



Neutral Citation Number: [2023] EWCA Crim 55

Case No: 202203487 A4
202203713 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
CROWN COURT AT SOUTHWARK
Her Honour Judge Taylor and
CROWN COURT AT NORWICH
Her Honour Judge Robinson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2023

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE SWEETING
and
HER HONOUR JUDGE NORTON

A REFERENCE BY HIS MAJESTY'S SOLICITOR
GENERAL UNDER SECTION 36 OF THE
CRIMINAL JUSTICE ACT 1988

LUIS FERNANDO BALCAZAR SOTO
MALCOLM WAITE

Respondents

Michael Tomlinson KC, S-G and Deanna Heer KC for The Crown
Mark Butler for Luis Fernando Balcazar Soto
Andrew Campbell-Tiech KC for Malcolm Waite

Hearing date : 25 January 2023

Approved Judgment

This judgment was handed down remotely at 2.00pm on 26 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Warning

The court made an order under Section 45A of the Youth Justice and Criminal Evidence Act 1999 in respect of the person referred to in the judgment as “a 16 year old friend”. Nothing during that person's lifetime shall be included in any publication if it is likely to lead members of the public to identify that person as being concerned in the proceedings.

Lord Justice William Davis:

Introduction

1. On 25 January 2023 we heard two applications by HM Solicitor General to refer sentences imposed for causing death by dangerous driving as unduly lenient pursuant to Section 36 of the Criminal Justice Act 1988. The applications related to two different defendants sentenced in different courts on different days. The cases were unrelated save that both required consideration of the effect of Section 86(2) of the Police, Crime, Sentencing and Courts Act 2022 which increased the maximum penalty for causing death by dangerous driving from 14 years' imprisonment to life imprisonment. The increase in the maximum sentence applies to any offence committed after 28 June 2022.
2. The current sentencing guidelines for the offence of causing death by dangerous driving were first issued with effect from 4 August 2008 by the Sentencing Guidelines Council. They were formulated on the basis that the maximum sentence was 14 years' custody. The sentencing range for Level 1 offences (described in the guideline as "the most serious offences") is 7 to 14 years' custody.
3. The Sentencing Council has adopted that guideline within the digital version of the guidelines. However, the Council is currently consulting on a new guideline for the offence of causing death by dangerous driving. How the new guideline will reflect the increase in the maximum sentence has yet to be determined. It will not come into force until later this year. Until then judges sentencing offenders for causing death by dangerous driving will have recourse only to a guideline based on the previous maximum sentence. In the hearing before us HM Solicitor General argued that for the most serious offences as defined in the current guideline the sentencing range should be extended significantly beyond the range identified in the guideline.
4. At the conclusion of the hearing we announced that we granted leave to refer the sentence in the case of Luis Balcazar-Soto. We determined that the sentence imposed on him was unduly lenient. Accordingly we increased the sentence as set out later in this judgment. In relation to the application to refer the case of Malcolm Waite we refused leave to refer. His sentence will remain unaltered. We further stated that we would give our reasons in writing at a later date. These are our reasons.

Luis Balcazar-Soto – the facts and background and the legal proceedings

5. At around 4.00 a.m. on 10 July 2022 the offender was driving a Kia car in South East London. He had too much to drink. When his breath was tested at 4.36 a.m. the result was 64 micrograms of alcohol per millilitres of breath. The legal limit is 35 micrograms. He drove around the roundabout at Elephant and Castle. Another motorist, a Mr Alimi-Omidori, saw him accelerate harshly as it exited the roundabout. Mr Alimi-Omidori commented to a passenger in his car that the driver of the Kia was "driving like a madman". He estimated that the Kia accelerated to at least 60 mph as it drove off down New Kent Road. Another motorist, a Mr Marrable, driving on New Kent Road also saw the Kia. He thought that the Kia was travelling at about 60 mph. New Kent Road is a main road in a built up area. The speed limit is 30 mph.

