

R.H.E. Oates Vs. Emperor

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Court : Kolkata

Decided On : May-07-1923

Reported in : 76Ind.Cas.417

Judge : C.C. Ghose and ;Cuming, JJ.

Appellant : R.H.E. Oates

Respondent : Emperor

Judgement :

C.C. Ghose, J.

1. This is an appeal against the conviction of and sentence passed upon the appellant under Section 193 of the Indian Penal Code by the Third Presidency Magistrate of Calcutta by his judgment dated the 10th February 1923.

2. The facts which gave rise to the prosecution of the appellant under Section 193, Indian Penal Code, out of which this appeal has arisen, shortly stated, are as follows:--One James Robert Edmond George propounded the Will of his sister, Ellen Lavinia Price, bearing date the 9th October 1912, in Testamentary Suit No. 17 of 1922 on the Original Side of this Court. The testatrix died on the 1st March 1922, at No. 49 Wellesley Street in Calcutta, being then about 71 years of age and by her Will she bequeathed the whole of her estate, subject to the payment of certain legacies, to her brother George whom she also appointed Sole executor.

Among the legacies was one of Rs. 2,000 to her sister, Mrs. Menditta. who filed in this Court a caveat against the grant of Probata of the said Will. The Will was in the handwriting of the son of George and it bore the signatures of two attesting witnesses, namely, the signature of the appellant, E. Oates, described as an Assistant in the Firm of A.J. Main & Co. and residing at 86, Dharamtola Street, and of one Peterson, Assistant in the Firm of Kilburn & Co. and also residing at 86, Dharamtola Street. The said testamentary suit was heard before Mr. Justice Buckland, and the propounded, George, gave evidence in that suit, in the course of which he stated, among others, as follows: A day or two before the 9th October 1912, the propounder, George, was asked to attend at his sister's house at No. 86, Dharamtola Street, for the purpose of witnessing the execution of her Will and between 6 and 7 p.m. on that date he attended at her residence, where he found one Mrs. Pybus and her son, Mr. Pybus, and one Allen, who was a dairy man and who used to supply his sister with milk. He asked his sister if these were the witnesses. She said, 'No, there are others coming in.' She sent word to Oates and Peterson, who were living in the same house and they appeared on the scene. George knew Oates but he had only seen Peterson once or twice; after a few formal words, the testatrix brought out the paper on which her Will was written. She said, it was her death warrant, and after stating that it was her last Will and testament, the testatrix signed it, initialling the alteration on the first page. All the persons present saw her sign and after she had done so, Oates and Peterson signed in turn, at the request of the testatrix as attesting witnesses. Pybus and Allen were about to sign the Will, when George said, there was no need for more than two persons to sign, and they thereupon refrained from signing the Will. After the Will had been so signed, Oates and Peterson went away, Mrs. Pybus and her Son also left leaving Alien and George, who left shortly afterwards.'

3. At the trial before Mr. Justice Buckland, in addition to George, Pybus and Allen, both gave evidence and they supported the story of George. The appellant, Oates, was called as a witness in the said suit and his evidence was to the effect that on one occasion George, with whom he was not acquainted at the time, came upstairs to him and said that his sister was in a very serious condition; she was dying, and would he (Oates) mind signing the Will as a witness? Without waiting, Oates said that if it was a serious thing he would sign at, once. He signed the

document and thereafter went downstairs and that was all he knew about the Will. He did not see the testatrix on that day and the testatrix did not sign the Will in his presence.

4. Mr. Justice Buckland gave judgment on the 31st July 1922, and granted Probate of the said Will. The other attesting witness, Peters on, was not called, as he had left India, but Mr. Justice Buckland observed as follows about the testimony of Oates before him: 'Oates has been called and he was called for the purpose of proving execution. He admitted the signature but denied that the concomitant circumstances were such as Section 50 requires. If Oates could not be found, then I think there can be no question that the evidence of Peterson's signature and of the signature of the testatrix and of the concomitant circumstances would be sufficient. Then, does the circumstance that one of the persons who is said to have been an attesting witness who has been called, who admits this signature but does not prove the attendant circumstances, defeat the propounded and may the attendant circumstances be proved by other evidence? I see nothing to the contrary and in my judgment Probate of the Will ought to issue, if I find as a fact that it was duly executed according to law. Before I dispose of the case, I must deal with the matter of the witness Oates. I have no doubt in my mind that Oates has committed perjury deliberately planned. This must be further investigated by a Criminal Court and I, therefore, direct that the papers be sent to the Government Solicitor with a view to an application being made for sanction to prosecute Oates for giving false evidence.'

