

IN THE PRIVY COUNCIL

No. 20 of 1964

ON APPEAL FROM  
THE BRITISH CARIBBEAN COURT OF APPEAL

B E T W E E N :

SHEILA PRESCOD and  
BENJAMIN JACOB JAMES  
(Defendants) Appellants

- and -

ELAINE REECE  
(Plaintiff) Respondent

- FEB 1966

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CASE FOR THE APPELLANTS

Record

1. This is an appeal from the Judgment and Order of the Federal Supreme Court (Appellate Jurisdiction) dated the 16th March, 1962, affirming the Judgment and Order of the Supreme Court of British Guiana dated the 29th May, 1961, in a Probate action pronouncing in favour of a Will dated 30th August, 1958, made by Jacob James, the father of the Appellants and the Respondent. p.110  
p.117  
p.80  
p.91

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2. On the 11th May, 1959, the Respondent commenced the present action in the Supreme Court of British Guiana by a Writ headed:-

1959 No. 704 DEMERARA

p.6, 11.1-10.

IN THE SUPREME COURT OF BRITISH GUIANA  
(PROBATE)

In the matter of the Estate of JACOB JAMES deceased

- BETWEEN -

ELAINE REECE, Plaintiff

- and -

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CLARABEL PICKETT  
BENJAMIN JACOB JAMES  
SHEILA PRESCOD, Defendants

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p.7, 11.6-15.

3. The Indorsement of Claim is as follows:-

"The plaintiff claims to be the sole executrix named in the last Will and testament dated the 30th day of August, 1958 of JACOB JAMES, late of Mahaicony, East Coast, Demerara, deceased, who died on the 17th day of December, 1958, and to have the said Will established.

"This Writ is issued against you, the said Clarabel Pickett, Benjamin Jacob James, and Sheila Prescod as the children of the deceased and three of the persons entitled to share in the estate of the said deceased, in the event of an intestacy, and because you have entered a caveat."

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4. On the 23rd May, 1959, the Respondent filed her Statement of Claim.

p.12.

5. On the 17th June, 1959, the Appellants who were the Second and Third Defendants, filed their Defence.

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The relevant pleas are -

p.13, 1.35 to  
p.14, 1.15.

"8. In the alternative, the defendants Benhamin Jacob James and Sheila Prescod say that the deceased at the time that the said alleged will purports to have been executed was not of sound mind, memory and understanding.

Substance of the Case

9. At the time the deceased executed the said alleged will he was of the age of sixty-six years suffering from diabetes and high blood pressure for the past six years. He was at the time of the execution of the said alleged will in such a condition of mind as to be unable to understand the nature of his acts and its effects, the extent of the property of which he was disposing, or to comprehend and appreciate the claims to which he ought to give effect.

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Particulars of Delusions

10. The deceased was not normal mentally. As a result he flew into violent fits of temper

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and rage and unless restrained would have seriously assaulted on several occasions so as to cause actual bodily harm his wife and children. He often had to be held and a cutlass or stick taken away from him. On one occasion he bit his daughter Lucille on her arm whilst she was holding on to the cutlass. As a result he suffered from the delusion that his children disliked and despised him, in which he was encouraged by the plaintiff. The deceased slept in a room by himself and never ate his meals with his family at the dining table. His wife had to take his meals to him wherever he was, sometimes on his daughter Maureen's tomb, and when he saw the food and if he did not like what it was, he would throw the plate with its contents at his wife."

On the 1st March, 1960, the First Defendant filed her Defence.

p.15.

The relevant pleas are -

"3. The deceased at the time of the execution of the said alleged will neither knew nor approved of the contents thereof.

p.15, 11.27-32.

Substance of case

4. The deceased never gave the instructions for the alleged will, and the said alleged will was neither read over nor explained to him, nor did he read it himself before it was executed and he was not aware of its nature, contents or effect thereof."

6. The sole question for determination in this appeal is whether the proper inference of law to be drawn from the evidence of the circumstances surrounding the execution of the Will is that the Appellant has satisfied the requirements of law as to the burden of proving the testamentary capacity of the testator.

7. The Probate action was heard before Mr. Justice Gordon in the Supreme Court of British Guiana.

pp.19-79.

8. At the hearing before the Trial Court the evidence was directed to the issue relating to the circumstances surrounding the execution of the Will

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and the proper inference to be drawn therefrom as to the testamentary capacity of the testator.

