

BAHAMAS FAITH MINISTRIES ADVICE AND RECOMMENDATIONS
REGARDING MARITAL RAPE AND PROPOSED AMENDMENTS TO THE
SEXUAL OFFENCES ACT 1991

We at Bahamas Faith Ministries as responsible citizens representing a diverse and expansive membership take seriously our fiduciary duty to create an environment for the betterment of our nation. When issues of national importance arise our custom has been and continues to be one of consultation with our membership including our legal team, relevant professionals from within our ranks, others both locally and abroad who we deem possess relevant information and our leadership team to formulate a well-researched position which we present to you at this time on the subject referenced above. As always our position is also guided by “Kingdom” based principles derived from the Bible and in particular the New Testament as we are a Christian based body.

The topic of marital rape re-emerged recently in The Bahamas after negative comments were made by Ms. Dubravka Simonovic, the United Nations Special Rapporteur on Violence Against Women. She said marital rape is the most pressing gender based issue facing The Bahamas. She reportedly expressed deep concern about the legality of spousal rape in the country and indicated that the matter could be easily corrected by legislation. The Bahamas is a signatory to a number of UN Conventions designed to protect the rights of women including the Committee on the Elimination of all forms of Discrimination against Women (“CEDAW”).

This issue has evoked much commentary from politicians, to pastors and civil society groups. Those fervently in support would like the concept of marital rape introduced and criminalized in Bahamian law expeditiously. Those passionately against see any intrusion or attempt to protect those in marriage from non-consensual sex as infringing on the sanctity of marriage and family life in a way that exceeds culturally and religiously accepted norms in The Bahamas.

Our advice and recommendations will cover the following:

1. What is the accepted definition of rape?
2. What is the current state of the law in relation to protecting married persons from sexual violence and assault generally in marriage?
3. What amendments to the law in relation to sexual offences against married persons were proposed in 2009 and what was the outcome?
4. What amendments are being proposed now? Do they differ from the proposed 2009 amendment?

5. Are there weaknesses in the existing laws beyond what is currently identified?
6. Are there risks attached to the introduction of these amendments?
7. Conclusion.

The views that follow are those of our collective team under the overall authority of myself, Pastor Dave Burrows, with legal analysis on the current state of the law provided by attorneys from the Legal Team at Bahamas Faith Ministries International.

What is the accepted definition of rape?

Firstly for context, how is ‘marital rape’ defined?

Marital Rape is defined as “the act of sexual intercourse with one's spouse without the spouse's consent”. It is a form of domestic violence and sexual abuse. [The Free Online Encyclopedia]

Secondly, anyone convicted of rape in The Bahamas is convicted under the definition provided in the Sexual Offences Act 1991 (“the Act”). Section 3 states the following:

“Rape is the act of any person not under fourteen years of age having sexual intercourse with another person who is not his spouse-
Without the consent of that other person;
Without consent which has been extorted by threats of fear of bodily harm;
With consent obtained by impersonating the spouse of that other person; or
With consent obtained by false and fraudulent representations as to the nature and quality of the act”.

As currently defined under the Act, it is technically not possible for one spouse to rape another spouse. The conclusion would appear to be that the issue of one spouse granting consent to the other for sexual intercourse does not arise.

Section 4 of the Act defines sexual intercourse as follows:

“For the purposes of this Act, “sexual intercourse” includes — (a) sexual connection occasioned by any degree of penetration of the vagina of any person or anus of any person, or by the stimulation of the vulva of any person or anus of any person, by or with — (i) any part of the body of another person; or (ii) any object used by another person, except where the penetration or stimulation is carried out for proper medical purposes; and (b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person, and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act”.

What is the current state of the law in relation to protecting married persons from sexual violence in marriage?

As previously stated, sexual offences are currently addressed in the Act. Additionally there is the *Domestic Violence (Protection Orders) Act 2007* (“*the Protection Orders Act*”).

The Sexual Offences Act 1991

Even though section 3 of the Act excludes the issue of granting consent by the other spouse from the definition of rape, the Act does provide certain protections for married persons and in most cases these are women.

