IN THE MAGISTRATE'S COURT AT SIGATOKA

CRIMINAL DIVISION

Traffic Case No. 1319/14

THE STATE –v- JONE MATAKULA

For the State: **IP Shameem**

For the Accused: **Mr. R. Naidu**

JUDGMENT

1. The Accused is charged with the following two counts:

FIRST COUNT

Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: Contrary to section 97(4)(c)(8) and 114 of the Land Transport Act 1998.

Particulars of Offence

Jone Matakula on the 30th day of April 2014, at Queens Road Lomawai, in the Western Division, drove a vehicle registration number LM 246 which was involved in an impact, occasioning grievous bodily harm to **Prashneel Kumar** and at the time of impact, **Jone Matakula** was driving vehicle registration number LM 246 in a manner dangerous to the said **Prashneel Kumar**.

SECOND COUNT

Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: Contrary to Section 97(4)(c)(8) and 114 of the Land Transport Act 1998.

Particulars of Offence

Jone Matakula on the 30th day of April 2014, at Queen Road, Lomawai, in the Western Division, drove a vehicle registration number: LM 246, which was involved in an impact occasioning grievous bodily harm of **Kavekini Naliva** and at the time of impact, **Jone**

Matakula was driving vehicle registration number LM 246 in a manner dangerous to the said **Kavekini Naliva**.

Background

2. The Accused was arraigned on 2nd May 2014 initially with three counts. He pleaded not guilty to the three counts in the charge and the matter proceeded to the first Trial on 17th March 2021. Later the matter was declared Trial De Novo. It then proceeded to Trial on 28th February 2022. By the close of their case, Prosecution called eleven witnesses with about six (6) exhibits.
3. Defense made an application for No Case to Answer pursuant to Section 178 of the Criminal Procedure Act and filed written submissions in support of their application. Prosecution submitted that they relied on the Court record. The Court ruled that the Accused had a case to answer for Counts 2 and 3 but did not have case to answer to for Count 1. This meant that the original Counts 2 and 3 of the initial charge became Counts 1 and 2 of the now current charge, as contained above and which is the subject of this Judgment.

The Case for Prosecution

4. Prosecution Witness 1 (PW1) is Vijay Anand of 4 Miles, Suva. He recalls between 10am and 10.30am on 30th April 2014, he was on his way alone driving his motor vehicle registration number FH 400 on Queens Road to Suva. It was drizzling that day. At Lomawai, as he was diving, he saw a minibus registration number LM 246 on the opposite lane towards Nadi suddenly tried to overtake a car and came onto his lane and headed towards him. He tried to turn right but could not as the car that the minibus tried to overtake was still in front of the minibus. The minibus then hit the left side of his vehicle resulting in him stopping on the road while the minibus went down the slope to his side. He then got off the vehicle and remembered someone took him to hospital as he received multiple chest injuries. The damage value to his vehicle was estimated at $30,000.

   In cross-examination, he states that he was not speeding. He states that he could not step on the brakes before the accident as it happened all of a sudden.

5. Prosecution Witness 2 (PW2) is Kavekini Naliva of Nasaucoko Village. He states that around 10.15am on 30th April 2014 he got onto the minibus at Vatudradra Police Post.

The minibus was heading towards Nadi. He identified the Accused as the driver as he sat behind his seat. He felt scared after observing the Accused's manner of driving. At Lomawai area, just before the overtaking lanes, he saw the Accused overtake a vehicle that was in front of them and so he turned to his own seat and hugged it. He saw the white twin cab coming down the road from the opposite lane and the Accused turning right to the other side of the road, which resulted in the twin cab's right side hitting the front passenger side, that is, the left side of the minibus. His received injuries as both thighs had parted, his reproductive organs damaged and legs crushed. He was taken to Sigatoka Hospital then to Lautoka Hospital.

In cross-examination, he states that when they overtook the vehicle, he saw the white twin cab was about 6 chains away, which is about 20 to 30 meters away.

6. Prosecution Witness 3 (PW3) is Shamal Kumar, Teacher of Tuvu. He remembers the day in question at about 10am he was at Maro Bus stop at Intercontinental with three others waiting for transport to go to Nadi. He and three others then went into a Viti minivan LM 246 driven by the Accused. He sat in the middle seat, which was just in front of his brother who was sitting in the back seat. He saw the Accused accelerating hi speed as they went. He then saw the Accused wanting to take over a vehicle in front of them but could not as there was an oncoming vehicle. He then saw the Accused take over the front vehicle the second time and by this time the minibus was on the opposite lane. The accident then happened. Consequently, he hit the roof, flew out of the vehicle and became unconscious. He regained consciousness and saw that his brother was bleeding and was not moving.

