

CANADA / JUDGMENT

R. v. Punko

2008 BCSC 568

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Supreme Court of British Columbia

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2008 BCSC 568 R. v. Punko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Punko,

2008 BCSC 568

Date: 20080410

Docket: 23501

Registry: Vancouver

Regina

v.

John Virgil Punko, Randall Richard Potts, Kerry Ryan Renaud,

David Pearce, Nima Ghavami, and Chad James Barroby

Ban on Publication Pursuant to Section 648 of the Criminal Code

Before: The Honourable Mr. Justice Groberman

Oral Ruling on Defence Applications

Concerning Sufficiency of the Indictment

April 10, 2008

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Date and Place of Hearing:

April 7 and 8, 2008

Vancouver, B.C.

[1] THE COURT: The applications before me concern the sufficiency of certain counts in the indictment. The counts in question read as follows:

Count 2 (Punko, Renaud, Pearse, Ghavami):

Between April 1, 2004, and June 3, 2005, at or near the Cities of Vancouver, Surrey, New Westminster, British Columbia and elsewhere in British Columbia did unlawfully conspire together, the one with the other or others of them, and with Nathan Potvin, Forrest Schab and with a person or persons unknown, to commit the indictable offence of production of a controlled substance, to wit: Methamphetamine, contrary to Section 7(1) of the Controlled Drugs and Substances Act and to commit the indictable offence of trafficking in a controlled substance, to wit: Methamphetamine, contrary to Section 5(1) of the Controlled Drugs and Substances Act and did thereby commit an offence contrary to Section 465(1)(c) of the Criminal Code of Canada.

Count 3 (Renaud, Pearse and Ghavami):

Between April 1, 2004, and June 3, 2005, at or near the Cities of Vancouver, Surrey, New Westminister, British Columbia and elsewhere in British Columbia, did commit the indictable offence of production of a controlled substance, to wit: Methamphetamine, contrary to Section 7(1) of the Controlled Drugs and Substances Act for the benefit of, at the direction of, or in association with a criminal organization, to wit: the East End Charter of the Hells Angels, and did thereby commit an offence contrary to Section 467.12 of the Criminal Code of Canada.

Count 4 (Renaud, Pearse, Ghavami, Barroby):

Between April 1, 2004, and June 3, 2005, at or near the Cities of Vancouver, Surrey, New Westminister, British Columbia and elsewhere in British Columbia, did commit the indictable offence of trafficking in a controlled substance, to wit: Methamphetamine, contrary to Section 5(1) of the Controlled Drugs and Substances Act for the benefit of, at the direction of, or in association with a criminal organization to wit: the East End Charter of the Hells Angels, and did thereby commit an offence contrary to Section 467.12 of the Criminal Code of Canada.

Count 6 (Potts, Renaud, Pearse, Ghavami, Barroby):

Between April 1, 2004, and June 3, 2005, at or near the Cities of Vancouver, Surrey, New Westminister, British Columbia and elsewhere in British Columbia did unlawfully conspire together, the one with the other or others of them, and with Nathan Potvin, Forrest Schab and with a person or persons unknown, to commit the indictable offence of production of a controlled substance, to wit: Methamphetamine, contrary to Section 7(1) of the Controlled Drugs and Substances Act and to commit the indictable offence of trafficking in a controlled substance, to wit: Methamphetamine, contrary to Section 5(1) of the Controlled Drugs and Substances Act and did thereby commit an offence contrary to Section 465(1)(c) of the Criminal Code of Canada.

- [2] There is an application to quash Counts 2 and 6 (the conspiracy counts), or in the alternative, for particulars further identifying the conspiracies.
- [3] There are also applications for particulars in respect of Count 3 and 4 (the criminal organization counts). The accused seek particulars as to whether those offences were committed for the benefit of, at the direction of, or in association with the East End Charter of the Hells Angels. As well, there a request for particulars as to the nature of the association with the Hells Angels Chapter.
- [4] Finally, Mr. Ghavami seeks broad particulars on each of Counts 2, 3, 4, and 6. He wants greater detail of his alleged involvement with respect to those allegations.

Sufficiency of Counts 2 and 6

- [5] Mr. Renaud, supported by the other counsel, alleges that Counts 2 and 6 ought to be quashed on the basis that they do not conform with the requirements of s. 581 of the Criminal Code:

581(1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

...

- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.
- [6] Counsel places great reliance on the case of *R. v. Brodie*, [1936] S.C.R. 188, 65 C.C.C. 289. In that case, the accused were charged with being parties to a seditious conspiracy, but the indictment did not set out the specific nature of the alleged seditious conspiracy. The Supreme Court of Canada held the indictment to be insufficient, stating (at S.C.R. pp. 194-5; C.C.C. pp. 294-5):

It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment. An accused person may not be charged merely of having committed murder; that statement must specify the matter. In the same way, in the present case, the appellants could not be charged merely with having been "parties to a seditious conspiracy," or having "committed the crime of seditious conspiracy." The particular agreement between each of them and "with one W.F. Greenwood, W.G. Brown, Mrs. Charles Alton and Mrs. A.M. Rose and also with other persons unknown" into which they are alleged to have entered and to which the Attorney-General gave the appellation of "seditious conspiracy" ought to have been specified in the charge prepared, either in popular language or in the words of the code, in such a way as to show on its face that "the matter charged" was an indictable offence and as to apprise the accused of the acts committed by them for which they were called upon to answer.

- [7] The court adopted the description of the indictment put forward by counsel for the appellants, stating (at S.C.R. p. 198, C.C.C. p. 297) that it did not, "describe the offence in such a way as to lift it from the general to the particular," and concluded (at S.C.R. p. 199, C.C.C. p. 298):

[A]lthough conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it does not follow that the count charging conspiracy alone, without the setting out of any overt act, must not describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged, or, in other words, in such a way as to specify, in substance, the specific transaction intended to be brought against the accused.

- [8] It is easy to understand why the indictment in *Brodie* was quashed. The essence of the charge was not present in the indictment. It simply did not state the nature of the sedition. The very object of the alleged conspiracy was therefore missing. I do not think that the case has direct application to the indictment in the case at bar; the counts in the case at bar are specific as to the objects of the alleged agreements.

- [9] In the case of *R. v. Cotroni*; *Papalia v. The Queen*, [1979] 2 S.C.R. 256, 45 C.C.C. (2d) 1, Dickson J. for the majority expressed some concern that the indictment charging a conspiracy to have possession of \$300,000 knowing that the money was obtained by extortion might also run afoul of the requirements of the Criminal Code. Citing Brodie, he said (at S.C.R. p. 277, C.C.C. p. 18):

The difficulty in this case stems from the essential vagueness of the charge. There is no indication that any motion to quash was made at the outset of the trial. I observe in passing, however, that it is open to question whether the indictment can be said to contain "sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him", or "to identify the transaction referred to", as required by the Criminal Code.

- [10] It appears to me, however, that the concern expressed in that obiter remark has been overtaken by a less strict view expressed by the Supreme Court of Canada in *R. v. Douglas*, [1991] 1 S.C.R. 301 at 314, 63 C.C.C.(3d) 29 at 39:

From these cases it can be seen that an indictment is adequate if it contains sufficient details to give the accused reasonable information with respect to the charge and to enable the accused to identify the transaction so as to permit the adequate preparation of the defence. Whether an indictment is sufficient will depend on the offence charged and the facts of the case. Time is not required to be stated with exact precision unless it is an essential part of the offence charged and the accused is not misled or prejudiced by any variation in time that arises.

- [11] In that case, the court upheld convictions based on a conspiracy charge very similar to the one in the case at bar. The count that was at issue in the Douglas case was as follows (quoted at S.C.R. p. 305, C.C.C. p. 32):

Between the 5th day of December, 1983 and the 19th day of February, 1984, in the City of Kitchener, in the Judicial District of Waterloo; in the City of Sarnia, in the County of Lambton; and elsewhere in the Province of Ontario; and in the City of Montreal, in the Province of Quebec; they did unlawfully conspire and agree the one with the other or others of them, and with Brent Howard Harding and Douglas Patrick Reidt, and with a person or persons unknown, to commit an indictable offence, to wit: traffic in a narcotic, to wit: cocaine, contrary to Section 4(1) of the Narcotic Control Act, thereby committing an indictable offence, contrary to Section 423(1)(d) of the Criminal Code of Canada.

- [12] It appears to me that there is nothing unusual in the conspiracy counts in this case. Indeed, they have followed the usual format for charging a conspiracy. I am not convinced that they fail in any way to set out the essential elements of the offence of conspiracy and it does not seem to me that they fail to meet the requirements articulated in *R. v. Douglas*.

