

CANADA / JUDGMENT

R. v. Khamb

2020 BCSC 1090

COURT

Supreme Court of British Columbia

DECIDED

9 July 2020

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2020 BCSC 1090 R. v. Khamb

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khamb,

2020 BCSC 1090

Date: 20200709

Docket: 80568-2

Registry: New Westminster

Regina

v.

Raveen Kumar Khamb

Restriction on Publication: A publication ban has been mandatorily imposed pursuant to 486.4(2) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness referred to in this judgment by the initials J.K.R. This publication ban applies indefinitely unless otherwise ordered.

Section 16(4) of the Sex Offender Information and Registration Act [SOIRA]: This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Sentence

Counsel for the Crown:

L. Ashton

Counsel for the Accused:

R. Dhanu

Place and Date of Hearing:

New Westminster, B.C.

July 9, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 9, 2020

[1] THE COURT: On February 8, 2019, the accused was convicted of the following two counts:

Count 1

On or about the 18th day of October, 2015, at or near Port Coquitlam, in the Province of British Columbia, did sexually assault J.K.R., contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]

Count 2

On or about the 18th day of October, 2015, at or near Port Coquitlam, in the Province of British Columbia, [he] did commit extortion of J.K.R., contrary to s. 346(1.1)(b) of the Criminal Code.

circumstances of the offences

[2] The details of the circumstances of the offences are set out in R. v. R.K.K., 2019 BCSC 1822.

In summary, the accused and the complainant were coworkers who became lovers. The accused was the complainant's superior. He was also married. When, after several months of a relatively torrid affair, the complainant told the accused that she had feelings for another man, the accused reacted with overwhelming jealousy. He confronted the other man, who also reported to the accused at the time at the same workplace, and attempted to put a stop to the new relationship.

[3] Undeterred by his lack of success, and despite it being clear to the accused that the complainant no longer had feelings for him beyond those of a friend, the accused remained steadfast in his quest to keep the complainant as "his girl" to the exclusion of other men. He was not prepared to take no for an answer. He asked the complainant to go out with him "one more time".

[4] After being able to induce her to accompany him in his vehicle under the guise of a work-related delivery, he drove her to his home and sexually assaulted her. He then took photographs of her undressed on the bed and threatened to send them to her coworkers and her family, unless she agreed to continue as his girlfriend and have sex with him.

offender's circumstances

- [5] Mr. Khamb is currently 36 years old. He identifies as East Indian and holds an Indian passport although he was born and raised in the Philippines. He is the youngest of his parents' three children. Growing up in the Philippines, he was subjected to a significant level of discrimination and racism. He graduated high school and completed a two-year diploma in computer science in Manila. He spent two years in England, where he obtained a diploma in mechanical engineering. He returned to the Philippines. In October 2006, he and his family moved to Canada, primarily because of the discrimination and security issues they faced there.
- [6] Mr. Khamb became a permanent resident of Canada. While here, he often worked at multiple jobs. Since 2015, he has worked full-time as a machine operator. He also currently works as a delivery driver for an on-line food service.
- [7] Mr. Khamb married his current wife in February 2010. They have two children, aged seven and four. His youngest child has only one functioning kidney, requires close monitoring, and had urinary tract surgery in February 2020. Mr. Khamb participates equally in the child-rearing responsibilities. He is the primary income earner for his family. His wife and children are dependent on his earnings.
- [8] Mr. Khamb informs the court through his counsel that he greatly regrets his infidelity with the complainant, acknowledges that his actions have significantly damaged his relationship with his wife, and has since worked hard to maintain his marriage. The charges and ultimate conviction have also damaged his once-close relationship with his parents, his siblings, and his community. They have also resulted in increasing emotional and health issues for his father. They resulted in Mr. Khamb losing the job he held at the time.
- [9] As a consequence of his convictions, which both carry a maximum penalty of ten years or more, Mr. Khamb is no longer admissible as a permanent resident of Canada pursuant to ss. 36(1)(a) and 64(1) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, and will be subject to deportation without right of appeal: *R. v. Eng*, 2019 BCSC 611 at paras. 20 to 21.
- [10] Mr. Khamb has no close family in India or in the Philippines. It is unlikely that his wife and children will accompany him to whichever country he would be deported to. It is clear that the convictions in this case will have lifelong repercussions beyond his sentencing in Canada. Mr. Khamb has no criminal record prior to his convictions in this case.

