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it has to make an order for sale under the provisions of the Partition Act.

Virtue, J.

I accordingly hold that the Court is not precluded from making an order for sale under the Partition Act by reason of the existence of the mortgage to the Director of War Service Homes and the provision of the War Service Homes Act and the question of law raised should be answered accordingly.

I express the hope that as was suggested by Counsel when I made the original order, it may be possible in the light of the decision of this point for the parties to resolve their differences without further recourse to the Courts being necessary.

*Judgment accordingly.*

*Solicitors for Plaintiff:* Keall & McCall.

*Solicitors for Defendant:* Gibson & Gibson.

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Mar., 19  
May, 21

MEHEMET ALI

Appellant

and

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Defendant

Dwyer, C.J.  
Wolff, S.P.J.  
Jackson, J.

*Criminal law—Wilful murder—Provocation reducing murder to manslaughter—Whether insults and threats on previous occasions relevant—Meaning of provocation—Secs. 281 and 245 of the Criminal Code (No. 28 of 1913).*

*Statute—Interpretation of Criminal Code—Definition of provocation—Use in one section of term defined in another section—Secs. 281 and 245 of the Criminal Code (No. 28 of 1913).*

The appellant was convicted of the wilful murder of R. He did not deny that he had shot and killed R. but the defence raised was that the killing had been done in self-defence and also that there had been provocation.

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There had been trouble and bad blood between the appellant and his brothers on the one side and R. and his brothers on the other for some time past and about three years before this shooting a brother of R. had been convicted of manslaughter after a fight in which one of the appellant's brothers had been killed with a knife. At the appellant's trial the appellant deposed that R. had on several occasions over the previous year in particular abused and insulted him and threatened to kill him, and that R. had repeated the abuse and threats immediately prior to his shooting R. At the time of the shooting R. was in an injured condition seated on the roadway on to which he had been knocked from his bicycle when a utility driven by the appellant had struck him.

No objection was taken at the trial to the trial judge's summing up in which he directed the jury both as to self-defence and provocation. Having retired to consider their verdict the jury returned and requested further direction on the meaning of provocation. In the course of this direction the judge said to them "what happened weeks before has nothing to do with it."

*Held:* Threats and insults on previous occasions while in themselves insufficient to amount to "sudden provocation" to reduce murder (or wilful murder) to manslaughter are relevant in considering whether or not the final wrongful act or insult constituted such provocation. And the statement made by the trial judge in his direction could therefore have been misleading.

*Per Dwyer, C.J. and Wolff, S.P.J.* The term "provocation" in sec. 281 of the Criminal Code is to be interpreted as defined in sec. 245.

*Per Wolff, S.P.J.* The suggestions in the Queensland cases of *R. v. Sabri Isa* and *R. v. Herlihy* that there is some difference between the meaning of "provocation" as contained in sec. 281 and the meaning of that word as used in sec. 245 of the Criminal Code and more particularly that sec. 281 is merely a restatement of the common law should not be followed. The view of Stanley J., in the latter of these cases, that the two sections should be read together, is preferable.

The common law distinction between circumstances suggesting adultery and discovering a wife in the act of adultery in relation to provocation seem to pay no regard to psychological reaction. The statements in *R. v. Scott* and *Dunstan v. The Crown* adopting the common law authorities cannot be maintained in view of the express provisions of the Criminal Code. The views of Viscount Simon expressed in *Holmes v. Director of Public Prosecutions* on the subject of a sudden confession of adultery without more never constituting provocation of a sort which might reduce murder to manslaughter and requiring an absence of any element of intention for a defence of provocation to prevail are not the law in Western Australia.

Appeal to the Court of Criminal Appeal against a conviction of wilful murder on the ground that "the learned Trial Judge wrongly directed the Jury when giving a further explanation as to the definition of provocation and what amounted to provocation." The facts are sufficiently stated in the headnote and judgments.

*Cases referred to:*

*Bank or England v. Vagliano Brothers*, [1891] A.C. 107.

*R. v. Sabri Isa*, [1952] St. R. Qd. 269.

