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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. No.763/2001**

Date of Decision : 20th FEBRUARY, 2017

SUDERSHAN

..... APPELLANT

Through

Mr.Mir Akhtar Hussain, Adv. with
appellant in person.

versus

STATE

..... RESPONDENT

Through

Mr.Ashish Dutta, Additional
Public Prosecutor for the State.

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

P.S.TEJI, J

1. Aggrieved by the judgment of conviction dated 18th July, 2001 convicting the appellant finding him guilty under Section 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act, 1985) and order on sentence dated 18th July, 2001 vide which the sentence was passed against the appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for the offence punishable under Section 21 of the NDPS Act, in default of payment of fine, convict was ordered to undergo simple imprisonment for three years, the present appeal has been filed.
2. The facts in brief are that a secret information was received on the basis of which the police of Narcotic Branch, on 15th January, 1999 at about 07.00 p.m., apprehended the appellant near

Chowdhary Sweet Corner, Indira Chowk, New Pusa Road, Delhi Notice under Section 50 of the NDPS Act, 1985 was served to which the accused refused to exercise the said option and his refusal was recorded in writing. The accused also refused to the offer of personal search of the investigating officer. On conducting out a search, 100 gram of contraband i.e. smack was recovered from the possession of the accused. Out of 100 gram smack recovered, 10 gram was kept aside as sample and converted into a parcel with the help of cloth while rest of the smack with momi packet and rubber band was converted into another parcel with the help of cloth. It appears from the record that the case property was seized vide seizure memo Exh.PWs 3/B & 3/C; CFSL form was filled in and sealed; rukka was prepared; FIR No.3/99 was registered; case property was handed over to the SHO; accused was arrested; the sample was chemically analysed and after completion of the investigation, accused was sent for trial to the court. It further emerges from the record that charge under Section 20 of the NDPS Act was framed against the accused to which he pleaded not guilty and claimed trial.

3. The prosecution had examined as many as thirteen prosecution witnesses namely PW 1 HC Bhagwat Dayal; PW 2 HC Vijay Pal Singh; PW 3 HC Bharat Singh; PW 4 SI Prem Chand; PW 5 Dr.R.M. Tripathi; PW 6 SI Phool Chand; PW 7 Inspt.Mahesh Chand Sharma; PW 9 SI Satbir Singh; PW 10 Const.Gajender Singh; PW 11 HC Roshan Lal; PW 12 Dasrath Singh & PW 13 HC Yashpal. The statement of the accused Sudershan was recorded under Section 313 of the Cr.P.C.

4. The appellant was held guilty by the learned Special Judge, Delhi and by an order dated 18th July, 2001, sentenced to undergo

rigorous imprisonment for ten years and fine of rupees one lakh for the offence punishable under Section 21 of the NDPS Act, 1985. In default of payment of fine, the convict was to undergo simple imprisonment for three years.

GROUND OF CHALLENGE

(a) There has been gross violation of Section 313 Cr.P.C. inasmuch as the appellant had been convicted on the evidence and incriminating material which were never put to the accused during examination under Section 313 Cr.P.C. The accused was held guilty on 18th July, 2001 at 3.45 p.m. and at the same time, the sentence of rigorous imprisonment of ten years with fine of Rs.1,00,000/- was announced. The appellant was picked up from his house on 14th January, 1999 at 8.00 p.m. There was no public witness though the appellant was stated to be arrested from a busy road. There was no compliance of Section 100 & 165 of Cr.P.C. There was no adjudication on the important issue of seal of CFSL on the sample of the alleged smack which was marked as Mark 'A'. The entry regarding deposit of seized property did not bear the signatures of the SHO. Deliberate non-examination of SI Govind Chowhan who was present at the time of recovery. It was also alleged that there was violation of Sections 50 of the NDPS Act.

5. Apart from challenging the judgment of conviction, learned counsel for the appellant further submitted that vide order dated 12th September, 2002 passed by this court, given the facts and circumstances of the case, the sentence of the appellant was suspended during the pendency of the appeal.

