

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

Crl.Rev.Pet.No. 1957 of 2014 ()

**AGAINST THE ORDER IN Crl.M.P. 165/2013 in S.C.No.584/2007
OF THE ASSISTANT SESSIONS COURT, OTTAPPALAM.**

REVISION PETITIONER(S):

- 1. RAHIMA, AGED 33 YEARS,
W/O.IBRAHIM, PATHYAPURAKKAL VEEDU,
NEAR KANIKKARATHUPALLI, KAPPUR.**
- 2. T.VELAYUDHAN, AGED 66 YEARS,
S/O.PARAGODAN, THIRUTHIPPARA VEEDU, VATTENAD,
PATTITHARA VILLAGE, KOOTTANAD.**

**BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.M.REVIKRISHNAN
SRI.VIPIN NARAYAN**

RESPONDENT(S):

- 1. STATE OF KERALA.
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031**
- 2. GENARDHANAN,
S/O.CHAMI, NELLIKATTU PARAMBU VEEDU, PARUTHIPRA,
SHORNUR - 697 101.**

R1 BY PUBLIC PROSECUTOR SRI. N. SURESH.

**THIS CRIMINAL REVISION PETITION ALONG WITH CRL.R.PNO.1958/2014
HAVING BEEN FINALLY HEARD ON 08-01-2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:**

:2:

Crl.Rev.Pet.No. 1957 of 2014

APPENDIX

PETITIONERS EXHIBITS:

- ANNEXURE A : COPY OF THE FINAL REPORT IN CRIME NO.153/06 OF THRITHALA POLICE STATION, PALAKKAD DISTRICT.**
- ANNEXURE B : COPY OF THE FINAL ORDER DATED 29.11.2012 IN CRL. M.C. NO.4350/2008 PASSED BY THIS HON'BLE COURT.**
- ANNEXURE C : COPY OF THE APPLICATION FOR DISCHARGE PREFERRED BY THE REVISION PETITIONER BEFORE THE TRIAL COURT.**

RESPONDENTS EXHIBITS: NIL

// True Copy//

P.A. to Judge

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K. RAMAKRISHNAN, J.

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Crl. R. P. Nos.1957 & 1958 of 2014
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Dated this the 8th day of January, 2015

ORDER

Accused Nos. 2 and 3 in Crime No153/2006 of Thrithala police station and accused Nos. 1 and 2 in S.C.No.584/2007 on the file of Assistant Sessions Judge, Palakkad, are the revision petitioners in Crl. R.P.Nos.1957/2014, while first accused in the same crime and sole accused in S.C.No.367/2008 of the same court is the revision petitioner in Crl.R.P.1958/2014.

2. The revision petitioner in Crl.R.P.1958/2014, who is the sole accused in S.C.No.367/2008 is the husband of first accused in S.C.No.584/2007 and first revision petitioner in Crl.R.P.1957/2014. The first accused is having landed property in Survey No.391/2006 of Vattenadu Desom Pattithara Village in Mala Amsom and it is being managed by the 2nd accused who is his wife as the first accused was

working abroad. First and 2nd accused according to the prosecution has entrusted construction of a well in that property to the 3rd accused and a well was under the process of construction, abutting the public pathway without providing any protection or precautionary methods to avoid persons falling into the well and in spite of warning given by the neighbours to the 2nd and 3rd accused to provide precautionary protection measures to avoid persons falling into the well which is being constructed very adjacent to the pathway, but they did not heed for the same. On 28.05.2006 at about 8.00 p.m., deceased Balan for the purpose of going to a marriage house through the pathway happened to fall into the well and sustained injuries and died and thereby all of them have committed the offence punishable under Section 304 of the Indian Penal Code.

