22. In the hind-sight, my hunch appears to have been right. Now when I have appreciated facts of the present matter, and when I have come to the conclusion that on the merits of the matter itself the conviction cannot be maintained, I find that, my observations on 4.5.2016 regarding the feeling I got from the documents and on hearing the counsel was not out of place. It does appear that, victim has grievances against her husband accused due to property. In cross-examination, such defence was put up. I find it risky to rely on her uncorroborated evidence regarding actual assault.

23. For these reasons, the Criminal Appeal is allowed. The conviction and sentence of the accused under Section 307 of the Indian Penal Code, 1860 is quashed and set aside. The appellant - accused is acquitted of the offence punishable underSection 307 of the Indian Penal Code, 1860. As per record, accused could not pay fine and on his behalf his sister Banubai Dhudku Deore deposited the same. The fine paid, be refunded to the appellant - accused in the presence of his sister Banubai Dhudku Deore. The appellant - accused shall be released forthwith unless his presence is required in any other offence.

***Result*:-** Appeal allowed.

ABC 2016 (II) 395 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(A.V. Nirgude & V.K. Jadhav, JJ.)

Criminal Appeal No. 422 of 2014 with Criminal Application No. 6431 of 2014 with Criminal Revision Application St. No. 267 of 2014 with Criminal Appeal No. 422 of 2014

Decided on 23 August, 2016

Aurangabad Bench

RANGNATH BAJIRAO KHADKE & ANR. ***- Appellant(s).***

Versus

STATE OF MAHARASHTRA ***- Respondent(s).***

Law Covered*:-** ***(A) Indian Penal Code, 1860 — Section 302 & 498-A — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Murder by setting deceased on fire by striking match-stick — Possibility of tutoring deceased & child witnesses — unreliable

medical witness — delay in FIR — non-examination of relevant witness — Case of prosecution failed — Acquittal. (Para 23, 24, 25, 27,29, 31)

(B) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Medical History — non-mentioning — by the doctor — fatal to prosecution. (Para 19)

(C) Criminal Jurisprudence — Duty of Medical officer — MLC papers — sending to Police Station — should be prepared by filling up all the required particulars, which included the history— Non compliance is —fatal to prosecution. (Para 22)

(D) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Relevant witness — non examination of — Head Constable came to hospital to record the statement of victim — not examined as prosecution witness — Neither any statement was brought on record — fatal to prosecution. (Para 23 & 24)

(E) Code of Criminal Procedure, 1973 — Section 154 — FIR — Delay in recording — matter was not reported to police for 2 days — Held, the delay in recording F.I.R. is an important aspect of this case and has created suspicion in the entire prosecution case— Indian Evidence Act, 1872 — Section 3 — Relevant fact. (Para 25 & 27)

(F) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Delay in FIR — lodged after two days — Condition of victim — was oriented & able to speak — Assault by the husband — allegation of — Conduct of witness — Delay in making statement — Held, deceased was oriented and was able to speak, she could have made this statement to all her relatives who come to see her including her parents— Had they heard that the injuries were caused by their son-in-law, they would have certainly rushed to the police station— This means that the deceased did not make such allegation for two days— fatal to prosecution — Code of Criminal Procedure, 1973 — Section 154. (Para 28)

(G) Code of Criminal Procedure, 1973 — Section 161 — Statement of the witness — failure to record — Deposition of Medical officer — the deceased gave him the history of her injuries — Held, Such statement would amount to oral dying declaration — the doctor was always a prosecution witness and police would have certainly recorded his statement u/s 161 CrPC — failure to do — fatal to prosecution — evidence discarded — Indian Evidence Act, 1872 — Section 32. (Para 29)

(H) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Conduct of witness — Evidence of Medical Officer — Subsequent entry of history in the case papers— Held, the entry was probably subsequently added to support the prosecution case — strong doubt about truthfulness of medical officer's testimony— He helped creation of false evidence against the accused—Acquittal. (Para 29)

(I) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Child witness — evidence of —Recording of statement — delay in — Held, had there been recording of statement of innocent children, soon after the incident —they would have certainly stated as to what had happened — Missed relevant details — Evidence discarded— Acquittal. (Para 31)

(J) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Tutored witness — Child witness — evidence of — reliability of — Held, If the deceased could be tutored, there was every possibility that the children would also be tutored —Evidence discarded— Acquittal. (Para 31)

