

## Case Note

RECENT DEVELOPMENTS IN INTOXICATION, PRIVATE  
DEFENCE AND RIGHT TO COUNSEL

*Tan Chor Jin v PP*  
[2008] 4 SLR 306

The Court of Appeal in *Tan Chor Jin v PP* recently took the opportunity to clarify the criminal law in relation to the defences of intoxication and the right of private defence. The case also discussed the nature of the constitutional right to counsel, in particular whether and how it could come to an end. The treatment of this area was particularly thorough, with the Court of Appeal reviewing case law from a number of foreign jurisdictions before coming to its conclusion. This case note seeks to highlight the developments in the law brought about by *Tan Chor Jin v PP* and to comment on their significance.

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**I. Factual summary**

1 Tan Chor Jin, nicknamed the “one eyed dragon”, was a former head of the secret society Ang Soon Tong. He and the deceased (“Lim”), were involved in illegal betting activities and Tan alleged that Lim owed him some RM500,000. According to Tan, Lim not only refused to pay but told Tan that he would ask someone to “settle with him”. Tan regarded this as a threat and purchased a Beretta handgun purportedly for self-defence.

2 On 15 February 2006, Tan was drinking with his friends late at night and was driven by one of them to Lim’s home. Tan claimed he wanted to persuade Lim to resolve their differences. Lim refused to see Tan. Tan returned again later that morning armed with a knife and the Beretta. He also had a bag with him which he used to contain valuables ransacked from the flat. Tan tied up Lim, his wife, daughter and maid, and confined them in separate rooms. He later confronted Lim, alone, in

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the study room. Six shots were fired before Tan left the flat, warning Lim's wife not to call the police as he made his getaway.

3 Tan would later argue that he had wanted to have "talks" with Lim, but Lim attacked him with a chair and Tan, in his panic and in self-defence, misfired the first shot before his mind went blank. Tan chose to appear in person during the trial after discharging his counsel before the Preliminary Inquiry and refusing representation by assigned counsel. In addition, despite confirming at numerous occasions throughout the High Court trial that he did not wish to have legal representation, just prior to closing submissions, he asked the trial judge "If I say I need a lawyer how?"

4 The trial judge rejected Tan's defences of intoxication, accident and the right of private defence and found Tan guilty of using an arm with the intent of causing physical injury under s 4(1) read with s 4(2) of the Arms Offences Act.<sup>1</sup> He sentenced Tan to death.

5 On appeal, counsel for Tan further raised a number of procedural issues, including that Tan had been deprived of his constitutional right to counsel. The appeal was dismissed. This case note will focus on three areas which the Court of Appeal paid particular attention to, namely, the defences of intoxication and the right of private defence, as well as the right to counsel.

## II. Intoxication

6 The Court of Appeal set out the relevant statutory provisions in ss 85 and 86 of the Penal Code,<sup>2</sup> the comparable common law position in England as set out in *Director of Public Prosecutions v Beard*,<sup>3</sup> and the Indian counterpart of ss 85 and 86 in the Indian Penal Code 1860 (Act 65 of 1860).<sup>4</sup> The court rightly observed that the English and Indian positions were materially different from the provisions in the Singapore Penal Code and focused their analysis on the Penal Code provisions.<sup>5</sup> It proceeded to address the relationship between the three provisions under the Penal Code under which a defence of intoxication could be invoked. These are: (a) s 85(2)(a) – where a third party maliciously or negligently causes the accused to become so intoxicated that the accused did not know his act to be wrong or did not know what he was doing; (b) s 85(2)(b) – where the accused is so severely intoxicated as to be "insane" at the time of the alleged crime; and

1 Cap 14, 1998 Rev Ed.

2 Cap 224, 1985 Rev Ed.

3 [1920] AC 479.

4 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [13]–[15].

5 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [16].

(c) s 86(2) – where intoxication, however caused, prevents the accused from forming the requisite *mens rea*.<sup>6</sup> The effect of the first and last provisions would be the acquittal of the accused, and as for the second, “section 84 of [the Penal Code] and sections 314 and 315 of the Criminal Procedure Code shall apply”.

