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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 947 OF 2017

Amir Ismail Sayyad @ Billa

Age about 27 years, Occ.

Residence : Chandnagar, Kausa,

Mumbra, Taluka & District Thane.

.. Appellant

Versus

1. The State of Maharashtra.

(At the instance of Mumbra Police
Station)

2. The Superintendent of Jail

Nashik Road, Central Prison,
Nashik, Maharashtra.

.. Respondents

Mr. Aniket Vagal along with Mr. Kunal Pednekar, Advocates for
Appellant.

Mr. Ajay Patil, APP for Respondents.

**CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.**

DATE : 25th August 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

. This Criminal Appeal is filed to question legality of
Judgment and Order dated 26.09.2017 passed by the Additional
Sessions Judge, Thane in Sessions Case No. 489of 2015, convicting
Appellant for the offence punishable under Section 302 of Indian
Penal Code (for short “**IPC**”) and sentencing him to imprisonment for
life and payment of fine of Rs.5,000/- and in default thereof to suffer
simple imprisonment for one month. In addition, Appellant is

convicted for offence punishable under Section 325 IPC and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.3,000/- and in default thereof to suffer simple imprisonment for one month. Accused is also convicted under Section 506 Part II of IPC and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/- and in default thereof to suffer simple imprisonment for 15 days; all sentences to run concurrently.

2. The gist of the prosecution's case is as under:

2.1. On 14.06.2015, PW-1 – Smt. Fatma lodged First Information Report vide C.R.No.569 of 2015 (for short “**FIR**”) alleging that on 08.06.2015, her son Rizwan (4 ½ years old) was killed by accused (for convenience Appellant shall be referred to as accused). PW-13 - Duty Officer in Mumbra Police Station registered the FIR. According to prosecution, PW-1 lived separately at Mumbra with her three children, viz; Nagma (PW-8), Alina and Rizwan. Her husband Nazim Shaikh lived separately in Gaondevi area. Accused was her paramour and used to visit her house frequently and lived with her; he forced her children to address him as daddy instead of Billa uncle and would regularly assault them; out of fear sometimes the children used to call him ‘daddy’; however accused used to bear all expenses of Fatma and the children, but did not like their frequent disturbances and presence while spending time with Fatma and used to get angry on them.

2.2. Incident happened on 08.06.2015; at about 11:30 a.m. Accused was having breakfast; at that time Rizwan consumed milk with bournvita; since he was hungry ate egg and bread; however after eating, Rizwan started vomiting. This enraged accused and he assaulted Rizwan with belt upon which Rizwan started crying loudly; this further enraged accused; at this time PW-8 and PW-1, both intervened to save Rizwan from his enagement and anger and anticipated beating from accused; accused twisted Nagma's right hand and pushed her and Fatma aside; thereafter he took the remote lying nearby, increased the volume of TV which was playing on to camouflage the loud crying of Rizwan and inflicted 5 to 6 blows with the remote on Rizwan's head to reprimand him. Rizwan became unconscious and accused left the house thereafter.

2.3. Later in the day accused threatened PW-1 and PW-8 that if they disclosed the incident to anyone he would kill PW-8 and Alina, hence PW-1 out of fear informed the doctor about Rizwan suffering an epileptic attack and having a fall and getting injured.

2.4. PW-1 took Rizwan to Bilal Hospital in Mumbra where PW-11 examined him at about 6:30 p.m. and found the following injuries:

- (a) Bruise over right hypochondric region 3 cm;*
- (b) Bruise 3 cm mid of chest;*
- (c) Bruise 2 cm left cheek;*
- (d) Swelling over head 2 cm x 1 cm right frontal region.*

2.5. PW-11 issued medical certificate at Exh.60 certifying that all four injuries were simple injuries; thereafter Rizwan was admitted to Sion Hospital at about 10:17 p.m. on the same day in an unconscious state and he remained unconscious till his death on 13.06.2015 at about 12:30 a.m.

2.6. On the basis of FIR, CR No. 569 of 2015 came to be registered at Mumbra Police Station against accused under offences punishable under Sections 302, 325 and 506(2) IPC. After completing spot panchanama, recovery and seizure panchanama, receiving PM report and all relevant documents, charge-sheet was filed before the Judicial Magistrate First Class (JMFC) for offences punishable under the aforesaid Sections. Since the offence under Section 302 IPC is exclusively triable by the Court of Sessions, learned JMFC committed the case for trial to the learned Sessions Court. Charge against accused was framed at Exh.7 for offences punishable under Sections 302, 325 and 506(2) IPC and contents thereof were read out and explained to accused in vernacular language; accused pleaded not guilty and claimed to be tried. Defence of accused gathered from the cross-examination and statement recorded under Section 313 of the Criminal Procedure Code (for short "**CrPC**") is of total denial.

