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**(2021) 10 BOM CK 0099**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 431 Of 2014**

Tanhaji Raghunath Barde

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

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**Date of Decision :** 21-10-2021

**Acts Referred:**

Indian Penal Code, 1860 — Section 302, 376  
Evidence Act, 1872 — Section 27  
Code Of Criminal Procedure, 1973 — Section 437A

**Citation :** (2021) 10 BOM CK 0099

**Hon'ble Judges :** V.K. Jadhav, J; Shrikant D. Kulkarni, J

**Bench :** Division Bench

**Advocate :** Vinod Y. Bhide, Rajendra V. Dasalkar

**Final Decision :** Allowed

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## Judgement

Shrikant D. Kulkarni, J

1. This appeal is directed against the impugned judgment and order of conviction passed in Sessions Case No. 7/2013 by the Additional Sessions Judge, Sangamner, Dist. Ahmednagar thereby, convicting the appellant/accused to undergo imprisonment for life and to pay fine of Rs.5,000/- and in default, to suffer rigorous imprisonment for three months for the offence punishable under section 302 of I.P.C. and further sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- with default clause for the offence punishable under section 376 of I.P.C.

2. The facts of the prosecution case in narrow compass are as under :-

(a) Sopan Raghunath Barde is a resident of Rahidanda Mandve (Bk) Shivar, Tal. Sangamner, Dist. Ahmednagar. He is residing there along with his family members. Sonali, aged 14 years (since deceased) was his daughter. Sonali had left the school in 4th Std. and she was helping her parents in agricultural field as well as in domestic work.

(b) On 08.12.2012, Sopan (first informant) had been to Sangamner along with his cousin brother-in-law Sunil Narayan Pawar to complete registration formalities of his newly purchased a vehicle Mahendra maxima. On that day, in the morning at about 10.00 a.m. Sonali along with her maternal aunt had left for agricultural labour work in the field of Namdev Gaikwad. The first informant could not meet his daughter in the afternoon at about 4.00 p.m. when they left for Sangamner.

(c) The arrival of first informant from Sangamner was delayed and therefore, he asked to his nephew (accused) - Tanhaji Barde on phone to make enquiry about daughter Sonali. In response, the accused informed to the first informant that Sonali had left his house. It was about 8.00 p.m.

(d) The first informant along with his wife came to their house at about 9.30 p.m. and went to bed. On the next day in the morning i.e. on 09.12.2012 at about 6.30 a.m. the first informant called to the accused on his phone and asked to send Sonali to his house. At that time, the accused informed to the first informant that Sonali had already left to his house in the night itself and Sonali did not come to his house on that night. Due to which the first informant started search for his daughter Sonali with relatives as well as maternal aunt of Sonali, but Sonali could not found. In the evening at about 5.00 p.m. the first informant was on the way to one foreteller of village Deswade, Taluka Parner when his cousin nephew Dattu Radhu Barde informed that dead body of his daughter Sonali is found in a ditch of Mandve Shivar and he should rush immediately. The first informant rushed to the said spot. He noticed that the dead body of his daughter Sonali was lying supine in the ditch in a naked condition on the quilt of his house. Mr Bajirao Khemnar, Police Patil of village Mandve (Bk.) gave information to the Police Station, Ghargaon about dead body of Sonali lying at Khilyacha Khadda Rahidanda. The first informant lodged F.I.R. against unknown person for committing murder of his daughter Sonali.

(e) The investigation of Crime bearing No. 94/2012 under section 302 of I.P.C. was entrusted to Police Inspector Mr Tambe. Police Inspector Mr Tambe prepared inquest panchanama and thereafter sent the dead body for postmortem examination to Rural Hospital at Sangamner. On the very day, he prepared spot panchanama. He recorded the statements of witnesses. Samples for D.N.A. were collected and sealed and packed and sent to D.N.A. for expert opinion.

(f) Other samples of deceased which were collected by the Medical Officer, Rural Medical College at Loni were sent to Chemical Analyzer for analysis and report.

(g) During postmortem examination, it was revealed that deceased Sonali was carrying pregnancy. The Medical Officer collected routine samples for chemical analysis as well as collected sample for D.N.A. test and preserved fetus for D.N.A. test. The first informant after knowing about pregnancy of Sonali, gave supplementary statement before the Investigating Officer and disclosed about illicit relations between the accused and Sonali. However, considering their

relations as brother and sister, he had earlier not disclosed about the same and suspicion to anyone. On that basis, accused came to be arrested. On 12.12.2012, the accused gave disclosure statement before the Investigating Officer in presence of two panch witnesses. On the basis of disclosure statement given by the accused, the Investigating Officer with two panchas discovered the clothes of the accused which came to be seized.

