SUPREME COURT OF QUEENSLAND

CITATION:	*R v Palmer & Hite* [2002] QCA 346
PARTIES:	**R** **v** **PALMER, Stuart William** **HITE, Leonard John** (appellants/applicants)
FILE NO/S:	CA No 21 of 2002 CA No 122 of 2002 CA No 26 of 2002 CA No 115 of 2002 SC No 572 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	28 June 2002
JUDGES:	Davies, Williams and Jerrard JJA. Joint reasons for judgment by Davies and Williams JJA; separate reasons of Jerrard JA dissenting in part.
ORDERS:	**1. CA No. 21 of 2002: Dismiss appeal against convictions.** **2. CA No. 122 of 2002: Refuse leave to appeal against sentence.** **3. CA No. 26 of 2002: Allow appeal, quash conviction for accessory after the fact to attempted murder and enter verdict of acquittal.** **4. CA No. 115 of 2002: Refuse leave to appeal against sentence for dangerous driving.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – JUDGE'S SUMMING UP – CONSIDERATION OF SUMMING UP AS A WHOLE – where appellant Palmer complains of misdirection by learned trial judge with respect to onus of proof – where learned trial judge repeatedly directed the jury correctly as to onus of proof – where directions need to be considered in context of

surrounding directions – whether directions mislead the jury as to burden or onus of proof

CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – BURGLARY AND LIKE OFFENCES – ENTERING AS TRESPASSER OR WITH INTENT AND BEING OR BEING FOUND WITH INTENT – where uncontradicted evidence that the appellant Palmer was found in a motor vehicle belonging to another – where appellant took fuses from the vehicle – where owner of motor vehicle gave no relevant permission – whether verdict unsafe and unsatisfactory

CRIMINAL LAW – PARTICULAR OFFENCES – DRUG OFFENCES – POSSESSION – OTHER MATTERS – where police found amphetamine on the appellant Palmer's person – where appellant complained that the drug was planted by police – whether it was open to the jury to accept the police evidence that they found the appellant in possession of the amphetamine – whether verdict unsafe and unsatisfactory

CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – ATTEMPT – PARTICULAR OFFENCES – OTHER CASES – ATTEMPTED MURDER – whether jury could be satisfied beyond reasonable doubt that appellant Palmer had intention to kill as distinct from an intention to injure or scare off – where no evidence existed to suggest the appellant had any intention other than to kill – whether verdict unsafe and unsatisfactory

CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – ATTEMPT – PARTICULAR OFFENCES – OTHER CASES – ATTEMPTED MURDER – where trial judge did not consider the firing of only one shot and the absence of any serious injury to the victim as mitigating factors when sentencing the applicant Palmer – where applicant armed himself whilst engaged in drug related activities – whether sentence manifestly excessive

CRIMINAL LAW – PARTICULAR OFFENCES – DRIVING OFFENCES – DANGEROUS DRIVING – GENERALLY – where appellant Hite exceeded speed limit on suburban and major roads – where appellant showed determination not to stop in response to police instructions – whether jury was entitled to consider the appellant's driving as operating a vehicle at a speed and in a manner that was dangerous to the public – whether verdict unsafe and unsatisfactory

CRIMINAL LAW – PARTICULAR OFFENCES – DRIVING OFFENCES – DANGEROUS DRIVING – GENERALLY – where applicant Hite defied clear indications to stop his vehicle – where sentence imposed so as to deter applicant and others from operating a motor

vehicle dangerously when attempting to escape from possible lawful detention – whether sentence manifestly excessive

CRIMINAL LAW – GENERAL MATTERS – ANCILLARY LIABILITY – ACCESSORY AFTER THE FACT – where no evidence as to whether appellant Hite knew that his passenger, appellant Palmer, was armed with a gun – where appellant continued to drive vehicle after a shot was fired by his passenger – whether this driving was merely a continuation of the attempt to avoid apprehension due to the presence of drugs in the vehicle – whether verdict unsafe and unsatisfactory

Criminal Code (Qld), s 1, s 668F(2)
Drugs Misuse Act 1986 (Qld)

M v R (1994) 181 CLR 487, considered
Murray v R (2002) 189 ALR 40, distinguished
R v Cutter (1997) 94 A Crim R 152, considered
R v Knight (1992) 63 A Crim R 166, distinguished
R v Mulholland [2001] QCA 480; CA No 122 of 2001, 5 November 2001, considered

COUNSEL: DJ Murray for the appellant/applicant, Palmer
KM McGinness for the appellant/applicant, Hite
BG Campbell for the respondent

SOLICITORS: Forest Lake Lawyers for the appellant/applicant, Palmer
Legal Aid Queensland for the appellant/applicant, Hite
Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES AND WILLIAMS JJA:** We have had the advantage of reading the reasons for judgment prepared by Jerrard JA, and will not repeat unnecessarily facts which are detailed therein.

[2] We do not wish to add to the reasons of Jerrard JA in concluding that the learned trial judge did not err in his directions to the jury dealing with the onus of proof. Further, we do not wish to add to those reasons for concluding that Palmer's convictions for possessing amphetamines and entering Lowe's motor vehicle were not unsafe and unsatisfactory. There was ample evidence upon which the jury could have acted to record convictions for each of those offences.

[3] However, in our view the jury verdict that Palmer was guilty of attempting unlawfully to kill Elaine Frances McMillan or another was not unsafe and unsatisfactory.

[4] In paragraphs [71] to [76] Jerrard JA has set out conclusions and inferences the jury were entitled to reach and draw from the evidence. A reasonable jury could have been satisfied beyond reasonable doubt of each of the matters referred to in those

paragraphs. We would add to those matters the following additional factors which, in our view, support the jury's verdict of guilty of attempted murder. The appellant Palmer at no stage prior to the trial suggested to investigating police officers that the shot in question had been fired by the witness Adam Palmer. The evidence of the appellant Palmer was not that he discharged the firearm but with an intent other than an intent to kill one of the police officers, but rather that the shot was fired by another person, namely the witness Adam Palmer. The evidence of appellant Palmer was contradicted by much of the prosecution evidence and it is not surprising that it was rejected by the jury. Significantly there was no evidence from the appellant Palmer that he was responsible for the discharge of the firearm but that he had at the time an intention other than an intention to kill one of the police officers.

