R v Levkovic (2013): Criminalizing Disposal of Fetus That Died Before Birth is Constitutional

Introduction

On May 3, 2013, the Supreme Court of Canada (SCC) issued its judgment[1] on whether section 243 of the *Criminal Code*,[2] prohibiting the disposal of a fetus which died before birth, violated the right to liberty and security guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[3] The SCC determined that, for the purpose of section 243, a fetus becomes a child when it reaches the stage in development where it is likely to be born alive. Hence, the death of such a child before birth is considered a stillbirth, which is caught by the *Criminal Code*. For this reason, the SCC found section 243 of the *Criminal Code* constitutional. This article examines the SCC's attempt to interpret the *Criminal Code* section at issue without engaging the long-standing debate over fetal rights.

Facts

On April 5, 2005, a superintendent at a building in Mississauga, Ontario, found a bag containing the remains of a human baby on the balcony of Ms. Levkovic's apartment. Ms. Levkovic was charged under section 243 of the *Criminal Code* for concealing the dead body of a child. Ms. Levkovic claimed that she fell, went into labour and had a stillbirth. At trial, the remains were identified as being a female child who was delivered at or near full term.

Ms. Levkovic challenged the vagueness of the wording of section 243, which criminalizes disposing the dead body of a child, whether the child died before, during or after birth. Ms. Levkovic claimed that the section was unclear as to when a fetus falls within the definition of "child died before…birth" of section 243.[4] She asserted that such vagueness of the pre-birth application of the section violated her *Charter* right to liberty and security.

Procedural History

On September 18, 2008, the Ontario Superior Court of Justice found section 243 of the *Criminal Code* unconstitutional.[5] The Court determined that the combination of words "child" and "before birth" in the section were vague as they did not clarify the time at which a fetus becomes a "child" for the purpose of section 243. The Court found that this vagueness violated Ms. Levkovic's *Charter* right to liberty and security. As a result, the Court ordered the word "before" to be severed from section 243 and acquitted Ms. Levkovic.

The Attorney General representing the Federal Government appealed the Superior Court

decision, claiming that section 243 was not vague. The Attorney General requested the Ontario Court of Appeal to declare section 243 constitutional and order a new trial.

On December 7, 2010, the Ontario Court of Appeal overturned the Superior Court decision and ruled that section 243 of the *Criminal Code* was constitutional.[6] The Court found the Superior Court applied an unnecessarily strict standard of vagueness. Hence, the Court of Appeal found that the word "before" was not vague for the purpose of section 243 and therefore there was no violation of the *Charter* right to liberty and security. The Court ordered a new trial.

Ms. Levkovic appealed the Court of Appeal decision to the Supreme Court of Canada, claiming that the Court of Appeal applied the wrong standard for vagueness, and requested that the Supreme Court restore her acquittal.

Issues

1. Did sanctions under section 243 of the *Criminal Code* engage Ms. Levkovic's *Charter* right to liberty and security?

2. Concept of "vagueness" as a principle of fundamental justice

A. Fair notice to citizens and limitation of enforcement discretion

B. Appropriate standard of "vagueness"

3. Was section 243 vague in a way that violated Ms. Levkovic's *Charter* right to liberty and security?

A. Interpretation of section 243

B. *R v Berriman* – "chance of life" standard

C. Based on the "chance of life" standard, was section 243 vague so as to violate the *Charter*?

4. If section 243 violated the *Charter*, was it justifiable under section 1 of the *Charter*?

Decision

The Supreme Court of Canada reached a unanimous decision to find that section 243 of the Criminal Code was constitutional. The words "child died before birth" in the section were not vague as they were limited to cases where the fetus was likely to have been born alive. While sanctions under section 243 included imprisonment, which engaged the Charter right to liberty and security, it was irrelevant in this case due to the Court's finding of the constitutionality of section 243. Therefore, the Supreme Court upheld the Court of Appeal decision and ordered a new trial.

Court's Analysis

1. Did sanctions under section 243 of the *Criminal Code* engage Ms. Levkovic's Charter right to liberty and security?

Section 7 of the *Charter* guarantees everyone the right to life, liberty, and security of the person.[7] The right to life generally concerns a person's right to be alive. Levkovic did not involve such issue. Hence, it was not necessary for the SCC to discuss the right to life.

