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Criminal Procedure—Indictment and Information—Sufficiency of Charging Offense in the Language of the Statute

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in some cases which would seem to merit such punishment, or will force the courts to overextend the definition of negligence in order to include such cases within the rule. Second, unless the courts are very careful to define implied malice so as to require wilfulness as distinguished from negligence, and actual knowledge of probable injury as distinguished from constructive knowledge of likely harm, the line between involuntary manslaughter and second degree murder based on implied malice will become confused.

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CRIMINAL PROCEDURE — INDICTMENT AND INFORMATION — SUFFICIENCY OF CHARGING OFFENSE IN THE LANGUAGE OF THE STATUTE.—The defendant, a county surveyor, made a claim to and received from Missoula county $600 for work on the county airport. The claim was made in the name of a fictitious company and the defendant signed a name other than his own, as secretary of such company. He was convicted of obtaining money by false pretenses. On appeal to the Supreme Court of Montana, *held,* reversed. An information alleging presentation of a "false and fraudulent claim," without specifying facts showing some material representation is insufficient. *State v. Hale,* 291 P.2d 229 (Mont. 1955) (Justice Angstman specially concurring; Chief Justice Adair and Justice Bottomly dissenting separately).

During the early years of the common law crimes were punishable with the greatest severity, because a private party was the prosecutor and the moving influence was revenge. Gradually the public reaction against the increasing number of executions for relatively petty offenses influenced the courts to construe criminal indictments and informations more strictly.[1] Thereafter it became necessary to state the offense charged with great particularity. Technicalities were of the utmost importance and as a result the criminal was often released.[2]

When the harshness of criminal penalties was ameliorated, the reason for the highly technical rulings on criminal pleading was gone and consequently the legislatures substituted new systems of pleading and practice which contained the necessary elements of the common law system but did away with the superfluous technicalities.[3]

By the Constitutions of the United States[4] and Montana[5] the accused is entitled to be apprised of the nature and the cause of the accusation against him. This is accomplished by the use of an indictment or information which must, under both common and statutory law, serve three general purposes: (1) inform the accused of the charge against him in order to enable him to prepare for his trial, (2) protect the accused from double jeopardy, and (3) enable the court to rule on evidence and upon conviction to pronounce just sentence.[6] An information that does not embody these requirements is insufficient and a conviction is subject to reversal.[7]

[1]PUTTKAMMER, ADMINISTRATION OF CRIMINAL LAW 125-130 (1953).
[2]See State v. Gondeiro, 82 Mont. 530, 268 Pac. 507 (1928).
[3]ORFIELD, CRIMINAL PROCEDURE 200 (1947).
[4]U.S. CONST. amend. VI.
[5]MONT. CONST. art. III, § 16.
[6]State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).
[7]*Id.* at 60, 92 S.E.2d at 416.

Generally an information which charges an offense in the language of the statute is sufficient,[8] but this rule is not without exception. Where the language of the statute is general, uncertain or ambiguous and does not inform the accused exactly of the nature of the charge against him, more is required to meet the purposes of the information.[9] A bill of particulars is allowed in some states[10] though such a bill will not cure a defective information.[11]

The Montana Code provides that the information must contain "a statement of the facts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended,"[12] and also that "the indictment or information must be direct and certain, as it regards—1. The party charged; 2. The offense charged; 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."[13] The instant case, relying on *State v. Wolf*,[14] held that "where the statute uses general or generic words in defining the offense the information or indictment bottomed upon that statute must specify the particular facts which constitute the offense."[15] This case uses the above rule as the sole test by which to determine the sufficiency of an information. It is submitted that this reasoning is incorrect and that the "general or generic" rule is not the true test of sufficiency in that it goes further than necessary and too often supplants the general rule that an information embodying the statutory language of the offense charged is sufficient. An information though in generic terms may still be sufficient when tested by the basic reason for the information—that the accused should be adequately informed of the offense so that he may prepare his defense.

The real problem presented by the instant case is the proper scope of the exception to the rule that the statutory description is sufficient. The majority opinion leaves no doubt that in cases involving fraud the information must particularize and that the language of the statute will not suffice. It relies heavily on the California decisions, with *People v. Walther*[16] as the latest California case cited. In that case the court stated that it is not sufficient to charge a crime based on fraud in the language of the statute because the terms false and fraudulent are general and fall within the excep-

[8]United States v. Carll, 105 U.S. 611 (1881); Sutton v. United States, 79 F.2d 863 (9th Cir. 1935); United States v. Lewis, 110 F.2d 460 (7th Cir. 1940); United States v. Dedof, 42 F. Supp. 57 (E.D. Pa. 1941); State v. Varnado, 208 La. 319, 23 So. 2d 106 (1944); State v. Shannon, 95 Mont. 280, 26 P.2d 360 (1933); State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956); 42 C.J.S., *Indictment and Informations* § 139c (1944).

[9]Boykin v. United States, 11 F.2d 484 (5th Cir. 1926); United States v. Dedof, 42 F. Supp. 57 (E.D. Pa. 1941); State v. Wolf, 56 Mont. 493, 185 Pac. 556 (1919); State v. Molitor, 205 Ore. 421, 289 P.2d 1090 (1955); State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956); 42 C.J.S., *Indictments and Informations* § 139g (1944).

[10]In State v. Bosch, 125 Mont. 566, 242 P.2d 977 (1952), the court, overruling a long line of cases to the contrary, held that there is no authority in the Code allowing a defendant to demand, nor a court to order a bill of particulars.

[11]State v. Varnado, 208 La. 319, 23 So. 2d 106 (1944); see also Annot., 10 A.L.R. 982 (1921), for a statement of the general rule and collection of cases.

