

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.252 of 2015**

Arising Out of PS.Case No. -132 Year- 2010 Thana -NAUGACHIA District- BHAGALPUR

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PAPPU SINGH, SON OF ONKAR SINGH, RESIDENT OF VILLAGE -  
DOGACCHI TARAR, P.S. -SANHAULA, DISTRICT - BHAGALPUR.

.... .... **APPELLANT/S**

**VERSUS**

THE STATE OF BIHAR

.... .... **RESPONDENT/S**

=====

**Appearance:**

For the Appellant/s : Mr. Amrendra Kumar, Adv.

For the Respondent/s : Mr. Abhay Kumar, APP

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

C.A.V. JUDGMENT

**Date: 28-03-2017**

Naugachia P.S. Case No.132 of 2010 was registered against appellant Pappu Singh along with Chandan Yadav (appellant of Criminal Appeal (SJ) No.330 of 2015) as named accused along with 3-4 unknown, however presence of appellant Pappu Singh was not at all secured at an earliest and on account thereof, charge sheet was submitted showing him as an absconder. After cognizance, the case was committed and accordingly, the trial of appellant was bifurcated having numbered as Sessions Trial No.1189A/2010 while original Sessions Trial No.1189/2010 proceeded against Chandan Yadav. However, after appearance of appellant Pappu Singh, both two trials proceeded separately, Independently and on account thereof, during course of hearing, both the appeals that means to say the present one Criminal Appeal (SJ) No.252 of 2015 as well as Criminal Appeal (SJ) No.330 of 2015 (filed on behalf of Chandan Yadav) heard conjointly but independently however, judgment is being delivered separately on the same day.

**2.** Appellant, Pappu Singh has been convicted vide judgment



dated 17.04.2015 for an offence punishable under Sections 147,326/149, 504 IPC and sentenced to undergo S.I. for two years under Section 147, S.I. for three years under Section 326/149 of the IPC and SI for two years under Section 504 IPC with a further direction to run the sentences concurrently vide order of sentence dated 22.04.2015 by the Second Additional Sessions Judge, Naugachia, Bhagalpur in Session Trial No.1189A/2010.

3. Banti Singh @ Bineet Singh (PW.4), an injured while was admitted at J.L.N.M. College and Hospital, Bhagalpur gave his fardbyean on 06.08.2010 at 05:00 P.M. alleging *inter alia* that on 05.08.2010 he has come to attend court of Second Additional Sessions Judge, Naugachia as the date was fixed for judgment. He was acquitted. Then, thereafter, he along with his uncle Ashutosh Singh (PW.1) and co-villager Manoranjan Singh (PW.3) came out from the court room and proceeded towards his vehicle parked south to the court of Sri Prakash Malwiya, Judicial Magistrate, 1<sup>st</sup> Class. At about 04:30 P.M. while he was about to his vehicle, all on a sudden Pappu Singh, Chandan Kumar Yadav along with three unknown persons armed variously came near him. Out of them, Pappu Singh ordered to kill over which Chandan shot at causing injury over his back as a result of which he fell down and became unconscious. After regaining his sense, he found himself admitted at hospital where treatment was going on. Rajesh Singh (not examined) stood as an attesting witness.

4. On the basis of the aforesaid fardbeyan Naugachia P.S. Case No.132/2010 was registered and after concluding investigation, charge sheet was submitted in a manner as indicated above facilitating trial which ended by way of recording guilt of the appellant and



accordingly, sentenced for, the subject matter of instant appeal.

5. Defence, as pleaded by the appellant so perceived by way of cross-examination of the witnesses as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence. Furthermore, it has also been pleaded that there happens to be caste rivalry in the village and on account thereof, he has been victimized. However, neither any D.W. nor any chit of paper has been exhibited in defence.

6. In order to substantiate its case, prosecution had examined altogether ten PWs out of whom PW.1 is Binay Kumar, PW.2 is Manoranjan Singh, PW.3 is Banti Singh, PW.4 is Dr. Mritunjay Kumar, PW.5 Dr. Maseech Aajam, PW.6 is Ashutosh Singh, PW.7 is Roop Narain Singh, PW.8 is Jyoti Kumar, PW.9 is Nand Kishore Singh, PW.10 is jai Ganesh Pathak.

7. Side by side also exhibited, Ext.-1 Series-Signature of informant as well as attesting witness over fardbeyan, Ext.2 Series-Fardbeyan as well as endorsement having over fardbeyan, Ext.3 Series-Seizure list as well as signature of the witnesses over seizure list, Ext.4-Injury report.

