Neutral Citation Number: **[2013] EWCA Crim 2388**

Case No: 200406710 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM NOTTINGHAM CROWN COURT

MR JUSTICE ASTILL

T20047477

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/12/2013

Before :

LORD JUSTICE JACKSON

MR JUSTICE HOLROYDE

and

HIS HONOUR JUDGE MILFORD QC

- -

Between :

REGINA Respondent

- and -

PAUL JAMES SMITH Appellant

- -

- -

Mr Paul Mann QC (instructed by the CPS) for the **Respondent**

Mr Nigel Lithman QC and **Ms Valerie Charbit** (instructed by **ZMS Solicitors**) for the **Appellant**

Hearing date: 5th December 2013

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Judgment

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part 1. Introduction,

Part 2. The facts,

Part 3. The criminal proceedings,

Part 4. The applications for leave to appeal to the Court of Appeal,

Part 5. The application to treat the previous notice of abandonment as a nullity,

Part 6. The application for leave to appeal against sentence.

Part 1. Introduction

2. This is an application by a young man convicted of murder for an order that the previous abandonment of his application for leave to appeal against conviction be treated as a nullity. This application involves strong criticism of counsel who conducted the defence at trial and of other counsel who advised on appeal.

3. There is also before the court an application for leave to appeal against sentence. An extension of time of seven years, eight months and one week is needed if this application is to proceed.

4. These proceedings arise out of the tragic death of a ten year old girl at a Christmas party. On any view the killer must have been one of the persons present at the party.

5. In this judgment we shall refer to the Criminal Justice Act 2003 as "the 2003 Act". We shall refer to the Criminal Cases Review Commission as the "CCRC".

6. After these introductory remarks we must now turn to the facts.

Part 2. The facts

7. On 28th December 2003 Mr Ian Smith and his wife held a Christmas party at their home in Normanton. Their four children were present, namely LS, CaS, ChS and JS. There were about sixty guests. These guests included Ian Smith's brother, Nigel, his wife Sue and their two sons, Paul and NS. The Storrie family were also guests at the party. This family comprised Mr and Mrs Storrie, their two sons, LaS and LuS, and their daughter Rosie-May.

8. It is only necessary to mention the ages of three persons. Rosie-May was aged 10. JS, the son of the hosts, was aged 11. Paul Smith was aged 17. JS and Paul were first cousins.

9. During the evening the adults generally stayed downstairs. The younger generation were spread more widely around the house.

10. Shortly after 9 p.m. some of the guests were preparing to leave. Mr and Mrs Storrie did not know where Rosie-May was, so people went to look for her. JS found Rosie-May lying face down on the bed in the bedroom of his sister, LS. She was unconscious and naked to below her buttocks. JS summoned others.

11. It was soon realised that Rosie-May's situation was serious. She was very pale and there was a blue/purple band across her eyes. Mrs Storrie and Mrs Sue Smith, who were both nurses, attempted resuscitation while an ambulance was being called. Rosie-May was taken to hospital, where attempts to revive her failed. She was pronounced dead on the following day.

12. Suspicion fell upon Paul Smith for a number of reasons. These included the following eight matters.

i) Witnesses had seen Paul and Rosie-May together on occasions during the evening.

ii) Mrs Storrie recalled that at one point in the evening she was in the study, while Rosie-May was playing a game on the computer there. Paul Smith came into the room and said that he felt like a sexual being.

iii) There was a beer can in LS's bedroom which bore the fingerprints of both Rosie-May and Paul Smith.

iv) Some witnesses said that Paul Smith had gone missing shortly before Rosie-May was found. Paul Smith accepted having gone upstairs at about this time, but said that his purpose was to use the lavatory.

v) Both CaS and LaS said that they saw Paul Smith near to LS's bedroom shortly before Rosie-May was found.

vi) DNA was found in Paul Smith's fingernail scrapings which probably came from Rosie-May.

vii) Paul Smith washed his jeans after the party and before they were seized by the police.

viii) Paul Smith suffered from Asperger's Syndrome, as a result of which he had had behavioural problems. There were said to be two previous occasions when he had attacked teenage girls, namely CA and his cousin, ChS. Paul Smith admitted the first incident but disputed the second incident.

