6. Criminal Law and Procedure

Sup. Ct., 3rd P.B., Jul. 16, 2001
Matsuura v. Japan
55 KEISHU 317

The act of taking in and storing obscene images on the hard disk of a "host" computer, rendering it possible for members of a specific network to view the images through their own PCs with the help of a certain software, was held to violate art. 175 of the Penal Code (hereinafter *Keiho*).

Reference:

Keiho Article 175.

Facts:

The defendant, T. Matsuura (hereinafter X), the operator of a certain computer network, was charged with violating art. 175 of *Keiho* by taking in and storing obscene images in the hard disk of a so-called "host" computer of the private network that he operated, thus rendering it possible for members of the network to view the images through their own PCs with the help of a specific image-viewing software.

The defendant's arguments were that the images in question were not "obscene"; they were information instead of "writing, picture, or other object"; and that he did not "publicly display" those data. The court of first instance (Kyoto District Court) and the court of appeals (Osaka High Court) both rejected his arguments, holding that the hard disk of the host computer of the network was an obscene "object", and that by taking in and storing obscene images in that hard disk, rendering it possible for members to view the images through their own PCs, he had "publicly displayed" that "object". Thereafter, X filed a *jokoku* appeal in the Supreme Court.

Opinion:

Jokoku appeal dismissed.

(1) The hard disk of the host computer, in which the defendant stored the data of obscene images is to be considered an "obscene" "object" as provided in art. 175 of *Keiho*.
(2) A person who "publicly displays" an obscene object, as provided in art. 175 of *Keiho*, is a person who renders it possible for an indefinite or a large number of persons to recognize the obscene content of the object. It is not necessary that the person render it possible to recognize the obscene content of the object firsthand, without requiring any specific act to recognize it.
(3) The act of taking in and storing obscene images in the hard disk of the host computer of the so-called "personal computer network", rendering it possible for an indefinite or a large number of members to reproduce and view the images through their own PCs, first downloading the images, and then viewing the images through the use of a specific image-viewing software, constitutes an act of "publicly displaying" the obscene "object" as provided in art. 175 of *Keiho*.

Editorial Note:

Article 175 of *Keiho* provides: "A person who distributes or sells an obscene writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment with forced labor for not more than two years or a fine of not more than 5,000 yen or a minor fine. The same shall apply to a person who possesses the same for the purpose of sale." In this article, "distribute" means to give for free, and "sell" means to give for value, each to an indefinite or a large number of people. On the other hand, "publicly displays" means to make it possible for an indefinite or a large number of people to view a certain object. The typical act of publicly displaying obscene objects would be to publicly show an obscene film or to exhibit an imitation of genitals, and so on. Under the circumstances of this case, the issue was whether the defendant "publicly displayed" the obscene "object". Namely, ① whether the data of obscene images were the "obscene writing, picture, or other object" provided in art. 175, and ② whether the act of X could be seen as "publicly displaying" the obscene object.

As to the problem of offering obscene images in a specific per-

sonal computer network or on the internet, most of the courts below have repeatedly held that the hard disk, in which the obscene images are stored, is an obscene "object". On the other hand, some say that the data itself is the obscene "object". However, since art. 175 illustrates the "object" using examples such as writing and pictures — both tangibles —, it should be construed that the information itself is not included in the "object" here. Moreover, even if we interpret the article as embracing information in the "object", there is a problem when some kinds of networks of computers come into play. In such cases, the data is transported from the hard disk of the host computer to the computer of the individual user (in this case, the member of the specific network), and the images are displayed on the computer screen of the user. In this respect, X could be said to have distributed — or sold, when the member had paid money in exchange for receiving those data — obscene images, but it is rather difficult to say that he has "publicly displayed" the data. Besides, when we consider information as the "object", the presenting of a strip show could also be punished as violating article 175 instead of article 174 (Public Indecency), the article which has been applied to the running of such shows. Some argue that this would make the boundaries in application between the two articles hopelessly ambiguous.

The Supreme Court affirmed the decision of the Osaka High Court in this respect. (Therefore, some people argue that the decision offers no implications as to whether the data itself, *in addition to the hard disk*, could be treated as an obscene "object"). The Court supported the view that the tangible body that holds the information in question is the obscene "object". However, there are criticisms of this view as well. First, it is very difficult to specify Physically where exactly the data is being stored in the hard disk. That means the connection between the information and the tangible body that holds that information is somewhat weak. But, although it moves upon renewal, it is not impossible to specify the place of storage.