   In cross-examination, he states that he could not tell the exact speed that the Accused was travelling at. He remembers it was drizzling. He states that PW1 could not avoid the accident to swerve to the right as the other vehicle that was overtaken was still on that lane.

7. Prosecution Witness 4 (PW4) is Avneel Singh, School Teacher of Sigatoka. He recalls on the day in question he was at Maro Junction waiting for transport with his friends PW3 and his brother to go to Lautoka. A minibus registration number LM 246 driven by the Accused stopped and they got on. It stopped at Vatudradra Police Post and two ladies got off the minibus. He sat behind the driver's seat and PW2 was to his left. He saw the Accused tried to overtake a vehicle near Lomawai after Maro junction but he

could not do so. He then saw the Accused go to the middle of the road and tried to overtake again but this time there was an oncoming vehicle, a Hilux twin cab coming from the opposite lane. The accident then happened and the passenger side of their minibus was hit by the hilux. He was thrown out and landed on the nearby farm. His right hand and wrist was swollen and bruises to his forehead.

In cross-examination, he stated that he did not see the speed of their minibus. He remembers it was drizzling. He did not tell the driver to stop.

8. Prosecution Witness 5 (PW5) is Joshua Love, Farmer of Kadavu. At 8am on the day in question he boarded the minibus in question from Suva as he was taking kava to Malolo. There were about 8 passengers that boarded. He was seated at the backseat and recalls the Accused was the driver. It was good weather but started to drizzle in Sigatoka. As they were travelling, he saw that the Accused tried to overtake but the vehicle from opposite lane appeared then they swerved to the right to try. He recalls they were parallel to the car they were passing when the other vehicle came. The collision then happened on the opposite lane. Their minibus then went down the slope. He received injuries on his body including his left hip.

   In cross-examination, he states that it was raining heavily. Their minibus was not parallel to the other vehicle. He states that he saw the twin cab coming from opposite side and it did not stop at any time.

9. Prosecution Witness 6 (PW6) is Prashneel Kumar of Maro, Sigatoka. He recalls around 10.15am on 30th April 2014 he got into the minibus from Maro junction and was sitting in the middle beside Shalvin Kumar at the back. He saw their vehicle trying to overtake the vehicle in front and finally did on the opposite lane. He then saw the twin cab coming from the opposite lane which was about 4 to 5 meters away. The accident then happened. Their minibus was damaged very badly as parts had fallen off. He sustained injuries on his left leg, left hand, left side of the chin and neck and back of neck. He was admitted in CWM Hospital for a month.

   In cross-examination, he states that it was raining and the minibus was going up the hill and reached the point where the vehicle was in front of them. He saw that the twin cab did not stop prior to the accident happening.

10. Prosecution Witness 7 (PW7) is Tevita Nakulanikoro of Lomawai, Sigatoka. He recalls around 10.10am on 30th April 2014 he went with his brother to fix his car at a garage which was about 20 meters from the Queens Highway. While at the garage facing the highway, he saw this white minibus travelling towards Nadi and it tried to overtake a car as he went on to the other lane. He then saw a white twin cab coming down that said lane. The minibus swerved right and the accident happened. He and his brother then attended to the scene and tried to assist the passengers.

    In cross-examination, he states that the accident happened half way on the hill.

11. Prosecution Witness 8 (PW8) is Sgt 3780 Trevor. On 30th April 2014, he attended to the accident scene at Lomawai. Upon arrival, he drew the rough sketch plan and saw that the minibus was about 16.5 meters down the slope. In his plan, he did not put the point of impact as he had overlooked it however he stated that the accident was on the lane coming towards Sigatoka. After drawing the plan, he and other officers then took the vehicles to the Sigatoka Police Station.

    In cross-examination, he states that he did not speak to both drivers of the accident at the scene. He also maintained his observation that the accident would have been on lane coming towards Sigatoka as there were broken glass and remnants of both vehicles on that side of the road. However, he admits that on the face of it no one can tell where the broken glass or remnants of the vehicles are on the plan. He did not write or prepare a fair sketch plan to his rough sketch plan but he knows that it was done later by another officer. He also admits that it is proper procedure that the plans need to be signed by both drivers and this was never done.

