

(2008) 06 AP CK 0042

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 790 of 2006

Shaik Mohammad Rahamath @ Sanjay

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 20-06-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : (2008) 2 ALD(Cri) 195 : (2008) 3 ALT(Cri) 16

Hon'ble Judges : R. Kantha, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : K. Balagopal, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R. Kantha Rao, J.—The subject matter of challenge in this appeal is the order of conviction and sentence passed by the Sessions Judge, Kadapa in Sessions Case No. 291 of 2005 whereby and whereunder the appellant was convicted for the offences under Sections 302 and 324 of IPC and was sentenced to undergo life imprisonment for the offence u/s 302 of IPC and no separate sentence being awarded for the offence u/s 324 of IPC on the ground that life imprisonment has been awarded for the major offence.

2. The gravamen of charge against the appellant is that he voluntarily caused the death of S. Jaibunnisa and S. Khader Basha, the deceased 1 and 2 by stabbing them with knife and also voluntarily caused injuries to his wife Shaik Hussain Bi (P.W-5) and thereby committed the offence punishable u/s 302 of IPC and 324 of IPC respectively.

3. Briefly stated, the prosecution case is as follows:

The deceased No. 1 S. Jaibunnisa, is the wife of the deceased No. 2 S. Khader Basha. They are residents of Muradiyanagar, Kadapa town and the house of the appellant is situate opposite to the house of the deceased. The appellant and the

deceased were said to be in inimical terms on account of frequent quarrels between them in the matter of drawing water from the public water tap.

4. On the date of incident i.e., on 15.04.2005 at about 12.30 p.m the appellant with an intention to kill the deceased No. 2 went to his house by holding a stick and concealing a knife at his waist. On noticing the deceased No. 2, the appellant tried to beat him with the stick but he warded off the blow by catching hold of the stick. Thereafter the appellant took out the knife from the waist, stabbed the deceased No. 2 on his abdomen, ribs and throat. The deceased No. 1 who was taking bath came out from the bathroom on hearing the cries of the deceased No. 2, whereupon the appellant stabbed her also on the chest, abdomen and on her legs.

5. P.Ws-1 and 2 viz., Patan Peeran Khan and Patan Halima Bi who are the inhabitants of the same locality and the close relatives of the deceased were coming to the house of the deceased at the same point of time and they witnessed the entire incident, did not intervene due to fear and raised cries and thereafter the appellant made his escape. After escaping from the house of the deceased, the appellant had a quarrel with his wife Shaik Hussain Bee (P.W-5) and he also inflicted stab injuries on the hands of his wife.

6. P.W-6 Shaik Imran Basha who is the son of the deceased aged nine years on the date of incident was also present at the house and witnessed the incident. After causing injuries to P.W-5, the appellant fled away with the knife. P.Ws-1 and 2 shifted the deceased 1 and 2 in two different autos to the Government Hospital, Kadapa. But the doctor who examined them pronounced them dead. P.W-2 took the body of the deceased No. 1 to the hospital at 12.50 p.m., whereas P.W-1 brought the body to the hospital at 1.10 p.m. The hospital authorities made a mention in their records that the dead bodies were brought by P.W-2 Patan Halima Bi.

7. On receiving information about the incident, P.W-13, T. Reddappa, the S.I. of Police, Kadapa Taluq Police Station rushed to the Government Hospital, Kadapa recorded the statement of P.W-1 and on the strength of her statement registered a case in Cr. No. 51 of 2005 u/s 302 read with 34 of IPC, and thereafter P.W-14 V. Narayana Swamy Reddy, the Inspector of Police, Kadapa West Circle took up investigation. In the course of his investigation apart from holding inquest, dispatching the bodies for postmortem examination, he seized the blood stained clothes (M.Os 3 and 4) of the appellant and the blood stained knife (M.O-12) in pursuance of the disclosure statement made by the appellant. After completing the investigation, he filed charge sheet in the Court of II Additional Judicial Magistrate of I Class, Kadapa. The learned Magistrate committed the case to the Court of Session, Kadapa, as the offences are exclusively triable by Court of Session.

