IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CRI-2020-425-000025
[2021] NZHC 1035

BETWEEN	FRASER WRIGHT MADDIGAN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 15 October 2020

Appearances: Appellant appears in person
R Donnelly for the Respondent

Judgment: 11 May 2021

JUDGMENT OF NATION J

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[1] Fraser Maddigan was charged by Police for breaching the Civil Defence Emergency Management Act 2002 (CDEMA).[1] The offence occurred on 2 April 2020 and the offence description is as follows:

> While a state of emergency was in force, having been previously warned by a constable to abide by Government restrictions during the state of emergency, refused by travelling out of his living area, without reasonable excuse.

[2] On 2 April 2020 in the District Court at Invercargill, Mr Maddigan pleaded guilty to the charge. He was sentenced to a fine of $1,000 and ordered to pay court costs of $130.[2] He appeals his conviction.

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1 Specifically, with failing to comply with a direction given by a constable under ss 102 and 91 of the Civil Defence Emergency Management Act 2002.

2 *Police v Maddigan* [2020] NZDC 5743.

Summary of Facts

[3] I set this out in full:

> **INTRODUCTION**
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> In response to the COVID-19 pandemic an epidemic notice was issued effective 25 March 2020 under s 8 of the Epidemic Preparedness Act 2006.
>
> New Zealand has been at COVID-19 Alert Level 4 – Eliminate, since 11:59 pm, 25 March 2020.
>
> A state of national emergency was declared effective from 12:21pm Wednesday 25 April. This will last for 7 days until 12:21pm on Wednesday 1 April and may be extended.
>
> **CIRCUMSTANCES**
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> The defendant Fraser Wright MADDIGAN's home address is […][3] where he had been self-isolating with [his family].
>
> On 30/03/2020 in the Queenstown area the defendant was spoken to by Constable JF7630 in relation to COVID-19 Self-Isolation and/or a L4 Lock-Down Breach.
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> The breach was treated as an education contact and COVID-19 'Lock Down' requirements were explained/reiterated.
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> The defendant was told he had to leave town and return to his home address by the morning and warned of arrest.
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> On 31/03/2020 in the Te Anau area the defendant was spoken to by Constable SWF466 in relation to a COVID-19 Self-Isolation and/or a L4 Lock-Down Breach.
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> The breach was treated as an educational contact and COVID-19 'Lock Down' requirements were explained/reiterated. The defendant was also directed multiple times to return to his home address immediately.
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> At about 9.30am on 01/04/2020 the defendant was seen driving towards Te Anau on SH94 the Te Anau Milford Highway.
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> The defendant was stopped and arrested in relation to the breaches.
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> **DEFENDANT COMMENTS**
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> In explanation the defendant stated he was having a break from home and self-isolating in his car in Fiordland, as well as doing some reconnaissance for his work in pest control.

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[3] In the District Court, the Judge suppressed details of that address for the benefit of the other occupants of the home address. In recognition of that, the address is not mentioned in this judgment.

The District Court decision

[4] Judge Farnan noted that Mr Maddigan had been charged with failing to comply with the CDEMA level 4 requirements which had "been imposed upon all citizens in New Zealand in response to the COVID-19 pandemic".[4]

[5] The Judge said:[5]

> [2] The situation arose when the defendant chose to leave his home address in Christchurch and travel to Queenstown, in the first instance. His rationale for doing so is that matters had got somewhat fraught for him at his usual Christchurch address and he thought the best course of action was to simply self-isolate on his own in his vehicle. The vehicle itself was not self-sufficient; it was simply a standard sedan.

[6] The Judge referred to the warning given to Mr Maddigan in Queenstown, that he should return to his home address by the next day and that there would be consequences if he failed to do so. The Judge then said:[6]

> [4] When Mr Maddigan had arrived in Queenstown, he had filled his car with petrol, he says, through a card-only petrol tank, and he had gone to a supermarket where he had taken isolation measures to make sure that he was not a risk to any person at the supermarket.
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> [5] After having received the warning, Mr Maddigan did not return to Christchurch, but rather he travelled towards the Te Anau-Milford area.
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> [6] He was found in the Te Anau area on 31 March 2020 and was again given an educational warning about returning to Christchurch. The defendant said at that stage he was going to return to Christchurch, but thought he should do so the next day, or later, because it was late at night when he received the second educational contact.
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> [7] The next day he was found on the Te Anau-Milford highway, travelling towards Te Anau. It was then that he was stopped and arrested.

[7] The Judge noted Mr Maddigan was a first offender, able to pay a fine and had pleaded guilty at the earliest opportunity. She then sentenced him by way of the fine and ordered that he pay court costs. She made a suppression order as to his Christchurch address and the occupants so they would not suffer any consequences because of Mr Maddigan's behaviour.

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4 *Police v Maddigan*, above n 2, at [1].
5 *Police v Maddigan*, above n 2.
6 *Police v Maddigan*, above n 2.

[8] On 29 April 2020, Mr Maddigan emailed an approximately four page typed document to the Registry at the Invercargill District Court requesting a rehearing of his case. Mr Maddigan detailed his complaints as to the unreasonableness of the lockdown requirements in his particular circumstances, the Police process and the way the Police had dealt with him.

[9] In a carefully reasoned decision, Judge Farnan said she could not find that a miscarriage would occur if a rehearing was not granted.[7] She declined the application but said, as to points in the application, the appropriate forum to deal with them was by way of an appeal.[8]

Mr Maddigan's appeal

[10] In a notice of appeal filed on 10 August 2019, Mr Maddigan specified the grounds of his appeal as:

* Incorrect information in original Police 'Summary of Facts'
* I was not able to be heard (say anything of influence) @ original hearing in Invercargill.
* I was 'heading home' when arrested so my actions were following Police instructions @ the time.
* Wrong charge – confusion over charge – no one knew what I was being charged for.
* First 9 days of lockdown – No law in place for Police to enforce.
* Bail was denied for no reason or reasons that contradict Bail Act.

