provision of the Criminal Code.

Prof. MINORU NOMURA
Lect. (Meijigakuin University)
FUJIHIKO KATSUMATA

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

X's claim.

[Opinions of the Court]

Jōkoku appeal dismissed.

Under the factual circumstances in this case, it is permissible to search the Boston bag which X, Y's cohabitant, was holding in the place searched on the basis of the warrant for search and seizure that specified Y's address as the place.

[Comment]

1. The issue disputed in this case is whether it is permissible to search the Boston bag carried by a person who lives at the place specified in the warrant based on a warrant of search and seizure that specifies the place alone as the object. Some lower court decisions held that it was legitimate to search a bag which was about to be carried away by a person who lived in the place searched on the basis of a warrant of search and seizure. Quite a few academic opinions approve the decisions from the standpoint that, if the personal effects carried by a person who was at the place of search might be recognized to have originally been there, they should be the object of search. This decision is important in that the Supreme Court clearly exposed its view of the issue for the first time.

2. Article 35(1) of the Japanese Constitution, in which the principle subject to warrant is set forth, provides, "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33 (namely in such cases as it is necessary in the case of legally arresting the suspect)", and demands specification of the place to be searched and the matters to be seized. Moreover, Article 35(2) provides, "Each search or seizure shall be made upon a separate warrant issued by a competent judicial officer". This provision means that each measure of search and seizure requires a separate warrant. In light of the purpose of the principle subject to warrant mentioned above, and in consideration that the interest violated by the search

of a human body might be greater than that in searching a place, it is generally problematic to interpret it to be permissible to search also a person who was at the place specified on a warrant based on the warrant.

However, many opinions consider the search in this case to be legitimate because: as a person who was living at the place searched was strongly suspected of carrying a thing which existed there to be seized, it was highly necessary to search his personal effects; as searching a bag etc. carried by a person was no more than searching the things and not accompanied by a body search of the person who carried it, the interest violated was less than that in the case of searching a person's body; when a person who had been living at the place to be searched carried a bag etc. there, it was not unreasonable to regard the bag etc. not as a thing that has already been moved from the place searched but as one that had been there.

In practice, the legitimacy of a search has been often disputed as problematic. This decision is meaningful in that the Supreme Court stated view with regard to one type of search and upheld it.

2. A case in which it was disputed whether it was legitimate to take the accused to the place for taking of his/her urine sample based on a warrant for taking a urine sample compulsorily

Decision by the Third Petty Bench of the Supreme Court on September 16, 1994. Case No. (*a*) 187 of 1994. A case of violation of the Stimulant Drug Control Act. 48 *Keishū* 420.

[Reference: Code of Criminal Procedure, Articles 99, 102, 218, 219 and 222.]

[Facts]

One day, there was a phone call to the police station from Z, the accused-to-be. As his words did not make sense, the police officer who answered the phone suspected Z of taking a stimulant drug due to his unusual remarks. Therefore, the officer searched for the car the accused was driving at that time and found it. Though Z stopped his car following the officer's direction, he displayed a suspicious attitude and behavior on the occasion of police questioning. The

officer asked Z to come to the police station voluntarily, but he consistently refused to do so.

While Z was detained on the road for a total of about six and a half hours, the officer was issued a warrant of search and seizure to take Z's urine sample, which is called a warrant to take a urine sample compulsorily, by a judge. Shown the warrant, Z resisted so blatantly that the officer took him to a hospital. At the hospital, a doctor inserted a catheter into Z's body and took his urine sample. As a result of the examination, stimulants were detected. Accordingly, Z was prosecuted for using stimulant drugs.

Z objected to the procedure of investigation in this case (① lengthy detention on the road while the police questioning was carried out, ② escorting Z to the place to take urine) and disputed the evidentiary admissibility of the written expert opinion of the results of urine analysis test.

The court of first instance held that; ① might be legal as a non-compulsory investigation; ② was allowable as "a necessary measure" (Article 111 of the Code of Criminal Procedure) to execute the warrant of search and seizure to take Z's urine sample. On the contrary, the *kōso* appellate court held that; ① was illegal, but the degree of its illegality was not so gross as to exclude the written expert opinion from evidence; ② might be allowable because, to execute the warrant, it was undoubtedly presumed to be necessary.

[Opinions of the Court]

Jōkoku appeal dismissed.

(1) Whether the procedure of taking a urine sample compulsorily in this case was legitimate or not must be judged also in consideration of the illegality that might arise within the preceding procedures and the degree of its illegality (decision by the Second Petty Bench of the Supreme Court on April 25, 1986. 40 *Keishū* 215. 7 *Waseda Bulletin of Comparative Law* 95).

