

3. AIDs decisions

In the family law area, there were the following two remarkable cases regarding artificial insemination by donor (AID) in this period.

(1) Tokyo High Court, September 16, 1998 [Takada v. Takada] 51

(3) KASAI GEPPŌ 165, 1014 HANREI TAIMUZU 245

A child born by the way of AID is a legitimate child to which is applied the presumption of legitimacy if the AID was performed under the husband's consent and the wife can not contest the absence of parenthood between the husband and child.

(2) Osaka District Court, November 18, 1998 [Yamabe v. Yamabe]

51 (9) KASAI GEPPŌ 71, 1017 HANREI TAIMUZU 213

The court admitted the avoidance of legitimacy alleged by husband based on the finding that neither the husband gave the wife the comprehensive consent to reproduce the child through AID, nor recognized the legitimacy of the child after her birth.

MASAYUKI TANAMURA

HIROSHI NARUSAWA

5. Criminal Law and Procedure

1. Supreme Court 1st P.B., Feb. 17, 1999

Tanabe v. Japan

53 (2) KEISHŪ 64, 1668 HANREI JIHŌ 151, 997 HANREI TAIMUZU

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Police use of a gun against a suspect with a small knife in his hand is not justified as self-defense.

Reference:

Penal Code, art. 36; Law concerning Execution of Duties of Police Officials, art. 7

Facts:

The defendant, Tanabe Kenji (hereinafter T), age of 53, working as a police officer in the suburbs of Hiroshima, received a phone call asking him to keep an eye on a “stranger” (who was in fact a resident of the city), who had often been seen by local citizens and had been considered as someone to be alarmed by. When T, accompanied by another officer (hereinafter W), reported to the scene and found the stranger (hereinafter S) on the road, he questioned S about his address, identity, etc. But S ran away and, after being chased, he was found with a knife (7.4cm in length, 1.58cm in maximum width of the blade) in his hand. W pointed his gun at the suspect and warned, “Drop the gun. If you resist, I’ll shoot you.” The suspect did not drop the knife, showing a vigorous intent to resist, swung the knife several times, and ran away again. The defendant found him again soon, and attempted to arrest him “red-handed”, on charges of possession of a knife over a certain size (Law Controlling Possession, etc. of Firearms and Swords, art. 3) and obstruction of official duty (Penal Code, art. 95). Since S resisted with the knife to avoid being arrested, T fired his gun once. The bullet hit S in the left hand, but he ran away again. When T caught up with him in the rice field and closed in on him, S stepped back a few steps and swung the knife again and battered T badly with a wooden stick (length-171.5cm, weight-500grams, diameter-3.2cm). T fought back with his nightstick, but was injured and could not hold on to it. S continued hitting T with the stick, giving him serious injuries. At that time, T was standing with his back against a stack of 200 sticks and felt that he had a slim chance of getting away. T aimed his gun at the left thigh of S and fired. The bullet hit S in the left chest and S bled to death. The firing of the gun took place approximately thirty seconds after they entered the rice field. The prosecutor did not prosecute him originally, but the compulsory process of the judicial prosecution (*fushinpan* procedure) was initiated and T was prosecuted for killing a person in the course of performing his public duty (Penal Code, art. 196).

The Hiroshima District Court acquitted him on grounds of self-defense. On the contrary, the Hiroshima Court of Appeals reversed

the judgment, convicted T of his second gun shot and gave him a suspended three year sentence of imprisonment. T appealed to the Supreme Court but the Supreme Court dismissed T's appeal on a ground unrelated to the issue of self defense, but stated its opinion *ex officio* as to the legality of the firing of the gun.

Opinion:

Appeal dismissed.

Although the defendant's firing of a gun was done in the course of police conduct to arrest the suspect, and also in order to defend himself, it was not justified. The knife of the suspect was relatively small, and his act of resistance was made only to keep the defendant away from closing in on him. The physical conditions surrounding them indicated that the suspect would neither attempt to injure the defendant positively, nor harm others in the vicinity, if the defendant kept away. There was no need for T to rush the arrest. T could have waited for his partner to arrive, and made the arrest with his assistance.

