UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No: MICT-14-79

Date: 16 November 2015

Original: English

BEFORE A SINGLE JUDGE

Before: **Judge Liu Daqun**

Registrar: **Mr. John Hocking**

THE PROSECUTOR

v.

NASER ORIĆ

PUBLIC

PROSECUTION'S RESPONSE TO NASER ORIĆ'S SECOND MOTION REGARDING A BREACH OF *NON BIS IN IDEM*

The Office of the Prosecutor:

Mr. Hassan B. Jallow, Prosecutor
Mr. Mathias Marcussen, Senior Legal Officer

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

A. Overview

1. Orić's Motion pursuant to MICT Rule 16 requesting that the Court of Bosnia and Herzegovina ("BiH Court") discontinue criminal proceedings against him[1] should be dismissed. The BiH Court has confirmed an indictment against Orić for having personally murdered three prisoners of war in 1992.[2] Before the ICTY, however, he was tried for Article 7(3) superior responsibility for cruel treatment and murders perpetrated by his subordinates at Srebrenica detention sites and for Article 7(1) individual responsibility and 7(3) superior responsibility for plunder and wanton destruction of towns or villages. These are different offences and the principle of *non bis in idem* does not prevent his trial before the BiH Court.

B. *Non bis in idem* prohibits multiple trials for the same offence

2. Article 7(1) of the Statute codifies the *non bis in idem* principle before the Mechanism:

> No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism.

As the ICTY and ICTR Appeal and Trial Chambers have repeatedly confirmed, the purpose of *non bis in idem* under the Statute is "to protect a person who has been finally convicted or acquitted from being tried for the same offence again."[3] The plain meaning of "acts" and "same offence" is the same specific criminal conduct for which an accused has been tried.

3. When Orić argues that military operations undertaken by Muslim armed units in Eastern Bosnia between May 1992 and February 1993 constitute a "course of conduct" that triggers

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1 *Prosecutor v. Orić*, Case No.MICT-14-79, Second Motion Regarding a Breach of *Non Bis in Idem*, 6 November 2015 ("Motion").

2 *See* Motion, Annex 1 ("BiH Indictment").

3 *Munyagishari v. Prosecutor,* Case No.ICTR-05-89-AR11bis, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 *bis*, App.Ch, 3 May 2013, para.65 (emphasis added). *See also Prosecutor v. Muvunyi*, Case No.ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, App.Ch., 24 March 2009, para.16; *Prosecutor v. Nzabirinda*, Case No.ICTR-2001-77-T, Sentencing Judgement, T.Ch., 23 February 2007 ("*Nzabirinda* SJ"), para.46; *Semanza v. Prosecutor*, Case No.ICTR-97-20-A, Decision, App.Ch., 31 May 2000, para.74; *Prosecutor v. Tadić*, Case No.IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, T.Ch., 14 November 1995, paras.10-12, 22, 24. This standard is furthermore consistent with the plain language of other key international instruments such as the International Covenant on Civil and Political Rights ("ICCPR"). *See e.g.*, ICCPR, Art. 14(7).

application of the *non bis in idem* principle,[4] he stretches that principle beyond its breaking point. This is demonstrated by his reliance[5] on a decision by the Supreme Court of Republika Srpska that radically departs from the case law of the Mechanism, the ICTY and ICTR and that seems to imply that a single criminal act or "course of conduct" could cover the entire five-year war period in Bosnia and Herzegovina.[6] Indeed, *Prince*, the Canadian case from which Orić derives his "course of conduct" standard, narrowly construes *non bis in idem* for "crimes of personal violence", finding that the principle is "inapplicable when the convictions relate to different victims."[7]

4. In fact, Orić's course of conduct argument[8] is virtually indistinguishable from the argument that the President rejected in *Zigić*.[9] Zigić claimed that although the crimes for which he was convicted in Bosnia "were not encompassed by the ICTY verdict", they were nevertheless "an integral part of the criminal offence of persecution for which he was convicted by the ICTY Judgments […] because they refer to the same territory, the same period of time, the same model of conduct and because Zigić committed the murder out of belief that the victim had been a Muslim spy".[10] The President held, however, that there was no violation of *non bis in idem* in such circumstances.[11]

C. Orić has not been convicted or acquitted for the offences charged by BiH

5. The BiH Indictment does not include the same offences for which Orić was tried before the ICTY. The only murder charge in the ICTY case against Orić alleged that guards at the Srebrenica Police Station and a building behind the Srebrenica Municipal Building killed

4 *See* Motion, para.18.
5 Motion, para.22.
6 *See* Motion, Annex 4, p.7 ("The accused Dmičić has already been convicted in a judgement that is in force of having taken the life of one civilian, during the armed conflict, while he was a member of an armed formation, and in violation of the rules of international law. The contested judgement charges the accused that he, during the same armed conflict, violating the same rules of international law, and as a member of the same armed formation, took the life of another civilian.").
7 Annex A, *R. v. Prince*, [1986] 2 S.C.R. 480, 506.
8 *See* Motion, paras.18-22.
9 *See Prosecutor v Žigić*, Case No.MICT-14-81-ES.1, Decision on Zoran Žigić's Request to Withhold Consent for the Execution of the Republic of Austria's Extradition Decision, 12 December 2014 ("*Žigić* Decision"). *Contra* Motion, fn.17. The holding in *Zigić* that the Prosecution had no standing to respond to Zigić's request not to be extradited and the accompanying issue of *non bis in idem* was grounded in the President's determination that the Prosecution lacks standing to address certain issues during enforcement of sentence proceedings. It thus does not apply to the present case. *See Zigić* Decision, para.10.
10 *Prosecutor v Žigić*, Case No.MICT-14-81-ES.1, Request of the Convicted Zoran Žigić for Non-Compliance with the Republic of Austria's Extradition Request, 10 September 2014, para.13. *See also Zigić* Decision, para.8.
11 *Zigić* Decision, para.14. *See also* fn.32 (noting that an Austrian court had reached a similar conclusion).

seven Serb detainees.[12] Moreover, rather than personal commission of murder, Orić was charged with superior responsibility under Article 7(3) of the ICTY Statute.[13]

6. The BiH Indictment by contrast alleges that Orić personally killed three Serb prisoners of war in 1992 who were not part of the ICTY group of victims. In particular, the BiH Indictment alleges that Orić: stabbed Slobodan Ilić in the neck and then kicked him in the face, causing his death; repeatedly kicked Milutin Milošević in the stomach and then fired at him with a machine gun, causing his death; and personally shot Mitar Savić from a distance of one meter, causing his death.[14]

7. The alleged murders did not take place at the Srebrenica detention sites from the ICTY trial but rather in the vicinity of a house in Zalazje, Srebrenica municipality; in Lolić, Bratunac municipality and in Kunjerac also in Bratunac municipality.

8. Thus, the three offences covered by the BiH Indictment are clearly three distinct offences for which Orić was not tried before the ICTY.

9. As for Orić's attempt to use the "Rules of the Road" process to claim a violation of *non bis in idem*, this misrepresents the case law he relies on. Contrary to his submissions,[15] under ICTY and ICTR jurisprudence a formal decision to withdraw charges already pled in an indictment under ICTY Rule 73*bis*(D) "cannot be interpreted as a finding on an accused's responsibility".[16] This reasoning applies *a fortiori* to this case, where the charges at issue before the BiH Court were never within the scope of the ICTY Indictment.

10. Also contrary to his submissions, the ICTY indicted Orić before, not after, the ICTY Prosecution received a Rules of the Road submission on him from Republika Srpska.[17] Specifically, the ICTY Prosecution did not receive his Rules of the Road file on 15

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[12] *Prosecutor v. Orić*, Case No.IT-03-68-PT, Second Amended Indictment, 1 October 2004 ("ICTY Indictment"), para.25. The Prosecution agrees that this is the relevant version of the ICTY Indictment for purposes of *non bis in idem*. *See* Motion, fn.1; *Prosecutor v. Orić*, Case No.IT-03-68-T, Decision on Prosecution's Motion for Leave to Amend the Second Indictment, T.Ch., 5 July 2005.

[13] ICTY Indictment, para.26. Other offenses charged in the ICTY Indictment include cruel treatment, wanton destruction and plunder, for which Orić was charged under Article 7(1) and/or 7(3). *See* ICTY Indictment, paras.22-37. These allegations are further afield from the BiH Indictment.

[14] BiH Indictment, pp.2-3. The BiH Indictment also charges Sabahudin Muhić with directly murdering Milošević and Savić. *Id.*

[15] Motion, para.26.

[16] *Prosecutor v. Karadžić*, Case No.IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, T.Ch., 16 November 2009, para.13. *Contra* Motion, fn.25. *See also Nzabirinda* SJ, para.46 ("[I]n the particular circumstances of this case where counts have been withdrawn without a final judgement, the principle of *non bis in idem* does not apply and cannot be invoked to bar potential subsequent trials of the accused before any jurisdiction").

[17] *Contra* Motion, paras.14-16.

December 2002[18] but only on 4 March 2004.[19] By that time, the initial indictment had been confirmed, Orić's initial appearance had taken place and the Prosecution Pre-Trial Brief had been filed.[20]

11. Orić fails to substantiate his claim that the "Rules of the Road submissions […] made in respect of him […] included charges and evidence relating to the allegations now made against [Orić] in BiH."[21] The portions of the Rules of the Road file highlighted by Orić consist of little more than records of individuals killed in the conflict, which include dozens of names beyond the three victims identified in the BiH Indictment.[22] There is no indication in these generic lists that any of the victims were murdered, or that Orić might have been directly responsible. With regard to Slobodan Ilić, the document Orić relies on merely states that Ilić disappeared, and is unable to do more than surmise that he may have been killed.[23]

12. The facts of this case thus bear no resemblance to those of *Fofana* and *Ganić*.[24] In *Fofana*, the court relied both on the "significant overlap" between the first (domestic) and second (foreign) proceedings and the fact that the domestic prosecutor was aware of the related charges in the foreign proceedings at the time that it chose not to include those charges in its indictment.[25] Meanwhile, in *Ganić*, the court's holding was based on its finding that the charges against Ganić were politically motivated.[26]

D. Conclusion

13. The offences charged in the BiH Indictment are not the same for which Orić was tried before the ICTY. For that reason, no legal principle requires that the Mechanism request the BiH Court to discontinue proceedings and the Motion should be dismissed.

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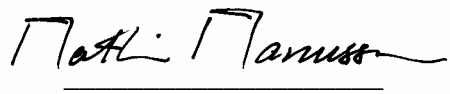
[18] On 15 December 2002, the RS District Prosecutor transferred evidence relating to the Orić case to the Bureau of the Government of RS for Relations with the ICTY. *See* Motion, Annex 2, Registry p.91 (RR32-1796).
[19] *See* Motion, Annex 2, Registry pp.88-89 (RR32-1795, RR32-1797).
[20] *See Prosecutor v. Orić*, Case No.IT-03-68-T, Judgement, T.Ch., 30 June 2006, paras.783-784, 797.
[21] Motion, para.28.
[22] *See* Motion, fns.14 (referring to Annex 2, pp.RR32-1893, RR32-1894), 15 (referring to Annex 3). Annex 3 is the same as Exhibit D395 (in English and BCS) from the *Orić* ICTY trial.
[23] *See* Motion, fn.13 (referring to Annex 2, pp. RR14-5431, RR322078).
[24] *Contra* Motion, paras.23, 27-28.
[25] Annex B, *Fofana v Thubin* [2006] EWHC 744 (Admin)(England), para.29. *See also* paras.27-28. *Contra* Motion, para.23.
[26] *See* Motion, Annex 5: *Serbia v. Ganić* (unreported), 27 July 2010, paras.19-25, 39-40. *Contra* Motion, para.27.

14. Orić's motion was not notified to Bosnia and Herzegovina. In accordance with past practice,[27] the Bosnian authorities should be so notified and invited to make submissions.

15. The Prosecution reserves the right to file further submissions if necessary on Orić's 880-page supplementary materials that it received on Friday afternoon, 13 November 2015.[28]

Word Count: 1,968



Mathias Marcussen
Senior Legal Officer

Dated this 16th day of November, 2015
At The Hague, The Netherlands.

[27] *See Prosecutor v. Orić*, Case No.IT-03-68-A, Order Requesting Submissions on a Motion Pursuant to Rule 13, T.Ch., 19 December 2008.
[28] *See Prosecutor v. Orić*, Case No.MICT-14-79, Supplementary Material Relating to the Second Motion Regarding a Breach of *Non bis in Idem*, 13 November 2015.

ANNEX A

Her Majesty The Queen *Appellant*

v.

Sandra Prince *Respondent*

INDEXED AS: R. *v.* PRINCE

File No.: 18223.

1986: April 23; 1986: November 6.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law — Kienapple principle — Accused's stabbing of a pregnant woman causing child's premature birth and his death — Accused convicted of causing bodily harm to the mother — Whether rule against multiple convictions precludes a trial on a charge of manslaughter of the child.

Criminal law — Procedure — Prerogative writs — Pre-trial motion for a stay based on the principle in Kienapple dismissed — Prohibition and certiorari sought by the accused — Whether superior courts should decline to grant prerogative remedy on an interlocutory application in respect of the rule against multiple convictions.

The accused stabbed a pregnant woman in the abdomen causing the premature birth of her child and his death. The accused, who was convicted of causing bodily harm to the mother at her first trial, made a preliminary motion requesting a stay of proceedings on a charge of manslaughter of the child on the basis of the principle in *Kienapple*. The trial judge denied the motion holding that *Kienapple* was inapplicable. The accused then made an application to the Court of Queen's Bench for an order of prohibition to prohibit the trial court from proceeding on the manslaughter charge and for an order of *certiorari* to quash the indictment. The application was dismissed. On appeal, the Court of Appeal held that the accused could not be convicted on the charge of manslaughter, granted *certiorari* and quashed the indictment. This appeal is to determine whether the accused, who was convicted of causing bodily harm in

Sa Majesté La Reine *Appelante*

c.

Sandra Prince *Intimée*

RÉPERTORIÉ: R. *c.* PRINCE

N° du greffe: 18223.

1986: 23 avril; 1986: 6 novembre.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Chouinard, Lamer, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit criminel — Principe de l'arrêt Kienapple — L'accusée a poignardé une femme enceinte causant la naissance prématurée et le décès de son enfant — L'accusée a été reconnue coupable d'avoir causé des lésions corporelles à la mère — La règle interdisant les déclarations de culpabilité multiples empêche-t-elle de tenir un procès relativement à une accusation d'homicide involontaire coupable perpétré contre l'enfant?

Droit criminel — Procédure — Brefs de prérogative — Rejet d'une requête préliminaire visant à obtenir une suspension d'instance en application du principe de l'arrêt Kienapple — Brefs de prohibition et de certiorari demandés par l'accusée — Les cours supérieures doivent-elles refuser de faire droit à une demande interlocutoire de bref de prérogative lorsque c'est la règle interdisant les déclarations de culpabilité multiples qui est en cause?

L'accusée a poignardé une femme enceinte à l'abdomen, causant ainsi la naissance prématurée et le décès de son enfant. L'accusée qui, à son premier procès, a été déclarée coupable d'avoir causé des lésions corporelles à la mère, a présenté une requête préliminaire visant à obtenir la suspension des procédures relativement à une accusation d'homicide involontaire coupable perpétré contre l'enfant en application du principe énoncé dans l'arrêt *Kienapple*. Le juge du procès a rejeté la requête, concluant que l'arrêt *Kienapple* ne s'appliquait pas. L'accusée a alors demandé à la Cour du Banc de la Reine de rendre une ordonnance de prohibition qui interdirait à la cour de première instance de la juger relativement à l'inculpation d'homicide involontaire coupable, ainsi qu'une ordonnance de *certiorari* qui annulerait l'acte d'accusation. La demande a été rejetée. La Cour d'appel, qui a conclu que l'accusée ne pouvait être reconnue coupable d'homicide involontaire coupable, a accordé un *certiorari* et a annulé l'acte d'accusation. Le présent pourvoi vise à déterminer si l'accusée, qui a été

respect of the mother, may also be tried for manslaughter in respect of the deceased child.

Held: The appeal should be allowed.

The rule against multiple convictions is applicable when there is a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences which form the basis of two or more charges. In most cases the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? It will not always be easy to define when one act ends and another begins, but when such difficulties arise they can be resolved having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events, and whether the accused's actions were related to each other by a common objective.

No element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted. The requirement of sufficient proximity between offences will therefore only be satisfied if there is no additional and distinguishing element that goes to guilt in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

An element cannot be regarded as distinct or additional for the purpose of the rule against multiple convictions where (1) an element in one offence is a particularization of an element in another offence; (2) there is more than one method, embodied in more than one offence, to prove a single delict; and (3) when Parliament in effect deems a particular element to be satisfied by proof of a different nature because of social policy or inherent difficulties of proof. In applying these criteria, however, it is important not to carry logic so far as to frustrate Parliament's intent or as to lose sight of the overarching question whether the same cause, matter or delict underlies both charges.

reconnue coupable d'avoir causé des lésions corporelles à la mère, peut également avoir à subir un procès pour homicide involontaire coupable en ce qui concerne l'enfant décédé.

Arrêt: Le pourvoi est accueilli.

La règle qui interdit les déclarations de culpabilité multiples est applicable lorsqu'il y a des liens suffisamment étroits tout d'abord entre les faits, et ensuite entre les infractions, qui constituent le fondement d'au moins deux accusations. Dans la plupart des cas, on satisfait à l'exigence d'un lien factuel par une réponse affirmative à la question suivante: Chacune des accusations est-elle fondée sur le même acte de l'accusé? Il n'est pas toujours facile de déterminer quand un acte prend fin et un autre commence, mais lorsque de telles difficultés surgissent, il est possible de les résoudre en fonction de facteurs comme le caractère éloigné ou la proximité des événements spatio-temporels, la présence ou l'absence d'événements intermédiaires pertinents et la question de savoir si les actes de l'accusé étaient liés par un objectif commun.

