

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Punko, 2012 SCC 39, [2012] 2 S.C.R. 396 | **Date:** 20120720  **Docket:** 34135, 34193 |

**Between:**

**John Virgil Punko**

Appellant

and

**Her Majesty The Queen**

Respondent

**And Between:**

**Randall Richard Potts**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 23)  **Concurring Reasons:**  (paras. 24 to 31) | Deschamps J. (McLachlin C.J. and Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)  Fish J. |

R. *v.* Punko,2012 SCC 39, [2012] 2 S.C.R. 396

John Virgil Punko *Appellant*

v.

Her Majesty The Queen *Respondent*

‑ and ‑

Randall Richard Potts *Appellant*

v.

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**Indexed as: R. *v.* Punko**

2012 SCC 39

File Nos.: 34135, 34193.

2012:  March 21; 2012:  July 20.

Present: McLachlin C.J. and Deschamps, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Issue estoppel — Application — Crown seeking to prove that Hells Angels is criminal organization — Whether doctrine of issue estoppel applies on basis that issue was decided adversely to Crown in prior multi‑issue jury trial.*

J.P. and R.P. were charged with several offences, some falling within the prosecutorial jurisdiction of the provincial Crown and others falling within the jurisdiction of the federal Crown. The provincial prosecutions proceeded first to trial. It was alleged that some of the offences were committed for the benefit of, at the direction of, or in association with a criminal organization, namely the Hells Angels. A jury found J.P. and R.P. guilty of a number of offences, but acquitted them on all the criminal organization counts. Meanwhile, J.P. and R.P. were charged with various federal drug‑related offences. It was again alleged that they had acted for the benefit of, at the direction of, or in association with the Hells Angels. In pre‑trial motions, J.P. and R.P. contended that the Crown should be estopped from leading evidence that the Hells Angels was a criminal organization, because the issue had already been decided by the jury in the provincial prosecution. Applying the standard of proof on a balance of probabilities and considering the general circumstances of the case, the judge granted the motions. The Court of Appeal allowed the appeals on the ground that it could not be said that the only rational explanation for the verdict of acquittal was that the jury had found that the Hells Angels was not a criminal organization. It ordered a new trial.

*Held*: The appeals should be dismissed.

*Per* McLachlin C.J. and Deschamps, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: In applying the doctrine of issue estoppel where the prior criminal proceeding was before a jury, the question is whether a finding in favour of the accused is logically necessary to the verdict of acquittal. Factors such as questions asked by the jury, the timing of the jury’s verdict or findings made by the sentencing judge under s. 724(2)(*b*) of the *Criminal Code* can be used only to reinforce a conclusion reached through reasoning based on logical necessity. Where, in light of the record and the parties’ allegations, there is more than one logical explanation for the jury’s verdict, and if one of these explanations does not depend on the jury’s resolving the relevant issue in favour of the accused, the verdict cannot successfully be relied on in support of issue estoppel.

Here, the transcript of the jury trial reveals that there are at least two logical explanations for the not guilty verdict on each of the criminal organization counts: either the Crown had not proven that the Hells Angels was a criminal organization or it had not proven that the predicate offences were committed for the benefit of, at the direction of, or in association with the Hells Angels. A finding that the Hells Angels was not a criminal organization was not logically necessary to the acquittal.

*Per* Fish J.: Subject to leaving open the question whether a factual finding made by a sentencing court pursuant to s. 724(2)(*b*) of the *Criminal Code* can, as a matter of principle, give rise to an issue estoppel, the majority reasons are agreed with. There is no principled reason to suggest that such a finding of fact could never estop the Crown from relitigating the issue in subsequent proceedings. Here, however, the accused have not satisfied the preconditions to issue estoppel.

**Cases Cited**

By Deschamps J.

**Applied:** *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; **referred to:**  *R. v. Violette*, 2009 BCSC 1025, [2009] B.C.J. No. 1940 (QL); *R. v. Violette*, 2009 BCSC 1557 (CanLII); *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3.

By Fish J.

