

**High Court of Judicature at Allahabad  
(Lucknow)**

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Neutral Citation No. - 2023:AHC-LKO:73240-DB

Judgment Reserved on 31.07.2023

Judgment Delivered on 07.11.2023

**Reserved**

**Case :- CRIMINAL APPEAL No. - 575 of 2015**

**Appellant :-** Ram Suresh And Ors.

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Rohit Tripathi, Chandra Bhushan Pandey

**Counsel for Respondent :-** Govt. Advocate

**Along With**

**Case :- CRIMINAL APPEAL No. - 599 of 2015**

**Appellant :-** Pawan Kumar

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Praveen Tripathi

**Counsel for Respondent :-** Govt. Advocate

**Case :- CRIMINAL APPEAL No. - 625 of 2015**

**Appellant :-** Pappu Sonkar And Another

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Nagendra Mohan

**Counsel for Respondent :-** Govt. Advocate

**AND**

**Case :- CRIMINAL APPEAL No. - 629 of 2015**

**Appellant :-** Hare Ram Mishra

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Kailash Nath Mishra

**Counsel for Respondent :-** Govt. Advocate

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**Hon'ble Rajan Roy,J.**

**Hon'ble Manish Kumar Nigam,J.**

*(Per: Rajan Roy, J.)*

1. Heard Sri Chandra Bhushan Pandey, learned counsel for the appellants in *Criminal Appeal No.575 of 2015 [Ram Suresh and Ors. vs. State of U.P.]*, Sri Praveen Tripathi, learned counsel for the appellant in *Criminal Appeal No.599 of 2015 [Pawan Kumar vs. State of U.P.]*, Sri Nagendra Mohan, learned counsel for the appellants in *Criminal Appeal No.625 of 2015 [Pappu Sonkar and Anr. vs. State of U.P.]*, Sri Kailash Nath Mishra, learned counsel for the appellant in *Criminal Appeal No.629 of 2015 [Hare Ram Mishra vs. State of U.P.]* and Sri Umesh Chandra Verma, learned A.G.A. for the State in all the appeals, as also, perused the lower Court records.

2. All these criminal appeals have been filed by the appellants challenging the judgment and order dated 30.04.2015 passed by the Sessions Judge, Ambedkar Nagar in Sessions Trial No. 10 of 2004 arising out of case Crime No. 47 of 2003, Police Station Malipur, District Ambedkar Nagar.

3. The appellants before us can be categorized in two different sets; one set of those who were alleged to have enticed away the girl aged about 15 years and, some of them, namely, Ram Suresh, Subhash Chandra, Ghanshyam and Balram have been convicted for the offence punishable under Section 363 read with Section 34 IPC and Section 366 read with 34 IPC, whereas, Pawan Kumar belonging

to the same group of appellants has also been convicted for the same offence but has been acquitted of the offence under Section 376 IPC. Others were not even charged of the offence under Section 376 IPC.

The first set of appellants have been sentenced to three years rigorous imprisonment for the offence punishable under Section 363 read with 34 IPC with fine of Rs. 2000/- each, failing which they would have to undergo additional imprisonment of two months each and for the offence punishable under Section 366 IPC read with 34 IPC they have been sentenced to seven years rigorous imprisonment with fine of Rs. 3000/- each, failing which they would have to undergo additional imprisonment of six months each.

The second set of appellants are Pappu Sonkar, Ram Sagar Hare Ram Mishra all Railway Protection Force (RPF) personnel. Pappu Sonkar and Ram Sagar have been convicted of the offence under Sections 342 read with 34 IPC and 376(2)(g) IPC, whereas, Hare Ram Mishra in addition to the aforesaid offences he has also been convicted for the offence under Section 3(2)(v) of the Scheduled Castes and the Schedules Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred as 'SC/ST Act').

As regards second set of accused persons, Pappu Sonkar and Ram Sagar have been sentenced to imprisonment of six months each and fine of Rs. 500/- each for the offence under Section 342 read with 34 IPC, failing which they would have to undergo additional

imprisonment of one month, for the offence under Section 376 (2)(g) IPC, they have been sentenced for life with fine of Rs. 10,000/- each, failing which they would have to undergo six months additional imprisonment. As regards the appellant Hare Ram Mishra, he has also been similarly sentenced except that his sentence of life imprisonment is also with regard to offence under Section 3(2)(v) of SC/ST Act.

4. The prosecution case, in nutshell, is that an FIR bearing case Crime No. 20 of 2003 was lodged on 30.07.2003 at 12.30 PM under Sections 363, 366 IPC at Police Station Malipur, District Ambedkar Nagar informing about an incident which was alleged to have taken place on 27.07.2003 at 8 PM, according to which, five accused, namely, Ram Suresh, Subhash Chandra, Ghanshyam, Balram, and Pawan Kumar took away minor daughter of the informant who was aged about 14 years (hereinafter referred as 'X'). The girl 'X' was taken to Railway Station Malipur and from there to Faizabad. She reached Faizabad Railway Station at 4.00 PM on 28.07.2003. She was accompanied by one of the appellants - Pawan Kumar from Malipur to Faizabad, remaining appellants are said to have returned from Malipur Station. While at Railway Station Faizabad on 28.07.2003 at 9.30 PM, Pawan Kumar and the girl 'X' were accosted by three RPF personnel who are the other set of appellants-accused before us. It is alleged that the said RPF personnel slapped and shooed away Pawan Kumar and taking advantage of the situation i.e. on coming to know that the

girl 'X' had run away with Pawan Kumar, they took her to the official accommodation of one of the RPF personnel and gang-raped her for about four hours. Thereafter, they brought her to Railway Station Faizabad and made her sit in a train which was going to Varanasi. Two of the passengers in the train, who belonged to Akbarpur, offered to take the victim 'X' with them and bring her back to Akbarpur. She reached Varanasi, where she met one of her relatives (son of her Maudi). She went to his house and from there it is said that her father was contacted and ultimately on 01.08.2003 she was brought back by her parents to her maternal home where she disclosed the incident to her uncle and mother who took her to Police Station, Malipur. She was then medically examined on 05.08.2003. Thereafter her statement was recorded before the Magistrate under Section 164 Cr.P.C. wherein 'X' alleged rape, etc. not only by RPF personnel but also by Pawan Kumar.

In the meantime, i.e. on 30.07.2003 Pawan Kumar the appellant and accused of the first offence under Sections 363/366 IPC, who claims that the girl 'X' had gone with him of her own volition as she was in a relationship with him, lodged an FIR at 4.55 PM at GRP, Railway Station Faizabad bearing case Crime No. 47 of 2003 informing about the girl having been taken away by three RPF personnel, as already referred above, in the night of 28.07.2003 at 09.30 PM. It is said that he kept approaching the police authorities but

the FIR was not lodged and ultimately when he moved an application before the District Magistrate in this regard, an inquiry was conducted, and thereafter FIR was lodged under Section 323, 504, 506, 342 and 364 IPC on 30.07.2003.

