The Swiss Properties

Lastly, and to a very limited extent, the prospect of recovering illegally acquired wealth deposited in Swiss Banks may be gleaned from the decision of the judicial authorities in Switzerland in the case of *Libyan American Oil Co.* (LIAMCO) v. *The State of Libya*,56 decided by the Swiss Federal Supreme Court in Lausanne, Switzerland, on June 19, 1960. In this case, LIAMCO's assets were nationalized and expropriated by Libya. Arbitral proceedings for compensation were instituted in Geneva. As a result thereof, damages in the amount of $80 Million were awarded to LIAMCO. Based on the award, and for purposes of enforcement, the award was brought before a Zurich District Court, which issued an order of attachment of Libya's deposit in a Swiss Bank. Deciding on appeal, the court held that under Swiss Federal Law, Swiss courts do not have jurisdiction to issue attachment, since enforcement of measures against foreigners require that there must be sufficient domestic relationship for Swiss Court to assume jurisdiction. The court defined "sufficient domestic relationship" under Swiss case law as ' present if the debt was contracted or is to be settled in Switzerland, or if the foreigner, as debror has engaged in actions suited to establish venue in Switzerland." To cap the decision, the court said that "the mere fact that assets of the debtor are located in Switzerland cannot create such a relationship.

Considering strict banking laws in Switzerland, and lack of "sufficient domestic relationship" as defined in *LIAMCO*, the possibility of recovering illegally acquired wealth deposited in Swiss banks through judicial processes, even if we have evidence of the accounts of public officials and private persons who have illegally acquired wealth, does not appear promising The only use of evidence on these accounts, assuming we can obtain the amount deposited (Which is again discouraging in view of Swiss Banking laws), is to use them for purposes of showing that amounts of money acquired during the imcumbency of public officials are manifestly disproportionate to their salary and lawful income under the Unexplained Wealth Act and the rules of the PCGG. But recovering is altogether a different story.[57]

[56] Reported in Recent Developments, Harvard Int'l. Law Journal, Vol. 23.

[57] On the day this lecture was delivered, the Philippine Solicitor General reported that Swiss authorites will turn over to Philippine government authorities a substantial amount of President Marcos' deposits in five (5) Swiss banks. This was subsequently denied by representatives of President Marcos. As of time of writing, there is no known case against President Marcos instituted by Philippine government authorities with any of the Swiss courts, for the recovery of bank deposits in said country.

IMPLICATIONS OF APPRECIATION OF GENERIC AGGRAVATING CIRCUMSTANCES NOT ALLEGED IN THE INFORMATION

by Atty. Donato Faylona*

This article will try to analyze some of the decisions of the Supreme court, in an attempt to resolve the seeming conflict as to whether aggravating circumstances, not alleged in the information, may be appreciated against the accused – in the imposition of the proper penalty.

This article will not discuss nor will it be concerned with any particular generic aggravating circumstance, but will discuss said attending circumstance, in general, as the implication is the same.

JUDICIAL IMPLICATION OF AGGRAVATING CIRCUMSTANCES

Judicially, there are two kinds of aggravating circumstances, generic and qualifying. Generic aggravating circumstances are those aggravating circumstances which serve to increase the imposable penalty to the maximum extent of a specific penalty, without changing the nature of the crime. Qualifying aggravating circumstances are those aggravating circumstances which, when attendant, changes a crime to a graver one. Like evident premeditation or treachery, when present in a homicide, changes the crime of homicide to murder which has a far graver penalty imposable.

CONSTITUTIONAL RIGHT OF THE ACCUSED TO BE INFORMED OF THE NATURE AND THE CRIME CHARGED

In criminal cases, the information serves as the judicial basic charge sheet upon which an accused is informed of the nature and crime of which he is charged.

The object of this written accusation is –

> "xxx To furnish the accused with such a description of the charge against him as a description of the charge against him as will enable him to make his defense; and second, to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and third to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. (United States vs. Cruikshank, 92 U.S. 542). In order that the requirement may be satisfied, facts must be stated; not conclusions of law. Every crime is made up of certain acts and intent; these may be set forth in the complaint with reasonable particularity of time, place, names (plaintiff and defendant), and circumstance necessary to constitute the crime charged. For example, if a malicious intent is a necessary ingredient of the particular offense, then malice must be alleged. In other words, the prosecution will not be permitted to prove, under proper objection, a single material fact unless the same is duly

*Professor of Law, Ateneo College of Law

set forth by proper allegation in his complaint. Proof or evidence of material facts is rendered admissible at the trial by reason of their having been duly alleged in the complaint." (Rex vs. Aspinwall, 2 Q. B. D. 56; Badlaugh vs. Queen, 3. Q. B. D., 607). (U.S. v. Karelsen 3 Phil. 223; 226). xxx"

It is due to this constitutional right of the accused to be informed of the nature of the charge against him, under the Bill of Rights, that the question of whether generic aggravating circumstances, not alleged in the information, may be considered by the court in imposing the penalty.