victim impact statement

- [11] The court was provided with a victim impact statement from the complainant dated May 27, 2020. She wrote, and this is a quote. Even though there are several typographical and other grammatical errors, I will quote it verbatim:

This whole incident has affected my life, physically mentally and my relationship with family alot. Not for short period but for long time and some relationship got affected for lifetime. when this whole incident happened, I used to stay with my cousin;s family (joint family who lives in two houses together with 10-15 people) . . . He DAMAGED my repuation in my families eyes, . . . My pictures out there who knows if they still have my photos. Its been 5 years I never talked to them and visited their family, as since this incident happened I moved out and start living in surrey with my college friend. At school, I was scared to go alone with the fear of seeing or facing [R.K.K.], if I was walking alone anywhere and noticed someone walking behind me or besides me I used to get scared if its Raveen or he left somone behind me purposly to harm me. coz I have seen news's in India putting chemical on girl's face and ruined her llfe forever. I grow up in a country where people used to humilate women and used to do this.

...

This whole incident has gave me Depression, stress, mentally and physically. My mental level was so low as I was unable to think, act study and even talk to anyone. I start hiding myslfe in a room for months. If I wouldnt get support from my Finace and victim service and whole legal department, I wouldnt be here today where I am right now. I could probably pushed myself to harm myself or soemthing. even today when i think about this incident i go crazy, I not only think about how he raped me and but also after incident actions he took . . . I have spent first few years in depression missed out so much stuff, who can bring those years back to me no one.

...

Right after this incident happened, i had to quit my job as I didnt want to go to same Job which remind me of him and also people were saying and thinking weird thing about me as Raveen approached to each and every people to tell stories. I failed my finals as few of them I couldnt attempt as this incident happend just in between my exams. I had to repeat all the courses but I got support from my school when I mentioned the reason and they waive my one semester fee. But job loss was real until I found another. plus I had to move out and start renting an apartment which doubled my expenses in that hard time. everything just got worse, I did borrowed money from my couple friends.

...

Fear from Cousin's family - What if they tell my parents in India? Fear of what if I get another Job and Raveen send them my nude pictures, . . . I sent him those pictures coz he always asked me for this. And to me I was sending to someone who I trust and who will be my future husband, as Raveen showed me dreams of marrying him. Plus he took my pictures the day he raped me and Who knows where he sent those picture. whats the Guarantee that he deleted all my picture - there are 1000 types of security and private apps these days . . . Who knows even after all the Settle down, who takes Guarantee that he wont Run after me again, i still have fear that he can approached to my friends, co-workers family members and show them my pictures, who knows if he hurt my future kids? I know these questions might sounds crazy BUT I am expressing all types of FEARS I kept in my heart for years and years.

...

For a year I almost locked myself, as a student (alone here with no support from parents) I started to suffer and always a fear what if someone tells this to my parents back in INDIA. Artur My fiancé, stood by my side all the times . . . Mother-Artur's Mother lives by herself with his grandma back in country . . . Oh Lord, everyday was nightmare as we didn't know what could happen any day . . . it wasn't easy attending court dates and all. it was a tough time, even final hearing all the weird questions Raveen's lawyer all questions was like raping my ears. seeing Raveen's face again at the court after all this was not easy. But no one can hide truth we seek justice in court House. 5.5 years since this incident happened, I was the one who suffered and along with my other half. . . . A married man and a father . . . your wife was 4-5 months pregnant when you were raping someone. You were going to hotels with some other girl (ME) showing her dreams of marrying her, showing her dresses what she should wear on our wedding- while you were making your wife pregnant . . . you were telling me that you divorced and your wife giving hard time to your whole family that's why she still lives in the same house but in basement. Geeesss. I was the only one who always suffered, I was the one in victim box standing there answering your lawyers weird questions why me? how come everyone question the victim ? Anyways that's all I got to say

