Stephen v Lush & Ors [2015] NTSC 55

PARTIES:	STEPHEN, Levi Storm v LUSH, Craig Robert And: SMITH, Angela Finn And: SCOTT, Emily And: AKERS, Matthew Paul And: BELL, Mitchell Christopher
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	21502890; 21502885; 21509890; 21502886; 21403984; 21525943 & JA 30 of 2015
DELIVERED:	8 September 2015
HEARING DATES:	26 August 2015
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – SENTENCING – JUSTICES APPEAL – Procedural fairness – Magistrate referred to media report not tendered – breach of procedural fairness found but appeal dismissed as no substantial miscarriage of justice occurred in the circumstances of restoration of suspended sentence.

SENTENCING – JUSTICES APPEAL – PRINCIPLE OF TOTALITY – appeal allowed in part.

Evidence (National Uniform Evidence) Act 2011 (NT), s 4(2).
Justices Act (NT), s 176, s176A and s 177(f).
Sentencing Act 1996 (NT), s 5, s 43 and s 104.

House v King (1936) 55 CLR 499, applied.
Madden v R [2011] NSWCCA 254; *R v Wise* (2000) 2 VR 287, 294, followed.
Ellis v The Queen (2005) 154 A Crim R 450; *Teakle v State of WA* [2007] WA SCA 15, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Ker
Respondent:	D Dalrymple

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director Public Prosecution

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Stephen v Lush & Ors [2015] NTSC 55
Nos: 21502890; 21502885; 21509890;
21502886; 21403984 & 21525943

BETWEEN:

LEVI STORM STEPHEN
Appellant

AND:

CRAIG ROBERT LUSH
First Respondent

AND:

ANGELA FINN SMITH
Second Respondent

AND:

EMILY SCOTT
Third Respondent

AND:

MATTHEW PAUL AKERS
Fourth Respondent

AND:

MITCHELL CHRISTOPHER BELL
Fifth Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 September 2015)

Background

[1] This is an appeal against sentencing orders of the Court of Summary Jurisdiction. The sentence that is the subject of appeal comprises both the full restoration of sentences previously imposed and cumulative sentences for two further offences. The total effective term imposed on 9 June 2015 was 5 months and 16 days imprisonment, commencing on 3 June 2015.

[2] The appellant was first sentenced on 5 March 2015, to a total effective term of 7 months imprisonment for the following offences:

> 21403984: Possess thing used to administer a dangerous drug and possess a trafficable quantity of methamphetamine (offence date 25 January 2014);
>
> 21502885: Possess methamphetamine in a public place (offence date 28 February 2014);
>
> 21502886: Engage in conduct resulting in a breach of bail undertaking (offence date 19 May 2014);
>
> 21502890: Possess a trafficable quantity of methamphetamine in a public place, possess thing used to administer a dangerous drug and supply methamphetamine (offence date 16 January 2015).

[3] The sentence was ordered to commence on 8 December 2014 with the balance of the sentence suspended forthwith. An operational period of two years was set.

[4] One of the conditions of the suspended sentence was:

> "The offender will at the direction of a probation and parole officer immediately enter into the Banyan House residential rehabilitation program, or any other program assessed as suitable, participate fully in that program and do nothing to cause their early discharge".

[5] On 9 June 2015, the appellant pleaded guilty to one count of stealing, committed on 1st December 2014 and one count of breach of a bail undertaking, committed on 27 May 2015. He also admitted breaching the suspended sentence by leaving Banyan House and by the commission of the bail offence, relevant to the bail he had been granted for the stealing offence.

[6] After the appellant admitted the breaches of the suspended sentence originally imposed on 5 March 2015, the balance of the suspended sentence was restored in full, a period of four months and two days. A further period of one months imprisonment was imposed upon conviction for the stealing offence. The stealing offence was not an offence that constituted a breach of the suspended sentence. In relation to the bail offence, the appellant was convicted and sentenced to a period of 14 days imprisonment. Both sentences were ordered to be served cumulatively upon each other and upon the restored term. This brought the total effective term to a term of five months and 16 days imprisonment, commencing on 3 June 2015:

Grounds 1 and 2:

The learned sentencing Magistrate erred by receiving into evidence by his own inquiry media reports relating to the defendant; in the alternative to ground one, the learned sentencing Magistrate erred by placing excessive weight on media reports relating to the defendant.

