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1579

COURT OF GENERAL SESSIONS OF THE PEACE,
CITY AND COUNTY OF NEW YORK. PART II.

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-----X
THE PEOPLE OF THE STATE OF NEW YORK

B e f o r e:

vs.

HON. CHARLES C. NOTT, JR. J

THOMAS J. VENTIMIGLIA.

and a jury.

-----X
Indictment filed February 26th, 1918.

Indicted for robbery in the first degree.

New York, July 12, 1918.

APPEARANCE:

FOR THE PEOPLE: ASSISTANT DISTRICT ATTORNEY GEORGE W. BROTHERS.

FOR THE DEFENDANT: MR. SIDNEY R. LASH.

Peter P. McLoughlin,

Official stenographer.

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PHILIP R. BATT, a witness called on behalf of the People, being duly sworn, testified as follows:

(The witness states he resides in San Francisco, California.)

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DIRECT EXAMINATION BY MR. BROTHERS:

Q In what business are you? A Suit and cloak business.

Q With whom? A Phil Katz & Co.

Q Where is Phil Katz & Co.? A 11 East 26th street.

Q In New York City? A Yes, sir.

Q How long have you been with them? A Two and a half years.

Q What is your position with them? A Commercial traveler.

Q Were you in the city of New York on the 12th of February, 1918? A I was.

Q Were you here upon business? A Yes, sir.

Q Where were you stopping at that time? A The Claridge Hotel.

Q Broadway and 44th street? A Yes, sir.

Q Did anything happen to you on the evening of that day?

A Yes, sir, on the evening of that day--

Q Were you at the Claridge Hotel? A No, sir.

Q Where did you have your dinner that night? A At the Claridge Hotel.

Q What time did you leave the Claridge Hotel? A I should judge about 7.45.

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Q In the evening? A Yes, sir.

Q When you came out of the hotel was it dark? A Well, we had those lightless nights at that time.

Q Where did you go from the hotel? A I went to the 42nd street subway station.

Q Then where? A To Dyckman street.

Q Tell all that happened? A I stepped off the subway station and I walked, I should judge, about three-quarters of a block to the home of my mother-in-law, 112 Nagle avenue.

Q Is that in the city and county of New York? A Yes, sir, right as you step off the subway, Nagle avenue is the junction; I walked into the hallway. There was only one light burning due to the condition of New York City at that time, one light in the hallway.

Q Was that an electric light? A Yes, sir, one light in the hallway. I got in the vestibule-- after you pass in the door -- and immediately upon stepping into the hallway under this light I was seized by two men and taken by the throat, forced backwards, and as I turned around I could see but one person and then I became unconscious.

Q Had you seen any persons near you as you entered this hallway? (No answer.)

Q Did you see any persons near you when you entered the hall? A No, sir.

Q What was the first thing that happened to you in the hall? A I was taken by the throat from the rear, and turn-

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ed around and saw both then--

Q . How long were you struggling with these men? A Well, I should judge not more than thirty seconds before it was all over.

Q Did you lose consciousness? A Yes, sir.

BY THE COURT:

Q What caused you to lose consciousness? A My skull was fractured.

Q Struck on the head? A Yes, sir.

BY MR. BROTHERS:

Q Do you know who struck you? A Well, it is very hard to say. One man I positively saw.

Q Well, that man whom you positively saw did you ever see him again after that night? A Which one struck me I could not say, but which one I did see --

Q One of them hit you and you became unconscious? A Yes.

Q When you regained consciousness where were you? A At the hospital on 168th street, somewhere up on the west side, I am not well accustomed to the streets. It is between Broadway and St. Nicholas.

THE COURT: It used to be the J. Hood Wright Hospital.

MR. BROTHERS: I think it is the Washington Heights.

BR. MR. BROTHERS:

Q Do you recall what time it was that you regained con-

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sciousness in the hospital? A Well, the best recollection I have I would wake up for five minutes, become unconscious again, I should judge around five or six o'clock in the morning.

Q Have you any recollection of being taken to the hospital? A No, sir.

Q Did you see either of the men that assaulted you as you have described after the assault? A Have I ever seen them? Yes, sir, the following morning, the second morning after that they took me to court in Harlem the west side and I identified a man there.

Q Which man did you see at the Harlem Police Court?

A Which man did I see? That man sitting there (pointing to the defendant)

Q Is he here now? A Yes, sir.

Q Which one is he? A The gentleman sitting there with the gray suit on.

Q Indicating the defendant on trial? A Yes, sir.

Q Do you know what his name is? A Well, it is a long drawn out name, Veraglia or something like that.

Q Had you ever seen him before that night of the assault?

A No, sir.

Q Can you tell the jury just what this defendant did to you that night? A Well, from the general assault my skull was --

Q What was it that the defendant did himself. Do you

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understand me. Two men assaulted you? A Yes, sir.

Q What was it that the defendant did? A He had me by the throat choking me.

Q Did you see his face at that time? A Yes, sir.

Q At the time you were looking at the defendant's face how far were you from the light which was burning in the hallway? A Directly underneath it.

Q Was this an apartment house? A Yes, sir, an apartment house.

Q With or without an elevator? A Without an elevator.

Q How far in from the street had you gone before being assaulted? A This light was directly in the center of the hall, and it is not a very deep one.

BY THE COURT:

Q About how many feet from the door? A I should judge about twenty feet.

BY MR. BROTHERS:

Q Did you see any other persons in the hall there? A No.

Q How were you dressed that night. Did you have an overcoat on? A Yes, sir, a muffler and gloves.

Q Had you gone to 112 Nagle avenue direct from the hotel? A Yes, sir.

Q Didn't stop anywhere? A No, sir.

Q What property, if any, did you have with you as you entered this place? A I had a diamond ring.

Q Upon which hand did you have it? A The left hand.

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Q Did it have one or more stones in it? A One stone.

Q What was it, a diamond? A Yes, sir, a diamond stone.

Q What else had you? A A diamond scarf pin.

Q Describe that? A A diamond scarf pin with a blue center, sapphire center.

Q Surrounded by smaller diamonds? A Yes, sir.

Q Did you have any money with you? A Yes, sir.

Q How much? A Possibly about between seventy and seventy five dollars. It is very hard to tell exactly; I didn't always keep the correct amount.

Q In what part of your clothing did you have the money?

A In the trousers pocket.

Q Which side? A The side over here. (Indicating)

Q The left side? A Yes, sir.

Q The left side pocket? A Yes, sir.

Q Was it loose or in a purse? A Loose.

Q Was anything said by either of the men who assaulted you? A No, sir.

BY THE COURT:

Q Were you wearing gloves when you entered the hallway?

A No, sir, I had taken the gloves off before entering the house.

Q Did you wear gloves coming up in the subway? A Yes.

Q Did you wear gloves when around the Claridge before you left there? A No, sir; I left there, I had my dinner there, and as leaving the hotel, naturally, I would put on my

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gloves.

Q Did you notice whether any one got off the train when you got off at Dyckman street? A I paid no attention.

BY MR. BROTHERS:

Q Was your attention called to any person before you were assaulted? A No, sir.

Q Did you hear any noise just before being taken hold off? A No, sir; my hearing is not perfect, and naturally we all wore rubbers at that time, most any one did.

Q You are hard of hearing now? A Yes, sir, since then.

Q Well, did you have any difficulty with your hearing before the assault? A No, sir.

MR. LASH: I object to that and move to strike it out.

THE COURT: Objection overruled; exception.

BY MR. BROTHERS:

Q When you regained consciousness did you find any of this property which you have described. Did you find the diamond ring? A No, sir.

Q Your scarf pin? A No, sir.

Q Nor any of the money? A No, sir.

Q Have you ever seen the jewelry since that time? A No,

Q Were you injured in any way by this assault?

MR. LASH: I object to that as incompetent, immaterial and irrelevant.

THE COURT: Of course he is not an expert but I will

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allow him to testify as far as a layman can.

MR. LASH: The mere fact of an injury is not material to the crime charged.

THE COURT: Yes, it is material. Robbery in the first degree may be committed where the injuries inflicted are grievous. That is one of the three ways in which it may be committed.

MR. LASH: But there mere fact that he was injured is sufficient, is it not? Not the extent of the injuries.

THE COURT: Where grievous bodily injury is inflicted it makes it robbery in the first degree. That is one of the three things which may differentiate robbery in the first degree from robbery in the second degree. I will allow it.

Q Where were you injured? A My skull was partly fractured.

Q Well, was there any wound upon your head? A Well, I don't know what you would call a wound, but the whole side of my head was black and blue for amonth and a half after.

Q You indicate the part of your head behind your left ear? A Yes, sir.

Q Were you injured any other place? A My spine was badly hurt.

Q Your back was lame? A yes, sir.

Q How about your throat, was that hurt? A yes, sir I could not talk for ten days.

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Q Why not? A Well lost my voice from the choking. The nurse claimed that the choking had paralyzed the nerves at my throat.