Appellant's submissions

[11] Mr Maddigan represented himself at the hearing of the appeal. He filed written submissions on 29 September 2020 and expanded on those orally when he appeared in the High Court at Christchurch. Mr Maddigan did not appreciate the way in which submissions had to be based on evidence which was properly before the Court, especially after a guilty plea had been entered. The hearing of the appeal could not be used as an opportunity to present his case as if it was a first trial on the charge he faced.

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7 *Police v Maddigan* CRI-2020-025-000546, 14 July 2020.
8 At [50].

The Court nevertheless gave him significant latitude in the arguments he wished to present to ensure it was informed as to why he was aggrieved at being required to comply with lockdown restrictions in the manner the Police required of him, and the way he considered he had been dealt with by the Police and the District Court.

[12] I summarise his arguments:

(a) With the judgment of the full High Court in *Borrowdale v Director-General of Health*, it has been held the first nine days of the lockdown were unlawful.[9] Additionally, in their judgment, the High Court had said, with regard to powers that could be exercised under the CDEMA:[10]

> We think it unlikely that a failure of an individual or group of individuals to stay at home would constitute an activity "that may cause or substantially contribute to an emergency".

(b) The Police and the District Court failed to consider that Mr Maddigan was clearly "self-isolating" in his "own way, given the situation".

(c) The Police had not been consistent in the way they dealt with people who had not complied with lockdown restrictions. Mr Maddigan referred to situations mentioned in the media where individuals or groups appeared to have been in breach of lockdown restrictions and apparently not prosecuted.

(d) There was confusion and inconsistency about what people could and could not do at the start of the level 4 lockdown. Mr Maddigan knew he and his family needed to self-isolate so he chose to self-isolate in his car as a second home amongst the mountains.

(e) The CDEMA did not apply because it relates to natural disasters. The Health Act had been relied on to declare a state of national emergency but the High Court in *Borrowdale* had held the Health Act 1956 had not empowered the restrictions imposed by the lockdown over the first nine days.

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9 *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [2.40].
10 At [221].

(f) In purporting to exercise powers under the CDEMA in giving a direction to return to Christchurch, the Police had to be acting reasonably. They were not acting reasonably because they failed to take into account that Mr Maddigan was following "self-isolation", staying in his bubble and was in remote mountains where he was not "causing or substantially contributing to an emergency".[11]

(g) The Police never asked him if he had COVID-19 symptoms, had arrived from overseas, could be carrying COVID-19 or anything to that effect.

(h) There were reports in the media as to opinions expressed by Simon Bridges and others questioning whether the Police had the legal power to arrest people for not staying at home.

(i) The Police failed to tell the District Court Judge that, at the time he was arrested, Mr Maddigan was complying with the Police direction in that he was driving back to Christchurch.

[13] In oral submissions, Mr Maddigan said, after being told on 31 March 2020 he must return to Christchurch, he decided it would not be safe to do so at that time, so remained where he was. He said he was in the process of driving back the following day when he was stopped and arrested by the Police. In his written submissions, Mr Maddigan said "I believe the [p]rosecutor chose to hide this crucial evidence in an attempt to convince the Judge [I] was equally as bad as the mosque shooter". He said he had not been allowed to speak about this at the hearing in the District Court. He said the summary of facts was "false and hearsay". He said he had been unfairly denied bail by the Police and the Court. Mr Maddigan said he pleaded guilty as it was his "only hope".

[14] In his written submissions, Mr Maddigan said, at the time he was arrested, he was driving home and adhering to Police requests:

> … and yet the Judge and Police thought [I] was still such a huge risk that [I] should be locked up for at least 2 more weeks. It is madness. Of course [I] pled guilty as it was my only hope. But it was a massive failing of the system and [I] will not accept it. The Police went far too far, they abused their powers

[11] Assumedly with reference to [12](a) above.

> like they so often do. I will make sure they learn a valuable lesson from this … we will never give in and one day [I] will succeed.

[15] After the appeal hearing, I listened to a recording of what had been said when Mr Maddigan appeared on this charge before the Judge in the Invercargill District Court. I provided a transcript to both Mr Maddigan and counsel for the Crown and gave them the opportunity to make further submissions.[12] Mr Maddigan filed further written submissions on 12 November 2020. Mr Donnelly filed supplementary submissions on 18 November 2020. In response, Mr Maddigan filed further submissions on 24 November 2020. I have already referred to a number of the submissions made by Mr Maddigan but, in addition, Mr Maddigan submitted:

(a) the Police had not established or provided proof that he "was a substantial risk to public health or a significant contributor to the public health emergency". Given the statement of the High Court, referred to in [12](a) above, the High Court had ruled his actions of "not staying at home" would not cause or add significantly/contribute to the health emergency;

(b) Judge Farnan had incorrectly stated in the District Court that it was legal for Mr Maddigan to be arrested, detained in custody and denied his right to bail;

(c) Mr Maddigan referred to various statements in the media from a lawyer and a professor from the University of Canterbury Law School that were critical of the apparent uncertainty as to the extent of Police powers and just what the Police guidelines were as to how Police would intervene to enforce the lockdown;

(d) there had been confusion over the legislation under which he had been arrested. The original arrest summary had stated he was arrested under the Health Act. It was only when he was in custody that this was changed to his being arrested under the CDEMA;

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[12] The transcript did not include record of a brief exchange between Mr Maddigan and the duty solicitor where there was discussion of a possible sentence indication.

(e) Mr Maddigan was an essential worker through his business Pest Control Solutions Ltd. The Judge had asked if he had proof of this. He said he replied something along the lines of "I just have email proof but no physical proof at the moment" and the Judge subsequently dismissed this information. Mr Maddigan says he had received an MPI essential worker number 20000000149. As an essential worker, he was lawfully allowed to leave home;

(f) consistent with the argument referred to in [12](c), Mr Maddigan referred to media mention of situations where people or groups had failed to comply with lockdown rules. In this further submission, Mr Maddigan said:

> If the Police fail to charge other people committing clearly much worse acts, then I will not accept conceding here. Fairness, consistency and clarity are hallmarks of a democratic legal system.

