

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 480 OF 2016

Nazimoddin Mohammaddin alias
Nasiroddin, Age : 31 years,
Occu. Business, R/o: Village Chikalwadi,
Bhokar, Taluka Bhokar, District : Nanded

... APPELLANT
(Original Accused)

VERSUS

The State of Maharashtra
through the Police Station,
Bhagyanagar, Nanded
Taluka and District : Nanded

... RESPONDENT
(Original Complainant)

...
Mr. R.S. Deshmukh, Advocate for Appellant-accused
Mr. D.R. Kale, APP for Respondent prosecution
...

**CORAM : T.V. NALAWADE &
K. K. SONAWANE, JJ.**

DATED : 5th AUGUST, 2019.

ORAL JUDGMENT : (Per : K.K. Sonawane, J.)

1. The instant appeal calls in question the impugned judgment and order rendered by learned Sessions Judge, Nanded in Sessions Case No. 163 of 2011 dated 21-07-2016, thereby convicting the appellant-accused for the offence punishable under sections 302, 323 of the Indian Penal Code (for short "IPC") and he was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for one month. He was also sentenced to suffer rigorous imprisonment for six months for the offence punishable under section 323 of the IPC. Both the sentences was ordered to run concurrently. The appellant -convict, taking recourse of

remedy under section 374 of the Code of Criminal Procedure (for short "Cr.P.C.") preferred the present appeal to redress his grievances.

2. The prosecution case sans unnecessary details in nutshell is that the ill-fated victim - Shankarsinh s/o Daulatsinh Kachwa, age 35 years old was the brother of first informant Mohansinh S/o Daulatsinh resident of Nanded. Both the brothers were eking livelihood by doing business to ply the passenger bus Tata make bearing registration No. MH-25-B-186, daily from Nanded to Bhokar and vice versa. The first informant Shri Mohansinh at the relevant time was in service with Ravina travels, Nanded whereas his brother deceased Shankarsinh used to remain with their passenger Bus for collecting fair from the passengers etc. The appellant-accused was also one of the counter part of both the brother i.e. first informant Mohansinh and deceased Shankarsinh. He was also running the passenger bus for public conveyance daily on Nanded - Bhokar road bearing Bus No. MH-26/B-199.

3. According to prosecution, prior to eight days of alleged incident occurred on 04-07-2011, there was quarrel between the appellant-accused and the deceased Shankarsinh on account of parking of the vehicles in a queue to pick-up the passengers for their vehicles. But, the dispute was settled due to intervention by the mediators. However, the appellant-accused gave threats of life to the deceased Shankarsinh and since then he had an rancour and bitter anger towards deceased Shanksingh. It has been alleged that on 04-07-2011 at about 8.00 a.m. the first informant had been to his travel booking office at Hingoli

gate. His brother deceased Shankarsinh as usual started proceeding towards Bhokar town with the passenger in his Bus No. MH-25/B-186. The driver Dilip @ Baban Sarote was driving the vehicle, whereas, Anil Sawate was the cleaner in the vehicle - travelling Bus of the deceased Shankarsinh. In view of threats of life to the deceased Shankarsinh on the part of appellant-accused, the brother-first informant used to follow the vehicle of brother uptill limits of Nanded city. Accordingly, on the day of incident, the first informant - Mohansinh was following the vehicle of brother Shankarsinh. He saw the vehicle-Bus of his brother stopped near Hingoli Naka to pick-up the passengers. Meanwhile, the appellant-accused also arrived there with his vehicle Bus. There was, once again, quarrel taken place between the deceased Shankarsinh and accused Nazimoddin. The on-lookers thronged at the spot. Eventually, the accused went towards own vehicle and occupied his driver seat. The deceased Shankarsinh was standing aside his passenger vehicle-Bus on the road. The accused started proceeding towards Bhokar with his traveller -Bus No. MH-26/B-199 and in a fit of rage, he attempted to trap the deceased Shankarsinh in between the left side portion of his vehicle and the vehicle of deceased parked aside the road at Hingoli Naka. The vehicle of accused brushed the deceased due to which he banged on his own vehicle bus near the driver door. The deceased sustained severe injuries to his chest, abdomen etc. The accused made his escape good from the spot. The injured Shankarsinh was escorted to the Government Hospital at Nanded, for medical treatment. Thereafter, he was shifted to private hospital for better medical treatment. Unfortunately, on the very same day, the injured

Shankarsinh breathed his last. The hapless brother Mohansinh approached to the Police and lodged the report.