5. Based on her statement under Section 164 Cr.P.C. the offence under Section 376 (2)(g) IPC was added in case Crime No. 47 of 2003 relating to the RPF personnel as also against Pawan Kumar in case Crime No. 20 of 2003.

6. As stated, the girl 'X' was medically examined on 05.08.2003. Medical report is Exbt. Ka3. As per medical examination, the victim was habitual of sex and intercourse had taken place, however, no mark of injuries were found on her vagina and cervix nor was there any bleeding. Two vaginal smear slides were made, sealed and handed over to the Constable for examination of spermatozoa by the District Mahila Hospital, Faizabad. The smear test report is dated 06.08.2003 and is Exbt. Ka4, according to which no spermatozoa was seen on both smears. For determination her age, the Medical Officer who examined her, referred the matter to the Chief Medical Officer, Ambedkar Nagar. His report in this regard is dated 07.08.2003 (Exbt. Ka4) according to which she was was about 15 years of age.

7. It has come in the testimony of PW-7 that investigation of both the criminal cases referred above was merged considering the facts and sequence of events.

8. Based on the evidence collected, a charge-sheet was filed against both the set of accused for both the offences on 28.09.2003 and a single trial bearing Sessions Trial No. 10 of 2004 has been held.

9. After committal of the case, Charges were framed against all the accused on 06.06.2005. Charges were framed against first set of accused, namely, Ram Suresh, Subhash Chandra, Ghanshyam, Balram and Pawan Kumar under Section 363 read with 34 IPC and Section 366 read with 34 IPC. In addition charge under Section 376 IPC was also framed against one of accused, namely, Pawan Kumar. On the same day, charges were framed against other accused of the second offence i.e. Pappu Sonkar and Ram Sagar as also Hare Ram Mishra on 06.06.2005 under Section 376 (2)(g) read with Section 34 IPC, Section 323 read with 34 IPC, Section 342 read with 34 IPC and Section 504 read with 34 IPC. Charge against Appellant-Hare Ram Mishra (RPF personnel) was also framed under Section 3(1)(x) and 3(2)(v) of SC/ST Act.

10. The appellants denied the charges and demanded trial. Accordingly, they were put to trial.

11. The prosecution examined nine witnesses. PW-1 is father of victim and informant. PW-2 is the minor victim 'X'. PW-3 is the appellant Pawan Kumar of Criminal Appeal No. 599 of 2015. He is himself an accused with regard to case Crime No. 20 of 2003. He is a prosecution witness with regard to the second FIR bearing case Crime

No. 47 of 2003 relating to commission of offence by RPF personnel upon the victim girl 'X' who was with him at Railway Station Faizabad. This situation arose on account of merger of two FIRs investigation of which resulted in a single charge-sheet that is in respect of case Crime No. 47 of 2003 only.

12. Even at the cost of repetition it needs to be stated that initially two separate First Information Reports were lodged bearing No. 20 of 2003 and 47 of 2003, subsequently they were merged and accordingly a single charge-sheet was filed with reference to case Crime No. 47 of 2003 and the trial bearing Sessions Trial No. 10 of 2004 was held by the Trial Court in respect of both the offences.

Thus, though PW-3 is an accused of the first offence referred above including the offence of rape upon the victim, he is an informant with regard to the second offence committed by the RPF personnel, in the same trial.

13. PW-4 is the Doctor who medically examined the victim 'X'. PW-5 is the Investigating Officer of the second offence committed by the RPF personnel. PW-6 is also Investigating Officer of the second offence committed by the RPF personnel as he took over the investigation subsequently. PW-7 is the then Circle Officer, Jalalpur, District Ambedkar Nagar who is also said to have investigated the offence, especially one under SC/ST Act. PW-8 is the then Head Constable posted at Police Station Malipur, District Ambedkar Nagar

who had made requisite entries in the GD and had prepared the Chik FIR, etc. PW-9 is the Head Constable, Ramakant posted as the then Moharrir at GRP Police Station, Faizabad who had made requisite entries of the First Information Report relating to the second offence committed by the RPF personnel.

The defense produced DW-1, Jaswant Singh retired ASI who was posted as Senior DCP Reserve Company, Lucknow on the date of incident, in their defense.

14. The statement of all the appellants/accused were recorded under Section 313 Cr.P.C. on 10.07.2012. In the statement under Section 313 Cr.P.C, the first set of offenders took the plea that the girl 'X' was major and had gone away of her own free will; that she was molested and raped by three RPF personnel when they reached Railway Station Faizabad.

15. As regards the second set of offenders, out of the three, two, namely, Pappu Sonkar and Ram Sagar took the plea of *alibi* that they were undergoing training and were on musketeering duty, etc. on the alleged date of incident, at Lucknow, and it is in this context that DW-1 was examined by them as defense witness and also that they had been falsely implicated due to rivalry within the department. The third accused Hare Ram Mishra also took the plea of *alibi*.

16. The Trial Court after taking into consideration the evidence on record found that the appellant Pawan Kumar was not guilty of offence

under Section 376 IPC as the victim had turned hostile, but, he was guilty of other offences along with other accomplices.

17. As regards RPF personnel, they were found guilty of the offence with which they were charged as already narrated in the earlier part of the judgment.

18. The contention of Sri Chandra Bhushan Pandey, learned counsel appearing for the appellants i.e. the first set of appellants relating to first offence, was that there is no evidence to establish commission of the offence under Sections 363 and 366 IPC for which his clients had been convicted. The girl 'X' was 15 years of age at the time of the alleged incident, but, she has not supported the prosecution case before the Trial Court. In this view of the matter her statement under Section 164 Cr.P.C. loses significance and cannot be relied upon as has been done by the Trial Court. In this regard he relied upon the judgment of Hon'ble the Supreme Court in the case of **State of Karnataka vs. P. Ravikumar alias Ravi Kumar and others**<sup>1</sup>, especially para 7 which reads as under:

*"7. Insofar as Respondent no. 1 - Accused No. 2 P. Ravi Kumar @ Ravi is concerned, the prosecution relies upon the extra judicial confession made to PW-2 (Auto Driver) who is stated to be the friend of Accused no. 1 and 2. PW-2 has stated that about 20 days prior to the date of incident, when he was sitting in the auto, A-1 was with him and that Accused 1 asked him to chase the deceased who was going on his motorcycle. PW-2 further stated that about 20 days later Accused 1 and 2 approached him and said to have made extra judicial confession that they had committed the murder of deceased Mohan Kumar to whom on*

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<sup>1</sup> 2018 (9) SCC 614

*earlier occasion they chased. Though PW-2 in his chief examination stuck to his version, when he was cross examined, he resiled from his earlier version and consequently PW-2 was treated hostile. When PW-2 resiled from his earlier statement, his statement recorded by PW-22 (Judicial Magistrate) under Section 164 Cr.P.C. may not be of any relevance; nor can it be considered as substantive evidence to base the conviction."*

According to him, the appellant-Pawan Kumar and PW-2 were in a relationship and the girl herself left her house without any enticement or taking away by the appellants herein. He invited our attention to the testimony of PW-2 the alleged victim to submit that she was declared hostile, therefore, there was absolutely no evidence on the basis of which an order of conviction could have been passed against his clients.

