A

CHANDRAN

v.

STATE OF TAMIL NADU

August 16, 1978

B [R. S. SARKARIA AND P. S. KAILASAM, JJ.]

Code of Criminal Procedure 1898—*Magistrate not appending memorandum certifying that he believes that the confession was voluntarily made by the accused—If fatal to the use of confession against accused at the trial.*

Words and phrases—'Hope' and 'believe'—meaning of.

C The deceased, an aged, wealthy widow living alone always wore on her person valuable jewellery. The prosecution alleged that with a view to rob her of all her jewels, the appellant, who was formerly her servant, along with two others, decoyed her into a field nearby and murdered her and took away all the jewels.

In the confessional statement of the appellant recorded by the Magistrate, he appended a note at the foot—"I hope that this statement was made by him D voluntarily". The Magistrate had omitted to certify that "this confession was taken in his (the appellant's) presence and hearing and was read out to the person making it and it is admitted by him to be correct, and it contains a full and true account of the statement made by him."

Acquitting the third accused the Sessions Judge convicted the appellant and the second accused under section 302 read with section 120B of Indian Penal Code and under S. 379 IPC and sentenced them to death. E

On appeal, acquitting second accused, the High Court maintained the conviction and sentence passed against the appellant.

In further appeal to this Court it was contended on behalf of the appellant that (1) the Magistrate did not testify that he *believed* that the confessional statement had been made by the accused voluntarily and this defect being one F of substance is not capable of being cured and (2) the appellant's confessional statement leading to the recovery of the jewels was neither proved nor exhibited in evidence.

Allowing the appeal in part,

HELD: (1) (a) If, in the course of police investigation, the Magistrate recording the confession of an accused, does not certify on the face of the G record his satisfaction or belief as to the voluntary nature of the confession nor testifies orally, as to such satisfaction or belief, the defect so caused would be fatal to the admissibility and use of the confession against the accused at the trial. [187H—188A]

(b) There is a marked difference in what is connoted by "hope" and "believe". "To hope" means "to want and expect", "to look forward with expectation and desire". "Hope" is a wishful feeling, floating on nebulous H foams projected into the unknown future. Deep hidden in "hope" dwells a lingering doubt, a speck of suspicion that what is desired and expected may not turn out true. Not unoften in the mind of the person hoping, there lurks

subconscious fear that the "hope" may turn out a "dupe". In contrast the term "believe" in the sense in which it is used in section 164 Cr.P.C. has 'logical confidence' or 'rational conviction' as its essential element. It imports a very high degree of expectation wrought by reason, a satisfaction fast rooted in *terra firma,* free from doubt as to the truth of the fact perceived and believed. [188E-G] A

(c) The Magistrate, a judicial officer, advisedly chose to use the word 'hope' instead of 'believe' because he was not fully convinced that the confession had been voluntarily made and his mind was troubled by suspicion and doubt as to the voluntariness of the confession. In view of this the retracted confession should be excluded from consideration. [188H] B

(2) (a) On the facts of this case it cannot be said that the recovery of jewels had been made from the exclusive possession or control of the appellant. Assuming it to be so, the inference drawn from their recovery at the instance of the appellant cannot legitimately be stretched to hold that he was a participant in the murder of the deceased. The blood on the jewels is not sufficient to establish, unerringly the appellant's complicity in the murder, when it was the prosecution's own case that the second accused murdered the deceased and removed the jewels from her body and gave them to the appellant. [190D—190E] C

(b) The High Court had acquitted the second accused and altered the conviction of the appellant to one under s. 302 read with s. 34 I.P.C. The safest limit to which the inference can extend is that the appellant was only a receiver of stolen property. [190C, 191C] D

(c) The prosecution story of the recovery of the blood stained clothes of the deceased at the instance of the appellant cannot be believed because there was no mention of the same in the *mahazar*. It does not stand to reason that the appellant would preserve and keep such worthless incriminating articles in his house for 23 days after the murder. [190G, 191A, 191B] E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 588 of 1976.