3. Falling of deceased Balan into the well and his death was intimated to the police and Crime No.153/2006 of Thrithala police station was registered

against three accused persons, who are the revision petitioners herein originally for the offence under Section 304A of Indian Penal Code. After investigation, final report was filed, alleging offence under Section 304 of Indian Penal Code against all the accused. Accused Nos. 1 and 2 in the above case filed Crl.M.C.No.4350/2008 for quashing the proceedings as against them and this court by Annexure-B order in that case, disposed of the petition leaving open the right of the petitioners to apply for discharge under Section 226 and 227 of the Code of Criminal Procedure. Thereafter, revision petitioners in Crl.R.P.No.1957/2014 filed Crl.M.P.No.165/2013 and revision petitioner in Crl.R.P.No.1958/2014 filed Crl.M.P.No.164/2014 for discharge and those applications were dismissed by the learned Assistant Sessions Judge by the impugned common order, which is being challenged by the revision petitioners, by filing the above respective revision petitions.

4. Heard the counsel for the revision petitioners,

learned Public Prosecutor and the defacto-complainant who appeared in person and submitted that he had no grievance at present against the revision petitioners.

5. The counsel for the revision petitioners submitted that, first accused though the owner of the property was not present at the time when the construction was going on and as such he cannot have held responsible for any of the act alleged to have been committed by other accused persons and no vicarious liability can be fastened on him, as he was not directly responsible for any of the acts. Further even assuming that, the entire allegations are accepted, no offence under Section 304 of the Indian Penal Code is attracted as against any of the accused persons, even against accused Nos.2 and 3 also and mere omission to do certain things alone is not sufficient to come to the conclusion that they are responsible for the unfortunate death of deceased Balan, so as to attract the offence under Section 304 of the Indian Penal Code against them. There is

no wilful act or intention on the part to cause the death. Further even assuming that, there was any act that may amount to act or omission that may amount only negligence, for which offence under Section 304A alone is attracted. So under the circumstances, court below was not justified in dismissing their applications.

6. On the other hand, the learned Public Prosecutor submitted that, the well was constructed in such a way adjacent to the public pathway without providing any precaution or preventive protection wall etc., thereby causing death of said Balan. They are expected to take reasonable care before construction of the well. Further the evidence will go to show that, there was warning given regarding this aspect and the 2nd accused was inspecting the property and it was under her instruction that the well was being dug by the 3rd accused. So at this stage, it cannot be said that, no offence under Section 304 is attracted, as it was done with the knowledge that their act is likely to cause

death of some persons.

7. It is an admitted fact that, first accused Ibrahim in the above crime was the owner of the property in which the digging of the well was in progress. It is also an admitted fact that, Ibrahim was not there at the time when the digging was going on and even as per the statements given by the witnesses he was working abroad at that time and the digging of the well was done under the instruction of the 2nd accused who is his wife and it is being dug by the 3rd accused. It is also the case of the prosecution that, there is a pathway passing just abutting the well under construction and it is also in away admitted that there was no protection measure provided to cover up the well so as to avoid persons passing through that pathway falling into the well. It is also an admitted fact that on the fateful day, namely, on 28.05.2006 at about 8.00 p.m., while the deceased Balan was passing along the pathway situated just abutting the well, he fell down into the well, as there was no light provided

indicating the presence of such danger or any protection measure was provided to avoid people passing through the pathway falling into the well and on account of that he fell down and though attempts were made to rescue him, but he succumbed to the injuries. It is also an admitted fact that originally a crime was registered by Thrithala police on the basis of the statement given by the 2nd respondent in both these revisions, as Crime No.153/2006 under Section 304A of the Indian Penal Code against all the three accused persons and after investigation, final report was filed, alleging offence under Section 304 of the Indian Penal Code. It is also an admitted fact that, since first accused who is the revision petitioner in Crl.R.P.No.1958/2014 was not available, case against him was split up and case against the revision petitioners in Crl.R.P.No.1957/2014 who were shown as accused Nos. 2 and 3 in the crime was committed to the Sessions Court by the Magistrate and it was taken on file as S.C.No.584/2007 and it was made over to Assistant

Sessions Court, Palakkad, for disposal. Later when the first accused also appeared, case against him was also committed to the Sessions Court and the Sessions Court has taken cognisance of the case as S.C.No.367/2008 and it was also made over to Assistant Sessions Court, Palakkad, for disposal and both these cases were pending before that court now.