4. Pursuant to FIR, Police of Bhagyanagar Police Station registered the crime No. 171 of 2011 under Sections 302, 323 and 506 of the IPC and set the penal law in motion. Investigating Officer visited to the spot of incident and drawn the panchnama of scene of occurrence. He drawn the Inquest Panchnama and referred the dead body for autopsy. Investigating Officer recorded statements of witnesses acquainted with the facts of the case. Investigating Officer seized the clothes of deceased and accused as well as vehicle used by the accused for commission of crime in this case. He collected relevant documents of P.M. report, C.A. report etc and after due completion of investigation, Investigating Officer filed charge-sheet against accused vide Sessions Case No. 163 of 2011.

5. The learned Sessions Judge framed the charge against the appellant-accused. But, he pleaded not guilty and claimed for trial. In order to bring home guilt of the accused, prosecution adduced the evidence of in all nine (09) witnesses in this case. The learned Sessions Judge also recorded statement of accused under Section 313 of Cr.P.C. to afford him an opportunity to explain the incriminating circumstances brought on record. The appellant-accused examined one Dr. Gajanan Chaudhary in support of his defence.

6. After hearing both sides, the learned Sessions Judge appreciated the oral and circumstantial evidence adduced on record and held the appellant-accused guilty for murder of deceased Shankarsinh

punishable under section 302 of the IPC. Accordingly, the learned Sessions Judge passed the Judgment and order of conviction and resultant sentences imposed on the appellant-accused as indicated above. The impugned Judgment and order of learned Sessions Judge, Nanded is the subject-matter of present appeal.

7. Mr. Rajendra Deshmukh, learned counsel for appellant-accused vehemently submitted that the impugned findings of conviction and resultant sentence expressed by the learned trial Court are erroneous, illegal and not within the ambit of law. The evidence of prosecution witnesses adduced on record are suspicious, doubtful and not sufficient to draw adverse inference against the accused/appellant. According to learned counsel Shri Deshmukh, the deceased succumbed to injuries sustained to him in vehicular accident. The accused has no nexus with the alleged injuries received to deceased Shankarsinh. But, he has been falsely implicated in this case. The learned counsel drawn the attention towards the seizure panchnama of vehicle of accused as well as spot panchnama of the alleged incident. According to learned counsel Shri Deshmukh, there was no damage to both the vehicle as shown involved into the crime. It would difficult to believe that the accused crushed the deceased in between two vehicles. The learned counsel gave much more emphasis on the evidence of defence witness Dr. Shri Gajanan Chaudhary. He submits that, the witness Dr. Chudhary get admitted the injured Shankarsinh immediately after occurrence of incident in his hospital for medical treatment. Dr. Chaudhary put in writing the history of patient for his injuries and thereafter the witness Dr. Chaudhary passed on MLC in this matter to

Police for further process. According to Dr. Chaudhary the person accompanied with the patient gave the history that the injured received the injuries in a road traffic accident by traveler vehicle while taking it in reverse direction. It has been contended that the learned trial Court did not appreciate all these crucial circumstances on record and committed error for conclusion of guilt of the accused. The learned Counsel Shri Deshmukh submit that the story of murder of deceased Shankarsinh as propounded by prosecution was not at all possible and probable one. He harped on the circumstances that without any sort of damage or scratches to both the vehicles it would highly impossible to visualize that the deceased could be crushed in between two vehicles. According to learned counsel, the spot of incident was located in bustling area on public through-fare. But no one any independent witness came forward to favour the prosecution case. He urged that the death of deceased Shankarsinh was not homicidal but accidental one. Therefore, it would unjust and improper to fasten guilt on the appellant-accused at the behest of first informant - Mohansinh.

8. The learned APP vociferously opposed the contentions propounded on behalf of appellant-accused and supported the findings of conviction expressed by the learned trial Court.

9. We have given anxious consideration to the arguments advanced on behalf of both sides. We have also carefully delved into oral and circumstantial evidence adduced on record. We have also taken into consideration the factual score of the matter resulting into death of deceased Shankarsinh. The intense scrutiny of circumstances on

record made it difficult to persuade ourselves to subscribe to the theory of accidental death of deceased Shankarsinh propounded on behalf of appellant-accused.

