IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

Ass. 2

SAAKNOMMER: CC 482/85

DELMAS

1986-05-07

DIE STAAT teen: PATRICK MABUYA BALEKA EN 21 ANDER

VOOR: SY EDELE REGTER VAN DIJKHORST EN
ASSESSORE: MNR. W.F. KRÜGEL
PROF. W.A. JOUBERT

NAMENS DIE STAAT: ADV. P.B. JACOBS
ADV. P. FICK
ADV. W. HANEKOM

NAMENS DIE VERDEDIGING: ADV. A. CHASKALSON
ADV. G. BIZOS
ADV. K. TIP
ADV. Z.M. YACOOB
ADV. G.J. MARCUS

TOLK: MNR. B.S.N. SKOSANA

KLAGTE: (SIEN AKTE VAN BESKULDIGING)

PLEIT: AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS: LUBBE OPNAMES

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IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO. CC.482/85

DELMAS

1986-05-07

THE STATE

versus

P.M. BALEKA & 21 OTHERS (10)

J U D G M E N T

VAN DIJKHORST, J.: On Monday 5 May 1986 I issued a rule nisi calling upon the editor of the Weekly Mail and the reporter Jo-Ann Bekker to show cause in this court on 6 May 1986 at 09h00 why they should not be convicted of contempt of court. On the return day counsel appeared for the two respondents and after hearing them and their counsel I reserved judgment until today.

This matter arose from reports in the Weekly Mail, (20) Volume 2, No. 17 of Friday 2 May 1986. The most objectionable report is headlined "A Judge's Own Notes on Police Activities". It reads:

> "Notes made by a judge while watching video footage shown by lawyers for the treason trialists in Delmas throw a remarkable light on police action during the September 1984 unrest. Lawyers submitted the film to support their contention that violence after a mass funeral in Evaton was the result of police action. What follows is presiding judge Justice J. van Dijkhorst's record (30)

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of the video footage:

'A group of people are seen running to the side of the road presumably trying to get away from their bus which has been stopped. One of the hippos veers right to cut them off. The cameraman then records the following incidents:

Police sjambokking through windows, no obvious reason. The Brigadier (G. Viljoen, in charge of riot control in the Vaal during September 1984) is seen, his back facing the camera. He is waving his arms (10) and presumably says something to the police sjambokking at the windows because they stop. He then turns and walks out of view at which stage police continue sjambokking at the windows. A person is then struck in the face by a policeman. A policeman is seen sjambokking perhaps three people in the top of the bus. They talk to him and he stops. However when he sees another policeman climbing up he suddenly starts sjambokking again. You then see a person being kicked on the ground. You then (20) see a youth running away, jumping over a fence and being hauled back. You then see the aforesaid two policemen on top of the bus forcing a person off the top and taking a swipe at his hands with batons as he is about to drop. You then see a person in grey pants and a white shirt in the custody of a policeman. A black policeman comes up and starts to assault him. You then see the Colonel on the top of the Land Rover. His smile is questionable. You again see the person in the grey pants and white (30)

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shirt being taken to where a number of people have been grouped on the side of the road, seated. On his way you see him being struck on the head by the butt of the rifle. On reaching the group he is tripped and almost immediately thereafter he is again struck by a baton. What did this poor fellow do to deserve all this attention?'

On 5 May 1986 I placed on record that what is stated here is false. These are not my notes. I did not make any notes on this video film available to anyone nor did anyone have (10) access to my notes. I further stated that I would not comment on the correctness of the contents of these alleged notes as the matter is _sub judice_. It is not to be inferred from my silence at this point that the notes are correct.

This report constitutes contempt of court in that

(a) It falsely leads the public to believe that the judge acted irregularly by making his own notes which are not part of the record and which purport to set out his impressions of and his comment upon the evidence available to the press. (20)

(b) It falsely leads the public to believe that the judge did this while the case is still being tried and without having given counsel an opportunity to address the court on the correctness of the observations.

