

DANIEL SMITH (alias Frank Kelly), being called and duly sworn as a witness on behalf of the People, testified as follows:

DIRECT EXAMINATION BY MR. MC GUIRE:

Q What is your right name? A Daniel Smith.

Q You have also gone under the name of Daniel Tinsman? A Never was arrested under that name in my life.

Q You have been convicted before? A Yes sir.

Q Of burglary? A Yes sir.

Q On two or three occasions? A Yes sir.

Q And you served time in the States Prison? A Yes sir.

Q (continuing) For these two or three convictions here, one, two years in Sing Sing in 1902, and two years in Sing Sing in 1888? A Yes.

Q And one year in the Penitentiary in 1896? A Yes.

Q Kelly, how long have you known Walsh here? A I made his acquaintance in State's Prison, to start with.

Q How long have you known him? A About ten years.

MR. COHEN: I object to this inquiry. Here is a man that goes on the stand and states that he met this man in prison. I stated that I did not expect to put in any defense, and under those circumstances, I ask your Honor to call this a mistrial. This de-

CASE # 626

fendant cannot have a fair trial under these circumstances. I do not say it is true or is not true. A man goes on the stand in the face of a statement from me as attorney for the defendant, that I would not put in any witnesses, on the stand, that I did not expect to have any defense, and that that was my present plan, and now here is a man that goes on the stand and says "I met this defendant in State's Prison".

MR. MC GUIRE: It strikes me that counsel is not proper in his imputation of unfairness. I put this man on the stand because I intended to put him on the stand.

MR. COHEN: I do not say it is unfair of Mr. McGuire. I mean unfair to us, not by Mr. McGuire.

THE COURT: Now, counsel, the answer given by the witness has no relation at all to your statement that you did not propose to put in a defense, because that was a temporary frame of mind that you were in, that you were at liberty to change at any time. The question is merely whether, entirely aside from that statement of yours, the answer of this witness, uncalled for by the question, is of

CASE # 626

a character to so prejudice this defendant in the minds of the jury, that in the light of your statement, the defendant cannot have, at the hands of this jury, a fair trial.

MR. COHEN: Well, that states the proposition more succinctly and precisely than I could. The only point is, your Honor will recognize, that we always have the right of not putting in a defense.

Now, we appeal to your Honor's judgment and discretion in this matter, where we have that right, and we are not called upon to exercise it until the prosecution has entirely proven its case and rested. I cannot now, in fairness to my client, try my case as I please, and your Honor must see the position I am in.

THE COURT: Counsel, the fact that you do not propose to put in a defense, if that be a fact, has no bearing at all upon the question. The only question is whether the answer or statement, if you please, made by the witness, intended to be in response to a question put by the District Attorney, which question was not so formed or framed as to elicit necessarily the statement of the witness, is of such a character as to necessarily, or prob-

CASE # 626

ably prejudice this jury so against your client your client, the defendant, that he cannot have at the hands of this jury a fair trial.

MR. COHEN: I submit that it is just that character of question. I cannot imagine anything that might be more prejudicial to the defendant on a trial for a crime of this kind than the statement that he met the defendant in State's Prison.

THE COURT: Now, let me make a suggestion to you, counsel: You can either object or not, as you see fit. Without prejudice to your rights to make an application at the close of the People's case that this shall be considered a mistrial, without prejudice, let the evidence of this witness be taken and you enter upon your cross examination. It may then be that despite the introduction of this evidence, you may still feel disposed to make your application to the Court as a matter of law and that the Court can pass upon your application, in which event your time will be saved and the time of the Court.

MR. COHEN: I will adopt your Honor's suggestion.

THE COURT: If I cannot dispose of your appli-

CASE # 626

cation then, as a matter of law, or the case has got, in my view, to go to the jury, then you will be in position to make your application to withdraw the case from the jury, on the ground that the statement made by the witness has prejudiced necessarily the defendant.

MR. COHEN: Yes, your Honor, I will take that course.

BY MR. MC GUIRE:

Q On this night of the 9th of January, 1907, when and where did you first see Walsh, the defendant here?

A Between 35th and 36th Street, on Eleventh Avenue.

Q Tell your story from then. Who, if anybody, was with Walsh when you met him; what you and Walsh did up to the time of your arrest by officer Hale? A There was a girl with him.

Q Talk louder? A There was a lady with him, and I was walking down towards 34th Street, where I was told I would find him, and before I got that distance, before I got off Eleventh Avenue, I met him and this girl, and we went in a saloon and we had a couple of drinks. We all drank whiskey, and we come out of there and we went in the saloon across the street and we had several drinks there. He had no money and I gave him two dollars. I treated

CASE # 626

first; the complainant treated second, and he treated, and the bartender treated, and there was about six drinks passed. In the meantime, he was talking^{to} this girl in the box at the end of the bar, and me and this complainant was standing at the bar. Then the complainant goes out with this girl, and him and I stayed in for a half an hour, I should judge. Then he says to me: "Come on out", and I went out with him, and we stood on the corner, and he says "Come on over here until I get that hussy", meaning this girl. I says "Where is she"? He says "She is in here with this barber". So we went in the hall, and he says "You knock at the door and ask him to come out." I knocked at the door, and she says "Who is there?" and I hesitated, and he says "Tell the barber it is you", so I says "It is me, open the door", and when the barber come out, he was in his underwear, and he hit him, and I fell with my arm around the barber.

