

Manohar Vs. State of Karnataka

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Court : Karnataka

Decided On : Jun-19-1996

Reported in : 1997CriLJ398; ILR1996KAR3419; 1996(7)KarLJ503

Judge : Kumar Rajarathnam, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302, 307 and 324; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 162, 162(1), 164, 172 and 172(2); Evidence Act - Sections 24, 25, 26, 27, 32(1) and 145

Appeal No. : Criminal Appeal No. 298 of 1990

Appellant : Manohar

Respondent : State of Karnataka

Advocate for Def. : B.H. Satish, Govt. Pleader

Advocate for Pet/Ap. : Smt. Gayathri for C.H. Hanumantharaya, Adv.

Judgement :

1. The trial Court found the accused guilty of an offence punishable under Section 307 I.P.C. in its judgment and order dated 21-4-90 and sentenced him to undergo R.I. for a period of 5 years and to pay a fine of Rs. 5,000/- in default of payment of fine, to undergo R.I. for a period of 18 months. Aggrieved by the judgment and order of the learned Prl. District and Sessions Judge, Shimoga in S.C. No. 6/89,

dated 21-4-1990, the appellant has preferred this criminal appeal.

2. The facts of the case very briefly are :-

The accused Manohar and the complainant Nagaraj P.W. 2 belong to the same age group and they were classmates in school and were friends. The said accused Manohar used to visit the house of P.W. 2 and also the cycle shop that was run by the family members of P.W. 2. The case of the prosecution is that when the accused-Manohar was visiting the cycle shop that was being run by the family members of P.W. 2, he was committing some petty thefts. This came to the knowledge of the family members of P.W. 2. They wanted to report the matter to the police, but due to the intervention of the parents of the accused this was not done. From that day onwards, there was some ill-will between the accused and the complainant. This incident of alleged petty theft was five years prior to the date of occurrence.

3. On 18-3-1988 at about 8 p.m. the P.W. 2 was returning home from his shop. When he was passing on the road just near his house, he found the accused coming from his opposite direction. When the P.W. 2 was passing just in front of the house of One Chandrashekar P.W. 6 and one Kushalraj P.W. 5, the accused who came in the opposite direction dashed against P.W. 2. P.W. 2 asked the accused to behave properly, there was some altercation as a result of which, the accused ran to his house and a little later, brought a chopper M.O. 1, rushed towards P.W. 2 who was proceeding along the road and stabbed him near his neck. P.W. 2 started bleeding. P.W. 5 and P.W. 6 and some others who were near about there rushed towards them and removed the injured P.W. 2 to the hospital where he was treated. P.W. 2 first went to a private Doctor Kote and later was admitted in the Bhadravathi hospital.

4. P.W. 1 Doctor who examined P.W. 2 on 18-3-1988 at about 8.20 p.m. noted the following injuries :

An incised wound on the left side of neck below the mandible, six 2' x 1', heavy bleeding through the wound.

Patient was conscious and gave the history of the assault as having been hit by P.W. 2 - accused Manohar. The accident register extract issued by the Doctor was marked as Ex.P. 1. The type of injury noted by the Doctor was that M.O. 1 - Chopper could have caused such an injury on P.W. 2. The Doctor, however, does not say whether the injury was grievous in nature. When specifically asked, the Doctor stated that he cannot say whether the injury was simple or grievous in nature.

5-6. P.W. 10 who is the Investigating Officer states that on 18-3-1988, he received a phone call from one Nagaraju regarding the offence and that he was informed that the injured had been shifted to the hospital. Immediately P.W. 10 went to the hospital and recorded the statement of P.W. 2 in the presence of the Doctor. He returned to the police station and registered a case in Crime No. 25/86 under Section 307 I.P.C. and issued F.I.R. which was marked as Ex.P. 7. He then proceeded to the hospital and seized currency notes which were blood stained in presence of panchayathdars. He also examined one Mr. Rangaswamy P.W. 3, one Kushalraj P.W. 5 and recorded their statements. At 11.30 pm. the accused was arrested on the same day and remanded to the custody on the next day.