8. The case was tried by the Principal Sessions Judge, Kadapa. During the course of trial, the prosecution in order to bring home the guilt of the appellant

examined 14 witnesses, exhibited 24 documents and marked 18 material objects. A portion of 161 Cr.P.C. statement of P.W-2 was marked as Ex.D-1 contradiction on behalf of the defence.

9. Upon considering the oral and documentary evidence on record, the learned Sessions Judge, Kadapa found the appellant guilty for the offences u/s 302 IPC and 324 of IPC convicted the appellant for the said offences and sentenced him to punishment as mentioned above.

10. Before the trial Court P.Ws-1 and 2 who are the close relatives of the deceased No. 1 and 2 have categorically spoken to the criminal Act committed by the appellant i.e., his stabbing the deceased No. 2 in the first instance and thereafter deceased No. 1 on the vital parts of the body as mentioned above. P.W-6 Shaik Imran Basha a child witness who is no other than the son of the deceased also deposed that he witnessed the appellant stabbing and killing the deceased No. 1 and 2 who are his parents.

11. P.W-3 Shaik Dilshad is a neighbour stated in her deposition that there used to be quarrels between the appellant and the deceased. She did not witness the actual occurrence but stated that people gathered at the venue of offence were saying that the appellant stabbed the deceased, the appellant was also present there and he was abusing his wife by saying that because of her only the incident took place, P.W-5, the wife of the appellant requested one Fiyaz (L.W- 4) to save her and thereafter the appellant pushed Fiyaz aside and fled away. P.W-4 Shaik Ghouse Mohiddin, another neighbour stated in his deposition that at about 12.30 p.m. while he was coming from the Maseed in their street after doing namas he observed Hussain Bi (P.W-5), the wife of the appellant hurriedly running, when he questioned P.W-5 she told him that her husband was inside the house of the deceased and when she intervened he beat her and being afraid she was running away.

12. P.W-5 who is no other than the wife of the appellant stated that on the date of incident at about 12.30 p.m., the appellant was sleeping in their house and she was attending to house-hold duties, on hearing the cries she and the appellant went outside and saw several people gathered at the place of occurrence and the people were saying that somebody killed the deceased No. 1 and 2 and went away. This witness was treated hostile by the prosecution.

13. P.W-7 Lalith Kumar, deposed that the police recorded the statement of the appellant in his presence and in pursuance of the said statement that blood stained shirt and pant (M.Os-3 and 4) of the appellant were recovered by the police.

14. P.W-8 Syed Jamalvalli, who is the punch witness for the recovery of M.O-12 knife deposed that the police did not seize any knife in his presence in pursuance of the disclosure statement made by the appellant and he subscribed his signature (Ex.P-8) on the seizure report in the hospital. P.W-9 Sajja Saibaba, another punch witness also turned hostile and he has stated that the police never

observed the scene of offence and they also never seized any material objects in his presence. P.W-14 V. Narayanaswamy Reddy, the Investigating Officer has categorically spoken to the fact of seizing M.Os-3 and 4 blood stained clothes of the appellant in the presence of punch witnesses and also about recovery of M.O.12 blood stained knife, in pursuance of the disclosure statement made by the appellant from cheeki bushes near Shameeria Darga of Kadapa Town.

15. The learned Sessions Judge having arrived at the conclusion that the evidence forthcoming was enough to establish the case of the prosecution beyond reasonable doubt, convicted the appellant for the offences under Sections 302 and 324 of IPC and sentenced him to punishment as mentioned above.

16. Mr. K. Balagopal, learned Senior Counsel appearing for the appellant assailed the order of conviction and sentence passed by the learned Sessions Judge on the following grounds:

1. The trial Court failed to see that the alleged eye witnesses P.Ws-1 and 2 are set up by the prosecution and they are not real witnesses and the trial Court also erred in relying on Ex.P-16 death intimation issued by Casualty Medical Officer, Government Hospital, Kadapa as a piece of evidence, but in fact Ex.P-16 at best reveals that P.Ws- 1 and 2 brought the deceased 1 and 2 to the hospital.

2. P.Ws-1 and 2 failed to explain in their depositions as to the purpose of their visiting the house of the deceased, when actually they reached the house of the deceased and how they witnessed the entire incident in such detail.

