

CASE NO.:  
Appeal (crl.) 116 of 2003

PETITIONER:  
Dayanidhi Bisoi

RESPONDENT:  
Vs.  
State of Orissa

DATE OF JUDGMENT: 23/07/2003

BENCH:  
N.Santosh Hegde & B.P.Singh.

JUDGMENT:

### J U D G M E N T

SANTOSH HEGDE, J.

This appeal arises out of a judgment of the High Court of Orissa at Cuttack made in Death Reference No.2 of 2002 and in Jail Criminal Appeal No.244 of 2000. The reference in question was made by the Additional Sessions Judge Jeypore in Sessions Case No.8 of 1999 whereby the learned Sessions Judge having found the appellant in this appeal guilty of an offence punishable under Section 302 IPC came to the conclusion that on facts of the case the appellant should be given the maximum sentence of death, hence, referred the case for confirmation of the sentence under Section 366 of the Code of Criminal Procedure to the High Court.

The appellant preferred the connected Criminal Appeal No.244 of 2000 challenging his conviction and sentence awarded by the learned Additional Sessions Judge, Jeypore. Both the matters came to be heard together in the High Court and by the impugned judgment the High Court confirmed the conviction awarded to the appellant as also accepted the reference made by the learned Additional Sessions Judge in regard to awarding death penalty to the appellant.

It is against the above said judgment of the High Court of Orissa at Cuttack, the appellant is before us in this appeal.

Brief facts necessary for the disposal of this appeal are as follows:

The prosecution alleges that the appellant was an agnetic nephew of the deceased Anirudha Sahu who was working as a Peon in the Sales Tax Department and residing in the Irrigation Colony at Jeypore. The appellant is a resident of village Niranguda and was carrying on turmeric and mustard business. According to the prosecution, he used to come to Jeypore and visit the deceased and often used to stay in the house of the deceased. The prosecution further alleges that the deceased Anirudha was married to Lata and had a three year old daughter by name Puja who were all residing together in the flat at Irrigation Colony. It is also the case of the prosecution that the appellant had suffered loss in his business and was in constant need of financial assistance. The visit of the appellant to their house was not liked by Anirudha's wife Lata since she was suspecting the character of the appellant. She had complained about this to the brother of her husband (PW-15) who in turn had spoken to Anirudha about the propriety of allowing the appellant to stay with Anirudha and his family during the visits of the appellant to Jeypore. According to the prosecution, Anirudha, however, took a very sympathetic view of the

financial position of the appellant, hence, told his brother it is not fair not to help a person like the appellant in his days of trouble. Hence, against the wish of Lata and his brother, Anirudha continued to entertain the appellant in his house.

The prosecution alleges that on 3rd June, 1998, the appellant had visited Jeypore. On that day about 9 p.m. Lata had gone to the house of one Babu Lenka (PW-1) to recall her daughter Puja who was playing there. At that time when Lenka's mother (PW-3) asked Lata to stay for a while, she replied that they had a guest from the village at home and she has to serve dinner, so saying she left for the house along with daughter Puja. The prosecution also alleged that Goutam Kumar Swain (PW-2) who was the owner of a Betel shop in the Irrigation Colony had seen on 3rd June, 1998 Anirudha in the company of the appellant at about 9 p.m. According to the said witness, the deceased and the appellant had gone to his Betel shop to purchase two Sachets of "Khaini". The same witness also says that on the next day i.e. on 4th June, 1998 he had seen the accused going from the direction of the house of the deceased. It is the further case of the prosecution that on 4th June, 1998 having not seen the family members of Anirudha till late in the morning, the neighbours got suspicious about the welfare of the family of Anirudha, hence, tried to find out what has happened to Anirudha and his family. In this process, it is stated that one Kanhu Charan Lenka (PW-9) brother of the neighbour of the deceased Babu Lenka PW-1 climbed a Guava tree in front of the flat of the deceased and saw Anirudha, Lata and Puja lying dead inside the house. Thereafter, the prosecution alleges that the neighbours joined together broke open the front door of the flat which was locked from outside and entered the house where they found the dead bodies of the above-mentioned persons having injuries in their neck. They also noticed that the ornaments normally worn by Lata and Puja were missing. They also saw the almirah in the flat was opened and all the household articles were ransacked. Some of the witnesses who had seen the appellant in the company of the deceased on the previous evening also noticed that the appellant was missing. Therefore, suspecting that he might have been the assailant Babu Lenka (PW-1), the neighbour, filed a complaint in Jeypore Town Police Station which was registered as Case No.148 of 1998. The investigation of the case in question was then taken up by PW-22 Ram Mohan Uttarkabat, who visited the spot and held the inquest over the dead bodies. He also requisitioned the assistance of scientific team from the office of the Superintendent of Police, Koraput to collect blood scraping, finger prints etc. from the place of incident. The bodies of the deceased were sent for post mortem examination. The further investigation was conducted by PW-18 Nathuram Sahani. The post mortem of the dead bodies was conducted by PW-20 Dr. Umesh Chandra Patnaik who noticed punctured wound on the neck of all the three victims, consequent to which wound the carotid artery, jugular veins, trachea and larynx of the victims were cut into pieces. The doctor opined that the death was due to shock and hemorrhage suffered due to the above injuries. During the course of investigation, the prosecution alleges that the police arrested the appellant and his finger prints, foot prints etc. were collected by the scientific team. It is further stated that on information given by the appellant, a knife M.O.VIII was recovered from a bamboo bush near the hay-stack in the village of the appellant. The prosecution also alleges that on the information of the appellant they recovered some cash and a ladies watch in small plastic box M.O.IX from the house of the appellant. It is also stated that on information given by the appellant gold ornaments M.Os. I to VI were recovered from the goldsmith T.Rama Rao (PW-19) which according to the

