J A M A I C A

IN THE COURT OF APPEAL

R. M. COURTS CIVIL APPEAL No. 47/72

BEFORE: The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Robinson

BETWEEN	STANFORD CARMICHAEL) URIAH BLAKE)	Plaintiffs/Appellants
AND	LILLETH MAY JONES	Defendant/Respondent

Mr. Horace Edwards, Q.C., for the Plaintiffs/Appellants
Mr. Leon Green for the Defendant/Respondent

8th, 9th, 10th May, 1973

FOX, J.A.,

THE FACTS:

This case is concerned with two wills. The first will dated 6th September, 1960, was prepared by Mr. Fred Marshall, a Justice of the Peace, and a businessman of Manchioneal in Portland. This will was properly executed by the testator John Jones. It was signed by him in the presence of two attesting witnesses. By this will, the testator appointed executors and gave his real estate in Portland consisting of six and three-quarter acres of land in Grange Hill and a half an acre with a house at Gurney to his wife Roslyn for her life, and after her death, to his

illegitimate daughter Lilleth May Jones, the defendant in the case. The validity of this will is not in dispute.

The plaintiffs are the executors of the second will. It is dated 25th January, 1968. It is a joint will. Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor. In the Estate of Heys [1914] P. 192. This joint will was made by John Jones and his wife Roslyn. It was written by Stanford Carmichael and witnessed by himself and Uriah Blake. After appointing Carmichael and Blake executors, that will gave two pieces of land and a house situated at Gurney and Pond Bush to Joseph Walker and Patricia Walker; three acres of land at Grange Hill Land Settlement to the defendant, and affirmed the sale to Mrs. Elfreda Brown of one of the five squares of land at Gurney on which the dwelling house stood. This will was questioned. The executors filed an action in the Resident Magistrate's Court, Portland, seeking to prove it in solemn form. The defendant lodged objection to such proof and advanced the will dated 6th September, 1960 as the Last Will and Testament of John Jones. As stated in the defence to the action, the grounds of objection were -

(a) want of knowledge and approval, and

(b) non-execution.

The evidence established that Roslyn died on the 18th of January, 1969, and John followed her on the 28th of January, 1969. Joseph Walker, a beneficiary under the disputed will, was grown up by Roslyn who was his aunt. Mrs. Elfreda Brown was cooking for Mr. and Mrs. Jones at the time of their death. Walker said that he received a message from Mrs. Brown as a result of which he went to Gurney where he "found my aunt on dying". Mr. and Mrs. Jones told him that they were going to make a will and sent him to buy a will form. He bought this will form in Manchioneal, returned to Long Road, Portland, where Mr. and Mrs. Jones lived and gave it to them. They then sent to call the plaintiffs.

The plaintiffs were neighbours of Mr. and Mrs. Jones.

They gave evidence to this effect. As a consequence of a message which he received from Mr. and Mrs. Jones on a Thursday morning in January, 1968, Blake said that he fetched Carmichael from his home and both of them went to the home of Mr. and Mrs. Jones. Mr. Jones was sitting and Mrs. Jones was lying on a bed. Mr. Jones told Carmichael that "he is getting worse everyday so he is asking him to make a will for him". Carmichael agreed. Mr. Jones told him what to write. Carmichael wrote as directed. Mrs. Jones was present. Carmichael read over the will to them both. They agreed with it. Mr. Jones said he could not write. Carmichael gave him the pen to touch, signed his 'X' mark and signed Mr. Jones' name. Blake did not say anything in relation to the signing of the will by Mrs. Jones. Carmichael said that when he arrived in the yard of Mr. and Mrs. Jones on the 25th January, 1968, Walker approached him and gave him the will form. He went with Blake into the house. He saw Mr. Jones sitting on a chair and Mrs. Jones lying on a bed. Walker remained on the verandah. Mrs. Jones told him that, "they have decided both she and her husband, to have a will drawn up so they called me to write it for them." He wrote the will in accordance with the specific instructions given to him by Mrs. Jones in the presence of Mr. Jones. He signed the will by the 'X' mark appearing thereon because Mr. and Mrs. Jones said that they could not write. The Magistrate gave a judgment admitting the will of 6th September, 1960 to probate and rejecting that of the 25th of January, 1968. The plaintiffs appealed.

