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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 25th February, 2020

Judgment pronounced on: 06th March, 2020

+ CRL.A. 1199/2018

MAHESH KUMAR Appellant

Through: Mr. Kanhaiya Singhal, Advocate.

versus

STATE Respondent

Through: Ms.Aashaa Tiwari, APP for State with
Inspector C.L. Meena and SI Pankaj
Kumar, P.S. Kirti Nagar.

+ CRL.A. 1022/2018

SHRI RAVI alias RAMBO Appellant

Through: Mr.Amit Dhankhar with Mr.Arpit Jain,
Advocates.

versus

STATE Respondent

Through: Ms.Aashaa Tiwari, APP for State with
Inspector C.L. Meena and SI Pankaj
Kumar, P.S. Kirti Nagar.

+ CRL.A. 560/2019

AJAY alias GOLDEN Appellant

Through: Mr.Raj Kumar, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Ms.Aashaa Tiwari, APP for State with
Inspector C.L. Meena and SI Pankaj
Kumar, P.S. Kirti Nagar.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals arise out of a common judgment dated 18.07.2018 and order on sentence dated 18.07.2018 passed by the learned Additional Sessions Judge (Pilot Court), Tis Hazari Courts, West, Delhi in Sessions case No. 57732/2016, in FIR No. 189/2009, registered under Sections 394/397/302/34/120B of the Indian Penal Code (hereinafter referred to as 'IPC') at Police Station Kirti Nagar, whereby the Learned Sessions Judge found the appellants guilty and passed the following order:

“84. The upshot of the entire discussion is that all the three accused persons namely, Ravi @ Rambo son of Rakh Pal, Ajay @ Golden son of Vishnu and Mahesh @ Maheshwa son of Shiv Kumar are held guilty for commission of offence punishable under Section 394 IPC read with Section 34 IPC and are hereby convicted. The accused persons are also liable for minimum punishment as per Section 397 IPC.

85. All the three accused persons are also held guilty for commission of offence punishable under Section 302 IPC read with Section 34 IPC and are hereby convicted.

86. Accused persons namely, Ajay @ Golden and Mahesh Kumar @ Maheshwa are held guilty for commission of offence punishable under Section 174-A IPC and are hereby convicted.

87. However, all the three accused persons stand acquitted of the charge for the offence punishable under Section 120-B IPC.”

2. The trial court vide separate order dated 18.07.2018 passed the order on sentence, which is reproduced hereinbelow:

1. (i) *For the offence punishable under Section 394/34 IPC and in view of minimum sentence stipulated under section 397 IPC, the convict namely Ravi @ Rambo is sentenced to undergo rigorous Imprisonment for a period of ten (10) years and to pay fine of Rs.3000/-. In default of payment of fine, the convict Ravi @ Rambo is further sentenced to undergo rigorous imprisonment for a period of three months.*
(ii) *For the offence punishable under Section 302/34 IPC, the convict namely Ravi @ Rambo is sentenced to undergo imprisonment for life and to pay fine of Rs.5000/-. In default of payment of fine, the convict Ravi @ Rambo is further sentenced to undergo rigorous imprisonment for a period of six months.*
2. (i) *For the offence punishable under Section 394/34 IPC and in view of minimum sentence stipulated under section 397 IPC, the convict namely Ajay @ Golden is sentenced to undergo rigorous imprisonment for a period of ten (10) years and to pay fine of Rs.3000/-. In default of payment of fine, the convict Ajay @ Golden is further sentenced to undergo rigorous imprisonment for a period of three months.*
(ii) *For the offence punishable under Section 302/34 IPC, the convict namely Ajay @ Golden is sentenced to undergo imprisonment for life and to pay fine of Rs.5000/-. In default of payment of fine, the convict Ajay @ Golden is further sentenced to undergo rigorous imprisonment for a period of six months.*
(iii) *For the offence punishable under Section 174-A IPC, the convict namely Ajay @ Golden is sentenced to*

undergo rigorous imprisonment for a period of seven (7) years and to pay fine of Rs.1000/-. In default of payment of fine, the convict Ajay @ Golden is further sentenced to undergo rigorous imprisonment for a period of one month.

3. (i) *For the offence punishable under Section 394/34 IPC and in view of minimum sentence stipulated under section 397 IPC, the convict namely Mahesh Kumar @ Maheshwa is sentenced to undergo rigorous imprisonment for a period of ten (10) years and to pay fine of Rs.3000/-. In default of payment of fine, the convict Mahesh Kumar @ Maheswar is further sentenced to undergo rigorous imprisonment for a period of three months.*

(ii) *For the offence punishable under Section 302/34 IPC, the convict namely Mahesh Kumar @ Maheswar is sentenced to undergo imprisonment for life and to pay fine of Rs.5000/-. In default of payment of fine, the convict Mahesh Kumar @ Maheshwa is further sentenced to undergo rigorous imprisonment for a period of six months.*

(iii) *For the offence punishable under Section 174-A IPC, the convict namely Mahesh Kumar @ Maheswar Is sentenced to undergo rigorous imprisonment for a period of seven (7) years and to pay fine of Rs.1000/- In default of payment of fine, the convict Mahesh Kumar @ Maheshwa is further sentenced to undergo rigorous imprisonment for a period of one month.*

