

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.197 of 2011

(Against the Judgment of conviction and Order of sentence dated 14.02.2011 passed by the Additional Sessions Judge-I, Munger, in Sessions Trial No.66 of 2004/G.R. No.1584 of 2003, arising out of Kotwali P.S. Case No.415 of 2003).

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Md. Faiyaz Ahmad, son of Late Md. Habibur Rahman, resident of Mohalla - Shearpur, P.S. Bihar, District – Nalanda.

..... Appellant.

Versus

The State of Bihar

..... Respondent.

with

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Criminal Appeal (DB) No. 145 of 2011

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Bhushan Mahto, son of Vishwanath Mahto, resident of Village- Digha, P.S. Digha, District-Patna.

..... Appellant.

Versus

The State of Bihar

..... Respondent.

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Appearance :

(In CR. APP (DB) No.197 of 2011):

For the Appellant : M/s. Akhileshwar Prasad Singh, Senior Advocate and Amrit Anunay, Advocate.

For the State : Mr. S.C. Mishra, A.P.P.

(In CR. APP (DB) No.145 of 2011):

For the Appellant : Mr. Jagannath Singh, Advocate.

For the State : Mr. A.K. Sinha, A.P.P.

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CORAM:HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA)

Date: 17 -08-2016

Criminal Appeal (DB) No.197 of 2011 filed on behalf of

the appellant Md. Faiyaz Ahmad and Criminal Appeal (DB) No.145 of 2011 filed on behalf of the appellant Bhushan Mahto are directed against the common Judgment of conviction and Order of sentence dated 14.02.2011 passed by the Additional Sessions Judge-I, Munger, in Sessions Trial No.66 of 2004/G.R. No.1584 of 2003, arising out of Kotwali P.S. Case No.415 of 2003.

By the aforesaid Judgment of conviction and Order of sentence, dated 14.02.2011, both the appellants, namely, Md. Faiyaz Ahmad {in Criminal Appeal (DB) No.197 of 2011} and Bhushan Mahto {in Criminal Appeal (DB) No.145 of 2011} have been convicted under Sections 364(A)/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of Rs.10,000/-each, and in default of payment of fine, to further undergo rigorous imprisonment for two years, whereas the eight other accused, namely, Vinodi Prasad Yadav, Ram Kumar alias Rama Yadav, Md. Irfan, Sheo Kumar Yadav, Chandan Kumar Singh, Fantush Yadav, Bambam Yadav and Niraj Yadav, were not found guilty and have been acquitted of the charge.

2. The prosecution case, according to the written report (Ext.1) of the informant Abhay Mankar (P.W.1), is that on 18.09.2003, his son, Ankesh alias Nishu, aged about 5 years, had gone to his school, Natrodom Academy. When Ankesh alias Nishu,

did not return till 03.00 P.M., he became worried. In course of search, the informant went to the school of his son Ankesh alias Nishu, where the Gateman of the school informed him that his son has left the school for home. As the son of the informant did not reach home, the informant raised suspicion that his son has been kidnapped either by culprit or his enemy with evil design after school hours from the school gate.

3. On the basis of the aforesaid written report of the informant Abhay Mankar (P.W.1), Kotwali (Kasim Bazar) P.S. Case No.415 of 2003 was instituted against unknown under Section 364 of the Indian Penal Code on 18.09.2003. After investigation, police submitted chargesheet against the seventeen accused, namely, Parmendra Kumar Singh, Md. Irfan, Ram Kumar Yadav, Vinodi Yadav, Faiyaz Ahmad (appellant), Bhushan Mahto (appellant), Md. Sayed Khalid Sah, Md. Wasim Ahmad alias Romi, Md. Rajji, Niraj Yadav, Chandan Kumar Singh, Sheo Kumar Yadav, Bambam Yadav alias Rambriksh Yadav, Chandan Kumar alias Chandan Bind, Kuldeep Yadav alias Kulo Yadav, Manish Yadav and Fantush Yadav.

