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Court : Kolkata

Decided On : Nov-07-1924

Reported in : AIR1925Cal501

Appellant : i.G. Singleton

Respondent : Emperor

Judgement :

Mukerji, J.

1. The appellant I.G. Singleton has been convicted by the Sessions Judge of 24-Parganas in agreement with the unanimous verdict of the jury on charges under Section 409 and 409/120-B of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for 9 months under Section 409, I.P.C., no separate sentence having been passed under Section 409/120-B, I.P.C.

2. The facts of the case alleged against him on behalf of the prosecution are set out in sufficient details in the summing up of the learned Judge and it will serve no useful purpose by recapitulating them here. The charge under Section 409, I.P.C. alleged that on the 27th February, 1924, the appellant being a public servant in the employ of the Customs Department committed criminal broach of trust in respect of 34 bags of peacock feathers over which he had dominion as such public; servant. The charge under Section 409/120-B, I.P.C., averred that on the same data he conspired with one Basanta Singh to commit the aforesaid offence of

criminal breach of trust.'

3. The appellant claimed a right of appeal on matters of fact as well as on matters of law under the provisions of Section 449 (1), Criminal P.C. That claim was opposed on behalf of the Crown. It appears that on appearing before the Magistrate who held the enquiry preliminary to commitment the appellant asserted his right to be tried as a European British subject, and upon that the Magistrate evidently being satisfied that he was one, passed an order that he was to be dealt with under Section 443, Criminal P.C. It is not clear whether this claim on the part of the appellant included a claim to be tried according to the provisions of Chap. 33 of the Code, but there is a clear mention of Section 443, Criminal P.C., in the order which the learned Magistrate passed on the occasion. On behalf of the appellant it has been contended that the appellant was entitled to be tried under the procedure laid down in Chap. 33 as the information upon which the case against him originated was laid by Sub-Inspector A.T. Haider who presumably is a British Indian subject and that, therefore, the case came within Section 443 (1) (a), Criminal P.C. In this connection some reference was also made to the fact that the appellant was committed to the Court of Sessions along with one Basanta Singh and it was urged that that would bring the case within Section 443 (1) (6), Criminal P.C. On behalf of the Crown it was pointed out that the fact that Sub-Inspector A.T. Haider was the informant would not, by reason of the proviso to Section 444, Criminal P.C., help the appellant nor the fact that Basanta Singh was a co-accused with him in the indictment under which the commitment had been made. While I entirely agree with the contention put forward on behalf of the Crown in this respect and while also I am disposed to think that the distinction between a claim to be tried as a European British subject and a claim to be dealt with under the provisions of Chap. 33 was not properly appreciated by the enquiring Magistrate, and that there is hardly any foundation for the appellant's claim to be tried under the provisions of Chap. 33, I find it difficult to hold that that right can at this stage be disputed by the Crown, in the face of the clear order which the learned Magistrate recorded in the order sheet and which I have already alluded to. It is true that in the order of commitment itself the learned Magistrate only referred to the fact that the appellant had claim-ed to be triad as a European British subject and also to the seriousness of the offence as justifying the course he was

adopting, but in my opinion it is not safe to draw from this the conclusion, that it was aver intended that the appellant was not to get the benefit of the order which the Magistrate had already passed in his favour. The Crown did not take any steps to get the order sot aside or corrected. I hold, therefore, that the appellant's appeal lies and must be dealt with on matters of facts and matters of law, as contemplated by Section 449(1), Criminal P.C.

4. The contentions put forward on behalf of the appellant shortly stated are as follows:-As regards the conviction under Section 409/120-B, I. P.C., the propriety and legality of is challenged on the ground that Basanata Singh with whom the appellant was alleged to have conspired was subsequently tried in a trial separately held, and in that trial there was a unanimous verdict of 'not guilty' in favour of Basanta Singh which was accepted by the presiding Judge and on that verdict Basanta Singh was acquitted, that with the acquittal of Basanta Singh recorded as indicated above the fact that the appellant conspired with Basanta Singh (the indictment in both the trials setting out a conspiracy between the two persons only and not with others) became a legal impossibility and therefore the appellant is entitled to an acquittal. It has also bean contended that Basanta Singh was examined as a prosecution witness in the case and his evidence completely demolishes any theory of a conspiracy between him and the appellant; and that upon the evidence generally the appellant should be acquitted of that offence. As regards the conviction under Section 409, I.P.C., it was argued that the elements necessary to constitute offence and the facts necessary to be proved in order to bring the offense home to the appellant have not been made out upon the evidence on the record.

