

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2018
DELIVERED ON : 27.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.77 of 2000

The Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit, Chennai. ... Appellant

Vs

1.S.Yogadasan @ Kutty
2.S.Thangaraja
3.P.Samuel
4.M.Santhakumar
5.V.Kothandapani @ Kothandam ... Respondents

Prayer: Criminal Appeal filed under Sections 378 of the Code of Criminal Procedure, against the Judgment of acquittal dated 16.07.1999 in C.C.No.149 of 1995 on the file of the Principal Special Court under N.D.P.S. Act, Chennai.

For Appellant : Mr.N.P.Kumar (for NCB cases)
Special Public Prosecutor

For Respondents: Mr.E.Kannadasan (for R1 to R4)
Legal Aid Counsel

Mr.R.C.Paul Kanagaraj (for R5)

JUDGMENT

This appeal is filed by the complainant, viz., Intelligence Officer, Narcotics Control Bureau, against the acquittal of the Respondents/Accusedno.1 to 5, as per the judgment dated 16.07.1999 made in C.C.No.149 of 1995 on the file of the learned Principal Special Court under N.D.P.S. Act, Chennai.

Brief case of the Appellant:

2.The case of the Appellant is that one P.W.4 Vaidayanthan and Mohan, Intelligence Officers were working in the Narcotic Control Bureau, Southern Region, Chennai, they received an intelligence report on the morning of 18.03.1995 and after

reducing the same into writing, they gave the report Ex.64 to their Superintendent , P.W.8 Dilip Kumar. It was alleged in the report that one Yogadasan @ Kutty, Accused No.1 residing at No.15, Kumarappa Street, Nungambakkam, Chennai had arranged for the procurement of 3 kgs of heroin from Bombay and that the same would be brought by a lady carrier by name Ritta from Bombay and that she will be staying at Hotel Sri Lekha Intercontinental, Chennai, on 18.03.1995 and that A1 had planned to illicitly export the said heroin to Srilanka along with the aid of one Thangaraja (accused 2) and that both of them would go to the Hotel Srilekha and take delivery of the drugs from the lady and that the place of stay of both the accused 1 and 2 both Srilankan, were identified and if further surveillance is made, the contraband could be seized and the above persons may be apprehended. On receiving this intelligence at 08.00 hours on 18.03.1995, P.W.8 Dilip Kumar instructed P.W.3 Mohan and PW-4 Vaidyanathan to follow and watch the activities of A1 and asked Ganesh and Rangarajan to watch A-2. Thereafter PW8 Dilip Kumar instructed the Intelligence Officer PW1 Vijyalakshmi to go over to Hotel Srilekha. PW-8 along with Gopal also reached Hotel Srilekha and verified the Guest Register and found out that the lady Rita mentioned in the information Ex.P64 was staying in Room No.629. Thereafter PW8 arranged for search witnesses and PW5 M.Suresh and Ganesh, the employees of the Hotel Sri Lekha came forward to witness the search of the Room No.629. Then PW1 came to the Hotel at 12.45 p.m. and all of them went to Room No.629 and knocked at the door. A middle aged women opened the door and she stated her name as Nympha @ Rita Fernandes and told that she came from Bombay by flight at about 10.30 a.m. and is staying in the Hotel room, PW8 disclosed his identify to Rita, A6 herein, that he is a Gazetted Officer, Narcotic Control Bureau, Chennai and that as they received information that Narcotic Drug is being smuggled and hence he has to search the room along with other officers. He also brought to the notice of the A6 that if she requires, she will be taken to the magistrate or gazette officer for search and that on the other hand A6 gave her consent to search the room by PW8 and his party themselves. PW8 then ordered PW1 to search the room. PW8 also supervised the search. When PW1 examined the hand bag of A6, she found one Indian Airlines Ticket in the name of Fernandes/Nympha, from Bombay to Madras to Bombay dated 18.03.1995 viz, Ex.P3 and one Airlines boarding pass (Ex.P4) and Advance Receipt/Fax copy (Ex.P5).

3. Then PW8 saw an unlocked blue colour suit case, which was claimed to belong to the A6 and opened it. The said M.O.1 suit case contained dressing cloth and that even after removing the clothes, the bottom of the suit case was unusually heavy and hence when the lining cloth was removed, a wooden plank was found and below the same there was a polythene cover, pasted by

a cloth tape, in which the officers found brown colour powder, and on examination with the help of Test Kit, it answered for heroin and when weighed it was 3 kgs, PW1 seized M.O.1 and the heroin and the documents Exs.P3 to P5 found in hand bag of A6. PW1 then took two 5 grams each samples from the polythene bag and packed in separate polythene and brown covers and sealed them with NCB seal and marked them as S1 and S2, viz, M.O.2 and M.O.3. The balance of heroin in the polythene cover, seized from the suit case was packed in a paper cover and sealed with NCB seal, which is M.O.4.

