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CASE # 3072

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

3633

THE PEOPLE OF THE STATE OF NEW YORK, . . .

-against-

FRANK RUSSO.

B e f o r e

HON. OTTO A. ROSALSKY, J.,

And a Jury.

New York, N. Y., December 19, 1921.

INDICTED FOR BURGLARY IN THE THIRD DEGREE, GRAND LARCENY IN THE
FIRST DEGREE, AND CRIMINALLY RECEIVING STOLEN PROPERTY IN
THE FIRST DEGREE.

INDICTMENT FILED APRIL 28, 1920.

APPEARANCES:

Thomas J. Whalen, Esq., Assistant District Attorney,
For the People.

K. H. Rosenberg, Esq., For the Defendant.

(A jury was duly impanelled and sworn.)

(Mr. Whalen opened the case for the People.)

MR. ROSENBERG: Your Honor, we made a concession in this
case, which you will remember. Will your Honor dictate it?

THE COURT: It is conceded by the learned counsel represent-
ing the defendant that on the 10th day of April, 1920, in the
Borough of Manhattan, County of New York, the premises occupied
by Herman H. Diller and Nat Mintzer, copartners doing business
by the firm name and style of Majestic Leather Goods Company,
were feloniously and burglariously broken into and entered with
intent to commit some crime therein, namely, with intent to steal,
take and carry away, the personal property of said copartnership;

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that said premises were feloniously and burglariously broken into, entered, and property consisting of a quantity of cloth of the value of more than \$500. was feloniously stolen, taken and carried away, from said premises, and that said property was appropriated by someone with intent to deprive and defraud the said Herman H. Diller and Nat Mintzer; but the defendant, in making this concession, does not directly or indirectly concede or admit that he was concerned either in the commission of the alleged crime of burglary in the third degree or in the alleged crime of grand larceny in the first degree.

The purpose of this concession is to save time, so as not to require the People to present formal proof showing that the premises occupied by the complaining witness were broken open and entered, and that property was feloniously taken therefrom.

MR. ROSENBERG: Of course, we do not concede either that we were in any way involved in the crime of receiving stolen property.

THE COURT: Surely not. There is no concession that this defendant criminally received any property. The People must show now that he was concerned in a crime set forth in the indictment; that burden is upon the People.

It is also conceded by the learned counsel for the defense that the property found in the hallway of the premises occupied by the complaining witness, and also in the premises No. 327 East 28th Street, was the property or merchandise that belonged to Herman H. Diller and Nat Mintzer, doing business under the

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firm name and style of Majestic Leather Goods Company; and in making this concession the defendant does not concede that the property found in the 28th Street house was received by him or that he had guilty knowledge that the property was in the premises, or that it was in his possession. These things must be proved by the People.

N A T M I N T Z E R, a witness called in behalf of the People, having been duly sworn, testified as follows:

(The witness stated that he resided at 19 West 82nd Street, New York City.)

DIRECT EXAMINATION BY MR. WHALEN:

Q What is your occupation, Mr. Mintzer? A Manager of real estate.

Q What was your business on April 10, 1920? A Manufacturer of ladies' handbags.

Q Under what name? A Majestic Leather Goods Company.

Q Where? A 37 West 19th Street.

Q Borough of Manhattan, County of New York? A Yes, sir.

Q Was that a corporation or a copartnership? A A copartnership.

Q Consisting of whom? A Nat Mintzer and Herman H. Diller.

Q Now, it has been conceded on the record here that your loft was burglarized on April 10, 1920. You remember that date, do you not? A Yes, sir.

Q What day of the week was that? A On a Saturday night.

Q Did you afterwards see any of your property, after Satur-

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day, April 10th? A Yes, sir.

Q Where? A I saw them in two places. One was at the police station in West 20th Street, and --

Q When was that? A Sunday morning.

Q April 11th? A Yes, sir.

Q How many pieces of silk or other material did you see at police headquarters? A Why, about twenty, I believe; twenty or twenty-five pieces, linings, silks and velvets.

Q About twenty or twenty-five? A Yes, sir.

Q And they were what you call bolts, were they? A Yes.

Q How large is one of those bolts? A I should judge about a little over a yard. They vary. Silks sometimes run a little over a yard. About that long (indicating). The velvetine runs smaller; it runs about that much (indicating).

Q About two feet? A About eighteen inches or so.

Q Well, the bolts, then, were between eighteen inches and a yard each? A Yes, sir; or more than a yard. They are at least forty inches.

Q You do not know this defendant, Frank Russo, do you?

A No, sir.

Q But you did know Joseph Calagna? A Yes, sir.

Q And Joseph Calagna occupied a loft on the same floor that you did, at 37 West 19th Street? A Yes, sir; part of the loft. It was my loft.

Q That is, he occupied what portion? A The front part.

Q And you occupied the rear? A The rear.

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MR. ROSENBERG: No cross-examination.

JOHN MORIARTY (Detective Division, Main Office),
called as a witness on behalf of the People, having been
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WHALEN:

Q Officer, you are a police officer of the City of New York?

A I am.

Q Assigned to the detective force? A I am.

Q How long have you been a police officer? A Five years.

Q Do you know this defendant, Frank Russo? A Since the
arrest, I do.

Q When did you first see him? A April 12, 1920.

Q Where? A 327 East 28th Street.

Q Is that his home? A That is.

Q On what floor does he reside there? A One flight up,
on the second floor.

Q Is that front or rear? A Front.

Q What time did you go there on April 12, 1920? A I went
to his home about nine P.M.

Q Who was with you at that time? A Detective Schauss
and Detective Westervelt.

Q You all entered together, did you? A Yes, sir.

Q Where did you see Russo at that time? A In the front
room of his house.

Q Do you remember how many rooms there were there? A I do.

Q How many? A Four.

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Q Will you please describe the layout of that apartment?

THE COURT: Can you agree upon some diagram?

MR. ROSENBERG: I will agree to anything the officer says.

THE COURT: Can you draw a diagram of it?

THE WITNESS: I believe I can. (Witness draws diagram and hands diagram to the Court.)

THE COURT: I have simply increased the dimensions. Let the officer look at it and state whether or not this is a fairly correct representation of the rooms of that apartment (handing diagram to witness).

THE WITNESS: It is.

MR. WHALEN: I ask that that be marked for identification.

(There being no objection, the diagram was marked People's Exhibit No. 1 for identification.)

Q What was the first room you entered into, officer?

A The kitchen.

Q And from the kitchen where did you go? A To the front room.

Q Is there a door leading from the kitchen right into the front room? A I don't remember. If there was, it was open.

Q And the front room faced on 28th Street? A Yes, sir.

Q What other rooms were there? A There is a bedroom adjoining the kitchen and a bedroom adjoining the front room.

Q Where was Russo when you entered? A In the front room.

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Q Was he standing or sitting, or what was he doing?

A He was sitting at a table.

Q Who else was in the room at that time? A Joseph Calagna, the other defendant in this case, and three other men.

Q Do you remember their names? A I do.

Q Who were the other men? A Incera, Salvatore Baladina, John Locapola, the defendant Frank Russo and Joseph Calagna.