5. In order to deal with the question of law raised in connection with the charge under Section 409/120B, I.P.C., it is necessary just to state what exactly happened.

6. The usual inquiry preliminary to commitment was held against the appellant as well as Basanta Singh jointly and at the conclusion of the enquiry the Magistrate committed both the persons to the Courts of Session for trial-Basanta Singh under Section 406/114 and 411, I.P.C., and the appellant under Section 409,I.P.C. In the

Court of Session there were separate trials of the two persons, presumably on the ground that their defences were antagonistic. So far as the appellant is concerned he was tried, as already mentioned, on the charge under Section 409, I.P.C., on which he was committed, and on a fresh charge, viz., one under Section 409/120-B, I. P.C., which was added in the Court of Session. The appellant's trial came to an end on the 19th June, 1924. The trial of Basanta Singh commenced on the 21st July, 1924. He was tried on the charge under Section 411, I.P.C., on which he had been committed and on a charge under Section 406/109 which was framed on amendment of the charge under Section 406/114, I.P.C., on which also he had been committed, and on a fresh charge, viz., one under Section 406/120-B, I.P.C., which was added. The trial was held by the Assistant Sessions Judge-of 24-Parganas with the aid of jury and Basanta Singh was acquitted as already stated. The charge of conspiracy in both the trials averred in effect that the two persons ware the only members of the conspiracy.

7. Now, the law in England on the point is summarised in Russel on Crimes and Misdemeanour, 8th Edition, Vol. I, p. 152: 'As a matter of procedure it would seem that if A is indicted and tried alone for conspiring with others, he could be lawfully convicted, though the others referred to or included in the indictment had not appeared or pleaded or were dead before or after the indictment was preferred or before they pleaded not guilty or were subsequently and separately tried. But it is not settled whether in cases of separate trials of conspirators the acquittal of those tried later would avoid the conviction of one earlier tried and convicted for the same conspiracy,' An examination of the authorities bearing on the question is very interesting.

8. First of all, there is abundant authority for the proposition that if an accused who is said to be a member of a conspiracy was arraigned and tried alone for the conspiracy and was convicted, his conviction would have been good at the time and judgment could have been given against him although the other persons included in the indictment had not appeared or were dead or the trial of them had been postponed: Bex v. Kinnersely (1795) 1 Strange 198, Rex v. Nicholls (1742) 12 R.R. 388, Rex v. Scott (1761) 2 Burr. 1262 and Rex v. Cooke (1826) 5 B. and C. 538. In the case of Reg v. John Ahearne (1852) 6 Cox. C.C. 6, where three

prisoners had been jointly indicted for a conspiracy to murder and severally pleaded guilty, but severed in their challenges and the Crown consequently proceeded to try one of such prisoners; it was held that upon the conviction of such prisoner judgment must follow, although the others have not been tried, and that the possibility of the other prisoners being found not guilty (although such a verdict would be a ground for reversing the judgment) is not a sufficient reason for holding such judgment and all the legal consequences of such conviction of such prisoner irregular.

9. In the course of the arguments for the prisoner in that case the cases cited above were sought to be distinguished, and it was contended as follows: ' Ahearne may be executed and the others may be acquitted; he will then have been hung for a conspiracy with himself, which is absurd. Again there is a contradiction on the face of the record: he is both innocent and guilty; for the others have not been found guilty, and until they are, his guilt is not proved: he is therefore innocent and yet he is found guilty.' The Court was unanimously of opinion that there was no ground on which the judgment; in the case should be respited or arrested.

10. In the course of his judgment Lefroy, C.J., observed that if the application to respite execution be made to the proper authorities it would be for them to say if such postponement should be granted until the result of the second trial ware known as it might fail from the death of a witness, or from other circumstances which would be quite consistent with the prisoner's guilt. There are passages in the judgment which suggest that the subsequent verdict of not guilty against the others may be a ground for reversing the judgment of the one tried before, but it is not expressly stated whether such reversal was to be by the Court or by the proper authorities who are mentioned in one part of the judgment.

