



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.876 OF 2022

Amit @ Baba s/o Rambali Gautam, Aged
about 38 years, Occ – Labor, R/o Fulfail,
Ward No. 27, Wardha.

... APPELLANT.

VERSUS

State of Maharashtra, through
PSO Wardha (City), Wardha.

... RESPONDENT.

Shri A.M. Jaltare, Advocate for the appellant.
Shri V.A. Thakare, A.P.P. for the respondent/State.

CORAM : VINAY JOSHI AND VALMIKI SA MENEZES, JJ.

CLOSED ON : 04.09.2023.

PRONOUNCED ON : 08.09.2023.

JUDGMENT : (Per : Vinay Joshi, J.)

The sole accused is convicted for the offence punishable under Section 302 of the Indian Penal Code, and sentenced to suffer imprisonment for life and to pay fine of Rs.15,000/- with default clause by the Additional Sessions Judge, Wardha in Sessions Case No.5 of 2018 vide judgment and order dated 11.11.2022, hence this appeal.

2. The few facts which are necessary to decide this appeal are that, the informant Vimal Bhagadkar (PW1) resident of Fulfail area Wardha, was staying with her three sons namely Nagesh, Mangesh (deceased), Yogesh, husband Prabhakar (PW9) and grandchildren. The deceased Mangesh was doing labour work. Accused Amit @ Baba Gautam was nearby resident, who was indulging into illicit liquor business. Deceased Mangesh was not in good terms with accused Amit @ Baba.

3. On 02.10.2017, around 8.00 to 8.15 p.m., while the informant Vimal (PW1) was at her house, her granddaughter Dhanashree aged 8 years, informed her that somebody is assaulted her father (Mangesh) near public toilet. Immediately, informant Vimal (PW1) went to the place and saw that accused Amit @ Baba was beating Mangesh by means of spade. She was threatened by the accused that if she intervened, she would also be dealt accordingly. The informant got frightened. Within short time, the informant's another son Yogesh arrived on the place on which both of them rushed to the Police Station. The informant Vimal (PW1) lodged the report regarding the incident.

4. Initially, the Police registered the crime vide Crime No.23 of 2017 for the offence punishable under Sections 307 and 506 of the Indian Penal Code (IPC), which triggered to commence the process of investigation. The Panchanama of the scene of the offence was drawn. The injured was shifted to the Government Hospital where he succumbed to the injuries on 15.10.2017. The accused came to be arrested. At the instance of the accused, broken handle of spade was seized by drawing the Panchanama. Cloths and necessary articles were sent for chemical analyzation. The statement of witnesses have been recorded. After completing all formalities of investigation, final report came to be filed. The accused denied the charges and put the prosecution to the task of establishing levelled charges with requisite standard of proof. The prosecution has examined in all 17 witnesses to bring home the guilt of accused. The prosecution also banks upon certain documents to substantiate its case. The defence of accused is of total denial and false implication.

5. The prosecution case heavily rests upon the solitary eye-witnesses i.e. informant Vimal (PW1). Though the prosecution has examined two other neighboring eye-witnesses, however they remained back footed in the Court. The prosecution has examined other family

members of informant Vimal (PW1), however in true sense they are not the eye-witnesses. The prosecution evidence also consists of Panch Witnesses, Medical Officers and the Police.

6. Since the prosecution is heavily banking upon the evidence of the informant Vimal (PW1), we prefer to deal with the same. Before scrutinizing the evidence of solitary eye-witness, we have adverted our attention to the decision of the Supreme Court relied by the accused in case of *Birapa and anr. v. State of Karnataka (2010) 12 SCC 182*, wherein it is observed that, when the prosecution case rests on single eye-witness, such witness must inspire full confidence of the Court. On the same line, reliance is placed on the decision of the Supreme Court in case of *Narsinhbai Haribhai Prajapati etc v. Chhatrasinh and ors. AIR 1977 SC 1753*, wherein it is observed that in absence of inspiring confidence on the eye-witness, the prosecution case cannot be trusted. We are well aware of the legal position that the quality of evidence matters more than the quantity. Undoubtedly, if the prosecution case is based on the solitary eye-witness, the Court must cautiously evaluate the evidence of said witness to base the conviction. If the evidence of solitary eye-witness is shaky or leaves room for reasonable doubt then the benefit goes to the accused.

