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Judgment Sheet
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.612 of 2014
Jabir Hussain versus The State, etc.

Murder Reference No.119 of 2014
The State versus Jabir Hussain

JUDGMENT

<i>Date of hearing</i>	01.06.2017
<i>Appellants (Jabir Hussain) represented by:</i>	<i>Mr. Muhammad Irfan Malik, Advocate</i>
<i>The State by:</i>	<i>Mr. Zubair Ahmed Farooq, Additional Prosecutor General along with Muhammad Afzal S.I.</i>
<i>Complainant (Shahid Hussain) represented by:</i>	<i>Mr. Kazim Ali Malik, Advocate.</i>

SARDAR AHMED NAEEM, J.- *Jabir Hussain son of Abdul Aziz appellant-accused of case FIR No.433 dated 23.12.2012 under Sections 364-A/377/302/201 PPC registered at Police Station City Wazirabad, was tried by the learned Addl. Sessions Judge, Wazirabad. At the conclusion of the trial, the appellant was convicted and sentenced as under:-*

- 1. Under Section 302(b) PPC:** *Sentenced to death with the direction to pay Rs.2,00,000/- as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C., in default whereof to further undergo six months simple imprisonment.*
- 2. Under Section 364-A:** *Sentenced to death.*
- 3. Under Section 377 PPC:** *Sentenced to undergo Rigorous Imprisonment for life with fine of Rs.50,000/-, in default whereof to further undergo simple imprisonment for three months.*
- 4. Under Section 201 PPC:** *Sentenced to Rigorous Imprisonment for seven years with fine of Rs.10,000/- in default whereof to further undergo simple imprisonment for one month.*

All the sentences awarded to the appellant were ordered to run concurrently with benefit of Section 382-B Cr.P.C.

2. *The appellant has filed Crl. Appeal No.612 of 2014 against his conviction. Murder Reference No.119/2014 is also before us for confirmation or otherwise of the death sentence.*

3. *The prosecution story, in brief, as unfolded in the complaint Ex.PK, on the basis of which FIR No.433/2012 (Ex.PK/1) was lodged by Muhammad Shahid complainant, was that on 23.12.2012 at 5.00 p.m., his son namely Ameer Hamza went to the shop of the Mohalla and did not return. He searched his son but could not succeed. The matter was reported to the police against unknown persons. On 25.12.2012, the complainant moved another application Ex.PR suspecting that Jabir Hussain appellant, whose shop was closed for two days and was also not traceable, has abducted his son. Hence the present FIR was got registered against him.*

4. *Muhammad Suleman, S.I. (PW.15), on entrustment of investigation of this case, on 24.12.2012, proceeded to the place of occurrence, inspected the spot and also visited house of the complainant. He prepared un-scaled site plan, investigated the matter and started searching the accused. On 25.12.2012, at 5.00, complainant Muhammad Shahid moved an application implicating Jabir Hussain appellant as accused of abduction of his son. He recorded statements of the witnesses. On 26.12.2012, he arrested the appellant who disclosed that he committed sodomy with the victim Ameer Hamza, who raised hue and cry whereupon the appellant strangulated him with hands at his throat. The appellant further disclosed that he put the dead body into a deep freezer lying in his shop after tightening his hands and legs with cloth and got recovered the dead body in the presence of witnesses which was taken into possession vide (Memo Ex.PS). He prepare rough site plan of the place of recovery of*

the dead body vide (Memo Ex.PV). He also took into possession deep freezer vide Memo (Ex.PE), prepared inquest report Ex.PW and injury statement (Ex.PX). He deputed Nisar Ahmad Constable for conducting post-mortem examination of the dead body. After conducting post-mortem examination, Nisar Ahmad Constable handed over last worn clothes of the deceased alongwith post-mortem report and other articles which were taken into possession vide Memo (Ex.PT). He recorded the statements of the witnesses under section 161 Cr.P.C. He took physical remand of the accused on 27.12.2012 and on the same day, the accused led to the recovery of last worn clothes of the deceased which were taken into possession vide Memo (Ex.PG). On 28.12.2012 Aamer Sattar Constable handed over seven snaps of the deceased P1-P7 which were taken into possession vide Memo (Ex.PB). He summoned Bilal Masood Bhatti Draftsman, who took rough notes on the pointation of the PWs and drafted site plan (Ex.PA) and (Ex.PA/ 1). On 29.12.2012, he got examined the accused for potency test vide written application (Ex.PM) and report (Ex.PM/ 1). He also joined in the investigation, Mst. Shagufta Nawaz wife of Muhammad Nawaz, (PW.13) owner of the shop, who disclosed that the appellant was tenant in the shop and paid Rs.2,000/- per month as rent. On 03.01.2013, he visited Gujranwala and recorded statement of Jabbar Ahmad, Sales Officer of the PEPSI and took into possession agreement deed (Ex.PJ) whereby accused was entrusted a freezer by the company.

