

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1355 of 2018

Arising Out of PS. Case No.-58 Year-2010 Thana- KHARHAGPUR District- Munger

Shankar Pandit S/o Lali Khiju Pandit, Resident of Village-Dhundhaladeh,
P.S.-Kharagpur, Distirct-Munger.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1337 of 2018

Arising Out of PS. Case No.-58 Year-2010 Thana- KHARHAGPUR District- Munger

Narayan Pandit S/o Late Hari Pandit, Resident of Village- Dhundhaladeh,
P.S.- Kharagpur, District- Munger.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1338 of 2018

Arising Out of PS. Case No.-58 Year-2010 Thana- KHARHAGPUR District- Munger

Paltu Kumar Pandit @ Surendra Kumar Pandit @ Ramkumar Pandit S/o
Nago Pandit @ Nageshwar Pandit, Resident of Village- Dhundhaladeh, P.S.-
Kharagpur, District- Munger.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 1341 of 2018

Arising Out of PS. Case No.-58 Year-2010 Thana- KHARHAGPUR District- Munger

1. Nago Pandit S/o Late Khiju Pandit,
2. Jogi Pandit, S/o Late Thakur Pandit,
3. Bhuneshwar Pandit, S/o Lakhon Pandit,
4. Umesh Pandit, S/o Late Gaini Pandit,
5. Bigan Pandit, S/o Late Thakur Pandit, All are resident of Village-
Dhundhaladeh, P.S.- Kharagpur, District- Munger.

... .. Appellants

Versus



The State Of Bihar Respondent

with
CRIMINAL APPEAL (DB) No. 1370 of 2018

Arising Out of PS. Case No.-58 Year-2010 Thana- KHARHAGPUR District- Munger

Bibhishan Pandit Son of Hari Mohan Pandit, resident of Village- Ghughla
Dih, P.S.- Gangta Kharagpur, District- Munger.

... .. Appellant

Versus

The State Of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 1355 of 2018)

For the Appellant/s : Mr.Binod Kumar, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 1337 of 2018)

For the Appellant/s : Mr.Binod Kumar, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 1338 of 2018)

For the Appellant/s : Mr.Binod Kumar, Advocate

For the Respondent/s : Mr.Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 1341 of 2018)

For the Appellant/s : Mr.Binod Kumar, Advocate

For the Respondent/s : Mr.Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 1370 of 2018)

For the Appellant/s : Mr.Ajit Kumar Singh, Advocate

For the Respondent/s : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH

SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 26-07-2023

Heard learned counsel for the appellants and learned A.P.P.
for the State.

2. By the judgment of conviction dated 05.09.2018 and the
order of sentence dated 07.09.2018/13.09.2018 passed by Sri
Tribhuvan Nath, Additional Sessions Judge-1st-cum-Special



Judge (SC/ST and POCSO Act), Munger in Sessions Trial No. 12/2013 arising out of Kharagpur P.S. case No. 58/2010/C.S. No. 2441/2013 whereby and whereunder the appellant Shankar Pandit (Cr. Appeal No. (D.B.) No. 1355 of 2018) and the appellant Paltu Kumar Pandit @ Surendra Kumar Pandit @ Ramkumar Pandit (Cr. Appeal (D.B.) No. 1338 of 2018) have been convicted for the offences under Sections 302/149 of the Indian Penal Code (hereinafter referred to 'I.P.C.') and sentenced to undergo rigorous imprisonment till death and a fine of Rs. 50,000/- and in default of payment of fine, they have been directed to further undergo additional simple imprisonment for six months. It was further directed that the period of custody undergone by the appellants during the course of trial shall be set off under the provisions of Section 428 of the Cr.P.C. **Further**, by the judgment of conviction dated 05.09.2018 and the order of sentence dated 18.09.2018 passed by Sri Tribhuvan Nath, Additional Sessions Judge-1st-cum-Special Judge (SC/ST and POCSO Act), Munger, in Sessions Trial No. 12A/2013, arising out of Kharagpur P.S. case No. 58/2010/C.S. No. 2441/2013, the appellant Narayan Pandit (Cr. Appeal (D.B.) No. 1337 of 2018), appellants Nago Pandit, Jogi Pandit, Bhuneshwar Pandit, Umesh Pandit and Bigan Pandit (appellants in Cr. Appeal (D.B.) No.



