5. Criminal Law and Procedure

a. Criminal Law

1. A case in which it was held that the crime of death caused by negligence in the course of business was constituted when a truck driver not aware of those riding in the carriage behind him had accidentally caused them to die.

Decision by the Second Petty Bench of the Supreme Court on March 14, 1989. Case No. (*a*) 193 of 1986. A case of bodily injury and death caused by negligence in the course of business. 43 *Keishū* 262.

[Reference: Criminal Code, Article 211.]

[Facts]

The accused, in the course of business, while he was driving a truck of ordinary size at a speed exceeding twice the speed limit, mishandled the wheel, being confused by a vehicle he saw coming before his eyes. As a result, he made his truck run out of control and caused its carriage to crash into a signal pole on the roadside. This accident caused death to two males riding in the carriage behind him and injury to another sitting beside him. The accused had not been aware of the two others riding behind him.

The court of first instance decided that the crime of death caused by negligence in the course of business was constituted regarding the death of the two males riding in the carriage, holding that whether the accused had perceived the existence of the victims or any other person riding with him and, if he had not, whether that perception should have been possible did not have any influence when the court found whether the accused had owed a duty of care to those victims and, if so, whether he had been negligent in observing that duty. The appellate court held that the accused naturally should have known that the reckless driving without observing the duty of care might

result in death or injury to the persons riding with him and others involved in the traffic; it decided that, therefore, the crime of death caused by negligence in the course of business was constituted regarding the death of the victims even if the accused had not been aware that they or any other person was riding behind him. Dissatisfied with this original (appellate court) decision, the accused lodged a *jokoku* appeal to the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

The accused naturally could have known that such reckless driving would possibly lead to an accident that might cause death or injury to persons involved. Hence, the crime of death by negligence in the course of business is constituted even if the accused had not been aware that the victims were riding in the carriage behind him.

[Comment]

The issue in this case was whether an offense by negligence could be constituted when death or injury had consequentially occurred to the subject that the perpetrator did not actually perceive.

In this decision the Supreme Court held that an offense by negligence could be constituted if "causing death or injury to person" was foreseeable, and that the actual consciousness of which subject (person) it might be was unnecessary, though the Court did not clarify whether the perceivability was necessary concerning the existence of the subject that the actual result occurred to.

As to the object of foreseeability in the case of an offense by negligence, two academic theories are antagonistic to each other: whether it is the occurrence of a result to a particular (concrete) subject or the occurrence of a result to any (abstract) subject. If the object of foreseeability is the former, the perpetrator must be able to foresee the "death" of a "specific subject (person)" for the constitution of the crime of death caused by negligence. In this case, it is presupposed that the perpetrator is actually aware of the existence of a specific subject. On the contrary, if the object of foreseeability is the latter, the perpetrator who can foresee the "death of a per-

son" will suffice. According to this view, if the occurrence of "death to a person" is foreseeable from the mode of the perpetrator's driving, it is sufficient for the constitution of the crime of death caused by negligence, and the perpetrator's awareness of the existence of a specific victim is not a necessary condition. In consideration of this theoretical antagonism, hereinafter an examination shall be made of what standpoint this Supreme Court decision relied on.

There is a view that the theory of mistake applicable in the case of an intentional offense was applied to a negligent offense in this decision; that is, the view estimating that this decision regarded the perpetrator's awareness of a particular (concrete) subject as unnecessary because it followed the precedents in which it was held that the perpetrator was guilty of a wilful homicide if he caused "death to a person" along with his perception of the "death of a person". However, the theory of the precedent in favor of the theory of mistake applicable in the case of an intentional offense presupposes the perception by a perpetrator of the result occurring to a particular (concrete) subject. On this premise, this theory finds wilfulness when "death of a person" is a common factor even if the subject that the result (death) occurred to is different from the subject that the perpetrator was aware of. If this theory is applied to a negligent offense, the foreseeability of a result that may occur to a particular (concrete) subject should be presupposed. Then this theory should lead to the conclusion that the perpetrator is liable for negligence even if a result occurs to another subject in so far as there is a common factor of "death of a person".

