

(2009) 09 SC CK 0002

In the Supreme Court Of India

Case No : Criminal Appeal No's. 673 of 2001 and 835-836 of 2002

Sonali Mukherjee

APPELLANT

Vs

Union of India (UOI)
Dr. Battacharya Vs Sonali
Mukherjee and Others

RESPONDENT

Date of Decision : 30-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Penal Code, 1860 (IPC) — Section 302, 303, 304, 304(I), 306
Probation of Offenders Act, 1958 — Section 4(1)

Citation : (2010) AIRSCW 499 : (2009) 12 JT 626 : (2009) 13 SCALE 42 :
(2009) 14 SCR 858

Hon'ble Judges : V. S. Sirpurkar, J;H. L. Dattu, J;B. N. Agrawal, J

Bench : Full Bench

Advocate : Tapan Roy Choudhury, V. Krishnamurthy and R. Venkataramani,
Satyajeet Saha, V.D. Khanna, R. Nedumaran, Prasanth P., T. Harish Kumar, V.G.
Pragasam, Aljo K. Joseph and S. J. Aristotle, for the Appellant;

Final Decision : Disposed Of

Judgement

V.S. Sirpurkar, J.—This judgment will govern Criminal Appeal No. 673 of 2001, filed by one Sonali Mukherjee, original accused No. 1 (hereinafter called "A-1" for short), who stood convicted by the Second Additional Sessions Judge, Pondicherry and Madras High Court and Criminal Appeal Nos. 835-836 of 2002 filed by one Dr. Battacharya, the father of one Biswajit (deceased), challenging the acquittal of one Assadid Poddar (respondent No. 2 in Criminal Appeal Nos. 835-836 of 2002), original accused No. 2 (hereinafter called "A-2" for short) by the Madras High Court, as also modification of the conviction of Sonali Mukherjee (A-1) from Section 302 of the Indian Penal Code (hereinafter referred to as "IPC" for short) to Section 304 Part (I) IPC and imposing lesser sentence.

2. Both Sonali Mukherjee (A-1) and Assadid Poddar (A-2) were tried on the allegation that both of them had developed illegal intimacy between them, as a result of which, they (the accused persons) committed murder of Biswajit

(deceased), who was the husband of appellant Sonali Mukherjee, at Pondicherry. Both of them were convicted by the Sessions Judge, however, the appeal filed by Assadid Poddar (A-2) was allowed by the Madras High Court and he was acquitted. The High Court also acquitted Sonali Mukherjee of the offence u/s 302 but convicted her for the offence u/s 304 Part I, IPC.

3. This prosecution arose out of a private complaint by PW-1 Dr. Battacharya (appellant in Criminal Appeal Nos. 835-836 of 2002), the father of the deceased. Initially, the police investigation concluded that the death of the deceased Biswajit was a suicide. They filed a chargesheet against Sonali Mukherjee (A-1) only for the offences punishable u/s 324 and 309, IPC. Sonali Mukherjee (A-1) admitted her guilt and was released under the Probation of Offenders Act. The complainant Dr. Battacharya (PW-1) filed a criminal complaint, which ultimately resulted into a trial by Sessions Judge for the two accused persons for the offence punishable u/s 302.

4. The prosecution story as was unfolded by the complainant was that deceased Biswajit met Sonali Mukherjee (A-1) in 1976, when he was about 17 years old. It was he, who introduced Sonali Mukherjee (A-1) to his parents, however, the parents felt that he was too young for the marriage nor he had completed his studies and, therefore, objected to the association. Subsequently, Sonali Mukherjee (A-1) got married with one Alope Sarkar, however, apparently even after the marriage, the deceased kept in touch with Sonali Mukherjee (A-1) and after about six months, he expressed his desire to take care of Sonali Mukherjee (A-1), since her husband was torturing her. The parents felt that the deceased should not have any connection with a married woman and hence, he was sent to USA to pursue his higher studies. However, after the deceased came back from USA, he allegedly got married to Sonali Mukherjee (A-1). He tried to take Sonali Mukherjee (A-1) to USA, however, could not succeed. He discontinued his studies and returned to India in 1981 and thereafter, it was decided that Sonali Mukherjee (A-1) and the deceased should live in Pondicherry, since his grandmother was living in Aurobindo Ashram at Pondicherry. They, therefore, went to Pondicherry and started their life together in 1982. In September, 1983, they again tried to go back to USA, however, they could not succeed. It was the complainant Dr. Battacharya (PW-1), who started a shop in Pondicherry for Bengali Sarees and it was only in order to establish the deceased. The business was doing well, however, the deceased went thrice to Calcutta between January, 1984 to May, 1984, leaving Sonali Mukherjee (A-1) alone in Pondicherry. The last occasion when deceased went to Calcutta was on 1.5.1984 and he returned to Pondicherry only on 15.5.1984. Before three or four days of his arrival to Pondicherry, the parents of deceased got a phone call from Sonali Mukherjee (A-1), complaining that deceased was visiting the prostitutes in Calcutta. At that time itself, Sonali Mukherjee (A-1) allegedly threatened Geeta Battacharya (PW-3, the mother of the deceased) on phone that she would cut the deceased to pieces. This was reported to the deceased by his mother (PW-3). The deceased, however, assured that he would sort out the things and left Calcutta

for Pondicherry on 14.5.1984. He had also sent a telegram to Assadid Poddar (A-2), who was friend of Sonali Mukherjee (A-1), informing him of his proposed arrival on 15.5.1984 in the night by Coromandel Express and therein, he also requested to tell Sonali Mukherjee (A-1) not to leave for Calcutta.

5. On 16.5.1984, early morning, Dr. Battacharya (PW-1) received a phone call from his brother-in-law in Cochin, informing him that the deceased was in a serious condition. Therefore, Dr. Battacharya (PW-1) and Geeta Battacharya (PW-3), as also their other son took the evening flight from Calcutta and reached Pondicherry. A car was sent for them from Aurobindo Ashram and it was informed that their son Biswajit (deceased) had already expired.