13. We should say a little more about those two previous incidents. The incident which Paul Smith admitted occurred on 5th June 2002. A family friend CA (aged 16) went round to Paul Smith's address and saw him. He proceeded to point an air rifle at her and told her to lie on the floor. When she did not comply, he pushed her onto the bed and tied her wrists together. He then tied up her feet with duct tape, wrapped tape around her head and mouth and threw her into the boot of his father's car. He drove off but later stopped. He let her out of the car, said he was sorry and drove off.

14. The incident which Paul Smith denied was said to have occurred at his sixteenth birthday party on 8th January 2002. ChS says that she was a guest at that party and she was watching television with Paul in his bedroom. Suddenly he pushed her face down onto the bed. He held her there with both hands on her shoulders. ChS says that Paul tied her hands behind her back with soft rope-type material and blindfolded her. He said "where's your money?". The incident lasted about ten minutes. He prodded her with a metal object. ChS was frightened and never wanted to be alone with her cousin Paul again.

15. The police arrested Paul Smith on 29th December 2003. In interview he denied having been involved in any way in Rosie-May's death. In due course the police charged Paul Smith with the murder of Rosie-May Storrie.

16. Criminal proceedings then followed.

Part 3. The criminal proceedings

17. The defendant stood trial at Leicester Crown Court in October 2004 before Mr Justice Astill and a jury. The indictment contained two counts, namely count one murder and count two manslaughter. Those two counts were in the alternative. Mr Paul Mann QC appeared for the prosecution leading Miss Dawn Pritchard. Mrs Frances Oldham QC appeared for the defence, leading Mr Alwyn Jones.

18. The prosecution called evidence from numerous witnesses concerning the matters referred to in Part 2 above, with one exception. The judge did not allow the prosecution to prove or rely upon the incident concerning CA.

19. In relation to causation of death, the prosecution called a pathologist, Professor Rutty. The professor expressed the view that Rosie-May's death was caused by positional asphyxia. In other words someone had held her face down on the pillow, so that she could not breathe. Marks on her body indicated that she had struggled until she had lost consciousness.

20. The defendant gave evidence, maintaining his denial that he had killed Rosie-May or that he had had any involvement in her death. He denied going upstairs, except when he went to the lavatory or went up to check on his brother NS. He denied saying that he was feeling sexual. If Rosie-May's DNA was in his finger nail scrapings, he said that this may be because he ruffled her hair in greeting or because of transfer from his mother.

21. Various members of the Smith family gave evidence for both the prosecution and the defence.

22. Neither party called expert evidence concerning the defendant's Asperger's Syndrome, although there were a number of references to it during the trial. Both prosecution and defence made reference to the defendant's condition. Mrs Oldham relied upon the defendant's condition in

order to explain his somewhat unusual manner in the witness box and his flat, unemotional way of talking. Indeed the judge directed the jury that by reason of the defendant's condition the jury should not hold against him his manner of presentation.

23. Mr Mann, when cross-examining the defendant's father, referred to the defendant's condition and suggested that he was more prone to lose his self-control than others. The defendant's father Mr Nigel Smith admitted that he had in the past written a letter concerning his son's condition in which he used the following sentence: "it used to be a question of lighting the blue touchpaper and standing back".

24. The trial lasted for over two weeks and the evidence was extensive. For the purposes of the present application we do not need to embark upon a full summary of the evidence. In due course the jury returned a verdict of guilty on count one, murder. The judge sentenced the defendant to custody for life. He specified the minimum term at 14 years less the period of 284 days which the defendant had spent in custody on remand.

25. The defendant was aggrieved by his conviction. Accordingly he applied for leave to appeal to the Court of Appeal.

Part 4. The applications for leave to appeal to the Court of Appeal,

26. The proceedings in the Court of Appeal have followed a long and tortuous path. In the first instance the applicant applied for leave to appeal against conviction on one ground only. This was that the judge had wrongly failed to give the first limb of the good character direction.

27. On 14th February 2005 Mr Justice Royce refused the application for leave to appeal. He noted that the applicant had been convicted of dangerous driving. This dangerous driving had occurred immediately after the applicant's assault on CA. In Royce J's view it was not possible to separate the dangerous driving from the applicant's admitted abduction and assault upon CA. Accordingly the applicant was not entitled to any part of the good character direction.

28. At this point the applicant and his solicitor, Mr David Watts, decided to consult new counsel. Mr Watts sent instructions to Mr Jeremy Lindsay to advise on the prospects of a renewed application for leave to appeal.