3. Prosecution examined 13 witnesses in all to bring home the guilt of accused; PW-1 - Fatma Nazim Shaikh is mother of deceased Rizwan as well as first informant/complainant; PW-2 - Iqbal Abdul

Razak, PW-3 – Ravikumar Walmiki and PW-13 – Dilip Mango Patil are police panchas/witnesses; PW-4 - Mahesh Rohidas Sable conducted the post-mortem of Rizwan's dead body and prepared the PM Report; PW-5 - Dattatray Vilas Thakur, treated injured Nagma for the fracture on her hand; PW-6 - Hajra Abdul Kadir Shaikh and PW-7 – Nasreenbanu Julfikar Sayyed are neighbours of PW-1; PW-8 Nagma Najim Shaikh is the elder sister of Rizwan, 13 years old and injured child eye witness; PW-9 Juber Husain Shaikh is brother of PW-1; PW-10 - Sadiq Qadir Bagwan is the Investigating Officer (I.O.); PW-11 - Dr. Nizamudin Sayyed Mohd Anis is the Doctor who examined Rizwan at Mumbra and PW-12 - Kishore Yuvraj Khodke.

4. Mr. Aniket Vagal, Advocate appearing for Appellant/accused made the following submissions: -

(i) that PW-1 turned hostile and did not support the prosecution case; she has specifically deposed that Rizwan suffered from epilepsy and due to an epileptic attack had a fall and sustained head injury; although PW-1 turned hostile, learned Advocate has argued that her deposition be taken into consideration to discern Rizwan's medical history which creates a doubt in the prosecution's case that Rizwan was assaulted;

(ii) that there is no evidence against accused except that of PW-8; PW-8 was 11^{1/2} years old at the time of incident and her age cannot be ignored since being a child witness she was susceptible to being

tutored and her deposition should therefore not be considered in the absence of corroborative evidence; since there is no material corroboration of PW-8's evidence, accused is entitled to benefit of doubt;

(iii) Hence, he has prayed for setting aside of the impugned Judgment.

5. Mr. Ajay Patil, learned APP appearing for Respondent in support of the prosecution's case submitted that evidence given by PW-8, the eyewitness in this case is supported by the evidence given by PW-6, PW-7, PW-9 and corroborated by the medical evidence; evidence of PW-8 cannot be brushed aside on the ground of she being a child witness as she herself is an injured witness sustained a fracture during the incident; hence due to the injury sustained by PW-8 the weight of her evidence is naturally greater than any ordinary witness. Hence, he has prayed for dismissal of the Appeal.

6. We have heard the learned Advocates appearing for the Appellant/accused and the learned APP and with their able assistance perused the entire evidence on record.

7. It is seen that on 09.06.2015, PW-8 was taken to Sion Hospital by her uncle (PW-6) for checkup due to swelling on her right hand; out of fear PW-8 mentioned that she had a fall and her hand was injured; PW-5, Resident Medical Officer/doctor in Sion hospital examined Nagma and opined that there was a fracture in her hand;

Nagma was admitted to Sion Hospital for two days; her hand was bandaged in plaster and she was discharged on 11.06.2015; PW-5 issued medical certificate for PW-8's injuries which was marked in evidence as Exh.32.

8. PW-4 - Medical Officer, Sion hospital conducted autopsy on the dead body of Rizwan on 13.06.2015 at 10:15 a.m. and prepared PM Report which was marked in evidence as Exh.30.

8.1. He opined that there were three external injuries observed by him as under:-

- (i) contusion of size 5 x 4 cm present over left zygomatic region of face-bluish black in color;*
- (ii) contusion of size 4 x 4 cm present over right side of chest in between midline and nipple-bluish black in colour; and*
- (iii) therapeutic injection mark for central line present over right infraclavicular region at middle one third.*

8.2. He also certified the following internal injuries:-

- (i) Under scalp hemorrhage of size 10 x 6 cm over frontal region, dark reddish in colour; sub dural hematoma present over right fronto temporo parietal region containing about 50 cc blood and blood clots and thin layer of subarachnoid hemorrhage present over whole cerebral cortex; and*
- (ii) Thorax: congested brain; contusion present over lower lobe of right lung at anti year aspect of 4 x 3 x 1 cm and opined the cause/probable cause of death "Shock*

due to head injury (unnatural).