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*R. v. Herlihy*, [1956] St. R. Qd. 18.*R. v. Duffy*, [1949] 1 All E.R. 932.*R. v. Scott*, (1909) 11 W.A.L.R. 52.*Dunstan v. The Crown*, (1931) 33 W.A.L.R. 118.*Holmes v. Director of Public Prosecutions*, [1946] A.C. 588.*Gibson* for the appellant.*Ruse*, Crown Prosecutor, for the respondent.*Cur. adv. vult.*

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*Wolff, S.P.J.*

WOLFF, S.P.J.: The appellant was convicted of wilful murder. It was established that he killed one Seit Ramadan. At the trial he gave evidence on his own behalf, and the defence raised was that he did the the killing in self defence, and further, that he had been provoked by certain actions and words of the deceased. It is difficult to reconcile these two defences but nevertheless when they are raised and there is some factual basis for them the Judge is bound to put them to the jury.

This appeal concerns a direction which the Trial Judge gave to the jury regarding the appellant's defence of provocation.

The facts and circumstances of the alleged provocation depended on the evidence of the appellant. In giving evidence on his own behalf the appellant testified that there had been bad blood between him and Seit Ramadan for some considerable time. About three years previously the deceased man's brother had knifed the accused's brother to death in the Castle Hotel, York, and had been convicted of manslaughter, receiving a sentence of 10 years' imprisonment; but he had been released from detention some months before this killing.

Seit Ramadan had been with his brothers in the Castle Hotel when the killing of the appellant's brother took place and he was to some extent a party to that killing.

The appellant deposed that for a period of about one year Seit Ramadan had threatened and insulted him; that he had menaced him with his fists and with a knife which he carried in his pocket, and further that he had used insulting words about the appellant and the appellant's mother. The appellant instanced particular occasions and mentioned

one on which Seit Ramadan had threatened to kill him, which he said had occurred about 8 days previously to the killing.

The evidence showed that on the 8th December, 1956, about 9 o'clock at night, the appellant was driving a utility truck, which collided with a push cycle ridden by Seit Ramadan at the junction of Suburban Road and Glebe Street, York. Seit Ramadan was injured, appellant deposing that the injuries were serious. The appellant gave several different versions of how he came to kill Ramadan. The one that concerns this appeal is set out as follows: According to the appellant, the injured man was in a sitting position, after the appellant had stopped his vehicle about 80 yards from the place of impact and returned to the spot. The appellant's story was that when he came back to the scene of the collision and found Seit Ramadan sitting in the road, Ramadan said to him "I will kill you as I killed your other brother now or some other time", and then Ramadan moved his left hand to his pocket as though searching for something. The appellant said he got frightened and jumped at Ramadan thinking he would have a pistol in his pocket. He grabbed Ramadan by the hand and took a pistol, either from his hand or his pocket. When he secured the pistol Ramadan said "Whatever you do I am going to kill you, your brother, and everyone in your family". In evidence the appellant said that he thought Ramadan would have a knife; he kept moving his hand but could not get the knife from his pocket because apparently he was too weak. The appellant says he then lost his self-control and did not know what he did, although he did remember emptying the pistol. He then fired seven bullets from a .32 automatic pistol in rapid succession at point blank range into the face and upper body of the deceased. One of these shots penetrated the heart, causing death.

In summing up to the jury on this phase of the defence, the Trial Judge explained the meaning of provocation in terms of section 245 and section 281 of the Criminal Code.

I have given some consideration to whether the word "provocation" in section 281 of the Code is to be interpreted differently from "provocation" in section 245. Recent decisions in Queensland (*R. v. Sabri Isa*; *R. v. Herlihy*) have suggested that there may be some difference in the interpretation of "provocation" in section 281 from what is intended in section 245; more particularly that section 281 is merely a restatement

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of the common law, which tended to be somewhat rigid in the demarcation of instances where a set of circumstances would be regarded as constituting a sufficient defence of provocation. I would subscribe to the view held by Stanley J. in *R. v. Herlihy* that the two sections have to be read together. I think the common law principles are well set out in Russel on Crimes and Misdemeanours 8th ad. vol. 1. pp. 654-663. The common law regards an assault as provocation, provided the assault is of such a nature as to be calculated to make an ordinary person lose control of his temper, and present threats and gestures which indicate an immediate intention to do violence are regarded in law as an assault although in fact no violence is done.

