**THE COURT OF APPEAL**

**Birmingham J.**
**Sheehan J.**
**Mahon J.**

**46/14**

**47/14**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**v**

**William Wall and James Cash**

**Appellants**

**Judgment of the Court delivered on the 11th day of May 2015 by**

**Mr. Justice Birmingham**

1. The appellants were convicted on the 7th November, 2013, following a trial in the Circuit Court in Cork on four counts of burglary. It is to be noted that the appellants were acquitted on the same occasion on three further counts of burglary and also acquitted of the offence of possession of implements with the intention that they be used in the course of a burglary contrary to s. 15(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001. Consequent to the convictions, Mr. William Wall was sentenced to seven years imprisonment with two years suspended and Mr. James Cash was sentenced to seven years imprisonment with one suspended. The appellants now appeal against conviction and sentence.

**Background**
2. The background to the trial was that a number of burglaries were found to have occurred in the Cork area on the 1st and 2nd December, 2012. In particular there was a burglary on the 1st December, 2012, at 23 Glendale Drive, Glasheen, Cork, the home of the Gibbons family. The occupants of that house had left their home at around 7.20 pm that evening and had returned at around 9.15 pm to find that their home had been burgled. The householders contacted their son who lived next door and he in turn contacted the gardaí at 9.22 pm, a time that he noted from his telephone. Mr. Gibbons then decided to drive around the housing estate where both he and his parents lived. His attention was drawn to a parked car with "KE" registration plates, which he felt was unusual, so he decided to pull in near that car, which then pulled off and left the Glendale housing estate followed by Mr. Gibbons. His evidence was that, as he and the car he was following left the estate, a garda car was arriving from the opposite direction. The car with the KE plates then sped out onto the road quite quickly and pulled out onto the main road breaking the lights. Mr. Gibbons then followed the car for several miles, keeping the gardaí informed of the route that he was following and of his suspicions in relation to the car. The gardaí then stopped the vehicle that was being followed on the South Link Road. The vehicle that was stopped was being driven by Mr. Thomas Wall, who was a co-accused, while Mr. James Cash was the front seat passenger and Mr. William Wall was a back seat passenger. The vehicle was searched at the side of the road and a Hamilton High School jacket was located in the boot. That jacket was linked to the burglary that had occurred shortly before at 23 Glendale Drive. The occupants of the car were then arrested and brought to Togher garda station. While the appellants and Mr. Thomas Wall were all in custody, a more detailed search of the car was carried out. At this stage jewellery was found concealed in two socks hidden underneath the passenger footwell. In addition a quantity of cash was located hidden in the roof lining of the car. These items were linked to various burglaries. In stopping and searching the KE registered car, the gardaí were purporting to exercise a power pursuant to s. 8 of the Criminal Law Act 1976.

3. A number of grounds of appeal have been advanced in the course of the written submissions, namely:

1. The power relied on by the gardaí to search the car at the side of the road did not exist in law.

2. The learned trial judge erred in not withdrawing the case from the jury.

3. The learned trial judge erred in his charge to the jury.

4. The verdict of the jury is inherently inconsistent.

5. The verdict of the jury is perverse and contrary to the weight of evidence.

Of these, it is grounds one and two that have received most attention at the hearing of this appeal.

4. The arguments advanced in relation to the power of search and detention raise an interesting point of statutory interpretation. In summary, it was the appellant's case at trial, and indeed on the hearing of this appeal, that the power which the gardaí purported to exercise, the power provided for by s. 8 of the Criminal Law Act 1976, was no longer applicable to the offence of burglary. It was argued that the invocation of s. 8 of the Criminal Law Act 1976 was invalid and that being so, the appellants' right to liberty was violated. Then it was said that the roadside search, the roadside detention, the subsequent arrest, the seizure of the car which took place pursuant to s. 9 of the Criminal Law Act 1976 and the thorough search which followed were all inextricably linked and that the evidence sought to be presented was unconstitutionally obtained and ought not to have been admitted in evidence.

5. The starting point for consideration of this argument is s. 8 of the Criminal Law Act 1976. So far as material, it provides:-

> "8(1) This section applies to:
>
> (d) an offence under section 23, 23A or 23B of the Larceny Act, 1916;
>
> (2) Where a member of the Garda Síochána who with reasonable cause suspects that an offence to which this section applies has been, is being or is about to be committed requires a person to stop a vehicle with a view to ascertaining whether –
>
> (a) any person in or accompanying the vehicle has committed, is committing or is about to commit the offence, or
>
> (b) evidence relating to the commission or intended commission of the offence by any person is in or on the vehicle or on any person in or accompanying it,
>
> he may search the vehicle, and if (whether before or after the commencement of the search) he suspects with reasonable cause that any of the facts mentioned in paragraph (a) or (b) above exists, he may search any person in or accompanying the vehicle."

