

**HIGH COURT OF TRIPURA
AGARTALA**

Crl.A.(J) No.22 of 2023

Sri Bishnu Bardhan, S/o Sri Tapash Bardhan, R/o Narayanpur, Airport, PO-
Airport, PS- Airport, District- West Tripura, Pin- 799251, Age- 23 years
.....Appellant(s)

Versus

The State of Tripura, represented by its Secretary-cum-Commissioner,
Department of Home, Government of Tripura, PO- Kunjaban, PS- New Capital
Complex, Dist- West Tripura
.....Respondent(s)

For Appellant(s) : Mr. Ankan Tilak Paul, Legal Aid Counsel.

For Respondent(s) : Mr. Sumit Debnath, Addl. Public Prosecutor.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Date of Judgment & Order: **25.08.2023**

Whether Fit for Reporting: **YES**

JUDGMENT & ORDER (ORAL)

Heard Mr. Ankan Tilak Paul, learned Legal Aid Counsel for the
appellant and Mr. Sumit Debnath, learned Additional Public Prosecutor for the
respondent-State.

2. The sole convict, that is the appellant, is aggrieved by the
impugned judgment of conviction and sentence dated 09.06.2022 passed by the
learned Assistant Sessions Judge, Court No.1, West Tripura, Agartala in
S.T.(Type- 2) 44 of 2021, whereby he has been convicted under Section 382D
of the Indian Penal Code, 1960 (IPC, *for short*) and has been sentenced to
undergo rigorous imprisonment for 7(seven) years.

3. The prosecution story, in a nutshell, is that PW-1, the owner of the
motorbike bearing registration No.TR-01G-5874 (Star City), is the complainant
who lodged a written complaint on 11.02.2021 before the Officer-in-Charge,
Airport P.S., being Airport P.S. Case No. 2021 ARP 019 under Section 382D

of the IPC alleging that on 10.02.2021 at around 06:00 pm, the accused person, that is the appellant herein, committed theft of his motorbike from his house. After a few days, the complainant's son saw the stolen bike, driven by another person, that is PW-3, at Lichubagan, Agartala. Thereafter, he detained that person and handed him to the police along with the bike. That person disclosed that he purchased the bike bearing registration No.TR-01G-5874 (Star City) from the accused i.e. the present appellant. After completion of investigation, chargesheet was submitted against the present appellant only under Section 382D of the IPC. Learned Judicial Magistrate, First Class, West Tripura, Agartala took cognizance of the offence on 08.09.2021 against the present appellant and the accused was supplied copies before proceeding for trial. Charges were framed against him on 04.12.2021, to which he pleaded not guilty. Trial commenced, prosecution examined six witnesses and also adduced some exhibited documents which are marked as follows:

- Exhibit 1/1 – Signature of Pw-1 in the FIR,
- Exhibit 2/1 – Signature of PW-1 in the seizure list, dated 12.02.2021,
- Exhibit 2 – Signature of PW-2 in the seizure list, dated 12.02.2021,
- Exhibit 2/2 – Signature of PW-2 in the seizure list, dated 18.03.2021,
- Exhibit 3 – Signature of PW-3 in the seizure list dated 18.03.2021,
- Exhibit 2/2 – Signature of PW-5 in the seizure list dated 12.02.2021,
- Exhibit P 1/2 – Endorsement in the FIR form by PW 6,
- Exhibit P 4 – Entries in the FIR form by PW 6,
- Exhibit 7 – Seizure list dated 12.02.2021 prepared by PW 6,
- Exhibit 8 – Seizure list dated 18.03.2021 prepared by PW 6.

4. The defence did not adduce any evidence. But during his examination under Section 313 of Cr.P.C., he stated that he had stolen the motorbike of the complainant by mistake in a drunken state and sold it.

5. Learned Trial Court framed the points for determination at Para 10 of the impugned judgment which is reproduced hereunder:-

“i) Whether the above named accused person, on 10.02.2021, at around 18:00 hours, at Dighalia, under Airport P.S. the accused person committed the offence of “vehicle lifting” of the motor bike bearing registration No.TR-01G-5874 (Star City), belonging to the complainant and whether an admission of accused in a statement under Section 313 Cr.P.C. can be the sole basis of conviction?”

6. After consideration of the evidence adduced by the prosecution and the statement of the accused under Section 313 of Cr.P.C., the learned Trial Court proceeded to convict the accused/appellant herein under Section 382D of IPC and sentenced him to undergo rigorous imprisonment for 7(seven) years.

7. Mr. Ankan Tilak Paul, learned counsel for the appellant who has been nominated by the High Court Legal Services Committee to represent as a Legal Aid Counsel, has placed the evidence of PW-2, who is the son of the complainant. According to this witness, PW-3 was detained along with the stolen bike by him and handed over to the police. PW-2 also deposed that his father's bike bearing No.TR-01G-5874 was stolen. After detaining PW-3 with the stolen bike, he handed over the bike and the person to the police who seized the bike from that person.

