

**HIGH COURT OF TRIPURA
AGARTALA
CRL.REV.P NO.02 OF 2022**

1. **Saktipada Chakraborty,**
S/o. Late Hiralal Chakraborty,

2. **Sri Suman Chakraborty,**
S/o, Sri Saktipada Chakraborty,

3. **Smt. Niva Chakraborty,**
W/o. Sri Saktipada Chakraborty,

4. **Smt. Dipti Chakraborty,**
W/o. Sri Swapan Chakraborty,
D/o- Sri Saktipada Chakraborty

All Resident of: Bagmara, S.C. Colony, P.S.-
Melaghar, District-Sepahijala, Tripura

..... **Petitioner(s)/Convict(s)**

Vs.

1. **The State of Tripura.**

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

CRL.REV.P NO.03 OF 2022

1. **Saktipada Chakraborty,**
S/o. Late Hiralal Chakraborty,
Resident of: Bagmara, S.C. Colony,
P.S.- Melaghar, District-Sepahijala, Tripura.

..... **Petitioner(s)/De-facto complainant(s)**

Vs.

1. **The State of Tripura.**

2. **Smt. Pramilla Chakraborty,**
D/o: Lt. Kajal Chakraborty.

3. **Smt. Rama Chakraborty,**
D/o- Lt. Kajal Chakraborty,
Respondents No.2 and 3

Both R/o: Bagmara S.C. Colony, P.S.- Melaghar, Dist: Sipahijala
Tripura.

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

For the Petitioner(s) : Mr. S. Kar Bhowmik, Sr. Advocate.
Mr. S. Bal, Advocate.

For the Respondent(s) : Mr. S. Lodh, Advocate.
Mr. S. Ghosh, Addl. P.P.

Date of hearing and delivery of
Judgment & Order : 14.09.2023.

Whether fit for reporting : YES.

HON'BLE MR JUSTICE T. AMARNATH GOUD
JUDGMENT AND ORDER(ORAL)

The present revision petitions are filed challenging the orders dated 22.11.2021 passed by the learned Sessions Judge, Sepahijala, Sonamura in Case No. Criminal Appeal No.02 of 2019 (*impuged order in Crl.Rev.P No.02 of 2022*) and Criminal Appeal No.04 of 2019 (*impuged order in Crl.Rev.P No.03 of 2022*).

2. The accused persons and the review petitioners in Crl.Rev.P.No.2 of 2022 have challenged the order dated 22.11.2021 passed in Criminal Appeal No.02 of 2019, wherein the learned Sessions Judge, Sepahijala, Sonamura upheld the Judgment and Order of conviction dated 07.02.2019 passed by the learned Chief Judicial Magistrate, Sepahijala, Sonamura in GR-444 of 2011 sentencing the petitioners No.1 and 2 to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- for the commission of an offence under Section 448 of IPC with default stipulation and also sentenced the convict-petitioners No.1 and 2

to suffer R.I for 7 years and to pay a fine of Rs.30,000/- with default stipulations under Section 326 of IPC. The Court below further sentenced the convict-petitioners No.3 and 4 to suffer R.I. for one year and to pay a fine of Rs.1,000/- for the commission of offence under Section 448 of IPC with default stipulation and also sentenced the convict-petitioners No.3 and 4 to suffer R.I. for 3 years and to pay a fine of Rs.30,000/- with default stipulation under Section 326 of IPC. All the sentences were passed to run concurrently.

3. Against the complaint filed by the complainant in Crl.Rev.P.No.2 of 2022, in Crl.Rev.P. No.3 of 2022, the complaint has also been filed by the review petitioner No.1 of the Crl.Rev.P.No.2 of 2022 against private respondents of Crl.Rev.P No.03 of 2022 and others. So both are counterblast complaints.

4. In Crl. Rev. P No.3 of 2022, the Trial Court has acquitted the accused persons, aggrieved thereby, the appeal was preferred and the First Appellate Court confirmed the order dated 07.02.2019 in its originality. Thus, the present revision petition has been filed.

5. The facts of the case in Crl.Rev.P No.02 of 2022 is that on 8th November 2011 in the evening hours, i.e. at around

6.00 P.M., accused persons namely Saktipada Chakraborty, Suman Chakraborty, Niva Chakraborty, and Dipti Chakraborty attacked on the informant Bivo Rani Chakraborty, Pramila Chakraborty and her sister Rama Chakraborty in their courtyard and also attack upon Rajat Jha (*son of the elder sister of the informant*). Thereafter, a written complaint was lodged to the then O/C Melaghar P.S Kajal Deb registered as Melaghar P.S case No.101 of 2011 dated 08.11.2011 under Section 448/326/34 of IPC against. Thereafter, the investigation was completed and charge-sheet was filed against the accused under Section 448/326/380/34 of IPC vide Melaghar P.S C/S No.1/12. To prove the case, before the Trial Court, against the accused persons prosecution examined as many as 18 witnesses including the I/O of this case, and some documents were also exhibited. Thereafter, after the closure of the evidence, the Court below found all the accused persons guilty and sentenced as mentioned here-in-above, which was affirmed by the Lower Appellate Court.