Aucun élément que le Parlement a jugé bon d'inclure dans une infraction et dont l'existence a été prouvée hors de tout doute raisonnable ne doit être omis quand le contrevenant est appelé à rendre compte de ses actes à la société, à moins que cet élément ne soit essentiellement identique ou ne corresponde suffisamment à un élément de l'autre infraction dont il a été reconnu coupable. On ne satisfera donc à l'exigence d'un lien suffisamment étroit entre les infractions que si l'infraction à l'égard de laquelle on tente d'éviter une déclaration de culpabilité en invoquant le principe énoncé dans l'arrêt *Kienapple* ne comporte pas d'éléments supplémentaires et distinctifs qui touchent à la culpabilité.

Un élément ne saurait être considéré comme distinct ou supplémentaire aux fins de la règle interdisant les déclarations de culpabilité multiples (1) si un élément d'une infraction est une manifestation particulière d'un élément d'une autre infraction, (2) s'il existe plus d'une méthode, comprise dans plus d'une infraction, d'établir un seul délit et (3) si le Parlement prévoit en fait que l'existence d'un élément donné est réputée être établie au moyen d'une autre sorte de preuve, parce que des considérations de politique sociale ou des difficultés qui se rattachent à la preuve l'imposent. Toutefois, en appliquant ces critères, il importe de se garder de pousser la logique au point de contrecarrer l'intention du législateur ou de perdre de vue la question clé de savoir si les deux accusations sont fondées sur la même cause, la même chose ou le même délit.

In the case at bar, *Kienapple* is not applicable. The requirement of a sufficient factual nexus is satisfied—a single act of the accused grounds both charges—but there is no sufficient correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions. The first offence contains as an essential ingredient the causing of bodily harm to the mother; the second requires proof of the death of her child. Neither of these elements can be subsumed into the other. Moreover, in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims.

Finally, notwithstanding the possibility of jurisdictional error in some cases, a superior court should generally decline to consider the merits of a *Kienapple* argument on an interlocutory application.

Cases Cited

Distinguished: *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; **considered:** *R. v. Hagenlocher* (1981), 65 C.C.C. (2d) 101, aff'd [1982] 2 S.C.R. 531; *Krug v. The Queen*, [1985] 2 S.C.R. 255; *Côté v. The Queen*, [1975] 1 S.C.R. 303; **approved:** *R. v. Logeman* (1978), 5 C.R. (3d) 219; *R. v. Lecky* (1978), 42 C.C.C. (2d) 406; *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65; *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284; *R. v. Père Jean Grégoire de la Trinité* (1980), 60 C.C.C. (2d) 542; **referred to:** *R. v. Quon*, [1948] S.C.R. 508; *R. v. Siggins* (1960), 127 C.C.C. 409; *Connelly v. D.P.P.*, [1964] A.C. 1254; *R. v. Boyce* (1975), 23 C.C.C. (2d) 16; *R. v. Allison* (1983), 33 C.R. (3d) 333; *McKinney v. The Queen*, [1980] 1 S.C.R. 401, aff'g (1979), 46 C.C.C. (2d) 566; *R. v. Harrison* (1978), 7 C.R. (3d) 32; *R. v. Taylor* (1979), 48 C.C.C. (2d) 523; *R. v. Langevin* (1979), 47 C.C.C. (2d) 138; *McGuigan v. The Queen*, [1982] 1 S.C.R. 284; *R. v. Loyer*, [1978] 2 S.C.R. 631; *R. v. Gushue* (1976), 32 C.C.C. (2d) 189, aff'd on other grounds [1980] 1 S.C.R. 798; *Terlecki v. The Queen*, [1985] 2 S.C.R. 483; *R. v. Birmingham and Taylor* (1976), 34 C.C.C. (2d) 386; *Hewson v. The Queen*, [1979] 2 S.C.R. 82.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34 as amended, ss. 11, 205(5)(*a*), 206(2), 589, 663(2), 666(1).

Authors Cited

Béliveau, Pierre et Diane Labrèche. "L'élargissement du concept de "double jeopardy" en droit pénal canadien:

En l'espèce, l'arrêt *Kienapple* ne s'applique pas. On a satisfait à l'exigence d'un lien factuel suffisant—l'une et l'autre accusations sont fondées sur un seul acte de l'accusée—mais il n'y a pas entre les éléments des deux infractions une correspondance suffisante pour justifier l'application de la règle interdisant les déclarations de culpabilité multiples. La première infraction comporte comme élément essentiel le fait d'avoir causé des lésions corporelles à la mère; la seconde exige la preuve du décès de son enfant. Aucun de ces éléments ne peut être subsumé sous l'autre. De plus, en ce qui concerne les crimes violents contre des personnes, la règle interdisant les déclarations de culpabilité multiples ne s'applique pas lorsque les déclarations de culpabilité se rapportent à des victimes différentes.

Enfin, nonobstant la possibilité d'une erreur de compétence dans certains cas, une cour supérieure devrait généralement refuser d'examiner le bien-fondé de l'argument de l'arrêt *Kienapple* invoqué dans le cadre d'une demande interlocutoire.

Jurisprudence

Distinction d'avec l'arrêt: *Kienapple c. La Reine*, [1975] 1 R.C.S. 729; **arrêts examinés:** *R. v. Hagenlocher* (1981), 65 C.C.C. (2d) 101, confirmé [1982] 2 R.C.S. 531; *Krug c. La Reine*, [1985] 2 R.C.S. 255; *Côté c. La Reine*, [1975] 1 R.C.S. 303; **arrêts approuvés:** *R. v. Logeman* (1978), 5 C.R. (3d) 219; *R. v. Lecky* (1978), 42 C.C.C. (2d) 406; *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65; *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284; *R. v. Père Jean Grégoire de la Trinité* (1980), 60 C.C.C. (2d) 542; **arrêts mentionnés:** *R. v. Quon*, [1948] R.C.S. 508; *R. v. Siggins* (1960), 127 C.C.C. 409; *Connelly v. D.P.P.*, [1964] A.C. 1254; *R. v. Boyce* (1975), 23 C.C.C. (2d) 16; *R. v. Allison* (1983), 33 C.R. (3d) 333; *McKinney c. La Reine*, [1980] 1 R.C.S. 401, confirmant (1979), 46 C.C.C. (2d) 566; *R. v. Harrison* (1978), 7 C.R. (3d) 32; *R. v. Taylor* (1979), 48 C.C.C. (2d) 523; *R. v. Langevin* (1979), 47 C.C.C. (2d) 138; *McGuigan c. La Reine*, [1982] 1 R.C.S. 284; *R. c. Loyer*, [1978] 2 R.C.S. 631; *R. v. Gushue* (1976), 32 C.C.C. (2d) 189, confirmé pour d'autres motifs [1980] 1 R.C.S. 798; *Terlecki c. La Reine*, [1985] 2 R.C.S. 483; *R. v. Birmingham and Taylor* (1976), 34 C.C.C. (2d) 386; *Hewson c. La Reine*, [1979] 2 R.C.S. 82.

Lois et règlements cités

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APPEAL from a judgment of the Manitoba Court of Appeal (1983), 27 Man. R. (2d) 63, 9 C.C.C. (3d) 155, [1984] 2 W.W.R. 114, allowing the accused's appeal from a judgment of Kroft J. dismissing the accused's application for *certiorari*. Appeal allowed.

Stuart Whitley, for the appellant.

Barry Hart Sinder, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal raises once again the scope of the principle enunciated in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. A single act of the respondent, Sandra Prince, caused injury to one person and is alleged to have caused the death of another. Prince has been convicted of causing bodily harm in respect of the injured victim. The question is whether she may also be tried for manslaughter in respect of the deceased victim.

de bis puniri a bis vexari» (1977), 37 *R. du B.* 589.
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POURVOI contre un arrêt de la Cour d'appel du Manitoba (1983), 27 Man. R. (2d) 63, 9 C.C.C. (3d) 155, [1984] 2 W.W.R. 114, qui a accueilli l'appel interjeté par l'accusée contre un jugement du juge Kroft qui avait rejeté sa demande de *certiorari*. Pourvoi accueilli.

Stuart Whitley, pour l'appelante.

Barry Hart Sinder, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF—Ce pourvoi soulève une fois de plus la question de la portée du principe énoncé dans l'arrêt *Kienapple c. La Reine*, [1975] 1 R.C.S. 729. Un seul acte de l'intimée, Sandra Prince, a causé des blessures à une personne et serait à l'origine du décès d'une autre. Prince a été reconnue coupable d'avoir causé des lésions corporelles à la première victime. La question est de savoir si on peut aussi lui faire subir un procès pour homicide involontaire coupable dans le cas de la seconde victime.

I

Facts

On January 1, 1981, Sandra Prince, by means of a single blow to the abdomen stabbed Bernice Daniels. At the time Daniels was six months pregnant. On January 2, 1981, Prince was charged with the attempted murder of Daniels. On January 6, 1981, Daniels gave birth to a child who lived for 19 minutes and then died. The cause of death is alleged to be traceable to the stabbing. The autopsy report indicated that the knife penetrated the amniotic sac, causing contamination of the amniotic fluid which in turn caused the child's premature birth. Because the fetus was not sufficiently developed, the child died.

Between December 7, 1981, and January 4, 1982, Prince was tried and acquitted of the attempted murder of Daniels but was convicted on a charge of causing bodily harm to Daniels. An appeal to the Manitoba Court of Appeal in respect of her conviction and sentence (six months imprisonment) was dismissed on October 20, 1982.

In the meantime, on July 1, 1981, following an inquest into the death of the child, and following Prince's committal for trial on the charge of attempted murder of Daniels, Prince was charged with manslaughter of the child as follows:

THAT she, the said SANDRA PRINCE, between the thirty-first day of December, in the year of our Lord one thousand nine hundred and eighty, and the seventh day of January, in the year of our Lord one thousand nine hundred and eighty-one, both dates inclusive, at the City of Winnipeg, in the Eastern Judicial District, in the Province of Manitoba, did unlawfully cause death to the unnamed male child of Bernice Daniels, and did thereby commit manslaughter.

A preliminary inquiry regarding this charge was held in February, 1982, and Prince was committed to stand trial. On April 29, 1983, Prince's lawyer made a preliminary motion to the trial judge, Barkman Co. Ct. J., requesting him to enter a stay of proceedings on the basis of the principle in *Kienapple v. The Queen.*

I

Les faits

Le 1er janvier 1981, Sandra Prince a asséné un coup de couteau à l'abdomen de Bernice Daniels. À l'époque, Daniels était enceinte de six mois. Le 2 janvier 1981, Prince a été accusée de tentative de meurtre contre Daniels. Le 6 janvier 1981, cette dernière a accouché d'un enfant qui n'a vécu que dix-neuf minutes. On allègue que le décès est imputable au coup de couteau. D'après le rapport d'autopsie, le couteau a percé le sac amniotique, provoquant la contamination du liquide amniotique, ce qui a entraîné la naissance prématurée de l'enfant. Parce que le fœtus n'était pas suffisamment développé, l'enfant est décédé.

Entre le 7 décembre 1981 et le 4 janvier 1982, Prince a été jugée et acquittée relativement à la tentative de meurtre contre Daniels, mais a été déclarée coupable de lui avoir causé des lésions corporelles. L'appel de la déclaration de culpabilité et de la peine imposée (six mois d'emprisonnement) a été rejeté par la Cour d'appel du Manitoba le 20 octobre 1982.

Entre-temps, le 1er juillet 1981, à la suite d'une enquête sur le décès de l'enfant et après avoir été renvoyée à son procès relativement à l'accusation de tentative de meurtre contre Daniels, Prince a été accusée d'homicide involontaire coupable perpétré contre l'enfant. L'accusation est ainsi formulée:

[TRADUCTION] D'AVOIR [ladite SANDRA PRINCE], entre le trente et unième jour de décembre de l'an de grâce mil neuf cent quatre-vingt et le septième jour de janvier de l'an de grâce mil neuf cent quatre-vingt-un inclusivement, dans la ville de Winnipeg, dans le district judiciaire de l'Est, province du Manitoba, causé la mort de l'enfant mâle innommé de Bernice Daniels, commettant ainsi un homicide involontaire coupable.

Une enquête préliminaire portant sur cette accusation a eu lieu en février 1982 et Prince a été renvoyée à son procès. Le 29 avril 1983, l'avocat de Prince a présenté au juge du procès, le juge Barkman de la Cour de comté, une requête préliminaire visant à obtenir une suspension d'instance en application du principe énoncé dans l'arrêt *Kienapple c. La Reine.*

II

Judgments in the Manitoba Courts

Barkman Co. Ct. J. denied the motion. He held that *Kienapple* was inapplicable because, although there was only one act of the accused, there were two persons affected and there were two different elements: the wounding of Daniels, and the wounding of the child ultimately resulting in his death. Barkman Co. Ct. J. said that it was difficult to reconcile the decision in *R. v. Hagenlocher* (1981), 65 C.C.C. (2d) 101 (Man. C.A.) with other cases. The majority of the Manitoba Court of Appeal left the impression in its reasons in that case that the focus of the *Kienapple* inquiry was on the acts of the accused which grounded the charges. If a single act was involved, it appeared that *Kienapple* would be applicable according to those reasons. Barkman Co. Ct. J. suggested that whether *Hagenlocher* was correctly decided was a question which might possibly be resolved in time. In his view, the majority of the authorities indicated that *Kienapple* was inapplicable in multiple-victim situations.

Prince then applied to the Court of Queen's Bench for an order of prohibition to prohibit the County Court Judges' Criminal Court from trying her on the manslaughter indictment, and for an order of *certiorari* quashing the indictment. Without dealing with the merits of the *Kienapple* argument, Kroft J. dismissed the application. In his view, the application was in the nature of an appeal from the decision of Barkman Co. Ct. J. on the preliminary motion. He felt the proper course for Prince was to appeal the decision of the trial judge at the conclusion of the trial.

In the Manitoba Court of Appeal, on an appeal from the decision of Kroft J., Matas J.A. delivered the reasons for a unanimous panel consisting also of O'Sullivan and Huband JJ.A. Matas J.A. observed that the decision of the Manitoba Court of Appeal in *R. v. Hagenlocher* was affirmed by

II

Les jugements des tribunaux manitobains

Le juge Barkman a rejeté la requête. Il a conclu que l'arrêt *Kienapple* était inapplicable puisque, bien que l'accusée n'ait commis qu'un seul acte, cet acte touchait deux personnes et comportait deux éléments différents: les blessures infligées à Daniels et celles infligées à l'enfant qui ont fini par entraîner son décès. Le juge Barkman de la Cour de comté a affirmé que l'arrêt *R. v. Hagenlocher* (1981), 65 C.C.C. (2d) 101 (C.A. Man.), était difficilement conciliable avec d'autres décisions. Les motifs rédigés par la Cour d'appel du Manitoba à la majorité dans cette affaire donnent l'impression que, dans l'affaire *Kienapple*, on s'est arrêté surtout aux actes de l'accusé sur lesquels reposaient les accusations. D'après ces motifs, il semblait que s'il n'était question que d'un seul acte, l'arrêt *Kienapple* serait applicable. Le juge Barkman a laissé entendre qu'il se pourrait que la question du bien-fondé de l'arrêt *Hagenlocher* puisse être résolue en temps utile, mais à son avis, il ressortait de la majorité des précédents que l'arrêt *Kienapple* est inapplicable dans les cas où il y a plus d'une victime.

Prince s'est alors adressée à la Cour du Banc de la Reine en vue d'obtenir une ordonnance de prohibition qui interdirait à la Cour criminelle de comté de la juger relativement à l'inculpation d'homicide involontaire coupable, ainsi qu'une ordonnance de *certiorari* qui annulerait l'acte d'accusation. Le juge Kroft a rejeté la demande sans examiner le bien-fondé de l'argument invoquant l'arrêt *Kienapple*. D'après lui, cette demande participait d'un appel de la décision du juge Barkman sur la requête préliminaire. Il a donc estimé que ce qu'il convenait à Prince de faire était d'interjeter appel de la décision rendue par le juge du procès à la fin de l'instance.

La décision du juge Kroft a été portée en appel devant la Cour d'appel du Manitoba et le juge Matas, qui a prononcé les motifs unanimes d'une formation composée aussi des juges O'Sullivan et Huband, a fait remarquer que l'arrêt *R. v. Hagenlocher* de la Cour d'appel du Manitoba a été

this Court, [1982] 2 S.C.R. 531, for the reasons delivered orally by Laskin C.J.:

> We do not need to hear you, Mr. Margolis and Mr. Zaifman. We are all of the opinion that the conclusions reached by the majority judgment of the Manitoba Court of Appeal in applying the *Kienapple* principle were correct and hence this appeal must accordingly be dismissed.

Matas J.A. felt that *Hagenlocher* (which I will summarize below) was applicable to the facts of the present case. Accordingly, Prince could not be convicted on the manslaughter indictment. The Court of Appeal granted *certiorari* and quashed the indictment, noting that it would have been a jurisdictional error for Barkman Co. Ct. J. to have proceeded with a trial on the manslaughter charge and that no purpose would be served by refusing relief to Prince and thereby requiring her to submit to an unnecessary trial: (1983), 27 Man. R. (2d) 63, 9 C.C.C. (3d) 155, [1984] 2 W.W.R. 114.

III

The *Kienapple* Case

Since this Court's decision in *Kienapple*, there has been considerable controversy about the nature and scope of the principle of *res judicata* articulated for the majority by Laskin J., as he then was. Various commentators have expressed differing views about the meaning and application of the *Kienapple* case: see Dennis R. Klinck, "The Same Cause or Matter": The Legacy of Kienapple" (1983-84), 26 *Crim. L. Q.* 280; James C. Jordan, "Application and Limitations of the Rule Prohibiting Multiple Convictions: Kienapple v. The Queen to R. v. Prince" (1984-85), 14 *Man. L. J.* 341; Alan W. Mewett, "Nemo Bis Vexari" (1973-74), 16 *Crim. L. Q.* 382; A. F. Sheppard, "Criminal Law—Rule Against Multiple Convictions" (1976), 54 *Can. Bar Rev.* 627; Kenneth L. Chasse, "A New Meaning for Res Judicata and its Potential Effect on Plea Bargaining" (1974), 26 C.R.N.S. 20, 48, 64; E. G. Ewaschuk, "The Rule Against Multiple Convictions and Abuse of Process" (1975), 28 C.R.N.S. 28; Pierre Béliveau and Diane Labrèche, "L'élargissement du concept de

confirmé par cette Cour, [1982] 2 R.C.S. 531, pour les motifs rendus oralement par le juge en chef Laskin:

> Il n'est pas nécessaire de vous entendre Me Margolis et Me Zaifman. Nous sommes tous d'avis que les conclusions de l'arrêt rendu à la majorité par la Cour d'appel du Manitoba, relativement à l'application du principe *Kienapple* sont exactes. En conséquence, le présent pourvoi doit être rejeté.

