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種 別： 論説

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論 説

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# Customs Officers' Protocols and the Hearsay Rule

Noriyoshi Naganuma

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

The purpose of this article is to illustrate some aspects of the hearsay rule in Japanese criminal procedure by referring to a recent lower court decision and analyzing its logical structure. Tokyo High Court justifiably ruled in the said judgment on March 13, 2014<sup>(2)</sup>, that some of the documents formally made by customs officers in the course of their investigation of a smuggling case were admissible into the trial court on the ground that the article 321, subsection 3 of the Code of Criminal Procedure (1948 Act #131, hereinafter cited as CCP), one of the hearsay exception clauses, should be applicable in the case before the court, whereas some other documents should not have been admitted. The court, however, rejected the defendant's appeal because it found that the error was only harmless with evidence ample enough to establish his guilt without the

evidence to be excluded.

## 2 Statutory Backgrounds

(1) The CCP replaced its preceding statute, namely, the Code of Criminal Procedure (1926 Act #75). It introduced several new rules and clauses such as the idea of count in an indictment, limitation of using defendant's confession in a trial and the hearsay rule, thus changing the criminal procedure into an adversary one and strengthening evidentiary requirements. The clauses relevant to the case in issue can be cited as follows;

Article 189

subsection 1

Any policeman shall perform his duties as a law enforcement officer<sup>(3)</sup> as authorized by other statutes, and/or regulations of the National Public Safety Commission or the prefectural public safety commissions concerned.

subsection 2 (……)

Article 190

Those who are to exercise the duties of law enforcement officers in regard to forestry, railways or other designated areas, and the scope of their functions shall be specifically provided by other statutes.

Article 191

subsection 1

A public prosecutor may, if he deems it necessary, investigate a criminal case by himself.

subsection 2

A prosecutor's assistant officer shall investigate a criminal case under the supervision of a public prosecutor.

Article 320

subsection 1

Except as otherwise provided by the articles from 321 through 328, no document shall be substituted as evidence for a statement of any person to be given orally at a public trial, nor shall be used as evidence any in-court oral description of a statement made by another person outside of a public trial.

subsection 2 (……)

Article 321

subsection 1 (……)

subsection 2 (……)

subsection 3

A written record which describes the result of an inspection of a scene of a crime made by a public prosecutor, a prosecutor's assistant officer or a law enforcement officer may, despite the subsection 1 of this article, be used as evidence if the officer concerned is called as a witness at a public trial and verifies the document to be examined.

subsection 4 (……)

Article 326

subsection 1

Despite the articles from 321 through 325, any document or statement may be used as evidence only when both the prosecutor and the accused consent thereto and the court finds it appropriate after scrutinizing the circumstances under which the document or the statement was obtained.

subsection 2 (……)

Article 379

Where an appeal to the second instance of a High Court is lodged upon the ground, other than provided by the two preceding articles, that a specific provision of procedural law or ordinance was violated and that this violation is

material to the judgment, the appellant must point out articulately, in the form to state the reasons for the appeal, the facts appearing in the record of proceedings and/or the contents of the evidence taken by the trial court which make the appellant's cause *prima facie*.

(2) The Customs Law (1954 Act #61) provides the scope of customs imposed, the procedure to levy them and other customs formalities as well as the definition of customs crimes and the duties of customs officers. A customs officer should perform similar functions as those of a law enforcement officer when he investigates a customs case. Just to name a few, he may interrogate a suspect, inspect an object and retain it, and inquire public or private entities for information (art. 119 of the Customs Act, which is equivalent to art. 197, 198 and 221, CCP), he may execute a warrant of inspection, search and seizure issued by a judicial officer (art. 121, equivalent to art. 218, CCP), and he may seize an object as evidence without a warrant in a flagrant case (art. 123, similar to art. 212 and 220, CCP). Technically speaking, however, he is not a law enforcement officer for the purpose of applying the article 190, CCP, because the Customs Law has no provision to articulately designate him to that position as required by the article 190, CCP. This apparent incompatibility raises an issue: whether a protocol formally made by a customs officer after he has inspected an object or a place should be deemed to be admissible as evidence into a criminal trial court by applying the article 321, subsection 3, CCP, or should it be excluded from evidence because it is, after all, merely a hearsay in the strict sense of the provision.

