

**HIGH COURT OF TRIPURA
AGARTALA
CRL.A(J) NO.17 OF 2023**

Sri Suran Lila Jamatia@ Retharaj@Charanjoy,
S/o Late Gobinda Kishore Jamatia, R/o No.2 Colony, Dalak,
P.S. Birganj, Gomati Tripura

.....**Convict-Appellant(s)**

Versus

The State of Tripura

.....**Respondent(s)**

For the Petitioner(s) : Ms. R. Purukayastha, Advocate.

For the Respondent(s) : Mr. Raju Datta, P.P.
Mr. S. Ghosh, Addl. P.P.

Date of hearing and delivery of
Judgment & Order : 08.04.2024

Whether fit for reporting : NO

**HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT
J U D G M E N T & O R D E R (O R A L)**

T. AMARNATH GOUD(J)

This present appeal has been filed under Section 374 of Cr. P.C against impugned Judgment of conviction and sentence dated 29.09.2022 and 30.09.2022 respectively passed by the learned Additional Sessions Judge Gomati Judicial District, Udaipur in case No. S.T. 18 of 2012 whereby and whereunder the appellant has been convicted under section 376(1) of IPC and has been sentenced to suffer R.I for a period of 14 years with a fine of Rs.25,000/- U/S 376(1) of IPC and with default stipulations.

2. The brief fact of this case is that on 05.07.2011 at around 4.00 pm. the daughter of the informant had gone missing from the house. On 06.07.2011 morning at around 4.15 A.M., he lodged a missing diary with the Maharani Outpost. Subsequently, the informant along with the police recovered the daughter of the informant from Adibasi Colony near Banduar Kaju Badam area. Thereafter, the victim informed the informant that on 05.07.2011 evening at around 7.00 p.m., when she was returning to her house from Maharani bazaar, on her way, at Sanjoymani Tilla, the accused persons wrongfully restrained her and had taken her to the nearby jungle and committed rape upon her one after another.

3. On the receipt of complaint, the O/C R.K.Pur PS registered R.K.Pur PS Case No. 295/2011 under Section 376(2)(g) of IPC. On the completion of the investigation, the I/O submitted charge sheet against the appellant under Section 341/376(2)(g) of IPC. During the trial, the prosecution examined as many as 15 witnesses to prove the charge against the appellant. On the closure of prosecution evidence, the appellant was examined under Section 313 of Cr.P.C. to which he strongly denied the allegations brought against him by the prosecution. But he denied to adduce any defence evidence on his side.

4. The learned Trial Court took up the following points for discussion and decision:-

(i) Whether the accused person namely Shri Suran Lila Jamatia alias Retharaj alias Charanjy, S/O Late gobinda kishore Jamatia on 05.07.2011 after 1900 hours to morning on 06.07.2011 at Sanjoymani Tilla and Maharani Adibasi Colony near Banduar Kaju Badam area under P/S- R.K.Pur, Sub-Division: Udaipur, District: South Tripura wrongfully restrained the victim and thereby accused committed an offence punishable under sec. 341 of the IPC and within the cognizance of this court;

(ii) Whether the accused person namely Shri Suran Lila Jamatia alias Retharai alias Charanjpy, S/O Late Gobinda Kishore Jamatia on 05.07.2011 after 1900 hours to morning on 06.07.2011 at Adibasi Colony near Banduar Kaju Badam area under P/S-R.K.Pur, Sub-Division: Udaipur, District: South Tripura wrongfully restrained the victim and thereby accused committed rape upon the prosecutrix and thereby accused committed an offence punishable under sec. 376(1) of the IPC and within the cognizance of this court.

5. After hearing the arguments of both sides, the learned Court below by the impugned Judgment of conviction of sentence dated 29.09.2022 and 30.09.2022 convicted the appellant as mentioned herein above.

6. Being aggrieved and dissatisfied with the impugned judgment of conviction and sentence, the convict-appellant herein has filed this appeal seeking the following reliefs:-

"i) Admit this appeal;

ii) Call for the record;

*iii) Issue notice upon the respondent;
and*

iv) After hearing the parties be pleased enough to set aside the impugned Judgment of conviction and sentence dated 29.09.2022 and 30.09.2022 respectively passed by the Ld. Additional Sessions Judge (Sri M. Debbarma), Gomati Judicial District, Udaipur in case No. S.T. 18 of 2012, for fair ends of justice otherwise the appellant would be seriously prejudiced and further to suspend the operation of the impugned judgment of conviction and sentence dated 30.09.2022 till final disposal of the appeal.

7. Heard Ms. R. Purukayastha, learned counsel appearing for the appellant as well as Mr. Raju Datta, learned P.P., and Mr. S. Ghosh, learned Addl. P.P., appearing for the State-respondent.