6. Shortly before 4.00 a.m. Sophie Strickland and Jade Redford were travelling from the direction of Elephant and Castle along New Kent Road in a rickshaw driven by Tanvir Ahmed. Sophie and Jade had been out for a birthday celebration. They were on their way back to their hotel. On their nearside as they went along New Kent Road was a Tesco Express with a cashpoint. Jade needed some cash. The rickshaw pulled over and stopped on the nearside in a bus lane. Jade got out to use the cashpoint. Sophie and Tanvir Ahmed stayed in the rickshaw.
7. As Sophie and Tanvir Ahmed waited in the rickshaw the offender driving the Kia approached at speed from their rear. The later calculation of the collision investigator was that the Kia was travelling at between 46 and 56 mph when it was 40 metres from the rickshaw. It did not slow down thereafter. At the point where the rickshaw was stationary on the nearside of New Kent Road there was excellent street lighting. The rickshaw itself had lights illuminated on the back. The road had two lanes for vehicles travelling in the direction away from Elephant and Castle. Several cars passed the rickshaw without incident as it was stationary. The rickshaw caused no impediment to the Kia's progress. For some reason the offender drove to the nearside of the road just as he approached. He collided at speed with the rickshaw. The Kia came to a stop nearby.
8. The offender had two passengers. The rear seat passenger got out of the Kia shouting "let's go come on". He ran off never to be seen again. He has never been identified. The front seat passenger was a woman named Kayleigh Avalos. She had asked the offender to collect her in his car even though the offender was prohibited from contacting her under a protection from harassment order only a month before. She was helped from the Kia by Mr Alimi-Omidori who had stopped to give assistance. She then helped the offender from the car. She screamed at him "we've got to go". After a short interval during which the offender appeared to be in shock, they ran up a side street close to the scene of the collision. Ms Avalos had grabbed items from the back seat of the car. The offender had said "come on let's go quick" as they were about to run off.
9. Mr Alimi-Omidori and Mr Marrable (who had also stopped to give help) chased after the offender. They grabbed hold of him. He said "let me go or I'll fist you up" and attempted to punch Mr Marrable. He then asked Mr Alimi-Omidori to let him go saying that he would give Mr Alimi-Omidori money if he were to do so. The police arrived at the scene. The offender was identified as the driver of the Kia. Initially he claimed that he was not the driver. It was apparent to the police that he had been drinking. The offender denied that he had. The roadside breath test showed the contrary. The offender then said that he had been about to park when the Kia span and he lost control. He said that he was not allowed to drive. The Kia belonged to his step-father who was unaware that he had it.
10. Sophie suffered multiple broken bones and a significant head and neck injury. When paramedics arrived she was displaying no signs of life. All efforts to help her were unsuccessful. She was pronounced dead at the scene. Her friend, Jade, was physically unharmed. But she witnessed Sophie die by the roadside.
11. Tanvir Ahmed suffered a brain contusion, facial fractures and fractures to his right arm and leg. He was taken to Kings College Hospital. He underwent operations on his arm and his leg. He developed a blood clot on his lung which required anti-

coagulant therapy. On 23 August 2022 he was transferred to his local hospital. At the point of his transfer he could not put pressure on his right leg and his right arm was subject to a tremor. Both his job as a rickshaw driver and his pastime of cricket are dependent on his physical fitness. The long term prognosis remains unclear. Whatever the position Tanvir Ahmed suffered very serious injuries.

12. When the offender was told about Sophie's death he said that he could not believe it and that he was so sorry. We have seen body worn camera footage of the offender taken whilst he was sitting in a police van. His general demeanour was matter of fact. In the period for which footage is available the offender made no enquiry about what had happened to others. Initially he was taken from the scene to hospital. Later that morning he was taken to Charing Cross police station where he was interviewed. He provided a prepared statement. He denied trying to run away, attempting to punch anyone and offering anyone money. He denied driving dangerously whether as alleged or at all. He said that he was not speeding. At the end of the statement the offender said that he would not answer any further questions. He maintained that position throughout the interview.
13. The offender was sent for trial at the Crown Court on 11 July 2022. He gave no indication as to his pleas. On 1 September 2022 he appeared at the Crown Court at Southwark. He pleaded guilty to causing death by dangerous driving, causing serious injury by dangerous driving and breach of a restraining order, namely the order relating to Ms Alvalos. On 1 November 2022 he was sentenced to 9 years' imprisonment for causing death by dangerous driving, 3 years' imprisonment for causing serious injury by dangerous driving and 12 weeks' imprisonment for breach of a restraining order. All of those sentences were ordered to run concurrently. On 9 June 2022 the offender had been sentenced to 9 months' imprisonment suspended for 2 years. It was then that the restraining order had been made. The offences in the early hours of 11 July 2022 were committed less than five weeks after the imposition of the suspended sentence. That sentence was activated in full and ordered to run consecutively. The total sentence imposed on the offender was 9 years 9 months' imprisonment. He was disqualified from driving for 10 years and 9 months. An extended re-test was ordered.
14. The offender was born on 3 January 1998. He was 24 at the time of the offence. He is 25 now. He has three previous convictions for offences involved driving. In June 2018 he was fined and disqualified for driving with excess alcohol, driving when uninsured and driving without a licence. In May 2019 he was sentenced to 8 weeks' imprisonment for driving whilst disqualified. The sentence was suspended for 12 months. In July 2019 for a further offence of driving whilst disqualified he was sentenced to a community order and a further period of disqualification was imposed.