Q Anybody else there? A That is all.

Q Did you say anything, or did the defendant Russo say anything to you, when you entered? A When I entered the room I said, "I am a policeman." I said, "Who owns this apartment here?" He got up from the table and he said, "I do."

Q You mean the defendant Russo? A This defendant Russo.

Q What else was said? A I said, "I am looking for stolen merchandise. Have you got any in this house?" and he said, "No." I said, "I am going to search this house." He said, "Go ahead; you can do so." I searched the rooms. I went into the bedroom; that is, the bedroom adjoining the front room.

Q Is that bedroom east or west of the front room? A It is west of the front room. In one corner of the bedroom, on top of a trunk, I found some merchandise, silk, the property of the complainant, Nat Mintzer.

BY THE COURT:

Q You went into the apartment and found what? A I quantity of silks.

Q Where? A On top of some trunks.

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BY MR. WHALEN:

Q In what condition were the silks? A Some had wrappers on and some did not have wrappers on.

Q I mean, were they in the shape of bolts? A In the shape of bolts. They were not in any package; they were not tied up.

Q Just loose bolts? A Just loose bolts.

Q And how many bolts or pieces did you find there?

A About twenty-five.

Q And they were piled up on the trunk? A They were.

Q That was the bedroom, you say? A The bedroom adjoining the front room.

Q Was there a bed there? A There was.

Q Do you remember what else was in the room? A I believe there was a dresser there.

Q Now, can you state where the other men were when you entered the front room? A They were all sitting; some sitting around the table and others sitting on a couch in the front room.

Q Was this table the defendant was sitting at in the center of the room or some other part of the room? A In the center of the room.

Q You say some of the men were sitting at the table?

A Yes, sir, they were.

Q And some were sitting on a couch? A Yes, sir.

Q Where was Mrs. Russo?

MR. ROSENBERG: He has not said she was there.

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THE WITNESS: I did not say she was there when I entered. I seen her afterwards.

Q She was not there when you entered? A She was not.

Q Where did you see her afterwards? A I seen her in the kitchen. It looked as though she came from the hallway. She may have been in the bedroom adjoining the kitchen.

Q You did not see her when you first entered? A No, sir.

Q You kept right straight on through the kitchen and did not see anybody until you got into the front room? A You could see the men sitting around the table from the hallway. The hall door was open leading to the apartment and you could look right in and see everybody in the front room.

Q Do you remember who was sitting at the table with Russo?

A I do not.

Q What further conversation did you have with Russo?

A I asked him, does this merchandise belong to him and he said not, it does not. I said, "How did this merchandise come to get in here?" and he said, "I don't know." I said, "Do you sleep in this room?" and he says, "I do."

Q Is that all the conversation you had with Russo? A Yes.

BY THE COURT:

Q How many feet from where the defendant was sitting did you locate the merchandise? A About ten.

Q And at the time that you saw the defendant when you first entered the room, was the door between the front room and the bedroom shut or was it open? A It was open.

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BY MR. WHALEN:

Q Now, could you see these bolts of silk in the bedroom from where the table was in the front room? A You could.

Q Do you remember whether there was any light in the bedroom or not? A I don't remember. I don't think there was.

Q Was there a light in the front room? A There was.

BY THE COURT:

Q How many bolts did you find there? A About twenty-five

Q How high was that pile? Describe it to the jury.

A Well, the trunks was about as high as this (indicating), from the floor up to here.

Q How many feet? A About three and a half feet, the trunk was. There may have been two trunks there, and on top of the trunks was part of the silk and the other part was on the floor alongside of the trunks.

Q How much of a pile was on top of the trunks? A Oh, it would make pretty near four and a half feet; that is including the trunks.

Q Looking from the front room into the bedroom, could you see the merchandise? A You could; that is, from certain parts of the room. If you were nearer the window, nearer the 28th Street side, you could not; but if you were nearer the kitchen, on the 29th Street side of the house, you could.

Q Where were you? A I walked right in and I observed both, all the rooms in fact, when I walked in, and the men at the same time.

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Q From where the defendant was seated could you see the property? A His back was towards the goods. He was not facing the goods.

Q But seated at the table, could you look into the room? A If you were facing the goods you could. This defendant Calagna was about opposite the defendant Russo, but he was facing the goods.

Q Who was facing the goods? A Calagna, and Russo was not.

BY MR. WHALEN:

Q Do you remember whether Calagna was sitting at the table or not? A I believe he was sitting at the couch, sitting on the couch.

Q Now, were the goods in the bedroom towards the front of the room, towards the street, or were they in the rear of the bedroom, away from the street? A Nearer the street.

Q And was the door leading into the bedroom near the street or at the other end of the bedroom? A About the center of it.

Q Was there any other conversation in which Russo, the defendant, took part that you overheard? A Well, he had a conversation with his wife in Italian and I did not understand it. He asked her --

Q Never mind. The rest of the conversation that you have described took place in English; that is, your conversation with Russo? A Yes, sir.

Q And then you removed the goods that you found there to

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police headquarters; is that right? A I did, and arrested all the men in the house.

Q Now, before that, before you entered the house, had you had that house under observation? A I did.

Q How long? A About two hours, three hours, between two and three hours.

Q And the other officers were with you? A Yes, sir.

Q You never knew this defendant Russo before that time, did you? A No, sir.

CROSS-EXAMINATION BY MR. ROSENBERG:

Q Now, officer, you had this house, No. 327 East 28th Street, under observation for two or three hours? A Yes, sir.

Q Before you went upstairs; is that correct? A Yes, sir.

Q Who was with you when you were observing those premises?
A Detective Schauss and Detective Westervelt.

Q You watched everyone who went into the house, didn't you; everyone who went into the premises? A Well, I did.

Q You were there for that purpose? A Not necessarily to watch people going in.

Q You were watching those who went in and those who came out? A I was watching the entrance to the house. Yes, sir, I observed people going in and out.

Q When you got upstairs it was dark, wasn't it? It was evening, wasn't it? A Yes, sir, it was.

Q Was there a lamp lit in the room which you have described as the front room? A There was some kind of a light; I

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don't remember what kind, whether it was a lamp or gas or electricity.

Q Was there a light in the kitchen? A There was.

Q Was it dark when you got upstairs into the kitchen?

A The kitchen was lit.

Q Wasn't Mrs. Russo in the kitchen when you got there?

A I don't believe she was.

Q Will you deny she was there? A I don't believe she was there. She got there a few minutes after we got in. She may have been in the adjoining bedroom off the kitchen.

Q Do not these bedrooms connect with each other by a door?

A Not that I know; not from my observation. They may, for all I know.

Q You do not know? A I do not know.

Q At any rate, was the bedroom illuminated; was there a light in the bedroom? A I don't remember.

Q Was there a light in the bedroom into which you went from the front room? A I don't remember.

Q You were watching the place for two or three hours. Now, didn't you see this defendant going up to the house? A He may have. I did not know the defendant; I never seen him.

Q Well, after seeing the defendant, won't you please tell this jury whether you did see him go up into the house just before you arrived? A I did not know the man.