### 3 Facts and Judgment

(1) The case before the court is a smuggling of regulated stimulant drug.

Three defendants were accused of attempting to smuggle about 10 kilograms of stimulant substance with intent to profit from criminal activity, with other few co-conspirators whose identities were unknown, by concealing the drug into 39 boxes of smoked salmon and packing them up into 3 suitcases, then getting on an aircraft from Las Vegas via Salt Lake City to Tokyo International Airport, thus trying to import that regulated drug illegally into the territory of Japan, but in vain, because the customs officers succeeded in detecting them trying to smuggle. The three defendants pled 'not guilty' by asserting, among other causes, that they lacked mens rea. The trial court, however, rejected their contentions and found them guilty.

(2) The defendants made an appeal by claiming, among other grounds, that some specific provisions of the CCP were violated, leading the trial's court decision to a miscarriage of justice. Their assertions contained that the following documents submitted by the prosecutor should not have been admitted into the trial court by applying the article 321, subsection 3, CCP;

(a) three reports of taking photographs of the defendants' personal belongings, made by the customs officers, purporting to prove the shapes etc. of the suitcases and the contents therein which the defendants were bringing

(b) three reports of taking photographs of the seized articles, made by the customs officers, purporting to prove the shapes etc. of the stimulant drug seized from the defendants

(c) three reports of taking photographs and confirming the packed situations of white crystallized substance, made by the customs officers, purporting to prove the shapes etc. of the stimulant drug seized from the defendants

(d) three seizure reports describing the time and date, the place and the objects of the seizure concerned, made by the customs officers, purporting to prove the fact that white crystallized substance to be regarded as regulated drug and other relevant items were seized from the defendants at the time and the

place described

(2) The defense counsel argued that those protocols made by the customs officers were obviously different from a written record describing the result of an inspection made by a law enforcement officer, and that the article 321, subsection 3, CCP should neither be construed as applicable, nor be inferred to bear analogy, in the case before the court. The High Court delivered the opinion that a protocol formally made by a customs officer in the course of his investigation of a customs crime should be included in the written record as provided by the article 321, subsection 3, CCP, only when the protocol has the same nature as that of the written record, and concluded that the reports of taking photographs in this case (documents (a), (b) and (c) in the aforementioned paragraph) could be deemed to bear the same characteristics as those of a written record of a law enforcement officer, whereas the seizure reports (documents (d) ) could not be considered to be the same in nature as a written record of a law enforcement officer. From this reasoning, the appeals court decided that the District Court erred in admitting the documents (d) as evidence into its trial, while rejecting the defense counsel's argument that the documents (a), (b) and (c) should also have been excluded from evidence, thus maintaining the guilty judgment.

(3) The important phraseology can be extracted from the judgment document of the appeals court as follows: <sup>(4)</sup>

“All of those who made these documents were customs officers. Because of the unique nature of investigating a customs case, these officers may, subject to the specific provisions of the Customs Law, interrogate a suspect, inspect his personal belongings, and execute a warrant of inspection, search and seizure issued by a judicial officer. When the customs officer has conducted these

investigations, he is to make written reports which should describe the matters required by the law (See Chapter 11, Paragraph 1 of the Customs Law and Chapter 9 of the Ordinance to Enforce the Customs Law). According to these provisions, the investigation of a customs case conducted by a customs officer can be construed to bear the same nature as that of a criminal investigation of a public prosecutor, a prosecutor's assistant officer or a law enforcement officer, so that it may safely be said that a document made by a customs officer in the course his investigation of a customs case can be included in the document specifically mentioned in the article 321, subsection 3, CCP, when, and only when, it has the same nature of a written record of an inspection of a crime scene.

