Somaliland Shillings fine. He refused to pay and the accused held a knife against him and took 20,000 Somaliland Shillings from him. Defendants 1-10 were caught by the police and confessed. Defendant 11 did not confess. Defendants 12 and 13 are missing. The defendants were charged with Article 485 (extortion) and Article 358 (Use of Counterfeit Tickets of Public Transport). There were seven eye-witnesses in the case, including the victim who identified the accused, and one exhibit – an alleged counterfeit ticket.

Outcome

On 4 April 2015, the prosecutor proposed to the families that they deal with the case out of court. He made this decision because all of the defendants apart from one were under 18 years old, and because, in his view, the offence was not a serious one.

The prosecutor's reasoning was that if the families deal with the case outside of the criminal justice system the victim will receive some compensation for what happened to him, whereas if the case went through the formal justice system, the victim would receive little or no compensation. The families of defendants 1-11 agreed to pay a fine of 100,000 Somaliland Shillings each as well as compensation to the victim which was agreed between the parties.

The defendants had been kept in pre-trial detention in Burao prison since their arrest. In a letter from the Custodial Corps to the Attorney General's Office, dated 4 April 2015, the Custodial Corps requested that if the defendants were fined, that the money be used to fumigate the prison to get rid of the insects. This was agreed by the Attorney General's Office on 5 April 2015 and most of the money from the fine went to Burao prison.

Analysis

Use of Counterfeit Tickets of Public Transport is punishable with up to six months imprisonment or a fine, while extortion (Article 485) is punishable with three to ten years imprisonment. It was suggested to the prosecutor that a robbery charge could have been added to the charge sheet, since the offence is made out on the victim's account. The prosecutor replied that if the case had proceeded to trial he would have changed the charge to robbery. It is notable that the prosecutor thought it better to substitute a new charge rather than add an additional one. This is a recurring issue in prosecutorial practice in Somaliland.

While it is commendable that the prosecutor is seeking to keep young people out of the criminal justice system, it is suggested that such a decision should be made once a full analysis of the case has been made. For example, extortion and robbery are serious offences with sentences ranging from 3-10 years imprisonment. The prosecutor took two relevant factors into account in deciding not to prosecute – the age of the accused and the seriousness of the offence. It is suggested that the prosecutor should also have considered the serious circumstances of the offences, namely the use of a weapon, and should have pursued a prosecution in this case.

4. Gang rape in Hodan Qaylo village, March 2015

Case Summary

On 17 March 2015 around 8.30 p.m. in Hodan Qaylo village, the five defendants came across the victim, a 13-year old girl, with two young male friends and attacked them. Her friends ran away and the defendants forcibly took the victim away. On the road, they passed a mother and her three children who saw the victim struggling with the defendants. The mother tried to help the victim but the accused threw stones at her and her children to prevent her from intervening. On arriving at a deserted place, the defendants raped the victim. When they finished, they phoned another man and told him to come and join them. When he arrived, he saw that the victim was very young and was pleading to be left alone. He told the accused to let the girl go but they refused and he left. Some time later, the accused left the scene. The victim was discovered by a witness who called the police. When the police arrived, they found the victim dripping blood and covered in bruises.

Evidence

The police took the victim to a hospital. The medical report, dated 21 March 2015 recorded scratches on the victim's right leg, bruising all over her body, vaginal bleeding, broken hymen and undone customary FGM. The police interviewed the victim, her two young male friends, the mother who tried to intervene, the man who the defendants called to join them.

Court process

The defendants were charged with rape (Articles 398 Penal Code) and association for purpose of committing crimes (Articles 71 and 322 Penal Code). Two lawyers represented the defendants. All five defendants confessed in front of the court that they raped the victim but denied planning the rape in advance and associating for that purpose. The prosecutor brought six witnesses, including the victim, the two friends she was with, the woman who tried to help her, the man who joined the defendants and the witness who found the victim in support of their case.

In closing, the Prosecutor requested that the court convict the accused and sentence them for 15 years under Article 398 Penal Code, seeking the maximum sentence due to the victim's age and vulnerability, the determination of the accused to commit the offence as well as the multiple perpetrators. The prosecutor also sought an additional 15 years imprisonment under Article 322. The Prosecutor also requested that the court order the victim to be provided with civil compensation based on Islamic Sharia law in accordance with Articles 158, 159 and 160 of the Penal Code.

Judgment

On 7 April 2015, the Regional Court sentenced the five defendants to seven years imprisonment and a fine of \$2,500 each.

A significant concern in this case is that the judge also convicted the two male friends who had been with the victim when the defendants attacked them, of public indecency (presumably "obscene acts" under Article 402 Penal Code – there was no charge sheet). These two witnesses were both under 18 years old. The Prosecutor did not seek this prosecution and it was entirely unexpected. In giving his judgment, the judge stated that the two boys should not have been in the company of the victim, since they were not her relatives; this was inappropriate behaviour. On this basis, he sentenced them to six months imprisonment.

