Death by dangerous driving – New interim guideline?

Soto & Anor, Re (Re Section 36 of the Criminal Justice Act 1988) (Rev 1) [2023] EWCA Crim 55

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Soto and Anor involved an application by HM Solicitor General to refer sentences in R v Soto and R v Waite as unduly lenient. Both cases involved drunk drivers who had been convicted of death by dangerous driving (hereafter DbDD) who were subject to the new Section 86(2) of the Police, Crime, Sentencing and Courts Act 2022 which increased the maximum sentence for that offence from 14 years to life imprisonment. The sentencing council have recently consulted on changing the guidelines to reflect this increase in the maximum tariff but no formal replacement guideline has yet been issued. The question for the court in both cases is to what extent the new maximum sentence (applicable to any offence committed after 28th June 2022) should be reflected in the sentencing of the offenders where the current relevant guideline still states the previous maximum sentence (of 14 years).

Facts of the cases

R v Soto

Luis Balcazar-Soto (25 years old) was seen by multiple witnesses driving fast and erratically at 4am in South East London. Sophie Strickland, Jade Redford and Tanvir Ahmed were parked in a Rikshaw on New Kent Road in Elephant and Castle. Jade left the vehicle to visit an ATM machine. Mr Soto crashed into the back of the Rickshaw at speed instantly killing Ms Strickland and causing very serious injury to Mr Ahmed. The Rikshaw was parked in a safe position at the side of the road in which Mr Soto had no reason not to see it as the street lighting was good and the Rikshaw had rear lights on. There was no reason for Mr Soto's car to be impeded by the vehicle instead he swerved into the back of it. There were three occupants in Soto's car, all three attempted to leave the scene of the accident. One was never found the other occupant was Soto's partner who screamed they had to go.

After a short period of shock, Soto regained his composure and attempted to flee the area. He was chased down by two passers-by who held him till the police arrived. Both alleged Mr Soto had said "let me go or I will fist you up" whilst they tried to detain him, he was also alleged to have offered money for his release.

The female occupant of the car, Kayleigh Avalos, had a protection of harassment order which prohibited contact from Mr Soto that had been imposed a month previously. Mr Soto was also under a 9 month suspended sentence order (to run for two years and imposed only five weeks previously) from which the harassment order arose. On interview he gave a prepared defence statement and refused to answer any further questions. He denied driving dangerously, said he was not speeding and denied threatening or offering cash to the two people who detained him. On 1st September 2022 at a second hearing, he pleaded guilty to DbDD, causing serious injury by dangerous driving and breach of a restraining order (against his passenger). He had three previous driving convictions for drink driving, no insurance, driving without a

licence in which he had been disqualified and an 8 week suspended sentence for 12 months in 2019 for driving whilst disqualified. A further sentence of a community order was imposed when he was found to driven whilst disqualified again in 2019 (only two months after receiving the suspended sentence order!).

A sentencing note form the CPS noted the increase in maximum sentence as a result of the changing law but made no mention as to how this was to effect the current sentencing guideline. It was stated, and agreed by the defence, that this fell into category one offending (starting point 12 years custody) and that there were significant aggravating factors. The defence submitted no note but asked for an increase in sentence reduction of 25% to reflect the guilty plea at the PTPH.

On 1st November Soto was sentenced to 9 years for DbDD, 3 years for causing serious injury by dangerous driving and 12 weeks for breach of a restraining order all to run concurrently. The judge held that this fell into the most serious category of level 1 offending under the guideline and determined the sentence to be 12 years minus 25% reduction for the early plea. The 9 month suspended sentence order was also activated and to run consecutively. His total sentence was 9 years and 9 months combined with 10 year disqualification and an extended retest at the end of that disqualification period.

R v Waite

Malcolm Waite (68 years old) was driving along the A149 on Wayland Road in Norfolk. He was seen driving erratically in this single carriage highway, drifting across the road and into grass verges and brambles. At one point he mounted the pavement striking 20-year old Fennella Hawes and her 16-year old friend. Ms Hawes was fatally injured, the 16-year old girl miraculously escaped any serious injury. Mr Waite's car continued

for a further 800 meters before crashing into a lamppost and road sign and coming to a stop. A half empty bottle of vodka was found in his vehicle and he registered 3.5 times the legal limit for alcohol. Mr Waite claimed on interview that he took a few swigs of the vodka after coming to a stop, not before he struck the girls.

