

**SPECIAL PROCEDURE FOR THE CHARGING OF
OFFENCES AGGRAVATED BY PREVIOUS
CONVICTIONS AND ITS RATIONALE:
IMPLEMENTED IN ALL INSTANCES?**

by Yoseph Gebre Egziabher*

Article 114 of the Criminal Procedure Code of Ethiopia provides a special procedure for charging aggravated offences due to previous convictions. According to this Article, where the offence an accused has committed is an offence aggravated by the accused's previous convictions, he may not be charged with the aggravated offence. Instead he must be charged with the unaggravated offence. It is only after conviction, if any, that the prosecutor may cite the convicted person's previous convictions for purposes of aggravation.

The question that comes to one's mind is Why provide a special procedure? Why not charge the accused with the aggravated offence. One obvious answer to this could be as shown below: The purpose of trial is to prove whether or not an offence has been committed. If an accused had been previously convicted, it means that whatever offence had been committed had been previously proved. What must be stated in a charge is what must be proved. Therefore it is unnecessary to allege previous convictions in a charge.

However, this cannot be the main consideration taken into account in deciding to provide the special procedure, since the prosecutor would have to "prove the previous convictions of the accused."¹ It therefore seems immaterial to delineate the time as to when previous convictions should be proved, had it not been for a different purpose.

The rationale for providing the special procedure seems to emanate from Article 138 of the Criminal Procedure Code. According to this Article, previous convictions of an accused person may not be disclosed to trial court before the accused person is convicted unless the law expressly provides;² nor should an accused person's convictions be included in the record of any preliminary inquiry.

The purpose behind Article 138 seems to be to eliminate any prejudicial effect on the trial court which is a trier of facts as well. If prior convictions are disclosed to the trial court, it may be prejudiced before hearing evidence on the issue before it, i.e. did the accused commit the particular offence with

* Lecturer, Faculty of Law, Addis Ababa University

1. Crim. Pro.C., Art. 114 (2)

2. The Phrase "unless otherwise expressly provided by law" seems to be a reference to the law of evidence. The rule enunciated in this Article is a rule found in the law of evidence in Common Law Jurisdictions. See P.N. Ramaswami & S. Rajogopalan. *Woodroffe & Ameer Ali's Law of Evidence In India* (Law Book Company Allahabad, 11th ed. 1963) Vol 11, pp. 1159-73 and G.D. Nokes, *An Introduction to evidence* (London Sweet & Maxwell 4th ed. 1967) pp. 136-41 for evidence. That our Criminal Procedure Code's foreign sources are both common law and civil law systems see Stanley Z. Fisher, *Ethiopian Criminal Procedure: A Source Book* (Faculty of Law, Addis Ababa University in association with Oxford University Press, 1969) pp. iv - xii (Historical Introduction). Thus, following the traditional civil law approach, we have a law on evidence in the law of Criminal Procedure. That this is typical civil law approach to evidence, see Civ. C., Art. 2001-2026 which deal with evidence and yet are made part of the substantive law of our Civil Code.

which he stands charged?³ That this seems to be the rationale behind this Article is buttressed by the non-reference to police investigation report in this provision since, in contradistinction to police investigation report, the original preliminary inquiry record must be sent to the Registrar of the High Court, the High Court being the exclusive trial court in relation to offences on which preliminary inquiry may be conducted.⁴ As the duty of the Registrar is to transmit charges to divisions of courts, that the original of the preliminary inquiry record will have to be submitted to that division of the High Court which may try⁵ the case seems to be clear. As opposed to this, the police investigation report must be sent to the Public Prosecutor,⁶ who will, generally speaking,⁷ be the only authority among those involved in trial to have access to it. And, as can be clearly seen from the provision, the Public Prosecutor is expected to rely not on the basis of prior convictions but on the basis of evidence as disclosed by the police investigation report in relation to the offence with which the accused will stand charged. Thus, if prior convictions are included in a preliminary inquiry record, the trial court will be aware of the prior convictions of an accused before trial and may be prejudiced against the accused. This would defeat the rationale. But, in relation to police investigation report, since it is within the jurisdiction of the prosecution, inclusion of prior conviction records will not, it seems to be presumed, have any detrimental effect on a "fair trial."⁸

It is only after conviction, if any, and before sentence that prior convictions should

be cited for purposes of aggravation. Had the rationale for providing special procedure in relation to aggravated offences due to previous convictions not been to provide a neutral forum for trial by implementing the principle stated in Art. 138, there would not have been any need for the special procedure.

