

Date of the decision	2008.11.10
Case number	2007 (A) No. 1961
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Title	Decision concerning the meaning of the term "obscene behavior" set forth in Article 2-2, paragraph (1), item (iv) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965)
Case name	Case charged for violation of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance
Result	Decision of the Third Petty Bench, dismissed
Court of the Second Instance	Sapporo High Court, Judgment of September 25, 2007
Summary of the decision	<p>1. The term "obscene behavior" set forth in Article 2-2, paragraph (1), item (iv) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965) refers to vulgar and indecent speech or conduct that is contrary to sexual morality under the socially accepted standards.</p> <p>2. The term "obscene behavior" set forth in Article 2-2, paragraph (1), item (iv) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965), in combination with the phrase included in the main clause of paragraph (1) of said Article, "without due cause,...make another person in a public place or on public transport feel seriously embarrassed or insecure," can be construed reasonably as a term of everyday language, and it is not unclear.</p> <p>3. The accused's act of stalking a female customer at a shopping building and taking photographs of her buttocks in trousers with his cellular phone with a built-in digital camera from a close distance several times can be regarded as an obscene act which may make the victim feel seriously embarrassed or insecure. (There is a dissenting opinion concerning 3.)</p>
References	(Concerning 1 to 3) Article 2-2, paragraph (1) and Article 10, paragraph (1) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefectural Ordinance No. 34 of 1965); (Concerning 2) Article 31 and

Article 39 of the Constitution

Article 2-2, paragraph (1) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965) (Prohibition of Obscene Acts)

(1) No person, without due cause, shall commit any of the following acts which may make another person in public place or on public transport feel seriously embarrassed or insecure:

- (i) touching the person over his/her clothes, etc. or directly;
- (ii) taking a peep at or taking a photograph of the person's body or his/her underwear covered with clothes, etc.;
- (iii) taking a look at or taking a photograph of the person's body or his/her underwear covered with clothes, etc. by looking through the clothes, etc. by means of a camera, etc.;
- (iv) in addition to what is listed in the preceding three items, showing obscene behavior

(2) No person, without due cause, shall take a photograph of another person who is completely or partially undressed at a public bath house, public toilet, dressing room available to the public or any other place where people usually are completely or partially undressed.

Article 10, paragraph (1) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965) (Penal Provisions)

(1) A person who has violated any of the provisions of Article 2-2, Article 6 or Article 9 shall be punished by imprisonment with work for not more than six months or a fine of not more than 500,000 yen.

(2) A person who has habitually violated any of the provisions of Article 2-2, Article 6 or Article 9 shall be punished by imprisonment with work for not more than one year or a fine of not more than one million yen.

Article 31 of the Constitution

No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Article 39 of the Constitution

No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he had been acquitted, nor shall he be placed in double jeopardy.

Main text of the decision

The final appeal is dismissed.

Reasons

Among the reasons for final appeal argued by the defense counsel, FURUTA Wataru, the reason alleging violation of Article 31 and Article 39 of the Constitution lacks a premise because the term "obscene behavior" set forth in Article 2-2, paragraph (1), item (iv) of the Hokkaido Prefecture Ordinance on Prevention of Violent Public Nuisance (Hokkaido Prefecture Ordinance No. 34 of 1965) can be construed to refer to vulgar and indecent speech or conduct that is contrary to sexual morality under the socially accepted standards, and in combination with the phrase included in the main clause of paragraph (1) of said Article, "without due cause,...make another person in a public place or on public transport feel seriously embarrassed or insecure," said term can be construed reasonably as a term of everyday language, and it cannot be deemed to be unclear as alleged by the counsel. The rest are assertions of unappealable violation of laws and regulations or errors in fact finding. The reasons for final appeal argued by the accused himself are assertions of unappealable violation of laws and regulations or errors in fact finding. None of these assertions can be regarded as a reason for final appeal permissible under Article 405 of the Code of Criminal Procedure.

After considering the arguments, however, we decided to make a determination by this court's own authority.

According to the findings of the judgment of prior instance and case records, the outline of the facts of this case is as follows.

The accused, without due cause, on July 21, 2006, around 7:00 p.m., from near the entrance of a shopping building in Asahikawa City to the women's shoe department on the first floor of the building, stalked a female customer (age 27) for at least five minutes for more than 40 meters, and by holding his cellular phone with a built-in digital camera with his right hand down to near his waist, aimed at her buttocks in slim trousers with said camera about one to three meters behind her, took photographs of her buttocks about 11 times. According to the facts mentioned above, the accused's act of taking photographs was obviously vulgar and indecent behavior that is contrary to sexual morality under the socially accepted standards even though the victim did not notice it and the victim was wearing trousers when she was photographed, and it can be said that this act would have made the victim feel seriously embarrassed or insecure if she noticed it. In conclusion, the accused's act falls under Article

10, paragraph (1) and Article 2-2, paragraph (1), item (iv) of the Ordinance. The holdings of the court of prior instance that go along with this reasoning are justifiable.

