IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 974 OF 2019

Sandip Baburao Waidande
Age: 35 years, R/o. Banpuri,
Taluka- Atpadi, District- Sangli. ….Appellant

Versus

The State of Maharashtra
Through, Kurlap Police Station,
District-Sangli. ….Respondent

Mr. Amit Mane (Legal aid) for the appellant.

Mrs. M. M. Deshmukh, learned APP for the Respondent.

CORAM : PRASANNA B. VARALE &
S. M. MODAK, JJ.

RESERVED ON : 3 MARCH, 2021

PRONOUNCED ON : 9 APRIL, 2021

JUDGMENT : (PER S. M. MODAK, J)

. Issue involved in this appeal is whether the link in between the incident of murder and the accused is established on the basis of proved circumstances? The case is based on circumstantial evidence. The case falls within narrow compass. Even though the circumstances relied upon by the prosecution are not too many, we have to ascertain whether they are proved and whether guilt of the accused is

established.

2. Law does not require a particular number of circumstance so as to establish the chain. It altogether depends upon the nature of the transaction. In a particular case there may be few circumstances which are strong enough which leads to guilt of the accused. There may be more circumstances which may be relied upon by the prosecution. It depends upon the facts and circumstances of each case. In the case before us, there were few circumstances relied upon by the prosecution. The Additional Sessions Judge District, Sangli was pleased to believe those circumstances and draw an inference about guilt of the accused for committing murder of his own wife Nirmala. He decided the case as per the judgment dated 2/2/2018. There was conviction under section 302 of IPC. The correctness of the said judgment is challenged before us.

3. We have heard Mr. Amit Mane, the learned Advocate appointed by this Court on behalf of the appellant and Mrs. M. M. Deshmukh, learned APP for the Respondent. First informant PW-2 Bhausaheb Jaywant Patil is taken a contract of cutting of sugarcane crop from Bharat Deshmukh. He has hired persons for that job. They were doing the job near Kurlap village. Accused and his wife Nirmala resident of village Banpuri Tal. Atpadi, Dist-Sangli were the labourers.

4. The incident took place in the intervening night of 29/12/2015 and 30/12/2015. Accused and deceased went from the duty at about 4:00

p.m. of 29/12/2015 on account of stomach pain of accused. Both returned at 9:00 p.m. and slept. As usual on 30/12/2015 at 5:00 a.m., first informant went for awakening the labourers. To his surprise, he saw dead body of Nirmala. He has not noticed accused. Accordingly, he lodged complaint with Kurlap police station. It was registered under Section 302 of IPC. Police arrested accused on 04/01/2016. Police filed chargesheet for the offence punishable under Section 302 of IPC.

5. In all prosecution examined 13 witnesses. The defence of accused is that of denial. The case is based on circumstantial evidence. The circumstances relied upon by the prosecution are as follows:

a) Last seen theory.
b) Motive.
c) Noticing soaked blood stains on the clothes of the accused.
d) Absconding himself from the spot of the incident even though his wife is murdered.

6. The findings of the trial Court are challenged mainly on the following grounds

a) Every circumstance is not proved.
b) Evidence is weak and not reliable.
c) The circumstance of last seen together as spoken by PW-2-Bhausaheb Jaywant Patil the first informant was not put to the appellant under section 313 of Cr.P.C.

7. On the point of circumstantial evidence the Appellant relied upon judgments in the case of

a) *Sharad Birdhichand Sarda vs. State of Maharashtra*[1]

b) *Raj Kumar Singh @ Raju @ Batya vs. State of Rajasthan*[2]

c) *State of Goa vs. Sanjay Thakran and Anr.*[3]

8. Whereas the learned APP supported the judgment. According to her the trial Court has rightly drawn an inference against the accused it was due to the failure of the accused in giving explanation about unnatural death of deceased Nirmala. According to her even though circumstances are few, they are sufficient enough to draw an inference about guilt of the accused. The learned APP also brought our attention to section 313 of Cr.P.C and according to her the accused who has failed to participate in the process of recording of the statement as contemplated under sub-section 5 of section 313 of Cr.P.C. cannot take benefit of omission to put certain questions.