Q I know; but you afterwards saw him upstairs in the dining room, or what you call the front room; is that correct?

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A Yes, sir.

BY THE COURT:

Q During the two or three hours you had this house under observation, did you note the persons who went in or out of this house? A I didn't pay any particular attention to them, your Honor.

BY MR. ROSENBERG:

Q After you saw Russo up in the front room, will you now say that you did not see him go up into that apartment or into that building while you were watching there? A He may have. I did not recognize him; I did not pay any attention to him, in fact.

Q Didn't you ask him -- A I was not interested in the people going in and out of that house at all.

Q Didn't you ask Russo, in part of this conversation, how long he had been in the room? A I may have. I don't remember.

Q Well, didn't you ask him? A I don't remember; I may have.

Q Didn't you say, "Russo, do you live here?" A I did.

Q Isn't that what you meant when you said, "Who owns the apartment?" Isn't it a fact that you merely said, "Who lives here?" and Russo said, "I do, with my wife."? A I wanted to know who the lessee of the apartment was, so I could talk to him. I didn't want to talk to all the men.

Q Didn't you ask Russo whether he lived there? A I believe I asked, "Who owns the apartment?"

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Q And he said he lives there with his wife and family?

A He did.

Q And then his wife came out, didn't she? A She did.

Q And he introduced you to his wife? A He said, "This is my wife." She was the only woman there.

Q When you asked who slept in the bedroom, didn't he say, "I sleep there and my wife sleeps there."? A He did.

Q Why didn't you tell that to the jury before? A I was not asked.

Q You were asked. You said he told you, in response to your question, that he slept there. Isn't that what you told the jury? A I believe there was only one bed in the house.

Q It is not unusual for a man to sleep in the same bed with his wife, is it? A I hope not.

Q Were there any children there, of Russo's? A I don't remember.

Q Now, didn't Russo tell you that he had just gone into the apartment when you came up, in response to your questions? A He may have. I don't remember.

Q Have you got a record of the conversation you had with Russo? A I have not.

Q Now, you are positive, however, that there were three other men in the same room where you found Russo on that evening? A Four with this defendant; four other men.

Q That is, the defendant, Calagna, Lucera, Baladina and Locapola; is that correct? A Yes, sir.

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Q And you arrested all of those men? A I did.

Q For this identical crime? A Yes, sir.

Q As being in possession of this identical property; is that correct? A I charged them all with the burglary.

Q And as being in possession of the property which you say you found in the bedroom? A Yes, sir.

Q Is that correct? A Yes, sir.

CHARLES SCHAUSS (Detective Division, Main Office),
called as a witness in behalf of the People, having been
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WHALEN:

Q You are a police officer of the City of New York?

A I am.

Q And have been for how long? A Twelve years.

Q Do you recall the 12th of April, 1920? A I do.

Q Do you recall going to a house on 28th Street that night?

A I do.

Q What time was it? A About nine o'clock, around nine o'clock.

Q Who was with you? A Detective Moriarity and Detective Westervelt.

Q And did you see this defendant, Frank Russo, there that night? A I did.

Q Did you have any conversation with him personally?

A I did not.

Q You simply went in there with Officer Moriarity? A I

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did.

Q Did you assist in the search of the premises there?

A I did.

Q Did you find anything there? A I did, yes.

Q Where was what you found? A We found about twenty-five rolls of silks and velvets in the bedroom leading off a parlor in the front of the house.

Q Where was Russo when you first entered? A Russo was sitting in the parlor.

Q Sitting in the parlor, or the front room? A Frontroom.

Q And that led off the bedroom where you say you saw these pieces of silk? A It did.

Q Do you recall who was sitting with Russo when you entered? A I do not.

Q Do you recall in what part of the room he was sitting? A He was sitting at a table in the center of the room.

Q In the center of the room? A Yes, sir.

Q Do you recall seeing the defendant Russo's wife, Mrs. Russo, there that night? A I saw her there, yes.

Q Do you remember whether she was there when you first entered or not? A I did not see her when we entered.

Q You saw her afterwards? A Afterwards.

Q Where were the other men sitting, if you remember, in the room? A I believe there were three of them sitting on a couch and one was sitting on the opposite side of the defendant.

Q At the table? A At the table.

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Q How big was that table? A It was a long, square table on the style of this, but longer (indicating stenographer's table).

Q About how long would you say it was? A I should judge about 36 inches by 40 inches.

Q About three or three and a half feet long? A Yes.

Q Was that bedroom east or west of the front room? A It was west.

Q Which way was Russo facing? A Russo was facing south. As you went in, he was facing south.

Q Which way was the other man sitting at the table with Russo facing? A He was facing north, right on the opposite side of him.

Q So that Russo was facing the street? A Facing the street, yes.

Q And the other three men were sitting on a couch? A Yes.

Q On which side of that room was that couch? A It was on the east side.

Q And you do not recall which one of the men was sitting with Russo? A I do not.

Q Can you state what they were doing there at the table?
A The defendant had a lot of paper in front of him and I picked the papers up and he said he was making up some bills. The papers did have his name on them.

Q He said he was making out bills? A Bills, yes.

Q Did you examine those papers? A I did.

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Q Did you keep the papers or return them to Russo?

A I did not. I left them there.

Q Can you state how far away Russo was from the bedroom; how many feet? A About eight or ten feet.

Q Can you recall how wide that house is? A Do you mean from the parlor?

Q The width of the whole house; do you know? A No, I couldn't tell that. It looked like a twenty-five foot front.

Q And this table was about in the middle of the front room? A The parlor.

Q Where were the pieces of cloth located in that bedroom? A On some trunks.

Q In the front of the bedroom, toward the street, or in the rear? A Toward the street.

Q How many pieces were there? A About twenty or twenty-five pieces.

Q Do you recall how large that bedroom was? A The bedroom, I should judge, would be about nine by fifteen.

Q What else was in the bedroom? A There was a bed there and dresser and a chair and two or three trunks.

Q Could you see the pieces of silk or the pieces of merchandise, from the front room? A You could.

Q You could easily see it from the front room, could you? A You could see it from the front room.

Q Do you recall whether there was any light in the bedroom? A I do not.

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Q There was a light in the front room? A There was a light in the front room.

Q Did that light in the front room shine into the bedroom?
A Well, you could just about see the stuff in there.

Q There was enough light to see the goods in there?
A Yes, sir.

Q Do you remember whether the door leading into the bedroom was open or closed? A It was open.

Q You never knew the defendant before that night? A I did not.

Q You had been watching the house for some time before that? A About three hours.

Q Can you state whether you saw this defendant going in or out of the house before you entered? A I cannot.

CROSS-EXAMINATION BY MR. ROSENBERG:

Q Now, didn't you see the defendant going upstairs that night? A I did not.

Q Entering the premises? A I did not; not that I can remember. He may have went up, but I can't remember seeing him.

Q After you saw the defendant and looked at him, didn't you recognize that you saw him going upstairs before you went up?
A I do not.

Q Wasn't that the subject of a talk between you? A Detective Moriarity had the conversation with the defendant.

Q You listened to it, didn't you? A I did, yes.