6. Per contra, argument advanced by learned Additional Public Prosecutor for the State is that the appellant was rightly held guilty

under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. It is submitted that on 15th January, 1999, a secret information was received by the police of Narcotic Branch and the appellant was apprehended with contraband i.e. smack at Indira Chowk, New Pusa Road. It is submitted by APP that search of the accused persons was effected and that smack weighing 100 grams was recovered from his possession.

7. Upon hearing the rival contentions of the parties at length, evidence led is being examined.

(I) PW 12 SI Dasrath Singh in his statement stated that on 15th January, 1999, while posted as ASI at Police Station Narcotic Branch, Kamla Market, at about 5.45 p.m., he received a secret information to the effect that one person namely Sudershan, resident of Nehru Nagar, Rameshwari Nagar, was a dealer of smack and in order to supply the smack, would reach Indira Chowk, New Pusa Road around 6.30-7.30 p.m. by LML Vespa scooter bearing registration no.DL-8HB-2653. Information to this effect was given by this witness to PW 7 SHO Inspt.Mahesh Sharma who further conveyed this information on telephone to the ACP who directed the SHO to conduct raid. PW 12 SI Dasrath Singh reduced this secret information to writing and entry to this effect was made in DD No.32 (Exh.PW 12/A) and copy thereof was forwarded to the senior officers. This witness organised a raiding party consisting of PW 9 ASI Satbir Singh; PW 3 HC Bharat Singh; Ct.Krishan Kumar; Ct.S. Paul; Ct.Sumer Singh; Ct.Daya Chand as well as the secret informer. This witness made departure entry vide DD No.33 (Ex.PW 12/B). The team reached the spot at 6.30 p.m. when this witness asked five passersby to join the proceedings, however none agreed to it. PW 12 thereafter

briefed the staff and effected nakabandi. This witness further deposed that at about 7.00 p.m., the accused person reached the spot on scooter no.DL-8SB-2653 from Mata Rameshwari Nagar side, when the secret informer stopped him and that the accused Sudershan was apprehended near Chaudhary Sweet Corner below electric pole. PW 12 Dasrath Singh explained the accused about the information regarding possession of contraband i.e. smack and gave him option to be taken either before a Gazetted Officer or a Magistrate and that notice under Section 50 (Ex.PW 3/A) of the NDPS Act was served to the accused to which he refused. This witness offered his search to which the accused refused. PW 12 further stated that he effected personal search of the accused and that a momi packet tied with rubber band was recovered from the right side pocket of the pant of the accused, which when opened, checked and weighed, was found to contain 100 gram dark brown coloured powder i.e. smack. Out of the 100 grams smack recovered, 10 grams was kept aside as sample and the remaining smack with momi packet and rubber band, was converted into two parcels; both parcels were sealed with the seal of DS; the sample parcel was given Mark 'A' while the remaining parcel was given Mark 'B'; CFSL form was filled in and seal of DS was affixed thereon; both parcels & CFSL form were seized (Exh.PW 3/B); search of the scooter was conducted though nothing incriminating was found therefrom; scooter was seized (Exh.PW 3/C) and that the seal was handed over to PW 9 ASI Satbir Singh. Thereafter, PW 12 Dasrath Singh prepared rukka (Ex. PW 12/C) & sent PW 13 Ct.Yashpal to SHO for the purpose of producing rukka, both parcels, CFSL form as well as copy of seizure memo. This witness further stated that PW 13 Ct.Yashpal & PW 4 SI Prem Chand

returned to the spot and that the investigation was handed over to PW 4 SI Prem Chand who, on the instructions of this witness, prepared site plan (Ex.PW 4/A) and interrogated the accused. Thereafter, statement of the accused was recorded by PW 4 and the accused was arrested (Memo Ex.PW 4/B). PW 12 further stated that after informing the arrest of the accused to his son vide memo Ex.PW 4/C, the house of the accused was searched however, nothing incriminating was found therefrom. Thereafter, at about 11.50 p.m., the accused was produced before the SHO. This witness, thereafter, also brought the scooter of the accused at police station and deposited the same with MHCM.