**Referred to:** *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 724(1), (2), 725(1)(*c*).

APPEALS from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Kirkpatrick and Groberman JJ.A.), 2011 BCCA 55, 299 B.C.A.C. 235, 508 W.A.C. 235, 266 C.C.C. (3d) 316, 330 D.L.R. (4th) 399, [2011] B.C.J. No. 199 (QL), 2011 CarswellBC 195, reversing a decision of Leask J., 2010 BCSC 70, 251 C.C.C. (3d) 232, [2010] B.C.J. No. 82 (QL), 2010 CarswellBC 105. Appeals dismissed.

*Gil D. McKinnon*, *Q.C.*, and *Larry Fleming*, for the appellant John Virgil Punko.

*Bonnie Craig* and *Jeffrey Ray*, for the appellant Randall Richard Potts.

*W. Paul Riley* and *Martha M. Devlin*, *Q.C.*, for the respondent.

The judgment of McLachlin C.J. and Deschamps, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

1. Deschamps J. — These appeals concern the application of the doctrine of issue estoppel, as clarified by this Court in *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, in the context of a multi-issue jury trial. The specific question may be stated as follows: Is the Crown estopped from seeking to prove that the East End Chapter of the Hells Angels (“Hells Angels”) is a criminal organization, on the basis that the issue was decided adversely to the Crown in a prior jury trial? For the reasons that follow, I would answer this question in the negative and dismiss the appeals.

I. Facts and Judicial History

1. A multi-faceted, multi-year investigation by the Royal Canadian Mounted Police into the activities of the Hells Angels led to the identification of a broad range of acts that could constitute criminal offences. Some of the offences fell within the prosecutorial jurisdiction of the provincial Crown, while others fell within that of the federal Crown.
2. The provincial prosecutions proceeded to trial in 2008 in the British Columbia Supreme Court before Romilly J. and a jury. The appellants, John Virgil Punko and Randall Richard Potts, and two others, Jean Joseph Violette and Ronaldo Lising, were tried jointly on varying charges of extortion, uttering threats, counselling mischief and unlawful possession of explosive substances and firearms. Some of the offences were allegedly committed for the benefit of, at the direction of, or in association with a criminal organization, namely the Hells Angels. In July 2009, following a ten-month trial, a jury found each of the accused guilty of a number of offences; however, it acquitted all four of them on all the criminal organization counts. Romilly J. delivered two sets of sentencing reasons, the first concerning Messrs. Punko, Potts and Lising (*R. v. Violette*, 2009 BCSC 1025, [2009] B.C.J. No. 1940 (QL)), and the second, Mr. Violette (*R. v. Violette*, 2009 BCSC 1557 (CanLII)).
3. Meanwhile, a federal prosecution had been authorized. The appellants were charged individually with various drug-related offences, and on some of the counts — to the effect that they had produced and trafficked in a controlled substance (methamphetamine) — it was again alleged that they had done so for the benefit of, at the direction of, or in association with a criminal organization (the Hells Angels). A trial for the drug-related offences was scheduled before Leask J. of the British Columbia Supreme Court without a jury. On November 26, 2009, Leask J. heard pre-trial motions made by the appellants, who contended that the Crown should be estopped from leading evidence that the Hells Angels was a criminal organization, because the issue had already been decided by the jury in the provincial prosecution.
4. Leask J. granted the appellants’ motions (2010 BCSC 70, 251 C.C.C. (3d) 232). He held that the standard to be applied in answering the question whether an issue was decided in a prior proceeding for the purposes of issue estoppel is that of “proof on a balance of probabilities” (para. 28). To determine whether issue estoppel applied, Leask J. considered the general circumstances of the case. First, he considered the fact that the jury had resolved its deliberations shortly after asking Romilly J. a question concerning the definition of a criminal organization (para. 43). Second, Leask J. noted that Romilly J. had found in his reasons for sentence that Mr. Potts had been holding weapons for the Hells Angels (at para. 57) and that Mr. Violette had acted on behalf of the Hells Angels (para. 69). On this second point, Leask J. was of the view that Romilly J. had found that the jury had acquitted Mr. Punko and Mr. Potts on the criminal organization counts because it was not satisfied that the Hells Angels was a criminal organization (para. 75). Leask J. held that the Crown should be estopped from seeking to prove that the Hells Angels was a criminal organization in the trial before him. The Crown appealed.
5. The Court of Appeal allowed the appeals and ordered a new trial (2011 BCCA 55, 299 B.C.A.C. 235). Kirkpatrick J.A., writing for the court, found that Leask J. had erred in casting the question whether an issue was resolved in a prior proceeding in terms of burden of proof, as it is actually “a question of logic and law” (para. 82). According to Kirkpatrick J.A., because individual jurors may have reached their decisions on the verdict by different routes, it could not be said that the only rational explanation for the verdict of acquittal was that the jury found that the Hells Angels was not a criminal organization (para. 85). Nor did the nature and timing of the jury’s question, or the sentencing judge’s reasons, support a conclusion by a court in a subsequent proceeding that the issue of whether the Hells Angels was a criminal organization had necessarily been resolved by the jury. In Kirkpatrick J.A.’s opinion, the sentencing reasons did not “unequivocally state the relevant finding on which the issue estoppel is based” (para. 93).