Q Had you pain in your throat? A Any time I wanted to talk, yes, sir.

Q Whom were you going to visit at 112 Nagle avenue? A My mother-in-law, Mrs. I. Davis.

Q Upon what floor did she reside? A The third floor.

Q How long had she lived there? A Two years or two and a half years.

Q When you got out of the subway at Dyckman street was it dark? A Yes, sir.

MR. LASH: I object to that and I move to strike it out as already answered by the witness.

THE COURT: Yes, I think it has been.

Q Now, you say that this defendant upon trial caught you by the throat. Are you positive of it? A Positive of it.

CROSS EXAMINATION BY MR. LASH;

Q How long have you been in New York City? A I cannot hear you. Step a little closer please.

Q How long before the 12th day of February, had you been in New York City? A Two months.

Q Two months? A Yes, sir.

Q During those two months where were you stopping? A At the Claridge Hotel.

Q For the entire period? A Yes, sir.

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Q Did you have any friends stopping at the Claridge?

A Yes, sir.

Q Quite a number of them? A Yes, sir.

Q Where had you been during the day of February 12th?

A At my business.

Q Been to any place of amusement? A No, sir.

Q Been with any friends? A Why the usual crowd that we have dinner with every night.

Q With whom did you have dinner on the night of February 12th? A Who did I have dinner with, why I could name three gentlemen that we had dinner with.

Q Were there only three? A Three gentlemen.

Q You had no ladies in the party? A No, sir, no ladies in the party.

Q Do you recall what you had for dinner? A No, sir, I could not recall what I had for dinner.

Q The usual ordinary dinner? A Yes, sir.

Q Did you partake of any liquid at dinner? A No, sir.

Q Nothing whatsoever? A No, sir.

Q What time did you leave the Claridge Hotel? A About 7.45, naturally I can't tell you exactly.

Q I don't expect you to. Give me your best recollection? A 7.45.

Q Now, you left the Claridge about 7.45? A Yes, sir.

Q You walked to 42nd street. Did you walk hurriedly or at your leisure? A At my leisure.

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Q It took you about ten minutes to walk to the subway station? A No, sir.

Q About five minutes? A No, sir.

Q Do I understand you correctly that you took the subway at 42nd street, do you mean the Times Square or the Grand Central? A Times square.

Q You took the first local train that pulled in at the Times Square station? A Yes, sir.

Q You took that to 72nd street, did you? A I beg pardon.

Q You took that local to the 72nd street station? A Yes, sir, as I recall it, yes, sir.

Q About how long did you have to wait at Times square station for a local train to take you to 72nd street? A I could not tell you.

Q About five minutes? A No, sir, I shouldn't think so.

Q How do you estimate the time from the time you left the Claridge until you actually boarded the subway train at Times square-- how many minutes about? A I should judge two minutes because I took that train very often, in the morning when I left the hotel to go downtown.

Q You got the Dyckman street express at 72nd street? A Yes, sir.

Q You got off where? A At Dyckman street.

Q How long did it take you from 72nd street to Dyckman street? A I could not tell you.

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Q Well about how long? A I should say 8.15, I should judge, arrived there about 8.15.

Q You got to Dyckman street about 8.15? A Yes, sir.

Q Now, how far is it from the Dyckman street station to your mother-in-law's house, 112 Nagle avenue? A Less than a block I should judge.

Q About how many blocks? A About one block.

Q Only one block? A I should judge so.

Q Did you notice this defendant in the subway train as you came uptown? A No, sir.

Q Up to the time you reached Dyckman street had you ever in your life seen this defendant? A No, sir.

Q From the time you left Dyckman street until thirty seconds before you were assaulted had you ever seen this defendant? A No, sir.

Q Then the only time you remember seeing him was for a period of about thirty seconds. How do you fix the period of time as thirty seconds, how do you in your mind fix the period at thirty seconds. That is a guess isn't it? A Well, naturally.

Q It is an estimation on your part? A Yes, sir, that is my estimate of the time.

Q It might be less than thirty seconds? A Yes, sir.

ROBERT D. DUGGAN, a witness called on behalf of the people, being duly sworn, testified as follows:

(The witness states he is attached to the Detective Bureau,

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40th Precinct.)

DIRECT EXAMINATION BY MR. BROTHERS:

Q You are a member of the Police Force of this city? A I am.

Q Have been for how many years? A Going on seven years.

Q Do you know the defendant in this case? A I do now.

Q Did you arrest him or assist in arresting him? A Well, I arrested him with the assistance of two other detectives.

Q Do you recall the date? A I think it was on February 13th.

Q Where was it that you placed him under arrest? A He was in a dance hall at 185th street and Amsterdam avenue.

Q Had you known him prior to that time? A No, sir.

Q Did you see the complaining witness before you arrested the defendant? A I did.

Q Had you received from the complaining witness -- don't state what he said-- any statement about any assault. Just yes or no? A Yes, sir.

Q After you arrested the defendant to what place did you take him? A To the Fourth Branch detective Bureau.

Q How soon after you arrested the defendant did you again see the complaining witness? A Why, I think it was the next day.

Q Where was that? A That was at his mother-in-law's house 112 Nagle avenue.

Q Have you recently endeavored to subpoena any witnesses

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in this case for the prosecution?

MR. LASH: I object to that as incompetent, immaterial and irrelevant.

THE COURT: Well where it appears from the testimony in a case that there were certain witnesses who were materially, then it is always permissible for a party to show effort to subpoena them; but in this case as far as the evidence now discloses, there were no witnesses. I will therefore sustain the objection now. If during the course of the case -- either your case or the defendant's case -- it appears that there were such witnesses, then I will allow you to explain the failure to call them.

MR. BROTHERS: All right.

CROSS EXAMINATION BY MR. LASH:

Q Did you have this defendant on a line up? A Yes, sir, I think I did.

Q Where did that take place? A Police Headquarters.

Q Downtown? A Yes, sir.

Q Were you ever in the company of the complaining witness when this defendant was seemingly identified as the man who committed this crime? A I was.

Q Or one of them? A I was.

Q Where was that? A In the 12th District Court.

Q Where is that? A 166th street and St. Nicholas avenue.

Q Had you had any talk with the complaining witness before the alleged identification of this defendant? A I had.

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Q Did you try to refresh the memory of the complaining witness? A Why Detective Shields and I showed him a photograph previous to him identifying him in the court.

Q Did the complaining witness at that time express to you any doubt as to whether or not this defendant was one of the men who assaulted him? A He did not.

Q Where were you standing when you first entered the building-- did you step out in the hallway of the Magistrates' Court or did you go directly inside? A I don't understand the question.

Q When you went in to the 12th District Magistrates' Court did the complaining witness identify the defendant-- where did you meet Batt outside of the courtroom or inside of the court room? A I think it was in the court room.

Q Do you recall calling him out in the hall? A No, sir, not in the hall.

Q Do you recall showing Batt a photograph? A Not on that day, no, sir.

Q Do you recall telling him that this man was just out of Sing Sing, and he is probably the man that did the job? A I did nothing of the kind.

Q You did not say that? A I did not.

Q You are quite positive of that? A I am sure.

Q Did you ever make that statement to the complaining witness at the Forty Branch Detective Bureau? A The complaining witness? I don't think he ever was in the Fourth Branch Detective Bureau.

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Q I ask you if you made that statement? A I could not; he was not there. I don't know anything about this man here.

Q Did you take out a photograph of this defendant and hand it to Batt, and say to him, "This is the man that did the job? A I never did.

Q Did Batt there reply to you, "I think it is." A Batt positively identified the picture.

RE DIRECT EXAMINATION BY MR. BROTHERS:

Q When did you show the picture to Mr. Batt? A I think it was two days after the alleged crime, if I am not mistaken.

Q Was it before or after the arrest? A Before the arrest.

Q Where was he when you showed him the picture? A At his mother-in-law's house, 112 Nagle avenue.

Q Did you show him one picture or more than one? A I think we only showed him one.

Q Do you know, of your own knowledge, whether he saw any other photograph at any time? A No, sir, not that I know of.

Q Had you talked with Mr. Batt about the appearance of his assailant before you showed him the photograph? A Yes, sir, received a description from the witnesses and also from Mr. Batt.

Q You say there was a lineup at Police Headquarters in which line the defendant stood-- when was that? A That was

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not the day he was identified; that was just the procedure we had.

Q That is the formal proceeding with arrested persons?

A Yes, sir.

Q You told counsel upon cross examination that Mr. Batt identified the defendant at the 12th District Court? A Yes.

Q Under what circumstances did he identify him there?

A Well, I brought the defendant out into the audience, told the defendant to find a seat. I then went inside and brought out Mr. Batt during which time the defendant had changed his seat. Mr. Batt came out and identified the defendant.

Q Were any other people sitting in there? A Yes, sir sixteen men.

Q Bu the audience do you referto that part of the courtroom set aside for spectators to sit in? A Yes, sir.

