

A discussion of the current test for dishonesty in light of *Ivey v Genting Casinos* largely overruling *R v Ghosh*.

Despite having been a landmark in the English legal landscape for 35 years as the leading authority on defining dishonesty in criminal law cases, the case of *R. v Ghosh*^[1] has long received a diverse and mixed reception from commentators and the Courts alike.^[2] It is subsequently unsurprising that its *obiter dicta* treatment in the 2017 case of *Ivey v Genting Casinos* has elicited much attention,^[3] with some proclaiming that the *R. v Ghosh* test has effectively been overruled. However, in reality, the impact of *Ivey v Genting Casinos* is significantly more nuanced. By considering the content of the decision, the manner of its passing and the changes it makes, it will be submitted that *Ivey v Genting Casinos* represents an overdue and desirable change to the criminal law.

It is worthwhile first to briefly consider the state of the law prior to *Ivey v Genting Casinos*. Whilst some guidance exists in English statutory law as to the meaning of dishonesty, for instance as in the 1968 Theft Act s.2, and so some supplement has been found from the common law. Especially significant here is the case of *R. v Ghosh* which is relevant to circumstances where a defendant admits to the criminal action but submits that the action was in fact not dishonest. In *R. v Ghosh* a doctor who claimed money for surgical operations that he had not actually performed, the Court laid out a test for evaluating dishonesty in a criminal law context. Whilst the defendant in *R. v Ghosh* submitted that his actions were not dishonest on the grounds that he was owed money for unpaid consultations to the same value as that he claimed for the surgeries, Lord Lane CJ, delivering the lead judgment in the Court of Appeal, stated that the core question was 'whether according to the ordinary standards of reasonable and honest people what was done was dishonest', and thus the defendant's conviction was upheld.^[4]

So, for many years, the Courts proceeded to direct juries in criminal cases to apply a test utilizing both subjective and objective elements, whereby it was considered whether the defendant's actions would be objectively viewed as dishonest, and whether the defendant subjectively appreciated this. Notably, as Virgo emphasises, the same approach has not been cleanly utilised in civil law.^[5] Rather here, a greater emphasis on the objective component of dishonesty was contributing to an increasing gulf between legal definitions of dishonesty in a criminal versus civil context. This approach attracted criticism from commentators who considered that it required 'for the defendant's moral compass to be assessed', adding needless complexity and obscurity to a fundamental concept of criminal law.^[6] Moreover, the degree of scope it afforded the jury in

assessing subjectivity was considered to allow for 'absurd' decisions to be reached and go unchallenged.^[7]

Indeed, such was the view adopted by the Supreme Court in *Ivey v Genting Casinos*. Here, the Court considered the actions of a professional gambler who had won a sizable sum in a game that was theoretically entirely dependent on luck. The claimant used an 'edge-sorting' approach whereby minute pre-existing differences on the backs of playing cards are identified and used to gain a competitive advantage. The casino refused to pay out to the claimant, asserting that he had cheated and thus breached an implied promise not to do so as part of the gambling contract. However, whilst the claimant freely admitted to having used edge-sorting, he viewed this technique as wholly legitimate resultant from his area expertise. Whilst it was acknowledged that the claimant's belief as to the honesty of his actions seemed true, the Supreme Court held that his actions did in fact amount to cheating. Here, the Court directly considered *R. v Ghosh*, and considered that its second limb, whereby a defendant's subjective failure to appreciate dishonesty could be the determining factor in a judgment, was an undesirable approach. Instead, it was viewed that the objective assessment of the actions ought be primary with the defendant's subjective appreciation merely one of multiple possibly relevant factors.

Whilst *R. v Ghosh* previously attracted numerous commentators, the verdict in *Ivey v Genting Casinos* can be generally said to have surprised many commentators. This is as *Ivey v Genting Casinos* was not a criminal case, and yet the Court explicitly commented on the use of *R. v Ghosh* in criminal cases, consolidating the criminal and civil approaches to evaluating dishonesty and lessening 'unprincipled divergence'.^[8] This verdict was further considered surprising as the Supreme Court had seemingly circumvented opportunities to criticize *R. v Ghosh* on previous opportunities.^[9]

Nonetheless, whilst some have welcomed this move, others have commented on the fact that the Supreme Court used an appeal case not directly concerned with *R. v Ghosh* to launch an attack on it in *obiter dicta*. Laird is especially critical in this regard, submitting that the approach of the Supreme Court here 'has distorted principles that are fundamental to the common law'.^[10] Laird elaborates that, whilst the content of the Supreme Court's decision is both fair and persuasive, by attaching it as an *obiter dicta* in a judgment that was not directly relevant, the Court failed to properly appreciate the legal system's structure and operation, delivering a judgment with the potential to wreak 'havoc'.^[11]

However, it is suggested that this is a slightly excessive criticism, particularly in light of the fact that Laird's criticism focuses on the manner of the change in law, rather than the

change *per se*. A more persuasive position is instead found in Galli's comment, who states that '*Ivey v Genting Casinos* was the opportunity that the Supreme Court needed to clarify the test for determining dishonesty, both in criminal and civil cases' and further that the Supreme Court 'grasped [it] with both hands'.^[12] Whilst it is persuasive that this move would have been less surprising and perhaps more coherent in a case that directly considered *R. v Ghosh*, it is not compelling that it would have been preferable for the Supreme Court to allow a questionable authority to continue to prevail for the sake of formalism. Whilst not ideal, by considering the matter in *Ivey v Genting Casinos*, the Supreme Court was able to update a much-criticised part of the criminal law test for dishonesty, thus facilitating an overarchingly fairer and more just criminal law.