Q Didn't Moriarity ask the defendant, "Who lives here?"

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A He did. He said, "Who is the owner of the house?"

Q Didn't the defendant Russo say he lived there with his wife? A Detective Moriarity asked him, "Who is the owner of the house?" He said it out loud to all the men sitting there, as he entered the front room from the kitchen, and the defendant Russo turned around in his chair and said, "I own it."

Q Owned the whole house? A The apartment, he meant.

Q Didn't Moriarity say, "Who lives here?" and not "Who owns the house?" A I don't just remember the words he used, but it was words to that effect.

Q It was to the effect, who lived there? A Who was the owner of the flat. That was what he meant.

Q And then Russo said, "My wife and myself live here"; didn't he say that or words to that effect? A He said, "I live here."

Q Didn't Russo say his wife lived there? A He may have.

Q Didn't his wife come in? A She did.

Q Weren't they taling together? A They were.

Q In English? A In Italian.

Q Didn't they talk in English? A No.

Q At any rate, will you swear that from the position Russo occupied when you saw him, that he could see the goods that you afterwards found? A I will not.

Q Wasn't his back to the entrance to that room? A It was.

Q Now will you swear the door was open in the bedroom?

A The door was open.

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Q Didn't you open it with Moriarity? A No; the door opened out. The door was on a slant like that (indicating).

Q It was on a slant so that it was not fully open? A It was fully open, but on a slant. The whole door was open; you could come in and out the whole width of the door, but it was on a slant that way (indicating). Do you understand? After it was opened it was on a slant.

Q When you went into the bedroom didn't you light a match to see the goods, to locate the property? A I don't remember.

Q Didn't you have a flashlight in your pocket, one of those Ever-ready lights? A We did not.

Q A flashlight? A No, sir.

Q Didn't Moriarity have one? A Not that I remember; no.

Q But you had some kind of illumination, didn't you?

A I can't remember that.

Q Was it a flashlight or was it a match that you struck?

A I don't remember what was struck, whether it was a match or a flashlight, but I don't believe we had any flashlight.

Q What is your best impression? A I couldn't tell you.

Q What? A I believe the room was light enough at the time we went in there. I don't remember any gas or lamp or anything being lit.

Q Didn't you ask Russo how long he had been in the house and he said he had just come home? A I had no conversation at all with Russo.

Q Didn't Moriarity ask him? A I don't remember whether

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he asked him that.

Q Didn't you examine the bills that Russo was making out?

A He had some papers laying there with his name on it, Frank Russo, contractor, and I picked them up and examined them. I said, "What are you doing there?" and he said, "I am making out some bills."

Q He was sending out bills to his customers? A That is what he said, yes.

Q And you knew he was in the contracting business?

A Afterwards I did, yes.

Q Yes; you found that out? A Yes.

Q How large was the front room? You spoke about the bedroom being nine by fifteen. How large was the front room?

A Well, the front room was probably twelve by fifteen.

Q And the bedroom you speak of was separated from the front room by a wall; isn't that correct? A It was, yes.

CHARLES E. WESTERVELT (Detective Division, Main Office), called as a witness on behalf of the People, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. WHALEN:

Q You are a police officer of the City of New York? A I am; yes, sir.

Q And have been for how long? A About seven years.

Q Do you know this defendant, Frank Russo? A I do not.

Q You have seen him before, haven't you? A I have.

Q Where did you first see him? A On April 12th, when

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Detective Moriarity arrested him at 327 East 28th Street.

Q That is at his home. You never knew him before that time? A I did not.

Q Did you enter the premises with officers Moriarity and Schauss? A As far as the kitchen door. Moriarity says to me, "Westervelt, stay outside --"

THE COURT: Strike out what Moriarity said to him.

Q You went as far as the kitchen door? A Yes, sir.

Q Did you enter the rest of the apartment with Moriarity and Schauss, or did you wait? A I waited at the kitchen door.

Q How long did you wait there? A Well, I judge twenty minutes about.

Q Then afterwards did you enter the front room? A To help carry the stuff out.

Q Then you went in to help carry what out? A Velvets and satins and merchandise.

Q Did you carry it all out? A Yes, sir.

Q In one trip or more than one trip? A Oh, we made a couple of trips.

Q Do you remember how many pieces there were? A Well, I should judge about twenty.

Q You did not enter the front room with the other officers, then? A I did not.

Q Did you see Mrs. Russo there that night? A I did.

Q Where was she when you first saw her? A It seems she was in the back, in another apartment in the rear. She was holler-

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ing or talking Italian. She wanted to know what I was doing there.

Q Do not give any conversation. That was out in the hallway. Did you have a conversation with Mrs. Russo in the hall?

A No; she brushed past me.

Q Did you see her in the apartment? A Yes.

Q You were standing at the door to the kitchen and she passed you? A Yes.

Q Where did she go? A In the front room.

BY THE COURT:

Q Had your brother officers been in the apartment before Mrs. Russo entered? A Yes, sir.

Q You are sure of that? A. Positively.

Q How long had your brother officers been in the apartment before Mrs. Russo came in? A I should judge about fifteen minutes. There were some children in the hallway there, and they were kind of suspicious --

THE COURT: Strike that out.

Q They were in the apartment, you say, about fifteen minutes? A About.

BY MR. WHALEN:

Q Where did you get the goods that you took downstairs?

A Out of a bedroom. Moriarity and Schauss were throwing it out in the parlor and I was carrying it down.

Q They threw it out from the bedroom to the front room and then you picked it up and carried it downstairs? A That is right.

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Q You did not see it inside the bedroom? A I did not.

Q Did you have any conversation with Frank Russo? A I did not.

Q Did you see him when you entered the front room? A I could not say whether I seen him or not. There were five men all told together.

Q You saw five men in there, and then you took the merchandise down to police headquarters? A Put it in the patrol wagon and took it down to the police headquarters.

Q So you had no conversation with Russo yourself and you did not overhear any conversation between Russo and anybody else? A I did not, sir.

CROSS-EXAMINATION BY MR. ROSENBERG;

Q You watched the place for two or three hours before you went upstairs? A I did.

Q Did you see Russo going up there? A From where I was standing I could not notice anybody. I was standing around the corner, near First Avenue.

Q Now, officer, will you deny that Mrs. Russo was in the apartment when you first went there? A No, she come from that other apartment.

Q In order to get into or out of the apartment she would have to pass the kitchen? A Yes, past me.

Q And you were stationed at the -- A Kitchen door.

Q At the entrance to the kitchen? A Leading into the apartment.

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Q Did you see Mrs. Russo go out? A No, I did not.

Q You do not know whether she was in the apartment or not?

A No; she come from another apartment in the rear.

Q And there was some commotion, wasn't there? A Yes.

Q And how long after you had first got in there did Mrs. Russo come in? A Well, I judge about twenty to twenty-five minutes.

Q Could it have been less? A Well, I don't know. I really couldn't tell you. About that.

Q Were you there when Moriarity asked the defendant who lived there? A I was standing outside.

Q You couldn't hear from where you stood? A There was a lot of commotion going on and I was afraid some of the mob might get away on us.