12. Prosecution Witness 9 (PW9) is Loqorio Waqa. He was a police officer based in the Traffic Department in Sigatoka in 2014 and he recalls assisting PW9 in attending to the accident scene on 30th April 2014. On 2nd May 2014, he interviewed the Accused at 9.40am and it concluded at 7.08pm. He and the Accused signed the record of interview. The Accused was then charged and brought to Court.

    In cross-examination, he states that he never questioned the Accused on dangerous driving nor did the Accused admit to dangerous driving. He states that after continuous attempts he finally recorded PW1's statement but it was after the Accused was charged. He states that the recording of PW1's statement was done as a result of

Defense' letter questioning the decision on why PW1 was not charged. He also cannot recall if Land Transport Authority (LTA) Report was done on the brakes of the minibus but he agrees that it would have been proper to conduct a LTA Report.

13. Prosecution Witness 10 (PW10) is PC 3980 Ravi. He drew the fair sketch plan and its keys.

    In cross-examination, he states that he took over as Investigating Officer (IO) of this case in 2015 after the original IO of this case, PW8, failed to draw a fair sketch plan back in 2014. He states that he drew the fair sketch plan after taking measurements from the rough sketch plan. He did not visit the scene. He states that the fair sketch plan does not show the point of impact.

14. Prosecution Witness 11 (PW11) is Dr. James Kalouvaki, Head of Forensics. He has a Degree in Surgery, Post Graduate and Masters. He looks after pathology services and conducts autopsies on unnatural deaths and accident, suicide and underdetermined cases. To date, he has done more than 200 autopsies.

15. Prosecution tendered in the following exhibits:
    - **PE 1 – Medical Report of PW1**
    - **PE 2 – Medical Report of PW2**
    - **PE 3 – Medical Report of PW4**
    - **PE 4 – Medical Report of PW5**
    - **PE 5 - Rough Sketch Plan**
    - **PE 6 – Record of Interview of Accused**
    - **PE 7(a) – Fair Sketch Plan**
    - **PE 7(b) – Keys to Plan**

16. That was the case for Prosecution.
17. The Court found that the Accused had a case to answer. The Defence opted to give evidence.

<u>The Case for Defense</u>

18. The Accused, Farmer of Nakorotubu, Ra. Prior to 2014, he had been driving for about 10 years and he would usually use Queens Highway to commute. He recalls that on

30th April 2014 at around 6am he was driving a minibus registration number LM 246 from Suva towards Lautoka with passengers whom he picked and dropped. It was cloudy but not raining when he left Suva. But it was raining heavily when he reached Lomawai, Sigatoka. From Suva to Sigatoka, he recalls driving at 80 to 90 km per hour. On the way, he remembers picking some passengers from Natadola. At this point, he recalls none of the passengers complained to him about his manner of driving nor of the speed that he was travelling at. When he passed Lomawai Junction, there was no traffic but there was one car moving ahead of him. He wiped his windows with his wipers. He then saw the said car stop on their lane. He tried to apply the brake of his vehicle as he also saw a vehicle coming down from the opposite lane. But the brake failed. He then tried to save the vehicle ahead of him by turning the vehicle to the middle of the road but because the vehicle on the opposite side was coming down at a higher speed he then turned the wheel of the vehicle to the other side of the road, which was grass. In doing so, the opposite side vehicle hit the left side of his van which was on the grass by then which then resulted in his van tumbling three (3) times ending up with the sugarcane field. The police then took him in for questioning. He told them about the brake failure in question and answer 33 of PE 6 where it is stated:

> "Question 33 – Were your brakes effective? Answer – It was good, only at the last minute and noticed something might have happened."

The police never asked any follow up questions regarding the brakes. He also cannot recall seeing PE5 and PE6 (a) before nor did the police ask him afterwards about it for his viewing and signature. He knew there was a brake failure because it did not work when he applied it (brakes) three times. The brake failure happened all of a sudden.

In cross-examination, he states that he has been driving for more than 10 years prior to the incident and he has a Driver's License for Groups 2, 3, 4, 6, 7 and 8 inclusive defensive drivers' course. On the day, he states that he was carrying 13 passengers and travelling at 80 or 90 km per hour throughout the trip to the point in time of the accident. He admits he did not take precaution to slow down when coming down and crossing Lomawai junction and saw the moving vehicle and realising it was stopped. The said vehicle was about 20-30 meters ahead of him when he realised this. Prior to the accident, he did not feel the brake was playing up. He states that he said in his

caution interview that is PE6, that his carelessness caused the accident. He admits that his speeding and inattentiveness caused the accident.

