ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 6/2020
[2020] NZSC 153

BETWEEN	DENNIS HAUNUI Appellant
AND	THE QUEEN Respondent

Hearing: 1 September 2020

Court: Winkelmann CJ, William Young, O'Regan, Ellen France and Williams JJ

Counsel: A J Bailey and E Huda for Appellant
M J Lillico and M L Wong for Respondent

Judgment: 18 December 2020

JUDGMENT OF THE COURT

A The appeal is allowed. The convictions are quashed.

B We order a retrial.

C We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest is permitted.

REASONS
(Given by Ellen France J)

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The appeal

[1] In January 2019, the appellant stood trial in the District Court at Christchurch before Judge Kellar and a jury. He was charged with possession of a class A controlled drug (methamphetamine) for supply, possession of an offensive weapon in a public place (knuckle-dusters), possession of a utensil for the purpose of the commission of an offence, namely, a pipe used to smoke methamphetamine, and possession of a class C controlled drug (cannabis).

[2] The appellant was acquitted of the charge of possession of a pipe and convicted on the other three charges. He was subsequently sentenced to eight months' imprisonment, cumulative on an existing prison sentence.[1] The appellant appealed against conviction to the Court of Appeal. His appeal was unsuccessful.[2] He appeals with leave to this Court.[3]

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1 *R v Haunui* [2019] NZDC 2095.
2 *Haunui v R* [2019] NZCA 679 (Clifford, Ellis and Peters JJ) [CA judgment].
3 *Haunui v R* [2020] NZSC 41. The approved question is whether the Court of Appeal ought to have allowed the appeal to that Court.

Overview

[3] The charges arose out of a search undertaken by the police after two officers stopped a car which the appellant was driving. Drugs and drug-related paraphernalia were found in the vehicle. Ms X, the appellant's then partner, was in the front passenger seat of the car when it was stopped.[4]

[4] The evidence at trial included evidence of text messages obtained from the cellphone in the appellant's possession when the vehicle was stopped. Detective Sergeant Geoffrey Rudduck gave evidence about the meaning of the codes used in the appellant's text messages, as well as evidence about methamphetamine dealing, the use of scales, utensils, and of the notebooks or "tick" books used to record arrangements where drugs have been purchased on credit. The evidence was that the text messages indicated the appellant was offering methamphetamine for supply.

[5] In his defence at trial, the appellant maintained there was a reasonable possibility that the methamphetamine found in the vehicle was in the sole possession of Ms X. To support this defence, defence counsel sought to cross-examine Detective Sergeant Rudduck on text messages derived from Ms X's cellphone. The police had recovered these messages from her cellphone but these were not adduced in evidence. The Crown objected to defence counsel's questions on the basis Ms X's text messages were hearsay statements as defined in s 4(1) of the Evidence Act 2006 and therefore inadmissible.[5] In ruling that the text messages were inadmissible, the trial Judge appears to have been satisfied that the text messages were hearsay statements and inadmissible because Ms X was not to be called to give evidence.[6]

[6] In the Court of Appeal, the appellant challenged the convictions on the basis that the text messages were admissible and their exclusion had given rise to a miscarriage of justice. As we shall discuss, the Court of Appeal dismissed the appeal.

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4 We have anonymised Ms X's name because her interests were affected but she was not before the Court.

5 Section 4(1) of the Evidence Act 2006 defines "hearsay statement" as a statement that "was made by a person other than a witness" and "is offered in evidence at the proceeding to prove the truth of its contents".

6 *R v Haunui* [2019] NZDC 930.

In doing so, the Court agreed (save for one exception) that the text messages were not hearsay, were relevant, and that the trial Judge had been wrong to exclude them.

[7] The exception was a text message sent from Ms X's cellphone at 08.57.24 on 3 September 2016 (the 8.57 am text message). The Court found this was a hearsay statement as it was an assertion that Ms X had methamphetamine and was able to supply, and it would be offered to prove the truth of its contents. Therefore, the admissibility of the 8.57 am text message turned on whether Ms X was "unavailable as a witness" under s 18(1)(b)(i) of the Evidence Act. The appellant's argument was that because Ms X had indicated through her lawyer that she would, if called to give evidence, assert the privilege against self-incrimination, she was not compellable to give evidence in terms of s 16(2)(e) of the Evidence Act and was therefore unavailable under s 18(1)(b)(i). The Court did not accept that, on these facts, Ms X was unavailable as a witness. Accordingly, the Court concluded that the 8.57 am text message was inadmissible.

[8] Finally, although the Court said that all of the other text messages to and from Ms X should have been admitted, the Court found that their exclusion did not give rise to a miscarriage of justice. There was no reasonable possibility of a different verdict, albeit the Court accepted that if the text messages from Ms X's cellphone had been in evidence, the jury would most likely have concluded the appellant was guilty "on the basis of an implicit finding of joint possession".[7]

[9] After setting out the relevant background, we will address the case primarily by reference to the two main arguments advanced by the appellant. These arguments are that:

(a) Ms X was unavailable as a witness because of her assertion, through her lawyer, that she would claim the privilege against self-incrimination and therefore the evidence of the 8.57 am text message was admissible hearsay; and

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7 CA judgment, above n 2, at [54].

(b) a miscarriage of justice has arisen because admissible text messages which strengthened the appellant's defence were wrongly excluded.

[10] In addressing whether a miscarriage of justice has arisen, we will also consider the effect of s 232(2)(c) of the Criminal Procedure Act 2011 which sets out when the first appellate court must allow an appeal against conviction. In particular, the question is whether the omission from s 232 of the proviso formerly contained in s 385(1) of the Crimes Act 1961 has altered the required approach to appellate review.