[5] Palmer's appeal against the conviction for attempted murder is essentially based on the proposition that the jury could not be satisfied beyond reasonable doubt that he had an intention to kill as distinct from an intention to injure or scare off the police officers. In that regard reliance was placed upon the decision of the High Court in *R v Knight* (1992) 175 CLR 495. The majority in that case concluded that it was not possible to exclude, as not being reasonably open on the evidence, the hypothesis or inference that the appellant fired the shot in question without an intent to kill; the hypothesis which in the view of the majority was open was that the shot was fired recklessly without the intent to kill. However, the facts in *Knight* were significantly different to the relevant facts here. Knight gave an extensive record of interview to investigating police detailing his version of relevant events, and he also gave evidence at the trial. As was recorded by Mason CJ, Dawson and Toohey JJ at 498:

> "Both in his record of interview and at the trial the appellant stated that he did not know that Battaglia had been shot. He denied that he intended to kill or shoot Battaglia or, indeed, anyone."

[6] As is made clear by a reading of the judgments the defence, supported by evidence Knight gave at the trial, was that the discharge of the rifle was accidental. In those circumstances it was not simply a matter of the jury drawing an inference as to the relevant intent; before the jury could draw the inference beyond reasonable doubt that the accused had an intent to kill they had to reject an alternative hypothesis reasonably open and supported by evidence before them.

[7] In the present case there is no evidence suggesting a particular intention other than an intention to kill at the time the gun was fired. Once the jury completely rejected Palmer's evidence that he was in a drug-induced sleep at all material times and had nothing to do with the shooting, there was no evidence which had to be overcome before the conclusion could be reached beyond reasonable doubt that he fired the shot with an intent to kill.

[8] There was overwhelming evidence supporting the conclusion that it was the appellant Palmer who fired the shot. His fingerprints on the motor vehicle, the circumstances in which the gun was subsequently located, and the finding of a bullet on his person were, even without the additional evidence, sufficient to make the conclusion that he fired the shot inevitable.

[9] The fact that Palmer waited until he had the opportunity of firing substantially side on toward the police vehicle could well have been regarded by the jury as indicative of the fact that he intended to kill. It is significant, or at least may have been so regarded by the jury, that no shot was fired whilst the police car was travelling behind the car in which Palmer was a passenger. Palmer lent out of the window whilst his vehicle was making a sharp turn to the left taking it into a slip lane. On seeing the gun Byles immediately swung the police car to the right. The vehicles were about 25 metres apart and Palmer could fire almost side on to the police car. He had a clear view of the passenger Constable McMillan. The bullet struck about 30 cm behind the rear pillar and just below window level. The bullet must have passed very close but to the left of Constable McMillan's body. From that the jury was entitled to infer that if the police vehicle had not been turning away as the shot was fired she would have been struck in the upper body. In the absence of any other evidence as to intention, a reasonable juror would ordinarily draw the inference that the discharge of a gun aimed at a person some 20 to 25 metres away carried with it an intent to kill.

[10] Given all the circumstances and matters referred to by Jerrard JA and herein the jury were entitled to conclude that Palmer aimed at Constable McMillan and intended to kill her. In the circumstances we are not persuaded that the verdict of guilty of attempted murder was unsafe and unsatisfactory.

[11] Palmer also seeks leave to appeal against the sentence of seventeen years imprisonment imposed on him with respect to the attempted murder.

[12] In the course of his sentencing remarks the learned trial judge said:

> "I do not think that the fact that you fired only one shot and that you did not cause any serious injury are of any great moment in determining whether some leniency is deserved."

[13] That passage is attacked by the appellant as constituting an error which resulted in the sentence being manifestly excessive.

[14] There is no substance in the contention that it was a mitigating factor that only one shot was fired. The police vehicle swerved away as the shot was fired and in consequence contact was lost with the vehicle being driven by Hite. There was simply no opportunity for a second shot to be fired. As already noted, Palmer waited until he had the opportunity of firing substantially broadside at the police vehicle before firing the first shot.

[15] Palmer has an extensive criminal history. Of particular significance are the following:

(i) 18 November 1994 – assault occasioning bodily harm;
(ii) 3 July 1995 – assault occasioning bodily harm in company;
(iii) 3 July 1995 – assault;
(iv) 13 September 2001 – assault.

In addition he has numerous offences for dishonesty and for drug-related matters. Whilst he is a relatively young man, he was aged 24 at the time of the offences, he

has spent a significant period in jail since about 1998. He had been released from jail only shortly before the commission of these offences.

[16] The offence was particularly serious. The appellant had obviously armed himself whilst engaged in drug-related activities. There was obviously a degree of pre-meditation involved. Undoubtedly he intended to use the gun if necessary to protect himself whilst engaged in those drug-related activities.

[17] Attempting to kill a police officer in order to avoid arrest is an extremely serious offence and should be punished accordingly. It was fortuitous that neither police officer was physically injured but it is the intent to murder which is the gravamen of the offence.

[18] In the circumstances no basis has been established for interfering with the sentence imposed, and the application for leave to appeal against sentence should be refused.

[19] We turn now to the appeals by Hite.

[20] For the reasons given by Jerrard JA there is no substance in the appeal against the conviction for dangerous driving. Nor is there any basis for appealing against the sentence imposed for that offence.

[21] It is submitted on behalf of Hite that the conviction of being an accessory after the fact to attempted murder is unsafe and unsatisfactory. Principally it was submitted that there was no evidence on which the jury could be satisfied beyond reasonable doubt that Hite knew that Palmer had attempted to kill one of the police officers and thereafter assisted him in evading capture. The evidence relied on by the prosecution is the driving of the motor vehicle after the shot was fired.

[22] When initially apprehended Hite gave a highly improbablE version of events to the apprehending police officers. He said that he had been abducted at gunpoint by "an Abo bloke". There was no attempt at the trial to advance that version of events. Other than that Hite made no statement to police officers and did not give evidence at trial.

[23] It is clear that after the shot was fired the vehicle was driven for only a comparatively short distance before it was abandoned. The evidence would suggest it was abandoned a kilometre or two from the point where the shot was fired. The driving constituting the offence of dangerous driving had occurred prior to the shot being fired. There is no doubt that on the occasion in question Hite was driving the vehicle in a manner endeavouring to avoid police apprehension. There was no significant difference between his conduct before the shooting and after.

[24] There is no evidence, one way or the other, as to whether Hite was aware that Palmer was armed with a gun. The conclusion was reasonably open on the evidence that Hite drove the vehicle dangerously in an endeavour to avoid apprehension by

police knowing that there were dangerous drugs in the vehicle. The inference was also reasonably open that he did not know Palmer was armed, and was only aware that a shot had been fired by Palmer during the chase. Driving the car in the dangerous manner involved would have required a deal of concentration on the part of Hite and the reality is that a person in his position, in the absence of some specific evidence to the contrary, would not know whether Palmer aimed the gun before discharging it or not. The driving after the shot was equally consistent with a continuation of the attempt to avoid apprehension because of the presence of drugs in the vehicle. There is nothing in the evidence which specifically supports the conclusion that Hite did something after the shot was fired which was referable only to his assisting Palmer to escape knowing that Palmer had intended to kill one of the police officers.