Section 15 of the Act is actually entitled “Sexual assault by spouse”, it provides that “*any person who has sexual intercourse with his spouse without their consent (a) where there is in existence in relation to them:*

(i) a decree nisi of divorce;

(ii) a decree of judicial separation;

(iii) a separation agreement; or

(iv) an order of a court for the person not to molest or co-habit with his spouse, or any other order made under Part II; or

(b) where the person has notice that a petition for judicial separation, divorce or nullity of marriage has been presented to a court, is guilty of the offence of sexual assault by spouse and liable to imprisonment for a term of fifteen years.”

It is noteworthy that the law currently does recognize circumstances where a spouse cannot have sex with a spouse without their consent. In these circumstances, if an offence is committed as stated above under section 15, the offence of “sexual assault” is committed, not rape. The law currently categorizes these offences differently than those committed under section 3 and the ordinary definition of rape.

By analysis we can conclude that unless there is a court order, a separation agreement, or notice of intent to petition for divorce or judicial separation is in place, section 15 does not protect a spouse in marriage. Unless a spouse takes one of the steps outlined in section 15, he/she will not be able to claim that he/she were sexually assaulted and the Act law does not provide protection for him/her.

The Domestic Violence (Protection Orders) Act 2007

Although The Domestic Violence (Protection Orders) Act does not contain a provision for marital or spousal rape, the Act does contain “teeth” so as to allow protection of a spouse who is subjected to “physical, sexual, emotional, psychological or financial abuse” (per Section 2 of the Act).

Interestingly, although “emotional and psychological abuse” is defined, as well as “financial abuse” and “physical abuse”; “sexual abuse” is not defined in the Act. In this regard, in our current context, it appears that the only means by which a spouse could successfully obtain a Protection Order on the basis of sexual abuse, that abuse would have to be coupled with physical abuse.

“Physical abuse” under the Act means any act or omission which causes physical injury to a complainant or his/her child.

In order for the Act to take effect, the “abused” spouse usually files a complaint to the Police who would conduct an investigation and take the “abuser” into police custody for questioning. Once the Police is satisfied that the evidence is sufficiently strong, they would caution the accused and place him/her under arrest. Thereafter, the person is charged before the Court.

In the meantime, the abused person makes a separate application for a Protection Order pursuant to the Act, before a Magistrate (or a Supreme Court Judge in cases where divorce proceedings have been filed).

To invoke a protection order, the civil standard of evidence is applied. That is, based upon the information presented to the Court, the Court’s decision is made based “on a balance of probabilities” rather than having to be persuaded on the criminal standard, which is “beyond a reasonable doubt”.

The issuance of the Protection Order means that a binding-over provision would immediately take effect so as to prevent the abuser from being within a certain distance of the abused.

Meanwhile, the criminal prosecution of the abuser/accused continues and based upon the extent of the injuries, the Police are able to levy charges ranging from attempted murder to grievous bodily harm, to assault and battery etc. But in a marital situation, where the abuser committed actual rape against the spouse, the Police would not have the power to levy that charge specifically.

If convicted, the Court is able to institute prison sentences in accordance with the provisions of the Penal Code.

What amendments to the law in relation to sexual offences against married persons were proposed in 2009 and what was the outcome?

In 2009, the government tabled in Parliament the Sexual Offences Amendment Bill 2009.

The Bill proposed that section 3 of the Act be amended to delete the words “who is not his spouse”. Under the Act, because of this phrase, it is not possible to rape one’s spouse. Removing it would have left a spouse open to being charged with the offence of rape.

Ultimately because of public reaction at that time led by segments of the religious community (the Anglican and Catholic Churches did not oppose the amendment), the government decided not to proceed with the amendment to the Act.

What amendments are being proposed now? Do they differ from the proposed 2009 amendment?

As of the writing of this paper from extracted information from the Attorney General’s office we understand that the government has to amend section 15 of the Act entitled “Sexual assault by a spouse” to introduce an additional offence to cover the concerns raised by proponents of marital rape, without using the exact language defining it as rape.

