Tatam v Svikart [1999] NTSC 54

PARTIES:	MATT ANTHONY TATAM
	v
	GOTTLIEB THOMAS SVIKART
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA87 OF 1998 (9305063)
DELIVERED:	18 May 1999
HEARING DATES:	10 May, 1999
JUDGMENT OF:	Riley J

REPRESENTATION:

Counsel:

Appellant:	C. McDonald QC
Respondent:	J. Blokland

Solicitors:

Appellant:	M. Little
Respondent:	The Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tatam v Svikart [1999] NTSC 54
No. JA 87 of 1998 (9305063)

IN THE MATTER of the *Justices Act*

AND IN THE MATTER of an appeal from a sentence by the Court of Summary Jurisdiction at Darwin

BETWEEN:

MATT ANTHONY TATAM
Appellant

AND:

GOTTLIEB THOMAS SVIKART
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 18 May 1999)

[1] On 7 September 1998 Matt Anthony Tatam was convicted of assault in the Court of Summary Jurisdiction. In relation to that conviction he was sentenced to imprisonment for a period of nine months commencing on 7 September 1998. It was directed that the sentence be suspended after he had served one month. His Worship specified that, for the purposes of s 40 of the *Sentencing Act*, a period of one year from the date of sentencing was the period during which the appellant should not commit any other offence

punishable by imprisonment in order to avoid being dealt with under s 43 of the *Sentencing Act*.

[2] The events which gave rise to the conviction occurred on 31 January 1993 in the vicinity of a nightclub in Cavenagh Street, Darwin. There was no dispute that the victim, Peter Clifford Meredith, had attended the nightclub on that night. It seems a person named Gary Young, who was described as a "bouncer" at the nightclub, assaulted him. He was then escorted from the premises. During the course of being removed from the premises he lost a shoe and was insisting upon returning to recover that shoe. A different person, who was also described as a "bouncer", then assaulted him. The major issue for determination in the proceedings was whether the assailant on the second occasion was the appellant, Matt Anthony Tatam.

[3] The prosecution case as to identification relied principally upon one witness, Kristen May Richardson, who was a police auxiliary. On that night she was present at the nightclub in her private capacity and she told the Court that she witnessed the assault. The appellant was a "bouncer" at the premises and Ms Richardson indicated she had seen him at the premises "probably around 15 times" over a period of "four or five months, maybe a bit longer" and was able to identify him as the assailant. She and her girlfriends had noticed "he was a nice looking man" and they had commented on him being a "spunk" or words to similar effect. She identified him on the night of the assault and then in Court and she also gave evidence that she had previously been able to identify him outside of the Court. This occurred away from the

particular courtroom in which the matter was heard. He was in the area of the Office of Births Deaths and Marriages whilst she was having a cigarette whilst waiting to be called to give evidence in the proceedings.

[4] Mr McDonald QC appeared on behalf of the appellant and he identified the grounds of appeal against conviction upon which the appellant relied as follows:

(a) that his Worship erred in failing to warn himself as to the dangers of identification evidence;

(b) that his Worship erred in his application of the law with respect to identification evidence, and

(c) that his Worship "used and relied upon his observations of the appellant in the court room so as to discredit the appellant's evidence in denial of the charge without any notification of this to counsel acting on his behalf".

[5] In addition Mr McDonald argued that in all of the circumstances the finding of guilt was unsafe and unsatisfactory. The appellant also appealed against the sentence imposed by his Worship.

The Findings of His Worship

[6] In this matter the issue of identity was raised at the beginning of the hearing and was always the major issue to be addressed. The dangers of

identification evidence were drawn to the attention of his Worship. He was told that such evidence is "notoriously unreliable" and that his Worship needed to "warn (himself) about the dangers of identification evidence". He was referred to *Craig v R* (1933) 49 CLR 429; *Davies and Cody v The King* (1937) 57 CLR 170; *Kelleher v R* (1974) 131 CLR 534; *R v Burchielli* (1981) VR 611. He was reminded that "even apparently honest witnesses make mistakes and that's been proven time and time again".

