Journal of Korean Law | Vol. 15, 397-408, June 2016

Notable Supreme Court Decisions: Criminal Law

1. The Constitutional Court's 2015. 2. 26. 2009 Hun-ma17 et al. Decision. <Adultery Law Is Unconstitutional>

【Facts】

Article 241 of Criminal Law, enacted in 1953. 9. 18. as Law no. 293, is an article that defines adultery a crime and imposes punishment. The defendants, who were accused of adultery, requested for constitutional review for the article above. Some courts have requested the Constitutional Court to review the constitutionality of the article, while others have rejected, making the defendants to directly re-file the petition to the Constitutional Court. Considering both sides, the Constitutional Court has combined the petitions and reviewed the constitutionality of the article above.

【Main Issue】

[1] Nonfeasance

【Holdings】

As public attitude towards social structure, marriage and sex has changed and the awareness of the importance of the right of sexual self-determination has spread widely, there no longer exists consensus on propriety of regulating extramarital affairs through criminal law. Many countries around the world have abolished anti-adultery law, as it is a trend of contemporary criminal law that state power should not intervene even in immoral conduct, if the conduct essentially belongs to private life and the mischief it inflicts on the community is not significant or there is no obvious violation of the specific benefit and protection of the law.

In addition, keeping marriage and family, which is the benefit and protection achievable through the adultery law, cannot be compelled by law and should be left to one's free will and affection. Function of the law as standards of conduct also waned and hardly brings the intended effect of criminal policy, general deterrence effect of crimes and special preventive effect, as conviction rates and social disapproval of extramarital affairs dropped to a significantly low level. Marital chastity duty and the protection of female spouse can be achieved more effectively by civil law such as damage suit and filing for divorce against spouse in misconduct. Furthermore, adultery law rather had been largely misused for abusive purposes such as using adultery as a method of divorce by a spouse who is more liable, or a tool to threat housewives who have temporarily inclined to mischief.

Thus, the article under review is unconstitutional, as it infringes on the people's right of sexual self-determination and freedom of privacy and is against the principle of proportionality.

【Comments】

Prior to the decision above, the Constitutional Court has reviewed constitutionality of Article 241 of Criminal Law several times. In 1990.9.10. 89Hun-ma82 decision, majority decision ruled that the article above did not violate the constitution, with the three dissenting justices, of whom two decided it as constitutionally nonconforming, and one decided it as unconstitutional. The decision stayed the same in the subsequent 1993. 3. 11. 90Hun-ga70 decision and 2001. 10. 25. 2000Hun-ba60 decision. In 2000Hun-ba60 decision, however, it was pointed out that legislators should seriously approach the matter of whether the adultery law should be abolished, and there was one dissenting justice. In 2008. 10. 30. 2007Hun-ga17 decision, four judges decided it as unconstitutional and one judges decided it as constitutionally nonconforming, thus making the opinion of the article unconstitutional a majority opinion, it failed to meet the quorum of 6. Meanwhile, in 1992, the legislation of penal code amendment, which removed the adultery article, was preannounced but was not led to an actual revision.

The decision has a significant meaning in the historical background above as the adultery law is finally declared unconstitutional. The judicial

opinion (five judges) ruled unconstitutional, saying it was against the principle of proportionality, which is presented in [Holdings] above. The decision of unconstitutionality also includes one judge's opinion that the law is unconstitutional for being a blunt instrument of state punishment power in that it gives indiscriminate application of criminal punishment even in the cases that do not have accountability or anti-sociality, in such case that does not have sexual duty of good faith to a spouse any more due to the irrecoverable family breakdown, and another judge's opinion that the law is unconstitutional for being against the principle of proportionality between responsibility and punishment in that it uniformly impose prison sentence although each case differs in nature of crime, and being against the principle of disclosure because of the unclear concept of inducement or forgiveness. On the other hand, two judges dissented from these seven judges' opinion, arguing the law is not unconstitutional.

Nevertheless, the decision above has a significant meaning as it put an end to the debate on the constitutionality of adultery law that has been ongoing in the Korean society for a long time.