6. Here in Pondicherry, on receipt of the information from the hospital, First Information Report (FIR) was registered by Muthialpet Police Station, being FIR No. 103/1984 u/s 174 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C." for short). Dr. Battacharya (PW-1) identified the dead body of his son (deceased). The inquest was conducted on the dead body on 16.5.1984. The body was sent for post mortem. Dr. . Sahay (PW-4) conducted the autopsy and found on his external examination:

(i) copious amount of latery froth, white in colour, mixed with tinge of blood, present around the mouth and nostrils.

(ii) scalp hair, in and around anterior fontonella area, were found to be cut short compared to rest of the hairs and

(iii) eyes and mouth were closed.

The injuries, which were found in the post mortem were:

(i) seven burn marks round in shape, each of 0.5 c.m. 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 1 c.m. diameter in six (including depth). Rest were skin deep only.

(ii) Left upper eye-lid was swollen and bluish in colour. Conjunctive of both the eyes were congested.

(iii) Three linear scratches running along the length of upper limb situated in the middle of lateral aspect of left forearm. Each was a line's width, carrying in length from 3 to 6 cms. These were parallel to each other. Each was situated at 1 cm. distance from the closer one.

7. The viscera was sent by Dr. Sahay (PW-4), the Doctor conducting autopsy, for chemical examination and it suggested the presence of barbiturate and alcohol. The cause of death, according to Dr. Sahay (PW-4), was due to Gardenal poisoning. Ultimately, the body was cremated on 17.5.1984 in the evening. Dr. Battacharya (PW-1) and his wife Geeta Battacharya (PW-3) returned to Calcutta and thereafter, Subbash Dass (PW-5), a servant of the deceased, also reached Calcutta after some days. He narrated the events which led to the death of the

deceased to Dr. Battacharya (PW-1). It was through him that Dr. Battacharya (PW-1) came to know that barbiturate tablets were consumed by the deceased, with the knowledge of Sonali Mukherjee (A-1) and Assadid Poddar (A-2) and that A-1 and A-2 had illicit relationship, which was objected to by the deceased. As per the narration of Subbash Dass (PW-5), it came out that the events which led to the death of the deceased started from the evening of 14.5.1984. On that day, after closing the shop, the said witness went to the house of the deceased and he was informed by Sonali Mukherjee (A-1) that they had to go to Madras on the next day. He was also told that if the deceased does not arrive from Calcutta, then Sonali Mukherjee (A-1), herself, would go to Calcutta, since the deceased was spending all his time in the company of prostitutes. According to Subbash Dass (PW-5), he had refused to go. However, on the next day, Sonali Mukherjee (A-1) insisted on Subbash Dass (PW-5) to accompany her to Madras. Therefore, Subbash Dass (PW-5), Sonali Mukherjee (A-1), Assadid Poddar (A-2) and one Subir, reached Madras at 5.30 p.m. and went to the Railway Station. There, Sonali Mukherjee (A-1) again told Subbash Dass (PW-5) that if the deceased does not arrive by Coromandel Express, she would herself go to Calcutta on the next morning. Coromandel Express arrived a little late and the deceased did come out from the train. When he reached the gate of the Station, Sonali Mukherjee (A-1) went to him and began to cry in presence of Assadid Poddar (A-2) and others. A Police personnel intervened, however, the deceased said that it was a domestic matter and they returned to the hotel.

8. Then, Assadid Poddar (A-2) engaged a taxi at the instance of the deceased and all of them started for Pondicherry. Sonali Mukherjee (A-1), the deceased and Assadid Poddar (A-2) sat in the rear seat, while Subbash Dass (PW-5) sat in the front with the driver. On the way, Subbash Dass (PW-5) heard a cry of pain and he turned back only to find Sonali Mukherjee (A-1) burning the left arm of deceased with the lighted cigarette end. When Subbash Dass (PW-5) tried to stop it, Sonali Mukherjee (A-1) asked him not to look behind and just sit in the front. Ultimately, they reached Pondicherry, released the taxi and entered the house. Sonali Mukherjee (A-1) and the deceased went to the bedroom, while Assadid Poddar (A-2) and Subbash Dass (PW-5) remained outside. Subbash Dass (PW-5) could hear cries from inside the room and when he was about to knock, Assadid Poddar (A-2) prevented him, saying that it was a matter between husband and wife. He heard a loud cry and, therefore, he kicked the door and the door opened. He entered the room and found that the deceased was lying on the bed with face downwards. There were pieces of cut hair on the bed alongwith a hair brush and a wire and Sonali Mukherjee (A-1) was beating the deceased with a piece of antenna wire. When Subbash Dass (PW-5) tried to stop, he was also beaten by wire. Subbash Dass (PW-5) found swelling on the back of the deceased. He also found the parts of mustaches and cropped pieces of hair lying on the floor. After sometime, deceased got up to go to the bathroom. He was staggering and hence, Subbash Dass (PW-5) tried to help him, but deceased refused his help. Afterwards, Subbash Dass (PW-5) heard a sound of crying from

inside the bathroom. Since the deceased did not come out for considerable time, Subbash Dass (PW-5) put his arm on the top of the partition wall between the bathroom and lavatory and found the deceased standing and crying. He found that door was not bolted but simply closed and, therefore, he opened the door and brought the deceased to his bedroom, when he found Sonali Mukherjee (A-1) and Assadid Poddar (A-2) talking to each other. He made deceased lie on the bed. The deceased asked for a piece of paper and wrote down two lines in English, which could not be understood by Subbash Dass (PW-5). There was a date written on the top, being 16.5.1984. Subbash Dass (PW-5) asked the deceased whether he should fetch a Doctor. Deceased refused, however, Subbash Dass (PW-5) had fetched a Doctor. Assadid Poddar (A-2) came from behind and said that there was no need to call a Doctor.