5. On the 31st August 1922, Mr. Justice Bucland granted sanction under Section 195 of the Code of Criminal Procedure to the Public Prosecutor to prosecute the appellant for having on certain dates at Calcutta, being bound by solemn affirmation to state the truth, intentionally given false evidence in a judicial proceeding by having given false evidence in answer to questions (which were set out in a schedule) put to him in the course of his evidence before this Court. The schedule contains practically the whole of Oates' evidence before Mr. Justice Buckland.

6. The matter then went before the Third Presidency Magistrate and Oates was charged with having given false evidence, in answer to certain of the following questions, the questions being the same as are in the schedule to the order granting sanction. At the trial before the Third Presidency Magistrate it appears that the judgment of Mr. Justice Buckland, as well as the depositions of George, Pybus and Allen before the learned Judge were tendered and received in evidence. In addition thereto, George, Pybus and Allen were examined before the Third Presidency Magistrate. Mr. Mohini Mot an Chatterjee, a Solicitor of this Court, who was the Solicitor of George in the proceedings before Mr. Justice Buckland, was also examined. In addition to this body of evidence certain other witnesses were called, whose evidence, however, is not material for the purposes of this appeal.

7. On behalf of the appellant it has been contended before us that the Third Presidency Magistrate was wholly wrong in admitting in evidence, at the trial before him, the judgment of Mr. Justice Buckland and the depositions of George, Pybus and Allen in the testamentary suit. It has further been contended before us that the circumstances under which the evidence of Pybus and Allen was obtained and the evidence itself of these two witnesses show conclusively that no reliance can be placed upon the statements of witnesses like Pybus and Allen. It has also been argued that if the evidence of Pybus and Allen cannot be believed on the question as to who were present at the time and place, when and where, the testatrix is alleged to have signed the Will, the evidence of George, who procured these witnesses, must be disbelieved. Our attention has been further drawn to the form in which the sanction to prosecute has been granted and also to the charge framed against the accused in the Court of the Third Presidency Magistrate.

8. We have carefully gone through the order granting sanction to prosecute and the charge as framed against the accused in the Court of the Third Presidency Magistrate and we observe that at no time was an opportunity afforded to the accused to know with certainty the precise questions in respect of which he is alleged to have intentionally given false answers. The examination of the accused in the testamentary suit covered a wide ground and it was incumbent on the prosecution to specify the particular answers given by the accused in the

testamentary suit, which, according to them, were intentionally false. No such particulars were ever specified and we think the accused had a legitimate grievance about the way in which he was called upon to meet the charge against him. Further, we are constrained to observe, that we know of no provision under the law which authorised the reception in evidence by the Third Presidency Magistrate of the text of Mr. Justice Backhand's judgment in the testamentary suit. The learned Deputy Legal Remembrancer, who appeared in support of the conviction of the appellant, has frankly stated to the Court that the judgment of Mr. Justice Buckland ought never to have been received in evidence in this case. We think the accused has been very considerably prejudiced by that judgment having been received in evidence, and, so far as this appeal is concerned, we must put the same entirely out of our consideration. As regards the depositions of George, Pybus and Allen in the testamentary suit, the same no doubt would have been relevant if they were used for the purpose of corroborating the statements of the witnesses in question at the criminal trial. The judgment of the learned Magistrate, however, shows conclusively that they were not used for any such purpose and under those circumstances we think it was unfortunate that the depositions of those witnesses, in the testamentary suit should have been used at the criminal trial.

9. It now remains for us to consider whether on the merits the deposition of George, Pybus and Allen at the criminal trial can be relied upon. The witness George, in his deposition before the Magistrate states that his sister was ill in November 1912, and not before, and that, although she had lapses of illness, she was not ill on the 9th October 1912. He said that he had seen Peterson only once or twice; that he did not remember having heard him speak before the 9th October 1912. He did not know Mr. Oates at all, except that he had seen him at 86, Dharamtola about 1912--once or twice in all before October 1912. He had never spoken to him nor to Peterson. He was shown a rough plan of the house. No. 86, Dharamtola Street, which, it is clear from his cross-examination, had been made by him in order that the same might be used by Pybus and Allen for the purpose of 'refreshing' their memory as regards the arrangements of the rooms, etc., in the house in question. He says that his Attorney told him that he must have two witnesses to prove the Will, and he adds: 'When I saw Oates failed and Peterson

not available, I set about getting two witnesses who had witnessed the execution. I discovered them within a week or fortnight.' He said that he knew one Mr. Griffin and told him to enquire about the whereabouts of Pybus. He found Pybus's memory fairly good before he had refreshed it. He found it defective in some respects, in some minor details Pybus knew the position of the rooms; but he had to refresh' Pybus's memory.' The genesis of the plan (Exhibit H-i) was to refresh Pybus's memory. He added that in order to confirm their ideas about Peterson, he 'charged' them with a description of Peterson in his own way The description of Peterson in the plan itself is marked Exhibit H. He stated that he had been to the offices of Mess s.A.T. Main & Co. in order to get Pybus and Allen verify Mr, Oates' signature. That was after Oates had refused to make an affidavit in the testamentary suit.