The trial

[11] The evidence at trial was that Constables Isaac Kingi and Cameron Sollitt stopped the vehicle in which the appellant was driving and Ms X a passenger at around 12.30 am on 4 September 2016. The vehicle was registered to a friend of Ms X. When checking the registration label of the vehicle, Constable Kingi noticed a set of knuckle-dusters by the handbrake. The officer decided there was a basis to search the car. As the Court of Appeal explained, the search of the vehicle located:[8]

(a) A black leather bag, in the driver's footwell, partially under the driver's seat. The bag contained a makeup bag holding $1,750 in cash, a bottle containing two point bags, holding a combined weight of 0.94 grams of methamphetamine, and another point bag holding 1.68 grams of cannabis.

(b) A first aid kit in the front seat passenger footwell which contained point bags.

(c) A set of digital scales, and a sunglasses case containing the pipe, each of which Constable Kingi thought had been in the first aid kit.

(d) A notebook containing notes and telephone numbers.

[12] Constable Kingi asked the appellant who owned the various items. The appellant responded that they were his "and that he would take the rap for everything in the car and that it was for personal use". The appellant was arrested. He was charged the next day. Ms X was not charged.

[13] There was also evidence at trial about the fingerprint analysis of the items located in the vehicle. Ms X's fingerprints were found on the digital (electronic) scales

8 CA judgment, above n 2, at [7].

and in the notebook. It was agreed that the notebook was not a "tick" book and so of no particular relevance. The appellant's fingerprints were not found on any of the tested items.

[14] The jury was also provided with an agreed statement of facts pursuant to s 9 of the Evidence Act. The agreed statement of facts recorded that the appellant was convicted on 13 March 2018, having pleaded guilty to a charge of offering to supply methamphetamine. The offending was reflected in text messages sent by the appellant during March and April 2016. This evidence was advanced on the basis it indicated a propensity to offer for supply methamphetamine in his possession. The agreed statement of facts also recorded that Ms X had two convictions for offences committed on 31 August 2017, namely, possession of methamphetamine for supply and possession of utensils for consuming methamphetamine. That offending post-dated the vehicle stop.

[15] Detective Sergeant Rudduck gave evidence to help the jury to "decode" the appellant's text messages. As the Court of Appeal noted, this evidence addressed text messages relevant to the charges. For example, the officer discussed a text message on 31 August 2016 at 21.11.20 sent to the appellant which said, "See you about 6 cuz? Just bring a Q." The officer explained that "Q" was slang for a quarter of a gram of methamphetamine which the appellant was being asked to bring with him. As a further illustration of this evidence, there were a series of text messages on 1 September 2016 starting at 04.22.44. In the first of these messages, the appellant sent a text message saying "Got sum ladys". The appellant was then asked where he was. He responded saying he would be home in an hour. The recipient responded saying he would see the appellant there. The officer's evidence was that a "lady" is a reference to a quarter of a gram of methamphetamine which, by this text message, the appellant indicated he had for sale.

[16] There was a further reference to whether the appellant had "Got lady?" in a text message on 2 September 2016 at 09.10.42. The next day, on 3 September 2016 at 11.29.57, the appellant was asked by the same phone number "Do you want to do the same az yesterday bro" and at 15.02.24 that day asking "Should I come to you bro?". The appellant's response at 17.05.19 was "Up 2s bruv got 2 ladys an one 2 go".

The evidence of Detective Sergeant Rudduck was that the appellant was indicating that, about seven and a half hours before the vehicle was stopped, he had two quarter-grams of methamphetamine and one was for sale.

[17] Subsequently, on 3 September 2016 from 19.49.17 to 23.18.41 (about an hour before the vehicle was stopped) the appellant and a person referred to as "Bute" exchanged voice calls and text messages. As the Court of Appeal noted, the text messages appear to show Bute telling the appellant at 19.56.13 where he was after which they had an exchange in the course of which Bute indicated he "Probably want same as before". But, after an inquiry as to how far away the appellant was, in a text message at 23.18.41 Bute said he was "already sorted" but would "be in touch".

[18] As we have said, trial counsel sought to cross-examine Detective Sergeant Rudduck on some text messages sent on 1 and 3 September 2016 from third parties to Ms X and from her in response. The Court of Appeal said it was common ground that some of these text messages showed third parties seeking supply of methamphetamine and Ms X "responding in a way consistent with a willingness to do so".[9] The Court of Appeal gave as an example a third party asking "… what's cheapest you can do a whole for?", to which Ms X replied "… i think 85 a litre paint …". It was accepted on appeal that these text messages related to the supply of methamphetamine.

[19] We come back later to some of the detail of these text messages from Ms X's cellphone, but at this point it is sufficient to note that there was ultimately no challenge to the Court of Appeal's conclusion that only one of these text messages, namely, the 8.57 am text message, was a hearsay statement.[10] The other text messages were not to be offered to prove the truth of their contents. By contrast, the 8.57 am text message stated: "fuk all; i was jus txtn to c if u had any gunj;ive got 2 ladis if u knw any1 25;". The Court of Appeal took the view that this text message contained an assertion to the effect that Ms X was in possession of methamphetamine and was able to supply. It would be hearsay as it would be offered to prove the truth of its contents.[11]

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9 CA judgment, above n 2, at [21].

10 The Crown in its written submissions queried the finding that the other text messages were not hearsay statements. But the Crown did not pursue that argument in the oral hearing and we take this point no further.

11 There was no challenge to the Court's finding that this was hearsay. We accordingly express no view on that conclusion.

