Privy Council Appeal No. 6 of 1955

Judah I. Laredo and another - - - - - - - *Appellants*

v.

Samuel Abraham Marrache - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF GIBRALTAR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH NOVEMBER, 1956.

Present at the Hearing:

VISCOUNT SIMONDS
LORD NORMAND
LORD OAKSEY
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* LORD OAKSEY]

This is an appeal from a judgment of Chief Justice Roger Bacon and a jury in the Supreme Court of Gibraltar pronouncing in favour of the will made by the late Simy Marrache dated the 29th day of May, 1953. The defence asked the Court to pronounce against the said will propounded by the respondent on the grounds that

(i) The will was not duly executed ;

(ii) The deceased was not of sound mind, memory or understanding at the date of execution ;

(iii) The execution of the will was obtained by the respondent's undue influence ;

(iv) The execution of the will was obtained by the respondent's fraud ;

(v) The deceased neither knew nor approved of the contents of the will at the date of execution.

The respondent as executor and sole beneficiary of the said will brought the action to prove the will in solemn form, a caveat having been filed by the appellants on the day of the death of the testatrix, the 2nd of June 1953.

The trial occupied seven days and the learned Chief Justice after hearing all the evidence ruled that there was no evidence of fraud or undue influence and the appellants in their printed case state:

" No question arises on this Appeal on any of the issues withdrawn from the Special Jury and the sole question is whether, having regard to the evidence and the summing up to the Special Jury, they were adequately and properly directed on the issue of whether the deceased knew and approved of the contents of the Will."

In summing up the learned Chief Justice said:

> "In each instance the burden rests upon the plaintiff, for there is a rule of law for trials of this kind: he who propounds a Will, that is to say, he who brings it to court for affirmation of its validity bears the burden of proving, first, its due execution and, secondly, the soundness of the testator's mind and, thirdly, the knowledge and approval of the testator as to the contents of the Will when he signed it. If those questions are raised in the pleadings of those who oppose the Will, the burden is on the plaintiff. Of course, in the present case these issues are raised in the pleadings. So your task is to look to see whether the Plaintiff has proved each of those matters to you by a satisfactory preponderance of evidence, that is to say by evidence—whether that of the plaintiff's own witnesses or that which was elicited from the defendants' witnesses or by the documents exhibited—evidence which effectively outweighed the opposing evidence. That is what it comes to. Nothing matters except the evidence given in the box and contained in the documents put in, and the legitimate arguments addressed to you on that evidence."

The Chief Justice then dealt with the evidence at great length and read his note of the evidence of all the witnesses—and concluded his summing up as follows:—

> "Now, gentlemen, you have once more listened with very great patience and I can only tell you that it is not only, of course, your duty to carry out your oath but, as I mentioned before, you have a very solemn duty to find in all truth on the evidence before you, and on that alone, and by applying the principles of law to which I have referred, what value should be given to the deceased lady's signature on her Will on the 29th May, 1953. It is a question of the full value or no value; that is the choice, and the answer depends upon your replies to these three questions put to you in writing. Your reply to the first question should undoubtedly be 'Yes'; your replies to the second and third are matters entirely for your decision."

The jury's verdict was:

> "Answers to questions
>
> (1) Yes (due execution).
>
> (2) Yes (capacity).
>
> (All by majority of 7 jurors to 2) (3) Yes (knowledge & approval)."

The appellants' counsel contended before their Lordships' Board that there were various circumstances of suspicion which should have been put to the jury as circumstances of suspicion and that a recital of the evidence as to these circumstances was not enough and that the Chief Justice ought to have told the jury that there was a very heavy burden upon the respondent on the three questions put to them. Reference was made to such cases as *Barry* v. *Butlin* 2 Moo. P.C. 480, *Fulton* v. *Andrew* [1875] L.R.7 H. of L. 448, and *Tyrrell* v. *Painton* [1894] P. 151. It was also contended that the testatrix who had made a previous will and a codicil in 1946 and another codicil in 1951 might have thought that the new will was merely changing the trustee and not the beneficiary.

Their Lordships are of opinion that the summing up was unexceptionable. It dealt fairly and exhaustively with all the evidence and related that evidence to the three relevant questions which the jury had to decide, namely due execution, capacity, and knowledge and approval of the will. The fact that the Chief Justice did not refer to the circumstances as suspicious is not unnatural in view of his finding that there was no evidence of fraud or undue influence. The evidence of the witnesses for the respondent if believed entitled the jury in their Lordships' view to find that the testatrix had capacity to make a will on the 29th May 1953 and knew and approved of the terms of the will which she made on that day.

If the testatrix had capacity to make the will on the day in question, knew its contents and approved of them, there was no ground for suspicion. It is true that the respondent did not go into the witness box but Mr. Triay the lawyer, Miss Dines the sister who had care of the testatrix at the hospital, Dr. Giraldo who had been her doctor since 1946 and attended her until her death, Miss Olivero another nurse at the hospital, and Mr. Dotto who had been the Secretary of the hospital for twenty-seven years, all of whom were independent witnesses without any interest in the case, gave evidence as to the execution of the will and as to the capacity of the testatrix, and Mr. Triay and Mr. Dotto gave evidence that she knew and approved of the terms of the will. In such circumstances it was not obligatory to call the respondent who was the interested party.

As to the burden of proof the passages from the summing up above quoted are in their Lordships' opinion sufficient. The jury were reminded of their solemn duty and of the necessity of the evidence for the respondent effectively outweighing the evidence for the appellants. The burden of proof varies according to the circumstances of each case and it is not in their Lordships' opinion necessary to describe the weight of the burden in any particular form of words.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

(39855) Wt. 8369 –3 90 12/56 D.L.

In the Privy Council

JUDAH I. LAREDO AND ANOTHER

v.

SAMUEL ABRAHAM MARRACHE

DELIVERED BY LORD OAKSEY

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