June 2014 copy for July 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 recently 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 and you can receive our weekly sentencing Alerter.

Q I want a straight answer. If the main man is found guilty in a conspiracy to murder and a man is killed, does the judge pass mandatory life? If not, can the judge pass a determinate sentence? Which rules does this come under? Explain why.

A Where the offence is murder the penalty is 'mandatory life'. This means the judge has to sentence the defendant to life imprisonment. This is laid down in Murder (Abolition of Death Penalty) Act 1965 s 1. Mandatory life is not applicable to any other offence.

Where the offence is conspiracy to murder, the sentence need not be life, although it often is. It could be a fixed-term sentence, like 12 years. The reason why the judge does not have to give life is because the offence is contrary to Criminal Law Act 1977 s 1(1), which lays down a maximum of life and not a requirement to pass life. This sentence is called discretionary life. In conspiracy to murder cases, the life sentence is determined by the 'dangerousness' provisions of the Criminal Justice Act 2003 s 224, 225 and 226.

If the defendant committed the conspiracy to murder after 2 December 2012, he or she may qualify for an automatic life sentence. In judging this, the date of the actual murder (if there is one) is irrelevant. This sentence is mandatory when a) the defendant at the time of the offence had a conviction for a Criminal Justice Act 2003 Sch 15B offence (which are serious offences like GBH/wounding with intent, certain firearm offences, rape and certain child sex offences), b) the instant offence merits at least a 10-year custodial sentence and c) the defendant is aged at least 18 years. When the conditions are fulfilled, the court must pass the sentence unless in the particular circumstances it would be unjust, Criminal Justice Act 2003 s 224A(2).

Q I pleaded to six robbery counts and five possession with intent firearm counts. At a preliminary hearing the Judge said if I pleaded guilty I would get full credit. At the next hearing, the PCMH, I did plead guilty and was told I would be getting full credit. The case was adjourned for a pre-sentence report. The report wasn't ready at the next hearing so the case was adjourned again. The Judge again said I would be receiving full credit. At the next hearing prosecution counsel wasn't there. This time the Judge read the report and said he did not believe my mitigation and I was a desperate man. He added that if I carried on with the mitigation I would lose some of my discount. He also wanted me to go into the witness box so he could question me. The case was further adjourned. At the next hearing, I withdrew my mitigation. At the end, the Judge gave me an 18-year extended sentence. He said he would give me only 25% credit for the plea. He gave three reasons, a) I had no choice but to plead, b) that he had not given me a life sentence and he said I ticked all the boxes for a life sentence,

and c) he was making a 'special inference' because of two of the victim impact statements. I am quite confused. Can you help me?

A I am not surprised you are confused. I am not sure what the Judge meant by special inference. None of these reasons should apply because the Judge has given you a promise which needs to be kept, *R v Clough* 2009 EWCA Crim 1669. Whether there are good reasons or not is irrelevant.

It might be helpful to consider those three reasons.

The first reason was 'you had no choice but to plead'. Clearly you did have a choice and, however hopeless a case, a plea of not guilty can be entered. The Judge may have also said the case was overwhelming. This can be a reason to reduce the credit. The suggested discount, if the plea is entered at the first opportunity, is 20%. A few days ago, the Court of Appeal published the judgment in *R v Kadiri* 2014 EWCA Crim 1106. In that case the defendant, D, pleaded to a commercial burglary and the Judge found the evidence was overwhelming and so he reduced the plea credit to 20%. The Court of Appeal found that the evidence against D was very strong. They noted that although D had been seen by a cleaner in the building and on CCTV entering and leaving the premises, he was not captured taking any items away. They held it was not inevitable D would plead guilty and his plea had saved valuable public time and resources. The Court gave D full credit for his plea.

The second reason your Judge gave was that he chose not to give you life imprisonment, despite claiming you ticked all the boxes. Imposing a life sentence is mandatory if the sentence is justified, Criminal Justice Act 2003 s 225(2)(b). If the Judge did not impose it, it therefore was not justified. Also, if a life sentence is justified a plea of guilty is reflected in the minimum term. This is not a lawful reason to withhold plea credit.

I assume the third reason given is something to do with the effect the crime had on the victims. This is a factor that applies when the court is determining the sentence before the plea credit is considered and should not be used to reduce the credit for the plea.

So none of these are valid reasons for reducing your discount. On the facts you gave me you should appeal your sentence. I will ask David Wells to write to you.

Q I have been told the Court of Appeal cannot increase a sentence if I appeal. I have also been told that if I appeal my sentence I may receive more imprisonment. Which is right?

A Although these principles appear in conflict, strangely both are right. Criminal Appeal Act 1968 s 11(3) prohibits the Court, when hearing an appeal against a sentence by a defendant, from dealing with the defendant more severely than he had been dealt with by the Crown Court. They can, however, increase some sentences and change consecutive and concurrent orders but they may not make the total sentence 'more severe'. So the first principle is correct.

If the Court of Appeal considers an application to appeal is wholly without merit, the Court may order time spent in custody awaiting the appeal should not count when release is considered. This means the second principle is correct. This power is used sparingly. A Court of Appeal Judge has said as far as they can tell the power has never been used when a defendant has applied for leave to appeal using grounds of appeal drafted by barristers or solicitors.

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.