Rules and Orders, let alone Statutory Instruments, the court was satisfied that the word "Order" in the Act should be given a wide meaning covering at any rate any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament. That was all the more so when the acts in question were merely designed to facilitate proof of matters which could clearly be proved otherwise, albeit in a less convenient manner. [W. G.]

Commentary. The Documentary Evidence Act 1868 provides that prima facie evidence of any order or regulation made by a government department may be given by (*inter alia*) the production of a copy purporting to be printed by the government printer.

The difference between the order in the present case and the circular (presumably also issued by the Stationery Office ?) in *Scott v. Baker* [1968] 2 All E.R. 993 is that the latter was not an order that the device be approved, but a narrative to the effect that a particular device had been approved.

Home Secretary's approval of breath test device—whether order expressing approval ultra vires

R. v. Storer

Nottinghamshire Quarter Sessions: H.H. Judge Flint, Deputy Chairman: January 6, 1969.[16]

The defendant was charged with driving a motor vehicle with a blood alcohol concentration above the prescribed limit contrary to section 1 of the Road Safety Act 1967. At the trial, in order to prove that the breath test device used had been approved by the Secretary of State for the purposes of section 7 (1) of the Act, the prosecution produced a copy of the Breath Test Device (Approval) (No. 1) Order 1968. At the conclusion of the case for the prosecution, the defence submitted that there was no case to answer, the order being inadmissible and there being no proof before the court that the device used was of an approved type.

Held, the Breath Test Device (Approval) (No. 1) Order 1968 purported to be made under a power conferred by section 7 (1) of the Road Safety Act 1967. That section conferred no power on the Secretary of State to make an Order to evidence his approval of a breath test device, but merely provided that the device should be of a type approved by the Secretary of State; accordingly, the Order was *ultra vires* and could not be received in evidence. The

[16] For the defendant: *R. A. D. Payne* (instructed by German & Son, Beeston, Nottingham). For the prosecution: *J. B. Milmo* (instructed by D. W. Ritchie, Nottingham).

...would be adjourned for the prosecution to be given an opportunity of proving the approval of the Secretary of State in an admissible manner.

[*Ex rel.* G. M. Jarand, Barrister-at-Law.]

Commentary. The decision seems to be inconsistent with the subsequent decision of the Court of Appeal in *Clarke* (*ante*, p. 203) where it was said that the Secretary of State had a duty and a power to approve types of device, and the form of approval and method of verification was entirely for him. It would seem that the Order in the present case ought to have been admitted under the Documentary Evidence Act 1868, as in *Clarke*.

ROBBERY

"Force" used by informer with consent of victim—larceny

R. v. Macro and Others

Court of Appeal (Criminal Division): Winn L.J., Widgery L.J. and Lyell J.: *The Times*, February 11, 1969.[17]

M. and others pleaded guilty to robbing (together with a man "unknown"—in fact, S.) a postmaster, and were sentenced to four years' imprisonment. They said that S. had persuaded them to commit the offence. Unknown to the judge and counsel S. had informed on them to the police, with the object of claiming a reward, and the postmaster was aware that a raid was to take place at his post office and a police officer was on hand to protect him.

Held, the convictions would be quashed, since it might well have been that the postmaster's will was not overcome either by force or fear. Verdicts of guilty of larceny would be substituted, and in the circumstances the sentences would be varied so as to allow the appellants' release.

The court hoped that such a situation would not arise again. If judges are not permitted to know the true and complete facts of cases they cannot exercise their functions properly. [W. G.]

Commentary. The action of the court in substituting a conviction for larceny is strange. If *Millar and Page* (1965) 49 Cr.App.R. 241 be rightly decided, the proper course in the present case was to substitute a conviction for attempted robbery: see Comment at [1965] Crim.L.R. 458 and authorities there referred to. Probably the conviction for larceny was correct in that the postmaster's "consent" was inoperative, not being communicated to the accused. It would have been otherwise

[17] For the appellants: *L. Borrett* (instructed by Fison & Co., Ipswich). For the Crown: *L. Boreham, Q.C.* and *F. Petre* (instructed by M. F. C. Harvey, Ipswich).

if the property had actually been handed to the accused by the postmaster's direction: *Turvey* [1946] 2 All E.R. 60; *Millar and Page* (supra) and *cf. Martin* v. *Puttick* [1967] 1 All E.R. 899; Smith and Hogan, *Criminal Law*, 351.

