pure responsibility, that is, it decided whether the actor actually could be blamed or not.

[Reference: Articles 39 and 235 of the Criminal Code]

By Prof. MINORU NOMURA
TOSHIMASA NAKAZORA

b. Law of Criminal Procedure

1. A case in which the legality of continuous interrogation of a suspect making him stay at lodgings near the police station for four nights was tested.

Decision by the Second Petty Bench of the Supreme Court on February 29, 1984. Case No.(*a*) 301 of 1982. Case of murder. 38 *Keishū* 479.

[Facts]

The accused was tried for murder. The admissibility as evidence and the probative value of his confession made during investigations were disputed at the trial.

The interrogation of the accused was made in the following manner: Because the police's suspicion of the accused was confirmed in the initial stages of investigation, he was asked to go to the police station. After acceding to this request, the accused confessed to the crime, and asked to be provided with some accommodation for that night so that he could continue his confession in greater detail on the following day. He was made to stay near the police station guarded by several investigators. The suspect was interrogated at the police station all the next day. Even after that the suspect did not want to go home. So he was made to stay in a hotel near the police station and was placed under surveillance by several investigators. The same thing occurred on the third and fourth days. A record of interview was made

during the interrogation. The suspect was eventually permitted to return home, but was arrested two months later and confessed to the crime.

The accused changed his confession at his trial, but the court at first instance admitted the original confession as evidence and found that it had probative value. This was confirmed on appeal. The accused lodged a *jokoku* appeal claiming that his interrogation had been illegal because at the time the police had been detaining him without a warrant, and that a confession obtained from such an interrogation had neither evidential competency nor probative value.

[Opinions of the Court]

The interrogation took place after the accused had been asked to go to the police station and had been made to remain four nights in custody. The investigation took place as one based on voluntary cooperation of the accused and according to Article 198 of the Code of Criminal Procedure. An investigation based on voluntary cooperation is, however, permitted only when it is performed in a reasonable manner and when there is no compulsion.

It should be found that the interrogation was, in objective terms, not reasonable: the home of the accused was not very far from the police station; the investigators continuously watched him; the accused was interrogated until midnight everyday; and therefore the accused was placed in such a situation where he felt urged to consent to the interrogation. On the other hand, however, subjectively, it can be found that the accused had freely consented to the interrogation and to staying with the police: staying the first night was proposed by the accused; and neither did the accused ask to go home nor did the investigators reject any such request. Moreover, in light of the nature of the case, it was necessary to carry out the investigations promptly. Therefore the methods of investigation adopted in this case can be considered reasonable when compared with generally accepted ideas

and it cannot be said that they were illegal for exceeding the limits of investigations based on voluntary cooperation. Therefore, it must be held that the confession was voluntary and admissible as evidence (see dissenting opinions).

[Comment]

Investigations must be performed with the voluntary cooperation of those involved, and compulsory measures are permitted only when specified by the code (Article 197 (1) of the Code of Criminal Procedure). An investigation which actually uses compulsion to obtain evidence is not permitted even when it has an external appearance of an investigation based on voluntary cooperation. That is, an investigation which can be classified as one based on voluntary cooperation is limited. What is the limit, then? This problem closely correlates to the problem of how to distinguish an investigation based on voluntary cooperation from an investigation based on compulsion. Incidentally, unless a suspect is formally arrested, whether he will submit to interrogation or not completely depends on his will (Article 198 (1) of the Code of Criminal Procedure).

On this point, it had been conventionally thought that compulsion meant a use of force, and that this was not permitted in an investigation based on voluntary cooperation. However, the decision of the Third Petty Bench of the Supreme Court (on March 16, 1976, 30 *Keishū* 187) judged that compulsion meant a measure to gain ascendancy over an individual and the use of force not amounting to compulsion might be permitted even when an investigation was at the stage of being based on voluntary cooperation.