9. When Subbash Dass (PW-5) ultimately returned, he found A-1 and A-2 in the room and the deceased was lying in an unconscious state and some white things like pieces of white tablets were coming out of his mouth. Subbash Dass (PW-5) found a phial. He showed it to Assadid Poddar (A-2), who said that it was poison. Therefore, some salt water was given by Subbash Dass (PW-5) to the deceased. The deceased vomited some small broken and whole pieces of tablets. Subbash Dass (PW-5) insisted on calling a Doctor, hence, Assadid Poddar (A-2) went to the house of Dr. Datta. Assadid Poddar (A-2) had gone to the Doctor with phial, while Subbash Dass (PW-5) went in search of father and mother of Assadid Poddar (A-2). Doctor also said that it was a poison and asked Assadid Poddar (A-2) to shift the deceased to JIPMER Hospital. They went to the Hospital together. The Senior Doctor, who came, pronounced the deceased as 'dead'. Hence, a medical officer lodged an FIR D-47 at 3.30 hrs., reporting the death that the deceased had swallowed about 100 tablets. It was thereafter that the dead body was sent to mortuary. Then Sonali Mukherjee (A-1), Assadid Poddar (A-2) and Subbash Dass (PW-5) returned back. When they returned home, Sonali Mukherjee (A-1) and Assadid Poddar (A-2) asked the maid servant to clean the room. When father of Sonali Mukherjee (A-1) arrived, Subbash Dass (PW-5) began to explain everything and he was told that he should not tell anything to the police. Then on 20.5.1984, the elder brother of Sonali Mukherjee (A-1) arrived and again Subbash Dass (PW-5) was tutored that he should not say about what had happened. He was kept under lock by the family of Sonali Mukherjee (A-1) and was threatened by the brother of Sonali Mukherjee (A-1) that he would be beaten, if he tried to escape, however, he managed to run away and reached the police station. On the same day, he reached Madras and boarded the Howrah Madras Mail and reached Calcutta and met Dr. Battacharya and narrated the whole story leading to the death of Biswajit.

10. In the meantime, on 21.5.1984, the provisional post mortem certificate was sent by Dr. Sahay (PW-4), wherein it was stated that the cause of death may be homicidal because of the injuries which were not self-inflicted. The investigation at this stage was shifted to Ramalingam (CW-1) and ultimately, the original chargesheet for offence u/s 174 Cr.P.C. was altered into Section 302 IPC. CW-1

then proceeded with the investigation. A letter was sent by Dr. Battacharya (PW-1) to the Senior Superintendent of Police on 26.5.1984, wondering if there was trace of foul play. This letter is on record as Exhibit P-10. Again one letter was written to CW-1, bringing to his knowledge, the information received by Dr. Battacharya (PW-1) from Subbash Dass (PW-5). He raised a genuine doubt as to whether the death was a suicidal or homicidal death. The investigation was transferred to CBCID and was continued by S. Shanmugasundaram (CW-3), the Inspector of Police, CID Branch, Pondicherry.

11. On 30.5.1984, Subbash Dass (PW-5) was threatened at Calcutta by the brother of Sonali Mukherjee (A-1) and, therefore, he was entrusted by Dr. Battacharya (PW-1) to the care of one Sarogi. Subbash Dass (PW-5) told him all that had happened at Pondicherry and also swore an affidavit, which was ultimately marked as Exhibit P-9. The same was also forwarded to S. Shanmugasundaram (CW-3), the Investigating Officer. CW-3 found that the bottle, which contained the Gardenal tablets, was purchased at Calcutta. He, therefore, went to Calcutta for further investigation and after thorough investigation, CW-3 concluded that from the material available, no offence u/s 302 IPC could be made against the accused, however, the only charge that could be made was u/s 306 IPC. However, he was of the opinion that Sonali Mukherjee (A-1) should be prosecuted for offence u/s 324 IPC for causing injuries to the deceased, as also u/s 309 IPC for attempting to commit suicide. Accordingly, Sonali Mukherjee (A-1) was chargesheeted. This was informed to Dr. Battacharya (PW-1). On 22.3.1985, final order came to be pronounced in aforementioned Calender Case No. 4 of 1985, whereupon Sonali Mukherjee (A-1) pleaded guilty to the charges and instead of convicting her, she was released u/s 4(1) of the Probation of Offenders Act on executing a bond for Rs. 500/-. When all this was known by Dr. Battacharya (PW-1), he filed a complaint on 21.6.1985, in which he made all the aforementioned allegations.

12. After the complaint was filed before the Chief Judicial Magistrate (CJM), Pondicherry on 21.6.1985, the CJM committed it to the Court of Sessions Judge. The Second Additional Sessions Judge then ultimately tried the Sessions Case No. 34 of 1986. In all, five witnesses were examined on behalf of the prosecution, while four witnesses were examined as Court witnesses. Number of documents were got proved like Exhibit P-1 to P-24. The defence also led some evidence and on the basis of all the evidence, the two accused came to be convicted by the Sessions Judge for an offence punishable u/s 302 read with Section 34 IPC and were sentenced to undergo the life imprisonment. A fine of Rs. 100/- was also imposed upon, in default of which, they were to undergo imprisonment of one more month.

13. As has been stated earlier, the appeal was filed before the Madras High Court, wherein Assadid Poddar (A-2) came to be acquitted, while the conviction in case of Sonali Mukherjee (A-1) was modified to one u/s 304(I) IPC and the sentence of life imprisonment u/s 302 IPC was set aside and lesser sentence of

nine years' rigorous imprisonment u/s 304 Part (I) IPC was awarded. While Sonali Mukherjee (A-1) has challenged her conviction in Criminal Appeal No. 673 of 2001, the original complainant Dr. Battacharya, by filing two separate appeals, has challenged the verdict of the High Court, converting the conviction of Sonali Mukherjee (A-1) from the offence u/s 302 to Section 304 Part (I), as also the total acquittal of Assadid Poddar (A-2). All these appeals are now before us for consideration.