(K) Indian Penal Code, 1860 — Section 302 & 498-A — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Murder by setting deceased on fire by striking match-stick —Evidence of witness — the incident took place between deceased on one hand and accused on the other— Both were grown-up — Held, the deceased could have certainly resisted the assault & the attempt of pouring kerosene on her person— Assuming that he somehow poured kerosene — she would have certainly avoided his further assault which included striking of match-stick and setting her on fire— evidence unbelievable —Acquittal. (Para 32)

(L) Criminal Jurisprudence — Setting a person on fire by striking match-stick —Held, "Striking a match-stick" is a physical act — It is generally not connected to "igniting something using the burning match-stick — Even after a match-stick is ignited successfully, the user would take a few moments to get the flame settled and then within short time he has to ignite an object with it — If the user tries to use it before the flame of match-stick is settled — there is possibility of extinguishing of the flame, before it could reach the target — Even after the match-stick is ignited and the flame is settled, due to small size of the stick, the user is required to ignite the target as soon as possible — If the target is not ready and close by, the burning match-stick would get extinguished. (Para 32)

(M) Criminal Jurisprudence — Setting a person on fire —by striking match-stick —kerosene socked clothes of victim — While doing so the assailant should find the victim stationary — If the victim is moving and resisting, then setting up the fire could get difficult — At such time the victim is required to be made stationary — so that resistance and movement would be stopped. (Para 33)

(N) Criminal Jurisprudence — Defence version — Appreciation of — Prosecution case was disbelieved — appeal was disposed of without considering the defence version — Acquittal. (Para 34)

Facts:- *It was alleged that the accused murdered his wife by setting her on fire at his house. It was further alleged that he also treated her with cruelty so as to constitute offence punishable under section 498-A, IPC. In addition to this, it was also alleged that accused assaulted his wife and thereby committed offence punishable under sections 323, 504, 506 of the Indian Penal Code.*

In the present appeal it was observed by the hon'ble Bombay High Court that there was delay in registering the crime and it has affected the credibility of the prosecution case. The Court refused to accept the reliability of the the case-paper of Hospital. Further, the dying declaration was found untrustworthy. No evidence regarding the torture was found. The Court declined to trust the evidence of child witnesses. It appeared to the Court that the parents of the deceased, brother and children ganged-up against the accused. It was held that had there been recording of statement of the children, soon after the incident, they would have certainly stated as to what had happened. The court suspected the theory of setting the deceased on fire by striking matchstick, put forth by the prosecution. The accused was acquitted of the offences with which he was charged.

Law of relief:- If the case of prosecution fails appreciation of truthfulness or falsehood of defence version is not required.

Held:- Admittedly, Vaishali was brought to Bembde Hospital at about 10.00 p.m. on 13.02.2013. She had sustained 85% of burn injuries and the Doctor who had attended her first P.W.10 Dr. Miniyar sent medico-legal case papers to Satara Police Station at 10.30 pm. This paper is brought on record. On perusal of this paper we found that history of burn injuries was not mentioned. P.W.10-Dr. Miniyar stated that by the time he prepared this paper, he was not aware of the history of the injuries. This paper reached the police station (as per the station diary entry No.44) at about 12.20 mid-night. (Para 19)

The question is - why did P.W.10-Dr. Miniyar not mention the history of the incident in MLC paper? As per the printed format of MLC papers, the Medical Officer was expected to write down history of the incident. Until such information is recorded by the Medical Officer, he was not supposed to send the MLC papers to Police Station. No doubt, the MLC paper is required to send to Police Station as soon as possible, but such paper should be prepared by filling up all the required particulars, which included the history. (Para 22)

Surprisingly, the prosecution did not examine Police Head Constable - Pradhan as their witness. The record indicates that Pradhan went to Bembde Hospital during the night between 13.02.2013 and 14.02.2013 and tried to record victim's statement, but the prosecution could not bring such statement on record. (Para 23)

It is, thus, clear that Head Constable - Pradhan did, after the case was assigned to him, come to the Hospital for enquiry. But he was not examined as prosecution witness. As if the prosecution does not place reliance on what he did then. (Para 24)

As said above, the delay in recording F.I.R. is an important aspect of this case and the question is -whether this delay has created suspicion in the entire prosecution case? The answer is in affirmative. (Para 27)

