



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

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23 JUNE 2026

**MEDIA RELEASE**

TYSON WADE FRANCIS REPIA v THE KING

(SC 12/2025) [2026] NZSC 82

**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](http://www.courtsofnz.govt.nz).

**Suppression**

Publication of the name, address, occupation or identifying particulars of the complainant is prohibited by s 203 of the Criminal Procedure Act 2011.

**What this judgment is about**

Section 10(2) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act) provides that if before trial a defendant is found unfit to stand trial, the court must decide on the balance of probabilities whether the defendant “caused the act or omission that forms the basis of the offence with which the defendant is charged”.

Mr Repia was charged with sexual violation. The core factual elements of sexual violation for present purposes are three: (1) intentional penetration; (2) absence of complainant consent; and (3) absence of reasonable belief by the defendant that the complainant consented.

The question posed by this appeal is whether the third element is one the Crown is required to establish at a s 10 involvement hearing.

**Background**

Mr Repia faced three charges of sexual violation in the District Court arising from an incident in October 2019 when he and the female complainant were inpatients in the same mental health unit. It is not in issue that intentional penile and digital penetration occurred and that the complainant did not consent to any of it. Those acts would constitute sexual violation, so

long as the Crown could also prove Mr Repia did not believe on reasonable grounds that the complainant consented.

In August 2020, the District Court found Mr Repia unfit to stand trial. He suffered from schizophrenia and psychosis. His thought processes were disorganised, and he had poor insight into his mental illness. The Court traversed difficulties arising particularly from Mr Repia's disorganised thought processes. In accordance with s 10(1), an involvement hearing was convened.

### **Lower Courts**

In April 2021, the District Court found the evidence was sufficient to establish Mr Repia's involvement in the alleged offending under s 10. The prosecution was only required to prove non-consensual penetration. Whether Mr Repia had a reasonable belief the complainant was consenting was not relevant to the inquiry.

In June 2022, the High Court upheld the District Court finding of involvement. The High Court agreed that in cases of penetrative sexual violation, the involvement inquiry is limited to whether non-consensual penetration took place. However, objective evidence of accident, mistake or self-defence should still be considered where it arises.

Mr Repia also argued in the High Court that the District Court's earlier refusal to admit a doctor's file note containing Mr Repia's statements regarding his belief in consent was an error. The High Court disagreed, because that belief was not relevant, and the contents of the file note could not in any case be characterised as objective evidence.

In April 2024, the Court of Appeal dismissed Mr Repia's second appeal. It held that while an involvement hearing may extend to mental elements integral to the actus reus, or defences like mistake or self-defence when supported by objective evidence, proof of subjective mental states is not required. Reasonable belief in consent is not inherent in the actus reus and therefore does not arise for consideration at the involvement hearing. It agreed with the High Court on the status of the doctor's file note.

### **Supreme Court**

In May 2025, this Court granted leave for Mr Repia to appeal. The approved question was:

... whether the Court of Appeal was correct to dismiss the appeal on the basis that Mr Repia's reasonable belief in consent was excluded from inquiry in the involvement hearing under s 10 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

The Court has unanimously dismissed Mr Repia's appeal.

*Ellen France, Kós and Miller JJ*

Ellen France, Kós and Miller JJ held that while the text of s 10(2) does not necessarily confine the involvement inquiry only to proof of physical elements of the offending, it does make it clear that something less than full proof of the relevant offence was intended (at [43] and [70]). To the extent the proper construction of s 10(2) imposes an extended probative burden on the Crown that goes beyond the pure actus reus, the scope of that burden must be defined by the essential purpose of the provision (at [44]). It is clear from the legislative history that the

broad purpose of s 10(2) is to remove from the CPMIP Act process those persons whose continued subsection to the criminal justice process cannot reasonably be justified by reference to their proven conduct (at [46]).

Ellen France, Kós and Miller JJ found a number of rights in the New Zealand Bill of Rights Act 1990 and Convention on the Rights of Persons with Disabilities were engaged (at [47]–[49]). While the involvement inquiry is different from a criminal trial, the full force of the protections enshrined in our criminal justice system, and most importantly those found in the Bill of Rights, applies (at [50]). Section 10(2) must be interpreted so as to preserve safeguards inherent in the ordinary criminal process unless clearly excluded (at [51]).

Ellen France, Kós and Miller JJ held that limitation of the subject matter of a s 10 involvement hearing to actus reus elements alone would be neither practicable, consistent with the statutory purpose nor consistent with protected rights under the Bill of Rights (at [62]).

