

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 128 OF 2018

Mohammad Azad Alam Diljad Ansari ..Appellant
Versus
The State of Maharashtra ..Respondent

Mr. Swapnil Ovalekar, (Appointed Advocate) for Appellant.
Mr. S. R. Agarkar, APP for State/Respondent.

**CORAM : SARANG V. KOTWAL, J.
DATE : 22nd NOVEMBER 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 11/09/2017 passed in Sessions Case No.152 of 2015 by learned Additional Sessions Judge, Kalyan. The Appellant was convicted for commission of offence punishable U/s.307 of I.P.C. and was sentenced to suffer R.I. for 7 years and to pay fine of Rs.3000/- and in default of payment of fine to suffer S.I. for 3 months. He was given benefit of set off U/s.428 of the Cr.p.c. The Appellant was acquitted from the Charges of commission of offence punishable U/s.150, 152 and 155 of the Indian Railways Act.

2. Heard Shri. Swapnil Ovalekar, learned appointed Advocate for the Appellant and Shri. Agarkar, learned APP for the State.

3. Learned APP has submitted a report from the Superintendent of Nashik Road Central Prison dated 18/07/2022. It is mentioned in the report that the Appellant had suffered actual imprisonment of 5 years, 4 months and 8 days till 15/05/2022. After that he was released on Covid-19 parole and then he has not surrendered.

4. The prosecution case is that the injured Nandkumar Joshi in this case was travelling in a bogie for handicapped persons in Kasara bound local train. He boarded the train at Dombivali. At that time, the Appellant was standing at the door. It was difficult for the injured to enter the bogie and, therefore, there was some heated exchange of words. The other passengers supported the injured. One of them even slapped the Appellant. There was further trouble. The Appellant scuffled with others and pushed the injured Joshi from the bogie from a running train. Joshi fell down

and suffered compound fracture of his right elbow. He also suffered injuries on his head. The co-passengers caught the appellant in the bogie itself. Somebody pulled the chain. The train stopped at Kalyan station. In the meantime, the injured had walked back upto Dombivali railway station. He was helped by railway police. The Appellant was brought from Kalyan and was handed-over to the police. The F.I.R. was lodged. The investigation was carried out. The charge-sheet was filed and the case was committed to the court of Sessions.

5. During trial, the prosecution examined 13 witnesses including the injured Nandkumar Joshi, two eye witnesses, the Motorman and the Guard of the local train, two Medical officers, G.R.P personnels, Deputy Station Master of Kalyan Railway station and two Investigating Officers.

6. The defence of the Appellant was that, he was travelling in that local train in a bogie for handicapped people. A passenger asked him to get down. He told him that he would get down on the next station, but the passengers started abusing and beating

him with kicks and fist blows, though he was standing at the inner side of the bogie. A false case was lodged against him. He has not committed anything wrong.

His defence was not accepted by learned trial Judge. He believed the evidence of the prosecution. According to learned trial Judge, all the ingredients of Section 307 of I.P.C. were made out. After recording his conclusion, he convicted and sentenced the Appellant, as mentioned earlier.

7. The prosecution case unfolds through the evidence of PW-1 Nandkumar Joshi. He has deposed that, he was having issue of blood pressure. He boarded a fast local train going towards Kasara at 7.19p.m. on 09/01/2015 from Dombivli railway station. He boarded a bogie for handicapped persons. The Appellant was standing at the door obstructing the entrance. PW-1 requested him to shift aside, but the Appellant started abusing and assaulting him with fists. The other passengers tried to pacify him, but he was not in a mood to listen. One of the co-passengers slapped the Appellant on the back side. PW-1 tried to intervene and stop the

quarrel, but the Appellant was angry with him due to the incident at the entrance of the bogie. He pushed the PW-1 from the bogie. PW-1 fell down. His right hand was fractured at the elbow joint. He also received six severe injuries to his head. He went towards Dombivli by walking. According to him, the incident took place between Dombivali and Thakurli railway station. He reached the platform No.2 of the Dombivali railway station. Somebody took him to the railway police on platform No.3. A memo from the Station Master was obtained and the PW-1 was taken to Shastri Nagar Hospital. The Medical Officer gave him first aid treatment and referred him to Sion Hospital. Till then his relatives came there. Then he was taken to Sai Sadan Hospital, Kalyan; where he was treated further. The police came to Sai Sadan Hospital and recorded his F.I.R. The F.I.R. was produced on record at Exhibit 15. He was hospitalized for about 9 to 10 days. He identified his own blood stained clothes in the Court. He also identified the Appellant in the Court.