[7] Shortly after the submissions were completed his Worship provided an ex tempore judgment. He did not repeat the matters of which he had just been informed in relation to the danger of identification evidence and he did not identify and warn himself in relation to particular dangers arising in this case.

[8] In addressing the issue of identification his Worship referred to the "clear and unequivocal evidence of Ms Richardson". He regarded her as "both forthright and honest in giving her evidence". He indicated that he had "absolutely no doubt … that she was attempting to give an honest account of her recollections". He went on to observe:

> "Not only did Ms Richardson say that she had previously seen the defendant, she explained why she remembered him in evidence, mainly because he appeared to her to be a man of handsome proportions."

[9] His Worship referred to the evidence of Ms Richardson that she "chased the defendant upstairs" but lost him and that she saw the same person at 4am

speaking to a police constable. His Worship noted that this evidence "is totally consistent with the story by Senior Constable Warren, who said he did not find the defendant on the first occasion upstairs but came back seeking a man of the same description as he sought before and immediately identified and spoke to the defendant".

[10] His Worship referred to and relied upon the supporting testimony of Senior Constable Warren and of a lay witness, Mr Grayson. Neither of the supporting witnesses identified the appellant directly but rather provided incidental support to the identification provided by Ms Richardson. His Worship accepted the identification by Ms Richardson as being "absolute and consistent with all other evidence".

Identification Evidence

[11] The complaint of the appellant was that the learned Chief Magistrate failed to warn himself as to the dangers involved in relying upon identification evidence.

[12] The High Court addressed the issue of identification in *Domican v The Queen* (1991-92) 173 CLR 555. That case involved circumstances where there was a fleeting identification of an accused person made from a distance and in difficult circumstances. Six members of the Court (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), in a joint judgment, said (561):

> "Nevertheless the seductive effect of identification evidence has so frequently led to proven miscarriages of justice that Courts of Criminal Appeal and ultimate appellate courts have felt obliged to lay down special rules in relation to the directions which judges must give in criminal trials where identification is a significant issue.
>
> Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the Judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of (the identification) evidence in the circumstances of the particular case". A warning in general terms is insufficient. The attention of the jury "should be drawn to any weaknesses in the identification evidence". The jury must have the benefit of a direction which has the authority of the Judge's office behind it. It follows that the trial Judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

[13] Their Honours pointed out that the adequacy of a warning in an identification case must be evaluated in the context of the identification evidence in the case. They went on to say:

> "The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification – not by reference to other evidence which implicates the accused."

[14] In *R v Bartels* (1986) 44 SASR 260 Johnston J at 270 addressed the issue of what warning was necessary to be given by a judge to a jury and he adopted the following passage from the judgment of Wells J in *R v Easom* (1981) 28 SASR 134:

> "Where the person identified is well known to the witness, no more than a few words may well suffice. Where, however, the conditions in which the person questioned was seen presented difficulties to an observer, the person was seen only a very short time, the circumstances could well have induced heightened emotions in the witness, or there is, in general, some other feature in the case that casts a shadow over the witness' mental processes of observation, retention, recollection or recognition, care must be taken to ensure that the jury is brought to appreciate the dangers of giving too ready an acceptance to evidence of later identification."

[15] As was pointed out by Sheppard J in *Grbic v Pitkethly* (1992) 65 A Crim R 12, if a case is tried without a jury the tribunal must still give itself the appropriate warnings as to the dangers inherent in identification evidence. He said the tribunal:

> "… then needs to consider those warnings and to be sure that it has heeded them. This does not mean it is to be overawed by them but it needs to pay them real attention."

[16] The present case was not one of a fleeting identification of a person previously unknown to the witness. The courts have recognised that there is an important distinction to be drawn between the identification of a person with whom the witness is familiar and that of a person with whom the witness is not familiar: *Marijancevic* (1993) 70 A Crim R 272 at 276. In that case Teague J noted that the care necessary to be taken with a witness who identifies an accused or suspected person must vary according to the familiarity of the witness with that person. He went on to say:

> "The circumstance that identification evidence is given relative to the face of a familiar person does not mean that there is no need for caution. On the contrary, it is always necessary to have regard to the circumstances of the particular case."