10. PW-5 Dr. Maroti Digambar Dake conducted the post mortem on the dead body of deceased Shankarsinh. He saw the blood oozing from the mouth and blood stains in the nostrils. The Dr. Dake noticed following external injuries on the dead body of deceased.

- I. Contused abrasion present on right malar prominence of size 3 x 2 cm red in colour.*
- II. Contused abrasion present on right zygomatic region 1 cm anterior to right tragus of ear 3 x 2 cm red in colour.*
- III. Contusion present on front of chest in midline and both supra-clavicular region of size 25 x 15 cm red in colour.*
- IV. Tram track contusion present on back of left elbow 3 x 2 cm red in colour with area of 1 cm of paleness, another contusion present 5 cm below left elbow joint on posterior aspect of left forearm in the area of 10 x 3 cm red in colour with area of 1.5 cm paleness present and another contusion present and lateral aspect of left forearm of size 9 x 3 cm with area of paleness of 3.5 cm.*
- V. Grased abrasion present on left scapular region 5 cm lateral to midline of size 9 x 5 cm red in colour directed upwards and laterally.*

VI. Left humerus fractured at middle part with tense swelling present in surrounding region.

11. All these external injuries were anti mortem in nature . He has also observed following internal injuries.

- "i Brain was intact and pale. Meninges were intact and pale.*
- ii Sternum was fracture at mid part horizontally, right clavicle was fractured at sterno-clavicular joint and second to eighth ribs were fractured on both sides anterior aspect, blood was present in surrounding tissue of fractured bones corresponding to injury No. 3 in column No. 17.*
- iii Pleura was lacerated on both sides corresponding to fractured rib, pleural cavity was containing about 1 liter blood on both sides.*
- iv Both lungs were lacerated and contused at places corresponding to injury No. 3 in column No. 17, both lungs were collapsed.*
- v About one liter blood was present on peritoneal cavity.*
- vi About 100 ml of altered blood was present in the stomach, no abnormal smell perceived.*
- vii Liver was lacerated and contused on right lobe lateral aspect, it was pale.*
- viii All other internal organs were intact and plae."*

12. The medical expert Dr. Dake expressed the opinion that the death of deceased Shankarsinh was caused due to shock and hemorrhage following injuries to his both lungs and liver. He issued

the P.M. report (Exhibit-40). According to prosecution the death of deceased Shankarsinh was homicidal in nature, whereas, the appellant-accused claimed that the deceased Shankarsinh died due to vehicular accident.

13. In order to bring home guilt of the appellant-accused prosecution adduced the evidence of PW-1 first informant Mohansinh, brother of deceased Shankarsinh. He stated about the quarrel taken place between accused and his deceased brother prior to eight days of the incident and in the fight the appellant-accused gave threats of life to deceased Shankarsinh. PW-1-Mohansinh further deposed that on 04-07-2011, as usual his brother started proceeding at about 9.20 A.M. towards Bhokar town with passenger in his bus bearing No. MH-25-B-186. The first informant was following the vehicle of brother on motor bike. According to PW-1 Mohansinh, he saw the vehicle - bus of his brother stopped at Hingoli Naka near Chandralok Hotel to pick-up the passengers. Meanwhile, the vehicle-bus of appellant-accused also came there from behind and stopped near the vehicle-bus of deceased Shankarsinh. There was quarrel taken place in between deceased Shankarsinh and accused Nazimuddin. The accused gave fist blows to deceased Shankarsinh. On seeing the fight, PW-1 Mohansinh gave call to accused not to assault his brother. According to PW-1 Mohansinh, the accused left his brother - Shankarsingh and went towards own vehicle and occupied his driver seat. The accused while driving the vehicle-bus crushed his brother in between his own vehicle and vehicle of deceased. At the relevant time his brother - deceased Shankarsinh was standing aside his own vehicle-bus. Due to impact of vehicle of

accused, his brother received serious injuries. The accused went away from the spot with his vehicle - Bus. Thereafter, deceased Shankarsinh was escorted to the hospital for medical treatment but he succumbed to injuries.