19. Sri Praveen Tripathi, learned counsel for the appellant Pawan Kumar in Criminal Appeal No.599 of 2015 submitted that he adopts the arguments of Sri Pandey and in addition to it, he stated that subsequently the alleged victim has married appellant-Pawan Kumar, with whom she was in a relationship, of her own free will and is residing with him and also has a child from the said wedlock. He asserted that the Trial Court has rightly exonerated the appellant Pawan Kumar of the charge of rape under Section 376 IPC as the alleged victim turned hostile, but, it has erred in convicting the appellant Pawan Kumar for the offence under Sections 363/366 IPC read with Section 34 IPC as there is no evidence to prove the said charges.

20. In response, learned AGA submitted that it is an admitted fact that as per medical examination report, age of the victim 'X' as on the date of incident was about 15 years i.e. she was a minor, therefore, her consent is immaterial and no benefit can accrue to the appellants represented by Sri C.B. Pandey and Sri Praveen Tripathi, merely on the basis of the victim 'X' turning hostile before the Court as taking her away from her house is established. This is sufficient to prove the offence for which they have been convicted, there being no consent of guardian of the minor girl.

21. As regards appellants RPF personnel relating to second set of accused relating to the second offence, Sri Nagendra Mohan, learned counsel submitted that no identification parade of the accused RPF personnel was held as per law. The statement of PW-2 alleged victim was not shown to the accused RPF personnel at the time of recording of their statement under Section 313 Cr.P.C. The application filed by Pawan Kumar before the District Magistrate for lodging FIR was belated about which there is no explanation. The FIR itself was lodged belatedly on 30.07.2003, whereas, the incident involving the RPF personnel is alleged to have taken place on 28.07.2003. He submitted that two separate FIRs were lodged; one with regard to offence committed by the other five accused under Sections 363, 366 IPC, etc.; and, second FIR was lodged by one of the said accused, Pawan Kumar, against three RPF personnel on an application submitted by

him on 30.07.2003. Both had separate numbers and a different incident to narrate. They were not part of the same offence/transaction, therefore, separate investigation should have been held and separate trial should also have been held, instead, charge-sheet was filed only in the context of case Crime No. 47 of 2003 and there was no charge-sheet with regard to the case Crime No. 20 of 2003. Most surprisingly, according to him, Pawan Kumar who was himself an accused in Sessions Trial No. 10 of 2004 including the offence of rape, albeit, of a different incident but involving the same victim, is also a witness in the same trial against the accused RPF personnel which is incongruous and impermissible. The trial, according to him, is void *ab initio*.

22. He also submitted that the same counsel appeared on behalf of all the accused/appellants although there was a conflict of interest as Pawan Kumar was informant and witness of the offence allegedly committed by the RPF personnel. According to him representation of the RPF personnel by the same counsel vitiates the entire trial. He further submitted that so far as the two accused, namely, Pappu Sonkar and Ram Sagar, they had taken the plea of *alibi* and to prove the same they had produced DW-1 and documentary evidence was also produced which was proved by DW-1 who clearly testified that the two were present at Lucknow for musketeering training on the date of the incident, yet, without proper appreciation of the said evidence, Trial Court convicted the said accused of the offence under Section 376 (2)

(g) IPC. The findings in this regard are against the weight of evidence and are based on conjectures, surmises and are presumptuous, therefore, not sustainable.

23. He also submitted that Pawan Kumar is not a witness of alleged rape by the RPF personnel. This leaves us only with the testimony of alleged victim PW-2, whose testimony is not reliable for the reason she has tried to save Pawan Kumar and has turned hostile. In her statement under Section 164 Cr.P.C. she had indicted Pawan Kumar of the offences alleged including that of rape, but, before the Court below she renegaded. There are various contradictions in her testimony and her conduct in going with strangers in the train to Varanasi makes the entire prosecution case suspect and her testimony unreliable so far as the charge of rape against RPF personnel is concerned. In view of her testimony under Section 164 Cr.P.C. and that before the Court below, she is not at all a reliable witness, yet, relying on her testimony the Trial Court has convicted his clients. The medical examination of girl reveals that she was habitual of sex. This is also a circumstance which should have been taken into consideration, but has been ignored. No semen was found on her clothes. There was no recovery of any cloth of the alleged victim from the room where the RPF personnel are alleged to have raped her. Naming of three RPF personnel in her statement under Section 164 Cr.P.C. is also strange as they were not known to each other which

goes to show that their names were planted. Most important, the accused were never confronted with the testimony of 'X' PW-2. This evidence cannot be read against them and as her statement is the only basis of their conviction then it is liable to be set aside.

24. Learned AGA on the other hand contended that so far as the guilt of three RPF personnel regarding rape on the minor girl is concerned, her statement as against them remained consistent and free from contradiction right from stage of recording of her statement under Section 164 Cr.P.C. till recording of her statement before the Court below and in her cross-examination the accused have not been able to impeach her credibility. The RPF personnel taking advantage of the situation in which Pawan Kumar and the victim 'X' found themselves, having eloped from their house, shooed away Pawan Kumar and took the girl to a room of one of the accused and raped her. The narration of events by PW-2 victim is vivid, natural and free from inconsistency and contractions and there is no reason as to why the same be not relied upon. The Trial Court has not committed any error in relying upon her testimony to convict the said accused. The judgment of Trial Court does not require any interference. He, however, could not refute the fact that the same counsel had represented all the appellants and though separate FIRs were lodged a single charge-sheet was filed nor that Pawan Kumar who was himself an accused including that of rape, was also a witness for the offence by RPF personnel, nor the fact that

the accused RPF personnel were never confronted with the testimony of PW-2, the alleged victim.

