

UGANDA / JUDGMENT

Uganda v Okumu & Ors (Criminal Revision No. 0003 of 2018) [2018] UGHCCRD 206 (13 December 2018)

[2018] UGHCCRD 206

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Revision No. 0003 of 2018

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CRIMINAL REVISION No. 0003 OF 2018

(Arising from Nwoya Chief Magistrate's Court Criminal Case No. 390 of 2018)

UGANDA APPLICANT

VERSUS

1. OKUMU REAGAN }
2. OKETA MICHAEL }
3. OLANYA COSMAS alias BENI } RESPONDENTS
4. KOLO K'AKOT }
5. KIBWOLA DAVID }
6. OMONY PATRICK }

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under sections 48 and 50 of *The Criminal Procedure Code Act* seeking revisions of the decision by the trial Chief Magistrate to preclude two prosecution witnesses from testifying on account of the fact that they recorded their statements with the police long after the trial had begun. The trial is still ongoing before the Chief Magistrate's Court.

The background to the application is that the six respondents were on 20th June, 2014 jointly charged with the following offences; Count 1; Arson C/s 327 of *The Penal Code Act*. - on 10th June, 2014 at Atek Odong village in Nwoya District, the respondents and others at large wilfully and unlawfully set fire to two grass thatched houses of Olanya Denis. Count 2; Malicious damage to property C/s 335 (1) of *The Penal Code Act* - on 10th June, 2014 at Atek Odong village in Nwoya District, the respondents and others at large wilfully and unlawfully damaged (burnt) three bicycles, the property of Olanya Denis. Count 3; Stealing cattle C/s 264 of *The Penal Code Act* - on 10th June, 2014 at Atek Odong village in Nwoya District, the respondents and others at large stole one goat valued at approximately shs. 80,000/= the property of Olanya Denis. Count 4; Theft C/s 251 (1) and 261 of *The Penal Code Act* - on 10th June, 2014 at Atek Odong village in Nwoya District, the respondents and others at large stole chicken valued at approximately shs. 60,000/= the property of Olanya Denis. They applied for and were granted bail on 3rd October, 2014.

Trial began on 21st April, 2015. Since then, only two prosecution witnesses had testified when the Prosecution sought and was on 15th March, 2016 granted leave to amend the charge sheet to; eight (8) counts of arson C/s 327 of *The Penal Code Act*, one count of malicious damage C/s 335 (1) of *The Penal Code Act*; two (2) counts of stealing cattle C/s 254 and 264 of *The Penal Code Act*; one (1) count of theft C/s 251 (1) and 261 of *The Penal Code Act*; one (1) count of injuring an animal C/s 334 of *The Penal Code Act*; and one (1) count of doing grievous harm C/s 219 of *The Penal Code Act*.

On 26th July, 2017 when P. W.3 took the stand, counsel for the accused objected to his competence to testify arguing that; the witness only recorded a statement with the police on 7th July, 2015 when the trial had already begun on basis of an amended charge sheet where she was named as one of the complainants. Compiling evidence as the trial goes on is prejudicial to the accused as they will be incapable of effectively preparing their defences. Recording a statement one year after the incident complained of, and after the testimony of the first two witnesses, would occasion an injustice. In response, the State Attorney argued that introduction of the witness was necessitated by the amendment to the charge sheet. Any inconvenience would be cured by exercise of the right to cross-examination and no injustice will be occasioned.

In his ruling, the learned trial Chief Magistrate decided that the practice which has acquired the force of law is that hearing only commences after the conclusion of investigations. This is intended to avoid the mischief of the prosecution patching up gaps in its evidence disclosed during the trial. The accused would be prejudiced in their defence since they would have no knowledge of the evidence they are to confront. The court thereby precluded her from testifying as well as all other witnesses who recorded statement with the police after the trial had begun.

The prosecution sought revision of the decision. Since under section 50 (2) of *The Criminal Procedure Code Act* no order on revision may be made unless the Director of Public Prosecutions has had an opportunity of being heard, and no order may be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by an advocate in his or her own defence, when the matter came up for hearing on 4th December, 2018, both parties were directed to file written submissions.

In his submissions, the learned Resident Senior State Attorney Mr. Patrick Omia argued that there is no legal requirement that a prosecution witness must have recorded a statement at the police before he or she qualifies to testify. Even then, there is no time limit for the recording of police statements. A person can only be disqualified if he or she is prevented by age, illness or other form of incapacity from testifying. The requirements of pre-trial disclosure cannot be used as a bar since the element of surprise can be cured by grant of an adjournment and any fabrication may be disclosed by cross-examination. The order of the trial court should be reversed. Learned Counsel for the respondents Mr. Walter Okidi Ladwar did not file any response.

