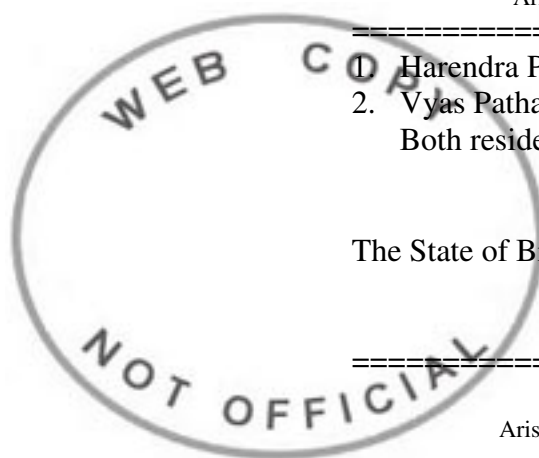




IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.36 of 1992

Arising out of PS.Case No.-63 Year-1982 Thana-Ander District- SIWAN

=====

1. Harendra Pathak, Son of Sri Muneshwar Pathak.
2. Vyas Pathak, Son of Sri Ram Chandra Pathak.
Both residents of Village Barwan, P.S. Andar, District Siwan.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

=====

Criminal Appeal (DB) No. 37 of 1992

Arising out of PS.Case No.-63 Year-1982 Thana-Ander District- SIWAN

=====

1. Uma Nath Pathak, Son of Pahwari Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
2. Amar Nath Pathak @ Amar Payhak, Son of Pahwari Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

=====

Criminal Appeal (DB) No. 38 of 1992

Arising out of PS.Case No.-63 Year-1982 Thana-Ander District- SIWAN

=====

1. Swami Nath Pathak, Son of Paras Nath Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
2. Paras Nath Pathak, Son of Sri Krishna Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
3. Keshav Pathak, Son of Pahwari Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
4. Pahwari Pathak, Son of Sri Krishna Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
5. Ram Pravesh Pathak, Son of Sarda Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.
6. Tarkeshwar Pathak, Son of Suraj Pathak, Resident of Village Barwan, P.S. Andar, District Siwan.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

=====

Criminal Appeal (DB) No. 44 of 1992

Arising out of PS.Case No.-63 Year-1982 Thana-Ander District- SIWAN

=====

1. Yogendra Pathak, Son of Sri Muneshwar Pathak.
2. Ram Suresh Pathak, Son of Sri Jadunandan Pathak.
3. Dilip Kumar Pathak, Son of Sri Ramaji Pathak.

- 4. Ram Bilas Pathak, Son of Sri Sarada Pathak.
 - 5. Ramajee Pathak, Son of Sri Sarada Pathak.
 - 6. Bacha Pathak, Son of Sri Muneshwar Pathak.
 - 7. Radhe Shyam Pathak, Son of Sri Jadunandan Pathak.
 - 8. Prahlad Pathak, Son of Sri Chandra Pathak.
- All residents of village Barwan, P.S. Andar, District Siwan.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 98 of 1992

Arising out of PS.Case No.-63 Year-1982 Thana-Ander District- SIWAN

Prabhunath Pathak, Son of Sri Rampravesh Pathak, Resident of Barwan, P.S. Andar, District Siwan.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellants : Shri S.N.P. Sinha, Senior Advocate
Shri Yogesh Chandra Verma, Senior Advocate
Shri Bamdeo Pandey, Advocate
Shri Awadhesh Kumar Pandey, Advocate
Shri Rohit Kumar, Advocate
Shri Prem Sheela Pandey, Advocate

For the Informant : Smt. Soni Srivastava, Advocate
Ms. Madhuri Kumari, Advocate

For the State : Shri Dilip Kumar Sinha, APP
Shri Abhimanyu Sharma, APP
Shri M.N. Jha, APP
Mr. Shree Prakash Dubey