8. Learned legal aid counsel has referred to the deposition of PW-3, the person who was ridding the stolen bike. PW-3 has stated that about one year ago, PW-4 called him and informed that he knows one seller of old bikes. He brought him to the seller, i.e. the present appellant, near Kali Mandir, at Noabadi, and the bike was purchased at Rs.6,000/-. The owner of the bike

identified the stolen bike and he also went to the police station. PW-3 has also stated that the bike was then seized from his possession.

9. Learned legal aid counsel has also drawn the attention of this Court to the deposition of PW-4, who acted as an intermediary in the alleged sale of the stolen bike. In his deposition, he stated that he has a fast-food restaurant and sets up stalls in fairs. About two years back, he was looking for workers for his stall in the X-Mas Day fair. At that time, this accused met him and requested him to give him some work. Then, he was hired and from that time onwards, he had good relation with him. He also visited his house on some occasions in connection with work. About a year back, one day in the evening, the accused went to the house of PW-4 with a motorbike and told him that he wanted to sell the motorbike immediately as he was in urgent need of money. Then PW-4 contacted PW-3 who was the manager of the bike showroom in bypass road. On that day itself, they met in front of Bankumari Kali Mandir at West Noabadi. At that place, the accused handed over the motorbike to PW-3 for Rs. 6,000/-.

10. Learned legal aid counsel for the appellant further submits that only on the exculpatory statement of PW-3 and the statement of PW-4, the accused/appellant herein has been convicted of a serious offence under Section 382D of the IPC as per The Criminal Law (Tripura Amendment) Act, 2018 and has been sentenced to undergo rigorous imprisonment for 7(seven) years. PW-3 has not even been charged by the Police despite clear offence being made out against him on the basis of his own statement under Section 414 of the IPC.

11. It is submitted that the prosecution has completely failed to prove the charge against the present appellant on the basis of any material evidence whatsoever. The learned Trial Court has convicted the accused/appellant with the aid of his statement made under Section 313 of Cr.P.C.; though the prosecution did not adduce any material evidence to establish his guilt. Neither had the complainant seen the accused stealing the bike, nor was the bike recovered from the custody of the present accused. PW-3 has not been able to show any paper through which he had purchased the stolen bike from the accused/appellant. PW-3 was himself a manager of a bike showroom and it could not be believed that he had purchased a stolen bike without papers and attributed the theft of the bike to an innocent person like the accused.

12. Learned counsel for the appellant has relied upon a decision of the Apex Court in the case of ***Raj Kumar Singh alias Raju alias Batya v. State of Rajasthan*** reported in (2013)5 SCC 722 and also placed reliance upon another decision of the Apex Court in the case of ***State of Madhya Pradesh v. Ramesh and another*** reported in (2011) 4 SCC 786.

13. Mr. Sumit Debnath, learned Additional Public Prosecutor, has opposed the prayer and submits that considering the rampant cases of theft of motorbikes and vehicles in the State of Tripura, the State has introduced the provision under Section 382D of the IPC with minimum punishment of seven years which can go up to ten years. Learned Additional Public Prosecutor also submits that the evidence of PW-3 together with PW-4 shows that the stolen bike was purchased from this appellant for Rs.6,000/- and was being used by PW-3, who was a manager of a bike showroom, when PW-2, the son of the

complainant, caught him and handed him over to the police along with the bike. The police, after conducting investigation, found that the allegations against the present appellant of having stolen the bike are made out and, therefore, submitted chargesheet only against him. However, learned Additional Public Prosecutor for the State has not been able to state as to how the exculpatory statement of PW-3 could arraign the present accused of having stolen the bike when neither the bike was recovered from the custody of the accused/appellant herein, nor were any papers evidenced by the PW-3 and the I.O to show that the bike was purchased by PW-3 from the accused/appellant. He has also not been able to show as to how PW-3 has not been chargesheeted for offence relating to concealment and disposition of stolen property; though he, being a manager of a bike showroom, had reason to believe that a bike without papers could not be sold or purchased for a sum of Rs.6,000/-. However, learned Additional Public Prosecutor for the State submits that the appellant has accepted his guilt in his statement made under Section 313 of the Cr.P.C. and also stated that he had stolen the bike in a drunken condition. Therefore, with the aid of the statement made by the accused under Section 313 Cr.P.C. together with the evidence brought by the prosecution through PW-3 and PW-4 in particular, and also PW-2, son of the complainant, who caught PW-3 with the stolen bike, the learned Trial Court has rightly convicted him of the charges. As such, the impugned judgment does not suffer from any error in appreciation of evidence, nor are there any perversity in the findings which require interference by this Court.