(h) The Investigating Officer after collecting D.N.A. report, C.A. report, p.m. report and other papers filed the charge sheet against the accused in the Court of Judicial Magistrate First Class at Sangamner, Dist. Ahmednagar for the offence punishable under section 376 and 302 of I.P.C. The JMFC Court at Sangamner committed the case to the Sessions Division at Sangamner for trial.

(i) The charge against the accused came to be framed at the hands of the Additional Sessions Judge at Sangamner for the offence punishable under section 302 and 376 of I.P.C. The appellant/accused pleaded not guilty and trial was commenced. The defence of the accused is of plain denial and false implication in the case at the hands of the first informant.

(j) The prosecution machinery has examined in all 13 witnesses including first informant, panch witnesses, Medical Officer, Assistant Director of Forensic Science Laboratory, Mumbai, Chief Medical Officer, Sasoon Hospital, Pune regarding collection of D.N.A. sample of accused and sample carriers and closed its evidence. The appellant/accused did not prefer to adduce any evidence by way of defence.

(k) The learned trial Judge after appreciating the evidence on record and considering the argument advanced by both the sides, arrived at conclusion that the prosecution has proved the charges against the accused punishable under section 302 and 376 of I.P.C. and accordingly, awarded the sentence against the appellant/accused referred above.

(l) The appellant/accused has assailed the impugned judgment and order of conviction on various grounds.

3. Heard Mr Vinod Y. Bhide, learned counsel for the appellant/accused and Mr R.V. Dasalkar, learned A.P.P. for the State/Respondent at length.

4. Mr Bhide, learned counsel for the appellant/accused submitted that the case entirely rests upon circumstantial evidence. The prosecution has come out with story of last seen together by placing reliance on the testimony of one witness P.W.No. 3 Digambar Madhav Pawar, which is a weak piece of evidence. According to P.W. No. 3 Digambar Pawar, he had seen Sonali and accused on 08.12.2012 at about 9.00 p.m. to 9.15 p.m.

As per prosecution story, the dead body of Sonali was found on 09.12.2012 at about 5.00 p.m. at Khilyacha Khadda, Rahidanda. There was wide gap between the time of last seen together disclosed by P.W. No. 3 Digambar Pawar and the time of dead body found. Mr Bhide submitted that testimony of P.W. No.3

Digambar Pawar is not corroborated by any independent witness. The evidence of P.W. No. 4 is not reliable in view of the material brought on record during his cross-examination.

5. Mr Bhide, learned counsel for the appellant/accused submitted that the father of the deceased had lodged the F.I.R. against unknown person. He even did not suspect the accused behind the unnatural death of his daughter Sonali. Sonali was found pregnant at the time of postmortem examination. The father of the deceased/first informant after noticing that Sonali was pregnant, implicated the accused by giving supplementary statement. Mr Bhide, learned counsel submitted that even though D.N.A. report of the fetus of Sonali matches with the D.N.A. of accused, the D.N.A reports produced by the prosecution machinery are not at all reliable. Mr Bhide invited our attention to the evidence of P.W. No. 7 Lahu Jankudas Kharat, P.W.No. 8 Ganesh Suresh Tarhalkar, Police Constable, who carried the sample. He also invited our attention to the testimony of Assistant Director, FSL, Mumbai, P.W. No. 12 Shrikant Hanumant Lade and testimony of P.W. No. 13 Virendra Narayan Ghogre (Chief Medical Officer, Sasoon Hospital, Pune). Mr Bhide submitted that there were major lapses on the part of the Investigating Officer while collecting the D.N.A. sample. There is variance between the evidence of sample carrier and the D.N.A. experts. As such, D.N.A. reports relied upon by the prosecution are surrounded by doubt. It is not safe to accept those D.N.A. reports in view of the material inconsistency about the D.N.A. samples sealed, carried and deposited with the respective institutions. He submitted that C.A. report and D.N.A. report can be considered only as evidence to corroborate the fact which is otherwise required to be proved independently. The trial court has not considered this important aspect and relied upon the D.N.A. reports and C.A. reports. He submitted that the findings recorded by the trial court are erroneous. There is no iota of evidence to attract the offence punishable under section 376 of I.P.C. Section 376 of I.P.C. is slapped against the accused simply on the basis of D.N.A. report.

