



# HOKKAIDO UNIVERSITY

Title	The Law of Criminal Procedure in Contemporary Japan (2)
Author(s)	Cleary, William B.
Citation	北大法学論集, 41(4), 512-454
Issue Date	1991-03-28
Doc URL	<a href="https://hdl.handle.net/2115/16783">https://hdl.handle.net/2115/16783</a>
Type	departmental bulletin paper
File Information	41(4)_p512-454.pdf



《Article》

THE LAW OF CRIMINAL PROCEDURE  
IN CONTEMPORARY JAPAN (2)

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TABLE OF CONTENTS

Part I.

CHAPTER ONE	INVESTIGATION
CHAPTER TWO	PRINCIPLES OF PROSECUTION
CHAPTER THREE	THE INDICTMENT
CHAPTER FOUR	AMENDING THE INDICTMENT
CHAPTER FIVE	DUE PROCESS (Printed in Vol. 41 No. 3)

Part II.

CHAPTER SIX TRIAL

A. The Power of the Court

- 6.01 Introduction
- 6.02 Territorial Jurisdiction
- 6.03 The Court's Duty to Examine Evidence
- 6.04 The Identity of the Defendant and Res Judicata

B. The Appointment of Counsel

- 6.05 Introduction
- 6.06 The Anonymous Defendant
- 6.07 The Resignation of Counsel
- 6.08 The Necessity of Counsel

C. Speedy Trial

- 6.09 Introduction
- 6.10 Speedy Trial for the Defendant
- 6.11 For the Prosecution

D. Consolidation, Severance, and Discovery

- 6.12 Consolidation and Severance

The Law of Criminal Procedure in Contemporary Japan (2)

6.13 Pretrial Discovery and Judicial Discretion

CHAPTER SEVEN EVIDENCE

- 7.01 Introduction
- 7.02 Admissibility
- 7.03 Publicly Known Facts
- 7.04 The Use of a Prior Record
- 7.05 The Admissibility of Illegally Seized Evidence
- 7.06 Co-Principals as Witnesses
- 7.07 The Credibility of a Child Witness
- 7.08 The Reliability of Photographic Identifications
- 7.09 Immunity in Exchange for Testimony

CHAPTER EIGHT SCIENTIFIC EVIDENCE

- 8.01 Introduction
- 8.02 Polygraph
- 8.03 Voice Print
- 8.04 Scent Detecting Canine
- 8.05 Bacterial Evidence
- 8.06 Psychological Examination

CHAPTER NINE CONFESSIONS AS EVIDENCE

- 9.01 Introduction
- 9.02 Confession Based on Promise
- 9.03 Confession Obtained by Trick
- 9.04 Confession Obtained During Commitment
- 9.05 Discovery of Other Evidence
- 9.06 Corroborating a Confession
- 9.07 In-Court Confession
- 9.08 Corroborating by a Co-Defendant's Confession

CHAPTER TEN HEARSAY

- 10.01 Introduction
- 10.02 Statements Made to a Prosecutor
- 10.03 Admissions and Declarations Against Interest
- 10.04 Investigation Reports
- 10.05 Hearsay in Reports
- 10.06 Sobriety Tests
- 10.07 Expert Opinions

- 10.08 Double Hearsay
- 10.09 Voluntariness of Hearsay
- 10.10 Hearsay by Consent
- 10.11 Hearsay to Impeach
- 10.12 Photographs as Hearsay

(to be continued)

Part III.

CHAPTER ELEVEN	PROBLEMS WITH THE JUDGMENT
CHAPTER TWELVE	APPEALS
CHAPTER THIRTEEN	NEW TRIAL
CHAPTER FOURTEEN	JUVENILE PROCEEDINGS

Part II.

## CHAPTER SIX TRIAL

### A. The Power of the Court

#### 6.01. Introduction

In this part of Chapter Six the power of the courts will be examined in three areas; territorial jurisdiction, the examination of evidence, and *res judicata*. Regarding territorial jurisdiction a few fundamental points must be observed. Unlike the United States, Japan is not a federation and therefore, there are no federal-state jurisdictional problems. All the courts are under the direct control of the Supreme Court. However, the district courts and high courts are divided into different regions and have jurisdiction over cases arising in their territory.

Once the jurisdictional question has been solved, the question of the court's power to examine evidence on its own must be confronted. Japan has an adversary system, but there are times when the role of the court will appear to have some prosecutorial undertones. Usually the government introduces evidence of guilt and the defense responds by offering evidence which tends to negate that guilt. The court usually doesn't introduce evidence to the benefit or detriment of either party. However, in order to ensure that justice prevails, the court has the power to do so, as will be demonstrated by an important case.

The concept of *res judicata* is firmly implanted in the criminal justice system of Japan. It prevents the court from hearing the same issue more than once. In other words, the court lacks the power to hear cases or issues which have already been decided. This concept will be outlined by examining a specific example.

## 6.02. Territorial Jurisdiction

One of the most fundamental requirements for a criminal prosecution is territorial jurisdiction. Territorial jurisdiction refers to the power of the court to hear matters related to a geographical area. Without it, a court is not authorized to hear the matter. In Japan territorial jurisdiction is determined by where the crime is committed, where the defendant lives, or where he can be found<sup>1</sup>.

In most cases territorial jurisdiction is easily established. This is particularly true for a single crime committed by a one individual. The problem of territorial jurisdiction arises most often when the same person commits several offenses in many different areas, when several persons jointly committed the same offense, or when several persons acting through a conspiracy commit several individual offenses. Under these circumstances the cases are considered to be co-related<sup>2</sup>. In order to prevent confusion and promote judicial efficiency co-related cases can

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### 1. The Code of Criminal Procedure:

Article 2. The territorial jurisdiction of the court shall be determined by the venue, or the domicile or residence of the accused, or the place where the accused may be found.

2. An offense committed on a Japanese vessel sailing outside Japan is, in addition to the places as stipulated in the preceding paragraph, to be brought under the jurisdiction of the place where such vessel has called at a port after the offense has been committed.
3. An offense committed on a Japanese aircraft outside Japan is, in addition to the places as prescribed in paragraph I above, to be brought under the jurisdiction of the place where such aircraft lands (including the place where it alights on water) after the offense committed.

be consolidate into one case<sup>3</sup>.

In one case the Supreme Court had to decide a question of territorial jurisdiction dealing with several defendants<sup>4</sup>. The case arose out of a protest movement against the opening of the New Tokyo International Airport (Narita). Eleven protesters were indicted for various offenses related to the protest effort. The indictments were filed with the Chiba District Court because the crimes were committed within that court's territorial jurisdiction. However, the prosecution suspected that one of the defendant's was involved with a conspiracy case in Tokyo and that he had a Tokyo address. For this reason, the prosecution moved to have the entire case transferred to the Tokyo District Court.

Over the defendants' objection, both the Tokyo District Court and the Tokyo High Court affirmed the decision to transfer the case. Thereafter, it was learned that one of the defendants lived in Tokyo and was a minor and the case against him was dismissed. After passing through some juvenile proceedings, the case against the minor was

2. The Code of Criminal Procedure:

Article 9. Several cases shall be deemed to be co-related in the following cases:

- (1) When a person has committed several offenses;
- (2) When several persons have jointly committed the same offense, or a separate offense;
- (3) When several persons have committed individually an offense pursuant to a conspiracy.

2. Such offenses as harboring offenders, suppression of evidence, perjury, false expert testimony or interpretation, and the offense relating to the stolen goods and the offense of the principal offender thereof shall be deemed to have been committed jointly.

3. The Code of Criminal Procedure:

Article 6. When several cases the territorial jurisdiction of which is different, are co-related, the court having jurisdiction over one case may have the jurisdiction over the other cases by consolidation: Provided, That nothing herein shall allow the court to have jurisdiction over a case belonging to the jurisdiction of a particular court in accordance with the provisions of other laws.

4. Supreme Court Judgment, October 13, 1983, 37 Keishu 1139, 1095 Hanrei Jiho 24.

## The Law of Criminal Procedure in Contemporary Japan (2)

reinstated at the District Court. All the defendants were tried and convicted together. They appealed to the Supreme Court claiming that the trial court lacked territorial jurisdiction and that their convictions violated due process as guaranteed in Article 31 of the Constitution.

The Supreme Court agreed that at the time the indictments were filed and the case was originally transferred, it was unclear whether one of the defendants was involved in a Tokyo case or whether another one lived in Tokyo. If a motion to dismiss for lack of jurisdiction had been made at his juncture, it would have been granted. However, when the minor's case was brought back to the Tokyo District Court and his Tokyo address was confirmed, the prior lack of territorial jurisdiction was cured.

This case is considered to be important in Japan because it is the first case decided by the Supreme Court which held that a lack of territorial jurisdiction is curable. Even though the court may have initially lacked jurisdiction, if it later obtains jurisdiction there is no problem. The subsequent jurisdiction reverts back to the beginning of the proceedings.

### 6.03. The Court's Duty to Examine Evidence

The Japanese system of criminal procedure employs the adversary method for fact finding. The prosecution has the duty to introduce evidence pertaining to the offense and to prove that the defendant is guilty. If the prosecution neglects this duty the court may, in order to prevent the release of a guilty person, order the prosecution to take certain action to insure a conviction?

The prosecutor or the accused may request the court to admit into evidence any proof relevant to the issues in the case. Also, the court has the power to examine any evidence on its own authority when it is deemed necessary<sup>5</sup>.

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#### 5. The Code of Criminal Procedure:

Article 298. A public prosecutor, the accused or the counsel may request the examination of evidence.

2. The court may, when it is deemed necessary, conduct the examination of evidence *upon its own authority*.(emphasis added)

This power also gives the court the authority to order the prosecution to present evidence known to exist which it has failed to introduce.

For example, in a 1958 case<sup>6</sup>, several people were involved in a conspiracy to fix bicycle races. The riders were paid for their cooperation. There was a large number of defendants who were separated into two groups. All of the defendants in the first group were convicted, while those in the second group, were acquitted due to a lack of evidence. The lack of evidence stemmed from the prosecution's failure to submit the written statements of the other defendants. The court knew such evidence existed, but since the government had not introduced it, the court wasn't about to do the prosecutor's work for him.

The prosecution appealed claiming that the court should have pointed out the careless mistake being made by the government. The high court agreed and remanded the case to the trial court. It held that the court has a duty to hear the case to its conclusion and to urge the prosecution to submit evidence known to exist.

The defendants appealed to the Supreme Court. The Supreme Court held that, in principle, the introduction of evidence should be left up to parties to decide for themselves, and that the court has no duty to urge the prosecution to submit certain evidence. Nevertheless, the Court upheld the high court's decision in this case. The defendants were involved in an illegal gambling conspiracy and some of them were convicted at the first trial. The remaining defendants should not be allowed to escape justice due to the prosecution's oversight. The Court held that the trial court had a duty to fulfill its judicial obligation by ensuring the conviction of the guilty defendants.

Justice Mano dissented and held that trial court was correct in finding the defendants not guilty. He claimed that the majority opinion failed to correctly interpret Article 298(2) of the Code of Criminal Procedure, which provides: "The court may, in case it is deemed

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6 . Supreme Court Judgment, February 13, 1958, 12 Keishu 218, 142 Hanrei Jiho 32.

necessary, conduct the examination of evidence upon its own authority<sup>7</sup>.” He felt that this language meant that a court may, but is not required to urge the prosecution to submitted evidence.

This case illustrates the adversary system in Japan. Generally, it is the duty of the parties to introduce evidence to the court upon which it will make its decision. When the one of parties fails to present evidence which the court knows is crucial to the case the court *must* order that party to submit such evidence. In order to reach a just result the court must have before it all the admissible evidence which exists.

#### 6.04. The Identity of the Defendant and Res Judicata

Criminal prosecutions are individual affairs and only affect the specific defendant on trial<sup>8</sup>. Every indictment must name a specific person against whom the charges are being brought<sup>9</sup>. In addition, no further charges can be brought with respect to a certain matter after a final and conclusive judgment has been made<sup>10</sup>.

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7 . The Code of Criminal Procedure:

Article 298. A public prosecutor, the accused or the counsel may request the examination of evidence.