29. On 22nd February 2006 Mr Lindsay delivered his written opinion. This was to the effect that Mrs Oldham's conduct of the applicant's defence had been deficient. He advised that the applicant should renew his application for leave to appeal on four grounds. These were as follows:

i) The applicant's counsel at trial had omitted to deploy vital evidence concerning the applicant's Asperger's Syndrome. This would have explained the way he behaved generally, in particular during his interviews with the police and at trial.

ii) The applicant's counsel had failed to utilise the expert evidence available from Doctor Cary, the pathologist instructed by the defence, to demonstrate (a) that the force needed to cause Rosie-May's death could have come from an 11 year old child and (b) that the death could have resulted from play going wrong.

iii) The applicant's counsel at trial failed to identify JS as a suspected perpetrator of the killing.

iv) The judge mis-directed himself by refusing to give at least the credibility part of the good character direction.

30. In accordance with counsel's advice Mr Watts on 28th February 2006 notified the Court of Appeal that the applicant wished to renew his application for leave to appeal against conviction on the grounds settled by Mr Lindsay. On 7th March 2006 the applicant signed a waiver of privilege, so that Mrs Oldham could provide comments on the criticisms of her conduct of the case.

31. Mrs Oldham provided her comments in a note dated 1st May 2006, to which we shall refer as "Mrs Oldham's note". In that note Mrs Oldham summarised the expert evidence about the applicant's Asperger's Syndrome. She explained that if she had deployed this expert evidence, it would have

been damaging. Also the prosecution would have made a fresh application to put in evidence about the applicant's abduction of and assault upon CA.

32. Mrs Oldham accepted in her note that the defence had obtained a report from their own pathologist, Dr Cary. Dr Cary thought that the mechanism of death was strangulation with a soft ligature, rather than smothering. Mrs Oldham did not adduce this evidence because she did not think it would advance the applicant's case.

33. Mrs Oldham said that she did not suggest in cross-examination or otherwise that JS was the killer. She did not have a proper basis to make this suggestion. She added that almost anyone in the house would have had the opportunity to kill Rosie-May.

34. Once Mrs Oldham's comments had been received, the Criminal Appeals Office made arrangements for the oral hearing of the applicant's renewed application. On 5th June 2006 the Criminal Appeal Office prepared a summary for the assistance of the court. A hearing date of 25th July 2006 was fixed.

35. In the meantime Mr Watts, very sensibly, was obtaining the advice of leading counsel. He sent instructions to Mr Douglas Hogg QC.

36. Mr Hogg read the transcript of the trial and the extensive documentation which had accumulated both before and since the trial. He came to the conclusion that the proposed appeal could not succeed. Mr Hogg set out his reasons for reaching that conclusion in a very full opinion dated 28th June 2006.

37. Mr Hogg agreed with Mrs Oldham's view that it would have been damaging to the applicant's case if counsel had deployed expert evidence concerning the applicant's Asperger's Syndrome. Mr Hogg considered that there was no proper basis for suggesting that JS was the killer. Indeed it would have been counter-productive to make such a suggestion. Mr Hogg did not think that any useful purpose would have been served by calling Dr Cary to give evidence about the mechanism of death.

38. This advice came as a great disappointment to the applicant and his family. Mr Hogg held a conference with the family to explain his views. Mr Watts subsequently visited the applicant in prison to discuss the matter.

39. In the light of leading counsel's advice the applicant decided to abandon his appeal. On 18th July 2006 the applicant signed a notice of abandonment.

40. On 30th November 2006 Mr Watts wrote to the CCRC asking them to review the case. The CCRC considered the matter for some time. In March 2009 the CCRC issued a provisional report, stating that they did not intend to refer the case back to the Court of Appeal. Mr Watts considered this provisional report together with the applicant's family. They decided to take the matter no further.

41. The next development came in late 2010. Reporters at the BBC were making a programme about the case and believed that they had uncovered new evidence. The new evidence was a report from Dr Cary expressing in somewhat stronger terms than before his belief that Rosie-May's death had been caused by strangulation with a soft ligature rather than smothering. He accepted that the immediate cause of death was asphyxia, but he believed that it had been caused by the strangulation method. A BBC reporter contacted the applicant's family. The reporter subsequently spoke to Mr Watts. The BBC programme was broadcast on 30th January 2011.

42. After considering matters further the applicant and his family decided that they wished to resurrect the application to the Court of Appeal. Mr Watts set about obtaining further expert evidence.

43. On 30th December 2011 Dr Cary provided a further report concerning the mechanism of Rosie-May's death. As before, he believed that death was caused by strangulation rather than smothering. As a result of advances in medical knowledge he now held that view more strongly than previously.