(g) denial to his right to bail was unlawful and unreasonable. He was bailable as of right. The Judge had been incorrect in saying he would continue to be detained in custody if he did not enter a guilty plea. The Judge and Police were wrong to use his continued detention due to COVID-19 health risks as a protective health measure to override Bail Act 2000 rights. The Judge had been in error in saying he would be detained in custody in Invercargill Prison for two weeks and denied his right to bail; and

(h) there was misleading information in the Police bail opposition form through it not referring to the fact that, at the time of his arrest, he was in the process of returning home and following the Police direction he had been given the night before.

[16] For the Crown, Mr Donnelly provided supplementary submissions after the transcript of the hearing in the District Court was made available to him. In these submissions he noted the Police opposed bail and suggested it was incumbent on the District Court Judge to consider whether there was just cause for continued detention under s 8 of the Bail Act. There was no mention of the fact that Mr Maddigan was bailable as of right under s 7(2) of the Act.

[17] Other submissions for the Police are reflected in what follows below.

Appeal against conviction following guilty pleas

[18] The Court of Appeal authoritatively discussed the circumstances in which the Court might allow an appeal against conviction following a guilty plea in *Gleason-Beard v R*.[13] The Court said:

> **The law**
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> [21] As this is an appeal against conviction, it falls to be considered under s 232 of the Criminal Procedure Act 2011. The relevant provision in this case is s 232(2)(c) which requires an appellate court to allow an appeal where there has been a miscarriage of justice for any reason. A miscarriage of justice means:
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> > (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.
> >
> > …
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> [22] Where the conviction follows a guilty plea, the appeal threshold has been described in the following terms:
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> > [16] … it is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. …
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> [23] Those exceptional circumstances include three broad categories discussed by this Court in *R v Le Page*:
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> > (a) where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;
> >
> > (b) where on the admitted facts the appellant could not in law have been convicted of the offence charged; or
> >
> > (c) where the plea was induced by a ruling which embodied a wrong decision on a question of law.

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13 *Gleason-Beard v R* [2018] NZCA 349, [2018] 3 NZLR 699 (emphasis original)

[24] The third category includes circumstances where a judge rules there is insufficient evidence for a particular defence to be left to the jury.9 However, a guilty plea will be set aside in the circumstances of an adverse ruling only if there is no other option for a defendant other than to plead guilty.10

[25] A fourth category, where trial counsel errs in the advice given as to the non-availability of certain defences or potential outcomes, was more recently adopted in *R v Merrilees*. This Court noted:

> [35] It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. Later regret over the entering of a guilty plea is not the test as to whether that plea can be impugned. If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

[26] In these circumstances, the appellant must raise a defence of "some substance". There is conflicting authority as to the threshold the defence must meet. In *Cooper v R*, this Court declined to set a particular threshold and refused to adopt the Crown's submission that the appellant must show the defence has good prospects of success. More recently in *Nixon v R*, this Court stated mere assertions were not enough and a "real case for the defence must be established". Having said that, the Court then cited the following passage from *Penniket v R*, indicating that the "real case" comment does not elevate the threshold but rather requires there be more than the mere existence of a possible defence:

> [8] … The existence of a defence at the time of the guilty plea, even a possibly viable defence, is not alone enough to allow a change of plea. There may be defences that could be run, but which are put to one side because they are unlikely to succeed, or carry other disadvantages. In the absence of material counsel error, such decisions cannot be revisited on appeal save in rare circumstances. The sole fact that a possible defence was known to exist at the time the appellant pleaded guilty does not on its own show a miscarriage of justice.

[27] Other categories of exceptional circumstances for allowing an appeal against conviction following a guilty plea have been accepted in principle. To give one example, the Supreme Court in *Wilson v R* stated:

> [104] We accept Mr Cook's submission that the summary in *Le Page* is incomplete because it does not recognise the possibility that a conviction following a guilty plea may be quashed on appeal (and no retrial ordered) where there is an abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system. In principle, where an abuse of process by the police or prosecuting authorities is sufficiently significant to justify the granting of a stay, the fact that a defendant has entered a guilty plea should not prevent him or her from appealing against conviction in reliance on the abuse of process. The entry of the stay in this type of case indicates that the prosecution should not have gone to trial for reasons based on the public interest. The fact that a conviction results from a guilty plea rather than a trial should not change the position, at least in principle.

(footnotes omitted)

Discussion

The hearing in the District Court

[19] The transcript from the District Court hearing recorded that, from the outset of his appearance in the District Court, Mr Maddigan had the benefit of assistance from the duty solicitor, Mr Slater. In refusing a rehearing, the Judge said Mr Slater is senior counsel, appearing regularly in the District Court over many years with significant trial experience.[14]

[20] The Judge asked Mr Slater if Mr Maddigan had indicated what his intentions were. Mr Slater indicated Mr Maddigan wished to apply for bail and return to Christchurch.

[21] Mr Maddigan was then called into Court. In Mr Maddigan's presence, Mr Slater said Mr Maddigan was appearing on a charge laid under the CDEMA where it was alleged he had failed to comply with directions that had been given to him under powers granted to constables under ss 91 and 94M of the CDEMA.

[22] Mr Slater said opposition to bail had been filed by the Police. He noted that s 8 of the Bail Act applied and Mr Maddigan was bailable as of right. Mr Slater however said the Court has the power to deny bail if it considered there was just cause for Mr Maddigan's continued detention.

[23] Mr Slater then summarised the factual background, as apparent from the opposition to bail and the summary of facts.

[24] Mr Slater then advised the Judge of the instructions he had received and of Mr Maddigan's reasons for leaving his home and family in Christchurch. Mr Slater explained the steps Mr Maddigan had taken to avoid contact with people when filling up with petrol in Queenstown and when shopping at a grocery store in Queenstown. Mr Slater said Mr Maddigan was isolating in his vehicle by the foreshore at Queenstown when he received an educational instruction from a police officer.