14. It is true that in the cross examination of PW-1 Mohansinh, the appellant-accused denied about the occurrence of any such incident inflicting fatal injuries to deceased. The suggestions were put to PW-1 Mohansinh that the deceased himself fallen from his own vehicle and sustained injuries. But in para No. 6 of the cross-examination of PW-1 Mohansinh, the appellant-accused brought on record the circumstances as follows :

"6. *There is no outpost nearer to the spot. The office of central excise is nearer to the spot. I was also obstructed due to traffic. The people from said traffic were rising shouts for clearing the road. Driver of our vehicle was on driving seat. It is not true to say that my brother also sat in the cabin and he has asked the driver to move the vehicle from said spot. It is not true to say that due to traffic jam, Nazimoddin has also his vehicle and started his vehicle to proceed towards Bhokar. But, it is correct that Nazimoddin proceeded towards Bhokar. Said quarrel had taken place next to Chandralok hotel in front of one grocery shop. The quarrel between my brother and Nazimoddin took place by the side of driver side of the rear wheel of the vehicle. People had gathered there at the time of quarrel. When I gave call, at that time said quarrel was going on for two minutes. I could not give call to driver or cleaner of our vehicle. I gave call to Nazimoddin not to beat my brother, Nazimoddin has taken his vehicle*

by pressing his middle side towards left side of his vehicle. When Nazimoddin took his vehicle by pressing my brother on our vehicle, the face of my brother turned towards the side of our vehicle and his blood was attached to our vehicle and till his vehicle going ahead by pressing our vehicle, the blood was attached to our vehicle up to that portion. As my brother was in between two vehicle by its side, there was no damage caused to the vehicle. I have not seen whether the blood was also lying on the road."

15. The prosecution also examined PW-2 Anil Bhagwantrao Sawate and PW-3 Dilip @ Baban Ananda Sorte, both were driver and cleaner on the vehicle of deceased Shankarsinh at the relevant time. Both these witnesses were accompanied with the deceased at the relevant time and eye witnesses of the incident. They both stepped into the shoe of PW-1 – Mohansinh and verbalized the occurrence of alleged incident causing serious injuries to the deceased at the hands of accused. They stated that after quarrel the accused started taking his bus ahead and brushed the Shankarsinh with his vehicle. The deceased got trapped in between two vehicle which resulted into pressing his chest.

16. In the cross-examination of PW 2- Anil Sawate, it has brought on record in paragraph No. 4 as below:-

"4. It did not happen that Nazimoddin required to take reverse of the vehicle to proceed towards Bhokar. There was distance between two buses to take Nazimoddin to his bus ahead. It is correct that Nazimoddin started his vehicle and started to proceed to Bhokar. Due to quarrel between Nazimoddin and Shankarsinh, dirver Dilip @

Baban had got down from the bus. It did not happen that when Nazimoddin started taking his bus ahead, the driver of our bus also get into the cabin of said bus. It did not happen that our bus has given dash to the bus of Nazimoddin."

17. PW 3- also deposed in his cross-examination that when he stopped the Bus near the Chandralok hotel, that time the accused Nazimoddin came with his vehicle from back side. Initially, quarrel taken place at the rear side of vehicle of deceased Shankarsinh. Thereafter, deceased Shankarsinh came towards driver cabin to talk with him. But, the accused started his Bus and by striking to deceased vehicle went away towards Bhokar.

18. The prosecution adduced the evidence of PW4 Rameshwar More and PW-8 Prakash Dutale. Both these witnesses received the opportunity to watch the spectacle of alleged incident resulting into causing serious injuries to victim Shankarsinh, intentionally and purposefully on the part of accused.

19. The evidence of all these star witnesses of the prosecution demonstrate that the deceased Shankarsinh received fatal injuries due to sudden impact from the vehicle of accused. The appellant-accused also examined the defence witness DW-1 Dr. Gajanan Chaudhary. He recorded history of injuries received to deceased as "road traffic accident by traveller - bus vehicle while taking on reverse direction." There was no doubt that the deceased Shankarsinh received injuries due to impact of traveler vehicle- Bus. It was not denied that the vehicle of appellant - accused was arrived at the spot during the

relevant time of the incident. It was also suggested that the vehicle of appellant-accused arrived on the spot located at Hingoli Naka from behind the vehicle of deceased. It has proved that there was quarrel between both the deceased and accused on account of passengers. Thereafter, the accused started his vehicle-Bus and while proceeding ahead he attempted to strike the deceased by the cleaner side portion of his vehicle, which resulted into serious fatal injuries to deceased Shankarsinh. There was no reason to disbelieve the evidence of eye witnesses of the present case. The evidence of eye witness account in the light of defence put forth on behalf of appellant/ accused, found to be credible, cogent and impeccable in nature. There is no impediment to act upon the evidence of prosecution witness to fasten the guilt on the appellant-accused. In such peculiar circumstances, we do not find any error or perversity in the findings of learned trial Court for adverse inference against the accused. The conclusion drawn by the learned trial Court about the guilt of appellant-accused for the death of deceased Shankarsinh appears to be just, proper and reasonable one. The prosecution has proved that the appellant-accused was the author of injuries sustained to deceased Shankarsinh resulting into his death.