9. On this background we have perused the record with the assistance of both the sides. Also gone through citations relied upon on behalf of the Appellant. Law on the point of circumstantial evidence is already well settled.

10. We have perused above citations in the light of submissions

1 *AIR 1984 SC 1622*

2 *2013 AIR (SC) 3150*

3 *2007 (3) AIR BOM R 552*

made before us. Hon'ble Supreme Court has already laid down golden principles while appreciating circumstantial evidence. They still holds good. So the following are the principles:-

a) The circumstance relied upon must be fully established.
b) They must be consistent with the hypothesis of guilt of the accused.
c) They should be conclusive in nature. Only inference about guilt of the accused is to be inferred.
d) There should be complete chain of evidence so as not to lead any doubt about involvement of the accused.

11. So we have to apply these principles to the facts before us. Trial Court while convicting the appellant has blamed the accused for not giving explanation, also considered evidence on the point of motive satisfactorily and has also drawn an inference against the accused for noticing blood of group 'B' on his shirt. We have read the findings of the Court. We think trial Court committed fault on two aspects first trial Court has forgotten the difference between suspicion and proof. Secondly trial Court forgotten to put to the accused circumstance of 'last seen together' as evidenced by PW-2 first informant. So for these reasons, we are inclined to set aside the conviction. We will give reasons hereinafter. The findings of the trial Court are as follows:

ON THE POINT OF LAST SEEN TOGETHER

12. On the basis of evidence of PW-2-Bhausaheb first informant, trial Court believed last seen theory. As deceased and accused are

husband and wife, their joint company is considered natural. That is why trial Court casted burden on accused to explain probable cause of death of deceased. Trial Court referred to Section 106 of the Evidence Act. Trial Court considered it as an additional link in chain of circumstances (para 24).

13. On these findings the evidence of PW-2 Bhausaheb needs to be considered. Following facts emerge from his evidence

a) Accused and his wife Nirmala are the labourers in cutting of sugarcane. The first informant heads the *Toli (group)*
b) Both the deceased and accused met him on 29/12/2015 at 4.00 p.m. On the pretext of stomach pain accused left for hospital along with his wife-deceased.
c) Both returned at 9.00 p.m. and went to sleep.
d) On next day i.e. 30/12/2015 at 5.00 a.m., when the witness had gone for awakening, he saw deceased lying in a pool of blood near the hut.
e) He did not see accused there.
f) Went to Kurlap Police Station and lodged the complaint.

14. The relationship between accused and deceased is not disputed. On the basis of above facts, trial Court considered company of accused and deceased together on 29/12/2015 at 9.00 p.m. This fact can be inferred in favour of the prosecution or against them also. So to say it is but natural for both the spouses to stay together and sleep

together. In various cases, this Court as well as Hon'ble Supreme Court has considered such circumstance. So in a given case both the spouses may be lastly found in the house or they may be found together outside the house. The place is also important.

15. It is also true that last seen circumstance has to be proved just like any other circumstance. Only difference is once the prosecution will prove that both the deceased and accused were found lastly together then certainly it is for the accused to explain about whereabouts or what has happened about his companion. In this exercise the time of last seen and time of death also plays important role. This has been discussed by Hon'ble Supreme Court in the case of **State of Goa Vs. Sanjay Thakran and Another** reported in **2007 (3) SCC 755**.

16. Now coming to the facts it is nobody's case that both the deceased and accused slept in the house/hut. PW-2-Bhausaheb has referred about the hut. It will be material to consider the evidence on the point of spot.

