

The Law of Entrapment in Contemporary Japan

By William B. Cleary¹

I. Introduction

The law of entrapment in Japan has become a topic of some importance recently due to a significant Supreme Court decision² involving an Iranian charged with violating the Cannabis Control Law.³

Entrapment is known as "otori sousa" in Japanese, and refers to using a decoy in order to assist the police with an investigation. There are two kinds of entrapment in Japan, one permissible, and the other not.

The permissible type deals with providing the defendant with an opportunity to commit an offense.⁴ The impermissible type is where the authorities instill in the defendant the criminal intent necessary to constitute the required mental element.⁵

As to the types of crimes connected with an undercover agent, they are mainly limited to drug related offenses. Drugs in Japan have been a problem for sometime, and it seems that recently the issue of illicit drug use and trafficking is on the rise.

II. Drugs in Japan

Most people may not visualize Japan as a country with drug problems, and in a Western context, Japan's problems can seem slight. Japan's major problem drugs are methamphetamine.

1 Associate Professor of Criminal Procedure, Iwate University; Attorney at Law (Admitted in New York, California, West Virginia, Guam, and the FSM)

2 Supreme Court Decision, July 12, 2004. (note: In Japan Supreme Court decisions are referred to by the date of the decision, rather than the names of the parties.)

3 Few Japanese are aware that the Cannabis Control Law (tama torishimari ho in Japanese), the first Japanese law ever to restrict the cultivation and possession of cannabis, was passed in 1948 when Japan was not a sovereign nation but still under American occupation, under the supreme command of General Douglas MacArthur.

4 In Japanese, "Kikai teikyo."

5 In Japanese, "Yuuhatu han'i."

Japan's drug problem goes further than its coastline. The *yakuza*, in concert with foreign criminal organizations, have taken their business to the global arena. Tokyo is now more than a hub of international commerce — it is also a hub of international drug smuggling and money laundering, connected to all the drug markets of the world.

The politicians and bureaucrats of Tokyo have made some laudable achievements through stiff anti-drug legislation and enforcement, bringing marijuana, cocaine, and heroin abuse to a minimum.

Estimates by a Japanese Ministry of Education panel in 2001 placed the number of amphetamine users around 2.6 million, and estimated that 15 tons of amphetamines were consumed each year. In 2000 alone, over 19,000 Japanese were arrested on stimulant abuse or trafficking charges, and one in four prison inmates was being held on an amphetamine-related conviction.⁶

Most drug investigations in Japan are carried out by the National Police Agency (*Keisatsu Chō* or NPA), an umbrella law enforcement organization that supervises and coordinated prefectural police operations. The NPA is independent of the Justice Ministry: it is controlled by the Cabinet Office and reports directly to the Prime Minister. Japan also has a Narcotics Control Office (*Mayaku Torishimari Kan* or NCO), a branch of the Ministry of Health and Welfare. Its "Narcotics Agents" are primarily responsible for detection and monitoring, and have only a limited authority to arrest for drug related offenses, and are authorized to carry small firearms.⁷

6 Matsubara Hiroshi, "Nation struggles with drug abuse," *The Japan Times*, November 21, 2001.

7 NARCOTICS AND PSYCHOTROPICS CONTROL LAW (Law No. 14 of March 17, 1953)

Article 54. The Ministry of Health and Welfare shall have narcotics control officers and the Prefecture shall have prefectural narcotics control officials.