[7] It is convenient to deal with these two grounds together.

[8] It needs to be appreciated, this is not a case in which it is suggested his Honour made specific inquiries in the absence of the parties,[1] nevertheless, the manner in which a certain media report was utilised in the proceedings was unfortunate and in my opinion constituted a procedural error. Once all of the material and the proceedings as a whole in the court below are considered however, it is concluded here that this is not a case in which the appellant could have grounds to complain that the restoration of the sentences previously held in suspense constituted a substantial miscarriage of justice. Nonetheless in my opinion error has been demonstrated. I agree however with the respondent's alternative argument that s 177(2)(f) of the *Justices Act* applies to these circumstances: consequently ground one should be dismissed on that basis.

[9] The transcript discloses the learned Magistrate was aware of a press report in relation to the appellant's apparent disregard of his obligations under the suspended sentence. During the course of submissions made on the appellant's behalf, the following exchange occurred:

[1] *Teakle v State of WA* [2007] WA CCA 15.

Ms Crouch: Your Honour, [the appellant] is no longer using ice and he hasn't used methamphetamine –

His Honour: Ms Crouch, are you aware of the newspaper article about your client and his Facebook mouthing's off in the interim?

Ms Crouch: No, your Honour.

His Honour: Perhaps you should become so. And mould your plea around that.

Ms Crouch: Sorry, your Honour, I don't know what you're referring to.

His Honour: It helps if you know the facts before you prepare your plea. There's a fact that apparently you're not aware of relevant to your client's attitude and rehabilitation.

Ms Crouch: Yes, your Honour.

His Honour: I'm inviting you to speak to your client and become aware of it, before you continue your submissions.

Ms Crouch: Yes, your Honour.

His Honour: It may assist.

Ms Crouch: Thankyou, your Honour.

His Honour: As a member of the public, I do read the newspaper. As a result of that, I'm aware of this article about your client and his Facebook mouthing's off after he had left the Residential Rehabilitation Facility.

I'm not going to pretend I'm not aware of it. It's a matter which — it's in the public domain.

The following exchange then occurred between the Learned Magistrate and the Prosecutor:

> Are you aware of it, Ms Louden?
>
> Ms Louden: Yes, your Honour. Very briefly.
>
> His Honour: Would you please assist Ms Crouch with some details of that?
>
> Ms Louden: Yes, your Honour.[2]

[10] The proceedings were then stood down in order for the Appellant's counsel to obtain further instructions.

[11] What should have occurred in these circumstances is that the learned Magistrate should have invited the prosecutor to consider obtaining and tendering the relevant report, alternatively, the Court could have provided the report to the parties to obtain instructions, or otherwise consider submissions on how to proceed in the light of it. The learned Magistrate approached the matter correctly by telling the parties he was aware of this material and that it may be relevant to his consideration.

[12] Following his Honour's disclosure of his awareness of the material to the parties, the matter was stood down to allow the parties to obtain instructions. Beyond the disclosure made by his Honour, there does not appear to have been any further enquiries made to ascertain whether the knowledge the prosecutor had of the material was the same as the learned

[2] Transcript, Court of Summary Jurisdiction, 10-11.

Magistrate's knowledge or recollection. It would have been far preferable for the learned Magistrate to particularise the material in greater detail or arrange for the article to be produced to the parties, and preferably tendered by the prosecutor if the content of the article was to become a significant factor.

