

## March 2016 copy for April 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 £99 (incl. VAT). The print copy costs £106. There is also a discount available when the print copy and app are purchased together and a large discount if the current edition is bought with the edition to be published at the end of April. If you have access to a computer, you can follow Robert on Twitter, @BanksonSentence and you can receive his weekly sentencing Alert.

**Q** I appeared in court for sexual activity with a child family member (a section 25 offence) and received a full discount for my plea. The child was my step-daughter, who was 17 years 10 months old. I was aged 37. The prosecution agreed there was no grooming and the offence was opportunist. The Judge said the range was 6-11 years before the plea discount was considered. I was sentenced to 4 years. I looked in *Banks on Sentence* and saw the range was 1-4 years. I sent a photocopy of the page to my solicitor and asked why I was not sentenced under this guideline. She said she would look into it and sent me a copy of the *Sexual Offences Definitive guideline*. This said the range was 4-10 years. It looked as if I was Category 1 (because of penetration) and Category A (because of a significant disparity in age). No other aggravating factors applied. Two months later, having heard nothing from my solicitor, I rang her. She said the Judge uses the guideline and not a book. She said she did not understand why the cases in the book indicated such low sentences and said the book was inaccurate. Can you please clear up the confusion?

**A** I have not discussed this with your solicitor but it appears she does not understand how guidelines work. I assume you were sentenced after 1 April 2014, so you should have been sentenced using the *Sexual Offences Guideline 2014*, which it seems is the one your solicitor sent you. You refer to an entry in my book which refers to a range of 1-4 years and to victims aged 16 or 17. This means that you and your solicitor were looking at a copy or photocopy of the 2013 edition of my book (or an earlier edition). The guideline there is clearly stated to be the *Sexual Offences Act 2003 Guideline 2007*. You ask if the guideline in my book is inaccurate. The guideline in the book was correct at the time it was published. Interestingly this old section 25 guideline does not apply to your case, as the guideline does not apply where the defendant is a non-blood relative and the other party is over 16.

I am at a loss as to why your solicitor says the book is inaccurate when it appears she can't spot that the guideline is clearly dated 2007 or that it did not apply to your offence at any time and so by inference a lesser sentence is appropriate.

So how should you have been sentenced? It is important to start with the *Sexual Offences Guideline 2014* at page 51, which deals with section 25 offences. If the Judge said the range in the guideline for the offence was 6-11 years, he was applying the wrong guideline. What guideline it was I don't know. That range cannot apply to your offending.

Your case was clearly a Category 1 offence, because there was penetration. If your step-daughter had been two months older, there would have been no offence under this section. As she was nearly aged 18, I think most judges would consider the culpability factor of 'significant disparity in age' would not apply in the same way it applies when there is a child aged 12-14. An aggravating factor listed is 'ejaculation' which I consider would have less weight than usual as the other party was a willing party.

I also think with the age of your step-daughter, most judges would consider that a child sex guideline is not helpful or that a substantial discount from the starting point is appropriate. This was the approach taken by the Court of Appeal in *R v B* 2012 EWCA Crim 349 (a much more

serious case than yours, where 3 years 9 months was substituted), *R v Alderson* 2012 EWCA Crim 1824 (2 years substituted) and *R v Davies* 2013 EWCA Crim 3166 (16 months).

I will ask David Wells to write to you as it appears you may have a ground of appeal.

Q I have just been acquitted of joint-enterprise murder and convicted of manslaughter. I was on the other side of the road when it happened but the Judge said I was in the lead role. I fell out with my QC and was sentenced without a barrister. The Judge gave my co-defendant, who was convicted of murder, life with a 14½-year minimum term and my other co-defendant, who was convicted of manslaughter, 3 years. I have a manslaughter and a death by careless driving on my list of previous offences. The Judge said he would have given me a 30-year minimum term if I had been convicted of murder. I got life with a 15-year minimum term, which is the equivalent of a 30-year prison sentence. How can that be right?

A Your case neatly highlights three important principles of law. First is about joint enterprise. You don't have to be next to the victim to be a lead defendant. The man in charge can shout across the road, "Kill him now" and be guilty of murder in a leading role. Second, the length of the minimum term must not be extended to reflect the risk to the public you pose. An Internet report says that you had a 10-year GBH sentence after you were released from your first manslaughter sentence. It also says you had another 10-year sentence for an attack involving 11 stab wounds. You were released from this sentence shortly before the latest killing. The risk factor may determine the issue of 'dangerousness' and so whether a life sentence is appropriate. However, when fixing the minimum term risk is not factor and is a matter for the Parole Board when they consider whether it is safe to release you after you have served the minimum term. Third, the Judge has to sentence you on the basis of both the guilty and the not guilty verdicts. An Internet report says in the latest offence you encouraged a teenage boy to attack the deceased. I don't know the full facts but it looks as if the jury was not satisfied that you encouraged the boy to kill or cause serious bodily harm to the victim. The other factor is that you cannot be the lead defendant in the murder that your co-defendant was convicted of, as you were not convicted of murder. However, you could be the lead defendant in the activity. I think there are a lot of factors which I don't know about, so I will ask David Wells to write to you. However, I am confident that a) the criteria for a life sentence were present and b) the minimum term was significantly lengthened to reflect your extremely relevant previous convictions (which is a different issue to the risk factor).

### **Update**

The judgment in the IPP case was issued on 18 March 2016. Thirteen defendants had asked for their IPP sentences to be set aside mainly because the statutory criteria for passing IPP was not satisfied. The Lord Chief Justice rejected all the appeals and emphasised the need for appeals to be lodged within 28 days of the sentence. There was nothing in the judgment to help those trapped in prison with wrongly imposed IPP sentences.

### **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](http://www.banksr.com).