the legal duty to supervise and raise their own child. However, the reasons why the Court recognized the doctor's responsibility to protect the baby were based on the following factors, which were unique to this case:

① The accused undertook to perform abortion when a viable baby might be born.

② The mother, who was only 16 at the time, had no medical knowledge at all. Therefore, the accused, as a doctor, had a duty to instruct her about the proper care of a premature baby.

③ Only the doctor can send a premature baby to a hospital that is well equipped to give the necessary treatment; in this case, only the accused could have done so.

④ The accused let the mother go home after the operation but kept the premature baby in his custody.

Therefore, the current decision does not consider that the responsibility to protect may arise exclusively from the status of the obstetrics/gynecology doctor who performed the abortion.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not the competence of the evidence obtained through an illegal examination of personal effects and the proceeding of taking a urine sample was affirmed.

Decision by the Second Petty Bench of the Supreme Court on September 16, 1988. Case No. (*a*) 944 of 1987. A case of violation of the Stimulant Drug Control Act. 42 *Keishū* 1051.

[Reference: Constitution of Japan, Article 35; Police Duties Law Act, Article 2 (1) through (3); Code of Criminal Procedure, Articles 1, 218 (1) and 221.]

[Facts]

A policeman was questioning the accused in line of duty on suspicion of using stimulants, when the accused attempted to escape. The policeman chased and apprehended the accused. Judging it inappropriate to continue questioning at the site, the policeman requested of the accused that they should go together to the nearest police station. However, the accused refused to do so, and the policeman forcibly put the accused into the patrol car. At that time, the policeman noticed that the accused dropped something wrapped in paper into the street; believing the contents to be stimulants, the policeman retrieved the item and took it into his custody. After getting into the patrol car, the policeman had to control the accused, who continued to resist. Upon arrival at the police station, the policeman examined the sulking accused's personal effects. As a result of the examination, the policeman recognized that the accused's left sock had something in it; the policeman found hidden inside it a paper-wrapping which appeared to contain stimulants. After chemically analyzing both items and determining that they were in fact stimulants, the policeman arrested the accused as a flagrant offender, and seized the two items as evidence. Subsequently, the policeman requested a urine sample, which the accused voluntarily provided; the policeman also retained this as evidence.

[Opinions of the Court]

1. The examination of personal effects in this case is illegal because it was done, without the accused's consent, directly using the chance of the policeman illegally forcing the accused to go to the police station and, furthermore, it was done in a form similar to the search in that evidence was removed from the accused's clothing. Although it might be acknowledged that the proceeding itself of taking the urine sample was completed with the accused's consent, that proceeding is also illegal because the illegality of a series of events that preceded it should be considered to pass into it. (See the decision by the Second Petty Bench of the Supreme Court on April 25, 1986; 40 *Keishū* 215; 7 Waseda Bulletin of Comparative Law 95.)

2. Even though the examination of personal effects as well as the proceeding of taking the urine sample in this case were illegal, it should not be held that the competence of the evidence obtained thereby is denied straightaway. In other words, the evidentiary competence should be denied only if the degree of illegality is so serious that it is tantamount to ignoring the principle of requiring a warrant, and affirming the evidentiary competence would be regarded as unreasonable in order to deter illegal investigations in the future. (See the decision by the First Petty Bench of the Supreme Court on September 7, 1978; 32 *Keishū* 1672.)

In this case, it is recognized that the requisites for questioning were all present and the examination of personal effects was necessary and expedient; that the policeman would have been substantially allowed to arrest the accused when he judged that the contents of the paper-wrapping the accused initially dropped were stimulants and, therefore, the policeman did nothing more than make a mistake in following the proper sequence of the investigation and his action deviated only slightly from what the legislation calls for; and that the policeman's use of physical force was necessary and inevitable in order to stop the accused's resistance. Given these circumstances, it cannot be said that the illegal nature of the examination of personal effects as well as the proceeding of taking the urine sample was serious and that admitting the evidence obtained in this manner is contrary to the goal of deterring illegal investigations in the future. Consequently, the competence of the evidence in this case should not be denied. (Judge Shimatani submitted a dissenting opinion, in which Judge Okuno concurred.)

