WILLIAM J. McBURROUGH, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, MARYLAND COUNTY.

Argued January 9, 1934. Decided January 26, 1934.

1. If a juror is admitted to try a cause without objection, or after objections have been taken and disallowed, the verdict will not be set aside for any disqualification existing before his acceptance as such.
2. A defendant, especially in a criminal case, has a right to have a jury polled and this should be done in open court when the verdict is presented.
3. The trial judge has no right to have private communication with the jury in the absence of the parties or their attorneys after they have retired to deliberate, nor any communication at all on the subject of the trial except in open court.
4. If the court, after considering all the evidence, has not an abiding conviction of the truth of the charge, the defendant should be discharged.

Appeal from a conviction by the Circuit Court of the Fourth Judicial Circuit, Maryland County, of the crime of false imprisonment. *Judgment reversed.*

William V. S. Tubman for appellant. *The Attorney General* and *Anthony Barclay* for appellee.

MR. JUSTICE GRIGSBY delivered the opinion of the Court.

This is a case brought up to this Court upon an appeal from the Circuit Court of the Fourth Judicial Circuit, Maryland County, where appellant was indicted by the grand jury of said County for the crime of false imprisonment at the February term of said court, 1931.

At the August term of said court, 1931, the cause was called up for trial, and prisoner when arraigned pled not guilty to the charge, whereupon a jury of said County was duly empanelled to try the issue joined between appellant and appellee. The petit jury in said case returned a verdict of guilt, upon which verdict the assigned judge

passed a sentence to the effect that appellant pay a fine of two hundred dollars, or be imprisoned for six months with hard labor. It is from this verdict and judgment that appellant excepted and gave notice that he would move for appeal by bill of exceptions. His bill of exceptions which deals with the motion for a new trial is in substance as follows:

> "Because the said verdict of the said petit jury is manifestly against the evidence and law adduced at the trial of said case and submitted to said petit jury at said trial, because it was substantially proven by defendant and not impeached nor rebutted by plaintiff, that the arrest of private prosecutor was done by lawful orders of the Superintendent of Maryland County to the acting Commissioner of the Kru Coast District, and not by the defendant as charged in the indictment."

The court below after hearing arguments *pro et con* dismissed the foregoing motion for a new trial, and proceeded to render final judgment. Although this Court agrees that a motion for a new trial is addressed to the discretionary power of the trial court to grant or deny according to the exigency of each particular case, yet if the allegations contained therein are of sufficient validity, reason dictates that it becomes a legal and indispensable duty of the judge to grant the same and award a new trial.

The indictment charges *inter alia* that:

> "On the fourth day of April A.D. 1929 and on divers other days subsequent to the said fourth day of April A. D. 1929 at the town of Grand Cess, in the County and Republic aforesaid, in and upon the body of one Nyepanh, a Frenropo man, then and there being, unlawfully did make an assault, and upon him the said Nyepanh the said William J. McBurrough, defendant, then and there without any color of right or authority, he wrongfully, and unlawfully imposed physical restriction, by apprehending his the said Nyepanh's body and confining it for a number of consecutive days at

the town of Grand Cess and County of Maryland and the Republic of Liberia aforesaid in which said imposed condition the said Nyepanh remained until he was brought to the City of Harper, County and Republic aforesaid, and delivered to some authority to be imprisoned at the said Police Station, upon a presumed charge that the said Nyepanh had reported certain officials to Monrovia and which said charges were never legally set up and framed, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the Republic of Liberia."