44. In relation to Asperger's Syndrome, Mr Watts approached a consultant psychiatrist, Dr Helen Pearce. Dr Pearce had not previously been involved in the case. She read the relevant material. She interviewed the applicant at Parkhurst Prison. She also met the applicant's parents and interviewed them. She produced her report on 28th May 2012.

45. Dr Pearce stated that the applicant suffered from Asperger's Syndrome and that this had impacted on him throughout his life. In relation to the applicant's attack on CA, Dr Pearce said this:

> "In my opinion the incident with CA was characterised by an intense emotional response to a situation that occurred.
>
> Paul was described as acting 'out of character', and the event was dominated by poor emotional regulation. As stated above this is a feature for some people with Asperger Syndrome and such emotional difficulties had occurred previously for Paul."

46. Dr Pearce recorded that the applicant denied having killed Rosie-May. She then added this comment:

> "In my opinion, if the prosecution version of events turned out to be correct, this situation is most likely to have occurred secondarily to intense emotional dysregulation as a result of poor emotional control as part of the Asperger Syndrome.
>
> In my opinion this would amount to diminished responsibility."

47. Mr Watts instructed new counsel to advise, namely Mr Nigel Lithman QC and Ms Valerie Charbit. These counsel advised that Mr Hogg's approach was wrong and his advice was incorrect. Contrary to Mr Hogg's opinion the applicant had good prospects of successfully appealing against conviction on no less than five separate grounds. These were as follows:

i) New and stronger evidence had been obtained from the pathologist Dr Cary. The failure to call Dr Cary to give evidence at trial meant that the jury did not have an alternative cause of death properly laid before them. Dr Cary's evidence would have enabled the jury to consider the possibility of accident; alternatively, it would have provided stronger grounds for contending that the death of Rosie-May was manslaughter.

ii) New evidence was available in relation to the applicant's Asperger's Syndrome in the form of a report from Dr Pearce. If this evidence were put before the court it would enable the jury to consider the defence of manslaughter by reason of diminished responsibility.

iii) The evidence relating to the attack on ChS should not have been admitted before the jury. If Dr Cary's expert evidence had been adduced at trial there would have been stronger grounds for resisting the admission of that evidence.

iv) The DNA evidence relied upon by the prosecution at trial was potentially inadmissible. This was because the evidence involved low copy numbering. Accordingly it should not have been relied upon.

v) Defence counsel were remiss in failing to put in cross-examination to anyone, in particular JS, that he was the killer of Rosie-May.

New counsel also expressed the view that the applicant had grounds for appealing against sentence.

48. Having received this advice, the applicant made three separate applications to the Court of Appeal with the assistance of his solicitors:

i) An application to treat as a nullity the previous abandonment of his appeal against conviction.

ii) A renewed application for leave to appeal out of time against conviction, following the refusal of such leave on the papers by Royce J on 14th February 2005. The five proposed grounds of appeals were as we have summarised.

iii) An application for leave to appeal against sentence out of time, no such application having previously been made.

49. In view of the criticisms made against his former counsel, the applicant signed another waiver of privilege. The Registrar of Criminal Appeals then invited Mr Douglas Hogg QC and Mrs Frances Oldham QC for their observations on the criticisms of their conduct made by the applicant's new counsel. Both Mr Hogg and Mrs Oldham responded, robustly rejecting these

criticisms. Mr Hogg adhered to the view that the appeal had no prospect of success. Mrs Oldham maintained that it would not have been advantageous or proper to conduct the applicant's defence in the manner now suggested.

50. In support of the applications Mr Watts made and filed two affidavits. In the first affidavit he set out the entire history of the litigation. In the second affidavit Mr Watts said that, when conveying Mr Hogg's advice to the applicant, he did not state that any abandonment of the appeal would be final, unless it was treated as a nullity. Significantly, Mr Watts does not say that he ever advised the applicant that a notice of abandonment was something which might be capable of being withdrawn.

51. Having set out these matters by way of background, we must now turn to the application to treat the previous notice of abandonment as a nullity.

Part 5. The application to treat the previous notice of abandonment as a nullity

52. We must first review the relevant legal principles. In R v Medway [1976] QB 779 M was convicted of arson and made the subject of a hospital order under sections 60 and 65 of the Mental Health Act 1959, without restriction of time. M applied for leave to appeal against sentence, but subsequently abandoned that application on the advice of his solicitors.

