

(2017) 12 BOM CK 0008
In the Bombay High Court
Case No : 221 of 2002

The State of Maharashtra

APPELLANT

Vs

Sheshrao S/o Sonaji Jadhav

RESPONDENT

Date of Decision : 21-12-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 84](#) - Punishment for murder - Act of a person of
unsound mind
[Evidence Act, 1872](#), [Section 105](#) -
Burden

Citation : (2017) 12 BOM CK 0008

Hon'ble Judges : T. V. Nalawade, A. M. Dhavale

Bench : DIVISON BENCH

Advocate : S. D. Ghayal, N. B. Jadhav

Final Decision : Dismissed

Judgement

1. This is an appeal by the State against acquittal of the respondent, who was found guilty u/s 302 IPC for committing murder of his wife who was acquitted on the ground of insanity.

2. The prosecution is launched against the accused on the basis of FIR lodged by his father PW3Sonaji on 08.12.2000 at Police Station Chaklamba, Tq. Georai, Dist. Beed. As per the FIR, the accused Sheshrao, aged 45 years, was behaving like a mad person and was under treatment of Dr. Vinay Barhale at Aurangabad. The accused had two daughters and two sons. His daughters were married whereas; sons were residing at their grandmother's house on account of insanity of their father. Deceased Kamalbai was wife of the accused Sheshrao. She was residing at her maternal house and just 12 days before the incident she had resumed cohabitation with her husband. As she stayed at her maternal house for long period, the accused used to assault her. On 06.12.2000, deceased Kamalbai due to fear of her husband was proceeding to her maternal house, hence the accused had confined her in the house. The accused and his wife were the only

persons residing in the house. On 07.12.2000, the house of the accused was not opened upto 09:00 a.m., hence, PW3 Sonaji and his brother knocked the door but it was not opened. Hence, PW3 Sonaji called some neighbours and some of them entered the house by removing the roof sheets. It was noticed that, Kamalbai was lying unconscious and accused Sheshrao was sleeping by her side. There was ligature mark of some rope around her neck. PW3 Sonaji formed an opinion that, his son Sheshrao under the insanity attempted to commit murder of his wife Kamalbai during the night between 10:00 p.m. to 09:00 a.m. Kamalbai was first taken to outpost at Umapur and she was forwarded to Primary Health Centre at Umapur but she was referred to Rural Hospital at Georai and then to Civil Hospital at Beed. She had some injuries on her neck as well. On the basis of such FIR, the crime was registered at C.R. No. I63/ 2000 at Chaklamba Police Station, Georai and the same was investigated into by PW6API Waghmare. The accused was produced before the Id. JMFC. Initially, he was remanded to police custody from 09.12.2000 to 11.12.2000 and thereafter he was remanded to MCR. The Investigating Officer visited the spot and drew spot panchanama. Some pieces of bangle were seized from the spot. A rope prepared from Saree found on the spot was seized. The Investigating Officer recorded the statements of material witnesses and collected medical evidence. On 07.01.2001, Kamalbai died without regaining consciousness. The postmortem was conducted on her dead body which discloses that there was one ligature mark and two abrasions on her neck. There was internal damage to the brain and dislocation of cervical spine C1C2. She died due to complications of spinal injury due to fracture dislocation of cervical spine C1C2 associated with ligature compression of neck. On 14.03.2001, the Investigating Officer submitted a report to the Id.JMFC, Georai that the accused should be referred to medical examination about his mental condition and he was accordingly referred to Mental Hospital at Pune and he was accordingly in mental hospital from 21.03.2001 to 18.06.2001. He was declared fit to face trial and defend himself. Thereafter, chargesheet came to be filed. In due course, the case was committed to the court of sessions. The accused could not engage advocate and advocate appointed on state expenses was provided to him. The charge Exh. 4 was explained to the accused to which he pleaded not guilty. The prosecution examined six witnesses. The accused has admitted that he and his wife were alone in the house during the fateful night but claimed that due to unsoundness of mind he was unable to understand what has happened during that night. The Id. trial Judge accepted the prosecution evidence to hold the accused guilty u/s 307 IPC but also accepted evidence of accused about insanity and therefore the accused was acquitted but he was detained in the Jail with direction to the Jail authorities to submit report to the Government whether the accused could be released without danger to himself or to any other person. It is reported that soon thereafter the accused was released from the Jail.