7 Running through these three provisions, it becomes apparent that the defence of intoxication deals with a spectrum of wrongful behaviour and exonerates the commission of such behaviour to different degrees. Yet, it has frequently been argued<sup>7</sup> or implied<sup>8</sup> that “insane” under s 85(2)(b), the second of the provisions, is the same as “unsoundness of mind” described in s 84, which provides a complete defence to any offence. It is submitted that *Tan Chor Jin v PP*<sup>9</sup> (“*Tan Chor Jin*”) correctly made clear that the courts will regard the two concepts as different not only because: (a) the causes of these respective conditions are different – the former being severe alcohol or drug-induced intoxication and the latter an abnormality of the mind;<sup>10</sup> and (b) the former may be transient or temporal whereas the latter is a permanent condition,<sup>11</sup> but because it preferred to “afford statutory defences greater interpretative latitude provided the interpretation adopted dovetail[ed] ... with both the letter and the intent of the provisions concerned”.<sup>12</sup>

8 At this juncture it is noted, however, that although the two concepts of “insanity” and “unsoundness of mind” may be different in the senses described by the Court of Appeal, there is little *practical* difference between them and criminal practitioners should probably not be too troubled with the way the two concepts have been distinguished. The evidence required to prove insanity and unsoundness of mind will inevitably be medical evidence or evidence of the surrounding acts or behaviour of the accused to show that at the time of the alleged offence, the accused’s state of mind was such that he did not know that what he was doing was wrong or he did not know what he was doing. The touchstone – of being in a state of mind such that one did not know what one was doing was wrong or did not know what one was doing – is the same. The similarity between the two concepts is further confirmed

6 Adapted from Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 25.3.

7 See, for example, Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at paras 25.26–25.27.

8 See, for example, *PP v Tan Ho Teck* [1987] SLR 226 at 238; *PP v Jin Yugang* [2003] SGHC 37 at [86].

9 [2008] 4 SLR 306.

10 Lee Kiat Seng, “Case Notes: *Public Prosecutor v Tan Ho Teck*” [1990] SAclJ 332 at 335, approvingly cited in *Tan Chor Jin v PP* [2008] 4 SLR 306 at [23].

11 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [25].

12 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [25].

by s 86(1) of the Penal Code. Section 86(1) equates s 85(2)(b) with s 84, and makes the penal consequences flowing from a finding of either unsoundness of mind or insanity the same. These consequences are described in s 315 of the Criminal Procedure Code.<sup>13</sup>

9 Despite its thoroughness, one point the Court of Appeal did not address in *Tan Chor Jin* was the *meaning* of “insane” – was this the same as “insanity” in *M’Naghten’s Case*,<sup>14</sup> where the House of Lords held that “to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”? Or was “insane” to be regarded as a type of unsoundness of mind which was caused by intoxication and could be transient? It is submitted that what the Court of Appeal meant in *Tan Chor Jin* was the latter for a number of reasons.

10 First, the court had earlier made clear that the Singapore Penal Code was unique and comparison with the English position may not be useful. This was an instance where the English definition of “insanity” would not be useful and interpretation of “insane” in context of the Penal Code is preferable to importing foreign concepts of, for instance, a “disease of the mind”. Second, the court’s holding that “insane” was not the same as “unsoundness of mind” was premised on descriptive factors (cause and persistence) and certainly cannot be read to mean that these concepts were entirely different animals. Finally, the definition of insanity in *M’Naghten’s case* is *prima facie* unsuitable to the defence of intoxication as clarified by *Tan Chor Jin*. In *R v Sullivan*, the House of Lords broadened the concept of “disease of the mind” in *M’Naghten’s case* to include psychomotor epilepsy which had so severely impaired the mental faculties of reason, memory and understanding that the accused did not know what he was doing, or if he did know, that he did not know that it was wrong.<sup>15</sup> However, this broadening was still insufficient to encompass intoxication, which was a transitory effect caused to the body by an external factor such as drugs or alcohol.<sup>16</sup> This

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13 Cap 68, 1985 Rev Ed. Section 315(1) of the Criminal Procedure Code provides that if but for the incapacity of the accused, the act committed would constitute a criminal offence, then the court “shall ... order that person to be kept in safe custody in such place and manner as the court thinks fit and shall report the case for the orders of the Minister”, and under s 315(2), the Minister “may order that person to be confined in a mental hospital, prison or other suitable place of safe custody during the President’s pleasure”.

14 (1843) 10 CI & Fin 200; 8 ER 718.

15 *R v Sullivan* [1984] AC 156 at 172.