THE LAW:

The relevant law is not in doubt. There are two rules laid down in the Privy Council by Baron Parke in Barry v. Butlin, 2 Moo. P.C.C. 480 at 482. The first rule fixes the burden of proof upon the party propounding the will to, "satisfy the conscience of the court that the instrument so propounded is the Last Will of a free and capable testator". In relation to this rule, Parke explained (ibid at 484) that the onus "is in general discharged

by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."

The second rule relates to the suspicion engendered by the circumstance that a party writing or preparing a will took a benefit thereunder. In such a case, the court was required to be, "vigilant and jealous" in examining the evidence in support of the will and was directed not to pronounce in its favour unless the suspicion was removed by the propounder of the will. This rule has undergone judicial development. In Tyrrel v. Painton [1894] P.151 Lindley, L.J. pointed out (ibid at 157) that the rule was not, "confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court". In his judgment, Davy L.J. expressed the same view (ibid at 159) and said that the taking of a benefit under a will by the person who prepared it, "is one state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed".

THE MAGISTRATE'S DECISION:

In his reasons for judgment, the learned resident magistrate stated that he found, "that the circumstances in which Exhibit 1, (the will of the 25th of January, 1968) is said to have been prepared and executed as well as the dispositions which the deceased made are such as to cause grave suspicions. The plaintiffs failed to discharge the burden of removing the suspicion and proving affirmatively that the deceased knew and approved of its contents."

THE GROUNDS OF APPEAL:

The grounds of appeal filed are contained in a document of six pages which describe argument and totally fail to identify concisely the specific matters about which complaint is made. It little assists the purpose for which it was intended. Mr. Edwards made scant reference to it and was content to develop his submissions around three broad contentions namely:-

(1) the absence of suspicious circumstances relevant to the preparation and execution of the disputed will;

(2) the presence of circumstances, not taken into account by the magistrate, which rebutted the objection of want of knowledge and approval;

(3) failure by the magistrate to apply the maxim Omnia praesumuntur rite et solemniter esse acta, upon proof of due execution and proper attestation of the disputed will.

It is convenient to deal with these contentions in reverse order.

Contention (3): In all cases, as the trial progresses, a shifting of the evidential burden of proof may be discerned. The party failing to displace this burden must suffer an adverse decision on the relevant issue, whether that issue is a particular factual one or the general issue. Persons propounding a will may be able to prove (as in the instant case) that after it was read over to him the will was signed by a competent testator in the presence of attesting witnesses. This gives rise to a "grave and strong presumption that the will has been duly and properly executed by the testator"; but the party propounding the will could not then seek to apply the maxim Omnia rite esse acta so as to shut out further enquiry into other circumstances affecting the validity of the will. This fallacy was effectively exploded by the Judgments in Fulton v. Andrew (1875) L.R. 7 H.L. 448. If evidence of such other

circumstances is tendered, it will be received and considered by the court. Such evidence must sufficiently support the allegations advanced for the purpose of defeating the will. These allegations may assert objections such as undue influence, fraud, or any other objection recognised by the law. Where the objection is that the testator did not know or approve of the contents of the will suspicious circumstances must be shown, and "the evidence of facts giving rise to suspicion must be such as to create a real doubt that the testator did not know or approve of the contents of the will." Lucky v. Tewari (1965), 8 W.I.R. 363, 367. This contention is without merit.

Contention (2): It is not an easy matter to establish that a resident magistrate has failed to take into account relevant factual matters. The mere circumstance that some facts may not have been expressly referred to in his reasons for judgment, is not a sufficient ground for concluding that he has ignored those facts. A magistrate must be allowed some lattitude in his effort to secure conciseness in stating the reasons for his judgment. The circumstances which Mr. Edwards said rebutted the objection of want of knowledge and approval are:

(1) Walker was an adopted son and a nephew of Mrs. Jones;

(2) The defendant was an illegitimate child of Mr. Jones;

(3) Carmichael was a person of sound repute;

(4) The disputed will was read at the funeral of Mrs. Jones.

(5) Blake had had a long and trusted association with Mr. and Mrs. Jones as substantiated by the fact that he had once signed documents for them in relation to land.

The immediate point to notice in relation to this contention is that the first three matters were expressly referred to by the

magistrate in his reasons for judgment. The second, and in my view, the decisive point which must be admitted is that, notwithstanding the absence of any express reference in his reasons for judgment to the other two matters, it is impossible to avoid the conclusion from the clear tenor of those reasons, that the magistrate must have considered them. This second contention is equally without merit.