5. Talib Hussain S.I. (PW16) partially investigated the case. On 21.2.2013, Mst. Shagufta Nawaz joined investigation and produced copy of registered sale deed of the house (Ex.PD). On the same day, Faisal Aslam (PW-14) produced before him agreement (Ex.PC) which was taken into possession vide recovery Memo (Ex.PC/ 1). After completion of investigation, the challan was prepared and submitted before the court. The learned trial court, after observing legal

formalities, as provided under the Code of Criminal Procedure, 1898 framed charge against the appellant on 21.02.2013, to which he pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined as many as sixteen witnesses.

7. The medical evidence was furnished by Dr. Zakir Ali Rana Medical Officer, (PW.8). On 26.12.2012 at 11.30 P.M, he conducted the postmortem examination on the dead body of Ameer Hamza deceased.

In his opinion, the death was occurred due to asphyxia as a result of throttling. Probable duration between injuries and death was approximately 3 to 5 minutes whereas, between death and postmortem examination was three days.

8. Muhammad Shahid, complainant (PW-11) supported the prosecution story as mentioned in the FIR. Sarfraz Ahmad (PW-12) was witness of arrest and disclosure of the accused, made before the police and also witness of recovery of dead body. Mst. Shagufta Nawaz (PW-13), owner of the shop stated that the appellant was his tenant. Faisal Aslam (PW-14), Sales Officer of Naubahar Bottling Company, Gujranwala stated that company has delivered deep freezer to the appellant for his shop. Bilal Masood Draftsman (PW-1) prepared scaled site plans (Ex.A) and (Ex.PA/1) of the place of occurrence. Rest of the witnesses are of formal in nature, therefore, need not to be discussed.

9. Learned Deputy District Public Prosecutor gave up Mubarik Ali 100/C, Muhammad Anwar 2181/C, Sajjad Ahmad, Riaz Ahmad, Muhammad Tariq and Muhammad Khalid PW being unnecessary and after tendering in evidence the report of Punjab Forensic Science Agency (Ex.PZ) close the case of prosecution.

10. In his statement recorded under section 342, Cr.P.C., the appellant pleaded false implication. He neither appeared

as his own witness under section 340(2), Cr.P.C. nor produced any witness in his defence. In answer to a question why this case against you and “why the PWs deposed against you”, the appellant stated as under:-

“I have been falsely implicated in this case. I am totally innocent. Neither I abducted Ameer Hamza deceased nor committed sodomy with him, nor murdered him. It is a case of no evidence. The evidence produced against me is totally false, fake, frivolous and fabricated and the story introduced by the prosecution is concocted one. In fact, I have not taken this shop on rent and I am also not owner of the said rented shop. Neither I obtained the shop on rent from Shagufta Bibi nor entered into any agreement regarding said shop with any body. The freezer which has been shown by the prosecution as to be taken by me from Nau Bahar Bottling Company nor I signed any agreement. The said freezer was not owned by me. “PW.11 Muhammad Shahid admitted that dacoity was committed into the jewelry shop of his brother prior to the present occurrence. They got recorded FIR in police station Sadar Wazirabad and named accused in said FIR. But accused could not be traced out”.