A GENERIC AGGRAVATING CIRCUMSTANCE ONCE PROVEN MAY BE APPRECIATED IN THE IMPOSITION OF THE PROPER PENALTY

It is well settled that aggravating circumstances once proven, although not alleged in the information, without the objection of the accused may be considered by the court in imposing the proper penalty. The leading case of *People v. Campo,* 23 Phil. 368 succintly discusses this *dictum,* in the following words.

"This rule of practice is justified on the ground that the introduction of such evidence is admitted only for the purpose of showing the precise manner in which the offense actually charged in the complaint was committed; and not for the purpose of changing the legal characterization or designation of the offense charged in the information, or of showing that the offense committed was in fact a higher offense than that charged in the information. It follows, of course, that proof of the existence of one or more aggravating circumstances not expressly charged in the complaint can and should serve no other purpose than that of aiding the court in determining whether the penalty should be imposed in a more or less severe form within the limits prescribed for the offense charged in the complaint or information.

Proof that the commission of an offense charged in the complaint or information was marked by an aggravating circumstance not mentioned therein should not and will not be denied its logical and normal effect in increasing the severity of the penalty to be imposed within the limits prescribed by law for that offense, on the sole ground that, had the aggravating circumstance been set forth in the complaint or information, proof of its existence would have justified the treatment of that circumstance as a qualifying circumstance, and the conviction of the accused of a higher offense than that actually charged."

This has since been reiterated with approval in *People v. Collado* (60 Phil. 610); *People v. Abella,* et al. (450 O.G. 1802) and the case of *People v. Martinez Godinez,* (106 Phil. 597) to name a few.

NO BASIS IN THE BUTLER CASE TO STATE THAT PROOF MAY BE MADE OVER ACCUSED'S OBJECTION.

The question, now, is whether a generic aggravating circumstance not alleged in the information can be proven and considered over and above the objection of the accused. The most recent ruling of the Supreme Court regarding this, is found

in the case of *People v. Ang* 139 SCRA 115, promulgated on 8 Octobe5 1985, which in part, held :

"Generic aggravating circumstances, even if not alleged in the information, *may be proven during the trial over the objection of the defense and may be appreciated in imposing the sentence (People v. Martinez Godinez,* 106 Phil. 597 *c1959* ; People v. Butler 120 Phil. 281 [1983].

The case of *People v. Butler, Ibid,* cited as the authority in the *Ang* case is the *first* instance that the Supreme Court categorically stated the subject *dictum,* i.e., generic aggravating circumstances, even if not alleged in the information, may proven during the trial *over the objection of the defense* and may be appreciated in imposing the sentence. This writer humbly submits that this *dictum* is erroneous and without basis. In fact, it is submitted that it is patently violative of the right of the accused to be informed of the nature of the crime he is charged.

The *Butler* case cites the case of *People vs. Matinez Godinez supra,* as the authority to pronounce the subject *dictum.* Yet, the *Martinez Godinez* case did not involve reception of evidence of any generic aggravating circumstance, over and above the objection of the accused. Said case merely had to pronounce whether a generic aggravating circumstance (disregard to rank in this case) proven during the trial may be appreciated in the imposition of the penalty. The *Martinez Godinez* case cited, with approval, the case of *People v. Collado* (160 Phil. 610) and *People v. Abella,* et al., (450 O.G. 1802) in support of its pronouncement that an aggravating circumstance, even if not alleged in the information, once proven during the trial, may be taken into consideration in the imposition of the proper penalty although the said case never went as far as to say that the same may be proven over the objection of the accused.

The *Collado* case likewise did not have to answer the question as to whether evidence of an aggravating circumstance not alleged in the information may be proven over the objection of the accused. It merely cited the case of *People v. Campo* (23 Phil. 368) which is essentially the basis of the *Martinez Godinez* case. Of all the cases, the *Campo* case is the one that first fully discusses the basis as to why a generic circumstance once proven may be considered in the imposition of the penalty, even though not alleged in the information. A reading of the quoted portion of the *Campo* case earlier cited, *does not,* however, answer the question whether the proof may be made over the objection of the defense.

ACCUSED'S OBJECTION TO PROOF OF FACTS NOT ALLEGED IN THE INFORMATION FOUNDED ON CONSTITUTIONAL RIGHT.