SPOT OF INCIDENT

17. PW-1-Chandrashekhar Patil spot panch, PW-12 Mahesh Vaval Circle Officer, PW-13-PI Sachin Investigating Officer and photographer PW-6-Machindra are the material witnesses. It is clear from their evidence that spot is situated behind Zilha Parishad School, near the house of Madhukar Patil, village Karalap in an open space. There are signs of residence of sugarcane cutting group. So also

household utensils, bedding material, blood stain towel, blood stain scarf, blood stain quilt were found.

18. We can see the situation on the spot as per map at Exhibit 45 proved by PW-12-Mahesh Vaval. We have also seen the photographs. All the witnesses were cross examined. Even in the map houses/huts are shown but spot is shown outside these huts in an open space. But from the articles seen at the spot, it is but certain that incident had taken place there. Even photographs do not suggest that these articles were found in the house. It is nobody's case that deceased was murdered inside the house and body was lying outside the house.

19. So it is very much clear that the spot is not situated within four walls of the house but it is an open space. Even there is reason to believe that the open space is not surrounded by walls but a place accessible. On this background we have to see whether there is a burden on accused to explain how deceased was found there in a dead condition.

20. PW-2-Bhausaheb had seen both of them at 9.00 p.m. on 29/12/2015. Both have slept. Next day morning at 5.00 a.m. he had seen deceased lying in a dead condition and accused was not there. P.H.C. Suryawanshi PW-10 recorded the complaint of PW-2 and registered an offence under section 302 of IPC against this accused. While giving evidence, PW-2-Bhausaheb initially disowned certain portion from FIR. But subsequently he admitted it.

21. After witnessing the situation at the spot, PW-2-Bhausaheb suspected accused. Admittedly what has happened in between 9.00 p.m. of 29/12/2015 till 5.00 a.m. of 30/12/2015 no witness is examined. The prosecution was liable to adduce evidence so as to convert suspicion into reality by adducing legal evidence.

22. Though PW-2-Bhausaheb has said about good relations between deceased and accused his testimony on the point of joint stay on 29/12/2015 is not challenged by accused. We can very well say that these preliminary facts are proved by the prosecution.

23. When we talk about explanation from the accused during cross examination nothing is suggested. It is important to note that accused was not put about story put up by PW-2 about joint stay. It is conspicuously absent in a statement recorded under section 313 of Cr.P.C.

OMISSION IN SECTION 313 Cr. P. C. STATEMENT

24. We have perused the statement with the help of both the sides. It is true that incriminating circumstance as depicted from the evidence of PW-2-Bhausaheb was not put to the accused. Law on this point needs to be looked into. Learned Advocate for the appellant relied upon following judgments:

a) *Sharad Birdhichand Sarda vs. State of Maharashtra*

b) Asraf Ali vs. State of Assam[4]

c) Raj Kumar Singh @ Raju @ Batya vs. State of Rajasthan

25. In case of *Sharad Sarda* Hon'ble Supreme Court excluded some of the circumstances from consideration and the reason was the appellant was not given a chance to explain them. (Para No.142)

26. Similarly, the Hon'ble Supreme Court was pleased to set aside the conviction in case of *Asraf Ali* and one of the reason was "question was not put to the accused as not depicted from the evidence on record and hence prejudice was caused to the accused. It was the case based on circumstantial evidence and hence there was emphasis on bringing those circumstances to the notice of the accused (Para-6). Similar is the situation in case of *Rajkumar Singh*. There was emphasis on what is the effect of proving a circumstance. Basically, in such a case the judgment is based on inferences.

27. The law on this issue is well settled. Section 313 of the Code of Criminal Procedure empowers the Court to put questions in two eventualities. One is optional and it may be at any stage of proceeding. Whereas 2nd is mandatory and it is after prosecution witnesses were examined. The Section has further elaborated about non-necessity of administering an oath. The protection is also given to accused from possible punishment which may occur if he has refused to answer or given false answer. This is in the light of the protection given as per Article 20(3) of the constitution. At the same time Court

4 2009 AIR (SC) (Supp) 654

is not debarred from considering the answers given by the accused. These were the provisions existing earlier to 2009.