[13] In these circumstances, the issue is whether the appellant was afforded procedural fairness. Pursuant to s 104 *Sentencing Act* (NT), a sentencing court may, before passing sentence on an offender, receive such information as it thinks fit to enable it to impose the proper sentence. The information must, however, be received in a manner that is fair. Potentially the learned Magistrate was able to receive the article into evidence on the plea, notwithstanding any hearsay content under s 4(2) *Evidence (National Uniform Evidence) Act*. Under that provision, a sentencing court is not bound by the rules of evidence, unless a direction is made to the contrary. No such direction was made, hence there would appear to have been no bar to receiving the material. Nonetheless, a sentencing court is required to afford procedural fairness to both parties.[3] Maintaining the customary procedures and practices with respect to sentencing hearings avoids blurring the roles of the parties and the court, as was emphasized in *Madden v R*:[4]

> "The roles of counsel and the judge are clearly defined and trespassing by one upon the role of the other is not to be encouraged, certainly not by this Court. It is not the role of a judge to seek out

[3] *Re JRL; Exparte CJL* (1986) 161 CLR 342, 350 per Mason J.
[4] [2011] NSWCCA 254, [29], per Simpson J.

> evidential material, nor to determine the scope of the evidence put before him or her".

[14] As already stated, this is not a situation in which his Honour sought out the material; his Honour was aware of the material in the public domain and drew the material to the attention of the parties. The nature of the material described by his Honour was potentially adverse to the appellant. It should have been produced or failing production disregarded. It should have at least been precisely particularised. The difficulty with what occurred is discerning precisely what part of the report was on his Honour's mind and whether his Honour and the prosecutor were speaking of exactly the same report or part of the report. Although a different factual situation than here, some guidance may be drawn from *R v Wise*[5] where the Court of Criminal Appeal (Vic) stated:

> ".....where a judge has a document which is not provided by the parties, that judge should make assurance doubly sure by seeing that counsel have access to that document or a copy of it, or, if they do not, that they are for one reason or another all agreeable that the judge may continue to look at the document who he or she alone has".

[15] The proceedings here in large part were salvaged because his Honour stood the hearing down and asked the prosecutor to assist defence counsel "with some details" (of the article). His Honour initially rejected an application by defence counsel to stand the matter down for a longer period stating:

[5] (2000) 2 VR 287, 288.

> "I'm very sorry, Ms Crouch. The matters on before me, you're not prepared. I'm not saying it's necessarily your fault, but you do need to take instructions from your client and if you're going to stand before the court and tell me what a good boy he's been, you need to know whether he has or hasn't been".[6]

[16] Although initially his Honour refused an application to adjourn the matter until 2:00pm, it is common ground between the parties in this Court that the matter resumed at or after 2:00pm. It may readily be inferred the article in question was in the Northern Territory News. Although many in the community no doubt read the Northern Territory News, as I do daily, it would be risky to assume that all counsel do so, or would otherwise be aware of published material about their clients.

[17] In any event, when the hearing resumed, to her professional credit, defence counsel addressed the article and issues of concern raised by his Honour. She informed the Court she had spoken to the prosecutor and taken instructions in relation to the article. She told the Court her instructions were that the comments (apparently those referred to by his Honour) were made on Facebook by the appellant and that the photo that was posted with the article was a photo taken prior to him being taken into custody in December 2014.

[18] His Honour remarked that the tenor of the appellant's attitude revealed by the posting on Facebook seemed inconsistent with defence counsel's earlier submissions. Although I conclude there has been a breach of procedural

[6] Transcript, Court of Summary Jurisdiction at 11.

fairness, in the circumstances it was largely remedied as both counsel appear to have been placed in a position that enabled them to argue the merits of any impact the publication may have had on sentence.

[19] Defence counsel also made submissions on the gravity of the breach, the actions taken by the appellant since the "posting" and told the Court the appellant was no longer using amphetamines.

[20] What needs to be appreciated in terms of the restoration of the suspended sentence is that the appellant had not reported to or contacted Community Corrections since his release date on 5 March 2015. Upon release on 5 March 2015, he immediately entered the Banyan House residential Rehabilitation Programme to address his methamphetamine and cannabis misuse. On 7 March 2015 it was identified that the appellant had absconded from Banyan House Residential Rehabilitation Programme. Community Corrections received an "Exit Report" from Banyan House on 9 March 2015. As a result of the appellant absconding from the Banyan House Residential Rehabilitation Program, Community Corrections were unable to conduct any drug urinalysis testing on the appellant.[7]

[21] This was to be balanced against submissions on the appellant's behalf that he was no longer using ice, that at the time of the hearing he was spending his time with family and his partner and at that time was working in his father's boat building business receiving $800 per week.

