# 5. Criminal Law and Procedure

## a. Criminal Law

### 1. A case in which causation was held to exist between the accused's original violence and the victim's final death even if a third party's violence intervened.

Decision by the Third Petty Bench of the Supreme Court on November 20, 1990. Case No. (*a*) 1124 of 1988. A case of bodily injury resulting in death. 44 *Keishū* 837.

[Reference: Criminal Code, Article 205.]

***[Facts]***

The accused committed an act of violence against the victim of the current case by delivering numerous blows to the head (hereinafter referred to as "the first act of violence") at a workmen's bunkhouse in Mie Prefecture. The victim was so severely injured that he fell into cerebral hemorrhage. The accused carried the victim by car to a materials storage yard in Osaka and left him there. The victim was again given several blows (hereinafter referred to as "the second act of violence") by an unknown person at the materials storage yard. Before dawn the next morning, the victim, at the same place, died from the cerebral hemorrhage.

The prosecutor, deeming the second act of violence also to be the act of the accused, took this as an act of murder and made it the primary count. Also, the prosecutor, deeming the first act of violence to be an act of bodily injury resulting in death, took this as the conjunctive count.

In the first instance, the court, while not finding sufficient evidence to indicate that the second act of violence was the act of the accused, affirmed the existence of causation between the accused's first act of violence and the victim's death, and thereby admitted the constitution of a crime of bodily injury resulting in death. It denied any existence of causation between the second act of violence and the victim's death. In the second instance, the appellate court reaf-

firmed the existence of causation between the first act of violence and the victim's death and dismissed the accused's *koso* appeal on the ground that the first act of violence alone would have been sufficient to cause death. Here again, the court denied the existence of causation between the second act of violence and the victim's death because that violence had only the effect of hastening the victim's death.

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

*Jokoku* appeal dismissed.

In the case in which violence by the offender constituted an injury to the victim that resulted in death, causation can be affirmed to exist between the offender's violence and the victim's death even if death was hastened by other violence given later by a third party.

***[Comment]***

What is disputed in the current case is whether or not any causal nexus should be admitted between the offender's act (the first act of violence) and the consequence (the victim's death) in case death followed a third party's violence (the second act of violence) which was committed against the victim after the first act of violence.

The current decision, employing the concept of "cause of death", held that a causal nexus could be affirmed between the first act of violence and the consequence if this violence had already constituted the cause of the victim's death and the second act of violence had no effect but to hasten the death. This structure of theory is common to both the decision of first instance and the decision of second (original) instance. The causation between the second act of violence and the consequence, which was expressly denied by those decisions, is not at all referred to in the current decision.

Cases in which after an action is performed another action or situation intervenes may be divided into the following patterns: (1) an original action, after it was performed, is followed by a new situation building up the foundation of a process of cause and effect independently from the original action, the progress of which brings about the consequence; (2) the consequence is caused only

by the combination of the original action and the succeeding action (or situation); (3) the second action (or situation), by being added to the original action and thereby accelerating the flow of cause and effect, speeds up the consequence which might have been reached any way by the original action alone.

What can be thought to fall under pattern (1) is such case where the perpetrator administered poison to the victim who, however, was later shot to death by a third party well before the poison would have worked to the victim. In this pattern there is no objection to the denial of any causation because there is no *conditio sine qua non* between the original action and the consequence. Pattern (2) includes the case decided by the Great Court of Judicature on October 25, 1930 (see 9 *Keishū* 761) in which the accused delivered blows to the victim on the head, thereby causing him to suffer a heavy bruise and skull fracture. The victim, knocked down, staggered to his feet and started walking away, but he was caught again and thrown into a river by a third party. The victim, having lost his reflex movement through the violence committed by the accused, could not raise his face from the water of the river and drowned. In this case the Great Court of Judicature affirmed the existence of causation, holding the accused's act of injuring to be one of the joint causes of death.