14. I have considered the submission of learned counsel for the parties and gone through the lower court records including the deposition of

prosecution witnesses, in particular PW-6. As the prosecution story unfolds through the FIR, the bike of PW-1-informant was stolen on 10.02.2021. PW-1 has not named any person as accused who stole his bike. After 3/4 days, the informant's son i.e. PW-2 sees PW-3 riding the stolen bike. PW-3 is caught red handed with the stolen bike and both of them are handed over to the police. PW-3, now instead of being chargesheeted for the offence of receiving stolen property, if not for theft of the property under Section 382(D), takes the aid of PW-4 to implicate the present appellant by exculpatory statement. PW-3 states that PW-4 introduced the accused to him as the accused was in a hurry to sell off the stolen bike. PW-3 says that he purchased the stolen bike from the accused for Rs.6,000/-. PW-3 is a manager of a bike showroom. A manager of the bike showroom purchases a stolen vehicle/bike from a person without any chit of paper or proof. The statement of PW-3 and PW-4 together forms the basis for chargesheeting the accused under Section 382D of the IPC as introduced by The Criminal Law (Tripura Amendment) Act, 2018 published vide notification No.F.8(19)-Law/Leg-I/2018/4640 dated 29.05.2019. In the entire sequence of dates and materials adduced by the prosecution witnesses, the prosecution is at best could have made recovery of the stolen property from PW-3, who was caught red handed. The theft of the bike of PW-1 is not in dispute; but there is no material evidence to connect the present accused/appellant with the act of stealing the bike of PW-1. The Investigating Authority instead of arraigning PW-3 from whom the stolen bike was recovered for the offence under Section 414 of the IPC, proceeded to chargesheet the present appellant and on the basis of this so-called evidence, the learned Trial Court has proceeded to hold the accused guilty of the offence by taking aid of

the statement made by the accused under Section 313 of the Cr.P.C. The accused/appellant has, in answer to Question No.8 stated that “True, I sold the bike in a drunken state.” The seizure list [Exhibit-8] shows the place, date and time of seizure as 18.03.2021 at 1330 hours at Lichubagan. The particulars of the person to whom seized under the Exhibit-8 shows the name of PW-3- Sandip Sharma, son of Shri Kalidas Sharma who has also recorded his signature on the seizure list in the presence of other witnesses. The question, therefore, arises as to whether in the absence of any material evidence regarding the theft of the property i.e. the bike belonging to PW-1, the conviction of the present appellant would be recorded on the basis of the statement made by him under Section 313 of the Cr.P.C.

15. In this regard, learned counsel for the appellant has relied upon a decision of the Apex Court in the case of **Raj Kumar Singh** (supra). Paragraph 41 of the report is extracted hereunder as it gives complete answer to the present imbroglio:

“41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 Cr.P.C. is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under

Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.P.C. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself.”

Reliance is also placed upon the decision of the Apex Court in the case of *State of Madhya Pradesh* (supra), paragraph 27 of which is extracted hereunder:

“27. The cumulative effect of reading the provisions of Article 20(3) of the Constitution with Sections 161(2), 313(3) and proviso (b) to Section 315 Cr.P.C remains that in India, law provides for the rule against adverse inference from silence of the accused.”

16. From the exposition of law as laid down by the Apex Court in the aforesaid decisions, it is clear that recording of statement under Section 313 of Cr.P.C. is to meet the principles of natural justice to enable the accused with an opportunity to furnish explanation of the incriminating material which had come against him during trial. However, his statement cannot be made a basis for his conviction. The statements made under Section 313 of the Cr.P.C. are not in the nature of confession or statement made on oath in a witness box by the accused. His answers to the questions under Section 313 of the Cr.P.C. cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. It is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the

inculpatory part of his statement cannot be made the sole basis of his conviction since it is not recorded after administering oath to the accused and cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. The accused has a right to remain silent as he cannot be forced to become a witness against himself.

17. This Court has, in the foregoing part of the discussion, clearly come to a conclusion that there was no material evidence of theft of the bike by the present appellant. At best, the prosecution case and the evidence of PW-2 and PW-6 together with the statement of PW-3 could make out a case against PW-3 of having received the stolen property. In the absence of any evidence in the eye of law, as regards the charge of theft of the bike by this accused person, the statement made by the accused under Section 313 of the Cr.P.C could not alone be made the basis for his conviction of a serious charge under Section 382D of the IPC. The learned Trial Court appears to be completely oblivious of the correct legal position. It has misdirected itself by holding the accused/appellant guilty of the charge under Section 382D of the IPC in the absence of any incriminating material regarding theft of the bike by this accused being fully established on the part of the prosecution witnesses.

18. As such, his conviction cannot be sustained in the eye of law. Since the appellant is stated to have remained in custody since 03.06.2021 till date, his conviction is set aside. Let him be released on bail, if not wanted in

connection with any other case. His bail bonds stand discharged. Appeal is allowed.

19. Before parting, this Court considers it proper to record its appreciation for the valuable assistance rendered by the learned counsel for the appellant who has been nominated by the High Court Legal Services Committee to represent the appellant. His admissible remuneration shall be paid without any delay.

20. Stay order, if any, stands vacated. Send down the lower court records forthwith.

21. Pending application(s), if any, also stands disposed of.

(APARESH KUMAR SINGH), CJ