2 . The court may, in cases where it is deemed necessary, conduct the examination of evidence upon its own authority.

8 . The Code of Criminal Procedure:

Article 249. A public prosecution shall not have any effect upon any person other than the accused named by a public prosecutor.

9 . The Code of Criminal Procedure:

Article 256(2). The indictment shall contain the following matters:

(1) The name of the accused and other matters sufficiently specifying the accused;

(2) Facts constitution the offense charged;

(3) Offense.

10. The Code of Criminal Procedure:

Article 337. A judgment of acquittal shall be pronounced in the following cases:

(1) When a final and conclusive judgment has been made;

(2) .....

In one 1975 case decided by the Supreme Court the defendant used another man's driver's license when he was stopped for driving a car after having drunk alcohol<sup>11</sup>. At the time the defendant didn't have a drivers' license, but the police didn't know this fact. The defendant was given a ticket, and on a certain day he went to the court and paid a 20,000 yen fine. Sometime thereafter, the police learned that the defendant had used someone else's license. He was charged and convicted for driving without a license.

On appeal, the defendant claimed that the subsequent prosecution for driving without a license was barred by the doctrine of *res judicata*. He claimed that the authorities were barred from bring any further *action against him once the fine had been paid*.

The Supreme Court upheld the high court judgment which affirmed the conviction. The high court stated that the identity of the defendant should be made reasonably clear during the course of the proceedings. However, due to the summary nature of traffic proceedings, an in-depth inquiry into the identity of the defendant was not made. The defendant was identified simply by the name used during the proceedings and the fact that he paid a fine is not important. The court held that the subsequent prosecution of the defendant using his real name for the crime of driving without a license was independent of the other charges and not barred by the doctrine of *res judicata*.

## B. The Appointment of Counsel

### 6.05. Introduction

In Japan there are two types of appointed counsel, privately appointed counsel and court appointed counsel. Article 37(3) of the Constitution guarantees that the accused has a right to one or the other depending on circumstances of the case<sup>12</sup>. However, this right can be

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11. Supreme Court Judgment, May 30, 1975, 29 Keishu 360, 778 Hanrei Jiho 24.

12. The Constitution of Japan:

Article 37(3). At all time the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

waived or lost due to the defendant's inappropriate behavior. In this part of Chapter Six both types of appointments will be examined and examples of how the right can be denied will be provided.

#### 6.06. The Anonymous Defendant and the Right to Appoint Counsel

In Japan the defendant may appoint counsel at any time<sup>13</sup>. However, in order to exercise that right certain formalities must be complied with. For example, the joint signature of both the defendant and his attorney must be on the appropriate form registering the appointment of counsel. What happens when the defendant refuses to give his name to the court and instead his photograph and fingerprint are used as a substitute? Will these be recognized as complying with the signature requirement?

One 1965 Supreme Court case answered these questions<sup>14</sup>. The defendant was arrested for a minor offense<sup>15</sup> and refused to give the authorities his name. On the indictment instead of the defendant's name there was an explanation stating that the accused was the twenty-year old man whose picture and fingerprints appeared on the attached document. The same thing was done for the registration of counsel.

At the trial the defendant was convicted. On appeals to, first the high court, and thereafter to the Supreme Court, the defendant continued to persist, as part of the right to remain silent, in his refusal to provide his name.

The Supreme Court held that while the defendant does enjoy a

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#### 13. The Code of Criminal Procedure:

Article 30. The accused or the suspect may appoint a counsel at any time.

2. The legal representative, curator, spouse, lineal relatives, brother and sister or the accused or the suspect may independently appoint a counsel.

14. Supreme Court Judgment, July 20, 1965, 19 Keishu 591, 19 Hanrei Jiho 56.

15. Article 1(33) of the Minor Offense Law, to wit: "Any person who has wantonly posted labels on houses, or other structures of other persons, or who has removed signboards of other persons, public notice boards, or other signs, or made dirty these structures or signs, shall be punished with detention or minor fine."

right to remain silent, that the right does not allow him the right to refuse to identify himself. The Court held that both the application for appeal and the registration of counsel were invalid. It stated that the formalities must be strictly complied with, and that without an appropriate reason all defendants must provide their names to the court. Since the defendant had no valid reason for refusing to provide his name, it dismissed the appeal and invalidated the appointment of counsel.

#### 6.07. The Resignation of Counsel

The Constitution makes it very clear that the accused has a right to competent counsel at all times, and that if he is too poor to provide one for himself the court will appoint one for him<sup>16</sup>. It appears from the language of the Constitution that this right is absolute. However, in law, especially constitutional law, nothing is ever absolute. If the defendant abuses this right through uncooperative behavior he may find himself without the assistance of any counsel.

In the notorious "April 28 Okinawa Demonstration Case" the Supreme Court had to determine the limits of the right to counsel for some unruly protesters<sup>17</sup>. About 240 people were indicted for crimes related to a gathering they held to prepare dangerous weapons and for action they took to prevent the authorities from carrying out official duties. For the purpose of prosecution the defendants were separated into several groups. Two of the groups, X and Y, had ten defendants each. Just prior to the beginning of the trial their private counsel resigned in mass. On the opening day they requested the court to appoint counsel. The court appointed three attorneys to each group. After the fifth day of the trial the two groups were combined and the case proceeded to the tenth day of trial, when suddenly all six of the appointed counsel expressed an intention to resign from the case.

The defendants had spoken harshly to the appointed counsel and had verbally abused them. They said that they couldn't trust the

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16. Article 37(3) of the Constitution, above.

17. Supreme Court Judgment, July 24, 1979, 33 Keishu 416, 931 Hanrei Jiho 3.

lawyers, that lawyers lacked heart, and that the lawyers would escape their duty to defend them. As a result, the lawyers lost their enthusiasm to defend these people and resigned.

Thereafter, the defendants requested the court to appoint new counsel. The court asked the defendants if they were willing to promise not to repeat their rude behavior if new counsel were appointed. The defendants answered that it was the courts duty to appoint counsel unconditionally, and therefore, would make no promises. In addition, they refused to sign the request for counsel application form, persisted in speaking for themselves, and disobeyed the court's instructions. Many times the court was forced to order the defendants from the courtroom. As a result, the judge decided to deny the defendants' request for counsel.

The court reasoned that if the appointed counsel resigns due to the defendant's own fault, the right to counsel has been waived. The defendants were convicted and given suspended sentences ranging from ten months to two years. This decision was affirmed by the high court.

On appeal to the Supreme Court the defendants claimed that it was a violation of Article 37(3) of the Constitution for the court to hold that they had waived their right to counsel. In addition, they stated that a relationship of trust between the defendant and counsel is basic to the guarantee of the right to counsel, and that the court should not have interfered in that relationship. By inquiring into the complication and discord that existed between the defendants and their counsel when the lawyers expressed their intent to resign, the court violated their right to counsel they claimed. Under such circumstances certain privileged information might have been revealed.

The Supreme Court rejected their arguments. The Court held that the defendants did not actually want to be represented by court appointed counsel in spite of their formal request for one. The defendants abused their right to counsel and, therefore the right was forfeited as a result. When the court received the petition to resign from the counsel it had to determine if there existed a proper reason for granting such a request. In so doing, the court had to inquire into the cause of the discord between the defendants and counsel, and there was no infringement of the attorney-client privilege.

## 6.08. The Necessity of Counsel

In Japan a public trial cannot be held without counsel for the defendant in cases where he could receive the death penalty, life imprisonment, or a maximum sentence of more than three years<sup>18</sup>. But what happens when the defendant refuses to cooperate with counsel or counsel resigns? Can the court hold the trial without counsel under such circumstances?

In one 1981 case, the defendant, a man with a short temper, was charged for repeated acts of violent behavior<sup>19</sup>. His trial lasted for ten years due to numerous delays caused by motions for change of venue, challenges of the judge, failure to be present in the courtroom, and the resignation of counsel. During this time a total of eight court appointed counsel resigned from the case. The last attorney claimed a breakdown in the attorney-client relationship.

Thereafter, the trial continued without counsel and the defendant was convicted and given a sentence of eighteen months. He appealed to the Osaka High Court which reversed the lower court's decision. It held that it was people like the defendant, people with unruly behavior, who needed counsel the most. This is so, even if the defendant rejects counsel or refuses to cooperate. The court must ensure that the defendant's legal interests are protected in order for a fair trial to occur. Fundamental to that protection is the right to counsel in serious cases. Moreover, the Court held that it was absurd to think that this right could be denied if the defendant wasn't being confined during the course of the trial. Article 289 of the Code of Criminal Procedure is absolute in that counsel must be present in the courtroom for serious cases. The

## 18. The Code of Criminal Procedure:

Article 289. In the event that a case punishable by the death penalty or life imprisonment or penal servitude or imprisonment for the maximum period of more than three years is to be tried, the public trial shall not be opened without a counsel.

2. When the counsel does not appear or is not yet appointed in the event that the public trial can not be opened without his presence, the presiding judge shall, upon its own authority, appoint a counsel.

## 19. Osaka High Court Judgment, December 15, 1981, 34 Kosai Keishu 416, 1037 Hanrei Jiho 140.

defendant's ill manners and rudeness is no reason to eliminate this fundamental component of due process.

### C. Speedy Trial

#### 6.09. Introduction

In this part of Chapter Six the right to a speedy trial will be examined from two perspectives. In Japan, both the defendant and the government have a right to a speedy trial. The exercise of that right will be examined from both perspectives.

In general, the right to speedy trial attaches once an indictment is filed with the court. This right is to be distinguished from the statute of limitations, which benefits the defendant prior to the indictment. During the pre-indictment stage, the statute of limitations is the defendant's guarantee that he won't be required to answer to stale charges.

In Japan the trials are notoriously long and drawn out. Because there is no jury system functioning in Japan today, the courts spend several years in hearing many cases<sup>20</sup>. The first day of trial and the second may be several weeks apart, with the third day a few weeks after that and continuing at a snail's pace thereafter. As you shall see

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20. Johnson, Chalmers, *Conspiracy at Matsukawa* (Univ. of Cal. Press, 1972), at page 407-8:

"The longest trial in Japan, the May Day Riot case of 1952, took seventeen years and nine months for just the first instance hearing before the Tokyo District Court. One judge, Hamaguchi Seirokuro, spent virtually his entire postwar career presiding over the eighteen hundred courtroom sessions that this one trial required. Of course, the case had some 214 defendants, and they were charged with the crime of riot (Penal Code, art. 106), a notoriously difficult prosecution requiring that the state prove the existence of a "common will among the rioters" and that there was "disturbance of the peace." A similar 1952 riot case in Nagoya was before the first instance court for sixteen years before it returned a verdict of guilty. Since the first verdicts in both of these riot cases were handed down only during 1969 and 1970, if either side chooses to appeal, the cases may well continue until all the defendants have died. (citing Japan Times, November 12, 1969; January 22, 1970; New York Times, January 29, 1970.)

from the cases below that the concept of “justice delayed is justice denied” has never taken a firm root in Japanese criminal procedure.

#### 6.10. For the Defendant

While Japan doesn't yet have a speedy trial act, Article 37(1) of the Constitution guarantees that the accused shall enjoy a right to a speedy trial<sup>21</sup>. However, the Constitution doesn't specify what is meant by the term “speedy”, and leaves unclear what remedy should be imposed if a violation occurs. These issues and others were dealt with in a 1972 landmark decision issued by the Grand Bench of the Supreme Court<sup>22</sup>.

The case began in May of 1952, when the defendants were taking part in a riot. There was much public disturbance at the time and they raided a police box and were indicted for breaking and entering, arson, and battery. The trial began shortly after the indictments were issued and proceeded until March 4, 1954. After that date no action was taken by either of the parties or the court until June 10, 1969, some fifteen years later.

The district court held that such a delay violated the defendants' right to a speedy trial and dismissed the case. The court considered the type of case, the degree of complexity, the length of the delay, the kind and amount of evidence, and the difficulty in investigating the facts, as important factors which must be weighed in reaching their decision. Thereafter, the prosecution appealed to the high court which reversed the trial court's decision. It held that since there was no provision in the Code of Criminal Procedure which authorized the courts to dismiss a case when a violation of the speedy trial guarantee occurred, the trial court had improperly resorted to judicial legislation.

