

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

% **CRL. APPEAL NO. 449 OF 2003**

+ **Date of Decision: 8th September, 2008**

MATADIN **...Appellant**
! **Through: Ms. Rakhi Nigam,**
Advocate

versus

\$ **STATE** **...Respondent**
^ **Through: Ms. Richa Kapoor,**
APP

CORAM:
* **HON'BLE MR. JUSTICE B.N. CHATURVEDI**
HON'BLE MR. JUSTICE P.K.BHASIN

1. Whether Reporters of local papers may be allowed to see the judgment?(No)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

JUDGMENT

P.K.BHASIN, J:

The appellant Matadin and three other persons were tried for the offences punishable under Sections 302 and 201 IPC read with Section 34 IPC for committing the murder of one Hari

Shankar and causing disappearance of the evidence of his murder but vide judgment dated 27.08.2002 the learned Additional Sessions Judge convicted the appellant alone under Sections 302/201 IPC and acquitted his three co-accused of both the charges. Vide order dated 28.8.2002 the appellant was sentenced to undergo life imprisonment and also to a fine of Rs. 5000/- under Section 302 IPC and rigorous imprisonment for three years and a fine of Rs. 1000/- under Section 201 IPC. Sentences of further imprisonment in case of default in payment of fine were also imposed. Questioning the correctness of his conviction and the sentences awarded to him the appellant(hereinafter referred to as 'the accused') has preferred this appeal.

2. Before delving into the correctness of the impugned judgment of the trial Court it would be necessary to notice the case of the prosecution. A dead body of a boy aged 20-22 years was noticed lying on the railway track near Pandav Nagar on 6.3.96 at about 10.45 a.m. by one Head Constable of Police Control Room. Intimation about that was given to the Railway police station at Delhi's main station. ASI B.D. Sharma (PW-15)

was asked to go to the spot. He reached the spot where he found dead body of a boy aged 20-22 years lying on the railway track. The legs were found tied with a rope and the face and neck of the body were swollen and injuries were also present on the face and neck of the deceased person. Since it appeared to be a case of murder a case under Section 302 IPC was registered vide FIR no. 48/96 (on the report Ex. PW-15/A) (Ex. PW-3/B) at Railway police station on the report of ASI B.D. Sharma. Since the dead body could not be got identified it was preserved in the mortuary for 72 hours. Intimation about recovery of a dead body of an unknown person was flashed to all the police stations so that it could be got identified.

3. It so happened that on 7.3.96 PW-9 Sukhai went to Moti Nagar police station to lodge a missing report of his cousin brother Hari Shankar who had been missing from his house since 5.3.96. That report was recorded as DD no. 5-A. He stated in his report that his cousin brother Hari Shankar was living with him for about 1-1/2 months and was working in Venkateshwara Rolling Mill at 63, Najafgarh Road. On 05.03.96, which was the day of Holi

festival, at about 8 a.m. one Matadin(appellant herein) who was a close associate of the owner of the said Mill had taken Hari Shankar for playing holi. Hari Shankar, however, did not return till 4 p.m. and then he(Sukhai) went to the factory and enquired from Matadin about Hari Shankar who told him that Hari Shankar was sleeping after eating and drinking(thoda kuch kha-pi liya hai aur so raha hai) and he would bring him to his house after he would wake up but Hari Shankar had not come back. Sukhai raised suspicion against Matadin as well as the owner of his factory and requested the police to trace his cousin. By that time the dead body found from the railway track on 06/03/96 was lying in the mortuary and on the same day Sukhai was taken to the mortuary at Subzi Mandi and was shown that dead body and on seeing the dead body Sukhai identified the same to be that of his cousin Hari Shankar. PW-16 Insp. R.S. Dahiya who was the SHO posted at Railway Police Station at Delhi Railway Station then recorded the statement of Sukhai under Section 161 Cr. P.C. and started the search of Matadin and went to his house as well as his factory where he was working but he was not found at any of these two places. He was reported to be absenting from duty. Accused

Matadin could finally be arrested on 11.3.96 on the pointing out of PW-9 Sukhai from his house. At that time accused Matadin was found packing his luggage to flee away. From the room of Matadin PW-16 recovered one whisky bottle(half) having some liquor in it and the same was taken into police possession and sealed. Accused Matadin made a disclosure statement in police custody and pursuant to that the police arrested two more persons, namely, Mukhtiar Singh and Ram Singh on 11.3.96. Matadin had in his disclosure statement disclosed about his involvement in the murder of the deceased Hari Shankar as also that of the said Mukhtiar Singh and Ram Singh and one Shitla Prasad who, however, could not be arrested by the police but subsequently he himself surrendered before the concerned Court on 27.5.96.

