

August 2015 copy for September 2015

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 2015 edition of the book and app was published recently. The app is for Apple iPads and Windows 8 tablets and computers and costs £99 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on www.banksr.com. There is also a discount available when the print copy and app are purchased together. If you have access to a computer, you can follow Robert on [twitter](#): [@BanksonSentence](https://twitter.com/BanksonSentence) and you can receive his weekly sentencing Alert.

Q Police trapped me when I was selling in a gym. I was a one-man band. The police were furious because they watched four sales on the CCTV, stopped the people as they left the club and then three turned out to have been given legal stimulants and only one sale was coke. I pleaded and the Judge said I was acting in an organisational role as there was no-one higher. He said it was a Category 3 case as I was street dealing and that the guidelines were hard to apply. He said he would take a mid-tariff sentence and gave me 4½ years plus 1 extra year for my previous. Can I appeal because I should have been given a lesser role?

A It is important to remember that the Sentencing Guidelines are a rough and ready attempt to provide the right sentence. Not all situations will fit into the guidelines and this is particularly true of the *Drug Offences Guideline 2012*. A recent case is significant. In *R v Mellor 2015 EWCA Crim 1243*, the defendant was street dealing and there was no suggestion there was anyone higher up in the chain. The Judge determined he was playing a lesser role and considered he had to be sentenced for a single sale of heroin. He started at 3½ years and gave 28 months with a plea. The Court said that they would not determine whether it was a significant or a lesser role but considered it was right to start at 2½ years, which made 20 months on a plea. This means the 4½ years starting point could be argued to be wrong. Your case raises an interesting point. Street dealing is a Category 3 offence and 'street dealing' is defined as 'selling directly to users'. It could be argued that you were not selling to users but to one user, so you should have been put in Category 4. Put another way, you were doing the same as someone who sells a wrap of coke at a party. He or she could not be said to be street dealing. I will ask David Wells to write to you.

Q I was given an extended sentence with a custodial term of three years. I was told I would serve 2 years. My solicitors wrote to me and confirmed the sentence and the release date. This meant I was going to be released on 17 April 2016. When I received my release papers it had my eligibility for parole on 17 April 2016 and a release date of 17 April 2017. In December 2014, my solicitor obtained an e-mail from the Judge which said I would be released at the two-thirds point as he had ordered. He said I had been misinformed and quoted some sections of Criminal Justice Act 2003. My solicitors then wrote to the Sentence Calculations Board and then to NOMS saying they were wrong. My solicitors also said unless they conceded the point they would seek judicial review. My solicitor eventually wrote back saying I should have been sentenced under Sexual Offences Act 2003 Schedule 15B. This meant my legal team and the Judge were wrong. Who is responsible for this almighty mess? My solicitor said, "Your trouble is that you demand to fly Business Class but can only afford to pay stowage." Well I am on

legal aid so I don't decide what he is paid. I have written to the Derby Crown Court and asked them to comment. I am getting no sympathy from anyone. My solicitor is now saying that due to the lapse of time I have missed the opportunity to appeal my sentence. This means his threat of judicial review was just bravado. What are your comments?

A What a cock-up!

To determine the release date for a 2012 EDS extended sentence it is necessary to answer the following questions.

- 1 Was the sentence before 13 April 2015?
- 2 If the answer is Yes, was the offence one that is listed in Criminal Justice Act 2003 Sch 15B?
- 3 If the answer to Question 2 is No, was the custodial term of the extended sentence 10 years or more?

If the answer to question 1 is No or the answer to either question 2 or 3 is Yes, the release date is determined by the Parole Board and will be between two-thirds of the custodial term and the whole custodial term.

If the answer to questions 2 and 3 is No, the release date is after two-thirds of the custodial term has been served.

Your case has a Yes to questions 1 and 2, so the answer is the first answer.

Looking at the facts of your case, I wish I had some good news for you. It is easier to say what went wrong than what went right. I have looked your case up on the Internet and I have found a case which exactly matches your name and the facts you give and the report says you do have a previous conviction which is a Schedule 15B conviction.

Assuming you have a Schedule 15B conviction, the Judge was wrong to say in his sentencing remarks that you would serve 2 years. As indicated earlier, because of that conviction you only become eligible to release after serving two-thirds of your sentence and the decision is made by the Parole Board, Criminal Justice Act 2003 s 246A(4). If the Parole Board declines to release you, you stay in prison. You have to be released at the end of the custodial term, which in your case is 3 years. The Judge was therefore wrong for the same reason to say in his e-mail that release would be at the two-thirds point and that it was mandatory.

Your solicitor was wrong to think judicial review was appropriate at any stage. If the sentence is unlawful, defendants should make an appeal to the Court of Appeal. If the release date is incorrect one writes a letter to HM Prison Service explaining why it is wrong. In my experience in almost all cases the prison decision is correct and solicitors are wrong.

Your solicitor was wrong to suggest you demand to fly Business Class. If he seeks to work in the Crown Court, he is required to know the law and if he does not like the rates of pay he should stop doing it on legal aid. If a surgeon does not like National Health rates of pay, that is no reason to do botched surgery. The poor rate of pay is not an opportunity to obtain a fee and provide an inadequate service. Providing the correct answer was not an onerous task. If your solicitor had looked in my book he could have found the answer in 30 seconds. In any event, he should know the answer.

Your solicitor is wrong to say you have missed the opportunity to appeal. If the sentence is unlawful the Court of Appeal should grant leave to appeal out of time.

If, on the other hand, you don't have a Schedule 15B offence on your record, your sentence is unlawful because extended sentences where there is no Schedule 15B offence have to have a custodial term of 4 years or more.

You ask for my comments. It was inevitable that the cuts to legal aid would lead to this and other shambles. You have been provided with a poor service. If your solicitor had provided you with the correct answer at the beginning it would have taken him a fraction of the time he has spent on your case because he did not know the law. Many solicitors are able to provide an excellent service because they know the law, which saves time. Extended sentences are routinely messed up. The Court of Appeal recently made a whole series of errors in *R v*

Bradbury 2015 EWCA 1176 when it sought to substitute extended sentences. At the end of June, the Court of Appeal substituted an unlawful extended sentence in *Balasupramaniam*'s case. In those cases despite the errors it appears that no one is doing anything about them.

The irony is that your position has always been the same. From start to finish, whatever the Judge said, you will be released between two-thirds and the whole of your 3-year custodial term. It is not what the Judge says that matters, it is the operation of the law. Extended sentences are very unfair. If a solicitor writes to me and says I'm unfair, I will ask him or her whether he or she would be happy with botched surgery because of low pay. If they ask why I don't blame counsel, I would be happy to say there are many counsel who provide a very poor service. So there you are. Perhaps you shouldn't have asked for comments!

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). Conviction enquiries should be sent to Inside Time and they will be answered by someone else. 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. Robert and Jason cannot in their answers in effect do the work that should be done by solicitors and barristers who have the relevant case papers.

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.