Malcolm Waite – the facts and background and the legal proceedings

15. At around 4.20 p.m. on Sunday 31 July 2022 the offender was driving his Lexus car from Hoveton in Norfolk along the A149 Wayland Road. This is a single carriageway road with two lanes subject to a speed limit of 50 mph. It was a sunny dry day. The offender approached the village of Stalham. Another car was following behind him. The occupants of that car saw the offender's car drifting from side to side of the road. At one point his car scraped branches on the nearside of the road.

Then his car swerved onto the offside of the road before moving back onto the nearside grass verge. The offender was driving at around 50 to 55 mph.

16. On the nearside of the road as the offender drove along it there was a pavement. It was separated from the carriageway by a grass verge. Fenella Hawes and a 16 year old friend were walking along the pavement in the direction of Stalham. They were on their way home from work. As the offender approached the two girls the offender's car swerved off the road and mounted the pavement. The offender drove along the pavement and verge. He struck the two girls throwing them into the air. He then went back onto the road and drove on for a further 800 metres. At that point he veered off the road again. This time he struck a road sign and a lamppost and came to a stop. His car was badly damaged.
17. Fenella Hawes had been thrown into the hedgerow beside the pavement. Members of the public and emergency services tried to help her. Their efforts were to no avail. She had suffered a severe traumatic head injury causing catastrophic brain damage. She also sustained fractures of the spine. She was pronounced dead at the scene. Her friend had been thrown into a nearby ditch. She was found sobbing and asking after Fenella. Remarkably she suffered no serious physical injury.
18. The offender was still sitting in his car when the police arrived. He was obviously drunk. A half empty bottle of vodka was found in his car. He was taken to the local hospital and thereafter to Great Yarmouth police station. A breath test was carried out at just before 9 p.m. The reading was 120 micrograms of alcohol per 100 millilitres of breath. The offender said that he had had two swigs of vodka after the accident. Assuming that to be true, his breath alcohol concentration at the time of the accident would have been somewhere in the range 91 to 131 micrograms. Without post-accident alcohol consumption the breath alcohol concentration would have been in the range 138 to 178 micrograms. As we have noted in relation to Balthazar-Soto, the legal limit is 35 micrograms. When he was interviewed by the police the offender made no comment to all questions.
19. The offender was sent for trial on 2 August 2022. He indicated an unequivocal plea of guilty. On 15 September 2022 he pleaded guilty at the Crown Court at Norwich to causing death by dangerous driving. Sentence was adjourned. On 18 November 2022 he was sentenced to 8 years' imprisonment. He was disqualified from driving for 11 years. An extended re-test was ordered.
20. The offender was born on 2 May 1954. He was 68 at the time of the offence. He has no previous convictions. He was made the subject of a conditional caution in February 2022 for an offence of battery committed against his wife. At the time of the offence he was on police bail in relation to a further incident at the matrimonial home in Hoveton. It was a condition of that bail that he was not to visit his wife in Hoveton. He was driving along the 149 Wayland Road having visited her in breach of his bail conditions.

Luis Balcazar-Soto – the sentence

21. The judge was provided with a sentencing note by the prosecution. The note identified that the maximum sentence for causing death by dangerous driving had been increased to life imprisonment. However, nothing was said about the potential

effect of this increase on the existing Sentencing Guidelines Council guideline which was based on a maximum sentence of 14 years' custody. The sentencing note submitted that the offence of causing death by dangerous driving fell into the highest level of offence i.e. Level 1. This relates to "the most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others". It was argued that each of the determinants of seriousness set out at page 3 of the guideline was present. Further the prosecution submitted that there were aggravating factors: bad driving record; serious injury to another victim; other offences committed at the same time; attempting to escape; breach of a suspended sentence.