"This Court holds the opinion that the reason the article 321, subsection 3 provides that a written record which describes the result of an inspection of a scene of a crime made by a law enforcement officer may be used as evidence if the officer verifies the document at a public trial is that a written report of the result is not only more accurate and easily understandable than an oral presentation of the officer, but the least possible for fabrication by the officer's malicious intent as well, in light of the unique characteristics of an inspection which is carried out objectively with the five senses to observe and recognize conditions of places and objects and the result of which is recorded precisely in details as official duties soon after the inspection is finished.

"From this point of view, those reports of photography (documents (a), (b) and (c)) were made by the customs officers, in order to make clear the detecting details of the regulated articles and thus to preserve evidence, who observed, identified and photographed, with their five senses, the three defendants' personal belongings and the regulated articles before attaching these photographs to the formal protocols, which fact demonstrates that their process of gathering evidence and making records have the same distinctive characteristics as those of an inspection by a law enforcement officer, that their

reports are more accurate and easily understandable, and that their documents can be considered to be the same in nature as an inspection protocol for the purpose of applying the article 321, subsection 3, CCP.

“On the other hand, the three seizure reports (documents (d)) were made by the customs officers in order to mainly ensure and record the fairness of seizing procedure, which is wholly different from an inspection in terms of its purpose and nature, so that these documents cannot be considered to be the same in nature as an inspection protocol for the purpose of applying the article 321, subsection 3, CCP, even if those facts are taken into account that the customs officers observed and identified the regulated objects and that seizure reports might be more accurate and easily understandable of the features of the objects than oral presentations of the officers. Therefore, this Court is obliged to hold that the article 321, subsection 3, CCP should not be applicable to the three seizure reports, and that the trial court erred in construing and applying this clause when it admitted these reports into evidence.”

#### 4 Comment

(1) It is generally recognized that the articles from 320 through 328, CCP provide the hearsay rule, its scope and exceptions, although the phrase of “hearsay evidence” does not appear anywhere in the text of the code.<sup>(5)</sup> The Supreme Court used these words as early as in 1951.<sup>(6)</sup> Therefore, this comment also follows this analytical framework, and discusses whether the article 321, subsection 3, CCP should be applicable to hearsay documents made by other persons than those explicitly provided in that subsection.

(2) Several comments on this point thus far may be categorized into some conclusions as follows;

(a) commentators who admit to apply that clause relatively largely to other

persons, by analogy or by other construction <sup>(7)</sup>

(b) commentators who deny to apply that clause to other persons <sup>(8)</sup>

(c) commentators who admit to apply that clause to those who bear similar responsibility as that of a law enforcement officer <sup>(9)</sup>

The conclusion (a) can be seen as stressing the accuracy of each document in issue and the faintness of human memories, whereas the conclusion (b) can be analyzed to be adherent to the principle of the hearsay rule and thus to make a public trial more orally-oriented one which is open to cross-examination. The conclusion (c) may be led to mainly by practical considerations.

(3) The judicial precedents can be found in the following two decisions of the Supreme Court .

(a) Sup. Ct. Decision on Sep.8, 1960 <sup>(9)</sup>.

In this case, a record of non-compulsory inspection without a warrant made by a law enforcement officer was submitted by the prosecution to prove the specific features of a scene of a traffic accident. The Supreme Court maintained the lower court's judgment that admitted this documentary evidence, saying that the article 321, subsection 3 should be construed to include a report made after a non-compulsory inspection. In this kind of cases, law enforcement officers of road traffic sections do not usually resort to an inspection warrant, for the crime scenes concerned are ordinarily public thoroughfares and do not involve anyone's private interests. Despite the lack of judicial authorization in advance, a non-compulsory inspection should be carried out with the same precision as that of an inspection with a warrant, the result of which should be recorded in details as required by the article 104, subsections from 2 through 4, Rules of Criminal Investigation (1957 Rule of the National Safety commission #2). Thus, the conclusion of this case is widely accepted.

(b) Sup. Ct. Decision on Aug.27, 2008 <sup>(10)</sup>.

