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論 説

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# Accused's Competency to Stand Trial and Stay of Trial Proceedings

Noriyoshi Naganuma

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## 1 Introduction<sup>(1)</sup>

This article purports to introduce a couple of recent lower court decisions concerning the accused's competency to stand trial and the possibility for the trial court to dismiss the prosecution *ex officio*, namely, without the public prosecutor's motion to withdraw the prosecution by himself. One was rendered by Tokushima District Court, holding that the trial proceedings should be stayed due to the accused's incompetency to stand trial caused by his mental disorders including *dysmnesia*, which decision became final and binding since both parties did not make an appeal against it. The other was given by Nagoya District Court, holding that the court should dismiss the prosecution because the accused suffered from *schizophrenia* which impaired his competency to stand trial past recovery from it. The public prosecutor made an appeal against it,

asserting that the Code of Criminal Procedure does not allow the trial court to exercise such a power *ex officio* without any articulate provisions to do so, which was granted. The defense counsel, however, made an appeal against the appellate court's judgment over again to the Supreme Court. The Supreme Court reportedly decided that it would hold a public trial to hear the arguments of both parties on November 28, 2016,<sup>(2)</sup> which indicates that the appellate decision would probably be reversed and that the prosecution might be dismissed due to the incompetency of the accused, although the final conclusion is yet to be seen as a matter of course.

## 2 Relevant Statutory Provisions and Case Law

(1) Competency to stand trial is a criminal defendant's ability to stand trial, measured by the capacity to understand the proceedings, to consult meaningfully with counsel, and to assist in the defense. Japanese Code of Criminal Procedure (hereinafter cited as CCP), however, uses a legal phraseology which may be translated as "procedural capacity." This term appears only in the title name of the 3rd chapter of Part I, CCP. Relevant statutory provisions in this context can be cited as follows:

Code of Criminal Procedure

Part I General Provisions

Chapter III Competency to Stand Trial

§ § from 27 through 29

(omitted because these provisions are irrelevant to the issue)

Part II First Instance

Chapter II Prosecution

§ 247 Prosecution shall be instituted by a public prosecutor.

§ 257 Prosecution may be withdrawn up until the judgment of the first instance is rendered.

### Chapter III Public Trial

§ 314 (1) When the accused is in a state of insanity, the proceedings shall, after hearing the opinions of the public prosecutor and the defense counsel, be suspended while he is in such a state; unless it is apparent that the accused is not guilty, that the case should be dismissed due to legal prerequisites, or that a remission of the punishment or a dismissal of prosecution should be rendered, in which cases the court may immediately render these judgments respectively without the appearance of the accused.

(2) (3) (omitted)

(4) Prior to suspending the trial pursuant to the preceding three subsections, the court shall hear the opinion of a medical doctor.

§ 338 The court shall, by a judgment, render a dismissal of the prosecution when:

(i)~(iii) (omitted) , or

(iv) the procedure to institute the prosecution is to be found ineffective due to violation of the provisions concerned.

§ 339 (1) The court shall, on a ruling, render a dismissal of the prosecution when:

(i) (ii) (omitted)

(iii) the prosecution is withdrawn.

(iv) (omitted), or

(v) (omitted)

(2) (omitted)

### Penal Code

§ 39 (1) An act of the insane is unpunishable.

(2) The contents and nature of procedural capacity have been construed and analyzed by legal scholars. One of the most reliable explanation is offered by a standard textbook,<sup>(3)</sup> essential part of which is as follows:

“ Procedural capacity (*Prozessfähigkeit*) differs from capacity to become a party in that it applies to capacity to perform procedural acts. Procedural capacity is necessary whether one is a defendant or a suspect. Procedural capacity must be distinguished from capacity to plead (*Verhandlungsfähigkeit*). Even though the defendant has procedural capacity, he does not have capacity to plead at the appellate instance. The standard for procedural capacity is mental capacity. Taking the reverse implication of Article 341 (1), procedural capacity requires that there be no “state of insanity” as defined in that provision. The concept of insanity also appears in substantive penal law in connection with capacity to commit a crime, but differs both in theory and objectives from procedural capacity in the law of criminal procedure. In application, procedural capacity is the ability of the defendant or suspect to comprehend the interests which he has at stake, and accordingly to make a suitable defense. As indicated earlier, if the defendant or suspect lacks procedural capacity in his procedural acts are legally ineffective within certain limits. Again, when the defendant lacks procedural capacity because he is insane, as established by expert medical opinion, trial proceedings must usually be stayed.”

One might wonder why German legal terms appear in this description. The main reason is that Japanese legal system has adopted many European ideas and terminologies for more than a century. The theory and the practice of criminal law and procedure have been influenced by specifically German ones. Just for reference, German Code of Criminal Procedure provides an articulate clause of *Verhandlungsfähigkeit* in order to handle an unordinary situation, while the idea of *Prozessfähigkeit* is a theoretical and practical one which has been dealt with by case law and commentaries.<sup>(4)</sup>

From this standpoint it can safely be said that, in Japanese criminal procedure, competency of an accused to stand trial has been construed to be equal to "the ability of the defendant or suspect to comprehend the interests he has at stake, and accordingly to make a suitable defense."

(3) The leading decisions by the Supreme Court in connection with this issue are relatively new, that is, the following two decisions should be cited;

Case A (called for the convenience' sake):

Supreme Court decision on February 28, 1995<sup>(5)</sup>

The accused in this case of theft was congenitally deaf and mute. The Supreme Court stated, "a state of insanity for the purpose of applying Article 314 (1), CCP, means the lack of procedural capacity which consists of the ability of the accused to comprehend the important interests which he has at stake and accordingly to make a suitable defense," and affirmed the appellate court's judgment to stay the trial proceedings. Justice Chigusa delivered a concurring opinion, suggesting the possibility for the trial court to terminate the criminal proceedings by its own initiative.

Case B:

Supreme Court decision on March 12, 1998<sup>(6)</sup>

The accused in this case of theft was born with severely impaired hearing and scarcely got educated at school. The Supreme Court stated, "despite the fact that the accused is gravely limited with his procedural capacity, namely, the ability of the accused to comprehend the important interests which he has at stake and accordingly to make a suitable defense, due to severe auditory impairment and resultant mental retardation, he still does retain it with appropriate aids both by the defense counsel and the interpreter and with the court's paternalistic role," and reversed the appellate court's decision that the

accused was in a state of insanity for the purpose of applying Article 314(1), CCP.