8. Ms. R. Purukayastha, learned counsel appearing for the appellant submits that the victim in her statement made under Section 164 of Cr.P.C., stated that five persons i.e., Anjan Kumar Jamatia, Arun Kumar Jamatia, Jagat Mani Jamatia, Sagar Manik Jamatia, and Suran Lila Jamatia raped her one by one after kidnapping her. But in her witness, she stated that out of the five persons four of them left after the arrival of one villager, and only the appellant herein i.e. Suran Lila Jamatia did not leave and raped her forcibly and tore her wearing apparels and as such, there is

contradiction and improvement in the statement of the victim girl. Learned counsel also submitted that in the statement of the victim, it is revealed that when one villager came, the appellant herein told the villager that she is his wife and that villager also left the place but she did not raise any alarm or ask the villager for help. Stating thus, learned counsel submitted that the statement of the victim-girl is not reliable.

Learned counsel submits that in 2011 the consent of the female in terms of the Indian Penal Code was 16 years and only after 2013 amendment, the age bar for consent was raised to 18 years. In the FIR, it is stated that the age of the victim is 19 years and in the medical report, the P.W.-10 i.e., Dr. Pradipta Narayan Chakraborty after examination of the victim girl opined the age of the victim as above 17 years and below 18 years. Learned counsel stated that in the cross-examination of the informant i.e. P.W.-2, he stated that when he recovered her daughter he found her feeble but her wearing apparel was in order which is contrary to the statement that the appellant tore the wearing appeals of the victim. The medical report also does not reveal any mark or injury on the person of the victim. Stating thus, learned counsel urged this Court to allow this appeal as evidence reveals that there was mutual consent between the parties and later on the prosecution improved their stories.

9. On the other hand, Mr. S. Ghosh, learned Addl. P.P. appearing for the respondent submits that the victim in her cross-examination stated that nearby the place of occurrence, there was no house and she cried for help. Learned Addl. P.P., stated that this statement of the victim contradicts the consent argument advanced by the learned counsel appearing for the appellant.

10. Heard both sides and perused the evidence on record.

11. Before delving into the reasoning of the case let us examine some important witnesses.

12. P.W.-1 i.e., the victim girl in her evidence deposed that on 05-07-2011 at around evening time 7.00 p.m. while she was returning to her house from Maharani Chowmohani Bazaar on way nearby a brick-kiln she was restrained by five persons, namely, Suranlila Jamatia, Ajoymani Jamatia, Sagarmanik Jamatia, Arun Jamatia and another. Then Suranlila Jamatia gagged her mouth with his hand and beaten her with a slipper and also threatened her with a knife. Thereafter, one villager arrived there and seeing him four persons left the place, but Suranlila did not leave her, rather told the villager that she is his wife. P.W.-1 also deposed that after the villager left, Suranlila took her forcibly towards Kaju Bagan and tore her wearing apparel. Though she raised objection and there he

committed rape upon her during the whole night. On the following morning, she was recovered by her parents and police from that Kaju Bagan. She informed the matter of the incident to her mother and other villagers. P.W.-1 also deposed that she gave her statement before the Magistrate by narrating all the incidents wherein she put her signatures which she identified as Exhibit-1 (series).

In the cross-examination, P.W.-1 stated that the alleged incident took place on 05.07.2011 and on that date, she met with Suranlila Jamatia and others in front of one brick kiln near Maharani Bazar. P.W.-1 further stated that she talked to the villager who arrived there and seeing him four others left the place. P.W.-1 also stated that nearby the place of occurrence, there was no house available and she cried for help. P.W.-1 further stated that on the next morning, she was recovered by her parents along with police at around 12.00 noon and there she informed about the incident to the police. P.W.-1 also stated that she tried to go to her house during the alleged night of the incident and Suranlila Jamatia is not known to her previously, as she came to know the name of the accused Suranlila Jamatia during the incident.

13. P.W.-2 Shri Tarunjit Jamatia deposed that on 05-07-2011, his victim-daughter did not return to the house, as such on the next early morning, he went to the Maharani Out Post to

lodge a missing diary about his daughter and there he informed the matter. P.W.-2 also deposed that subsequently, police personnel of that Outpost accompanied him in the search of his daughter and they recovered her from Adibasi Colony also known as Kaju Bagan at around 10/11 A.M. in the presence of Suranlila Jamatia. P.W.-2 further deposed that his daughter was taken to the house and on the next day when she got sick, then, he came to know about the incident from his daughter that while she was returning home from the local bazaar in the evening of 05-07-2011, Suranlila accompanied his daughter towards their house but on way, Suranlila had used force upon his daughter and committed such incident. P.W.-2 further deposed that, then, he lodged the ejahar on 08-07-2011 after stating all the facts as written by one villager namely Muslem Miah wherein he identified his signature as Exhibit-2.

In the cross-examination, P.W.-2 stated that he did not inquire to her daughter about the incident after recovery at Kaju Bagan, Maharani, and while recovery of her daughter, he found her feeble, though all her wearing apparels was in order. P.W.-2 further stated that Suranlila Jamatia is known to him earlier. The rest part of the cross-examination is denial and suggestion of defence side.

