with a hearing similar to an oral argument depending on the circumstances.

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5. Criminal Law and Procedure

a. Criminal Law

1. A case in which the reasonableness of a defensive act, which is a requirement of self-defense, was approved according to the subjectivity of the actor.

Decision by the Fourteenth Criminal Division of the Osaka District Court on April 24, 1991. Case No. (*wa*) 3360 of 1990. A case of injury. 763 *Hanrei Taimuzu* 284.

[Reference: Criminal Code, Articles 36(1) and 204.]

[Facts]

The accused had a quarrel with a woman in an eating place and the woman left. A short while later, the woman returned to the place with her *de facto* husband. The husband stepped to the accused, grasped and pulled him by the collar, verbally abusing him. The accused, trying to free himself, struck the man around the right shoulder with a fish-slicing knife which happened to be near by. The husband received an incision in the right shoulder which required 31 days' treatment.

The accused, during this act, was not conscious that the object he held was a fish-slicing knife.

[Opinions of the Court]

The accused is found not guilty. (Later, this sentence became final and conclusive.)

The act of the accused, as such, was a counterattack using a fish-slicing knife against the other party's empty-handed attack and exceeded the scope of reasonableness of a defensive act because he inflicted an injury requiring 31 days' treatment. However, the accused was only conscious that the means he used for the counterattack was something like a bar. As to a means of defense, the perception of the actor should be a decisive factor when the objective fact does not accord with his perception. Based on that, it is generally accepted that the act of striking with what the accused perceived to be something like a bar against an attack of both hands pulling him by the collar is reasonable for a counterattack. Therefore, the accused's act can be justified as a self-defense and he is not guilty.

[Comment]

In order for an act which is required to constitute defense to be justified as self-defense, the "necessity" and "reasonableness" of the defensive act, as well as the "imminence" and "unjustness or illegality" of the attack, are required (Article 36 of the Criminal Code). Of these, what was disputed in the current case is the "reasonableness" of the defensive act. The reasonableness of a defensive act is considered to mean (1) that there is no remarkable unbalance between the legally protected interests infringed on by the attack and those infringed on by the counterattack thereto, and (2) that the means used against the attack is reasonable as the counterattack thereto.

In the current case, it was found that although the defending actor (i.e. the accused) made a counterattack by a fish-slicing knife against the empty-handed attack, the means of counterattack was, in his perception, something like a bar, not a fish-slicing knife. So, in the case there is any discrepancy between the objective fact (defense with a fish-slicing knife in the current case) and the actor's perception (defense with something like a bar in the current case) in assessing the reasonableness of the means employed in the defensive act,

the problem is how this discrepancy should be dealt with.

In academic opinions, with regard to the case in which a means of defense is such that it is affirmed in its reasonableness if based on the counterattacker's perception of the means while it exceeds the scope of reasonableness if based on the objective fact, there are two views which are antagonistic to each other: the view regarding the case as a case of "mistaken self-defense" and the view regarding it as a case of "excessive self-defense".

The view that seeks to treat this case as a case of mistaken self-defense holds that it is a case of mistaken self-defense not only when there is an erroneous assumption of the "imminence" and "illegality" of the attack but also when there is an erroneous assumption of the "necessity" and "reasonableness" of the defensive act. This theory of mistaken self-defense is further divided into two viewpoints: one that understands the mistaken self-defense itself as a mistake (erroneous conviction) of fact, and the other that understands it as a mistake of illegality. If mistaken self-defense is taken for a mistake of fact, then *mens rea* is supposed to be precluded. If mistaken self-defense is taken for a mistake of illegality, on the contrary, *mens rea* is supposed to be precluded in mistaken self-defense according to the *strenge Vorsatztheorie* which holds that consciousness of illegality is another factor of *mens rea*, but *mens rea* is held to exist anyway and the responsibility therefor is supposed to be precluded only when there is no negligence in the erroneous assumption of reasonableness according to the *Schuldtheorie* which holds that consciousness of illegality is not a factor of *mens rea* and the responsibility is precluded only when there is no possibility of consciousness of illegality.