Q Who hit whom? A Walsh hit the barber, and when the barber fell on the floor, I held him there, and he went in and took his vest and his watch and his money, and dropped the clothes in the end of the hall, and we went out, and the policeman seen us coming out of the door, and paid no attention. We stood on the corner, and we stood there talking, out side the door. Then we walked down to

1272
CASE # 626

the saloon on Eleventh Avenue and 36th Street, and we stood there, I guess, pretty near an hour; maybe an hour and ten minutes, and he paid the man a dollar that he owed him, and we had several drinks.

Q Who, Walsh paid the man a dollar? A Yes, and we come out of there and we passed this officer and another officer and this woman, and we stood on the corner. We stood on the corner, the saloon where we first came out of, for 15 minutes, and the officer come over and says "Come here, I want you", and he took me over and I said "Why?" And he says to this woman, "Is that the fellow?" And she says "Yes". He says "Go and get the barber." The barber come out. "Is that the fellow?" And the barber says "Yes, all I want is my watch". This fellow come over then and he says "What have you got him for; he didn't do nothing", and got around me.

BY THE COURT:

Q When you say "this fellow", whom do you mean?

A I mean Walsh, and he come there and went between me and the officer and he says "He didn't do nothing; what's this for, for being drunk? He's all right". We were taken to the station house and this woman said that he had nothing to do with it. So, all I know --

BY MR. MC GUIRE:

127

CASE # 626

Q Said that Walsh had nothing to do with it? A Yes, so all I know, I am taken into the back room, and I had a lot of drink in, and I am assaulted, because I didn't tell nothing about this fellow. When I was taken in the back room I didn't know I was there, because I have a silver plate in the back of my head, where I was hurted, and the next morning we were taken to Police Headquarters.

CROSS EXAMINATION BY MR. COHEN:

Q Now, in the Police Court, you both had the same lawyer, didn't you? A He had the lawyer, yes. The lawyer didn't defend me.

Q He defended both of you in the Police Court?

A Never spoke for me, no.

Q Did not Col. Townsend appear for both defendants?

A I don't know anything about it. He spoke for this man. He had an examination, but I didn't. I never said nothing.

Q Was it a separate examination? A Well, I didn't say anything. I couldn't say that. I asked counsel --

Q Now, when you were brought down to the Tombs, there was a firm of lawyers appeared for both of you? A No lawyer came near me.

Q Didn't you have a lawyer named Campbell? A Oh, here, yes.

CASE # 626

Q And Mr. Campbell in the beginning appeared also for Walsh, didn't he? A Walsh was asked who is his lawyer and he says Campbell.

Q Then later on, you heard after the pleading that Walsh's friend determined to have a separate trial, didn't you? A He told me it himself.

Q And you also heard they had retained my firm?
A Cohen Brothers, yes.

Q You heard that they had us as lawyers? A Yes.

Q And then you made up your mind -- your friends were not able to raise money to pay your lawyer? A No.

Q You have not paid your lawyer a cent? A Not a cent.

Q And Walshes friends were not paying any attention to you, were they? A No.

Q Did not come to see you? A No.

Q Gave you nothing, no money or anything? A No.

Q Did not employ a lawyer for you? A No.

Q And in the meantime, your relations with Walsh had become very strained here in the Tombs? A Yes.

Q It got so you did not speak to each other? A Oh yes, we spoke every day.

Q You were threatening to kill each other every day? A No, I never threatened to kill that man.

Q Well, your relations had become very much strained?

CASE # 626

A In what respect?

Q I mean, you were not as friendly as you were before?

A I was always friendly with him, but he would never speak to me much. I would ask him a question and he would not answer.

Q He would not talk to you at all? A No.

Q But when you heard he had employed a lawyer and was going to have a separate trial, was that the time you made up your mind to plead guilty? A The time I made --

Q (interrupting) yes or no? A Well, you will have to go over that again.

Q Did you make up your mind to plead guilty of this crime of robbery when you learned for the first time that Walsh was determined to have a separate trial? A I had my mind made up as soon as I had my senses; before I got in the Tombs, I had my mind made up to plead guilty.

Q And notwithstanding the fact that the minute you got to the Tombs you made up your mind to plead guilty, you came to this bar and pleaded not guilty? A I did not intend to do it on the start. I expected to get a lighter plea.

Q You made up your mind that you were going to make what may be termed the best deal you could? A Exactly.

Q And you made up your mind, if you could save yourself from going to prison, or get yourself as light a sen-

CASE # 626

tence as possible, you were going to do it? A Certainly.

Q If necessary, to tell everything that happened, and a little more, too? A No, only the truth.

Q Only the truth? A That's all.

Q And by telling the truth, you mean to say that Walsh was also connected with it? A He certainly was.

Q And to whom did you convey the information that you desired to plead guilty? A To nobody at all, only right here at this bar.

Q When ? A The other day; yesterday.

Q Did your lawyer go to see you? A He came down and spoke to me and he asked me what I intended to do, and I told him I was in a ponderment. I didn't know what to do.

Q In a what? A Ponderment. I didn't have a chance for a trial. I had no means, and I says "I will take a plea if I can get it to assault in the second degree".

Q And you have pleaded guilty to what? A Assault in the second degree.

Q And you know what you were indicted for, robbery in the first degree? A Yes.

Q Have you got what is known as short time to do in State's prison? A No sir. I left the State's Prison in October, 1904.

Q How many years of your life have you spent in

State's Prison? A Well, two years and nine months; one year; four years and a half, and two years.

Q And in order to save yourself as much punishment as possible, you have made up your mind to assist the District Attorney if you could? A I throw myself on the mercy of the Court by telling the truth.

Q What did the District Attorney tell you he would do for you? A He simply says he would try and get me that plea of assault in the second.

Q Did he tell you he would try and get you a light sentence? A No sir, he did not. I was satisfied with the plea of assault in the second.