3. Shri. S. D. Ghayal, learned APP for the State has deposed that, there is convincing evidence both ocular as well as circumstantial to show that the

accused and his wife Kamalbai were alone in the house and Kamalbai sustained throttling and strangulation whereby she became unconscious and later she died due to injuries on 07.01.2001. He argued that, the medical evidence and evidence of material witnesses has not been challenged and the same is sufficient to show that the accused has committed murder of his wife. The Id. trial Judge has rightly held him guilty u/s 302 IPC.

4. However, Shri. Ghayal argued that, the Id. trial Judge erred in holding that the accused committed murder under insanity and was covered by the exception u/s 84 of IPC. He relied on judgments in *Sudhakaran v. State of Kerala* 2011 Cri.L.J. 292 and *Santosh S/o Shridharrao Bhatambrekar v. The State of Maharashtra* (Cri. Appeal No. 173 of 2001) delivered by Division Bench of this Court to which one of us (T.V. Nalawade, J.) was party, on 06.09.2017. He argued that, the conduct of the accused at the time of commission of offence or soon before or after the crime is relevant to determine whether he was legally insane or not or whether his case would fall under exception to Section 84 of IPC. He relied on Section 105 of Evidence Act and submits that the burden was on the accused to prove that his case falls under exception to Section 84 IPC. He fairly conceded that the burden is on the accused that he has to show by preponderance of probability that his case falls under exception. He pointed out that, there is no such evidence to show that the accused was suffering from mental insanity at the time of commission of offence. There is also no expert evidence to show that the accused was suffering from some mental insanity and unsoundness of mind which would deprive him of powers to realize what he was doing was wrong or contrary to law or that what he was committing was an offence. Mr. Ghayal submitted that the accused used to assault his wife and while she was proceeding to her maternal house he had brought her back. He had wrongfully confined her. He was in senses and he was knowing the consequences of his acts. The Id. trial Judge erred in relying on the evidence regarding previous and subsequent behaviour of the accused which was not in close proximity with the date of incident. He submitted that, the case of the accused does not fall under exception to Section 84 IPC. Therefore, the accused should be convicted u/s 302 IPC.

5. Per contra, Id. Counsel Shri. N. B. Jadhav for respondent supported the judgment of the trial court. He relied on *State of Rajasthan Vs Shera Ram*. AIR 2012 SC 1 and *Ratan Lal v The State of Madhya Pradesh* AIR 1971 SC 778. He submitted that, even if the accused succeeds in creating reasonable doubt in the mind of the Judge about the mens rea, the accused is entitled for acquittal. He has to prove the defence of case falling under exception by preponderance of probability. He submitted that, right from FIR and evidence of the witnesses there is ample material to show that the accused was suffering from insanity and was under treatment of psychiatrist. Even after the incident, he was required to be sent to mental hospital where after treatment of three months, he was declared fit to face the trial. According to Id. advocate, there is sufficient material to show that at the time of the incident as well, the accused was not

understanding the consequences or that whatever he was doing was wrong or contrary to law. He therefore submitted that the Id. trial Judge has properly appreciated the evidence and no interference is called for.

6. On the basis of the evidence on record, the points for our consideration with findings thereon are as follows :

Sr. No. Points Findings

1 Whether the deceased Kamalbai met with a homicidal death? In the affirmative.

2 Whether the accused has committed murder of deceased Kamalbai? Proved.

3 Whether the accused committed murder due to unsoundness of mind and his case falls under exception to Section 84 IPC? Proved.

