

Written November 2016 copy for December 2016

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 has an app which is for Apple iPads and Windows 8/10 tablets and computers. It costs £95 plus VAT. The print copy has sold out. If you have access to a computer, you can follow Robert on Twitter, @BanksonSentence and you can receive his weekly sentencing Alert.

Q My partner and I had regular sex and we had two young children. I knew she didn't want to give me oral sex but one weekend I gave it to her hoping it might change her mind. Well it didn't and it helped to cause our break-up. There was some sex after that, but not much. When we broke up she got a new boyfriend and wanted to stop me seeing my kids and reported me for rape. I said it hadn't happened and the jury didn't believe me. A letter I had written apologising for it sunk me. She also reported me for other matters which had not taken place, which the jury threw out. It didn't help when she said how traumatised she was by it, which was just invented. The Judge said she was bound by the guideline and it was a Category 3B rape. Also, because it was within a relationship she could start at the bottom of the range, which was 4 years. Then with my good character and job etc. she took a year off. So I got 3 years, which I think is ridiculous. My solicitor said there could be no appeal because that is what the guideline says and I was lucky to get a year off. Surely I can appeal?

A Well I think it was ridiculous too. Three years is the sort of sentence a repeat burglar would receive. The problem here is that the Judge and your solicitor appear to misunderstand the guideline system. For guidelines issued by the Sentencing Guidelines Council or those issued before 6 April 2010, judges only have to 'have regard to a guideline'. For guidelines issued by the Sentencing Council after 6 April 2010 (which your guideline was), there is a duty to follow the guideline 'unless the court is satisfied it would be contrary to the interests of justice to do so', Coroners and Justice Act 2009 s 125(1). So guidelines, starting points and ranges don't apply to all defendants. There is another misconception. Your solicitor believed the 'range' for the offence, which was 4-7 years, placed a restriction on the sentence. It does not. A range is described as being where 'the sentence will normally fall in most cases'. That means that on occasions a sentence will fall outside the range. Where an offence is particularly nasty, judges sentence well over the guideline range. Sentencing well below the stated range is less common. Mrs West shot her husband and the Judge who sentenced her for murder said it was inevitable that he selected the 30-year starting point as that was the starting point for a murder 'involving a firearm'. The Court of Appeal held it was not inevitable and considered the 15-year starting point was the appropriate one, see *R v West* 2007 EWCA Crim 701. Although there are differences between murder and non-murder guidelines the principle remains the same. Here your plea of not guilty, which you imply was a false plea, denied you a basis of plea and the third off plea discount.

The key fact for me is that the sex carried on afterwards so I infer that your partner's trauma was either created after she found out how useful it might be or was caused by other matters. I consider that the sentence should have been constructed by considering the aggravating factors (of which I know none) and the mitigation, which seems considerable. Then the culpability and harm are considered. Next it is necessary to consider the comparable cases. In *Att-Gen's Ref 2016 Re Hay* 2016 EWCA Crim 969, the Court of Appeal considered for rape within a relationship and on rather special facts that the Judge should have sentenced outside the range and should have started at 3 years. I will ask Alan Burcombe to write to you so that we can know more about your case.

Q I am a victim of a police fit-up and have been completely let down by the legal profession. My barrister would not appeal so I listed all the lies and errors of law and sent my grounds of appeal to the Court of Appeal. I investigated the background and sent all the proof of the

barrister's incompetence to the Court of Appeal. I have now had a letter from the Court saying I have to submit a summary of all my paperwork in three pages. How can I put all of it down in three pages? Is it a breach of my human rights?

A Appeals based on police misconduct and criticism of legal representatives are very difficult to present. For your appeal over misconduct you will almost certainly have to apply to admit fresh evidence and explain why it wasn't relied on at your trial, Criminal Appeal Act 1968 s 23. For the ground of appeal relying on criticism of your barrister, you are required to set out each criticism in a list. In *R v James and Selby* 2016 EWCA Crim 65 the Court explained that it has schemes designed to help and control litigants in person. The help includes guidance. Interestingly the Court invited the Criminal Procedure Rules Committee to address the problem of excessive paperwork from litigants in person, which may be why the rules are appearing later than usual this year.

If you are showering them with paperwork it is understandable that they want you to direct your mind to what is important. It is essential that you comply with their requests, although I doubt the 2-3 pages includes your fresh evidence. You should also avoid repetition and opinions on the strength of your points. You should see your task as collecting the material to show the conviction is unsafe.

The desire for the Court to manage your case is in line with its case management procedures, Criminal Appeal Act 1968 s 31B and 31C. Such management is not in breach of your human rights, because the Court would not consider that any of the human rights inhibit the courts in managing their appeals in this way. One reason might be that they are probably as fed up with excessive paperwork from litigants in person as the Court of Appeal is!

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 Alan Burcombe 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 (1 Amron House, North Shields, NE29 6RN). 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.