[Comment]

1. In its 1978 decision cited in the present case the Supreme Court enunciated the so-called exclusionary rule regarding the competence of illegally obtained evidence. The tests presented for excluding evidence are: ① the seriousness of the illegality of the proceedings used in gathering the evidence; and ② the reasonableness of affirming the evidentiary competence in view of deterring illegal investigations in the future. Following that decision, there were a number of

lower court decisions that depended on these tests. In the 1986 decision cited in this case, the Supreme Court itself applied these tests as well.

The current decision is based upon an extension of these two important precedents. In particular, both the examination of personal effects regarding stimulants and the proceeding of taking urine sample, which were issues in the 1978 and 1986 decisions respectively, were also issues in this case. Consequently, it may be safely said that the present decision has great significance in how courts will decide future cases.

2. This decision is unanimous in the view that the examination of personal effects and the proceeding of taking the urine sample were illegal. (The same is true for the decisions of both the court of first instance and the *koso* appellate court.) The issue is whether or not the competence of the evidence obtained from using illegal proceedings is affirmed. There was a powerful dissent in this case but the Court, by a narrow 3-2 margin, held that the evidentiary competence was affirmed.

The majority opinion of the Court enumerated several considerations regarding this problem. Among these considerations, one point that the Court seems to have emphasized was that upon judging that the contents of the paper-wrapping the accused dropped were stimulants, the policeman would have been substantially permitted to immediately arrest the accused; following this line of reasoning, the policeman's failure to arrest the accused at that moment can be viewed as amounting to no more than a mistake in following the proper sequence of investigation methods, and the policeman's actions cannot be said to have greatly deviated from the law. Judge Shimatani opposed this line of reasoning. In his opinion, he argued that the policeman could not have objectively judged that the contents of the paper-wrapping were stimulants; therefore, Judge Shimatani doubted that the policeman could have been substantially permitted to arrest the accused at the particular moment in question. Moreover, he went on to argue that forcing the accused to go to the police station amounted to a seriously illegal action similar to an illegal arrest; that the examination of the accused's personal

effects and the proceeding of taking the urine sample were also seriously illegal because these were direct consequences of the policeman's illegal action; and that, therefore, the Court should deny the competence of the evidence obtained thereby in order to deter illegal investigations.

The view expressed in the majority opinion of the Court is also evident in lower court decisions. However, if one follows this way of thinking, there is always the danger that when the police do not adhere to the formalities of the investigative proceedings, their excesses may be redeemed by "hindsight." As Judge Shimatani points out, because there is doubt whether in the current case arrest at the point in question, i.e., when the accused dropped the item, would have been permissible, there could be problems with the Court emphasizing the idea that the policeman could have arrested the accused at that particular point and judging that the policeman's admittedly illegal actions were not serious. Moreover, voluntary accompaniment and examinations of personal effects are, by definition, based on voluntary cooperation; the party who is asked for cooperation has no obligation to consent. However, if investigative officials take for granted the investigative proceedings, such as the use of physical force, which are intended to deprive the party who is asked for cooperation of his freedom to refuse to cooperate, there is a great danger that illegal investigations, such as the one in this case, will take place again in the future. Accordingly, given the goal of deterring illegal investigations, it may be safely said that the competence of the illegally obtained evidence should be denied.

Anyway, if the accused had not dropped the stimulants, the evidentiary competence probably would have been denied even on the footing of the majority opinion of the Court. Therefore, the prevailing academic view gives a warning that the investigative officials should be fully aware that there is a high probability that the evidentiary competence will be denied in cases where they engage in illegal activities that are the basis for their conducting examinations of personal effects and/or proceedings of taking urine samples and this results in the officials obtaining the evidence.

2. A case in which it was disputed whether or not the court's finding of guilt in the crime of arrest and confinement where neither the name of that crime nor the applicable statutory provision was mentioned in the indictment while only the crime of murder was prosecuted corresponded to "when the judgment was rendered on a case the trial of which was not requested"(Code of Criminal Procedure, Article 378(iii)).