7. After receiving the chemical examiners report with respect to the blood stained articles, visiting the scene of occurrence and having seized M.O. 1 under a mahazar on the voluntary information of the accused, he completed the investigation. One Lingareddy, P.S.I. submitted the charge sheet. It is in these circumstances that the accused was convicted for offence under Section 307 I.P.C. and sentenced to undergo R.I. for 5 years and to pay a fine of Rs. 5,000/- in default of payment of fine, to undergo R.I. for a period of 18 months by the trial Court.

8. The learned counsel for the accused Smt. Gayathri submitted that the nature of injuries being simple and that the patient was conscious throughout even after receiving injury it is clear that an offence under Section 307 I.P.C. could be made out. She also submitted that there were certain admissions in 161 statement of P.W. 5 wherein P.W. 5 had admitted that P.W. 2 and the accused were grappling with each other and dragged each other just before the occurrence.

9. The learned State Public Prosecutor submitted that no reliance can be placed on 161 statement of P.W. 5. He also submitted that the Court cannot be permitted to either look at the case diary in respect of the statements recorded under Section 161 Cr.P.C. to alter a conviction even if it is in favour of the accused. He drew my attention to Section 162 of the Cr.P.C. However was not able to substantiate his submission with any precedents of this Court.

10. What may I ask is the legal position of a confession by an accused given to a police officer Let me straight way say such confession cannot be used against an accused unless as contemplated under Section 164 Cr.P.C. that too for the purpose of corroboration.

11. Under Section 25 of the Evidence Act no confession made to a police officer shall be proved as against the person accused of any offence. Section 26 of the Evidence Act contemplates that no confession made by any person while he is in custody of police officer shall be proved against such person unless it is made in the presence of a Magistrate. Section 27 deals with as to what portion of the confession that is admissible. Only that portion of the confession is available which relates distinctly to the fact discovered. In all these sections it is abundantly clear that such confessions can never be used against an accused.

12. Can such confession be used in favour of the accused. I think so. In a case reported in 1951 Mad WN (Cri) 174 : (1952 Cri LJ 1210) (Mottai Thevan v. State), a Division Bench of the Madras High Court dealt with proposition. The judgments are quoted in full as the law and the facts are inter-twined.

13. In Mottai Thevan v. State, 1951 Mad W.N. (Cri) 174 : (1952 Cri LJ 1210), the Division Bench held as follows :

'Appellant, a young man aged 20, has been found guilty under Section 302 I.P.C. and sentenced to death by the learned Sessions Judge of Coimbatore for the murder of one Muthuswami Goundan, who was incidentally sentenced to transportation for life in 1926. After serving his sentence, he returned to his village Andhiyur and lived with his younger brother P.W. 9. The deceased had the right, it would appear, to collect tolls at the Andhiyur shandy from hawkers.

The prosecution case is that on 20-11-1950 on shandy day in this village the appellant came to the police station at about 2.30 p.m. with a blood stained spear. The statement recorded from him by the Sub-Inspector (P.W. 15) was ruled out as inadmissible in evidence, quite rightly but most unfortunately in this case as, under Section 25 of the Evidence Act a confession made to a Police Officer cannot be proved against an accused. The Sub-Inspector immediately after recording the accused's statement and taking him into custody went to the Andhiyur Shandy and found a bloodstained patch near the rice baskets of hawkers. The evidence shows that P.Ws. 4 and 5, two coolies in the employ of the deceased, who assisted in the collection of tolls from paddy stalls, carried the deceased to his house but that he died on the way. The Sub-Inspector found the corpse on the pial of the deceased's brother P.W. 9 who in the meantime had made a separate complaint Ex.P. 8, timed at 3 p.m. to the village Magistrate (P.W. 13) to the effect that the appellant and his father-in-law came together to the shandy where the appellant speared the deceased. The 2nd accused was later quite rightly struck out of the case as an accused.