The defendant appealed to the Supreme Court which overturned

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21. The Constitution of Japan:

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

22. Supreme Court Judgment (Grand Bench), December 20, 1972, 26 Keishu 631, 687 Hanrei Jiho 18.

the high court decision. It held that the right to a speedy trial is a fundamental right which must be recognized by the courts. The Court specifically stated that it was not simply a "program right", and that the dismissal of the prosecution was a proper remedy even though there wasn't any statutory authority for such in the Code of Criminal Procedure. It held that not only the length of delay, but both the reason and the cause of the delay must be examined. If the delay is caused by the defendant's own fault, that is, by fleeing or by refusing to appear in court, there is no reason to hold that a violation has occurred. However, when the delay is caused by government the case should be dismissed.

### 6.11 Speedy Trial for the Prosecution

When we think of the right to a speedy trial we usually have the defendant in mind. It is he who is subject to the uncertainty and anxiety caused by having a criminal charge hanging over his head. He usually wants to have his name cleared as quickly as possible so that he can resume a normal life. The prosecution has an interest in seeing the efficient execution and enforcement of the criminal law. Therefore, the courts have recognized a right to a speedy trial for the government. An example of this will be shown in a 1962 Grand Bench decision<sup>23</sup>.

The defendant was indicted for various offenses related to acts of civil disobedience including trespass. He was indicted with ten other people as co-principals. The trial began in February of 1960, but in August 1961, the defendant petitioned the court to postpone the continuation of the trial for five years so he could attend school in East Germany. Attached to the petition was the defendant's application for a passport, and a statement that the trial of the other defendants would not be impeded. Over the objection of the prosecution, the trial court granted the defendant's request.

The prosecution appealed to the Supreme Court which reversed the trial court's decision. The Court had to reconcile two conflicting

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23. Supreme Court Judgment (Grand Bench), February 14, 1962, 16 Keishu 85, 290 Hanrei Jiho 8.

provisions of the Code of Criminal Procedure. The first provision gives the presiding judge the authority to set the date for public trial<sup>24</sup>. The other provision declares that the purpose of the Code is to properly and speedily enforce the penal law<sup>25</sup>.

The Court held that a speedy trial is not only for the defendant's benefit, but also serves the government's interest as well. To interrupt the flow of a criminal trial for five years in order to accommodate the defendant's plan to study abroad, a matter completely unrelated to the trial, was an abuse of discretion by the presiding judge.

This case is important because it makes clear that the right to a speedy trial is a right shared by both the prosecution and the defense.

#### D. Consolidation, Severance, and Discovery

##### 6.12. Consolidation and Severance

In Japan multiple criminal cases can be separated into two or more trials or consolidated into a single case<sup>26</sup>. Consolidation is usually ordered by the court when two or more cases are related and the court

#### 24. The Code of Criminal Procedure:

Article 273. The presiding judge shall designate the public trial date.

2. The accused shall be summoned on the public trial date.

3. The prosecution, the defense counsel, and assistants shall be notified of the public trial date.

#### 25. The Code of Criminal Procedure:

Article 1. The purpose of this Code is to make the facts of the case clear as well as to apply and enforce properly and *speedily* the punitive laws and orders with respect to criminal cases, while taking in full consideration of the maintenance of public welfare and the guarantee of the fundamental human rights of the individual. (emphasis added)

#### 26. The Code of Criminal Procedure:

Article 313. The court may, when it deems appropriate, separate, or consolidate the oral argument, or reopen the argument closed by ruling upon the request of a public procurator, the accused, or the counsel, or upon its own authority.

2. The court shall, when it is necessary for the protection of the right of the accused, separate the oral argument by ruling in accordance with the rules of court.

See also, Dando Shigemitsu, *The Japanese Law of Criminal Procedure*, (English trans. B.J. George Jr.) p. 362.

believes that by joining the cases together time and expense can be saved. On the other hand, severance usually occurs in order to safeguard the rights of the defendant. For example, this is true when multiple defendants assert different defenses. However, the defendant does not have an absolute right to consolidation or severance, for such is left to the discretion of the court. In a 1975 case this point was made clear<sup>27</sup>.

On October 18, 1969, at approximately 10:10 a.m. the seven defendants in this case gathered near the entrance of the subway station located in the area of the Diet headquarters. They were armed with steel pipes and Molotov cocktails which they subsequently used in a struggle with the police. Thereafter, while they were attempting to enter the Prime Minister's residence and had advanced 13 to 14 meters onto the grounds, they were apprehend. They were subsequently indicted for various offenses related to the incident.

Three of the seven defendants wanted to have their cases severed and the remaining four cases were consolidated into one trial. On October 5, 1971, they were all given prison sentences. The three defendants whose cases were severed, appealed to the high court, which dismissed the appeal. Thereafter, they appealed to the Supreme Court.

According to the trial court decision, the defendants were either part of a student protest group or were sympathizers. During this same period there was much public unrest and repeated acts of violence related to protest movements concerning the Japan-U.S. Security Treaty, the continued occupation of Okinawa by the United States, and Prime Minister Sato's plan visit to the United States. In general terms, this was known as the October-November Case. About a total of one thousand people were indicted. They formed a group defense and hired their own team of lawyers to represent the entire group. However, the court denied their request to consolidate all the cases into one. Instead, the court order that the defendants be tried in groups. The defendants claimed that it was unconstitutional not to consolidate all of the cases since the Prime Minister's Residence trespass case had been consolidated. The Supreme Court held that the trial court did not abuse its discretion when it ordered the cases severed. The Court stated that

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27. Supreme Court Judgment, September 12, 1975, 793 Hanrei Jiho 106.

there was no connection between the two cases and consolidation would be inappropriate under the circumstances.

### 6.13. Pretrial Discovery and Judicial Discretion

In any trial, criminal or civil, each side has evidence which they hope to present at trial in order prove facts favorable to their position. However, under modern rules for the pretrial discovery of evidence the parties are now able to find out much of what the other sides intends to offer as evidence. Such pretrial discovery tends to eliminate the element of surprise and helps to save the court's time by narrowing the issues.

In Japan, rules of discovery under the Code of Criminal Procedure are far and few between, and much of the decisions concerning what is discoverable is left to the discretion of the court<sup>28</sup>. However, under one provision, the prosecution, or the defense may obtain the name and address of witnesses the other side intends to call to the stand, and to look at documents and articles belonging to the other party<sup>29</sup>.

In one case dealing with a defendant charged with obstructing an official in the performance of official duties, the discovery of witnesses' statements was an issue<sup>30</sup>. After the victim testified, the court asked the defense counsel whether it had any evidence concerning the question of violence. The defense counsel answered that it was unable to respond

#### 28. The Code of Criminal Procedure:

Article 294. The presiding judge shall exercise control over the litigation on the public trial date.

#### 29. The Code of Criminal Procedure:

Article 299. A public prosecutor, the accused, or the defense counsel shall, when requesting the examination of a witness, an expert, an interpreter, or a translator, beforehand give the adverse party an opportunity to know his name and address. When requesting the examination of evidential documents or articles, he shall beforehand give the adverse party an opportunity to peruse them: Provided, that this shall not apply when there is no objection by the adverse party.

2. The court shall, when determining the examination of evidence upon its own authority, hear the opinion of a public prosecutor and the accused or his counsel.

to the court's question until he had an opportunity to see the written statements given by five witnesses. These documents were in the possession of the prosecution. Depending on the content of those statements the defense would make a decision concerning the evidence it intended to present to the court. The prosecution stated that it did not intend to call the persons who gave the statements as witnesses, and therefore, it had no obligation to let the defense counsel see them. Over the objection of the prosecution, the court ordered that the defense counsel be allowed to inspect those statements. The court held that under its discretionary powers it could order the prosecution to release the documents. The court felt that these documents were necessary for the preparation of a defense, and stated that there was no threat that the documents would be destroyed.

The prosecution appealed to the Supreme Court. The Supreme Court upheld the decision for the same reasons given by the trial court. It held that when there doesn't exist a specific statute dealing with the question of discovery, the matter is left up to the discretion of the court. When the defense can show a concrete necessity for the evidence, taking into account the type and amount of evidence, the method and scope of discovery, and the lack of any harm coming to the witnesses, the court may exercise its discretionary powers and order the prosecution to allow the defense counsel to inspect such statements.

## CHAPTER SEVEN EVIDENCE

### 7.01. Introduction

In this chapter some basic rules of evidence will be introduced. The concept of strict proof and liberal proof will be examined as it relates to admissibility. Publicly known facts are admissible without proof under the Japanese application of judicial notice doctrine. Prior records are also admissible in certain situations and an example will be provided. Illegally seized evidence will also be discussed. The testimony of co-principals will be covered and the credibility of the child witness will be reviewed. Photographic identification and its dangers will be demonstrated through specific examples. Finally, the concept of granting immunity in exchange for testimony will be considered and the

Tanaka-Lockheed Bribery case will be discussed in detail.

## 7.02. Admissibility

In Japan, the admissibility of evidence is governed by two German principles, the principle of strict proof (Genkaku Na Shomei) and the principles of liberally admissible proof (Jiyu Na Shomei)<sup>1</sup>. Strict proof refers to evidence which goes to the heart of the case. This kind of evidence is admissible only if it meets certain high standards designed to insure its trustworthiness. For example, evidence related to the material elements of the crime in question must be proved by strict proof. On the other hand, when someone provides a written statement (hearsay) to the court, which states that certain evidence requested by the defendant to establish an alibi does not exist, such a statement is admissible as liberally admissible proof.

Generally speaking, documentary hearsay evidence is inadmissible in Japanese courts<sup>2</sup>. However, there are certain exceptions to this general rule as shown in following example<sup>3</sup>. The defendant was being tried for kidnapping and one of the items of evidence used against him was the statement of an office employee. The victim's family had received a call from the kidnaper at the same time the defendant had

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1 . The concept of strict proof (Strengbeweis) and liberally admissible proof (Freibeweis) was introduced by the German scholar named Ditzgen in his 1926 work entitled "The Three Kinds of Proof in Criminal Procedure" (Dreierlei Beweis im Strafverfahren).

2 . The Code of Criminal Procedure:

Article 320. Except as those provided for by Articles 321 to 328 inclusive, any document shall, in lieu of the statement on the public trial date, not be made as evidence, nor shall any statement, the contents of which is the *statement of another person made on the date other than the public trial date* be made as evidence.

2 . With regard to the evidence of the case on which the ruling as mentioned in Article 291-2 has been rendered, the provisions of the preceding paragraph shall not apply: Provided, that this shall not apply in such cases wherein a public prosecutor, the accused, or the counsel has made an objection to treat them as evidence.

3 . Supreme Court Judgment, December 19, 1983, 37 Keishu 1753, 1102 Hanrei Jiho 147.

used a telephone in his office. The employee stated that the defendant had made a telephone call from the office at exactly the same time the victim's family received the call demanding ransom money. The office was located in the vicinity of the drop off point for the money and could be seen from the office window.

In order to establish an alibi, the defendant requested the court to order the local telephone bureau to provide records of all the calls made from the office phone on that day. The defendant claimed that through these records he could prove that he wasn't the one who had made the call to the victim's family. The court then ordered the telephone bureau to provide such records, but the bureau chief sent a written response to the court, stating that such records did not exist. The defendant objected to this statement being admitted into evidence and demanded that the chief personally testify in court.

The Supreme Court held that such evidence was the type which could be liberally admitted, and that there was no reason to call the chief as a witness. The Court relied on section 3 of Article 323 of the Code of Criminal Procedure which provides that documents made under particularly credible circumstances are admissible<sup>4</sup>.

The reason the Court settled for the written statement of the bureau chief in stead of his live testimony was because the evidence didn't involve a matter related to the material elements of the crime. It related to the existence or non-existence of telephone records, a peripheral matter to which the Court was not going to require live

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4 . The Code of Criminal Procedure:

Article 323. The following documents other than those mentioned in the preceding two Articles (art. 322 affidavits and depositions of the accused; art. 321 affidavits and depositions of witnesses) may admitted as evidence:

- (1) A transcript or a family register, of a notarial deed, or such other document as made by a government official in regard to a fact that may be certified in the course of performing official duties;
- (2) A commercial ledger, a voyage log, or such other documents made in the regular course of carrying on a business;
- (3) In addition to those mentioned in the preceding two items, such other documents which have been made under particularly credible circumstances.

testimony. The statement was sufficiently credible by itself.