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

C.A.V. JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 23-07-2015

The present batch of five appeals arise out of
judgment dated 31.03.1992 and order of sentence dated 28.04.1992

passed in Sessions Trial No. 281 of 1982 by which the appellants of the five appeals were convicted under various provisions of the Indian Penal Code. Appellants Yogendra Pathak, Dilip Kumar Pathak, Ramjee Pathak, Bachcha Pathak and Radheshyam Pathak were convicted under Sections 148 and 304 of the Indian Penal Code and each of them was directed to suffer rigorous imprisonment for two years and fourteen years respectively on the two respective counts. Appellant Ram Bilash Pathak was convicted under Section 304 read with 114 of the Indian Penal Code and was directed to suffer rigorous imprisonment for fourteen years. Appellants Ram Suresh Pathak, Prabhunath Pathak, Umanath Pathak and Amar Nath Pathak were held guilty of committing offences under Sections 147 and 304 of the Indian Penal Code and each of them was directed to suffer rigorous imprisonment for one year and fourteen years under each of the two counts. Appellants Tarkeshwar Pathak, Harendra Pathak, Keshaw Pathak and Pahawari Pathak were found guilty of committing offences under Sections 147 and 323 and each of them was directed to suffer rigorous imprisonment for one year and six months respectively on the two counts. Appellant Ram Pravesh Pathak was convicted of offences under Sections 147 and 323 of the Indian Penal Code and was directed to suffer rigorous



imprisonment for one year and two years respectively on each of the two counts. As regards appellant Swaminath Pathak and Parash Nath Pathak each of them was convicted only under Section 147 of the Indian Penal Code and was directed to suffer rigorous imprisonment for one year. Appellant Vyas Pathak was held guilty of committing offences under Sections 148 and 323 of the Indian Penal Code and was directed to suffer rigorous imprisonment for two years and one year respectively whereas appellant Prahalad Pathak was convicted of offences under Sections 148 and 302 of the Indian Penal Code and was directed to suffer rigorous imprisonment for two years and ten years respectively on the above noted two counts.

The nineteen convicts who had been convicted as above and sentenced to different terms, preferred the five appeals as per the array of the appellants in each of the appeals, to challenge the above noted judgment of conviction and order of sentence and this is how that the present batch of appeals were heard by us and are being disposed of by the present common judgment.

2. Before we advert to the facts of the case, we want to point out that the date of occurrence was 29.05.1982 and the judgment was delivered on 31.03.1992, i.e., after about nine years



and just above eight months and, as may appear from the impugned judgment, appellant Harendra Pathak was assessed to be 22 years of age while appellant Keshav Pathak was assessed to be 19 years of age. Appellant Tarkeshwar Pathak was aged 24 years while appellants Yogendra Pathak and Dilip Kumar Pathak were assessed to be 25 years of age at the time of their statements under Section 313 Cr.P.C. The purpose of noting down the age of these appellants is merely to point out that they might be covered by the definition of 'Juvenile in conflict with law' as contained in Section 2(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. We also want to point out that the conviction of the appellants for the offences was something which was completely different from the charges that had been framed against most of them. Appellants Bacha Pathak, Yogendra Pathak, Umanath Pathak, Amar Nath Pathak, Ramjee Pathak, Dilip Kumar Pathak, Prabhunath Pathak, Ram Suresh Pathak and Radheshyam Pathak had been charged under Sections 302/34 of the Indian Penal Code for committing the murder of Girijesh Kumar Pathak, Kanhaiya Pathak and Sheo Shankar Pathak, the three deceased of the case. Out of the above, Prahalad Pathak had distinctly been charged under Section 307 of the Indian Penal Code for attempting to commit murder of Girijesh Kumar Pathak the informant of the