In the cross-examination, he deposed that, while lodging his F.I.R. he had mentioned that the said boy scuffled with him when he entered the bogie, however, that particular portion

was not mentioned in his statement before the police and he could not assign any reason as to why the word 'scuffle' was not mentioned in his statement. He was suffering from high blood pressure and he agreed that if his blood pressure shot up, he felt giddiness and usually fell down. On 09/01/2015, his blood pressure was high. He accepted that, because of heavy crowd there was no place to sit in the bogie. He denied the suggestion that, he fell down due to giddiness suffered because of blood pressure. After the incident, he saw the Appellant for the first time while his evidence was recorded in the Court. His F.I.R. at Exhibit 15 substantially corroborated his evidence.

8. PW-4 Ashwin Purohit was one of the co-passengers. He has deposed that, he was travelling in the same bogie at the time of incident. PW-1 boarded the bogie at Dombivli railway station. There was exchange of words between the Appellant and PW-1. During that quarrel somebody shouted that, 'uncle fell down from the train'. PW-4 and others tried to pull the chain, but the train did not stop. Some passengers caught the Appellant. The local train arrived at Kalyan station. Then they alighted at Kalyan railway

station and approached the R.P.F. office and reported the incident. The Appellant was handed-over to R.P.F. officials. Then he was handedover to Dombivli police. This witness stated that, he was not in a position to identify the Appellant because he had seen him only once at the time of the incident. Thus, his evidence describes the incident in general and is not of much help to either the prosecution or the defence. Its Evidentiary value is limited. It only corroborates the prosecution case to a certain extent and demonstrates that the incident had taken place.

9. PW-9 Vivek Bhor is another important eye witness. He has deposed that the incident took place on 09/01/2015. He caught the Kasara local train at Mulund station at 07.08p.m. One physically normal boy entered their bogie. The others told him to get down, but he started quarreling with them. At Dombivli railway station, PW-1 boarded the bogie. He also asked the Appellant why he had boarded that bogie and there was quarrel. The Appellant started scuffling and beating PW-1. This witness has further deposed that, the Appellant pushed PW-1 thrice. He pushed on his chest and therefore, PW-1 fell down. Then he also pushed

PW-1's legs. PW-1 fell down between Thakurli and Kalyan. The other passengers caught the Appellant. One Ashwin Purohit (PW-9) travelling in the train pulled the chain and also caught the Appellant. The others also helped him in catching the Appellant. The local train did not stop at Thakurli station, but stopped at Kalyan railway station at about 7.30p.m. Then railway officers along with R.P.F. came there. The Appellant was handed over to them. This witness identified the Appellant in the Court as the person who had pushed the PW-1 from the train. There were certain portions of his depositions which were not mentioned by him in his police statement. Those portions in the form of omissions were put to him. He could not explain as to why those portions were not appearing in his police station. He could not explain why it was not mentioned that, PW-1 was talking with the Appellant angrily, or that the Appellant beat PW-1, or that the Appellant pushed PW-1 thrice, or that he had given two jerks on the chest and one jerk on the leg. All these omissions were important, however, the defence has not taken care to prove these omissions through the evidence of the Investigating officer.

Therefore, those omissions cannot be used by the defence in this case.

From the evidence of these three witnesses i.e. PW-1, PW-4 and PW-9 the incident is established as to how the PW-1 was pushed by the Appellant outside the running train. The other evidence is mostly supportive in nature.

10. PW-2 Harjiram Menon was Deputy Station Master at Kalyan Railway station. He has deposed that the concerned local arrived at Kalyan at 7.28p.m. The motorman gave a specific sound indicating an emergency and seeking help. The railway officials went to the local train and heard the noise from the coach for handicapped persons. They went there and found that the Appellant was caught by some passengers. The R.P.F. personnels were called. The boy was handedover to them and then he was taken to G.R.P police station, Kalyan. This witness identified the Appellant in the Court. Thus, this witness has not deposed about the main incident, but has given evidence about handing over of the Appellant to the police officers.

11. PW-3 Sachin Ugale was attached to G.R.P Kalyan. He has deposed in a similar fashion as deposed by PW-2. He has deposed that, after the co-passengers had apprehended the Appellant, he was handed over to G.R.P police station at Kalyan railway station. The co-passengers Vivek Bhor – PW-9 and Ashwin Purohit – PW-4 were with him. The incident had taken place within the jurisdiction of G.R.P Dombivli police station and, therefore, the Appellant was taken there and was handed over to P.S.O. of Dombivali G.R.P police station.

12. PW-5 Suresh Jadhav was a point-man on platform Nos.4 and 5 of Kalyan railway station. He has also spoken about the co-passengers having caught the appellant. He has supported the evidence of PW-2 and 3.

13. PW-6 Soheb Shaikh was a pancha in whose presence personal search of the Appellant was conducted and then clothes of the injured PW-1 were seized. Those panchanamas were produced on record at Exhibit 33 and 34.

14. PW-7 Ramgopal Verma was a Motorman of the said local

train. He has deposed that the train halted at Dombivli platform at 7.25p.m. Thereafter it started from Dombivli and had reached around Thakurli. He noticed the buzzer and audio sound indicating chain pulling. According to him, at that time, the speed of his local train was upto 100 Kms. per hour, but because of that sound he reduced the speed to about 20Kms. per hour. Then he gave a signal to the Guard who responded by giving normal buzzer after verifying the situation. Therefore, he took the train to Kalyan railway station. Then he gave whistle sound indicating some trouble. The Station Master responded and then the Appellant was arrested.

15. PW-8 Prakash Swami was the Guard on that train. He has deposed similar to PW-7.

16. PW-10 Dr. Majetia Shamjibhai and PW-11 Dr. Swapnil Zambre were examined by the prosecution to prove injuries. Both of them had treated the injured PW-1. It is hardly in dispute that the injured PW-1 had suffered following injuries:

- i) Compound fracture injury on right forearm.

ii) Multiple C.L.W. on scalp over left ear-pinna.

In the cross-examination of PW-10, he accepted that if the blood pressure shoots up the person may feel giddiness and because of fall due to giddiness these injuries were possible. He also accepted that there was no abnormalities in the brain of PW-1.

17. PW-11 Dr. Zambre elaborated and deposed that, there was Grade 3 B open fracture of radius ulna with bone loss. Size of the injury was 8cm x 6cm x bone deep. The nature of injury was grievous and dangerous to life. The injuries were possible if a person was pushed from a running train. The second stage surgery failed and the patient was advised for third stage surgery, but the patient did not respond positively. All the medical papers were produced on record. This witness also accepted that PW-1 was suffering from blood pressure and those injuries were possible if a person fell down from a running train because of giddiness caused by blood pressure.

18. PW-12 P.S.I. Jayant Dumbre was attached to Dombivali (Railway) police station. He has deposed that, PW-1 came to their

police station at about 10.00p.m. to 10.15p.m. and narrated the incident. PW-1 was sent to Shastri Nagar Hospital, Dombivli along with memo issued by the Station Master of Dombivli railway station. The report of PW-1 was reduced into writing in the hospital. This witness had carried out personal search of the Appellant brought by two passengers. The clothes of the victim were seized. The medical papers were collected by him. He identified the Appellant before the Court.

19. PW-13 Mahesh Bagve was the next Investigating Officer. He had recorded the statements of various witnesses. He carried out the remaining investigation and had submitted the charge-sheet.

20. Learned counsel for the Appellant made following submissions.

That the prosecution has not proved its case beyond reasonable doubt. The evidence of PW-1, PW-4 and PW-9 is not consistent. PW-9 himself has given contrary answers and there are major omissions in his evidence. The injuries could have been

possible because of the fall caused by high blood pressure. The nature of injuries do not match with the description of the incident.

21. Learned APP, on the other hand, submitted that the prosecution has proved its case through the evidence of PW-1, PW-4 and PW-9. Rest of the evidence sufficiently corroborates their version. The Appellant was caught at the spot by co-passengers. The PW-4 and PW-9 have specifically deposed about his arrest.

22. I have considered these submissions. The evidence of PW-1, PW-4 and PW-9 is consistent on major aspects. Though there are minor discrepancies regarding some minor details, the incident as a whole is consistently deposed by them. There are some omissions in the evidence of PW-9 Vivek Bhor, but as mentioned earlier, these omissions are not proved through the evidence of the Investigating Officer. Even if those omissions are ignored, the consistent fact which is proved by the prosecution beyond reasonable doubt is that, after PW-1 boarded the train there was a quarrel between him and the Appellant. There was also scuffle and

quarrel between the Appellant and other passengers. In that incident the Appellant deliberately pushed the PW-1 from a running train. The PW-1 fell down and suffered these injuries. Though, PW-4 had not actually seen the PW-1 falling from the train, the PW-1 himself has deposed that, because of the push given by the Appellant, he had fallen down. To that extent, the PW-9 has supported the version of PW-1. Thus, the prosecution has proved that, because of the quarrel the appellant got angry and he deliberately pushed the PW-1 from a running train.

23. The Appellant was caught in the bogie itself by co-passengers. This fact is consistently deposed and proved through the evidence of PW-4 and PW-9. In that behalf, both these witnesses corroborate each other. They are further corroborated by the evidence of PW-2 the Deputy Station Master of Kalyan Railway station, PW-3 Sachin Ugale – G.R.P. personnel and PW-5 Suresh Jadhav. These witnesses have deposed as to how the Appellant was already caught by the co-passengers and how he was taken in their custody by the officers. Thus, the prosecution has also proved that the Appellant was caught by the co-passengers in the bogie itself

after he had pushed the PW-1 from a running train. Though, PW-4 has not identified the Appellant, the PW-1, PW-9 and other witnesses have identified the Appellant. Thus, the prosecution has proved that the co-passengers had caught the Appellant in the bogie after the incident. He was immediately caught at the scene of offence.

24. The medical evidence is also clear enough. The PW-11 has deposed that the injury was grievous and dangerous to life. The injuries suffered by PW-1 are undisputed. Though, the injuries are possible by falling from a running train; it is also established that the Appellant had pushed the PW-1 and, therefore, he has caused those injuries to PW-1.

25. PW-7 Ramgopal Verma was a Motorman and in spite of having received an indication of chain pulling, he went ahead upto Kalyan railway station because of the signal given by the Guard. He has deposed that the train was running at a speed of 100 Kms. per hour when he received the signal of chain pulling. The incident had taken place soon after the train had left the Dombivli railway

station. The train was gathering speed. But when the PW-1 fell down, the prosecution has not proved that, at that point of time the train was running at a speed of 100 Kms. per hour. The chain was pulled after the PW-1 had already fallen down from the bogie. Thus, the prosecution has not proved that, at that point of time the train was running in a high speed. What is proved by the prosecution is that the injured PW-1 was pushed from a running train and that itself was dangerous. The prosecution has also not established whether the injured PW-1 fell on another railway track or on the side where there was no to and fro traffic of the local trains. This aspect is important in considering whether the Appellant had requisite intention necessary U/s.307 of I.P.C.

Thus, from the above discussion, I am of the opinion that the prosecution has proved beyond reasonable doubt that, in the quarrel and scuffle the Appellant had deliberately pushed the PW-1 from a running train, causing grievous injury.

26. The next crucial question is whether the offence would fall within the four corners of Section 307 of I.P.C. In that behalf,

the prosecution evidence is lacking. The prosecution case falls short of proving offence U/s.307 of I.P.C. From the evidence discussed above, it is clear that the Appellant was not knowing the injured PW-1. There was no premeditation and no preparation for commission of offence. The incident had taken place suddenly as a result of sudden quarrel. In that quarrel the Appellant got angry and pushed PW-1 from a running train. Therefore, his intention or knowledge cannot be stretched to conclude that he attempted to commit murder of PW-1. Though, it is proved that the injured PW-1 had suffered grievous injury, which was even dangerous to his life, the requisite intention and knowledge mentioned U/s.307 of I.P.C. is not proved. From the nature of evidence, in my view, though the ingredients of Section 307 of I.P.C. are not proved, the ingredients of Section 308 of I.P.C. are proved by the prosecution.

Section 308 of I.P.C. reads thus:

“308. Attempt to commit culpable homicide. - Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either

description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

27. As mentioned earlier, it was a sudden fight and, therefore, there was no premeditation or preparation. At the same time, the Appellant had pushed the injured from a running train, therefore, he can be attributed knowledge that his act was endangering to life of the PW-1. Therefore, his act would fall within the meaning of Section 308 of I.P.C. To that extent, the conviction recorded against the Appellant needs to be modified and instead of Section 307 of I.P.C. the Appellant will have to be convicted U/s.308 of I.P.C. which is a lesser offence. Since, in the incident hurt is caused to PW-1, the maximum punishment prescribed U/s.308 of the I.P.C. can extend to 7 years. But in the present case, looking at the nature of injuries suffered by PW-1, it is not a case where maximum punishment is required to be imposed on the Appellant. At the time of arrest, the Appellant was hardly of 22 years old. He was recently married and was blessed

with a child only a few days before the incident. These are the mitigating circumstances in deciding the quantum of sentence. The Appellant has already suffered 5 years, 4 months and 8 days of imprisonment for his act. Thus, the sentence can be reduced to the period he has already undergone.

28. With the result, following order is passed:

O R D E R

- i) The Appeal is partly allowed.
- ii) The conviction and sentence of the Appellant recorded U/s.307 of the I.P.C. is set aside.
- iii) Instead, the Appellant is convicted for commission of offence punishable U/s.308 of the I.P.C. His sentence is reduced to the period which he has already undergone.
- iv) The imposition of fine of Rs.3000/- and in default of payment of fine, sentence to suffer S.I. for 3 months is maintained.
- v) The Appellant is granted benefit of Section 428 of the Cr.p.c.

vi) The Appeal is accordingly disposed of.

(SARANG V. KOTWAL, J.)