IN THE SUPREME COURT OF FIJI
[APPELLATE JURISDICTION]

CRIMINAL PETITION NO. CAV 0040 of 2023
[Court of Appeal No. AAU 150 of 2017]

BETWEEN : **SAMUELA NAVUNISARAVI**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Justice Anthony Gates, Judge of the Supreme Court**
The Hon. Justice Brian Keith, Judge of the Supreme Court
The Hon. Justice Terence Arnold, Judge of the Supreme Court

Counsel : **Petitioner in person**
: **Ms. R. Uce for the Respondent**

Dates of Hearing : **11 October 2024 and 22 October 2024**

Date of Judgment : **30 October 2024**

JUDGMENT

Gates, J

Introduction

[1] The petitioner has lodged a timely appeal to this court following the dismissal of his appeal by the Court of Appeal on 25 May 2023.

[2] He relies on one ground of appeal. That is:

> *"1. That the Learned Trial Judge erred in law and in fact when he failed to direct himself and/or the assessors on the issue of the belated charge causing a miscarriage of justice."*

[3] On 31st of August 2017 the petitioner had been convicted at the Lautoka High Court of two representative counts of rape under the old Penal Code [sections 149 and 150]. The assessors tendered unanimous opinions of guilt with which the trial judge agreed. The two victims were the petitioner's class 3 students. He was their class teacher. They were at the time 8 years old. They were identified as AB and GM (not their real names). The offences were said to have been committed between 1st of October 2006 and 30th of November 2006 at Nadi.

[4] He was sentenced to an aggregate term of 13 years 11 months 2 weeks imprisonment with a non-parole period of 11 years.

[5] In dismissing his appeal, the Full Court refused enlargement of time within which to appeal. The petitioner had filed his Notice of Appeal to the Court of Appeal on 29th of June 2020, which was late by 2 years and just over 8 months. He had not explained in an affidavit the reasons for the delay in appealing. Nonetheless, the court considered the usual factors for such an application including the merits of the appeal.

[6] Amongst the proposed grounds was a similar ground to the single ground now before us, that the trial judge had failed to direct himself and the assessors on the issue of the belated charge.

The Nature of the evidence at trial

[7] The Full Court summarised the evidence in the trial:

"[11] In 2006, the complainants 'GM' and 'AB' aged 08, were class 3 students of a Primary School. The appellant was their class teacher. According to GM, between 01 October 2006 and 30 November 2006, he took her to the last cubicle in the classroom on more than one occasion. GM had some errors in her book. The appellant made her sit on his lap and spread his legs so that her legs would move apart. Whilst sitting on his lap, she would face away from him. He would then ask questions from her book and if she failed to answer he would squeeze or pinch the side of her vagina by putting his hand underneath her dress, then pulling the side of the underwear, he would insert his penis in her vagina. She had felt his penis and the pain. She did not cry out but was only biting her lips. When cross-examined as to how many centimetres deep was the penile insertion, she had said 'half way through' but it was not clarified by either counsel as to what she meant by that phrase. This had been repeated on more than one occasion. She did not tell anyone about what the appellant was doing to her because she didn't know at that time what he was doing was right or wrong.

[12] 'AB' testified that during the same time, the appellant would take her to the last cubicle in the classroom and make her sit on his lap with the book in front of them. Whilst sitting on his lap, the complainant would be facing away from him. He would ask questions and if she failed to answer he would try to shift her panty to one side but as her panty was too tight, he would pull it down to her ankle and then squeeze or pinch on the top layer of her vagina. She had explained that what she referred to as the top layer of the vagina was the clitoris. He would rock her back and forth by holding her waist with his hands and whilst rocking she could feel his penis on the top layer of her vagina which was her clitoris. She was scared and therefore did not say anything. This happened on more than one occasion.

[13] The third prosecution witness was Dr. Elvira Ongbit. On 28 November 2006, the doctor had examined both the complainants. The specific medical findings for both the complainants were that their hymen was intact. The hymen being intact meant that there was no injury on the hymen.