22. No sentencing note was submitted on behalf of the offender. In the course of the brief submissions made on his behalf at the hearing nothing was said about the level of the offence within the guideline. His counsel sought to persuade the judge to increase the reduction for the pleas of guilty from 25% which usually would follow from the first indication of plea being at the PTPH. Otherwise, the submissions were restricted to a reference to his age, to his young child and to character references which spoke highly of the offender's general character.
23. The judge had victim personal statements from various members of Sophie's family. The judge said this:

"The Court has heard today very moving victim impact statements from Sophie Strickland's family, from her father and brothers, and from her mother, and her friend Jade Redford and Lucy Smith. All express the intense pain and deep loss caused by your dangerous driving, which took Miss Strickland from them. She was a much-loved young woman, 31 years of age and in the prime of life, a life which you have denied her. She came to London to celebrate a birthday with friends, and due to your selfish and dangerous actions she never returned to her family. I have also heard a statement from Mr Ahmed as to the injuries and effect on him. Your actions have had devastating effects, not only on the victims themselves but on many other lives."
24. The judge concluded that the offence of causing death by dangerous driving fell into Level 1 of the guideline. She referred to the speed at which the offender was driving and the fact that he had no licence. She said that the course of bad driving was prolonged. She referred to the evidence of Mr Alimi-Omidori. She noted the offender's bad driving record and to his consumption of alcohol on the night of the collision. The judge also referred to the serious injuries sustained by Tanvir Ahmed as aggravating the lead offence. Taking all of those matters into account, she said that the sentence before any discount for plea had to be towards the upper end of the scale for a Level 1 offence. By that route the judge determined that the appropriate overall sentence before any discount would have been 12 years' custody. After a reduction of 25%, the sentence was 9 years' custody. The suspended sentence was quite separate. Thus, it was activated to run consecutively.

25. At no point did the judge mention the increase in the maximum sentence and the effect of that increase on sentencing levels in relation to the most serious cases. We are not surprised by this omission. No submission was made to her that might have led her to consider that it was significant.

Malcolm Waite – the sentence

26. A pre-sentence report was prepared in relation to Mr Waite. This disclosed that for most of his life he had led a settled and happy existence. Until his late 50s he had been employed in various senior positions. He and his family were financially secure as a result of the provision he had made during his working life. When he was in his early 60's he disclosed to his wife that he had been abused as a teenager. Mr Waite explained that this disclosure led to a mental breakdown which in turn caused him to use alcohol as a coping mechanism. At the time of the offence he was separated from his wife and living in a caravan.
27. The content of the pre-sentence report was confirmed in a letter from Mr Waite's general practitioner who said that Mr Waite was suffering from significant depression. Mr Waite's wife made a statement setting out the way in which his condition had deteriorated over the months prior to the day of the offence.
28. In Mr Waite's case the prosecution sentencing note drew attention to the increase in the maximum sentence and pointed out that the sentencing range for a Level 1 offence of causing death by dangerous driving was set when the maximum sentence was 14 years' custody. The note submitted that the increase in the maximum sentence should increase both the starting point and the range. The defence sentencing note accepted that Mr Waite's case fell into Level 1 because his ability to drive was grossly impaired by the consumption of alcohol. Nothing was said about the effect of the increase in the maximum sentence, the defence submissions being directed to the proposition that the case fell at the starting point set out in the guideline.
29. The judge had victim personal statements from Fenella's mother and from the 16 year old girl who had been with Fenella at the time of her death. The mother's statement incorporated contributions from various members of Fenella's family. The judge summarised the position thus:

“Fenella Hawes was a young woman who had everything to live for. A beloved daughter, granddaughter, niece, sister, goddaughter, friend, and girlfriend. Her mother's victim personal statement which she read with great dignity speaks movingly of her daughter and the loss that they all feel and described her as a kind, loyal friend, an enthusiastic young person with a zest for life. She was generous to others in lockdown, took a keen interest in environmental issues and was talented at school. She achieved the highest grades and has been posthumously awarded a first-class degree in natural sciences, despite having completed only two years of the course. Family and friends regularly have to pass the spot where she died which brings back bitter-sweet memories. Nothing I say and no sentence I pass can assuage that loss.”