If the present decision applied to a negligent offense the position of the precedent regarding the theories of intention and negligence, the possibility of a result occurring to a particular (concrete) subject, i.e., the foreseeability of the death or injury to the person sitting beside the accused should play an important role. However, the decision did not refer to this foreseeability at all. Therefore, it seems difficult to understand this decision as one in which the theory of mistake applied to a negligent offense.

Furthermore, if the foreseeability of a result that may occur to a particular (concrete) subject is necessary for the constitution of a

negligent offense, then "unconscious negligence" cannot exist from the beginning. However, it would be against justice if no car driver were held liable for negligence when he caused death or injury to a subject that he was not conscious of in the traffic. In this sense, it should be admitted that there should be room for the constitution of a negligent offense even when a result occurring to a particular subject is unforeseeable.

On the other hand, it is feared that liability for negligence will expand without any restriction if we try to find it whenever the result (death) occurs to any "person" in so far as there exists the foreseeability of "death of a person" at all. Even if the perpetrator does not have to be aware of a result that may occur to a specific subject in the case of "*dolus generalis*", the scope in which wilfulness is found is still restricted. In the case of negligent offense as well, the scope in which liability for negligence can be charged should be limited even if it is unnecessary for the perpetrator to foresee the result that may occur to a specific subject. Even if it is unnecessary for the perpetrator to be actually aware of the existence of the subject (person) that the result of "death" occurs, the foreseeability regarding that existence should be required for the affirmation of liability for negligence. In consideration of the present case, therefore, it seems that the Court should have examined whether the accused could have been conscious of the existence of the riders on the carriage behind him even if it was unnecessary for the accused to be actually conscious of the existence of those riders.

2. A case in which it was held that the crime of theft was constituted when the lender of cars who had acquired the ownership of the cars under the car loan system took them back.

Decision by the Third Petty Bench of the Supreme Court on July 7, 1989. Case No. (*a*) 1168 of 1984. A case of theft and the violation of the Act Concerning Regulations of Deposit-Taking, Money on Deposit, Interest on Money, Etc. 43 *Keishū* 607.

[Reference: Criminal Code, Articles 235 and 242.]

[Facts]

As the business of the accused was lending to his clients money that was worth half to one-tenths of the market price of each car under the car loan system, he made them sign and seal the prepared written car sales contracts with redemptive clauses. According to the written contracts, the contracts were subject to such conditions as ① the debtor should transfer the rights of ownership and possession to the accused by selling the car over to the accused at the loan value and ② the accused might dispose of the car as he liked unless the debtor exercised his redemptive right before the expiration of the redemptive term which was equivalent to the loan term by repaying the loan amount plus a certain amount of interest carried. In addition, concerning two cars out of the total of thirty-one in question, the contracts included such a clause as ③ the accused "shall also have the right of directly possessing the car, may drive and move the car as he likes" unless the redemptive right was exercised. Between the parties to each contract, however, it was necessarily presupposed that the debtor should keep and use the car after the conclusion of the contract. The accused had the intention of taking back the cars immediately after the expiration of the loan term in order to resell them to other persons because such resale would be far more profitable to him. Therefore, he concealed this intent from the clients and did not give them sufficient explanation nor even a copy of the contract.

The accused visited where the cars were kept the day before the expiration of the loan term or in the early dawn of the expiration day in the case of part of the cars, and in the early dawn of the day after the expiration of the loan term or in a few days after it in the case of the rest of the cars. He took over the cars without getting permission from the debtors by using spare keys that he made secretly or a tow truck and he resold or tried to resell the cars.

The court of first instance decided that the crime of theft was constituted from the accused's act of taking over those cars, simultaneously holding that the accused violated Article 5(1) (punishment for high rate interest) of the Act Concerning Regulations of Deposit-

Taking, Money on Deposit, Interest on Money, Etc. The appellate court affirmed the violation of the Act and decided on the constitution of the crime of theft, holding as follows: ① the contracts themselves, being of a malicious nature, admit of invalidity or cancellation and there remains much room for a legal dispute as to whom the ownership of each car should be vested in; ② even if the contracts are valid, the pledgers (debtors) have been using and keeping the cars moderately and exclusively as before on the understanding with the accused and it may well be doubted whether the pledgers' (debtors') redemptive rights had been lost at the points of time when the cars were taken back; and ③ therefore, the pledgers' (debtors') possession of the cars still has legal interests deserving protection and the act of the accused constitutes the crime of theft.

