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Crl.A.No.442 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 31.10.2023

Coram:

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.442 of 2018

Suresh : Appellant/Accused

Vs

State rep.by
Inspector of Police
W.15, All Women Police Station
Royapuram
Chennai – 600013
Crime No.663/2016

: Respondent/Complainant

PRAYER: Criminal Appeal Case is filed under Section 397(2) of Cr.P.C to set aside the judgment and sentence passed by the Special Court Cases under POCSO Act 2012/Mahila Court, Chennai – 600104 in S.C.No.310/2017 dated 13.07.2018.

For Petitioner .. Mr.K.Ethirajalu
Legal Aid Counsel for Appellant

For Respondent .. Mrs.G.V.Kasthuri
Additional Public Prosecutor

ORDER

The Criminal Appeal has been filed to set aside the judgment and sentence passed by the Special Court Cases under POCSO Act 2012/Mahila



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Court, Chennai in S.C.No.310 of 2017 dated 13.07.2018.

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2. The brief facts, which are necessary for the appreciation and consideration in the Appeal are, as follows:

2.1. P.W-1 was the father of the victim girl who was employed as a security guard in a private company where the P.W-2 was the Manager in the same organization. P.W-1 was from Nepal. P.W-1 was staying along with his family in the very same premises. On the alleged date of occurrence on 04.07.2016, the victim was alleged to have attended the School and she did not return home in the evening. P.W-1 went in search of her and found all the students left the School. Therefore he went to the Police Station and lodged the complaint under Ex.P-1. Ex.P-1 was written in Tamil, and P.W-1 signed it in English.

2.2. P.W-2 was the Manager of the company where P.W-1 was employed. As per the evidence of P.W-2, he had accompanied P.W-1 to the School in search of the victim and also to the Police Station to lodge a complaint under Ex.P-1. P.W-3 was the maternal Uncle of the Victim. P.W-4 was Doctor Gomathi who had examined the Victim and issued the medical certificate under Ex.P-3 to Ex.P-6. P.W-5 was the Doctor who had examined



the Accused and issued Potency Certificate under Ex.P-7. P.W-6 was the Victim. P.W-7 was the Sub-Inspector of Police, who registered the F.I.R under Ex.P-10. P.W-8 was also a Sub-Inspector of Police who assisted the Investigation. P.W-9/Inspector of Police had recorded the statement of the Victim under Section 161 of Cr.P.C. As per the evidence of P.W-9, he had almost completed the investigation and handed over the Case Dairy file to the P.W-10, the Inspector of Police, All Women Police Station, Royapuram.

2.3. The Prosecution had not furnished any proceeding either the circular of the Director General of Police regarding standing orders regarding the investigation in this case being done by the Inspector of Police, All Women Police Station or transfer of the Investigation from the P.W-9 to P.W-10. P.W-10 had not conducted any investigation and had filed the Final Report. It was noted that after 9 months from the date of the alleged occurrence on 04.07.2016 the Final Report was laid before the Court.

3. The learned Counsel nominated by the Legal Aid Committee attached to this Court, thiru. K. Ethirajalu herein for the Appellant submitted his arguments. As per his argument, the age of the victim was not proved as



per the prosecution. There were many flaws in the case particularly regarding the age of the victim. When the age of the victim itself was disputed, the Bonafide certificate under Ex.P-2 states pupil name as Lila Devi Sharma whereas the victim/P.W-6 before the Court had signed her name as Leela Devi Sharma. It was pertinent to note that the Headmaster of G.K.Jain Higher Secondary School was not examined by the Investigation Officer, regarding Ex.P-2 and the Registers maintained by the School whether the victim in this case was the original student of the same School. Only bonafide Certificate was marked by the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai. Therefore, the learned Counsel for the Appellant would submit that the bonafide certificate under Ex.P-2 mentioned the name of the student as Lila Devi Sharma whereas the name of the victim in this case was Leela Devi Sharma as per procedure in case of this nature.

4. Further the learned Counsel for the Appellant submit that the Mother of the victim/Sarasu who was examined by the Investigation Officer/P.W-9 and the statement under Section 161 of Cr.P.C., was not examined before the



Court. Further he would submit that there was no Radiology Report obtained regarding age of the Victim as per medical evidence. Therefore when the Prosecution had failed to prove the case, the presumption under Section 29 of the POCSO Act cannot be invoked in this case.