20. But, the pivotal issue is still remained to be resolved as to whether learned trial Court was right in convicting the appellant-accused under section 302 of the IPC in this matter.

21. At this juncture, the learned counsel Shri Deshmukh fervidly contends that the circumstances categorically reflects that there was no intention of the appellant-accused to kill the deceased Shankarsinh. It

has brought on record that prior to alleged incident, there was bitter argument and fight in between accused and deceased. The on-lookers thronged at the spot. The PW-1 Mohansinh also reached to the spot on his motor-bikes. Thereafter, the accused left the deceased and went towards vehicle-Bus. He occupied his driver seat and started proceeding towards Bhokar town. But, in a fit of rage, he attempted to strike the deceased from the left side middle portion of his bus resulting into causing severe impact to the deceased. According to learned counsel Shri Deshmukh there was no intention of appellant-accused to commit murder of deceased but in a heat of anger due to quarrel between himself and deceased, he attempted to cause hurt to the deceased to teach lesson to him. The learned counsel Shri Deshmukh urged that the liability of the appellant-accused at the most could be travelled upto the scope of Section 304 Part (II) of the IPC.

22. In view of factual score discussed above, we find considerable merit in the contentions propounded on behalf of learned counsel Shri Deshmukh for appellant-accused. Undisputedly, the prosecution proved beyond reasonable doubt that the deceased Shankarsinh sustained the fatal injuries owing to severe impact of the vehicle-Bus of accused. Obviously, due to altercation and fight with the deceased, the accused at the relevant time must have in angry mood. Thereafter, the infuriated accused occupied his driver seat and started proceeding towards Bhokar town by his vehicle-bus. But, on seeing the deceased standing aside the vehicle on the road, the accused would have seething with anger, and in a fit of rage, he would have given impact of his vehicle to the deceased Shankarsinh. These circumstances

conjurs-up an image that the accused done the alleged act with the knowledge that it was likely to cause death but without any intention to kill him.

23. We are of the opinion that the attending circumstances of the instant case impelled to appreciate that the alleged act of appellant accused would not fall within the ambit of Section 300 of the IPC but it would attract the provisions of section 304 Part (II) of IPC. Therefore, we proposed that the conviction of the appellant/accused under Section 302 of the IPC awarded by learned trial Court is essential to be set aside and quashed. However, appellant-accused is to be convicted under Section 304 Part (II) of IPC instead of Section 302 of the IPC. Admittedly, it would sub-serve the purpose in the interest of justice. It would preposterous and incomprehensible to convict the accused for the offene under Section 323 of IPC in this case, when he has been held guilty for the major offence under Section 304 Part (II) of IPC committed in one and the same crime. Accordingly, appeal deserves to be allowed partly. Hence, we proceed to pass following order.

ORDER

- i) The Criminal Appeal stands partly allowed.
- ii) The conviction of the appellant - accused Nazimoddin Mohammaddin alias Nasiroddin under Sections 302 and 323 of the Indian Penal Code (IPC) is hereby quashed and set aside.
- iii) However, the appellant-accused is convicted for the offence punishable under Section 304 Part (II)

instead of Section 302 of IPC, and he is sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs. 1,000/-. In default of payment of fine amount, he shall suffer further rigorous imprisonment for one month.

iv) The accused is entitled for set-off as contemplated under the provision of Section 428 of the Code of Criminal Procedure (Cr.P.C.)

v) Rest of the part of impugned Judgment and order in regard to muddemal property, compensation under Section 357-A of the Cr.P.C etc., passed by the learned Sessions Judge, is hereby made absolute and confirmed.

vi) Accordingly, the appeal is hereby disposed of in above terms.

Sd./-

[K. K. SONAWANE]
JUDGE

Sd./-

[T.V. NALAWADE]
JUDGE