The second criticism concerns the use of computer networks. In such cases, the images are downloaded from the host computer to the personal computer of the individual user, and displayed on his computer screen. Should not the "object" be the hard disk of the personal

computer of the individual user? The Supreme Court said no, affirming the judgment below. As the Osaka High Court held in this case, the hard disk of the host computer is the obscene "object" because "as to the images in the computer of the user and those memorized and stored in the hard disk (of the host computer), there is an identity in the obscene images displayed through these data". Some point out that the downloading does not in any way alter the images, and so it should not be evaluated to have a specific legal significance. Nevertheless, when viewed closely, what is displayed is the information downloaded and stored in the hard disk of the user's computer. If the criminal character of the act is to be viewed in terms of when the image is displayed, the obscene "object" should be the hard disk of the user's computer. It should also be noted that it is nothing but a legal fiction to say that the hard disk of the host computer is the obscene "object", when the data is not displayed on the screen. The hard disk, in itself, is nothing more than an apparatus, not an obscene object. It only becomes an obscene object when the data stored therein is displayed on the computer screen.

The act of offering obscene images through a computer network is substantially no different than the acts formerly punished as violating article 174, in respect of the influence it has on the order of public morals (decency). The interest of society in punishing these acts is apparent. However, article 175 was not originally enacted to cope with crimes through the internet or computer networks. The article was designed to deal with tangibles. Ideally a new provision to the *Keiho* should be added that is capable of controlling crimes through the internet, rather than stretching the interpretation of article 175 so as to take in and punish acts such as the ones presented in this case.

Sup. Ct., 3rd P.B., Apr. 11, 2001
Hasegawa v. Japan
55 KEISHU 127

A general finding as to the time, place, and means of murder, and an alternative finding as to the actual murderer are not insufficient to show the "facts constituting the offense" (Code of Criminal Procedure,

hereinafter *Keisoho*, art. 335). Alternatively holding "A (the accomplice) or the defendant or both" as the actual murderer without changing the count, in which the prosecutor had specifically named the defendant as the sole actor, is not illegal under certain circumstances.

Reference:

Keisoho Articles 256(3) and 312(1)(2); *Keiho* Articles 60 and 199.

Facts:

The defendant, T. Hasegawa (hereinafter X), was charged with conspiring with M. Nara (hereinafter A) and K. Hasegawa (hereinafter Y) to commit arson on the house of A's friend in order to fraudulently receive insurance for the house burnt, and with committing the arson, and thereafter conspiring with A to murder Y, and then committing the murder that they had conspired about, and then conspiring to and abandoning the corpse of Y. The Aomori District Court convicted X on the charges of arson, fraud, murder and the abandoning of a corpse. (In Japan, generally, conspiracy and the commission of the crime conspired do not constitute separate offenses.) In announcing the judgment of conviction for murder, the court held that "upon conspiring with A, between 8pm on the same day as above (24th of July, year 63, *Showa* (1988)) and the dawn of 25th of the same, inside a car parked in or around Aomori city, A or the defendant or both, by strangling, throttling or by another act of the same sort, murdered Y". X filed a *koso* appeal, arguing that the finding was insufficient to show the "facts constituting the crime" (art. 335), and that the court erred in finding "A or the defendant or both" as the murderer, without first letting the prosecutor (or identifying his will) to change the count, since the prosecutor had specifically named the defendant as the sole actor. The Sendai High Court affirmed the judgment below, and X filed a *jokoku* appeal in the Supreme Court.

Opinion:

Jokoku appeal dismissed. (Unanimous opinion)

(1) Even if the finding as to the time, place, and means of murder is general, and if the finding as to the actual murderer was alterna-

tive, such as "A or the defendant or both", they are not insufficient to show the "facts constituting the offense" of murder, when the case concerns a murder conspired by the defendant and A.

(2) When the count of a jointly committed murder does not name the actor at all, it does not necessarily mean that the "facts constituting the crime" are not sufficiently specified. Accordingly, even if the actor is specifically named in the count, the change of count would not be necessary in light of the function of the count to mark out the scope of trial, in order for the court to find facts that differ from what is mentioned in the original count. However, viewed from the perspective of the defendant's defense, it is very important that he be notified of the actual wrongdoer. Therefore, ideally the prosecutor should name the specific actor in the count, in order to make the issues of the case clearer or for other purposes. And once the actor is specifically named in the count, the general rule is that the count must be changed, if any finding that substantially differs from that count is to be reached. Nonetheless, since it is not necessary to specifically name the actor in the count, when — in view of the whole process of trial, including the actual progress of his defense — the finding would not mean a surprise attack upon the defendant, and when the facts found would not be more prejudicial to the defendant than finding the facts expressed in the count, finding of facts that substantially differ from the ones in the original count, without first changing the count, would not be illegal.