4 What order? The appeal is dismissed.

REASONS

7. The prosecution has examined following witnesses and produced documents which can be conveniently grouped as follows: (I) Homicidal Death:

PW1 - Anil Jinturkar. Provisional Certificate Exh. 13 and

PM notes Exh. 14. Inquest panchanama Exh.10 (admitted).

(II) Evidence on last seen together and custodial death: PW2 - Laxman, Police Patil.

PW3 - Sonaji, father of the accused.

PW4 - Madhukar, spot panch with panchanama Exh. 24.

Evidence of Investigating Officer API - Waghmare PW6.

(III) Plea of insanity :

(a) Evidence of Sonaji and FIR Exh. 20.

(b) Evidence of PW2 Laxman.

(c) PW5 Psychiatrist Mr Stanley.

(d) First remand report.

(e) Application dt. 17.3.2001 by prosecution and was passed by Id. JMFC, Exh.30.

(f) Certificate of fitness issued by Pshychiatrist (PW5) Exh. 29.

(g) Application by APP for referring the accused to the Mental Hospital dt. 14.3.2001 and order of JMFC (Exh. 51).

8. Point No. 1 - Homicidal Death. Evidence of PW1 Anil Jinturkar shows that on 07.01.2001, he conducted PM between 12:30 to 1:30 p.m. on the dead body of Nanda. He found following injuries on her person. (i) Abrasions over the region of

right and left angle of mandible of sizes 3 cm x 2 cm and 3 cm x 3 cm., respectively with black scab over them. Scab was falling from margins. (ii) Whitish scar of 5 cm. length seen over right side of neck antero lateral aspect above thyroid cartilage width was 2 cm. (iii) Bed sores seen over both buttock and sacral region granulation tissue seen.

9. Injury no. 2 referred above is a ligature mark around the neck whereas; injury no. 1 is the abrasions found on the right and left side of angle of mandible with black scab. These are obviously the injuries caused on the fateful night. Injury no. 3 bed sores is not attributable to the incident. Dr. Jinturkar deposed that, on examination of spine and spinal cord he found deformity in cervical region. There was fracture of body of cervical 1 with evidence of dislocation of intervertebral joint between C1 & C2. Paraspinal muscles were contused and showed haemorrhages, spinal cord in respect of fractured vertebra was soft and showed dark blackish tiny hemorrhages after cut section. Dr. Jinturkar opined that the cause of death was delayed complications of spinal injury due to fractured dislocation of cervical spinal C1 & C2 associated with evidence of ligature and compression of neck. He has sent the viscera and organs for histopathology and received report thereof which is on record. After referring to the report, he had given his opinion in provisional death certificate at Exh. 13 and PM notes at Exh. 14. He deposed that, no fracture of odontoid process of second cervical vertebra was noticed. He opined that, besides the hanging manual pressure was applied around the neck and such injury was possible by applying pressure by means of Saree around the neck.

10. The evidence of PW2 Laxman and PW3 Sonaji disclosed that, after the fateful night, in the morning deceased Nanda was lying unconscious inside the house and the accused was beside her. They were in a house latched from inside and Nanda was taken out by making entry from the roof by removing tins. In the light of these facts, it is clear case of homicidal death. There is no possibility whatsoever of suicide or accidental death. Even the defence has not denied this fact. We therefore hold that deceased Nanda met with homicidal death.

11. Point No. 2 : whether the accused has committed murder? In this regard, we find that the accused and deceased Nanda were the only two persons inside the house. The room was latched from inside. In the morning, when father of the accused Sonaji knocked the door, the accused did not open it. PW3 Sonaji called the neighbours and made entry in the room by removing tin sheets. They found that Kamal was lying unconscious with ligature marks around her neck. The accused was sleeping by her side. She and the accused were immediately shifted to the hospital. PW3 Sonaji has stated that Kamal was alright when she and the accused were gone for sleep. According to his evidence, his son used to assault Kamalbai and hence Kamal stayed at a maternal house. She had taken to her matrimonial house few days before the incident. Due to fear of the accused, she was proceeding to her maternal house but the accused went to the S.T. Stand, Shirsala and brought her back and confined her in the house. Thus, it is clear

