

March 2014 copy for April 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 next edition is due to be published at the end of April 2014. The book will be available for app, tablets and computers. 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](https://twitter.com/BanksonSentence): [@BanksonSentence](https://twitter.com/BanksonSentence)

Q I am up for another burglary and face the 3-year minimum sentence. The burglary was of a flat that was being renovated. I am told that if the flat is not a dwelling, I won't get the 3 years. Is that right, and how does the court decide what a dwelling is?

A There is a common misconception that for repeat burglars the penalty is 3 years. It is not. There is a minimum term of 3 years which can be reduced by up to 20% for a plea of guilty. When the rule applies, repeat burglars frequently receive more than 3 years. The second misconception is that non-dwelling burglaries will receive less than 3 years. The proper length will be determined on all the facts of the case and will on occasions be over 3 years.

The first task is to look at the indictment. If the particulars say the property is a dwelling then if you plead you are accepting it is a dwelling. If it does not and you plead guilty, you are not accepting the property is a dwelling. If there is a dispute, the matter needs to be tried by a jury. That issue should not be tried by a judge in a *Newton* hearing.

More difficult is to determine what a dwelling is. Clearly if the occupiers go away for the weekend they do not dwell in their home but the home is still a dwelling. I would imagine if the householders moved out for five days while the electric wiring was being replaced, most jurors would say the home was still a dwelling. Clearly the distress to the victims of a burglary would be the same if they went away for a night or for a two-week holiday. Suppose a block of flats is renovated over a year. There are unlikely to be many personal belongings there and I don't think that would be a dwelling. Where between those two examples the building ceases to be a dwelling is not defined by the law. Jurors would consider all the facts and determine whether they think it was a dwelling or not.

If you plead to an indictment which does not suggest the building is a dwelling I would expect most judges would want to know whether you entered thinking it was a dwelling. If the answer to that question is 'Yes', the appropriate sentence is likely to be similar whether the dwelling minimum term applied or not.

Unless there is some special feature, I would expect a sentence of 3 years or more, subject to the discount if you plead.

Q I came out of prison after a 12-year stretch and I didn't have much luck with finding a job so I went back to robbery with some of my old mates. We did a post office and I waited in the getaway car. Well the police seemed to know what we were doing and as my two mates left the post office, three police cars rammed us. So I am back here again. It is going to be a plea as we had the cash bags from the post office in the car. I face robbery and possession of a firearm count, but there was no firearm. The woman in the post office saw the gun, but it was a toy gun which could not fire any bullets. I certainly never possessed it because I was in the car. I saw my solicitor and she said I could get automatic life because I have a robbery on my record with a firearm with it. Well on that robbery I never possessed a firearm either. It was like guilt by association. Can you help me as to what I am liable for and how best to avoid life?

A I suspect if you look at the indictment, or the charge if there is no indictment yet, the particulars of the offence will say 'possession of an imitation firearm with intent to commit an indictable offence'. The relevant section of the Firearms Act 1968 specifically refers to

firearms and imitation firearms. To be guilty of that count you do not have to physically possess the firearm. The team of robbers can be in joint possession of it. This is because of the legal principle of joint enterprise. This means that if there is a plan among a group of criminals, each is responsible for the acts of the others when they carry out their plan. Ironically when judges explain this concept to jurors they invariably use the example of an armed robbery to show that each participant possesses the firearm. So that explains why you have been charged with possession of a firearm and why your previous offence involved a firearm count even if you didn't carry it.

Most judges would consider the automatic life provisions first. The Court of Appeal has recently held that approach is wrong. The judge should start with the dangerousness provisions in the Criminal Justice Act 2003. He or she must consider whether you satisfy the 'dangerousness test' and whether a life sentence is justified. I don't have enough information to determine that issue. If the judge considers a 2003 life sentence is appropriate, then he or she should pass that sentence and record that you also qualified for an automatic life sentence. If the judge determines that a 2003 life sentence isn't appropriate, he or she must go on to consider whether automatic life applies.

To qualify for an automatic life sentence the offence has to be listed in Criminal Justice Act 2003 Sch 15B. The relevant entry says, 'Robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm.' An imitation firearm is defined as 'anything which has the appearance of being a firearm whether or not it is capable of discharging any shot, bullet or other missile'.

The offence was committed after 3 December 2012, which is the date these orders started. Clearly you have committed a Sch 15B offence and have such an offence on your record. The sentence you received for that offence was ten years or more. As you must be over 18, the court is obliged to pass a life sentence unless, a) the judge considers a sentence of less than 10 years would be appropriate or b) there are 'particular circumstances which relate to the offence, to the previous offence or the offender and would make it unjust in all the circumstances'. As you received 12 years last time the chances of receiving less than 10 years is remote. Your letter does not reveal any 'particular circumstances that would make a life sentence unjust'.

The tempting approach is to plead as quickly as you can and hope the CPS are so burdened with cases to read they don't notice that the automatic life provisions are triggered. However, barristers are not permitted to take that approach, as professional rules prevent them from misleading the court. Being silent about the issue is taken as misleading the court.

If you are sentenced to automatic life the judge will approach setting the minimum term in the same way as for discretionary life imprisonment cases. The judge will determine the appropriate term if you were sentenced to a fixed-term custodial sentence. The previous conviction and the fact you had been recently been released on licence are considerable aggravating factors. Next, the discount for your plea is deducted. The resulting term is divided by two, and that is the minimum term.

As you can see life sentences are exceptionally and needlessly complicated.

So not good news I am afraid. Good luck.

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.