Under section 48 of *The Criminal Procedure Code Act* the High Court has the power to call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court. This Court may call for the record either on the application of a party aggrieved or *suo moto*. The powers of revision conferred upon this court are very wide but are purely discretionary in nature. There is no vested right of revision in the same sense in which there is vested right of appeal. The power is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to: - a defect in the procedure or a manifest error on a point of law, excess of jurisdiction or abuse of power. In exercising its revisional jurisdiction the High Court may cure any irregularity or impropriety. The court though should always bear in mind the limitation that it cannot in effect exercise the power of appeal by invoking powers of revision.

Furthermore, the revisional powers are not ordinarily exercisable in relation to interlocutory orders but to final orders. The High Court will therefore not interfere in an on-going trial by way of revision unless there is a glaring defect in the procedure or a manifest error in law, which has resulted in or threatens to result in a flagrant miscarriage of justice. Merely because a Magistrate's Court has taken a wrong view of law or misapprehended the evidence on the record cannot by itself justify the interference or revision unless it has also resulted in grave injustice. The exercise of revisional power is justified only to set right grave injustice not merely to rectify every error however inconsequential. The object of these powers is to clothe this court with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. It conserves the powers of this Court to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that Magistrates Courts do not exceed their jurisdiction, or abuse the powers vested in them.

The adversarial trial system is based on the opposing sides acting as adversaries who compete to convince the judicial officer that their version of the facts is the most convincing. The advocates are given free choice in terms of which issues are presented, what evidence to adduce in support of their submissions and what witnesses to call. Under section 117 of *The Evidence Act*, every person is competent to be a witness unless the court considers that the person is prevented from understanding the questions put to him or her, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The judicial officer presides over the trial and rules on disputed issues of procedure and evidence, asking questions of the witness only to clarify evidence, and concludes the trial by delivering a decision based on the facts as presented and the law. It is not therefore open to the judicial officer in an adversarial system to enquire beyond the facts and evidence that are presented by the opposing advocates; his or her role as regards choice of evidence to be produced at the trial is largely passive; he or she is an impartial referee who rules on matters of law. The role of the judicial officer in this system is to hold the balance between the contending parties without himself or herself taking part in their factual disputations.

The respective advocates for the prosecution and the accused in an adversarial system have the freedom to choose what evidence to present to the court. A decision of court barring a witness called by either party therefore has fair trial implications. The right to a fair trial entails the right to offer the testimony of witnesses, to compel their attendance if necessary, the right to present the prosecution's version of the facts as well as that of the accused to the court so that it may decide where the truth lies. To ensure that justice is done, it is imperative to the function of courts that all necessary witnesses be available for the production of evidence needed either by the prosecution or by the defence. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

The principle that undergirds the parties' right to present evidence is thus also the source of essential limitations on the right. The trial process would be a shambles if either party had an absolute right to control the time and content of his or her witnesses' testimony. Firstly, under the rules of evidence, parties do not have an unfettered right to offer testimony that is irrelevant or incompetent (Part II of the Act), privileged (sections 119 - 128 of the Act), or otherwise inadmissible. Secondly, the adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case, hence the requirements of pre-trial disclosure. The underlying principle of pre-trial disclosure is the avoidance of undue delay or surprise. Pre-trial disclosure, like cross-examination, minimises the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.

Under the general duty to ensure fairness of a trial, it is evident that judicial officers have the discretion to exclude witnesses but the suggestion that courts have absolute power to preclude the testimony of a surprise witness is extreme and unacceptable. Preclusion may be justified where the witness is found to be incompetent or where their evidence is found to be irrelevant, unnecessarily repetitive beyond that which is required to corroborate other evidence, or likely to compromise the speedy disposal of the case. Cumulative evidence that may corroborate other evidence should ordinarily be admitted but may be rejected if it is unnecessarily duplicative.

This is particularly so because unlike civil trials where the rules of procedure provide for an elaborate time bound process of pre-trial disclosure, in criminal trials by Magistrates Courts pre-trial disclosure is not regulated by any statutory provisions. With regard to cases triable on indictment, before the 1990 amendment of **The Magistrates Courts Act**, a summary of evidence was required at committal and it had to contain the names of witnesses and the synopses of their testimonies. It was a detailed lay out of the evidence of all the prosecution witnesses as per their police statements as well as details of exhibits. With the enactment of **The Magistrates Courts Act (Amendment) Statute, 1990**, section 163A replaced the "Summary of Evidence" with a "Summary of the Case" which limited the prosecution to providing "such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he is charged."

