SUPREME COURT OF QUEENSLAND

CITATION:	*R v Aston-Brien* [2004] QCA 23
PARTIES:	**R** **v** **ASTON-BRIEN, Stephen John** (applicant/appellant)
FILE NO/S:	CA No 307 of 2003 DC No 2078 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	11 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2004
JUDGES:	de Jersey CJ, Davies JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Quash the conviction for attempted entry with intent and set aside the penalty of two years imprisonment imposed on that count. Otherwise, dismiss the appeal against conviction and refuse the application for leave to appeal against sentence**
CATCHWORDS:	PARTICULAR OFFENCES – PROPERTY OFFENCES – RECEIVEING AND POSSESSION OF PROPERTY STOLEN OR REASONABLY SUSPECTED OF BEING STOLEN OR UNLAWFULLY OBTAINED – RECEIVING – RECEIPT – whether conviction should be overturned on the ground the charge was incorrect – whether the Crown established an attempted entry JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OTHER CONVICTIONS OF OFFENDER – where the appellant had substantial prior criminal history - whether the sentences imposed were manifestly excessive
COUNSEL:	The appellant appeared on his own behalf P Rutledge for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: The appellant was convicted on charges of receiving and attempted entry with intent. He was acquitted on other counts of offences alleged to have been committed on the same date - burglary, breaking and entering and stealing and unlawful use of a motor vehicle.

He appeals against his convictions on the ground they are unsafe and unsatisfactory and contrary to law. The particulars of that ground which he has provided were limited and I will come to those shortly. The case against him was as follows. A breaking and entering was committed in relation to a house and adjoining garage at Tennyson in the night time on the 5th of May 2002. Property was stolen and a Range Rover was driven away.

Among the stolen property were sets of keys, including keys to cars in the garage and remote control devices in relation to the garage doors. The Range Rover was later found unoccupied with its engine running at Fortitude Valley in a street near to where the appellant was then living.

Then the following morning, police on patrol in the Tennyson area, located the appellant in a car with two other men at about 1.30 a.m. parked in King Arthur Terrace about 360 metres

away from the house which had been broken into. The keys and remote control units were found concealed near the appellant in the back seat area of the vehicle.

The Prosecution case was that the three men had returned after the first offence in order to steal the remaining two cars, which were valuable, being a Jaguar and a Jeep Cherokee. The Crown position was that they were interrupted by the police upon their being located at that position in King Arthur Terrace.

The particulars of the challenge to the convictions given by the appellant were confined to the count of receiving and the circumstance that the count referred not only to the keys and remote control units, but as well to a number of photographs. The appellant, who appeared for himself, urged that the conviction should be overturned on the ground the charge was incorrect.

Although the indictment which appears in the record book at page 1B was apparently not formally amended in the sense that the words, "A number of photographs" were actually deleted from count 4 on the indictment, the Crown Prosecutor at the beginning of the trial, before his opening address to the jury, sought leave to amend count 4 to delete reference to the photographs. There was no objection to the amendment which was allowed. Defence counsel did not require that the appellant be re-arraigned on the amended indictment.

The Crown Prosecutor had prepared, for the jury's assistance, copies of the counts in that amended form and they were provided to the jury.

It must accordingly be taken that the jury in returning its verdict of guilty in relation to count 4 was proceeding upon the count in its amended form and contrary to the apprehension expressed here this morning by the appellant, would not have been influenced by the original inclusion of the reference to the photographs.

That ground of challenge to the conviction is accordingly unsustainable. As to the conviction for attempted entry with intent, there is no doubt there was an adequate case before the jury that the appellant had the requisite intent. The issue ventilated here this morning has been whether the Crown established an attempted entry. The Crown evidence stopped short at the locating of the appellant in the street of the house which had been broken into, approximately 360 metres away, and in possession of the keys.

By force of section 4 of the Criminal Code, for an attempt to occur, the person intending to commit the offence must have begun to put his or her intention into execution by means adapted to its fulfilment and to have manifested that intention by some overt act. In my view the Crown evidence being limited in that way, the Crown did not establish that the appellant had begun to put his intention into execution by means adapted to its fulfilment.

In short, proceeding to King Arthur Terrace to that point, albeit with the intent to commit the offence, did not amount to an attempted entry of the premises. Accordingly, in my view, the appeal against conviction should be allowed to the extent of quashing the conviction in respect of the count of attempted entry with intent.

There is a separate application for leave to appeal against sentence on the ground that the sentences imposed, in each case imprisonment for two years - the terms to be served concurrently, were manifestly excessive. Plainly the sentence of two years imposed in respect of the count of attempted entry with intent must be set aside. The issue then arises whether, in these circumstances and having regard to the matter generally, the sentence of two years imprisonment imposed in respect of the receiving can stand.

At the time of committing the offence of receiving, the appellant was 46 years of age. He suffered from an extensive amphetamine addiction. He had a substantial and relevant prior criminal history, including convictions for drug offending, indecent dealing, unlawful use and stealing. He was first convicted in June 1994, first imprisoned in 1998 and later imprisoned in July 2001 to serve a term of 18 months for unlawful use of a motor vehicle. He committed the instant offences on 5 May 2002.

Having regard to the nature of the offending involved in the receiving and the appellant's past criminal history, it could not - in my view - be said that the two year term of

imprisonment imposed in respect of the receiving, was manifestly excessive. I would accordingly refuse the application for leave to appeal against sentence in respect of the offence of receiving.

MACKENZIE J: I agree.

DAVIES JA: I agree.

THE CHIEF JUSTICE: The orders are as I have indicated.