prosecution belonged to the deceased Lata and Puja. In a Test Identification Parade conducted by the police, the appellant was identified by the owner of the Pan shop PW-2, the goldsmith who negotiated the transaction between the accused Keshab Rao Acharya (PW-19) and T. Rama Rao (PW-17). The ornaments recovered were also identified as belonging of the deceased persons by PW-3 Tamala Lenka, the mother of PW-1 who used to meet deceased Lata frequently including the night before the incident in question and had occasion to notice the jewellery. The jewellery and the wrist watch were also identified as belonging to the deceased by the brother-in-law of Lata PW-15 Bidyadhar Sahu. On analysing the finger prints found at the place of incident, the Finger Prints Bureau reported that some of the finger prints recovered tallied with that of the appellant. Based on such investigation, the prosecution charged the appellant of offences punishable under Sections 394 and 302 of IPC before the learned Additional Sessions Judge Jeypore as stated above.

The defence of the appellant in the courts below is one of denial and false implication by the police. He admitted his relationship with deceased Anirudha but denied that he had visited him or his family.

Learned Sessions Judge after examining the material on record and hearing the arguments addressed came to the conclusion that though the case in hand is based on circumstantial evidence, the prosecution has established each and every circumstance placed against the appellant and the links in the chain of circumstances without any doubt had established the guilt of the appellant. Having so come to the conclusion that the appellant is guilty of offences punishable under Sections 302 and 394 of IPC and having heard the learned counsel for the defence on the question of sentence and after discussing the law on this point elaborately, and also considering the facts of the case, the trial court came to the further conclusion that the act of the appellant was a diabolical and a pre-meditated murder, executed in a well planned manner, causing the death of the entire family including a three year old child. The court also came to the conclusion that the action of the appellant was in no manner caused by any provocation whatsoever from the victims and was motivated solely by greed. The court also came to the conclusion that on entire perusal of the material on record, there were no extenuating circumstances and the case being one of the rarest of the rare cases deserved the maximum punishment. The court also came to the conclusion that since for an offence under Section 302 IPC he was awarding the maximum punishment of death, there is no need to sentence the appellant further for an offence punishable under Section 394 IPC. Accordingly the trial court sentenced the appellant to be hanged by neck till death As required by law, the trial court referred the matter to the High Court under Section 366 of the Code of Criminal Procedure for confirmation of the sentence.

The appellant preferred an appeal to the High Court against the said judgment of the trial court. The High Court heard the death reference case as also the appeal of the appellant together and delivered the impugned judgment dismissing the appeal of the appellant and accepting the reference made by the trial court in regard to the death sentence awarded by it to the appellant.

As noticed above, it is against this common judgment of the High Court, the appellant is in appeal before us.

