Abdulla Mohammed Pagarkar

Vs

State (Union Territory of Goa, Daman and Diu)

Moreshwar Hari Mahatme

Vs

State (Union Territory of Goa, Daman and Diu)

Criminal Appeals Nos. 224 and 268 of 1977

(Syed M. Fazal Ali, A.D. Koshal JJ)

11.09.1979

JUDGMENT

KOSHAL, J. –

1. By this judgment we shall dispose of Criminal Appeals 224 and 268 of 1977 in both of which a judgment dated March 19, 1977 of the Judicial Commissioner, Goa, upholding the conviction of the appellants and the setences imposed upon them by the trial Court is challenged.

2. The appellants were tried jointly by the Special Judge, Panaji, who found them guilty and awarded them punishments as specified in the table below :

#----------Serial Name of the Section of the law Sentencenumber accused under which convictionof the recordedaccused---------- 1 2 3 4---------- 1. Abdulla (a) Section 120-B(1) Rigorous imprisonment Mohammed read with Section 420, for two years and a Pagarkar 468 and 471 of the Indian fine of Rs. 500, the Penal Code as also sentence in default section 5(1)(d) of the of payment of fine Prevention of Corruption being rigorous Act. imprisonment for one month. (b) Sections 420 and Rigorous imprisonment 468 and Section 109 read for two years and fine with Sections 468 and 471 of Rs. 500, the of the Indian Penal Code sentence in default of payment of fine being rigorous imprisonment for one month.2. Moreshwar (a) Section 120-B(1) Rigorous imprisonment Hari read with Section 420, for two years and a Mahatme 468, 471 and 109 of the fine of Rs. 500, the Indian Penal Code as well sentence in default of as Section 5(1)(d) of the payment of fine being Prevention of Corruption rigorous imprisonment Act. for one month. (b) Section 5(1)(d) of the Prevention of Corruption Act read with Section 109 of the Indian Penal Code. (c) Sections 420, 468 Rigorous imprisonment and 471 read with Section for two years and a 109 of the Indian Penal fine of Rs. 500, the Code. sentence in default of payment of being rigorous imprisonment for one month. (d) Section 5(2) read Rigorous imprisonment with Section 5(1)(d) of for two years and a the Prevention of fine of Rs. two lakhs Corruption Act and the sentence in Section 109 of the default of payment of Indian Penal Code. fine being rigorous imprisonment for eighteen months.----------##

All the substantive sentences of imprisonment in the case of each of the accused were directed to run concurrently. It may be stated here that the charges framed against them under Sections 467 and 477-A of the Indian Penal Code were not found proved and they were acquitted of the same.

The prosecution case has to be set out at some length and may be stated thus. In the year 1965 the appellant Abdulla Mohammed Pagarkar (hereinafter referred to as A-1) was holding the post of Surveyor-in-Charge, Mercantile Marine Department, Marmagoa as also of the Captain of Ports, Panaji. In his capacity last-mentioned, the work of deepening and widening the Kumbarjua canal which connects river Zuari with river Mandovi required his urgent attention as the canal had to be made navigable at low tide for the use of mine barges during monsoon season when the sea becomes rough and it is hazardous to navigate across the mouth of the river Mandovi at Aguada. A survey of the canal had been carried out by the Marmagoa Port Trust and its report had been submitted to the concerned authorities. Tenders were invited by A-1 through an advertisement in the press and appellant Moreshwar Hari Mahatme (hereinafter described as A-2) was the only person to present one, which he did on January 5, 1966. As the cost of the work exceeded rupees one lakh and the tender was a solitary one, the Lieut. Governer forwarded it to the Central Government for approval and did not accept a suggestion made by the Secretary to the Industries and Labour Department (to be hereinafter called I.L.D.) that the work be started immediately in anticipation of the said approval. Nevertheless A-1 entrusted the work to A-2 who started executing it on March 15, 1966. No approval of the tender was received from the Government of India who directed, however, that the work be carried out departmentally.