On the other hand, the view which regards excessive self-defense as disputable in such a case as this holds that, once there is an imminent and unjust infringement, the case where there is such infringement should be distinguished from the case where there is not such infringement in reality. That is, in this view, only erroneous assumption as to "imminence" and "illegality" of the attack is regarded as a mistaken self-defense, and if a defensive act exceeds the scope of "reasonableness", excessive self-defense is constituted regardless

of whether or not the defending actor perceived that excessiveness. The current case is exactly a case in which there is no perception of excessiveness. According to this view, the illegality of the counterattack is not precluded and leaves room only for discretionary reduction or remission of penalty (Article 36(2) of the Criminal Code).

There is a precedent in which a person acting in defense who had not been conscious of the excessiveness of the defense was held not guilty on the ground that it was a mistaken self-defense (decision by the Ichinoseki Branch of the Morioka District Court on March 15, 1961, 3 *Kakeishū* 252). Compared with this, the current decision neither relies on the theory of excessive self-defense nor on the theory of mistaken self-defense. In other words, in this decision, the "reasonableness" of the defensive act was approved exclusively on the basis of the criterion of the defending actor's perception. Among academic opinions, there is a view that seeks to approve self-defense depending on that perception if the defending actor's misconception as to the existence of an imminent and unjust infringement is based on a reasonable ground, but the current decision which, without questioning a reasonable ground for the defending actor's misconception, employed as a criterion the circumstances the defending actor had perceived can only be said to be very exceptional. Whether a defensive act in such a case as this is viewed as mistaken self-defense or as excessive self-defense, it is an illegal act in itself. Therefore, that "defensive act" is one against which there can be self-defense in turn, and it can also be punished if the defending actor's misconception is careless. On the other hand, if a defensive act is approved as self-defense according to such a view as in the current decision, there cannot be "self-defense" by the other party against it and the defending actor cannot be punished no matter how careless his misconception might have been. Also, even if a defensive act objectively satisfied the requirement of "reasonableness", on the contrary, self-defense would not be constituted if the defending actor perceived the act as exceeding the scope of "reasonableness". In this way, the current decision includes not only theoretical questions but also many questions that may affect actual conclusions.

2. A case in which it was held that the falsification of telephone cards would constitute a crime of altering valuable papers.

Decision by the Third Petty Bench of the Supreme Court on April 5, 1991. Case No. (*a*) 791 of 1990. A case of theft, altering valuable papers, and delivery of altered valuable papers. 45 *Keishū* 171.

[Reference: Criminal Code, Articles 162 and 163.]

[Facts]

The accused altered many 50-call telephone cards produced by Nippon Telephone and Telegram Company (NTT) so that they could be used, and sold them to a third party, stating that he had altered them to 1998-call cards.

It was held in the first and second instances that the act of the accused constituted a crime of altering valuable papers. The accused, asserting that telephone cards are not equivalent to valuable papers, made a *jokoku* appeal.

[Opinions of the Court]

Jokoku appeal dismissed.

(1) A valuable paper is a paper on which the property right is indicated, and the exercise of this right requires the possession of the paper. A telephone card contains electro-magnetically recorded information concerning the number of calls possible at the time of issue, the number of calls remaining and information that shows that the card was authentically issued. The number of calls remaining and the issue information, among others, cannot be ascertained from the description on the surface of the card. But, the former is indicated on the counter of card-use public telephones when the card is inserted into the telephone and the latter can be read out by the built-in card reader. Therefore, it can be approved that the property right to receive services of telephone is indicated on that paper if the aforementioned magnetic information and the surface description or outer appearance of the telephone card are seen in combination with each other. In addition, the user uses his telephone card by inserting it into a card-use public telephone. In this sense, it is appropriate to

consider the telephone card to be a kind of valuable paper.

In the past, valuable papers have been regarded as documents because they have been only taking the form of a document, but this does not mean that there are no valuable papers other than in the form of a document.

