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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1323 of 1999**

Shamsuddin son of Sirajuddin aged 21 years resident of Quarter No.3
Nehru Nagar Colony Raipur Madhya Pradesh (now Chhattisgarh)

---- Appellant

Versus

The State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

Criminal Revision No. 834 of 1999

Jamir Ahmed S/o Mehfooz Ahmed resident of Santoshi Nagar P.S.
Tikrapara Raipur

---- Applicant

Versus

1. Sirajuddin alias Johnny S/o Allaudin aged about 48 years
 2. Razia Begum W/o Sirajuddin aged about 35 years
- Both resident of Quarter No.3 Nehru Nagar Colony Raipur

---- Respondents

For Appellant/Accused : Shri P.K. Verma, Senior Advocate with Shri Sumit
Verma and Shri Varunendra Mishra, Advocates.
For State : Smt. Smita Ghai, Panel Lawyer.
For Petitioner/Complainant: Shri Adil Minhaj, Advocate.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board**Per Deepak Gupta, Chief Justice****20/09/2016**

1. The appeal and the revision petition are being disposed of by this common judgment since they both arise out of one trial and one judgment delivered by the Learned Additional Sessions Judge (Special Judge, NDPS), Raipur on 7.4.1999 in Sessions Trial No.14 of 1998 whereby he convicted the Appellant for having committed an offence under Section 302 IPC and sentenced him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default of payment of fine amount, he would have to undergo simple imprisonment for six months and two of the co-accused

namely Sirajuddin alias Johny and Razia Begum, father and mother of the Appellant have been acquitted.

2. There is hardly any dispute as far as the factual aspects of the case is concerned. The prosecution story is that on 23.7.1997, the deceased Mehfooj @ Kaju was standing at Chandni Chowk, Raipur along with PW-9 Mohd. Hayat @ Bablu, PW10 Naeem @ Nammu and PW5 Shakeel Ahmed. It is also the case of the prosecution that just near the place of occurrence, the informant PW8 Jamir Ahmed, son of the deceased was shutting down his Thela from where he used to sell Pan. Shamsuddin came towards Chandni Chowk alongwith PW14 Wasim Ahmed, brother of PW10 Naeem @ Nammu. Naeem @ Nammu asked his younger brother Wasim Ahmed where he was going. The younger brother replied that he alongwith Shamsuddin were going towards Baijnathpara. Naeem @ Nammu told his younger brother that he had already gone to Baijnathpara earlier also and he need not go with him again to Baijnathpara. Thereupon, Shamsuddin remarked “जाने दो न यार, अंकल”. This basically meant that Shamsuddin took it in a very casual way and asked Naeem @ Nammu not to take this very seriously. It is alleged that the deceased Mehfooj @ Kaju remarked that Shamsuddin being the friend of his younger brother should not talk to his elder brother in such a manner. Therefore, Naeem @ Nammu got angry being addressed in such a casual fashion by Shamsuddin and slapped him. Thereupon, Shamsuddin told Naeem @ Nammu “you wait here and I will come back and teach you a lesson”. He then went home and returned armed with a knife. The prosecution story is that by the time Shamsuddin returned, PW-9 Mohd. Hayat @ Bablu, PW10 Naeem @ Nammu had gone to the side to urinate and only Mehfooj @ Kaju was there. When Shamsuddin returned to the place of occurrence, he was accompanied with his parents i.e. Sirajuddin @ Johny and Razia Begum (father and mother). Razia Begum was

instigating Shamsuddin that he should kill Naeem @ Nammu or Mehfooj @ Kaju or whoever is there. Thereupon, he gave one blow of the knife on the abdomen of Mehfooj @ Kaju and thereafter two blows on his thigh. The injured was immediately taken to the hospital by his son, PW8 ,Jamir Ahmed but soon after being admitted in the hospital, he died.