Q And you say that under those circumstances Mr. Batt picked out this defendant from among these sixteen other men?

A Yes, sir he did.

Q As the men who had assaulted him? A Yes, sir.

Q At 112 Nagle avenue? A Yes, sir.

RE CROSS EXAMINATION BY MR. LASH:

Q The picture which you showed the complaining witness when was that taken, do you know? A Why it was taken, I believe pretty near about nine years ago if I am not mistaken .

Q Taken in 1908? A Yes, sir.

Q Ten years ago? A Yes, sir.

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Q Was there a striking resemblance between that picture as it was taken then and the defendant as he now appears?

A Somewhat.

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Q Rather vague? Wasn't it? A Well, it was not--

Q It was very vague? A I don't think it was very vague.

Q You had some difficulty, didn't you, in looking at that picture and looking at the defendant to tell if it was one and the same person? A Well, I don't know the profile showed up pretty good.

Q There was a resemblance in the profile? A Yes, sir.

Q Now, you put this defendant in the audience in the Washington Heights Court? A Yes, sir.

Q There were how many people? A About sixteen men.

Q Sixteen men? A Yes, sir.

Q You brought the complaining witness out you say, and he picked out this defendant as the man that did the job? A Yes, sir, he did.

Q You did not stand near this defendant or point to the defendant to have Batt identify him as the man, did you? A No, sir, I did not.

Q Now, you had a photograph of this defendant, and you say there was some resemblance in the profile? A Yes, sir.

Q You were in court when Mr. Batt testified? A Yes, sir.

Q This morning? A Yes, sir.

Q You heard him testify that he never before in his life saw this defendant except for a period of about thirty seconds, and that it might be less than thirty seconds? A I did.

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Q Do you want this jury to believe that from that photograph he could pick out this defendant?

MR. BROTHERS: I object to that.

THE COURT: Objection sustained. He does not say he picked him out from the photograph. He claims that he first picked him out from having seen him.

MR. LASH: I withdraw the question.

P H I L I P R. B A T T, the complaining witness recalled.

BY MR. BROTHERS:

Q Do you recall seeing any photograph or photographs before you saw the defendant in the Police Court? A Yes, sir.

Q Who showed them to you? A The arresting officer.

Q Do you know how many you saw? A Yes, sir, five or six, I wouldn't say positively, but five or six.

Q Did you see among those five or six photographs any picture of this defendant? A Yes, sir.

BY MR. LASH:

Q When those photographs were shown you what did the police officer say to you? A He said nothing to my recollection. He asked me if I saw anybody there that I recognized.

Q Well, didn't he take this photograph in particular and ask you if that don't look like the man. Didn't he hand you the photograph of one man in particular and ask you if it didn't look like the man? A No, sir.

Q Didn't he make any suggestion to you? A No, sir, if

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I recall very well I was lying on a couch and they were put on the bed cover, and immediately on seeing this picture I immediately recognized this party. That was as far as they questioned me. He said I was making a mistake and I said, "You don't forget a face like that." I don't think you ever had that happen to you and I hope it won't ever happen to you.

Q February 12th was a very dark night? A Yes, sir.

Q Much more so because the Coal Administration had ordered lightless nights? A Yes, sir.

Q Everything was dark with the exception that you stood under that electric light? A Yes, sir.

Q It was a small one? A No, sir, the usual one.

Q The ordinary electric light? A Yes, sir.

Q You have testified that you saw the defendant for a period of thirty seconds or less. Do you want the jury to believe that on a night such as you have described during which you saw a person for a period of thirty seconds or less that you could with absolute positiveness and without the possibility of making a mistake or being in error identify a person from a photograph taken a period of ten years theretofore. That is what you want the jury to believe? A Yes, sir.

BY MR. BROTHERS:

Q You also identified him in court, didn't you? A Yes, sir.

Q Picked him out from a number of people? A Seventy odd people in the court room.

Q The Judge there? A Yes, sir.

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Q Lawyers? A Yes, sir.

Q Court officers? A Yes, sir.

MR. BROTHERS: The people rest.

MR. LASH: If the Court, please, ordinarily I would not take up your Honor's time with the making of a motion because I know that from the nature of the charge the case is one which presents a question of fact which your Honor should submit to the jury, but in this particular case, the facts are altogether different. We have no testimony here other than that of the complaining witness who testifies that he never before saw this defendant; that he did see him for a period of thirty seconds or less, and in that short period of time, thirty seconds, he identifies the defendant from a picture taken ten years ago.

THE COURT: Why do you say that?

MR. LASH: He so testified.

THE COURT: He did not say he identified the defendant from the picture. He says he identified the defendant as the same man he saw in the hallway.

MR. LASH: Well take the facts to be that way.

THE COURT: He said he identified the picture of the defendant from having seen the defendant. He did not identify the defendant from having seen the picture.

MR. LASH: We will take it as your Honor says. He has two methods of identifying him now after seeing him for a period of thirty seconds or less and he picks him out of

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an audience unassisted by the police in the Magistrates' Court, and he further identifies him from a picture taken ten years ago although the arresting officer says that the picture is not a very good likeness of this defendant.

THE COURT: It appears that the picture is a picture of the defendant. He saw a photograph of a man of whom the picture was taken. He didn't select the picture of one man and then identify another man in court.

MR. LASH: But your Honor will take into consideration that at that time the arresting officer knew him to be Ventimiglia, knew he had a record. He had to go to the Rogues' Gallery to get the picture. There can be no question about that.

THE COURT: That is where the picture came from. I am speaking about the complainant picking it out.

MR. LASH: Under those circumstances I respectfully ask your Honor to entertain motion to dismiss the indictment and discharge the defendant.

THE COURT: No, I will submit the question of fact to the jury.

MR. LASH: I take an exception.

(Mr. Lash opens the case on behalf of the defendant).

BECKIE SCHANTZ, a witness called on behalf of the defendant, being duly sworn, testified as follows:

(The witness states she lives at 128 Second Avenue.)

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DIRECT EXAMINATION BY MR. LASH:

Q How long have you lived at that address? A I am living there for the past two months.

Q Before that where did you live? A 1277 Shakespeare avenue.

Q Who did you know in that house? A Mr. and Mrs. Fischera.

Q She is a sister and he is a brother-in-law of the defendant? A Yes, sir.

Q They keep an apartment there? A Yes, sir.

Q What floor did they live on? A The first floor.

Q What floor did you live on? A The third floor.

Q Through living in that house you became friendly with them? A Yes, sir.

Q So much so that you visited her apartment at times?
A Yes, sir.

Q And she visited your apartment? A Yes, sir.

Q And you through that social intercourse had become acquainted with various members of their respective families?
A Yes, sir.

BY THE COURT:

Q Where is this house, what is the number? A My new residence? 1277 Shakespeare avenue.

BY MR. LASH:

Q Do you remember the night of February 12th, 1918? A Yes.

Q That is Lincoln's birthday, isn't it? A Yes, sir, it is.

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Q Were you in the house of , the apartment rather, of Mr. and Mrs. Fischera? A Yes, sir.

Q What was the occasion of your being at the apartment?
A Well, I was invited down by Mrs. Fischera. My husband was working that evening.

Q For any particular affair, for any particular purpose?
A No, sir, I generally used to come down to her being my husband was working and she invited me for supper.

Q She asked you down for supper? A Yes, sir.

Q What time did you go down? A I was with her in the afternoon in Mrs. Ventimiglia's house.

Q That is the mother of the defendant? A Yes, sir; in the afternoon with Mrs. Fischera.

Q From the house of the mother of this defendant did you go directly to Mrs. Fischera's apartment? A Yes, sir.

Q Did you stay there for dinner? A Yes, sir.

Q About what time did you get to Mrs. Fischera's apartment? A Well, about it was -- it wasn't seven yet, it was before seven, I got there very early.

Q The sun hadn't gone down yet? A No, sir; it was very light.

Q You stayed there for dinner? A I did.

Q Did you see this defendant, Thomas J. Ventomiglia at Mrs. Fischera's apartment? A Yes, sir, I saw him first at the mother's house.

Q You first saw him at Mrs. ventimiglia's house? A Yes, sir.

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Q Late in the afternoon? A It was after six.

Q Did he accompany you and Mrs. Fischera from his mother's house to Mrs. Fischera's apartment? A No, sir.

Q When did you next see him? A At Mrs. Fischer's.

Q How long after you arrived at Mrs. Fischera's apartment did you see him? A It was a very short time.

Q Give me your best recollection? A It wasn't quite half past seven; we had not finished supper or dinner.

Q What time did you next see him at Fischera's apartment? A It was not quite half past seven.

Q How late did you stay at Mrs. Fischera's apartment?
A 12 o'clock.

Q Till 12 o'clock? A Yes, sir.

Q Did you see this defendant in Mrs. Fischera's apartment, from the time that you saw him arrive there until the time that you left? A No, sir.

Q How late did you see him there? A Well, I can recollect about after ten that I can remember; he was there till late; I just don't remember when he went home or out.

