Tilbury v The Queen [2015] NTCCA 4

PARTIES:	**TILBURY, SCOTT**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 6 of 2015 (21433807)
DELIVERED:	25 August 2015
HEARING DATE:	5 August 2015
JUDGMENT OF:	RILEY CJ, SOUTHWOOD & BLOKLAND JJ
APPEALED FROM:	BARR J

CATCHWORDS:

CRIMINAL LAW – sentences – co-offenders – parity principle – discretion to mitigate disparity – whether justifiable sense of grievance from disparity – criminal culpability

CRIMINAL LAW – sentences – co-offenders – parity principle – discretion to mitigate disparity – whether justifiable sense of grievance from disparity – whether co-offender's sentence unduly lenient

Criminal Code Act 1983 (NT), s 411(4) and s 429(2)

Youkhana v R [2011] NSWCCA 37 at par [49]; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462; *Saraya v The Queen* [2015] NSWCCA 63, applied.

Lowe v The Queen (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; *R v Draper* (unreported, Court of Criminal Appeal (NSW), 12 December 1986); *R v Rexhaj* (unreported, Court of Criminal Appeal (NSW), 29 February 1996), *R v Ismunandar* (2002) 136 A Crim R 206, *R v Bloomfield* [1999] NTCCA 137, referred to.

REPRESENTATION:

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Respondent:	P Usher

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Appellant:	Maley and Burrows Solicitors
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

Tilbury v The Queen [2015] NTCCA 4
No. CA 6 of 2015 (21433807)

BETWEEN:

SCOTT TILBURY
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 25 August 2015)

Riley CJ:

[1] This is an application for leave to appeal against a sentence imposed upon the applicant for having unlawfully caused serious harm. The application came before a judge of this Court and was dismissed. The applicant has referred it to the Court for reconsideration pursuant to s 429(2) of the *Criminal Code Act 1983* (NT).

Facts

[2] On 5 March 2015 the applicant and his son, Dylan Tilbury, pleaded guilty to having unlawfully caused serious harm to their male victim on 27 July 2014.

A co-offender, Calen Podesta, had been dealt with for his part in the offending by a different judge on 9 January 2015.

[3] The co-offenders were known to each other but they did not know the victim. At about 1.50am on 27 July 2014 the victim observed Mr Podesta on Knuckey Street, Darwin kicking display signs whilst yelling and swearing. The victim contacted police by calling 000. Whilst he was on the phone he observed two mounted police officers on Mitchell Street and drew their attention to the conduct. Dylan Tilbury was with Mr Podesta and police walked their horses to where the two co-offenders were standing and had a conversation with them. They were each argumentative and became enraged with the victim for having involved the police. The applicant, who is the father of Dylan Tilbury, arrived a short time later and, without provocation, went behind the police horses towards the victim and pinned him against a shop wall. The applicant and his son proceeded to strike the victim multiple times to the face and body with closed fists. Mr Podesta attempted to strike and kick the victim but was pulled away by another person. The victim fell to the ground as a result of the attack and attempted to protect himself by putting his arms over his face. The applicant was separated from the victim by police however Dylan Tilbury continued to strike him, punching him repeatedly to the head with a closed fist. He proceeded to kick the victim to the head until a bystander intervened.

[4] The applicant grabbed the bystander by the waist and threw him to the ground. His son then continued with the assault, kneeling behind the victim and holding him with one arm whilst hitting him to the head several times with a closed fist. As the victim got to his feet the applicant grabbed him and attempted to punch him to the head. The victim attempted to run away and to seek protection behind the police horses. However both men chased him and attempted to punch him. At that time Mr Podesta broke free from the person who had been restraining him and struck the victim once to the head with a closed fist causing the victim to fall to his knees.

[5] The victim again attempted to flee but was chased by the three offenders and was again struck by Mr Podesta causing him to fall to the ground in an unconscious state. Mr Podesta approached him and kicked him with force in the face saying, “I hope you die”.

