

In Re: Narayan Singh Amar Singh and ors.

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Court : Madhya Pradesh

Decided On : Apr-24-1965

Reported in : AIR1965MP225; 1965CriLJ507

Judge : T.P. Naik and ;Shiv Dayal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395; [Evidence Act, 1872](#) - Sections 9; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162, 164 and 364

Appeal No. : Criminal Appeal Nos. 44, 45 and 55 of 1964

Appellant : In Re: Narayan Singh Amar Singh and ors.

Advocate for Pet/Ap. : P.L. Dubey, Addl. G.A.

Disposition : Appeal dismissed

Judgement :

1. The judgment in this appeal shall also govern Criminal Appeals Nos. 45 and 55 of 1964.

1a. The accused-appellants Narayan Singh and Harnath Singh have been convicted by the Additional Sessions Judge, Morena, under Section 395 of the Indian Penal Code and sentenced to rigorous imprisonment for five years together with a fine of Re. 1/-, or, in default, further rigorous imprisonment for one day. The

accused-appellant Chhotelal has been convicted in the same trial under Section 395, read with Section 75, of the Indian Penal Code and sentenced to imprisonment for life. They have all filed appeals against their convictions and sentences--Narayan Singh and Chhotelal from jail, and Harnath Singh through his counsel, Shri J. P. Gupta.

2. The prosecution case, in brief, is as follows: On the night between the 10th and 11th of December 1962, at about mid-night, there was a dacoity at the house of Dhudilal (P. W. 2) in village Chhota Kheda, during which the inmates of the house were beaten and the property of Raghunath (P. W. 9). e.g., Rs. 350/- in currency notes, some silver ornaments and some silver coins were looted by the dacoits from the quarters in the occupation of the latter.

3. Ramkumar (P. W. 1) had raised an alarm, hearing which some villagers had gathered in front of the house. While the dacoits were attempting to make good their escape, one of them, viz., Chhotelal was caught practically red-handed and handed over to the police.

4. The first information report (Ex. P-2) was lodged by Dhudilal (P. W. 2) on 11-12-1962, at about 9 a.m., at Police Station, Sheo-pur-Kalan.

5. During investigation, Rs. 335/- in currency notes, 2 silver kadas of a child and small change worth Rs. 1/12/- were found on the person of Chhotelal which were duly seized, vide seizure memorandum Ex. P-6. Narayan Singh produced a small brass jug with the name 'Raghunath' engraved on it and a small stone idol of Lord Ganesh from his house on 12-12-1962. These articles were seized vide seizure memorandum Ex. P-20. On the same day, on a personal search of Harnath Singh, four 'George V silver rupee coins, one Victoria silver rupee coin, one silver half-rupee coin and one old square coin, all having marks of vermilion on them, were found and were duly seized, vide seizure memorandum Ex. P-18-A.

6. In test identification parades of the accused, the accused Chhotelal was correctly identified by all the eye-witnesses of the incident, the accused Narayan Singh by Tulsabai (P. W. 12), Ramkumar (P. W. 1) and Hari Shankar (P. W. 15), and the accused Harnath Singh by Ramkumar (P. W. 1), Panabai (P.W. 13) and

Hari Shankar (P. W. 15). The articles seized from the possession of the accused were also got identified by their alleged owners who also correctly identified them.

7. The accused and the inmates of the house of Dhudilal (P. W. 2) who were injured on the date of the incident by the dacoits were medically examined on 12-12-1962. Exhibits P-9 to P-14 are the injury reports.

8. All the accused abjured their guilt and pleaded that they had been falsely implicated. Chholelal admitted his presence in the village on the night of the incident and also admitted the seizure of Rs. 335/- from his possession which he claimed to be his own. He, however, denied the seizure of the silver kadas from his possession Narayan Singh also denied the recovery of the brass jug and the idol of Lord Ganesh from his house. Harnath Singh admitted the seizure of the five rupee coins and the square coin from his person and claimed them all as his

9--14. (After discussing the evidence as against accused Chhotelal, his appeal was dismissed. Then after discussion of evidence as against accused Narayan, the judgment proceeded.)

