Dodd v Byrne [2014] NTSC 31

PARTIES:	DODD, JACOB
	v
	BYRNE, NICHOLAS O'SHEA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21402578
DELIVERED:	30 JULY 2014
HEARING DATES:	13 JUNE 2014
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (KATHERINE)

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – Assaulting police officer – Spitting – Manifestly excessive sentence –Sentence not proportionate to offending – Appeal allowed – *Criminal Code* (NT), s 189A(2)(a).

Sentencing Act (NT), ss 5, 5(a), 5(2)(e), 6(a),6A.

House v The King (1936) 55 CLR 499; *Munnunggurritj v The Queen* [2010] NTCCA 17; *Nona v The Queen* [2012] NTCCA 03; *Olsen v Sims* (2010) 245 FLR 64; *R v Haji-Noor* (2007) 21 NTLR 127; *Veen v The Queen* (No 2) (1988) 164 CLR 465; *Weininger v The Queen* [2003] 212 CLR 629, applied.

Muldrock v The Queen (2011) 244 CLR 120; *R v McNaughton* (2006) 66 NSWLR 566, distinguished.

Barbaro v The Queen [2014] HCA 2; *Bellis v Burgoyne* (2004) 150 A Crim R 1; *Burgoyne v Dixon* (2004) 150 A Crim R 1; *Dixon v Pryce* (1996) 135 FLR 27; *Ellis v The Queen* (2005) 154 A Crim R 450; *Fernando v Balchin* [2011] NTSC 10; *Hampton v The Queen* [2008] NTCCA 5; *JKL v R* [2011] NTCCA 7; *Kelly v The Queen* (2000) 10 NTLR 39; *Marshall v Llewellyn* (1995) 79 A Crim R 49; *R v Katrina Ryder* JA 67/2012; (21218919), 12 October 2012; *R v Linton Joshua*, Supreme Court Sentencing Remarks, 20215910 18 June 2004; *R v Mulholland* (1991) 102 FLR 465; *R v Wilson* (2011) 30 NTCR 51; *Sultan v Svikart* (1989) 96 FLR 457, referred to.

Fox and Freiberg's Sentencing, State and Federal Law in Victoria 3rd Edition (Thomson Reuters, 2014)[5.20].

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	C Dixon

Solicitors:

Appellant:	North Australia Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dodd v Byrne [2014] NTSC 31
No. 21402578

BETWEEN:

JACOB DODD
Appellant

AND:

NICHOLAS O'SHEA BYRNE
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 30 July 2014)

Introduction:

[1] This is an appeal against a sentence passed by the Court of Summary Jurisdiction, Katherine for the offence of assault a police officer in the execution of duty. Sentences were imposed on the appellant on 7 March 2014, following pleas of guilty to one count of assault a police officer in the execution of duty, as well as one count of resisting arrest and one count of disorderly behaviour. On the charge of assault a police officer (contrary to s 189A(2)(a) of the *Criminal Code*), the learned Magistrate sentenced the appellant to 12 months imprisonment with a non-parole period of eight months. The assault was constituted by spitting.

[2] An aggregate fine of $500 was imposed for the charges of resisting arrest and one disorderly behaviour. The fine is not challenged on appeal.

The Grounds of Appeal:

[3] The appellant argued that the sentence passed in respect of the "assault police" charge was manifestly excessive in all of the circumstances. By reference to comparable sentencing decisions, it was submitted that the sentence imposed was significantly outside of the ordinary sentencing range.

[4] A further ground alleged that the learned Magistrate took as a starting point a sentence of imprisonment that was not proportionate to the objective seriousness of the offending. In practical terms there is substantial overlap between the matters to be considered relevant to both grounds of appeal.

Proceedings in the Court of Summary Jurisdiction:

(i) The Facts

[5] The facts before the Court of Summary Jurisdiction were that on 17 January 2014, the appellant was observed by police to approach an unknown male and punch him with a closed right fist two times to the head in a hook motion. He acted in a highly aggressive manner and when police proceeded to intervene, he attempted to push past them in order to continue fighting.