### 7.03. Publicly Known Facts - Judicial Notice

Usually the prosecution must prove all the facts relevant to the case. However publicly known facts, that is those facts which are generally known by the people living in a given area, do not have to be proven in Japan<sup>5</sup>. The question of what is a publicly known fact was dealt with in the following case<sup>6</sup>.

The defendant was charge with certain election law violations arising out of his campaign for mayor. At the trial the prosecutor stated in his opening statement that defendant had announced his candidacy on May 5, 1947, and had won the election on May 25. No evidence was submitted to prove these facts, and the trial court accepted them as true because they were publicly known. The defendant contended that they were not publicly known facts and that only those persons involved with the election had knowledge of them.

The Supreme Court upheld the trial court's decision. It simply stated that matter such as the filling of candidacy and the results of an election are publicly known.

### 7.04. The Use of a Prior Record - To Prove Motive

In a criminal case justice is determined by the particular facts of the case at hand. The judge should only consider the facts which have been proven in open court when reaching a conclusion as to the guilt or innocence of the defendant. To do it any other way would be patently unfair to the accused, and would it make it impossible for him to defend against such evidence to which he was unaware. Article 317 of the Code of Criminal Procedure is a short but precise statement of this principal, it states in its entirety: "Fact finding shall be based on evidence".

However, with some individuals with past criminal records for similar offenses, the question arises as to whether past criminal history

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5 . See Dando, Japanese Law of Criminal Procedure, translation by B. J. George, Jr. p. 190.

6 . Supreme Court Judgment, May 17, 1956, 10 Keishu 685.

can be used as a basis for determining intent or motive in the case at hand. In Japan, this issue was decided by the Supreme Court in the following case<sup>7</sup>. The defendant was indicted for fraud in connection with a scheme to collect donations which were allegedly for the purpose of social welfare. He collected donations on 202 occasions, totaling 201,500 yen. The defendant claimed that he was collecting the donations for religious reasons and stated that he did not have the intent to defraud anyone. To show intent and to establish his motive in this case, the prosecution presented the record of a case in which the defendant had been convicted three years previously for the same crime involving a similar scheme.

The Supreme Court, in upholding the defendant's conviction stated that it was not unlawful or unconstitutional for a court to consider the prior record of an individual accused of a similar crime in order to prove intent.

#### 7.05. The Admissibility of Illegally Seized Evidence

The Exclusionary Rule does exist in Japan, but only in theory. When the police use unlawful means to investigate and gather evidence of a crime the question arises as to whether the illegally seized evidence should be admissible to prove the guilt of the defendant. In Japan this question was brought before the Supreme Court in a case where both the trial court and high court had found the defendant not guilty because certain illegally seized evidence had been excluded<sup>8</sup>.

The defendant was suspected of being involved with both drugs and prostitution. On one occasion he was stopped by the police when he was driving with some of his friends. His face was pale; and the arresting officer suspected that he was addicted to drugs. The officer conducted a pat down of the outer pockets and notice a soft packed of something in the defendant's shirt pocket. He asked the defendant to remove the contents, but the defendant refused. The officer then remove

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7. Supreme Court Judgment, November 22, 1966, 20 Keishu 1035, 67 Hanrei Jiho 65.

8. Supreme Court Judgment, September 7, 1978, 32 Keishu 1672, 901 Hanrei Jiho 15.

the contents himself without the defendant's consent and discovered an illicit drug.

Both the trial and appellate courts excluded the evidence because the police officer did not have probable cause to conduct the search. The Supreme Court for the first time announced that evidence illegally seized may be excluded under some circumstances, but not in the case at hand. The court balanced the degree of unlawful conduct with the necessity for the evidence, and found that in this case, the intrusion was slight and the necessity great. The Court stated that due process, as guaranteed in Article 31 of the Constitution, required that evidence be excluded when there was a grave violation of a suspect's civil rights, but not when there was only a minor intrusion<sup>9</sup>. The packet of drugs, though illegally seized, was admissible.

#### 7.06. Co-Principals as Witnesses

(The Right of Silence, The Right to Refuse to Answer Specific Questions, and Declarations Against Interest)

In Japan the defendant enjoys both a constitutional and statutory right to remain silent<sup>10</sup>. Moreover, anyone can refuse to testify when

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#### 9. The Constitution of Japan:

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

#### 10. The Constitution of Japan:

Article 38. No person shall be compelled to testify against himself.

The Code of Criminal Procedure:

Article 311. The accused may keep silent all along, or refuse to make a statement regarding any individual question.

2. In the event that the accused makes a statement voluntarily, the presiding judge may at any time request the accused to make a statement on related matters.

3. The attending judge, a public prosecutor, the defense counsel, a co-defendant, or the counsel thereof, may request to make a statement as mentioned in the preceding paragraph upon notifying the presiding judge.

there exists a threat that he or she may incriminate themselves<sup>11</sup>. On the other hand, a written declaration of the accused or a signed deposition which contains any admission of the fact can be used as evidence against him<sup>12</sup>.

In one 1960 case decided by the Supreme Court, three defendants were indicted together for violating certain laws and regulations dealing with the manufacture and sale of tobacco<sup>13</sup>. In order for them to testify against one another, the cases were separated and each gave damaging testimony concerning the culpability of the other. When they testified, they were called as witnesses not as defendants.

After giving the testimony as a witness at the trial of the other co-principals, the testimony of each witness was introduced as evidence in their own trial as a declaration against interest. Their attorney claimed that this was a gross violation of their right to remain silent, and that they were tricked into giving testimony which incriminated themselves in their own trials. They claimed that Article 38(1) of the Constitution, which provides that nobody shall be compelled to testify against himself, had been violated.

The Supreme Court held, based on prior decisions, that a co-principal did not have the right to remain silent when called as a

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11. Id.

Article 146. Any person may refuse to give testimony when there is a fear that he may be subjected to a criminal prosecution or be convicted of a crime.

12. Id.

Article 322. A written declaration made by the accused or the deposition of the accused which is signed or sealed thereby may be used as evidence only when such declaration contains an admission of facts disadvantageous to the accused, or when it is made under particularly credible circumstances: Provided, That the document containing the admission of facts disadvantageous to the accused may, in case it is deemed that such admission is doubtful of having been not been made volutarily according to the provisions of Article 319 (confessions) even when the confession is not used as evidence.

2. The deposition of the accused made at the preparation for public trial or at the trial may be used as evidence only when it is deemed to have been made voluntarily.

13. Supreme Court Judgment, September 9, 1960, 14 Keishu 1477.

witness to testify in the trial of the other co-principal. However, the witness co-principal could refuse to answer specific question when there existed a threat that the answer would be used as a basis for a criminal charge. In addition, the Court held that when one co-principal testifies against the other and reveals matters which tend to incriminate him, such testimony is admissible at trial.

#### 7.07. The Credibility of a Child Witness

In Japan any person may be examined as a witness, including small children<sup>14</sup>. Moreover, the Tokyo High Court held in a 1971 case that a statement given to the prosecutor shortly after an accident is more trustworthy than testimony given to the court several months later<sup>15</sup>.

The defendant was driving a delivery truck, and when he was backing up he hit a four year old child. The child suffered a ruptured spleen as a result of the accident. Offered as evidence against the defendant for the crime of negligence resulting in injury were two statements made by two children. The first statement was made by an eye witness, a boy who was four at the time of the accident and five when he made the statement. The second statement was made by the victim, a boy who was 4 years and 11 months old at the time of the accident and 5 years 7 months when the statement was made. The victim's statement was held to be admissible pursuant to Article 321(1) (2) of the Code of Criminal Procedure. That provision states that a written statement is not admissible unless the witness is unable to testify at trial due to death, mental or physical incapacitation, missing or being outside Japan, or when the statement is inconsistent with testimony given at trial, and for some special reason the prior statement is more reliable than the testimony.

In this case the victim's initial statement to the prosecutor was

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14. The Code of Criminal Procedure:

Article 143. Unless otherwise prescribed in this Code, the may examine *any* person as a witness. (emphasis added)

15. Tokyo High Court Judgment, October 20, 1971, 22 Toko Kei Jiho 276, 657 Hanrei Jiho 93.

## The Law of Criminal Procedure in Contemporary Japan (2)

held to be more reliable because it was made at a point in time closer to the accident. The defense argued that all of the children's statements should not be allowed. The Court held otherwise. The Court stated that statements by children should not automatically be inadmissible. The court should consider the degree to which the child can understand the facts, his ability to express himself, and his ability to remember. In this case, the victim stated that he was playing with some of his friends when he got pushed down by one of them. When he saw the defendant's truck coming at him he yelled at the defendant to stop, but the truck backed up into the victim and he was hit by the muffler.

The testimony at the trial was quite different from the statement given to the prosecutor. For this reason the court allowed the prior statement to be used as evidence under Article 321(1)(2), above. The Court held that special circumstances existed, and that the prior statement was more credible than the in-court testimony.

### 7.08. The Reliability of Photographic Identifications

In some cases the only evidence against the accused is the testimony of eye witnesses. Often the courts are called upon to determine whether the identification made by an eye witness is certain and positive enough for a guilty conviction. There are many factors which the courts in Japan use to help determine this question. We shall see some of them in the next case<sup>16</sup>.

Two defendants, alleged members of a radical group, were indicted for an offense related to a violent attack on an individual. The only evidence against them were the statements of six eye witnesses. The defendants claimed that it was a case of mistaken identity and offered an alibi as a defense.

The major issues in the case involved questions related to the *method of identification*. The Osaka District Court held that the photographic identification by the six eye witness was not sufficiently reliable and acquitted all of the defendants.

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16. Osaka High Court Judgment, March 29, 1985, 556 Hanrei Taimuzu 204.

The prosecution appealed claiming that the trial court had exaggerated the minor contradictions which existed between the statements of the six eye witnesses. It also claimed that the alibi offered by the defendants was unnatural and unreasonable.

The Osaka High Court held that there was a difference between remembering someone's face and describing a personal experience. The Court said that in order to test the credibility of an eye witness's identification, the courts must carefully scrutinize the facts to see if the identification procedure was suggestive in anyway. When the witnesses have never seen the accused prior to the incident, when there is no special physical characteristics to distinguish the defendant, and when the length of time the witness saw the accused is short, it is usually thought that any memory of the person's face is weak. Moreover, the first impression is affected by the showing of a series of photographs of people resembling the accused. An initial weak impression will be strengthened by a subsequent photo identification. The courts must consider the danger of an eye witness being subconsciously affected by the photo identification procedure to the point that the original impression has now become blurred. The first impression the witness receives at the scene of the crime is the most important. It is critical that any identification be based upon this incident. In this case the criminals had been wearing baseball caps which had been pulled down over their forehead. There was also the possibility that they were wearing masks or towels as a disguise. There was also the strong possibility that the eye witnesses viewed the photographs together and perhaps even exchanged opinions.

The High Court held that there remained too many unanswered questions concerning the identification procedure. It held that the defendant was not guilty because the identification procedure had not been sufficiently reliable. Moreover, since the prosecution failed to prove its case in chief, there was no need to consider the defendant's alibi.

#### 7.09. Immunity in Exchange for Testimony

In Japan the concept of the government granting immunity in exchange for testimony has recently been introduced in the famous 1984

Lockheed-Tanaka kickback and perjury scandal<sup>17</sup>. Until then the immunity was unknown. Clutter and Kotchian, two officials of Lockheed with information concerning the case were wanted for questioning by the Japanese authorities. Both men were living in the U.S. and refused to give any information until they were granted immunity from the Japanese government. In order to obtain their statements, the Japanese Supreme Court issued a proclamation stating that they would not be tried in Japanese courts for their participation in the kickback scheme. In addition, the Prosecutor General also issued a statement that it would refrain from prosecuting either of the two men in connection with the case.