As previously stated, section 15 of the Act does provide protection and criminal sanction for those persons found guilty of sexually assaulting their spouse under certain prescribed circumstances where the married couple are separated or have given notice of their intent to separate or initiate divorce proceedings.

Are there weaknesses in the existing laws beyond what is currently identified?

In an attempt to understand the present Act, it is submitted that the Act was drafted to conform with the societal perception that a husband could not be guilty of raping his wife because by their mutual matrimonial consent and contract, the wife has given up herself in this way to her husband which she could not retract. Hence, a husband could never rape his wife. This presents a challenge to women in particular who suffer at the hands of abusive husbands without legal recourse. This side of the issue is borne out in the words of local crisis center director, Dr. Sandra Dean-Patterson. She is quoted as saying, “at the Crisis Centre we hear stories of women forced to have sex with their husbands despite their obstetrician’s advice to abstain following the birth of a baby, women getting HIV or STIs from abusive husbands who have sex with other women and force sex on them. From many of those victims we hear the shame and humiliation they feel following sexual assault by their husbands and their sense of powerlessness. These are but some of the examples where marital rape occurs. It is a devastating and traumatizing experience for women to find out that our law does not protect them from this behavior. Statements which misinform citizens about their right to safety or protection normalize violence and perpetuate rape myths and belief systems that husbands have the right to make choices for their wife’s body without her consent. This is abhorrent and unacceptable.”

By virtue of Section 15, a spouse is provided with some protection from sexual assault perpetrated by the other spouse, nevertheless, the law is silent with respect to circumstances where the marital relationship has broken down and both spouses reside within the same residence. We do believe the law should be amended to address those type circumstances because in some cases, a spouse does not have the financial capability to withdraw from the residence. In other cases, because of the stigma associated with marital rape, a spouse is reluctant to withdraw from the residence. This sentiment is echoed again by Dr. Sandra Dean-Patterson in said press release where she expresses that, "From many of those victims we hear the shame and humiliation they feel following sexual assault by their husbands and their sense of powerlessness."

As previously stated we are forced to "conclude that unless there is a court order, a separation agreement, or notice of intent to petition for divorce or judicial separation is in place, section 15 does not protect a spouse in marriage. Unless a spouse takes one of the steps outlined in section 15, he/she will not be able to claim that he/she was sexually assaulted and the Act does not provide protection for him/her.

Are there risks attached to the introduction of these amendments?

While we firmly agree with the need for protection, we are mindful based on research that there are some risks that should be considered that are somewhat unique to marital relationships. We have documented some of the existing perils experienced by men because of false accusations which according to some estimations could range between 2-10% of accusations.

False accusations:

Perjury is currently a criminal offence under the Penal Code 1927. *Section 423* defines perjury as "an assertion as to a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court or by affidavit or otherwise, such assertion being known to the witness to be false, and being intended by him to mislead the court, jury or persons holding the proceeding".

Additionally, Section 424 of the Penal Code says, "whoever commits perjury shall be liable to imprisonment for ten years." Furthermore, the Penal Code in *Section 433* specifies that "whoever fraudulently brings any action against another person in a false or fictitious name, having no ground for such action, is guilty of a misdemeanor."

Although bringing fraudulent actions is addressed in the Penal Code, a guilty charge results in a mere misdemeanor offence. Our research with persons working as social services officers and persons who currently work with or have worked with the Women's Crisis Center and international publications indicate that there is a very real danger of exploitation of the law as borne out in the following examples.

Wife falsely accused ex-husband of rape 'to get rid of him'

A "calculating" wife falsely accused her estranged husband of rape because she wanted him out of her life, a court heard.

9:16PM BST 02 Jul 2009

Michaela Lodge, 45, accused her husband Martin of raping her in November last year because she was involved with another man when, in fact, she had initiated sexual intercourse, the court was told. Mr. Lodge was arrested and questioned before eventually, three months later, she wrote a letter to him admitting she had lied to the police.

Generally, feminists dismiss this idea by arguing that false accusations are rare—only between 2% and 10% of all reports are estimated to be false. What's equally important to know, however, is that false rape accusations almost never have serious consequences.