9. PW-2 and PW-3 are pancha witnesses; PW-2 vide panchanama being Exh.18 identified the spot of incident, whereas PW-3 witnessed recovery and seizure of one brown coloured 122 cm long leather belt having steel buckle and white colour remote control of Videocon d2h set top box/TV; seizure report was marked in evidence as Exh.23; thus incriminating articles used by accused were proved in evidence by prosecution.

10. PW-6 Hajra Abdul Kadir Shaikh is neighbour who met PW-8 at about 5:00 to 5:30 p.m. and was informed by her that accused assaulted Rizwan and PW-1 had taken him to hospital.

11. PW-8 - Nagma Nazim Shaikh is the injured child eye witness to the incident; she was 11^{1/2} years old at the time of incident. In 2015, PW-8 resided with PW-1 (her mother) and her younger siblings Alina and Rizwan. In her deposition, PW-8 has stated that her father lived separately; that accused would visit their house frequently and also reside with them; that she and her siblings would address the accused as 'Billa Uncle', but he would force them to call him 'daddy'; that accused would also regularly assault PW-1, PW-8, Alina and Rizwan. She has further deposed that on 08.06.2015, PW-1 gave milk and bournvita alongwith egg and bread to Rizwan and after eating he vomited. Accused was enraged and beat Rizwan, since he started

crying loudly, he closed the door and windows and increased the TV volume and beat him with his belt; at that time she intervened to save Rizwan, but accused twisted her hand with force injuring her, thereafter PW-1 intervened to save Rizwan and PW-8, but accused assaulted PW-1 and thereafter accused assaulted Rizwan with the remote 5 to 6 times on his head and Rizwan became unconscious. Thereafter accused left and PW-1 took Rizwan to hospital. Accused later in the day returned home and threatened PW-1 and her that if they disclosed the incident to anyone he would kill Alina and her; that PW-8 was later taken to Sion Hospital by PW-9 (her uncle) for treatment where it was found that her hand was fractured. PW-8 identified accused and articles i.e. article No.1 (leather belt with steel buckle) and article No.2 (TV remote).

12. From the above deposition of PW-8, it is discernible that evidence given by PW-8 - Nagma corroborates and supports the deposition of PW-7 and PW-6. Deposition of PW-8 proves the presence of accused at the spot of incident on the date and time of incident. Evidence of PW-8 who is herself an injured witness is also corroborated by medical evidence given by PW-5, doctor who treated her. PM notes at Exh.30 clearly identify the injuries caused to Rizwan. Recovery evidence proved on record through PW-2 and PW-3 about the articles recovered and seized clearly support and corroborates PW-8's deposition. In this backdrop, though PW-1 - Fatma has turned

hostile, the evidence led by prosecution alluded to herein above will have to be reappreciated in its proper perspective.

13. The settled legal position as enunciated by Apex Court pertaining to admissibility of testimony of child witness is well entrenched by the following citations:-

(i) In the case of ***Nivrutti Pandurang Kokate and Ors. Vs. State of Maharashtra***¹, the Apex Court in paragraph Nos.7 to 9 of the Judgment while dealing with and enumerating the law relating to admissibility of testimony of child witness has held as under:

“7. The age of the witness during examination was taken to be about 12 years. The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States 159 US 523. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See Suryanarayana v. State of Karnataka MANU/SC/0001/2001 : 2001CriLJ705]

8. In Dattu Ramrao Sakhare v. State of Maharashtra MANU/SC/1185/1997 : (1997)5SCC341 it was held as follows: (SCC p. 343, para 5): A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evi-

¹ AIR 2008 SC 1460 :: (2008) 12 SCC 565

dence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

9. *The above position was highlighted in Ratansingh Dalsukhbhai Nayak v. State of Gujarat MANU/SC/0841/2003 : 2004 CriLJ 19 . Looked at from any angle the judgments of the trial court and the High Court do not suffer from any infirmity to warrant interference.”*

(ii) In the case of ***Shamim Vs. State (GNCT of Delhi)***² in paragraph No.14 the Apex Court has held as under:-

“14. In State of U.P. v. Krishna Master and Ors., MANU/SC/0553/2010 : (2010) 12 SCC 324, disagreeing with the High Court which had doubted the credibility of a child witness, it was observed:

“36. ... This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in his memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the Respondents by firing gunshots. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory

2 AIR 2018 SC 4529 :: (2018) 10 SCC 509

when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.

