Settlement Officer, he had no objection to the plaintiffs being described in the Record of Rights as occupancy raiyats in place of the present description "tenure holders." It may be well, however, to add that if there are tenants under the plaintiffs, they are not parties to this litigation and are not bound by the result of it.

The result is that this appeal should be allowed in part. The judgments and decrees of the Courts below must be discharged so far as they vary the rent settled by the Settlement Officer, but the Record of Rights should be altered in the manner agreed to by the Government Pleader. No order as to costs.

WALMSLEY J. I agree.

L. R. *Appeal allowed in part.*

APPELLATE CRIMINAL.

Before Sanderson C. J. and Beacheroft J.

BENI MADHAB KUNDU

v

EMPEROR*.

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May 3.

Verdict—Juror speaking to an outsider without the leave of the Court after their retirement to consider the verdict—Legality of the verdict—Criminal Procedure Code (Act V of 1898) s. 300.

The verdict of the jury is vitiated by the mere fact of one of them having, without the leave of the Court, and after their retirement to consider the same, spoken to, or held any communication with, a person not a juror.

It is not necessary for the Court to enquire into the nature of the subject matter of the conversation or communication.

* Criminal Appeal, No. 117 of 1918, against the order of H. C. Maitland, Additional Sessions Judge of Hooghly, at Howrah, dated Jan. 30, 1918.

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Rex v. *Ketteridge* (1) referred to.

THE appellant and his son, Bistupada Kundu, carried on the business of dealers in brass utensils at Kallyanpur. On the 2nd April 1917 a boat with 167 bags of the same was proceeding down the river, and had arrived near Rangamati, when a number of men boarded it and forcibly removed 20 bags. On the 31st May the house of the appellant was searched, and 18 of the stolen bags recovered.

The appellant and his son were committed to the Court of Sessions at Howrah, and tried before the Additional Judge with a jury on alternative charges under s. 395 or 412 of the Penal Code. The jury found Beni Madhab guilty under s. 412 of the Code and acquitted Bistupada. The Judge sentenced the former to rigorous imprisonment for five years.

It appeared that just after the verdict was delivered the defence pleader drew the attention of the Judge to the fact that certain jurors had been seen talking to outsiders in the Court compound after they had retired to consider their verdict. The Judge accordingly questioned the jurors in the presence of the public prosecutor and the pleader for the defence. Three of the jurors stated that they went to the compound to answer a call of nature but spoke to no one. The fourth juror alleged that he went there to say his prayers when a man asked him "*Is your business finished*," to which he replied "*No*," and that he had no further conversation with him. The last juror said that he had not left the retiring room nor spoken to any one.

Beni Madhab appealed to the High Court from his conviction and sentence, and one of the grounds of his petition related to the above incident, as stated in the judgment below.

(1) [1915] 1 K. B. 467.

Babu Narendra Kumar Bose, for the appellant.

The Deputy Legal Remembrancer (Mr. Orr) and *Babu Manindra Nath Banerjee*, for the Crown.

SANDERSON C. J. In this matter the point has been taken by the learned vakil for the appellant that "the proceedings at the trial were vitiated by the fact "that after the Judge's charge was finished—" I am now using the words of paragraph (12) of the petition— "the members of the jury were found walking about "in the compound of the Court, and persons other than "a juror were seen to speak to the members of the "jury." Upon that being drawn to the attention of the Court, and the appeal having been admitted, apparently the learned Judges who admitted the appeal asked for an explanation with regard to this matter, and the learned Sessions Judge has reported as follows: "Just "after the jury delivered their verdict in this case, the "learned vakil for the defence drew my attention to "the fact that certain jurors had been seen out of their "retiring room and talking to persons other than jurors "after their retirement and before their return. I drew "up a proceeding and questioned every one of the "jurors, the full particulars of which will be found in "the proceeding which forms a part of the record of this "Court. In my opinion the jurors' replies are perfectly "true, and the point is of no importance."

