

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 444 OF 2001

The State of Maharashtra,
through Police Station,
Sonkhed, District Nanded

..Appellant

Versus

1. Ramrao s/o Vitthal Dalve,
Age 30 years, Occu. Agri.,
R/o Wadeपुरi, Taluka Kandhar,
District Nanded
2. Vasant s/o Sambhaji Bodke,
Age 25 years, Occu. & r/o as above
3. Sopan Vitthal Dalve,
Age 20 years, Occu. & r/o as above
4. Hanmant Venkati Lungare,
Age 25 years, Occu. Agri.,
R/o Bijewadi, District Nanded
5. Venkati Sakharam Lungare,
Age 52 years, Occu. Agri.,
R/o Bijewadi, District Nanded
6. Babus @ Purbhaji s/o Sambhaji
Bodke, aged 30 years,
Occu. Agri., R/o Wadeपुरi,
Taluka Kandhar, Dist. Nanded

..Respondents

- WITH -

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Bodke, aged 30 years,
Occu. & r/o as above

..Respondents

Mr R.V. Dasalkar, A.P.P. for appellant

Mr S.S. Choudhari, Advocate for respondents no.1 to 6

**CORAM : T.V. NALAWADE AND
A.M. DHAVAL, JJ**

**DATE OF RESERVING
THE JUDGMENT : 13.11.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 17.1.2018**

JUDGMENT (Per A.M. Dhavale, J.)

1. These appeals arise out of common judgment in Sessions Case No.98/1998 delivered by learned Sessions Judge, Nanded on 18.8.2001 whereby four, out of six accused were convicted for culpable homicide not amounting to murder, punishable under Section 304 Part II of Indian Penal Code of one Ananda and were sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5,000/- each, in default rigorous imprisonment for one year with directions to pay the compensation of Rs.10,000/- out of the fine amount to sister of deceased Ananda. Accused nos.1, 2, 3 and 6 were acquitted of the offences of rioting with deadly weapons and committing murder of two others Jairam and Govinda. Accused nos.4 and 5 were acquitted of all the offences. The aggrieved State has preferred Criminal Appeal No.444/2001 against acquittal and Criminal Appeal No.447 of 2001 for enhancement of sentence under Section 304 (II) read with Sec.34 of Indian Penal Code.

2. Deceased Jairam is father of deceased Govinda and deceased Ananda and one Kerba and P.W.5 Rukhminibai. He was residing with his children and wife at Wadepuri and was doing agricultural work. Accused no.1 Ramrao is his nephew. On 3.9.1997, bull of accused no.1 Ramrao entered the field of Jairam and damaged the crops, hence, deceased Ananda impounded it in cattle pound, however, on next day 4.9.1997 his brother Kerba paid the impounding charges and released the bull. On 5.9.1997, in the morning Kerba, Govinda, Ananda and Rukhminibai had gone to their field for agricultural work. They returned at 11.00 a.m. That time, accused no.1 Ramrao, his brother accused no.3 Sopan and accused no.2 Vasant and accused no.6 Babus came in front of their house. They were armed with weapons like axe, knife and sticks. They picked up quarrel with Jairam as to why he had impounded their bull and rushed at him to assault him. Then Jairam, Govinda and Ananda started running away. The accused chased them. Accused no.3 Sopan inflicted a blow of knife in the abdomen and on skull of Ananda. Accused no.1 Ramrao and two outsiders (accused nos.4 Hanmant and 5 Venkati) assaulted Govinda on skull and back by sticks. While Sopan - A-3 and Ramrao A-1 and one more person assaulted Jairam near the house of 'a mang' by means of knife and stones on skull. P.W.5 Rukhminibai tried to rescue her father. Accused no.3 Sopan inflicted a knife blow on her back. Her father died on the spot. At the time of incident, Kerba escaped the assault. The incident was witnessed by several villagers. P.W.5 Rukhminibai accordingly lodged F.I.R. Crime was registered at C.R.No.58/1997 under Sections 302, 307, 147, 148, 149 of Indian