II. The Scope of the Doctrine of Issue Estoppel in the Criminal Context

1. In *Mahalingan*, this Court had to decide whether the doctrine of issue estoppel should be retained as part of Canadian criminal law. A majority of the Court favoured retaining it in the criminal law, but in a narrow form. Not all issues raised in a previous trial can be the subject of issue estoppel. Rather, the Crown is precluded from relitigating only those issues that were *decided in favour* *of the accused* at the earlier trial (paras. 22, 31 and 33). Moreover, the resolution of an issue in favour of the accused must be “a necessary inference from the trial judge’s findings or from the fact of the acquittal” (para. 52).
2. In applying the doctrine of issue estoppel where the prior proceeding was before a jury, “[t]he question is whether a finding in favour of the accused is logically necessary to the verdict of acquittal” (*Mahalingan*, at para. 53 (emphasis added)), not whether the general circumstances of the case tend to indicate that the jury resolved the issue in favour of the accused. Thus, factors such as questions asked by the jury, the timing of the jury’s verdict or findings made by the sentencing judge are not directly relevant to whether the jury resolved an issue in favour of the accused. They can be used only to reinforce a conclusion reached through reasoning based on logical necessity. Where, in light of the record and the parties’ allegations, there is more than one logical explanation for the jury’s verdict, and if one of these explanations does not depend on the jury’s resolving the relevant issue in favour of the accused, the verdict cannot successfully be relied on in support of issue estoppel. An approach that encourages judges to inquire into the jurors’ mental deliberations and reasoning processes should be rejected.
3. I therefore agree with the Court of Appeal that Leask J. erred in law in drawing inferences on a balance of probabilities — a question of burden of proof — rather than considering whether a finding regarding the criminal nature of the organization was logically necessary to the acquittal — a question of logic and law.
4. Mr. Potts submits that the doctrine of issue estoppel can be applied on the basis of findings of fact made by a sentencing judge under s. 724 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”). That section provides as follows:

**724.** (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

(2) Where the court is composed of a judge and jury, the court

(*a*) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and

(*b*) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

. . .

In support of his submission, Mr. Potts refers to a passage from *Mahalingan* in which the Court held that “an accused should not be called upon to answer allegations of law or fact already resolved in his or her favour by a judicial determination on the merits” (para. 39). In the context of a multi-issue jury trial, I cannot accept that the findings of fact made by the sentencing judge are determinative for the purposes of issue estoppel.

1. Where a fact is necessary for the purpose of determining the appropriate sentence but is not express or implied in the jury’s verdict, the sentencing judge must make his or her own finding (s. 724(2)(*b*) *Cr. C.*). However, such a finding does not constitute a judicial determination *on the merits* of the case; rather, it constitutes a judicial determination only for the purpose of sentencing. The merits of the case in a jury trial pertain to the issues the jurors can take into consideration in reaching a verdict. It is the role of the jury, not the sentencing judge, to make judicial determinations on the merits. The jurors must arrive at a unanimous result on the basis of the evidence. In doing so, it is their prerogative to make their own determinations on the merits. Issue estoppel will apply only where unanimity of the jury on an issue can be discerned through reasoning based on logical necessity.
2. A sentencing judge must also accept as proven facts that are implicit in the jury’s verdict of guilty (s. 724(2)(*a*) *Cr. C.*). These are not determinations of the sentencing judge, but simply his elucidation of the facts the jury must have relied on to convict the accused. The sentencing judge has no duty to elucidate or make findings with respect to a jury’s verdict of acquittal. Any observation the sentencing judge makes in that regard may indicate his or her own views, but it is not a determination that binds a judge sitting on a subsequent motion based on issue estoppel. In every case, the judge in the subsequent proceeding must determine whether the sentencing judge’s elucidation of the jury’s verdict meets the standard of logical necessity. Findings made by a sentencing judge regarding a jury’s determinations in a multi-issue trial cannot be used to circumvent the standard of logical necessity established in *Mahalingan*, but only to confirm a conclusion reached by applying that standard.