that on the night intervening 07.12.2001 to 08.12.2001 Kamal sustained fatal injuries to her neck and spinal cord which ultimately resulted into her death after one month. This is a case of custodial death. PW2 Laxman, Police Patil and PW3 Sonaji father of the accused have deposed that the accused used to assault Kamalbai. They have no reason to falsely implicate the accused. The accused alone had opportunity to commit murder of Kamalbai during the night. She has met with a homicidal death. In the light of these facts, we rely upon the judgment in Trimukh Maroti Kirkan Versus State of Maharashtra (2006) 10 SCC 681. . This was the case where bride Revata was subjected to dowry and illtreatment. She died in her matrimonial house. Her husband disclosed that she died due to snake bite but the medical evidence disclose that she died due to asphyxia due to compression of neck. Explaining the scope of Section 106 of Evidence Act regarding the burden to prove of the accused, it was held that these crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished. In such case, strict principle of circumstantial evidence should not be insisted upon by courts. The prosecution is not expected to lead evidence which is almost impossible to be led. After reporting to various judgments, it was observed that when the accused has committed murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling house where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. The conviction awarded by the High Court u/s 302 was upheld by the Apex Court.

12. The evidence of custodial death against the accused rules out possibility of murder by anybody else except the accused. We find that chain of evidence is so complete as to leave no other hypothesis consistent with the guilt of the accused. The accused in his statement u/s 313 also has not disputed the material facts which point towards his guilt. We therefore hold that the homicidal death has been proved.

13. The plea of insanity: The accused has taken plea of insanity. Even when a person has committed any offence if the case falls u/s 84 under exception at Section 84 IPC is not guilty. Section 84 IPC reads as follows: Section 84. Act of a person of unsound mind.-Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

14. The law with regard to scope of Section 84 IPC has been explained in various rulings, which is as follows. (a) Bhikari v The State of U.P. AIR 1966 SC 1. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. It is for this reason that S. 105 of the

Evidence Act places upon the accused person the burden of proving the exception relied upon by him. (b) State of M.P. v. Ahmadulla AIR 1961 SC 998 & Jay Lal v. Delhi Administration AIR 1969 SC 15. State of mind of the accused just before or just after commission of the act is relevant. (C) Dahyabhai Chhaganbhai Thakkar v. State of Gujarat AIR 1964 SC 1563. The evidence shows that the accused gave several blows is not indicative of insanity. It reflects of his vengeful mood or his determination to see that the victim had no escape. (d) Ratan Lal v The State of Madhya Pradesh AIR 1971 SC 778. Tendency to set fire to one's own clothes and house is more than mere irrationality. It is prima facie proof of insanity. Testimony of defence witnesses as to unsoundness of mind of accused should not be disbelieved merely because they are relation of accused. It is not necessary that every insane person should have homicidal tendencies. What is material is behaviour of the appellant on the day of the occurrence.