(Appeal by Special Leave from the Judgment and Order dated 28-8-1975 of the Madras High Court in Criminal Appeal No. 399 of 1975 and referred Trial No. 9 of 1975) F

Altaf Ahmed (*A. C.*) for the Appellant

A. V. Rangam for the Respondent

The Judgment of the Court was delivered by

SARKARIA, J.—This appeal by special leave is directed against a judgment of the High Court of Madras, whereby it maintained the conviction of the appellant Chandran under Section 302 read with Section 34 Penal Code, and confirmed the sentence of death inflicted on him by the Session Judge, Nagapattinam. G

The prosecution case as it emerges from the record, (including the confessional statement, Ex. P. 27) of the appellant, is as follows :— H

A The murdered person in this case was Gunabushanathachi, an aged wealthy widow, who was living alone in her ancestral house in the East Street of Kodiakarai. Her sons and daughters were grown-up persons and have been living separately from her. Her second son Ragupathy (P.W. 5) is living and carrying on business at Vedaranyam. Her married daughter Rukmani Ammal (P.W. 6) is B living with her husband in the North Street at Kodiakarai. The husband of the deceased had died about 2½ years before the occurrence in question. The deceased was managing the family properties.

The appellant was working as a servant in the house of the C deceased till he attained the age of 15 years. Even thereafter, whenever called upon by the deceased, he used to work off and on for her. Jayabal was co-accused No. 3 and Vaithi alias Vaithianathan was co-accused No. 2 who were jointly tried with the appellant, Chandran. Appellant, Vaithi and Jayabal will hereafter be referred to as A-1, A-2 and A-3 respectively. A-2 is related to A-1 and was his fast D friend. A-1, A-2 and A-3 were all living in the Harijan Colony at Kodikari.

A-1 contracted intimacy with Papathi (P.W. 1), the sister of A-3, A-1 was desirous of marrying her. A-3 was willing to bring about this matrimonial alliance. About a month before the occurE rence, A-1 made a proposal of marriage to Papathi. She asked A-1 as to what would he give her as a gift if she married him. A-1 promised to give her two jewels, a *thodu* and *thongattan*. She further questioned him as to where from he would get the money for acquiring those jewels. A-1 assured that he would find out some means to get the promised jewels. Papathi used to meet A-1 in the F Kollai (field) of the deceased where Pappa (P.W. 12) was living. A-1 is related to Pappa as her brother-in-law. She also heard the conversation between A-1 and P.W. 1, relating to the proposal of marriage.

The deceased always used to wear a double-row gold chain G (M.O. 2), three gold bangles (M.O. 3 series) a pair of gold *thodus* studded with seven white stones and a gold finger ring.

Some weeks before the occurrence, A-1, A-2 and A-3 were taking tea at the Katha Pillai's tea-stall at about 8 A.M. They saw the deceased coming from her house and proceeding to Paramassivam H Temple. She was, as usual, wearing her gold ornaments. Thereupon, A-2 (Vaithi) suggested that if the deceased would go alone to Kila Kollai which was her forest field, A-1 should inform A-2 who

would murder her there and take away her jewels and appropriate the same between them. The two had this talk on reaching the house of A-1. A-1 reluctantly agreed to the suggestion. A-1 further told A-3 about the plan to get the jewels to meet the expenses of his proposed marriage with A-3's sister. A-3 also approved of the plan. Subsequently, at the suggestion of A-2, it was agreed that A-1 would decoy the deceased to Kila Kollai on the false representation that some persons were cutting her trees in that field.

In pursuance of the above conspiracy, on January 4, 1974 at about 10 A.M., A-1 came to the doorway of the deceased and called her saying that certain trees were lying cut in the Eastern Kollai belonging to her and that she should go and see them. The deceased came out later and accompanied A-1 to the Kollai, but returned shortly thereafter. All this was seen and heard by Smt. Pappa Ammal (P.W. 11) who was living in a house just opposite the house of the deceased, and was at the relevant time, standing in front of her house holding her child in her arms. On her return, the deceased told P.W. 11 that no trees were lying cut there. She further informed P.W. 11 that she, along with her daughter (P.W. 6), would go to Vedaranyam in the evening for worship in the Temple since it was a Vaikunta Ekadasi Day. The same day at about 5 p.m. Sundarmbal (P.W. 2), was sprinkling water at the entrance of her house situate in East Street, Kodiakarai. She noticed A-1 sitting on the *medai* of a well near the Manmathankoil in that street. P.W. 2 then saw the deceased coming out of her house and proceeding towards the south carrying a *torattu* stick (M.O. 4) and a coir rope (M.O. 5). On seeing the deceased, A-1 asked her to come quickly. P.W. 2 heard this and saw the deceased going with the accused towards the south. She also saw that the deceased was at that time wearing a green sari (M.O. 6), a red jacket (M.O. 1), a pair of rubber sandals (M.O. 7 series) and the aforesaid jewels.