4. Through a letter dated May 16, 1966 (Ex. P-7), the said Secretary informed A-1 that as the work was to be executed departmentally the conditions laid down in Rules 133 and 141 of the General Financial Rules (G.F.R.) had to be fulfilled and directed him to obtain the concurrence of the Public Works. Department (P.W.D. for short) for the various rates mentioned in a bill which A-1 had submitted earlier for payment in connection with the work. Such concurrence was obtained by A-1 on May 26, 1966 to payment of daily wages at the rates of Rs. 4.50 and Rs. 3.00 per head for male and female labourers respectively altough the preailing P.W.D. rates were Rs. 3.50 and Rs. 2.00 respectively (Ex. P-9).

5. The two appellants entered into a conspiracy to cheat the government in relation to the execution of the work. A-2 would submit occasionally to A-1 hand-written statements of the work done each day, specifying therein the details of quantity in cubic metres of the mud and salt excavated, the number (without the names) of male and female labourers employed, the cost of labour in accordance with the approved rates, charges for the country craft employed, etc. None of these statements bore the signature of A-2. A-1 would get typed copies of these statements prepared in his office and would send one of such copies under his own signature to the I.L.D. for sanction which used to be accorded after the concurrence of the Finance Department had been obtained. Thereafter a contingent bill would be prepared in the office of A-1 and in that bill A-1 would certify under his own signature that the work was carried out departmentally in compliance with Rule 141 of the G.F.R. Each of such bills accompanied by the relevant copy of the statement of work signed by A-1 would be forwarded to the Accounts Department which would issue a cheque in favour of A-1 who would realise the amount of the cheque and pay it in cash to A-2 against a regular receipt.

6. A stage was reached when the Directorate of Accounts objected to the payment of the bills and asked for muster rolls of labourers employed for execution of the work. A-1 then had prepared register Ex. P-37 and muster roll Ex. P-36 on the basis of entries in a copy book (Ex. P-47) which had been supplied to A-1 by A-2. The entries in the muster roll having been found to be suspicious,

the case was entrusted to the Central Bureau of Investigation who found that, as against a total amount of Rs. 4,73,537.50 paid by the government to A-1 and by him to A-2, the work done was worth no more than Rs. 76,247.43. It was this conclusion which led to the prosecution of the appellants.

7. Now we shall give a resume of the defence stand taken by A-1. He held numerous offices in addition to that of the Captain of Ports and as such he had to perform multifarious duties while the staff placed at his disposal was grossly inadequate by any standards so much so that he did not even have an Accounts Officer. As the work of deepening and widening the Kumbarjua canal needed urgent attention, tenders for its execution were called and A-2 was found to be the only tenderer. A-1 was assured by the Secretary, I.L.D., that the necessary order approving the tender would soon be forthcoming and that the execution of the work should be taken in hand immediately in anticipation of orders. The Assistant Marine Surveyor, Shri D'Souza (PW 4) was instructed to personally supervise the work which was started on March 15, 1966. By the end of April, 1966, A-1 was told that the work should be executed departmentally by engaging labour and not through A-2. However that was not possible under the circumstances and the work proceeded as before. Shri D'Souza (PW 4) used to check the volume and the kind of material excavated daily and used to make entries in his notebook accordingly. When objection was taken by the Directors of Accounts at the end of the financial year to the passing of the bills on the ground that muster rolls were not being maintained, A-1 made enquiries from Shri D'Souza (PW 4) and learnt that A-2 had maintained a gang-wise muster roll on the basis of which documents were prepared by Shri D'Souza (PW 4) under the orders of A-1 and were submitted to the I.L.D. The work was executed in conformity with the bills submitted by A-1 to the government. In any case, A-1 acted in good faith and if any of the bills did not conform to facts the reason must be that he had been cheated by A-2.

8. The stand taken by A-2 in defence was more or less the same. He averred however that the bills were prepared not on the basis of labour engaged but on the volume of work done that he never supplied any labour to A-1, that the total material excavated amounted to 35,516.70 cubic metres, that there was no question of keeping any muster or acquittance roll as the work was executed by the labourers on piece-rate basis and that the average number of labourers working per day for execution of the work was about 700.

9. From the documentary evidence placed on the record at the trial the learned Special Judge found the following facts proved :

(a) Under directions of A-1 the execution of the work was started by A-2 before the tender submitted by the latter, which had been forwarded by the Lieut. Governer for approval to the Government of India, had been accepted.