These two Supreme Court's decisions are regarded as legal precedents in this specific area, the contents of which will be introduced more thoroughly in the following section. Two critical points may be indicated here at this paragraph. First, the Supreme Court stated a formal and precise definition of "procedural capacity" which is very similar to that of the leading scholar aforementioned, <sup>(7)</sup> and expressed the clear linkage between "procedural capacity" and "state of insanity" for the purpose of applying Article 314(1). Second, the Court did not deny the possibility for the trial court to dismiss the prosecution in an extraordinary case by its own initiative.

### 3 Two Recent Lower Courts' Decisions

(1) The first one is rendered by Tokushima District Court.

Case C: Tokushima District Court Decision on June 29, 2015<sup>(8)</sup>

(i) The cases before the court were a murder by strangulation with an electrical cord and a theft of large amount of money and a shoulder bag at a pachinko parlor on another occasion. The result of the pretrial arrangement proceeding showed that the accused would plead guilty of all counts at the public trial and that it would take only a few days to elect lay judges, to conduct the public trial proceedings, to deliberate on the counts and to reach a verdict. The accused, however, developed a postrenal kidney failure while he was under detention and received medical treatment including urination by inserting a catheter into his bladder. His renal insufficiency gradually improved with this medical care, but he turned out to suffer from slight obnubilation and dementia as its aftereffects. After several days passed, his physical conditions ameliorated with rehabilitation, whereas his mental ones did not. Evidence showed such

psychiatric symptoms as follows; (a) While the defendant had a small talk with the custody officer, he said, "Hi Dad!", "It's in 2011 this year, isn't it?" or he suddenly began to talk about his past career. (b) When he was asked, "Do you understand why you are here?" he answered, "I'm accused of a traffic violation." When he was asked, "Where are you now?" he replied, "Under the bridge." (c) When his retained evidentiary objects were to be returned, he called a detective officer "my Dad", he did not understand the officer's explanation and he denied that he had submitted those items. (d) When he took a summary recognizing function inspection, he was not able to draw a dial of clock correctly.

(ii) The defense counsel argued that the defendant lacked in the competency to stand trial and that the trial procedure should be stayed due to his mental conditions, while the public prosecutor asserted that the accused was sane enough to stand trial. The trial court ordered an expert witness D (anonymous in publication) to conduct a psychiatric test of the accused, and it asked the accused some questions by itself as well to examine the relevant facts.

(iii) The gist of the expert witness D's report was as follows:

The accused contracts subcortical vascular dementia. His ability to communicate with others is limited due to his dysmnesia and impaired orientation. As for his intellectual faculties, his IQ is 55, and his mental age is 9 years and 8months old. The prospect of his recovery from mental disorder is little if any. The trial court should be careful that his memory in recent months was severely impaired due to his symptoms and dysphasia. His acute onset of the disease hinders one from figuring out the direct cause of his symptoms, although it is possible that irreversible organic brain disorder might have occurred.

(iv) On the other hand, the prosecutor requested other three doctors (E, F and G) respectively to examine the accused's mental conditions, the results of

which were submitted to the trial court. Doctor E's report stated that acute vascular dementia was rare, that it was questionable that the accused contracted vascular dementia due to lacunar infarction below his brain cortex, that the expert witness D's examination as to the accused's ability to communicate was only abstract, that it was certain that the accused presently suffered from dysmnnesia in terms of both anterograde and retrograde, and that this medical diagnosis showed that the accused most probably suffered from Korsakoff syndrome. Doctor F's document stated that the expert witness D's description of the accused's mental conditions was insufficient, and that the accused managed to answer the trial court's questions in his own way in spite of slight dysmnnesia and delusion, which fact showed that he somewhat retained his ability to communicate with others. Doctor G's opinion asserted that the accused suffered from memory disorder, and that the expert witness D's evaluation of the accused's ability to communicate was insufficient.

(v) The trial court examined the relevant evidence and concluded that its trial procedure should be stayed due to the accused's mental conditions. The gist of the court's opinion is that there is no doubt about the witness expert D's capacity and fairness, that the accused's ability to communicate with others and to understand his situations is limited, and that the accused is not capable of getting enough information to defend himself at his public trial. The important phraseology of the text of this judgment can be quoted as follows;

“ The three doctors' reports coincide with each other in the sense that the accused's mental conditions include memory disorder, although the contents of these reports are not the same to the letter, which is also true with the expert witness D's diagnosis. Doctors F and G raise no doubt about the expert witness D's diagnosis that the primary disease of the accused's memory disorder is vascular dementia whereas Doctor E articulately denies this diagnosis and states that the accused contracts Korsakoff syndrome, to be sure, but it does not matter

so much to decide his diagnostic names, that is, either vascular dementia or Korsakoff syndrome, as to ascertain his mental conditions as such in order to judge legally whether the accused is competent to stand trial at present. In this sense, it is useless to adhere too much to the difference between the diagnostic name of the expert witness D's report and that of Doctor E's document.

“ Doctor E indicates that it is inappropriate that the expert opinion about the accused's cognitive function mainly relies on Tanaka-Binet scale. It is apparent, however, the expert witness D reached his conclusion of the accused being suffered from memory disorder by using the results of MMSE scale (18), HDS-R scale (14), Miyake-test (memory disorder (+)), Benton visual memory test (visual memory disorder (+), visual cognition disorder (-)) and ideomotion apraxia. Doctor E's assertion is nothing short of either distortion or misreading of the expert witness's document, which misconstruction this court does not agree with. In addition, the expert witness diagnosed the accused's moderate vascular dementia not only from the results of the aforementioned psychological tests, but also from such objective findings as diagnostic imaging of head computerized tomography and magnetic resonance imaging, and he concluded that the accused has memory disorder due to this disease. This court does not find anything unreasonable in his diagnostic method and procedure.