At about the same time, Papathi (P.W. 1) who was coming after taking bath at the well, Mallia Kinaru and Thamarai (P.W. 3) who was coming to take water from the well, saw A-1 carrying the coir rope (M.O. 5) immediately followed by the deceased who was carrying the thorattu stick (M.O. 4). She was wearing the aforesaid clothes and jewels. On seeing P.W. 3, the deceased told her that she was accompanying A-1 to the Eastern Kollai to see some trees which were lying cut there. The deceased asked P.W. 3 to send her father, Mariappan (P.W. 4), to that Kollai. P.W. 3 replied that her father had gone for fishing. The deceased then asked her to send her father to the Kollai as soon as he returned home. On

A reaching home, P.W. 3 passed on the message to her father, P.W. 4. The latter thereupon proceeded to the Kollai. On reaching near the Kollai, P.W. 4 shouted to, A-1 by name and found the latter standing under a *portia* tree. A-1 told P.W. 4 that the deceased had gone to the Western Kollai and asked P.W. 4 to come away with him (A-1). P.W. 4 informed A-1 that he had been asked by the deceased to B come to the Eastern Kollai where some trees were lying cut. A-1 then told P.W. 4 that there were no such trees. A-1 then went away towards the East, while P.W. 4 returned home.

The prosecution case further is that the deceased was thus decoy- C ed by A-1 to the Eastern Kollai, where A-2 and A-3 were lying in ambush. A-2 pounced upon the deceased and assaulted her with a sharp cutting weapon severing the neck and one hand from the wrist to facilitate the removal of the gold bangles. After killing the deceased, they removed her jewels.

D

On January 5, 1974 at about 1 P.M., A-1 met Kaliappan (P.W. 13) and showed him the gold bangle (M.O. 11) and offered to give it in exchange of cash. Asked from where he had obtained the bangle, A-1 told P.W. 13 that he found it in the New Tank. P.W. 13 took the bangle and asked A-1 to come in the evening to E get the money. Accordingly, at 5.30 p.m. on the same day, A-1 went to P.W. 13 and received Rs. 20/- from him in lieu of the bangle. At the time of the receipt of Rs. 20/-, A-1 was accompanied by his younger brother and A-3. On the following day, in the evening, A-1 and A-3 again met P.W. 13 near the culvert in the village and took some arrack together. All the three then went to F the house of P.W. 12 and took coffee together which was prepared by her. All the three stayed in the house of P.W. 12 for the night.

On January 6, 1974, P.W. 9 and P.W. 10 were chasing a rabbit which ran into the Eastern Kollai of the deceased. They had put up a net for catching the rabbits on the Northern side of the Kollai G At that time, A-2 came from the Eastern side and asked them to remove the net saying that there was no rabbit in that Kollai. P.W. 9 and 10 insisted that they had themselves seen the rabbit going into the Kollai and asked A-2 as to how he was saying that the rabbit had not gone there. They asked A-2 to remain there while they proceeded further towards the South and then discovered the dead body H of the deceased lying there with the head and left hand severed from the body. They all then returned and informed A-1 what they had seen. A-2 and A-3 told P.Ws. 9 and 10 that if they divulged the matter to

anybody, they would get into trouble and therefore it was better for them to leave the place after removing the net. P.W. 5 and P.W. 10 did accordingly. A

At about 1.30 a.m. that day, P.W. 15 and 16 were proceeding to the sea-shore to board a boat which was about to launch for deep-sea fishing. On seeing, A-2 they asked him if he would also like to accompany them. A-2 did not answer. Thereupon, they enquired why he was so morose. A-2 then confessed that he had along with A-1 and A-3 murdered the deceased in the Eastern Kollai and robbed her of the jewels worn by her. A-2 further informed those witnesses that A-1 had taken away those jewels and escaped with the booty. B C

On January 7, 1974, at about 6 a.m. A-1 himself went to the house of P.W. 7, President of the Panchayat Board, Kodiakarai, who is the brother of the deceased's husband and informed him that the deceased was lying dead in the Eastern Kollai. Thereupon, a large crowd, including P.W. 4, P.W. 6 and P.W. 7, proceeded to the Eastern Kollai. A-1 who was following the crowd, slipped away. In the Eastern Kollai, they found the dead-body of the deceased. There were no jewels on the body. Her head and one arm had been severed. P.W. 7 sent word to the village Munsif (P.W. 19) who arrived at the scene of crime at 8 a.m. and prepared the report (Ex. P-5) and the *yadast* (Ex. P-6) and sent them to the Police Station through a bearer. Documents P-5 and P-6 were received in the Police Station by the Sub-Inspector (P.W. 13) at 10 a.m. on the same day. After registering a case under Sections 302, and 379, Penal Code, the Sub-Inspector sent express First Information Report to the concerned authority. The Inspector of Police (P.W. 34), on receiving a telephonic message, reached the scene of occurrence at 3 p.m. and started investigation. He prepared the inquest report and took into possession the articles found there. He also took the finger-prints of the deceased. D E F