Penal Code and Section 135 of Bombay Police Act at Sonkhed police station on the same day at 2.00 p.m. and the same was investigated into by P.W.11 A.P.I Arvind Shinde and P.W.12 A.P.I. Shaikh Ismail. Earlier, the Police of Sonkhed Police Station received message about some persons receiving injuries at Wadeपुरi. P.W.12 A.P.I. Shaikh Ismail sent police jeep and brought the injured to the hospital. The investigation revealed that on the next day, i.e. 6.9.1997 Ananda and on 7.9.1997 Govinda succumbed to the injuries. On 5.9.1997, at 8.30 p.m. dying declaration of Ananda was recorded by P.W.9 Judicial Magistrate Bhutada. The Police drew spot panchnama, inquest panchnama. All the accused came to be arrested. During interrogation, they made discoveries of different weapons. Their statements were recorded and in pursuance thereof, the weapons discovered were seized. The clothes of the injured/deceased were seized. All seized articles were sent to Chemical Analyst and the Chemical Analyst's reports were collected. During investigation, it was revealed that three persons were assaulted at different places. There was also counter case in which two accused persons were wounded. After completion of investigation, the charge-sheet was submitted in the Court. There was a counter case also filed against Kerba son of deceased Jairam and brother of deceased Ananda and Govinda.

3. In due course, the case was committed to the Court of Sessions. The charge was framed at Exh.6 under Sections 147, 148, 302 read with Sec.149, 307 read with Sec.149 of Indian Penal Code and under Section 37 read with Sec.135 of the Bombay Police Act. The prosecution examined 14 witnesses. The defence of the accused is of

total denial. According to them, deceased Jairam was a known thief of cattle and he was in habit of impounding the cattle and then claiming those cattle. At the time of incident, there was assault by deceased persons on accused no.3 Sopan and accused no.6 Babus. Babus had stab wound in the abdomen and his intestine protruded out with heavy bleeding. Some lamhani persons were against Jairam and his son and they might have killed them.

4. Out of 14 witnesses, the main witness is P.W.5 Rukhminibai, who was injured eye witness. She has been disbelieved by learned Sessions Judge. The reliance was placed on dying declaration recorded by P.W.9 J.M.F.C. Bhutada Exh.69 of deceased Ananda and on the basis of the same, accused nos.1 Ramrao, accused no.2 Vasant, accused no. 3 Sopan and accused no.6 Babus were held guilty for offence under Section 304 Part II of the Indian Penal Code. Hence these appeals.

5. Learned A.P.P. Mr R.V. Dasalkar submitted that the accused had been to the house of deceased Jairam and when Jairam, Ananda and Sopan were running away due to fear, they were chased and assaulted and injured. P.W.5 Rukhminibai, sister of Ananda and Sopan had also sustained stab wound on the back. Her evidence is supported by dying declaration of deceased Ananda. All the accused should have been convicted for committing three murders and attempting to commit murder of P.W.5 Rukhminibai and other offences charged. Hence, the appeal be allowed.

6. Learned Advocate Mr S.S.Choudhari for the respondents argued that most of the prosecution witnesses have turned hostile. P.W.5 Rukhminibai, the informant has narrated a story, which is totally inconsistent with her previous statement before Police as well as before Judicial Magistrate, First Class. Her brother Kerba who was eye witness is not examined. Rukhminibai has suppressed the genesis. She has not given any explanation about the injuries sustained by two accused. According to her, statement under Section 164 of Cr.P.C. she was in the field when she learnt about assault on her father. Therefore, she could not have witnessed the assault on her father, as the field is far away from her house. Besides, the assaults on Jairam, Ananda and Govinda had taken place at different places. Her evidence is not trustworthy and reliable and it has been rightly discarded by the learned trial Judge. As far as evidence of P.W.9 J.M.F.C. Bhutada is concerned, he argued that the evidence discloses that Ananda was operated and tubes were fitted in his chest and nostril. He was not in a position to speak, he was serious. His consciousness to make a statement is very much doubtful. The prosecution has not explained injuries sustained by two accused persons. The learned Judicial Magistrate, First Class had not personally verified the consciousness of Ananda. He has taken signature of the deceased Ananda at two places. He has not followed the proper procedure while recording the dying declaration, hence the dying declaration should not be believed and both the appeals should be dismissed.