8. It is also an admitted fact that accused Nos. 1 and 2 filed Crl.M.C.No.4350/2008 before this court for quashing the proceedings as against them. But this court by order dated 29.11.2012, which was produced as Annexure-B in Crl.R.P.No.1958/2014 dismissed the same, leaving open the right of the parties to apply for discharge under Section 226 or 227 of the Code of Criminal Procedure. It was on that basis, that they filed Crl.M.P.No.164/2013 in S.C.No.367/2008 and Crl.M.P.No.165/2013 in S.C.No.584/2007 seeking discharge and the learned Assistant Sessions Judge had dismissed those applications by

the impugned common order.

9. Section 304 of Indian Penal Code reads as follows:

304 Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

10. Section 304A of the Indian Penal Code Reads as follows:

[304A. Causing death by negligence.- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

11. In order to attract the offence under Section 304 of Indian Penal Code, the basic ingredient are intention to commit the offence or it was committed with a knowledge

that on account of their act, the consequence of death will ensue. But for the purpose of 304A of Indian Penal Code, if the death occurred due to any negligent act or reckless act on the part of the accused, then they can be proceeded under Section 304A of Indian Penal Code.

12. In the decision reported in **State of Rajasthan v. Chhittarmal (2007(10) SCC 792)**, the Hon'ble Supreme Court has considered the question regarding the electric live wire being placed in the canal used for supplying water which is situated in between the fields of the deceased and the accused and when the deceased came into contact with the same, he died and the accused was charge sheeted for the offence under Section 302 of the Indian Penal Code. The Hon'ble Supreme Court on the basis of the evidence came to the conclusion that, there was no intention of causing death and on the basis of the evidence, the Supreme Court has observed that there is no offence under Section 302 of Indian Penal Code is

attracted, but it was converted the conviction for the offence under Section 304A of Indian Penal Code.

13. In the decision reported in **[2010(2) Crimes 194 (A.P.) Kolishetty Venkateswarlu v. Bandaru Venkat Reddy and Others]**, while considering the question as to whether the proprietor of the swimming pool will be held responsible for the death of a 11 year old child drowning into the swimming pool, the Hon'ble Supreme Court has held that, in order to constitute the offence under Section 304A of Indian Penal Code, the prosecution should prove that, the death of the person must have been caused by the accused by doing any act in a rash and negligent manner and as such there must be positive proof that, the rash and negligent act of the accused was proximate cause, which resulted in the death of the deceased. A negligent act is an act done without doing something which a reasonable man could have done in ordinary course of business, which prudent or reasonable man could not have done in the attending circumstances.

Whether the omission and commission of the accused proved the offence under Section 304A of Indian Penal Code or not need not be discussed in detail in this case. But failure to exercise reasonable and proper care also amount to criminal negligence. Therefore, though vicarious liability is not applicable, but the person in charge of the swimming pool who have to take reasonable care and steps to prevent any untoward incident or any accident or injury to any person and whether such act attracts offence under Section 304A of the Indian Penal Code or not have to be considered by the court at the time of trial. That was a case where the owner of the swimming pool was not added as a party by the police in the final report, but on the basis of the evidence, trial court invoking the power under Section 319 of the Code of Criminal Procedure, implicated him an additional accused and that was challenged and the High Court has declined to interfere and quash the proceedings as against him invoking the power under Section 482 of the Code of Criminal

Procedure. That was confirmed by the Apex Court.