Q You were afraid somebody might get away? A Yes.

Q You were standing at the exit? A Yes, sir.

Q You didn't listen to the talk? A No.

Q Were you ever in the bedroom at all? A I was taking out the stuff. Moriarity and Schauss were throwing it out in the parlor and I was bundling it up and taking it downstairs to the patrol wagon.

Q Were you in the bedroom itself? A No.

Q You had never been in the bedroom? A No, sir.

Q When you got there for the first time with the officers, do you remember whether the door was open or closed? A It was open.

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Q I am talking now of the door between the front room and the bedroom; or could you see it? A I don't remember. I couldn't recall whether the door was open or not; but I know the kitchen door was open.

Q Yes, the kitchen door was open. And the same charge that was made against this man Russo was made against the other four men; is that correct? A Yes, sir.

Q At the same time and for the same crime? A Yes, sir.

MR. WHALEN: The People rest.

MR. ROSENBERG: I ask your Honor to direct the District Attorney to elect upon which count of the indictment he intends to proceed.

THE COURT: Motion denied.

MR. ROSENBERG: Exception. I move to dismiss the indictment and for a direction of an acquittal upon the ground that the People have failed to establish the facts or the crime charged in either count of this indictment beyond a reasonable doubt.

THE COURT: Motion denied.

MR. ROSENBERG: Exception.

THE COURT: Gentlemen of the Jury: Do not discuss this case among yourselves nor permit any person to talk to you about it, nor form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted to you. The jury may retire for five minutes.

(The jury retired at 12:28 P.M., and returned at 12:36

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P.M.†

THE COURT: Gentlemen of the Jury: Do not discuss this case among yourselves nor permit any person to talk to you about it, nor form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted to you.

Counsel for the defense asks for a postponement of this case because of certain proof that he might offer. If he determines not to offer it, it will tend in a great measure to expedite this case; in other words, we will accomplish more by granting him the adjournment than by proceeding with this case. In view of that fact, I shall continue it until tomorrow morning. Be here at 10:30 tomorrow morning.

(Whereupon, at 12:45 P.M., the Court stood adjourned until tomorrow morning at 10:30 A.M.)

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New York, N. Y., 10:30 A.M., December 20, 1921.

TRIAL RESUMED.

(Mr Rosenberg opened to the jury for the Defendant.)

A N T O N I O C A P A C I, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

(The witness stated that he resided at 232 East 29th Street, New York City.)

DIRECT EXAMINATION BY MR. ROSENBERG:

Q Mr. Capaci, what business are you in? A I am a grocery man.

Q How long have you been engaged in business as a grocery man? A Twenty-three years in that place.

Q Are you a citizen? A Oh, yes, I am a citizen.

Q Where is your place of business? A 232 East 29th St.

Q Is that anywhere near where the defendant lives? A Yes.

Q How far do you live from where the defendant lives?

A I live at 232 East 29th Street.

Q That is around the corner from where the defendant lives?

A Yes. That party lives at 325 East 28th Street. He lived in my property three years ago for three years.

Q How long do you know the defendant? A About ten years.

Q Do you know other people who know him? A Oh, yes.

Q Do you know his friends and his countrymen? A Well, the men who lived a long time in the neighborhood.

Q Do you know what his reputation is; good or bad? A All good reputation, because I know that party since ten years ago

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and he lived in my house and he pay me the rent on the first of the month, and he trade in my store a long time and he pay me every week.

Q What I want to know is his reputation in the neighborhood? A Good. I did say good reputation.

Q He is a law abiding citizen? A Yes, sir.

CROSS-EXAMINATION BY MR. WHALEN:

Q Are you well acquainted with the Italian residents of that section there? A Yes, sir.

Q Do you know a man named Pacci? A No, sir.

MR. ROSENBERG: Your Honor, I have two other character witnesses. The District Attorney will admit, if your Honor will consent, that the two other witnesses whom I would call would testify to substantially the same as the previous witness, as to previous good character only.

MR. WHALEN: That is agreeable to me, sir.

SALVATORE TINERVIA, called as a witness in behalf of the defendant, having been duly sworn, testified as follows, through an interpreter:

(The witness stated that he resided at 207 East 29th Street, New York City.)

DIRECT EXAMINATION BY MR. ROSENBERG:

Q What is your business? A Moving man.

Q Moving man? A Removing ashes.

Q Who are your partners? A The defendant and some other fellows.

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Q What particular kind of business are you engaged in; removing what kind of ashes, and from where? A From places in New York, Madison Avenue, Lexington Avenue, 11th Street, 12th Street; wherever they call us.

Q Have you got business with any hotels? A Yes, with hotels also.

Q What hotel? A Bellmore Hotel in Lexington Avenue, Madison Avenue Building, and some other places in 31st and 32nd Streets.

Q Now, for how long are you a partner of the defendant? A About two years and a half.

Q Do you remember the 12th day of April, 1921, of this year? A I don't remember the day.

Q Do you remember the time when the defendant was arrested? A He was arrested on Monday evening. Tuesday morning I learned of his arrest because he didn't show up for work.

Q Now, on Tuesday following the day of the arrest you learned that the defendant had been arrested the night before. Now will you please tell the Court and jury where the defendant was on the day previous to his arrest, Monday, April 12th?

A He did work all day long on Monday with me.

Q What time did he leave you on Monday? A About half past seven or a quarter to eight.

Q Where did you leave the defendant? A 28th Street and Third Avenue.

Q Where did you go and where did the defendant go? A He

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went to his house and I brought the truck over to the garage.

Q Where is the garage? A 24th Street, between Lexington and Third Avenue.

Q You are talking of Monday, April 12th, now; is that correct? A Yes; in the evening I am talking about.

Q Now, what do you say about Sunday, April 11th, as to seeing the defendant; and if so, how long? A Yes; we worked half day.

Q Is that all you worked on Sunday? A Yes, we begin at five o'clock in the morning and we stop working about half past eleven or twelve o'clock.

Q Now, then, on Saturday, April 10th, can you tell the Court and jury how long you saw the defendant on that day? A He worked with me, he worked with my friends; we go around the city different places, of course. I could not say that I was with him all day long.

CROSS-EXAMINATION BY MR. WHALEN:

Q Who is the other man that is a partner of you and Russo? A Frank Tinervi; Salvatore Russo, the brother of this defendant; Natali Russo and Guiseppe Balamente.

Q Who are all your partners in business? A To begin with, we were eight. Two went to Italy; now we are six.

Q Six partners in that business? A Yes.

Q Do you remember the time the defendant was arrested? A Yes.

Q Was that April, 1921, or April, 1920? A No; 1920.

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Q Now, who were the partners in the business at that time?

A All those that I mentioned and one more, Guiseppe Balamente.

Q Please give me all those names now. A Frank Russo, Salvatore Tinervi, Salvatore Balamente, Guiseppe Balamente, and another Guiseppe Balamente, Frank Tinervi, Salvatore Russo and Natali Russo.

Q Then there were three Balamentes, two Tinervis and three Russos? A Yes.

Q Was there a man named Lucicero in the business? A No.