Q Your plea then, was to some extent based upon the fact that you were afraid if you did not take the plea you would probably get the limit? A No sir, I simply did not want to stand trial, and I know I had no chance, and if I could get off with a plea in the second, I would take it.

Q I mean, was it not induced to some extent by fear of the sentence you could get if you did stand trial? A Certainly, I could not stand trial.

Q And you were afraid to stand trial? A Of course I was.

Q Because you had no lawyer? A Not that alone. I

CASE # 626

13

was not the guilty person individually. I did not take the man's watch.

Q You had the watch when you were arrested, didn't you? A Yes.

Q And I suppose Walsh gave you that? A He slipped it in my pocket when he came over there.

Q He slipped it in your pocket? A He certainly did.

Q Well, now you say that your plea of guilty and this confession that you claim to be making now, is not induced in any way by fear, is it, fear of the result if you do not? A Yes.

Q And have you also made some bargain with anyone as to what, if possible, your sentence would be if you told, what you might possibly receive as punishment? A I don't know until I get it.

Q Well, when you offered to plead guilty to assault in the second degree, what was said to you? A The District Attorney there says he would try and get it for me.

Q What else was said? A That's all.

Q Nothing else? A Then I was sworn and pleaded guilty.

Q Did they say anything to you about if you did plead guilty and you were convicted, you might get twenty years?

CASE # 626

A No sir.

Q Nothing like that? A No.

Q Do you know what the sentence is for robbery in the first degree? A Fifteen years.

Q You know that? A Yes.

Q And you know what the sentence, the limit of the sentence is for assault in the second degree? A I believe it is five years.

Q And that was the reason that you pleaded guilty to assault in the second degree, because you saved yourself a possible 15 years sentence? A That's one reason.

Q What are the others? A The other is because I was not guilty of taking this watch.

Q What are the others? A That's all.

Q Those are the only reasons? A Yes.

Q And then, the other reason is that you were a little sore on Walsh because he forsook you and employed his own lawyer, and his friends stuck to him and not to you?

A No.

Q Now, you did not know Walsh until you met him that night, did you? A I had met him a day or two previous to that.

Q Cut out the State's Prison business, now? A I ain't going to speak about that; that is an error on my

CASE # 626

15

part. I didn't mean to say that before. When I said that, my idea and reason was that --

Q No, I do not want it? A Well, I did not mean to do it.

Q I ask you now, getting right down to January, 1907?

A Well, I met him the day previous to this. He made an appointment to meet me for some reason or other, I don't know, but he said he wanted to see me, and that's how we met that night.

Q Well, the night before, when he made this appointment with you? A Well, that is the prison thing again, if I speak about that.

Q How many years ago was that? A Well, I ain't sure what year it was. It is quite a few back that I met Walsh.

Q How many, do you think? A I ain't got no idea.

Q Would you say it is ten years? A Well, it might be ten, might be eight.

Q So that, the fact is you think you met him eight or ten years previous in State's Prison? A I don't think it. I know it.

Q When you met him the night before this robbery, you knew him? A He recognized me first.

Q What did he say to you? A He spoke about it first.

Q Well then he made an appointment with you for the

CASE # 626

next night? A The acquaintance was renewed. This girl was in the house where I was, she was to be a witness in the case, and he thought that I was somebody that was keeping her from being a witness.

Q Now, isn't that the way he came to know you?

A That's the way he came to place me this time. Then we made an appointment, and we went out and drank together and we renewed the acquaintance.

Q Wasn't this appointment in connection with the case of a man named Gallagher, who was to be tried about that time in the Court of General Sessions? A It was connected with some man, but who the name was I don't know.

Q And he thought you were in some way trying to induce some woman not to testify? A He thought this woman that was in this room, where she had a furnished room, where I was, that I was the one that held her there.

Q And that is why he spoke to you? A Yes, he come in, to see who that party was.

Q And is not that the first time he spoke to you this year? A Yes, and a good many more years.

Q And he made an appointment with you for the next night? A Yes.

Q And the following day the appointment he made with you, he was there with the woman who was to be a witness

CASE # 626

17

next day in some case? A That was the time I met him on Eleventh Avenue; he was coming down to meet me then.

Q And later on, this barber went off with this woman?

A Yes.

Q And went into his room with her? A I didn't know where he went until Walsh showed me.

Q Well, he went away with her? A Yes.

Q Was the barber drunk? A Well, he had as much as I did.

Q How many did you have? A Well, I started on whiskey with Walsh, and I and this girl, we had two of the a piece. Then we come over in this other saloon, and met the barber there, and I drank lager and bass' ale, or something like that, and we had about six drinks apiece.

Q And the barber the same? A Well, I don't know how many he had before that, but he had as many as I did in there.

Q Now, you know that this case in which this woman was a witness was coming on the next day? A I didn't know anything about it until she told me.

Q That trial was on that day? A I don't know when the trial was.

Q So that later, when this barber went off with the woman, and you and Walsh were left alone, Walsh said he

CASE # 626

wanted to get hold of that woman, did he? A He didn't say "woman". He didn't say nothing about it, until we got on the street, then he says "Come on until I find that hussy". That's the way; woman was not mentioned.

Q He wanted to get hold of that woman? A It appeared that way to me.

Q He did not say he wanted to go and rob this man?

A No.

Q There was no talk about robbery? A No.

Q You and he did not arrange to go and rob that man?

A No.

Q Nothing of that kind? A No.

Q Do you know where this woman is? A I do not.

Q Do you know her at all? A I know her by seeing her that day.

BY THE COURT:

Q What is her name? A Well, as far as I understand from Walsh, he claims her name is Mamie Herrman.