After my arrest in this case about ten people met the complainant party as well as during course of investigation for proving my innocence but in vain. It is pertinent to mention here that neither I made disclosure or extra judicial confession before I.O. nor dead body of the deceased was recovered on my pointation. In fact deceased Ameer Hamza was abducted by some unknown persons who committed dacoity into the shop of complainant’s brother. These unknown persons who committed this occurrence. Actually they demanded ransom from complainant party and these unknown persons were in the knowledge of the complainant party as well as police but they could not be traced out. The complainant party in connivance with the police wrongly and malafidely falsely implicated me in this case. The local police in order to get rid of this case wrongly challaned me in this false case. I am a married person having three children and earning head of my family. I am a law-abiding religious and noble person of the society. The PWs are related interse, hence they have deposed falsely against me.”

11. After evaluating the evidence and considering the merits of the case, the learned trial court held the appellant

guilty, convicted and sentenced him as detailed above. Now, this appeal.

12. Learned counsel for the appellant contended that he was not nominated in the FIR rather, his name finds mention in the application (Exh.PR) moved on 25.12.2012; that the case of prosecution entirely rests on circumstantial evidence and there was no direct evidence to connect the appellant with this occurrence; that the prosecution has badly failed to prove the charge levelled against the appellant; that the evidence produced by the prosecution suffered from the material contradictions; that there was no independent witness to support the prosecution version; that the case of the prosecution does not fall under Article 40 of the Qanun-i-Shahdat Order 1984, therefore, on the basis of such evidence, conviction and sentence awarded to the appellant cannot be sustained; that the prosecution could not establish through convincing-cogent evidence that the appellant was running the shop wherefrom the dead body of the deceased was recovered lying inside a deep freezer; that no evidence was brought on the file to establish the tenancy of the appellant; that the scaled/unscaled site plans, both, reflected that there was nothing in the shop except deep freezer; that there was no eye witness of the occurrence; that the investigation in this case was dishonest and mala fide from the very inception as the police investigating the case did everything with a set mind to pin the crime on the appellant and though an out of the way, effort was made to strain every evidence against the appellant, yet the investigating agency failed to collect any evidence as could prove that it was the appellant who killed the deceased. Learned counsel for the appellant contended that the death sentence is not warranted in a case which rests upon circumstantial evidence. He submitted that there was no credible evidence available with the prosecution to

prove the guilt of the appellant beyond reasonable doubt, thus, it was a fit case for acquittal.

13. *On the other hand, learned Additional Prosecutor General assisted by the learned counsel for the complainant argued that the case against the appellant was proved beyond any shadow of reasonable doubt. It was submitted that the learned trial Court had thoroughly examined the entire evidence adduced by the prosecution and reached to the conclusion that the guilt of the appellant was fully proved, therefore, such findings being based on proper and careful appreciation of evidence called for no interference on mere discrepancies. It was contended that nomination of the accused in Exh.PR shows the bona fide of the complainant; that the disclosure made by the appellant in police custody resulted into the recovery of the dead body/deep freezer from the shop run by the appellant, thus, Article 40 of Qanun-i-Shahdat Order was attracted; that the prosecution produced the independent witnesses having no malice/animus for false implication; that the case of prosecution is further supported by the medical evidence suggesting injuries on both thighs and anal canal of the deceased who was just five years old; that no link in the chain was missing and even capital sentence can be awarded on the basis of circumstantial evidence. Learned counsel for the complainant frankly conceded that sections 364-A and 201 PPC were not attracted in this case. Lastly, it was contended that the trial Court was quite justified to convict the appellant on the basis of material available on the record as there was no glaring contradictions in the testimony of the prosecution witnesses.*

14. *We have gone through the record carefully and considered the submissions of the learned counsel for the parties.*

15. *Before adverting to the arguments advanced by the learned counsel for the appellant, we shall at the threshold*

point out that in the present case, there was no direct evidence to connect the appellant with the offence in question and the prosecution rests its case solely on circumstantial evidence. The apex Court in the series of judgments has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following test:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency pointing towards guilt of the accused;

(iii) The circumstances should form a chain so completely that there is no escape from the conclusion that the crime was committed by the accused; and

(iv) The circumstantial evidence in order to sustain conviction must be complete and capable of explanation of any other hypotheses than that of the guilt of the accused and such evidence should not only be consisted upon the guilt of the accused but should be inconsistent with his innocence;

16. Bearing the above principles of law enunciated by the Hon'ble Supreme Court of Pakistan, we shall scrutinize scrupulously and examine carefully the circumstances appearing in this case with serious and onerous responsibility imposed on the Court.

17. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. The case of prosecution is required to be covered by leading cogent, believable and credible evidence.

18. The circumstantial evidence (Al-Qarinah) is also one of mode to find out guilt or innocence of the accused under the

Islamic law. The terms “Qarinah” comes from the root word “Qarana” which signifies “connecting something” Technically “Qarinah” means any sign, proof or evidence which is circumstantial in nature which may corroboratively give a definite impression of an occurrence of any relevant fact or any fact in issue in a case. “Qarinah” in its literal meaning, means connection, conjunction, relation, union, affiliation, linkage or association. However, in legally speaking, it refers to logical inference to be drawn from the circumstances. By now, “Al-Qarinah” has been accepted and recognized as one of the means of proof. The reason for admitting “Qarinah” is based from sources in Holy Quran:

“They stained his shirt with false blood. He said: “Nay, but your minds have made up a tale (that may pass) with you (for me) patience is most fitting: against that which ye assert it is ALLAH(alone) whose help can be sought.” (Al-Quran, 12:18)

“So they both raced each other to the door, and she tore his shirt from the back: they both found her lord near the door. She said: “What is the (fitting) punishment for the one who found formed an evil design against thy wife, but prison or grievous chastisement?”. He said: “it was she that sought to seduce me from my (true) self.” and one of her household saw(this) and bore witness, (thus) “if it be that his shirt is rent from front, then is her tale true, and he is a liar! “but if it be that his shirt is torn from the back, then is she the lair, and he is telling the truth. (Al-Quran 1225-27)

In fact, awareness has been given to this world 1437 years ago by the Allah Almighty in the Holy Book of Quran in Surah Yousaf wherein this method of proving a guilt or innocence has been highlighted. The applicability of “Qarinah” in proving a case is nowhere expressly provided by the Holy Quran. However, its applicability could be

gleaned by references of several verses in the Holy Quran together with analogical deduction.

19. *The instant case is entirely based upon circumstantial evidence. The deceased, namely, Ameer Hamza (05 years old boy), on 23.12.2012 at 5.00 p.m, left for a shop in his street to fetch some candies but never returned. The complainant reported the kidnapping/disappearance of his son to police on 23.12.2012 through an application Exh.PQ. Thereafter, got registered FIR (Exh.PK) regarding incident against unknown accused on 24.12.2012 and then, nominated the appellant in his application Exh.PR moved on 25.12.2012. The appellant was arrested on 26.12.2012 and disclosed that he could not control his sexual lust and that after committing sodomy with Ameer Hamza eliminated him by way of strangulation and then got recovered his dead body as a result of said disclosure from a deep freezer lying in his shop. However, learned counsel for the appellant raised objection regarding admissibility of the disclosure made by the appellant.*

20. *In order to apply Article 40 of Qanun-i-Shahdat Order, 1984 the prosecution must establish that information given by the accused led to the discovery of some fact deposed by him and discovery must be of some fact which the police had not previously learnt from any other source and that the knowledge of the fact was first derived from the information given by the accused. In the instant case, the police had no previous knowledge if the appellant kept the dead body of the deceased inside a deep freezer lying in his shop and when the appellant disclosed such fact, the Investigating Officer in presence of marginal witnesses, discovered the above referred deep freezer, dead body of the deceased, so the information of the appellant fully comes within the scope of Article 40 of Qanun-i-Shahdat Order, 1984: Ref: “Mst. Askar Jan and others V. Muhammad Daud and others” (2010 SCMR 1604).*

21. In order to prove its case, the prosecution produced Faisal Aslam as PW.14. He served for three years being Sales Officer and deposed that on 07.3.2011, the appellant approached his company "Nau Bahar Bottling Company" Pvt. Ltd, for the delivery of a deep freezer of Pepsi company for his shop. He referred to an agreement entered into between the appellant and the company (Exh.PC) evidencing the delivery of deep freezer against the terms and conditions mentioned therein. The prosecution also produced Mst. Shagufta Nawaz, wife of Muhammad Nawaz the owner of the shop (PW.13). She deposed that she had rented out the shop to the appellant on a monthly rent of Rs.2000/-. The appellant was running that shop in the name and style of "Inam Karyana Store". During investigation, it revealed that Inam was a son of the appellant.