1341 of 2018) and appellant Bibhishan Pandit (Cr. Appeal (D.B.) No. 1370 of 2018) have been convicted for the offences under Sections 302/149 of the I.P.C. and sentenced to undergo rigorous imprisonment till death and a fine of Rs. 50,000/- and in default of payment of fine they have been directed to further undergo additional simple imprisonment for six months. It was further directed that the period of custody undergone by the appellants during the course of trial shall be set off under the provisions of Section 428 of the Cr.P.C.

3. The prosecution case, as per the written report of informant, namely, Ghanshyam Pandit is that on 01.03.2010 at about 8:30 p.m. after taking meal, the informant along with family members was going to sleep in the meantime his neighbour Pintu Kumar Pandit called informant's father namely Kailash Pandit to open the door. Then he called informant's younger uncle Ramnath Pandit to open the door for taking medicine. Informant's mother Pancha Devi opened the door and as soon as the door was opened, the accused persons including the appellants along with 7-8 unknown persons in uniform having S.L.R., Rifle, Farsa and sword in their hands entered into informant's house and tied both hands of informant's father and took towards south after assaulting him. The family members of



the informant along with others started crying and followed the accused persons. The accused persons took informant's father in front of the house of Bichcho Shaw and on the orders of Narayan Pandit, Shankar Pandit beheaded the informant's father and closed the family members of the informant in the house of Mukesh Yadav. The accused persons threatened that if any one would disclose the incident, then whole family will be killed. The informant saw the whole occurrence by hiding him inside the bamboo bushes. After killing the informant's father, the accused persons went towards west raising slogan 'Maowadi Zindabad' and left the place of occurrence. The informant and family members, out of fear, hid themselves in the house. In the next morning, the informant also got information that accused persons had also killed the Chowkidar Kamleshwari Pandit by beheading him and two purchas were left at the place of occurrence in which it was written in red ink that the same punishment will be given to the spy of the police. On the basis of written report of the informant, Kharagpur P.S. case No. 58/2010 was registered under sections 147, 148, 149, 302, 379, 121A, 122, 124A of the Indian Penal Code and Sections 10 and 13 of U.A.P.A. Act.. The police after investigation submitted charge-sheet against the appellants. The cognizance of the offence was taken by the



learned jurisdictional Magistrate and thereafter the case was committed to the Court of Sessions. Charges were framed against the appellants on which they pleaded not guilty and claimed to be tried.

4. During the trial, in order to substantiate the charges against the accused persons, the prosecution examined as many as ten witnesses, namely, PW1 Pancha Devi, PW2 Teepu Pandit, PW3 Ghanshyam Pandit (informant), PW4 Baijnath Pandit, PW5 Mukesh Kumar, PW6 Shobha Devi, PW7 Shamshad Ali, PW8 Manish Kumar Anand, PW9 Chandrika Prasad and PW10 Md. Mustafa. The prosecution has also produced exhibits namely, Ext. 1 written report, Ext. 2 and 2/1 (inquest reports), Ext. 3 and 3/1 (post-mortem reports) The defence has also produced two witnesses in support of its defence viz. DW1 Babu Lal Pandit and DW2 Chunchun Pandit. The defence has also produced exhibits viz. Ext. A certified copy of charge-sheet of Kharagpur P.S. case No. 195/04 and Ext. B certified copy of judgment of Sessions Trial No. 209/2001. Thereafter, the statements of the appellants were recorded under section 313 of the Cr.P.C and after conclusion of the trial, the learned trial Court convicted the appellants in the manner stated above.