At the inquest held from 3.30 p.m. the Sub-Inspector examined three rice hawkers, P.Ws. 1 to 3, who deposed that they heard a shout of stabbing and all they saw when they turned round in the direction of the shout was the appellant pulling a spear out of the deceased's back while he was standing and again stabbing him after he fell down. A Petition writer (P.W. 14), who had his office room opposite to the police station, said he saw the accused entering the police station with M.O. 1 on which he saw blood at 2.30 p.m. that day.

The motive actually disclosed in the evidence was the fact that a civil suit had been filed by the deceased against the appellant in the Gobichettipalayam District Munsiff's Court on 27-9-1950 for a declaration and injunction in respect of house. The appellant contested the suit in which he had filed a written statement and counter. The injunction application was posted to 22-11-1950, for hearing. The learned Sessions Judge observed that the main defect in the prosecution case was the absence of any proximate motive as this litigation by itself could not have furnished a motive for the appellant to spear the deceased. In the committing Court the appellant was undefended and merely took refuge in a whole-sale denial

of knowledge of anything, even as regards the civil suit filed against him. In the Sessions Court, where he was defended by a learned advocate, an astonishing line of defence was taken, involving an unwarranted attack on the integrity of the Police. The appellant, while pleading not guilty, went to the length of saying that there was no enmity between him and the deceased over the house, that the three eye-witnesses had been bribed to give evidence against him and finally that some police men asked him to pick up M.O. 1, which was lying near the deceased, took him to the police station and beat him. There can be no doubt whatever that it was the appellant, who speared the deceased and that he is guilty of murder as found by the learned Sessions Judge in agreement with the four assessors. On the legally admissible evidence, the learned Sessions Judge can perhaps be scarcely blamed for sentencing the appellant, despite his youth, to death.

We have no doubt at all that the appellant, after spearing deceased at the shandy, went straight to the Police Station with the blood stained spear and there made a clean breast of the offence and that this was the first information received in the case. Even assuming that he was caught by a constable going off with the blood-stained spear and taken to the police station, the statement he made there should certainly be considered in his favour. It is obvious that the learned Sessions Judge did not peruse the case diary as he was entitled to do under Section 172(2) Cr.P.C. The result of our perusal of the confession recorded from him at the Police Station is that not only do we find mitigating circumstances to justify the imposition of the lesser punishment but we also feel justified in making a recommendation to the Government for commutation of the sentence.

There was in 'fact' some further motive evidence in the suit of an eloquent nature apart from the mere filing of the suit by the deceased against the appellant. It was in evidence that the house belonged to the appellant's father Perumal Thevan, who also kept a concubine by whom he had a daughter Nanjammal examined as P.W. 12. Her evidence was to the effect that after Perumal Thevan died, the appellant's mother and her mother lived, each occupied a half of this house till they died two or three years ago. About three months before the offence, appellant asked her to vacate claiming the whole house as belonging to him as he wanted to occupy it as he had got recently married. Then P.W. 12 conveyed the whole house

by a registered sale deed, Ex.P. 9 on 7-9-1950, to the deceased for Rs. 250/-. That sale deed recites that the house belonged to her mother and that it had devolved on her as she had no male heir and it was on the basis of Ex.P. 9 that the deceased filed his suit against the appellant alleging that he was in possession of the whole house.

The confession, appellant made at the Police station, contains a recital of grave and sustained provocation by the deceased, of threats by him to murder him and his wife and of threats also against his father-in-law to compel him to vacate the house, which drove him in desperation to the commission of this crime. Under Section 24 of the Evidence Act, no confession made to a police officer shall be proved as against a person accused of any offence. There is nothing in the most unsatisfactory state of the law as regards confessions to Police Officers to stop the use of such a confession in favour of an accused person. The resultant impasse created by Ss. 25, 26 and 27 of the Evidence Act and Section 162 Cr.P.C. is to shut out as legally inadmissible not merely any confession made to Police Officers but anything said to a Police Officer by an accused person in the course of an investigation. In this case, we are satisfied that the confession of the appellant was in fact the first information the police received of this offence and had it been admissible in evidence or had it been recorded by a Magistrate, the full recital of motive would have been entitled to credence and to be taken into the fullest consideration in the assessment of sentence.

