# 5. Criminal Law and Procedure

## a. Criminal Law

### 1. A case in which it was held that the reasonableness necessary to constitute self-defense under Article 1 (1) of the Law Concerning Prevention and Punishment of Burglary, Robbery, Larceny, etc. was more moderate than the reasonableness necessary to constitute self-defense under Article 36 (1) of the Criminal Code but the reasonableness of the defensive act in the former meaning was negated.

Decision by the Second Petty Bench of the Supreme Court on June 30, 1994. Case No. (*shi*) 71 of 1994. A case of re-*kōkoku* appeal of the decision to dismiss the *kōkoku* appeal of the decision to commit to the Middle Juvenile Training School. 48-4 *Keishū* 21; 1503 *Hanrei Jihō* 147.

[Reference: Law Concerning Prevention and Punishment of Burglary, Robbery, Larceny, etc., Article 1 (1); Criminal Code, Article 36 (1).]

*[Facts]*

With the intent of robbery or extortion, seven students at a junior high school, including the victim A, took the appellant X, who was a third year student at a high school, to a deserted place, where they unilaterally began to assault and batter X. One of the seven students was wearing brass knuckles, and the others used no weapons. They attacked X on the back and kicked his legs, etc.. While their violent assault and battery continued for several minutes, X, being unable to bear their cruelty, took out the knife which he carried with him for self-protection, and aimed it at the leg of the student who was standing in front of X. The damage that X brought to the student was no more than a scratch. Immediately, X turned himself sideways, and A was about to attack X with his empty hands. Deciding to stab the aggressor before he himself was struck down, X stabbed A in the left part of his chest with the state of mind that he would

risk doing it regardless of the probability of A's death. As the result, A was stabbed in the heart and died from loss of blood.

***[Opinions of the Court]***

*Kōkoku* appeal dismissed.

To constitute self-defense under Article 1 (1) of the Law Concerning Prevention and Punishment of Burglary, Robbery, Larceny, etc. (hereinafter referred to as LCPPBRL), it is required that the defensive act not only formally fulfills the requirements in the provision, but also is regarded as a reasonable measure for eliminating imminent danger. However, Article 1 (1) of the LCPPBRL differs from Article 36 (1) of the Criminal Code in the following ways: 1) Article 1 (1) of the LCPPBRL limits the purpose of the defense to the elimination of the danger against one's life, body and chastity; 2) wounding and killing for the purpose of eliminating imminent danger is permitted only in each instance provided under Article 1 (1) of the LCPPBRL; and 3) Article 1 (1) of the LCPPBRL does not provide the requirement of an "act unavoidably done". Taking these points into consideration, the reasonableness of self-defense under Article 1 (1) of the LCPPBRL is construed to be more moderate than that of self-defense under Article 36 (1) of the Criminal Code.

In a situation in which the opponents who undertook robbery used no offensive weapon other than brass knuckles and brought no danger to X's life, the appellant X, without assuming a threating position with the knife, abruptly stabbed the victim in the left part of his chest causing his death. Even if the Court takes into consideration the circumstances, for example, that the seven opponents attacked one person (the appellant X) and that the scene of the event was a deserted place, the defensive act of the appellant should be regarded as excessive for a measure to eliminate the danger against his body. That is, in regard to the act of X, the reasonableness of the defensive measure which was necessary to constitute self-defense under Article 1 (1) of the LCPPBRL should be negated. Therefore, the original decision that negated self-defense under the provision and found excessive self-defense is legitimate.

***[Comment]***

1. Article 36 (1) of the Criminal Code provides that an "act unavoidably done" for the purpose of defending one's own or another person's right from imminent and unjust attack should not be punished, and allows self-defense as one of the grounds for justification (which is distinguished from the grounds for excuse). Also, Article 1 (1) of the LCPPBRL prescribes a special provision of self-defense in the following ways. There are certain facts permitting its application: ① the case in which one would prevent burglary, robbery, larceny, etc. or take back stolen goods (No.1); ② the case in which one would prevent the entry of a trespasser into a dwelling house, residence, building or ship, who carries an offensive weapon, who jumps over or destroys the door or fence, etc., or who opens the lock (No.2); ③ the case in which one would exclude the person who has trespassed into the dwelling house, residence, building or ship without cause, or the person who would not leave these places in spite of a request to do so (No.3). In the above three cases, Article 1 (1) of the LCPPBRL provides that, where one kills or wounds an offender in order to eliminate imminent danger against his own or another person's life, body or chastity, a defensive act under Article 36 (1) of the Criminal Code should be regarded as existing.