3. The brief facts of the case, as mentioned by the learned Trial Court are reproduced hereinbelow:

“2. ...vide DD No.10B dated 09.07.2009, an information regarding one dead body lying in Plot No.36/2, Loha Mandi, Naraina, was received in PS Kirti Nagar. The said DD was assigned to Assistant Sub-Inspector (ASI) Ram Gopal, who alongwith constable (Ct.) Sanjay

proceeded to the spot. Inspector C.L Meena alongwith Ct. Vinod Kumar also reached at the spot According to the prosecution story, i.e A Block Industrial Area Naraina near the railway tracks in front of plot no. A-40 where one male dead body aged about 21-22 years was found lying there. Crime team was informed and the spot was got photographed. There was stab injury on the chest of the deceased while on the right shoulder and middle of the neck, there were scratch marks. One Ram Karan @ Rudra Pratap accompanied with Bablu Vishwakarma, Dindayal @ Raju and Jaiprakash reached the spot and identified the deceased as Rajkumar @ Bablu son of Jagdev Vishwakarma resident of village Chanpura Police Station Sumer Pur, District Hameer Pur, U.P. Ram Karan @ Rudra Pratap told that he used to work as watchman (Chowkidar) at TATA Company Tower. His co-villagers namely, Bablu Vishwakarma, Rajkumar @ Bablu (deceased), Jai Prakash and (Dindayal Pandit @ Raju also used to work as watchmen at different places. On 08.07.2009, at about 8 pm, Ram Karan @ Rudra Pratap alongwith Rajkumar @ Bablu (deceased) went to answer the natures' call near railway line at Naraina Industrial Area. At that time three boys aged about 25-30 years came there. Two of the boys caught Rajkumar @ Bablu while one boy caught Ram Karan @ Rudra Pratap, who slapped him (Ram Karan @ Rudra Pratap) and hit him with a stone on his forehead and also asked to hand over all the money he was having. Out of fear, Ram Karan @ Rudra Pratap handed over Rs. 6000/- which were kept in his purse to that boy. He somehow managed to escape from there. He told about the whole incident to his other friends and also made a call at 100 number. Police came to the spot and searched for Rajkumar @ Bablu but could not find him on the spot. Ram Karan @ Rudra Pratap was taken to the hospital by the police. After his discharge from the hospital, Ram Karan @ Rudra Pratap alongwith his other friends, again went to the spot where they found

Rajkumar @ Bablu lying dead near railway line. He further stated that the said three persons had robbed and injured him and Rajkumar @ Bablu and committed murder of Rajkumar @ Bablu after robbing him of his salary amount of Rs. 3500/-. He further stated that he could identify all the said three persons. On the basis of above-said statement of Ram Karan @ Rudra Pratap, Tehrir was prepared and the same was sent to the police station for registration of the FIR through Ct. Vinod Kumar.

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3. During further investigation, on 11.07.2009 at the instance of eye-witness namely Ram Niwas Gupta, accused Ravi @ Rambo was apprehended from Satyam Park, Naraina Road, Delhi who on interrogation disclosed about the involvement of other co-accused persons namely, Ajay @ Golden and Mahesh @ Maheswar. Out of the robbed amount, a sum of Rs. 1800/- alongwith one purse were recovered from the possession of accused Ravi @ Rambo. Accused Ravi @ Rambo was arrested. However, co-accused persons namely, Ajay @ Golden and Mahesh @ Maheswar could not be arrested. Test Identification Parade (TIP) of accused Ravi @ Rambo was conducted but he refused to participate. The TIP of the case property i.e. purse was also got conducted. After concluding the investigation, the IO came to a conclusion that sufficient evidence were collected against the accused persons qua commission of offences under Section 394/397/302/34/120-B IPC. As only accused Ravi @ Rambo could be arrested, he prepared chargesheet against accused Ravi @ Rambo and filed in the court on 08.10.2009.

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5. Accused Ajay @ Golden and Mahesh @ Maheshwa could not be arrested and proceedings under Section 82 Cr.P.C were initiated against them. Both the said accused person were declared proclaimed offender vide order dated 21.12.2010. Subsequently, on 08.03.2011

both the accused persons were also arrested. Accused Ajay @ Golden refused to participate in the TIP proceedings whereas accused Mahesh @ Maheshwar was duly identified in the TIP proceedings. A supplementary charge-sheet was filed against both of them in the court on 28.05.2011.

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6. On 11.01.2010, after hearing the learned Additional Public Prosecutor for the State and the learned counsel for the accused Ravi @ Rambo, charge was framed against accused Ravi @ Rambo for commission of offences punishable under Section 394/34 IPC, under section 397 IPC, under section 302/34 IPC and under section 120-B IPC. The charge so framed was read over and explained to the accused to which he did not plead guilty and claimed trial.

7. On 18.08.2011, after hearing the learned Additional Public Prosecutor for the State and the learned counsel for the accused persons namely, Ajay @ Golden and Mahesh Kumar @ Maheshwa, charge was also framed against them for commission of offences punishable under Section 394/34 IPC, under section 394 IPC r/w section 397 IPC, under section 302/34 IPC and under section 120-B IPC. The charge so framed was read over and explained to the accused persons to which they did not plead guilty and claimed trial.

8. During the course of trial, vide order dated 06.03.2017, on an application under Section 216 Cr.P.C moved by the State, after hearing the learned Additional Public Prosecutor for the State and the learned counsel for the accused persons namely, Ajay @ Golden and Mahesh Kumar @ Maheshwa, charge was also framed against them for commission of offence punishable under Section 174-A IPC. The charge so framed was read over and explained to the accused persons to which they did not plead guilty and claimed trial.”

