

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Carvery*, 2011 NSSC 500

Date: 20110915

Docket: CRH 343275

Registry: Halifax

Between:

Her Majesty the Queen

v.

Tirrell Shane Carvery

Judge:

The Honourable Justice M. Heather Robertson

Heard:

June 15 and 20, September 12, 14 and 15, 2011, in
Halifax, Nova Scotia

**Written Release
of Decision:**

January 18, 2012 (**Verdict - September 15, 2011**)

Counsel:

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

Robertson J.: (Orally)

[1] Mr. Tirrell Shane Carvery is charged with two counts under the *Controlled Drugs and Substances Act*, s. 5(1) and s. 5(2) that on April 7th, 2010, he did traffic in cocaine and on that date had possession of cocaine for the purpose of trafficking as defined by s. 4(3)(a)(ii) of the *Canadian Criminal Code*.

[2] This trial turns very much on the facts of the case that the Court will find having regard to all of the evidence and, in particular, whether Constable Marriott's evidence concerning what he observed of this alleged street level drug transaction constitutes proof beyond a reasonable doubt that the accused, Mr. Carvery, committed these offences with which he has been charged.

[3] This alleged drug transaction took place in the north end of Halifax, in an area well known for street level drug trafficking, where crack cocaine users approach dealers on the public street and arrange to purchase a single stone or rock of crack cocaine in a transaction that takes mere seconds to complete for the consideration of a single \$20 bill.

[4] On April 7th, 2010, Mr. Carvery, the alleged trafficker, and Mr. Burke, the individual who purchased one stone of cocaine, were both arrested within minutes of the alleged events near and at the trafficking location. They were observed by two undercover police constables, Constable Cooke and Constable Marriott, who say they observed the events from an observation post less than 130 feet from the incident and from a position of some elevation. Constable Marriott had the use of expensive binoculars to view the encounter.

[5] In an earlier ruling, I determined that the Crown's motion for observation post privilege was valid (see 2011 NSSC 283). Upon subsequent motion made by defence counsel during the continuation of this trial on September 12, 2011, to waive the privilege, I upheld my earlier decision and denied any waiver finding that the accused was able to make full answer and defence despite not knowing the exact address from which the police officers observed the alleged transaction.

[6] In aid of the motion for waiver, defence counsel had earlier placed in evidence a series of photographs of the neighbourhood and the transaction location that were taken 14 months after the event in June, 2011. These photographs were very helpful to the defence in having an opportunity to challenge the observations

of Constable Cooke and Constable Marriott and were also useful to the Court in understanding the precise locations referenced in evidence.

[7] There are many aspects of this case that are not in issue. They are the identification of the accused, the nature of the substance seized, the matter of jurisdiction and the date of the alleged events. None of these matters are challenged by the defence.

[8] The defence does say, however, that the Court has insufficient evidence of the alleged drug transaction, in that neither police officer could see a stone of crack cocaine pass into the palm of the hand of Mr. Burke, nor did they see an exchange of cash at the time of these events.

[9] Further, defence counsel argues that their challenge to the credibility of Constable Marriott, the Crown's primary witness, should raise a reasonable doubt in my mind that these events did not unfold as he testified.

[10] Constable Cooke testified that he and Constable Marriott were at an observation point for some of the drug activities in the area when at approximately 9:30 p.m. on April 7th, 2010, they watched a white male, later identified as Mr. Burke, roaming in the area, first calling at apartment 20 of 2388 Gottingen Street and then with apparently no answer proceeding down Uniacke Street to a townhouse, civic number 5418, where he was on the doorstep for a minute or so. Constable Cooke testified that his exact observation of the accused at this time was obscured by a "little wall at the entry to these doorways." Both constables testified they observed the white male walk back up Uniacke Street to the corner of Gottingen where he encountered a black male, one of the Carvery twins, in the crosswalk at Uniacke and Gottingen. Constable Cooke testified that there appeared to be a conversation that was not audible. He testified that Mr. Carvery continued to walk northward on Gottingen Street but turned and motioned with his hand into the area of 2388 Gottingen Street.