11. In the case of Rex v. Cooke (1826) 5 B. and C. 538, referred to above, Baley, J., observed: 'It is true, as stated, that an accessory cannot be tried before principal unless by his own consent, but if an accessory be tried at his own request before the principal he is liable to sentence, although if the principal be afterwards acquitted the judgment against the accessory falls to the ground in the same manner, as the reversal of the attainder of a principal ipso facto reverses the

attainder of the accessory: Hawk P.C. b. 2 c. 29, Section 40 (a)... But I think we are not warranted in presuming that the other defendants in this case will be acquitted.'

12. In the same case Littledale, J., observed in the course of his judgment: 'If the other defendant, R.S. Cooke, shall hereafter be acquitted, perhaps this judgment may be reversed.' Judgment against an accessory passed during the attainder of the principal was held good during the attainder, but on reversal of the attainder against the principal was said to be 'without any writ of error utterly cancelled;' for by the reversal of the attainder against the principal the attainder of the accessory, which depends on the attainder of the principal ipso facto is utterly defeated and annulled: 1 Halo P.C. 625; Lord Sancher's case (1612) 9 Co. Rep, 207; Wright, J., in his judgment in the case of Rex v. Plummer (1902) 2 K.B. 339; on reference to this case as well as the other cases cited above observed as follows:

It is, however, not clearly settled whether in such a case of separate trials a subsequent acquittal of the other would not avoid the effect of the previous conviction of the appellant, so if in the present case, the appellant had been sentenced, as ha might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed; but it is not certain whether upon the acquittal of the other defendants the sentence upon him must have been vacated or treated as erroneous just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but as was ipso facto avoided when the attainder was removed.

13. The rule of English law that is now well settled is that where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted. In Harrison v. Errington 1 Pophan 202 where upon an indictment of three for riot, two were found not guilty, and upon error brought it was held a 'void verdict' and it was said to be 'like to the case in 11 Hen. 4 C. 2, conspiracy against two and only one of them is found guilty, it is void, for one alone cannot conspire.' In Rex v. Sudbury (1698) 12 Mod. 262 where only two out of three were found guilty of riot, and there was no allegation of cum aliis the judgment was arrested. In O'Connell v. The Queen (1844) 11 Cl. and F. 155 was

pointed-out the legal impossibility that when several persons are indicted for a conspiracy any verdict should be found which implies that some were guilty of one conspiracy and some of another.

14. In Reg v. Thompson (1851) 16 Q.B. 832 Lord Campbell, C.J., observed: 'The acquittal of two involves the acquittal of the third.' Though the existence of this rule was noticed in a series of cases, Lord Coleridge, C.J., in charging the Jury in the case of The Queen v Manning (1883) 12 Q.B. 241, tried in the summer assizes at Winchester in 1888, in which an indictment was preferred against the defendants Manning and Hannar for conspiring to cheat and defraud the prosecution, directed them that on that indictment they might find one prisoner guilty and acquit the other. The jury returned a verdict of guilty against Manning but ware unable to agree as to Hannar and were discharged. Upon a rule moved for a new trial it was held by Lord Coleridge, C.J., himself and Mathew and Stephen, JJ. [The Queen v. Manning (1883) 12 Q.B. 241] that there had been a misdirection. In Rex v. Plummer (1902) 2 K.B. 339 the facts were these: Plummer, Fenton and Wheeler were charged jointly on an indictment containing six counts, of which five related to obtaining money by false pretence and are not material and the sixth charged them with conspiring amongst themselves. Upon the five counts relating to obtaining money by false pretence Plummer pleaded not guilty and a verdict of not guilty was returned in his favour. Plummer was subsequently called as a witness for the prosecution against Fenton and Wheeler, who pleaded not guilty to the whole indictment and were found not guilty upon the whole indictment. When verdict of not guilty was recorded in favour of Fenton and Wheeler, Plummer's Counsel claimed that Plummer could not be convicted and punished, but that be should be acquitted. The Chairman sentenced Plummer but respited the sentence and admitted Plummer to bail pending the hearing of the case by the Court for the consideration of Crown Cases Reserved. Wright. J. observed that there was much authority to the effect that if Plummer had pleaded not guilty to the charge of conspiracy, and the trial of all three defendants together had proceeded on that charge and had resulted in the conviction of Plummer and the acquittal of the only alleged conspirators, namely, Fenton and Wheeler, no judgment could have been passed against Plummer because the verdict must have been repugnant in finding that there was a criminal agreement between Plummer and the others and none

