6. Criminal Law and Procedure

Sato v. Japan
Supremu Court 1st P.B., July 10, 2003
Case No. (*a*) 60 and 80 of 2003
57 KEISHU 903; 1836 HANREI JIHO 40; 1134 HANREI TAIMUZU 102

Summary:

Article 47 of the Penal Code (hereinafter *Keiho*) is interpreted as meaning that the whole punishment for each offence composing concurrence-of-offenses (hereinafter *Heigozai*) is formed as a punishment to be sentenced which is complying with this article and that the concrete punishment for the whole of each offence composing *Heigozai* is decided within this punishment range, sentencing to an imprisonment for a definite term of plural offences in the *Heigozai*.

Reference:

Keiho Article 47.

Facts:

On Nov. 13, 1990, the defendant, N. Sato (hereinafter X), kidnapped a girl, who was 9 years old then. After that, X confined her for more than 9 years and inflicted the injury of muscle weakness and bone loss. At the beginning of Oct. 1998 during the confining, X stole the 4 blouse liners, whose price was about 2,464 yen (about 22 dollars at the exchange rate of those days).

The court of the first instance (Niigata District Court) convicted and sentenced X to 14 years in prison. The defendant appealed against it as the addition of the punishment of this theft that should be estimated as 1 year in prison at most and the limited punishment of art. 221 (custody resulting in death or injury), which is 10 years in prison, was 11 years, but this 14 years in prison sentence was against the principle of aggravation with *Heigozai* in art. 47.

The court of appeals quashed the original decision and sentenced X to 11 years in prison accepting it.

Thereafter, the prosecution and X filed each a *jokoku* appeal in the Supreme Court.

Opinion:

The original decision was quashed.

Koso appeal against the first instance dismissed. (unanimous)

... Sentencing to an imprisonment for a definite term of plural offences in *Heigozai*, art. 47 is a provision that the whole punishment for each offence composing *Heigozai* is formed as a punishment to be sentenced which complies with this article and that the concrete punishment for the whole of each offence composing *Heigozai* is decided within this punishment to be called the modified statutory punishment range. Deciding a concrete punishment for the whole of each offence composing *Heigozai* within the limits of the punishment to be sentenced, the article is not designed to sum up each of the punishments after the determination of the appropriate punishment for each offence composing *Heigozai*. ... When the first offence (as the abduction of a minor and the capture and confinement resulting in injury compete ideally, it is the latter.) and the second offence (theft) are aggravated in *Heigozai* following art. 47, the range of the punishment to be sentenced against the whole of the both the first offence and the second offence is from 3 months to 15 years in prison. There shall be no legal limitation on the deciding the punishment in the range of this punishment to be sentenced except whether the sentencing is reasonable or not. ...

Editorial Note:

In Japan, concerning the treatment of *Heigozai*, which are plural offences that do not become irrevocable (art. 45) and can be sentenced to the punishment increased by half on the heaviest offence when it is imprisonment (art. 47), three principles are considered. First, the principle of absorption limits the range of the punishment to be sentenced for plural offences to the maximum of the statutory punishment range of the heaviest. Second, the principle of aggravation increases certain punishment to that of the heaviest among each offence related as *Heigozai*. And third, the principle of aggregation adds up each punishment that is provided for each offence.

Among these, the principle of absorption has a difficult problem that the control of minor offences is lost because the maximum punishment is fixed when a heavy offence is committed. The principle of aggregation also has a difficult problem that a prison term becomes too long to execute, and is too painful for the prisoner. Thus, correcting both difficulties, the principle of aggravation is supported most in Japan. The meaning is that the punishment is heavier than that of one offence and lighter than that of a simple sum.

The active *Keiho* adopts the principle of absorption on capital punishment and imprisonment for an indefinite term (art. 46), the principle of aggravation on imprisonment for a definite term (art. 47), and the principle of aggregation on fines (first clause of art. 48). The art. 47 at issue in this case is generally regarded as adopting the principle of aggravation because the punishment increased by half on the long-term of the statutory punishment range in the heaviest offence is made into the long period of time of the punishment to be sentenced. But, considering the process of the legislation, it is based on the principle of limited aggregation.

In this way, art. 47 adopts the principle of limited aggregation, but it has been thought that it complies with a request of the principle of responsibility that is based on the accusation against *each* offence on the theoretical system of criminal law, and that therefore the punishment predicted against each offence composing *Heigozai* must not exceed not only the statutory punishment range of the offence, but also the amount of the punishment allowed against the offence.