The undisputed facts are -

- (1) that the testator was in failing health for some five years prior to his death;
- (2) that during the said period the testator desired his estate to pass to his heirs according to law and not to prefer any one heir to the exclusion of any other heirs; and
- (3) that inconsistent with his previous wish the testator expressed a desire to make a Will at a time when he was in failing health and in the last stages of inoperable carcinoma and in a serious diabetic condition.

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p.90, 11.1-6.

9. The learned Trial Judge held that "The circumstances of this case viewed as a whole do not in any way conflict with the law as set out, and the Court is satisfied from the plaintiff's case that the testator knew and approved of the contents of the Will, that he was of sound mind, memory and understanding when he executed it, and that such suspicions as may have arisen have been dispelled."

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pp.80-90.

The Trial Court accordingly delivered Judgment on the 29th May, 1961 in favour of the validity of the Will and admitted it to probate.

p.91.

On the 29th May, 1961, an Order was made in accordance with the Judgment.

10. The Appellants appealed to the Federal Supreme Court by Notice of Appeal dated the 15th September, 1961 on the grounds of appeal following:-

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p.2, 1.28 to  
p.4, 1.18.

"3. (a) The learned trial Judge erred in law and misdirected himself when

- (i) Dealing with the case as if it were an ordinary civil action in which the preponderance of evidence on one side was sufficient to determine the issues raised.

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(ii) He held that the mere belief by him of the evidence adduced on behalf of the Respondent (Plaintiff) was sufficient to discharge the burden of proof of the .. issues raised.

(b) That the decision was erroneous and could not be supported having regard to the evidence as a whole because

10 (i) The medical evidence established that the testator was suffering from a debilitating disease, which having regard to the nature of his self administered and indiscriminate doses of insulin was likely to have affected his mind and impaired his judgment at all material times.

(ii) The learned trial Judge did not address his mind to the cumulative effect of all the suspicious circumstances but dealt with each seriatim.

20 (iii) The various reasons given by the trial Judge for his findings of fact were based upon a consideration of irrelevant evidence, a misunderstanding of the medical evidence and the failure to appreciate the need in the circumstances for positive affirmative proof of the testamentary capacity of the deceased at all material times.

30 (iv) The learned trial Judge dealing with the questions of testamentary capacity and want of knowledge and approval at the material times, did not address his mind to the effect of the testimony of the following witnesses:-

40 ESTHER JAMES - That he injected himself thrice daily with the type of insulin which was found in his room after his death and produced in Court, and that he exhibited daily during this period the symptoms which the Doctors described as indicating hypoglycemia as the result of overdoses of insulin. That he administered this treatment and showed these symptoms on the day the Will was executed. He took an injection at

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11 a.m. on that day (3 hours before the Will was executed).

CLAUDETTE SHEPHERD - aged sixteen and granddaughter of the testator who resided in his home, - that she took hot water in to her late grandfather daily for him to sterilise his hypodermic needle, that she saw him inject himself. She saw him administer an injection on the morning of the day when the Will was executed. He was sick on that day and he was very weak.

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CLINTON WONG - Barrister-at-Law, who was present at the execution and witnessed the Will - that when he saw the testator for a few minutes on the day on which the instructions for the will were given to one Fraser, the testator "was a sick man," and that on the day of the execution of the Will the deceased looked sick physically so that he volunteered "to accommodate the deceased" by executing the Will in a car at a street corner in the city of Georgetown, to save him climbing the steps of his chambers, and that the whole process of reading over and explaining took not more than ten minutes.

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THOMAS BEDFORD FRASER - That at the material times the testator appeared "Unduly anxious to make a Will." "

11. The Court of Appeal consisted of Mr. Justice Lewis, Mr. Justice Marnan and Sir Donald Jackson.

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p.110.

The Judgment of the Court was delivered by Mr. Justice Marnan.

The learned Judges held that no question of law was involved and that the findings of the Trial Court were not against the weight of the evidence.

The relevant passage from the Judgment is as follows:-

p.113, 1.3 to  
p.114, 1.27.

