

(2000) 09 MAD CK 0065

In the Madras High Court

Case No : Criminal App. No's. 502 and 509 of 1988

Sonali Mukherjee

APPELLANT

Vs

Union of India
Assadid Poddar Vs Dr. Battacharya and
State

RESPONDENT

Date of Decision : 22-09-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 302

Citation : (2001) 1 LW(Cri) 40

Hon'ble Judges : S. Jagadeesan, J;Prabha Sridevan, J

Bench : Division Bench

Advocate : B. Sriramulu, for R. Subramanian and N. Natarajan, for Mr. K. Selvakumaraswamy in Criminal Appeal No. 509 of 1988, for the Appellant; R. Natarajan, Additional Public Prosecutor in both the appeals, for the Respondent

Judgement

Prabha Sridevan, J.—Both the appeals arise out of the same judgment of the Section Additional Sessions Judge, Pondicherry in Sessions Case No. 34 of 1986. The first accused has filed Criminal Appeal No. 502 of 1988 and the second accused had filed Criminal Appeal No. 509 of 1988, both having been charged with the offence u/s 302 IPC read with Section 34 IPC for causing the death of one Biswajit by administering poison on 16-05-1984 and sentenced with imprisonment for life.

2. This case arises out of a private complaint by P.W. 1 the father of the deceased ("D" in short) On 16-05-1984, the deceased was brought dead to JIPMER Hospital and the Causality Medical officer reported the death to the police by FIR. D47 since it had occurred by swallowing 100 tablets. The final opinion given was that the death may be homicidal on account of other injuries which were definitely not self-inflicted. However, the police investigation concluded that it was a case of suicide. At the instance of P.W. 1, the investigation was handed-over to an officer of CB CID. C.W.3. He came to the same conclusion. A1, who

was charged with the offence u/s 324 IPC for causing the injuries on the deceased admitted her guilt and was released under Probationers of offenders Act. The case u/s 302 IPC, came to naught. The grief stricken father filed the private complaint.

3. His case is as follows:

The deceased met A1 in 1976 when he was about seventeen years old. He introduced her to P.W. 1 and P.W.2 as his girl-friend. They felt that he was too young and he has not completed his studies and objected to the association. Subsequently, A1 married one Alope Sarkar. But, apparently the deceased kept in touch with A1 and about six months later he expressed his desire to take care of A1, since her husband was torturing her. Since P.Ws. 1 and 3 felt that the deceased should not interfere with a married woman they advised him to pursue higher studies abroad. The deceased went to USA Sometime later without his parents knowledge he returned to India and married A1. He tried to take A1 to USA but in vain. Though his parents asked him to continue his studies he discontinued his studies and returned to India in 1981. Thereafter it was decided that A1 and "D" should live in Pondicherry, since P.W.3's mother was in Aurobindo Ashram. Both of them went to Pondicherry and started life together in 1982. In Sep" 83 the deceased went with A1 to Calcutta and made a fresh attempt to go to USA with the help of "D"s elder sister. But it failed. Then, P.W.1, who is a very successful Orthopaedic surgeon in Calcutta helped "D" to start a shop in Pondicherry for selling Bengal sarees. The place that was selected for locating this shop belonged to P.W.2. The business was doing well. But "D" went to Calcutta three times between January, 1984 and May, 1984 leaving A1 in Pondicherry. The last occasion on which "D" went to Calcutta was on 01-05-1984 and he returned to Pondicherry on 14-05-1984. Three or four days before that P.W.1 and P.W.3 got a phone call from A1. At that time, "D" was not at home. A1 complained to P.W.3 that "D" was living with prostitutes in Calcutta. Though P.W.3 tried to say that these suspicions were unfounded A1 threatened that she would cut "D" to pieces. When "D" returned home, P.W.3 reported this to him. He assured P.W.3 that he would sort out things and left Calcutta for Pondicherry on 14-5-1984. Before leaving, he sent a telegram to A2 who was a friend of A1 and "D" informing him of his arrival on 15th night by Coromandel Express and to tell A1 not to leave for Calcutta.

4. On 16-05-1984 early morning, P.W.1 received a phone call from his brother-in-law in Cochin informing him that "D" was in a serious condition. So P.W. 1, and P.W.3 and the other son and A1's father took the evening flight and went to Pondicherry. A car was sent from the Ashram and the person who came from the Ashram had informed that "D" had died. They went to the hospital but as it was late, they could not see him.

5. One Vijaya Kumar who was a Station House Officer, Muthialpet Police Station on receipt of D47, registered the same as Crime No. 103 of 1984 u/s 174 of the Code of Criminal Procedure. P.W. 1 identified the dead body of his son in the

presence of the said officer. The inquest was conducted on the dead body of the deceased by the Station House Officer, Muthialpet Police Station in the presence of Panchayatars. The inquest report is dated 16-05-1984, he forwarded the dead body with a requisition for postmortem to P.W.4. On receipt of the requisition, P.W.4 the Associate Professor in Forensic Medicine in JIPMER Hospital performed the autopsy on the dead body from 11.15 a.m. till about 1.00 p.m. on 17-05-1984. The following features were noticed by the Professor on the dead body:

External Examination:

- (1) Copious amount of latery froth, white in colour, mixed with tinge of blood, present around the mouth and nostrils.
- (2) Scalp hair, in and around anterior fontanelle area, were found to be cut short, compared to rest of the hairs and
- (3) Eyes and mouth were closed.

Injuries:

- (1) Seven burn marks, round in shape, each of 0.5 cm. in diameter on the lateral aspect of left upper arm, each at a distance varying from 3 to 7 cms from each other. The most marked one had caused subcutaneous haematoma of one c.m. diameter in size (including depth). Rest were skin deep only.
- (2) Lest upper eye-lid was swollen and bluish in colour. Conjunctive of both the eyes were congested.
- (3) Three linear scratches running along the length of upper limb situated in the middle of lateral aspect of left fore-arm. Each was a line's width, varying in length from 3 to 6 cms. These were parallel to each other. Each was situated at one c.m. distance from the closer one.