15. The aforesaid evidence, in our opinion, is sufficient to bring home the guilt to the accused Narayan Singh. His conviction under Section 395 of the Indian Penal Code is thus correct and is hereby affirmed. The sentence also calls for no interference, though we do feel that a sentence of a fine of one rupee only in addition to the sentence of imprisonment, both of which are obligatory, is not adequate compliance with the requirement of the section. When the law makes the imposition of a fine, in addition to a jail sentence, obligatory, it does not mean that the fine is to be a token fine only in utter contempt of the requirement of the section. The fine imposed must bear a reasonable relationship with the enormity of the crime and must truly reflect the disapprobation of the Court to the act of the accused.

16. The appeal of the accused-appellant Narayan Singh thus fails and is dismissed.

17. The third accused-appellant Harnath Singh has been identified as one of the dacoits by Ramkumar (P. W. 1), Pannabai (P.W.13) and Hari Shankar (P.W. 15). They had also identified him earlier in a test identification parade. It is contended by Shri Gupta, the learned counsel for the appellant, that the test identification parade was of no evidentiary value, as it was conducted by a Magistrate of the Third Class. Reliance is placed on the judgment of Khan J. in Criminal Appeal No. 218 of 1963 (Triveni v. State), decided on 17-1-1964 (MP) and of Nevaskar J. Criminal Appeal No. 35 of 1964 (Vidyaram v. State), decided on 10-7-1964 (MP). The contention is based on the reasoning that as the statements recorded by a Magistrate during the identification parade must necessarily fall under Section 164 of the Code of Criminal Procedure, the Magistrate empowered to record them can only be a Magistrate of the Class specified in Section 164. In our opinion, the argument is misconceived, because no such result as is contended for before us follows from that reasoning. When the identity of a thing as an incriminating article or the identity of a person as an accused is in question because there is nothing intrinsic in the thing to identify it as such nor is the person so well known to the complainant by name and face as to make his identity beyond doubt or dispute, the complainant is asked to identify the thing or person in the trial Court and the result of his assertion on the point has to be judged on the veracity to be attached to his statement in that regard. The identity of the thing or person being the fact in issue, evidence to establish it must be led in the trial Court and on that alone the outcome of that issue depends. Section 9 of the Evidence Act then says that facts which establish the identity of any thing or person whose identity is relevant are relevant in so far as they are necessary for that purpose. Accordingly, identification parades are resorted to for testing the power or the capacity of the witnesses to identify the person or thing they claim to identify. These are tests designed to eliminate false assertions as also to guard against honest mistakes. One who asserts that he had clearly seen the accused who though unknown to him by name and face, was yet one whom he could pick out if he met him again, is thus given a chance to prove his assertion in a test designed for the purpose. If he is able to do so, his assertion gets added weight and if he fails to do so and cannot reasonably explain his failure., his assertion is considerably weakened. This ability or failure to do so by the identifying witnesses being facts establishing the identity

of the thing or person are themselves made relevant facts and as such admissible in evidence for proof of identity of the thing or person, as the case may be.

18. As the identification parades are tests for eliminating false assertions and to guard against honest mistakes of the witnesses, the Courts require that they should be held under conditions most conducive to their being fair tests for the elicitation of truth, such as without undue delay, when the impressions are fresh and other influences are less likely to have operated, without giving an opportunity to the witnesses to see the accused or to acquaint themselves with his features with the aid of photographs, sketches, description or the like, by mixing the accused with sufficient number of other persons to eliminate chance, identification, by mixing the accused with persons of the same race, culture, age, height and position, in life, so that he is not easily picked out by reason of any of the aforementioned characteristics, by allowing the accused to select his own position in the line, by concealing the distinguishing marks of the accused if any by not permitting the identifying witnesses on their leaving the parade to communicate with others who are yet to identify, by holding the parade free from the influence of the police and the prosecuting agency etc.