The autopsy of the deceased was performed by the Medical Officer, Dr. Ethirajan (P.W. 24) at 9 a.m. on the spot. According to the Doctor, the deceased died of shock and haemorrhage due to the fatal injury involving severing of the head and left hand. In his opinion the death was instantaneous. G

A-1 was arrested by the Inspector of Police on January 31, 1974 at 11 a.m. A-1 in the presence of P.W. 21, the Karnam, lead the police party to Odayankollai and produced the gold chain (M.O. 2) and H

A two bangles of M.O. 3 series from the roof of a thatch in the occupation of one Murugan. These jewels were found covered with the banian (M.O. 20). The Inspector seized the articles and prepared the Memo (Ex. P. 11). A-1 then took the Police party to the field of Ayyathurai Pillai and produced the aruval (M.O. 21) from a bush. A-1 then took the police party to the house of P.W. 13 and asked B P.W. 13 to produce the bangle. Thereupon P.W. 13 produced the bangle (M.O. 11) which was seized by the Inspector under Memo (Ex. P-13). Thereafter, A-1 led the police party to his house and produced the Kaili (M.O. 22) and the towel (M.O. 23) which were also seized and sealed into a parcel by the Inspector.

C On February 2, 1974, the Inspector of Police made the application (Ex. P-25) to the Sub-Divisional Magistrate, Mannargudi, requesting for recording the confession of A-1. He further requested that the accused be kept in a separate cell in the Jail till confession was recorded. Accordingly, the accused was admitted to the Sub-Jail. Two days thereafter, A-1 was produced from the Sub-Jail before the Sub-D Divisional Magistrate at 3.30 p.m. The preliminary questioning of the accused to ascertain if he was going to make a confession voluntarily, was done by the Magistrate on this date. Ex. P-26 is a record of those proceedings. A-1 was then sent back to the Sub-Jail to give him sufficient time for reflection.

On February 8, 1974, he was again sent for from the Sub-Jail by E the Sub-Divisional Magistrate. Then, on that day, his confessional statement (Ex. P. 27) was recorded by the Magistrate.

A-2 was arrested at 2.30 p.m. on April 4, 1974. Nothing was recovered in consequence of the statement made by him. A-1, A-2 and A-3 were committed for trial before the Sessions Judge. A-2 F was charged under Section 302 I.P.C. *simpliciter*, for committing the murder of the deceased. All the three accused were further charged under Section 302, read with Section 120-B I.P.C. A separate charge under Section 379 was framed against A-1 in respect of the theft of the gold jewels, while A-1 to A-3 were further charged under Section 379 read with Section 120-B I.P.C.

G At the trial, the plea of A-1 to A-3 was one of complete denial of the commission of the offences. A-1 stated that he had made the confession before the Magistrate on account of torture and ill-treatment by the Police Inspector. He denied the recovery of the gold ornaments at his instance.

H The Sessions Judge acquitted A-3 of all the charges. He, however, convicted A-1 under Section 302 read with Section 120-B I.P.C. and under Section 379 I.P.C. On the capital count, he awarded the death

penalty. Similarly, A-2 was convicted under Section 302, I.P.C. read with Section 120-B and under Section 379 I.P.C. He was also awarded the death penalty on the capital charge. A

A private revision was filed before the High Court against the acquittal of A-3. A-1 and A-2 appealed against their conviction. The High Court accepted the appeal of A-2 and acquitted him but maintained the conviction of A-1 in regard to the murder but altered it to one under Section 302 read with S. 34, Penal Code, and confirmed his death sentence. A-1's conviction and sentence under Section 379 were also maintained. B

A-1 has now come before us in appeal by special leave under Article 136 of the Constitution. C

There is no State appeal against the acquittal of A-2 by the High Court. We are therefore, in this appeal concerned with the case against A-1 only.

