



“Oh *Ghosh*, that’s not dishonest!” A note on the test for dishonesty.

- *R v David Barton and Rosemary Booth* [2020] EWCA Crim 575

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I. INTRODUCTION

In a landmark decision, the Court of Appeal recently took the opportunity to clarify the test for dishonesty in criminal law. The question for the Court of Appeal was whether the Supreme Court’s *obiter dicta* on dishonesty in the civil case of *Ivey v Genting Casinos (UK) (trading as Crockfords Club)*¹ were to be preferred to the longstanding authority of *R v Ghosh*.² The decision has potentially important implications for the principle of *stare decisis*, as the Court of Appeal is bound by its previous decisions, but not technically bound by *obiter* statements of the Supreme Court.

II. THE FACTS OF THE CASE

The case facts are legally unremarkable. The defendants were, respectively, the owner and general manager of Barton Park, a luxury Southport care home. They were convicted of a number of offences of dishonesty as a result of their actions, over a period of 20 years, during which they obtained millions of pounds from elderly residents. The owner, Barton, while providing the residents with a luxury lifestyle, was found to have isolated his victims from their families and previous financial advisors. He then ‘groomed’ them to provide him with large sums of money, grant him power of attorney and change their wills in his favour. The general manager, Booth, acted as Barton’s ‘eyes and ears’ at the home and assisted him in his fraudulent activities. In his defence, Barton maintained that he had rescued the residents from their former unsatisfactory living situations, that all were grateful and that they had merely acted out of gratitude to Barton when making their financial decisions.

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¹ *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67.

² *R v Ghosh* [1982] QB 1053.

III. GROUNDS FOR APPEAL

There were a number of grounds for appeal, one of which related to whether *Ivey* provided the correct approach to the law on dishonesty and should, therefore, be preferred to the test described in *Ghosh*.

(a) *The test for dishonesty in Ghosh.*

The *Ghosh* case outlined a two-stage test for dishonesty that represented the law for 35 years and was expressed in these terms:

“... a jury must 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. ...”³

This may be summarised into a two-stage test as follows: (a) was the defendant's conduct dishonest by the ordinary standards of reasonable people? If so, (b) did the defendant appreciate that his conduct was dishonest by those standards?⁴

The *Ghosh* test was the subject of academic criticism for *inter alia* leading to potentially inconsistent decisions between juries and assuming a community norm within a jury on ordinary standards of honesty.⁵

(b) *The test for dishonesty in Ivey.*

The facts of *Ivey* might be described as ‘entertaining’ and, indeed, Baroness Hale described them as ‘fun’.⁶ The case was concerned with the activities of a pair of professional gamblers engaged in the practice of ‘edge sorting’, whereby the eagle-eyed gambler is able to identify the value of cards as a result of minute differences in the patterns on the back of the cards in a deck. Using this technique, *Ivey* and his companion were able to accrue winnings of £7.7 million.

Ghosh was discussed extensively in the judgment and the second limb of the test, concerning the requirement that the defendant himself appreciated that his actions were dishonest by the ordinary standards of reasonable people, was roundly criticised. Lord Hughes considered the history of the law and concluded that, as the second limb of *Ghosh* did not correctly represent the law, directions on this should no longer be given.⁷

³ *R v Ghosh* [1982] QB 1053, [1064D].

⁴ *R v David Barton and Rosemary Booth* [2020] EWCA Crim 575, [82].

⁵ EJ Griew, ‘Dishonesty – The Objections to *Feely* and *Ghosh*’ [1985] Crim LR 341.

⁶ The Rt Hon the Baroness Hale of Richmond DBE PC FBA, ‘Dishonesty’ The UK Supreme Court Yearbook Volume 9, Legal Year 2017-2018, pp. 243-255 [243].

⁷ *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67, [65]-[74].

The law set out in *Ivey* largely reflects the test for dishonesty provided by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan*⁸ and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005].⁹ Lord Hughes stated:

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”¹⁰

Summarising this into a simple two-stage jury test, the direction suggested by the Supreme Court in *Ivey* is as follows:

- (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?¹¹

The court in *Ivey* stated explicitly that there should be no difference in the test for dishonesty between the civil and criminal law, as there could be no logical or principled basis for such a difference.¹²

IV. THE STATUS OF THE *IVEY* TEST

Following *Ivey*, most practitioners asserted that criminal law had now changed in tandem with civil law and that the *Ivey* test was to be followed in criminal cases. This is evident in the *Crown Court Compendium*¹³ and the practitioner guides *Blackstone's Criminal Practice*¹⁴ and *Archbold*.¹⁵ Indeed *Ivey* was followed in the High Court case of *Pattinson*,¹⁶ where Sir Brian Leveson P acknowledged that the observations of the Supreme Court were strictly *obiter* and that as a matter of strict precedent the court would be bound by *Ghosh*. However, it was held that the Court of Appeal does not adhere to the principle of *stare decisis* with the same rigidity in criminal proceedings as it does in civil proceedings.¹⁷ The court held that as the Supreme Court had been unanimous in its assertion that *Ghosh* did not represent the law, it would be “difficult

⁸ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.

