

J. Y. Interpretation No.238 (March 31, 1989) *

ISSUE: Is a procedural violation of the law in trial proceedings subject to an extraordinary appeal if it does not affect the outcome of the trial decision?

RELEVANT LAWS:

Articles 172, 379, Subparagraph 10, 380, 441, and 447 of the Code of Criminal Procedure (刑事訴訟法第一百七十二條、第三百七十九條第十款、第三百八十條、第四百四十一條及第四百四十七條) ; J.Y. Interpretation No. 181 (司法院釋字第一八一號解釋) .

KEYWORDS:

extraordinary appeal (非常上訴) , plain violation of the law (當然違背法令) , procedural violation of the law; procedure held to be in some way in violation of the law (訴訟程序違背法令) , a procedural violation of the law which apparently does not affect the outcome of the trial decision (訴訟程序違背法令而顯於判決無影響者) , fact finding (事實認定) , applying the law (法律適用) , Resolution of the Joint Meeting of the Civil and Criminal Panels of the Supreme Court (最高法院民刑庭總會決議) .**

* Translated by TSAI Chiou-ming, Head Public Prosecutor.

** Contents within frame, not part of the original text, are added for reference purpose only.

HOLDING: “The evidence should be investigated at trial according to the provisions in this Code” as provided in Article 379, Subsection 10, of the Code of Criminal Procedure (hereinafter the “CCP”) refers to the evidence that serves objectively as the basis for investigating the facts and applying the laws in a trial court. If the court fails to investigate such evidence, the ensuing decision will be deemed as a plain violation of the law. However, for the evidence which does not fall into the abovementioned category, the court’s failure of investigation at trial will not be subject to the provision mentioned above, i.e., no plain violation of the law will result. The failure to investigate such evidence can constitute a procedural violation of the law. However, since such violation provides no grounds for an appeal of the third instance (i.e., an appeal on account of legal grounds) due to the provision of Article 380 of the CCP (which provides that a procedural violation of the law which apparently does not affect the outcome of the trial decision will constitute no grounds for an appeal of the third instance), it will not accordingly

解釋文：刑事訴訟法第三百七十九條第十款所稱「依本法應於審判期日調查之證據」，指該證據在客觀上為法院認定事實及適用法律之基礎者而言。此種證據，未予調查，同條特明定其判決為當然違背法令。其非上述情形之證據，未予調查者，本不屬於上開第十款之範圍，縱其訴訟程序違背法令，惟如應受同法第三百八十條之限制者，既不得據以提起第三審上訴，自不得為非常上訴之理由。中華民國二十九年二月二十二日最高法院民、刑庭總會議決關於「訴訟程序違法不影響判決者，不得提起非常上訴」之見解，就證據部分而言，即係本此意旨，尚屬於法無違，與本院釋字第一八一號解釋，亦無牴觸。

constitute a basis for an extraordinary appeal. Thus, the part “the procedural violation of the law is not subject to an extraordinary appeal, if it in no way affects the trial decision” in the Resolution of the Joint Meeting of the Civil and Criminal Panels of the Supreme Court issued on February 22, 1950, in terms of evidence investigation, is not contrary to the law nor is it contradictory to J.Y. Interpretation No. 181.

REASONING: The mechanism of extraordinary appeal in criminal procedure is designed to ensure the uniform application of the law in trials and to offer relief for the parties who claim that a final trial decision is contrary to the law. Due to its unique nature, an extraordinary appeal does not apply, either by a plain application or that of *mutatis mutandis*, to any CCP provision concerning the appeal of the third instance except for Article 349 of the Code. Article 441 of the CCP provides: “When a decision which is finalized in terms of appeal (i.e., the relief of appeal has run out) is found as the result of a trial to be in violation of the law, the

解釋理由書：非常上訴，係為統一審判上法律之適用，而對審判違背法令之確定判決所設之特別救濟程序，除刑事訴訟法第三百九十四條外，並無準用第三審上訴程序之規定。依刑事訴訟法第四百四十一條規定，「判決確定後，發見該案件之審判係違背法令者，最高法院之檢察長得向最高法院提起非常上訴」。所謂「案件之審判係違背法令」，包括原判決違背法令及訴訟程序違背法令，後者係指判決本身以外之訴訟程序違背程序法之規定，與前者在實際上時相牽連，如判決前之訴訟程序違背法令，致適用法令違誤，而顯然於判決有影響者，為兼顧被告之利益，仍應認為原判決違背法令而有同法第四百