[25] In the circumstances the conviction for being an accessory after the fact to attempted murder should be set aside.

[26] The orders of the Court should be:
Palmer:

CA No 21 of 2002
Dismiss appeal against convictions

CA No 122 of 2002
Refuse leave to appeal against sentence

Hite:

CA No 26 of 2002
Allow appeal, quash conviction for accessory after the fact to attempted murder and enter verdict of acquittal.

CA No 115 of 2002
Refuse leave to appeal against sentence for dangerous driving.

[27] **JERRARD JA:** On 4 June 2000 police officers Mathew James Byles and Elaine Frances McMillan became involved in the pursuit of a Toyota motor vehicle driven by the appellant Hite. That pursuit was terminated when the person then occupying the front passenger seat of the Toyota fired a shot from a revolver, hitting the rear door of the police car. On 19 December 2001 the appellant Hite was convicted of the offence of having dangerously operated the Toyota vehicle during that pursuit, and the appellant Palmer was convicted of the attempted murder of one of those two police officers. That conviction was based upon his having fired that shot. He was also convicted that day of having unlawfully possessed the dangerous drug Methylamphetamine on 4 June 2000, and of having entered the premises of a Graham Keith Lowe that same day with the intention of committing an indictable offence therein. The appellant Hite was convicted of being an accessory after the fact of the attempted murder committed by the appellant Palmer.

[28] On 8 April 2002 the appellant Palmer was sentenced to 17 years imprisonment for the offence of attempted murder, four years imprisonment for the offence of unlawfully possessing amphetamines, and six months imprisonment for the offence of entering premises, those sentences to be concurrent. The appellant Hite was sentenced to 18 months imprisonment for the offence of being an accessory after the fact to attempted murder, and to six months imprisonments for the offence of dangerous operation of a motor vehicle.

[29] Palmer has appealed against his convictions for attempted murder, possession of amphetamines, and entering premises. He has applied for leave to appeal against the sentence of 17 years imprisonment for attempted murder. Mr Hite has appealed against both his convictions, and applied for leave to appeal against both the sentences imposed upon him. Mr Palmer's grounds of appeal against all three convictions are expressed to be that each is unsafe and unsatisfactory, and in addition he complains of what is asserted to be misdirection by the learned trial judge to the jury as to the standard of proof. Mr Hite's appeals against both convictions are also expressed to be that the convictions are unsafe and unsatisfactory.

The Issues

[30] The particular issues raised in Mr Palmer's appeal include:

- The argument that the jury was presented with insufficient reliable evidence for them to be satisfied that the appellant Palmer was the person who fired the shot;

- The argument that the jury acting reasonably could not have rejected as a rational inference the possibility that if Mr Palmer fired the shot, he did so without an intent to kill either police officer.[1]

- The argument that there was insufficient reliable evidence to establish that Mr Palmer did possess the amphetamines allegedly found on his person.

[31] The particular issues raised in the appeals by Mr Hite include:

- The argument that the unchallenged evidence of his driving on 4 June 2000 did not describe driving which the jury could have been satisfied beyond reasonable doubt was dangerous in the circumstances;

- The argument that, assuming Mr Palmer had fired a shot from the revolver with an intent to kill one or other police officer, there was insufficient evidence from which the jury could have concluded that Hite knew either before or after the shot was fired that Palmer had had that intention;

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1 See *R v Knight* (1992) 63 A Crim R 166 at 172 and *R v Cutter* (1997) 94 A Crim R 152.

- The argument that when Hite continued to drive the car containing Palmer after the shot was fired, he did so not to enable Palmer to escape punishment, but rather to preserve himself from apprehension by police.

[32] There is a considerable body of both direct and circumstantial evidence relevant to those issues. It was never in dispute that Mr Hite was the driver of the white Toyota, and he made a formal admission to that effect at the commencement of the trial. It became clear as the issues emerged during the trial that Mr Palmer conceded that he was a passenger in that vehicle at the relevant time, but he asserted a third person, a hitchhiker Mr Hite had picked up, had fired the shot. Mr Palmer himself gave evidence to that general effect, and called evidence from a third person who claimed responsibility for firing the shot. The case made for Mr Palmer included the assertion that the allegation he possessed amphetamines on 4 June 2000 was supported only by false evidence given by police officers. Mr Hite neither gave nor called evidence.

The Facts Established in Evidence

[33] Police Constable Byles was driving the police car with Police Constable McMillan in the front passenger seat, when at about 10.25a.m. on 4 June 2000 their attention was drawn to the white Toyota vehicle Mr Hite was driving. The police were curious at the apparent unwillingness of the Toyota driver to bring his vehicle up next to the police car, at a time when the police car was stopped at traffic lights and waiting to proceed northbound along Beaudesert Road in the south of Brisbane area. The white Toyota was then signalling an intention to turn right at those same traffic lights and could have, but did not, come to stop next to the police vehicle. Instead, it stopped about a car length back. Constable Byles could see in his outside rear vision mirror that there were two males in the front seat of the Toyota, and that the passenger had long hair which Byles described as brown. He was wearing no shirt, and Byles observed what he described as a tattoo on the passenger's left upper arm, which Byles described as a "Celtic band". That was further described by Byles as a "flowery patterned sort of tattoo", probably about an inch wide.

[34] When the lights facing Byles turned green (and when the right turning lane remained red) Byles drove forward, then did a U turn, and returned to the intersection so that he was now facing the white Toyota. He then drove the police car left onto the road into which the Toyota would make a right hand turn, travelling slowly along the shoulder of that road and waiting for the Toyota. Eventually it turned to the right and passed his vehicle. He pulled in behind it, and activated the rotating red and blue lights on the roof of the marked police car, intending thereby to indicate to the driver of the Toyota to pull over.

[35] On their evidence, the police officers intended at that stage to conduct a check of the licence of the vehicle's driver. Their suspicions that an occupant or occupants of that vehicle were anxious to avoid any variety of police scrutiny appeared confirmed when the Toyota did not pull over to the kerb and stop as desired, but instead, (and after the police siren had also been activated) made a sharp right hand turn from Riawena Street, along which both cars were then travelling, and into

Orange Grove Road. That sharp right hand turn was not made from the marked right turning lane but from the lane adjacent to it.

[36] The police car followed the Toyota, which made a sharp left hand turn into Middle street, travelling down it at speeds reaching about 80km per hour. Middle Street is an ordinary suburban street with a maximum speed limit of 60km per hour. Another sharp left turn was made into Troughton Road, another into Kessels Road, then back into Orange Grove Road, and again into Riawena Road. The police car had the revolving lights, its headlights, and its siren on throughout that period.