Composite elements that raise both actus reus and mens rea elements cannot sensibly be detached and excluded from assessment of whether the defendant caused “the act or omission that forms the basis of the offence”. The more rights-consistent approach is to insist the Crown demonstrate a composite element also (at [63] and see [65]). In the present case, absence of reasonable belief in consent involves a mixture of subjective and objective belief. The Crown may meet it by establishing the absence of honest belief in consent, but the usual and simpler route is to establish that any belief in consent could not on all the evidence be reasonable anyway, which involves an assertion of objective fact (at [64]). It follows that the mens rea element of absence of reasonable belief in consent involves an assertion of objective fact that the Crown must also establish in an involvement hearing (at [65]). Similarly, where there is reliable evidence providing foundation for a defence or excuse such as mistake, self-defence or accident, then the court should not find the accused involved unless satisfied that the prosecution has negated that defence or excuse (at [67]).

However, for the same reason Parliament limited the scope of the Crown’s burden under s 10(2), a defendant unfit to stand trial will ordinarily be unable to rely on evidence of the same mental condition rendering him or her unfit as evidence negating involvement and responsibility. In a case of sexual violation, he or she cannot ordinarily rely on it to contest absence of reasonable belief, or by way of defence or excuse negating involvement and responsibility (at [68]). Where, however, an objective, independent basis exists for asserting reasonable belief in consent, a defendant ought to be able to make that case at a s 10 involvement hearing, and the Crown must disprove that possibility on the balance of possibilities (at [69]).

In summary, the scope of s 10(2) is not confined only to actus reus elements alone. Nor does it embrace all mens rea elements. Composite elements which include both physical and mental aspects fall within s 10(2). So do mens rea elements involving an assertion of objective fact such as the absence of reasonable belief in consent. Where an objective, independent basis exists for asserting a reasonable belief in consent, the Crown must disprove it on the balance of probabilities (at [71]).

In Mr Repia’s case, on the clear evidence of resistance, refusal and protest by the complainant, only his impairment might explain his contrary apprehension as to consent. The file note was irrelevant and inadmissible as it was self-reporting evidence affected by that impairment

causing his unfitness to stand trial. The District Court would certainly have been entitled to conclude that the Crown had demonstrated absence of reasonable belief in consent (at [74]). The appeal therefore had to be dismissed (at [76]).

### *The Chief Justice*

The Chief Justice, concurring, disagreed as to Ellen France, Kós and Miller JJ's interpretation of s 10(2). However, no different outcome would have resulted had the District Court applied the legal analysis she preferred (at [78]–[79]).

The Chief Justice agreed with Ellen France, Kós and Miller JJ that the operation of s 10(2) engages rights affirmed in the Bill of Rights and the Convention (at [83]–[86]). She considered that the statutory purpose, when construed in accordance with the Bill of Rights and with New Zealand's international obligations, supports a construction of s 10(2) which requires the Crown to satisfy the judge of all of the elements of the offence including mens rea elements, subject only to the proviso that the Crown need not prove a mens rea element where the deficiency in proof in the Crown case in that regard, or any doubt raised by the defence in that regard, is attributable to the defendant's mental impairment (at [89]).

That is because the language of s 10(2) is both opaque and incomplete. As a consequence, it provides no clear guidance as to the operation of the provision in all the circumstances in which it is to be applied (at [80], [81] and [90]). The language of the provision makes clear that the section permits less than full proof of all elements in some circumstances (at [92]). But a less rights-infringing interpretation than Ellen France, Kós and Miller JJ's remains available, consistent with the text and purpose of the provision and the Bill of Rights (at [94]). To the extent that the fitness of the defendant does not bear upon the ability of the Crown to discharge its burden, there is no justification for relieving the Crown of that burden (at [95]).

### *Glazebrook J*

Glazebrook J, concurring, preferred to approach the issue solely on the basis of principle and in respect only of sexual violation (at [96] and n 123). She agreed with Ellen France, Kós and Miller JJ that a finding of involvement may result in significant restrictions on the person's liberty and their views as to the broad purpose of s 10(2) (at [98]).

In the context of sexual violation, the Crown must prove a lack of reasonable belief in consent where there is an evidential foundation for the proposition that there may have been such an honest belief on grounds that do not relate solely to the person's incapacity (at [99]). Evidence tending to show honest belief in consent could include a person's statement before they became incapacitated, text or social media messages, or evidence elicited from other witnesses (at [100]). In this case, Mr Repia's contrary apprehension as to consent could only have resulted from his impairment, and so the appeal had to be dismissed (at [101]).

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