

JERSEY / JUDGMENT

AG -v- McKeegans [2018]

JRC 063 (23 March 2018)

[2018] JRC 063

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JUDGMENT

THE COMMISSIONER: 1. This is an application by the prosecution to adduce evidence of body worn vest camera footage from two police officers who attended the scene of an alleged attempted murder and/or grave and criminal assault. The application is made on the basis that what was said in that footage by persons who had been present at the incident constitutes part of the *res gestae*. The application is opposed by the defence.

Background

2. The defendant is charged on an Indictment containing three offences. Count 1 is a charge of attempted murder of Victim A, Count 1A is an alternative count of grave and criminal assault on Victim A. Count 2 is a charge of grave and criminal assault on Victim B and Count 3 is a count of grave and criminal assault on Victim C. The defendant has pleaded not guilty and the matter is due to be heard before a Jury commencing 30th April. The application is opposed by the defence on the ground that the evidence is not admissible; failing which, that the evidence should be excluded under Article 76 of the Police Procedures and Criminal Evidence (Jersey) Law ("the Law"). 3. I take the background from the case summary prepared by the prosecution and what follows is accordingly the prosecution version of events. The defendant and Victim C were in a relationship and living together in St Helier. Victim A and Chloe Dashwood ("Dashwood") were known to each other and had been in contact via the dating app Tinder. 4. On the night of Saturday 30th September/Sunday 1st October, 2017, the defendant, Victim C and Dashwood (who was a friend of Victim C's) were drinking and chatting at the flat. The defendant was drinking, as were the others. 5. Victim A and Victim B are friends and had been out drinking in town. Victim A had been in text and phone call contact with Dashwood and it was agreed that Victim A and Victim B would join the others at the flat. They had not met the defendant before. At about 3:15am on the Sunday morning, Dashwood and Victim C met Victim A and Victim B near Springfield and walked them to the flat. On arrival they were introduced to the defendant. 6. There is then evidence about events at the flat and it appears that the defendant and Victim A were not hitting it off. There was plenty of drink being consumed and the defendant in particular was drunk and slurring his words. At about 5:30-6am, there was a verbal altercation involving Victim A and

the defendant whereupon the defendant jumped on Victim A and attacked him, grabbing Victim A's neck and punching him. Victim B intervened to try to get the defendant off Victim A and Victim C was shouting at the defendant to get off Victim A and was also trying to pull him off. Dashwood left the flat and called the police at 6:10am. Victim B ran out of the flat and the defendant ran after him with a knife in his hand. 7. In the meantime Victim A remained in the flat. He got up after the attack from the defendant thinking that the flat was empty. His eye was swollen and he could see bruising and blood coming out of his nose. Whilst in the flat he tried to telephone various people, the last of these calls being made at 6:22am. The defendant then came back and, according to Victim A, attacked Victim A with a knife, trying to slit Victim A's throat and then continuing to stab at Victim A with the knife. Victim A moved his left arm up and was cut on his left forearm and down his chin. The defendant then started to stab Victim A to the head before the first knife snapped. The defendant was shouting "I am going to kill you", "I am going to cut your throat". Victim A feared for his life and was screaming for help. 8. After the first knife broke, the defendant grabbed another knife and continued to stab Victim A. Whilst Victim A was being stabbed, Victim C came into the kitchen. She was crying and shouting "stop", trying to pull the defendant off Victim A. Victim A saw the defendant turn around and wave the knife at Victim C. He then saw that Victim C was bleeding, sitting on the floor and crying. Victim A did not see the defendant cut Victim C and could not say if it was intentional or by accident. 9. PCs Abreu and Luis arrived at about this time. Outside the building, Victim B told one of the officers, PC Abreu that his friend was being held in a flat at knifepoint. The officer asked Victim B to show him where this flat was. As they approached he heard female screams and ran towards the block of flats. As he got to the top floor he saw a woman coming out of the flat. This was Victim C; she ran past him and he told her to keep running. 10. Immediately behind him PC Luis entered the block of flats and encountered Victim C in the stairwell. It is the body camera footage of PC Luis recording his conversation with Victim C which is the first item which the prosecution wish to adduce. It starts at 6:24am according to the time stamp on the footage. 11. Meanwhile, PC Abreu continued into the flat and as he stepped into the hallway he saw the defendant holding a knife. PC Abreu shouted at him to drop it and the defendant threw the knife down. Victim A then appeared covered in blood and said "I've been stabbed, he just stabbed me". The police officer then described various scuffles with the defendant until he was placed in leg restraints and handcuffed. 12. PC Campbell then entered the flat and her footage starts at 6:27am according to the time stamp on her camera. She spoke to Victim A and her body camera recorded his account of what had happened. This is the second piece of footage which the prosecution wish to adduce. 13. I have viewed both footages. That of PC Luis concerns things said by Victim C immediately outside the block of flats in which the flat is situated. A transcript has been prepared but it will clearly need careful checking as there appear to be some errors. 14. During the footage, amongst other things, Victim C said that the defendant had 'lost his shit' and 'gone nuts', that the defendant had sliced Victim A's face, that he was going at Victim A's throat, that he 'just sliced his throat open in front of me', that he was 'sawing into his throat', that 'he's just knifed Victim A', that she had repeatedly tried to tell the defendant to stop, that he had