P.W.10-Dr. Miniyar says that he heard Vaishali's statement that her burns were due to assault on her. He even recorded such statement in the case-papers. But no one approached the police. If Vaishali was oriented and was able to speak, she could have made this statement to all her relatives who come to see her including her parents. There was thus strong possibility that parents of Vaishali ought to have learnt about the cause of injuries by morning of 14.02.2013. Had they heard that the injuries were caused by their son-in-law, they would have certainly rushed to the police station. But, this did not happen. This means that Vaishali did not make such allegation before 16.02.2013. (Para 28)

We have strong doubt about truthfulness of Dr.Miniyar's testimony. In our view, P.W.10-Dr. Miniyar has not disclosed the truth. He helped creation of false evidence against the accused, by making entry of history in the case papers subsequently. This entry was probably subsequently added to support the prosecution case. He even went to the extent of recording his deposition that Vaishali

gave him the history of her injuries. Such statement would amount to oral dying declaration. P.W.10-Dr. Miniyar was always a prosecution witness and police would have certainly recorded his statement under section 161 of Cr.P.C. This was also not done. We, therefore, discard Dr. Miniyar's evidence. (Para 29)

The next question that is required to be decided is - whether the child witnesses are trustworthy? Our answer is in negative. If Vaishali could be tutored, there was every possibility that the children would also be tutored. It is apparent that Vaishali's parents, brother and children ganged-up against the accused. Had there been recording of statement of these two innocent children, soon after the incident, they would have certainly stated as to what had happened during evening of 13.02.2013 in their house. We are, therefore, inclined to discard their depositions on the ground that they were certainly tutored witnesses. (Para 31)

Even otherwise going by their depositions, we found their depositions not trustworthy. They stated that their father poured kerosene on their mother's clothes and then their father ignited match-stick. Should we assume that when this atrocity was taking place, victim Vaishali was standing still and suffering it quietly? Should we assume that Vaishali did not resist at the time of incident? According to the children, the incident took place between Vaishali on one hand and accused Vishnu on the other. Both of them were grown-up persons. Assuming Vishnu was physically more powerful, yet Vaishali could have certainly resisted Vishnu's assault and the attempt of pouring kerosene on her person. Assuming that Vishnu somehow poured kerosene on her person, she would have certainly avoided his further assault which included striking of match-stick and setting her on fire. "Striking a match-stick" is a one physical act. It is generally not connected to "igniting something using the burning match-stick". We are aware that a match-stick is thin piece of wood. Even after a match-stick is ignited successfully, the user would take a few moments to get the flame settled and then within short time he has to ignite an object with it. Before the flame of match-stick is settled, if the user tries to use it, there is possibility of extinguishing of the flame, before it could reach the target. Even after the match-stick is ignited and the flame is settled, due to small size of the stick, the user is required to ignite the target as soon as possible. If the target is not ready and close by, the burning match-stick would get extinguished. Thereafter the user is required to strike another match-stick. (Para 32)

When an assailant is trying to ignite his victims kerosene socked clothes, he should find the victim stationary. If the victim is moving and resisting, then setting up the fire could get difficult. In our view, at such time the victim is required to be made stationary, so that resistance and movement would be stopped. For achieving this, the assailant is required to either pin-down the victim or to hit her or him in such a manner that for at least few seconds, the victim becomes stationary. These were the possibility that could have happened at the time of the incident in question. The child witnesses did not state that these or some of these events took place st the time of the incident. Therefore, we are of the view that they are tutored. We are not inclined to believe them. (Para 33)

The last question is - whether we would make any comments on the line of defence? The accused is trying to suggest to us through his deposition that while he and his wife were in the house and since came to house unannounced, Rohit entered his house etc., thereby suggesting that a tete-a-tete was going on between Vaishali and Rohit. He also suggested to us that since Vaishali was exposed on that day, she committed suicide. (Para 34)

Counsel:- ***For Appellant(s):*** *Mr. N.S. Ghanekar, Advocate.*

For Respondent(s): *Mr. A.R. Borulkar, A.P.P. & Mr. H.V. Tungar, learned Counsel assist to A.P.P.*

JUDGMENT

A.V. NIRGUDE, J.: - 1. The delay caused in filing Criminal Revision Application is condoned for the reasons stated in the Criminal Application. Criminal Application No.6431 of 2014 for condonation of delay is allowed.

