

December 2013 copy for January 2014

Robert Banks, a barrister, writes *Banks on Sentence*. It is the second largest selling criminal practitioner's 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. The current edition is also available for tablets and computers. The print copy costs £96 on the web and there are regular updates on www.banksr.com If you have access to a computer, you can follow Robert on [twitter](https://twitter.com/BanksonSentence): [@BanksonSentence](https://twitter.com/BanksonSentence)

Q I was convicted of fraud and sentenced to 3 years. I was ordered to pay £58,000 to the victims in compensation. An £83,600 confiscation order was made with 2 years in default. The compensation order loss was included in this sum. I served my 3 years. On release I was unable to pay the confiscation order and I was taken to Court. I was ordered to serve the 2-year prison in default term. On my release from that sentence I was again taken back to the Court and asked why I hadn't paid the compensation order. I said it was part of the confiscation order. I quoted the Proceeds of Crime Act 2002 but the District Judge did not seem to get it. I was then given a 12-month default sentence. I have now been given three sentences for the same amount of money. I am sure this is unlawful. Please tell me I'm not mad.

A Unfortunately for you, the court can enforce a confiscation order and a compensation order which arise out of the same loss, because each is a separate order and each is subject to separate enforcement procedures. No issue of abuse or double accounting can arise at the enforcement stage. Most people recognise confiscation can be very unfair but this part of the law is not based on fairness. The watchword now is proportionality.

Perhaps the more interesting question is whether the two orders were properly made by the Judge when you were sentenced. This will depend on what the Judge said in his sentencing remarks and what was said during your hearing. Proceeds of Crime Act 2002 s 13 and 15 would have to be considered. As I don't have those details I regret I can't help you further.

Q A woman made a complaint of rape and to cut a long story short I ended up being convicted of a sexual assault. The case was put back a month for reports and I have read the law is being changed as they have brought out some new sex sentencing guidelines. Will this affect my sentence? If so, how?

A No, this will not affect your sentence. The guidelines, which were published on 12 December 2013, will only affect cases where the sentencing hearing is heard on or after 1 April 2014. Then it will not matter what the date of conviction is or the date of the offence. You may be interested to know that if you were sentenced after the guidelines had come into force the sentence for sexual assault (a section 3 offence) would not be very different from the sentence you would receive in January 2014. However, if you had been convicted of rape the sentence for many different types of rape under the new guidelines has gone up. The Sentencing Council say this is to reflect the current practice of the courts.

Q My wife was really irritating me and I slapped her a bit. She ran to the police and before you could say fit-up she had all the help she needed from people claiming to help victims. Well as she is trying to block me from having access to the children she exaggerated everything both in her statement and when she gave evidence. She particularly added and exaggerated violent incidents in the past. I didn't get convicted of all the charges but I was convicted of two of the counts. I was told to see probation before the Judge passed sentence. Well it was another woman who started going on about how I hadn't addressed my offending. Some of the detail she relied on was of matters I had been acquitted of. Some of it was of matters she wound me up about which had not been in a charge. Well I started shouting and so I know I am going to get a dreadful report. She wasn't being even-handed. She was just

supporting my wife who I know lies when it suits her. When I go back to court what can my barrister do about the lies that I am sure will be in the report?

A Correcting probation reports has become a problem. The law is relatively clear but some of the principles are not easily reconciled. First, when the Judge decides the factual basis for sentencing, the defendant should have the benefit of the doubt for matters adverse to him or her. Second, the judge or magistrate can only sentence a defendant for the matters he or she has pleaded to or has been convicted of. Third, the sentencer is guided by, but not bound by, the pre-sentence report. However, where a judge or magistrate considers disagreeing with an assessment in the report he or she must give each side an opportunity to address the court on the issue, *R v Lang* 2005 EWCA Crim 2864. Fourth, where there is a history of unproven violence towards the victim the sentencer can reduce any credit for good behaviour.

In practice things can appear very different. Sentencers are reluctant to depart from the findings of a pre-sentence report. Where a victim has given evidence, sentencers are very keen to take into account what they consider to be the 'background'. Sentencers can take previous violence into account but not say they have done so.

The Domestic Violence Guideline 2006 para 3.1 says, 'The history of the relationship will often be relevant in assessing the gravity of the offence. Therefore, a court is entitled to take into account anything occurring within the relationship as a whole, which may reveal relevant aggravating or mitigating factors.' At section v), which is entitled *A proven history of violence or threats by the offender in a domestic setting*, para 3.14 says, 'It is important that an assessment of the seriousness of an offence recognises the cumulative effect of a series of violent incidents or threats over a prolonged period, where such conduct has been proved or accepted.' I have no doubt that if your ex-wife gave evidence the Judge would consider her account of the background has been proved.

Therefore your room for manoeuvre is limited. I would expect your barrister to ask the Judge to use the evidence for his assessment rather than the pre-sentence report because the writer never had the benefit of hearing your wife's evidence on oath. Further he or she should not rely on matters adverse which were not based on admitted conduct or your two convictions. Criticism of the pre-sentence report will need to be couched in measured tones. Explicit reasons should be given to show why the Judge should disregard parts of the report. Most importantly, don't start shouting at the Judge!

Q I had cancer and it spread to my lungs. I see my specialist at fixed intervals to see how the problems are being managed. I recently wanted to provide for my wife and took part in a robbery. Well it didn't work out as we were shopped before any of the money was shared out. I pleaded to a conspiracy and the Judge was told about the cancer. She did not seem very interested although she said she took it into account. I was given 7 years. I will need to see my cancer doctor in February. Before I ask for permission I would like to know what my entitlement is so I can include it in my request. Can you help me? Also I have a fairly long history of crime and the prison put me in cuffs more than others. What are the rules for that? (The details have been slightly altered so as not to identify the questioner.)

A The fact of imprisonment doesn't take away all your rights: *R v Board of Visitors of Hull Prison ex parte St Germain* 1979 QB 425. You are entitled to expect the same level of health care as if you were at liberty, subject to the constraints of having to be escorted and the consequent restriction on movement, *Margaret Brooks v Home Office* 1999 1 PLR 7. A failure to provide adequate medical treatment may give rise to an action for damages occasioned by negligence if it results in the patient suffering harm. As you can see, the inclusion of the phrase about 'subject to the constraints' means there is an element of discretion written into the rule.

If you ask to see the Medical Officer in the prison, that request has to be recorded and passed on, Prison Rules 1999 Rule 20(2). The medical officer is obliged to make any 'special

arrangements' that appear necessary for your 'supervision or care', Prison Rules 1999 Rule 21(2). This may include transfer to an outside hospital or visits to an outside hospital.

A failure to provide adequate medical treatment to a prisoner is also capable of breaching European Convention on Human Rights art 2, *Tarariyeva v Russia* 2003 (No 4353/03).

You may have to wear handcuffs during a visit to an outside hospital. European Convention on Human Rights art 3 does not prevent this, providing it is kept to the minimum level necessary, *R (Graham and Allen) v Sec of State* 2008 1 PLR 316. On the other hand, confidentiality of your discussions with your doctor and others treating you has to be respected. A failure to allow you confidentiality because you are handcuffed to a guard during consultations could result in a successful claim under European Convention on Human Rights art 8.

I hope you are successful in your first application as that then sets a precedent for you.

Asking Robert and Jason questions

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott, PO Box 847, North Shields, NE29 1FJ. Please send the letter to Inside Time, marked for Robert Banks or Jason Elliott. Unless you say you don't want your question and answer published, it will be assumed you have no objection to publication. 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.

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 sent by readers to Inside Time are sent on to a solicitor, who forwards them to Robert and Jason. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.