19. There is no requirement that the test identification parades should be conducted by a particular person or a particular class of persons. Any independent person may conduct them so long as he conducts them fairly and is competent to give evidence in respect of them, which evidence under Section 9 of the Evidence Act is relevant at the trial on the question of the identity of the accused. The tests have thus been conducted by influential persons, of the locality, by village panchas, by doctors, Revenue Officers and the like. There are, however, two qualifications to the rule. One is that the parades must not be conducted by police officers. Explaining the reason for this, their Lordships of the Supreme Court in *Ramkishan v. Bombay State*, (S) AIR 1955 SC 104 at p. 114 said:

'...--the process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by

his finger or touch the property or the person identified, may either nod his head or give his assent in the answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person.

The distinction therefore which has been made by the Calcutta and the Allahabad High Courts between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of Section 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification, such evidence of his would attract the operation of Section 162 and would be inadmissible in evidence the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial.'

The second qualification is that if it is conducted by a Magistrate in his official capacity, namely, qua a Magistrate empowered to record statements under Section 164 of the Code, then, unless the statements made to him by a witness have been recorded by him in conformity with the provisions of that section, such statements, even though relevant for the purpose of establishing the identity of a thing or person under Section 9 of the Evidence Act, cannot be proved. This is because, in the first place, such statements would conflict with the provisions of Section 164 of the Code. And, secondly, because to admit such statements would conflict with the principle that where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all other methods of performance being necessarily forbidden. As to the first, their Lordships of the Supreme Court in *Deep Chand v. State of Rajasthan*, AIR 1961 SC 1527 at p. 1531 said:

"These two sections (Section 164 Cr. P. C. and Section 9 of the Evidence Act) deal with different situations; Section 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during investigation or before trial; Section 9 of the Evidence Act, on the other hand, makes certain facts which establish the identity of a thing as relevant evidence for the purpose of identifying that thing, if a statement of a witness recorded by a Magistrate in derogation of the provisions of Section 164 will go in as evidence under Section 9 of the Evidence Act, the object of Section 164 of the said Code will be defeated. It is, therefore, necessary to resort to the rule of harmonious construction so as to give full effect to both the provisions. If a Magistrate speaks to facts which establish the identity of any thing, the said facts would be relevant within the meaning of Section 9 of the Evidence Act; but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of Section 164 of the Code of Criminal Procedure, such part of the evidence, though it may be relevant within the meaning of Section 9 of the Evidence Act, will have to be excluded. By such a construction of the provisions a satisfactory solution could be evolved.' And as to the second, the rule was first invoked by the Privy Council in *Nazir Ahmad v. King-Emperor* AIR 1936 PC 253 (2). It has since been approved by the Supreme Court in *Deep Chand's Case*, AIR 1961 SC 1527 (supra). The reason of the rule is that to permit such a Magistrate to do so would be (i) to make all the precautions and a safeguards laid down by Sections 164 and 364 of the Code to be of such trifling value as to be almost idle, and (ii) to relegate the Magistrate to the position of an ordinary citizen as a witness and then to require him to depose to matters transacted by him in his official capacity unregulated by any statutory rules of procedure or conduct whatever. However, the rule cannot obviously have any application to the case where a Magistrate is not competent to act in his official capacity under Section 164 of the Code. '

20. It is, however, argued that if a Magistrate is employed to conduct an identification parade, then, in so far as the process of identification itself implied statements, express or implied, communicated by the identifying witness to him as to the physical fact of identification which had no separate existence apart from the statements involved in the very process of identification, he must first be a

Magistrate of the class empowered to record statements under Section 164 of the Code, and secondly, he must record them in the manner provided by that section, before he can be permitted to give his evidence in respect of them. In our opinion, the contention is misconceived. (21) Section 164 of the Code addresses itself to such Magistrates who are empowered under that section to record statements and confessions and who are therefore asked in their official capacity to so record them for the purpose of their being used, if necessary, during any subsequent enquiry or trial, to which they may relate. It has no relevance to things done by others who do not belong to the category of Magistrates specified in that section. It has also no relevance to implied statements which the physical fact of identification involves. Such statements are not meant to be recorded under Section 164 of the Code. Equally it has no relevance to things done by the Magistrate of the class specified in the section if the Magistrate was neither asked to act in his official capacity nor was he purporting to act in that capacity.