[7] Transcript, Court of Summary Jurisdiction, 9 June 2015 at 7.

[22] His Honour rejected the appellant's claim that he had ceased using illicit drugs. It was submitted in this Court on behalf of the appellant that the finding was based in part on the article. The learned Magistrate relied upon the reported comments on social media as demonstrating the appellant's poor attitude and that the comments "were plainly indicative of bravado and a disregard of these matters".[8]

[23] As I have already mentioned, there was a breach of procedural fairness in that the article should have been produced, either by the Court or tendered by the prosecutor, however, to the credit of both the appellant and his counsel, it was admitted that the appellant had made the relevant comments that were of concern to his Honour. A fair reading of the transcript shows it was clear to the parties that his Honour intended to have some regard to the article in his assessment of the appellant. By advising the Court that the photo was taken in December 2014 (prior to the appellant being taken into custody) it is apparent defence counsel was placed in a position where his Honour could be corrected as to the time frame of the taking and the subsequent posting of the photo.

[24] In the Court below, the appellant's counsel explained a connection between the article and the appellant's rehabilitation. This submission was to the effect that the appellant had been the subject of criticism as a result of his

[8] Transcript, Court of Summary Jurisdiction, 9 June 2015 at 22.

comments reported in the article "and realised that he needed to sort himself out".[9]

[25] In respect of ground two it is argued the learned Magistrate placed excessive weight on the article in terms of assessing both the offending and the appellant's prospects of rehabilitation. In my view a fair reading of the sentencing remarks do not indicate the article was overvalued. His Honour's concerns were directed to the total failure of the appellant to comply with the conditions of the suspended sentence. Against that, although there were other favourable factors to consider (potentially obtaining work, ceasing drug use and an apparent change in attitude) it cannot be said to be an error to fully restore a relatively short term of imprisonment when there was an acute failure to engage with rehabilitation services. Self-assessment, in terms of drug use, may well be unreliable. It is not unusual for little or no weight to be given to such claims. There was nothing before the Court to support the appellant's assertion that he was no longer using illicit drugs. His Honour was not obliged to accept the assertion.

[26] Pursuant to s 43(7) of the *Sentencing Act*, his Honour was required to fully restore the sentence held in suspense unless he was "of the opinion that it would be unjust to do so in view of all of the circumstances which have arisen since the suspended sentence was imposed including the facts of any subsequent offence". The prosecutor sought full restoration on the ground

[9] Transcript, Court of Summary Jurisdiction, 9 June 2015 at 13.

that there was nothing that would indicate it would be unjust to so do. His Honour asked the appellant's counsel if there were any submissions to address that point. Counsel declined to submit any further matters specifically on that point. The appellant's counsel appears to have put all that could possibly have been submitted on the appellant's behalf. Reasonable minds way differ about whether it is appropriate or not to give a person in the appellant's circumstances a "second chance", but such a difference of opinion is a long way short from establishing that it was an error not to do so in this case.

[27] In my opinion, with respect to ground one, procedural fairness as generally applied in sentencing cases was not afforded to the appellant, however, the impact of the error was largely rectified throughout the course of the hearing. Ground one should be dismissed on the basis that no substantial miscarriage of justice actually occurred.[10] I would also dismiss ground two.

[28] At the hearing of this Appeal, counsel for the respondent sought to tender two affidavits. One was deposed to by the prosecutor in the Court below, setting out her understanding of the article, retrieving the article and her interaction with defence counsel when the matter was stood down. The second was deposed to by Ms Ellie Turner, of the Northern Territory News. Annexed to Ms Turner's affidavit were articles published in respect of the appellant. I admitted the affidavits on a provisional basis. The admission into evidence was opposed by the appellant. Having considered the matter

[10] Section 177(2)(f) *Justices Act*.

since the hearing I decline to admit the affidavits into evidence. First, there is not consent under s 176 of the *Justices Act*. Second, the material does not meet the criteria set out in s 176A of the *Justice Act*. Although s 176A of the *Justices Act* appears more relevant, if not confined, to appellants, it is nevertheless the criteria that determines admissibility of new material in the context of Justices Appeals. The material would not afford a ground for allowing the appeal as required by s 176A(1) *Justices Act*. There is no reasonable explanation for the failure to adduce it as required by s 176A(1)(b) *Justices Act*. Further, the procedural requirements are not met pursuant to s 176A(2) and (3) of the *Justices Act*.