A more cogent criticism of *Ivey v Genting Casinos* comes from Dyson and Jarvis who posit that the Supreme Court left several major pertinent issues unexamined in their consideration of *R. v Ghosh*.^[13] Specifically, first the *R. v Ghosh* test was impliedly approved by Parliament when it enacted the Fraud Act 2006 by incorporating the two limbs of the *R. v Ghosh* test rather than overturning it and replacing it. Secondly, the criminal law has previously treated the dishonesty question as a 'a mental element rather than a conduct element', however now with objectivity as the prevailing factor, it appears to have quietly moved to being a conduct element without much discussion of the ramifications of this.^[14] Thirdly, Dyson and Jarvis lament that the Supreme Court did not directly consider whether the approach in *Ivey v Genting Casinos* was compatible with the fundamental human right of individuals to be able to 'foresee... the consequences which a given course of conduct may entail', as enshrined in Article 7 of the ECHR, incorporated into English law via the Human Rights Act 1998. with the resultant consequence being that 'confusion is already creeping into the law'.^[15]

However, it is suggested that the practical impact of the update in the law will not be as dramatic as some suggest. Whilst Dyson and Jarvis raise interesting and persuasive issues in terms of matters ignored by the Supreme Court in *Ivey v Genting Casinos*, it is submitted that the move remains both appropriate and defensible. Ultimately, the major change instituted by *Ivey v Genting Casinos* is a lessening, but not removal, of the consideration placed on the defendant's subjective appreciation of his objectively dishonest behaviour. Thus, Courts retain the discretion to allow this to be a determining factor in appropriate cases, without being bound by it, and can direct the jury with more flexibility. As Clough aptly comments, whilst this does not entirely remove the potential for a jury to deliver an unexpected verdict, 'this new Supreme Court test of dishonesty provides less room for manoeuvre' and instead 'creates a more definitive and helpful approach for the jury to adopt'.^[16]

In conclusion, whilst there have been substantial discussions surrounding *R. v Ghosh* and *Ivey v Genting Casinos*, it is suggested that, practically, the change is both welcome and, whilst important, not as dramatic as some imply. Instead, Courts have been given the desirable opportunity to direct juries more clearly and give proper regard to all the relevant circumstances of a case without being required to allow a defendant's subjective failure to appreciate the dishonesty of their actions from being the primary factor in circumstances where that may not deliver the most just result. Undoubtedly, despite its potentially limited practical effect, it will 'reverberate throughout the criminal law for some time'.^[17] Nonetheless, it is hoped that some of the various issues, as described by Dyson and Jarvis, are directly considered and resolved before greater confusion can develop.

Words: 1542

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[1] *R. v Ghosh (Deb Baran)* [1982] QB 1053.

[2] See generally: David Ormerod, 'The Fraud Act 2006 - criminalising lying?' (2007) 3 Crim LR 193, 200; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, cf. *Cornelius* [2012] EWCA Crim 500.

[3] *Ivey v Genting Casinos UK Ltd (Crockfords Club)* [2017] UKSC 67.

[4] *Ghosh* (n 1).

[5] Graham Virgo, ' Cheating and dishonesty' (2018) 77(1) CLJ 18, 18.

[6] Mark Galli, 'Oh my Ghosh: Supreme Court redefines test for dishonesty in Ivey v Genting Casinos' (2018) 29(2) Ent LR 56, 57.

[7] Joanne Clough, 'Giving up the Ghosh: Ivey (Appellant) v Genting Casinos (UK) Ltd trading as Crockfords (Respondent)' (2018) 236 Crim L J 2, 2.

[8] Virgo (n 5) 19.

[9] *Cornelius* (n 2).

[10] Karl Laird, ' Dishonesty: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)' (2018) 5 Crim LR 395, 396.

[11] *ibid* 398.

[12] Galli (n 6) 57.

[13] Matthew Dyson and Paul Jarvis, 'Poison Ivey or herbal tea leaf?' (2018) 134 LQR 198.

[14] *Ibid* 200.

[15] *Ibid* 200 – 201; e.g. *DPP v Patterson* [2017] EWHC 2820.

[16] *Clough* (n 7) 3.

[17] *Laird* (n 10) 396.