Therefore, according to Article 414 and Article 386, paragraph (1), item (iii) of the Code of Criminal Procedure, the decision has been rendered in the form of the main text by the unanimous consent of the Justices, except that there is a dissenting opinion by Justice TAHARA Mutsuo.

The dissenting opinion by Justice TAHARA Mutsuo is as follows.

In my opinion, the act with which the accused is charged in this case does not constitute the crime set forth in Article 2-2, paragraph (1), item (iv) of the Ordinance, and therefore the accused should be found not guilty.

1. Article 2-2 of the Ordinance provides as follows: "(1) No person, without due cause, shall commit any of the following acts which may make another person in a public place or on public transport feel seriously embarrassed or insecure: (i) touching the person over his/her clothes, etc. or directly; (ii) taking a peep at or taking a photograph of the person's body covered with clothes, etc. or underwear; (iii) taking a look at or taking a photograph of the person's body or his/her underwear covered with clothes, etc. by looking through the clothes, etc. by means of a camera, etc.; (iv) in addition to what is listed in the preceding three items, showing obscene behavior. (2) No person, without due cause, shall take a photograph of another person who is completely or partially undressed at a public bath house, public toilet, dressing room available to the public or any other place where people usually are completely or partially undressed."

2. As the provisions of the Ordinance clearly show, any "obscene behavior" prescribed in paragraph (1), item (iv) of Article 2-2 must be found to be as "obscene" as the acts prescribed in item (i) to item (iii) of said paragraph. In addition, such "obscenity" must be recognized objectively, irrespective of the perpetrator's subjective points of view. When the accused's act charged in this case is examined from this aspect, I still find a doubt about whether it is appropriate at all to judge the accused's act to be "obscene," and what is more, I cannot find his act to satisfy the definition set forth in the main clause of said Article, "which may make another person feel seriously embarrassed or insecure."

I will explain the grounds for my view separately on the

relevant issues in the sections below.

3. The act of "looking at" another person's "buttocks," and its "obscenity"

The point in dispute in this case is whether or not the accused's act of taking photographs of the female victim's buttocks in trousers with his camera constitutes the crime set forth in Article 2-2, paragraph (1), item (iv) of the Ordinance. Before examining the "obscenity" of the act of taking a photograph of another person's "buttocks," I will examine the act of "looking at" another person's "buttocks," which precedes the act of taking a photograph of the same.

(1) The female victim's "buttocks" in trousers can be "looked at" by anybody who passes her by, and in this respect, the act of "looking at" her buttocks is completely different in nature from the act of "taking a peep of the person's body covered with clothes, etc." prohibited under Article 2-2, paragraph (1), item (ii) of the Ordinance.

(2) Furthermore, in a Japanese dictionary, etc., the term "obscene" is defined as "being filthy and indecent; being vulgar and dirty" (Kojien, sixth edition), and it is construed to mean the state of being crude and coarse in relation to sexuality or excretion. A woman's "buttocks" themselves, if they are covered with clothes, are far less sexual than the area between a woman's thighs or a woman's breasts, and they are also not directly related to excretion.

(3) The act of "looking at" another person's buttocks, when examined with emphasis on the act per se, can be driven by various subjective motives. People may look at another person's "buttocks" exclusively due to their sexual interest, may look at the buttocks while enjoying the beauty of their silhouette, or may look at the buttocks while admiring robust and well-trained muscles in the case of athletes' buttocks. However, such subjective motives cannot be objectively identified unless they can be detected from their appearance. It is true that the act of "looking at another person's buttocks" can be judged to be "obscene" if it means "looking at" the buttocks while putting one's face close to them. However, the "obscenity" of such act comes from "putting one's face close to the buttocks," which should be judged from a different perspective than that for the act of "looking at" the buttocks.

(4) Where the act of "looking at another person's buttocks" per se cannot be found to be "obscene," even if the act continues for a certain period of time, it cannot be construed that the act of "looking at" changes in nature and becomes "obscene" only because of such continuity of the act. Of course, if the perpetrator stalks the subject that he/she "looks

at," and goes beyond the acceptable level, he/she would be accused for having "stalked another person in a manner that may make said person feel insecure or annoyed" as set forth in the second sentence of Article 1, item (xxviii) of the Minor Offenses Act. However, this is another question.

(5) Conclusion of this section

As examined above, the act of "looking at another person's buttocks" per se cannot be found at all to be as "obscene" as the acts listed in Article 2-2, paragraph (1), item (i) to item (iii) of the Ordinance.