7. The points for our consideration with our findings are as follows:
- (I) Whether deceased Jairam, Ananda and Govinda met with homicidal death ? .. In the affirmative
 - (II) Whether all the accused formed unlawful assembly and in prosecution of the unlawful assembly used force ? .. No,
Accused nos.1,2, 3 and 6 came with common intention
 - (III) Whether all the accused in prosecution of the common object of the assembly were armed with deadly weapons while committing riot ? .. Does not survive
 - (IV) Whether all the accused in prosecution of common object of the assembly committed murders of Jairam, Ananda and Govinda ? .. Murder of Jairam and Govinda by the accused - not proved;
Culpable homicide not amounting to murder of Ananda by accused nos.1, 2, 3 and 6 - proved
 - (V) Whether all the accused in prosecution of the common object of the assembly attempted to commit murder of P.W.5 Rukhminibai ? ..Not proved

(VI) What order and sentence ? ..Both the appeals
are dismissed

- REASONS -

8. The prosecution examined 14 witnesses, which may be conveniently grouped as follows :

(I) Eye witness : P.W.5 Rukhmini

(II) Medical witnesses :

P.W.1 Dr. Hemant Godbole: He has conducted post mortem on the dead body of Jairam on 6.9.1997. His post mortem notes are at Exh.29. On 6.9.1997 he conducted post mortem on the dead body of Ananda and his post mortem notes are at Exh.30. On 7.9.1997, he conducted post mortem on the dead body of Govinda. His post mortem notes are at Exh.31. He had received the request letters for post mortem Exh.33, 34 and 35. Dr. Godbole opined that the injuries sustained by Jairam, Ananda and Govinda were possible by weapons like axe, crow bar, sticks.

P.W.14 Dr. Nitin Bilolikar : He has examined P.W.5 Rukhminibai on 5.9.1997 and issued certificate Exh.90. Besides, medical certificate of accused nos.6 @ Purbhaji is at Exh.95 and medical certificate of accused no.1 Ramrao is at Exh.96.

(III) Panch witnesses :

P.W.2 Uttam, panch to the seizure of blood stained clothes of Jairam and Ananda Exh.47.

P.W.4 Vyankati, panch to the inquest panchnama of Ananda Exh.52.

P.W.6 Govinda, panch to the spot panchnama, did not support prosecution.

P.W.7 Ratan, panch to the inquest panchnama of Jairam Exh.61.

P.W.8 Vyankati, panch to the spot panchnama - cross-examined by A.P.P. In cross by the accused, he has admitted and deposed the defence story.

(IV) Evidence to the Dying Declaration :

P.W.9 J.M.F.C. Bhutada - dying declaration of Ananda Exh.69

P.W.13 Dr. Munjaji Mohite : He was duty Medical Officer. While recording dying declaration of Ananda, on request of learned J.M.F.C. P.W.9 Bhutada, he had examined Ananda and issued certificate about his consciousness and ability to speak Exh.86.

(V) Police witnesses :

P.W.10 - Baliram Waghmare, a carrier of covering letter with acknowledgement Exh.71.

P.W.11 A.P.I. Shinde - He carried out subsequent investigation, arrested accused no.4 Hanmant and forwarded Muddemal to Chemical Analyst and received Chemical Analyst's reports Exh.73 and 74.

P.W.12 A.P.I. Shaikh is the main Investigating Officer. He has deposed about recording of F.I.R. Exh.57, drawing inquest panchnama of Jairam Exh.61, Ananda Exh.62 and Govinda Exh. 52. He had attached receipt of (cattle pound) from the pocket of Jairam Articles B-

1 and B-2. Spot panchnama Exh.78. Seizure of samples of ordinary soil and blood mixed soil. Seizure of blood stained clothes Exh.47. He has deposed about voluntary statement given by accused no.2 Vasanta and recovery of stick from the house of accused no.1 Ramrao Exh.79. Voluntary statement and recovery of stick Exh.80. Statement of accused no.3 Sopan and discovery of crow bar Articles 81 and 82. Discovery of axe by accused no.1 Ramrao. Memorandum and panchanama Exh.83 and 84.