2. Supreme Court en banc Decision 2015Do6809. November 12, 2015

【Facts】

D1 as the captain of the Ferry S, D2 as the first officer, D3 as the second officer, and the D4 as the chief engineer, embarked on the ship. While sailing with 443 passengers and 33 crew members including the defendants(D1-D4), ferry S stopped, listed to portside by the accident at 08:52, April 16th, 2014. D2 — when the stability was affected due to the ship having heavily listed to its portside and the healing pump (maintaining the ship's balance) was not functioning — realized that the ship was about to sink and requested rescue at around 08:55 to the Jeju Vessel Traffic Service Center (hereinafter "VTS") . On D1's command, D4 stopped the engine, gave order to engineering crews to exit the engine room, and stood by on the third-floor hallway with them. D1 ordered D3 to make an announcement to passengers to wear a life vest and stand by where they were, and stayed at the wheelhouse with D2 and D3.

Amid such circumstances, on 09:13 D1,D2, and D3 received a communication from Doola Ace sailing nearby that it would come to rescue if they evacuate, another from Jindo VTS that nearby fishing vessels and patrol vessel are on their way to rescue, another on 09:23 to instruct the passengers to prepare for evacuation, another from Doola Ace at 09:24 to evacuate the passengers, another at around 09:25 to the captain to make a decision as quickly as possible whether to evacuate the passengers, and another at 09:26 that the patrol vessel will arrive in 10 minutes.

D3 asked D1 several times "what should we do?" for additional commands, and crews at the information desk sent numerous requests through radio in the wheelhouse to take measures such as evacuation of passengers inside the ship. However D1 ignored such requests without discussing or explaining rescue measures such as abandoning the ship and took no further action; D2 and D3, while they still remained in the wheelhouse, not only did not take any measures to help passengers escape, but also did not raise objections to D1 or mention plans to rescue passengers, etc.

D4 was also aware of the passengers waiting inside the ship following the announcement, but only prepared for his own evacuation process by wearing a life vest, and did nothing to rescue passengers. In fact, most of the passengers followed the announcement from D1, and continued to wait in the hallways and the quarters even after the patrol vessel arrived. At around 09:34 when the Sewol Ferry submerged in water up to the 3rd floor deck and completely lost stability, and at around 9:35 when the maritime police's patrol vessel arrived at the scene, D1 did not even take basic measures such as issuing an abandon-ship order, and crew members including D2, D3, and D4 stood by idly as the situation unfolded. Accordingly, the passengers, etc. — without being aware that the ship was sinking until after golden time (the crucial time period to carry out rescue efforts) was lost — continued to remain inside the ship according to repetitive announcements to remain in their cabins. D9 along with the engineering crew abandoned the ship to board the maritime police rescue boat at around 09:39 without revealing their identity as crew members. The deck crews, including D1, D2, D3, also abandoned ship without revealing they were the captian or crew and got on board the patrol vessel. And even after getting off the ship, they did not inform the maritime police that there

were passengers, etc. waiting inside the ship. As such, even after the rescue force arrived, the passengers, etc. remained inside the ship awaiting instructions that were never given, such as order to evacuate or abandon the ship. It became impossible for the passengers, etc. to get out on their own as the railing on the third floor was completely flooded at around 09:47 and the railing on the fourth floor at around 09:50. Therefore, despite rescue efforts by the maritime police, etc., 303 people drowned to death and 152 people were rescued by the maritime police, etc. but were injured when the Sewol Ferry suddenly tilted or while escaping.

【Main Issue】

[1] elements of omission by the criminal law

① elements for an omission to be meaningful on the aspect of the criminal law,

② elements of omission by willful negiligence

③ intention in omission by willful negligence

④ causal link of ommission by willful negiligence

[2] Whether D1's murder is established, meeting the above-stated elements

[3] Whether D2,D3, and D4's murder is established, meeting the above-stated elements

【Holdings】

[1] ① In order for omission, or failure to take certain action, to have meaning by the criminal law, it should be said that an actor did not take a required action, that he/she was able to take realistically and physically, to avoid fulfilling elements of crime in a situation where there is risk of infringing upon legal interests of others.