4. During the search was going on in Room No.629, two persons one a short and one a long came to the room and when enquired they disclosed their names as Yogadasan @ Kutty (A1) and Thangaraja (A2) both belonging to Srilankans. When PW8 told them that they are officers of Narcotic control Bureau and questioned accused 1 and 2 as to why they had come to the Hotel Room No.629, they stated that they came to the hotel room to receive the heroin from A6, who came from Bombay. Then PW8 searched A1 and A2. A1 was in possession of Rs.430/- Indian Currency, 2800 U.S.Dollars and one visiting card (Ex.P1) of one Nanne Bhai of Bombay. The search of A2 resulted in the recovery of one visiting card of Hotel Sri Lekha Intercontinental Ltd, with number 629 written in ink which is Ex.P2. The U.S. Dollars 2800 and Indian currency of Rs.430/- were packed in a brown cover and sealed, which is marked as M.O.5 in this case. PW1, A1, A2 and A6 and two witnesses signed on the seized properties namely M.O.1 to M.O.5. Mahazar was prepared for this search and seizure of contraband and other documents at Room No.629. The Mahazar is Ex P6 which is signed by PW1. The Mahazar witnesses PW5 Suresh and Ganesh and accused Nos.1, 2 and 6. PW8 also signed Ex.P6 as he was present during the search. PW1 gave Ex.P7 summons under Section 67 of N.D.P.S. Act to A6 to appear before their office for examination. Likewise, PW2 Murali another Intelligence Officer gave summons to A1 and A2. Then all of them, along with A1, A2 and A6 and the seized goods, returned to NCB Office.

5. The Appellant, the Intelligence Officer, Narcotics Control Bureau, South Zone, Madras-17 filed the Final Report against the A1 to A6 and the absconding accused Daya herein, stating that they have entered into a criminal conspiracy during the month of March 1995 at Bombay, Madras and other places, to do some illegal act namely to procure 3 Kgs of heroin from unknown sources and conceal, possess and to transport the same from Bombay to Madras, to purchase the same and to illicitly export the same to Srilanka and thereby A1 to A6 and absconding accused Daya abetted each other in the matter of procuring, keeping, concealing, transporting importing inter-state, exporting inter-state and making preparations for the illicit export of the same

to Srilanka and hence they have committed offences punishable under Sections 8(c) r/w 21, 23, 29 and 30 of N.D.P.S. Act.

6.The learned Special Court for NDPS Cases framed charges against A1 to A6 under section 8 (c) r/w 21, 23, 30 r/w sec. 29 of N.D.P.S.Act 1985 and explained to the accused and questioned for which they pleaded not guilty. On the prosecution side, 10 witnesses were examined and 119 documents were marked and M.Os 1 to 7 was marked.

7.On the basis of the evidence adduced, incriminating circumstances under Section 313 of Cr.P.C were put to the accused. They denied their complicity with the crime. A1 to A5 retracted their confessions by saying that their confessions were obtained by NCB officials under threat and torture. After going through the evidence both oral and documentary, the learned trial judge has come to a conclusion that the guilt against the accused under Sections 8(c) r/w 21, 23, 30 r/w 29 of the NDPS Act was not proved beyond any reasonable doubt and consequently acquitted all the accused from the charges leveled against them. Aggrieved by the findings of the learned trial Judge, the State has preferred this appeal.

Rival Submissions;

8.The Learned Counsel for the appellant contends that the learned Trial Judge has not appreciated the evidence in proper perspective and ought to have accepted and relied on the voluntary statements of the accused in Exhibits P8,30,33,72,73,74 and 34 as true and voluntary.

9.The Learned Counsel for the appellant further contends that the Lower Court has failed to note that there is no acceptable material to show that the statements have been obtained under threat, coercion or undue influence and there is no satisfactory explanation for retraction and as such ought to have held that the statements were voluntary and retraction is only an after-thought following 1954 H.M.N. Cr1. 136 SC and 1997 (3) SCC 721 and ought to have relied on their voluntary statements.