6. The complication arises from the fact that burglary is no longer dealt with under the Larceny Act 1916, rather, the Criminal Justice (Theft and Fraud) Offences Act 2001 now makes provision for the offence of burglary at section 12, which provides as follows:-

> "12(1) A person is guilty of burglary if he or she –
>
> (a) enters any building or part of a building as a trespasser and with intent to commit an arrestable offence, or
>
> (b) having entered any building or part of a building as a trespasser, commits or attempts to commit any such offence therein.
>
> (3) A person guilty of burglary is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or both.

7. Section 3 of the 2001 Act provides as follows:-

> "3(1) Subject to section 65, the Acts specified in Schedule 1 are repealed to the extent specified in the third column of that Schedule.
>
> (2) Any offence at common law of larceny, burglary, robbery, cheating (except in relation to the public revenue), extortion under colour of office and forgery is abolished.
>
> (3) The abolition of a common law offence mentioned in subsection (2) shall not affect proceedings for any such offence committed before its abolition."

The first schedule which lists the Acts repealed includes the Larceny Act 1916 and the extent of the repeal is identified as the repeal of the whole Act.

8. In a situation where the Larceny Act 1916 was repealed and there was no specific amendment to s. 8 of the Criminal Law Act 1976, it is necessary to consider the provisions of s. 65(4) of the Criminal Justice (Theft and Fraud) Offences Act 2001. So far as material it provides:-

> "(4) Except as regards offences committed before the commencement of this Act and except where the context otherwise requires –
>
> (a) references in any enactment passed before this Act to an offence abolished by this Act shall, subject to any express amendment or repeal made by this Act, have effect as references to the corresponding offence under this Act, and
>
> (b) without prejudice to paragraph (a), references, however expressed, in any enactment, whenever passed, to theft or stealing (including references to stolen goods) or related offences, and references to robbery, burglary, aggravated burglary, receiving or handling stolen property, forgery or counterfeiting shall be construed in accordance with the provisions of this Act, and any such enactment shall have effect accordingly, with any necessary modifications.
>
> (5) (a) The repeal by section 3(1) of sections 23 (robbery), 23A (burglary) and 23B (aggravated burglary) of the Larceny Act, 1916, shall not affect the operation of those sections for the purposes of section 2 of, and paragraph 9 of the Schedule to, the Criminal Law (Jurisdiction) Act, 1976, and accordingly that section and that paragraph shall have effect as if section 3 (1) had not been enacted.
>
> (b) References in paragraph (a) to sections 23, 23A and 23B of the Larceny Act, 1916, are to those sections as substituted, or as the case may be inserted, by sections 5 to 7 of the Criminal Law (Jurisdiction) Act, 1976."

9. On behalf of the appellants, it was submitted at trial and is now submitted that s. 65(4)(a) refers to offences "abolished" by the 2001 Act and that this has to be seen as a reference to the provisions of s. 3(2) which abolished a number of common law offences including burglary, contrary to common law. However, it is argued that s. 65(4)(a) does not validate the operation of s. 8 of the Criminal Law Act 1976 so far as it referred to s. 23A of the Larceny Act 1916. It is contended that the subsection in question does not refer to repealed sections or subsections, but to offences that are abolished. Attention is drawn to subsection (5) which deals with the position relating to the Criminal Law (Jurisdiction) Act 1976 and it is said that this subsection would be entirely unnecessary and would serve no useful purpose if the interpretation contended for by the prosecution was to be given. Section 23A of the Larceny Act 1916, which had previously dealt with the offences of burglary having been inserted into the Larceny Act 1916, after s. 23 by virtue of the provisions of s. 6 of the Criminal Law (Jurisdiction) Act 1976.

10. On behalf of the Director of Public Prosecutions, it was submitted that s. 65(4) of the Criminal Justice (Theft and Fraud) Offences Act 2001 meant that an enactment passed prior to 2001 which had applied to the offence of burglary as provided for by the Larceny Act 1916, or thereafter applied to the offence of burglary as provided for by the 2001 Act. It is pointed out that s. 3 of the 2001 Act abolishes the offence of burglary at common law, but also goes on at subs. (3)(i) to repeal a statutory provision which provided for that offence. So, it is said that the effect of the saving provision is to bring within the search and seizure provisions of the 1976 Act the offence of burglary as provided for by the 2001 Act. Attention is drawn to the fact that subs. (4)(b) of s. 65 provides that references **however expressed** and in any enactment to . . . . burglary . . . shall be construed in accordance with the provisions of this Act and any such enactment shall have effect accordingly. [Emphasis added]. It is said that it is clear that s. 8 of the Criminal Law Act 1976 referred to burglary by reference to s. 23A of the Larceny Act 1916.