Decision by the Second Petty Bench of the Supreme Court on January 29, 1988. A case of murder, harboring a criminal, and arrest and confinement. Case No. (*a*) 1551 of 1984. 42 *Keishū* 38.

[Reference: Criminal Code, Articles 45, 199 and 220 (1); Code of Criminal Procedure, Articles 256 (2), (4) and 378(iii).]

[Facts]

The accused A and B were indicted based on the facts that in conspiracy with each other they bound, arrested, and confined their victim, X, and they transported him 50 kilometers where they killed X with a knife. However, in the indictment, only murder (Criminal Code, Article 199), not arrest and confinement (Criminal Code, Article 220), was mentioned as the name of the crime and the applicable statutory provision. Regarding this prosecution, the court of first instance found A guilty of murder (the court also found that the fact of arrest and confinement was part of the killing); holding that B had no intent to murder, the court found him guilty of the arrest and confinement only. The *koso* appellate court upheld these findings. Dissatisfied with the decision, both accused filed a *jokoku* appeal. The main reasons for the *jokoku* appeal were as follows: in this case, the act of arrest and confinement and that of murder constituted separate crimes (i.e., both crimes are consolidated crimes); because the accused were indicted only on the crime of murder, and not on the crime of arrest and confinement, the court should have decided only on the issue of the crime of murder; in spite of this, the court included the fact of arrest and confinement in the subject of the trial and found the accused guilty of arrest and confinement. This corresponded to "when the judgment was rendered on a case the trial of which was not requested" (Code of Criminal Procedure,

Article 378(iii)) that is an absolute ground for a *koso* appeal, and, in addition, this finding was contrary to precedent (e.g., the decision by the First Petty Bench of the Supreme Court on June 8, 1950; 4 *Keishū* 972).

[Opinions of the Court]

1. In the current case, the public prosecutor thought that the act of arrest and confinement constituted part of carrying out the murder; the decisions of both the court of first instance and the *koso* appellate court accepted the prosecutor's view. However, it is inappropriate to consider the arrest and confinement to be part of the murder, because we can apprehend that the accused A did not intend to commit the murder by the act of arrest and confinement itself but rather A carried out the arrest and confinement, planning to commit the murder afterwards. Consequently, in the case of the accused A, both the murder and the arrest and confinement were constituted together, and the two crimes should be viewed as consolidated crimes.

2. In this way, the original judgment (i.e., the *koso* appellate court judgment) was incorrect in its determination as to the number of crimes committed. However, because we can understand that in the indictment in the current case the fact of arrest and confinement is also described as part of committing the murder, we should conclude that the public prosecutor was asking the court for imposition of punishment not only for the murder but also for the fact of arrest and confinement as well. Therefore,the original judgment's finding that the accused A was also guilty of arrest and confinement as part of the murder, and that the accused B was guilty of arrest and confinement only, does not correspond to "when the judgment was rendered on a case the trial of which was not requested."

[Comment]

1. In Japan, the public prosecutor shall make the institution of public prosecution by filing an indictment (Code of Criminal Procedures, Article 256(1)); and in this indictment, in addition to the name of the accused, the public prosecutor shall also state the

facts constituting the offense and the name of the crime (Article 256(2)). At that time, the facts constituting the offense shall be clearly described in the form of specified counts (Article 256(3)); and the name of the crime shall be mentioned by enumerating the applicable statutory provisions (Article 256(4)). As to the question of whether the so-called subject of the trial is the facts constituting the offense or the specific counts, the popular view's understanding is that because the present Code of Criminal Procedure is, in its fundamental structure, based on the adversary system, the subject of the trial is the contention by the public prosecutor as one of the adversarial parties regarding the concrete facts corresponding to the substantive elements of the crime, i.e., the specific counts. The mentioning of the names of crimes and the applicable statutory provisions is understood as an ancillary method of assisting in the clarification of the counts. For example, the name of the crime is murder, and the applicable statutory provision is the Criminal Code, Article 199. If the public prosecutor mentions the applicable statutory provision, he does not have to mention the name of the crime. Furthermore, errors or omissions in mentioning the applicable statutory provisions shall not affect the validity of the institution of public prosecution unless there is a fear that a substantial prejudice may result in the defense of the accused (Article 256(4) Proviso).