(b) Through a latter dated May 16, 1967 (Ex. P-7) the Secretary, I.L.D., directed A-1 to have the work executed departmentally in accordance with the conditions laid down in Rules 141 and 133 of the G.F.R. and to obtain concurrence of the P.W.D. to various rates applicable to the work. Such concurrence was actually obtained by A-1 (Letters Exs. P-8 and P-9).

(c) The work was being carried out by A-2 with his own labour and no labour on muster roll was employed by A-1.

(d) A-2 prepared statements of work or summaries which he submitted to A-1 who

would then sign typed copies thereof and forward the same for sanction to the I.L.D. On receipt of such sanction A-1 would prepare contingent bills and sign each of them along with a certificate that the work was being carried out departmentally in accordance with Rule 141 of the G.F.R. as per the attached summary. Each bill would then be submitted alongwith the summary to the Accounts Department which issued the corresponding cheque to A-1. The amount of the cheque was then realised by A-1 and paid over to A-2 under a receipt.

(e) Muster roll Ex. P-36 for the period from March 15, 1966 to April 6, 1967 was prepared in the Office of A-1 and under his directions at a stretch after the completion of the work and on the basis of Ex. P-47 which A-2 had maintained. Register Ex.P-37 was similarly prepared on the basis of written statements containing details of labour employed and submitted by A-2.

10. The learned Special Judge further arrived at the findings given below from the oral evidence produced before him :

(i) A-2 was fully aware that his tender had not been accepted by the government and that A-1 had been directed to carry out the work departmentally.

(ii) The amount really spent by A-2 in execution of the work was no more than Rs. 32,287.75 against which he manoeuvred, with the assistance of A-1, to receive sum of Rs. 4,73,537.50 from the government.

(iii) None of the bills could have been sanctioned for payment by the Accounts Department but for the certificate appended by A-1 to each of them that the work was being carried out departmentally under Rule 141 of the G.F.R.

11. From the above findings the learned Special Judge concluded that the two accused had entered into a conspiracy to cheat the government in the matter of the execution of the work by presenting inflated bills and receiving against them far greater amounts than had actually been spent, that muster rolls ultimately produced to support the bills contained false averments and were forged documents, and that A-1 was fully aware that the certificate regarding the work being carried out departmentally in accordance with Rule 141 of the G.F.R. and appended to each of the bills was false. It was also proved to his satisfaction that muster roll Ex. P-36 and register Ex. P-37 were dishonestly or fraudlently prepared by A-1 to support false bills and that this was done with the assistance of A-2. The amount really spent on the work done having been found by the learned Special Judge to be only Rs. 32,287.75, he held that the government had been cheated into an excess payment of Rs. 4,41,249.75.

12. It was in these premises that the learned Special Judge convicted and sentenced the two accused as stated earlier.

13. The learned Judical Commissioner upheld the findings of fact arrived at by the learned Special Judge expect the one relating to the amount actually spent in execution of the work which, in his opinion, was Rs. 76,247.43 as made out by the entries in books Exs. P-79 to P-82 which were recovered as a result of a search of the house of A-2. The conviction recorded against and the sentences imposed upon the appellants by the learned Special Judge were therefore confirmed by the learned Judicial Commissioner.

14. On behalf of the appellants it was vehemently contended before us by their learned councel that the tender submitted by A-2 was actually accepted by the government and that it was on that basis that the entire work was executed. In support of this argument there is not a shred of evidence on the record and we have therefore no hesitation in rejecting it straighway. In Ex. P-7 there is a clear intimation to A-1 that the work has to be carried out departmantally and that therefore he should obtain concurrence of the P.W.D. to the rates applicable to various items of work. Facedwith this situation learned councel for A-1 submitted that even under Rule 141 of the G.F.R. any work to be carried out departmentally could be entrusted to a contractor and in that submission he is right. However, it carries his case no further inasmush as no bills were drawn nor was any sanction accorded to any payment on the basis of any part of the work having been executed through A-2 working as a contractor. On the other hand those bills contained the number of labourers engaged for the work and the amounts claimed pertained to their wages at the sanctioned rates. In fact no bill contains even a mention of the fact that any contractor was executing the work or that A-2 was anywhere in the picture. Add to it the fact that A-2 did not submit any singed bills or statements either to A-1 or to the I.L.D. or, for that matter, to the Directorate of Accounts. Insofar as correspondence between A-1 on the one hand and government departments on the other is concerned, the name of A-2 and his connection with the execution of the work remained conspicuous by its absence except insofar as the tender submitted by him was concerned and that tender, as already stated, never became effective by its acceptance by any department or office of the government. The position which the two appellants therefore took in no uncertain terms throughout the period during which the work was executed was that it was being handled directly by the Department and not through any contractor. Any plea based on its execution through A-2 as a contractor must therefore be repelled.