“ Doctors E and F assert that the expert witness's conclusion of the accused's ability to communicate with others being limited is insufficient, partly because the accused's responses cannot be deemed deviously relevant. It is true that most of the accused's replies were what he meant after he understood the doctor's questions according to the expert witness D's interview document (excerpts), but the expert witness D does not contend that all of the accused's answers were deviously relevant. Just to name a few, that interview record shows that when he saw the accused for the second time there were such conversations as, “When did we meet for the first time?”, “ This is the first

time.”; “We met in here, didn’t we?”, “I’m here for the first time.”; “You were arrested because you hurt someone, weren’t you?”, “I was arrested on another charge and I went to a hospital to see if I’d taken such a kind of drug.” These responses may be deemed deviously relevant so that the expert witness’s document does not fall short of objective findings.

“ From the aforementioned analysis this court holds that there is no reasonable doubt to make the expert witness’s document inadmissible into the court in terms of the witness’s unfairness or incapacity, or unfounded prerequisites of his observations. This court recognizes that, according to the document, the accused suffers from mental manifestation centered on memory disorder and that his ability to communicate with others and to understand and judge ordinary matters is lowered to a considerable degree.

“ Taking these facts into account, this court examines whether the accused is competent to stand trial, that is, whether he is able to comprehend the interests he has at stake and to make a suitable defense accordingly.

“ The central issue in this case is whether the accused, who is unable to retain short term memory, can be competent to stand trial with the assistance of his defense counsel and the paternalistic function of the court. From this standpoint, it is not easy for the accused to communicate with his defense counsel appropriately, to recall and understand the nature of the proceedings until the day before, and to make a suitable defense accordingly, since he cannot recall the incident charged even if he receives its explanations, and in the first place he forgets what happened the day before, and his ability to understand and judge ordinary matters is lowered to a considerable degree. The accused cannot even retain the memory of the fact that the trial was held the day before, let alone its contents and nature. He cannot recall the presence and the contents of his public trial even if he receives appropriate explanations from his defense counsel and the trial court, or if he takes a note of what happens in the proceedings by

himself. It is needless to say that these arrangements are severely limited in nature and that it is impossible or very difficult at best for the accused to make a suitable defense at his public trial even with these assistance, thereby infringing his right to defend himself. The prosecutor's opinion thinks too slightly of the accused's mental situations including memory disorder, which this court cannot agree with.

“ The accused is deemed to be unable to understand the nature of the proceedings and several procedural acts concretely, substantially and comprehensively and to communicate with others appropriately, even if he has a capacity to understand his situations, nature of each procedural act and right such as the right to remain silent generally, abstractly and linguistically and to communicate with others superficially. It cannot be said that the accused has a capacity to accumulate enough information through several trial dates even with the effective assistance of his counsel and the trial court, and to defend himself accordingly. This court holds that the defendant is incompetent to stand trial. ”

(2) The second one is rendered by Nagoya District Court, against which the prosecutor's appeal is filed.

Case D: Appellate Court's decision:

Nagoya High Court Decision on November 16, 2015<sup>(9)</sup>

Trial Court's decision:

Nagoya District Court, Okazaki Branch, Decision on March 20, 2014<sup>(10)</sup>

(i) The cases before the court were a murder of a man with an all-purpose knife, another murder of a baby with the same knife and an illegal possession of that knife.

(ii) The accused was indicted with these counts in September, 1995. At the first date of the trial in November, the defense counsel made a request that the court should hear an expert psychiatrist in order to ascertain whether the trial

procedure should be stayed due to the accused's mental disease, which was granted. The trial court ordered Doctor E (anonymous in publication) to conduct an expert examination of the mental conditions of the accused. The court called the doctor as an expert witness at public trial and requested him to submit a document of his diagnosis as well. It also asked the accused several questions at trial by itself. At the seventh date of the trial in March, 1997, the court judged that the accused was incompetent to stand trial due to his schizophrenia and that the trial procedure should be stayed until he would recover from his mental disease. Thereafter the public prosecutor requested the trial court to quash the judgment to stay the procedure and to reopen the trial, but in vain. The trial court called other expert witnesses F and G, suspended the execution of the detention, and sent the accused to a psychiatric hospital as an involuntary legal commitment according to Article 29 (1) of the Mental Health Law. The suspension of the execution of the detention was renewed for 4 months several times at first and for half years subsequently while the accused was treated at the institution. The court, the public prosecutor and the defense counsel held out-of-court sessions intermittently in order to determine the prospects for the accused's recovery from the disease. Meanwhile the trial court ordered Doctor H who was in charge of the accused at the hospital to conduct a psychiatric test, examined the document reported by Doctor H and other documents made by Doctors I and J as well, and conducted by itself an on-the-spot investigation by visiting the institution which the defendant was admitted to. The prosecutor asserted over and over again that he had no intention to withdraw the prosecution. The trial court, however, dismissed the prosecution due to the accused's incompetency to stand trial at the 8th date of the trial in March, 2014. The prosecutor made an appeal against this judgment on the ground that the trial court erred in dismissing the prosecution, asserting that the trial court misjudged the accused's mental conditions for the last 17 years and the prospects for his

recovery, and that it also misconstrued the text of the Code of Criminal Procedure since the trial court should not be able to dismiss the prosecution notwithstanding the prosecutor's disapproval unless the case was extremely rare and carefully judged, which was not true with this particular one.

(iii) Nagoya High Court quashed the judgment and ordered to refer the case back to the trial court. The appellate court acknowledged the accused's incompetency, but decided that this case did not fall into the extremely rare category where the trial court was able to dismiss the prosecution because of the apparent unreasonableness for the prosecutor not to withdraw the prosecution by himself.

The fact-finding of the appellate court is as follows:

“ The doctor in charge of the accused reports that he suffers from paranoid schizophrenia, and has chronic hallucinatory paranoid and its serious residual disorders, complicated with multiple vascular infarctional dementia which might have been caused by multiple cerebral infarction, that both diseases severely damage his intellectual capacity to understand and judge situations properly and to communicate with others to the most gravely retarded extent that he needs to be waited on hand and foot, can only speak most simple words, and cannot talk with others, and that it can safely be said that he is unable to communicate with others linguistically, to understand his surroundings correctly and to defend himself accordingly. The doctor also states that it is not possible, generally speaking, to deny completely the prospects for recovery from paranoid schizophrenia, and that the accused's pathologies ameliorated temporarily in the course of his 14 years' treatment, to be sure, but that his comprehensive recovery cannot be diagnosed at all, and his progressive cerebral atrophy and incurable multiple infarctional dementia make him practically beyond recovery of his mental capacities.