The result of the enquiry which the learned Judge made from the jurors is this: it appears that three of the jurymen, after arriving in their retiring room, went out into the compound for the purpose of relieving nature. The fourth, who was a Mahomedan, went out of the retiring room into the compound for the purpose of saying his prayers, and the fifth juryman remained in the retiring room. The fourth juryman, in his answer to the learned Judge, admits

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that, while he was outside the retiring room, a man spoke to him and asked him a question and he replied to it. The learned vakil for the appellant has argued that in view of this fact the verdict which involved the conviction of the appellant cannot stand, and, he relied on section 300 of the Code of Criminal Procedure which is in these terms—"In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict. Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury." That is an explicit direction to the Court with regard to the course to be adopted when the jury retire to consider their verdict after the charge has been delivered, and it seems to me, in view of the undoubted facts in this case, that this verdict cannot stand for the reason that it is clear that a person other than a juror did speak to, and hold a communication with, a member of the jury after the charge had been delivered, and it was without the leave of the Court. The result is that this verdict must be set aside.

It will be open to the Crown to proceed further with the case if it be advised.

It is not necessary for us, and it would not be right, in my opinion, to enquire into what was the nature of the question which was put by the person other than a juror to the juror or what was the answer. It is said by the learned Judge in his report to us that in his opinion the point is of no importance. With great respect to the learned Judge I cannot agree with him. I think it is a matter of great importance that the section of the Act, which is explicit in its terms, should be observed.

In the course of the argument a case was cited to us, viz., *Rex* v. *Ketteridge* (1). Of course it is

(1) [1915] 1 K. B. 467.

no authority upon the point in this Court, because we have to decide the question according to the section of the Act, and, I only refer to it upon this question of importance. The learned Judges in giving their judgment in that case said. "In our opinion it is "not necessary or relevant to consider whether the "irregularity has in fact prejudiced the prisoner." Having regard to the terms of section 300, if it is proved, as it was in this case, that after the charge had been delivered, a person other than a juror spoke to or held a communication with a member of the jury without the leave of the Court, in my judgment that is sufficient to upset the verdict; and, in order to show how important it is regarded that no one other than a juror should speak to the jury without the leave of the Court after a charge has been delivered, I refer to the English Act of 1897 called the Juries Detention Act, which provides in the first section—"Upon the trial of "any person for a felony other than murder, treason, or "treason felony, the Court may, if it see fit, at any time "before the jury consider their verdict, permit the jury "to separate in the same way as the jury upon the trial "of any person for misdemeanor are now permitted to "separate." It, therefore, appears that the Legislature, in giving power to the Court to allow the jury to separate in felony cases, other than those specifically mentioned, did not give the Court power to allow the jury to separate after they had retired to consider their verdict, for we find the words "at any time "before the jury consider their verdict" are put into the section.

My learned brother and I are of opinion that we ought to say something with regard to the general question, because the matter which was the basis of this appeal could easily have been prevented if proper precautions had been taken when the jury retired to

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consider their verdict. We hope that in future the learned Judge, who presides over the Court, will see that proper precautions are taken to make it impossible, after the charge has been delivered and when the jury retire to consider their verdict, for any one other than a juror to speak to the jury or communicate with the jury without the leave of the Court. It may be pointed out that this was a case the trial of which took eight days, and the result of this irregularity, which could have been easily prevented by the taking of proper precautions, is that the time occupied by the trial is altogether thrown away.

We direct that until a fresh trial, if any, the accused be enlarged on bail to the satisfaction of the District Magistrate.*

BEACHCROFT J. I agree.

* *Before Sanderson C. J. and Panton J.*

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Aug. 28.

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v.

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[After the order of the High Court set forth above, the petitioner was called upon, on the 15th July 1918, to stand his trial again before the Court of Session. He appeared accordingly, but objected to the second trial on the ground that he had been acquitted by the High Court on the appeal from his former conviction and sentence. The Sessions Judge, thereupon, adjourned the case to enable the petitioner to apply to the High Court in the matter. The latter then moved the Court and obtained the present Rule on the grounds stated in the judgment below.]

Babu Narendra Kumar Bose, for the petitioner.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

§ Criminal Miscellaneous Case No. 82 of 1918, against the order of H. M. Veitch, Additional Sessions Judge of Hughli, at Howrah, dated July 15, 1918.

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SANDERSON C. J. This was a Rule obtained on behalf of Beni Madhab Kundu calling upon the District Magistrate to show cause why the trial of the petitioner should not be stayed, or why such other order should not be passed in the matter as to this Court might seem fit.