Le juge Matas a estimé que l'arrêt *Hagenlocher* (que je résumerai plus loin) s'applique aux faits de la présente affaire. Par conséquent, Prince ne pouvait être reconnue coupable d'homicide involontaire coupable. La Cour d'appel a accordé un *certiorari* et a annulé l'acte d'accusation, soulignant que le juge Barkman de la Cour de comté aurait commis une erreur de compétence s'il avait procédé à l'instruction de l'accusation d'homicide involontaire coupable et qu'il ne servirait à rien de refuser à Prince le redressement sollicité et de l'obliger ainsi à subir un procès inutile: (1983), 27 Man. R. (2d) 63, 9 C.C.C. (3d) 155, [1984] 2 W.W.R. 114.

III

L'arrêt *Kienapple*

Depuis l'arrêt *Kienapple* de cette Cour, la question de la nature et de la portée du principe de l'autorité de la chose jugée énoncé au nom de la majorité par le juge Laskin (plus tard Juge en chef) a soulevé une vive controverse. Divers glossateurs ont exprimé des opinions divergentes sur le sens et l'application de l'arrêt *Kienapple*: voir Dennis R. Klinck, « «The Same Cause or Matter»: The Legacy of Kienapple» (1983-84), 26 *Crim. L. Q.* 280; James C. Jordan, «Application and Limitations of the Rule Prohibiting Multiple Convictions: Kienapple v. The Queen to R. v. Prince» (1984-85), 14 *Man. L. J.* 341; Alan W. Mewett, «Nemo Bis Vexari» (1973-74), 16 *Crim. L. Q.* 382; A. F. Sheppard, «Criminal Law—Rule Against Multiple Convictions» (1976), 54 *R. du B. can.* 627; Kenneth L. Chasse, «A New Meaning for Res Judicata and its Potential Effect on Plea Bargaining» (1974), 26 C.R.N.S. 20, 48, 64; E. G. Ewaschuk, «The Rule Against Multiple Convictions and Abuse of Process» (1975), 28 C.R.N.S. 28; Pierre Béliveau et Diane Labrèche, «L'élargissement du

«double jeopardy» en droit pénal canadien: de bis puniri a bis vexari" (1977), 37 *R. du B.* 589 at pp. 628-36; William J. Braithwaite, "Down to the Core of the Kienapple" (1979), 9 C.R. (3d) 88; Roger E. Salhany, *Canadian Criminal Procedure* (4th ed. 1984), at pp. 258-63; Heather Leonoff and David Deutscher, "The Plea and Related Matters", in Vincent Del Buono (ed.), *Criminal Procedure in Canada* (1982), at pp. 258-62; William J. Braithwaite, "Developments in Criminal Law and Procedure: The 1979-80 Term" (1981), 2 *Supreme Court L. R.* 177, at pp. 213-19. The courts also have expressed widely differing views regarding the proper scope of the *Kienapple* principle: contrast, for example, the majority opinion of Huband J.A. with the dissenting opinion of Monnin J.A., as he then was, in *R. v. Hagenlocher*.

concept de «double jeopardy» en droit pénal canadien: de bis puniri a bis vexari» (1977), 37 *R. du B.* 589, aux pp. 628 à 636; William J. Braithwaite, «Down to the Core of the Kienapple» (1979), 9 C.R. (3d) 88; Roger E. Salhany, *Canadian Criminal Procedure* (4th ed. 1984), aux pp. 258 à 263; Heather Leonoff et David Deutscher, «Le plaidoyer et les problèmes connexes», dans Vincent Del Buono (éd.), *Procédure pénale au Canada* (1983), aux pp. 300 à 305; William J. Braithwaite, «Developments in Criminal Law and Procedure: The 1979-80 Term» (1981), 2 *Supreme Court L. R.* 177, aux pp. 213 à 219. Les tribunaux aussi ont exprimé des points de vue très divergents quant à la portée véritable du principe formulé dans l'arrêt *Kienapple*: comparer, par exemple, l'opinion que le juge Huband a rédigée au nom de la Cour d'appel à la majorité dans l'affaire *R. v. Hagenlocher* avec les motifs de dissidence du juge Monnin (alors juge puîné) dans la même affaire.

The variance of views within the judiciary and in the learned journals suggests that the time may well be ripe for a review of the jurisprudence in this area. The appropriate point of departure is, of course, the judgment of the majority in *Kienapple* in which an accused was indicted on two counts in respect of a single act of non-consensual sexual intercourse with a thirteen year old girl who was not his wife. The defendant, Kienapple, was charged with rape contrary to s. 143 and unlawful carnal knowledge of a female under fourteen years of age contrary to s. 146(1) of the *Criminal Code*. At page 744, Laskin J. said:

Compte tenu des divergences d'opinions exprimées au sein de la magistrature et dans les revues savantes, il se peut fort bien que le moment soit venu d'entreprendre un examen de la jurisprudence dans ce domaine. Il convient, bien entendu, de commencer par examiner les motifs de la Cour à la majorité dans l'affaire *Kienapple* où l'accusé avait fait l'objet de deux chefs d'accusation relativement à un seul acte consistant à avoir eu des rapports sexuels avec une adolescente non consentante de treize ans qui n'était pas son épouse. Le prévenu, Kienapple, a été accusé d'avoir commis un viol, contrairement à l'art. 143, et d'avoir eu des rapports sexuels illicites avec une personne du sexe féminin âgée de moins de quatorze ans, contrairement au par. 146(1) du *Code criminel*. À la page 744, le juge Laskin affirme:

> It is plain, of course, that Parliament has defined two offences in ss. 143 and 146(1), but there is an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. It is my view that in such a case, if the accused has been charged, first, with rape and, secondly, with a s. 146(1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge and the jury should be so directed. Correlatively, however, the jury should also be directed that if they find the accused not guilty of rape they may still

> Il est clair, bien entendu, que le Parlement a défini deux infractions aux art. 143 et 146(1), mais il y a recoupement en ce sens que l'une embrasse l'autre quand les rapports sexuels ont eu lieu avec une jeune fille de moins de quatorze ans sans son consentement. Je suis d'avis que dans un tel cas, si l'accusé est d'abord inculpé de viol et, ensuite, d'une infraction prévue à l'art. 146, par. (1), et si un verdict de culpabilité de viol est rendu, la seconde inculpation tombe comme inculpation de remplacement et il faut en instruire le jury. Corrélativement, toutefois, il faut aussi dire au jury que

find him guilty under s. 146(1) where sexual intercourse with a girl under age fourteen has been proved.

(Emphasis added.)

In describing the rationale underlying his conclusion Laskin J. referred to a principle that there ought not to be multiple convictions for the same "delict", "matter" or "cause". At page 750, he explained:

The relevant inquiry so far as *res judicata* is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.

(Emphasis added.)

And at p. 751:

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions: . . .

(Emphasis added.)

The majority judgment at p. 753, however, recognized that Parliament could create two separate offences out of the same matter and could mandate multiple convictions if it made clear its intentions in this regard.

After considering the legislative history of the two offences in the *Kienapple* case, Laskin J. stated at pp. 753-54:

If any conclusion can be drawn from this short history, it is that carnal knowledge of a victim under age ten, and later under age fourteen, with its lesser punishment after 1877 (and until that for rape was changed), was regarded as an alternative charge to rape, unnecessary where there was no consent (since age was not and is not a necessary averment in rape) but available where proof of want of consent could not be made or was doubtful.

(Emphasis added.)

s'il trouve l'accusé non coupable de viol il peut encore le trouver coupable d'une infraction prévue à l'art. 146, par. (1), lorsque des rapports sexuels avec une fille de moins de quatorze ans ont été prouvés.

(C'est moi qui souligne.)

En exposant la raison fondamentale de sa conclusion, le juge Laskin a parlé d'un principe selon lequel il ne doit pas y avoir de déclarations de culpabilité multiples pour le même «délit», la même «chose» ou la même «cause». À la page 750, il explique:

La question pertinente pour ce qui est de l'autorité de la chose jugée est de savoir si la même cause ou chose (plutôt que la même infraction) se trouve comprise dans deux infractions ou plus.

(C'est moi qui souligne.)

À la page 751, il ajoute:

Si un verdict de culpabilité est rendu sur le premier chef et que les mêmes éléments, ou fondamentalement les mêmes, constituent l'infraction imputée dans le second chef, la situation invite l'application d'une règle s'opposant aux condamnations multiples: . . .

(C'est moi qui souligne.)

À la page 753 toutefois, la Cour à la majorité reconnaît que le Parlement peut créer deux infractions distinctes à propos de la même chose et qu'il peut autoriser des déclarations de culpabilité multiples à la condition de manifester clairement son intention à cet égard.

Après avoir fait l'historique législatif des deux infractions en question dans l'affaire *Kienapple*, le juge Laskin affirme, aux pp. 753 et 754:

Si une conclusion peut être tirée de ce bref historique, c'est que le commerce charnel avec une victime âgée de moins de dix ans, et plus tard de moins de quatorze ans, avec sa peine plus légère après 1877 (et jusqu'à ce que soit changée la peine pour viol), était considéré, relativement au viol, comme une inculpation de remplacement, inutile lorsqu'il n'y avait pas eu consentement (vu que l'âge n'était pas un élément à alléguer et ne l'est pas encore, en matière de viol) mais disponible lorsque la preuve de l'absence de consentement ne pouvait être faite ou était douteuse.

(C'est moi qui souligne.)

Professor Klinck in the following passage at p. 286 of his article, " "The Same Cause or Matter": The Legacy of Kienapple", *supra*, has in my view correctly identified the manner in which the two charges in *Kienapple* were "alternative" to each other:

> Sexual intercourse with a female under 14 could be regarded as a kind of "constructive rape"; it might be said that the statute deems a girl under 14 to be incapable of consenting.

It is only in this fashion that it can properly be said that "the same or substantially the same elements" made up the offences of rape and carnal knowledge of a female under 14 years of age.

Several commentators on the *Kienapple* decision have suggested that *res judicata* in criminal law is an inappropriate foundation upon which to rest a rule against multiple convictions, or at least that a new meaning had to be given to *res judicata* in order to support the *Kienapple* decision: Sheppard, *supra*, at p. 635; Ewaschuk, *supra*, at p. 30; Jordan, *supra*, at pp. 347-48; Chasse, *supra*, at pp. 20-21; and Mewett, *supra*, at p. 385. There may be some merit to questioning the choice of terminology selected by the majority, and for this reason I prefer to refer to the doctrine enunciated in *Kienapple* as a rule against multiple convictions or, simply, as the *Kienapple* principle.

What cannot seriously be denied, however, is that there was antecedent Canadian case law precluding multiple convictions in circumstances that did not fall neatly within the plea of *autrefois convict*, or within s. 11 of the *Criminal Code* (prohibiting multiple punishment for the "same offence"), or within the requirements of an included offence under s. 589: see, for example, *R. v. Quon*, [1948] S.C.R. 508, and *R. v. Siggins* (1960), 127 C.C.C. 409 (Ont. C.A.) These cases, amongst others, prior to the Court's decision in *Kienapple*, make it clear that the Canadian courts have long been concerned to see that multiple

Le professeur Klinck, dans l'extrait suivant de la p. 286 de son article intitulé « «The Same Cause or Matter»: The Legacy of Kienapple», précité, a su, selon moi, décrire correctement la manière dont les deux infractions dans l'affaire *Kienapple* constituaient des infractions «de remplacement» l'une par rapport à l'autre:

> [TRADUCTION] Les rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans pourraient être considérés comme une espèce de «viol par interprétation»; en effet, il serait possible de prétendre que, aux fins de la loi, une jeune fille de moins de 14 ans est réputée incapable de consentir.

Ce n'est que dans ce sens que l'on peut affirmer à juste titre que «les mêmes éléments, ou fondamentalement les mêmes», constituent l'infraction de viol et celle de rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans.

Plusieurs commentateurs de l'arrêt *Kienapple* ont laissé entendre que l'autorité de la chose jugée en droit criminel n'est pas un fondement approprié pour une règle interdisant les déclarations de culpabilité multiples, ou qu'il faut à tout le moins donner à l'autorité de la chose jugée un sens nouveau afin de justifier l'arrêt *Kienapple*: Sheppard, précité, à la p. 635; Ewaschuk, précité, à la p. 30; Jordan, précité, aux pp. 347 et 348; Chasse, précité, aux pp. 20 et 21; et Mewett, précité, à la p. 385. On peut être fondé à critiquer les termes employés par la majorité et, pour cette raison, je préfère désigner le principe énoncé dans l'arrêt *Kienapple*, comme règle interdisant les déclarations de culpabilité multiples ou, simplement, comme principe de l'arrêt *Kienapple*.

On ne peut toutefois pas sérieusement nier l'existence d'une jurisprudence canadienne antérieure selon laquelle il ne peut y avoir de déclarations de culpabilité multiples dans des circonstances qui ne relèvent pas clairement du plaidoyer d'autrefois convict ou de l'art. 11 du *Code criminel* (qui interdit les peines multiples pour la «même infraction»), ou qui ne satisfont pas aux exigences établies par l'art. 589 relativement aux infractions incluses: voir, par exemple, l'arrêt *R. v. Quon*, [1948] R.C.S. 508, et l'arrêt *R. v. Siggins* (1960), 127 C.C.C. 409 (C.A. Ont.) Il ressort nettement de ces arrêts, pour ne nommer que ceux-là, qui ont

convictions are not without good reason heaped on an accused in respect of a single criminal delict. I therefore cannot agree with those commentators who refer to the *Kienapple* case as having created an entirely "new defence": Chasse, *supra* at p. 20; Jordan, *supra*, at p. 356. What was new in *Kienapple* relative to *Quon* (though not to *Siggins*) was the abandoning of an attempt to give effect to a rule against multiple convictions by "reading down" a *Criminal Code* provision. What was also new was an express recognition that the test for the application of the rule had to be framed not in terms of whether the offences charged were the "same offences" (or "included offences"), but in terms of whether the same "cause", "matter" or "delict" was the foundation for both charges.

précédé l'arrêt *Kienapple* de cette Cour, que les tribunaux canadiens veillent depuis longtemps à ce qu'un accusé ne soit pas assujetti sans raison valable à des déclarations de culpabilité multiples à l'égard d'un seul délit criminel. Je ne puis donc être d'accord avec les glossateurs qui affirment que l'arrêt *Kienapple* a créé un moyen de défense complètement «nouveau»: Chasse, précité, à la p. 20; Jordan, précité, à la p. 356. Ce qui est nouveau dans l'arrêt *Kienapple* par rapport à l'arrêt *Quon* (mais non par rapport à l'arrêt *Siggins*) est l'abandon d'une tentative d'appliquer une règle interdisant les déclarations de culpabilité multiples en donnant une «interprétation atténuée» à une disposition du *Code criminel*. Une autre innovation était la reconnaissance expresse que le critère permettant de déterminer l'applicabilité de la règle devait être formulé non pas en fonction de la question de savoir si les infractions reprochées étaient les «mêmes infractions» (ou des «infractions incluses»), mais de savoir si les deux accusations avaient pour fondement la même «cause», la même «chose» ou le même «délit».

This second change acknowledges that "offence" is a term of art and any given offence cannot be "the same as" or "included in" any other offence unless there is a precise correspondence in the definition of the offences. In the words of Lord Devlin, "legal characteristics are precise things and are either the same or not": *Connelly v. D.P.P.*, [1964] A.C. 1254 (H.L.) See also Klinck, *supra*, at p. 285. In short, I believe it was the acknowledgment of the independent legal identity of different offences which led the majority in *Kienapple* to its careful choice of the words, "cause", "matter", or "delict" in lieu of "offence".

Par ce second changement, on reconnaît que le mot «infraction» est un terme technique et qu'une infraction donnée ne peut pas être «la même» qu'une autre infraction ou «incluse dans» celle-ci, à moins que les définitions des infractions ne correspondent exactement. Comme l'a dit lord Devlin, [TRADUCTION] «les caractéristiques légales sont des notions précises; elles sont les mêmes ou elles ne le sont pas»: *Connelly v. D.P.P.*, [1964] A.C. 1254 (H.L.) Voir aussi Klinck, précité, à la p. 285. Bref, je crois que c'est la reconnaissance de l'identité légale indépendante de différentes infractions qui a amené la majorité dans l'arrêt *Kienapple* à choisir soigneusement les termes «cause», «chose» ou «délit» plutôt que le mot «infraction».

Unfortunately, some commentators and courts have wrongly inferred from these words that there need be no substantial nexus between the offences for which an application of the *Kienapple* principle is sought, providing there is a common act of the accused underlying the charges. The excerpts which I have quoted above from the *Kienapple* case, including phrases such as "substantially the same elements", "alternative charges", and "one

Malheureusement, certains glossateurs et tribunaux ont déduit à tort de ces termes qu'il n'est pas nécessaire d'avoir un lien solide entre les infractions à l'égard desquelles on demande l'application du principe de l'arrêt *Kienapple*, pourvu seulement que les accusations soient fondées sur un même acte de l'accusé. Les extraits de l'arrêt *Kienapple* que j'ai cités, y compris les expressions telles que «fondamentalement les mêmes [éléments]», «incul-

[offence] embraces the other", suggest that the majority thought otherwise.

IV

The Scope of the *Kienapple* Principle

(i) *The Factual Nexus Between the Charges*

It is elementary that *Kienapple* does not prohibit a multiplicity of convictions, each in respect of a different factual incident. Offenders have always been exposed to criminal liability for each occasion on which they have transgressed the law, and *Kienapple* does not purport to alter this perfectly sound principle. It is therefore a *sine qua non* for the operation of the rule against multiple convictions that the offences arise from the same transaction.