7. The informant Vimal (PW1) is the mother of the deceased Mangesh. It is her evidence that on 02.10.2017 around 8.00 p.m., she was at her house. At that time, her grand daughter came, informing that somebody is assaulting to her father, which led the informant to immediately rush to the spot. She saw that the accused was beating to Mangesh by means of spade. She saw that the spade was broken but the accused dealt further blows by the broken handle of spade. The accused deterred her not to intervene hence she remained silent. Thereafter, informant Vimal (PW1) along with her another son Yogesh rushed to the Wardha Police Station to lodge the report. The Police on receipt of information sent police team to the place of incident. The Police have shifted injured Mangesh to the Government Hospital, Wardha, where Mangesh succumbed on 15.10.2017.

8. The prosecution has examined Mangesh Kailaskar (PW6) and Akash Pradhan (PW7), who are nearby resident, however they favoured the accused. Prosecution has relied on the evidence of Prabhakar Bhagadkar (PW9), who is the father of the deceased Mangesh. It is his evidence that at the relevant time, he also came to know through minor Dhanashree (PW11), that somebody is beating to Mangesh. It is his evidence that immediately, the informant Vimal

(PW1) rushed to the place to which he followed after short while. When he reached to the place of occurrence, Mangesh was lying on the road. He also stated that when he reached to the place, the accused was still beating to Mangesh and then ran away. His evidence gives impression that he has reached to the spot after actual occurrence. Moreover, there are material omissions in his evidence about the actual witnessing the occurrence. These omissions have been duly established and thus, it is not safe to place reliance on his words. The prosecution has examined Yogesh Bhagadkar (PW10), who is the brother of the deceased. His evidence is not useful in true sense since as per his version he reached to the spot after the incident is over. When he went near public toilet, he saw that Mangesh was lying in pool of blood. The prosecution has examined minor Dhanashree (PW11) who has corroborated the informant's version to the extent that while she was playing some boys told her that somebody is beating to her father. Immediately, she went inside and informed the things to her grandmother i.e. informant Vimal (PW1). Thus, in true sense, the evidence of informant Vimal (PW1) is the only back bone of the prosecution case to establish the guilt.

9. Learned Counsel appearing for the informant has strongly

criticized the evidence of informant by stating that she was not present at the time of occurrence. It is argued that the conduct of the informant is highly improbable. According to the defence, it is unnatural for the informant-mother to rush to the Police Station by leaving her injured son on the spot. According to him, the natural reaction of mother would be to save her son, but instead of that she rushed to the Police Station, which improbablizes her version. In support of said contention reliance is placed on the decision of the Supreme Court in case of ***Amar Singh Vs. State (NCT of Delhi) and connected matter (2020) 19 SCC 165***. In said case, two brothers of the deceased did not make a slightest attempt to save the deceased from the assailant. In that context, their testimony was found to be unnatural and not worthy of acceptance. The said decision was squarely based on the facts of that case. Herein the victim was illiterate village lady, who was alone on the spot and had seen the assault. Considering her state of mind, her reaction in approaching to the Police instead of saving injured cannot be considered to be a circumstance to disbelieve her presence on the spot.