'Guilty until proven innocent': life after a false rape accusation

A growing group of men are calling for changes in the law around sexual assault to protect those who are the victims of false accusations.

His own story was a messy affair. James says his wife accused him of rape as an added bargaining chip in ongoing divorce proceedings: "She told me to back off in the family courts - she was losing the case to have residency of our children. I said I wouldn't. So she went down to the local police station and alleged that she'd been repeatedly raped by me during our marriage."

Almost immediately, James' life became a nightmarish whirlwind: he was arrested during his twins' 7th birthday party, had various personal effects seized, and was required to attend police stations for interviews in the dead of night.

James lost residency of his children, resigned from his job and, he says, was pushed to the brink of suicide. However, justice prevailed: the charges against James were dropped within the year.

“British rape laws need urgent reform to prevent injustice”

After Jay Cheshire killed himself following a false rape allegation, the Government must act to stop men being named before they are charged with rape or sexual abuse. Chris, another false accusation victim, is passionately averse to the lack of anonymity offered to the accused. "It's like a sick joke," he tells me. "It is such a stigmatized accusation that it doesn't feel as if you're innocent before being proven guilty, but the other way round. "I still feel as though I was attacked by some sort of monster - that I was tormented and abused by the system." "And now," he continues, "I am tarnished, shamed and alienated. And I cannot describe how it feels to have had my country do this to me in such a cold blooded way. My hands still feel tied, and I am humiliated amongst my community - whilst the person who

accused me is still walking the streets like a sorry victim, telling people that I have raped others. And this is all down to the system itself."

David, a former school teacher who was accused of rape, child abuse and making threats to kill, agrees that anonymity would shield the wrongly-accused against any media and social backlashes. "I absolutely think that anyone who is subject to a criminal allegation of sexual or domestic violence should have the same anonymity as the victim during criminal proceedings," David shares with me. "And then, if they are convicted, of course it would be acceptable to name them. But not before."

"In the domestic abuse system, the authorities - be this the police, the court or social workers - seem to believe the first person who makes the allegations. And whilst the police and social services don't want to discourage women who have genuinely been abused from coming forward, the result is that if you are innocent and falsely accused, the system will, almost 100 per cent of the time, support your accuser's attempts to frame you."

Source: <http://www.telegraph.co.uk/men/thinking-man/11912748/Guilty-until-proven-innocent-life-after-a-false-rape-accusation.html>

False accusation of sexual assault

In the summer of 2002, Banks was arrested and charged after classmate Wanetta Gibson falsely accused him of dragging her into a stairway at Polytechnic High School (Poly) and raping her. Faced with a possible 41 years to life sentence, he accepted a plea deal that included five years in prison, five years of probation, and registering as a sex offender. Wanetta Gibson and her mother Wanda Rhodes sued the Long Beach Unified School District, claiming the Poly campus was not a safe environment, and won a \$1.5 million settlement.^{[17][18]} According to Banks, his lawyer told him that he stood no chance at trial because he would be tried by an all-white jury who would automatically assume that he was guilty because he was "a big, black teenager."

Source: Wikipedia

We were also advised by women in the area of social services of women who have made assertions against their husbands that were false for manipulative reasons. As it relates to false accusations of rape and other sexual offences, there is an obvious concern by many that a married woman may trivially accuse her husband of rape and as a result manipulate him into subjection. It may be necessary for the Sexual Offences Act to be amended to specifically make it an offence for a spouse to bring false allegations of forced sexual intercourse despite existing remedies in the penal code. This would assist in protecting against the abuse of the law and the court system.

Confidentiality for the accused

Since community-based programs in The Bahamas such as the Crisis Center began serving victims of domestic violence and sexual assault, privacy and even secrecy have been considered a crucial component of a victim's safety. Federal laws in the United States include privacy and confidentiality provisions and most States prohibit the disclosure of victim information.

However, in a marital family matter as sensitive as marital rape or marital sexual assault, maintaining privacy and confidentiality for the rape accused should also be considered at least until the accused is proven guilty. The examples provided show that irreparable harm is caused by simple accusation even in the case where one is eventually exonerated. The other justification for this would be to protect the children (if any) and the family itself from unnecessary public scrutiny in a community as small as ours. If an accused person is subsequently acquitted of this offence, the pre-trial publicity and scrutiny may do irreparable damage to the accused and that family unit.

