

**THE HIGH COURT OF TRIPURA**  
**AGARTALA**

**Crl. Rev. P. No.51 of 2011**

Sri Nunvuaia Darlong,  
son of Sri Sandama Darlong,  
resident of Village-New Kathal Charra,  
P.S. Nepal Tilla,  
District – Dhalai, Tripura

..... **Petitioner**

- **Vs** -

The State of Tripura,  
represented by the Secretary,  
Department of Home,  
Government of Tripura,  
Agartala

.....**Respondent**

**B E F O R E**  
**THE HON'BLE MR. JUSTICE S. TALAPATRA**

|                                                     |                               |
|-----------------------------------------------------|-------------------------------|
| For the petitioner                                  | : Mr. A. Bhowmik, Advocate    |
| For the respondent                                  | : Mr. R. C. Debnath, Addl. PP |
| Date of hearing and<br>delivery of judgment & order | : <b>17.06.2015</b>           |
| Whether fit for reporting                           | : <b>NO</b>                   |

**JUDGMENT & ORDER (ORAL)**

Heard Mr. A. Bhowmik, learned counsel appearing for the revisional petitioner, namely Nunvuaia Darlong, as well as Mr. R. C. Debnath, learned Addl. Public Prosecutor appearing for the State.

**02.** This petition filed under Section 401 read with Section 397 of the Cr.P.C. is directed against the judgment and order dated 18.05.2011 passed by the Sessions Judge, North Tripura, Kailashahar, now Unakoti Judicial District in Criminal Appeal No.2(1) of 2011.

**03.** By the said judgment and order dated 18.05.2011, the judgment of conviction and order of sentence dated 08.02.2011 delivered in ST 36(NT/K) of 2010 by the Assistant Sessions Judge, North Tripura, Kailashahar whereby the petitioner was convicted under Section 376(1) of the IPC for committing rape on the victim, (PW2), whose name has been withheld for protecting her identity has been upheld. Pursuant to the said judgment of conviction, the petitioner was sentenced by the order dated 08.02.2011 to suffer RI for 7 years along with fine of Rs.10,000/-, in default in making payment of fine six months further RI. The petitioner has also been sentenced to suffer 6 months RI under Section 448 of the IPC for committing trespass.

**04.** The genesis of the prosecution case is rooted in the written ejahar filed by one Sumendra Reang (PW1) on 26.07.2009 disclosing that when he and the other family members were away from home for cultivation in the jhum field, his daughter, the victim was alone at home. He came to know from her daughter that at about 2.30 p.m. an unknown person raped her against her will. One of her aunts, namely Dulabati Reang suddenly appeared in the place of occurrence and saw the act. She raised alarm. The people from the neighbourhood rushed to the place of occurrence.

**05.** Based on the said written ejahar, Kumarghat PS Case No.55 of 2009 under Section 448/376 IPC was registered and taken up for investigation. On completion of the investigation, the investigating officer namely Manash Paul, PW16, filed the final police

report chargesheeting the petitioner under Section 376/448 of the IPC. As the trial is to be conducted by the Court of Sessions, the police papers were accordingly committed. In due course, the case was transferred to the Court of the Assistant Sessions Judge, North Tripura, Kailashahar for trial in accordance with law. The trial Judge framed the charge under Section 448 and 376(1) of the IPC on 06.08.2000. The petitioner denied the charge and claimed to face the trial.

**06.** In order to substantiate the charge, as many as 16 witnesses were examined and 12 documentary evidence have been introduced in the record of evidence. In addition to that, one excerpt of the statement of the victim (Exbt.A) has also been introduced in the evidence. After the evidence led by the prosecution was recorded, the petitioner was examined under Section 313 of the CrPC for having his response on the incriminating material surfaced in the evidence. The petitioner reiterated that he was completely innocent and implicated in the case falsely.

**07.** Mr. A. Bhowmik, learned counsel appearing for the petitioner has submitted that there is no legal evidence of rape. Even there is no foundation of sexual intercourse as the doctor who examined the victim has categorically stated that there had been no sign of recent sexual intercourse. Even on scientific examination, no spermatozoa could be located in the vaginal swab or any stain on the wearing apparels. Apart that, Mr. Bhowmik, learned counsel for the petitioner has submitted that if had there been any sexual intercourse

it was consensual in nature as the victim never raised alarm or tried to resist the petitioner. PW3, Dulabati Reang, claimed to have witnessed the said act but she did not give any description, except to have stated that she saw one Darlong boy raping the victim. Mr. Bhowmik, learned counsel has further submitted that it is clear from the medical examination report that there was no mark of violence over the body of the victim.