11. However, the appellants argue that if subs. (4)(b) is read more closely that the words "however expressed" do not in fact have the significance contended for by the respondent. The appellant says that the words "however expressed" are only referable to theft or stealing (including references to stolen goods) or related offences and that the words "however expressed" do not relate to robbery, burglary, aggravated burglary, receiving or handling stolen property, forgery or counterfeiting.

12. It is the Court's view that the interpretation contended for by the appellant is a highly artificial one. The objective of statutory interpretation is to ascertain and identify the intention of the Oireachtas and to give effect to it. It is impossible to believe that the Oireachtas sought to remove the power to stop and search a vehicle in cases of the offences of robbery, burglary and aggravated burglary.

13. There is a further argument advanced on a "belt and braces" basis by the respondent. It is clear that, even if there was any doubt about the statutory power to stop and search the vehicle and then seize it pursuant to s. 9, the gardaí had both a duty and a common law power to seize and retain "any evidence which may affect the guilt or innocence of an accused person", referring in that regard to the case of *Ludlow v. DPP* [2009] 1 I.R. 640, where the judgment of Pallas CB in *Dillon v. O'Brien* 9 (1887) 20 LRI was quoted. In response, the appellants say that at trial, counsel sought to uphold the actions of the gardaí by reference to s. 8 of the Criminal Law Act 1976 and it was this argument which found favour with the trial judge in what was described as a "pithy" judgment. It is said that not having advanced this argument at trial, that the DPP is now "Croninised," which is a reference to the decision in *People (DPP) v. Cronin* [2003] 3 I.R. 377. It must be said immediately that the factual situation could scarcely be more different. In Cronin, the applicant was convicted of murder following a shooting incident in a nightclub. At trial, the applicant gave evidence that he had nothing whatsoever to do with the shooting and did not have a gun on the night of the incident. However, at the appeal stage, the applicant sought to argue that the judge had erred in failing to charge the jury in relation to the defence of accidental or mistaken discharge of the firearm.

14. However, in the present case, the question of the entitlement of the gardaí to stop, search and seize was always to the forefront. It would be a very radical extension of the Cronin jurisprudence to suggest that either party to a criminal trial is to be confined to the specific arguments advanced in support of a position. It is the nature of a criminal trial that legal issues may sometimes emerge which were unexpected by one or other, or perhaps both parties. In those circumstances, it is understandable that arguments will be refined and indeed expanded upon at the appeal stage. Accordingly, the Director is not prevented from seeking to rely on the common law powers and duties of the gardaí on the evening in question. However, in a situation where the actions of the gardaí were validated by s. 8 of the Criminal Law Act 1976, she does not need to do so.

15. Accordingly, the ground of appeal which relates to the claim that the powers sought to be exercised by the gardaí did not exist fails.

16. There is a further point. The gardaí believed that they were acting in accordance with statutory powers that had been available to them for some 40 years. In those circumstances the judgment of the Supreme Court of the 15th April, 2015 in *D.P.P. v. J.C.* [2015] IESC 31 might have relevance. However, in a situation where that issue has not been the subject of argument and where it is unnecessary to do so, this Court will say no more on that topic at this stage.

Decision not to grant a direction

17. The argument made is that while this was a case where there had to be suspicion, indeed grave suspicion, that there was just insufficient evidence at the close of the prosecution case to allow the matter be considered by a jury. The appellants summarised the state of the evidence at the close of the prosecution case as follows:-

(a) The appellants were both passengers in a car in which property taken in the course of burglaries was found.

(b) The appellants were stopped in this car around 9.30 pm on the 1st December, 2012.

(c) The gardaí had been alerted that a burglary had occurred around 9.15 pm/9.22 pm.

(d) The appellants gave their correct name and addresses at the side of the road and cooperated when there was a purported invocation of a statutory power.

(e) A jacket bearing the logo Hamilton High School was found in the boot of the car in which the appellants were travelling.

(f) Apart from the Hamilton High School jacket, nothing else linked to the burglary was located in the car at the side of the road.

(g) The appellants were arrested and detained and that nothing of probative value emerged from their detention.

(h) Jewellery and cash were found following a more detailed search of the car at Togher garda station.

(i) There was no forensic evidence to connect the appellants with the burglary or with any of the jewellery or cash located in the car.

(j) There was only one pair of gloves in the car.

The point was also made that insofar as the car was driven in an erratic manner, and there might appear to have been an attempt to escape, that provided evidence against only the car driver Mr. Thomas Wall and not against the appellants who were passengers.