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[14] *Police v Maddigan*, above n 2, at [2].

Mr Slater told the Judge that Mr Maddigan was self-isolating in his motor vehicle, coming into contact with no one else.

[25] On a query from the Judge, counsel said the vehicle was not self-contained, it was just a car, but Mr Slater said Mr Maddigan had food and did not necessarily need to cook at all. Mr Slater told the Judge that Mr Maddigan left Queenstown after receiving the educational instruction and went to Te Anau because he said he had some work in the area involving pest control. The Judge inquired further into why, instead of returning to Christchurch, Mr Maddigan had decided to go to Te Anau. There was some discussion about Mr Maddigan having heard of a group of tourists who he heard had been allowed to travel to get closer to an airport, but Mr Slater noted Mr Maddigan was not waiting on a plane. While he was in the area, Mr Maddigan decided he would go over to Te Anau and look at the area where he had previously been involved in pest destruction. Counsel then emphasised Mr Maddigan was self-isolating in his motor vehicle and avoiding contact with anyone.

[26] Mr Slater told the Judge that, after Mr Maddigan was spoken to at 8.30 pm on 31 March 2020, about 17 km north of Te Anau on the Milford Road, and was educationally instructed he should head back to Christchurch, Mr Maddigan did not feel it was safe for him to make the trip back to Christchurch. Instead, he found himself an isolated place and slept in the car that night. Mr Slater said, on the day Mr Maddigan was arrested, he was heading to Te Anau so he was going from the Milford direction to Te Anau. This was on his way back to Christchurch.

[27] Mr Slater acknowledged there were comments made in the opposition to bail suggesting Mr Maddigan might have been somewhat vocal in some of the things he said when stopped by Police.

[28] Mr Slater advised the Judge that, at the time Mr Maddigan spoke to the Police on 1 April 2020, the Police had started searching his vehicle. Mr Maddigan said they were questioning him about items he had in the vehicle and it was not being dealt with in a calm, measured and kindly way. He was arrested.

[29] Mr Slater explained to the Judge that Mr Maddigan was resigned to heading back to Christchurch, but had a practical difficulty in doing that because, following his arrest, his vehicle was at the Te Anau Police station. In the course of discussing how that had come about, Mr Slater said, as Mr Maddigan saw it, he had been in his own separate bubble, remaining completely separate and having no contact with anyone other than the Police.

[30] Mr Slater concluded the discussion about bail by saying Mr Maddigan was happy to go back to Christchurch, report to the Police in Christchurch if necessary and go back into isolation with his family in Christchurch.

[31] The Judge then made her bail decision. She referred to s 8 of the Bail Act and the onus being on the prosecution to show good cause for his continued detention. She said there was no information to suggest Mr Maddigan would fail to appear apart from his failure to comply with the educational directions he had received from the Police. She said there was no material to suggest he would interfere with witnesses. The Judge considered the main plank of the Police opposition to bail was the likelihood of "further offending". The Judge referred to Mr Maddigan's decision to leave the family home in Christchurch, the contact he had with the Police in Queenstown on 30 March 2020 and in the Te Anau area on 31 March 2020, his failure on those occasions to comply with Police directions and his later arrest on 1 April 2020. The Judge referred to his explanation for these events, as mentioned by Mr Slater, including Mr Maddigan's decision to rest up before heading to Christchurch after receiving the direction to drive back to Christchurch on the evening of 31 March 2020.

[32] The Judge concluded:

> I have considered this matter carefully Mr Maddigan. Mr Slater has addressed me in significant detail in respect of your circumstances. However, it is clear that you took a belligerent attitude to the Police when you were stopped by them and arrested. I do not accept that your reasons for travelling as far from Christchurch in this time of Government restrictions is a valid reason for being in the areas in which you have been in. Even if you were justified in travelling to [sic] Christchurch in the first instance, it is clear from the information before me that you had simply no intention of then complying with the regulations. If you were minded to comply with the regulations after your first educational warning, you would have immediately got in your vehicle, which by then, on your information conveyed to Mr Slater, was full of petrol and you had the means of travelling back to Christchurch.

> I formed a clear view, considering how clear our Government has been to all citizens of New Zealand regarding the need to isolate in their local area and to be extremely careful about what they do, that your leaving Christchurch in the manner in which you had left and then having all of the warnings from the Police, that you have no intention of complying with the law and therefore, in my view, the Police have made out a case for your continued detention which they have satisfied me on the balance of probabilities. Therefore you are remanded in custody.

[33] The Judge then said they needed to consider the length of the remand. She asked Mr Slater to have a further discussion with Mr Maddigan and said, on an intimated guilty plea, the matter could be transferred to Christchurch and he could be taken to appear in Christchurch. The Judge then stood Mr Maddigan down for him to have a further discussion with Mr Slater.

[34] When the hearing resumed, Mr Slater said on behalf of Mr Maddigan that he was keen to avoid him being put in an infectious environment and was concerned there could be a risk of that with the Invercargill Prison. He said he had spoken to Mr Maddigan. Mr Slater indicated there could be value in a sentencing indication.

[35] The Judge indicated that, with a maximum penalty of three months' imprisonment and a first offender, a fine or order to do community work could be expected. Mr Slater said that would be the position he would advance. The Judge asked if Mr Maddigan was in a position to pay a fine. In response to that, Mr Slater said Mr Maddigan wished him to emphasise that, on 31 March 2020, he had decided to stay in Te Anau for the night and had self-isolated in his vehicle. Mr Slater emphasised that, when he was arrested, Mr Maddigan told the constable he was on his way home, complying with the instructions given the night before. Mr Maddigan then added that this was crucial. The Judge acknowledged he had made that clear to her.