3. The version of P.Ws-1 and 2 as to how they brought auto rickshaws for shifting the deceased to the hospital and with whose assistance they laid the deceased in auto rickshaws is lacking in details and therefore no reliance can be placed on such witnesses.

4. The trial Court failed to see that when the motive made out by the prosecution is trivial, the inference is inescapable that the prosecution has not come forward with the full story and is hiding some of the relevant facts.

5. The trial Court failed to appreciate the crucial circumstance that the witnesses for the recovery of the weapon did not support the story of the prosecution and there is no other evidence to link the alleged weapon with either the murder or the appellant.

6. The trial Court failed to notice the fact that the evidence of direct witnesses comes into conflict with medical evidence as the nature of injuries suggest that the deceased were stabbed with double edged knife whereas M.O-12 has a single edge.

7. P.Ws-1 and 2 did not speak about the presence of P.W-6 at the venue of offence. Similarly P.W-6 also did not speak about the presence of P.Ws-1 and 2 and the trial Court having disbelieved the presence of P.W-6 also should have disbelieved the presence of P.Ws-1 and 2.

17. We have given our anxious consideration to the contentions urged by the Learned Senior Counsel.

18. As to the contention that the presence of P.Ws-1 and 2 at the venue of offence at relevant time is doubtful, it may be stated that admittedly P.Ws-1 and 2 were residing in the same locality where the deceased were also residing. It is not always necessary that there must be some specific reason for one person to visit the house of another. The visit may be a casual visit but in the course of such visit there is every possibility for the person to witness the incident. Since admittedly the house of P.Ws-1 and 2 is also located in Muradiya Nagar in Kadapa town where the deceased were also living, P.Ws-1 and 2 cannot be branded as chance witnesses. Failure to give each and every detail regarding the occurrence does not render the testimony of a witness unreliable. Natural witnesses only speak the important facts unlike the tutored witnesses. Therefore when the evidence of P.Ws-1 and 2 inspires confidence, the question that they failed to give the details as to how and from which place they witnessed the incident does not render their testimony unreliable. In this context it is relevant to refer to a decision in the case of State of U. P. Vs. Shanker, wherein the Supreme Court held as follows in regard to appreciation of evidence in a criminal trial. "In this country it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is the function of the Court to separate the grain from the chaff and accept what appears to be true and reject the rest. It is only where the testimony of a witness is tainted to the core, the falsehood and the truth being inextricably intertwined, that the Court should discard his evidence in toto."

19. Coming to the case on hand P.Ws-1 and 2 have absolutely no enmity whatsoever with the appellant. The substratum of their version has not been shattered in the course of the cross-examination though they did not give a detailed version as regards the occurrence. Being the inhabitants of the same locality, their presence at the venue of offence is more probable and not unusual. Apart from speaking about the actual occurrence, P.Ws-1 and 2 have stated in their depositions that there used to be quarrels between the appellant and the deceased persons in connection with drawing water from the public water tap situate in front of the house of the appellant. This fact reveals that P.Ws-1 and 2 were in the habit of visiting the house of the deceased and could know about the disputes between the deceased and the appellant.

20. It was argued on behalf of the appellant that P.Ws-1 and 2 deposed that they were present through out the incident but did not interfere to save the deceased persons and the unnatural conduct of P.Ws-1 and 2 leads to an inference that in fact they were not present at the place of occurrence. As to this, P.Ws-1 and 2 explained in their evidence that since the appellant was armed with knife and causing stab injuries to the deceased 1 and 2 indiscriminately they were afraid of interfering and rescuing the deceased. Further we cannot say as to how after witnessing a crime the witnesses would react. If really P.Ws-1 and 2 tried to

rescue the deceased, there was every possibility for P.Ws-1 and 2 also receiving stab injuries in the hands of the appellant. Therefore the conduct of P.Ws-1 and 2 cannot be said to be unnatural and on that score their version cannot be doubted.