**Criminal Appeal No. 575 of 2015 and Criminal Appeal No. 599 of 2015**

25. First and foremost, we may consider the charges against the first set of appellants numbering five who are appellants in Criminal Appeal No. 575 of 2015 and Criminal Appeal No. 599 of 2015. Out of them, four appellants were charged, as referred above, for the offence under Sections 363, 366 read with Section 34 IPC, whereas, in addition to the aforesaid charge fourth appellant Pawan Kumar was also charged with the offence of rape under Section 376 IPC, however, the Trial Court did not find the allegation of rape proved against Pawan Kumar *inter alia* on account of the victim having turned hostile. Thus, we are only required to consider as to whether there is evidence to prove the charges under Sections 363, 366 IPC read with Section 34 IPC against first set of appellants.

We may in this context refer to the judgment of Hon'ble the Supreme Court in the case of **S. Varadarajan vs. State of Madras**<sup>2</sup> wherein meaning and purport of Section 361 Cr.P.C., which obviously has to be read into the provision of Sections 363, 366 IPC, was considered, especially the purport of the word 'taking' which occurs in Section 361 IPC. In the above referred case, Hon'ble the Supreme Court has held as under:

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<sup>2</sup> AIR 1965 SC 942

*“It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”*

The victim in **S. Varadarajan** (supra) was about 17 years of age.

26. For determination of age, the victim was referred to the Chief Medical Officer, Ambedkar Nagar, who ascertained the age of the victim as on 07.08.2003 as about 15 years. Variation of two years in such determination of age based on medical examination is possible and permissible. We may in this regard refer to the judgment of Hon'ble the Supreme Court in the case of **Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir and others**<sup>3</sup>.

27. Considering her age it cannot be said that she had not attained the age of discretion or could not understand what was right or wrong for her. As far as her statement under Section 164 Cr.P.C. is concerned, once she has not supported the prosecution case.

28. In her testimony before the Court below, then, the same is rendered inconsequential and cannot be made the basis for convicting

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3 1982 (2) SCC 538

the said accused for the offence referred hereinabove. In her testimony before the Trial Court, PW-2 has stated that she was in love with Pawan Kumar. She wanted to marry Pawan Kumar but the family was opposed to it. She had gone to the Railway Station with Pawan Kumar on her own. He had not enticed her nor did the other accused Ram Suresh, Subhash Chandra, Ghanshyam and Balram nor had they persuaded her to go with Pawan Kumar, though they were present at the time of the incident. It is the admitted position that only Pawan Kumar accompanied the girl on the journey after reaching the Railway Station Malipur. Other accused did not accompany the girl after Malipur Railway Station. She has further stated that she had married Pawan Kumar subsequently and has a child from the said wedlock. As she was declared hostile, therefore, the D.G.C. (Criminal) cross-examined her. In cross-examination also she denied her statement before the police implicating Ram Suresh, Subhash Chandra, Ghanshyam and Balram that they had enticed her away from her house. As regards rape by Pawan Kumar, she has stated that she gave the statement before the Magistrate under duress and influence of her family members who were opposed to the relationship. He did not have intercourse with her nor did he commit rape. 'X' has stated that she was in a relationship with Pawan Kumar since six months prior to the incident and used to meet him.

29. The Trial Court has proceeded on the premise that the girl was a minor and her consent was needless. No doubt consent of a minor is not much of importance, but, in this case the girl was about 15 years of age based on medical examination and as already stated variation of two years is possible and permissible in such assessment, therefore, in view of decision of Hon'ble the Supreme Court in the case of **S. Varadarajan** quoted hereinabove, it cannot be said the girl had not attained the age of discretion as referred in **S. Varadarajan** (supra). Moreover, there is no evidence of persuasion or enticement or for that matter 'taking away' as expressed in **S. Varadarajan** (supra) by the accused including Pawan Kumar. Except for the testimony of PW-2, there is no other evidence which could be considered so far as the offence against these five accused are concerned. There is no evidence to show that the girl was persuaded to go with the accused, clearly not the testimony of the alleged victim, who, on the date of recording of her evidence before the Trial Court, was a major and there is nothing in her testimony to prove that she was enticed away by the accused and that she went away from her home on her such enticing. As per her statement, the victim 'X' left the guardianship and protection of her father on her own knowing what she was doing and it cannot be said in the facts of this case that the concerned appellants took her away from the lawful guardianship of her father. In her cross-examination she has also stated that three years after Pawan Kumar was released from jail (during trial) she again went away with him and

this time also she went away without asking her family members. She has also stated that this second time her family members did not bring her back nor did they lodge any report.

30. Considering the facts of the case and decision in **S. Varadarajan** (supra), we are of the opinion that the offence under Sections 363, 366 read with Section 34 IPC is not made out. The girl has already married Pawan Kumar subsequently, of her own free will and is residing with him. This fact has been stated by PW-1/informant uncle of 'X' PW-2 also, apart from X's own statement in this regard. She also has a child from the said wedlock. In the facts of this case, based on evidence on record, as discussed, we are of the opinion that the ingredients of Sections 363 and 366 read with 34 IPC are not made out. In view of the above discussion, the Trial Court has erred in convicting the appellants. Thus, the judgment of Trial Court relating to first set of appellants is set aside. Consequently, we absolve the said appellants of the said offences. Accordingly, Criminal Appeal No. 575 of 2015 and Criminal Appeal No. 599 of 2015 are **allowed**.

**Criminal Appeal No. 625 of 2015 and Criminal Appeal No. 629 of 2015**

31. We may now consider the charge of gangrape, etc. against the second set of accused i.e. three RPF Personnel, namely, Pappu Sonkar, Ram Sagar and Hare Ram Mishra relating to the second incident.

32. Facts of the case have already been narrated in the earlier part of the judgment, but, the same may be reiterated briefly. After victim 'X' went away from her home with accused Pawan Kumar, they spent the night at Malipur Railway Station and on the next day, as stated by Pawan Kumar, who is also a witness with regard to this second incident, boarded a train to Faizabad and reached there at about 4 PM as has come in the testimony of PW-2, the victim. Sometime around 8.30 PM, it is alleged that the above three RPF personnel accosted them and inquired as to how they were loitering around together, some explanation was offered that they are siblings but on further probing by the RPF personnel they told them the truth. The allegation by the victim (PW-2) and PW-3 (Pawan Kumar) informant to this second incident is that on coming to know about their elopement, Pawan Kumar was slapped by the said RPF personnel and shooed away and the victim was taken by the RPF personnel to a Government accommodation of a colleague and there she was gangraped. PW-3 tried to find out the whereabouts of victim at the GRP Police Station, but, did not succeed. In this process, he is even said to have met the three accused who again threatened and shooed him away. Ultimately he submitted a representation to the District Magistrate, Faizabad whereupon it is said that a preliminary inquiry was conducted including the process of identification at the GRP Police Station of the three accused which the victim participated and the FIR was ultimately

lodged on 30.07.2003 at 4.55 PM against the said accused as already narrated hereinabove, after she came back from Varanasi.