9. The evidence of P.W.1 Hemant shows that Jairam had sustained nine injuries. Some of which were lacerated wounds on right ear pinna and left ear pinna with cutting of pinna and right black eye, lacerated wound on face, lacerated wound on scalp and four abrasions. There were corresponding internal damage noted in the skull. He opined that Jairam died due to 'Depressed fracture of vault' Similarly, he deposed that Ananda had a right black eye and eight injuries, out of which two incised wounds on chest, one injury on the abdomen resulted into internal damage. He had also contusions on scalp right frontal region, right parietal, left on the occipital region. He opined that Ananda died due to shock due to stab injuries. Dr. Godbole stated that deceased Govinda had eight injuries, mostly abrasions, but one contusion over face, temporal region. It produced haematoma under scalp and fracture of vault, which was cause of death. His evidence regarding causes of death of Jairam, Govinda and Ananda has not been challenged. We, therefore, hold that deceased Jairam, Ananda and Govinda all met with homicidal death.

10. P.W.5 Rukhminibai is the main witness to the incident. She is illiterate rustic woman, unable to give details about date and time of the incident. As per her deposition, on that day, there was programme of 'Tervi' of one Shewantabai in the village and several people were coming there. She deposed that two days before the incident, bullock of accused no.1 Ramrao, who happens to be her cousin, had entered her father's field and, therefore, it was required to be impounded by Ananda in cattle pound, but subsequently, Kerba deposited the impounding charges and released the bullock. On receipt of Exh.B-1 and B-2 in the pocket of Jairam supports this story. From the date of incident, i.e. 5.9.1997, Rukhminibai with Ananda and Govinda had gone to their agricultural field for seed plantation and at about noon time, they three returned. That time, accused no.1 Ramrao, Accused no.2 Vasant, accused no.3 Sopan and accused no.6 Babus and two more persons from Vijaywadi came to her house and called her father. She stated that those two persons were father-in-law and brother-in-law of Ramrao A-1. Her brothers had returned to house for taking bath and breakfast and intended to go to field again. As accused no.1 Ramrao called her father out of the house, her father came out. That time, Ramrao A-1 was having crow bar and axe in his hand. Sopan A-3 was having knife and Babus A-6 and other three accused were having sticks. On seeing the accused persons armed with weapons, Jairam started running away towards mangwada locality and her brothers also followed him. She also followed them. She stated that accused nos.1, 2, 3 and 6 gave stick blows on the person of Jairam, he fell down, received injuries on head and back and

then, Ramrao A-1 gave blow of crow bar on his forehead. Her father shouted as 'Purey-Purey' (enough-enough), but they continued to assault him and he died on the spot. She deposed that Sopan A-3 assaulted her brother by means of knife on his left eye and abdomen. Her brother Govinda was assaulted by A-2 Vasant, A-6 Babus and two relatives of Ramrao. Her brothers were injured and fell down in mangwada locality. A-3 Sopan gave a blow of knife on her back at the center. As per her evidence, all the three persons were assaulted in mangwada locality and she was also lying there in injured condition. Then police came and took them to the police station and then to the hospital at Nanded.

11. P.W.5 Rukhminibai has proved her F.I.R. Exh.57. Her cross-examination reveals that her father's field and the field of the accused are not adjacent to each other. There is one field in between belonging to Shivram, who is brother of her father. The said field was used for grazing the cattle. There is open drain in the village Wadeपुरi and there are mangwada and baudhawada localities connected with the other area by separate bridges. Besides, there is one bridge known as 'Lendicha Pool". She denied the contents of her F.I.R. that her father had accompanied her to the field. Her evidence that accused no.1 Ramrao called out her father, her father was shouting as 'Purey-Purey' (enough-enough) is not there in the F.I.R. She has deposed that accused no.1 was having crow bar, but she could not give explanation why it is not there. Her statement that her father was assaulted by accused nos.1, 2, 3 and 6 is also not in the F.I.R. Her evidence that accused no.1 Ramrao gave blow of crow bar on the

forehead of her father is not in the F.I.R. Her evidence that accused no.2 Vasant and accused no.6 Babus assaulted her brother Govinda is not specifically disclosed in the F.I.R.