The current case belongs to pattern (3). In veiw of the fact that the precedent as foregoing admitted the existence of causation in regard to the original action also in pattern (2), it seems natural that the current case, which falls under pattern (3), affirmed a causal nexus in regard to the first act of violence, for, whereas the *conditio sine qua non* which is supposed to be a prerequisite for causation is affirmable in both original and second actions in the case of pattern (2), the *conditio sine qua non* may be affirmed only in the original action in the case of pattern (3). It can be fairly said, in other words, that while the original and second actions are connected with the consequence in a practically equal manner in the case of pattern (2), both actions in the case of pattern (3) are connected with the consequence differently in the way that the former connection is primary and the latter incidental.

According to the theory of legally sufficient cause (*Adäquanztheorie*) which is deemed to be academically dominant, causation would be denied in the case of pattern (1) because of no existence of *conditio sine qua non*. Causation would be possibly denied also in the case of pattern (2) because of remoteness between the first action and the consequence. In the case of the foregoing precedent, it was discussed whether the third party's action had been foreseeable or not at the point of time when the first perpetrator committed violence against the victim or whether there was sufficient proximity or not between the violence first committed and the final death by drowning, and thus there was enough room to deny the existence of causation. In the case of pattern (3), causation would be discussed in the same process but, perhaps, with greater possibility of sufficient proximity admitted between the first act of violence and the consequence than in the case of pattern (2). But, if the components of the consequence are more concretely considered including the time of its occurrence, it may be logically possible that a gap arising between the time at which the consequence would have been caused by the first action alone and the time at which the consequence was caused with the intervention of the second action should become enough ground to deny sufficient proximity between the first action and the consequence, though such concrete consideration of the consequence might affirm a *conditio sine qua non* also between the second action and the consequence.

The current decision made it clear that the causation between the first action and the consequence is affirmative in the case of pattern (3), and as aforementioned, this conclusion may be reached also from any theory of causation, though it is not clear on which theory the decision was based.

**2. A case in which willfulness (*mens rea*) was found in regard to crimes of importing and possessing a stimulant drug even if the accused had not firmly recognized the object as a stimulant drug.**

Decision by the Second Petty Bench of the Supreme Court on March 9, 1990. Case No. (*a*) 1038 of 1989. Charges of violation of

the Stimulant Drug Control Act and the Customs Act. 1341 *Hanrei Jihō* 157.

[Reference: Criminal Code, Article 38.]

***[Facts]***

The accused (an American) was requested in Taiwan by a man connected with a gangster organization to bring into Japan what was referred to as "cosmetics". The accused, upon this request, carried the object to Japan in an airplane and let it pass through customs entry at Narita Airport. He stayed at a hotel in Tokyo with the object. The object he was entrusted to carry was three kilograms of a stimulant drug, but he insisted that he had not perceived it to be such.

At the trial, the court found that the accused, before his departure from Taipei, had been conscious that the object entrusted to him was a thing, the importation of which into Japan was prohibited and the smuggling of which into Japan would be very profitable to him. The court, holding his act of importing a stimulant drug with such consciousness to be completely sufficient for the formation of his willfulness in regard to a crime of importing a stimulant drug, found him guilty of crimes of importing and possessing a stimulant drug and sentenced him to seven years' imprisonment with forced labor.

In the original instance, the appellate court dismissed the accused's *koso* appeal, holding as follows: The recognition of the object as a stimulant drug is supposedly required for the formation of willfulness in regard to crimes of importing and possessing a stimulant drug. This recognition, however, does not have to be a firm recognition of the object as a stimulant drug, and *dolus generalis* is constituted when the person importing or possessing it recognizes beforehand some kinds of medicinal substances including a stimulant drug as illicit medicinal goods injurious to healthy bodies even if he does not specifically recognize as to which category of illicit medicinal goods the object belongs to.

From this decision, the accused filed a *jokoku* appeal with the Supreme Court.

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

*Jokoku* appeal dismissed.

When the accused was importing and possessing the object, he was conscious that it was a kind of injurious medicinal substance, including a stimulant drug. This is attributable to the fact that the accused had the feeling that the object might be a stimulant drug or some other injurious medicinal substance. If so, this is quite sufficient for the formation of his willfulness in regard to crimes of importing and possessing a stimulant drug.

***[Comment]***

The dispute in the current case is what prior recognition is required from the perpetrator in order to find the formation of willfulness in regard to crimes of importing and possessing a stimulant drug.