We have heard learned counsel for the parties. The learned counsel for the appellant has adopted the same argument as was addressed by his counter parts in the courts below and contended that there being no direct evidence

implicating the appellant and the case being one founded on circumstantial evidence the courts below ought to have analysed each and every link in the chain of circumstances to find out whether these links in the prosecution case have been established beyond all reasonable doubts or not. Learned counsel contended such an exercise has not been done by the courts below. He also contended that the entire case of the prosecution is based on suspicion and none of the links in the chain have been really established nor are they safe enough to rely upon to base a conviction. He also contended that the case being one of circumstantial evidence the extreme penalty of death ought not to have been awarded, that is assuming the prosecution has established its case against the appellant. He also contended that the courts below did not take into consideration the facts which should have been treated as extenuating circumstance not to award death penalty. His further submission was that apart from the fact that the case in hand was not a rarest of rare case, on facts of this case did not deserve the extreme penalty of death. While the learned counsel appearing for the State supported the judgment of the courts below, both in regard to conviction as also in regard to sentence.

The courts below in the absence of direct evidence have relied upon 11 circumstances to come to the conclusion that the appellant is guilty of the offence charged against him. The said circumstances are as follow:-

- i) At the relevant time the accused was in need of money;
- ii) On the night intervening between the 3rd and 4th June, 1998 the accused was found absent from his village;
- iii) The accused was found in the company of deceased Anirudha in the night of occurrence i.e. 3rd June, 98;
- iv) On the next morning of 4.6.1998 the accused was seen going away from the direction of the house of the deceased;
- v) On the night of 3.6.1998 the neighbours were told by deceased Lata that a relative is present in their house as guest;
- vi) On the next morning the appellant was found absent from the flat when the dead bodies of the deceased persons were discovered.
- vii) Homicidal nature of death of all deceased; similar modus operandi.
- viii) While in custody the accused led to the discovery of:
  - (a) the weapon of offence.
  - (b) a wrist watch suspected to be belonging to deceased Lata and cash.
  - (c) The ornaments of the deceased Lata and her daughter Puja.
- (ix) The accused was visiting the house of the deceased and had weakness towards Lata.
- (x) The nail clippings collected from the accused were found to be stained with blood.
- (xi) Matching of the blood stained finger prints and chance finger prints found from the scene of occurrence with specimen finger prints of the accused.

The courts below have very elaborately discussed the material produced by the prosecution while accepting each of the above circumstances. In the normal course, there would have been no need for us to go into these circumstances as elaborately as was done by the two courts below in an appeal

filed under Article 136 of the Constitution of India, especially when the finding in this regard is concurrent. But taking into consideration that the appellant is facing a death sentence and the case in hand is one of circumstantial evidence, we think it appropriate and in the interest of justice to re-appreciate the evidence brought on record by the prosecution to assure ourselves that the finding of the two courts below is appropriate on the material available on record.

The first link to be noticed in the chain of circumstantial evidence is the factum of accused's presence in Jeypore in the company of the deceased Anirudha and in the flat of the said deceased in the evening and night intervening between 3rd and 4th June, 1998. While analysing this circumstance, we can proceed on the basis that the appellant and deceased Anirudha were related which factum is admitted by the appellant. While so admitting the relationship, the appellant has taken a defence that he has never visited Anirudha at any point of time. The prosecution, however, relies on the evidence of PW-5 Trailokya Bisoi, PW-6 Nilanchal Bisoi, PW-7 Prem Chandra Sahu all of whom are common relations of the accused and the deceased to show that the appellant was on visiting terms with Anirudha. We find from the evidence of these witnesses that they have no reason to depose falsely against the appellant.

The evidence of PWs. 5 to 7 find support on this aspect of the case from the evidence of PW-15 who is the elder brother of deceased Anirudha. From his evidence, it is seen that the appellant was visiting the house of deceased many times, in regard to which the deceased Lata had once complained to him that she did not like the appellant visiting her house because she suspected appellant's intentions. She also had requested PW-15 to tell her husband about this because of which PW-15 once had told his brother not to entertain the appellant in his house. But being a very kind man Anirudha told his brother that the appellant being his relative he cannot forbid him for coming to his house for a morsel of food. From the evidence of PW-15 coupled with the evidence of PWs. 5 to 7, it is clear that the appellant was visiting the house of deceased Anirudha.