Thereafter, the two men appeared at a U.S. Federal Court in California and testified at a deposition which was held before a commissioner pursuant to letters rogatory issued by the Japanese government. The defense objected to the introduction of their testimony on the grounds that no provision or case had ever allowed the use of immunity in exchange for testimony. Nevertheless, the Tokyo District Court issued a historic decision and allowed the testimony to be used at the trial. The Tokyo High Court upheld the conviction and stated that Japan had an international duty to respect the judicial systems of other countries.

In the U.S. immunity is well accepted as a means of gaining information from those involved in criminal activity in order to convict the individuals with greater culpability. In this case both witnesses had the right not to give any testimony which could incriminate them. The Court recognized that domestically, Japan has not accepted the concept of immunity in either statutory law or judicial precedent. Nevertheless, it held that Japanese courts have a duty to respect the civil rights of foreign witnesses and must grant them immunity when necessary. In this case the Court held that the necessity was great. Moreover, it held that the granting of immunity was within the scope of the prosecutor's discretion.

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17. Tokyo High Court Judgment, April 27, 1984, 37 Kosai Keishu 153, 1129 Hanrei Jiho 3.

## CHAPTER EIGHT SCIENTIFIC EVIDENCE

## 8.01. Introduction

In this chapter the use of scientific evidence in Japanese criminal cases will be examined. Generally, scientific evidence is admissible in Japanese courts provided that the device, machine, or technique is reliable and has been accepted as a sound method for determining the truth or falsity of certain facts. The devices or techniques discussed in this chapter are the polygraph machine, voice prints, scent detecting canine, bacterial tests, and psychological examinations.

## 8.02. Polygraph - Lie Detector

In Japan the results of a polygraph examination are admissible in evidence provided the defendant consented to the examination<sup>1</sup>. Moreover, the examination must be conducted by a competent examiner. In one 1968 case the results of the examination were used against the defendant to convict him for fraud in connection with the unlawful withdrawal of money from a post office savings account<sup>2</sup>.

During the investigative stage of the case the defendant consented to a polygraph examination. The results were used to convict him. The defense appealed claiming that the polygraph had not been accepted as scientifically sound, and therefore, any use of a polygraph in a criminal trial was improper, even though the defendant may have consented. In the first Supreme Court decision to deal with the issue, the Court held that the results of a polygraph examination are

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1. *The Code of Criminal Procedure:*

Article 326. Any document or statement that a public prosecutor or the accused has consented to use as evidence may... be used as evidence only when it is deemed proper upon consideration of such circumstances...

2. When the accused fails to appear the examination of evidence may be carried out without his presence, the consent mentioned in the preceding paragraph shall be construed to have been obtained: Provided, that this shall not apply when counsel has appeared.

2. Supreme Court Judgment, February 8, 1968, 22 Keishu 55, 509 Hanrei Jiho 19.

admissible. It upheld the high court's reasoning that when the polygraph examination is administered in a proper way, and due care is taken to insure the accuracy of the equipment and the competence of the examiner, the results are reliable enough to be used as evidence.

### 8.03. Voice Print

In Japan voice prints are admissible to show the identity of the criminal. In one 1980 case, the defendant had called Former Prime Minister Miki and pretended to be Mr. Fuse, Prosecutor General<sup>3</sup>. He had asked for favors from Miki in connection with the Lockheed Case. In order to determine if the defendant had been the one who placed the call, his recorded voice was compared with a recorded voice of the person placing the call. The voices matched, and the evidence was used to convict the him for a minor offense.

The Tokyo High Court held that while the certainty of voice print examination had not been approved as being scientifically sound, the results were admissible. The Court reasoned that since there are no juries in Japan which might be overly influenced by the results, a judge could fairly weigh the evidence and determine if the examination was conducted accurately and if the equipment was operating properly. The court held that the evidence could be used to support other evidence which tended to prove the defendant's guilt.

### 8.04. Scent Detecting Canine

In Japan, the use of dogs to detect the scent of drugs or track the odor of a suspect is common. However, the courts will carefully scrutinize the examination process before allowing such evidence to be admitted into court. For example, in one 1981 case the defendant was acquitted when the Hiroshima High Court held that due to improper handling of the exhibits, the accuracy of the scent detection was in doubt and the evidence untrustworthy<sup>4</sup>. In this case, the defendant was

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3 . Tokyo High Court Judgment, February 1, 1980, 31 Keishu 5, 960 Hanrei Jiho 8.

4 . Hiroshima High Court Judgment, July 10, 1981, 450 Hanrei Taimuzu 157.

on trial for trespass and rape. The real criminal had been careless and left his sandals at the scene of the crime. The defendant was given a polygraph examination (which is irrelevant to the issue in this case) wherein he had to remove his socks so that the electrodes could be connected to his feet. After the examination he forgot to put his sock back on. The police used a scent detecting dog to determine if the odor on the sandals was the same as that of the defendant's socks. The results of the examination indicated that the sandals belonged to the defendant.

However, the Hiroshima High Court disallowed the evidence on the grounds that the examination had been conducted in an improper manner. A proper examination requires the skill of an experienced technician trained in the field of odor detection. In addition, the exhibits must be kept separate to prevent contamination from other specimens. In this case, the sandals found at the scene of the rape had been mixed with other sandals at the police station. Moreover, the examination had not been properly conducted. The dog was not given several samples to choose from, but rather only the evidence in question was present to the dog for examination. Also, the dog was guided to the exhibit and didn't spontaneously confirm the odor. The dog used had a accuracy rating of eighty percent. The test was only conducted twice. All of these factors, when considered together, lead the Court to conclude that the evidence could not be use against the defendant. The court held that this type of evidence must meet a "reasonably high standard of accuracy" before it will be admissible.

#### 8.05. Bacterial Evidence

In some cases the evidence is highly technical and the admissibility of which depends on the opinions of highly trained people. In one 1982 case the defendant, a doctor and medical professor at Chiba University was indicted for infecting sixty-four people with either typhoid bacillus or dysentery<sup>5</sup>. They contracted the illness through

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5. Supreme Court Judgment, May 25, 1982, 1046 Hanrei Jiho 15, 470 Hanrei Taimuzu 50.

hypodermic needles and food stuffs provided by the defendant at his clinic. The defendant and his counsel argued that the people had become ill due to a general epidemic occurring at the time. The trial court held that the prosecution had failed to prove beyond a reasonable doubt that the defendant was responsible for the illness of the sixty-four individuals. It was possible that they became ill due a general infection of the area. The Tokyo High Court reversed the decision and held that the scientific evidence was sufficiently reliable.

The Supreme Court upheld the conviction. It stated that medical evidence of this nature is a type of circumstantial evidence which helps to establish a chain of causation. When it can be reasonably determined, based on experience, that there is a causal connection in law, the evidence may be admitted in a criminal case. However, in addition to the evidence above, there was sufficient other evidence to conclude beyond a reasonable doubt that the defendant was culpable.

#### 8.06. Psychological Examination

In Japan insane and weak-minded individuals are given special consideration through a provision in the Penal Code. Article 39 provides: "The conduct of person who is insane is not punishable. 2. The penalty may be reduced for an act done by a weak-minded person." The definition of insanity was determined in a 1982 Supreme Court decision<sup>6</sup>. The defendant was indicted for stealing 158, 500 yen from three houses. At the trial, he was convicted and sentenced to fourteen months in prison. His sanity was not in issue. At the high court level the question of the defendant's mental condition was raised for the first time, and the court order a psychological examination. The expert's opinion was that the defendant was suffering from drug addiction, had been experiencing an auditory hallucination when the crime was committed, and that he lack the ability to tell between right or wrong. The Court was not satisfied with the first expert's opinion and order another. This time the expert found that the defendant had been hospitalized on three occasions for drug addiction, that the defendant

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6 . Supreme Court Judgment, September 13, 1982, 232 Saibanshu Keiji 95, 1100 Hanrei Jiho 156.

exhibited a nervous character, that he had consumed three bottles of beer on the morning in question, and that he had been experiencing “flashbacks”. Based on these two opinions the Court held that the defendant was legally responsible for his acts because he did have the ability to determine between right and wrong at the time the crime was committed.

On appeal to the Supreme Court, the defendant argued that if he wasn't insane, than at least he was a weak-minded person and entitled to a reduction in penalty. The Supreme Court rejected this argument as well and upheld the conviction.

## CHAPTER NINE CONFESSION AS EVIDENCE

### 9.01. Introduction

In this chapter confessions as evidence will be considered from five perspectives. The first one deals with confessions elicited by a promise from the authorities. The second one concerns confessions which have obtained by tricks and deception. The third one relates to confessions made after indictment and while the defendant is being held pending trial. The fourth matter to be examined concerns the Japanese application of the “poisonous tree doctrine”. In the last section the corroboration requirement will be covered and three specific examples will be provided.

### 9.02. Confession Based on Promise

In Japan, the concept of plea bargaining has not yet been accepted. Until now it has been thought that to negotiate a sentence between the government and the criminal is contrary to justice. If a person is guilty, he should confess regardless of the consequences, and shouldn't be motivated by promises of leniency. Another reason plea bargaining hasn't been used in Japan is because the prosecution can't be trusted to keep a promise. Our next case is an illustrious example<sup>1</sup>. The defendant, an employee of the tax bureau, was indicted in

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1. Supreme Court Judgment, July 1, 1966, 20 Keishu 537, 457 Hanrei Jiho 63.

connection with a bribe he received from a taxpayer in exchange for favorable treatment he had given to the taxpayer on his income tax return. The taxpayer involved in the case had an attorney who had a meeting with the prosecutor. At the meeting the prosecutor stated that if the defendant quit lying and showed some remorse, the prosecution would seriously consider suspending the prosecution of the case. The attorney for the taxpayer and the defendant's attorney went to meet with the defendant while he was being confined. At the meeting the taxpayer's attorney relayed what the prosecutor had said, and advised him to accept the prosecutor's offer. The defendant did so; he confessed, and expected to have his case dismissed.

At the trial, the confession was admitted as evidence. The High Court upheld the admissibility of the confession stating that even though the defendant may have been motivated to confess by what the prosecutor had said, the prosecutor's conduct was not illegal.

The Supreme Court upheld the conviction, but excluded the confession because it hadn't been given voluntarily. The Court held that it was reasonable to question the admissibility of a confession which is based upon a promise to suspend prosecution. The decision was based on an early high court judgment dealing with the same issue wherein it was held that a confession based upon a promise could not have been given voluntarily<sup>2</sup>. Even though the confession was excluded, there was sufficient other evidence to confirm the conviction.

This case is considered to be important in Japan because it was the first case dealing with the question of voluntariness decided by the Supreme Court concerning a confession given pursuant to a false promise. While the result in this case tends to support plea bargaining, the practice has not yet caught on in Japan. Perhaps, the low volume of criminal cases attributes to this result, and plea bargaining might be an attractive device if court congestion becomes a serious problem.

### 9.03. Confession Obtained by Trick

Confessions obtained by trick will not be admissible in Japanese courts. For example, in one case a husband and wife were accused of

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2 . Fukuoka High Court Judgment, March 10, 1954, 26 Hanketsu Tokuhō 71.  
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possessing illegal firearms and ammunition<sup>3</sup>. Initially, the husband claimed that the wife had secretly bought the contraband and that he had told her to return them. However, the prosecution believed that both were culpable and wanted to prosecute the husband as well. The husband refused to confess until he was told that if he did so there was a good chance that the wife would not be punished. As a result of this prodding by the investigators, the husband confessed.

The husband appealed his conviction to the Supreme Court claiming that the confession lack the necessary volition in that he had been psychologically coerced into confessing. The Supreme Court agreed and reversed the conviction. It held that investigator's tactics had violated both the Code of Criminal Procedure and Article 38(2) of the Constitution<sup>4</sup>. Pursuant to Article 319(1) of the Code of Criminal Procedure, a confession that is made under compulsion, torture or threat, or is made after an unreasonably long arrest or detention, or that is doubtful of having been not made voluntarily may not be used as evidence. In this case, the Court stated that it was doubtful that the husband's confession, which was the only substantial evidence against him, had been given voluntarily.