6. Mr Bhide, learned counsel submitted that P.W. No.1 Sopan (first informant/father of the deceased) has admitted in his cross-examination about long standing enmity between his family and accused since the year 2002 and pendency of criminal cases filed by the families against each other. Mr Bhide, learned counsel submitted that the testimony of first informant/father of the deceased is unworthy of credence. His role is very much doubtful. Mr Bhide submitted that the age of the deceased is not proved beyond reasonable doubt. The Investigating Officer has not taken any pains to collect the birth certificate of the victim. The prosecution has failed to establish the complete chain of circumstances beyond reasonable doubt so as to establish the guilt of the accused.

7. Mr Bhide, learned counsel submitted that the medical evidence on medical examination of the victim has ruled out the symptoms of rape at the relevant time. The prosecution has not ruled out the possibility of a case of 'honor killing'

by the family members of the victim when they came to know about illicit relations between the accused and the victim, who are cousins inter se.

8. To buttress the argument, Mr Bhide, learned counsel for the appellant/accused has placed his reliance on the following stock of citations :-

(i) Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Anr. reported in 2009 STPL 3237 Gujarat

(ii) The State of Maharashtra Vs. Vishnu Tulshiram Karwate and others reported in 2020 BHCCO 1366

(iii) Mr. Pradeep S/o. Puno Horo and others vs. Police Inspector, Margao Police Station and others reported in 2020 (3) Bom CR (Cri) 66

(iv) Anjan Kumar Sarma and Ors. Vs. State of Assam reported in 2017(6) Mh LJ (Cr) 401 SC

9. Per contra, Mr Dasalkar, learned A.P.P. for the State/Respondent vehemently submitted that the prosecution has proved the chain of circumstances by examining relevant witnesses. The prosecution has proved its case of last seen together by examining important witness P.W. No. 3 Digambar Pawar.

10. Mr Dasalkar, learned A.P.P. for the State/Respondent invited our attention to the testimony of P.W. No.3 - Digambar Pawar and submitted that he has categorically stated that he had seen the accused in the company of Sonali in the night of 08.12.2012 at about 9.00 p.m. to 9.15 p.m. On the very next day on 09.12.2012 at about 5.00 p.m., the dead body of Sonali was found in the ditch of Khilyacha Khadda village Rahidanda. The prosecution has proved that Sonali met with homicidal death by examining Dr. Javed. Postmortem report and final case of death are placed on record by prosecution. The prosecution has also examined experts of D.N.A. who have conducted the analysis and submitted the report. Sonali was pregnant at the time of incident and accused has committed murder of Sonali in order to save himself and to avoid stigma in the society. There were illicit relations between the cousins and accused eliminated Sonali when he noticed her pregnancy.

11. Mr Dasalkar, learned A.P.P. for the State/Respondent submitted that even though F.I.R. is alleged against unknown person, father of the deceased gave supplementary statement and suspected about the involvement of the accused in causing murder of his daughter Sonali. On that basis, the accused came to be arrested. The role of accused in causing murder of Sonali is duly established by the prosecution agency beyond reasonable doubt with the help of cogent and sufficient evidence.

12. Mr Dasalkar, learned A.P.P. for the State/Respondent has submitted that the findings recorded by the trial court are based upon sound reasons. The trial court has rightly considered the importance of D.N.A. reports and C.A. reports which has established that the fetus of Sonali matches with the D.N.A. of accused. The

trial court has rightly convicted the appellant/accused for the offence of the murder and rape. There is no perversity in the findings recorded by the trial court. He submitted that the order of conviction passed by the trial court needs to be upheld by dismissing the appeal.

13. We have considered the submissions of learned A.P.P. for the State and the learned counsel for the appellant/accused. We have also gone through the impugned judgment and order of conviction passed by the Additional Sessions Judge, Sangamner in Sessions Case No. 7/2013 and record and proceedings of the trial court with assistance of both the sides.

