Privy Council Appeal No. 24 *of* 1949

Gideon Nkambule and others - - - - - - - *Appellants*

v.

The King - - - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF SWAZILAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1950

Present at the Hearing:

LORD PORTER
LORD GREENE
LORD OAKSEY
LORD REID
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

This is an appeal in *forma pauperis* to His Majesty in Council against the judgment of the High Court of Swaziland dated the 18th October, 1948, whereby the appellants were found guilty of murder, and against the sentences passed upon the appellants. All the appellants were sentenced to death by the said High Court but the sentences on appellants Nos. 3, 4, 5 and 6 were later commuted to imprisonment with hard labour for 15, 15, 5 and 10 years respectively.

Special leave to appeal in *forma pauperis* to His Majesty in Council was granted by an Order in Council dated the 28th day of July, 1949.

The appellants were jointly charged with the murder, on or about the 17th day of May, 1947, at Mpopono in the district of Central Swaziland of one Northway Mdingi.

According to the case for the Crown, the death of the deceased was the result of a ritual murder. The deceased, it was said, was a Xosa, and in charge of a school at Mpopono. He lived in the same village as appellants Nos. 1 and 5, who are husband and wife. No. 2 also lived in that village; No. 3 lived about two miles away, and No. 4 lived at Paulo's kraal, which is about 250 yards distant from No. 2's home. The body of the deceased was not discovered until Thursday, the 22nd May, 1947, when it was found in a stream about 550 yards from the hut where it was alleged he was killed, the hut itself being in or near the village in which No. 1 accused lived.

The principal evidence implicating the accused was that of two accomplices, Violina Hlatshwako and Matanjana Dhlamini. Violina Hlatshwako was a female school teacher on the staff of the deceased's school, lived at Paulo's kraal, and was a lover of appellant No. 1. That appellant appears to have practised a form of " witch-doctoring " and on Saturday, 10th May, 1947, he asked her to be his assistant in it. She agreed and thereupon some rite was performed, after which No. 1 told her that in order to complete his collection he required the bone of a Xosa, and for that

purpose he proposed to kill the deceased on the following Saturday night. In order to assist him in this project he asked Violina to distract the attention or suspicions of the deceased. She at first demurred, but a day or two afterward was called by No. 4 to his hut where she also found Nos. 1 and 2, and was then persuaded to consent. On Wednesday, 14th May, No. 1 told her that certain persons would arrive with cattle from the paramount chief's kraal and would assist in the killing, and these persons ultimately turned out to be the accused No. 6 and the accomplice Matanjana. On Friday, 16th May, she was again called by No. 4 and instructions were given in the presence of Nos. 1 and 3, and plans were discussed. It was proposed to use a hammer for the killing belonging to No. 4 accused, which was at the time without a handle, but to which he said he would fit one.

According to Violina's account, No. 4 woke her up on the evening of Saturday, the 17th May, and she accompanied him to the kraal of No. 2, and went on to the hut of the deceased whom she found sitting on his bed, sat down beside him and pretended to read. The deceased did not speak, and appeared to be in some sort of stupor. After a while No. 2 entered and sat on a chair, and thereafter No. 1 entered, followed by the accomplice Matanjana. No. 2 stood up and No. 6 then entered, followed by No. 4 and on a signal given by No. 2, who said, "That is it, young man", the deceased was seized and dragged to the floor by the five men present, whereupon accused No. 3 entered and hit the deceased with a hammer. No. 1 accused then took a knife and cut something from the deceased's head after which the body was lifted and pointed eastward and then westwards, south and north. As soon as the deceased man had been killed, Violina was sent away on the orders of No. 1 accused, and in leaving found No. 5 standing guard outside the hut. On the following Sunday Violina was pledged to silence by No. 1 in the presence of No. 2 and Matanjana, and in order to ensure her compliance No. 1 showed her three skulls and informed her that she would become like those skulls if she should speak.