In this case, there are two matters about the valuation of the theft indicted as supplementary. The first is whether the theft is a light offence equivalent to one year in prison. And the second is whether it is against the justice that the limit of the punishment is increased to 15 years in prison by the addition of the theft to the abduction and the custody resulting in death or injury and by the concurrence of offenses on account of the expansion of the range of the punishment to be sentenced to the accused.

The appellant court, following the idea as noted above, thought that the attempt evades the purpose of the system of aggravating in concurrence-of-offenses after the theft was estimated as light.

The decision of the Supreme Court denied the idea that the decision of the appellate court supported. It estimated that this theft was a seri-

ous offence. This theft of the underwear was committed for as a means to continue confining the victim, and could not be treated as the same as a normal shoplifting case. From this standpoint, it is not necessarily against the justice that the limit of the punishment to be sentenced became 15 year in prison.

But it is possible to understand that this decision denied the unsubscribed legal limitation on the sentencing of *Heigozai*. The Supreme Court said, "deciding a concrete punishment for the whole of each offence composing *Heigozai*..., the article is not designed to sum up each of the punishments after the determination of the appropriate punishment for each offence composing *Heigozai*." It is possible to regard the basic idea of the Supreme Court as that the punishable is not what the offence A and the offence B make simply, but the new body that the offence A and the offence B unites to form, as it were "the custody-resulting-in-injury-and-the-theft", and that it is impossible to separate simply offence B from offence A, and corresponds to the whole of the punishment to be sentenced after aggravating the statutory punishment range by half. From this viewpoint, the two matters as noted above go away and it is nonsense to consider the question of what gave rise to the additional 4 years in prison above the limit of the statutory punishment range with the custody resulting in injury. But it is to be feared that, as an easy means to increase the punishment to be sentenced above the statutory punishment range against the basic offence in serious cases, light offenses are indicted supplementary, and the meaning of the statutory punishment range is practically lost.

Anyway, this is the decision where for the first time the Supreme Court clearly indicated the interpretation of art. 47 that each lower court has interpreted differently. It is meaningful as it made public the principle of the aggravation in *Heigozai* that has never so far been cleared up.

Fusagawa v. Japan
Supreme Court 2nd P.B., Feb. 14, 2003
Case No. (*a*) 1678 of 2001
57 KEISHU 121; 1819 HANREI JIHO 19; 1118 HANREI TAIMUZU 94

Summary:

The written instrument of an expert opinion concerning the urine of the accused extracted on the day he was arrested is not admitted because the arrest procedure was seriously illegal. Notwithstanding, psycho-stimulants discovered by the search based on the search warrant issued on the written instrument of an expert opinion concerning the urine of the accused which was excluded, are admitted.

Reference:

Code of Criminal Procedure, Articles 1, 73(3), 201, 218(1), 221, and 317.

Facts:

Although the arrest warrant against the defendant, M. Fusagawa (hereinafter X) on suspicion of larceny had been previously issued, three police officers (including police officer A) of the Shiga Otsu police station went to the X's house on the morning of May 1, 1998, without carrying the arrest warrant, in order to arrest X. The three police officers found X in front of his house and requested him to report voluntarily. But the defendant demanded that the police officers show an arrest warrant and did not respond the request to report voluntarily. Then, X suddenly escaped, and he was arrested on the street near his house. After X was taken to the Otsu police station, the arrest warrant was immediately shown to him by the police officer. It was written on this warrant in the name of A that when X was arrested, this warrant was shown to him. And A drew up the criminal-investigation report including a statement to this effect on the same day. When X responded to the urine test voluntarily in the Otsu police station on the same day, he was not subject to compulsion. Testing X's urine, psycho-stimulant ingredients were detected. The warrant to search X's house and seize psycho-stimulants was issued on the 6th of the same month and was

executed the same day together with the warrant to search and seizure on suspicion of larceny which previously had been issued. As a result of the search of X's house, the police seized psycho-stimulants. X was later charged with the possession and use of psycho-stimulants in violation of the Psycho-stimulants Control Law.

