

Case

The Case Concerning the Seizure of the South Korean Fishing Boat Daedong-Ho No.909

(Sup. Ct., P. B. 3, November 30, 1999) 1694 Hanrei-Jiho 155

[Facts]

On June 9, 1997, the South Korean fishing boat Daedong-Ho No. 909 was seized off Shimane Prefecture. After the fishing boat was seized, South Korean national Kim Sun-ki, the captain of this fishing boat, was prosecuted for the violation of Art. 3, para.1 of the Act on Regulation of Fishing Activities by Foreigners. Art. 3, para. 1 of this Act on Regulation of Fishing Activities by Foreigners prohibits foreigners from conducting fishing activities in Japan's internal and territorial sea.

According to the 1996 Act on the Territorial Sea and Contiguous Zone, the area where the seizure took place was Japan's territorial sea. However, this area was also outside Japan's 12-miles exclusive fishery zone as established under the 1965 Agreement on Fisheries concluded between Japan and South Korea. Art. 4(1) of the 1965 Agreement provides that "the right of control . . . and jurisdiction in waters outside the exclusive fishery zone shall be exercised only by the High Contracting Party to which ship belongs."

The defense counsel claimed as follows; The fishing boat in question had not entered waters where the seizure would be justified under the 1965 Agreement.

This claim was accepted by the Hamada branch of the Matsue District Court, but was rejected by the Matsue branch of the Hiroshima High Court. Therefore, the defendant appealed to the Supreme Court.

[Judgment]

The Supreme Court denied the appeal. The reasoning is as follows; "The Area where the seizure took place in this case is within the newly expanded territorial sea of Japan under Arts. 1 and 2 of the 1996 Act on the Territorial Sea and Contiguous Zone. Therefore, the judgment of the Matsue branch of the Hiroshima High Court is proper in that the exercise of jurisdiction by Japan in this area is not restricted by Art. 4(1) of the 1965 Agreement on Fisheries concluded between Japan and South Korea."

[Comments]

It is the generally accepted principle of international law that a state may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation.

Additionally, in the Anglo-Norwegian Fisheries case, the International Court of Justice found as follows "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its

municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”

In this case, it seems that it should have been considered in more detail whether the 1996 Act on the Territorial Sea and Contiguous Zone is valid and opposable to South Korea under international law.

(S. IDE)

The Case in which a Hypothecary could Execute by Subrogation an Owner's Right and Demand that an Illegal Occupant Vacate the Property used as Collateral for a Fixed Mortgage

(Supreme Court, Grand Bench, November 24, 1999) [Hanrei-jihō No. 1695 p. 40]

[Facts]

“A” owned said land and building and used them as collateral to secure a loan from “X”. “X” demanded that the land and the building be auctioned. However, there were no bids on the property. The auction did not proceed because the person who intended to buy the property hesitated to make a proposal on the grounds that “Y₁” and “Y₂” illegally occupied the building in dispute four months prior to the auction. Since “A” was unable to meet his obligation to “X”, “X” attempted to secure and claim the property. “X” also brought suit against “Y₁” and “Y₂” by subrogation (Article 423, Civil Code) and “X” demanded that the building be vacated. The Nagoya District court and Nagoya High Court admitted “X’s” claim. “Y₁” and “Y₂” filed an appeal.

[Judgments]

The Supreme Court rejected the appeal of “Y₁” and “Y₂”. The reasons for this are as follows:

- (1) A hypothecary, in principle, can not profit from or interfere with the use of the mortgaged property. However, when the terms of the loan for the mortgaged property are not met, it is possible that the proceedings of the auction may not advance and a fair price for the property may not be obtained due to the illegal occupation of the a third party. Such a case is considered to be an infringement of the hypothecary's rights.
- (2) The owner of the property shall maintain and manage it in such a way that an infringement of a hypothecary's rights do not arise. If the hypothecary's rights are infringed upon, he has the right to demand that the property be maintained according to the law. According to the meaning of Article 423, Civil Code, he can execute by subrogation a disturbance exclusion claim based on ownership.
- (3) In addition, when the unlawful occupation by a third party prevents the

hypothecary from obtaining a fair price for the property, the hypothecary may demand such an exclusion based on ownership.

[Comments]

The Supreme Court explained that a hypothecary can't interfere in the occupancy of a building in relation to a fixed mortgage when the occupancy doesn't infringe upon a hypothecary's rights. Therefore, it denied a disturbance exclusion claim based on ownership and the attempt of subrogation by "X". [March 22, 1991 (Minsyu No. 45-3, p. 268)]. The Supreme Court reversed the decision of the lower court and accepted the above. From now this point on, arguments will begin.

(K. KIMURA)

The Dentsu Company Case: The Case Concerning Suicide Allegedly Caused by Overwork

(Supreme Court; March 24, 2000) Rodo-hanrei No. 779, p. 13.