The High Court has listed 11 pieces of evidence, out of which the first ten are of circumstantial evidence and the last is A-1's confession, Ex. P. 27, recorded by the Magistrate (P.W. 28). The evidence, as catalogued by the High Court is as under :— D

"(1) Motive for the alleged murder, and the theft of the jewels from the person of the deceased, as testified to by P.W. 1 and 12;

"(2) The evidence of P.W. 11 that on 4-1-1974 at about 10 a.m. she noticed the first accused standing at the threshold of the house of the deceased and calling her, saying that some trees were lying cut in her Eastern Kollai; E

"(3) The evidence of P.W. 2 that at about 5 p.m. on 4-1-1974, she saw the first accused and the deceased going towards the South carrying a *thorattu* stick (M.O. 4) and coir rope, (M.O. 5), respectively and that she heard the first accused (urging the deceased to hurry up) and she saw both the first accused and the deceased going towards the South; F

"(4) The evidence of P.W. 1 and 3 to the effect that at about 5 p.m. on 4-1-1974, they both saw the deceased going with the *thorattu* stick (M.O. 4) followed by the first accused who was carrying the coir rope (M.O. 5) and proceeding towards the eastern *Kollai.* G

(5) P.W. 4's evidence that, when he was told by P.W. 3 that the deceased had asked him to go to the Kollai, since she had been told that some trees were lying there cut, he went towards the eastern Kollai, that when he was going along the foot path to the west of the *Kollai,* he called out to the first accused by his name; that the first accused H

A came and told him that the deceased had gone away to the western *kollai* and that when he (P.W. 4) told him that the deceased had asked him to come there for the purpose of seeing some trees which were lying there cut, the first accused told him that there were no such trees and asked him to come away with him.

B "(6) The evidence of P.W. 6, the daughter of the deceased that on the evening of 4-1-1974, the first accused came and gave her a tender coconut and told her that her mother had gone to Thiruthuraipundi by bus.

"(7) The evidence of P.W. 7 and P.W. 8 that (on 7-1-1976 at C about 6 a.m.) after the first accused had come and told P.W. 7 that the deceased was lying dead in the Eastern Kollai, P.W. 7 and P.W. 8 went with a number of persons to the Kollai and that the first accused followed them but slipped away before they reached the scene of the occurrence.

"(8) The testimony of P.W. 13 to the effect that on 5-1-1974 at D about 1 p.m. A-1 gave him the bangle (M.O. 11) and asked him to lend him Rs. 20/- on the security of the bangle and that he (P.W. 13) kept that bangle with him until the first accused came with the Police and pointed him out and asked him to produce the bangle, whereupon he produced M.O. 11 before P.W. 34 (Police Inspector) in the E presence of P.W. 21 (on 31-1-1974).

"(9) The recovery (on 31-1-1974) of the chain (M.O. 2) and the two bangles out of M.O. 3, which belonged to the deceased on the information furnished by the first accused, in pursuance of his statement, Ex. P-27, from the Attukottagai, which jewels when later sent to the Serologist, were found to have been stained with human blood.

F "(10) The production (on 31-1-74) of M.O. 22 and 23 by the first accused, as seen from the testimony of P.Ws. 21 and 34, which items of clothing when sent to the Serologist, were found to have been stained with human blood.

"(11) The judicial confession, Ex. P-27, recorded by P.W. 28 G from the first accused."

Mr. Altaf Ahmed, Advocate, who has meticulously studied the case, assisted us as *amicus curaie*. He has taken us through the evidence on the record and the judgments of the courts below. He has made these submissions on behalf of the appellant :

H (1)(a) The confessional statement, Ex. P-27, was inadmissible in evidence because the Magistrate who recorded it, did not comply with the requirement of Section 164, Cr. P.C. inasmuch as he

did not in the memorandum. Ex. P-28, at the foot of the record, certify the voluntariness of the confession and of the fact of the statement having been read over to the accused, and its being a true and accurate record of the statement made by the accused. A

(b) This defect is one of substance and not merely of form, and therefore could not be cured under Section 533 Cr.P.C. B

(c) In any case, the Magistrate (P.W. 28) did not testify that he was satisfied and believed that the confessional statement had been voluntarily made by the accused. Thus, it could not be said that the defect had been remedied by the prosecution in the manner specified in Section 533. C

2. (i) Circumstance No. 9, as enumerated by the High Court, had not been firmly and fully established. (a) No confessional statement of the appellant leading to the recovery of the jewels (M.O. 2 and M.O. 3) was proved or exhibited in evidence under Section 27, Evidence Act; (b) the alleged recovery of the jewels was from the roof of a house which was not in the occupation of the appellant; (c) the recovery was admittedly made about 27 or 28 days after the murder. In view of the facts (a), (b) and (c), the recovery of the jewels would not be incompatible with the inference that the appellant was only a receiver of stolen property and not a participant in the murder of the deceased. D E

(ii). The High Court was mainfestly wrong inasmuch as it said that these jewels were recovered in pursuance of the confessional statement, Ex. P-27.