principles of sentencing

- [12] Section 718 of the Criminal Code provides that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. This purpose is achieved by imposing sentences which have, among others, the following objectives:
- a) denouncing unlawful conduct and harm to victims;
 - b) deterring the offender and other persons from committing offences;
 - c) separating offenders from society where necessary;
 - d) assisting in the rehabilitation of offenders;
 - e) providing reparations for harm done to the victim and to the community; and
 - f) promoting a sense of responsibility in offenders and acknowledgment of the harm done to the victim and to the community.
- [13] Section 718.1 of the Criminal Code stipulates that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R. v. L.M.*, 2008 SCC 31 at para. 22.
- [14] Section 718.2(a) of the Criminal Code stipulates that when imposing a sentence, the court shall take into consideration any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

- [15] Section 718.2(a)(iii) stipulates that the court shall deem as an aggravating circumstance evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.
- [16] In serious sexual assault cases, the paramount sentencing objectives are denunciation and deterrence. Those objectives can be given primacy over other sentencing principles such as rehabilitation: *R. v. G.M.*, 2015 BCCA 165 at para. 17 [G.M.]. However, the principle of rehabilitation remains a consideration, particularly in cases where there is no previous criminal record and where there have been contributions in other facets of life, such that a lengthy sentence may permanently disrupt the beneficial connections an offender has to work, family, and the community: *R. v. J.S.S.*, 2015 BCSC 1369 at para. 29 [J.S.S.]; *R. v. Mercer*, 2015 BCCA 330 at para. 19. There is a presumption that a first-time offender is capable of rehabilitation: *R. v. Sidhu*, 2011 BCCA 246 at para. 26.
- [17] The maximum sentence available for the offence of sexual assault by indictment is ten years: s. 271. The maximum sentence available for the offence of extortion is life imprisonment: s. 346(1.1)(b). Extortion is considered by Parliament to be one of the most serious offences in Canada and one of high moral blameworthiness.
- [18] The range of sentence for sexual assaults involving, as here, intercourse, is two to six years: *G.M.* at para. 22, citing *R. v. B.S.B.*, 2010 BCCA 40 at para. 6 [B.S.B.], and *R. v. Pouce Coupe*, 2014 BCCA 255 at para. 31. Although sentencing ranges are guidelines rather than hard and fast rules, they, nevertheless, are important considerations.
- [19] The court may be required to consider collateral consequences when determining the appropriate sentence, including any consequence arising from the commission of the offence, the conviction for the offence, or the sentence imposed that impacts the offender: *R. v. Suter*, 2018 SCC 34 at paras. 46 to 51. Collateral consequences related to immigration may be relevant in tailoring a sentence: *R. v. Pham*, 2013 SCC 15 at paras. 11 to 13.
- [20] It is also a relevant consideration on sentencing that a substantial period of imprisonment of an offender will have a significant impact on the offender's dependants who will also be victimized by the offence: *R. v. Grassick*, 2012 BCCA 432 at para. 15.
- [21] Loss of employment can be considered as a mitigating factor on sentencing: *R. v. Giles*, 2012 BCSC 775 at para. 38.
- [22] Those are the principles of sentencing and considerations that I must apply today.

aggravating factors

- [23] In its submissions on sentencing, the Crown points to the following aggravating factors in this case:

- a) Mr. Khamb was in a managerial position at his place of employment and the complainant was an employee who reported to him. On the day of the offences, in his capacity as her superior, he asked her to assist him in a catering event. She was dressed in her work uniform at the time the sexual assault took place. He drove her back to their place of employment after the assault.
- b) The sexual assault was violent and in the face of clear and repeated requests for Mr. Khamb to stop, showing a contemptuous disregard for the complainant's personal integrity.
- c) Mr. Khamb took an intimate photograph of the victim immediately after the assault and used it in an attempt to extort her cooperation.
- d) Mr. Khamb told the victim that he had deliberately impregnated her during the assault, which added to the psychological trauma that had been inflicted on the victim.

mitigating factors

[24] The following mitigating factors are present in this case:

- a) Mr. Khamb had no criminal record at the time of the offences.
- b) He had a history of productive employment.
- c) He continues to have the support of his family and community.
- d) There has been a significant delay between the laying of the charges in this case and the date of sentencing, which can be a mitigating factor: *R. v. Downes*, 2020 BCSC 177 at para. 72.
- e) Although he pleaded not guilty, Mr. Khamb made various admissions which obviated the need for the Crown to call additional witnesses at trial, such that the length of the trial was reduced, which again can be a mitigating factor: *Downes* at para. 71.