The hearsay provisions

[20] As a hearsay statement, the 8.57 am text message would only be admissible in the circumstances provided for in s 18 of the Evidence Act. Section 18 deals with the general admissibility of hearsay evidence and provides that a hearsay statement is admissible in any proceeding if two conditions are met, namely, the circumstances provide reasonable assurance of reliability and, relevantly here, the maker of the statement is unavailable as a witness. The section provides in full as follows:

> **18 General admissibility of hearsay**
>
> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.[12]

[21] A "witness" means "a person who gives evidence and is able to be cross-examined in a proceeding".[13] A "statement" is relevantly defined as "a spoken or written assertion by a person of any matter".[14]

[22] Whether a person is "unavailable as a witness" is dealt with in the interpretation section in s 16(2) as follows:

> (2) For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
>
> (a) is dead; or

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12 Section 20 of the Evidence Act deals with the admissibility in civil proceedings of hearsay statements in documents relating to applications, discovery or interrogatories. Section 22 sets out the process for giving written notice which a party proposing to offer a hearsay statement in a criminal proceeding must follow.

13 Section 4(1) definition of "witness".

14 Section 4(1) definition of "statement", para (a).

(b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or

(c) is unfit to be a witness because of age or physical or mental condition; or

(d) cannot with reasonable diligence be identified or found; or

(e) is not compellable to give evidence.

[23] Compellability is dealt with in ss 71 to 75 of the Act. Section 71(1) provides that in a civil or criminal proceeding, any person is eligible to give evidence and a person who is eligible to give evidence is compellable. Section 71(2) provides that this general rule is subject to the narrow exceptions in ss 72 to 75.[15]

[24] The exceptions in ss 72 to 75 are as follows. First, judges are not eligible to give evidence in the proceeding in which they are involved. Jurors and counsel are also ineligible unless the judge in the proceeding gives permission.[16] Next, defendants in a criminal proceeding and associated defendants (except where the associated defendant is being tried separately or the proceeding against the associated defendant has been determined) are not compellable for the purpose of that proceeding.[17] Further, under s 74, the Sovereign, the Governor-General, a Sovereign or Head of State of a foreign country, and a judge (in respect of their judicial conduct) are not compellable. Finally, a bank officer, in respect of banking records, is not compellable in a proceeding to which the bank is not a party.[18]

Was Ms X "unavailable as a witness"?

[25] The appellant's principal argument is that Ms X was unavailable as a witness in terms of s 16(2)(e) because she had a lawful justification not to give evidence and she had, through her lawyer, exercised that right.

[26] This argument was addressed by the Court of Appeal. The Court determined that Ms X could not be treated as unavailable as a witness "only on the basis of her

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15 See Simon France (ed) *Adams on Criminal Law – Evidence* (online ed, Thomson Reuters) [*Adams*] at [EA71.01]; and Chris Gallavin *Evidence* (LexisNexis, Wellington, 2008) at 96.

16 See s 72(1) of the Evidence Act in relation to judges and s 72(2) in relation to jurors and counsel.

17 Section 73.

18 Section 75. The remaining section in this subpart, s 76, deals with evidence of jury deliberations.

lawyer's advice prior to trial".[19] The Court said that "at the very least it would be necessary to have summonsed Ms X, with her availability or otherwise to be determined by reference to events thereafter".[20] The Court also made the point that there was no certainty as to how matters would have developed if Ms X had been summonsed. The respondent supports this approach.

[27] Considering the matter in this way, we agree with the Court of Appeal that it is clear the potential claim to privilege is not one that could lead to Ms X being unavailable as a witness. We explain the reasons for our conclusion after summarising the relevant statutory provisions.

Provisions relating to the privilege against self-incrimination

[28] Section 60 of the Evidence Act deals with the privilege against self-incrimination.[21] The section applies if a person is "required to provide specific information" in certain circumstances where the information "would, if so provided, be likely to incriminate the person".[22] The person has a privilege in respect of the information and cannot be required to provide it.[23] The relevant circumstances where the privilege may be claimed are not confined to the course of a proceeding, but also include other formal requests for information such as where the person is required to provide information to a police officer in the course of an investigation into a criminal offence.[24] A person who claims the privilege against self-incrimination in court proceedings "must offer sufficient evidence to enable the Judge to assess whether self-incrimination is reasonably likely if the person provides the required information".[25]

[29] Both "self-incrimination" and "incriminate" are defined terms. Under s 4(1), "self-incrimination" means the "provision by a person of information that could reasonably lead to, or increase the likelihood of, the prosecution of that person for a criminal offence". "Incriminate" is defined as providing "information that is

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19 CA judgment, above n 2, at [43].
20 At [43].
21 See also s 53(2) of the Evidence Act which provides for the effect and protection of the privilege.
22 Section 60(1).
23 Section 60(2)(a).
24 See s 60(1)(a). See also Gallavin, above n 15, at 275.
25 Section 62(2).

reasonably likely to lead to, or increase the likelihood of, the prosecution of a person for a criminal offence".

Our assessment of the appellant's argument

[30] The appellant's argument rests on the fact that through her lawyer Ms X said she would invoke the privilege against self-incrimination. However, that is no more than an assertion which in this case would have needed to be determined by a court in the context of specific questions. As the authors of *Cross on Evidence* note, "[i]t has never been the case that a mere assertion of the privilege is enough. A witness's assertion, even under oath when there are no grounds to doubt his or her bona fides, is not sufficient".[26] Rather, in the situation where the witness is testifying, the court will need to decide whether the privilege applies, as s 62(2) makes clear.