The question then arises whether on 3rd of June, 1998 the appellant was in the company of deceased Anirudha. To establish this part of its case the prosecution relies on the evidence of PWs. 1, 2 and 3 who were the neighbours of the family of the deceased. In their evidence, these witnesses state that he had good relationship with the deceased and his family and they were on visiting terms. PW-1 states that on 3.6.1998 at 9 p.m. deceased Lata had come to his house to take her daughter Puja who was playing in the house. At that time his mother PW-3 asked Lata to stay for a while to which Lata had replied that she had a guest from her village to whom she had to serve food, therefore, she was in a hurry to get back to the house. So saying she went to her house. The evidence of PW-1 in this regard is supported by the evidence of PW-3 who is the mother of PW-1 who also speaks about the visit of Lata on the night of 3.6.1998 and having told her that she had a visitor from the village whom she had to serve the dinner. From this evidence, it is clear that on the night of 3.6.1998 the family of the deceased had a visitor from the village. PW-2 Goutam Kumar Swain is the owner of the Betel shop in the Irrigation Colony. At about 9 p.m. on 3.6.1998, he had seen the appellant and the deceased Anirudha because they had come to his Pan shop to purchase 'Khaini'. After the said purchase, he noticed these two persons going towards the house of the deceased Anirudha. This part of his evidence, that the appellant and the deceased Anirudha came to a shop and purchased two Sachets of "Khaini", is further corroborated by the fact that during the

search of the flat of Anirudha, the Investigating Agency recovered two Sachets of "Khaini" out of which one was partly consumed and the other was found intact. This witness also states that on the morning of 4.6.1998 at about 6 a.m. while he was opening his Pan shop, he saw the accused coming from the side of the house of the deceased and going away. He also states that he had seen deceased earlier and he had identified him after the incident in Sub-Jail, Jeypore in a T.I. Parade. PWs. 1 to 3 have no enmity with the appellant and as found by the courts below, we find no reason why these independent witnesses should speak against the appellant falsely. Accepting the evidence of these witnesses, it is clear that the appellant was seen in the company of Anirudha on the evening of 3.6.1998 and had dinner with him in his house. Therefore, presence of the appellant in Irrigation Colony in Jeypore is established on the night of 3rd of June, 1998 as also in the early morning of 4th June, 1998. From the evidence of PWs. 5 to 7 and PW-15, we have already noticed that the appellant being a relative of the deceased was on visiting terms with the deceased Anirudha. Hence, as held by the courts below the prosecution has established that the appellant was with the deceased on the night of 3rd of June, 1998 and was seen leaving the house in the morning of 4th June, 1998. While examining this aspect of the prosecution case as to the presence of the appellant in the house of the deceased Anirudha on the date of incident, we will also have to bear in mind the factum that the prosecution has established through the evidence of PW-5 that the appellant was not in his village on the said date and he has not been able to prove where exactly he was on that day.

So far as the factum of the homicidal deaths of the deceased are concerned, there can not be any dispute. From the evidence of PW-1, it is seen that on 4.6.1998 even as late as 11 a.m. in the morning the neighbours did not see Anirudha and his family members outside the house as was the normal practice, hence, on being curious Kanhu Charan Lenka brother of PW-1 was asked by his mother PW-3 to go upstairs and see why the deceased have not come out of their flat. Therefore, PW-9 climbed a guava tree and peeped through the window of the flat when he found all the deceased persons lying dead in their house. Having come to know of this, PW-1 went upstairs and found the door of the flat locked from outside, therefore, he broke open the said door with the help of a hammer and entered the house along with other neighbours like PW-8 Puspallata Mohanty, PW-9 etc. and found the deceased lying dead with injuries on their neck. From the evidence of PW-20 the doctor, it is seen that the deceased had suffered punctured wound on their neck which had cut the carotid artery, jugular veins and damaging the trachea and larynx. The doctor had opined that injuries in question were anti-mortem in nature and could be caused by heavy sharp cutting double edged weapon like M.O.VIII. He stated that cause of death was due to shock and haemorrhage because of the injuries to vital organs. The timing of death noted by the doctor was about 36 hours at the time of the autopsy on 5.6.1998 which fits into the prosecution case that the deceased were done to death on the intervening night between 3rd and 4th June, 1998. Therefore, link in the prosecution case as to the cause and time of death of the deceased also stands established.