case. Ram Pravesh Pathak similarly had been charged under Section 325 of the Indian Penal Code for deliberately causing grievous hurt to Kashinath Pathak by means of a Farsa. Likewise, Tarkeshwar Pathak, Harendra Pathak, Pawahari Pathak and Keshav Pathak had jointly been charged under Section 323 of the Indian Penal Code for deliberately causing hurt to Girijesh Kumar Pathak, Tribhuwan Pathak and Upendra Pathak. The nineteen appellants were jointly charged under Sections 302/149 of the Indian Penal Code as well out of whom Radheshyam Pathak, Dilip Kumar Pathak, Ramji Pathak, Bachcha Pathak, Yogendra Pathak, Vyas Pathak, Prahalad Pathak, Ram Bilash Pathak had distinctly been charged under Section 148 of the Indian Penal Code. The remaining eleven appellants, namely, Ram Suresh Pathak, Prabhunath Pathak, Umanath Pathak, Amar Nath Pathak, Tarkeshwar Pathak, Harendra Pathak, Ram Pravesh Pathak, Pawahari Pathak, Keshav Pathak, Paras Nath Pathak and Swaminath Pathak had distinctly been charged under Section 147 of the Indian Penal Code. Appellant Yogendra Pathak had also been distinctly charged under Section 27 of the Arms Act but in spite of the above charges and also in spite of the fact that the court below was convicting all the appellants under Sections 147 or 148 of the Indian Penal Code was acquitting them under Section



302/149 of the Indian Penal Code and was convicting eight of them under Section 304 of the Indian Penal Code. Appellant Ram Bilash Pathak was convicted under Section 304/114 of the Indian Penal Code in spite of the fact that there was no charge framed against him under that provision of law. As I have already noted, other appellants were convicted under Sections 323, 324, 325 and 326 of the Indian Penal Code or merely under Section 147 of the Indian Penal Code as appears in respect of appellant Paras Nath Pathak. This was one of the points which was urged before us that in spite of finding that there was an unlawful assembly which had a common object of committing murder of and further finding that the appellants were members of that unlawful assembly, the court below did not convict all the appellants either under Section 302/149 of the Indian Penal Code or under Section 304/149 of the Indian Penal Code even if for the sake of argument it could be said that only that offence was constituted on facts. This was one of the serious error both of law and fact that was brought into our notice and we were asked to consider it.

3. Before we proceed to examine the above issue raised before us, we want to have a glance of the facts of the case.

4. Admittedly, as may appear from the evidence of P.W.8 Kashinath Pathak an injured witness in paragraph-15 of his



deposition that the accused persons and the witnesses including the deceased were descendants of a common stock and they were share holders in immovable property as per the records of rights. The witnesses who came to depose in court also were very close relatives being related by blood. The same P.W.8 Kashinath Pathak stated in paragraph-15 that deceased Kanhaiya Pathak and P.W.15 Dwarika Nath Pathak were his full brothers while P.W.9 Tribhuban Pathak and P.W.18 Upendra Kumar Pathak were his own nephews. Deceased Sheo Shankar Pathak was a full brother of his father and, as such, his uncle while deceased Grijesh Kumar Pathak and informant Brajeshwar Pathak were his cousin brothers. In the same paragraph the witness (P.W.8) stated about the relationship between the accused persons and it appears from the reading of paragraph-15 of P.W.8 at pages 118 to 120 of the paper book that while the deceased, the informant and the witnesses were the descendants of one branch of the family the accused persons were descendants of the other branch and that they were residing side by side with each other and were still sharing many properties out of which the disputed plot, which we shall point out a little later was one of them.

In the above background of relationship it was alleged by P.W.7 Brajeshwar Pathak who happened to be the son

of one of the deceased Sheo Shankar Pathak that on 29.05.1982 at 4 p.m. the accused persons, were, either getting cut or themselves cutting a *Jamun* tree which was situate on a plot situated south east of village Barma under police station Ander in the district of Siwan. Seeing the cutting of the tree, the informant Brajeshwar Pathak along with his father deceased Sheo Shankar Pathak as also with Kanhaiya Pathak (deceased), Girijesh Kumar Pathak (deceased), Kashinath Pathak (P.W.8), Tribhubhan Pathak (P.W.9) and Upendra Kumar Pathak (P.W.18) went there and forbade the accused to the felling of the tree. It turned into an altercation between the parties and while it was going on, appellant Paras Nath Pathak and Pahawari Pathak also reached there. In the meantime, appellant Ram Bilash Pathak ordered to kill upon which appellant Prahalad Pathak dealt a *Farsa* blow on the head of Brajeshwar Pathak (P.W.7), the informant of the case, while Tarkeshwar Pathak with Harendra Pathak assaulted him with *Lathis*. Sheo Shankar Pathak, the father of the informant was assaulted with *Bhala* and *Lathi* by appellants Radheshyam Pathak and Ram Suresh Pathak while another deceased Kanhaiya Pathak was given blows with *Bhala* by Ramjee Pathak and with *Farsa* by Dilip Kumar Pathak and with *Lathi* by Prabhunath Pathak. The third deceased Girijesh Kumar Pathak was assaulted by Bachcha