10. In the course of his evidence in the Court of the Third Presidency Magistrate, the witness, Allen, admitted that it was George who had, pointed out Oates to him in the High Court. Allen gave a minute description of the various incidents at the time of the execution of the Will and in support of his evidence he produced the counterfoils of a bill book, which showed that he had to receive a sum of Rs. 7-8-0 from Mrs. Price for milk supplied during September. At the end of his examination he made the following statement:--'Mr. Chatterjee (the Solicitor) put some questions to me then he drafted the statement, Exhibit 9, then I read it and signed it I presumed that Oates and Peterson had also signed and so I said they had signed. Mr. Oates took up the pen but I did not see him sign. He pointed to a signature and said he had already signed.'

11. The witness, Pybas, admitted that he had been convicted on a charge of theft and had been bound down under the provisions of Section 562 of the Code of Criminal Procedure. He further admitted that before that he had been concerned in a bogus cheque matter i.e., that he had issued a bogus cheque. The Criminal Investigation Department were after him and he paid up the money and the matter was allowed to be dropped. He admitted that he did not see the attesting witnesses actually sign and that, therefore, when he stated that they did sign, it was because he reasonably believed that they did sign. When he stated that they did sign, that was not actually correct. He further said in cross-examination

that he was not in a position while in the room to see any of the witnesses actually sign.

12. As regards Oates, he admitted that it was George who had pointed out Oates to him and to Allen in the High Court. He added that the reason was that he had only seen him once in his life and that, had not George pointed Oates out to him, he would not have been able to swear about his identity.

13. As regards the evidence of Mr. Mohini Mohan Chatterjee, the same, taken along with the evidence of his clerk, leaves no room for doubt that when Oates was brought to him as an attesting witness to the Will all that he did was to give instructions to his clerk to draw up a common form affidavit. Mr. Chatterjee very fairly admits that he did not make any notes whatsoever of the conversation between him and Oates and the inference seems to be irresistible from the evidence of Mr. Chatterjee taken as a whole that from the fact that Oates was brought to him as an attesting witness, he believed that Oates stated to him that he had seen the testatrix sign the Will. In any event, we are persuaded that the evidence of Mr. Chatterjee can only be used for the purpose of corroborating the evidence of George. Therefore, the question resolves itself into this, whether the evidence of George can, under the circumstances detailed above, be believed. If it can be believed, then no doubt the evidence of Mr. Mohini Mohan Chatterjee can be used in support of the same.

14. We have, after a very careful and anxious consideration, come to the conclusion that, having regard to the statements made by George, Pybus and Allen, it would be the height of absurdity to rely on their evidence. The circumstances brought out in their evidence are of such a suspicious character that we have no other alternative but to decline to believe their evidence. It is quite clear from the evidence of George that he drew up the plan Exhibit H-1 and supplied the description of Peterson, Exhibit H in order, as he says, to 'refresh' the memory of Pybus and Allen--in other words, it is quite clear that George has tutored the witnesses, Pybus and Allen, This conclusion is further strengthened by the fact that it was he who pointed out Oates to the witnesses, Pybus and Allen, in the High Court shortly before they gave evidence. If we hold that George has

tutored the witnesses, Pybus and Allen, as we do, then there is an end of the case for the prosecution. In these circumstances, we are not prepared to use the evidence of Mr. Mohini Mohan Chatterjee in support of the case for the prosecution,

15. Now, if we cannot believe the evidence of George, Pybus and Allen, it follows that we cannot accept the evidence as regards the identity of Oates, having been present at the time of the execution of the Will by the testatrix. In this trial we have got to be satisfied beyond doubt that the witness, Oates, has intentionally given false evidence. We find on the record no evidence calculated to lead us to hold affirmatively that Oates has intentionally given false evidence. On the contrary, there are abundant indications on the record, suggestive of the fact that the witnesses for the prosecution are unworthy of credit. In these circumstances, we are constrained to hold that the prosecution have not made out any case whatsoever against the appellant Oates.