Victim A on the floor and she thought Victim A was dead, and that it was not Victim A's fault or her fault. 15. She also said that the defendant had punched her and thrown her to the floor. Her arm had also been cut by the defendant but she said that he didn't mean to do that. Her comments take place before, during and shortly after the treatment of the cut to her arm by a paramedic. 16. The footage of PC Campbell occurs when she enters the flat immediately after the defendant is subdued in the hallway and she then speaks to Victim A. Much of it is concerned with his injuries but, during the course of the footage, he says on a number of occasions that he has been attacked with a knife by the defendant and cut open. He says it was a random attack and that the defendant had just flipped. 17. Although the evidence of what Victim C and Victim A said is sought to be proved by the camera footage (as the best evidence of what was said), the issue of admissibility is not related to the fact that it is camera footage; it is a question of whether what was said by Victim C and Victim A is admissible. The test for *res gestae* 18. In *Shewan v AG*

[2006] JLR 79 the Court of Appeal held that the law of Jersey in relation to *res gestae* is similar to English law and is derived from the principles set out in *Ratten v R*

[1972] AC 378 and *R v Andrews* [1987] AC 281. In *Ratten*, Lord Wilberforce confirmed that a hearsay statement made by the victim of an attack or by a bystander was admissible if it was part of the *res gestae*. He then went on to explain what this meant and concluded at 391 that the authorities:- "...show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused." 19. Earlier, at 388, he had said this:- "The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevance test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and the differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it." 20. The position was authoritatively summarised by Lord Ackner in *Andrews* where he said this at 300:- "My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as 'hearsay evidence':- 1. The primary question which the judge

must ask himself is - can the possibility of concoction or distortion be disregarded? 2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity. 3. In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading. 4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion..... The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused. 5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error." Application to the facts

- (i) Admissibility 21. I take first the footage of PC Luis concerning Victim C. This was immediately after Victim C ran out of the flat. The footage therefore took place within minutes of the incident. It is clear from watching the footage that Victim C is in an extremely distressed state as a result of what has occurred. I have no hesitation in concluding that her mind was completely dominated by what she had just seen. What she was saying was her instinctive reaction to what had happened and I do not consider that there was any opportunity for reasoned reflection on her part. To use Lord Ackner's phraseology, the pressure of what she had just seen excluded the possibility of concoction or distortion and her mind was still dominated by what she had seen. I appreciate that some of what she said was in answer to questions but I do not consider that this affects my

conclusion.