It should be noted that, in this case, a use of force was not deemed a direct issue. Therefore, in this decision, whether the method of the investigation was considered adequate in comparison with generally accepted ideas was tested. This was the criterion used to judge the legality of the investigation. Therefore, it can be said that this decision classified the procedures for taking

the suspect to the police and the interrogations that followed in the following manner: (a) an illegal investigation where compulsion is used in the sense that the suspect is arrested; (b) an illegal investigation where, although the kind of compulsion described in (a) is not used, the method is considered unreasonable so that the interview cannot be classed as an investigation based on voluntary cooperation, and (c) a legal investigation where no compulsion is used and the method is considered reasonable.

It is important to consider the practical results of the decision. The Court judged that the interrogation performed in this case was unreasonable in the objective sense but could not be judged illegal. The dissenting opinions concluded that the freedom of the accused had been suppressed due to material or psychological pressure imposed by the investigators, and that for practical purposes the accused had been acting under compulsion; and therefore the interrogation in this case was an illegal one exceeding the limits for investigations based on voluntary cooperation. Therefore the voluntariness of the confession was doubtful, the minority felt.

This was a marginal decision, and with respect it is difficult to judge which opinions are better. Either way, it is necessary, in the future, to further clarify the contents of reasonableness required for an investigation based on voluntary cooperation to be admissible as evidence.

[Reference: The Code of Criminal Procedure §§197 (1) and 198 (1)]

2. A case in which the selective prosecution by a public prosecutor and the scope of a trial were in question.

Decision by the First Petty Bench of the Supreme Court on January 27, 1984. Case No. *(a)* 909 of 1983. Case of violation of the Public Offices Election Act. 38 *Keishū* 136.

[Facts]

The accused, a candidate for the House of Representatives,

was prosecuted on a crime that he had delivered about one hundred million yen earmarked for his election campaign to his canvassers for the purpose of winning election. The court at first instance found him guilty and an appeal was dismissed. The accused then lodged a *jokoku* appeal. Although the crime of "delivery" (Article 221 (1) (v) of the Public Offices Election Act) was used as the count in this case, the delivered money was suspected to have been given to third parties and at the same time there was suspicion that there had been a conspiracy concerning the transfer of funds between the accused and his canvassers. If this were the fact, the crime of "giving" (Article 221 (1) (i) of the Public Offices Election Act) would be formed and the crime of "delivery" would be absorbed into it (see the decision of the Grand Bench of the Supreme Court on July 13, 1966, 20 *Keishū* 622; the decision of the First Petty Bench of the Supreme Court on March 21, 1968, 22 *Keishū* 95).

The accused claimed that where it was suspected that the crime of "giving" had been committed, the court should examine whether the crime of "giving", which was not cited as the count in this case, had been committed, and that the court was only permitted to make a judgment on the crime of "delivery" when any guilt concerning the crime of "giving" had been ruled out. It was not open to the court to make its decision based solely on the crime of "delivery", it was claimed.

[Opinions of the Court]

The above precedents quoted by the accused concern cases in which the accused is not only charged with the crime of "delivery" but also with "giving". Such a case is different from the present case, where the crime of "delivery" was solely charged.

1. Even in the case where not only the crime of "delivery" is judged to have been committed but the crime of "giving" is also suspected to have been committed, the public prosecutor is permitted to prosecute only the crime of "delivery", taking many factors such as the difficulty in proving each crime into consider-

ation.

2. In such a case, the court should only examine the crime of "delivery" which was cited as the count and it is obliged neither to examine whether the crime of "giving" was committed if it was not charged, nor to urge the public prosecutor to add to or change the count.

[Comment]

In the case of violation of the Public Offices Election Act with corrupt practices, a case of the candidate delivering the expenses for the election campaign to his canvassers in a conspiracy to give them to third parties is usual. The money usually does reach the third parties. The Public Offices Election Act punishes not only this conduct as the crime of "giving" (Article 221 (1) (i)) but also the act of "delivery" in preparation for committing the crime of "giving" (Article 221 (1) (v)). But the Supreme Court does not consider the crime of "delivery", as being absorbed by the crime of "giving" if that crime is found to occur (see the above precedents). Therefore, in such a case where the crime of "giving" as well as the crime of "delivery" is suspected to have occurred, as in this case, the following matters become problems: 1. whether the public prosecutor is permitted to prosecute the case by citing only the crime of "delivery"; and 2. whether the court should only examine whether the crime of "delivery" has occurred.