16. The result, therefore, is that the conviction of and sentence passed on the appellant are set aside and the appellant is acquitted. The bail-bond of the appellant will, therefore, be accordingly discharged.

Coming, J.

17. This is an appeal against the order of Mr. K.B. Das Gupta, Third Presidency Magistrate, convicting the appellant, one R.H.E. Oates under Section 193 for having intentionally given false evidence in a judicial proceeding and sentencing him to undergo one year's rigorous imprisonment. The facts would appear to be these. The appellant was called as a witness in a certain Probate suit in which the Will of a certain Mrs. Price was in question. The Will was propounded by one Mr. George and a caveat was entered by a Mrs. Menditta. Mr. Justice Buckland by whom the case was heard was of opinion that Oates had committed perjury and directed the papers to be sent to the Government Solicitor with a view to prosecuting Oates for perjury. The Government Solicitor put in an application in which he first set forth the facts of the case and then some 50 questions to and answers given by Oates and he asked for sanction to prosecute Oates for having

given false answers to certain of the questions put to him as set out in paragraph 6. He did not specify which answers were false. Paragraph 6 contained all the 50 questions and apparently the case was, as I read the application for sanction, that all these 50 answers were false. Mr. Justice Buckland then gave sanction to prosecute the appellant for having given false evidence, by having given false evidence in answers to questions set out in the schedule put to him in the course of the evidence. The sanction apparently covered all these 50 answers and. I take it, it was the case of the prosecution that all the answers were false. On the sanction the appellant was put on his trial and, after recording certain evidence, the Magistrate drew up a charge under Section 193 against the appellant. That charge is a remarkable document. It covered in my brief pages of typewriting. The material portion is as follows: 'That you...intentionally gave false evidence in a stage of a judicial proceeding, to wit, the proceedings in the suit above mentioned by having given false evidence in answer to certain of the following questions put to you in the course of your evidence before the said Court.' Then followed the 50 questions and the answers to which I have before referred. Which answers were alleged to be false did not appear and it is impossible to discover from the charge itself and no accused person reading such a charge could say what he was called on to answer. It could not be said that such a charge was reasonably sufficient to give the accused notice of the matter with which he was charged. The learned Magistrate's attention was drawn to Section 222 (1), Criminal Procedure Code. Mr. James who appeared for the appellant has not asked, however, for a fresh trial preferring and as will be seen later, rightly, to base his defence on the merits. He has also contended that certain evidence which has been admitted is inadmissible. The evidence is the evidence of George, Pybus and Allen given in the Probate proceedings before Mr. Justice Buckland and the judgment of Mr. Justice Buckland in the same proceedings. Now, former statements by witnesses can be used in certain circumstances to contradict or corroborate them. Mr. Orr contends that the statements in question were used to corroborate the evidence of these three witnesses. But a perusal of the learned Magistrate's judgment will show that be used these statements not to corroborate the witnesses but as substantive evidence for he says that the evidence given in the High Court appears to him to be more truthful than what they had given before him. For this purpose they are

obviously inadmissible.

18. With regard to the admission of the judgment of Mr. Justice Buckland in the Will case, Mr. Orr does not attempt to defend it. It was most improperly admitted and has, I think, seriously prejudiced the appellant. With regard to the facts of the case as I have pointed out the charge threw no light on what the appellant is charged with but from the judgment of the learned Magistrate and the argument of the learned Counsel it would seem that there the case against the appellant is that he stated that he did not see the testatrix sign the Will but that it was brought up to him by George to his own room upstairs and George told him, Mrs. Price was very ill and asked him to sign the Will as a witness and he did so, while the truth was that he came downstairs and actually saw Mrs. Price, the lady whose Will was in question in the Probate proceedings, sign the Will and then attested it. With regard to the presence of the appellant, Oates, at the time of the alleged signing of the Will by Mrs. Price, the case against the appellant rested mainly on the point there are three witnesses Pybus, Allen and George and also the Solicitor Mr. Chatterjee. The last witness was not actually present but the case of the prosecution is that Oates made certain admissions to him at the time of the application for the Probate which would show Oates already saw the signing of the Will.

