

b. Law of Criminal Procedure

- 1. A case in which it was held that the results of a urinalysis test were inadmissible as illegally-obtained evidence because there was a serious illegality in the investigation from the proceeding of a criminal suspect's coming to the police station to the taking of the suspect's urine sample.**

Decision by the Sixth Criminal Division of the Osaka High Court on February 5, 1992. Case No. (*u*) 424 of 1991. A case of violation of the Stimulant Drug Control Act. 1421 *Hanrei Jihō* 142.

[Reference: Code of Criminal Procedure, Articles 197(1) and 218.]

[Facts]

A police officer received information concerning some trouble between two persons who appeared to be gangsters, and proceeded to the spot immediately. The two were questioned by the police officer. One of them answered and gave his name to the police officer, but the accused did not. Furthermore, there seemed some cause for suspicion concerning the accused, so the police officer continued questioning the accused. In the course of questioning, the policeman suspected the accused of using a stimulant drug, and asked him to come to the police station. As the accused refused the request, the policeman forced him to ride on a police car and come to the police station.

The accused's attitude was unchanged even after arriving at the police station. The police thought it necessary to take a urine sample, and examined the accused's arm and took photographs of injection marks. Submitting documents and the photographs before a judge, the police requested and were granted a warrant for taking a compulsory urine sample. The police, showing the accused the warrant, told him that they would execute the warrant unless he produced a urine sample. Under these circumstances he produced the sample. The police sent it for analysis, which showed that the accused had used a stimulant drug. For this reason the accused was prosecuted.

The court of first instance found the accused guilty. Although

the court found that there was an illegality in his coming to the police station, the court held that the accused consented to produce the urine sample and that the procedure of taking the sample in the police station was legal, and therefore, that the analysis had evidentiary competency. The accused filed a *kōso* appeal, claiming that the expert opinion should be excluded from evidence because it was illegally obtained.

[Opinions of the Court]

Appeal allowed.

(1) As the original decision found, there was an illegality in the procedure of the accused's coming to the police station, since in this procedure the police apparently made use of physical force and ignored his strong refusal, and it was not necessary to force him to come to the police station.

Furthermore, the illegality continued to the procedure of taking the urine sample in the police station. The accused had been convicted of another charge and a prison sentence was pending, and he was a fugitive. For this reason he did not want to be identified. His position was the same after arriving at the police station. Under these circumstances, it could not be found that the accused would voluntarily cooperate in the police investigation (examination of his arm and taking photographs of injection marks) in order to produce documents for obtaining a warrant for taking a urine sample compulsorily. In addition, the accused produced the sample, but the reason he did so was that the police told him that they would execute the warrant unless he produced the sample. In consideration of these circumstances, production of the sample by the accused was not done voluntarily in the proper sense of the word. Rather, he could not help producing the sample because of the warrant. Based on these facts, it must be held that the procedure of taking the urine sample was strongly affected by the preceding procedure, which was found to be illegal, and that the urine sample and the expert opinion were illegally obtained.

(2) If the expert opinion is found to be illegal, it comes to the question whether or not the opinion has evidentiary competency.

The series of investigations by the police in this case essentially amounts to compulsory measures. Since compulsory measures require a warrant under the principle of due process, gross illegality in the investigations is found in this case. If the expert opinion is held to have evidentiary competency, it means that an illegal investigation would be allowed. This is not desirable in respect of deterrence of illegal investigations in the future. Therefore, the evidentiary competency of the expert opinion should be denied in this case.

[Comment]

This is a case in which the evidentiary competency of the expert opinion is denied by application of the exclusionary rule, finding gross illegality in the investigations from the procedure of bringing the accused to the police station to the procedure of taking the urine sample. The number of cases of stimulant drug use is increasing rapidly in recent years. There is an urgent need to reduce such drug use. Control authorities have made efforts to improve the situation. However, the situation is far from desirable. So, investigating officials take every opportunity to come in contact with those who are suspected of using stimulant drugs, and ask them to come to the police station and produce a urine sample. But in some cases investigation may give rise to illegal procedures. The current case can be said one of them.

(1) In this case, both the trial judge and the *kōso* appellate court found that bringing the accused to the police station was illegal. Then, the question is whether or not the procedure of taking the urine sample in the police station was considered to be a distinct procedure not affected by the preceding procedure, and, therefore, legal. This question was already resolved by the Supreme Court. The Supreme Court recognized that in some cases the illegality and the degree of preceding procedures influences the determination of the suitability of the following procedures to obtain evidence (decision by the Second Petty Bench of the Supreme Court on April 25, 1986. 40 *Keishū* 215. 7 *Waseda Bulletin of Comparative Law* 95). More precisely, the Supreme Court held in that case that the preceding procedure of taking a urine sample was conducted for “the same

purpose” as investigating the case of a stimulant drug, and that the illegality in the preceding procedure affected the procedure of taking the sample so long as the latter was conducted by “the direct use” of the illegality of the former, and thus, that the urine sample and the expert opinion which were obtained in these procedures were illegally-obtained evidence. In the current case, although the court did not make clear reference to “the same purpose,” the requisite of the same purpose was satisfied because the police suspected the accused of using a stimulant drug when asking him to come to the police station. The court held that the requisite of “the direct use” was also satisfied because taking the urine sample was conducted in an illegal state brought about by the preceding procedure which was itself illegal.

(2) The next question is that of the evidentiary competency of the illegally-obtained evidence. On this point, the Supreme Court held that the evidentiary competency of the evidence involved should be denied so far as the degree of illegality in the procedure of obtaining the urine sample is so serious that it is tantamount to ignoring the principle of the requirement of a warrant and an affirmation of its evidentiary competency is seen as unreasonable in order to deter illegal investigations in the future (decision by the First Petty Bench of the Supreme Court on September 7, 1978. 32 *Keishū* 1672). While in the decision by the Supreme Court in 1986, the urine sample was not excluded from evidence even though it was found to be illegally obtained in a state affected by the illegality of the preceding procedure, the court in the current case denied the evidentiary competency of the urine sample and the expert opinion because the court found the two requisites of the exclusionary rule were satisfied. This is because the court distinguished the facts of the current case from those of the case in 1986 in that while physical force was used in the accused’s coming to the police station in the former case, it was not used in the latter and in that producing the urine sample was not voluntarily conducted in the former case.

There are many precedents in which the Supreme Court has declared rules by which illegally-obtained evidence is excluded

from evidence. However, there are few cases in which evidentiary competency was denied by the application of the exclusionary rule in spite of recognition of illegality in obtaining evidence. In the aforementioned case of 1986 the Supreme Court did not exclude the illegally-obtained evidence. Recently, however, some lower courts have allowed application of the exclusionary rule. It can be said that the current decision by the high court is noteworthy, reflecting the tendency demonstrated by the recent lower court decisions.

2. A case in which it was disputed whether or not interpretation by an interpreter was proper at the scene of an interrogation of foreign suspects and whether or not a written statement obtained as a result of the interrogation had evidentiary competency.

Decision by the Third Criminal Division of the Tokyo High Court on July 20, 1992. Case No. (*u*) 942 of 1991. A case of robbery causing injury. 1434 *Hanrei Jihō* 143.

[Reference: International Covenant on Civil and Political Rights (ICCPR), Articles 14(3)(a) and (f); Constitution of Japan, Article 31; Code of Criminal Procedure, Article 175.]

[Facts]

The accused, A, B and C, Pakistani nationals from the Province of Punjab, were indicted for robbing property from nine people and injuring two of them. The trial court found the accused to be co-principals of robbery causing injury. The accused filed a *kōso* appeal claiming as follows. X, who attended A as an English interpreter during interrogation, was incompetent and unfair, and the contents of X's interpretation were inaccurate. As for B and C, although they are speakers of Punjabi, the interpretation was in Urdu, the national language of Pakistan, and also in Hindi, which is a foreign language to them. Thus, the interrogation was held without a proper communication between the investigator and the accused. In consequence, the meaning of what the accused said was not fully reflected in the written statements, and therefore, the original judgment of conviction based on such written statements

violates the principle of due process of law (Japanese Constitution, Article 31).

[Opinions of the Court]

(1) The accused are fluent in Urdu, their national language, and English, in addition to Punjabi, their mother language. Furthermore, they are able to understand some Japanese. Concerning the interpreter, X has experience of interpreting for foreigners in approximately 50 cases of interpretation for foreigners, and there is no doubt that he carried out the interpretation in good faith in spite of his status as a police officer. Therefore, X's competence and fairness as an English interpreter was not lacking, and the accuracy of the content of the interpretation does not amount to a special circumstance indicating that the real meaning of A's statements is not properly reflected in the written statement.

(2) The accused, B and C, have the ability to understand Urdu, their national language. Hindi, which is a foreign language for them, is not so different from Urdu in oral conversation, allowing B and C to understand Hindi to a considerable extent. It is quite difficult in a remote city to find an interpreter who can speak a minority language, and this reality should not be forgotten. Therefore, as far as B and C understand Urdu or Hindi, it is inappropriate to say that the interpretation in this case is illegal. Furthermore, the competence and the fairness of Y as an interpreter, and the accuracy of the content of interpretation is not a special circumstance to be taken into consideration.

(3) The protection of the right of defence of the accused should be completely considered through all the stages of criminal procedure, and the inappropriateness of interpretation during interrogation (disqualification and unfairness of the interpreter; inaccuracy of the contents of the interpretation) will not automatically become a violation of law in the proceedings. In this case, the interpreter was competent and fair at the trial stage of the original court, and, the accused had sufficient opportunity to examine the accuracy of the interpretation on the written statement provided from the interrogation. Therefore, even if the interpretation during interro-

gation was inappropriate, it shall not cause the violation of law in the proceedings.

[Comment]

In conjunction with Japanese economic development and the internationalization of social conditions, the number of foreigners coming to Japan is rapidly increasing, as is the number of criminal cases involving foreigners. As a result, various problems previously unencountered are now arising. For example, there are a lot of foreigners who have difficulty in understanding Japanese and require interpretation during interrogation and trial. Various languages are used, making it difficult to find qualified interpreters. This is particularly true in cases of minor languages, making this one of the most severe problems today. The current case concerns just this contemporary problem.

(1) The Japanese Court Organization Law, Article 74, provides, “in the court the Japanese language shall be used.” Similarly, the Code of Criminal Procedure, Article 175, provides, “in case a person or persons not versed in the Japanese language are required to make a statement, an interpreter or interpreters shall be caused to interpret,” and Article 177 of the same Code provides, “any letters, signs, or marks that are not in the Japanese language may be caused to be translated.” They are not rules that directly apply to investigations.

However, as a consequence of these provisions, written statements made by foreigners during interrogation which are to be submitted to the court as evidence need to be made in Japanese or, need to be attached to a Japanese translation. Therefore, as a premise, an investigator, if he himself is not able to communicate with others in a foreign language, will have to interrogate foreign suspects through interpreters when elaborating written statements.

It has been generally said that the accuracy of interpretation is natural because it is technical and mechanical. However, interpretations might be inaccurate when the language ability of the accused is low, or when the competence (ability) or the fairness (neutrality) of the interpreter is doubtful. These points are often disputed

at the trial after interrogation.

(2) In the current case, the accused are Pakistani, whose national language is Urdu but mother tongue is Punjabi. Accordingly, the best thing for them is to be attended by an interpreter who has mastered Punjabi. However, if it is quite difficult to find such an interpreter, interpretation in Urdu, or some other language the accused can understand should be allowed as well.

Then, we can consult International Covenant on Civil and Political Rights (ICCPR), Articles 14(3)(a) and (f). Japan has ratified the Covenant, which provides that when foreigners are sentenced on criminal charges, the following rights are secured: “to be informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him,” and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Although they are provisions which rule the proceedings at the court, it can be understood that these rights are also secured at the interrogation stage. The point to be discussed is the meaning of the phrase “a language which he understands.” In another case in which it was disputed whether or not the interpretation during interrogation was appropriate, the First Criminal Division of the Tokyo High Court held the interrogation of an Iranian suspect through an interpreter who spoke English, not Persian—which is the mother tongue of the suspect—to be lawful. It means that the Covenant secures the right to have notification or an interpretation in a language which the suspect can understand, even if it is not his mother tongue. Therefore, the interrogation was lawful because it was carried out through an English interpreter and the suspect could understand English (decision on April 8, 1992, 1434 *Hanrei Jihō* 140).

According to this reasoning, it is not illegal that English-interpreter X attended the accused A. A did not dispute this point, but disputed X’s ability as an interpreter. In regard to the accused B and C, it is possible to reason in the same manner.

On the other hand, the competence and the fairness of the interpreter and the accuracy of the contents of the statement result-

ing from interpretation should be judged after full consideration of related evidence. In this case, the judgment held, based on the various circumstances, that there was no problem. However, as regards the fairness of the interpreter, whether or not the investigator can serve as an interpreter while being an investigator, for example, a police officer of this case, has become to be disputed. Attention should be paid to a high court decision that held such interpretation does not directly result in illegality or inappropriateness, but cannot be immune from criticism in that it is detrimental to fairness (decision by the Osaka High Court on July 30, 1991, unreported).

(3) The Code of Criminal Procedure provides by Article 379 that when a violation of laws and orders in the proceedings was existing, and it is obvious that such violation affects the judgment, it can be one of the grounds of a motion for *kōso* appeal. “The proceedings” is generally understood to be the basic proceedings of the original judgment, namely, the proceedings after indictment, but not the proceedings of interrogation. However, if a defect during interrogation was overlooked and had an effect on the trial proceedings itself and caused it to be illegal, this can be a ground for a motion for *kōso* appeal. It can be thought that this decision is based on such a reasoning.

(4) The abrupt increase of the foreigners in Japan has caused some serious problems also in the area of criminal procedure. Above all, there is an urgent need to coordinate interpreters properly. Specifically, it is necessary to obtain and train interpreters who have full language skills for interpretation and basic knowledge about criminal procedure, or who can make both sides communicate well while remaining neutral between the investigator and the suspect, and to set a standard for preparing written statements during interrogation through an interpreter.

Prof. MINORU NOMURA
KATSUYOSHI KATO