Analysis

The prosecutor's preparation in this case was impressive. He had recorded the evidence of each witness and had prepared a detailed prosecution summary. Apart from requesting an overly long sentence in respect of Article 322 – he requested an additional 15 years where the sentencing range under Article 322 is three to seven years, so his submission on this point was not based in law - his sentencing submissions were commendable in analyzing the aggravating features of the crime and taking a strong victim-centred approach. There was no written judgment in this case. There is no record of the reasons the judge had for sentencing the accused to seven years imprisonment, whether he took aggravating and mitigating factors into account, or whether he found the accused guilty of associating for the purpose of committing the crime. The sentencing range for rape is 5 – 15 years. The sentence in this case is towards the lower end of the range, despite the victim's young age and the group nature of the offence. The AGO did not appeal the sentence since it falls within the sentencing range. Since the judge's reasons are not available, it is difficult to say whether the AGO should have considered an appeal against sentence in this case.

Regarding the judge's conviction of the two witnesses for public indecency, this has no basis in law. The Attorney General's Office did not seek this prosecution, nor was there any the evidence to suggest that the boys committed any "obscene act."

5. Gang rape of a mentally ill girl in October village, September 2014

Case summary

On 19 September 2014, the twelve accused in this case were at a wedding in Xero Dhiighta. The victim is a mentally ill girl. At around midnight, the victim tried to leave the party with a man driving a car, but he refused to take her. Some of the accused tried to forcibly take the victim away from the party but two armed men (later witnesses in the case) intervened and stopped them. Soon afterwards, some of the accused forcibly took her from the wedding and took her to the 1st defendant's house where a group of them raped her. They then took her to a wooded area in October village where they raped her again. At around 3 a.m. people in the village heard the victim screaming for help and came to help her.

Court process

The preliminary hearing took place on 26 September 2014 with 17 accused (the police had arrested all of the young men at the wedding party) charged with rape (Article 398 Penal Code) and association for purpose of committing crimes (Articles 71 and 322 Penal Code) in aggravating circumstances (Article 39 Penal Code). At that hearing, two of the accused told the judge that they were not involved but had prevented the other defendants from taking the victim from the wedding party. They agreed to be prosecution witnesses and testify against the others.

At the preliminary hearing the prosecution requested that the case be pursued against twelve defendants and dropped the charges against the others, for lack of evidence. Defendant 1 and Defendant 12 were 16 years old; the others were 18-24 years old.

The trial of the remaining 12 defendants took place on 8 October 2014. Two legal aid lawyers from SOLLA, Hassan Yasin and Bile Abdi each represented six defendants.

The Prosecution relied on 18 witnesses and five exhibits including the victim's medical report, sketch of place of incident, in court confessions of the 1st, 3rd and 5th accused, the victim's shoes and her mental health examination report. The medical report, dated 21 September 2014 and signed by a doctor and two midwives, documented evidence of rape including that the victim's customary FGM had been undone and she had lost her hymen. Her genital area was visibly injured and there were bruises on her left hand and arm.

The witnesses included eye-witnesses who saw some of the defendants leaving the wedding with the victim, eye witnesses who identified defendants 1-9 and saw them take the victim to the 1st defendant's house, and saw them with the victim on the way and in October village, an eye witness who testified having seen some of defendants in the act of raping the victim, and witnesses who came to the aid of the victim when they heard her screaming. Other witnesses gave evidence about the victim's mental state, admissions made by the 1st, 3rd and 4th defendants and the police investigation.

Defendants 1, 3, 4 and 5 confessed that they forcibly took the victim from the wedding party and went to the 1st defendant's house and then to October village. Accused 2, 5-12 denied being involved, and Accused 6 stated that he had helped to rescue the girl at the wedding and was not included in the group taking the girl.

The defence relied on alibi evidence for defendants 5, 10, 11 and 12, denied the involvement of defendants 7-12 in the offence, and submitted that defendants 5 and 6 were part of the group for short periods of time, and were not involved in the rape.

In his closing statement, the prosecutor requested the court to convict accused 1-9 of rape under Article 398 and 332/71, and summarized the supporting evidence. He acknowledged that there was no evidence to link defendants 10, 11 and 12 to the crime, and did not seek a conviction in their cases. He requested that defendants 1-9 be sentenced to 30 years imprisonment each - 15 years under Article 398 Penal Code and an additional 15 years imprisonment under Article 322. In his submissions, the prosecutor highlighted the victim's mental state and her vulnerability. He asked that the court take into account these aggravating factors in passing sentence. The Prosecutor also requested that the court order the victim to be provided with civil compensation based on Islamic Sharia law in accordance with Articles 158, 159 and 160 of the Penal Code.

Judgment

Defendants 1-4 were sentenced to 7 years imprisonment and \$2,500 compensation and did not appeal. Defendant 5 was sentenced to seven years imprisonment, reduced to two years on appeal and \$2,500 compensation. Defendant 6 was found not guilty of rape under Article 398 but guilty of Article 298 (assistance relating to the object of a crime). Defendants 7-12 were found not guilty.

Prosecution for False Evidence

One of the two accused who agreed to testify for the prosecution, turned hostile and refused to testify against the defendants at trial. The prosecution brought a separate prosecution against him for withholding information and for giving false evidence (Article 291 Penal Code). He was convicted on 12 November 2014 and sentenced to two years imprisonment. On appeal, his sentence was reduced to a fine.