2. The numbers of narcotics control officers and the respective numbers of prefectural narcotics control officials in the Prefecture shall be fixed by the Cabinet Ordinance.
3. The necessary matters concerning the qualification of a narcotics control officer and local narcotics control official shall be provided in the Cabinet Ordinance.
4. A narcotics control officer shall be appointed from among the officials of the Ministry of Health and Welfare by the Minister of Health and Welfare, and a prefectural narcotics control official shall be appointed from among the officials of the Prefecture by the Governor of the Prefecture after consultation with the Chief Prosecutor of the District Public Prosecutor's Office in the same level with the district court having jurisdiction over the principal place of duty of the prefectural narcotics control official to be appointed.
5. A narcotics control officer, under the supervision of the Minister of Health and Welfare, and a prefectural narcotics control official, under the supervision of the Governor of the Prefecture, shall perform the duties of a judicial police officer under the provisions of the Criminal Procedure Code (Law No. 131 of 1948) in relation to violations of this Law, the Cannabis Control Law, Opium Law, Stimulants Control Law (Law No. 252 of 1951), Law Concerning Special Provisions for the Narcotics and

Japan's stance on drug consumption, production, and importation has ranged from blind to draconian. Marijuana cultivation, sale, and consumption has been illegal since the first Hemp Control Act of 1948: Paul McCartney found this out the hard way when he was caught with several grams of marijuana at Narita Airport in 1980, and spent two nights in a Japanese jail. Amphetamines have been controlled to varying degrees since 1951: the current Stimulants Control Law calls for sentences of three years to life in prison for the sale of amphetamines or other stimulants.⁸ Sentences of up to fifteen years are given to those convicted of smuggling ecstasy or cocaine.⁹

III. Investigation Agencies

Japan's agency to deal with the drug problem is the Headquarters for the Promotion of Measures to Prevent Drug Abuse (*Yakubutsu Ranyō Taisaku Suishin Hombu* or "The Headquarters"), headed by the Prime Minister and staffed by several members of his cabinet. On 17 January 1997, the Headquarters was formed by the Hashimoto Ryūtārō administration. In May of the following year, it adopted a "Five-Year Drug Abuse Prevention Strategy" to combat domestic stimulant abuse. The Headquarters announced four broad objectives in its counterdrug campaign:

1. To halt drug abuse trends among young people by educating them about its hazards.
2. To strictly control groups engaged in illicit traffic, which consist of organized crime groups and some foreign undesirables, by implementing effective and efficient action against the increasingly sophisticated sales of illicit drugs.
3. To interdict smuggling at the border and promote international cooperation, including support for measures in illicit drug production areas.
4. To support the rehabilitation of drug intoxicated persons and prevent them from relapsing into drug abuse.

Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation (Law No. 94 of 1991), or violations of the provisions of Chapter 14, Part 2 of the Penal Code (Law No. 45 of 1907), or crimes committed due to the addiction to narcotics, opium or stimulants.

6. The judicial police officer under the provision of the preceding paragraph and the other judicial police personnel shall cooperate mutually in the performance of their duties.
7. A narcotics control officer and prefectural narcotics control official may, in case they perform their duties as a judicial police officer, carry a small-sized weapon. (emphasis added)

8 English translation can be found at http://www.unodc.org/unodc/legal_library/index-countries-jp.html

9 Ananova, "Briton arrested after massive ecstasy haul found," *The Guardian*, 1 May 2002.

Under the supervision and guidance of the Ministry of Health and Welfare, narcotics agents perform duties as special judicial police officer in accordance with the provisions of the Code of Criminal Procedure. Narcotics agents jurisdiction is limited to offences and crimes in violations of any one of the five drug-related laws listed below, to crimes related to smoking opium as stipulated in Book 2, Chapter 14 of the Penal Code, and those committed due to the addiction of narcotics, opium or stimulants.

In cooperation with the Customs and the Japan Coast Guard, Narcotics Agents strive to seize drugs smuggled from abroad. Applying the Anti-Drugs Special Law enacted in 1992, they also work to confiscate proceeds derived from illicit drug sales and arrest ringleaders by conducting controlled delivery operations etc. Moreover, making use of their expertise, Narcotics Agents actively investigate the crime of illegal distribution and drug abuse committed by the persons concerned in the field of medical care, and wide-ranging crimes committed by taking advantage of Internet.

Five drug-related laws

- Narcotics and Psychotropics Control Law
- Cannabis Control Law
- Opium Law
- Stimulants Control Law
- Law Concerning Special Provisions for the Narcotics and Psychotropics Control Law, etc., and the Other Matters for Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances Through International Cooperation.