22. Thus, as long as identification parades are conducted by independent persons, who are not police officers or Magistrates, no difficulty arises and the statements of such persons are admissible under Section 9 of the Evidence Act. But even if the investigating agency wishes to take advantage of the position and prestige of a Magistrate in order to eliminate any possible criticism of bias or prejudice or to give added weight to the proceedings as having been conducted by a person, whose integrity and impartiality was beyond dispute, it is free to make use of a Magistrate for the purpose. The fact that subsequently he will be deposing about what took place in his presence would, subject to the exception hereinafter mentioned, not be hit by the provisions of Section 164 of the Code. The exception is that if the investigating agency wants him in his official capacity to record statements under Section 104, then he must, in order that his evidence in regard to such statements becomes admissible in evidence, strictly comply with the provisions of that section. It was for this reason that the Supreme Court in *Deep Chand's Case*, AIR 1961 SC 1527 (supra) stated:

'It is, therefore, clear that the memorandum prepared by the Magistrate describing the present condition of the house and the evidence given by him on the basis of that memorandum would be relevant evidence under Section 9 of the Evidence

Act; but the statements made by Suraj Bhan to the Magistrate said to be not recorded in the manner prescribed by Section 154 of the Code of Criminal Procedure would be inadmissible.' (p. 1532).

It is, therefore, argued, on the strength of the observations in Nazir Ahmad's Case, AIR 1986 PC 253 (2) (supra), that a person who is a Magistrate can never be relegated to the position of a private citizen for the purpose of deposing to facts relevant under Section 9 of the Evidence Act. We do not agree. There is nothing in the decision in Nazir Ahmad's Case, AIR 1936 PC 253 (2) which debars the admissibility of such statements. In that case, the Judicial Committee had pointed out that it would not permit the Magistrates, who were empowered under Section 164 of the Code to record statements and who had been asked by the prosecution to so record them, to be relegated to the position of ordinary citizens as witnesses and then to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever. The emphasis of the Judicial Committee was on the disability of a Magistrate to depose to matters transacted by him in his official capacity under Section 164 of the Code without first complying with the requirements of that section. But this is far from saying that Magistrates of the class who are not empowered to record statements under that section and who cannot therefore act in their official capacity for the purpose cannot conduct and witness identification parades. It should, however, be borne in mind that even when the evidence of a Magistrate was excluded because of the operation of Section 164 of the Code, it did not mean that the identifying witnesses could not themselves depose to the fact of their earlier identification of the accused in the parade because such evidence is neither hit by Section 162 nor by Section 164 of the Code. It was only when the Magistrate wanted to give evidence regarding statements made by persons to him in his official capacity under Section 164 of the Code that he was prevented from giving evidence in respect of such statements unless the provisions of Section 164 of the Code had been strictly complied with. But, even so, the Magistrate may yet depose to facts relevant to the issue of identification which are not statements which he was asked or required to record under Section 164 of the Code in his official capacity

23. In the instant case, the identification parades were conducted by Dinkar Rao (P. W. 18), who was a Magistrate. Third Class, Shivpur, Ex.P-1 is the memorandum prepared by him in respect of the identification proceedings. In this document, besides recording the fact of identification, he has also recorded statements of the identifying witnesses which accompanied their acts of identification. As pointed out above, Section 9 of the Evidence Act allows proof of facts which established the identity of any thing or person so far as they are necessary for that purpose, and Section 164 of the Code of Criminal Procedure does not bar proof of such statements as they were made to persons not competent to record statements of witnesses under Section 164 of the Code in their official capacity. Consequently, the memorandum of the Magistrate (Ex. P-1) and his evidence relating thereto, including statements made by witnesses which accompanied their acts of identification, in so far as it established the fact of identification of the accused by the witnesses, would be admissible in evidence