In the present case, it was found that the seven junior high school students undertook to commit a robbery. Therefore, the fact presupposed for the application of the special provision corresponds to the above case number 1. It was disputed whether self-defense under Article 1 (1) of the LCPPBRL could be asserted and sustained.

2. Article 1 (1) of the LCPPBRL, unlike Article 36 (1) of the Criminal Code, does not provide the express requirement of an "act unavoidably done". It becomes a question whether Article 1 (1) of the LCPPBRL permits a broader and more moderate requirement of self-defense than Article 36 (1) of the Criminal Code.

Academic opinions are divided into three views. [1] The first view insists that Article 1 (1) of the LCPPBRL is the provision to be noticed, because it construes and concretely specifies the requirements of self-defense under Article 36 (1) of the Criminal Code, and the

substantial requirements necessary to constitute self-defense are the same in both provisions. According to this view, to constitute self-defense under Article 1 (1) of the LCPPBRL, the reasonableness of the defensive act is required in the same sense as that of Article 36 (1) of the Criminal Code. [2] On the other hand, the second academic view makes much of literal construction and positively affirms the moderation and extension of the substantial requirement of self-defense in the LCPPBRL: that is, because Article 1 (1) of the LCPPBRL does not provide the express requirement of an "act unavoidably done", the fulfillment of the formal literal requirements should always permit the use of self-defense. In this view, Article 1 (1) of the LCPPBRL, unlike Article 36 (1) of the Criminal Code, makes the requirement of reasonableness unnecessary. [3] The third view is the middle position and says: to be sure, Article 1 (1) of the LCPPBRL relaxes the requirement of self-defense under Article 36 (1) of the Criminal Code and makes the requirement of an "act unavoidably done" unnecessary, but the moderate requirement of reasonableness should be still necessary. The stance of [3] is the widely accepted view.

The precedents of the lower courts have been divided between the position of [1] and that of [3]. In addition to these, a noteworthy precedent of a lower court is the decision by the Osaka High Court on May 15, 1975, 28-3 *Kōkeishū* 249. This decision held that, though Article 1 (1) of the LCPPBRL extended the scope of self-defense under certain conditions and rendered the requirement of an "act unavoidably done" / the reasonableness of the defensive act unnecessary, Article 1 (1) of the LCPPBRL should not be applied to an act which cannot be evaluated to lack wrongfulness, judging from the essence of wrongfulness. That is, this decision would restrict the scope of self-defense under Article 1 (1) of the LCPPBRL from the point of view of substantial wrongfulness without the concept of reasonableness. Therefore, the position of the decision would not be substantially different from viewpoint [3], at least in its practical consequences, because it demands not only the fulfillment of the formal literal requirements under Article 1 (1) of the LCPPBRL, but also a lack of substantial wrongfulness.

3. The significance of the present decision lies in the fact that the Supreme Court clearly adopted position [3] of the above-mentioned trend of academic opinions and precedents. It seems to be based on the following deliberations. In relation to position [1], the details concerning the enactment of the LCPPBRL as a countermeasure against the frequency of burglary, robbery and larceny, etc. (1930), and the significance of Article 1 (1) of the LCPPBRL for existing independently of Article 36 (1) of the Criminal Code were taken into account. On the other hand, in relation to position [2], apprehension of the undue overreaching extension of the scope of self-defense under Article 1 (1) of the LCPPBRL might have been considered. However, the next point raises a question. According to the commonly accepted view, the requirement of an "act unavoidably done" is construed to mean the necessity and reasonableness of the defensive act. Therefore, under position [3], it should be clarified why the requirement of reasonableness would come to be demanded after Article 1 (1) of the LCPPBRL has rendered the requirement of an "act unavoidably done" unnecessary. Also the substantial theoretical rationale calls into question why the reasonableness of the defensive act under Article 1 (1) of the LCPPBRL should be more moderate than that under Article 36 (1) of the Criminal Code. The Supreme Court in the present case does not necessarily indicate a sufficient explanation to solve these problems.