The "Kienapple" Issue

[13] The accused argue, as well, that the counts ought to be quashed because they leave open the possibility of two convictions for the very same crime. They point out that a failure to prove a conspiracy against every co-conspirator mentioned in the charge will not necessarily mean that the conspiracy is unproven against at least some of the conspirators. This point was made in *R. v. Douglas* at S.C.R. p. 322, C.C.C. p. 45:

If the conspiracy proven includes fewer members than the number of accused or extends over only part of the period alleged, then the conspiracy proven can still be said to be the same conspiracy as that charged in the indictment. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused, establishes that it occurred at some time within the time frame alleged in the indictment, and had as its object the type of crime alleged.

[14] This leaves open the possibility, the accused say, that the three accused charged in both Counts 2 and 6 might face conviction on both counts based on a single crime. They say, further, that the principle in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, 15 C.C.C.(2d) 524 could not be applied to correct that possibility, because the trial judge will not necessarily be in a position to know that a jury convicted on both counts based on a single delict.

[15] Let me say, at the outset, that I do not think the problem is one involving the Kienapple principle per se. That principle holds that a person cannot properly be convicted of two crimes arising out of a single delict. It takes as its point of departure the idea that a single transaction may constitute more than one crime and holds that where such a situation exists, a conviction may only be entered for a single crime, with a stay entered in respect of any other count arising out of the same delict.

[16] In the case at bar, the suggestion is not that two crimes would be constituted from a single delict, but rather that two identical convictions might result from a single crime. In my view, this is not a matter for the trial judge to deal with after the jury provides its findings in the way that a judge deals with the Kienapple issues. Rather, it is a matter to be dealt with in instructions to the jury outlining what must be proven on each count. The court will have to explain to the jury what the nature of the conspiracy charged in each count is and ensure that the jury understands that two separate conspiracies are alleged. It might also be necessary, depending on the evidence and the theories put to the court by Crown and defence, to instruct the jury that if it finds that there is only one rather than two conspiracies, it cannot convict any accused on both counts.

[17] While the presence of two separate conspiracy counts covering the same timeframe, involving the same object, and having overlapping members will render the charge to the jury more complex than is typical even in conspiracy cases, I do not think that it raises the possibility of multiple convictions for a single crime. I, therefore, do not find that there is any basis to quash the conspiracy counts.

Applications for Particulars of the Conspiracy Counts

- [18] I turn, now, to what I consider to be the most important issue on this application, that of whether particulars of the conspiracy charges need to be furnished. The accused argue that the similarity of the two conspiracy counts, the scope of the evidence, and the fact that some pieces of evidence will be relevant to both counts make it essential that further particulars be provided. The Crown, on the other hand, argues that it has provided full, detailed, and particularized disclosure in this case. It says such disclosure obviates the need to particularize the counts. The Crown says that the accused know the case that they are facing and that further particulars should not be ordered.
- [19] Before considering the law on the issue, I will say a bit about the allegations. The Crown has provided various synopses of its allegations ranging from a short four-page version to disclosure documents of lengths that I can only imagine. It says that there are two distinct conspiracies alleged in this case, one directed by Mr. Potts and one directed by Mr. Punko. It says that the agreements are in no sense the same and could not be merged in a single count. The Crown says that the conspiracies represent two entirely different agreements. Indeed, it says they are two competing conspiracies for production and trafficking in methamphetamine. I am satisfied that on the Crown's theory there would, indeed, be two separate conspiracies.
- [20] With respect to the law, it is apparent that the language used in the count is important for a number of reasons. Of course, the accused are required to know what allegations there are against them; that is fundamental. However, as has been pointed out by the accused, it is important that they know both what is formally alleged as well as what evidence may be presented. In this respect, the accused cite from the case of *R. v. G.R.*, 2005 SCC 45, [2005] 2 S.C.R. 371 at para. 2:

It is fundamental to a fair trial that an accused knows the charge or charges he or she must meet. The proper focus is on what the Crown alleges, not on what the accused already knows. An accused will often know a good deal more about the circumstances of an offence than the police or Crown will ever know, but it is not enough for the Crown to say to an accused "you know perfectly well what you're guilty of". The basis of our criminal law is that he or she is only called upon to meet the charge put forward by the prosecution. In this case, lack of consent (or the age of the daughter) was not part of the charge put against the respondent.