53. M subsequently consulted different solicitors, who advised that an appeal should be pursued. This was because the Court of Appeal had power to substitute a different sentence if appropriate material became available. M applied to withdraw his previous notice of abandonment of the appeal. The Court of Appeal comprising Lord Widgery CJ, Stevenson LJ, O'Connor, Lawson and Jupp JJ dismissed that application.

54. The court in its judgment reviewed a long line of authorities and concluded that a notice of abandonment could only be withdrawn if it was treated as a nullity. The court then formulated the principle as follows at 798 G-H:

> "In our judgment the kernel of what has been described as the '"nullity test" is that the court is satisfied that the abandonment

> was not the result of a deliberate and informed decision; in other words, that the mind of the applicant did not go with his act of abandonment. In the nature of things it is impossible to forsee when and how such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its exercise."

55. In three more recent cases the Court of Appeal has applied this principle in cases of defective legal advice. In R v Offield [2002] EWCA Crim 1630 O was convicted of conspiracy to defraud and sentenced to four years imprisonment. He applied for leave to appeal against conviction and renewed that application after refusal by the single judge. Subsequently O abandoned his application, having been warned that he was likely to lose time if the application was refused. That advice was incorrect, since the Court of Appeal rarely ordered loss of time unless an application was clearly unmerited. O's co-accused pressed on and succeeded in his appeal against conviction. O then applied for an order that his notice of abandonment be treated as a nullity. The Court of Appeal allowed that application because O had received inaccurate legal advice as to the risk of losing time. The Court of Appeal held that this was probably a case where O's mind did not go with the abandonment of the appeal.

56. In R v Elrayess [2007] EWCA Crim 2252 counsel warned E that if his appeal succeeded the Court of Appeal could direct a re-trial which might lead to a more severe sentence than originally imposed. Daunted by this risk, he abandoned his application for leave to appeal. This advice was wrong. When E was told of the error, he immediately applied to withdraw his notice of abandonment. The Court of Appeal held that abandonment of an appeal on the basis of mistaken legal advice may or may not be a nullity. It all depended on the circumstances. In the instant case E's mind did not go with his act of abandonment. Therefore the notice of abandonment would be treated as a nullity.

57. In R v RL [2013] EWCA Crim 1913 L obtained leave to appeal against sentence from the full court. Despite that success L's solicitors advised him in strong terms to abandon his appeal because of the risk that he would lose time. That advice was clearly incorrect. Having obtained leave to appeal, L was not at risk of losing time. L subsequently applied to the Court of Appeal to treat his notice of abandonment as a nullity. The Court of Appeal acceded to that application. The court held at paragraph 12 that a deliberate decision to abandon an appeal, taken as a result of advice founded on a wrong view of the law, is capable of vitiating the effectiveness of the notice to abandon if the appellant's mind did not truly go with the abandonment.

58. From this review of the law we derive four propositions which are relevant to the present case:

i) A notice of abandonment of appeal is irrevocable, unless the Court of Appeal treats that notice as a nullity.

ii) A notice of abandonment is a nullity if the applicant's mind does not go with the notice which he signs.

iii) If the applicant abandons his appeal after and because of receiving incorrect legal advice, then his mind may not go with the notice which he signs. Whether this is the case will depend upon the circumstances.

iv) Incorrect legal advice for this purpose means advice which is positively wrong. It does not mean the expression of opinion on a difficult point, with which some may agree and others may disagree.

59. If these rules are thought to be too restrictive, then the remedy may lie in the hands of the Criminal Procedure Rule Committee. As presently drafted, rule 65.13 of the Criminal Procedure Rules sets out the procedure for applying to reinstate an application or appeal after abandonment. The rule does not purport to expand the grounds upon which such an application might succeed.

60. We turn now to the application in the present case. Mr Nigel Lithman QC on behalf of the applicant, very sensibly, did not pursue all of the grounds

originally formulated. Instead he submitted that the legal advice given by Mr Hogg was incorrect in three respects, which may be summarised as follows:

i) Contrary to the advice of Mr Hogg, Dr Cary's expert evidence would have assisted the applicant if it had been adduced at trial. Dr Cary's updated expert evidence would assist the applicant's proposed appeal.

ii) If Dr Cary's expert evidence had been adduced, the ChS incident would probably have been excluded. Alternatively, it would have been put into context. Mr Hogg failed to advise to this effect.

iii) Contrary to Mr Hogg's advice, expert evidence about Asperger's Syndrome should have been adduced at trial. This would have assisted the defence. Furthermore such evidence would assist the applicant's proposed appeal.