[25] However, the Crown points out as non-mitigating factors that the accused did not plead guilty and the complainant was required to testify, both at the preliminary hearing and at trial.

position of the parties on sentencing

The Crown

[26] The Crown relies on the following cases for sentencing, which it says involved similar facts:

Sexual assault

- a) *R. v. Hume*, 2016 BCCA 230 - the offender was sentenced to three years' incarceration for a sexual assault that did not involve intercourse but, as here, the offender continued his aggression and dominance over the victim after the assault took place;

- b) R. v. Aulakh, 2010 BCSC 1194 - the offender, a taxi driver who was in a position of trust, sexually assaulted an intoxicated passenger and stole her debit card, received a sentence of four years' incarceration.

Extortion

- a) R. v. Saumier, 2008 BCCA 473 - a cocaine dealer who extorted a drug buyer to sign over his vehicle to him under the threat of death was sentenced to three year's imprisonment;
 - b) R. v. McFarlane, 2018 MBCA 48 - examined the appropriate sentencing range for extortion that can be described as "sextortion", namely an attempt to extort sexually explicit material or activity from a complainant by threatening to disseminate intimate images of her, thereby interfering with her freedom of choice over her sexual integrity. The offender in that case had no criminal record, had pleaded guilty, and had expressed remorse. He was sentenced to a global 18 months' incarceration.
- [27] In this case, the Crown seeks a custodial sentence of four years on Count 1 (sexual assault) and a custodial sentence of 2.5 years on Count 2 (extortion) to be served consecutively to the sentence imposed on Count 1.
- [28] However, the Crown asks the court to consider the principle of totality pursuant to s. 718.2(c) of the Criminal Code, which stipulates that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. The Crown submits that the sentence in respect of the extortion conviction should be reduced from 2.5 years to one year imprisonment. Accordingly, the Crown seeks a global custodial sentence of five years.
- [29] In addition, the Crown asks for the following ancillary orders:
- a) a mandatory DNA order pursuant to s. 487.051, which stipulates that the offences for which Mr. Khamb has been convicted are primary designated offences;
 - b) that Mr. Khamb be required to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 for a period of 20 years pursuant to s. 490.012; and
 - c) a 10-year firearms and weapons prohibition pursuant to s. 109(1).

The Defence

- [30] Counsel for the defence, Mr. Dhanu, submits that in the circumstances of this case, while the principles of denunciation and deterrence must be given the most weight, the principle of rehabilitation looms large and must also play a significant role in the determination of a fit and just sentence. He submits that the appropriate sentence should be, for Count 1, 18 months' imprisonment followed by a one-to three-year period of probation, and for Count 2, five months and 29 days' imprisonment served consecutively. The result would be a global sentence of two years less one day imprisonment to be served in a provincial institution, followed by a one- to three-year period of probation. Mr. Dhanu takes no issue with the mandatory DNA, SOIRA, and s. 109 orders.