[6] The victim was taken to Royal Darwin Hospital by ambulance where it was found he had sustained multiple facial fractures, including fractured nasal bones, bilateral fractured pterygoid plates, fractures of the left and right maxillae, a left palatal split and a fractured left orbital floor. He underwent various operations including open reduction and internal fixation of his bilateral Le Fort fractures and a closed reduction of his nasal fractures. The operative procedures involved fixation of titanium plates and screws to the mid-face. If his injuries had been left untreated he would have developed a

permanent disability. At the time of sentence he continued to suffer from partial facial numbness and had permanent clicking of the jaw.

Sentences Imposed

[7] Mr Podesta was sentenced to imprisonment for a term of three years with the sentence suspended on conditions of supervision after he had served six months. Dylan Tilbury was sentenced to imprisonment for a term of two years suspended on conditions of supervision after he had served three months. The applicant was sentenced to imprisonment for a period of four years suspended on conditions of supervision after he had served one year and eight months.

[8] Mr Podesta was the first to be sentenced. He was sentenced by a different judge from his co-offenders and on a different occasion. At the time of sentencing he was aged 25 years and did not have any convictions for crimes of violence. The sentencing judge observed that when Mr Podesta saw the video of the attack he was “shocked and shaken” and thereafter had abstained from consuming alcohol. He voluntarily entered into the Hollyoake rehabilitation program in Perth, attended Alcoholics Anonymous meetings and sought weekly counselling from a psychologist. He was described as a gentle and caring person for whom the offending was out of character. He had a strong work ethic, a strong sense of responsibility and had employment available to him upon release from prison. He had the support of his family. His prospects for rehabilitation were assessed as being

reasonably good and the judge accepted that he was truly remorseful. The starting point for the sentence was imprisonment for four years reduced by 25% for the plea.

[9] In sentencing the applicant and his son the sentencing judge distinguished between them on various bases. His Honour noted that Dylan Tilbury had been celebrating his 18th birthday and was significantly affected by the amount of alcohol he had consumed. It was observed that as an inexperienced drinker he was probably not fully aware of the significant disinhibiting effects of alcohol upon himself. It was noted that Dylan Tilbury was in the presence of his father and was under the influence of his father "who led the attack on the victim". Credit was given for his clean record and his youth. The sentencing judge concluded that Dylan Tilbury was genuinely remorseful, had an appropriate level of empathy with the victim, and his Honour emphasised the importance of rehabilitation.

[10] His Honour observed that there was "no satisfactory explanation" for the applicant's behaviour. In the record of interview the applicant claimed that Mr Podesta had told him that his wife had been assaulted. There was no evidence to that effect but his Honour accepted that it "may" have happened. There was no suggestion that the applicant sought to confirm with his wife that an assault had occurred before he launched the attack on the victim. His Honour said:

> I give you the benefit of the doubt that Podesta did [say] such a thing to you, or something to that effect, and that is not a fabrication on your part in an attempt to blame the victim for your own disturbing violence.

[11] His Honour went on to say:

> However, the level of violence on your part and your failure to restrain your son from full participation in that violence with you, even to the point where you freed your son from the restraint of a bystander who was attempting to do what you should have been doing, make your explanation near worthless in terms of mitigation.

[12] The sentencing judge posed the question "who is the real Scott Tilbury" and then said of the applicant:

> You showed no mercy to a victim who, if not completely defenceless, was outnumbered by your group. You did not let up on him as he tried to get away and seek police help. Putting to one side your own dangerously violent participation, you failed to restrain your 18-year-old son and show the leadership and example he clearly needed from you. The effects of alcohol may have some relevance in explaining or answering the question that I have just posed. But the evidence does not suggest that you were greatly affected by alcohol on that night.

[13] His Honour did not accept that the applicant felt true remorse. Whilst he regretted the situation in which he placed himself and his family and was "remorseful for the extremely bad example" shown to his son, his Honour did not accept that the applicant had any compassion or empathy for the victim or true remorse for what he had done to the victim. The starting point for the sentence was imprisonment for five years reduced by 20% to four years to reflect the plea which was not made at the first reasonably available

opportunity. It was not submitted that the sentence imposed upon the applicant was manifestly excessive.

