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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 was convicted of a drugs conspiracy and the amount of heroin was 2.2 kilos with between 51% and 65% purity. There were three of us and all our barristers said it was a Category 2 offence. My barrister said I would receive 4-6 years. During the trial, the prosecution said we were 'foot soldiers' and 'fetchers and carriers'. The Judge said it was a Category 1 offence and that we were 'trusted lieutenants' and sentenced me to 11 years. He said I had a significant role due to the nature of the operation, the high purity and thus the value of the drugs. For heroin, Category 1 in the guideline is for weights of 5 kilos and Category 2 is for weights of 1 kilo. The Judge said there were no mitigating features but it was an isolated incident and I have no recent or relevant convictions. The barrister never came to see me afterwards, but has drafted grounds of appeal. I feel let down and your view would be greatly appreciated.

A I would not normally give legal advice when you have a legal team acting for you in a continuing appeal. In your case I can, because your letter was sent to Inside Time by your solicitor so I cannot be 'treading on your legal team's toes' (which is not permitted). I have no access to your papers so cannot advise fully on an appeal but from what you say, there are a number of issues, which I will divide up.

What category does 2.2 kilos of heroin fall into?

It is important to remember that the category will sometimes reflect the amount of drugs traded which may be greater than the amount that was seized. However, reading about the facts in your case, it does appear the Judge had to take 2.2 kilos as the weight for sentencing.

In your case, the weight of drugs was nearer the Category 2 weight. There are two ways to deal with cases where drug amounts are in between these two category weights. The first is to treat the case as Category 2 and make an upward adjustment. The second and better approach is to choose a figure between the two starting points. These approaches, however, amount to much the same.

A significant role Category 1 starting point is 10 years and a Category 2 starting point is 8 years. Using the second approach, 9 years would be for a weight halfway between the two category weights. Your weight is nearer the Category 2 weight. The appropriate starting point would be 8 to 8½ years. When the sentence is over 5 years, courts invariably pass a sentence which is either a whole number or one with a half year in it.

Was the Judge able to ascribe to you a significant role?

The Judge does not have to accept the role agreed between the prosecution and the defence. However, if he or she departs from the suggested role, he or she must give reasons. An appeal should succeed when it is shown that his or her assessment was outside his or her discretion. Considering the reasons given, the nature of the operation cannot be a reason to put you in a significant role because within all operations with a number of people in them, one would expect the three role categories to be present. The high purity and value cannot be used to support a significant role for the same reason. In any event, the purity of the drugs was not high for quantities of that amount. 51-65% purity is just the purity drugs weighing 1 kilo or more are. So the Judge's reasons didn't justify the finding of a significant role.

Will the Court of Appeal therefore reduce the role because the Judge's reasons were faulty?

This is more difficult. The Court of Appeal is normally very reluctant to disturb the findings of sentencing judges particularly when the judge has conducted a trial (as opposed to sentencing after a plea of guilty). If the judge's reasons for a particular role are inadequate, the Court is likely to look at the telephone traffic which I understand there was along with everything you did. The Court of Appeal looks for reasons not mentioned by the sentencing judge to support the role the sentencing judge found. The Court of Appeal frequently supports a higher role than the one the facts suggest. The descriptions for the categories are also very poorly drafted. Without clear boundaries between the various categories for the roles, I would be surprised if the Court of Appeal altered the role ascribed to you. You have probably already discovered that the law and its application are not always fair.

What about the mitigation?

I see your counsel listed the mitigation as: a) letters from your mother and partner, b) the effect on your 10-year-old daughter from a previous relationship, c) your gambling addiction, d) the short length of the conspiracy, e) your lack of any drugs convictions other than possession of cannabis and f) there was no other link to drug dealing. Matters a) to c) are routinely ignored in drug supply cases as the overriding consideration is the offence, not the personal details of the offender. This can be shown where three defendants with the same involvement but different mitigation are sentenced. They invariably receive the same sentence. Matter d) would normally make little or no difference. However in fact, 'Isolated incident' is mentioned in the *Drugs Offences Guideline 2012* as a 'factor reducing seriousness or reflecting personal mitigation'. Matter e) may be a mitigating factor. 'No previous convictions or no relevant or recent convictions' is mentioned in the *Drugs Offences Guideline 2012* as a 'factor reducing seriousness or reflecting personal mitigation'. Matter f) cannot be mitigation as it cannot reduce the seriousness of the drugs conspiracy.

Therefore, the Judge may have been wrong to say there was no mitigation, although the factors above are unlikely to have made a significant difference.