- [31] Mr. Dhanu stresses that Mr. Khamb had no prior criminal record, is a hard-working immigrant to Canada who has been a productive and contributing member of our society since his arrival in this country. He is the father of two young children, as well as a husband and son who has significantly affected his family's future by his actions. He submits that incarcerating Mr. Khamb for any longer than is absolutely necessary will only serve to revictimize his family, on top of the trauma that he has already inflicted upon them. He submits that sentencing Mr. Khamb to a provincial rather than a federal institution will not bring the administration of justice into any form of disrepute and will serve to balance the competing principles at play.
- [32] Mr. Dhanu also stresses that almost five years have elapsed since Mr. Khamb was charged with these offences, and that his life has essentially been on hold since that time, resulting in significant mental and financial repercussions to him and his family.
- [33] He relies on the following decisions involved similar facts:

Sexual assault

- a) G.M. - involved forced, non-consensual anal intercourse with a former intimate partner by an offender with no previous criminal record, who was gainfully employed, and had community support. The court imposed a custodial sentence of 18 months.
- b) B.S.B. - a case involving particularly heinous and violent non-consensual sexual intercourse with a vulnerable victim by a 30-year-old offender with no previous criminal record. The offender lost his job because of the charges, but continued to have community support. The event had a devastating effect on the victim. The offender showed little or no remorse for or insight into what he had done. He was sentenced to two years' incarceration.
- c) J.S.S. - the offender, with no prior criminal record, was convicted of sexually assaulting his wife over a lengthy period of time. The assaults resulted in both physical and emotional harm to the wife. The offender continued to have a positive employment history and strong support from his family and friends. The court gave the principles of denunciation and deterrence the greatest weight, but nevertheless considered that the offender's rehabilitation potential was such that (at para. 29):

any sentence imposed must not be so harsh or lengthy that it disrupts permanently all of the beneficial connections he has to work, family, and the community. Rehabilitation therefore will exert a strong moderating influence in this situation.

The court there imposed a sentence of 18 months' imprisonment, stating that a sentence in excess of two years would have been appropriate in the absence of mitigating factors which took the sentence into the provincial range of imprisonment.

- d) R. v. Dahlman, 2007 BCSC 1912 - the 47-year-old offender was convicted of sexual assault and forcible confinement of his former common law spouse of some 15 years. He used extreme force in the process. He had also pled guilty to the breach of his non-contact conditions and

to criminal harassment. He had a criminal record but was employed and had a positive relationship with his family. Noting that the low range of sentence for sexual assault was close to two years, but that longer sentences were imposed in cases involving serious aggravating circumstances, the court imposed a sentence of two years less one day for the sexual assault, followed by three years' probation to be served concurrently with the same sentence for forcible confinement.

- e) R. v. Skoyen, 2020 BCSC 362 - a 31-year-old photographer with no previous criminal record was convicted of sexually assaulting a model. The assault was described as "rough and aggressive". The victim suffered physical injury, as well as profound emotional pain which impacted virtually every aspect of her life. Throughout the trial, the offender maintained that the victim had consented to having "rough sex" with him. The court found that the offender's degree of responsibility was very high and the gravity of the offence was serious. The court found no exceptional or unique mitigating circumstances. Nevertheless, the court considered the principle of restraint, the lack of criminal record, and the role of rehabilitation, despite the offender's apparent lack of insight into his behaviour. He was sentenced to three years in prison.

Extortion

- a) R. v. W., 2014 BCPC 197 - an accused pled guilty to attempting to extort a victim into sending him nude photographs of herself under threat of an intimate video of her being sent to her 746 Facebook friends. He also sent the video to several of her friends and uploaded it to a pornography website. The incident had a profound psychological impact on the victim. After considering the aggravating and mitigating factors, as well as the offender's relatively young age and lack of prior criminal record, the court imposed a sentence of 60 days to be served intermittently.
- b) R. v. P.S.D., 2016 BCPC 400 - the offender, frustrated having been rejected by the victim with whom he had been in a long-term but on-again/off-again relationship, took pictures of her without her consent while she was only partially clothed, and then sent them to two friends with the intention of causing her emotional harm was sentenced to two years' suspended sentence. The court took into consideration that the offender did not have a criminal record, that his offending conduct had been "rash" within the context of a volatile and dysfunctional relationship, as well as the relatively low level of harm that had actually occurred, and the positive rehabilitative prospects for the offender.

analysis

- [34] Sentencing is an individualized process. However, as part of its analysis, the court considers the range of sentences imposed for similarly situated offenders committing similar offences, and the principles governing sentencing that I have reviewed are those must prevail.