2. Both the Criminal Appeal and the Criminal Revision Application can be disposed of by this common judgment, as they arise from judgment dated 10.07.2014 delivered by the Additional Sessions Judge, Aurangabad, in Sessions Case No.184 of 2013 convicting accused -Vishnu for the offence punishable under section 302 of the Indian Penal Code and sentenced him to suffer life imprisonment and to pay a fine of Rs.10,000/- with a default clause. Accused - Vishnu was further convicted for offence punishable under section 498-A of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.5000/- with a default clause. The Criminal Appeal is filed by the accused for seeking his acquittal;

whereas the original complainant has filed Criminal Revision Application for seeking death penalty to the accused.

3. The prosecution case alleged that accused -Vishnu murdered his wife by setting her on fire on 13.02.2013 at about 9.00 p.m. at his house situated at Aurangabad. It was also alleged that accused Vishnu also treated his wife Vaishali with cruelty so as to constitute offence punishable under section 498-A of the Indian Penal Code. In addition to this, the prosecution also alleged that accused - Vishnu assaulted his wife and thereby committed offence punishable under sections 323, 504, 506 of the Indian Penal Code.

4. The prosecution tried to prove its case by examining in all ten witnesses. On the other hand, Vishnu examined himself as D.W.1 and examined two more witnesses as defence witnesses. The evidence that came on record through depositions, in short, can be stated as under :-

5. P.W.3-Shital and P.W.4-Vishal are child witnesses aged about 13 and 10 years respectively and are eye witnesses. They stated that they are children of accused - Vishnu and deceased - Vaishali. At the time of incident their family used to stay in Satara area of Aurangabad town. P.W.3-Shital stated that at the time of incident she was 7th standard student. Accused - Vishnu is her father and was working as a Police Constable in open jail at Paithan. Vishnu used to go to job in the morning and come back in the evening. Vishnu was habituated to drinking. He used to come home in drunken condition. He used to quarrel with her mother -Vaishali. He would abuse and assault her. On 13.02.2013 at about 8.00 to 8.30 p.m. Vishnu came to their house in drunken condition. P.W.3-Shital, her brother P.W.4-Vishal and their mother - Vaishali were present in the house. Vishnu watched TV for sometime. Suddenly he started giving abuses to Vaishali. He pushed Vaishali in the kitchen. Then he picked-up kerosene tin from kitchen and poured kerosene on Vaishali's person. P.W.3-Shital asked accused - Vishnu as to why he was behaving in such a manner. Accused - Vishnu pushed both the children out of kitchen and asked them to sit on sofa in sitting room. He also threatened them not to shout. Accused - Vishnu then entered in the kitchen, picked up match-box and with the help of match-stick set Vaishali on fire. Thereafter, accused - Vishnu went inside bath room. P.W.3-Shital and her brother P.W.4-Vishal threw water and milk which they found in refrigerator on the person of Vaishali. P.W.3-Shital brought bucket full of water kept near bath room. She poured

water on Vaishali's body. Vaishali fell down on the floor. P.W.4-Shital brought one red blanket and spread it on Vaishali's body. By then, accused-Vishnu came out of bath room, put one shawl and petticoat on Vaishali's body. Accused-Vishnu told his children that he would go to hospital with Vaishali and would come back to take them. Accused-Vishnu then took Vaishali to hospital. Using mobile phone of Vaishali, P.W.4-Vishal made phone call to their grand father P.W.5-Rangnath (Vaishali's father). P.W.5-Rangnath came there. P.W.3-Shital and P.W.4-Vishal narrated the incident to P.W.5-Rangnath. P.W.4-Vishal who was 10 years old boy, repeated what is stated by his sister earlier almost in verbatim.

6. Dr. Bipin Miniyar was P.W.10. He stated that on 13.02.2013, he was working as a Medical Officer at Bembde Hospital. At about 10.00 p.m., Vaishali was brought to the hospital by her husband Vishnu. Vaishali had sustained burn injuries. She was taken to casualty section of the hospital. After primary treatment, she was admitted to hospital. He completed admission process and asked history of burn injuries. He prepared MLC papers of Vaishali's case and then sent them to police station at about 10.30 p.m. He admitted that the cause of burn injury was not mentioned in MLC papers since by that time Vaishali had not given history of injuries. He admitted that from the hospital, Satara Police Station of Aurangabad is at a walking distance of five minutes.