The other accomplice Matanjana Dhlamini deposed that he and appellant No. 6 came from the vicinity of the paramount chief's kraal. They went to Mpopono with some cattle which they fetched from Bremersdorp at the request of No. 2 accused. They arrived at the kraal of appellant No. 2 on Friday, 10th May, and during the evening No. 2 told them that he wanted to kill a man and enlisted their aid. They agreed as No. 2 promised them two head of cattle each. On the Saturday evening, 17th May, he and No. 6 were in No. 1's hut when No. 4 arrived with Violina. Appellants Nos. 1, 2 and 3 were already there and Violina was told to go and distract the teacher's attention and appellant No. 5 was instructed to stand guard outside the teacher's hut. The party thereupon entered the teacher's hut and the killing took place. Matanjana's evidence in respect of the killing differs to some extent from that of Violina, but supports it in its general outline and is only at variance in certain details.

Mtonela Tabede, a constable in the Swaziland Police, gave evidence of the finding of the deceased's body on the 22nd May, 1947, in a stream called the Mpopono stream in about 18 inches of water, some little distance below the place where a path by which people were accustomed to pass crossed the stream. The approximate width of the stream at the place where the body was found was eight feet, and it was not in flood.

The post-mortem examination on the deceased's body was conducted by Dr. Oscar Arnheim who was unable to find the cause of death and who certified that he found no signs of violence. He stated that the body was in an advanced state of decomposition, and it was not possible to ascertain the cause of death or whether any violence had been used.

Some further evidence was indeed called on behalf of the Crown by way of implicating the appellants:—

A constable of the Swaziland Police, who arrested appellant No. 1 on the 16th January, 1948, deposed that that appellant was in possession of a

bag filled with bottles—two of which were identified by Violina as having been used at her initiation ceremony—and a skin bag containing bones which might presumably be connected with witch-doctoring, and that a hammer was found in the kraal of appellant No. 2.

On the night on which Northway Mdingi was alleged to have been killed, appellant No. 3 was seen walking in the direction of the kraal of appellant No. 2 and away from his own kraal.

Appellant No. 2 was said by one witness to have spoken of having hit " a foreign guinea fowl " and put it " in the stream ", and by another to have acknowledged that by " foreign guinea fowl " he meant the deceased. But this acknowledgment was denied by the first of the two witnesses, who said he thought it only meant a bird.

It was established that appellant No. 2 had been instructed to bring certain cattle to the village, and the hammer with which it was alleged the killing was done was identified as lying about the kraal of No. 4 but said to have had no handle until August, 1947.

Finally the grandson of appellant No. 2 deposed to the arrival with the cattle of appellant No. 6 and Matanjana, and that they came to his grandfather's kraal on the Friday preceding the day of the alleged murder. He also said that on the Saturday evening following he slept under the bed of appellant No. 2 and that at cock crow (which he later explained as being midnight) he was awakened by Appellant No. 2 trampling on him and getting into the bed.

This was the only evidence beyond that of the two accomplices which was produced on behalf of the Crown, and though it is consistent with their testimony and perhaps points to some slight extent to its truth, their Lordships do not think it is of sufficient weight to be used as satisfactory independent corroboration of their evidence. They therefore find themselves under the necessity of determining what, under the law administered in Swaziland, is the effect of evidence of the commission of a crime given by the mouths of two accomplices unsupported by any other testimony.

In this country the accepted doctrine is now summed up in *R.* v. *Baskerville* (1916) 2 K.B.D. 658, and it has long been recognised that it is unsafe to convict on the testimony of an accomplice or accomplices, that one accomplice cannot corroborate another and that a jury must have careful warning of these dangers, but that, if such warning is duly given, a jury is entitled to convict upon the evidence of an accomplice alone. But where evidence is given and is sought to be relied upon as corroborative of the testimony of an accomplice it is not enough if it shows that the accomplice told the truth in matters unconnected with the guilt of the accused, it must not only show that a crime has been committed, but must also establish the connection of the accused with its commission.

In South Africa the position is different; the provisions are statutory and begin with those contained in Ordinance 72 of the Cape of Good Hope which was promulgated in 1830. The wording of that Ordinance substantially sets out the law as it has been administered under the Roman-Dutch system in South Africa since that date.