6. Ex.P-22 is the post-mortem certificate given by P.W.4. P.W.4 sent the viscera for chemical examination and Ex-P21 is the Chemical Report. It showed the presence of barbiturate and alcohol. The cause of death according to him is due to Gardenal poison. Thereafter the said officer came to the scene of occurrence and examined A1 and A2 and other witnesses. Thereafter the body was handed over to P.W.1 and "D" was cremated on 17-04-1984 in the evening. P.W. 1 and 3 returned to Calcutta. Later P.W.5 a servant of "D" reached Calcutta. He met P.W.1 and told him the events that led to the death of the deceased.

7. According to P.W.5 it was not a case of suicide but the consumption of barbiturate tablet by the deceased was only with the knowledge of A1 and A2. He informed P.W. 1 that A1 and A2 had an illicit relationship and though A1 objected to this and reproached A1, she ignored it. He reported to "D" but "D" said that since he had married A1 in spite of family opposition he could not take any action in this regard. P.W.1 was aware of A1's relationship with A2, since he had once seen A2 in the company of A1, when "D" was not there, offering her gifts and

presents. This was not approved by P.W.1. According to P.W.5 the events that led to the death of the deceased started from the evening of 14-05-1984.

8. On 14-5-1984 after closing the shop, P.W.5 went to the house of "D". A1 told him that they had to go to Madras, the next day. When P.W.5 had asked why they all have to go to Madras, he was told he had to go, because "D" was returning and if "D" did not come A1 would go to Calcutta since D was spending all his time in the company of prostitute. P.W.5 refused to go saying that he had to look after the shop. But on the next day, A1 said that P.W.5 had to accompany them to Madras. So P.W.5, A1, A2 and one Subir reached Madras at about 5.30 p.m. and went to the Railway Station. Then A1 told P.W.5 that if "D" comes in the Coromandel Express, it would be alright, otherwise, they would all leave for Calcutta the next morning, the Coromandel Express arrived a little late and "D" was on the train and came out. Just as he came to the gate of the station, A1 went up to him and began to cry A2 and others were also present. When the police intervened, "D" said it was a domestic matter. They returned to the hotel. But, Subhir was not there. Then "D" asked A2 to engage a taxi to go to Pondicherry. They engaged a taxi and started for Pondicherry. In the taxi in the rear seat on the right hand side "D" sat, A1 sat in the centre and A2 on the left. P.W.5 sat in the front with the driver. Sometime later when he heard a cry and he turned back he found A1 holding the lighted end of the cigarette against the left arm of "D". When P.W.5 asked him about it, she asked him not to look behind, and just sit in the front. They reached Pondicherry released the taxi and entered the house. A1 and "D" went into the bedroom. A2 and P.W.5 were walking outside. P.W.5 could hear the cries from inside the room. When he was about to knock on the door A2 prevented him from doing so saying that he should not interfere when the husband and wife are inside. Then he heard a loud cry so he kicked upon the door with two blows and the door opened. When he entered the room "D" was lying on the bed with face downwards. There were pieces of cut hair on the bed along with a hair brush and a wire and A1 was beating "D" with a piece of antenna wire. When he tried to stop her she gave P.W.5 a blow with the wire. P.W.5 found swelling on "D"s back. He also found the parts of mustaches and hair had been cropped and pieces of hair were lying on the floor. After sometime "D" got up to go to the bathroom. He was suffering and P.W.5 tried to help him. "D" told "no" and afterwards P.W.5 heard the sound of his crying. Since he did not come out after some minutes P.W.5 put his arm on the top of the partition wall between the bathroom and lavatory and found "D" standing and crying. He asked "D" to come out. Then when he found that the door was not bolted but simply closed P.W.5 opened the door and brought "D" to his bedroom. He found A1 and A2 talking together. He made "D" lie on the bed. "D" asked for a piece of paper and wrote down two lines in English, which P.W.5 could not understand and also wrote the date on top, 16-05-1984. When P.W.5 asked "D" whether he could fetch a doctor "D" said "no". But, still P.W.5 went to fetch the doctor, A2 came from behind and said that there was no need to call the doctor. Then when P.W.5 returned he found A2 and A1 in the room where "D"

was lying in an unconscious state and something white like pieces of white tablets, was coming out of his mouth. P.W.5 looked around and found there was a phial. When he showed it to A2, A2 said that it was a poison. P.W.5 gave "D" some salt water to make him vomit. Though he vomited a small quantity, P.W.5 found small pieces, broken and whole pieces of tablet. So, P.W.5 told A2, "we must call doctor". A2 went with him to the house of the doctor, Datta. A2 went with the phial to the house of the doctor and P.W.5 went in search of A2's father and mother. Doctor said that it was poison and asked A2 to take "D" to JIPMER Hospital, A2 came in a car. P.W.5 and A1 and A2 went to the Hospital together. D was brought down and made to lie down in a place there. The Senior Doctor, who came pronounced "D" dead. The Casualty Medical Officer, at JIPMER Hospital lodged the FIR D47, on the same day namely 16-05-1984 at 3.30 hrs reporting the death of "D" alleging that "D" had swallowed 100 tablets. Then the doctor sent the dead body to the mortuary. P.W.5, A1 and A2 returned home at about 7 or 7.30 a.m. When they returned home A1 and A2 asked the maid servant to clean the room.

9. When A1's father arrived P.W.5 began to explain everything and he was told that he should not tell the police what actually happened. On 20th A1's elder brother arrived and P.W.5 was tutored as to what he should say and what he should not say. A1's family kept him under lock and key and A1's brother threatened that he would beat him when he had tried to escape. He managed to run away and went to the police station. Then on the same day he reached Madras and boarded the Howrah Madras Mail and reached Calcutta.