Analysis

It is evident from the case file that the prosecutor meticulously prepared and presented this complex prosecution case. He prepared a detailed typed summary of the case which set out the evidence against each accused. He was fair in his analysis of the evidence and in pursued an evidence-based prosecution. He did not proceed where there was no evidence, and acknowledged that there was no case against defendants 10-12 when the case came to trial. He was right to seek a conviction against defendants 1-9 since one or more eyewitnesses identified seeing them together with the victim in various locations between midnight and 3 a.m. From a prosecution perspective, the identification evidence against defendants 7,8 and 9 was strong enough to provide a realistic prospect of conviction, however ultimately the judge took a different view.

In his submissions to the court on sentencing, the prosecutor highlighted the victim's vulnerability and that the rape was planned and coordinated by defendants 1-9 operating together. He sought the maximum sentence of 15 years under Article 398 Penal Code against all the defendants for these reasons.

The prosecutor also sought an additional 15 years imprisonment for each accused under Article 322 Penal Code which is far higher than the legally prescribed range of three to seven years. The 1st defendant in this case is 16 years old and due to his youth is eligible for a reduced sentence under

Article 60 of the Penal Code, however, it seems that no submissions were made on this point by either side, or that the judge considered this.

The sentencing range for rape is 5-15 years imprisonment. On any view, the seven-year sentences for defendants 1-4 are low, particularly considering the age and vulnerability of the victim and the gang features of the crime. This appears to be a recurrent theme in sexual violence cases in Somaliland.

6. Unnatural offences committed with violence in Ceelgooni village, March 2015

Case Summary

The victim in this case is a 15 year-old shoe shiner from Ceelgooni village. The defendant is a 60 year-old man. They used to chew khat together and on four previous occasions, the defendant paid the victim 4,000 Somaliland Shillings to have sex with him. On 1 March 2015, the defendant paid the victim 10,000 Somaliland Shillings to have sex with him. The victim agreed and they went to a stream, behind their usual meeting place. They both removed their trousers but were interrupted by two witnesses. The defendant was arrested and detained at the police station. On 2 March 2015 he was charged with Unnatural Offences Committed with violence, Article 400 of the Penal Code.

Evidence

A medical report for victim dated 2 March 2015 confirmed that penetration had taken place but there were no other physical injuries. On 3 March 2015 the defendant made a confession before the Burao Regional Court. He confessed that he had an agreement with the victim to pay him for intercourse. However, two men interrupted them and they did not have sex. At trial two weeks later, the victim, two eye-witnesses and the police investigator gave evidence. The victim testified that the accused agreed to pay him Somaliland Shillings 10,000 and he took him to a stream and they both removed their trousers but penetration did not take place because they were interrupted. The defendant had paid him for sex on four previous occasions. Both eye-witnesses claimed that they had seen the defendant and the victim having sex by the stream.

Judgment

We attended the judgment in this case on 22 April 2015. The Regional Court Judge Aden Osman gave an oral judgment stated that a haram and unnatural act had taken place. He considered the sentencing range for this particular crime is 5-15 years and the appropriate sentence was deemed to be 10 years imprisonment in this case. He did not give reasons. The defendant was given 30 days to appeal.

Analysis

The prosecutor took the correct view that it was not in the interests of justice to prosecute the victim due to his young age and vulnerability. Furthermore, the prosecutor used the broad powers given to the Attorney General's Office to protect witnesses under Article 87 of the Criminal Procedure Code and proposed to the court that the victim's mother accompany the victim to support him to give his testimony which she duly did. This innovative victim-centred approach is commendable and good prosecutorial practice.

The prosecutor charged the defendant with Article 400 Penal Code, Unnatural Offences Committed with Violence. Article 400 covers the circumstances in which a person has sex with a person of the same sex who is incapable of giving consent, i.e. a child. The charge was therefore the correct one.

The issues of concern in this case relate less with the prosecution, and more with the judiciary. Despite the Chairman of the Regional Court's assurances the day before that every defendant facing a serious charge is provided with a lawyer, the defendant in this case was not legally represented. In reaching his sentencing decision, the judge cited the sentencing range for rape which is lower than that for "unnatural acts" and seemed more concerned with highlighting the immorality of the offence, rather than addressing the specific circumstances of the case.

Recommendations for Training

Based on the above analysis of recent cases undertaken by the Attorney General's Office, the following are proposed areas for future training for prosecutors and Deputy Attorney Generals working on juvenile and GBV cases:

1. Identifying the suitability of juvenile cases to be diverted from the criminal justice system by the Attorney General's Office, having considered all the circumstances of the offence;
2. Selecting the most appropriate charge under the Penal Code and use of multiple charges; and
3. Taking a victim-centred approach to prosecution;
4. Assisting children and GBV victims to give their best evidence through the use of special measures;
5. Supporting the AGO's DAGs and prosecutors across the country to ensure greater consistency in prosecutorial approaches in juvenile and GBV cases.