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The Law of Double Jeopardy in Contemporary Japan

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Introduction

The Constitution of Japan contains many rights that are enjoyed by a criminal suspect or defendant, including the right not to be placed in double jeopardy.[2] This being said, it must be noted at the outset that the concept of double jeopardy has been interpreted to be something quite different from the notion of double jeopardy in the United States.

Ⅰ. The Right of Appeal

In Japan, both the prosecution and defendant may appeal a lower court ruling.[3] For the purposes of double jeopardy, the trial court, the first appeal to a high court, and the subsequent appeal to the Supreme Court, are all considered the same proceeding for the purpose of double jeopardy analysis. Therefore, the prosecutor can seek a heavier sentence when he/she is unsatisfied with the punishment imposed by the trial court.[4]

Ⅱ. The Kabutoyama Case

Between March 17 and 19, 1974, one boy and one girl, both aged twelve, were found missing from their residence at the Kabutoyama Gakuen, a school for the mentally disabled in Nishinomiya, Hyogo prefecture. A massive search of the area by police and community lead to the discovery of the bodies in the school's septic tank. The cause of death was listed as drowning.

The police immediately suspected murder and began to interview and interrogate each and every member of the institution's staff, thirty three in all. Few imagined that

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2 The Constitution of Japan: Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

3 The Code of Criminal Procedure: Article 351. A public prosecutor or the accused may file an appeal.

4 Supreme Court Judgment, Grand Bench, September 27, 1950, 4 Hanreishu 1805 (criminal). An English translation of this case appears in, Maki, Court and Constitution of Japan, Selected Supreme Court Decisions, 1948-60, at page 219.

their children could perpetrate such a tragedy. Yet, the police vacuum of the septic tank uncovered many toys and pieces of clothing. The heavy seventeen kilogram (thirty-five pound) lid covering the tank had to have been moved several times to hold the quantity of items removed in the search. External and internal pressure upon the authorities to arrest a suspect became intense. On April, 7, twenty eight days after the incident, prefectural police arrested twenty two year old Etsuko Yamada (formerly know as Etsuko Sawasaki), a teacher of the school on charges of murder

Yamada was one of three on duty the night that the second child is assumed to have disappeared. Her family background was slightly odd. She was raised by her father after a divorce. Born in the mountain prefecture of Toyama, she grew up in the city of Matsuyama on the island of Shikoku. Though no small city-the population at the time was about 400,000- residents of Tokyo or Osaka would consider it a provincial town. Not the model of obedience and obsequiousness one would expect of a young Japanese woman, she was outspoken and direct in speech and communication. Yet, she had a sensitive personality and wept wildly at the children's funerals. This fact added to the suspicion surrounding her.

Such was the scope of evidence at the time. The absence of credible materials implicating Yamada was not seen as a problem, she could be held in custody in a substitute prison (daiyou kangoku) for twenty three days without being formally charged. During this period, interrogation was administered from morning until midnight with very limited access to counsel; good tactics for extracting a confession.

This plan proceeded as expected. After vehemently protesting her innocence, Yamada broke under interrogation and signed a confession. Strongly insisting she had no recollection of harming the children, the confession stated: "I believe I committed the crimes while unconscious." Several days later, after repeated reminders that unrepentant murderers go to the gallows, the detectives succeeded in extracting a full blown confession to the charge of murder.

With confessions in hand the next step, according to common judicial procedure, would be a formal indictment with the prosecution. A trial would begin and the prosecution would make a case before three judges (Japan has no jury system, but intends to introduce a modified version of one in 2009). However, without verifiable evidence or credible testimony to corroborate her confession, they drop the case.[5] With the public desire for a scapegoat satiated, and Yamada's name already permanently destroyed, the police released their suspect with the casual rejoinder, "pending further investigation."

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5 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.

Thereafter, Yamada filed demand for compensation against the prefectural police demanding apologies and damages under the Criminal Indemnity Law.[6]

As the suit against the state gradually proceeded, the powers that be went on the attack. A reinvestigation was opened, previous wards of the now defunct school, all mentally impaired to some degree, were questioned closely and carefully by the police. Yamada was rearrested in March of 1978 along with two colleagues who supported her alibi. The brunt of the evidence: testimony of the mentally disabled young adults of the institution, commencing three years and several months after the incident occurred.

The prosecution appealed, despite the presence of article 39 of the Japanese constitution proclaiming "those accused shall not be put in double jeopardy of life and limb." The Osaka High Court refused to try the case but remanded it to the district court for a retrial. The second trial began in Feb 1993. Five years and one month later, on March 26,1998, the Kobe District Court again declared the defendant "not guilty."