6. In Crl. Rev. P. No.3 of 2022, during the Trial, the prosecution has examined 8 witnesses including the I.O. of the case.

7. Heard Mr. S. Kar Bhowmik, learned Sr. counsel assisted by Mr. S. Bal, learned counsel appearing petitioners in both the review petitions as well as Mr. S. Ghosh, learned Addl.

P.P., appearing for State respondents, and Mr. S. Lodh, learned counsel assisted by Ms. A. Saha, learned counsel appearing for respondents No.2 and 3 in Crl.Rev.P No.3 of 2022.

8. It is the case of Mr. S. Kar Bhomwik, learned Sr. counsel appearing for the petitioners that it is a counterblast case and the Courts below has passed the order in perverse. They did not appreciate the evidence in the light of legal provisions of law and he relied upon the witnesses of P.W-1, the complainant, P.Ws.-3, 4, 5, 6 and other prosecution witnesses.

In addition to the above, on the point of defence in Section 313 of Cr.P.C., he relied upon **para-19, 20 & 21** of the Judgments of the Hon'ble Apex Court reported in **(2019) 13 SCC 289** titled as **Reena Hazarika Vs. State of Assam** which is reproduced here under:-

"19. Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused

taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

20. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in *Hate Singh Bhagat Singh vs. State of Madhya Bharat*, AIR 1953 SC 468 observing as follows (AIR-P. 471, Para

"26. "26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to assess, the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person but for the word a reasonable defence which is likely to be true,..... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true pitted against a vacillating case is bound to raise reasonable doubts of which the accused must get the benefit....

21. A similar view is expressed in *M. Abbas vs. State of Kerala*, SCC p. 108, para-10) as follows :-

"10....On the other hand, the explanation given by the appellant both during the cross-examination of prosecution witnesses and in his own statement recorded under Section 313 CrPC is quite plausible. Where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities...."

On the point of evidence of hostile witnesses, learned Sr. counsel relied upon **para-32** of the Judgment of the Hon'ble Gauhati High Court reported in **2013 CrI.L.J. 286** titled as **Hanu Baistav Vs. State of Assam** which is reproduced here-in-under:-

"32. What follows from the above discussion is that a hostile witness's evidence is not completely washed off the record and his evidence cannot, therefore, be thrown away lock, stock and barrel. If, as a result of cross-examination by prosecution, prosecution's witness admits the statement, which he had made before the police and also admits that the said statement was true, then, such a statement is evidence of not only of the statement having been made, but also evidence of the fact that what had been stated, in the past, was, according to the witness, true; or else, the previous statement of the witness can only be used for contradiction. The principle, that a hostile witness's evidence cannot be thrown away lock, stock and barrel, does not mean that

the Court will rely on his previous statement to found conviction of the accused, no matter whether the witness admits to have made the previous statement, which was contended to have been made by him and no matter whether the witness admits that his previous statement is true. Even if the previous statement of the witness is proved by the Investigating Officer as statement made by the witness, this previous statement can be used, under the proviso to [Section 162\(1\)](#) CrPC, only for the purpose of contradicting the witness. Notwithstanding such contradiction, if there is any evidence, which such a hostile witness gives in the court, at the trial, such evidence would not be washed off the record and can be used to the extent his evidence favours the prosecution or supports the defence's case. There has to be, therefore, substantive evidence on record in order to enable a Court to use previous statement. The statement of a witness, made during investigation, to a police officer, is not substantive evidence and no conviction can be based on previous statement made by a prosecution's witness to a police officer during investigation."

On the point of Right of private defence, learned Sr. counsel relied upon **para-10, 11, 12, and 14**, of the Hon'ble Apex Court Judgment reported in **(2002) 9 SCC 494** titled as **Moti Singh Vs. State of Maharashtra** which is reproduced here-in-under:-

"10. Regarding the contention that the appellant is disentitled to get the benefit of right of private defence as he failed to make out a plea in that regard we may point out that it would be quite unjust to deny such a right to the accused merely on the ground that he adopted a different line of defence. If the evidence adduced by the prosecution would indicate that the accused were put under a situation where they could reasonably have apprehended grievous hurt even to one of them, it would be inequitable to deny the right of private defence to the accused merely on the ground that he has adopted a different plea during the trial. The crucial factor is not what the accused pleaded, but whether the accused had the cause to reasonably apprehend such danger. A different plea adopted by the accused would not foreclose the judicial consideration on the existence of such a situation.

11.. This Court has stated the above legal position time and again. A three judge bench of this Court in [State of U.P. v. Lakhmi](#) has stated thus(SCC pp. 341-42, para-17):

"17. The law is that burden of proving such an exception is on the accused. But the mere fact that the accused adopted another alternative defence during his examination under [Section 313](#) of the Code without referring to exception I of [Section 300](#) of IPC is not enough to deny him of (he benefit of the exception, if the court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence, would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either

through defence evidence or even through prosecution evidence by showing a preponderance of probability".

12. A two judge bench of this Court in *Periasami and Anr. v. State of Tamil Nadu* has stated thus(SCC P. 462, para-16):

"We may point out that the appellants have not stated, when examined under [Section 313](#) of the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to denude them of the right if the same can be made out otherwise.