Q Then you say that you and he could not make up your minds as to which was to knock at the door, could you?

A Yes, certainly.

Q Even at that time, had the idea suggested itself to him so that he confided it to you, about robbing this man? A No.

CASE # 626

Q And the first time there was any overt act, offence and robbery, was that when the door was opened and somebody struck this man? A When the barber and I fell in the hall, and I held the barber, then the robbery came off.

Q That is, after the assault? A Right there on the spot, when I fell with the barber, Walsh and took the barber's vest and pants.

Q Did you grab the barber by the throat? A I did.

Q Now, would it surprise you to know that the barber said that was all that happened, somebody grabbed him by the throat? A It would not surprise me what he says.

Q Was it dark then? A Yes.

Q How do you know what Walsh did to the man? A Because I am looking at him coming out with the vest and pants.

Q He came out? A Yes.

Q You did not? A I certainly did go right out after him.

Q He took the watch and chain from the vest and gave it to you? A He didn't give it to me. He slipped it in my pockets after, a considerable time after.

Q When did you know it was in your pocket? A When the officer searched me.

CASE # 626

Q That is the first time? A That is the first time.

Q Which pocket was it put into? A I don't know. You can leave that to the officer. I think it was in this pocket (indicating), and in this pocket (indicating), I had a small pen knife about that long (indicating).

Q And this man, without your knowledge, put this watch and chain into your pocket? A Anybody could do it, I suppose, under the circumstances.

Q I did not ask you that. Who did it? A He did, yes. I had that much drink in he could have took my coat off, almost.

Q Did you have somuch drink that you did not know what happened? A I know all that happened. But that watch was done so neat I did not know that.

Q Did you see any money taken? A Yes sir.

Q Who took the money? A Walsh.

Q You did not do a thing? A I held the barber.

Q Well, why, if you and Walsh had not made up your minds to rob this man -- A (Interrupting) Had not made up our minds? No, certainly.

Q Now, I say that, notwithstanding the fact that you and Walsh had not made up your minds to rob him, why did you assault the man when he opened the door? A When I fell with the barber?

CASE # 626

21

Q Well, how did you come to fall? A The blow that he gave him knocked him down along with me. The force of the barber coming to my body, I fell against the wall like that (indicating) and slipped, and I held the barber then until he came out.

Q You say this man struck him first? A Yes, as soon as the door was opened.

Q Where was the woman at the time? A She was in the room. I could not see her, but I heard her hollering.

Q Then, the two of you went out, and after -- A Yes, we went out in the street.

Q What became of the barber? A I don't know.

Q Who went out first? A Both of us came out together, and the officer that got us arrested, seen us coming out of the door.

Q Who left the room of the barber first? A I never was in the room. I was in the hall. I never crossed the door. I was in the hall with the barber all the time.

Q Which officer saw you come out of the doorway?

A This officer here (Mr. Hale).

Q Is that the one (indicating)? A Yes.

Q He saw you coming out? A Yes, because he was the only one that passed.

Q How far away from you was he? A From the curbstone

CASE # 626

to the hall door; that is, I guess about 14 feet at the most; the width of the sidewalk.

Q You say when you were searched you had a knife on you? A I had a small pocket knife, at the very biggest, opened and all, it would not cover five inches.

Q Did you see Walsh when he was searched? A No, I was taken in the back room, and lied, because I would not tell who was with me.

Q Well, Walsh was there at the time? A At what time?

Q In the station house? A I can't remember whether he was or not. He was there when I was in the station house, but where he was when I was in the back room I don't know.

Q And you know you and Walsh were arrested together?

A Yes, we walked to the station house together.

Q And when I say together, I want to ask you if you were or not arrested separately, and then Walsh came over and wanted to know what the trouble was? A The policeman took me and came over to this woman, and says "Is that the fellow?" And Walsh walked over there then.

Q Where was Walsh before that time? A Right with me, standing, and another young fellow.

Q And yet he took you alone? A He took me, and did not bother him at all, and walked over to this woman and

CASE # 626

the other officer and he says to her "Is that the fellow?" and she says "Yes".

Q About you? A About me.

Q And where was Walsh at the time? A He come over there then.

Q Where had he been, to come over from? A From where I was left, where we were all standing together on the opposite corner.

Q On the uptown corner? A On the northeast corner.

Q And at that time, the officer was on the downtown corner? A He was on the southeast corner.

Q And you and Walsh and Gallagher and somebody else?
A No Gallagher.

Q Well, you and Walsh and some other man? A Another man.

Q Who? A I don't know. He knows.

Q Do you know Gallagher? A I know him from seeing him come in to see this fellow in 54th Street, that's all.

Q Well, you say Gallagher was not standing there; you don't remember? A Gallagher was not there, no. There was only three of us.

Q Who was the third man? A Some other young fellow. That's all I know. He was to go to court the follow-

CASE # 626

ing morning.

Q You are positive it was not Gallagher? A I am positive.

Q How long were you standing there? A I guess from ten to fifteen minutes.

Q And after the officer was on the other side of the street? A Two officers and this woman.

Q That was how long after you and Walsh had assaulted this man? A I judge over an hour.

Q And the woman standing there? A I didn't say she was standing there; when we came back, after this depredation had been committed, from the saloon where we spent part of our time, when we came back in that direction, and stood on the opposite corner, we saw this woman with those policemen talking there, and we stood there looking at them, and looking at this woman. Then the officer comes over and he takes me, and Walsh comes over and wants to know what I am arrested for.

Q Walsh came over? A Yes, he came over and asked what I was arrested for. He didn't know himself. He was so drunk, I guess.

Q What did they say? A They didn't say nothing, and the barber come out and says I was the man, and they took the two of us to the station house.