14. Facts can be more fanciful than fiction and that was the case in this prosecution, as also in appeal. Here was a case, where according to the prosecution, Biswajit (deceased), who was a teenager, got infatuated by Sonali Mukherjee (A-1). So much so that his parents got worried, as in those initial days of infatuation, he was neither a major nor had he completed his education. He was, therefore, sent to USA, wherefrom he came back and got married to Sonali Mukherjee (A-1). Sonali Mukherjee (A-1) pleaded in her examination that she was married to the deceased even when she had not obtained separation (probably meaning, divorce) from her husband Alope Sarkar, with whom she was already married. There does not seem to be any serious dispute about the relations between Sonali Mukherjee (A-1) and the deceased prior to her marriage, but it is clear from the evidence of Dr. Battacharya (PW-1), as also Geeta Battacharya (PW-3) that there was a love affair between Sonali Mukherjee (A-1) and Biswajit (deceased) and the parents, i.e., Dr. Battacharya (PW-1) and Geeta Battacharya (PW-3) had initially not approved of the same. It is after her marriage that Sonali Mukherjee (A-1) and the deceased came to Pondicherry after a brief stay at Bombay and Cochin. According to the prosecution story, Sonali Mukherjee (A-1) developed illegal intimacy with Assadid Poddar (A-2) and probably as a result of the same, committed murder of Biswajit. Before proceeding, it would, therefore, be necessary to examine as to whether Biswajit (deceased) died a homicidal death.

15. Biswajit (deceased) was brought to JIPMER Hospital and the Doctors declared him "brought dead". We have already referred to the internal and external injuries in the earlier part of this judgment, therefore, we need not repeat them. Fact of the matter is that there were seven burn marks on the left upper arm. Secondly, his left upper eye-lid was swollen and bluish in colour and thirdly, there were three linear scratches alongwith the length of upper limb of his left forearm. In the post mortem report, it is suggested that the burn injuries could have been caused by cigarette like object, while the second injury was likely to have been caused by a blunt object and the last injury, i.e., three linear scratches, could have been caused by a nail like object. In the final opinion given by the Doctor in the post mortem examination, which was after the examination of viscera, it was suggested that his viscera contained barbiturate, as also alcohol. Evidence of Dr. Sibal, who was examined as Court Witness (CW) No. 4, does not help the prosecution for the reason that he had refused to identify the initials Dr. Shyam Mohan on Exhibit C-1, which was the first document relating to Biswajit's death. Exhibit D-55 is the report by the Causality Medical Officer and it was at 3.50 a.m.

on 16.5.1984, allegedly signed by Dr. Shyam Mohan, whose signatures were refused to be identified by Dr. Sibal (CW-4). However, it seems to be established position that Biswajit was declared dead at 3.50 a.m. on 16.5.1984. According to the opinion of Dr. Sahay (PW-4), the death was caused as a result of ingestion of barbiturate. He had deposed that viscera was sent for chemical examination and as per the report Exhibit P-17, it showed the presence of barbiturate and alcohol of 0.19 gram percent. He also deposed that barbiturate should have dissolved in alcohol and that the presence of alcohol aggravates the action of barbiturate. A very important statement has come in his evidence that:

Normally, one cannot distinguish between homicidal poisoning and suicidal poisoning.

In his remark, he had suggested that it might have been homicidal, since there were injuries on the body of the deceased, which arose suspicion. He admitted in his cross examination that from October, 1964, for three years, he was not allowed to conduct post mortem examination, as those were conducted by the Pathology Department. A very interesting answer comes to the effect that because he was following the righteous path, though there were no charges against him, he was not allowed to do post mortem examination. He, however, admitted that though after initial denial, he appeared before the Medical Board and he was asked by the Board to take treatment in the Psychiatric Department. He further deposed that he did not know whether the Board certified that he suffered from Paranoid Schizophrenia. He was put a direct question that before he conducted the post mortem, he was suffering from hallucination and illusion, which he denied. He further denied that the description of the injuries given by him was illusory and that Dr. Baruva had instructed him to take special interest in this case. He, however, admitted that Dr. Baruva told him the family history of the deceased. He was confronted with his earlier statements made to the police that he took interest in this case, which he denied. He, however, admitted that Dr. Baruva, who was a student of Dr. Battacharya (PW-1), though had made a statement that he (Dr. Sahay) had handed over the viscera to Dr. Bala Subramaniam, he denied the fact, but admitted that he might have accompanied the staff. In his further cross examination, he asserted that the injuries were anti-mortem and gave the reason therefore, however, admitted that the quantity of barbiturate was not mentioned, as it was not possible to mention the quantity. He also asserted that it was not possible that before how many hours of the post mortem, the poison had been consumed. He further expressed his inability to fix the duration of injuries as the case was old and he was not having the records. He was given a direct suggestion that in order to oblige Dr. Baruva, he had mentioned in Exhibit P-22 that it was a homicidal death. He was confronted with the original of Exhibit P-22 and he admitted that the words "may be homicidal" were the additions made. This was after he was made to say that he should be careful in insertions and deletions in post mortem certificate. To the specific question that minus these words, Exhibit P-22 would be different, his answer was that:

It is for you to decide.

One more contradiction was put to him to the following effect:

I mentioned as homicidal, it does not mean, it is a murder. It indicates that the injuries found on the body of Biswajit were not self-inflicted. In other words, the injuries were caused by other persons which is technically called as homicidal injuries.

Further statement made by him was also put to him, which is to the effect:

It was said 'may be homicidal', it means it may not be homicidal. In other words, it may be suicidal also. It is difficult to explain the difference between homicidal poisoning and suicidal poisoning.

He was then confronted with his following statements:

Even before getting the viscera report, it might be homicidal.

and

In my final opinion, it may be the case of suicidal also.

All these statements were got proved by the defence in the examination of the witness S. Shanmugasundaram (CW-3) who was Superintendent of Police, South Pondicherry and at the relevant time, was Inspector of police. He was the one, who recorded the statement of Dr. Sahay (PW-4). All the aforementioned statements were got proved from him.