33. As already mentioned there are two FIRs. The accused are different but, the victim is same. The investigation as per testimony of PW-7 was merged and ultimately one charge-sheet has been filed, therefore, we cannot loose sight of the peculiarity of facts in this case where there are two sets of offenders based on two separate incidents though the victim is the same. Most important, Pawan Kumar is an accused in respect of the first incident, but, he is an informant and witness with regard to part of the second incident. He is a witness to the RPF personnel having taken away the victim with them i.e. in the context of Section 342 IPC, but, is not a witness of gangrape under Section 376 (2) (g) IPC. The interesting part is that he himself was an accused of rape of the same victim based on the first incident in the same trial as already narrated above, though subsequently he was acquitted of this charge.

34. Based on this, submission of Sri Nagendra Mohan was that the accused himself being a witness in the same trial is a strange phenomena unknown to him and legally unsustainable. It was also his submission that this is relevant because the victim has tried to falsely implicate RPF personnel only to save PW-3 (Pawan Kumar) with whom she was in a relationship, as claimed. He also invited our attention to the suggestions made to PW-2 that the RPF personnel

had been falsely implicated as they had caught the victim red handed in compromising position with Pawan Kumar and are also said to have slapped him a couple of times on finding that the explanation offered by them for being together was incorrect by their subsequent retraction and only to teach them a lesson they had been falsely implicated.

35. No doubt, the facts of the case are slightly twisted and entangled in the sense that Pawan Kumar (PW-3) was himself an accused of committing rape upon the victim after taking her away from her home in the same trial whereas he is informant as well as witness of the alleged crime committed by the RPF personnel against the same victim. We have to keep all this in mind while considering relevant aspects of the matter, as acquittal of Pawan Kumar from the charge of rape was an event subsequent to the stage of recording of evidence.

36. The conviction of all the RPF personnel is based on the testimony of PW-3 the informant, and PW-2 the victim. As already stated the informant is an alleged witness of RPF personnel having slapped and shooed him away from the Faizabad Railway station while he was with the victim and having taken her along with them. He is not a witness of rape. PW-2, the victim, on the other hand, is witness of both the facts. The charge of gangrape for which the said appellants have been sentenced to life has been proved only on the basis of statement of the victim 'X'.

37. Most important when we peruse the questions put to the accused Ram Sagar, Pappu Sonkar and Hare Ram Mishra under Section 313 Cr.P.C., we find that vide question no. 4 the Trial Court confronted the accused with the oral testimony of PW-1, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9, but, quite surprisingly did not confront any of the accused with the testimony of the victim PW-2. This is evident from the original records. This is a serious flaw, as, the very material which is the basis for conviction of the appellants of the charge of gangrape by the Trial Court was never shown to the appellants. In fact the questions framed and put to them are not only vague and casual but they also show that they were prepared mechanically unmindful of the fact that there were two set of offenders with different charges and allegations. This is evident from question no. 5 put to them under Section 313 Cr.P.C. which reads as under:

*"प्रश्न 5 – साक्ष्य में आया है कि आपने परिवादी मुकदमा की भतीजी कु0 दिनकला का अपहरण कर उसे बहला फुसला कर विवाह हेतु विवश किया तथा उसकी इच्छा के विरुद्ध बलात्संग करने के सम्बन्ध में आपको क्या कहना है।"*

Now this question has been put to aforesaid three appellants-accused of the second offence though it was not relevant in their case. This was the question relevant to the first set of offenders who are alleged to have enticed away a minor girl from her home and Pawan Kumar is alleged to have done so with the intent to marry her. This question has no relevance to the charge against the aforesaid three appellants. PW-3 is not a witness of gangrape. Medical evidence does not support gangrape, therefore, we are left only with the testimony of

PW-2, but, the appellants/accused were never confronted with her testimony nor any opportunity was given to them in this regard under Section 313 Cr.P.C. In this context we may refer to judgment of Hon'ble the Supreme Court in ***Maheshwar Tigga vs. State of Jharkhand***<sup>4</sup> wherein it has been held that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him and must be excluded from consideration. The legal position in this regard is well settled. In a criminal trial, the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity of not only to furnish his defense, but also to explain the incriminating circumstances against him. A probable defense raised by an accused to rebut the accusation without the requirement of truth beyond reasonable doubt. In the said reported case, reference has been made to an earlier decision in the case of ***Nawal Kishore Singh vs. State of Bihar***<sup>5</sup> wherein it was held that under Section 313 Cr.P.C. the accused should have been given an opportunity to explain any of the circumstances appearing in the evidence against him. At least the various items of evidence which had been produced by prosecution should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. The Court deprecated the practice of putting the entire evidence against the accused put together in a single question and giving the opportunity to explain the same, as the accused may not be in a position to give

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4 (2020) 10 SCC 108

5 2004 (7) SCC 502

rational and intelligent explanation. The Supreme Court emphasized the necessity of the Trial Judge keeping in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and that Section 313 Cr.P.C. examination should not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defense and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to an accused is a part of fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence.

38. In view of the law referred hereinabove and our consideration of the questions framed under Section 313 Cr.P.C. as put to the appellants/accused, we have no doubt that this exercise was conducted in a slipshod casual manner without due and proper application of mind. In fact the irrelevance of some of the questions as stated hereinabove is itself testimony of lack of proper application of mind by the Trial Court to such an important aspect of the Trial thereby affecting the trial materially in its fairness.

39. In her statement under Section 164 Cr.P.C. victim 'X' had alleged rape, etc. by Pawan Kumar PW-3 also *albeit* at a different place but on being shown her statement under Section 164 Cr.P.C., she has stated before the Trial Court that she had deposed against Pawan Kumar of having committed rape, etc. under the pressure of her family

members. However, she has deposed about gangrape by the three RPF personnel without any pressure. She also identified three RPF personnel in Court as the one who had committed gangrape, etc. on her. It is not out of place to mention that prior to her deposition she had come to GRP Lucknow to identify the accused, but no identification parade was held in terms of Section 54A Cr.P.C. read with Section 9 Evident Act.

40. We may now refer to the medical evidence on record. As per medical examination report (Exbt. Ka-3) which is dated 05.08.2003 and was undertaken eight days after the gangrape, there was no mark of injury on her breast, lower abdomen, thigh and private part. We have to keep in mind that three police personnel had allegedly committed rape on her forcibly for four hours. The report further says that hymen was torn old healed tags of hymenal tissues were present. As per medical report she was habitual of sexual intercourse. There was no mark of injury on vagina or cervix nor any bleeding. No doubt, the gangrape had been committed eight days ago, but, the report clearly indicates that she was habitual of sexual intercourse.