"In support of his submissions that the trial Judge erred in his findings, Counsel first submitted that the Judge had failed to

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10 appreciate the weight of the burden of proof which lies on the plaintiff in a probate case when the testator is proved to have been suffering from a debilitating disease. He cited the cases of Harwood v. Baker 3 Moore's P.C. 232 and Amirchan v. Batan Singh (1948) 1 A.E.R. 152. If, which I doubt, any principle of law germane to this case can be derived from either of those decisions, it is to my mind only to the effect that the most strict proof of testamentary capacity is required when it can be shown by evidence that a testator's mental powers had become impaired prior to or at the time of the execution of a will. The test is not what was the type of disease from which a testator may have suffered, or whether it can be described as debilitating, but whether the malady, whatever its nature, had in fact debilitated the testator's mental powers. Both of the cases referred to where the testators were in a state of mental feebleness and at death's door, are clearly distinguishable on the facts, from the present case. I do not think that they are relevant, nor do I think that the present case raises the question of any mistake in law on the part of the learned Judge.

30 "The rest of Mr. Cummings' arguments, though presented with much complexity, can be summarised under two headings: direct evidence as to the testator's condition on the 30th August, 1958, and evidence of so-called suspicious circumstances. Mr. Cummings conceded that there was no evidence as to the testator's physical or mental condition on the occasion in July when he gave his instructions for the will, but as to the 30th August he pointed to the evidence of the male appellant, of the testator's wife and grand-daughter, and of Mr. Wong, which indicated that the testator was in a bad physical condition, on that day. As to the testator's mental condition, however, he could only rely on the evidence of Dr. Williams, who has never seen the testator, to the effect that the circumstances described to him by Counsel suggested that the testator might well have been suffering from an attack of hypoglycemia on the occasion in question. Having regard to the direct evidence of Mr. Fraser and Mr. Wong to the effect that

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the testator was in a clear and normal state of mind when the will was read and explained to him, and he signed it, it is my opinion impossible to say that the trial Judge was wrong in coming to a corresponding conclusion.

"I have not forgotten that Mr. Cummings submitted that the Judge, before coming to that conclusion, should have taken into account the evidence of suspicious circumstances, and I would agree with that submission could I find any cause for genuine suspicion in this case. But I have been unable to do so, nor could I gather from the argument what evil or mischief it is that the Judge or this Court should have suspected. Mr. Cummings first referred to the previous will making equitable distribution of his property. The admitted fact that that will was destroyed by the testator, *animo revocandi*, a long time before the execution of the disputed will, seems to me to indicate that the testator had made up his mind to make quite different dispositions. Mr. Fraser's destruction of his notes and draft will be highly suspicious if it were suggested that he had deliberately drawn up a will conflicting with the testator's instructions, but that is not suggested. Counsel eventually did not persist in his submission that Fraser's indebtedness to the testator was a suspicious circumstance, and he was unable to advance any reason why the testator's semi-literacy should be regarded in that light. He argued that the apparent conflict of evidence as to the times and sequence of the testator's visits to Fraser and Wong was suspicious, but at most that seems to me to reflect only on the reliability of memory of one or the other witness. I can see nothing suggestive of malpractice in the fact that the will was executed in a motor car, nor in the suggestion that neither the testator nor Fraser appreciated the value of the residuary bequest. The only matter which, to my mind, can be properly described as suspicious in this case is the disparity of the provisions made for the various children which, *prima facie*, might give cause to suspect that the will was at variance with the testator's natural desires and responsibilities and therefore with



his true and lucidly formal intentions. But when one comes to examine the will, with all its detailed provisions and distinctions, and to take into account the evidence as to the testator's attitude towards the various members of his family, it seems plain that he intended to dispose of his property as he did.

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10 "I find it quite impossible to hold that the learned Judge's findings were against the weight of the evidence in this case. On the contrary, I think that they were entirely justified."

An Order affirming the Judgment of the Trial Court was made on the 16th March, 1962. p.117.

12. From the said Judgment and Order Final Leave to Appeal to Her Majesty's Privy Council was granted by the British Caribbean Court of Appeal on the 4th January, 1963. p.120

20 13. The Appellants humbly submit that this Appeal be allowed and that the Judgment and Order of the Federal Supreme Court (Appellate Jurisdiction) dated 16th March, 1962, be set aside and that the costs of all the parties in the Courts below and on his Appeal be paid out of the estate, for the following among other

#### R E A S O N S

1. BECAUSE the Courts below failed to consider and apply the true principle of law as to the degree of burden of proof.
- 30 2. BECAUSE the Courts below misdirected themselves in failing to consider whether the testator's mental capacity about the time of the execution of the Will was sufficient to enable him to apprehend and to effect a sudden and considerable change in his previously expressed intention as to the disposition of his estate.

S.P. KHAMBATTA

HARRY LESTER

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CASE FOR THE APPELLANTS

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WONTNER & SONS,  
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Appellants' Solicitors.