In re-examination, he states he does not understand inattentiveness. He states that he was not able to control the vehicle because the brakes could not work. He states that carelessness means no care.

19. That was the Defense's case.
20. Both parties then filed written closing submissions which the Court is grateful for. I have perused and taken account of the same in preparation of the following.

Analysis

21. Prosecution bears the burden of proving the elements of the offence beyond reasonable doubt or so that you are sure. This means that if one element of the offence is not proved beyond reasonable doubt, the whole offence is not proved beyond reasonable doubt. There are two offences or counts in the charge before this Court.

22. Now the elements of Count 1 - Dangerous Driving Occasioning Grievous Bodily Harm are:
    1. The Accused
    2. Drove a vehicle registration number LM 246 which was involved in an impact
    3. And that impact occasioned grievous bodily harm to PW6
    4. And at the time of impact, the Accused drove the said vehicle in a manner dangerous to the said PW6.

23. The elements of Count 2 – Dangerous Driving Occasioning Grievous Bodily Harm are:
    1. The Accused:
    2. Drove a vehicle registration number LM 246 which was involved in an impact
    3. And that impact occasioned grievous bodily harm to PW2
    4. And at the time of impact, the Accused drove the said vehicle in a manner dangerous to the said PW2.

24. I have carefully considered all the evidence, the demeanor of witnesses, the exhibits and legal submissions. Without meaning to make this into an academic exercise that

tries to capture every issue before this Court, the following will be focusing on what, after much consideration, the pertinent issues are in as far the charges against the Accused before this Court are concerned.

25. In the course of the proceedings, it became apparent that the parties were not disputing elements 1 and 2 of both counts that is, that it was the Accused who drove the vehicle registration number LM 246 which was involved in the impact. Therefore, these two elements of both counts are proved beyond reasonable doubt.

26. The Court will now look at element 4 of both counts first before addressing element 3 of the respective counts.

27. The test for dangerous driving was discussed in the case of **Ajnesh Kumar –v- The State Criminal Appeal HAA014 of 2001**. At page 6 of the judgment, Madam Justice Shameem stated as follows: -

> *"There are many authorities which say that the test for both Dangerous Driving and Careless Driving, is whether the accused has departed from the standard of a reasonable, prudent, competent and experienced driver in all the circumstances of the case. The accused is guilty of either offence even if he committed an error of judgment (**Simpson -v- Peat** (1952) 1 ALL ER 441) or was an inexperienced driver (**McCrone -v- Riding** (1938) 1 ALL ER 157.) The difference between Careless Driving and Dangerous Driving in Fiji, is whether the manner of driving (which fell below the requisite standard expected) created a dangerous situation. Thus a careless driver is also a dangerous driver, if his careless driving caused a pile-up of vehicles on a busy motorway resulting in death and injuries. The question of what is careless as opposed to dangerous is one of fact, usually best left to the trial court to decide, on the evidence"*

25. In adopting this binding authority of **Ajnesh Kumar** (supra), the Court acknowledges the authorities that look to expanding the question of fact of determining what is dangerous from careless; and the manner of driving that is dangerous to the public. Given the similarity in definition of dangerous driving in Australia's related legislation to Fiji's Land Transport Authority, the Court adopts the obiter in **McBride v the Queen (1966) 115 CLR 44** where the then Chief Justice Barwick stated (and which this Court found it amiss not to reproduce) :

> "*The section speaks of a speed or manner which is dangerous to the public. This imports a quality in the speed or manner of driving which either intrinsically in all*

circumstances, or because of the particular circumstances surrounding the driving, is in a real sense potentially dangerous to a human being or human beings who as a member or as members of the public may be upon or in the vicinity of the roadway on which the driving is taking place. It may be, of course, that potential danger to property on or in the vicinity to that roadway would suffice to made the speed or manner of driving dangerous to the public, but the need for death or injury to a person to result from impact with a vehicle so driven may make that question unlikely to arise, though the possibility of its doing so must be acknowledged.

This quality of being dangerous to the public in the speed or manger of driving does not depend upon resultant damage, though to complete the offence under the section, impact causing damage must occur during that driving….A person may drive at a speed or in a manner dangerous to the public without causing any actual injury: it is the potentially in fact of danger to the public in the manner of driving, whether realised by the accused or not, which makes it dangerous to the public within the meaning of the section.