Drug crimes, often called “crimes without victims,” tend to go underground. They are highly international in context and perpetrated with crafty skill. To combat them, Narcotics Agents gather information through a wide range of activities.

Most of the controlled drugs such as narcotics and stimulants are smuggled to Japan mainly from East and Southeast Asia and passed to crime syndicates and other organizations engaged in drug trafficking.

To prevent the illegal inflow of narcotics, stimulants and other controlled drugs, Narcotics Agents actively gather information at international airports and seaports with overseas routes, on addicts and organizations engaged in illegal drug sales.

Using computers, Narcotics Agents gather and supervise information on controlled drugs from the media, anonymous letters, and Internet, reports from citizens and suspects arrested, and intelligence from domestic and foreign investigative agencies, etc. They also collect information on the sales and abuse of uncontrolled drugs in anticipation of future legislation on these drugs.

In order to carry out their duties they are allowed to receive narcotics from anyone.¹⁰ Article 58 (formerly Article 53) of the Narcotics and Psychotropics Control Law has been used to support the theory that undercover operations are permissible and lawful.

IV. Entrapment and the Case Law

There have been several cases dealing with issue of entrapment when it comes to the question of police investigation related to drug offenses. The courts have generally taken the view that the use of undercover agents or decoys to assist in the police efforts to combat drug violations is permissible if certain conditions exist.

A. Case One — Tokyo High Court Decision,

Dated November 26, 1951.

Facts: On the evening of May 11, 1951, Defendant B was arrested on the spot for possession of 0.6 grams of heroin by the judicial police in the City of Yokohama.

However it was clear from the evidence that the judicial police used a trick in order to get Defendant B to possess said drugs.

A female police officer, D, pretended to be a drug addict and asked Defendant B to sell her some drugs. Without knowing the true identity of the buyer, he went to Defendant A to get the drugs and was then arrested in front of his house for possession by the judicial police and the drugs were seized.

The police used this kind of investigation to prevent and suppress crime and it can be said to be necessary. On the other hand, it is a trap to induce one to commit a new crime. The court held that there was no way to avoid the condemnation of this kind of arrest directly after creating the criminal situation in such a bold manner.

And due to Japan's recent acceptance of democracy at the time, the court declared that this kind of technique cannot be allowed under a contemporary state wherein sovereignty rests with the people.

The court further stated that the government holds a sacred trust for the people and the public welfare as is set forth in the preamble to the Constitution and Article 13 thereof. The legislative purpose behind the Stimulant Control Law¹¹ does not stop at the

10 NARCOTICS AND PSYCHOTROPICS CONTROL LAW (Law No.14 of March 17, 1953) Article 58.

(Receipt of Narcotics by Narcotics Control Officer and Prefectural Narcotics Control Official) Notwithstanding the provisions of this Law, a narcotics control officer and prefectural narcotics control official may, in connection with criminal investigation of narcotics crimes, receive narcotics from any person under the permission of the Minister of Health and Welfare.

prevention of a specific danger from occurring, but also address the concerns of the abstract danger to society.

In this case Defendant B was caught in the trap laid by the judicial police. His act was manipulated by the pulling of an unseen string and all measures were taken to seize the stimulant drugs which he had in his possession.

The court noted that it was probably impossible for him to escape from this trap, and it could be said that the act of Defendant B was not a crime because, unless he became aware of the trap, there was no way to objectively remove the abstract previous danger caused by possession of the stimulants.

Defendant A explained his side of the story as follows:

May 7, at 16:00 I went to visit this old woman, A, a friend of my mothers who lived in Yokohama. I told her I have under my pillow, stimulant drugs and that if she knew someone who wanted to buy some, to please let me know. I told they came in two varieties, one packet for 500 yen pack, and one packet for 1000 yen. But, I was not really very enthusiastic and A talked about morphine and heroin, and I knew a little about stimulant drugs, I knew it was dangerous and said I would go buy some if she knew anyone who wanted to buy.