Whether or not the accused is an habitual offender can, it seems obvious, be proved only by producing prior convictions. One can foresee a situation where an offender is apprehended and, on examination, it is found out that he has committed several offences against property, say theft, each offence with "renewed guilt."⁹ However, this situation will be governed under Article 189 of the Penal Code, and although the end result will be aggravation of penalty, it will be aggravation of penalty on the basis of Article 189 of the Penal Code and not aggravated penalty due to violation of an aggravated offence. Prior convictions may also play a role in determining whether or not an offender has made a profession of committing acts proscribed by the penal law. Thus, if the prosecution can prove that an offender has prior convictions on abortion, the trial court can conclude that the offender has made a profession of the offence.

As noted above, if the prosecution is of the opinion that an offender should be convicted of an offence aggravated by prior convictions, the offender must be charged with the unaggravated offence and the charge must be filed in the court that has jurisdiction to try the aggravated offence. Thus, if the rationale behind Article 138 of the Criminal

3. For statements that this is the reason why prior convictions are not disclosed before conviction in common law jurisdictions, see John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in trials at Common Law* (Boston Little, Brown and Company, 3rd ed. 1940), vol 1 pp. 412-415 and 454-456.

4. Crim. Pro. C., Art. 80 (2).

5. The Prosecutor has the duty to refuse to institute proceedings under Art. 42 (1) (a) of the Crim. Pro. C. where he is of the opinion that there is no sufficient evidence to justify conviction. Although there is no reference to Preliminary inquiry record in this Article, an examination of Articles 80 (2) and 109 (1) of the Code shows that Art. 42 (1) (a) should also be applicable to Preliminary inquiry records that do not disclose sufficient evidence to justify conviction. On this point see p. Graven, "La Nouvelle Procedure Penale Ethiopienne," *Rev. Penals Suisse*, 79e annee, 1963, note 22 as cited in Stanley Z. Fisheer, *Ethiopian Criminal Procedure- A Source Book* (Faculty of Law, Addis Ababa University in association with Oxford University Press, 1969), p. 200.

7. See Crim. Pro. C., Art. 145, however.

8. The question may be raised, "how about the prejudicial effect that prior convictions may have on a fair investigation?" However, the Code is silent on this point.

9. See Pen. C., Art. 60-63.

Procedure Code for the implementation of which the special procedure is devised is to have effect on all offences aggravated due to prior convictions, it is necessary to determine material jurisdiction of courts such that the court that tries the aggravated offence must be the same court that should try the unaggravated offence in cases where prior convictions are made elements of aggravated offences.

The Penal Code of Ethiopia defines aggravated offences due to prior convictions in a number of special part Articles. The phrases used in the different special part Articles are "has made a profession" (Article 365 on offences against the fiscal and economic interests of the state), "of an habitual or professional nature" (Article 381 (1) on offences against currencies or against official seals, stamps or instruments), "an habitual offender" (Article 420 (1) on offences against the public interest or the Community: Falsification of goods), "makes a profession" (Article 517 as aggravation to the offences defined in Articles 515 and 516), "has habitually made a profession" (Article 531 (1) as aggravation of the offence of abortion), "makes a profession of" (Article 601 (1)(b) on offences against morals and the family), "professional procuring" (Article 606 on offences against morals and the family: Exploitation of the immorality of others), "a habitual thief or habitually commits other offences against property" (Article 635 (3) (a) on offences against property), "committed habitually" (Article 637 (2) second proviso on offences against property), "habitually commits the offence" (Article 658 (a) on offences against rights in property) and "a habitual offender" (Article 670 (a) on offences against rights in property).

An examination of these special part Articles of the Penal Code reveals that there are two approaches taken on aggravation of offences.

These are:

- (a) defining circumstances that bring about aggravation in one special part Article and providing that

where the defined aggravating circumstances exist in relation to any unaggravated offence, the material jurisdiction of which is assigned to one and only one court, the penalty shall be aggravated;¹⁰ and

- (b) defining circumstances that bring about aggravation in a special part Article and making this special part Article an independent offence the material jurisdiction of which is assigned to one court; whereas the material jurisdiction of the unaggravated offence may or may not necessarily be assigned to the same court.¹¹

Where the special part Article defines aggravating circumstances as stated in (a) above, the rationale behind Article 138 of the Criminal Procedure Code is implemented. This is true for the simple reason that as the aggravating special part Article is a provision common to all the provisions in the section, it is not a provision that is designed to define an offence and therefore not a provision that can be assigned to a given court when one takes into consideration the material jurisdiction of courts. Thus, it is clear that the same court will always have material jurisdiction over the offence whether or not an offender is to be convicted of an aggravated offence due to previous convictions, and the fear cannot materialize that when an offender stands charged before it of an unaggravated offence the jurisdiction of which is of a lower court in the hierarchy of our court system a court may suspect that it is due to the offender's prior convictions that he stands charged before it.