8. As stated above neither any DW nor any chit of paper has been produced on behalf of appellant.

9. While assailing the judgment of conviction and sentence, it has been submitted by the learned counsel for the appellant that the finding recorded by the learned lower court happens to be cryptic, perverse and not based upon materials available on the record, on account thereof, is fit to be set aside. Furthermore, it has also been submitted that the status of order giver like the appellant happens to be



purposely introduced by way of revenge in the background of animosity. So far present case is concerned, there happens to be admitted position that parties are on strain relationship and so, introduction of appellant as an order giver has got a bearing. The learned lower court failed to consider the aforesaid position which, in the surrounding circumstance, appears to be more probable.

**10.** In order to substantiate the same, it has been submitted that the persons who chased the assailant and apprehended, have not stated that they have seen others also fleeing therefrom. Those witnesses happens to be an independent witness, their presence in the court campus was on one pretext or other. Because of the fact that independent witnesses have not castigated against the appellant on account thereof, appellant should not have been caponized on the evidence of inimical interested witness, hence appellant should have been acquitted.

**11.** Apart from this, it has also been submitted that the case suffers from improbability in the background of the fact that had there been an intention at the end of Chandan Yadav, co-accused to have murderous attack upon Banti Singh which he was independent to pursue, then, in that event, there was no occasion for the appellant to be present and further, directing the Chandan to kill Banti. In likewise manner, being on inimical term and further, was apprehensive at their end, the prosecution party would not have been careless, seeing the appellant and others, rather some sort of proper step by way of precaution would have been at their end to ward off any kind of eventuality, which is completely lacking, as is evident from the evidence.

**12.** Furthermore, it has been submitted that FIR has been



registered one day after the occurrence without any cogent explanation. The intervening period was sufficient to fabricate the story otherwise the police officials, who were present on 05.08.2010 itself at the hospital where there happens to be, admitted case of the prosecution with regard to presence of Ashutosh as well as Manoranjan, who might have come forward to narrate regarding the incidence. Apart from this, from the evidence it is manifest that police officials arrived at court campus just after the occurrence, in that circumstance the FIR, occurrence identifying cognizable one, would have been recorded on the basis of statement of one of the police officials who became informant of 131/10, but keeping behind curtain for such long period by those two persons waiting for regaining of sense by Banti Singh clearly indicates that appellant has fallen victim of false implication in shrewd manner by the prosecution as well as such activity also ruled out presence of Asutosh and Manoranjan as an eye witness coupled with the fact that driver neither been examined by the Investigating Officer during course of investigation, nor made charge sheet witness, nay FIR witness, where upon, no case is found substantiated against the appellant and on account thereof, should have been acquitted. In an alternative, it has also been submitted that considering the status of the appellant inconsonance with the finding of guilt recorded by the learned trial court, appellant should have given benefit of doubt and if not, instead of substantial sentence at least dealt with in terms of Section 4 of the Probation of Offenders Act.

**13.** On the other hand, the learned Additional Public Prosecutor refuted the submission and submitted that from the evidences available on the record, it is found conclusively proved with regard to commission of an occurrence inside court campus wherein informant Banti Singh was



shot at by Chandan on an order of appellant. It is also apparent that only the assailant was chased by the police officials who apprehended him and further, there was recovery of firearm, ammunition from his possession. It is also found exposed from the evidence of the witnesses that other associate ran away in different direction whereupon they managed to succeed and that happens to be reason behind, whereunder the witnesses who were connected with apprehension of assailant found incapable to identify the appellant, however is not found adverse to the prosecution, as it suggests genuine conduct of the prosecution.

**14.** It has further been submitted that PW.2, PW.3 and PW.6 have categorically stated regarding status of the appellant to be order giver at whose instance Chandan shot at Banti. That being so, the judgment impugned is fit to be confirmed.

**15.** From the record, it is evident that trial of S.Tr. No.1189 of 2010, 1189A/2010 were conducted by the same P.O. same set of evidence was produced by the prosecution and accused Chandan was found and held guilty for an offence punishable under Sections 307/149 IPC, 326 IPC, 504 IPC, 148 IPC, 149 IPC as well as 27(ii) of the Arms Act while appellant Pappu Singh has not been convicted and sentenced for an offence punishable under Sections 307/149 IPC. Though, the aforesaid trial sailed independently, and the evidence of one S.Tr. is not to be considered in another Sessions Trial, but there should be logical conclusion on the basis of the evidence available on the respective records. Furthermore, it is also apparent that no charge with aid of Section 114 of the IPC has been framed against the appellant although there was material before the learned lower court on that very score identifying the appellant to be an order giver. Therefore two different yard



stick has been adopted by the learned lower court during course of conduction of the trial for the same occurrence. The court is alive with the fact that it is not an appeal against acquittal, however the approach of the learned lower court during course of appreciation of evidence found completely disintegrate the finding so recorded at its end.

