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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2021-409-178
[2022] NZHC 670

BETWEEN	BARRY VAN DER HAVEN Applicant
AND	NEW ZEALAND CUSTOMS SERVICE Respondent

Hearing: 17 February 2022

Appearances: T J Mackenzie for Appellant
B J Hawes and A M Harvey for Respondent

Judgment: 11 May 2022

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 11 May 2022 at 10.00 am

Registrar/Deputy Registrar
Date:

Introduction

[1] The appellant, Barry van der Haven, had two matters before the District Court. The New Zealand Customs Service (Customs) had, through a charging document, charged Mr van der Haven with an infringement offence under s 364(1)(a) Customs and Excise Act 2018 (the Act) for making an import entry that was erroneous in a material particular (the s 364 offence).[1] Secondly, Customs charged Mr van der Haven under s 371(1)(a) of the Act for knowingly doing an act, or omitting to do an act, intending to evade the payment of any duty on goods (the s 371 offence).[2]

[2] The s 364 offence is an infringement offence as defined in s 2 Summary Proceedings Act 1957, for which a conviction must not be entered when a defendant is found or pleads guilty.[3] The s 371 charge is subject to the Criminal Procedure Act 2011 (CPA) — it is commenced by a charging document identifying the offence[4] and, upon a defendant being found or pleading guilty, the Court may convict the defendant.[5]

[3] The fact that a conviction is not entered on the s 364 offence assumes potential significance for the reasons discussed below at [35]–[46].

[4] In the District Court, Mr van der Haven entered a guilty plea to the s 364 offence, and the Judge imposed a fine of $500 together with a costs order of $130.[6] Mr van der Haven entered a special plea of previous conviction under s 46 CPA in respect of the s 371 charge.[7]

[5] The Judge ruled the special plea of previous conviction was unavailable in relation to the s 371 offence (the judgment).[8]

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1 Customs and Excise Act 2018, s 364(1)(a); maximum penalty a fine not exceeding $1,000.
2 Customs and Excise Act 2018, s 371(1)(a); maximum penalty five years' imprisonment or a fine not exceeding the greater of $10,000 or three time the value of the goods to which the offence relates.
3 Customs and Excise Regulations 1996, reg 83A and sch 3; Criminal Procedure Act 2011 [CPA], s 375(1).
4 CPA, s 14.
5 CPA, s 114.
6 *New Zealand Customs Service v van der Haven* [2021] NZDC 24566 [the Judgment] at [24].
7 At [2].
8 At [48].

[6] Mr van der Haven appeals this decision on the basis it involved an error of law.

Outcome

[7] In this judgment, I grant Mr van der Haven leave to appeal but dismiss the appeal.

[8] I find that ss 45 and 46 CPA do not directly apply and that wider double jeopardy principles, while applicable, do not in this case require a stay of the prosecution of the s 371 offence.

[9] In particular, in the reasons that follow, I find:

(a) Mr van der Haven was not "convicted" of the s 364 infringement offence in the sense the term "convicted" is used in ss 45 and 46 CPA ([35]–[46]);

(b) he was nevertheless subject to a complete adjudication on the s 364 offence, so that the common law principles of double jeopardy apply ([47]–[54]);

(c) the aspect of double jeopardy principles under ss 45–47 CPA, as identified in recent Court of Appeal judgments, focused on "common punishable acts" does not directly inform this case ([55]–[56]);

(d) when a second charge is based on the same facts as the first charge, but is charged as a more serious (aggravated) offence, the relevant principle (both at common law and under the CPA) is the ascending scale principle ([57]–[86]);

(e) the ascending scale principle applies to the charges against Mr van der Haven as the s 371 charge contains an added statement of intention ([87]–[102]); and

(f) notwithstanding the application of the ascending scale principle, it is not an abuse of process, on the part of the prosecutor, to proceed on the s 371 charge, and the proceeding on that charge ought not to have been stayed ([103]–[109]).

[10] The decision in the District Court will therefore be updated, albeit for different reasons.

Application for leave to appeal

[11] Mr van der Haven applies for leave to appeal under s 296 CPA. If leave is granted, Mr van der Haven seeks a finding that a special plea was available in respect of the s 371 offence. Leave may be granted to appeal under s 296(3) CPA because questions of law arise in relation to the determination of the s 371 charge.[9]

[12] Responsibly, Mr Harvey for the respondent did not oppose the granting of leave to appeal. Leave will be granted.

Facts

[13] All financial sums in this judgment are in New Zealand currency unless otherwise indicated.

[14] Mr van der Haven applied for a customs number in 2019, prior to importing a 2013 Ferrari California (the car) from Singapore in September 2020. He paid for the car in three payments. 'Payment' of $30,262.14 was made to TradeIt. Two further 'representation fees' of $29,974.98 and $72,017.50 were paid to Shawn Huang (the co-director of TradeIt).

[15] Mr van der Haven engaged a customs broker to lodge the car under import entry 46663747.

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9 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73 at [26]–[27].

[16] On importation, the car's "Value for Duty" was entered as $28,537 (SGD $27,000) which led to GST payable of $4,557.82 and an import entry transaction of $48.44.

[17] Customs made further enquiries and established the car was originally listed for sale at USD$86,000, with the description that it was in flawless condition. No apparent mechanical issues were present. This was despite claims to the contrary as justification for the low price originally given to Customs.

[18] When interviewed, Mr van der Haven acknowledged making three separate payments for the car. He identified them as 'purchase' and 'representation' fees. Mr van der Haven said he would expect to pay around $150,000 for the car in New Zealand. He had subsequently insured it for $180,000. Mr van der Haven stated he was aware of the 15% GST payable on the purchase price of goods imported into New Zealand. Mr van der Haven also stated the true purchase price was approximately $130,000, and he was aware GST was being paid only on the 'purchase' fee and not the other 'representation' fees.

[19] The car had been undervalued by $103,728.00 which resulted in an underpayment of GST in the amount of $15,557.70.

The charges

[20] The charges against Mr van der Haven, with their associated wording, were:

Section	**Statutory wording**	**Charging document wording**
364(1)(a)	**Offences in relation to erroneous or defective entries, etc**	
	A person commits an offence if the person –	That the defendant, did make import Entry 46663747, that was erroneous in a material particular
	(a) makes an entry under this Act that is erroneous or defective in a material particular;	Particulars: One (1) 2013 Ferrari California was imported into New Zealand ex Singapore on 15 September 2020. Defendant being the importer and owner of the vehicle, made an erroneous

		entry undervaluing the Ferrari by $103,728.00 on the entry.
371(1)(a)	**Defrauding Customs revenue** A person commits an offence if the person knowingly does any act, or omits to do any act, intending to – (a) evade the payment of any duty on goods; …	That the defendant did import a 2013 Ferrari California from Singapore and knowingly undervalue it, intending to evade the full payment of duty. Particulars: One (1) 2013 Ferrari California was imported into New Zealand ex Singapore on 15 September 2020. Import Entry 46663747 was lodged with a Value for Duty of NZD$28,527.00 using only one invoice of SGD$27,000. Two subsequent invoices of SGD$27,000 and SGD$65,000 identified the vehicle being undervalued by NZD$103,728.00 and result in $15,557.70 of underpaid revenue.