4. In order to bring home the guilt of the accused persons, the prosecution examined 31 witnesses in all. After the conclusion of the prosecution evidence, all the incriminating evidence brought by the prosecution on record was put to all the accused-appellants and in their statements recorded under Section 313 Cr.P.C, all the accused-appellants denied the same to be correct while claiming themselves to be innocent and to have been falsely implicated in this case. The appellants chose not to lead any evidence in their defence.
5. Mr. Kanhaiya Singhal, Mr. Amit Dhankhar and Mr. Raj Kumar appeared for the appellants Mahesh Kumar, Ravi alias Rambo and Ajay alias Golden respectively. The learned counsel contended that the case of the prosecution is based on the testimony of the injured eye-witness PW-2 (Ram Karan @ Rudra Pratap); that the testimony of PW-2 (Ram Karan @ Rudra Pratap) is not of sterling quality and is full of inherent discrepancies, concoctions and inconsistencies; that the testimony of PW-2 (Ram Karan @ Rudra Pratap) is not corroborated by the other witnesses who have been examined by the prosecution in order to establish the false story put up to rope in the appellants in the present crime. The counsel further contended that even the formal documents relied upon by the prosecution do not support the version which emerges from the testimony of the star eye-witness in the present case i.e. PW-2 (Ram Karan @ Rudra Pratap).
6. Adding to their contentions, the learned counsel for the appellants argued that the prosecution failed to examine the guard who finds mention in the testimony of PW-2 (Ram Karan @ Rudra Pratap), to

whom PW-2 (Ram Karan @ Rudra Pratap) first narrated the happening of the said incident; that the said guard could have thrown light to the happening of the incident and the non-examination has led to a grave impact on the case of the prosecution.

7. The learned counsel further argued that PW-2 (Ram Karan @ Rudra Pratap) deposed that as the day of the incident was a Sunday and the Toilet in the building was closed, thus he along with the deceased went to the railway tracks to defecate in the open, whereas the calendar of the year 2009 clearly reflects that the day of the incident i.e. 08.07.2009 was a Wednesday and not Sunday, which creates a dent in the version of the PW-2 (Ram Karan @ Rudra Pratap).
8. Arguing on the lines of recovery of the dead body, the learned counsel argued that the same is doubtful as varying versions have been given by the prosecution witnesses in this regard. Adding to the contention with regard to recoveries, the counsel argued that PW-2 (Ram Karan @ Rudra Pratap) has deposed that they were carrying two plastic bottles full of water on their way to defecate, however, no such bottles were recovered by the investigation agency from the place of incident.
9. Turning to the medical evidence on record, the counsel for the appellants argued that deposition of the PW-2 (Ram Karan @ Rudra Pratap) reflects that they went to defecate near the railway track and even before they could have completed the act, the incident took place, however, the post-mortem report reflects that the rectum of the deceased was found empty at the time of conducting of the post-mortem which further falsifies the case of the prosecution.

10. Adding to the aforesaid common contentions on behalf of the appellants, the learned counsel for the Appellant Ravi @ Rambo while arguing on the lines of refusal to be a part of the TIP proceedings, the counsel submitted that the testimony of the prosecution witnesses reflect that the appellant was already familiarized with the prosecution witnesses by the investigating agency, hence, the appellant rejected the request of getting the TIP conducted. So far as the appellant Mahesh is concerned, Mr. Kanhaiya Singhal appearing for the said appellant contended that PW-2 (Ram Karan @ Rudra Pratap) during the TIP proceedings failed to recognize the said appellant which is evident from (**Ex. PW-27/E**) and it was only after the investigating agency familiarized the appellant Mahesh with PW-2 (Ram Karan @ Rudra Pratap), that he was able to identify him. In support of his contention, he placed reliance on ***Hare Kishan Singh & Ors. vs. State of Bihar*** reported at ***AIR 1988 SC 863***.
11. Conversely, the learned APP on behalf of the State contended that the case of the prosecution is based on the cogent, consistent and reliable testimony of the sole injured eyewitness PW-2 (Ram Karan @ Rudra Pratap) which could not be impeached during the cross-examination. Strengthening her argument, the learned APP contended that PW-2 (Ram Karan @ Rudra Pratap) rightly identified the appellants before the Trial Court. She further contended that PW-2 (Ram Karan @ Rudra Pratap) has unequivocally narrated the entire incident of beating given to the deceased.

12. The learned APP further contended that the recovery of the wallet of PW-2 (Ram Karan @ Rudra Pratap), who was present with the deceased at the time of the incident was at the instance of the appellant Ravi @ Rambo, which the appellant failed to negate. She further contended that the appellants Ravi @ Rambo and Ajay @ Golden refused the judicial Test Identification Parade, which gives a valid ground to draw adverse inference against the said two appellants.
13. Adding to her submissions, the learned APP argued that the ocular evidence is supported by medical and scientific evidence which proves that the deceased died a homicidal death. She submitted that the dead body of the deceased was found lying between the Railway sleepers in a pool of blood and the post-mortem revealed that there were six external injuries. She further stated that the cause of death was hemorrhagic shock subsequent to the stab injuries to the heart which were sufficient to cause death in the ordinary course of nature.
14. Learned APP, for the State while vociferously rebutting the contentions of the Appellants about the non-recovery of the weapon of offence which was used to kill the deceased argued that the non-recovery of the weapon of offence was not fatal to the case of the prosecution if other clinching evidence was available on record. She submitted that in the present case the testimony of the sole-eyewitness i.e. PW-2 (Ram Karan @ Rudra Pratap) is available on record and is of stellar quality. In support of her view she placed reliance on *Yogesh Singh v. Mahabeer Singh & Ors.* reported in

AIR 2016 SC 5160 and Mritunjay Biswas v. Pranab @ Kirti Biswas & Anr. reported in ***AIR 2013 SC 3334***.

15. We have heard learned counsel for all the appellants as well as the learned APP for the state.
16. The case of the prosecution is based on the eye-witness testimony of PW-2 (Ram Karan @ Rudra Pratap) coupled with the testimony of the formal witnesses and the medical evidence. At the outset, we deem it necessary to peruse the testimony of the prosecution witnesses. PW-2 (Ram Karan @ Rudra Pratap) stepped into the witness box and deposed that:-

I was working in TATA company as a watchman. There were other watchmen working in the same company with me namely Bablu Vishkarma who died, Raj Kumar @ Bablu, Raju @ Din Dayal Pandit and Jai Prakash. These watchmen were performing their duties at different towers of TATA company at different places.