Q And your place of business was your garage at 24th St. between Lexington and Third Avenues? A Yes.

Q Did you have horses or automobile trucks? A Two automobile trucks.

Q What kind of automobiles? A The Old Reliable.

Q What kind of a truck is that? A One capacity of five tons and another two tons and a half.

Q Just an ash truck, is it? A Yes.

Q Have you any other automobiles there? A Now we bought another one.

Q When did you buy that? A A month ago.

Q What kind of a car is that? A The same mark.

Q Have you ever visited Frank Russo's home? A Yes, once in a while.

Q Do you know Joseph Calagna? A No, sir.

Q Do you know a man named Pacci? A No, sir.

Q Did you ever hear of a man named Pacci? A No, sir.

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Q You never heard of a man named Pacci, who lives in 26th Street between Second and Third Avenues? A No, sir; I do not know him at all.

FRANCISCO TINERVI, called as a witness on behalf of the defendant, having been duly sworn, testified as follows through an interpreter:

(The witness stated that he resided at 221 East 29th Street, New York City.)

DIRECT EXAMINATION BY MR. ROSENBERG:

Q What relation are you to the last witness, if any?

A No relation at all. I know him from quite a long time.

Q Don't you bear the same name? A Cousin. I did not understand what the gentleman was talking about.

Q Are you in business with this defendant? A Yes, sir.

Q Were you in business with this defendant and others in April, 1920? A Yes, sir.

Q Are you still in business with him? A Yes, sir.

Q Are you a partner of the defendant? A Yes, partner.

Q What business do you conduct? A Moving ashes and dirt.

Q Do you remember April of 1920, when this defendant was arrested? A I remember that he was arrested on some Monday. The following day, on Tuesday, I inquired about him because I didn't see him and I was told that he was arrested.

Q Now, on the day of his arrest, which was Monday night, April 12th, will you tell the court and jury what the defendant did on that day? A Yes; he did work with us all day long.

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Q What time did you go to work in the morning? A Five o'clock.

Q What time did you finish at night? A Sometime at seven, half past seven or eight o'clock. We have not got just exactly specified time when we stop work.

Q Now, on the Sunday before Monday, April 12th, on April 11th, how long did he work on that day? A Well, we go to work at the same hour and we finished about eleven, or half past eleven or twelve o'clock sometimes.

CROSS-EXAMINATION BY MR. WHALEN:

Q What part of the business does Frank Russo take care of?
A He does the same kind of work that we all do, load the truck and put ashes in, dirt, or whatever we get.

Q Do you all go out on the truck? A Yes.

Q There were eight partners in April, 1920? A Yes.

Q And you had two trucks? A Yes.

Q And did all the eight men go out on the two trucks?
A Yes.

Q Didn't anybody stay in the office? A No, sir.

Q Did you have anybody else working for you except the eight partners? A Nobody else.

Q Do you know a man named Pacci? A No, sir.

Q You never heard of him? A No, sir.

JOHN J. MORIARITY, recalled as a witness for the defense, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

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Q Mr. Meriarity, I forgot to inquire of you concerning whether or not you had a talk with this defendant after he talked with his wife in Italian. Did you, yes or no? A Yes.

Q Now will you please tell the Court and jury the whole of that conversation that you had with him at that time? A Well, he had a conversation with his wife in Italian. He asked her how the goods come to get into the house. He told me that his wife said that it was left there by somebody, and then he stated again that his wife said she bought it, that she was a dress-maker. Those were the two answers I got from the defendant Russo.

Q That is, the defendant told you that his wife told him those two separate things; is that correct? A Yes, sir.

Q Was that conversation which you have now detailed had with the defendant after you had gone into the room and showed him the goods which were found there? A Yes, sir.

Q Did you inquire of the defendant whether he was there at the time the goods were delivered at the home? A I did not.

Q Did he say anything on that subject? A I don't believe he did.

Q Didn't you ask him whether he was there when the goods came? A I don't remember.

Q Now, about Calagna, didn't you see Calagna going up into the apartment or into those premises that evening? A I did not know the man, never seen him.

Q After having seen him, do you now recollect whether he

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had gone up to the apartment or into the premises shortly before you went up into the premises? A I was not paying any attention to the people that went in and out.

Q Have you learned when those goods were delivered into the premises on 28th Street? A I have not.

Q At what hour? A No, sir.

Q Haven't you made full and complete investigation for the purpose of discovering when those goods were taken into that apartment? A No, sir; I could not find out.

MR. WHALEN: No further questions.

FRANK RUSSO, the defendant, having been duly sworn, testified as follows:

(The witness stated that he resided at 327 East 28th Street, New York City.)

DIRECT EXAMINATION BY MR. ROSENBERG:

Q How old are you, Russo? A Thirty-six years old.

Q Are you married? A Yes, sir.

Q Have you got a family? A Yes, sir.

Q How many children? A Five.

Q Where do you live? A 327 East 28th Street.

Q Where did you live in April, 1920? A In the same place.

Q How long have you lived in that house? A Over three years now.

Q What is your business? A Ash man; removing ashes.

Q From where? A From all over New York City.

Q From private persons by contract? A By contract, yes.

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Q You do not work for the City, do you? A No, sir.

Q Now, how many men were engaged in business with you in April, 1920, in that ash business? A Seven besides me.

Q Are you still engaged in that same business? A Yes, sir."

Q Where? A We got an office at 339 East 31st Street.

Q And the two men who were on the stand, what are they in connection with the business; are they your partners? A Yes.

Q Two other partners? A Yes, sir.

Q Now, on the 12th day of April, 1920, you were arrested, were you? A Yes, sir.

Q What time of the night were you arrested? A About nine o'clock.

Q And where were you arrested? A In my house.

Q What time did you get home that day or night? A Between half past seven and eight o'clock.

Q When you got home what did you do? A I eat.

Q And after you got through eating what did you do?

A I started to write some bills for my customers.

Q Sent out statements or bills? A Bills.

Q What happened while you were writing out your bills?

A After a little while my partners come into the house and helped me write the bills, and after about half an hour the police came up in the house.

Q When the police came up into the house, was it the same policeman, Mr. Moriarity? A Yes, sir.

Q And Mr. Schauss? A Yes, sir.

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Q And Mr. Westervelt? A Yes, sir.

Q Were those the three policemen? A Yes.

Q Were they dressed as they were yesterday, or were they in policemen's clothes; were they dressed like an ordinary citizen? A Yes.

Q Regular clothes; not in police uniforms? A No, sir.

Q What happened when the policemen came into your house?

A They asked me if I got any goods in the house that don't belong to me.

Q Keep your voice up. A They asked me if I got the goods in the house that don't belong to me.

Q And what did you say? A I said, "No, sir."

Q Who asked you that? A That Mr. Moriarity.

Q Mr. Moriarity? A Yes.

Q He spoke to you in English? A Yes.

Q Did he ask you anything else, as to who owned the house?

A Yes, he told me, "Who own this house?" and I said, "I will do it."

Q Did he say, "Who lives here?" A He said, "Who live in this house?" and I told him, "I live in this house."

Q Did he ask you who lives there with you? A Yes.