The Court here observes that from an inspection of the records, the names of Nyepanh, Chief Jack Jaraca, Commissioner H. R. W. Diggs, E. Monroe Cummings, Gyedade Nimley, Chief Bloh and Goffah Suduway were endorsed on the bill of indictment as witnesses, which strikes the minds of this Court that the grand jury were guided by their testimony in finding a true bill. It further goes without saying that the presence of said witnesses was secured as they were placed under the jurisdiction of the court by appearance bonds previous to the institution of criminal proceedings. But what is strange is that only two of them deposed; namely, the private prosecutor and Goffah Suduway who were placed on the stand and they failed satisfactorily to prove the charge. For, other than the private prosecutor's testimony, there was no evidence adduced at the trial to substantiate the truthfulness of the allegations contained in the bill of indictment, as that of Goffah Suduway is based on what was told him by the private prosecutor, and uncorroborated. Evidence is that which makes clear the issue in litigation and leads the court to an unerring conclusion. It is not enough for the prosecution merely to state the commission of a crime without becoming actively engaged in establishing the allegation by positive, direct, presumptive, or circumstantial evidence. This lack of duty on

part of the court below has thrown a doubt over the case and a verdict formed on such evidence is an error.

In the said court it was also strongly contended by counsel for defense that the indictment is wholly unfounded in so far as it relates to prisoner's being responsible for the charge as laid in the indictment in that the arrest of the private prosecutor was done by lawful orders of the Superintendent to the then acting Commissioner for the Kru Coast District. As appears from the testimony of J. Samuel Brooks, at the time Superintendent of Maryland County, and other corroborating witnesses who were placed on the stand, they supported the prisoner in his plea that he was not guilty of the charge, but that the order was authorized by the Superintendent's Council and received the endorsement of the Superintendent himself and that he forwarded same to the said Commissioner of the Kru Coast District, who effected the arrest.

> "Count 2: And also because the verdict of guilty was not brought down by his peers, neither did the panel consist of twelve (12) citizens of the Republic of Liberia (male), in that John Ross one of the empanelled jurors is not an enfranchised citizen of the Republic of Liberia."

As to this count, the Constitution guarantees to every party criminally charged the right of trial by a jury of his peers; but obviously it becomes the duty of a party desiring to enjoy the privileges guaranteed him under the law to take advantage thereof at the proper time. At the call of the case the trial court proceeded to select twelve good and lawful citizens of the Republic to try the issue joined by allowing challenges for cause. But where a competent and impartial jury shall have been secured in any proceeding its verdict will not be set aside because the trial judge erred in retaining upon the panel one who was in fact disqualified and who was then peremptorily challenged and admitted to which no exception was taken, although it afterwards appears that

the party had exhausted all his peremptory challenges. From a careful inspection of the records of the case in point, it is nowhere shown that the prisoner or his attorneys ever called the attention of the court below to the fact that the said juror was not an enfranchised citizen of this Republic, and established the allegation by the testimony of the justices of the peace who by law are supposed to have dispossessed him of his rights of franchise or other proof, and such failure on their part is tantamount to a waiver. Hence defendant cannot at this stage object to the said juror as he is also guilty of laches. Our statute provides that:

> "Any party to an action may object to the entire panel on the ground that the same was illegally drawn or to any juror on the ground of bias, prejudice or other cause sufficient to disqualify such juror, which objections shall be determined by the court subject to the right of the party objecting to take an exception, of which exception he may avail himself in the event of an appeal on his part after the final trial of his case. After a jury is drawn for the trial of an action and before it is sworn any party may peremptorily object to three jurors, and may examine each juror as to his qualifications, and any objection to the competency of any juror to sit on a trial shall be disposed of by the Court, subject to the right of the party objecting to take an exception. . . . But if a juror is admitted to try a cause without objection, or after objection has been taken and disallowed, the verdict shall not be set aside on account of any disqualification existing before his acceptance as a juror." 1 Rev. Stat. 467, § 360.

> "Count 3: And also because said verdict of the petit jury which purports to convict defendant is not legally founded nor received, in that the Clerk of Court, at the time of making the inquiry of them if it were their verdict, defendant, through his counsel, asked the court for the privilege of polling the jury; but the same was

denied. And also because His Honour Stephen H. Dickerson, assigned judge presiding over the aforesaid court, whereat the said case was tried, and at the term aforesaid did have communication with the said petit jury after the case had been submitted to them in his private chambers, to the exclusion of the defendant or his counsel, which was contrary to the law governing trials."