(c) It prejudges an issue in the case.

There are further aspects of the reporting of this reporter that require comment. The report headlined "Commission Shuns 'Agitator' Thesis" contains the following:

"The Van der Walt Commission into the September 1984 uprising in the Vaal townships could have major (30)

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implications for the 22 men facing charges of high treason in Delmas."

And then a further quotation:

"The report was submitted to the government in March 1985 but was only tabled in parliament a fortnight ago. The reason for the delay is a mystery. One wonders if the protracted Delmas trial might have taken a different route had the findings been made available earlier."

The report headlined "About Face from a Key State Witness" contains the following: (10)

"New evidence which could shake the State's case includes the following:"

And then three aspects of the evidence before Court are set out, but not even correctly. Prima facie this amounts to speculative comment which constitutes contempt of court. I will revert to this later.

I wish to correct two further errors in this newspaper pertaining to this trial. The reporter states:

"At the same time there appears to be little clarity as to what the hearing is about." (20)

If this reporter has no clarity it is due to ignorance and lack of preparation. This is not surprising if it is borne in mind that she attended the hearing only on three days in more than three months of trial. I trust the reporter did not intend to convey that this Court did not know what the case was about.

A striking photograph of the accused is published on the same page with the following caption:

"The first and only picture of all the Delmas treason trialists taken this week after a lengthy battle for (30) permission from the judge, the local chief magistrate

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and the district commissioner of police."

I did not refuse or grant permission. I informed the attorney that I had no objection but that the area where the photograph was to be taken fell outside my jurisdiction. There was no "battle" and the attorney spoke to me for about a minute.

I have referred above to two aspects of the reports which in my view constitute contempt of court. The more serious one is the report falsely purporting to be an excerpt of my notes. The explanation given is the following:

Mr Dison, a partner in a reputable firm of attorneys (10) appearing for some of the accused testified that he had not been in court when the video material was shown but had been handed certain notes about the contents thereof by his assistant Mr Sutherland. Although Mr Sutherland did not tell him that, Mr Dison understood these to be notes of the Court's observations. He filed them. When he was approached by Miss Bekker, the journalist, he handed her the notes and told her they were the judge's notes. He also furnished her with other documents, inter alia portions of the court record. These did not include a transcript of the proceedings when (20) the video matter was shown to the Court. He tendered an apology.

Mr Harber, the editor of the Weekly Mail, testified that he had requested Miss Bekker to do a feature article on the Delmas trial. He referred her to Mr Dison. Upon receiving her article he read it and discussed it with his colleagues. He had no reason to believe these were not the judge's notes. He regards Miss Bekker as a very reliable reporter. He stated that he had no intention to bring the judge into disrespect. He tendered his apology and offered to publish a correction (30)

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in the next issue of his paper. As far as the reports which speculate upon the effect of certain evidence are concerned he saw nothing wrong in that. He has been a journalist for six years.

Miss Bekker gave evidence that she is a freelance journalist with three years experience. After having undertaken to write the feature article she went to Mr Dison who referred to the video. He furnished her with notes saying these were the court's notes. She was given no transcript of the evidence. She understood that the judge had written these notes into (10) the record. She was also furnished with certain portions of the record and copies of the Van der Walt Report. The heading of the report "A Judge's Own Notes on Police Activities" is not hers nor did the first paragraph, which refers to notes made by a judge, flow from her pen. It was the work of the sub-editor. She was unaware of this until after the report had appeared. She had never told the sub-editor or any of the staff of the Weekly Mail that these were the judge's notes. She justified her comment in the other report by maintaining that there is nothing wrong with them. She stated that she (20) had suggested that her articles be submitted to a legal expert. She tendered her apologies.