14. In the decision reported in **[2008(4) Crimes 218 (SC)] Mahadev Prasad Kaushik v. State of U.P. & Another**, the Hon'ble Supreme Court has considered the distinction between Section 304 and 304A, in paragraph 29, 30 and 31 of the judgment and observed as follows:

29. There is the distinction between Section 304 and Section 304A. Section 304A carves out cases where death is caused by doing a rash or negligent act which does not amount to culpable homicide not amounting to murder within the meaning of Section 299 or culpable homicide amounting to murder under Section 300 IPC. In other words, Section 304A excludes all the ingredients of Section 299 as also of Section 300. Where intention or knowledge is the 'motivating force' of the act complained of. Section 304A will have to make room for the graver and more serious charge of culpable homicide not amounting to murder or amounting to murder as the facts disclose. The section has application to those cases where there is neither intention to cause death nor knowledge that the act in all probability will cause death.

30. In *Empress v. Idu Beg.* (1881) ILR 3 All 776. Straight. J. made the following pertinent observations which have been quoted with approval by various Courts including this Court:

"Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or

failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted".

31. Though the term 'negligence' has not been defined in the Code, it may be stated that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a reasonable and prudent man would not do.

That was a case where one of the doctor had administered some injections which resulted in the death of the deceased and he was charge sheeted for the offence under Section 304 of Indian Penal Code and after consideration of evidence, the Supreme Court has held that, offence under Section 304 is not attracted, but it may fall under Section 304A of Indian Penal Code.

15. In the decision reported in **Tarseem Chand v. State (Delhi Administration), Delhi (1985(2) Crimes 948)**, the question as to whether a master will be responsible for the act of his servant in a criminal action was

considered. That was a case where a building was under construction near a school and on account of the negligence in not taking precaution, a beam fell down on the head of a student resulting in his death and since the workers could not be traced out and case was registered against the contractor alone for the offence under Section 304A and the Hon'ble Supreme Court had dismissed the application for quashing the proceedings. It is observed in the decision that, rashness consists in hazarding and dangers with a knowledge that, it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifferences, so as to the consequences.

16. In the decision reported in **(AIR 1957 Madhya Pradesh 236) Bharosi v. State**, it has been observed that, rashness means, doing an act with consciousness of the risk, that feel consequences and will fall, but with the hope that, they will not and negligence is a breach of duty imposed by law. In criminal cases, the

amount and degree of negligence are the determining factors. There must be mens rea in the criminal negligence also. In order to establish criminal liability, facts must be such that, the negligence of the accused, when beyond a mere matter of compensation and show such disregard for the life and safety of others has to amount to the crime. That was a case where though the truck was driven through the wrong side and when a cyclist came from the opposite direction, he swerved the vehicle to avoid hit against the cyclist, but in spite of that, accident occurred resulted in the death of the cyclist. In such circumstances, it was observed that there was no criminal negligence and that benefit was given to the accused. Same view has been reiterated in the decision reported in **(AIR 1967 Madras 365 In re, Ambalal)**.

17. In the decision reported in **(2002 CRI.L.J. 3453 Ramesh Chandra Mohapatra and another v. State of Orissa and others)**, when a child fell down from

the stairs of the school and sustained injuries on the forehead and the child was taken to school dispensary and treatment was given and the pharmacist applied the medicine and advised that nothing will happen and instructed to take the child home, but later the child died. In such circumstances, it was observed that, the school authorities could not be held responsible for the death. But that was not a fact of this case. The question as to whether in a particular set of act whether offence under Section 302, 304 or 304A has been attracted has been considered by the Supreme Court in the decision reported in **(JT 2004(3) SC 211) Shankar Narayan Bhadolkar v. State of Maharashtra**. In that case, the deceased was invited by the accused for a dinner and after dinner while the deceased was waiting for the bus, the accused picked up a gun and unlocked it and loaded with cartridge and shot from a close range while aiming at the chest and in such circumstances, it has been held that, it may not fall under Section 304A of

Indian Penal Code and it cannot be said to be a negligent act or it is an accident. But it may fall under Section 304 part II of the Indian Penal Code, as he had done it with a knowledge that, his act is likely to cause death.