(II) PW 1 HC Bhagat Dayal in his statement stated that while he was working as MHC(M) at P.S. Narcotic Branch, Kamla Market, Delhi, on 15th January, 1999 at about 9-10 p.m., PW 7 Inspt.Mahesh Sharma who was the then SHO of the police station, deposited with him two sealed parcels marked 'A' & 'B' along with CFSL form as well as copy of the seizure memo, for the purpose of depositing the same in the malkhana (Ex.PW 1/A). In this regard, this witness made entry in register no.19 at serial no.60 and handed over the sample parcel marked 'A' with CFSL form along with road certificate no.7/21 to Ct.Ajit Singh for depositing in CFSL, Chandigarh (Exh.PW 1/B). This witness deposed that there was no tampering with the seals when he again made return entry of the same (Exh.PW 1/C) and again handed over the same to Ct.Gajender Singh for depositing the same vide road certificate no.8/21 (Exh.PW 1/D). This witness further stated that on 15th January, 1999, ASI Dashrath singh deposited with him one scooter no.DL 8SH 2653 as well as the contents of the personal search of the accused Sudershan and entry in this regard was made by him in

register no.19. On 27th May, 1999, PW 1 HC Bhagwat Dayal received the remnant of sample marked 'A' along with the report of chemical examination of CFSL which were handed over by him to the investigating officer.

(III) PW 9 SI Satbir Singh in his statement stated that while posted at P.S. Narcotic Branch, at about 5.45 p.m., PW 12 ASI Dasrath Singh received a secret information regarding possession of contraband and that a raiding team comprising of this witness; PW 12 Dasrath Singh; PW 3 HC Bharat Singh; Ct.Sumer, Ct.Daya Chand; PW 13 HC Yashpal & Ct.Krishan Kumar was organised which reached the spot at about 6.30 p.m. when investigating officer briefed them. Thereafter, five shopkeepers and passersby were asked to join the team, however, none of them agreed. This witness stated that at 7.00 p.m., the accused reached the spot in his scooter no.DL 8SB 2653 who, at the instance of secret informer, was apprehended. Thereafter, PW 12 ASI Dasrath Singh explained the accused of information about his possessing smack; served notice under Section 50 of the NDPS Act; offered his search & search of the scooter for this purpose and gave option to be searched before a Gazetted Officer or Magistrate to which the accused refused which was mentioned in the notice Ex.PW 3/A bearing his signature at point 'A'. PW 9 further stated that PW 12 Dasrath Singh took search of the accused Sudershan; found packet tied with rubber band from right pocket of pant of the accused which when opened; checked & weighed, was found to be 100 grams smack of which 10 grams sample was separated & sample smack was converted into parcel while the remaining smack in momi packet was also converted into another parcel which bore seal of DS and marked as March 'A' & 'B' respectively.

Thereafter, duly filled in CFSL form; rukka and both the parcels along with copy of seizure memo were handed over to PW 13 Ct.Yashpal with direction for giving the same to SHO. This witness further stated that PW 4 SI Prem Chand prepared site plan Ex.PW 4/A; accused was interrogated & arrested; information to this effect was given to the son of the accused (Ex.PW 4/C) and that thereafter, this witness along with others, went to the house of the accused where nothing incriminating was found which was recorded as memo Ex.PW 2/A.

(IV) PW 2 HC Vijay Pal Singh stated that on 15th January, 1999 at about 11.00 p.m., while on patrolling duty, he along with SI Govind Chauhan, reached the spot when PW 4 SI Prem Chand joined him and that search of the house of the accused was conducted in their presence, however, nothing incriminating was found (Memo Ex.PW 2/A).

(V) PW 3 HC Bharat Singh being part of the raiding party, corroborated the statement of the investigating officer i.e. PW 12 Dasrath Singh with regard to the apprehension of the accused, serving of notice under Section 50 of the NDPS Act; recovery of smack from the possession of the accused; preparation of rukka; filling up of CFSL Form etc. This witness further stated that at about 10.00 p.m. on 15th January, 1999, further investigation was handed over to PW 4 SI Prem Chand who prepared site plan, recorded their statement, enquired the accused and, thereafter, arrested him. Thereafter, this witness stated that he along with the local police officer, visited the house of the accused and effected search, but nothing incriminating was found therefrom.