between them and him. All the learned Judges who heard this case were pressed by the rule which had been followed in a long course of decisions that because the record of conviction can only be made in the terms of the indictment the acquittal and conviction on the same record would be directly repugnant and contradictory to each other, and that the record would be inconsistent and contradictory and so bad on its face.

15. As pointed out by this Court in the case of Umadasi Dasi v. King-Emperor A.I.R. 1924 Cal. 1031, Lord Alverstone, C.J., and Jelf, J. in Rex v. Plummer (1902) 2 K.B. 339 considered the objection to be to a certain extent technical, but they concurred in the judgments of the other three learned Judges because they were, as they said, unable to give satisfactory reasons for adopting a contrary view, and Mathew and Stephen, JJ., in the case of R v. Manning (1883) 12 Q.B. 241, expressly stated that they affirmed the principle with great reluctance. In fact Lord Alverstone, C.J., speaking for himself and Jelf, J., said in Rex v. Plummer (1902) 2 K.B. 339, that in so concurring they placed great reliance on the fact that there was a joint trial on the indictment charging the three defendants jointly with conspiring together, and not alleging any conspiracy with other or unknown persons. In R. v. Manning (1883) 12 Q.B. 241, Lord Coleridge, C.J., was rather doubtful as to the propriety of the rule. He observed as follows: 'I am by no means prepared to say that if the matter were res Integra, and even in this case if there could have been an appeal from this decision to some other tribunal, I might not have adhered to my view and left the point to be settled by higher authority. But I feel bound by what I now understand to be the established rule of practice. The earlier cases, it is true, are stated shortly and without much particularity of detail. It may be, if we had all the facts of those cases, they might turn out to be less in point than they appear to be at present but still from the time of the 14 Hen. 4 (1) it has been taken for granted by the Judges of these Courts that in cases of an indictment for conspiracy when two people are indicted and are tried together (because different considerations arise when people are not tried together) either both must be convicted or both must be acquitted. That seems to have been determined or, if not determined taken for granted from very early times.'

16. So far then as the acquittal of a conspirator in a subsequent trial is concerned, it is now settled that it forms the ground of reversal of a conviction of one tried before; on the other hand, the conviction of the latter is a perfectly good one at the time that the judgment is pronounced against him, and all the legal -consequences of a valid conviction follow from it. As for the principle relating to the acquittal of a conspirator following from the acquittal of the other when the conspiracy is alleged only amongst the two and in a joint trial held in respect of both, it is based upon rule of practice and procedure, which under the English law appears to be well settled, that repugnancy or contradiction on the face of the record is a ground for arresting judgment or annulling a conviction, and is a ground on which the accused can claim an acquittal.

17. The powers exercised by the Court for the consideration of Crown Cases Reserved and by the Court of Criminal Appeal are, under the statutes under which the said Courts act, much larger than the powers conferred on Courts in this country under Section 423 of the Code of Criminal Procedure. In an ordinary appeal from an order based on the verdict of a jury this Court as a Court of Appeal is bound by the provisions contained in Sub-section (2), to that section which enacts that 'nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down here,' but in the present case we are not fettered by that proviso in consequence of the exception expressly made in Section 449, Criminal P.C. It has been held by this Court in a number of cases that repugnancy in the verdict of jury in this country is not by itself a sufficient ground for quashing a conviction, and there is no provision in the Code justifying interference with a conviction on the ground of repugnancy in the record: Per Beachcroft, J., in Romesh Chandra v. Emperor (1913) 41 Cal. 350, Manindra Chandra Ghose v. Emperor (1913) 41 Cal. 754 and in the case of Umadasi Dasi v. The King Emperor : AIR1924 Cal1031 , it was held that in the absence of any provision in the Indian Statute Law the Court is not bound to follow the rule of English law that repugnancy or contradiction on the face of the record is a ground for, quashing a conviction. That no doubt is so; but if we ware satisfied that if a rule was recognized under the English Law which was not a mere rule of practice and procedure but as embodying a principle of