10.The Learned Counsel for the appellant further contends that apart from the statements of the accused , the prosecution documents filed as Exhibits 1 to 5, Ex P12 to 14, Ex P 18 to 26 Ex P 43 to 62 Ex. P 83 to 113 and Ex P 119 corroborate the statements of the accused and show the association of the accused with each other and clearly establish the conspiracy in which each and every accused had a role to play.

11.The Learned Counsel for the appellant further contends that the Lower Court failed to note that in these transactions,

activities being secretive, there cannot be any direct evidence, unless there is an approver and that the conspiracy regarding these underground activities dealing in Heroin is often a matter of inference from the attendant facts and circumstances and the reasons assigned by the Trial Court in acquitting the accused on the charges of conspiracy are unsound and unsustainable.

12.The Learned Counsel for the appellant further contends that Lower Court have not assessed the evidence of witnesses PW1, PW3 PW4 and PW8 in a proper perspective and the recoveries of prosecution exhibits effected from the accused corroborate the statements of the accused.

13.The Learned Counsel for the appellant further contends that the Learned Trial Judge failed to note that there is really no contradiction between Ex P7 and Ex P16 summons under section 67 to A1, A2 and A6 because Ex P 66 would show the Srilanka address of A1 while Ex P16 summons showed A1's Nungambakkam Address.

14.The Learned Counsel for the appellant further contends that the Learned Judge erred in appreciating that there is no independent corroboration for the confessional statements in as much as PW 5 fully corroborate the confessional statements of A1, A2 and A6 regarding the seizure as set out in the mahazar Ex P6 and the recovery of Rs.80,000/- was not connecting A4 with the offence since the evidence of PW4 and Ex P69 show that this amount of Rs.80,000/- is the advance paid by A4 to A1 for the purchase of a part of Heroin from A1.

The Learned Counsel for the appellant further contends that the Learned Judge failed to note that the cumulative assessment of the statements of the accused on the recoveries in this case viz, Ex P1 to 5 , Ex P.12 to 14, Ex P.18 to 26, Ex P.42 to 62, Ex P 83 to 112 and Ex P 119 and the contraband in the circumstantial background of the case leads to the necessary inference that A1 to A6 were involved in the Criminal conspiracy in trafficking in 3 Kgs of Heroin which came to be seized.

15.The Learned Counsel for the appellant further contends that the Learned Trial Court ought to have found the accused guilty under section 29 of the N.D.P.S. Act read with sections 8 (c), 21, 23 and 30 of the N.D.P.S. Act and ought to have convicted the accused by appreciating the evidences on record.

16.The learned Legal Aid Counsel appearing for the Respondents 1to 4 in the course of his argument focus the attention of this Court to the evidence of P.W.1, wherein P.W.1 has deposed that the intelligence officer who are working under her have acted upon the information they received and that apart

from Ex.P.1-intelligence report, she has also received other information also and out of them some of the information have been recorded and some of the information were given orally. Relying on the above said evidence of P.W.1 in the cross-examination, the learned counsel for the respondents/accused would contend that there is a serious violation of the provisions contemplated under the NDPS Act in recording the confessions, the evidences adduced were not reliable and supported the Judgment of the Trial Court.

17.The learned Legal Aid Counsel for the respondents 1 to 4 contended that the Scope of appeal against acquittal has been gone into by the Hon'ble Supreme Court, inter-alia, in Jaswant Singh v. State of Haryana AIR 2000 SC 1833, wherein it was observed:

"21. The principle to be followed by appellate Courts considering an appeal against an order of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the order is clearly unreasonable it is a compelling reason for interference see Shivaji Sahabrao Bobade v. State of Maharashtra. The principle was elucidated in Ramesh Babulal Doshi v. State of Gujarat.

While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions."

18.The learned Counsel for the respondent no-5 contended that the trial Court has given detailed reasons for recording the order of acquittal and the acquittal is based on several material contradictions in appreciating the evidence of the witnesses and violations of the mandatory provisions of the N.D.P.S Act and not to disturb the findings of the learned trial Court when two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

19.Now the point for determination in the appeal is;

Whether the Judgment of the trial Court is palpably wrong, manifestly erroneous or demonstrably unsustainable warranting interference by this Court in the findings of the trial Court of acquittal of all the accused?

20.I have heard Mr.N.P.Kumar, learned Special Public Prosecutor for the appellant/State and Mr.Paul Kanagaraj, learned counsel for the 5th Respondent and Mr.E.Kannadasan, Legal Aid Counsel for the respondents/accused Nos.1 to 4 and considered their rival submissions. I perused the entire records.