[37] As the vehicles travelled back down along Riawena Road towards its intersection with Beaudesert Road, Constable McMillian was about 25 to 35 metres behind the Toyota, and could observe what he thought was the male passenger in the front seat reaching around in the area between the bucket seats of the Toyota, and into the back of the Toyota vehicle. At that stage the vehicles were travelling at about 100km per hour, (the speed limit was either 60 or 70 kph) and both slowed down at the intersection with Beaudesert Road. The Toyota made a right hand turn through a red light into that road (having almost come to a complete stop before doing so), and the chase proceeded northbound towards the city. Byles could see the person in the front passenger seat putting on a jacket, which to Byles appeared to be red and blue; and he told McMillan to broadcast a description of the car and occupants over the police radio. The police had already recorded the registration number of the vehicle, which police records showed to be in Hite's possession. As Police Constable McMillan was engaged in recording the description to be broadcast, the Toyota made a sharp left turn into Muriel Avenue when Byles was about 25 metres behind it, and he started to follow it in that left hand turn.

[38] At that stage he saw the passenger lean out of the Toyota vehicle, pulling himself out of the window with a hand on its sill, and point a revolver "directly towards our vehicle". His evidence described the revolver being "pointed at us, at the vehicle, it looked like it was pointed in our direction", and he immediately turned the police car away to the right. He heard a bang and the rear passenger seat window of the police car broke.

[39] The Toyota then proceeded on down along Muriel Avenue, and the police car was unable to make the left hand turn. It performed other manoeuvres and rejoined Muriel Avenue, but the Toyota was nowhere to be seen. It was located nearby in Golf Links Road at about 11.00 a.m. and a search of it at 11.15 a.m. found, amongst other things, Mr Hite's drivers' licence and Bankcard, and a set of small scales, which the police officer locating them described without objection in these terms:

> "Every time I have located them previously it has been involved in drug use".

A black fingerless glove for a right hand was also found in the car.

[40] At around 11.00a.m. two witnesses each saw two men who were apparently together, and moving at some speed through the back yards of house properties in Golf Links Road. One witness noticed one man was bleeding from the forehead, and another witness noticed that one man had what the witness described as a red

and black jacket. That witness later found in his property a black fingerless left hand glove, not known or noticed to have been there before.

Hite

[41] At about 12.30p.m. that day Mr Hite was located on a service road adjacent to the Ipswich Motorway, and south of Golf Links Road. When questioned by detectives at 1.00p.m. he first said he walked there, then told a tale of having been abducted by "an abo bloke", whom Mr Hite said he had picked up as a hitchhiker at about 8.00a.m. that morning on the Ipswich Motorway. Mr Hite claimed that the man had held a gun at Mr Hite's head, and was going to kill Mr Hite.

[42] There was no further reference in the evidence at any stage of the trial to this assertedly aboriginal hitchhiker. Hite was described as rocking backwards and forwards in the seat of the police car when recounting that event, with his hands over his face, and appeared to be crying. In evidence in chief he was described as being hysterical at that time, and the opinion was proffered in cross-examination that it was fake hysteria.

[43] Hite remained in police custody thereafter, and no evidence was led of anything else ever said about the incident by him to any police officers. Evidence was led that on 12 January 2001, when being released from custody on bail, he had claimed in a conversation with a prison officer that he and an unidentified "mate" had picked up a female hitch hiker on 4 June 2000, and when they got into a car chase with police, the female hitchhiker had held a gun to Mr Hite's head. He identified the female as a Shannon Keating. Shannon Keating was then being held in the same prison as that from which Mr Hite was being released, and was undergoing procedures including hormonal treatment to affect a sex change.

[44] After that evidence was given a formal admission was made on Mr Hite's behalf that Shannon Keating had not fired the gun on 4 June 2000, and did not take Mr Hite hostage. This is the sum total of all that is on the public record from Mr Hite about the circumstances of 4 June 2000. It is apparently unlikely that Shannon Keating, who was described as having observable breasts, would in any way resemble the description of "an abo bloke". It was not suggested by any one that Shannon Keating does.

Palmer

[45] Turning to Mr Palmer, he was located at about 3.00p.m. that day, at the QRX site at Curzon Street in Tennyson, another south of Brisbane suburb. That QRX site is north of Golf Links Road. He was located after he was observed seated in a white utility by a QRX security guard, who knew the utility and its owner Graham Keith Lowe (the complainant in Mr Palmer's third conviction), and the security guard required Mr Palmer to vacate that vehicle immediately. Palmer claimed to the guard the vehicle was a hire car which he was there to pick up, but Palmer was removed from it by the guard. Police were called, and arrived almost immediately.

[46] When searched at the QRX premises Mr Palmer was observed to be wet up to about the waist, and in possession of $900 in wet $50 notes, and a packet of fuses identified as the property of Mr Lowe. He was described as having a very aggressive and extremely hostile attitude to the police at the QRX premises, and as apparently affected by drugs. When being driven from that site to the Mt Ommaney Police Station, he was heard muttering words which one witness recalled as including "you coppa cunts you should all die", and which another described as to the effect that "he would kill us, harm us in some way". When first located he was observed to have a small cut above his eye and to be bleeding somewhat from the forehead, and he also appeared to have very recently shaved and nicked himself in so doing. The prosecution case included evidence that prior to being taken from the QRX site he had been spoken to by detectives, who had wanted to question him, and all Palmer had said was "get fucked I'm not saying anything"; and then a little later "find the gun you cunts and prove it in court". The prosecution case was that at that stage he had not been told the topic about which he was to be questioned.

[47] The prosecution case was that he was further searched on arrival at the Mt Ommaney Police Station, and the right hand zip pocket of the jacket he was then wearing was found to contain two clip seal bags, each containing a yellow crystal substance later identified as containing the drug methylamphetamine. That same pocket also had a .357 bullet in it. The police evidence was that that search occurred at around 4.00p.m. on 4 June 2000, and the case for Palmer was that there was no such search, and the police were the source of those amphetamines and that bullet. It is clear that a number of written records were made by different police officers that day of the fact of those amphetamines and that bullet being found at that time; and the bullet was photographed that day.

[48] The particular point about the bullet being assuredly found on 4 June 2000 and the claim made on Mr Palmer's behalf that it was "planted" on him, (denied by the police), is that it was not until 5 June 2000 that the revolver apparently used was located and identified as a .357. Meticulous cross examination on Mr Palmer's behalf did not succeed in identifying any basis at all upon which the investigating police could have concluded, before the revolver was found, that a weapon of that particular calibre or of any particular calibre had been used.