7. Vaishali told him that her husband poured kerosene on her person and set herself on fire. He mentioned this fact in the case papers.

8. On 16.02.2013 when the Police came to his hospital for recording Vaishali's dying declaration, he was present there. It was, he who endorsed for the police that Vaishali was conscious and was oriented etc. at the time of recording of her statement. This witness further admitted that he did not inform the police that Vaishali had sustained injuries due to an assault. He admitted that he had no talk to any Police Officer of Satara Police Station, even on phone. He also admitted that in the case papers, sentence "patient's husband poured kerosene on her and ignited" was added using a different pen. He also admitted in cross-examination that for the first time before the Court he had disclosed that Vaishali had told him about history of homicidal burns. He further admitted that after Vaishali's death, photocopies of case-papers were given to police. On 14.02.2013 he had

no occasion to meet the police. Till 15.02.2013, police had not taken any cognizance of the incident. Between 13.02.2013 and 15.02.2013 Vaishali was conscious, oriented and was able to give her statement. He did not feel it necessary to inform Police about Vaishali's history of assault till morning of 16.02.2013. The prosecution also produced on record Vaishali's admission papers of Bembde hospital.

9. P.W.5-Rangnath in his deposition stated that on 13.02.2013 he received phone call of his grand-son P.W.4-Vishal at about 10.00 - 10.30 p.m. On hearing news of Vaishali's mishap, he and his son Babasaheb came to the house of the accused using a motor-cycle. They found P.W.3-Shital and P.W.4-Vishal (children) standing at the gate of the house. The children told him that they were not aware as to where their father had taken their mother. So, P.W.5-Rangnath and his son Babasaheb took the children to their house. From there, they came back to search Vaishali. Soon, they received Vaishali's phone call, who told them that she was in Bembde Hospital. P.W.5-Rangnath went to Bembde Hospital and saw Vaishali in Ward No.104. She told him that her husband Vishnu poured kerosene on her person and set her on fire. She further told him that Vishnu came home in drunken condition, abused her and suspected her character. After 10 days, Vaishali died during treatment.

10. P.W.6-Parigabai stated that after she learnt that her daughter suffered burn injuries and was admitted to hospital, she went there and saw Vaishali. Vaishali told her that her husband - Vishnu suspected her character. He poured kerosene on her person and set her on fire.

11. P.W.7-Dr.Bembde stated in his deposition that on 13.02.2013 at about 10.00 p.m. accused-Vishnu brought Vaishali to his hospital with 85% deep burn with lung injury. He started Vaishali's treatment. On 16.02.2013, P.W.8-Kachmande-Police Inspector of Satara Police Station gave requisition letter about Vaishali's fitness to give dying declaration. On 16.02.2013 at about 11.00 a.m. he examined Vaishali and found her fully conscious and oriented. Thereafter, P.W.8-P.S.I. Kachmande recorded Vaishali's statement, in presence of another Dr.Bipin Miniyar.

12. P.W.8-P.S.I. Kachmande stated that on 16.02.2013 while he was working at Satara Police Station as Sub-Inspector, M.L.C. was received at the police station and Police Inspector asked him to go to the place of incident and prepared spot panchanama. He went to the

house of the accused and prepared panchanama. Thereafter, his superior officer directed him to go and record statement of injured Vaishali. He went to the hospital and then recorded Vaishali's statement. Vaishali told him that the accused had set her on fire etc. He recorded her statement and obtained her thumb impression. He, thereafter, handed over this statement to Police Inspector.

13. P.W.9-Baburao Kanje is Police Inspector of Satara Police Station, who investigated the offence. He stated that while he was attached to Satara Police Station on 16.02.2013, he was entrusted with investigation of Crime No.26 of 2013, which was based on Vaishali's dying declaration dated 16.02.2013. During investigation, he found that on 14.02.2013 M.L.C. from Bembde Hospital had reached the Police Station at about 00.20 hours. He noticed from the M.L.C. that after it was registered at the Police Station, enquiry was handed over to one Police Head Constable - Pradhan.