[31] It is apparent from the provisions described above that whether the privilege applied to Ms X would depend on the questions asked. That is because the privilege against self-incrimination does not mean Ms X can never be a witness or answer any questions at all in the appellant's trial. Rather, the privilege protects a prospective witness from answering certain questions, namely, those that will incriminate the witness. An obvious illustration of this point is that a witness could be asked about background matters without any issue of self-incrimination arising.[27]

[32] The last point is reinforced by the requirement that the claim of privilege relates to "specific information". That requirement reflects the view of the Law Commission in its preliminary paper, *The Privilege Against Self-Incrimination: A discussion paper*. The Commission saw this requirement as excluding "blanket claims of privilege".[28] As the authors of *Adams on Criminal Law* note, the Commission "advanced [this] limitation to prevent people relying on the privilege as a justification

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26 Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) [*Cross on Evidence*] at [EVA62.4], citing *R v Boyes* (1861) 1 B & S 311, 121 ER 730 (KB); and *Re Reynolds, ex parte Reynolds* (1882) 20 Ch D 294 (CA).

27 *Singh v R* [2010] NZSC 161, [2011] 2 NZLR 322 at [12].

28 Law Commission *The Privilege Against Self-Incrimination: A discussion paper* (NZLC PP25, 1996) at 125. See also Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, 1999) vol 2 at 159.

for a pre-emptive announcement that they would refuse to answer *all* questions put to them".[29]

[33] Whether the privilege applied would also depend on whether Ms X could show future prosecution was likely, the decision having been made not to charge her. The definition of "incriminate" captures the provision of information reasonably "likely" to lead to, or increase the likelihood of, prosecution. As this Court said in *Singh v R*:[30]

> The use by the legislature of the word "likely" shows that it intended to confine the privilege to circumstances where the potential for incrimination is "real and appreciable" and not "merely imaginary and fanciful".

[34] Further, the claim of privilege has to be made in response to a requirement to provide the relevant information.[31] But here there has been no requirement to provide any information.

[35] Finally, we do not know what Ms X may have done if called to give evidence. Therefore, it is premature to suggest that in this case the claim to the privilege is clear because, for example, simply providing her cellphone number would incriminate her.[32] To illustrate the point, Ms X may have decided to waive privilege. She may have simply denied any offending or she may have cast responsibility on the appellant. In response to this proposition, the appellant says it would be unfair to require the defence to call Ms X in order to resolve the question of her claim to privilege. However, if the defence did not wish to take that course, the available course was to make an application that the prosecution call Ms X.[33] That was not done here.

[36] In all these circumstances, the claim based on the indication that Ms X would assert privilege must fail. It follows that we do not need to address the appellant's

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29 *Adams*, above n 15, at [EA60.02(2)].

30 *Singh*, above n 27, at [31] (footnote omitted).

31 Section 60(1)(a). The Court in *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [47] cited John Henry Wigmore *Wigmore on Evidence in Trials at Common Law* (McNaughton revision, Aspen Law & Business, United States of America, 1961) vol 8 at 379 for the proposition that the privilege is directed at testimonial compulsion.

32 In any event, as we have noted, she could have been called and asked to provide other background information.

33 Under s 113(3) of the Criminal Procedure Act 2011, where "the court is of the opinion that a witness who is not called for the prosecution ought to be called" the court may "require the prosecution to call the witness" and, if necessary, "make an order for the attendance of the witness".

further argument, made in reliance on *King v PFL Finance Ltd*[34] and *Awatere v R*,[35] that situations of non-compellability in the context of the hearsay provisions are not confined to those set out in ss 72–75 of the Evidence Act. The Court of Appeal in *King* and the High Court in *Awatere* suggested that witnesses who have been lawfully excused from giving evidence may be treated as non-compellable for the purposes of s 16(2)(e). Whether compellability for the purposes of s 16(2)(e) is wholly defined by ss 71–75 of the Evidence Act or whether it should be given an expansive interpretation so as to extend to persons who have a lawful excuse not to give evidence is an important question. But it is one that should be addressed in a case in which it would be determinative.

[37] We add that conceptually it can also be contended that the appellant's case confuses two discrete topics, that is, compellability which is the obligation of an eligible person to attend court and be sworn in as a witness, and privilege which encompasses carefully defined circumstances in which a person may refuse or may be obligated to refuse to provide certain information.

[38] As we have explained, whether a prospective witness can be compelled to give evidence is now dealt with in the Evidence Act on the basis that a person who is eligible can be compelled.[36] The Evidence Act separately sets out the situations in which a prospective witness who is both eligible and compellable may nonetheless refuse to answer certain questions on the basis that privilege applies.[37] That suggests the availability of a privilege does not affect compellability, rather, the two are discrete concepts. As the Court of Appeal said in *Solicitor-General v X*, difficulty or even impossibility in enforcing compellability "does not make a person non-compellable in terms of the Evidence Act".[38]

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34 *King v PFL Finance Ltd* [2015] NZCA 517.

35 *Awatere v R* [2018] NZHC 883.

36 Evidence Act, s 71(1)(b). See *Cross on Evidence*, above n 26, at [EVAPart3Subpart1.1]. Prior to the Evidence Act, the general rule was that anyone was "competent and compellable" to give evidence with certain exceptions concerning, for example, children, the accused in a criminal trial and the accused's spouse: Donald L Mathieson (ed) *Cross on Evidence* (6th ed, Butterworths, Wellington, 1997) at 181.

37 Evidence Act, ss 51–67.

38 *Solicitor-General v X* [2009] NZCA 476 at [35].

[39] The distinction between these concepts is expressed in the leading texts. For example, in its pre-Evidence Act commentary *Adams* stated:[39]

> Although statutory language describing a privilege may sometimes unhelpfully employ the terminology of compellability …, privilege should be distinguished from compellability. A witness who is not compellable cannot be forced to enter the witness box and respond to any questions. The holder of a privilege is still liable to be sworn as a witness, and must answer any relevant questions and provide any relevant information when to do so will not involve the disclosure of any privileged information.

