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

+ CRL.A. 1132/2018

UMESH

..... Appellant
Through Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI

..... Respondent
Through Ms. Aashaa Tiwari, APP for State
with Insp. Karan Singh Rana,
SHO/Mukherjee Nagar

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Reserved on: 11th February, 2020
Date of Decision: 18th February, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 15th September, 2018 and the order on sentence dated 18th September, 2018 passed by Additional Sessions Judge/Pilot Court, North District, Rohini, Delhi in Sessions Case No. 473/2017 arising out of FIR No. 629/2016 registered with Police Station Mukherjee Nagar, whereby he had been convicted under Sections 302/34 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to rigorous life imprisonment with a fine of Rs. 10,000/- for the offence punishable under Section 302 read with Section 34 of IPC.

CASE OF THE PROSECUTION

2. The case of prosecution, as noted by the Trial Court, is reproduced hereinbelow:-

“1. On 26.07.16 at about 8.45 PM Anil Kumar was standing outside the shop situated in house no.138 Munshi Ram Colony. He noticed his brother-in-law Amit coming towards his shop from the side of Indira Vikas Colony. In the mean while two boys came to the corner of the street and fired on Amit. He ran towards Amit to save him. Those two boys fled away after firing on Amit. Amit fell down on the ground. He was bleeding from his back and became unconscious. He removed Amit to the hospital with the help of neighbor, where Amit was declared dead. Anil told to the police that he suspect that Umesh and Sombir, both sons of Kalu killed Amit. He can identify those persons. FIR was registered. Investigation was carried out. Initially Bhupender, Sanjay and Sameer were arrested. Bhupender was charged for the offence punishable under Sec.302 IPC. Sanjay and Sameer were discharged. Trial continued against accused Bhupender only. The other accused Umesh and Sombir could not be arrested. Bhupender was held guilty and convicted vide order dt.22.08.2017 and has been sentenced vide order dt.29.08.2017. Accused Umesh and Sombir were later on arrested. After completion of investigation charge sheet against them was filed before the court of Ld.MM. Ld.MM after complying with the provisions of Sec.208 Cr.PC committed the case to the Sessions court as the offence punishable under Sec.302 IPC is exclusively triable by the Sessions Court. Both the accused were charged for the offence punishable under Sec.302 read with Sec.34 IPC and also under Sec.174A IPC. Both the accused persons pleaded not guilty and claimed trial.”

FINDING OF THE TRIAL COURT

3. The conclusion of the Trial Court is reproduced hereinbelow:-

“118. After hearing the arguments and going through the record I found that there are only two eye witnesses in this case namely Anil PW-9 and Anita PW-3. PW-3 deposed that she along with Amit

(deceased) had gone to the market for making purchases. While they were returning Amit was moving ahead of her. Accused Umesh and Sombir @ Cheli along with their co-accused came from the side street and fired upon Amit. It was Umesh and Bhupender who fired upon Amit and the other two accused kicked Amit to find out if he is alive or not. PW-9 also corroborated the testimony of PW-3 that when Amit entered the gate two accused persons fired upon Amit. He stated that he can identify them and he identified Umesh as the person who fired upon Amit. Sombir @ Cheli kicked Amit to find out if he is alive or not. No doubt blood stained clothes of Anil were not seized and even the location of PW-3 and PW-9 is not shown by the IO in site plan. But as both the witnesses are reliable and trustworthy merely due to this lapse on the part of the IO no benefit can be given to the accused persons. Ld. Defence counsel has also raised the plea that PW-9 was not there but I found that PCR form itself shows that Amit was removed firstly to New Life Hospital by Anil as also deposed by Manoj PW-25 also and both Ct. Pawan PW32 and SI Manoj PW25 also deposed that Anil met them in the hospital which supports the contention that it was he who removed the injured to the hospital. No other person was there in the street at that time as deposed by PW-9. Therefore, non examination of any other witness does not impact the case even otherwise it is the quality of evidence and not the quantity which is material. When those two witnesses are fully supporting the prosecution case examination of more witnesses does not mean anything and on this ground no benefit can be given to accused. Ld . Counsel has also raised the plea that Mahesh who made the call at 100 number has not been examined. But in my opinion that also does not make any difference as there are two other eye witnesses who have been examined who have fully supported and corroborated each other. The testimony of PW3 and PW9 also founds corroboration from the medical evidence i.e. the post mortem report Ex.PW4/A wherein the doctor also found two penetrating wounds on the back of the deceased and thus the scientific evidence corroborates the ocular evidence.

