Louisiana Law Review

Volume 6 | Number 4
The Work of the Louisiana Supreme Court for the 1944-1945 Term
May 1946

Criminal Procedure - Short Form Indictments

C. C. C.

Repository Citation
C. C. C., *Criminal Procedure - Short Form Indictments*, 6 La. L. Rev. (1946)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol6/iss4/17

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

"nighttime" is "the period between sunset and sunrise,"[15] the court has held[16] that evidence showing entry to have been made "in the evening sometime after dark"[17] was clearly sufficient to justify the jury's conclusion that the offense was committed after sunset. Massachusetts by statute[18] similarly defines "nighttime," but in the tort case of *Sodekson v. Lynch*,[19] where there was no direct testimony as to the exact time of the injury, the court held that night had begun at the time described by the plaintiff as "dusk turning to dark" and at a time when she, being possessed or normal eyesight, could not see.

According to a decision of the Supreme Court of Georgia[20] the defendant will be given the benefit of the doubt where the evidence shows that the burglary was committed within a relatively short period—one-half of which was day and one-half night. This decision is in accord with the usual policy of strict construction of criminal statutes in favor of the accused.

The desirability of a statutory definition of "nighttime," to be applied wherever possible, is well illustrated by the principal case wherein Chief Justice O'Niell and Justice Higgins filed vigorous and well reasoned dissents based upon the theory that the so-called "twilight period" is not included in "nighttime." Still, this same difficulty would have been present, if the burglary had occurred after the adoption of the Criminal Code, for there was no direct evidence as to the precise time when the apartment was entered—thus excluding the ready availability of the almanac to establish the nature of the crime.

NINA J. NICHOLS

CRIMINAL PROCEDURE—SHORT FORM INDICTMENTS—The bill of information charged that the defendant, Davis, "did commit the crime of gambling as defined by Article 90 of the Louisiana Criminal Code." Defendant tendered a motion for a bill of particulars which was granted and the particulars furnished. The motion to quash the indictment and the plea of unconstitutionality were overruled. Defendant excepted and appealed. *Held*, the use of the short form, authorized by Article 235 of the Code of Criminal Procedure of 1928 as amended by Act 223 of 1944, was sufficient

15. Cal. Pol. Code (Deering, 1944) § 3260.
16. People v. Mendoza, 17 Cal. App. 157, 118 Pac. 964 (1911).
17. 17 Cal. App. 157, 159, 118 Pac. 964, 965.
18. Mass. Gen. Laws (1932) c. 278, § 10 et seq.
19. 314 Mass. 161, 49 N.E. (2d) 901 (1943).
20. Caesar Water v. Georgia, 53 Ga. 567 (1875).

and any possible deficiency in the short form information was cured by the answer filed by the district attorney pursuant to defendant's motion for a bill of particulars. *State v. Davis*, 23 So. (2d) 801 (La. 1945).

The development, function and constitutionality of the short form indictment have been discussed in two recent comments in the LOUISIANA LAW REVIEW.[1] The *Davis* decision, passing upon the sufficiency of the short form indictment for all crimes included in the 1942 Criminal Code, is of momentous significance and merits a brief re-appraisal of certain fundamental principles brought out in those previous writings.

The long and cumbersome common law forms of indictment were developed during a period in English legal history when formalism was at its height. With one hundred and sixty capital offenses, it was not surprising that the judges of that day seized upon purely technical defects in the charge to save offenders from penalties which were excessive.[2] As our criminal laws became more humane, penalties for the various crimes were adjusted in accordance with the seriousness of the offense. Thus the need for the technical common law indictment forms disappeared, and they became a device whereby astute lawyers could often secure the release of criminals who had been convicted after a full and fair trial. A step was taken toward simplifying indictment forms when the Louisiana legislature adopted the 1928 Code of Criminal Procedure. Article 235 of that code authorizes the use of the short form indictment which succinctly apprises the accused of the particular crime with which he is charged. If the offender desires the details or circumstances of his alleged transgression, he can secure them through a bill of particulars. While the granting of a bill of particulars is left to the discretion of the trial judge, an abuse of this discretion (which deprives the accused of a full opportunity to understand and meet the charge) is reversible error.[3] This method of procedure, suggested in the American Law Institute's model Code of Criminal Procedure, has been adopted in a number of states, and its constitutionality has been universally upheld.[4] Despite this simplification, reversals based on technicalities in indictment forms did not abate, since