[40] This distinction between privilege and compellability is also evident in the other leading New Zealand texts.[40]

[41] To this commentary may be added the point that a privilege is the right in certain circumstances not to answer questions on a particular topic or of a particular nature. Legal professional privilege is an illustration of a privilege protecting a witness from answering questions on particular topics and the privilege against self-incrimination protects against questions which tend to incriminate the witness. And, as we have seen, the privilege against self-incrimination protects against the provision of certain information or a response to certain questions. It does not provide some sort of blanket protection to the prospective witness from being summonsed and required to take the oath or make an affirmation.[41] *Singh* is illustrative of the position.[42]

[42] In *Singh*, Ms D said that her partner, the appellant in that case, had assaulted her. Her evidence at a preliminary hearing was consistent with her statements to the police and with those made in her diary. She then resumed living with the appellant. The appellant was charged with various counts of violence as alleged by Ms D. Ms D subsequently sought to discourage the prosecution continuing, and at one point swore

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39 *Adams*, above n 15, at [ED20.04]. See also Zelman Cowen and PB Carter *Essays on the Law of Evidence* (Oxford University Press, London, 1956) at 220; and Wigmore, above n 31, at 405.

40 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (Thomson Reuters, Wellington, 2018) at [EV71.05] say that "[w]itnesses who are otherwise eligible and compellable … may nonetheless be able to refuse to answer certain specific questions (or be prohibited from disclosing information) on the grounds of privilege or the protection of confidences". *Cross on Evidence*, above n 26, at [EVAPart3Subpart1.1] says that "[i]n a limited number of situations, a witness who is both eligible and compellable may nevertheless refuse to answer certain questions, by virtue of a privilege".

41 See Wigmore, above n 31, at 405.

42 *Singh*, above n 27.

an affidavit saying she was living happily with the appellant and did not want to give evidence against him. The appellant was also charged with attempting to pervert the course of justice.

[43] When the matter finally went to trial, Ms D claimed the privilege against self-incrimination on the basis that if she gave evidence she would perjure herself. That claim was rejected. The appellant was convicted on five charges of violence against Ms D and of attempting to pervert the course of justice. He appealed unsuccessfully against conviction in part on the basis the claim of privilege should have been upheld. In upholding the decision of the Court of Appeal to dismiss the appeal, this Court took the view there was no substantial risk of prosecution (save in one respect which was not material) and the claim of privilege could not be justified. The key point for present purposes is that there was no question Ms D was compellable, albeit asserting privilege.[43] That said, we need not take this point any further given our conclusion, in agreement with the Court of Appeal, that Ms X's indication she would assert privilege was insufficient to mean she should have been treated as unavailable.

The removal of the proviso

[44] We turn now to consider the effect of the change in language applicable to conviction appeals brought about by s 232 of the Criminal Procedure Act. To put that discussion in context, it is helpful to begin with the relevant provisions.

The Crimes Act

[45] Prior to the enactment of s 232 of the Criminal Procedure Act, s 385(1) of the Crimes Act materially provided that a conviction appeal following trial on indictment must be allowed where the court was of the opinion:

> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

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[43] See also *Boyle v Wiseman* (1855) 10 Ex 647 at 653, 156 ER 598 (Assizes) at 601 where it was held that a party to a suit subpoenaed as a witness cannot object to being sworn and examined on the basis the only relevant questions would be self-incriminating.

(b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or

(c) that on any ground there was a miscarriage of justice; or

(d) that the trial was a nullity—

and in any other case shall dismiss the appeal:

[46] That position was subject to the following proviso:

> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

The Criminal Procedure Act

[47] Section 232 of the Criminal Procedure Act makes no reference to a proviso. Section 232(2) provides that the first appeal court must allow an appeal if satisfied that:

(a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or

(b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or

(c) in any case, a miscarriage of justice has occurred for any reason.

[48] Section 232(3) provides that the court must otherwise dismiss the appeal.

[49] A "miscarriage of justice" in s 232(2) is defined in s 232(4) as:

(4) … any error, irregularity, or occurrence in or in relation to or affecting the trial that—

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

Has the change in language brought about a change in the appellate function?

[50] The parties are agreed that the fact the proviso has not expressly been carried over from s 385(1) to its equivalent, s 232(2), does not alter the task for the appellate court. We can accordingly explain fairly briefly why we accept that position. In this respect, we adopt the approach of the Court of Appeal in *Wiley v R*.[44]

[51] We preface our discussion by making the obvious point that the question about the effect of the removal of the proviso is only relevant to the appellate approach to the test for miscarriage of justice under s 232(4)(a). We say that because this Court held in *R v Matenga* that the proviso could not apply to the unreasonable verdict ground and the nullity ground.[45] Further, the Court in *R v Condon* said that there could not be any recourse to the proviso where there has been an unfair trial.[46] The position must be unchanged under s 232(2)(a) of the Criminal Procedure Act (unreasonable verdict) and s 232(4)(b) (nullity or unfair trial). There is no requirement in these situations to make any further inquiry into whether or not what occurred constitutes a miscarriage of justice.

[52] With these introductory remarks in mind, we turn then to the effect of the Criminal Procedure Act's repeal without replacement of the proviso.[47] It is helpful to begin by setting out the approach taken in *Matenga* because the Court there addressed s 385(1) and, particularly, the correct application of the proviso. In that case, with two differences as identified below, the Court adopted the approach of the High Court of Australia in *Weiss v R*.[48]

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44 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1.