3. Accused Shamsuddin stepped into the witness box and the defence is not one of denial. He has accepted the fact that he gave three blows to the deceased. However, according to him, his parents had no role in the occurrence and his only defence is that when he came back and asked Mehfooj @ Kaju where Naeem @ Nammu was, then Mehfooj @ Kaju who was in a drunken condition abused him and therefore he got enraged and due to this grave and sudden provocation, gave the blows. The Learned Trial Court acquitted the parents of the Appellant. It however convicted the Appellant for having committed murder and sentenced him as aforesaid. Hence this appeal.

4. We have heard Shri P.K. Verma, Learned Senior Counsel, Smt. Smita Ghai, Learned Panel Lawyer and Shri Adil Minhaj, Learned Counsel for the revision Petitioner who has prayed that the acquittal of the parents be also set aside.

5. Since there is no dispute with regard to the occurrence and the only dispute is with regard to the manner and background in which the occurrence took place, we may refer to the testimony of only few witnesses.

6. PW10 Naeem @ Nammu states that he alongwith the deceased Mehfooj @ Kaju and PW9 Mohd. Hayat @ Bablu consumed liquor near the water tap, close to the place of occurrence. After consuming liquor, they had sat down at the spot then Shamsuddin alongwith younger brother of Naeem @ Nammu came from Nehru Nagar side. He asked his younger brother where he was going and the reply was that they were going to

Bajinathpara. The witness then told his younger brother not to go to Bajinathpara then Shamsuddin spoke to him and said “जाने दो न यार, अंकल”. Mehfooj @ Kaju then told Shamsuddin that you are friend of his younger brother and is this the way to talk to elders. Shamsuddin then misbehaved whereupon this witness slapped Shamsuddin. Thereafter Wasim Ahmed and Shamsuddin went back from the spot. A few minutes later, this witness went to urinate. After some time, the three accused came to Chandani Chowk (place of occurrence). PW9 Mohd. Hayat @ Bablu stopped these three persons and said that there should be no fight. Shamsuddin was carrying an open knife. He first attacked Mohd. Hayat @ Bablu who managed to escape, then two people came towards Mehfooj @ Kaju and Razia Begum was instigating that whether it is Mohd. Hayat @ Bablu or Naeem @ Nammu or anybody else, don't leave them. Razia Begum caught hold of the hand of Mehfooj @ Kaju and then Shamsuddin gave blows by knife on his thigh and abdomen. Thereafter three accused ran away from the spot. This witness has been confronted with the statement recorded by the Police under Section 161 Cr.P.C. (Exhibit D/4) in which, it is not mentioned that Mehfooj @ Kaju had told the accused that this is no way to talk to your elders.

7. Averting to the statement of PW9 Mohd. Hayat @ Bablu, his version is that when the first part of occurrence took place, Mehfooj @ Kaju told Shamsuddin that you are friend of the younger brother and you should talk to the elders with respect. In the meantime, Naeem @ Nammu just slapped Shamsuddin. 10-15 minutes later, Shamsuddin alongwith his parents i.e. Sirajuddin @ Johny and Razia Begum (father and mother) came to Chandni Chowk. Shamsuddin was in front, Razia Begum was behind him and Sirajuddin was walking at the end. Sirajuddin was telling Shamsuddin and Razia Begum that don't do anything. First he would talk to Naeem @ Nammu. However, Razia Begum was saying whether it was

