R. *v.* Sullivan, [1991] 1 S.C.R. 489

Mary C. Sullivan and Gloria J. Lemay *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Women's Legal Education and Action Fund and R.E.A.L. Women of Canada *Interveners*

and between

Her Majesty The Queen *Appellant*

v.

Mary C. Sullivan and Gloria J. Lemay *Respondents*

and

Women's Legal Education and Action Fund and R.E.A.L. Women of Canada *Interveners*

Indexed as: R. *v.* Sullivan

File Nos.: 21080, 21494.

1990: October 30; 1991: March 21.

Present: Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, and Stevenson JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Criminal negligence causing death and criminal negligence causing bodily harm -- Child dying in birth canal during delivery by midwives -- Conviction on charge of criminal negligence causing death but acquittal on charge of criminal negligence causing bodily harm -- Acquittal not appealed by Crown -- Conviction on charge of criminal negligence causing death appealed -- Court of Appeal substituting conviction on charge of criminal negligence causing bodily harm -- Whether Court of Appeal had jurisdiction to substitute conviction -- Criminal Code, R.S.C. 1970, c. C-34, ss. 2, 198, 202, 203, 204, 206, 613.

Courts -- Appeal -- Jurisdiction -- Child dying in birth canal during delivery by midwives -- Conviction on charge of criminal negligence causing death but acquittal on charge of criminal negligence causing bodily harm -- Acquittal not appealed by Crown -- Conviction on charge of criminal negligence causing death appealed -- Court of Appeal substituting conviction on charge of criminal negligence causing bodily harm -- Whether Court of Appeal had jurisdiction to substitute conviction.

Sullivan and Lemay, midwives with some experience in home births but with no formal medical training, were charged under ss. 203 and 204 (now ss. 220 and 221) of the *Criminal Code*, after a child they were attempting to deliver died while still in the birth canal. At trial, they were convicted of criminal negligence causing death of the child (s. 203) (count 1) but were acquitted of criminal negligence causing bodily harm to the mother (s. 204) (count 2). Sullivan and Lemay appealed their conviction on count 1; the Crown did not appeal their acquittal on count 2. The Court of Appeal allowed the appeal from the conviction but substituted a conviction on the count of criminal negligence causing bodily harm, notwithstanding the absence of a crown appeal. Sullivan and Lemay appealed the substituted conviction to this Court, and the Crown appealed the decision of the Court of Appeal to overturn the initial conviction on count 1.

At issue, in *R. v. Sullivan and Lemay*, was whether a living child partially born is a person within the meaning of s. 203 of the *Criminal Code*, and if so, whether an appropriate standard for determining liability is an objective standard. At issue in *Sullivan and Lemay v. The Queen* was whether s. 613(2) and (8) gave the Court of Appeal jurisdiction to substitute a conviction of criminal negligence causing bodily harm in the absence of a Crown appeal on that count and whether the Court of Appeal erred in holding the foetus to be a part of the mother, such that a conviction for criminal negligence causing bodily harm could obtain on the death of the foetus.

Held in *Sullivan and Lemay v. The Queen* (L'Heureux-Dubé J. dissenting): The appeal from the Court of Appeal's judgment substituting a conviction of criminal negligence causing bodily harm should be allowed.

Held in *R. v. Sullivan and Lemay*: The appeal from the Court of Appeal's judgment acquitting Sullivan and Lemay of criminal negligence causing death should be dismissed.

Per Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.: From the wording of s. 206, a foetus is not a "human being" for the purposes of the *Code*. The introduction of the criminal negligence provisions in 1954 was not intended to change the meaning of "person" and that term, as used in s. 203 of the *Code*, is synonymous with the term "human being".