5. Learned counsel for the appellants submitted that the judgment of conviction suffers from several infirmities that have been overlooked by the learned trial Court and therefore, the impugned judgment is not sustainable in the eyes of law. The learned trial court has not appreciated the evidence brought on record by the prosecution properly. It has been contended that the prosecution has miserably failed to prove the place of occurrence to the satisfaction of the court, in the light of the material contradiction between the deposition of the prosecution witnesses and the documentary evidence brought on record. It has been argued that the presence of informant and the wife of deceased at the alleged place of occurrence is also doubtful, taking into account the testimony of other witnesses. It has been further argued that there is no evidence whatsoever to show that the appellants were properly identified by the Informant or other witnesses, as there is no whisper of any source of identification in the deposition of any of the prosecution witnesses. Furthermore, the learned counsel for the appellants asserts that there is unreasonable delay in lodging of the FIR in connection with the present case. Another argument advanced by the learned counsel for the appellants is that the learned trial Court has also failed to appreciate that during trial, the prosecution has not



produced the Investigating Officer, who conducted the substantive investigation, as a prosecution witness and no explanation in this regard has been put forth, which has caused prejudice to the appellants. Therefore, it has been argued that on these scores of the judgment of conviction, assailed in the present appeal, be set aside, the appellants be acquitted of the charges and set free from custody.

6. Learned A.P.P. appearing for the State, on the other hand, has rebutted the arguments advanced by learned counsel for the appellants. It has been submitted that the judgment of conviction and order of sentence under challenge require no interference as the prosecution has been able to prove the case beyond all reasonable doubts. It has been contended that the witnesses have been consistent in their depositions and there does not remain any lacuna in case of the prosecution. The minor inconsistencies in the testimony of the witnesses cannot be a ground to reject their evidence as a whole. Further, it has been submitted that non-examination of the Investigating Officer would *per se* not make the appellants liable for acquittal and there has been no demonstration of any prejudice which has been caused to the appellants. Moreover, there is no unreasonable delay in lodging of the FIR. So far as the non-revelation of source of identification



by the prosecution witnesses is concerned, the same has not been controverted by the learned A.P.P. However, it has been submitted that the appellants could have been identified when they allegedly entered the house.

7. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issues arise for consideration in the present appeal:

(I) Whether the prosecution has established the place of occurrence beyond all reasonable doubt?

(II) Whether the prosecution has been able to establish beyond all reasonable doubts the presence of PW 1 and PW 3 at the place of occurrence at the time when the alleged occurrence has taken place?

(III) Whether the non-disclosure of any source of identification by the prosecution especially when alleged occurrence is said to have taken place at 8:30 pm at night casts doubts on the prosecution's case?

(IV) Whether the non-examination of investigating officer who has carried the substantive investigation has caused prejudice to the trial of appellants?



(IV) Whether the delay in instituting the FIR on the written statement of the informant (PW 3) casts doubt on the case of the prosecution?

8. In order to deal with the first issue, we have given our anxious consideration over the deposition of PW 1 (mother of the informant) and PW 3 (informant). It is found that PW 3 in his deposition as well as in written report has stated that appellants had beheaded his father (deceased) in front of the house of one, Bichcho Shaw. However, in cross-examination, he has further clarified that the incident had taken place on the road located in the west adjacent to the house of Bichcho Shaw. Further, PW 1 in her deposition also confirmed that the beheading had taken place at the aforementioned place of occurrence. However, in sharp contradistinction to such testimony of PW 1 and PW 3, it has been deposed by PW 2 that the alleged occurrence has taken place at his doorstep. Thus, it is apparent that there is severe inconsistency in the testimony of PW 1 and PW 3 on one hand and PW 2 on the other hand with regard to the place of occurrence. Moreover, both PW 1 and PW 3 have explicitly stated in their deposition that the Investigating officer seized the blood from the stated place of occurrence. However, despite their assertions, there is no seizure list on record that specifically