The above quoted portion of the *Karelsen* case, in its discussion of the function of the criminal complaint or information categorically states that :

". . . . . the prosecution will not be permitted to prove, under proper objection, a single material fact unless the same is dualy set forth by proper allegation in his complaint. Proof or evidence of material facts is rendered admissible at the trial by reason of their having been duly alleged in the complaint." (Pep. v. Karelsen *supra).*

In other words, the prosecution is delimited to the facts alleged in the information. It cannot prove facts other than those alleged therein. The accused has the right to rely on the information as the totality of the nature and charge against him. His objections to proof of facts not alleged in the information are but his assertions of his constitutional right to be informed of the charge against him. No evidence may be presented or admitted, over the accused's objections, without violating his constitutional right.

The case of U.S. v. de Mesa (7 Phil. 729) hints at the reason why evidence may not be received without the accused's expressed or at least tacit approval as to facts not alleged in the information, to wit :

"Neither can this court consider, in connection with the accused and his offense, paragraph 17 of said article 10 of the Penal Code — that is to say, consider the prior convictions of the accused for other crimes for which the law provides an equal or greater penalty in cases of two or more prior offenses punishable by a less penalty. Since the certified copies of the sentences rendered against the accused in the former cases were not exhibited during the trial of the present case nor attached to the record herein, a procedure that must be observed in order to take into consideration *the existence or fact of aggravating circumstances connected with the commission of an offense, and this is in the presence and with the knowledge of the accused on trial, the said accused being the one affected and prejudiced by the production of the proof as to such prior convictions,* it is not proper to increase the penalty of the accused." (U.S. v. de Mesa, 7 Phil. 729; 732). (Emphasis supplied.)

Finally in U.S. v. Tieng Pay (42 Phil. 212), the Supreme Court categorically states that "no evidence may be adduced during the trial which not does directly or indirectly tend to prove some of the essential allegations in the complaint.", to wit :

"The lower court also admitted another *expediente* (No. 14213 of the Court of First Instance of the City of Manila). It is admitted in the record that *expediente* (No. 14213) was a case against another defendant, by the name of Tan Tuan, who was not even a defendant in the present case. The record does not show why that *expediente* was admitted in evidence. Objection to the admissibility of said two *expedientes* (Nos. 18100 and 14213) was duly made and erroneously overruled by the lower court.

With reference to the third assignment of error, to wit :That the court erroneously admitted proof of recidivism when recidivism was not charged in the information, it may be said (a) that the law requires that in every criminal case in courts of record a written complaint of the charges of record a written complaint of the charges must be presented; (b) that the complaint must contain a full and complete description of the crime charged, reciting the essential facts; (c) that the same must be read to the accused; and (d) *that no evidence should be adduced during the trial of cause which does not directly or indirectly tend to prove some of the essential allegations of the complaint.* Any evidence presented which does not directly or indirectly tend to prove some of the facts alleged in the complaint should be rejected by the court. Otherwise, and under any other rule, a defendant might be charged with one crime and convicted of a very different and dissimilar crime, which, of course, cannot be sanctioned under a government of law. *In the present case, the lower court admitted evidence of recidivism against the objection of the defendant, without the same having been alleged in the complaint. It must follow, therefore, that the court committed an error in admitting such evidence."* (Ibid, pp. 215-216, Emphasis supplied.)

The same principle has since been reiterated in People v. Luna, 58 SCRA 199, although for a different reason, in the following words :

"The lower court did not err in considering recidivism as aggravating although it was not alleged in the information. *Generally, recidivism should be alleged in the information. If not alleged, it cannot be proven over the objection of the accused* (U.S. vs. Tieng Pay, 42 Phil. 212; U.S. vs. De Mesa.7 Phil. 729). However, in this case, Luna, by his own admission in his confession and on the witness stand, proved that he is a recidivist. At the time he was tried in this case, he had been previously convicted by final judgment of robbery. He had served sentence for it (Art. 14[19], Revised Penal Code)." (Ibid, pp. 208-209, Emphasis Supplied).

RECONCILIATION OF CONFLICT

Resolution of the apparent conflict may be found in answering the question "Is the right of the accused to be informed of the nature of the charge against him, waivable?" If it is waivable, then the conflict is resolved. Certainly, the *Sarabia* case implies that it is waivable.

"He was of course furnished before the trial with a copy of this complaint. He made no objection to its sufficiency, either by demurer or motion or in any other way. Evidence was procured at the trial to show when the offense was committed. He made no objection to this evidence on the ground that the time the defense was committed was not stated in the complaint. Evidence also was presented to show where the offense was committed. He made no objection to this evidence on the ground that the place where the offense was committed was not stated in the complaint. Evidence was produced to show that the defendant was the captain of a steam launch belonging to the Atlantic, Gulf and Pacific Company, and that he was engaged in transporting stone from Mariveles to the works of the port which this company was then engaged in constructing. This evidence tended to show that the defendant was not connected with the Army or Navy, but the defendant made no objection to its introduction on the ground that such fact was not alleged in the complaint. The alleged defects in the complaint which his counsel now points out must have been as apparent to such counsel then as they are now, and why, if the complaint was in fact insufficient and if from it he could not understand the acts with the commission of which his client was charged, he did not take some action to secure further information, that he was sufficiently infomed of the charged and was satisfied with the complaint, understood what it meant, and was willing to go to trial on the assumption that it was sufficient." (U.S. v. Sarabia *supra;* 567-568).