In this case, an abridgment of a report analyzing the cause of a fire made by a

private expert W (called for the convenience's sake) was submitted by the prosecution to prove, as one of the circumstantial evidence, that the fire was started by the defendant. The original report on a combustion experiment was made by W, who had worked as a fire-fighter for 15 years before engaging in private business to investigate and analyze a cause of a fire to meet a demand, above all, from an insurance company for some years, and performed the experiment in this case with a contract between a corporation owned by W and the Fukuoka prefectural police school through the intermediation of an insurance company. During the course of the trial, the original report was submitted, the defense counsel did not agree with it in terms of the article 326, CCP, and the prosecution withdrew the request and asked the court to call W as a witness, which was granted, before the abridgment of the original copy was produced. The abridged document described, basically, that W carried out the experiment by setting a fire on kerosene-sprinkled cardboard in a drawer, and observing to what extent it burned by minute-and-second-wise, so that its contents apparently looked like an inspection report in the sense that the result of the experiment was objectively described as it was. The trial court admitted it by applying the article 321, subsection 3, CCP, found the defendant guilty of arson and fraud, and sentenced him to 8 years' imprisonment, which was granted by the appeals court. The Supreme Court, however, denied the admissibility of that abridged document as evidence through the article 321, subsection 3, CCP, saying that the clause in issue explicitly provides that "a written record …… made by a public prosecutor, a prosecutor's assistant officer or a law enforcement officer", so that it should not be applicable to a document made by a private entity such as the abridgment of this case, even when he might have expertise in the certain area, in light of the phraseology of the provision and its purpose, although the Supreme Court did not go so far as to revoke the guilty judgment on the ground that the evidence in issue should be

acceptable by another clause instead which this comment does not deal with. The gist of this decision may be summarized as the inapplicability of the article 321, subsection 3, CCP to a documentary evidence made by a private expert. It left room for another conclusion in a case where a documentary evidence made by a public official such as an expert personnel at a fire department or at a revenue or customs office, which the Supreme Court did not have to elaborate any further in this case.

(4) The decision by Tokyo High Court declared <sup>(11)</sup>, as cited at 3 (3), that an investigation of a customs case by a customs officer resembles a criminal investigation by a law enforcement officer in nature, and that a document made by a customs officer should be admissible as evidence by the article in issue so far as it has the same characteristics as those of an inspection report made by a law enforcement officer. It can be said that this decision showed another good chance of the applicability of the article 321, subsection 3, CCP, which the latest Supreme Court decision left room for. This conclusion can easily be agreed upon when it is considered that the delineation of law enforcement officers is merely a matter of statutory technicalities.

On the other hand, the High Court denied the admissibility of the seizure reports as evidence. This conclusion can also be approved of, because the CCP clearly defines the compulsory measures which a law enforcement officer is entitled to take. From historical and other statutory reasons, it resembles German legal structure of *Durchsuchung*, *Beschlagnahme* and *Augenschein*, which somehow corresponds to search, seizure and inspection, respectively. The article 321, subsections 2 and 3, CCP provides, without dispute, the admissibility of an inspection record. It is regrettable that the trial court missed to distinguish this obvious difference. It is not clear from the text cited on the *Hanrei Times* whether the documents (d) had some photographs attached, or some measurements or graphs included. From the fact that the appeals court did

not mention them at all, it can safely be said that the documents (d) may have been merely verbal or linguistic protocols of the seizing proceedings. It could not, undoubtedly, be admissible as evidence.

## 5 Conclusion

The High Court's decision is worthy of being noted as a legal precedent. This decision will be referred to when a similar public fact-finding procedure and its documentary records are involved.<sup>(12)</sup>

