

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Carvery*, 2011 NSSC 283

**Date:** 20110516

**Docket:** CRH 343275

**Registry:** Halifax

**Between:**

Her Majesty The Queen

v.

Tirrell Shane Carvery

**Judge:**

The Honourable Justice M. Heather Robertson

**Heard:**

May 16, 2011, in Halifax, Nova Scotia

**Decision:**

May 16, 2011 (Orally) *Voir Dire* re defence motion for disclosure order pursuant to ss. 37(4) or (5) of the *Canada Evidence Act*

**Written Release  
of Decision:**

July 22, 2011

**Counsel:**

Shaun O'Leary, for the Crown  
Lee Seshagiri, for the accused

**Robertson, J.:** (Orally)

[1] This is an application by the defendant for disclosure of information relating to the vantage point where observations were made by police of an alleged drug transaction.

[2] The transcript of the preliminary inquiry is before the Court where Constable Marriott and Constable Cooke gave evidence with respect to the alleged event and their general position as observers.

[3] Constable Marriott is the primary witness, who using binoculars and maintaining his position during the five to ten second transaction, testified that he saw the alleged drug transaction and exchange between the two suspects.

[4] Constable Cooke's testimony is less specific as he could only testify to seeing one of the suspects offer his hand palm up as though to receive something i.e. half of the transaction. Constable Cooke also moved his position away from Constable Marriott and lost sight of the two suspects at one point and returned to his vicinity within five to ten feet of Constable Marriott. In this respect there is varying testimony on the observations made.

[5] The defence say that in light of conflicting testimony between these two constables and given the light conditions at the site the defence requires further particulars of the observation post to make full answer and defence, particularly asks for:

The approximate height (elevation) of the observation post.

The distance between the observation post and the suspects, as calculated from point to point on a map.

The angle of elevation between the position of the suspects and the observation post.

The angle of observation relative to the line which could be drawn connecting Mr. Burke and Mr. Carvery when standing face to face at the transaction location.

The distance between the observation post and Mr. Burke when he was attending at a house on Uniacke St. "a couple of houses up from Brunswick St."

[6] There is agreement by counsel that the Crown has a valid claim at common law of observation post privilege in this case.

[7] The Crown is concerned that greater or more precise identification of the observation post might adversely effect people involved in this location.

[8] In particular, citing *R. v. Cameron*, [2001] M.J. No. 347 at para. 25:

25 In deciding this matter, I recognize that there is a very compelling basis for the Crown's claim of privilege. As was stated in the Morris case referred to by Ms. Krahn, at the hearing of this matter on February 12th of this year:

There may also be situations where the individuals involved do not care about the protection of their own identities, say for example because they are tenants and intend to move soon away. However, if the police surveillance location is revealed there may be retribution against a property itself, which would be owned by the landlord, or against the current tenants, the criminal element, not having made the effort to verify the same tenants are there. Acts of retribution may also have an impact on neighborhoods, particularly in densely populated areas. Therefore there is a broader public concern that goes beyond the interest of the particular person in having his or her own identity kept secret. This is in addition to the public interest in encouraging other individuals to assist the police in the future.

[9] Counsel also agree that the guiding principals of law have recently been set out in *R. v. Hernandez* 2010 BCCA 514 which offers a framework for trial judges to work within when considering this privilege:

23 *Lam* thus recognized that there are two distinct points during the analysis where different weighing exercises must be undertaken. First, when considering whether to permit the Crown to rely upon the observation location privilege to any extent, and then, if the observation location privilege is upheld to any extent, in determining what if any weight to give to the evidence of the officer who made observations or heard discussions from the observation post. Based on the reasoning in *Meuckon* and *Lam*, the following framework emerges in terms of the steps to be taken by a trial judge in cases where observation post privilege is asserted by the Crown:

- a) The judge must decide whether the Crown has shown that disclosure of the information sought would adversely affect the public interest.
- b) If the public interest would be adversely affected by disclosure of the information sought, then the judge must determine, having regard to both the public interest and the accused's right to a fair trial, whether upholding the privilege would prevent the accused from making full answer and defence.
- c) If the judge determines that upholding the privilege claim would not prevent the accused from making full answer and defence, then the claim will be upheld. However, if the judge determines that upholding the privilege claim would prevent the accused from making full answer and defence, then the judge must consider whether partial disclosure of the information sought can be made without adversely affecting the public interest and without preventing the accused from making full answer and defence. However, if upholding the claim even in part would prevent the accused from making full answer and defence, then the claim will not be upheld and disclosure of the information sought will be required.
- d) If the privilege claim is not upheld, then the Crown will have to decide whether it wishes to continue with the prosecution.
- e) If the privilege claim is upheld, then, at the conclusion of the trial, the trier of fact, in assessing the reliability of, and weight to be given to the observer's testimony, is entitled to take into account the limitations placed on the accused's ability to cross-examine that witness.

[10] Other relevant cases are *R. v. Lam* 2000 BCCA 545, a case where the Crown provided no information other than that the observation post was 80 feet from the event; *R. v. Sam*, [2006] B.C.J. No. 2088, where significant information was provided similar to this case; *R. v. Bigsorrelhorse* 2006 BCPC 0095; *R. v. Richards*, [1997] O.J. No. 2086; *R. v. Blair*, [2000] O.J. No. 3079; *R. v. Cameron, supra*; and *R. v. Lyttle*, [2004] 1 S.C.R. 193. I have reviewed all of these cases.

[11] As in *Blair*, I note that relevant factors in this case are:

- (1) The fact that the Crown's evidence against the accused is derived from the observations made at the observation post and more specifically almost solely dependant on the testimony of Constable Marriott.

- (2) The degree of disclosure now made by the Crown about the observation post.
- (3) Whether upholding the claim of privilege might affect the outcome of the trial.
- (4) Whether the accused has identified specific reasons that indicates why the information disclosed is inadequate in terms of providing full answer and disclosure.

[12] In *Blair, supra*, the Court of Appeal found at para. 6:

6 In our view, there is no basis on which to interfere with the trial judge's ruling. We reach this conclusion for several reasons.

7 First, as mentioned above, the trial judge was aware of, and applied, the correct legal principles.

8 Second, this was not a case where the accused had no information, or even very little information, about the police observation post. The accused knew the building where Preston was located; it was a modest three-storey building. The accused also knew how far it was from the restaurant and knew the conditions between that building and the restaurant.

9 Third, as the trial judge noted in her ruling, defence counsel was not able to point to anything specific about either the observation post or its general surroundings to indicate why the information she had already received was inadequate in terms of providing a full answer and defence.

10 Fourth, and importantly, the trial judge's ruling was made before the trial commenced. Defence counsel sought, and the trial judge granted, permission to renew the application during the trial . . .

During the trial, the defence did not renew its application. In our view, this is fatal to the contention that the specifics of the location of the observation post were necessary to permit the appellant to challenge the reliability of the identification evidence.

[13] We do know from the preliminary testimony of Constables Marriott and Cooke that much information has been revealed.

- The distance in a straight line from the observation post to the accused during the drug transaction (120 to 130 feet)
- The observation post was elevated
- They did not move from this post
- They were within distance that they could communicate orally to each other
- One of the officers was using binoculars (Cst Marriott)
- The observation post was in the area of Gottingen Street and Uniacke Street
- The observations were not make through glass
- The officers described the angles in relation to the accused at which they were able to observe the transactions.
- They were able to place the location of the transaction next to a building further serving to narrow the possible angles of observation
- They were able to indicate areas where they were unable to make observations
- They were able to describe the lighting in the area on the night in question.
- They described the streets for which they had a field of view
- They described that there were no obstructions in there (sic) view like traffic.

[14] The Crown takes the position the disclosure provided more than enables the accused to make a full answer and defence.

[15] I have also had the opportunity to review with both counsel and discuss Exhibit 1 and Exhibit to this *voir dire*, the sketches of the transaction site at the rear of an alleyway located at 2388 Gottingen Street at the north side location of

the rear building where both police officers, marked in colour pen the location of the suspects at the time of the event and testified as to their line of vision and how they could observe the suspects.

[16] This evidence in my view significantly narrowed the possibility of the angles of observation and showed areas from where they could not observe.

[17] I find myself in agreement with the Crown that the significant disclosure provided does afford the defendant to make full answer and defence.

[18] At trial I fully expect defence counsel to seek further clarification relating to the degree of illumination, presence of shadows made by any obstruction, the presence of additional obstructions if any and to explore in the course of cross-examination the reasons for any inconsistencies in the two officers' testimony. Clearly, Constable Marriott's testimony provides greater observation than Constable Cooke's. I expect a fulsome cross-examination along the lines that the defence counsel outlined in their own brief in para. 45:

Given the officers' distance from each other during the alleged transaction, as well as their distance from the suspects, the discrepancy in their testimony is curious and suggests fertile ground for cross-examination. Issues the Defence may wish to canvass include:

- Whether the position of the observation post could account for the conflict between the testimony of Constables Cooke and Marriott as to whether Mr. Burke passed anything to Mr. Carvery during the hand-to-hand transaction .
- Whether the position of the observation post can account for the different viewing angles described by Constable Marriott and Cooke at the time of the transaction.
- Whether and to what degree shadows may have impaired the view of Constable Marriott given his location.
- The degree to which the suspects' bodies may have blocked the views of the officers given their location.

- The presence of additional/unmentioned obstructions in light of Constable Cooke's testimony that his view was obstructed when he moved from his initial position during the time of the alleged transaction.

[19] Accordingly, I am denying the defence counsel's motion for further specific disclosure and upholding the privilege.

[20] However, I will at the conclusion of the trial in assessing the reliability of and weight given to the observer's testimony I will take into account any limitations I feel are placed on the accused's ability to cross-examine these witnesses at trial.

[21] I will if it appears appropriate entertain a renewal application in accordance with *Blair*, as we see the evidence and particularly the cross-examination unfold at trial.

Justice M. Heather Robertson