Sections 9, 12 and 33 of the Ordinance of 1830 are in the following terms:—

> " 9. And be it further enacted and declared that no person shall in any criminal case be incompetent to give evidence in respect of having been an accomplice, either as principal or accessory, in the commission of any crime or offence charged in the indictment, information, or complaint under trial in such case.
>
> 12. And be it further enacted and declared that it shall and may be lawful and competent for any court or jury in any case which shall and may be lawfully tried by such court or jury respectively, to convict any person who shall be so tried before any such court or

jury of any crime or offence charged in the indictment, information or complaint under trial on the single evidence of any such accomplice as aforesaid (i.e. an accomplice either as principal or accessory): Provided, always, that such crime or offence shall by competent evidence other than the single and unconfirmed evidence of such accomplice be proved to the satisfaction of such court or jury respectively to have been actually committed.

33. And be it further enacted and declared that it shall be competent for the court or jury by which any person prosecuted for any crime or offence shall and may lawfully be tried, except in so far as has been or shall be herein excepted, enacted, and declared, respectively, to convict such person of any crime or offence charged in the indictment, information, or complaint under trial on the single evidence of any competent and credible witness: Provided, always, that it shall not be competent for any such court or jury to convict any person of the crime of perjury on the evidence of any one witness, except in addition to and independent of the testimony of such witness some other competent and credible evidence as to the guilt of such person shall be given to such court or jury."

So far as Swaziland is concerned the history of the enactments dealing with accomplices is as follows: —

In 1893 after the Convention of 1890 the South African Republic assumed jurisdiction and continued to exercise it until, after the South African War, jurisdiction over the Transvaal and Swaziland was assumed by this country. So far as the Transvaal is concerned provision for the admissibility and regulation of evidence was made by Proclamation No. 16 of 1902 in terms substantially the same as those contained in the Cape Ordinances of 1830, and in 1904 by Proclamation the Roman-Dutch and statute law of the Transvaal was applied to Swaziland. It is not, however, necessary to set out the terms of that Proclamation since its relevant provisions were re-enacted by a further Proclamation of 1907. Section 2 is in the following terms :—

"The Roman-Dutch Common Law save in so far as the same has been heretofore or may from time to time hereafter be modified by statute shall be law in Swaziland and all statute law which is in force in Swaziland immediately prior to the date of the taking effect of this Proclamation shall save in so far as the same is hereby amended or altered or is inconsistent herewith or may hereafter be amended or altered shall be the Statute Law of Swaziland."

This Proclamation was followed by the Criminal Procedure and Evidence Act of the Union of South Africa, passed into law in 1917, and as a Union Act binding in the Transvaal. Sections 260, 284, 285 and 286 of that Act are in the following terms: —

"260. Every person not expressly excluded by this Act from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in the Union, or before a magistrate on a preparatory examination.

284. It shall be lawful for the court or jury by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment, summons or charge, under trial on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court or jury—

(1) to convict any person of perjury on the evidence of any one witness, unless in addition to and independent of the testimony of such witness, some other competent and credible evidence as to the guilt of such person is given to such court or jury ; or

(2) to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment, or where two or more such overt acts are so charged, upon the evidence of one witness to each such overt act.

285. Any court or jury which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge, under trial, on the single evidence of any accomplice:

Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court or jury (as the case may be) to have been actually committed.

286. Any court or jury which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge, under trial, in respect of and by reason of any confession of that offence proved to the satisfaction of the court or jury (as the case may be) to have been made by him, although the confession is not confirmed by any other evidence:

Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of such confession, been proved to the satisfaction of the court or jury (as the case may be) to have been actually committed."

From 1917 until 1938 the Criminal Law as administered in Swaziland was governed by the terms of this statute, but in 1938 the Swaziland Criminal Procedure and Evidence Proclamation came into force.

By section 8 of that Proclamation as amended by Proclamation 43 of 1942, it was provided that the presiding judge should sit with assessors and that the agreement or disagreement of such assessors with the decision of the judge should be noted in the record.