[36] Counsel then had the Judge confirm, if there was a guilty plea, Mr Maddigan could expect a fine or community work. The Judge asked again if he could afford a fine.

[37] There was a brief exchange between counsel and Mr Maddigan in the courtroom to discuss what had been said. Mr Slater then asked the Registrar to put the charge to Mr Maddigan. Mr Maddigan thanked Mr Slater. The Registrar then read out to Mr Maddigan:

> Fraser Wright Maddigan, you are charged on the first day of April 2020 at Te Anau, while a state of emergency was in force, having been previously warned by a constable to abide by Government restrictions during the state of emergency, you refused by travelling out of your living area without reasonable excuse. How do you plead, guilty or not guilty?

[38] Mr Maddigan replied "I am guilty your Honour".

[39] The prosecutor then read out the summary of facts. Mr Maddigan interrupted the reading of the statement when there was reference to his being stopped while driving on 1 April 2020, seemingly to add that he was "returning home". When the statement was finished, Mr Maddigan asked if he could say something more. The Judge permitted him to do so. Mr Maddigan then referred to his business. Mr Maddigan told the Judge that his "pest control business supplies the agricultural sector so essentially it is essential work as well and MPI have given an email to register as an essential supplier".

[40] In response to a query from the Judge, Mr Maddigan acknowledged he did not have a letter from MPI at the time of his travels. The Judge then proceeded with the sentencing. She referred to the background events as already discussed. The Judge convicted Mr Maddigan and fined him $1,000 plus court costs of $130.

[41] It is apparent from a careful review of what happened in Court that:

(a) Contrary to his assertion that he was not able to tell the Court he had been in the process of driving back to Christchurch when he was stopped on 1 April 2020, he had in fact been able to do so. He thus pleaded guilty to the charge knowing this was his explanation for what he was doing at the time he was stopped.

(b) He did plead guilty when he knew he was to be remanded in custody but it cannot be said he pleaded guilty for just that reason. He knew, with a plea of guilty, he was likely to be fined, a penalty which in the circumstances was acceptable to him. He would be able to make whatever arrangements that were needed to recover his vehicle and then drive back to Christchurch.

(c) Given the comments Mr Maddigan made in Court at the time he decided to enter his guilty plea, it cannot be said he demonstrated that he had been subjected to improper pressure in deciding to plead guilty. He was content with his entering a guilty plea and being fined as a way of bringing the proceedings to an end.

(d) It is apparent from the transcript of the hearing in the District Court and Mr Maddigan's written submissions both to this Court on appeal and to the District Court when he applied for a rehearing, that he understood he was being charged with failing to comply with a direction from a Police constable. The direction was that he return to his home in Canterbury. He understood the direction that had been given to him. His complaint is that the constable's direction was unreasonable. He does not assert he did not understand the charge. With his plea of guilty, he admitted the charge he faced.

(e) Contrary to what Mr Maddigan submitted on his appeal, there is nothing in the record of what happened at the time of his District Court appearance to suggest the summary of facts was, as he asserts "a pack of lies". The summary of background events leading up to his arrest was consistent with Mr Maddigan's account of what happened, as conveyed to the Court by the duty solicitor to whom Mr Maddigan had given detailed instructions. Mr Maddigan had been able to give the duty solicitor detailed instructions as to the situation he was in and the background to it. The duty solicitor did convey to the Judge Mr Maddigan's instructions as to his explanation for the situation that had arisen. That explanation is consistent with Mr Maddigan's submissions on appeal. The duty solicitor emphasised the fact Mr Maddigan said he was going home at the time he was arrested.

(f) The information before the Court at the time and as apparent from the detailed way in which Mr Maddigan has prosecuted his appeal indicates he was a person of strong opinions, confident of his ability and his right to decide for himself how he should deal with the situation he was in.

[42] I consider this was a situation where Mr Maddigan fully appreciated the claimed merits of his position. He knew of the explanation he had for being in the car where and when he was stopped on 1 April 2020 and of the potential for him to claim that, at that time, he was complying with the direction given earlier by the Police constable. He made an informed decision to plead guilty, knowing what the consequences would be.

[43] Mr Maddigan submitted the Judge said he would continue to be detained if he did not enter a guilty plea. He also submitted there was confusion as to what he was charged with because, in the Police opposition to bail form, it had been said the maximum sentence was six months' imprisonment while in other documents the maximum sentence was said to be three months' imprisonment.

[44] There was no confusion over the charge Mr Maddigan was facing and the charge to which he pleaded guilty.

[45] The Judge did not say to Mr Maddigan he would be detained in custody if he did not plead guilty. She made the decision about bail with the assumption that he would not be pleading guilty and would have to be remanded for a further appearance. There was nothing in the way the Judge dealt with bail to suggest she denied bail so as to pressure or induce Mr Maddigan to plead guilty. She made her decision about bail assuming it was a decision she was legally free and required to make and with the assumption that the proceedings would continue at some future date, still to be arranged.

[46] Having decided in the circumstances that Mr Maddigan would not be bailed, the Judge gave him the opportunity to discuss with the duty solicitor the possibility of his entering a guilty plea and his then being transferred to Christchurch for a next appearance. Again, there was nothing improper in the Judge giving Mr Maddigan that opportunity.

[47] The Judge refused bail after considering the prospect of Mr Maddigan offending while on bail by refusing to abide by lockdown restrictions and directions that might be given by Police to enforce those restrictions. Mr Maddigan's intention, as conveyed to the Court by the duty solicitor, of returning to Christchurch and to the family home, were weighed against his conduct in refusing to comply with the previous directions of the Police to return home, Mr Maddigan's belligerent attitude towards the Police, and his firm view that he was entitled to decide for himself how he would self-isolate.