[6] He shouted aggressively and physically resisted police attempts to restrain him from further fighting. He was instructed to step back and stop fighting. He refused to comply with the direction and continued to struggle with police. The appellant was restrained by police. He continued to resist and

struggle. He was ultimately placed in the rear of a police vehicle with the assistance of extra police. When police attempted to close the door of the vehicle, the appellant kicked out his feet between the vehicle and the door in an attempt to stop the door from being closed.

[7] The victim of the "assault police" charge was a female police officer. When she was securing the padlock of the police vehicle, the appellant aggressively spat towards her, the spittle struck her in the face covering her mouth and nose. The appellant then shouted "Fuck you, bitch."

(ii) Prior convictions:

[8] The appellant has a lengthy criminal history.[1] The previous matters included three prior convictions for assaulting a member of the police force (2010, 2006 – the appellant was a juvenile in respect of the two offences resulting in convictions in 2006; both offences were committed on the same date); unlawfully causing serious harm (2010), three convictions for resisting police in the execution of their duty (2013, 2009, 2008) and taking part in a riot (2006 – when the appellant was a juvenile). The appellant's record also includes various entries for breaches of suspended sentences and other court orders.

[9] In the Court of Summary Jurisdiction, counsel for the appellant pointed out that a number of the relevant prior convictions were imposed when the

[1] "Information for Courts", Exhibit P2, Court of Summary Jurisdiction, Katherine.

appellant was a juvenile and that it had been four years since the appellant had been dealt with for assault.

(iii) Matters submitted in mitigation:

[10] The appellant's counsel informed the court that he had lived with his parents in Tennant Creek until he was about 12 or 13 years old. At this time, his father's employment as a community police officer was terminated as a result of his offending against the appellant's mother. This offending involved the appellant's father assaulting his mother. She developed an acquired brain injury as a result. The appellant's father moved to Mt Isa and the appellant moved to an outstation on Blue Lagoon Cattle Station near Borroloola to be raised by his aunt and uncle. The Court of Summary Jurisdiction was told the appellant had not been in regular contact with his father, but that he had managed to maintain a relationship with his mother who also lived at the outstation. The court was told the appellant assisted with the care of his mother who continued to suffer with the effects of the acquired brain injury.

[11] Submissions also canvassed the appellant's childhood history of petrol sniffing as a way of coping with the domestic violence he was exposed to. He ceased sniffing petrol when he moved to the outstation with his aunt and uncle.

[12] The court below was told that alcohol and cannabis use were still a problem for the appellant, however he had shown that he could successfully complete

the Venndale rehabilitation programme. Alcohol and cannabis use were said to be implicated in the current offending. When he resided at the outstation, he abstained from substance abuse and was described as hardworking. His family remained supportive of him. His work history included fencing, mustering and breaking in horses.

[13] The appellant's counsel described him as a "good man when he was off the grog". Broadly, counsel attempted to contextualise the nature of the offending by reference to the environment of domestic violence in which he spent his formative childhood years.

(iv) Prosecution Submissions

[14] The prosecutor emphasised the appellant's previous similar offending and non-compliance with previous court orders. It was submitted the plea should be characterised as a plea on the evidence, rather than at the first opportunity, given that a contest mention had already taken place and the prosecution brief had been served. General and specific deterrence were emphasised.[2]

(v) Relevant Sentencing Remarks

[15] When sentencing the appellant, his Honour clearly took into account the subjective factors put on the appellant's behalf. His Honour also dealt with the criminal history, observing "You're a violent man".[3] Also noted was "a

[2] T 7/03/4, Court of Summary Jurisdiction 14-16.
[3] T 7/03/14 at 17.

gap in offending to some degree, of this nature". His Honour summarised the impact of the offending on the victim (as provided in a victim impact statement) of her distress and medical concerns that led her to seek medical help. The offending was characterised, as "a very serious instance of assault police", and as disgusting and demeaning. Unsurprisingly, his Honour considered specific deterrence to be an important factor.