4. The dead body of the deceased was subjected to post mortem examination by PW-13 Dr. L.T. Ramani on 11.3.96. He noticed the following external injuries on the dead body of the deceased at the time of post mortem examination:

1. Bruise with abrasion 1 inch x ½ inch on the left sub-mandibular area.

2. Multiple abrasion on the left cheek over 2 inch x 2 inch area.
3. Abrasion 1 ½ inch x 1 inch on the lower part of right cheek.
4. Abrasion 1 ¼ inch x 1 ¼ inch on the under surface of chin on the right side.
5. An abrasion ½ inch x 1 ¼ inch on the right sub-mandibular area.
6. Multiple grazed abrasion running vertically on the lower front of chest and front of abdomen involving 11 inch x 9 inch area with peeling off cuticle from below upwards at several places in vertical direction. There was no evidence of blockage/effusion beneath(post mortem injury).
7. Impression of ligature(rope) over lower parts of thighs 2 inch above the knee level.

On internal examination the autopsy surgeon had found the smell of alcohol from the stomach. The cause of death was opined to be asphyxia resulting from strangulation and time since death was opined to be about 5 to 6 days.

5. The case was finally transferred to Patel Nagar Police Station since the place from where the dead body of the deceased was recovered fell within the jurisdiction of Patel Nagar Police Station. There a separate FIR was registered (being FIR

No.168/96, Ex PW-6/A). On completion of the investigation the appellant Matadin and the three other accused persons, named already, were charged under Sections 302/201 read with Section 34 IPC. The trial Court framed charges against all the four accused persons under Section 302/34 IPC and also under Section 201/34 IPC. Since the accused persons had pleaded not guilty to these charges framed against them the prosecution was called upon to establish its case. Thereafter the prosecution examined 19 witnesses. Since there was no eye-witness of the murder of the deceased the prosecution had sought to establish its case against the accused persons on the basis of circumstantial evidence. The learned trial Court has not enumerated the circumstances specifically in its judgment but we find all the circumstances found to have been accepted by the trial Judge summed up in para nos. 30 and 31 of the judgment which are reproduced hereunder:

“30. Thus the deceased was last seen alive in the company of Matadin on 5.3.1996 his dead body was recovered from the railway track which was just near the house of Matadin. The deceased was employed by Matadin and he was taken to the house of Matadin by Matadin for celebrating holi and when he did not return to the

house of Sukhai he made enquiries from him and was given different version at different time. Three different versions were given by Matadin to Sukhai. First that the Hari Shankar was taking rest after taking liquor. Second that he had gone to Shahdra after taking 1000/ from him (Matadin). And third that Hari Shankar had left for his village. Matadin was himself not attending to his work at Venkateshwar Mill and was found missing for two days. All these facts conclusively prove that Hari Shankar was taken by Matadin for celebrating the Holi and he was offered liquor which was also found in his body at the time of post mortem and thereafter he was killed by strangulation and his dead body was put on the railway track to cause disappearance of the evidence.

31. The liquor bottle recovered from the house of Matadin was examined by Chemical Examiner and he found that the liquor bottle contained Ethyl Alcohol of 42.0 % V/V. The viscera was also found containing Ethyle Alcohol. These facts proved that Hari Shankar was in the company of Matadin on 5.3.1996 the date when it was holi and he was given liquor and thereafter he was killed by strangulation and his dead body thrown on the track to cause disappearance of the evidence.”