The court of first instance held that the willfulness of committing the crimes of importing and possessing a stimulant drug could be found if the perpetrator was aware that the object was a kind of illicit medicinal substance, the importation of which into Japan was prohibited. Contrary to this, the court of second instance (the original decision) was of the opinion that such general recognition of it as one of such prohibitive goods was insufficient to find his willingness in regard to crimes of importing and possessing a stimulant drug. Based thereon, the court employed the concept of "*dolus generalis*" and built up a logical structure where willfulness could be found as far as a stimulant drug was included in the illicit medicinal substances that the perpetrator generally recognized as such. The current decision by the Supreme Court, though not expressly using the term "*dolus generalis*", seems also to have set up the same logical structure.

Although it is disputed among academic circles whether or not consciousness of illegality should be included in willfulness as one of its components or ingredients, there is no denying that the recognition of fact is an element of willfulness. The recognition of fact means recognition of the fact corresponding to the *Tatbe-*

*stand* (crime-constituting conditions). Therefore, this necessitates recognition of the fact that has been stereotyped by each of the *Tatbestand*, and if willfulness were found only with recognition of illegality and without recognition of such fact, it would lead to denial of the function that *Tatbestand* has to limit and restrict willfulness. On the other hand, it would be impossible to demand the name of the object or the exact recognition of its attribute as the substance of the recognition of fact. Then, it may be that the concept of "*dolus generalis*" was invoked.

But the term "*dolus generalis*" has diverse meanings. Its first meaning is, for example, the willfulness in the case where one is going to injure or kill others by throwing a bomb into a crowd. That is to say, the party recognizes a result in light of the *Tatbestand*, but which and how many objects a result will be brought to, he recognizes only "generally". The second meaning is what is called "Weber's *dolus generalis*". In this, from a subjective point of view, the party is deemed to have conducted two actions, but objectively, in case the result of the first action occurs only by the second action, its willfulness is found "generally" in regard to the whole matter. Against this, the term "*dolus generalis*", which the court expressly used in the original decision and the Supreme Court relied on in the current decision, is not covered by either of these meanings. In other words, in such a case as this the perpetrator recognizes the object concretely and firmly but only "generally" as to its attribute.

Apart from whether or not consciousness of illegality is an element of willfulness, the culpability principle may demand consciousness of illegality (or at least its possibility) so that an act can be attributed to the perpetrator. The illegality meant here should not be such in the general sense but should be referred to as such as stereotyped by each of the *Tatbestand*. In this sense, the recognition of fact which should have the function of individualizing the consciousness of illegality must contain recognition as to the attribute of the object to some extent. Recognizing that the possession of the object is legally prohibited does not serve to individualize the consciousness of illegality. In such a case as the current case, it is not yet up to the mark that one is conscious of importing and possessing

illicit medicinal substances. Yet, there may be no need of going so far as requiring the recognition of the object as a stimulant drug or the complete coincidence between the attribute of the object under the party's consciousness and that of a stimulant drug. Recognition may be necessary to the extent that the object is a kind of medicinal material, the habitual user of which cannot do without and may be adversely affected both bodily and mentally. If such recognition is considered to be the "general" recognition of the object's attribute, then it can be deemed that the party is held accountable for his willfulness in case there is a "*dolus generalis*" in that meaning. It is natural to find the existence of willfulness in a case where the party recognized even wantonly or recklessly that the object he was going to import and possess might be a stimulant drug.

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## b. Law of Criminal Procedure

### 1. A case in which it was disputed whether or not it was legal to make a quasi-*kokoku* appeal claiming the disposal or delivery of the prints and negatives of the photographs taken by a policeman at the time of search and seizure.

Decision by the Second Petty Bench of the Supreme Court on June 27, 1990. Case No. (*shi*) 9 of 1990. A case of special *kokoku* appeal by the accused from the decision dismissing his quasi-*kokoku* appeal against the issue of a search and seizure warrant and the measure of seizure. 44 *Keishū* 385.

[Reference: Code of Criminal Procedure, Articles 218(1), 430(1) and (2) and 426.]

***[Facts]***

With regard to a case of the accused's attempted intrusion into a building, a search and seizure warrant was issued and a search