The further material provisions of the Proclamation of 1938 were in the following terms, and still remain in force save in one particular:—

" 207. Every person not expressly excluded by this Proclamation from giving evidence shall be competent and compellable to give evidence in a criminal case in any court in the Territory or before a District Commissioner on a preparatory examination.

230. It shall be lawful for the court by which any person prosecuted for any offence is tried, to convict such person of any offence alleged against him in the indictment or summons on the single evidence of any competent and credible witness:

Provided that it shall not be competent for any court—

(1) to convict any person of perjury on the evidence of any one witness unless, in addition to and independent of the testimony of such witness, some other competent and credible evidence as to the guilt of such person is given to such court ; or

(2) to convict any person of treason except upon the evidence of two witnesses where one overt act is charged in the indictment, or, where two or more such overt acts are so charged, upon the evidence of one witness to each overt act.

231. Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice:

Provided that the testimony of the accomplice is corroborated by independent evidence which affects the accused by connecting or tending to connect him with the crime:

Provided further that such evidence shall consist of evidence other than that of another accomplice or other accomplices."

The one emendation was made by Proclamation No. 14 of 1944 which repealed the two provisos to section 231 and replaced them by a single proviso and reads as follows:—

"1. Section *two hundred and thirty-one* of the principal law is hereby amended by deleting the first and second provisos and substituting therefor the following proviso:—

'Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

The result of the change was to annul the two provisos which required proof of the commission of a crime similar to or perhaps stricter than that required in this country and to return to the requisites which the law of the Union of South Africa demanded.

In these circumstances, the appellants maintain

(1) that section 8 of the Proclamation of 1938 as amended in 1944 has not been complied with, inasmuch as the agreement of the assessors had not been noted on the record,

(2) that upon its true construction s. 231 as amended in 1944 allows, it is true, proof of the commission of a crime by an accused person on the evidence of a single accomplice but only if the fact that a crime has actually been committed has been established by evidence other than that of the accomplice and that for that purpose the evidence of another accomplice or other accomplices will not suffice.

(1) So far as the first point is concerned it is true that the presiding judge sat with two European and two Swazi assessors and that their concurrence was not formally noted on the record of the proceedings, but the judge in open Court and in the presence of the assessors said in terms that they had all come to the conclusion that the accused were guilty of the crime with which they were charged. It is not even as if the judge was in any way bound by the opinions of the assessors. In Swaziland, as in India, he must form an independent opinion, and although he will be assisted and influenced by their opinions, he is not bound by them. Section 8 of the Swaziland Criminal Procedure and Evidence Proclamation says in terms that the assessors shall give their opinion and such opinion shall be considered by the Court but the decision shall be vested exclusively in the judge.

Nor indeed does the Proclamation impose upon him the duty of seeing that the agreement or disagreement of the assessors is noted. It is a purely ministerial obligation left to be performed by the Court officials and its omission in a case such as the present where their assent has been publicly proclaimed may indeed be an irregularity but is not of such importance as to invalidate the conviction. The position is not as was suggested analogous to that in *Mahlathlili* v. *R.* (1942) A.C. 583. When that case was decided section 8 (supra) enacted that the assessors should give their opinion and such opinion should be considered by the Court. Upon that wording it was held that they must give their opinion in open Court and that their doing so was an essential element in its decision: compliance with the provision was not ministerial but obligatory.

As a result of the decision in that case however the law has been changed and all that is now required is, as indicated above, that the agreement or disagreement of the assessors with the decision of the judge should be noted on the record.

(2) The second problem has lately been considered by their Lordships' Board in two cases, the first *Tumahole* v. *R.* (1949) A.C. 253, and the second *Bereng Griffith Lerotholi* v. *R.* (1950) A.C. 11. In each case it was common ground that anyone charged with an offence might be convicted on the evidence of a single accomplice but that if one accomplice only was called to prove the guilt of the accused, it must be proved to the satisfaction of the Court that the crime had actually been committed. The Crown, however, contended that if two accomplices were called to establish the guilt of the accused, the section has no application; the proviso is only brought into play where one accomplice and one only

testifies to the accused's part in committing the crime. In any case, they say, the commission of the crime can be established by the testimony of another accomplice inasmuch as his is competent evidence and the commission of the crime will then be proved, if the evidence is believed, by competent evidence other than that of the single and unconfirmed evidence of the accomplice called to prove the guilt of the accused.