30. The judge found that the offence fell into Level 1 because of Mr Waite's gross impairment through alcohol. She said that, taking into account the increase in the maximum sentence, the starting point was 12 years' custody rather than 8 years' custody. The judge reviewed the aggravating and mitigating factors. The most significant was the involvement of the 16 year old girl who very easily could have suffered very serious injury or have been killed. On the other side of the equation the judge concluded that the offender's mental health problems reduced his culpability. Although his consumption of alcohol was voluntary, it was linked to those problems. So it was that the judge determined that the aggravating and mitigating factors balanced each other out so as to leave the sentence before any reduction for the plea of guilty at the starting point of 12 years. Since the plea was indicated at the point of sending, the reduction was one third.

Discussion of the legal framework

31. The maximum sentence for the offence of causing death by dangerous driving has been increased more than once since the offence was introduced in 1992. Originally the maximum sentence was five years' imprisonment. This was later increased to ten years' imprisonment. In 2004 the maximum sentence was increased to fourteen years' imprisonment. This increase was prior to the introduction of the Sentencing Guidelines Council guideline. The significance of that increase was considered in *Richardson and others* [2006] EWCA Crim 3186. At [4] the court said:

Statutory changes in sentencing levels are constant. In recent years, maximum sentences have been increased (for example, drug related offences) or reduced (for example, theft). In general, changes like these provide clear indications to sentencing courts of the seriousness with which the criminal conduct addressed by the changes is viewed by contemporary society. In our parliamentary democracy, sentencing courts should not and do not ignore the results of the legislative process, and as a matter of constitutional principle, reflecting the careful balance between the separation of powers and judicial independence, and an appropriate interface between the judiciary and the legislature, 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.

That core principle was expounded when there was no guideline in relation to the offence with which the court was concerned. There were in reality very few guidelines at all in 2006. However, the core principle is not affected by the fact that now there are guidelines for almost every offence. A change of the kind introduced by Section 86(2) of the 2022 Act must be taken into account by the sentencing court.

32. The court went on to review a welter of authority dealing with the extent to which an increase in a maximum sentence should affect sentencing practice at all levels of seriousness of the relevant offence. Having conducted that review the court said at [13]:

We shall avoid an anxious parade of knowledgeable citation of judicial observations from within these authorities. Consistently with our own analysis, the principle to be derived from them is that the primary object of the increase in the maximum sentence was to address cases of the most serious gravity, so as to

permit the sentence to be greater than before, and in an appropriate case to be as long as or longer than the previous maximum. However, even in such cases it was not intended that the increase in sentence should reflect the consequences of the increase from ten years to fourteen years in a strictly mathematical proportion. It has long been recognised that mathematics does not provide the appropriate answer to a sentencing decision. That said, appropriate proportionality between the huge variety of offences which come within the ambit of these crimes leads to the conclusion that if the level of sentence in cases of the utmost gravity is significantly increased (as it should be) there should be some corresponding increase in sentences immediately below this level of gravity, continuing down the scale to the cases where there are no aggravating features at all. In adopting this approach, we are following earlier guidance given by this court in Attorney General's References 14 and 24 of 1993, where the court addressed the doubling in the maximum sentence from five to ten years' imprisonment by significantly increasing the higher, but not the lower starting points.

Since the offence of causing death by dangerous driving falls within a range of offences where death is caused by deliberate criminal behaviour the court went on to say at [14]:

We also believe that some proportion needs to be maintained between the levels of sentences for these offences, 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.

The same point was made much more recently by Sir Brian Leveson in *Williams* [2017] EWCA Crim 305 where the court was concerned with an offence of motor manslaughter.

33. This does not mean that sentencing judges should refer to the Sentencing Council guideline in relation to manslaughter in order to reach an appropriate level of sentence. The Sentencing Guidelines Council guideline in relation to causing death by dangerous driving provides a self-contained framework. The guideline assumes that the maximum sentence might be imposed in a given case. Thus, even before the increase in the maximum sentence, a very long sentence could be imposed.
34. The explanatory notes to Section 86 of the 2022 Act are as follows:

"14 years' imprisonment is the current maximum custodial penalty available for the offences of causing death by dangerous driving and causing death by careless driving when under the influence of drink or drugs. 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."

In the context of the offence of causing death by dangerous driving, the term "the most serious cases" must be regarded as a reference to an offence in Level 1. That is

the language of the guideline. Thus, the increase in the maximum sentence will be of particular significance to Level 1 offences.