[17] He referred to *Turnbull* (1977) QB 224 where it was said:

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[18] In *Davies and Cody v The King* (supra) the High Court said (181):

> "It is almost unnecessary to say that the amount of care and the nature of the precautions which should be taken when a potential witness is brought to identify an accused or suspected person must vary according to the familiarity of the witness with that person. It would be ridiculous, because the prisoner has been shown alone to a potential witness, to deny the value or reliability of the identification if the witness' knowledge of the prisoner arose from long and close association or from every day intercourse in business affairs."

[19] In *Sharrett v Gill* (1993) 65 A Crim R 44 Miles CJ dealt with a case of the identification by a police officer of a person whom he had seen on approximately six previous occasions and where he saw him fleetingly on the occasion in question. He said (53):

> "That there were points of weakness in the identification evidence cannot be overlooked. Perhaps the magistrate recognised them and did approach the case with the proper caution. The difficulty is that he did not say so. The combined effect of *Grbic* and *Domican*, as I see it, is that the magistrate was required to search out the weaknesses and then expressly warn himself of the various dangers. This he did not do. Accordingly, the conviction would be liable to be set aside as unsafe and unsatisfactory by a court sitting as a Court of Criminal Appeal."

[20] In *Parker v Espinoza* (1996) 85 A Crim R 336 Anderson J said (340):

> "In this case, counsel for the applicant submitted that the magistrates decision that the applicant was the person attempting to steal the vehicle in question, cannot stand because the magistrate failed

> expressly to identify the weaknesses in the identification evidence and failed to expressly warn himself of the danger of convicting the applicant in the light of those weaknesses.
>
> In my opinion, supported as it is by *Grbic v Pitkethly* and *Sharrett v Gill*, this submission should be accepted. I think the combined effect of the cases to which I have referred is that the law now is that judicial officers sitting without juries who are invited to convict an accused person on the basis of identification evidence containing any weaknesses must expressly recognise those weaknesses and must expressly recognise the dangers of convicting on that evidence."

[21] Mr McDonald, on behalf of the appellant, has identified the aspects of the identification evidence that he submitted were weaknesses present in this case and which needed to be specifically addressed by his Worship. These were as follows:

(a) Identification was in dispute and the appellant denied he was the assailant from the outset and throughout the history of the matter.

(b) There was only one eyewitness who purported to make a positive identification.

(c) There was no identification parade or use of photograph boards or photographic evidence.

(d) No notes from the police existed at the time of the trial as to any initial description given by any witness as to the identity of the assailant at the time of the first involvement of police.

(e) The appellant said in his evidence and record of interview that he was spoken to by police at around 2am and yet was not identified by them by reference to the description.

(f) Ms Richardson was noted by his Worship to have, from time to time, an "unusual" demeanour and that she "seemed to be on the side of the prosecution".

(g) Despite Ms Richardson being a police auxiliary she did not advise the police that she had seen the appellant before.

(h) The description of the assailant's hair was different in her evidence from the initial statement taken in 1993. When she signed her statement she described the assailant's hair as "short dark hair", but in her evidence in chief she described it as "short brown hair I'd say shorter around the sides … in a sort of a flat crew top".

(i) Her evidence as to the location of the blow she saw inflicted upon the victim differs from other witnesses.

(j) She failed to identify the red bow tie and red cummerbund the appellant says he was wearing.

(k) She said the assailant looked like he was on drugs whereas Senior Constable Warren denied that this was the case when he spoke to the appellant some two hours later.

[22] The appellant says that these were all matters in relation to which his Worship should have provided himself a warning and he did not do so. It is also said that his assessment of the witness, Ms Richardson, concentrated upon her credit rather than upon the additional issues of reliability and the prospect of honest mistake.