10. In the meantime, on 21-05-1984, the provisional postmortem certificate was sent by P.W.4 wherein it was stated that the cause of death may be homicidal, because of the injuries which were not self-inflicted. C.W.1 took charge of the case thereafter. The original charge sheet for the offence u/s 174 of the Code of Criminal Procedure was altered into Section 302 IPC. C.W. 1 proceeded with the investigation. P.W. 1 sent a letter on 26-05-1984 to the Senior Superintendent of Police wondering if there was trace of foul play. This letter is Ex-P 10.

11. P.W.1 again wrote a letter Ex-P12 to C.W.1 bringing to his knowledge the information that he had received. He raised a genuine doubt as to whether the death was a suicidal or homicidal. Therefore at P.W. 1's request the investigation was transferred to CBCID and C.W.3 the Inspector of Police C.I.D Branch, Pondicherry continued further investigation.

12. On 30.5.1984 P.W.5 who was in P.W.1's house in Calcutta was threatened by another brother of A1 and P.W.5 fear for his safety. Then P.W. 1 entrusted P.W.4 to the care of one Sarogi who had an Investigation Security Service. P.W.5 told him all that happened at Pondicherry. With Sarogi's help he swore to the affidavit marked as Ex-P9 (Ex-P23 on 30-05-1989) and the same was forwarded to C.W.3.

13. C.W.3 who has taken up the investigation took the bottle which contains the

Gardenal tablets since the lot number of it showed that it was purchased at Calcutta. C.W.3 and C.W. 1 went to Calcutta for further investigation. They examined thirty three witnesses including A1. After completing the investigation C.W.3 concluded that from the materials available neither an offence u/s 302 IPC nor u/s 306 IPC was made. But he was of the opinion that A1 should be prosecuted for the offence u/s 324 IPC for causing injuries on "D" and u/s 309 IPC for attempting to commit suicide. Accordingly A1 was charge-sheeted and to the anxious enquiries made by P.W.1, the Superintendent of Police, CID sent Ex-P15 informing him that A1 was arrested and charge sheeted for the offence u/s 324 and 309 IPC and the trial was pending before the then Judicial Magistrate, Pondicherry. On 22-03-1985 final order was pronounced in the aforesaid case Calendar Case No. 4 of 1985 upon A1 pleading guilty to the charges and the learned Chief Judicial Magistrate released her u/s 4(1) of the Probation of Offenders Act on executing a bond for Rs. 5 00/-. The case ought to have ended there. But when P.W. 1 received information that his efforts to find out whether the death of his son was suicidal or homicidal, would not proceed further he filed the complaint on 21-06-1985 seeking necessary action.

14. The complaint was filed before the Chief Judicial Magistrate Pondicherry on 21-06-1985 and thereafter it was committed by the learned Special Judicial Magistrate to the Session Judge. The Second Additional Sessions Judge at Pondicherry tried the Sessions Case No. 34 of 1986. Five witnesses were examined on behalf of the prosecution four witnesses were examined as Court-witnesses, twenty exhibits were marked by the prosecution. Ex-Pi to P24 through P.W.1 and Exs-D1 to D57 were marked by the defence. Ex-C1 is marked through Court and one material object was also produced. The learned Sessions Judge on considering the evidence available before him found A1 and A2 guilty u/s 302 IPC read with 34 IPC and sentenced them to undergo life imprisonment and imposed fine of Rs. 100/- each in default thereof to undergo rigorous imprisonment for one month. Against this the present appeal has been filed.

15. Mr. N. Natarajan learned Senior Counsel appearing for A2 pointed out that P.W.5. the only person who spoke about what transpired on the fateful day was not at all a reliable witness since he was willing to change his stand depending on the situation.

16. The accused gave their statements u/s 313 of the Code of Criminal Procedure denying everything and giving a version of what actually happened. The learned Senior Counsel pointed out that P.W.5 ought to have come out with the truth. If according to him Ex-P9 reveals what actually happened even when he was in Pondicherry there is no reason why P.W.5 should go all the way to Calcutta to inform P.W.1 as to what happened and he referred to the decision reported in Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad, for the purpose that when an eyewitness does not give information of a crime to anyone else, his evidence should be scanned with much caution and the Court must be fully satisfied that he is the witness of truth.

17. P.W.1 was in Pondicherry on 16th of June itself. Immediately P.W.5 could have told him. The story set up by P.W.5 that A1's father and brother threatened him not to tell the truth cannot be believed because even before they came on the scene, C.W. 1 had recorded the statement of P.W.5. Therefore the threat itself is a futile one. The learned Senior Counsel pointed out that when P.W.5 who had been brought to Pondicherry by "D" had no place to stay after "D" death returned to Calcutta, he must have been tutored by P.W.1 to fabricate the story of how A1 and A2 caused the death of "D". The learned Senior Counsel pointed out that there was no independent evidence to support the case of the illicit affair between A1 and A2 except P.W.5's statement that he used to find fault with A1's behaviour. The learned Senior Counsel said it was very unlikely that a servant would be emboldened to attempt to correct his employers wife. So this testimony of his reprimanding A1 for her relationship cannot be believed. He also submitted that in fact, the allegation regarding the affair between A1 and A2 was a figment of imagination of P.W.5 since, the documents show that "D" himself trusted A2. In fact, according to A1 in the statement given by her u/s 313 of the Code of Criminal Procedure that every time "D" left her behind in Pondicherry he would ask A2 to take care of her and this is supported by the telegram Ex-D52 in which "D" had informed A2 to tell A1 that he was definitely proceeding to Pondicherry. If as P.W.5 stated "D" knew all about the affair between A1 and A2 and he was keeping quite because he had blackened his name before the family members. "D" had no reason to send the telegram to A2. This would believe that he nurtured suspicion about A1 and A2. He referred to the evidence of C.W.1 and C.W.3 to demonstrate that their account of what P.W.5 stated before them differ from the evidence given by P.W.5 before the Court and hence he submitted that P.W.5's evidence was unreliable. He submitted that "D"s death being suicidal cannot be ruled out. He also referred to Ex-P12, the letter written by P.W. 1 wherein it was stated as follows:

after more than an hour of mental torture he went to the bathroom and took some medicine to end his own life.

and again.

when Biswajit was really ill they gave him Salt water to induce vomiting which he did but inadequately

again

Biswajit probably did not want to commit suicide only physical and mental torture made him to take that unfortunate decision.