The prosecution then has relied upon the financial condition of the appellant as a motive for the murder in question. It has come in evidence that the appellant was dealing in turmeric and mustard business at the material time and had suffered some loss. From the evidence of PW-12, it is seen that the appellant had gone to him about 8 to 10 days prior to the date of incident seeking a loan of Rs.5000/- but PW-12 did not

lend him the said amount. As a matter of fact, the appellant has admitted this fact in Section 313 of Criminal Procedure Code statement which establishes the fact that the appellant was in need of money.

The prosecution has alleged certain jewellery belonging to Lata like gold chain, nose tops, a pair of ear tops and a ring fitted with red stone some of which was gifted to her by her elder brother PW-13 as also a gold chain given to Puja by PW-13 were missing from the person of Lata and Puja. PW-13 also had stated that a Titan ladies wrist watch given to Lata by him was also missing. PW-3 the neighbour and mother of PW-1 has stated that she had seen Lata and Puja wearing these gold ornaments. The missing of these gold ornaments were mentioned in the FIR (Ext.1). It is the case of the prosecution that these ornaments were recovered at the instance of the appellant which part of the prosecution case is spoken to by I.O. PW-22 and PW-21 Goura Chandra Bisoi. From the evidence of these two witnesses, it is seen that the accused while in custody revealed to the I.O. in the presence of panch witnesses that he has concealed certain cash and wrist watch in the box in his house. He had further revealed that he had sold the gold ornaments to a goldsmith at Jeypore and further had stated that if permitted he would lead the police to the place where the knife used in the murder was concealed. It is pursuant to the said statements of the appellant, the recoveries in question were made.

M.O.VIII the knife which was recovered at the instance of the appellant was seen to contain blood which on chemical and serological examination was found to be human blood of Group AB to which group the blood of Puja belonged.

PW-17 T. Keshab Rao Acharya and T.Rama Rao (PW-19) another goldsmith in their statement have stated that on 4.6.1998 deceased met PW-17 and expressed his desire to sell certain gold ornaments on the ground that his wife had died and he required immediate cash for the purpose of funeral on which request of the appellant PW-17 took him to PW-19 who agreed to purchase the said ornaments for a sum of Rs.7200/- and while doing so he asked the appellant to execute a receipt in which appellant had signed as Dibakar Sahu. From the evidence of these two witnesses, it is seen that the jewellery which belonged to Lata and Puja were sold by the appellant on 4.6.1998 for a sum of Rs.7200/-. Though on behalf of the appellant, it was contended that the entire evidence of PWs 17 and 19 are so artificial, the same cannot be accepted, we are not inclined to accept this argument. From the perusal of the evidence of PW-17 and 19 which is supported by Ext.15, the document signed by the appellant establishes that these ornaments belonging to the deceased were in fact sold by the appellant under a false name to PW-19. From the evidence led by the prosecution, it is seen that the amount paid by PW-19 to the appellant as also the Titan watch belonging to Lata were recovered from the house of the appellant which establishes the prosecution case that the appellant was in possession of these jewellery belonging to Lata and Puja immediately after their death and sold the same to PW-19.

We have already noticed the recovery of M.O.VIII, the weapon and the blood stains on it and as held by the two courts below, in our opinion, the prosecution has proved beyond all reasonable doubt that this recovery was also made at the instance of the appellant and the said weapon was stained with human blood of Group AB to which group Puja's blood belonged.

The prosecution has also relied upon the evidence of PW-23, the doctor, who examined the appellant and collected

certain samples and nail clippings from the person of the appellant which when examined were found to contain blood. The courts below have considered this piece of evidence rather cautiously and have held that the same can be relied upon by them only if all other circumstances put forth by the prosecution are established beyond all reasonable doubt. We agree with the said finding of the courts below that this circumstance by itself would not assist the court to base a conviction but when all other circumstances put forth against the appellant are held to be established beyond reasonable doubt, this circumstance can be used for corroborating those circumstances which are otherwise held established. The prosecution has also relied upon certain finger prints taken from the place of incident which on examination were found by the Finger Print Bureau to tally with the finger prints of the appellant. This again is a circumstance which establishes the presence of the appellant in the flat of the accused and blood stains found in the said finger prints taken from the place of incident indicates that the appellant must have been in the flat after the assault had taken place on the deceased.

