

Geoffrey Payne and Sushil Kumar appear in Leading Case that Changes the Criminal Law on Dishonesty

For 35 years, when assessing whether a defendant was dishonest, juries were directed in accordance with the test in *Ghosh* [1982] QB 1053. The case of *Barton and Booth* [2020] EWCA Crim 575 has overturned that decision and harmonised the tests for dishonesty in the civil and criminal law.

Ghosh had concerned a surgeon who had made false claims from the NHS for procedures he said he had carried out but had not. He asserted, however, that he was not dishonest because the money was due to him anyway in the form of consultancy fees. The appeal was presided over by the then Lord Chief Justice.

The *Ghosh* test, as it became known, required a jury to approach dishonesty in the following way,

first of all, decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards that is the end of the matter and the prosecution fails.

If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest...

What was required was an assessment of the subjective mind of the defendant but by reference to the standards of dishonesty held by society at large.

In the case of *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67, the civil courts came to consider the test for dishonesty in the civil law. Mr. Ivey was a gambler who had won £7.7 million at Crockfords Casino using, in part, a technique known as 'edge sorting'. The casino asserted that he had cheated and refused to pay out, prompting civil action by Mr. Ivey. The matter went all the way to the Supreme Court. The court found against Mr. Ivey and refused to award him his 'winnings'.

It decided that the test for dishonesty should be in two stages, namely,

- (a) what was the defendant's actual state of knowledge or belief as to the facts; and
- (b) was his conduct dishonest by the standards of ordinary decent people?

There were therefore two stages: a consideration of the subjective state of mind of the person in question and, secondly, the superimposition onto that state of mind of an objective standard of dishonesty. Accordingly, that became the test applied in the civil courts and in regulatory jurisdictions.

Lord Hughes, however, went further and declared that the *Ivey* test should be followed in crime as well. He said, in terms, that directions based on *Ghosh* should no longer be given to juries and, reflecting academic criticism, he went on to undertake an extensive criticism of the *Ghosh* test.

He said, firstly, it meant that the more warped the belief of a defendant as to the normal standards of honesty in society, the less likely he or she was to be convicted. Secondly, although dishonesty should depend upon the actual state of mind of the defendant, *Ghosh* was not necessary for the preservation of that principle. In fact, it had led to a divergence between civil and criminal law that could not be justified, was a departure from the law that had existed before the Theft Act 1968, and was not compelled by previous authority.

Notwithstanding the force of Lord Hughes' judgment, the decision in *Ivey* was strictly speaking, obiter, when it came to crime. Furthermore, the *Ghosh* test had only relatively recently survived unscathed following a consideration in the LIBOR appeal (*Hayes* [2015] EWCA Crim 1944) which was presided over by the then Lord Chief Justice. That said, there had been signs of change for some time. The Divisional Court in *Patterson* [2017] EWHC 2820 (Admin) had suggested that *Ivey* might be binding notwithstanding its obiter nature and the Crown Court Compendium, which contains sample directions to juries, had been updated in accordance with *Ivey*. But *Ghosh* had never formally been overruled by a criminal court.

The law, in short, was in a state of some confusion.

The matter fell finally for determination by an extraordinary five-judge Court of Appeal presided over by the Lord Chief Justice. In *Barton and Booth*, the appellants had been convicted after a trial that lasted just over a year in Liverpool Crown Court, of various counts of conspiracy to defraud. The case arose out of a fraud in a care home. Geoffrey Payne and Sushil Kumar appeared for the General Manager, Rosemary Booth. The judge had directed the jury in accordance with the *Ivey* test having rejected submissions that *Ghosh* remained good law.

The judgment in *Barton and Booth* is highly significant for two reasons. Firstly, the Court of Appeal endorsed the *Ivey* test, thus banishing any doubt over whether *Ghosh* (which had been good law for 35 years) remained binding. Now, juries will be directed in accordance with the two-stage test in *Ivey*. The court was at pains to point out that the test is not purely objective. The first question, which relates to the state of mind of the accused, does not limit consideration to past facts. Rather, it encompasses "*all the circumstances known to the accused... [and] all matters that lead an accused to act as he or she did will form part of the subjective mental state*". The approach of any court must be as follows,

The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof [Paragraph 108].

Secondly, the court modified the doctrine of binding precedent. That was done to avoid the situation that arose here where the Supreme Court had indicated, in a civil case, that its decision should be followed in crime but where that decision was technically obiter. Now, where every judge of the Supreme Court agrees as to an effect of its decision, and hence any further appeal to that court would be a foregone conclusion, that decision must be applied by the lower courts notwithstanding its obiter nature.

However definitive the judgment in *Barton and Booth*, it leaves a number of questions open. The court described them as a “*range of consequential issues*”. What is the interplay between the *Ivey* test and the subjective states of mind in section 2 of the Theft Act 1968 that, by operation of law, are not to be regarded as dishonest? What is the effect of the rules on statutory conspiracy that require a defendant, when becoming party to a dishonest agreement, to know, subjectively, of its dishonest nature? What counts as a matter that “*led the accused to act as he or she did*” and which, therefore, forms part of the consideration of the first question in *Ivey*?

The court left those questions for another day, stating [paragraph 109] that they will be, “*addressed as cases are tried*”.

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