After retiring, the jury sought redirection on the question of provocation generally. That indicated that they were paying some regard to that phase of the defence. The Judge then referred again to the two sections of the Code and explained that the deed must be done in the heat of passion caused by sudden provocation before there was time for the temper to cool. At this stage the question was raised as to how far the defence of provocation could be supported by what had happened on previous occasions, and in dealing with this question the Trial Judge directed the jury that the law required that the act should be done on sudden provocation and that they had to be satisfied that what had happened on the night of the killing amounted to provocation.

In his report to us the Trial Judge agrees with the accused's counsel's statement that in the course of his redirection the Judge told the jury that what happened on previous occasions had nothing to do with the matter.

I do not think this was a correct direction. Facts which tend to explain the fact in issue are admissible in proof. If in fact the appellant had been insulted on previous occasions and had been threatened by words and gestures, there was, in my opinion, all the more cause for his being suddenly provoked into action by a fresh outburst and threats. I think it may be said that what might appear to be colourless circumstances on an isolated occasion may well prove to be of extremely serious significance when interpreted in relation to prior events.

I am of the opinion that the appellant's story, if believed, would have reduced the finding from wilful murder to manslaughter.

As to the meaning of "sudden provocation" in section 281 I do not think the common law ever excluded proof of circumstances related to and preceding the crucial act of alleged provocation. In the case of *R. v. Duffy* which was relied on by the Crown, the charge of the Trial Judge (Devlin, J.) pointed out that "provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person, and actually causes . . . a temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind . . ." The Trial Judge there was dealing with a case in which a woman who, after having been subjected to brutality by her husband, left their room for a period of time, changed her clothes, and eventually struck him with a hatchet and a hammer when he was in bed. There was a period of time elapsing between the last of the husband's cruel or wrongful acts, and it was material to take that into account in deciding whether the woman had acted on the sudden in the heat of passion. But the Trial Judge did not say that the previous incidents should not have been taken into account had she attacked her husband immediately on receiving provocation. In fact, he indicated the contrary—that is, that a series of acts leading up to a culminating act of provocation could be taken into account.

As to the functions of the Judge and of the jury in these matters, the editors of Kenny—*Outlines of Criminal Law*—1952 Turner ed. p.133. para 119 state—

"Until relatively modern times the question whether in any particular case the provocation actually given should be regarded as excusing a man for the loss of his self-control was decided by the Judges as a matter of law and in such a position it is not surprising to find that in the old cases there was some variation of view from one judge to another. The principle upon which their decision had to be taken was simple—it was that the law of benignity would only operate when the provocation had been such that human frailty could not withstand it. Human frailty must be measured by the general average standard of ordinary men. The average man would not be so disturbed by a light attack as to be immediately overcome by desire to murder his assailant; but he might be angered to the point of retaliation in kind, returning the like blow for

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the blow received. Accordingly it was not unusual for the judge to declare that it was not every slight provocation, even by a blow, which would suffice to reduce the homicide to manslaughter, and sometimes to add that the retaliation must bear some relationship to the provocation given”.

In the next paragraph, 120 p. 134, it is stated that—  
“The question whether the provocation received was enough to reduce the homicide to manslaughter was originally decided by the judge. Gradually, however, the judges developed the practice, which has now become the established rule, that they should leave it to the jury to decide as a matter of fact whether there was sufficient provocation or not. In order to guide the jury the judges evolved an objective test, directing juries that they should decide whether the acts of provocation were in their opinion enough to cause an ordinary reasonable man to lose his mastery over his passions. This objective test has been reaffirmed in modern cases”.