indicates wherefrom the blood was allegedly seized. Furthermore, upon examining Ext.2 (inquest report), it becomes evident that the indicated place of occurrence is a Kaccha Road located to the west, adjacent to the house of one Kishun Shaw. Thus, considering the facts of this case as indicated above, the place of occurrence remains smeared in doubts. Such a fundamental defect casts reasonable doubts as to the genuineness of the prosecution's case. In this regard, it would be pertinent to take note of the decision of the Hon'ble Supreme Court passed in the case of *Syed Ibrahim versus State of Andhra Pradesh, reported in (2008) 10 SCC 601*, wherein it has been held that when the place of occurrence itself has not been established, it would not be proper to accept the version of the prosecution.

In view of the facts and circumstances of the case and considering the legal position as discussed above, we are of the considered opinion that the prosecution has not been able to prove the place of occurrence beyond all reasonable doubts.

Accordingly, the first issue is decided in *negative*.

9. In order to deal with the second issue as formulated above, we have carefully perused Ext-1, which is written report given to police, wherein informant has narrated that the deceased was done to death by the appellants. It has been clearly stated



therein that the family members of the deceased followed the accused as they were taking away the deceased near the house of one Bichcho Shaw where they murdered him and thereafter, they forcefully confined family members in the house of one Mukesh Yadav. Further, it states that informant (PW3) witnessed the entire incident from a hiding spot in the bamboos adjacent to the place of occurrence. However, in contrast to this account, PW 2, in his cross-examination has categorically stated that the incident took place at his doorstep and none of the family members of the deceased were present at the time of occurrence. The informant (PW 3), deceased's wife (PW 1) and other family members arrived at the place of occurrence half an hour after the incident. Thus, we find that there is clear contradiction regarding the claim of PW 1 and PW 3 being present at the place of occurrence during the time of incident. Moreover, we have taken note of the fact that the evidence of Mukesh Yadav was not brought on record, nor of the neighbors whose houses were situated between the informant's house and the alleged place of occurrence. Therefore, based in the facts and circumstances discussed above we are of the considered opinion that the prosecution has not been able to prove the presence of the informant (PW 3) and deceased's wife



(PW 1) at the alleged place of occurrence beyond reasonable doubts.

Accordingly, the second issue is decided in *negative*.

10. With regard to third issue as formulated above, upon the perusal of entire material available on record it has come to fore that the occurrence has taken place at 8:30 pm night on 01.03.2010. However, PW 3 (informant) in his written information to police has explicitly named the appellants as well as 7-8 other unknown accused persons as being involved in the incident. Similarly, PW 1, has also deposed the name of appellants during her testimony. However, it is important to note that the PW 1 and PW 3, who contend to be the eyewitnesses to the alleged occurrence, have not disclosed any source of light through which they identified the appellants. It is found that prosecution has neither brought on record anything nor given any explanation as to how the appellants were identified in absence of any source of light. This omission raises questions about the reliability and accuracy of their identifications. Furthermore, it is found that PW 1 has claimed that the appellants' faces were not covered, whereas PW 5 and PW 6 have deposed that the accused persons had their faces covered. Thus, it can be safely gleaned that there is apparent inconsistency and contradiction in the



evidence of prosecution witnesses. Moreover, there is no whisper of identifying the appellants through their voices made. Also, during the course of trial, informant (PW 3) in his evidence has explicitly stated that no test identification parade was conducted. This further casts doubt on the credibility of the identifications made by PW 1 and PW 3. At this juncture, we would gainfully rely on the decision rendered by the Hon'ble Supreme Court in the case of ***Ram Narain Singh versus State of Punjab (1975) 4 SCC 497***, wherein the Hon'ble Apex Court observed the following:

“On the day of the occurrence i.e. October 2, 1972, it would be quite dark at 8-00 P.M. and unless there was some light burning in the house it would be difficult for the witnesses to have identified the assailants and to have given such a graphic description of the occurrence... .. There also the accused could not be identified because there is no evidence of any witness to show that any light was burning there, nor does any of the eye witnesses say that he had identified the accused by voice. For these reasons, therefore, we are convinced that even accepting the prosecution case at its face value, if the occurrence took place at 8-00 P.M. the possibility of mistake in identification cannot be excluded in the present circumstances.”