There are certain curious features in the explanations before court. Why, if Mr Dison thought that the notes were notes of the court's observations, did he not hand Miss Bekker the transcript of the proceedings? I would expect a prudent attorney who knows that what he hands over is to be published, to do just that in order to ensure that no mistake can occur. Why did Mr Dison not tell Miss Bekker that these were Mr Sutherland's notes of what had been recorded as the court's (30)

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observations, but instead tell her that these were the judge's notes? How is it possible that the focus of the report , as is evident from the headline and first paragraph, is on the judge's own notes if Miss Bekker did not tell the sub-editor this, as she testified? If Miss Bekker made no mention, either in her report or otherwise, of the fact that these were the judge's own notes, why did Mr Harber, the editor, who says that he saw nothing wrong with the report, fail to take us into his confidence and explain how the headline and first paragraph came to be inserted and why he thought them to be justified? (10) The lack of an explanation on this point is glaring. I am not satisfied with the explanations placed before court.

Mr Kuny, who appeared for the two respondents, submitted that the report referring to the notes was written and published bona fide and under a mistaken belief and without intention to bring the court into contempt. He referred me to Hunt, South African Criminal Law and Procedure, Volume 2 page 183 and 184 and S v GIBSON N.O. & OTHERS 1979 (4) SA 115 (N) 131 and submitted that intention was an element of the crime of contempt of court. In respect of the other (20) reports he submitted that they contained fair comment and did not prejudice or tend to interfere with the administration of justice. He referred me to IN RE NORRIE v CONSANI 1932 CPD 313 and S v VAN NIEKERK 1972 (3) SA 711 (A) 720, 724.

The first question which has to be decided is whether intention is an element of the crime of contempt of court where a newspaper publisher, its editor and/or a reporter are respondents. This was taken for granted in GIBSON's case. The matter was not argued and no reference was made by the learned judge to the cases I am about to refer to. The (30)

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learned judge referred to the classic definition of contempt of court of Melius de Villiers in The Roman and Roman-Dutch Law of Injuries at 166:

> "Contempt of court is an injury committed against a person or body occupying a public judicial office by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated."

The learned judge also referred to Hunt's definition:

> "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it." (10)

The learned judge stated that both these definitions have received judicial approval. This is of course correct.

A reference was made by the learned judge to S v KAAKUNGA 1978 (1) SA 1190 (SWA) at 1193 which case does, however, not deal with the aspect with which I am at present concerned. At page 131C of GIBSON's case the learned judge states:

> "It is trite law that the state must prove beyond (20) reasonable doubt that the accused had such an intention. I think it is clear that none of the accused subjectively desired to violate the dignity, repute or authority of the court or to interfere in the administration of justice. There was therefore no *dolus directus*. It would be sufficient, however, if it was shown that the accused made a statement falling within the definition of a contempt of court and that he subjectively foresaw a real possibility that his words or conduct would be insulting to the court and nevertheless acted recklessly (30)

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without caring that such a result might ensue."

The case of S v GIBSON is concerned with the publication of an article in a newspaper and inter alia the editor was before court.

From what follows it appears that the statement that what is set out above is trite law, is not necessarily correct in the context I am concerned with. The decision in MAKIWAME v DIE AFRIKAANSE PERS BPK & 'n ANDER 1957 (2) SA 560 (WLD) at 562D and 563B is against this contention. HIEMSTRA, J. held, with reference to R v ODHAMS PRESS LIMITED 1956 (3) (WLR) (10) 801, in a case where liability for a press report was in issue that the absence of intent or mens rea is no defence. The publisher and editor were found guilty. MAKIWAME's case was referred to in S v BEYERS 1968 (3) SA 70 (A) at 77 but the Appellate Division did not comment on this aspect although it quoted the general definition of contempt of court of Melius de Villiers in The Roman and Roman-Dutch Law of Injuries. The view of HIEMSTRA, J. in MAKIWAME's case is in line with the older cases. In FROMBERG v HALLE & ANOTHER 1904 TH 54 at 58 the editor and manager of a newspaper were (20) found guilty of contempt of court by WESSELS, J. although the learned judge accepted their explanation that they had been unaware of the offensive paragraph in the article which they had published. FROMBERG's case was referred to by the Appellate Division without adverse comment in AFRIKAANSE PERS PUBLIKASIE (EDMS) BEPERK v MBEKI 1964 (4) SA 618 (A) 627. In IN RE BLANCHE & RICHARDSON 1882 HCG 83 Richardson, the printer and publisher of a newspaper, was found guilty of contempt of court on a letter published without his knowledge during his temporary absence from the office. In R v DREW 1907 (30)