This case is a concrete illustration of the anomalous and practical difficulties and grave injustice, which may be done to an accused person himself by the operation of Sections 25, 26 and 27 of the Evidence Act enacted, though they were in 1872, on distrust of the then existing Police, and an apprehension that they may misuse extensive powers if confessions made to them by accused persons are admissible in evidence. There is a world of difference between a voluntary confession of this kind made to a Police Officer, which constitutes the first information he receives of an offence and a confession made by an accused person while in police custody but even the law as it stands completely rules out a confession in the former category. S. 26 makes wholly inadmissible any confession made by a person while he is in the custody of a Police Officer unless it be made in the immediate

presence of a Magistrate. There is the important proviso to this contained in Section 27, which makes admissible amounts to a confession or not, which relates distinctly to the fact thereby discovered which has undoubtedly given Courts and investigating Police very great difficulty. In *Athappa Goundan In re* (1937) Mad WN 442 : ILR (1937) Mad 695 : (1937 (38) Cri LJ 1027), a Full Bench of this Court attempted to broaden the scope of this proviso by holding that a statement connecting the object discovered with the offence was admissible and that for instance if an accused said 'this is the spear with which I stabbed the deceased' and then shows the spear in a place of concealment, the confession portion of that statement is admissible. But in *Kotayya v. King Emperor*, (1947) Mad WN 217 : ILR (1948) Mad 1 : (1947 (48) Cri LJ 533), this decision has been over-ruled by the Privy Council. It discontinued a practice which had become a tradition with investigating Police Officers of working into confessions such incriminating adjectival clauses relating to all sorts of discoveries. Applying Sections 25, 26 and 27 to the present case in the light of the Privy Council decision, all that is legally admissible in the confession made by the appellant at the police station was that he brought with him a blood-stained spear. Having tried sessions cases continuously from 1937 to 1948, bound as I was by the decision in *Athappa Goundan in re*. (1937 (38) (Cri LJ 1027) according to which chopped up confessions, leading to discovery with these incriminating adjectival clauses had to be admitted in evidence, there were many cases in which I felt that this unqualified admission of guilt worked into such a clause without relation to the rest of the confession which the accused is said to have made or the circumstances which led up to that confession while in police custody worked injustice and hardship to the accused unless the case diary was carefully scrutinised in a manner we have had to do in the present case. The mere production of a knife or weapon in a murder case implies that the accused has made a confession. It is necessary and desirable that a Court should know in my view the full fact and circumstances relating to the production of the article and all that the accused said when he produced it. A perusal of case diaries often shows a confession alleged to have been made by an accused in it. The confession is there and it cannot but prejudice the mind of an inexperienced Judge or Magistrate who is entitled to read the whole of the case diary, whereas if confessions which are alleged to have been made

and do appear in case diaries have to be proved in full by the Police Officer in the witness box in his sworn testimony and substantiated under the fire of cross-examination, the view I have no hesitation in taking is that far fewer confessions will appear in case diaries. With the law relating to confessions being what it is, it has become extremely difficult for investigating Police Officers to give their evidence in a coherent manner in strict accord with truth, with the result that all the facts are not placed before a Court to enable it to arrive at a correct conclusion. I should like to give expression for what it is worth to the view, which I have had for sometime, that the distrust and apprehensions of the Police founded on conditions of lack of education, character and integrity amongst the subordinate police in 1872, do not exist today, at any rate in the same degree, and that the time has come for a modification of these three Sections and S. 162, Cr.P.C. and the bringing of the law relating to confessions more into line with that of the United Kingdom which permits a Police Officer to say in evidence what an accused person told him at the time of his arrest but rigorously shuts out any confession which the Court has no reason to think was not made voluntarily. It is my view that the removal of these shackles from police testimony is necessary if they are to be evolved into a responsible force, deserving of the confidence of the Public, the Bar and the Courts, which can be relied upon to deal severely with any police officer found guilty of concocting a confession or giving false evidence in this direction. My learned brother does not think that the time is quite ripe for such a reform and still shares the apprehensions of the legislature, which enacted the Evidence Act of 1872. With the highest regard for his opinion, I would like to take this opportunity of expressing a different view in this case although we are in complete agreement with the guilt of one appellant and the sentence to be passed on him. We confirm his conviction for murder under Section 302 I.P.C., and for reasons given supra sentence him to transportation for life with a recommendation to the Government, to whom will be forwarded a copy of his confession recorded at the police station, that showing as it did grave and sustained provocation given to him by the deceased and also in consideration of his youth, that the sentence be commuted to 7 years rigorous imprisonment. The learned Sessions Judge has found accepting the Radiological Expert's evidence that the appellant was 20. We think under Section 10(A) of the Borstal Act the State Government may favourably