So what does all that mean?

If the Judge was able to ascribe a significant role to you with the lack of mitigation, that would mean that the starting point of 8 or 8½ years would also be the actual sentence. If the Judge was wrong to ascribe a significant role then the sentence should be less than that. From what I have seen your barrister was right to draft grounds of appeal.

What about the barrister not coming to see you?

The *Guide to Commencing Proceedings in the Court of Appeal 2008* para A1.1 states that, 'Immediately following the conclusion of the case, the legal representatives should see the defendant and counsel should express orally his initial view as to the prospects of a successful appeal (whether against conviction or sentence or both).' Your barrister breached that requirement. Unfortunately with the minimal fees paid to advocates this breach is more common than it should be. Some advocates consider they have more important things to do. I consider seeing a defendant after he or she is sentenced is one of the most important things an advocate does. Defendants especially need advice at this stage.

I wish you luck with your appeal.

Q Before I was sent to jail I was on a tag on and off. After I was sentenced, I was told the tag days should have been taken off. Is this true? I wrote to my solicitors but they don't respond to my letters. Can you help?

A I hope I can. If the tag time qualifies, as it invariably does now, half the number of days should be deducted. The first Court of Appeal case of the year, *R v Thorsby and Others* 2015 EWCA Crim 1, which was published by the Court of Appeal yesterday, deals with tag time.

The Court considered four cases where counsel and others had failed to ask for tag time to be taken off and appeals were launched long after the appeal time limits had expired.

The Court identified five steps for the Crown Courts and Magistrates' Courts to take when sentencing defendants with tags:

Step 1 Add up the days spent on qualifying curfew including the first, but not the last, if on the last day the defendant was taken into custody.

Step 2 Deduct days on which the defendant was at the same time also: i) being monitored with a tag for compliance with a curfew requirement, and/or ii) on temporary release from custody.

Step 3 Deduct days when the defendant has broken the curfew or the tagging condition.

Step 4 Divide the result by two.

Step 5 If necessary round up to the nearest whole number.

They added that: 1) It remains essential that every court which imposes a curfew and tagging condition uses the Court Service form entitled 'Record of Electronic Monitoring of Curfew Bail' which is required to follow the defendant from court to court. When a defendant is sent or committed to the Crown Court, the form (properly completed) must go with the papers to the Crown Court. If the defendant has never been subject to curfew and tagging, the magistrates are required to say so, or to send a copy of his bail conditions. If on receipt of a case involving a defendant on bail, there is no such form and the question of his status is not clear, the Crown Court must ask the magistrates for clarification and get hold of the form if it exists.

2) Solicitors and, if they have not done it, counsel are required to ask the defendant whether he has been subject to curfew and tagging. If he says that he has, they are required to find out, from the court of record, for which periods. It is also the responsibility of the CPS to have a system for ensuring that such information is available.

(I have missed out paras 3 to 7 through lack of space.)

8) Save in a case where it is clear that there is no possibility of crediting a period of remand on bail, the order of the court should, in accordance with *R v Nnaji* 2009 2 Cr App R (S) 107 (p 700), be along the following lines: "The defendant will receive full credit for half the time spent under curfew if the curfew qualified under the provisions of section 240A. On the information before me the total period is … days (subject to the deduction of … days that I have directed under Step(s) 2 and/or 3 making a total of … days), but if this period is mistaken, this court will order an amendment of the record for the correct period to be recorded".

9) It remains the case that it ought not to be expected that this Court will routinely grant long extensions of time to correct errors when no one has applied his mind to the issue until long after the event.

The Court noticed that their instructions to the courts and to advocates had not been heeded.

The Court of Appeal wants to restrict late appeals. The lengthy judgment includes the observation that none of the responsibility for the failure to deduct tag time lay with the four defendants personally. No one suggested that there was a long gap between the discovery of the error and the lodging of the appeal. In the circumstances, the Judges thought they were obliged to grant permission to appeal out of time and they ordered that the tag time for each should be deducted.

So what about your case?

It appears that your advocate failed in his or her duty to you. The prosecution failed in their duty to the Court. The CPS failed you in not having the procedures in place to stop this happening. The Crown Court failed to have their paperwork in order. I expect the Judge failed

to make the order (detailed above in para 8) for the flexible approach to the days in his sentencing remarks. Having read your letter, I am sure you are blameless.

Justice requires that your days on a tag should reduce your sentence. As your solicitor appears to have no interest in helping you, I will ask David Wells to write to you.

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 (PO Box 847, North Shields, NE29 1FJ). 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 direct to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.