45 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9].

46 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78]. There was no specific reference to the unfair trial ground in the old s 385(1) but the Court in *Condon* described the right to a fair trial as an absolute right. It follows that a breach of that right means that the conviction must be quashed. See also *Wiley*, above n 44, at [34] and [37]; and *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [25].

47 The proviso has been a part of New Zealand law since it appeared, albeit in different wording, in s 415 of the Criminal Code Act 1893. Section 415 referred to identification of "some substantial wrong or miscarriage".

48 *Weiss v R* [2005] HCA 81, (2005) 224 CLR 300.

[53] The Court in *Matenga* said it was necessary to identify whether there was an error or irregularity and then to put to one side irregularities which plainly could not have affected the result. The Court said that:[49]

> In the end, departing in this respect from *Weiss*, we consider that in the first place the appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity.

[54] The Court observed that "having identified a miscarriage of justice" the proviso came into play and it was then necessary "to consider whether that potentially adverse effect on the result may *actually*, that is, in reality, have occurred".[50] The Court continued noting that:[51]

> The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused. Before applying the proviso the Court must also be satisfied that the trial was fair and thus that there was no breach of the right guaranteed to the accused by s 25(a) of the [New Zealand Bill of Rights Act 1990].

[55] That approach reflected the purpose of the proviso which was described in *Weiss* in this way:[52]

> What the history reveals is that a "miscarriage of justice", under the old Exchequer rule, was *any* departure from trial according to law, regardless of the nature or importance of that departure. By using the words "substantial" and "actually occurred" in the proviso, the legislature evidently intended to require consideration of matters beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure. On that understanding of the section as a whole, the word "substantial", in the phrase "substantial miscarriage of justice", was more than mere ornamentation.

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49 *Matenga*, above n 45, at [30].
50 At [31].
51 At [31] (footnotes omitted).
52 *Weiss*, above n 48, at [18].

[56] In terms of the application of the proviso, the Court in *Matenga* explained that the approach to be taken was as follows:

> [32] In coming to its conclusion concerning the inevitability of the verdict, the appeal court must of course take full account of the disadvantage it may well have in making an assessment of the honesty and reliability of witnesses on the sole basis of the transcript of the oral evidence. In a case turning on such an assessment the court will often be unable to feel sure of the appellant's guilt and will therefore be unable to apply the proviso.
>
> [33] There is a second respect in which *Weiss* should be qualified. The High Court said that the appellate court's task under the proviso was to be undertaken on the whole of the record. That is correct. However, it expressly included in the record the fact that the jury has returned a guilty verdict. But of course the jury's verdict may have been influenced by the existence of the miscarriage. While the verdict may indicate the jury's view on some question unrelated to the miscarriage, the appeal court must form its own view on whether a finding of guilt was, notwithstanding the miscarriage, the only reasonably possible verdict.

[57] *Matenga* was recently applied by this Court in *Lundy v R*.[53] The Court in *Lundy* also clarified that the proviso required simply that the appellate court itself be sure beyond reasonable doubt of the appellant's guilt.[54] The effect of *Lundy* was to clarify that what is variously referred to in *Matenga* as the "guilty verdict was inevitable", "the guilty verdict was … the only reasonably possibly verdict" and "the [c]ourt must itself feel sure of guilt" are all saying the same thing in different ways. It adds nothing to use these alternative expressions. Rather, the point being made is that it is best just to focus on the need for the appellate court to be sure of guilt.

[58] It seems plain that, in enacting s 232, the intention was to capture the appellate approach as reflected in *Matenga* and in a series of other appellate decisions[55] rather than to make any substantive change to the position as it was understood under s 385(1). As was noted in *Misa v R*:[56]

> [41] The explanatory note to the Criminal Procedure (Reform and Modernisation) Bill 2010 records that the Bill consolidated and updated the then appeal provisions in the Crimes Act and in the Summary Proceedings Act 1957 "to provide one set of coherent provisions that applies to each appeal

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53 *Lundy*, above n 46.

54 At [31]–[36]. See also at [87].

55 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730; *Condon*, above n 46; *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37; *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315.

56 *Misa v R* [2019] NZSC 134 (footnote omitted).

> category".[57] The explanatory note also recorded that the Crimes Act model was generally preferred where the two Acts dealt differently with the same matter. In particular, in terms of the appeal provision with which this case is concerned, the explanatory note recorded that the grounds had been "rationalised, by following the Crimes Act 1961 model but rewriting section 385(1) of that Act to integrate the existing grounds of appeal with the proviso to that subsection".[58]

[59] The Criminal Procedure (Reform and Modernisation) Bill 2010 as introduced kept the "substantial miscarriage of justice" criterion. The explanatory note to the Bill also provided that:[59]

> The policy implemented in this subpart is to make substantial miscarriage of justice the ultimate test for determining an appeal against conviction. This approach follows section 276 of the Criminal Procedure Act 2009 (Vict) and addresses aspects of section 385 of the Crimes Act 1961 (such as the proviso to subsection (1)) discussed in the reported decisions *Owen v R* and *Matenga v R* and elsewhere.

[60] At the select committee stage, the Justice and Electoral Committee recommended that a definition of "substantial miscarriage of justice" be included in relation to cl 236, which was the precursor clause to s 232.[60] The definition proposed in cl 236(5) reflects the definition in s 232(4), referring to "any error, irregularity, or occurrence … that has created a real risk that the outcome of the trial was affected" or "has resulted in an unfair trial or a trial that was a nullity".

