

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Traffic Case No. 7/2021

BETWEEN: **STATE**

PROSECUTION

AND: **SANJAY KARAN**

ACCUSED

Counsel: Ms. S. Naibe for the State
 Mr. R. Filipe for the Accused

Date of Prosecution's Case: 6-7 May 2024
Date of NCTA Ruling: 4 October 2024
Date of Defence's Case: 12 November 2024
Date of Judgment: 27 June 2025

JUDGMENT

Introduction

1. Mr. Sanjay Karan ("the Accused") on 17 February 2021 was charged and produced in Court for 2 counts of Dangerous Driving Occasioning Death contrary to section 97(2)(c), 5(c), 8 and 114 of the Land Transport Act and 5 counts of Occasioning Grievous Bodily Harm by Dangerous Driving contrary to section 97(4)(c) and 5(a) and 8 and 114 of the Land Transport Act.
2. On 5 April 2022, the Accused pleaded Not Guilty to the above charges. Admitted Facts were filed on 11 May 2023. The following facts were admitted to:
 - i. That at all material time, Sanjay Karan (hereinafter referred to as the "accused") was 40 years old, unemployed, residing at Namosau, Ba.
 - ii. That the accused on 2nd March 2020 was at Moto, Ba returning from Balevuto.
 - iii. That the accused was driving a Nissan Vanette registration number CG 059.
 - iv. That the accused held a valid driving licence with a class 2 and 8.
 - v. That the accused drove his brother and his family.
 - vi. That at the material time Ashwindra (hereinafter referred to as PW1), 53 years old, Assistant Market Master residing at Namosau, Ba was sitting in the front passenger seat.
 - vii. That at the material time Meenal M. Naidu (hereinafter referred to as PW2) was also travelling in the same vehicle as the accused and PW1.
 - viii. That at the material time Ritesh Naidu (hereinafter referred to as PW3) was also travelling in the same vehicle as the accused, PW1 and PW2.
 - ix. That at the material time, Rakesh Naidu (hereinafter referred to as PW4) was also travelling in the same vehicle as the accused, PW1, PW2 & PW3.
 - x. That at the material time Shinal Kritika Sami (hereinafter referred to as PW5) was also travelling in the same vehicle as the others.
 - xi. That at the material time Tanshi Tanisha Naidu (hereinafter referred to as PW6) was also travelling in the same vehicle.
 - xii. That there was 11 passengers altogether in the vehicle which also included some children.

- xiii. That the accused was driving when the vehicle got into an accident at Moto, Ba.
 - xiv. That at the material time Shaleshni Narayan (hereinafter referred to as deceased 2) was also travelling in the same vehicle and passed away due to the accident at Moto, Ba.
 - xv. That at all material time, PW1, PW2, PW3, PW4, PW5, PW6, Rishti Achari, Rishav Naidu and accused all received injuries due to the car accident.
 - xvi. That the accused was arrested and interviewed under caution on 15th February 2021.
3. Further Admitted facts were filed by the parties on 2 May 2024 where the Accused admitted the following documents:
- i. Fiji Police Medical Examination Form of Ashwindra Narayan dated 2nd March 2020.
 - ii. Fiji Police Medical Examination Form of Meenal Monisha Naidu dated 2nd March 2020.
 - iii. Fiji Police Medical Examination Form of Ritesh Naidu dated 2nd March 2020.
 - iv. Fiji Police Medical Examination Form of Dishar Naidu dated 2nd March 2020.
 - v. Fiji Police Medical Examination Form of Rishti Shanya Achari dated 2nd March 2020.
 - vi. Post-Mortem Examination Report of Disha Tansha Naidu dated 3rd March 2020.
 - vii. Post-Mortem Examination Report of Shaleshni Narayan dated 2nd March 2020.
 - viii. LTA Report dated 4th March 2020.
4. The matter proceeded to Trial on 6 May 2024 with Prosecution calling 2 witnesses and thereafter making an application to amend the charge. The counsel for the Accused requested for time to consider the same. The matter was then called on 7 May 2024 and, on that date, the counsel for the Accused informed that they would not be objecting to an Amended Charge being filed. As such, leave was granted and the Amended Charge was filed in Court.
5. It is important to note that the amendment was to the charging sections, that is from section 97(2)(c) to section 97(2)(b) in Counts 1 and 2 and section 97(4)(c) to section 97(4)(a) in Counts 3-7. The Accused pleaded Not Guilty to all the charges in the Amended Charge. The particulars of the offences are:

Count 1
Statement of Offence

Dangerous Driving Occasioning Death: Contrary to Section 97(2)(b), 5(a), (8) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning the death of **Saleshni Narayan**.