A court of appeal has no jurisdiction to disturb a verdict of acquittal unless there has been an appeal by the Crown from that acquittal. An exception occurs, however, where the *Kienapple* rule is applicable. The *Kienapple* rule has no application here. First, there is an insufficient legal nexus between the two offences; count 1 requires proof of the death of the foetus while count 2 requires proof of bodily harm to the mother. The two charges, while they may involve the same general conduct, involve two separate consequences. Second, the acquittal entered by the trial judge on the charge of criminal negligence causing bodily harm was an acquittal on the merits and was not entered pursuant to a finding of guilt on the first count. Sullivan and Lemay could have been convicted on both

counts. Even if no independent bodily harm was found to have occurred, it would still not be impossible for Sullivan and Lemay to have been convicted on both counts. The Court of Appeal had no jurisdiction under s. 613 to substitute a conviction of criminal negligence causing bodily harm.

No compelling policy reasons were put forward for granting a further exception which would extend the Court of Appeal's jurisdiction to substitute a conviction for an acquittal in the absence of a Crown appeal.

Per L'Heureux-Dubé J. (dissenting in *Sullivan and Lemay v. The Queen*): The Crown's appeal from the acquittal entered by the Court of Appeal should be dismissed as proposed by Lamer C.J. The appeal by Sullivan and Lemay should also be dismissed since the Court of Appeal had jurisdiction to enter a conviction pursuant to s. 613(8) of the *Criminal Code*. The trial judge specifically considered the question of guilt on the second count of causing bodily harm by criminal negligence. She would have convicted if she had not concluded that the child was not part of the mother.

Cases Cited

By Lamer C.J.

Referred to: *R. v. Marsh* (1979), 31 C.R. (3d) 363; *Terlecki v. The Queen*, [1985] 2 S.C.R. 483; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Brooks v. Canada Safeway*

Ltd., [1989] 1 S.C.R. 1219; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *Rickard v. The Queen*, [1970] S.C.R. 1022; *Guillemette v. The Queen*, [1986] 1 S.C.R. 356; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Provo*, [1989] 2 S.C.R. 3.

By L'Heureux-Dubé J. (dissenting in *Sullivan and Lemay v. The Queen*)

Referred to: *R. v. Terlecki* (1983), 42 A.R. 87 (C.A.), aff'd [1985] 2 S.C.R. 483.

Statutes and Regulations Cited

An Act Respecting the Criminal Law, S.C. 1953-54, c. 51, s. 192.

Criminal Code, R.S.C. 1970, c. C-34, ss. 2, 198, 202, 203, 204, 206, 613 [am. S.C. 1985, c.19, s. 143].

Authors Cited

Canada. House of Commons. House of Commons Debates, 1st Sess., 22nd Parl., 1953-54, vol. III.

APPEAL from a judgment of the British Columbia Court of Appeal (1988), 31 B.C.L.R. (2d) 145, 43 C.C.C. (3d) 65, 65 C.R. (3d) 256, substituting a conviction for an acquittal by Godfrey L.J.S.C. (1986), 31 C.C.C. (3d) 62, 55 C.R. (3d) 48, on a count of criminal negligence causing bodily harm. Appeal allowed, L'Heureux-Dubé J. dissenting.

APPEAL from a judgment of the British Columbia Court of Appeal (1988), 31 B.C.L.R. (2d) 145, 43 C.C.C. (3d) 65, 65 C.R. (3d) 256, allowing an appeal from a conviction by Godfrey L.J.S.C. (1986), 31 C.C.C. (3d) 62, 55 C.R. (3d) 48, on a count of criminal negligence causing death. Appeal dismissed.

Thomas R. Berger and *Peter Leask, Q.C.*, for Mary C. Sullivan and Gloria J. Lemay.

E. R. A. Edwards, Q.C., and *Deborah K. Lovett*, for Her Majesty The Queen.

Lynn Smith, Mary Eberts and *Helena Orton*, for the intervener Women's Legal Education and Action Fund.

Angela M. Costigan, for the intervener R.E.A.L. Women of Canada.