Contention (1): The suspicious circumstances which excited the mind of the Resident Magistrate are clearly identifiable on the evidence, and in his reasons for judgment. They are:

(1) The date of the disputed will. Under cross-examination Walker said:

> "Elfreda Brown sent to call me. I went to Gurney. A day after I reached there she died. I went there the Friday, she died the Saturday. It was Elfreda Brown sent to call me when the will was to be made. She looked after them for me. When I went up I was sent to buy a will form."

Mrs. Jones died on Saturday 18th January, 1969. The clear conclusion from the evidence of Walker is that the disputed will was made on the day before her death. The Magistrate so concluded. It excited his suspicion. If the will had in fact been made on the 17th January, 1969, the date of the will, 25th January, 1968, was false. By a close analysis of the printed evidence of Walker, Mr. Edwards endeavoured to show that the buying of the will form by Walker must have taken place on a day in January, 1968, when Mrs. Jones was "on dying". I am unable to accept that interpretation of the evidence. The important point, however, is that the magistrate who saw the witnesses and heard all

the evidence concluded on this point as I have indicated.

(2) The signing of the disputed will by mark. The evidence is that both Mr. and Mrs. Jones could write their names. The will of the 6th of September, 1960, was signed by Mr. Jones. Mr. Fred Marshall, the businessman and Justice of the Peace of Manchioneal saw him sign his name to that will. Mrs. Jones is a literate person. She could read and write. She was a member of the church chior. It would have been reasonable for the magistrate to conclude that her standard of education and her sense of responsibility were not insignificant. She became blind in one eye six months before her death on the 18th of January, 1969. Defective vision could not, therefore, have been the cause of her inability to sign the will in January 1968, one year before she died.

(3) The dispositions in the disputed will. The defendant said in evidence that her father had acquired and had subsequently given her the land at Grange Hill. At the trial she produced a registered title for this land dated 3rd November, 1965. It is clear, therefore, that the purported disposal of three acres of this land to the defendant in the disputed will was beyond the competence of Mr. or Mrs. Jones. He must have know this. The validity of the registered title was not questioned. It must, therefore, be assumed that Mr. Jones concurred in its issue to the defendant. Carmichael said that he wrote the disputed will in accordance with directions from Mrs. Jones. She may very well not have known

that the land at Grange Hill had long ago been transferred to her husband's illegitimate daughter. There was some evidence of friction between the defendant and Mr. and Mrs. Jones. The defendant said that her father gave her the will because "Walker was making some worries." It was open to the magistrate to conclude that, well knowing what had happened to the Grange Hill land, the seeming acquiesence of Mr. Jones to the directions being given to Carmichael by Mrs. Jones was more apparent than real.

(4) The fourth circumstance which the magistrate considered suspicious was the part played by Walker, a beneficiary under the disputed will, in the preparation of that will. Walker obtained the will form. He said that he gave it to Mr. and Mrs. Jones. Carmichael said that he received it from Walker. Walker was on the verandah of the house at the time when the disputed will was being prepared in the house. The magistrate thought that although Walker played no part in the actual execution and attestation of the will, it could not be said that he was so far removed from these transactions as to make him a total stranger thereto. In addition, the magistrate thought that a friendship existed between Walker, Carmichael and Blake which was much stronger than these persons were prepared to admit.

(5) A fifth matter to which the magistrate adverted was the effect of the discrepancies which are apparent in the printed evidence of the plaintiffs' case.

The learned resident magistrate was obviously of the view that the first four circumstances raised a well grounded suspicion that the disputed will did not express the mind of Mr. Jones, and that

therefore, he ought not to pronounce in its favour unless that suspicion was removed. I agree with him. He must also have thought that the discrepancies in the evidence confirmed that suspicion. In this also, I agree with him. I would therefore dismiss the appeal and affirm his judgment. The cost of the trial and of the appeal should be paid out of the estate. Both parties should have the cost of the appeal fixed at $40 each.

GRAHAM-PERKINS, J.A.

In resolving the conflict between the propounders of the two will, the Resident Magistrate felt impelled to the conclusion that the plaintiffs had failed to discharge the burden of removing the grave suspicion engendered in his mind in the circumstances in which the 1968 will was prepared and executed and the dispositions contained therein. He found too, that they had failed to prove affirmatively that the deceased knew of and assented to its contents.

In my view, these conclusions were not only eminently desirable but absolutely inevitable in the state of the evidence before him. I agree that the appeal should be dismissed.

ROBINSON, J.A.

I also agree that the appeal should be dismissed for the reasons advanced.

FOX, J.A.

The order of the court is therefore as I proposed.