[29] My tentative view is that s 176A of *Justices Act* does not assist respondents, but in any event, there is no satisfactory explanation as to why the material was not sought to be tendered at the original hearing, as it should have been.

Ground 3

That the learned sentencing Magistrate erred by restoring the sentence of imprisonment previously held in suspense without directing that the defendant be re-assessed for community based supervision.

[30] A report from Community Corrections dated 11 March 2015 was before the Court of Summary Jurisdiction. The author of the report noted the appellant's unsatisfactory level of compliance and recommended he be re-assessed for supervision. It was argued in this Court that implicit in such a recommendation was an acknowledgment that the appellant's attitude had improved. The appellant's counsel requested a further report be ordered by

the Court. His Honour declined to make such an order. Despite the admitted breaches, it was submitted on appeal there was "cause for some optimism" in assessing rehabilitation, specifically because:

- There was no further drug offences;
- The only re-offending was a bail offence relating to an offence committed before the imposition of the suspended sentence;
- The appellant was a young person, 23 years of age;
- The appellant had reconnected with his family;
- He had obtained employment with his father (this was disputed by the prosecution, and no finding was made by the Court);
- He had demonstrated insight into his offending and behaviour given acceptance of criticism about his social media comments and had surrendered to police.

[31] These important factors were before the Court below. I agree with the substance of submissions made on behalf of the respondent in this Court. The recommendation by Community Corrections that the appellant be reassessed cannot simply be treated as an indication that the appellant would be suitable and has good prospects to be released. It may indicate the opposite, that Community Corrections no longer regard him as suitable. In short, the appellant can take no comfort, contrary to what was asserted on his behalf, that Community Corrections were attempting to convey a view to

the Court about his prospects. As with grounds one and two, reasonable minds may differ on whether it is appropriate to offer a "second chance" to offenders who are in breach of their suspended sentence in such a fundamental way, even if that 'second chance' amounts only to a further assessment. This is a long way from establishing that it was an error in this case not to order a re-assessment of the appellant about this suitability for supervision. It has not been demonstrated that the restoration of the suspended sentence was in error.

[32] Ground three is dismissed.

Ground 4 and 5

That the Learned Sentencing Magistrate erred in ordering the sentence of one month imprisonment to be served cumulative to the restored sentence; that the Learned Sentencing Magistrate erred in failing to give proper effect to the principles of totally in imposing a total effective sentence of five months and 14 days.

[33] It is convenient to deal with these two grounds together. The stealing offence was committed on 1 December 2014, a date within the period of offending for which the suspended sentence was imposed. It was accepted by his Honour that the stealing offence was "part and parcel of the defendant's drug fuelled lifestyle around that time". It was not offending that breached the suspended sentence. It involved stealing $60.02 worth of unleaded petrol on 1 December 2014. The appellant was identified and

spoken to by police on 17 January 2015. He was issued with a Notice to Appear on 11 February 2015. He was in custody on each of those dates. The charge was not filed until 4 March 2015.[11] In the Court below it was said to be "in [the appellant's] hands" to have the matter brought on earlier and dealt with when he was dealt with for the drug charges. There is nothing to indicate the failure to bring forward the charge was in the control of the appellant, particularly given he was in custody at crucial times. In any event, this did not preclude the operation of the principle of totality and appropriate orders for concurrency.

[34] The respondent has made a partial concession in respect of grounds four and five. It is conceded that it is not apparent from the sentencing remarks that totality was effectively taken into account as regards the order that the one month sentence imposed on the stealing offence should be serve wholly cumulatively on the restored sentence. It was argued there should still be partial concurrency, if error was found. Counsel for the respondent submitted the sentence for breach of bail should be cumulative on the restored term and that no error could be identified with respect to the accumulation of the 14 days imprisonment for the breach of bail.