However, thereafter on May 10 at around 6:30 or 7:00 in the evening, when I went to my street shop in order to sell some pants.

A new customer by the name of F, a 22 or 23 year old male, came to visit me, and ask for me to show him some work pants. At that time I remember what A had told me. And I ask him if knew anyone who might be interesting in some drugs.

F said if that were really true, that he would be interested in some drugs.

I told him that the drugs were not here, but that a friend had them, and asked him to please buy some.

When A told me about them I never intended to get involved, but when a person who wanted to buy some appeared I decided to make some money. Business was bad and I need money to live. After discussing the matter with my mother, she went to A's place to get the drugs.

My mother returned in about 30 minutes, but F didn't wait and would return the next day for the drugs. My mom said that these were in 1200 yen packets, so I should sell them for 1500 yen. I thought that I could make a profit of 300 yen.

Around noon on the next day, F came with 1000 yen which I put in my wallet and sold the drugs. He asked me to wait until the 20th for the remainder of the money. I took the 1000 yen that I got from F and added 200 yen out of my pocket and pay it to A.

Around 6:00 or 7:00 p.m. on the 10th, a woman I did not know came to our entrance and

11 Currently referred to as NARCOTICS AND PSYCHOTROPICS CONTROL LAW, (Law No. 14 of March 17, 1953)

asked to buy some drugs.

I took 1000 yen from her and went to A's place early the next morning. A said there was nothing for 1000 yen, but that for 1200 yen I could get the same packet as yesterday, and said I could sell it for 1500 yen. I paid him the 1000 yen and told him I would pay the rest later.

This time the drugs were a white powder packed in a triangle shaped envelope. I understood that it was wrong to sell or possess these drugs.

On May 11th at around 8:30 p.m. I was in the possession of unpacked heroin while the police were on the street in front of my house. Due to illness I had been sleeping at home for the past four or five days.

At around 8:00 p.m. on the 11th a woman who appeared to be staggering, came to my place and asked me to sell some drugs.

I thought she was an addict. I agreed to sell her a 1500 yen packet from the drugs I got from A.

Thereafter, I thought she might be a policewoman.

The court said that, "as we examine these facts, Defendant B, a few day before his arrest, on or about May 7, had discussed with the Defendant A selling drugs and knew that selling and possessing drugs was not allowed.

A few days later, around the 10th, a person by the name of F had asked if he knew of anybody who wanted to buy drugs.

This dealing was at the request of his mother, who introduced A, from whom heroin could be obtained for 1200 yen packets, and sold to F for 1500 yen, and others who want to buy drugs in order to make profit even though he knew it was wrong.

The reason for the arrest in this case was possession that occurred after the female police officer pretended to be an addict and asked to buy drugs, to which Defendant B agreed."

The act of Defendant getting the drugs from A and delivering them to F was one continuous act of possession and the role of the female police officer was to provide the opportunity to commit the offense.

The same defendant was influenced by the acts of the female police officer.

The policewoman did not instigate the possession of a drug by this defendant. She did not direct the place of acquisition, and the defendant was free to refuse to sell to the policewoman. There was no use of force or compulsion. And, the policewoman's action was not the main factor in this case.

Generally, the police protect the lives and property of the citizens and should not encourage or participate in criminal activity.

Unjust use of a drug is not only detrimental to people's health, but in a drug incident like this case, the characteristic easily spreads throughout the social classes, and it is clear to

destroy national healthy and social life and to do serious injury to the public welfare.

The court declared that when this kind of serious offense occurs, quick and thorough investigation is required. Since the crime is usually performed in secret, and there is a not specific victim. However, it is necessary to arrest each criminal in drug cases in order to exterminate the origin of the crime. Also, drug crimes are very difficult to investigate.

The court concluded that, it is not illegal for the police to conduct this type of investigation even though the narcotics law does apply directly to them.