19. I shall deal, first of all, with the evidence of Pybus and Allen who alleged that they saw Oates in the room at the time of the signing of the Will. In dealing with their evidence certain facts have to be borne in mind namely, that the events to which they are deposing took place some ten years ago on the 9th October 1912, that they had apparently never seen Oates before the 9th October 1912, and they did not see him again until George pointed him out to them in the High Court as Oates during the trial of the Will case some 10 years later. If they did not see this person who, as they allege, witnessed the Will they saw him for perhaps an hour 10 years ago. They had not known him before. They apparently never saw him again. They had no particular reason to remember him. In such circumstances it is highly improbable, though not impossible, that they would remember him. But when we come to examine their evidence and George's the only conclusion to which we can come is that they are tutored witnesses on whom no reliance can be placed. I will first consider the witness Pybus... he admitted that he has been

convicted for theft. He was concerned in a bogus cheque case. On his own showing he is, therefore, a somewhat unscrupulous person. He admitted that George coached him in his evidence. Mr. George gave him a plan of the house where the Will was signed apparently to help him in his cross-examination. Mr. George also gave him a description of Peterson, the other witness. He further admitted that George pointed out Oates to him and Allen in the High Court and says that if this had not been done he could not have identified Oates. Then he stated flatly George gave him and Allen...Rs. 50 each to pay their expense which George denied. His evidence shows that the witnesses and testatrix all signed with his fountain pen. An examination of the Will would show that Mrs. Price signed with entirely different ink to what Oates and Peterson signed. He admitted he did not see Oates sign. He is, on his own admission, a tutored witness and no reliance whatsoever can be placed on his evidence. The other witness of the signing of the Will is Allen. He is a dairy man who supplied Mrs. Price with milk and the case is that on the 9th October 1912, he came to Mrs. Price to collect a bill for Rs. 7-8. He was asked for some reason to wait. He did so, why, is not clear, and apparently saw the signing of the Will. In order to substantiate his story a certain bill book is produced in which are the counterfoils of the bills for milk and on the particular bill is noted 'paid 9. 10.' The witness however, in cross-examination is positive that he paid Rs. 7-8 over received for the bill to his wife, on the 9th October 1912, at 12 a.m. If that is so he obviously could not have received it in the evening of the 9th October. How George came to remember the witness's presence is not quite clear. This witness too like Pybus had not seen Oates before or after the day of signing the Will until Oates was pointed out to him in the High Court after an interval of 10 years. He gave a description of Peterson, the other witness, entirely different to that given by George. He describes him a tall 6 feet, and fair and not speaking with a foreign accent. George described him as medium height and built, slight stoop and speaking like a foreigner. The prosecution contends that these witnesses have been got at. A witness who can be got at can obviously be got at by either party. I must reject the evidence of these two witnesses as worthless. They are, on their own admission, coached and tutored witnesses. It is most unlikely that after 10 years they would remember a man whom they only saw for an hour or so. Allen, on his own evidence, could not have been there but was there the day

before. No explanation has been offered how George could remember after these 10 years their presence at the signing of the Will. He had no reason to remember it.

20. I will now consider the evidence of George and Mr. Chatterjee. The prosecution has argued that even if we reject the evidence of Pybus and Allen, the appellant can be convicted on the testimony of George corroborated by Mr. Chatterjee. George is a highly interested person. He was endeavouring to establish a Will which gave him his sister's property to the exclusion of his other sisters. No doubt, he has succeeded in establishing the Will in the Probate Court and so it is argued he had nothing more to gain. No doubt that is so, but, obviously, he must give the same evidence in the Magistrate's Court and in the High Court and he had possibly a desire to punish Oates whom he might consider had let him down. His evidence if it stands alone is worth little or nothing. On his own admission he had tutored the witnesses Pybus and Allen. He refers to the process somewhat euphemistically as refreshing their memory. He had a plan of the house and a description of Peterson (Exhibit H.H.), drawn up to refresh their memory with. Take only one instance, George states 'To confirm idea about Peterson I charged them (the witness with a description of Peterson in my own way.' In other words, George admits tutoring Allen and Pybus to give false evidence, for a man who deposes to facts which he does not really recollect after being tutored what to say is giving false evidence. A person who would induce a witness to give false evidence is clearly capable of giving false evidence himself. In these circumstances, I can place no reliance on George's statement by itself.

21. The prosecution contends that the evidence of Mr. Chatterjee, the Scitor who acted for George in the Probate proceedings, corroborates George. His evidence amounts to this that George brought Oates to him to swear the necessary affidavit of an attesting witness and that Oates made some statements to him to the effect that the Will was duly executed in his presence and he was one of the attesting witnesses. Mr. Chatterjee made no note of what Oates actually did say and it is obvious that in this case it was most important to know the exact words used by Oates.

22. Mr. Chatterjee then instructed his clerk to draw up the affidavit and the clerk says he drew up the usual affidavit. The fact remains that Oates when the affidavit was sent to him refused to sign it as being inaccurate.

* * * * *

23. The finding and sentence of the learned Magistrate must, therefore, be set aside and the appellant acquitted. If on bail, he should be discharged therefrom.

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