III. Application to the Facts

1. In the original trial presided by Romilly J., the jury acquitted the four accused on all the criminal organization counts. Leask J. stated that he was satisfied on a balance of probabilities, on the basis of Romilly J.’s sentencing reasons, the jury’s question and the timing of the jury’s verdict, that the jury must have acquitted the accused on the basis that the Hells Angels was not a criminal organization. In light of *Mahalingan*, however, the question is whether a finding that the Hells Angels is not a criminal organization is the only logical inference a judge can draw from the jury’s verdict. A review of the relevant portions of the transcript of the jury trial reveals that it is not.
2. In their closing arguments on the criminal organization counts, counsel for Mr. Punko, Mr. Potts and Mr. Lising each advanced two distinct defences: first, that the Crown had failed to prove that the Hells Angels was a criminal organization and, second, that none of the substantive offences were committed for the benefit of, at the direction of, or in association with the Hells Angels.
3. In his charge, Romilly J. informed the jury that, on all the criminal organization counts, the Crown had to prove the following five elements beyond a reasonable doubt:

that the accused committed the substantive offence;

that during the period specified in the count, the Hells Angels was a criminal organization;

that the accused knew that the characteristics of the Hells Angels were those of a criminal organization during the time period specified in the count;

that the accused committed the offence for the benefit of, at the direction of, or in association with the Hells Angels; and

that the accused committed the offence with the intent to do so for the benefit of, at the direction of, or in association with the Hells Angels.

Romilly J. instructed the jury that, if it was not satisfied of each element beyond a reasonable doubt, it had to deliver a verdict of not guilty. He also told the jurors that, if they acquitted the accused of the underlying substantive offence, they had to find him not guilty on the associated criminal organization count. The fact that there were five elements the Crown had to prove meant that, if the jury convicted the accused of the substantive offence, there were still four possible reasons for delivering a verdict of not guilty on the associated criminal organization count.

1. According to the arguments advanced by the defence, which Romilly J. summarized for the jury, there were two main issues the jury had to decide in relation to each criminal organization count once it had found the accused guilty of the predicate offence: (1) whether the Hells Angels was a criminal organization, and (2) whether the predicate offence was committed for the benefit of, at the direction of or in association with the Hells Angels.
2. It was not argued that Romilly J. had submitted defences to the jury that lacked an evidential foundation, or “air of reality” (see *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3). In this Court, Mr. Punko stated that his “primary defence” to the criminal organization charges was that the Crown had failed to prove that the Hells Angels was a criminal organization (A.F., at para. 21), but that

[a]s an alternate route to acquittal on the criminal organization counts the Appellants and Lising submitted to the jury that if they committed the substantive offences it was not for “the benefit of, at the direction of, or in association with” the [Hells Angels]. [A.F., at para. 23]