AMENDMENT

28. In order to achieve the involvement of the prosecutor as well as the defence counsel, Court may take their help in preparing relevant questions. Even filing of a written-statement by the accused has been statutorily recognized. It is by way of incorporating sub-section (5) to Section 313 of Code of Criminal Procedure. We have to address to the grievance about failure to put questions in the light of this amended sub-section. Mean to say that by incorporating such provision whether the accused cannot make a grievance of not putting the question? On this issue no direct judgment has been placed before us.

29. There are numerous occasions for the Courts to consider the written-statement filed by the accused in the light of Section 313 of the Criminal Procedure. The question of interpretation of Section 313 sub-section (5) had arisen under different circumstances. In case of *United Phosphorus Ltd. v/s. Sunita Narain & anr.*[5] Delhi High Court dealt with the question of dispensing from the personal appearance of the accused for the purpose of examination and instead permitted him to file written-statement. Court has refused to interfere in the order granting exemption to an accused in a prosecution involving summons case. Whereas in the case of *Mintu Dubey v/s. Union of India through SP, CBI, Jabalpur*[6] Madhya Pradesh High Court has

5 2001 Cri. L.J. 2077
6 2017 Cri.L.J.1185

dealt with an appeal against conviction. Therein , the appellant has submitted a written reply as provided under Section 313(5) of the Code of Criminal Procedure. That was a case arising out of the Prevention of Corruption Act. On the basis of examination and written-statement filed under Section 313(5) of the Code of Criminal Procedure, High Court of Madhya Pradesh has dealt with appeal against conviction. Court was required to decide whether the explanation given by the accused can be considered or not.

30. This Court (Panaji Bench) in the case of *Mrs.Fatima C. Fernandes Vs. State of Goa*[7] has taken a note of filing of written-statement as contemplated under Section 313(5) of the Code of Criminal Procedure. That was an appeal against conviction under Section 302 of IPC.

31. In the case of *Mahesh Mahadev Tari v/s. State of Goa*[8] this Court while dealing with an appeal against conviction under Section 302 of IPC has considered the fact of filing of written-statement under Section 313(5) of the Code of Criminal Procedure.

32. However, the issue of causing prejudice (due to not putting the question) needs to be decided in the light of the newly inserted sub-section (5) to Section 313 of the Code of Criminal Procedure. No doubt it is true that this sub-section is inserted so that assistance of the prosecutor and defence can be taken for preparing the questions

7 2018 ALL MR (Cri) 950
8 2018 ALL MR (Cri) 788

to be put to the accused. Whether it is mandatory or directory to take assistance? If we read the wordings of sub-section, we can find that the word 'may' has been used. If we take the literal meaning of the word 'may' we can find that taking the assistance by the Court can only be said to be directory. If it is to be considered directory, it means Court may take assistance or Court may not take assistance. If Court has chosen not to take the assistance, it means Court has not availed of that assistance. If it is so then one cannot have a grievance that other side cannot make a grievance about omission to put questions. This is one angle of looking to the question. There is another angle also. If sub-section (5) contemplates taking of the assistance by the Court, it does not mean to say that the Prosecutor or the defence counsel cannot on their own can offer assistance? If such assistance is offered, no doubt any Court will not refuse to accept such assistance.

33. Coming to the facts of the case, we have perused the record with assistance of both the sides. Nothing is pointed out to us by either of the side that Court has taken assistance or the Prosecutor or defence has offered any assistance to the Court. On this background there is a reason to believe that neither the Court nor both the sides have taken cognizance of this newly inserted sub-section. In view of this, it may not be proper to decide the grievance of omission to put questions in the light of newly inserted sub-section. So the grievance needs to be decided in the light of interpretation given in the judgments referred herein above.