So, the learned Senior Counsel submitted then even according to the father of the deceased namely P.W.1. "D" took his own life and when it was his specific case that "they" gave him salt water which can only mean A1. A2 and P.W.5 and not P.W.5 alone induced vomiting and also it would demonstrate that both, the accused actively tried to take steps to counteract the effects of the poison.

18. Learned Senior Counsel appearing for A2 would also submit that it was not proper for the prosecution to have cross-examined C.W.1 and C.W.3, since the presumption under the Evidence Act is that all official and judicial acts are regularly done. He also submitted that there was absolutely no corroboration for the evidence of P.W.5 and if P.W.5's statement stands alone waiting to be corroborated in the absence of anything to support and demonstrate that P.W.5's version could be true, it will have to fall. In any case where murder is involved, the learned Senior Counsel submitted that intention should be proved the overt act should be proved by either direct or circumstantial evidence. Here even assuming without granting that there may be intention on the part of A1 there is neither direct or circumstantial evidence as to she administered poison and with regard to A2 there is absolutely nothing to show his complicity or participation in the crime. He also drew attention to the statement made by A2 u/s 313 of the Code of Criminal Procedure which according to him gave an plausible account about what had happened. If from the facts intention on the part of A1 there is neither direct or circumstantial evidence as to she administered poison and with regard to A2 there is absolutely nothing to show his complicity or participation in the crime. He also drew attention to the statement made by A2 u/s 313 of the Code of Criminal Procedure which according to him gave a plausible account about what had happened. If from the facts two conclusions could be drawn one of which is favourable to the accused it is incumbent upon the Court to draw that conclusion which is favourable to the accused. He referred to the judgment reported in *Sharad Birdhichand Sarda v. State of Maharashtra* AIR 1984 SC 1922, where the, Supreme Court had laid down the principles as to the mode and the manner of the proof of cases of murder by administration of poison, which is extracted below and if this is applied to the case, the prosecution case should fail.

We now come to the mode and manner of proof of cases of murder by administration of poison. In *Ram Gopal Vs. State of Maharashtra*, his Court held thus (at p.659):

Three questions arise in such cases, namely (firstly) did the deceased die of the poison in question? (secondly) had the accused the poison in question in his possession"" and (thirdly) had the accused an opportunity to administer the poison in question to the deceased? It is only when the motive is there and these facts are all proved that the Court may be able to draw the inference that the poison was administered by the accused to the deceased resulting in his death.

So far as this matter is concerned in such cases the Court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

- (1) there is a clear motive for an accused to administer poison to the deceased.
- (2) that the deceased died of poison said to have been administered
- (3) that the accused had the poison in his possession.

(4) that he had an opportunity to administer the poison to the deceased.

In the instance case, while two ingredients have been proved but two have not. In the first place, it has no doubt been proved that Manju died of potassium cyanide and secondly, it has also been proved that there was an opportunity to administer the poison. It has however, not been proved by any evidence that the Appellant had the poison in his possession. On the other hand, as indicated above there is clear evidence of P.W.2 that potassium cyanide could have been available to Manju from the plastic factory of her mother, but there is no evidence to show that the accused could have procured potassium cyanide from any available source. We might here extract a most unintelligible and extraordinary finding of the High Court.

It is true that there is no direct evidence on these two points, because the prosecution is not able to lead evidence that the accused had secured potassium cyanide poison from a particular source. Similarly there is no direct evidence to prove that he had administered poison to Manju. However, it is not necessary to prove each and every fact by a direct evidence. Circumstantial evidence can be a basis for proving this fact.

19. Mr. Sriramalu, learned Senior Counsel appearing for A1 submitted that in addition to what was argued by the learned Senior Counsel appearing for A2 he would submit the following:

He submitted that in any case which is depending on circumstantial evidence, each and every link should be completed. P.W.5 according to the prosecution is the only witness. P.W.5 is one who prepared to "shape" his evidence to suit the need. The learned Senior Counsel also submitted that when P.W.5 has categorically stated that a slip of paper was given by him to "D" on which the date 16-05-1984 was written by "D" along with two lines in English with the direction that if something happened to him nothing should be done in the absence of his father and that the slip should be handed over to the father. The said slip was not at all produced in evidence. According to the learned Senior Counsel that was burked by the prosecution in order to fix the crime on the accused. The learned Senior Counsel for A1 would also reiterate that Ex-D2 showed the suicidal tendencies of "D" He also referred to the evidence of C.W.3 to indicate that the reason for fixing the crime on A1 and A2 was because P.W. 1 was rich man and he did not want A1 to inherit the estate of "D" and what better way to deny her legal rights than to fix the responsibility of the death of her husband on her.

For all these reasons the learned Senior Counsel for both the accused would pray for the acquittal of the two accused.

20. Mr. R. Natarajan, Additional Public Prosecutor for Pondicherry appearing for the prosecution submitted that in this case motive was clearly established and it was the illicit affair between A1 and A2. It is the evidence of both P.W. 1 and P.W.5 that these two have connection and the reference to the illicit connection

referred to in the chief examination by P.W. 1 and P W.5 were not challenged in cross. He referred to the various loop holes in the investigation by C.W. 1 and C.W.3. According to the learned Public Prosecutor the inquest was done in front of strangers who could not have been known how the deceased died and the Station Officer had not even attempted to get a statement from P.W.5 who was present from the beginning at the spot. C.W.1 had accompanied C.W.3 to Calcutta to proceed with the investigation especially when the investigation had been transferred on the dissatisfaction of the investigation by P.W.1 to CBCID. Therefore, C.W.3 had investigated the case by burking Ex.P9 which is the affidavit sent by P.W.5 from Calcutta, where all factors revealed and hence something was indeed wrong in the manner in which the investigation was being proceeded with. When the learned Public Prosecutor said that when the persons in authority failed to protect the citizen's rights when such offences are committed there was nothing surprising in the case being taken up at the instance of a private complaint.

