

REX

-v-

GUY MUKENDI

SENTENCING

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this case. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s3 SO(A)A 92. I will refer to the complainant by her initials

OFFENCES AND PLEAS

Having been found guilty following a trial it now remains for me to sentence you for a single count of rape. When I make factual findings in these sentencing remarks, I am satisfied so that I am sure of such facts having presided over your trial and heard the evidence against you.

AGE AND PREVIOUS CONVICTIONS

You are now 39 years old and have a number of previous convictions

SUMMARY OF CONVICTIONS, REPRIMANDS/WARNINGS/CAUTIONS
AND NORTHERN IRELAND NON-COURT DISPOSALS (NI NCD)

CONVICTION (S) :	9	OFFENCE (S) :	13
DATE FIRST CONVICTED :	21/01/03	DATE LAST CONVICTED :	15/02/17
4 OFFENCES AGAINST THE PERSON		(2008-2017)	
1 OFFENCES AGAINST PROPERTY		(2017)	
1 FRAUD AND KINDRED OFFENCES		(2003)	
1 THEFT AND KINDRED OFFENCES		(2009)	
2 PUBLIC DISORDER OFFENCES		(2005-2008)	
3 OFFENCES RELATING TO POLICE/COURTS/PRISONS		(2005-2017)	
1 FIREARMS/SHOTGUNS/OFFENSIVE WEAPONS		(2017)	

After a hiatus in offending between 2010 and 2016, on 15 Feb 17, you were sentenced to a hospital order for attempt kidnaping, criminal damage, ABH, possessing an offensive weapon in a public place.

However, you have committed no previous sexual offences.

FACTS OF THE CASE

In May last year you and EP were near neighbours, while you hadn't had a relationship you had had consensual sex with her on a couple of occasions. However, I am sure, as she told this court, that she had never consented to sex without a condom with you.

Late on the evening of 8 May 23 you and she bumped into each other close to the shop near your flat. You had a friend over and you invited her to come round after your friend had left. She sent you at text at 0024 telling you that she might fall asleep and you told her that your friend was leaving and shortly after told her that he had left – she told you she'd be round in one minute.

EP came to your flat, and you had a couple of drinks and made her some food. After that she told you that she was tired and you asked her if she wanted to stay; she did and she went into your bedroom. You had not forced her to do so and she went willing. You gave her a pair of your boxer shorts to wear. While on the bed you started to touch her and pulled down her shorts, she didn't stop you, because for her this was all consensual. You then gave her oral sex.

I am sure that EP's evidence in the next crucial part is truthful. You then started trying to insert your penis, she stopped you and said, "You need to get a condom". EP told police that you went to the other side of the room; she could hear the plastic of the condom wrapper opening and then she guessed that you had put it on, it was dark, so she didn't actually see it but in her opinion, you seemed to be putting it on and then you came back on the bed

EP told police that you then inserted your penis into her vagina. At first, she was lying flat on her stomach and then she turned over and her leg was up, so that you were at her side. EP told police it was when they turned that it felt different from when a condom was there - so she put her hand towards the back of herself and couldn't feel the band of the condom – your penis was inside her at this point - she didn't feel that the latex was there and she realised the condom was no longer there – she asked why you were not wearing a condom - she agreed with the suggestion that you withdrew your penis basically immediately - and you replied "It's here, it's here" referring to the bed but the room was dark and she didn't look. EP told police that you didn't ejaculate as far as she was aware.

EP was frustrated and angry and you started saying sorry. She left the flat – returning shortly to retrieve her phone charge and tobacco. When she left the second time there was an exchange of text messages – in which she berated you and you apologised. I am sure that you were apologising for penetrating her without a condom, which is what she had consented to. She had not consented to you penetrating her without a condom and you knew it.

There is no victim impact statement, however I have re-read the ABE and note that she referred to the loss of trust and that she felt she had been violated by you, feeling unclean because of it.

SENTENCING COUNCIL GUIDELINES CONSIDERED

I have consulted a number of Sentencing Council Guidelines – specifically

Rape

The Imposition of community and custodial sentence guideline

The Reduction in sentence for a guilty plea guideline

Sentencing offenders with mental disorders guideline

By s60(2) Sentencing Act 2020, the court's duty in all cases includes imposing upon the defendant, in accordance with the relevant guideline, a sentence which is within the offence range. Where the

guideline describes categories of case, the court must decide which of the categories most closely resembles the defendant's case in order to identify the starting point within the offence range.

CLASSIFICATION OF THE OFFENCE

Identifying the appropriate category requires the court to consider both your culpability and the harm caused by the offence.

Harm

Turning firstly to the harm caused by your offence. Given the absence of factors in the higher brackets, I place the harm caused by your offence in the lower or category 3 bracket.

Culpability

Turning now to your culpability, given the absence of factors that would place your culpability in the higher bracket your culpability falls into the lower bracket, that being category B.

I have read the psychiatric report provided by Lambeth Forensic Community Team dated 9 May 24. I note that in 2002 you received a diagnosis of paranoid schizophrenia complicated by dissocial personality types and have had several hospital admissions as a result of your mental ill health. Your last hospital admission was between July 22 and April 23 – in effect you were found fit enough to be released shortly before the offence – indeed you were assessed as being free from psychotic symptoms at the time – after your arrest for this offence you were subject to a mental health assessment on 9 May 23 – when spoken to by the mental health worker on that occasion you denied having any current acute mental health concerns – and it was assessed that there was “nil evidence of any cognitive impairment” and no evidence of any deterioration in your mental state.