119. So far as the presence of PW-3 is concerned. She stated that she was at a distance of 7 – 8 steps following the deceased. The defence taken was that she had not sustained any pallet injury but it

is to be noticed that Amit was going ahead of PW3 and the firing was done on the back of Amit. It is not the case that Amit was coming towards her. Under the circumstances there was no chance of her suffering any pallet injury when the firing is done at the back of Amit as the fire arms were not pointed in the direction in which PW-3 was present.

120. It is also important to note that one HC Sukhleshwar was examined as PW33 and he stated that he came to know on the spot that Bhabhi of the deceased became unconscious on the spot. PW3 has also name the accused Umesh in her statement and it is quite natural she being residing in village Dubbal Dhan and Umesh was residing just opposite there house & there were also family relations between two families. So far as the non mentioning of name in the FIR is concerned it is clear that the accused persons were not known to PW-9 and hence, his not naming the accused persons and that does not make a difference when he has specifically stated that he can identify them. Keeping in view this evidence and the testimonies of the witnesses, I found that both the witnesses are reliable and trustworthy with minor variations and contradictions which are natural. So far as PW3 not seeking any medical help is concerned, I do not find any reason to discard the testimony of PW-3 merely on this ground because when she had seen her brother-in-law (Devar) being fired it is quite natural that she got a shock and then it is quite natural and probable that she lost her consciousness. She had deposed that she regained consciousness only on the following morning which is also quite natural and probable and it does not detract her from truth of her version. There were no upper external injuries suffered by her. She had lost her consciousness and the failure to call a doctor at that point in time cannot be said to unusual. Keeping in view the testimony of PW-3 and PW-9 it is apparent that they are reliable trustworthy and credible witnesses. PW9 is also a natural witness, as his shop is situated only two feet away from the spot & this fact is not disputed. They have with stand the cross-examination. The IO did not find it necessary to corroborate and investigate and record the statements of further witnesses as he found that both the witnesses are reliable and in fact those both witnesses have stood firm through the intensive cross examination.

121. So far as the testimony of PW-3 and PW-9 with respect to Sombir @ Cheli is concerned record shows that Anil in his statement Ex.PW9/A stated that two boys came at the corner of the street and fired on Amit. He ran to save Amit and both those boys ran away in two different streets. He also stated that murder of Amit has been committed by sons of Kalu i.e. Umesh and Sameer however he had not seen them earlier but can identify them. Here it is important to note that Anita PW-3 told the names of boys as Bhupender and Umesh who fired on Amit. Bhupender had already been held guilty and convicted vide Judgment dt. 22.08.2017 and sentenced vide order dt. 29.08.2017. Umesh is son of Surajmal and is identified by Anita and Anil as the same person who fired on Amit along with his co-accused. Anil in his statement does not say that there were four persons. He was confronted with his statement when he stated that there were four persons and that Sombir @ Cheli was also among them. He also deposed that after Amit fell down Sombir @ Cheli kicked Amit to find out if he is alive or dead and thereafter ran away. Anil was also confronted with his statement with respect to this fact as it was not mentioned in his first statement Ex.PW9/A on the basis of which FIR was registered. In my opinion if there would have been four persons Anil would have certainly noticed them and also mentioned this fact in his statement Ex.PW9/A. Non mentioning of this fact in exhibit PW9/A clearly shows that it is an after thought and has been introduced later on only to make out a case against accused Sombir @ Cheli. In my opinion this is a material improvement and no reliance on the same can be placed.

122. Similarly, so far as Anita PW-3 is concerned, she has not assigned any role to any other person except that Bhupender and Umesh fired on Amit though he stated that Sombir Cheli was also present but according to her Sombir Cheli fled away immediately when firing started. Merely because Sombir Cheli had fled away from the spot when firing started does not mean that he was involved in the commission of crime or having common intention to kill with the other accused persons. A new fact has been introduced by Anita that Sombir Cheli kicked Amit while he was lying on the ground in order to find out whether he is alive or dead. She was confronted with her statement where this fact was not found

mentioned. This is a material improvement and hence cannot be relied upon. In my opinion PW-3 and PW-9 do not inspire confidence so far as role of accused Sombir @ Cheli is concerned.