14. In our considered opinion, the appellant, even if the prosecution version that it was he who inflicted the fatal stab on the deceased is to be accepted as correct, it ended in the exercise of right of private defence. As the reasonable apprehension that the grievous hurt would have been inflicted to one of the accused cannot be ruled out on the broad probabilities, delineated by the prosecution to the evidence, we are disposed to extend the said right to this appellant. Resultantly the conviction and sentence passed on him cannot be sustained."

Learned Sr. counsel quoting the above-mentioned Judgments submitted that statements made under Section 313 of Cr.P.C., by the accused persons, before the concerned Courts need to be treated as evidence in defence and the evidence of P.W.-6, Sri Swapna Das (*in Crl. Rev.P.No.2 of 2023*) indicates that there was a fight between the complainant and the accused persons and it is a family dispute and both of them are neighbours. Because of goats damaging the rubber plantation nursery, the fight took place. In view of the same, he pleaded to acquit the accused revision petitioners and the acquittal made in other crime needs to be reversed, and the private respondents of Crl. Rev.P. No.3 of 2022 herein should be punished.

9. Learned Addl. P.P. appearing for the State vehemently opposed the submission of learned Sr. counsel

appearing for the petitioners and urged this Court to uphold the Judgment and Orders as passed by the Courts below.

10. Mr. S. Lodh, learned counsel appearing for the private respondents of Crl. Rev. P No.3 of 2023 contended that the scope of revision is very limited and the petitioners have not made out a case for interference and prayed for dismissing the review petition.

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

12. Now the point which falls for consideration before this Court is with regard to evidence of P.W.-6, Smt. Swapna Das. Though she turned hostile, but in terms of the **Hanu Baistav(supra)** even the statement made by the hostile witness cannot be brushed aside and relevant contents from the said statement need to be taken for consideration by the Court as indicated here-in-above.

13. In so far as statements made by the accused persons under Section 313 of Cr.P.C. are concerned. In answer to question No.86 to accused No. 1, Sri Saktipada Chakraborty, question No.85 to accused No.2, Sri Suman Chakraborty, and question No.85 to accused No.3, Smt. Niva Chakraborty, all of them replied that the alleged incident was a result of a mutual fight between the parties. So, in the light of their statement,

coupled with the evidence of P.W.-6, Swapna Das it is a clear case that both parties engaged in a fight and injured each other. Further, the incident took place in the Month of November when the sun set at 4.30 P.M. and according to the records no street light or any other light source was not there to identify who beat or injured whom. Further, the accused Dipti Chakraborty, studies under Manipal University, Sikkam at Agartala, and on the query of this Court, learned counsel of both sides submitted that the distance between Melaghar to Agartala is about 55 KMs and in 2011/12 when that alleged incident took place travel time between Melaghar to Agartala is 2(two) hours. So, after completion of classes, if the accused- Dipti Chakraborty starts her journey from Agartala at 5.00 to 5.30 P.M. she, would reach Melaghar at about 7.00 to 7.30 P.M. and according to the complainant, the incident took place at around 6.00 p.m. So, accordingly, she cannot be there at the time of the incident, but the trial court has not properly appreciated these facts in terms of the legal position set by the Hon'ble Supreme on the point of defence in Section 313 of Cr.P.C in **Reena Hazarika(supra)** and also on the point of hostile witnesses in **Hanu Baistav(supra)**.

14. Further, the right to self-defense is a natural right. Both the parties fought each other and both got injured and because of the darkness, who hit whom was also not ascertained.

It was only a quarrel between both the families and per the statement of the neighbours i.e. P.W.6, Smt. Swapna Das, it was a house dispute. So this point is answered in favour of the petitioners also.

15. In terms of the evidence on record, it is evident that the incident was a fight between the two families and it did not take place inside the house or in the boundary of the house, but the said incident took place outside the house. Both the families were neighbours and they knew each other and the question of trespassing does not arise because the incident took place in the late evening around 6.00 P.M., and no allegation of breaching the boundary of the house by force is not there. So the question of alleged crime committed under Section 448 of IPC does not arise and the same is struck down as there is no question of trespassing.

16. Moreover, the question of the crime being committed under Section 326 of IPC also does not arise because according to the evidence both the parties sustained injuries. Further, the incident took place at around 6.00 P.M. in the month of November when the sun set at around 4.30 P.M., and as per the evidence on record, there was no street light or any source of light at the place of occurrence. So there was no visibility and no evidence has been

adduced by any party either by the prosecution or by defense on the point of who beat whom or who injured whom. So assuming it was in the dark and who beat whom and how the parties sustained injuries are not made out due to the visibility, the benefit of the doubt has to be exercised and Section 326 of IPC is also struck down.

17. Accordingly, in terms of the above discussion, Crl. Rev.P. No.2 of 2022 is allowed to setting aside the orders passed by the Courts below and Crl. Rev. P No.3 of 2022 is also dismissed.

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

JUDGE

suhanjit

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SUHANJIT
SINGHA

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