

to necessary limits.

But, the current decision apparently rejected such standards, because it believed that allegations of facts having relation to the public interest of society as a whole are useful for the promotion of public welfare.

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b. Law of Criminal Procedure

1. Stop and Search and Exclusionary Rule.

Decision by the Second Criminal Department, the Osaka High Court, on Jan. 23, 1981. Case No. (*u*) 1043 of 1979. Charges of violation of the Stimulant Drug Control Act. 998 *Hanrei Jihō* 126.

[Fact]

An investigator, while conducting an investigation of a robbery, happened on the defendant and stopped and questioned him on suspicion of theft. Upon searching him, the investigator discovered stimulant drugs in his clothing.

The defendant was indicted for unlawful possession of stimulant drugs.

[Opinion of the Court]

Since the defendant was suspected of theft and evidence of theft (coins stolen from a game machine) was under their noses, further search for stolen goods shall not be allowed.

At that time, there was no probability of the defendant carrying a dangerous weapon with him nor the necessity and urgency of searching him. The act of reaching into his pocket and taking out the contents evidently overstepped the bounds of the purpose,

method and limit of ex-officio questioning and search.

The investigator was also aware that his investigation had gone too far by searching. Therefore, the unlawfulness in the investigation is very serious viewed from the standpoint of restraining unlawful investigation in the future and from the standpoint of judicial integrity consistent with reason. In this connection, the admissibility of evidence of stimulant drugs has to be denied.

[Comments]

As for the legal limit of searching or checking upon personal effects, the Supreme Court (Decision on June 20, 1978, 32 *Keishū* 670) listed the following factors to be considered: "necessity and urgency of conducting a search, and the balance between the legal benefit of an individual to be injured by such an act and the protection of public interest."

The current decision made an issue out of the necessity of discovery of evidence and dangerous weapons, etc. and made a strict acknowledgment of such necessity. In other words, the decision stated that the manner of the action, in which the investigator immediately reached into the pocket of the defendant and searched him, was unlawful and that the permissible scope of investigation should be running the hands over his clothing.

The current decision also sought the basis of exclusionary rule, not only in the restraint of unlawful investigation but in judicial integrity. While the Supreme Court only thought of the restraint of unlawful investigation, the current decision expanded the purport of exclusionary rule.

The decision also pointed out the investigator's awareness of illegality in connection with exclusionary rule. This has no more special meaning than merely emphasizing that the investigation in question was objectively unlawful procedure, and it seems that the decision was not meant to regard the subjective view of the investigator as an independent requirement for exclusionary rule.

[Reference: Act Concerning Execution of Duties by Police, §2]

2. Specification of Counts.

Decision by the First Petty Bench, the Supreme Court, on Apr. 25, 1981. Case No. (a) 1593 of 1980. Charges of violation of the Stimulant Drug Control Act. 35 *Keishū* 116.

[Opinion of the Court]

There is considerable obscurity concerning time, date and place in the record of facts constituting the offense with which the defendant was charged in the current case, and indication of the amount of drugs and method of usage is not very clear.

Since the prosecutor specified the counts as much as he possibly could on the basis of the evidence at the time of indictment, the said record of entries can be considered effective in specifying the counts in the crime of using stimulant drugs.

[Comment]

Counts are the assertion of the prosecutor, that is, the assertion of concrete facts.

According to the Code of Criminal Procedure, Article 256 (3), facts constituting the offense shall be stated by clearly indicating the counts by means of “time, place and method”. If the prosecutor fails to specify the counts, the judge must dismiss the prosecution (Code of Criminal Procedure § 338 (iv)). But, if the prosecutor amends this immediately, the prosecution can be considered valid.

Since there have been cases in which it is difficult to pinpoint the time, date place and method of a crime, the law provides that specifying “as much as possible” is sufficient. (Code of Criminal Procedure § 256 (3)). However, the judgment on the specification of counts must be made prudently, otherwise the defendant’s right will not be protected.

One academic theory has it that material with which to judge whether or not the counts are clear should be confined to the assertions of the prosecutors entered in the written indictment. According to this view, criticism may possibly arise that the current decision has virtually regarded the outcome of the taking of evidence as such material.

[Reference: Code of Criminal Procedure § § 256 (3), 338 (iv)]

3. Lawfulness and admissibility of evidence of secret tape recordings.

Decision by the Third Petty Bench, the Supreme Court, on Nov. 20, 1981. Case No (a) 490 of 1980. Charges of the act of minor offense. 35 *Keishū* 797.

[Opinions of the Court]

The two sound recording tapes submitted as evidence in the current "hoax phone call" case were both recorded without the consent of the defendant. (In this case, the defendant, an assistant judge in active service, telephoned the prime minister using the name of the public prosecutor general and discussed with him the punishment and other matters relating to the Lockheed payoff scandal, and he was indicted for impersonating someone using an official title, as prescribed in the Minor Offense Act, Article 1(xv).)

One of the tapes was a reproduction of the "hoax phone call" which the defendant let a newspaper reporter listen to for the purpose of having it carried in a newspaper, and included the conversation exchanged between the defendant and the reporter prior to the playback, which the reporter taped to record accurately the outcome of his coverage.

The other tape recorded the telephone conversation exchanged between the defendant and the reporter concerning the "hoax phone call" which the reporter taped for the same purpose. At that time, the defendant became vaguely aware that he was being recorded on a tape, but felt that it was of no consequence. The recording of the conversation by one of the speakers, under the circumstances mentioned above, should be considered lawful even if it was conducted without the consent of the other party.

[Comment]

There are conflicting views about tape recordings of conversations held in secret without the consent of one of the parties or the

wire tapping of conversations by a third person with the consent of one of the parties to the conversation.

The majority view supports that it is lawful while the minority view considers it unlawful. The majority view is based on the contention that the party to the conversation cannot claim secrecy when he leaves the contents of the conversation at the disposal of the other party, and the other party dispose of the contents and abandons them.

The minority opinion attaches importance to the protection of the privacy or personal rights of the speakers.

Under the circumstances where opinions in the lower courts are divided into pros and cons the current decision was the first of its kind ever ruled by the Supreme Court concerning the lawfulness of secret sound recordings, and is worthy of special attention.

The current decision, however, merely served to determine that as an individual judgment it was not unlawful under the circumstances, as in the current case, and did not go into the dispute at issue. Resolving the bone of contention has thus been left for the future.

In the current case it was possible, even from the minority standpoint, to draw a supporting conclusion that the recording was lawful in the light that the defendant brought the tape to the reporter hoping the latter would carry a story in his paper and that the recorder was justifiable by way of executing his duty. It is hoped that further discussions will eventuate concerning the limit to the lawfulness of bugging and secret sound taping, including the question of wire tapping and secret recording of conversations by a third person (investigatory organizations).

[Reference: Constitution §§ 11, 13 and 31]

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