⁹ *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37.

¹⁰ *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67, [74].

¹¹ *R v David Barton and Rosemary Booth* [2020] EWCA Crim 575, [84].

¹² *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67, [63].

¹³ The Crown Court Compendium, Part 1 Jury and Trial Management and Summing Up, December 2019 [8-18].

¹⁴ *Blackstone's Criminal Practice 2020* (Oxford University Press 2020) [B4.51].

¹⁵ *Archbold Criminal Pleading Evidence and Practice 2020 Ed.* (Sweet and Maxwell 2020) [21-5].

¹⁶ *Director of Public Prosecutions v Patterson* [2017] EWHC 2820 (Admin) [16].

¹⁷ See also *R v Gould* (1968) 52 Cr App R 152 to this effect.

to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.”¹⁸ Accordingly, the court followed *Ivey*. However, until *Barton*, the status of the *Ivey* test remained as technically an *obiter* statement, albeit one outlined by a fully constituted Supreme Court, whereas *Ghosh* retained the status of being binding on the Court of Appeal under the principle of *stare decisis*.

V. CONCLUSION - THE DECISION IN *BARTON*

In *Barton* the jury was directed in line with *Ivey* and it was contended on appeal that the *Ghosh* direction should have been given instead. On the facts of the case, it is difficult to identify the benefit that Barton would have gained from the *Ghosh* test. Indeed, any assertion that others would not find his conduct dishonest has been described as “beyond fanciful,”¹⁹ given his propensity to persistently overcharge and falsify invoices.

The Lord Chief Justice, giving the judgment on behalf of the court, acknowledged that the Supreme Court’s statement on dishonesty in *Ivey* was *obiter* and considered whether the Court of Appeal was, nonetheless, obliged to follow it. Referring to the previous case of *R v James; R v Karimi*,²⁰ where the Court of Appeal had followed a decision of the Privy Council in preference to one of the House of Lords, the Lord Chief Justice considered that it was permissible for the Supreme Court to alter the common law rules of precedent and if this occurred, it was for the Court of Appeal to follow. The conditions under which this occurred in *James* required that all of the Law Lords were in agreement that the decision clarified a point of English law, that the majority of the Privy Council represented half of the Appellate Committee of the House of Lords and the result of any appeal was a foregone conclusion. The court held that the position in *Barton* was analogous, but that the status of the Supreme Court (as opposed to the Privy Council) provided a further reason to adopt this approach.

To justify the departure from the ordinary rules of precedent, the court determined that it was clearly held in *Ivey* that the Supreme Court’s test should be followed in preference to the otherwise binding authority of *Ghosh* and that it was not for the Court of Appeal to conclude the Supreme Court had acted beyond its powers. The rules of precedent were said to exist to provide legal certainty, ensure order and predictability and allow for the development of the law, rather than providing a code which exists for its own sake. As such, it was opined that they need to be capable of flexibility in order to prevent them from becoming self-defeating.²¹

The Court concluded that, subject to the conditions outlined in *James* being satisfied, “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

¹⁸ *Director of Public Prosecutions v Patterson* [2017] EWHC 2820 (Admin) [16].

¹⁹ Andrew Campbell-Tiech QC, New Cases: Substantive law: Dishonesty: *R. v Barton and another*, Criminal Law Week, CLW/20/17/10.

²⁰ *R v James; R v Karimi* [2006] EWCA Crim 14.

²¹ *R v David Barton and Rosemary Booth* [2020] EWCA Crim 575 [102]-[103].

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*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified.”²²

The court, therefore, held that the test outlined in *Ivey* is now the correct test for dishonesty in criminal law. The result of *Barton* is that an otherwise unremarkable case involving numerous property offences has become important on two grounds.

First, we now have a definitive answer to the question of the status of the *obiter* statement in *Ivey*. *Ghosh* as a principle has finally been put to rest in its fourth decade of application and there is a new test for dishonesty that applies to both the civil and criminal jurisdiction. This decision has already been criticised for opening the door to more convictions “on the margins of criminality”,²³ although time will tell as to whether the new test makes any practical difference to convictions, given that the previous second limb of the direction seems redundant when considering the defendant’s own knowledge or belief as to the facts, thus preserving the required subjectivity of *mens rea* under s.8 of the Criminal Justice Act 1967.²⁴

Second, there has been a modification of the previous rules of precedent. This is something that has always been within the power of the highest court to develop²⁵ and which may be a pragmatic approach rooted in the wish to avoid appeals with foregone conclusions. Nonetheless, it may be regarded as a significant development that where the Supreme Court unanimously makes a statement of law, albeit *obiter*, the Court of Appeal must bow to that statement to the detriment of its own binding authority.

²² *R v David Barton and Rosemary Booth* [2020] EWCA Crim 575 [104].

²³ Andrew Campbell-Tiech QC, New Cases: Substantive law: Dishonesty: *R. v Barton and another*, Criminal Law Week, CLW/20/17/10.

²⁴ Criminal Justice Act 1967 c.80.

²⁵ Practice Statement, House of Lords [1966] 3 ALL ER 77.