[14] The final prosecution witness Shane Pickering, a fellow student in the same class as GM and AB said that between 01 October 2006 and 30 November 2006, he saw GM sitting on the lap of the appellant in between his legs inside the last cubicle when he went to give his attendance book to him. The appellant told the witness to go back and take his seat.

[15] The appellant had testified that in the year 2006, he was teaching both the complainants but denied all allegations made against him by GM and AB. However, he had admitted that both GM and AB were bright students and GM was quite talkative and acted as the leader of the pack. He had also

admitted that he pinched them on their stomach and thighs because they were cheating during scoring which, however, was not even suggested to GM and AB. He had denied Shane Pickering's evidence. The appellant was not sure why GM and AB had chosen to make the allegations but had attributed his strictness towards his students for making such allegations against him. However, no other student had complained against him. Nevertheless, he had admitted that in his experience as a teacher, a 08 year old would have almost zero knowledge about sexual activity. According to him under cross-examination, the cubicle could not accommodate two unless in a standing position and it cannot fit when an adult is seated and a 08 year old sits on his lap even if the chair is slightly moved to the back of the cubicle.

[16] The appellant's witness Penina Takobe in the year 2006 was teaching the class adjacent to the appellant's class. She was able to see his classroom through the glass. According to her, GM was a quiet student, hardly speaks and moody at times who would speak only when spoken to. At no time did the witness see GM or AB sitting on the lap of the appellant. Further, the witness had said that the cubicle could only fit one student and it is not possible for two people to be seated inside and if the chair was slightly put back the other students would see. However, under cross-examination, the witness had said that she could see only the appellant's head when seated inside the cubicle and if the appellant sat in the cubicle with a student on his lap, she would not be able to see the student. She further admitted that an adult sitting in the cubicle with a student on his lap would fit there by shifting the chair back but would have been seen by other students in the classroom."

[8] At the hearing before us, we requested the respondent's counsel to prepare a chronology showing what had happened after the alleged incidents in 2006 up to the conviction and sentence in 2017. This Ms. Uce commendably provided at short notice.

[9] In raising excessive delay before the trial court, or in the appellate courts subsequently, the chronology is more suitably presented in the form of an affidavit, or as an exhibit to an affidavit. It should set out the history of the case and the reasons (if any) for the relevant periods of delay: ***Mungroo v The Queen*** [1991] 1 W.L.R. 1351. The compilation of such relevant information from police files as well as from the prosecuting authority is an onerous task. We were grateful therefore that the detailed information, such as was available, was presented to us.

The History of the case

[10] The chronology provided was as follows:

Date	***What transpired?***
2006 1st October, 2006 to 30th November, 2006	Petitioner alleged to have molested PW1 and PW2, both of whom were 8 years old at the time.
28th November, 2006	Report was lodged with the police. PW1 and PW2 (complainants) gave statement. PW1 and PW2's parents and aunty interviewed. PW1 and PW2 underwent medical examinations. School principal interviewed. Teacher called by parents interviewed.
2007 February/March 2007	PW1 and PW2 made further statements. Classmate who said he saw PW2 sitting on petitioner's lap interviewed. Petitioner's colleagues and others interviewed.
2008 10th September, 2008 December, 2008	Petitioner was caution interviewed. Docket was forwarded to DPP's office for advice.
2009 January/December, 2009	File was allocated to a legal officer to advice. Advice was rendered by legal officer. PW1 and PW2 to be asked if they wished to proceed with the matter. Now that they might have healed, they might not want to relive the experience.

2010	
18th January, 2010	Charge and charging summons filed at Nadi Magistrate's Court.
3rd February, 2010	Docket was dispatched to the investigating officer for charging summon to be served on the petitioner.
2011	
14th June, 2011	Memo and docket were dispatched to Namaka Police Station pending service of charging summon.
23rd September, 2011	PW1's father advises police that he wishes to withdraw complaint against petitioner. Say his daughter agrees with this. Does not want to bring up old memories and wants to get on with his life. He also said that his wife had spoken to the mother of PW1, who said that she was also not interested in proceeding with the case as she wasn't happy with the delay.
28th September, 2011	Docket was returned to DPP's office with statement of PW1's father.
2012	
23rd March, 2012	Petitioner was not present in Court. The State was informed that NOAH was issued on the accused and has been pending service since February, 2010. The matter was adjourned to 25th May, 2012 to check on service of NOAH.
25th May, 2012	NOAH is still pending and the matter was adjourned to 30th of July, 2012.
30th July, 2012	The matter was called in Court to check on service of NOAH. The matter was adjourned to 7th of September, 2012.
7th September, 2012	The Court dismissed the charges as NOAH was not served.