"Entry of imported goods" is provided for in Part 3, Subpart 3, ss 74–77 of the Act. "Duty" is defined in s 5 to include duty imposed on goods under the Act — that includes import duties (provided for in Part 3, Subpart 5).

The double jeopardy provisions in the CPA — ss 45–47

[21] Section 45 CPA provides for special pleas in relation to previous conviction and acquittal, and to pardons.

[22] Sections 46 and 47 CPA relates to pleas of previous conviction and previous acquittal respectively. Section 46 provides:

> **46 Previous conviction**
>
> (1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—
>
> (a) the same offence as the offence currently charged, arising from the same facts; or
>
> (b) any other offence arising from those facts.
>
> (2) Subsection (1) does not apply if—

(a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and

(b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

The District Court judgment

Was there a "conviction" on the s 364 charge?

[23] Judge Kellar addressed whether there was a previous "conviction" in terms of s 46 CPA arising from Mr van der Haven's guilty plea. His Honour accepted Mr Mackenzie's submission that, notwithstanding the fact s 364 of the Act creates an infringement offence, the charge reached the point of final adjudication, amounting to a "conviction" under s 46 CPA, once a fine was imposed on the charge.[10] His Honour followed his previous decision in *New Zealand Transport Agency v Minakshi*.[11] In *Minakshi* his Honour discussed a contrary conclusion reached by the High Court in *Overington v Police*, and appeared to not apply *Overington*.[12]

Did the s 371 offence arise from the same facts as the s 364 offence?

[24] The Judge then addressed whether the s 371 offence arose from the same facts as the s 364 offence, therefore allowing a special plea to be made.[13] The Judge referred to the relevant authorities including *Rangitonga v Parker* (*Rangitonga*), *Filitonga v R* (*Filitonga*), *O'Reilly v Chief Executive of the Department of Corrections* (*O'Reilly*), and *Mitchell v Police* (*Mitchell*).[14]

[25] The Judge noted the thrust of s 371(1)(a) of the Act was on acts or omissions with the intended purpose of "evading the payment of the duty".[15] He observed the

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10 Judgment, above n 6, at [23].

11 *New Zealand Transport Agency v Minakshi* [2017] NZDC 23413 – reported as *New Zealand Transport Agency v Gabani* [2018] DCR 502 [*Minakshi*].

12 *Overington v Police* HC Auckland CRI-2006-404-125, 12 February 2007. See also *Wellington City Council v McCready* [1995] DCR 536.

13 Judgment, above n 6, at [25]–[48].

14 At [25]–[33]. *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796 [*Rangitonga*]; *Filitonga v R* [2017] NZCA 492, [2017] NZAR 1667 [*Filitonga*]; *O'Reilly v Chief Executive of the Department of Corrections* [*O'Reilly*] [2018] NZCA 313, [2018] NZAR 1327 at [18]; and *Mitchell v Police* [2021] NZCA 417 [*Mitchell CA*].

15 At [44].

focus of offending under s 364(1)(a) of the Act is only on an error being entered (via an import entry), with no intention required. Under s 364(1)(a), it is not a defence to say the error was unintentional. The Judge pointed to the broader array of acts and omissions that went to establishing the appellant's intention, such as the structure of the purchase, the claim of mechanical defects, the initial advertisement of the car for USD$86,000, and the admissions made by the appellant during interviews.[16]

[26] The Judge concluded the two offences involved different core punishable acts. The common fact of incorrectly recording the value for duty (ie the purchase price) did not mean the offences shared core punishable acts.[17] Judge Kellar accordingly found the special plea under s 46 CPA to be unavailable to Mr van der Haven.

Appellant's submissions

"Conviction"

[27] Mr Mackenzie first submitted the Judge had correctly treated Mr van der Haven as having been "convicted" of the s 364 offence. This was, in his submission, indicated for three reasons:

(a) the use of "conviction" or its cognates elsewhere in the CPA indicates the term has been used ambiguously in the CPA;

(b) a broader interpretation of "conviction" would be consistent with the common law principles relating to double jeopardy; and

(c) it would also be consistent with provisions of NZBORA.

[28] Mr Mackenzie submitted that, for these reasons, the Judge correctly treated the outcome of the s 364 offence as a conviction for the purpose of s 45 CPA.

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16 At [45]–[46].
17 At [48].

The special plea

[29] Mr Mackenzie submitted the Judge then erred in his consideration of the core punishable acts. He submitted it was correct to characterise the core punishable act of the offence under s 371 as the intended evasion of the duty. On the other hand, it was artificially narrow, merely focussing on the offending within the bounds of the provision, to consider the core punishable act of s 364 to be an error in misstating the purchase price. Just because the s 364 offence has no element of intention, and the s 371 offence would be proved on additional evidence, does not mean the provisions are incapable of addressing the same core punishable act. Mr Mackenzie drew an analogy with murder and manslaughter charges, noting that an excessive focus on the elements of a charge would allow prosecution under both arising out of the same incident, as there will be different elements. Mr Mackenzie suggested the issue may be tested by considering the consequence had Mr van der Haven pleaded guilty to the s 371 charge — in that event, in his submission, Mr van der Haven could no longer have been prosecuted on the s 364 charge.

[30] Mr Mackenzie submitted the District Court had incorrectly rejected the special plea, and the appeal must therefore be allowed.

Respondent's submissions

"Conviction"

[31] Mr Harvey, for Customs, submitted a guilty plea or finding on any infringement offence does not amount to a conviction under s 46 CPA. This, he submitted, is not altered by the proceedings being commenced (as here) by a charging document. He identified s 114 CPA as the provision which clarified (against a background of previously conflicting authority) the process by which a "conviction" comes into being under the CPA. It does not arise by guilty plea or a finding of guilt alone. A "conviction" requires the supplementary act of the Court convicting the defendant under the CPA. As Mr van der Haven could not be convicted on the s 364 (infringement) offence, in Mr Harvey's submission, Mr van der Haven had no "previous conviction" to which the special plea under s 46 CPA could attach.

The special plea

[32] Mr Harvey submitted the approach of the Court of Appeal in *Mitchell*, as it applies to this case, supports the Judge's decision. Despite the common fact in the present case of the entered undervaluation of the car, the core punishable acts differ between the charges. The single core punishable act of the s 364 offence, in his submission, was the making of a materially erroneous import entry. Conversely, the core punishable 'act' of the s 371 offence lay in the (intentional) omission of required documents (at the same time as providing a single invoice for NZ$28,527.00). The s 371 charge would be established by proving deliberate omissions, while providing the single (NZ$28,527.00) invoice. The thrust of the s 371 charge, in Mr Harvey's submission, is on the intention of the defendant. Ascertaining this intention requires an analysis of multiple acts and omissions as the prosecutor particularises them — in this case including the structuring of the car's purchase (coupled with interview admissions), the claims pertaining to the car's mechanical defects, and the original advertisement for the car.