(VI) PW 11 HC Roshan Lal in his statement stated that on 16th January, 1999, while posted as SO to ACP, Narcotic Branch,

Kamla Market, he received a report under Section 57 of the NDPS Act from the SHO which he produced before the ACP Mr.R.P. Mehta on 16th January, 1999 vide Diary No.7/SO/ACP/NER.

(VII) PW 10 Const.Gajender Singh stated that on 16th September, 1999, while he was posted at P.S. Narcotic Branch, at the instruction of PW 4 SI Prem Chand, he collected from PW 1 HC Bhagwat Dayal, MHCM, one sample parcel as well as CFSL form which bore seals of DS & MCS vide RC No.8/21 and that he took & deposited the same to CFSL, Chandigarh on the same day. After returning from Chandigarh, this witness deposited the copy of RC received from CFSL, with MHCM on the same day.

(VIII) PW 6 Phool Chand in his statement deposed that on 15th January, 1999 while he was posted as ASI with the PS Narcotic Branch, and working as DO from 8.00 pm to 8:00 am, he received rukka mark 'A' which was sent by PW 12 Dasrath Singh through PW 13 Ct.Yashpal and on that basis this witness recorded the FIR. For the purpose of registration of the case, this witness also made DD entry no.35 in DD register.

(IX) PW 5 Dr.R.M. Tripathi in his statement stated that on 16th February, 1999, he was posted as Sr.Scientific Officer, CFSL, Chandigarh, when one sealed cloth parcel sealed with the seal of DS & MCS accompanied with CFSL form having the same seals, deposited in the laboratory by PW 10 Ct.Gajender Singh, was marked to him and that he tallied the seals on the parcel with the sample seals and found the same to be intact. He further stated that he opened the parcel and found the same to contain brown coloured powder in polythene which, on chemical analysis, was found to be Diacetylmorphine (heroin) and that the same was re-sealed by this witness with the seal of CFSL. The detailed report given by this

witness is Exh.PW 5/A which bore his signatures.

(X) PW 4 SI Prem Chand in his statement stated that on 15th January, 1999 while he was posted at P.S. Narcotic Branch, Kamla Market, he received direction from the SHO at about 9.30 p.m. and that the case along with FIR & rukka was handed over to him by PW 6 ASI Phool Chand. This witness stated that he along with PW 13 HC Yashpal, reached the spot where PW 12 ASI Dasrath Singh handed over the custody of the accused and the documents of the proceedings conducted. This witness prepared the site plan (Ex.PW 4/A); arrested the accused and conducted J.T. (Memo Ex.PW 4/B); recorded and conveyed the grounds (Ex.PW 4/C) of arrest to the accused; led the police party and effected house search of the accused with the help of local police officials i.e. SI Govind Chauhan & HC Vijay Pal, however nothing incriminating was found therefrom. House search memo (Ex.PW 2/A) & reasons of house search (Exh.PW 4/D) were duly noted. PW 4 SI Prem Chand further stated that at about 11.50 p.m., he along with others, came to the police station; produced the accused before the SHO; interrogated the accused; deposited the Jamatalashi in malkhana & on 16th January, 1999, sent a report under Section 57 of the NDPS in his handwriting (copy being Ex.PW 4/E), to superior officer. On 25th January, 1999, this witness through Ct.Ajit Singh sent the sample parcel & CFSL form (vide RC No.7/21) and on 16th February, 1999, re-sent the same through PW 10 Ct.Gajender, to CFSL, Chandigarh (vide RC No.8/21). This witness also recorded statement of the witnesses; collected the report of the CFSL and after the investigation was completed, prepare the challan which was sent to the court.