Anyway, since the Supreme Court clearly adopted position [3], the following points would be worthy of notice concerning the hearing of similar cases from now on. The first is whether the number of those cases will increase where self-defense under Article 1 (1) of the LCPPBRL may be argued. Secondly, so as to clarify the meaning of "moderate reasonableness" in Article 1 (1) of the LCPPBRL, an accumulation of the judicial judgments would be expected with respect to the next types: ① cases in which the reasonableness of Article 1 (1) of the LCPPBRL is affirmed in spite of the negation of the reasonableness in the sense of Article 36 (1) of the Criminal Code; ② cases in which even the reasonableness of Article 1 (1) of the LCPPBRL is denied. The facts of the present case may be understood as one of the instances of the latter type.

**2. A case in which it was held that a thief should have a relationship to both the owner and the possessor in order to apply the special provision concerning larceny committed against relatives when the thief stole property from a possessor who was different from the owner.**

Decision by the Second Petty Bench of the Supreme Court on July 19, 1994. Case No. (*a*) 234 of 1994. A case of larceny. 48-5 *Keishū* 190; 1507 *Hanrei Jihō* 169.

[Reference: Criminal Code, Article 244 (1).]

***[Facts]***

The defendant stole 26,000 yen in cash which A had in his custody. The defendant was a relative living apart (relative by blood in the sixth degree of kinship) from the custodian A. The owner of the cash was not A, but B Co., Ltd. (representative director C), and the defendant was not a relative of the owner of the cash.

The court of first instance, finding the above-mentioned facts, declared him guilty. The defendant filed a *kōso* appeal and asserted as follows: because the defendant was A's relative living apart, the present case corresponded to a crime indictable upon complaint based on the latter part of Article 244 (1) of the Criminal Code, but A did not make the complaint, so the *kōso* appeal should be dismissed. The appellate court, however, upheld the conviction and held: with regard to the crime of larceny, not only the possession of the property, but also the title such as ownership, etc. should be the object of protection; not only the possessor of the property, but also the owner of it is the victim of the crime of larceny; therefore, in order to apply Article 244 (1) of the Criminal Code, the thief must have the relationship to both the possessor and the owner of the property as stipulated in the provision. Then the defendant filed a *jōkoku* appeal to the Supreme Court.

***[Opinions of the Court]***

*Jōkoku* appeal dismissed.

In order to apply Article 244 (1) of the Criminal Code when the thief stole the property which a possessor who was different from

the owner kept in his custody, the relationship stipulated in the provision should exist not only between the thief and the possessor of the property, but also between the thief and its owner.

*[Comment]*

1. Article 244 (1) of the Criminal Code prescribes the special provision for larceny committed against relatives, concerning cases in which the crimes of larceny and wrongfully taking possession of immovables (and attempts at those crimes) are committed. The provision is to be applied *mutatis mutandis* to fraud, breach of trust, blackmail, and embezzlement based on Articles 251 and 255 of the Criminal Code. When these crimes are committed against lineal relatives by blood, spouses, and relatives living together, the remission of punishment is allowed (the first part of Article 244 (1) of the Criminal Code). When these crimes are committed against other relatives, they are crimes indictable upon complaint (the latter part of Article 244 (1) of the Criminal Code). Therefore, in this case the prosecution and punishment of the crime are not possible unless a complaint has been made. In the present case, the defendant had the relationship of a "relative living apart" to the possessor of the property and the applicability of the latter part of Article 244 (1) was disputed.

The problem is with whom the offender must have the relationship when a person different from the owner keeps the property in his custody; that is, the scope of the relationship necessary for the application of Article 244 (1) when the owner of the property does not coincide with the possessor of it. The point at issue in the present case is that very problem.

