Spencer v The Queen [2005] NTCCA 3

PARTIES:	BRYCE JABALTJARI SPENCER v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 2 of 2004 (9818617)
DELIVERED:	29 April 2005
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JUDGMENT OF:	MARTIN (BR) CJ, THOMAS AND RILEY JJ

CATCHWORDS:

Criminal Law – Sentence – Aboriginal offender – Convicted of manslaughter following trial by jury on charge of murder – Mitigating factors leading to reduced sentence – Weight to be attached to offer to plead guilty to manslaughter prior to trial – Whether five year period from arrest to sentence taken into account – Manner in which criminal history including offences of serious violence associated with alcohol use to be taken into account – Sentence of 14 years imprisonment not manifestly excessive.

REPRESENTATION:

Counsel:

Appellant:	S. Cox QC
Respondent:	R. Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Spencer v The Queen [2005] NTCCA 3
No CA 2 of 2004 (9818617)

BETWEEN:

BRYCE JABALTJARI SPENCER
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, THOMAS and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 29 April 2005)

MARTIN CJ

[1] I agree that for the reasons given by Riley J the appeal should be dismissed.

THOMAS J

[2] I have read the reasons for judgment prepared by Riley J. I agree that for the reasons he has stated the appeal should be dismissed.

RILEY J

[3] On 17 September 2003, following a trial by jury, the appellant was convicted of the manslaughter of his wife. On 3 October 2003 he was sentenced to imprisonment for a period of 14 years with a non-parole period of nine years. He appeals against that sentence on six grounds.

[4] The circumstances of the matter were succinctly described in the sentencing remarks. The appellant and his wife lived together with other Aboriginal persons in a bush camp on the outskirts of Alice Springs. They had been at the camp for some months. On 3 September 1998 there had been a lot of drinking at the camp and substantial quantities of alcohol had been consumed. This was not an unusual occurrence. Both the appellant and his wife were affected by alcohol. Later that night the occupants of the camp lay down to sleep. The appellant and his wife shared a mattress. A witness, Amy Nambulla, who was a short distance from them, reported that the two were arguing and she heard the victim say to her husband: "I'm going to Tennant Creek". He responded: "If you go I will kill you". The witness then heard the appellant call out: "Come, I have already killed her". She and her husband went over and saw the victim lying on her back, covered in blood. They then called an ambulance.

[5] The ambulance arrived some time after 10 pm and the ambulance officers found the victim to be dead. She had suffered 18 knife wounds to her body and she also had burns to her chest and neck area. Subsequent examination

revealed that she died from a massive blood loss from the femoral artery and femoral vein which had been severed by a 10 centimetre deep horizontal stab wound to the left thigh. That wound, as with the other wounds, was consistent with having been inflicted by a 20 centimetre-bladed knife which was found underneath the rolled-up mattress of the appellant. Apart from the wound which caused the death, the other wounds would probably not have proved fatal.

[6] A blood alcohol reading taken from the deceased produced a result of 0.29 per cent. It was unclear how she came to be burnt on the chest and neck although it seems her upper clothing had somehow caught alight.

[7] The appellant was charged with murder and the matter came on for trial in 2001. On 23 April 2001 the solicitors representing the appellant wrote to the Director of Public Prosecutions offering a plea of guilty to the offence of manslaughter. The submission was that the death "arose in the course of an argument and was provoked by the deceased". That offer was rejected. The matter proceeded to trial and on 24 July 2001 the appellant was found guilty of murder. The appellant appealed against conviction and his appeal was upheld: *Spencer v The Queen* (2003) 172 FLR 471. The Court of Criminal Appeal set aside the verdict but declined an invitation from the appellant to substitute a verdict of manslaughter and directed there be a retrial.

