tute his criminal act.

However, it may be said that there is a situation where a violator of the administrative law does not have any special knowledge of the law and regulations, and therefore he does not feel that he has violated the law. Thus, from the viewpoint of the principle of responsibility (Schuldprinzip), we think it no good to hold that if the criminal recognizes the facts which constitute his criminal act, there is always his consciousness (or the possibility of his consciousness).

In this connection, lower court decisions have taken the position of denying intentional crimes when there is a reasonable cause for the criminal to genuinely lack consciousness of the illegality of his act. Also, lower court decisions have allowed for the existence of a "reasonable cause" only when there have been references to the administrative agencies and similar social institutions.

If this decision was based on the above-mentioned view of the judgment of the Supreme Court, there was no need to talk about the "nonexistence of a reasonable cause." The fact that this decision did refer to this point causes a conjecture that, in the near future, there may be a change in the viewpoint of the Supreme Court concerning mistakes of illegality.

Prof. MINORU NOMURA
TOSHIMASA NAKAZORA

b. Law of Criminal Procedure

1. A case in which it was disputed whether or not it was illegal to use as the data for an arrest warrant of the accused the written statement of any person other than him which lacked voluntariness or was obtained by illegal interrogation.

Decision by the Fifteenth Criminal Division of the Tokyo District Court on March 24, 1987. Case No. (*wa*) 112 of 1986. A case of attempted murder. 1233 *Hanrei Jihō* 155.

[Reference: Code of Criminal Procedure, Articles 199 (1) and 319 (1); Rules of Criminal Procedure, Article 143.]

[Facts]

The accused was indicted with A, B and others on a charge of attempted murder of X.

First, A was arrested on a separate charge and A raised B's name as an accomplice on that charge. Consequently, B was arrested and confessed to this charge (of attempted murder), naming the accused as an accomplice in this case. However, there were illegal points in the police interrogations of A and B, and their statements were considered to be lacking voluntariness. Nevertheless, an investigating officer furnished B's written statement as the data to issue an arrest warrant of the accused, who was arrested on a charge of attempted murder with the warrant issued by a judge.

[Opinions of the Court]

Even if the written statement may not be admitted in evidence against the person who made the statement because the written statement lacked voluntariness or was obtained by an illegal interrogation, it is not illegal to use the written statement as the data to issue an arrest warrant of a person other than him.

The reasons for the above are as follows: A written statement, which is denied its evidentiary competence because it falls under the term "confession" described in Article 38 (2) of the Constitution or Article 319 (1) of the Code of Criminal Procedure, can possibly be recognized as having, under certain conditions, evidentiary competence at a public trial for any person other than the person who made the statement because, to that person, the statement is not a "confession." Therefore, it is unreasonable to interpret that such a written statement may not be used at all during investigation of the accused before public trial. (This is more applicable to the written statement which was illegally obtained but does not directly fall under the purview of Article 319 (1) of the Code of Criminal Procedure which covers a written statement made under compulsion, torture, threat, etc.)

[Comment]

A confession that lacks voluntariness shall not be admitted in evidence (Article 38 (2) of the Constitution and Article 319 (1) of the Code of Criminal Procedure). A confession obtained by an illegal interrogation is often judged to be lacking in voluntariness as well. On the other hand, an investigating officer must furnish the data establishing the requisites for an arrest warrant when he applies for the warrant (Article 199 (1) of the Code of Criminal Procedure; Article 143 of the Rules of Criminal Procedure).

In reference to the above points, it has been often disputed in Japan as to whether it is legal to apply for the arrest and detention of a person on the main charge by using as the data his confession obtained while he was illegally arrested and detained on a separate charge (and, furthermore, as to whether the confession made while he is held in custody is recognized as having evidentiary competence). On the contrary, it has seldom been disputed until this decision whether it is lawful to use a statement that has no evidentiary competence as the data to investigate any person other than the person who made the statement. This decision is worth noting as the Supreme Court's first on this point.

By the way, this decision declares that a written statement can possibly be recognized as having, under certain conditions, evidentiary competence against the accused at public trial even in a case where the written statement of any person other than the accused, especially of any accomplice, may be denied its evidentiary competence in relation to the person himself who made the statement. The written statement of any person other than the accused is, to the person who made the statement, a confession, but it is, to the accused, only hearsay evidence. Japan's Code of Criminal Procedure, in principle, denies evidentiary competence of hearsay evidence (Article 320 (1) of the Code of Criminal Procedure). However, at the same time, exceptions are widely recognized under certain conditions (Articles 321 to 328 of the Code of Criminal Procedure).