15. A more serious argument put forward in support of the appeals was that the work actually executed had not really been shown to be worth anything less than the amount paid for it to A-2, i.e., Rs.4,73,537.50. The attack on the findings to the contrary arrived at by the two courts below consists of the submission that they are based really on mere conjectures rather than on evidence. And this attack appears to us, on a consideration of the material on the record, to be well-founded, as we shall presently show.

16. The amount of Rs.4,73,537.50 was received by A-1 against 4 bills the details of which appear below :

#----------Serial Exhibit mark Amount of the billnumber on the bill---------- Rs.1. P-13 98,294.502. P-18 82,811.003. P-24 84,847.004. P-28 2,07,585.00 ---------- Total 4,73,537.50 ----------##

17. As already stated, each of the bills above-mentioned was accompained by a document detailing the number of labourers employed. Other particulars such as sex of and rate of wages payable to each labourers also appeared in the document which has been described as a "summary". It is admitted on all hands that each bill confirmed to the corresponding "summary" but was not accompained, when submitted or passed, by any vouchers. The case propounded on behalf of the State is that the summaries contained false entries so that the number of labourers actually employed for the execution of the work was grossly inflated and that it was on that account that the appellants were able to draw moneys from the State Treasury far in excess of those actually paid by them for the execution of the work. On the other hand, the claim on behalf of the appellants is that no evidence at all is available to indicate that any of the entries made in the summaries as also in the

bills did not conform to facts.

18. The learned Special Judge analysed the oral evidence of PWs 1, 4, 7, 8, 13, 14, 17, 19 and 20 and observed that the number of labourers including the crew of the country craft working at all the sites where dredging was in progress during the period in question varied, according to thosse witnesses, from 80 to 200. He further noted the fact that in the statement recorded under Section 342 of the Code of Criminal Procedure even A-1 had taken the stand that the number of labourers found by him working at the canal, whenever he visted the site, varied between 200 and 250. He then proceeded to quantify the amount of money paid to the labourers at Rs. 32,287.75 with the following observations :

From the receipts produced by the prosecution witnesses Nos. 7, 8, 9, 10, 14, 15, 16, 17, 18, 19, 20 and 21 it is seen that the amount paid by A-2 to the labouurers and country craft owners is to the tune of Rs. 32,287.75. There was no suggestion of the Advocate of A-2 to the Investigation Officer that besides, the documents produced by A-2, there were other receipts which were not attacked by the Investigating Officer and produced by the procecution. The only contention of A-2 appears to be that, besides the amounts proved by the receipts by the receipts above, these were other amounts paid to the labourers for which receipts were not collected. All the procecution witnesses above had denied the suggestion of A-2 that, besides the amounts for which they have passed receipts, there were other amounts received by them for which they have not passed the receipts. Only PW 14 and PW 16 in their cross-examiniation, had admitted that besides the amounts for which they had issued receipts, they were also paid for some work on salary basis for which they were not issued receipts. These amounts, however, could not, according to me, go to thousands of rupees. Anyhow, it was for A-2 to prove that he had spent amounts besides those proved those proved by the prosecution which A-2 had failed to do.

19. Now this is hardly a proper approch to the requirements of proof in relation to a criminal charge. The onus of proof of the existence of every ingredient of the charge always rests on the prosecution and never shifts. It was incumbent therefore on the State to bring out, beyond all reasonable doubt, that the numbewr of labourers actually employed in carring out the work was less than that stated in the summaries appended to the bills paid for by the government. It is true that the total numbers of labourers working on a single day has been put by the prosecution witnesses mentioned above at 200 or less, while according to the summaries to the bills it varied on an average from 370 to 756. But then is it safe to rely on the mere impression of the prosecution witnesses, testified too long after the work had been executed, about the actual number of labourers employed from time to time ? The answer must obviously be in the negative and the justification for this answer is furnished by the variation in the number of labour employed from witness to witness.

