

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 May 2012 edition is now published. This edition will shortly be available in an App for iPads, available from the Apple iTunes Store. It is priced at £94.99 and will be regularly updated until March 2013. The book is classified by the Ministry of Justice as a core judicial text book. A supplement to the compact edition has just been published.

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I have received many letters about the discount for pleading guilty. As this issue affects so many readers, I will deal with the various situations that commonly arise. Pleas of guilty at the Magistrates' Court and the Crown Court are treated the same. The position for the Court Martial is virtually the same, although it is based on different statutes.

General matters

1 *Basic position*

The court first considers the appropriate sentence taking into account all the factors, including the mitigation. Second, the court considers the stage in the proceedings at which the defendant pleaded guilty and decides the suitable discount on a sliding scale. The recommended discount is one-third where the plea was entered at the first reasonable opportunity, reducing to 25% where a date of trial has been set and to a recommended 10% where the plea is entered 'at the door of the court or after the trial has begun'. Even where the plea comes very late it is still considered appropriate to give some reduction. The judge has a discretion and need not follow the relevant guideline as long as he or she gives his or her reasons. If there is an appeal, the Court of Appeal can consider whether the discretion was exercised properly. If the judge intends to reduce the normal discount he or she must warn the defendant's advocate. The Court of Appeal has indicated that where the judge indicates a certain proper discount, the defendant is entitled to exactly that discount. The discount should not be reduced because the defendant then gives false evidence for his or her co-defendant at their trial.

2 *What is the 'first reasonable opportunity'?*

The guidelines indicate that there may be occasions where the defendant should have indicated his or her plea before the indictment or the charges are put. However, the courts see the main priority to be to secure pleas. Consequently, the courts generally consider that the first reasonable opportunity is when they put, or seek to put, the counts or charges to the accused.

3 *Evidence served late/Complex cases*

Some judges take the view that the defendant can have no problem in deciding whether he is the drug dealer or the fraudster the prosecution suggest he is. However, most judges, including those in the Court of Appeal, are more understanding. Where crucial evidence was served late, the Court of Appeal upheld a full discount which the prosecution had challenged. In another case where the prosecution case only became clear after the evidence was explained in schedules, the Court of Appeal said: "As a general proposition, in a case of complexity, a defendant is entitled to know the full nature of the case against him before he enters his plea. Here the advocates could not properly advise earlier. All defendants here should be given full credit."

4 *Overwhelming prosecution case/Defendant caught red-handed*

The guideline states, 'Where the prosecution case is overwhelming, it may not be appropriate to give the full reduction. Whilst there is a presumption in favour of the full reduction, the fact that the prosecution case is overwhelming without relying on admissions from the defendant may be a reason justifying a departure from the guideline. A recommended reduction of 20%

is likely to be appropriate where the guilty plea was indicated at the first reasonable opportunity.’

There is a clearly an opportunity for unfairness when this guideline is applied. Some judges ignore it and think all defendants should be treated the same. Suppose in an affray case, two individuals are clearly shown to be involved on the CCTV because they were wearing distinctive T-shirts. Suppose two others were wearing nondescript items of clothing. I consider it would be unfair to give the first two defendants a lesser discount because their case was overwhelming, as it is absurd that people are sentenced to longer sentences simply because of what they are wearing. The fact they were wearing a distinctive item of clothing might indicate that they were not anticipating violence whereas that point cannot be said for the other two. Also some defendants will continue to fight a case even where the case is totally overwhelming. Should they not be encouraged by a full discount to plead like other defendants?

5 *Defendant offers to plead to lesser offence and he or she is convicted of that count, or the offer is later accepted*

This will depend on the specific facts. Suppose the defendant is charged with a section 18 assault and offers to plead to a section 20 assault (which is less serious). If the offer is initially rejected but then accepted on the day of the trial, the defendant should expect to receive the appropriate discount for when the offer was made. Suppose the defendant is charged with murder and offers to plead to manslaughter, which is rejected. Then suppose he denies he had anything to do with the murder and he is acquitted by a jury of murder but convicted of manslaughter. The judge then has a discretion whether to grant a discount for the offer to plead. It is very unlikely to be a full discount that would have been appropriate to the time the offer was made. The key factor would normally be whether there was a good reason why the acceptance of guilt to a lesser charge was not made known to the jury. If there was no good reason for that, the defendant should expect no discount to be given.

6 *Plea of not guilty entered so point of law can be argued*

Normally the defendant will not receive the full discount even if the defendant was advised to take the point of law. One reason for this is that early pleas save considerable court time and public expense. Points of law take up considerable time and public expense. The exact discount given after preliminary applications have failed will depend on the judge.

7 *False mitigation*

Normally false mitigation does not cause a reduction to the suitable discount for the plea. However, where the defendant lies to the court and causes needless adjournments, the judge can adjust the appropriate discount.

8 *Maximum sentence considered too low*

In this situation the Guideline says ‘sentencers cannot remedy perceived defects (e.g. an inadequate charge or maximum penalty) by [a] refusal of the appropriate discount’.