35. The authorities cited thus far are examples of offences for which, at the relevant time, there was no guideline. Where a guideline exists, the court is under a duty to follow any sentencing guidelines relevant to the offender's case unless the court is satisfied that it would not be in the interests of justice to do so: see Section 59(1) Sentencing Code 2000. Section 59(1) is refined by the provisions in Section 60 of the Sentencing Code but not in a way relevant to the issue which arises here. In *Nugent* [2021] EWCA Crim 1835 this court had to consider the impact of Section 59(1) where the maximum sentence had been increased for an offence subject to a guideline but the guideline did not reflect the increase in the maximum sentence.. That case concerned terrorist offences. Sentencing Council guidelines were in force for the relevant offences. The sentencing judge had applied those guidelines even though the maximum sentences for the offences had doubled since the guidelines had been issued.
36. When HM Solicitor General applied to refer the sentences as unduly lenient, the basis for the proposed reference was that the judge ought to have taken proper account of the increase in the maximum term. The court cited [13] of *Richardson and others* and went on to say at [24]:

In the pre-guideline era that was enough to address the effect of the increase in maximum sentences on the previous practice of the courts. In the modern era sentencing has become a much more structured process and it will be for the Sentencing Council in due course to consider what if any increases should be made to sentence ranges and starting points within the relevant guideline. It is enough for our purposes to say that we accept that where, as here, a maximum sentence has been very substantially changed and the guideline has yet to be updated, the sentencing court should reflect that fact, where necessary, by departing from the guideline in the interests of justice and imposing a sentence in the more serious cases which reflects that change. This will involve applying the structured process of the guideline and considering in particular the factors referred to in it. It will not, however, involve being constrained by the sentence ranges or starting points established under the previous maximum penalty.

Precisely the same considerations apply to the circumstances of the applications made to refer in these cases.

37. The position can be summarised in this way:
- Applying *Richardson and others*, sentences for the most serious cases of causing death by dangerous driving must be increased from the levels indicated in Level 1 of the current guideline because offences in Level 1 by definition are the most serious offences.
 - Prior to proper consideration by the Sentencing Council of the effect of Section 86(2) of the 2022 Act, sentences for the lower levels of offending should not be increased. It may be that the Council will decide that some increase will be appropriate. That decision will only be taken after full consultation about the effect of any such increase. It is not a matter for this court to consider given the advanced stage of the Council's work on the new

guideline. Further, the facts of these applications do not involve the lower level of offending.

- It also will be for the Sentencing Council to determine the appropriate starting point for the most serious cases. It is not for us to re-set the starting point in the current guideline. Judges who sentence cases of causing death by dangerous driving before the Sentencing Council issues a new guideline will use the starting point in the current guideline and adjust the sentence to take account of the increase in the maximum sentence. That is what was done by the judge who sentenced Malcolm Waite. Thereafter the sentence may be increased further to take full account of aggravating factors.
- Even where the case falls within Level 1 and the offence was committed after 28 June 2022, the sentencing judge must make their own assessment of the seriousness of the offence and the culpability of the offender. The increase in the maximum sentence requires the judge to determine whether the interests of justice require a sentence outside the category range for Level 1 offences. That cannot be a mathematical exercise.
- Whatever decision is made by the sentencing judge in an individual case, there must be consideration of the issue of proportionality as explained in *Richardson and others* and *Williams*.

The application in relation to Malcolm Waite

38. We shall deal with Mr Waite first since his case in our view presents no complications. The sentencing judge was aware of the increase in the maximum sentence. In the absence of that increase she would have used a starting point of 8 years' custody. Due to the increase she said that the starting point was 12 years' custody. This uplift is not criticised by HM Solicitor General. He concedes that it was "appropriate".
39. Undue leniency is said to arise because the judge erred in her balancing of the aggravating and mitigating factors. The submission is that the aggravated factors substantially outweighed the mitigating factors. For this submission to succeed, we would have to conclude that the judge went wrong in her assessment of those factors. We are not able to reach that conclusion. The judge took into account that a second person was struck by the offender's car. She suffered no significant injury. In those circumstances the judge was not obliged to give the same weight to the second person's involvement as would have been required had that person been badly injured. The judge took account of the offender's failure to stop. This was in the context of a man who was very drunk. The offender was not attempting to avoid apprehension. The judge paid regard to the offender's mental health problems which fuelled the consumption of alcohol. She concluded that the offender's culpability was reduced to some extent. In reaching that conclusion the judge paid proper heed to the overarching guideline in relation to sentencing those with mental disorders. The judge made no mention of the fact that the offender's visit to his wife involved a breach of bail conditions. We consider that she was entitled to take that approach. HM Solicitor General submits that, had the offender not chosen to breach his bail conditions, he may well not have been on the road. That may be true but the link between the offender driving whilst grossly intoxicated and his failure to observe his bail conditions in our view was too remote. We observe that the prosecution

sentencing note in the court below did not refer to this feature of the case as an aggravating factor.

