cruing from the maintenance of the secrecy of the news source and that from the realization of a fair trial."

[Comment]

This is the first case concerning whether or not a newspaper reporter can refuse to testify for the sake of maintaining the secret of his news source when summoned for questioning as a witness. On this score an argument is under way in academic circles on whether or not the "professional secrets" in the Code of Civil Procedure § 281 (1) (iii), include the news source of a reporter. In modern society, the question of the news source of newspaper reporters and refusal to testify has increasingly gained importance. The fact that an opinion in favor of refusal to testify in a civil action was offered in the current decision will have an important bearing in the future as the first such legal precedent.

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5. Criminal Law and Procedure

a. Criminal Law

1. Minamata disease originating in a child en ventre sa mère, and the crime of inflicting injury or causing death by negligence in the performance of work.

Decision at the second criminal division, the Kumamoto District Court, March 22, 1979. (Case No. (*wa*) 164 of 1976, Charges of inflicting injury or causing death by negligence in the performance of work. 931 *Hanrei Jihō* 6.)

–The decision in the first instance dealing with the criminal charge concerning the Minamata disease in Kumamoto–

[Reference: Criminal Code § 211, first half]

[Issues]

(1) Harmful act on a child en ventre sa mère and the formation of the crime of inflicting injury or causing death by negligence in the performance of work.

(2) Establishment of separate causations and epidemiological evidence.

(3) Whether or not the occurrence of such results could have been foreseen and the concrete degree of being foreseeable.

(4) Noxious waste water containing methyl chloride mercury was discharged by a plant, and the persons who ingested it orally by means of fish and shellfish developed a toxic disease causing trouble in the nervous system and later died. In this case, both the present executive of the said company and the superintendent of the plant were held responsible.

[Opinions of the Court]

On the death, the cause of which can be traced to the child en ventre sa mère:

By nature, there are signs of "human" functions in a child en ventre sa mère. In case a harmful act is inflicted on the child en ventre sa mère from outside and the signs of "human" functions are adversely affected, there fully exists the danger, when it becomes a "person" after birth, of developing symptoms leading to death, in other words, as the consequence of the factors comprising the crime of inflicting injury or causing death by negligence in the performance of work.

In this connection, when there exists the danger of developing symptoms leading to the death of a "person," there is no reason why it should have to be a "person," an object against which a certain act was committed. Since the "person," which is an object, existed at the time the results occurred leading to the death of the human, it is enough to form a case. In the case of the crime of inflicting injury or causing death by negligence in the performance of work, ordinarily there exists a "person," the object of the deeds. But, the existence of a "person" is not

necessarily a requirement for the execution of the actual act.

On causation:

Viewed from the epidemiological standpoint, separate causations can be found between the defendants' act of discharging the waste water and the victims' development of trouble.

On foreseeability:

With regard to the foreseeability of the occurrence of such results, it is enough if the process of the basic causation between the said act and the occurrence of the results can be foreseen, when viewed from the standpoint of an ordinary man and under the specific circumstances in which the person who committed the said act was placed. It is neither necessary that the process of causation should be foreseen one by one in detail nor is it to be foreseen with the endorsement of expert knowledge.

[Comment]

In the current decision dealing with the charge against the public hazards committed by an enterprise, the criminal liability of the company president and the plant superintendent was recognized. A new problem was submitted in the current case as a point of dispute in criminal theory, that is, whether or not the crime of inflicting injury or causing death by negligence in the performance of work can be formed after one's birth on the ground of an injury inflicted on a child en ventre sa mère by negligence in the performance of work.

The court in this instance handed down an affirmative decision on this score, although there existed theoretical disputes. The prevailing views in the affirmative are more or less similar in principle to the gist of the judgment. The decision in the current case maintains that the crime of inflicting injury on the "person" or "human" was committed at the time of birth. However, an academic theory has it that in the case of the Minamata disease of the child en ventre sa mère, the result of the injury occurred legally at the time when the Minamata disease of the child en ventre sa mère was confirmed after the lapse of a considerable period of time following birth.