Relative to this case, one may consider the application of Article 321 (1) (ii) which provides that a written statement made before

a public prosecutor by any person other than the accused may be given evidentiary competence as well as Article 321 (1) (iii) which provides that a written statement made before a police officer by any person other than the accused may be given evidentiary competence. However, it is generally thought in academic theory that the written statement of a third person clearly lacking in voluntariness should be denied its evidentiary competence in relation to the accused as well.

And then one may consider the application of Article 326 of the Code of Criminal Procedure which confers evidentiary competence upon a statement when the accused gives consent thereto. However, because Article 326 confers evidentiary competence upon a written statement "only when the court finds it proper," it is questionable whether Article 326 should be applicable even when a written statement lacks voluntariness. Therefore, there are very few possibilities that the written statement of a third person lacking in voluntariness is recognized as having evidentiary competence at the time of the accused's public trial. Looking at the decision, if the court accepts the idea that even such few possibilities are sufficient, there will seldom be a case in which such written statement should be excluded from investigation data. Thus, the reasoning of this decision can be said to be unjust.

Of course, concerning this point, there is a view that a different set of standards regarding the evidentiary competence of written statements should be applied during the investigation stage vis-à-vis during public trial because the judge requested to issue the warrant must carry out brief and speedy proceedings. It is certainly true that at the time of warrant examination, there are certain restrictions in judging whether the investigation data have evidentiary competence. However, this does not make it unnecessary for the judge issuing a warrant to examine any illegalities of the investigative proceeding and voluntariness of the statement. Therefore, the same standard must be applied at the time of warrant examination as well.

In short, the written statement, which is denied its evidentiary competence in relation to the person who made the statement, will possibly be denied its evidentiary competence, at the time of public

trial, against the accused as well. Consequently, it seems to be reasonable not to allow the use of the statement as the investigation data at the investigation stage which is prior to the public trial, either.

2. A case in which it was disputed whether or not the accused, who pleaded guilty in the court of first instance but received a sentence heavier than he had expected, should be permitted to request an examination of new evidence in the *koso* appellate court, for the first time insisting that there were errors in the finding of facts in the court of first instance.

Decision by the Second Petty Bench of the Supreme Court on October 30, 1987. Case No. (*a*) 406 of 1987. A case of violation of the Road Traffic Act. 41 *Keishū* 309.

[Reference: Code of Criminal Procedure, Articles 382.2 and 393 (1).]

[Facts]

The accused was prosecuted for violating the speed limit. In the court of first instance, he admitted the prosecution's presentation of the facts. (N.B. This is roughly the same as pleading guilty under Anglo-American law.) He was sentenced to three months imprisonment with penal servitude without a stay of execution.

Dissatisfied with this decision, the accused filed a *koso* appeal and insisted that there were errors in the finding of facts in the court of first instance, and requested an examination of new evidence which would prove that these errors existed. The accused insisted that the reason why he did not dispute the facts in the court of first instance was because he thought that he might receive a lighter punishment if he did not dispute; however, since he was sentenced without a stay of execution contrary to his expectations, he decided to dispute the facts which were recognized by the court of first instance.

[Opinions of the Court]

In the current case, even though the circumstances are acknowledged as the accused asserts them, these circumstances do not fall under the term "unavoidable reasons" of Article 382.2 of the

Code of Criminal Procedure. Therefore, the court has no obligation to examine any new evidence which the accused submitted (Proviso of Article 393 (1) of the Code of Criminal Procedure).

[Comment]

In Japan, an examination of new evidence in a *koso* appellate court is in principle prohibited based on the policy that all evidences should be concentrated in the court of first instance. However, there is an exception to this policy, i.e., in a case in which a party files a *koso* appeal and insists that there were errors in the finding of facts, Article 382.2 (1) of the Code of Criminal Procedure allows the appellant to present the facts which can be proved by the evidence (i.e. new evidence) of which, owing to "unavoidable reasons," the appellant was unable to request an examination prior to the conclusion of the oral proceedings in the court of first instance. Furthermore, by Proviso of Article 393 (1) of the Code of Criminal Procedure, the court is bound to examine the facts which are presented with the presumptive proof mentioned in Article 382.2 and which are essential to prove errors in the finding of facts.