10. Pertinent to note that informant Vimal (PW1) is an illiterate village lady. When she went to the spot she saw that her son was assaulted. True, her priority would be to give medical treatment to her

son however her conduct otherwise cannot be a sure criteria to distrust her. Reactions of the layman cannot be put in straight jacket formula. The people use to react in their own way in horrifying condition. It reveals that the assault was from the rear handle of spade and then by broken piece of wood meaning thereby she may not have expected that assault may lead to death. Immediately, she rushed to the nearby Police Station to inform the things on which the Police went to the spot and carried the injured to the Hospital. Considering the stand of illiterate lady in the society, we cannot surely say that her action is unnatural. We could have accepted the defence submission that instead of shifting her son or going to Police Station she did nothing. Pertinent to note that after seeing horrifying assault, she has immediately rushed to the Police to inform the things as per her own understanding. Therefore, we do not accede to the defence submission that only because she has not shifted injured to the Hospital, her presence is doubtful.

11. Learned Defence Counsel has attracted our attention to the cross-examination of Mangesh Kailaskar (PW6) and Akash Pradhan (PW7), who were neighboring eye-witnesses. Since both of them did not support the prosecution case they were declared hostile. During cross-examination both of them unanimously accepted the suggestion

that after seeing the injured, they rushed to his house and informed to the mother (Vimal) about the occurrence. Pointing towards the said admission, it has been submitted that at the time of assault the informant Vimal (PW1) was at her residence only, to whom these witnesses have informed the occurrence. As a matter of fact, both witnesses have turned hostile to the prosecution, therefore, we are not inclined to rely on their admissions as it is a part of concealed hostility. Already both of them have exposed their hostility by not supporting the prosecution case. The inference which can be logically drawn that merely to support the defence, they have agreed the suggestions which cannot be relied. Prosecution has also relied on some stray admissions of PW11 Dhanashree a child witness, but much importance cannot be given to them on the context of direct evidence.

12. In addition to that, Learned Defence Counsel took us through the evidence of Police Constable Gitesh Devghare (PW12). At relevant time, he was attached to Wardha Police Station. It deposed that on said evening, he was asked by his superior to shift the injured Mangesh to the Hospital, and accordingly, he did. During cross-examination, he admits that around 10.15 p.m., the Police received telephonic information that one person was lying on the road and

accordingly, he went to that place. On that basis, it has been canvassed that initially the Police received information about Mangesh lying in the pool of blood on which Mangesh was shifted to the Hospital. The defence tried to suggest that the informant never went to the Police Station before receipt of telephonic intimation and thus, the evidence of the informant about witnessing the occurrence is not reliable. We do not agree with the said submission because Gitesh Devghare (PW12) is mere Police Constable. Neither he has received the telephonic call, nor he denied that prior to receipt of telephonic call, the informant had already reached to the Police Station. Merely, as per direction of his superior, he went to the place to shift injured Mangesh. If we look the evidence of this witness in the context of informant's version, they corroborates each other. The informant has stated that she went to the Police Station to inform the things and remained there only. She stated that while she was seated in the Police Station, the Police went to the place and shifted her son. Thus, it is apparent that after receiving the information about occurrence, the Police went to shift the injured. There may be possibility of some villagers also informing about the incident to the Police and therefore on that count, the evidence of the informant cannot be discarded.

13. Then the prosecution has relied on the seizure of weapon namely broken wooden handle (Danda) at the instance of the accused. It is the prosecution case that, initially, the accused started to assault the deceased by means of rear side of spade, which was broken. Still the accused dealt blows by the broken handle of spade, which was recovered at the instance of the accused. The prosecution has examined Pravin Meshram (PW2) who happened to be panch on various aspects. It is his evidence that while the accused was in police custody, he shown his willingness to disclose the place where the weapon (danda) was concealed. The Police have drawn memorandum Panchanama (Exhibit 45) to that effect. It was followed by the accused leading to the Panch Witnesses and Police to the cattle shed belonging to his brother. The accused has produced wooden Danda which was sealed and seized by the Police vide Panchanama (Exhibit 46).