5. The learned Counsel for the Appellant submitted that as per the ruling of the Hon'ble Supreme Court in the case of ***Rishpal Singh Solanki -vs- State of Uttar Pradesh*** reported in ***2021 SCC Online SC 1079***, in which the Hon'ble Supreme Court has observed as follows:

“This Court was tasked to decide the credibility of the matriculation certificate issued by the Board of High School and Intermediate Examination, Uttar Pradesh. The Court upheld the credibility of the matriculation certificate on the ground that the date of Birth recorded in the matriculation certificate was corroborated by School admission records”.

The Registers maintained by the School has been produced and marked as documents. Here in this case Ex.P-2 was the bonafide Certificate issued by the School.

6. The learned Counsel for the Appellant invited the attention of this



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court to the evidence of the Victim who was examined as P.W-6. She had in her evidence clearly stated that she was in love with the Accused and she had accompanied him on her own volition.

7. Further attack by the learned Counsel for the Appellant was that as per the Prosecution case, the Accused was alleged to have kidnapped the minor girl from the lawful custody and stayed in a lodge in Thiruvananthapuram. Subsequently they left to Andhra Pradesh. Police claimed that they have secured them from Andhra Pradesh. There were no documents in support of the stay, however, furnished regarding the assault of the Accused. No Document was seized regarding the evidence of the Victim girl/P.W-6 for their stay in a lodge at Thiruvananthapuram for a day and the subsequent stay in Andhra Pradesh. No documents or no Registers from the lodge had been secured.

8. Also the learned Counsel for the Appellant invited the attention of this Court regarding the endorsement in Ex.P-10 by the learned XVI Metropolitan Magistrate. It was received on 06.07.2016 by 10.40 a.m.



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Therefore there was delay in filing the F.I.R. It was the defence of the Accused that there had been misunderstanding between the Accused and the P.W-2. The Accused was employed as a Driver in the same organization and the case had been foisted with the help of the P.W-1. The Investigation Officer had not proved the case of arrest or stay of the victim along with the Accused either in Thiruvannamiyur or at Andhra Pradesh.

9. The learned Counsel for the Appellant invited the attention of this Court to the contents of the F.I.R under Ex.P-10 in Column 2 where it was stated as '**NON-ACT**' and also to the Page 2 of the F.I.R under Ex.P-10 wherein it was stated as,

“மேற்படி புகாரினை பெற்று N1.CSR.No.414/2016 ல் பதிவு செய்து விசாரணைக்கு பின் இன்று 05.07.16 ம் தேதி 09.00 மணிக்கு N1.PS.Cr.No.663/16 U/s. Girl Missingல் வழக்கு பதிவு செய்து மேல் விசாரணைக்காக என்.1 இராயபுரம் காவல் நிலைய ஆய்வாளர் அவர்களின் பார்வைக்கு வைக்கப்பட்டது”.

10. As per the evidence of the victim/P.W-6 before the trial Court, she



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had accompanied the Accused on her on own volition. In the absence of the evidence of the Headmaster or Principal of the School, merely furnished the document as Ex.P-2 “bonafide Certificate” will not help the Prosecution to invoke Section 29 of the POCSO Act to prove the charge against the Accused.

11. The learned Counsel for the Appellant invited the attention of this Court to the judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai in S.C.No.310 of 2017 dated 13.07.2018 particularly in paragraphs 29 to 40 and submitted that the judgment of conviction recorded against the Accused in this case is perverse. In the light of the above discussion, the order of conviction has to be set aside.

12. The learned Additional Public Prosecutor vehemently objected to the submission of the learned Counsel for the Appellant stating that as per the reported ruling of the Hon'ble Supreme Court in the case of ***Ganesan -vs- State represented by its Inspector of Police reported in (2020) 10 SC 573***, stating the evidence of the victim alone will be sufficient to warrant the



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conviction for offences under this case.

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13. Further the learned Additional Public Prosecutor submits that the Doctor's evidence/P.W-4 and Ex.P-3 to Ex.P-6 will be sufficient to warrant the conviction against the Accused. The judgment of the learned Sessions Judge, Mahila Court, Chennai is a well reasoned judgment in the light of the evidence of P.W-1/father of the victim, P.W-2/Manager who accompanied P.W-1 in the School and also to the Police Station to lodge the complaint.

14. Further the learned Additional Public Prosecutor submitted that the non examination of the Headmaster or Principal of the School was not vital to the Case of Prosecution as the bonafide certificate had been marked as the evidence of P.W-1 and P.W-6/victim. It would be sufficient to prove that she studied in the very same School. As per her evidence, the Accused in this case who was working as Driver under P.W-2/Manager in the same organization where P.W-1 was employed. As he had asked her to wait after School hours at the entrance, he had picked her up in an Autorickshaw and stayed in a lodge at Thiruvannamiyur for a night and then both left to Andhra



Pradesh. She herself had admitted that she went along with Accused on the instruction of the Accused. The defence of the Accused that Accused was framed in this case was denied by her in her cross examination stating Accused alone had accompanied her and also submitted that she had sexual intercourse with the Accused during the stay in Andhra Pradesh which was available through the evidence of the Doctor and Ex.P-3 to Ex.P-6. Therefore the learned Additional Public Prosecutor submits that the Appeal lacks merit and has to be dismissed and the judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai is to be confirmed.