[12]R.C.M. 1947, § 94-6403, subd. 2.

[13]R.C.M. 1947, § 94-6405.

[14]56 Mont. 493, 185 Pac. 556 (1919).

[15]Instant case at p. 232. The court in the *Wolf* case, however, also recognized that the reason behind the rule is to inform the accused with reasonable certainty of the nature of the accusation against him to the end that he may prepare for his trial.

[16]27 Cal. App. 2d 583, 81 P.2d 452 (1938).

tion. The Montana court, however, overlooked a still later California decision, *People v. Dunn,* disapproving the *Walther* case on the ground that the court there did not take into consideration the provision in the Penal Code[17] to the effect that pleadings may be used in the words of the enactment describing the offense.[18] It has also been stated elsewhere that it is permissible in California to charge an offense in the language of the statute: "This is forcefully illustrated in cases where fraud is an element of the offense and that statutory definition of the crime may simply include the general term 'fraud' or 'fraudulently.' Where such offense is charged in the words of the statute, the facts constituting the fraud that may be involved need not be alleged."[19] From this it can be seen that the California courts and legislators intended for the exception to apply, if at all, to situations where it is shown that the wording of the information was so general that it did not adequately inform the accused of the charge against him. The Montana court appears to have relied on cases from a jurisdiction that is in fact directly opposed to the view expressed in the instant case. Since Montana does not have the statute which the *Walther* case failed to consider, however, it might be argued that that case is persuasive in this state.

Aside from cases involving fraud, how will the rule laid down in this case affect the pleading of other statutory crimes? Does it infringe on the rule that the language of the statute will generally suffice? To answer these questions we have to look at the phrase "general or generic." The courts have frequently applied the phrase, but without attempting to define it. As applied by the majority in the instant case it means that where an information embodies terms that are general in character the information must necessarily be inadequate to inform the accused of the offense charged. The phrase is made the determinant factor; it is the tool by which the sufficiency of an information is adjudicated. When "general or generic" is the sole test, as in the instant case, it leads to finding that the information is insufficient even though it could be shown by other means to be perfectly sound. It is submitted that the better method to determine whether or not an information is sufficient is by testing it in the light of its

[17]"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. . . ." CAL. PEN. CODE § 952 (Deering 1949).

[18]"No attempt was made in that case [*People v. Walther*] to charge the crime of theft under the provisions of section 952 of the Penal Code. Neither did the court there take into consideration the provisions in said section that 'It [the count in the information or indictment] may be in the words of the enactment describing the offense.' The discussion of this point may very properly be concluded with the following excerpt from People v. Plum, supra: 'Under the pretense of informing the defendant of the nature of the charge against which he was called upon to defend, it was necessary, at the ancient common law, to describe the means by which the homicide was committed, and the nature and extent of the wound and its precise locality; from which it necessarily followed that a trifling variance between the proof and the allegation frequently defeated a conviction, no matter how manifest the guilt of the defendant. It was a long time before legislators and judges discovered that this rule had nothing but the most flimsy pretext to support it.'" People v. Dunn, 40 Cal. App. 2d 6, 104 P.2d 119, 123 (1940).

[19]26 CAL. JUR. 2d, *Indictment and Information* § 57 (1956).

first requirement—*is the accused properly informed of the charge against him?*

Chief Justice Adair in his dissenting opinion sets forth an elaborate analysis of the information and comes to the conclusion that it sufficiently informed Hale of the charge against him. The essence of his argument is that under the Montana Code the legislature has provided the courts with the yardstick to measure the sufficiency of an information. Section 94-6401 states that the Code alone governs the form and sufficiency of criminal pleadings. In section 94-6410 the Code provides that words used in the information are given their common meaning except words and phrases defined by law, which are construed according to their legal meaning. Finally section 94-6412 lists the tests by which to determine the sufficiency of an information.[20] Regardless of the correctness of his conclusion the fact remains that he proceeded in the proper manner—an analysis of the information in the light of the Code provisions.

The intent of the legislature in enacting the above mentioned sections was clearly to do away with the technical and highly impractical requirements of sufficiency under the common law, and to substitute in their place much simpler tests. It is suggested, therefore, that the majority opinion in the instant case, in requiring a more complicated information, has taken a backward step in the progress toward more liberal application of the rules of criminal pleading and practice.

BRUCE D. CRIPPEN

CRIMINAL PROCEDURE—VENUE—PERJURY.—Defendant Rother was alleged to have signed a false affidavit in the presence of a notary public in Lake County, Montana, certifying that he was lawfully entitled to a state gasoline tax refund.[1] The State Board of Equalization, in Lewis and Clark County, received the affidavit through the mails. There was a fair inference that the defendant mailed the letter or gave it to another to be mailed in Missoula or Lake County. Upon prosecution for perjury in Lewis and Clark County the court directed a verdict for the defendant on the ground that the prosecution had failed to prove venue. On appeal to the Montana Supreme Court, *held,* affirmed. The crime of perjury is completed at the place where the perjurer parts with possession of the affidavit by deposit in the mails or delivery to an agent for mailing "with the intent that it be uttered or published as true." *State v. Rother,* 303 P.2d 393 (Mont. 1956) (Justices Adair and Bottomly dissenting).

It is fundamental that a crime is deemed committed in the county,

[20]"The indictment or information is sufficient, if it can be understood therefrom—

. . .

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

[1]REVISED CODES OF MONTANA, 1947, § 84-1818. All section numbers cited herein refer to the REVISED CODES OF MONTANA, 1947, unless noted otherwise.