Q How do you fix the time as after ten? A I was ready to go upstairs, being my husband was working and Mrs. Fischera says, "Stay a little longer." I said, "It is kind of late", and I happened to look at the time and I was hearing Mrs. Ventimiglia speaking in the following room with some cousins, fixing the music rolls on the pianola; I did not keep track; I don't know when he went out, but about that time I heard him speak-

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ing.

Q You know his voice when you hear it? A Yes, sir, I certainly do.

Q Were you there at any time before that day in question?
(No answer.)

Q You seen Ventimiglia before that day so that you knew him? A Yes, sir.

Q You know this man?(Indicating the defendant) A Yes, sir, I certainly do.

CROSS EXAMINATION BY MR. BROTHERS:

Q How old are you? A Nineteen.

Q Married? A Yes, sir.

Q Married how long? A About nine months.

Q Are you related to the defendant? A No, sir.

Q How long have you known him? A About three months.

Q Where did you meet him? A I made a mistake, you mean the defendant himself? His sister I have known about that time.

Q I asked you about him, not his sister? A Well, about a week or two that is all.

Q Before when? A Before the time that this occurred.

Q Where did you meet him? A At Mrs. Fischera's.

Q Is she related to the defendant? A Yes, sir.

Q What relation is she? A Brother and sister.

Q His sister? A Yes, sir.

Q Do you know where 112 Nagle avenue is? A No, sir.

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Q Where is Shakespeare avenue? A The new Jerome subway. I used to get off at 167th street station and we go up Jerome avenue, up the staircase, 167th street, right up the staircase, is our apartment house.

Q Do you know where Nagle avenue is? A No, sir.

THE COURT: Is Shakespeare avenue over on the other side of the Bronx?

THE WITNESS: Yes, sir.

THE COURT: The other side of the Harlem River?

THE WITNESS: Yes, sir it is right over the bridge.

BY MR. BROTHERS:

Q You cross the river to get there? A I don't know there is a new subway and I was recommended up there for an apartment.

Q How long have you lived up there? A About six months.

Q You don't know where the street is? A Nagle avenue, no, sir.

Q Shakespeare avenue, I mean? A Yes, sir, I do, I lived on it.

Q Where is it? A Up in the Bronx, High bridge.

Q When did you move away from there? A Well, it was in May yet.

Q May? A Yes, sir.

Q When did you go to live in Shakespeare's avenue? A In January.

Q Why did you move? A Well, it was too far for my husband.

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Q Do you know a Mrs. Lewis? A No, sir.

Q Mrs. Ethel Lewis? A No, sir.

Q Ever hear of her? A What is that? No, sir.

MR. LASH: I object to that as incompetent, immaterial and irrelevant.

THE COURT: Upon the cross examination I will allow it.

MR. LASH: I take an exception.

BY MR. BROTHERS:

Q You were pretty well acquainted with the defendant's family, weren't you? A Yes, sir.

Q Visited them quite often? A Yes, sir.

Q Where does he live? A On Nelson avenue.

Q Where is that? A About two and a half blocks from where we lived if I am not mistaken.

Q Has he any brothers? A Yes, sir.

Q How many? A I know two besides him.

Q Did you ever hear of his having been arrested in this case, in this affair? A No, sir-- about two or three days later.

Q Who told you about it? A Why, Mrs. Fischera.

Q Did Mrs. Fischera say anything about what the case was? A Why we read the paper about that case, and also she told us; she told me her brother was arrested on February 12th and I was in the house at the time and it seemed impossible.

Q You don't remember what time he went out, do you? A In

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the evening? Why till half past ten I can positively say he was in the house.

Q Who else was there? A Mrs. Fischera and Mr. Fischers and the children.

Q Who were the children? A Why they got two children, two adopted children.

Q How old are they? A Small children, I could not tell you.

Q Anybody else there that evening? A Another girl, a cousin of the adopted two children.

Q What is her name? (No answer.)

Q She is here today, isn't she? A No, sir.

Q She was there that evening, wasn't she? A Yes, sir.

Q What time did she leave? A She stayed with these people.

Q What time did you leave? A I left about twelve o'clock

Q You lost all track of the defendant from a little after ten until 12 o'clock? A Yes, sir.

Q Why was that? A I was sitting in the kitchen; they have a very big apartment, and the kitchen is like off the other room, and I did not keep any track, not thinking anything was coming up I just don't know what time he left, but I think it was half past ten.

Q Are you sure he left? A Why certainly.

Q How are you sure he left? A Because when I left the children went to bed; there was nobody left but myself.

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Q What time did the children go to bed? A I could not tell you.

Q Did you pay any attention to that? A No, sir.

Q What time did your husband get home that night? A Almost one.

Q Were you still up? A Yes.

Q Now did you read about the defendant's arrest or did you speak to his sister ^{first} about it? A Well, I really don't remember that I read it-- but she told me and I read it in the paper myself.

Q Do you remember what day it was that you read about the arrest? A No, sir.

Q Do you remember in what paper you read about it? A It a Bronx paper, if I am not mistaken. I don't know.

Q What paper was it? A I could not tell you, yet, pardon me, it was the Bronx Home News.

Q It was? A Yes, sir.

Q That is the first you knew about his being arrested?
A Yes, sir.

Q Did you go right over and speak to his sister about it?
A Why, yes, we live in the same house.

Q You went downstairs? A Yes, sir.

Q Did she remind you that Thomas was there the night of Lincoln's birthday? A No, sir, I mentioned it to her.

Q You mentioned it first? A Yes, sir.

Q Did she seem to have forgotten about it? A No, sir.

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Q You spoke of it first? A Just happen to say I seen it in the paper.

Q Was there anything in the paper which indicated the hour which he was supposed to have robbed Mr. Batt? A I think it was after eight.

Q Was there something in the paper about it? A I don't remember but I think it was, yes, sir, it was.

Q Sure about it now? A It is such a long time I can't tell.

Q As you think of it you are sure the paper said the hour of the robbery? A I will try and recollect what it was.

Q Will you tell us as well as you can remember what the defendant was doing in his sister's house that night? A Yes, sir.

Q What was he doing? A The time of his coming in we were just about having dinner.

Q What time was that? A It wasn't quite halfpast seven-- I know the hour was-- we were having our supper, and he happened to come in, Mr. Fischera says "so early", and when I heard him say "so early", I happened to look up and I saw the time.

Q You were not really expecting him, were you? A I did not.

Q Well, did his sister seem to expect him? A I don't know.

Q Did she say "You are here so early"? A His brother-in-law happened to say, "So early".

Q You had only left him a few minutes before? A Well, he

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came over.

Q You didn't get home you told Mr. Lash until almost 7 o'clock? A Well, it must have been earlier, I don't remember the time I came home.

Q Are you just guessing at the time? A No, sir, not at all, but I know I was at his house and he came up from downtown.

BY THE COURT:

Q What time did you get to your house? A I don't remember.

Q Did you go over then to his house? A We were over at his house first, and then went home to supper.

Q What time was it when you left his house? A Well, I don't know, it was around supper time, about six or seven o'clock, it was, I don't just remember the time.

BY MR. BROTHERS:

Q How long does it take to go from his mother's house to your house? A Only a few minutes.

Q Did you go to your own house or did you go to Mrs. Fischera's? A Right to Mrs. Fischera's.

Q Don't you remember telling Mr. Lash you got there just before seven o'clock? A About the time--

Q Didn't you tell the lawyer that you and Mrs. Fischera got home just before seven o'clock? A Well, it was quite early, I just don't remember the time, I never looked at the time.

Q Did she have to get supper ready? A It was a light

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supper so it didn't take long.

Q About how long did it take to get supper? A I could not tell you.

Q Did you have any lights burning when eating supper or dinner? A In the kitchen you mean?

Q Yes. Can't you remember whether you had the lights turned on in the dining room? A No, sir.

Q Didn't have any lights? A No, sir.

Q When was this, what day was it? A February 12th.

Q You were eating supper after seven o'clock on the 12th of February? A Well, that was in the kitchen.

Q In the kitchen? A Yes, sir.

Q Didn't have any lights? A I don't remember. I could not tell you.

Q Had you finished supper when the defendant came in? A No, sir.

Q Did he have any supper there? A He was invited but said he had it home.

Q Did you see anybody eating any supper at his house when you left there? A No, sir.

Q How many times have you been down here to this court house? A Why, when I was told the trial was coming up.

Q How many times have you been down here to this court-house? A Well, I couldn't tell you, for quite some time.

Q You hadn't been here on any other case? A No, sir.

Q The only time you have ever been in this building?

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A Yes, sir.

Q Can you tell us how many times you have been here?

A Every time the case was coming up.

Q Can you tell us how many times you have been in this building? A Well, every time the case came up I was here.

Q How many times, can you tell us? A No, sir.

Q You can't tell us? A No, sir; every time they said the case was coming up I was here.

Q Have you any children? A No, sir.