[49] On 4 June 2000 and after Mr Palmer had left the QRX site, a police dog followed an apparent scent from the utility in which Mr Palmer had been located to a land fill area, and a jacket with the words "Chicago Bulls" on it was located stuffed in between rocks in that area of rubble, and apparently concealed there. That jacket had red and **white** patches on its shoulder area, and blood on it in three areas, which the prosecution established matched Mr Palmer's DNA. That jacket was taken to the Mt Ommaney Police Station, and it was common ground in the case that later that evening when arrangements were being made to move Mr Palmer from the Mt Ommaney Police Station to the Inala Police Station, he saw that jacket in the possession of a police officer, and asked either "can I have my jacket?" or "can I have that jacket?"

[50] Mr Palmer does have a tattoo which goes around or almost around his neck, tattoos down his left side, and on his left forearm. He did have longish hair at that time,

which he described as being black. His fingerprint was identified on the left hand passenger side roof of the Toyota car, and also on the outside of the front passenger window. It was his left mid finger in each case.

[51] On 5 June 2000 a further search of the area behind the QRX premises was conducted with the assistance of SES Volunteers. At about 11.00a.m. one of those volunteer searchers located a point .357 magnum revolver in the immediate area in which the Chicago Bulls jacket had been found the day before. On examination the revolver had five live rounds, and one spent one in the "12.00 o'clock" position. Also found at that time, and a short distance from the jacket and revolver, were two bottles, one was later identified as containing hypophosphorous acid, and the other an acid detergent.

[52] Later that afternoon the searchers located a black backpack in bushes in the area immediately behind the position where Mr Lowe had parked his utility. That backpack was found to contain a large number of items of interest, including documents with Mr Palmer's name on them, letters addressed to him, a quantity of syringes, a quantity of clip seal bags, toiletries including a hair brush, toothpaste and a toothbrush, clothing, a wallet which was apparently Palmer's, and a document in the wallet described as a check list. That check list, upon careful examination, contained a list of the necessary ingredients and their quantities for the unlawful manufacture of amphetamines, including some very exact calculations. The necessary ingredients include hypophosphorous acid, which expert testimony established is used for converting the pseudoephedrine in Sudafed, available over the counter, into methylamphetamine. Acid detergent is a cleaner which is useful in the process.

[53] When the police car fired at that day was examined on 4 June 2000, a substantial hole made by a bullet was immediately visible on the left rear passenger door at about its mid point, and situated immediately below the level of the windowsill. The bullet had entered at an oblique angle, smashing the glass at the foot of the rear window, causing that window to collapse. Fragments of bullet casing were removed, and expert testimony was that those were consistent with the bullet having been fired from the .357 revolver located, but they were too small to positively identify the revolver as necessarily being the weapon which fired the shot.

Palmer's Evidence

[54] Mr Palmer's evidence on his own behalf was that Mr Hite and he had picked up a hitchhiker named Adam that day. At that stage Mr Palmer got into the back seat of Mr Hite's vehicle. Adam gave Mr Palmer an injection of a substance Mr Palmer's evidence implied was heroin, and Mr Palmer had then gone to sleep on that back seat. He woke up when he heard a bang, and was then hit by Adam on the head. Mr Hite pulled the car up, Adam left it, and the car took off again. Mr Palmer swore that he saw no revolver or gun at any time, and when the car stopped and he and Hite left it, he ran, simply because he was advised to by Mr Hite. He had no idea where he had run.

[55] He identified the backpack found on 5 June 2000 as his, and it appeared from his answers in cross examination that he accepted that the toiletries and clothes in it were his. He denied knowledge of the syringes found in it, or the document in his wallet containing a detailed description of how to manufacture amphetamine. His evidence included his volunteering that he had been in jail for the past four years, having last left imprisonment on 20 April 2000, and he at first described the jacket with the Chicago Bulls emblem as his jacket, but later claimed it had been given to him by Adam. He swore to having last seen it in the car.

[56] He called an Adam Palmer (not identified as being a relation) as a witness on his behalf. Adam Palmer was established to be a fellow prisoner, and claimed to have been given a lift that day by Mr Hite and Mr Palmer. Adam Palmer described being in possession of a .357 weapon that day and he claimed to have been occupying the front passenger seat of the vehicle. He swore he had lent out the window and "I didn't mean to fire the shot but it went off". Very soon after that he left the vehicle and went on his own way. He swore to having thrown the .357 away in the Brisbane River.

[57] There were a number of reasons why the jury would have been entitled to disbelieve either that Adam Palmer was the person occupying the front passenger seat of the Toyota who fired the shot, or that he was even in the vehicle that day. The evidence, including Adam Palmer's, was that his head was shaved on 4 June 2000, and he had no relevant "Celtic" tattoo or indeed any relevant tattoos. The jacket with the Chicago Bulls emblem, which he claimed to own, was too small to fit him, and he twice described the Toyota vehicle performing a manoeuvre during the chase by the police which it did not perform. This was that it made a U turn in Orange Grove Road. Adam Palmer did not know why the Toyota was originally observed to be making a turn from Beaudesert Road on Riawena Street.

Palmer's Defence

[58] During the trial, counsel for Mr Palmer made an effective and sustained attack upon the credibility of the assertion that amphetamines and a .357 bullet had been located on the accused Mr Palmer at the Mt Ommaney Police Station on 4 June 2000. A good deal of that attack consisted of an extremely careful analysis of the manner and content of the recording by different police officers of what objects had been found by particular police officers at particular places and specified times, and the records of the officer into whose care or custody those objects were reportedly placed. That cross examination certainly established significant inconsistencies in the evidence between various of the police officers; and contradictions between what individual officers claimed in evidence and what either they had recorded, or what was recorded about them, by other officers. Intelligent and effective as that cross examination was, its ultimate force depended upon the proposition, put to the police officer most involved in the searches affecting Mr Palmer, that the revolver had been found near the Chicago Bulls jacket on the afternoon of 4 June 2000, and had been deliberately left in place for the SES volunteers to find the following day, 5 June 2000.

[59] It was necessary for the defence to advance that proposition, because there was otherwise no explanation for the police having the foresight to "plant" on 4 June 2000 a bullet matching a gun only found later on 5 June 2000. The SES volunteer who found the revolver was called, and her evidence included that there were repeated searches of the same area, on the initiative of the volunteers. The jury were entitled to reject the proposition that the police had engaged in an organised and time consuming charade over two days, and to accept that the revolver, hypophosphorous acid, and backpack, were all found for the first time on 5 June 2000 and as a result of a commendably careful search. Once they were satisfied the .357 magnum revolver was only located on 5 June 2000, they were fully entitled to dismiss the allegation that a .357 bullet had been dishonestly (and by the farsighted and fortunate conspiracy of a number of police officers) attributed to Mr Palmer's possession on 4 June 2000; and likewise to accept that individual police officers were imperfect in completing written records.