The degree of factual identity between the charges that is required to sustain the application of the rule is exemplified by the decision of this Court in *Côté v. The Queen*, [1975] 1 S.C.R. 303, which involved two offences normally capable of supporting the rule against multiple convictions: see *Hewson v. The Queen*, [1979] 2 S.C.R. 82, at p. 97. In *Côté*, the accused had been found in possession of property two years after his conviction for a robbery in respect of the same property. The accused had been sentenced for the robbery offence, imprisoned and released from prison when the police found him in possession of the stolen property. Evidently the accused had hidden the fruits of his robbery before he served his jail sentence. It was argued that possession by the original thief was merely a continuation of the act of theft.

The majority of the Court, however, held that the accused's possession was sufficiently removed in time and circumstance from the original taking of the property so that the accused could be convicted of both offences. Fauteux C.J. (Ritchie, Abbott and Judson JJ. concurring) wrote, at pp. 310-11:

pations de remplacement» et «une [infraction] embrasse l'autre», portent à croire que la majorité n'a pas été de cet avis.

IV

La portée du principe de l'arrêt *Kienapple*

(i) *Le lien factuel entre les accusations*

Il va de soi que l'arrêt *Kienapple* n'empêche pas la multiplicité des déclarations de culpabilité lorsque chacune se rapporte à des faits différents. Les contrevenants encourent toujours une responsabilité criminelle chaque fois qu'ils transgressent la loi, et l'arrêt *Kienapple* n'a nullement pour effet de modifier ce principe parfaitement valable. Il est donc essentiel, pour que s'applique la règle interdisant les déclarations de culpabilité multiples, que les infractions tirent leur origine de la même opération.

Le degré d'identité factuelle des accusations qui est requis pour que la règle puisse s'appliquer ressort de l'arrêt de cette Cour *Côté c. La Reine*, [1975] 1 R.C.S. 303, où il est question de deux infractions normalement susceptibles de justifier l'application de la règle interdisant les déclarations de culpabilité multiples: voir l'arrêt *Hewson c. La Reine*, [1979] 2 R.C.S. 82, à la p. 97. Dans l'affaire *Côté*, des biens avaient été trouvés en la possession de l'accusé deux ans après qu'il eut été déclaré coupable du vol qualifié de ces mêmes biens. Condamné à une peine d'emprisonnement relativement à l'infraction de vol qualifié, l'accusé avait été libéré de prison au moment où la police a découvert qu'il avait les biens volés en sa possession. De toute évidence, il avait caché les fruits de son vol avant de commencer à purger sa peine. On a fait valoir que cette possession par le voleur initial ne constituait que la continuation de l'acte du vol.

La Cour à la majorité a toutefois conclu que la possession par l'accusé était suffisamment éloignée, sur les plans du temps et des circonstances, du vol initial des biens pour que l'accusé puisse être reconnu coupable des deux infractions. Le juge en chef Fauteux (à l'avis duquel ont souscrit les juges Ritchie, Abbott et Judson) écrit, aux pp. 310 et 311:

In my opinion one cannot validly maintain, on the one hand, that continuation of the thief's possession—whether for weeks, months or years—is always a continuation of the act of theft or, if one prefers, a continuation of the commission of the theft, and one cannot, on the other hand, maintain that at the very time and place in which the thief takes or converts the thing, and so acquires possession of it, he is committing the offence of unlawful possession dealt with in s. 296.

Determination of the time when the offence of theft is consummated and the offence of unlawful possession, described in s. 296, so far as the thief is concerned, begins, cannot be resolved in the abstract. However, the difficulty that may exist in determining this time, according to the circumstances of each case, does not affect the substance of the law.

For Pigeon J. (Martland J. concurring) it was the intervening conviction itself which separated the theft from the possession. In his view, an accused could not receive judicial sanction to continue breaking the law. For a continuing offence there is no undue multiplication of convictions when the second conviction relates to a continuation of the offence beyond the date of the first conviction.

In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? As *Côté* demonstrates, however, it will not always be easy to define when one act ends and another begins. Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined: see Klinck, *supra*, at p. 292; Leonoff and Deutscher, *supra*, at p. 261; and Sheppard, *supra*, at p. 638. Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events (such as the robbery conviction in *Côté*), and whether the accused's actions were related to each other by a common objective. In the meantime, it would be a mistake to emphasize the

À mon avis, on ne peut pas validement prétendre, d'une part, que la continuation de la possession par le voleur—quelle qu'en soit la durée en semaines, mois ou années—soit toujours la continuation de l'acte du vol, ou si l'on veut, la continuation de la perpétration du vol et on ne peut, d'autre part, validement prétendre qu'à l'instant même et au lieu même où le voleur soustrait ou détourne la chose et en acquiert ainsi la possession, il commet alors l'infraction de la possession illégale visée par l'art. 296.

La détermination du moment où l'infraction de vol est complètement consommée et le moment où commence, pour le voleur, l'infraction de possession illégale décrite dans l'art. 296 ne peut être solutionnée dans l'abstrait. Et la difficulté qu'il peut y avoir à déterminer ce moment selon les circonstances de chaque cas, n'affecte pas la substance du droit.

Pour le juge Pigeon (dont l'opinion a été partagée par le juge Martland), c'était la déclaration de culpabilité survenue entre-temps qui séparait le vol d'avec la possession. Selon lui, un accusé ne pouvait obtenir des tribunaux l'autorisation de continuer à enfreindre la loi. Dans le cas d'une infraction continue, il n'y a pas de multiplication indue des déclarations de culpabilité lorsque la seconde déclaration de culpabilité se rapporte à la continuation de l'infraction au delà de la date de la première déclaration de culpabilité.

J'estime que, dans la plupart des cas, on satisfait à l'exigence d'un lien factuel par une réponse affirmative à la question suivante: Chacune des accusations est-elle fondée sur le même acte de l'accusé? Comme le démontre l'arrêt *Côté* cependant, il n'est pas toujours facile de déterminer quand un acte prend fin et un autre commence. Non seulement les infractions continues suscitent-elles des problèmes qui leur sont particuliers, mais il y a aussi la possibilité d'obtenir des réponses différentes à cette question, suivant le degré de généralité de la définition d'un acte: voir Klinck, précité, à la p. 292, Leonoff et Deutscher, précité, à la p. 304, et Sheppard, précité, à la p. 638. Ces difficultés doivent être résolues une à une au fur et à mesure qu'elles surgissent, et ce, en fonction de facteurs comme le caractère éloigné ou la proximité des événements spatio-temporels, la présence ou l'absence d'événements intermédiaires pertinents (comme la déclaration de culpabilité de vol qualifié dans l'affaire *Côté*), et la question de

difficulties. In many cases, including the present appeal, it will be clear whether or not the charges are founded upon the same act.

(ii) *The Nexus Between the Offences: Need There be One?*

The next question which must be addressed is whether the presence of a sufficient factual nexus is the only requirement which must be met in order to justify application of the *Kienapple* principle. Counsel for Sandra Prince refers in his factum to the *Kienapple* principle as one relating to multiple convictions for the same act. Similarly, Sheppard, in his early commentary on *Kienapple*, propounds a same transaction test for the rule against multiple convictions. Some courts, too, have referred to the "same act" or "same transaction" underlying two offences in terms which might suggest that that was sufficient to sustain the operation of the rule: see, for example, *R. v. Boyce* (1975), 23 C.C.C. (2d) 16 (Ont. C.A.), *R. v. Allison* (1983), 33 C.R. (3d) 333 (Ont. C.A.) and *Hagenlocher* (Man. C.A.)

In my opinion, the application of *Kienapple* is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves. The requirement of an adequate legal nexus is apparent from the use by the majority in *Kienapple* of the words "cause", "matter" or "delict" in lieu of "act" or "transaction" in defining the principle articulated in that case. More telling is the fact that Laskin J. went to considerable pains to discuss the legislative history of rape and carnal knowledge of a female under 14 years and to conclude that the offences were perceived as alternative charges when there was non-consensual intercourse with a female under 14. I am not prepared to regard Laskin J.'s analysis in this regard as unnecessary or irrelevant to the outcome in *Kienapple*, which it would of course be if the rule against multiple convictions applied

savoir si les actes de l'accusé étaient liés par un objectif commun. En même temps, on aurait tort d'insister sur les difficultés. Dans bien des cas, y compris en l'espèce, il est facile de déterminer si les accusations reposent sur le même acte.

(ii) *Le lien entre les infractions: est-il nécessaire?*

La question à examiner ensuite est de savoir si la présence d'un lien factuel suffisant est l'unique condition à remplir pour justifier l'application du principe de l'arrêt *Kienapple*. Dans son mémoire, l'avocat de Sandra Prince affirme que ce principe se rapporte aux déclarations de culpabilité multiples pour le même acte. De même, Sheppard, dans le commentaire de l'arrêt *Kienapple* qu'il a fait peu après que cet arrêt eut été rendu, propose le recours au critère de la même opération pour la règle interdisant les déclarations de culpabilité multiples. Certains tribunaux ont également parlé du «même acte» ou de la «même opération» qui sous-tend deux infractions, d'une manière qui pourrait laisser entendre que cela suffit pour entraîner l'application de la règle: voir, par exemple, *R. v. Boyce* (1975), 23 C.C.C. (2d) 16 (C.A. Ont.), *R. v. Allison* (1983), 33 C.R. (3d) 333 (C.A. Ont.), et *Hagenlocher* (C.A. Man.)

À mon avis, il ne suffit pas de si peu pour que s'applique l'arrêt *Kienapple*. Une fois établie l'existence d'un lien factuel suffisant entre les accusations, il reste à déterminer s'il y a un rapport suffisant entre les infractions elles-mêmes. La nécessité d'un lien juridique suffisant se dégage de l'emploi par la majorité dans l'arrêt *Kienapple* des mots «cause» «chose» ou «délit» au lieu des termes «acte» ou «opération» dans l'énoncé du principe posé dans cet arrêt. Fait encore plus éloquent, le juge Laskin a pris grand soin de tracer l'historique législatif de l'infraction de viol et de celle de rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans et a conclu que ces infractions étaient perçues comme des inculpations de remplacement dans les cas de rapports sexuels avec une personne du sexe féminin de moins de 14 ans sans son consentement. Je ne suis pas prêt à considérer l'analyse du juge Laskin sur ce point comme inutile ou sans importance quant à l'issue

whenever there was a sufficient factual nexus between the charges.

In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions. In a unanimous judgment in *McKinney v. The Queen*, [1980] 1 S.C.R. 401, delivered orally by Laskin C.J., the Court saw no reason for interfering with a decision of the Manitoba Court of Appeal reported at (1979), 46 C.C.C. (2d) 566. Although *Kienapple* was not referred to in the reasons of this Court, it had been argued in the Court of Appeal. McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the *Wildlife Act*, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions.

Numerous other cases can be cited to illustrate that a single act of an accused can involve two or more delicts against society which bear little or no connection the one to the other. *R. v. Logeman* (1978), 5 C.R. (3d) 219 (B.C.C.A.) involved charges of driving while suspended and impaired driving; *R. v. Lecky* (1978), 42 C.C.C. (2d) 406 (N.S. Co. Ct.), contributing to juvenile delinquency and trafficking in a narcotic; *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65 (Nfld. C.A.),

de l'affaire *Kienapple*, ce qui serait évidemment le cas si la règle interdisant les déclarations de culpabilité multiples s'appliquait chaque fois qu'il existe un lien factuel suffisant entre les accusations.

À mon avis, la jurisprudence postérieure à l'arrêt *Kienapple* tend nettement à appuyer elle aussi la proposition selon laquelle il doit y avoir entre les infractions reprochées un lien suffisant pour justifier l'application de la règle interdisant les déclarations de culpabilité multiples. Dans l'arrêt unanime *McKinney c. La Reine*, [1980] 1 R.C.S. 401, rendu oralement par le juge en chef Laskin, la Cour n'a vu aucune raison de modifier un arrêt de la Cour d'appel du Manitoba, publié à (1979), 46 C.C.C. (2d) 566. Quoique l'arrêt *Kienapple* n'ait pas été mentionné dans les motifs de cette Cour, on l'avait invoqué devant la Cour d'appel. McKinney et d'autres personnes ont été accusés et déclarés coupables d'avoir chassé hors saison et d'avoir chassé la nuit en se servant de projecteurs, contrairement aux par. 16(1) et 19(1), respectivement, de la *Wildlife Act*, R.S.M. 1970, chap. W140. Les deux accusations découlaient du même incident de chasse. Le juge O'Sullivan, au nom de la cour à la majorité, a conclu que l'on était en présence de deux «délits». Le juge Monnin, dissident sur une autre question, a affirmé que la chasse hors saison et la chasse au moyen de projecteurs constituent deux «choses» différentes, tout à fait distinctes l'une de l'autre, qui ne constituent pas des infractions de remplacement l'une par rapport à l'autre. Les juges de la Cour d'appel ont tous été d'accord pour dire que l'arrêt *Kienapple* ne s'appliquait pas. Ainsi, même s'il n'y avait qu'un seul acte de chasse, il y avait des causes, des choses ou des délits distincts sur lesquels pourraient être fondées des déclarations de culpabilité distinctes.

Un bon nombre d'autres décisions peuvent être citées pour montrer qu'un seul acte de la part d'un accusé peut constituer deux délits ou plus contre la société, qui ont peu ou pas de rapport entre eux. Dans l'affaire *R. v. Logeman* (1978), 5 C.R. (3d) 219 (C.A.C.-B.), il était question d'accusations d'avoir conduit alors que le permis de conduire était suspendu et de conduite avec facultés affaiblies; dans l'affaire *R. v. Lecky* (1978), 42 C.C.C (2d) 406 (C. cté N.-É.), il était question d'incita-

breach of recognizance and possession of a narcotic; *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284 (B.C.C.A.), breach of probation and common assault; *R. v. Père Jean Grégoire de la Trinité* (1980), 60 C.C.C. (2d) 542 (Que. C.A.), contempt of court and unlawfully detaining children. Notwithstanding that a single act of the accused appears in each of these cases to have given rise to two charges, *Kienapple* was held to be inapplicable. In my view, these cases were correctly decided. If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality. In short, I agree with the following remarks of Lambert J.A. in *R. v. Harrison* (1978), 7 C.R. (3d) 32 (B.C.C.A.), at p. 37:

It is not sufficient to consider the charges and to ask whether conviction on one will involve conviction on another. It is not sufficient to consider the facts and to ask whether only one act is involved. The facts and the charges must be considered together and in their relationship to each other.

There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions.

(iii) *Is it Sufficient that the Offences Share a Common Element?*

It has frequently been suggested that the presence of a common element in the offences charged will be sufficient to attract the *Kienapple* principle. Ewaschuk, *supra*, at p. 41 of his 1975 article on the rule against multiple convictions suggests:

tion à la délinquance juvénile et de trafic d'un stupéfiant; dans l'affaire *R. v. Earle* (1980), 24 Nfld. & P.E.I.R. 65 (C.A.T.-N.), il était question de violation d'engagement et de possession d'un stupéfiant; dans l'affaire *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284 (C.A.C.-B.), il était question de manquement aux conditions d'une ordonnance de probation et de voies de fait simples; dans l'affaire *R. v. Père Jean Grégoire de la Trinité* (1980), 60 C.C.C. (2d) 542 (C.A. Qué.), il était question d'outrage au tribunal et de détention illégale d'enfants. Même si, dans chacun de ces cas, un seul acte de l'accusé semblait avoir donné lieu à deux accusations, l'arrêt *Kienapple* a été jugé inapplicable. À mon avis, ces affaires ont été tranchées correctement. Si un accusé se rend coupable de plusieurs méfaits, il n'y a rien d'injuste à ce que cette réalité se reflète dans son casier judiciaire. Bref, je suis d'accord avec les observations suivantes du juge Lambert dans l'arrêt *R. v. Harrison* (1978), 7 C.R. (3d) 32 (C.A.C.-B.), à la p. 37:

[TRADUCTION] Il ne suffit pas d'examiner les accusations et de se demander si une déclaration de culpabilité relative à l'une d'elles entraînera une déclaration de culpabilité relativement à une autre. Il ne suffit pas d'examiner les faits et de se demander si l'on se trouve en présence d'un seul acte. Les faits et les accusations doivent être examinés ensemble et en fonction des liens qui existent entre eux.

Il doit y avoir des liens suffisamment étroits tout d'abord entre les faits, et ensuite entre les infractions, qui constituent le fondement d'au moins deux accusations à l'égard desquelles on cherche à invoquer la règle interdisant les déclarations de culpabilité multiples.

(iii) *Suffit-il que les infractions aient un élément commun?*

On a souvent laissé entendre que la présence d'un élément commun dans les infractions reprochées suffit pour rendre applicable le principe de l'arrêt *Kienapple*. Ewaschuk, précité, à la p. 41 de son article de 1975 portant sur la règle interdisant les déclarations de culpabilité multiples, propose ceci:

If the offences stem from the same act and have a common element or elements, then *Kienapple* should apply.

The common element test rests on the proposition or principle that an act which constitutes an element of an offence can only be used to sustain a single conviction. It is thereafter "used up" for the purposes of the criminal law. Mewett, *supra*, at pp. 383-84, explained the *Kienapple* case in this light:

Kienapple is as good an illustration as any. The offence on count one embraces the *actus reus* of (i) sexual intercourse (ii) woman not his wife and (iii) no consent. On count two, it embraces (i) sexual intercourse (ii) woman not his wife and (iii) under fourteen. But two of the elements necessary under count two have become, as Laskin, J., stated, *res judicata*—they are used up, leaving, on count 2 only the third element dangling in the air. The acts (nouns) of the accused caused by his acting can only be used once—either for count one or count two but not both. Any acts not previously adjudicated remain, but, detached from the now adjudicated other acts, could not support a conviction.

(Emphasis added.)