8. Thus, as per the testimony of PW 12 SI Dasrath Singh, on

the date of incident, upon receipt of secret information that the appellant Sudershan, who was in possession of contraband i.e. smack, he informed PW 7 Inspt. Mahesh Chand Sharma, SHO and on his direction, this witness organised a raiding party. A raid was conducted and upon the pointing out of the secret informer, the accused person was apprehended while coming from Mata Rameshwari Nagar side towards the spot. PW 9 SI Satbir Singh; PW 3 HC Bharat Singh as well as PW 4 SI Prem Chand corroborated the statement of PW 12 Dasrath Singh that notice (Ex.PW 3/A) under Section 50 of NDPS Act was prepared and served upon the accused Sudershan. This witness apprehended the accused Sudershan and recovered from the right pocket of pant of the accused, a momi packet tied with rubber band. The packet when opened in the presence of this witness, found to contain brown powder which when weighed came out to be 100 grams and later proved to be the contraband i.e. smack. After preparing a separate sample packet, remaining smack was seized. Rukka Ex. PW 12/C was prepared; case was registered and the site plan (Ex.PW 4/A) was prepared by PW 4 SI Prem Chand in presence of PW 12 Dasrath Singh. PW 7 Inspt. Mahesh Chand Sharma, SHO, testified the statement of PW 12 SI Dasrath Singh to the effect that he was informed about the secret information and that the raid near Chowdhary Sweet Corner, Indira Chowk, New Pusa Road, Delhi, was conducted in his presence and on his direction, accused Sudershan was apprehended by PW 12 Dasrath Singh.

9. The testimonies of PW 12 SI Dasrath Singh and PW 7 Inspt. Mahesh Chand Sharma have been duly corroborated by PW 9 SI Satbir Singh; PW 12 Dasrath Singh; PW 3 HC Bharat Singh & PW 13 HC Yashpal. All these witnesses in the same breath have

stated that raid was conducted in which the appellant was apprehended with contraband i.e. smack. They have also stated in the same line that the proceedings were conducted at the spot by the investigating officer and the in-charge of raiding team and that recovery of smack, its seizure, search of appellant Sudershan, notice under Section 50 of NDPS Act were served upon the appellant and other proceedings were also conducted.

10. All the above witnesses were cross-examined at length but the defence failed to put any dent to their testimony. They remained unshaken with regard to conducting of raid and apprehension of the appellant with the contraband i.e. smack. They have also stated in a single voice that smack weighing 100 grams was recovered from the appellant; notice under Section 50 of the NDPS Act was served upon him and required proceedings were conducted at the spot.

11. Contention of the learned counsel for the appellant that there was no proper service of notice under Section 50 of the NDPS Act upon the appellant, is without any basis inasmuch as notice under Section 50 of the NDPS Act Ex.PW 3/A shows that after apprehension of the appellant, he was offered to get himself searched in the presence of a gazetted officer or a Magistrate before conducting his search. This clearly proves that the contents of notice under Section 50 of the NDPS Act were duly explained to the appellant before conducting his search and thus there is mandatory compliance of Section 50 of the NDPS Act by the police before conducting search of the appellant. Even ACP has stated that recovery was effected from the appellant which fact was duly informed him.

12. The testimony of the raiding party members has also been

duly corroborated by CFSL report which shows that when the sealed sample was opened and examined, the same was identified as smack. The CFSL report duly proves the case of the prosecution that the recovered substance from the appellant was a contraband i.e. smack.

13. The discussion made above shows that the testimony made by the police officials is trustworthy and their testimony coupled with CFSL report, brings the case of prosecution within the four corners of the alleged commission of offence which culminated into the conviction of the appellant. This court is of the considered opinion that the prosecution has successfully proven the guilt of the appellant.

14. As a result, no error or illegality is found in the view taken by the Trial Court and the judgment of conviction dated 18th July, 2001 is upheld.