**16.** In terms of Section 216 of the Cr.P.C. there happens to be empowerment of the court to amend, add charge till the judgment is pronounced. In likewise manner, unless and until there happens to be vagueness to such extent that it is difficult to identify the appropriate Section whereunder accused is to be charged, in terms of section 221 of the Cr.P.C. court is empowered to frame charge under different heads and may found guilty accordingly but, when the allegation happens to be apparent identifying proper course having played by the accused during course of commission of the crime, then in that event, there should have been a proper charge. The aforesaid lapses happens to be of great importance in the background of the fact that both the trial were taken up by the same judge, more or less both the trial proceeded in same sequence, same set of evidence was adduced however the judgment was delivered separately on two different dates. Furthermore, it is also evident that the status of appellant being order giver has properly been conceived during statement recorded under Section 313 Cr.P.C. though no change was there for the aforesaid activity. That means to say, in spite of ample incriminating material having on the record, though perceived by the court even during course of statement of the appellant under Section 313



Cr.P.C. been overlooked. That being so, it is apparent that there happens to be complete absence of proper application of judicial mind which caused miscarriage of Justice due to failure of the court by framing proper charge against the appellant and even failed to appreciate the evidence on that very score during judgment. That means to say, the status of appellant being as an abettor had gone out of judicial consciousness.

**17.** The purpose of framing a charge against an accused person is to acquaint him with the incriminating facts and circumstances proposed to be proved against him in the trial to follow. The principal objective is to afford him an opportunity of preparing his defence against the charge. The possibility of prejudice to the accused arises, if he is not made conversant with the entire gamut of facts constituting the accusations levelled against him. The proposition of law has succinctly been laid down by the Apex Court in V.C. Sukla vs. State reported in 1980 Supp. SCC 92.

**18.** At the present juncture, one should not be oblivious over presence of Section 464 Cr.P.C., whereunder the effect of omission to frame, or absence of or error in charge has been considered not adverse to the finding recorded by the trial court, and in analogous manner Section 469 Cr.P.C. deals with subject to prejudice caused to accused but here is the condition, wherein not only there happens to be omission in framing of charge rather status of accused so recognized during course of commission of crime has completely been ignored.

**19.** By such eventuality, neither the appellant was proceeded with proper accusation nor by the judgment impugned, such accusation was ever perceived, and on account thereof, there happens to be complete failure of proper adjudication of trial, in accordance with law,



resulting miscarriage of justice.

20. In **Ajay Kumar Ghoshal vs. State of Bihar & Anr.** reported in **2017 (1) PLJR 458(SC)**, it has been held by the Apex Court:

“11. Though the word “retrial” is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

12. ‘*De novo*’ trial means a “*new trial*” ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold ‘*de novo*’ trial. But the question is when such power should be exercised. As stated in *Pandit Ukha Kolhe vs. State of Maharashtra* (1964) SCR 926, the Court held that:

“An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.”

13. This Court, while dealing with the question whether the High Court should have quashed the trial proceedings only on account of declaration of the legal position made by the



Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act, this Court stated, “a *de novo* trial should be the last resort and that too only when such a course becomes so desperately indispensable; it should be limited to the extreme exigency to avert ‘a failure of justice’. Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a *de novo* trial”. In *State of M.P. vs. Bhooraji and Ors.* (2001) 7 SCC 679, the Court went on to say further as follows:

“8....This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence, the said course can be resorted to when it becomes unpreventable for the purpose of averting “a failure of justice”. The superior court which orders a *de novo* trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.”

14. In *Bhooraji's* case, the Court referred to Chapter XXXV of the Code and, particularly, Sections 461, 462 and 465 (1). After noticing the above provisions, the Court observed in paragraphs (15) and (16) of the order as follows:

“15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned “a failure of justice” the superior court shall not quash the proceedings merely on the ground of



such error, omission or irregularity.

16. What is meant by a failure of justice occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani vs. State of Karnataka* {2001 (2) SCC 577} thus:

“23. We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Dep'tt. of the Environment*, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.”

15. In *Gopi Chand vs. Delhi Administration* AIR 1959 SC 609, a Constitution Bench of this Court was concerned with the criminal appeals wherein plea of the validity of the trial and of the orders of conviction and sentence was raised by the appellant. That was a case where the appellant was charged for three offences which were required to be tried as a warrant case by following the procedure prescribed in the Code of Criminal Procedure, 1860 but he was tried under the procedure prescribed for the trial of a summons case. The procedure for summons case and warrants case was materially different. The Constitution Bench held that having regard to the nature of the charges framed and the character and volume of evidence led, the appellant was prejudiced; accordingly, set aside the orders of conviction and sentence and the Constitution Bench held as under:-

“29. ....the offences with which the Appellant stands charged are of a very serious nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the Appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the Appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible.”