3. Circumstance No. 10 had also not been fully and cogently established inasmuch as these clothes (M.O. 22 and 23 of Sari) were allegedly recovered from a house which was in the joint occupation of the appellant and other adults, and those articles were not lying concealed but were hanging at an exposed place accessible to all the occupants of the house. This being the case, the circumstance of the recovery of these clothes, 27 or 28 days after the murder, could not definitely connect the appellant with the murder. F G

4. The remaining circumstances 1 to 8 listed by the High Court fell far short of establishing beyong doubt the appellant's participation in the *murder.*

5. Circumstance No. 8, can, at the most, show that the appellant was a receiver of stolen property only. H

A As against this, it is urged by the counsel for the respondent, that the confessional statement, Ex. P-27, cannot be ruled out of evidence merely on the ground that the Magistrate in the memorandum, Ex. P-28, appended by him to Ex. P-27, used the word "hope", instead of "believe". It is maintained that these defects pointed out by the B counsel for the appellant, in Ex. P-27 were mere defects of form which stood rectified under Section 533 Cr. P.C. by the oral evidence of the Magistrate (P.W. 28). Our attention has been invited to the oral evidence of the Magistrate to the effect.

> "On 8-2-74 at 4.00 p.m., I repeated the warning, and I was satisfied that A-1 was in a position to give a volun- C tary statement. . . . Ex. P-27 is the statement given by him. I read over the statement to him and he admitted it to be correct and signed on all pages. Ex. P-28 is the certificate appended to Ex. P-27."

Stress has also been placed on the fact that the Magistrate had put D all the necessary questions, during the preliminary examination of the accused on February 7, 1974 to ensure that he was going to make a confession voluntarily, and thereafter, he gave him about 24 hours in Sub-Jail for reflection and to shed fear of the police, if any, and then on February 8, 1974 at 4 p.m., after repeating the warning, recorded the statement, Ex. P-27, of the appellant. It is against this E ground—proceeds the argument that the inept use of the word "hope" in the memorandum, Ex. P-28 and the oral evidence of the Magistrate, referred to above, is to be appreciated.

In regard to Circumstance 9, counsel has been unable to trace and point out any confessional statement of the accused, exhibited in F evidence, in pursuance of which the jewels (M.O. 2 and M.O. 3) are said to have been recovered. He further concedes that the house or shed from the roof of which the appellant produced these jewels was in the occupation of one Murugan, and not of the appellant. It is further not controverted that the house from which the clothes, referred to in Circumstance 10, were recovered, is in the joint occupation of G the appellant and others. The argument is that the very facts that these jewels (M.O. 2 and M.O. 3) and the clothes were found by the Serologist to be stained with human blood, and were produced by the appellant before the Police Inspector (P.W. 34), coupled with the other Circumstances, including the confession, Ex. P-27, were unmistakable pointers to the conclusion that the appellant had partici- H pated in the murder of the deceased.

First, we will examine the contentions canvassed on both sides in regard to the confessional statement, Ex. P-27.

A comparison of the memorandum, Ex. P-28, recorded by the Magistrate with the one prescribed by Section 164(3) will show that the former (Ex. P-28) suffers from two patent defects. Firstly, instead of certifying that he *believed* that this confession (Ex. P-27) was voluntarily made, the Magistrate has merely said : "I *hope* that this statement was made by him voluntarily". Secondly, he omitted to certify that 'this confession was taken in his presence and hearing, and was read over to the person making it and it is admitted by him to be correct, and it contains a full and true account of the statement made by him.' The latter was obviously a defect of form. In the case of the former, it was open to the prosecution to show that the use of the word 'hope' was merely due to an inadvertent error, although in substance and reality, the Magistrate was fully satisfied that the confession (Ex. P-27) was voluntarily made by the accused. The best informed person who could explain whether the use of the word 'hope' in Ex. P-28, was inadvertent or deliberate, was the Magistrate who recorded it. Although the Magistrate was examined as a witness (P.W. 28) at the trial, yet no attempt was made by the prosecution to establish from his word of mouth that the use of the word 'hope' by him was inadvertent or accidental. In the witness-box, also, the Magistrate did not go whole hog to vouch for the voluntariness of the confession. He did not go further than saying that on February 8, 1974, when he repeated the warning to the accused, the latter was found "in a position" to give a voluntary statement. To say that the accused was "in a position" or mood to give a voluntary statement, falls far short of vouching that upon questioning the accused, he (Magistrate) had "reason to believe that the confession is *being* voluntarily made", which under Section 164 is a *sine qua non* for the exercise of jurisdiction to record the confession. But that Section does not make it obligatory for the Magistrate to append at the end of the record the preliminary questioning, a certificate as to the *anticipated* voluntariness of the confession *about to be recorded.* But the law does peremptorily require that *after* recording the confession of the accused, the Magistrate must append at the foot of the record a memorandum certifying that he *believes* that the confession *was* voluntarily made. The reason for requiring compliance with this mandatory requirement *at the close* of the recording of the confession, appears to be that it is only after hearing the confession and observing the demeanour of the person making it, that the Magistrate is in the best position to append the requisite memorandum certifying the voluntariness of the confession made before him. If, the Magistrate recording a confession of an accused person produced before him in the course of police investigation,