Upon his arrest Mr Waite refused to answer and questions but did plead unequivocally guilty prior to trial. He had no previous convictions but was subject to a conditional caution for battery arising out of a domestic abuse incident with his wife. He was also on bail for a further incident in the matrimonial home. He had been driving from the matrimonial home, in breach of his bail conditions, at the time of the offence.

The CPS submitted a sentencing note referring to the change in maximum sentence as a result of the new law and stated that the guidelines were set according to the old statutory maximum, thus both the starting points and ranges should be uprated to take this into account. The defence note accepted it was a level 1 offence (due to alcohol) but made no mention of the new law merely addressed reasons as to why it was at the lower end of the level 1 category range.

The judge found the following mitigating factors for the defendant; he was suffering serious depression and his alcohol consumption was linked to this. The judge also found aggravating features including the involvement of the 16 year old girl who could also easily have been killed. Accordingly he was sentenced to 12 years reduced by one third due to his guilty plea at the earliest opportunity. His sentence was thus 8 years imprisonment and disqualified from driving for 11 years after which he will need to take an extended test.

Discussion

There were a number of questions for the Court of Appeal in these references. Firstly what effect the increased statutory maximum had on sentencing where a guideline already existed, albeit set at a level that reflected previous statutory maxima. There are three concerns within this question. Firstly whether a court should take into account new statutory maximum sentences, particularly where a sentencing guideline already exists reflecting the old maximum. Secondly the court had to consider whether the increased statutory maxima had the effect of uprating the sentencing starting points and ranges across all categories of offending. Furthermore, if it did then should the courts depart from the relevant sentencing guideline or are they mandated to consider it by virtue of s. 59(1) Sentencing Act 2020 which holds that

> (1)Every court—
>
> > (a)must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
> >
> > (b)must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

As regards the first concern the court relied on *R v Richardson and others [2006] EWCA Crim 3186* which concerned the previous increase from 10 years to 14 years. The court stated

> *… sentencing courts should not and do not ignore the results of the legislative process, … judges are required to take such legislative changes into account when deciding the appropriate sentence in each individual case, or where guidance is being offered to sentencing courts, in the formulation of the guidance.* [4]

As the court in *Soto & Anor* pointed out *Richardson* was decided when a sentencing guideline for DbDD was not in place [31]. Here the court determined there was no principle reason why this ratio should not apply to cases in which there was an existing sentencing guideline [31].

As regards the second point of contention the court again relied on *Richardson* for the proposition that an increase in a maximum sentence will generally be most relevant to those cases that are the most serious. In other words, those cases that typically fall into category 1 offending. Whilst the maximum sentence and top of the category range will increase, this does not necessarily mean that those cases at the lower end will likewise proportionally increase. Accordingly the court in *Soto* held that offences in category 1 must be increased [37] but that it was for the sentencing council to determine what should happen in the other category ranges.

As regards the obligation to take into account the relevant sentencing guideline, even where it did not reflect the current maximum sentencing power, the court in *Soto* relied on a previous HM Solicitor General Reference in *Nugent [2021] EWCA Crim 1835* in which the court held that a judge is justified in 'departing from the guideline in the interests of justice and imposing a sentence in the more serious cases which reflects that change' [24].

Taking all these considerations into account the court held in respect of Waite the sentence was not unduly lenient. In particular the sentencing judge had approached the case in the correct manner taking into consideration all of the relevant sentencing principles. Furthermore the judge specifically referred to the increased maximum when setting the starting point of 12 years – had that not occurred the sentencing judge stated she would have started at 8 years. The only error by the judge was that

she mistakenly told the defendant he would be released at the half way point, but this was not true due to Schedule 15 of the Criminal Justice Act 2003 since Waite had been sentenced to more than 7 years he would need to serve two thirds of the sentence.