On 08.07.09 I along with other employees received our monthly salary of Rs. 4500/- each and I received Rs.6000/- as a salary. After receiving salary I along with other watchmen above named came to Phase-II, Naraina. There is a tower at Phase-II, Naraina where I used to perform my duty and reside. I along with all the abovenamed watchmen came to Phase-II, Naraina after receiving our salary. We took leave on that day. We reached at Phase-II, Naraina, at 1.00pm and we all went to sleep. We got up at 5.00-5.15pm. Bablu Vishkarma and Jai Prakash went to market for purchasing some articles for preparing the dinner.

Raj Kumar @ Bablu went to answer the nature's call and I accompanied him. The others Bablu Vishkarma, Jai Parkash and Din Dayal Pandit remain at Phase-II, Naraina. I along with Raj Kumar @ Bablu were carrying

a water bottle in our hand for answering the nature's call at the railway track which is just behind the tower where we stay. Raj Kumar @ Bablu was ahead of me. When I along with Raj Kumar @ Bablu were on the railway track, three boys came from the front side. One of them, the accused Ravi who is present in the court today (the witness correctly identified the accused) caught hold of me and two other boys who accompanied accused Ravi caught hold Raj Kumar @ Bablu.

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....All of a sudden accused Mahesh and Ajay came and they are present in the court today (witness correctly identified the accused persons) and both of them caught hold of deceased Raj Kumar @ Babloo and the third accused namely Ravi (present in the court today) who was also with these two accused persons (witness correctly identified the accused Ravi) also reached there and caught hold of me. All the three accused persons started beating both of us by giving slaps to both of us first and thereafter they asked as to where we were going and started abusing both of us. All three accused persons asked us as to what we were having and accused Ajay started searching my pant pocket and when I resisted he gave me beating with stone on my forehead as a result of which blood started coming out from my forehead. Accused Ravi took out a knife from his pocket and threatened me to take out whatever I had. I took out my purse from my pant pocket containing Rs. 6,000/- and some other documents and handed over the same to accused Ravi. Accused Ravi had caught hold of me by my collar at that time. I somehow got myself free from the clutches of accused Ravi by tearing of my shirt and I ran away in order to save myself. When I reached on the boundary of railway line and looked back towards deceased Raj Kumar and accused persons, at that time I saw that accused Ravi giving a knife blow to the deceased Raj Kumar @ Babloo and accused Ajay and

Mahesh were holding the deceased Raj Kumar and I also saw that deceased Raj Kumar @ Babloo was screaming in loud voice. I ran towards the nearby factory and talked to the guard standing there and that guard called the police at number 100 when I told the whole incident to him and thereafter, I went to my house to call my other friends namely Jai Prakash, Deen Dayal and Babloo Vishwakarma. I took them to the place where the incident took place but we could not find deceased Raj Kumar @ Babloo there. Police had also reached there by that time. Police officials took me to DDU hospital. My treatment continued in the hospital till 4.00 am. I had received several stitches on my wound. On the next morning i.e. on 09.07.09, I along with police officials searched for deceased Raj Kumar @ Babloo and deceased was found amongst the sleepers of cement lying near the railway track. Police recorded my statement which is Ex. 2/A bearing my signature at point A.

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At this stage another sealed envelope sealed with the seal of Shri Mohinder Virat, Ld. MM is opened out of which TIP proceedings of accused Ravi is taken out (the said proceedings contains TIP refusal proceedings and therefore it is not put to the witness). Witness states that he had identified accused Ravi in Tis Hazari Court in front of Room No. 182 in presence of police officials on 8.8.09.

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....We did not use to go to ease ourselves daily on the railway track. Vol. We had gone there as it was Sunday and the main office of the company was closed. There was murcury light in the company which was at a distance of 25/30 meters from the railway line. The distance between deceased and myself was about 10 steps when the incident took place.

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...I was carrying a water bottle with me which was fallen on the railway tracking during the incident. When police came over there with me the bottle was not there on the spot. The guard of the company near the railway track had telephoned from my mobile phone at number 100. I do not remember whether police officials of PCR received information regarding robbery of Rs. 5000/-. Police had not taken my blood stained clothes. Police had seen my blood stained clothes. I did not hear as to what words the deceased was uttering.

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I do not know whether the day of incident i.e. 08.07.09 was Wednesday vol. I might have forgotten the day when I told that it was Sunday. It is wrong to say that I was tutored by the police outside the court. Police has taken me from the hospital to the place of occurrence on their vehicle. I did not go to ease myself thereafter.

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We used to take water from second floor and there was a latrine on the ground floor. There was a water tank on the top floor and we used to use the water of that tank also for drinking and bathing. We used to use the latrine constructed on the ground floor. Deceased Raj Kumar @ Babloo was normally not residing with me.

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There was lights on the way but I do not know whether these lights belong to the company or to the Government. I was wearing my full clothes at that time i.e. pant and shirt but I do not remember whether I was wearing Chappal or shoes at that time.

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....I came to know the name of accused Ravi when I came to the court and I identified the accused Ravi in the court. It is wrong to say that accused Ravi was shown to me in the police station. I prayed for mercy when I was beaten by the accused persons but I had not raised any alarm.

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When I had seen the guard, he was about 30 steps away from me. The guard was present by the side of gali. I do not remember whether any other person was present along with the guard there or not as I was perplexed.

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By that time police officials of PCR had reached. Police officials searched for the deceased along with me at the place of quarrel but the deceased was not found there, so they took me to the hospital as I was bleeding. I do not remember whether I had signed any paper on the next day.