It has been suggested that the two cases *R. v. Scott* and *Dunstan v. The Crown* are binding pronouncements by our Court of Criminal Appeal on the construction of section 281. In the former case the Court of Criminal Appeal in this State was dealing with the much canvassed doctrine at common law whether a confession of adultery by a man's mistress could be deemed to be sufficient in law to provoke him into an act of homicide. It is worthy of note that the Court of Criminal Appeal followed the old common law authorities but McMillan J. (as he then was) was somewhat doubtful as he considered that the matter had been codified by the Criminal Code, and if that were so should have been left to the jury and not taken away as the Trial Judge did take it. In the later case the Court of Criminal Appeal was dealing with the interpretation of a verdict of a jury which had convicted a husband of wilful murder of his wife, but added a rider recommending him to mercy on the ground of provocation. The circumstances showed that there was no present provocation when the husband killed the wife. The husband had returned home and heard a warning to get out being given to someone he thought was his wife's paramour. He saw a man hurriedly leave the premises, secured a revolver and gave chase but failed to catch him. After an

interval in which he consumed some liquor he found his wife, commenced to drag her home, but after going a short distance he shot her. It was held that the circumstances were not sufficient to establish provocation in law. The distinction at common law between circumstances suggesting adultery and discovering a wife in the act of adultery in relation to provocation seems to pay no regard to psychological reaction. It has been criticised. I do not think it is the law here. The remarks that came from the judges in the later case were not necessary for the decision. I cannot understand the reasoning of McMillan C.J. in view of his earlier pronouncement in *R. v. Scott*. I do not think the decision will stand examination in view of the express provisions of the Code.

The recent decision of the House of Lords in *Holmes v. the Director of Public Prosecutions* has not assisted in clarifying the common law. That case again was one where a husband had killed his wife after hearing from her a confession of infidelity. The passage to which I referred as creating the uncertainty is a passage from the speech of Viscount Simon in which he states—

“In my view however a sudden confession of adultery without more could never constitute provocation of a sort which might reduce murder to manslaughter . . . When words alone are relied upon in extenuation the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.”

Earlier in his speech Lord Simon had expressed the view that for the defence of provocation to prevail at all the element of intention had to be absent (in the particular case the prisoner had declared that he had intended to kill his wife) see p.958. If this is the law of England, and the dictum has been doubted, (see Article 69 L.Q.R. p. 547 by J.L.J. Edwards) it is not the law of this State although it was part of the reasoning in *R. v. Scott*. Section 281 of the Criminal Code distinctly states that where the act done under sudden provocation might otherwise constitute wilful murder (killing with intent to kill) then the offence is reduced to manslaughter. It is interesting to note, too, that this commentator refers to the report of the Royal Commission on capital punishment

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in England (Cmd. 8392) wherein the Commission recommends that the old distinctions between particular cases, which arose out of the different ideas of values on the part of various judges, should be abolished. That is what I think our Code did when it was first enacted in 1902.

*Wolff, S.P.J.* In my opinion Section 245 and Section 281 are complementary, and together lay down the conditions under which a killing, although wilful, may be reduced to manslaughter.

It was urged by the Crown that the Judge's direction concerning prior happenings had been taken out of its context by the appellant's counsel. In re-directing the jury the Judge emphasised that the provocation had to be sudden and that in coming to a decision on this factor the jury had to disregard all prior happenings. This would suggest that the prior happenings had nothing to do with the degree of provocation on the night of the killing; but if by a series of threats and insults a person's mind has become so worked up that a fresh act or insult, or a repetition of previous insults, is likely to assume greater magnitude in that person's mind, I think that has a material bearing on the question of the provocation which led to the killing. Therefore the Judge's direction to the jury is misleading.

I think this appeal should be allowed and that there should be a re-trial—that is, a re-trial on the whole indictment with all issues open to be raised again, i.e. self defence and provocation.

*Jackson, J.*

JACKSON, J.: The appellant was convicted of the wilful murder of one Seit Ramadan after trial before Virtue J. and a jury. His appeal is on the ground of a misdirection by The Trial Judge when instructing the jury on the subject of provocation.