“ The trial court correctly decided that the accused suffers both from

irreversible symptoms of chronic schizophrenia and from dementia due to his brain atrophy and that he is incompetent to stand trial and past recovery from it.”

(iv) The appellate court made a legal interpretation of the Code of Criminal Procedure as follows:

“ When the accused is incompetent to stand trial, namely when he is in a state of insanity in terms of the Article 314, sub. 1, CCP, the proceedings shall be suspended while he is in such a state, after hearing the opinions of the public prosecutor and the defense counsel, unless otherwise provided in that subsection. When the accused is past recovery after the proceedings are suspended, the public prosecutor, who has the exclusive authority to indict (Art. 247, CCP), should consider whether the prosecution be maintained, and when the prosecutor does withdraw the prosecution, the court shall render a dismissal (Art. 339, CCP).

“ On the other hand, Code of Criminal Procedure has no articulate provision for the court to handle such a situation as when the prosecutor does not drop the indictment by himself although the accused is deemed to be beyond recovery of competency after the process was stayed. This court holds that it is without artificialities of the text of the Code and logically coherent with the adversary system that the court basically does not have the authority to dismiss the indictment unilaterally despite the fact that the prosecutor, who has the exclusive authority to charge, maintains the prosecution and that much is expected of the prosecutor’s reasonable practice to withdraw the prosecution on his own discretion.

“ It must be added, however, that the Supreme Court decided in the so-called Takada case that, if an irregular situation occurs so as to infringe the right of the accused to a speedy trial while the criminal case is under trial, Article 37, sub. 1 of the Constitution should be construed to sanction an extraordinary measure to discontinue the trial, in which case it is appropriate for the court to dismiss the

prosecution. Another Supreme Court decision in 1995 may also be construed not to deny the possibility of the court to render a dismissal in an extremely rare situation where it is apparently unreasonable for the prosecutor not to withdraw the prosecution despite the fact that the accused is beyond recovery of his competency while the proceedings are stayed.

“ The trial court in this case stated that it could discontinue the trial as the final judgment depending on the situations of the accused, instead of keeping the proceedings stayed as long as the prosecutor wished to, when the court, which should preside overall proceedings of the case, kept on perceiving the recovering process of the accused for a long period of time, and it came to believe that he was past hope, nonetheless the prosecutor did not withdraw the prosecution. This court agrees with this conclusion to the effect that an extraordinary situation occurs in term with Article 37, sub. 1 of the Constitution.

“ Based on the above-mentioned analysis, this court examines the competency of the accused. His trial proceedings were stayed in March, 1997, and his detention was suspended in May, 1998, before he was involuntarily admitted to a psychiatric hospital where he has been treated until now. It can be recognized that he was competent to stand trial when the proceedings were stayed, that his mental conditions somewhat ameliorated from 1999 through 2000, and that those deteriorated gradually from 2008 through 2012. The trial court examined whether to renew the suspension of the detention of the accused every 4 months at first, and every 6 months afterwards, on which occasions the defense counsel submitted replies of the doctor in charge to the counsel's inquiries, according to Article 23-2 of the Lawyers Act, as materials for prima facie proof. The trial court kept to perceive the mental conditions of the accused and the contents of his treatment at stated periods with those materials. After February, 2010, the court held intermittent meetings in order to discuss the

future prospects and to examine the competency of the accused, which fact shows that this case is wholly different from whatever case might have been left without examination for a long period of time. In addition, it cannot be concluded that the prosecutor unreasonably exercises his discretionary authority not to withdraw the prosecution, since the indicted cases are heinous ones where an old man and his grandson were killed openly in broad daylight by a stranger and the prosecutor seems to take into account severe emotional damage suffered by the bereaved when he exercises his discretion. For these reasons stated above, this court holds that the cases before the court do not fall into the extremely rare category where it is apparently unreasonable for the public prosecutor not to withdraw the prosecution.

“ Therefore, the judgment of the trial court must be reversed due to its misapplication of Article 338 (4), CCP and its unlawful dismissal of the indictment, without considering other arguments made by the public prosecutor. The prosecutor’s case being proven, this court revokes the trial court’s judgment according to Article 397(1) and Article 378 (2), CCP, and remands the case back to Nagoya District Court. It is so ordered. ”

#### 4 Comment

(1) The leading decisions of the Supreme Court in this context are, as mentioned earlier at 2(3), relatively new. Since the issue is closely connected with each fact-finding of particular cases, it is appropriate to explain the nature of the two precedents and to quote the text of the Supreme Court’s decisions.

(2) Case A: Supreme Court decision on February 28, 1995<sup>(11)</sup>

The accused in this case of theft is congenitally deaf and mute, has not learned sign language and scarcely understands letters so that it is impossible for

the trial court to warn him of the right to remain silent through a sign language interpreter, that it is difficult to give him a correct account of the contents of his trial proceedings, and that it is doubtful whether he understands his own position of the accused. The gist of the Supreme Court decision can be cited as follows:

“ This Court holds that a state of insanity for the purpose of applying Article 314 (1), CCP, means the lack of procedural capacity which consists of the ability of the accused to comprehend the important interests which he has at stake and accordingly to make a suitable defense.

“ According to the facts established by the High Court, this Court cannot help but say that it is doubtful whether the accused retains his procedural capacity. Therefore this Court holds that, in such a case as this one before the court, it is necessary for the trial court to exert all its powers to scrutinize the accused's procedural capacity including hearing the opinion of a medical doctor according to Article 314(4) and, if needed, that of an expert on education for the deaf, and that the trial proceedings should be stayed when it finds the accused incapable to stand trial according to the main clause of Article 314(1), unless otherwise provided in that subsection. The decision of the High Court is affirmed. ”

Justice Chigusa delivered a concurring opinion as follows:

“ I hereby express a concurring opinion to the majority concerning the possible arrangements after the trial proceedings are stayed due to the accused's incompetency. The trial court should, since it manages and presides over all process, keep to perceive the accused's recovering situations of his procedural capacity by means of ordering the prosecutor to report periodically and so forth. If the accused does not recover from that situation afterwards, the court does not have to keep the proceedings stayed as long as the public prosecutor maintains the prosecution without calling it off by himself. The court may rather terminate the suit conclusively *ex officio* instead, depending on the accused's conditions.