[11] This is an address that is comprised of two actual buildings, one at the front of the lot and one at the rear of the lot, but both joined by a stairwell system that served entries on the back of the front building and the front of the rear building. This can be clearly seen on the exhibit book of photographs marked P-1, more particularly photographs 7, 8 and 9.

[12] As Mr. Carvery motioned, both gentlemen, he and Mr. Burke, both proceeded by different routes to meet at the northwest rear corner of 2388 Gottingen Street on a little pathway between a fence and the building that Constable Cooke described as dimly lit, although with his naked eye, he could see the gentlemen and also described the presence of a shopping cart and a garbage bin. Constable Cooke testified:

If I were walking with them and they're walking north along the little path, they would have taken a left or gone west, and I would ball park it to be 10-15 feet or whatever in width, and I would suggest in around the halfway point that they were at that time facing each other, at which point I saw Mr. Burke's left hand extended, there was no exchange, no handshake or anything like that. At that point, I had attempted to make a transition from my observation point to make a better observation and while doing so I was unable to capture the event in the next three to four or five seconds...

[13] Constable Cooke testified that he continued to talk back and forth with Constable Marriott who continued to monitor the event.

[14] Constable Marriott's evidence is that from his position he was able to observe the five second encounter between Mr. Carvery and Mr. Burke. He testified:

It was at that time that I observed Mr. Carvery produce from his right side, as I said, unknown if it was from his pants pockets, or jacket pocket, but on his right side a small plastic bag. It appeared to be pink or reddish in colour. He placed it into his left hand. It was at that time that he took something from the bag, and placed it into Mr. Burke's – his hand was already out, left hand out facing – palm up, facing up; placed something in it. The encounter was brief; maybe five to ten seconds.

[15] Constable Marriott then testified:

I didn't recall if any money was handed towards him, or to Mr. Carvery.

[16] Next, Constable Marriott testified:

Mr. Burke proceeded back out to Gottingen Street the same path that he came in through The Cut, and then made his way southbound on Gottingen. Mr. Carvery stayed near the corner, the northwest corner of 2388, in the rear. It was at that

time that I don't know if it was myself or Constable Cooke advised that Mr. Burke was arrestable for possession, and Mr. Carvery was arrestable for trafficking.

[17] And thus the officers notified other units in the area known as the "Quick Response Team" who then effected the arrest of the two gentlemen within a few minutes of the alleged transaction.

[18] The Court heard the evidence of Constable Todd Stephenson who arrested Mr. Burke at the corner of Buddy Daye and Gottingen Streets a short distance from the transaction site and testified that back at the police station he seized one ball of crack cocaine from Mr. Burke's pocket.

[19] The Court also heard the testimony of Constable Justin Sheppard and Constable Gena Hill who described their arrest of Mr. Carvery at the rear of 2388 Gottingen.

[20] Constable Sheppard had arrived first from one direction, the north, and Constables Hill and Carter arrived from the south, establishing that there was no one else at the rear of 2388 Gottingen except for Mr. Carvery. Having searched him and found no drugs on his person, these officers did seize two \$20 bills, one from his right pant's pocket, one from his left breast pocket, a \$5 bill from his jacket pocket, as well as an ID card and a LG cell phone.

[21] Constable Paul Jessen, the dog master, was called to the scene with his dog who found the location in the rock wall where a pink baggy of drugs had been stashed in a rock wall approximately one foot off the ground and five to six feet away from the rear corner of 2388 Gottingen Street.

[22] I note that with respect to the evidence of Constable Peddle, that two samples of the crack cocaine were analyzed in Winnipeg, Manitoba, one the stone seized from Mr. Burke and the second, a stone seized from the pink baggy of 22 stones from the rock wall at 2388 Gottingen Street. The latter being Exhibit #3 in this trial.