22. Furthermore, there is no suggestion of malice. On the contrary, it is clear that, despite what she had just seen and despite the fact that she had sustained a wound apparently inflicted by the defendant, she wanted to protect the defendant who was her boyfriend. Thus she refused repeatedly to give his name and expressed concern at the fact that he might go to prison. 23. As to the possibility of error, Advocate Morley-Kirk suggested that she was intoxicated. Even if she was, I do not consider that it was such as to affect the reliability of what she was saying given the dramatic nature of the events which she was describing. 24. I therefore rule that what she said on the footage about what had just occurred is admissible despite being hearsay. 25. Turning to the footage of PC Campbell concerning Victim A, this too was recorded a very short time after the incident. According to the case summary, the defendant was attacking Victim A when someone (presumably one of the police officers) shouted "Police". At this point the defendant stopped and ran out of the kitchen with the knife in his hand. PC Abreu encountered the defendant in the hallway holding the knife. He told the defendant to drop the knife and the defendant threw the knife down. There was then a struggle which involved more than one police officer and the use of PAVA spray. It appears to be at this time that PC Campbell went past the defendant who was restrained on the ground and started to speak to Victim A. 26. The footage does not suggest that Victim A was in the same obviously distressed condition as Victim C. However, he was badly injured and was bleeding. He was clearly concerned about his injuries and said on several occasions that he was in pain. He complained at one stage of feeling sick. I am satisfied that, given the very short delay since this very dramatic incident and given the nature and extent of his injuries, his mind would still have been dominated by what had just occurred and the idea that he took the short delay when seriously injured to concoct a false version of events is fanciful. I accept that a number of his statements were made in answer to questions but I do not consider that this leads to a conclusion that there was the possibility of concoction. As well as Lord Ackner's very helpful formulation, I remind myself of Lord Wilberforce's statement in *Ratten* :- "As regard statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it." I am satisfied that the former is the position in relation to Victim A. Furthermore, I see no grounds for concern based on malice in that Victim A had only met the defendant that evening. There was clearly some intoxication but, having seen the footage, I do not consider that it was such as to affect the reliability of what he was saying. 27. The factual situation in this case is not wholly dissimilar to that in *R v Nye and Loan*

(1977) 66 Cr App R 252 which was referred to with approval with Shewan . In Nye , the driver of a car was assaulted and the police were summoned. Having been assaulted, the driver went back to his car and sat in it. He had been punched in the face and was bleeding. His spectacles had been knocked off. When the police came upon the scene shortly afterwards, the driver pointed to the alleged assailant and said to the police that that man had hit him in the face. At trial, the driver was not asked to identify his assailant. The Crown relied upon his identification to the police officer and the judge admitted that evidence as part of the *res gestae* . The defendant then appealed on the ground that this evidence had been wrongly admitted. 28. The Court of Appeal applied the test in Ratten and said as follows at 256:- "We have to apply the opinion of Lord Wilberforce. Was there spontaneity in this identification? It is difficult to imagine a more spontaneous identification Mr Lucas had been savagely attacked. He called for the help of the police and when police officers arrived, one of them asked what had happened. Mr Lucas pointed out Loan to him and alleged that Loan was the man who had hit him. He did this in the presence of the crowd which had collected. Was there an opportunity for concoction? The interval of time was very short indeed. During part of that interval Mr Lucas was sitting down in his car trying to overcome the effects of the blows which had been struck. Common sense and experience of life tells us that in that interval he would not be thinking of concocting a case against anybody. He would have been trying to clear his head . So we can put out of mind altogether, in our judgment, any possibility of concoction." [emphasis added]. 29. In summary therefore I rule that the statements made by Victim A recorded in the footage were made in such circumstances of spontaneity that the risk of concoction can be excluded and that, applying the test described earlier, the evidence is admissible. Discretion 30. Advocate Morley-Kirk submits that, if the two pieces of footage are admissible, they should nevertheless be excluded pursuant to Article 76 of the Law on the basis that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would so adversely affect the fairness of the proceedings that the Court ought not to admit it. 31. In relation to Victim A, she submits that the footage in effect amounts to a previous consistent statement by Victim A. She submits that the footage is prejudicial in two other ways:- (i) It shows substantial quantities of blood both on Victim A and over the floor, furniture and walls. She contends that the amount of blood is not probative of anything and that there is a risk that the jury may, seeing the blood, be predisposed towards a finding of guilt. (ii) It is possible to hear the defendant screaming throughout the footage as he was being restrained in the hallway. Indeed the first part of the footage shows him being restrained. 32. I do not find that the evidence in relation to Victim A should be excluded under Article 76. As to the three points raised by Advocate Morley-Kirk I find as follows:- (i) It is in the nature of things that a hearsay statement admitted as part of the *res gestae* is likely to be a previous consistent statement of a witness who then gives oral evidence. That of itself cannot possibly be a reason for excluding the evidence. (ii) I agree that much blood is visible. However, it would be perfectly proper for the prosecution to produce photographs of the injuries to Victim A and of the scene of the alleged incident showing the blood. I do not see that the fact that it