- [21] While the matter at issue in *G.R.* was quite different from the issues that I am considering, it does appear to me that there is a need to keep in mind a distinction between what is alleged, on the one hand, and what has been disclosed or what becomes evidence, on the other. In addition to being provided with details of the evidence available to the Crown, the accused is entitled to know what the Crown is setting out to prove with that evidence. Thus, I do not fully agree with certain propositions put forward by the Crown suggesting that in the post-Stinchcombe world, the function of particulars has been overtaken by the function of disclosure. For example, the Crown cites *R. v. Dalton*, [1999] 192 Nfld & P.E.I.R. 20, [1999]

N.J. No. 388 wherein the court stated, at para. 12:

Since *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 the prosecution has a duty to fully disclose all relevant evidence to the accused. Accordingly, it is no longer necessary for an accused to obtain an order for "particulars" under section 587 of the Code in order to make full answer and defence. The effect of an order for "particulars" is to place restrictions on the prosecution because such "particulars" must be proven beyond a reasonable doubt.

[22] Further, in *R. v. Shalala* (2000), 224 N.B.R. (2d) 118, [2000] N.B.J. No. 14 at paragraphs 55 to 57, the New Brunswick Court of Appeal considered how disclosure affects the need for particulars and stated as follows:

55 Section 587 of the Code provides that a Court may order particulars if satisfied that it is necessary for a fair trial. Section 587(2) of the Code reads as follows:

For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.

56 That provision permits the court to give consideration to evidence taken at the preliminary inquiry. In *R. v. Alward* (1976), 32 C.C.C. (2d) 416 (N.B.C.A.), Justice Limerick, for the Court, said at p. 426:

Particulars of "the unlawful act" by which the appellants were alleged to have caused the death of Mr. Willet were unnecessary. The evidence taken on the preliminary inquiry clearly disclosed the only unlawful act which caused the death of the deceased was the inflicting of bodily harm on the deceased in his hotel room. There could have been no misunderstanding on the part of the accused or their counsel as to the unlawful act referred to in the indictment. There was therefore no miscarriage of justice in any event because of the refusal of the trial Judge to order particulars.

57 Moreover, in exercising his discretion not to order particulars, the trial judge could properly take into consideration the disclosure made by the Crown as required by *R. v. Stinchcombe*

[23] In my opinion, while these cases are correct in observing that some of the purposes of granting particulars can equally be served through disclosure, they do not eliminate the need for particulars in all cases. In *R. v. Canadian General Electric Co.* (1974), 17 C.C.C. (2d) 433, Pennell J. considered the purposes for which particulars are granted and stated, at p. 442:

The fact that the indictment is sufficient does not of itself put an end to an accused's right to particulars. Particulars are due whenever justice would be imperilled if particulars are withheld.

[24] After citing a provision of the Criminal Code, he said, at p. 443:

The function of particulars in a criminal trial is twofold. Primarily their function is to give such exact and reasonable information to the accused respecting the charge against him as will enable him to establish fully his defence. The second purpose is to facilitate the administration of justice (*R. v. Odduono*, [1940] 1 D.L.R. 597, 73 C.C.C. 152). The secondary purpose can be illustrated quite

simply. When a conspiracy count involves an alleged widespread complicated conspiracy for the accomplishment of a purpose going beyond the performance of individual acts, the particulars furnished will assist the Judge in ruling on the relevancy of the evidence. To adopt a homely form of words, a trial circumscribed by particulars will not wander all over the shop and will foreclose an unreal controversy.

[25] While disclosure may be of great assistance in ensuring that the accused knows the case he or she has to answer, particulars may nonetheless be necessary in order to tell him or her what essential elements are alleged; in other words, how the Crown alleges that the evidence adds up. Even beyond this function, however, particulars also serve the administration of justice generally by giving the court a basis for making determinations as to relevance of evidence and. (importantly, for conspiracy counts) a basis for determining the scope of the charge when instructing a jury.