CASE # 626

Q Why was Walsh arrested at that time, if the woman said you were the man? A I don't know.

Q Did anybody say anything at that time that implicated Walsh? A Not to my knowledge.

Q You were standing there? A Yes.

Q And although the woman said Mr. Walsh did nothing, and although the barber said you were the man that assaulted him, Mr. Walsh was also taken? A He didn't say I was the one that assaulted him at the time. He says I was the one, but what he meant by it I don't know at the time, but he said I was the one.

Q Was Walsh arrested because he was drunk? A No, he was arrested because he was drunk and he was arrested for being with me.

Q Just because he was with you? A Because he was in the whole thing with me, I should judge.

Q At that time nobody had said anything against Walsh, had there? A I don't know.

Q Did the officer say he had seen you both come out?
A He certainly did.

Q At that time? A I don't know whether he did that time or not. He did after.

Q Did he ask you whether you had the man's watch?
A No.

CASE # 626

Q He did not say a word to you at all? A When he got in the station house, all I remember the officer says that I have got the watch, and he was asked "Where did you get it" "I got it on tis fellow here", meaning me.

Q Did you have any money? A I may have had a dollar in silver. They gave it to me the next morning.

Q Didn't you hear the woman insist that Walsh had nothing to do with it? A She done that on the street.

Q Right there where you were arrested? A Yes.

Q And when she got to the station house didn't she say Walsh had nothing to do with it? A I believe she did.

Q And weren't you also present when the complaining witness said he was not sure he was the man? A Where was this?

Q At any time? A No. When the barber had his say, I couldn't hear him. He spoke very low.

Q Did you hear him say -- A (interrupting) The only thing I did hear him say is, if I remember right, was in 54th Street, he said Walsh was not the man.

Q That Walsh was or was not? A He said Walsh was not the man at his examination.

MR. MC GUIRE: That is all. The People rest.

MR. COHEN: I ask your Honor to strike out the testimony of this last witness, on the ground that

it is a confession that has been brought about by fear.

THE COURT: That rule, counsel, is ^{only} applicable where a confession is being used against the man who made it. In other words, if a man makes a confession, and that confession is produced by fear, it cannot be used against him.

MR. COHEN: Exception.

THE COURT: That is my impression of it. If you can show me any authority to control, I would like to have it.

MR. COHEN: I think I can, your Honor.

THE COURT: I will look at your authorities.

MR. COHEN: I take an exception. Now, I ask your Honor to strike out the testimony of the accomplice, on the ground that there is not that corroboration of his testimony which the law requires before the testimony of an accomplice can be used in evidence.

THE COURT: That is not ground for striking out the testimony. It may be a ground for moving to dismiss, on the ground that he has not been sufficiently corroborated.

MR. COHEN: I know, but I want to get my record

CASE # 626

clear, to get a ruling, so that I can have the record straight. That is denied?

THE COURT: Motion denied.

MR. COHEN: Exception. I ask your Honor to take from the jury the count of robbery in the first degree. Robbery in the first degree must be where the robbery is a result of a conspiracy, and there is no such proof here.

MR. MC GUIRE: Acting in concert.

MR. COHEN: Yes, acting in concert; the witness for the People goes on the stand, and whatever possibility there may have been of there having been a conspiracy, that entire presumption is destroyed by the testimony of the People's witnesses, ~~of~~ witness, who says that at no time was there ever a conspiracy or plan to rob this man; that he had nothing to do with the robbery; that he was thrown down by this man. That cannot be robbery in the first degree. This man's testimony is that he did not know they were going there to rob this man; that he did not go there for that purpose. That the defendant Walsh struck the complaining witness, and that the force of that blow threw to the ground the witness on the stand. There cannot be robbery in the first degree

on that. He says "I did not take any property; I did not take any money; this property was put in my pocket". Without conspiracy, there is no robbery in the first degree.

THE COURT: It is acting in concert, not conspiracy; it is concerted action.

The point you are making all turns upon the question as to whether, within the meaning of the law, this witness Kelly was an accomplice of Walsh at the time when Walsh took the property, if we assume that he did take it. In other words, robbery is the unlawful taking of personal property, not necessarily from the person, but in the presence of another, accomplished not necessarily by force or violence, but it may be fear of injury and where it is accomplished by fear, or by some one who is aided by an accomplice actually present, it constitutes robbery in the first degree.

Therefore, confining ourselves simply to the question as to whether the count of robbery in the first degree is made out, it depends upon whether the witness Kelly answers to the statutory definition of an accomplice of the defendant Walsh. If he does, robbery in the first degree is conceivably

CASE # 626

made out, assuming that the evidence is believed.

MR. COHEN: No, I respectfully disagree with your Honor.

MR. MC GUIRE: He was simply an accomplice for the purpose of assault, and he simply played his part in holding the barber.

MR. COHEN: Not for the purpose of robbery.

THE COURT: Counsel, let me make a suggestion to you: The first and fundamental proposition for you to consider is this, whether there is sufficient evidence in this case to warrant its going to the jury on the basis of sufficient corroboration of the testimony of this witness Kelly. In other words, regarding the counts in the indictment, is there enough corroborative proof to submit this case to the jury? Has this witness Kelly been sufficiently corroborated?

MR. COHEN: Yes, your Honor, but in my experience, I have always made my motions at this time just this way, making motions to strike out testimony and making motions to take away counts of indictments, and then one general motion to dismiss entirely what may be left. I want to find out what is going to be left in. Now, if your Honor denies

CASE # 626

the motion as to the robbery in the first degree, then I will proceed to the next count.

THE COURT: I will reserve decision on that.