24. We are, therefore, of opinion that the learned Judges in Criminal Appeals Nos. 218 of 1968 and 35 of 1964 (supra) were right in holding that if the statements recorded by the Magistrate (of the class competent to record statements under Section 164 of the Code) during test identification parades were not recorded in strict conformity with the mandatory provisions of Section 164 of the Code, they would be inadmissible in evidence. They were, however, in error when they held that the identification proceedings as a whole were vitiated if not held by a Magistrate empowered to record statements under Section 164 of the Code. The learned Judges failed to take note of the different situations for which the two sections were meant to provide, and also failed to note the difference between the facts establishing identity and statements of the identifying witnesses which only the Magistrate of a particular class can be asked to record in his official capacity or which could only be recorded by such a Magistrate in his official capacity, so as to be available for evidence in the enquiry or the trial. The former were not hit by Section 164 of the Code and were, therefore, admissible in evidence, if they satisfied the requirements of Section 9 of the Evidence Act. The latter were inadmissible in evidence unless recorded in strict conformity with the provisions of Section 164 of the Code. We are, therefore, of opinion that, in so far as the aforesaid two cases suggest that test identification parades conducted by a

Magistrate. Third Class, had no evidentiary value whatsoever, they were wrongly decided. To that extent, they are hereby overruled.

25. It is next contended that proper precautions were not taken, that the parade was held in the presence of the police officer and that the accused were mixed with persons who were mostly Saharias which made the identification of the accused-appellant Harnath Singh easier, especially as the accused was putting on trousers which others were not putting on. Dinkar Rao (P. W. 18), who conducted the test identification, has explained that though the test identification was conducted by him at the police station, there was no police officer present when the identification parade was held. It is, however, argued that the evidence of Dinkar Rao (P. W. 18) shows that the parade was held in the courtyard of the police station where a lock-up guarded by a sentry was located; and as it is admitted by the witness (P. W. 18) that the identifying witnesses were sent for by him through this sentry, the parade was vitiated. We, do not agree. The principle underlying the exclusion of the police from the identification parade is twofold : first, to remove any undue influence of the prosecuting or investigating agency on the identifying witnesses; and, secondly, to comply with the provisions of Section 162 of the Code of Criminal Procedure which prohibits the conduct of identification parades by police officers. The presence of a lock-up sentry in the courtyard, where the parade was being conducted by a Tahsildar and Magistrate, Third Class, or his use by the person conducting the parade as a peon for summoning witnesses cannot be said to be in conflict with the aforesaid principle. In the first place, his presence under the circumstances cannot be said to have exerted any undue influence on anybody, and, secondly, in so far as the sentry was not taking any effective part in the parade, it could not be said that in the process of identification any statement was being made to him by the identifying witnesses. Dinkar Rao (P. W. 18) has further stated that about 13 undertrials of all ages were mixed with the accused and all had been asked to cover themselves up with blankets provided to them for the purpose except that they were asked to keep their faces open. It is true, as admitted by Dinkar Rao (P. W. 18), that persons having the same or similar features as the accused Harnath Singh were not mixed with him in the parade and that most of them were Saharias: but, in our opinion, that by itself would not destroy the value of the test identification which is

only of a corroborative value. In our opinion, as it has been conducted bona fide with reasonable prudence to eliminate chances of false or mistaken identification, it ought to be accepted. To hold that for a satisfactory test identification, persons having same or similar features as the accused and of the same age, and dress as his should be mixed with him would be to make the test identification a very onerous or difficult task which it is not designed to be. In our opinion, the test identification parade, in the instant case, cannot be discarded as of no value under the circumstances of the case.