Public Prosecutor General should file an extraordinary appeal against it with the Supreme Court.” The expression “a trial held to be in some way in violation of the law” includes the trial decision and trial procedure in violation of the law. The latter means the trial procedure other than the decision itself is held to be in violation of procedural provisions and in effect renders the trial decision contradictory to the law. For instance, a previous trial proceeding was held to be in violation of the CCP provisions, resulting in an error in the application of law in turn adversely affecting the holding of the decision. In the interest of the accused, such error will be regarded as a case of a trial decision in violation of the law and subject to Article 447, Section 1, Subsection 1, of the CCP, as clarified by J.Y. Interpretation No. 181. In the case where “the evidence should have been investigated during the trial proceedings according to this Code” as provided in Article 379, Subsection 10, of the CCP, both the trial proceeding and the decision derived are plainly contrary to the law. However, “the evidence should be investigated during the trial proceeding

四十七條第一項第一款規定之適用，經本院釋字第一八一號解釋釋明在案。刑事訴訟法第三百七十九條第十款規定：「依本法應於審判期日調查之證據而未予調查者」，其判決當然為違背法令，亦為判決前之訴訟程序違背法令。惟所稱「依本法應於審判期日調查之證據」，指事實審訴訟程序中已存在之證據，而在客觀上為法院認定事實及適用法律之基礎者而言。此種證據，未予調查，同條特明定其判決當然為違背法令。如在客觀上非認定事實及適用法律基礎之證據，既無調查之必要，則為避免訴訟程序延滯，影響公益，自得不予調查，此觀同法第一百七十二條之規定自明。此種未予調查之情形，本不屬於上開第十款之範圍，縱因法院未駁回其調查之聲請，致訴訟程序違背法令，惟如應受同法第三百八十條之限制者，既不得據以提起第三審上訴，自不得為非常上訴之理由。中華民國二十九年二月二十二日最高法院民、刑庭總會議決議關於「訴訟程序違法不影響判決者，不得提起非常上訴」之見解，就證據未踐行調查程序部分而言，即係本此意旨，尚屬於法無違，與本院釋字第一八一號解釋，亦無牴觸。至關於證據未調查致訴訟程序違背法令，是否為同法第三百

according to this Code” refers to the evidence that should be admitted apparently as basis for investigating the facts and applying the law by the trial court. If the trial court fails to investigate such evidence, the decision made will be deemed as a plain violation of the law. Any evidence that does not objectively serve as the basis for investigating the facts or applying the law by the trial court will not be investigated so as to avoid any delay in trial proceedings or otherwise affect the public interest. The holding above is clearly justified with reference to the provision of Article 172 of the CCP (which provides that the trial court may dismiss a motion for an investigation of evidence when the investigation is viewed as unnecessary). Accordingly, the decision not to investigate such evidence does not fall into the application category of Article 447, Section 1, Subsection 1, of the CCP. The decision not to investigate such evidence can constitute a procedural violation of the law. However, since such violation provides no grounds for an appeal of the third instance (i.e., an appeal on account of legal grounds) due to the pro-

八十條之限制範圍，乃個案判斷問題，併予說明。

vision of Article 380 of the CCP (which provides that a procedural violation of the law which apparently does not effect the outcome of the trial decision will constitute no grounds for an appeal of the third instance), it will not accordingly constitute a basis for an extraordinary appeal. The part “the trial proceedings contrary to the law, which would in no way affect the outcome of the trial, are not subject to the review of an extraordinary appeal” in the Resolution of the Joint Meeting of the Civil and Criminal Panels issued on February 22, 1950, in terms of evidence investigation, is not contrary to the law nor does it contradict J.Y. Interpretation Shi-Tzi No. 181. As to whether the failure to investigate evidence results in a violation of the procedural rules, this is a matter to be decided on a case-by-case basis.

Justice Cheng-Tao Chang filed dissenting opinion in part, in which Justice Zu-Zan Yang and Justice Geng Wu joined.

本號解釋張大法官承韜、楊大法官日然與吳大法官庚共同提出一部不同意見書。