[23] It will not always be necessary for a court to enunciate the fact that it has provided itself with an appropriate warning in relation to matters of identification evidence. The fact that such a warning has been given and heeded may be obvious from the surrounding circumstances eg where counsel has addressed clearly on the issue and the court shortly thereafter provides ex tempore reasons for decision consistent with the dangers having been considered.

[24] However, the situation in this case is different. Although counsel raised with his Worship some of the relevant authorities, neither counsel nor his Worship specifically sought to identify the weaknesses in the identification evidence including the suggested weaknesses that have now been identified by Mr McDonald. There was no warning in relation to those potential weaknesses. Further, his Worship did not address the possibility of honest mistake. In light of the authorities discussed above, error occurred.

[25] In the Northern Territory the fact that error has been identified does not mean that the appeal automatically should be allowed and the conviction

quashed. Section 177(2)(f) of the *Justices Act* provides that the Supreme Court may:

> "notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[26] I have therefore conducted a review of the evidence myself. I have attributed weight to the findings of his Worship regarding the credibility and reliability of the various witnesses. I have then considered whether, on the whole of the evidence before his Worship, a miscarriage of justice occurred in this matter.

[27] The case centred upon the identification of the assailant by Ms Richardson. The suggested weaknesses and dangers in identification evidence have been set out above. Do they give rise to any reasonable doubt as to the identification of the appellant as the assailant?

[28] It is clear from the reasons provided by his Worship that he regarded Ms Richardson as both an honest and reliable witness. Her reliability was supported by her previous familiarity with the appellant (she had seen him "recently and regularly") and the attention she paid to him because of the interest she and her friends had in this "man of handsome proportions". It was also supported by the length of time she had to observe him on this occasion, her proximity to him when she did observe him, the clear view she had of him in a situation of good lighting and the close attention she was

paying to what was going on. In addition she was able to recognise the appellant as the assailant again when he was spoken to by Senior Constable Warren at about 4am on the same morning. Indeed, Senior Constable Warren was able to identify the appellant from the description provided of the assailant. The evidence of each of Senior Constable Warren, the appellant and Ms Richardson confirms that the appellant was the person interviewed by Senior Constable Warren at about 4am in circumstances which are consistently described by each of these three witnesses.

[29] Ms Richardson was also able to identify the appellant outside the court in circumstances where she observed him from a distance of some 30 metres, and when she was not prompted in any way as to his identity. Her evidence was that she would "never forget his face".

[30] There is further support for her identification in other matters which were consistent with the identification. In particular the fact that the person who committed the assault was a "bouncer", and that the other bouncers were excluded by a process of elimination. This evidence was, in my opinion, not sufficiently strong to support a positive identification of the appellant on its own but amounted to support for the identification made by Ms Richardson.

[31] Further, the appellant was, on his own evidence, in the vicinity at or about the relevant time. He says that he saw the victim escorted down the stairs by Gary Young, who he described as being blonde. The only other security officer present at the front door at that time was Anthony, who was

described by the appellant as "a fairly solid Maori fellow with long hair". Neither the appellant nor Ms Richardson identified any other security officer as being present at the relevant time. The appellant said he went upstairs and did not see the assault. That evidence was clearly not accepted by his Worship for the reasons he expressed.

[32] I turn to deal with the specific matters referred to by Mr McDonald in his submissions as being aspects of the identification evidence which he submitted amounted to weaknesses in the present case. These matters are identified at par [21] above.

[33] The fact that identification was in dispute was clearly in the forefront of everyone's mind at the time of the hearing. The evidence of identification by Ms Richardson was strong and clear. The evidence of the appellant to the contrary was able to be rejected for the reasons spelled out by his Worship.

[34] Although there was only one eye witness who purported to make a positive identification, that identification was by a person who was "forthright and honest" and gave "clear and unequivocal" evidence, in that regard. Save for the evidence of the appellant there was no evidence which had the potential to create any reasonable doubt regarding the identification made by Ms Richardson.