17. The prosecution also examined Babloo as PW-5 who deposed as under :-

In the year 2009 I was working on the tower of TATA company as watchman/guard situated at A-36/2, Phase-I Naraina Industrial Area, Delhi. I had joined this company one month prior to the incident. I am illiterate. I cannot tell the date and month. On the day of incident deceased Raj Kumar @ Babloo, Ram Karan @ Rudra Pratap and Deen Dayal had received their salaries of one month. On the day of incident I and Jai Prakash along with deceased Raj Kumar @ Babloo, Ram Karan @ Rurda Pratap and Deen Dayal had collected on the tower of Ram Karan @ Rudra Pratap. Deceased Raj Kumar @ Babloo was son of my 'Mausi. I, Jai Prakash and Deen Dayal had gone to the market and returned to the tower of Ram Karan @ Rudra Pratap. Thereafter we started preparing our meals. In the meanwhile deceased

Raj Kumar @ Babloo told that he was feeling urge to ease himself. So Ram Karan @ Rudra Pratap went with deceased Raj kumar @ Babloo and they told us that they were going to railway track for that purpose since toilet of the company was closed at that time. After some time Ram Karan @ Rudrapratap returned to his tower in injured condition, bleeding condition and was perplexed also at that time. Ram Karan @ Rudrapratap told us to accompany hurriedly saying that deceased Raj Kumar @ Babloo was being beaten up. Ram Karan @ Rudrapratap also told us that he had already got the police telephoned at 100 number. Jai Prakash also telephoned to the police at 100 number. In the meanwhile police also reached there. Police officials searched for the deceased on the railway track but he could not be found at the railway track. Since Ram Karan @ Rudrapratap was in serious condition, police officials took him to DDU Hospital where he was discharged after treatment. We along with police again searched for deceased on the railway track but deceased could not be found and Karan @ Rudrapratap also searched for the deceased along with us after discharged from the hospital and when we reached at some distance, the dead body of the deceased was found amongst the sleepers lying near the railway track. We informed police about the deceased and police officials reached there.

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....I remained present with the police officials at both the spots. I had seen water bottle at the spot which deceased and Ram Karan had taken with them while leaving for the spot. Police did not seized that bottle. I did not see any blood stained stone at the spot. There were blood spots between the two spots i.e. place of recovery of blood stains articles and place of recovery of dead body. The spots of blood were at 2-3 steps away from the dead body.

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Ram Karan and deceased Raj Kumar @ Babloo left the place at about 7.00 PM and after 15 minutes Ram Karan came back to the house and I saw blood oozing from the forehead of Ram Karan and stated to me and others present there that a quarrel was going on between Raj Kumar and another person and that he had returned saving himself. Ram Karan was wearing entire cloth on his body.

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After information received from Ram Karan we went to the place of incident stated by Ram Karan immediately thereafter along with watchman of another company and police officials of PCR van and it was night time so few people was there. It was almost dark. We can see only upto 5-6 steps. There is no light on the railway track but the lights are existing at the company located nearby which is situated at the distance of 100 ft. After inspecting the site along with police official I could not find deceased and Ram Karan went to the hospital. I came back to the tower and remained there till 4.00 AM. Again we went on the railway track in search of deceased and I found deceased lying between the sleepers lying nearby railway track. I called Ram Karan on mobile and called there and also made a call to the police. Police and Ram Karan reached there within one hour.

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One of the accused was apprehended by police within three days and the accused was shown to me. I cannot tell the name of that accused.”

18. The post-mortem report (Ex. PW-8/A) was proved on record by Dr. Santosh Kumar who was put to stand as PW-8 and deposed that:

“I have been deputed by the Medical Superintendent to depose on behalf of Dr. Sushil Kumar Chaurasia as he

has expired in a road accident. Dr. Sushil Kumar Chaurasia was working as Senior Resident in Department of Forensic Medicine in DDU Hospital on 11.07.09. I identify her handwriting and signatures as I have seen him signing and writing during the ordinary course of his duties. I have seen post-mortem report prepared by him with respect of Raj Kumar @ Babloo S/o Sh. Jagdev Vishwakarma aged 21 years male on 11.07.09 from 12.10 pm to 1.30 pm with the alleged history of found dead near railway track having stab injury as per information received at PS on 09.07.09 at 10.30 am. As per post-mortem report, deceased was having six external injuries on various parts i.e. left cheek, left forearm, back of elbow joint of right hand, right side of chest with collection of blood, two bruises on right clavicular region with blood, clean incised wound over left side of chest and their sizes are mentioned in the PM report.

On internal examination of head, sub scalp hematoma was present on the right frontal size 6 x 4 cm and left parieto temporal size 8 x 5 cm of reddish brown colour.

On internal examination of chest, on exploration of injury no. 6 mentioned above it was found to be penetrating the intercostal of muscle, pericardial and whole thickness of anterior wall of left ventricle of heart and collection of clotted and liquid blood approx. 1.2 Litre present in the thoracic cavity and staining of all surrounding tissues. Both the lungs were pale.

On internal examination of abdomen, approx. 15 ml. semi liquid of creamish colour was found and intestinal loops were distended with gases and pale and all viscera was also pale.

Time since death was approx. 64 hours. Blood in gauze piece and clothes of the deceased were sealed with the seal of DDU hospital.

Cause of death was hemorrhagic shock subsequent to stab injury to the heart and was sufficient to cause death in ordinary course of nature and external injuries no. 1 to 5 were possible in scuffled fight. All the injuries were ante mortem and were same in duration.

The detailed report prepared by Dr. Sushil Kumar Chaurasia is Ex. PW8/A bearing his signatures at point A and is in his handwriting.

In his cross-examination, PW-8 (Dr. Santosh Kumar) deposed that:

I am working in Department of Forensic Medical in DDU hospital since 2008. It is difficult to state as to for how long a man can run after receiving external injury no. 6. A person can survive from 15 minutes to half an hour after receiving the injuries mentioned in the PM report even if he does not get any medical treatment. If a person receive such injury blood would start coming instantly and that blood may fall on the spot vol. it depends upon the position of a person and also whether injured person has put pressure on the stab injury and in that case blood may not fall on the ground. I cannot tell how much blood might have oozed out of the body in the incident. It is correct that weight of the deceased is not mentioned in the relevant column of the PM report Ex.PW8/A. Considering the height and physique mentioned in PM report, I can state that deceased might be of 50/55 Kg. of weight. A normal body of adult mentioned in PM report may contain 5 Lts. of blood. It is difficult to calculate how much blood had come out of the body during the incident. The rectum of the deceased was found empty as there was no stool at the time of postmortem as per the PM report. I cannot say whether a person after receiving the injury in the heart can sit to pass the stool. As per report the underwear of the deceased was not smeared with the stool. It is not possible to receive external injury no. 1 to 6 by fall. The weapon which might have been used in the incident was pointed, single sharp edged.

19. During the trial, Retd. SI Gulshan Kumar was examined as PW-12 who deposed as below :-

“On 9.07.09 I was posted as Incharge Crime Team of West Distt. Crime Team. On that day on receiving of information about the murder in the area of PS Kirti Nagar from the control room. I along with staff of Crime team went to the spot in between Railway line near Industrial Area Naraina and Kirti Nagar Railway Station. At the spot which is a empty place and near the slippers of cement, we found a dead body of a male.

xxxx

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*I had not seen any water bottle at the spot. I had also not detected any blood spots on the railway line. **I had remained at the spot from 8.15 a.m. to 8.45 a.m. There was no light near the spot.** At the spot I had not found any knife. It is wrong to say that I have not visited the spot and I had prepared the report while sitting in the PS. It is wrong to say that I am deposing falsely.”*

20. PW-13 (SI O.P. Mandal) deposed as below :-

On 8.07.09 I was posted at PS Kirti Nagar as SI. On that day I was on emergency duty along with Ct. Ashok in the PS and my duty was from 8 p.m. to 8 a.m. I received DD No. 59-B about 9.08 p.m. copy of the same is Ex. PW13/A regarding stabbing of a person and taken away of Rs. 5000/- from that person from A-3, Phase-II, Naraina, Loha Mandi, Delhi. I along with Ct. Ashok reached at the aforesaid address. I made a enquiry and I came to know that the injured has been removed to DDU Hospital by the PCR. I received DD No. 36-A copy of the same is Ex. PW13/B at about 10.40 p.m. regarding that one injured Rudra Partap S/o Lalu has been admitted in the DDU Hospital. From the spot, I went to DDU Hospital. I made enquiry from the injured and found that the incident pertains to the Railway Sarai Rohialla. I informed Railway Sarai Rohialla and came to know that

the incident pertains to the area of Railway Nizammuddin so I got recorded the DD No. 26-B copy of the same is Ex. PW6/A in the PS Hazarat Nizammudin Railway.

21. Having perused the aforesaid testimonies, we are of the view that the following contradictions exist in the version of the prosecution witnesses:

- **Day of the Incident:** PW-2 (Ram Karan @ Rudra Pratap) in his examination in chief stated that We had gone there as it was Sunday and the main office of the company was closed whereas to the contrary, in his cross-examination he deposed that I do not know whether the day of incident i.e. 08.07.09 was Wednesday vol. I might have forgotten the day when I told that it was. Even otherwise also, the calendar of the year 2009 reflects that the alleged date of incident i.e. 08.07.2009 was a Wednesday;
- **Stabbing of the deceased:** PW-2 (Ram Karan @ Rudra Pratap) stated that When I reached on the boundary of railway line and looked back towards deceased Raj Kumar and accused persons, at that time I saw that accused Ravi giving a knife blow to the deceased Raj Kumar @ Babloo and accused Ajay and Mahesh were holding the deceased Raj Kumar and I also saw that deceased Raj Kumar @ Babloo was screaming in loud voice whereas to the contrary PW-5 (Babloo) submitted that Ram Karan @ Rudrapratap told us to accompany hurriedly saying that deceased Raj Kumar @ Babloo was being beaten up. PW-5 (Babloo) further deposed

that I saw blood oozing from the forehead of Ram Karan and stated to me and others present there that a quarrel was going on between Raj Kumar and another person and that he had returned saving himself. The said fact is further controverted by the Rukka (**Ex. PW-2/A**) which finds mention of an incident about a quarrel only and is silent on the fact as to beating. Further, the evidence of PW-2 (Ram Karan @ Rudra Pratap) is contrary to the formal evidence on record including the PCR form (**Ex. PW-10/A**) wherein it has been mentioned that when the PW-2 (Ram Karan @ Rudra Pratap) went to ease himself, 2/3 boys came and snatched Rs. 6000/- from him and injured him on the head with a stone and fled. Moreover, the MLC (**Ex. PW-18/A**) reflects that PW-2 (Ram Karan @ Rudra Pratap) was conscious and oriented when he was brought to the DDU Hospital for medical examination by HC Ramesh Chand, however, he failed to mention about the stabbing of the deceased either to the examining doctor or to HC Ramesh Chand. Moreover, PW-2 (Ram Karan @ Rudra Pratap) failed to disclose any such fact to SI O P Mandal who went to meet PW-2 (Ram Karan @ Rudra Pratap) after receiving the information about the happening of the incident which is evident from the testimony of SI O P Mandal who deposed that From the spot, I went to DDU Hospital. I made enquiry from the injured and found that the incident pertains to the Railway Sarai Rohialla;