Point for Consideration

Whether the judgment of learned Sessions Judge Mahila Court, Chennai in S.C.No.310 of 2017 is to be set aside as perverse?

15. Heard the learned Counsel, Thiru. K.Ethirajulu, Legal Aid Counsel for the Appellant. Heard the Additional Public Prosecutor, Mrs. G.V.Kasthuri. Perused the evidence of Prosecution witnesses P.W-1 to P.W-10, marked Ex.P-1 to Ex.P-11 and perused the judgment of the learned Sessions Judge



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Mahila Court, Chennai.

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16. On consideration of the rival submissions, on perusal of the F.I.R under Ex.P-10 it was found that, originally it was registered as C.S.R. Subsequently F.I.R was registered. As rightly pointed out by the learned Counsel for the Appellant, the Prosecution had not produced any proceeding of the Senior Police Officer either the Commissioner of Police or Director General of Police regarding the investigation by Inspector, All Women Police Station. The investigation had been completed by the P.W-9/MohanRaj and subsequently handed over to the P.W-10/The Inspector of Police, All Women Police Station, Royapuram, Mrs. Sabeetha. Even after taking up the investigation and custody of the Case Dairy file, P.W-10 had not noticed the loopholes in the investigation regarding seizure of the Registers from the lodges in Thiruvanmiyur and in Andhra Pradesh where the victim and the Accused were alleged to have stayed.

17. As rightly pointed out by the learned Counsel for the Appellant, the arrest was also not clearly proved before the Court. They were secured at



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Thiruvannamiyur, but P.W-9 claims, they were secured from a lodge in Andhra Pradesh. If that be so, P.W-9 ought to have produced copies of the Registers maintained by the lodge in which the Victim and the Accused were alleged to have stayed. They have not produced any document. Further as rightly pointed out by the learned Counsel for the Appellant, Ex.P-2 claims to be the Bonafide Certificate issued by the G.K.Jain Higher Secondary School in which the name of the pupil given as Lila Devi Sharma, whereas the victim as per P.W-6 had signed before the Court as “Leela Devi”. Also, P.W-1 mentioned the name as Leela Devi Sharma in the complaint. Right from the inception of the case, it was found suspicious. Initially it was registered as C.S.R. Subsequently it was written as F.I.R in Column-2 in which it was stated as “Non Act” which was pertinent. The Head Master of the School was also not examined as witness for the prosecution regarding the age of the victim.

18. As per the evidence available before the Court, the victim was alleged to have studied in 8th Standard. No registers had been produced before the Court. No Birth Certificate had been produced. In the absence of such registers or documents, the Investigation officer is within her discretion



could have subjected the victim to medical examination to obtain Radiologist Report. Those things were also missing. Therefore the submission of the learned Counsel for the Appellant that the Prosecution failed to prove the case, that the victim in this case was a child attracting Provisions of POCSO Act to invoke the presumption under Section 29 of POCSO Act was found acceptable in the light of so many loopholes in the case right from the inception stage of the case.

19. From the records it was seen that P.W-9 Thiru. Mohanraj, Inspector of Police had conducted the Investigation and almost concluded the investigation. At that stage as per his evidence as P.W-9 the case Dairy file/CD file was handed over to P.W-10-Mrs.Sabeetha, the Inspector of Police, All Women Police Station P.W-10 Sabeetha had laid the Final Report. Before laying the Final Report, it is the duty of the P.W-10 to peruse the Case Dairy file and take steps to remedy when there were any flaws in the earlier investigation. P.W-9 MohanRaj in his evidence stated that he had arrested the Accused in Andhra Pradesh. There was no document or witness for the arrest at Andhra Pradesh. As per the P.W-6/the victim, the victim and the Accused were secured at Thiruvannamiyur by P.W-9. Either they were arrested or they



were summoned to the Police Station and later arrested it was not known. As

per the evidence of P.W-6/Victim, they had stayed in a lodge in Andhra Pradesh. The records or registers maintained by the said lodge were not seized or the copies of the same were not obtained by the P.W-9 to prove the claim of the prosecution. Also when the P.W-6/victim was secured at the earliest opportunity when she was subjected to medical examination before P.W-4, the Investigation Officer/ P.W-9 had not taken steps to obtain Radiologist Report also from the Hospital concerned regarding the age of the Victim/P.W-6. P.W-9 had also not examined the Head Master or Principal of the G.K.Jain Higher Secondary School and also not obtained the Register maintained by the School regarding the admission of the pupil in the School and the date of birth of the pupil. When P.W-10 had taken up the investigation from P.W-9, it is for her to verify and find out that previous investigation done by the earlier Inspector or Investigation Officer had followed all the due procedures. If she had found out any lapses, she had the discretion to fill up the lacuna before filing the Final Report. She had not done so.