This concept is in sharp contrast to the concept of negligence. The concept with which the section deals requires some serious breach of the proper conduct of a vehicle upon the high way, so serious as to be in reality and not speculatively, potentially dangerous to others. This does not involve a mere breach of duty however grave, to a particular person, having significance only if damage is caused thereby. These distinctions make it imperative that the jury be specifically directed as to criteria to be applied and the distinctions to be observed in determining whether any particular speed or manner of driving can have the quality, intrinsic or occasional, of being dangerous to the public within the meaning of the section, and that the particular features of the driving charged as in breach of the section be isolated for the jury and related to these criteria."

26. This Court has heard from all witnesses who gave evidence pertaining to their respective view or opinion on speed that a vehicle driven by another person may have been travelling at. Normally a witness can only speak about facts, that is, what they saw, heard and said. For example, they saw the actual speed gauge in the minibus to determine the fact of the speed. But an expert with specialised knowledge may express an opinion within his or her particular area of expertise. Expert evidence is admitted to provide the Court with *scientific* information and opinion which is within the witness's expertise, but which is likely to be outside the experience and

knowledge of most Fijians. Only experts can give opinions on such matters as per **Transport Publishing Co v The Literature Board of Review (1956) 99 CLR 111** where the Court stated:

> "*opinion evidence must be confined to matters which are the subject of the witness's special study or knowledge*."

In this matter, no expert evidence was led to show or prove speed of both vehicles. Therefore, the observations and opinion of all the witnesses pertaining to speed is inadmissible in evidence.

In any event, the charges preferred by Prosecution is for '*in a manner dangerous to another*', not '*at a speed dangerous to another*'[1]. In **Mithun Naidu v State, Labasa High Court, Criminal Appeal Case No. HAA 07 of 2017** , the High Court stated:

> "*it is clear from the learned Trial Magistrates' reasons that he found the appellant to be at fault for creating a dangerous situation by over speeding…the appellant was not charged with driving at a speed dangerous to another person. Driving at a speed dangerous to another person is an offence under section 97(2)(b) of the Land Transport Act. The appellant was specifically charged with aggravated dangerous driving occasioning death under section 97((1)(2)(c*)…"

Further, the High Court stated in **Navinit Narayan v State HAA 41 of 2010**:

> "*the legislature has specifically made specific separate provisions for "driving at a speed dangerous to another person" and "driving in a manner dangerous to another person*"

Therefore, with the issue of speed not included in the parameters of the Court's consideration, the Court will now look at whether the manner of driving of the Accused and whether is amounts to dangerous driving as per the authorities cited above.

27. There are real limits, however, to what is common knowledge, or, to use the language of the common law, the facts about which we may take judicial notice.

[1] Note difference between Section 97(4)(b) and Section 97(4)(c) of the Land Transport Act.

In **Woods v Multi-Sport Holdings Limited [2002] HCA 9; (2002) 208 CLR 460**, McHugh J considered when a Court may take judicial notice of certain matters:

> *"As a general rule, facts in issue or relevant to a fact in issue must be proved by admissible evidence. The doctrine of judicial notice is an exception to this rule. A court may judicially notice a fact whenever it "is so generally known that every ordinary person may be reasonably presumed to be aware of it".*

In adopting the above principle, I take judicial notice of the generally known fact that:

- the part of Queens Road towards Nadi, on which this accident occurred is primarily a straight road;
- the straight road begins about 30 meters before the estimated point of impact; and
- the straight road stretches uphill for more than 60 meters.

28. PW1 stated that the Accused suddenly tried to overtake a car and came onto his lane and headed towards him resulting in the impact. PW2 stated just before the overtaking lanes (on this straight uphill road), he saw the Accused overtake a vehicle that was in front of them and the white twin cab coming down from the opposite lane resulting in the impact as the Accused turned right to the other side of the road. PW3 observed that the Accused took over the front vehicle the second time and by this time was on the other lane, which is the opposite lane when the accident happened. PW4 stated that the Accused went to the middle of the road and finally overtook the front vehicle but this time there was an oncoming vehicle a Hilux twin cab coming from the opposite lane which resulted in the accident. PW5 observed that the Accused tried to overtake but the vehicle from opposite lane appeared then they swerved to the right to try. He recalls they were parallel to the car they were passing when the other vehicle came and the collision then happened. PW6 stated saw their vehicle trying to overtake the vehicle in front and finally did on the opposite lane when he then saw the twin cab coming from the opposite lane which was about 4 to 5 meters away resulting in the accident. PW7 stated that he saw this white minibus travelling towards Nadi and it tried to overtake a car as he went on to the other lane. He then saw a white twin cab coming down that said lane. The minibus swerved right and the accident happened.