14. The prosecution has examined in all 13 witnesses to prove the charges against the appellant/accused which can be described as under :-

- (i) P.W. No. 1 Sopan Raghunath Barde Exh. 27 (father of deceased Sonali)
- (ii) P.W. No. 2 Bapu Gopal Dhulgand Exh. 29 (Panch witness on scene of offence where dead body was found)
- (iii) P.W. No. 3 Digambar Madhav Pawar Exh. 32 (witness on last seen)
- (iv) P.W. No. 4 Mangal Sopan Barde Exh. 33 (mother of the deceased)
- (v) P.W. No. 5 Parvatabai Pawar Exh. 34 (Panch on inquest panchanama)
- (vi) P.W. No. 6 Bajirao Balwanta Khemnagar Exh. 36 (Police Patil of village Mandve (Bk.))
- (vii) P.W. No. 7 Lahu Jankudas Kharat Exh.49 (Police Constable Sample Carrier)
- (viii) P.W. No. 8 Ganesh Tarhalkar Exh. 51 (Police Constable Sample Carrier)
- (ix) P.W. No. 9 Appasaheb Kolekar Exh. 54 (Police Constable/Sample Carrier)
- (x) P.W. No. 10 Dr. Javed Exh. 61 (Medical Officer of Rural Medical College, Loni who conducted postmortem examination)
- (xi) P.W. No.11 Vasant Tambe Exh. 65 (Police Inspector/Investigating Officer)
- (xii) P.W. No. 12 Shrikant Lade Exh. 73(Assistant Director of Forensic Science Laboratory, Mumbai, who has issued D.N.A. report)
- (xiii) P.W. No. 13 Virendra Ghogre Exh. 78 (Chief Medical Officer, Sasoon Hospital, Pune, who collected D.N.A. sample of the accused)

15. Apart from the above stock of oral evidence, the prosecution has pressed into service following piece of documentary evidence :-

- (i) F.I.R. Exh. 28
- (ii) Panchnama of scene of offence Exh. 30
- (iii) Inquest panchanama Exh. 35

(iv) Postmortem report Exh. 62

(v) Final cause of death certificate Exh. 63

(vi) D.N.A. report Exh. 43

16. Inquest panchanama vide Exh. 35 and postmortem report vide Exh. 62 are not much disputed by the defence side. However, it would be appropriate to have a glance on the evidence of Dr. Javed Farooqui, who has conducted postmortem examination and issued p.m. report and final cause of death certificate.

17. The testimony of P.W.No. 10 Dr. Javed Farooqui vide Exh.61 discloses that he has conducted p.m. examination on the dead body of Sonali on 10.12.2012 between 1.35 p.m. to 6.00 p.m. at Rural Medical College, Loni. Dr. V.S. Kalokhe, Dr. S.B. Buktar and Dr. Sai Borawke were also present at the time of p.m. examination. He has disclosed in detail about the features found during the course of external and internal examination of the dead body. He has disclosed that at the time of p.m. examination, deceased Sonali was found pregnant. According to Dr. Javed, in his opinion, cause of death in this case is due to smothering. He confirmed the same opinion even after receipt of chemical analysis report and Viscera report and final opinion of cause of death is at Exh.63. While facing the cross-examination, Dr. Javed has also explained the difference between the smothering and suffocation. In case of suffocation, oxygen contained in environment is less. However, in case of smothering, there is mechanical obstruction at the level of external respiratory orifices i.e. nostrils and and mouth. If the mouth and nostrils are pressed by person with hand or any other substance like clothes, cotton i.e. external matter, then there are chances of appearing of bruises and injuries around the mouth and nostrils and mouth.

18. Upon careful scrutiny of the evidence of Dr. Javed coupled with p.m. report Exh.62 and final cause of death certificate Exh.63, we do not find any material to discard the medical evidence and the final cause of death given by Dr. Javed. It is a case of smothering and not a suffocation. Sonali met with death by smothering. It is a homicidal death.

19. Inquest panchanama vide Exh. 35 is not disputed by the defence side, and as such, we do not find any need to discuss the testimony of P.W.No.5. Parvatabai Pawar Exh. 34, who had opted as a panch witness on inquest panchanama.

20. P.W. No. 2 Bapu Gopal Dhulgand vide Exh. 29 is a panch witness on the panchnama of the scene of the offence. He has disclosed that the spot of incidence is a ditch admeasuring 15 feet long and feet and depth about 5 feet. One quilt, one chadar and the clothes of the deceased were found in the said ditch. Those articles were seized by the Police under the spot panchanama vide Exh.30. While facing the cross-examination, P.W. No. 2 Bapu Gopal Dhulgand went on admitting that spot panchanama was already prepared. He merely put the signature on the spot panchanama at the instance of Police. He has further

disclosed that Police prepared a bundle of the seized clothes and put it away from the spot. In view of the material admissions given by P.W. No.2 Bapu Gopal Dhulgand, the spot panchanama at Exh. 30 is seriously under cloud. However, another panch witness is not examined by the prosecution to clear the doubt. Even the P.W. No.11 P.I. Tambe has stated about the preparation of spot panchanama but not given the details. As such, seizure of articles from the scene of offence cannot be said to be a safe exercise.