The parity principle

[14] At the time of the hearing the only proposed ground of appeal was that the sentencing judge failed to give sufficient weight to the principle of parity between offenders.

[15] The submissions of the applicant focussed upon the suggested disparity between the sentence imposed upon Mr Podesta and that imposed upon the applicant. Neither party addressed the sentence imposed upon the 18-year-old son of the applicant and that sentence can be ignored for present purposes. It was argued that the differences in the head sentences imposed and in the terms of actual imprisonment before suspension could not be justified.

[16] The applicant did not argue that he was less culpable than Mr Podesta but submitted that the degree of disparity between the sentences exceeded the differences between them. It was pointed out that the term of actual imprisonment imposed upon the applicant was more than three times greater than that imposed upon Mr Podesta. It was not submitted that the applicant should receive the same or a similar sentence to that of Mr Podesta but, rather, the sentence should be reduced to a level which, although lower than the present sentence, was still within the range of appropriate sentences.

[17] The application of the parity principles are well known and have been discussed by the High Court in cases such as *Lowe v The Queen,*[1] *Postiglione v The Queen*[2] and *Green v The Queen*.[3] The subsequent relevant authorities have recently been reviewed in the New South Wales Court of Criminal Appeal case of *Saraya v The Queen.*[4] This case noted that the parity principle is founded on the notion of equal justice which requires that "like offenders should be treated in a like manner".[5] An appeal court may interfere in order to avoid a marked disparity with the sentence imposed on a co-offender where "the disparity is such as to give rise to a justifiable sense of grievance giving the appearance that justice has not been done".[6]

[18] In *Green v The Queen*[7] it was said:

> [T]he existence of a discretion, where unjustified disparity is shown, to reduce a co-offender's sentence to one which is inadequate does not amount to an obligation to do so. Certainly, the discretion of the Court of Criminal Appeal to reduce a sentence to a less than adequate level would not require it to consider reducing the sentence to a level which would be, as Street CJ put it in *R v Draper*, "an affront to the proper administration of justice".[8] Moreover, if the relevant sentencing legislation, on its proper construction, does not permit an inadequate sentence to be imposed, there can be no discretion on appeal to impose one. Whether or not the discretion to reduce the sentence to an inadequate level is available, marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences.

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[1] (1984) 154 CLR 606.
[2] (1997) 189 CLR 295.
[3] (2011) 244 CLR 462.
[4] [2015] NSWCCA 63.
[5] At par [8], quoting *Green v The Queen* supra, at par [28], per French CJ, Crennan and Kiefel JJ.
[6] *Lowe v The Queen* [1984] 154 CLR 606 at p 610, per Gibbs CJ.
[7] [2011] 244 CLR 462 at par [34], per French CJ, Crennan and Kiefel JJ.
[8] *R v Draper* (unreported, Court of Criminal Appeal (NSW), 12 December 1986) at par [5], per Street CJ, Hunt and Wood JJ agreeing.

[19] Pursuant to s 411(4) of the *Criminal Code*, where the Court is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, the Court can pass such other sentence in substitution. The Court is not permitted to impose an inadequate sentence.

[20] In relation to circumstances where a sentence imposed upon a co-offender is manifestly inadequate it was observed in *Saraya v Regina* that "the discretion to mitigate disparity should not be exercised to reduce an otherwise adequate sentence to a level which would be an affront to the proper administration of justice".[9] The Court adopted the following observations expressed in *Youkhana v R:*[10]

> … the Court has a discretion and is not bound to interfere if a sentence offends the parity principle. A reason for not intervening is if the sentence imposed upon the co-offender is manifestly inadequate *and* intervention would "produce a sentence disproportionate to the objective and subjective criminality involved.

