COUNTING DOUBLE COUNTING

DESMOND CHYE & RUSSELL VAZ*

I. INTRODUCTION

The law against double counting is seldom taught but remains an important part of the criminal law. It ensures an offender is not punished twice for the same crime. This is especially vital in this day and age where the preponderance of similar offences makes double counting far more likely. In this article, we will attempt to explain the law on double counting; in particular, the dispute over the test for 'same offences' and the effect that *Tan Khee Koon v Public Prosecutor*[1] has had on this dispute.

II. WHAT IS DOUBLE COUNTING?

Double counting is not to be confused with its more famous relative, double jeopardy. As helpfully explained by the Singapore High Court in *Chong Kum Heng v Public Prosecutor,* "[t]he rule against double jeopardy is that a person cannot be made to face more than one trial for the same offence".[2] In contrast, the rule against double counting prevents double punishment for the same offence, where the same set of facts gives rise to liability under more than one written law.

The statutory basis for the prohibition on double counting derives from section 40 of the *Interpretation Act*:[3]

> "Where any act or omission constitutes an offence under 2 or more written laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under any one of those written laws but shall not be liable to be punished twice for the *same offence*." [emphasis added]

---

* LLB (Candidate) (NUS), Class of 2023. All errors and views expressed in this article remain our own.

1 [1995] 3 SLR(R) 404 [*Tan Khee Koon*].
2 [2020] SGHC 21 at para 50.
3 (Cap 1, 2002 Rev Ed) [*IA*].

A plain reading makes it clear that the determining factor in finding double counting is whether the offences charged constitute the 'same offence'. However, as this was not defined in the *IA*, case law is instructive on what it means.

III. THE MEANING OF 'THE SAME OFFENCE' IN CASE LAW

The starting point would be the Singapore High Court case of *Tan Khee Koon*,[4] where the court applied the test in the Malaysian case of *Jamali Bin Adnan v PP*.[5] However, the endorsement of *Jamali*, which is a double jeopardy case, indicates that the definition of the 'same offence' is shared with double counting, thus introducing some complications.

In the area of double jeopardy, the *locus classicus* on what constitutes the 'same offence' is the English House of Lords case of *Connelly v Director of Public Prosecutions*.[6] In *Connelly*, there were two proposed approaches to finding similarity. Lord Morris adopted a more generous approach where the similarity need only be substantial.[7] On the other hand, Lord Devlin took a stricter view that the offence must be exactly the same in law because "legal characteristics are precise things and are either the same or not".[8] However, it is unclear from the remaining Law Lords' judgements which approach is to be preferred.

The most authoritative court to have weighed in on the conflicting approaches is the Privy Council (on appeal from Singapore). In *Wee Harry Lee v Law Society of Singapore*,[9] a solicitor was subject to two disciplinary proceedings for violations under section 84(2) of the *Legal Profession Act*.[10] The provisions violated were:

> "[The solicitor] (a) has been convicted of a criminal offence, implying a defect of character which makes him unfit for his profession; or (b) has been guilty of … grossly improper conduct in the discharge of his professional duty …"[11]

---

[4] *Tan Khee Koon*, *supra* note 1 at para 105.
[5] [1986] 1 MLJ 162 [*Jamali*]
[6] [1964] AC 1254 [*Connelly*].
[7] *Ibid* at 1306.
[8] *Ibid* at 1340.
[9] [1983–1984] SLR(R) 768 (PC) [*Harry Lee*].
[10] (Cap 217, 1970 Rev Ed); that provision has since been redesignated as Section 83(2) of the *Legal Profession Act* (Cap 161, 2009 Rev Ed Sing), where it remains otherwise unchanged.
[11] *Harry Lee*, *supra* note 9 at para 2.

The first proceeding arose from (b), which resulted in a two-year suspension, while the second proceeding founded on (a) resulted in a further two year suspension.

Their Lordships ultimately allowed the solicitor's appeal against the further suspension, holding that the second proceeding was "an abuse of the disciplinary process".[12] In coming to their conclusion, the court endorsed both approaches proposed in *Connelly*, but stopped short of deciding which approach was to be preferred as the result would be the same regardless. Even if the case fell outside the narrow scope of Lord Devlin's test, it would still be covered "by the alternative form of relief which [Lord Devlin] favoured as mitigating the rigour of his strict test".[13] This is likely the rule in *Reg v Elrington*,[14] where Cockburn CJ held that "[w]here a person has been charged with an offence (whether he be acquitted or convicted), he cannot be again tried "on the same facts in a more aggravated form"".[15] This leaves only two possible conclusions: the offences were the same using either Lord Morris' or Lord Devlin's test, or that the *Elrington* approach was used instead.

Assuming it was the former, it would appear impossible for their Lordships to have used Lord Devlin's approach in *Harry Lee* if we were to examine the offences charged closely. This is because the emphasis in (a) is on the lawyer's character (in other words, propensity for *future* professional misconduct) for which his criminal conviction is evidence thereof whereas (b)'s emphasis is on the lawyer's *actual* act of wrongdoing. These are two conceptually distinct requirements that would certainly fail the exact similarity test. Therefore, in reaching the conclusion that they did, their Lordships must have considered the offences substantially—but not exactly—similar.