Q Live all alone with your husband? A Yes, sir.

Q No other members of your family there? A No, sir.

Q What time did you go to Mrs. Ventimiglia's house on the afternoon of February 12th? A I was there in the afternoon very early.

Q Well, what time? A Well, I was down there about two or three o'clock, or around that time.

MR. LASH: If you don't know say that you don't know.

MR. BROTHERS: I object to counsel coaching the witness.

THE COURT: You need not tell her what to say. Let her guess if she wants to.

Q How near can you tell us the hour that you went to the mother's house? A Well, to the mother's house about four in the afternoon.

Q Four? A Yes, sir.

Q Didn't you just say it was between two and three o'clock?

A No, sir, I meant to the sister's house.

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Q Now let us understand each other. I want to know as near as you can tell the hour you went to the mother's house?

A It was about four o'clock.

BY THE COURT:

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Q How long have you known the mother? A About a month or so.

Q You met her over at the sister's? A Yes, sir.

Q Did you go to the house before that day? A Mrs. Fischera said if I didnt mind coming over to her mother's and just pass a few hours away and we went down there it being only a few blocks.

Q You went there with Mrs. Fischera? A Yes, sir.

BY MR. BROTHERS:

Q When the defendant came in to his sister's apartment did he act as he ordinarily did? A Yes, sir.

Q He didn't seem to be out of breath? A No, sir.

Q Was not in a hurry? A No, sir.

Q Clothes disarranged any at all? A No, sir.

Q Clothes mussed up? A No, sir.

Q Just as quiet as could be? A Yes, sir.

Q Have you told us what he did there all the evening?

A Yes, sir.

Q What did he do? A When he came in Mrs. Fischera asked him to have supper. He said he just had supper and he went and sat down and was speaking about some kind of a story, I dont remember, and one of the children asked him to come in and help

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her re-roll the music roll-- the room is right next to the kitchen, and whatever was said in the following room we heard in the kitchen and he was telling her "This roll belongs in this box and so forth".

Q How long was he doing this? A He was staying until about half past ten; they were there.

Q You weren't in that room at all? A He was in the kitchen until about nine.

Q Until nine? A Yes, sir.

Q Then he went in and rolled these rolls? A Yes, sir.

Q Had you ever seen him there before that? A At Mrs. Fischera's, yes, sir.

Q Did he come there frequently while you were there? A No, sir; not very much.

Q How many times do you think you saw him there altogether? A About two or three times.

Q When were the other times you saw him there? A At the mother's?

Q Now, can you tell us any other day that you saw him there at his sister's apartment? A I could not tell you that.

Q You could not tell about that? A No, sir.

Q Or what day of the week it was? A No, sir.

Q Whether day time or night time? A No, sir.

Q Couldn't you tell us that? A No, sir.

RE DIRECT EXAMINATION BY MR. LASH:

Q You have no interest to testify here other than to

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see justice meted out, have you? A No, sir.

Q You have not been promised anything to come here?

A No, sir.

Q Not told a story by anybody to testify to here? A No.

Q You have not been asked by any relative of this defendant or this defendant to tell a story here? A No, sir.

Q You come here voluntarily out of your own sense of justice, is that right? A Yes, sir.

LOUIS FISCHER A, a witness called on behalf of the defendant, being duly sworn, testified as follows:

(The witness states he lives at 2131 Vyse avenue, Bronx.)

DIRECT EXAMINATION BY MR. LASH:

Q You are a musician? A Yes, sir.

Q You are the leader of a band? A Yes, sir.

Q And for the convenience of your profession you have taken the name of Fischer? A They call me that, they take the A off.

Q The people with whom you deal know you as Fischer?

A Yes, sir.

Q You are married to the defendant's sister? A Yes, sir.

Q You are his brother-in-law? A Yes, sir.

Q Where did you live on February 12th? A 1277 Shakespeare avenue.

Q Still live there? A No, sir.

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Q Where do you live now? A 2131 Vyse avenue.

Q Do you recall the 12th of February? A Yes, sir.

Q What time did you get home on the 12th of February?

A I don't think I went out at all, because we worked every day-- there was a fuel order and our place closed Tuesday, instead of Monday. We had worked Monday afternoon from three o'clock until 1 a. m.

Q You didn't have to work Tuesday? A No, sir, didn't have to work Tuesday.

Q On account of the order? A That was the last order of the fuel administrator.

Q You were home that day? A I might have gone out for cigarettes to smoke.

Q Home for dinner that evening? A Yes, sir, I cooked the supper.

Q Did your wife have dinner with you that night? A Yes.

Q Did your children have dinner and how many? A I had two of my own children and two cousins of my wife's, sir, they haven't any father or mother, and were living with us, one living with us for about four years and this Mrs. Schantz.

Q Tell us as near as you can what time you sat down to dinner that night? A Must have been around seven o'clock I believe.

Q The last witness whom I produced, Mrs. Schantz, she was present at dinner, wasn't she? A Positively.

Q You saw her sitting at the table? A Yes, sir, posi-

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itively.

Q Do you remember seeing the defendant Ventimiglia while you were sitting at the dinner table? A Yes, sir; while we were eating.

Q Did he come in the apartment? A Yes, sir, while we were eating.

Q Do you recall how soon after you sat down to dinner he came in? A Well, we were pretty near finished; it must have been around half past seven or something like that.

Q Do you know how late he stayed at the apartment that night? A Well, they were in the parlor there playing the pianolo it was about half past ten I told them to cut it out on account of people living upstairs. I went back into the kitchen at half past ten and he was still in the parlor with the big children; they were playing some rolls so with that I went back in the kitchen and I sat down. I was, in fact, practically all the time in the kitchen reading the newspaper.

Q You must have lived in the kitchen that night. Why did you stay there in the kitchen so much? A Because I cannot stand that mechanical piano; I can't stand the sound of that piano.

Q Was it an especially cold night that night? A Well, it was kind of cold.

Q Have trouble in getting the steam up? A Yes, sir, never had any.

Q You stayed in the kitchen principally to keep warm?

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A Yes, sir.

Q Now you are a brother-in-law of this defendant? A Yes.

Q Would the fact that you are related to him by marriage and the further fact that your wife is his sister tend to make you change your testimony or in any way aid him? A No, sir, I would not.

CROSS EXAMINATION BY MR. BROTHERS:

Q Do you keep any servant there? A No, sir.

Q Who prepared the dinner there that night? A I did.

Q You had it already when the other people came in?

A Yes, sir, already.

Q How do you come to remember this so well? A Well, because it was the last day, I passed the remark, I passed the remark, "this is Lincoln's birthday we are off today" we were closed.

Q When did you make that remark? A I made that to my wife in the morning when I got up probably at twelve o'clock.

Q When, what day? A On Lincoln's birthday, that is the 12th of February.

Q That was not the first day you spent home? A No, sir; I made the remark.

Q You had been home the Monday before that? A The Tuesday before that, Every Tuesday. I said that was the last Tuesday we were going to have.

Q How do you happen to remember that your brother-in-law was there? A Well, of course, I seen him come in, and asked

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him why so early ". I wanted to give him a glass of Italian wine.

Q Didn't he usually come in as early as that? A Well, sometimes he came in about eight o'clock after we had supper, and I thought probably --

Q As a matter of fact he had come in after 8 o'clock this night, hadn't he? A No, sir.

Q You were not in any hurry that night, were you? A No, sir; I just stayed home.

Q You didn't have to hurry through your dinner? A No, sir.

Q You didn't have your dinner eaten in half an hour, did you? A Positively.

Q You had Italian wine on the table? A Yes, sir, I had a bottle of wine, yea, sir.

Q Well, did he have any of the wine? A Did he have any? Well, that I can't recollect, I don't know if he had a glass of wine or not.

Q It didn't make any impression upon your mind at all? A To tell you the truth it was only a small little glass, only two glasses to a bottle.

Q You didn't have to go out to get any, did you? A No, sir. You could not buy it around there.

Q How many times a week did he come to your house? A Since he got released --

Q How often did he come? A He used to come every day,

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sometimes I seen him and sometimes I did not.

Q Would he come in the day time or in the evening? A Yes sir, he would come in the day time, in the afternoon, sometimes I would see him and sometimes not.

Q How long was it before the evening of Lincoln's birthday that you had seen him there in the evening? A I seen him, I think, the day before about seven o'clock when I was leaving the house to go to work.

Q You are not sure about it? (No answer.)

Q You could not be sure about it, could you? A Well, I am pretty sure.

Q Did you see him on Sunday? A Sunday afternoon.

Q How about Wednesday do you remember seeing him on Wednesday? A The day after Lincoln's birthday?

Q Yes. A Well, I heard he got arrested then.

Q Well, the question isn't about that-- did you see him on Wednesday? A I think it was Thursday, Wednesday or Thursday, that is the next time I seen him.

Q Did you see him Wednesday? A If I knew when the case was in the Magistrates' Court, that is the time I seen him, the very morning.