//*Lamer C.J.*//

The judgment of Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. was delivered by

LAMER C.J. -- This case involves two midwives who were charged under ss. 203 and 204 (now ss. 220 and 221) of the *Criminal Code*, R.S.C. 1970, c. C-34 , after a baby they were attempting to deliver died while still in the birth canal. At trial, they were convicted of criminal negligence causing death to the

baby (s. 203) but were acquitted of criminal negligence causing bodily harm to the mother (s. 204). The Court of Appeal overturned the conviction under s. 203 and substituted a conviction under s. 204 (criminal negligence causing bodily harm).

This case raises the issue of whether a foetus in the birth canal is a "person" for the purposes of s. 203. It also raises a procedural question regarding the jurisdiction of a court of appeal under s. 613 (now s. 686) of the *Code*. The case initially raised other important issues regarding the legal status of a foetus and the *mens rea* required for criminal negligence but, due to the lack of appeal by the Crown, these issues need not all be addressed because of the procedural determination.

The Facts

Sullivan and Lemay were hired by Jewel Voth to provide private pre-natal classes and to act as midwives during a home birth. Although Sullivan and Lemay had some experience with home births and had done background reading, they had no formal medical qualifications.

After five hours of second stage labour, the child's head emerged and no further contractions occurred. Sullivan and Lemay attempted to stimulate further contractions but were unsuccessful. Direct pressure was applied to the uterus, causing soreness to the mother's stomach and back and some bruising. Approximately twenty minutes later, Emergency Services were called and the

mother was transported to the hospital. Within two minutes of arrival, an intern delivered the baby using what the trial judge characterized as "a basic delivery technique". The child showed no signs of life and resuscitation attempts were unsuccessful.

Sullivan and Lemay were jointly charged with one count of criminal negligence causing death to the child of Jewel Voth contrary to s. 203 of the *Criminal Code*, and a second count of criminal negligence causing bodily harm to Jewel Voth contrary to s. 204. They were tried in the County Court of Vancouver and were found guilty on the first charge and were acquitted on the second charge.

Sullivan and Lemay appealed the criminal negligence causing death conviction on count 1 to the British Columbia Court of Appeal. The Crown did not appeal the acquittal of Sullivan and Lemay on count 2. The Court of Appeal allowed the appeal from the conviction on the first count, but substituted a conviction on the count of criminal negligence causing bodily harm (notwithstanding the absence of a crown appeal). Sullivan and Lemay have appealed the substituted conviction on the second count to this Court, and the Crown has appealed the decision of the Court of Appeal to overturn the initial conviction on the first count.

Both the Women's Legal Education and Action Fund (L.E.A.F.) and R.E.A.L. Women of Canada have intervened in this case.

Relevant Statutory Provisions

Criminal Code, R.S.C. 1970, c. C-34, as amended

2. In this Act

...

"every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

198. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

202. (1) Every one is criminally negligent who

(*a*) in doing anything, or

(*b*) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

203. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

204. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years.

206. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

(*a*) it has breathed,

(*b*) it has an independent circulation, or

(*c*) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(*b*) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

...

(2) Where a court of appeal allows an appeal under paragraph (1)(*a*), it shall quash the conviction and

(*a*) direct a judgment or verdict of acquittal to be entered, or

(*b*) order a new trial.

> (3) Where a court of appeal dismisses an appeal under subparagraph (1)(*b*)(i), it may substitute the verdict that in its opinion should have been found and
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> (*a*) affirm the sentence passed by the trial court; or
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> (*b*) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
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> (4) Where an appeal is from an acquittal the court of appeal may
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> (*a*) dismiss the appeal; or
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> (*b*) allow the appeal, set aside the verdict and
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> (i) order a new trial, or
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> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
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> ...
>
> (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

Judgments Below

County Court of Vancouver (Godfrey L.J.S.C.) (1986), 31 C.C.C. (3d) 62

The trial judge first dealt with s. 198 of the *Code* (now s. 216) and held that the acts of a childbirth attendant are included in the phrase "any other lawful act that may endanger the life of another person" and that the accused were therefore under "a legal duty to have and to use reasonable knowledge, skill and care in so

doing". The Judge held that the applicable standard was that of a "competent childbirth attendant". In assessing whether Sullivan and Lemay failed to have and to use such reasonable skill and knowledge, Godfrey L.J.S.C. noted, at p. 68, that she was satisfied beyond a reasonable doubt that:

> First, had this child and mother been transported to hospital even as late as one o'clock, the child would have lived; secondly, had the accused possessed the skills of the intern at St. Paul's Hospital, the child would have lived.