14. For defending his case, appellant - Vishnu entered witness box as defence witness and stated that on the day of incident, he and his family were residing in a house belonging to one Jadhav on rental basis. On the first floor of the house, the landlord, his wife and his grown-up children were residing. Rohit was landlord's son. He was about 23-24 years old college student. The stair-case to go to the first floor of the house was abutting the entrance of his house. On the day of incident, he had night duty from 4 p.m. till next day morning. On that day at 4.00 p.m. he went to attend the duty. At 5.00 p.m., he came back to Aurangabad for attending a wedding ceremony of a friend's relative. But before going to the wedding, he came home. He found that his wife and children were not present in the house. The door was latched from outside. He made phone call to Vaishali utilizing his mobile phone. Vaishali did not pick up her phone. He kept waiting outside his house in few minutes time, he noticed Vaishali stepping down from the first floor. When she saw him, she got frightened. He asked her as to why she had gone to the house of the landlord to which she replied that she went there to call her children, who had gone there for playing computer games. He and his wife then entered their own house. While they were in side the house, Rohit entered their house without knocking at the door and went up to the door of the bed-room. He saw Vishnu and got frightened. He tried to explain that he came there to tell Vaishali's that her children were playing computer

game in his house. He left thereafter. Vaishali was already knowing that children were playing in her house and yet Rohit had come to Vishnu's house. Vishnu felt suspicion. Thereafter, the children came home. Vishnu asked Vaishali as to whether she had love affair with Rohit. Vaishali then made phone call to her father. She started talking to her father about some other subject, but did not answer Vishnu's question. She tried to change Vishnu's subject. Vishnu continued to feel suspicious about her conduct. Thereafter, Vishnu went for attending the wedding. Vishnu came back home and told his wife that he would call his family members and even Vaishali's parents and brothers to discuss about the incident. He then removed his shirt and pant and went inside the bath room for taking wash. While he was inside, he heard shouts. He came out and saw Vaishali was burning. He took some water in bucket from bath room and threw on her person and tried to extinguish the fire. He then started to put on his clothes. He heard Vaishali's talking to her parents on phone telling them that she had burnt herself. He took the phone from Vaishali's hand and talked to Vaishali's brother Babasaheb, who asked him that Vaishali should be brought to Bembde Hospital. Vishnu then came out and went in search of an auto-rickshaw, but could not find auto-rickshaw. So, he came back home and asked Vaishali whether it was possible for her to sit on motor-cycle. She then sat on motor-cycle and then they went to Bembde Hospital. Vaishali's father and brother were already present there. Vaishali was admitted to hospital. Vishnu alleged that he was falsely implicated in this case by his brother-in-law and father-in-law.

15. In the cross-examination Vishnu admitted that earlier he had some dispute with Vaishali and Vaishali had made complaint against him etc. But, in 2010-11, there was no dispute between him and Vaishali. He also admitted that the incident about Rohit entered in his house and walking up to bed-room was not disclosed to his father-in-law and others.

16. D.W. No.2 was Somnath, who is Vishnu's relative. He stated that on 13.02.2013, he received phone call of Vaishali's father at about 10.30 p.m. stating that due to quarrel between Vaishali and Vishnu, Vaishali set herself on fire and was then admitted to Bembde Hospital. Somnath and his family members rushed to the hospital. Before reaching the hospital, he received another phone call. This time Vaishali's brother Madhukar too told him that Vaishali had set herself

on fire. Somnath then went to see Vaishali in the hospital. Vaishali told him that she had set herself on fire.

17. Learned Counsel for the appellant asserted that having regard to the circumstances that are brought on record in this case, both by the prosecution as well as by the defence, the delay in recording of F.I.R. has destroyed credibility of the case. He also asserted that there is a strong possibility of tutoring the victim as well as child witnesses. Lastly he asserted that the defence is probable and can safely be accepted.

18. The questions that are to be decided in this case are :-

(i) Whether there was delay in registering the crime and whether it has affected the credibility of the prosecution case?

(ii) Whether the case-paper of Vaishali's case of Bembde Hospital is a reliable piece of evidence?

(iii) Whether there is an indication of Vaishali's getting tutored before her statement was recorded on 16th February, 2013?