Law on Appeal against Acquittal

21.The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Hon'ble Apex Court in catena of decisions.

22.The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor AIR 1934 Privy Council 227. In this case, the ambit and scope of the powers of the appellate Court in dealing with an appeal against acquittal has been aptly elucidated by the Privy Council. Lord Russell writing the judgment has observed as under: (at p. 230):

"..the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.."

23.The law succinctly crystallized in this case has been consistently followed in many cases. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial Court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial Court. The appellate Court undoubtedly has wide powers of re-appreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the trial Court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

24.The Hon'ble Supreme Court in the case of Surajpal Singh & Others v. State, AIR 1952 SC 52, has spelt out the powers of the High Court. The Court has also cautioned the Appellate Courts to follow well established norms while dealing with appeals from acquittal by the trial Court. The Court observed as under:

"It is well established that in an appeal under S. 417 Cr.P.C., the High Court has full power to review the evidence upon which

the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused was further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

This Court reiterated the principles and observed that presumption of innocence of accused is reinforced by an order of the acquittal. The appellate Court could have interfered only for very substantial and compelling reasons.

25. In a latest decision in the case of "Muralidhar @ Gidda and another Vs. State of Karnataka", AIR 2014 SC 2200, the Hon'ble Apex Court has laid down the powers of the High Court in appeal against the order of acquittal. In para 12 of the said decision, the Hon'ble Apex Court has observed as under:

"12. In dealing with appeals against acquittal, the appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial Court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions disturbing the finding of fact recorded by the trial Court. It is so because the trial Court had an advantage of seeing the demeanour of the witnesses. If the trial Court takes a reasonable view of the facts of the case, interference by the appellate Court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial Court are palpable wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if view taken by the Court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the trial Court."

Analysis:

26. It is submitted by the learned Counsel for the appellant that the statement of the respondent/accused corroborate the prosecution documents filed as Exhibits 1 to 5, Exhibit P12 to P14, Exhibit P18 to P26, Exhibit P43 to Exhibit 62, Exhibit P83 to Exhibit 113 and Exhibit 119 and clearly establish the conspiracy in which each and every accused had a role to play.

27.It is no doubt that conspiracy always held in secrecy. But unfortunately, the appellant attempted to corroborate the confessions made by the respondents/accused through the aforesaid Exhibits. In criminal law, every person is presumed to be innocent until proved otherwise and the standard of proof in criminal law is "proof beyond reasonable doubt", in the guise of protecting the credibility of the judicial system. It has based its reasoning only to ensure that the people in whom the Investigating Agencies has reposed faith should not be allowed to turn back at the crucial movement. The learned trial judge with great care and caution, minutely appreciated the evidence of the witnesses adduced before him and discarded the unreliable statements which affect the substratum of the case.

28.A careful reading of the evidence on record by this Court clearly highlights the material contradictions and discrepancies in the prosecution evidence especially the testimonies of PW1, PW2 and PW4. The evidence of PW1 cannot be believed at all for the simple reason that if really the respondents/ accused 1 and 2 have committed the offence, they would not have entered the room No.629 after seeing the four officers standing outside the room. Further PW1 in her cross examination admitted the interpolations in the mahazar Exhibit P1 and P6 which would raise serious suspicion regarding the presence of A1 and A2 in entering the hotel room. Further the service of summons against A1 and A2 u/s 67 of NDPS Act has not also been proved on appreciating the evidences of PW 2 to 4.

29.The law on confession recorded under NDPS Act is well settled in catena of decisions rendered by the Hon'ble Apex Court and this can be summarized as follows:
"A confession should not be accepted merely because it contains a wealth of detail which could not have been invented unless the main features of the story are shown to be true, it is unsafe to rely."

30.The learned trial Court rightly discarded the confessions on the ground that it is involuntary and not given in an atmosphere free from fear, compulsion and threat. It is seen from the records that A1 and A2 were apprehended on 18.3.1995 and kept all along in the custody of the appellant till they were remanded on 20.3.1995 before the Magistrate. Similarly A3 and A4 were apprehended on 19.3.1995 and in the custody of the officers till 20.3.1995. Hence the absence of voluntary nature of confessions statements recorded from the respondents was subjected to prolonged custody and no weight can be attached to fasten the liability. Therefore the statements given by the respondent/accused are not only suspicious but lose its evidentiary value as rightly held by the learned trial Court.

