



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

30 MARCH 2026

MEDIA RELEASE

BARRY JOHN BAILEY v THE KING

(SC 120/2024) [2026] NZSC 20

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

What this judgment is about

A finding of unfitness to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) involves three steps. First, a defendant found to be mentally impaired (on the basis of evidence from two health assessors) may also be found unfit to stand trial. Then, if found unfit, the court proceeds to the involvement hearing, inquiring into whether the defendant caused the act or omission that forms the basis of the offence for which the defendant is charged. Finally, if found to be involved, the court must make disposition orders under pt 2 subpt 3.

This judgment concerns whether applications for dismissal of charges (resulting in an acquittal) or stay of proceedings may be considered between the first and second step of the CPMIP Act process—i.e. when a defendant who has been found unfit to stand trial but not yet found to have committed the offending may instead seek dismissal of the charge or a stay of proceedings.

Background

Mr Bailey is alleged to have sexually assaulted three female pupils, all between six and nine years old at the time, between 1982 and 1989 while caretaker at a primary school. The Crown brought eight charges against him in relation to the alleged historical offending.

In June 2021, counsel for Mr Bailey advised the District Court he was in the process of obtaining a full health assessment of his client. In October 2021, counsel applied for dismissal of the charge under s 147 of the Criminal Procedure Act (CPA) on the ground that the “time that has elapsed since the commission of the alleged offences ... is such that it is not possible for the defendant to obtain a fair trial”.

After a health assessment showed Mr Bailey was suffering from a degenerative condition affecting memory, likely caused by Alzheimer’s disease, a direction was made that reports be obtained under s 38 of the CPMIP Act to ascertain whether Mr Bailey was fit to stand trial. The Court received reports from two health assessors who, by April 2023, both considered him unfit to stand trial due to Alzheimer’s-type dementia. Judge Kellar found him unfit to stand trial and directed an involvement hearing to take place in September 2023.

After Judge Kellar’s ruling but before the commencement of an involvement hearing, defence counsel renewed the October 2021 application for dismissal of the charges, citing prejudicial delay and Mr Bailey’s advanced age and mental frailty. The Crown resisted the application citing s 8A (and s 10) of the CPMIP Act, which says the court “must” inquire into the defendant’s involvement following a finding of unfitness to stand trial. On 17 August 2023, Judge Savage granted the defence application and dismissed the charges.

On 30 October 2024, the Court of Appeal allowed the Crown’s appeal and set aside Judge Savage’s order. It held that once the defendant is found unfit to stand trial, his mental impairment cannot be relied upon as a basis for stay under s 147 because that would circumvent the processes mandated by the CPMIP Act.

On 5 March 2025, this Court granted leave for Mr Bailey to appeal, the approved question being whether the Court of Appeal was correct to allow the Crown’s appeal.

Supreme Court decision

The Supreme Court has unanimously allowed Mr Bailey’s appeal. The primary judgment is given by Glazebrook, Ellen France, Williams and Kós JJ. Miller J concurs.

The primary judgment made four key points.

First, in a case where fitness to stand trial has not yet been determined, the CPMIP Act does not preclude a defendant from seeking dismissal or stay. The court may postpone the question of unfitness to allow the defendant to seek dismissal or stay. That is the legacy of the English case law and legislative reform preceding the CPMIP Act (at [70]).

Secondly, where the defendant has been found unfit, an application for dismissal or stay unrelated to the defendant’s mental impairment may proceed despite the CPMIP Act otherwise being engaged. The purpose of the statutory imperative in ss 8A and 10 is to compel the involvement hearing to always precede the imposition of disposition orders under the

CPMIP Act (at [71]). Not allowing applications for dismissal or stay in these circumstances is not the necessary effect of the CPMIP Act, bearing in mind ss 6 and 19 of the New Zealand Bill of Rights Act 1990 (at [66]).

Thirdly, where the defendant has been found unfit by reason of mental impairment, and the dismissal or stay application is wholly reliant on the same unfitness, that application cannot then displace the requirement of ss 8A and 10 that an involvement hearing take place (at [72]).

Fourthly, in cases where there is a measure of overlap between mental impairment, physical impairment and delay, all of which in combination have caused fair trial to become impossible, ss 8A and 10 do not necessitate use of the CPMIP Act pathway where other grounds apart from those within the scope of the Act are substantially engaged (at [73]). Where however the other grounds lack substance, the CPMIP Act process must be followed (at [74]).

Applying those principles in the present case, Mr Bailey was entitled to pursue an application for stay under the inherent jurisdiction, or dismissal under s 147, after he was found unfit, so long as (1) that application was not wholly reliant on the mental impairment on which the finding of unfitness was made and (2) other factors preventing fair trial were substantially engaged. Those prerequisites are met in this case, his application relying both on prejudicial delay and mental impairment. In addition, the medical reports identify (but do not assess) a series of physical disorders affecting Mr Bailey's capacity to participate in a trial (at [75]).

There were however two issues with the decision in the District Court. First, it was based primarily on the medical reports' findings, which are concerned with Mr Bailey's mental impairment. It did not expressly justify departure from the CPMIP Act process by identifying substantial other reasons why the application should be entertained (at [76]). Secondly, it did not consider the alternative of granting stay rather than dismissal (at [77]).

Glazebrook, Ellen France, Williams and Kós JJ therefore considered it necessary to remit the application for dismissal for further consideration by the District Court in light of this Court's judgment (at [78]).

Concurring, Miller J considered a judge should be reluctant to dismiss a charge under the CPA unless for evidential insufficiency (at [82]) and that a defendant who has been found unfit may pursue dismissal or stay on grounds independent of mental impairment (at [83]). He however differed in two respects from the principal judgment. As a matter of process, an application for stay must be based on grounds that are independent of mental impairment (at [84]). As a matter of evaluation, a judge deciding the application must stand back and ask as a matter of overall impression whether a stay would be granted were it not for the qualifying mental impairment. If the answer is no, the CPMIP Act must run its course (at [86]).

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