[33] Mr Harvey submitted Mr van der Haven's omissions here were at the core of the offence committed under s 371 — while Mr van der Haven filed one entry (which identified the value for duty purposes and payment of the correct sum of GST) he deliberately held back (that is he omitted to supply) two invoices. As the focus of s 371 is not restricted to acts, but extends to omissions, the omissions here constituted part of the "core punishable acts or omissions".

[34] Mr Harvey submitted the Judge was therefore correct to find the special plea was unavailable and that the appeal should be dismissed.

"Conviction" used ambiguously in the CPA?

[35] The references to "conviction" in ss 45 and 46 CPA are not expressly limited to 'formal' convictions, in the sense that a conviction arises under s 114 CPA.

[36] The terms "conviction" or "convicted", as used in the CPA, are said by Mr Mackenzie to have varying meanings. Mr Mackenzie cited two provisions of the CPA which he suggested should not be read as being limited to 'formal' convictions. First

he referred to s 376 CPA, which creates the concept of a deemed conviction (where a Court proceeds to sentence a defendant or make an order under ss 108 or 110 of the Sentencing Act but does not at the time make an order convicting the defendant). Secondly, Mr Mackenzie referred to the right of appeal against conviction under s 229 CPA. He submitted that if the terms "convicted" and "conviction" in s 229 are interpreted to refer to a 'formal' conviction, then the person found guilty of an infringement offence, that has been the subject of a charging document under the CPA, could not appeal, because the s 364 (infringement) offence cannot result in a conviction.

[37] I do not find anything in those two provisions (ss 229 and 376 CPA) to require that the term "conviction", or its cognates, be taken to refer to a concept other than the 'formal' conviction that arises in a proceeding under the CPA.

[38] The fact that, under s 376 CPA, a defendant is deemed to be convicted in the prescribed circumstances reinforces, rather than cuts across, the consistency of use of "conviction" and its cognates in the CPA. Precisely because the defendant has not been made the subject of a formal order of conviction, Parliament has provided for the defendant's deemed conviction.

[39] Similarly, that the right of appeal under s 229 CPA provides for a person "convicted of an offence" to appeal "against conviction" does not advance Mr Mackenzie's submission as to the term "conviction" and its cognates being used with a broader meaning in parts of the CPA. A person who is found guilty in respect of an infringement offence is not without a right of appeal by reason of s 229 CPA. Section 21 Summary Proceedings Act 1957 (SPA) sets out the procedure for infringement offences. Section 21(8)(d)(i) SPA provides that the CPA applies with any necessary modifications. Accordingly, for the purposes of an appeal against a finding of guilty on an infringement offence, the appeal is to be treated as if it were an appeal against conviction.[18]

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[18] See, for instance, *Warren v Police* [2014] NZHC 2258 at [9]; and *Larason v Police* [2021] NZHC 653 at [6].

[40] The meaning of the provisions of the CPA (in accordance with s 5(1) Interpretation Act 1999) is to be ascertained from the CPA's text and in the light of its purpose.

[41] I find that nothing in the text of the CPA suggests there is an ambiguity in the use of the term "conviction" and its cognates. The references all appear to be to a 'formal' conviction. That leaves for consideration the two other matters that weighed with the Judge in interpreting "conviction" in a broader sense, namely:

(a) double jeopardy principles apply where the offence with which the defendant is charged has already been the subject of a complete adjudication against them by a Court of competent jurisdiction; and

(b) s 6 NZBORA requires the term "conviction" to be interpreted in the broader common law way so as to be consistent with s 26 NZBORA.[19]

[42] These two considerations could logically affect the otherwise clear textual meaning of "conviction" as it appears in the CPA only if that interpretation of the legislation would defeat or otherwise work against established double jeopardy principles. For the reasons that follow (below from [47]), I do not find that to be so. I therefore conclude the term "conviction" and its cognates, as they appear in ss 45–46 CPA, have the meaning of a 'formal' conviction, consistently with their use throughout the CPA.

[43] The fact the s 364 infringement offence did not result in a "conviction" in terms of the CPA (notwithstanding that it was made the subject of the charging document) does not mean that double jeopardy principles have no application. All it means is that the statutory codification of the plea of autrefois convict under the CPA does not apply. There still remain the double jeopardy principles as developed at common law. As discussed below at [60]–[86], it is those which fall to be applied in a situation not directly covered by ss 45–47 CPA.

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[19] Judgment, above n 6, at [22], adopting *Minakshi*, above n 11, at [43].

[44] This conclusion is reinforced by the recognition of double jeopardy principles contained in s 26(2) NZBORA, which provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[45] At first blush, the use of the term "convicted" in s 26(2) NZBORA might suggest the appellant's argument meets the same difficulty as arises from the use of the term "convicted" in the CPA. However, nothing in s 26(2) NZBORA, or other provisions of that Act, requires the term "convicted" to be read as being used in precisely the same sense as in the CPA. The NZBORA provision serves to recognise the double jeopardy rule long established at common law and is not to be read down by the way a particular term (whether "convicted" or otherwise) is used in other legislation.

[46] It has previously been found that an infringement offence cannot give rise to a (criminal) conviction, because the infringement procedure is civil in nature rather than criminal — such was found in relation to an infringement offence under the Land Transfer Act 1988 by Harrison J in *Overington v Police.*[20] While Mr Mackenzie invited me to find *Overington* to have been incorrectly decided, it is unnecessary that I determine that matter. Here, Customs elected to commence the proceeding in relation to the s 364 charge by filing a charging document under the CPA. Section 14(1) CPA provides that the proceeding thereby constituted a criminal proceeding. *Overington* (whether or not correctly decided) is distinguishable. Mr van der Haven pleaded guilty to the charge in a criminal proceeding. Therefore, while I have found Mr van der Haven has not been "convicted" of the s 364 offence in terms of the CPA, it remains the case that the s 364 offence was the subject of a criminal charge.

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[20] *Overington v Police*, above n 12, at [15], adopting *Wellington City Council v McCready* [1995] DCR 536 at 542.

Double jeopardy — the requirement of a complete adjudication

[47] Double jeopardy principles were established at common law. Martin Friedland, in his text *Double Jeopardy*, states that "[a]n analysis of the history of double jeopardy shows that the concept is as old as the common law itself." [21]

[48] The principles involved gave rise to the special pleas of *autrefois acquit* and *autrefois convict*, which have been rendered in more modern times (as in the initial provisions (ss 358–359) of the Crimes Act 1961 and in the current provisions of the CPA) as "previous acquittal" and "previous conviction".

[49] The underlying principle, long settled, has been explained on the basis that no person shall be placed in peril of legal penalties more than once upon the same accusation.[22] A more recent edition of *Broom's Legal Maxims* explains the principle thus:[23]

> The maxim *nemo debet bis vexari pro una et eadem causa* expresses a great fundamental rule of our criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the special pleas *of autrefois acquit* and *autrefois convict*.[24] When a criminal charge has been once adjudicated upon by a Court of competent jurisdiction that adjudication is final, whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a subsequent prosecution for the same offence, whether charged with or without matters of mere aggravation, and whether such matters relate to the intent with which the offence was committed or to the consequences of the offence:[25] Provided that the adjudication be by a Court of competent jurisdiction, it is immaterial whether it be upon a summary proceeding before justices or upon a trial before a jury.[26]

[50] More recently, in the Privy Council's judgment (on appeal from Jamacia) in *Richards v R*,[27] the Law Lords reviewed what adjudicative outcome is required at

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21 Martin L Friedland *Double Jeopardy* (Clarendon Press, Oxford, 1969) at 5 — a summary of double jeopardy in English law is rehearsed at pp 5–15. See also *Twice in Jeopardy* (1965) 75 Yale L.J. 262.