16 *R v Sullivan* [1984] AC 156 at 164–165; R D Mackay & Markus Reuber, “Epilepsy and the defence of insanity: Time for change” [2007] Crim LR 782 at 790–791.

has been recognised by *Tan Chor Jin* as an instance of insanity under s 85(2)(b).

### III. Private defence

11 The right of private defence is a deceptively simple creature when in actual fact it has historically been a rather confusing defence, due in no small part to the 11 sections in the Penal Code touching on the topic. In fact, the “right of private defence” is the only subsection (comprising ss 96–106) in the chapter on “general exceptions” in the Penal Code. Nevertheless, despite having a subsection devoted to it, the general right of private defence was mistakenly conflated with Exception 2 to the offence of murder under s 300 of the Penal Code (“Exception 2”) by the trial judge. He had relied on *Soosay v PP*,<sup>17</sup> a case on Exception 2, as an embodiment of the elements of the right of private defence. The Court of Appeal commented that this was inappropriate and distinguished Exception 2 from the general right of private defence because the effect of the former was to reduce an offence of murder to that of culpable homicide not amounting to murder and it was applicable even when the act of killing was disproportionate to the threat, whereas the latter would completely exonerate the accused and also required a proportionate response.<sup>18</sup>

12 Another interesting point dealt with by the Court of Appeal was whether someone who was the initial aggressor could ever rely on the right of private defence as a general exception. On the facts, the Court of Appeal agreed with the trial judge that Tan, being the aggressor who was armed with a knife and pistol, had no right of private defence against Lim even if Lim had tried to use a chair to attack Tan in an attempt to defend himself.<sup>19</sup> However, the Court of Appeal was hesitant to say that the initial aggressor could *never* avail himself of the right to private defence. Instead, in a manner designed to provide guidance to future cases, the Court of Appeal set out six conjunctive requirements gleaned from all the sections in the Penal Code relating to private defence that must be satisfied in order to establish the general exception of the right to private defence to the body. In summary, these six requirements are as follows:

- (a) Save where the defender is defending himself against an act of a person of unsound mind (s 98), the defender must show that an offence affecting the human body has been committed or is reasonably apprehended (s 97).

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17 [1993] 3 SLR 272.

18 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [41].

19 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [44].

- (b) The defender must show that there was no time to seek the protection of public authorities (s 99(3)).
- (c) If the defender was the aggressor at the material time, it is *prima facie* less likely that he had a right of private defence.
- (d) The defender must prove that, at the time of acting in private defence, he reasonably apprehended danger due to an attempt or a threat by the victim to commit an offence affecting the body (s 102).
- (e) Where the defender has killed the victim, he has to prove that the offence which occasioned the exercise of the right of private defence was one of those listed in s 100.
- (f) The defender must prove that the harm caused to the victim was reasonably necessary in private defence (s 99(4)).

13 The author agrees with all the six requirements save the third one concerning the defender being aggressor. Unlike the rest, this requirement finds no support in the provisions of the Penal Code. The Court of Appeal also pointed out that, in laying down this requirement, Singapore was departing from the Indian position (this was a case where comparison was suitable because of the identical language in the Indian Penal Code), which makes hardly any room or no room at all for an aggressor to invoke the right of private defence.<sup>20</sup> In contrast, the trial judge (impliedly) preferred the Indian approach. He commented that:<sup>21</sup>

[I]t is *inconceivable* for an assailant to have a right of private defence against someone legitimately exercising his right of private defence against the assailant ... If it were otherwise, the right of private defence would swing back and forth infinitely between victim and assailant like a perplexed pendulum. [emphasis added]

14 The author agrees with the trial judge and would further submit that the Indian position is the only one that is supportable on principle. Quoting from *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860*,<sup>22</sup> the Court of Appeal had earlier agreed with the following underlying principles of the right of private defence:

[When] an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted

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20 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [43], citing *Halsbury's Laws of India* vol 5(1) (LexisNexis Butterworths, 2006) at para 105.172.

21 *PP v Tan Chor Jin* [2007] SGHC 77 at [99].