11. Per contra, it is brought on record that one lamhani had assaulted her father Jairam, she denied the said fact. Her statement before police shows that her father and brother were killed in baudhawada. She denied this fact. In further cross, she admitted that her brothers were not at home and her father was alone at home. She was unable to tell date and time of the various events. She denied that she and her brothers while in field learnt about assault on Jairam, but could not explain why this fact was so recorded in her statement before the Judicial Magistrate, First Class. Her evidence shows that her brother Kerba was also an eye witness and he had ran away. She denied that her brothers had assaulted accused no.3 Sopan and accused no.6 Babus by means of knife and katti. She denied that her father was indulging in theft of bullocks by impounding them and then getting them released in his own favour. She denied that lamhani persons were angry with her father and had assaulted her father. Her F.I.R. is silent about the involvement of father-in-law and brother-in-law of accused no.1 Ramrao (accused nos.4 and 5).

12. On carefully considering her evidence in the light of other evidence, we find that she is not telling the truth. She has not deposed anything about the injuries sustained by accused no.3 Sopan and accused no.6 Babus when there are medical certificates Exh.95 and 96 showing injuries on their persons. Besides as per dying

declaration, Ananda was assaulted at baudhawada, whereas Jairam was assaulted at mangwada. P.W.5 Rukhminibai stated that she and her father and brothers were all assaulted at mangwada. Her material evidence is inconsistent with her previous statement in the form of F.I.R. and statement under Section 164, Cr.P.C. The learned trial Judge has disbelieved her. We find that the learned trial Judge has rightly disbelieved her as her evidence does not inspire confidence.

13. Then, the only material evidence that remains is in the form of dying declaration led by P.W.9 J.M.F.C. Bhutada and P.W.13 Dr.Mohite. As per their evidence on 5.9.1997 at 8.30 p.m. J.M.F.C. Bhutada received a request letter for recording dying declaration Exh.68. He then on his bike went to the hospital at 8.30 p.m. He made enquiry with P.W.13 Dr. Mohite and went to the patient. Dr. Mohite has examined the patient as per his request and he certified that he was conscious and able to speak. Accordingly, his endorsement was taken on paper and dying declaration was recorded. The Medical Officer was present in the hospital throughout the recording of dying declaration and at the end of dying declaration, he again made endorsement about patient's ability to speak and consciousness Exh.86. P.W.9 J.M.F.C. Bhutada has deposed that he personally made some questions and verified his understanding capacity. He was found physically and mentally fit but his questions and answers were not recorded in dying declaration. He asked questions and recorded dying declaration in question and answer form. He stated that he recorded the answers as per the answers

given by Ananda. Thereafter he read over the dying declaration. It was admitted to be correct and thereafter, he obtained signature of Ananda. Again Ananda was examined by Medical Officer. Thereafter, he made his endorsement on the dying declaration. As some part of the earlier signature of Ananda was on the endorsement, he again obtained signature of Ananda. On the next day noon, Ananda has died. The cross-examinations of these witnesses disclose that Ananda had received severe injuries and was operated. Both of them were unable to disclose whether a tube was fixed in his chest for draining out fluid and whether he was operated on abdomen and chest. The cross-examination was directed to show that due to brain damage, the patient was not in a position to speak, but both the witnesses have categorically denied the said fact.

14. P.W.9 J.M.F.C. Bhutada and P.W.13 Dr. Mohite are independent witnesses. They are holding responsible posts and are presumed to be honest persons. They have no enmity with the accused. There were no other persons to tutor Ananda for making such statement. The dying declaration Exh.69 is recorded after taking precautions and the dying declaration is not consistent with the evidence of Rukhminibai, who could alone have tutored Ananda. Deceased Ananda has stated that the incident took place in baudhawada. He had impounded bull of accused no.1 Ramrao as it had grazed in his hybrid crop and, therefore, accused no.1 Ramrao, accused no.2 Vasant, accused no.3 Sopan, accused no.6 Bapus had given fist and kick blows on the earlier day. On the day of incident, all of them came there and assaulted him with knife, sticks and stones. He stated that Ramrao

had inflicted blow of knife on his abdomen and Babus - A-6 inflicted blow of knife near his eye. The trial Court did not find any reason to disbelieve P.W.9 and P.W.13. We also have no reason to disbelieve both of them.