15. The material evidence with regard to previous and subsequent conduct of the accused just before the incident may be stated as follows. (i) PW2 Laxman, a villager and PW3 Sonaji, father of the accused have deposed that, on the earlier day, Kamal was frightened that the accused would beat her and therefore she was returning home. The accused went to the ST stand and persuaded her and brought her back to his house and thereafter confined her in the house by bolting the door. (ii) The accused and deceased Kamal had slept inside the house but the door was not opened till 09:00 a.m. Then PW3 knocked the door, still it was not opened. Hence, he called the neighbours and the neighbours made entry in the room by removing the roof tins. Kamalbai was found in unconscious condition in the house and accused was sleeping by her side. (iii) Thereafter, Kamalbai and the accused were put in a Jeep and were taken to Police Chowki. (iv) PW6API Waghmare arrested the accused on 08.12.2000 at 10:30 p.m. Thereafter, he was produced before the Magistrate. There is no evidence that, PW6 Magistrate saw any symptoms of insanity in the conduct of the accused. (v) The evidence shows that, the accused has used hands for throttling as well as rope for strangulation so as to ensure that his wife Kamalbai should not survive. The evidence of Medical Officer PW1 shows that there were scratch injuries on the neck showing throttling and besides there was a scar on the neck right side above thyroid cartilage. There was also dislocation of intra vertebral joints between C1 & C2. He has opined that, the cause of death was delayed complications of spinal injury due to fracture dislocation of cervical spine C1C2 associated with evidence of ligature of compression of neck. (vi) PW2 & PW3 Sonaji have not deposed any specific conduct or behaviour of the accused immediately after the incident disclosing signs of insanity when they entered the house. Even the FIR does not disclose such material. (vii) Evidence of PW5 Psychiatrist Dr. Ivan Stanley Neto does not show the nature of mental insanity of the accused when he examined him on 21.03.2001 much later from the date of incident. (viii) There is no evidence that, the accused had shown any homicidal or suicidal tendency or tendencies of setting on fire any property.

16. The Id. Sessions Judge, Beed considered the evidence on record showing

symptoms of insanity much before or much after the time of incident. These circumstances are not relevant for determining whether the case falls u/s 84 IPC or not. When the conduct of the accused at the time of incident is relevant and no evidence is possible to disclose his conduct at the time of incident, his conduct just before or just after the incident becomes more relevant. If the above circumstances are taken into consideration in the light of the various rulings, we are tempted to hold that the accused has failed to discharge his burden. However, the evidence on record of father of the accused and PW6 Dr. Ivan Stanley Neto shows that the accused was suffering from insanity both much before and much after the time of incident. There are some symptoms showing that the accused was sleeping with the deceased and did not open the house till 09:00 a.m. suggesting that he might be insane. There was specific FIR by the father of the accused showing that the accused was suffering from insanity and the murder was committed in the insanity. The FIR shows that, the accused was under medical treatment.

17. In the light of these facts, the judgment in *Siddhapal Kamala Yadav v State of Maharashtra* AIR 2009 SC 97 is most relevant. In this case it is held in para 8 as follows: 8. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law. The prosecution has not to establish these facts.

18. In the present case, it is material lacunae that the Investigation Officer did not produce the accused before the Medical Officer to obtain opinion about his mental status nor made inquiry with the Mental Hospital whether he was taking treatment. In the light of the facts, the accused is entitled to get benefit of doubt and therefore we though do not agree with the findings of the Id. trial Judge based on the evidence discussed by him, in view of the serious infirmity of non production of the accused before the medical officer & in the light of the previous and subsequent history, we grant the benefit of doubt to the accused and hold that at the time of incident he was probably insane.

19. One more lacunae in the present case is that, the accused was unrepresented and learned Sessions Judge had provided him a lawyer at the state expenses. It seems that, the lawyer was not sufficiently experienced particularly with regard to the conduct of cases involving point of insanity of the accused. There is no proper crossexamination of the witnesses to find out the conduct of the accused just before and just after the incident. The law regarding

necessity of appointment of the advocate for the accused may be stated as follows. . In *Md. Sukur Ali v. State of Assam* AIR 2011 SC 1222, it is held if the advocate for the accused either negligently or deliberately remains absent, still the Court is bound to appoint counsel for the accused in a criminal case. The accused should not suffer for the fault of his counsel. Proper legal assistance is a part of guarantee of protection of life and liberty under article 21, which is "heart and soul" of the fundamental rights. Relying on US Supreme Court in *Powell Vs. Alabama*, 287 US 45 (1932) and *Maneka Gandhi vs. Union of India* AIR 1978 SC 597, it is held; 22. We reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practising on the criminal side as *amicus curiae* and decide the case after fixing another date and hearing him.