21. As regards the argument that "D" showed suicidal tendencies the learned Additional Public Prosecutor would submit that the document relied upon by the defence was proved to have been written on a foreign paper and there was nothing to show that it was contemporary document and no importance could be attached to it.

22. As regard the arguments in defence that since the bottle was proved to have purchased at Calcutta there was no connection between the poison and the accused, the learned Public Prosecutor submitted that it was the old stock of the year 1982 and there was proof to show that A1 had visited Calcutta at that time and so A1 might have purchased the poison is really relevant. According to the learned Public Prosecutor all the links were complete and the circumstantial evidence pointed directly to the accused A1 and A2 had the motive viz., the illicit affair and P.W.5's evidence is cogent as regards the events that happened from the time "D" got out of the Coromandel Express at Madras till "D" breathed his last at Pondicherry. A person who according to P.W. 5 had got down from the train smiling had been reduced to a person who staggered on the way to the bathroom showing thereby the heavy dose of poison had been administered to him by the accused followed by the ill-treatment of injuring the "D" or with lighted cigarette by A1. The statements u/s 313 of the Code of Criminal Procedure are contrary to A2's admission of guilt as per Ex-P20 before the Chief Judicial Magistrate in Calendar Case No. 4 of 1985 for the offence u/s 324 and 309 IPC and this would show that the statements u/s 313 of the Code of Criminal Procedure are false. This is one more link in the case of circumstantial evidence. The learned Public Prosecutor submitted that A2 was only a layman and the moment P.W.5 showed the bottle to him before rushing of to Doctor Datta. A2 said that it was poison. This knowledge could only be attributed to the fact that he was guilty. As far as the delay in reiterating the truth regarding what happened the learned Public Prosecutor said that there was explanation in P.W.5 evidence as to how the delay had happened. As soon as A1's father and brother

came they threatened him and he actually escaped to Calcutta and since he was a servant of "D" it was natural that he should have reported to "D"'s father. The learned Public Prosecutor referred to certain passages in Modi's Medical Jurisprudence & Toxicology in page Nos. 356 and 357 to show that the symptoms of such poisoning was present in this case also. The post-mortem report also showed that the wounds were not self-inflicted. According to P.W.5 there were wires lying on the floor which might have caused those wounds on "D" Therefore the motive was there. The existence of the bottle of tablets on the scene of occurrence had been proved and there was also evidence to demonstrate that A1 could have used force or physical violence to administer the poison to "D" What happened inside the four walls could only be proved by A1 and since she did not come out with the truth the presumption would be against her. He referred to the following decisions: Vadivelu Thevar Vs. The State of Madras, for the proposition that conviction could be justifiable on the basis of the testimony of the single witness and in M.G. Agarwal v. State of Maharashtra 1962 SCR 405 wherein the Supreme Court has dealt with the manner in which the evidence has to be appreciated in cases where the prosecution rests on circumstantial evidence. Swapan Patra v. State of West Bengal, (1999) 9 SCC 242 was relied upon the proposition if the falsity of defence plea could be used as an additional link in the chain of circumstances. State of Tamil Nadu Vs. Rajendran, was relied on the proposition that the opportunity to offer an explanation or offering of the false explanation to the accused in response to the incriminating circumstance was an additional link in the chain of circumstance to make the conviction justifiable. Bhupinder Singh Vs. State of Punjab, was relied upon to support the prosecution case that the manner of proving murder by poisoning is the same as in any other case. This is what the Supreme Court had to say, "the poison murder cases are not to be put outside the rule of circumstantial evidence. There may be obvious very many facts and circumstances out of which the Court may be justified in drawing permissible inference that the accused was in possession of the poison in question. The insistence on proof of possession of poison with the accused invariably in every case is neither desirable nor practicable. It would mean to introduce an extraneous ingredient to the offence of murder by poisoning.... The accused in a case of murder by poisoning cannot have a better chance being exempted from sanctions than in other kinds of murder. Murder by poisoning is run like any other murder".

In that case also the post-mortem report gave descriptions of injuries found on the body. The Supreme Court therefore, held that these injuries defied all doubts about the theory of suicide. The learned Public Prosecutor relied on this to support his case that the accused had been rightly convicted. He also relied on the decision reported in Joseph S/o Kooveli Poulo v. State of Kerala 2000 III CTC 305 for the proposition that

Courts have from the falsity of the defence plea and false answers given to Court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the

person concerned with the crime committed.

23. Learned Public Prosecutor submitted that in any case it was not necessary for the prosecution to meet each and every hypothesis put by the accused; if the cumulative effects of the case is established and is consistent only with the hypothesis of the guilt of the accused. For this he relied upon State of U.P. Vs. Ashok Kumar Srivastava, to meet every suggestion.

24. In reply, the learned Senior Counsel for A2 said that it was the bounden duty of the prosecution to discharge the burden of proof. The investigation is a pre-trial area where the evidence is being collected to find out the culprit. Inquest is to ascertain the cause of death. Demolishing the investigation by stating that the panchayatars in the inquest are unknown persons or by stating that the affidavit Ex-P9 was kept in the case diary and not forwarded to the Court will not help the prosecution. He also relied on E.D. Smith v. Emperor AIR 1980 SC 111 wherein the Division Bench of this Court has held.

No doubt an accused person is always entitled to hold his tongue but where the only alternative theory to his guilt is a remote possibility, which if correct, he is in a position to explain the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account.