In *Tumahole's Case* this contention was rejected. The Board considered that " the single evidence of any accomplice " was not equivalent to " the evidence of a single accomplice ", and that in enacting that an accused person may be thus convicted, the provision must be read as stating that the conviction, if based upon accomplice evidence, whatever the number of accomplices testifying may be, is only permissible if the fact that the crime has been committed has been established by other than accomplice evidence.

Apart from the conclusion which they reached upon the construction of the Proclamation, their Lordships thought themselves bound to follow the cautionary rule which is to be found in English law and is set out in *R.* v. *Baskerville* (supra) that one accomplice cannot be corroborated by another, and that it was therefore unsafe to convict in *Tumahole's Case*.

So far as corroboration comes into consideration, it has to be remembered that the principles to be applied are those of Roman-Dutch Law as administered in South Africa, and it does not appear that when dealing with that case their Lordships were invited to regard, or in fact had before them, the principles applicable under that system of law to accomplice evidence or had an opportunity of tracing the development of the various statutory enactments which prevailed from time to time in that country or the case law interpreting them.

In *Lerotholi's Case* a similar question came before the Board, but in that case there was independent non-accomplice evidence of the commission of the crime upon which their Lordships felt they could rely and they therefore found it unnecessary to resolve the problem now in issue. But the facts and arguments were much more fully stated and developed and the Board left open the question whether, having regard to the fresh material which had been adduced, *Tumahole's Case* rightly decided the construction to be placed upon the relevant sections. They pointed out, however, that, inasmuch as the proper cautionary rule applicable in South Africa had not been brought to the notice of this Board in that case, it was almost inevitable that the English rule should have been adopted.

In *Lerotholi's Case*, the cautionary rule which is followed in South Africa was brought to the notice of the Board, and is set out in the wording used by Schreiner, J.A., in *R.* v. *Ncanana*, 4 S.A.L.R. (1948) 399, and quoted in *Lerotholi's Case* at p. 22.

Their Lordships agree with the conclusion reached in *Lerotholi's Case* that the cautionary rule so stated is that binding in Swaziland as it was in Basutoland, and are satisfied that it should be held in this case as it was in *Lerotholi's Case* that it was present to the mind of the learned judge who convicted the appellants and was properly applied by him.

There remains the difficult and controversial question raised by the wording of the proviso to section 231 as amended in 1944.

Undoubtedly their Lordships must give a construction to the language used which differs from that adopted in *Tumahole's Case* if they are to uphold the conviction now under appeal.

In ordinary circumstances they would be very slow to take this course. It is true that the Board does not act as the House of Lords acts on the strict rule that they are bound by a previous decision based upon the same considerations. Nevertheless as was said in *Read* v. *Bishop of Lincoln* (1892) A.C. 644, a decision upon a given state of facts ought not to be reopened without the greatest hesitation, though the right to reopen is not confined to cases where some fresh fact was adduced which

had not been under consideration on the previous occasion. Still the right to reopen remains and from these observations it is apparent that the existence of some fresh material not communicated or at any rate not fully presented to the Tribunal which heard and decided the earlier case is an element to be borne in mind when deciding whether that case should be followed or not.

From a perusal of the judgment in *Tumahole's Case* it is apparent that the history of the adoption and promulgation of the various Statutes and Proclamations dealing with the effect of the evidence of accomplices in South Africa was only partially put before the Board, and much material which has now been ascertained was not presented to their Lordships on that occasion.