26. According to Ramkumar (P. W. 1), the accused-appellant Harnath Singh was standing near his sister Tulsabai (P. W. 12). He also had a gajkundi and was firing crackers. He also had given his description to the police, viz., that he had close cropped hair and that he was just growing a moustache. He further said that he was fair and that he had identified him from his facial features. Panabai (P. W. 13) is another identifying witness and she said that the accused-appellant Harnath Singh was wearing a black coat and flashing a torch. Harishanker (P. W. 15) gives no specific reason for identifying this accused, though he does say that one of the dacoits was standing near his paternal aunt Tulsabai (P. W. 12). Tulsabai (P. W. 12) no doubt does not identify him; but it is significant that she said that the person, who was standing near her had a black coat on, which goes to support the statement of Panabai (P. W. 13). No doubt, there are a few minor discrepancies in the statements of these witnesses; but, even so, in our opinion, there appears to be no good and sufficient reason to discard their evidence on the point of their identifying the accused-appellant Harnath Singh as one of the dacoits, especially as their evidence gets amply corroborated from the other evidence on record.

27. The first circumstance that corroborates the testimony of these witnesses (P.Ws. 12 and 13) is the fact that the accused-appellant Harnath Singh was found in unexplained recent possession of some of the stolen articles which had been taken away by the dacoits in the dacoity in question. On 12-12-1962, on a search of the person of this accused-appellant, four silver rupee coins bearing the effigy of King George V, one silver rupee coin with the effigy of Queen Victoria, one silver half rupee coin and one square coin probably of brass, all bearing vermilion marks, were found which were duly seized vide seizure memorandum Ex. P-18 A. These

articles were identified by their owner Raghunath (P. W. 9)), his wife Panabai (P. W. 13) and his sister Tulsabai (P. W. 12). Raghunath (P. W. 9) and Tulsabai (P. W. 12) had also identified them earlier in the test identification parade vide Ex. P-5. The importance of this seizure is due to the fact that their theft had specifically been reported by Dhudilal (P. W. 2) in the first information report (Ex. P-2) at the instance of Raghunath (P. W. 9). He had therein stated that, amongst other things, the dacoits had taken away from his house-

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Raghunath (P. W. 9) explains that on these coins there were vermilion marks as they were used in the Diwali Puja. His report that they were separately tied in a cloth and were all in the form of silver coins further reinforces his testimony on the point. The accused-appellant Harnath Singh has claimed them as his own and has stated that they used to be worshipped by his father and grand-father but has not cared to explain that if it were so, why he carried them on his person. He has also not examined any witness to prove his statement on the point. Consequently, in our opinion, his explanation is, under the circumstances, false and was rightly not believed. The presence of the square piece in his possession also shows his complicity in the offence. The witness Raghunath (P. W. 9) has stated that it was kept separately from the other coins and that he did not know of what metal it was. The fact, however, remains that it was also marked with vermilion indicating that it was also used in the Diwali Puja and must, therefore, have been kept along with the other silver coins which were taken away from his house in the dacoity in question. The possession of all these coins is thus a strong incriminating circumstance against this accused-appellant for which he has given no reasonable explanation as his explanation that they were his does not carry conviction and is, in our opinion, false and cannot be accepted

28. The second incriminating circumstance is that though the accused-appellant was employed as a mate in the Chambal Canal Project, he was absent from duty as from 9-12-62 (see the evidence of Shankerlal (P. W. 19) and Allanur (P. W. 17) and Ex. P-22). The accused-appellant admits this: but says that he was suffering

from fever from 8-12-1962 onwards. He has, however, examined no witness to prove the fact; and, in the absence of any reliable independent evidence to establish his statement, it cannot be accepted. His unexplained absence from duty on the date when the dacoity was committed at the house of Dhudilal (P. W. 2) and Raghunath (P. W.9), in which his complicity is alleged, is thus another incriminating circumstance against him.

29. The complicity of the accused-appellant Harnath Singh in the offence of dacoity is thus fully established. His conviction under Section 395 of the Indian Penal Code is, therefore, hereby affirmed. The sentence calls for no interference. His appeal also fails and is hereby dismissed.

30. In the result, Criminal Appeals Nos. 44, 45 and 55 of 1964 are dismissed. The convictions and sentences of the accused-appellants Narayan Singh and Harnath Singh under Section 395 and those of the accused-appellant Chhotelal under Section 395, read with Section 75, of the Indian Penal Code are hereby affirmed.

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