It should be considered whether the same level of privacy that is afforded to minors in the form of closed or in chambers court proceeds to be afforded to an accused of rape or sexual assault on a spouse in the case of rape. Additionally, legislation should also provide for the identity of the accused to be kept confidential until he is proven guilty.

Constitutional Barrier

Rather than being tried before a jury of his peers, consideration may be given to making amendments to existing legislation to provide for matters involving sexual offences in marriage to be tried before a single judge or panel of judges. It may be argued that trials before a single (or panel of judges) judge allows the matter to be adjudicated faster and the law may be administered more efficiently, however we do recognize that trials by a single judge potentially infringes the constitutional rights of the accused.

Chapter III of our Constitution which addresses the Protection of Fundamental Rights and Freedoms guarantees a trial by jury for criminal trials in the Supreme Court. Although some have argued that this entrenched right should be revisited, as long as it remains a constitutional right, it would be difficult to dispense with criminal trials by jury.

Conclusion

In the window between the existing section 15 of the Act being acted on by a spouse and a domestic protection order being applied for and put in place, it is possible for a spouse to be the victim of sexual abuse of an aggravated nature including being forced into sex against their consent for any number of reasons including those articulated above. We believe it is impossible for anyone espousing the love of God and the free will he gives us in a biblical context to condone any form of marital abuse including forced sexual acts.

If the concerns about abuse of the law through false accusations and maintaining some degree of confidentiality during court proceedings are maintained, it would be possible for us to support some form of criminal sanction in these types of cases. It would be important to view carefully the proposed amendment to see if it accomplishes this goal.

Sentencing

It is we think important to distinguish between rape outside of a marital relationship and the sexual abuse that can occur in marriage as currently captured in section 15 of the Act.

Although this is normally the case when sentencing guidelines are considered, we think it is important to acknowledge that there may be varying degrees of this offence ranging from less serious to extreme criminal behavior and as such, we would want to ensure that the amendments to the Act build in some consideration for the fact that each case should be considered on its individual merits and that a “one size fits all approach” is not taken for sentencing. In cases of other crimes including murder and assault there are degrees such as: Simple assault, aggravated assault, 1st and 2nd degree murder, manslaughter etc.

It is clear from these distinctions that all crimes in a class are not treated equally in terms of sentencing and mitigating factors (such as premeditation, conspiracy, severity etc.) and thus there should not be a single sentence or sentencing guideline for marital rape.

Sentencing should also reflect severity of crime in relation to other crimes. We contend that a minimum sentence of 15 years is excessive if we consider circumstances and degree of sexual assault. Perhaps consideration should be given to sentences ranging from 3-5 years for sexual assault not involving violence (according to the definition of rape, if a husband simply touches his wife’s breasts or sexual organ he could be imprisoned for 15 plus years), what would be termed simple sexual assault/rape, 5-15 years for rape/sexual assault and 15-40 years for extreme aggravated rape/sexual assault.

Summary of substantive points:

We do not condone or endorse marital rape or any form of rape or sexual abuse.

We recognize the current gap in protection afforded to married women.

We believe provision should be made for the offence of marital rape/sexual assault within a marriage within certain parameters.

We believe both men and women should be protected by any laws we implement.

We believe that protections should be built into any new amendments that would protect against and penalize false reporting of rape beyond the level of misdemeanor.

We believe some form of shielding should be in place to protect the identity of accused persons until they are convicted as the nature of the accusation if unproven can result in permanent damage to reputation.

We believe the option should be available for trial before a single judge or panel of judges.

We believe distinction should be made between levels of offence within the bounds of marital sexual assault/rape to reflect the level of egregiousness similar to what is done for other offences with a range based upon degree of severity.

We believe sentencing should be based upon level of severity and relative in comparison to other serious offences.

We thank you for your consideration of our advisement and recommendations and trust that they would be helpful in the formulation of any new laws or amendments and remain available for further consultation.