As to this count of the said motion for a new trial as embodied in the twentieth count of appellant's bill of exceptions, it appears that the empanelled jury returned a verdict of guilt against prisoner, defendant in the court below, now appellant, to which verdict it is alleged that defendant's counsel asked the trial judge the privilege of polling the said jury under rule of court. The right to have the jury polled in a criminal case is a right given by law, as it is by this means that any juror who has been induced in the jury room to yield assent to a verdict against his conscientious conviction may have an opportunity to declare his dissent from the verdict as announced, and his denial of this right by the court will constitute grounds for a new trial. 20 R.C.L. 246, §§ 30, 31. Polling the jury must be done in open court when the verdict is presented, and not after the jury is discharged from the panel, as was revealed by an extra-judicial investigation held by the presiding judge and sent along with the records in the case.

It is a well established rule of common law that any communication between the judge and jury after they have retired to deliberate upon the verdict, except in open court, is improper. For

"In some cases the strict rule is maintained that if the judge enters the jury room in the absence of the attorneys, even at the request of the jurors, after they have retired to deliberate on their verdict, and has any communication or conversation with the jury in reference to the case, a new trial will be granted, without

consideration of the question whether such conversation was prejudicial or not; and the same is true if additional instructions or other communications are sent to the jury room without the consent of, or notice to, parties or counsel. According to other authorities, however, while the practice of communicating with the jury under such circumstances is discouraged, a new trial will not be granted if it appears that no prejudice resulted or could have resulted therefrom. But if the nature of a secret communication is not disclosed, it seems that it will be presumed to be prejudicial, notwithstanding a statement by the trial judge that it was immaterial. In some states it is provided by statute how and under what circumstances a trial judge may communicate with the jury, and any communication which is not in substantial compliance with the statutory provisions is ground for a new trial." 20 R.C.L. 257, § 39; *cf.* 3 Wharton, Criminal Procedure (10th ed., 1918), 2219, § 1770.

From a careful perusal of the statements of the witnesses it is clearly shown that Nyepanh, the private prosecutor, was the only witness introduced at the trial for the prosecution who endeavored to support the allegation contained in the indictment. The other witnesses appeared not to have been on the scene when the alleged false imprisonment of Nyepanh was made, and one, Goffah Suduway, only testified to facts which appeared to be peculiarly in the knowledge of the private prosecutor and rehearsed to him, Goffah Suduway, by the said private prosecutor after his imprisonment. Gyedade Nimley, who appeared to have been present, further testified to the imprisonment, but as to how and by whom Nyepanh was imprisoned he does not know and states that he was told that the prisoner gave orders for the arrest and imprisonment. The defendant's counsel introduced several witnesses to the stand to show that the prisoner, being Colonel for the Regiment, was on the Kru Coast to superintend

his quarterly drill, and had nothing to do with the arrest of the private prosecutor, but rather the arrest was ordered by the Superintendent of Maryland County and executed by the Kru Coast Commissioner, John B. Delaney, then in charge of the Kru Coast District; and nothing is shown on the cross-examination by the prosecution to impeach the statement of the corroborating witnesses of appellant. In order for a jury to arrive at a just and legal verdict they must, after hearing the evidence *pro et con,* become divorced of every hypothesis of doubt, and retain an abiding conviction of prisoner's guilt.

This Court fails to see that the prosecution made out a *prima facie* case, and hence upon what the jury predicated its findings to arrive at the legal conclusion of the guilt of accused. From the evidence adduced at the trial we are of the opinion that the prisoner was not guilty, for after taking all the surrounding circumstances into consideration, if there still remains a doubt as to the truthfulness of the alleged imprisonment, that is to say, whether the Kru Coast Commissioner or the prisoner is responsible for the arrest, a doubt arises therefrom, the benefit of which goes to the defendant.

In view of the foregoing, this Court cannot say that after weighing all the evidence it has an abiding conviction that prisoner is guilty of the charge.

The judgment and verdict of the court below should therefore be reversed; and it is so ordered.

Reversed.