20. The mind of the learned Special Judge in coming to the finding about the value of the work done being no more than Rs. 32,287.75 appears to have been influenced by the gross irregularitiess committed by the appellants in the execution of the work, specially their failure to prepare vouchers relating to all the payments as also a proper muster roll. These irregularities no doubt furnish to a circumstance giving rise to a strong suspicion in regard to the bona fides of the appellants in the matter of the execution of the work but suspicion, however strong, connot be substitute for proof. And it is certainly not permissible to place the burden of proof of innocwence on the person accused of a criminal charge. However, that is precisely what the Special Judge appears to have done while observing that "it was for A-2 to prove that he had spent amounts besides those proved by the prosecution which A-2 had failed to do".

21. The finding of the learned Judicial Commissioner on the point suffers from a similar defect. After examining the oral evidence in relation to it he observed :

> The evidence of these witnesses clearly indicated that the average total number of labourers working in the canal per day were 100 to 160. Taking an average of 123 labourers per day, out of which, on the basis of the statements furnished by A-2, less than 12000 would be males at the rate of Rs. 4.50 and a little more than 13000 femalesat the rate of Rs. 3.50, we have roughly a total sum of Rs. 80,000 spent on labour. This more or less tallies with the amount mentioned in the vouchers. Shri S. V. Naik has on behalf of A-2 suggested in cross-examination of these witnesses that the average number of workers working in the canal per day was 350 to 400. Even if we accept this figure the total amount payable on account of the labourers employed would be Rs. 3,00,000.00, but the accused have collected a sum of Rs. 4,73,537.50.

He differed with the learned Special Judge on the point of the value of the work actually done and in that behalf he has reasoned thus in another part of the judgment :

> No account books or receipts were produced by A-1 or A-2 to the government in support of the contigent bills and of the claims for the amounts which they received. No account books were produced or shown by any one of them. It is not the case of A-2 that he did not receive receipts for the payments made to the labourers, nor is it his case that he did not have any account books regarding the work. In fact, it would be unbelievable that a businessman or a labour-supply contractor should not keep account books or should not receive receipts for payments made. It is not the case of A-2 or A-1 that they had lost the account books or the receipts. When a search was effected of the residence of A-2, receipt books Exs. P-79 and P-82 and some books relating to the work seized. When a question was put to A-2 under Section 313 of the Code of Criminal Procedure, 1973, regarding this evidence, his answer was that neither the receipt books were account books. The receipts in the books are in serial numbers from 101 to 700. In the first search taken receipts bearing serial Nos. 151 to 200 for the period from April 14, 1966 to January 25, 1968 were missing. These receipts were all in one book, namely, Ex.P-82. Ex. P-82 was seized on a subsequent search : Another book no Ex.P-80 was also found in subsequent search. This book bear no serial numbers. All these three books constitute Exs.P-79, 80 and P-82 containing receipts relating to work. The total amount mentioned in the receipts relating to the work was Rs. 76,247.43. Accused 2 has not stated that he had vouchers for any other money paid by him nor has he produced any such vouchers. Prosecution Witnesses 7 to 10 and 14 to 21, twelve in all, who did the work of excavation in the canal have stated that they passed receipts for all moneys received by them. When suggestions were made to some of them that some payments were made to them without receipts, they denied the fact. The other books seized, namely, Ex. P-81 collectively, were, according to A-2, cash books. However, serial No. 23/11, item No.35, which was part of Ex.P-81 is definetly an account books and not a cash book. In any event, A-2 does not rely on any of these books nor has he said anything to show that any payments were recorded therein, which are other than the payments shown in Exs. P-79, 80 and 82. A-2 did not examine any workers who worked in the canal and who, according to him, had received any payments which were not receipted for. It is evidence from Exs. P-79 to P-82 that some moneys spent in the work were receipted and accounted for. Considering all these facts, the question that

> A-2 might have paid any amounts without receiving receipts can be ruled out. Exhibits P-79 to P-82 together with the other evidence on record support the version of the prosecution that the total amount of work done by the accused did not exceed Rs. 76,247.43.

We may at once state that thereis no evidence on the record to indicate that the bookd seized from the premises of A-2 contained entries about all the payments made by him to the labour employed for the execution of the work and that is a fact the correctness of which we see no reason to presume. The danger of assumptions of the type made by the two courts below is highlighted by the disparity in the figures which they reached in relation to the amount of the value above-mentioned. Each had his own way of looking at it; but then then grievous error into which they fell was that they thought that it was for the accused to show that the number of labourers employed confirmed to that shown for each day in the summaries attached to the bills. And that is an approach not sanctioned by law.