PW-2, the victim has stated before the Court below that she had gone away with Pawan Kumar of her own free will. Both had reached Malipur Railway station from her house. Ram Suresh, Subhash Chandra, Ghanshyam and Balram also accompanied them till Malipur Railway Station, but, they left them at Malipur Railway Station and

returned back. They went to Faizabad from Malipur Railway station by Dehradun Express. According to her, they reached Faizabad Railway station at about 4.30 PM. It has come in the testimony of PW-3 that both of them had remained at Malipur Railway station in the night intervening 27-28.07.2003, meaning thereby, they reached Faizabad Railway station at 4.30 PM. After reaching Faizabad Railway station, they went to the quarters of Ram Suresh, but, did not find him, as such, they came back to the railway station where they were resting on the platform in front of RMS (Railway Mail Service) at the railway station. At about 9 PM three police personnel came and started making inquiries as to who they were, whereupon the informant Pawan Kumar told them that she (victim) was his sister. The police personnel scolded them whereupon they spoke out the truth. Thereafter the RPF personnel took both of them to quarters of Ram Suresh and inquired from his neighbours about Ram Suresh. When both of them were being taken to the Railway Station by the RPF personnel they slapped Pawan Kumar twice and shooed him away. The RPF personnel then took her to a quarter where they raped her. She has also stated that the room where she was raped had a VCR and a television and she was shown a blue film. She was raped repeatedly on the cot with a bed-sheet on it. While committing the crime, the accused were taking the names of each other and that is how she came to know about their names. Thereafter PW-2 has gone on to state that Pawan Kumar did not molest her sexually anytime, but, these three RPF personnel had

sexually assaulted her. They brought her back to the railway station after committing the crime and made her sit in a train which was to go to Varanasi. She fell asleep and woke up only when the train reached Jaunpur. She met two persons in the train who were residents of Akbarpur. They told her that they were going to Varanasi to purchase some items and that she should accompany them and they will bring her back and leave her at Akbarpur. Then she says she met the son of her Masi, however, there is no explanation as to how, when and where, under what circumstances she met the son of her Masi. It is said that they took her to their house and then she returned to her parental home. She, however, has not stated clearly as to how she came back to her parental home. Nevertheless, she has stated that she on returning home told everything to her uncle and mother. She went along with them to the police station for lodging report. Her medical examination was conducted.

Now in this very context, we may refer to her statement in cross-examination on 06.10.2006 wherein she has stated that on being subjected to gangrape she had bled. Her hands, chest and face had been injured by the police personnel with their tooth marks while committing rape, these were present on her at the time of her medical examination. But, the medical examination report (Exbt. Ka-3) very clearly mentions that there was no mark of injury on breast. She has also stated that she had informed the Lady Doctor who had examined

her about the injuries and had also shown her the same. She has accepted in her cross-examination that she had not informed the Magistrate or Police about the injuries on her body. PW-2 has also stated that there were scratches and bruises on her hands and face which had been caused by scratching of hands by the accused. The skin had peeled off from these places and there were bruises, but, no such injury has been found on her medical examination, though she claims that even at the time of medical examination the same were present. She claims that she had shown the bruises, scratches and injuries to the Doctor. The medical examination report, however, does not mention about any such mark on her hand or face. In her testimony the Lady Doctor i.e. PW-4 Dr. Jaishree Gupta has mentioned that there were no injuries on her chest/breast. There were no sign of injury on her private part nor there was any bleeding. In her cross-examination PW-4 has stated that she had not witnessed any external or internal injury on the body of the victim at the time of medical examination. She had not prepared any supplementary report. Thus, not only the testimony of PW-2 is not corroborated by medical evidence, but also, the medical evidence does not prove rape of the victim. The smear test conducted was obviously irrelevant as after lapse of such period nothing would be found.

41. In this very context we may also refer to another statement by her in her cross-examination on 16.10.2006 wherein she has stated

that the two persons who had met her in the train were not known to her, yet, she went along with them. During the journey they fed her. The identity of these persons is not known. As already stated, there are missing links in her statement. She has stated that she had woken up in the train when she reached Jaunpur and thereafter on persuasion of aforesaid two unknown persons who also belonged to Akbarpur she went to Varanasi where she met the son of her Mausi. However, where, when and under what circumstances she met the son of her Mausi is not known.

42. It is not clear how long she remained with the two unknown persons. It has also come in her testimony that she did not raise an alarm when gangrape was being committed by the police personnel in the Government quarter. It is not the case of the prosecution that it was a solitary quarter. In fact, she has stated that she was not aware as to whether there was any other person in the adjacent rooms/quarters when the rape was being committed on her. She has stated that she did not raise any alarm or shout nor did she raise any alarm nor did she shout at the Railway Station, though she has offered an explanation in this regard that they had threatened her to kill her, if she shouted. Even in the train, she did not disclose the crime committed upon her to anybody nor did she raise any alarm.

43. In this very context, it is relevant to mention that it has come in her cross-examination on 16.10.2006 where she has stated that the

clothes which she was wearing while leaving home were not changed by her in Faizabad, however, she had changed the clothes before meeting the police at PS Malipur i.e, after returning from Varanasi. She has also said that the clothes she was wearing had sperm on it. She had not given the said clothes to the police nor to the Doctor who had conducted the medical examination. When she met the police at Police Station Malipur for informing them about the crime, after her return from Varanasi, she was wearing new clothes and had taken a bath before going there. Although she has stated that she had also taken a bath when she reached the quarter of her Mausei at Varanasi, but, she has nowhere stated that she had washed the clothes which were on her body when the rape was committed and which bore the evidence of crime, as alleged. In fact, in her testimony she has stated that she was wearing the same clothes till she came to her home which had sperm on it and these were washed away before going to the Police Station Malipur. Thus, there is no evidence of such clothes having sperm, etc. on them.

44. The bed-sheet which had been spread on the cot on which the gangrape was committed had stains of blood at several places and sperm on it as has been stated by the victim in her examination-in-chief on 26.09.2006, however, there is no recovery of bed-sheet with stains of blood and sperm nor is it mentioned in Exbt. Ka-5 nor any such bed-sheet was sent for forensic examination. Although a white

bed-sheet was recovered from the room where the crime is alleged to have been committed.

45. PW-2 was not able to identify the boundaries of the quarter where she was subjected to rape. She was also not able to identify the direction in which the same was situated and its distance from the railway station although she had stated that this was on account of the fact that she had visited the place for the first time.