Q Can't you remember whether you saw him Wednesday, whether in the Police Court or where it was? A I seen him in the Police Court the next time after that Lincoln's birthday.

Q You don't know what day that was? A I don't know if it was one or two days after.

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Q You can't even remember whether it was one or two days after Lincoln's birthday? A Well, the next time I seen him was in the Magistrates' Court.

Q How many days after you don't know? A No, sir, I can't recollect that.

Q You had never been in a police court in your life before? A Out of curiosity, yes, sir.

Q Where anybody that you were interested in was a defendant in the action? A Well, just to listen, yes, sir.

Q Had you been? A Yes, sir, I had been.

Q You were not in any trouble yourself on that occasion? A No, sir, a little bit of a misdemeanor, that is all.

Q Has you ever been convicted for a misdemeanor? A No.

Q What did you say about a misdemeanor? A Just got arrested once when we were boys, and got scolded, that is all.

Q How long have you lived in New York City? A Well, about thirty one years.

Q Your brother-in-law, the defendant, was not working at the time of his arrest, was he?

MR. LASH: I object to that as incompetent, immaterial and irrelevant.

THE COURT: I will allow it.

Exception.

Q Was he working? A Well, that I don't know.

Q Did you ever talk to him about it?

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MR. LASH: I object to that upon the same grounds.

Objection overruled; exception.

A I never talked about working to him.

Q Were you and him on friendly terms?

MR. LASH: I object to that as incompetent, immaterial and irrelevant.

THE COURT: I will allow it.

Exception.

A He would come in, "hello, how are you", that is about all.

Q How big were the children that were staying up till about 10.30? A One about fifteen and the other about a little over sixteen.

Q Did you see the defendant go out that night? A Yes, sir, I told them to stop playing that piano.

Q You could still hear their piano when in the kitchen? A Yes, sir, I seen that last tune they played--

Q Were they playing the piano or rolling up the music? A You know when they play a roll they got to re-roll it.

Q Do you remember what time Mrs Schantz went out? A Oh my God she must have stayed there until about twelve.

Q You heard her say so? A No, sir.

Q Didn't you? A I could hardly hear her back there.

Q You have talked to her since then about that night?

A She lives down on Second avenue; I only seen her when here.

Q When you saw her here did you and she talk about Lin-

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coln's birthday? A No, sir.

Q You never said anything to her about it? A No, sir.

Q She never mentioned it to you? A No, sir, only saying it was awful coming down here, and getting through with this thing, getting up early in the morning.

Q You don't mean that, do you? A Yes, sir, positively.

Q Your brother-in-law being tried for robbery and Mrs. Schantz a witness you never talked with her about it? A No, sir, not a word. If I thought he was guilty I would not sit on this stand and wouldn't come.

Q Never spoke to Mrs. Schantz about it? A Not a word.

Q Talk to your wife about it? A No, sir, not a word; because we were only telling the truth.

Q Didn't you ever speak to your wife about her brother being at her house the night he was charged with committing a robbery? A The only word we passed was that I said, "What do you think, he was here last night, how was it they arrested him". That is all I said to her, nothing in reference to the case.

Q Was he arrested that day or the day after? A I don't know whether it was the day after.

Q Did you know when you made that remark to your wife, "How could they arrest him when he was here last night" when it was that he was charged with committing this crime? A That is what I could not see because the man was in my place all that night.

Q Did you know when you said that to your wife that he

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was charged with robbing a man on that night? A No, sir, I didn't know what he was charged with.

Q Why did you say it to your wife? A Because I heard the mother called her up and said her son was arrested.

Q For what? A She did not know.
that

Q When you said to your wife, did you know he was charged with committing a crime on Lincoln's birthday? A I didn't know what he was charged with.

Q That is the only remark you made to your wife about this case? A Yes, sir.

Q Of course you spoke to the lawyer about it? A I hadn't seen him only once or twice; I didn't know where his office is because I thought it wasn't necessary to speak to him about it.

Q Did you tell him what you were going to say here? A No, sir; I didn't say a word; I didn't speak with him about it.

Q Now say that over again. Did you tell the lawyer for your brother what you were going to testify to? A No, sir.

Q Well, why didn't you? A Because I thought it was not necessary. I am telling the truth.

Q How did you think he would know what you were going to say? A How did I know what he was going to ask me?

MR. LASH: The defendant rests. I renew the motion if your Honor, please, on the same grounds.

THE COURT: Motion denied. Exception.

(Mr. Lash closed the case on behalf of the defendant)

(Mr. Brothers closed the case on behalf of the People.)

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(During the summing up of the Assistant District Attorney, Mr. Brothers said: "He also said he never talked with defendant's counsel.")

MR. LASH: I move to strike out that portion of counsel's summing up which refers to any conversation between the last witness and defendant's counsel.

THE COURT: Objection overruled. Exception.

THE COURT: Gentlemen, would you prefer that I send this case to you or would you prefer to have your lunch and take the case afterwards?

(The jurors indicate that they preferred to take the case before lunch.)

THE COURT: Now, I will ask counsel on both sides -- do either counsel wish the four counts in this indictment submitted to the jury or simply robbery in the first degree. In my opinion, on the evidence, it is either that or nothing.

MR. BROTHERS: I shall certainly take your Honor's opinion on that.

MR. LASH: I leave it to your Honor.

THE COURT: I will charge that unless you request me to charge some other degree.

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THE COURT'S CHARGE.

NOTT, J.- Gentlemen of the jury:

This case while brief and simple is of importance. Every criminal case is of importance, as a matter of fact, because on the administration of the criminal law depends the good order and safety of this community. This case, however, is of especial importance looking at it from either angle,-- on the one hand you have the defendant's right to preserve as an individual. The action is brought by the People of the State of New York but the defendant is one of the people as much as any other person is one of the people and his rights and the safeguards which the law throws around him as an individual are to be protected as his future may depend upon the result of a verdict here. On the other hand it is of equal importance to the whole of this community that men who are lawfully going about, their business in a lawabiding way are to be protected from violent and cowardly assaults and robbery and not subjected to injury in their persons or loss of their property. If occurrences like this were common in the city why it needs no statement from anybody to show you the seriousness of such a situation. Therefore, looking at it from either side, it is of importance that the case should receive

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your careful consideration and be dealt with by you as judges of the facts, for that is what you are. You sit in this case as the sole and exclusive judges of the facts. You are just as much judges as I am and the first requisite of every judge is to bring to the case a fair and impartial mind, uninfluenced by sympathy or prejudice either way, a mind only desirous of doing justice and ascertaining the truth. In this case it is for you to say where the truth lies, who is telling the truth, whether there has been any false testimony given, whether there has been mistaken testimony given or whether there has been true testimony given and where the truth is. The credibility of witnesses is entirely for you to determine. It is for you to say what their credibility is. You will take into consideration their character, their position and their respectability as far as it is known or not known; the motive that any witness may have to testify falsely or truly; the probability of the story told or its improbability and make up your minds where the truth is and then bring in a verdict in accordance with the truth as you find it.

A defendant under our system of law is presumed to be innocent until he is proved guilty. The burden rests upon those who make the accusation, to prove that accusation,

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to make it good. And, therefore, in this case, the burden of proof lies upon the people to overcome the presumption of innocence and establish guilt. That is what is meant by proving a defendant guilty beyond what the law calls a reasonable doubt. If a reasonable doubt of guilt exists the defendant is entitled to the benefit of it and thereby to an acquittal; but if the defendant is proved guilty beyond a reasonable doubt then he is guilty in the eye of the law and should be convicted. A reasonable doubt does not mean all doubt, Proving a man guilty beyond a reasonable doubt is a very different thing from proving him guilty as a mathematical demonstration is proved. There are very few things in this world that we prove beyond all doubt as a mathematical demonstration is proved and the law requires no impossibilities. A reasonable doubt is a doubt that is the product of reason, the product of the reasoning faculties. It is not a doubt raised by sentiment, emotion or timidity but it is a doubt raised by reason, a doubt which rests upon reason, a doubt which if a man entertains it he can give a good reason why he entertains it. That is the sort of a doubt which is a reasonable doubt. If that measure of doubt exists in the case the defendant should be acquitted. If he is proven guilty beyond a reasonable doubt that is all the law requires

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in the case and he should be convicted. There is one other matter I wish to caution you about. It appeared here by the remarks of counsel in picking you out and I think by something that was later dropped during the case that this defendant has been convicted of a crime. That, however, should not be taken into consideration by you. The fact that a man has been convicted at a past time of a disconnected crime, not connected with the one he is being tried for, is no proof of guilt of the later crime. Therefore in making up your minds as to the guilt of the defendant you should not say, "We have been convicted once of crime and therefore he probably committed this crime," because that is not warranted either by the rules of law or the rules of logic. A man may never ^{have} committed a crime and yet be guilty of the crime charged or he may have committed countless crimes and yet be guiltless of the crime charged. The two have no connection. Of course, where a man has committed one crime that is bound up in a general scheme with another that is another matter but where two crimes are entirely disconnected, both in fact and point of time, no evidence of guilt can be drawn if it appears inadvertently in the case that a man has been convicted. With these matters charged I will now come down

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to the crime of robbery and charge you what it is. Robbery is the unlawful taking of personal property from the person of another, against his will, or by means of force or violence. In other words it is larceny from the person committed not by stealth or dexterity but committed by force or violence against the consent and will of the person robbed. It is a larceny from the person committed by means of an assault. The law does not say that any particular measure of violence must be employed to constitute robbery. In general it says what amount constitutes robbery in the first degree but nothing as to any special measure of force to be employed to commit robbery because the law cannot pick out the measure of force to that extent. If, therefore, a robbery is committed by the use of any appreciable force or violence applied to the person of another; if force or violence is employed to get the property and keep it or to overcome resistance to the taking that is sufficient. Therefore, in this case you will first consider did somebody rob Mr. Batt, did somebody take from his person personal property against his will, against his consent by employing force or violence upon his person. If so, that is robbery and he was robbed.