Naeem @ Nammu or Mehfooj @ Kaju whoever comes he should be killed. His further submission is that he then went to urinate about 20-22 meters away. In the meantime, without urinating he came back to intervened in the ongoing altercation. He stood in front of Shamsuddin and told him not to fight but Shamsuddin attacked him with knife. He however then escaped and tried to take out a bamboo stick but the same broke and he fell down. Sirajudding caught hold of him and told him not to fight. In the meantime, Shamsuddin had attacked Mehfooj @ Kaju with a knife. Razia Begum had caught hold of Mehfooj @ Kaju and was asking him why he had beaten her son. This witness further states that when he went to save Mehfooj @ Kaju, he fell down because it was raining but he saw that Shamsuddin gave blows on the stomach and thigh of Mehfooj @ Kalu with the knife. By the time he got up, all three accused ran away from the spot. This witness has also been confronted with the statement recorded by the Police under Section 161 Cr.P.C. and it is apparent that there is a lot of exaggeration and improvement in the statement made in the Court. In the statement of this witness recorded under Section 161 Cr.P.C., there is no mention of the fact that Mehfooj @ Kaju told Shamsuddin that this is not the way to talk to elders. There is also no mention in his statement that he (Mohd. Hayat @ Bablu) tried to intervene and he was also attacked by the accused.

8. PW8 Jamir Ahmed is the informant. He is son of the deceased and his version is that while his father was standing at Chandni Chowk, Mohd. Hayat @ Bablu was about 3-4 feet away from him and Naeem @ Nammu was also present there. In the meantime, Razia Begum, her husband Sirajuddin and accused Shamsuddin came from Tikrapara side and Razia Begum caught hold of his father and Shamsuddin immediately attacked his father and then the three ran away from the spot. This witness has also stated that when the earlier part of the incident took place, it was Naeem

@ Nammu who told Shamsuddin that you are my younger brother's friend and you should talk in a civil manner.

9. PW14 Wasim Ahmed had accompanied the accused Shamsuddin when the first part of incident took place. According to him, when his elder brother Naeem @ Nammu stopped him to go to Baijnathpara, then Shamsuddin said they will return in 10 minutes. He still refused to give permission to to go Baijnathpara then Shamsuddin misbehaved with his brother Naeem @ Nammu and talked in a very causal manner and then Naeem @ Nammu gave a slap to Shamsuddin. Then Shamsuddin returned home and while returning to home, Shamsuddin told that your brother will not survive. He then told Shamsuddin that Naeem @ Nammu is his elder brother and went away.

10. In this case, the accused himself stepped into the witness box and he, in his statement, has fully corroborated the prosecution version as far as first part of incident is concerned. He however does not admit that Mehfooj @ Kaju had told him to behave properly when the first incident took place. His version is that after Naeem @ Nammu refused to give permission to his brother Wasim Ahmed to accompany the accused to Baijnathpara and he (the accused) told Naeem @ Nammu to let his brother go with him at that time, Naeem @ Nammu who was in a drunken condition, started abusing him and when he asked Naeem @ Nammu not to use abusive language then Naeem @ Nammu did not stop and in fact slapped him. Then he told Naeem @ Nammu you just wait here I am coming back and teach you a lesson. The accused says that he went home, picked up a knife and came back to Chandni Chowk. He then met Mehfooj @ Kaju and asked him where Naeem @ Nammu and Mohd. Hayat @ Bablu had gone. Mehfooj @ Kaju replied that they had ran away because they were scared. Thereafter, the accused asked Mehfooj @ Kaju, where they had ran away. According to the accused when he

returned, Mehfooj @ Kaju got very angry and started using abusive language and when he was hit by Mehfooj @ Kaju. Thereupon he lost his temper, took out a knife from his pocket and gave a blow to Mehfooj @ Kaju who fell down on the spot. He then also gave two blows on his thigh.

11. A suggestion has been put to this witness in cross-examination that when he returned to the place of occurrence for the second time from his house, then Naeem @ Nammu, Mohd. Hayat @ Bablu and Jamir Ahmed all three were present on the spot. He denied this suggestion. He also denied that his parents had accompanied him. He also states in cross-examination that he had not told his counsel all these facts prior to the case. He denied the suggestion that he had made this statement only with a view to protect his parents.

