

May 2014 copy for June 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 has just been published. The book will be available for tablets and computers shortly. 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](https://twitter.com/BanksonSentence)

Q I was on remand for 122 days and was sentenced to four years. The Judge said I had spun the case out and the delay was of my own making. He also said I hadn't told the truth. I think it was vindictive. He said he had a discretion to order the days not to count and he was going to do that. Can I appeal?

A I assume you were sentenced on or after 3 December 2012. If so, you should appeal, as the order was unlawful. Before that December date the Judge had to make the order about the days counting and he or she had discretion whether to exercise the power or not. The Judge no longer has the power to make such an order as the deduction of days on remand is an administrative act which is now carried out by the Prison Service.

Q I pleaded to possession of an offensive weapon, public order section 4 and racially aggravated harassment. I was convicted of ABH. For one offence the Judge said I only pleaded when the witnesses turned up at court and he refused to give me any discount for my plea. On another the Judge said I was not telling the truth to the probation so he reduced my discount. He said he didn't believe me when I said that I was drunk and did not remember putting the machete to the victim's neck. The Judge made me out as a sick psychopath who targets women. I got a total of 4½ years with 18 months concurrent. He gave me a 5-year extended licence. So I have to do two thirds of the 4½ years, making 3 years, and a 6-year extended licence. I am only 20 with four minor previous convictions, section 4, possession of an offensive weapon and a caution for cannabis. I've been to prison once before. That was for 18 weeks for the section 4 offence. My barrister said I would get more if I appealed. I think the sentence was harsh. Was the sentence fair? Can I appeal?

A It would be best if I answer by dividing the issues up.

1 You ask whether an extended sentence was fair. Perhaps the more interesting question is, "Was it lawful?" The answer is No. The total of the custodial term and the extended licence must not exceed the maximum for the offence.

I assume you received the extended sentence for the ABH. That carries a maximum of 5 years. The total term for your extended sentence was 4½ years and 5 years making 9½ years, so you were given more than the maximum sentence. If you received the extended sentence for racially aggravated harassment, it would still be unlawful as that has a maximum of only 7 years. If you received the extended sentence for the offensive weapon count or the public order count that is unlawful, as extended sentences cannot be passed for that offence.

2 You say you received a total of 4½ years. If that is because you received consecutive sentences, this may be another reason why your sentence was unlawful. That is not normally permitted. This area of law is exceptionally complicated.

3 Incidentally, taking into account your age, your 'minor previous' and that the likely charge that the extended sentence was given for was ABH, then the criteria for an extended sentence would not normally be satisfied.

4 You ask whether the Judge was entitled to refuse you credit when you only pleaded when the witness turned up. No, he was not. You are entitled to a 10% discount as laid down by the *Reduction in Sentence for a Guilty Plea Guideline 2007*. However, if this

was a concurrent sentence that did not add to your total sentence, the Court of Appeal would not be interested in any appeal.

- 5 You ask whether the Judge was able to reduce the credit for the plea because he did not believe you told the truth in your pre-sentence report.

The first issue is whether he warned your counsel that he was intending to do this. If not, then your complaint is stronger. *R v Wasden and Others* 2010 EWCA Crim 2423 is the relevant authority. Where the defendant gives a false account, the Judge is entitled to make a slight reduction in the discount, see *R v Martin* 2006 EWCA Crim 1035. In *R v Burns* 2010 EWCA Crim 1413, the defendant gave a false account to the probation service and his basis of plea had to be amended. The Judge reduced the discount from 33% to 20%. The Court of Appeal held this was wrong and gave the defendant a full discount. Again, if the sentence was a concurrent sentence which did not add to the length of your sentence, the Court of Appeal would not be interested.

- 6 You ask whether if you appeal you will get longer. No, not on the facts you give. The Court of Appeal is not able to increase your sentence, Criminal Appeal Act 1968 s 11(3). The Court can rearrange the sentence as long as overall the new sentences does not treat you 'more severely'. The Court can give a direction that periods of custody while you were waiting for an appeal do not count to your sentence when the appeal is considered 'wholly without merit'. This would not apply to you on the facts you give.

- 7 You say you were given 4 1/2 years with a 5-year extended licence, meaning that you will serve 3 years in prison and 6 on licence. Two-thirds of the custodial term is 3 years, as you say. That means your licence would have been 6½ years (1 ½ years and 5 years), but as I say your sentence is unlawful.

You appear to have grounds of appeal. They need to be investigated. I shall ask David Wells to write to you.

Q I was sentenced to 18 months for three offences and the Judge made a SOPO. I then received a letter from the Disclosure and Barring Service saying I was barred. As the Judge didn't order, it does it mean I can ignore the letter?

A No. The barring order is made automatically as a consequence of your convictions. Judges should mention to a defendant that he or she will be subject to the barring provisions, but the order is in force whether the judge mentions it or not. You should read the letter carefully. Depending on the charge you were convicted of it may refer to your ability to apply to lift the order.

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.