APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Krishnan Pandalai.

1931, July 21.

IN RE. SUNDARAM AYYAR (FIRST ACCUSED), APPELLANT.*

Jury—Verdict not vitiated by mistake or accident—Power of jury and Judge to revise same—Judge not satisfied with same—Procedure to be adopted.

When a Sessions Judge thinks that the jury had, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver, he cannot address another charge to the jury on the law and request them to re-consider their verdict in the light of the same but should, if he disagreed with the verdict of the jury, submit the case to the High Court under section 307 of the Code of Criminal Procedure.

APPEAL against the order of the Court of Session of the Tinnevelly Division in Case No. 97 of the Calendar for 1930.

K. S. Jayarama Ayyar and *G. Gopalaswami* for appellant.

Public Prosecutor (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

KRISHNAN PANDALAI J.

The JUDGMENT of the Court was delivered by

KRISHNAN PANDALAI J.—This is an appeal by the first accused in a case tried by the learned Sessions Judge of Tinnevelly with a jury for an offence under section 395, Indian Penal Code, in which the appellant and seven others were convicted and sentenced to various terms of imprisonment. The sentence on the appellant is six months and a fine of Rs. 200 and six months more in default. The facts alleged were as follows: The appellant is the accountant of the Isanam Mutt to which the Murappanad village belongs. The

* Criminal Appeal No. 136 of 1931.

other accused in the lower Court were mostly pallars residing in the paracheri in that village. The Mutt had engaged the pallars to repair a breach in a channel. On the 11th August 1930 the pallars quarrelled about the distribution of wages between the second accused in the lower Court and the father of the prosecution first witness. The dispute was referred to the appellant who asked that Rs. 10 should be deposited by both parties as caution money to abide by his decision by 3 p.m. on the 12th. The father of P.W. 1 did not turn up at the time nor did he pay. The son (P.W. 1) said that his father had gone to fetch the money. The appellant thought that it was a falsehood and that the father of the prosecution witness was trying to back out of the proposed settlement. It is alleged that at 5 p.m. that day (12th August 1930) the appellant and his co-accused pallars went to the hut where P.W. 1 was cooking. The appellant stood on the bund of the channel and asked for P.W. 1's father and was told that he had not come back. Thereupon the appellant is said to have lost his temper and told his pallar followers, the other accused, to pull off the roof of P.W. 1's house and to loot the contents of the house. They are alleged to have done so after binding P.W. 1's hands with his own cloth. After the looting, P.W. 1 is alleged to have been kept bound at the same place by two of the pallars and not allowed to go away until midday on the 13th.

The conviction of the appellant is said to be based on a unanimous verdict of the jury. If so, it cannot be disturbed unless there was material misdirection or other material irregularity at the trial which would vitiate the verdict and judgment.

Counsel for the appellant has urged that the charge to the jury is vitiated by misdirections (1) as to the

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explanation of the offence of dacoity, (2) by reason of mis-statements of the prosecution evidence in material particulars and (3) on account of general unfairness which did not leave the jury any real choice to exercise an independent judgment on the facts. He also complains that the sentence is vitiated by the fact that the verdict of the jury first given was one of acquittal of the appellant and that the subsequent verdict of guilty was given in circumstances in which the jury had no power to vary their first verdict and the Judge was not entitled to accept any variation.

In the view we take on this last point it is not necessary to consider the objections as to misdirection. The objection as to the verdict seems to us to be well-founded. From the judgment it appears that what happened was that after the learned Judge had charged the jury on the law and on the facts the jury returned the following unanimous verdict:—"Accused 7 and 9 are not guilty; accused 11 and 12 are not guilty. The first accused did this only to intimidate, and the others are guilty of dacoity. The first accused should be let off because he did not intend to cause wrongful gain to himself, only to show that he was all powerful." The judgment proceeds to show that upon this verdict being given the Judge again explained the definitions of "dishonestly" in the Code and sent back the jury to reconsider their verdict in the light of the legal definition. On their return after a long deliberation the foreman stated: "We are unanimous. First accused also is guilty of dacoity." In a note it is stated that this verdict was delivered by the foreman after a very long pause and with obvious emotion. The objection is that the jury, in the first instance, although for a reason which they were not bound to state and which may have been wrong, found the appellant not guilty as they state

expressly that he should be let off, and this verdict not being vitiated by any mistake or accident, neither the jury nor the Judge had the power to bring about its reversal and convert it into one of guilty. In a similar case in *Emperor* v. *Kondiba*(1), it was held that section 304 of the Code of Criminal Procedure contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and that it has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under section 307 of the Code to the High Court. It has also been held by this Court that there is no provision in the Code of Criminal Procedure which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it and that section 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is; see *In re Rama Naicker*(2). In this case we can find nothing in the first verdict to show that it was delivered by accident or by mistake, in other words, that that verdict did not express the jury's real meaning. The jury themselves did not say that they had made any mistake or intended anything else but what they said.

Their meaning was quite clear that the appellant should be left off, in other words, that he was not guilty. They no doubt added as a ground for that opinion that he was not actuated by any intention to cause wrongful

(1) (1904) I.L.R. 28 Bom. 412. (2) (1912) 22 M.L.J. 355.

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gain to himself but only to intimidate P.W. 1. That may not be right as an application of the law as to dishonesty in the Penal Code. All that it showed was that the jury had, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver. This was not a case under section 303 because the learned Judge put no questions to the jury as obviously no questions were necessary to be put to them to ascertain what their verdict was. They had stated their verdict clearly enough as also their reason for it which they were not bound to do. The case was one in which the learned Judge might have thought that the jury's verdict of not guilty against the appellant was based upon an error of law, and on that ground he might have thought fit to disagree with the verdict, and if so, he ought to have submitted the case to this Court under section 307. In fact, however, the course he adopted was to address another charge to the jury on the law as to "dishonestly" and to request them to re-consider their verdict in the light of the legal definition. On the re-consideration, the jury, apparently with great reluctance, returned a verdict of guilty and as the record shows they did so with obvious emotion. For this procedure there is no warrant in the Code of Criminal Procedure and the amended verdict of the jury was therefore illegally obtained and the conviction and sentence following thereupon cannot be sustained. The decision in *King-Emperor* v. *Nga Tin Gyi*(1), which was referred to by both sides during the argument, was not a case like the present but one in which the verdict of the jury did not make it plain under which part of section 304 they found the prisoner guilty. Thereupon the learned

(1) (1928) I.L.R. 4 Rang. 488 (F.B.).

Judge questioned the jury, as he was entitled to do, under section 303 to ascertain what their verdict was. From the answers given it appeared that the jury wanted some further elucidation of a decision which had been referred to in the summing up. The learned Judge explained the decision further to the jury who retired again and afterwards returned a verdict of guilty under section 303. It was held that this second verdict could be accepted. Whether in the particular circumstances of that case the opinion that the second verdict could be accepted or not and whether the decision was right it is not necessary for us to say. But the case itself is an illustration of the rule that only where the verdict is ambiguous or defective and it become necessary to ascertain what the verdict is, can the Judge question the jury under section 303. That was not this case nor indeed did the learned Judge, as already stated, question the jury under that section. We therefore set aside the conviction and sentence and order that the appellant be set at liberty. In the circumstances of the case we do not think it necessary to order a retrial. The appellant will be discharged.

K.N.G.