[35] The principle of totality is the last step in the sentencing process. If the total effective term infringes the principle of totality, accumulation of

[11] Transcript Court of Summary Jurisdiction, at 22.

particular sentences should be moderated.[12] The relevant principles are clear and do not need repeating here.

[36] In assessing overall culpability, the focus should be on the commonality in the underlying facts and circumstances of the offences. Clearly the stealing had its genesis in and around the original charges for which the suspended sentence was imposed. As part of a court's sentencing consideration to achieve a punishment "that is just in all the circumstances" the court is required, *inter alia*, to have regard to the sentences that the offender is liable to serve because of the revocation of previous orders made under the *Sentencing Act*.[13] Further, although in many cases the presumption will be readily discharged, s 43(6) of the *Sentencing Act* provides that where a court orders an offender to serve a term of imprisonment that had been held in suspense, "the term must" unless the court otherwise orders, be served immediately and concurrently with any other term of imprisonment. Having exercised the Court's available discretion to the fullest extent possible, to restore the total term outstanding, further consideration was required in respect of whether the sentence for two offences of far less gravity than the original offences were required to be served cumulatively.

[37] As indicated, the stealing offence was to an extent historical, arising during the period of the previous offending. The bail offence was committed, following the stealing offence and bears some relation to the stealing

[12] *Ellis v The Queen* (2005) 154 A Crim R 450, 452.
[13] Section 5(2)(b) *Sentencing Act*.

offence given the unusual timing of events. It seems unlikely the sentencing outcome in March 2015 would have been any different by the inclusion of the stealing offence. The stealing charge to which the bail related was not before the Court on 5 March 2015. The recognisance for the breach of bail was forfeited to the sum of $1,000.00 on the earlier occasion, upon the appellant's non-appearance. The breach of bail bears some consecutive relationship to the underlying factors of non-compliance and to the sequence of events relevant to the stealing offence. Although in my view the breach of the suspended sentence represented a fundamental failure by the appellant to engage with rehabilitation services and consequentially there was justification to restore the full term, the terms of imprisonment for the stealing and breach of bail offences should have been ordered to be served concurrently in recognition of the principle of totality. Respecting fully the principle of respecting the discretion in terms of *House v King*,[14] it appears unreasonable (as that term is understood and acknowledged in *House v King*)[15] not to sentence in this case in a manner that gives effect to the principle of totality.

[38] I will allow grounds four and five.

[14] (1936) 55 CLR 499.
[15] Ibid at 504-505.

Ground 6

That the total effective sentence imposed by the Learned Sentencing Magistrate was manifestly excessive having regard to all the circumstances.

[39] The appellant argues the sentence imposed for the stealing offence and the total sentences imposed were manifestly excessive. Given the facts of the stealing offence, that offending may not readily be thought to attract a prison sentence of one month. It was however, bound up in a time frame with other offending and the sentence was imposed at a time when the appellant was about to serve a further term of imprisonment. In those circumstances, a non-custodial sentence was impractical. As I have outlined in respect of grounds four and five, in my opinion it should have been ordered to have been served concurrently. The impractically of a different sentencing disposition underlines the need for concurrency.

[40] I have already dealt with the issue of totality. It was well within the discretion to order full restoration of the sentence. The total term however, was excessive by virtue of accumulation of sentences. The reasons for that finding however are more appropriately dealt with under grounds four and five. It is unnecessary in my view to deal with this ground in as much as it overlaps with the issues dealt with already. The restoration of the suspended sentences was to be expected. The question of concurrency or accumulation is dealt with in the discussion of grounds four and five.

Orders

[41] The appeal is allowed in part. The order accumulating the sentence of one month imprisonment for the offence of stealing on file 21509890 and the fourteen days imprisonment for the offence of breach of bail undertaking on file 21525943 upon each other and upon the restored terms on files 21403984, 21502885, 21502886 and 21502890 is quashed.

[42] The sentence of one month imprisonment for the offence of stealing on file 21509890 is to commence on 3 June 2015, concurrent with the sentences already being served. The sentence of 14 days imprisonment for the offence of breach of a bail undertaking on file 21525943 is to commence on 3 June 2015, concurrent with the sentences already being served. The total effective term will be four months and two days imprisonment commencing 3 June 2015.

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