6. From the aforesaid two paras of the impugned judgment we have been able to cull out the circumstances which the prosecution had relied upon and the trial Court also found the same to have been established beyond any doubt and proved the involvement of accused Matadin in the murder of the deceased

Hari Shankar. Those circumstances are:

- 1. The death of the deceased was homicidal.**
- 2. On 5.3.96 accused Matadin had taken Hari Shankar at about 8.30 a.m. from his house for playing holi.**
- 3. On the same day i.e. 5.3.96 at about 12.00 noon the appellant and the three acquitted accused persons and the deceased Hari Shankar had consumed liquor at the house of accused Matadin in Pandav Nagar.**
- 4. Hari Shankar did not return back to his home on 5.3.96 after the drinks party at the house of Matadin. In the evening of 5.3.96 when PW-9 Sukhai went to the factory to inquire about Hari Shankar from Matadin, he was told by Matadin that Hari Shankar was sleeping as he had consumed excessive liquor. Then on 7.3.96 in the morning by which time also Hari Shankar had not come back home, when Sukhai again enquired from Matadin about Hari Shankar**

Matadin gave different and unsatisfactory versions about the whereabouts of Hari Shankar.

5. On 7.3.96 the dead body of Hari Shankar was found lying on the railway track in Pandav Nagar area where accused Matadin was living.

6. After PW-9 Sukhai had expressed his suspicion against accused Matadin he absconded and could be arrested only on 11.3.96.

7. After examining the evidence of various prosecution witnesses the learned trial Court came to the conclusion that the prosecution had succeeded in establishing the guilt of accused Matadin alone on the basis of aforesaid circumstances which were found to have been established but the involvement of other three accused persons had not been established. Consequently, Matadin was convicted under Sections 302 and 201 IPC while the other three co-accused persons were acquitted. Feeling aggrieved by his conviction and the sentences imposed upon him accused Matadin preferred the present appeal.

8. It was argued by Ms. Rakhi Nigam, learned counsel for the appellant, that she was not disputing that the deceased died a homicidal death but this is a case of conviction of the appellant-accused for the offence of murder without there being any incriminating piece of evidence against him and the learned trial Court has convicted him primarily relying upon the confessional statement of the appellant which he had allegedly made after his arrest and was clearly inadmissible in evidence since it had not led to the recovery of anything incriminating which could be used against the accused. Learned counsel contended that both the prosecution witnesses examined to establish the circumstance of the deceased having been last seen alive in the company of the appellant Matadin and the acquitted accused persons had turned hostile during the trial and had not supported the prosecution case but still the learned trial Judge came to the conclusion that the deceased was seen alive for the last time in the company of the appellant Matadin. Learned counsel further contended that despite noticing that no witness had seen the deceased Hari Shankar in the house of Matadin enjoying liquor there the learned trial Judge gave a conjectural finding that the deceased must have

consumed liquor in the house of Matadin since alcohol was found in his viscera and one bottle of whisky having some whisky in it was seized by the police from his room at the time of his arrest. Learned counsel submitted that just because alcohol was found in the stomach contents of the deceased after his death and PW-10 Shyam Narain had claimed that on the day of holi some persons were consuming liquor in the house of Matadin and Hari Shankar had left his house that day telling his cousin that he was going to Matadin it could not be inferred by the trial Judge that Hari Shankar also must have taken liquor in that gathering and so appellant Matadin could not have been convicted. It was also submitted that even if all the circumstances relied upon by the prosecution are taken to have been established the appellant could still be not convicted as from those circumstances taken together it could be said that the same formed a complete chain from which the only conclusion which could be drawn was of the guilt of the appellant-accused and those circumstances were incompatible with his innocence.

9. On the other hand, Ms. Richa Kapoor, learned Additional

Public Prosecutor supported the trial Court's judgment under challenge and submitted that there was no infirmity in the findings arrived at by the learned trial Judge and, therefore, the present appeal deserved to be dismissed by this Court.

10. That the death of the deceased was homicidal is fully established from the evidence of autopsy surgeon and this fact was not disputed before us also by the learned counsel for the appellant. We will now proceed to examine if the other circumstances which the learned trial Court has found to have been established have actually been established or not and whether from those circumstances, the guilt of the appellant can be said to have been proved beyond any shadow of doubt. Regarding the second circumstance the prosecution as well as the learned trial Judge had relied upon the testimony of PW-9 Sukhai, cousin brother of the deceased with whom the deceased was living. The relevant part of his evidence reads like this:

“In the year 1996 I was working in Mittal Steel Mill in village Mundka. I had a cousin brother, son of my uncle whose name was Hari Shankar. Hari Shankar was working at Venkateshwar Steel and Rolling Mill as contract

labour under accused Mata Din who is present in the court today. Hari Shankar was residing with me in a house bearing no. W-153C/84, Rama Road, New Delhi.