22 *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code 1860* vol 1 (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) at pp 371–372.

with the necessity of averting an impending danger *not of self creation* ... The right of private defence is *purely preventive and not punitive or retributive*. The right of self-defence is *not a right to take revenge nor is it a right of reprisal*. It does not permit retaliation. It is a right which in fact is meant to ward off the danger of being attacked but the danger must be so imminent, potent and real that it cannot be averted otherwise than by a counter attack ... [emphasis added]

15 In my view, a person is an aggressor where he has through his conduct created a situation of danger, *ie*, by definition he cannot avail himself of the right of private defence. Since the right of private defence is premised on *prevention*, an aggressor is necessarily excluded from enjoying such a right. Whatever ensues, he can no longer rely on the right of private defence to *justify* his behaviour. The Court of Appeal was, therefore, setting the bar too low in stating that an aggressor was *prima facie* less likely to have the right of private defence. It is unlikely that raising the bar would deprive deserving accused persons of a defence. If the situation was truly an exceptional one, there will be other defences in the Penal Code which may excuse the aggressor's conduct, such as the defences of sudden fight or provocation. Additionally, whether or not someone may be considered an "aggressor" is a finding of fact which may allow the courts some leeway in granting the right of private defence to deserving persons, for instance, in the rare situation where the person who initiated the encounter cannot reasonably be regarded as an "aggressor".

16 The Court of Appeal in *Tan Chor Jin* appeared to be unduly concerned with the possibility of exceptional factual circumstances. Not content with the six requirements as they were, the court cautiously stated that *notwithstanding* these guidelines, whether or not there was a right of private defence "ultimately depend[ed] on all the relevant circumstances of the case".<sup>23</sup> This seems unnecessary, in light of the comprehensive guidelines, and perhaps somewhat unsatisfactory, since it suggests (although probably unintentionally) that there may be some factual situations where it would be permissible to go against the express provisions in the Penal Code.

#### IV. Right to counsel

17 Although the Court of Appeal answered the question of whether Tan's constitutional right to counsel had been violated based on the unique factual circumstances (the court found that Tan's alleged request for a lawyer was a mere tentative mention of the possibility of appointing a lawyer to represent him and not a request for legal

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23 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [46].

representation),<sup>24</sup> it also considered the issue of whether there were circumstances in which the right to counsel can be validly denied to or waived by an accused. For ease of reference, Art 9(3) of the Constitution of the Republic of Singapore provides for the right to counsel as follows:<sup>25</sup>

Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and *shall be allowed to consult and be defended by a legal practitioner of his choice*. [emphasis added]

18 The Court of Appeal disagreed with the view expressed by the learned author of *Criminal Procedure*<sup>26</sup> that the right to counsel was an absolute right although the time at which it became exercisable was qualified; rather, it took the view that the right to counsel could not be said to be “untrammelled or enduring and/or unwaivable”.<sup>27</sup> This must be correct because rights do not exist in a vacuum but interact with other rights. For instance, although a person has a right to be defended by a legal practitioner of his choice, it is apparent that the chosen legal practitioner may decline to act for the accused person. The key to the right to counsel is the phrase “shall be allowed”, meaning that the State or any of its organs cannot prevent the accused person from exercising his right to counsel.

19 This is analogous to the phrase used in the equivalent provision in s 20(6) of the Constitution of Jamaica 1962, which is that every person charged with a criminal offence “shall be permitted to defend himself ... by a legal representative of his own choice”. In *Frank Robinson v The Queen*,<sup>28</sup> a case cited in *Tan Chor Jin*, the Privy Council held at 966 that the word “permitted” was important and meant that the accused person must not be prevented by the State in any of its manifestations from exercising his right to counsel. The Privy Council then went on to find that the judge in that case had done all he could to secure for the accused counsel of his choice. Similarly, in the present case, the trial judge had also done his part by confirming twice with Tan on the first day of trial that Tan did not need a lawyer. Tan had before the Preliminary Inquiry discharged his counsel and confirmed at least twice before the trial that he did not want a lawyer. The trial judge could not be said to have prevented Tan from exercising his right to counsel in the circumstances.

20 However, this was not the approach the Court of Appeal took to arrive at its eventual conclusion. The court instead examined the case

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24 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [51].

25 Constitution of the Republic of Singapore (1999 Rev Ed) Art 9(3).

26 Tan Yock Lin, *Criminal Procedure* vol 1 (LexisNexis, 1996) at paras 254–300.

27 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [54].

