
MAJOR JUDICIAL DECISIONS

Jan. — Dec., 1994

1. Constitutional and Administrative Law

a. Constitutional Law

A case in which the publication of the facts concerning someone's previous conviction and the like by using his real name in a nonfiction work was held to be compensable by damages.

Decision by the Third Petty Bench of the Supreme Court on February 8, 1994. Case No. (o) 1649 of 1989. A case demanding compensation. 48 *Minshū* 149.

(See case 2 in the part of Law of Property and Obligations. *Infra*.)

[Reference: Constitution of Japan, Articles 13 and 21; Civil Code, Articles 709 and 710.]

[Facts]

In 1964, plaintiff X (*kōso* respondent, *jōkoku* respondent) was prosecuted for an injury in Okinawa Island, which was then under the rule of the United States, and was found guilty in a trial by jury. After provisional release in 1966, X went to Tokyo, where he found a job as a bus driver and married, but he hid his previous offense

from his company and his wife. While the case and the trial was reported widely in Okinawa, there was no report on the mainland and nobody around him knew about his previous offense. In 1977, defendant Y (*kōso* appellant, *jōkoku* appellant), who had served as juror in that case, gave the full account of the case, including the process of the verdict, and published a book entitled *Gyakuten* (Reversal). The book became popular, and a teleplay was made based upon the nonfiction work. X sued Y for a violation of his right to privacy and demanded compensation for mental anguish.

Since the Tokyo District Court in 1987 and the Tokyo High Court in 1989 ruled in favor of the plaintiff, the defendant appealed to the Supreme Court.

[Opinions of the Court]

The fact that a person was accused in a criminal case, that criminal action was commenced and judgment was passed on him, and particularly that he was found guilty and served his sentence, is a matter directly concerning his honor or credit. Therefore, he is to have an interest worthy of legal protection from having the facts concerning his previous conviction and the like published without good reason. This reasoning does not depend upon whether the publication of the facts is made by public agencies, or private individuals and organizations. Because the convicted person is expected to return to the community as an ordinary person after he has been found guilty and served his sentence, that person is to have an interest in not having the peace of his newly established social life impaired and not having his rehabilitation disturbed by having the facts concerning his previous conviction and the like published.

The facts concerning a previous conviction and the like are also related to a matter which the general public may be interested in or criticize as a criminal case or trial, so that it should not be said that to reveal the real name of the person concerned in the case is not permitted when it is recognized that there is historical or social significance in making the case itself public. There is also the case when the publication of the facts concerning a previous conviction and the like has to be tolerated as one of the materials used to criticize or

evaluate that person's social behavior, depending on the quality of his behavior and the degree to which he can influence the public through his behavior. Furthermore, if he is a public figure such as an elected public official or a candidate, to whom the general public pays a due attention, it should not be illegal to publish the facts concerning a previous conviction and the like as one of the materials to judge whether it is proper to have him as a public official.

When the facts concerning a previous conviction and the like are made public in a literary work by using a person's real name, it is necessary to consider the significance and the necessity of using the real name in light of the purpose and the nature of the writing in order to determine all the points mentioned above.

In short, as to the facts concerning a previous conviction and the like, there is a case where an interest in not having the facts published is worthy of legal protection as well as a case in which the publication should be permitted. In order to decide whether it constitutes a tort to publish the facts concerning someone's previous conviction and the like in a literary work by using his real name, it is necessary to consider the significance and the necessity of using the real name in light of the purpose and the nature of the writing, together with not only the later conduct of that person, but also the historical or social significance of the case itself, the significance of the affected person, and the social behavior and influence of that person.

It is clear that X had an interest worthy of legal protection from having the facts concerning his previous conviction published in light of the fact that X had tried to return to society and had established a new life for more than twelve years between the crime and trial and the publication of the book. Moreover, because X had been living his life as an unknown citizen, he does not have to tolerate the publication of the previous criminal facts as one of the materials to criticize or evaluate his behavior as a public figure. While Y argued that the book had the purpose of discussing the merits or democratic meaning of the jury system and throwing new light upon the state affairs of Okinawa, which was then governed by the United States, so that it was essential to describe the crime and the trial exactly,

it is not permissible to reveal X's real name even for those purposes. Therefore, Y does not have any good reason to make the facts public by using X's real name in the book.

[Comment]

Does the publication of someone's previous criminal facts together with his real name in a nonfiction work constitute a tort? Is it legally permissible to reveal an ex-convict's real name in a nonfiction work? In this case the Supreme Court answered this difficult question for the first time. Although the result of the case has been generally accepted, the rationale needs to be examined carefully.

First, the Court avoided using the term "the right of privacy." Instead, the Court referred to an interest worthy of legal protection from having the facts concerning someone's previous conviction and the like published without good reason. In this respect the Court followed its previous decision. There the Court held that the ward chief's reporting someone's previous conviction to a bar association, when the bar association had inquired, constituted illegal use of public authority. Then, why has the Supreme Court been avoiding using the term "the right of privacy"? One may suppose that the Court felt it difficult to consider a criminal record as a private matter. According to this interpretation, because a trial is open in principle and the document of adjudication is regarded as a public record, it is necessary that the criminal record and related information should always remain open. If this is true, however, why should the above interest be legally protected? The Court has not explained the legal basis of that interest.

Then, does a previous conviction turn into a private affair with the lapse of time? May a person regain the right of privacy with the lapse of time even when he or she had once lost the right? Indeed, public attention or news value concerning a given criminal case has generally declined once time has passed. However, there may be an exception, and the lapse of time offers no substantive reason for having a privacy interest. In this respect, the Court referred to an interest in not having the peace of a newly established social life impaired and not having rehabilitation disturbed. One may thus sup-

pose that the Court has attached importance to the fact of rehabilitation. However, there remains some ambiguity in this theory. For example, when does an ex-convict begin to have such an interest? In any event, the Court should have explained more in detail.

The Court has enumerated three justifiable causes for publishing the facts concerning a previous conviction and the like: when it is recognized that there is historical or social significance in making the case itself public; when it is used as one of materials to criticize or evaluate someone's social behavior, depending on the quality of his behavior and the degree to which he can influence the public through his behavior; when it is used as one of the materials to judge whether it is proper to have a person as a public official if he is a public figure such as an elected public official or a candidate, to whom the general public pays a due attention. This method of definitional or categorical balancing is expected to function as the guideline for future cases. However, the Court has not premised its position on the concept of the preferred position of free speech. In particular, the Court has prohibited the use of an ex-convict's real name as a general rule and has permitted it as an exception only. From the viewpoint of freedom of speech and the press, the Court should have considered the writer's interest more seriously. For this reason, this decision will be subject to criticism.

b. Administrative Law

A case in which the official documents concerning the social gatherings and receptions held by the Osaka Prefectural Waterworks Bureau for the purpose of execution of the undertakings was held ineligible for protection from disclosure under the Osaka Prefectural Ordinance for the Publication of Official Documents.

Decision by the Third Petty Bench of the Supreme Court on February 8, 1994. Case No. (*gyo tsu*) 149 of 1990. A case demanding cancellation of a disposition ordering the documents to be closed. 48 *Minshū* 2-255, 1488 *Hanrei Jihō* 3; 841 *Hanrei Taimuzu* 91.

[Reference: Osaka Prefectural Ordinance for the Publication of