17. In the decision reported in **(AIR 1964 (SC) 205) Cherubin Gregory v. State of Bihar**, the question as to whether the owner of the property can be held responsible for fixing live naked wire of high voltage across the passage to latrine to obstruct trespassers without putting any warning and the trespasser getting shock and sometime after he died, it was observed that, the occupier is guilty of the offence under Section 304A of Indian Penal Code.

18. In the above decision, it has been observed that, it is no doubt that the trespasser entered into the property at his own risk and the occupier was not having a duty to take any reasonable care for the protection. But at the same time, the occupier is not entitled to do wilful acts

such as setting of a trap or a naked live wire of high voltage with deliberate intention of causing harm to trespassers or any reckless disregard of the presence of the trespasser. In such circumstances, it has been observed that, he is guilty of the offence under Section 304A of the Indian Penal Code.

19. In the decision reported in **(AIR 1972 (S.C.) 1150) Ambalal D. Bhatt v. The State of Gujarat**, the question as to whether the manufacture of the drug for providing a batch number was responsible for the death of a person, which has been applied in a negligent manner and the Hon'ble Supreme Court has held that, unless it is proved by the prosecution that, the immediate proximate act is the cause of causa for the death, the person cannot be held responsible and remote cause is not sufficient for that purpose. It has been observed that, an act causing deaths “must be causa causans: it is not enough that it may have been the cause sine qua non”. Same view has been reiterated in the decision reported in **(AIR 1965 (SC)**

1616) Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra. That was a case where certain paints were manufactured without license and naked fire kept in proximity of turpentine and varnish and fire took place and some workers died, the factory manager was also held responsible for the death and he was charge sheeted for the offence under Section 285 and 304A of Indian Penal Code. In that case, the Hon'ble Supreme Court has held that, he was not responsible for the offence under Section 304A, but he may be responsible for the offence under Section 285 of Indian Penal Code, as he had not provided the necessary precaution to prevent such incident, and he was not present at that time when the incident took place.

20. In the decision reported in **(AIR 1968 (SC) 829) Suleman Rahiman Mulani and Another v. State of Maharashtra**, it has been observed that, in order to attract the offence under Section 304A of Indian Penal Code, direct connection between the death of the person and rash and

negligence act of the accused is essential. It was a case where the vehicle was driven by a person having only learners license and the owner of the vehicle was also held responsible for the offence for allowing the person to drive the vehicle who is having learners license. In that case, there is no evidence to show that, the person was shown as owner of the vehicle was really the owner of the jeep or person in charge of the jeep which involved in the incident. In such circumstances, conviction against him was held not proper.

21. In the decision reported in **(2009(1) Crime 431) Baldev Raj Kapur v. State**, the Delhi High Court while considering the question, when a four storied building collapsed causing death of six labourers where the owner of the building can be found guilty under Section 304 part II or 304A of Indian Penal Code and considering the fact that, he was not present at the time when the building collapsed or the construction was done at his instruction when the

accident occurred, the court has observed that, neither 304, 308 nor 304A of Indian Penal Code will be attracted as against him and he was acquitted.

22. In this case, it is seen from the case diary file that, a well was being dug in the property of the first accused, who is revision petitioner in Crl.R.P.No.1958/2014 as managed and instructed by the 2nd accused, who is the wife of the first accused and the digging was done by the 3rd accused. The 2nd and 3rd accused are the revision petitioners in Crl.R.P.No.1957/2014. It is seen from the evidence collected by the prosecution that, the well was constructed adjacent to the pathway, which is being used by the public. It is also in away admitted that, the first accused who is the owner of the property was not there either at the time when digging was going on or at the time when the incident occurred and there is no evidence to show that it was at his instructions that the well was dug. So under the circumstances, though he happened to be the owner of the