9 *Judicial offers on discounts*

On occasions judges will offer generous discounts. Judges honour them. The Court of Appeal invariably do not seek to undermine them where they have been accepted. However, suppose a defendant hears the Judge say many months after the defendants had pleaded not guilty, “Anyone who pleads now will receive a full discount”. If the defendant pleads guilty months later the offer will have no impact on the sentence. Some time ago, a group of Charlton football supporters chose, after considerable planning, to ambush Southampton supporters at Maze Hill railway station. An almighty battle ensued. Twenty-five people were charged with conspiracy to cause violent disorder. The evidence was extensive. The judge offered a 50% discount to those who pleaded before the trial. Some did so and were given that discount. Some appealed their sentences. The Court of Appeal worked out the appropriate amended

sentence and then gave each of them a 50% discount. I would expect that approach to be followed today.

10 *Newton hearings*

A *Newton* hearing is when the court decides a factual dispute about the offence between the prosecution and the defence. The prosecution and the defence have the opportunity to give evidence and call evidence. If after the hearing the defendant's account is not accepted the court will normally reduce the discount the defendant would have been entitled to for his guilty plea.

11 *Youth Courts*

Where a young offender could have been dealt with in the Crown Court but the Court has retained jurisdiction, the maximum sentence of 24 months can be imposed following a guilty plea where that plea was a factor in retaining a case for sentence in the Youth Court.

12 *The judge or magistrate must refer to the discount*

The judge or magistrate in his or her sentencing remarks must refer to the discount given and the reasons for it.

Particular offences

13 *Historic cases*

Historic cases are those cases where the offence took place many years ago. Early admissions and a guilty plea are considered of particular importance in these cases because it is said "a defendant would inevitably be tempted to lie his way out of allegations relating to facts which were long passed". A senior judge who is a judge specialising in these cases and teaches other judges about these cases tells the defendant whose offending stopped some time ago that the importance of pleas in these cases warrants a 50% discount.

14 *Other cases where the court wants to especially encourage pleas of guilty*

In complex cases judges often seek to encourage pleas of guilty by offering greater discounts than the guideline indicates. In rape cases the court is particularly keen to spare as many victims as possible, the ordeal of giving evidence and uncertainty of the verdict. Courts are encouraged to give 'substantial' discounts for pleas. This can apply to pleas tendered late. In fraud cases late pleas are considered to warrant a greater than normal discount because of the expense and difficulties of those trials. Terrorist cases can be particularly difficult and exceptionally expensive. Discounts are enhanced. The Court of Appeal has indicated that 'particular' credit should be given to those that plead. In one case a defendant pleaded guilty to terrorist offences ten days before his trial and was given a 10% reduction for the plea in line with the guideline. The Court of Appeal increased the discount to one 'in the region of 20%'.

Particular sentences

15 *Imprisonment for Public Protection (IPP)*

In these cases, the court works out what the sentence would have been if IPP was not being considered including the appropriate discount for the plea of guilty. This is called the 'notional determinate sentence'. The court then normally reduces this sentence by half and this is the length of the IPP. So if the offence is worth 12 years and the defendant pleads at the first opportunity, the notional determinate term is 8 years. The court halves that term to 4 years and then deducts the time the defendant had spent in custody before the plea. This sentence will be abolished when the relevant part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is brought into force. This will only affect sentences for offences committed after the repeal is in force.

16 *Life sentences*

Life sentences are either mandatory (which are those in murder cases) or discretionary (those in all other life cases). In discretionary life cases the discount is deducted in the same way as in IPP cases. A guilty plea does not prevent the judge from passing a whole life term in mandatory and discretionary life cases. A whole life term is where the offence justifies the defendant staying in prison for the rest of his or her life.

17 *Mandatory life in murder cases*

In murder cases a full discount usually continues to be available while the defendant's legal team investigates and obtains medical and other reports. However, to protect the discount the delay must be reasonable and it is advisable for the defence to let the prosecution know that the defendant accepts he caused the death where that is not in issue at that stage.

To calculate the term, the judge works out the notional minimum term applicable before the plea, see para 15. The judge should then decide the appropriate percentage discount using the standard sliding scale, see para 1. The discount for a plea entered at the first reasonable opportunity is one sixth of the term or five years, whichever is less.

18 *Minimum sentences*

The discount depends on which offence it is. For a third domestic burglary offence or a third drug trafficking offence (importation, supply etc.) the court is able to reduce the sentence up to 80% of the minimum sentence if there is a guilty plea. For firearm offences it is not possible to reduce the minimum term because of a guilty plea. However, a plea of guilty can add a little weight to other factors to enable exceptional circumstances to be established enabling the minimum term not to apply. Where the starting point is above the minimum term, the judge is obliged to reduce the sentence in the normal way, see para 1, as long as he or she does not reduce it below 80% of the minimum term.

The new offences of 'threatening with an offensive weapon in public' and 'threatening with article, blade or point, or offensive weapon' carries a minimum sentence of 6 months for those aged 18+ and 4 months for those aged 16-17. There is no power to reduce these minimum sentences because of a plea of guilty. The offences were created by Parliament on 1 May 2012 and are not as yet in force.

19 *Fines and other non-custodial orders*

Fines are reduced in the same way as custodial sentences, see para 1. Where immediate custody might be appropriate, a non-custodial term might be imposed instead because of the guilty plea. Community orders and Suspended Sentence Orders may have the unpaid-work requirement reduced by a suitable fraction to reflect the guilty plea.

20 *Disqualification, confiscation, notification and other ancillary orders*

There is no reduction made to any ancillary order.

Asking Robert questions

Please make sure your question concerns sentence and not conviction or release. 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.

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