The conclusion of Professor Fahy's report is that “there is no evidence that he was experiencing a deterioration in his mental health and that he was free from psychotic symptoms or any other type of psychiatric symptoms at around the time of the offence” – and, furthermore, there is no indication for a psychiatric hospital disposal.

Given those conclusions, applying the Sentencing offenders with mental disorders, developmental disorders, or neurological impairment I conclude that your mental health has no relevance to your culpability.

Therefore your offence falls within category 3B, which provides for a category starting point of 5 years imprisonment, within a range starting at 4 and rising to 7 years imprisonment.

Aggravating and Mitigating Factors

Having categorised the offence by reference to your culpability and the harm you have caused, I now go on to consider the aggravating and mitigating factors relevant to the offence.

While you do have previous convictions and are not a man of good character, given the nature of those convictions, I do not consider them to be aggravating factors justifying an upward adjustment to the category starting point. However, equally due to their number and severity – some resulting in custodial sentences - I cannot consider them to provide any mitigation notwithstanding their nature and your ill health at the time

I have already found that your mental ill health did not reduce your culpability and, equally, I do not consider it to be a mitigating factors here given all the circumstances of the offence. While I note your difficult personal background, I do not consider it to be relevant to your responsibility for the offence.

Upward / Downward Adjustment

Taking into account both aggravating and mitigating factors, I consider it fair to make no adjustment to the category starting point.

PROBATION OFFICER'S REPORT

I have read with care to the probation officer's report and note that in the professional assessment of the experienced probation officer:

- you pose a medium risk of reconviction
- you pose a high risk of causing serious harm

PERSONAL MITIGATION

I have listened carefully to everything that has been said on your behalf by Mr Kirk today as I have listened to everything he said on your behalf during the trial.

Mr Kirk says that this offence is different in character than many offences of this kind that come before this court – such that I can and should take an exceptional course and pass an exceptional sentence.

It is an unusual case to a certain extent but it is not so unusual that I can or should take the exceptional course suggested by Mr Kirk.

SENTENCE

GUY MUKENDI, taking into account:

- the appropriate sentencing guidelines
- the recent views of the Court of Appeal in respect to conditions in prison
- the conclusions of the probation officer
- and considering your personal mitigation

I sentence you as follows

The offence is so serious that only a custodial sentence can be justified. The least possible sentence I can impose having regard to the seriousness of the offence is 4 years 3 months' imprisonment.

Because you have been convicted of a Schedule 18 offence I am required to consider the issue of dangerousness, that is, whether there is a significant risk of you committing further specified offences and, if so, whether there is a significant risk of your causing serious harm thereby.

Given the conclusions of the probation officer, I am of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by you of further specified offences and thus the test for dangerousness has therefore been met in your case and an extended sentence of imprisonment is available. However, noting the nature and circumstances of the current

offence, your history of non-like offending, your mental health, your suitability for treatment and the assumption that I make, based on everything I have read that you are capable of engaging with the prison authorities and rehabilitation and my own observations of you during the trial, I do consider that a determinate sentence will be sufficient in your case and thus will not impose an extended sentence.

I have imposed a sentence of four years three months' imprisonment. Given the length of the sentence, your age at conviction and the fact that both offences are listed at s244ZA(7) Criminal Justice Act 2003 – which came into effect on 28 Jun 22 - you will be released from custody no later than two-thirds of the way through that sentence, namely two years and ten months, and the remainder of the sentence will be served on licence in the community. You must comply with all the conditions of your licence, failing which you will be at risk of recall to prison to serve the remainder of the term in custody.

The time you have spent remanded in custody will automatically count towards the custodial part of your sentence

You were granted bail on 12 May 23. From then until 29 Sep 23, when that condition was lifted, you were on an electronically monitored curfew. I therefore certify that you have spent 140 days on remand subject to a qualifying curfew and I direct that 70 days will count towards your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing

Barring

The offence of which you have been convicted is one which will make you subject to barring from working with children or others. You will be told of the restrictions under the Safeguarding Vulnerable Groups Act 2006 by the Disclosure and Barring Service.

Compensation

Given the sentence of immediate imprisonment and dismissal, we make no order for compensation. However, the victim surcharge will fall to be paid by you in the appropriate amount.

Sex Offenders Register

I certify that you have been convicted of a sexual offence and sentenced to a period of custody in excess of 30 months, so that you must, for the rest of your life keep the police informed at all times of your personal particulars, the address at which you are living and any alteration in the name you are using.

If you fail, without reasonable excuse, to comply with the notification requirements, you will commit a further offence which carries a maximum sentence of five years' imprisonment on indictment.

RESTRAINING ORDER

In order to protect EP you will be subject to a Restraining Order prohibiting contact with EP directly or indirectly. This means that you must have absolutely no contact with EP whatsoever: for example, you must not speak to her if you see her in town and there must be no phone calls, no messages over social media (either from you or anyone passing on messages from you) and you must not go to her home. This order will last for five years from today.

You will be given full details of the order and I must warn you that if you were to disobey the order you would be committing a further offence, punishable with up to five years' imprisonment.