34. Question also arises whether this Court can remand the matter back to the trial Court for the purpose of putting that circumstance to the accused? There are various judgments on this issue. In some of the judgments, the Court has refused to remand the matter. Whereas in few other cases, Court has remanded the matter. Similar situation arose before Hon'ble Supreme Court in case of **Nar Sing Vs. State of Haryana** reported in **(2015) 1 SCC 496**. Question was raised before Supreme Court about not putting the forensic science laboratory report to the accused. It was a case based on circumstantial evidence. Though the analysis of the report was not put to the accused, the trial Court as well as High Court consider it as one of the circumstance. Hon'ble Supreme Court after taking overview of different judgment, was pleased to remit back the matter before the trial Court with direction to record fresh statement of the accused. While considering various courses available before the trial Court, in such a situation, following courses of action were shortlisted (para 30)-

a) The Appellate Court can examine the accused and shall consider the answers.
b) The Appellate Court can hear and decide the matter upon the merits, if Appellate Court finds that no prejudice is caused or there is no failure of justice.
c) If there is failure of justice or prejudice – retrial from the stage of recording of statement can be ordered.
d) The Appellate Court can decide the appeal on its merits by declining to remit the matter and by considering the prejudice, if any, caused to the accused.

35. Considering the facts of the case, Hon'ble Supreme Court has decided to opt for the option of remitting the matter to the trial Court. If we consider the various judgments referred in the said judgment, we can find that there is no straight jacket formula for deciding which course of action can be adopted. So, ultimately it remains a question of fact. In a case before us, we are not inclined either to remit the matter or to put the questions to the accused. We are inclined to decide the matter on merits. There are reasons for taking this course of action. The accused is behind bar from 4th January, 2016 i.e. almost five years have expired. Secondly, even if the circumstance of last scene together is considered, we do not think that other circumstances are sufficient enough to prove the guilt of the accused i.e. neither recovery at the instance of the accused nor there is direct evidence. Even evidence on the point of motive is insufficient. So, certainly we are of the opinion that prejudice is caused to the accused. The above observations are on the basis of the facts of this case.

36. It is an admitted fact that questions were not put to the accused in 313 statement on the basis of facts stated by PW No.2 – the first informant. It is certainly the duty of the Court to put the questions on the basis of incriminating materials. The trial Court has not put those relevant questions. It may not be proper to use that incriminating material as evidenced in the testimony of PW No.2 and use it against the accused unless it is put to him. Certainly, it has caused prejudice to the accused. He has been denied opportunity to give an

explanation. Hence, that circumstance as appearing in the evidence of PW No.2 has to be excluded from the evidence.

MOTIVE

37. "Suspecting the character of the deceased" is the motive suggested by the prosecution. PW-4-Muktabai Pandharinath Landage, mother of the deceased is the only witness examined. She had a talk with deceased 2 days earlier to the incident on phone. There the deceased disclosed about "accused suspecting the character of the deceased and beating her" The trial Court gave following findings:

> "Trial Court believed the evidence of the mother. It is but natural for the deceased to disclose about harassment to the near and dear one. While arriving at this conclusion, trial Court also referred to the opinion of first informant PW-2- Bhausaheb about cordial relations in between the spouses. But it is not accepted (paragraph 24)"

38. On minute scrutiny of the evidence of mother we can find that she has narrated the disclosure made during telephonic communication. Motive is the purpose/reason for which offence is committed. Motive crops up in the mind of the culprit. We can understand the motive, only when it is manifested by some conduct. If the accused scolds, become angry and even beats the deceased it is manifestation. A person may like or dislike the act/conduct of another. There are ways to protest. So also it depends upon tolerance

limit of person. A trifle act may make another person angry and a blunder may not make a person angry. So it is difficult to opine which objectionable acts may compel another to take law into his own hand.

39. No doubt man always wants his wife to be loyal to him and if wife has shifted loyalty towards another person, her husband never likes. It is true for wife also. Coming to the evidence part there is solitary incident of telephonic communication. PW-4-Muktabai is not eyewitness to this beating by the accused. Except her there is no other witness. We are told that there are witnesses whose statements are recorded by police during investigation on this point but they were not examined. Let us not talk about what is not there. But even what is there according to us is insufficient to believe about reason for scolding. The opinion of group head PW-2-Bhausaheb about cordial relations is also important. He resides in the immediate vicinity. Trial Court wrongly inferred about motive as proved. We disagree with the same.