(3) When the actor is specifically named in the count of a jointly committed murder, alternatively finding "A or the defendant or both" as the actual murderer, without first changing the count, is not illegal under the circumstances that ① the range of accomplices is identical between the finding and the count, ② X denied, in the trial court, his conspiring with A and any connection to the commission of the crime, ③ X argued that A had testified to shift the responsibility on to X, when he had said that X had done the actual killing.

Editorial Note:

The issues in this case, which the Court answered *ex officio*, were: ① whether, in the case of a jointly committed murder, the general finding as to the time, place, and means of murder and the alternative finding as to the actual murderer made the holding insufficient to show the "facts constituting the crime" (art. 335), and ② whether the court violated a certain procedural provision in finding "A or the defendant or both" — alternatively — as the murderer, without first letting the prosecutor (or identifying his will) to change the count, when the prosecutor had specifically named the defendant as the sole actor.

The art of "indefinite holding/finding", in which the court does not specifically name certain aspects of the count in the judgment of guilt, is occasionally used by Japanese courts. Since the process of fact-finding in a criminal trial is a process of reproducing the event that had taken place in the past, by examining evidence that is practically limited both in quality and in quantity, it is impossible for judges to always make clear every aspect of the case in detail. The law is not considered to require such close finding at all times either. (It is also true, however, as some point out, that the law lacks a specific provision that permits this kind of indefinite finding). Nonetheless, the judgment of guilt is only to be reached "where there is proof of guilt" (art. 333, para. 1). And the judgment of guilt shall indicate "the facts constituting the offense" (art. 335, para. 1). Therefore, when employing the method of indefinite finding, the court should make sure that the case is proved beyond reasonable doubt and that the "the facts constituting the offense" are properly shown.

In this case, the issue was on the sufficiency of "the facts constituting the offense". "Facts constituting the offense" are concrete facts corresponding to the material elements of a particular crime provided in the substantive criminal law. The expression of these facts in a judgment only needs to show what is enough to identify whether the concrete facts correspond to the material elements in the named provision of the substantive criminal statute, indicating the factual ground of applying that particular provision. The facts of time, place, and means of a murder are not "the facts constituting the offense", since they are

not the material elements of the crime of murder. These facts are only used to specify a certain fact of crime (cf. art. 256, para. 3), and the general finding as to these facts does not necessarily make the showing of "the facts constituting the offense" insufficient.

How about the propriety of the alternative finding as to the actual murderer, in a case of a conspired and jointly committed murder, when the prosecutor had specifically named the sole perpetrator in the count? Although there are various types of alternative findings, it is settled that when the alternative facts in question both concern the same set of material elements of a particular crime, the finding only needs to show what is enough to identify whether the facts found correspond to the material elements of the crime in the named provision. A case where the actual perpetrator cannot be specified, as in this case, falls into this category. In Japan, according to the doctrine of conspired co-principals, when one member of conspiracy commits the crime conspired, every member thereof would be punished as co-principals. Thus, who actually committed the crime conspired, or which role each member played in the commission of that crime, would make no difference in the determination of which provisions to apply. Accordingly, expressly naming the actor in this case would not be necessary. Consequently, even if the judgment lacked the showing of the actual murderer, "the facts constituting the offense" would not be deemed insufficiently shown. Therefore, the alternative finding of the murderer would not make it insufficient either.

What is deemed more important in this decision is the holding on issue ②. There is, in Japan, a somewhat unique system of supplementing, withdrawing, and changing (hereinafter "changing") the count (art. 312). Two of the major issues in the system of changing the count concern under what circumstances the count needs to be changed, and to what extent the count can be changed. This case concerns the former issue.