16. The evidence of these two witnesses and more particularly, the Doctor, who conducted the post mortem examination, puts us on guard. A death by poisoning could be in three ways. Firstly, by accidental ingestion; secondly, by suicidal ingestion; and thirdly, by homicidal ingestion. The evidence of Dr. Sahay (PW-4) very clearly suggests that the Doctor was not himself certain as to whether the death by poisoning was homicidal. In his evidence, he specifically admitted that it was very difficult to differentiate between suicidal poisoning and homicidal poisoning. We must note that the Doctor has not given any specific reason to support his deduction that the death might have been homicidal. On the other hand, his evidence in the Court was riddled with contradictions, which contradictions were got proved through the police officer, who recorded his statement. They are very substantial contradictions. It was suggested firstly that this Doctor was himself a mental patient. We of course, cannot say as to whether at the time when he conducted the post mortem, he continued to be a mental patient of Paranoid Schizophrenia, but he himself admitted that he was asked by the Medical Board to take the treatment for mental disease. Secondly, he appears to be extremely fickle minded. His evidence does not create any confidence. He came as an expert witness and he had no explanation as to why he had expressed that it could be a suicidal poisoning. We do not give much importance to the suggestion by the defence that here was a witness, who was asked by Dr. Baruva to take interest in the matter. It will be too far-fetched to

hold that it was because of the intervention of Dr. Baruva that the witness took the so-called interest in the post mortem. Further upon a basic fact as to whether the poisoning was suicidal or homicidal, much better evidence was expected from the prosecution. The witness PW-4 had said nothing in support of his deduction that it was a homicidal poisoning.

17. We have seen the original post mortem report and we do find the words "may be homicidal" to be inserted later on. We do not see any reason why there had to be the insertion. The witness has not explained also. This puts us on guard. His damaging statements made, which we have quoted above, were got proved, wherein he had made some suspicious and casual statements like though he had mentioned it as homicidal poisoning, he did not mean that it was a murder. We have deliberately quoted the proved contradictions, in which he had suggested that in the absence of any such remark regarding the poisoning being homicidal, the case could have been thrown in the dustbin. As per his proved contradiction, the witness knew that Dr. Baruva was a student of Dr. Battacharya (PW-1) and he had asked him to take interest in the case. His further remark was extremely diabolical that the words "may be homicidal" could mean may not be homicidal also. All this contradictory version does not inspire any confidence. However, the fact of the matter is that the death had taken place.

18. The prosecution has further led the evidence regarding the phial which was lying in the room where Biswajit died. In that we have the evidence of two witnesses, namely, Ramalingam (CW-1) and S. Shanmugasundaram (CW-3). Initially it was Ramalingam (CW-1) who was the Investigating Officer. In his evidence, S. Shanmugasundaram (CW-3) who took over the investigation has revealed that the said Gardenal tablets were purchased at Calcutta at Lot No. 185. It has also come in his evidence that the said particular lot number was sold only at Calcutta. He collected this information from one A.K. Dutta, the Sales Development Officer in charge of May & Baker Company. From this, the prosecution probably suggested that the tablets which were sold only in Calcutta, must have been procured by the accused. We fail to see as to how such an inference could be possible on the basis of this evidence. The tablets could have been bought even by the deceased or by anybody else. Unless it was specifically proved that the tablets were available only at that place exclusively, no inference can be drawn that it was Sonali Mukherjee (A-1) or Assadid Poddar (A-2), who procured the tablets. They were ordinary sleeping pills, the overdose of which would have been fatal. The pills, however, were not poison. Therefore, the procurement of the sleeping pills, in our opinion, would lead nowhere. Therefore, the circumstance that the Gardenal tablets were purchased from Calcutta, does not help the prosecution.

19. On this backdrop, when we examine the prosecution case, it is shrouded in confusion. It is not the case of the prosecution that the tablets were accidentally taken. On the other hand, the prosecution specifically contends or at least seems to contend that the tablets were not taken by Biswajit accidentally. Now there

remain only two possibilities, one, that the tablets having been swallowed by Biswajit himself; and second, the accused persons putting the tablets into the mouth of Biswajit surreptitiously or under some pretext or forcibly. The exact number of tablets swallowed by Biswajit has not been established by the prosecution. But the number had to be substantial otherwise Biswajit would not have died because of the swallowing of those tablets. Of course, it has come in the evidence of the doctors that alcohol might have aggravated the effect of barbiturate and the barbiturate was soluble in alcohol. It is nobody's case and, more particularly, that of Subbash Dass (PW-5) that there was any drinking activity after the accused persons and the deceased came back from Madras. There does not appear to be any evidence on record suggesting the availability of the alcohol in that room at the relevant time and that the deceased was so inebriated that he had lost all his control and could be made to do anything including swallowing of the tablets.

20. On the other hand, the evidence of Subbash Dass (PW-5) suggests that Biswajit was crying and he was conscious in the sense that he was not immobilized at that time. In this behalf when we examine the evidence of Subbash Dass (PW-5), it comes out that Sonali Mukherjee (A-1) was alone with Biswajit in the room after they returned from Madras, for quite some time. The witness then suggests that he forced open the door of the room and all the time Assadid Poddar (A-2) was constantly with him. The witness further suggested that after he forced open the door, he found Biswajit lying on the bed and thereafter he got up to go to the toilet. When Subbash Dass (PW-5) tried to help staggering Biswajit, Biswajit refused that help and went into the bathroom. S. Shanmugasundaram (CW-3) further confirms that he saw from over the wall that Biswajit was crying leaning against the wall. Therefore, it is not as if Biswajit was immobilized so that the Sonali Mukherjee (A-1) or as the case may be Sonali Mukherjee (A-1) and Assadid Poddar (A-2) would be able to put some tablets into his mouth and make him swallow the same. The only two other possibilities of the introduction of the tablets to Biswajit could be the forcible opening of his mouth by the accused and putting the tablets into his mouth and compel him to swallow the same or, secondly, Biswajit himself taking the tablets. It must be noted here that when we see the medical evidence and more particularly, the injuries described by Dr. Sahay, there is no injury on the face of Biswajit. The injuries were on the other parts of the body and they were extremely insignificant injuries. At least the injuries nowhere suggest that his mouth was forced open and then the tablets were put into his mouth compelling him to swallow the same. That does not appear in the tenor of evidence of Subbash Dass (PW-5). For that matter, if we accept the evidence of Subbash Dass (PW-5) on the aspect as to what exactly happened on that night in that room, then there would be no other view possible excepting to exonerate Assadid Poddar (A-2) at least insofar as the introduction of the tablets to Biswajit is concerned. The witness very clearly says that all the time till the door was closed, Assadid Poddar (A-2) was outside and it was only Sonali Mukherjee (A-1), who was with