Editorial Note:

The decision is very important since this is the first Supreme Court decision as to the police use of firearms in self-defense, and the scope of the justification of such use. When a special official, such as a judge, a prosecutor, or a police officer assault, or cause death to a suspect or an accused in the course of performing his public duty, he or she will be charged with committing a crime as proscribed in Articles 195, 196 of the Penal Code. However, Article 7 of the Law concerning the Execution of Duties of Police Officers (*Keishokuhō*) justifies the use of police weapons under certain circumstances. The use of a weapon is justified when the weapon is used to arrest a suspect, or in defense of oneself or some other person, or to overcome resistance to the performing of a public duty. However, in addition to these requirements, there has to be a necessity for and rationality in the use of weapon, judged from the circumstances at hand. Necessity exists where the standard course of conduct in performing the duty necessitates such a use of weapon. Rationality will be judged according to the type of crime committed by the suspect, the degree of imminence of

danger caused by the attack, the number of suspects, the strength of resistance (if at all), the weapon used in resistance (if any), etc.

In the case noted above, the issue was whether there was the necessity to use the weapon, and whether there was rationality in the use of weapon judged from the particular circumstances.

The Court found no imminence of grave danger to the defendant's body or his life, since ① S did not have the knife at the point of gun fire, ② though S had a wooden stick in his hand, his left hand was severely injured, ③ T could have waited for his partner to come and arrested S with his assistance.

In these kinds of cases, the police officer will not be allowed to use firearms to overcome strong resistance in order to complete the arrest of the suspect. As a consequence of this decision, the police officer must place his life or body in jeopardy if the circumstances (degree of danger, etc.) are similar to the circumstances of this case, just to assure the safety of suspects possessing dangerous weapons.

2. Supreme Court G. B. March 24, 1999

Ando & Saito v. Japan & Prefecture of Fukushima

53 (3) MINSHŪ 514, 1680 HANREI JIHŌ 72, 1007 HANREI TAIMUZU
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Article 39, paragraph 3 of the Code of Criminal Procedure, allowing the prosecutor, when it is necessary for an investigation, to designate the date, time, and place of counsel-suspect (accused) interviews, does not violate Article 34, Article 37 paragraph 3, and Article 38 paragraph 1 of the Constitution.

Reference:

Code of Criminal Procedure, art. 39, para. 3; Constitution, arts. 34, 37 para. 3, 38 para. 1

Facts:

When counsels Ando and Saito (each at different occasions) requested to have an interview with a suspect who was being kept in custody, the prosecutor refused to let them meet. The reason for the refusal was that the counsels did not have the documents issued by the

prosecutor designating the date, time, place, etc. of the interview. The requests from the counsels were turned down in this manner for a total of 9 times before the suspect was indicted. The counsels filed a suit against the State and the Prefecture of Fukushima based on Article 1 of the State Redress Law (*Kokkabaishōhō*), seeking damages on the ground that the refusal was illegal. The District Court of Fukushima affirmed the argument of the plaintiffs as to the liability of the State, but did not find the Prefecture of Fukushima liable for the refusal. Both parties appealed, this time with the counsels (A and S) arguing the unconstitutionality of Article 39, paragraph 3 of the Code of Criminal Procedure in addition to the original issues. The Sendai Court of Appeals reversed, finding no liability of the State or of the prefecture of Fukushima, rejecting the argument of unconstitutionality as well. A and S appealed to the Supreme Court. The case as a whole originally was pending in the 3rd Petty Bench, but the issue of unconstitutionality was sent to the Grand Bench following the rule set forth in Article 10 of the Court Organization Law (*Saibanshōhō*).

Opinion:

Issue dismissed.

1. Article 34 of the Constitution substantially guarantees suspects in custody the chance to have the assistance of a counsel, including the chance to appoint a counsel, to exchange opinions with a counsel, to receive legal advice from a counsel, etc.