After taking cognizance of the offence, the case was committed to the court of sessions, where the proceeding against the accused Manish Yadav was dropped on 07.05.2005 due to his death and the charges were framed against the rest sixteen accused persons

including the present appellants under Sections 364(A)/34 of the Indian Penal Code to face trial. Out of 16 accused, only 10 accused including the present appellants were tried as the trial of accused Wasim Ahmad alias Romi, Md. Rajji, Syed Khalid Shah were separated on 16.11.2006 and trial of accused Parmendra Kumar and accused Kuldip Yadav were separated on 09.06.2008 and that of accused Chandan Kumar Bind was separated on 13.01.2008 as they were absconding.

4. During trial, the prosecution examined altogether 11 witnesses. Out of them, P.W.2 Girendra Prasad Sah, P.W.3 Damodar Pandit, P.W.9 Dinesh Rai and P.W.10 Mohan Sah have not supported the case of the prosecution and they have been declared hostile. The evidence of P.W.6 Vishwanath Singh, Sub Inspector of Police, Kotwali, Munger, is formal in nature as he took the charge of the investigation of the case on 09.12.2003 and only submitted the chargesheet.

5. P.W.1 Abhay Mankar is the informant of the case and is the father of the victim Ankesh alias Nishu. He has deposed in his evidence that his son was studying in Notredam Academy, Munger and usually used to go to school on rickshaw at 10.00 A.M. and used to return home at 01.30 P.M. His son on 18.09.2003, as usual had gone to school, but did not return in time. As such, he started to search



for him and in the process went to the school and queried the guard who feigned ignorance. In the meantime, he received a call on his phone. The caller was asking for his name, which he disclosed. He was told that his son is safe and a deal would be finalized. The informant became disturbed and informed the Superintendent of Police on phone and on his instructions, he submitted a written report at Kotwali. This witness has proved his written report as Ext.1. He has further stated that he had not shown any suspicion against any one having hand in the kidnapping of his son. On 16.10.2003, the police administration informed him about the recovery of his son safely from Galaxy Apartment. On 17.10.2003, he was called at about 01.00 A.M. to the residence of Superintendent of Police. When he reached the place saw his son. Thereafter, police dropped him and his son at his house. He stated that after missing of his son, a demand of ransom of Rupees Ten Lacs was made. He further stated that he did not attend the Test Identification Parade held for identification of the miscreants in connection with the kidnapping of his son, nor any other material was placed for identification. This witness has stated that he had not seen any person in suspicious condition near around his house. The prosecution declared him hostile on this point. He also denied the suggestion of the prosecution to the effect that he had raised suspicion against the accused Parmendra Kumar and his

villager Vinodi Yadav as Parmendra Kumar was seen scared after kidnapping of his son and was also seen moving with villager Vinodi Yadav towards village-Churamba.

6. P.W.4 Kumari Karuna is the wife of the informant and the mother of the victim Ankesh alias Nishu. She has stated in her evidence that on 18.09.2003, her son Ankesh alias Nishu had gone to his school Notredame Academy at about 10.00 A.M. on rickshaw, but he did not return. At about 01.30 P.M., her husband went to the school to search her son who was nowhere there and he returned home dejectedly. Her husband received a call on his mobile phone to the effect that his son is safe and the matter would be dealt with. Thereafter, her husband lodged the case at the police station. She did not learn from her husband about the kidnapping of her son. On 16.10.2003, phone was received from the office of the Superintendent of Police, Munger that her son has been traced out. This witness has also been declared hostile by the prosecution on the point of raising suspicion in her statement given before the police against Parmendra Kumar and his villager Vinodi Yadav, whose activities were found suspicious as they were moving towards the village-Churamba.

7. P.W.11 Ankesh alias Nishu is the victim and the son of the informant. He has stated in his evidence that he was kidnapped but the year of his kidnapping is not in his memory. At that time, he



was studying in Natrodame Academy from where he was kidnapped. He used to go to school from Krishi Vigyan Kendra, Munger, at 07.00 A.M. in the morning and return to the house at 11.00 A.M. He was kidnapped after school hours. Two persons on a motorcycle came and told him that his father has sent them to bring him. They boarded him on the motorcycle and also served him Toffee and carried him out of Munger boarding in a train. One lady was also present, where he was kept. They occasionally used to talk on phone. This witness did not identify the accused present in court. He further stated that culprits used to ask him to keep silent otherwise they would administer injection to him but they did not use to assault him.