[48] It was apparent from the Police opposition to bail that, when Mr Maddigan was directed to return to Christchurch on the night of 31 March 2020, he "told police to f… off and he doesn't give a f… about police or what they say". When directed to go back to Christchurch, he asked the Police if he could go to a point past where he had been stopped and stay there the night. He was directed several times to travel home. Despite that, he was last seen by the constable travelling on the Te Anau/Milford Highway towards Milford. The point at which he had been stopped and given that direction was about 16 km from Te Anau on the Milford Road. On 1 April 2020, when he was stopped and arrested, he was at a point roughly 30 km from Te Anau. He had thus not only refused to comply with the direction to return to Christchurch but had in fact driven a further distance towards Milford Sound.

[49] The Judge assessed the risk of Mr Maddigan offending while on bail in this way and the seriousness of the harm that could result from that in the context of all that was happening with the COVID-19 pandemic in New Zealand at that time. The potential risks had caused the Government to declare a state of national emergency and impose all the restrictions associated with a level 4 lockdown. It was not unreasonable for the Judge to consider that, if Mr Maddigan chose to continue to travel long distances away from his home in Christchurch in purported self-isolation, he could, through coming into contact with others, exacerbate the spread of the COVID-19 virus, with all the potential harmful consequences that could flow from that.

[50] In his submissions, Mr Maddigan made much of the full High Court deciding, in *Borrowdale*, that the first nine days of the COVID-19 lockdown were unlawful.[15] He suggested, on this basis, he had a defence to the charge to which he had pleaded guilty.

[51] In *Gleason-Beard*, the Court of Appeal said, in rare circumstances where an appellant seeks to set aside a conviction following the plea of guilty entered into freely with the offender knowing what they were doing, the appellant must raise a defence of "some substance".[16]

[52] In *Borrowdale*, Mr Borrowdale challenged the lawfulness of the level 4 restrictions announced by the Prime Minister on 23 March 2020 and particularly her statement requiring New Zealanders to "stay home and remain in their bubble". The main issue was whether they were restrictions that had been lawfully imposed in accordance with the provisions of the Health Act. The High Court held that, for the first nine days, the restrictions had not been lawfully imposed because they were not imposed by an order of the Director-General of Health.[17] That defect was rectified when the Director-General issued an order on 3 April 2020.[18]

[53] In *Borrowdale*, both Mr Borrowdale, who was challenging the legality of orders and steps taken by the Government to put the restrictions in place, and the High Court agreed measures affected by the orders were a necessary, reasonable and proportionate response to the public health emergency posed by COVID-19 in March and April 2020.[19]

[54] The charge to which Mr Maddigan pleaded guilty was not however a charge of failing to comply with level 4 lockdown restrictions. He was charged with failing to comply with a direction given under s 91 of the CDEMA following the declaration of a state of national emergency.

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15 *Borrowdale*, above n 9, at [240].
16 *Gleason-Beard v R*, above n 13, at [26].
17 *Borrowdale*, above n 9.
18 At [140].
19 At [97].

[55] Although the charge referred to Mr Maddigan having been given a warning that he must comply with the Government restrictions, the essence of the charge was that he failed to comply with a direction from a constable requiring him to return to his home, a direction that he had been given in terms of s 91 of the CDEMA.

[56] As was recorded by the High Court in *Borrowdale*, on 24 March 2020 the Prime Minister issued an epidemic notice under s 5 of the Epidemic Preparedness Act 2006 that would take effect on 25 March 2020.[20] On 25 March 2020, a state of national emergency was declared under s 66 of the CDEMA. Contrary to Mr Maddigan's submissions, the state of national emergency was not declared under the Health Act.

[57] Mr Maddigan challenged the applicability of the CDEMA to the COVID-19 epidemic on the basis it was not a natural disaster. That argument has no conceivable foundation. The CDEMA defines an "emergency" as including an epidemic.[21] This entitled the Minister of Civil Defence to declare a state of national emergency in response to the COVID-19 outbreak.[22]

[58] Relevantly, ss 91 and 102 of the CDEMA state:

> **91 Power to give directions**
>
> (1) While a state of emergency is in force, a Controller or a constable, or any person acting under the authority of a Controller or constable, may—
>
> (a) direct any person to stop any activity that may cause or substantially contribute to an emergency:
>
> (b) request any person, either verbally or in writing, to take any action to prevent or limit the extent of the emergency.
>
> …
>
> **102 Failure to comply with direction**
>
> A person commits an offence who intentionally fails to comply with a direction given under section 91 or 94N.

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20 At [24]–[25].
21 Civil Defence Emergency Management Act 2002, s 4, definition of "emergency", at (b).
22 Section 66.

[59] The purpose of s 91 is clearly to confer a wide discretion on constables responding to emergency situations. Because Mr Maddigan pleaded guilty to the charge he faced, the basis on which the constables exercised their discretion and directed Mr Maddigan as they did was never tested. However, to succeed on his appeal, Mr Maddigan would normally have to show, consistent with authority, there is a real case for the assertion that the constables' directions were unlawful.

[60] Through his submissions, Mr Maddigan asserted the directions were unlawful because they required him to travel back to his Christchurch home and live, subject to level 4 lockdown restrictions, within his bubble at that address. Mr Maddigan contends it would have been sufficient for him to live within his own bubble while travelling around New Zealand in a car and taking social distancing and other measures to limit the potential for him to come into contact with someone or to transmit the virus.

[61] In *Borrowdale*, there was no challenge to the lawfulness of the declaration of a state of national emergency.[23] The High Court did not have to decide whether a Police officer could exercise powers under s 91 of the CDEMA to enforce the lockdown restrictions. The Attorney-General, for the Government, did not argue that the CDEMA legally empowered the Government to impose the restrictive measure that applied over the first nine days of the level 4 lockdown. The High Court nevertheless did say something about the scope of enforcement powers that were possessed by Police during those first nine days.[24] In that context, they referred to the power of direction in s 91 of the CDEMA. The Court commented:[25]

> We think it unlikely that a failure of an individual or group of individuals to stay at home would constitute an activity that would cause or substantially contribute to an emergency.