natural or substantial justice, and there was nothing in the Code in force in this country militating against its application here the powers conferred by Section 423, Criminal P.C., would be large enough to invoke its application in this country as well, and I would have not hesitated to invoke the aid of that principle. In my opinion however, no such thing has been established in the present case. The net result of the acquittal of Basant Singh was to hold him not guilty for all purposes, and so far as he is concerned that verdict can no longer be challenged nor the effect of it in any way minimized, no matter whatever the reason was that formed the basis of that verdict or that actuated the Judge in accepting it. It has no effect so far as the present appellant is concerned, beyond suggesting that some of the evidence upon which the appellant was convicted was, in a different trial of another accused person, found to be unworthy of acceptance. That, in my opinion, is the highest at which the matter can be up in favour of the appellant.

18. If on the merits it is established that the evidence against the appellant was weak or there were inherent improbabilities or infirmities in the case against him then perhaps we may take into consideration the fact that the same witnesses were disbelieved- if we are sure that they ware actually disbelieved-in a subsequent trial. At least, that was what was done by the Court of Criminal Appeal in England in the case of George Baker v. Rex (1916) 9 Cr. App. Rep. 136 who set aside a conviction of the prisoner on a certificate granted under the Act for the reason that the prosecution had been disbelieved in a subsequent trial of another person for a similar offence. In that case Ridley, J., thought fit to quash the conviction as on the whole the conviction was unsatisfactory.

19. Speaking of the logic of the course he observed: 'It is not possible to say that logically that is a reason why the verdict should be interfered with, but the conviction is somewhat unsatisfactory.'

20. Turning now to the merits, so far as the charge of conspiracy is concerned, Basanta Singh, the alleged co- conspirator, was examined as P.W. 18 in the case. Basanta Singh was, at the time when he was so examined, awaiting his trial, having, as already stated, been committed for trial jointly with the appellant. It is difficult to appreciate the object of examining Basanta Singh as a witness in the

case, and I am unable to conceive what evidence the prosecution could reasonably expect to get from him. Basanta Singh himself objected to be so examined and his examination was also objected to by learned Counsel for the appellant. The prosecution insisted on the examination of the witness and the Court explained to him the provisions of Section 132 of the Indian Evidence Act and he was examined. The witness gave the whole case of conspiracy away: nothing less could, I think, be reasonably expected of him, be the prosecution case true or false. In my opinion, it was an injudicious step for the prosecution to take; but in view of the other evidence in the case which had already been adduced and the fact that even after the examination of Basanta Singh the prosecution went on examining other witnesses in support of the charge of conspiracy.

21. I am of opinion that the prosecution never meant to abandon that charge. It cannot be gainsaid that this procedure was likely to embarrass the appellant to a certain extent, for the prosecution could examine Basanta Singh as a witness. on their behalf. only by putting him forward as a witness of truth; but judging from the course of the trial and the statement filed by the appellant, at the close of the trial on the 18th June, 1924 it does not appear that he was in any way misled.

22. As to the evidence in support of the charge relating to the conspiracy, we start with the fact admitted by the appellant that he took delivery of the bags at the Balighata Railway Station, and had them put into handcarts for the purpose of taking them to the Customs Office. What happened then, according to him, was that he found an empty lorry and asked the driver whether he would take them to the Customs House and the man agreed, upon which the appellant paid him Rs. 10, that the appellant went for a taxi for himself and when he came back he found that the lorry had left, that he then searched for the lorry and even went to Howrah and Kidderpore but could find no trace of it.