[8] On 28 January 2003 the solicitors for the appellant again wrote to the Director of Public Prosecutions seeking a nolle prosequi on the count of

murder "on the basis that in all the circumstances there are no reasonable prospects of conviction" and offered a plea of guilty to the alternative count of manslaughter. In the course of the submission it was noted that the appellant admitted that he stabbed the victim in the leg but denied "the greater part of the other injuries". It was said that on a plea it "may be" he would accept culpability for all of the injuries. Again the Director of Public Prosecutions declined the offer.

[9] The matter went to trial in September 2003 and the appellant was found not guilty of murder but was convicted of manslaughter. On 3 October 2003 the appellant was sentenced to imprisonment for 14 years with a non-parole period of nine years. The sentence was backdated to commence on 3 September 1998.

GROUND 1 – The offer of a plea

[10] In the first ground of appeal the appellant complains that the learned sentencing judge failed to take into account or reduce the sentence on account of his offers to plead guilty to manslaughter prior to each trial. In the course of submissions counsel for the appellant complained that neither offer was brought to account in favour of the appellant. It was pointed out that the appellant's offer to plead to manslaughter could have been accepted in 2001 or in 2003 and, in the event of a dispute as to the factual basis for the plea, this may have been resolved by evidence on the plea. It was further submitted that the offer was deserving of a real reduction of sentence

as it demonstrated a "willingness to facilitate the course of justice": *Cameron v The Queen* (2001-2002) 209 CLR 339 at 343. The learned judge was required to give this aspect weight quite separately from any considerations of remorse or acceptance of responsibility. It was argued that the jury verdict demonstrated that the appellant's offers to plead guilty to manslaughter were soundly based. The offers to plead were said to have been bona fide and sincere attempts to avoid a trial on the count of murder and, had they been accepted, would have avoided the need for two trials and an appeal.

[11] The fact that an offender pleads guilty to an offence is a matter to be taken into account in the sentencing process. By operation of s 5(2)(j) of the Sentencing Act a court is required to consider the stage in the proceedings at which the offender did plead or indicated an intention to do so. There was no dispute between the parties that an offender's unaccepted offer to plead guilty to the offence of which he is ultimately convicted is relevant when considering sentence. The issue for determination is what weight should be given to the offers in the particular circumstances of this case. The appellant accepted that the Director of Public Prosecutions acted reasonably in refusing to accept the offer on each occasion but correctly maintained that this does not deprive the offer of all weight: *R v Marshall* [1995] 1 Qd R 673.

[12] In determining what weight should be given to an offer of this kind it is necessary to consider all of the circumstances in which the offer is made,

including any terms attached to the offer, the time at which it is made and the prospects, assessed at the relevant time, of conviction in relation to more serious offences on the indictment. Factors that will determine the extent to which leniency may be accorded those who plead guilty will include whether the plea demonstrates remorse, the utilitarian benefits that flow from the plea, the strength of the Crown case, and the extent to which the plea serves the self-interest of the accused. It may also be significant that the offender, whilst indicating a preparedness to plead guilty to one or more, but not all, charges on an indictment, subsequently pleads not guilty to all counts and fully contests the proceedings. Such was the case in this matter. Notwithstanding the letters written on 23 April 2001 and 28 January 2003 offering to plead guilty to the offence of manslaughter, when the offer was rejected the appellant did not do so. At each trial the appellant had the opportunity to plead not guilty to murder but guilty to manslaughter but did not do so, electing to preserve his chance of an outright acquittal. In such circumstances an indication by an accused person of a willingness to plead to a particular charge should not be equated with that person in fact pleading guilty to that charge.

[13] At the sentencing hearing before the learned trial judge it was submitted that "a substantial discount should be given on account that the prisoner offered to plead guilty to manslaughter prior to the first trial and again before the retrial". His Honour recounted the relevant history and characterised the offers made by the appellant as "self-interested manoeuvring" which, he

concluded, was not evidence of remorse. Rather than finding that a "substantial discount" should be provided his Honour observed that the "offers to plead are of little consequence relevant to sentencing, particularly in light of the circumstances of the crime; the prisoner's lack of remorse; his conduct at the trial when everything including infliction of the fatal wound was very much put in issue and his prior criminal record". It is clear from his Honour's remarks that he did take the offers to plead into account but, in contrast to the invitation to provide a substantial discount, concluded they were of little consequence in the sentencing process.