123. As discussed above PW-3 and PW-6 are reliable, trust worthy and inspires confidence so far as accused Umesh is concerned. The defence has failed to breach the veracity of both these witnesses during intensive cross-examination. Both the witnesses have testified that the accused Umesh along with his co-accused Bhupender @ Joker (already convict) fired on Amit resulting into his death. Keeping in view the testimony of these eye witnesses I am of the opinion that prosecution has proved and established the guilt of accused Umesh beyond doubt. He is therefore held guilty and convicted u/s 302 IPC.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. K. Singhal, learned counsel for the appellant-convict contended that none of the eyewitnesses i.e. Smt. Anita (PW-3) and Shri Anil Kumar (PW-9) were present at the scene of crime. He pointed out that the site plan prepared by the police did not precisely show the position of the two eyewitnesses in relation to the position of the assailant. He emphasised that Smt. Anita (PW-3) did not mention about the presence of the other eyewitness Shri Anil Kumar (PW-9) in her deposition. He stated that the Investigating Officer ought to have investigated as to whether Smt. Anita (PW-3) was unconscious for nine hours and should have collected the CDR and mobile phones used by Smt. Anita (PW-3) and Shri Anil Kumar (PW-9). He also contended that the aforesaid witnesses were not independent as they were related to the deceased. He lastly stated that the blood stained clothes of neither Shri Anil Kumar (PW-9) nor the neighbour who had helped him taking the deceased to the hospital, had been examined.

COURT'S REASONING

SIMILAR ARGUMENTS ADVANCED BY CO-ACCUSED BHUPENDER @ JOKHAR IN THE PRESENT FIR BEARING NO. 629/2016 REGISTERED WITH POLICE STATION MUKHERJEE NAGAR, HAVE ALREADY BEEN REJECTED BY A COORDINATE BENCH OF THIS COURT AFTER RELYING UPON THE DEPOSITIONS OF SHRI ANIL KUMAR (PW-9) AND SMT. ANITA (PW-3) WHO WERE ARRAYED AS PW-14 AND PW-15 RESPECTIVELY IN THE PREVIOUS APPEAL BEING CRL.A.NO. 895/2017. FURTHER, IT CANNOT BE SAID THAT SMT. ANITA (PW-3) AND SHRI ANIL KUMAR (PW-9) WERE EYEWITNESSES TO THE MURDER OF DECEASED-AMIT IN THE CASE OF CO-ACCUSED BHUPENDER @ JOKHAR AND NOT TO THE SAME MURDER IN THE CASE OF APPELLANT-CONVICT UMESH.

5. This Court finds that similar arguments advanced by co-accused Bhupender @ Jokhar in the present FIR bearing No. 629/2016 registered with Police Station Mukherjee Nagar, have already been rejected by a coordinate Bench of this Court after relying upon the depositions of Shri Anil Kumar (PW-9) and Smt. Anita (PW-3) who were arrayed as PW-14 and PW-15 respectively in the previous appeal being Crl. A. No. 895/2017. The relevant portion of the judgment passed by earlier Division Bench in Crl. A. No. 895/2017 filed by Bhupender @ Jokhar is reproduced hereinbelow:-

“4. There were two eye-witnesses to the incident. The first was Anil Kumar (PW-14), brother-in-law of the deceased who was running a grocery shop at House No. 138, Munshi Ram Colony, Mukherjee Nagar, Delhi. His wife belonged to village Dubbaldhan Majra, PS Beri, District Jhajjar, Haryana. She had three brothers viz., Sandeep, Satyawar and Amit (the deceased). PW-14 disclosed that there was a previous dispute between Satyawar and his cousin brother Chand. Chand was murdered and of the three persons who were convicted, one was Satyawar. As a result, the relation between in-laws of PW-14 and family of Chand was strained (ranjish chal rahi thi). According to

PW-14, Kallu @ Surajmal, elder brother of Chand and his sons, Umesh and Sameer, had threatened the family of the in-laws of PW-14 that they would be killed. As a result, Amit had begun residing with PW-14 and his wife in Delhi about two and half years prior to the incident.

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10. The other eye witness to the occurrence was Anita (PW-15), the sister-in-law of the deceased. Anita was also a resident of village Dubbaldhan. Her husband, Satyawan was arrested and convicted for the murder of Chand and was lodged in Jhajjar Jail. She confirmed that as a result of the above incident, the elder brother of Surajmal @ Kallu and other family members including Sameer and Umesh were inimical to them and threatened to take revenge.