61. We shall deal with these three issues separately.

(i) Dr Cary's evidence

62. Dr Cary was the pathologist instructed by the defence. He carried out his own separate post mortem examination. He agreed with Professor Rutty that death was caused by asphyxiation. In his view, however, the mechanism which led to asphyxiation was strangulation with a soft ligature, rather than smothering. If that is right, the ligature must have been the catsuit which Rosie-May was wearing. No other ligature has ever been suggested. Mrs Oldham decided not to call this evidence at trial.

63. Mr Lindsay argued that this evidence should have gone before the jury because an eleven year old child would have had sufficient strength to carry out strangulation. Dr Cary's evidence could have thus supported a suggestion that JS was the killer. Mr Lithman very wisely did not actively pursue that argument, leaving it merely as an observation in writing. There was no proper basis, with or without Dr Cary's evidence, for alleging that JS killed Rosie-May.

64. Mr Lithman submits that Dr Cary's evidence should have gone before the jury for two separate reasons. First, it raised the possibility that Rosie-May's death was the result of a children's game that went wrong. In other

words, her death may have been an accident, not a crime. Secondly, Dr Cary's evidence would have supported the proposition that the killing was manslaughter rather than murder, because the perpetrator did not intend to cause grievous bodily harm.

65. At trial Mrs Oldham did not suggest that the killing was an accident. She did, however, contend that this was a case of manslaughter rather than murder because of lack of intent.

66. In our view, the decision which confronted Mrs Oldham at trial was a delicate one. She undoubtedly could have called Dr Cary as a witness. On the other hand the marks on Rosie-May's body indicated that she put up a considerable struggle during the period before she lost consciousness. As Mr Paul Mann QC observed in his submissions to this court, she was fighting for her life when she sustained those injuries.

67. As recorded in Mrs Oldham's note, she did not think that calling Dr Cary as a witness or putting his views in cross-examination to Professor Rutty would advance the applicant's case. We agree. It was unrealistic to expect that any jury would regard the killing of Rosie-May as possibly being an accident which occurred during the course of play. Likewise we do not see how Dr Cary's evidence would have assisted Mrs Oldham in persuading the jury that (if the applicant was the killer), he did not intend to cause grievous bodily harm.

68. Mrs Oldham had firm instructions that her client was not the killer. On the basis on those instructions, it must have been someone else who entered the bedroom and asphyxiated Rosie-May. There were about sixty people in the house, any one of whom could (if they wished) have slipped upstairs and committed this terrible act. If Mrs Oldham had started cross-examining and calling expert evidence about the precise mechanism of asphyxiation, that could only have undermined her primary case. It would have made an unfavourable impression upon the jury, all to no useful purpose.

69. Mr Hogg dealt with this point on page 17 of his advice. He wrote:

> “There is also the technical point that the evidence of Dr Cary was available prior to the hearing and it was the considered decision of Mrs Oldham not to deploy it. In my view she was right to come to that conclusion.”

70. We agree with those comments. We reject Mr Lithman’s submission that that paragraph constituted incorrect legal advice.

(ii) ChS’s evidence

71. This issue is interlinked with the previous issue. Mr Lithman submits that if Dr Cary’s evidence had been adduced, the evidence of ChS would have been excluded.

72. We do not agree. In our view, the precise method of asphyxiation would not have affected the judge’s decision on the admissibility of ChS’s evidence. The applicant attacked ChS (aged 11) when they were alone together in a bedroom, while a party was taking place in the house. He overpowered her and held her face down on the bed. This is precisely what the killer of Rosie-May did, regardless of whether he then proceeded by way of strangulation or smothering. The similarities between the attack on ChS and the attack on Rosie-May are striking.

73. In the alternative, Mr Lithman submits that Dr Cary’s evidence would have helpfully put the ChS incident into context. We do not agree. ChS’s evidence would have been just as damaging to the defence case, whatever the precise method of Rosie-May’s asphyxiation.

74. We therefore conclude that Mr Hogg’s omission to give the proposed advice concerning ChS was not an error. Mr Hogg was entirely correct not to give the advice which Mr Lithman has formulated.