**08.** From the other side, Mr. R. C. Debnath, learned Addl. PP has submitted that the victim and the eye witness (PWs.2 and 3) have categorically stated of rape. Moreover, in the statement of the victim as recorded under Section 164(5) of the CrPC by the Judicial Magistrate, (PW14), the victim has stated that while she was asleep, the petitioner entered in her room and raped her. As her voice was broken, she could not raise the alarm, but on seeing the petitioner rape the victim, Dulabati Reang (PW3) raised the alarm and the people from the neighbourhood rushed to the place of occurrence. Apart that, Mr. Debnath, learned Addl. PP has submitted that the victim coming to the trial has categorically stated that the petitioner is the person whom she identified in the Test Identification Parade as the person who committed rape. There cannot be any amount of doubt about the identity of the person who committed the offence. Mr. Debnath, learned Addl. PP has further submitted that if the statement of the victim and the medical examination report are not congruous, then the precedence has to be given on the statement of the victim as the injured witness. Mr. Debnath, learned Addl. PP has categorically

stated that the plea of consent cannot be accepted by this court on the face of the statement made by the victim, PW2.

**09.** For purpose of appreciating the rival contentions as projected by the learned counsel appearing for the parties, it would be appropriate to have a short survey of the evidence that is on record.

There is no dispute that the judgment of conviction is primarily based on the statement of PWs.1, 2, 3, 4, 14 and 16. PW-15, Dr. J. B. Darlong did not support the prosecution case by giving his opinion on the basis of the medical examination. PWs.1, 2, 3 and 4 have stated in the same fashion about the incident. Except PWs.2 and 3, the PWs.1 and 4 are the hearsay witnesses who heard about the occurrence from PW.2. PW2 is the victim and she has stated in the trial that when she was sleeping in their house alone, all on a sudden, she woke up and found one Darlong boy was 'committing rape' upon her. During the relevant period, one Dulabati Reang (PW3) of their village came to their house and having seen the incident, she raised alarm and that boy ran away. After the incident, her parents came from their jhum land and Dulabati Reang intimated the incident to them. Thereafter, her parents informed the occurrence to the Kumarghat PS. She was examined medically as arranged by the police station and also she made statement to the Magistrate in connection with the occurrence. She has further stated that the Investigating Officer seized her wearing clothes of the time of incident. Since at the time of incident she could not identify the face of the said boy, she identified him in the jail. She has categorically stated in the cross-

examination that she did not know the petitioner from before. She had not described him to the Investigating Officer when she was confronted showing a part of the previous statement recorded by the IO under Section 161 of the CrPC, she found the statement at Exbt.A. The extract at Exbt.A is that the unknown boy is a driver of an auto van and every Saturday and Wednesday he transported banana from their village. But she denied the suggestion that the petitioner did not commit rape. PW3, Dulabati Reang has simply stated that when she entered in the house of the victim, she found one Darlong boy was 'committing rape' upon her. She raised alarm and then the Darlong boy ran away by one scooter standing nearby, along with two other boys. She has categorically stated that she could identify the Darlong boy at the time of committing the rape. She also denied the suggestions. PW1 is the informant and PW4, Pantharung Reang, is the mother of the victim girl. She has simply stated that she went to the Kumarghat PS along with her husband and daughter, the victim. PW5, Ranijoy Reang, has stated that she came to know the name of Darlong boy as Mobia Darlong from Dulabati Reang, PW3. PW6, Lalompua Darlong was not examined by the prosecution and was released without cross-examination. PW7, Bineswari Debbarma, was a woman constable in the Kumarghat Police Station. She led the victim to Kailashahar Court for recording her statement by the Magistrate. PW8, Amita Deb is a GDA in the Kumarghat Public Health Centre and she was present when the medical examination was conducted by the doctor. PW9, Thanga Darlong, was not examined by the prosecution and released from the cross-examination. PW11, Dr. Gopesh Banik,

examined the petitioner as to his potentiality to commit sexual intercourse and the report was positive (Exbt.P/5). PW12, Halkuma Darlong, is the owner of the auto rickshaw bearing No.1646 and the scooter bearing No.6732. He has stated that both those vehicles were being driven by the petitioner. He has stated that he came to know that the petitioner had committed some wrong with one girl at Kakchang para. PW13, Joymani Reang is a witness from the neighbourhood, who scribed the written ejahar (Exbt.P/1). PW14, Dhiman Debbarma, Judicial Magistrate, who conducted the Test Identification Parade in the District Jail, Kailashahar in connection with the Kumarghat PS Case No.55/2009. He has narrated how he conducted the Test Identification Parade. In the cross-examination, he has admitted that he did not enquire whether on the day when the accused was produced before the court, he was covered with musk or not. Even he did not enquire from the jail authority whether anyone had met the petitioner. PW15, Dr. J. B. Darlong, has stated as under:

***"On 26-7-09 I was posted at Kumarghat Rural Hospital as Medical Officer. On that day one Trisnarun Reang was produced before me in connection with Kumarghat P.S. Case No.55/09 for medical examination. As per requisition I conducted examination and on examination I find the following points:-***