11. PW-15 stated that about one and half months prior to the occurrence she had noticed Sameer roaming near the house of PW-14, her nandoi. She too confirmed that Amit went to Kolhapur on or about 17th June 2016 for wrestling and returned to Delhi on 9th July 2016. She stated that on 26th July 2016 on or about 8 pm she had gone with Amit to the Indira Vikas Colony Market for purchasing household articles/vegetables. While returning home at about 8.45 pm, the deceased was walking ahead of her. When they reached the iron gate of Munshi Ram Colony, she was only 10/12 steps behind him. As soon as the deceased entered the gate, the two accused, the Appellant herein and co-accused Umesh, standing there armed with the weapons fired on the deceased. She correctly identified the Appellant. While the two armed accused fired on the deceased – one other Somvir @ Chally and one more person came to the spot where the deceased was lying in an injured condition. They gave him kick blows to check whether he was alive or dead. Thereafter, the armed accused (including the Appellant herein) ran towards Indira Vikas Colony while the Somvir and the other person ran towards Mandir wali gali. PW-15 noticed PW14 standing in front of his shop. He along with few neighbours rushed to the place where the deceased was lying. PW-15 lost consciousness at that point in time.

12. PW15 stated that she regained consciousness in the early hours of the following day in her house. At around 6.30 am on 27th July, 2010 she received a phone call from Sumit, a cousin of the deceased, who

informed her that the Appellant herein and along with Umesh and Somvir and one other person had reached their village Dubbaldhan. He further disclosed to her that they had caused a gunshot injury to Sudhir, her brother-in-law, between 5 and 5.30 am on 27th July, 2016. The police then recorded the statement of PW15 at her house on 27th July, 2016.

13. PW15 also confirmed that on 22nd September, 2016, she along with PW14 had gone to PS Mukherjee Nagar and identified the Appellant as the person who had caused gunshot injury to the deceased. She also gave a statement to that effect to the police.

14. In her cross-examination, PW-15 confirmed that she and her family members had lodged 3/4 complaints to the police at village Dubbaldhan in the face of threats from the family members of Chand. The copies of those complaints were marked as Ex. PW15/D1 to D3. Importantly in her cross-examination, PW-15 volunteered that she had seen the Appellant “many a times in my native village and on one occasion accused Bhupinder had abused me while I was going to drop my children at their school.”

15. No doubt both the eye-witnesses i.e. PW14 and PW15 are related to the deceased, one being his brother-in-law and the other his sister-in-law. However, if on a careful scrutiny their evidence inspires confidence, it can certainly form the basis of a conviction. The caution that the Court has to exercise while examining the evidence of an interested witness is to look for inconsistencies and improvements, if any, that might affect the credibility of such witness. A greater degree of caution has to be exercised than the Court would while examining a non-interested witness.

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17. In the considered view of the Court, if the evidence of an eye witness inspires confidence, the mere fact that the prosecution had not examined other witnesses who may have corroborated the statement of such witness will not by itself weaken the evidence of such witness. PW-14 by all counts is a natural witness. A perusal of the PCR form clearly shows that the fact of the deceased having been brought to the New Life Hospital and Dr. Harish stating that he had been taken to the Hindu Rao Hospital are clearly set out. What is stated therein is

consistent with the version of PW14 who was certainly present throughout. The mere fact that the bloodstained clothes of PW-14 were not seized does not throw doubts on the veracity of his version.

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22. Once the evidence of two eye witnesses is clear and cogent, the failure to clearly state in the site plan as to where they were standing and in relation to the positions of the respective accused, is not of much consequence. While certainly such a site plan might have clearly shown the relative positions of the eye witnesses. However, the absence of such a site plan does not detract from the veracity of their evidence.

23. It was submitted that it was unusual that PW15 did not seek any medical help and even after regaining consciousness did not inform anyone about what she saw till she spoke to the police the next morning. As far as this submission is concerned, the Court finds it wholly probable that PW15 who was walking just ten steps behind the deceased was deeply disturbed on seeing the deceased being gunned down in front of her eyes. Her losing consciousness appears totally natural and probable. Likewise her explanation that she regained consciousness only the following morning also appears entirely probable. The fact that she herself may not have been injured in any significant way, does not detract her from the truth of her version. Since also, there are no external injuries suffered by her and she only lost her consciousness, the failure to call a doctor at that point in time cannot be said to be unusual. What is significant is that even in her first statement to the police under Section 161 Cr PC, PW15 named the Appellant and this was but natural since she had known him from before at her village where he had abused her while she was going to drop her children to the school.

24. Nothing much has been elicited from PW15 in her cross examination which could be said to assist the defence. The minor inconsistencies in the statement made by her to the police in the first instance under Section 161 Cr PC were confronted to her but were not material enough to cast any grave doubts on the truth of her version. The failure by the police to note whether there were any articles like vegetables etc strewn at the place of occurrence, does not per se falsify the versions of PWs 14 and 15.