Godfrey L.J.S.C. held that Sullivan's and Lemay's lack of knowledge, skill and care was in breach of the legal duty imposed by s. 198 and that this lack of knowledge and skill had caused the death of the child of Jewel Voth. The Judge then turned to the issue of whether Sullivan and Lemay had shown wanton or reckless disregard for the lives or safety of other persons within the meaning of s. 202 (now s. 219). She concluded that the *mens rea* of criminal negligence is determined by an objective standard and thus that "good intentions" on the part of the midwives were irrelevant. Consequently, Godfrey L.J.S.C. held that the actions and omissions of the appellants, in all the circumstances, showed a reckless disregard for the life and safety of the child.

Before finding the appellants guilty of criminal negligence causing death to the child, the Judge briefly considered whether the foetus is a person for the purposes of s. 203. She considered and adopted the reasoning of the County Court of Vancouver Island in *R. v. Marsh* (1979), 31 C.R. (3d) 363, to the effect that a full-term child in the process of being born is a person within the meaning of s. 203,

notwithstanding that it would not be a human being for the purpose of s. 206 (now s. 223).

With respect to the second count, Godfrey L.J.S.C. held that the bruising, etc., did not amount to bodily harm and therefore found the accused not guilty of criminal negligence causing bodily harm to the child of Jewel Voth. She also commented that had the baby been "part" of the mother, she would have found the appellants guilty on that count.

British Columbia Court of Appeal (Per Curiam) (1988), 31 B.C.L.R. (2d) 145

The court first dealt with the issue of whether the child was a person within the meaning of s. 203. After reviewing the law on this point in England, the United States, and Canada, the court stated that, at common law, the line of demarcation for a foetus to become a person was the requirement that it be completely extruded from its mother's body and be born alive. The court noted that the *Code* reflected this position in s. 206 in defining when a child becomes a human being. It stated that Parliament drew no distinction between a person and a human being prior to 1953 and that when Parliament legislated with respect to criminal negligence in 1953, it did not intend to insert such a distinction into the *Code*. Accordingly, the child was not a person within the meaning of s. 203 and Sullivan and Lemay could not be found guilty of criminal negligence causing death (to another person). The court noted, at p. 160, that

> If Parliament considers it appropriate to protect a child during the birth process from criminally negligent acts by those attending and assisting at the birth, that is a matter upon which Parliament can legislate.

Having reached this conclusion on the first count, the court did not find it necessary to consider the other grounds of appeal; thus the Court did not consider whether the trial judge was in error in finding *mens rea* based solely on an objective standard.

The Court of Appeal then considered the second count of criminal negligence causing bodily harm to Jewel Voth. It noted that the trial judge had indicated that she would have found the accused guilty on the second count in the event that she had reached the conclusion that the foetus was not a person, because she would then have found that the foetus was a part of its mother at the time of its death. The court indicated that its holding on the line of demarcation between a foetus and a person led it to the conclusion that a child in the birth canal is, as a matter of law, part of the mother. Thus, Sullivan and Lemay could be convicted of criminal negligence causing bodily harm to Jewel Voth via the harm done to the foetus. The court appeared to accept the Crown's submission that it had jurisdiction to allow the appeal pursuant to s. 613(2) (now 686(2)) and to thereby enter an acquittal on count 1, and also to enter a conviction on count 2 pursuant to s. 613(8) (now 686(8)). Referring to the reasons of Dickson C.J. in *Terlecki v. The Queen*, [1985] 2 S.C.R. 483, the court indicated that the normal procedure would be to remit the matter to the trial judge to consider whether to register a conviction on the second count. However, Godfrey L.J.S.C. had expressed her opinion on this point and it was

therefore unnecessary to do so. Therefore, the court entered a conviction on the second count.