Biswajit. In our view, it must be impossible for a lady like Sonali Mukherjee (A-1) to force open the mouth of Biswajit and put the tablets into his mouth and make him swallow the same. That indeed does not appear to be a possibility nor is that established by the evidence of Subbash Dass (PW-5). If Biswajit himself swallowed the tablets, may be on account of the bickering with Sonali Mukherjee (A-1) or may be due to the wordily fights going on between Sonali Mukherjee (A-1) and him, it cannot then be homicidal poisoning. It cannot be forgotten that it has come in the evidence of Subbash Dass (PW-5) that he had seen Biswajit leaning against the wall and weeping and contradiction was proved on the part of Subbash Dass (PW-5) by the evidence of Inspector Ramalingam (CW-1) (whom he called "Subhash Bhattacharya" for some inexplicable reason) whereby PW-5 had stated before the Inspector to the following effect:

I did not tell the police Inspector Ramalingam of Muthialpet, Cirol that when I scaled the wall which separates the latrine from the bathroom, I found that Biswajit was slanting on the wall, holding a plastic mug in one hand and a plastic container in the other hand.

The witness Ramalingam in his evidence admitted in the following words:

Subhash Bhattacharya told me that he climbed over the wall and peeped through the opening to see inside the latrine and saw Biswajit slanting on the wall of the latrine holding a plastic mug in one hand and a small plastic container in his other hand.

21. This is a very material piece of evidence as Subhash Dass had refused in his evidence that he had stated so in his statement. This creates a great doubt as to how Biswajit swallowed the Gardenal tablets, whether he swallowed the same on his own which would amount to his attempt to commit suicide or whether the tablets were forcibly or surreptitiously or accidentally put in his mouth by Sonali Mukherjee (A-1) and Assadid Poddar (A-2) or anyone of them. There can be no dispute that on the examination of the Viscera of Biswajit, alcohol mixed with barbiturate was found. Therefore, he must have consumed the alcohol. We do not have anything on record to support fully that it was Sonali Mukherjee (A-1), who gave the alcohol to Biswajit or, for that matter, any alcohol was available at all there in that room. On a very substantial issue, therefore, a reasonable doubt is created about the administration of the sleeping pills to Biswajit. Did he swallow the same on account of the inebriation on his part or was he persuaded to swallow the same on account of his having lost his power to reason on account of the alcohol or were the sleeping tablets forced into his mouth? Unfortunately, the evidence of Subbash Dass (PW-5) falls short to prove any of these circumstances and the whole story then remains shrouded in mystery. This witness was specifically asked about the condition of Biswajit when he forced open the door. He asserted that in the following words:

I am not sure when Biswajit left for the toilet after I entered the room. It may be 8 or 10 minutes. But I don't think it would be so much. But it would be 4 or 5

minutes. When Biswajit was leaving the room for the bathroom, he went alone. He did not require anybody's help to go to the bathroom. But he was weeping, crying, when he was going. It is not correct to say that he was normal when he was going to the bathroom. He was swaying from side to side. He was holding on to things on his left hand side and he, then, entered the bathroom which was on his right hand side.

22. This suggests that even at that time, which was much after the couple entered the room for the first time, that Biswajit was not only alive but he was in a position even to refuse anybody's help to go to the bathroom. If we read this evidence in the light of the contradiction which was proved by Ramalingam (CW-1) then it at least creates a doubt that Biswajit who carried a plastic container and mug to the bathroom might have or could have swallowed the tablets inside the toilet room. In fact another contradiction which was got proved is to the following effect:

I did not tell Inspector Shanmugasundaram that during the period when I went into the bathroom, A-1 tried to commit suicide by hanging herself with a saree. I did not tell S. Shanmugasundaram and Inspector Ramalingam that Biswajit came out of the bathroom out of my request.

23. The Inspector S. Shanmugasundaram (CW-3), however, has admitted that even Sonali Mukherjee (A-1) had tried to commit suicide and she was treated by the doctors. These things put together make the prosecution case extremely suspicious. Even this witness S. Shanmugasundaram admitted in his evidence that Sonali Mukherjee (A-1) had tried to commit suicide by taking Potassium Permanganate crystals. It cannot be ignored that the Sonali Mukherjee (A-1) was tried on account of that offence and was convicted and granted probation. If Sonali Mukherjee (A-1) herself was in such perturbed mental state, could she then either persuaded Biswajit to swallow 100 tablets or forcibly put 100 tablets into Biswajit's mouth. If she had persuaded Biswajit to swallow 100 tablets, there would undoubtedly be an offence u/s 306 IPC, however, the fact remains that that circumstance is neither proved nor even alleged as a prosecution case. Prosecution case is simply to the effect that Sonali Mukherjee (A-1) and Assadid Poddar (A-2) have committed murder of Biswajit. Considering the total lack of evidence on this aspect, it is very difficult to come to a definite conclusion that Sonali Mukherjee (A-1) persuaded Biswajit to swallow the tablets. We would, therefore, choose to reject that possibility. The only other possibility left is that Biswajit was forcibly made to swallow the tablets. We have already looked into the medical evidence for that purpose and more particularly, the injuries on the body of Biswajit (deceased). The injuries are not suggestive of forceful administration. The injuries are of three types. Firstly, there are seven burn marks, which according to Subbash Dass (PW-5), were given by Sonali Mukherjee (A-1) when they were traveling from Chennai to Pondicherry in a car. These burn marks cannot have any nexus with the swallowing of 100 tablets forcefully. Second injury is left upper eye-lid was found swollen and bluish in

colour. Even this injury has nothing to do and could not be connected with the forcible swallowing. Then there are three linear scratches on the left forearm. Obviously, these injuries would have nothing to do with the forcible administration of tablets to Biswajit. Very significantly, there are no injuries on the mouth or cheek of Biswajit, which we would have expected if there was a theory of forcible ingestion of the tablets. The prosecution has no evidence whatsoever, nor did the prosecution suggest that the tablets were fed by some trick like, firstly, dissolving the tablets in alcohol and then giving that alcoholic drink to Biswajit (deceased). For that matter, there is no evidence. This is apart from the fact that Subbash Dass (PW-5) has not even whispered about Biswajit's drinking after he reached Pondicherry. The theory of mixing the tablets in the drink gets further blow, inasmuch as, when Biswajit was made to vomit by Subbash Dass (PW-5) by giving him the lukewarm water, he actually vomited the broken and intact tablets. Therefore, one thing is certain that Biswajit had swallowed the tablets straightaway without mixing or dissolving the said tablets in any other drink. There is enough evidence to the effect that when Biswajit vomited, some half broken tablets came out from his mouth. In fact, only on that basis, it was deduced by Subbash Dass (PW-5) that Biswajit had swallowed certain tablets and from a phial, which he took to Dr. Datta, who told him and Assadid Poddar (A-2) that the tablets were poison and on that basis, Biswajit was also advised to be shifted to the hospital. Now, all this leaves only one possibility and that is of Biswajit's swallowing the tablets himself, which theory, if accepted, we have to exonerate both A-1 and A-2.