22. In coming to the finding under consideration the learned Judicial Commissioner also took into consideration the deposition of Lasli Rupert Donaud (PW 6) who surveyed the canal in September, 1965 and again in May, 1969, i.e., both before and after the work had been executed and in that connection prepared two documents, viz., Exs. P-55 and P-56, detailing his observations on the two occasions respectively. According to the witness the volume of solids to be dredged "to a depth of 10 feet below datum equals 5858 cubic metres". The figure is roughly one-fifth of 28,324.70 cubic metres which is the volume of total material alleged by the appellants to have been actually removed during the execution of the work and paid for. The argument advanced on behalf of the State that the disparity in the two figures itself shows that the claim of the appellants is false, although attractive on the face of it, is not acceptable to us on a deeper consideration. According to PW 6, the soundings taken on the two occasions were almost identical from which it was sought to be deduced that practically no work at all was done, which is not the case of either party. This shows that either the contents of the two documents represented observations which did not confirm to facts or which, in any case, could not be taken as a safe guide for calculating the actual number of labourers employed during the exxecution of the work which was carried out between the two surveys. Besides, our attention of has not been drawn by learned counsel for the State to any evidence from which it may be inferred that the portions of the canal where soundings were taken by PW 6 represented the entire length of the canal in relation to its breadth and depth. Again, the silting process which is a continous one, cannot be lost sight of. In between the point of time when the first survey was undertaken by PW 6 in 1965 and the end of the period during which the work was executed, a lot of silt must have settled at the bed of the canal and dredged out which would surely mean a considerable increase in the work actually done over the figure of 5858 cubic metres resulting from his estimate. Also siltation may havwe occurred and, for aught one knows, to a considerable extent, between the completetion of the work and the point of time when PW 6 took the soundings in 1969. Allowance has also to be made for the State of the tide when the surveys were undertaken. As pointed out by the witness himself, the soundings of 1969 were taken at the lowest tide. As it is, the witness had to make the following admission when he was asked if he could say on the basis of his two surveys whether any dredging was done in between :

> If some dredging is done during the years '66 and '67 in the canal and the soundings are taken in 1969 if it is identical to the soundings of 1965 I would not be able to say whether dredging was done in the canal or not . . . . .

23. We consider it very unsafe, in this state of the evidence to agree with the learned Judicial

Commissioner that the disparity between the estimate arrived at by PW 6 and the material claimed to have been dredged proved "that the documents on which moneys were collected by the accused were false". It appears to us that in coming to this conclusion, he was also influnced by the factors which raised a strong suspicion against the appellants.

24. Learned councel for the State sought to buttress the evidence which we have just above discussd with the findings recorded by the learned Special Judge and detailed as items (a) to (e) in paragraph 9 and items (i) and (iii) in paragraph 10 of this judgment. Those findings were affirmed by the learned Judicial Commissioner and we are clearly of the opinion, for reasons which need not be restated here, that they were correctly arrivedd at. But those findings merely make out that the appellants proceeded to execute the work in flagrant disregard of the relevnt rules of the G.F.R. and even of ordinary norms of procedural behaviour of government officials and contractors in the matter of execution of works undertaken by the government. Such disregard however has not been shown to us to amount to any of the of which the appellants have been convicted. The said findings no doubt make the suspicion to which we have above adverted still stronger but that is where the matter rests and it cannot be said that any of the ingredients of the charge have been made out.

25. Apart from the findings and evidence referred to earlier in paragraph 24, no material has been brought to our notice on behalf of the State such as would indicate that the bills or the summaries in question were false in any material particular.

26. Although it does appear that quite a few of the documents admittedly prepared by or at the instance of the appellants in connection with the execution of the work came into existence not while the work was in progress but only later when a demand for them was made by the Accounts Department, the charge cannot be sustained in relation to any of its heads, there being no prof of the falsity of any of the entries made in those documents. In the result, therefore, we accept both the appeals, set aside the conviction recorded against and the sentences imposed upon each of the appellants and acquit them of the charge in its entirety.

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