Q What did you say? A I said, "My wife and children."

Q Where was your wife when the policemen came in? A In the house.

Q In the same rooms? A No.

Q Where was she? A I wouldn't be sure. Maybe it was

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in the toilet or in the other room. I couldn't say exactly.

Q Now, after the policeman asked you whether you had any goods that did not belong to you and you told him that you did not, what did the policeman ask you to do? A He says, "We got to look over the house if you got any goods."

Q What did you say? A "All right," I says, "Look it up."

Q You said, "Go ahead." A Yes, "Go ahead and do it."

Q Did you know that there were any goods in the bedroom?

A No, sir.

Q Are you sure of that? A Certainly; yes.

Q Were you there when any goods were brought into the bedroom or put there? A No, sir.

Q Did you bring any goods into the bedroom and put them there? A No, sir.

Q Did you bring any silks or velvets into the bedroom?

A Never.

Q Or into the house? A I never bring anything into the house.

Q Did you know those goods were in the bedroom when the policeman spoke to you? A No, sir.

Q Could you see any goods from where you were sitting?

A No, sir.

Q You could not see any goods in the bedroom? A No, sir.

Q Was the bedroom lit or was it dark; light or dark?

A It was dark.

Q Was there any light in the bedroom? A There is a light

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but we never lighted that gas in that bedroom; we never use it.

Q Who occupies that bedroom? A I don't know what they call it in the English language. It is some curtain so that nobody can see the bed in that room. That is the reason, nobody can see what they have got in another room.

Q At any rate, the policeman went into the bedroom and then he came out and said something about finding goods there, didn't he? A Yes, sir.

Q Now, what did he say? A They spoke between themselves. They said, "Here is the goods."

Q And then they came out and he spoke to you, didn't he, the policeman? A Yes.

Q What did he say? A He said, "Who gave you these goods?" I said, "I don't know anything about the goods."

Q What did you do? A I called my wife.

Q What did you say to your wife? A I told her, "Who brought these goods in the house?"

Q In what language did you speak to your wife? A Italian language.

Q Does she understand English? A No, sir.

Q What did you say to your wife and what did she say to you? A She says somebody bring it in the house and she told me the name and she says they leave these goods and she says they will be back right away but they didn't show up.

Q Did you object with your wife or quarrel with her about taking the goods? A No. She says the man asked please if he

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can keep these goods a little while and she said, "I refused to do it and he asked me again and please he will be back right away"

Q Didn't you tell the policeman what your wife said?

A Yes; I told him, I says, "Somebody bring it up to the house and to take it out again."

Q Then you were arrested, were you? A Yes.

Q By the policeman? A Yes.

Q Now, what were you doing all of that day, the day you were arrested, Monday, April 12th? A I was working.

Q What doing? A Working.

Q What doing; doing what? A Working in the ashes business with my truck and my partnership.

Q Now, the truck that you speak of, is that a covered truck or an open ash truck? A It is an open truck.

Q Did you work all of that day? A Yes, sir.

Q At what time did you go to work? A Around five o'clock in the morning.

Q And what time did you get through? A Between half past seven and eight I got through.

Q You got home between what time? A Between half past seven and eight o'clock.

Q Who went home with you that night, do you remember?
A With me? Nobody.

Q Did Salvatore go home with you? A He did not come with me in the house.

Q That is what I mean. Did he go part of the way with you?

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A He left me at Third Avenue and 28th Street.

Q That is what I wanted to know. Then you went home and he went home? A Yes, I went home and he left the truck in the garage.

Q Now, the day before, on Sunday, April 11th, how long did you work? A Pretty near twelve o'clock or half past eleven.

Q What time did you go to work? A Five o'clock in the morning.

Q Now, on the day before, which was Saturday, April 11th, what time did you go to work and what time did you get home?

A About five o'clock and I was home about half past seven.

Q Now, did you at any time on April 10th, 11th or 12th, or at any other time, go into the premises 37 West 19th Street?

A I never was over there.

Q Did you, on those dates or either of those dates, go into the Majestic Leather Goods Company's place of business? A Never.

Q Did you on either of those dates break into the place? A No, sir.

Q Or were you with anyone else or request anyone else to do it? A I never was in that building at all.

Q Did you go into that building and into the Majestic Leather Company's place of business and steal a quantity of merchandise, silks and velvets? A No, sir.

Q On those days or any other days? A No, sir.

Q Or did you receive the goods which were found in the house, knowing that those goods had been stolen from the Majestic

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Leather Company? A No, sir.

Q Did you receive them at all? A No, sir.

Q By the way, has your company now or did they in April, 1920, have a Packard automobile? A We never owned anything like that.

Q Did you have one? A No, sir.

Q What is the name of your automobiles that you use in the business? A Every day in the week.

Q What is the name of the car? A Old Reliable.

Q They are regular open trucks? A Yes, sir.

Q Is that right? A Yes, sir.

Q That is all you know about this case? A That is all I know, sir.

Q Are you sure of that? A Yes.

CROSS-EXAMINATION BY MR. WHALEN:

Q How long have you lived at 327 East 28th Street? A About three years.

Q Do you know a man named Pacci? A Yes.

Q Where does he live? A He was a little bit around between Second and Third Avenue.

Q On what street? A 28th Street.

Q Do you remember what number he lived at? A No; I never paid any attention about his house.

Q Didn't you testify before that your wife told you that the goods were brought in by a man named Pacci? A Yes, sir.

Q Why didn't you say that today? A He didn't ask me that

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question.

Q You were asked to state what you said to the officer. Did you tell the officer that your wife told you that a man named Pacci had brought these goods in there? A No; he didn't ask me who is the man; he didn't ask me the name.

Q Didn't your wife tell you that night you were arrested who brought the goods in? A No.

Q Now, what is the number of the house in which Pacci lives? A I don't know.

Q About what part of the block is it? A It is about the middle of the block.

Q On 28th Street? A Yes.

Q Between what avenues? A Second and Third.

Q On the north or south side of the street? A It is on the south side of the street.

Q Is that the same block you live in? A Yes, sir. No; I live one block below, between First and Second.

Q What time did you say you got home that night, April 12th? A Between half past seven and eight o'clock.

Q And then you had your supper? A Yes, sir.

Q Where did you have your supper? A In the house.

Q In what room? A In the front room.

Q The same room that you were in when you were arrested?
A Yes, sir.

Q Did you have your supper on the same table at which you were sitting when you were arrested? A Yes, sir.

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Q Who had supper with you? A My wife and children.

Q Is that all? A That is all.

Q Your partner was not there then, was he? A No, sir.

Q Then you got in about half past seven? A Yes.

Q And you were in that room from half past seven until the time you were arrested at nine o'clock? A Yes, sir.

Q You were in there an hour and a half? A Yes.

Q You say that there was a curtain on that bedroom?

A Yes, sir.

Q Was the curtain drawn aside or was it down that night?

A It was down.

Q You are sure about that? A Yes, sir.

Q Didn't you have occasion to enter that bedroom when you arrived home that night? A I never go there except when I got to go to sleep. There is no room at all to get down there.

Q Who were the men that were there at the time that you were arrested? A My partner.