1. In sum, there are at least two logical explanations for the not guilty verdict on each of the criminal organization counts. This means that a judge cannot infer from the jury verdict, as required by *Mahalingan*, that the jurors necessarily found that the Hells Angels was not a criminal organization. There was, as counsel for Mr. Punko pointed out, an alternate route to the verdict.
2. Leask J. placed considerable weight on Romilly J.’s finding that Mr. Potts had been holding weapons for the Hells Angels and that Mr. Violette had been acting on behalf of the Hells Angels. However, regardless of whether Romilly J. was making his own finding of fact under s. 724(2)(*b*) *Cr. C.* or was interpreting the jury’s verdict, this finding does not assist the appellants in their issue estoppel argument. First, as I mentioned above, findings of fact made by the sentencing judge for the purpose of sentencing under s. 724(2)(*b*) cannot be relied on in support of issue estoppel. Second, no finding of fact that is implicit in a jury’s verdict as elucidated by the sentencing judge is a substitute for a conclusion by a judge hearing a motion based on issue estoppel, applying the standard of logical necessity, that the issue was previously decided in favour of the accused. It bears mentioning here that, because Romilly J.’s findings would have flowed from the jury’s decision to *acquit* on the criminal organization counts, they could not have been made under s. 724(2)(*a*). In any event, it cannot be said that Romilly J.’s findings were a necessary inference from the fact of the acquittal, as there were at least two logical explanations for the jury’s decisions to acquit on the criminal organization counts. In considering the motions based on issue estoppel, Leask J. could not conclude that a finding that the Hells Angels was not a criminal organization was logically necessary to the jury’s verdict of acquittal. Romilly J.’s findings of fact simply shed light on his own reasoning, not on that of the jurors, and do not provide the support Leask J. attributed to them.
3. Mr. Punko invokes a policy reason to justify applying the doctrine of issue estoppel in this case. He argues that because the provincial Crown successfully argued at the sentencing hearing before Romilly J. that the conduct of the accused was for or on behalf of the Hells Angels, as a matter of policy the federal Crown should be bound to accept that the jury acquitted them because it had a reasonable doubt that the Hells Angels was a criminal organization. In his opinion, the fact that the federal Crown is now arguing that the Hells Angels is a criminal organization is unfair to the accused (A.F., at paras. 122-24).
4. In my view, if an issue of unfairness does arise from the positions of the federal and provincial Crowns, it cannot be resolved on the basis of the narrow doctrine of issue estoppel. In Canadian criminal law, issue estoppel merely ensures that an accused will not be required to answer questions that *have already been determined* in his or her favour. If the Crown’s conduct in this case were found to be sufficiently egregious, the doctrine of abuse of process could provide protection against relitigation. Moreover, if any guilty verdicts are returned in respect of the federal prosecution, the sentencing judge will be in a position to take into consideration all the circumstances of the conviction, including the sentence imposed by Romilly J., if he finds that the charges are interconnected (s. 725(1)(*c*) *Cr. C.*).
5. In conclusion, it is worth recalling the point made in *Mahalingan* (paras. 24 and 54) that, in a multi-issue jury trial, it will be rare for an acquittal to ground issue estoppel, because such an acquittal will often have more than one possible basis and different jurors may have reached a unanimous verdict by different routes. These appeals are an illustration of that point.
6. I would dismiss the appeals.

The following are the reasons delivered by

1. Fish J. — Subject to the following reservation, I agree with the reasons and the conclusion of Justice Deschamps.
2. Unlike my colleague, and with the greatest of respect, I would leave open the question whether, *as a matter of principle*, a factual finding made by a sentencing court pursuant to s. 724(2)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46, can give rise to an issue estoppel.
3. In a trial by judge and jury, as in this case, it is the prerogative of the jury to make the factual findings relevant to its verdict. But the sentencing court is expressly empowered by the *Criminal Code* to “find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact” (s. 724(2)(*b*)).
4. I see no principled reason to suggest, as Justice Deschamps does, that such a finding of fact — expressly contemplated by the *Code* and independently made by the competent court — could never estop the Crown from relitigating the issue in a subsequent proceeding.
5. To constrain the doctrine as my colleague does is to create the possibility of conflicting judicial determinations, each purporting to be final, and each made in proceedings between the same parties. Where the earlier finding was made in the accused’s favour, it is precisely this sort of inconsistency that damages the integrity and coherence of the criminal justice system (*R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 45).
6. That said, the accused in this case have not satisfied the preconditions to issue estoppel. While Romilly J. found beyond a reasonable doubt, pursuant to s. 724(2)(*b*) of the *Code*, that Mr. Potts was holding weapons “for” the East End Chapter of the Hells Angels, he made no finding as to whether the Hells Angels was a criminal organization.
7. A judicial finding *that is not made* surely cannot give rise to an issue estoppel.
8. As mentioned at the outset, I am otherwise in agreement with the reasons of Justice Deschamps, and would dispose of the appeals as she suggests.

*Appeals dismissed.*

Solicitors for the appellant John Virgil Punko:  Gil D. McKinnon, Vancouver; Larry Fleming, Edmonton.

Solicitor for the appellant Randall Richard Potts:  Bonnie Craig, Vancouver.

Solicitor for the respondent:  Public Prosecution Service of Canada, Vancouver.