As regards Soto the court did find that the sentence imposed was unduly lenient since the judge took no account of the increased maximum. Since the judge had sentenced within the guideline rather than going outside, as allowed by s.59(1) Sentencing Act 2020 and failed to take into account the increase this was an error, one in which the Court of Appeal felt should have led to the judge sentencing beyond the guideline. Having taken the change in statutory maximum into account the Court of Appeal held it was not reasonably open to a judge to sentence to 12 years for a case that was at the top of the sentencing range, instead they substituted a sentence of 16 years reduced by 25% to reflect the early guilty plea. Thus, the custodial sentence was increased to 12 years (and nine months for the consecutive term which remained unchanged).

Discussion

Soto & Anor brings clarity to the current state of law on sentencing those who are the most serious DbDD offenders. Courts are not obligated to follow the current guidelines in such a way as to ignore the expressed will of parliament to punish the most serious offenders. However that obligation only arises at present to those cases falling within category 1 of the DbDD sentencing guideline. In Soto the court were swayed by the explanatory notes to s. 22 of the 2022 Act:

> *Increasing the maximum penalty to life imprisonment for these offences will provide the courts with enhanced powers to sentence appropriately for the most serious cases.* [45]

"the most serious cases" clearly indicating that the change in law was addressed at offences of the most serious kind.

The sentencing council in their guideline consultation have made changes to the category ranges which have the effect of increasing the starting point for offences in medium culpability offences from a 5 year starting point to 6 years in the new proposed guideline and an increased range from 4-7 years to 5-9 years. Under the least serious category there is no proposed change to the starting point or category range for those offences falling in the least serious culpability. As regards the most serious category the starting point proposed is 12 years (currently 8 years) with a range of 8-18 years (currently 7-14).

Road traffic offending is thankfully, after something of a long road, becoming recognised as serious crime in its own right. This is particularly so in offences that cause death or have some serious moral opprobrium attached (such as drink driving). DbDD attracted a sentence of only 5 years when first introduced in 1992, it was subsequently increased to 10 and again to 14 in 2004. The idea that death caused by a motor vehicle and that caused by an individual who owes a duty of care and is grossly negligent is qualitatively different should be of historical interest only. Both gross negligence manslaughter (hereafter GNM) and DbDD now have similar maximum sentences, although the sentencing council in their latest consultation on driving offences still treat the two qualitatively different.

In *Richardson* the Court of Appeal held that

> … that some proportion needs to be maintained between the levels of sentences for these offences [DbDD], and the sentences which are thought appropriate for other offences of crimes of violence resulting in death, such as, for example, the sentences for manslaughter following a deliberate, but single violent blow, and manslaughter arising from gross negligence, which is not identical to but certainly not far removed from negligent conduct which falls "far below" expected standards, which is, of course, the criminal ingredient for dangerous driving.

In the consultative proposals on DbDD the sentencing council did not adopt the culpability division that the GNM guidelines adopt. Instead the council merely updated the current DbDD proposals with new starting points and ranges to reflect the increased maximum.

The offence range is broadly similar, for the DbDD offence it is 2-18 years whereas for the GNM offence it is 1-18 years. However, when one looks at culpability and the starting points and category ranges differences emerge. Firstly there are 4 levels of culpability under the GNM guideline, but only three under the DbDD one. As a result it is not really possible to compare the two guidelines on culpability. The main difference seems to be that for the most serious offences the GNM guidelines reserve the highest culpability levels for extreme examples of high culpability. The DbDD guideline does not make this distinction and instead focuses on specific instances of dangerous behaviour (which the GNM guideline reserves for high culpability). The starting points and category ranges are roughly commensurate although it would appear that the DbDD tends to have a higher starting point for the category range. Thus driving offences, particularly those at the more serious end, should be treated as severely as the commensurate type of offences in more general criminal law (e.g.

Gross Negligence Manslaughter). The extent to which that message is being received by the public is open to question. Public consciousness of sentencing tends to be critical[1], and if reactions to media reports of sentences in particular cases is anything to go by then it is doubtful we have moved beyond a still highly critical public towards sentencing road traffic offending. Nevertheless it would appear we are starting to see a shift, in sentencing at least, away from the idea that car crime is not real crime.[2]

[1] HOUGH, M., & ROBERTS, J. V. (1999). Sentencing Trends in Britain: Public Knowledge and Public Opinion. Punishment & Society, 1(1), 11–26. https://doi.org/10.1177/14624749922227685
[2] Corbett, C., 2013. *Car crime*. Willan.