2013	
2nd October, 2013	Docket was returned to police with instructions to locate the petitioner and have him recharged.
4th October, 2013	Petitioner was charged at the Namaka Police Station. Petitioner was produced before Nadi Magistrate's Court. He was served with his full disclosures and opted for counsel from the Legal Aid Commission. The petitioner was granted bail with strict conditions. The matter was then adjourned to 12th December, 2013 for plea.
12th December, 2013	The petitioner had applied to Legal Aid Commission but no counsel was present. The matter was adjourned to 17th April, 2014 for plea.
2014	
17th April, 2013	Plea was vacated and the matter was transferred to the High Court at Lautoka.
6th May, 2014	ODPP received docket from police. The petitioner has been charged and the matter has been transferred to the High Court at Lautoka.
14th May, 2014	Court notes start. First Call date. Time given for State to file information and disclosures.
2nd June, 2014	State requested further time to file information and disclosures.
23rd June, 2014	State requested further time to file and serve information and disclosures.
30th June, 2014	Information was filed and served in Court.
25th July, 2014	Disclosures was filed and served in Court.
12th August, 2014	Information was read over to the petitioner and he pleaded not guilty to both counts. No voir dire as petitioner made no admission in his record of interview. Parties to work on admitted facts.

19th September, 2014	Agreed facts was prepared and served to the Legal Aid Counsel.
22nd October, 2014	Agreed facts not yet finalized. Petitioner did not appear as he was sick.
5th November, 2014	Agreed facts was filed in Court. The matter was adjourned to 6th March, 2015 for mention to fix a trial date.
2015	
6th March, 2015	Matter was adjourned to 5th June, 2015 to fix trial before his Lordship Judge Rajasinghe.
5th June, 2015	Matter was adjourned to 21st August, 2015 to fix a trial date.
21st August, 2015	Bench warrant was issued against the petitioner. The matter was adjourned to 22nd of September, 2015.
22nd August, 2015	Defence counsel informs Court that petitioner was sick. Bench warrant was cancelled. The matter was adjourned to 16th of November, 2015. Prosecution has 6-7 witnesses and Defence has 2 witnesses.
16th November, 2015	Matter was adjourned to 25th of April, 2016 for mention to fix hearing date.
2016	
25th April, 2016	Matter was adjourned to 6th June, 2016 for mention to fix a hearing date.
6th June, 2016	Matter was adjourned to 21st October, 2016 for mention to fix a hearing date.
21st October, 2016	Prosecution has 6 witnesses. Defence has 2 witnesses. No voir dire hearing. Trial date is fixed from 21st to the 25th August, 2017. Matter is adjourned to 21st April, 2017.

2017	
21st April, 2017	Matter is already assigned a hearing date. Matter is adjourned to proceed as scheduled.
21st August, 2017	Admitted facts to be amended and further disclosures to be filed and served. Matter is adjourned to 22nd August, 2017 to commence trial.
22nd August, 2017	Trial starts. PW1 and PW2 were 19 years old by this stage.
30th August, 2017	Summing-up to the assessors. No re-direction by both parties. Assessors later gave unanimous guilty verdict of both counts against the petitioner. The matter was adjourned to 31st August, 2017 at 3.30pm for Judgement.
31st August, 2017	Judgement delivered and learned Trial Judge convicted the petitioner on both counts of the charge. Both parties seek time to file and serve sentencing and mitigation submission. The matter was adjourned to 11th September, 2017 for sentencing.
11th September, 2017	Sentence was delivered and the petitioner was sentenced to 13 years 11 months and 2 weeks imprisonment with non-parole period of 11 years imprisonment.
6th December, 2017	The docket was returned to police for closure.