[23] The stone in Mr. Burke's possession in the Health Canada Exhibit envelope and report were subsequently destroyed on April 20th, 2011, when charges against Mr. Burke were resolved and a disposition order #H294770 was received by the

police holding the evidence. Remaining as Exhibit #6 in this trial is a copy of the Certificate of Analysis of the Burke stone which tested positive for cocaine.

[24] The stone from which the pink baggy was analyzed and reported to have been cut with benedryl, in contrast with the Burke stone that was not cut.

[25] The Court heard the evidence of Constable David Lane who was qualified as an expert to provide expert evidence with respect to jargon, use, availability, paraphernalia, distribution, packaging, sale, price and value of crack cocaine, as well as methods of avoiding police detection and stashing of drugs.

[26] Constable Lane testified that it was not uncommon for the individual stones from the same source to be analyzed and to be found with different substances used for cutting the crack cocaine. He testified that more than one substance could be used to cut the cocaine and could appear in different samples, or that a sample might not reveal any cut substance within it.

[27] Constable Peddle also testified that in the cooking process of crack cocaine, making it into stones, the cut substance is often boiled off and disappears and will not be found in analysis.

[28] Defence counsel has argued that the Burke stone could have come from another source, not as alleged from Mr. Carvery and could have been purchased earlier in the evening and had been in his possession before he met Mr. Carvery on Gottingen Street. I will address that suggestion in due course.

[29] But let me now address the various challenges the defence has made upon the Crown's case.

[30] While the defence agrees that the amount of cocaine involved, four grams in a baggy of 22 stones, constitutes enough cocaine for possession for the purposes of trafficking, they deny that the coke belonged to Mr. Carvery and say that the Crown cannot demonstrate constructive possession of the baggy in the wall at the rear of 2388 Gottingen Street.

[31] The defence asks the Court, in light of the disadvantage they suffer not knowing the exact location of the observation post, to assess the weight that ought

to be given to Constable Marriott's testimony and his credibility because of three specific areas of evidence that raise a reasonable doubt:

1. Constable Marriott's testimony about what he could observe at 5418 Uniacke Street, as Mr. Burke was allegedly roaming about looking for drugs;
2. His evidence on cross-examination about the lighting in the transaction location; and
3. Discrepancies in his notes and earlier testimony at the preliminary inquiry where he failed to note that the baggy was pink or pinkish in colour.

[32] Respecting Mr. Burke's encounter at 5418 Uniacke Street where Constable Marriott testified, Mr. Burke went to this door and:

Spoke to someone briefly at the door there, and then returned up towards the corner of Gottingen and Uniacke again.

[33] When asked on direct if Mr. Burke had any physical contact with the person at the door, he testified:

It didn't appear to me that there was any.

[34] On cross-examination, Constable Marriott testified that he had an unobstructed view of 5418 Uniacke Street. Defence counsel then proceeded to cross-examine Constable Marriott with reference to photographs 24-28 of P-1 which show the door scapes and the street scapes of 5418 Uniacke Street, with the presence of mature trees.

[35] The defence acknowledges that the photographs shown at P-1 were taken in June, 2011, 14 months after these events, when foliage would obscure that which could have been seen more clearly on April 7th, 2010.

[36] Constable Marriott explained on cross-examination that the presence of the trees in the street did not obscure his vision and that even if Mr. Burke had been standing near one of those trees or in front of it, his profile was much bigger than

the thickness of the trees and that in that sense he has a full view of Mr. Burke on the street outside of 5418.

[37] Defence counsel urges the Court to consider Constable Cooke's testimony in contrast. When asked if he could see the door at 5418 Uniacke Street, he replied no, but earlier in his testimony on cross he is more equivocal about his view of this area.