The present case therefore is one in which fresh facts have been adduced which were not under consideration when *Tumahole's Case* was decided and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations upon which that case was determined. No doubt the provisions of the relevant Proclamation as amended in 1944 might have been expressed more clearly, but it has to be borne in mind that the language now employed follows in substance that which is found in the Ordinance of 1830 and has been used and repeated in South Africa from time to time without any material alteration since that date, with the single exception of the Basutoland and Swaziland Proclamations of 1938. In their Lordships' view it is significant that after six years the wording then used was deleted and the original Roman-Dutch form employed in the Cape was reverted to. It appears indeed that up to the year 1915 the contention now put forward on behalf of the Crown was by no means universally acceded to by the Courts of the several states now forming part of the Union of South Africa and their adjacent territories: on the contrary, that maintained by the representatives of the Appellants in some cases prevailed.

But in 1915 in *R.* v. *Sethren* (1915) T.P.B. 257, the Crown's construction was adopted in the Transvaal and after the passing of the Act of 1917 this view was followed by the Appellate Court of the Union of South Africa in *R.* v. *Thielke* (1918) A.D. 373. It is true that Solomon, J., dissented, but the majority of the Court supported the Transvaal interpretation and from that day onwards a similar construction has always been put by the South African Courts upon the language used.

The position, therefore, is that the present form of words was made the law of the Transvaal by Proclamation No. 16 of 1902, and applied to Swaziland in 1904, and that under that regime *R.* v. *Sethren* (supra) declared that the evidence of two accomplices was sufficient to warrant a conviction. Subsequently the Act of 1917 which made the law of South Africa homogeneous was passed and so became law in the Transvaal as part of the Union of South Africa and was in force in Swaziland inasmuch as the law of the Transvaal was there applicable. This state of affairs continued to exist until 1938 when the temporary change already referred to was made.

Meanwhile the decision in *Thielke's Case* continued to control the application given in the Union of South Africa to the various relevant Ordinances—see *R.* v. *John* (1943) T.P.B. 295.

Had this history of the origin and development of the force and effect attributed to accomplice evidence in South Africa been presented to their Lordships in *Tumahole's Case* with the fulness with which it was put before their Lordships in the present instance, it might well have influenced the members of the Board who sat in the first-mentioned case to come to a different conclusion.

Moreover, it does not appear that the other sections forming part of the formulae of the Proclamation of 1938 which dealt with the admissibility and sufficiency of evidence and were left unaltered when s. 231

was amended, were brought to their Lordships' notice. For instance, s. 230 uses expressions similar to those found in s. 231. In the former section the wording is " the single evidence of any competent and credible witness " and that expression must refer to the evidence of one single witness and the necessity of so construing it is accentuated when the incompetence of convicting an accused man " on the evidence of any one witness " is spoken of in the first proviso. " The single evidence of any witness " in the enabling part of this section and the " evidence of any one witness " in the proviso appear to be contrasted with " some other competent and credible evidence " in proviso (1) and " the evidence of two witnesses " in proviso (2). If then in s. 230 the phrase " the single evidence of any competent and credible witness " means, as it appears to mean, the evidence of any one witness, it is difficult to attribute a different meaning to the phrase " the single evidence of any accomplice." That expression should naturally bear the same meaning as the similar phrase used in s. 230 and be interpreted as the evidence of any one accomplice.

Section 231 was recognised by the Board in *Tumahole's Case* as being capable of bearing more than one interpretation. It is, as they say, sufficiently difficult and ambiguous to justify the consideration of its evolution in the statute-book as a proper and logical course. Unfortunately they had not before them the full facts concerning that evolution which are now in the possession of the Board and therefore failed to construe it in the sense which a fuller knowledge of the circumstances require.

In these circumstances their Lordships are of opinion that they are justified in placing an interpretation upon the section which is required by the information now before the Board and would hold that the Crown's contention is right and that the evidence of two accomplices is sufficient, if believed and if due warning of the danger of accepting it be borne in mind, to warrant the conviction of those accused of a crime. In the present case those conditions were fulfilled: due warning of that danger was present to the mind of the judge and his assessors and the evidence of the accomplices was believed.

Their Lordships have accordingly humbly advised His Majesty to dismiss the appeal.

(67999) Wt. 8148—56 120 4/50 D.L. G. 338

In the Privy Council

GIDEON NKAMBULE AND OTHERS

v.

THE KING

[DELIVERED BY LORD PORTER]

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