[Facts]

"A" was an employee of the defendant, "Y" corporation. "A" committed suicide one and half years after he began to work for "Y". "X", "A's" parents and the plaintiff, claimed that depression caused by overwork was the reason for "A's" suicide. "X" brought suit against "Y" to cover damages.

The Tokyo District Court admitted "X's" claim for the causative relationship between overwork, depression, "A's" suicide and the nonfulfillment of Y's duty to provide safe working conditions. The Court concluded that "Y" was liable for damages due to nonfulfillment of "Y's" duty to care for an employee's safety. (Decision of March 28, 1996, Rodo-hanrei No. 692 P. 13) "Y" appealed to the Tokyo High Court. Since "X" claimed that the amount of damages was small, "X" also appealed.

The Tokyo High Court admitted "X's" claim for damages. However, as it concerns the calculation of damages, the Tokyo High Court admitted that "Y" was 70 percent liable for damages because "X's" emotional problems and the fact that he did not take appropriate measures was also the source of damage. That is to say, the Court admitted fault in common. (Decision of September 9, 1997, Rodo-hanrei No. 723 P. 13) Both "X" and "Y" appealed again.

[Judgment]

The Supreme Court denied Y's appeal, reversed the decision and remanded the case to the original court. The points of the judgment are as follows:

- 1) A causative relationship exists between overwork, depression, and A's suicide.
- 2) The employer has a duty to prevent the laborers from risk when the health of both mind and body are threatened by working. Although "Y" had been aware that the

condition of A's health had become worse, "Y" didn't take appropriate measures. Therefore, fault lies with "Y", and "Y" is liable for damages.

- 3) The employer should be able to anticipate if this happened or if other damages were caused by the laborer's personality and working attitude, with the exception of when a laborer's personality is not average compared with his co-workers. Therefore, the standard that calculates damages should not include the laborer's personality and working attitude or mental condition. In this case, "A's" personality is average and it is unnecessary to take the reason of "X's" side into consideration when calculating damages.

[Comments]

This case is about suicide which was caused by overwork (referred to in Japanese Karo-jisatu). This case is the first judgment where an employer's duty to care for a laborer's safety was admitted by the Supreme Court. In Japan, similar cases have suddenly increased. However, it is difficult to prove causation between overwork and suicide. Therefore, the liability of an employer is difficult to prove. However, this judgment is severe in that the employer shifts the liability on to the principal and his family by admitting fault in common. Therefore, I think that this judgment will have an effect on similar cases. The amount of damages will be calculated by the original court.

(A. NAKAGAWA)

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A Case in which the Noncommission of a Murder was Not Allowed

(Fukuoka High Court, Sept. 7, 1999) [Hanrei-jihō No. 1691, p. 156]

Key words: voluntariness and acts to prevent the result

[Facts]

The defendant, "X", demanded "A", the victim who was also his wife, to get into the driver's seat of a car. She attempted to escape from him because he was violent but she was unable to do so. Although he denies this, he then became very angry, and suddenly strangled her with both of his hands to the degree that she lost consciousness. She escaped from the car but he brought her in the car again and strangled her with all of the strength of his left hand. After she lost consciousness, he continued to strangle her for about another 30 seconds. When he realized what he was doing and because he feared she might die, he suddenly stopped strangling her.

[Judgments]

The Fukuoka High Court agreed with the original judgment, which didn't allow for the noncommission of a crime and it denied the Koso-appeal. The reason for the judgment is as follows: the Koso-appeal insisted that it is unreasonable that the noncommissioned crime was denied because the defendant was not required to act to

prevent the crime although he had voluntarily stopped his actions.

However, since the noncommissioned crime occurred, it is objectively allowed that the actual danger of the victim's life had already occurred and the defendant was aware that his actions (at least, strangling the victim for 30 seconds after she lost consciousness) were dangerous. Therefore, at the moment when his criminal act was complete, it is necessary to prove that the commission of the crime involved preventive action on the part of the defendant so that the criminal result did not occur. For example, rescuing the victim, as the original judgment stated. Since the defendant didn't behave in this manner, the original judgment that didn't allow for the noncommission of the crime is correct.

[Comments]

As to the requirement of Penal Code § 43 proviso, voluntariness, and acts to prevent the result are required. In this case, whether or not the defendant acted to prevent the result was in question. When the noncommissioned act concludes without criminal wrongdoing, the noncommissioned act is allowed. However, when the criminal act has been completed, the noncommissioned act is not allowed.

As to the important theories about the concluding moments of the criminal act, there are two theories. One is the "synthetic rule" which requires that the perpetrator have both an objective understanding and a recognition that the actions will result in criminal wrongdoing if continued. The second is the "stopping theory" which involves no attempt on the part of the perpetrator to stop and the result is criminal wrongdoing. This is a significant judgment because the court recognizes the "synthetic rule".

(M. NOZAWA)