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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 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 recently read of a case where IPP prisoners who were not provided with courses had their human rights breached. What does that mean for me? I received a 2-year IPP in 2008. I have had access to a few courses but some were cancelled when I moved prison etc. There have been long waits for others. The Parole Board keeps relying on old reports and giving me a knock-back.

A The answer to this question would take up a whole page of this paper and, after reading it, it would all seem very confusing. The short answer is there is an unseemly legal tussle between the UK courts (which on occasions have disagreed), the European Court of Human Rights and an intransigent Ministry of Justice. Despite the recent helpful European case you mention, don't expect any significant changes soon.

It might perhaps be helpful to show how short some of the IPP sentences were before the law was changed in 2009. When the last figures were given in October 2014, there were 650 prisoners still serving a pre-2009 IPP sentence, which were so short they could not be passed. The figures were:

Prisoners	IPP minimum term
327	18 months and less than 2 years
114	15 months and less than 18 months
88	12 months and less than 15 months
64	9 months and less than 12 months
27	6 months and less than 9 months
8	Less than 6 months

The injustice is obvious.

Q I was charged with murder and conspiracy to rob. There was a trial and the jury convicted some defendants of both charges. For me they disagreed about the murder but convicted me of the conspiracy to rob. The prosecution decided not to have a retrial. They offered no evidence for the murder and the Judge said I was not guilty. The prosecution account was always that I was acting as look-out at the front door of the victim's block of flats. My defence was that I didn't know what was going on upstairs and I didn't know that anyone who went into the house had a firearm. I was not armed. The prosecution said I was aware of the gun and was therefore a party to the murder. In the sentencing hearing, the Judge said he was satisfied I knew there was a handgun as it was inevitable the group, as career criminals, would have discussed what they were going to do and sentenced me on the basis it was an armed domestic robbery. Well, no jury convicted me of using a firearm, so how could the judge decide that I did know?

A I will split the answer into the different sentencing principles.

Can the judge decide matters that the jury has not given a view on? The judge can do so. In almost all sentencing exercises the judge will do this. The classic example is where the judge in a drug conspiracy case decides the roles the various defendants played. He or she has to be sure of the roles if they are different from the roles the defendant's counsel suggests. The real difficulty arises when considering how much the judge can determine.

The judge must not sentence defendants for offences that they have not pleaded to or been convicted of. This rule is simple to state but can be difficult to apply. An easy example is if a defendant is charged with two drugs importations but the case papers indicate he was involved in three or more importations, the judge can only sentence the defendant for two importations. Another example is your offence, conspiracy to rob. The prosecution don't have to charge the theft of the cars/TDA, the dangerous driving or an assault if someone is bumped into, if any of those things happened. They are constituent parts of the offence. Good practice would be to charge a serious assault so there is no issue about it and the assault is recorded on the defendant's record. In domestic violence cases the Court of Appeal has bent the rule somewhat.

So what about the firearm? The law is that where the prosecution believe that a firearm was used on a robbery, they should include a suitable firearm count on the indictment, *R v Eubank* 2001 EWCA Crim 891. Not only is this fair to the defendant, but it is important that the firearm conviction is on a defendant's record, because it is very important for a court in the future to know whether the firearm was carried on the robbery or not. This is because that conviction will determine (if the following issues arise) whether the defendant qualifies for automatic life, qualifies for an extended sentence under the Criminal Justice Act 2003 Sch 15B route and sometimes whether the defendant is entitled to be released after having served two-thirds of his sentence or only when the Parole Board 'is satisfied it is no longer necessary the defendant is confined'.

So does that mean the Judge should not have decided the firearm issue? You don't say whether the Judge held a *Newton* hearing, offered you a *Newton* hearing which you declined, heard submissions about it or just announced his finding. Whichever it was, the Judge should not have decided the issue. It should have been determined by a jury. The Judge should have raised the issue at a pre-trial hearing and suggested a firearm count should have been added. The prosecution may have thought the conspiracy to rob count was needed to determine the factual issue for the murder (e.g. to determine whether the murder was for gain, which would have determined one of the starting points for murder). In fact, the use of the firearm would have meant the same starting point would apply.

What about the dropping of the murder count? This is significant as well. When the prosecution dropped the case, a formal verdict of not guilty was entered. This means you officially were not involved in the killing. As the killing was so linked to the handgun, the factual basis was that you were not involved with the firearm. I think this is an additional reason why you should appeal your sentence. I will ask David Wells to write to you.

Q In October, I was sentenced to an extended sentence with a custodial term of 4 years. My solicitor wrote me a letter saying I would normally be expected to serve half. When I received the prison paperwork it said I had to serve two-thirds of the sentence. Well I thought if I was serving a sentence of under 10 years, I only had to serve half. Can you offer some clarity?

A The prison staff are right. It looks as if your solicitor sent out a standard letter which did not deal with your extended sentence. You have to serve two-thirds of the EDS extended sentence. Had you: a) received a custodial part of 10 years or more, or b) received an

extended sentence based (wholly or partly) on you a previous conviction for one of the Criminal Justice Act 2003 Sch 15B offences which enable an extended sentence to be made, your case would be referred to the Parole Board. Not all the Schedule 15B offences enable an extended sentence to be passed. The test for the Parole Board is 'protection of the public' (see the last answer).

Those serving the old extended sentences only have to serve half of the custodial part of their sentence.

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.