[11] It took 3 years 2 months from the making of the report to police to the filing of the summons at the Nadi Magistrate's Court. Though the docket was dispatched to the investigating officer for summons to be served on the petitioner, it is not clear when it was actually served.

[12] According to counsel who enclosed a minute dated 23rd of November 2021 from the police officer in charge, Namaka Police Station, the police docket for this case was to be dealt with as a "*Disposal of Archives*" matter, and destroyed. This was said to be the appropriate disposal after the docket had been kept in archives for more than 5 years. This action was approved by the DPC Western. Unfortunately, this means there remains little police explanation for the lack of progress for the investigation, charging and re-charging.

[13] Fiji's Constitution grants a right for accused persons "to have the trial begin and conclude without unreasonable delay"; section 14 (2) (g). Section 15 (1) provides that "every person charged with an offence has the right to a fair trial before a court of law." As was noted in ***Nalawa v State*** [2010] FJSC 2; CAV0002.2009 (13th August 2010) at paragraph 20, those rights are set out in Article 8 of the Universal Declaration of Human Rights, to which Fiji is a party. They are also included in the International Covenant on Civil and Political Rights at Article 9 (3).

[14] In ***A-G's reference No. 1990*** (1992) Cr. App. Report 296 the Court of Appeal stated that delay due merely to the complexity of the case or which has been contributed to by the actions of the defendant himself should never be the foundation for a stay. There should never be a stay ordered unless the defendant could demonstrate on the balance of probabilities that due to delay he would suffer serious prejudice to the extent that no fair trial could be held.

[15] Other remedies for delay can be resorted to, such as a reduction in the sentence imposed: ***Sahim v State*** [2008] FJCA 124; Miscellaneous Action 17 of 2007 (25 March 2008). The appellate court can also quash the conviction after trial: ***Seru v State*** [2003] FJCA 26; AAU 0041.99S (30 May 2003). That case followed ***R v Coghill*** [1995] 3 NZLR 651 a decision of the Full Court of the New Zealand Court of Appeal which dealt with a delay argument under the corresponding New Zealand legislation on appeal after trial. The court considered it was open to an appellant to raise the delay issue post trial, certainly in cases where the point had been taken pre-trial, and where an appeal against dismissal had been lodged and remained extant.

[16] The court in ***Seru*** interpreting the 1997 Constitutional provision, identical to section 14 (2) (g), explained:

> *"But the fact remains that this country has adopted s29(3) thus confirming that one of the fundamental rights of all citizens is to have a charge disposed of within a reasonable time. If the court fails to acknowledge unreasonable delay when it occurs, the constitutional right will become a dead letter."*

[17] The court stated its approach to the issue:

> *"Against the background of our consideration of the relevant factors we come to the critical balancing exercise. A decision to stay a prosecution on the ground of delay is a serious matter. A stay clashes with the interests of the State, representing the general body of citizens, in bringing the case to justice. The more serious the charge the greater the interests of the community in ensuring the case goes to trial. This is particularly relevant to the unusual charge brought against Seru. It follows that dismissing a case on this ground after an actual conviction is an even graver step. Assessors have made a finding, confirmed by a Judge, that the accused are guilty of significant offences. In those circumstances no court would set convictions aside lightly."*

[18] There was a delay of 4 years 10 months, and the court concluded no other remedy was suitable but the quashing of the conviction.

[19] The two rights, determination within a reasonable time, and fair trial are distinct and to be considered separately: ***Martin v Tauranga District Court*** [1995] 2 NZLR 419.

[20] Some cases come to light years after the event perhaps when a complainant eventually has courage enough to make a report to the police. In ***Seru*** it was said:

> *"That a fair trial may be available notwithstanding the lapse of time does not exclude the possibility that the delay after charge is such that the prosecution ought to be stayed. See **Martin** at 430, per Casey J. This is emphasised by the many cases under the corresponding provisions in New Zealand where charges have been brought years after the event, most commonly alleged offences of a sexual nature where the complainant only felt able to report the matter to the authorities long afterwards. In many such instances applications to stay on grounds of breach of the fair trial right have been*