4. The relationship between the act of "taking a photograph" and the act of "looking at"

When a person "looks at" a subject, the image of the subject remains in the person's memory, and he/she can reproduce the subject in his/her memory. On the other hand, when a person takes a photograph of something, the person can view the photograph repeatedly. When the act of "looking at" a subject per se cannot be found to be "obscene," the act of "taking a photograph" of the same can never be "obscene." There can be no difference in nature between these acts in terms of "obscenity."

As shown above, under the provision of Article 2-2, paragraph (1), item (ii) of the Ordinance, the act of "taking a peep" and the act of "taking a photograph" are treated equally, and in view of the language of the provisions of the Ordinance, we can imagine that paragraph(1) of said Article of the Ordinance does not find any difference in nature between the act of "looking at" and the act of "taking a photograph." Paragraph (1), item (iii) of said Article regulates the act of taking a photograph of something that is usually invisible, by using a special photographing method, and therefore such act should not be taken into consideration when judging the accused's act. There may be the possibility that the act of taking a photograph of another person's buttocks can be judged to be "obscene" when the perpetrator takes such photograph with a single lens reflex camera, while putting the camera close to the buttocks. However, in such case, what is judged to be "obscene" is not the act of taking a photograph but the manner of taking a photograph.

5. The aspect of an "obscene" act, as an act "which may make another person feel seriously embarrassed or insecure" Even if the accused's act of taking photographs of the victim's buttocks using his cellular phone with a built-in camera constitutes an "obscene" act, in order to allege said act to constitute the crime set forth in Article 2-2, paragraph

(1), item (iv) of the Ordinance, said act must be an "act which may make the victim feel seriously embarrassed or insecure" as prescribed in the main clause of paragraph (1) of said Article. It is not required that the act has actually made the victim "feel seriously embarrassed or insecure," but it must be objectively recognized as an "act which may make the victim feel seriously embarrassed or insecure," irrespective of the victim's subjective points of view. The legal interest to be protected under Article 2-2, paragraph (1) of the Ordinance is "peaceful life" (Article 1 of the Ordinance). The Minor Offenses Act has the purpose of protecting the same legal interest, and some of the acts that are regulated by said Act are similar to the act in question in this case, as seen in the terms such as "a person who has, without due cause, secretly peeped into another person's residence, bathroom, dressing room, toilet or any other place where people are usually undressed" (Article 1, item (xxiii)), and "a person who has stalked another person in a manner that may make said person feel insecure or annoyed" (the second sentence of Article 1, item (xxviii)). A person who has violated the Minor Offenses Act shall be sentenced to a punishment no severer than detention or a petty fine, whereas a person who has violated Article 2-2 of the Ordinance shall be sentenced to imprisonment with work for not more than six months or a fine of not more than 500,000 yen. In view of such a large gap in these statutory punishments, the "act which may make another person feel seriously embarrassed or insecure" prescribed in the main clause of paragraph (1) of said Article should be construed to mean an act which may make another person feel "seriously embarrassed or insecure" in a true sense, compared with the above-mentioned acts regulated under the Minor Offenses Act.

6. The accused's act charged in this case

According to the findings of the judgment of prior instance, the accused stalked the victim for about five minutes for more than 40 meters, and by holding the camera built in his cellular phone with his right hand down near his waist, directed the lens on the camera toward the victim by sense, and took photographs of the victim's buttocks about 11 times about three meters behind her.

Unlike an act that obviously appears to be an act of taking a photograph, i.e. holding a camera, aiming at the subject with one's own eye, and pressing the shutter button, the accused's act of taking photographs cannot be directly recognized from its appearance as an act of taking a photograph, and his manner of taking photographs per se cannot be found to be

"obscene."

Furthermore, in light of the camera and photographing method used by the accused and the distance from the victim, the accused's act of taking photographs of the victim may possibly make the victim feel unpleasant but it cannot be objectively judged to be an "act which may make another person feel seriously embarrassed or insecure."

In addition, as explained in 4 above, there is still a doubt about whether or not the act of taking a photograph of another person's "buttocks" per se is "obscene." The photographs taken by the accused, which are attached to the judgment of prior instance, show the victim's buttocks. However, more specifically, these photographs show the backside of her body, from the middle of her waist to the lower part of her body, from her back to buttocks, etc. They cannot be deemed to have been taken to show "exclusively" the victim's buttocks, and we cannot get the impression that they are "obscene" only at a glance.

7. Conclusion

Based on the examination made above, the accused's act of taking photographs per se cannot be judged to be an "obscene" act set forth in Article 2-2, paragraph (1), item (iv) of the Ordinance, and even supposing that said act can be found to be "obscene" at all, it cannot be regarded as an "act which may make another person feel seriously embarrassed or insecure" prescribed in the main clause of paragraph (1) of said Article. In conclusion, the accused is found not guilty.

Presiding Judge

Justice FUJITA Tokiyasu
Justice HORIGOME Yukio
Justice NASU Kohei
Justice TAHARA Mutsuo
Justice KONDO Takaharu

(This translation is provisional and subject to revision.)