Count 2
Statement of Offence

Dangerous Driving Occasioning Death: Contrary to Section 97(2)(b), 5(a), (8) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning the death of **Disha Tarisha Naidu**.

Count 3
Statement of Offence

Occasioning Grievous Bodily Harm by Dangerous Driving: Contrary to Section 97(4)(a), 5(a), (8) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm to **Ashwindra Narayan**.

Count 4
Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: Contrary to Section 97(4)(a), 5(a), (8) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm to **Meenal Monisha Naidu**.

Count 5
Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: Contrary to Section 97(4)(a), 5(a), (8) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm to **Ritesh Naidu**.

Count 6
Statement of Offence

Dangerous Driving Occasioning Grievous Bodily Harm: Contrary to Section 97(4)(a), 5(a), 8 and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm to **Dishar Naidu**.

Count 7
Statement of Offence

Occasioning Grievous Bodily Harm by Dangerous Driving: Contrary to Section 97(4)(a), 5(a), 8 and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

Sanjay Karan, on the 2nd day of March, 2020 at Ba in the Western Division drove a motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm to **Rishhti Shanya Naidu**.

6. The Amended Charge was read and explained to the Accused in his preferred language and he pleaded Not Guilty to the same on 7 May 2024. Prosecution then led the evidence of 2 further witnesses on 7 May 2024 and thereafter closed its case.
7. The counsel for the Accused then made an application pursuant to section 178 of the Criminal Procedure Act stating that a case was not sufficiently made out against the Accused to require him to make a defence. Directions were made with respect to filing of submissions. The counsel for the Accused complied with directions and filed submissions on 28 May 2024. However, due to the delay of the State counsel, submissions on behalf of the State was filed on 12 August 2024. Counsel for the Accused thereafter, informed that they would not be filing any Reply submission.
8. On 4 October 2024, the Court refused and dismissed the application for no case to answer and held that it appeared that a case was made out against the Accused to sufficiently require him to make a defence in respect of Dangerous Driving Occasioning Death in Counts 1 and 2 and Dangerous Driving Occasioning Grievous Bodily Harm in Counts 3 to 7.
9. The Court was then informed that the Accused would give evidence but not call any witnesses. As such on 12 November 2024, the Accused gave evidence and did not call any witnesses. Parties then informed the Court that they could file Closing submissions. Counsel for the Accused filed his Closing submissions on 14 January 2025 whilst counsel for the State filed her Closing submissions on 24 June 2025.
10. Having read the submissions and considered the evidence presented by Prosecution and Defence, I now pronounce my Judgment.

Burden of Proof

11. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
12. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

13. Prosecution's first witness, Rakesh Naidu ('Rakesh') testified that on 2 March 2020, he had gone to Nukuloa, Ba with his wife – Meenal Monisha Naidu and his children with some other passenger and that the Accused had driven them. Upon their return from Nukuloa and as they came to Moto, the vehicle was really overspeeding and going in a zigzag manner. The vehicle then tumbled 4-5times.