However, the lower court erred in deciding that such an investigation was a violation of the Constitution, and it is not reasonable to hold that the defendant is not responsible for his criminal behavior.

The purpose of the law is not simply to punish an individual offender, but to ensure that drug use does not become widespread in the society. Therefore, any illegal act of possession, manufacturing, distribution, sale, or importation must be dealt with accordingly.

The court reasoned that since the drugs maybe stolen by others and used, any possession that does not fall within an exception to the prohibition must be treated as a serious crime and the use of "unfair" tactics by the police is permissible under the circumstances.

The Defendant was caught in the police trap and the lower court erred when it decided that the crime of illegal possession was not constituted because the danger was abstract in terms of the drugs illegal use. The police trap and their subsequent possession of the drugs was not illegal for Article 35 of the Penal Code provides that acts performed in accordance with laws and ordinances or in carrying on a lawful or proper business are not punishable.

The lower court erred in deciding that the defendant's act of possession did not constitute a violation of the law.

B. Case Two- Tokyo High Court Decision

Dated: July 29, 1952

Case Name: Stimulant Drugs Illegal Investigation

Result: Appeal Dismissed

Issue: Was a crime committed when the investigators planned to arrest someone for a violation of the Narcotics and Psychotropics Control Law when the possession occurred chiefly from a plan created by the police?

Answer : No.

When the police design a plan from the beginning to trick someone into possessing drugs, there is no injury caused to the interest of society, and therefore, no crime has been committed.

The appeal by the prosecution was dismissed by the Court.

Reason:

The court held that the lower court was correct in finding the defendant not guilty of the possession charge. It declared that the defendant's acts did not constitute possession under the law.

First, it must be determined if the lure by the investigator caused the defendant's behavior. The lower court, after examining all of the evidence held that the defendant was not guilty.

According to court records, beginning around September 1950, the defendant was aware that his friend, C, knew someone with a large amount of raw opium, and asked if he knew anyone who wanted to buy some. A person referred to as D (the mole) told the police about this information. Several police officers conferred about this matter, and decided to disguise someone as the buyer of these drugs in order to arrest defendants C and A. As the first step, D went to A and C and told them that he knew someone who wanted to buy some opium. Two detectives pretended to be agents for the buyer and started to negotiate with Defendant A for the purchase of a large quantity of the drugs. They agreed to pay the 30,000 yen that Defendant A wanted, and lured him with encouraging words. Soon thereafter, Defendant C's enthusiasm for the plan faded. And, they told Defendant A, that if it was difficult to obtain the raw opium, that some other kind of drug would be fine. They also repeated the same offer of money, and planned to trick him in the same way.

Thereafter, the defendant received 6 cc of chloride morphine from a co-defendant, and on the 10th of October, but returned the same on the 17th of the same month due to a shortage.

On the 19th A decided that the original quantity was sufficient and went back and got the drugs at around 1 p.m., and was arrested for possession at around 6 p.m. The entire scheme had been planned and executed by the investigators.

The fact that the undercover agents offered to buy other drugs with the raw opium was not available, and offered 300,000 yen loan to purchase the drugs indicates that the

defendant was not guilty for the possession offense.

All the acts of the defendant's, from the beginning to the end, were orchestrated by the police and the arrest was effectuated as result of serious police involvement and trickery.

The judgment of not guilty issued by the lower court is correct.

C. Supreme Court Decision-First Petty Bench

Dated: July 12, 2004

Type of Case: Violation of Cannabis Control Law, the violation defendant incident of Immigration-Control and Refugee-Recognition Act.

Summary: Example by which the sting operation performed for those who are suspected to have planned the secret transfer of hemp was lawful as a search conducted pursuant voluntary measures.

Result: Appeal Dismissed, Defendant allow 120 days for time served during first trial.

The Supreme Court held that according to defense counsel, the defendant did not want to get involved with this transaction related to the sale of hemp resin, and that he was influenced by the undercover operative.