From the above circumstances discussed by us namely â\200\223 (a) that the appellant was related to the deceased and was on visiting terms with them and on the evening of 3.6.98 he was in the company of Anirudha and was seen leaving the house of Anirudha on the morning of 4.6.1998 coupled with the fact that he was not in his own village as also the statement of deceased Lata made to PW-3 that she had a visitor from the village for dinner shows that the appellant was in the company of the deceased on the night of 3rd and was last seen leaving the place in the morning of 4.6.1998 and that the appellant was in need of money; (b) and that on that intervening night the deceased met homicidal death because of the injuries caused by a weapon like M.O.VIII containing blood of the same group as that of Puja was recovered at the instance of the appellant; (c) and that the appellant was in need of money; (d) and that the gold ornaments belonging to deceased Lata and Puja were in the possession of the appellant on 4.6.1998 and were sold to PW-17 for a sum of Rs.7200/- which money was recovered at the instance of the appellant from his house; (e) and that the Titan ladies wrist watch belonging to deceased Lata was recovered at the instance of the appellant from his house; (f) and that the finger prints of the appellant with blood stains were found in the house of the deceased immediately after the murder was discovered, in our considered opinion, show that the prosecution has established beyond all reasonable doubt that these incriminating circumstances indicate a hypothesis consistent only with the guilt of the accused and each and every such circumstance form a link completing a chain of circumstances without break establishing the involvement of the appellant in the murder of Anirudha, Lata and Puja. Therefore, we have no hesitation in accepting the prosecution case concurring with the finding of the two courts below in regard to the guilt of the appellant.

Since the courts below have elaborately discussed the case law applicable to various issues involved in this case, we do not think it necessary for us to reconsider the same, having independently considered the material produced by the prosecution as against the appellant.

Having agreed with the conclusions of the courts below in regard to their findings as to the guilt of the appellant, we will now consider the merit of the sentence imposed on the appellant by the two courts below. As noticed above, the learned Judge on facts and circumstances of this case found it

appropriate to award the maximum sentence of death and on his reference the High Court has agreed with him on the question of sentence also. Learned counsel appearing for the appellant submitted before us that the appellant's age is 35 years and there is no material to show that he is involved in any other crime prior to this. He submitted that the crime in question as per the prosecution case itself is because of the acute financial need of the appellant and that he has aged parents and minor daughters and there is every possibility of he being rehabilitated if given an opportunity. Therefore, he prays that the sentence of death may be reduced to life imprisonment.

We have taken note of various judgments of this Court like in the case of Bachan Singh vs. State of Punjab (AIR 1980 SC 898), Surjvaram vs. State of Rajasthan (1997 12 CCR (SC) 214), Ravji alias Ram Chandra vs. State of Rajasthan (1996 2 SCC 175) and Dhananjay Chatterjee alias Dhana vs. State of W.B. (1994 2 SCC 220) which judgments have also been considered by the courts below. A cumulative reading of these judgments shows that for awarding a punishment of death sentence, there must be some special reasons, the courts should give relative weight to the aggravating and mitigating factors available on the facts of the case, the case in question should be a rarest of the rare case. Having noticed the above principles broadly laid down by this Court to be borne in mind by the courts while awarding death penalty, we find both the courts below have considered each and every aspect required to be taken note of by the courts before choosing to award the death sentence in this case. On re-appreciation of those material on record, we find no reason to differ from the said findings of the courts below. The fact that the murder in question is committed in such a deliberate and diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims' side, that too having enjoyed the hospitality and kindness of the victims, indicates the cold blooded and premeditated approach of the appellant to put to death the victims which include a child of three years age just to gain some monetary benefit. In our opinion, the extenuating circumstances put forth by the learned counsel for the appellant in regard to the age of the appellant, his surviving relatives and the possibility of rehabilitation would not, in our opinion, justify the courts to impose a sentence of life imprisonment on the facts and circumstances of this case. Hence, we have no hesitation in agreeing with the findings of the courts below and coming to the conclusion that the case in hand is a rarest of the rare case involving a pre-planned brutal murder without provocation, hence, we find no reason whatsoever to interfere even with the quantum of punishment awarded by the courts below.

For the reasons stated above, this appeal fails and the same is dismissed.