② In the so-called crime committed through omission or action where a crime, such as murder, normally committed by an action is committed by an omission, the infringement of legal interests due to an omission and due to an action shall be regarded as equal before the criminal law and thus regarded as the commission of a crime on the following conditions: a subject under the benefit and protection of the law should be unable to protect him/herself from the risk of his/her legal interests being infringed; a party in omission has a legal duty to act to prevent infringement of legal

interests; and a party who failed to act should have control over a situation that causes infringement of legal interests from a protective position and should be able to easily prevent such consequences by performing the duty to act. Provided, that the duty to act herein shall be established by decree, law, and precedence, and shall be anticipated under the good faith principle or social rules or sound reasoning.

③ Purpose or premeditation is not necessarily required to establish intention of crime committed by omission or action, but it will suffice if a person under a legal duty to act in order to prevent consequences resulting from infringement of legal interests — even if having predicted that such consequences can be easily prevented — fails to perform such duty by letting the consequences occur and neglecting the said duty; and the prediction or recognition, etc., whether conclusive or not, of the person under the duty to act may be acknowledged as willful negligence.

④ If having caused death by failing to perform — even if able to — rescue duties individually and specifically required (depending on the form and degree of infringement of legally protected rights, etc.), and remaining idle as the situation unfolds and letting the consequences to occur, then omission is regarded as murder committed by an action, and causal link exists between the omission and the result (i.e., death) if recognizing that the performance of the duty to act would not have resulted in death.

→ (summary) For an omission equivalent to a criinal action, there exists a causal link between the omission and the result if the result would not have happened if the duty was performed.

[2] ①, ② D1 — as the captain playing a crucial role in rescuing passengers, etc. — was obligated to issue abandon-ship order and so forth in order to save the lives of passengers, etc., and had de sure and de facto sole authority to command and control rescue measures such as deciding whether passengers, etc. should abandon the ship as well as its timing and method, and assigning the crew to perform emergency duties. At the time, the passengers remained inside the tiling ship and waited for the rescue force (such as the maritime police) to arrive according to the announcement instructed by Defendant 1. As such, Defendant 1 can be deemed to have been in control of the unfolding situation. It was sufficiently possible to carry out efforts to save the passengers, etc. Above all, issuing an evacuation

order or abandon-ship order at the right time would have been enough to save a number of lives, and such orders could have been easily given using equipment, etc. in the wheelhouse. As such, it can be deemed that D1 could have at least prevented the situation leading to the death of the passengers, etc. due to having continuously waited (rather than escaping) inside the sinking ship according to the announcement. Nonetheless, Defendant 1 got off the ship along with the deck crew and boarded the maritime police's rescue boat without taking measures to help the passengers, etc. waiting inside escape, thereby resulting in the passengers, etc. unable to escape the ship on their own. Hence, Defendant 1's aforementioned omission, which is failure to carry out measures to abaondon the ship, can be deemed equal to murder and the consequences (i.e., death or injury of the passengers, etc.) can be said to be equal to the consequences by an action before the criminal law. (②)

③ Behavior of Defendant 1 can be seen as anticipating and knowingly accepting the fact that the passengers, etc. could die due to his omission; thus, murder by willful negligence due to omission is established.

④ The passengers, etc. would not have died if Defendant 1 had taken rescue measures. Therefore, causal link can be deemed to exist between Defendant 1's omission and the consequences of such omission, i.e., 303 victims excluding Non-Party drowning to death.

[3] ①, ② Although D2, D3, and D4 are executive crew, the fact that they were either with the captain in the wheelhouse or waiting in the hallway on the third floor without any order from the captain to abandon the ship and save the passengers, etc., does not affirm that the Defendants were in a position to control a situation

③ It cannot be easily determined that an abnormal situation was unfolding to the extent that D2,D3 and D4 had to disregard the captain's professional judgment and command and arbitrarily decide to push ahead with measures to abandon the ship for which they may likely be held accountable. Hence, D2, D3 and D4'S wilful negligence cannot be determined.