In this case, the police officer detained Z at the place of police questioning for a long time without demanding a warrant in the early stage of investigation. Such a measure taken by the officer was certainly illegal as it went beyond the scope of permissible investiga-

tion with voluntary cooperation. The extent of illegality, however, is not so gross as to exclude it from evidence.

(2) With regard to the procedure of taking Z's urine sample involuntarily in itself, it must be considered especially whether it was legitimate or not for the officer to escort the person from whom the urine sample was to be taken to the place for taking the urine sample. It should be understood that it is possible to take the accused compulsorily to the nearest place suitable for taking a urine sample based on a warrant of search and seizure to take a urine sample when it is impossible to escort the suspect to a place for taking a urine sample with the suspect's voluntary cooperation, and that, in such cases, a minimum of physical force may be used. The reason is that, unless it is understood in the above way, the purpose of the warrant would not be accomplished. Moreover, it can be seen that the judge who issued the warrant had examained also whether escorting should be carried out or not. In such a case, the judge may state "I hereby permit taking the accused to the nearest place suitable for taking his urine sample" on the warrant.

In this case, as mentioned above, the procedure prior to taking the urine sample was not grossly illegal and the procedure for taking the urine sample was not illegal in itself. Accordingly, the written expert opinion of the urine analysis test result should be admissible evidence.

[Comment]

1. In Japan, in accordance with the principle that compulsory measures may not be taken unless otherwise stipulated in the code (Proviso to Article 197 of the Code of Criminal Procedure), compulsory measures shall not be allowed unless special rules are provided by law. However, because there has been no specific provision about taking urine samples compulsorily in the law, its legitimacy has been seen as problematic. The Supreme Court held that taking a urine sample compulsorily from an arrested suspect can be legitimately carried out if a warrant which details the medically proper conditions and procedures under which it must be done by a doctor has been issued (see the decision by the Supreme Court on November 23, 1980.

34 *Keishū* 300), therefore the Supreme Court worked out a solution to this issue.

Still, the issue of whether a suspect who has not yet been arrested and who has refused to submit a urine sample voluntarily shall be compulsorily taken to the place for taking urine on the basis of a warrant of search and seizure for taking a urine sample has been left unresolved. Among the decisions by lower courts, some held that escorting the suspect to the place for taking a urine sample was legitimate. (Incidentially, there has been no decision that judged it illegitimate.) As to the grounds for its being held legal, opinions have been divided. ①: Some decisions regarded escorting as a "necessary measure" (Article 111 of the Code of Criminal Procedure) to execute the warrant of search and seizure for taking a urine sample involuntarily. (For example, the decision by the original court in this case was based on this ground.) ②: Others held that escorting ought to be allowed as the natural power stemming from the issuance of a warrant (for example, the decision by the *kōso* appellate court). However, it has been said that there's no substantial difference between the two views in their essential thought.

The instant decision is noteworthy because the Supreme Court clearly expressed its viewpoint for the first time that it agrees with opinion ② above, and regards escorting in such cases as legitimate. In addition, the decision is important also in that it pointed out the illegality of a lengthy detention at the place of police questioning and approved the evidentiary competence of a written expert opinion of an analysis test result about a urine sample taken within a series of procedures which included such an illegal preceding procedure.

2. The opinion which views it as legitimate is based on the following: escorting a person to a proper place had already been judicially examined because a warrant was issued on the supposition that the taking of the sample would be executed in a medically proper place; the purpose of the warrant of search and seizure for taking a urine sample would not be accomplished unless escorting was considered as legitimate. It would be legal provided that the physical force used to escort should be limited to the minimum amount neces-

sary, which is different from the case of arrest, in which the use of handcuffs is generally permitted, and that the place to which the suspect was taken should not be unfairly located too far from the original place. Essentially, the decision also stands on the same basis as mentioned above.

On the contrary, among academic opinions, there are not a few that regard escorting like this as problematic. In particular, they take it seriously that taking a urine sample compulsorily in iteslf and escorting a person to carry out must be considered to be different measures. That is, even if the warrant of search and seizure for taking a urine sample compulsorily had been issued, the escorting which accompanies a restriction of personal liberty had not yet been judicially screened, and it should not have been allowed so long as the escorting was not provided by law. Furthermore, one opinion has critically pointed out that the purpose of a warrant of search and seizure for taking a urine sample compulsorily will not alone be sufficient to justify the measure of escorting.

While the original laws have not provided for the measure of taking a urine sample compulsorily, the decisions served the function of producing law and invented a so-called warrant of search and seizure for taking a urine sample compulsorily. It can be said that the Supreme Court extended its former view in that it held that escorting a suspect to the place for taking a urine sample is also legitimate.

Prof. MINORU NOMURA
Prof. (Aichi University)
KATSUYOSHI KATO