[35] Although the case was described as one of identification, it was, more precisely, one of recognition. In the circumstances of this matter there was

no need for an identification parade or any other form of identification process to be undertaken and no prejudice resulted from the failure to conduct an identification parade.

[36] It was the case that the police notes were not available at the time of the trial and the reasons for this were described. Although it was desirable for such notes to have been produced and made available to the appellant, the fact was that they were not available. The absence of the notes does not serve to create any doubt as to the identification evidence. The circumstances of the identification made by Ms Richardson at 4am on the morning of the incident make it clear that the description provided by Ms Richardson to police was of the appellant.

[37] The appellant gave evidence that he spoke with police at around 2am and, accepting that to be so, he submits that it is significant that they did not identify him by reference to the description. However, it is not clear whether the police who spoke to the appellant at 2am had the full description of the assailant provided by Ms Richardson. Constable Warren says that he had a description at that time and when he searched he was unable to locate anyone fitting the description. However he was able to locate the appellant as a person fitting that description when he returned some hours later. The only description which the appellant revealed as being given to him at 2am was that the officers to whom he spoke "were looking for someone with short hair". There is no dispute that the appellant had short hair at the time.

[38] It is true that his Worship regarded Ms Richardson as having an unusual demeanour and that he commented that she "seemed to be on the side of the prosecution" but, for the reasons he expressed, his findings of credibility and reliability were unaffected by those matters. Similarly the fact that Ms Richardson did not advise the police that she had seen the appellant before that night did not affect the conclusions reached by his Worship. She said she did not provide that information because she was not asked the question. This is entirely understandable when she was able to say who the assailant was by virtue of a description. Mr McDonald did not seek to argue that the witness was deliberately untruthful.

[39] The difference in the descriptions of the assailant's hair given by Ms Richardson in 1993 and then in 1998 was not significant. Indeed the descriptions, whilst differing in emphasis, are consistent.

[40] The fact that her description of the position of the blow which she saw land on the victim differs from descriptions provided by other witnesses, is to be expected in the circumstances. Other witnesses were affected by alcohol and one would be surprised if, in the circumstances of this matter, there was complete uniformity of evidence in this regard. Reference to the descriptions provided by the witnesses Richardson, Meredith and Grayson suggests they are each describing a blow which is in approximately the same area ie to the right hand side of the face. Mr Savy referred to the left hand side of the face. Save for the evidence of Mr Savy I do not see any significant discrepancy in the evidence of the witnesses. Such discrepancy

as might exist does not detract from the ability of Ms Richardson to provide reliable evidence regarding the description of the person who was the assailant. This observation also applies to her comment that the assailant looked as though he was on drugs whereas Senior Constable Warren, who spoke to the appellant two hours later, did not regard the appearance of the appellant as being as though he was on drugs. The circumstances in which Ms Richardson saw the assailant were such that he was in an agitated state, bouncing up and down on his toes and about to inflict a blow to the head of the victim. It would not be surprising if his appearance was different at that time from what it was two hours later.

[41] Finally the appellant directs attention to the fact that Ms Richardson failed to notice the red bow tie and red cummerbund the appellant says he was wearing. Indeed she failed to notice a red bow tie or red cummerbund on any of the security personnel present on that occasion. In so doing she was not alone, both Mr Meredith and Mr Savy described the dress of the "bouncers" as consisting of dark trousers and a white shirt and did not make any reference to a tie or cummerbund. Assuming that the security personnel were so attired, and I note that the only evidence to this effect was from the appellant, whose evidence was not accepted by his Worship, it seems that this fact failed to register with Ms Richardson. She did however record that they were each wearing black trousers and a white shirt. To my mind this possible failure of recall or observation, in the circumstances of this matter,

does not raise any doubt as to her capacity to identify the appellant as being the assailant.

[42] Bearing in mind the dangers associated with identification and recognition evidence and the prospect of honest mistake, I am of the opinion that the quality of the identification evidence in this matter was such as to exclude any reasonable possibility of mistake. The evidence of identification was clear and strong and came from a witness who was truthful and reliable. I consider there has been no miscarriage of justice arising out of the matters addressed above.