【Comments】

This decision is about omission(specifically unechte Unterlassung-

sdelikte). The legal principle shown on this decision is neither different from the past nor ground-breaking. However, this decision holds great significance for it has organized the traditional logic and provided standard for distinguishing cases where omission is applicable and ones where omission is not applicable by applying the principle to a specific case.

It is interpreted that the court requires elements of omission as follows; ① circumstances for elements and individual possibility for action, ② guarantor position, possibility of prevention, and equivalence of omission, ③ mens rea, and ④ causation. Under these standards, the majority opinion has concluded that D1 is guilty of murder/attempted murder by omission, but not D2, D3, and D4. Dissenting opinion claims D2 and D3 are also guilty of murder by omission.

The main basis of dissenting opinion is that D2 and D3 are 1st and 2nd mate and therefore have duty to command crews by serving a captain and undertake captain's duty in emergency, and thus their legal status and statutory duty is said to be equivalent to that of captain in protecting the life and body of passengers.

Supreme Court's decision has more than theoretical importance. This case has had major impacts on Korean society because Koreans came to realize that this was not just an accident, but an exposure of a problem inherent in Korean society and the government. Through the ruling on this case, The Supreme Court contributed to stitching up the nation-wide conflict by offering its judgment.

3. Supreme Court en banc Order 2011Mo1839. July 16, 2015

【Facts】

The Prosecutor obtained a warrant ("Warrant 1") to search and seize the office (located in Company J's building) of Party L, the president of Company J, on charge of breach of trust. During the search and seizure, in determining that electronic information in the storage device subject to seizure contained both information related to the indicted charge ("relevant information") and information not related to the indicted charge ("irrelevant information"), the Prosecutor took the storage device to one's own office upon Company J's consent and delivered it to the National

Digital Forensic Center ("NDFC") of Supreme Prosecutor's Office. Subsequently, in the presence of Party L, an investigator at the NDFC duplicated the entire electronic information file in the storage device via imaging onto another storage device ("Disposition 1"); after which the Prosecutor returned the storage device to Company J and re-copied the duplicate onto an external hard drive of one's own without Party L's presence ("Disposition 2"); and discovered information related to a separate charge involving Party L while searching for relevant information in the external hard drive and printed out the said information in document form ("Disposition 3") without Party L's presence. Upon notification from the Prosecutor, the said information related to a separate charge ("separate information") was submitted as evidence by another prosecutor and a warrant to search and seize ("Warrant 2") the external hard drive was obtained, and the separate information was printed out during which Party L's presence was not guaranteed.

【Main Issue】

[1] the means of search and seizure of electronic information

[2] the party's right to be present during the search and seizure process

[3] determining the lawfulness of the whole search and seizure process when part of the process is found unlawful

[4] measures to be taken when information related to a separate charge happened to be found during the search and seizure process

【Holdings】

[1] In principle, an investigation agency's search and seizure of electronic information should be carried out by means of collecting information only relevant to the indicted charge through printing out the information in document form or saving it in file format in a portable storage device, but search and seizure by means of taking the storage device itself and/of hard copies, duplicates via imaging, etc. (hereinafter "duplicates") to investigation agencies, etc. are exceptionally permitted, limited to cases where printing out or copying electronic information is not possible or realizing the purpose of seizing electronic information is considered difficult, and in these exceptional cases printing out the information in document form or copying it in file format from the storage

device itself or duly obtained duplicates constitutes as part of the search and seizure process that took place based on a warrant, the scope of search and seizure of electronic information printed out or copied should be confined to information relevant to the indicted charges.

[2] Even in cases where a search and seizure by means of taking the storage device itself or its duplicate to investigation agencies, etc. are exceptionally permitted, the opportunity to be present during the search and seizure should be granted, and if such measures are not taken, the search and seizure cannot be deemed as lawful unless special circumstances exist, and the same applies in cases where the investigation agency copied and printed out electronic information relevant to the charges indicted from a storage device or its duplicate.