8. P.W.5 Premraj Chouhan is the Investigating Officer of the case. He has stated in his evidence that on the basis of the statement of the informant Abhay Mankar (P.W.1), Kotwali P.S. Case No.415 of 2003 was instituted on 18.09.2003 under Section 364 of the Indian Penal Code and investigation of the case was handed over to him by the Officer Incharge of Kotwali Police Station. Thereafter, he recorded the re-statement of the informant Abhay Mankar (P.W.1), his wife Kumari Karuna (P.W.4) and visited the place of the occurrence, which was the campus of Natrodame Academy situated in the south of the pitch road of Bhagat Singh Chowk, Sojhi Ghat. The Natrodame Academy was of two storeyed building surrounded by



the boundary around the field of the Academy. After the boundary wall, there was small field, in which the children used to play in Tiffin time, and there was a shed also from where the guardian used to pick-up the children. The field was also surrounded by another boundary wall and in west direction, there was iron gate and in both sides of the gate, there was post for standing the watchman. He further stated that he was informed that kidnappers entered through the gate on bicycle and carried the victim Ankesh alias Nishu. He further stated that thereafter he recorded the statement of the Rickshaw Puller Mohan Sah (P.W.10). While he searched Vinodi Yadav but he did not find him in his house and he came to know that he has gone to Chauramba to meet Md. Irfan. When he reached Chauramba, he was informed by the father of Md. Irfan that Irfan has gone with Parmendra Saheb to his sasural at Daltonganj. He went to the village Nandlalpur, where he found Vinodi Yadav and he recorded his statement and on the order of the higher officials, he set him free. He recorded the statement of Damodar Pandit (P.W.3). He went to the house of Parmendra with the help of police station-Sabour, where Parmendra was found and he was taken to Bhagalpur and, thereafter, at the residence of Superintendent of Police, Munger and, on enquiry, Parmendra was arrested, he recorded the statement of Girindra Prasad Sah (P.W.2), driver of Krishi Vigyan Kendra and also the statement of Brahmdeo

Singh (not examined), owner of telephone booth. In the meantime, he again visited the village-Chaurambha from where Irfran was arrested and on his disclosure, the accused Ram Kumar Yadav was arrested. The accused Vinodi Yadav was also arrested. In the meantime, he received information from the informant Abhay Mankar (P.W.1) about arrangement of his talk with his son on his phone no.227225 by the kidnapper and making demand of Rupees Ten Lacs as ransom by the kidnappers and handing over Rs.3,50,000/- to the kidnapper but he received phone of kidnapper that the money was paid to someone other and kidnapper disclosed the code number for verification in future and to pay the amount of ransom. Abhay Mankar (P.W.1) informed him that the kidnapper was talking on his mobile no.9431103799 using mobile no.9835259692. He has further stated that on verification from the offices of BSNL and Reliance, Nalanda, it was detected that the SIM No.9835259692 was handed over to the shop of City Time House and Electronics. On verification, it was found that the said shop belonged to Prem Raj Dhanju in which theft of materials including four SIMs took place on 29.08.2002 and out of four SIMs, one SIM is being used by kidnapper. Accordingly, he recorded the statement of Prem Raj Dhanju. He further stated that on 16.10.2003 at about 8.05 A.M., he received the telephone call from an unknown person to the effect that when that person was passing urine

in the toilet at Bus Stand Biharsharif, Nalanda, one person was talking on mobile to a person in the name of Romi that the father of Ankesh has made arrangement of Rs.5,00,000/- for payment as ransom with assurance that the rest amount would be arranged within two days and the matter would be finalized in that period and the person, who was talking by his mobile, disclosed his name as Faiyaz Ahmad (appellant), resident of Mohalla-Sherpur, Bihar, introducing himself to be friend of Romi. Thereafter, he went to the house of Faiyaz where he met him and on query, he confessed his guilt and disclosed the name of the members and leader of the gang and gave the details of kidnapping of Ankesh and keeping the victim Ankesh at Flat No.37, Galaxy Apartment, Patliputra Colony belonging to Syed Khalid Shah, Advocate, where Syed Khalid Shah used to run his office also. Faiyaz also disclosed that if the information will reach Galaxy Apartment then the victim would be shifted at any other place. This witness has further stated that the confessional statement of Md. Faiyaz (appellant) is detailed in paragraph-173 of the case diary and the same is marked as Ext.'Y' for identification. He has further stated that he carried Faiyaz (appellant) to Superintendent of Police, Nalanda, who also made query from him. Superintendent of Police, Nalanda, also told that the details of Mobile No.9835259692 has already been collected from the Reliance Office, Patna, which was

