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

was executed thereunder. At that time a policeman, in addition to seizing the objects listed on the warrant, took photographs of several articles not corresponding to such objects.

The accused filed a quasi-*kokoku* appeal, claiming the revocation of the photography in question and the disposal or delivery of its prints and negatives (hereinafter referred to as "disposal of the photographs"). In the original decision, the court dismissed the accused's claim, holding that although the photography in this case was illegal because it deviated from the scope of the permissible measures incidental to such search and seizure, the accused's application for disposal of the photographs was illegal because it is not approved under Article 430(2) of the Code of Criminal Procedure. Against this decision, the accused filed a special *kokoku* appeal with the Supreme Court.

[Opinions of the Court]

As the photography in this case takes on the character of inspection, it does not correspond to any of the "measures concerning seizures" which are subject to the quasi-*kokoku* appeal as mentioned in Article 430(2) of the Code of Criminal Procedure. Therefore, the quasi-*kokoku* appeal claiming the disposal of the photographs is illegal, and the original decision to the same effect is justifiable (see the concurring opinion of Judge Fujishima).

[Comment]

1. It is not infrequent that in their practice, investigating officials take photographs on the spot without obtaining a warrant separately at the time of their search and seizure. This decision is important as the first decision ever given by the Supreme Court as to whether or not it is legal to file a quasi-*kokoku* appeal against such photography.

Incidentally, what is called a "quasi-*kokoku* appeal" is a means to raise an objection against certain decisions rendered by a judge or against certain measures taken by a public prosecutor or policeman, as the case may be (see Articles 429 and 430 of the Code of Criminal Procedure). The dispute of this occasion applies to the latter case.

To put it concretely, the dispute was whether or not the photography in this case should be considered to be the policeman's "measure concerning seizure", which is expressly prescribed as being subject to a quasi-*kokoku* appeal.

2. There are three types of cases in which investigating officials take photographs on the spot of search and seizure: (1) the case in which, in order to prove the legality of the procedure of search and seizure, photographs are taken of the status of such procedure; (2) the case in which, in order to secure the evidential value of the objects seized, photographs are taken of the state in which such objects are found; and (3) the case in which photographs are taken of things other than the objects of seizure in order to record the shape and contents of such things. It is commonly understood that cases (1) and (2) are legal as the permissible measures incidental to search and seizure. On the other hand, the precedents of the lower courts and the position of academic circles are in favor of the view that photography as in case (3) is illegal because it deviates from the scope of the permissible measures incidental to search and seizure (the original decision of this case and the concurring opinion of Judge Fujishima (*infra*) have the same effect).

The problem is what means should exist to raise an objection in such a case. Generally it is indisputable that as remedies for illegal investigations, there are exclusion of the photographs from evidence, claims of compensation for damages, and so on. Against this, the precedents of the lower courts and the opinions of academic circles as to whether or not it is legal to file a quasi-*kokoku* appeal claiming the revocation of the photography and, further, the disposal of the photographs themselves are roughly divided into the following three arguments: (1) one that deems the quasi-*kokoku* appeal to be illegal (the original decision of this case has the same effect); (2) one that allows the quasi-*kokoku* appeal claiming the revocation of the photography but regards the application for the disposal of the photographs themselves as illegal; and (3) one that deems the application for the disposal of the photographs themselves, too, to be legal. Under these circumstances, the possibility of quasi-*kokoku* appeal was denied in this decision. This declared

for the first time that the Supreme Court took the position of (1).

(3) Regarding this decision, however, there remain some questions to discuss.

First, the majority opinion of the Court did not give any direct decision on the legality of the photography. This may be because, once the photography in this case was considered to be an inspection, it was unnecessary for the Court to decide on the legality of the photography because it could not be subject to a quasi-*kokoku* appeal when the relevant law was interpreted in its literal sense even if the photography itself might have been illegal. Therefore, it cannot be fairly said that this decision recognized the legality of the photography in question. Rather, it should be noted that as aforementioned, the precedents of the lower courts and the academic opinions have taken the position regarding this as illegal.

