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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 virtually 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 was convicted of touching my 11-year-old daughter. I am thoroughly ashamed of myself. It occurred at a very low point in my life. The Judge gave me 4 years although I had no previous convictions. I was sent to a prison that only has sex offenders in it, which gives me a good chance to compare my sentence with other prisoners' sentences. The range of different sentences is quite shocking. Is it just a lottery and how did this come about? My sentence seems far too long. Can I appeal?

A There are always difficulties when comparing sentences with other prisoners. First they may not reveal why their sentence was particularly high or low. This is especially so with sex offenders. Also it is important to discover which prisoners pleaded guilty and which did not. For those that pleaded the discount may vary from one-third off to virtually nothing at all. People who regularly work in a particular court soon discover which judges pass shorter sentences than the others at that court house and which ones pass longer sentences. Some judges are influenced by mitigation. Others try to ensure that the sentence is almost entirely based on the offending. However, perhaps the most significant factor is that the Court of Appeal is not concerned with the sentences Crown Court judges pass. The Court of Appeal is primarily concerned with applying the guidelines and often says that its own decisions in previous cases do not assist because they are fact-specific. This means that you won't be able to use other prisoners' sentences to show your sentence is manifestly excessive. Regrettably, without even knowing what you are charged with, I cannot advise you about whether it is manifestly excessive or not. That is the test used by the Court of Appeal.

You ask whether it is a lottery. Well the table below shows the various offences that could have been charged in your case. Next to them are the 'Harm' and 'Culpability' levels with the resulting starting points. I have applied the details of your case to select the right category and features in the guideline for each of the following offences.

No	Sex offence	Offence	Harm	Culpability	Starting point
1	Sexual Offences Act 2003 s 7	Sexual assault of a child aged under 13	Category 2 Touching of naked genitalia or naked breast area Child is particularly vulnerable due to extreme youth or personal circumstances	Culpability A Abuse of trust	4 years
2	Sexual Offences Act 2003 s 8	Causing or inciting a child aged under 13 to engage in sexual activity	Category 2 Child is particularly vulnerable due to extreme youth or personal circumstances	Culpability A Abuse of trust	8 years

No	Sex offence	Offence	Harm	Culpability	Starting point
3	Sexual Offences Act 2003 s 9	Sexual activity with a child (when the child is under 13 or the defendant does not believe child to be aged 16+)	Category 2 Touching of naked genitalia	Culpability A Abuse of trust Significant disparity in age	3 years
4	Sexual Offences Act 2003 s 10	Causing etc. a child to engage in sexual activity (when the child is under 13 or the defendant does not believe child to be aged 16+)	Category 2 Touching of naked genitalia	Culpability A Abuse of trust Significant disparity in age	3 years
5	Sexual Offences Act 2003 s 11	Engaging in sexual activity in the presence of a child (when the child is under 13 or the defendant does not believe child to be aged 16+)	Category 2 Engaging in masturbation	Culpability A Abuse of trust Significant disparity in age	2 years
6	Sexual Offences Act 2003 s 16	Abuse of trust: Sexual activity with a child (when the child is under 13 or the defendant does not believe child to be aged 18+)	Category 2 Touching of naked genitalia	Culpability A Specific targeting of a particularly vulnerable child	1 year
7	Sexual Offences Act 2003 s 18	Abuse of trust: Sexual activity in the presence of a child (when the child is under 13 or the defendant does not believe child to be aged 18+)	Category 2 Engaging in masturbation	Culpability A Specific targeting of a particularly vulnerable child	1 year
8	Sexual Offences Act 2003 s 25	Sexual activity with a child family member (when the child is under 13 or the defendant does not believe child to be aged 18+)	Category 2 Touching of naked genitalia	Culpability A Significant disparity in age	4 years

You can immediately see who are the winners and the losers in the decisions made by the CPS as to what to charge. The range of starting points for near-comparable offences is 1-8 years. You can also see that for each one there is either an abuse of trust with a child under 13 (nos 1-7) or the offence is committed against a child family member (no 8). It could be said that for no 2 it could be the least serious offence, and it carries the highest starting point. I can see from the press reports on the Internet that the prosecution said you were masturbating at the time and touching your daughter inappropriately. That would mean you could have been convicted of Sexual Offences Act 2003 s 11 or 18 which are nos 5 and 7. I think that would be unlikely as that would not include the suggestion that you touched your daughter. These two offences have a starting point of 2 years and 1 year respectively. The only other offence which usually does not require the offender to touch the child is no 2, which has the highest starting point of all.

The skill in defending these cases is to persuade the prosecution to substitute charges that carry a lower starting point. This introduces another chance element, that is, who is prosecuting the offender and whether they are amenable to such an approach or not. Also whether they meet police resistance or not. However, it could be said, "Why should the police or the prosecutor go along with such tactics when the facts prove what they have charged?" It could also be said that the prosecution and police often see their non-sexual cases under-sentenced because of the guideline system.

You ask how this all came about. The guideline system was launched on 1 July 1999, when Crime and Disorder Act 1998 s 80-81 came into force. The chair of the panel which was set up to recommend the guidelines was an academic who had no known experience of Crown Court practice. Seven other members of the panel had no known experience of the Crown Court. Two others were busy judges and one other was a District Judge who occasionally sat in the Crown Court. The final member was a lay magistrate. Later when the structure of the guideline was formulated it was never put out for consultation and no-one had a chance to say that the structure would lead to gross inconsistencies.

Judges will tell you that sentencing is an art and not a mathematical exercise. The key to good sentencing is balancing all the competing factors so that the aims of sentencing are met. Selecting just two or even one factor will not produce much of an artwork. The official version is that sentencers can move within the guideline. Yet, many judges and magistrates simply start at the guideline figure and with or without a discount for the plea allow the starting point to determine the sentence. The majority of the movement within a guideline is when there are aggravating factors. Mitigating factors usually do not permit significant movement. Parliament has not helped here because it made the ill-conceived guideline structure compulsory when it enacted Coroners and Justice Act 2009 s 121. Equally unfortunate was section 125 of that Act, which provided that the courts had a duty to follow a guideline replacing the previous requirement of a duty to have regard to the guideline. Ironically no one has been able to be sure what the difference means. The vast majority of Crown Court judges I have spoken to dislike the guidelines and magistrates continually voice their opposition to them. They, like practitioners, are just stuck with them. Meanwhile the judicial establishment continues to give the guidelines their support.

I see the three main faults with the guidelines are: a) the type of person who is selected to sit on the two bodies that produce the guidelines. All practising barristers have been rejected until this year. b) The structure of the guidelines is flawed. c) Offences that can be charged vary greatly and the offences are made to fit the current guideline structure rather than each offending group having a tailor-made guideline.

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.