On 5.3.96 at about 8 - 8.15 p.m. accused Matadin came to my house to call Hari Shankar and at that time I was cooking meals and it was a day of holi. Matadin had taken Hari Shankar to celebrate holi at Venkateshwar Rolling Mill. Hari Shankar left telling me that he was going with Matadin and would return in a short while.

Hari Shankar did not return and I waited till 4/4.30 p.m. and then I went to Venkateshwar Rolling Mill. Matadin told me that Hari Shankar was resting in his room after taking something (KHA PEEKE ARAAM KARR AHA HAI) and that he would come back to my house in the evening. Thereafter I returned to my house. Hari Shankar did not return at all though I went in search of him at one or two places. He did not return till next morning. I went to my duty and while leaving for my duty I had asked Ganga Ram to go to the mill where Hari Shankar was working and asked Mata Din about Hari Shankar. When I returned in the evening from my duty I enquired from Ganga Ram who told me that he had visited the mill and could not find Hari Shankar. He also informed me that he did not see Matadin in the Mill. In the evening I went in search of Hari Shankar to various places.....

The holi was on Tuesday. Matadin accused met me again on Thursday when I went to the Mill to enquire about Hari Shankar. On enquiry Matadin told me that Hari Shankar had gone to Shahdara and would be returning by about 8.00 A.M. today to join the duty. I had gone to the Mill on that day at about 6.30 A.M. He again said that may be Hari Shankar had gone to his village as he (Hari Shankar) had taken Rs. 1000/- from him. I waited at the mill till 8.00 AM and when Hari Shankar did not turn up I went to Moti Nagar PS and lodged report which was recorded DD

No. 5A mark X. On my report one Sanjeev Kr. was sent from PS who brought accused Mata Din to PS and after some time he was allowed to go but I kept on sitting at PS. After about two hours police officials again brought Matadin to PS and made enquiries from him. I do not know what kind of enquiries were made.

At the police station somebody said that a dead body has been recovered from near Rly. Lines and then I was taken to mortuary Subzi Mandi where I identified the dead body of my cousin Hari Shankar. After post-mortem the dead body was handed over to me vide receipt Ex. PW-7/A.....”

11. This is what he deposed in his chief-examination. However in his cross-examination on behalf of the accused he claimed that he himself had not seen Matadin on 05.03.96 taking Hari Shankar from his house for playing holi but Hari Shankar had told him that he was going to Matadin. He also admitted that during investigation stage he had told the police that, in fact, one person had come and told Hari Shankar that Matadin was calling him. He further claimed that he had not seen that person who had come to call Hari Shankar and that he himself had not seen Matadin also on 5.3.1996 at his house and he had presumed that Matadin had come to call Hari Shankar as Hari Shankar while leaving the house

had told him that he was going with Matadin.

12. The learned trial Judge, however, despite having noticed in his judgment that PW-9 Sukhai had claimed in cross-examination that Hari Shankar had told him that he was 'going to Matadin' and he himself had not seen Matadin at his house taking away Hari Shankar came to the conclusion that on 05/03/96 Hari Shankar was taken by Matadin for celebrating the Holi. The conclusion of the learned trial Court in this regard is to be found in the following lines of para no. 30 of the impugned judgment:

“Thus the deceased was last seen alive in the company of Matadin on 5.3.96.....The deceased was employed by Matadin and he was taken to the house of Matadin by Matadin for celebrating holi.....All these facts conclusively prove that Hari Shankar was taken by Matadin for celebrating the holi.....”

This conclusion appears to have been arrived at by relying upon the missing report (Mark 'X') lodged by PW-9 Sukhai on 7.3.96 wherein he had claimed that Matadin had come to his house and had taken Hari Shankar along with him for playing Holi. That missing report, however, could not be taken into