[21] Whilst inconsistency in punishment may lead to an erosion of public confidence in the administration of justice so will "the multiplication of manifest errors".[11]

[22] Further, the inadequacy of a sentence imposed upon a co-offender may be of such a degree that any sense of grievance engendered in the offender sentenced to a more severe sentence can no longer be regarded as

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[9] *Saraya v Regina* supra, at par [15].
[10] [2011] NSWCCA 37 at par [49].
[11] *R v Rexhaj* (unreported, Court of Criminal Appeal (NSW), 29 February 1996), per Gleeson CJ, quoted in *R v Ismunandar* (2002) 136 A Crim R 206 at par [38].

legitimate.[12] Whilst disparity may give rise to a sense of grievance, the grievance would not be a justifiable one.

Criminal Culpability

[23] It was apparent from the sentencing remarks that his Honour regarded the applicant as the most culpable of the three offenders and this finding was reflected in the sentences imposed. The respondent submitted that his Honour was correct in so concluding. In my opinion there was a sound basis for the conclusions.

[24] The applicant was the oldest and most mature of the offenders. He was aged 38 years, Mr Podesta was aged 25 years and Dylan Tilbury had turned 18 that day. A review of the findings of the sentencing judge and a viewing the CCTV footage of the incident makes it apparent that the applicant was, without any provocation, the instigator of the attack upon the victim. He did so by running behind the police horses and pinning the victim against the wall of a shop. He and his son then struck the victim multiple times to the face and body. Mr Podesta followed the applicant and attempted to strike and kick the victim but was restrained by another person. The applicant was pulled away from the victim by police whilst his son continued the assault. A bystander took hold of the son and the applicant then grabbed the bystander and threw him to the ground freeing his son to continue the assault. In so doing he knowingly facilitated the continued violence of his

[12] *Green v The Queen* supra, at par [106], per Bell J citing a range of decisions of the Court of Criminal Appeal (NSW), including *R v Ismunandar* supra.

son. When the victim regained his feet the applicant grabbed him with one hand to the side of the head and attempted to punch him to the head area. The victim managed to escape and the applicant and his son chased after him attempting to punch him. Mr Podesta, who had been detained by a bystander, broke free and all of the co-offenders chased after the victim. Mr Podesta caught him and struck him to the head causing him to fall to the ground. Mr Podesta then kicked him to the face.

[25] The involvement of the applicant was made all the more serious because his behaviour was not explained or in any way justified. The evidence did not suggest that he was affected by alcohol to any significant extent. He instigated the violence and continued his involvement throughout. In the words of the respondent he "led the charge" for his two younger co-offenders, one of whom was his son. Following the offending he had taken no steps towards rehabilitation and demonstrated no true remorse for his actions.

[26] The actions of Mr Podesta were also serious and included the final, and disgraceful, acts of punching the victim rendering him unconscious and kicking him whilst he was down. Nevertheless he was a much younger man and had taken significant steps to rehabilitate himself.

Conclusions

[27] In my opinion there was a difference in the culpability of the applicant and Mr Podesta and the applicant was deserving of a sentence of greater

magnitude than his co-offender. I see no error on the part of the sentencing judge in distinguishing between the two.

[28] In my opinion, for the reasons expressed by Southwood J, the sentence imposed upon Mr Podesta was, in all the circumstances, unduly lenient. There was no appeal from that sentence by the Crown.

[29] Whilst there is some force in the submission made on behalf of the applicant that the difference in sentences is greater than could be justified, in my opinion, this is because the sentence imposed upon Mr Podesta was unduly lenient. As is conceded by the applicant, his sentence was appropriate in all the circumstances that related to him. In those circumstances any sense of grievance that may be felt by the applicant because of the disparity is not a justifiable one.

[30] I would allow the application for leave to appeal but dismiss the appeal.

Southwood J

[31] In my opinion, leave to appeal should be granted but the appeal should be dismissed for the following reasons.

[32] It is an established principle that an appellate court has a discretion and is not bound to intervene if a sentence offends the parity principle. A reason for not intervening is if the sentence imposed upon the co-offender is unduly lenient and intervention would produce a sentence disproportionate to the

objective and subjective criminality involved.[13] The leniency of the sentence imposed on the co-offender may be of such a degree that any sense of grievance engendered in the offender sentenced more severely cannot be regarded as legitimate.[14]

[33] The sentence imposed on the applicant's co-offender, Mr Podesta, of three years imprisonment suspended after six months was unduly lenient and does not reflect the objective seriousness of his offending.