21. As regards the contention that the version of P.Ws-1 and 2 on the aspect of their shifting the deceased Nos. 1 and 2 to the hospital in two separate auto rickshaws is lacking in details, as we have already said that a witness is not expected to give each and every detail about the incident. It is enough on the part of the witness to speak the material facts and the only requirement is his version must be trustworthy having regard to the surrounding circumstances. It is not the version of P.Ws- 1 and 2 that both of them only lifted the deceased and laid them in the auto rickshaws without taking anybody's help. Since admittedly after the incident several persons gathered and the deceased were lying at their house, it is quite natural that some persons might have helped P.Ws-1 and 2 in removing the deceased to the hospital. Therefore on the mere ground that P.Ws-1 and 2 failed to state as to who helped them in removing the deceased to the hospital in auto rickshaws, their testimony cannot be brushed aside.

22. On the issue that the motive part has not been projected by the prosecution properly and has also not been proved properly, it has to be fairly accepted that in the charge sheet a detailed version about motive for the offence committed by the appellant has been furnished. It shows that the appellant brought P.W-5 from a brothel, married her and was living with her in the locality where the deceased were also living. Deceased No. 2 S. Khader Basha some how came to know that P.W-5 Shaik Hussain Bi is a prostitute and started blackmailing her, that if she does not yield to him sexually, he would inform her previous history to the neighbours, ultimately P.W-5 succumbed to the blackmailing of the deceased No. 2. One day it so happened that the appellant found deceased No. 2 in his house with his wife (P.W-5). Actually this in fact appears to be the motive for commission of offence by the appellant as disclosed from the charge sheet. But the prosecution did not adduce any evidence on this aspect and more over set up the motive as the quarrel relating to drawing of water from the public water tap. Undoubtedly it is a lapse on the part of the prosecution. However this is a case based on direct as well as circumstantial evidence and P.Ws-1 and 2 who are the direct witnesses to the occurrence deposed about their witnessing the occurrence and their version found to be reliable. When dependable direct evidence of witnesses is available the motive loses its significance and on account of failure on the part of the prosecution to prove the motive, the version of direct witnesses cannot be rejected and still the appellant can be convicted basing on the evidence of P.Ws-1 and 2 since the case is not entirely based on circumstantial evidence.

23. The other contention urged is that the direct evidence in this case comes into conflict with medical evidence and therefore the account of eye witnesses and the fact asserted by the prosecution that M.O-12 which has only one sharp edge was used by the appellant in commission of offence cannot be believed.

24. It is true that according to the prosecution the appellant stabbed the deceased with M.O.12 knife. P.W-14, the Investigating Officer stated in his deposition that he recovered M.O-12 knife in pursuance of the disclosure statement made by the appellant in the presence of punch witnesses. The punch witnesses did not support the prosecution version on this aspect. But P.W-14 the Investigating Officer has spoken to the fact of recovering M.O-12 knife in pursuance of the disclosure statement made by the appellant to him. Admittedly M.O-12 has a single sharp edge.

25. P.W-10 Dr. K. Nagaraju, who conducted postmortem examination over the body of S. Jaibunnisa, the first deceased found the following injuries:

1. Stab injury over the right side of the upper abdomen, 6" below the right side of the umbilicus, slit shape, edges sharp, measures 3 x 1/2" with peritoneal deep.
2. Stab injury over the left side of the lower abdomen 6" below the left side of umbilicus, slit shaped, edges sharp measures 3 x 1/2 " with peritoneal deep.
3. Incised injury over the around the left little finger, 3 x 1 x skin depth.
4. Two stab injuries over the lateral part of the middle of the left thigh, 2 x 1 x 1" each.

In his opinion the injuries can be possible with a weapon like M.O-12 knife. The postmortem certificate of the first deceased issued by P.W-10 is marked as Ex.P-13.

26. Whereas P.W-11 Dr. K. Vani, who conducted postmortem examination on the body of the deceased No. 2 S. Khader Basha found the following injuries:

1. Two stab injuries of about (i) 3 cms x 2 cms over front of chest in the mid line just below the sternum, elliptical in shape, and edges are sharp and (ii) 3 cms x 1 cm elliptical in shape, 1" above and left of the injury nO.(i).
2. A stab injury of about 2 cms x 1 cm over front of abdomen, obliquely directed, present over front of abdomen in the middle, slightly to the left of mid-line.
3. A stab injury of about 3 cms x 1 cm over front of the chest, elliptical in shape in right anterior axillary line.
4. A stab injury of about 4 cms x 1 1/2 cms over right side of chest 5 cms to the right of right-nipple in the mid-axillary line, edges sharp.
5. A stab injury of about 1 1/2 x 1 cm over front of neck. 1/2" to the left of mid-line, oblique in direction.
6. An incised injury of about 3 cms x 1 cm in the web-space between left thumb and left index finger.