Secondly, the range of this decision is problematic as a leading case, because it does not seem that the Court, in its opinion, declared that any kind of photography at the time of search and seizure corresponded to inspection (and, therefore, any quasi-*kokoku* appeal against it should always be illegal). In this regard, the concurring opinion of Judge Fujishima is instructive. First, he said that, as originally decided, the photography in this case was an illegal act for inspection deviating from the scope of the permissible measures incidental to search and seizure but could not be subject to a quasi-*kokoku* appeal when the relevant law was interpreted in its literal sense. And he added that if the photography, not limited to the outer appearance of articles, were extended to the contents of the diary, notebook, and so on, such act could substantially be identified with a seizure and, therefore, this could be subject to a quasi-*kokoku* appeal as a "measure concerning seizure". In other words, in the case where photography can substantially be identified with a seizure, a quasi-*kokoku* appeal should be allowed (but the photography in this case could not be so identified because it was limited to the outer appearance of articles). Further, it is worth noting that he suggested the possibility of an application for disposal of the photographs taken.

The Code of Criminal Procedure did not regard inspections as

being subject to quasi-*kokoku* appeal from the beginning because the infringement on personal rights by inspection was considered to be of a passing nature unlike that by seizure. That is to say, it was considered that while in the case of seizure it was necessary to allow a quasi-*kokoku* appeal because such infringement on rights would continue unless the object seized was returned to its owner, the infringement by inspection, even if it was illegal, would cease as soon as such inspection was completed because the inspection was a measure to recognize the outer appearance of an article or place by means of the five senses, and, therefore, the merit of approving the revocation of the inspection *ex post facto* was small. However, taking a photograph of the contents of a diary or notebook, for example, does not mean to take possession of an article as a seizure does, but by recording the inspection results in a film it is supposed to mean the semipermanent continuance of the infringement on rights to the same extent as in the case of seizure. Therefore, powerful in academic circles is the opinion which supports Judge Fujishima to the effect that the court should allow a quasi-*kokoku* appeal including an application for disposal of the photograph in cases when the photography can substantially be identified with a seizure.

The distinction between photography of only the outer appearance of an article and that of its contents is not always clear, however. It will be necessary in the future, therefore, to reexamine the difference between inspection and seizure and thereon discuss legislation.

2. A case in which it was disputed whether or not it was legal for a policeman to record a conversation without the consent of the party involved at the time of search and seizure and whether or not there was any evidential competence in the expert opinion of the voiceprints.

Decision by the Seventh Criminal Division of the Tokyo High Court on July 26, 1990. Case No. (*kei wa*) 608 of 1989. A case of compelling the performance of official duties. 1358 *Hanrei Jihō* 151.

[Reference: Code of Criminal Procedure, Articles 197(1), 317 and 321(4).]

[Facts]

In conjunction to a struggle by a political movement organization against the construction work of an airport, the accused, who was a member of this organization, was prosecuted for having telephoned a public officer, X, at home who was involved in the work and used threats against him in order to bring about his resignation.

In the trial, the prosecution, asserting that the voice of threatening X which had been recorded by X with a caretaking telephone was identical with the accused's voice recorded stealthily on a cassette tape by a policeman when he, with a search and seizure warrant, searched the building of the organization to which the accused belonged, requested the examination of evidence which supported that assertion, including the expert opinion of the voiceprints.

Against this, the accused pleaded not guilty, asserting that the cassette tape in question was illegally obtained evidence and, therefore, it did not have any evidential competence, and that even if it was deemed to have such competence, the expert opinion of the voiceprints did not have such competence.

[Opinions of the Court]

1. The recording of a conversation which is rendered by one party, A, without the consent of the other party, B, may certainly infringe on B's privacy to some extent. However, unlike in the case of wiretapping, B, in the relationship with A, may be deemed to have waived the confidentiality of the conversation and left the contents of his speech to A's control. Therefore, whether or not it was legal to record the conversation should be decided depending on whether or not there was anything extraordinarily unfair in the procedure for recording in consideration of the circumstances such as the purpose, object and means of the recording and the situation in which the conversation was held. (In light of this, the recording was legal in this case.)

2. It certainly cannot be said that a perfectly precise method

has been established for voiceprint analysis. However, in light of the facts that the theory of voiceprint analysis is scientifically reasonable and that the efficiency of the instruments used and the techniques applied in voiceprint analysis have greatly improved, it is not reasonable to deny the evidential competence of expert opinion of voiceprints sweepingly. Therefore, the evidential competence can be affirmed when voiceprint analysis is undertaken by a qualified person with efficient instruments and, thus, the outcome of the analysis is deemed to be credible. (In light of this, the evidential competence can be affirmed to the expert opinion of the voiceprints in this case.)