#### 9.04. Confession Obtained During Commitment

In Japan a person who has been indicted may be held for two months. This is known as commitment and the time begins to run from the commencement of public prosecution<sup>5</sup>. During this period the defendant may make a confession which can be used against him at trial. But what happens if the arrest is illegal, is the subsequent

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3. Supreme Court Judgment, November 25, 1970 (Grand Bench), 24 Keishu 1670, 613 Hanrei Jiho 18.

4. Article 38(2). Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

5. The Code of Criminal Procedure:  
Article 60.

2. The period of commitment shall be for two months as from the day of the institution of public prosecution. When it is particularly necessary to continue the period, it may be renewed every month by ruling setting forth concrete reasons therefore...

confession tainted by the prior illegality? This issue was resolved against the defendant in the following Supreme Court case<sup>6</sup>.

The defendant in the case had a girl friend who worked as a bar hostess. In the early morning hours of March 14, 1973, a fire broke out in her home and destroyed it and several dwellings in the vicinity. The authorities suspected the cause of the fire was arson. She was not home at the time and the leading suspect in the case was the defendant, her boyfriend. Apparently there was some grudge between them. The police didn't have enough evidence to obtain an arrest warrant so they resorted to the use of a "bekken taiho"<sup>7</sup>. The woman complained to the police that five months earlier the defendant had entered her apartment without permission while she was sleeping. Based on this evidence, the police obtained an arrest warrant for trespassing. After he was arrested, the defendant was interrogated concerning the fire and confessed to the crime of arson. Thereafter, the defendant was released for trespassing and simultaneously rearrested for arson. He again confessed to the arson and an indictment was issued against him. He was also committed into custody pending trial. During this period he was questioned again, this time by the fire department officials who wanted to determine the nature and cause of the fire. He admitted setting fire to her futon (Japanese bedding), but didn't know that the fire had cause so much damage.

He was convicted and the evidence used against him was this last confession. The defense appealed claiming that the entire period of confinement had been tainted by the illegal arrest and that nothing stemming from such illegality could be used against the defendant. They claimed that the entire proceeding was inseparable.

The Supreme Court agreed that the first confession was illegal because it was the fruit of a bekken taiho. But, the Court held that questioning during commitment is separate and independent from the general interrogation conducted by the authorities prior to indictment.

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6 . Supreme Court Judgment, July 12, 1983, 37 Keishu 791, 1092 Hanrei Jiho 127.

7 . A "bekken taiho" refers to an arrest made for a different charge in order for the authorities to interrogate the defendant concerning the main offense.

The Court ruled that in the absence of some special circumstances, a confession of this nature was admissible and that there was no reason to attach the prior illegal police conduct to this confession.

#### 9.05. The Discovery of Physical Evidence from an Involuntary Confession

In the next case we will see how the “Fruit of the Poisonous Tree” doctrine is used in Japan. If a confession is given under force, torture, or threat it is doubtful that the confession can be relied upon as trustworthy. An involuntary confession is always inadmissible, but the question sometime arises whether physical evidence discovered as a result of such a confession should also be excluded. There is a great cost to society when a violent criminal is allowed to go free when there is evidence of guilt.

In this case the defendant was indicted for 1) the theft of explosives, 2) the bombing of a rival gang, 3) battery, and 4) the possession and manufacturing of an explosive. At the trial the defendant was convicted on counts 1 through 3, but, due to the exclusion of evidence based on an involuntary confession, two bombs and explosive materials could not be admitted into evidence against the defendant. The confession had been obtained pursuant to a “bekken taiho”(see footnote 6) and therefore it was inadmissible.

The Osaka High Court held that evidence which is obtained illegally as well as any derivative evidence should be excluded. This thinking is based on the notion that the derivative evidence would not have been discovered had there been no original evidence. In other words, the original illegality taints the derivative evidence. However, the court did recognize the independent source doctrine. If the discovery of the evidence can be link to a source other than the original illegal source, than the taint is said to have been dissipated. In this case the defendant confessed twice. The first time his confession was obtain using illegal interrogating techniques. The second confession was made in open court at the trial. This confession was used by the Court to justify the admission of the two bombs. It held that the second confession was an independent source and therefore, the taint had been dissipated.

## The Law of Criminal Procedure in Contemporary Japan (2)

The Court spoke of sliding scale for the application of the “fruit of the poisonous tree” doctrine. When the degree of violation by the authorities increases so does the need to exclude evidence. The greater the infringement of the rights of the accused the greater is the need to protect the individual by excluding whatever evidence is thereby obtained.

### 9.06. Corroborating a Confession

In Japan, the accused cannot be convicted of a crime when the only evidence against him is his own confession<sup>8</sup>. The question then arises what kind of evidence is sufficient to corroborate a confession. Must the evidence prove merely that the confession is truthful or must the evidence actually go toward proving the question of guilt? We will take a look at three cases dealing with these questions.

In the first case the defendant was indicted for dealing in black market rice in 1951<sup>9</sup>. He confessed to the crime and a notebook he used to record the transactions was used as corroboration. The defense argued that the notebook was to remind the defendant of his accounts, and that as such it was linked closely with the confession and could be considered as part of the confession. Therefore, the notebook should not be used to corroborate it since it was a type of confession itself.

The Supreme Court dismissed the defendant’s appeal and rejected his argument. It held that the notebook was documentary evidence which supported the defendant’s in-court confession, and as such it was good corroborating evidence.

### 9.07. Corroboraton of an In-Court Confession

Before 1967, the courts treated in-court confessions different from confessions made outside of the courtroom. In-court confessions were considered more trustworthy and corroboration was not required.

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8 . Article 38(3) of the Constitution, and Article 319(2) of the Code of Criminal Procedure.

9 . Supreme Court Judgment, November 2, 1957, 11 Keishu 3047.

In a 1967 decision, the Supreme Court eliminated the distinction and required that in-court confession be corroborated too<sup>10</sup>.

The defendant was an assistant driver for a truck company even though he had no driver's license. While he was driving a large size vehicle he collided with a bicycle killing the rider. He was indicted for criminal negligence and for driving without a license. The only real evidence against him concerning the driving without a license charge was his own in-court confession; he was convicted. The defendant claimed that such a ruling was contrary to Article 38(3) of the Constitution<sup>11</sup>. The trial court held, based upon earlier Supreme Court precedent, that an in-court confession does not need to be corroborated.

The Supreme Court upheld the conviction, but stated that the trial court had committed a harmless error in deciding that in-court confessions don't need to be corroborated. It held that all confessions must corroborated in order to comply with Article 319(2) of the Code of Criminal Procedure<sup>12</sup>. The trial court had ruled that the fact of whether the defendant had a license or not could be proved by his confession alone. It reasoned that the act of not being a licensed driver is not a crime. A crime is not committed until an unlicensed driver attempts to drive a motor vehicle. The Supreme Court held this reasoning to be in error, and stated that even the fact of not having a license must be corroborated. Since a fellow worker of the defendant had given a statement that he knew the defendant did not have a license, such was sufficient to corroborate the in-court confession of the defendant. With this case the old distinction between in court and out of court confession was eliminated.

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10. Supreme Court Judgment, December 21, 1967, 21 Keishu 1476, 505 Hanrei Jiho 19.

11. The Constitution of Japan:

Article 38(3). No person shall be convicted or punished in cases where the only proof against him is his own confession.

12. Article 319(2). The accused shall not be convicted when his confession is, *whether made in the public trial court room or not*, the sole disadvantageous evidence against him. (emphasis added)

9.08. Corroboration by Co-Defendant's Confession

The last of three cases dealing with the corroboration of a confession concerns the question of whether an accomplice's confession alone is sufficient evidence for a conviction. In this case four individuals, whom we shall call A, B, C, and D, were charged with insurance fraud in connection with a scheme wherein a traffic accident was staged. A, B, and C all confessed to the crime at trial, but D refused to confess or acknowledge that he was part of a staged accident. Nevertheless, all four were convicted by the trial court. The High Court upheld the conviction and the defendant appealed to the Supreme Court<sup>13</sup>.

D contended that it was improper to find him guilty based on the confession of the accomplices alone. In an earlier opinion by the Grand Bench of the Supreme Court, it was held that confessions by two or more accomplices is sufficient to convict, and that no violation of Article 38(3) occurs when such evidence is the only basis for a conviction. In this case there were three accomplices who confessed; this was enough to convict the fourth.

While the First Petty Bench reach an unanimous opinion as to the propriety of using the accomplices confession for a conviction, there was a great difference of opinion as to the reason. Justice Yasuo Kishigami held that the term "by his own confession" in Article 38(3) of the Constitution did not include the confession of accomplices, and therefore, there was no need to corroborate the confession of an accomplice. On the other hand, Justice Shigemitsu Dando held that the confessions of accomplice are the same as the defendants within the meaning of the phrase, "by his own confession". Kishigami explained that while Anglo-American law may prohibit the use of accomplices' confessions, such was not case in Japan. He held that it was not unreasonable for a judge to decide that the defendant is guilty when the only evidence against him is the confession of two or more accomplices. Based on the principle of free discretion, judges should be allow to evaluate the evidence and attach what weight is appropriate under the circumstances. Dando, on the contrary, has continued to advocate that the confession of an accomplice is the same as a confession by the accused for purposes of Article 38(3). The question, according to Dando

is whether the accomplices' confessions can be used to corroborate each other. He answer this question in the affirmative. He says that the confession of an accomplice, like the defendant must be corroborated, but the confessions of two or more accomplices may be used to corroborated each other. Since there were three confessions which corroborated each other in this case, they could be consider trustworthy and could be used to convict D, who refused to confess.

The difference between the two schools of thought could be seen more clearly if there had been only one confession. In that case Kishigami would have held that since the confession of an accomplice doesn't need to be corroborated, it would be sufficient evidence, standing alone, to convict the other person. Dando, on the other hand, would hold that where there is only one confession, some other corroborating evidence must be produced before a guilty verdict can be reached.

## CHAPTER TEN HEARSAY

### 10.01. Introduction

In this chapter the hearsay rule, and the exceptions to it, will be examined in detail. In theory, hearsay evidence is inadmissible in Japanese courts under a general prohibition found in Article 320 of the Code of Criminal Procedure<sup>1</sup>. However, there are several exceptions to the hearsay rule which are used frequently to allow the introduction of statements made by out-of-court declarants<sup>2</sup>. The first exception to be

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1. Article 320. With the exception of Articles 321 to 328, no document, in lieu of testimony, nor the out-of-court statements of someone other than a witness shall be admitted as evidence.

2. (deleted-unnecessary for our purpose)

2. Articles 321 to 328 of the Code of Criminal Procedure:

Article 321. A written declaration made by a person other than the accused, or a deposition of such person which is signed or has the personal seal of the person may be used as evidence only in following cases:

(1) When, with regard to a deposition made before a judge, such person as made the statement cannot state at the trial because of death, mental or physical incapacitation, missing, or being out side of Japan, or he made a statement different from the previous statement given at the trial.

The Law of Criminal Procedure in Contemporary Japan (2)

discussed deals with statements made out of court which are admissible when necessary for proving the facts constituting the offense in question. To ensure their trustworthiness there is the requirement that such statements be made under "particularly credible circumstances"<sup>3</sup>. A hearing must be held in each case to determine if there exist "particularly credible circumstances." When the court fails to hold such a hearing a major violation of procedure occurs, as is shown in a 1955 Supreme

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- (2) When, with regard to the deposition made before a public prosecutor, such person who made the statement cannot state at the trial due to death, mental or physical incapacitation, missing, or being outside of Japan, or he made a statement contrary to or substantially different from the previous statement at trial: Provided, that this shall apply only when there exist *special circumstances under which the previous statement is more credible than the statement made at trial*; (emphasis added)
- (3) When, with regard to documents other than those mentioned in the preceding two paragraphs, such person who made the statement cannot state at trial because of death, mental or physical incapacitation, missing, or being outside of Japan, and the deposition there of is *essential for proving the existence or non-existence of facts constituting the offense charged*: Provided, that this shall apply only when such statements are made under *particularly credible circumstances*. (emphasis added)
2. The deposition of a person other than the accused...or such documents which contain the results of inspections conducted by the court or judge may, notwithstanding the provisions of the preceding paragraph, be made as evidence.
3. Documents which contained the results of inspections conducted by the public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when verified in court, may be used as evidence notwithstanding the provisions of paragraph 1.
4. The same shall apply as in the preceding paragraph for documents which contain the process and conclusions of an expertwitness.