In the other category of offences mentioned in (b) above, however, unless the material jurisdiction of an unaggravated offence and the corresponding aggravated offence due to prior convictions is vested in one and the same court, the rationale behind Article 138 of the Criminal Procedure Code is violated because of the special procedure itself. This can be seen from Article 114 of the code that establishes the special procedure. In this Article, the possibility that the material

10. See, for example, Pen. C., Art. 365 and 381.

11. See, for example, Pen. C., Art. 630 and 635 and 636 and 367.

jurisdiction of an unaggravated offence and an aggravated offence can be in two different courts in the hierarchy of our court structure is anticipated, and the Article provides that where such a possibility materialises, the charge should be filed in the court that has material jurisdiction to try the corresponding aggravated offence.

To illustrate this, let us take Article 637 (1) of the Penal Code. An examination of those aggravating circumstances under this sub-Article (leaving aside sub-Article 1 (b) for the moment) shows that they are circumstances that must be alleged in the charge at the outset and proved at the trial. This is for the simple reason that aggravation under these circumstances does not depend on prior convictions. But, if we take sub-Article 1 (b), the aggravating circumstance is, obviously, prior conviction. If the material jurisdictions of Articles 636 and 637 of the Penal Code were to be that of Awraja Court and High Court respectively, an offender to be convicted in the opinion of the prosecutor of robbery aggravated by prior convictions must be charged with Article 636 and not 637, and the charge must be filed in the High Court and not the Awraja Court. But it is only in cases of aggravation due to prior convictions that an offender would have to be charged under Article 636. Therefore, the High Court would, obviously, before trial and conviction know in advance that the accused stands charged before it because of prior convictions.

This possible defeat of the rationale could be purely theoretical if the material jurisdiction of an unaggravated offence and the corresponding aggravated offence is vested in the same court. Therefore, one must examine material jurisdiction of courts in relation to these offences to see whether or not this possible theoretical defeat of the rationale materializes.

An examination of the repealed First Schedule of the Criminal Procedure Code in relation to the category of offences mentioned in (b) above shows that except for aggravated unnatural carnal offences (Article 601 (1) (b)) and aggravated theft (Article 635

(3) (a)), the court that has jurisdiction to try the unaggravated offence is the same court that has jurisdiction to try the corresponding aggravated offence. In relation to these offences, therefore, since the rationale of Article 138 of the Criminal Procedure Code is implemented by the special procedure, the special procedure would always achieve the purpose.

However, in relation to aggravated unnatural carnal offences and aggravated theft, the repealed assignment of material jurisdiction of courts, as can be seen in the First Schedule to the Criminal Procedure Code, violates the rationale behind Article 138 of the Criminal Procedure Code. Therefore, in relation to these offences, the special procedure fails to serve the purpose.

The amended material jurisdiction of courts¹² reinstates the rationale behind Article 138 of the Criminal Procedure Code in relation to aggravated unnatural carnal offences by assigning the material jurisdiction of unaggravated and aggravated carnal offences to the Awraja court. In relation to theft and aggravated theft (Articles 630 and 635 (3) (a)) due to prior conviction, however, the rationale behind Article 138 of the Criminal Procedure Code is violated as anticipated by the special procedure, since the court that has material jurisdiction to try theft is the Wereda Court, whereas the court that has material jurisdiction to try aggravated theft is the Awradja Court which has the duty-pursuant to the second proviso of Article 110 of the Criminal Procedure Code-not to refuse a charge under Article 630 of the Penal Code, despite its possible prejudice against the accused person. And, incidentally, is it not possible that the prejudice may itself cause result in conviction?

CONCLUSION

The possibility that the rationale behind Article 138 of the Criminal Procedure Code may not be implemented in all offences aggravated due to prior convictions is anticipated in Article 114 of the Code, establishing the special procedure to implement the

12. Criminal Procedure Code Amendment Regulations, 1975, Art. 3, Legal Notice No. 17, *Neg.Gaz.*, Year 34, No. 38.

rationale. That the rationale is not to be implemented in relation to theft and aggravated theft is foreseen by the second proviso of Article 110 of the Code.

However, as seen above, the rationale behind providing the special procedure seems to be intended to implement Article 138 in order to avoid any prejudicial effect that prior convictions may have on an accused during trial. That the prejudice might play a role in a verdict of guilt and that the verdict

would have been otherwise had it not been for the prejudice seems to be a legitimate inference from human nature. Therefore, since the rationale behind Article 138 of the Ethiopian Criminal Procedure Code seems to be a rationale worth defending in relation to all offences aggravated by previous convictions regardless of their nature, the Law Revision Committee of the Ministry of Law and Justice should, in the opinion of the writer, consider it.