1. The first problem is closely connected to the problem of whether the prosecution of a part of a crime is permitted. The majority of theories interpret it to be legal. The basis for this can be found in the basic structure of the current Code of Criminal Procedure, which is based on the adversary party principle and adopting the system of counts (Article 256 (3) of the Code of Criminal Procedure). That is, under the system of counts, importance is attached to the fact that the right to select the counts belongs to the public prosecutor as the accuser (refer to Articles 247 and 248 of the Code of Criminal Procedure).

The Supreme Court also judged a partial prosecution of a crime to be legal (the decision of the Grand Bench on December 16, 1953, 7 *Keishū* 550). However, this decision was made based on the old Code of Criminal Procedure in which the system of counts had not yet been adopted. Since that decision, however, the Supreme Court made a series of decisions in which the adversary party principle implied in the current Code of Criminal Procedure was regarded as important (see the decision of the Third Petty Bench on May 20, 1958, 12 *Keishū* 1416; the decision of the Grand Bench on April 28, 1965, 19 *Keishū* 270; the decision of the First Petty Bench on August 31, 1967, 21 *Keishū* 879; the decision of the Third Petty Bench on November 26, 1968, 22 *Keishū* 1352; and the decision of the Third Petty Bench on September 6, 1983, 37 *Keishū* 930). The decision in this case is important because partial prosecution of a crime was judged legal for the first time under the system of counts. The decision took the above precedents as its theoretical basis. It is not certain whether this decision is also applicable to the partial prosecution of crimes requiring private complaint. Further, it is needless to say that the public prosecutor is not permitted to abuse its discretion by needlessly instituting partial prosecutions.

2. Concerning the second problem, a natural consequence of the above standpoint of the Supreme Court was that the Court in this case held that a court was not required to examine the crime of "giving" when it was not charged (refer to Article 378 (iii) of the Code of Criminal Procedure) and had no obligation to urge the public prosecutor to change the count to include the crime (refer to Article 312 (2) of the Code of Criminal Procedure).

Whether the same concept can be applied to this case is uncertain. The relationship between the crime of "delivery" and the crime of "giving" is specified in the substantive law in that the former is absorbed by the latter. It is true that the precedents quoted by the accused concern cases different from the case in question. But if a thorough substantive examination of law outlined in those precedents is made, the following assertion may

be true: Whether the crime of "giving" is formed or not must also be examined to judge whether the crime of "delivery" is formed or not, because the responsibility of the accused for the crime of "delivery" cannot be pursued if the crime of "giving" is found to have been committed.

In fact, this point has been repeatedly disputed in inferior courts. The decision in this case, however, regarding the binding effect of the count as important, judged that the scope of a trial should be limited by the scope of the count. In this case, the procedural examination of law was given a priority over the substantive examination of law, a significant point.

[Reference: The Public Offices Election Act §221 (1) (i) and (v); The Code of Criminal Procedure §§247, 248, 312, and 378 (iii)]

By Prof. Minoru Nomura
Katsuyoshi Kato

6. Commercial Law

1. Conditions precedent to the nullification of amendments of the articles of incorporation of a limited liability company (*Yūgen-Gaisha*).

Decision by the First Petty Bench of the Supreme Court on Mar. 23, 1984. 1111 *Hanrei Jihō* 139, 524 *Hanrei Taimuzu* 197, 694 *Kinyū Shōji Hanrei* 3.

[Facts]

X1 and X2 (plaintiffs, *koso* appellants, *jokoku* appellants) were the founders of A Company, and were substantially responsible for its day to day operations. The company fell into a bad