[16] The learned Magistrate said he would make an example of the appellant. He indicated that without the plea of guilty he would have sentenced the appellant to 14 months imprisonment. However, with the plea of guilty the sentence would be 12 months imprisonment. His Honour noted there was no remorse.

Ground 1: Manifestly excessive

[17] The essence of the argument made in relation to this ground was that the ultimate sentence of 12 months was so obviously excessive as to be unreasonable. The appellant cited *Hampton v The Queen*[4] to support the proposition acknowledged here, that this ground is not capable of a great deal of elaboration. The limitations on interference with a discretionary sentence are well known. The sentence is presumed to be correct. In the absence of specific error, the sentence must be shown to be excessive, thereby disclosing error in that it was plainly unjust.[5]

[4] [2008] NTCCA 5.
[5] *House v The King* (1936) 55 CLR 499 at 505.

[18] Counsel for both parties drew attention to a range of cases relevant to both grounds of appeal. Counsel for the appellant argued that the appellant's offending did not justify a departure from the range of sentences generally passed for offending of this type.

[19] Counsel for the respondent submitted the sentence imposed was at the higher end of the range, but was not so clearly and obviously excessive as to manifest error. The maximum sentence for the offending against s 189A(2)(a) of the *Criminal Code* is seven years imprisonment. If dealt with summarily, the jurisdictional limit is three years imprisonment, however, it is the maximum penalty that is relevant when setting the sentence.

[20] Counsel for the respondent submitted that in common with most sentencing exercises, sentencing the appellant necessarily involved a balancing of the objective circumstances of the offending and the subjective circumstances of the offender (summarised above). The features of the offending highlighted by counsel for the respondent included the surrounding circumstances, for example, the appellant's continuous struggling and resistance towards police, requiring more officers to assist in the arrest. This in itself had been preceded by an act of violence by the appellant. Further, the fact that the spittle projected by the appellant made contact with the victim's eyes, mouth and nose meant that this was a particularly humiliating and degrading form of spitting. Finally, that the assault was accompanied by the insulting words: "Fuck you, bitch" – a tacit display of contempt for authority. The

respondent highlighted the judicial recognition of the need to treat spitting as a significant or serious assault.

[21] While acknowledging the seriousness of a charge of this kind, counsel for the appellant submitted that the offending involved a single spit and, although committed after having resisted arrest, was not part of an ongoing or repeated assault. This submission is accepted in part only. It is clear the appellant was dealt with separately for the charges of resist arrest and disorderly behaviour (by way of fine). However, his actions immediately proximate to the assault, including the level of aggression demonstrated towards the victim are relevant to the assessment of the objective seriousness of the assault. Although the aggravating feature of "harm" was made out on the basis of physical contact, the medical evidence[6] noted "low risk exposure" and that no further action was required other than "thorough irrigation of eye and affected area".

[22] Spitting on a person is a humiliating and degrading act. Plainly this is aggravated when the spitting is to a person's face. This factor is well accepted in the authorities. In *Burgoyne v Dixon*,[7] it was said:

> "The act of spitting in an officer's face is humiliating and degrading. It can have far more devastating consequences and be more difficult to fend off than the more common form of assault which involves kicks or punches to the body. There is a potential risk of contracting communicable diseases".

[6] Notes 1, Exhibit P4, Court of Summary Jurisdiction, Katherine.
[7] (2004) 150 A Crim R 1 at [25], per Thomas J.

[23] Both parties relied on (broadly) comparable cases to illustrate the range of sentences that have been imposed in cases of this kind. Allowing for relevant points of distinction commonly present when undertaking an exercise to ascertain a relevant sentencing standard, I have concluded the sentence under appeal stands well above previous sentences for offences of this kind and for offenders with a similar background to that of the appellant. The court has not been referred to any sentencing example involving a 12 month term of imprisonment being imposed for the offending of this type.