16. In *Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.* (2004) 4 SCC 158, [Best Bakery case] being an extraordinary case, the Supreme Court was



convinced that the witnesses were threatened to keep themselves away from the Court and in such facts and circumstances of the case, not only the Court directed a '*de novo*' trial but made further direction for appointment of the new prosecutor and retrial was directed to be held out of the State of Gujarat. The law laid down in *Best Bakery case* for retrial was in the extraordinary circumstances and cannot be applied for all cases.

"17. After considering the question a "speedy trial" and "fair trial" to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in *Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi)* (2012) 9 SCC 408, this Court held as under:-

"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such



power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

**21. In *Satyajit Banerjee & Ors. vs. State of WB & Ors.***

reported in **(2005) 1 SCC 115**, it has been held:

"**24.** Without going into the correctness of all the observations made by the High Court in the impugned judgment, we find it necessary to clarify that the High Court ought not to have directed the trial court to hold a *de novo* trial and take a decision on the basis of the so-called "*suggested formula*". The High Court in its concluding part of the judgment does state that any observation in its judgment should not influence the mind of the trial court but, at the same time, the High Court directs the trial court to take "*a fresh decision from stage one*" and on the basis of the "*suggested formula*". Learned counsel for the accused is justified in his grievance and apprehension that the aforesaid observations and directions are likely to be mistaken by the trial court as if there is a mandate to it to record the verdict of conviction against the accused regardless of the worth and weight of the evidence before it."

**22. In *Pooja Pal v. Union of India and Ors.* reported in **(2016)****

**3 SCC 135**, it has been held:

"**92.** That the pre-eminence of truth is the guiding star in a judicial process forming the foundation of justice, had been aptly propounded by this Court in *Maria Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira* (2012) 5 SCC 370. It was ruled that the entire judicial system had been created only to discern and find out the real truth and that the Judges at all levels have to seriously engage themselves in the journey of discovering the same. Emphasising that the quest for truth is the mandate of law and indeed the bounden duty of the courts, it was observed that the justice system will acquire credibility



only when the people will be convinced that justice is based on the foundation of the truth. While referring with approval, the revealing observation made in *Ritesh Tewari v. State of U.P. (2010) 10 SCC 677* that every trial is voyage of discovery in which truth is the quest, the following passage of Lord Denning scripted in *Jones v. National Coal Board (1957) 2 WLR 760* was extracted in affirmation: (*Maria Margarida case (2012) 5 SCC 370*, SCC p. 384, para 39)

“39. ... ‘... It’s all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth.’ (*Jones case (1957) 2 WLR 760*, QB p. 64)”

**93.** A strain of poignance and disquiet over the insensitive approach of the court concerned in the textual facts in the context of fair trial in the following observations of this Court in *Vinod Kumar v. State of Punjab (2015) 3 SCC 220* sounds an awakening caveat: (SCC p. 227, para 3)

“3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognise ‘the felt necessities of time’ and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes ‘fair trial’ for the accused as well as the prosecution?”

**23.** In the backdrop of aforesaid perception considered by the Apex Court, now the judgment impugned has to be seen. From para-12 of the judgment, it is evident that the learned lower court has perceived the appellant to be an order giver, in spite of the same, failed to properly adjudicate whether he should be found guilty for the same, and in likewise manner, for want of proper charge on that very score, could be held guilty. On that very score there should have been proper appreciation as well as finding which is found completely absent.

**24.** Being appellate court, the matter would have been considered, but, the event should not be allowed to be taken up at this



stage under the garb of Section 464 Cr.P.C. as it will cause prejudice to the interest of appellant which could be protected in case, the matter is remitted back to the learned lower court to proceed, after invoking provisional Section 216 Cr.P.C. whereupon, if chosen, the appellant has an opportunity in terms of Section 217 Cr.P.C.

25. Accordingly, the judgment and sentence impugned is set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh from the relevant stage as indicated above in accordance with law. Appellant is on bail hence is directed to surrender before the learned lower court within a month and for such tenure, his bail bond is directed to be alive failing which, the learned lower court will be at liberty to take proper legal recourse for his appearance. After appearance, appellant will seek bail and during consideration of the same learned lower court will take into notice the status of the appellant being remained on bail. It is further directed that trial should be concluded at an earliest. It is further observed that any finding recorded here in above will not cause prejudice to the interest of the appellant during course of trial.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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