In the trial, X argued that because the police did not present him with the arrest warrant when arresting him, the procedure taken by the police violated article 201(1) of Criminal Procedure. On the other hand, the three police officers presenting at the arrest testified in the court that they told X the summary of the suspicion and presented X with the arrest warrant at the place of his arrest. The Otsu District Court did not trust this police officer's testimony and found that the police did not carry this arrest warrant and it was not shown to him at the time of his arrest. And it judged that, considering the fact that the police had made a false testimony, the violation was so serious that the evidence, such as the written instrument of an expert opinion concerning X's urine and the psycho-stimulants seized in executing the warrant to search and seize, should be excluded. The district court acquitted X of the charge. The Osaka High Court affirmed the judgment below, and the prosecutor filed a *jokoku* appeal in the Supreme Court.

Opinion:

Jokoku appeal dismissed. The Court held *ex officio*:

In this case, the arrest procedure was illegal because there was no presentation of the arrest warrant at the time of arrest, and no actions were taken to issue an urgent arrest warrant. And to conceal these facts, the policemen filed a falsehood into the arrest warrant, made a criminal-investigation report containing a falsehood and made a false testimony in the trial. Considering that these attitudes of the police appeared throughout this case synthetically, this arrest procedure was seriously illegal. Therefore the evidence of the written instrument of an expert opinion about the defendant's urine extracted on the day of his arrest is excluded.

Under the circumstances of this case, including the fact that the warrant was issued through the judicial process and was executed together with the warrant for search and seizure on other suspicions,

psycho-stimulants discovered and seized in executing the second warrant for search and seizure was admitted, notwithstanding the fact that the warrant was issued on the written instrument of an expert opinion concerning the defendant's urine which was excluded.

Editorial Note:

Concerning the admissibility of the illegally obtained evidence, the Supreme Court held that the evidence was excluded when the procedures used to search and seize it demonstrate such grave illegality as to offend the aim of warrant requirement embodied in Article 35 of the Constitution and Article 218 para. 1 of the Codes of Criminal Procedure, and when it was deemed inappropriate to admit the evidence with the aim of deterring future illegal investigations (Hashimoto v. Japan, 32 KEISHU 1672, Supreme Ct., September 7, 1978). Since then, the Supreme Court and lower courts have followed this precedent, but there is nothing that expressly applied the judicial precedent theory and denied the admissibility of the evidence of illegally obtained evidences in the judicial precedent of the Supreme Court until this case. This decision is the first Supreme Court judicial precedent which denied the admissibility of illegally obtained evidence. In this case the arrest procedure is illegal because an arrest warrant was not shown when the police arrested the defendant. And to conceal the illegality of this arrest procedure, the police filed a falsehood into the arrest warrant, made a criminal-investigation report that contained a falsehood and gave a false testimony in the trial. Considering these attitudes of police appeared throughout this case synthetically in addition to the illegality of the arrest procedure itself, the Court held that this arrest procedure was seriously illegal and excluded the written instrument of an expert opinion concerning the defendant's urine extracted on the day of his arrest which had close relevance to the arrest procedure. At this point, the Court affirmed the judgment of the lower court in this case, but about the admissibility of the psycho-stimulants discovered and seized in executing the warrant issued on this written instrument the Court reversed it.

The judgment about the admissibility of the psycho-stimulants concerns the admissibility of the evidence which has been derived

from illegally obtained evidence, and it is a question of the application of the so-called "fruits of the poisonous tree" theory. Since illegally obtained evidence was not excluded until this case, the Court has not previously spoken on this matter. Therefore this case may be important also from this standpoint. Considering the fact that the seizure of the psycho-stimulants was performed with the warrant which was issued during the judicial process, and was carried out by combining it with the execution of the warrant to search and seize against the defendant on another suspicion, that of larceny, which had been already issued before the arrest of the defendant, the Court admitted this evidence of psycho-stimulants. Though the Court did not argue this point decisively, the former might be considered from the viewpoint that the illegality of derivation evidence, or the relevance between the illegally obtained evidence and the derivative evidence dilutes for the reason that the warrant used to seize it issued through the judicial process, and the latter might be considered from a viewpoint similar to the theory of "the exception of inevitable discovery."

7. Commercial Law

X v. Janome Mishin
Tokyo High Court, March 27, 2003
Case No. (*ne*) 2835 of 2001
1172 KINYU SHOJI HANREI 2; 1133 HANREI TAIMUZU 271

Summary:

The court found that the directors of Janome (defendants) had breached their duties of care or loyalty, but there had not been any negligence in their business judgments, so they should not owe liability of compensation to their company.

Reference:

Commercial Code, Articles 266, para. 1. no.5 & 294.2 (295)