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CRIMINAL LAW-INDICTMENT AND INFORMATION-VARIANCE BETWEEN ALLEGATION AND PROOF

Daniel A. Isaacson S.Ed.
University of Michigan Law School

CRIMINAL LAW—INDICTMENT AND INFORMATION—VARIANCE BETWEEN ALLEGATION AND PROOF—In a Texas prosecution for drunken driving, the complaint and information charged that the defendant "...on or about the 11th day of April, A.D. 1948...did then and there unlawfully while intoxicated and while under the influence of intoxicating liquor, drive a motor vehicle...upon a public highway within said county, to-wit: U.S. Highway #108 about two miles north of the City of Stephenville, Texas...."[1] Upon conviction, defendant appealed, one ground being that the State had introduced evidence to the effect that he drove his automobile on Highway #108, not U.S. Highway #108 as alleged. *Held*, judgment reversed. The evidence was not sufficient to support conviction

[1] As to the place of the offense in actions of this nature, the Texas courts require that the prosecution need only allege that it occurred on a "public highway." Thomas v. State, (Tex. Cr. 1948) 210 S.W. (2d) 826; Duncan v. State, (Tex. Cr. 1948) 213 S.W. (2d) 824.

because of fatal variance between allegation in information and proof. *Tate v. State*, (Tex. Crim. App., 1949) 223 S.W. (2d) 634.

The early common law view on variance was that any discrepancy at all between an allegation of some material fact in an indictment or information and proof of that element was fatal to a conviction, while a deviation as to some immaterial fact was of no consequence.[2] Furthermore, if some legally essential or material element was described to a degree that was unnecessary, nonetheless the proof had to correspond exactly with the given description,[3] whereas if the entire averment, along with the descriptive matter, was surplusage, it did not have to be proved.[4] While originally intended to prevent the prejudicing of an accused, the rule required such strict conformity that it developed into a device for frustrating justice at every turn. This abuse led to its being repudiated and discarded in favor of a more rational view. The modern approach, which has beeen established throughout the states by virtue of court decisions and statutes, goes to the very basis for having any variance rule in selecting the proper test.[5] The question asked is whether the variance itself is material, rather than whether it is a variance no matter how slight, as to a material matter, and the criterion of materiality is whether the defendant is prejudiced in any way.[6] The considerations are that the defendant be fully appraised of the nature of the offense with which he is charged and that he be in no danger of a second prosecution for the same offense.[7] Consequently, in the proper cases, words describing essential matters with unnecessary particularity have been held to be mere surplusage which need not be proved.[8] Under this analysis, it cannot be said that the defendant in the principal case was prejudiced. What possible justifiable reason is there for the court to reject a competent approach to which it has previously subscribed and to resort to the tarnished common law rule?[9] The principal case, along with the

[2] State v. Brozich, 108 Ohio St. 559, 141 N.E. 491 (1923); Kemp v. United States, 41 App. D.C. 539 (1914).

[3] Hayes v. State, 33 Ala. App. 178, 31 S. (2d) 306 (1947); Kutler v. United States, (C.C.A. 3d, 1935) 79 F. (2d) 440; Smith v. State, 107 Tex. Cr. 511, 298 S.W. 286 (1927).

[4] Duncan v. State, supra, note 1; Barbour v. State, 66 Ga. App. 498, 18 S.E. (2d) 40 (1941).

[5] 27 AM. JUR., Indictments and Information §176 (1940); State v. Brozich, supra, note 2.

[6] United States v. Twentieth Century Bus Operators, (C.C.A. 2d, 1939) 101 F. (2d) 700; State v. Potter, 195 Iowa 163, 191 N.W. 855 (1923).

[7] "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935). See also, Henderson v. State, 97 Tex. Cr. 247, 260 S.W. 868 (1924).

[8] Mealer v. State, 64 Ga. App. 282, 13 S.E. (2d) 38 (1941); Barbour v. State, 66 Ga. App. 498, 18 S.E. (2d) 40 (1941); McCallister v. State, 217 Ind. 65, 26 N.E. (2d) 391 (1940).

[9] Within one month of the decision in the principal case, this same court held that where the indictment charged that the defendant had unlawfully and fraudulently taken a check "on or about the 25th day" of March 1946, proof that the check was taken at any time about that time was admissible, although the check was dated March 26, 1946. Adams v. State, (Tex. Cr. 1949) 225 S.W. (2d) 568. See also, Henderson v. State, supra, note 7.

much publicized "drowning"[10] and "stomping"[11] decisions handed down by this same court in the past few years, is but a part of a series of such opinions which have shocked the public and which manifest an urgent need for reform.[12] It is questionable whether legislative enactments, some of which have already been proposed,[13] can, alone, get at the real roots of the problem. Rather, it would seem that the trouble is more fundamental than such legislation presupposes, lying basically with the attitude of some members of the bench and bar who seek this sort of result. Thus, a reform must come, and it must come from within, if public confidence and respect for the legal profession is to be retained. [14]

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[10] Gragg v. State, 148 Tex. Cr. 267, 186 S.W. (2d) 243 (1945). The defendant was accused of drowning his wife and child. The indictment charged that the defendant did "kill Flora Gragg, by then and there drowning the said Flora Gragg. . . ." The defendant objected to the sufficiency of the allegation because it did not allege whether the deceased was drowned in "water, coffee, tea or what." On appeal after conviction, the Court of Criminal Appeals upheld this contention.

[11] Northern v. State, 150 Tex. Cr. 511, 203 S.W. (2d) 206 (1947). This case involved a murder prosecution in which the indictment charged that the defendant did "kill Fannie McHenry by then and there kicking and stomping the said Fannie McHenry. . . ." When the sufficiency of the indictment was raised on appeal after conviction, the Court of Criminal Appeals reversed the case on the ground that the indictment did not state that the "kicking and stomping" were done "with the feet."

[12] Potts, "Texas Bar Seeks Improvement in Criminal Procedure," 31 J. AM. JUD. SOC. 145 (1947-8).

[13] Annual Report of the Texas State Bar Committee on Criminal Law and Procedure, 11 TEX. B.J. 306 (1948).

[14] Seventy-five criminal lawyers in Dallas County have sensed this need and have formed the Dallas County Criminal Bar Association to combat "unjust criticism of their profession." Their objectives include (1) support of proper enforcement and administration of criminal law; (2) to propose more just and proper criminal laws; (3) to publicize and stress the necessary place of the criminal lawyer in society; (4) to strive for a high code of ethics among the profession; (5) to educate the public and themselves on the duties of the criminal lawyer. 12 TEX. B.J. 498 (1949).