29. The above are the individual accounts of witnesses. The inconsistencies and consistencies as addressed by Prosecution and Defense are noted. In doing so, it is vital to accept that "*no two witnesses have a similar memory of an incident or observe the same incident exactly in the same way*"[2]. But nevertheless, the issue that this Court is confronted with appears not to wager on the common issues of credibility (and divisibility of credibility) or reliability of the witnesses.

30. The issue is that it is a fact that all witnesses including the Accused, have said that the Accused after observing the vehicle, whether mobile or not, in front of him drove right onto the opposite lane regardless of whether he wanted to take pass or because of a mechanical default. If going by the Prosecution witnesses' account that the Accused was overtaking then the inference is that the vehicle in front of them was either slow or mobile. If the front vehicle was slow or mobile then on that rainy day the Accused ought to have slowed down and stop behind the front vehicle to ensure that there were no vehicle(s) coming from the opposite lane before overtaking. Such is required of a reasonable, prudent, competent and experienced driver. But he did not.

31. In his evidence, the Accused stated that he saw the said car ahead of him moving. After wiping his widows, he saw the same car stop and he had to evade it. A reasonable, prudent, competent and experienced driver would have kept a three car length distance as commonly required of all motorists from the front car. Had he done that, an accident may have been prevented. Such was his carelessness, to which he admits to an extent in his evidence.

32. Now the Accused states that at that point he tried to apply the brake of his vehicle as he saw a vehicle coming down from the opposite lane. But the brake failed. This mechanical default or failure was raised in his interview. However, the police did not inquire further into it.

33. Prosecution relied on Question 33 of PE6 to show that the Accused stated that the brakes worked but at the last minute. The last minute here may be in reference to the last moment before the collision. Now the answer also implies to what was not said and that is, that the brakes were not working before the last minute. The question is –

[2] **Ratu Ravuama Vuibau v State Criminal Appeal No. 103 of 2002 (FCA)**

were the police mandated to investigate more into this purported defence of mechanical default that is brake failure?

34. The persuasive case of **State v Bulivorovoro [2006] FJMC 30** possesses similar facts as this case. In that case, the accused was driving his 3 tonne truck down Edinburgh Drive. He was following a bus downhill and tried to slow down. His brakes were loose and he couldn't stop or slow down. He saw a wall and trees to the left side. On his right was an empty space but another bus was coming uphill about 6 meters away. He swerved into the oncoming bus and came to a halt at the curve on the right side. His vehicle was extensively damaged. The oncoming bus suffered damage to its front left. One of his passengers died and three others suffered grievous bodily harm. The defence did not dispute any facts except they say the cause of the accident was mechanical failure of the brakes and not within the control of the driver. The crucial evidence was of the expert witness, the LTA vehicle examining officer who concluded that the brakes were working. In addition to this, the brake marks of the Accused's vehicle on the road assisted the Court in showing that the brakes was working.

In this case before this Court, there is no mechanical examination report before the Court to show whether or not he brakes was working.

35. In **Gurdial Singh Parhar v Regina (1963) 9 FLH 154**, the High Court in overturning a decision to convict a person of careless driving stated:

> "*Once an Accused raises a defence of mechanical failure it must be considered with the rest of the evidence and the onus of proof remains with the prosecution.*"

This fundamental position is confirmed the authorities of **Kanda Sami v R Criminal Appeal 55 of 1978, R v Atknson (1970) 55 Cr App R 1 and R v Spurge (1961) 2 QB 205.**

36. All in all, the investigators in this case saw it fit to end their inquires in Question 33 of PE6. By law, they were required not only to inquire further about the brake failure as a form of mechanical failure or default but to attain relevant expertise such as in the above authorities to assist this Court in determining the validity of the defence of

mechanical default. Therefore, Prosecution has failed to rebut the defence of mechanical default.

37. For near completeness sake though, it is also imperative to note that Prosecution did not adduce any medical evidence pertaining to element 4 for count 1 of the charge. Therefore, there is insufficient evidence to prove this element of the offence beyond reasonable doubt.

38. Bearing in mind that mechanical default is a complete defence to both counts of the charge according to the cited authorities above, it would be a redundant exercise to proceed further in this analysis.

Court's Finding

39**.** Court finds Prosecution has not discharged its burden of proving counts 1 and 2 of the charge beyond reasonable doubt.

40. The Accused is hereby found not guilty as charged.

41. The Accused is acquitted accordingly.

42. 28 days to appeal.

J. Daurewa

Resident Magistrate

17th August 2023