14. Prosecution's second witness Meenal Naidu ('Meenal') testified that they had gone to an area in Moto, Ba and upon their return, she testified that she could feel the vehicle going very fast and that they had shouted to the Accused to slow down but he didn't listen. She further explained that the vehicle went in a zigzag manner and then it tumbled 3-4 times.
15. W/Cpl 4243 Maria Ratauvata ('W/Cpl Maria') testified that she had received a call on 2 March 2020 regarding a fatal accident at Moto Road as such she headed to the scene. She testified that the vehicle was out of the road where the drain was. W/Cpl Maria testified that the tyre marks as per the Rough Sketch Plan ('PEX1'), which was drawn at the scene, began from where the road was coming down from and that the zig zag mark on the plan is the tyre mark. She stated that the vehicle went zig zag; it went onto the opposite lane then came back to his lane and then to the other side of the road where the vehicle landed. From where the tyre mark started to where the vehicle landed it was 127 meters. She further testified that the speed limit at Moto Road was between 60-80km and that on seeing the tyre marks at the scene it indicated that it could be due to speeding.
16. Prosecution's last witness was DC 3651 Vimal Sharma ('DC Vimal') who testified that on 20 March 2020, he had received a call from Cpl Maria regarding a fatal accident along Nukuloa Road at Moto, Ba. He had gone to the scene and photographed the scene as well as the deceased lying beside the road and he drew a Rough Sketch Plan with assistance of the Traffic personnel and then uplifted the deceased's body and took her to Ba Mortuary. He testified that he had also attended to the Post-Mortem at Lautoka and had taken photographs of visible injuries on the 2 deceased. The photographs were then developed and prepared into a booklet which was then tendered as 'PEX11'. The Rough Sketch Plan and Fair Sketch Plan which had been drawn of the scene was also tendered as 'PEX12' and 'PEX13' respectively.
17. The Accused admitted to driving his vehicle with registration number CG 059 after attending a prayer meeting at Balevuto on 1 March 2020. He stated that after leaving the prayer meeting, he had only stopped his vehicle once at his family's home as he had a running stomach. Afterwards, the Accused testified that as he was driving downhill on Moto Road, a horse crossed the road which caused the Accused to apply his brake. He then testified that the horse started coming back, so he applied the handbrake and that the vehicle tumbled.

Preliminary Issue

18. At this juncture, it is important to discuss Counts 3, 4, 5, 6 and 7 with respect to the Statement of Offence and Particulars of Offence. Sections 58 and 61 of the Criminal Procedure Act states:

Offence to be specified in charge or information with necessary particulars

58 Every charge or information shall contain –

- (a) a statement of the specific offence or offences with which the accused person is charged; and
- (b) such particulars as are necessary for giving reasonable information as to the nature of the offence charged.

Modes in which offences are to be charged

61 (1) A count of a charge or information shall commence with a statement of the offence charged and this shall be called the statement of offence

(2) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.

(3) The charge shall contain a reference to the section of the law creating the offence.

(4) After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.

(5) Where any rule of law of any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this section shall require any more particulars to be given than those so required.

(6) The forms applying or approved under this Act (or forms conforming to these forms as nearly as may be) shall be used in cases to which they are applicable: with the statement of offence and the particulars of offence being varied according to the circumstances of each case.

(7) Where a charge or information contains more than one count, the counts shall be numbered consecutively.

19. The above sections provide a guideline in terms of drafting a charge or information and the necessary particulars that are required.

20. In ***Nauasara v State*** Criminal Appeal No. AAU 108 of 2018 (27 July 2023) His Lordship JA Maitaitoga when dealing with an appeal pertaining to a defective indictment stated:

[21] Generally, a charge or statement of offence should state all the elements of the offence and contain particulars as to the time, place and manner of the commission of the offence. There is a distinction made between the essential factual ingredients required for the validity of a charge and the particulars needed to allow the defendant to adequately prepare a defence. There are also requirements of charges in stating an offence both generally and for specific offences.

[22] In considering arguments about want of particularity of a statement of offence, the context in which the argument is raised is of importance. The difference between what is necessary for the statement contemplated in section 58 and what is sufficient in the form of an information may be important. There is a distinction between the matter of what constitutes sufficient particularity to support the validity of information and the question whether in the exercise of his or her discretion a judge should order the prosecution to provide further and better particulars to a defendant. Be that as it may, section 58 does not do away with the common law requirement that an information must identify the essential factual ingredients of the actual offence alleged to have been committed. [See *Smith v Moody* [1902] UKLawRpKQB 143; [1903] 1 KB 56 for common law requirements].

[25] In the High Court case of *Sakiusa Kaukimoce v The State* [2009] FJHC 22 the court held that failure to include an essential element of an offence, in the manner of the wording of the charge cannot be saved by section 119 & 122 of the *Criminal Procedure Code* [what is now section 61 of the *Criminal Procedure Act*] because without inclusion of all essential elements, the charge would be in law a nullity.

[26] The Supreme Court in *Alifasi Kirikiti v State* [2015] FJSC 13, on a claim of defective charge due to lack of adherence to requirements of sections 58 and 61 of the *Criminal Procedure Act* held that:

[29] The particulars allege that the Petitioner stole cash in company. The offence created by section 311 (1) (a) is rob in company. The difference between rob and steal is the use of force. It is not frivolous to claim that the charge was

defective because there was no reference to the use of force or any reference to a fact or acts that might constitute the use of force. In my judgment a ground of appeal that has the effect of claiming that the charge is defective on account of non-compliance with sections 58 and 61 of the Criminal Procedure Decree is not a frivolous ground. This is even more so the case when the particulars have not been drafted in accordance with Form 8 in the Criminal Procedure Decree 2009 (Forms) Rules."