19. Admittedly, Vaishali was brought to Bembde Hospital at about 10.00 p.m. on 13.02.2013. She had sustained 85% of burn injuries and the Doctor who had attended her first P.W.10 Dr. Miniyar sent medico-legal case papers to Satara Police Station at 10.30 pm. This paper is brought on record. On perusal of this paper we found that history of burn injuries was not mentioned. P.W.10-Dr. Miniyar stated that by the time he prepared this paper, he was not aware of the history of the injuries. This paper reached the police station (as per the station diary entry No.44) at about 12.20 mid-night.

20. Police then entrusted this case of Head Constable Bakkal No.2109-Pradhan.

21. P.W.10-Dr. Miniyar stated that subsequently he learnt from Vaishali as to how she sustained injuries and then he even recorded such information in the case papers.

22. The question is - why did P.W.10-Dr. Miniyar not mention the history of the incident in MLC paper? As per the printed format of MLC papers, the Medical Officer was expected to write down history of the incident. Until such information is recorded by the Medical Officer, he was not supposed to send the MLC papers to Police Station. No doubt, the MLC paper is required to send to Police Station

as soon as possible, but such paper should be prepared by filling up all the required particulars, which included the history.

23. Surprisingly, the prosecution did not examine Police Head Constable - Pradhan as their witness. The record indicates that Pradhan went to Bembde Hospital during the night between 13.02.2013 and 14.02.2013 and tried to record victim's statement, but the prosecution could not bring such statement on record.

24. P.W.9-I.O.Kanje stated that though on 16.02.2013 investigation of Crime No.26 of 2013 was given to him, on previous day Head Constable - Pradhan had informed him that Tahsildar Raut had refused to accept requisition for recording dying declaration of the victim. It is, thus, clear that Head Constable - Pradhan did, after the case was assigned to him, come to the Hospital for enquiry. But he was not examined as prosecution witness. As if the prosecution does not place reliance on what he did then.

25. As per prosecution nothing happened from 14th Morning till 16th Morning. Vaishali and her family members did not report the incident to the police. They could have easily approached Satara Police Station for lodging the complaint.

26. On 16.02.2013 P.W.9-P.S.I.Kachmande was directed to go to the place of incident for preparation of spot panchanama. He prepared the spot panchanama. Thereafter, he was directed to go and record statement of injured Vaishali. Thereafter, at 11.00 a.m. he recorded Vaishali's statement and on the basis of which at about 8.35 p.m. offence punishable under section 307, 498-A, 323, 504 and 506 of the Indian Penal Code was registered.

27. As said above, the delay in recording F.I.R. is an important aspect of this case and the question is -whether this delay has created suspicion in the entire prosecution case? The answer is in affirmative.

28. P.W.10-Dr. Miniyar says that he heard Vaishali's statement that her burns were due to assault on her. He even recorded such statement in the case-papers. But no one approached the police. If Vaishali was oriented and was able to speak, she could have made this statement to all her relatives who come to see her including her parents. There was thus strong possibility that parents of Vaishali ought to have learnt about the cause of injuries by morning of 14.02.2013. Had they heard that the injuries were caused by their son-in-law, they would have certainly rushed to the police station. But,

this did not happen. This means that Vaishali did not make such allegation before 16.02.2013.

29. We have strong doubt about truthfulness of Dr.Miniyar's testimony. In our view, P.W.10-Dr. Miniyar has not disclosed the truth. He helped creation of false evidence against the accused, by making entry of history in the case papers subsequently. This entry was probably subsequently added to support the prosecution case. He even went to the extent of recording his deposition that Vaishali gave him the history of her injuries. Such statement would amount to oral dying declaration. P.W.10-Dr. Miniyar was always a prosecution witness and police would have certainly recorded his statement under section 161 of Cr.P.C. This was also not done. We, therefore, discard Dr. Miniyar's evidence.

30. The next question before us is - whether dying declaration of Vaishali is trustworthy? The answer is in negative. There is strong possibility of tutoring to her. By 16.02.2013, Vaishali's parents apparently decided that they should lodge complaint against their son-in-law. So, it was quite possible that they tutored Vaishali and her statement was recorded.

31. The next question that is required to be decided is - whether the child witnesses are trustworthy? Our answer is in negative. If Vaishali could be tutored, there was every possibility that the children would also be tutored. It is apparent that Vaishali's parents, brother and children ganged-up against the accused. Had there been recording of statement of these two innocent children, soon after the incident, they would have certainly stated as to what had happened during evening of 13.02.2013 in their house. We are, therefore, inclined to discard their depositions on the ground that they were certainly tutored witnesses.