She also stated in the chief-examination that the injuries are possible with weapon like M.O-12. The postmortem certificate of deceased No. 2 issued by

P.W- 11 is marked as Ex.P14.

27. P.W-11, however, while speaking about internal examination of the injuries stated that the stab injuries are elliptical in shape. Basing on the said fact she was cross-examined by the defence on the issue as to with which type of weapon elliptical shaped injury can be caused. P.W-11 stated that elliptical shape means oval in shape and the injuries found on deceased No. 2 are possible with a double edged weapon. She also admitted that M.O.12 knife has only one sharp edge and other edge is blunt.

28. Since it is the case of the prosecution that the injuries on the person of the deceased Nos. 1 and 2 were caused with M.O.12 knife which has sharp edge on only one side, it is the contention of the learned Senior Counsel that the medical evidence comes into conflict with the version of the prosecution as to using of M.O-12 knife, and the evidence of eye witnesses has to be disbelieved. We absolutely see no force in the contention. P.Ws-1 and 2 have only stated in their evidence that the appellant stabbed the deceased No. 1 and 2 with a knife. They absolutely did not describe the knife used by the appellant. They simply stated that the appellant caused injuries with a knife. Therefore it cannot be said that in this case the medical evidence comes into conflict with the ocular version. Further the factum of proof of using M.O-12 knife by the appellant in commission of offence is altogether a different one which has nothing to do with the version of eye witnesses. For argument sake even if it is accepted that the prosecution failed to establish that M.O-12 was not used in commission of offence by the appellant or that it was planted by the investigating agency only for the purpose of the case, it has no impact on the evidence of P.Ws-1 and 2 who are direct witnesses, since they did not describe the weapon of offence minutely. They only stated that the weapon of offence is a knife.

29. In this context it is relevant to mention the finding recorded by the learned Sessions Judge as to the nature of M.O-12 knife she specifically mentioned that M.O-12 knife has sharp tip. She also mentioned that according to Medical Jurisprudence, a knife having sharp tip can cause elliptical shape of injury. The finding of the learned Sessions Judge has to be accepted because if an injury is caused with knife having a sharp tip the tip of the knife penetrates to the bottom of the wound by causing elliptical shape of injury even though the remaining portion of the knife has only one sharp edge. Therefore there is every possibility for elliptical shape of injury with M.O-12 knife which has a sharp tip. As such we have also absolutely see no force in the contention that the ocular version comes into conflict with medical evidence and the same is liable for rejection.

30. In so far as rejecting the testimony of P.W-6 and accepting the testimony of P.Ws-1 and 2 by the learned trial Court, we are of the view that the trial Court perfectly justified in rejecting the testimony of P.W-6 because he was aged nine years on the date of incident, susceptible of being tutored and influenced and more particularly in view of the fact that the police examined him two months after the incident. It is not possible to accede to the submission made by the

learned Senior Counsel appearing for the appellant that the trial Court which doubted the presence of P.W-6 also has to disbelieve the presence of P.Ws-1 and 2 at the venue of offence. As has already mentioned herein before, P.Ws-1 and 2 have absolutely no enmity whatsoever with the appellant and it is not possible to believe that they would unnecessarily implicate the appellant in a grave crime. The learned trial Court gave appropriate reasoning for believing P.Ws-1 and 2 and disbelieving P.W-6. Since the evidence of P.W-6 is considered untrustworthy his omitting to state the presence of P.Ws-1 and 2 at the time of incident is of no consequence. As such in our considered view, rejection of the testimony of P.W-6 does not automatically lead to an inference that the testimony of P.Ws-1 and 2 is doubtful. We affirm the view taken by the learned trial Court that P.W-6 was in fact not present at the venue of offence whereas P.Ws-1 and 2 were very much present.