Pathak with *Bhala*, Yogendra Pathak with *Farsa*, Umanath Pathak and Amar Nath Pathak with *Lathis*. P.W.8 Kashinath Pathak was given a blow with *Farsa* by Vyas Pathak while he was assaulted with *Lathi* by Ram Pravesh Pathak. P.W.9 Tribhuban Pathak was assaulted at the orders of appellant Paras Nath Pathak by Pahawari Pathak with *Lathi* which hit him on his ankle joint. P.W.18 Upendra Kumar Pathak was also assaulted by the accused persons and was injured. The informant stated that after being assaulted in the manner and by the persons as noted above, all the injured fell down on the ground whereupon appellant Yogendra Pathak fired multiple shots so as to scaring away persons who could have dared coming there.

5. As may appear from the above statement of facts three persons, namely, Sheo Shankar Pathak, the father of the informant (P.W.7), Kanhaiya Pathak cousin of P.W.7 and Girijesh Kumar Pathak brother of P.W.7 lost their lives at the spot while seven persons were injured in the attack given allegedly by the accused persons upon the prosecution party.

6. On the basis of Ext.4, the Fardbeyan of P.W.7 the First Information Report of the case Ext.14 was drawn up by C.W.1 Bhubneshwar Prasad Sinha who took up the investigation and during the course of inspection of the place of occurrence, as



may appear from his evidence, he found the mark of cutting the *Jamun* tree on it. He had also found other marks of violence, like, the blood which was found at different places at the place of occurrence and signs indicating trampling at the spot. The inquest reports were prepared after holding inquest upon the three dead bodies and those were sent for post-mortem examination. The statements of witnesses were recorded by the Investigating Officer in the case diary. P.W.17 Dr. Rameshwar Singh had held post-mortem examination on the three dead bodies and had also treated the injured witnesses for their injuries and had issued the post-mortem report as also the injury certificates in respect of the injuries found on the injured witnesses. After close of the investigation, the Investigating Officer submitted charge-sheet for trial of the accused persons.

7. The defence of the accused was that the land over which the *Jamun* tree was standing belonged to them and both were in their possession. It was pleaded by them that it was the informant, the three deceased and others who after forming an unlawful assembly had come on to the plot and had started cutting the *Jamun* tree and when they were resisted, the informant and others assaulted appellant Radheshyam Pathak and others for which Ext.B the First Information Report of the counter version

was instituted. The defence of the appellants has been discussed in paragraph-3 of the impugned judgment.

8. In proof of the charges, the prosecution examined 18 witnesses and the court also summoned the Investigating Officer S.I. Bhubneshwar Prasad Sinha to examine him as a court witness. The defence examined 12 witnesses and after considering the evidence both of the prosecution and the defence, the impugned judgment was passed by the learned trial Judge.

9. We were taken through the evidence of witnesses by the learned counsel for the appellants and it was submitted before us that charges against the appellants under Sections 302/34 and 302/149 of the Indian Penal Code were framed with no charge against appellant Ram Bilash Pathak under Sections 304/114 of the Indian Penal Code but while acquitting the appellants under Sections 302/34 and 302/149, some of the accused persons were convicted as per the judgment only under Section 304 of the Indian Penal Code and a sentence of rigorous imprisonment for fourteen years which was completely unknown to the realm of law was imposed upon them. It was further submitted by both the sides that the court was holding that it was an unlawful assembly who had a common object and that was to commit murder and, as such, the appellants were convicted either under Section 147 or 148 of the



