

## **b. Law of Criminal Procedure**

- 1. A case in which the evidentiary competency of a secondary confession was in dispute, when (1) the primary confession was obtained from the suspect during an illegal arrest on a separate charge, (2) the suspect was arrested based on this primary confession as evidence, and (3) later the judge was requested to detain the suspect, whereupon the secondary confession was obtained from the suspect during the judge's interrogation for detention.**

Decision by the Third Petty Bench of the Supreme Court on July 12, 1983. Case No. (a) 790 of 1980. Charges of setting fire to dwellings, etc. 37 *Keishū* 791.

### ***[Opinions of the Court]***

Interrogation for detention is a procedure conducted by the judge, who acts as an agent independent of the investigating officials, and it has the purpose of ensuring careful consideration as to whether or not the request for detention should be accepted, by informing the suspect of the case against him and giving him an opportunity for explanation. In light of the subject and purpose of interrogation for detention, even if the investigating proceedings before the request for detention were illegal, interrogation for detention itself is legal. Therefore, the evidentiary competency of the record of an interrogation for detention (i.e. the record in which the statement of the suspect in interrogation for detention was recorded) must be affirmed.

### ***[Comment]***

In the Japanese criminal justice system, the detention of a suspect may not be requested unless and until the suspect is arrested (the principle of “arresting first”), and when the detention is properly requested, the judge must first interrogate the

suspect for detention (Code of Criminal Procedure, Articles 61 and 207).

In this case the primary confession was obtained during an illegal arrest on a separate charge which did not fulfill the requirements for arrest. Then, after the arrest a secondary confession was obtained during the judge's interrogation for detention. As to the evidentiary competency of the confession during the illegal arrest on a separate charge, the recent majority theory agrees that the above-mentioned confession can be excluded from evidence because it was illegally obtained, even if its voluntariness is not questioned. This position depends for its rationale on the requirements of due process, the deterrence of illegal investigations in the future, and the preservation of judicial integrity (the theory of excluding illegally-obtained evidence). In addition, this theory would suggest that the evidentiary competency of the secondary evidence obtained in the course of an investigation based on illegally obtained primary evidence can be denied, transferring the "taint" of the primary evidence synthetically (the theory of "fruit of the poisonous tree"). The Court here approved the judgment of the courts of first and second instance which had excluded from evidence all confessions made to the police, including the primary confession, because of the illegality of the proceedings. Therefore, this holding seems to approve of the thinking mentioned above. (See Judge Ito's concurring opinion, which declared the acceptance of this theory clearly.)

However, a point still at issue is whether or not the evidentiary competency of the record of interrogation for detention should be denied on the basis of the theory of "fruit of the poisonous tree." Some precedents of lower courts say it should be, and others say it should not. Some courts, which have applied the theory of excluding illegally-obtained evidence as a basis for excluding the record of confession made to the investigator, have also a tendency to deny the evidentiary competency of the record of interrogation for detention. But in this case, the Court affirmed the evidentiary competency of the record of interrogation for detention, emphasizing the difference between the sub-

ject and purpose of interrogation for detention and those of an illegal investigation. This decision is worthy of note, because it is the first decision in which the Supreme Court recognized the theory of “fruit of the poisonous tree”, yet defined the case to which the theory did not apply.

There remains the following criticism on the Court’s decision: the difference between a confession made to police investigator and one made to the judge is arguably important, but, given the actual conditions of interrogation for detention, which is conducted under physical restraint of the suspect and behind closed doors, and in which the judge who interrogates the suspect is fully aware of the contents of the prior confession illegally obtained by the investigators, it is questionable whether the differences are substantively important.

[Reference: Code of Criminal Procedure, §§199, 319(1), 322(1), 61, 207]

**2. A case in which it was disputed whether or not the court had the duty to order or positively recommend the filing of different charges against a defendant when the filing of the different charges could result in conviction for a serious crime.**

Decision by the Third Petty Bench of the Supreme Court on Sept. 6, 1983. Case No. (a) 629 of 1980. Charges of obstructing performance of official duty, causing bodily injury, and causing death resulting from bodily injury. 37 *Keishū* 930.