Issues

Count 1 (R. v. Sullivan and Lemay)

1. Did the Court of Appeal err in concluding that a living child, partially born, is not a "person" within the meaning of s. 203 (now s. 220) of the *Criminal Code*?

If so,

2. Did the trial judge err in concluding that the appropriate standard for determining liability for criminal negligence under s. 203 (now s. 220) is an objective standard?

Count 2 (Sullivan and Lemay v. The Queen)

3. Did the Court of Appeal err in holding that s. 613(2) (now s. 686(2)) and s. 613(8) (now s. 686(8)) gave it the authority to substitute a conviction on count 2 in the absence of a Crown appeal on that count?

If not,

4. Did the Court of Appeal err in holding that as a matter of law the foetus is part of the mother, and that therefore the appellants could be convicted under s. 204 (now s. 221) based on the death of the foetus?

Analysis

The Meaning of "Person" in s. 203

Sullivan and Lemay have argued that the Crown's appeal on this issue should be dismissed, both on the grounds that it has been abandoned and that it cannot be supported on the merits. It is true that the Crown has not directly supported the contention that a foetus is a person within the meaning of s. 203. The Crown has appealed on this ground because it takes the position that a foetus must either be a part of its mother or a person; there can be no intermediate state. Thus, the Crown has appealed on this ground in order to avoid putting this Court in the position of finding a foetus to be a person under s. 203 and yet being forced to acquit the appellants because the first count is not before the Court. Counsel for the Crown did acknowledge that it had sought leave to appeal before the decision of this Court in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, and it directed no oral argument to the proposition that a foetus is a person.

Sullivan and Lemay contend that the Crown is only bringing this appeal as a convenience to the intervener, R.E.A.L. Women, which has argued that the foetus is a person within s. 203. They argue that the Crown has no right to bring an appeal on an issue which it does not, itself, support. In my view, it is unfair to say

that the Crown's appeal has been brought solely for the convenience of the intervener, R.E.A.L. Women. The Crown has brought the appeal because it takes the position that if the foetus is not a part of the mother, then it is a person. The Crown assumes that if this Court finds, in the main appeal, that the Court of Appeal erred in finding that a foetus in the birth canal is a part of the mother, the natural corollary will be that the foetus is a person. Whether or not this assumption is valid, the Crown's appeal on count 1 is consistent with its approach to the issues and it is clear that the Crown has not brought this appeal to aid the intervener R.E.A.L. Women. Admittedly R.E.A.L. Women's arguments depend on there being a crown appeal before us. Thus, I now turn to the merits of this appeal.

It is clear from the wording of s. 206 that a foetus is not a "human being" for the purposes of the *Code*. However, R.E.A.L. Women has argued that "person" and "human being" are not equivalent terms within the *Code*. The argument was made that "person" is broader than "human being" because "person" includes a foetus, while "human being" does not. I have not been persuaded by any of the textual arguments put forward to support this position.

The Court of Appeal has, in my view, reviewed and analyzed the law on this point in a very thorough manner. The terms "person" and "human being" were used interchangeably in the pre-1954 homicide provisions. The question then becomes, is there any reason to conclude that the 1953-54 *Criminal Code* revision gave new meaning to these terms? The Court of Appeal has concluded that the introduction of the criminal negligence provisions by Parliament in 1954 (*via An Act Respecting the Criminal Law*, S.C. 1953-54, c. 51, s. 192) was not intended to change

the long established meaning of the word "person". Indeed, the *House of Commons Debates* [p. 2423] indicate that when the criminal negligence provisions were considered in committee on February 25, 1954, the members did not address the fact that the sections employed the term "person" as opposed to "human being". Moreover, when the revised homicide provisions were considered in committee, the members did not address the fact that these provisions employed the term "human being" while the criminal negligence provisions employed the term "person". In fact, the revisions were agreed to rather quickly following a short discussion regarding the concept of criminal negligence.