This principle against the duplication of elements appears to underlie a number of judicial decisions: see, for example, *R. v. Taylor* (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.), at pp. 537-38 and *R. v. Allison*, *supra*, at pp. 339-40. But, like the "same act" test, it fails to explain a number of cases which I believe were correctly decided, such as *McKinney* and *Logeman*.

In any event, I observe that a common element test has already been considered and rejected by this Court. In *Côté v. The Queen*, *supra*, at p. 310, Fauteux C.J. wrote:

The fact that [a thief's] possession is a common ingredient of both offences [i.e. theft and unlawful possession] is no reason to exclude or ignore what is actually the crucial factor distinguishing one from the other, and is of the essence of their respective nature.

[TRADUCTION] Si les infractions résultent du même acte et ont au moins un élément commun, l'arrêt *Kienapple* doit s'appliquer.

Le critère de l'élément commun repose sur la proposition ou le principe portant qu'un acte qui constitue un élément d'une infraction ne peut servir à étayer qu'une seule déclaration de culpabilité. Cet acte est par la suite «épuisé» aux fins du droit criminel. Voilà comment Mewett, précité, aux pp. 383 et 384, explique l'affaire *Kienapple*:

[TRADUCTION] Comme illustration, l'affaire *Kienapple* en vaut bien une autre. L'infraction visée par le premier chef d'accusation comporte comme *actus reus* (i) des rapports sexuels (ii) avec une femme qui n'est pas son épouse et (iii) sans son consentement. Pour ce qui est du second chef d'accusation, il consiste à (i) avoir eu des rapports sexuels (ii) avec une femme qui n'est pas son épouse et (iii) qui est âgée de moins de 14 ans. Mais, deux des éléments nécessaires du second chef d'accusation sont devenus, comme l'a dit le juge Laskin, chose jugée—leur effet est épuisé, de sorte que, dans le cas du second chef d'accusation, il ne reste que le troisième élément. Les actes (noms) commis par l'accusé ne peuvent être invoqués qu'une seule fois—soit pour le premier chef d'accusation, soit pour le second, mais non pour les deux. Il reste encore tous les actes qui n'ont pas déjà fait l'objet d'une décision, mais qui, séparés d'avec les autres actes qui ont fait l'objet d'une décision, ne peuvent fonder une déclaration de culpabilité.

(C'est moi qui souligne.)

Le principe qui interdit qu'un élément donné soit utilisé plus d'une fois paraît sous-tendre plusieurs décisions judiciaires: voir, par exemple, *R. v. Taylor* (1979), 48 C.C.C. (2d) 523 (C.A.T.-N.), aux pp. 537 et 538, et *R. v. Allison*, précité, aux pp. 339 et 340. Mais, tout comme le critère du «même acte», il n'explique pas un certain nombre de décisions comme *McKinney* et *Logeman*, qui, selon moi, sont fondées en droit.

De toute manière, je constate que cette Cour a déjà étudié et rejeté le critère de l'élément commun. Dans l'arrêt *Côté c. La Reine*, précité, à la p. 310, le juge en chef Fauteux écrit:

Le fait que sa possession [celle du voleur] soit un élément commun aux deux infractions [c.-à-d. le vol et la possession illégale], ne justifie pas d'exclure de la question et d'ignorer ce qui, à la vérité, est le facteur vital qui les distingue l'une de l'autre et qui est le propre de leur nature respective.

The majority in *Côté* thus pointed in the direction of a test which focused not on the presence or absence of a common element, but on the presence or absence of additional, distinguishing elements.

Indeed, such a focus is apparent even in the *Kienapple* case. At page 755, Laskin J. specifically addressed the elements that were different in the two offences for which the Crown sought convictions:

> In the circumstances of the present case, the superadded element of age in s. 146(1) does not operate to distinguish unlawful carnal knowledge from rape. Age under fourteen is certainly material where consent to the sexual intercourse is present; but once that is ruled out, as it is in the present case, it becomes meaningless as a distinguishing feature of the offences of rape and unlawful carnal knowledge.

(Emphasis added.)

Most recently, in *Krug v. The Queen*, [1985] 2 S.C.R. 255, this Court unmistakably focused on the presence of distinguishing elements, rather than on the presence of shared elements, in assessing the applicability of *Kienapple*. Krug was charged with robbery under s. 302(*d*) and with various firearms offences including an offence under s. 83(1)(*a*). Krug submitted that the *Kienapple* principle at common law and as allegedly constitutionalized in ss. 7 and 11(*h*) of the *Canadian Charter of Rights and Freedoms* precluded convictions for the firearms offences. His arguments regarding the s. 83 conviction were rejected in a unanimous judgment, delivered by La Forest J.

La Forest J. adopted the following passage from the reasons of Martin J.A. in *R. v. Langevin* (1979), 47 C.C.C. (2d) 138 (Ont. C.A.), at p. 145:

> Notwithstanding that in most cases of "armed robbery" the offender will have used the weapon, none the less, s. 83(1), by making the *use of a firearm an essential element* of the offence created by the subsection, unlike

La Cour à la majorité dans l'arrêt *Côté* a ainsi opté pour un critère fondé non pas sur la présence ou l'absence d'un élément commun, mais sur la présence ou l'absence d'éléments supplémentaires distinctifs.

En fait, ce fondement est apparent même dans l'arrêt *Kienapple*. À la page 755, le juge Laskin parle précisément des éléments qui étaient différents dans les deux infractions à l'égard desquelles la poursuite tentait d'obtenir des déclarations de culpabilité:

> Dans les circonstances de l'espèce présente, l'élément surajouté que constitue l'âge à l'art. 146, par. (1), n'a pas pour effet de distinguer les rapports sexuels illicites du viol. Un âge inférieur à quatorze ans est certainement pertinent lorsqu'il y a eu consentement aux rapports sexuels; mais dès lors que cela est éliminé, comme c'est ici le cas, l'âge perd tout son sens en tant que trait distinctif de l'infraction de viol et de rapports sexuels illicites.

(C'est moi qui souligne.)

Tout récemment, dans l'arrêt *Krug c. La Reine*, [1985] 2 R.C.S. 255, cette Cour s'est indubitablement concentrée sur la présence d'éléments distinctifs, plutôt que sur la présence d'éléments communs, pour déterminer l'applicabilité de l'arrêt *Kienapple*. Krug a été accusé d'avoir commis un vol qualifié, contrairement à l'al. 302*d*), et différentes infractions reliées aux armes à feu, y compris celle définie à l'al. 83(1)*a*). Krug a fait valoir que le principe de l'arrêt *Kienapple*, suivant la *common law* et tel qu'il serait consacré dans la Constitution à l'art. 7 et à l'al. 11*h*) de la *Charte canadienne des droits et libertés*, écartait toute possibilité de le déclarer coupable des infractions reliées aux armes à feu. Ses arguments concernant la déclaration de culpabilité fondée sur l'art. 83 ont été rejetés dans un arrêt unanime rendu par le juge La Forest.

Le juge La Forest a adopté l'extrait suivant des motifs du juge Martin dans l'arrêt *R. v. Langevin* (1979), 47 C.C.C. (2d) 138 (C.A. Ont.), à la p. 145:

> [TRADUCTION] Même si dans toutes les affaires de «vol à main armée», le contrevenant utilise l'arme, il reste qu'en faisant *de l'usage d'une arme à feu un élément essentiel de l'infraction* qu'il crée, le par. 83(1), à la

s. 122 which required only that the offender have a firearm on his person, imports a further element in addition to those which suffice to constitute theft while armed with a firearm.

(Emphasis added.)

Or, as expressed by La Forest J. himself at pp. 262-63:

[The doctrine of *res judicata*] would apply to prevent conviction for both offences if the difference between the two was limited solely to the fact that s. 83 particularizes the form of weapon since the specific weapon was, of course, the weapon used in both offences. But s. 83 also requires that the firearms be used, an act not necessarily encompassed in being armed with it, and there was evidence of use apart from that of being armed. In short, to be convicted of an offence under s. 83 it was necessary to prove that the accused did something beyond what is required to establish the offence under s. 302(*d*).

(Emphasis added.)

It has been a consistent theme in the jurisprudence from *Quon*, through *Kienapple* and *Krug* that the rule against multiple convictions in respect of the same cause, matter or delict is subject to an expression of Parliamentary intent that more than one conviction be entered when offences overlap: see, in particular, *McGuigan v. The Queen*, [1982] 1 S.C.R. 284. In *Krug*, La Forest J. was careful to explain that the presence of additional, distinguishing elements was in itself an expression of such an intent. No element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.

I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence

différence de l'art. 122 qui exigeait seulement que le contrevenant ait l'arme à feu sur lui, ajoute un élément supplémentaire à ceux qui suffisent à constituer un vol alors qu'on est muni d'une arme à feu.

(C'est moi qui souligne.)

Ou encore, comme l'affirme le juge La Forest lui-même, aux pp. 262 et 263:

[Le principe de l'autorité de la chose jugée] s'appliquerait de manière à empêcher qu'on soit reconnu coupable de l'une et l'autre infractions si la différence entre les deux tenait uniquement au fait que l'art. 83 précise la nature de l'arme, étant donné évidemment que la même arme a été utilisée dans les deux cas. Mais, l'art. 83 exige aussi que l'arme à feu ait été utilisée, un acte qui n'est pas nécessairement compris dans l'expression en être muni. En l'espèce, il y a des éléments de preuve d'usage distincts de ceux relatifs au fait d'être muni d'une arme. En résumé, pour reconnaître l'accusé coupable d'une infraction à l'art. 83, il était nécessaire de prouver qu'il a fait quelque chose de plus que ce qui est nécessaire pour établir une infraction à l'al. 302*d*).

(C'est moi qui souligne.)

Un thème qui revient constamment dans la jurisprudence depuis l'arrêt *Quon*, en passant par l'arrêt *Kienapple* et l'arrêt *Krug*, est que la règle interdisant les déclarations de culpabilité multiples à l'égard de la même cause, de la même chose ou du même délit ne joue pas si le Parlement exprime l'intention d'exiger plus d'une déclaration de culpabilité lorsque des infractions chevauchent: voir, en particulier, l'arrêt *McGuigan c. La Reine*, [1982] 1 R.C.S. 284. Dans l'arrêt *Krug*, le juge La Forest a pris soin d'expliquer que la présence d'éléments supplémentaires distinctifs constituait elle-même l'expression d'une telle intention. Aucun élément que le Parlement a jugé bon d'inclure dans une infraction et dont l'existence a été prouvée hors de tout doute raisonnable ne doit être omis quand le contrevenant est appelé à rendre compte de ses actes à la société, à moins que cet élément ne soit essentiellement identique ou ne corresponde suffisamment à un élément de l'autre infraction dont il a été reconnu coupable.

Je conclus donc qu'on ne satisfait à l'exigence d'un lien suffisamment étroit entre les infractions que si l'infraction à l'égard de laquelle on tente d'éviter une déclaration de culpabilité en invo-

for which a conviction is sought to be precluded by the *Kienapple* principle.

There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. For example, in *R. v. Loyer*, [1978] 2 S.C.R. 631, *Kienapple* was applied to bar convictions for possession of a weapon for the purpose of committing an offence when convictions were entered for the more serious offence of attempted armed robbery by use of a knife. Although the robbery charges contained the element of theft which distinguished them from the weapons charges, there were no elements in the weapons charges which were additional to or distinct from those in the robbery charges. Accordingly, it was appropriate for the Court to apply *Kienapple* to bar convictions on the lesser weapons charges rather than on the robbery charges.

quant le principe de l'arrêt *Kienapple* ne comporte pas d'éléments supplémentaires et distinctifs qui touchent à la culpabilité.

Il y a toutefois un corollaire à cette conclusion. Dans le cas où les infractions sont de gravité inégale, l'arrêt *Kienapple* peut s'appliquer de manière à empêcher une déclaration de culpabilité relativement à une infraction moindre, même si l'infraction plus grave à l'égard de laquelle une déclaration de culpabilité a été inscrite comporte des éléments supplémentaires, pourvu toujours que l'infraction moindre ne compte pas d'éléments supplémentaires distincts. Par exemple, dans l'affaire *R. c. Loyer*, [1978] 2 R.C.S. 631, l'arrêt *Kienapple* a été appliqué de manière à empêcher des déclarations de culpabilité de possession d'une arme en vue de commettre une infraction dans le cas où des déclarations de culpabilité avaient été inscrites relativement à l'infraction plus grave de tentative de commettre un vol qualifié en se servant d'un couteau. Même si les accusations de vol qualifié contenaient l'élément de vol qui les distinguait des accusations relatives aux armes, ces dernières ne comportaient pas d'éléments qui venaient s'ajouter à ceux contenus dans les accusations de vol qualifié ou qui étaient distincts de ceux-ci. Il convenait donc que la Cour applique l'arrêt *Kienapple* de manière à empêcher des déclarations de culpabilité relativement aux infractions moindres reliées aux armes plutôt que relativement aux accusations de vol qualifié.

(iv) *When is an Element of an Offence not Additional or Distinct?*

I now turn briefly to the question of when an element of an offence sufficiently corresponds to another element so that it cannot be regarded as additional or distinct. When can it be said that elements are "substantially the same" or "alternative" the one to the other? This is a question which defies precise answers. Differences of degree are often important and, as La Forest J. has pointed out, abstract logic must be supplemented by an awareness of practical considerations in ascertaining Parliament's intention in creating different offences: *Krug*, *supra*, p. 269. Without purporting to be exhaustive, I believe that there are at least three ways in which sufficient correspondence be-

(iv) *Quand un élément d'une infraction n'est-il pas supplémentaire ou distinct?*

Maintenant, j'aborde brièvement la question de savoir quand un élément d'une infraction correspond à un autre élément au point de ne pouvoir être considéré comme supplémentaire ou distinct. Quand peut-on dire que des éléments sont «fondamentalement les mêmes» ou qu'ils offrent un «choix» l'un par rapport à l'autre? Voilà une question qui n'admet pas de réponse précise. Les différences de degré sont souvent importantes et, comme l'a fait remarquer le juge La Forest, la logique abstraite doit être assortie d'une connaissance des considérations d'ordre pratique lorsqu'on vérifie l'intention qu'avait le législateur en créant différentes infractions: *Krug*, précité, à la p. 269.

tween elements can be found, each of which is subject always to the manifestation of a legislative intent to increase punishment in the event that two or more offences overlap.

Sans prétendre en dresser une liste exhaustive, je crois qu'il y a au moins trois façons d'établir l'existence d'une correspondance suffisante entre des éléments, dont chacune demeure toujours assujettie à la manifestation de l'intention du législateur d'imposer une peine plus sévère dans le cas où il y a chevauchement de deux ou plusieurs infractions.

First, an element may be a particularization of another element. In *Krug*, the Court was called upon to consider not only the relationship between s. 83(1)(*a*) and s. 302(*d*), as described above, but also the relationship between s. 83(1)(*a*) and s. 84. Section 84 made it an offence to point a firearm at a person. Section 83(1)(*a*), it will be recalled, made it an offence to use a firearm while committing an indictable offence. The trial judge had characterized the element of "pointing at a person" as an ingredient additional to "use". This Court disagreed, saying, "It is obvious that pointing a gun is a manner of using it" (p. 268). Accordingly, the Court referred to pointing as a particularization of use. Under the circumstances, it was difficult to believe that Parliament intended "automatically to make the same objectionable behaviour the subject of two separate offences" (p. 270).

Premièrement, un élément peut constituer une manifestation particulière d'un autre élément. Dans l'affaire *Krug*, la Cour était appelée à étudier non seulement le rapport entre l'al. 83(1)*a*) et l'al. 302*d*), décrit précédemment, mais aussi le rapport entre l'al. 83(1)*a*) et l'art. 84. L'article 84 crée l'infraction qui consiste à braquer une arme à feu sur une personne. Suivant l'al. 83(1)*a*), rappelons-le, commet une infraction quiconque utilise une arme à feu lors de la perpétration d'un acte criminel. Le juge du procès a qualifié l'élément qui consiste à «braquer une arme à feu sur une personne» d'élément qui vient s'ajouter à l'«usage». Cette Cour a manifesté son désaccord en affirmant: «Il est évident que braquer un fusil est une façon de l'utiliser» (p. 268). En conséquence, la Cour a décrit le fait de braquer une arme à feu sur une autre personne comme une façon particulière de l'utiliser. Dans les circonstances, on pouvait difficilement croire que le législateur a voulu que «la même conduite répréhensible fasse automatiquement l'objet de deux infractions distinctes» (p. 270).

In general, the particularization in one offence of an element of another offence should not be regarded as a distinguishing feature that renders *Kienapple* inapplicable. Parliament may create offences of varying degrees of generality, with the objective (*vis-à-vis* the more general offence) of ensuring that criminal conduct will not escape punishment because of a failure of the drafters to think of each individual circumstance in which the conduct might be committed, or with the objective (*vis-à-vis* the more specific offence) of addressing with certainty particular conduct in particular circumstances. In the absence of some indication of Parliamentary intent that there should be multiple convictions or added punishment in the event of an overlap, the particularization of an element ought

En général, on ne doit pas considérer la mention particulière dans l'énoncé d'une infraction d'un élément constitutif d'une autre infraction comme un trait distinctif qui rend inapplicable l'arrêt *Kienapple*. Le Parlement peut créer des infractions de différents degrés de généralité, dans le but (en ce qui concerne l'infraction plus générale) d'assurer qu'une conduite criminelle n'échappe pas à toute sanction pour le motif que les rédacteurs de la loi n'ont pas envisagé chacune des situations dans lesquelles cette conduite peut se présenter, ou dans le but (en ce qui concerne l'infraction plus précise) de viser avec certitude une conduite particulière dans des circonstances particulières. En l'absence d'une indication quelconque que le législateur a voulu qu'il y ait des déclarations de culpa-

not to be taken as a sufficient distinction to preclude the operation of the *Kienapple* principle.