It must, however, be added that the court should be careful, considered from the nature of the matter, in terminating the suit conclusively since a long-term follow-up examination is needed in order to determine the possibility of recovery of the accused's procedural competency. ”<sup>(12)</sup>

This decision, for the first time rendered by the Supreme Court, made an articulate and specific construction of “state of insanity” for the purpose of applying Article 314(1), CCP, and set forth the direct linkage between state of insanity and “procedural capacity”, the content of which was formulated as well. One might easily notice that it has much resemblance to the definition of the standard textbook mentioned earlier at 2(2).<sup>(13)</sup> It should also be noted that the concurring opinion suggested the possibility for the court to terminate the lawsuit without the prosecutor's motion to withdraw the case, although the deliberate opinion demanded that the court should be prudent and careful in dealing with the case.

(3) Case B: Supreme Court decision on March 12, 1998<sup>(14)</sup>

The second case somewhat resembles the first one, but then again the decision is closely connected with its unique factual basis. The Supreme Court itself summarized the contents of the fact-finding of the lower courts.

The accused in this case of theft was born with severely impaired hearing, scarcely got educated at school and spent 25 years in prison in total for serial thefts from his juvenescence. He does not keep company with the deaf except for his siblings who are also deaf, and lives his daily life among normal listeners so that he cannot use sign language, let alone, spoken and written ones, and communicates with others by his own unique signs and gestures and with a few specific letters such as numerals and people's names. The accused misses general and abstract ideas and episteme due to his lack of language, his verbal IQ is immeasurably low, and it is extremely difficult to get abstract, structural

and hypothetical matters across to him. Nonverbal intelligence tests shows that his mental age is 9 years old, which means that he is considerably retarded and that his mental capacity and communicative ability are severely impaired. That being said, however, it is possible for the accused to communicate with others about realities of life such as direct and concrete matters and nonverbal and practical ideas, and for others to assume how deeply the accused understands them, although it depends on others' goodwill and patience. The accused has acquired adaptive ways to learn directly from his visible and nonverbal experiences and has resilient adaptive ability and practical knowledge owing to his characteristics of being emotionally stable and doing well with interpersonal relationships. In particular, he has a keen intellect to comprehend empirical and intuitive matters and is sensitive to financial interests. He has some experiences to lend money to his relatives based on his own judgment using others' opinions. He is well aware of social rules such as "You mustn't trouble others," and "You must keep your promise," and able to adapt to social life, though not quite satisfactorily, since he earns his own living as a construction worker with others' benevolence after he was given a suspended sentence and released at his trial.

The accused has several criminal records of the same kind, and appropriately understands the general nature of criminal lawsuit, namely, he is fully aware that he was arrested on a charge of theft, that he was brought before the trial court after the police station and the prosecutor's office, that the issue is whether he stole and should be punished, that he may state his own case to the judge, that the judge has the authority to decide, that he may be committed to prison by the judge's decision, that the defense counsel stands by him, and that his lawsuit is not yet finished. The trial court and the appellate court supplied interpreters who tried to get the contents of the proceedings across to the accused with sign language. Some of the responses of the accused were as

follows:

The accused asserts consistently, from the beginning of the investigation through the trial, that he only saw a 36-year-old man named Taniguchi committing serial burglaries and thefts using a bicycle and screwdrivers, that he did not committed these crimes, and that he was arrested while he only chased that man and possessed the stolen goods, the bicycle and the screwdrivers the man had missed. The accused was requested to put on a ski mask when his mugshots were taken, which he declined at first, and then complied with reluctantly by persuasion, saying that he would be dealt with as the robber if he put the mask on, putting it on top of his head instead, and refusing the request to mask himself overall. The accused gave his statements both at the trial court and at the appellate court to the questions which he was asked of, except for some questions mentioned below. Their contents are appropriate and correct by and large save that from time to time the accused's unique signs were not understandable and that some questions were not gotten across to him. The accused stated at the trial court that a written account of what he had said while under investigation had been fabricated by a policeman, that he had not applied his fingerprint on the document, and that the written statement had not been read to him for verification by the police. When the trial court warned him of the right to remain silent, the interpreter used four kinds of gestures which the accused was able to comprehend, that is, "to say," "not to say," "it's up to you," and "you may." When he was asked whether he understood that he could remain silent, he replied in an unsatisfactory manner, "Sign language; Not to talk; I understand. I said; To talk; I said I would talk. I received; Good sign language." When he was asked whether he knew what a judge was, he replied, "Yes. I'd like to say a lot." The accused denied that he had committed the charged offence. Meanwhile he refused to answer some questions in relation to the stolen goods found in the vicinity of where he was arrested and his act of

guiding the police to a cache for other stolen goods, saying "Stop talking about that, " "I don't want to talk about it. "

The case for the accused at the trial court was basically argued to the effect that he had not perpetrated the crimes indicted, both by the accused himself and by the defense counsel, the former being helped by the interpreter and the latter trying to sound out the accused's intention. The trial court carefully weighed the accused's legal competency and procedural competency.

The gist of the Supreme Court decision can be cited as follows:

"An aid of a sign language interpreter enables the accused to understand his position in a criminal case correctly to a certain degree, to assess his situation appropriately for his defense, and to be told about each content of his proceedings by and large, despite the fact that the accused is deeply affected with his intellectual and communicative disability caused by severe auditory impairment and resultant mental retardation due to his unacquisition of language to the extent that it is extremely difficult for him to understand abstract, structural and hypothetical matters and to communicate these ones with others. The accused can make a statement and take the necessary measures pursuant to the nature of respective procedural acts, with the sign language interpreter present, according to the lines of defense laid down by himself. The right to remain silent was warned by some signs the accused could comprehend so that it can safely be said that his right was not infringed. Furthermore, the cases before the court are relatively simple ones in terms of both facts and legal issues, the contents of which the accused apparently understands.