Dissatisfied with this original (appellate court) decision, the accused lodged a *jokoku* appeal to the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

It is evident that the cars were virtually under the control of the debtors at the points of time when the accused took them back. Even if the accused had the ownership of the cars, his act of taking them back constitutes the crime of theft as it corrresponds to the stealing of the property which is another's possession referred to in Article 242 of the Criminal Code. What is worse, this is an illegal act that exceeds the limit of patience the debtor is required to exercise.

[Comment]

In the current case, it was disputed whether a person (lender) who had acquired the ownership of a car under a sales contract with redemptive clauses could be punished for the crime of theft when he had taken back the car without permission of another person (debtor) who had been still in possession of the car in question after the loss of his redemptive right.

The current decision, following the precedents in which it was held that the interests protected by law were the possession of property in the case of the crime of theft, further made it clear that the object

of protection was not restricted to "lawful possession". That is to say, the Court, irrespective of the title for possession, holding that the *de facto* control itself was the interests protected by law, admitted the Tatbestandsmäßigkeit (applicability of crime-constituting conditions) of theft in the infringement of those interests.

In addition to admitting the Tatbestandsmäßigkeit of theft extensively as above-mentioned, the current decision is characteristic of clarifying that whether such infringement of possession should deserve punishment turns on a judgment of substantial illegality.

So far, as to the interests protected by law in the case of the crime of theft, two academic theories are antagonistic to each other: one that regards such interests as the ownership (theory of ownership) and the other as the *de facto* possession (theory of possession). What is a practical problem in this theoretical antagonism is a case in which a perpetrator who has a title of property such as ownership takes away the property from its possessor who does not have the title of the property. For example, in case the victim of the theft gets back his property from the thief, this act of recovery is from the very beginning not equivalent to an act of theft according to the theory of ownership. According to the theory of possession, on the contrary, as the possession by the thief itself also comes under the interests protected by law, this act of recovery satisfies the Tatbestand (crime-constituting conditions) of another act of theft. On the other hand, in case a third party takes away the property in question from the original thief, this act satisfies the Tatbestand (crime-constituting conditions) of theft according to the theory of possession because it infringes on the possession by the original thief. In opposition to this, according to the theory of title (ownership), this act should in principle not constitute an act of theft because there exists no infringement on the original thief's own ownership. In order to come to the conclusion that the act of recovery is unpunishable in the former case and that act constitutes the crime of theft in the latter case, the view in which moderate possession is looked upon as a basis for the latter case, the view in which moderate possession is looked upon as a basis for the interests protected by law has come out predominant in academics. This view is intended to relatively decide whether the pos-

session by each actor (the victim of theft or the third party) is moderate.

As mentioned above, the traditional way of thinking was intended to decide whether the crime of theft was constituted solely in terms of the Tatbestand (crime-constituting conditions). Against this, it has been advocated in a clear manner that, presupposing that the interests protected by law are the *de facto* possession in general in the case of the crime of theft, whether the infringement on such possession deserves punishment should be judged in terms of substantial illegality. In this assertion it is throught that patterns of theft, the original relations of rights to property, and others may be better taken into consideration at the stage of illegality.

The current case was a case in which the accused who had acquird the ownership of cars under sales contracts with redemptive clauses took away the cars from the persons (his clients) who had lost their ownership of the cars through the loss of their redemptive rights but still had continued the possession of the cars; in other words, the accused's act was an exercise of his rights. We may understand that in the decision under review the Court found the Tatbestandsmäßigkeit (applicability of crime-constituting conditions) of theft in the infringement on the *de facto* control but yet allowed room for denying the illegality of theft to an act within the limit of patience the victim is required to exercise. In this sense, the decision can be regarded as having taken the approach of the theory of *de facto* illegality. As a result, the Court decided that this case was a case in which the substantial illegality should be affirmed as well because the accused's act of infringement on the possession by the victim exceeded the limit of patience the latter was required to exercise.

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