Mr Palmer's Appeal

[60] In addition to his complaints about his three specific convictions, the appellant Palmer has one general ground of appeal which covers all three matters. This is that the learned trial judge misdirected the jury as to the onus of proof. The complainant focuses on a passage at the very end of the summing up in which His Honour directed the jury immediately before their retirement in these terms:

> "If you are satisfied of the innocence of an accused, you must find him not guilty".

[61] Had that been all the learned judge said on that topic, those words would have constituted a misdirection. They must be put in context. The learned judge had repeatedly directed the jury quite correctly as to the onus of proof. Directions given included:

> "You should begin your deliberations presuming that each is not guilty of the charges brought against him, and find him guilty if, and only if, you find that that presumed innocence has been displaced by proof beyond a reasonable doubt of his guilt".
>
> "The onus of proof of the guilt of the accused is at all times on the Crown and never moves from the Crown. There is no onus on an accused person to establish his innocence."
>
> "If there is any matter tending to prove an accused person's innocence raised in the evidence, the accused person does not have the burden of proving that matter to you, rather the Crown has the onus of disproving it and satisfying you beyond a reasonable doubt that it does not apply in this case".
>
> "It is your duty to find the accused not guilty if you are not satisfied beyond a reasonable doubt of the existence of any element or component of a charge".

> "Before you can be satisfied on that issue so as to entitle you to find the accused person guilty, you must be satisfied beyond a reasonable doubt that the facts found by you are inconsistent with any rational conclusion other than that the accused person is guilty".
>
> "If …you are not positively satisfied that Adam Palmer fired the shot, but you none the less find yourself in a state of reasonable doubt that Stuart Palmer did, then you must acquit Stuart Palmer".

[62] Then came in these terms the direction complained of, together with other directions which put it in context:

> "Well, now is the time for you to decide the matter. If you are satisfied of the guilt of an accused beyond a reasonable doubt, you must find him guilty. If you are satisfied of the innocence of an accused, you must find him not guilty. If then not positively satisfied of the innocence of an accused but you none the less find yourself in a state of reasonable doubt about his guilt, you must in that event as well find him not guilty. It is only if you are satisfied of an accused person's guilt beyond a reasonable doubt that you are entitled to return a verdict of guilty".

[63] The jury retired immediately after those directions were given. Neither of the experienced counsel who appeared asked for any redirection. There is no reason why they should have. There had been no error made in the directions given. Later when the jury sought redirection, His Honour directed the jury in the following terms:

> "And let me remind you that if you come to the conclusion that there is a reasonable doubt about the guilt of an accused person, even though you are not positively satisfied of the person's innocence, if there is a reasonable doubt about his guilt you must find him not guilty".

Once again no redirections were sought.

[64] The directions given by the learned trial judge in the instant case bear no resemblance to the directions given in the matter of *Murray v R* (2002) 189 ALR 40, which led to the order for a retrial in that case. The directions given in the instant case could not have mislead the jury as to the burden or onus of proof. That ground of appeal must be dismissed.

[65] Turning to the appeal against Mr Palmer's conviction for possessing amphetamines, the circumstantial evidence presented to the jury entitled it to find that Mr Palmer's backpack did have within it a meticulously prepared "recipe" for the unlawful manufacture of amphetamines, and that Mr Palmer had been carrying at least one essential ingredient (hypophosphorous acid) in his backpack in Hite's car on 4 June 2000, together with the .357 magnum revolver and bullets for it. They were entitled to accept that that degree of apparent involvement in either actual or intended amphetamine production suggested by those facts was entirely consistent with the discovery upon Mr Palmer's person of what was established on analysis to be amphetamine with a high degree of purity (between 60% and 70%). Those

circumstances, and the circumstance that the jury was entitled to find that the assertion the bullet was planted lacked any logical substance, meant that it was more than open to the jury to accept the police evidence that they found Mr Palmer in possession of that amphetamine. That conviction should be upheld.

[66] Likewise the conviction for entering Mr Lowe's "premises" (his motor vehicle)[2]. The uncontradicted evidence was that he was found in it, and that he took some fuses from it. Mr Lowe had given no relevant permission. It would have been a perverse verdict to acquit him on that charge.

[67] Turning to the most serious charge, that of attempted murder, the jury was entitled to conclude that Mr Palmer was the person who leant out the car window and fired the shot. The jurors were entitled to conclude that Mr Palmer had put on the Chicago Bulls jacket whilst he was seated in the front seat of the car, and had fired the shot whilst wearing that jacket and when using the .357 revolver later found close to the jacket, and close to where he was found in Mr Lowe's vehicle. They were certainly entitled to take notice of the fact that neither police officer could identify either the driver or the only other person seen by either of them in Mr Hite's vehicle, but I think that fact goes to the general credit of both Constable McMillan and Constable Byles. The discrepancy between Constable Byles' description of a "Celtic" tattoo and a "red and blue" jacket, or one with "red and blue blocks", on the one hand, and on the other the in fact red and white patches on the Chicago Bulls jacket, and the actual tattoos on Mr Hite, goes only in my opinion to support the favourable credit of Constable Byles. The other direct and circumstantial evidence described herein overwhelmingly identifies Mr Palmer as the tattooed male with longish hair who fired that shot.

[68] The critical question is proof of the intent with which the shot was fired. Photographs of the police car, and reflection upon the vehicles' respective positions when the shot was fired, shows that had the barrel of the revolver been a fraction higher, and the shot fired a fraction earlier, in all likelihood it would have hit Constable McMillan in her upper body. However, the fact of a very near miss does not establish beyond reasonable doubt that the shot fired was intended to kill either officer.

[69] It is relevant to note that the indictment alleges that Mr Palmer attempted unlawfully to kill Elaine Francis McMillan or another. The alternative charge laid, upon which the jury was discharged without returning a verdict, alleged that Mr Palmer with intent to resist his lawful detention, or the lawful arrest or detention of Mr Hite, unlawfully attempted to strike Elaine Frances McMillan or another with a projectile. Whilst at first sight those charges might each appear bad for duplicity, they are in fact a description of Mr Palmer firing the revolver with the indiscriminate intent to kill or hit one or other officer. They are an allegation of the state of mind which may be attributed to a person who fires more than once into and at a crowd of persons unknown to the shooter, with the intent of causing the death of, or hitting, an unknown number but as many as possible.

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2 Section 1 of the *Criminal Code*.