A second way in which elements may correspond relates to there being more than one method, embodied in more than one offence, to prove a single delict. In *R. v. Gushue* (1976), 32 C.C.C. (2d) 189 (Ont. C.A.), affirmed on other grounds, [1980] 1 S.C.R. 798, the accused was charged under s. 124 with giving evidence in a judicial proceeding that was contrary to his own previous evidence. He was also charged with perjury contrary to s. 121. The Court reached the conclusion that convictions under both offences would have infringed the *Kienapple* principle. I agree. Although s. 121 and s. 124 have different elements, the difference is clearly not a reflection of any Parliamentary intent to add extra punishment when both offences can be proven. Section 124 is designed merely to facilitate proof of false evidence having been given, notwithstanding that no one particular statement can be proven false. Parliament has merely succumbed to the imperatives of logic: if two contradictory statements are given, one of them must be false and the delict of giving false evidence must have been committed on one of the two occasions.

The third situation in which there is sufficient correspondence between elements to sustain the *Kienapple* principle is somewhat similar. It arises when Parliament in effect deems a particular element to be satisfied by proof of a different nature, not necessarily because logic compels that conclusion, but because of social policy or inherent difficulties of proof. The *Kienapple* case itself affords one example. There, as we have seen, the element of the victim's age served as a substitute for the element of non-consent. A girl of less than fourteen years of age could not in Parliament's opinion meaningfully consent to sexual intercourse. Another example is provided by *Terlecki v. The*

bilité multiples ou une peine supplémentaire en cas de chevauchement, la mention particulière d'un élément donné ne doit pas être considérée comme une distinction suffisante pour empêcher l'application du principe énoncé dans l'arrêt *Kienapple*.

Une seconde façon dont des éléments peuvent correspondre tient à l'existence de plus d'une méthode, comprise dans plus d'une infraction, d'établir un seul délit. Dans l'arrêt *R. v. Gushue* (1976), 32 C.C.C (2d) 189 (C.A. Ont.), confirmé pour d'autres motifs, [1980] 1 R.C.S. 798, l'accusé avait été inculpé en vertu de l'art. 124 d'avoir donné au cours de procédures judiciaires un témoignage contraire à sa propre déposition antérieure. On l'accusait en outre d'avoir commis un parjure contrairement à l'art. 121. La Cour est arrivée à la conclusion que ce serait faire une entorse au principe énoncé dans l'arrêt *Kienapple* que de rendre des verdicts de culpabilité relativement aux deux infractions. Je suis d'accord avec cela. Bien que les art. 121 et 124 comportent des éléments différents, cette différence ne traduit manifestement pas une intention du législateur d'ajouter une peine supplémentaire chaque fois qu'il est possible de prouver la perpétration des deux infractions. L'article 124 a simplement pour objet de faciliter la preuve d'un faux témoignage, même s'il est impossible d'établir la fausseté d'une déclaration en particulier. Le Parlement s'est simplement rendu aux impératifs de la logique: si deux déclarations contradictoires ont été faites, l'une d'elles doit être fausse et le délit qui consiste à rendre un faux témoignage doit avoir été commis à l'une des deux occasions.

La troisième situation dans laquelle il existe entre des éléments une correspondance suffisante pour justifier l'application du principe de l'arrêt *Kienapple* est quelque peu semblable. Elle se présente lorsque le Parlement prévoit en fait que l'existence d'un élément donné est réputée être établie au moyen d'une autre sorte de preuve, non pas nécessairement parce que la logique commande cette conclusion, mais parce que des considérations de politique sociale ou des difficultés qui se rattachent à la preuve l'imposent. L'affaire *Kienapple* en est elle-même un exemple. Dans cette affaire, comme nous l'avons vu, l'élément de l'âge de la victime a servi de remplacement à

Queen, [1985] 2 S.C.R. 483. Although the case largely dealt with a procedural issue, the Court's decision was predicated on the applicability of *Kienapple* as between the offences of impaired driving contrary to s. 234 and "over 80" contrary to s. 236. Impairment is inherently difficult to prove, and Parliament has deemed a certain proportion of alcohol in one's blood to constitute an impairment of driving ability. The differences between the elements of these offences are explained by an attempt to facilitate the apprehension by the police or the conviction by the courts of persons who are guilty of essentially the same wrongful conduct: see Leonoff and Deutscher, *supra*, at p. 261. I believe that elements which serve only as an evidentiary proxy for another element cannot be regarded as distinct or additional elements for the purposes of the rule against multiple convictions.

I emphasize that in applying the above criteria it is important not to carry logic so far as to frustrate the intent of Parliament or as to lose sight of the overarching question whether the same cause, matter or delict underlies both charges. For example, there exist offences aimed at a particular evil which (in certain circumstances) contain as an element the commission of some other offence directed toward an entirely different wrong. Such was the relationship between the offences in *Lecky*, *Earle*, *Pinkerton* and *Père Jean Grégoire*. In these cases, it could be argued, a substantive offence was subsumed by a greater, generic offence: Klinck, *supra*, at pp. 301-02. To illustrate, the offence of breach of probation contains as an element the non-compliance with a probation order which, as a matter of law, requires the accused to keep the peace and be of good behaviour: s. 663(2). The fact that breach of probation is an offence punishable by summary conviction

l'élément de l'absence de consentement. De l'avis du législateur, une jeune fille de moins de quatorze ans ne pouvait pas réellement consentir à des rapports sexuels. Un autre exemple se dégage de l'affaire *Terlecki c. La Reine*, [1985] 2 R.C.S. 483. Bien que le litige ait porté principalement sur une question de procédure, la Cour a fondé sa décision sur l'applicabilité de l'arrêt *Kienapple* aux infractions de conduite avec facultés affaiblies contrairement à l'art. 234 et de conduite avec un taux d'alcoolémie «supérieur à 80 mg» contrairement à l'art. 236. Or, l'affaiblissement des facultés est quelque chose de difficile à prouver en soi et le Parlement a établi une présomption selon laquelle la présence d'une certaine concentration d'alcool dans le sang cause une diminution de la capacité de conduire. Les différences entre les éléments constitutifs de ces infractions s'expliquent par une tentative de faciliter l'arrestation par la police, ou la condamnation par les tribunaux, des personnes qui se rendent coupables essentiellement de la même conduite illégale: voir Leonoff et Deutscher, précité, à la p. 304. J'estime que des éléments qui servent uniquement à remplacer un autre élément en matière de preuve ne sauraient être considérés comme distincts ou supplémentaires aux fins de la règle interdisant les déclarations de culpabilité multiples.

J'insiste sur le fait qu'en appliquant les critères susmentionnés il importe de se garder de pousser la logique au point de contrecarrer l'intention du législateur ou de perdre de vue la question clé de savoir si les deux accusations sont fondées sur la même cause, la même chose ou le même délit. Par exemple, il existe des infractions visant à réprimer un mal particulier, qui (dans certaines circonstances) comportent comme élément la perpétration d'une autre infraction créée en vue de réprimer un mal tout à fait différent. Tel était le rapport entre les infractions dont il était question dans les affaires *Lecky*, *Earle*, *Pinkerton* et *Père Jean Grégoire*. On pourrait prétendre que dans ces affaires une infraction matérielle précise était subsumée sous une infraction générique de portée plus large: Klinck, précité, aux pp. 301 et 302. Par exemple, l'infraction de manquement aux conditions d'une ordonnance de probation contient comme élément le non-respect d'une ordonnance de probation qui,

(s. 666(1)) is a clear indication that Parliament cannot have intended a conviction for that offence to operate as a bar to a conviction for the substantive offence (which might attract a far more severe penalty) merely because the substantive offence might be regarded as a particularization of a failure to keep the peace and be of good behaviour. Plainly, breach of probation is an offence designed to protect the effective operation of the criminal justice system, a societal interest which is entirely different from that protected by an offence such as assault. Accordingly, *Kienapple* had no application in those four cases.

de par la loi, exige que l'accusé s'abstienne de troubler l'ordre public et qu'il ait une bonne conduite: par. 663(2). Le fait que le manquement aux conditions d'une ordonnance de probation constitue une infraction punissable sur déclaration sommaire de culpabilité (par. 666(1)) indique clairement que le Parlement n'a pas pu vouloir qu'une déclaration de culpabilité prononcée relativement à cette infraction ait pour effet d'empêcher une déclaration de culpabilité d'avoir commis l'infraction matérielle précise (laquelle risque d'entraîner une peine bien plus sévère) simplement parce que cette dernière infraction pourrait être considérée comme une manifestation particulière du fait d'avoir troublé l'ordre public et de ne pas avoir eu une bonne conduite. Manifestement, le manquement aux conditions d'une ordonnance de probation est une infraction destinée à assurer le fonctionnement efficace du système de justice criminelle et il s'agit-là d'un intérêt public complètement différent de celui protégé par une infraction comme les voies de fait. En conséquence, l'arrêt *Kienapple* ne s'appliquait pas dans ces quatre affaires.

V

Applicability of the *Kienapple* Principle in the Present Case

As has been noted above, the respondent Sandra Prince has been convicted of causing bodily harm to Bernice Daniels. She has been charged with a second offence, namely, the manslaughter of Daniels' child, arising out of the same act of stabbing. I should, perhaps, explain that no question arises regarding the viability of a manslaughter charge founded on an act prior to the victim's birth. Section 206(2) reads as follows:

206. . . .

(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.

The only issue before the Court, therefore, is the applicability of *Kienapple*.

V

L'applicabilité en l'espèce du principe énoncé dans l'arrêt *Kienapple*

Comme nous l'avons déjà vu, l'intimée Sandra Prince a été reconnue coupable d'avoir causé des lésions corporelles à Bernice Daniels. Elle a été accusée d'une seconde infraction, celle d'homicide involontaire coupable perpétré contre l'enfant de Daniels, résultant du même acte, savoir le coup de couteau. Je devrais peut-être préciser qu'il n'y a pas de doute quant à la possibilité de fonder une accusation d'homicide involontaire coupable sur un acte commis avant la naissance de la victime. Le paragraphe 206(2) porte:

206. . . .

(2) Commet un homicide, quiconque cause à un enfant, avant ou pendant sa naissance, des blessures qui entraînent sa mort après qu'il est devenu un être humain.

La seule question dont la Cour se trouve saisie est donc celle de l'applicabilité de l'arrêt *Kienapple*.

I have no hesitation in concluding that the requirement of a sufficient factual nexus is satisfied in the present appeal. A single act of the accused grounds both charges. It is true that the stabbing produced two separate consequences, the injury to Bernice Daniels and the death of the child. But such matters as the consequences of an act, the circumstances in which it was committed, or the status of the victim are most appropriately considered in the analysis of the legal nexus requirement. For it is only when consequences, circumstances, or status are incorporated into elements of an offence that they are relevant.

Is there sufficient correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions? One offence contains as an essential ingredient the causing of bodily harm to Bernice Daniels. The other offence requires proof of the death of Daniels' child. I cannot see how either of these elements can be subsumed into the other. There is no sense in which it can be said that one is a particularization of the other or is designed to facilitate proof of the other.

The respondent relies heavily on the *Hagenlocher* case. The accused in *Hagenlocher* was charged with manslaughter and with wilfully setting fire to a substance which was likely to cause a building to catch fire contrary to s. 390. He had poured some vodka on a hotel bed and set fire to it. The fire spread through the hotel, causing the death of one person by asphyxiation and extensive property damage. On the facts it is evident that the manslaughter charge was grounded in s. 205(5)(*a*), which reads:

205. . . .

(5) A person commits culpable homicide when he causes the death of a human being,

(*a*) by means of an unlawful act

Je conclus sans aucune hésitation que l'on a satisfait en l'espèce à l'exigence d'un lien factuel suffisant. L'une et l'autre accusations sont fondées sur un seul acte de l'accusée. Il est vrai que le coup de couteau a eu deux conséquences distinctes, les lésions subies par Bernice Daniels et le décès de l'enfant. Mais des points tels que les conséquences d'un acte, les circonstances dans lesquelles il a été commis ou le statut de la victime doivent de préférence être étudiés dans le cadre de l'analyse de l'exigence d'un lien juridique. En effet, ce n'est que lorsque les conséquences, les circonstances ou le statut de la victime sont intégrées dans les éléments d'une infraction qu'elles deviennent pertinentes.

Y a-t-il entre les éléments des deux infractions une correspondance suffisante pour justifier l'application de la règle interdisant les déclarations de culpabilité multiples? L'une des infractions comporte comme élément essentiel le fait d'avoir causé des lésions corporelles à Bernice Daniels. L'autre exige la preuve du décès de l'enfant de cette dernière. Je ne puis voir comment l'un ou l'autre de ces éléments puisse être subsumé sous l'autre. Il n'y a aucun sens dans lequel on peut affirmer que l'un constitue une manifestation particulière de l'autre ou est destiné à faciliter la preuve de l'autre.

L'intimée s'appuie fortement sur l'arrêt *Hagenlocher*. L'accusé dans l'affaire *Hagenlocher* était inculpé d'homicide involontaire coupable et d'avoir enfreint l'art. 390 en mettant volontairement le feu à une substance susceptible de faire prendre feu à un édifice. Il avait versé de la vodka sur un lit d'hôtel et y avait mis le feu. L'incendie s'est propagé dans l'hôtel, provoquant la mort d'une personne par asphyxie et causant des dommages matériels considérables. D'après les faits, il est évident que l'accusation d'homicide involontaire coupable reposait sur l'al. 205(5)*a*), dont voici le texte:

205. . . .

(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain,

a) au moyen d'un acte illégal

The unlawful act was the wilful setting fire to a substance. Assuming that *Hagenlocher* was correctly decided, in my view the result can only be justified if it is regarded as a case in which all the elements of the s. 390 offence were incorporated into a greater offence. The manslaughter charge consisted of (i) an unlawful act, particularized as the setting of a fire likely to cause a building to burn, and (ii) a consequence of that act, that is, the death of a person. No elements of the s. 390 offence remained to sustain a second conviction. If this Court adopted reasons inconsistent with those I have just outlined, then I believe the Court erred. But, in my opinion, this Court's approval of the reasoning below was restricted to the conclusion that *Kienapple* applied in that case. I should add that to treat the arson offence as a particularization of the "unlawful act" requirement in s. 205 is, at best, at the very outer edges of the *Kienapple* principle. However, the Court has not been asked to reconsider the correctness of *Hagenlocher* in the present appeal, and I refrain from doing so.

L'acte illégal consistait à avoir volontairement mis le feu à une substance. À supposer que l'affaire *Hogenlocher* ait été tranchée correctement, j'estime que l'issue ne peut être justifiée que si cette affaire est considérée comme un cas où tous les éléments de l'infraction visée par l'art. 390 étaient incorporés dans une infraction plus grave. L'accusation d'homicide involontaire coupable comportait (i) un acte illégal, savoir le fait d'avoir mis le feu d'une manière susceptible de faire prendre feu à un édifice, et (ii) une conséquence de cet acte, c'est-à-dire le décès d'une personne. Il ne restait donc aucun élément de l'infraction prévue par l'art. 390 qui pouvait justifier une seconde déclaration de culpabilité. Si cette Cour a adopté des motifs incompatibles avec ceux que je viens d'exposer, alors je crois qu'elle a commis une erreur. Mais, à mon avis, l'approbation par cette Cour du raisonnement de la Cour d'appel se limitait à la conclusion que l'arrêt *Kienapple* s'appliquait à cette affaire. Je dois ajouter qu'en traitant le crime d'incendie comme une manifestation particulière de l'exigence d'un «acte illégal» posée par l'art. 205, on touche, dans la meilleure des hypothèses, aux confins mêmes du principe énoncé dans l'arrêt *Kienapple*. Dans le présent pourvoi cependant, on n'a pas demandé à la Cour d'examiner la justesse de l'arrêt *Hagenlocher* et je m'abstiens de le faire.

Even if the manslaughter charge in the case at bar is seen to be framed under s. 205(5)(*a*) rather than s. 206 the distinction between the present case and *Hagenlocher* is readily apparent. The lesser offence in *Hagenlocher* proscribed only an unlawful act, the setting of a fire. The lesser offence in the present case, on the contrary, also proscribes particular consequences which lie at the heart of that offence.

Même si l'accusation d'homicide involontaire coupable en l'espèce est considérée comme fondée sur l'al. 205(5)*a*) plutôt que sur l'art. 206, la différence entre la présente affaire et l'affaire *Hagenlocher* est bien évidente. L'infraction moindre dans l'affaire *Hagenlocher* ne proscrivait qu'un acte illégal, celui consistant à mettre le feu. Dans la présente affaire, par contre, l'infraction moindre proscrit aussi les conséquences particulières qui se situent au coeur de cette infraction.

Although the above analysis suffices to dispose of this appeal, I wish to underline that the conclusion I have reached reflects the importance which the drafters of the *Code* have attached to criminal conduct that results in bodily injury or death of the victim or victims. Many of the provisions of the *Criminal Code*, particularly those in respect of crimes of violence, contain an escalation of penalties for acts of the accused that result in graver

Bien que l'analyse qui précède suffise pour trancher le pourvoi, je tiens à souligner que la conclusion à laquelle je suis arrivé reflète l'importance que les rédacteurs du *Code* ont attachée à la conduite criminelle qui entraîne chez la victime ou les victimes des lésions corporelles ou la mort. Un bon nombre de dispositions du *Code criminel*, notamment celles relatives aux crimes violents, prévoient des peines plus sévères pour les actes

consequences than otherwise identical conduct. Parliament's concern for the physical safety of the public would be frustrated by holding that either of the respective elements of bodily injury to Bernice Daniels or the death of the child were (to use the words of Laskin J. in *Kienapple*) "meaningless as a distinguishing feature".

It is, moreover, of some interest to the present case that the majority judgment in *Kienapple* at p. 750 referred to the death of a victim of violent crime as a "new relevant element". It is clear from this reference that the consequence of a wrongful act of an accused is an "element" which is capable of distinguishing two convictions in respect of a single unlawful act by an accused.

Also of particular relevance to the present appeal is a passage at pp. 744-45 in which Laskin J. referred to his conclusion in *Kienapple* in the following terms:

> The rationale of my conclusion that the charges must be treated as alternative if there is a verdict of guilty of rape on the first count, that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law.
>
> (Emphasis added.)

It would appear from this passage that, at least in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims. Indeed, I believe it was never within the contemplation of the majority in *Kienapple* that the rule enunciated therein would preclude two convictions for offences respectively containing as elements the injury or death of two different persons.