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ORC 111 the accused, professing that he had had no intention to interfere with the course of justice in writing articles in defence of the reputation of a friend, was nonetheless found guilty of contempt of court. His counsel conceded that his innocence was no defence. In IN RE DORMER 1891 (4) SAR 64 The Star newspaper was fined £500 for contempt of court. The question of mens rea was not even argued. Obviously all concerned accepted that the press was strictly liable. In S v VAN STADEN EN 'n ANDER 1973 (1) SA 70 (SWA) TRENGOVE, J. held the opposite. The learned judge differed from MAKIWAME's (10) case and held that intent, which includes dolus eventualis, is required for a conviction of contempt of court, also where the press is to be held liable. The other cases referred to by me were not referred to. Reference was made to the view of Hunt, South African Criminal Law and Procêdure, Volume 2, page 182, as to what the law ought to be, and to a contradictory statement in De Wet and Swanepoel, Die Suid-Afrikaanse Strafreg, 2nd Edition, page 596. The learned judge stated that support for his view can be inferentially drawn from S v VAN NIEKERK 1972 (3) SA 711 (A) at 723. With respect (20) I find it unlikely that the Appellate Division, intending to depart from the law as it has existed for a century, would do so in such an obscure way. In any event the charge against VAN NIEKERK was not that he had published the matter concerned in a publication but that he had made a speech which amounted to contempt of court at a public meeting in the Durban City Hall. Obviously the general requirement of intent would be applicable. It was also an element of the offence alleged by the State in the indictment. VAN NIEKERK's case cannot be authority on the question whether there is (30)

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strict liability of the press in contempt of court cases.

In IN RE MACKENZIE 1933 AD 367 the Appellate Division fined a newspaper editor for contempt of court arising from the publication of a letter. The court, reluctantly it would seem, accepted that he had not appreciated the letter's true meaning. There was therefore an absence of intent, but negligence. Reference can also be made to DUNSTAN v TRANSVAAL CHRONICLE LIMITED 1913 TPD 557 where there was no malicious intent but the proprietor and editor of a newspaper were found guilty. There had been a patent error of judgment. (10) In IN RE NORRIE v CONSANI 1932 CPD 313 we have a similar case.

To the list can be added IN RE COOKE v DAVIS (THE NATAL ECHO NEWSPAPER) 1893 (14) NLR 13 and 14; HERSCHENSOHN v DAVIS 1894 (15) NLR 160, 164; DEMPSTER v ROBINSON 1907 (28) NLR 128, 133, 136, and CLERK OF THE PEACE v P. DAVIS 1908 (29) NLR 20, 27.

In my view the reasons for holding the press strictly liable in defmation cases set out by the Appellate Division in PAKENDORF EN ANDERE v DE FLAMINGH 1982 (3) SA 146 (AD) are with equal force applicable in cases of contempt of court. (20) I am aware of the view expressed in the Law of South Africa, Volume 6, paragraph 109 that it is unlikely that strict liability for contempt of court will in future be imposed on publishers and editors. As against this reference can be made to the contrary view of Snyman in Criminal Law, page 294 who is in favour of strict liability.

I find the existing law to be that in cases of contempt of court the proprietor, publisher and editor of newspapers are liable even in the absence of intent. This finding also conforms with modern exigencies. The courts cannot allow the (30)

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powerful media to attack the dignity of the courts and interfere with the administration of justice with impunity while shielding behind a sub-editor who is not before court.