[27] In **State v Brian Singh** [2007] FJCA 47, the Court of Appeal in addressing similar claims of defective charges stated as follows:

"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the State intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces."

[28] In **R v Fahey & Others** [2001] QCA 82, where the Queensland Court of Appeal had to address a claim of defective indictments, the Court said:

The submission for AD is that the indictment omits an element or ingredient of the offence and that this is fatal. Some reliance was placed upon *John L Pty Ltd v Attorney-General (NSW)* [1987]163 CLR 508 in which an information which failed to identify a "material" of an information to ground a summary offence. Broadly speaking the function of an information has been seen as fulfilling two requirements, first informing the court of the identity of the offence and second providing the accused with the substance of the charge. It was recognised as a common law requirement that the information should condescend to identifying the essential factual ingredients of the actual offence.

The *John L* case would seem to be an instance of an information which failed to tell the defendant what was alleged against him. It alleged that he had made a misleading statement about intended future conduct, but failed to specify any material particular of what was said to be false or misleading. The case is perhaps not far from the borderline of cases where a sufficient general allegation might be cured by the provision of particulars. But in any event, the basis of the defect that invalidated the information here lies in the disadvantage suffered by the defendant by reason of an information that failed to tell him what the prosecution alleged against him.

[29] In the present case, the defect in the information lies in the disadvantage suffered by the appellant as a result of the incorrect information set out in the charge, specifically that the offence he was charged with took place on the wrong date – 25 June 2015. This is evident by the appellant's plea at the trial when the information was read to him afresh.

[30] It is apparent that **there is more than just a variance between the charge information and the evidence led at trial. It is apparent that it had a material effect on the conduct of the defence at the outset of the trial when the appellant pleaded not guilty.**

[31] In my view, there is an error that is material to the merits of this case. The formulation and presentation of charges is a matter of fundamental importance in the administration of criminal justice. It is apparent that this is a case where **a failure to properly and accurately particularise reasonable information as to the nature of the offence charged, has had a material effect upon the manner in which the case of the appellant proceeded at trial.**

21. Consequently, a charge or information provides the court with the identity of the offence and provides an accused with the nature or ingredients of the charge. Thus, a charge or information is required to have the essential factual ingredients to allow the charge to be

valid but also particulars to allow an accused to adequately prepare a defence. Failure to include an essential element of the offence would cause the charge to be a nullity in law.

22. As per the Statement of Offence for Counts 3 to 7 herein, Prosecution has charged the Accused for Dangerous Driving Occasioning Grievous Bodily Harm pursuant to section 97(4)(a), (5)(a), (8) and 114 of the Land Transport Act 1998. This section creates an offence of dangerous driving occasioning grievous bodily harm when the person driving a vehicle was involved in an impact occasioning grievous bodily harm to another and at the time the driver was under the influence of an intoxicating liquor or a drug.
23. However, as per the Particulars of Offence in Counts 3 to 7 herein, Prosecution has alleged that the Accused drove his motor vehicle registration number CG 059 on Moto Road, Ba in a speed dangerous to another person involved in an impact occasioning grievous bodily harm.
24. It is evident that the Statement of Offence which is created by section 97(4)(a), (5)(a), (8) and 114 of the Land Transport Act 1998 pertains to driving whilst under the influence of an intoxicating liquor or drug whilst the Particulars of Offence relates to an offence under section 97(4)(b), 5(a), (8) and 114 of the Land Transport Act 1998 which is driving at a dangerous speed.
25. Unlike *Nauasara* [supra], the Particulars of Offence in the matter herein has properly and accurately provided the essential factual ingredients to indicate to the Accused the nature of the offence or ingredients of the actual offence which the State intended to present and pursue against him. It is only the Statement of Offence which has failed to identify the correct section numbering.
26. Whether the charge is defective or not, the Court will need to look at whether the Accused has suffered a disadvantage by reason of the charge failing to tell him what the prosecution alleges against him (vide *Nauasara* [supra]).
27. In the case of *FICAC v Rabuka*; Criminal Appeal No. HAA 57 of 2018 (12 November 2018), the Chief Justice, Justice Gates stated:

[108] This is a fundamental protection. Nor is this a case where there is merely a slip in the charge or section numbering where everything else is clear, such as the Statement of Offence and the Particulars of Offence. In such circumstances if the court finds that the Accused and his counsel were able to make their defence without embarrassment or prejudice and they were not misled as to what they had to answer, the defective charge will not be held to be bad in law: Skipper v. R [1979] FJC 6; Shekar and Shankar v. State Cr. App. AAU0056 of 2004, Mudaliar v. State Cr. App. AAU0032.2006.
28. When the Amended Charge was filed on 7 May 2024 and during the Trial, the counsel for the Accused raised no objections with respect to the Statement of Offence not complementing the Particulars of Offence for Counts 3 to 7. Rather, the counsel for the Accused conducted the Accused's defence on the basis that at the time of the accident the Accused had not been speeding which is in line with the Particulars of Offence for Counts 3 to 7. There were no allegations raised during the Trial that the Accused had been under the influence of an intoxicating liquor or drug.
29. The Court finds that there is no variance between the Particulars of Offence for Counts 3 to 7 and the evidence led at the time of Trial to allow the Accused to be disadvantaged at the time of conducting his defence. It is also evident that there was no embarrassment or

prejudice and the Accused and his counsel were not misled as to what charge the Accused had to answer.

30. Moreover, with the benefit of hindsight, the Court is aware of how the Accused's defence was conducted and how Prosecution presented its case against the Accused. With this benefit, the Court finds that neither the Accused nor the Prosecution were prejudiced by this slip in the charging or section numbering.
31. As such, the Court finds that Counts 3,4,5,6 and 7 are not defective.

Evaluation of Evidence

32. In *Kumar v State*; Criminal Appeal No. HAA 014 of 2001S (12 April 2002) Her Ladyship Justice Shameem discussed the test for dangerous driving wherein she stated:

"In R -v- Gosney (1974) 3 ALL ER 220, it was held that a charge of dangerous driving is proved when the driver drives in a way which falls below the standard of a competent and prudent driver, and thereby causes a situation, which viewed objectively, is dangerous.

The test for a charge of Dangerous Driving is an objective one, as is the test for Careless Driving. The difference between the Careless Driving and Dangerous Driving is not the manner of driving, (which has the same test) but the situation that has been caused thereby. In other words, a person who drives carelessly, also drives dangerously, if viewed objectively, his/her manner of driving creates a dangerous situation. Thus a person who drives carelessly, drives dangerously if he/she thereby causes a death.

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. However, on a charge of Causing Death by Dangerous Driving, it is no defence that the driver was driving carelessly and not dangerously. The only question is whether the driver's manner of driving fell below the standard expected of a reasonable and prudent driver, and thereby caused a dangerous situation as a result of which, a person died.

33. Considering *Kumar* [supra], the Court will need to first determine whether there was a dangerous situation and then consider whether there had been some fault by the driver causing this dangerous situation. If the conduct of the driver contributed to cause the dangerous situation then it has fallen below the care or skill of a competent and experienced driver and it could constitute the element of fault.
34. For a proper analysis of the evidence, it is imperative for the Court to turn its mind to the elements for Dangerous Driving Occasioning Death, which are:
- i. the accused
 - ii. drove a motor vehicle
 - iii. which was involved in an impact
 - iv. occasioning the death of a person

v. at a speed dangerous to other persons.

35. I now turn to the counts relating to Dangerous Driving Occasioning Grievous Bodily Harm, the elements for this offence are:

- i. the accused
- ii. drove a motor vehicle
- iii. which was involved in an impact
- iv. occasioning grievous bodily harm
- v. at a speed dangerous to other persons.

36. From the outset there is no dispute that on 2 March 2020, the Accused was driving motor vehicle CG 059 and that the said motor vehicle which was driven by the Accused was involved in an accident at Moto Ba. This is canvassed in paragraphs 1,2,3 and 11 of the Admitted Facts filed on 11 May 2023.

37. There is also no dispute that on the said date that Shaleshni Narayan passed due to the accident. This is also canvassed in paragraph 14 of the Admitted Facts as well as Post-Mortem Examination Report of Shaleshni Narayan being tendered as 'PEX9'. There is also no dispute from Defence that Disha Tarisha Naidu passed away from the said accident given that the Post-Mortem Examination Report was tendered as 'PEX8'.

