

Robert Banks, a barrister, writes *Banks on Sentence* and *Banks on Sentence Compact*. The main work is the second largest selling practitioner's criminal text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. It is priced at £94.99 and is regularly updated. The latest edition is also available in an App for iPads from the Apple iTunes Store. If you have access to a computer, you can follow him on [twitter: @BanksonSentence](#)

**Q** I pleaded guilty. The case was adjourned. The prosecution then served additional material on the sentence hearing day. Was the Judge able to refuse me the right to defend myself against this evidence and not allowing me a *Newton* hearing?

**A** I have very little to go on. Without knowing more about the matter you pleaded to and what information was introduced, I can only provide matters of principle.

For the Judge to consider fresh material which is adverse to you, the material must be:

- a) Relevant,
- b) Served in time so the defence has time to consider it or has an adjournment, if needed, to make enquiries,
- c) Not be suggesting criminal activity which should form a separate count in the indictment, and
- d) Consistent with the prosecution case.

The defendant must be given the benefit of the doubt in relation to determining the factual basis for the sentence.

If there is a contest about the accuracy of either the prosecution information or as to the proper conclusion to be drawn from the prosecution material, the Judge needs to consider whether the difference between the prosecution and the defence is such it would affect his or her likely sentence. If No, no *Newton* is required. If Yes, then the Judge should consider whether the defence suggestions are obviously false. If Yes, he or she may reject the defence suggestions. If No, the matter must be decided by a *Newton* hearing. If the Judge refuses one, the defendant can appeal and ask the Court of Appeal to reduce the sentence taking the defence version as correct. If the defence decline an offer of a *Newton* hearing then the Judge can sentence on the prosecution version, if he or she thinks that is appropriate.

**Q** I am awaiting sentence for two assaults, one section 18 (with intent) and one section 20 (no specific intent). In the section 18 matter, I stabbed someone once. In 2010, I got 15 months for another section 20. Since then, I faced trial for another section 18. The witness didn't turn up and I walked out. I have also been questioned about a firearm but there has been no charge yet. Can the prosecution mention these other matters? I have been told a) you cannot get IPP for section 20, b) you must have more than one section 18 to get IPP, c) your sentence must carry 10 years and d) the minimum IPP is now a 5-year tariff. Is any of this true?

**A** Some but not all of it. I'll divide the questions up.

**Can the prosecution mention the firearm matter?** It would be good practice for the prosecution to tell you whether they intend to pursue the firearm offence before the sentencing hearing, because it is unfair to you to leave it hanging in the air. Further, judges expect all matters, unless there would be an excessive delay, to be sentenced together. Unless the Judge is considering IPP it should not be mentioned. How far the prosecution can state the facts will depend on many factors.

**Can the prosecution mention the not guilty matter?** Similar considerations arise. Normally this should not be mentioned. If it is, following *R v JW* 2009 EWCA Crim 390, it is inappropriate for the Judge to place any weight on the facts of the not guilty matter.

**Can you receive IPP for section 20?** No. However, if the Judge is sentencing for an offence which he or she feels should be subject to IPP, the normal practice is for the Judge to pass a

global IPP sentence for all the offending and attribute that sentence to the most serious offence that carries IPP.

**Do you need two section 18 convictions to receive IPP?** No. IPP and extended sentence are passed when Judges considers that, 'there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences'.

**Does the sentence have to carry 10 years?** The offence must carry a maximum of 10+ years and be a specified offence (i.e. one that is listed in CJA 2003 Sch 15), unless you had previously been convicted of a CJA 2003 Sch 15A offence (which includes section 18 and other serious offences).

**Is there a 5-year minimum tariff for IPP?** No. An IPP can be imposed where the minimum term would be at least 2 years or where there is a previous qualifying offence. An offence is a qualifying offence if it is listed in CJA 2003 Sch 15A. Section 18 is in the list. Section 20 is not. So if there is a qualifying offence there is no minimum length for the term. If not, the minimum term must be at least 2 years, CJA 2003 s 226(3).

**Q** I was in a drug case with lots of co-defendants. We were all sent to prison. In fact I am only 20. Is my sentence unlawful? If it is, what now?

**A.** Yes it is almost certainly unlawful. This mistake is one of the most frequent involving unlawful orders. It is possible for the court to have 'deemed' you as aged 21+ if on the available evidence you 'appear' to be aged 21+, using their powers under Criminal Justice Act 1982 s 1(6). With the databases available, it is extremely unlikely this was applicable. If no one knew your age you would expect the Judge to ask your counsel and section 1(6) could not apply unless you lied about your age and maybe there was other evidence which suggested you were aged 21+. What should have happened is both advocates should have looked at your antecedent form and told the Judge that you were only aged 20.

The next issue is what does your warrant of commitment say, (this is the document signed by the Judge which is the authority for you to be taken into custody and kept there). If the Judge's clerk fills it in with the relevant period of detention, I would expect no one to take the matter any further, as they would treat the oral sentence as a slip of the tongue. If the warrant says 'imprisonment' one would expect the prison department to contact the Court and your case should be relisted for the Judge to substitute the correct order of detention. The Judge has 56 days to correct his or her sentence. If the mistake is only noticed after the 56 days have expired, then papers should be drafted by your defence team for an appeal to the Court of Appeal. The papers will go to the 'Single Judge'. He or she, with the current annoyance there is for unspotted legal errors, (if he or she is satisfied you were under 21 and were sentenced to imprisonment), will probably demand that your advocate tell the Court, why the error was not spotted and referred to the Judge on the day or if not, shortly after. If there is an application that the sentence was manifestly excessive, he or she will determine whether such an appeal is arguable. If he or she determines that it is arguable you would be granted leave to appeal and given legal aid if you have asked for it. If he or she determines the application is not arguable, or there is no application that the sentence was manifestly excessive, he or she will send the case to the full court. Following recent directions, legal aid will not be granted and you will not be brought to Court. The sentence will then be varied in open court and with no party in attendance.

**Whilst the prison service are obliged to hold young offenders separately from adult prisoners there is an increasing body of evidence that NOMS are getting round the problems caused by this by designating cells or even wings in adult prisons as being for young offenders.**

#### **Asking Robert questions**

Please make sure your question concerns sentence, prison law or release and not conviction. It is usually not possible to determine whether a particular defendant has grounds of appeal

without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers.

Please start your letter with the question you want answered and send the letter to Inside Time, marked for Robert Banks. Unless you say you don't want your question and answer published, it will be assumed you don't have an objection to publication. No-one will have their identity revealed. Letters which a) are without an address, b) cannot be read, or c) are sent direct, cannot be answered. Letters have to be sent from Inside Time to a solicitor. If your solicitor wants to see a previous question and answer, they are posted on the website, [www.banksr.com](http://www.banksr.com).