In order to make use of investigatory powers, however, there are times when the interrogation of suspects in custody will be needed, and the Constitution does not prohibit these kinds of interrogations.

This leads us to conclude that there should be some reasonable balancing of the right to an interview with the investigatory power.

Generally, the investigation must allow counsels to meet suspects whenever requested. The use of the right of designation will be strictly limited to cases in which the interview could cause manifest setbacks to the investigation, such as when the interview necessarily terminates an on-going interrogation, etc.

Since the designation is strictly limited to those cases, Article 39, paragraph 3 of the Code of Criminal Procedure does not violate sub-

stantially the spirit underlying the protection of right to counsel in Article 34 of the Constitution.

In addition, there is a useful, speedy way of objecting to the designation, namely, the system of *jun-kōkoku* appeal.

2. Article 37, paragraph 3 of the Constitution can not be construed in any way so as to render it applicable to a suspect who has not yet been indicted.

3. The question of how to make the protection of the right to remain silent (Constitution, art. 38, para. 1) substantial, is basically a question of policy, that needs to be considered in light of the practical administration of investigation.

Editorial Note:

This decision made clear for the first time since the enactment of the Constitution, that Article 39, paragraph 3 of the Code of Criminal Procedure, proscribing the system that permits the prosecutor to designate the date, place, and time concerning interview or receipt, did not violate Article 34, Article 37, paragraph 3, and Article 38, paragraph 1 of the Constitution.

When this particular issue was sent for an *en banc* (“Grand Bench”) deliberation, assuring that either a reversal of a former Supreme Court decision, or a judgment as to the constitutionality of a certain institution, etc. (*See* Court Organization Law, art. 10) to follow, some people (mostly lawyers) expected a decision declaring the unconstitutionality of the designation. The actual decision, however, was not as satisfactory as some lawyers had expected. The Supreme Court, in an unanimous opinion, declared that the prosecutorial designation of counsel-suspect interviews was (perfectly) constitutional although the scope of the provision would be limited.

The argument of the Appellants was the following. ① The right of the suspect in custody to have the effective assistance of a counsel (which includes the right to have interviews with a counsel, or the counsel’s right to have interviews with the suspect) is a constitutional protection, since the right was mentioned directly or indirectly in Articles 34, 37, paragraph 3, and 38, paragraph 1 of the Constitution. ② But the state power of investigation do not have any constitutional

status as it lacks mention in the Constitution. ③ Since they do not exist on the same legal plane, they can not be “balanced” in any way. ④ Since Article 39, paragraph 3 of the Code of Criminal Procedure assume the possibility of that balancing in the first place, the provision itself has the potential of being unconstitutional. Formerly, this argument was strongly supported by some scholars (although never gaining the status of the prevailing view). The Court noted, in this particular decision, the constitutional status of the power to investigate, making the argument of “rational balancing” theoretically persuasive.

In rejecting the argument of the appellant, however, the Court specifically noted the importance of the protection of the right of the accused to have the assistance of a counsel (Art. 34) and made clear what protections were embedded in this provision.

Considering that the opinion was a unanimous opinion of the court, leaving only a small chance of reversal in the near future, the contemporary issues in suspect-counsel interviews would be on the illegality of the actual designation. The Court noted that the designation will be permitted in cases, “in which the interview could cause manifest setbacks to the investigation, such as when the interview necessarily terminates an on-going interrogation, etc.”. The next question follows. Under what circumstances would the interview be judged as something that could cause manifest setbacks to the investigation?

As to the issue concerning Article 37 of the Constitution, including the construction of the word “accused” in the English translation of the Constitution, the Court rejected the argument that the word “accused” meant something more than “defendant”. The Court read the word as meaning nothing but defendant, strictly limiting the scope of the protection. As a consequence of this reading, the argument of assigned counsel for suspects lost its grounds in this particular provision as well.

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