The negative views contend that in view of the fact that an abortion by negligence is not punished under the present Criminal Code, it is unreasonable to punish the injury on the unborn child by less grave negligence.

Moreover, opinions are divided as to whether or not the existence of a "person" is necessary at the time when the act of inflicting an injury is committed.

The decision is also considered likely to cause big arguments in that the epidemiological causation was taken up as its premise, and that with regard to the foreseeability of the outcome of the results it was enough whether an ordinary man could foresee the basic process of the causation under concrete circumstances.

2. The liability of the accused for bringing narcotics into Japan, taking them for stimulants by mistake, and importing them without customs clearance.

Decision by the First Petty Bench, the Supreme Court, March 27, 1979. (Case No. (*a*) 836 of 1977. Charges against violation of Narcotics Control Act and Customs Act. 33 *Keishū* 140.)

[Reference: Criminal Code § 38 (1) and (2).]

[Issues]

1) The liability of the accused for importing narcotics, powdered diacetylmorphine, for business purposes by taking them for stimulants by mistake.

2) The liability of the accused for importing the narcotics without clearance of the superintendent of a customhouse by taking them for stimulants by mistake.

[Opinions of the Court]

1) Since it is thought reasonable to believe that the conditions constituting the offenses of importing stimulants and narcotics overlap, the intention of committing the resultant offense of importing narcotics cannot be barred. Hence, the crime of importing narcotics can be established in accordance of the Narcotics Control Act § § 64 (2) and 12 (1).

2) It is reasonable to interpret that the offense relating to the import of stimulants without permit and the offense concerning the import of contraband goods such as narcotics overlap in requirements constituting such crimes, since the actions of importing similar goods without going through customs formalities are subject to punishment. So far as the conditions for constituting both offenses overlap, the intention of committing the lesser crime of importing the stimulants without permit can be recognized, thus substantiating the crime of importing without license as stipulated in the Customs Act § 111(1).

[Comment]

Major problems presented in the current decision were the bounds of the mistake of concrete fact and the mistake of abstract fact in the issue of 1) and the applicability to the provisions concerned of the abstract fact in the case of 2).

In the issue of 1), it is reasonable to interpret that the conditions for constituting the two cases overlap, although the mistake of the accused concerning drugs of this type is a mistake of abstract fact, and it is generally understood that intention with regard to the resultant offense of importing narcotics cannot be barred. The current case is worthy of note in that the theory supporting the correspondence of the conditions constituting the offenses was adopted. In other words, it is made clear that some cases can be interpreted as belonging to the same conditions regardless of the fact they are stipulated in the same law and same articles. It must also be noted that others hold the current decision as based on the interpretation of the mistake as that of concrete fact.

With regard to the decision on 2), a clear-cut judgment was made on the application of the Criminal Code, Article 38, Paragraph 2. There is little doubt that when a person who committed a crime was not, at the time of commission, aware of the fact that he was committing a crime (B) graver than the one (A) he thought it to be, he will be punished according to the provisions stipulating the crime (A). But, the question is whether

or not the crime (A) alone can be substantiated or the crime (B). In the current decision, the Supreme Court made it clear that the crime (A) is substantiated so long as the conditions constituting offenses overlap, thereby clarifying the interpretation of Article 38, Paragraph 2, by making the name of the crime consistent with the penalty.

3. The liability of accomplices who conspired to inflict assault and mayhem when one of them happened to commit homicide.

Decision at the First Petty Bench, the Supreme Court, April 13, 1979. (Case No. (*a*) 2113 of 1977. Changes of violation of laws concerning punishment for bodily injury resulting in death, obstruction of execution of official duties, blackmail acts of violence, false imprisonment, mayhem and violation of the law regulating "*Fuzoku*" businesses which may affect public morals. 33 *Keishū* 179.)