being used from Flat Nos.33 and 37 of Galaxy Apartment, Patliputra Colony, Patna, belonging to Syed Khalid Sah. This witness has further stated that he alongwith Nikhil Kumar, the Officer Incharge of Sohsarai, District-Nalanda, Havaldar Dilip Kumar, Hawaldar Azad and Dharmendra Kumar, the Officer Incharge of Dharhara Police Station, Munger, proceeded for the Police Station-Patliputra and by handing over an application requested for cooperation in conducting the raid. Thereafter, he alongwith Tripurari Prasad, Sub Inspector of Patliputra Police Station (P.W.8), constables Lalan Kumar Paswan (not examined), Kameshwar Prasad (not examined) and Jagdish Prasad Singh (not examined) proceeded for Galaxy Apartment, Patliputra Colony. In presence of the witnesses Bharat Singh (not examined), Dinesh Rai (P.W.9), the Flat No.37 of Galaxy Apartment was raided. In that course, one person was found there having double barrel gun in his hand. On entering into room, one boy was found sitting, who was identified as Ankesh on the basis of the photograph. Two others were also apprehended. Out of three, one disclosed his name as Wasim Ahamd alias Romi, son of Ahmad Hussain, resident of Paitahi, P.S. Kurbha, District-Jehanabad. The second disclosed his name as Syed Khalid Sah, son of Late Mahmood Sah, resident of Flat Nos.33 and 37, Galaxy Apartment, Patliputra Colony, Patna and third disclosed his name as Bhushan Mahto (appellant), son of Vishwanath



Mahto, resident of Mohalla and P.S. Digha, District-Patna. Wasim Ahmad alias Romi was in possession of loaded double barrel gun alongwith two mobile sets. Regarding the recovery of loaded barrel gun and two mobile sets, he prepared the separate seizure lists on which Bharat Singh (not examined) and Dinesh Rai (P.W.9) put their signature as witnesses. Syed Khalid Shah was also found in possession of one Nokia Mobile Set which was seized in presence of Bharat Singh (not examined) and Dinesh Rai (P.W.9). He further stated that an application alongwith double barrel gun with seizure list was given to the Officer Incharge of Patliputra Station for action. Thereafter, he recorded the statement of the victim Ankesh and the witnesses of the seizure list. This witness produced two mobile sets without having any identification in court saying that the same were recovered from the possession of Romi and both mobile sets were not sealed and in function. One Nokia mobile set was produced by this witness in court saying that the same was recovered from the possession of Syed Khalid and that was also not sealed and in function. This witness has identified the accused Romi and Syed Khalid Shah in dock. This witness has further stated that he had not recorded the statement of other occupants of the flats of Galaxy Apartment. He further stated that he recorded the statement of the accused Rajji, Niraj, Chandan Kumar Singh and made query to the



accused Sheo Kumar and handed over the investigation on 01.11.2003 to S.I. Nirmal Kumar Tiwari (P.W.7) on the order of the Superintendent of Police. In cross examination, this witness has stated that nothing was recovered at the time of raid from the possession of Bhushan Mahto (appellant). He has further stated that he recorded the confessional statement of the appellant Faiyaz Ahamd on 16.10.2003 at his house at about 03.05 P.M., which was marked as Ext.'Ga' at the instance of the defence. He has also stated that in the case diary, it is detailed that he alongwith others reached at the house of Faiyaz at 03.45 P.M. and no mobile was found with him.