[24] Both parties acknowledged that there is no tariff for this type of offending.[8] I will briefly set out however, the series of comparable cases referred to by counsel, that deal with the issue of the appropriate penalty for an assault constituted by spitting.

[25] In the matter of *Burgoyne v Dixon*,[9] a Crown appeal on the grounds of manifest inadequacy was upheld by Thomas J. The sentence at first instance for a charge that involved spitting on a police officer was 14 days imprisonment. The offence involved spitting on the face, eye and forearm of the officer from the rear of a police vehicle. The respondent had prior convictions for assault, including "assault police". Thomas J resentenced the respondent to one month imprisonment, taking into account double jeopardy that was at that time associated with Crown appeals, however, her

[8] See *Bellis v Burgoyne* (2004) 150 A Crim R 1 at [18].
[9] (2004) 150 A Crim R 1.

Honour concluded that without that consideration the appropriate sentence would have been between two and four months imprisonment.

[26] In the matter of *Linton Joshua,*[10] the offender spat on two police officers whilst being arrested – offending that was accompanied by the words "I hope you get AIDS". Riley J, (as he then was) imposed a sentence of two months imprisonment for both counts of assault to be served concurrently. In the context of this appeal, counsel for the appellant pointed out that Linton Joshua had prior convictions for assault and "assault police;" however, counsel for the respondent noted that his Honour had also considered Linton Joshua's 'antisocial personality disorder' in mitigation.

[27] In *Fernando v Balchin,*[11] the offender spat at a police officer three times in close succession when apprehended for protective custody, due to his level of intoxication. The spittle landed on the officer's face, chest, mouth and neck. At first instance he was sentenced to four months imprisonment. The appeal was allowed and the appellant was re-sentenced to two months imprisonment, primarily on the basis of fresh evidence admitted on appeal showing that he had received extra curial punishment as a result of his treatment in the police holding cells. It was also found that assessing the offending as an example of "top of the range" for assault offences was in error. The appellant had prior convictions for assault. Both the appellant and respondent accepted that the primary reason for the reduction in

[10] *R v Linton Joshua*, Supreme Court Sentencing Remarks, (20215910) 18 June 2004.
[11] [2011] NTSC 10.

sentence in that matter was the extra-curial punishment inflicted upon the appellant. The respondent also pointed out that in *Fernando v Balchin*, the appellant had mental health and rehabilitation issues which affected the sentence imposed.

[28] In the matter of *R v Katrina Ryder*,[12] Barr J resentenced an appellant to six months imprisonment. The sentence was not suspended. The appellant at first instance had been sentenced to a fixed term of nine months imprisonment, for spitting on a police officer. The spittle entered the eyes and mouth of the officer. This act was accompanied by the words "Ha-ha, I've got Hep C and HIV, now you've got them". With respect, I would adopt his Honour's remarks that:

> "….police should not have to endure this kind of unprovoked and entirely demeaning behaviour from people who are in police custody".

[29] Although there is no established 'tariff' for offending of this type, sufficient cases exist to demonstrate the usual range of sentences imposed. In an appropriate case, an offender may properly be sentenced to a term outside of any established range. Although the offending in the present matter was disgusting and humiliating, it could not be said to be so serious as to justify a sentence significantly outside of the broad range of sentences usually imposed. It does not in any event possess the attributes of more serious assaults that would attract a 12 month term. This conclusion remains even

[12] JA 67/2012; (21218919), 12 October 2012.

though the appellant has previous convictions for assault and assault police. As can be seen from the cases discussed, that feature is unfortunately, not uncommon in cases of this kind.

Ground 2: The learned Magistrate took as a starting point a sentence of imprisonment that was not proportionate to the objective seriousness of the offending.

[30] The appellant also argued that the sentence of 12 months imprisonment with a non-parole period of 8 months could not be justified as proportionate to the gravity of the offending in light of the objective circumstances and matters personal to the offender. It was argued that the starting point adopted by the learned Magistrate of 14 months imprisonment was objectively disproportionate, and while a mathematical approach was not to be adopted in the sentencing process an upper limit of 14 months was excessive.