[70] To establish the indiscriminate attempted murder of one or other officer, the prosecution had to establish beyond reasonable doubt the existence of an actual intention to kill.[3] The intention to cause **either** death **or** grievous bodily harm would not suffice to prove attempted murder. None of this is controversial. Likewise uncontroversial is the obligation of an appellate court to whom an appeal is brought in which the appellant claims that the conviction is unreasonable, or cannot be supported having regard to the evidence, or that the conviction is unsafe and unsatisfactory. The appellate court is required to make its own assessment of the evidence, within the limits imposed by the fact that its judges have neither seen nor heard the witnesses as have the jury, and the appellant judges are required to act upon the view of the facts which the jury, having seen and heard the witnesses were entitled to take.[4]

[71] The issue to be decided is whether upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that Mr Palmer was guilty of attempted murder. More specifically, it is whether the jury could have rejected as a rational inference the possibility that he fired the shot without an intent to kill, and instead with, for example, an intent to cause death or very serious injury, and reckless of whether death might be caused from that injury.

[72] Judging by the record, the appellant Palmer was an argumentative and aggressive witness on his own behalf. The view of the facts which the jury was entitled to take, having seen and heard the witnesses including him, would include the following matters, fundamental to the conviction for attempted murder.

[73] The first is that the appellant Palmer possessed both the amphetamines for the possession of which the jury convicted him, and the "recipe" for manufacturing amphetamines. They could conclude that he was directly and actually involved in the illegal manufacture of amphetamines, or certainly intended to be. They were entitled to conclude he possessed the .357 magnum revolver and bullets for it; and that the possession of that unlawful and concealable firearm was directly associated with the appellant Palmer's intent to obtain income from the illegal means of amphetamine manufacture.

[74] They were entitled to accept his evidence that he had been recently released from prison after serving a number of years, and to find that he was determinedly living outside the law. They were entitled to conclude that any search of his person or goods by the police on 4 June 2000 would have immediately led to his being returned to custody, and to a certain term of further imprisonment. They were entitled to conclude Mr Palmer knew that any search would have that result.

[75] They were entitled to accept the appellant Palmer's evidence that he had taken drugs that morning. He possessed them later that afternoon, and was considered to be affected by drugs at 3.00p.m. If, as was likely, he was affected by drugs that morning, and had Mr Hite's car been stopped by the police whilst Mr Palmer, his backpack and its contents were still in the car, the police would certainly have been

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3 *R v Knight* (1992) 63 A Crim R 166 at 170, 171.

4 *R v Knight* (supra) at 172 and *M v R* (1994) 181 CLR 487 at 492 – 493.

acting within their then powers under the *Drugs Misuse Act* 1986 (Qld) had they searched Mr Palmer and his knapsack, after forming a reasonable suspicion he possessed either drugs or things for use in connection with the commission of offences against that Act.

[76] I consider the jurors were entitled to draw the following inferences from the evidence. The first is that Mr Palmer needed to have Mr Hite escape from the pursuing police officers that morning so that Mr Palmer could keep safe from the police his drugs, his recipe for manufacturing amphetamines, his revolver, and his $900, all of which he was carrying with him. The second is that the chase had gone on long enough for Mr Palmer to realise that Mr Hite was not a successful "get away" driver, and that Mr Palmer's merely brandishing the weapon he was carrying would simply have led to the police car dropping back to a safe distance from Mr Hite's vehicle, and not to the abandonment of the pursuit by police. More police assistance would simply have been requested. The third is that Mr Palmer realised that in light of Mr Hite's ineffective and unsuccessful attempts to avoid that pursuit, Mr Palmer's escape from it could only be guaranteed if one or other of the police officers was shot by him, and was either killed outright or needed immediate and urgent medical aid. The fourth is that he fired only when he had the best opportunity to hit one of the two police officers. The fifth is that any shot which did hit either police officer would hit the upper part of the body, that is, the head, neck, or upper trunk. It would be likely to kill. The sixth is that Mr Palmer was therefore willing to kill one or other of those two police officers to make good his escape.

[77] The jurors unanimously concluded that he intended to kill one or the other. With some reluctance I have come to the view that the jury acting reasonably could not have rejected as a rational inference the possibility that Mr Palmer fired with the intention to either kill **or** to cause immediate serious injury. Causing serious injury to one officer would have ended the police pursuit. Proof of an intention either to kill or to cause immediate serious harm is not proof of attempted murder. Accordingly, the conviction for that charge has to be regarded as unsafe and unsatisfactory, the conviction quashed, and a verdict of acquittal entered.

[78] As earlier described, the appellant Palmer had been indicted and had pleaded not guilty to a count of having unlawfully attempted to strike one or other police officers with a projectile, with the intent to resist either his own lawful arrest or detention, or the lawful arrest or detention of Mr Hite. No verdict was taken on that count after the conviction was recorded for attempted murder. I am satisfied that it is appropriate pursuant to s 668F(2) of the Criminal Code to regard that alternative charge on which he was indicted as one on which the jury could have found him guilty. The jury must have been satisfied that he attempted to strike one or other police officer with a projectile. On the evidence led, the appellant Palmer could not avoid the finding that that was done with intent to resist either his own or Mr Hite's lawful arrest or detention. Accepting that the jurisdiction granted by s 668F(2) must be exercised with great care, it is appropriate in this case to substitute a verdict of guilty on count 3 for the verdict on attempted murder. That was in fact one of the courses urged by the appellant in his outline of submissions on the appeal, with the other course being the substitution for a conviction instead on count 4, (a charge of

having assaulted the two police officers whilst those officers acted in the execution of their duty).

[79] Turning to the appropriate sentence on a conviction for count 3, it is undeniable that in this case that conviction involves seriously criminal conduct. It exhibits the quality of disgracefully reckless indifference to the serious risk of killing one or other of the two police officers that was remarked upon by de Jersey CJ, when dismissing the appeal by a Ross Barry Mulholland who was sentenced to 10 years imprisonment for an offence of like nature.[5] That applicant had also been involved in a pursuit of his vehicle by police, and was also carrying components of a methylamphetamine laboratory in his car, and together with written instructions for the production of that drug. He was also carrying a loaded pistol.

[80] The protracted police pursuit in that case involved more dangerous driving then that in this one, and Mulholland fired at least eight shots at or in the direction of a police officer. He had a substantial prior criminal history, and for the offence of attempting to strike a police officer with a projectile was sentenced to the 10 years described.

[81] Mullholland had pleaded guilty. de Jersey CJ, in giving the judgment of this court, remarked that the sentencing judge must be taken to have arrived at the 10 year term by reducing a substantially longer term which would have been appropriate but for the pleas of guilty. The Chief Justice thought that the starting point from which the learned sentencing judge began was probably from a lower term than 18 years, although in the view of the Chief Justice the sentencing judge was not constrained to work from a point many years below 18. As the Chief Justice observed in that case, sentences for offences of this nature call for a strong deterrent penalty.