A "Summary of the Case" is simply a summation of the case, the details of which are then produced by way of evidence. It was rightly observed in **Soon* *Yeon kong kim and another v. Attorney General, Constitutional Reference No. 6 of 2007** that;

pre-trial disclosure in the trial before the High Court in Uganda was the norm rather than the exception until 1990 when **The Magistrates Court (amendment) Statute No. 6 of 1990** was enacted. Before that enactment, there were preliminary hearings conducted by Chief Magistrates or Magistrates Grade one for cases triable by the High Court. The purpose of the preliminary hearings was to screen out those cases where the prosecution evidence was too weak to justify a trial..... In 1967, **The Criminal Procedure (summary of Evidence) Act** was enacted. This changed **th*e purpose of Preliminary hearing from screening to disclosure. The purpose became to give to the accused advance knowledge of the prosecution's case. The Director of Public Prosecutions was required under this Act to file with the Magistrates Court a proper indictment and a Summary of Evidence containing the substance of the evidence of each would-be witnesses for the prosecution. In the summary of evidence, reference was made of exhibits intended to be produced by the prosecution at the trial. These exhibits would be produced in court at the committal proceedings, marked and taken into custody of the court. Copies of the summary of evidence would be given to the accused. This too was full pre-trial disclosure. It was only upon the enactment of **The Magistrates Courts (Amendment) Statue No. 6 of 1990** that trial by "ambush" was introduced in criminal trial by the High Court in this Country. As we have seen above, trial by ambush is repugnant to Article 28 (1) (3) above as there can be no equality between the contestants in a trial by ambush and therefore no fairness.

To restore fairness, it was decided in that case that subject to some limitations to be established by evidence by the State on grounds of State secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to the simplicity of the case, disclosure is not justified for purposes of a fair trial, Article 28 (1) (3) (a), (c), (d) and (g) of *The Constitution of the Republic of Uganda, 1995* entitles an accused person before a Magistrate's Court to a pre-trial disclosure of copies of all "material statements" made to Police by the would-be witnesses for the prosecution and copies of exhibits the prosecution would rely on at the trial, to enable him or her prepare his or her defence without any impediment.

The implication is that all prosecution has the duty to provide only "material statements" but what is material is not defined and this may vary from case to case. Although the decision introduced the principle of pre-trial disclosure in trials before a Magistrate's Court, there is no requirement of full disclosure but rather disclosure of "material statements," and without a specific system of rules of such disclosure. This still does not compel the prosecution to be entirely open with regards the evidence that they possess. Materiality must be taken from the perspective the accused, meaning that it merely requires that they disclose any information that is specifically requested by the accused. Of course, this operates to restrict the emergence of evidence; if it is not known to exist, it will not be requested. Similarly, in an adversarial system, if the defence is in possession of negative evidence, they can merely ignore it and hope that it is not requested by the prosecution.

In *Soon* *Yeon kong kim and another v. Attorney General, Constitutional Reference No. 6 of 2007*, the Constitutional Court was unable to give any hard and fast rule as to the time of disclosure in criminal trials because the circumstances of each case differ. It opined though that essentially, disclosure should be made before the trial commences depending on the justice of each case and on which documents to be disclosed. This is entirely within the discretion of the trial court. Therefore, non-adherence to the discovery rules by the prosecution would ordinarily not warrant a preclusion of the witness or dismissal of the evidence but rather an order for due compliance and a time framework within which such compliance may be enforced (see *Ddumba Muwawu v. Uganda, H. C. Crim. Session Case No. 169 of 2012*).

Furthermore, during the trial, the Magistrate is not a passive arbiter; he or she is an active participant who constantly seeks avenues through which the trial can be expedited, simplified or even avoided by a resort to alternative procedures or modes of dispute resolution. In the absence of specific rules of disclosure, it is unquestionably within the trial courts' power to require the parties at any stage, before or during the trial to (a) state the number of witnesses intended to be called to the stand, their names addresses, and a brief summary of the evidence each of them is expected to give, as well as to (b) formally disclose the number of the documents and things to be submitted and to furnish copies thereof or a short description of the nature of each. The tenor or character of the testimony of the witnesses and of the writings to be adduced at the trial being thus made known, in addition to the particular issues of fact and law, it becomes reasonably feasible to require the parties to state the number of trial dates that each will need for his or her case, and maybe bring about a further agreement as to some other controverted facts, or an

amendment of the charge sheet, etc.