24. At this juncture, it will be helpful to see the evidence of Subbash Dass (PW-5) in details. He is the only witness at Pondicherry, who suggested that Sonali Mukherjee (A-1) had illicit intimacy with Assadid Poddar (A-2) and she used to share Assadid Poddar's bed during the absence of Biswajit. Barring this witness, prosecution has not been able to produce any witness or any other circumstance, which would justify the inference of the illicit intimacy between A-1 and A-2. That evidence is also suspicious, as no details have been given by this witness in support of his claim of such illegal intimacy. In his evidence, Subbash Dass (PW-5) asserted that from 1 a.m. to 3 a.m. on 16.5.1984, Sonali Mukherjee (A-1) was alone with Biswajit and at 3 a.m., when he entered the room by kicking the door, he found Biswajit crying. The witness has asserted that there was bleeding on Biswajit's back and there was also swallowing. In the post mortem, no such injury was found. His further claim that Biswajit wrote two lines in English and requested him to hand over the letter to his father belied the theory that Biswajit was totally overpowered or was not in proper mental state. If at 3 a.m., Biswajit could write something and tell this witness to reach the letter to his father and further to see that his dead body is not removed before his father's arrival, then it cannot be denied that Biswajit was alive at 3 a.m. The witness saw the further happenings for some time, waited for about 10-15 minutes, when he found Biswajit unconscious. The witness also goes on to say that Biswajit was moved to Hospital and he was declared dead at 3.50 a.m.

25. The claim of this witness that Sonali Mukherjee (A-1) and Assadid Poddar (A-2) had asked the maid-servant to clean the room and sweep away everything that was in the room, appears to be far-fetched for the simple reason that even Sonali Mukherjee (A-1) admittedly was in the hospital and was under the treatment because she had attempted to commit suicide while the presence of Assadid Poddar (A-2) in the house of Sonali Mukherjee (A-1) and the deceased in their absence was not probable. The sinister silence of this witness speaks volumes against him. According to him, he was questioned by Ramalingam (CW-1) on 20.5.1984 and he was instructed by the relatives of Sonali Mukherjee (A-1) not to speak out the things to Ramalingam (CW-1). That is unrealistic. Then he made a fantastic claim that he was kept under the lock and key and he was beaten. It is ridiculous that he could escape easily by the backdoor and in that attempt, he was tried to be assaulted by Sonali Mukherjee (A-1) by bonti (an instrument for cutting vegetables). He further claimed that he had reached Howrah somewhere on 23.5.1984 and went to the father of Biswajit and narrated all the events that had happened. Even there in Calcutta, he was accosted by Rana (the brother of A-1), who threatened him. Thereafter, he interacted with Sarogi, who was admittedly the patient of Dr. Battacharya (PW-1). He is said to have remained with Sarogi and that is how Exhibit P-23, the original affidavit, is said to have come into existence.

26. Subbash Dass (PW-5) admitted in his evidence that he had never spoken about Sonali Mukherejee (A-1) and Assadid Poddar (A-2) occupying the same bedroom. In the later part of his cross-examination, he also denied to have told the police that Biswajit frowned at Subir Majumdar because Biswajit knew that Subir had divulged to Sonali Mukherjee (A-1) that Biswajit had an amorous affair with one Anju Singh in Calcutta. His evidence is replete with contradictions and omissions, which contradictions and omissions have been proved by Ramalingam (CW-1), as well as, S. Shanmugasundaram (CW-3). In fact, he had told the police in his statement about Subir's narration to Sonali Mukherjee (A-1) about Biswajit's spending nights with one Anju Singh and further about he being in the company of one Tara, which he denied in evidence. All these contradictions have been proved thoroughly. Even about the main incident, his whole evidence is full of contradictions and omissions, which are of a very substantial nature. We have referred to some in earlier part of our judgment. His interaction with Sarogi, who ran a detective agency at the instance of Dr. Battacharya (PW-1) appears to be extremely suspicious. He did not even remember the name of the person in Ashram with whom he had gone to the Police Station in Pondicherry. In short, all the statements made in the Court were found admittedly not to have been stated to Ramalingam (CW-1). All this evidence is in the question and answer form. The whole texture of the evidence is extremely coarse and in our opinion, the witness was not liable to be believed at all.

27. Same thing goes about the evidence of Dr. Battacharya (PW-1), who initiated this prosecution. His evidence about the illegal intimacy between A-1 and A-2 was all hearsay. He had seen nothing. His further evidence in examination-in-