**[Opinions of the Court]**

In this case, it appears that (a) an ultimate fact (fact A) was found not to have occurred and so the defendants were found not guilty of serious crimes including death resulting from bodily injury in the court of first instance, and (b) if the charges (i.e. counts) had been changed to require proof of another ultimate fact (fact B), the defendants could have been convicted of other serious crimes. But on the other hand it is also true that (c) the public prosecutor retained the original charges through all phases

of the trial in the court of first instance, that (d) though the presiding judge asked the public prosecutor for explanation at the end of the trial, the public prosecutor still maintained his position, and that (e) the defendants developed their defense based on the premise of the charges filed by the public prosecutor. Referring to these circumstances, the court of first instance practically urged that the charges should be changed, asking the public prosecutor for explanation for his failure to do so. Beyond such urging, however, the court did not have the duty to order or positively recommend that the charges should be changed.

*[Comment]*

Article 312 (2) of the Code of Criminal Procedure gives the court the competence to order that charges should be changed. This article is to apply in cases in which the charges filed by the public prosecutor and the court's evaluation of what proper charges should be differ from each other. A point at issue is whether or not the court has the duty to order the change of charges. This issue is relevant to the question of whether the subject of trial is simply the general offense involved or rather the specific counts filed (refer to the Code of Criminal Procedure, Article 256 (3)). Further, the issue is also relevant in asking to what extent the principle of officially-controlled proceedings, which aims at finding substantive truth, should prevail even though the trial structure in Japan is primarily based on the adversary party principle.

According to one view, the specific charges filed are simply one legally-composed aspect of the general offense charged, while the subject of the trial is the offense itself. Therefore, the power to compose appropriate charges belongs to the court as a matter of interpretation and application of the law, and it is the right and (in certain cases) the duty of the court to change charges improperly filed. In contrast, another view holds that the charges are a description of the concrete facts corresponding to the substantive elements of the crime, that the subject of trial is

the charges themselves, and that therefore the court is also obliged to respect the charges filed. Given this premise, the court has no duty to order the change of charges. But apart from the question of how to think about the function of the charges, many academic theories uphold the duty of the court to order the change of charges, emphasizing the viewpoint of finding substantive truth, only in cases where, because the public prosecutor doesn't change the counts he has filed, the result is extraordinary injustice that a serious offender may escape punishment. The Supreme Court has denied any duty to change charges, as a general rule. However, it has also decided that in cases where (1) the offense was serious and (2) the evidence overwhelming, if the public prosecutor does not change the charges filed, then the court has the duty to order or recommend the change of the counts exceptionally (Decision by the Third Petty Bench of the Supreme Court on Nov. 26, 1968. 22 *Keishū* 1352).

A point which remains at issue is the concrete standard for determining what cases apply to this "exception". On that very point this decision considered various factors in making the determination, including not only substantive ones of the crime (above (a)) and the weight of the evidence (above (b)), but also procedural ones of the intention of the public prosecutor to indict the defendants under particular counts (above (c) and (d)) and the interests of the defendants in preparing their defense (above (e)). This decision also recognized that here the lower court judges had practically urged the change of charges by using their power to ask the public prosecutor for explanation for his actions (Rules of Criminal Procedure, Article 208 (1)). As a result, although in this case the two conditions mentioned by the above-cited 1968 decision were fulfilled, this decision, considering all the circumstances peculiar to this case as a whole, held that in this case the court had taken all possible steps to perform its duty by using the power to ask the public prosecutor for explanation, and therefore the court did not have the duty to order or positively recommend the change of the charges. It can be said that this decision, adding the viewpoint of procedural fairness to the

above-cited 1968 precedent, has now made it clear that the contents of the court's duties to act may depend upon the concrete circumstances of each individual case.

However, the exact standard of judicial behavior which must be applied is still unclear. Therefore the development of further judicial decisions on these points should be expected.

[Reference: Code of Criminal Procedure §312, Rules of Criminal Procedure §208]

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## 6. Commercial Law

### 1. Liability for damages caused by a person who was permitted to use another person's name as his own trade name.

Decision by the Third Petty Bench of the Supreme Court on Jan. 25, 1983. 1072 *Hanrei Jihō* 144, 669 *Kinyū Shōji Hanrei* 3, 1030 *Kinyū Hōmu Jijō* 45.

#### [Facts]

Y<sub>1</sub> (defendant, *koso* appellant and *jokoku* appellant), who conducts business under the name of Y<sub>2</sub> forwarding corporation (defendant, *koso* appellant and *jokoku* appellant), received 100 tires from a tire selling company X (plaintiff, *koso* appellee and *jokoku* appellee). At the time of receipt of the tires, Y<sub>1</sub> represented that the tires would be used by Y<sub>2</sub>. Later, negligent actions by Y<sub>1</sub> concerning the tires caused damages of about 2.4 million yen to X.

X filed a suit for damages against Y<sub>2</sub> on the basis of Article