[34] Having considered the sentencing remarks for both Mr Podesta and the applicant, the Statement of Crown Facts and the footage which is on the CCTV disc in the appeal book, the objective seriousness of Mr Podesta's offending may be summarised as follows. The attack upon the victim was brought about by Mr Podesta's conduct and his reaction to the victim reporting him to the police. His violent conduct in kicking the store display signs in Mitchell Street caused the victim to do the responsible thing and telephone the police and also report him to the mounted police nearby. Mr Podesta became argumentative with the mounted police when they spoke to him. Rather than calm down and behave appropriately after he was spoken to by the police, Mr Podesta joined in the attack on the victim. He did so in the presence and full view of the police. He attacked the victim solely because he was angry with the victim for reporting him to the police. He aided the applicant and Dylan Tilbury in their initial attack upon the victim.

[13] *Youkhana v R* [2011] NSWCCA 37 at par [49].
[14] *Saraya v R* [2015] NSWCCA 63 at par [14].

He tried to strike and kick the victim while he was pinned to the wall by the applicant and Dylan Tilbury. He persisted in the attack on the victim despite the police and members of the public trying to stop him. After the victim got away from the applicant and Dylan Tilbury, and ran into the middle of Mitchell Street to try and get protection from the mounted police, Mr Podesta escaped from the bystander who had pulled him back. He caught up with the victim and punched him once in the head with a closed fist. This caused the victim to fall on one knee. After the victim stood up and tried to get away again all three offenders chased him. Mr Podesta caught up to him and punched him in the head again. This caused the victim to fall to the ground unconscious. While the victim lay on the ground in an unconscious state, Mr Podesta kicked him forcefully in the face and said to the victim, "I hope you die." He then ran down Knuckey Street in an attempt to avoid being apprehended by the police. He was eventually arrested in Tamarind Park.

[35] Mr Podesta's attack upon the victim was a brazen, sustained, vicious and cowardly attack which came about simply because the victim had reported Mr Podesta to the Police. Mr Podesta's conduct showed a total disregard for the law and law enforcement officers and it was a very serious invasion of the victim's human rights of safety and security. The punches thrown by Mr Podesta and the kick to the victim's face were extremely dangerous acts. The victim was very seriously injured. The extent of harm which may be caused by such acts is now well known. Offending such as this is prevalent.

[36] The greater the harm suffered by a victim, the greater its weight in the balance of conflicting interests against an offender by way of punishment as a general deterrent.[15] As a result of the attack the victim suffered the very serious injuries referred to at [6]. Common sense would suggest that it was Mr Podesta's attack on the victim that is largely responsible for the victim's injuries. After sustaining those injuries the victim's jaw was out of alignment and required ongoing treatment. For six weeks he had to eat through a straw and he could only eat normally after 12 weeks. The victim suffers from partial facial numbness and a permanently clicking jaw. He also suffered significant emotional and psychological consequences. He remains at risk of depression and post-traumatic stress disorder. He has been regularly seeing a psychologist.

[37] Laws against violence protect the rights of citizens to go about their ordinary affairs with safety and security. Sentences are required to take into account the objective seriousness of the offence, and that seriousness consists of the extent of the invasion of the rights or interests involved in the offending conduct.[16] The reason the law makes the conduct of the applicant and Mr Podesta a crime is to protect the public, and to vindicate the human rights of safety and security.[17]

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[15] *R v Bloomfield* [1999] NTCCA 137 at par [19].
[16] Gleeson CJ, "A Core Value", Judicial Conference of Australia, Annual Colloquium, Canberra 6 October 2006 at p 11.
[17] Ibid.

[38] There is a degree of particular sensitivity in this case arising from the victim being a good citizen who reported the conduct of Mr Podesta to the police. People who report matters to the police must be protected.