Failure on the part of the accused to object to deficiencies in the information, more so, to object to presentation of evidence, not alleged in the information, stops the accused from complaining about the appreciation of facts proven without his objections (even if they be generic aggravating circumstances which serve to increase the accused's penalty). This ruling is impliedly reiterated in the *de Mesa* case wherein it pronounced that admission of proof of *reiteration* should have been made in the presence of the accused as he would be affected and prejudiced with the heavier penalty imposed. At the very least he should be present to give him the opportunity to assert or waive his right to the admission of such facts.

On the other hand, Prof. Manuel V. Moran, in his Rules of Court, Vol. 2, p. 748, 1952 Edition, stated that the right of the accused to be informed of the nature of charges against him is not waivable as it is impressed with public interest. However, the noted Remedial Law expert did not cite any authorities to support his position. Assuming the position of Prof. Moran is valid, the apparent conflict goes deeper into constitutional law.

Yet, it is opined that the conflict is more seeming than real. Like most rights, the right to be informed of the nature of the charges, is a right that must be asserted. Failure to object is a tacit waiver of such right. The Supreme Court has recently in the cases of People v. Caguioa (95SCKA 2) and People v Comendador (100SC) stated that the right to counsel is a waivable right. In other words it is not absolute. Despite the adoption of the landmark United States case, Arizona vs. Miranda (345 U.S.436) into our constitution, our Supreme Court has seen it clear to state that the right to counsel is not absolute if the same is waived intelligently and voluntarily. The constitution merely requires that the accused be *properly* informed of his rights.

Perhaps, one way of resolving the conflict is to prescind from the fact that a charge has to be made against the accused by the state. This is a *sine qua non* condition. This is constitutionally and procedurally sound. Constitutional, in the sense that is mandates upon the state to initiate the accusation or the charge that informs the accused against which he must defend himself. That knowledge of the charge and the chance to defend himself essentially satisfies the due process requirement as well. Procedurally, a complaint has to be filed that establishes the cause of action of the complainant. For all intents and purposes the criminal information or complaint filed in court handles and fulfills this requirements (U.S. v. *Karelsen, supra).* The existence of the information is indispensable and non-waivable. The right, however, to question the sufficiency if the information is now with the accused. A motion to quash may be filed by him if he deems it fit. Or he may choose to litigate and defend himself upon an imperfect information but he should not claim later a denial of the right to be informed if he chooses the later course of action (U.S. v. Sarabia, *supra*). The right to assert his right to full information of the nature of the charge against him, is not limited to the quashal of the information. This right remains all throughout the trial by his right to object to facts or evidence about to be proven, not alleged in the information (U.S. v. Tieng Pay, *supra*). His failure to object should not detract nor preclude the court to appreciate the implications of such fact, once proven. Hence, it is logical to adopt the rationale of the *Campo* and *Martinez Godinez* cases since then reiterated in the *Collado, Butler* and Ang cases, i.e., facts proven (including generic aggravating circumstances) without objection from the accused, although not alleged in the information, may be considered by the court in the imposition of the proper penalty.

On the other hand, it is erroneous to state, as in the *Butler* and *Ang* cases that proof may be admitted on facts not alleged in the information even over the objection of the accused as it would be clearly violative of the accused's right to be informed of the nature of the charge against himself. Once he asserts his right by his objection to the proof, no evidence may be presented or considered on facts not alleged in the information.

The assertion of the accused of his right to be informed is an assertion of a constitutional right and reception and appreciation of evidence of facts not alleged in the information over his objection thereto, violates his constitutional right. Just as evidence procured without aid of counsel requested by the accused is inadmissible in evidence, the same inadmissibility likewise applies to facts not alleged in the information seasonably objected to by the accused (U.S. v. Tieng Pay, *supra).*

Much has been said by the Court that the appreciation of a generic aggravating circumstance proven during the trial though not alleged in the information as it does not change the nature of the crime. This is true, but it does not detract from the fact that appreciation of even one generic aggravating circumstances serves to increase the penalty by a substantial period of time, depending on the penalty imposable for a particular crime, even though imposed within the extent of the imposable penalty. Thus, the accused has every right to object to proof of aggravating circumstance not alleged in the information as he will be "the one affected and prejudiced by the production of the proof"(People v. de Mesa, *supra).*