Pre-trial disclosure of witnesses to be called is a means of discouraging and exposing fabrication, inaccuracy, and collusion. The public interest in the orderly conduct of criminal trials is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence. All should be geared at satisfying the public interest in a full and truthful disclosure of critical facts before trial. To be effective, the principle must be applied with equal force to both the prosecution and the accused. When such a procedure has been adopted, if a party does not place the name of a witness on such a list of witnesses, the court may then be justified in its decision not to permit the party to place the witness on the witness stand.

While a trial court is afforded wide latitude to exclude evidence that is of marginal value or repetitive, or which poses a risk of issue confusion, this cannot be done whimsically on the basis of conjecture. It can only be determined after the court is made privy to the tenor or character of the testimony of the witnesses. Moreover, unlike in a civil trial where the rules of procedure provide for specific requirements and time frames of disclosure, where disputes concerning discovery arise in a criminal trial where there are no specific rules but only practice, fairness would require a specific time bound order compelling discovery prior to imposition of sanctions. In a criminal trial, it is only in extreme cases of non-compliance, cases of a pervasive abuse that causes prejudice is involved, that a trial court may be justified to impose sanctions without a prior time bound discovery order.

By way of analogy, trial courts usually issue sequestration orders barring witnesses from the courtroom while other witnesses are testifying. During the hearing of the case, the parties' witnesses are identified and excluded from the courtroom until called to testify. All witnesses who are not on the stand wait from outside court, save; a party who is a natural person, an officer or employee of a party that is not a natural person, after being designated as the party's representative, a person whose presence a party shows to be essential to presenting the party's claim or defence. Sequestration orders are meant to prevent witnesses from tailoring their testimony to that of other witnesses and to aid the court in the detection of false testimony. That notwithstanding, the testimony of a witness who has been present during prior testimony of another witness is not thereby rendered incompetent (see **Mabiiho Deo v. Fred Kaijabwangu* [1972] HCB 176* and **Katorano v. Attorney General* [1974] HCB 127*). The fact that a witness was in court throughout the testimony of the adversary's witnesses' testimony does not disqualify the witness or render his or her evidence admissible, but only goes to the weight to be attached to such evidence.

Similarly, pre-trial discovery in criminal proceedings was introduced to further truth-seeking and one of the purposes of the discovery rule itself is to minimise the risk that fabricated testimony will be believed. It is also intended to prevent parties from presenting last minute evidence in a manner designed to surprise and outmanoeuvre the other party who may be unprepared for that evidence. Discovery helps to develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise. The severest sanction for a

discovery violation is the preclusion of the testimony which a party seeks to introduce in violation of the rules. However, enforcement of truth-seeking rules by preclusion of testimony may also preclude truth finding and violate the right to a fair trial. In most cases, precluding a witness from testifying bears an arbitrary and disproportionate relation to the purposes of discovery. An appropriate sanction should have a minimal effect on the evidence and merits of the case. For this reason courts should resort to the punitive sanction of preclusion only if the corrective measures, such as adjourning the trial to allow the defaulting party time for further discovery, are inadequate to remedy the situation.

Although it is evident that a trial court may exclude evidence which the violating party wishes to introduce and that the decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court, because of its potential to subvert criminal justice by basing convictions on a partial presentation of the facts, preclusion of the testimony of a witness as a sanction for violating a discovery rule is a power to be used sparingly. It ought to be restricted to situations where discovery violations are wilful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. In such cases it would be entirely appropriate to exclude the witnesses' testimony.

A trial court must balance the parties' interest in a robust presentation of their evidence with the (i) public interest in the integrity of the adversary process by ensuring orderly, fair, and accurate criminal trials or efficient administration of justice, (ii) public interest in excluding evidence lacking integrity, (iii) public interest in a strong judicial authority with followed rules, and (iv) the adverse party's interest in avoiding prejudice due to an the other party's discovery violation. Preclusion is justified where discovery violations are the result of egregious misconduct sufficient to raise a presumption that the proffered testimony is perjured (see *Taylor v. Illinois*, 484 U. S. 400 (1988)). In such cases, it would be justified to exclude the testimony in advance rather than receive it in evidence and thereafter disregard it.

However, the determination that the proffered evidence is the outcome of egregious misconduct sufficient to raise a presumption that it is perjured, is motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony, is not to be based on conjecture. The court ought first to undertake a *voire dire* examination or some other mode of inquiry by which it will then be in position to determine whether the violation was inadvertent or deliberate, and whether or not the prejudice resulting from surprise in the particular case justifies the imposition of the preclusion sanction. The trial court must first determine whether the violation actually occurred and, if so, whether prejudice will result from allowing the testimony.