The defendant, a citizen of the Islamic Republic of Iran, had previously served a six-year sentence for a drug offense and had been deported thereafter. He re-entered Japan on a counterfeit passport on December 30, 1999.

The criminal-investigation cooperators were those who became acquainted with the defendant during his penal servitude in the Osaka prison.

His younger brother had been arrest in Thailand due to the defendant's request to supply hashish.

The cooperative had a grudge against the defendant and during 1999, went twice to the Kinki Area Drug Enforcement Agency and requested the defendant be arrested when he attempted to bring drugs into Japan.

On Dec. 26, 2000, the defendant requested by telephone, the cooperative to introduce a dealer of hemp resin. The cooperative replied that if the place was Osaka, that he could help him. Until this telephone call from the defendant, the cooperative was never asked by the defendant to get involved with a transaction dealing with hemp resin.

The cooperative, on the 28th of the same month, informed the Kinki Area Drug Enforcement Agency of the contents of the said telephone conversation above.

The same office decided to conduct an undercover operation because it was difficult to arrest the defendant and gather evidence in any other way, and they didn't know where he resided or places he frequented.

On the 29th a drug enforcement officer from the agency met with the cooperative.

It was decided by the police that on the following March 1, the cooperative would introduce the drug enforcement officer, who would be posing as a dealer, to the defendant at a hotel near Osaka Station, and a room at said hotel was reserved for this purpose. The cooperative contacted the defendant and asked him to come at that time.

On the same March 1, the drug enforcement officer went to the hotel room and told the defendant that he had been introduced by the cooperative and asked if he had anything to sell. The defendant said he didn't have anything today, but said that if he came to Tokyo he could sell his some hemp resin.

The drug enforcement officer refused to go to Tokyo himself, but said he would buy two kilograms of hemp resin if he could bring it to Osaka.

Then, the defendant somehow said he would return to Tokyo the following day and return to the same hotel room with the drugs and the transaction could be completed.

The drug enforcement office offered to pay the transportation expense between Osaka and Tokyo, but the defendant said that this was business and that he would pay for it himself.

On the 2nd of the same month, the defendant returned from Tokyo to the same room carrying 2 kg of hemp resin, and was arrested on the spot and a seizure warrant, that have been previously issued, was executed.

It is clear from the relevant facts above that an undercover investigation had occurred.

An undercover investigation is permitted as a voluntary investigation under Article 197 of the Code of Criminal Procedure when there is suspicion surrounding the subject of the investigation, and when it is believed that the person will commit the offence if he/she is given the opportunity to do so. It is difficult to discover a drug offence using conventional methods, where there is no direct victim. Usually, the person is brought into custody and arrested on the spot when the offense occurs, and drug enforcement or the coopera-

tive facilitate the secret execution of the offense themselves or by an intended third party.

In conclusion, the court held that that this type of sting operation is permissible because the residence of the defendant was unknown and it is difficult to detect where the hemp resin was located. In addition, the defendant had already planned the onerous transfer of hemp resin and was seeking a buyer.

Where the narcotics agent prepares the place for the transaction and indicates the intent to purchase the drugs, said investigation is permissible and the lower court decision is correct and affirmed.

Unanimous decision of the Court.

Conclusion

Will the authorities in Japan continue to use undercover agents in the war against drugs? Will the use of undercover agents and sting operations widen into other criminal areas such terrorist activities? The July 12, 2004, Supreme Court Decision clearly answered the first question with a resounding "YES". As to the second question, it is likely that the use of undercover agents will expand into area where the detection of an offense is made difficult by the secretly inherent nature of such crimes.

Japan has enjoyed a relative safe society compared with other countries and the authorities should be applauded for their efforts and achievements in this regard. In order to maintain a safe society, Japan must increase its efforts to fight crime using legal sting operations.

As to the *otori Sousa*, since the courts have determined that it is a voluntary investigative measure, and does not require a warrant for its effectuation, we will likely see it use expand and increase.

It will be a rare case, indeed, where an innocent person is lured to commit a crime by the authorities.