[62] Although the Court expressed that opinion, it did not decide that a Police officer could not exercise a power under s 91 to direct a person to stay at home or otherwise abide by the Government's lockdown restrictions. The Court did not decide

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23 *Borrowdale v Director-General of Health*, above n 9.
24 At [217].
25 At [221].

whether a refusal to abide by the restrictions, having been given a direction to do so, could be an offence in terms of s 102 of the CDEMA.

[63] Nevertheless, Mr Maddigan understandably draws support from the view expressed by the High Court for his firmly held opinion that, in leaving his home, travelling a considerable distance from it in his car and limiting the contact he might have with others through social distancing and other measures, he was not involved in an activity that would "cause or substantially contribute" to the COVID-19 emergency.

[64] Section 91 of the CDEMA confers on constables a wide discretionary power of direction to enable them to effectively respond to an emergency in an "on the ground" capacity.[26]

[65] A Police officer's power of direction under s 91 was not absolute or unfettered. Section 91(1) of the CDEMA provides a statutory test for the exercise of the power. The constable had power to "direct any person to stop any activity that may cause or substantially contribute to an emergency" or "to take any action to prevent or limit the extent of the emergency".

[66] Had Mr Maddigan pleaded not guilty to the charge he faced, the lawfulness of the constables' directions could have been an issue at trial. It might then have been necessary for there to be evidence that the constable formed at least a belief on reasonable grounds that the person to whom they were giving a direction was engaged in an activity that might cause or substantially contribute to an emergency or that the direction (here, to return to his normal residence) was necessary to limit the extent of the emergency.

[67] Mr Maddigan pleaded guilty to the charge he faced and thus accepted there was no need for the Police to produce evidence as to this. Given he did so, he cannot advance his appeal, as he attempts to do, on the grounds there was no such evidence before the Court at the time he was convicted.

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[26] Civil Defence Emergency Management Act, s 3(c); Policing Act 2008, s 9(h).

[68] This is not a case where, on admitted facts, Mr Maddigan could not, in law, have been convicted of the offence charged. The charge was that, having been previously warned by a constable to abide by Government restrictions during the state of national emergency, he refused to do so by travelling out of his living area without reasonable excuse. There was no dispute that, after being warned on both 30 and 31 March 2020, he must return to his home in Christchurch, he refused to do so and was still found in the Te Anau/Milford area on 1 April 2020. On those facts, he could be guilty of the offence charged.

[69] To succeed on his appeal, there would usually have to be some evidential or legal basis to indicate he might well have had a defence to the charge he pleaded guilty to.

[70] This Court has a significant amount of information which would indicate the constables concerned would have had good reason to think Mr Maddigan's actions might substantially contribute to the emergency, namely the COVID-19 pandemic and/or that the direction for him to return directly to his home was necessary to limit the extent of the emergency. Much of this information is referred to in the *Borrowdale* judgment.[27]

[71] Before 30 March 2020, the Prime Minister, with advice from the Director-General of Health, had made a number of public statements. In those statements, she said the level 4 restrictions were necessary to contain the COVID-19 pandemic, to limit community transmission and to avoid widespread outbreaks and new clusters. She said staying at home was essential to contain the virus and not doing so would put the lives of others at risk.

[72] There was a significant amount of information in the public arena, and thus available to the Police, which would have informed the Police officers:

(a) At the end of March and beginning of April 2020, there were a number of COVID-19 cases within the community in New Zealand, the incidents and spread of such cases was increasing throughout the country. If steps were

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[27] *Borrowdale v Director-General of Health*, above n 9.

not taken to halt the spread of the virus, the damage that would be done to New Zealanders generally, in terms of their health and economic and social wellbeing, would be potentially catastrophic.

(b) But, if all people complied with the Government restrictions and stayed isolated and in quarantine in their homes within their particular family groups, compliance with the restrictions could eradicate COVID-19 from New Zealand. The control and/or eradication of COVID-19 from or within New Zealand was however dependent on people complying with the lockdown restrictions.

(c) Quarantine and isolation of New Zealanders within their bubble was reasonably required to stop the spread of the virus because, in the absence of this, there was the potential for those who were not affected by the virus to inadvertently or unconsciously be infected by others with whom they might come into contact, however briefly, or through picking up the virus left on surfaces with which they might come into contact. There was potential for those who were infected with the virus to spread it to others without appreciating they were at risk of doing so.

(d) Because the success of lockdown restrictions in limiting the spread of the virus was dependent on widespread and general compliance with those restrictions, Police tolerance of deliberate flouting of the restrictions would potentially have encouraged others to not comply with the restrictions and would thereby have reduced the effectiveness of the restrictions in controlling the spread of the virus.

[73] In *Borrowdale*, the High Court held the limitations on NZBORA rights via announcements by members of the Executive branch were a necessary, reasonable and proportionate response to the public health emergency posed by COVID-19 in March and April 2020.[28]

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[28] At [292].

[74] That was the context in which Mr Maddigan was given directions to return immediately to Christchurch and refused to do so. With his guilty plea, Mr Maddigan accepted the directions he had been given were lawful and he had not complied with them.

[75] I doubt there is any basis on which Mr Maddigan might successfully suggest that his decision not to isolate or quarantine within his home, and instead to travel in his car to the Queenstown and Te Anau areas, was not an activity that might cause or substantially contribute to the emergency to which the state of national emergency related, that is the COVID-19 pandemic. I doubt there is any basis on which he might suggest the directive for him to return to his home in Christchurch was not necessary to limit the spread of the pandemic. It is thus unlikely Mr Maddigan would be able to successfully assert that the constables' directions to him to stop that activity and return to Christchurch were not directions that the constables were authorised to make pursuant to s 91 of the CDEMA.

[76] Accordingly, this is not a case where, on the admitted facts or even on facts that Mr Maddigan might seek to put before the Court, he has shown that he could not, in law, have been convicted of the offence with which he was charged and as to which he pleaded guilty.