21. P.W. No. 1 Sopan Raghunath Barde is a father of the deceased Sonali. He lodged the F.I.R. about murder of his daughter on 09.12.2012 at about 22.40 hours. It is an F.I.R. against the unknown person. It is evident from the P.W. No.1 Sopan/first informant that on 08.12.2012 at about 10.00 a.m. he met with his daughter Sonali. She left for labour work in the field of Namdev Gaikwad. Sonali did not meet him when he left for Sangamner. He has further stated that when he reached at Sakur Phata while coming from Sangamner, he called his nephew/accused on phone and enquired about Sonali. Accused informed him that Sonali had slept in his house. It was 8.00 p.m. to 8.30 p.m. when that conversation took place between the first informant and the accused. He returned to his house in the night at about 10.00 p.m. to 10.15 p.m. and went to bed. This piece of evidence of P.W. No.1 Sopan appears to be somewhat unnatural and unbelievable. If his daughter had stayed in the house of accused, obviously after coming to the house, P.W. No.1 Sopan and his wife P.W.No. 4 Mangal ought to have called their daughter Sonali at their house. Being father and mother by way of natural course, it was expected from them to call their daughter Sonali after coming to their house. But, it did not happen as appearing from the testimony of P.W. No.1 Sopan which appears to be unnatural conduct on the part of the father.

22. Another important aspect which raises serious question mark about Sonali staying in the house of accused during night. P.W. No.1 Sopan while facing the cross-examination, admitted that the dispute is going on between him and the family of accused since the year 2002-2003. Even on the date of incident, the dispute was going on account of land. One criminal case came to be registered at the instance of Dattu Barde against him and others in the year 2007. In the background of such strained relations with the family of the accused, can it be believed that P.W.No. 1 Sopan made enquiry with the accused in the night of 08.12.2012 at about 8.00 to 8.30 p.m. and asked about Sonali. Secondly, in the background of such strained relations, no father and mother would allow their daughter to stay for night in the house of the family with whom they had strained relations. Even though P.W.No.1 Sopan has stated that Sonali was pregnant from accused and that is why accused killed his daughter Sonali, his testimony is found unworthy of credence. The accused and Sonali are the cousins inter se. If there was any illicit relations amongst them, obviously P.W. No.1 Sopan and P.W. No. 4 Mangal being parents could have raised strong objection about such relations and subject would have blown up. P.W.No.1 Sopan and P.W. No. 4 Mangal being parents did not make any attempt to raise any issue about

the so-called relations between Sonali and accused till filing of F.I.R. It is somehow unbelievable for common and prudent man.

23. On 08.12.2012 in the morning at about 8.00 a.m. Sonali had gone for labour work in the field of Namdev Gaikwad with one Kavita Sunil Pawar, who happened to be wife of maternal uncle of Sonali. Kavita Sunil Pawar was an important witness. She was the person accompanied with Sonali throughout the day. She could have focused light as to what had happened on that day after evening. Unfortunately, the prosecution has not examined this important witness. It is further important to note that the distance between the house of first informant and accused is 700 to 800 feet. It was not a long distance. There was no difficulty for the first informant to go to the house of the accused after coming back to the house in the night so as to pick up his daughter Sonali, which would have been natural conduct.

24. Upon careful scrutiny of the evidence of P.W. No.1 Sopan Barde (first informant), we noticed that he is not telling the whole truth. He is suppressing something from the Court. His evidence appears to be unworthy of credence due to his abnormal and unnatural conduct being a father of a daughter of 14 years. The testimony of P.W. No. 4 Mangal Sopan Barde vide Exh. 33, who happens to be mother of the deceased, has given similar story like her husband P.W. No.1 Sopan. The defence has also brought on record certain material omissions through her cross-examination. Her cross-examination para No.10 are the omissions, which are material. P.W. No. 4 Mangal has stated that they returned to their house from Sangamner at about 9.30 p.m. On reaching at their house, her husband made a phone call to the accused and asked him to send Sonali to their house. However, accused replied that Sonali had slept in his house and she would come in the morning. This piece of evidence is contrary to the evidence of P.W.No.1 Sopan. P.W. No.1 Sopan has nowhere stated the above conversation. As such, it is found to be improvisation made by P.W. No.4 Mangal. P.W. No.4 Mangal being a mother, must have been aware about her daughter and her day to day activities and her company. She did not notice any abnormal behaviour of her daughter much less about alleged illicit relations between the accused and Sonali. In the background of above state of affairs and quality of evidence of P.W. No. 4 Mangal, no more reliance can be placed on her testimony.