The editor is found guilty of contempt of court on the report about the judge's notes.

I hesitate to go so far as to hold individual reporters strictly liable for contempt of court. I do not think that that is clearly the position in our existing law, nor do I think that it is necessary for policy reasons. Once the publisher and editor are held strictly liable, the necessary (10) safeguards will be instituted by the press itself to guard against the misuse of its power. Though I have doubts about her explanation I do not find Miss Bekker guilty of contempt of court on the report about the judge's notes.

This brings me to the speculative comment to which I have referred above. Contempt of court is punishable because it undermines the confidence of the public in the due administration of justice by the established courts of law. The test to be applied is whether the statement or document tends to interfere with the administration of justice in a pending (20) proceeding, S v VAN NIEKERK 1972 (3) SA 711 (A) 724. A reason for the objection to the prejudging of issues to be tried by a court of law, is that it may affect the mind of those who may later be witnesses or possibly even of the judicial officer. In the instant case that contingency is remote. There is, however, a more profound reason. Trial by newspaper is intrinsically objectionable as it would lead to disrespect for the law. There will always be a section of the mass media that is ill-informed or prejudiced and which, regardless of the truth, attempts to sway public opinion to its purposes. (30)

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If the mass media are allowed to usurp the function of the courts and judge the issues which are to be tried, not only will unpopular causes not get a fair trial, but the public will be led to believe that it is easy to find the truth, viz. in the popular press, and disrespect for the process of the law could follow. Wild speculation in the press about the outcome of a case would tend to lower the esteem in which our courts are held. Should the judgment conform to the speculation the impression might be created that the judge was influenced by the press. Should the judgment differ from (10) the speculative expectation false hopes will have been raised and the public will not accept the correctness of the court's finding.

I have discussed the dangers of wild speculation. Even a carefully balanced discussion (if that is possible) about the outcome of a pending case holds an inherent danger. It may provoke replies which overstep the bounds, and the descent on the slippery slope over the abyss of trial by newspaper will have begun. An absolute rule against media prejudging of issues in pending cases is necessary. Trial by news- (20) paper is a monster which should not be allowed to set foot on our soil. See also ATTORNEY-GENERAL v TIMES NEWSPAPERS LTD 1974 AC 273 (HL).

The sections of the reports referred to by me are in my view the type of speculative comment on the evidence, the weight thereof and the effect which it may or may not have on the outcome of the case which is an unwarranted and unacceptable interference with the due administration of justice. The respondents have published it wilfully. They persist in their view that they acted legitimately. They offer no excuse. (30)

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I find them both guilty of contempt of court.

MR KUNY: My Lord Your Lordship has found, insofar as the article on the judge's notes is concerned, that the editor is liable on the basis of Your Lordship's finding that strict liability would apply to the press, not on the basis that the editor wilfully allowed this to be published intending to commit contempt of this Court, and I would submit that when it comes to a question of sentence in respect of the offence Your Lordship would take into account that the basis of (10) criminal liability here is not that the editor had the intention, that he had dolus directus, but there is a strict liability and to that extent my submission is that the penalty would be appropriately less than if there had been a finding that he had intention to commit contempt of court in the normal sense of dolus directus, or even dolus eventualis. Insofar as the other two portions of the report are concerned although Your Lordship has found that they do constitute a contempt of this Court and that there has been no retraction of the view adopted by the editor and the journalist that (20) they are contemptuous of this Court I would submit that one would categorise these two passages as borderline contempt, with respect. There has not been a deliberate interference through the publication of these passages in the proceedings of this Court. It has been a kind of tentative speculation which, if one reads them objectively one would see that they are not likely in any way to interfere with the administration of justice or the ultimate finding of this Court. It was speculation which, on Your Lordship's judgment, should not have taken place and the press is certainly to be warned (30)