MR. COHEN: very well. Now, your Honor, there is no proof as to value in this case, and they cannot make out grand larceny in the first degree.

MR. MC GUIRE: That is unnecessary for robbery.

MR. COHEN: You are discussing now the second count, grand larceny in the first degree.

THE COURT: Now, what does the District Attorney say in regard to that proposition?

MR. MC GUIRE: Well, that seems to be so.

THE COURT: I am disposed to sustain that motion. I will take away the second count in the indictment.

MR. COHEN: I ask your Honor to take away the count of assault in the second degree. There is not any proof, outside of the testimony of the accomplice, uncorroborated, as to who assaulted, as to which person assaulted the complainant. He says he don't know, and he says distinctly, as I recollect the testimony, that the defendant Walsh did not do it. I ask your Honor to take away the count of assault in the second degree, because the complaining

witness says that Walsh did not assault him. What is more, if it would be anything, it would be merged in the robbery count.

THE COURT: I am disposed to grant that motion. Why should I not, Mr. District Attorney?

MR. MC GUIRE: With an accomplice?

THE COURT: Yes.

MR. MC GUIRE: Assault in the second degree, it seems to me --

THE COURT: I will grant that motion.

MR. MC GUIRE: Then I ask that assault in the third degree be retained in the indictment. Under the indictment, a lesser degree may be retained, as the count in the second degree embraces the count in the third degree.

THE COURT: Ordinarily, that proposition is correct, as a matter of law. When a Grand Jury indicts for a crime with varying degrees, the case may be submitted to the jury on a lesser degree, and the count may be retained in the indictment for purposes of submitting on a lesser degree, but ^{the} same consideration, the lack of testimony bearing upon the commission of the assault in the higher degree, would likewise bear upon the lesser degree, and therefore take

CASE # 626

it out altogether. That motion is granted.

MR. COHEN: Now, your Honor, that leaves us the last count of criminally receiving stolen property.

MR. MC GUIRE: I consent to that.

THE COURT: Then that goes out.

MR. COHEN: Now, that leaves but one count in the indictment, the charge of robbery in the first degree, and as to that, I ask your Honor to take away from the jury, and direct the jury to acquit, on the ground that the People have failed to make out a case; on the ground that at this time there is no such testimony in the case as would permit a Court to submit it to the jury's consideration.

THE COURT: Counsellor, there are only two circumstances in this case, which would warrant its being sent to the jury, if they do warrant it -- I do not say they do, but there are just two. One, is the fact, that this man Walsh was in that room there late at night. I am talking now about the circumstances, outside of any connection with the testimony of the accomplice. One is the fact that he was in that room very late at night, and at or about the time when the crime was committed. The

CASE # 626

other is, that he was seen going out of that building at about eleven o'clock in the evening, and at about the time when the officers became informed that the crime had been committed -- not eleven, I think one o'clock, and then the fact that he was in company with Kelly at the time that the arrest was made, and that some of the stolen property was upon the person of Kelly at the time of the making of the arrest.

Now, the question is, whether those three circumstances, in addition to the testimony of the accomplice, do not make it a sufficient case to go to the jury.

MR. COHEN: Now, I will tell your Honor why, taking up the first count, taking up the point about the watch and chain, the watch and chain are not in evidence; there is no proof before this court that the watch and chain, even assuming that the accomplice's testimony was true, was not the watch and chain of this man, which he had a right to drop into the pocket of the complaining witness, or the other defendant.

THE COURT: There is some evidence in this case that when the complainant Foster returned to consciousness, he found himself in a room with a woman,

CASE # 626

and that this defendant, that the defendant was about ten feet away from him, and that he saw the defendant in the room. Now, I do not say that is sufficient, but there is some testimony to that effect.

MR. COHEN: Not unless he is positive of the identification. He says "I think it is the man."

THE COURT: The question is whether, taking the other circumstances with the evidence of the accomplice, there is enough to go to the jury.

MR. MC GUIRE: It seems to me clearly enough, the property was in his trousers or vest when he went to bed, and there is the fact that after the assault occurred the property disappeared. He does not know, as far as the complainant is concerned, how it disappeared, except that it was gone and the watch was shown to him by the officer, which the officer bears out.

THE COURT: Now, is there proof that the property disappeared after the assault?

I am rather inclined to think that the case will have to be taken from the jury; that there is not sufficient proof, outside of the testimony of the accomplice, of the commission of the crime by this defendant.

MR. MC GUIRE: There is the presence of the defendant in the room immediately after the assault, and leaving the room, and his meeting the complainant in the saloon before, and his arrest with Kelly; there is Kelly's story, and an accomplice need not be corroborated to such an extent that the corroboration in itself constitutes a complete case. All that is necessary for the corroboration of an accomplice is evidence that a crime has been committed, and that is what we have here clearly and absolutely, the crime has been committed.

THE COURT: No, I beg your pardon; a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

What legal evidence is there that the watch found by the officer was the one taken from the complainant?

MR. MC GUIRE: May I recall the officer upon that point?

THE COURT: Yes.

MR. COHEN: I object to the introduction of any further testimony on the part of the prosecution, on

the ground that they have rested, and that it is not fair now, nor is it proper or legal, to introduce further testimony, after the defendant has made his motion to dismiss the indictment and take it away from the jury.

THE COURT: I think I will have to sustain that objection. If the objection is made, I think it is legal. The reason for my hesitancy is, that this witness has been here during the discussion of this particular point, and has heard all that discussion.

The stenographer will read the testimony on that point.