1. Broussard, The Short Form Indictment: History, Development and Constitutionality (1944) 6 LOUISIANA LAW REVIEW 78; Cutrer, Indictment Forms —A Technical Loophole for the Accused (1945) 6 LOUISIANA LAW REVIEW 461.
2. Comment (1945) 6 LOUISIANA LAW REVIEW 461.
3. State v. De Arman, 153 La. 345, 95 So. 803 (1923); State v. Larocca, 156 La. 567, 100 So. 720 (1924); State v. Cryar, 158 La. 498, 104 So. 304 (1925).
4. Comment (1944) 6 LOUISIANA LAW REVIEW 78.

short forms were limited to those crimes specifically set out in Article 235.[5] Faced with this discrepancy, the legislature, in 1944, acted upon the recommendation of the Criminal Law Section of the Louisiana Bar Association.[6] It amended and extended the scope of the short form indictment article to include all offenses set out in the Criminal Code.[7] By authority of this amendment the information in the *Davis* case was drawn.[8]

The instant case marks the first challenge to the constitutionality of a short form indictment drawn pursuant to the 1944 amendment. It is not surprising that criminal lawyers, who were disturbed that technical defense opportunities had been further legislated away, should marshal every possible argument against the statute. Fortunately the majority of the court recognized the fact that the newly authorized short forms differ only in phraseology from those already sanctioned by Article 235. The substance and purpose remain constant.[9] The accused is specifically informed of the crime charged, and the need for further details entitles him to a bill of particulars setting out the form and circumstances of the offense. A definition of the crime may be obtained by reference to the Criminal Code. This same method and procedure was followed as to the short forms previously sanctioned by Article 235.

The importance of the issue involved warrants a careful analysis of the dissenting opinions of Justices Fournet, Higgins and Ponder. Justice Fournet, who dissented in part, took the position that the amendment is violative of the mandate in Article I, Section 10, of the Louisiana Constitution of 1921 which specifies "In all criminal prosecutions, the accused shall be informed of the nature and cause of accusation against him." In developing this point, he stated:

> "The information in the instant case does not allege a single fact or circumstance upon which the offense is based. There

---

5. State v. Morgan, 204 La. 499, 15 So. (2d) 866 (1943); State v. Fazzio, 23 So. (2d) 99 (La. 1945); State v. Varnado, 23 So. (2d) 106 (La. 1945), discussed in Comment (1945) 6 LOUISIANA LAW REVIEW 461, 464.

6. See Bennett, Louisiana Legislation of 1944: Criminal Law and Procedure (1944) 6 LOUISIANA LAW REVIEW 9, 16-18.

7. La. Act 223 of 1944.

8. State v. Davis, 23 So. (2d) 801, 803 (La. 1945). "The short form of information employed in this prosecution is authorized by the provisions of Act 223 of 1944, this being a statute that amended and re-enacted Article 235 of the Louisiana Code of Criminal Procedure, as amended by Act 147 of 1942."

9. State v. Davis, 23 So. (2d) 801, 803 (La. 1945): ". . . it was proper to charge in the information, by using the name and article number of the offense committed, that defendant 'did commit the crime of gambling as defined by Article 90 of the Louisiana Criminal Code.'"