*dismissed, notwithstanding delays of an order which, if occurring after the charge, undoubtedly would have led to the case being stayed. See for example **R v O** [1999] 1 NZLR 347 where 14 years elapsed between the last of the offending and the date of charge."*

[21] In ***Sahim*** [paragraph 29] the Court of Appeal set out the approach to be applied:

> *"29. The correct approach of the courts must therefore be two-pronged. Firstly, is there unreasonable delay and a breach of section 29(3) of the Constitution? In answering this question, prejudice is relevant but not necessary where the delay is found to be otherwise oppressive in all the circumstances. The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence."*

Pre-charge delay

[22] The petitioner was not at Court on 23rd of March 2012. A Notice of Adjourned Hearing (a NOAH) had been pending, not yet served, since February 2010. The charge and summons had been filed at Nadi Magistrate's Court on 18th of February 2010, though its service on the petitioner is not confirmed.

[23] The alleged incidents from which the two charges arose occurred in October/November 2006. The NOAH was still pending unserved on the 7th September 2012 when the Magistrate dismissed the charges. From 2006 to 2012 it was therefore already a 6 year period. That part of the 6 years that related to the investigation process was far too long, and could hardly have demonstrated proper progress. It had been 2 years from the first report before the petitioner had even been interviewed under caution. The evidence in this case was of a very limited scale. It concerned incidents alleged to have happened in a classroom, upon two young complainants, and with one supporting fellow student who in court confirmed seeing one of the incidents. There was one medical witness who submitted medical reports on the two complainants. That evidence was not adverse to the

petitioner. The case was of small compass and non-complex. One of the issues was whether it was possible for an 8 year old pupil to fit into one of the individual classroom cubicles and to sit on an adult person's knee whilst he was seated there. There was also an issue as to what can be seen looking from one cubicle or classroom to another.

[24] I conclude that the investigation delay itself must have caused the petitioner much anguish and anxiety. He claimed in his submissions that it had, and in so many, obviously believable ways. He could not teach again, and visits from the police undermined his reputation, even when no charges had been forthcoming. His life was in limbo and he found it difficult to support his family.

[25] The redress for this part of the harm caused must be compensated by a substantial reduction of his term of imprisonment.

[26] The case was awaiting trial in the High Court for approximately 3 years 3 months [May 2014 – August 2017]. The petitioner was represented during that time. In the interlocutory stages or at the commencement of the trial, no application for stay was made by his counsel. This omission does not bar the raising of delay upon appeal. However, in protecting the integrity of the criminal justice system all parties have a part to play to avoid the harm caused by delay.

[27] Cases in the list which have certain features need to be prioritized by the efforts of the police, the prosecuting authorities, the Legal Aid Commission, defence solicitors and counsel, the magistracy and the judiciary. Obvious examples of such cases are those cases which have been ordered to be re-tried or which, (as here) have had to be re-started after dismissal, cases where (as here) the charges arose out of events long in the past, cases where the accused have been long held on remand in custody, cases where there are vulnerable witnesses (young children, the sick or elderly), or for other reasons need to be prioritized.

[28] In ***R v Morin*** (1992) CR (4th) 1 delay arguments were raised after trial and conviction. The appellant failed in his application. Sopinka J said:

"The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in ***Smith*** *[****R v Smith*** *(1989) 52 CCC (3d) 97], '(i)it is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?' …While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analysing how long is too long may be listed as follow:*

1. *the length of the delay;*
2. *waiver of time periods;*
3. *the reasons for the delay, including*

    (a) inherent time requirements of the case;
    (b) actions of the accused;
    (c) actions of the Crown;
    (d) limits on institutional resources, and
    (e) other resources for delay, and

4. *prejudice to the accused. (12 – 13)."*

[29] In ***Nalawa*** the court collated the relevant principles [at paragraph 27] and listed the factors to be considered. They included:

"(a) The length of the delay;
(b) The reasons for the delay (including on the part of the accused, the judiciary, the prosecution or legal aid);
(c) The inherent time requirements of the case;
(d) The limitations on institutional resources (including the judiciary, the prosecution and legal aid);
(e) Any waiver by an accused of his rights;
(f) Acquiescence to delay by an accused;
(g) The effect of delay on the fairness of a trial;
(h) Any prejudice to the accused cause by the delay."