25. The prosecution has placed much reliance on the testimony of P.W. No.3 Digambar Madhav Pawar vide Exh. 32 who has been posed as a witness on last seen together. On going through the testimony of P.W. No. 3 Digambar Pawar, it is found that he has stated that he had seen Sonali and accused on 08.12.2012 around 9.00 p.m. to 9.15 p.m. The testimony of P.W. No. 3 Digambar Pawar is also seriously under cloud in view of the cross relations between him and the brother of the accused. He has admitted that Dattu Barde is a brother of the accused, who has prosecuted him and others and that criminal case is pending in the Court. His wife has also prosecuted the father of the accused and others and that criminal case is also pending. It is not enough the defence counsel has

brought on record material omissions during the cross-examination of P.W. No. 3 Digambar Pawar which are very much fatal and raises serious doubts about his narration of role as witness on last seen Sonali and accused. Even one step ahead, Sonali was not found dead on the very night or immediately after said time. The dead body of Sonali was found on 09.12.2012 at about 5.00 p.m. There is wide time gap between time stated by P.W. No.3 Digambar Pawar of looking Sonali and accused on 08.12.2012 at about 9.00 p.m. to 9.15 p.m. and dead body of Sonali found on 09.12.2012 at about 5.00 p.m.

26. Mr Bhide, learned counsel for the appellant/accused has placed reliance in the case of Anjan Kumar Sarma and Ors. Vs. State of Assam (supra), wherein it is held that in case of circumstantial evidence not only should be the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Where the various links as stated in the case have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definitive case and in proximity of the deceased as regards time and situation and he offers no explanation, which is accepted, though not proved would offer a reasonable basis for a conclusion on the entire case consistent with his innocence. Such absence of explanation or cause explanation would itself be an additionally which complete the chain.

27. In the case of State of Goa Vs. Sanjay Thakuran reported in 2007 (3) SCC 755, it is held by the Hon'ble Supreme Court as under :-

From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in

the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

28. Having regard to the legal position made clear by the Hon'ble Supreme Court in case of State of Goa Vs. Sanjay Thakuran, the prosecution has failed to prove in the facts and circumstances of the case in hand that there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period, the proof of last seen together, would be relevant evidence. It is nowhere shown by the prosecution that the deceased Sonali was in the company of accused from 8.00 p.m. of 08.12.2012 to 09.12.2012 afternoon. In absence of that important evidence, it is difficult to implicate the accused.

29. In the present case, the prosecution case rests upon the incriminating evidence of last seen together coupled with the D.N.A. report. On careful examination of the testimony of P.W. No. 3 Digambar Pawar, who is stated to be a star witness on the last seen, his evidence is not found trustworthy and reliable. Moreover, even if the version of P.W. No. 3 Digambar Pawar is accepted that he had lastly seen accused in the company of Sonali on 08.12.2012 at about 9.00 p.m. to 9.15 p.m., not any way sufficient to jump to the conclusion that the accused is the person, who killed Sonali when there is a large time gap. There is no evidence to connect the link that Sonali was in the company of accused throughout the night of 08.12.2012 as well as in the day time of 09.12.2012 till her dead body was found. Nothing is recovered from the accused except his clothes. The clothes of accused came to be seized under section 27 of Evidence Act. His clothes were sent to C.A. for analysis and report. The C.A. Report vide Exh. 39 is not supporting to the prosecution. No blood stains are found on the clothes of accused as per opinion of C.A. Exh. 39.

30. So far as the D.N.A. reports are concerned, according to the prosecution, deceased Sonali was pregnant at the time of incident. While conducting p.m. examination The sample of fetus was collected and sent to D.N.A. The sample of D.N.A. of accused was also collected. After having chemical anylysis and examination, it was found that the D.N.A. of the fetus matches with the D.N.A. of the accused.