[14] In my opinion the appellant was entitled to credit for his offer to plead to the offence of which he was ultimately convicted. However the conditional nature of each offer, the circumstances in which the offers were made including the strength of the Crown case against him in relation to the more serious charge of murder, and the fact that he chose to place all matters in issue in each trial, all indicate that the willingness of the appellant to facilitate the course of justice was quite limited. I see no error on the part of the learned sentencing judge in according little weight to the offer made by the appellant.

GROUNDS 2 AND 3 – The five-year period from arrest to sentence

[15] The appellant contended that the sentencing judge failed to take into account as a mitigating factor the period of delay prior to the imposition of sentence and, in particular, that the appellant had spent five years in custody either on

remand or as a person sentenced to life imprisonment between the time of his arrest and the ultimate disposition of the matter. Section 5(2)(k) of the Sentencing Act requires the court to have regard to time spent in custody by the offender for the offence before being sentenced. In this case the appellant spent three years on remand and the balance of the time as a prisoner sentenced to life imprisonment. It was submitted that the sentence imposed by his Honour did not reflect that fact. The remarks on sentence are to the contrary. His Honour specifically referred to the lengthy time that the appellant had spent in custody and noted that the time was spent on remand. This was said in circumstances where his Honour had been referred to an earlier judgment of his own in the matter of *Walker* (SCC 20005210) and was reminded of the difficulties experienced by people on remand including not having access to programs in prison and being kept in an area of the prison under conditions that are less satisfactory than those that apply to mainstream prisoners. In *Walker* his Honour also addressed the circumstances where a remand prisoner is facing a charge of murder that is ultimately resolved by a conviction for manslaughter. In light of this specific reference his Honour must be taken to have been aware of those matters and to have taken them into account.

GROUND 4 – The criminal record of the appellant

[16] The appellant had relevant prior convictions including a serious history of violence. The learned sentencing judge recounted that history which

included offences stretching from 1976 through to 1995. The appellant had his first period of imprisonment in November 1976. In 1980 he was convicted of assault and fined. In 1989 he was convicted of two unlawful assaults and given a sentence of imprisonment for three months fully suspended. In 1991 he was convicted of assault with intent to have carnal knowledge and was sentenced to imprisonment for two years. Also in 1991 he was convicted of aggravated assault and sentenced to imprisonment for three months. Of significance, on 14 May 1992 he was convicted, following a trial, of an aggravated dangerous act and sentenced to imprisonment for five years with a two year non-parole period. That conviction followed the death by stabbing of his former wife in 1991. She died as a consequence of injuries inflicted upon her by the appellant. In 1995 he was convicted of an aggravated assault upon a female and sentenced to imprisonment for eight months.

[17] The learned sentencing judge observed that the prior convictions amounted to a serious history of violence. His Honour had been the sentencing judge in 1992 and, on that occasion, had said:

> "I do not think you have ever been able to face the realisation that you are morally and criminally responsible for the death of your wife. I hope you are able to come to that realisation because if you do you will be, for the first time, on the real road to rehabilitation."

In relation to the present matter his Honour noted: "Not much has changed since I made those remarks back in 1992, regretfully".

[18] The appellant submitted that the sentencing judge had taken the criminal history and applied it so as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. It was submitted that the moral culpability of the appellant was not increased by way of his prior convictions. The appellant noted that, in dealing with the criminal history of the appellant, his Honour relied upon his earlier decision in *Mulholland* (1991) 1 NTLR 1 at 14 in which he followed the majority in *Veen v The Queen [No 2]* (1987-1988) 164 CLR 465 at 477-478. In the present case his Honour went on to quote from the judgment of the Privy Council in *Ziderman v Dental Council* [1976] 1 WLR 330 at 334. His Honour referred, with apparent approval, to the passage in which Lord Diplock, speaking for the Privy Council, said:

> "… the national sense of what constitutes justice in the field of sentencing recognises that an offence which is committed by a person who has offended before is graver than a similar offence committed by a person who offends for the first time."