(The stenographer reads the testimony as follows:)

"By Mr. McGuire:

"Q Go on? A E placed them under arrest and asked them if they had been in 448 Eleventh Avenue, and they denied it and said they had not been in there that night. I made a search of them and found the watch and chain on Kelly, which was subsequently identified by Mr. Foster as his property. Q Did you find anything on Walsh? A Only a knife; I found a long knife on Walsh.")

CASE # 626

THE COURT: Well, I think I would like to take the matter under consideration before deciding the motion, and I will adjourn the case until tomorrow morning, and in the meantime will take the matter under consideration.

The Court admonished the jury in accordance with Sec. 415 of the Code of Criminal Procedure, and adjourned the further trial of the case until tomorrow, February 8th, 1907, at 11 o'clock A. M.

CASE # 626

TRIAL RESUMED.

New York, February 8th, 1907.

MR. COHEN (After argument): I ask your Honor to direct the jury to acquit on the ground that the People have failed to make out a case; on the ground that there is no evidence in the case other than the testimony of an accomplice, whose testimony is not corroborated as required by law, which connects this defendant with the crime, and that for that reason there is no proper proof which would justify your Honor in submitting this case to the hazard of a jury on a count of robbery in the first degree; on the further ground that an essential element of proving property in the possession of the complaining witness at the time of the robbery has not been shown; on the ground that the People have failed to make out a case against this defendant.

THE COURT: I will deny your motion, Counsel, and give you an exception.

MR. COHEN: Well, now I ask your Honor to strike out the testimony of the defendant Kelly, on the ground that it has not been corroborated as required by law.

THE COURT: I deny your motion, and give you an

CASE # 626

exception.

MR. COHEN: Now, if the Court please, your Honor reserved decision on a motion, and that was, to have this case taken away from the jury, on the ground that the evidence, or a statement made by the witness Kelly would so prejudice the mind of the jury, by the statement that he had met this defendant in state's prison, that this defendant cannot have a fair trial. I make that motion all the more, if your Honor please, for the reason that as I said during the trial, and as I have now concluded, not to offer any evidence on behalf of the defendant, and as your Honor is aware, the rule requires and the rule is, that nothing shall be regarded as against this defendant by reason of the fact that he fails to take the stand in his own behalf. In view of the fact that this statement is in the record that this man has been in state's prison, that it would seem to require in all fairness to the defendant that he take the stand either to admit or deny it, that we are not permitted by reason of that statement being in the record to exercise the constitutional right which this man has of either taking the stand or not; that the condition of the

CASE # 626

record now is in such shape that he is prejudiced; that he cannot freely exercise the right to which he is entitled, either to take the stand or refusing to take the stand. For that reason, I ask your Honor to regard this as a mistrial, and remand the defendant for further trial.

THE COURT: I am disposed not to do that, but merely direct the jury to disregard that statement made at that time by that witness, and strike that answer, so far as it was not responsive, from the record. The conclusion which I reach is partly due to the fact that I am convinced that the statement made is not one which would necessarily or probably prejudice this defendant before this jury. It is also due to the fact that on your cross-examination of the witness, you elicited answers which were along the same line as that response to which you objected.

MR. COHEN: Yes, your Honor, but your Honor will remember I said two or three times not to refer to it. I asked him specifically not to mention it, and I remember the expression I used, which was "to cut it out"; those were the very words I used.

THE COURT: I will give you an exception, Counsel.

CASE # 626

MR. COHEN: I except. The Defendant rests.

MR. McGUIRE: The People rest.

MR. COHEN: If your Honor please, on the whole case I renew the motions made at the close of the People's case, to take away the count of Robbery in the first degree, on the ground that the People have failed to make out a case on the count of robbery in its first degree. I also renew the motion made at the close of the People's case to direct the jury to acquit, on the ground that the People have failed to make out a case of robbery in the first degree, or any other kind, which your Honor denies, and we respectfully except?

THE COURT: Motion denied. Exception.

MR. COHEN: Exception, and I renew my motion in which I asked your Honor to direct this to be regarded as a mistrial for the same reason which I urged at the close of the People's case.

THE COURT: Motion denied, and exception.

MR. COHEN: Exception.

CASE # 626

THE COURT'S CHARGE:

HON. THOMAS C. T. CHAIN, J.

THE COURT: Gentlemen of the Jury, the defendant Frank W. Walsh is before you, charged with the crime of Robbery in the first degree. That is the only crime with which he is now charged.

You, Gentlemen of the Jury, are the exclusive judges of the facts. The evidence is doubtless present to your minds, and it is from your recollection of the evidence and the rules of law to be stated to you in the charge that you are to determine the question of the guilt or the innocence of this defendant.

You are not to be influenced in the slightest by any argument which has taken place in court in your presence on questions of law. You are not to construe or consider any determination or decision reached by the Court after any such argument, as bearing in the slightest upon the question of what your verdict should be in this case. No decision by the Court of any question arising upon any motion of Counsel is in any sense any intimation by the Court of what view you should take of the evidence in this

CASE # 626

case. You gentlemen, as I said before, are the exclusive judges of the facts.

The defendant comes to the bar with the presumption of innocence. He is presumed to be innocent, and that presumption goes with him all through the case. The burden of proof is upon the prosecution at all times during the case. In order to render a verdict of guilty against this defendant, you must be satisfied beyond a reasonable doubt of his guilt of the crime charged in the indictment, or of one of the lesser degrees of that crime, as I will state the constituent elements of the crime and of the lesser degrees.