[31] The respondent argued that the learned sentencing Judge properly considered all matters within s 5 of the *Sentencing Act*, including the prior convictions of the offender. As noted above, the appellant had been convicted on three previous occasions of assaulting a member of the police officer; albeit two were as a juvenile for offending on one day. The respondent argued that the sentence was not disproportionate to the overall circumstances.

[32] By reference to the cases discussed with respect to ground one, and accepting that “assault police” constituted by spitting is a serious matter, I

am persuaded the final sentence of 12 months imprisonment is disproportionate to this particular offending; as a consequence of that conclusion, the national "starting point" was also disproportionate.

[33] Counsel for the appellant emphasised the learned Magistrate's starting point of 14 months imprisonment or "more" illustrates the error. The respondent submitted the remarks need to be seen in context. His Honour stated:

> "Had you not pleaded guilty, I would have sentenced you to 14 months imprisonment. You have pleaded guilty. I take into account the maximum as well as the objective circumstances and the matters in mitigation in arriving at this. The objective seriousness is such that it's worth 14 months in my estimation…..I'm still prepared to provide you with a significant discount of two months for your guilty plea for saving the court time and utilitarian value. Therefore I sentence you to 12 months imprisonment".

[34] His Honour then stated that:

> "….I might say in arriving at that head sentence I took into account your difficult background. I think you could have received more, given the aggravating factors".

[35] In my opinion this is not a case where it is particularly helpful to analyse the "starting point". In many cases it may well be. Although there is much encouragement in the authorities, for courts to express how a plea of guilty has been taken into account in a particular sentence,[13] that is no warrant to critique each aspect of a sentence in a formulaic way. His Honour here appeared to be assessing other factors beyond the reduction he would make for a plea of guilty, clearly the percentage of the reduction may be the

[13] *Kelly v The Queen* (2000) 10 NTLR 39.

subject of scrutiny.[14] In this matter it is helpful to focus on the final term. The process of intuitive synthesis and recent authority disapproves of a mathematical approach, however, clearly for the reduction expressed for a plea of guilty is firmly part of the sentencing process. In *Barbaro v The Queen*,[15] the High Court discussed the sentencing task:[16]

> "Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said in *Wong v The Queen*, "[s]o long as the sentencing judge must, or may, take account of all of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform".

[36] Counsel for the appellant argued that the appellant's previous convictions had been taken into account inappropriately in determining the proportionate sentence. Reliance was placed on *Muldrock v The Queen*[17] in terms of the importance of determining the objective seriousness by reference to the nature of the offending, without reference to subjective matters. It must however, be remembered, as pointed out on behalf of the respondent, that *Muldrock* involved specific legislative provisions relating to standard non-parole periods for the sentencing of offenders in accordance with the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act*

[14] For example, *JKL v R* [2011] NTCCA 7; *R v Wilson* (2011) 30 NTCR 51.
[15] [2014] HCA 2.
[16] *Barbaro v The Queen* [2014] HCA 2 at [34].
[17] (2011) 244 CLR 120.

2002 (NSW), which governs the sentencing of offenders if a standard non-parole period applies. As was said in *Munnunggurritj v The Queen*,[18] those provisions are not reflected in the Northern Territory *Sentencing Act*.

[37] The sentencing process in the Northern Territory is governed by the *Sentencing Act* and the common law. Proportionality is fundamental; any sentence imposed by the court should never exceed that which can be justified as proportionate to the gravity of the crime in the light of its objective circumstances.[19] This is reflected in s 5(a) *Sentencing Act*, as one of the enumerated "purposes for which sentences may be imposed": "to punish the offender to an extent or in a way that is just in all the circumstances". It is clear that prior criminal history may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences.[20] Clearly however, prior criminal history may be relevant "to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instance offence a continuing attitude of disobedience of the law".[21]

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[18] [2010] NTCCA 17 at [24].
[19] *Olsen v Sims* (2010) 245 FLR 64; per Southwood J at 50, citing *Hoare v The Queen* (1989) 167 CLR 348 at 354; *Veen v The Queen* (No 2) (1988) 164 CLR 465.
[20] *Veen (No.2)* (1988) 164 CLR 465 at 477.
[21] *Veen (No.2)* (1988) 164 CLR 46.