46. It is not out of place to mention that upto the stage of recording of her statement before the Court, Pawan Kumar was also accused of rape upon her who was alleged to be a minor. Though PW-2 has proved her statement before the Magistrate under Section 164 Cr.P.C., but, she has belied her allegations against Pawan Kumar on the ground that these were given under pressure although she had reiterated her allegations of gangrape, etc. against the RPF personnel. In this context suggestions were made to her in the cross-examination by the defense that the appellants had been falsely implicated because they had caught her in a compromising position with Pawan Kumar and being enraged by it the police personnel had been falsely implicated. A suggestion was also made to her that the policemen objected to her lying with Pawan Kumar at the Railway Station, therefore, the said personnel had been falsely implicated. It was also suggested that she had falsely implicated the police personnel only to save Pawan Kumar.

47. From the above discussion, it is evident that as per the medical report she was habitual of sexual intercourse there was no injury on her breast, etc. nor were there any external or internal injuries noticed by the Doctor so as to corroborate the commission of rape that too gangrape by three police personnel for four hours, even if a couple of days ago. No doubt, ocular testimony is to be given primacy over medical evidence, but, there are missing links and unexplained facts in the case such as why did she go along with two unknown persons whom she met in the train who also fed her, how long she remained with them, when did she meet the son of her Mausi, under what circumstances she went to the quarters of her Mausi, who took her there, how she returned to her parent's home on 01.08.2003. It is a fact that she remained away from home since 27.07.2003 till her return on 01.08.2003, and during this time, she was, as per her own statement, with Pawan Kumar at least till 28.07.2003 and the initial allegation as per her statement under Sections 161 Cr.P.C. and 164 Cr.P.C. was that he also had sexual intercourse with her who was a minor, but, subsequently she retracted from her statement against Pawan Kumar, though she has stood her ground against the RPF personnel who it is alleged had confronted the two at Police Station Faizabad and inquired about them whereupon they had initially given a false story but subsequently told the truth whereupon they alleged to have slapped Pawan Kumar and shooed him away. The clothes worn by her have not been recovered. They had been washed by her prior

to going to Police Station Malipur though according to her they had evidence of gangrape on her. The bed-sheet having stains of blood and sperm at various places has not been recovered from the quarter where the crime is alleged to have been committed. There is no recovery of VCR, Television and any apparatus to display blue film as alleged by her, in her statement. She never raised a shout while being taken away by the police personnel to the quarter nor did she raise any alarm at the Railway Station Faizabad when she came back after being raped for four hours and she came on foot. She did not raise any alarm when she was made to sit in the train to Varanasi. Her statement that the police personnel while committing rape upon her were taking each others names is also not normal as such professional police personnel who are indulging in such crime would not commit such a mistake. As already stated the medical report says that she was habitual of sexual intercourse and she herself has stated that she was in a relationship with Pawan Kumar (PW-3) who himself was an accused of rape in the same trial. All this creates a reasonable doubt as to the reliability of her testimony before the Court below. She has subsequently married Pawan Kumar.

48. The fact that two separate incidents leading to two separate FIRs wherein the accused were different though victim was the same, were investigated together, and a common charge-sheet was filed resulting in a common trial complicated the matter and prejudiced the appellants

which is evident from the manner in which the trial has been conducted. PW-3 was the accused in the first incident under Section 363/366 IPC as also Section 376 IPC, but, he is an informant and witness in the same trial so far as the second incident of gangrape by the RPF personnel is concerned. The facts further get complicated as the victim though minor at that time, although given the variation of two years, she was about 17 years, has renegaded on her statement against Pawan Kumar before the police under Section 161 Cr.P.C. and before the Magistrate under Section 164 Cr.P.C. and has stated that she went along with Pawan Kumar and other accused of the first incident of her own volition as she was in a relationship with him and has denied any sexual intercourse tenable or otherwise with Pawan Kumar but, in the same vein she has deposed against the RPF personnel of having committed gangrape on her which is the second incident. We have already discussed the inconsistencies and missing links in her statement. She is not a reliable witness nor is PW-3. The possibility of a story having been cooked up to save PW-3 of the offence of rape or on account of suggestions made by defense cannot be ruled out.

49. For the reasons aforesaid the testimony of PW-2 victim lacks credibility and cannot be made the basis for convicting the appellants for the crime of gangrape under Section 376(2)(g) IPC, nor of the

offence under Section 342/34 IPC nor under Section 3 (2) (v) of SC/ST Act.

50. Moreover, as already stated, her statement before the Court was never shown to the appellants so as to enable them to offer an explanation under Section 313 Cr.P.C.

51. PW-3 is witness of the factum of RPF personnel having shooed him away after slapping him and having taken away the victim with them, that is, at the most, of the offence under Section 342 IPC. He is not a witness of rape.

52. As already stated, it is a peculiar case where PW-3 is the informant as also a witness in a trial where he was also accused of the offence under Sections 363, 366, 376 IPC. He claims in his testimony before the Court that the said RPF personnel came to him and the victim when they were sitting on a cot near the RPF post and enquired about them. On being suspicious, these personnel took them to the quarter of Ram Suresh at about 9.30 PM. Ram Suresh was not found there. These RPF personnel enquired from the neighbours of Ram Suresh and thereafter scolded him i.e. PW-3, beat him up, shooed him away and took the girl with them. In this process they threatened to kill him unless he went away. As already stated, he is not a witness of rape. At best he is a witness of the offence under Section 342 IPC. It is PW-2 who is the victim of rape. Her testimony alone is relevant for the offence of rape. Coming back to testimony of PW-3, he claims that he

got injured due to beating by the police personnel but did not get himself medically examined nor did he report anywhere. He did not furnish any application to any competent authority on the next day nor did he submit any report in the Kotwali. Next day he was in Faizabad at the railway station. He did not give any information/complaint to the GRP or RPF post.

In his cross-examination he has denied certain recitals in the application allegedly given by him to the District Magistrate. He has admitted the fact that in the application given by him the date 30.07.2003 had not been mentioned and expressed surprise that how it got mentioned. He also expressed surprise as to how in the said application addressed to the District Magistrate it had been mentioned that he had come to the Police Station to give the information although he had not said so to the scribe, who was an Advocate. He has stated that he did not go to the RPF post again to look for the victim. He has stated that he did not meet the RPF personnel again and has denied recitals to the contrary in the application submitted by him to the District Magistrate in this regard.