Article 322. A written declaration made by the accused or the deposition of the accused which is signed or sealed thereby may be used as evidence only when such declaration contains admissions of facts disadvantageous to the accused, or when it is made under particularly credible circumstances: Provided it was made voluntarily...

Court decision<sup>4</sup>.

The defendant was charged with rape resulting in death. At the trial the issue of the defendant's motive to commit the crime was raised, and the question of whether he had some preconceived plan to rape the victim was considered to be a key issue. As evidence of the defendant's motive to have sex with the victim, a witness testified that the victim had said she was afraid of the defendant, that she had run away from him before, that she disliked him, and that he was constantly doing obscene things.

The trial court held that such statements by the witness were admissible because they had been offered to prove that the defendant was disliked by the victim, and to show that there was no romantic involvement between them, and because they had not been offer to prove

2. (deleted)

Article 323. The documents other than those mentioned in the preceding two Articles may, for only those as mentioned here under, be made as evidence:

- (1) A transcript of family register, or a notarial deed, or such other document as made by a government official in regard to the fact that he may certify in the course of performance of his duties;
- (2) A commercial ledger, a voyage log, or such other document made in the regular course of carrying on a business.;
- (3) In addition to those as mentioned in the preceding two item such documents made under particularly credible circumstances.

Article 326. Any document or statement that the parties have consented to use as evidence....may be used as evidence only when it is deemed proper....

2. When the accused fails to appear in court, the evidence mentioned above may be used as evidence, the consent of the accused being construed to have been obtained: Provided that this shall not apply when the representative or the counsel for the accused has appeared.

Article 328. Any document or statement that may not be used as evidence in accordance with the provisions of Articles 321 to 324, may be used as evidence for the purpose of impeaching the statements of the accused, a witness, or other person at the trial.

3. Article 321(1)(3) and Article 324(2) of the Code of Criminal Procedure, above.
4. Supreme Court Judgment, December 9, 1955, 9 Keishu 2699, 137 Hanrei. Jiho 34.

intent. The defendant was convicted. The Supreme Court reversed and remanded the case to the trial court. It held that the statement by the witness was hearsay and that a hearing should have been conducted to determine if the statements were necessary to prove a fact constituting the offense and whether the statements were credible. The Supreme Court was concerned with the fact that this witness had been a suspect himself, and had admitted having a intimate relationship with the victim up until the day before the rape was committed. The Supreme Court held that the trial court had left unresolved an important question and had erred in finding the defendant guilty under the circumstances of this case.

#### 10.02. Statements Made to a Prosecutor

##### Prior Inconsistent Statements

In most cases witnesses are deposed before a prosecutor in order to preserve their statements of the facts for trial. If for some reason they later become unavailable as a witness their deposition may be used. There is another reason for taking the deposition of a witness. If their in-court testimony is different from the testimony given during the deposition, the deposition may be used to contradict their testimony<sup>5</sup>. In some cases the witness is not given an opportunity to explain the discrepancy. The prosecution merely waits and introduces the deposition at a later date, after the witness has been excused. Under this exception to the hearsay rule it is required that special circumstances exist which show that the previously recorded statement is more credible than the testimony<sup>6</sup>.

In an important 1965 case decided by the Supreme Court the

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5. The Code of Criminal Procedure:

Article 321(1)(2). ...such evidence made only be used as evidence in the following cases:

(2) When with regard to the deposition made before a public prosecutor, the declarant can not state at trial due to death, mental or physical incapacitation, missing, or being out side of Japan, or made the statement contrary to or substantially different from the previous statement at the trial...

6. Id.

requirement of proving "special circumstances" was discussed<sup>7</sup>. This case dealt with election improprieties wherein a large number of witnesses were called to testify. On the second and seventh days of the trial twenty-two witnesses were called to testify. On the eighth day of trial the prosecution asked the court to allow the introduction of all the witnesses' prior depositions. The defense counsel objected claiming that the prosecution had offered no evidence to prove that the depositions were more credible than the in-court testimony. The trial court reject this argument and the defendant was convicted.

On appeal to the Supreme Court, the defense argued that the prosecution had the burden of proving, with additional evidence why the depositions were to be deemed more credible than the in court testimony. The defense claimed that the depositions alone could not be used to prove the "special circumstances". The Court rejected this argument and held that the depositions, by their own content, could contain information which could show that they are more credible than the prior testimony. The main concern of the Court was the question of sufficient credibility based upon the circumstances. It held that when the testimony of a witness can be contradicted by prior statements the requirement of proving credibility through special circumstances is automatically satisfied.

#### 10.03. Statements of the Accused, Admissions and Declarations Against Interest

In the previous case we discussed the question of pretrial statements given by a witness. In this section the question of statements by the accused will be discussed. Under Article 322 of the Code of Criminal Procedure a written statement of the defendant or his deposition may be used as evidence when it contains the admission of facts disadvantageous to him. There is the additional requirement that these documents be signed or a seal be affixed to them.

In one 1957 case decided by the Supreme Court the question of the defendant's signature was raised with regard to a translated copy of

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7. Supreme Court Judgment, January 11, 1955, 9 Keishu 14.

a statement<sup>8</sup>. The defendant was an American serviceman stationed in Japan. He was charged with robbery resulting in injury and was convicted at the trial court. The main issue on appeal dealt with the statement he made before the prosecutor during the interrogation. The defendant made a statement before the prosecutor which was translated from English into Japanese. The prosecutor recorded the translated statement in Japanese. This document did not contain the signature of the defendant, but was signed by the prosecutor and the translator. Thereafter, an English version of the statement was prepared by the same translator. The defendant was called again to the prosecutor's office and asked to read and sign the document. The defendant agreed and this re-translated document was signed by *him, the prosecutor and the translator*.

At the trial, the prosecutor offer in evidence both the Japanese and English versions of the defendant's statement. The defense counsel objected to the Japanese version being admitted into evidence because it lacked the defendant's signature. In response to this objection, the prosecutor withdrew his request to have the Japanese version admitted into evidence. However, the prosecutor thereafter, petitioned the court again to accept the Japanese version. Over the defense counsel's objection the Japanese version was admitted into evidence and the defendant was convicted.

The Supreme Court upheld the conviction. It ruled that two versions of the defendant's statement, both Japanese and English, were actually the same document. The translator certified on the document, in writing, that the translation was correct and accurate. The Court held that the defendant's signature on the English version was proof of the defendant's approval as to the accuracy of the narrated statement. The effect of the defendant's signature on the English version, taken together with the translator's certification, amounts to approval as to the Japanese statement as well, even though it lacked the defendant's signature.

We can see from this case that translated documents will be accepted into evidence together with the Japanese original when there is

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8 . Supreme Court Judgment, October 29, 1957, 11 Keishu 2708.

a translator's verification that the translation is accurate.

#### 10.04. Investigation Reports

One of the biggest loopholes in the Japanese criminal procedure law with regard to the restriction against hearsay evidence is found in Article 321(3)<sup>9</sup>. This provision states that results of police investigations may be used as evidence. Before for going any further, it must be pointed out that there are two types of investigations in Japan. The first one is a court ordered investigation pursuant to a warrant, or an investigation without a warrant involving the arrest of a one caught in the act of committing a crime<sup>10</sup>. The second type of investigation is one conducted at the scene of a crime or accident. The results of either type of investigation may be admitted into evidence when the person who made the report appears in court and testifies that the report is true and correct.

The problem with allowing the reports to be used as evidence is that the reports frequently contain statements of what other people said. For example, the report might include a statement from an eye witness to an automobile accident. Moreover, the officer making the report routinely seeks out information from those people at the scene, including the victim and the defendant. Pursuant to Article 321(3) only the officer making the report has to testify in court that his account of what happened was truly and correctly reported.

#### 9 . The Code of Criminal Procedure:

Article 321:.....

- 3 . The document contained in the result of an inspection conducted by a public prosecutor, a secretary of the public prosecutor's office, or a policeman may, in case such person as made the statement has stated upon examination as a witness on the public trial date that it is made truly and correctly, be made as evidence notwithstanding the provisions of paragraph 1.

#### 10. The Code of Criminal Procedure:

Article 218. (provides for seizure, search and inspection under a warrant, including the examination of a body.)

Article 220. (provides the authority for seizure, search and inspection without a warrant for flagrant offenders.)

This procedure is a patent violation of the defendant's right to confront witnesses which is clearly spelled out in Article 37(2) of the Constitution<sup>11</sup>. The Supreme Court has upheld this practice and we shall see from the following 1960 case<sup>12</sup>.

The defendant was charged with criminal negligence when the car he was driving collided with another vehicle coming from the opposite direction. One evening the defendant was going to Chiba from Tokyo when the lights of an on-coming car were so bright that they temporarily blinded him. In stead of pulling off and stopping his car until his vision was restored the defendant continued to proceed and ran head-on into a vehicle trailing the one with the bright lights.

The driver of the other vehicle died at the scene accident. The defendant was quite upset at seeing the victim and the amount of blood loss. One of the policeman who had arrived at the scene reported that the defendant was making self-condemning statements. Without adequately stating the reason for its decision the Supreme Court held that the officer's report was admissible under Article 321(3). The Court rejected the defense's argument that Article 321(3) only applies to court ordered or emergency types of investigation, and held that accident reports are also admissible even if they contain hearsay. The Court stated that such a procedure does not violate the defendant's right to confront and cross-examine adverse witnesses guarantee in the Constitution.

#### 10.05. Hearsay in Reports

This decision was affirmed in a 1961 opinion of the Supreme

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11. The Constitution of Japan:

Article 37. ...

(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

12. Supreme Court Judgment, September 8, 1960, 14 Keishu 1437, 249 Hanrei Jiho 12.

Court<sup>13</sup>. The case also involved a traffic accident, this time resulting in the death of a pedestrian. The Court held that while a deposition must be signed or stamped with the maker's seal, the statements of people who give information to an officer at the scene of an accident do not. The officer can use these statements as part of his report. In addition the officer can have these persons write out a statement explaining what they observed. These written type of statements also don't have to be signed or stamped with a seal.

#### 10.06. The Result of Sobriety Tests

In Japan the police use a card to record the results of a field sobriety test. On the card is noted the results of the breath analyzer examination, the attitude and general appearance of the suspect including his gross motor skills, and personal information. The use of these cards as evidence in a criminal trial was the main issue in the following 1972 case.

Prior to discussing the facts and arguments of the case it is necessary to review the law of drunk driving in Japan. There are two provisions dealing with the consumption of alcohol in conjunction with the operation of a motor vehicle. The first provision utilizes an objective standard and makes it illegal for anyone to drive with 0.25 milligrams or more of alcohol in one liter of exhaled breath, or 0.5 milligrams of alcohol in one CC of blood<sup>14</sup>. The maximum penalty under the law for violating this provision is three months of imprisonment or a fine of 30,000 yen.

The second provision relates to the inability to operate a vehicle properly and utilizes a more subjective standard. A person violates this provision when they are in such an intoxicated state that are unable to control their vehicle in a normal manner<sup>15</sup>. The maximum penalty is

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13. Supreme Court Judgment, May 26, 1961, 15-5 Keishu 893, 266 Hanrei Jiho 31.

14. Article 119 of the Road Traffic Law.

15. Article 117(2) of the Road Traffic Law.

## The Law of Criminal Procedure in Contemporary Japan (2)

two years of imprisonment or a fine of 50, 000 yen.

The defendant in this case was indicted for criminal negligence and drunk driving<sup>16</sup>. A card indicating the results of a sobriety test was admitted into evidence over the defendant's objection and he was convicted. On appeal to the Supreme Court the defense argued that the use of the card violated Article 37(2) of the Constitution by denying the defendant the right to cross examination.

On the "scientific determination" section of card the officer involved had noted the results of a breath analysis which he determined by using a specially treated piece of paper which had changed colors after being placed in a liter of the defendant's breath. In addition, on the "appearance" section of the card he indicated the speech, movement, odor of alcohol, external appearance, and attitude. Based on the results of the sobriety test the officer determined that defendant had been operating a motor vehicle while intoxicated.