2. With regard to this problem, *Daishinin* (the former Supreme Court) had refused the application of the special provision concerning larceny committed against relatives in cases where a non-relative possessed property which belonged to a relative and where a relative possessed property which belonged to a non-relative. *Daishinin* had basically taken the position that the special provision concerning larceny committed against relatives could be applied only when the thief had a relationship to both the owner and the possessor.

The decision by the Supreme Court on May 21, 1949, 3-6 *Keishū*

858, rejected the application of the special provision in a case in which there was no relationship between the thief and the possessor of the property and it was not clear whether a relationship existed between the thief and the owner. Here, as one of its reasons, the Court declared that "the provision regarding larceny committed against relatives in Article 244 is concerned with the relationship between the possessor as the direct victim of larceny and the thief....., not with the relationship between the owner of the object and the thief".

There is a diversity of views on the interpretation of this decision. Taking notice of the above part of the citation, one might infer that the Supreme Court depended upon the view that it was sufficient for the necessary relationship to exist only between the thief and the possessor of the property. According to this interpretation, the instant decision alters the position of *Daishinin*. On the other hand, based on the facts of this case, where no relationship existed between the thief and the possessor, the position of *Daishinin* would also arrive at the same conclusion. Therefore, it might be possible to construe that the Supreme Court decision was only based on the position that it was not illegal to negate the application of Article 244 (1) without inquiring into the existence of the relationship with the owner when the thief stole the property which the non-relative possessed. The lack of clarity of this decision of the Supreme Court has brought confusion among the lower courts thereafter.

The significance of the present case lies in the point that under these circumstances the Supreme Court made its own position clear and intended to settle the confusion between the lower courts. However, this decision of the Court merely indicates the conclusion that the relationship provided in Article 244 (1) should exist not only between the thief and the possessor of the property, but also between the thief and its owner. The Court leaves the theoretical rationale unclear.

3. Among the academic opinions there are four distinct views on the scope of relationship necessary for the application of the special provision concerning larceny committed against relatives: ① the first view finds it sufficient for the necessary relationship to exist only between the thief and the owner; ② the second view is that it

is sufficient for the necessary relationship to exist only between the thief and the possessor; ③ the third view is that the thief must have a relationship with both the owner and the possessor; ④ the fourth renders it sufficient for the thief to have a relationship with either the owner or the possessor. The commonly accepted theory, as well as the present decision of the Supreme Court, adopts position ③. So far, two main approaches for the examination of this problem have been suggested in the academic theories: (1) the approach that emphasizes the connection with the legally protected interest in the crime of larceny; (2) the approach that emphasizes the connection with the rationale of the special provision concerning larceny committed against relatives.

(1) *The legally protected interest in the crime of larceny: Who is the victim of the crime of larceny?*

According to the first view that crimes against the individual property, including the crime of larceny, are crimes against the other person's ownership (title) and possession is not the legally protected interest of the crimes (the title theory), position ① is proposed. Here, because the victim of the crime of larceny is construed as the owner, the existence of the relationship matters only between the owner and the thief. However, the factual state of possession could also be worth protection by the Criminal Law. So this position might be thought unjust in that the protection of possession is completely ignored. Secondly, based on the view that the legally protected interest with respect to crimes against the individual property is only the factual possession (the possession theory), position ② is consistently argued. This view ultimately leads to the conclusion that, when the owner entrusts the care of the property to another person and the relative of the possessor steals the property, the owner comes to enjoy no protection under the Criminal Law. In such cases, the relative of the possessor could freely steal without reservation. Therefore, the third view regards both the owner and the possessor of the property as the victims of the crime of larceny. Here it is indeed disputed whether one should make more of the ownership or the possession, nonetheless this view leads to position ③. With respect to the legally protected interest in the crime of larceny, the precedents of the Supreme Court

are said to have adopted the position similar to the possession theory mentioned above since World War II. Yet if the present decision of the Court is based on an approach that emphasizes the connection with the legally protected interest in the crime of larceny, the position of the Court could be thought different from the thorough possession theory that is the basis of position ②.