At this stage, it is not out of place to mention that in the said application submitted by PW-3 to the District Magistrate, as alleged, it is mentioned that when he did not find the girl he went back to look for her at her home on 29.07.2003 but did not find her there, therefore, he returned to the RPF post on 30.07.2003 at Faizabad in the morning where he met the three RPF personnel who are the appellants herein

who again scolded him and asked him to go away otherwise he would be put in jail. Firstly, the FIR had been lodged by the uncle of PW-2 on 28.07.2003 itself against PW-3 (Pawank Kumar) and others, therefore, for him to say that he went to her home to look for her is highly improbable and unacceptable. Secondly, in the application submitted by him to the District Magistrate, he has mentioned about meeting the appellants on 30.07.2003 in the day, but, in his testimony before the Court he denies the same.

Moreover, in the said application, it is mentioned that after the RPF personnel beat him up and shooed him away he met the victim sitting in RPF police station which is inconsistent with the testimony of PW-2 and his own testimony.

PW-3 has further stated that on repeated queries of PW-3 they told him that he should go away, the girl would be sent to her home. In the application submitted to the District Magistrate, he has mentioned that the RPF personnel had told him that the girl had been sent to her home. In this context, the testimony of PW-2 is relevant where she has stated that the appellants herein made her sit in a train which was going to Varanasi and she fell asleep. She woke up when the train reached Jaunpur. She met two strangers who also belonged to Akbarpur, who offered to take her to Varanasi and then bring her back to Akbarpur i.e. her native place. She remained at Varanasi till 01.08.2003 till she returned home and then her uncle lodged the FIR against RPF personnel, this is her claim. The only thing is that she

says that prior to being made to sit in the train on 28.07.2003, she was forcibly taken away by the RPF personnel as has also been stated by PW-3 and she was raped. Her testimony has already been discussed earlier and has not been found to be credible. The defense alleges false implication by the two on account of they having found PW-2 and PW-3 in a compromising position after they had run away from their home and/or on account of PW-3 having been slapped a couple of times, as alleged, etc. It has also come in the testimony of PW-2 and PW-3 that on being enquired by the RPF personnel PW-2 had firstly given a false story about she being wife of PW-3. On further enquiry, she had stated that she was his sister. The RPF personnel grew suspicious and accordingly in view of their statement that they had gone to the quarter of Ram Suresh, relative of PW-3, the personnel took them to the said quarter to enquire as to whether they had gone there and thereafter it is alleged that PW-3 was slapped and shooed away. It is highly improbable that they would be taken to the quarter of Ram Suresh, their relative, to enquire as to whether their story was correct or not, if the RPF personnel wanted to rape her. As already stated false implication has been alleged by the defense for the reasons already discussed.

53. PW-3 has claimed to have given a complaint to the District Magistrate, but, denies the date 30.07.2003. He also denies various recitals contained therein. In this scenario his testimony cannot be

made the basis for conviction of the offence alleged under Section 342 IPC. It is not reliable for the same.

54. There is another aspect of the matter which requires our consideration. It was contended by Sri Nagendra Mohan that the informant-witness Pawan Kumar (PW-3) and his clients who are accused of gangrape, all were represented in the trial by the same counsel. We have verified from original record and found that his contention is correct. As already stated this is a peculiar case where the informant-witness PW-3, Pawan Kumar, was himself an accused in the same trial for the offence under Sections 363, 366, 376 IPC, but, he was also the informant-witness against aforesaid three appellants Ram Sagar, Pappu Sonkar and Hare Ram Mishra of the offences alleged under Section 342, 376 (2)(g) IPC, etc. It seems that, as, Pawan Kumar and the aforesaid three persons, all were accused of rape, therefore, they engaged the same counsel. No doubt, the three appellants were on bail and they had engaged the same counsel, but, it seems that they were not properly advised in the matter nor could they understand the nuances of being represented by the same counsel who was representing the informant in their case. This has added to the complications resulting from a common charge-sheet in respect of two separate FIRs and a single trial based on such charge-sheet. The cross-examination of PW-2 has also been conducted by these very counsel(s). This is not in keeping with a fair opportunity of defense to the accused. The same counsel was representing the

accused Pawan Kumar relating to first offence and the RPF personnel accused of gangrape based on the second incident, although the former was the informant and witness of the second offence. There was a clear conflict of interest and a genuine possibility of the interest of appellants herein being compromised. We, therefore, take this also into account.

55. As regards the plea of alibi set up by Pappu Sonkar and Ram Sagar and the evidence led in this regard in the form of Defense Witness No. 1, we find that the Trial Court has cursorily rejected the same. However, we find that in his testimony DW-1 has testified on the basis of documents which were prepared ten years ago. He had retired subsequently. Though in his cross-examination he has stated that the Constables used to go back in the Barrack after 6 PM, his duty was in the Barrack and no Constable could come out and also that the Rojnamcha used to be prepared by the Duty Writer in his presence and on his dictation, we cannot loose sight of the fact that for the plea of alibi to succeed, the proof has to be a very high level and there had to be a specific statement that DW-1 has seen the appellants on the relevant date and at the relevant time at Lucknow and mere statement that it was not possible for anybody to go out would not suffice. However, this is not very relevant in view of the fact that we have found the testimony of PW-2 and PW-3 incredible.

56. In view of the above discussion the prosecution has failed to prove the charges of gangrape, etc. against the appellants beyond reasonable doubt.

57. As regards conviction of appellant-Hare Ram Mishra for the offence under Section 3(2)(v) of SC/ST Act, since we have not believed the testimony of victim 'X' who belonged to Scheduled Caste community and have absolved him of the offence under Section 342/34, 376(2)(g) IPC, therefore, the conviction of the appellant-Hare Ram Mishra under Section 3(2)(v) of SC/ST Act is also not found proved beyond reasonable doubt.

58. We are, therefore, of the opinion that the Trial Court has not appropriately considered and appreciated the evidence on record, therefore, the judgment is liable to be set aside. We accordingly set aside the said judgment. Consequently, we absolve the said appellants of the offence. Accordingly, Criminal Appeal No. 625 of 2015 and Criminal Appeal No. 629 of 2015 are **allowed**. The appellants are in jail since 2015. They shall be released forthwith, if not wanted in any other criminal case.

59. The appellants of Criminal Appeal No. 575 of 2015 and Criminal Appeal No. 599 of 2015 are on bail, their bail bonds are cancelled and sureties are discharges. The appellants of Criminal Appeal No. 625 of 2015 and Criminal Appeal No. 629 of 2015 are in jail. They shall be released forthwith, if not wanted in any other criminal case.

60. All the appellants are directed to file a personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of Criminal Procedure within six weeks from the date of release.

61. Let the Lower Court Records along with certified copy of this judgment be sent to the trial Court and the C.J.M. concerned for necessary action.

62. A copy of this judgment shall also be sent to those appellants who are lodged in jail.

**[Manish Kumar Nigam, J.] [Rajan Roy, J.]**

**Order Date :- 07.11.2023**

Santosh/-