A does not, on the face of the record, certify in clear categorical terms his satisfaction or belief as to the voluntary nature of the confession recorded by him, nor testifies orally, as to such satisfaction or belief, the defect would be fatal to the admissibility and use of the confession against the accused at the trial.

B In the instant case, the Magistrate has no where in the record of the confession, certified his satisfaction or belief about the voluntariness of the confession. In the memorandum (Ex. P. 28) appended by him at the foot of the confession, he has merely expressed a "hope" that the confession was voluntarily made. Even in his oral evidence at the trial, the Magistrate (P.W. 28) did not vouch for the C voluntariness of the confession. He did not say that the use of the word "hope" by him in the memorandum (Ex. P. 28) was due to some accidental slip or heedless error. P.W. 28 is a Sub-Divisional Magistrate and a member of the Judicial service. He is supposed to be a judicial officer of standing and experience. The memorandum, Ex. P. 28, is in English, and in the handwriting of the Magistrate. It D is, therefore, not possible to hold that the Magistrate was ignorant of the difference in the meaning of the words "hope" and "believe" and that he unwittingly chose the former, while in reality, he intended to express what was meant by the latter. There is every probability that the use of the word "hope", instead of "believe", in the memorandum, Ex. P. 28, by the Magistrate was deliberate, and not inadvertent. There E is a marked difference in what is connoted by "hope" and "believe". "to hope" means "to want and expect"; "to look forward with expectation and desire". "Hope" is a wishful feeling floating on nebulous foams projected into the unknown future. Deep hidden in "hope" dwells a lingering doubt, a speck of suspicion, that what is desired F and expected may not turn out true. Not unoften, in the mind of the person hoping, there lurks subconscious fear that the "hope" may turn out a "dupe". In contrast with it, the term "believe", in the sense in which it is used in Section 164, has 'logical confidence' or 'rational conviction' as its essential element. It imports a very high degree of expectation wrought by reason, a satisfaction fast-rooted G in *terra firma,* free from doubt as to the truth of the fact perceived and believed.

In the light of the above discussion, we are of opinion, that the Magistrate advisedly chose to use the word "hope" instead of 'believe', in the memorandum Ex. P-28, because he was not fully convinced that the confession, Ex. P-27, had been voluntarily made, the Magistrate's H mind being troubled by suspicion and doubt as to the voluntariness of the confession. The retracted confession, Ex. P-27, therefore must be excluded from consideration.

We now turn to the remaining ten Circumstances. Out of them, Circumstances 9 and 10 could connect the appellant with some degree of certainty with the murder in question. But, as rightly pointed out by Mr. Altaf Ahmad, some vital factual components of these Circumstances which were pointers towards the guilt of the appellant on the capital charge, had not been established, and the learned Judges of the High Court were in error in assuming their existence.

While setting out Circumstance 9, the High Court has said that the jewels (M.O. 2 and M.O. 3 belonging to the deceased) were recovered in pursuance of the statement (Ex. P-27) made by A-1. Reference to Ex. P-27 is obviously wrong because that Exhibit number has been given to the confessional statement of A-1 recorded by the Magistrate (P.W. 28) on February 8, 1974, while these jewels are said to have been recovered on January 31, 1974. Surprisingly enough, the Sessions Judge, also, had committed the same mistake when he said : "M.O. 2 and M.O. 3 series which are gold jewels belonging to Bushana Theshi were recovered at the instance of A-1 *in pursuance of his confessional statement marked P-27 before P. W.* 34."