consideration as a piece of substantive evidence. If Sukhai had stuck to that version in Court then only that document could have been pressed into service by the prosecution to corroborate Sukhai's testimony. As noticed already, PW-9 in cross-examination had claimed that in his statement to the police (under Section 161 Cr.P.C. recorded after he had identified the dead body recovered from railway track on 06/03/96) that in fact on 05/03/96 somebody sent by Matadin had come to his house and had called Hari Shankar from outside their house saying that Matadin had called him for playing holi. It appears that the trial Judge relied upon that statement also when he observed in para no. 32 of his judgment that as per the prosecution evidence in fact Matadin had called Hari Shankar to his house for celebrating holi. That shows that PW-9 Sukhai had not been consistent in his version regarding what had actually transpired on 5.3.1996. In our view, no reliance can be placed on this kind of a witness. It is significant to note that the prosecution had not examined any other witness to establish that it was Matadin who had taken Hari Shankar from his house in the morning of 5.3.96 for celebrating holi and, therefore, in these circumstances the conclusion of the learned trial Court that the

deceased had been taken away from his house by Matadin in the morning of 5.3.96 cannot be accepted by us. In our view, from the answers given by PW-9 in his cross-examination it is clear that the circumstance of the deceased having been taken by accused Matadin from his house in the morning of 5.3.1996 for playing holi, as was the prosecution case, was not established and on the contrary the statement of PW-9 in cross-examination demolished the prosecution case in respect of this circumstance relied upon by the prosecution. The aforesaid conclusions arrived at by the learned trial Court regarding the circumstance of accused Matadin having come to the house of the deceased Hari Shankar in the morning of 5-3-1996 and his having taken Hari Shankar with him for playing holi have been arrived at without giving any importance to the answers given by PW-9 Sukhai in cross-examination to the effect that he himself had not seen Matadin that day coming to his house and taking away his cousin Hari Shankar with him. It is now well settled that whatever a witness states in cross-examination is as much a part of his testimony as is the statement made during examination-in-chief and if in cross-examination on behalf of the accused something favourable for the accused has been elicited

that part of his statement cannot be ignored and has to be given due weightage otherwise the whole purpose of giving an opportunity to the accused to cross-examine prosecution witnesses becomes redundant. Grave prejudice is caused to the accused if the favourable answers elicited on his behalf from some material prosecution witness in cross-examination are not taken into consideration, as has been done in the present case by the learned trial Court, and are totally ignored without assigning any reason. In our considered view, the prosecution cannot be said to have established this circumstance.

13. We find from the evidence adduced by the prosecution that even the third circumstance found to have been established by the learned trial Judge cannot be said to have been established at all. The findings of the trial Court regarding the third circumstance are totally based on surmises and conjectures. It was the prosecution case that after the deceased had left his house on the day of holi in the morning he was seen in the company of the appellant-accused and the three acquitted co-accused having liquor at the house of accused Matadin around noon time that day. The only witness on

this circumstance was PW-10 Shyam Narain but he did not support the prosecution and so he was cross-examined by the prosecutor. Even then he did not claim that he had seen the deceased also in the house of Matadin having drinks although he admitted that that day some people including Matadin were enjoying drinks at his house. Despite this witness having claimed that Hari Shankar was not seen by him at the house of Matadin having drinks and the trial Judge himself having taken note of this fact held in paras no. 31, 32 and 33 of the impugned judgment that :

“31. The liquor bottle recovered from the house of Matadin was examined by Chemical Examiner and he found that the liquor bottle contained Ethyl Alcohol of 42.0 % V/V. The viscera was also found containing Ethyle Alcohol. These facts proved that Hari Shankar was in the company of Matadin on 5.3.1996 the date when it was holi and he was given liquor and thereafter he was killed by strangulation and his dead body thrown on the track to cause disappearance of the evidence.

32. It is in evidence that at the house of Mata Din people were taking liquor on Holi festival. P.W. Sham Narain saw people consuming liquor in his house. He did not see Hari Shankar in the house but his statement proves one fact that liquor was being offered and taken by the guests and friends of Matadin. It is also in evidence that on the same day in the morning Matadin had called Hari Shankar to his house for celebrating holi.....