[38] Counsel for the appellant drew the court's attention to *R v McNaughton,*[22] particularly in relation to a discussion of Northern Territory case law about whether prior record is an objective circumstance pertinent to the gravity of the offence.[23] Most, but not all of the discussion in *R v McNaughton* deals with cases preceding the introduction of the *Sentencing Act* in September 1995. The earlier decisions need to be seen in a slightly different light, as after its introduction, the *Sentencing Act* became the broad legislative framework for sentencing decisions. The *Sentencing Act* does not require a conclusive determination to be made of an "upper limit", save that this is desirable in cases where there has been an adjustment for pleas and/ or co-operation of a certain type.[24]

[39] The *Sentencing Act* provides that the court *must* have regard to a number of enumerated factors including the offender's "character",[25] which in turn includes "the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions".[26] Previous convictions are not however, listed specifically as "aggravating factors".[27]

[40] In my opinion the weight of authority that is consistent with the operation of the *Sentencing Act* favours the view that previous convictions cannot be given such weight as to lead to a penalty disproportionate to the offending

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[22] (2006) 66 NSWLR 566.
[23] *R v McNaughton* (2006) 66 NSWLR 566; citing the re-sentencing proceedings in *R v Baumer* (1989) 40 A Crim R 74 at 79; cf 85-85; *Sultan v Svikart* (1989) 96 FLR 457 at 461-462; *R v Mulholland* (1991) 102 FLR 465 at 478-479; *Marshall v Llewellyn* (1995) 79 A Crim R 49; *Dixon v Pryce* (1996) 135 FLR 27 of 30-31*; Ellis v The Queen* (2005) 154 A Crim R 450 at 455.
[24] *Nona v The Queen* [2012] NTCCA 03.
[25] Section 5(2)(e) *Sentencing Act*.
[26] Section 6(a) *Sentencing Act*.
[27] Section 6A *Sentencing Act*.

under consideration. That is not to say that certain sentencing principles (for example denunciation, general and specific deterrence and protection of the community), cannot be validly applied with more rigour in relation to a repeat offender. That will often be the case. That in turn will generally result in a repeat offender being subject to a more serious penalty, all things being equal, than a person who has led a blameless life.[28]

[41] There are confined circumstances in which it has been held that moral culpability and therefore the gravity of the crime may be increased by recidivism, (for example, demonstrating an "increased animus"), but this was not a consideration in the present case.[29]

[42] I am persuaded the ultimate sentence imposed was disproportionate to the offending for similar reasons given in respect of ground one. It is not clear that the reason for the term elevated beyond the range indicated was because of previous convictions as contended on behalf of the appellant in oral argument. Nevertheless, this ground is allowed.

Re-Sentence

[43] If not for the plea of guilty, the appellant could have expected a sentence of around seven to eight months imprisonment. With the plea he will be

[28] *Weininger v The Queen* [2003] 212 CLR 629 at [32]; *R v Haji-Noor* (2007) 21 NTLR 127 at [47], Angel J said: "Even if this analysis be wrong, I nevertheless respectfully agree with Grove J in *McNaughton* (at [75]), that "whatever philosophical or semantic path is travelled, if all other things are equal the respect offender will receive severer punishment than an offender without prior criminal history".

[29] See discussion in "Fox and Freiberg's Sentencing, State and Federal Law in Victoria", Third edition, Thomson Reuters at [5.20], 2014.

convicted and sentenced to six months imprisonment. The commencement date is 13 February 2014.

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