The deceased was killed shortly after 9 p.m. on 8th December, 1956. He had been riding a bicycle in the town of York and had been knocked to the ground and injured when a utility driven by the appellant had struck him. The appellant stopped his utility some little distance away and returned to the spot on the road where Ramadan was lying. Within a very short time the appellant fired seven shots from a .32 revolver at the deceased at very short range, hitting him in the head and upper part of the body and killing him instantly. These

facts were not denied by the appellant at the trial, but his defence was twofold, viz., self-defence and provocation. No one but the appellant can say what occurred between him and the deceased immediately before the shooting, and his accounts of this, given first to the police and later in evidence, varied considerably. The version most favourable to him is, I think, that which he gave in examination-in-chief and is as follows:—

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“I went back to where accident happened.

When got there recognised it as Seit Ramadan.

Ramadan was hurt a lot but he was sitting.

When I arrived Seit recognised me and abused me again.

He said ‘I will kill you as I killed your other brother now or some other time.’

He moved his left hand and was as if searching for something in his pocket.

I was frightened and jumped at him. I thought he would probably have a pistol in pocket.

I grabbed him by hands.

I took revolver which Seit Ramadan had in hand.

He seemed to have something else in his hand, probably a knife or another revolver.

He only had revolver in hand.

He had knife in hip pocket.

When I took revolver from Seit he said ‘Whatever you do I am going to kill you, your brother and everyone in your family.’

With the threat he made he was going to kill me I thought he would have a knife also.

Seit was moving but couldn’t get knife from pocket because he was too weak.

I lost my temper. I don’t know what I did. I remember emptying the revolver.

I was very nervous and very frightened at the time.

I don’t know where I emptied revolver.

I don’t remember how close I was to Seit when emptied revolver.”

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*Jackson, J.*

There was evidence of past trouble between the appellant and his brothers, and the deceased and his brothers. Some three years before, Saleman Ramadan had been convicted of manslaughter, following a fight in an hotel in York in which the appellant's brother was killed with a knife. The deceased and a third Ramadan brother had been present on that occasion and had taken some part in the fight. Since then, and particularly during the past twelve months, the appellant said that the deceased had frequently threatened to kill him and had abused him on at least one occasion.

The jury retired to consider their verdict late on the afternoon of the second day of the trial, after a summing up by the Trial Judge in which he instructed the jury as to both self-defence and provocation. No exception to the summing-up is taken by the appellant. Just over an hour later, the jury returned and asked to be redirected as to the meaning of provocation. In the course of doing this the Trial Judge apparently said—"What happened weeks before has nothing to do with it". It is to this statement that the appellant objects as being in law a misdirection, because he claims it amounted to a direction to the jury that in considering provocation the past was entirely irrelevant. The appellant claims that the sudden provocation to him was the threat by the deceased to kill him, coupled with an apparent attempt to do so then and there; that the previous circumstances should be considered because they go to show the nature of the assault which the appellant had reason to apprehend, and that he was justified in regarding the threat as a serious one, and in consequence that he believed he was in danger, and that belief caused him to lose his self-control. It was argued that a long course of earlier conduct could result in his being ultimately provoked by a comparatively slight incident.

On the other hand, the Crown Prosecutor says that the Trial Judge did not use the phrase in the sense suggested by the appellant. He claims that it was used only in emphasising to the jury that the provocation must be sudden and that earlier acts or threats could not of themselves constitute provocation. The question is, therefore, in what sense were these words used, and what meaning did they convey to the jury. The answer cannot be supplied with any degree of certainty without a knowledge of the whole context in which the Trial Judge used this sentence. Unfortunately there is not available to us any

