Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67

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Introduction

Mr Ivey ("the Appellant") is a professional gambler. He had amassed winnings of £7.7 million playing Punto Banco, a game of chance, at the Respondent's casino. His success was derived not from good fortune but by using a tactic called edge-sorting which relies on exploiting irregularities on the backs of playing cards. Accordingly, the Respondent refused to pay him his winnings. At first instance, it was agreed between the parties that there was a term implied into contracts between casinos and gamblers that the latter will not 'cheat' or 'otherwise act to defeat the essential premise' of the various games. The Claimant denied that his actions amounted to 'cheating' he believed that he had deployed an honest tactic, he and the casino were in an adversarial position and the casino should have protected themselves from the risk. The Court dismissed his claim; holding that the test for determining 'honesty' in the context of playing cards was objective; while no dishonesty or deception had been present in this case he had taken advantage of an innocent croupier and breached the above implied term.

The majority in the Court of Appeal dismissed the Appellant's appeal. Sharp LJ gave the dissenting judgement finding that there could not be cheating unless an offence of cheating under s.42 of the Gambling Act 2005 ("the Act") was established. He opined that that dishonesty as defined in the case *of R v Ghosh* [1982] QB 1053 was a necessary ingredient of the offence and given that the Appellant did not consider his actions to have been dishonest no offence had been committed.

Judgement of the Supreme Court

Cheating will often involve dishonesty, but it is not a necessary component: the runner who trips his opponent has cheated but has not been dishonest. The test is objective, and the Appellant's actions plainly amounted to cheating. Accordingly, the Appellant was in breach of the implied term not to cheat and his contract with the Respondent was unenforceable.

Further, dishonesty was not an essential element of the offence of cheating under the Act and, if the Court was wrong about this, the second limb of Ghosh (that the Defendant must have known that their conduct was dishonest by the ordinary standards of reasonable and honest people) does not correctly represent the law.

Ghosh!

At the heart of the Court's obiter decimation of the Ghosh test is the different interpretation of dishonesty in the civil courts. Giving the leading judgment, Lord Hughes identified the test in a civil jurisdiction as follows:

> "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 that belief, but it is not an additional requirement that his belief must be reasonable. When once his actual state of mind 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 people. There is no requirement that the Defendant must appreciate that what he has done is, by those standards, dishonest."

In the view of the Court, the same approach should be adopted in the criminal courts. In fact, Lord Hughes went as far as to say "it would be an affront to the law if [the meaning of dishonesty] differed according to the type of proceedings in which it arose". However, civil and criminal jurisdictions are entirely distinct. There is good reason to adopt a more stringent test in circumstances where a defendant faces a potential loss of liberty.

One of the factors in favour of moving away from the Ghosh test, in the view of Lord Hughes, was that jurors find it "puzzling". It is unclear from the judgement what evidential basis there was for such a finding particularly given that jury deliberations are sacrosanct. The test adopted in civil jurisdictions appears to be less clear than that currently applied in criminal courts: juries will likely query why they are being asked to examine the Defendant's subjective beliefs if ultimately they are to make a finding on an objective standard. How are Judges to direct a jury on the weight to be given to the Defendant's own beliefs? In the view of this author, what may work in the sphere of civil disputes where a professional judge is required to weigh evidence in a delicate balancing act is entirely unsuited to criminal prosecutions which require, so far as possible, certainty.

Lord Hughes' statement that the Ghosh test necessarily means that the more warped a defendant's beliefs are the more likely he is to be acquitted has some merit. However, the majority of people who hold what may be considered unusual beliefs about particular conduct know that the rest of society disagrees with them (and those that don't may very well be unfit to be tried). There may be one or two cases where a defendant is acquitted in circumstances where the clear majority of people would consider their actions to have been dishonest. However, the Court appears to have forgotten the adage 'it is better that ten guilty persons escape than one innocent person suffer.'

Conclusion

The Supreme Court appears to have unnecessarily watered down the test for dishonesty to be applied in criminal courts. The issue will almost certainly be examined again the next time a defendant is convicted in circumstances where they purport to honestly hold a belief about particular conduct and are denied a Ghosh-type direction.

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