Society, through the criminal law, requires Prince to answer for both the injury to Bernice Daniels and the death of the child, just as it would

dont les conséquences sont plus graves que celles qui résultent d'une conduite par ailleurs identique. Le souci du législateur d'assurer la sécurité physique du public serait contrecarré si l'on concluait que l'un ou l'autre des éléments que sont les lésions corporelles infligées à Bernice Daniels et le décès de l'enfant a perdu (pour reprendre les termes du juge Laskin dans l'arrêt *Kienapple*) «tout son sens en tant que trait distinctif».

De plus, il n'est pas sans intérêt dans la présente affaire que les motifs de la Cour à la majorité, à la p. 750 de l'affaire *Kienapple*, qualifient de «nouvel élément pertinent» le décès de la victime d'un crime violent. Cela révèle clairement que la conséquence de l'acte illégal commis par un accusé constitue un «élément» susceptible de justifier deux déclarations de culpabilité relativement à un seul acte illégal de cet accusé.

On trouve également aux pp. 744 et 745 de l'arrêt *Kienapple* un passage qui revêt une importance particulière dans le présent pourvoi. Dans ce passage, le juge Laskin parle ainsi de la conclusion qu'il tire dans cet arrêt:

> Ce qui motive ma conclusion que les inculpations doivent être traitées comme offrant un choix si un verdict de culpabilité de viol est rendu sur le premier chef, qu'il ne doit pas y avoir de déclarations de culpabilité multiples pour le même délit perpétré contre la même adolescente, remonte loin dans l'histoire de la *common law*.
>
> (C'est moi qui souligne.)

Il paraît se dégager de ce passage que, du moins en ce qui concerne les crimes violents contre des personnes, la règle interdisant les déclarations de culpabilité multiples ne s'applique pas lorsque les déclarations de culpabilité se rapportent à des victimes différentes. En fait, je crois que la Cour à la majorité dans l'arrêt *Kienapple* n'a jamais voulu que la règle énoncée dans cet arrêt rende impossible deux déclarations de culpabilité pour des infractions comportant respectivement comme éléments des lésions infligées à deux personnes différentes ou le décès de deux personnes différentes.

La société, par le moyen du droit criminel, exige que Prince rende compte à la fois des lésions infligées à Bernice Daniels et du décès de l'enfant,

require a person who threw a bomb into a crowded space to answer for the multiple injuries and deaths that might result, and just as it compels a criminally negligent driver to answer for each person injured or killed as a result of his or her driving: see *R. v. Birmingham and Taylor* (1976), 34 C.C.C. (2d) 386 (Ont. C.A.)

de la même manière qu'elle exigerait qu'une personne qui lancerait une bombe dans un lieu rempli de monde rende compte des blessures et des décès multiples qui pourraient résulter, et de la même manière qu'elle oblige un conducteur d'automobile qui fait preuve de négligence criminelle à répondre pour chaque personne blessée ou tuée par suite de sa conduite de l'automobile: voir l'arrêt *R. v. Birmingham and Taylor* (1976), 34 C.C.C. (2d) 386 (C.A. Ont.)

I have undertaken the analysis of the present case as though the respondent were seeking to bar a conviction on the lesser offence of causing bodily harm to Bernice Daniels. In fact, she seeks to bar a conviction on the more serious charge of manslaughter, having already been convicted of causing bodily harm. The Crown elected to proceed by way of successive trials rather than seek joinder. Although I do not suggest that the Crown did so in an effort to avoid the rule against multiple convictions, it is perhaps worth emphasizing that the *Kienapple* principle cannot be avoided by the simple expedient of proceeding in this fashion. Had I reached a different conclusion on the principal issue in this appeal, it would accordingly have been necessary to consider whether a trial on the more serious charge would have been entirely precluded, or whether, by analogy to cases such as *Loyer* and *Terlecki*, the trial should have been undertaken on the understanding that a stay would be entered on the lesser offence in the event of a conviction on the more serious offence. However, since I have concluded that *Kienapple* has no application to the offences charged, I need not address that issue.

Dans mon analyse de la présente affaire, j'ai fait comme si l'intimée cherchait à éviter une déclaration de culpabilité relativement à l'infraction moindre consistant à avoir causé des lésions corporelles à Bernice Daniels. En réalité, elle cherche à empêcher une déclaration de culpabilité relativement à l'accusation plus grave d'homicide involontaire coupable, car elle a déjà été reconnue coupable d'avoir causé des lésions corporelles. La poursuite a choisi de procéder par voie de procès successifs plutôt que de demander la réunion des causes. Bien que je ne laisse pas entendre que, ce faisant, la poursuite a tenté de contourner la règle interdisant les déclarations de culpabilité multiples, il vaut peut-être la peine de souligner qu'on ne saurait par cette simple façon de procéder échapper à l'application du principe de l'arrêt *Kienapple*. Donc, si j'avais conclu différemment sur la question principale posée dans ce pourvoi, il aurait été nécessaire d'examiner si la tenue d'un procès portant sur l'accusation plus grave aurait été entièrement exclue, ou si, par analogie avec des affaires comme *Loyer* et *Terlecki*, il aurait dû y avoir un procès, à la condition qu'une suspension d'instance fût inscrite relativement à l'infraction moindre si jamais une déclaration de culpabilité était prononcée au sujet de l'infraction plus grave. Toutefois, étant donné que j'ai conclu que l'arrêt *Kienapple* ne s'applique pas aux infractions reprochées en l'espèce, il ne m'est pas nécessaire d'aborder cette question.

Although it was not argued in this Court, I wish to add that in my view it is normally appropriate for a superior court to decline to grant a prerogative remedy on an interlocutory application in respect of the rule against multiple convictions. That rule has proved to be a fertile source of

Quoique ce point n'ait pas été soulevé en cette Cour, je tiens à ajouter que, selon moi, il convient normalement qu'une cour supérieure refuse de faire droit à une demande interlocutoire de bref de prérogative lorsque c'est la règle interdisant les déclarations de culpabilité multiples qui est en

appeals. The delay engendered by an erroneous application of the *Kienapple* principle prior to the conclusion of the trial is regrettably illustrated by the present case. Prerogative remedies are discretionary, and notwithstanding the possibility of jurisdictional error in some cases, it would generally be preferable for superior courts to decline to consider the merits of a *Kienapple* argument on an interlocutory application.

I would allow the appeal, reverse the decision of the Manitoba Court of Appeal granting a writ of *certiorari* and an order quashing the indictment, and remit the matter for trial on the manslaughter indictment.

Appeal allowed.

Solicitor for the appellant: The Department of the Attorney General, Winnipeg.

Solicitors for the respondent: Nozick, Sinder & Associates, Winnipeg.

cause. Cette règle est à l'origine de nombreux appels. La présente affaire offre malheureusement un exemple des retards qui peuvent résulter d'une application erronée du principe de l'arrêt *Kienapple* avant la fin du procès. Les brefs de prérogative relèvent de l'exercice d'un pouvoir discrétionnaire et, nonobstant la possibilité d'une erreur de compétence dans certains cas, il serait généralement préférable que les cours supérieures refusent d'examiner le bien-fondé de l'argument de l'arrêt *Kienapple* invoqué dans le cadre d'une demande interlocutoire.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel du Manitoba qui a accordé un bref de *certiorari* et une ordonnance portant annulation de l'acte d'accusation, et de renvoyer l'affaire pour qu'un procès soit tenu relativement à l'accusation d'homicide involontaire coupable.

Pourvoi accueilli.

Procureur de l'appelante: Le ministère du Procureur général, Winnipeg.

Procureurs de l'intimée: Nozick, Sinder & Associates, Winnipeg.

ANNEX B

[2006] EWHC 744 (Admin) [2006] Extradition L.R. 102 Official Transcript [2006] EWHC 744 (Admin) [2006] Extradition L.R. 102 Official Transcript
(Cite as: 2006 WL 1333340)

[2006] EWHC 744 (Admin)

About Fofana, Moise Belise v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France

Case No: CO/10635/2005CO/10609/2005

High Court of Justice Queen's Bench Division Administrative Court

Lord Justice Auld, and Mr Justice Sullivan

Date: Wednesday, 5th April 2006

Representation

• Mr Liam Pepper (instructed by Edwards Vaziraney) for the First Appellant.
• Mr Ben Watson (instructed by GT Stewart) for the Second Appellant.
• Mr Peter Caldwell (instructed by CPS London) for the Respondent.

Judgment

Auld LJ:

1 Each of the appellants, About Fofana and Moise Belise, is the subject of a European Arrest Warrant ("the Warrant") issued on 29th June 2005 by the Deputy Prosecutor of the Tribunal de Grande Instance de Meaux in France. France is a designated "Category 1 territory" for the purposes of Part 1 of the Extradition Act 2003 ("the 2003 Act"). They appeal, pursuant to section 26 of that Act, orders of the Deputy Senior District Judge, Judge Wickham, on 21st December 2005 directing their extradition.

2 The main issue on the appeals is whether the appellants' extradition is barred on the ground of double jeopardy, now a broader concept than a plea in bar of autrefois acquit or convict , by virtue of criminal proceedings commenced in the City of London Magistrates' Court in June 2005, shortly before the issue of the Warrant, and completed in the Southwark Crown Court in mid November 2005 a few weeks before the extradition proceedings were heard and determined by Judge Wickham in the Bow Street Magistrates' Court on 21st December 2005. But for the decision of one department of the Crown Prosecution Service in June to press on with the domestic prosecution, the extradition hearing would have taken place on 18th July, the date originally fixed for it at the request of another department of the Service acting on behalf of the French authorities.

3 In addition, both appellants challenge extradition on the ground that the Warrant does not accurately or adequately describe commission by them of an extradition offence.

The European Arrest Warrant

4 It is common ground that one of the offences described in the Warrant, which is of fraudulent conduct towards, among others, a French company called Serviware SA ("Serviware"), is an extradition offence within section 64 of the 2003 Act, namely that it would constitute an offence under English law. Though the Warrant, which is identical, for each appellant, describes itself as "related to a total of 1 (one) offence", the main body of information given in it was as to two specific instances of similar fraudulent conduct against Serviware, followed by more generalised allegations of similar frauds on a number of other French companies. Because much may turn on the nature and detail of the information in the Warrant, I had better set out the material parts of it in full under the heading:

"Description of the circumstances in which the

offence was committed, included [sic]the moment (date and time), place so as the degree of participation of the wanted person in the offence.", It read:

In May, 2004 Serviware SA located … [in] France received by fax several orders … from Brown Information Technology … for a total amount of 60,225 Euros. The goods were to be paid for by *a* bank transfer from as [sic] the transfer of Lloyds TSB Account … Fraudulent paperwork was then faxed to Serviware SA to confirm this transfer had occurred. The goods were sent to Great Britain and the bank transfer later proved to be false. The goods were lost to Serviware SA.

On 5 June 2005 Serviware SA was again contacted by a British company called Hire Phone Ltd ordering … equipment of an amount of 55,600 Euros which was to be delivered to … Great Britain.

The documents sent were checked by Serviware SA and they were able to definitively link this order with that from May 2004. … The documentation faxed was … identical to that used on the previous occasion.

The Prosecutor of the Republic of Meaux … instructed the French Police services to get in touch with the British Authorities. The liaison Officer UCLAT at the National Criminal Intelligence informed us that Hire Phone Ltd does not exist. This confirmed the assertion that the fraud taking place was on behalf of an organised group, considering the value of the goods involved in their deception and the infrastructure that would be required to arrange their realisation." The document, still under the heading of the description of "1 (one) offence", went on to outline the arrangements made for a controlled delivery to Serviware in June 2005, the attempted fraudulent obtaining by the use of a false instrument of this second consignment, all leading to the arrest of the two appellants when taking delivery of it the middle of that month. The information in the Warrant then reverted to specific mention of both the May 2004 and the June 2005 fraudulent conduct towards Serviware SA:

"The liaison officer UCLAT at the National Criminal Intelligence informed us that the search which took place at the location of the delivery … resulted in the discovery of the Lloyds TSB banking documentation required to make the orders to Serviware SA on both occasions by Hire Phone Ltd and Brown Information Technology. Finally, the information in the Warrant turned to much wider allegations of fraud by the two appellants, but fraud of the same nature, against a number of other French companies:

"It was also apparent that numerous other French companies had been the victim of the same fraud from the documentation found. There was also computer equipment seized, which it is believed was used to produce the fraudulent banking documentation. In that the victims are French companies, both the charged suspects are French and the fraud was committed in [sic] France companies, both the charged suspects are French and the fraud was committed in France as orders for goods were [sic] received there and the goods despatched from there, an enquiry into organised fraud was started.

Nature and judicial qualification of the offence so as [sic] the applying legal provisions: Fraud in an organised gang — Offence provided for and punished by sections 313–1, 313.2. 313–3. 313–7 and 313.8 of the Penal Code ."

5 I stress that it is the description of the alleged criminal conduct in the Warrant that is relied upon by the French authorities, not the "charge" drafted by Mr Peter Caldwell, the English counsel instructed for the Respondent in the extradition proceedings before Judge Wickham and on this appeal. The purpose of that "charge", as he explained to the Court, was to illustrate in the extradition proceedings by reference to the conduct of the appellants as described in the Warrant, that it amounted to an extradition offence. This illustrative "charge", which was confined to the fraud on Serviware, went beyond the June 2005 transaction so as to allege a conspiracy between the two men to defraud

it covering the two fraudulent transactions alleged in respect of it, and going beyond allegations of user or custody or control of fraudulent documentation. However, it did not extend to the general allegations in the Warrant of fraud against other French companies. It stated that the appellants:

…, between 1st day of May 200 4 and 14th day of June 2005, conspired together to defraud Serviware SA by dishonestly representing that goods ordered from Serviware SA would be paid for by a bank transfer from a Lloyds TSB account, knowing that no such payment would be made." Within the jurisdiction of France

The criminal proceedings in this country

6 In mid June 2005, as I have indicated, the appellants were arrested in this country taking delivery of the controlled delivery that month of a consignment of computer equipment from Serviware. The French authorities acted promptly by issuing the Warrant within a fortnight of those arrests, clearly considering that the appellants' conduct was part of a serious, long-term and wide-spread conspiracy to defraud. Before they could proceed with the extradition proceedings, the City of London Police decided to prosecute them here in respect of substantially the whole range of transactions alleged with varying particularity in the Warrant. They charged them, not just with those relating to Serviware, but of six offences of using a false instrument, contrary to section 3 of the Forgery and Counterfeiting Act 1981 Act ("the 1981 Act"), one for each of six French companies, including Serviware. However, the Crown Prosecution Service sought the committal of the matter to the Southwark Crown Court on a single charge of using a false instrument, contrary to section 3 , seemingly confined to the June 2005 — the second — Serviware transaction, but with, as purported exhibits, allegedly false documentation relating to the transactions originally charged by the City of London Police in respect of all six French companies.

7 The indictment, as drawn at the Crown Court, was confined to the appellants' dealing with Serviware, and, did not, therefore, reflect the seriousness and range of conduct referred to in general terms in the Warrant, or covered by the police charges, or that documented in the exhibits bundle. Each appellant was merely charged with two counts of using a false instrument with intent, in relation to the second of the two transactions with Serviware described in the Warrant, contrary to section 3 of the 1981 Act. The statement of offence in each count was the same, namely "[u]sing a false instrument with intent", contrary to section 3 of … the 1981 Act. The material particulars of each count were also the same, save as to dates and the nature of the instrument, the first charging user of the instrument over a four month period between 24th February and 15th June 2005 and specifying the alleged false instrument as a purported international bank transfer from Lloyds TSB for 60,225 Euros. The second was for an overlapping period, but only of nine days, between 4th and 15th June 2005, clearly in relation to the same transaction, but specifying user of a different alleged false instrument, namely a purported funds transfer confirmation of credit slip, again for 60, 225 Euros, from Lloyds TSB I should note that the value of 60, 225 Euros attributed by the indictment to this transaction was that attributed by the Warrant to the May 2004 transaction, its valuation of the June transaction being 55,600 Euros.

8 On 28th October 2005 the appellants pleaded not guilty to those two counts. On 14th November 2005 the prosecution amended the indictment by adding two alternative and lesser counts of having custody or control of respectively the same alleged false instruments, each still in the amount of 60,225 Euros, contrary to section 5(2) of the 1981 Act, but both over the same period in 2005, that is, from 24th February to 15th June 2005. On re-arraignment on that day, Fofana pleaded guilty to the two new counts and Belise pleaded not guilty to them. The Judge directed verdicts of not guilty on the original two counts against Fofana and on all counts against Belise, and sentenced Fofana to a short period of imprisonment on the two new counts. So much for the allegations of widespread

fraud described with varying particularity in the Warrant, taken up by the City of London Police in their charges and suggested in the documentation included in the committal papers for the Southwark Crown Court.

9 Only then did it fall to Judge Wickham to consider, in December 2005, what was left over in the Warrant's description of an extradition offence.

Submissions on the main issue — double jeopardy

10 As I have indicated, Fofana and Belise contended before Judge Wickham that their extradition was barred under the principle of double jeopardy as applied to extradition proceedings in sections 11 and 12 of the 2003 Act, which are in the following terms:

"11.(1)… the judge … must decide whether the person's extradition to the category 1 territory is barred by reason of —(a)the rule against double jeopardy; …"

12.A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—"(a)that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;(b)that the person were charged with the extradition offence in that part of the United Kingdom."

11 The arguments advanced on behalf of both appellants is that the indictment that they faced, in its original and amended form, was based on the same conduct, including the same alleged false documentation relied upon by French authorities in the Warrants. But, as I have said, the indictment, in all its counts, related only to the June 2005 transaction. Whereas the description of the alleged criminality in the Warrant, notwithstanding its heading as "related to a total of 1 (one) offence", and of that in the original police charges before the City of London Magistrates Court, was of a much wider and lengthy course of fraud against a number of French companies, of which the June 2005 Serviware transaction was only part. The fact that the committal papers for the prosecution in respect of that transaction at Southwark Crown Court included documents that might have supported a more widely based charge or charges does not mean that they were relevant to or would have been admissible if there had been a trial on that indictment.