The defendant is not to be prejudiced in your minds in the slightest degree by the fact that he did not take the stand as a witness. That is his privilege. It is his privilege to contend through his Counsel that the facts established by the testimony or the inferences to be drawn from the testimony are not such and of such a character as to warrant at your hands a conviction, and the fact that he has not taken the stand, but has argued on the basis of the insufficiency of the testimony adduced, is in no sense to be taken against him when you come to con-

CASE # 626

sider the question of his guilt or innocence in the jury-room. No man is to be convicted on a guess or a surmise. The law requires proof --not necessarily the direct evidence of someone who has personally seen the occurrence throughout every stage of the occurrence, but if not by direct testimony, then by circumstantial evidence which is so persuasive that reasonable minds can reach but one conclusion respecting its cogency, its force, its effect, and that conclusion in the direction of and as establishing the guilt of the one who is at the bar in answer to the charge made by the People.

The law says, respecting the testimony of an accomplice, that a conviction cannot be had upon such testimony unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. In other words, the story of the accomplice, in and by itself, is not enough. The story of an accomplice, plus proof that a crime has been committed, is not enough. The story of the accomplice must be corroborated by evidence which connects the defendant with the commission of the crime. Otherwise, in the absence of such evidence, the verdict must be one of acquittal.

CASE # 626

Now, you are to bring the testimony in this case logically and systematically to the test of the requirements of the law. That is to say, on the one hand you have got to see what the law says must be proved in order to establish the offense, and then you must measure the testimony offered by that standard of proof which the law requires, and after that measuring you must see whether the testimony does measure up to what the law says must be proved; and if you say that it does not, then you must acquit, and if you say that you have a reasonable doubt as to whether it does or not, then you must acquit. If you say that you have a reasonable doubt as to whether it does or not respecting some single element which enters into the elements constituting the offense charged or the lesser degrees of that offense, then, in that event, you must acquit.

Now, I will read to you from the law those portions of the definition of robbery which are pertinent in connection with the evidence adduced in this case:

Robbery is the unlawful taking of personal property in the presence of another, against his will, by means of force or violence.

CASE # 626

Does the testimony in this case show beyond a reasonable doubt that there was an unlawful taking of personal property by this defendant?--That this defendant took personal property unlawfully from the presence of the complaining witness Foster?--That this defendant took personal property unlawfully from the presence of Foster by force or violence? Robbery in the first degree, which is charged in the indictment, is where such unlawful taking is accomplished by force, being aided by an accomplice actually present; and I have read you merely those portions of the section defining robbery in the first degree which by possibility may be considered applicable to the evidence as adduced in this case.

Was Kelly the accomplice of Walsh for the purpose of a robbery? Were they merely there together, if you shall say that they were there together, for some purpose so far as they were unitedly concerned, other than robbery? Was robbery the independent thought of one of them, and not of both of them? Was it an act which was done by one of them without the other being an accomplice to it?

To hold the defendant Walsh guilty of the crime of robbery in the first degree, you must be satisfied

CASE # 626

beyond a reasonable doubt, from the testimony in this case, that the robbery was effected by the aid of an accomplice actually present.

The law says that under certain circumstances, where a crime is divided into different degrees, a jury may convict of a lesser degree than that charged in the indictment; but a verdict in a lesser degree cannot be rendered simply because a jury do not believe from the evidence that the defendant is

guilty in the higher degree, unless they also believe, as an independent fact, that he is guilty in the lesser degree; and the same rule respecting the presumption of innocence applies to the lesser degree as to the greater, and the same rule respecting the burden of proof, and the same principles must be applied in the testing of the sufficiency of the evidence.

Robbery in the second degree is such unlawful taking, when accomplished by force, but not under circumstances amounting to robbery in the first degree, by the use of violence, or by putting the person robbed in fear of immediate injury. When force is employed, the degree of force is immaterial. The force must be employed, however, either to obtain

CASE # 626

or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery.

The taking of property from the person of another is robbery ----I do not charge that, because there is no evidence here that any property was taken from the person of the complaining witness.

MR. COHEN: Will your Honor say something about the presence of the property being necessary; that he had to have it there before it could be taken? The jury must find that the property was there, before there could be robbery.

THE COURT: You have to find, Gentlemen of the Jury, as a substantive fact from the whole testimony, that the complaining witness had, at the time of the occurrence or alleged occurrence set forth in the indictment, property of which he could have been robbed at the place where the robbery is said to have taken place.

Gentlemen of the Jury, I will only add this in conclusion: This is perhaps peculiarly a case for the exercise of intelligent, keen and discriminating judgment respecting the sufficiency of the evidence

CASE # 626

regarding the charge laid in the indictment. It is a case for the banishment of all prejudice. It is a case for an analytical, careful, thoughtful consideration of the testimony. It is a case where, in view of the charge made and the circumstance that no testimony by word of mouth has been produced here for the defendant, coming from witnesses subpoenaed by him, the sufficiency of the evidence adduced by the prosecution has to be tested with care and discriminating judgment, to see whether every single necessary step in the making out of that degree of proof which the law says must be made out in order to convict, has in point of fact been done to such an extent that no reasonable doubt exists in the mind of any juror respecting the sufficiency of the evidence itself.

Are there any requests to charge?

MR. COHEN: No sir, no requests, and no exceptions.

THE COURT: Gentlemen of the Jury, you may retire.

The jury retired at 2:55 P. M.

The jury returned to the court room at

CASE # 626

4 o'clock P. M., and stated that they were unable to come to an agreement.

THE COURT: I want to ask you one question: Is there any reasonable prospect, in your opinion, of the jury agreeing, Mr. Foreman?

THE FOREMAN: No sir.

THE COURT: Is there any point upon which you want further enlightenment by the Court, or have you understood the charge as made?

THE FOREMAN: There is nothing that I know of, your Honor.

THE COURT: Then I will discharge the jury. The jury are discharged from further consideration of this case.

CASE # 626