transcript or full record either of the summing up or of the further direction when the jury returned to Court, so that we cannot read the context for ourselves. In his report to this Court, necessarily prepared some weeks after the event, the Trial Judge says—"Some question was then raised about how far the defence of provocation could be supported by what had happened on previous occasions as opposed to what happened immediately before the shooting. I told them that the law required that the accused should have acted upon sudden provocation, and that they must accordingly be satisfied that what happened on the night in question amounted to provocation as explained to them, and on which the accused had in fact acted. I have no reason to doubt the correctness of Mr. Gibson's affidavit that in the course of this explanation I told them that what had happened on previous occasions had nothing to do with it". This does not taken the matter very much farther, and still leaves uncertain the real sense in which the words were used. It would have been correct, I think, to tell the jury that, in considering the necessity for some sudden provocation, earlier acts by the deceased could not of themselves be sufficient, for they would not supply the requirement of suddenness. But it would have been wrong, in my view, to instruct the jury that what had happened earlier was irrelevant either on the question whether a wrongful act then suddenly offered would have been likely to cause an ordinary person to lose his power of self-control or on the question whether the accused was in fact deprived of his self-control by such wrongful act. On such matters, the past history of the relations between the deceased and the accused could well be of great importance. The final wrongful act or insult might, of itself, be comparatively trifling, but when taken with what had gone before, might be the last straw in a cumulative series of incidents which finally broke down the accused's self-control and caused him to act in the heat of passion. ✓

In the absence of a full transcript of the Trial Judge's direction, one cannot assume a context most favourable to the Crown. If any assumption were to be made, it should rather be in favour of the appellant. But even without doing this, I am driven to the conclusion that the words used, viz., "What happened weeks before has nothing to do with it" were too wide even if intended to be used solely in relation to the requirement of suddenness. In my view, they could reasonably have been

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construed by the jury to mean that on the whole subject of provocation, the past was irrelevant. So construed, they would, for the reasons I have given, constitute, in my opinion, a wrong direction which may have materially prejudiced the accused on this part of his defence.

*Jackson, J.* For these reasons, I am of the opinion that the appeal should be allowed and the conviction quashed, and there should be an order for a new trial on the same indictment at the next sittings of the Criminal Court.

*Dwyer, C.J.*

DWYER, C.J.: This appeal is based on a complaint of misdirection regarding provocation, and hence, in the first place, raises the question of what the provocation is which, according to Section 281 of the Criminal Code reduces murder to manslaughter. I agree with the view that it refers to provocation as defined in Section 245. The principles of interpreting a codification stated by Lord Herschell in *Bank of England v. Vagliano Brothers* seem to be applicable in this connection and to support that conclusion.

If provocation is to serve in mitigation of the homicide now under our consideration, a dissection of the two Sections referred to indicates that certain conditions must be present. They are these (1) the provocative act or insult must be sudden (2) it must bring about at once such a flare up of anger as to cause loss of self control (3) it must induce the homicidal act (4) the killing must ensue not only in the heat of passion but also before there is time to cool down.

In every phase the characteristic of what might be called immediacy must be present. This is nothing novel. A delayed resentment is inconsistent with loss of self control; brooding over threats or insults obviously allows time for reason to return and may often be better described as indicative of revenge. When the Trial Judge, speaking of what had occurred weeks before the slaying of the victim having nothing to do with it, he was referring to such occurrences as not amounting in themselves to acts of provocation. In my opinion that was not a misdirection in prejudice of the appellant, although the provocation alleged at the time of the killing having been in essence a repetition of prior threats may in consequence fail to answer to the description of being sudden. I agree with the proposition that it may be necessary, in order to understand or explain a present provocation, to refer to a

former one, but that does not make the latter admissible as itself provocation under Section 281. It would not be admissible without provocation at the time of the crime, and I can find nothing ambiguous or requiring explanation in the alleged provocation which occurred on the night of the murder.

As, however, the other members of the Court are of opinion that the appellant may have suffered an injustice by reason that the Trial Judge's direction totally excluded previous happenings from consideration for any purpose, I agree that the proposed order should be that the appeal be allowed, the conviction quashed, and that a new trial be had on the same indictment.

*Appeal allowed. Conviction quashed.  
Order for new trial on same indictment.*

Solicitors for appellant, *Gibson & Gibson.*

Solicitors for respondent, *Crown Solicitor.*

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*Dwyer, C. J.*

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