Ground 13

[43] At the commencement of the hearing the appellant was given leave to add a further ground of appeal in the following terms:

> "That the learned Chief Magistrate erred in law in the manner in which he used and relied upon his observations of the appellant in the court room so as to discredit the appellant's evidence in denial of the charge without any notification of this to counsel acting on his behalf".

[44] The appellant relied upon one particular paragraph of the ex tempore reasons delivered by his Worship. This paragraph was as follows:

> "Mr Tatam, on the other hand, gave evidence quite fairly. I thought he was very cool giving his evidence. He almost had a trained appearance in the way he attempted to be very quietly spoken and to turn to me on each occasion when he denied the fact of the assault. His tenet in the box was somewhat different from his manner in the court room and other times, when he appeared much more confident and assertive than he was in the box."

[45] It was said that his Worship relied upon these observations because, later in his reasons, having addressed other faults he found in the evidence of the appellant, he said:

> "So having taken all those things into account, I accept the evidence of Ms Richardson and the other prosecution evidence wherever it conflicts with that of Mr Tatam, and in those circumstances I find him guilty of the charge of assault."

[46] It was submitted that the learned Chief Magistrate relied upon his observations of the appellant outside of the witness box and should have drawn this to the attention of the parties so that they may have an opportunity of answering or dealing with those matters: *Minagall v Ayres* (1966) SASR 151; *Jobst v Ingliss* (1986) 41 SASR 399; *Gaston and District Hospital v Thamm* (1987) 47 SASR 177; *Government Insurance Office of New South Wales v Bailey* (1992) 27 NSWLR 304 and *Marelic v Comcare* (1993) 121 ALR 114.

[47] In my opinion a fair reading of the paragraph does not support the interpretation placed upon it by the appellant. Taken at its highest his Worship made an observation that whilst the witness was in the witness box he was quietly spoken and deliberate and, when he was not in the witness box, he was "more confident and assertive". This observation does not in any way reflect upon the credit of the appellant and, further, was not something which "fair play and commonsense" required that either party have an opportunity to deal with. As I read the passage in its context within the ex tempore reasons it was not a matter of "significant influence" upon

the decision and, indeed, it was merely a passing observation. The real basis upon which the evidence of the appellant was not accepted was set out in a separate paragraph in which his Worship spelled out the difficulties he had with the evidence of the appellant.

Unsafe and unsatisfactory

[48] The test for determining whether a verdict is unsafe and unsatisfactory was stated by a majority in the High Court in *M v The Queen* (1994) 181 CLR 487 as being whether, upon the whole of the evidence, the court is persuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. In making this assessment the Court must pay full regard to the consideration that the court below is the body entrusted with the primary responsibility of determining guilt or innocence and has had the benefit of having seen and heard the witnesses. See also *Gipp v The Queen* (1998) 72 ALJR 1012.

[49] I have reviewed the whole of the evidence (much of which is discussed above) and I am not persuaded that this verdict was unsafe or unsatisfactory.

Grounds 8 and 9

[50] The appellant complains that in determining sentence the learned Chief Magistrate erred by placing too much emphasis on deterrence and insufficient emphasis on the rehabilitation of the defendant and says that the

sentence imposed was manifestly excessive in all the circumstances of the case.

[51] The assault on the victim was quite serious in that the victim had already been the subject of a serious assault and was particularly vulnerable. The circumstances of the assault were such that it was unprovoked and quite unexpected. It was inflicted by a person who was employed to ensure the safety and security of patrons of the establishment. Rather than protecting this patron the appellant attacked him. In the circumstances his Worship was justified in placing emphasis on deterrence.

[52] In addition the appellant could not claim the benefit of mitigating factors such as co-operation, a guilty plea or remorse. In my opinion the sentence was clearly within the expected range and by suspending most of the sentence the prospects for, and desirability of, rehabilitation were given appropriate weight.

[53] In the circumstances I dismiss this appeal.

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