

Written December 2016 copy for January 2017

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 I am a repeat burglar and it is all because of my heroin addiction. I am told I face a minimum 3-year sentence unless it would be unjust. My solicitor is a bit vague about what would make it unjust. Surely if I can cure my addiction then that is in the interest of everyone?

A For all the time I have been working in the courts, defendants have tried to avoid prison sentences by saying they will cure themselves. There has been a series of schemes to help addicts and they have had mixed success. However, in the last 12 months, the Court of Appeal has made it more difficult to avoid minimum sentences particularly with firearm offences. The reason your solicitor cannot define 'unjust' is because the courts have not defined it. Often the more a word is defined the more unclear the meaning of the word becomes. Judges are expected to consider all the factors, both individually and collectively, then assess whether it would be 'unjust' to impose a minimum sentence. For you to show it would be unjust you would need to do more than present an account of your addiction and your wish to be cured. In *Attorney-General's Ref No 118 of 2015* 2016 EWCA 1108 para 32, the Court of Appeal set out the relevant law. "This court has indicated that section 111 [the minimum sentence provisions] gives the sentencer a fairly substantial degree of discretion as to the categories of situations where the presumption can be rebutted (see *R v McInerney* 2002 EWCA Crim 3003, 2003 2 Cr App R (S) 39 (p 240) at para 16), and when there is a sustainable and proper basis and when the overall circumstances permit, this court will support sentences imposed by judges which are merciful and which, for instance, seek to address a cycle of offending by enabling the offender to be released immediately or early into the community because this will place him or her in the best position to address the offending and the circumstances that cause or motivate the offender to commit crimes. An obvious and relevant example of this is where an offender has been making real efforts to reform or conquer his or her drug or alcohol addiction."

In that case the Judges were considering a prosecution appeal that the minimum sentence should have been imposed for a repeat burglar. They quashed the Judge's sentence and started at 4½ years, which gave the defendant 43 months after the plea discount. The Court made it clear that evidence to support the claims was required. A positive pre-sentence report, actual engagement with help programmes, drug-free tests etc. can be relied on. However, many judges have heard all the promises before and will consider that if you choose to commit the crime you need the required punishment and if you are sincere about your desire to reform you can make those efforts while you are serving the custodial sentence. Frequently when these judges have given a burglar a chance they see the same burglar back in their court shortly afterwards.

It is important to remember that when the minimum sentence for burglary is triggered it does not mean the defendant will receive 3 years, as the case above shows. Many repeat burglars will receive far more than 3 years. Also a defendant is entitled to receive a discount for his or her plea of guilty. So if the defendant pleads early and the Judge starts at 6 years, the sentence would normally be 4 years. There is one restriction, which is that when there is a plea of guilty the sentence must not be below 80% of 3 years.

Q I never got much help from my solicitors. I wanted to show that the police observation logs were fabricated because so many entries look similar. The solicitors asked to spend legal aid money on a report and that was refused. My solicitors said I couldn't spend my money on an expert. How fair is that? Well I was convicted and got 10 years. My barrister did at least appeal on the summing up and I have leave to appeal. I now want to have transcripts to show that the

Judge was biased, which the barrister won't take up. How can they stop me buying transcripts? If I pay, how will they stop the transcripts being typed up?

A Solicitors and barristers in a criminal trial in the Crown Court trial are not allowed to mix private and legal aid money for their defence. The rule was instituted after various defendants, who had a legal aid order, had a junior counsel paid for under legal aid and a QC paid privately. That was considered a rip-off of legal aid money. There are, however, two relevant exceptions to the rule. Solicitors who have a legal aid order can pay privately for 'fees incurred in a) obtaining any report or opinion or further evidence provided by an expert witness, and b) obtaining any transcripts or recordings', if they have sought an extension of the legal aid order to cover the costs and this has been refused, Criminal Defence Service (Funding) Order 2007 reg 11(b) (i) and (ii). This means your solicitor could have obtained a report from a handwriting expert about the logs if a) an application to have them had been refused and b) you paid for them. I would not expect the Court of Appeal to be worried if transcripts of the Crown Court were obtained and there had been no refusal of legal aid as no grant of legal aid money for reports etc. is made post-conviction.

The rule does not apply to defendants and it appears there is no restriction on the defendant paying for work directly but that is not how the rule is interpreted in many Crown Courts. However, I ought to warn you that if you obtain the transcripts it is unlikely they will persuade your barrister to add bias as a ground of appeal. That is because he or she had heard the Judge during trial and did not consider that the Judge's conduct amounted to provable bias. Further, it is his or her decision what grounds to rely on. If you sack your barrister and go it alone your bias grounds will pollute your summing-up point and may destroy your appeal because if you allege bias I expect the Court of Appeal judges will look at your appeal less favourably. Bias is a very unpopular ground of appeal in the Court of Appeal.

I am grateful to Jason, Alan and Ronan Maguire (of Maguire solicitors in Manchester) for checking this answer. Ronan was in the case of *R v Banfield* 2014 EWCA Crim 1824 which was on the legal aid/private funds point.

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 ODW). 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.