The provisions of Section 106 and 114 of the Evidence Act are not without bearing on this point.

25. He further relied upon the decision reiterated in Shambu Nath Mehra Vs. The State of Ajmer, with regard to the effect of Section 106 Evidence Act. It is stated therein that

Section 106 is certainly not intended to relieve it of the duty on the prosecution to discharge the burden of proof. On the contrary it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience....

If the Section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder.

If the common object of A1 and A2 were to commit the offence u/s 302 IPC they would not have gone to Madras to bring back "D" taking P.W.5 along with them. The learned Senior Counsel submitted that this itself showed the innocence of the accused.

26. We have heard the arguments advanced by the three counsel. This is a case where "D" was brought dead to the Hospital. Since the Casualty Doctor found that it was a medico legal case as death is due to the tablets, he reported the death to the Police Officer. Investigation followed. On the basis of the injuries

found on the body of "D" a case was filed against the wife of "D" A1, u/s 324 IPC but at the end of the investigation the officer concluded that no offence was made out u/s 302 IPC. The case against the wife of "D" A1 for inflicting injuries on the deceased was filed which ended quietly on her own admission whereby she was released under the Probationers of Offenders Act. Enraged by what was perceived as miscarriage of justice the father of the deceased lodged a private complaint resulting in the conviction of the Appellants herein.

27. As rightly submitted by the learned Senior Counsel Mr. N. Natarajan, there might have been infirmities in the inquest. There might have been inadequate or improper investigation during the inquest. There may even be falsehood in the statements given by the accused. But, inquest and investigation were matters that preceded trial and the infirmities and the irregularities in pre-trial proceedings can never strengthen a weak prosecution case before the trial Court. The statement given u/s 313 of the Code of Criminal Procedure may be even proved to be false, but unless the falsity was intrinsic to the implicating circumstances the mere fact that the accused is a liar is not a good ground for conviction. The prosecution had examined five witnesses and produced several exhibits. If the case of the prosecution could not be sustained on the basis of the evidence produced before the Court it cannot seek to win on the ground of abdication or dereliction of duty on the part of the investigation officers. This submission of the learned Senior Counsel is absolutely justified.

28. It is a case of direct evidence up to a point and circumstantial evidence thereafter. We shall see if each link connects with the other and leads to the guilt of the accused. The first basic fact that it has to be proved is the motive. Two conflicting theories have been projected. One is that "D" was leading an immoral life with prostitutes in Calcutta. It has resulted in extreme dejection and dissatisfaction on the part of A1. Her complaints to her parents-in-law proved to be of no avail and therefore, she planned to confront "D" when he returned from Calcutta on 15-05-1984. The other theory advanced is A1 and A2 were having an illicit affair which was noticed by P.W. 1, the father of "D" who was unsettled by that. It was also noticed by P.W.5 who in fact reiterated to "D". "D" is alleged to have stated that since he had blackened the face, of his family by marrying A1, he cannot now do anything about the immoral conduct of A1. So we have on the one hand, the case of a wife who is unhappy about her husband's infidelity or the case of an unfaithful wife. In either way the fact that, there was resentment on the part of A1 is undeniable. The question is whether this resentment drove her to commit homicide or whether the depression of "D" on account of his wife's infidelity drove him to commit suicide.

29. The next link is possession of the poison. It was stated on behalf of the defence that the tablets having been bought under a Lot that could have been only purchased in Calcutta it was not possible for the accused to have possession of the same. But as it was pointed out by the prosecution the tablets were purchased in 1982, at which point of time both A1 and "D" had visited Calcutta.

If the tablets have been purchased recently when "D" alone visited Calcutta the possession could be fixed to "D" alone. But now in view of the fact that it was purchased in 1982 the possession cannot be fixed on "D" alone. A1 also had the opportunity to be in possession of the poison. Now where was the poison consumed? The learned Senior Counsel for the defence submitted that the evidence was not clear as to whether the poison was actually consumed? Therefore even if there was a remote possibility that "D" could have consumed the tablets in the train, that possibility should be accepted, in giving the benefit of doubt to the accused. But as per 313 of the Code of Criminal Procedure that the bottle was found at the scene of occurrence in the bed room of A1 and "D". Further, C.W.3 in his evidence stated that "P.W.5 told him that he saw Biswajit in the toilet holding a mug in his hand and crying". On the other hand, in the evidence of P.W.5 nothing was stated about "D" holding the mug in the latrine. In the statement given by the accused u/s 313 of the Code of Criminal Procedure. A1 states that she did not know anything after Biswajit left the room to go to the bathroom and according to A2. P.W.5 saw "D" holding a mug in one hand and a plastic container in the other inside the bathroom and "D" said that he had taken the tablets. So the presence of the bottle containing the Gardenal tablets in the place of occurrence is also established. "D" could not have consumed the 100 tablets, in the train, since it is unlikely that he would carefully pack the empty bottle into his bag after swallowing the poison. Any way it is no one's case that he appeared drugged or abnormal when he came of the train. Therefore, the only hypothesis that is possible with regard to the existence and consumption of the bottle of tablets is at the scene of occurrence.

30. As regards the injuries, on the deceased the case of P.W.5 is that A1, caused injuries on "D" burning him with a cigarette but in the car while returning from Madras to Pondicherry. The Doctor, P.W.4 in his evidence has stated this injury was caused by cigarette like object. While A1 admitted her guilt in inflicting these burns on the deceased in Calendar Case No. 4 of 1985 she denied the same in her statement u/s 313 of the Code of Criminal Procedure. While it may prove that she is a liar as stated by the prosecution, it is not sufficient to prove the prosecution case that she is a murderer. Next we come to the other injured which according to P.W.4 were caused due to blunt impact or nail-like object. P.W. 1 in his evidence has deposed as follows:

I met A1 and asked her how Biswajit could have sustained so many injuries on the body as claimed by her to be self-inflicted. But A1 told him that Biswajit's behaviour is known to me and he caused those injuries to himself to show that he is innocent.