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20. The submission of the learned Additional Public Prosecutor where as per the reported ruling in the case of ***Ganesan -vs- State represented by its Inspector of Police reported in (2020) 10 SC 573***, the evidence of the victim was corroborated with Doctor's evidence was sufficient to warrant conviction cannot at all be accepted in this case as there are many loopholes in the prosecution case. The prosecution had not established its case regarding age of the victim/P.W-6 that she is a child to invoke the provisions of POCSO Act.

21. Therefore the submission of the learned Counsel for the Appellant is accepted and the argument of the learned Additional Public Prosecutor is rejected. In the light of the above discussion, the conviction recorded by the learned Sessions Judge fast Track Mahila Court, Chennai is found perverse and the same is set aside. **The Point for consideration is answered in favour of the Appellant** and against the Prosecution.

22. While concluding the argument, the learned Counsel for the Appellant submitted that the Appellant was denied bail by this Court. After



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rejection of the bail he had filed Criminal Miscellaneous Petition twice which was also dismissed. Already, almost he had completed 5½ years of sentence of rigorous imprisonment for 7 years for both offences. During the period of detention, he had completed +2 Higher Secondary and also completed Diploma certificate. The learned Counsel nominated by the Legal Aid Committee, Thiru. Ethirajulu, filed the certificates of the Appellant in Diploma in Fashion Designing and Garment making.

23. The Accused in Criminal cases are also protected by the Constitution of India by guarantee for right to fair trial. The rights of the citizens are restricted when they face criminal cases. They had to face imprisonment. Therefore one of the rights under constitution is the right to fair trial and speedy trial. The same right continues till the Appeal is disposed off. The Counsels appearing in criminal cases are expected to protect the rights of the citizens by defending the citizens during trial till the case is disposed off. Here is a case, where the learned Counsel on record for the Accused failed to protect the citizen of his valuable right by getting his Appeal disposed off at the earliest either ending in acquittal or confirming the



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judgment of the trial Court. The Lawyers are expected to protect the right of the Accused in getting justice in the fair trial in continuation of the same in getting the Appeal disposed off at the earliest.

24. Here is the case, where the Appeal was filed in the year 2018 even after 5 years, the learned Counsel for the Appellant was not willing to co-operate with the Court when the old cases were posted for disposal before the Bench. Still the advocate did not come forward to argue the case and sought repeated adjournments which cannot be appreciated. Therefore this Court considering the right of the citizens, had nominated and issued direction to the Legal Aid Committee attached to this Court to nominate a learned Counsel having sufficient experience on the Criminal side to proceed with the Appeal. Accordingly the Legal Aid Committee nominated the learned Counsel, Thiru. Ethirajulu. This Court appreciate the learned Counsel nominated by the Legal Aid Committee, Thiru.Ethirajulu for defending the Appellant and co-operating with the Court for early disposal of the case. Also the learned Counsel had argued the case as though it was his private brief highlighting the flaws in the investigation and the flaws in the prosecution case. Based on the



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submissions of the learned Counsel nominated by the Tamil Nadu Legal Aid Committee, this Court arrived at a conclusion that the judgment of the learned Sessions Judge Special Court for trial of POCSO cases /Mahila Court is perverse and had set aside the judgment.

25. It is condemnable that the learned Counsel engaged by the Accused had not come forward to dispose off the case, when the Accused was in detention in continuation of the judgment of conviction. Even though the Appeal was filed in the year 2018, the learned Counsel who had filed the Appeal had not volunteered to proceed with the appeal. It was found to be failure of the professional ethics of the learned Counsel, Mr.Nambirajan and Ms. S.Revathi. In spite of repeated adjournments, this Court had rejected the adjournment and nominated a learned Counsel through the Legal Aid Committee attached to this Court, Thiru. Ethirajulu for the Appellant. The Counsel on record finding no appearance and failed to proceed with the case to protect the right of the person, the citizen of this Country suffered conviction had filed Appeal was a failure of professional ethics. The service of the learned Counsel nominated by the Legal Aid Committee is appreciated.