Indian Penal Code but none of them was convicted under Section 302/149 of the Indian Penal Code. The judgment as such appears erroneous on account of being contrary to the principles of law specially if the court was convinced that an occurrence had taken place in the manner as was alleged and the accused persons had participated in the same on account of being the members of an unlawful assembly either being armed with a dangerous weapon or without any weapon. Submission was that the judgment is against the principles of law and if the charges were proved then it could not have made out the offences under which the accused persons were convicted. The learned counsel both for the State and the appellants, who were comprised by some of the senior members of the bar, like, Shri S.N.P. Sinha and Shri Y.C. Verma were equivocal in pointing out that the judgment does not appear in consonance with the evidence and the charges and it was required that it should be re-written in the light of the evidence after considering it fully and completely. In support of the above contention, two decisions of the Supreme Court passed in the case of *Main Pal Vs. State of Haryana* reported in (2010) 10 SCC 130 and *Kantilal Chandulal Mehta Vs. State of Maharashtra* reported in (1970) 2 S.C.R. 742 were placed before us.

10. We after having heard the learned counsel for



the appellants and after having considered the evidence of the witnesses and without expressing any opinion as regards the merits of the evidence and the findings recorded by the court below, want to go to the part of the judgment by which the learned trial Judge had recorded the findings of guilt against the appellants. If the charges had been proved by the evidence then we find that there was no material discussed by the learned trial Judge to justify that it could be a case under Section 304 of the Indian Penal Code and even if it could be assumed by taking the worst view that an offence under Section 304 of the Indian Penal Code was made out, we simply could not reconcile ourselves to the sentence passed by the learned trial Judge upon those appellants who had been held guilty under Section 304 of the Indian Penal Code and were directed to suffer rigorous imprisonment for fourteen years. Likewise, if there was an unlawful assembly, as appears held by the learned trial Judge, as he was convicting some of the appellants under Section 147 of the Indian Penal Code and others of them under Section 148 of the Indian Penal Code, which unlawful assembly had a common object, as appears from the above finding of guilt, then we simply could not reconcile ourselves again as to how the others who were not convicted for homicide either punishable under Section 302 or under Section 304 of the Indian



Penal Code could be acquitted for the charges under Sections 302/149 or 302/34 of the Indian Penal Code. The learned trial Judge had never stated in his judgment that there was any grave and sudden provocation or that the accused persons had acted in exercise of their right of private defence and exceeded it, rather the learned trial Judge had held that the accused persons, while the informant alongwith the three deceased were retreating from the plot of land over which the *Jamun* tree was standing, were chased down and beaten up as a result of which three persons died and seven others were badly injured. This was a case in which a reasonable—conscientious person could not come to a conclusion that there could be conviction only under Section 304 of the Indian Penal Code and that too only against some of the nineteen appellants. The way the learned trial Judge approached the evidence in order to marshalling the facts indicates a pure mechanical illegal approach without considering the facts in the light of the provisions of the Indian Penal Code and further appears as if the learned trial Judge was not trained in applying the provisions of the Indian Penal Code to the facts of a case and then reaching a conclusion as to what offences were made out. He appears probably falling in slumber while dictating the judgment as his own findings were conflicting to each other as at the one

time he was finding an unlawful assembly with common object and at the other he was not applying the appropriate provision to convict all the appellants under the principles of vicarious liability creating the offence under Section 149 of the Indian Penal Code. The judgment was written in a manner which defied the weight of the evidence on record.

11. Some of the submissions that Ram Bilash Pathak had not been charged under Sections 304/149 of the Indian Penal Code and was still convicted of that offence appears serious contention. Likewise, the submission of the prosecution that the learned trial Judge was unmindful of his duties of appreciating the facts so as to reaching a just conclusion and, as such, it was urged that the judgment be set aside and a direction be issued to the trial Court to hear the parties again and to pass a fresh judgment. While making the above submission, it was contended that a time frame should be fixed for delivery of the judgment after hearing the parties again.