32. Even otherwise going by their depositions, we found their depositions not trustworthy. They stated that their father poured kerosene on their mother's clothes and then their father ignited match -stick. Should we assume that when this atrocity was taking place, victim Vaishali was standing still and suffering it quietly? Should we assume that Vaishali did not resist at the time of incident? According to the children, the incident took place between Vaishali on one hand and accused Vishnu on the other. Both of them were grown-up persons. Assuming Vishnu was physically more powerful, yet Vaishali could have certainly resisted Vishnu's assault and the

attempt of pouring kerosene on her person. Assuming that Vishnu somehow poured kerosene on her person, she would have certainly avoided his further assault which included striking of match-stick and setting her on fire. "Striking a match-stick" is a one physical act. It is generally not connected to "igniting something using the burning match-stick". We are aware that a match-stick is thin piece of wood. Even after a match-stick is ignited successfully, the user would take a few moments to get the flame settled and then within short time he has to ignite an object with it. Before the flame of match-stick is settled, if the user tries to use it, there is possibility of extinguishing of the flame, before it could reach the target. Even after the match-stick is ignited and the flame is settled, due to small size of the stick, the user is required to ignite the target as soon as possible. If the target is not ready and close by, the burning match-stick would get extinguished. Thereafter the user is required to strike another match-stick.

33. When an assailant is trying to ignite his victims kerosene socked clothes, he should find the victim stationary. If the victim is moving and resisting, then setting up the fire could get difficult. In our view, at such time the victim is required to be made stationary, so that resistance and movement would be stopped. For achieving this, the assailant is required to either pin-down the victim or to hit her or him in such a manner that for at least few seconds, the victim becomes stationary. These were the possibility that could have happened at the time of the incident in question. The child witnesses did not state that these or some of these events took place st the time of the incident. Therefore, we are of the view that they are tutored. We are not inclined to believe them.

34. The last question is - whether we would make any comments on the line of defence? The accused is trying to suggest to us through his deposition that while he and his wife were in the house and since came to house unannounced, Rohit entered his house etc., thereby suggesting that a tete-a-tete was going on between Vaishali and Rohit. He also suggested to us that since Vaishali was exposed on that day, she committed suicide.

We are not inclined to either accept or reject the theory of defence mainly because, we can dispose of this appeal without considering this aspect of the case. We disbelieve the prosecution case. We are, therefore, not inclined to go into truthfulness or

otherwise of the defence. The prosecution case should, therefore, fail.

ORDER

i) Criminal Appeal No.422 of 2014 is allowed.

ii) The judgment and order dated 10.07.2014 passed by learned Additional Sessions Judge, Aurangabad, in Sessions Case No.184 of 2013 is quashed and set aside.

iii) The appellant - Vishnu Asaram Kanade is acquitted of the offences with which he was charged.

iv) The appellant be set at liberty forthwith, if not required in any other case.

v) Fine amount, if paid by the appellant, be refunded to him.

vi) Criminal Revision Application St. No.267 of 2014 stands dismissed.

***Result*:-** Appeal allowed.

ABC 2016 (II) 410 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT

(S.G. Shah, J.)

Criminal Misc. Application (For Leave to Appeal) No. 2387 of 2016 In Criminal Appeal No. 99 of 2016 with Criminal Appeal No. 99 of 2016
Decided on 9 September, 2016

STATE OF GUJARAT ***- Appellant(s).***

Versus

MAHESHKUMAR PARSHOTTAMDAS PARMAR - Respondent(s).

Law Covered*:-** ***(A) Code of Criminal Procedure, 1973 — Section 378— Appeal against Acquittal —Prevention of Corruption Act— Sections 7, 13 [1][d] r/w 13[2] —Conviction under — Decoy trap — Bribe by Octroi Department staff — allegation of — No cogent and reliable evidence regarding actual demand, offer & acceptance— Acquittal upheld. (Para 11)

(B) Prevention of Corruption Act— Sections 7, 13 [1][d] r/w 13[2] — Decoy trap — Giving prize to raiding party —Tradition of —Held, there is a reason to believe that they are interested in arranging such trap