Therefore, applying the aforesaid view of the Hon'ble Supreme Court in the given facts of the case, we reach to the conclusion that in the absence of revelation of any source of



identification by the prosecution, the evidence with regard to identification of the appellants is not sufficient so as to connect the appellants to the said offence. Besides, with appellants they are not on cordial terms, and relations between them are admittedly inimical. Therefore, false implication of the appellants, on mere suspicion cannot be entirely ruled out.

Accordingly, the third issue is decided in *affirmative*.

11. Adverting to the fourth issue at hand, a thorough examination of the case records reveals a significant omission on the part of the prosecution. It is evident that the Investigating Officer, who conducted the substantive investigation, has not been examined in this case. Instead, PW 7 and PW 8, who conducted the formal investigation, have been presented as witnesses. However, in the facts of the present case, the darkness surrounding the place of occurrence, the collection of blood samples, holding of test identification parade and other crucial aspects would have been dispelled if the examination of the Investigating Officer had been conducted. It is germane to the issue at hand to underscore the pivotal role of the Investigating Officer in establishing the place of occurrence and circumstances surrounding the occurrence through the presentation of evidence, including searches and seizures, and statements of the key



witnesses. It is pertinent to note that examination of the investigating officer enables the accused's significant right to highlight contradictions in the statements made by witnesses during the investigation, as recorded by the Investigating Officer. This right holds considerable weight, as it allows the defense to effectively demonstrate that the witness has provided inconsistent testimony compared to their earlier statements before the Investigating Officer. Thus, by not examining the Investigating Officer who has carried the substantive investigation, an essential aspect of the investigation has been overlooked, which could have a significant impact on the outcome of the trial. However, we must also highlight that non-examination of investigating officer in every case will not result in the vitiation of the trial when accused is not likely to suffer any prejudice. Nonetheless, in certain circumstances, where the non-examination of the investigating officer has seemingly caused prejudice to the appellants, it can significantly affect the prosecution's case. In the present case, the circumstances indicate that the prosecution has attempted to suppress certain material witnesses, including the Investigating Officer, without providing any reasonable justification. In the case of *State Of Karnataka versus Bhaskar Kushali Kotharkar And Ors., (Cr. Appeal no. – 498 of 1998)* the



Hon'ble Supreme Court while highlighting the importance of examination of Investigating Officer, observed:

“It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr. P.C. or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr. P.C.”

We also put reliance on the decision rendered by Hon'ble Supreme Court in the case of ***Ravishwar Manjhi v. State of Jharkhand***, reported in ***(2008) 16 SCC 561***, wherein the Hon'ble Apex Court in paragraph 27 has held as follows:

“27. The investigating officer in a case of this nature should have been examined. His examination by the prosecution was necessary to show that there had been a fair investigation. Unfortunately, even no site plan was prepared. There is nothing on record to show as to the exact place where the occurrence had taken place. It is stated that the house of the parties is divided by a road. If that be so, it was all the more necessary to pinpoint the exact place of occurrence to ascertain who was the aggressor.”

Therefore, applying the aforesaid proposition of law as held by the Hon'ble Supreme Court in the given facts of the case, we reach to the conclusion that in the present case, the non-examination of the Investigating Officer, who conducted the



substantive investigation, undeniably prejudiced the accused, as the actual place of occurrence remains unverified, and the accused have been deprived of the opportunity to challenge the credibility of the prosecution witnesses through questioning of the Investigating Officer. Therefore, in our considered opinion, the failure to examine the Investigating Officer in this case constitutes a significant flaw that has caused prejudice to the case the appellants.

Accordingly, the fourth Issue is decided in **affirmative**.