40. The application to refer the sentence imposed on Mr Waite in effect invites us to substitute our own judgment for that of Judge Robinson in Norwich, an extremely experienced Crown Court judge. That would be an impermissible exercise. The application is refused. There is no proper basis for saying that his custodial sentence was unduly lenient.
41. Mr Waite's sentence was eight years' imprisonment. He was sentenced for an offence which falls under Schedule 15 of the Criminal Justice Act 2003 and for which life imprisonment is available. Since the sentence exceeded seven years, he will not be eligible for release until he has served two thirds of his sentence. The judge told him that he would be released at the halfway point of his sentence. This is of no relevance to the propriety of the custodial sentence imposed. The release provisions applicable at any given time will be irrelevant to the sentencing exercise: *Patel and others* [2021] EWCA Crim 231. The judge's misapprehension as to the release provisions meant that she did not impose the correct period of disqualification. The discretionary period of disqualification should have been two thirds of the period to be served: see Section 140 of the 2022 Act. Since we have refused the application to refer the sentence there is no means by which this error can be corrected. Too much time has passed to allow the sentence to be reviewed under the slip rule. This is a feature which needs to be borne in mind whenever sentencing for this offence and the period of custody is seven years or more.

The application in relation to Luis Balcazar-Soto

42. When sentencing this offender, the judge took no account of the increase in the maximum sentence. HM Solicitor General accepts that, had the increase in the maximum sentence not been introduced, the sentence of 12 years' imprisonment for the driving offences before reduction for the pleas of guilty would have been appropriate. It is submitted that the increase in the maximum sentence means that the range in the Sentencing Guidelines Council guideline should be exceeded where the facts of the case and the interests of justice require it. The sentence actually imposed was based on a sentence after trial close to the top of the range in the guideline. Therefore, the judge should have imposed an overall sentence in excess of that range.
43. As we have already explained, the sentencing judge was alerted to the increase in the maximum sentence. Nothing was said beyond that. It is well established that HM Solicitor General is entitled to refer a sentence as unduly lenient even if concessions were made in the court below inconsistent with the arguments advanced as part of the reference: see e.g. *Stewart* [2016] EWCA Crim 2238. The same principle must apply where the prosecution in the Crown Court has failed to make any submissions relating to a significant factor relevant to sentence.
44. The offender's counsel has not argued that HM Solicitor General is barred from arguing that the judge should have taken into account the increase in the maximum sentence. Rather, he submits that the judge did give that factor the weight it deserved on the facts of the case. It is accepted that the case fell into Level 1 within the guideline. Counsel argues that the increase in the maximum sentence is to be reserved for "the most serious cases". By reference to the facts he submits that,

although the case fell into the highest level in the guideline, it was by no means the worst example of dangerous driving. In his written response to the application for leave to refer, he said that “one can easily think of cases that are far more serious in terms of culpability and harm”.

45. We reject the argument based on “there will be worse cases”. In *Brown* [2018] EWCA Crim 1775 the court had to consider an application to refer a sentence imposed for causing death by dangerous driving where HM Solicitor General argued that the sentence should have been at or near the maximum sentence (as it then was). The application was resisted on a similar basis to that adopted in this case on behalf of the offender. Sir Brian Leveson determined that this argument was fallacious. He said at [38]:

We have no hesitation in rejecting the argument that the maximum sentence must be reserved for some notional case, the gravity of which cannot be matched by any other set of circumstances. As we already have noted, the sentencing guideline for the offence of causing death by dangerous driving provides a sentencing range which encompasses the maximum sentence for the offence. At page 10 of the guideline this appears:

"Level 1 is that for which the increase in maximum penalty was aimed primarily. Where an offence involves both of the determinants of seriousness [which this offence did]particularly if accompanied by aggravating factors such as multiple deaths or injuries or a very bad driving record this may move an offence towards the top of the sentencing range".