(2) *The connection with the rationale for the special provision concerning larceny committed against relatives*

The first view is that the special provision concerning larceny committed against relatives is based on a bar of liability. That is, the view asserts that, as the impulse forming the motive counter to the crime weakens between relatives and it is hard to expect a thief not to commit the crime of larceny against his relative, the crime should not be recognized. Based on this view, on the other hand, explaining that inasmuch as either the owner or the possessor is a non-relative it is possible to fairly expect the thief not to commit the crime of larceny, position ③ might be applied. However, there has been some doubt as to the starting point of this view: that is, in light of the modern context of relationship in which individualism prevails, from the outset, it is difficult to provide a convincing explanation through the standard of fair expectability in the ordinary case where the possessor coincides with the owner.

The second view is that the relationship brings about a decrease in the degree of illegality of the act of larceny against one's relative, and the illegality which deserves punishment for the crime of larceny should be negated. According to this view, the reason is that a sort of consumer community is organized between relatives and the infringement of the ownership or the possession is not regarded as illegal between the members of this community. Two contrary strands of opinion are derived from this point of view. One is the opinion that agrees that this kind of community exists only between relatives whose degrees of relationship are very close, and intends to restrict the scope of the negation of the illegality which deserves punishment. According to this restrictive way of thinking, the negation of the illegality which deserves punishment also seems to be consistently limited in the case where the owner and the possessor of the property are

different persons, so that this opinion would lead to the above-mentioned position ③. The other opinion is one that gropes for a wide scope of negation of the illegality which deserves punishment in cases of larceny committed against relatives. In this point of view, in a case where the owner of the property is different from the possessor of it, it is asserted that the illegality which deserves punishment could be negated if the thief had a relationship to either the owner or the possessor the property (the above-mentioned position ④). However, this viewpoint would require clarification of the criteria concerning the negation of the illegality which deserves punishment, based on the analysis of the concrete cases of larceny committed against relatives.

Thirdly, the commonly accepted view is that the special provision is construed to allow personal exemption from punishment through the status of being a relative, grounded on the idea "The law should not intrude in one's home" (the *persönlicher Strafausschließungsgrund* theory). That is to say, this view is based on the legal policy consideration that the order of property between the relatives should be maintained by discipline among the relatives rather than through the application of external punitive authority, although the larceny committed against relatives constitutes the crime itself. The theorists who support this view, insisting as follows, lead to the above-mentioned position ③: "The crime among relatives" with which the punitive authority of the state should refrain from interference is not permitted, unless the thief has a relationship to both the owner and the possessor of the property when they are different persons. In other words, when either the owner or the possessor is a non-relative, the consideration of the idea, "The law should not intrude in one's home," is limited so that the property at issue should be treated just as the general property of the other person's. With respect to the rationale for the special provision concerning larceny committed against relatives, the Supreme Court also adopted the same position as the commonly accepted view (the decision of December 12, 1950, 41-12 *Keishū* 2543). Therefore, the Supreme Court could also explain the grounds for position ③, based on the approach that emphasizes the connection with the rationale for the special

provision of the Criminal Code.

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## b. Law of Criminal Procedure

### 1. A case in which it was disputed whether it was permissible to search X, who had cohabitated with Y, based on a warrant for search and seizure of Y's address.

Decision by the Supreme Court on September 8, 1994. Case No. (a) 852 of 1993. A case of violation of the Stimulant Drug Control Act. 48 *Keishū* 263.

[Reference: Code of Criminal Procedure, Aritcles 102, 218 and 219.]

***[Facts]***

Y, the accused X's common-law wife, was suspected of violation of the Stimulant Drug Control Act. Having been issued a warrant for search and seizure that specified the apartment in a building where X and Y were living as the place to be searched, a police officer started to search. As Y was not there at that time, the officer appointed X as an observer and began to search. X was holding a Boston bag at the time. The officer repeatedly demanded that X hand it over to him voluntarily. Since X rejected the demand, the officer took up the bag and searched inside it. As a result, stimulant drugs were found. The officer arrested X as a flagrant offender and seized the stimulant drug by means of warrantless seizure accompanied with X's arrest.

X was prosecuted for possessing stimulant drugs for the purpose of gaining profit. X claimed that the procedure of search and seizure in this case was illegal and the stimulant drug seized was illegally-obtained evidence, and he disputed its evidentiary admissibility. Both the original court and the *kōso* appellate court, however, rejected