12. Now coming to the fifth issue, which is regarding delay in lodging of the F.I.R. upon the written report of the informant. It is found that the F.I.R. in connection with the present case was lodged on 02.03.2010 at about 01:00 p.m., whereas the incident took place on 01.03.2010 at 8:30 p.m. Thus, virtually there is 16 hours delay in lodging of the F.I.R. The police station was situated at a distance of 13 kms. from the place of occurrence. Considering the fact that there is prevailing enmity between the parties, such delay raises suspicion when there is no explanation whatsoever coming forth from the prosecution. It is well established that there should be promptness in lodging of the F.I.R to obtain the earliest information regarding the incident and to make the investigation just and fair and to avoid any possible



foul play. Such delay often results in concoction and embellishment of the occurrence. Thus, it is necessary for the prosecution to satisfactorily explain such delay to withhold the court to draw suspicion. At this juncture, it would be pertinent to take note of the decision of the Hon'ble Supreme Court passed in the case of ***Bhagaloo Lodh v. State of U.P.***, reported in **(2011) 13 SCC 206**, wherein the Hon'ble Apex Court in paragraph 27 has held:

“10. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case there is some delay in filing the FIR, the complainant must give explanation for the same. In absence of such an explanation, the delay may give presumption that allegations/accusations were false and had been given after thought or had given a coloured version of events. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. (Vide Sahib Singh v. State of Haryana [(1997) 7 SCC 231 : 1997 SCC (Cri) 1049 : AIR 1997 SC 3247] ; Gorige Pentaiah v. State of A.P. [(2008) 12 SCC 531 : (2009) 1 SCC (Cri) 446] and Kishan Singh v. Gurpal Singh [(2010) 8 SCC 775 : (2010) 3 SCC (Cri) 1091 : (2010) 3 SCC (Civ) 583 : AIR 2010 SC 3624] .)”

In the light of the discussions made above, this Court is of the view that such unreasonable delay as aforesaid casts dark clouds of suspicion and is certainly fatal to the case of the prosecution.



Accordingly, the fifth Issue is decided in **affirmative**.

13. In light of the legal position as discussed above and on the basis of the findings arrived at on the issues formulated above, we are of the considered opinion that the conviction of the appellant is not sustainable in the eyes of law and the prosecution has failed to prove its case beyond all reasonable doubts.

14. Accordingly, all these appeals are allowed. The judgment of conviction dated 05.09.2018 and order of sentence dated 07.09.2018/13.09.2018 passed by Sri Tribhuvan Nath, Additional Sessions Judge-1st-cum-Special Judge (SC/ST and POCSO Act), Munger in Sessions Trial No. 12/2013 arising out of Kharagpur P.S. case No. 58/2010/C.S. No. 2441/2013 and judgment of conviction dated 05.09.2018 and order of sentence dated 18.09.2018 passed by Sri Tribhuvan Nath, Additional Sessions Judge-1st-cum-Special Judge (SC/ST and POCSO Act), Munger, in Sessions Trial No. 12A/2013, arising out of Kharagpur P.S. case No. 58/2010/C.S. No. 2441/2013, are set aside.

15. Since all the appellants viz. appellant Shankar Pandit (in Cr. Appeal No. (D.B.) No. 1355 of 2018), appellant Paltu Kumar Pandit @ Surendra Kumar Pandit @ Ramkumar Pandit (in Cr. Appeal (D.B.) No. 1338 of 2018), appellant Narayan Pandit (in



Cr. Appeal (D.B.) No. 1337 of 2018), appellants Nago Pandit, Jogi Pandit, Bhuneshwar Pandit, Umesh Pandit and Bigan Pandit (in Cr. Appeal (D.B.) No. 1341 of 2018) and appellant Bibhishan Pandit (in Cr. Appeal (D.B.) No. 1370 of 2018), are in jail custody, they are directed to be released from custody forthwith, if not wanted in any other case.

(Sudhir Singh, J)

Pankaj/-

(Chandra Prakash Singh, J)

AFR/NAFR	AFR
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