On the other hand, a Supreme Court decision states that even if the "unavoidable reasons" are denied in relation to new evidence, the court is allowed to examine the new evidence at the court's discretion in accordance with the main clause of Article 393 (1). (Decision by the First Petty Bench of the Supreme Court on September 20, 1984. 38 *Keishū* 2810.) Thus, even if the "unavoidable reasons" are not accepted, it does not mean that an examination of new evidence is always denied. However, judgment on whether there is an "unavoidable reason" takes on an extremely important meaning when it is decided whether it is a matter of duty to examine new evidence and whether it is lawful to file a *koso* appeal which depends only on new evidence.

By the way, among the judicial precedents as to the existence of "unavoidable reasons," there are two major types of cases.

(1) First, there is the type of cases in which the accused, in the court of first instance, has admitted the prosecution's presentation of facts, but then, for the first time, disputes the facts in the *koso*

appellate court, requesting an examination of new evidence. In these cases, the lower courts have denied the existence of "unavoidable reasons."

(2) Secondly, there is the type of cases in which the public prosecutor requests an examination, because he has found anew the existence of the accused's previous offense which he did not notice during the public trial in the court of first instance. In these cases, the judicial precedents have agreed that there is an "unavoidable reason." (As one precedent by the Supreme Court, the decision by the Second Petty Bench on February 16, 1973. 27 *Keishū* 58.)

The current decision under review is worth noting as a clear decision that the Supreme Court gave for the first time about the type (1) of cases.

Regarding the definition of "unavoidable reasons," there are two theories broadly divided and in opposition to each other as follows:

(a) The Theory of the Physical Impossibility of Examination: This is a theory that limits an examination of new evidence only to the type of cases in which it was impossible to request the examination because the evidence was either unknown from the beginning or could not be located.

(b) The Theory of the Mental Impossibility of Examination: This is a theory that allows an examination of new evidence in the type of cases as well in which it was mentally impossible to request the examination of evidence, e.g., in which a party believed that he had already submitted other sufficient evidences and there was no need to submit the said evidence.

The lower courts are taking the position of denying "unavoidable reasons" as in the above-mentioned type (1) of cases. Therefore, it might be said that the lower courts are inclined to the Theory of the Physical Impossibility of Examination. It might be said that in the background lies the consideration that the meaning of "unavoidable reasons" should be interpreted strictly in terms of the policy of concentrating the evidence in the court of first instance, and even if a case is likely to result in an unjust conclusion because of this interpretation, the *koso* appellate court has only to examine new evidence at its discretion as per the main clause of Article 393 (1).

However, the examination as per this clause is in the end left to the court's discretion, and there are more than a few cases in which the courts deny the examination of new evidence. Moreover, it may lead to severe consequences for the accused to be required to submit all evidences in the court of first instance at all times, because he compares poorly with a public prosecutor in terms of his capability to collect evidence. Consequently, the leading academic theory supports the Theory of the Mental Impossibility of Examination, insisting that while the principle of not granting an examination of new evidence should be maintained, there must also be an increase in possibilities for the correction of misjudgments because the *koso* appellate court has a duty to correct misjudgments in concrete cases.

Regarding the type (1) of cases, the current decision under review denied the existence of "unavoidable reasons." However, in this case, it will be difficult to affirm the "unavoidable reasons" even by using the Theory of the Mental Impossibility of Examination, for the accused did not think that it was not necessary to furnish the evidence in question in order to dispute the prosecutor's presentation of the facts. In this case, the accused expected a favorable assessment and, thus, thought that he had better not dispute the facts in the court of first instance. However, when he received the unexpectedly harsh sentence, he filed the *koso* appeal and disputed the facts, insisting that the decision came short of his expectation because of his mistake. This posture he took was a type of speculative defense, and not only can it be said that it does not meet the principle of substantive truth, but it is also apt to lead to too heavy a burden on the *koso* appellate court.

In this manner, the current decision cannot be regarded as clearly taking a particular position regarding this interpretative dispute, so the resolution of this problem will be left to future decisions.

Prof. MINORU NOMURA
KATSUYOSHI KATO