"This Court holds that despite the fact that the accused is gravely limited with his procedural capacity, namely, the ability of the accused to comprehend the important interests which he has at stake and accordingly to make a suitable defense, due to severe auditory impairment and resultant mental retardation, he still does retain it with appropriate aids both by the defense counsel and the

interpreter and with the court's paternalistic role. Therefore, this Court holds that the accused was not in a state of insanity for the purpose of applying Article 314(1), CCP, both at the trial court and at the appellate court.

“ This Court holds that the appellate court erred in determining the accused was in a state of insanity at the trial court when it construed and applied Article 314(1), CCP, and that it is clearly unjust not to revoke that decision. This Court revokes the appellate court's judgement according to Article 411(1), CCP, and remands the case back to Osaka High Court. It is so ordered with unanimity. ”<sup>(15)</sup>

This case shows that the Supreme Court uses the same framework as that of the former one, but that it depends upon the individual accused's capacity to decide whether he is competent enough to stand trial. In particular, the Supreme Court's decision in the second case takes into account not only his various acts at the trial court but his own way of handling the stern realities of life as well. According to the Court's judgment, it may affect the conclusion of the accused's ability to comprehend the interests and to make a suitable defense, which can be agreed upon since this ability comprises communicative capacity revealed both inside and outside of the trial court. The possibility of terminating the lawsuit is not referred to in this case as a matter of course.

(3) The nature and the contents of the two recent lower court decisions should be scrutinized in line with the aforementioned legal precedents of the Supreme Court.

The accused in Tokushima case was aware of such abstract matters as the right to remain silent, the roles of each party in a lawsuit, and his position of the accused to some extent, which is quite different from the accused in the Case B. According to the district court, the accused suffered from dysmnnesia including short-term memory disorder to the extent that he could neither comprehend the nature of his criminal proceedings and each procedural acts concretely and

substantially nor communicate with others, even with the assistance of the defense counsel and the paternalistic role of the trial court. The court found him incompetent to stand trial which would last for several days since he could not be assumed to accumulate enough information to comprehend the interests he had at stake and to make a suitable defense accordingly. This conclusion might be approved of, if the accused's ability to retain short-term memory about concrete matters should be critical and decisive in order to determine his competency, say it were such and such dates, places, people's names and each episode. It must be stressed, however, that the Supreme Court's decision in the Case B found the accused competent to stand trial because he could manage to live his everyday life even though he might lack in abstract, structural and hypothetical way of thinking. The implication would be that, for the purpose of applying Article 314 (1), the court does not have to confirm whether the accused can comprehend abstract matters, but that it may find him competent when the accused can understand simple realities of life and communicate with others in his own way. The Supreme Court never demanded the public prosecutor to establish that the accused could recall specific events which happened several hours or a few days before. It can be said that the accused in Tokushima case still holds his abstract intellectual ability, and that his incompetency to accumulate enough information even with human and physical support is as yet unproven. The court's decision would be questionable unless other grave factors not articulately delineated in the judgment might affect the accused's mental conditions so seriously that his capacity to comprehend both abstract and concrete matters is substantially impaired.

A few additional remarks would be appropriate. First, the Case A was tried by a court comprised of professional judges and lay ones as well. Generally speaking, it is impossible, or quite difficult at best, for such a court to decide whether the trial should be stayed by means of ordinary trial proceedings,

hearing an expert witness and other suitable measures which can be taken by a court consisted only of career judges. In this particular case, the court reportedly accumulated enough information to decide the accused's competency in its own way such as questioning the accused, conducting psychiatric tests, debriefing the detention officer in charge, and holding a mock trial limited to the opening procedure so that it might observe the accused's memory disorder in a direct fashion. <sup>(16)</sup> Second, the trial proceedings in this case will be stayed for a certain period of time. It is unsettled at present whether the lawsuit itself is terminated due to the impossibility of his recovery. In such a case as this particular one, cooperation of judicial justice and social welfare is needed to examine when and how the case is dismissed and to decide how the accused should be treated until that time depending on the nature of his mental disorder.

(4) The accused in the Case D was found incompetent to stand trial due to chronic hallucinatory schizophrenia and its serious residual disorders complicated with multiple vascular infarctional dementia which were beyond recovery. The main issue, therefore, is the possibility and prerequisite requirements for the court to terminate the lawsuit by itself. My commentary on the Supreme Court's decision of the Case C positively discussed that alternative primarily because it would be contrary to the purpose of the criminal procedure as defined in Article 1, CCP, that is, to find out the true facts of the case and to apply criminal provisions in a proper and speedy manner, if the trial proceedings would have to last as long as the public prosecutor would not consent to withdrawing the prosecution by himself. <sup>(17)</sup> Justice Chigusa's concurring opinion should be read carefully and prudently in this context.

Neither the appellate court nor the trial court denied the court's authority to dismiss the prosecution *ex officio*, although its reasoning and qualification varied a great deal which led to the original judgment reversed. The High Court

apparently made much account of the lack of the specific provision of CCP which articulately delineates when and how the court should handle such a situation, thereby invoking the Supreme Court's decision on Takada case where the court terminated the lawsuit on the ground that the accused's constitutional right to a speedy trial was infringed. It should be noted, however, the Takada case was an extraordinary one in the sense that both the court and the public prosecutor failed to act in a proper and swift fashion to the extent that the accused, who was not responsible for the delay, was kept in a position of the accused for a prolonged period of time. That abnormal situation should be avoided, and could have been only if the court had acted appropriately. The Takada case should be referred to when one would rather think of the possibility that the prosecution might get void due to an obstacle to the trial coming up after the indictment was filed whether such a circumstance is clearly stated in CCP or not. The contents and nature of these impediments may differ from one case to another. Therefore, the possibility and prerequisite requirements for the court to terminate the lawsuit by itself, then again, depend on the unique factual basis of the each case in issue. It must be said that the High Court qualification for the court to terminate the lawsuit is too limited when it stated that was a matter of abnormal occasions.