[82] The appellant Palmer displayed no remorse at any time for his extraordinarily dangerous conduct. Instead, he advanced a defence that accused many of the police of dishonesty and which was illogical in an important part. He did suffer a serious head injury in the mid nineteen-nineties, and he has experienced a number of assaults in prison. Nevertheless, he has a quite significant criminal history, and has mostly been in custody since mid 1998. He has numerous convictions including for offences of assault, wilful and unlawful destruction of property, breaking and entering premises, dangerous driving, and possession of implements of house breaking. Taking into consideration those matters relevant to his sentence, and the observations of this court in *R v Mulholland* (supra), I consider the appropriate sentence is an order that he be imprisoned for 13 years on count 3 on the indictment.

Appeal by Hite

[83] Turning to the matters of appeal by the appellant Hite, the appellant Palmer's success in quashing his conviction for attempted murder means that Hite's conviction for being an accessory after the fact to that offence must also be quashed. As to whether a conviction should be substituted for being an accessory after the

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5 *R v Mulholland* [2001] QCA 480.

fact to the offence for which Mr Palmer will now stand convicted, the fact is that the evidence did not show how many of the matters of fact proven before the jury, and critical to Palmer's conviction (for either attempted murder or count 3), were actually known to Hite. That is, the evidence did not clearly demonstrate that Hite would have known, when the appellant Palmer entered Hite's car on 4 June 2000, that Palmer then possessed either the amphetamines or the revolver. One may think Hite probably knew that, but that knowledge was not established beyond reasonable doubt. It was not established how they came to be together that day, or where they were going or why. Mr Hite's own criminal conduct demonstrated by his driving was not particularly serious, in that the speeds reached were relatively moderate for an offence for dangerous driving committed during a police chase. He almost stopped before making a right hand turn through a red light, and there was no description in evidence of any other vehicle being required to take any evasive action to avoid his at any time. It follows that his own observed conduct does not necessarily imply that he was aware of just how much illegality Palmer was involved in.

[84] There was no evidence of anything said by Palmer to Hite before or after Palmer fired the shot. Hite does not seem to have slowed to allow Palmer a better shot. Hite could not have seen where Mr Palmer was actually aiming the revolver when the shot was fired. Hite had no particular reason of his own shown in evidence to drive dangerously, under police observation, a vehicle which was immediately traceable to him. He probably acted under Palmer's urging or direction. Whatever Hite knew about Palmer, the evidence does not show that he knew enough to understand that when Palmer fired the shot, Palmer did so intending to either kill or immediately and seriously injure a police officer. On the evidence, for all Hite knew Palmer could have deliberately and obviously fired onto the roadway.

[85] Had Palmer done that, he would not have committed offences other than that of going armed so as to cause fear, and the offences involved in discharging a firearm in a public place on a Sunday. I am satisfied that it would be unsafe to substitute a conviction against Hite for being an accessory after the fact to the offence for which Palmer is now convicted. Lest it be unclear, had Palmer's conviction for attempted murder stood, I would have considered that Hite's conviction as an accessory after the fact to that offence should be quashed by reason of the deficiencies described in the evidence.

[86] With respect to Hite's appeal against his conviction for having operated a motor vehicle dangerously, I am satisfied that conviction should stand. He did exceed the speed limit on both suburban, and major roads, and when apparently determined not to stop. It is that determination not to stop his vehicle in response to police instructions to so do that adds a quality to his driving which was dangerous. He also passed through a red light. It was simply fortunate for other road users that there were not more of them on the roads he drove along. The jury was entitled to consider his driving as operating the vehicle at a speed and in a way dangerous to the public.

[87] It was not a serious example of that offence. On the other hand, he had previous convictions for offences for violence, for damaging property, and the unlawful

possession of weapons. He did not plead guilty, but did by admission concede he drove the Toyota.

[88] As it happened, Mr Palmer's counsel sought an adjournment after the convictions were recorded in December 2001, for the purpose of obtaining various reports about Mr Palmer. That was why they finally came to be sentenced only on 10 April 2002. In the meantime, on 21 December 2001 Hite was sentenced in the District Court at Toowoomba to 12 months imprisonment for another offence of dangerous driving, that sentence to be suspended after five months. The learned judge imposing that partly suspended sentence in December 2001 determined that no allowance would be made for presentence custody, since Hite had been firstly awaiting trial, and then awaiting sentence, in the Supreme Court. Mr Hite complained that there was therefore a delay of four months between the date of his conviction and his sentence which was relevant when applying principals of totality, but which could not be declared as time already served. When Hite was sentenced for this offence of dangerous driving in April 2002, only the 27 days of presentence custody, between 4 June 2000 and 30 June 2000, (when Hite had been released on bail), were declared imprisonment already served.

[89] A sentence of six months imprisonment for the dangerous operation of a motor vehicle committed by Hite may at first seem a stern sentence for that driving. On reflection, it is the determination not to stop evidenced by it that attracts a prison sentence, and the fact that Hite was defying clearly understood indications to stop his vehicle. It was appropriate to impose a sentence that would both discourage Hite personally, and other people generally, from operating a motor vehicle dangerously when attempting to escape from possible lawful detention or arrest. I do not think the sentence of six months imprisonment was manifestly excessive in the circumstances, and the presentence custody declared already served was in truth the correct number of days.

[90] This is because after Hite's release on bail on 30 June 2000 his return to custody in March 2001 was for the different offence of dangerous driving for which he was later sentenced in December 2001 in the District Court. He was granted bail on that charge, which bail was revoked on 29 August 2001 when Hite was charged with a number of other offences which included possession of weapons, producing dangerous drugs, stealing and other offences. He has remained in custody since 29 August 2001, but not solely in relation to the offence of dangerous driving committed on 4 June 2000, and he was serving a sentence of five months imprisonment on and from 21 December 2001. I do not see why the totality principle would result in a reduction in the sentence of six months imprisonment for this offence. Accordingly, his application for leave to appeal against that sentence should be dismissed.

[91] I would order as follows:

- That the appellant Palmer's appeal against his conviction and sentence on count 2 for the offence of attempting to unlawfully kill be allowed, the conviction quashed and a verdict of acquittal entered.

- That in lieu thereof a conviction for attempting unlawfully to strike Elaine Francis McMillan or another with a projectile with intent to resist lawful arrest or detention be substituted, and a sentence of 13 years imprisonment for that offence imposed in lieu of the sentence of 17 years imprisonment for attempted murder.

- That the appellant Palmer's appeal against his convictions for unlawful possession of amphetamine (count 8), and entering the premises of Graham Keith Lowe with an intent to commit an indictable offence (count 9), be dismissed.

- That the appellant Hite's appeal against his conviction and sentence as an accessory after the fact to the offence of attempted murder committed by the appellant Palmer (count 5) be allowed, the conviction quashed, and a verdict of acquittal entered.

- That the appellant Hite's appeal against his conviction for dangerously operating a motor vehicle be dismissed, and likewise that his application for leave to appeal against the sentence of six months imprisonment imposed for that offence be dismissed.