[19] What is to be understood from that passage is governed by the meaning to be given to the words "a similar offence" and the degree of similarity between the circumstances of the two sets of offending. If, by referring to that passage, his Honour intended to convey that in all cases an offence committed by a person who has offended before is graver than a similar offence committed by a person who offends for the first time, I am, with respect, unable to agree. Much will depend upon the nature of the offence and the circumstances of the offending and of the offender on each occasion.

[20] However this is not an issue in the circumstances of this case. Here the prior offending does serve to illuminate the culpability of the appellant. The approach to be adopted to the appellant's antecedent criminal history in circumstances such as these is as discussed in *Veen v The Queen [No 2]* (supra) where, in a joint judgment, Mason CJ, Brennan, Dawson and Toohey JJ said at 477:

> "There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences … . The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

[21] In this case the appellant had, as his Honour observed, a history of violence and his criminal record was a relevant sentencing factor. The observation by his Honour that the appellant is prone to violence, particularly when affected by alcohol, was supported by the evidence as was his conclusion that the appellant posed a risk of reoffending. This was not an example of an uncharacteristic aberration. The offending is yet another instance of the offender acting violently under the influence of alcohol. In the

circumstances justifiable emphasis was placed upon the need for personal deterrence.

[22] It was submitted on behalf of the appellant that his moral culpability was not increased by way of his prior convictions and reference was made to the fact that he is a traditional Aboriginal male who was alcohol-dependent and extremely intoxicated at the time of the offence. The appellant referred to the 1974 decision of Forster CJ in *R v Benny Lee* (NTSC 221 of 1974) where his Honour regarded the overuse of alcohol as being "much more the mitigating circumstance in the case of Aboriginal people" because such people were often led out of despair into drinking. It is a regrettable fact that the observations of his Honour regarding the consumption of alcohol in many Aboriginal communities remains true today.

[23] The approach courts take to this issue has been addressed in many cases since *R v Benny Lee*, including the decision of this Court in *Inness Wurramara* (1999) 105 A Crim R 512. In that case the court reviewed the relevant authorities in some detail and then placed emphasis upon the need to protect the community and in particular women, children and the vulnerable in the community from violence associated with the excessive consumption of alcohol. The authorities have repeatedly emphasised that courts must ensure there is no basis for a belief within any particular community, or in the wider community, that serious violence committed by drunken persons within a particular community is to be treated more lightly than is generally the case: *Fernando* (1992) 76 A Crim R 58 at 62;

R v Ceissman [2001] NSWCCA 73 at par 29. The fact that an offender and/or his victim may come from an Aboriginal community which is deprived or dysfunctional and where alcohol abuse and violent crime may be prevalent and more tolerated than in the general community does not mean that lower sentences should prevail. In *Wurramara* the court observed that vulnerable people in such communities should not be deprived of the protection of the law and adopted the following observations made by Moynihan J in *Daniel* [1998] 1 Qd R 499 at 530:

> "I cannot accept that, in principle, Aborigines who inflict violent crimes on their communities while intoxicated should be accorded special treatment by the imposition of lighter sentences than would otherwise be appropriate having regard to the circumstances of the offence and other relevant factors, including considerations personal to the offender."

[24] In the present case the appellant was, at the time of offending, significantly affected by alcohol. He had also been affected by alcohol on the occasion that he committed the offence of dangerous act causing the death of his then wife for which he was sentenced in 1992. On this occasion, as his Honour held, he was not so intoxicated as to deprive him of the capacity to foresee that the death of his wife was a possible consequence of his action in stabbing her in the left thigh. His Honour regarded the case as one of manslaughter by the intentional infliction of non-grievous harm in circumstances where the appellant could foresee the possibility of the death of the deceased. This is not a case where the appellant is an offender of previously unblemished character committing a minor offence which is

totally out of character by reason of intoxication. Rather, it is towards the other end of the scale: *Pappin v R* [2005] NTCCA 2. The appellant in this case, whilst affected by alcohol, was not acting out of character and he was not unaware of what he was doing.