On April 13, 1998, the Kobe prosecutor's office filed an appeal with the Osaka High Court for a retrial. The court accepted the appeal,

On January 22, 1999, the prosecutors presented arguments against her again for murder, a crime which she has been tried and found not guilty twice over the last twenty four years. On September 22, of the same year she was found not guilty for a third time. Thereafter, on October 7, and in accordance with the prosecution's decision not to appeal further, the not guilty judgment was confirmed.[7]

Some scholars have said that appeals by the prosecution are against Article 39 of the Japanese Constitution, which stipulates that no person shall be held criminally liable for an act of which he or she has been acquitted, nor shall he or she be placed in double jeopardy.[8]

The United States and most countries in Europe do not allow prosecutors to appeal when the accused is found not guilty.

Ⅱ. September 27, 1950 Grand Bench Decision[9]

As mentioned above, the prosecutor has the equal right with the defendant when

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6 Law No. 1, January 1, 1950.

7 In Japanese, kakutei hanketsu.

8 Tokyo lawyer, Futaba Igarashi.

9 The Japanese Supreme Court consists of fifteen judges who make up three petty benches. When there is a matter deemed to be of great importance the Grand Bench (all 15 judges) is convened to hear the case.

it comes to appealing an unfavorable decision.[10] In this case the defendant was handed a guilty verdict by the district court for crimes related to the election law. His penalty was a fine.

The prosecutor wanted a more severe penalty and appealed to the high court. This time the defendant was sentenced to three months of imprisonment. He appealed to the Supreme Court on two grounds. The first one that the penalty was excessive when compared with precedents. The second ground what that he had been placed in double jeopardy, in contravention of Article 39 of the Constitution.

The Supreme Court ruled against the defendant and declared that a criminal proceeding, in the first, second, and third instances (i.e. District Court, High Court, and Supreme Court), is all one case and that there is no double jeopardy, per se. Hence, a defendant is not placed in double jeopardy if the prosecutor appeals against a judgment of not guilty, or a guilty decision to which he/she is not satisfied with the penalty imposed.

Ⅲ. Recent Supreme Court Decision

On October 10, 2003, the Japanese Supreme Court rendered a landmark decision in the area of double jeopardy. The case involved two independent provisions related theft.[11] One is Article 235 of the Penal Code and deals with the classic crime of larceny (hereinafter "simple larceny"). The second provision deals with a law aimed at habitual offenders, people who make stealing a way of life (hereinafter "habitual larceny".

The Court held that when there are two trials for separate cases of simple larceny, there is no violation of double jeopardy, even though the prosecutor could have charged both set of facts as a single crime of habitual larceny.

In the first case the defendant were charged and convicted of simple larceny and trespass. On June 8, 1998, the Tokyo High Court sentenced the defendant to one year imprisonment, suspended for three years. This decision became final on June 23 of the

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10 Id. N3.

11 Article 235 of the Penal Code: A person who steals the property of another commits the crime of larceny and shall be punished with imprisonment at forced labor for not more than 10 years.

Article 2 of the Law for Prevention and Disposition of Robbery, Theft, etc.: A person who has habitually committed or attempted to commit a crime provided in Articles 235, 236, 238, or 239 of the Penal Code, in any ways provided in the following subparagraphs, shall be punished with imprisonment at forced labor for not less than three years if the crime is deemed as theft, or for not less than seven years if the crime is deemed as robbery:

(1) Committing the crime with a weapon;
(2) Committing the crime jointly with another person or persons at the crime scene;
(3) Committing the crime while intruding, by crossing over or damaging a gate/door or wall or breaking a chain or lock, upon a human habitation or upon the premises, structure, or vessel guarded by another;
(4) Committing the crime while intruding, at night, upon a human habitation or upon the premises, structure, or vessel guarded by another.

same year.[12] In the middle of the night on October 19, 1997, the defendant, with a friend, stole three vehicles parked in the City of Yokohama.

Thereafter, the defendant, on 22 separate occasions, committed crimes of trespass and simple larceny. The defense counsel argued that the crimes were actual a single offense of habitual larceny, and to charge them as separate counts was a violation of double jeopardy. He relied on a judgment of January 24, 1984 of the Takamatsu High Court. That case involved the application of a provision of the Code of Criminal Procedure requiring the pronouncement of acquittal where a final judgment has already been rendered.[13]

The Supreme Court held that is was within the discretion of the prosecution as to whether to charge the defendant with a single of offense of habitual larceny, or to charge multiple counts of trespass and simple larceny. In either case, there would not be a violation of double jeopardy.

Conclusion

It is clear that the concept of double jeopardy in Japan is quite different for that of other countries. Prosecutors are given broad powers of discretion, and the ability to appeal cases to higher courts when they do not get the desired result from a lower court. No change is expected by the courts at any time soon regarding this deeply rooted notion of prosecutorial authority, and the power to fit the facts of any given case in such a fashion as to achieve the most severe punishment possible.

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12 In Japan, a decision becomes final on the lapse of 14 days from the date of judgment and the absence of an appeal within that period.

13 Article 337, subparagraph 1, Code of Criminal Procedure: A pronouncement of acquittal shall be made by a judgment in the following cases: (1) Where a final judgment has already been rendered.