15. A prayer is made by learned counsel for the appellant to the effect that a lenient view may be taken in terms of sentence awarded to the appellant keeping in view the fact that the appellant is facing trial since 1999 and that almost seventeen years have elapsed. Learned counsel for the appellant has further submitted that the appellant was awarded punishment under the Narcotic Drugs & Psychotropic Substances Act, 1985 which was amended in the year 2001 and in view of the amended Act, the punishments for the offences under the Act, have been reduced. Likewise, the sentence in the present case may also be reduced.

16. In the judgment passed by the High Court of Rajasthan, it was held as under:-

“When a legislation is brought into existence, it is for the benefit of the people and

the Court should give such interpretation which is not only beneficial to the person who takes benefit out of it but it should also be in consonance with the Statement of Objects and Reasons given in the Amending provisions. The Statement of Objects and Reasons appended to the Bill is as follows:

Statement of Objects and Reasons:-

Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformatory approach towards addicts. In view of the general delay in trial, it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalisation of the sentence structure, provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

12. This Statement of Objects & Reasons itself is beneficial for the interest of the accused who are languished in jail for a considerable time on account of being minimum ten years punishment in contraband drugs and are denied right of bail as against those who are indulged in large scale quantity of drugs trafficking. This Amendment provides rationalization in the matter of grant of bail as well as in the matter of awarding sentence by distinguishing the narcotic drugs &

psychotropic substances in three categories viz; (i) small, (ii) commercial and (iii) in between small & commercial. If the legislation is silent on a particular issue which is apparently in the present case about applicability of the Amending Act' In case where sentence has been passed prior to Amendment and no appeal has been filed after the Amendment, then the Court should give that interpretation which is in furtherance of the intention of the legislature given under its preamble or Statement of Objects & Reasons.”

[Prema alias Prem Singh Vs. State of Rajasthan in S.B. CrI.J. Appeal No.738/2001 Dt.19.07.2007]

17. This Court on similar facts and circumstances, has held as under:-

“It is a fundamental right of every person that he should not be subjected to greater penalty than what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.”

[Sultan Vs. State 2004 (73) DRJ 460]

18. *India is a party to three United Nations Drug Conventions and to give effect to the treaties, NDPS 1985 enacted in order to provide adequate penalties for drug trafficking, strengthen enforcement powers, implement international conventions to which India was a party and enforce controls over the contraband. NDPS Amendment Act 1989 came into effect to combat drug trafficking which was influenced by the signing of 1988 Convention by India. After this amendment, people caught with small amounts*

of drugs faced long prison sentences and hefty fines. The said amendment of 1989 was criticized for harsh and disproportionate sentencing structure and a momentum for reform was created. By way of amended Act of 2001, scale of sentencing and fine was reduced depending upon the substance and quantity found. It basically provides for determining the amount of drugs involved in an offence while sentencing an accused. It also provides for deterrent punishment for the drug traffickers while a reformatory approach towards addicts has been adopted. Therefore, three different quantity of drugs have been involved i.e. small, commercial or intermediate while sentencing. The legislature was wise enough to provide different punishments for possessing small or commercial quantity of drugs.

19. *The amended Act of 2001 is a beneficial legislation which provides for lesser punishment in case of drug addicts who are found with the lesser quantity of prohibited substance as compared to the drug traffickers who are found having commercial quantity of contraband which attracts harsh punishment and hefty fines.*

20. In the present case, the appellant has already undergone about three years seven months and twenty five days incarceration for possessing 100 grams of smack. The peculiar circumstances of the present case are that the appellant was arrested on 15th January, 1999 and as per the sentence awarded to him, he would have completed ten years in the year 2009 if he remained confined in jail for the said period. Keeping in view the judgment in the case of **Sultan (supra)** and the beneficial provisions of the amended NDPS Act of 2001, the sentence awarded to the appellant is reduced to four years with fine of Rs.40,000/-. In default of

payment of fine, the appellant shall undergo simple imprisonment of one year.

21. The appellant is directed to surrender immediately before the trial court concerned to serve the remaining sentence of imprisonment.

22. With the above modification in the sentence of imprisonment, the present appeal is disposed of.

(P.S.TEJI)
JUDGE

FEBRUARY 20, 2017
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