[61] As the Court of Appeal in *Wiley* noted, the changes recommended by the Select Committee may also have reflected a submission to the Committee made by the former Chief Justice which canvassed problems with s 385 of the Crimes Act.[61] This submission also suggested omitting the word "substantial" while adding a definition of "miscarriage of justice" to make it clear the phrase should have the meaning attributed to "substantial miscarriage of justice" in both *Matenga* and *R v Gwaze*.[62]

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57 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 12. The general purpose of the Bill was described as to "simplify criminal procedure and provide an enduring legislative framework" with a number of objectives including to ensure the fair conduct of criminal prosecutions in New Zealand courts reflecting s 25 of the New Zealand Bill of Rights Act 1990: at 1.

58 At 12.

59 At 66 (citations omitted).

60 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 10.

61 *Wiley*, above n 44, at [18], referring to Sian Elias "Submission to the Justice and Electoral Committee on the Criminal Procedure (Reform and Modernisation) Bill 2010".

62 *Gwaze*, above n 55.

[62] It appears that it was considered that taking out the reference to "substantial" miscarriage of justice might result in confusion, because as matters stood that might mean that the threshold for allowing a conviction appeal appeared to be lower than that for granting leave to appeal to this Court.[63] At that point, the threshold for leave was expressed in terms of a "substantial miscarriage of justice".[64]

[63] As the submissions for the respondent record, ultimately, it was agreed the definition of substantial miscarriage should be "[i]n line with current case law".[65] On the report back of the Bill, it was said that:[66]

> Clause 236 is intended to consolidate and simplify current statutory provisions, particularly section 385 of the Crimes Act 1961, in relation to appeals against conviction, *without changing the core principles underlying the courts' current approach to these appeals*. We recommend some amendments to clause 236 to ensure that this intent is clear.

[64] The word "substantial" did not come out of the Bill until late in the piece. This change was implemented by way of a supplementary order paper at the Committee stage of the Bill. The explanatory note to the supplementary order paper suggests that the change was intended to be one of form rather than substance:[67]

> The Supplementary Order Paper amends the phrase "substantial miscarriage of justice" in clause 236, which governs the determination of appeals against conviction, by omitting the adjective "substantial". *The amendment simplifies but does not alter the test for allowing an appeal against conviction. For this purpose, clause 236 defines "miscarriage of justice" in line with current case law*. To ensure consistent terminology throughout the Bill, the adjective "substantial" is also omitted where the phrase "substantial miscarriage of justice" is used in other appeals and related provisions.

[65] The Court in *Wiley* suggested that the removal of the term "substantial" was to address what Elias CJ in *Gwaze* described as the "jarring" effect of the "substantial miscarriage of justice" test under s 385(1) of the Crimes Act.[68] That is, the notion that

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63 *Wiley*, above n 44, at [19]–[20], citing Ministry of Justice and Law Commission *Departmental Report for the Justice and Electoral Select Committee: Criminal Procedure (Reform and Modernisation) Bill* (16 May 2011) [Departmental report].

64 Supreme Court Act 2003, s 13(2)(b).

65 Departmental report, above n 63, at [1136].

66 Criminal Procedure (Reform and Modernisation) Bill (243-2) (select committee report) at 9 (emphasis added).

67 Supplementary Order Paper 2011 (281) Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 10 (emphasis added).

68 *Wiley*, above n 44, at [48]. See *Gwaze*, above n 55, at [58]. See also at [57]. *Gwaze* was a case about s 382 of the Crimes Act which was constructed along similar lines to s 385.

although a miscarriage of justice had occurred, the court in applying the proviso was saying that was immaterial where the miscarriage was not substantial. We agree that removal of that awkwardness appears the likely explanation for the linguistic change and that there was no apparent attempt to move away from the approach to appellate review more generally.[69]

[66] Nor did the Court in *Wiley* consider that interpreting s 232 in a similar manner to that adopted under s 385 involved "reading back" the word "substantial" into s 232.[70] Rather, the Court said the approach under s 385 "puts to one side errors that are inconsequential or immaterial to the outcome of the trial and focuses on errors of substance".[71] Under s 385(1), the Court said a miscarriage was established where there was "a real risk the error adversely impacted on the outcome or the trial was unfair".[72]

[67] Whether the change in language has nonetheless brought about a change in the required appellate approach has to be considered in light of the statutory wording and, in particular, in light of the question for the appellate court under the relevant part of s 232. The question under s 232(4)(a) is "whether the error, irregularity or occurrence in or in relation to or affecting [the] trial has created a real risk the outcome was affected".[73] That question "requires consideration of whether there is a reasonable possibility another verdict would have been reached".[74] If the answer to that question is "no", that is the end of the matter and the appeal will be dismissed. If the answer to that question is "yes", we consider the effect of the Criminal Procedure Act is that the appeal court then asks whether it is sure of guilt. If the answer is "no", the appeal will be allowed. If the answer is "yes", the court determines the error did not in fact create a real risk that the outcome was affected and the appeal will be dismissed. Finally, as we have noted, if the appeal court is satisfied that the jury's verdict was unreasonable (s 232(2)(a)) or that the error has resulted in an unfair trial or a trial that was a nullity (s 232(4)(b)), the appeal will be allowed and the proviso reasoning does not apply.

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69 See also *Wiley*, above n 44, at [22].
70 At [47].
71 At [47].
72 At [47].
73 *Misa*, above n 56, at [48]. For convenience we describe "error, irregularity or occurrence" as an "error".
74 At [48]. See also *I v R* [2020] NZSC 143 at [37].

[68] We are satisfied that such an approach maintains an effective right of appeal and so is consistent with s 25(h) of the New Zealand Bill of Rights Act 1990 (which protects the right of appeal). We add that courts have applied the proviso to s 385(1) sparingly and that should continue to be the case to the proviso reasoning under the Criminal Procedure Act. That too is important to ensure compliance with s 25(h).