[30] The list was not intended to be exhaustive and each case was to be examined in the context of its own particular facts before unreasonableness can be determined.

[31] The delay from the first report to the police to the passing of the sentence was approximately 11 years. Prior to reaching the High Court the case suffered excessive delay. It took 1 year 5 months for instance for the summons to be served on the petitioner.

There was delay in seeking advice from a legal officer who instructed the police to ask if the complainants still wanted to proceed with the charges. One wonders if, and why, there was a reluctance to proceed in this case.

[32] Advice was received from the DPP's office in October 2013 to proceed, and at court the petitioner was then represented by counsel from the Legal Aid Commission.

[33] On 17th of April 2013 the Magistrate, realising that this matter was serious and that his powers of sentence might be inadequate, transferred the case to the High Court. Nothing further seems to have happened till 14th of May 2014. The information was then filed, followed by the disclosures. In August 2014 a plea was taken, and by November the agreed facts were also filed. The case thereafter waited in the list for 2 years 9 months approximately before the trial could start.

[34] From 6th of March 2015 the pre-trial matters had been attended to, and the case remained parked, as it were, in the list. No blame can be attributed to the prosecution or to the defence. The delay factor was that the judiciary lacked both judges and courtrooms to cope with a list averaging 200 pending trials. Two judges were assigned to hear criminal trials at Lautoka High Court, four for civil. The new court house for the High Court, long in the making, had run into various architectural and contractual problems. There existed therefore insufficient resources to cope with the volume of cases.

[35] Overall this case was not being brought to a sufficiently timely determination, a finality which was in everyone's interest, the complainants, the petitioner, and that of the public.

Fair Trial

[36] This was the second part of the inquiry. Did the petitioner have a fair trial? The delay, without more, being unreasonable, must be assumed to have caused prejudice. That prejudice affected the petitioner. It did so adversely and seriously as I have indicated in paragraph 24. This referred to his personal circumstances, his occupation, and his life generally. But that prejudice did not affect the conduct of his trial. At paragraph [23] I

have discussed the nature of the trial, and its comparative straight forwardness. The offences took place in a classroom of 8 pupils, in a cubicle. The circumstances of molestation were somewhat unusual. But the evidence was of short compass. The judge clearly believed the two complainants and one other member of the class. Both in his summing up and in his final judgment convicting the petitioner the judge wrote careful accounts of what had happened. He found both complainants truthful and reliable, as indeed the other pupil who confirmed one of the accounts.

[37] Besides the petitioner the defence had called another teacher to speak of what could be seen from one classroom to another. Part of her evidence was not accepted by the judge.

[38] Although testimony was given by all witness participants in the trial a little over a decade later than the incidents, the judge found the recall of the complainants to be "forthright and straightforward".

[39] I conclude that in spite of the delay in this case that the petitioner did receive a fair trial.

[40] In the result, leave to appeal against conviction is to be granted. The appeal against conviction is to be dismissed, and the conviction is to be affirmed. In consequence of the finding of unreasonable delay I would grant leave for a petition against sentence. The petitioner's sentence of 13 years 11 months 2 weeks with a non-parole term of 11 years is to be quashed. In substitution, he is sentenced to a term of 10 years imprisonment with a non-parole period of 7 years.

Keith, J

[41] I agree with the judgment of Gates J, with its reasoning and with the orders which he proposes.

Arnold, J

[42] I have read the judgment of Gates J in draft and agree with the orders proposed for the reasons the Judge gives.

Orders of the Court:

1. Leave to appeal against conviction granted.
2. The petitioner's application for leave to appeal against his conviction be treated also as an application for leave to appeal his sentence.
3. Leave to appeal against sentence granted.
4. Appeal against conviction dismissed.
5. Appeal against sentence allowed.
6. Sentence of 13 years 11 months 2 weeks with a non-parole term of 11 years quashed, and a sentence of 10 years imprisonment with a non-parole period of 7 years substituted.

The Hon. Justice Anthony Gates
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

The Hon. Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon. Justice Terence Arnold
JUDGE OF THE SUPREME COURT

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