12. The main question is whether we should believe the statement of the accused or of the prosecution witnesses with regard to the manner in which the occurrence took place. While deciding so, we have to keep certain principles in mind. The first is that as far as the prosecution is concerned, it has to prove its case beyond all reasonable doubt. Such an onus does not lie upon the accused and the accused only has to show that the case set out by him is a probable case. Applying these principles, we have to appreciate the statement made hereinabove. There is no doubt that when Shamsuddin came back from his home, he was carrying a knife. This clearly shows that after he had been slapped by Naeem @ Nammu, he got very angry and went to his house and picked up a knife and came back accompanied by his parents. This by itself would negate any question of their being grave or sudden provocation as far as first part of incident is concerned. He went home armed himself with a knife and this by itself was a clear indication that he was going to wield the knife and cause grave harm/injury including death to somebody. The question is that did he at that time had any animus to harm Mehfooj @ Kaju. The version

now being given in the witness box is that when Nayeem @ Nammu objected his younger brother Wasim to accompany Shamsuddin to go to Baijnathpara, then Shamsuddin in a very causal manner said “जाने दो न यार, अंकल”.

13. According to PW9 Mohd. Hayat @ Bablu and PW10 Naeem @ Nammu, Mehfooj @ Kaju objected to Shamsuddin addressing his friend's elder brother in such a causal manner showing lack of respect to the elders. However, both the witnesses have been confronted with their statements recorded by the Police under Section 161 CrPC wherein this fact was not mentioned. Therefore, it is apparent that this is an improvement made at the stage of deposition before the Court. Therefore, when Shamsuddin went back to his home, he may have been very angry as far as Naeem @ Nammu is concerned. He may have been very angry with regard to Naeem @ Nammu but his intention, if any to cause death or such bodily injury would be with regard to Naeem @ Nammu and not with regard to Mehfooj @ Kaju.

14. Therefore, something must have happened when Shamsuddin came back which gave rise to him for giving blows to Mehfooj @ Kaju. According to Mohd. Hayat @ Bablu he was was the first person to be attacked. However, this is also an improvement because this fact is not recorded in his statement under Section 161 CrPC. It is also stated that Razia Begum was instigating her son by naming Naeem @ Nammu, Mehfooj @ Kahu and Mohd. Hayat @ Bablu and saying that whoever comes in front, kill him. There is some mention of these facts even in the FIR. It may even be true that the parents were accompanying the accused but they have been acquitted by the trial Court and the State has not filed any appeal against them. If the trial Court has disbelieved that part of the statement of eyewitnesses that the mother Razia Begum was instigating the accused Shamsuddin to kill these persons then we cannot use that

very portion of the statement against Shamsuddin to hold that he was intending to kill Mehfooj @ Kaju. The version given by the accused may or may not be true but it is definitely a possible version. We are of the considered opinion that something must have happened when the second incident took place which gave rise to the accused Shamsuddin to give three knife blows to Mehfooj @ Kaju. Unfortunately the version of the prosecution witness that the mother was instigating has not been believed. That leaves us with no other reason why the accused gave a blow to Mehfooj @ Kaju. These witnesses especially PW9, Mohd. Hayat @ Bablu and PW10, Naeem @ Nammu are not telling the whole truth. They are partially telling the truth but something is being hidden as to what was the cause of the second fight which took place between Shamsuddin and Mehfooj @ Kaju. Therefore, if two versions are possible, we have to give the benefit to the accused and we hold that the version of the accused that Mehfooj @ Kaju abused him may be a possible version. It is true that this version was not put to any of the prosecution witnesses when they stepped into the witness box and this may be a cooked up version to save the lives of his parents, but here also we have to remember that as far as Sirajuddin is concerned, none of the witnesses have spoken anything. In fact, all the witnesses have stated that Sirajuddin was trying to stop his wife and son from attacking anybody. Therefore, there is something which is being hidden from the Court.

15. We also cannot lose sight of the fact that the accused in his statement made on oath clearly stated the facts and it appears to us that his story is probable and may not be a total lie. This witness has been cross-examined at length but nothing substantial has been brought out in his cross-examination. Therefore, we accept the defence version that it is a case of grave and sudden provocation and therefore hold that it falls under Exception (1) of Section 300 IPC and therefore the offence

committed by the accused is culpable homicide not amounting to murder.