consider detaining him in a Borstal School.

Somasundaram, J.

I agree with the conclusions arrived at by my learned brother regarding the guilt and the punishment to be meted out to the accused. But with great respect to my learned brother, for whom I have great regard, I regret my inability to share his view regarding Sections 25 to 27 of the Indian Evidence Act. My learned brother has himself referred to my opinion in the judgment and I would like to add a few words to it.

Section 24 of the Indian Evidence Act says that 'no confession made to a police officer shall be proved as against a person accused, of any offence.' I underline the word against; the section does not therefore prohibit the use of it in favour of the accused. In the majority of cases, the confessions are sought to be used only against the accused. The cases in which such confessions would or can be used in favour of the accused will be very few and they will be the exceptions of the general rule. The section therefore ought not to be repealed or modified for the sake of the few, or the exception.

In the present case, though we have used the confession in favour of the accused, it cannot be said that that is the only view to be taken of the confession. It is possible to take a different view of the confession and that too in a telling manner against the accused. It depends therefore, on the use the Court is going to make of the confession. It is to be used against the accused, then Section 25 is a bar and it cannot be admitted but if it is to be used in favour of the accused, I do not think that Section 25 is a bar and the confession can well be admitted.'

14. The similar view was expressed in a judgment of the Division Bench of Madras High Court reported in 1973 Mad LW (Cri) 42 : (1974 Cri LJ 381), in the matter of Ganeshan, wherein it is held as follows :

'3. The evidence shows that the appellant went straight to the police station at 9.15 a.m. and made a statement. In fact, that is the first information report in the case. It contains the confession that the appellant inflicted cuts on his wife. The learned

Sessions Judge has excluded this portion and marked the rest of the statement as Ex.P-6. This, however, is not correct. In *Aghnoo Nagesia v. State of Bihar*, : 1966 CriLJ100 , it has been observed :-

'Now, a confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts suggest the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement, partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement is part of the confession.' Little substance and content would be left in Sections 24, 25 and 26, if proof of admissions of incriminating facts in a confessional statement is permitted. 'Some of the decided cases took the view that if a part of the report is properly severable from the strict confessional part, then the severable part could be tendered in evidence. We think that the separability test is misleading, and the entire confessional statement, is hit by Section 25 and save and except as provided, by Section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it could be tendered in evidence.'

The above decision has been followed in *Khatri Hemraj Amulkah v. State of Gujarat*, : 1972 CriLJ626 . According to these decisions, the only portion of the statement, which could be admitted is the initial portion that he was making the statement, which would not be of any use to the prosecution. But there is no bar to the appellant using the statement in his favour-see also *Mottai Thevan, In re.* (1951) 2 Mad LJ 605 : (1952 Cri LJ 1210).

15. It is clear from the above cases cited that a confession given by an accused to a Police Officer can only be used in certain circumstances to enable the Court to

do complete justice if the confession in certain parts is in favour of the accused. It can never be used against the accused.

16. Similarly the Courts can certainly look at the case diary as contemplated under Section 172(2) of the Cr.P.C., to determine the veracity of the investigation and to aid the Court in such enquiry. However, such diaries cannot be used as evidence.