Accordingly, I agree with the Court of Appeal that the introduction of the criminal negligence provisions by Parliament in 1954 was not intended to change the meaning of "person" and that the term, as used in s. 203 of the *Code*, is synonymous with the term "human being". Therefore, according to s. 206, the child of Jewel Voth was not a "person" within the meaning of s. 203 and Sullivan and Lemay cannot be convicted of criminal negligence causing death to another person.

The intervener L.E.A.F. encouraged this Court to find that a foetus is not a "person" within the meaning of s. 203 on the basis that such a result would be inconsistent with the goal of sexual equality in the law which has been recognized by this Court in both *Charter* and non-*Charter* cases: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *R. v. Lavallee*, [1990] 1 S.C.R. 852. Such an approach to statutory interpretation may have arisen if an examination of the legislative history of the criminal negligence provisions had revealed that Parliament had intended that the term "person" would

include a foetus, whereas "human being" would not. However, this was not the case. The result reached above is consistent with the "equality approach" taken by L.E.A.F.; but it is unnecessary to consider this point in further detail.

I would therefore dismiss the Crown's appeal from the acquittal entered by the Court of Appeal on count 1.

The Jurisdiction of the Court of Appeal under s. 613

Sullivan and Lemay have appealed from the substituted conviction on count 2 on the basis that the Court of Appeal had no jurisdiction to substitute a conviction on count 2 in the absence of a Crown appeal.

This Court has previously held that a court of appeal has no jurisdiction to disturb a verdict of acquittal unless there has been an appeal by the Crown from that acquittal: see *Rickard v. The Queen*, [1970] S.C.R. 1022; *Guillemette v. The Queen*, [1986] 1 S.C.R. 356. An exception to this general rule has, however, been established in cases where the *Kienapple* rule is applicable: see *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. When the *Kienapple* principles are operative, s. 613(8) provides supplementary powers to an appeal court such that the acquittal at trial can be considered in the absence of a Crown appeal. This is because the *Kienapple* rule arises in cases where the principle *nemo debet bis puniri pro uno delicto* (a person should not be punished twice for one offence) is applicable. In other words, in a *Kienapple* situation, there have been two findings of guilt but a conditional stay is

entered on one charge for policy reasons. As was stated by Justice Wilson in *R. v. Provo*, [1989] 2 S.C.R. 3, at p. 16:

> If the accused's appeal from the conviction arising from the same delict is eventually dismissed or the accused does not appeal within the specified times, then the conditional stay becomes a permanent stay and in accordance with this Court's judgment in *R v. Jewitt*, [1985] 2 S.C.R. 128, that stay becomes tantamount to a judgment or verdict of acquittal for the purpose of an appeal or a plea of *autrefois acquit*. If, on the other hand as is the case here, the accused's appeal from the conviction is successful, the conditional stay dissolves and the appellate courts, while allowing the appeal, can make an order remitting to the trial judge the count or counts which were conditionally stayed by reason of the application of the rule against multiple convictions notwithstanding that no appeal was taken from the conditionally stayed counts.

The exception to the general rule that a court of appeal has no jurisdiction to substitute a conviction for an acquittal which has not been appealed by the Crown, which arises in a *Kienapple* situation, is justified by the policy considerations which underlie the *Kienapple* rule. As was stated by Wilson J. in *Provo*, at p. 17:

> The accused who would be guilty of an offence except for the application of the rule against multiple convictions is not, in my view, deserving of an acquittal in the true sense that the state had not met its burden of proving the elements of the offence. ... The policy considerations here are analogous to those which apply when proceedings against an accused are stayed because of entrapment. They are concerned with the integrity and fairness of the administration of justice rather than with the culpability of the accused.