***(a) Hymen ruptured. (b) No violence mark on her body and private parts, (c) No foreign body on her private parts, (d) No recent sign of forceful intercourse, (e) 2 Nos. of Vaginal swab collected and preserved in normal Saline and then handed over to police for pathological examination of spermatozoa. For the purpose of determination of age, the case was referred to RGM hospital, Kailashahar. On 31-7-09 I prepared my examination report in my own handwriting and signed and seals. This is the said report prepared by me. On identification it is marked as Ext. P7 and signature is marked as Ext.7/1."***

No cross-examination by the prosecution was carried out. As such, the prosecution cannot dispute the veracity of his statement. PW16, Manash Paul, investigated the case and narrated shortly how he conducted the entire investigation. He has also stated how he seized the wearing apparels and the vaginal swab for further examination. After receipt of the memorandum of Test Identification Parade, he finalised the police report chargesheeting the petitioner under Section 448/376 of the IPC. In the cross-examination, he has admitted that as per the expert report seminal stain and spermatozoa of human origin could not be detected after examination of swab. The report of chemical examination of wearing apparels of the victim was also received by him with opinion that no seminal stain was detected in those clothes. He has also confirmed that Exbt.A was recorded by him. It is to be noted that PW14 though recorded the statement under Section 164(5) CrPC but the said statement was not brought in the evidence by him, though it has been marked as Exbt.P/3 at the instance of PW2. In that statement, the victim has stated that all on a sudden a boy caught hold of her and pressed her mouth and raped her. She was very sick and could not raise her voice as she had a broken voice. Subsequently one of her relatives, namely Dulabati Reang, entered in the room to take a glass and saw the incident. She then and there caught hold of the accused person but as the accused was stronger than her, he fled away. According to her, that boy came along with Sanga and Umpui Darlong. She had given the physical appearance of the accused person. According to her, he is short and having whitish complexion with short hair. But neither the victim nor

the doctor who examined her medically, not even in the memorandum of the Test Identification Parade, such description of the accused has been recorded. As stated by PW15, the medical report (Exbt.P/7) has observed as under:

***"(a) Hymen ruptured. (b) No violence mark on her body and private parts, (c) No foreign body on her private parts, (d) No recent sign of forceful intercourse, (e) 2 Nos. of Vaginal swab collected and preserved in normal Saline and then handed over to police for pathological examination of spermatozoa."***

There is no opinion that the victim was subjected to rape.

**10.** If the statements of PWs.2 and 3 are read keenly, it would appear that what the victim has stated in her statement under Section 164(5) CrPC does not tally with what has been stated by PW3 in the trial. In the statement recorded under Section 164(5) CrPC, the victim has stated that Dulabati Reang came subsequently and saw the incident. She caught hold of the accused person but she could not hold him back as the accused was the stronger. PW2 has further stated that a boy caught hold of her and pressed her mouth and raped her as she was sick, she could not raise her voice and she had also broken voice but in the trial, the victim has stated that she raised the alarm and the boy ran away. Even Dulabati Reang did not state that she caught hold of the Darlong boy who committed rape on the victim. What has been curiously noted is that the victim or PW3 nowhere stated how the rape was committed, even there is no scant description.

**11.** Mr. Bhowmik, learned counsel for the petitioner has strongly contended that by bringing the pieces together, it would be apparent that for protecting the dignity of the family, the episode has been contoured as an incident of rape. From the conduct of the victim (PW2), it will be conspicuous that she did not even try to resist, nor did she state that how the accused person raped her, whether there was forceful intercourse, whether did she try to resist the accused person or whether was her mouth held by the accused person? That creates a lot of doubt and presumption as to the consent becomes more brighter. That doubt gets further thicker when the medical examination report or the chemical examination report are read together. Even though, the petitioner did not plead that the sexual intercourse which took place allegedly was a consensual one, but it appears that a probable case has been churned out from the prosecution evidence that even if there was sexual intercourse that was not by applying force. It may be consensual or there might not happen any sexual intercourse at all. Since admittedly, the victim was aged about 18 years on 27.07.2009, when her statement under Section 164(5) Cr.P.C. was recorded and hence there cannot be any presumption of absence of consent.

**12.** What Mr. Debnath, learned Addl. PP has submitted that if the rape is not established, a case of attempt to rape has been made out by the prosecution beyond reasonable doubt. Again this court is constrained to hold that for lack of any description as to the act that has been allegedly committed by the petitioner, this court cannot

safely reach to such conclusion that there was any attempt of rape on the victim.

**13.** Having held so, this court is of the opinion that the petitioner is entitled to get the benefit of doubt and accordingly the impugned judgment and order is interfered with. The petitioner is acquitted from the charge under Section 376(1) and 448 of the IPC on benefit of doubt.

In the result, this petition stands allowed.

Send down the LCRs forthwith.

**JUDGE**

MB