chief could not have been allowed to be brought on record because he was admittedly not present on the spot, where the incident took place. It is his contention that it was on 24.5.1984 that Subbash Dass (PW-5) narrated the whole incident to him. Since his evidence is only inferential, it will be of no use to the prosecution. The witness in his cross-examination has made some strange claims like he did not have the knowledge of marriage between Biswajit and A-1. All the photographs like D-1 to D-4 belie his claim that he was not aware of the relation between Biswajit and Sonali Mukherjee (A-1). The tone of letters written by PW-1 suggests that parents of Biswajit have accepted his marriage and everything was alright with them. Even if everything in his evidence is accepted, all the letters written by him belie the claim made by the witness that Biswajit was murdered. It is for the first time that he told that he came to know from the Ashram people that there was illegal intimacy between Sonali Mukherjee (A-1) and Assadid Poddar (A-2). He has very specifically admitted that he could not tell the name of persons who told him about the illegal intimacy between A-1 and A-2. It is his claim that he came to know about this illegal intimacy way back in February, 1984. However, in his letter Exhibit D-28, he does not seem to have referred to any such illegal intimacy, which was extremely strange. His complete silence in the letter Exhibit P-12 dated 26.5.1984 about his having been told by Subbash Dass (PW-5) about the happenings, raises doubts. He clearly admitted that when he wrote the letter Exhibit P-12, he was not sure whether the death of Biswajit was homicidal or suicidal. He made an assertion that the Police officers, investigating the case, stayed in the flat belonging to the family of A-1, which was flatly denied by both the police officers, namely, Ramalingam (CW-1) and S. Shanmugasundaram (CW-3). There is nothing to suggest that these police officers were working under the influence of anybody else, muchless the accused persons and their relatives. The witness was candid in accepting his relationship with Sarogi. It is obvious that Exhibits P-10 and P-12 were the wild guesses made and therein some suspicious statements have been made which belie the claim that this was a murder. The witness went to the extent of saying that he had not given any statements to Ramalingam (CW-1) or S. Shanmugasundaram (CW-3). In his evidence, S. Shanmugasundaram (CW-3) has specifically admitted that he had examined Dr. Battacharya (PW-1) on 17.7.1984. On that basis, the witness refused to answer any question about his having made any disclosures to S. Shanmugasundaram (CW-3). In short, the evidence of Dr. Battacharya (PW-1) does not inspire any confidence and has to be rejected.

28. That leaves us with the other witnesses like Dr. Baker Fenn (PW-2), and Geetha Battacharya (PW-3), the wife of Dr. Battacharya (PW-1) and the mother of the deceased, which is of no use. Evidence of PW-3 relates to as to how Sonali Mukherjee (A-1) and Biswajit came closer. She has very specifically admitted that they (she and her husband - PW-1) had accepted Sonali Mukherjee (A-1) as their daughter-in-law. Her claims regarding Sonali Mukherjee (A-1) and Assadid Poddar (A-2) depended only on one circumstance that Assadid Poddar (A-2) was seen in the house with flowers, gifts and photos of Sonali Mukherjee (A-1) for

celebrating the birthday of Sonali Mukherjee (A-1). We do not think that this is sufficient enough to establish any illegal intimacy between A-1 and A-2. Her evidence does not really take the prosecution any further.

29. Having discussed all these witnesses, we are of the firm opinion that the whole prosecution rests on suspicions and it is trite law that mere suspicion is not enough to convict the accused persons.

30. In fact, in this case, the whole basis of the complaint was the dishonest investigation on the part of Ramalingam (CW-1) and S. Shanmugasundaram (CW-3). Seeing their evidence closely, we do not think that such an inference was possible. These two witnesses have been examined as Court Witnesses and, therefore, they could have been cross-examined by the prosecution. Their cross-examination does not reveal anything to suggest that investigation was guided investigation, so as to exonerate the accused persons.

31. The impugned judgment turns more or the less on the inferences, the basic inference being that there was an illegal intimacy between Sonali Mukherjee (A-1) and Assidid Poddar (A-2), for which there is very little or no evidence. Once that basis is shaken or is held not to be established, the further case of the prosecution must fail.

32. We also cannot agree with the High Court that the death of Biswajit was homicide. We have already pointed out as to how the tablets could not have been administered by a single lady or how could there not be the accidental administration of the tablets leaving the only possibility of suicide. All the circumstances should have been addressed to by High Court, as well as, the Trial Court which is absent in both the judgments and conviction stood solely on the basis of evidence of Subbash Dass (PW-5), whom we have found an extremely unreliable witness. He was always under the thumb of Dr. Battacharya (PW-1), as well as, his friend Sarogi, with whom the witness admittedly lived and served for some time.

33. The dubbing of the investigation as "dishonest" or "guided investigation" would be very difficult in this case and no clear finding has been given by the High Court in that behalf.

34. The High Court has also not given sufficient attention to the fact that Sonali Mukherjee (A-1) also tried to commit suicide and was convicted for the offence punishable u/s 309 IPC alongwith offence punishable u/s 324 IPC for having caused simple injuries to Biswajit. True it is that such conviction would not come in the way of the accused being tried for the offence u/s 302 IPC, but this circumstance had to be examined, as it was a very crucial circumstance in the whole story.

35. The whole prosecution story is shrouded with mystery and is suspicious and, therefore, the benefit of doubt must go to the accused persons.

36. The High court has also not explained as to how the offence could come

within the parameters of Section 304 Part I IPC. The view taken by the High Court that the offence could amount to one u/s 304 Part I IPC, is in our opinion, erroneous.

37. Under the circumstances, the appeal filed by Sonali Mukherjee (A-1) must be allowed. It is accordingly allowed. The judgment of the High Court, as well as, the Trial Court are set aside and Sonali Mukherjee (A-1) is directed to be acquitted.

38. This takes us to the appeal against the acquittal of Sonali Mukherjee (A-1) for offence u/s 302 IPC and Assadid Poddar (A-2) of all the offences. The appeal against acquittal of Sonali Mukherjee (A-1) is dismissed in view of her total acquittal. We have found that Assadid Poddar (A-2) had absolutely no role to play in the whole affair. We have already rejected the theory of illegal intimacy between Sonali Mukherjee (A-1) and Assadid Poddar (A-2). Even otherwise, according to the evidence led by Subbash Dass (PW-5), Assadid Poddar (A-2) had no opportunity to administer the tablets to Biswajit. He was acting like a true family friend in going with Sonali Mukherjee (A-1) to receive the deceased from Chennai. Even according to Subbash Dass (PW-5), they were all through together outside the house. We do not, therefore, think that there is any case against Assadid Poddar (A-2). The High Court is correct in acquitting Assadid Poddar (A-2) and we confirm the judgment of the High Court. In the result, we also dismiss the appeal, challenging the acquittal of Assadid Poddar (A-2).

The bail bonds of both the accused, if any, shall stand discharged.