- **Light at the spot:** PW-2 (Ram Karan @ Rudra Pratap) in his testimony stated that There was lights on the way but I do not know whether these lights belong to the company or to the Government. There was mercury light in the company which was at a distance of 25/30 meters from the railway line while PW-5 (Babloo) had stated that It was almost dark. We can see only upto 5-6 steps. There is no light on the railway track but the lights are existing at the company located nearby which is situated at the distance of 100 ft. The said fact is further contradicted by the testimony of PW-12 (Retd. SI Gulshan Kumar) who deposed that I had remained at the spot from 8.15 a.m. to 8.45 a.m. There was no light near the spot ;
- **Recovery of the dead body:** PW-2 (Ram Karan @ Rudra Pratap) deposed that On the next morning i.e. on 09.07.09, I along with police officials searched for deceased Raj Kumar @ Babloo and deceased was found amongst the sleepers of cement lying near the railway track, however, this fact has been contradicted by the testimony of PW-5 (Babloo) who deposed that Again we went on the railway track in search of deceased and I found deceased lying between the sleepers lying nearby railway track. I called Ram Karan on mobile and called there and also made a call to the police. Police and Ram Karan reached there within one hour;
- **Water Bottles at the spot:** PW-2 (Ram Karan @ Rudra Pratap) in his examination had stated that "I was carrying a water bottle with me which was fallen on the railway tracking during

the incident. When police came over there with me the bottle was not there on the spot whereas PW-5 (Babloo) deposed that “I had seen water bottle at the spot which deceased and Ram Karan had taken with them while leaving for the spot. Police did not seize that bottle.” The said fact is further controverted by the testimony of PW-12 (Retd. SI Gulshan Kumar) who deposed that I had not seen any water bottle at the spot. I had also not detected any blood spots on the railway line;

- **Purpose of visit to the Railway Tracks:** From the testimony of PW-2 (Ram Karan @ Rudra Pratap) it is evident that the only purpose for which he along with the deceased went to the railway tracks was to defecate as the toilet in the premises where he used to live was closed as it was a ‘Sunday’. However, the deposition of doctor Santosh Kumar who deposed on behalf of Dr. Sushil Kumar Chaurasia (who conducted the postmortem of the deceased) reflects that the rectum of the deceased was empty. The language of the deposition of PW-2 (Ram Karan @ Rudra Pratap) reflects that even before the deceased and PW-2 (Ram Karan @ Rudra Pratap) could attend the nature's call, the incident took place, then how could the rectum of the deceased have been empty. The prosecution has failed to explain the said fact;
- **Non-seizure of clothes of PW-2 (Ram Karan @ Rudra Pratap) by the Investigating Agency:** PW-2 (Ram Karan @ Rudra Pratap) in his testimony had stated that the “Police had not taken my blood-stained clothes. Police had seen my blood-

stained clothes. I did not hear as to what words the deceased was uttering” whereas to the contrary, PW-31 (Insp. C. L. Meena) deposed that There were no blood spots on the shirt of complainant Ram Karan as he was medically examined before I recorded his statement and he had changed his clothes. I did not seize the clothes which the complainant Ram Karan was wearing when he was attacked by assailant with the stone ;

- **Failure to examine the guard who made the telephone call to the police regarding the stabbing of the deceased:** PW-2 (Ram Karan @ Rudra Pratap) in his examination-in-chief stated that “I ran towards the nearby factory and talked to the guard standing there and that guard called the police at number 100 when I told the whole incident to him and thereafter, I went to my house to call my other friends namely Jai Prakash, Deen Dayal and Babloo Vishwakarma. He further deposed that The guard of the company near the railway track had telephoned from my mobile phone at number 100.”. However, the guard was not produced by the prosecution as a witness during the course of trial.

22. Having perused the record, we are of the view that the testimonies of the prosecution witnesses suffer from inconsistencies, are not cogent and cannot be relied upon. The prosecution failed to give any explanation why PW-2 (Ram Karan @ Rudra Pratap) remained silent after the stabbing of the deceased till 10:15 AM on 09.07.2009. Further, PW-2 (Ram Karan @ Rudra Pratap) failed to elaborate upon the fact of stabbing to HC Ramesh Chand who took him to DDU

Hospital or to the examining doctor who prepared the MLC. The prosecution even failed to prove the persons at whose instance the body of the deceased was recovered. Moreover, there is failure of the prosecution to explain the cause which led them to not seize the blood-stained clothes of PW-2 (Ram Karan @ Rudra Pratap). In addition to the aforesaid, the Guard who could have supported the prosecution case and brought clarity to the happening of the said incident was not examined by the prosecution and no valid explanation was provided for such omission. The aforesaid inconsistencies and the lacunae when read together weaken the case of the prosecution.

23. Hence, the result of the aforesaid discussion is that the testimony of the witnesses produced by the prosecution to establish its case are not reliable and they cannot be made the ground to convict the appellants in the present case.
24. Having discussed the testimonies of the prosecution witnesses, we deem it appropriate to peruse the evidence which the prosecution alleges would connect the appellants with the present crime. The learned APP argued that Ravi @ Rambo and Ajay @ Golden refused to get the TIP conducted and an adverse inference be drawn against them. Moreover, the learned APP contended that PW-2 (Ram Karan @ Rudra Pratap) was able to identify all the three appellants before the court, which further strengthens the case of the prosecution. To the contrary, learned counsel for the appellant Ravi @ Rambo and Ajay @ Golden argued that both the appellants were shown to PW-2 (Ram

Karan @ Rudra Pratap) by the investigating agency even before the TIP could be conducted which is evident from the evidence on record.

25. The Apex Court in ***Lal Singh and others vs. State of U.P.*** reported at **(2003) 12 SCC 554** has held that the court should find out whether witnesses had sufficient opportunity to see the accused at the time of the occurrence and whether had any chance to see the accused before test identification parade. Their Lordships have held as under: -

“28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard and fast rule can be laid down. The Court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The Court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the Court must adopt a cautious approach so as to prevent mis-carriage, of justice. In cases of inordinate delay it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the Court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal.