Q. Okay. Did you observe Mr. Burke speaking to anyone on the patio at that location?

A. At 5418?

Q. At 5418 Uniacke Street.

A. No. There would be a front step but no – it's not a patio. No, I didn't observe it one way or the other.

Q. Okay. Were you able to observe the front of the patio of 5418 Uniacke?

A. Not in its entirety. It was quite dark there.

[38] He then went on to testify that he was "ballparking too"– "I said in and around 5418." He was also at a different location than Constable Marriott, at the observation post for at least some of the time of these events.

[39] The other area of challenge is the issue of lighting at 2388 Gottingen Street and 2406 Gottingen Street, which is called Sunrise Manor, the high-rise building next door to 2388 Gottingen Street which also had some exterior lights affixed to the building. Defence counsel prepared a one-page summary of references to the evidence given by Constable Marriott and Constable Cooke on the issue of lighting.

[40] On direct examination, Constable Marriott said he could see the transaction location and, in particular, referenced lights in the area. He testified there was a light on the rear end of the front building at 2388 Gottingen that would have assisted in the illumination of the transaction and also one half-way up the side of the rear of the building. The light on the rear of the front building can be seen in P-1 photograph 8 and is a two-headed spotlight facing in two directions up and

down the alley way. In photograph 7 of P-1, the west side of the rear building, does not reveal a light 10-12 feet off the ground and one half-way up the west side of the rear wall of this building as Constable Marriott testified, but the photograph was taken when a tree in foliage obscures a full view of this western wall. Constable Marriott testified that such a light at this location helped illuminate the transaction location.

[41] I have reviewed each reference that defence counsel specifically showed me and then re-visited all of the evidence of these officers with respect to the available light at the transaction location.

[42] With the assistance of the photographs he took, defence counsel was able to conduct a very full cross-examination of the issue of lighting, in contrast to the more general comments made in direct examination about the light available to assist in their observation.

[43] The evidence of Constable Cooke does contradict Constable Marriott in that Constable Cooke, in particular, did not believe there was any light from the 2388 buildings in the transaction area that night, but that he could testify that there was ambient illumination because he could clearly describe the accused, his clothing, his path of travel, his ultimate encounter with Mr. Burke at the transaction location and Mr. Burke turning up his palm and the presence of the grocery cart and garbage container.

[44] Constable Marriott was the constant observer with his binoculars who never lost sight of Mr. Carvery and Mr. Burke from the observation post once they proceeded along the path toward the northwest corner of the rear building at 2388 Gottingen.

[45] He testified that the lights on two sides of the Sunrise Manor assisted in illuminating the area, but agreed that the presence of the fence between the two properties meant that the light would not shine directly on the transaction location. He was certain in his testimony that the light shown in photograph 8 at 2388 was lit and helped illuminate the site and also that a light nearest the transaction location, the one unable to be seen in photograph 7, as present, lit and provided illumination.

[46] Although I cannot reconcile this contradiction between the two officers' testimony, I am not of the view that Constable Marriott has lied about what he saw and described that evening. Indeed, as far as Constable Cooke's observations went up to the point of Mr. Burke's palm up, both officers could both see the transaction location and testified so, either by ambient or direct light as is obvious from their testimony.

[47] So in the context of Constable Marriott's evidence as a whole, I do not believe that the rigorous cross-examination on lighting impacted on his credibility and Constable Marriott had the binoculars to assist in his observations.

[48] With respect to the colour of the baggy, not mentioned in his notes or at the preliminary inquiry, I find that otherwise his description of the event as it relates to the baggy is consistent. The colour issue does not, in my view, impact on Constable Marriott's credibility. He describes the baggy with particularity, "not a sandwich bag, but a portion or a corner of another bag."