12 Mr Liam Pepper, for Fofana, and Mr Ben Watson, for Belise, submitted nevertheless that it is the commonality of the *conduct* the subject of criminal proceedings — not of the charges based on them in this country — and that described in the Warrant, that determines whether there is double jeopardy. They take as their starting point the European Council Framework Decision of 13th June 2002 on the European Arrest Warrant and Surrender Procedures between Member States ("the Framework Decision), to which the 2003 Act was intended to give effect. The Framework Decision provides, in Article 3 , under the heading "Grounds for mandatory non-execution of the European arrest warrant":

"The … [executing] judicial authority of the Member State shall refuse to execute the European arrest warrant in the following cases:(1)… (2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of *the same acts* provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; …" [emphasis added]Article 4 , which provides grounds for optional non-execution of such a warrant, also does so by reference to the "same acts" the subject of the prosecution and the warrant.

13 Mr Pepper and Mr Watson maintained that the focus of the Framework Decision on the same acts or conduct, constituting the extradition offence is

carried through into our law in the 2003 Act, in section 2 , which provides, in sub-section (2) that the warrant should contain a "statement" as stipulated by sub-section (3) and the information identified in sub-section (4) . As to the statement, sub-section (3) provides:

"(3)The statement is one that —(a)the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and(b)the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence." And as to the information, sub-section (4) includes:

"c)particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence."

14 Mr Pepper and Mr Watson, submitted that there is further support for their concentration on the commonality of the conduct described in the Warrant and that behind offences charged and dealt with at Southwark Crown Court in that the 2003 Act, like the Framework Decision , was drafted in the context of the Schengen Convention , a collection of European Union protocols and accession agreements providing an additional means by which Member States may seek to develop an area of "freedom, security and justice in which the free movement of persons is assured". Chapter 3 of that instrument, which the United Kingdom has adopted, provides, in Article 54 , for European Union-wide application of the double jeopardy principle:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the *same acts* provided that if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." [emphasis added]

15 From that starting point, and by reference to certain well-visited domestic authorities to which I shall turn in a moment, Mr Pepper and Mr Watson submitted that the Judge should have adopted a broader test by reference to the commonality of the conduct described in the Warrant and relied upon in the prosecution at Southwark Crown Court, rather than the formulation of the alleged offences at Southwark. Accordingly, they argued for the broader principle of double jeopardy than the narrow plea in bar of autrefois acquit or convict . They maintained that the Judge should have turned to that broader principle, which, as they expressed it, is that a person cannot be prosecuted twice on the same or similar facts, a principle which, they said, is expressly incorporated in the extradition process by sections 11(1)(a) and 12 of the 2003 Act. In addition, Mr Watson submitted that, in the case of Belise, given the verdicts at Southwark Crown Court entered at the direction of the Judge of not guilty on all four counts, the Warrant does not fairly or accurately describe his conduct.

16 Mr Watson submitted that the effect of sections 11(1)(a) and 12 of the 2003 Act, barring extradition where prosecution would be barred in this country "under any rule of law relating to previous acquittal or conviction" is to bar extradition under any such rule that would prevent their trial here for any of the conduct described in the Warrant. In short, he said, the test is whether they could be re-arraigned at Southwark Crown Court on the facts set out in the Warrant, this time for conspiracy to defraud or some other wider course of conduct than that covered by the June 2005 transaction concerning Serviware.

17 In that connection, the law established by the English authorities to which Mr Pepper and Mr Watson turned —notably Connolly v DPP [1964] AC 125, HL , and post Connolly decisions, in particular R v Humphries [1977] ACT 1, HL , is not

challenged by Mr Peter Caldwell, who appears for the French Deputy Prosecutor, only its application to the facts of this case.

18 In summary the authorities establish two circumstance in English law that offend the principle of double jeopardy:

• i) Following an acquittal or conviction for an offence, which is the same in fact and law — autrefois acquit or convict ; and
• ii) following a trial for any offence which was founded on "the same or substantially the same facts", where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place.

19 In Connelly , their Lordships reached this position in practical, though not unanimously in formal, terms by, in the main, confining the notion of double jeopardy to the narrow pleas in bar of autrefois acquit or convict , but allowing for a wider discretionary bar through the medium of the protection afforded by the court's jurisdiction to stay a prosecution as an abuse of process. In *Humphreys* , where their Lordships sanctioned a prosecution for perjury based on the same facts plus evidence of perjury by the defendant at an earlier failed prosecution for a driving offence, Lord Hailsham of St Marylebone indicated the second broader discretionary bar in the following passage at 41D–E:

"(10)Except where the formal pleas of autrefois acquit or convict are admissible, when it is the practice to empanel a jury, it is the duty of the court to examine the facts of the first trial in case of any dispute, and in any case it is the duty of the court to rule as a matter of law on the legal consequences deriving from such facts. In any case it is, therefore, for the court to determine whether on the facts found there is as a matter of law, a double jeopardy involved in the later proceedings and to direct a jury accordingly."

20 In R v Beedie [1998] QB 356, the Court of Appeal, Criminal Division , gave more formal expression and separation to the two routes to preventing a second prosecution where the charges and/or facts relied upon are the same or substantially the same, the first, where the charge also is the same, and the second, where the charge is different. It confined the principle or doctrine of autrefois acquit or convict to the first, and allowed the court a "discretion" to stay the proceeding where there are "special circumstances".

21 The semantic bonds that so constrained their Lordships in Connelly and the Court of Appeal in Beedie to confine the notion of "double jeopardy" — the terminology now employed in sections 11 and 12 of the 2003 Act — to the absolute plea in bar of autrefois acqui or convict , were loosened by their Lordships, albeit indirectly, in R v Z [2000] 2 AC 483 , so as to apply it to a case where, even though the charge is different, it is founded on the same or substantially the same facts as an earlier trial. Lord Hutton, considering the various speeches in Connelly and speaking for their Lordships, said at 497C–D:

"In my opinion the speeches in the House recognised that as a general rule the circumstances in which a prosecution should be stopped by the court are where *on the facts* the first offence of which the defendant had been convicted or acquitted was founded on the same incident as that on which the alleged second offence is founded."

22 Thus, as Mr Pepper and Mr Watson submitted and Mr Caldwell agreed, the term "double jeopardy", as a generality — and as used in the 2003 Act, given its wider European origins — should now be taken to include both the plea in bar and the long established jurisdiction of the court to stay proceedings as an abuse of process. Either constituent is a means of protecting a defendant from "double jeopardy". (Cf., in the context of extradition, the narrower approach of Newman J, with which Scott Baker LJ agreed, as to the meaning of that expression in Bohning v USA [2005] EWHC 2613 (Admin), at para 21 — narrower as a matter

of terminology, but not in substance.)

23 As I have said, Mr Caldwell acknowledged the narrow basis of the doctrine or principle of autrefois acquit or convict as a bar to a prosecution and also the broader notion of double jeopardy as it has been developed since Connelly and has now been articulated by Lord Hutton in Z . He went further, by underlining the wording of section 12 of the 2003 Act, which refers to "any rule of law relating to previous acquittal or conviction". However, he submitted that neither is engaged in the circumstances of this case. As to autrefois acquit or convict , he maintained that it does not apply because the conspiracy to defraud Serviware described in the extradition proceedings is not an offence with the same material ingredients as any of those charged in the Southwark Crown Court. As to the second, the broader principle of double jeopardy, he submitted that it does not apply because the whole of the conduct relating to Serviware described in the extradition proceedings has not been the subject of a previous trial or adjudication. His argument was that, consistently with the reasoning in Connelly and the other domestic authorities, a court should consider first, whether extradition would be barred under the narrow principle of autrefois acquit or convict and, if not, it should then consider the wider residual jurisdiction of abuse of process, as Newman J did in Bohning .

24 Turning to the application of the two constituents of the double jeopardy principle to the facts here, the first, the plea in bar of autrefois acquit or convict , clearly does not arise, since the May 2004 and June 2005 transactions identified in the Warrant, considered separately or as part of a course of conduct, though covering some of the same facts in the Southwark Crown Court indictment, describe wider criminality from the substantive offences charged in the Southwark indictment.

25 As to broader argument on which Fofana and Belise rely, namely that if they were to be re-arraigned in this country for conspiracy to defraud on the facts set out in the Warrant, the court would stay the prosecution as an abuse of process, Mr Caldwell has submitted that it would not because the conduct described in the Warrant is not the same or substantially the same as that in the indictment, in particular:

• i) the extradition offences cover a much longer time scale than those in the Southwark indictment;
• ii) commission of the offence of conspiracy to defraud or a like offence in France of a fraudulent course of conduct, which is what the Warrant describes, is not contingent on proof of the conduct charged in the Southwark indictment, confined as it was to the June 2005 transaction, and to an allegation of using or having custody or control of a false instrument in relation to it; and
• iii) prosecution of Fofana and Belise in France for the extradition offence could not result in their conviction in France of offences that were charged in the Southwark indictment, albeit that the documentation found in this country could be relied upon in France for the purpose of the broader allegation.

Conclusion on the main issue — double jeopardy

26 The contemplated French proceedings for a continuing offence of fraud against Serviware, of which the two described fraudulent transactions could be regarded as overt acts, concern a longer and more serious course of criminality than the second of them to which the Southwark indictment was confined. Prosecution in France for such a continuing offence would not, of itself, offend against the double jeopardy rule. In the recent case of Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid, Spain [2006] EWHC 167 (Admin), to which Mr Caldwell referred the Court, Smith LJ, with whom Newman J agreed, accepted that the Spanish authorities might prosecute the appellant for wide-ranging offences concerning the forgery of passports, despite his conviction in this country for an offence of using a particular passport. She did not find it to be an abuse of process that the offences to be prosecuted

in Spain were of a more serious nature, and observed that it would be appropriate for the evidence supporting the conviction in this country to be led in Spain in support any prosecution there for the wider forgery offences.

27 However, in the circumstances of this case the contrast in extent and seriousness between the two sets of proceedings, the extradition criminality confined, as Mr Caldwell acknowledged, to fraud against Serviware, would not be so great. A hypothetical attempt to prosecute both men again in this country on a broader charge based on both Serviware transactions, would, in my view, be vulnerable to the court directing a stay as an abuse of process. The only significant addition to the June 2005 Serviware conduct giving rise to the Southwark indictment would be the almost identical conduct described in the Warrant against Serviware a year before, albeit subject to some confusion in that instrument as to the relative values of the two transactions. The case is clearly distinguishable on its facts from that considered by Smith LJ and Newman J in Boudhiba .

28 In addition, as I have indicated earlier in this judgment, it is an unhappy feature of the case that the Crown Prosecution Service proceeded with and narrowly confined its Southwark prosecution to the June 2005 Serviware transaction, not only in the full knowledge of the pending and more broadly based extradition proceedings, but also causing them to be delayed until after the completion of that prosecution. In doing so, the Crown Prosecution Service was also already aware, as a result of the information provided in the Warrant and other information provided by the French authorities, not only of the earlier Serviware transaction alleged, but also of the allegations in respect of other French companies, none of which, despite its inclusion of documentation relating to them among the exhibits prepared for the Southwark prosecution, it chose to rely upon as a basis for charging in the indictment. The fact that it chose to frame a prosecution on only one transaction, notwithstanding the material as to others available to it and lying, albeit unused, in the prosecution papers, would, I think, make it difficult for an English Judge to resist an application for a stay as an abuse of process such a prosecution as that now sought by the French authorities in these extradition proceedings.

29 Accordingly, I am of the view that, although the extradition offence specified in the Warrant is not based on exactly, or only partly, on the same facts as those charged in the Southwark indictment, there would be a such significant overlap between them as to have required the District Judge to stay the extradition proceedings as an abuse of process. But, in any event, given what was known, and the material available, to the Crown Prosecution Service when committing this matter to the Southwark Crown Court and when framing the indictment on which they were respectively convicted and a acquitted, extradition of these men would be an abuse of process and, on that account, in the words of section 11(1)(a) and 12 of the 2003 Act would be barred “by reason of … the rule against double jeopardy”.

30 For those two reasons alone, I would allow the appeal of each appellant in respect of the extradition order made against him.

31 It is unfortunate that when the matter was before Judge Wickham, the broader meaning now given to “double jeopardy” in this and in other contexts, so as to include circumstances wider than autrefois acquit or convict , was seemingly not clearly identified in argument, leading her to conclude her judgment in the following terms:

“Thus I find that the double jeopardy rule does not apply in respect of these two defendants. I understand that neither defence counsel wish to raise abuse of process arguments nor indeed do they wish to make any further submissions. I therefore order the extradition of both defendants.”

The adequacy and accuracy of the information in the Warrant

32 If I am correct in my conclusion on the main issue in the appeals, there is no need for me to give a view on the second issue raised by both appellants as to the adequacy and accuracy of the particulars given in the Warrant, including in the case of Belise that, in the light of his acquittals at Southwark Crown Court, it does not describe his conduct accurately or fairly. The effect of those acquittals in his case, Mr Watson submitted, is that the information in the Warrant alleging that he accepted signing for delivery of the goods, that he unloaded them and that he had possession of any documents used in the alleged frauds is inaccurate and unfair. However, the issue is, as a matter of principle, of some importance, and, in deference to the arguments of counsel, it may be of some help for me to give a view.

33 Mr Watson referred to observations of Thomas LJ in Castillo v The Kingdom of Spain and the Governor of HM Prison , Belmarsh [2004] EWHC (Admin) 1672 , at paragraph 25, and of Laws LJ in Palar v Court of First Instance, Brussels [2005] EWHC 915 , at paragraphs 5–8 and 11, on the importance of the Warrant specifying, and specifying correctly, the conduct relied upon to establish the extradition offence.

34 Section 2(4)(c) of the 2003 Act includes among the “information” to be provided in a Part 1 warrant:

“particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence.”

35 As to the adequacy or particularity in the Warrant, both appellants complain of insufficiency of the detail as to their respective participation in the criminal conduct described. They maintain that such details in it as to either of the Serviware transactions derive in the main from the June 2005 allegation, in respect of which they can rely respectively on the defences of autrefois convict and acquit .

36 Mr Caldwell's response to these arguments was that it is plain from the description of the offence in the Warrant that it alleges a long-term offence of fraud, or conspiracy to defraud, beginning in May 2004, and gives a sufficient account of its history until the arrest of both appellants in June 2005. Save for such issues of fact that may arise from Belise's acquittal on the particular charges that he faced in relation to the June 2005 transaction, he maintained that the Warrant complies in the case of each appellant with the requirements of section 2(4)(c) of the 2003 Act, giving particulars of the circumstances in which they are alleged to have committed the offence, including the conduct alleged to constitute it, when they are alleged to have committed it and the relevant provision in French law.

37 Proof of the commission of the extradition offence, Mr Caldwell reminded the Court, is ultimately for the French court, and this Court should not trespass into a review of the sufficiency of the evidence to support the charge of fraud as described in the Warrant. This is not, he submitted, a case like Castillo or Palar , where respectively, the information given in the Warrant was in material respects of dubious accuracy and fairness or insufficiently particularised to support the extradition offence alleged. Even if some part of the fraud charge — the conspiracy to defraud in his “illustrative” charge — is unseated by Belise's acquittal on the particular charges he faced at Southwark in relation to the June 2005 transaction, the remainder of the conspiracy to defraud, as described in the Warrant, would be sufficient to uphold the Judge's decision.

38 In my view, Mr Caldwell's submissions on this issue are to be preferred to those of Mr Pepper and Mr Watson. The dicta of Thomas LJ in Castillo and of Laws LJ in Palar on the need for accuracy and particularity should be considered in their context.

In Castillo , as Thomas LJ explained at paragraphs 27 and 28 of his judgment, the description in the warrant of the criminal conduct relied on was so inadequate and unfair that, if it had been described properly, it could not have covered the offence under English law claimed for it. That is not, on any showing, a criticism that can be made of the Warrant in this case, which, read as a whole clearly would, but for double jeopardy, support a charge of conspiracy to defraud in respect of the Serviware transactions. It is also to be noted that, in Castillo , Thomas LJ went on to find, in paragraph 28, that the impugned description covered another extradition offence claimed for it. In Palar , as Laws LJ observed at paragraph 7 of his judgment, the language of the warrant, notwithstanding a further translation of it directed by the court, was still so bad that it did not disclose facts "capable of constituting conduct which amount[ed] to the extradition offences alleged". Again, that is far from the case here, where the information provided in the Warrant clearly discloses an extradition offence of conspiracy to defraud.

39 Providing that the description in a warrant of the facts relied upon as constituting an extradition offence identifies such an offence and when and where it is alleged to have been committed, it is not, in my view, necessary or appropriate to subject it to requirements of specificity accorded to particulars of, or sometimes required of, a count in an indictment or an allegation in a civil pleading in this country. Allowance should be made for the fact that the description, probably more often than not, was set out in a language other than English, requiring translation for use in this country, and that traditions of criminal "pleading" vary considerably from one jurisdiction to another. As Laws LJ observed in Palar , at paragraph 8, while emphasising the need for conduct said to constitute the extradition offence to be specified in a warrant:

"… the background to the relevant provisions made in the 2003 Act is an initiative of European law and … the proper administration of those provisions requires that fact to be borne firmly in mind. … the court is obliged, so far as the statute allows it, to proceed in a spirit of co-operation and comity with the other Member State parties to the European Arrest Warrant scheme. …"

40 As to the accuracy of the Warrant in Belise's case having regard to his acquittals on the charges based on the June 2005 transaction, the inroad of such acquittals at a trial on the charge of conspiracy to defraud would be for the French Court as a matter of law, bound as it would be, not to permit prosecution or conviction for essentially the same offences as those in the English prosecution. It would also depend on the nature and range of the evidence as to the alleged conspiracy that would be adduced by the French prosecuting authorities. It would not be a basis for impugning the Warrant in extradition proceedings here on the ground of inaccuracy.

41 In my view, the Warrant in this case described the extradition offence of conspiracy to defraud and did so sufficiently and accurately, including the conduct alleged and its dates and location. Accordingly, I would not have allowed either appeal on this issue.

42 However, on the main issue, for the reasons I have given, I would allow both appeals.

Mr Justice Sullivan:

43 I agree.
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