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As he had highlighted the loopholes in this prosecution case ending in acquittal of the Accused and to avoid Social Stigma of the Accused.

In the result, the Appeal is allowed.

The judgment of conviction and sentence imposed on the Appellant/Accused in Sessions Case No.310 of 2017 on the file of the learned Sessions Judge, Special Court for Cases under POCSO Act, 2012/Mahila Court, Chennai - 104, dated 13.07.2018, is set aside and the Appellant/Accused is acquitted from the charges under Sections 366 IPC and Section 4 of POCSO Act, 2012.

The Jail Authority is directed to release the Appellant/Accused forthwith, unless he is required in connection with any other case. The bail bond, if any executed by the Accused, shall stand cancelled. The fine amounts, if paid by the Appellant/Accused, shall be refunded to him.

Before parting with the case

i). As per the earlier circular issued by the High Court that had been followed for decades. The book was published by the High Court for the



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guidance of the Magistrates which was given the detailed guidance to the Magistrates. This Book was published by the High Court in the year 1991 and it was circulated to all the Judicial Magistrates serving in the Tamil Nadu across the State in all the Districts.

ii). As per the book published by this High Court and issued to the Magistrates, the Magistrates are expected to call for or summon the Investigation Officers under their Jurisdiction and to discuss the pending investigation and pending Final Reports with the Court wherein lapses are found in which case final reports were returned for complying certain defects pointed out by the Court. When Final Reports are presented before Court, the Court takes cognizance of the offences by perusing the materials. When there are flaws as pointed out in the case by the learned Counsel for the Appellant, the Judicial Magistrate who takes the Final report on file also can point out the same and bring it to the notice of the Investigation officer concerned so that any loopholes in the prosecution cases had to be plugged at the Initial stage. This is to avoid the Accused utilizing those loopholes during trial.



iii). Recently circular had been issued by this High Court in which it is stated that all the Magistrates shall not return the Final Reports. They shall number the Final Report. This circular is found contrary to the earlier circular issued by the High Court in which the Magistrate were given the task to point out the deficiency in the investigation and to pluck the loopholes at the initial stages. The recent circular ignores the discretion of the Magistrates meaning taking cognizance that is reduced as an empty formality by which the learned Judicial Magistrate are forced to get the Final Report numbered without returning the same as defective. The well reasoned and time tested procedures had been reduced to an empty formality by the learned Judicial Magistrate as taking the Final Report on file without giving the Magistrates concerned to take the Final Report as taking “cognizance” of the offences. Both are different. Taking cognizance means the learned Magistrate applies his/her mind to the law involved in that particular case which a legally trained mind Magistrate alone can appreciate. The learned Judicial Magistrate educates the Investigation Officer regarding the flaws. By the recent circular, this had given the time tested earlier circular of the very same High Court which was issued as “A Manual of Instructions for the guidance of Magistrates in Tamil



Nadu” in the book published in 1993 by the very same High Court.

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iv). This had given rise to the present case where the Charge Sheet filed by the Investigation officer was taken on file, not taken, “cognizance” as per the Cr.P.C. Therefore it had resulted in getting the Accused the chance to escape from the clutches of law. The Commissioner of Police, The Greater Chennai and the Director General of Police Tamil Nadu Police Head of the Police Force are directed to take steps to find out the lapses in the Investigation which is a serious issue regarding offence alleged in the case attracting POCSO which is stringent law which was investigated by a person with a lackadaisical attitude without realizing the risk involved in the investigation. The Commissioner of Police, Greater Chennai and the Director General of Police Tamil Nadu, Head of Tamil Nadu Police directed to take steps to sensitize the Officers of Police Department who are Investigation Officers to train Investigation Officers in the skills involving laws which are stringent in punishing the Accused. When those cases are investigated the Investigation Officer shall realize the lack of skill or lack of involvement will result in departmental enquiry against them. Therefore to take appropriate



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steps to give the officers particularly the Special Sub Inspectors, Inspectors of Police appropriate training either at the Judicial Academy or in the Police Academy concerned regarding investigation skills, regarding collecting materials, regarding prosecuting the criminal cases before the Court of Sessions.

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Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

To:

1. The Sessions Judge,
Special Court for cases under POCSO Act 2012/Mahila Court,
Chennai.

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2. The State rep by
Inspector of Police
W.15, All Women Police Station
Royapuram
Chennai – 600 013.
3. The Public Prosecutor
Madras High Court, Chennai – 600 104.
4. The Section Officer, VR Records
Madras High Court, Chennai – 600 104.

SATHI KUMAR SUKUMARA KURUP, J.

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