31. Mr Bhide, learned counsel for the appellant/accused, took us through the cross-examination of P.W. No. 12 Shrikant Lade (Assistant Director of Forensic Science Laboratory) and P.W. No. 13 Dr Virendra Ghogre and pointed out as to how there were lapses in sending the samples to the experts. He even pointed

out that there was possibility of tampering with the container of the sample carried to the D.N.A. expert.

32. Mr Bhide, learned counsel has also referred the citation of Gujarat High Court in case of Premjibhai Bachubhai Khasiya Vs. State of Gujarat and Anr.(supra) and submitted that even positive D.N.A. report can be of great importance where there is supporting evidence. Obviously, it cannot be made use of as sole basis of conviction in a criminal case as the D.N.A. Science and the report is founded on probability theory and that too when accused charged with rape.

33. In the present case, there is no medical evidence on record to show that the deceased Sonali was subjected to sexual assault. No evidence of rape was found during p.m. examination. No semen found on the clothes of deceased as per C.A. report Exh. 39. There are no allegations of rape in the F.I.R. The charge of rape seems to have been slapped after noticing pregnancy of Sonali during p.m. examination.

34. Mr Bhide, learned counsel has also referred two citations of the Division Bench of this Court in case of The State of Maharashtra Vs. Vishnu Tulshiram Karwate and others (Nagpur Bench) and Mr. Pradeep S/o. Puno Horo and others vs. Police Inspector, Margao Police Station and others (supra). He has pointed out that when there are lapses in sealing and packing of the blood samples and D.N.A. samples, no more reliance can be placed on those reports.

35. In the present case, there are two D.N.A. samples, one of the fetus allegedly found during the autopsy and another is blood sample of the accused. The p.m. notes do not indicate regrading collection of such sample sealing and handing over the same to the Police or sending to the Laboratory for analysis. Even though P.W. No. 10 Dr. Javed Farooqui has stated so far, his evidence is not supported by any written record. It is further evident that for collecting D.N.A. of the fetus, the D.N.A. kit was not brought from the concerned Laboratory and no proper procedure was followed. The prosecution could not explain where the samples were kept before their journey to different laboratories.

36. It is very much necessary to refer relevant part of evidence of P.W. No. 12 Shrikant Hanumant Lade vide Exh. 73, Assistant Director in Forensic Science Laboratory, Mumbai, who conducted D.N.A. test. P.W. No. 12 Shrikant Lade has stated that after receiving samples, he prepared D.N.A. extract. After amplification of D.N.A., D.N.A. profile was generated. The D.N.A. profile obtained from Exh.7, scalp hair of Sonali Sopan Barde, fetus of Sonali Sopan Barde and Tanhaji Raghu Barde. After analysis of these D.N.A. profiles, as per his opinion, Tanhaji Raghu Barde (accused) and Sonali Sopan Barde (deceased) are concluded to be the biological parents of fetus of Sonali Sopan Barde. He has also stated that he started D.N.A. analysis on 13.12.2012, and it was completed on 06.05.2013. He has also admitted while facing the cross-examination that it did not so happen on 13.12.2012, one Police Constable Ganesh Tarhalkar of Ghargaon Police Station came to him along with a sealed thermos containing

fetus. He further went on admitting that if analysis of D.N.A. profile is continuously carried out, then it may be completed within five days. He has stated that he had given D.N.A. sample kit for D.N.A. test of accused, but he has not given the kit for D.N.A. sample of deceased Sonali Barde. He has also admitted that if samples are not promptly preserved, then D.N.A. profile will not detect during analysis.

37. On careful scrutiny of evidence of Mr Shrikant Lade, Assistant Director of Forensic Science Laboratory, Mumbai, it is noticed by us that it took about five months to complete the process of D.N.A. analysis (period from 13.12.2012 to 06.05.2013), which appears to be undue delay.

38. The testimony of sample carrier, Police Constable Ganesh Tarhalkar (P.W.No.8) vide exh. 51 speaks that on 13.12.2012, he collected sealed samples, which were kept in a sealed thermos in a fridge of veterinary hospital at Ghargaon. As pointed out earlier, P.W.No.12 Shrikant Hanumant Lade, Assistant Director of Forensic Science Laboratory, Mumbai has stated that he did not receive the sample in a thermos containing fetus. In view of this material inconsistency between the two witnesses, it raises serious suspicion about preservation of fetus, sealing, packing and carrying the same upto Forensic Science Laboratory, Mumbai. There is no evidence as to what precautions were taken by the Police machinery for preserving the fetus. It is simply brought on record that fetus was kept in a sealed thermos in a fridge at veterinary hospital at Ghargaon. What about its safety and other standards as per medical protocol. That evidence is lacking.