14. The evidence of Panch Witness has been criticized on the ground that he was habitual panch. However, that by itself cannot be a reason to discard the testimony of witness if otherwise found credible. Evidence of Chandu Khonde, Head Constable (PW14) corroborates the testimony of panch witness about disclosure and consequential recovery of 'Danda' at the instance of the accused. The Police have also

seized electric bills showing that said place owned by brother of accused. Recovery of a broken piece of Danda corroborates the evidence of the informant that at the time of occurrence, spade was broken into two pieces. Evidence of disclosure and consequential seizure connects the accused with the crime.

15. The learned Defence Counsel has strongly criticized the prosecution case on the point of delay in lodgement of First Information Report. It is submitted that there happened to be inordinate delay in lodging First Information Report though the Police station was at ten minutes distance. According to him, the said delay casts doubt on the credentials of the entire prosecution case. To substantiate said contention, reliance is placed on the decision in cases of *Mahtab Singh and anr. v. State of Uttar Pradesh (2009) 13 SCC 670*, *State of Karnataka v. M.S. Basappa and ors. (2019) 16 SCC 242*, *Ashraf Hussain Shah v. State of Maharashtra 1996 CRI.L.J. 3147* and *Rupchand Chindu Kathewar v. State of Maharashtra (2009) 17 SCC 37*. We have also been taken through some of above decisions to impress that in some cases 45 minutes time gap has considered to be an inordinate delay. As a matter of fact, there cannot be a straight jacket formula as to what amount of time gap can be construed as an

inordinate delay. Always it depends upon the facts and circumstances of each case. Undoubtedly, the law expects quick lodgment of FIR which eliminates the chances of concoction. On the basis of facts of the case submission requires scrutiny.

16. It is the prosecution case that after witnessing the occurrence in between 8.00 p.m. to 8.15 p.m. The informant lady rushed to the Police Station and lodged the report. The record indicates that the Police have received the information at 23.45 p.m. on the very day and around 12.56 a.m. crime has been registered. After noticing the things, the informant lady proceeded towards the Police Station after 8.30 p.m. It is informant's case that within short time her another son came to the spot and they proceeded to Police Station. Naturally, the son and mother had consumed some time to gain senses, gather courage and then go to the Police Station. To our mind, the gap of 2 to 3 hours is quite natural and cannot be construed as an inordinate delay. One has to bear in mind that after initial intimation, the Police went to the spot and shifted the injured to the Government Hospital. Certainly, it must have consumed some time. The informant herself stated that the Police went to the spot to verify the thing whilst she remained seated at Police Station itself. Naturally, after admitting the injured

Mangesh to the Government Hospital, the Police returned and then registered the FIR. Therefore, the time gap, which is hardly of two to three hours, cannot be construed as an inordinate delay.

17. To the next, the learned Defence Counsel would submit that the prosecution has failed to establish the homicidal death which is the prerequisite to establish the charge of murder. In this regard, learned Counsel took us through the medical evidence to impress that the deceased Mangesh has sustained injuries only at the left portion of his body. In this context, our attention has been invited that, at relevant time the deceased was under influence of alcohol. According to the Defence Counsel, there was strong possibility of deceased felling on the tar road under influence and sustained injuries. In this regard, the learned defence Counsel relied on the evidence of Dr. Sandip Krushnrao Charade (PW8), who has examined the injured on admission. He has admitted that he did not notice fracture injury and the injuries are possible if a person fell in running condition. Moreover, he has admitted that there was no pattern abrasion or pattern bruises over the body. In that light, it is canvassed that the prosecution case about assault is not believable as there is strong possibility of deceased sustaining injuries by fall.

18. Evidence of Dr.Sandip Charade (PW8) unfolds that the deceased sustained total five injuries, which are as below :

- “i) Contusion 8 x 5 cm over left temporal parital on posterly.
- ii) Contusion 10 x 2 cm epigastic region of abdomen.
- iii) Contusion 10 x 2 cm on left infra scapular region.
- iv) Contusion 8 x 2 cm on left scapular region.
- v) Abrasion 2 x ½ cm o n left elbow joint.”