12. None framing of charge or omission to frame charge or framing of wrong charge are not going to have any impact on the judgment of conviction as regards the findings recorded by the learned trial court in view of the provisions of Sections 468 and 465 Cr.P.C. In *Kantilal Chandulal Mehta*

(supra), the Supreme Court was also pointing out that position of law with reference to Section 535 of the Code of Criminal Procedure, 1898 which corresponds to the present provision of Section 464 of the Code of Criminal Procedure, 1973. In that view of the matter, the conviction of Ram Bilash Pathak under Sections 304/114 of the Indian Penal Code might not have been of such importance as to allowing his appeal but what we found was that the learned counsel for the parties had rightly pointed out that the judgment impugned herein was so perverse as regards the application of the law to the established facts that it was extremely desirable that this Court acting under Section 386 Cr.P.C. ought to direct rehearing of the arguments of the parties so that a fresh judgment was passed after due application of mind by appreciating the facts so as to applying the law properly to them. The learned Judge was holding that there was an unlawful assembly and that unlawful assembly had a common object as well in prosecution whereof the murder of three persons was committed and, as such, he was convicting some of the accused under Section 147 and some other under Section 148 of the Indian Penal Code but the curious aspect of the judgment is that he was simply ignoring the application of Section 149 of the Indian Penal Code by virtue of which a charge under Section 302 of the Indian Penal Code had



been framed and was not assigning any reason as to why after being found members of an unlawful assembly some of the members of which had committed culpable homicide the others who were acting in prosecution of the same common object should not be convicted even for that offence. We do not want to express our opinion in spite of holding a very concrete one as to what offence could be constituted in the light of the evidence which was adduced by the prosecution during the trial, but we do feel that the trial court is required to pass fresh judgment as it was necessary to be done so as to imparting justice fully and completely. The present judgment was ridiculous and had only heaped injustice not only to the informant and the three deceased persons and their families but also to the accused persons who had either been not adequately convicted or had been convicted and sentenced improperly.

13. These are some of the reasons besides the others which we do not want to express so as to avoid prejudicing the retrial which we are ordering. In the light of the evidence and the observations which we have recorded in brief by giving brief reasons, we allow the appeals, set aside the judgment of conviction and order of sentence passed upon the appellants and direct the retrial of Sessions Trial No. 281 of 1982 from the stage of hearing



arguments on both the sides. We shall request the District & Sessions Judge, Siwan that he should list this case in his Court and take up the hearing of the trial on a day to day basis. The appellants are on bail. They are directed to surrender in the court below and the District & Sessions Judge shall allow them to remain on bail and if he so desires, he may ask them to furnish fresh bail bonds to his own satisfaction. We fix a time frame of three months from the date of receipt of the lower court records with the copy of the present judgment as the counsel for both the parties have undertaken before us to conclude the hearing so that the judgment is delivered within three months as noted above.

14. Before we part, we want to point out that we have noted down the age of some of the appellants, like, accused Harendra Pathak, Keshav Pathak, Tarkeshwar Pathak, Yogendra Pathak and Dilip Kumar Pathak who could be in our opinion less than 18 years on 29.05.1982. The learned trial Judge may examine their case in the light of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and after due enquiry, if they are found aged below 18 years on 29.05.1982 then their case may be sent to the Juvenile Justice Board for enquiry as per the provisions of the above noted act. We want further to point out that during pendency of these appeals, Swaminath Pathak, Paras

Nath Pathak, Ram Pravesh Pathak, Ramjee Pathak and Prahalad Pathak died. As such, the trial court should not spend any time on that aspect of the trial. The trial shall continue only against the surviving accused persons. With the above observations and directions, the trial is remanded back in terms as indicated above by allowing the five appeals.

15. We believe that the learned District & Sessions Judge, Siwan shall not be prejudiced by any observation made herein nor he shall go through the impugned judgment and shall pass his judgment independent of any observation/findings recorded by any court. The learned trial Judge shall not hesitate in passing any judgment which, in his opinion, appears justified under the facts and circumstances of the case.

(Dharnidhar Jha, J.)

Amaresh Kumar Lal, J.:- I agree.

(Amaresh Kumar Lal, J.)

Sanjay/N.A.F.R.

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