ARREST OF ACCUSED

40. The incident took place in the intervening night of 29/12/2015 and 30/12/2015. The accused was not found at the spot. He came to be arrested by Police Constable PW-8-Mithun Pardhi. He was attached to Atpadi Police Station. When accused came in their territory witness arrested him . He noticed blood stains on the clothes of accused. They were in soaked condition. He brought him to police station and informed to Kurlap Police station where offence is registered.

41. Whereas PW-11 Police Head constable Bokad from Kurlap Police Station went to Atpadi Police Station on 4/1/2016 and arrested accused. While appreciating the evidence of PW No.8 Police Naik Pardhi, the Court has rightly excluded the facts allegedly stated by the accused to him at the time of taking him into custody. This fact pertain to the incident that took place in the intervening night on 29th December 2015 and 30th December 2015. Those facts suggest confession given by the accused. In every eventuality, that has to be excluded being stated to police.

42. It is very well true that after noticing accused near Bankpuri and after confirming the identity of the accused, the witness Pardhi has not prepared any document. One may understand that it might not have clicked him. Even nothing is tendered in evidence about giving of a report by him to higher police officers once he brought the accused to Atapadi police station. It is also admitted fact that witness Pardhi has not prepared any arrest panchnama. It has also not come in evidence that except giving oral intimation on a telephone to Kurlap police station witness Paradhi has not made any correspondence.

43. Even when witness police Hawaldar Bokad PW No.11 when he reached Atapadi police station, it has not come in the evidence of both these witnesses that any written communication is made in between them. Witness Bokad simply went to police station Atapadi and gave

report and then took the custody of the accused. Admittedly, said report is not tendered in evidence. He admits that while taking custody from Aatapadi police station, no panchnama is prepared.

44. It simply means that except the bare words of these two witnesses, there is nothing in writing since the time PW No.8 noticed the accused till the time of custody of the accused is handed over to PW No.11. Even PW No.13 PI Kamble investigating officer stated about arrest of the accused on 4.1.2016. He does not say about preparing the arrest panchnama. He referred about the letter given by Atapadi Police Station but that has not been tendered in evidence.

45. Police Officers are not layman. They are the officers having the responsibility to carry out the investigation as per the police manual and as per the provisions of the Criminal Procedure Code. They need to substantiate their stand on the basis of documents which are created simultaneously.

46. We find no explanation coming forward from the prosecution for not creating and not producing the single document to show this entire arrest exercise. So we give least evidenciary value to what PW No.8 has stated about noticing so called blood stains clothes of the accused. It is at the time when he saw him at Aatpadi village. Trial Court believed testimony of both the witnesses (paragraph Nos. 26 and 27). Unfortunately, trial Court has not appreciated this evidence. In the light of the above discussion, we disagree the conclusion drawn

by the trial Court about arrest of the accused.

CA REPORT

47. Blood group of deceased could not be ascertained. Whereas blood of 'B' group was noticed on pant and shirt of accused. On articles found at the spot, blood of 'B' group was found. (para 27) Accused was interrogated on 6/1/2016 by PI Kamble PW-13 at Atpadi Police Station. Clothes on his person were the same clothes he had worn at the time of incident. This was told by the accused to PI Kamble. He seized those clothes by drawing panchanama at Exhibit 12. Panch witness PW-1-Chandrashekhar Patil is also examined. It is true that this panchanama is not preceded by any Memorandum panchanama statement recorded of the accused under section 27 of the Evidence Act.