20. In *Mohd. Hussain v. State (Govt. of NCT), Delhi* 2012 Cri. L. J. 1069, it is held that denial of assistance of counsel to the accused charged with serious offences amounts to negation of concept of due process of law. The conviction and sentence of death penalty were set aside for want of assistance of counsel.

21. In *Ranchod Mathur v. State of Gujarat* AIR 1974 SC 1143, it is observed that, Sessions Judge should view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command, and the accused also may feel confident that his counsel chosen by the court has had adequate time and material to defend him properly.

22. In *Sunil Gaikwad v State* 2009(3) BCR (Cri.) 504, the Division Bench of this Court in a case of triple murder found that advocate of 9 years standing was appointed for the accused, he had conducted sessions cases but had no experience to conduct sessions cases of this magnitude and complexities. It was observed that, by referring to observations from *Jahira Shaikh v State of Gujarat* AIR 2006 SC 1367 regarding concept of fair trial and the role of Judicial Officer as a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality to both the parties, "we have minutely considered the evidence on record more particularly the crossexamination of the witnesses conducted by the defence. In the facts of the case, we are not of the opinion that, this is a fit case for setting aside the judgment and order of conviction and sentence and remanding the matter back to the court for holding fresh trial but certainly we are of the opinion that, some of the witnesses already examined are required to be crossexamined afresh maintaining the earlier crossexamination conducted by the defence counsel".

There was direction issued for appointment of an advocate for the accused having sufficient experience of conducting such cases and permitting the accused to take further cross-examination of the material witnesses. . (The case where the accused has appointed advocate of his own choice will be governed by the ratio in AG v. Shiv Kumar Yadav & Anr. 2015 Cr.L.J. 4640 SC).

23. It is necessary to issue directions to all the police officers through Director General of Police and to all the Judicial Magistrates, Sessions Judges/Special Judges through the Registrar General of the High Court of Bombay as follows : i. Whenever any accused person is arrested and there is any history or the conduct of the accused indicating that he is not mentally sound, it is the duty of the Police Officer who has arrested him to produce him before the Medical Officer for his examination with regard to his unsoundness of mind and to obtain the necessary certificate. If he is suffering from any unsoundness of mind, he should be forwarded to mental hospital for treatment and until certificate of his fitness is received, the matter cannot proceed further.

ii. If the Investigating Officer fails to perform his duty of getting the accused person examined, it is the obligation of Judicial Magistrate before whom he is produced for the first time. If he finds at the time of first remand that there is history of insanity or symptoms of the accused showing insanity, he should refer the accused for medical examination and find out whether the accused is suffering from mental or legal insanity or not. In case of mental insanity, he should be provided with appropriate medical help.

iii. It should be also born in mind by the trial Judges that, no criminal case particularly inviting the substantial sentence should be conducted without appointment of advocate. If the accused is not represented, appropriate legal assistance should be provided to him at the state expenses.

iv. In case of sessions triable offence, it is the duty of the Sessions Judge that sufficiently experienced lawyer should be provided for conducting the case of accused person. The inquiry should be made whether he has conducted sessions cases or not and his length of practice would not suffice for his appointment. In case of sessions cases of complex or peculiar facts it should be esquired whether he has conducted such case or not. Legal aid to be provided at state expenses should not be for the name sake. Then only he should be appointed as advocate for the accused and after recording his satisfaction of competency of the advocate. Copies of this judgment may be forwarded to Registrar General and Director General of Police, Maharashtra for issuing necessary directions in this regard

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24. When the cases in which advocate is appointed at state expenses at the trial stage comes before this Court in appeal, it becomes difficult for the appellate court to find out the competency of the lawyer or otherwise. It is therefore advisable that while appointing a lawyer at state expenses, the trial court should

disclose in its order the length of practice of the advocate appointed and his/her experience in conducting the criminal cases, sessions cases or sessions of particular types and his opinion that in the situation he/she was the competent person to be appointed for the accused particularly in cases where there is likelihood of conviction for major offences.

25. In the result, the appeal deserves to be dismissed and same is dismissed.