- [35] The evidence in this case clearly demonstrates that the accused sexually assaulted his former girlfriend because she told him she had feelings for another man and no longer wanted to be in a relationship with him. Despite their previous relationship having been sexual, he knew she no longer wanted to have sex with him. He forced himself on her without regard to her protests and lack of consent. In this case, the accused's moral culpability is high and the harm caused to the victim is profound. In my view, the gravity of the offences committed by Mr. Khamb and the degree of harm done to the complainant fall at the high end of the seriousness scale.
- [36] In such circumstances, the law is clear that the need for denunciation, deterrence, and retributive punishment must take precedence. However, the principle of rehabilitation remains a consideration.
- [37] I accept that the aggravating factors enumerated by the Crown are present in this case. I also accept that the mitigating factors put forward by Mr. Dhanu are present.
- [38] Mr. Khamb, will you please stand. Is there anything that you wish to say before I sentence you?
- [39] THE ACCUSED: [Inaudible/not near microphone]
- [40] THE COURT: I am sorry, you will have to speak up because I can't hear you.
- [41] THE ACCUSED: [Inaudible].
- [42] THE COURT: You may, yes, thank you.
- [43] THE ACCUSED: Your Honour, anything [inaudible] I have my kids dependent on me. I'm the only one who can provide things for them, and nobody else, my wife only works [inaudible] two days, four hours in each day, and I'm the only source of income they have.
- [44] THE COURT: All right. Is there anything else?
- [45] THE ACCUSED: No.
- [46] THE COURT: All right, thank you, Mr. Khamb, you may have a seat.
- [47] Sentencing of any offender for a sexual offence is a difficult task. I have given the circumstances of this case considerable thought. At the time of the offence, Mr. Khamb was the complainant's superior at their place of employment, was in a position of trust, and abused that position of trust in contemptuous disregard for the complainant's protestations and sexual integrity. He manipulated her into believing that his intentions were honourable and then violently raped her. He continued his dominant and manipulative behaviour in his vehicle afterwards when she was most vulnerable by extorting her, threatening to shame her culturally if she did not submit to him and his deviant desires at his beck and call.

- [48] There is no doubt in my mind that the accused's inexcusable conduct was largely influenced by his jealousy and the feeling of having been snubbed by his former girlfriend. Instead of moving on with the relationship, he decided to avenge his slighted honour.
- [49] Though the accused made some admissions, he has never acknowledged his guilt personally, nor has he expressed remorse for his conduct and the impact it has had on the complainant. Although his counsel, Mr. Dhanu, advised the court this morning that Mr. Khamb is remorseful for any hurt he caused the complainant, when he was invited to address the court a moment ago, he said nothing about it. Again, his remorse is focused upon the impact that his actions have had on his family rather than the victim.
- [50] In my view, the sentencing principles of denunciation and deterrence are paramount considerations in this case. However, in tailoring the sentence to be imposed, I have also considered the collateral consequence related to Mr. Khamb's immigration, as well as the impact the sentence will have on his dependants. I have also considered the delay between the laying of the charges in this case and the date of sentencing, a period of almost five years. I do note, however, that a large part of that delay lies at the feet of the defence rather than the court or Crown, as I ruled in a Charter application previously.

The sentence

- [51] Mr. Khamb, I am sentencing you to 2.5 years' imprisonment on Count 1 and 1 year imprisonment on Count 2, to be served consecutively, for a total sentence of 3.5 years' imprisonment.
- [52] In addition, I am making the following ancillary orders:
- the mandatory DNA order pursuant to s. 487.051, which stipulates that the offences for which you have been convicted are primary designated offences;
 - that you are required to comply with the Sex Offender Information Registration Act for a period of 20 years, pursuant to s. 490.012; and
 - a 10-year firearms and weapons prohibition pursuant to s. 109(1).
- [53] All right, are there any questions? Anything further?
- [54] MS. ASHTON: No, thank you.
- [55] MR. DHANU: No, My Lord. Thank you, My Lord. Thank you to my friend.
- [56] THE COURT: Mr. Khamb, I wish you the best of luck.

"G.C. Weatherill J."

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