33. The statement of PW Sukhai, the postmortem report that Ethyle Alcohol was found in the viscera and the liquor found in the house of Matadin also found containing Ethyle Alcohol of 42 % VV similar to the one found in viscera prove that ethyl alcohol was given to Hari Shankar at the house of Matadin by Matadin and thereafter he was strangled to death and his dead body thrown at the railway track to cause the disappearance of the evidence. “

We see no logic whatsoever in the reasoning given by the trial Court for arriving at the conclusion that the deceased had consumed liquor on 5.3.96 offered by accused Matadin at his house. Just because alcohol was detected in the viscera of the deceased which was got examined from CFSL and PW-10 Shyam Narain had seen people drinking liquor at the house of Matadin on the day of holi it cannot be inferred that Hari Shankar too must have consumed liquor at that party particularly when the only witness, namely, PW-10 Shyam Narain examined by the prosecution to establish this fact had not claimed so during his evidence. When he was cross-examined by the public prosecutor with the permission of the trial Court he categorically denied the suggestion that when he had gone to the room of Matadin on the day of holi he had seen Hari Shankar sitting in that room. It is a

matter of common knowledge that on the day of holi many people consume liquor as a part of holi celebration. The presence of alcohol in the viscera of the deceased can only show that he too must have consumed liquor on the day of holi but from that fact it can certainly be not said that he had consumed liquor in the company of accused Matadin and the three acquitted accused persons. We tried to find out if there was any other evidence adduced by the prosecution from which it could be said that deceased Hari Shankar had consumed liquor in the company of accused Matadin and the three acquitted accused persons but found none.

14. We are also of the view that even if prosecution had been successful in establishing that the deceased had participated in the drinks party at the house of Matadin on 5.3.96 that fact by itself would still not be sufficient to incriminate accused Matadin for the murder of Hari Shankar since it is the prosecution case itself that at the house of Matadin besides Matadin and the three acquitted accused persons many other persons were present there and were taking liquor. PW-10 Shyam Narain had deposed

that around 20-25 persons were present in the room of Matadin enjoying drinks but he did not claim to have seen the deceased Hari Shankar also there. However, even if it were to be accepted that the deceased was also a part of that gathering at the house of Matadin, as has been found by the learned trial Court, it cannot be said that the deceased was last seen alive in the company of Matadin alone for which he was expected to offer some explanation as to when they parted each other's company and under what circumstances. The learned trial Court itself has rejected the prosecution case against the three other accused persons who were also, as per the prosecution case, seen together with the deceased Hari Shankar at the house of Matadin. If the prosecution case to that effect which was sought to be established on the basis of evidence of PW-10 Shyam Narain was not found by the trial Court to have been established then, in our view, this part of the prosecution case against accused Matadin also could not be said to have been established on the same very evidence which was sought to be utilized against three acquitted persons.

15. The fourth circumstance relied upon by the prosecution was that on 5.3.96, i.e. on the day of holi when the deceased Hari Shankar who had allegedly gone with accused Matadin did not return till the evening the complainant Sukhai(PW-9) went to his factory and enquired from Matadin about Hari Shankar on which he was told that because of having consumed excessive liquor Hari Shankar was sleeping in his room and when Hari Shankar did not come back home even till 7th morning PW-9 Sukhai again enquired from Matadin about Hari Shankar at about 6.30 a.m. and at that time Matadin had told him that Hari Shankar had gone to Shahdara and would return by about 8.00 a.m. and then he changed his version and had told Sukhai that Hari Shankar might have gone to his village as he had taken Rs. 1000 from him (Matadin). Thus, as per the prosecution case accused Matadin gave different answers to PW-9 Sukhai on 5th and 7th March, 1996 when Sukhai had enquired from him about the deceased Hari Shankar when, in fact, Hari Shankar had already died and that conduct of Matadin has been found by the learned trial Judge to be of incriminating nature. However, in our view, this circumstance cannot be said to have been established beyond

reasonable doubt. PW-9 Sukhai is the only witness examined by the prosecution on this aspect of the prosecution case. We have already found him to be unreliable because of his having given different versions regarding the departure of deceased Hari Shankar from his house in the morning of 5.3.96. There is yet another reason for not accepting his version that accused Matadin had falsely told him in the evening of 5.3.96 that Hari Shankar was sleeping in his room after consuming liquor. As per the prosecution case, PW-9 Sukhai had not tried to find out at that time itself whether his cousin was sleeping in the room of Matadin as was being told to him by Matadin. When Hari Shankar did not return home even during the night and not even the next day the matter was not reported to the police by Sukhai expressing his suspicion regarding the involvement of accused Matadin in the disappearance of the deceased which he would have done if actually Matadin had told him on 5th evening that Hari Shankar was sleeping in his room after consuming liquor. PW-9 had also claimed that on 6.3.96 he had requested one Gangaram to enquire from Matadin about Hari Shankar and that Gangaram had told him that he could not find Matadin. However,

that Gangaram has not been examined by the prosecution. In these circumstances, the delayed lodging of missing report by PW-9 Sukhai in which suspicion was raised against Matadin for the first time assumes significance and the unexplained delay casts doubt on the correctness of his version regarding contradictory answers given by Matadin regarding the whereabouts of Hari Shankar. Therefore, we are not inclined to place reliance on the testimony of this witness in respect of this part of the prosecution case also.