> is nothing in it from which the accused can tell or even guess what act or acts he is being charged with having done. At most it is a mere statement or conclusion of the district attorney. It is barren of any statement which informs the accused or the court of the acts allegedly committed by the accused upon which the prosecuting attorney has based his conclusions."[10]

The constitution does not require that all the details of the crime be couched in the indictment. The fact that the accused is accurately informed as to the crime charged, together with his right to secure the details and circumstances of the crime by means of a bill of particulars, fully protects his constitutional rights. It is significant to note that Article I, Section 10, is identical with constitutional provisions in other states where short form indictments have been upheld.[11]

In the instant case the accused was charged with the crime of gambling as defined by Article 90 of the Louisiana Criminal Code.[12] Justices Higgins and Ponder in their dissents took the position that this article is a *general* statute which can be violated in a number of ways. They reasoned that reference to Article 90 of the Criminal Code did not sufficiently apprise the accused of the ground or basis of the prosecution.[13] Justice Hamiter, speaking for the majority of the court, answered this by pointing out that the net effect of the gambling article is to take the offense of gambling as created by pre-existing statutes and place it under one comprehensive statute, making it an offense to conduct gambling "as a business."[14] This last element (conducting gambling as a business) is the feature which distinguishes criminal from non-criminal activity.[15] That the offense can be committed in a number of different ways does not provide a sound basis for holding that the statute is a "general" one which denounces an offense not sufficiently specific to be charged by the short form indictment. Murder may also be committed in a number of ways—by the killing of a human being with a gun, knife, bludgeon or other instrumentality where the assailant has the specific intent to kill or where his intent was to "inflict great bodily harm." It may also result from an accidental killing in

10. Id. at 817.
11. Comment (1944) 6 LOUISIANA LAW REVIEW 78.
12. Art. 90, La. Crim. Code of 1942.
13. Justices Higgins' and Ponder's dissenting opinions in 23 So. (2d) 801, 813 (La. 1945).
14. State v. Davis, 23 So. (2d) 801 (La. 1945).
15. Comment (1945) 6 LOUISIANA LAW REVIEW 461.

the perpetration of a dangerous felony.[16] The sufficiency of the short form for murder, manslaughter and rape, however, has not been seriously questioned.[17] There is no sound basis for putting the offense of gambling in a separate category from the other crimes embraced in the Criminal Code. Such reasoning threatens the whole tenor of the Criminal Code, which has sought to eliminate artificial distinctions between the various forms of criminal activity. To follow such a premise to its ultimate conclusion would result in a return to the uncertainties of the common law and the frequent mistrials which the short forms were adopted to eliminate.

Justice Hamiter, speaking for the majority, said:

> ". . . The question of whether or not the short form so used herein satisfies the constitutional guaranty that an accused shall be informed of the nature and cause of the accusation against him need not be determined. If the information as originally drafted be defective in that respect, the defect was cured by the answer filed by the district attorney pursuant to defendant's motion for a bill of particulars."[18]

The conclusion reached is undoubtedly correct, but the writer left himself open to attack by the dissenting justices. The right to demand a bill of particulars is essential to the constitutionality of the short form indictment procedure, but it is not the function of a bill of particulars to cure a defective indictment. Justice Rogers, speaking for the court in the recent case of *State v. Bienvenu*,[19] declared:

> "The sole office of a bill of particulars is to give the adverse party information which the pleadings by reason of their generality do not give and to compel the State to observe certain limitations in offering evidence. A bill of particulars cannot change the offense charged nor in any way aid an indictment or information fundamentally bad."[20]

16. Art. 30, La. Crim. Code of 1942.

17. In a very recent case, State v. Frazier, 24 So. (2d) 620 (La. 1946), it was held that a bill of information, which was stripped of surplusage and drafted in accordance with the short form and charged defendant with attempt to murder named person, was not fatally defective because of failure to allege that defendant had specific intent to kill or inflict great bodily harm.