(iii) Asperger’s Syndrome

75. Before the trial commenced Mr Watts very sensibly obtained expert reports about Asperger’s Syndrome in general and the applicant’s specific condition. These reports were prepared by Dr Nazir, a consultant child and adolescent psychiatrist, Professor Bailey, a professor of child and adolescent forensic medicine, and Dr Brugha, professor of psychiatry and consultant

psychiatrist. Mrs Oldham studied the reports and decided not to rely upon them at trial. She explains the reasons in her note.

76. In essence, Mrs Oldham concluded that expert evidence about the applicant's Asperger's Syndrome would be likely to damage rather than assist the applicant's case. She therefore decided to make brief reference to the applicant's condition in order to explain his unusual presentation in the witness box, but not to delve further into that aspect.

77. We agree with that assessment. The expert reports available to Mrs Oldham referred to the applicant's history of aggression and his social impairment. They reveal that the applicant had a polarised view towards women. He regarded some as perfect and others as beneath contempt. He would engage in acts without appreciating their broader consequences.

78. Mrs Oldham feared that if she called psychiatric evidence concerning the applicant's Asperger's Syndrome, this was likely to let in the evidence concerning the applicant's attack on CA. Unsurprisingly the experts regarded this as a significant episode which indicated the nature of the applicant's condition.

79. Mr Hogg agreed with Mrs Oldham's assessment. He reviewed at some length the medical reports which were available before the trial. He concluded that this evidence, if adduced, would have been highly damaging to the applicant's primary defence. First, this would make it seem more likely that the applicant was the person who killed Rosie-May. Secondly, it might have let in evidence concerning the applicant's attack on CA.

80. We agree with the views which both Mr Hogg and Mrs Oldham have expressed on this issue.

81. We turn now to the recent expert evidence which Mr Watts has obtained on the applicant's condition. This is the report of Dr Helen Pearce, parts of which we have quoted in paragraphs 45 and 46 above.

82. If that evidence had gone before the jury at the original trial or if that evidence were to go before the jury at a re-trial, it would be devastating. In

the face of that evidence, we do not see how any jury could fail to conclude that the applicant was the killer.

83. We put these points to Mr Lithman in the course of argument. He accepted that psychiatric evidence would make the applicant's main defence, viz that he did not kill Rosie-May, more difficult to sustain. On the other hand he submitted that such evidence would lay the foundation for a defence of diminished responsibility.

84. These submissions take us to the heart of the present case. In truth the applicant faced a stark choice between two alternative and inconsistent courses. They were:

i) Admit that he killed Rosie-May and put forward the defence of diminished responsibility with the support of psychiatric evidence.

ii) Maintain his denial that he was the killer and then press on without calling psychiatric evidence.

85. In the circumstances of this case it was, and indeed still is, not practicable for the applicant to ride both horses at the same time. Suppose that this appeal succeeds and the Court of Appeal orders a re-trial. The applicant's primary defence at the re-trial would be that he was not the killer. He is still today adamant in that denial. Given those instructions, we do not see how the applicant's counsel at a re-trial could adduce Dr Pearce's evidence concerning the applicant's condition. If counsel were to do so, they would be undermining the very defence which they were instructed to put forward.

86. Let us now draw the threads together. For the reasons set out above we conclude that Mr Hogg's advice was correct on the Asperger's Syndrome issue. Indeed it was correct on all the issues which Mr Lithman has identified. We reject the submission that when the applicant abandoned his appeal on the basis of Mr Hogg's advice, he was relying upon incorrect legal advice.

87. We also reject the contention (advanced in writing but only touched upon briefly at the hearing) that the applicant was in some way misled about

the effect of abandonment. It appears from the evidence that no-one ever suggested to the applicant that it might be possible to withdraw his notice of abandonment.

88. There is a further point which is significant. Mr Hogg's advice dated 28th June 2006 set out his opinion on a set of difficult issues. That was a perfectly reasonable opinion to hold, even if some lawyers may disagree. Seemingly Mr Lindsay takes, or at least once took, a different view. Mr Hogg's opinion cannot be characterised as "wrong advice" for the purpose of the Medway test, even if some lawyers take a different or more optimistic view.

89. We therefore conclude that the applicant's application to treat his notice of abandonment as a nullity must fail.

90. This application is illustrative of a growing and unwelcome tendency of convicted defendants to dismiss their original counsel and then to bring in new counsel to criticise their predecessors. In the present case the applicant criticises two sets of previous counsel. This strategy by appellants is an attempt to circumvent the restriction on calling fresh evidence contained in section 23 (2) (d) of the Criminal Appeal Act 1968. If a defendant has two alternative and inconsistent defences available, this strategy enables him to get the best of both worlds. He tries one defence before the jury. If that fails, he tries the alternative defence before the Court of Appeal and possibly before a new jury at his re-trial. We deplore this strategy. Members of the Bar should not lend their support to this strategy unless there really is a proper basis for impugning the conduct of previous counsel. In this case there is none.