[3] Dispositions taken by an investigation agency during the search and seizure of electronic information i.e., confiscating/imaging/searching storage devices and copying/printing out information onsite, are base on a search and seizure warrant. Even if the investigation agency's disposition during a specific stage of search and seizure is revoked following the end of the overall search and seizure, this does not imply that subsequent searches and seizures will be impeded; rather, the issue lies as to whether the investigation agency should hold onto the seized articles. Therefore, in this case the court should not determine the unlawfulness or revocation of individual dispositions during each stage of the search and seizure, but determine whether to revoke the entire search and seizure depending on the unlawfulness of each stage of search and seizure that is sufficient to regard the entire search and seizure process as being unlawful, and it shall be deemed that only one search and seizure exist. The gravity of unlawfulness in this case should be determined by taking into account the intent of the procedural provisions that were violated, the significance of the violation that took place during the entire search and seizure process, the likelihood of infringing legally protected interests stemming from such violation, etc.

[4] In cases where electronic information relevant to the separate charges are coincidentally discovered during the process of duly searching electronic information relevant to the charges indicted, the investigation agency can duly search and seize such information after having suspended further information searches and having obtained a search and seizure

warrant for separate charges. In these cases proper measures should be taken to protect the interests of the party whom the warrant was served (i.e., ensuring the right to be present during the search and seizure, and providing the list of seized electronic information) unless special circumstances exist, as the said party was responsible for managing the relevant electronic information prior to the initial search and seizure.

【Comments】

The importance of electronic evidence in the field of criminal evidence is increasing everyday. While nore and more new evidential questions are raised due to the tendency aforementioned, existing evidence law based on real evidence cannot suggest any proper solution. The decision confirms the basic legal principles of recent precedents regarding search and seizure (aforementioned [1], [2]) and provides a meaningful standard regarding legitimacy of search and seizure that has illegitimacy in a part of the search and seizure process (aforementioned [3]) and regarding measures for separate information found coincidentally during a legitimate search and seizure process (aforementioned [4]). Based on this principle, the case concluded that even if the process up until the disposition 1 is legitimate, whole search and seizure based on warrant 1 is illegal because there was no right to participate in disposition 2 and 3, and irrelevant information was printed out. Furthermore, request for warrant 2 is based on the above separate information obtained through the illegal method, which makes the warrant not fulfilling the request requirement, thereby making the search and seizure process illegitimate even if the warrant 2 was issued.

There are several minority opinions in the case. The first opionion, on the one hand diverges from the majority opinion by stating that as long as the search and seizure process consists of a series of distinguishable dispositions and each disposition can be tested for its legitimacy, it is possible to decide the revocation by each disposition; but on the other it concurs with the majority opinion in that Disposition 2.3 are deemed unlawful and in the end Disposition 1 is also deemed unlawful, not because the process was carried out unlawfully, but because the investigation agency cannot hold onto the relevant information since it is insufficient enough to be accepted as evidence, and thus there is no need to seize aformentioned information (Separate Opinion as to Disposition 1). The

second opinion states that the legitimacy of the search and seizure process should be determined by 'the electronic information subject to search and seizure' as a whole, and based on this, the search and seizure of relevant information based on Warrant 1 cannot be deemed as seriously illegitimate to the extent that the search and seizure itself be revoked, while whether or not to revoke the search and seizure of irrelevant information based on Warrant 1 should be determined after further examining of the scope (Dissenting Opinion as to Dispositions 1.2.3). The third opinion states that although Disposition 2.3 is deemed illegitimate, this does not lead to conclude that previous Disposition 1 which was legitimately taken should be retroactively deemed illegitimate(Dissenting Opinion as to Disposition 1).

The forms and structures of electronic evidence are changing continuously, and thus, the related legal principle should continuously change. In this situation, this decision can be highly appreciated as a milestone towards a better understanding of legal principles regarding the search and seizure of electronic evidence.

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