[77] On this appeal, the Court is concerned with whether there was a miscarriage of justice in Mr Maddigan being convicted on the charge he faced following his guilty plea. The fact other people were not prosecuted for failing to comply with lockdown restrictions would not provide a potential defence to the charge he faced. That would be so even if the other people Mr Maddigan referred to in his submissions could have been charged with failing to comply with a constable's directions issued under the CDEMA, which may or may not have been the case.

[78] There were no particular circumstances relevant to Mr Maddigan that might suggest the Police decision to prosecute was so unreasonable as to amount to an abuse of process. Mr Maddigan was charged only after he had twice refused to comply with directions to return to Christchurch and had indicated to the Police he had no intention of doing so. The Police had noted, in insisting that instead of returning to Christchurch

and in asking he be able to camp further along the Te Anau Milford Road, Mr Maddigan's attitude was "belligerent".

[79] Nor could the possibility that the Police noted in internal records that his arrest had been for an offence under the Health Act, rather than for an offence under the CDEMA, provide a potential defence. All the information before the Court indicated he was arrested for failing to comply with a Police direction to return to Christchurch. His arrest on suspicion of having committed such an offence was not unlawful. He was not charged with an offence where an essential element of the charge was that he was lawfully in custody at the time.

[80] In his first written submissions, Mr Maddigan said he felt his conviction "(and the employment and travel problems a conviction causes) is disproportionate punishment to [his] actions here". It was not a submission he advanced further in oral submissions before me. He provided no evidence to explain why the consequences of a conviction and fine, as inevitably followed his guilty plea, would be disproportionate to his offending. He has not made out that ground for appeal.

[81] Mr Maddigan has accordingly not established he had a defence to the charge to which he pleaded guilty on all but one of the grounds on which he advanced his appeal.

[82] Mr Maddigan however entered his plea of guilty only after he had been denied bail and remanded in custody. The Judge did not deny him bail to pressure or induce him to plead guilty. However, given Mr Maddigan's unwillingness to accept the reasonableness of or necessity for the level 4 restrictions, it seems most likely that, had Mr Maddigan been granted bail, he would not have pleaded guilty. He would have wanted to defend the charge, albeit on a basis that was not likely to succeed. It was his right to deny the charge and to require the Police to prove the charge. I am satisfied he surrendered that right and pleaded guilty, at least in part, because he did not want to remain in custody.

[83] There had however been a fundamental error made by the duty solicitor and then by the Judge when Mr Maddigan was refused bail.

[84] In Mr Maddigan's presence, the duty solicitor advised the Judge that Mr Maddigan was bailable as of right but could nevertheless be remanded in custody if there was just cause for his continued detention. The Judge dealt with Mr Maddigan on that basis.

[85] Both the duty solicitor and the Judge were mistaken.

[86] The maximum penalty for the charge Mr Maddigan faced was a fine of $5,000 or three months' imprisonment.

[87] Section 7 of the Bail Act states:

> **7 Rules as to granting bail**
>
> (1) A defendant is bailable as of right who is charged with an offence that is not punishable by imprisonment.
>
> (2) A defendant is bailable as of right who is charged with an offence for which the maximum punishment is less than 3 years' imprisonment, unless the offence is one against—
>
> (a) section 194 of the Crimes Act 1961 (which relates to assault on a child, or by a male on a female); or
>
> (b) section 194A of the Crimes Act 1961 (which relates to assault on a person with whom the defendant is, or has been, in a family relationship).
>
> (3) *[Repealed]*
>
> (4) Despite anything in this section, a defendant who is charged with an offence punishable by imprisonment is not bailable as of right if the defendant has been previously convicted of an offence punishable by death or imprisonment.
>
> (5) Subject to sections 9 to 17, a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.

[88] Mr Maddigan did not come within the exceptions in ss 7(2) and 7(4). He was thus bailable as of right. Under s 30 of the Bail Act, conditions could have been imposed to ensure he attended Court as required, did not interfere with any witness or evidence, and/or did not commit any offence while on bail. Here, a condition could

have been imposed in an attempt to ensure Mr Maddigan would comply with Police directions to return to and stay at his Christchurch home.

[89] What I must decide is whether there would be a miscarriage of justice if Mr Maddigan is to remain convicted and sentenced when he pleaded guilty only after being wrongly remanded in custody when it is likely he had, and still has, no defence to the charge.

[90] By a narrow margin, I have decided there would be such a miscarriage. It is not however a situation where the Court should enter an acquittal.

[91] Accordingly, Mr Maddigan's appeal is allowed. The conviction and sentence are quashed. The proceedings are remitted back to the District Court for Mr Maddigan to appear again on the charge he faces and to decide again how he is going to plead.

[92] Section 30 of the Bail Act requires that, if a defended is granted bail, he must be released on conditions that he attend personally at any time and place to which, during the course of the proceedings, the hearing may from time to time be adjourned.

[93] Section 233 of the Criminal Procedure Act 2011 permits the High Court, on allowing the appeal, to direct that a new trial be held or to make any order that it considers justice requires.

[94] Mr Maddigan resides near Christchurch. He needs to consider whether he still wishes to defend the charge he faces. If he does, the trial will have to be held in the District Court at Invercargill.

[95] I consider it is now appropriate for Mr Maddigan to be remanded on bail to appear at the District Court in Christchurch at 10.00 am on 27 May 2021. It will be for a Judge in that Court to decide when and where Mr Maddigan's next appearance will be. That is likely to depend on how Mr Maddigan chooses to now respond to the charge. If the charge is to be defended, the hearing will be before a Judge alone. That Judge will have to decide whether the Police have proved the charge based on the

evidence and legal arguments that are advanced at that hearing. I do not consider there is any need to suppress this judgment to preserve Mr Maddigan's fair trial rights.

[96] Mr Maddigan's appeal is allowed. His conviction and sentence are quashed. The proceedings are remitted back to the District Court. Mr Maddigan is remanded on bail to appear at the District Court in Christchurch on 27 May 2021 at 10.00 am. He is granted bail on condition that he does so.

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