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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 was published earlier this year. The book is available for tablets and computers and costs £80 + VAT. The print copy costs £102 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: @BanksonSentence and you can receive his weekly sentencing Alerter.

Q I was sentenced for a drugs supply conspiracy. There were seven of us. The prosecution put four of us in a leading role. My barrister tried to go for significant role. The prosecution said, "You'll have to argue it". They also said one of the phones was attributed to me. Well I had used it but it was passed around. We went into court and the prosecution read out their case summary which included the roles the prosecution said we had played, and I was still in a leading role. The Judge then said those roles were his provisional view too and, with the prosecution egging him on, said that if anyone wanted to dispute them they would have to give evidence in a *Newton*. There was then a break for lunch and I saw my barrister. She said we should avoid a *Newton* hearing at all costs as we would not know what the prosecution was going to ask. She also said *Newton*s usually fail and if I had one I would lose part of my full plea discount. That seemed sensible. We went back into court and no one challenged the prosecution. My mitigation was mostly about my family and a prison report. My barrister only spoke for about six minutes. Nothing was said about my role, which meant the Judge took the Category 1 leading role and started at 15 years. With the plea discount, I was hammered with 10 years. None of the barristers said much and we were all chucked back downstairs in less than an hour. I had waited 10 months for my mitigation and nothing of substance was said. The police officer was just smirking. My barrister came downstairs and said there was no appeal, smiled a bit and left me high and dry. This can't be fair. Is it lawful as I was walked all over?

A Well it is certainly not fair and it isn't the proper procedure. I call it the '*Newton* trap'. This tactic is very common now and very convenient for the prosecution and for prosecution-minded judges. I give this answer based on the facts in your account and, of course, I haven't heard anyone else's account. There are a number of issues here, so may I divide them up?

Can the prosecution say what they think the roles are? They can say what their view is. However, they should give their reasons. I don't know whether this happened in your case. Their view is only a suggestion and it is the view of the judge that matters.

So what went wrong? What went wrong was that your barrister, and maybe other defence barristers as well, failed to address the Judge and the prosecution about two important matters. First, it is for the prosecution to prove factors adverse to you to the criminal standard of proof. That means the judge can only sentence you on the basis of a disputed significant fact put forward by prosecution, if he or she is sure that fact is correct. Put another way, the defence version of the facts must be accepted, unless the judge is sure that it is wrong, *R v Ahmed* 1984 6 Cr App R (S) 391. What appears to have happened in your case is that the Judge took the prosecution's version and gave your barrister the task of disproving it. The defence do not have to prove anything when the judge is determining the factual basis for sentence, except for a few very technical matters which do not apply here.

…and what else went wrong? I suspect that when Iron Age chieftains dispensed justice, the convicted person could always address the court as to the suitable penalty including the factual basis. Since then, no doubt the same rule has applied. It has certainly been in place for hundreds of years. It should have applied in your case. Where a court fails to allow the defence to address the court, sentences have been quashed, *R v Billericay Justices ex parte Rumsey* 1978 Crim LR 305. Where the judge does want to hear the mitigation, he or she has

to ‘listen patiently’. The judge cannot by interruption or by offensive comments prevent counsel from addressing the court, *R v Harris* 1986 Unreported 26/6/86. In your case, the Judge prevented your counsel from addressing the court about the facts. Although this is becoming quite common, it is still irregular.

What should my barrister have done? The best way to deal with a disputed factual basis is to do either a basis of plea document or a sentencing note. They amount to the much the same thing. The document should refer to the relevant law and what the contentions of the defence are. It should contain the key points. There are dangers if it is too long or too short. The prosecution will probably agree with some of the matters suggested and then everyone knows what is to be considered. Some trigger-happy judges have reduced the plea discount for a rejected basis of plea, but this is very rare. In any event, a basis of plea must have a better chance of a fair sentence than just being sentenced on the prosecution version.

Your barrister was fortunate as she had the lunch break to prepare her submissions about: a) the prosecution needing to prove their case so that the court was sure, b) the Judge could only sentence you on a factual basis he was sure about, and c) she had a right and a duty to address the Judge about what the factual basis was. As soon as the court resumed, she should have told the court she did not require a *Newton* but she was going to deal with the factual basis of your case when it came to her turn to mitigate. If either the prosecution counsel or the Judge objected to this course she should have held her ground and pointed out the relevant entries in the law books.

Suppose the Judge had stopped my counsel from addressing the court? The Judge would have been in error and there would be the exchange on the transcript to show there had been an irregularity. You could then appeal over this irregularity.

But would it have made any difference? I don’t know the facts of your case but your point about phones being able to be passed around is a valid one. However, who knows what might have happened.

Is there an appeal? Unfortunately the Court of Appeal does not provider a second chance for your counsel to repair the damage done in the lower Court. The Court of Appeal judges see their task as to decide whether the sentencing Judge made an error in his findings of fact. Your problem is that your counsel had an opportunity to deal with the prosecution case and, by saying nothing, she would be taken as having agreed to the Judge’s provisional view. I can’t see the Court of Appeal being remotely interested in allowing submissions to be made to them which could and should have been made to the sentencing Judge. It is a bit like a football match. Once the whistle is blown at the end, your chances are over. If you mess up a penalty kick you can’t come back in six months’ time to take it again. If you were to appeal saying your barrister failed to represent you properly, you would have to waive ‘privilege’. That means the private conversations and documents between you and your legal team are revealed. Your counsel would make a statement and the Court of Appeal would inevitably say you had agreed to the course she had taken.

Asking Robert and Jason questions

All letters should be sent to Inside Time, marked for Robert Banks or Jason Elliott. Letters are then sent by Inside Time to David Wells of Wells Burcombe, who forwards them to Robert and Jason.

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott. Unless you say you don’t want your question and answer published in Inside Time, 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 directly to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.