19. He has specifically stated that all injuries were caused by hard and blunt object. Dr. Sandip Charade has examined the weapon namely Danda and stated that those injuries are possible by means of the spade. Besides that there is specific evidence of the informant about the assault at the hands of accused. In the circumstances, only on mere speculated possibility, the evidence of eye-witness cannot be thrown out of the board. The cause of death is head injury with septicemia. The cause squarely relates to head injury hence it is a case of homicidal death.

20. Moreover, learned A.P.P. has attracted our attention to requisition letter (Exhibit 78) issued by the Police at the time of admission. Pertinent to note that the said letter bears specific reference

that the injured was assaulted by the accused namely Amit @ Baba Gautam by means of a spade. The said intimation given by the Police to the Medical Officer strongly corroborates the prosecution case and assists us to rule out the possibility of sustaining injuries by fall. Therefore, there is no substance in the submission canvassed by the defence in that regard.

21. Learned A.P.P. would submit that since the deceased has chosen head to dealt stick blows it is a case of murder. He would submit that though the death was caused by septicemia it was due to head injury and thus, the offence punishable under Section 302 of the IPC is made out. In this regard, reliance is placed on the decision of the Supreme Court in case of *Jagtar Singh and anr. v. State of Punjab (1999) 2 SCC 174* and *State of Haryana v. Pala and ors. (1996) 8 SCC 51*. Always there is thin line between the culpable homicide amounting to murder and culpable homicide not amounting to murder, depending upon the intention of accused which is to be inferred from the facts of each case.

22. The prosecution has examined Dr. Temchand Warbhe (PW13) who has conducted autopsy on the dead body on 15.10.2017.

The cause of death is opined as “due to head injury with septicemia”. The prosecution has also examined Dr. Pratapsingh Parihar (PW17) Radiologist, who has done CT scan of brain and found following injuries :

“(1) Crescent shaped blood density collection was noted in right fronto parieto temporal region of approx maximum thickness of 15 mm with buckling of underlying brain parenchyma.

(2) Multiple air foci noted in left cerebaral hemisphere, bilateral cerebellar hemispheres, cerebello pontine angle cistern prepontine cistern sellar and suprasellar region and around spinal cord suggestive of pneumocranium.

(3) Midline shift of approx 16 mm towards left side.

(4) Bony depression of left parietal bone with depression of approx 10 mm.

(5) Linear undisplaced fracture of bony nasal septum.”

23. He has expressed that there was grievous and life threatening injuries on the person of the deceased. It is apparent that the deceased sustained contusion over left temporal parietal region with left scapular region, which is opined to be a cause of death being head injury.

24. Learned defence Counsel would alternatively submits that it

is a case of death due to medical negligence. In that regard, our attention is invited to the cross-examination of Dr. Temchand Warbhe (PW13), who admits that there is post operative bony defect and multy scattered air foci noted in right temporo left-pariatal region. There was evidence of diffuse cerebral edema. It is a submission that septicemia may have been developed due to post operative complication and therefore, it is not a case of homicidal death. Coming to the plea regarding absence of proper medical treatment the argument is clearly unsustainable in view of the Explanation to Section 299 IPC. The Explanation clearly contemplates that where the 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 death might have been prevented. As noted above, the deceased sustained head injury, which resulted into developing septicemia having direct correlation with the cause of death, therefore it is a case of homicidal death.

25. The next question naturally falls for consideration is the nature of offense which accused has committed. In this regard, the learned Counsel appearing for the appellant would submit that there was no intention to cause the death. It is argued that the accused has

used rear side of spade which itself demonstrates that he did not intend to cause particular injury, with the intention to cause death. Moreover, it is submitted that the deceased was under influence of alcohol, and survived for next twelve days from the occurrence. Since, the infection was developed, it resulted into death and thus, on this count also, it can be inferred that there was no requisite *mens rea* to cause death.