It is submitted that, under section 1 of the Theft Act, which does not refer to the consent of the owner, there should be no difficulty in convicting of theft in circumstances such as those of the present case: see Smith, *Law of Theft* [67]. Whether the accused could be convicted of robbery under the Theft Act then depends on whether they were parties to the use of force, or the putting in fear of any person in order to steal. This seems very doubtful. The "force" appears to have been used only by S., and this would seem to be insufficient for two reasons: (1) since the postmaster consented and was not, apparently, subjected to any such bodily injury as might have rendered his consent irrelevant, S.'s action could not be described as "force"; and (2) since S. did not intend to steal, any force which might have been used was not used in order to steal.

SENTENCE

Criminal Justice Act 1967, s. 39 (3)—consecutive sentences, each of not more than six months, must be suspended—whether sentence less severe if suspended

R. *v.* TAYLOR: Salmon L.J., Fenton Atkinson L.J. and Milmo J.[18]: T. pleaded guilty to three charges of breaking and entering and stealing, and asked for eleven other offences to be taken into account, and was sentenced to five months' imprisonment on each charge consecutive.

Held, as each of the sentences was for a term of not more than six months, and none of the circumstances set out in s. 39 (3) of the Criminal Justice Act 1967 were present, the sentences must be suspended under the section. The total sentence of fifteen months was appropriate, but the court could not substitute concurrent terms of fifteen months on each charge because that would amount to dealing with him more severely than he had been dealt with in the lower court (albeit not more severely than the lower court intended): Criminal Appeal Act 1968, s. 11 (3). The appeal would be allowed and the sentences suspended for three years. [W. G.]

Commentary. The sentence on each count is a separate sentence for the purposes of section 39 (3): The court must suspend the sentence when it passes a sentence of not more than six months' imprisonment "in respect of one offence." It would apparently have been in order for the judge to impose a sentence of fifteen months concurrent on each count, even though he evidently thought that the appropriate sentence for each offence, taken by itself, was five months. The Court of Appeal must exercise its powers under section 11 so that, "*taking the case as a whole*, the appellant is not more severely dealt with on appeal than he was dealt with by the court below." To replace three consecutive sentences by three concurrent sentences each of the same length as the three consecutive sentences added together would seem then to be permissible. The point in the present case is that the three consecutive sentences were necessarily suspended (by law —though the judge did not intend that) and a sentence which is not suspended is more severe than one which is suspended.

[18] For the appellant: *G. N. Barr-Young* (instructed by the Registrar of Criminal Appeals). The Crown was not represented.

Breach of trust by public servant—suspended sentence inappropriate

R. *v.* BAZELEY: Lord Parker C.J., Ashworth and Willis JJ.: December 17, 1968. *Age*: 45 (m.). *Facts*: a postman, he pleaded guilty to three counts of stealing postal packets and asked for 54 other cases to be taken into account. The offences were committed over a period of two years. He said he had started stealing because of financial difficulties and then could not stop. There was some evidence he had suffered from depression. Sentenced to two years' imprisonment. *Previous convictions*: none. *Special considerations*: it was submitted that a suspended sentence would be appropriate. *Decision*: it is always tragic when a public servant loses his good character, job and pension because of criminal stupidity, but it has always been recognised that that is no ground for not imposing a severe sentence. The sentence was lenient and there was no question of suspending it. [W. G.]

Commentary. The court has generally been reluctant to order suspension of sentences for offences involving breach of trust by employees but has ordered suspension in such a case on one recent occasion (*Hagar*, February 14, 1969, No. 7925/68). [D. A. T.]

Evidence tending to aggravate the offence—whether admissible after conviction for purposes of sentence—procedure

R. *v.* ROBINSON: Winn L.J., Widgery L.J. and Lawton J.: (1969) 113 S.J. 143. *Age*: 43 (m.). *Facts*: convicted of unlawfully possessing three grammes of cannabis made up into nine twists. Sentenced to three years' imprisonment. *Previous convictions*: one for possessing cannabis in 1966: fined £150. *Special considerations*: after conviction police officers giving evidence about him said that at the time of the offence in 1966 £1,000 was found in his home and he was believed to be one of the main distributors of drugs in the Midlands. *Decision*: the evidence should not have