It is also interesting to note that the subsequent Singapore High Court case of *Lim Keng Chia v Public Prosecutor*[16] interpreted *Harry Lee* to stand for the former, as evidenced by the learned judge's description of the case:[17]

> "In *Wee Harry Lee*'s case, the Privy Council was asked to determine whether the two successive sets of disciplinary proceedings brought against the appellant were based on the same instance of misconduct; and if so, whether the second set of such

---

[12] *Ibid* at para 27.
[13] *Ibid.*
[14] 1 B. & S. 688 [*Elrington*]; cited in *Connelly*, *supra* note 6, at 1202.
[15] *Ibid* at 696.
[16] [1998] 1 SLR(R) 1.
[17] *Ibid* at para 8.

> proceedings amounted to a violation of the doctrine of autrefois convict and acquit or at the very least, an abuse of the disciplinary process provided for in the Legal Profession Act (Cap 217). The Privy Council answered these questions in the affirmative. It must be pointed out, however, that the Privy Council in *Wee Harry Lee*'s case was faced with two sets of the same sort of proceedings."

The use of the phrase "same sort of proceedings" implied the learned judge's belief that it was the similarity between the offences that was critical to the outcome. It would thus be reasonable to believe that in the future, the courts will not treat *Harry Lee* as a case applying the rule in *Elrington*.

We return to the decision in *Tan Khee Koon*, which began the controversy by citing *Jamali*. Ironically, this citation is the closest thing we have to a resolution. The test in *Jamali* involves an inquiry into whether essential ingredients of the offences are the same. In *Jamali*, the offences were held to be different because the essential ingredients of armed robbery differed from that of an offence under the *Malaysian Internal Security Act 1960*.[18] "[A]rmed robbery can be regarded as an aggravated form of theft causing fear of instant death or hurt on the intended victim voluntarily by means of a deadly weapon" while "the essential ingredients under the Internal Security Act 1960 are simply control of firearms and/or ammunitions without lawful authority".[19] This bears a striking similarity to Lord Morris' test, which the court in *Jamali* treated as the majority judgement without making any mention of Lord Devlin's test. This signals an implicit endorsement of Lord Morris' test over Lord Devlin's by the court in *Tan Khee Koon*, albeit in *obiter*.

However, as the citation in *Tan Khee Koon* was merely *obiter* and no court has yet to make a definitive pronouncement, there regrettably remains some element of uncertainty as to whether Lord Morris' substantial similarity approach is truly preferred.

IV. *TAN KHEE KOON*'S SIGNIFICANT ADDITION TO DOUBLE COUNTING

Double counting arose as an issue in *Tan Khee Koon*. The case involved an accused who tried to steal $20,000 but was only able to obtain $4,500. He was charged with two separate offences: the first for obtaining $4,500 ("1st Offence") and the second for attempting to obtain $20,000 ("2nd

---

[18] *Jamali*, *supra* note 5 at 166.
[19] *Ibid* at 167.

Offence"), with the former sum naturally being a component of the latter sum.[20] Although one concerned an attempt and the other concerned the actual commission of an act, statutory provisions prevent one from being punished with both.[21] The court therefore had to decide the following: can obtaining $4,500 be considered the same offence as attempting to obtain $20,000 if the $4,500 was a part of the $20,000?

The answer was simple: the 2nd Offence did not consist of an attempt of the 1st Offence alone. It consisted of a series of attempts; only one of which was committed. The learned judge approached the problem in an ingenious manner. His Honour broke down the 2nd Offence into 2 'sub-offences', *ie*, (1) obtaining $4,500, and (2) attempting to obtain $14,740. In the result:

(a) 1st Offence: Obtaining $4,500

(b) 2nd Offence: Obtaining $20,000 = Obtaining $4,500 ('Sub-offence 1') + Attempting to obtain $15,500 ('Sub-offence 2')[22]

It becomes clear that Sub-offence 1 is identical to the 1st Offence.[23] In order to avoid double counting, it became necessary to separate the offending 'sub-offence' from the remaining portions.[24] However, the nature of the 2nd Offence prevented that, causing it to be struck out entirely.[25]

Tan Khee Koon represents a significant addition to our legal firmament. A single offence can now be considered an amalgamation of several smaller 'sub-offences'. Double counting is now far easier to successfully plead, especially with infinitely divisible elements like money.

Unfortunately, this rule introduces uncertainties into the already fractious law on double counting. Chiefly, how far can an offence be broken down? Such ramifications can only be answered by the courts.

V. CONCLUSION

Given the importance of double counting as a statutory safeguard against punitive punishment, the considerable uncertainty over what is required to find it is highly undesirable. The endorsement of

---

[20] *Tan Khee Koon*, *supra* note 1 at para 100.
[21] *Ibid* at para 122.
[22] *Ibid* at paras 114-117.
[23] *Ibid* at para 115.
[24] *Ibid* at para 116.
[25] *Ibid* at para 119.

Jamali's essential ingredient test in *Tan Khee Koon*, albeit in *obiter*, suggests it will be used going forward. Being the practical embodiment of Lord Morris' substantial similarity test, it would appear that the debate is somewhat provisionally resolved. However, while resolving one uncertainty, *Tan Khee Koon* has created another: the court's method of breaking down offences bypasses the need for offences to be holistically similar. As such, it would be in the interest of the courts to demarcate the boundaries of *Tan Khee Koon*'s rule to avoid stretching the concept of similarity too far and conclusively decide which test for similarity they prefer.