39. P.W.No.10 Dr Javed Farooqui claims that D.N.A. samples were given to the Police and he was instructed. In response to communication vide Exh.64, the same witness mentions the name of the carrying Police Constable as PHC/2168 K.B. Varkate. However, the name of this witness is neither shown in the witness list with the charge sheet nor he was examined before the trial court as a witness. As such, very existence and custody of D.N.A. sample is seriously under cloud of suspicion. In the above background, it is unsafe to rely upon D.N.A. reports and C.A. reports though fetus of the D.N.A. matches with the D.N.A. report of the accused.

40. Admittedly, this is a case rest upon circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by the Hon'ble Supreme Court stated in case of Anjan Kumar Sarma and Ors. Vs. State of Assam (supra) in para No. 13 as under :-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty;

- (3) The circumstances should be of a conclusive nature and tendency;
- (4) They should exclude every possible hypothesis except the one to be proved; and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the Accused and must show that in all human probability the act must have been done by the accused. (See: Sharad Birdhichand Sarda v. State of Maharashtra: 1984) 4 SCC 116; M.G. Agarwal v. State of Maharashtra: AIR 1963 SC 200)

41. The circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence as held, in *Kanhaiya Lal Vs. State of Rajasthan* reported in (2014) 4 SCC 715 by the Hon'ble Supreme Court as under :-

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in *Madho Singh v. State of Rajasthan* [(2010) 15 SCC 588]." In *Arjun Marik v. State of Bihar*, 1994 Supp (2) SCC 372 this court held that:

"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."

42. Having regard to the legal position made clear by the Hon'ble Supreme Court in a case of circumstantial evidence, if evidence produced by the prosecution machinery in this case, is examined carefully and assessed, we arrived at conclusion that the prosecution has not been able to prove the chain of circumstances. The story of last seen together projected by the prosecution is found shaky and not reliable. The D.N.A. reports relied upon by the prosecution agency so as to connect it with the appellant/accused are not safe in view of the

serious lapses in collection and sending of samples to the experts.

43. We are not in agreement with the findings recorded by the learned trial Judge. The learned trial Judge seems to have recorded findings on the basis of assumptions and presumptions. There was missing chain to connect the circumstances. The learned trial Judge completely overlooked aspect of missing link. The learned trial Judge has presumed that the accused must have committed sexual intercourse with the deceased from time to time, due to which she became pregnant on the basis of D.N.A. report which is seriously under cloud. The learned trial Judge must have given the benefit of doubt to the accused when the chain of circumstances is not complete and there is a missing link. There was no sufficient evidence against the accused to connect his complicity in the commission of alleged offence of murder and rape. We are, therefore of the candid view that it is necessary to interfere with the findings recorded by the learned trial Judge and conviction under respective offences by invoking our appellate jurisdiction.

44. The suspicion howsoever may be strong against the accused but the suspicion cannot take place the required standard of proof. It has to be established by cogent evidence. The circumstances should be of a conclusive nature to rule out possibility of hypothesis.

45. Having regard to the above reasons and discussion, we arrived at conclusion that the prosecution has failed to prove the charge of murder and rape against the appellant/accused punishable under section 302 and 376 of I.P.C. beyond reasonable doubt. The accused is entitled to get benefit of doubt in view of the shaky evidence produced by the prosecution machinery. The chain of circumstances is not complete.

Certainly, the accused needs to be acquitted by giving him benefit of doubt.

#### ORDER

(i) The Criminal Appeal stands allowed.

(ii) The impugned judgment and order of conviction passed in Sessions Case No. 7/2013 by the Additional Sessions Judge, Sangamner, Dist. Ahmednagar for the offence punishable under section 302 and 376 of I.P.C. is hereby quashed and set aside.

(iii) The Appellant/accused is acquitted from the charges of murder and rape.

(iv) The Appellant/accused be released forthwith from the jail if not required in any other case or crime.

(v) The appellant-accused - Tanhaji s/o Raghunath Barde shall execute P.B. of Rs. 25,000/- (Rupees Twenty Five Thousand) with one or two solvent surety of the like amount in view of Section 437-A of Cr.P.C. so as to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for

a period of six months from the date of its execution.

(vi) The Criminal Appeal is disposed of in above terms.