22 See, for instance, *Connelly v Public Prosecutions* [1964] AC 1254 (AL) [*Connelly*] per Lord Morris at 1312, citing *Broom's Legal Maxims* (2nd ed) (1848) pp 257–258.

23 R G Chaturvedi *Broom's Legal Maxims* (11th ed, Universal Law Publishing, New Delhi, 2011) at 247. See also, *Smith v Hickson* [1930] NZLR 43 (SC, Full Court) per Ostler J at 56.

24 2 Hawk PC, c.35, sec.1; c.36, sec.10.

25 *R v Miles* (1890) 24 QBD 423, 431 [*Miles*].

26 *Miles*, above n 25; *Wemyss v Hopkins* LR 10 QB 378, 381.

27 *Richards v R* [1993] AC 217 (PC).

common law (and also by the Constitution of Jamacia) to support a plea of previous conviction. Lord Bridge, delivering the judgment of the Privy Council, stated:[28]

> It is common ground between the parties and their Lordships readily accept as correct that section 20(8) of the Constitution of Jamaica is simply intended to embody the common law doctrines of autrefois convict and autrefois acquit. The central issue raised by the appeal is whether a plea of autrefois convict can be sustained by anything less than evidence that the offence with which the defendant stands charged has already been the subject of a complete adjudication against him by a court of competent jurisdiction comprising both the decision establishing his guilt (whether it be the decision of the court or of the jury or the entry of his own plea) and the final disposal of the case by the court by passing sentence or making some other order such as an order of absolute discharge.

[51] The principle identified in *Richards* was recognised by Randerson J in *R v Stagg* as of equal application in New Zealand.[29]

[52] Our courts have recognised that the predecessor provisions to ss 45–47 CPA — ss 358–359 Crimes Act — have been declaratory of the underlying principles established at common law.[30]

[53] The outcome required at common law for double jeopardy to apply is accordingly one where the offence with which the defendant has been charged, and which they assert to be in the nature of a previous conviction (or acquittal), must have been the subject of a complete adjudication by a Court of competent jurisdiction, both as to guilt and as to sentence or other outcome.

[54] Here, the s 364 offence had such an outcome, when the Judge fined Mr van der Haven and ordered him to pay costs.[31]

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28 At 222.

29 *R v Stagg* HC Auckland T69/98, 29 May 1998 at 5–6.

30 See, for instance, *R v Brightwell* [1995] 2 NZLR 435 (CA) at 437–438; *R v Stagg*, above n 29 at [4]. See, also, Richard Mahoney "From "The Same Offence" to "The Same Facts*"* — The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal" [2013] NZ L Rev 171 at 175 [Mahoney "Same Offence" article].

31 Judgment, above n 6, at [24].

Double jeopardy — a wider principle

[55] It is well established that outside the boundaries of the strict autrefois rule, protection against double jeopardy is provided by a special application of the abuse of process rules.[32] The "strict autrefois rule" (at common law), as recognised in *Connelly v Director of Public Prosecutions* (*Connelly*), limited the plea to offences which are substantially the same.[33] In *Connelly*, however, it was found the common law recognised a wider double jeopardy principle — that there should be no sequential trials for offences on an ascending scale of gravity, enforcing that protection through staying the proceeding on the second charge.[34] In New Zealand, the Court of Appeal recognised that wider principle also has application when the more serious charge is pending and the lesser charge is still before a court.[35]

[56] Where a defendant seeks a stay on abuse of process grounds, the formal burden of proof falls on the defendant to show there is something so unfair and wrong that the court should not allow the prosecutor to proceed with what is in all other respects a regular proceeding.[36] Under the *Connelly* principle that burden is reversed. The United Kingdom Law Commission in its 2001 report *Double Jeopardy and Prosecution Appeals* referred to the *Connelly* principle thus:[37]

> **The *Connelly* principle**
>
> 2.16 … As Lord Devlin explained, where a person has once been tried in respect of particular facts, it is prima facie oppressive to put that person on trial a second time in relation to those same facts, because it will normally be the case that the second charge could and should have been dealt with at the same time as the first. …

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32 United Kingdom Law Commission *Double Jeopardy and Prosecution Appeals* (LC 267, March 2001), at 2.14 [UK Law Commission Report 2001].

33 *Connelly*, above n 22. See also *R v Beedie* [1997] 3 WLR 758, [1998] QB 356 (CA). See also (New Zealand) Crimes Act 1961, s 359. See also Richard Mahoney, above n 30 [Mahoney "Same Offence" article] at 175.

34 At 1332; and *R v Beedie,* above n 33, at 362.

35 *R v Lee* [1973] 1 NZLR 13 (CA).

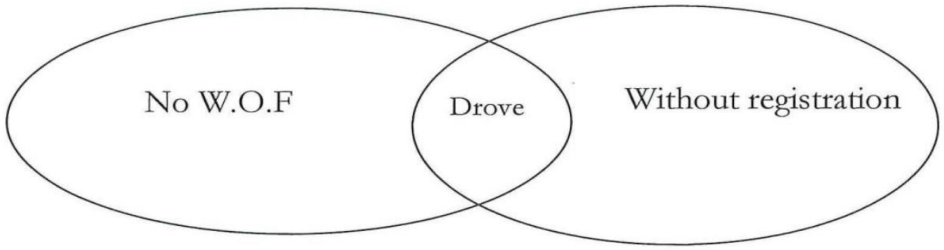
36 UK Law Commission Report 2001, above n 32, at 2.14, citing *R v Horseferry Road Magistrates' Court,* ex parte Bennett [1994] 1 AC 42.

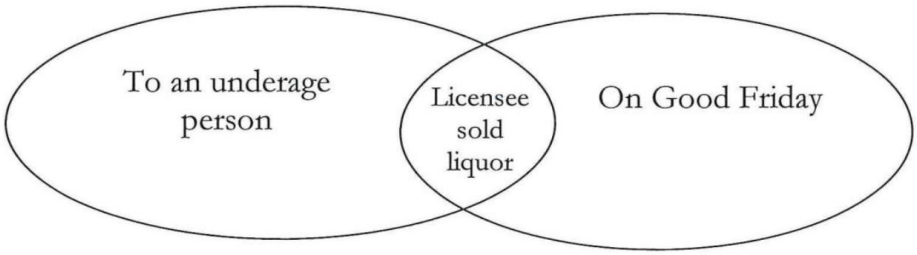
37 UK Law Commission Report 2001, above n 32.

Double jeopardy — the requirement of "common punishable acts"

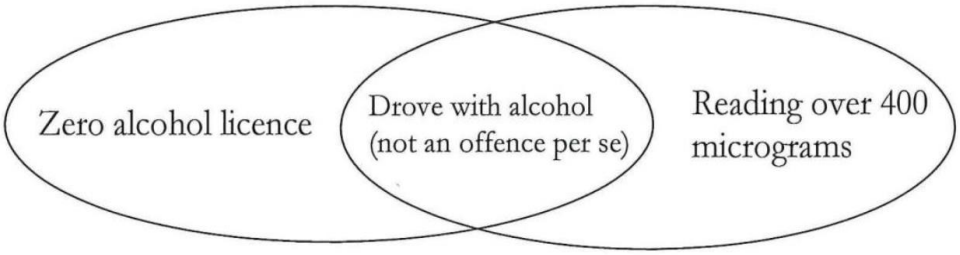
[57] The regime applicable under the CPA to the special plea of previous conviction is set out in s 46 CPA (reproduced above at [22]).

[58] The correct approach to whether offences "[arise] from the same facts", in the terms used in ss 46–47 CPA, has been largely established by the Court of Appeal in a series of judgments — *Rangitonga*,[38] *Filitonga*,[39] *O'Reilly*,[40] and *Mitchell*.[41] Those cases each involved situations where it was the acts of the parties, leading to separate charges (without an element of intention or aggravating circumstances), that fell for consideration. It was recognised that in some cases — *Filitonga* was one — there was a "common punishable act". In other cases, there were not "common punishable acts". In *Mitchell*, the Court of Appeal demonstrated these latter situations by adopting three Venn diagrams provided by counsel:[42]





38 *Rangitonga*, above n 14.
39 *Filitonga*, above n 14.
40 *O'Reilly*, above n 14, at [18].
41 *Mitchell CA*, above n 14.
42 *Mitchell CA*, above n 14, at [27]–[29].



Double jeopardy — the "ascending scale" principle

[59] It is clear that the legislature, in ss 44–47 CPA, introduced the "arising from the same facts" test in order to address what had become a strict approach to the interpretation of ss 358 and 359 Crimes Act.[43]

[60] At the same time, the legislature, through the enactment of s 46(2) CPA, has retained another aspect of the underlying double jeopardy principles, namely that identified by Lord Hodson in *Connelly* as the "ascending scale" principle.[44] The decisions of the Court of Appeal on ss 46–47 CPA to which I have referred[45] have generally been concerned with whether offences "arise from the same facts". They have not dealt with the ascending scale principle.

[61] The predecessor provision to s 46(2) CPA was in s 359 Crimes Act, which provided:

> **359 Second accusation**
>
> (1) Where an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to the indictment.
>
> (2) A previous conviction or acquittal on an indictment for murder or manslaughter or infanticide shall be a bar to a second indictment for the same homicide charging it as any one of those crimes.
>
> (3) If on the trial of an issue on a plea of previous acquittal or conviction to an indictment for murder or manslaughter or infanticide it appears that the former trial was for an offence against the person alleged to have been now killed, and that the death of that person is now alleged

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43 See Mahoney, "Same Offence" article, above n 30, at 171–172 and 175.
44 *Connelly*, above n 22, at 1332.
45 Above at [55].

> to have been caused by the offence previously charged, but that the death happened after the trial on which the accused was acquitted or convicted, as the case may be, then, if it appears that on the former trial the accused might if convicted have been sentenced to imprisonment for 3 years or upwards, the court shall direct that the accused be discharged from the indictment before it. If it does not so appear the court shall direct that he plead over.

[62] Sir Francis Adams, in the second edition of his *Criminal Law and Practice in New Zealand* (1971) (*Adams*), provided this commentary in relation to s 359(1) Crimes Act:[46]

> Thus, for instance, an acquittal or conviction for simple perjury under s. 108 would bar a subsequent trial for the same perjury alleged as having been committed with an intent specified in s. 109 (2): similarly as to robbery under s. 234 and aggravated robbery under s. 235. The same rule exists at common law ([*R v*] *Miles* …, [at] 436; *Connelly* …, per Lord Hodson at p. 1332 — "the ascending scale principle" — and per Lord Pearce at p 1363).

[63] In *Connelly* (the House of Lords decision cited in *Adams*), Lord Hodson referred to the old case of *R v Elrington*, where Lord Cockburn CJ had observed:[47]

> … we must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form.

[64] Its operation, through its embodiment in s 359(1) Crimes Act, was illustrated in three New Zealand decisions:

(a) *R v Lee*[48] — a plea of previous conviction was upheld on a charge of possessing a drug for the purpose of sale when the defendant had been convicted of a charge of mere possession of the drug;

(b) *R v Baker*[49] — a plea of previous conviction was upheld in relation to a charge of aggravated assault when the defendant had previously pleaded guilty to a charge of common assault; and

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46 Francis Adams *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell, Wellington, 1971) at [2891].

47 *Connelly*, above n 22, at 1332. As cited in *R v Elrington* (1861) 1 B&S 688, 121 ER 870 (QBD).

48 *R v Lee*, above n 35.

49 *R v Baker* [1975] 1 NZLR 247 (HC).

(c) *R v Pene*[50] — a plea of previous conviction was upheld on a charge of riotous and tumultuous assembly to the disturbance of the public peace when the defendants had variously been convicted or acquitted on being a member of a riotous assembly.

[65] The operation of the ascending scale principle can also be illustrated in three English decisions referred to in *R v Miles* (cited for the common law rule in the second edition of *Adams* (above at [62]):[51]

(a) *R v John Walker*[52]— a conviction for an assault by wounding before justices was held to be a bar to an indictment for the same assault and wounding with felonious intent to maim, disable, and do grievous bodily harm;

(b) *R v Stanton*[53] — Earle J observing that, had *autrefois convict* been pleaded, the defendant's previous conviction for an assault would have been an estoppel to a charge of felonious assault; and

(c) *R v Elrington*[54] — a plea of *autrefois acquit* was found to be available on an indictment for assault and maliciously wounding and causing grievous bodily harm when a charge of common assault before the justices had been dismissed.

[66] Another example frequently cited, as in the judgment of Lord Morris in *Connelly*, is where a prosecution for assault is followed by a second charge of assault with intent to injure.[55]

~~[67]~~ In the New Zealand cases, the Courts consistently spoke in terms of conviction (or acquittal) of the "minor" or "less serious" charge precluding conviction on the

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50 *R v Pene* [1982] 2 NZLR 652 (HC).
51 *Miles*, above n 25.
52 *R v John Walker* (1843) 2 M&Rob 446, 174 ER 345.
53 *R v Stanton* (1851) 5 Cox CC 324.
54 *R v Elrington*, above n 47. See also, *Connelly*, above n 22, per Lord Pearce at 1363.
55 *Connelly*, above n 22, at 1317, per Lord Morris. See also *R v Morton* [2014] NZHC 2178 at [44]–[45].

"more serious" charge, reflecting the fact that the more serious charge contained a statement of intention or circumstances of aggravation.[56]

[68] The Court of Appeal in *Lee*, in following *Connelly*, explained the appropriate procedure to be adopted where one charge involves the addition of a statement of intention or circumstance of aggravation in relation to the other charge:[57]

> It follows from what we have said that where is it desired to proceed with two charges … in respect of the same facts, no conviction should be entered on the summary proceedings, notwithstanding that a plea of guilty may have been tendered, while the charge on indictment is pending. If in the event there is then a conviction on the graver charge, the minor charge may be dropped; but if the accused is acquitted on indictment, that acquittal will not be a bar to the outstanding summary proceedings.

[69] When it ultimately comes to sentencing considerations, the good sense of this approach is also obvious. The principal rationale for the double jeopardy rule is that it prevents double punishments. On the approach approved by the Court of Appeal in *Lee*, everything the sentencing court needs to take into account is included in the punishment of the defendant on the more serious offence.

[70] In the context of the provisions subsequently enacted in ss 46 and 47 CPA, turning on whether the two offences "arise from the same facts", the Court of Appeal's recognition in *Lee* (in the passage set out at [68] above) that the two charges were "in respect of the same facts" becomes important to an understanding of how s 46(2) CPA (and the common law approach to "ascending scale" charges) operates.

[71] That then brings us to the provisions of ss 46 and 47 CPA, which replaced ss 358 and 359 Crimes Act.[58]

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56 See, for instance, *R v Lee*, above n 35, at p18 per Turner P (delivering the judgment of the Court of Appeal).

57 *R v Lee*, above n 35, at p19.

58 Sections 358 and 359 Crimes Act 1961 were repealed, as from 1 July 2013, by s 6 Crimes Amendment Act (No 4) 2011.

[72] In his excellent article on the then new CPA, Richard Mahoney explained the continuing (but modified) role of the ascending scale principle thus:[59]

> (3) Exception to s 358(1)'s first limb: s 359(1)
>
> The reason that s 359(1) amounts to an exception to s 358(1)'s requirement of identity between the original and the current charges is that s 359(1) recognises a valid special plea when the current charge is an aggravated version of the original charge, carrying a higher potential penalty. The perhaps surprising effect of s 359(1) is that an acquittal or a conviction for an original charge of, say, assault, bars a subsequent prosecution for assault with intent to injure! Clearly, the legal elements are not the same. The current charge adds to the elements required for a conviction on the original charge.
>
> Section 46(2) of the CP Act is the new version of s 359(1) of the Crimes Act. The legislature has engaged in some tinkering. The new provision introduces a qualification on a defendant's ability to successfully plead previous conviction (but not previous acquittal) in the case of a current charge that alleges a more serious offence than that which formed the basis of the original conviction. This qualification is the prosecution's ability, pursuant to s 46(2)(b), to defeat the previous conviction plea by satisfying the court that "the evidence of the more serious offence was not readily available at the time the charging document for the original offence was filed". For the purposes of this article, I wish to point out that this one change to the earlier law is offset by another. This is that, as with the rest of ss 46 and 47, the only required link between the current more serious charge and the original charge is that they arose from the same facts. This is a far cry from the prerequisite for a successful plea under s 359(1) that the current, more serious charge had to allege "substantially the same offence as that with which the accused was formerly charged" (but carrying the aggravating feature). Not surprisingly, that important limitation was interpreted strictly, with the result that there are very few examples of s 359(1) ever being applied to actually benefit a defendant. This becomes obvious from a quick review of any annotation of the section.
>
> (footnotes omitted)

[73] In his footnotes to the article, Richard Mahoney identified *Lee* and *Pene* as two examples involving the application of s 359(1) Crimes Act.

[74] In short, the CPA regime for previous conviction retained the ascending scale principle which existed both in antecedent legislation and at common law. But the prosecutor expressly has the ability to defeat a special plea by satisfying the Court they did not have the evidence to support the more serious offence when the charging document for the less serious offence was filed.

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[59] Richard Mahoney "Same Offence" article, above n 30, at 179–180.

[75] This conclusion means I do not follow another judgment of this Court, namely *R v Taylor*.[60] In that case, Mr Taylor, as a result of driving his car into a police car, was charged with and pleaded guilty to assault with a weapon. A conviction was entered. Subsequently the Police obtained evidence that Mr Taylor had intended in the incident to kill the police officer. Mr Taylor was charged with attempted murder. Mr Taylor entered a special plea. The Court ruled the charge of attempted murder was based on new and different facts as to Mr Taylor's intent, and on that basis the special plea was not available.[61] Alternatively, the Court would have applied the proviso to s 46(2) CPA as the evidence as to the intention to kill became available only after the charging documents on the assault with a weapon charge had been filed.[62]

[76] It does not appear that the Judge considered the ascending scale principle or any of the associated authorities to which I have referred. The authors of *Garrow and Turkington's Criminal Law in New Zealand*[63] express doubt as to the correctness of the primary decision in *Taylor*, observing that it is difficult to see when s 46(2) would be needed if a more serious intent changed the punishable act. I similarly regard *Taylor* as correctly decided on the facts but respectfully decline to follow it on the primary finding.

[77] As reinforced by the provisions of s 46(2) CPA, the ascending scale principle continues to apply — a special plea is available in relation to a prosecution covered by the CPA where there has been an earlier conviction.

[78] Equally, where the previous outcome did not constitute a conviction in terms of the CPA but nonetheless represented a complete adjudication in terms of *Richards*,[64] the common law principles continue to apply.

[79] At this point, it is necessary to consider whether anything should turn on the fact that Customs, in this case, filed the two charging documents at the same time.

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60 *R v Taylor* [2020] NZHC 390.
61 At [46].
62 At [47].
63 Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (looseleaf ed, LexisNexis) at [CPA 46.1].
64 *Richards*, above n 27.

[80] In *R v Arnold*, Hughes LJ (delivering the judgment of the Courts-Martial Appeal Court) stated:[65]

> The *Elrington* principle is a rule against *sequential* trials. It is in no sense breached if two charges arising out of the same facts are put before the same Court on the same occasion. That might have been gleaned from the use of the word *again* in the proposition "he is not to be tried again…", but it would certainly have been apparent if anyone had looked at the cases.

And he continued:

> To the contrary, sometimes the presentation of different charges in the same Court, arising from the same facts, is positively the right thing to do since it may enable the tribunal of facts to determine the several issues which arise — for example, whether driving was dangerous because of the manoeuvre undertaken or also because of (sic) the driver was unfit through drink, or, in an allegation of homicide, which party was at the outset carrying a firearm which was used.

[81] It is indeed evident, on a reading of earlier authorities, that the courts there were generally concerned with cases where there had been an earlier set of charges and/or hearing, frequently before the justices or in another summary context. In his text *Double Jeopardy*, Martin Friedland observed that, while in earlier periods multiple prosecutions tended to arise mainly after multiple trials (by reason of the early rules against joinder), the rule against multiple convictions applies also to multiple convictions arising from the same proceeding.[66]

[82] I do not read the New Zealand authorities as indicating the ascending scale aspect of the double jeopardy rule has no application where two sets of proceedings are pending at the same time. The discussion of the Court of Appeal in *Lee* (quoted at [68] above) implicitly confirms that the double jeopardy principles do apply in that situation — the prosecutor may guard against a conviction arising on the less serious charge by inviting the Court either not to enter a conviction or not to otherwise finalise a proceeding (such as by sentencing on that charge) while the more serious charge is pending.

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65 *R v Arnold* [2008] 1 WLR 2881 (Courts-Martial Appeal Court) at [35]. The passage in question was obiter: see [31]. See also *Connelly*, above n 22, per Lord Morris at 1314.

66 Friedland *Double Jeopardy*, above n 21, at 197–199, citing *R v Leatham* (1860) 3 L.T. 504.

[83] Whether or not a case falls squarely within the rules relating to double jeopardy, the Courts retain their inherent power to prevent abuse of process.[67] Such was recognised by the Court of Appeal, in the double jeopardy context, in *R v Spencer*.[68] In *Spencer*, the defendant, following the death of a co-worker, had been convicted in the District Court of a breach of safety requirements under the Health and Safety in Employment Act 1992. Subsequently, he had been charged with the crime of manslaughter in relation to the same event. The Court of Appeal quashed the conviction (with no order for a new trial) on the basis of a misdirection to the jury. But Keith J, delivering the judgment of the Court, recognised (notwithstanding the prosecutor's discretion in relation to whether the prosecution should continue or not) the Court must be master and must have the last word, where to countenance the continuation of a prosecution would be contrary to the recognised purposes of the administration of justice.[69] The judgments of Lord Devlin and Pearce in *Connelly* are to like effect — a Court possesses an inherent jurisdiction to bar a second prosecution where, for instance, the second trial would be oppressive (notwithstanding a contrary desire of the Solicitor-General as prosecutor).[70]

[84] Counsel in this case, in their submissions for and at the hearing, did not refer to the ascending scale principle — they addressed matters by reference to the "common punishable acts" line of authorities. After reserving my decision, and identifying the ascending scale principle as relevant, I invited further submissions from counsel. Both recognised the existence of the principle. Mr Harvey submitted again that the two offences involved distinct, different core acts and that there has been no "conviction". He submitted the s 371 offence was not therefore a "scaled up" version of the s 364 charge. In the event I was to consider the ascending scale principle, Mr Harvey submitted I should reject its application in this case because:

(a) double jeopardy principles are aimed at preventing subsequent prosecutions (for substantially the same offence) — this should not be applied where charges are filed contemporaneously;

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67 *Connelly*, above n 22, per Lord Reid at 1296; *R v Spencer* CA353/00, 5 April 2001 at [25].
68 *R v Spencer*, above n 67.
69 At [25] citing *Moevao v Department of Labour* [1980] 1 NZLR 464, 482.
70 *Connelly*, above n 22, per Lord Devlin at 1347, Lord Pearce at 1361 and 1365 and semble per Lord Reid at 1296. Contrast Lord Hodson at 1335 and Lord Morris at 1304–1305.

(b) the principles are not intended to operate where a technical argument would defeat the laying of a more serious charge;

(c) here the Court made its final adjudication on the s 364 charge, at Mr van der Haven's urging, at the same time as ruling on the special plea; and

(d) this is not a case of the prosecution having a "second bite of the cherry" so as to give rise to an abuse of process.

[85] I have taken these submissions into account in my above identification of the principles, and in my application of the principle which now follows.

Application of the ascending scale principle in this case

[86] How then, does the ascending scale (or its recognition in s 46 CPA) apply to the charges against Mr van der Haven? Is one offence a more serious offence and the other a less serious offence, arising from the same facts?

[87] The charging document itself is of fundamental importance.

[88] The fact from which the s 364 offence arose is Mr van der Haven's making of an erroneous entry (Import Entry 46663747).

[89] For convenience, I set out again the wording of the charge in relation to the s 371 offence:

> That the defendant did import a 2013 Ferrari California from Singapore and knowingly undervalue it, intending to evade the full payment of duty.

[90] Reference is made in the particulars of the charge to Import Entry 46663747. The undervaluing of the Ferrari in Import Entry 46663747 was also the precise particular provided by Customs for the s 364 offence.

[91] In the District Court judgment, the Judge identified the s 371 offence as being characterised in the Customs and Excise Act as "defrauding the revenue",[71] with the focus of the offending being on "the intention of the defendant".[72]

[92] It is evident from the Judgment that the ascending scale principle was not identified in submissions of counsel (just as it was not in the hearing before me). The authorities to which I have referred, establish that the added statement of intention or aggravated circumstances is not to be treated, in relation to a plea of previous conviction, as part of the facts or core acts on which the offence is based. Rather, they are circumstances which render those core acts more serious.

[93] The Judge, by way of reinforcement of the conclusion that the requirement for an intention under s 371 meant that the offences did not share core punishable acts, noted the establishing of Mr van der Haven's intention required analysis of multiple acts and omissions.[73] Mr Harvey, in his submissions on this appeal, adopted that approach. It is however, flawed. The charge as filed was that Mr van der Haven knowingly undervalued the car, intending to evade the full payment of duty. The undervaluation was in the import entry. It is one and the same act.

[94] The particulars provided by Customs in relation to the s 371 charge (above at [20]), included the act of submitting one invoice and the omission of the other two invoices. They are certainly acts as noted by the Judge, and they may well establish evidence of Mr van der Haven's intention, but the core punishable act, as charged, lies in the import entry with its understated value.

[95] Had Customs elected to charge Mr van der Haven with a s 371 offence by reference, not to the undervalued entry, but to the provision of a single invoice and the failure to provide two relevant invoices, the outcome of this case may have been different. That is not for determination here. What matters is that Customs here relied for both charges on the act of providing an import entry for goods at a stated value of $28,537, when that was erroneous.

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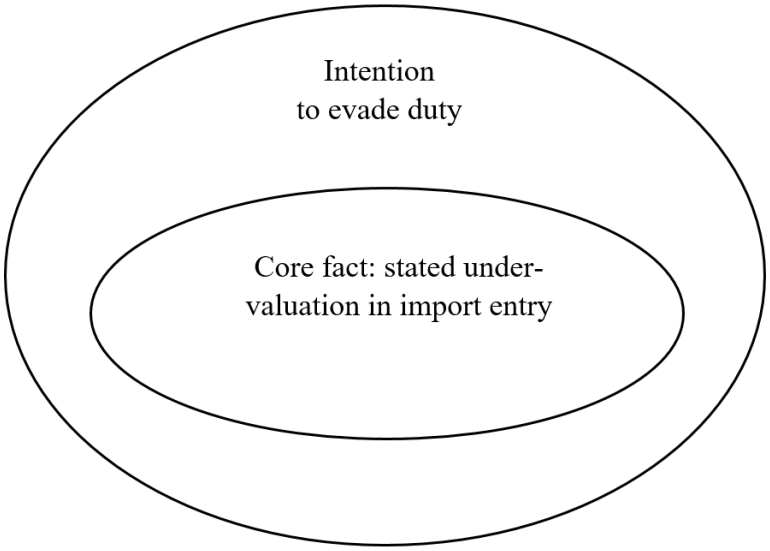
71 Judgment, above n 6, at [43].
72 At [44].
73 At [45].

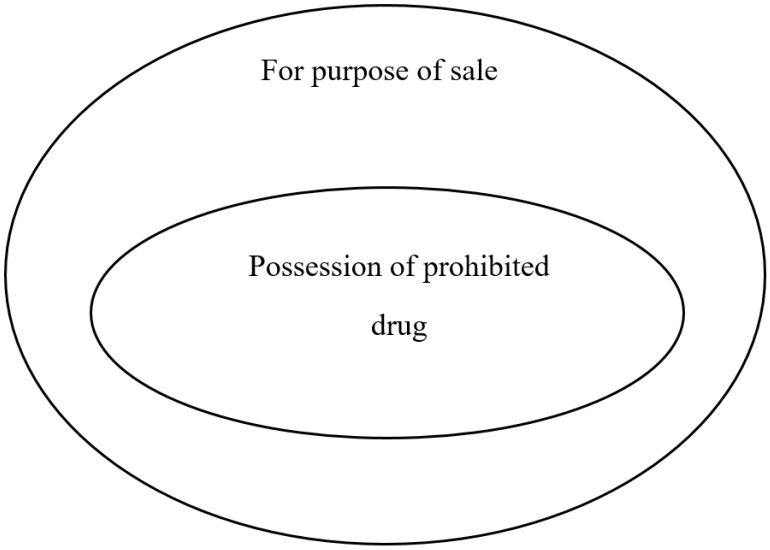
[96] Where the ascending scale principle (under s 46(2) CPA) applies, the Venn diagrams adopted by the Court of Appeal in *Mitchell* (reproduced at [58] above) have no application.

[97] The circumstances of two offences to which the ascending scale principle applies may instead be appropriately depicted in the following manner. The first diagram shows Mr van der Haven's stated undervaluation in his import entry as the core fact. The second and third diagrams reflect the earlier New Zealand ascending scale decisions in *Lee*[74] and *Baker*.[75]

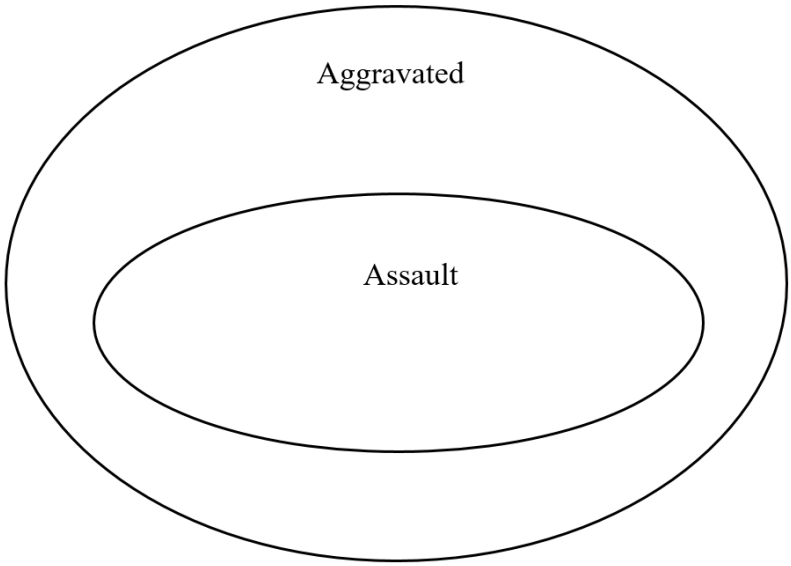


(this case)

[74] *R v Lee,* above n 35.
[75] *R v Baker,* above n 49.



(*R v Lee)*



(*R v Baker*)

[98] What distinguishes the two offences charged, in terms of the ascending scale principle, is the 371 charge has an added layer — a statement of intention.

[99] Here, the s 364 charge against Mr van der Haven has been the subject of a final adjudication in the District Court (on his guilty plea which has been accepted), he has been fined and ordered to pay costs. The punishment relates to what I have identified as the core fact, namely his understated valuation of the car in his import entry. All

that remains to be taken into account for punishment, should he be convicted on the s 371 charge, is the intention or circumstances of aggravation which are addressed by the ascending scale principle.

[100] A course open to the prosecutor in terms of the Court of Appeal's guidance in *Lee* (above at [82]), was to invite the Court, while the other remaining charge was pending, to defer any final determination on the s 364 charge. For reasons not apparent from the record, the prosecutor in the District Court does not appear to have made such a request. Instead, submissions appear to have been directed both for the final disposition of the s 364 charge and the Court's ruling on the special plea in relation to the s 371 charge. The Judge in the single judgment then finally disposed of the s 364 charge before turning to consider and rule on Mr van der Haven's special plea. The Judge might equally have refrained from finally disposing of the s 364 charge, thereby leaving moot the operation of double jeopardy principles.

[101] The way the Judge dealt with both issues in the single judgment (the prosecutor apparently making no requests for Mr van der Haven not to be dealt with immediately on the s 364 charge) means that the ascending scale principle has application in this case.

[102] The ultimate issue in this case then becomes whether, as recognised by the Court of Appeal in *Spencer,*[76] continued prosecution on the second charge would therefore amount to an abuse of process.

[103] As discussed above at [56], under the Connelly principle, the usual burden of proof is reversed with the consequence that it is prima facie oppressive to put a person, tried in respect of particular facts, on trial a second time in relation to the same facts. There is therefore a burden in this situation, upon the prosecutor, to establish that continued prosecution on the second charge would not be oppressive.

[104] I am satisfied in the circumstances of this case that it would not be oppressive for Mr van der Haven to face the s 371 charge.

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[76] *R v Spencer,* above n 67.

[105] The focus of the double jeopardy principles, as discussed above at [49], is on ensuring that defendants are not twice penalised for the same offending. That will usually be achieved by having all desired charges arising from the one incident dealt with at a single hearing.[77] Here, had the Judge refrained from finally disposing of the s 364 charge, the District Court, in the event Mr van der Haven was convicted on the s 371 charge, would have proceeded to sentence Mr van der Haven in relation to the totality of his offending (both the core act and the aggravated aspect) without the spectre of the sentences on the two charges being in some sense overlapping, and therefore double penalising Mr van der Haven for his conduct.

[106] Mr van der Haven knew, when he entered the guilty plea to the s 364 charge, that Customs' case against him was that he had also committed the more serious, aggravated offence.

[107] In the event the prosecution on the s 371 charge continues and Mr van der Haven is convicted, the sentencing Judge (whether or not it is Judge Kellar) will be able to take into account the sentencing outcome on the s 364 charge to ensure the sentencing on the s 371 charge is appropriate, having regard to totality principles.

[108] In the circumstances of this case, it does not amount to an abuse of process, whether on oppression grounds or otherwise, for Customs to wish to proceed on the s 371 charge.

Outcome

[109] The appeal will be dismissed.

[110] The Judge was correct to conclude that the plea of previous convictions was not available to Mr van der Haven (albeit that he reached that conclusion for reasons I do not uphold).

Orders

[111] I order:

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[77] See *Mahoney* "Same Offence" above n 30, at 172.

(a) the appellant is granted leave to appeal the decision of the District Court in relation to the charge under s 371(1)(a) Customs and Excise Act 2018 (the Act);

(b) the appeal is dismissed; and

(c) costs are reserved.

Osborne J

Solicitors:
Crown Solicitor, Christchurch

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