14. PW.10 Dr. Pradipta Narayan Chakraborty deposed that on 04-08-2011 he along with Dr. Ranjit Kumar Das examined

the victim i.e. D/o. Tarunjit Jamatia in connection with R.K. Pur PS Case No. 295/11 dated 08-07-2011 for determination of her actual age through the Ossification Test. P.W.-10 deposed that after conducting the examination they opined that based on physical, dental and radiological examination findings, the examined victim girl was of the age above 17 years and below 18 years. PW.10 identified the report as Exhibit - 4, his signatures thereon as Exhibit 4/1 and Exhibit 4/2. PW.10 also identified the signatures of Dr. Ranjit Kumar Das as Exhibit - 4/3 and Exhibit - 4/4.

In the cross-examination, PW.10 stated that they came to their conclusion about the age of the examined victim relying on some examined facts.

15. P.W.-14 Dr. Dhruva Das deposed that on 08.07.2011 he examined the victim herein in connection with R.K. Pur P.S. case No.295/2011 Under Section 376(2)(g) of IPC. P.W.14 also deposed that after pre-vaginal examination he found tear on hymen at 3, 5 and 9 o'clock position mentioned at the column of Hymen intact/tear or any other injury and he opined that tear found on hymen at 3, 5 and 9 o'clock position is evidence of penetration of vagina by adult erected penis like object. P.W.-14 identified the report marked as Exbt.P-7 and his signature thereon marked as Ext.P-7/1. P.W.-14 further deposed that on that day he also conducted the potency test of the accused Suranlila Jamatia to

which he found nothing that the accused is incapable of sexual intercourse. P.W.-14 identified the potency test report marked as Exbt.P-8 and his signature thereon marked as Ext.P-8/1.

In the cross-examination, P.W.-14 stated that he did not mention in his report about the age of penetration. P.W.-14 further stated that it is not necessary that in the case of gang rape there should be any injury in the private parts of the victim.

16. Now, let us also produce the statement made by the victim-girl under Section 164 of Cr.P.C.:-

"On the 6th day of July, 2011 A.D, at about 7 o'clock in the evening, I was standing at Maharani Chowmuhan. At that time, Anjan Kumar Jamatia, Arun Kumar Jamatia, Jagat Mani Jamatia, Sagar Manik Jamatia and Suran Lila Jamatia asked me as to where I would go. I replied that I would go home. Then, they told me that they would get me there as they were going in that direction. Keeping a good faith in them, I started proceeding with them. On the arrival near the Maharani Bricks Factory, they took me into the nearby jungle by force and at the point of knife and by covering face. By holding my hands pressed, (they) assaulted me with footwear and denuded me. Thereafter, they raped me one by one. When I screamed out, four boys fled away. When the people came up, they saw Suran Lila Jamatia near and with me. On being asked by the people, Suran said that I was his wife. Thereafter, he

took me by force to Adibashi Colony near Banduar Kaju Badam and by keeping me there for one night he raped me again and again. Police came the next day and rescued me. This is my statement."

17. Heard both sides and perused the evidence on record

18. The entire case runs around 2(two) facets number one is with regard to committing of rape and number two is whether it was a consenting or against the will of the victim girl.

19. It is seen from the record that in her statement made under Section 164 of the Cr.P.C., in her deposition as P.W.-1, in her evidence and in the cross-examination, the statements made by the victim girl are inconsistent. It falls for consideration before the Court that when according to the victim a villager was present, she did not make any complaint to the villager for seeking any help or to rescue her. In so far as considering their statement that she accompanied the accused persons and she was although with the accused, she could have taken steps for escaping but in turn, there is no evidence on the said issue. Hence, this Court considers that this is not a 'rape' but they knew each other and the victim girl accompanied the accused persons.

20. Now coming to the issue of whether there was any sexual intercourse by the accused-appellant against the will of the victim, by referring to Section 375 of IPC, prior to the 2013

amending, it is seen that the age of consent is defined as not less than 16 years of age. The relevant portion of the same is extracted here-in-under:-

"375. Rape. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.-Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her

or any person in whom she is interested in fear of death or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

*Sixthly. **With or without her consent, when she is under sixteen years of age***

Emphasis added"

21. Since the exhibit which is marked by the Doctor i.e. P.W.-10 i.e., the ossification test is concerned, he has categorically stated that the age of the victim girl is above 17 and below 18 years. In so far as the school certificate which is marked as exbt-No.5 is concerned, the age of the victim girl is marked as born on 24.12.1996, and the certificate is issued subsequently. At all levels of evidence, the age of the victim girl as deposed by her is 17 years and by her father i.e. P.W.-2 is 19 years. In view of the discrepancies, this Court considers the medical report, the

ossification test as more appropriate, and thus, the age of the girl is considered above 17 years and below 18 years. Since the alleged crime was committed on 05.07.2011, Section 375 of IPC prior to the 2013 amendment applies. Accordingly, this Court feels that it is not 'rape' but it was consenting between the victim and the accused. Thus, the appellant herein is entitled to relief and the present criminal appeal accordingly stands allowed and the accused person i.e., appellant herein stands acquitted. Accordingly, the impugned Judgment of conviction and sentence dated 29.09.2022 and 30.09.2022 is set aside

22. As a sequel, stay if any stands vacated. Pending application(s), if any also stands closed.

B. PALIT, J

T. AMARNATH GOUD, J

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