GROUND 6 – Failure to evaluate the evidence

[25] The learned trial judge found that the verdict of manslaughter was reached on the basis that the appellant, despite his intoxication, foresaw death as a possible consequence of the stabbing of the deceased in the left thigh. Counsel for the appellant submitted that the learned judge was required to evaluate other matters consistently with his finding that the verdict of manslaughter was reached on the basis that the death was unintended. Those factual matters were said to provide evidence of remorse and reduced culpability. In this regard it was submitted that his Honour was required to address the issue of the number of stab wounds involved and whether some or a large number of those wounds were self-inflicted. He was also required to consider the significance of the evidence that the appellant cradled the deceased at the scene and blew in her ear apparently to try and raise consciousness. A review of his Honour's sentencing remarks reveals that each of those matters was addressed and that his Honour made findings as to each of them, beyond reasonable doubt, based upon the evidence and consistent with the verdict of the jury.

[26] Particular complaint was made that his Honour failed to conclude that a number of the wounds suffered by the deceased were self-inflicted. The basis of the submission that the wounds were self-inflicted came from the evidence of the forensic pathologist, Dr Sinton, that some of the injuries were characteristic of self-inflicted injuries and evidence that had been given by a witness, Ms Singleton, that the knife which was used in the attack had been borrowed from her that night by the deceased. His Honour dealt with this issue as follows:

> "As the Crown submitted, the lack of defensive wounds is telling. The deceased did not defend herself ergo she was unable to either because of insensibility, alcohol, shock, surprise, loss of blood from her wounds or the fatal stab wound. Whatever the reason for her lack of defending herself I am quite satisfied the wounds were not self-inflicted. The back wound and the deep thigh wounds including the fatal blow were manifestly not self-inflicted. The head wounds both to the side and to forehead some of which were of sufficient force to damage the skull were, I am satisfied, not self-inflicted either. … The lack of evidence of screams of pain and the like I think confirms that for whatever reason the deceased was insensible to her situation."

There was a clear evidentiary basis for the conclusions reached by his Honour.

[27] Similarly the appellant complains that his Honour concluded that the appellant was "play-acting" when he was found cradling the deceased at the scene and blowing in her ear. It was suggested on his behalf that he did so in order to raise her to consciousness. There was evidence that this was a way in which Warlpiri people sometimes proceeded "just to wake them up to see if they are alive". There was a basis for his Honour's conclusion that

the conduct of the appellant was "mere play-acting that he was attempting to resuscitate her". The sequence of events as described by the various witnesses revealed that, at that time he blew in her ear, the appellant must have been aware that the deceased had died. His Honour observed that the first witness on the scene, Amy Nambulla, had been called to the scene by the appellant saying: "Come, I have already killed her". His Honour concluded that upon her arrival the victim was obviously dead, lying near the fire. It was subsequent to that time the appellant cradled the deceased and blew in her ear. The appellant must have known that his wife was dead when he did so. The finding that he was "play-acting" was open on the evidence.

[28] The significance of the evidence of the appellant blowing in the ear of his wife was, in the submission of the appellant, to demonstrate that the appellant felt remorse. His Honour rejected that submission, pointing to the fact that the appellant lied to both the ambulance officer and the police regarding the circumstances of the death of his wife and sought to disassociate himself from anything to do with the infliction of her wounds.

GROUND 7 – Manifest excess

[29] The final ground of appeal was that the sentence imposed was manifestly excessive having regard to sentences for other offences of a similar kind. In making that submission it was conceded by the appellant that there is no tariff for the crime of manslaughter and that each sentence has to be

considered in light of the particular circumstances of the offence. That is clearly correct.