Q What was his name; which one? A Salvatore Balamente.

Q How do you spell that? A B-a-l-a-m-e-n-t-e.

Q Who else was there? A My brother-in-law.

Q What is his name? A Lucicero.

Q Who else was there? A John Lapiccolo.

Q Who else? A And Calagna.

Q Now, you had known Balamente, your partner, for how long?

A At that time about four or five months.

Q How long had you known Lapiccolo? A Oh, about, I don't

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know exactly; six or seven months.

Q How long had you known Lucicero? A That is my brother-in-law.

Q How long had you known him? A About twelve years.

BY THE COURT:

Q He is your brother-in-law, Lucicero? A Yes, sir.

BY MR. WHALEN:

Q Do you mean to say he is your wife's brother? A Yes.

Q He was not in business with you? A No, sir.

Q What business was he in? A He was in soda water business.

Q In the soda water business? A Yes.

Q Where? A Fourteenth Street.

Q Fourteenth Street and where? A Near Avenue B. I don't know exactly the number.

Q Did he own the business or did he work there? A At that time he owns the business.

Q Don't you know the address? A Not exactly.

Q Fourteenth Street near Avenue A? A Near Avenue B.

Q Where is he in business now? A He sold his business.

BY THE COURT:

Q Where is Lucicero? A I don't know. I didn't see him for a couple of months.

Q When was the last time that you saw your brother-in-law?

A About three months ago.

Q When were you arrested? A In 1920, in April.

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Q How many times had you seen him between April, 1920, and today? A Oh, I don't know exactly, because he used to come about one time in a week and sometimes he didn't come for two or three weeks.

Q Have you seen him since your arrest? A Yes.

Q How many times? A I don't remember exactly.

Q Did you see him five or six times? A More than that.

Q Do you know where he is now? A No, sir.

Q When did you last see him? A About three months ago. I saw him about three months ago.

BY MR. WHAIEN:

Q Where was he when you saw him last? A In the house.

Q At your house? A Yes.

Q How old a man is he? A About thirty-five.

Q How long did you know Joseph Calagna? A The first time I know Joseph Calagna was that night when I was arrested.

Q You never saw him before? A No, sir.

Q Did you know Calagna's sisters or any of his family?

A No, sir.

BY THE COURT:

Q Did you wife tell you the name of the person who brought the goods to the house? A Yes, sir.

Q What name did she tell you? A Pece.

Q Did you know Pece? A I saw him a couple of times on the street. He had a horse and a wagon and sometimes he saw me and would say "Good morning" if it was in the morning, or if it

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was in the afternoon he would say "Good day" or "Good night", but I never had any particular - I never was interested to speak with him.

Q Did he ever visit you at your home? A Never in my house.

Q Did you ever see him in your house? A No, sir.

Q Are you related to this man? A I don't know what that word means.

Q Do you know what "relation" means? A No, I got no relation with that man.

Q Do you know whether he was related to your wife? A No, sir, he was not.

Q Do you know whether the man who brought the goods to your home was related to your wife? A Not related with me wife at all.

Q Are you sure of that? A That is as far as I know.
BY MR. WHALEN:

Q When did these men come there that night? A Which men?

Q When did Balamente come there? A He come about half past eight.

Q And when did Lapiccolo come there? A Lapiccolo came up there about two minutes before the cops was up at the house.

Q Who came in with Lapiccolo? A Mr. Calagna.

Q When did Lucicero come there? A Lucicero come before Mr. Lapiccolo was up to the house.

Q What did Lapiccolo say when he came in, or Calagna?

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A Lapiccolo says, "Mr. Russo, my brother buy a horse and if you got time" he says, "to come down and see if you like it or not" and I told him, "Not tonight because I got some bills to write and it is very important to send them away." I said, "I got work today, but I will do it tomorrow morning for you."

BY THE COURT:

Q You were to give your opinion as to whether the horse was a good one or not? A I didn't see him that night.

Q Did they ask you to do so? A No; he says, "If you want to go down to see if you like it or not."

Q What do you mean? A If it is good or it is not good.

Q Why did he ask you to do that, do you know? A Yes; because he knows I had about five teams of horses a couple of months before that time and he knows I got a little bit of experience on horses.

BY MR. WHALEN:

Q Calagna you never saw before? A No, sir.

Q What did Calagna say when he came in? A He did not say a word.

Q What did Lucicero say when he came in? A He didn't say anything. He come in the house and sit down without talking.

Q Who was sitting with you at the table? A My partner.

Q And where were the other three men sitting? A Sitting near the window. There is a rocking chair and a couple of chairs and a couch.

Q Didn't you know that Calagna had a business over at 37

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West 19th Street? A I don't know anything about that.

Q Have you seen this man Pacci since April, 1920, since you were arrested? A No, sir.

Q You do not know where he could be located? A No, sir.

Q Did you go to look for him? A I was looking for him.

Q And can't you tell me the number of the house that you went to to look for Pacci? A I did not look for the house, because I don't know if they had a family or not, but I was looking in the street all the time I passed through if I can't see him or not.

Q Do you know where John Lapiccolo is now? A I don't know.

Q When did you last see Lapiccolo? A About three months ago.

Q Did you see him for the last time with Lucicero, your brother-in-law? A No, sir.

Q Where did you last see John Lapiccolo? A On 29th St.

Q Do you know where he is now? A No, sir.

Q Where is Lapiccolo's brother located? A He got a business

MR. ROSENBERG: That is the defense, your Honor.

JOHN J. MORIARTY, recalled in rebuttal, testified as follows:

DIRECT EXAMINATION BY MR. WHALEN:

Q Officer, have you made any search for a man named Pacci?

A I did.

Q Have you been able to locate him?

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MR. ROSENBERG: I object to that as not binding on this defendant, not an issue in this case, and as wholly incompetent, irrelevant and immaterial.

THE COURT: Objection sustained.

MR. ROSENBERG: The jury must not draw any inference against this defendant, because your Honor sustained the objection.

THE COURT: That is right.

MR. ROSENBERG: I renew the motion I made at the close of the People's case, your Honor, to direct that the District Attorney be compelled to elect upon which count of this indictment the case shall proceed.

THE COURT: I shall submit this case on the count charging the defendant with the crime of criminally receiving stolen property in the first degree.

MR. ROSENBERG: That count now standing alone in the case, your Honor, the defendant moves for a direction of a verdict in his favor and for a dismissal of the indictment upon the ground the People have failed to establish the facts set forth in that count of the indictment, and have failed to establish by proof beyond a reasonable doubt that the defendant has been guilty of the crime charged in this indictment.

THE COURT: Motion denied.

MR. ROSENBERG: To which the defendant excepts.

(Mr. Rosenberg summed up to the jury.)

THE COURT: Gentlemen of the Jury: Do not discuss this case among yourselves nor permit any person to talk with you about

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it, nor form or express any opinions as to the guilt or the innocence of the defendant until the case is finally submitted to you. Be in your seats, gentlemen, at two o'clock)

(Recess until two o'clock P.M.)

AFTER RECESS.

(Mr. Whalen summed up to the jury.)

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