9. P.W.7 Nirmal Kumar Tiwari has stated in his evidence that on 01.11.2003, he was posted as Officer Incharge of Naya Ram Nagar Police Station, District-Munger. On 01.11.2003, he took the charge of investigation of Kotwali (Kasim Bazar) P.S. Case No.415 of 2003 from Premraj Chouhan (P.W.5) on the direction of the Superintendent of Police Munger. He arrested the non F.I.R. named accused Chandan Kumar Bind, son of Sri Nagendra Prasad Singh of village-Tetia, Police Station-Tetia Bumbar, District-Munger, who confessed his guilt and disclosed that on being asked by Manish, he alongwith Manish reached at Bhagat Singh Chowk where Fantush, Niraj and Chandan Singh met him. From Bhagat Singh Chowk, all reached near the gate of Notredame School, where Parmendra Kumar

Singh told that the way is clear, then all reached near the gate of the school where inside the campus of school, the students were playing and Manish got identified the victim boy and moved from there alongwith Chandan Singh on road side. Thereafter, he alongwith Niraj and Fantush reached at the place where the guardian used to sit waiting for their wards. The victim Ankesh in course of playing fell down then he alongwith Niraj and Fantush reached near him and after offering the toffee he was taken outside the campus of school with bag. Thereafter, Fantush took Ankesh on his bicycle and went to his village Hasanganj. He further disclosed that Manish asked him to go to his house with assurance that his share will be given. Later on, he came to know that the victim was in the custody of Romi alias Wasim Ahmad, leader of the gang. This witness has further stated that on the basis of the confessional statement of Chandan Bind he reached at the house of Fantush Yadav whose house was searched from where one school bag containing pencil box, books etc. and one water bottle were recovered which were seized in presence of the witnesses Shankar Mahto (not examined) and Ramanand Sharma (not examined). This witness has also produced the seized materials in the court but the same were not sealed. He has further stated that in course of investigation, he had not recorded the statement of any witness nor he put the seized articles for identification by the father of

the victim Ankesh nor any document was prepared regarding identification of the seized articles.

10. P.W.8 Tripurari Prasad has stated in his evidence that on 16.10.2003, he was posted as Sub Inspector at Police Station-Patliputra. On that day, a raiding party reached at Patliputra Station of which Sub Inspector Pemraj Chouhan (P.W.5), Sub Inspector Dharmendra Kumar (not examined), Sub Inspector Nikhil Kumar (not examined) and other police personnels were the members. He helped the raiding team and at about 08.55 P.M. proceeded to Flat No.37, Galaxy Apartment, Patliputra Colony, Patna and the said flat was searched. In course of search, the accused Wasim alias Romi was found in possession of double barrel gun and two mobile sets, whereas Syed Khalid Shah was found in possession of one mobile and the victim Ankesh was recovered from his possession. Regarding the recovery of double barrel gun and two cartridges, seizure lists were prepared before him. This witness identified only one accused Syed Khalid Shah out of 11 accused present in the dock.

11. Learned counsel for the appellant Md. Faiyaz Ahmad {in Criminal Appeal (DB) No.197 of 2011} made submission that it has come in the evidence of P.W.5 Premraj Chouhan, the Investigating Officer of the case, that he received the telephone call of an unknown on his mobile to the effect that he heard the talk of the

appellant Md. Faiyaz Ahmad on mobile with his friend Romi of Mohalla-Sherpur at the urinal of Bus Stand Biharsharif, Nalanda, to the effect that the matter has been finalized regarding the payment of ransom in the kidnapping of the victim Ankesh alias Nishu and the father of the victim has arranged Rs.5,00,000/- and the remaining amount would be arranged within one or two days. Thereafter, P.W.5 Premraj Chouhan, the Investigating Officer, went at the house of the appellant Md. Faiyaz. According to the disclosure of the appellant Md. Faiyaz, P.W.5 Premraj Chouhan alongwith P.W.7 Nirmal Kumar Tiwary, P.W.8 Tripurari Prasad and other police personnels raided the Flat No.37 of the Galaxy Apartment, Patliputra Colony, Patna, of Syed Khalid Shah, Advocate where at the door of a room Wasim Ahmad alias Romi was found armed with loaded double barrel gun and two mobile sets. Syed Khalid Shah having one mobile set in his hand and the victim Ankesh alias Nishu was found sitting on a chowki in the room, who was identified on the basis of the photograph. The appellant Bhushan Mahto {in Criminal Appeal (DB) No.145 of 2011} was also present but nothing was recovered from his possession. The appellant Md. Faiyaz Ahmad has not been identified by the victim in court which would appear from the evidence of the victim Ankesh alias Nishu (P.W.11). Moreover, the confessional statement of the appellant Md. Faiyaz Ahmad has been marked as Ext.'Ga' from