48. Seizure of clothes panchanama can be a plain seizure panchanama without there being any statement made by the accused that he had worn those clothes at the time of incident. Trial Court has accepted this piece of evidence. The trial Court was conscious of the fact that any explanation of non seizure of clothes on 4/1/2016 was not given. In spite of that, Trial Court observed *"it shows blood group of deceased as non conclusive then how blood group "B" is found on the articles except Exhibit 6 and 7 remained unexplained"* (paragraph No.27). We do not agree to this reasoning.

49. We have already said that the evidence of PW-8-Mithun Pardhi and 11-Kalu Bokar cannot be relied upon because their evidence is not

supported by any document prepared at the material time. So also we do not find any incriminating material from the CA reports mentioned above. Finding out blood of "B" group on clothes of accused and articles found at the spot leads us to no clue. This could have been helpful only when blood group of deceased could have been ascertained. So we will not consider evidence on this aspect.

CAUSE OF DEATH

50. PW-7-Nitin Bapu Chivate is the Medical Officer who has conducted post mortem on 30/12/2015. Cause of death was *"due to cardio respiratory arrest due to Asphyxia due to hypovalumia due to multiple injuries".* According to him death must have been caused within 10-11 hours. So, if we go back 10-11 hours prior to 1.30 p.m. of 30/12/2015, probable time of death will be in between 2.30 a.m. to 3.30 a.m. It is true that PW-2-Bhausaheb Patil had gone to the spot on 30/12/2015 and seen the deceased lying in a dead condition. So the time of death expressed by the Medical Officer seems probable.

51. In case of *Raj Kumar* (cited supra) the Hon'ble Supreme Court has dealt with the effect of time gap in between timing of last seen together and timing of death. Merely because there is a huge time gap in between the timing of last seen together and probable timing of death, the evidence of last seen together can not be rejected in all cases. It is further observed that *"when the time gap in between the point of time when both were found together alive and probable timing of death is small than the possibility of any other person being*

with the deceased can completely be ruled out". (paragraph 29)

52. If the time gap is more then the accused may suggest that he has not but some other person has killed the deceased. These circumstances certainly goes against the accused.

WEAPON OF OFFENCE

53. As no one has seen the assault we do not know how the accused has used the weapon koyta. Weapon Koyta was found at the spot when spot panchanama at Exhibit 11 was carried out. It is clear from the evidence of PW-1-Chandrashekhar Patil and PW-13-Sachin Kamble. From this we can only infer that the culprit after the assault has thrown away the koyta at the spot. Blood of "B" group was noticed on that koyta as per CA report. Blood group of deceased from her blood could not be ascertained. From this we can only infer that seized koyata is the weapon of offence. When shown to Medical Officer PW-7-Nitin Chivate injuries were possible by that koyta. Except that we cannot draw any inference of the involvement of accused.

54. As said above the prosecution has sufficiently proved the circumstances of last seen together. As said above we are unable to use that circumstance against the accused for want of putting it to the accused under section 313 Statement of Cr.P.C. We have already opined that circumstance of motive is not proved. The evidence on the point of arrest and seizure of clothes is not trustworthy. So what we feel is that chain of circumstances is not established. At the most we

can say that there is grave suspicion on accused that he has committed murder of his own wife. As every one knows that suspicion cannot take place of proof. So we are unable to subscribe to the view taken by the trial Court. Hence we have no alternative but to set aside conviction. We appreciate the assistance given by learned Advocate Mr. Amit Mane for the appellant. Hence, the order:

ORDER

i. Appeal is allowed.
ii. Conviction of accused Sandip Baburao Waidande recorded by Additional Sessions Judge, Islampur dated 2/2/2018 in Sessions Case No.41/2016 for the offence punishable under section 302 of IPC is set aside.
iii. Accused is acquitted from that charge.
iv. Accused be set at liberty if he is not required in any other case.
v. He be returned the amount of fine if he has already deposited.
vi. The fees of the learned Advocate for the appellant is quantified to Rs.10,000/-. The High Court Legal Services Authority, Mumbai to do the needful.

(S. M. MODAK, J.) **(PRASANNA B. VARALE, J.)**