is recorded on video footage rather than by way of photograph is material and I do not consider that the jury would be predisposed towards a finding of guilt for that reason. In any event, the judge will no doubt direct them to focus on the real issues in the case. (iii) I agree that the defendant can be heard screaming but it will no doubt be explained to the jury that he had been subject to PAVA spray. In any event, evidence of how a defendant behaves when arrested is perfectly proper evidence to admit. I do however consider that the footage admitted should start a little later than it does. The first part focusses on the scene in the hallway where the defendant is being restrained and I do not see that as being necessary or relevant and therefore the footage should start from when PC Campbell moves past the defendant and encounters Victim A. 33. Subject only to that, I do not consider that it would be right to exclude the footage relating to Victim A pursuant to Article 76. 34. As to the evidence in relation to Victim C, Advocate Morley-Kirk submitted that this should be excluded under Article 76 on two grounds (as well as the previous consistent statement point with which I have already dealt). First, she submitted that PC Luis was impatient and for the most part unsympathetic. The officer asked Victim C a series of questions aimed at eliciting information despite the fact that Victim C told her repeatedly that she did not want to answer the questions. The officer told Victim C that she needed to tell her what was going on. Advocate Morley-Kirk said that the officer raised her voice and sounded angry and insistent. She submitted that this must have given Victim C the impression that she had to talk to the police officer. 35. I do not accept this submission. Whilst it is true that the officer did ask questions aimed at eliciting information, this is hardly surprising given the fact that she was dealing with an incident where a knife had been used, where Victim C was wounded and where Victim C was clearly in an extremely distressed state. It is clear that Victim C did not feel oppressed by what was being said to her because she repeatedly refused to answer questions about the defendant's name on the ground that she did not wish to get him into trouble. 36. Advocate Morley-Kirk's second submission relates to the fact that it appears that Victim C is likely to refuse to give evidence. I was informed by the Solicitor General that the police had seen her on more than one occasion to ask her if she would be willing to give evidence at trial (with the last occasion being within the last week or so) but that she was refusing to do so. He was not aware of whether she had given any reason for this decision. 37. Advocate Morley-Kirk submitted that, if Victim C was not to give evidence at trial, the evidence of what she said at the scene should be excluded. She relied upon Attorney General's Reference (No 1 of 2003)

[2003] 2 Cr App. R.29. In that case, D was charged with a serious assault on his mother. At trial the prosecution informed the judge that they did not intend to call the mother because they believed she would give untruthful evidence and exculpate her son. The prosecution proposed to produce evidence from other witnesses as to what the mother had said about her injuries at the time when she sustained them but the judge held that evidence of these other witnesses was inadmissible. Accordingly, the prosecution offered no evidence and not guilty verdicts were entered. The Attorney General applied to the Court of Appeal to

give its opinion on a point of law which was formulated as follows:- "If a statement is otherwise admissible as part of the *res gestae*, is it nonetheless to be excluded when the witness who made the statement can be brought to court but there are reasonable grounds for believing that the witness would not give truthful evidence in accordance with the *res gestae* statement?" 38. The Court of Appeal held that the question was not capable of a sensible answer other than that it all depended on the circumstances in which the statements were made and how practicable it was to make the witness available. Once it was accepted that the problem should be dealt with as a matter of discretion rather than law, there was no black and white answer (see paragraph 259 of the judgment). 39. Nevertheless, the Court said as follows at paragraph 21:- "If the purpose of the Crown was that the *res gestae* evidence should be given without any opportunity being given to the defence to cross-examine the maker of the statement, the court might well conclude that the admission of the evidence would indeed have an adverse effect on the fairness of the proceedings and refuse to allow it to be given. As a general principle, it cannot be right that the Crown should be permitted to rely only on such part of a victim's evidence as they consider reliable, without being prepared to tender the victim to the defence so that the defence can challenge that part of the victim's evidence on which the Crown seeks to rely and, if so advised, elicit that part of her evidence on which the defence might seek to rely." The Court also held that it did not consider the possibility of the defence calling such a witness as being an adequate response to the problem as the defence could not ask the witness leading questions or cross-examine, whilst the Crown could do so. That would give the Crown an advantage which might well adversely affect the fairness of the proceedings. 40. Advocate Morley-Kirk also referred to the observation of Lord Ackner in *Andrews* at 302:- "Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done." 41. In response, the Solicitor General referred me to the case of *Barnaby v DPP*