[Reference: Criminal Code § § 205 (1), 60, 199 and 205 (1)]

[Opinions of the Court]

Since the only subjective difference concerning homicide and the crime of causing death as a result of bodily injuries is whether or not there existed an intent to kill and the remaining factors constituting the respective crimes are the same, other accomplices who had no murderous intent should be regarded as co-principals of the less grave crime of inflicting injuries resulting in death, within the bounds in which the factors required of co-principals of the homicide overlap with those required of the co-principals of the crime of causing death as a result of the injuries.

[Comment]

In the current case, the question was raised that when one of the co-principals had committed an act beyond the conspiracy agreed upon, within what scope can a crime be formed against the rest of the co-principals? On this problem, opinions have

been varied according to the theoretical interpretation of the structure of joint criminal participation, and existing judicial precedents have not necessarily been clear.

It was ruled, in the current case, that even if A committed a graver crime (homicide) as a matter of objective fact, B et al. who had no intent to kill shall be subject only to the less grave crime (inflicting injuries resulting in death) as co-principals in terms of the crime itself as well as in terms of the punishment.

There was no direct mention about the relation between A's homicide and B et al.'s crime of inflicting injuries resulting in death, however. On this point, the following views are maintained in the academic circles: (1) A and B et al. are co-principals within the bounds of the crime of inflicting an injury resulting in death, while A should be taken as having committed homicide as a single-handed offense which includes an act as a co-principal of the crime of inflicting injuries resulting in death. (2) A and B et al. are co-principals within the scope of the crimes of assault and mayhem. At the same time, B et al. are subject to the crime of inflicting an injury resulting in death as a single-handed offense while A is subjected to homicide as a single-handed crime. (3) A and B et al. are co-principals within the scope of the crimes of assault and mayhem, and A is subject to homicide as a single-handed offense while B et al. are co-principals of the crime of inflicting an injury resulting in death.

In short, as a result of the current decision, when an act is committed in excess of the scope of conspiracy, the formation of a crime itself is to be confined to the less grave crime, to say nothing of the application of resultant punishment, in dealing with those who had no intent to commit other than the less grave crime.

4. A case on violence used toward a JNR diesel railcar driver which was adjudged as constituting the crime of obstructing the performance of official duties.

Decision at the First Petty Bench, the Supreme Court, Jan. 10, 1979. (Case No. (*a*) 549 of 1978. Charges of assault and

obstruction of the performance of official duties. 33 *Keishū* 1.)

[Reference: Criminal Code § 95 (1)]

[Opinions of the Court]

An assault inflicted on the diesel railcar driver, who was then walking on a platform to take a final roll call by an assistant station master in charge of train operations, after having completed the procedure of takeover and change of duties with a driver of a junction station in the motorman's cabin of an express train constitutes the crime of obstructing the performance of official duties.

[Comment]

In the current case, the question was raised as to the meaning of the passage " . . . in the performance of his duties" in the crime of obstructing the performance of official duties. Since the final roll call is part of the work directly linked with the work of train operations, the driver in question was regarded as involved in the performance of his duties then.

It must also be noted that Justice Dando voiced a dissenting opinion that the formation of the crime of obstructing the performance of official duties should not be recognized with regard to the worksite operation of the employees of the Japanese National Railways.

However, the majority view in the current decision which followed the existing judicial decisions had taken it for granted that the worksite operation of those "who are thought of as public servants" like the JNR employees should be interpreted as work mentioned in the crime of obstructing the performance of official duties. Theoretically speaking, however, opinions are divided on this score.

5. The person in charge of the development and production of saunas and the crime of fire caused as a result of failure to take necessary occupational, professional or routine precautions.

Decision at the Second Petty Bench, the Supreme Court, Nov. 19, 1974. (Case No. (*a*) 989 of 1978. Charges of fire caused as a result of failure to take necessary occupational precautions and the charge of causing death due to negligence in the performance of work. 33 *Keishū* 728.)