[Comment]

This case attracted great attention because the direct evidence that connected the threat by telephone and the accused was only the "voice" recorded on the cassette tape. And the current decision indicated a detailed judgment on many issues of the "voice" which had not been so much argued in the past, and, therefore, is worthy of notice. In the following, out of these issues the two most important points shall be discussed.

1. It is generally understood that wiretapping is a compulsory measure which infringes on the privacy of individuals and it cannot be effected except when there is a special provision for this in light of the requirement that compulsory measures shall not be taken unless otherwise stipulated in "this" Code (Proviso of Article 197(1) of the Code of Criminal Procedure). On the other hand, the legality of the recording of a conversation by one party, A, without the consent of the other party, B, is argued separately by the following three academic opinions: (1) the opinion that holds it to be legal because, once B approved A to hear his speech, he can be deemed to have waived the confidentiality of the conversation and left the contents of his speech to A's control, apart from the moral point of view; (2) the opinion that holds it to be illegal because, between revealing the contents of the conversation to a third party and recording it on a cassette tape, there is a great difference in the degree of the infringement of privacy; and (3) the opinion which,

though basically standing for the above opinion of (2), regards it exceptionally as legal in case there was any justifiable reason for such recording and the conversation was recorded under the situation from which any privacy could not be expected. The majority opinion is (1), and recently the opinion of (3) is also becoming powerful.

Precedents of the Supreme Court include the decision by the Third Petty Bench of the Supreme Court on November 20, 1981, 35 *Keishū* 797. This decision, in consideration of the concrete circumstances of the case such as the purpose, object and means of the recording and whether or not the recording was consented to, held it legal to record the conversation without the consent of the other party. Since this decision was made, it can be safely said that precedents have tended to judge the legality of such recording in consideration of the circumstances such as the purpose, object, means, and so on. The current decision approved the legality of the tape recording of the conversation, standing almost on the same footing as this and examining more carefully the circumstances to be considered. But it is not necessarily clear which academic opinion (particularly (1) or (3)) these precedents employ. After this decision there is also a lower court decision which held recording without the other party's consent to be illegal in principle (see the decision by the Chiba District Court on March 29, 1991, 1384 *Hanrei Jihō* 141). But, even based on the opinion of (3), the current case can be deemed to correspond to the case in which the recording of the conversation is exceptionally approved as legal.

2. Voiceprint analysis, that is, a method of identification of voices by their sound spectrograms, was developed and put to practical use in the United States. In Japan, too, this method was utilized in the famous "Kidnapping Case of Yoshinobu-chan" in 1963 and since then, study has progressed until today when it is said to be in the stage of practical use.

Expert opinion of voiceprints has raised questions in the past, particularly in regard to its evidential competence. To put it concretely, it has been disputed whether or not there is any logical relevancy between expert opinion of voiceprints and the fact that should

be proved; that is, whether or not expert opinion of voiceprints has the minimum credibility required for the fact to be proved. For, unless such a logical relevancy is perceived, it is useless and time-consuming to examine such evidence.

Under certain conditions, precedents have taken the position of approving such relevancy and affirming the evidential competence of expert opinion of voiceprints. For example, the decision by the Tokyo High Court on February 1, 1980, 960 *Hanrei Jihō* 8, which is the original instance of the aforementioned decision by the Third Petty Bench of the Supreme Court on November 20, 1981, held that the evidential competence of expert opinion of voiceprints should be judged in light of the aptitude of the person who made an analysis, the efficiency of the instruments used, and the reliability of the test result. The current decision, too, basically relying on the same standard and adding a more detailed consideration, approves that there is evidential competence in the expert opinion of voiceprints.

However, under the present circumstances where there is no completely precise method established for voiceprint analysis, it is necessary to make a continuous effort to improve it, and courts should maintain the attitude of approving the evidential competence of expert opinion of vioceprints as far as it meets certain requirements. Further, approval of evidential competence should not immediately lead to the affirmation of a high degree of credibility. Whether or not and to what extent there is any credibility should be strictly examined in itself. These arguments may equally apply to scientific evidence other than expert opinion of voiceprints (for example, results of a polygraph examination and dog's detecting by smell).

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