[2015] 2 Cr App R 4 . In that case the victim telephoned 999 on three occasions alleging that she was being assaulted by the defendant, who was her boyfriend. Police arrived shortly afterwards whereupon the victim told the police that her boyfriend had just strangled her. The police noticed marks on her neck. The victim was very agitated and upset, but refused to give a statement or sign an entry in the police officer's notebook because she said that she had done so after a previous incident and had received a beating from the defendant as a result. At the subsequent trial of the defendant for assault, the victim was not called to give evidence or to be cross-examined before the magistrates but the prosecution sought to adduce *res gestae* evidence, namely an edited transcript of the 999 calls and the evidence given to the police. These were admitted by the magistrates as part of the *res gestae* and the defendant was subsequently convicted. On appeal, amongst other matters,

he submitted that the evidence should not have been admitted when the victim was not giving evidence. 42. The Court of Appeal held that the 999 calls and the conversation with the police officer fell well within the *res gestae* principle and were therefore admissible. It then turned to consider whether the evidence should nevertheless have been excluded because the victim was not giving evidence. The Court was referred to Attorney General's Reference (No 1 of) but went on to say this at paragraph 34:- "Although the court has a cardinal responsibility to ensure that a defendant receives a fair trial, careful decisions need to be taken in situations of this kind if there is a real risk that a victim of domestic abuse may suffer further harm following her cooperation with the prosecuting authorities. Here, the prosecution was aware from the outset that Ms Gibb was frightened that providing a witness statement might provoke a violent reaction from the defendant. This was not a situation in which the prosecution was seeking to resort to unfair tactics in order to avoid introducing evidence that was potentially inconsistent with the case against the defendant, or because it simply anticipated that there was a risk the witness might give an untruthful account. The Crown's stance was a seemingly sensible recognition of the potentially dangerous position in which Miss Gibb had been placed. Given these facts, it was appropriate to admit this *res gestae* evidence notwithstanding, in a strict sense, that Miss Gibb was available as a witness, for instance if the court had issued a witness summons." 43. I do not consider that I am presently in a position finally to determine whether the statements by Victim C at the scene should be excluded under Article 76. In the first place, I have no evidence before me as to the reason why Victim C is not willing to give evidence. In the footage, she refers on occasion (page 3 and page 27) to being petrified and that she will be killed if she talks to the police, and on other occasions as to whether she can get a restraining order against the defendant. That suggests that she is in fear of him. However, on other occasions, she asserts that she loves him and makes it clear that she does not wish to do anything to hurt him. For example she says she will not be pressing charges. 44. In my judgment, the prosecution should obtain evidence by way of a statement from a police officer setting out the efforts which have been made to persuade Victim C to give evidence and any reasons which she has given for declining to do so. 45. Secondly, it is not clear what stance the prosecution will be taking. The Solicitor General very fairly conceded that he had not yet decided. One option would be not to call her at all if she is refusing voluntarily to give evidence. However, it is of course possible to summons her to Court. At that stage, she could simply be tendered for cross-examination or she could be examined in chief but, if she gave some completely different version and the judge agreed to her being treated as a hostile witness, she could be confronted with what she said in the footage (as in the *Shewan* case). If the prosecution decide to call her or simply tender her for cross-examination, there would in my judgment be no reason to exclude the evidence of the footage under Article 76. If the prosecution decide not to call her at all, the Court will at that stage need to consider the evidence before it as to the background circumstances to her not giving evidence and decide on the basis of that evidence whether the footage should be excluded or not.

Conclusion

46. In summary, I rule that the evidence contained in the footage as to things said by Victim A and by Victim C at the scene as recorded in the two pieces of footage is admissible under the res gestae principle. I decline to exclude the evidence in relation to Victim A under Article 76 but adjourn the application to exclude the footage in respect of Victim C. It will be a matter for the trial judge to exercise his discretion having regard to the evidence then before him and consideration of the course which the prosecution propose to take. 47. Finally, I should add that the application before me originally included consideration of whether comments made by the defendant to the Force Medical Examiner, Dr French (to the effect that he could not recall the incident) should be admitted. It transpired that the prosecution would only wish to adduce such evidence in rebuttal should that become relevant. The prosecution was not seeking to adduce that evidence as part of its case at this stage. The parties agreed therefore that this application should be deferred because one could only decide whether evidence should be admitted in rebuttal when one knew what the prosecution was seeking to rebut. It will be a matter for the trial judge in due course. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. *Shewan v Attorney General*

[2006] JLR 79 . *Ratten v R*

[1972] AC 378 . *R v Andrews* [1987] AC 281. *R v Nye and Loan* (1977) 66 Cr App R 252. *Barnaby v DPP*

[2015] 2 Cr App R 4 . *Attorney General's Reference (No 1 of 2003)*. Page Last Updated: 02 Jul 2018
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