31. Doctor P.W.4 states that all the injuries were ante-mortem. A1 had admitted to have inflicted these injuries in Calendar Case No. 4 of 1985. In his statement to C.W.3 during the course of investigation, P.W.4 had stated that the injuries found on the body of "D" were not self-inflicted and this is the reason why he had stated in his post-mortem report. Ex.P-22 that the death may be homicidal,

Of course, in his evidence P.W.4 states that he does not remember his statement to that effect before the police. But there is the presence of the injuries, and the opinion of the Doctor regarding the object which could have caused such a injury and the admission of guilt by A1 in Ex-P20 and the presence of antenna wire in the scene of occurrence spoken to by P.W.5 which was unchallenged in cross-examination shows that it is indeed. A1 who caused those injuries on the deceased.

32. As submitted by the learned Public Prosecutor what happened within those four walls can only be spoken to by A1. On 16-05-1984, A1 and A2, "D" and P.W.5 reached Pondicherry at 1.00 a.m. Immediately A1 and "D" went and locked themselves inside the room. Disturbed by the noise heard from the room, P.W.5 opened the door and saw "D" staggering into the lavatory. He is alleged to have been holding a mug in one hand. He had staggered out and fell down. This is about 3.00 a.m. By 3.50 a.m. "D" is dead, So all the events happened during the span of three hours and fifty minutes. According to P.W.5 it was at that point of time that he gave a slip of paper and to his suggestion that a Doctor should be brought A2 is alleged to have stopped him initially and then when "D" found some white material, coming out of the month, P.W.5 said that he found the phial on the window. At that time A2 told that it was supposed to be poison. P.W.5 gave him salt-water to make "D" vomit. This statement of P.W.5 that he gave warm salt-water to make "D" vomit is not denied by A1 or A2. In fact in their statements u/s 313 of the Code of Criminal Procedure, A1 admits that it is only P.W.5 who gave the warm salt-water and A2 also admits the same. When P.W.5 showed the phial to A2, immediately A2 had rushed to the house of Datta and soon after "D" was taken to the JIPMER Hospital where he was pronounced dead. So the time when "D" came out of the bath room and fell dead could not have taken more than thirty minutes because it must be remembered that P.W.5 broke into the room where A1 and "D" were present at 3 O' clock.

33. Now we look at Ex-D54, the answer to questions put by the Inspector of Police, CID in connection with the post-mortem examination. To question No. 8, "In what time does Barbitone generally prove fatal? The answer is "it varies from few hours to a week". P.W.4 who is a Doctor also had stated that depending upon the quantity of barbiturate consumed "D" would have fallen into coma like state within four to five hours of departure from Calcutta. In the extract from Modi's Medical Jurisprudence and Toxicology page 352, it is stated as follows:

The fatal period is not certain. Death may take place after several hours or days.

Therefore both Modi's Medical Jurisprudence and Toxicology and the opinion of the post-mortem Doctor shows that death by barbitone poisoning is not instantaneous, I takes a few hours. The possibility of "D" consuming the poison in the train has already been ruled out, since he is not likely to have swallowed it, closed the bottle again packed it safely in his bag and brought it to Madras. There was no evidence that he consumed it in the car. So the only possibility is that he should have taken it in the two hours when he and A1 were alone in the

room. Much was made by the learned Senior Counsel for the defence about the presence of alcohol in the body of "D". According to them, when there was no evidence to show that there was a bottle of alcohol at the scene of occurrence there is a break in the link in the evidence. The statement of P.W.5 in Ex.P9 is that A1 had the habit of consuming liquor and the same has not been contradicted by the defence in their cross-examination of P.W.4. So the consumption of alcohol in the house of A1 is not unnatural. Next the evidence of P.W.5 that whitish tablets came out from the mouth of the deceased and administering warm salt-water also shows that "D" could not have consumed the tablets on the train. It could have happened only when he was alone with A1 since it has already been demonstrated that "D" could not have consumed the tablets in the bathroom, since death by barbitone poisoning is not instantaneous.

34. Learned Senior Counsel for A1 had drawn attention to the fact that the small slip of paper on which "D" wrote a few lines was not produced by the prosecution with an intention to burke it so that the crime could be fixed on A1 and A2. This argument can cut both ways. According to P.W.5 the two lines that were written in English and he could not understand. It is not the letter written by "D" Ex-D23. As stated above this letter contained only two lines, "D" could have either written that he was taking his own life or he could have written that A1 had compelled him to swallow the tablets. In any event it is the case of P.W.5 that the entire house was swept and cleaned by the maid when they returned from the hospital. This could account for not only the absence of the slip of paper but also the absence of the bottle of alcohol. So no importance need be attached to the slip of paper for the purpose of securing the several links of circumstantial evidence.

35. In the decision reported in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, which is relied by the defence, the Supreme Court read out the conditions which must be fulfilled before a case against the accused based on circumstantial evidence could be said to be fully established.

(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 and 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.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

36. We have already referred to paras 163 and 164 of this judgment where Supreme Court laid down the four important circumstances which alone can justify a conviction, this case can be tested against the principle laid down by the Supreme Court.

(1) Is there a clear motive?

Yes, there is clear motive for the first accused. She was filled with anger with "D" either because he was unfaithful to her or because she was unfaithful to him by having illicit relationship with A2.

(2) Did the deceased died of the poison said to have been administered?

P.W.4. the postmortem Doctor in his postmortem certificate has deposed that the death is due to Gardenal poisoning and C.W.3 had stated, in his evidence, that the bottle seized from the scene of occurrence showed the Lot number and from this in the course of investigation he found out that that bottle contained Gardenal tablets which were purchased at Calcutta. Therefore, the deceased did die of consuming Gardenal tablets.

(3) Did the first accused have the poison, in her possession?