26. Learned Defence Counsel by placing reliance on the decision in cases of *Murlidhar @ Murlia s/o Gangaram Pawara v. The State of Maharashtra* 2017 ALL MR (Cri)1940, *Rajangam V. State (Tamil Nadu)* AIR 1993 SC 2636, *Natthu s/o Bakshu Uike v. State of Maharashtra* 2015 ALL MR (Cri) 124, *Kashinath Kisan Bhoje v. State of Maharashtra* (1991) Cri.L.J.1909 and *B.N. Kavatakar and ors. v. State of Karnataka (Criminal Appeal No.536 of 1979) dated 12.05.1993* would submit that the circumstances show that the accused did not intend to cause death by handle of the spade.

27. There is no evidence on record as to how the quarrel irrupted. The evidence of the informant only suggests that while the assault was going on, she went to the spot. However there is no denial that though the accused was having a spade he did not use an iron

blade but the assault was by rear side of the handle. In absence of other material, we have gone through the statement of the accused recorded under Section 27 of the Evidence Act. The accused has stated that at relevant time deceased was under influence of alcohol and was abusing him. The accused returned to the cattle shed, brought spade and dealt blows from its rear side. Section 25 and 26 of the Evidence Act, precludes the use of confessional statement made in police custody against the accused. The rider is that it shall not be proved against the accused, but it can be used in his favour. Therefore, to that extent, the disclosures statement assisting us to enlighten on the starting point of the occurrence can be used in favour of accused.

28. It is evident that at the relevant time, the deceased was under influence of alcohol. Since the deceased started to abuse, the accused brought the spade and particularly dealt blows by rear side wooden handle. The deceased sustained contusions and died after gap of twelve days from the occurrence. In the situation, the question arose whether the act of the accused causing death of Mangesh amounts to murder or culpable homicide not amounting to murder. On the basis of evidence, the pivotal question of intention is to be decided whether the case falls under Section 302 or 304 Part I or 304 Part II of the IPC.

29. In this regard observations of the Supreme Court in case of ***Pulicherla Nagaraju v. State of A.P (2006) 11 SCC 444*** at paragraph 29 are worth to be noted, which reads as below :

“29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was

picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.”

30. Reverting to the facts, it revealed that there was no deep rooted enmity in between the parties. The deceased was prone to consume alcohol. At relevant time, the accused was not armed with sharp edged weapon. The accused dealt four blows by the rear handle of spade. The circumstances indicate that nobody has intervened the assault but the accused himself left the place and went away.

31. Certainly the nature of weapon and part chosen of the body

are relevant, however, those circumstances are to be appreciated on the combination of surrounding circumstances. The medical evidence suggests that there are four contused wounds however there was no fracture. The force used by the accused also stands as one of the indicator to infer the intention. The circumstance indicates that in sudden occurrence the accused brought spade and particularly by rear side dealt blows. The said fact itself indicates that he did not intend to cause death. These circumstances would show that the accused would not have intended to cause death of the deceased by inflicting the injuries by rear side of the handle. However by inflicting repeated blows, it can be construed that he had knowledge that his act may result in to causing death. On over all scrutiny of the facts and circumstances, we are of the view that the offence would be one punishable under Section 304 Part II of the IPC instead of Section 302 of the IPC.

32. In view of above, the conviction of the appellant for the offence punishable under Section 302 of the IPC is converted into the offence punishable under Section 304 Part II of the IPC. The accused is in jail from 03.10.2017 i.e. for near-about six years. Though learned Counsel for the appellant urged that the period already undergone is

sufficient, however we are not in an agreement with the said submissions since one person has lost his life on a petty issue. While imposing sentence right balance is to be maintained in both situations. The accused is a young labourer having wife and a child aged 12 years. He submitted before the Trial Court that he was also suffering from diseases. Having regard to all above facts, we are of the view that the accused shall stay behind bars for some more years to meet the ends of justice. Therefore, in our view, rigorous imprisonment for eight years would be adequate to balance the scale. We are not interfering in to the amount of fine and the stipulation of default as imposed by the Trial Court. In view of above, the appeal stands partly allowed and disposed of in above terms.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)

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