Robbery in the first degree may be committed in one of several ways, and the indictment here alleges that

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there were two facts which made it robbery in the first degree. A person is guilty of robbery in the first degree when he commits a robbery being aided by an accomplice actually present. The law says that if two men combine to rob, if two men attack one man, the fact that the two men were present makes the crime more dangerous and there it is robbery in the first degree. The indictment also alleges that in this case grievous bodily harm was inflicted upon the complainant. The law says that when the offender inflicts grievous bodily harm or injury upon the person robbed that is robbery in the first degree. Therefore the indictment alleges that this is robbery in the first degree, first, because the defendant was aided by an accomplice actually present, an unknown man who got away, and, second, it is robbery in the first degree because grievous bodily harm or injury was inflicted. It is for you to say if a robbery was committed was there an accomplice actually present. If you find an accomplice was actually present then it is robbery in the first degree. You need not waste time in considering whether the injuries inflicted were grievous or not. If you find either of these two elements present, either an accomplice or grievous injury, that is sufficient to constitute robbery in the first degree. You do not need to find both in robbery in

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the first degree if either one of these elements, of an accomplice or grievous bodily harm, is present. If you find that somebody committed robbery in the first degree on Mr. Batt then it would be for you to say was that person this defendant. I may say, in passing, that the value of the property taken is immaterial in robbery. In robbery the gist of the offense is the force or violence and the value of the property taken is immaterial. If you find that robbery was committed in the first degree then you will determine who committed it and that, as I understand it, is the point that is in serious controversy in this case. As I understand it, the defense, while not actually conceding that Mr. Batt was robbed, still makes no serious contention that somebody may have done so. The defendant says he did not do it, and he sets up the defense known as an alibi, meaning that he was elsewhere, and therefore, could not have done it. On the other hand Mr. Batt says he did do it.

You have seen the complaining witness on the stand, and it is for you to make up your minds as to the reliability of his testimony. According to his testimony the inference is warranted that he must have been followed by somebody who noticed this property. At any rate, whether that is so or not he says that when he got into the hallway of the house where his mother-in-law lived, under an

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electric light, he was suddenly set upon by two men. According to his story there was a tussle and the defendant got in front of him, was choking him, was close to him, and that he gazed into his face. There are two contentions on that matter. The defendant, of course, with great reasonableness, contends that thirty seconds is not a long time and according to the defendant's contention it would be unsafe to convict anybody on an identification that lasted through an interview of that length of time. On the other hand the people contend, with no less reasonableness, that it is not so much the length of time that stamps a face upon the memory as the face itself and the circumstances under which it is seen. Some men's faces are so colorless, so ordinary, that it is hard to remember them; on the other hand other men bear very strong marked features that are remembered after a casual seeing of them. You have seen this defendant at the bar here, and it is for you to say under which category his face and features come.

The people also contend that the circumstances will make a difference. I suppose every one of you men coming downtown this morning in the trolley or subway sat opposite some man, probably sat opposite him anywhere from twenty minutes to half an hour and I don't suppose one of you

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would recognize again the man whom you sat opposite to. Why? Because there was absolutely nothing in the circumstance that would make you look at him and distinguish him; but on the other hand if you were to go out into this corridor and a man came up to you, spoke a few words to you, and then struck you suddenly in the face you might recall his features tomorrow if you saw him. It is for you to take all these common sense matters into consideration in making up your minds as to the truth here. The defense says that the defendant was seen under an electric light for thirty seconds and that is not long enough. On the other hand the People contend that you must take into consideration the make up of Mr. Batt, the features of the defendant and the circumstances under which the occurrence took place and the people's contention is that thirty seconds is enough. Now, it is for you to say and nobody else. Nobody but you can determine that fact.

The defense in addition to contradicting the people's case, has called two witnesses to prove, as I say, the alibi. An alibi if genuine and truthful is a complete defense and is often the only defense an innocent man can put in. On the other hand for a great many years the Courts have warned jurors that it is a defense which should be carefully scrutinized because it is a defense which is very

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easily fabricated. A transaction may be picked out which is perfectly truthful, the only falsehood being a shifting of hours or points of time, sometimes days or sometimes only a few minutes in time and therefore the incident having really occurred that gives a color of truthfulness to the whole transaction whereas the falsity of it lies in the shifting of the point of time of an hour or whatever time is required. In this case you have heard the two witnesses who have testified to this alibi. It is for you to say whether you believe their testimony or whether it raises a reasonable doubt in your minds. One of them is a brother-in-law of the defendant, and the other is a woman not related to him. One says that she was present and fixes the time of the appearance of the defendant as about 7.30. You will recall that this occurrence as testified to by Mr. Watt was put at about 8.15 or 8.20 in the evening. You, therefore, can see the importance of an hour's time. It is for you to take all the testimony and make up your minds whether it is truthful and genuine testimony or whether they have come to the aid of the defendant. If you find that the testimony is true, or if it raises a reasonable doubt in your minds why then, of course, the defendant is entitled to an acquittal. On the other hand if the jury find that the ali-

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bi is false not only does the alibi itself fail but the interposition or putting in of a false alibi may be taken by the jury as evidence of guilt, as independent evidence of guilt because a person who is innocent does not have to put in a defense which is false. Therefore, as I say, if you find that this alibi is a false alibi not only is it out of the case as a defense but you can regard it as evidence of guilt strengthening the People's case as put in.

I think, gentlemen, that comprises all the rules of law governing this case. The evidence is short, simple and is fresh in your recollections. Therefore, I will leave the case to you trusting that you will give it your careful consideration making, as I know you will, a perfectly honest and intelligent effort to determine where the truth is and then bring in a verdict in accordance therewith.

Your verdict will be guilty of robbery in the first degree or not guilty according as you find the facts.

Any requests or exceptions?

MR. LASH: I ask your Honor to charge the jury that they are not to draw any inference whatever from the testimony that the complainant had been followed on the night in question by the defendant or anybody else.

THE COURT: Of course, you should not draw any inference that he was followed by the defendant unless you

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find that the identification is true. As to whether or not he must have been followed by somebody why all those sort of inferences are for the jury. It appears that he had gloves on and certainly this ring was gone. Did whoever robbed him in that hallway know that he had his ring on under the glove?

MR. LASH: I ask your Honor to charge the jury that there is no testimony here that the complainant was followed by any one.

THE COURT: There is no testimony other than that inference. If you believe that these men posted themselves in this hallway on a chance of robbing whoever might come in there of course not. I don't say that he was or was not followed. It is for you to draw what inference you believe the evidence justifies on that head.

MR. LASH: I ask your Honor to charge that there is no testimony that the complainant spoke to this defendant or that this defendant spoke to the complaining witness.

THE COURT: I recall no such testimony. The jury will pass on the facts. I shall not tell them what the facts are. I recall none. If they recall any they can follow their own recollections, not mine.

(The jury retire at 12.45 p.m.)

(The jury return to court at 2.32 and state that they find the defendant guilty of robbery in the first

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gree.

MR. LASH: Will your Honor entertain emotion now?

THE COURT: You may make your motions on the day of sentence.

(Defendant remanded until July 19th.)

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COURT OF GENERAL SESSIONS OF THE PEACE,
CITY AND COUNTY OF NEW YORK. PART II.

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THE PEOPLE OF THE STATE OF NEW YORK : B e f o r e:
vs. : HON.CHARLES C.NOTT,JR.J.
THOMAS J. VENTIMIGLIA. :
-----X

Indictment filed 26th of February, 1918.

Indicted for robbery in the second degree.

New York, July 26th, 1918.

(The defendant being arraigned for sentence.)

A P P E A R A N C E S.
FOR THE PEOPLE: ASSISTANT DISTRICT ATTORNEY GEORGE N.BROTHERS.
FOR THE DEFENDANT: MR. SIDNEY R. LASH.

MR. LASH: Does your Honor wish to hear argument on
my motion?