[Reference: Criminal Code § 117.2. and § 116 (1)]

[Opinions of the Court]

With regard to the knockdown sauna involved in the current case, there is a danger of the wooden bench catching fire through its electric heater overheating when used for a long period. The defendants being in charge of the development and manufacturing of knockdown sauna are obligated to take care of fire preventive steps, as part of their work, by investigating and securing the fire resistance of its structure. In this regard, the defendants should be considered subject to the crime of fire caused as a result of their failure to take necessary occupational precautions if fire should be caused through the process recognized in the original judgment.

[Comment]

In the current case, the meaning of occupation in the crime of fire caused as a result of failure to take necessary occupational precautions was disputed. The scope of occupational work, as seen in existing judicial decisions, is as follows:
1) It is not confined to work directly handling fire likely to be responsible for fire mishaps, 2) it is work handling material and equipment highly probable to cause fire, and 3) it includes work concerned with the discovery and prevention of fire, although it may not be related to the actual handling of fire. The current decision can be considered as relating to the aforementioned category 2), but it is commented in some circles that the decision has made a wider interpretation of the scope of occupational work.

The meaning of occupational work in "occupational negligence" is generally understood to be as follows: 1) It must be based on the status of social life, 2) the work in question should

be characterized by its repetition and continuity, and 3) the work itself must be of a dangerous nature.

In the case of the crime of inflicting an injury or causing death due to occupational negligence, importance is usually attached to the requirements mentioned in 2) and 3), but in the case of the crime of fire due to occupational negligence, the scope excludes housewives handling fire in their daily life and smokers, and, as a result, the requirement 1) has to be given more importance. Such is the view expressed in some academic circles.

6. The interpretation of the provision regarding the "reduction of penalty by reason of release" in crimes of kidnaping by force or allurement.

Decision by the Third Petty Bench, the Supreme Court, June 26, 1979. (Case No. (*a*) 1407 of 1978. Charge of kidnaping for the object of procuring surrender of property. 33 *Keishū* 364.)

[Reference: Criminal Code § 228 (2)]

[Issues]

1) The meaning of "safe place" as mentioned in the Criminal Code, § 228 (2).

2) The case in which the kidnapped was "released at a safe place" as described in the Criminal Code § 228 (2).

[Opinions of the Court]

1) "The safe place" mentioned in the Criminal Code, Article 228, Paragraph 2 means a place where the kidnaped can be safely rescued by his close relatives and the police authorities, and that the kidnaped shall not be exposed to danger in concrete or realistic terms until such time as he is rescued. Even if there exists "vague, abstract danger or a sense of uneasiness or danger," it does not immediately constitute a "lack of safety."

2) The kidnaper who abducted a first-year primary school pupil had released the child on a side road in a farm village area some several kilometers away, in a direct line, from the child's home.

The place itself was not dangerous and the culprit had made various attempts to return the child to the latter's home as shown by the court decision. Under such circumstances, it could be said that the child was released at a "safe place" as designated by the Criminal Code, Article 228, Paragraph 2.

[Comment]

This was the first decision ever made by the Supreme Court on the provision for a reduction of penalty by reason of "release" as stated in the Criminal Code, Article 228, Paragraph 2. Moreover, it is worthy of note that the decision laid down a course aimed at interpreting the article in question in a forward-looking manner. The decision also made a relatively wider interpretation of "safe place" in consideration of the characterization and purpose of the said article.

The characterization of the article, however, still remains problematical whether or not it should be based on a reduction of responsibility as in the case of the voluntary desistance from a crime or on simple criminal policy consideration. At any rate, the current decision seems to have given consideration to the safe rescue of the kidnaped in order to avoid tragic results in the crimes of kidnaping for ransom. Accordingly, it appears that importance has been attached to the fact that the child was released instead of making a strict evaluation of all the prevailing circumstances.

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b. Law of Criminal Procedure

1. The case in which a request for dismissal and reappointment of state-appointed defense counsel was turned down.

Decision by Third Petty Bench, the Supreme Court, July 24, 1979. (Case No. (*a*) 798 of 1976. Charges against assembly