On the other hand, it is not permissible for the court to render a judgment on any matter that the court is not called upon to try. This is termed the principle of no trial without prosecution, any breach of which is an absolute ground for *koso* appeal (Code of Criminal Procedure, Article 378(iii)). That is to say, should the court make a judgment as to the facts that are not described in the indictment as counts, the *koso* appellate court must reverse the decision.

2. The issue in the current case is what was the subject of the trial. More concretely, in addition to the murder, can one say that the subject of the trial extends to the fact of arrest and confinement, which appeared in the counts, even though neither the name of that crime nor the applicable statutory provision was specifically mentioned in the indictment?

If one assumes that in the current case the act of arrest and con-

finement was part of carrying out the murder, even if constitution of the crime of murder should be denied, there is still the possibility of a finding of guilt in the crime of arrest and confinement. The reason is that in that case there is between the murder and the arrest and confinement a difference in the degree of seriousness, and this would allow for a reduced finding for the arrest and confinement alone. However, in the current decision, both crimes were held to be separate but consolidated. Consolidated crimes are several crimes committed by a person in which no final judgment has been rendered (Criminal Code, Article 45). With this as a premise, if the public prosecutor had also intended to prosecute the crime of arrest and confinement, he should have entered a supplementary indictment on the fact of the arrest and confinement separate from the indictment for murder.

However, in the current decision, the Court laid stress on the point that although the public prosecutor did not mention in the indictment the name of the crime of arrest and confinement and the applicable statutory provision regarding the fact of arrest and confinement, that fact was described in the count of murder as part of carrying out the murder; consequently, the Court held that the public prosecutor had every intention of prosecuting for the fact of arrest and confinement as well. In reference to this, in the 1950 decision that the accused cited as a precedent in their appeal, it was held that when the public prosecutor did not mention the crime of trespass and its applicable statutory provision while he described the fact of "trespassing upon a dwelling" and stealing the property of another, the fact of the trespass constituted nothing more than a circumstance attendant to the theft and, thus, finding of guilt regarding that fact was contrary to the principle of no trial without prosecution. On this point, there arises a question as to whether the current decision contradicts this 1950 decision. Ultimately, it is a question of how the mention in the indictment is to be interpreted.

Some academic theories hold that the Court's understanding in this case that the fact of the arrest and confinement itself is the subject of the trial is correct; thus, there is no contradiction with the 1950 case. Certainly, as noted above, it is not always necessary for

the name of crime and the applicable statutory provision to be mentioned in order to obtain a guilty judgment. However, when the question of consolidated crimes arises, as in the current case, with only one name of crime (murder) and its applicable statutory provision mentioned in the indictment, there is enough room for us to consider that the fact of arrest and confinement was described as nothing more than events leading to the murder, and not as the subject of the trial. The reason why the system of counts was employed in the present Code of Criminal Procedure was to avoid such surprise findings as create prejudices to the defense of the accused; and mentioning the name of crime and the applicable statutory provision also serves to accomplish this goal. Thus, there has been strong criticism that the Court's judgment in this case that the fact of arrest and confinement was also the subject of the trial was an unreasonable interpretation of the indictment, which ran counter to the spirit of the system of counts, and the Court's judgment also deviated from precedent.

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6. Commercial Law

Who has shareholder status as against a corporation in cases where a person acquires transfer-restricted shares (i.e., shares whose transfer requires the approval of the board of directors) by auction, but the acquisition has not been approved yet by the board of directors?

Decision by the Third Petty Bench of the Supreme Court on March 15, 1988. Case No. (*o*) 965 of 1986. A claim for confirmation of shareholder status, etc. 794 *Kinyū Shōji Hanrei* 3; 1273 *Hanrei Jihō* 124; 665 *Hanrei Taimuzu* 144.