property, it cannot be said that, he was responsible for any of the acts done in the property in his absence, so as to make him responsible for any omission or act resulted in the incident, so as to attract the offence under Section 304 or 304A of the Indian Penal Code. So, even going by the statements given by the witnesses of Cws 1 and 2, it is clear that, first accused was not in station at the time when the well was being dug or he had not given any instruction in respect of the digging of the well as well. So under the circumstances, court below was not justified in coming to the conclusion that first accused is also responsible for the offence under Section 304 of Indian Penal Code. Even going by the allegations, neither Section 304 nor Section 304A of Indian Penal Code will be attracted as against him as he was not in India even as per the statements given by prosecution witnesses at the time of alleged incident. So court below ought to have discharged the first accused, who is the owner of the property, as he was not present at the time when the

incident occurred and he cannot be held responsible for the act or omission of any of the persons and it was not done under his instruction as well.

23. As regards accused Nos. 2 and 3 are concerned, the statements of CWs1 and 2 will go to show that, in spite of the warning given, they did not take care of the warning and they did not provide any protection or make any warning so as to attract the persons coming through the pathway about the existence of such danger. Further it will be seen from the evidence that, the well was dug so close to the pathway which is being used by the public. So under the circumstances and on the basis of the evidence collected by the prosecution, it cannot be at this stage come to a conclusion that accused Nos. 2 and 3 were not aware or not having the knowledge of their act, which is likely to cause death of person/ persons who is/ are expected to use the pathway falling down in the well resulting in his death. So under the circumstances, the submission made by the

counsel for the revision petitioners in Crl.R.P.No.1957/2014 that, they cannot be held responsible for the offence under Section 304 at this stage is not sustainable and the court below was perfectly justified in proceeding against accused Nos. 2 and 3 for the offence under Section 304 of the Indian Penal Code, on the basis of the materials available on record and whether that is sufficient for conviction or not is a matter to be considered by the court below on the basis of the evidence. The dictum laid down in the decision reported in **Shantibhai .J Vaghela v. State of Gujarat (2012(4) KLT (SN 137) Case No.130 SC)** is not applicable to the fact of this case. So under the circumstances, the revision petitioner in Crl.R.P.No.1958/2014 succeeds and he is entitled to get an order of discharge and the order passed by the court below that he is also responsible for the commission of the offence under Section 304 of Indian Penal Code is unsustainable in law and the same is liable to be set aside and he is entitled to get discharge of the offence

alleged against him, as even on the basis of the allegations of the prosecution witnesses, no such offence is attracted against him, but the revision petitioners in Crl.R.P.No.1957/2014 are concerned, the court below was perfectly justified in dismissing that application for discharge and their revision is liable to be dismissed. So the Crl.R.P.No.1958/2014 is allowed and the accused in S.C.No.367/2008 on the file of the Assistant Sessions Judge, Palakkad (first accused in Crime No.153/2006 of Thrithala police station) is discharged as the allegations and the materials available on record is not sufficient to attract the offence as against him and he is entitled to get discharge under Section 227 of the Code of Criminal Procedure. So he is discharged and he is set at liberty. The bail bond executed by him will stand cancelled.

Crl.R.P.No.1957/2014 is dismissed as on the basis of the materials available on record, it cannot be at this stage said that, no offence has been made out against them

and the order passed by the court below deciding to proceed against them to frame charge under Section 304 of Indian Penal Code is hereby confirmed. But it is made clear that, any observation made by this court will not affect the right of the court below to appreciate the evidence at the trial stage to come to an independent conclusion, as to whether they have committed the offence under Section 304 of Indian Penal Code or not or any other offence has been committed by them on the basis of the materials and circumstances available on record and dispose of the case in accordance with law.

Office is directed to communicate the order to the court below at the earliest. Interim order of stay granted is vacated and criminal revision petition is dismissed.

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge

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