It is clear that the top of the sentencing range (which, for this offence, is the maximum sentence permitted by parliament) is not reserved for a notional exceptional case (which might itself justify a charge of manslaughter). If the nature of the offence is serious enough, it may attract the maximum sentence after a trial even if one could envisage some even more grave set of circumstances.

These observations apply equally to the position with which we are faced, namely an increase in the maximum sentence to custody for life.

46. By reference to the determinants of seriousness to which we have already referred, this was a very serious case. The offender engaged in a persistent and deliberate course of very bad driving. The observation of Mr Alimi-Omidori of the offender’s driving at the Elephant and Castle roundabout was made some distance from the scene of the collision. The offender was affected by drink. His alcohol level was twice the legal limit. The speed of the offender’s vehicle was inappropriate, his speed being at or close twice the speed limit for the road. The offender’s behaviour was seriously culpable. It is impossible to say why he drove at speed into the nearside lane so as to strike the rickshaw. Whatever else led him to do that, it was not part of a parking manoeuvre. Someone planning to park does not drive at around 50 mph or more towards their parking place. The offender had no regard for Sophie and Mr Ahmed who were vulnerable road users.
47. The offender’s driving involved a deliberate decision to ignore the rules of the road and a disregard for the danger it caused to others. This case is on a different level to

that of Mr Waite. Mr Waite got into a car and drove it when his consumption of alcohol grossly impaired his ability to drive. His case was very serious but the nature of his driving stemmed wholly from his consumption of alcohol. It is generally unhelpful to draw comparisons between cases which are different on their facts. But in this instance we are considering the two cases for the same purpose. It is instructive to consider the effect of the increase in the maximum sentence on the sentence imposed on Mr Waite when assessing the appropriate outcome in this offender's case.

48. The offender's case was aggravated by the factors to which the sentencing judge referred. He had a bad driving record. The injury suffered by Tanvir Ahmed was very serious. The offender had no right to drive the car on the night in question. He was driving without a licence. In those circumstances he was uninsured. After the collision the offender tried to leave the scene. When apprehended he attempted to free himself by throwing a punch and by offering money to allow him to leave. He was subject to a suspended sentence imposed a very short time before his offending in the early hours of 10 July 2022. The cumulative effect of these aggravating factors was very substantial.
49. The mitigating factors were of little weight. The character references were in very general terms. Their effect was rendered nugatory by the offender's previous convictions. Although he was a relatively young man, it could not be said that his age affected his culpability other than marginally. His supposed parenting responsibilities did not amount to him being the sole or primary carer for his child. All it amounted to was that he had a child from whom he would be separated. Remorse could hardly be said to be a factor of any significance. The offender knew precisely what he had done. Yet he made assertions to the police that were clearly false.
50. Even if there had there been no aggravating factors, the figure taken by the judge for the sentence after trial would have been close to (and possibly beyond) the boundary of what was reasonable given the increase in the maximum sentence. Once those aggravating factors are taken into account, we have no doubt that the sentence imposed was not one reasonably open to the judge. As we have said, no submissions were made to her about the effect of the increase in the maximum sentence. Had they been, we consider it very likely that she would have increased her sentence.
51. We give leave to refer the sentence imposed on the offender. We consider that the least sentence that was appropriate prior to reduction for the pleas of guilty was 16 years' imprisonment. We quash the sentence imposed on the count of causing death by dangerous driving. We substitute in its place a sentence of 12 years' imprisonment which reflects the reduction for the plea of guilty at the first hearing in the Crown Court. The other sentences will remain unaltered. Therefore, the overall sentence to be served by the offender will be 12 years 9 months' imprisonment.
52. The judge in this case was under the same misapprehension in relation to release as the judge in Mr Waite's case. The discretionary disqualification she imposed was 6 years. That period will remain unaltered. Because of the change in release provisions the extended period of disqualification required pursuant to Sections 35A and 35B of the Road Traffic Offenders Act 1988 was 8 years in relation to the offence of causing death by dangerous driving and 4 ½ months in relation to the offence for which a suspended sentence of imprisonment had been imposed, that sentence being activated

consecutively. The overall period of extended disqualification will be 8 years 4 ½ months. The total period of disqualification from driving will be 14 years 4 ½ months. The judge's order for an extended re-test will remain.