The right to liberty means that people cannot be physically held against their will without due process.[8] However, an exception applies where the imprisonment resulted from the person having been found guilty of an offence. Nevertheless, as a general rule, imprisonment of a person violates the right to liberty.[9] As for the right to security, it gives individuals personal autonomy over their physical and psychological integrity – allowing them to make choices concerning their own bodies.[10]

In *Levkovic*, conviction under section 243 could result in imprisonment for a term not exceeding two years. Moreover, a mandatory disclosure of a naturally failed pregnancy could interfere with a woman's personal autonomy and privacy interest. Therefore, section 243 engaged Ms. Levkovic's *Charter* right to liberty and security.

2. Concept of "vagueness" as a principle of fundamental justice

Under section 7 of the *Charter*, the Government's breach of a person's right to liberty may be justified only if it was made in accordance with the principles of fundamental justice.[11]It is a well-established principle of fundamental justice that a law cannot be vague. In fact, this doctrine against vagueness has existed long before the *Charter*, requiring that no one "be convicted or punished for an act or omission that is not clearly prohibited by a valid law".[12] The doctrine against vagueness has two rationales: first, a law must provide fair notice to citizens of the legal consequences of their conduct, and second, a law must limit the discretion of those charged with its enforcement.[13]

A. Fair notice to citizens and limitation of enforcement discretion

The first rationale that a law must give fair notice to citizens of the legal consequences of their conduct is grounded in the rule of law. Rule of law means that everyone is subject to the law.[14] In order to have a properly functioning society within which citizens abide by the rules and enjoy their rights and freedoms, laws must be created in a way in which citizens can learn what activities the rules pertain to.

The second rationale that a law must limit the discretion of those charged with enforcing that law is also based on the rule of law.[15] As mentioned, the rule of law subjects everyone to the law, which includes the government. Hence, laws must be sufficiently precise, not vague, to prevent those responsible for its enforcement from making decisions that extend beyond the boundary intended by the legislation.

B. Appropriate standard of "vagueness"

The two rationales equally apply to criminal law where "prohibited conduct must be fixed and knowable in advance".[16] This does not mean that an individual must know the consequences of the prohibited conduct with certainty. The rationales call for a minimum standard of precision where it is sufficient for the criminal legislation to indicate essential elements of the crime that are noticeable to citizens.[17]

However, in addition to the two requirements, Ms. Levkovic argued that the standard used to ascertain vagueness required the Court to also consider the impact of the problematic legislation on the *Charter* protected interests. The Supreme Court rejected this claim because "in the context of vagueness…there is no need to compare the purpose of the law with its effects".[18] The Court found that the appropriate standard of vagueness is the minimum standard of precision and that any additional considerations should be dealt within the section 1 *Charter* analysis.[19]

3. Was section 243 vague in a way that violated Ms. Levkovic's Charter right to liberty and security?

A. Interpretation of section 243

Both parties in *Levkovic* agreed that section 243 is focused on the event of birth and thus applies only to stillbirth and not to miscarriages or abortions.[20] However, Ms. Levkovic challenged that the word "before" makes the section vague because it does not clearly distinguish a stillbirth from a miscarriage. She claimed that a woman might not know the difference between a stillbirth and a miscarriage.[21] According to her argument, this means that section 243 failed to give her fair notice as to whether section 243 applies to her or not.

The Supreme Court rejected this argument. To interpret section 243 and determine the scope of the phrase "child died before birth", the Court examined the English case from 1854, *R v Berriman*, which established the test for the same offence as section 243.[22]

B. *R v Berriman* – "chance of life" standard

In *R v Berriman*, the accused was charged with concealing the bones of her baby with a gestational age of seven to nine months. The English court applied the "chance of life" test to the fetus to determine whether the accused should be convicted of concealing the birth of her child. For a fetus to be considered a child at law, the test required it to have reached the stage of maturity where, but for some accidental circumstances, it could have been born alive. The Court held that it was unnecessary for the child to actually have been born alive.[23]

C. Based on the "chance of life" standard, was section 243 vague so as to violate the *Charter*?

For the purpose of section 243, the Supreme Court modified the "chance of life" standard from *Berriman*. To provide greater certainty in applying the test, the Court adopted a likelihood standard and replaced "might have been born alive" with "likely to have been

born alive".[24] Moreover, the Court found that the likelihood standard serves the purpose of section 243 which is to facilitate an investigation for potential homicide where the victim must be a human being.[25]

In *Berriman*, the English Court suggested that the chance of life begins after seven months of pregnancy. However, in *Levkovic*, the Supreme Court viewed a case-by-case approach more appropriate and refrained from adopting a "fixed threshold based on gestational age that Parliament has so far chosen to omit".[26]

Despite this clarification, Ms. Levkovic continued to assert vagueness of section 243 in that the likelihood test requires the accused to depend on medical evidence to determine whether the fetus was likely to have been born alive. She claimed that the test fails to allow the accused to predict whether a particular act would be a crime and behave accordingly.