16. The learned trial Court has also found that the dead body of the deceased Hari Shankar was recovered from the railway track which was near the house of accused Matadin. Apart from this fact that there is no evidence whatsoever adduced by the prosecution to the effect that the place of the recovery of the dead body was near the house of accused Matadin. This circumstance, even otherwise, cannot be accepted to be incriminating one which could be utilized by the prosecution.

17. The next circumstance relied upon by the trial Court for

convicting the appellant is his abscondence. However, we find from the evidence of PW-14 Sub Insp. Sanjeev Kumar, who was entrusted with the investigation of the matter after PW-9 Sukhai had lodged the missing report on 7.3.96 at Moti Nagar Police Station, that accused Matadin had not absconded at all. PW-14 had deposed that when on getting a copy of DD no. 5A, which is the missing report lodged by Sukhai, he alongwith complainant Sukhai had gone to Venkateshwar Rolling Mill accused Matadin was found present and he had interrogated Matadin and thereafter Matadin was allowed to go. In our view, this statement of PW-14 totally demolishes the prosecution case regarding the circumstance of accused Matadin having absconded after the complainant Sukhai had expressed his suspicion against him. Although PW-16 Insp. R.S. Dahiya had deposed that when he had gone in search of accused Matadin he was not found in the Mill where he was working and even at his house also he was not found on 8.3.96 but from this statement of this witness it cannot be said that accused Matadin had absconded. If actually Matadin was to abscond he would have done that after he was interrogated by PW-14 S.I. Sanjeev Kumar in connection with the

murder of Hari Shankar and he would not have been found in his house on 11.3.96 when he was arrested. We are, therefore, of the view that this circumstance also cannot be said to have been established beyond reasonable doubt.

18. The upshot of the foregoing conclusions arrived at by us in respect of the various circumstances relied upon by the prosecution for securing the conviction of accused Matadin is that the prosecution has miserably failed to establish any of the circumstances relied upon by it except that the deceased died a homicidal death. But despite that he has been found guilty by the trial Court. A reading of the impugned judgment of the trial Court clearly shows that the learned trial Judge has based the conviction relying upon the confessional statement of accused Matadin and that is evident from the observations made by the learned trial Judge in para no. 34 of the impugned judgment which is being reproduced below:

“34. Accused Matadin after giving three different versions about the whereabouts of Hari Shankar when questioned by Sukhai himself disappeared and was traced by the police after few days when he made disclosure statement

disclosing how he killed Hari Shankar during a quarrel with him and how he caused the disappearance of the dead body. His disclosure statement proves his conduct.”

We also find it quite shocking that despite the fact that none of the witnesses had claimed in evidence that deceased Hari Shankar was taken by accused Matadin on 5.3.96 from his house for celebrating holi the learned trial Judge while recording the statement of accused Matadin under Section 313 Cr.P.C. framed a question to the effect that Matadin had himself gone to the house of Hari Shankar and had taken him away after telling PW-9 Sukhai that they were going to Venkateshwar Rolling Mill to celebrate holi. In our view, when this incriminating circumstance was not available in the prosecution evidence the same could not have been put to the accused.

19. We, therefore, have no hesitation in setting aside the judgment dated 27.8.2002 and order dated 28.8.2002 passed by the learned Additional Sessions Judge and the same are hereby set aside. Resultantly, appellant-accused Matadin stands acquitted of the charges for which he was convicted by the

trial Court. Presently he is serving out the sentences of imprisonment awarded to him and now that his conviction has been set aside he shall be set at liberty forthwith from the jail unless he is required to be detained in connection with some other case.

(P.K.BHASIN)
JUDGE

(B.N. CHATURVEDI)
JUDGE

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