16. Having held so, the next question which arises for consideration whether this offence falls within Part-I or Part-II of Section 304 IPC is concerned, Shri P.K. Verma, Learned Senior Counsel has argued that this offence falls within Part-I of Section 304 IPC. We are unable to agree with the submission of Shri Verma. The fact of the matter is that the accused went back to his house armed himself with a long knife which was a deadly weapon. He was definitely having the intention to cause grievous harm/injury to Naeem @ Nammu. Probably because Naeem @ Nammu ran away from the spot and was not available at the spot, he attacked Mehfooj @ Kaju. Even if there was some provocation, it cannot be said that the accused had no knowledge that the weapon which he had used would not cause death in ordinary course of nature. Any person who carried such a big knife and gave a blow straightaway in the abdomen which goes 13 cm inside clearly indicates that even if he did not have the intention to kill he had the knowledge that such an act could cause death. Therefore, the offence of the accused falls within Part-II of Section 304 IPC.

17. It has been urged by Shri Verma that at that time when the occurrence took place, the accused was aged about 21 years. 19 years have been elapsed since then and in the meantime, the accused got married and has two children. He submits that the accused has already undergone imprisonment of 6 years and 11 months and therefore, he may not be sent back to jail.

18. While considering the issue of sentence, we are alive to the fact that this appeal is pending in this Court since 1999. Unfortunately, for 17 long years, this appeal was not taken up for hearing. Delay in Courts is a factor to be taken into consideration while assessing the punishment. We cannot impose the same punishment to a person because long drawn out trial is

also a punishment. Every accused has a right to speedy trial and justice. He is entitled to claim that if justice is delayed, then the punishment must be tempered with some element of mercy. At the same time, the victim can also claim why should his rights not be taken into consideration only because trial or the decision of the case has been delayed. At the same time both society and the member of the family of the victim may feel that the accused is the person who managed to delay the proceedings. Each case has to be dealt with in its own peculiar facts and circumstance. In one case long delay in disposal of the case may mean that lower punishment has to be imposed but in another case it may not be same especially if the Court comes to the conclusion that the accused himself was responsible for the delay. As far as the present case is concerned, the accused is not at all responsible for delay which has caused in the High Court.

19. The second important aspect of the matter is that in the meantime, the accused got married and has two children. If we send the Appellant to jail, we shall not only be punishing the accused but we would also be punishing his wife and children who are not at fault and should not be punished for the delay caused in the Court.

20. Therefore, while assessing the punishment, we shall take all these factors into consideration that since the accused has been out of jail from 21.6.2004 and more than 12 years have been elapsed, we are of the view that sending him again back to jail at this stage would not serve the cause of justice.

21. We therefore sentence the accused for the period already undergone by him but we enhance the amount of fine from Rs.1,000/- to Rs.1,00,000/- and order that in terms of Section 357 Cr.P.C., the fine, if deposited shall be paid to the family of the victim. In case the fine amount is not deposited then the Appellant shall undergo further rigorous imprisonment for two years.

22. The appeal is disposed of in aforesaid terms.

23. As far as the revision petition is concerned, the main argument of Shri Adil Minhaj is that the lower Court below has totally misinterpreted and misread the evidence. It is urged by Shri Minhaj that the statements of the witnesses clearly show that the parents were present when the second occurrence took place. He further urged that all the witnesses have stated that the mother of the accused Razia Begum was instigating her son to kill. Unfortunately, there is no appeal by the State. In criminal revision, our hands are very limited and we cannot reassess the evidence. If the trial Court has taken a view which is a possible view, we cannot overturn the judgment.

24. In this view of the matter, revision petition is also dismissed.

Sd/-
(Deepak Gupta)
Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge