ber can be applied to identification, as well as his address, because they indicate his whereabouts. However, the question as to who is the nominal person should be judged relatively in the relation to the person who would receive the documents. It must not be fixed simply based on the documents. For F who received the documents in reality, the person whom he had originally known as A was nobody but the accused. Accordingly, for F, the nominal person would be A. On the other hand, if a third party had received the documents, there would have been a possibility that he/she might have regarded the nominal person as lawyer A living in Tokyo from the statements "member of the Second Tokyo Bar Association". Accordingly, in the relation to the third party, it may be concluded that it would constitute the crimes of forgery of private documents. However, documents ① and ② were originally significant only for a limited range of people including the client F. Certainly, it cannot be said that it would be utterly impossible for a third party to identify the personality different from the accused as the nominal person. But it is certain that such a possibility would be very weak because the very possibility that the documents would be circulated was also weak. In this case, it seems that the illegality which deserves punishment for the crime of forgery of a document has not yet been realized.

This is the first decision to conclude that, when another person who had the same surname and forename exists, the act of drawing up documents with the title of that person would constitute the crimes of forgery of private documents. However, the fundamental problem is to be discussed in regard to the criterion for the identification of the nominal person.

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b. Law of Criminal Procedure

1. A case in which it was disputed whether or not a suspect was allowed to select a special defense counsel.

Decision by the Third Petty Bench of the Supreme Court on Oc-

tober 19, 1993. Case No. (*shi*) 79 of 1993. A case of special *kōkoku* appeal against a decision by the *kōkoku* appellate court in which the *kōkoku* appeal against the disallowance of the selection of a special defense counsel was dismissed. 47 *Keishū* 67.

[Reference: Code of Criminal Procedure, Article 31.]

[Facts]

The appellant, A, was booked for speeding by a policeman who was patrolling with speed-checking device to calculate the speed of motorcars. As A contested the allegation that he had been speeding, he was called for interrogation by the public prosecutor's office. One week before the scheduled day for the interrogation, A asked the summary court to allow A's friend, B, who was knowledgable about both speed-checking devices and the law to be appointed as a special defense counsel. The court rejected his petition. Against this, A filed a *kōkoku* appeal. The *kōkoku* appellate court dismissed the appeal on the ground that the suspect had no right to choose a special counsel according to Article 31(2) of the Code of Criminal Procedure. A submitted a special *kōkoku* appeal to the Supreme Court against this decision.

[Opinions of the Court]

The Code of Criminal Procedure provides in Article 31(1) that a defense counsel shall be appointed from among lawyers. That is, it prohibits a person who does not have a qualification as a lawyer from being chosen as defense counsel. But, as an exception, Article 31(2) provides that a person who is not a lawyer may be appointed to be a special defense counsel. However, this provision applies: ① only in exceptional cases. ② only 'when permission from the court was obtained in the summary court, the family court, or the district court', that is, the case is already pending (after public prosecution is carried out); ③ with a proviso in the case of the district court that this is possible 'only in cases where there is another counsel appointed from among lawyers'. At the stage where a person is still a suspect, it is not certain to which court the suspect may be prosecuted. Accordingly, if the case were indicated to the district court after the

summary court allowed the appointment of a special defense counsel, though there were no defense counsel selected from among lawyers, it might conflict with the proviso of the same provision. For the reasons mentioned above, appointment of a special counsel should be made only after a case is indicted to the court. Therefore, the *kōkoku* appeal should be dismissed. (See the concurring opinion of Judge Ohno.)

[Comment]

A special defense counsel is a one who does not have the qualification of a lawyer. Article 37(3) of the Constitution of Japan guarantees an accused the right to appoint a counsel. Here, by 'counsel' is understood 'a competent counsel', namely, a lawyer, in the light of the significance of the counsel's responsibility. This leads to Article 30(1) of the Code of Criminal Procedure which extends this guarantee to suspects, and Article 31(1) which makes it a principle that a counsel should be chosen from among lawyers. On the other hand, in Article 31(2), it is allowed to choose a special counsel when the court permits. The reason why this special counsel system has been admitted is that, in certain cases, it is advantageous to be represented by a person who has no legal qualification but special knowledge and experience rather than by a qualified lawyer, and that, if he so wishes, it would protect the right to choose a counsel more substantially. There is no doubt that it can be understood that the system is allowed for the benefit of the accused. (However, in the *kōso* appellate court and the *jōkoku* appellate court, it is not allowed even for the accused to choose a special counsel because highly expert knowledge is needed there, Articles 387 and 414 of the Code of Criminal Procedure.) Then, the point at issue is whether or not the suspect is allowed to choose a special counsel. There has been no case in which a judgment was made on this issue and there are opposing opinions as to the problem among academic theories. This judgment is important because it is the first case held by the Supreme Court on the point.

The reason why this judgment confirmed the opinion which would not allow a special counsel to be appointed for the suspect is based

on the above-mentioned point ① to ③. This is the prevailing opinion, which is most strongly supported by the second point (②), that is, a formalistic reason on the construction of the provisions. Contrarily, the opinion which would allow a special counsel to be appointed stresses some substantial reasons. At the investigative stage prior to the indictment, the suspect must collect deffensive evidence to obtain a more advantageous disposition for him/her, for example, non-prosecution. For this purpose expert legal knowledge is not always necessary. Rather, it is often more advantageous for him/her to choose an aquaintance as a special counsel. Furthermore, as A asserted in this case, the suspect has no right to appoint an official defense counsel in Japan, and therefore the special counsel system should be admitted for the suspect as 'second-best' option. Here, Judge Ohno's concurring opinion on this point should be noted. The judge stated that there has been no system of official defense counsels, which is a very serious obstacle to the protection of the rights of the suspect in custody, and admitted that it is necessary for the suspect to be supported by a defense counsel at the interrogative stage which is critical to the criminal justice procedure, as there are few suspects who are attended by a private defense counsel. Having admitted such a problem, the judge examined who was the best suited to act as counsel for the suspect. His opinion is that the defense counsel's responsibility is so significant, especially for the suspect in custody, that advocacy by a lawyer with expert knowledge, experience and a code of professional ethics is ideal, and that a special defense counsel is not well suited for this role. The judge concluded that it was not appropriate to allow the suspect the right to appoint a special defense counsel. This is the substantial reason supporting this decision. However, there have been some criticisms of it: that it is too harsh in view of the aim of the special counsel system; and that ordinary citizens are unfairly discriminated from legal professionals.

Judge Ohno, while estimating the so-called 'duty solicitor scheme' as an advance, added that there were so many problems with the scheme that it was urgently needed for the whole criminal justice to establish a system of defense by lawyers for suspects. Apart from the question of whether it is right that the suspect should not be al-

lowed to appoint a special counsel, it came to be broadly acknowledged that it is important that a system of defense for the suspect by a qualified counsel should be established. This argument was brought about by several cases in which the accused were found not guilty as a consequence of retrial. In these cases, one of the main causes for the miscarriage of justice was the insufficiency of the pre-indictment advocacy for the suspect in custody. In the face of such incidents, many Bar Associations in various areas have started a duty solicitor scheme on the model of that operating in Britain. However, as this system has not a few problems as Judge Ohno pointed out (for example, the expense for advocacy is not met in total and the scheme depends in practice upon volunteers who are qualified lawyers), it is argued that it will function only as temporary scheme until an official defense counsel system is established. Accordingly, taking this judgment as good opportunity, it is necessary for us to seriously reconsider how the right to appoint a legal adviser for the suspect should be protected.

2. A case in which the accused was convicted on evidence including DNA analysis after such evidence was admitted as competent.

Decision by the Criminal Division of the Utsunomiya District Court on July 7, 1993. Case No. (*wa*) 451 of 1991. A case of kidnapping for the purpose of obscenity, abandonment of a corpse, and murder. 820 *Hanrei Taimuzu* 177.

[Reference: Criminal Code, Articles 190, 199 and 225; Code of Criminal Procedure, Article 321(4).]

[Facts]

The accused, A, was prosecuted on the ground that he allegedly kidnapped a girl (who was then 4 years old) for the purpose of obscenity, committed obscene acts after strangling her, and finally abandoned her corpse. The following describes the process of the investigation held in this case. The victim's underwear to which semen was attached was found near to the place where the crime had been committed. In the light of the investigation over year, A was considered as a suspect. The police, then, retained a piece of tissue-

paper thrown away by A on which his semen was present and requested the National Institute of Police Science attached to the National Police Agency to give an expert opinion on the similality of two specimens of semen, on the victim's underwear and on the tissue-paper. As a result, it was found that the blood type and the type of DNA coincided with each other, and that the frequency with which the same types of blood and DNA emerge was about 1.2 per 1,000 persons. Judging from these results, the police began to interrogate A. A then confessed to the crime, and was arrested.

A consistently admitted the crime from the interrogation stage to the 5th day of the trial. However, he then changed his confession from time to time after the 6th day of the trial, and, moreover, wrote a letter in which he denied the crime to his defense counsel after the trial had been once closed. He again denied the crime after the trial was reopened. At the trial, the counsel claimed that the competency of the DNA analysis as evidence should be denied. His assertion is: that the reliability of DNA analysis is not yet recognized; that there are some cases in other countries in which the competency of DNA analysis as evidence was not admitted; that the MCT118 type of DNA analysis which was carried out in this case is performed only at the National Institute of Police Science, and so it would be hard for other institutes to re-examine the result; and that there were some statistical problems about the frequency with which the same type of DNA will emerge.

[Opinions of the Court]

(1) It is not long since DNA analysis came to be used for discriminating one person from another and identifying him/her so that the reliability of the method has not yet been fully recognized in public. However, this method for examination is founded on a scientific basis. The MCT118 type of analysis which was applied in this case was especially created in order to overcome the technical defects of other methods discovered in the USA. No false result has yet emerged from this type of analysis at the National Institute of Police Science. Furthermore, the technique for the examination can be learned rather easily, and it is possible for another institution to re-examine the

result. Also, there is no problem about the frequency with which the same type of DNA will emerge. That is, the number of the samples which supported this examination was 380, and the result obtained analyzing them was virtually the same as the result that was obtained from the later analysis which was based on 1,000 samples. Therefore, it can be said that a result of the analysis would not give the court an unjust bias if it was performed in a proper way by a person who had special knowledge, skill, and experience in DNA analysis. Therefore, DNA analysis is admissible to be competent as evidence.

When it comes to this case, the DNA analysis was carried out in a proper way by two technical officials of the National Institute of Police Science who had special knowledge, skill, and experience. Moreover, although each official made an independent examination, they obtained the same result. Therefore, the DNA analysis performed in this case is admissible to be competent as evidence.

(2) Secondly, the issue of the identification of the offender as the accused will be examined. In this case, the semen left at the place where the crime was committed coincided with the accused's in blood type and DNA type, and the frequency with which the same type of blood and DNA will emerge is 1.2 per 1,000 persons. Indeed, from this frequency it can be estimated that there are 120 persons who have the same type of DNA per 100,000 members of the population. It is also possible that the frequency with which the same type emerges may vary according to the area. Thus, when we consider the question of the competency of the results obtained from DNA analysis as evidence at the fact-finding, it is necessary to remember these points. However, it cannot be denied that the fact that not only the blood type but also the type of DNA coincided is one of the important indirect evidences. In this case, there are other forms of evidence which point towards the guilt of the accused. Considering them all together, we find the accused to be the offender (and sentence him to imprisonment with labor for life).

[Comment]

DNA analysis is a method of discriminating and identifying a person by analyzing the arrangement of the pattern of the four bases

constituting teoxyribonucleid acid which exists in the cells of the human body. Cells can be collected from hair or semen. The method was invented by getting a hint from the fact that each person has his own pattern and the pattern of one person is different from that of any other person, and that it does not change through life. Since Jeffrey and his colleagues first invented this method, it has come to be very much noticed worldwide. Also, in Japan, DNA analysis has been studied at the National Institute of Police Science, where some other methods have been invented and made practicable including the MCT118 type analysis which was applied in this case. While there are many cases where DNA analysis was used in the investigation of serious offenses, for example, murder or rape, there are few cases in which the results of the DNA analysis were submitted as evidence for judgment at the criminal court. As a case which appeared in journals, we can find the decision by the Shimozuma Branch of the Mito District Court on February 27, 1992, 1413 *Hanrei Jihō* 35. In that case, however, because the defense counsel accepted the written expert opinion in which the result of the DNA analysis was described, a decision on the competency of DNA analysis as evidence was not made. This is the first case in which the competency of a DNA analysis as evidence was disputed.

Recently, scientific technique has greaty progressed. Now, scientific evidence from the application of scientific techniques (for example, voiceprint analysis, the results of a polygraph examination) plays an important role in the interrogation and in the court. DNA analysis is especially worth paying attention to. For, although it is inferior to the identification by examining fingerprints in its accuracy, it ensures more accurate identification than the blood-type examination that has been usually used, and the identification will be much more accurate when both DNA analysis and blood-type examination are used. However, science is not almighty. We should acknowledge its limitaions. There appear new problems such as the conflict between science and human rights, especially the right to privacy. DNA examination is no exception. In Japan, many paper in which DNA examination is dealt with have appeared. It can be said that people are highly interested in it and that there are many

problems associated with it. In this case, the counsel for the accused posed the above-mentioned questions and refused to accept the DNA analysis as evidence. In contrast, the court, considering each of them, held that the result of the DNA analysis was admissible to be comperent as evidence if the DNA analysis had been performed in a proper way by a person who had special knowledge, skill, and experience.

In previous cases, courts have regarded the following as requisites for admitting scientific analysis as being competent as evidence: the eligibility of person who performed the analysis; the efficiency of the instruments used; the reliability of the test result; the faithfulness of the report on the test process and the result (see, for example, the decision on a voiceprint analysis by the Tokyo District Court on February 1, 1980, 960 *Hanrei Jihō* 8). Therefore, it is understood that according to the decision in this case DNA analysis can be admissible as evidential competency, as far as all these requisites are satisfied. However, there are several problems to be solved; by whom, with what procedure, or to which extent such proof should be carried out, and so on.

There has been strong criticism that the accuracy and reliability of DNA analysis have been greatly exaggerated. Therefore, relatively prominent is the modest view that, at the current stage, DNA analysis should be applied together with blood to corroborate other direct evidence.

DNA analysis is, indeed, an excellent method to identify an individual. However, it is not long since it came to be used, and studies and developments are still proceeding. Also, in theoretical work, so many problems concerning DNA analysis have been pointed out that further discussion should be fully made. Lastly, as a *kōso* appeal was submitted against the judgment in this case, it is expected that a further decision will be made by the High Court and, possibly, by the Supreme Cout.

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