(2) The alteration of a valuable paper is the act of modifying an authentic valuable paper without any authorization to do so. Given that a telephone card is a valuable paper, any falsification applied to its magnetic information would obviously be equivalent to the alteration of a valuable paper.

(3) The uttering of a valuable paper counterfeited or otherwise modified means the use of it, as if it were an authentic thing, according to the original way it ought to be used. Therefore, the use of that altered telephone card by inserting it into a card-use public telephone would be equal to the uttering of that altered telephone card.

[Comment]

Problems in the current case are (1) whether or not a telephone card is equivalent to a valuable paper under the Criminal Code, (2) whether or not the falsification of the magnetically recorded information recorded on a telephone card is equal to the "alteration" of a valuable paper, and (3) whether or not speaking by telephone by inserting a telephone card into a card-use public telephone is equivalent to the "uttering" of a valuable paper.

The first problem comes from the fact that a telephone card, unlike a traditional typical valuable paper, is composed of two portions, one being the surface information on the name of the card producer and the number of calls at the time of issue and the other being the electro-magnetically recorded information on the number of calls remaining, etc. Academic opinions and precedents argue from the definition in leading cases in which it was held that a valuable paper viewed under the Criminal Code is a "paper on which the property right is indicated and of which possession is required for the exercise of that indicated right" (decision by the Great Court of Judicature on March 16, 1909, 15 *Keiroku* 261; decision by the

Supreme Court on July 25, 1957, 11 *Keishū* 2037). The opinions based on this are divided into three antagonistic theories. Theory A holds that a valuable paper under the Criminal Code is not necessarily in the form of a document, and that the part where the right is embodied is its essence and, thus, in the case of a telephone card, the electro-magnetically recorded part forms the core of a valuable paper. Theory B holds that the surface description and the electro-magnetically recorded part of the telephone card are united to form a valuable paper. Theory C holds that a valuable paper must be in the form of a document, that is to say, from the viewpoint of the necessity of readability, a telephone card is not equivalent to a valuable paper because the essence of the telephone card is its electro-magnetically recorded part which is not readable.

These differences among opinions can be said to come from the problem as to how to grasp the relation between "embodiability of the right" and "readability of the contents of the right" among the requirements of a valuable paper. That is, in the case of traditional valuable papers, the right is embodied therein by the description of that right on the surface of the paper, and "embodiability" and "readability" are united as one body. In the case of telephone cards and other prepaid cards, on the contrary, the relevant right is embodied in the magnetic information which is not readable, and "embodiability" and "readability" are separated from each other. Theory A, among the others, finds the attributes of a valuable paper in magnetic information itself because "embodiability" is the very essence of valuable papers. In contrast to this, Theory C presupposes that the owner exercises his right in the valuable paper by showing it to another and thus attaches importance to "readability" of that right. Therefore, it denies the attributes of a valuable paper to the telephone card because its owner can directly exercise his right therein only by inserting it into a public telephone, not by showing it to another.

In the current decision, the Supreme Court seems to take the standpoint of Theory B because it finds the attributes of a valuable paper in the combination of the surface description and the magnetic information, though the Court affirms them because the issuer's

name and the number of calls possible at the time of issue are indicated on the surface of the card and because the magnetic information such as the number of calls remaining can be read out by the counter and the card reader of a public telephone. That is to say, it appears that the Court, requiring "readability" as an attribute of a valuable paper, does not confine its contents to the surface description but extends them to such things as readable through machines. If Theory A were adopted, the attributes of a valuable paper would be affirmed even to the card without any description on the surface. However, even viewed from the standpoint in the current decision, if readability through machines meets a requirement of "readability", then the indication of such information as the issuer's name would not be of much account and, thus, the decision seems likely to come near to Theory A. The standpoint in the current decision, in order to clarify the difference from Theory A, should stress such factors as public confidence toward the information shown on the surface, though it would come near, in turn, to Theory C if this factor were emphasized.