23. The driver of the lorry, Banamali Das, has been examined as P.W. 10 in the case. He was not able to identify the appellant as the Sahib in whose presence the bags were loaded on his lorry; but that he was the driver and the appellant was the Sahib in question admits of no doubt; for on behalf of the appellant the following question was put to the witness and the following answer obtained: 'Q.- I put it to

you that the Sahib said 'Go and take the goods to the Customs House, I am coming in a taxi.' A-'No.' So the fact that the witness is not able to identify the appellant does not at all matter. The evidence which this witness has given, and which in my opinion there is absolutely no reason to disbelieve, clearly and conclusively establishes the charge of conspiracy as against the appellant. He says that Basanta Singh had booked an order for the lorry (which upon the evidence of Mr. Sherman, P.W. 13, appears to have bean booked at about 5-30 P.M., about which time the witness said he was inclined to be confidant), that the Superintendent of the garage told him that the lorry was to take some jute from Sealdah Railway Station to Bhowanipur, that ho started with Basanta Singh from the garage at about 8 p.m., that under the directions of Basanta Singh he waited near the Baliaghata Railway Station, that at about 10 P.M. the bags were put into the lorry, and during the loading the Sahib remained standing 12 or 14 cubits away.

24. What happened then may batter be described in the words of the witness himself: 'Later on Basanta Singh turned up. The Sahib left. Basanta Singh said that the goods belonged to the Sahib and he would direct me as to where the goods were to be taken to. When the coolies were tying up the goods the Sahib turned up. He said: 'thick hai.' I said 'yes.' Ha walked away. I asked the Sahib in Hindusthani when are the goods to be taken. The Sahib said: 'At 10 or 11.' I asked him: 'To-night' or to-morrow. He said: 'To-morrow'.'

25. I can see nothing on which I may say that the witness did not depose truthfully as to what occurred. Then there are certain circumstances which cannot be overlooked. The appellant upon his own statement knew that the goods had not arrived at their proper destination that night, and he made a fruitless search for the same at different places; but he did not inform the police or the Customs Authorities. The next morning he arrived at the thana after the bags had been seized and claimed the bags as his, but did not tell the police the story as to how the bags had been diverted or make any complaint on that score. He moved the Assistant Commissioner and having succeeded in getting them back quietly deposited them in the Customs House go-down without making any mention of what had happened to anybody. The explanation which he has offered as to how

he came to spot out the Bhowanipur thana as the place where the goods would be found does not bear scrutiny, and the explanation which he offers for not mentioning the matter to his superior or to the police seems to be absurd and points inevitably to a guilty conscience. These are but a few of the many circumstances which, in my opinion, point unmistakably to a conspiracy between him and Basanta Singh, the object of which was to wilfully suffer the latter to commit the offence of criminal breach of trust in respect of the goods.

26. The conviction of the appellant under Section 409/120-B. I.P.C., is, in my opinion, amply supported on the evidence and is unassailable.

27. As for the substantive offence under Section 409, Indian Penal Code, for which also the appellant has been convicted, I am of opinion that the prosecution has not succeeded in proving the elements requisite to constitute that offence. One of essential facts that they have got to establish is that the bags did actually contain peacock feathers at the time when the appellant came to have dominion over them. It is true that in his report the appellant stated that be had seized 34 bags of peacock feathers, but the evidence of the witnesses, which has all been fully discussed before us, shows that only one bag was opened and found to contain peacock feathers and there is no positive evidence as to the contents of the other bags at the time when appellant took charge of them. There is no clear evidence that the condition of the bags when found by the police was not the same as it was when they were in the charge of the appellant. It is no doubt not very likely that the one solitary bag which the appellant chanced to open would contain peacock feathers and all the others would contain chaff; but to sustain a conviction for a criminal offence all the necessary facts must be strictly proved. In my opinion the offence under Section 409, I.P.C. has not been proved beyond doubt.

28. I would accordingly set aside the conviction of the appellant under Section 409, I.P.C. and affirm the conviction under Section 409/120-B, I.P.C.

29. As to sentence: the learned Judge considered the recommendation of the jury for a light sentence, and taking into consideration all the facts and circumstances sentenced the appellant to undergo rigorous imprisonment for nine months. I am not prepared to say that the sentence is severe.

30. I would accordingly dismiss the appeal subject to the modification that the conviction of the appellant under Section 409, I.P.C. is to be set aside, and the sentence passed upon the appellant should be allotted to the conviction under Section 409/120-B, I.P.C.

31. The appellant will surrender to his bail and serve out the sentence.

Suhrawardy, J.

32. I agree in the able and learned judgment of my learned brother.

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