38. Moreover, there is also no dispute that on the said date that Ashwindra Narayan, Meenal Monisha Naidu, Ritesh Naidu, Dishar Naidu and Rishi Shanya Achari had sustained injuries due to the accident. This is also canvassed in paragraphs 6,7, 8 and 15 of the Admitted Facts as well as with the Medical Reports of the abovenamed persons being tendered as 'PEX3', 'PEX4', 'PEX5', 'PEX6' and 'PEX7' respectively.

39. Thus, it is proven beyond a reasonable doubt that the motor vehicle with registration number CG 059 was involved in an impact whereby the vehicle overturned which caused the death of Shaleshni Narayan and Disha Tarisha Naidu, who were being conveyed in the vehicle.

40. It is also proven beyond a reasonable doubt that the motor vehicle with registration number CG 059 was involved in an impact whereby the vehicle overturned which caused grievous bodily harm to Ashwindra Narayan, Meenal Monisha Naidu, Ritesh Naidu, Dishar Naidu and Rishi Shanya Achari, who were all being conveyed in the vehicle.

41. The only dispute that arises is whether the Accused drove his motor vehicle with registration number CG 059 in a speed dangerous to other persons. The Accused denies speeding but maintains that a horse crossed the road leading to him applying his brake and handbrake which then caused the motor vehicle to tumble. Prosecution through its witnesses maintains that the Accused was speeding which caused the vehicle to go in a zigzag manner and thereafter tumble a few times before it landed out of the road where the drain was.

42. In State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024) His Lordship Justice Rajasinghe referred to the Liberato principle as expounded in Liberato and Others v The Queen [1985] HCA 66; 159 CLR 507 at 515 where Brennan J held that:

"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the

prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

43. Prasad [supra] also made reference to the case of Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022) where His Lordship Prematilaka highlighted the importance of modifying the *Liberato* principle and held:

[29] On the other hand *Liberato* has not uttered the final word on this issue. In *Johnson v Western Australia* [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in *Liberato* as a template for the direction: a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

[30] For that reason, it was usefully held in *Anderson* [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that **it is preferable that a *Liberato* direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?**

44. His Lordship Justice Rajasinghe in Prasad [supra] further stated "if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information".
45. Thus, the Court will need to evaluate the evidence by Prosecution whilst keeping in mind the evidence presented by the Accused insofar as they relate to the issue it is considering. The evidence presented by the parties will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide State v Moroci Criminal Case No. HAC 161 of 2023 (26 April 2024)).
46. When considering the Accused's evidence, the Accused admits to driving motor vehicle registration number CG 050 on 1 March 2020 to attend a church prayer meeting at Balevuto and that accompanying him were Rakesh Naidu, Meenal Naidu, Ashwindra Narayan and others. He testified that they left the prayer meeting at around 12:30am and that he only stopped his vehicle only once upon their return and this was at his family's home due to him having a running stomach.

47. The Accused then testified that as he was driving down the hill of Moto Road, a horse crossed the road. He testified that he was driving 60 km/hr and that he then saw the horse crossing, he applied his brake. He then testified that the horse started coming back as such he applied the handbrake and that the vehicle tumbled.
48. The Court is mindful of the cross examination of Rakesh by the Accused's counsel. At the time, it had been suggested to Rakesh that the reason the Accused had accelerated as he was going downhill was to avoid bumping a horse that came onto the road. Rakesh responded that he never saw a horse as he was sitting right at the back and couldn't see properly.
49. The above questioning of Rakesh goes against what the Accused stated in his evidence that he had been driving at 60 km/hr and that he applied his brake and thereafter his handbrake. It was never stated by the Accused that he had accelerated to prevent a collision with the horse.
50. Further, the Court is mindful of the probability of the Accused's version of events, in that, the Accused never testified nor was he asked by his counsel how far his vehicle was from the horse when it crossed the road. In cross examination, the Accused agreed that if he had been coming down the hill at 60 km/hr then he could have been able to stop the vehicle. When questioned further that he had not stopped, the Accused stated that he had applied his brake and tried to stop but the vehicle did not stop. If the Accused's vehicle was quite a distance from the horse when it appeared and his vehicle was traveling at 60 km/hr then wouldn't the Accused have been able to stop his vehicle in time?
51. Additionally, the Accused never explained whether the horse was already on the road as he was coming down the hill along Moto Road or had it suddenly appeared by galloping or even trotting onto the road which meant that he could not brake his vehicle within time to bring his vehicle to standstill.
52. Moreover, when it was suggested in cross examination that Rakesh had told the Accused to stop as the Accused was speeding downhill, the Accused stated that all the passengers were asleep. The Court is mindful that when Rakesh and Meenal were giving evidence, they both stated that they both shouted for the Accused to slow down as they had kids in the van. However, during the cross examination of Rakesh, it was never suggested by the counsel for the Accused that he had been sleeping. It was only suggested to Meenal that she could not recall correctly as to what happened leading up to the accident as she had taken a nap, however, she maintained that the Accused was driving fast even though she had taken a nap.
53. Thus, the Court finds that Accused's evidence has failed to create a reasonable doubt in Prosecution's case.
54. I now turn my mind to Prosecution's case. Rakesh testified that on 2 March 2020, he had gone to Nukuloa, Ba with his wife – Meenal Monisha Naidu and his children with some other passengers and that the Accused had driven them. Upon their return from Nukuloa, Ba at around 1am in the morning, the van had stopped 6-7 times and then they had stopped at one of the Accused's relative's place for a while before they left again.
55. Rakesh stated that he was sitting at the last seat of the van on the left side with his son and daughter and a boy from Nadi named Ritesh, who had his son and daughter with him while his (Rakesh's) wife was sitting in front of him with the lady who had passed away as well as another lady named Shinal. Sitting with the Accused was the Market Master – Ashwin.

56. Rakesh then testified that as they came to Moto, the van was really overspeed and was going zig zag. He had shouted to the Accused to slow down as there were children in the van. He then testified that the van tumbled 4-5 times. He stated that when they were at the top of where they were and as the van was coming down, it over-spiced and as it reached the bottom then it tumbled. When asked why the van had stopped 6-7 times, Rakesh testified that he didn't know as the Accused hadn't said anything but that the van would go again after waiting and then starting the engine again.
57. In cross examination, Rakesh maintained that the van went zig zag because it was over-speeding and he agreed that as the vehicle started going downhill it started to speed and go in a zig zag manner. He, however, agreed that he was not aware of the speed the van was travelling at but that as it was coming down from the hill it over-spiced. When it was suggested that even when the Accused had accelerated to avoid impact, he was within the speed limit of 80km, Rakesh maintained that it was more than 80km.
58. Meenal, Prosecution's second witness testified that they had gone to an area in Moto, Ba and that upon their return the van had stopped 3-4 times. She stated that they had stopped at the Accused's cousin's place before they left again. She testified that the vehicle had stopped once more and after that the Accused had driven the van fast. When questioned if there was any other car on the road at the time or anything on the road, she testified no to both questions.
59. She further testified that she could feel the vehicle going very fast and that they had shouted to the Accused to slow down but he didn't listen. She stated that the van went zig zag and then it tumbled 3-4 times.
60. W/Cpl Maria testified that she had received a call on 2 March 2020 between 3-5am whilst she was at home regarding a fatal accident at Moto Road. She had been directed by the Traffic Officer to take a vehicle and head to the scene. Once at the scene, she testified that the vehicle was out of the road where the drain was and that the victims had been conveyed to the Hospital including the driver except for the lady – the deceased who was lying down beside the sugarcane field.
61. W/Cpl Maria explained that she drew the Rough Sketch Plan of the scene including the tyre marks from where the vehicle was coming down from. She also drew the Fair Sketch Plan with Keys. The Rough Sketch Plan was tendered as 'PEX1' and the Fair Sketch Plan was tendered as 'PEX2'. She then testified that the tyre marks as per the Rough Sketch Plan, which was drawn at the scene, began from where the road was coming down from and that the zig zag mark on the plan is the tyre mark. She stated that the vehicle went zig zag; it went onto the opposite lane then came back to his lane and then to the other side of the road where the vehicle landed. From where the tyre mark started to where the vehicle landed it was 127 meters.
62. As a Traffic Officer with more than 10 years of experience, W/Cpl Maria testified that the speed limit at Moto Road was between 60-80km and that on seeing She explained that when she arrived at the scene, the tyre marks were still fresh and it was due to the vehicle that caused the accident and that if the tyre marks were followed that morning, it would direct you to where the vehicle had landed. She further testified that it was very quiet that morning and that there was no one there. She also testified that the accident occurred due to over-speeding.
63. In cross examination, W/Cpl Maria testified that she had more than 10 years of experience as a Traffic Officer. She explained that as she drew the Rough Sketch Plan at 3:45am, she had parked the vehicle she had taken near the accident vehicle and put on the light of her

vehicle to draw the Rough Sketch Plan. When questioned about the tyre marks having breaks in them, WCPL Maria testified that what she drew was the tyre mark on the road that morning. She further testified as the door of the vehicle had been thrown away on the sugar field, it was not possible that it was not speeding.

64. W/Cpl Maria also stated in cross examination that speed could only be calculated by LTA using certain calculations from the measurements taken from the tyre marks but that what she saw at the scene, it was due to speeding as the door of the vehicle had been thrown away and that the driver of the vehicle had lost control of the vehicle.
65. The evidence of Rakesh and Meenal, who were in the vehicle at the time of the accident, when the Accused was driving the vehicle downhill on Moto Road was that it was "really overspeed" or "going very fast" as respectively stated and then the vehicle went in a zigzag manner and thereafter tumbled. The Court finds their evidence to be credible and reliable and therefore truthful given that W/Cpl Maria testified that as per the tyre marks from the scene and from what she drew on the Rough Sketch Plan, it (the tyre marks) began from where the road was coming down from and that the zigzag mark on the plan highlighted the tyre mark which indicated that it was due to speeding. Even in cross examination, W/Cpl Maria maintained that what she saw at the scene indicated that the driver of the vehicle had been speeding and lost control of the vehicle when coming down the hill which led to it going off the road.
66. With respect to W/Cpl Maria evidence she further explained that the vehicle went in a zigzag manner meaning that it went onto the opposite lane then came back to his lane and then to the other side of the road where the vehicle landed. She also testified that what she had seen at the scene was due to speeding as the door of the vehicle had been thrown away into the sugarcane field. She stated that from this it was evident that that it was not possible that the vehicle was not speeding.
67. Considering photo 9 in the Photographic Booklet which was tendered as 'PEX11' and as highlighted by DC Vimal, it shows the top of the hill as well as the tyre marks on the opposite lane whilst photos 10 and 11 in the Booklet showed the zigzag tyre marks on the road on both lanes. Photo 12 in the Booklet highlighted where the vehicle hit before going off the road and going into the drain. Photos 1 and 2 in the Booklet show the vehicle where it landed after going off the road and into the drain. It also shows the damages sustained to the vehicle. Moreover, the Fair Sketch Plan tendered as 'PEX13' shows the tyre marks going in a zigzag manner when the vehicle came downhill of Moto Road and then went off the road and into the drain.
68. Thus, the evidence of W/Cpl Maria is credible and reliable in conjunction with the photos and the Fair Sketch plan which shows the vehicle going in a zigzag manner, tumbling and going off the road.
69. Given the above evidence led by Prosecution, the Court finds that when the Accused was driving his motor vehicle CG 059 downhill on Moto Road, he had been speeding which caused him to lose control of his vehicle causing it to go in a zigzag manner across the road which consequently caused the vehicle to tumble a few times before going off the road. It is evident that the Accused contributed to causing this dangerous situation of the vehicle going in a zigzag manner and then tumbling when he was speeding and failed to negotiate his vehicle as he was coming downhill along Moto Road. It is also evident that the Accused's driving as mentioned fell below the care or skill of a competent and experienced driver.

70. Thus, considering the evidence in totality, I find that Prosecution has proven beyond a reasonable doubt that the Accused drove his motor vehicle CG 059 at a speed which was dangerous to others for Counts 1 to 7.

Determination

71. I find that Prosecution has discharged its burden in proving Counts 1 and 2 Dangerous Driving Occasioning Death and Counts 3, 4, 5, 6 and 7 Dangerous Driving Occasioning Grievous Bodily Harm against the Accused beyond a reasonable doubt

72. I, therefore, find the Accused, Sanjay Karan, guilty as charged for Counts 1 and 2 Dangerous Driving Occasioning Death and Counts 3, 4, 5, 6 and 7 Dangerous Driving Occasioning Grievous Bodily Harm.



N. Mishra
Resident Magistrate