15. It is true that the dying declaration is silent regarding the injuries sustained by accused no.3 Sopan and accused no.6 Bapus, however, the incident has taken place at different places. Jairam was assaulted at Mangwada, whereas Ananda was assaulted at baudhawada. Ananda had not deposed about assault on his father Jairam and sister Rukhminibai and brother Govinda in his presence. There is nothing on record to show that accused no.3 Sopan and accused no.6 Bapus had received injuries at the hands of Ananda. The dying declaration of Ananda is wholly corroborated by evidence of P.W.1 Medical Officer Dr. Godbole. He has described the injuries sustained by Ananda as follows :

- 1) Right eye-black eye;
- 2) Sutured wound over face - lateral end of right eye-brow three stitches in situ - wound length 2.5 c.m. - wound healthy;
- 3) Two abrasions over left cheek - laterally 1 x 1 cm x 3.5 x 0.5 cm in reddish;
- 4) Sutured wound over chest left side oblique - medially corresponding to 6th rib and laterally to axilla - 15 stitches in situ wound length about 14 cm - wound healthy;

- 5) Incised (surgical) wound on chest left side – in 6th I.C. space laterally, size 1 x 0.5 cm rubber drain seen protruding this wound – wound healthy;
- 6) Sutured surgical wound over abdomen – left side (paramedian incision) – upper end – 2 cm below-xiphisternum level and lower end 4 cm below umbilicus level – 13 stitches in situ – wound length 12.5 cm – wound healthy;
- 7) Sutured wound over chest – lower aspect laterally – 6 cm lateral to upper end of wound no.6 above oblique 7th I.C. space - 3 stitches in situ – wound healthy about length 2.5 cm;
- 8) Incised wound on abdomen left side – iliac region of 1 x 0.5 cm wound healthy.

These injuries are consistent with the dying declaration. We, therefore, find that the dying declaration of Ananda is truthful, reliable and trustworthy.

16. The main injuries to Ananda are injury nos.1, 4, 5, 6, 7 and 8. As per Ananda's dying declaration, two incised wounds were caused to him, one by Ramrao A-1 on his abdomen and other by Bapus A-6 near his eye. The cross-examination reveals that injury nos.5, 6 and 8 are surgical wounds. He was operated for removing the blood collected in the chest and abdomen cavities.

17. The injuries by knife one single injury on the abdomen and single injury on the eye will not be sufficient in the ordinary course of nature to cause his death. Abdomen is not a fatal part. Though the

assailants knew that by causing such injury, they were likely to cause death of Ananda. It cannot be inferred that they had an intention or higher degree of knowledge which is required for holding the accused guilty under Section 302 read with Sec.34 of Indian Penal Code.

18. We do not agree with the reasoning of the learned trial Judge that the injuries were caused to Ananda in free fight. There was a motive for commission of attack. Accused nos.1, 2, 3 and 6 are related to each other. They came together for assault armed with weapons and they have committed attack with prior concert. It is not at all a case of free fight. When some of the accused were armed with knives, it can be assumed that all other knew that they were likely to use knives for causing grievous injuries likely to cause death. Considering the fact that there was only stab wound in the abdomen and one stab wound near the eye, we find that injuries do not indicate that the accused intended to cause death of Ananda. There is no material to show that injuries were sufficient in the ordinary course of nature to cause death. We, therefore, find that injuries caused by the accused were likely to cause death and the injuries were caused with knowledge. Therefore, learned trial Judge has rightly held the accused guilty for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code.

19. We find that there is no evidence against accused nos.4 and 5 and the learned Sessions Judge has rightly acquitted them. The learned Sessions Judge rightly held that there was no evidence that accused nos.1, 2, 3 and 6 committed murder of Jairam and Ananda or

attempted to commit murder of Rukhmini. He rightly held accused nos.1, 2, 3 and 6 guilty for committing culpable homicide of Ananda not amounting to murder punishable under Section 304 (II) of the Indian Penal Code. Considering the fact that the incident has taken place 20 years back and there was some compromise between the parties which resulted into non-examination of Kerba, we do not want to interfere with the sentence imposed. Hence, we pass the following order:

- ORDER -

Both the Criminal Appeals No.444 of 2001 and 447 of 2001 are dismissed.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

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