THE COURT: I will hear you, certainly.

MR. LASH: If the Court please, the defendant was
convicted on July 12, 1918 of the crime of robbery in the
first degree. To be sure that your Honor has firmly fixed
in your mind the facts as they appeared on that day.I will
make a brief summary of them. The only witness of iden-
tification and the only witness other than the police of-
ficer was the complaining witness, Philip J. Batt. I think
that your Honor will recall that his testimony was to the

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effect that he left the Claridge Hotel, 43rd street and Broadway at 7.45 p.m.; that he walked to the Times Square station and took a subway local train to 72nd street and there boarded a Dyckman street express. That he alighted at Dyckman street and walked three-quarters of a block to 112 Nagle avenue, the home of his mother-in-law where, as he says, he intended to visit. He says that he never before in his life saw the defendant except when he entered or was about to enter the door of 112 Nagle avenue. He says that it was an exceptionally dark night and more so because the lights were extinguished by the order of the Fuel Commissioner. Now he says there was an ordinary electric bell in the hallway. Again I repeat that he says he never saw the defendant excepting at that time that he was there.

THE COURT: I have all that clearly in mind. I have the facts clearly in mind. I remember them.

MR. LASH: If your Honor will just bear with me there is one fact that I wish your Honor would let me bring out. He says that he never saw the defendant excepting for a period of thirty seconds and on cross examination he said that it might have been less than thirty seconds, and that it was at a time that he was being hit on the head, at the time that he received a fractured skull, and at the time he was being choked. It is upon that testimony that the case was permitted to go to the jury, and it was upon that

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that the defendant was convicted. My motions, your Honor, is to set aside that conviction, and I base that motion firstly upon the People against reported in 116 N. E. 793, decided by the New York Court of Appeals on the 25th day of May, 1917, the opinion being written by Mr. Justice Chase. I quote you an extract from that opinion. Mr. Justice Chase in writing held: "Where a witness positively identifies a defendant as one who committed a crime the weight of evidence of identification is for the jury, but where such evidence is incredible as a matter of law, it is for the Court."

Now, the question will arise when is evidence of identification incredible as a matter of law. To be incredible as a matter of law it must be first incredible as a matter of fact or such facts surrounding the facts as would lead to a possible doubt. I maintain, your Honor,-- I may be in error and my opinion may not agree with your Honor's -- but I maintain that when a man who has never before seen a person's face which is of no particular contour for a period of thirty seconds or less on an especially dark night at a time when he is being blackjacked, being choked, when his skull is being fractured when he

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himself admits that he is being choked by a man directly in front of him and when the natural situation of his face must have been looking towards the heavens. I say that under those circumstances a statement such as the complaining witness testifies to is not only improbable, but it is most impossible. In dealing with a set of circumstances just as exists in the case at bar the Court of Appeals in writing the opinion in the People against Jueng Hing, reported in 212 New York, the opinion being written by Mr. Justice Werner held as follows: (Reading)

Now let us see if that opinion in any way affects the facts in this case. Let us take it for granted that if an ordinary human being sees a face of a particular contour for a brief period of thirty seconds under ordinary circumstances -- if he met him in the hallway as he was about to go upstairs, met him under this light and saw the defendant he might remember him. There might have been some mark of identification on the defendant, he might have noticed the large head of the defendant or its peculiar shape or may have noticed something about him, but the facts in this case are just as the facts were in the Jueng Hing case, 212 New York. The identification, if any, was made in a time of excitement. Surely this complaining witness was not himself; he was not calm, cool and collect-

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ed when somebody was blackjacking him in the back and some one strangling him in front. He did not have an opportunity to look in front of him as the circumstances were that he was being blackjacked and his face was in a heavenly position. Now, your Honor, that is my opinion as far as I have gone.

THE COURT: Well, as to that I can simply say this that the whole issue of identity has been left to the jury in this case. I made an effort to put myself in this complaining witness's place. This defendant has very strongly marked features, heavy eyebrows and his physiognomy is of so marked a description that I am very sure that if he were to hold me up and an electric light shone upon his face that I would remember his face the next day.

MR. LASH: That is true, but isn't there a possibility of mistake taken into consideration the Court of Appeals decision in the Jueng Hing case. Isn't there a much greater possibility of mistake.

THE COURT: That is an argument to address to a jury, and it was addressed to the jury in this case, and they resolved that issue of fact.

MR. LASH: But, your Honor, isn't it such a statement of fact that never should have gone to the jury?

THE COURT: In that I disagree with you. If that were so why robbery would be safe in this city-- if an

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identification by one person was insufficient to take a case to the jury.

MR. LASH: Your Honor denies the motion as far as I have gone?

THE COURT: Yes.

MR. LASH: I have a further motion for a new trial on the ground that your Honor in charging the jury committed an error which was prejudicial to the rights of the defendant, and that therefore the defendant is entitled to a new trial. I make this motion with great respect for I have the greatest respect for your Honor, but your Honor knows to err is human especially judicially. At page 55 of the stenographer's minutes the Court charged the jury as follows: "According to his testimony the inference is warranted that he must have been followed by somebody who noticed this property."

At the end of the Court's charge the defendant's counsel made the following request to charge: "MR. LASH: I ask your Honor to charge the jury that they are not to draw any inference whatever from the testimony that the complainant had been followed on the night in question by the defendant or anybody else. THE COURT: Of course you should not draw any inference that he was followed by the defendant unless you find that the identification is

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true. As to whether or not he must have been followed by somebody while all those sort of inferences are for the jury. It appears that he had gloves on and certainly this ring was gone. Did whoever robbed him in that hallway know that he had his ring on under the glove? MR. LASH: I ask your Honor to charge the jury that there is no testimony here that the complainant was followed by any one. THE COURT: There is no testimony other than that inference. MR. LASH: I ask your Honor to charge that there is no testimony that the complainant spoke to this defendant or that this defendant spoke to the complaining witness. THE COURT: I recall no such testimony. The jury will pass on the facts. I shall not tell what the facts are. I recall none. If they recall any they can follow their own recollections not mine."

Now, if your Honor, please, there is not the slightest scintilla of evidence in the entire record that this complaining witness was followed by the defendant or anybody or that he ever spoke to this defendant or anybody. I feel that the Court's reference or the Court's statement going outside of the record was highly prejudicial to the rights of the defendant and for this reason--in that box sat twelve men unlearned in the ways of procedure, each and every one of them while they are fair men wishing to

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do right are guided by circumstances and by impressions and each one of those men have profound respect, justly so, for your Honor. There is no man on that jury when they heard that remark from your Honor who did not feel that that was your Honor's impression of what happened that night.

THE COURT: What difference does it make. I stated to the jury my impression, and I think the impression of everybody, that whoever committed this robbery must have followed the man home. I told them that if the identification was faulty it did not make any difference whether he was followed or not.

MR. LASH: Yes, your Honor, but no matter how much your Honor tried to correct the charge in the first instance, that charge could not be corrected as the impression was then made on the mind of each juror.

THE COURT: What impression?

MR. LASH: The impression that he was probably followed by the men who assaulted him. I refer your honor to the case of the People against Vanaiken, 217 N.Y., page 532.

I will submit my brief on that matter.

THE COURT: Motion denied; exception.

MR. LASH: One more question. I would ask your Honor to grant a certificate of reasonable doubt.

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THE COURT: That motion has to be made on notice.

MR. LASH: Hasn't your Honor the power to grant it at the conclusion of the trial on my motion?

THE COURT: I prefer that you make that motion before a Judge of the Supreme Court.

MR. LASH: Your Honor will not entertain it?

THE COURT: No. I will give you a stay of judgment so that you can make it before a Supreme Court Justice.

In this case after a lengthy trial in which he was ably defended by counsel the defendant was convicted by the jury on the simple question of identity. The jury are the sole judges of the facts and where the verdict is supported by credible evidence and is not the result of passion or prejudice it is conclusive on the Court. While my opinion -- while if I had been on the jury I should have found the same verdict irrespective of that fact their judgment binds me. That is what they are for. It is for them to determine the facts and the Court then is bound to act on that judgment as correct. If that were not true then the jury is perfectly useless and superfluous branch of the Court. As a matter of fact the jury is an essential part of the court and just as the jury are bound by the Court's instructions on the law so the Court is bound by the finding of a jury. The finding of the jury in this case establishes the fact that this defendant was

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the person who committed this very atrocious robbery; it also establishes the fact that a false manufactured alibi was attempted to be interposed. The complaining witness was a business man who was going to visit a relative; he was set upon in this hallway and received very serious injuries, he lost some jewelry and seventy dollars in cash. He said that that happened in the hallway of an apartment house in which a relative resided. The defendant has a record for some four previous convictions having started in the House of refuge he progressed to the Elmira Reformatory and then to state prison and then later to the Penitentiary. Under those circumstances there is but one thing I can do and that is to impose a substantial sentence. He is sentenced to six years in the state prison.

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