The public prosecutor has the authority to withdraw the prosecution by himself according to Article 257, CCP. Generally speaking, one could not deny the likelihood that the power might be misused on account of factual errors, inappropriate discretion or other possible mishandlings. The court, which shall preside and manage the overall proceedings, should be able to review why the prosecutor maintains the prosecution and, when it finds the prosecutor's case inappropriate, to take suitable measures which could lead to a dismissal in the ultimate end. The central issue should be fact-finding the accused's mental conditions both at present and in the foreseeable future. When the court does

find the accused past recovery, contrary to the prosecutor's opinion, it should not hesitate to call off the proceedings.

Another small remark can be made here at this last paragraph. A commentator states that the court should not take into account the gravity of the offense indicted when it considers whether it should dismiss the prosecution since what matters is solely the accused's competency.<sup>(18)</sup> However, when the prosecutor exercises his prosecutorial discretion, he may take account of such factors as the seriousness of the crime charged, strong sentiment toward punishment of the bereaved and other circumstances affecting the sentence. The court also may consider these elements when it reviews the prosecutorial discretion. In that sense, the Case D needs a prolonged intense examination since it involves heinous crimes compared to more mitigated ones.

## 5 Conclusion

It should be possible for the court to dismiss the prosecution without the prosecutor's motion to withdraw it when the court finds the accused incompetent to stand trial at present and in the foreseeable future after it scrutinizes his mental capacity in detail for a relatively long period of time utilizing as much information as possible. Expecting the Supreme Court's judgment in the Case B in the near future, we have to keep on deepening the understanding of fundamental framework and appropriate fact-finding methods.

### Notes

- (1) This article is based upon the author's oral presentation at Jochi Keijiho Kenkyukai (Sophia Criminal Law Seminar) held on June 15, 2016. I would like to offer my heart-felt appreciation to the participants of the session for their useful and informative comments, although I should be solely responsible for all of the text and possible defects.

I feel highly honored to be amongst the contributors of this special issue of Sophia Law Review which is dedicated to Professor Emeritus Tadashi Takizawa, who was the founding dean of Sophia Law School when I joined the faculty, and who I believe was most generous and sensible while I was in my personal hardships.

- (2) The Asahi Shimbun, Oct. 1, 2016.
- (3) DANDO, Shigemitsu, Elements of Criminal Procedure, 112, (7th ed., 1967); translated by GEORGE, B. J.; original footnotes omitted, italics in the original.
- (4) Strafprozeßordnung (StPO)

§ 231a Herbeiführung der Verhandlungsunfähigkeit durch den Angeklagten

- (1) Hat sich der Angeklagte vorsätzlich und schuldhaft in einen seine Verhandlungsfähigkeit ausschließenden Zustand versetzt und verhindert er dadurch wissentlich die ordnungsmäßige Durchführung oder Fortsetzung der Hauptverhandlung in seiner Gegenwart, so wird die Hauptverhandlung, wenn er noch nicht über die Anklage vernommen war, in seiner Abwesenheit durchgeführt oder fortgesetzt, soweit das Gericht seine Anwesenheit nicht für unerlässlich hält. Nach Satz 1 ist nur zu verfahren, wenn der Angeklagte nach Eröffnung des Hauptverfahrens Gelegenheit gehabt hat, sich vor dem Gericht oder einem beauftragten Richter zur Anklage zu äußern.
- (2) Sobald der Angeklagte wieder verhandlungsfähig ist, hat ihn der Vorsitzende, solange mit der Verkündung des Urteils noch nicht begonnen worden ist, von dem wesentlichen Inhalt dessen zu unterrichten, was in seiner Abwesenheit verhandelt worden ist.
- (3) Die Verhandlung in Abwesenheit des Angeklagten nach Absatz 1 beschließt das Gericht nach Anhörung eines Arztes als Sachverständigen. Der Beschluß kann bereits vor Beginn der Hauptverhandlung gefaßt werden. Gegen den Beschluß ist sofortige Beschwerde zulässig; sie hat aufschiebende Wirkung. Eine bereits begonnene Hauptverhandlung ist bis zur Entscheidung über die sofortige Beschwerde zu unterbrechen; die Unterbrechung darf, auch wenn die Voraussetzungen des § 229Abs. 2 nicht vorliegen, bis zu dreißig Tagen dauern.
- (4) Dem Angeklagten, der keinen Verteidiger hat, ist ein Verteidiger zu bestellen, sobald eine Verhandlung ohne den Angeklagten nach Absatz 1 in Betracht kommt.

Strafgesetzbuch (StGB)

§ 20 Schuldunfähigkeit wegen seelischer Störungen

Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen Schwachsinn oder einer schweren anderen seelischen Abartigkeit unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln.

The idea of Fähigkeit is explained in the following way, that is, die Handlungsfähigkeit des Prozessbeteiligten ist Voraussetzung für die Wirksamkeit seiner Prozesshandlung (BGH MDR 55, 271), ihn begünstigende, den Eintritt der Rechtskraft einer Verurteilung hemmende Prozesshandlungen eines verhandlungsunfähigen Beschuldigten sind aber

wirksam. Die Verhandlungsfähigkeit des Beschuldigten ist die Fähigkeit, in order ausserhalb der Verhandlung seine Interessen vernünftig wahrzunehmen, die Verteidigung in verständiger und verständlicher Weise zu führen, Prozesserkklärungen abzugeben und entgegenzunehmen (BVerfG NJW 95, 1951; BGH 41, 16, 18).

The last sentence of the preceding paragraph shows how German Federal Courts understand the idea of Fähigkeit. For more information, see, e. g. MEYER-GOSSNER, Lutz, Strafprozessordnung, Einl. 97 (53Aufl. 2010).

