

Dishonesty? Ghosh, Ivey got a surprise for you! (R v Barton)

06/05/2020

Corporate Crime analysis: The Court of Appeal affirmed in the case of R v Barton that the test for dishonesty to be used in criminal proceedings is that set out in obiter dicta by the Supreme Court in Ivey v Genting Casinos UK (t/a Cockfords Club), expressly overruling the two-stage test set out in R v Ghosh. Modifying (albeit to a limited extent) the principle of stare decisis, the court held that, in limited circumstances, where the Supreme Court directs, obiter dicta, that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow that direction. The test in Ivey ensures dishonesty is objectively assessed by reference to society's standards, rather than the defendant's own understanding of what is dishonest. This resolves the problematic second limb of the Ghosh test. Written by John Oliver, barrister, and Alexa Le Moine, pupil barrister, at 5SAH, Chambers of David Josse QC.

R v Barton and another [\[2020\] EWCA Crim 575](#)

What are the practical implications of this case?

The test in *Ivey v Genting Casinos UK (t/a Cockfords Club)* [\[2017\] UKSC 67](#), removes the subjective test in *R v Ghosh* [\[1982\] QB 1053](#) (the second limb). The only remaining subjective element is found in the jury's assessment of the defendant's knowledge or genuinely held belief of the facts. Having established those facts, the objective test is whether the defendant's conduct amounted to dishonesty; that assessment being based the standards of ordinary decent people.

At para [108] of *Barton* uses the following example to illustrate how the test works in practice:

'the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest than the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts.'

The *Ivey* test might detrimentally impact a defendant—they could be convicted despite them not realising that ordinary decent people would consider their conduct dishonest because their definition is at odds with that of ordinary decent people. The subjective test exists in many other areas of the criminal law to guard against this very situation. To that extent, the test is less generous than the test in *Ghosh*.

Factors affecting a defendant's state of mind—such as cognitive or psychiatric difficulties—will be considered only when examining her or his knowledge and what she or he genuinely believed the facts to be, as illustrated in the example above. So long as the jury accepts that the defendant acted on the basis of an honestly held belief that London bus journeys were free of charge, a properly directed jury ought to acquit.

The modification of the rules of precedent means that this test (approved obiter by the Supreme Court) was adopted without in depth analysis by the Supreme Court of the consequences of doing so. The test applies to a very broad range of offences that include dishonesty as an ingredient of the offence, which is often the central issue in the trial. The Court of Appeal itself acknowledged at para [109] that 'there is, no doubt, a range of consequential issues that will need to be decided following the decision in *Ivey*.'

What was the background?

The case concerns Mr Barton, who ran a nursing home, of which Rosemary Booth was the manager. The prosecution case was that Mr Barton dishonestly manipulated wealthy residents of the care home in order to take their money from them. Both Mr Barton and Ms Booth were convicted (inter alia) of conspiracy to defraud and theft. The trial judge directed the jury on the issue of dishonesty in accordance with *Ivey*, not *Ghosh*.

Until *Ivey*, *Ghosh* was the test for criminal dishonesty for over 35 years.

The *Ghosh* test was articulated in two stages:

- was the defendant's conduct dishonest by the ordinary standards of reasonable people? If so
- did the defendant realise that their conduct was dishonest by those standards?

The *Ghosh* test was criticised by Lord Hughes in *Ivey* in having the unintended effect that the more warped the defendant's standards of honesty, the less likely it is that they will be convicted of dishonest behaviour.

In contrast, the *Ivey* test proposed two alternative stages:

- what was the defendant's actual state of knowledge or belief as to the facts? and
- was their conduct dishonest by the standards of ordinary decent people?

The difficulty in knowing which test for dishonesty to apply was partially clarified in *R v Patterson* [2017] EWHC 2820 (Admin), [2018] 1 Cr App Rep 412 in which the then President of the Queen's Bench Division, Sir Brian Leveson remarked:

'These observations [of Lord Hughes] were clearly *obiter*, and as a matter of strict precedent the court is bound by *Ghosh* [...] Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that *Ghosh* does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.'

Despite this Mr Barton and Ms Booth submitted that *Ghosh* remained binding authority as the commentary on dishonesty in *Ivey* was *obiter dicta* and that, even applying the *Ivey* test, the convictions were unsafe because the trial judge had failed to direct the jury to ascertain their actual state of mind before considering the second stage of the test.

The Court of Appeal considered how the trial judge summed up the case, how the elements of the conspiracy to defraud were explained to the jury and most importantly, it grappled with the question of which was the correct test of dishonesty.

What did the court decide?

The court held at para [104]:

'[...]where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*.'

This approach is a significant modification to the common law rules of precedent.

The court held that the second limb of the *Ghosh* test was problematic. Lord Hughes' reasoning was quoted in the decision of *Barton* and considered compelling by the Court of Appeal. The Court set out at para [106] that this is not a reluctant following of *Ivey*—'concerns about *Ghosh* have resonated through academic debate for decades'.

At para [107] the court endorsed the submission that the *Ivey* test for dishonesty is 'a test of the defendant's state of mind—his or her knowledge or belief—to which the standards of ordinary decent people are applied'. Resolving the problem of the warped standards Lord Hughes perceived in the second limb of the *Ghosh* test, the *Ivey* test ensures dishonesty is

objectively assessed by reference to society's standards—those of ordinary, decent people—rather than the defendant's understanding of what is dishonest.

Therefore, the test for dishonesty in all criminal cases is now that set out in *Ivey*.

Case details

- Court: Court of Appeal, Criminal Division
- Judge: Lord Burnett CJ, Dame Victoria Sharp P, Fulford LJ, McGowan and Cavanagh JJ
- Date of judgment: 29 April 2020

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