In this case the petitioner was tried by the Assistant Sessions Judge with a jury, and the verdict of the jury was that he was guilty of an offence of receiving stolen property obtained by means of dacoity, and he was sentenced to five years' rigorous imprisonment. An appeal was made to this Court based upon the ground that, after the jury had retired to consider their verdict, one of the jurymen had spoken to a person who was not a juryman, outside the retiring room, and that this person had asked him a question and he had replied to it. On the hearing of the appeal, this Court set aside the verdict on the ground of the irregularity to which I have just referred, and the judgment contained the following sentence :—"It will be "open to the Crown to proceed further with the case if it be so advised," and at the end of the judgment there was this sentence :—"We direct that "until a fresh trial, if any, the accused be enlarged on bail to the satisfaction of the District Magistrate".

The Crown did proceed further and, upon the second trial, the learned vakil on behalf of the petitioner took objection to the trial taking place and the trial of the case was adjourned in order that this matter might be decided by the High Court, whereupon a petition was presented to this Court, and, as I have already said, a Rule was granted.

The grounds upon which the petition is based are as follows : (*i*) "that "the order of the High Court amounted to an acquittal in law ; (*ii*) that "this Court not having ordered a retrial, the Court of Sessions has no juris-"diction to try the petitioner ; and. (*iii*) that, at any rate, the order of "commitment, dated the 9th November 1917, has expired, and the Court of "Sessions has no further jurisdiction to proceed in virtue thereof."

Now, the section upon which this depends is section 423 of the Code of Criminal Procedure, which provides that "the Court may, if it considers "that there is no sufficient ground for interfering, dismiss the appea, or "may, in an appeal from a conviction, reverse the finding and sentence, and "acquit or discharge the accused, or order him to be retried by a Court of "competent jurisdiction subordinate to such Appellate Court or committed "for trial." Then there is the sub-section which provides that "Nothing "herein contained shall authorise the Court to alter or reverse the verdict "of a jury, unless it is of opinion that such verdict is erroneous owing to a "misdirection by the Judge, or to a misunderstanding on the part of the "jury of the law as laid down by him."

The learned vakil argued that this Court did not in fact order the petitioner to be retried, and consequently, inasmuch as the verdict had

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been set aside, the order of the Court amounted to an acquittal. In my judgment that argument cannot prevail.

I think there can be no doubt upon reading the judgment of this Court that it was never intended by this Court to acquit the petitioner. If there could be any doubt about it, I think the last sentence of the judgment would make it clear, because it was directed that, until a fresh trial, the accused should be enlarged on bail. If it was the intention of the Court to acquit the accused, there would have been no necessity for an order for bail. Then it is equally clear on the judgment that it did not amount to a discharge, because the same argument will apply to a discharge as to an acquittal.

But the real crux of the whole matter seems to me to be this, whether the Court did order a retrial.

I think there can be no doubt that orders similar to the one which was made in this case have frequently been made. In fact both the learned counsel for the Crown and the learned vakil for the petitioner agreed that that was so. But the learned vakil argued that, even if similar orders had in fact been made on previous occasions, if they were made without jurisdiction, that would not entitle this Court to make an order in this case. If I may say so, he was right in that, but the fact that similar orders have been made on previous occasions, without any point being taken as to their validity, is some evidence that the Court has jurisdiction to make such an order. Although the order of the Court might have been made in more explicit language than it was, I have no doubt that the order did amount to an order for retrial, subject to the right of the Crown, if it thought fit, to withdraw the proceedings. That really disposes of this case.

But if the argument of the learned vakil were to prevail, then I think the position would be this, that the Court did not finally dispose of the matter, because, as I have said, it is clear that this Court never intended to acquit the petitioner, nor did it intend to discharge him; but it did set aside the verdict on the ground of an irregularity which occurred in the course of the trial. If that be the real position, namely, that the Court did not finally dispose of the matter, I presume that it would be open to us to dispose finally of it now by directing that the petitioner should be retried. But in my judgment it is not necessary to take that course, because, as I have already said, the order did amount to an order that the petitioner should be retried.

For these reasons we are of opinion that this Rule should be discharged.

PANTON J. I agree.

E. H. M. *Rule discharged.*