According to the prevailing view in Japan, a count is an allegation by the prosecutor, of facts that constitute the crime to be charged, which sets the scope of trial, and at the same time, notifies the range of the defense that the defendant needs to perform. In the light of the ideal of the adversary system, the court is not permitted to find facts

outside the limit set by the prosecutor, through his expression of facts in the count — this is called the "binding effect" of the count. There are times, however, when there is divergence between the facts notified in the count and the facts that become apparent in the course of the trial (or the facts that the court is convinced to have found on its part). For such cases, it is provided in article 312 of the *Keisoho* that the court may permit the prosecutor to, upon his request, or may even order him to "change" the count. It would be theoretically ideal if the prosecutor were to request — and/or the court were to permit or order — the change of count whenever there is such a divergence. But viewed practically, considering the judicial economy and the burden upon the parties, always requiring such a change of count would be perceived as plain nonsense. Therefore, the rule has been set out by courts and scholars as to require the changing of count only in cases where there is a significant divergence between the facts set out in the count and those that became apparent, or those that the court has found. But under what circumstances exactly should the count be changed? Two standards have been offered in this respect, taking the function of the count — mainly its function concerning the interest of the defendant in performing his defense — into consideration. One of the two standards is the standard of "concrete (actual) defense", which does not require the change of count when, taking all the actual process and circumstances of the trial that have already taken place into consideration, the defense suffers no disadvantage. The other (which has become the prevailing view in Japan) is the standard of "abstract defense", which requires the change of count whenever there is, abstractly or generally, a danger that the defense might suffer a certain disadvantage. The Court is thought to have adopted the latter theory in general, but some point out that there are decisions that reflect a similar consideration to that of the former theory.

In (1) of this decision, the Court expressly took notice of the other function of the count, namely the function to set the scope of a trial, in deciding the necessity of a change of count. In addition, in (2), the Court offered still another element to be considered — the need to clarify the issues (or other purposes) —, that is not so closely connected with the function of the count itself. The Court goes on to hold

that there may be exceptions to the general rule that a change of count may be necessary when the need for clarifying issues makes it necessary. According to this decision, ① even if "the change of count would not be necessary in light of the function of the count to mark out the scope of the trial", it may be ideal to have the prosecutor include a certain fact in the count, "in order to make the issues of the case clearer or for other purposes". And once such a fact is named, "the general rule is that the count must be changed, if any finding that substantially differs from that count is to be reached." And, even in such cases, "when — in view of the whole process of a trial, including the actual progress of the defense — the finding would not mean a surprise attack upon the defendant, and when the facts found would not be more prejudicial to the defendant than finding the facts expressed in the count,... the finding of facts that substantially differ from the ones in the original count, without first changing the count, would not be illegal".

The first question about this decision concerns the Court's evaluation of the two functions of the count. Does the decision here contradict the former approach, which is considered to emphasize initially the function of the count concerning the interest of the defendant in his defense. This should be answered in the negative. It is true that the Court first took notice of the function of marking out the scope of a trial. However, as one scholar points out, the two functions of the count may be compared to the two sides of a coin. When the scope of the trial is marked out, the range of the necessary defense may also be limited to those facts set forth in the count. (In this respect, it could be said that the standard of abstract defense had not only focused on the interests of the defense in the first place). Therefore, a change of count required by this function could also protect the interests of the defense that the standard of abstract defense had tried to protect hitherto. When read in this context, this decision could be seen, rather, as protecting the interest of the defendant more thoroughly than the previous decisions. The Court recognized the requirement to change the count even where "the change of count would not be necessary in light of the function of the count to mark out the scope of the trial".

There is also a question concerning the exception to the general

rule of requiring a change of count when the need for the clarification of the issues makes it necessary. According to this decision, when the finding of facts outside the count would not mean a surprise attack upon the defendant, and when the facts found would not be more prejudicial to the defendant than finding the facts expressed in the count, such a finding would not be illegal. This type of consideration resembles the one employed in the standard of concrete defense. Some hold that this type of consideration (which has been deemed as rejected when the abstract defense standard was adopted) should not be used so as to make the change of count unnecessary. This argument might very well be considered appropriate in cases where the change of count is required in light of the function of the count itself. However, the change of count in this case is only required in light of the need for the clarification of the issues, or for preventing a surprise attack on the defendant, in order to guarantee opportunities to fully carry out attacks and defenses on the particular issue. Theoretically speaking, the clarification of issues is not — at least essentially — the function of the count itself. Therefore, as long as this goal would be reached, there may be exceptions to the general rule, and the type of consideration that is shown here could also be employed.

The Supreme Court, in (3), indicated that, under those circumstances, the alternative finding without the change of count would not be illegal, because such a finding would not be a surprise to the defendant, and the facts found would not be more prejudicial to the defendant than finding the facts expressed in the count. The Court thereby "remedied" the procedure performed by the trial court, which, actually, had been less than ideal. As one scholar points out, the decision should be read as asking all the courts or the prosecutors to change the count in cases similar to this case. In light of the fact that this is the decision of the Supreme Court, it is expected that the application of the general principle delivered in this decision will be deemed more and more important by practitioners.