The bottle was found in the scene of occurrence viz., the room in which A1 and "D" closed themselves. As shown by the prosecution the tablets were purchased in 1982 itself. So the possibility that "D" could have purchased it at Calcutta only during this visit is ruled out. Therefore, A1 had access to the poison which caused the death of the deceased.

(4) Did the first accused had an opportunity to administer the poison to the deceased?

Yes, she had. She alone was with the deceased for about three and half hours prior to his death. If we exclude the fifty minutes from 3 o'clock to the time of death of 3.50 p.m. she alone had the knowledge as to what happened from 1.00 a.m. to 3.00 a.m. on 16-05-1984. Death by barbitone poisoning is confined by the doctor's opinion and postmortem certificate. Therefore, A1 alone knew whether she administered the poison to "D" by force or whether she forced him to take it or whether he took it himself. Here, her statement u/s 313 of the Code of Criminal Procedure that after "D" came out of the bathroom, he was shown the phial and seeing that "D" said that he had taken all the tablets was proved false. Since "D" could have only taken the tablets when he was with her, this false statement could be used as the additional link since the other essential conditions laid down by the Supreme Court in the judgment referred to above have been satisfied. The various links in the chain of events have been proved. The circumstance points out to the guilt of accused with reasonable definiteness

and the circumstance is the proximity with the time and situation. A1 alone knew in what manner "D" consumed the poison and A1 is not stating the truth in this Court. All the other details regarding her attempt to commit suicide her taking potassium permanganate. "D" vomiting because of drinking salt water are irrelevant. We need not take note of all the diversions to the path leading us to the identity of the perpetrator of the crime. There is motive, there is the poison, there is access, there is opportunity and there is proof regarding the cause of death.

37. We must remember however that the prosecution case is that there was a complicity between A1 and A2 in the crime and the offence was charged, u/s 302 read with Section 34 IPC. A2 had accompanied A1 and P.W.5 to Madras to fetch the deceased. He had returned with them. According to him, he was tired and slept through out the journey and he did not know how the burnt injuries were inflicted. The learned Public Prosecutor says that it must be a blatant lie. But even assuming it to be a lie, it will not advance the case of prosecution, so far as A2 is concerned. After they returned to Pondicherry, P.W.5 and A2 were together all the time. Only P.W.5 who gave the deceased the warm salt-water to make him vomit. But that alone cannot be a ground to establish his guilt. It is also the evidence of P.W.5 that when first suggested that they should call a Doctor. A2 said No. But it is also P.W.5's evidence that the moment he was shown the phial it was A2 who rushed to Doctor Datta and brought the car to take "D" to the hospital. Two lapses were pointed out by the prosecution on the part of A2 one by standing simply without doing anything when P.W.5 was offering salt water and the other is refusal to go to the Doctor at that juncture. These two lapses alone cannot be relied on to establish his guilt. There is nothing in the evidence to show that he knew what was happening inside the room. Nothing has been elicited in evidence to show that they had planned to poison "D" with Gardenal. It is possible that he did not help "D" and watched him die. It is also possible that he was having an illicit affair with A2 and therefore, knew what was going to happen inside. But there are mere suspicious factors. And suspicion cannot be a substitute for proof. At the same time, since the possibility that he like P.W.5 was just a person who happened to be there and watched helplessly while one event followed another cannot be ruled out, we must give him the benefit of doubt. The Prosecution's contention that the behaviour of the accused would show that he wanted to do away with the deceased cannot be accepted since the links in the chain of circumstantial evidence atleast as regards A2 was not complete. Unless the circumstances which have been established are consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence, he cannot be convicted. He is definitely entitled to the benefit of doubt. For these reasons, we set aside the conviction of A2.

38. As stated earlier though it is possible that A1 and A2 had the common intention to commit the murder of the accused, the common intention has not been proved beyond doubt. No doubt both C.W. 1 and C.W.3 have deposed in their evidence that A1 and A2 are living as husband and wife P.W.5 also says that

when he was running frantically to go and fetch the Doctor back and forth, he saw A1 and A2 standing together while "D" was on the floor almost dead. It is possible that both of them were buying time to ensure that the deceased is not saved by medical aid. It is the reason why A2 does not respond to P.W.5's request to call the Doctor. But these are all mere conjunctures and not established facts. As regards A1 we have already seen that she has failed to come out with the truth regarding the consumption of the poison tablets by "D". Either she could have made him to swallow it by force or with his consent under the pretext of both to take or the deceased would have swallowed it himself, if it was the third alternative then her normal reaction would have been to rush out of the room seeking help for her husband who had swallowed 100 Gardenal tablets. She did not do so. So "D" did not swallow the tablets on his volition. It could only be A1 who administered the tablets to him and as stated by P.W.1. A1 probably used force to make him agree to swallow the tablets. All the other possibilities have been ailed out and this possibility or the other one of A1 administering it by force alone remains. If out of two hypothesis one leans in favour of the accused we have to adopt that hypothesis. Hence all the circumstantial evidence points out to A1 committing the offence of culpable homicide but under Exception 5 to Section 300 IPC. It is seen from the correspondent that she is quite an independent intelligent woman. She obviously knew that consumption of so many Gardenal tablets would result in death of "D" and intended to cause the death of the deceased Therefore the offence would come u/s 304 part (1) IPC.

39. We therefore, set aside the finding of guilt as regards A2 and acquit him giving him the benefit of doubt. We confirm the findings of the trial Court with regard to the guilt of the accused A1. However, we set aside the sentence of life imprisonment u/s 302 I.P.C. and awarding lesser sentence of nine years rigorous imprisonment u/s 304 Part (1) IPC Hence the Criminal Appeal No. 502 of 1988 is dismissed with the above modification and the Criminal Appeal No. 509 of 1988 is allowed.

40. Before we part with this case, we place on record our appreciation for the strain taken by the learned Additional Public Prosecutor, Thiru R. Natarajan, who took us through the entire facts of the case with clarity and cogency in order to appreciate the case of the prosecution especially the circumstances of the case.