25. This Court has also carefully examined the evidence of the IO, PW23. Learned counsel for the Appellant sought to suggest that the IO ought to have investigated into PW15 becoming unconscious and ought to have collected the CDRs of the mobile phones used by PWs 14 and 15. It was for the IO to make an assessment of the strength of the evidence of PWs 14 and 15. If he felt that they were trustworthy and credible witnesses and could withstand cross-examination, he might not have further probed any alternative explanation to the events. The IO's assessment in the present case was found to be correct as both eye witnesses stood firm in their respective versions despite intensive cross-examination."

(emphasis supplied)

6. This Court emphasises that it can rely upon the findings of the earlier Division Bench judgment in Crl. A. No. 895/2017 as it was a case of a co-accused out of the same FIR and not a cross case. Further, it cannot be said that Smt. Anita (PW-3) and Shri Anil Kumar (PW-9) were eyewitnesses to the murder of deceased-Amit in the case of co-accused Bhupender @ Jokhar and not to the same murder in the case of appellant-convict Umesh.

MERELY BECAUSE THE WITNESSES ARE RELATED TO THE DECEASED, THEIR EVIDENCE CANNOT BE THROWN OUT. IN OTHER WORDS, THE RELATIONSHIP IS NOT A FACTOR TO AFFECT THE CREDIBILITY OF A WITNESS.

7. This Court is also of the opinion that the contention of the appellant-convict that the eyewitnesses in the present case were not independent on account of them being related to the deceased is untenable in law. The Supreme Court in **Waman vs. State of Maharashtra (2011) 7 SCC 295** while discussing how the testimony of a related witness has to be examined, has held as under:-

“16. The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution was the brother of the wife of the deceased and was living with the deceased for quite a few years. This Court held that: (Sarwan Singh case [(1976) 4 SCC 369 : 1976 SCC (Cri) 646] , SCC p. 379, para 16)

“16. ... But that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true.”

17. In Balraje v. State of Maharashtra, this Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that: (SCC p. 679, para 30)

“30. ... if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.”

18. The same principles have been reiterated in Prahalad Patel v. State of M.P. [(2011) 4 SCC 262 : (2011) 2 SCC (Cri) 205] In para 15, this Court held that: (SCC p. 265)

“15. ... Though PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. In a series of decisions this Court has accepted the above principle (vide Israr v. State of U.P. [(2005) 9 SCC 616 : 2005 SCC (Cri) 1260] and S. Sudershan Reddy v. State of A.P. [(2006) 10 SCC 163 : (2006) 3 SCC (Cri) 503]).”

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20. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of

being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care.”

(emphasis supplied)

8. The Supreme Court in ***Ganapathi & Anr. Vs. State of Tamil Nadu, (2018) 5 SCC 549*** has reiterated that “related” is not equivalent to “interested”. The relevant portion of the said judgment is reproduced hereinbelow:-

“13. The evidence of ocular witnesses, PWs 1 and 2, father and brother of the deceased, clearly exhibits the way in which the accused took away the life of deceased Murugan. Their evidence narrates the guilt of the accused beyond reasonable doubt and corroborates with that of the medical evidence. Dr Danraj (PW 12) who conducted the post-mortem on the body of deceased Murugan, had pointed out as many as 10 cut injuries out of which Injuries 1, 2, 5, 6, 7, 8, 9 and 10 are fatal which were possible by sickle and capable of causing death whereas Injuries 7 and 9 were possible by knife. It appears that there were two independent witnesses (PWs 5 and 6) projected by the prosecution, but they have turned hostile. In several cases, only the family members are present at the time of incident, then the case of the prosecution will be based only on their evidence. When their evidence is the only evidence available, the courts should be cautious and meticulously evaluate the evidence in the process of trial and we are not able to appreciate the contention on behalf of the accused that the non-examination of independent witnesses and conviction based on the evidence of family members is fatal to the case of the prosecution.

14. “Related” is not equivalent to “interested”. A witness may be called “interested” only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who

is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be “interested”.

15. Merely because the eyewitnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made.

(emphasis supplied)

CONCLUSION

9. Keeping in view the aforesaid mandate of law, conclusions of the coordinate Bench in Cr. A. 895/2017 as well as the testimonies of Smt. Anita (PW-3) and Shri Anil Kumar (PW-9) which are clear, cogent, consistent, credible and trustworthy, this Court is of the opinion that the present appeal is bereft of merit. Consequently, the present appeal is dismissed.

10. Trial court record be sent back. Copy of the judgment be supplied to the appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 18, 2020

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