[69] We turn then to the application of these principles to the present case.

Has exclusion of the other text messages resulted in a miscarriage of justice?

The approach of the Court of Appeal to a miscarriage

[70] The Court did not consider that the admission of the other text messages derived from Ms X's cellphone (apart from the 8.57 am text message) would have materially affected the case in terms of its strengths or weaknesses against the appellant on the basis of the remainder of the evidence or the jury's task in assessing that evidence. In this respect, the Court emphasised the reference in a text message from Ms X at 13.42.21 on 3 September (almost 11 hours before the vehicle stop) to "we been busi". The Court said that a "reasonable and obvious inference" from this message was that the "we" was Ms X and the appellant.[75] The Court also saw it as significant that there was no evidence to suggest that Ms X was offering to supply methamphetamine at a time when the appellant was not, or had said he could not. Finally, the Court noted that the Crown acknowledged at trial that joint possession was a realistic possibility.

[71] Accordingly, the Court concluded that there was no reasonable possibility of a different verdict even if these text messages were in evidence, notwithstanding that the Court accepted "the jury would most likely have done so on the basis of an implicit finding of joint possession".[76]

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75 CA judgment, above n 2, at [51].
76 At [54].

Submissions

[72] In submitting that the exclusion of these messages has given rise to a miscarriage of justice, Mr Bailey undertook a fairly close analysis of the text messages. He said this analysis bore out the defence proposition that closer to the time of the vehicle stop the appellant had no stock left and that the only drugs left in the car were those Ms X was offering to supply.

[73] The respondent supports the approach taken by the Court of Appeal. That submission is based on the proposition there was no reasonable possibility that Ms X, while in possession of the drugs, was in sole, exclusive possession of the methamphetamine, and in that sense the Crown says the Court can be sure of the appellant's guilt of possession for the purposes of supply.

[74] The respondent's submissions and the Court of Appeal judgment were directed at s 232(4)(a), but we do not need to engage with s 232(4)(a) on these facts. This is because, for reasons which we discuss below, we consider an unfair trial has resulted from the exclusion of the text messages in terms of s 232(4)(b).[77]

Our assessment

[75] The Crown case was strong and it was strengthened by the appellant's admission (albeit the appellant was nonetheless acquitted of the charge involving possession of the pipe). Further, the defence advanced – effectively that the appellant had managed to sell all his methamphetamine before the vehicle stop – was of limited merit. Finally, there was evidence before the jury in the form of the agreed statement of facts which made it clear that Ms X had dealt in methamphetamine, albeit after the vehicle stop.

[76] That said, the defence case was stronger if there was evidence that Ms X was offering methamphetamine for supply in the period leading up to the vehicle stop as the text messages indicated. In this respect, we disagree with the Court of Appeal's assessment that admission of these messages would not have had any material effect

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[77] In the course of the hearing, we raised the question of unfair trial with both parties.

on the case against the appellant, particularly given the focus at trial on the fact Ms X's fingerprints and not those of the appellant were found on items located in the car.

[77] More importantly, without the text messages, the case was presented to the jury on a basis (primarily that the methamphetamine was the appellant's) which was questionable on the evidence known to the Crown. Further, the Crown knew that the evidence was reliable, in the sense that it was authentic, and that without it the jury was being presented with an incomplete picture of material events leading up to the vehicle stop. Nonetheless, the admission of the evidence was resisted. Against this background, it was unfair that the appellant was prevented from placing before the jury evidence supportive of his defence.

[78] In response, the approach urged upon us by the respondent on the appeal is that the jury could have reached the same verdict on the basis the appellant and Ms X were in joint possession. The joint possession analysis was also a critical part of the Court of Appeal's reasoning. But this reasoning does not answer the fair trial issues. And, in any event, the difficulty we see with this analysis is that the prospect of joint possession was given only fairly cursory treatment at trial, so the appellant did not have a fair opportunity to address it.

[79] In opening, the prosecutor referred to the possibility of joint possession but that was obviously in anticipation of the defence raising that option. The prosecutor asked the jury "to bear in mind as long as Mr Haunui had effective custody and control of these items and he knew they were there, then he can be in joint possession along with [Ms X]".

[80] In closing, the prosecutor did refer to the prospect of joint possession in discussing the concept of possession. The point made was as follows:

> So, imagine for a second a situation a bit removed but a flatmate type situation. Say your flatmate's bought a packet of chocolate biscuits. You know that they are there in the shared pantry. You know what they are and they're somewhere that you could exercise control over them. You could go and take them from the pantry if you wanted to but you are not in possession of them though in this legal sense until you do intend to go and do something with them; lose them, have one, whatever, that sort of thing and clearly, both you and your flatmate can be in possession of those chocolate biscuits at the same time.

[81] But the Crown case was essentially advanced on the basis that the appellant had accepted that the drugs were his. Mr Bailey thus said in his closing address, that "to the extent the Crown now say, … [the appellant] could have been in sort of joint ownership or possession, it's a little bit rich. She's not here, he is."

[82] In the context of determining whether the erroneous exclusion of the messages has resulted in an unfair trial, we do not consider it would be right to effectively rely on a case which was, for all practical purposes, eschewed by the Crown.

[83] In these circumstances, we have concluded that an unfair trial under s 232(4)(b) of the Criminal Procedure Act has resulted. The appeal must accordingly be allowed.

Result

[84] The appeal is allowed. The convictions are quashed and a retrial is ordered.

[85] For fair trial reasons, an order is made prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest is permitted.

Solicitors:
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