[26] In the case at bar, the Crown says that all of these functions can be served without an order for particulars. It says that the Crown theory is clear and it will govern the conduct of trial. There is some concern in my mind as to whether the case law supports that proposition fully. In *R. v. McCune* (1998), 131 C.C.C. (3d) 152, the British Columbia Court of Appeal considered the place of the Crown's theory in determining the scope of count. It said as follows at paras. 36 - 37):

36 The question of whether the Crown's theory may constrain it beyond the allegations set out in the indictment was considered in *R. v. Bengert* (No. 5) (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.). In that case, the accused were charged with conspiracy to traffic in cocaine in Vancouver. During the Crown's opening, Crown counsel indicated that the conspiracy involved importing cocaine from South America into Canada. In his charge to the jury, the trial judge emphasized that the jury had to be satisfied that the accused had conspired to bring cocaine into Canada. On appeal, this Court overturned the accused's acquittal, finding that the trial judge had mistakenly elevated the Crown's opening to the level of particulars (at 542):

Crown counsel opened the case to the jury at considerable length. An opening serves important purposes. It assists the jury in following the evidence by acquainting them with the theory of the Crown and what the various witnesses are expected to say. It may inform defence counsel as to the evidence which otherwise he would not know was going to be adduced. It may assist the trial Judge by warning him of legal questions that will have to be determined.

Here, the complexities of this long and difficult trial led the Judge into the error of assigning a function to the opening which it does not have, namely, to serve as particulars of the indictment.

37 While the decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, now governs Crown disclosure of its case to the defence, *Stinchcombe* does not alter the principle that the Crown's theory of a case is different from a particularized indictment and it is only the indictment which defines the factual transaction which the Crown must prove for a conviction.

[27] The reference to Bengert (No. 5) is of interest as it was not the last word with respect to the status of the Crown opening. Bengert had failed to mention a passage from Cotroni that gave the Crown's opening some status in interpreting the indictment. In Cotroni, Dickson J. had said (at S.C.R. pp. 285-86, C.C.C. p. 25):

When considering whether a conspiracy count is bad for duplicity, a trial judge should look at the count itself, the particulars if provided, and the opening address of the prosecution.

[28] In a concurring opinion in *R. v. Dixon* (1984), 16 C.C.C. (3d) 431, Lambert J.A. addressed the issue of the failure of the court in Bengert to consider Dickson J.'s statements in Cotroni. He said, at p. 442:

I do not think that if a count is duplicitous, it can be made something other than duplicitous by the Crown's opening statement. I think that Mr. Justice Dickson must be saying that, since duplicity alone in a count is not objectionable, because of s. 519(1)(b), the opening address can be considered in order to decide whether duplicity, coupled with some other factor in the indictment, makes the count bad in that particular case.

But that does not cast any doubt on the passage that I have quoted from the reasons of this court in Bengert (No. 5). An opening statement can not change the conspiracy charge in the indictment. The Crown can not leave the decision as to what conspiracy it is trying to prove until the beginning of the trial. If the Crown charges a very general conspiracy, and if it does not narrow the charge by providing particulars, then the conspiracy charge must be considered to be a broad overall conspiracy, and it can not become a narrower conspiracy because of what Crown counsel says in the Crown's opening address.

Lambert J.A. was speaking only for himself in this passage.

[29] The Supreme Court of Canada, revisited the issue in *R. v. Douglas* and said this at S.C.R. p. 323, C.C.C. pp. 45-46:

This Court has held that the opening address is a factor to be taken into account in construing the indictment; Cotroni, supra, per Dickson J. at pp. 285-86. In its opening address at the first trial, the Crown stated that it was relying on the January 14 meeting. It is true that the new trial constituted a new beginning. Yet, in this case, the Crown made a very short opening statement at the second trial. The opening referred to the first trial and that, as a result of the decision of the Court of Appeal, the jurisdictional argument was no longer available to the defence. Reference was made to the section of the Criminal Code relied upon and the two principal witnesses to be called. The greatest portion of the very brief opening was taken up with a request for defence counsel to make known their position with regard to the wiretap evidence. No details were given and, particularly, no reference was made to the meeting in Sarnia.

In these circumstances, where the Crown stated the essence of the conspiracy relied on at the first trial and omitted to make any such statement, whether consistent or inconsistent with that given at the first trial, at the second trial the Crown is bound by the position it had taken in its opening at the first trial.