18. State v. Davis, 23 So. (2d) 801, 803 (La. 1945).

19. State v. Bienvenu, 207 La. 859, 22 So. (2d) 196 (1945).

20. 207 La. 859, 865, 22 So. (2d) 196, 198.

This position is supported by other authorities.[21]

The majority could have justified its decision by pointing out that the information adequately charged the offense under Article 90, and that the bill of particulars, which is not a part of the indictment, accorded the constitutional rights of the accused a full measure of protection. The purpose of the short form indictment statute is to transfer the superfluous allegations in the common law indictment forms to the bill of particulars, leaving for the indictment the sole function of charging the accused with the crime.

Had the supreme court ruled in the *Davis* case that the short form indictment for gambling was insufficient, it would have established a precedent which might well serve as an opening wedge for a general attack upon the sufficiency of short form indictments and the simplified methods of criminal procedure which were envisaged by the draftsmen of the 1928 Code of Criminal Procedure. It is regretted that the opinion of the supreme court was not unanimous on so vital an issue. If the constructions given the statute by the dissenting justices were carried to the ultimate conclusion that astute defense lawyers will urge, it would be a matter of a short while only before the short form indictment would become a legal curiosity instead of the beneficent remedial statute that a reasonable interpretation and application can make it.

CECIL C. CUTRER

Addendum

A recent case of particular importance to this subject has been reported since this note was prepared.[1]

The defendant was charged with the crime of aggravated rape pursuant to the short form provided for in Article 235 of the Code of Criminal Procedure. The supreme court, without dissent, reversed a judgment quashing the indictment. Justice Ponder, speaking for the court, made the following significant statements:

> "It is to be noted that in Article 235, where the short forms are set out, there is a provision to the effect that the

21. See authorities cited in 27 Am. Jur. 672, 673, § 112; 31 C.J. 752, 753, § 310.

1. State v. Chanet, 24 So. (2d) 670 (La. 1946).

district attorney may be required to furnish a bill of particulars setting forth more specifically the nature of the offense charged. The defendant's constitutional guaranty that he shall be fully apprised of the nature and cause of the accusation is amply protected by this provision."

"It might be suggested that Article 235 of the Code of Criminal Procedure does not make it mandatory upon the court to require the State to furnish the particulars. While it is discretionary with the trial judge, yet, he cannot arbitrarily refuse to order the State to furnish essential particulars.

"This Court has upheld the short form of indictment on charges for murder, State v. Capaci, 179 La. 462, 154 So. 419; State v. Matthews, 189 La. 166, 179 So. 69; forgery, State v. Ducre, 173 La. 438, 137 So. 745; State v. Digilormo, 200 La. 895, 9 So. (2d) 221; State v. Pete, 206 La. 1078, 20 So. (2d) 368; perjury, State v. Abeny, 168 La. 1135, 123 So. 807; negligent homicide, State v. Ward, supra.

"We see no valid reason why an indictment charging the accused with the commission of aggravated rape upon a named person as provided for in Article 235 is not equally sufficient. Moreover, a defendant is amply protected when the short form is used by the provision granting him essential particulars when requested."[2]

C. C. C.

EQUITY—PERSONAL SERVICE CONTRACTS—ENFORCEMENT OF NEGATIVE COVENANTS—Defendant was the inventor of an "Atomisscope" which could be successfully employed in geophysical work. In consideration of a monthly salary and as part of a general plan to develop the device, he contracted with the plaintiff, an experienced oil man, to render exclusive services in the operation of the instrument. He also covenanted not to lend, give, sell, or demonstrate the instrument to any other person. Defendant breached his contract and rendered services to others. Plaintiff brought an injunction suit and defendant filed an exception of no cause of action. The Louisiana Supreme Court *held* the services were of a special, unique and extraordinary character, overruled the exception of no cause of action, and reinstated the temporary restraining order. *Pennington v. Drews*, 24 So. (2d) 156 (La. 1945).

---

2. Id. at 671.