[39] The main sentencing objectives in determining the sentencing disposition to be imposed on Mr Podesta were general deterrence and protection of the public. The usefulness of punishment as a general deterrent to criminal conduct has often been doubted but it remains the fact that the criminal justice system has always proceeded on the assumption that punishment deters. There is also a point where the seriousness of the crime overrides the mitigating factors.[18] Notwithstanding the credit to which Mr Podesta was entitled for his remorse after he had time to reflect on what he had done, his plea and the steps that he had taken to rehabilitate himself, general deterrence and protection of the community were sentencing objectives which should have been given very real and considerable weight in his sentencing disposition.

[40] The sentence imposed on Mr Podesta of three years imprisonment to be suspended after six months fell well short of giving the necessary weight to general deterrence and protection of the public required by the circumstances of this case. While it was appropriate to recognise the steps which Mr Podesta had taken to rehabilitate himself, those factors cannot result in a sentence which is unduly lenient.

[18] *R v Bloomfield* [1999] NTCCA 137 at par [21]

[41] In contrast, the sentence imposed on the applicant was an adequate sentence which gave appropriate weight to the objective seriousness of the applicant's offending. Given the serious nature of the applicant's offending which is carefully analysed in his Honour the Chief Justice's reasons for decision, any intervention by this Court to reflect the principle of parity to reduce the applicant's sentence in the face of an unduly lenient sentence would produce a sentence disproportionate to the objective and subjective criminality involved. That being so, this Court should decline to exercise any discretion arising from the application of the parity principle.

[42] The applicant's complaint of disparity accepts that the sentence imposed on him was otherwise appropriate. While it is plain that there is disparity between the sentence imposed on the applicant and the sentence imposed on Mr Podesta, the disparity is due mainly to the unduly lenient sentence imposed on Mr Podesta. There is no justifiable basis for the applicant having any grievance about the sentence imposed on him.

Blokland J

[43] I agree the application for leave to appeal should be granted but the appeal should be dismissed. The relevant sentencing facts have been set out in his Honour the Chief Justice's judgment.

[44] Although the learned sentencing judge made no specific findings differentiating the relative levels of culpability as between the applicant and the co-offender Mr Podesta, it is clear his Honour regarded the overall

gravity of the applicant's role in the offending, coupled with his particular subjective circumstances, in a more serious light than both co-offenders. There is no reason to depart from his Honour's approach.

[45] All offenders participated in a variety of ways in a sustained and disturbing assault on the victim that resulted in serious injuries. Aside from the applicant's direct participation in the assault, particular features of the applicant's offending were highlighted by the learned sentencing judge. First, that the applicant instigated the assault. Second, that the applicant stopped a bystander's attempts to restrain the applicant's son and that this action resulted in further assaults on the victim. Additionally, the applicant participated in chasing the victim. The chase culminated in the final serious assaults by the co-offender Mr Podesta.

[46] The learned sentencing judge clearly regarded the applicant bore a high level of moral culpability given he was the father of one of the co-offenders and was markedly older than both co-offenders. There was no error in assessing the applicant's moral responsibility in this way.

[47] For sentencing purposes, the co-offender Mr Podesta's response to the charge and his subjective circumstances allowed for greater latitude in respect of mitigation than could be permitted in respect of the applicant. Mr Podesta was 25 years of age at the time. At his own initiative he engaged seriously with alcohol rehabilitation programmes after the offending. His

plea of guilty was entered early and his remorse was accepted as genuine. The same subjective features were not present in the case of the applicant.

[48] To be successful on an appeal based on an alleged failure to have regard to the principle of parity, the applicant would need to demonstrate his sentence was so disparate from Mr Podesta's sentence as to engender a justifiable sense of grievance. The sense of grievance is to be objectively assessed. When all sentencing facts and circumstances as between the applicant and Mr Podesta are properly appreciated, any apparent disparity would be found to be justified given the differences between their particular circumstances.

[49] I do not consider it necessary to embark on an assessment of whether the sentence imposed on Mr Podesta was manifestly inadequate.

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