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State of Utah v. Albert Edmund Barlow : Brief of Appellant

Utah Supreme Court

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No. 8533

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

AUG 5 - 1956

STATE OF UTAH,
Plaintiff and Respondent,

vs.

ALBERT EDMUND BARLOW,
Defendant and Appellant.

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

ALBERT EDMUND BARLOW,
Defendant and Appellant.

No. 8533

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Albert Edmund Barlow was on the 31st day of October, 1955, in Salt Lake County, Utah, charged with the crime of unlawful cohabitation in that in Salt Lake County, between April 30, 1952, and October 31, 1955,

“the said Albert Edmund Barlow, at the time and place aforesaid did unlawfully cohabit with more than one person of the opposite sex, to-wit: Maureen Owen, Amanda Kate Kilgrow, Vio Frazer”. (R. 16)

The defendant was bound over for trial upon waiver of preliminary hearing (R. 1), and defendant appeared for arraignment December 23, 1955 (R. 17). On Decem-

ber 31, 1955, defendant demanded a bill of particulars (R. 19-20), which was furnished (R. 23-24), together with an amended information (R. 21-22), on the 13th day of January, 1956. Defendant filed a motion to quash (R. 25-26) on four grounds on the 14th day of January, 1956, which was heard on the 19th day of January, 1956, and denied by the court. Defendant on the 21st day of January, 1956, entered a plea of not guilty (R. 29). The case came on for hearing before a jury on the 12th day of March, 1956.

During the impanelling of the jury the court denied a motion of the State to strike Juror McMurrin on the basis of admitted prejudice (R. 47-48) and a motion of defendant to strike Juror Ohran for cause on the basis that he had predetermined the defendant's marital status, an essential element of the case (R. 51-53). The court further denied defendant's motion to discharge the jury on the district attorney's voir dire as to plural marriage (R. 54) and the district attorney's reference to the three women named in the information as defendant's "wives" (R. 50-51). The court further refused to strike for cause Juror Nelson on the ground that his employment arose directly from the L.D.S. Church (R. 61) and denied defendant's challenge to the panel on the basis that ten of the twelve were of the L.D.S. faith (R. 62).

The case proceeded to trial after both the defendant and the State had exhausted their preemptory challenges. The State proceeded to put on its evidence, and at 2:00 p. m. on March 13, 1956, the defense rested.

The court released the jury for thirty minutes without supervision after all the evidence was in, prior to instructions. Defendant requested Instructions Nos. 1 to 6 inclusive (R. 245-252). Defendant excepted to the court's refusal to give requested Instruction No. 1 (R. 246). The court gave its instructions covering the offense, together with stock instructions (R. 253-262). The court thereafter modified Instructions Nos. 3, 5 and 10 (R. 234-235). The defendant excepted to the court's Instructions Nos. 3, 5 and 10 and the modification thereof (R. 235-236). The State excepted to Instructions Nos. 6 and 10. Arguments were presented, the jury retired and returned a verdict of guilty. Defendant was sentenced by the court for an indefinite period not to exceed five years in the State prison.

Within the time provided by law, defendant appealed to the Supreme Court of the State of Utah.

STATEMENT OF FACTS

Albert Edmund Barlow married Kate Kilgrow (Amanda Kate Barlow) on October 23, 1922 (R. 69 and Exhibit 1), said marriage resulting in several children. Thereafter he lived with and had issue by Maurine Owen and Vio Fraser, the evidence not showing the beginning dates of either relationship. Barlow was convicted of unlawful cohabitation with these three women in May, 1944, and sentenced thereon in 1945 (R. 74). At the time of his release from the Utah State prison on parole Barlow was informed by the parole board that he was under the duty to support and maintain his children (R.

260). At all times after Barlow's release, the three families lived in separate and widely segregated homes. Amanda Kate Barlow lived at 25 West 6025 South, Murray, Utah, in Salt Lake County (R. 78), and at Bluebell, Duchesne County (R. 221). Vio Fraser lived at 50 Granite Avenue, Salt Lake County (R. 195), and in Mountain Home, Duchesne County (R. 199). Maurine Owen lived at 1538 South 3d East, Salt Lake City and County, during the entire period (R. 183).

Several witnesses had seen Barlow around each of the three homes at intervals during the period in which the crime is charged. With regard to 25 West 6025 South, see the testimony of Bruce Andreasen (R. 75-86), Shirley Broadbent (R. 86-95), David Eccles (R. 95-101), Alhona Barlow (R. 102-109), and David W. Barlow (R. 110-119). With regard to 1538 South 3d East, see testimony of Evelyn Clampitt (R. 126-144), and Annie M. Roll (R. 159-166), Sarah Arpin (R. 166-169), and Edmund Barlow (R. 170-176). With regard to 50 Granite Avenue, see testimony of Vio Fraser (R. 194-200) and David W. Barlow (R. 110-119).