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as a result of Your Lordship's judgment that this kind of speculation will not be tolerated. But it is, with respect, much more tentative than a great deal of court reporting that takes place in the press every day, and which is not of course to be encouraged and at best, or should I say at worst for the accused, it can be said that they went slightly too far in speculating in this manner but that fortunately nothing that was contained in those sections is likely to have any adverse effect on the administration of justice. It may perhaps have been inexperience, it may have been also the belief (10) that the press is entitled to comment a little more liberally than is in fact permissible, as one finds every day in the press, on television and on the radio. One finds perhaps lurid headlines relating to court proceedings which would amount to this kind of comment and that is something that we find taking place all the time. So at worst for the accused they went a little too far, but with respect, not seriously so. In the circumstances my submission to Your Lordship is that in line with the sort of punishments that have been imposed in past cases Your Lordship should consider the (20) imposition of a very moderate fine if Your Lordship is not disposed to caution and discharge the accused in respect of the offence on which he found them guilty. The tendency in this type of offence has been to impose a fine and the fines have been relatively moderate. In these circumstances we would submit that, regrettable as the publication is, the fact that it has now been fully aired in open court, that Your Lordship has made it clear to not only these accused but to the press at large that this kind of comment will not be tolerated in the future by the press is in itself fortunate(30)

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and Your Lordship should not now in addition impose a heavy penalty on the accused who have been suitably admonished for the publication.

By and large comment, certainly political comment, in this country has been of a fairly robust nature and one does not want to discourage robust reporting. One does want to discourage reporting which is contemptuous but the courts have in the past been able to withstand this sort of comment and in my submission in these circumstances, Your Lordship having said what Your Lordship has about these articles (10) Your Lordship should not in addition impose a heavy penalty on the accused. My submission would be that a very moderate fine would be an appropriate penalty to impose, particularly because, certainly in the case of the reporter, her conduct was perhaps negligent and it may be due to inexperience as well. As far as the editor is concerned he had nothing to do with the actual writing of the article and he bears responsibility only because he is the editor of the publication and bears the ultimate responsibility as the editor. I have nothing more to add. (20)

S E N T E N C E

VAN DIJKHORST, J.: Mr Kuny addressed me in mitigation of sentence. He stressed that the editor has been held guilty on the basis of strict liability in the matter of the first report and he further stressed that as far as the other objectionable portions of the reports are concerned they contained tentative speculation. His submission was that they went slightly too far and that this perhaps was due to inexperience. He further stated that the Court should (30)

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consider the imposition of a very moderate fine as the matter has not been aired in the open and what was to be said about these articles has been said, which is of course correct. He further stressed that political comment in our country is robust and that it should not be unduly discouraged. With that I also agree. Of course there remains the question of sentence. I have given due consideration to the question of sentence and have come to the conclusion that the sentences that I am about to impose are in the circumstances the correct ones. (10)

1. Miss Jo-Ann Bekker is fined R200 or one month's imprisonment. The whole of this sentence is suspended for a period of two years on condition that she not be found guilty of the offence of contempt of court committed during the period of suspension.
2. Mr Anton Paul Harber is fined R750 or three month's imprisonment. He is further ordered to publish in the next issue of the Weekly Mail an apology and correction in terms approved of by me. It is to be placed as prominently as the objectionable reports. (20)

MR KUNY: My Lord I am not sure whether ....

COURT: As far as the apology is concerned Mr Kuny, you placed an apology before me. As far as I am concerned, except for the incorrect initial it can be placed as it is.

MR KUNY: As Your Lordship pleases. My Lord I am not sure whether it is within Your Lordship's province to permit the fine imposed on Mr Harber to be paid within a period of time. I do not know whether he has the funds available at court at the moment. (30)

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COURT: Well I am quite amenable to grant him a week or a month to pay the fine.

MR KUNY: Well My Lord if Your Lordship would grant a week I am sure that that would be quite adequate time.

COURT: Yes. I add to the Order that Mr Anton Paul Harber is to pay the fine within a week. (10)

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