

Robert Banks, a barrister, writes *Banks on Sentence*. It 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. The new edition has just been published and is also available for tablets and computers. It costs £96 on the web and there will be regular updates on www.banksr.com If you have access to a computer, you can follow Robert on [twitter: @BanksonSentence](https://twitter.com/BanksonSentence)

Q I was arrested and charged with conspiracy to supply cocaine. The Judge accepted that I was to collect 1 kilo. I got sentenced in Category 1 and with a leading role. The Judge said I organised it. There was no evidence of this. The prosecution put me in a significant role. Can the Judge do this?

A I take as the first question whether the Judge can sentence you in Category 1 when you were only to collect 1 kilo. The Judge can do so if he or she is satisfied that the 'indicative supply' (a term from the Drugs guideline) in the case is greater than the amount you were actually to collect. The amount for Category 1 is 5 kilos.

Next, was the Judge right to ascribe to you a 'leading role'? Although not found in your case, two people can be in the same top category. The Judge can depart from the view of the prosecution, but if he or she does, they must give reasons. The Judge must also give you the benefit of any doubt. Without seeing the sentencing remarks and the case papers I am afraid I cannot say more.

Q I was up for two common assaults and an ABH. I have three ABHs in 1993 and a section 18 in 1997. There are also common assaults in 2011 and 2012. The pre-sentence report stated I was 'high risk'. The psychiatric report said I was not a danger to society. The Judge said he disagreed with that and agreed with probation. He sentenced me to an extended sentence of 3 years' custody and an extended licence of 2 years for the ABH. I got 18 weeks each for the common assaults to run concurrently. The Judge said I would serve 18 months. My barrister said I would have to serve 2 years and the Judge said, "Oh well", but did not alter the sentence. The Judge also made some factual inaccuracies which I had to correct. I have been given a sentence expiry date of 2017. Surely my sentence should expire after 3 years? Where is the 2017 coming from? Am I to be released by the Parole Board or not? No one seems to know. Should I have got this sentence? I'm also told I won't be eligible for the HDC scheme.

A There are a number of issues here. Usually an extended sentence of three years would be unlawful because normally the custodial part must be 4+ years. Your sentence is lawful, however, because it need not be 4+ years where the defendant has a Criminal Justice Act 2003 Sch 15B offence on his record, which your section 18 assault is. You ask whether your release date is determined by the Parole Board. The answer is 'No', because extended sentences (EDS) have automatic release unless they are either a) for Sch 15B offences or b) where the custodial sentence is 10+ years, Criminal Justice Act 2003 s 246A(2). Although you have a section 18 on your record you were only sentenced for ABH, so neither applies to you.

This means your custodial sentence will end after you have served two-thirds of your sentence. You ask where the 2017 date comes from. Because you can be recalled during the time you are on licence the sentence does not end until the licence period is over. As you went into custody in July 2012 the whole sentence will expire 5 years later in 2017. You are right, the HDC scheme does not apply to you because of your sentence, PSI 43/2012 2.1.

You also ask whether you should have received the sentence. The sentence was one the Judge had power to make. The only issue is whether the sentence was 'manifestly excessive'. The fact that the Judge initially gave you a false date for your release does not invalidate the sentence. Without seeing the papers I would be unable to say whether it was manifestly excessive. Three years for ABH is, however, rare. I suggest you ask for an advice on sentence from your counsel.

Q I saw my barrister in prison and I was quite happy with him. He represented me when I pleaded on an agreed basis and the case was put back for a pre-sentence report. He said he would see me at the sentence hearing. I was quite positive and then on the day a younger barrister turned up and he didn't seem to know the papers. As there had been a trial the Judge knew it all backwards and undermined what my new barrister said. I got more than I expected and felt completely let down. How can this happen?

A This is an old problem. It not only during sentence hearings that advocates disappear. Sometimes they go missing during a trial. Some time ago a defendant agreed to pay a substantial fee to his barrister with a large fee to cover the first day and the preparation time. The defendant insisted that the first-day money (known as a brief fee) would only be paid if the barrister turned up every day the case was listed. The barrister agreed and funnily enough the barrister turned up for every hearing! Those on legal aid cannot make such conditions. The duty of the barrister is to warn the defendant that he or she may not be able to come. Further when he or she finds it difficult to meet all his or her commitments for the various cases he or she must try to honour them all by arranging to move cases. What I don't know is whether your barrister chose not to turn up because he was doing a more lucrative case or whether he was stuck somewhere else. Out of London, where often there is one court house which covers a large area, it can be easier for the barrister to hop from one court to another and to ask the list officer to put one case at 10 am when the other one starts at 10.30. Inside London, where there are so many court houses, it can be much more difficult.

Looking at this problem from the barrister's point of view he cannot be expected not to take any work in case he can't turn up for a Friday listing. Nor can he or she know how accurate the estimated length of a case is when he or she may not know who is prosecuting and which Judge will try it. Those factors can make a huge difference to when a case ends. Co-defendants' counsel can unexpectedly extend cases and jurors can be ill etc. The barrister might have been ill.

It sounds as if your case is one where it was very important for the barrister to attend because there had been a trial. The counsel's fee for attending was, I suspect, minimal. Some barristers doing criminal work receive so little that they are able to claim income support. In the past, when there was proper competition, solicitors made sure the barristers turned up. Those days have gone. I am afraid there is little you can do about it. The only issue is whether the sentence was manifestly excessive. Whether you received proper representation does not itself create a ground of appeal. You can complain but without knowing the reason the barrister failed to attend, the complaint will be ineffectual. I am sorry I can't be more help.

Asking Robert and Jason questions

Please make sure your question concerns sentence, prison law or release (dealt with by Jason Elliott, Dere Street Chambers, Newcastle upon Tyne) 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 sent by you to Inside Time are sent on to a solicitor, who forwards them to Robert. If your solicitor wants to see previous questions and answers, they are posted on the website, www.banksr.com.

It is hoped there will be a release and prison law column next month.