28 [1985] 1 AC 956.

law from Malaysia, Jamaica, Canada and the US and gleaned the principle that lay at the foundation of the case law (despite the difference in wording of the right to counsel in the Constitutions of all these countries); namely, that whether or not the right to counsel had been violated rested on the “universal concept of fairness to the accused”.<sup>29</sup> This involved balancing the rights of and prejudice to the accused, on the one hand, and to the other parties involved in the proceedings (including the witnesses, the Prosecution and the court) on the other.<sup>30</sup> The court chose not to propound a specific test as the Canadian and US courts had done to determine if the right to counsel had been waived by the accused, but chose to take a “more broad-based, fact-centric approach” using this foundational principle of fairness.<sup>31</sup>

21 The author agrees with this approach. First, it does away with the academic problem of determining whether the right to counsel had been “waived” by the accused, which would in turn probably spawn further academic enquiry into whether the right to counsel may be resurrected despite having earlier been waived. Rather, the attention of the court is focused on the more fundamental question of whether the absence of counsel had led to unfairness to the accused, taking into consideration the other parties involved in the proceedings. Second, this balancing approach is more persuasive than one based on interpreting the words of the Constitution. This is because the Constitution is not an ordinary statute and it is the spirit rather than the letter of it that demands compliance. Finally, a balancing test would be more suitable than one based on a list of compulsory requirements in this context as it would lead to more convincing reasoning based on application of the stated principle to the particular facts of the case at hand.

22 Nevertheless, however fine a principle, the key is in its application – the author agrees with the eventual decision of the Court of Appeal, that Tan had not been deprived of his right to counsel, but in arriving at its conclusion, the court appears to have placed too much emphasis on answering the question of whether or not allowing Tan legal representation would have made a practical difference.

23 The court correctly analysed the record and observed that the trial judge had not only confirmed twice on the first day of trial that Tan did not need a lawyer but had taken pains to ensure that Tan was following the proceedings. The court also considered that bringing a lawyer on board at the stage in the proceedings when Tan made his (apparent) request for counsel would have engendered confusion. This was because the trial was over and the matter was at the stage of closing

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29 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [68].

30 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [55] and [68].

31 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [68].

submissions. If Tan's would-be counsel were allowed to cross-examine the witnesses all over again, this would be unfair to the Prosecution which had already presented its case and also to the witnesses who had already been subject to cross-examination by Tan. Thus far, the court's reasoning cannot be faulted. However, the court also commented that there would not be "any real accompanying benefits to Tan" had he been granted counsel just prior to closing submissions.<sup>32</sup> And in response to counsel for Tan taking the position that had he been engaged earlier by Tan he would only have prepared closing submissions and would not have sought leave to adduce any further evidence or to call any other witnesses, the court further said:<sup>33</sup>

On the evidence that was presented before this court, it was difficult to maintain the position that it would have made a critical difference for Tan had he been represented by counsel for the purposes of making closing submissions at the trial. In the circumstances, we were not at all persuaded that fairness to Tan had been compromised due to his lack of legal representation in the court below.

24 These comments do not contribute to the discussion of whether there had been unfairness to Tan and were additionally speculative in nature. Although the court was probably right that having counsel make closing submissions on Tan's behalf without more would not have made much of a difference, such comments were not entirely appropriate and may open the court to criticism because the right at stake was a constitutional one, rather than a simple right of civil procedure.

## V. Conclusion

25 In conclusion, *Tan Chor Jin* is an important case in the criminal law landscape because it clarifies the framework to deal with the defences of intoxication and private defence as well as lays down a principled approach to deal with the question of when an accused's right to counsel may cease. Nevertheless, with regards to the defence of intoxication, the meaning of "insane" has not been made absolutely clear although it is submitted that the Court of Appeal's reasoning suggests it to be closely related to the concept of "unsoundness of mind". As for the right of private defence, the author disagrees with the court's implication that an aggressor may in certain situations be able to avail himself of the right of private defence. Finally, although the issue of whether the accused was deprived of his right to counsel raised many interesting theoretical questions, the issue was resolved rather anti-climatically on a factual point. The court, however, in speculating that there would be little benefit to Tan had he been granted the opportunity

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32 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [70].

33 *Tan Chor Jin v PP* [2008] 4 SLR 306 at [70].

to appoint counsel to make closing submissions on his behalf, may have opened itself to criticism by implying that a constitutional right may be less important than practical outcomes.

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