Thus, unless the case at bar falls within the *Kienapple* exception or raises similar policy issues which compel a new exception to the general rule, it is my view that there was no jurisdiction under s. 613 by which the Court of Appeal could substitute a conviction on count 2. Outside of a *Kienapple* situation, s. 613(8) confers no

jurisdiction on a court of appeal with respect to a count which has not been appealed from the court below - the ancillary powers embodied in s. 613(8) can only be exercised in relation to a count which is properly before the court.

In my opinion, the *Kienapple* rule has no application to this case. First, there is an insufficient legal nexus between the two offences; one requires proof of the death of the foetus while the other requires proof of bodily harm to the mother. While the two charges may involve the same general conduct, they involve two separate consequences. Second, the acquittal entered by the trial judge on count 2 was an acquittal on the merits and was not entered pursuant to a finding of guilt on the first count. I respectfully disagree with the Crown's assertion that Sullivan and Lemay could not have been convicted on both counts in this case. The trial judge explicitly considered whether Jewel Voth had suffered bodily harm (independent of the death of the foetus) and concluded that she had not. Had the trial judge made a different finding of fact, she may well have convicted Sullivan and Lemay on both counts. Furthermore, even if no independent bodily harm was found to have occurred, it would still not be impossible for Sullivan and Lemay to have been convicted on both counts. It would not have been illogical to find that bodily harm was done to Jewel Voth through the death of the foetus which was inside of and connected to her body and, at the same time, to find that the foetus was a person who could be the victim of criminal negligence causing death.

In summary, the *Kienapple* rule does not apply to this case and no compelling policy reasons have been put before this Court for granting a further

exception which would extend the Court of Appeal's jurisdiction to substitute a conviction for an acquittal in the absence of a Crown appeal.

Disposition

Based on the reasons given above, I would dismiss the Crown's appeal from the acquittal entered by the British Columbia Court of Appeal on the first count, and would allow the appeal by Sullivan and Lemay from the conviction entered by the Court of Appeal on the second count.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in *Sullivan and Lemay v. The Queen*) -- I have had the opportunity to read the reasons of the Chief Justice. While I agree with him that the Crown's appeal from the acquittal entered by the British Columbia Court of Appeal must be dismissed, contrary to the Chief Justice I would also dismiss the appellants' appeal from the conviction entered by the Court of Appeal on the second count.

I agree with the judgment below (1988), 31 B.C.L.R. (2d) 145, that the Court of Appeal had jurisdiction to enter a conviction pursuant to s. 613(8) (now s. 686(8)) of the *Criminal Code*, R.S.C. 1970, c. C-34, which reads:

> **613.** . . .
>
> (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

Referring to *R. v. Terlecki* (1983), 42 A.R. 87 (C.A.), aff'd [1985] 2 S.C.R. 483, the Court of Appeal stated at p. 163, *per curiam*:

> Adopting what was said by Dickson C.J.C. in *Terlecki* as to the proper disposition of the matter, it would normally follow that we would return the matter to the trial judge to consider whether to register a conviction on count 2 and, if so, to impose sentence. In this case the trial judge has already considered the matter. In these circumstances we would enter a conviction on count 2 . . . .

The trial judge specifically considered the question of guilt on the second count, which was causing bodily harm by criminal negligence. She stated ((1986), 31 C.C.C. (3d) 62), at p. 75:

> I should comment that had I reached the opposite conclusion with respect to the "persons" argument above, then I would have found the accused guilty on this count because I would have concluded that the child was a part of Jewel Voth at the time of its death.

In these circumstances, I agree with the Court of Appeal's disposition and therefore I would dismiss the appellants' appeal from their convictions on the second count.

In the result I would dismiss both appeals.

Appeal in Sullivan and Lemay v. The Queen allowed, L'HEUREUX-DUBÉ J. *dissenting.*

Appeal in R. v. Sullivan and Lemay dismissed.

Solicitor for Mary C. Sullivan and Gloria J. Lemay: Thomas R. Berger, Vancouver.

Solicitor for Her Majesty The Queen: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener Women's Legal Education and Action Fund: Lynn Smith, Vancouver.

Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.