The admissibility of the card is determined by the interpretation of Article 321(3) of the Code of Criminal Procedure which provides that documents containing the results of an examination conducted by the prosecution or the police may be used as evidence, provided that the person who made the report testifies in court that it was truly and correctly made.

The Court upheld the admissibility of the card and stated that there was no violation of the Constitution because the defendant was given the opportunity to cross examine the policeman who filled out the card.

### 10.07 Expert Opinions

*In Japan the report of an expert's opinion is admissible as an exception to the hearsay rule. Article 321(4) provides that a document which contains the conclusions of an expert, as well as the method used*

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16. Supreme Court Judgment, June 2, 1972, 26 Keishu 317, 668 Hanrei Jiho 29.

to arrive at those conclusions are admissible as evidence<sup>17</sup>. However, in Japan there are two kinds of experts. The first type of expert is a court-ordered expert<sup>18</sup>. The second type is an expert who has been requested by the prosecution or police to give expert testimony<sup>19</sup>.

In the next case the question of whether the report of the second type of expert should be given the same status in regards to the hearsay exception as a court ordered expert<sup>20</sup>. The defendant was indicted for the manufacture of a stimulant drug. As part of the evidence against the defendant was the report of chemists who had been requested by the police to determine the nature of the contraband. The chemist was not a court-ordered expert. The defendant objected to the admissibility of the report on the grounds that the hearsay exception for the reports prepared by experts only pertained to court-ordered experts.

Unlike the court-ordered expert, the second type of expert is not required to take an oath<sup>21</sup>. With a court-ordered expert, both the

17. The Code of Criminal Procedure:

Article 321....

3. The document containing the result of an inspection conducted by a public prosecutor, a secretary of the public prosecutor's office, or a policeman may, in case such person as made the statement has stated upon examination as a witness on the public trial date that it is made truly and correctly, be made as evidence notwithstanding the provisions of paragraph 1.

4. The same shall apply in the case of the preceding paragraph with respect to such document as contained the progress and conclusion of expert testimony and as made by an expert.

18. The Code of Criminal Procedure:

Article 165. The court may order persons of learning and experience to give expert testimony.

19. The Code of Criminal Procedure:

Article 223. A public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when it is necessary to investigate an offense, request the appearance of a person other than the suspect, and examine him, or ask him to give expert testimony, and to make interpretations or translations.

20. Supreme Court Judgment, October 15, 1953, 7 Keishu 1934.

21. The Code of Criminal Procedure:

Article 166. An expert witness must take an oath prior to testifying.

prosecution and the defense have a right to be present when an expert is making an examination. However, in the case of the second type of expert there is no such right<sup>22</sup>.

Nevertheless, the Supreme Court held that the reports of the second type of expert should be given the same status as a court-ordered expert. The Court allowed the report to come in as evidence and the defendant's conviction was upheld.

#### 10.08. Double Hearsay

Double hearsay occurs when B tells C what A told him and C is called as a witness to testify. Double hearsay can also be found in documentary evidence. If B writes down on paper what A told him, and the paper is offered as evidence this is double hearsay. In order for the evidence to be admissible it must clear the hearsay prohibition by jumping two hurdles and finding double exceptions.

In one 1957 landmark case dealing with activities of the Japanese Communist Party, five people were indicted for attempted arson<sup>23</sup>. Four of the five went to the victims home and threw a flammable substance at the shutters causing them to ignite. The fire was quickly extinguished.

One of the defendants, X, gave a written statement to the prosecution that included the following language : "I together with Y and Z1 intended to carry out the plan, however I did not actually participate. The next morning I heard from Y that he and Z1-Z3 had thrown the flammable device at the victim. This statement was admitted into evidence against Y. He objected on the ground that it was hearsay and that he was not given an opportunity to cross examine X at trial.

The trial court allowed the written statement made before a prosecutor to be admitted as evidence as an exception to the hearsay rule pursuant to Art. 321(1)(2)<sup>24</sup>. The hearsay that was included within

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22. The Code of Criminal Procedure:

Article 170. A public prosecutor and the counsel for the defense may be present when an expert makes an examination. ...

23. Supreme Court Judgment, January 22, 1957, 11 Keishu 103.

24. Article 321(1)(2) of the Code of Criminal Procedure.

that document, that is the admission by Y, was also admitted into evidence as coming within an exception to the hearsay rule under Art. 324<sup>25</sup>.

The Supreme Court upheld the conviction and said that the evidence was admissible. It concluded that if the defendant was unhappy with X's assertions regarding what he had allegedly said, he was free to take the stand himself and refute or deny the statements. By this we can see that the right not to testify is of no value to a defendant faced with allegations that he had made admissions. Because the defendant could take the stand and testify himself in order to deny the assertions of the declarant there had been no denial of the defendant's right to cross examine a witness<sup>26</sup>.

#### 10.09. Voluntariness of Hearsay

In Japan there is the requirement that hearsay be given voluntarily before it is considered admissible as evidence. Article 325 of the Code of Criminal Procedure provides that the court may not admitted a hearsay statement even though it falls within an exception if it has been obtained by force<sup>27</sup>. The Court must determine whether the hearsay statement was given voluntarily or not. This determination must be made before the evidence can be admitted into evidence.

In one 1979 case decided by the Supreme Court we see the limits of this provision<sup>28</sup>. The defendant was convicted for violating the campaigning provisions the Public Election Law. He had given 50

25. Article 324 of the Code of Criminal Procedure.

26. Article 37(2) of the Constitution.

27. The Code of Criminal Procedure:

Article 325. Even if the document or statement is to be made as evidence in accordance with the provisions of the preceding four Articles, the court may, unless after it had beforehand conducted the investigation as to whether or not the statement in such document or the statement of the other person, the contents of which has been the statement at the preparation for public trial or on the public trial date has been made voluntarily, not take it as evidence.

28. Supreme Court Judgment, October 16, 1979, 33 Keishu 633, 945 Hanrei Jiho 133.

people ¥1000 worth of food and drink. Several of these people gave statements to the prosecution. The statements were admitted into evidence as an exception to the hearsay rule pursuant to Article 321(1) (2) of the Code of Criminal Procedure. The defense counsel questioned the voluntariness of the statements and claimed that because the court had not conducted an investigation prior to their admission as evidence, they should not be allowed in as evidence.

The Supreme Court disagreed. It held that when a witness appears and testifies in court, the prior statements given to a prosecutor are admissible. There is no need for the court to conduct a prior investigation on the question of voluntariness. The court can determine whether the statements were given voluntarily or not by examining the witness in court. There are no exact procedures for determining voluntariness, and the court is free to decide the issue by itself on an ad hoc basis.

#### 10.10. The Admissibility of Hearsay Evidence by Consent and Constructive Consent

In Japan, the parties may stipulate to the admissibility of hearsay evidence<sup>29</sup>. Moreover, if the defendant fails to appear, or is ordered from the courtroom for disruptive behavior, the introduction of hearsay evidence may occur without his knowledge. This is due to a legal fiction created in Article 326(2) of the Code of Criminal Procedure which allows for the court to conclude, through judicial construction, that the defendant, by his absence, has consented to the introduction of hearsay evidence.

In one 1978 case dealing with a student demonstration on the campus of Tokyo University during the Vietnam War, the issue of constructive consent was decided<sup>30</sup>. A large group of students were arrested when they occupied the Yasuda Auditorium at Tokyo University. The name Yasuda was closely associated with one of the prewar Zaibatsu and the students saw it as a hallmark of the establishment.

At the trial, the defendant and his counsel were ordered to leave

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29. Article 326 of the Code of Criminal Procedure.

30. Supreme Court Judgment, June 28, 1978, 32 Keishu 724, 890 Hanrei Jiho 73.

the courtroom due to their disruptive behavior. Thereafter, the prosecution introduced evidence against the defendant which included statements made by people who had observed the incident. The trial court allowed the admissibility of these statements on the grounds that there was constructive consent. This consent was premised on the legal fiction of Article 326(2) whereby consent is inferred by ones absences from the courtroom.

The conviction was upheld by the Tokyo High Court and the defendant appealed to the Supreme Court. The Supreme Court ruled that Article 341 allows a trial court to excluded the defendant from the proceedings, and that a judgment may be rendered against him without hearing his statement. Moreover, Article 326(2) allows the introduction of hearsay by constructive consent in order to facilitate the smooth and harmonious flow of a criminal trial. The Court recognized that the defendant is deprived of his right to cross examine witnesses under such circumstances. Nevertheless, the Court held that the trial must proceed.

#### 10.11 Hearsay Evidence to Impeach and Rehabilitate

In Japan, hearsay evidence may be used to attack the credibility of any witness testifying in court, or rehabilitate the testimony of a witness whose credibility has been questioned<sup>31</sup>. In a 1979 Tokyo High Court case, the defendant was indicted for rape. The main issue in the case was whether the victim had consented to sexual intercourse with the defendant<sup>32</sup>. Initially, the victim testified that she had been raped by the defendant and was thoroughly cross examined by defense counsel. After her testimony the defense counsel moved for the introduction of a prior statement she had made to him. The attorney had arranged a

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31. The Code of Criminal Procedure:

Article 328. Any document or statement that may not be made as evidence in accordance with the provisions of Articles 321 to 324 inclusive, may be made as evidence for the purpose of contending the probative power of the statement of the accused, a witness, or other persons at the preparation for public trial or on the public trial date.

32. Tokyo High Court Judgment, February 7, 1979, 940 Hanrei Jiho 138, 391 Hanrei Taimuzu 144.

meeting with the victim at a coffee shop. At the meeting she indicated that she had consented to the sexual intercourse. The attorney had scared her by talking about a potential perjury conviction if the court didn't believe her. Her statement to the attorney was written and signed, and her personal seal affixed to it.

Thereafter, she made another written statement to the police which contradicted the statement made to the attorney. In this document she stated that she had told the attorney she had consented to the sexual intercourse out of psychological pressure from him. She had pleaded with the attorney to hurry up and get the trial over as soon as possible, and stated that she was intimidated by his threat of a charge of perjury against her.

The High Court ruled that both statements were admissible. The statement made to the attorney was admissible as hearsay evidence because it was offered to impeach the witness's in court testimony. The subsequent statement to the police was also admissible as hearsay evidence used to rehabilitate the testimony of an impeached witness.

#### 10.12. Photographs as Hearsay Evidence

In Japan, it has been argued that a photograph should be treated the same as a report under the hearsay rule. The proponents of this theory state that pursuant to Article 321(3) of the Code of Criminal Procedure, a photograph is a pictorial report of a scene, and in order to have such admitted into evidence, the maker of the report, that is the photographer, must testify that it is true and correct.

Unfortunately, there is no expressed provision in the Code of Criminal Procedure expressly dealing with photographs. Until very recently there had not been a Supreme Court decision which considered the issue. However, in 1984 the Court made its position clear in the famous Shinjuku Station case<sup>33</sup>. October 21, 1968 had been declared the International Vietnam War Protest Day. Thousands of students occupied Shinjuku Station because they had learned that a shipment of air fuel for U. S. military aircraft was to pass through that station on

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33. Supreme Court Judgment, December 21, 1984, 38 Keishu 3071, 1141 Hanrei Jiho 62.

that day. The students became unruly and threw rocks at the police injuring several officers.

As evidence of the crime, the police confiscated the film of an amateur photographer who had taken pictures of the scene. They also obtained film from public employees who refused to reveal their source. At the trial, the evidence was held to be admissible as non-testimonial evidence. The court ruled that so long as there was a relationship between the case and the photographs, that under the rule of the free admissibility of evidence (*Jiyu na Shomei*), the film could be used as evidence.

The Supreme Court upheld the ruling and the photographs were admissible. There was no need for the photographer to testify himself as to how the picture was taken. The court held that so long there existed some relationship between the photograph and the case, the evidence is admissible. The defense had argued that a photograph is a type of hearsay evidence and must find some place in the exceptions in order to be admissible. He argued that photographs should be treated the same as testimony. He claimed that a photograph can be tampered with in such a way as to be the same as perjury. In order to assure that only accurate evidence is used to reach a criminal conviction, photographs should be subjected to the same judicial scrutiny as hearsay, they argued.