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A simple card game may have dealt prosecutors the Aces. How Phil Ivey fundamentally changed the concept of dishonesty in English criminal law.

November 2017

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The card game Punto Banco (a form of baccarat) is a straight game of chance. Or at least it should be, according to the UK Supreme Court, who found that Phil Ivey, a legend in the professional gambling world, cheated Crockfords Casino of £7.7m by using a technique known as "edge spotting". In deciding whether or not the concept of dishonesty was an integral element of cheating (it found it was not), the Supreme Court took the opportunity to amend the criminal law and remove a purely subjective element from its definition. In one simple hand, the Ghosh test, which has represented established law for the past thirty years, is gone.

Mayfair, August 2012

Phil Ivey is known as the "Tiger Woods" of the gambling world. In August 2012 he spent two days at Crockfords Casino in Mayfair playing Punto Banco, and during that time exploited a weakness in the manufacture of some of the playing cards that were being used in the game. The weakness lay in the printing of the back of the cards (the details on one of the longer sides were clearly different to the other long side). Without touching the cards, but through the use of an unwitting croupier, he engineered certain high value cards (7, 8 and 9) to be placed in the playing shoe with a particular side facing him (rather than all the others, which were facing away). He won £7.7m but the casino's investigators subsequently spotted the ruse and refused to pay up.

In the course of lengthy litigation that went all the way to the UK's Supreme Court, Ivey never denied that he had been "edge-spotting" – the term used to identify the high value cards. He maintained that it was not cheating but described it as legitimate gamesmanship (indeed the High Court judge, Mitting J, who heard live evidence from Mr Ivey found him to have given a factually frank and truthful account of what he had done). However, the question that mattered was not whether the Supreme Court thought it amounted to cheating, which (agreeing with the lower courts) it did.

What does this have to do with dishonesty in criminal cases?

As part of the appeal, the Supreme Court had to decide whether or not the concept of cheating (within the confines of the Gambling Act) involved an element of dishonesty. It found, rather controversially, that it did not (even though offences such as Cheating the Revenue do require the prosecution to prove dishonesty). The case in theory might have ended there. But the Supreme Court took the opportunity to examine the concept of dishonesty and the ***Ghosh*** test, which had been settled criminal law for over thirty years.

What was the *Ghosh* test?

The case of ***R v Ghosh*** was reported in 1982 when Mr Ghosh, a surgeon, made claims for payments for services he had not provided. Whilst his own appeal was dismissed, a two-stage test evolved which required the tribunal to assess:

(i) Whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people; (if the answer to that was no, the defendant would be acquitted)

(ii) If the answer to (1) was "yes", the jury would then go on to consider whether the defendant must have realised that ordinary honest people would regard his behaviour as dishonest (he would be convicted only if the answer to question (2) was "yes".

The Supreme Court in ***Ivey*** felt that this created the unpalatable scenario whereby the more warped the defendant's standards of honesty, the less likely he was to be convicted. It also felt that the concept of dishonesty should be defined in the same way as in civil law (where there is no such subjective limb).

The Supreme Court judges therefore, unanimously, decided to abolish the second limb of the Ghosh test, effectively removing the purely subjective element. Instead, the wording they preferred was as follows:

"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….When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder 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."

So, subjectivity has not been entirely removed from the equation – the tribunal must consider the defendant's genuinely held belief or knowledge as to the facts, before going on to decide whether or not the ordinary man would consider the conduct dishonest. But it does remove the possibility that someone with no real moral compass might effectively be able to get a "jail out of free" card.

Where does this leave us now?

Defendants in criminal cases involving an element of dishonesty (for example conspiracy to defraud – the charge used in the LIBOR cases – theft, fraud by false representation) may have to re-think how they argue their defence. They may no longer have the same opportunity to convince the jury that they did not realise that ordinary people would have found their actions dishonest. The issue of whether certain conduct was dishonest goes to the very heart of the proceedings in many cases (such as the rate manipulation in LIBOR). The need to show dishonesty in connection with the criminal cartel offence under the Enterprise Act 2002 was removed in 2014; to be held criminally liable for cartel conduct no longer requires dishonesty. The boundaries for proving liability are being rolled back. In such cases the prosecutors now hold the aces.

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