However, the Supreme Court rejected this argument. In cases where the accused may not know that his or her conduct resulted in a crime, expert medical evidence serves to help establish whether the offence has occurred.[27] For example, without a breathalyzer, individuals may not know whether the amount of alcohol they consumed would go beyond the legal limit for operating a motor vehicle. As such, it is the subject matter that calls for expert evidence and not the imprecision of the legislation. Therefore, the Court ruled that reliance on expert medical evidence for the purpose of section 243 did not make it vague.

In summary, the likelihood test for chance of life established a clear standard for section 243 which would only capture cases where the fetus reached a point of maturity and was likely to have been born alive, if not for some accidental circumstances. Therefore, the Supreme Court found that section 243 gave fair notice to citizens and limited enforcement discretion – thus satisfying the two minimum standards of precision required by the doctrine against vagueness.[28]

4. If section 243 violated the Charter, was it justifiable under section 1 of the Charter?

Since the Court found that section 243 was not vague, there was no violation of Ms. Levkovic's *Charter* right to liberty and security. Therefore, section 243 was held constitutional and a new trial was ordered.[29] Consequently, it was unnecessary for the Court to perform the *Charter* section 1 analysis.

Significance of the Ruling

In Levkovic, the Supreme Court of Canada affirmed that a fetus at or near full term is likely to have been born alive, and therefore is a "child" under section 243 of the Criminal Code. However, the Court did not establish precisely which time in the gestation period a fetus becomes a child. If a definitive gestation period were set, it would have confirmed the time at which life begins during gestation. This could have sparked the debate on extending Charter protection for the fetus that reached this specified period of maturity. Therefore, the Court was cautious to avoid any discussion that could involve fetal rights and when life

begins for a fetus. These are issues that Parliament has yet to specify.

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[1] *R v Levkovic*, 2013 SCC 25 .

[2] *Criminal Code*, RSC 1985, c C-46, s 243 ("[e]very one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years" s 243).

[3] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" s 7).

[4] *Criminal Code*, *supra* note 2.

[5] *R v Levkovic*, 2008 CanLII 48647 [ONSC].

[6] *R v Levkovic*, 2010 ONCA 830.

[7] *Charter*, supra note 3.

[8]*Motor Vehicle Act*, [1985] 2 SCR 486 at para 77.

[9] *Ibid*; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 90.

[10] *ONSC*, *supra* note 5 at para 8.

[11] *Charter*, *supra* note 3.

[12] *Levkovic*, *supra* note 1 at para 1.

[13] *Ibid* at para 32.

[14] Eugene A Forsey, *How Canadians Govern Themselves* (Ottawa: Library of Parliament, 1980) at chap 5, online: Parliament of Canada <http://www.parl.gc.ca/about/parliament/senatoreugeneforsey/book/chapter_5-e.html>.

[15] *Levkovic*, *supra* note 1 at para 32.

[16] *Ibid* at para 33.

[17] *Ibid* at para 34.

[18] *Ibid* at para 37.

[19] *Ibid* at para 39; *Charter*, *supra* note 3, s 1 ("[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable

limits prescribed by law as can be demonstrably justified in a free and democratic society" s 1)

[20] *Levkovic*, *supra* note 1 at para 14 (stillbirth is generally defined as "[t]he complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more [without signs of life]").

[21] *Ibid* at para 45.

[22] *R v Berriman*, [1854] 6 Cox CC 388.

[23] *Levkovic*, supra note 1 at para 49.

[24] *Ibid* at para 54.

[25] *Ibid* at para 59.

[26] *Ibid* at para 52.

[27] *Ibid* at para 72.

[28] *Ibid* at para 80.

[29] *Ibid* at para 81.