February 2016 copy for March 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 book. 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. The 2015 app with updates and the 2016 app (available when it is published) costs £138 (incl. VAT) as a joint purchase. The 2015 print copy and the 2016 print copy (when published) costs £128 as a joint purchase. If you have access to a computer, you can follow Robert on Twitter, @BanksonSentence and you can receive his weekly sentencing Alert.

Q I was charged with section 18 and I was accused of pushing my partner on a concrete path and she fell. It was an accident. When the police took a statement from her she lied, as she wanted me out of her life. She invented an account of what I said at the time. I saw my barrister before trial and he seemed capable enough. On the day of trial he didn't turn up but another barrister did. This barrister was only interested in making me plead guilty, which I wasn't interested in doing. So he started the trial without fully coming to grips with my case and when it came to cross-examination he tried to read out my account and the Judge kept interrupting him. He seemed out of his depth and when the so-called victim was cross-examined she emerged unscathed when there were so many things that should have been put to her. The Judge then took her case as the facts of the case and hammered me on sentence. My barrister was simply so incompetent he could not handle the case. He said there were no grounds of appeal. Well he would, wouldn't he? My solicitor washed her hands of the case and I am stuck here. To me it's obvious, I am the victim, not her. Can I appeal?

A Poor representation is becoming a significant problem. As the authorities cut the rates of pay, good barristers stop doing criminal work. On occasions, people who lack experience fill the gap and without sufficient people wanting the work, there is sometimes no real competition. The rich pay for a competent barrister and they are much more likely to be acquitted than the rest, who on occasions have to sit there while their case is not properly presented. The other problem is, unless advocates take on more work than they can properly do, they can't pay their rent or mortgage. You also faced the difficulty that when couples fall out, both sides invariably start improving their account of what happened. This is especially so when there are children involved. However, the police, CPS and the criminal courts are programmed to always treat the evidence of victims as correct. If anyone doubts the problem it is perhaps worth noting that Lady Brittan, the widow of Lord Brittan, the former Home Secretary, is so angry about how her husband was treated that she wouldn't let the Metropolitan Police Commissioner (Britain's top police officer) into her house. The Commissioner wanted to apologise for his force's investigation following the receipt of a sexual complaint against Lord Brittan.

So back to your case. I have not spoken to your barrister, who I am sure would, if asked, give reasons why he didn't do certain things. He might say that the Judge did give him enough time to see you before the case. He might also say that he tried to see you in prison before the trial but the prison did not have any slots left. I just don't know and will answer your question on the basis of your version. There was a time when, if your barrister was incompetent, you had a ground of appeal. That has changed. To quash a conviction, it is necessary to show that the advocate's performance led to identifiable errors or irregularities in the trial, which themselves made the trial process unfair or unsafe, *R v Day* 2003 EWCA Crim 1060. The distinction between the two tests is subtle but it is now far more difficult to quash a conviction. A recent example of the law in action is *R v Ekaireb* 2015 EWCA Crim 1936. The defendant was convicted of murder and the victim's body was never found. The evidence was entirely circumstantial and relied on a complex factual background. The defendant dismissed his QC after his defence speech. The defendant appealed, saying the QC's incompetence rendered the conviction unsafe. At the appeal hearing the QC, the junior barrister and the solicitor gave evidence. There were two sections to the grounds of appeal. The first section was 'a severe

criticism of style' which amounted to incompetence. This referred to a) a failure to present the defence in an appropriate or focused manner, b) being patronising to the jury and making personal attacks on the prosecution counsel, and c) making inappropriate attempts at humour which were bound to alienate the jury. The second section was that there was a failure to confront the contentions advanced by the prosecution which was in stark contrast to the detailed way the prosecution had advanced their case. This referred to the QC's suggested failure both before and during the trial to prepare the case properly, his lack of engagement during the trial and the QC doing other work during the trial. Before the trial the solicitor commented that the QC was "far from up to speed and was not concerned, that was obvious". During the cross-examination of the defendant the QC was sending e-mails regarding other cases. After all the prosecution evidence was called, the defence contended that there was insufficient evidence for the case to continue. The prosecution document for this issue was 17 pages long, whereas the QC's document was a page and a half. It was suggested that the QC's closing speech failed to rebut the prosecution points.

The Court of Appeal found that the QC had not read the material before he used his junior counsel's work to apply to exclude the evidence of a psychologist who was to be called by the prosecution. The QC's page and a half document was lamentable and wholly inadequate. They accepted most of the defence suggestions (most of which I have not listed). However, the failures during the application about the psychiatrist were not material as the evidence was excluded by the Judge. The failure to draft more than a page and a half was not relevant as there was a case to answer. The other failures did not make the trial unfair or the conviction unsafe. They looked at all the evidence and were satisfied the conviction was safe.

So you can see what an uphill task you have. Another difficulty is that if you accuse your counsel of incompetence, the Court of Appeal will require you to 'waive privilege', which means the court will be given all your counsel's and solicitor's papers and will ask for a statement from your former advocate. This material will then be served on the prosecution.

The situation as far as sentence is concerned is very different. The facts are there to be determined by the Judge. The appeal issue is simply whether the sentence was manifestly excessive. If material factors were not put before the Judge they can be raised but there is no opportunity for the witness to be cross-examined again because the first cross-examination was so unsuccessful. The Court of Appeal seeks to look at the primary factors. I consider a successful appeal to be most unlikely on the information you have given me.

Update

At the moment there is no judgment in the adjourned IPP case which I mentioned last year. It is expected soon.

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 (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.