17. The Supreme Court has dealt with the powers of the Court to examine the case diaries under Section 172(2) of the Cr.P.C. In *Mukund Lal v. Union of India*, : AIR 1989 SC144 , the Supreme Court has held as follows : (At p. 146, Para 3)

'We are of the opinion that the provisions embodied in sub-section (3) of Section 172 of the Cr.P.C. cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172, Cr.P.C. the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. It has empowered the Court to call for any such relevant case diary, if there is any inconsistency or contradiction arising in the context of the case diary the Court can use the entries for the purpose of contradicting the Police Officer as provided in sub-section (3) of Section 172 of the Cr.P.C. Ultimately there can be no better custodian or guardian of the interest of justice than the Court trying the case. No Court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the Police Officer with reference to the contents of the diaries.'

In the same judgment, the Supreme Court at paragraph 4.5 reiterated this point further by stating as follows :

'The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the Court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded.'

18. This proposition of law will equally apply to the statements made to the police officer in the course of investigation under Section 161 of the Cr.P.C. under Section 162(1) of the Cr.P.C. there is a bar to the statement made by any person to a Police Officer to be used for any purpose and the same as provided under Section 145 of the Indian Evidence Act.

19. However, the bar under Section 162, shall not apply to the statements falling under Section 32(1) of the Indian Evidence Act or for a discovery of fact as required under Section 27 of the Indian Evidence Act. If certain admissions were made to the Police Officer by a witness in the course of investigation and if such admissions or contradictions were not elicited in evidence, it is always open to the Court to look at the case diary to find out contradictions not elicited in evidence. If such contradictions are in favour of the accused, it can be looked into to aid the Court in favour of the accused. If the Court can look at a confession in favour of the accused, I do not see any inhibition for looking at the statement of witnesses recorded under Section 161 in favour of the accused. It is only in these circumstances the Court looked at 161 statement of P.W. 5 and noticed certain contradictions that were not elicited by the defence counsel in favour of the accused. I do not find anything wrong in this procedure, otherwise the power under Section 172(2) of the Criminal Procedure Code could become an empty formality.

20. It was further submitted by the learned counsel for the accused that the doctor who examined P.W. 2 at the earliest, was not examined in Court and that M.O. 1 could not have caused the injuries and that P.Ws. 3 and 5 could not have really seen the occurrence since the occurrence was at about 8.20 p.m. and there was darkness in the place. Learned counsel submits that taking all these points into account the accused should be given the benefit of doubt.

doctor and the doctor examined P.W. 2 and sends for the police. There is no doubt that reliance has to be placed on the evidence of P.W. 2, whatever be the infirmities in the evidence of P.Ws. 3 and 5. Nothing much turns on the fact as to whether P.Ws. 3 and 5 have seen the occurrence or not. The fact remains that the injured witness has categorically stated that the accused has assaulted him at about 8.20 p.m. with M.O. 1. This will have to be accepted.

22. The only question that arises for consideration is, in the light of the injury and the circumstance under which P.W. 2 was injured, whether an offence can be made out under Section 307 I.P.C. It is clear that there was some quarrel even as per the evidence of P.W. 2, just prior to the occurrence. As a result of quarrel, the accused assaulted P.W. 2. The nature of injury on P.W. 2 is a simple injury since the doctor was not able to state whether the injury was simple or grievous in nature, and that P.W. 2 was found completely conscious throughout. In these circumstances, taking into account the statement of P.W. 5 before the police that there was some grappling and dragging before the occurrence, no case is made out for conviction under Section 307 I.P.C. However, the fact remains that the weapon like chopper was used which is a dangerous weapon. Therefore offence will necessarily fall under Section 324 I.P.C. Accordingly, the appellant is acquitted for the offence under Section 307 I.P.C. and is convicted for the offence under Section 324 I.P.C.

23. Coming to the question of sentence, the accused was in custody from 19-3-1988 to 3-5-1988 and late from 21-4-1990 to 28-5-1990, in all it comes to about 80 days. Taking into account the fact that the alleged incident took place on spur of the moment and that there is perfect peace now between the family of the accused and P.W. 2. I feel the ends of justice will be met if the accused is sentenced to the period already undergone. Accordingly, the accused is sentenced to imprisonment for the period already undergone.

24. The appeal is allowed in part.

25. Appeal partly allowed.