[30] The general principles applicable to an appeal against sentence are well known. The presumption is that there is no error in the sentence and an appellant must demonstrate that error occurred in that the learned sentencing judge acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts: *The Queen v Raggett, Douglas and Miller* (1990) 50 A Crim R 41. In applying these principles to submissions that a sentence is manifestly excessive it is for the appellant to show that the nature of the sentence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. To do so he must show that the sentence was clearly and obviously, and not just arguably, excessive: *Cranssen v The King* (1936) 55 CLR 509 at 520.

[31] It was submitted that a sentence of 14 years imprisonment with a non-parole period of nine years is manifestly excessive in the circumstances. It was argued that the sentence does not give adequate weight to the fact that the fatal wound was inflicted to the thigh with force which was described as being to the "lower end of mild to moderate". Other matters which it was submitted were not accorded sufficient weight included: none of the other stab wounds were life-threatening; the appellant was a traditional Warlpiri man who was alcohol-dependent and living in a fringe bush camp; the basis for the jury verdict was that there was no intent to cause death or grievous

harm but only foresight of the possibility of death in the context of heavy alcohol consumption; the appellant had spent five years in custody awaiting trial, three years of which had been spent on remand; and the appellant had offered pleas to manslaughter on 23 April 2001 and 28 January 2003. The appellant, it was said, was remorseful. The arguments that I have discussed were all relied upon as relevant to the submission that the sentence was manifestly excessive.

[32] Each of the identified matters was addressed by the learned sentencing judge in the course of his remarks on sentence. The complaint of the appellant is that they could not have been afforded sufficient weight in light of the penalty that was imposed. That penalty, it was submitted, was more appropriate to an offence of provocation manslaughter rather than to the circumstances of the present matter. With respect, I agree with the observations of the sentencing judge that it is generally unhelpful to categorise one type of manslaughter as more serious than another. Rather, it is necessary to consider the particular circumstances of the particular case before the court.

[33] The offending on this occasion was a serious example of offending of its kind. The findings of the sentencing judge demonstrate that the victim did not defend herself. It seems she did not do so because she was insensible through alcohol, shock, surprise or loss of blood from one or more of her wounds. There were no defensive wounds. The deceased was attacked with a knife and suffered 18 separate stab wounds. The fatal wound was a

10 centimetre deep wound to the left thigh. The other wounds may not have proved fatal but included three wounds near the right ear (two of which lacerated the skull), three wounds to the forehead, a wound which passed through muscles to the abdomen wall terminating at the peritoneum, four upper thigh wounds and wounds to other parts of the body. All of these wounds were inflicted by the appellant. They reveal an ongoing attack upon the deceased with a knife. The wound that proved fatal was a result of an intentional stabbing by the appellant who foresaw the death of, or serious injury to, his wife as a possible consequence of his actions. Whilst he did not intend to kill her or cause her grievous harm, he proceeded notwithstanding his awareness that her death may result from his actions.

[34] The criminal history of the appellant demonstrated that he has a propensity to violence when intoxicated. That propensity has resulted in him having been sentenced to terms of imprisonment in 1985, 1989, 1991 (two occasions), 1992 and 1995. The offence in 1992 was of a similar kind to the present offence. The appellant shows an ongoing disobedience of the law in a particular way. Retribution, deterrence and protection of society are significant factors in the sentencing process. As I have observed, the criminal history illuminates the moral culpability of the appellant in this case and shows his dangerous propensity.

[35] The appellant has not demonstrated any remorse. Notwithstanding the offers to plead guilty to manslaughter made on behalf of the appellant, at trial he maintained a full contest to the Crown case, including to the offence of

manslaughter. The cross-examination of the forensic pathologist was to the effect that all of the wounds, including the fatal wound, could have been inflicted by the deceased herself. The case presented on behalf of the appellant was inconsistent with the subsequent claim made on his behalf that he felt remorse.

[36] In my view it has not been demonstrated that the sentence of imprisonment imposed in this case was manifestly excessive.

[37] The appeal should be dismissed.

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