- [30] This passage does not appear to have been considered by our Court of Appeal in the McCune decision. Whatever one might say about the effect of the Crown opening on the interpretation of the indictment in McCune (which does not really seem to have been a case about interpreting the indictment), the continued reliance of the Court of Appeal on Bengert (No. 5) is, arguably, *per incuriam*. In any event, McCune itself shows that that the trial judge has the ability to prevent unfairness by prohibiting the Crown from ambushing an accused by taking one position in opening and another in closing.
- [31] Recognizing that there is a need to ensure the Crown differentiates between the two conspiracies in this case, then, the question is whether it is necessary to order particulars here.
- [32] There are undoubtedly difficulties with making an order for particulars in a conspiracy case. In *R. v. Violette*, 2008 BCSC 185, Romilly J. considered whether he should order particulars of a conspiracy and said:

In the case of a conspiracy information or indictment the task of giving particulars is extremely onerous. Since proof of a conspiracy is generally a matter of inference from overt acts, it is generally impossible to give particulars other than by a lengthy recital of the overt acts. This lengthy recital of the overt acts would become incorporated into the information pursuant to s. 587(3)(c) of the Criminal Code. The ordering by the court of particulars on conspiracy informations or indictments could have the effect of placing the Crown in the conundrum of having to prove these particulars as it was in *R. v. Daemore*, [1990] B.C.J. No. 2919.

- [33] I agree with the rationale set out by Romilly J. Particulars ought not to be used as a method of unduly limiting the Crown case or as a trap laid in such a manner as to force the Crown into proving beyond reasonable doubt details that may not be central to the conspiracy count. On the other hand, both the accused and the court are entitled to know the essential nature of the charge and the accused is entitled to know in detail the allegations against him or her.
- [34] In the case at bar, the essences of the two conspiracies have been set out by the Crown. It alleges that one was directed by Mr. Punko and one by Mr. Potts. It is reluctant, however, to make that allegation a matter of particulars, lest the language of the particulars serve as a trap in the event that the evidence does not develop as expected.
- [35] In my view, the naming of Mr. Punko in one count and the naming of Mr. Potts in the other sets an essential feature differentiating the counts. It may be possible, conceivably, for each count to be proven without necessarily resulting in a conviction of Mr. Potts in the one case and Mr. Punko in the other. Nonetheless, it seems to me that the involvement of Mr. Potts in

one case and of Mr. Punko in the other is a key element of the offence charged. Once it is accepted that that is the case, it seems to me the argument that the charges are not sufficiently differentiated or sufficiently specific vanishes.

- [36] While I agree, therefore, with the accused that the charges require differentiation and must be adequately particularized, in my opinion, properly construed - both on their wording and in the context of the representations that the Crown has continually made - these charges meet the required test and I am not, therefore, ordering further particulars.
- [37] I do, however, warn the Crown that if it wishes to stray from its theory of two conspiracies, one involving Mr. Potts and one involving Mr. Punko, it will have to amend the indictment and properly notify the accused. I consider that theory to be an essential element of the conspiracy counts as they have been put before me.

Other Applications for Particulars

- [38] The other requests for particulars that are before me can be dealt with briefly. Mr. Ghavami seeks particulars as a result of his acquittal in a related prosecution, *R. v. Lising and Ghavami*, 2007 BCSC 514 and of the fact that certain Crown evidence suggests that he is not involved in the alleged crimes. With all due respect, it seems to me that this application is not properly characterized as one for particulars. Rather, it is a perhaps understandable attempt to get the equivalent of a preliminary inquiry in a case prosecuted by direct indictment. I do not have jurisdiction to consider whether there is sufficient evidence for this matter to go to trial. I do not think that ordering particulars is appropriate. It seems to me that the allegations of the Crown against Mr. Ghavami are clear enough and Mr. Ghavami has been given adequate notice of the case that he must meet. If that case is a weak one, it is not a justification for granting further particulars.
- [39] There are two other requests for particulars in respect of the counts alleging a criminal organization. As I have said, those relate to the manner in which the crime is alleged to have been committed, that is, whether the crimes were for the benefit of or at the direction of or in association with the East End Chapter of the Hells Angels. There is a further application for particulars to set out in detail the nature of the association alleged. In my view, these sorts of particulars should not be ordered. Such particulars would lay a trap for the Crown, and would not go to the essence of the charge. It will be open to the Crown to prove the Criminal Organization counts in any of the ways alleged in the indictment. The meaning of the word "associate" is one that is a matter of law and it should not necessarily be a matter of particulars.

Conclusion

- [40] I am, therefore, dismissing the applications. In my view, properly interpreted, the counts in the indictment are adequately particularized charges.

The Honourable Mr. Justice H. M. Groberman

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