We have, with the aid of the counsel on both sides, examined the record and find that no statement of A-1, alleged to have been recorded under Section 27, Evidence Act leading to the recovery of the jewels (M.O. 2 and M.O. 3), was proved against him (A-1). The Police Inspector (P.W. 34) testified at the trial that in pursuance of the confessional statement (Ex. P-10), A-1 took the police party to Kodayan Kollai and produced the jewels (M.O. 2 and M.O. 3 series) from the roof of Attukottaigai, where they were lying covered in the Banian (M.O. 20). He seized these jewels under the Memorandum (R-11) which was attested by P.W. 21. We have examined Ex. P-10, dated 31-1-74. It is conspicuous by the non-mention of anything relating to the jewels (M.O. 2 and M.O. 3). It refers only to certain clothes. In his deposition, the Police Inspector (P.W. 34) did not reproduce the substance of the statement alleged to have been made before him by A-1 in respect of these jewels. Nor has the extract of the alleged confessional statement of the appellant leading to the discovery of these jewels been incorporated in the Memorandum (R-11). Thus the fact remains that no confessional statement of A-1 causing the recovery of these jewels was proved under Section 27, Evidence Act. The only component of Circumstance 9, that had been established was that A-1 led the police party to a hut in the occupation of one Murugan and produced from the thatch (roof) of that hut, the jewels (M.O. 1 and M.O. 2) and the Banian (M.O. 20),

A and later the Serologist found human blood on these jewels. In regard to this recovery, two facets of this Circumstance and a related factor must be borne in mind. Firstly, it is undisputed that the place of the recovery was not in the control or occupation of the appellant. Secondly, this recovery was made about 23 days after the murder. The third factor to be taken into consideration in this connection is, B the charge, as originally laid against this appellant, was that he had abetted by conspiracy, the murder committed by A-2. Indeed, the trial Judge had found that A-2 alone had murdered the deceased. He convicted A-2 for the substantive offence under Section 302, Penal Code and A-1 was made vicariously liable for the act of A-2, and convicted under Section 302 read with 120B I.P.C. The High Court, C however, acquitted A-2 and altered the conviction of A-1 to one under Section 302 read with Section 34 I.P.C. In view of the first facet, it is doubtful whether the recovery of the jewels can be said to have been made from the exclusive possession or control of the appellant. Even if it is assumed to be so, then also the inference to be drawn D from the recovery of these jewels at the instance of the appellant, cannot in view of the other two factors noted above, be legitimately stretched to hold that he was a participant in the murder of the deceased. The safest limit to which the inference can go against the appellant is that he was only a receiver of stolen property. The blood on these jewels is not sufficient to establish unerringly the E appellant's complicity in the murder, when it was the own case of the prosecution that A-2 murdered the deceased and removed the jewels from her body and gave them to the appellant.

As regards Circumstance 10, the prosecution case was that after making the confessional statement (Ex. P-10) to the Police Inspector F (P.W. 34), A-1 led the police party into the house and produced therefrom the blood-stained *sari* (M.O. 1), a kaili (M.O. 2) belonging to the deceased and the towel (M.O. 23) belonging to the appellant. These articles were seized by P.W. 34 under the Mahazar (Ex. P-14) in the presence of P.W. 21.

G Mr. Atlaf Ahmad contends that there was reason to suspect that the story of the recovery of these blood-stained clothes of the deceased at the instance of the appellant was a fabrication because firstly, these clothes were found on the dead body of the deceased on January 7, 1974 and secondly, the appellant was not a lunatic to keep these useless incriminating articles in his house for 23 days after the murder.

H We find merit in this contention. In the first place, it is in the evidence of Sundarambal (P.W. 2), that when she along with others went to see the dead body of the deceased at the scene of occur-

rence, the *sari* and the jacket were on the dead body. Secondly, neither in the statement (Ex. P. 10), nor in the Mahazar (Ex. P. 14) is there any mention that these clothes were found blood-stained. Thirdly, there is a discrepancy between the Statement (Ex. P. 10) and the Mahazar (Ex. P. 14), inasmuch as the former speaks of the *Sari* of the deceased in addition to the *Kaili* of the deceased, and the towel, but in the Mahazar there is no mention of the Sari, but only of the *Kaili* of the deceased. Fourthly, it does not stand to reason that the appellant would preserve and keep these worthless incriminating articles in his house for 23 days after the murder.

For these reasons, we think, Circumstance 10 was a wholly untrustworthy piece of evidence. Circumstances 1 to 8 were not of a clinching character, and even in their totality, they were too insufficient to bring home the Capital Charge to the appellant beyond doubt. Circumstance 8, by itself, could at best, lead to the inference that the appellant was a receiver of the stolen property or the thief.

In the light of all that has been said above, we set aside the conviction and sentence of the appellant in respect of the charge under Section 302 read with Section 34, I.P.C. We maintain his conviction and sentence under Section 379 I.P.C. The appeal is thus allowed to the extent indicated above.

Before we part with this judgment, we will like to place on record our appreciation of the valuable assistance rendered to us by Mr. Altaf Ahmad, Advocate, as *amicus curiae* in this case.

N.V.K. *Appeal allowed in part.*