91. Criminal litigation is a process in which the defendant is required to make a series of irrevocable (or usually irrevocable) decisions: for example, whether to plead guilty, whether to give evidence and so forth. If things go badly for the defendant, he cannot simply go back to square one and try a different tack. Criminal litigation is not a tactical exercise. It is a serious process conducted to promote the overriding objective set out in rule 1.1 of the Criminal Procedure Rules. This includes, first and foremost, acquitting the innocent and convicting the guilty.

92. A further element of the overriding objective is dealing with cases efficiently and expeditiously. The need for finality in litigation is a basic principle, which applies in all areas including criminal justice. In the criminal context the principle of finality has less drastic consequences because there exists a safety net outside the courts. That safety net is the CCRC. If (absent a reference from the CCRC) criminal proceedings drag on interminably, many people suffer. These include the victim's family, the victim (if alive) and others involved in the case. The present application is a good example. It is now nine years since the applicant's conviction. Successive counsel have been engaged, dismissed and criticised. The ordeal for the deceased's family continues, as we can see from the updated victim impact statement.

93. In our view the applicant's proceedings in the Court of Appeal have now come to an end. He has abandoned his application for leave to appeal against conviction. That abandonment is irrevocable. We reject his application to treat the notice of abandonment as a nullity.

Part 6. The application for leave to appeal against sentence

94. Until very recently the applicant has not applied for leave to appeal against his sentence. Accordingly this application is not part of the appellate proceedings which the applicant abandoned by his notice dated 18th July 2006.

95. The applicant now applies for leave to appeal against sentence. He contends that a minimum term imposed was manifestly excessive. The applicant also applies for an extension of time of seven years, eight months and one week in which to make this application.

96. We would summarise the grounds of this application as follows:

i) The applicant committed the murder as a result of his medical condition. Therefore his culpability is reduced.

ii) The applicant's crime was not pre-meditated. It was the result of a sudden outburst or impulse.

iii) The judge referred to sexual motivation when passing sentence. The judge should not have done so, because Mr Mann had not suggested any sexual motive in his cross-examination of the applicant.

iv) The applicant is behaving well in prison. The sooner he is released from prison, the sooner he can receive appropriate psychiatric treatment.

97. We shall deal with these matters in turn. The first two submissions are linked. They are both based upon the applicant's psychiatric condition. The judge expressly took that matter into account as a mitigating factor, as set out on the second page of his sentencing remarks. Furthermore the applicant's comments earlier in the evening suggest he was pre-meditating some form of sexual assault.

98. As to Mr Lithman's third argument, the judge had good reason to refer to the applicant's sexual motivation. This was a natural inference from the fact that Rosie-May's clothes had been removed to expose her buttocks. Also there was evidence that shortly before the applicant committed the murder, he said that he was feeling sexual.

99. As to Mr Lithman's fourth argument, we are pleased to hear that the applicant is behaving well in prison. However, that good behaviour has not been a continuous feature. The applicant was recently convicted of causing grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. The applicant achieved this by pouring boiling water over a fellow prisoner. The fact that the applicant may need medical or psychiatric treatment is not a good reason for reducing the minimum term.

100. In our view there is no proper basis for criticising the minimum term specified. The judge took as his starting point twelve years. This was in accordance with schedule 21 to the 2003 Act. Indeed if the applicant had been just eleven days older, the starting point would have been thirty years. So he can count himself extremely fortunate.

101. The judge then weighed up the aggravating and mitigating factors. He correctly treated the motivation to commit a sexual assault as an aggravating feature. He noted that the applicant planned the attack during the evening, because when he was downstairs he said that he was feeling

sexual. The judge also treated the applicant's propensity to attack young girls (CA and ChS) as an aggravating feature.

102. We can detect no error in the manner in which the judge assessed the minimum term. It may be for this reason that for over seven years none of the applicant's legal advisors has thought it worthwhile to challenge the applicant's sentence.

103. In our view the proposed appeal against sentence has no prospect of success. Accordingly we refuse the applicant's application for an extension of time in which to make the application.