31. As regards the conviction of the appellant for the offence u/s 324 IPC, as rightly pointed by the learned Sessions Judge. P.W-5 the injured being no other than the wife of the appellant will not normally speak against her husband. P.W-5 stated in her deposition that at about 12.00 noon on the date of incident the appellant was sleeping in their house and she was attending to the house hold duties. On hearing shouts she and the appellant went out and found several persons gathered at the place of occurrence, they also found the dead bodies of the deceased No. 1 and 2. She was treated hostile by the prosecution and in the course of the cross-examination she stated that she sustained injuries to her hands and she was sent by the police to the hospital for examination and she also added that she sustained injuries while cutting onions. She admitted that she handed over the blood stained clothes to the police. She also identified her clothes as M.Os-1 and 2 before the Court. She admitted to have made a statement to the Magistrate which was recorded u/s 164 Cr.P.C. but stated that she gave such a statement as the police put her under fear. The 164 Cr.P.C. statement made by P.W-5 to the Magistrate shows that the appellant stabbed the deceased No. 1 and 2 and also caused injuries to her.

32. In the cross-examination on behalf of the appellant, she stated that she and the appellant shifted the deceased No. 1 and 2 to the hospital and in that process their respective clothes got stained with blood. It is the specific version of the appellant that on hearing cries he and his wife (P.W-5) rushed to the house of the deceased found the dead bodies, they removed the bodies to the hospital and when the appellant went to I Town Police Station, Kadapa which is nearby his house to lodge a report, he was arrested by the police and was falsely implicated in this case.

33. The version of the defence does not appear to be probable either from the evidence of the witnesses examined or from the circumstances. The entire evidence indicates that P.Ws-1 and 2 witnessed the incident and they removed the deceased 1 and 2 to the Government Hospital, Kadapa. Ex.P-16 is the hospital intimation received by the police and according to this document the

deceased No. 1 was taken to the hospital in an auto at 12.50 p.m. and the deceased No. 2 was taken to the hospital at 12.10 p.m. The name of the person who brought the deceased to the hospital is mentioned as Haleema Bi i.e., P.W-2 and her relationship with the deceased is given as aunt. This document is prepared by the hospital authorities at the earliest point of time and by no stretch of imagination can it be said that the hospital authorities made a wrong entry in Ex.P-16. P.W-3 a neighbour of the appellant has stated in her evidence that the deceased was shifted to the hospital by their relatives. Therefore it is obvious that the appellant and P.W-5 came forward with a false theory as to the happening of the incident. This is an additional circumstance in the matter of proving the guilt of the appellant. Having accepted receipt of bleeding injuries, P.W-5 did not admit that they were caused by the appellant. Despite the said fact the learned Sessions Judge convicted the appellant for the offence u/s 324 of IPC for voluntarily causing injuries to P.W-5 with knife. It is but natural that P.W-5 always supports the version of her husband and in view of her admission that she received bleeding injuries and handed over blood stained clothes to the police and those injuries were said to be received at the same point of time when the deceased No. 1 and 2 also received injuries, the conduct of P.W-5 as well as the appellant becomes highly suspicious.

34. Having given our careful consideration to the submissions made by the learned Counsel appearing for the appellant, we found that the evidence of P.Ws-1 and 2 who are the direct witnesses is worthy of credence. Their testimony receives corroboration from the circumstances such as the presence of the appellant at the venue of offence soon after the occurrence and abusing his wife (P.W-5), P.W-5 requesting Fiyaz (L.W-4) to save her from the appellant and thereafter the appellant fleeing away pushing aside Fiaz, as spoken to by P.W-3, P.W-4 noticing the wife of the appellant hurriedly running and informing him that the appellant was inside the house of the deceased and telling him that the appellant beat her, P.W-5 admitting the injuries on her hands and offering false explanation that she received injuries while cutting onions, coupled with the false theory of defence that the clothes of the appellant and P.W-5 were stained with blood while removing the deceased to the hospital and also claiming that the appellant was arrested by the police when he went to the police station to lodge a report about the incident. Thus in the light of the evidence forthcoming in this case the findings arrived at by the learned Sessions Judge are wholly justified and the contentions raised by the learned Counsel for the appellant in our considered view do not merit acceptance.

35. For the foregoing reasons, the order of conviction and sentence passed by the Sessions Judge, Kadapa against the appellant is confirmed. The appeal is dismissed.