The appellant pleaded false implication that he was involved in this case because local police wanted to get rid of this false case, as reflected by his statement recorded under section 342, Cr.P.C. It was not imperative for the appellant to appear as his own witness under section 340(2), Cr.P.C in disproof of the allegations or to examine some witnesses in his defence but in this case, he could not substantiate his plea that he was not running the shop as stated by Mst. Shagufta Nawaz (PW.13). The trend of cross-examination rather, suggested that he was running "Inam Karyana Store" as borne out from the statements of Bilal Masood draftsman (PW:1) and Sarfraz Ahmad (PW.12). At this juncture, we may mention that the plea of the appellant of not running a shop is after-thought as no such suggestion was put to any witness till the examination of Mst. Shagufta Nawaz (PW.13).

22. The appellant got recovered the deep freezer (P-10) delivered to him by the Pepsi company through memo(Exh.PE). It was lying in his shop and also shown in

the scaled and unscaled site plans of the place of occurrence. The dead body of the deceased was lying frozen inside the said deep freezer in the month of December and was identified by Sarfraz Ahmad (PW.12). The appellant could not produce any witness or any local to establish that he was not running a shop in "Sipaal" colony. The prosecution witnesses including Faisal Aslam, Shaghuftha Nawaz and Sarfraz Ahmad have no relation, whatsoever, with the deceased. They had no ostensible reason to depose against the appellant for his false implication. They remained firm and nothing favourable to the appellant was elicited during the cross examination, thus, there was no reason to disbelieve their evidence.

The autopsy was held by Dr. Zakir Ali Rana M.O (PW.8). He observed a ligature mark around the neck and found a nylon string on the neck of the deceased, taken into possession vide memo Exh.PT. He also observed the following injuries on his neck, head, thighs and anus.

- (i) Ligature mark on neck anterior side around the neck;
- (ii) Abrasion 3 x 4 cm under right thigh;
- (iii) Abrasion 3 x 4 cm under left thigh;
- (iv) Lacerated wound 4 x 2 cm on the back and middle of head;
- (v) Perianal anal tear 1.5 x .2 cm at 6'0 clock on upper border;
- (vi) Perianal tear 1.5 x 2 cm at 6'0clock on the lower border.

No seminal material was identified on any item examined for the presence of semen, therefore, no further DNA profiling was conducted on these items as reflected by the report of Punjab Forensic Science Agency Exh.PZ. However, in view of injuries No.(ii), (iii), (v), (vi), section 377 PPC is attracted.

23. As regard the contentions of the learned counsel for the appellant that imposition of death sentence awarded in

the instant case which wholly rests upon circumstantial evidence, was not warranted, it may be mentioned here that the contentions appears to have been raised perhaps under the misconception. There is no prohibition in law that in a murder case conviction cannot be based on circumstantial evidence. In fact, it is not the quantity but sufficiency and quality of the evidence which matters. In a number of cases, including following imposition of death sentence has been approved by the Hon'ble Supreme Court of Pakistan purely on the basis and in appreciation of circumstantial evidence which are as follows:

(i) "Inayatullah v. The State" (PLD 2007 SC 237). In this case, the plea was raised by the accused that capital punishment could not be awarded on the basis of circumstantial evidence and the Hon'ble Supreme Court of Pakistan observed that generally capital punishment could not be awarded to accused persons on the basis of circumstantial evidence, however, in the present case, if the pieces of circumstantial evidence collected during the investigation were put in juxtaposition then they would bring the case in the area where the accused was connected with the commission of offence coupled with the fact that the prosecution witnesses were disinterested:

(ii) In case "Muhammad Aslam and others V. The State" "Daulat Ali V. Muhammad Aslam and others" (1999 SCMR 845), none had seen the occurrence . The dead body of the girl was found in the house of the accused for which he lodged misleading report at police station. The accused had himself pointed to the blood stained churri buried by him in the courtyard of his house. The accused persons were acquitted by the learned trial Court, however, on appeal to the Federal Shariat Court, they were convicted. The conviction and sentence of both the male accused persons including the sentence of death were maintained by the Hon'ble Supreme Court of Pakistan in the case purely

resting on circumstantial evidence. In the wake of above, it thus, follows that in cases, where either direct evidence is not available or has not been found trustworthy, conviction can be recorded on the basis of circumstantial evidence alone subject to the condition that all the circumstances must lead to the guilt of the accused and no link in the chain should be missing

(iii) “Khubaib Ahmad V. The State” (1992 SMCR 398). In this case, evidence of last seen together with extra-judicial confession, corroborated by the medical evidence and recovery of dead body of the victim at the instance of the accused was believed.

(iv) In the case of “Khuda Bukhsh V. The State” (2003 SD 690), the prosecution was depending completely on circumstantial evidence but the conviction and sentence of death inflicted on the appellant by the trial Court and confirmed by the Federal Shariat Court, was upheld by the Shariat Bench of the Hon’ble Supreme Court of Pakistan. In this view, we are fortified by the following reported judgments as well:

- 1) “Khuda Bukhsh V. The State” (2004 SCMR 331)
- 2) “Sheraz Tufail V. The State” (2007 SCMR 518)
- 3) “Muhammad Latif V. The State” (PLD 2008 SC 503)
- 4) “Mobashar Ahmad V. The State” (2009 SCMR 1133)

and:

- 5) “Gul Muhammad V. The State” (2011 SCMR 670)

24. In this case there is strong circumstantial evidence which leads to the inference that Ameer Hamza was done to death after commission of sodomy by the appellant. The prosecution case is based on the recovery of deep freezer, dead body , a piece of string, medical evidence and the statements of PWs.12 to 14 having no reason for false implication of the appellant. The events which took place subsequently , disappearance of the appellant after closing his shop and then, recovery of the dead body after his

arrest from his shop also cannot be doubted. The appellant could not point out any defect in the statements of the independent witnesses. The statements of the prosecution witnesses have been thrashed out, who all have supported the prosecution version and stood firm to the test of cross examination and nothing beneficial could be elicited casting any doubt in their veracity.

25. It is settled principle of criminal jurisprudence that circumstantial evidence can only be based for conviction when it is incompatible with the innocence of the accused and is incapable of explanation of any other reasonable hypothesis than that of the guilt of the accused. It was held in the case "Ali Khan V. The State" (1999 SCMR 955) that where the case is resting on the testimony of circumstantial evidence, no chain in the link should be missing and that all the circumstances must lead to the guilt of the accused.

26. In view of the above discussion, the prosecution has been successful in establishing the guilt of the appellant. Acting like a beast, he subjected a boy of tender age to his unnatural lust and then strangulated him to death. The prosecution version finds support from the recovery of deep freezer, dead body, 'Fard Nishandahi' and medical evidence. Another fact worth consideration is that the complainant or for that purpose other witnesses have had no motive to falsely implicate the appellant and instant case is also not a case of substitution of the accused, therefore, it does not appeal to reason as to why the legal heirs of the deceased would let go the real culprit and instead make the appellant scapegoat just for nothing.

27. So far as the charges under sections 201,364-A PPC are concerned, suffice it to observe that no evidence was brought on record that the appellant forcibly kidnapped the minor/deceased. It is also settled by now that concealing a dead body by the accused himself does not amount to

causing disappearance of evidence as contemplated by section 201 PPC.

28. *No doubt, this murder is diabolical in conception and cruel in execution. The totality of the circumstances, unerringly, unfailingly and unshakably proves that the appellant alone was the perpetrator of this heinous crime. The result is that the conviction of the appellant and sentences awarded to him under section 302(b), and 377 PPC are maintained and the impugned judgment is modified only to the extent of setting aside the conviction under sections 201,364-A PPC.*

29. *With this modification, the appeal is hereby dismissed.*

Murder Reference is answered in the affirmative and death sentence is confirmed.

(MUHAMMAD ANWAARUL HAQ) (SARDAR AHMED NAEEM)
JUDGE JUDGE

APPROVED FOR REPORTING

Judge

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