18. In support of their contention that there was no case to answer, the appellants refer to cases such as *People (Attorney General) v. Nugent and Byrne* [1964] 98 ILTR 139. That was a case where a sum of money stolen during a larceny which had occurred on either a Saturday or Sunday was found on the following Monday evening in a car which belonged to Nugent. The stolen money was in a canvas bag which was behind the driver's seat. Both men were acquitted of larceny, but convicted of receiving. The Court of Appeal was of the view that there was in fact no evidence that Byrne was ever in possession of the money found in the car. There was no evidence that he was, or should have been aware that it was in the car and no evidence of any facts or circumstances from which such knowledge could be inferred. There was no evidence to suggest that he exercised any control over the car or its contents. However, the Court of Appeal took the view that the position in Nugent's case was different in that the car was his. The appellants say that their position is analogous to that of Mr. Byrne. Reference is also made to the Northern Ireland case of *R. v Whelan* C.C.A. [1972] N.I. 153. In that a case a gun was found concealed under loose clothing on the top of a wardrobe in a bedroom shared by three brothers. At trial all three were convicted. However, that conviction was overturned by the Court of Criminal Appeal. The Court was of the view that there was a very strong case that at least one of the men was in possession of the gun but that it could not be said that all three were. It might be that all three were, but it might also be that only one was or that two were. The Court of Appeal was of the view that in those circumstances, a direction ought to have been granted.

19. The trial judge dealt with the application for a direction as follows:-

> "It appears to me that the submissions made, although they are made in learned form and with enthusiasm, they, in my view, completely and totally ignore the evidence. For example, the initial evidence of Gerald Gibbons is very specific and determinative on many points. He was brought to his father's house, saw the burglary and was of the opinion that the burglars were in the general area. He left, searched, parked behind the car and that car then took off and after a short distance involved itself in extraordinary driving. He never lost sight of it. And that car and its occupants when stopped and challenged a short time later, low and behold, the items from various houses were found in it, not in one location, but secreted in areas around the car in which various people were sitting. It is open to the jury, in my opinion, given the names, addresses and presence of these people in the car, given the manner in which the car drove, given the times involved, given the manner in which the discovery was made, it is open to them, on the evidence if they are properly charged, that they could find the accused, and all of them guilty. They might and they will be told that they must be sure that they all took part and that they were not merely present. It would be very clearly explained to the jury that presence in the car or at the location is by no means enough. . . . So I think there is ample evidence on all charges to allow case to proceed to the jury. Now can we get on?"

20. The trial judge characterised the application for a direction as one that ignored the evidence. Whatever about the reference to ignoring the evidence, the Court is of the view that the trial judge was correct in emphasising the need to engage with the evidence. In cases where possession is in issue, there is no general position that presence in a car or indeed in a bedroom is or is not sufficient. Everything turns on context. In this case the context includes the fact that the vehicle in which all three men, including the two applicants, were spotted was parked very close to a premises where a burglary had occurred a very short time before, the fact that the vehicle was driven albeit by Mr. Thomas Wall from where it had first been observed in the manner described and the fact that a jacket linked to the burglary which had so recently occurred was seen in the vehicle when it was stopped. In the view of this Court there was material to be considered by a jury which could lead a jury to conclude that the three young men in the car, so far from their own homes, were acting in pursuit of a common design and that the common design extended to participation, in one way or another in the burglary.

21. Accordingly, the ground of appeal relating to the failure to grant a direction fails.

**The balance of the grounds of appeal**

22. The balance of the grounds is capable of being dealt with quite briefly. Additional grounds relate to criticisms of the judge's charge, inconsistent verdicts, a failure to direct separate trials and the contention that the verdict was perverse and against the weight of the evidence. In the view of the Court there is no substance to any of these grounds. The trial judge's charge read as a whole, was fair and balanced and sought to direct that jury's attention to the key issues in the case and gave appropriate legal directions.

23. The point about inconsistent verdicts is really a point relating to the fact that the jury returned verdicts of not guilty on those counts which related to the possessions of implements with the intention that they be used in a burglary. In the Court's view there was no fundamental inconsistency such as to bring into question the safeness of verdicts on those counts which resulted in a conviction. There are any number of reasons why a jury might have felt it appropriate to differentiate between the possession of implements counts and the burglary counts. It may be, for example, that the jury were not satisfied that all of the items that were in the boot of the car were intended for use or were actually used. Again, it may be that the jury were of the view that, whether or not the items had been used prior to the car being stopped, there was no intention to make further use of them, once the vehicle left the Glendale housing estate.

24. So far as the issue of separate trials is concerned, the Court is of the view that there is no substance in this criticism. The case for the prosecution was always that this was a joint enterprise. On the issue of separate trials, the fact that there was additional evidence available to the prosecution against Mr. Thomas Wall could not possibly provide a basis for directing separate trials. Finally, in relation to the suggestion that the verdict was perverse and against the weight of the evidence, this Court has concluded that the judge was right to leave the matter to the jury. In a situation where there was evidence to be considered and where, as this Court has held, the jury were properly charged, there is no basis whatsoever for interfering with the verdict of the jury.

25. In the circumstances the Court rejects all the grounds that have been advanced and, accordingly, will dismiss the appeal.