The current decision affirmed the attributes of a valuable paper with regard to telephone cards, which are a kind of prepaid card, by uniting the surface description and the magnetic information of the cards as one body. In contrast to this, the prevailing view is that in the case of railroad passenger tickets and commutation tickets, even if they include magnetic information besides the surface description, the magnetic information here is only for the convenience of operational processing and it is only the surface description of such a ticket that forms the basis of the attributes of a valuable paper because the user's right is solely embodied in that description on the surface.

The second problem, that is, the concept of "alteration", is closely connected with the first problem. That is to say, if viewed from the standpoint that the magnetic information recorded on a telephone card forms the core of the attributes of a valuable paper or that the magnetic information united with the surface description as one body forms the basis of the attributes of a valuable paper, the falsification of the magnetic information is really equal to the alteration of

a valuable paper. On the contrary, if the surface description solely forms the basis of the attributes of a valuable paper, then only the falsification of the surface description is equivalent to the alteration of a valuable paper and the falsification of the magnetic information will not constitute the alteration of a valuable paper. It is a natural conclusion that the current decision in which it was held that the combination of the surface description and the magnetic information as one body forms the attributes of a valuable paper deems the falsification of the magnetic information to constitute the alteration of valuable papers.

Thirdly, the constitution of the crimes of counterfeiting and altering a valuable paper requires the "purpose of uttering". The concept of "uttering" is also connected with that of a valuable paper. The central problem is whether it is required to show a valuable paper to another in order to exercise the right embodied in the valuable paper or it is sufficient to operate a machine in order to do so. The viewpoint that the exercise of a right by showing a valuable paper is the "uttering" of the valuable paper is connected with the viewpoint that "readability" is required for the attributes of a valuable paper. In a precedent, the uttering of a valuable paper is interpreted as "to use as an authentic thing according to the way it ought to be used" (decision by the Great Court of Judicature on March 31, 1911, 17 *Keiroku* 482). If based on this, as the way of using a telephone card is to receive services of telephone by inserting it into a public telephone, it is not expected at all to show it to another person. Therefore, as long as the concept of "uttering" defined in the aforesaid precedent is relied on and the telephone card is approved to have the attributes of a valuable paper, the act of inserting the telephone card into a public telephone to make a call may be equivalent to the "uttering" of a valuable paper.

As above, the current decision is the first case in which the Supreme Court approved the constitution of the crimes of altering valuable papers and delivery of altered valuable papers by affirming the attributes of a valuable paper to a telephone card, holding the falsification of the magnetic information recorded on a telephone card to be the alteration of a valuable paper, and assessing as the

uttering of a valuable paper the act of inserting a telephone card into a public telephone to make a call. As previously mentioned, it may be theoretically possible to affirm this conclusion. But, in consideration of the fact that telephone cards and other prepaied cards are different by nature from traditional documentary forms of valuable papers, it would be more desirable to settle this kind of problem by legislation, by which doubts arising in light of the principle of '*nulla poena sine lege, nullum crimen sine lege*' should be dispelled.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not the fact that an interrogation was prearranged applied to "when it is necessary for the investigation" (Article 39(3) of the Code of Criminal Procedure), the requirement to designate the date, time, and place of interview with defense counsel.

Decision by the Third Petty Bench of the Supreme Court on May 10, 1991. Cases Nos. (*o*) 379 and 381 of 1983. Cases of claim to the state for damages. 45 *Minshū* 919.

[Reference: State Redress Act, Article 1(1); Constitution of Japan, the former part of Article 34; Code of Criminal Procedure, Articles 39(1) and (3).]

[Facts]

The defense counsel, A, went to the police station around 10:40 a.m. to request an interview with the suspect under detention, B. But, as he did not possess an interview permit, the policeman, C, telephoned the public prosecutor, D, of the district public prosecutor's office for instructions. D instructed C to tell A to come to obtain an interview permit which would be issued. Upon hearing this, A lodged a protest against C, saying, "It will take me more than two hours to go from here to the public prosecutor's office and back.