37. This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which the reliable testimony of PW 2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

14. In view of the above settled legal position, in the present case PW-8 has witnessed the assault on her brother Rizwan and has also been injured by accused; therefore it is highly improbable that PW-8's understanding and recalling of the incident wherein she herself tried to intervene and prevent the assault on her brother's life can be incorrect or disbelievable. To discard her testimony would be doing injustice to the child who has witnessed the entire incident unfolding before her own eyes. Minute perusal of her deposition and cross-examination shows that she is a fully reliable witness and there is no obstacle in the way of us accepting her evidence as admissible.

15. From the evidence of PW-9 it is further gathered that accused had after the incident paid visit to the hospital and met PW-1. PW-1 - Fatma in her evidence has stated that Appellant used to bear all household expenses of her and her three children. Hence, on reading of the entire evidence on record it can be gathered that the unfor-

fortunate incident occurred on the sudden spur of the moment which was triggered by the vomiting by Rizwan, this was further escalated by his loud crying/screams and thereafter in a heat of passion accused used the belt and remote which was lying closeby to inflict blows on Rizwan's head; vide Exh.22 Appellant has himself on 19.06.2015 voluntarily produced the leather belt and TV remote with which he assaulted Rizwan. Though PW-1 - Fatma has turned hostile, PW-8 - Nagma has witnessed the entire incident; there is no evidence of any person tutoring Nagma, however facts and circumstances in which the entire incident occurred certainly proves that it was not premeditated; that accused did not have any intention to commit the crime of murdering Rizwan nor had he planned the assault; hence the accused will have to be given the benefit of doubt.

16. In this context before we state our observations and findings on the above, it will be apposite to refer to the relevant provisions of IPC. Sections 299 and 300 IPC define the offences of culpable homicide and murder respectively and read thus:

"299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have

caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

300. Murder.— *Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.—When culpable homicide is not murder.—*Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.—*Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising*

such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

17. Sections 302 and 304 IPC prescribe the punishment for the offence of murder and that of culpable homicide not amounting to murder respectively and read thus:

"302. Punishment for murder.—Whoever commits murder shall be punished with death or 1[imprisonment for life], and shall also be liable to fine."

"304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with 1[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."

[emphasis supplied]"

18. The Trial Court has convicted and sentenced the Appellant for the offence of murder (as defined in Section 300 IPC) under Section 302 IPC. In view of the above discussion, in our considered opinion the conviction and sentence passed by the Trial Court calls for reconsideration due to the following reasons.

18.1. Exception 4 to Section 300 IPC outlines a situation where culpable homicide does not amount to murder. There are three requirements for this exception to apply:

- (i) the act of killing is committed without premeditation;
- (ii) the act of killing is committed in a sudden fight in the heat of passion upon a sudden quarrel; and
- (iii) the offender should not have taken undue advantage or acted in a cruel or unusual manner.

18.2. In the present case, the aforesaid three requirements of Exception 4 to Section 300 IPC have been satisfied as under:

- (i) From appreciation of evidence as a whole it is clearly discernible that there was no premeditation, preparation and/or intention harboured by accused to commit the act of killing Rizwan;
- (ii) evidence given by the sole eyewitness i.e. PW-8 proves that the incident occurred because of the sudden vomiting and loud crying of Rizwan which provoked the

accused and in a heat of passion/sudden spur of moment he assaulted Rizwan with the belt and remote which were lying nearby;

(iii) that the articles used for assault were picked up by Appellant in a fit of rage which were lying next to him and in the strictest sense were not dangerous weapons and hence it cannot be reasonably said that he acted in an unusual manner.

19. On the basis of the above, we conclude that, though accused had knowledge that his act of assaulting Rizwan on his head with the TV remote and leather belt would be likely to cause his death but he had no intention to do so. Such an act does not travel beyond the offence of culpable homicide (as defined in Section 299 IPC) not amounting to murder. Punishment for culpable homicide not amounting to murder has been prescribed under Part II of Section 304 IPC. Facts and evidence alluded to hereinabove alongwith our observations come within the ambit of Part II of Section 304 IPC. As such, the Trial Court erred in convicting and sentencing the accused for the offence of murder under Section 302 IPC.

20. In view of the above discussion and findings, we are of the firm opinion that accused, in a heat of passion, acted in a manner that he knew is likely to cause death of Rizwan but without the intention to

kill him. According to us, the act of Appellant falls within the purview of Exception 4 of Section 300 of IPC. Hence following order:-

- (i) Appellant is convicted under Section 304 (Part II) of IPC and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 25,000/-, in default of payment of fine to suffer further rigorous imprisonment for one year;
- (ii) Appellant is entitled for set off of the period already undergone in jail;
- (iii) Appellant shall be released on the completion of the sentence unless required in any other case / cases;
- (iv) Appeal is partly allowed in the aforesaid terms.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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