It all depends upon the facts and circumstances of each case.”

26. The evidence on record reflects that the incident took place at around 8 PM on 08.07.2009. Taking into consideration the time at which the incident took place coupled with the fact that there was no provision of light at the spot, as already established above, we are unable to accept the fact that PW-2 (Ram Karan @ Rudra Pratap) could have had a proper opportunity to see the faces of the assailants. Further, PW-2 (Ram Karan @ Rudra Pratap) in his examination has clearly deposed that ***he had identified accused Ravi in Tis Hazari Court in front of Room No. 182 in presence of police officials on 8.8.09*** which shows that the investigating agency had already shown the appellants to PW-2 (Ram Karan @ Rudra Pratap). Hence, the said acts of the investigating agency give good reason to the appellants to reject the Test identification parade. So far as the appellant Mahesh is concerned, the learned counsel has contended that the evidence on record reflects that PW-2 (Ram Karan @ Rudra Pratap) failed to identify the appellant Mahesh during the TIP proceedings and it was only after the investigating agency familiarized him, that PW-2 (Ram Karan @ Rudra Pratap) could identify him in court.
27. The TIP of the appellant Mahesh was conducted before the learned ACMM, North-West District who proved the TIP proceedings as (***Ex. PW-27/A***). The bare perusal of the said proceedings reflects that the star witness of the prosecution failed to identify the appellant Mahesh during the course of TIP. It is highly unbelievable that the said witness could not identify the appellant Mahesh within one week

of the said incident, wherein he himself also received injuries but on the other hand could identify the appellant Mahesh after a gap of almost 3 years when he was put in the stand. Our view is further strengthened by the dicta of the Apex Court in ***Hare Krishna Singh & Ors. vs. State of Bihar*** reported at ***AIR 1988 SC 863*** wherein the court has held as under:

26. The most significant fact is that P.W. 3 failed to identify the appellant in the T.I. Parade. P.W. 8 did not attend the T.I. Parade. His case is that he was not called to attend the T.I. Parade. On the other hand, it is the defence case that P.W. 8 was called but he did not attend the T.I. Parade. Whatever might have been the reason, the fact remains that no attempt was made by the prosecution to have Paras Singh of Birampur identified by P.W. 8. In such circumstances, the High Court was not justified and committed an error of law in relying upon the statement of P.Ws. 3 and 8 made before the police mentioning the name of Paras Singh of Birampur. It is true that P.Ws. 3 and 8 identified Paras Singh of Birampur in court, but such identification is useless, particularly in the face of the fact that P.W. 3 had failed to identify him in the T.I. Parade. In the circumstances, the prosecution has failed to prove the complicity of Paras Singh of Birampur in the crime. Indeed, the prosecution has failed to prove that Paras Singh of Birampur was present at the time of occurrence. His conviction and sentence cannot, therefore, be sustained.

28. Hence, the contention of the appellants that PW-2 (Ram Karan @ Rudra Pratap) was already shown to PW-2 (Ram Karan @ Rudra Pratap) sustains as the record is clear that the investigating agency had ample time to familiarize PW-2 (Ram Karan @ Rudra Pratap) with the present appellants. Moreover, the said contention is further

shattered by the TIP proceedings of the appellant Mahesh (*Ex. PW-27/A*) wherein PW-2 (Ram Karan @ Rudra Pratap) could not identify the assailant Mahesh within one week of the alleged incident.

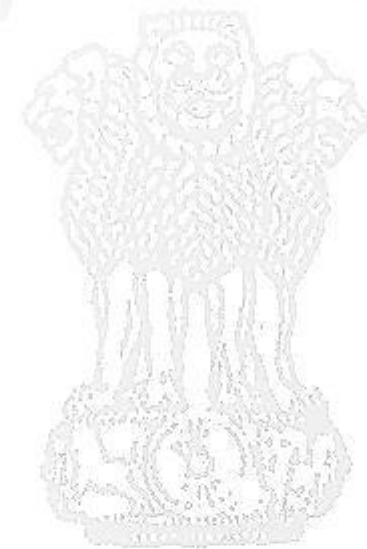
29. Having perused the material available on record, we are of the view that the prosecution has failed to prove its case beyond reasonable doubt which is their solemn duty. The testimony of the prosecution witnesses suffers from inherent inconsistencies and is contradictory to each other. The deposition of the star witness PW-2 (Ram Karan @ Rudra Pratap) cannot be the basis to convict the present appellants. Moreover, there is nothing incriminating on record which would connect the appellants to the alleged incident. The only evidence available against them was the test identification parade by PW-2 (Ram Karan @ Rudra Pratap) which has already been discussed above and deemed to be unreliable. In the facts and circumstances of the case, the recovery of the wallet of the deceased at the instance of the appellant Ravi cannot be taken to be as truthful and cannot be the sole basis to convict the present appellants.
30. In terms of the aforesaid discussion, the appeals of all the three appellants namely Mahesh Kumar, Ravi alias Rambo and Ajay alias Golden are allowed and the judgment of the learned Trial Court is set aside. All the three appellants namely Mahesh Kumar, Ravi alias Rambo and Ajay alias Golden are acquitted of the charges under Section 394 read with Section 34 IPC, Section 302 read with Section 34 IPC and section 174-A IPC.

31. The Trial Court record along with a copy of the judgment be returned to the Trial Court.
32. Copy of the judgment be also sent to the Superintendent Jail, Tihar Jail. Superintendent Jail, Tihar Jail is directed to release the appellants forthwith if not required in any other case.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

MARCH 06, 2020
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