BARTON and BOOTH[1]

-v-

THE QUEEN[2]

WHEN JUDICIAL OPINION CONVERTS TO BINDING PRECEDENT

It is now beyond doubt that the direction to juries as to the meaning of *"dishonesty"* decided in *Ghosh*[3] is dead and with it the courts have buried 35 years of precedent.

As has been the practice in our criminal courts for some time, the Court of Appeal (Criminal Division) has held itself, and thus the lower courts, bound by the obiter dictum of Lord Hughes of Ombersley in *Ivey*[4], namely that the second test in *Ghosh* is not to be applied **(consideration of the defendant's understanding of whether his conduct was dishonest)** and instead the test is (i) what is the defendant's actual state of knowledge or belief as to the facts and (ii) having regard to those proven facts was his conduct dishonest by the standards of ordinary decent people.

Ivey was a civil case. It followed the precedent established in earlier civil cases in particular *Royal Brunei Airlines* (House of Lords)[5] and *Barlow Clowes* (Privy Council)[6].

This is the second case in recent times where the courts have abandoned decades of precedent because the law "took a wrong turn".

Just as *Jogee*[7] had rendered it more likely that an innocent defendant would be convicted, *Ghosh* had rendered the guilty defendant more likely to be acquitted.

How have obiter dicta in a civil judgment come to bind our criminal courts and overturn long-established precedent?

It is noteworthy that in *Ivey* Lord Hughes found that *Ghosh* departed from the law that applied before 1968 when no such divergence was intended. On a careful analysis he concluded that

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[1] Appearing for Booth were Geoffrey Payne and Sushil Kumar of 25 Bedford Row, instructed by JD Spicer Zeb Solicitors.
[2] (2020) EWCA Crim 575
[3] (1982) QB 1053 (Court of Appeal (Criminal Division))
[4] (2017) UKSC 67 (Supreme Court)
[5] (1995) 2 AC 378
[6] (2006) 1 WLR 1476
[7] (2016) UKSC 8

the departure was not justified given that the balance of post-1968 jurisprudence reflected his analysis of the law.

Clearly the discussion in Ivey about "dishonesty" was obiter given that it was not necessary for the decision of the court. However, it did not stop the Supreme Court from stating that directions based on *Ghosh "should no longer be given"*. This revived approach is now reflected in the Crown Court Compendium, Archbold and Blackstone.

Apart from confirming that current judicial practice is correct, what else does the judgment in this case demonstrate?

Its significance is to be found in what it tells us about the courts approach to precedent.

The first question that fell for consideration was whether the Court of Appeal (Criminal Division) was obliged to follow the Supreme Court.

Ordinarily it is obliged to follow the decision of the House of Lords. However, what if the Judicial Committee of the Privy Council (not binding on the courts of England and Wales) reaches a different decision on an important question of law decided earlier by the House of Lords?

This was the position faced by the Court of Appeal (Criminal Division) in *James*[8]; was the correct statement of the law of provocation to be found in the decision of the House of Lords in *Smith (Morgan)*[9] or that of the later Privy Council decision in *Holley*[10] which consisted of nine of the twelve Lords of Appeal in Ordinary.

The Committee in *Holley* was split; six formed the majority (Lord Nicholls giving the leading judgment) and four dissented (Bingham, Cornhill, Hoffmann and Carswell).

In *James*, Lord Phillips of Worth Matravers CJ noted that to follow the earlier House of Lords decision, whilst inevitably giving leave to appeal, would be to require judges to direct juries in a way that would inevitably be overturned. The court did not wish to produce that result but in order to avoid it two interrelated questions had to be answered.

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[8] (2006) EWCA Crim 14
[9] (2001) 1 AC 146
[10] (2005) 2 AC 580

The first being how can one justify disregarding well-established rules of precedent? The second being what principles are to be replace those that are to be disregarded?

It was the Lords of Appeal in Ordinary, albeit sitting in the Privy Council, who had altered the established approach to precedent in *Holley*. Lord Phillips held that rules of precedent are common law principles and it was not for the Court of Appeal to rule that it was not beyond the Law Lords' powers to develop them.

Thus, it followed that the Privy Council could overrule a decision of the House of Lords with the consequence that the Court of Appeal was bound to follow its decision.

This analysis was justified for three reasons. First, **each** member of the Privy Council agreed that the decision **definitively** clarified English law. Second, the majority in the Privy Council constituted half the Appellate Committee (six) of the House of Lords. Third, the result of an appeal to the House of Lords was a foregone conclusion.

In the current appeal, the court was not only in an analogous position but expressed itself to be in a stronger one because the ordinary rules of precedent required it to follow decisions of the Supreme Court (as the successor of the Judicial Committee of the House of Lords).

In *Ivey* the Supreme Court altered the established common law approach to precedent in the criminal courts by stating that the test for dishonesty they identified, although strictly obiter dicta, should be followed in preference to an otherwise binding authority of the Court of Appeal.

As in *James*, the Court of Appeal did not consider that it was for it to conclude that it was beyond their power to do so.

Thus, this appeal recognised (as had other cases before it[11]) that although the rules of precedent exist to provide certainty, which is a foundation stone of the administration of justice and the rule of law, and thus serve to ensure order and predictability whilst allowing for the development of the law in well-understood circumstances, **they did not** form a code which existed for its own sake and **must** where circumstances arise be capable of flexibility to ensure that they do not become self-defeating.

[11] See DPP v Patterson (2017) EWHC 2820 (Admin)

This judgment of the court consisting of the Lord Chief Justice, the President of the Queens Bench Division, the Vice-President of the Court of Appeal (Criminal Division) and two Justices of the High Court concluded that 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** then the Court of Appeal is bound to follow **what amounts to a direction** from the Supreme Court **even though it is strictly obiter**.

The court shed no judicial tears in reaching its conclusion. Far from being reluctant to follow Ivey it acknowledged that concerns about Ghosh had resonated through academic debate for decades and Lord Hughes's reasoning in Ivey was compelling.

So on the dishonesty front we are back to square one; it is to be assessed on the facts known to the defendant by reference to society's standards and not the defendant's understanding of what those standards were.

All matters that lead a defendant to act as he or she did will form part of his/her subjective mental state; thus forming part of the fact-finding exercise before applying the objective standard. Where relevant that will include the experience and intelligence of the accused.

Thus, as considered in the course of submissions, a visitor to London who failed to pay a bus fare because he believed travel by bus was free (as was the case in Luxembourg) would be no more dishonest than the diner or shopper who genuinely forgot to pay before leaving a restaurant or shop. The approach is to (i) establish the facts and then (ii) apply an objective standard of dishonesty to those facts; those facts being judged by the usual burden and standard of proof.

For an understanding of the consequential issues that following *Ivey* will need to be addressed as cases are tried, it is recommended that reference be had to Professor Omerod QC's and Karl Laird's article in the UK Supreme Court Yearbook 2018 Vol.9 pgs. 1-24.

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