After the inquiry into the violation and resulting prejudice, the trial court then proceeds to address the propriety of a sanction. There should be evidence of the party's or counsel's consent, connivance, procurement, or knowledge regarding the violation before a sanction can be imposed against that party. The rationale for this is that refusal to permit a witness in violation to testify because his or her violation has tainted the testimony is a sanction on the party offering the evidence, not the witness. The party is subject to sanction where there is evidence of that

party's or counsel's consent, connivance, procurement or knowledge regarding the violation. A court may find that no prejudicial violation occurred if it was clearly inadvertent. This in not, however, to suggest that in every case a trial court must hold a "mini-trial" on the issue of a sequestration or discovery violation and the imposition of a sanction. It may do so at it did in this case by inviting submissions on the point, asking further questions of the prosecution and the defence counsel, or make a relatively brief inquiry of the witness being proffered. In any event, the party seeking exclusion of another party's witness bears the burden of demonstrating that such relief is appropriate under the circumstances.

In addressing an application for preclusion of a witness belatedly disclosed after the close of discovery, a court should consider the following factors: (1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness or of the precluded evidence; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony [or evidence]; and (4) the possibility of a continuance (see **Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 269 (2d Cir. 1999*). A trial court may certainly insist on an explanation for a party's failure to comply with the requirement to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was wilful, blatant and motivated by a desire to obtain a tactical advantage that would minimise the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely justified simply to exclude the witness' testimony (see **United States v. Nobles*, 422 U. S. 225 (1975*)).

The preclusion sanction may then only be applied after balancing the circumstances of the violation with the consequences of admitting the proffered testimony and its probative value. Without having done so, the preclusion order may be unnecessarily harsh. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited (see **Taylor v. Illinois*, 484 U. S. 400 (1988*)).

Disqualifying witness testimony is a severe sanction to be imposed only after careful consideration. Precluding evidence because of its apparent, anticipated or supposed lack of credibility is not an option available under **The Evidence Act**. Issues of credibility only go to the weight of the evidence and not to its admissibility. Precluding evidence based on its presumptive or apparent lack of credibility would be antithetical to the principles of a fair trial. Such motive must be developed through proper cross-examination, not through arbitrary rules of practice that prevent whole categories of witnesses from testifying on the basis of **a priori** categories that presume them unworthy of belief are a violation of the right to a fair trial. A trial court has no special or inherent authority to exclude witnesses based on their apparent or presumed unreliability. It is for the court to determine the veracity and weight of such testimony. The proper method to use with such witnesses is to let them testify and then allow the adversary, through cross-examination, to inform the court about the circumstances casting doubt on the testimony.

According to section 50 (1) (b) of *The Criminal Procedure Code Act*, in the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, it may in the case of any other order, other than an order of acquittal, alter or reverse the order. The record in the instant case does not show that there was a prior time bound order of discovery. It does not show that the prospective witness's testimony would have been marginal or repetitive, or confusing with respect to material issues. There is no evidence that raises strong inferences that the State Attorney was deliberately seeking a calculated tactical advantage in failing to make earlier disclosure of the witness or that witnesses were being found that did not exist at the commencement of the trial. Instead, it is clear that the witnesses intended to be proffered by those witnesses became relevant only after the amendment of the charge sheet. Their statements could not have been availed to the defence before that amendment. In any event, although it is desirable that trials should begun after close of investigations, there could be cases where for example because of initial concerns for personal safety, witnesses subsequently emerge who were not bold enough to come forward during the investigations that occurred before the trial commenced. Each occurrence of statements recorded belatedly ought therefore to be determined on its facts rather than on basis of a supposed rule of practice, whose existence as such is also doubtable.

The record does not show evidence of fabrication, collusion, or bad faith. Thus, the case does not fit into the category of wilful misconduct for which the severe sanction of preclusion is justified for the protection of the integrity of the judicial process. It is instead an order that precluded the witness without consideration of the importance of that testimony and without proof of any prejudice likely to be caused to the accused that could not be remedied by adjournment with a time bound order of discovery designed to enable the defence study the statements and prepare for cross-examination at the subsequent sitting of court. The preclusion order was therefore unnecessarily harsh and disproportionate. This is an error material to the merits of the case which also involves a miscarriage of justice. For all the foregoing reasons, the order precluding the prosecution witnesses that were proffered is quashed. The file is returned to the trial court for continuation of the hearing.

Dated at Gulu this 13th day of December

Stephen Mubiru

Judge

13th December, 2018.

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