### notes

- (1) This article is based upon the author's oral presentation at Jochi Keijihou Kenkyukai (Sophia Criminal Law Seminar) held on June 17, 2015. I would like to express heartfelt appreciation to Professor Emeritus T. Iwase, Justice Y. Furuta, Professor M. Miyoshi and other participants of the session for their informative and encouraging comments without which this article would not have been completed because of my poor health condition for the last few years, although I should be solely responsible, as a matter of course, for all of the text and possible defects included. I feel honored to be amongst the authors of this special issue of Sophia Law Review.
- (2) 1406 Hanrei Times 281 (2015).
- (3) Japanese text of this clause uses an expression of 'police judiciaire' translated from French law. The distinction between 'police judiciaire' and 'police administratif', however, has scarcely anything significant to do with the construction of the existing law and the analysis of the current issue.
- (4) *supra* note 2, at 283.
- (5) This lack of phraseology might have occurred because of the short period of time the full text of the code was prepared for. The prototype of the articles first appeared in the so-called 6th draft in March, 1947, with the suggestion of the authority of the GHQ, which was fairly smoothly accepted by the legislative task force of Japanese government, partly because it happened to be in total accord with the intention to concentrate examination of evidence into a public trial (Hauptverhandlung) rather than a pre-trial proceeding (Vorverfahren). The latter idea is called 'Direktionsprinzip' or 'Grundsatz der persönlichen Vernehmung' after German criminal procedure, which appears in the following clause. "Beruht der Beweis einer Tatsache auf der Wahrnehmung einer Person, so ist diese in der Hauptverhandlung zu vernehmen. Die Vernehmung darf nicht durch

Verlesung des ueber eine fruehere Vernehmung aufgenommenen Protokolls oder schriftlichen Erklaerung ersetzt werden." (art. 250, Strafprozessordnung). If this perspective were to be taken, the article 321, subsection 3 should be precisely applied with little, if any, analogical inference.

- (6) Sup. Ct. Decision on Sep. 26, 1951, 5 Keishu (Sup. Ct. Crim. Rep.) 1895. See, Y. Terasaki, H. Tanaka, N. Naganuma, Keijisoshoho (Criminal Procedure), 300 (4th ed., 2015).
- (7) K. Matsuo ed., 2 Keijisoshoho (Criminal Procedure) 264 (1992); H. Tamiya, Keijisoshoho (Criminal Procedure) 384, (2nd ed., 1996); S. Ito et. al, 5 Chukai Keijisoshohou (Annotations on Criminal Procedure) 330 (2nd ed., 1998); K. Matsuo, 2 Keijisoshoho (Criminal Procedure) 90, (2nd ed. with suppl., 1999); K. Matsuo supv., Jokai Keijisoshoho (Commentaries on Criminal Procedure by Its Provisions) 864 (4th ed., 2009).
- (8) D. Yokoi, 3 Shin-Keijisoshoho Chikujo Kaisetsu (Commentaries on the New Code of Criminal Procedure ) 113 (1949); R. Hirano, Keijisoshoho (Criminal procedure) 216, (1958); S. Suzuki, Keijisoshoho (Criminal procedure) 209, (2nd ed., 1990).
- (9) S. Usui, Shoko (Evidence), 144 (2nd ed., 1992); K. Ishii, Keiji Jitsumi Shokoho (Evidence in the Practical Criminal Procedure) 182 (5th ed., 2007). For further literature, see, i.g., T. Miura, Comment on the Sup. Ct. Decision on Aug. 27, 2008, in [H. 20] Saikosaibansho Hanrei Kaisetsu Keiji-hen (Supreme Court Researcher's Comment on Criminal Cases Decided by Supreme Court) 608, at 619 and infra (2012).
- (9) 14 Keishu (Sup. Ct. Crim. Rep.) 1437.
- (10) 62 Keishu (Sup. Ct. Crim. Rep.) 2702. For this particular decision, see, T. Miura, supra note 8, at 608; J. Kojima, "Shijin Sakusei no Nensho-Jikken-Hokokusho (Reports of Combustion Experiments made by a Private Person), in Keijisoshoho Hanrei Hyakusen (A Hundred Selected Cases in Criminal Procedure) 182, (9th ed., 2011).
- (11) supra note 2.
- (12) This decision is also worthy of attention because it elaborately described how to affirm the defendants' mens rea. Much to my sorrow, this comment cannot cover that issue because of the limited period of time and my personal condition. I would appreciate it in advance if the readers generously understand it.

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