31. Admittedly in this case, the contraband was seized from A6 and she has not filed appeal against her conviction. Further on careful perusal of record and the evidence of the witnesses, it is seen that no contraband was seized from the respondent/accused A1 to A5. They were implicated only on their statements made under Exhibits P30, 33, 72, 73 and 74. Further the respondents retracted their confessional statements. The seizure of mahazar under Exhibits P6, 17 and 85 would only prove the ownership and business conducted by A1, his wife and nothing more can be attributed for advancing the case of the prosecution. Though there is no specific bar for the police personnel to stand as a mahazar witness, to inspire the confidence of this Court regarding the search and seizure, the Intelligence officer should have made an attempt to get some independent person to stand as witness. The manner in which the search and seizure was conducted by the officers and the evidence let in by the prosecution regarding the search and seizure does not inspire the confidence of this Court. On overall re-assessment and re-appreciation of evidences, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the Respondents.

32. The learned Trial Judge rightly held that A1 to A5 have not been shown to be connected with the offence of conspiracy since the link evidence and circumstantial evidence adduced by the prosecution is not sufficient enough to hold that they are guilty of the offence.

33. For the reasons stated above, it is held that the prosecution has not been able to prove its case beyond all reasonable doubts against the respondents /accused no.1 to 5 and thus, the findings of acquittal recorded by the learned Principal Special Judge NDPS Cases are liable to be confirmed as they are based on correct appreciation of evidence on record and this appeal deserves to be dismissed.

34. Accordingly, this Criminal Appeal filed by the Appellant is dismissed, by confirming the judgment and order of acquittal dated 16.07.1999 in C.C.No.149 of 1995 passed by the learned Principal Special Judge N.D.P.S. Act, Chennai.

35.The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Mr.E.Kannadasan, Legal Aid Advocate.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

vs

To

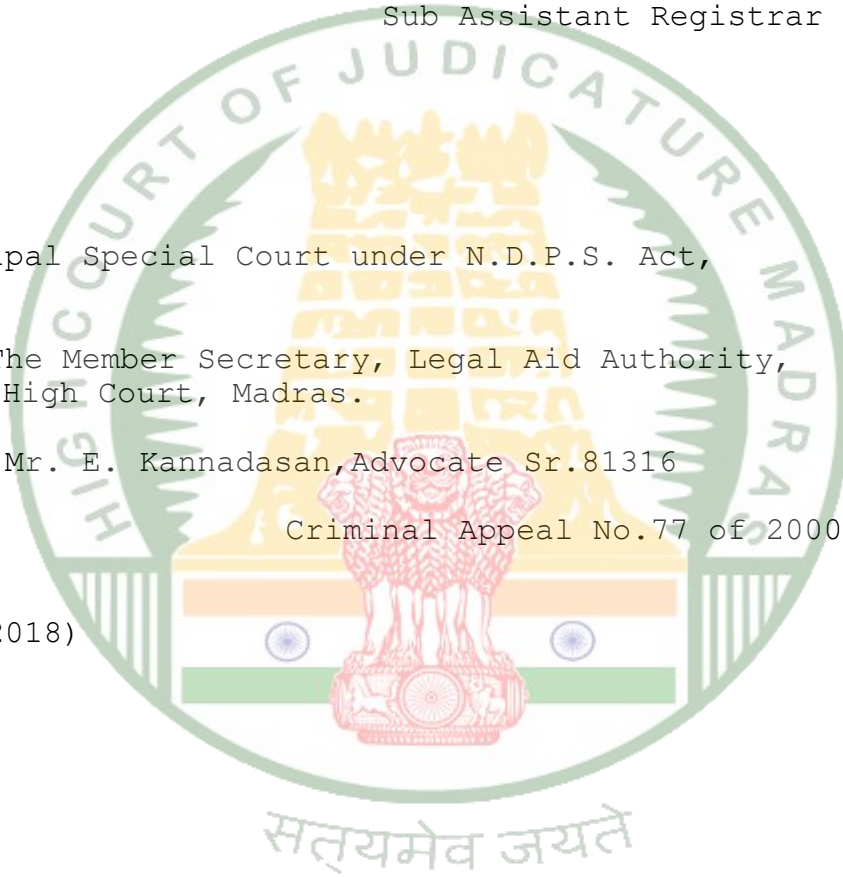
The Principal Special Court under N.D.P.S. Act,
Chennai.

Copy to: The Member Secretary, Legal Aid Authority,
High Court, Madras.

+ 1 cc to Mr. E. Kannadasan, Advocate Sr.81316

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