[49] Constable David Lane's evidence was significant in that he testified as to the nature of low level street trafficking, buyers searching out drugs on the street to meet their immediate needs, the brief and direct contact between the seller and the buyer of crack cocaine stones, the passing communication and the gesture to go to another place to do the deal to avoid police scrutiny and observation in this high drug trafficking area and the frequent disposal of the remaining drugs by stashing so that the dealer will not be caught in possession of the drugs. He also testified to the payment by \$20 bills as the regular price and the habit dealers have of separating the bills on their person, profit versus the funds required for re-up or restocking when the supply of stones are sold and the dealer must then return to his mid level contact to purchase more crack cocaine.

[50] I accept his evidence on these practices and find the encounters between Mr. Burke and Mr. Carvery are consistent with these drug trafficking practices and not consistent with any other possible explanations.

[51] I accept the evidence of Constable Marriott and find that the elements of this offence were a matter of his direct observation as he testified.

[52] I find that the Crown has proved beyond a reasonable doubt that the contact between Mr. Burke, as buyer, and Mr. Carvery, as seller, was a trafficking offence contrary to s. 5(1) of the *Controlled Drugs and Substances Act*.

[53] On the issue of Mr. Carvery's possession pursuant to s. 5(2) as further defined by s. 4(3) of the *Canadian Criminal Code*, Mr. Carvery was not in possession of the drugs when arrested, but moments after being observed taking something out of the pink baggy and handing it to Mr. Burke, who then left the alley, he went around the back of 2388 and his silhouette could be seen by Constable Marriott a few feet behind the building in the area where the drugs were stashed in the wall.

[54] This is not a public hide hole, but one chosen so it could not easily be seen one foot off the ground – pushed into the rock wall – just inside the corner of the building.

[55] I am satisfied beyond a reasonable doubt that Mr. Carvery stashed these drugs in the rock wall after the transaction and did so minutes before his arrest. His possession is constructive, done knowingly by him for his use and benefit so he could return to the stash for his next transaction. I am satisfied that he had control of these drugs and that they were not accessible to any other individual but to him. It was his stash that he placed in the rock wall in the minute following the transaction with Mr. Burke.

[56] Lastly, I should say that I was not troubled by what defence counsel calls the unanswered questions.

[57] I accept that the gesturing to another place for the deal to take place is a common practice to avoid detection.

[58] I accept that not all the street level drug dealers carry weapons, although some do as Constable Lane testified.

[59] I accept that although there was no evidence that Mr. Carvery might have known he was under observation this could be expected in this high drug trafficking area of town and stashing one's supply is a common practice in street level drug trafficking.

[60] I do not view the stash location as being very public, nor do I think it is a likely explanation that Mr. Carvery merely went behind the building to relieve himself, particularly as minutes before his meeting with Mr. Burke, he had just left a residence on Gottingen Street.

[61] I accept Constable Lane and Constable Peddle's evidence respecting the cutting substances in crack cocaine as an explanation for the absence of the agent benedryl in the Burke stone.

[62] I also accept Constable Lane's testimony that in the circumstances of this street level drug arrest, analysis of tin foil or finger print analysis of baggies would not usually be conducted.

[63] Although it is unfortunate that the Burke exhibit of one crack stone was destroyed, I accept that Exhibit #6 is helpful as an analysis report. I note also that the suggestion that Mr. Burke could have made an earlier purchase from someone else, not Mr. Carvery, does not seem very plausible as I am satisfied he initiated communication with Mr. Carvery to purchase drugs and completed the transaction at the rear of 2388 Gottingen Street.

[64] Constable Lane also testified as to the immediacy of the need of the buyer and the usual practice of going directly to a place to smoke crack cocaine undetected from view as soon as the purchase is made.

[65] Mr. Burke's conduct was consistent with that pattern, complete the purchase and make a quick retreat.

[66] And I should say that I have considered the weight of Constable Marriott's evidence in light of the *Hernandez* case. (*R. v. Hernandez*, [2010] B.C.J. No. 2275) In its totality, I find his evidence to be credible.

[67] In the result, I find that the Crown has proved its case. Mr. Carvery is guilty of the offences with which he is charged.