- (5) 49 Keishu (Sup. Ct. Criminal Reporter) 481
- (6) 52 Keishu (Sup. Ct. Criminal Reporter) 17
- (7) Supra note 3.
- (8) 1421 Hanrei Times (Court Cases Times) 369 (2016).
- (9) 2303 Hanrei Jiho (Court Cases Reporter) 131 (2016). See, Kurei, M., 86 Kikan Keiji Bengo (Criminal Defense Quarterly) 119 (2016); Nakajima, H., 738 Hogaku Seminar (Jurisprudence Seminar) 126 (2016).
- (10) 2222 Hanrei Jiho (Court Cases Reporter) 130 (2015). See, Ito, M., 16 Shin Hanrei Kaisetsu (Commentaries on Current Court Decisions) 185 (2016); Nakajima, H., 717 Hogaku Seminar (Jurisprudence Seminar) 128 (2016); Nakajima, H., 45 Keijiho Journal (Criminal Law Journal) 219 (2016); Kurei, 86 Kikan Keiji Bengo (Criminal Defense Quarterly) 119 (2016).
- (11) Supra note 5.
- (12) See, Commentary of the court clerk in charge of the case; Kawaguchi, M., 49 Hosho Jiho (Judicial Reporter) 12-355 (1997), later included in, <1995> Saikousaibansho Hanrei Kaisetsu Keijihon (Commentaries on Supreme Court Decisions; Criminal Cases) 125 (1998); and its flash bulletin, Kawaguchi, M., 1079 Jurist 106 (1995), later included in, 4 Saikousai Tokino Hanrei Keijihouhen (Recent Supreme Court Criminal Cases, Jurist Extra Issue) 162 (2004). For further references, see; Aoki, N., 1561 Hanrei Jiho (Court Cases Reporter) 230 (1996); Fujita, S., 565 Kenshu (Legal Training) 21 (1995); Fukushima, I., Keijisoshou Hanrei Hyakusen (Selected 100 Cases in Criminal Procedure) 114, (9th ed., 2010) edited by INOUE, M. et al; Ibusuki, M., 181 Hogaku Kyositsu (Legal Classroom) 120 (1995); Naganuma, N., 1091 Jurist 162 (1996); Naganuma, N., 1108 Jurist 114 (1997); Tsuji, H., 148 Keijisoshou Hanrei Hyakusen (Selected 100 Cases in Criminal Procedure) 116, (7th ed., 1995) edited by INOUE, M. et al; Watanabe, O., 897 Hanrei Times (Court Cases Times) 38 (1996); Watanabe, S., Kijisoshou Hanrei Hyakusen (Selected 100 Cases in Criminal Procedure) 118, (8th ed., 2000) edited by INOUE, M. et al; Anonymous, 67 Horitsu Jiho (Legal Reporter) 12-88 (1995).
- (13) Supra note 3.
- (14) Supra note 6.
- (15) See, Commentary of the court clerk in charge of the case; Nakatani, Y., 51 Hosho Jiho

(Judicial Reporter) 6-157 (1999), later included in, < 1998 > Saikousaibannsho Hanrei Kaisetsu Keijihin (Commentaries on Supreme Court Decisions; Criminal Cases) 12 (2001); and its flash bulletin, Nakatani, Y., 1137 Jurist 107 (1998), later included in, 4 Saikousai Tokino Hanrei Keijihouhen (Recent Supreme Court Criminal Cases, Jurist Extra Issue) 221 (2004). For further references, see; Iwao, N., 603 Kenshu (Legal Training) 19 (1998), Matsumoto, I., 1 Gendai Keijiho (Current Criminal Law) 2-58 (1999), Sakai, K., 51 Keisatsugaku Ronshu (Articles on Police Science) 9-201 (1998), Sakamaki, T., 1180 Jurist 92 (2000), Shimizu, M., 105 Hogaku Shinpo (Jurisprudence Newly Reports) 8-9-265 (1999), Umebayashi, K., 52 Horitsuno Hiroba (Legal Forum) 2-43 (1999), Uto, T., 217 Hogaku Kyositsu (Legal Classroom) 120 (1998), Watanabe, O., 1658 Hanrei Jiho (Court Cases Reporter) 246 (1999), Yasumura, T., 1157 Jurist 186 (1999).

(16) Hanrei Times, *supra* note 8, at 370.

(17) Naganuma, *supra* note 12, at 116 (1997). For further reference, see, i. g., Kurei, *supra* note 10. Many commentators argue for the possibility for the court to terminate the lawsuit by its own initiative on several grounds; whereas very few against it, i. g., Tsuchimoto, T., 757 Sosa Kenkyu (Researches on Investigation) 119 (2015).

(18) Kurei, *supra* note 10, at 122.

(supplementary note)

While proofreading, the author noticed that the Supreme Court revoked the appellate court's decision (Case D, *supra* note 9) on December 19, 2016 to the effect that the prosecution should be dismissed and the case should be terminated. Visit, Supreme Court's website, [http://www.courts.go.jp/app/hanrei\\_jp/detail2?id=86355](http://www.courts.go.jp/app/hanrei_jp/detail2?id=86355).

The gist of the judgment is as follows : "This Court holds that, when the court which the case is pending before decides that the proceedings should be stayed due to the defendant's incompetency to stand trial pursuant to the provision of Article 314, subsection 1, CCP, and arrives at a final conclusion that the defendant is past recovery from incompetency and that there is no possibility left to reopen the trial, it should be able to pronounce that the prosecution be dismissed irrespective of the prosecutor's withdrawal of the case, because the Code of Criminal Procedure cannot be construed to assume that trial proceedings should be stayed for so long as until the pending litigation would become only nominal in light of the purpose of the Code, that is, to establish the true facts of the case and to enforce criminal provisions in a speedy and appropriate manner (Article 1, CCP). Although the Code of Criminal Procedure has no articulate provisions to handle such a situation, this Court holds that it is apposite to that occasion for the court to render a judgment on the basis of oral arguments in the same fashion as provided in Article 338 (4), CCP, given the nature of the issue over the possibility of the defendant's recovery from his lost competency during the trial. Therefore, this Court holds that, when the trial proceedings are stayed due to the defendant's incompetency to stand trial, and the court

finds that there is no possibility left to reopen the trial because the defendant is past recovery from his incompetency, it can render a judgment of dismissal by applying Article 338 (4) *mutatis mutandis* to the case.”

The nature of this Review and its publication schedule do not allow the author to analyze this Supreme Court’s decision in detail. See, Naganuma, *supra* note 12 (1997), at 118, instead.

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