which it appears that he had simply knowledge about keeping of the victim at the house of Syed Khalid Sah and only on that very basis, the appellant Md. Faiyaz Ahamd {in Criminal Appeal (DB) No.197 of 2011} could not be held guilty for the offence under Section 364(A)/34 of the Indian Penal Code.

Learned counsel for the appellant Bhushan Mahto {in Criminal Appeal (DB) No.145 of 2011} submitted that it would appear from the evidence of P.W.5 Premraj Chouhan, the Investigating Officer of the case, that this appellant was found at Flat No.37 of Galaxy Apartment, Patliputra Colony belonging to Syed Khalid Sah, Advocate, from where the victim was recovered. It has come in the evidence of P.W.5 that nothing was recovered from the possession of this appellant nor the victim Ankesh alias Nishu (P.W.11) identified him as his kidnapper having hand in the kidnapping. In fact, the appellant Bhushan Mahto had gone to the house of Syed Khalid Sah, Advocate, for consultation in connection with his case and he was apprehended there with empty hand on suspicion.

Learned A.P.P. appearing on behalf of the State made submission that on the disclosure of appellant Md. Faiyaz Ahmad, the victim was recovered from Flat No.37 of the Galaxy Apartment, Patliputra Colony, Patna, belonging to Syed Khalid Shah, Advocate,

where appellant Bhushan Mahto was present. As such, both the appellants have rightly been convicted and sentenced under Section 364(A)/34 of the Indian Penal Code through the impugned Judgment and Order.

12. On going through the evidence of the witnesses, as discussed above, I find that the victim Ankesh alias Nishu has not identified both the appellants in court. In the evidence of Premraj Chouhan (P.W.5), who is the Investigating Officer of the case, it has only come that on the basis of disclosure of the appellant Md. Faiyaz Ahmad {in Criminal Appeal (DB) No.197 of 2011}, the Flat No.37 of the Galaxy Apartment, Patliputra Colony, Patna, of Syed Khalid Shah was raided from where the victim was found sitting on a chowki in the room and outside the room, Wasim Ahmad alias Romi was present having double barrel gun and two mobile sets. Syed Khalid Sah, the owner of Flat No.37, Galaxy Apartment, Patliputra Colony, Patna, was also present there and he was found in possession of one mobile. The appellant Bhushan Mahto {in Criminal Appeal(DB) No.145 of 2011} was also found there but no incriminating article was recovered from his possession. The confessional statement of the appellant Md. Faiyaz Ahmad (Ext.'Ga') on which basis Flat No.37 of Galaxy Apartment of Syed Khalid Sah was raided and the victim was recovered does not disclose having his hand in the kidnapping of the

victim in any manner. P.W.7 Nirmal Kumar Tiwary has stated that he recorded the confessional statement of Chandan Bind, who gave the description regarding the kidnapping of the victim Ankesh alias Nishu having his hand and his associates but he did not disclose the name of both the appellants. As such, I find that the prosecution has not been able to prove its case that the appellants Md. Faiyaz Ahmad and Bhushan Mahto had hands in the kidnapping of the victim Ankesh alias Nishu beyond all reasonable shadow of doubt.

13. In the result, both these appeals are allowed. The impugned Judgment of conviction and Order of sentence passed against the appellants, abovenamed, is set aside and they are acquitted of the charges. The appellants, abovenamed, are in jail custody, therefore they are directed to be released forthwith, if not wanted in any other case.

(Rajendra Kumar Mishra, J)

Samarendra Pratap Singh, J: I agree

(Samarendra Pratap Singh, J)

Pradeep Srivastava/-

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