June 2015 copy for July 2015

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 2015 edition of the book and app was published recently. The app is for Apple iPads and Windows 8 tablets and computers and costs £99 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on www.banksr.com. There is also a discount available when the print copy and app are purchased together. 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 aged 71. I pleaded to attempted sexual assault on a 14-year-old boy. The sentence was 3 years reduced to 2 years because of the plea. I think I was sentenced on my record, which is:

1981 Attempted sexual assault on a male, aged 14 and 12 years old (sic). Non-custodial.

Approx. 1978 Attempted sexual assault on a male aged 17. Non-custodial.

1972 Buggery of a 14-year-old male. 10 years' imprisonment.

1969 Buggery of a male aged 18. 3 years' imprisonment. (I can't be sure whether the male was aged 18 or 15 as I am having trouble with your writing.)

1967 Attempted sexual assault on a male aged 18. Non-custodial.

I thought after a certain time convictions became spent. Seven years ago I was told to do jury service and I told them about my record. The Court said the convictions were spent and they said I had to do jury service and I did it.

Should I appeal my sentence?

A You ask whether, after so long a time, your old convictions should not be taken into account. Unfortunately there are a number of principles operating here. I will divide them up.

Rehabilitation The first appears relatively simple. Each type of sentencing order imposed has a rehabilitation period. A fine has a rehabilitation period of 12 months for adults and 6 months for those aged under 18. The rehabilitation periods for custodial sentence are:

Length of sentence	**The rehabilitation period for adults**	**The rehabilitation period for those aged under 18 at date of conviction**
Custodial sentences of more than 48 months	The conviction will never be spent	
Custodial sentences of more than 30 months and not exceeding 48 months	7 years	3½ years
Custodial sentences of more than 6 months and not exceeding 30 months	4 years	2 years

Custodial sentences of 6 months or less	2 years	1½ years

In March 2014 these shorter periods were introduced, it was said, to assist members of the ethnic minority communities into employment.

The new system means that if you received a fine on 1 June 2015, on 1 December 2015 that fine would be a 'spent conviction'. This means from 1 December 2015, if you are asked about your convictions, you do not have to declare this conviction, unless the person asking is in a special category, like a local authority employing teachers or a police force assessing applications for jobs. If, however, you are convicted of another offence before the conviction becomes spent, the 1 June 2015 offence may continue as a disclosable conviction. The rule is quite complicated. The official description of a rehabilitated person is someone who 'shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction'.

What about spent convictions and sentencing? As you would expect, the authorities give with one hand and take away with the other. The rehabilitation procedure does not apply to court proceedings, Rehabilitation Act 1974 s 7(2). The Lord Chief Justice has, however, issued Criminal Practice Direction 2014 EWCA Crim 1569 para V 35A.2. It says, 'Section 4(1) of the 1974 Act does not apply, however, to evidence given in criminal proceedings: section 7(2)(a). Convictions are often disclosed in such criminal proceedings.

35A.4 It is not possible to give general directions which will govern all these different situations, but it is recommended that both court and advocates should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can reasonably be avoided.'

So what actually happens at court? The rules about how a criminal record shall be compiled clearly state that those offences which are spent should be specifically marked as such. In fact, in my experience, with all the cutbacks this is not done. The rules are both complex and confusing as the legislation was worded badly to start with and the series of amendments are just as badly drafted. Also it is my experience that most judges, barristers and solicitors simply don't know the rules and the whole list of convictions is used without written reference to whether any are spent.

So what about your convictions? The 1972 offence of buggery on a 14-year-old male is not spent. Your 1967 and 1978 convictions should be disregarded as the conduct is now legal. Your 1969 conviction, depending on the age of the other party, may also need to be disregarded for the same reason. Your 1981 conviction may or may not to be a spent conviction. This will depend on which Court dealt with it.

How should the Judge have approached your non-spent convictions? Criminal Justice Act 2003 s 143(2) states: 'In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of a conviction) the court considers that it can reasonably be so treated having regard, in particular, to:

a) the nature of the (previous) conviction, and

b) the time that has elapsed since the conviction.'

So each previous conviction is an aggravating factor when it is reasonable to treat it as such. Further, in considering whether it is reasonable, the court must have regard to 'the time that has elapsed since the conviction'. This principle has not been interpreted by the Court of Appeal as far as I know. In *R v Halliwell* 2015 EWCA Crim 1134, a very recent case, the defendant pleaded to section 18 and ABH. He had stabbed his daughter in the shoulder area and in the back. D was now aged 45 and between 1982 and 2005 he had 13 sentencing hearings for 29 offences. He had two section 47 offences in 1984 (a fine and 21 days' detention). In 1987, he had a section 20 wounding (community order). He also had a long history of alcohol abuse. The Court of Appeal held that the 1984 and 1987 offences were historical offences and [could not be used] to assess dangerousness and whether an extended sentence should be upheld. The Court noted that there had been no violence on D's record for 25 years. They quashed the extended sentence.

It is left to the Judge to use his or her discretion. If it was down to me I would consider it unreasonable to increase your sentence because of convictions 43 and 40 years ago. I also think it is unfair because there would be no records, and therefore few details of the offence would be available. Without the details false assumptions can be made. I suspect your Judge had a very different approach.

What about the offences where the conduct is now legal?

This falls into two parts. The first part is the barring system and the second is about the criminal record kept by police.

Gay offences which are now legal and the barring system When a defendant is convicted of most sexual offences the defendant is subject to automatic notification whether or not the judge mentions it. He or she has to comply with the terms laid down. Where notification is for buggery and gross indecency and the other party was aged over 16 and consented to the sexual act, Sexual Offences Act 2003 Sch 4 provides the defendant with the opportunity to apply to the Secretary of State for the notification to cease. The opportunity applies to people with convictions and cautions for such offences. It is hoped that no one is now subject to notification for such activity.

Gay offences which are now legal and your criminal record Protection of Freedoms Act 2012 s 92 enables a defendant with a conviction or caution for buggery, gross indecency, Offences against the Person Act 1861 s 61 and Criminal Law Amendment Act 1885 s 11 to make an application for the conviction or caution to be disregarded. Parliament sought to include corresponding offences but whether it did is open to argument. The inclusion of section 61 is interesting as it relates to concealment of birth, an offence which was abolished in 1957. That section does not fit in with the later sections of the 2012 Act and is clearly a drafting error. I think Parliament intended to include section 68 not 61 as section 68 deals with gay offences committed by members of the Royal Navy. Section 11 is interesting as that was known as the blackmailers' charter and was used to prosecute Oscar Wilde, who made such withering attacks on the Victorian penal system. Many of his criticisms are valid today. Section 11 was abolished in 1957.

For the conviction to be disregarded, the other party must have consented to the act and have been aged 16 or over at the time. Additionally the conduct was not sexual activity in a public lavatory, as that is still illegal. You may think this is a bit rich, as in the 1950s and 1960s the state forced gays to seek sex in public lavatories as it was a refuge from the war of terror the state was conducting against them. (For younger

readers, at that time the state invaded gays' bedrooms, clubs and meeting grounds, forced them out of employment and put them in prison for having sex with adults. It caused many to commit suicide, like Alan Turing, the code-breaker.)

Your appeal

So the answer to your first question is quite involved. I am afraid I cannot answer your question about whether you can appeal as I know so little about your case. I will ask David Wells to write to you so he and I can see whether you have an appeal.

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 (PO Box 847, North Shields, NE29 1FJ). 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.