The testimony of the witnesses showed Barlow at each of the places at various times helping care for the premises, controlling the children, and on occasion bringing groceries and supplies to the houses. With respect to 1538 South 3d East, the testimony of Evelyn Clampitt indicates Barlow dined there on occasion.

The State produced 27 birth certificates, which were entered with two exceptions, upon the withdrawal of

objection as to materiality by the defendant. Only two of these birth certificates concerned children born or conceived within the period charged in the information, both of these children being born to Maurine Owen.

The testimony of several witnesses, including David W. Barlow, Arlene Mitchell and Vio Fraser, showed the defendant and at least two of the women with whom he is accused of having cohabited, to-wit, Amanda Kate Barlow and Vio Fraser, to have lived in Duchesne County during a portion of the time charged in the information and in different places in Duchesne County.

The court allowed, over defendant's objection, a plethora of hearsay testimony by witnesses consisting of neighbors of the three abodes in Salt Lake County regarding statements made to them or overheard by them from the children and alleged cohabitees with the defendant and out of the presence of the defendant.

The evidence shows beyond any doubt that the defendant continued after his former conviction to care for, maintain, support and educate his children, but there is no evidence of cohabitation or holding the three women set forth in the information out as wives during the period charged in the information.

ASSIGNMENTS OF ERROR

I

The court erred in denying defendant's motion to quash and more particularly Paragraph 1:

“The information does not charge the defendant with the commission of an offense,”

and Paragraph 3:

“That there is more than one offense charged, except as provided in Section 77-21-31, U. C. A., 1953, to-wit:

‘a. Cohabiting with Maurine Owen and Kate Kilgrow during the period alleged in the information.

‘b. Cohabiting with Maurine Owen and Vio Frazer during the same period.

‘c. Cohabiting with Vio Frazer and Kate Kilgrow during the same period.’ ”

II.

The court erred in allowing in evidence facts outside of the period charged in the information.

III.

The court erred in allowing in evidence hearsay statements and conclusions arising from conversations not in the presence of the defendant.

IV.

The court erred in giving Instruction No. 2, in that said instruction, together with other instructions, does not inform the jury of the elements of the crime charged.

V.

The court erred in giving Instruction No. 5, in that it is ambiguous, entirely negative, and construed together

with Instruction No. 2 tends to confuse the jury.

VI.

The court erred in failing to define the word, "cohabitation," to the jury.

VII.

The court erred in denying defendant's challenge for cause to Juror Ohran.

VIII.

The evidence, in view of the instructions, is insufficient to show cohabitation between defendant and any two of the women charged during the period set forth in the information.

IX.

The court erred in amending Instructions Nos. 3, 5 and 10 after the original submission to the jury.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH, AND MORE PARTICULARLY PARAGRAPH 1 THEREOF, THAT THE INFORMATION DOES NOT CHARGE THE DEFENDANT WITH THE COMMISSION OF AN OFFENSE, AND PARAGRAPH 3, THAT THERE IS MORE THAN ONE OFFENSE CHARGED. (Assignment of Error Nos. 1 and 9).

Said errors will be discussed separately.

A.

The information does not charge an offense in that the statute, Section 76-53-2, Utah Code Annotated, 1953, is so ambiguous and uncertain that it does not inform the public as to the crime it charges, nor advise the court in directing the trial of the matter. It is in violation of defendant's constitutional rights under Amendments V and XIV of the Constitution of the United States. The ambiguity arises from the entire lack of a time factor.

The section so far as is applicable to this point reads as follows:

“If any person cohabits with more than one person of the opposite sex, such person is guilty of a felony.”

This court has from 1896 to the present date given many and varied definitions of the word, “cohabit,” as used in this law, the sum and substance of them being to the effect that “cohabit” was intended by the legislature for the purpose of this legislation to come under the second dictionary definition of that word, i.e., “to live together as man and wife; or ostensibly to hold one of the opposite sex out to the world as one's spouse.”

U. S. vs. Cannon, 4 U. 122, 7 P. 369;

U. S. vs. Snow, 4 U. 295, 9 P. 686;

State vs. Jessup, 98 U. 482, 100 P(2) 969;
State vs. Barlow, 107 U. 292, 153 P(2) 647;
U. S. vs. White, 4 U. 500, 11 P. 570.

Nowhere in the law itself is a time factor considered. There is nothing in the title nor in the body of the law to connote the necessity of cohabitation with more than one person of the opposite sex simultaneously or within a reasonable period of time; in fact, the only legislation putting a time factor to this section is the omnibus limitation of actions as to felonies, which makes a limitation on prosecution of felonies not otherwise enumerated of four years.

Let us ask: Is the person who divorces his or her spouse and then marries again within four years after living with the first spouse guilty of a felony? He or she is not guilty of polygamy as the first marriage is ended in law prior to entering into the second, but is he or she not guilty of a violation of Section 76-53-2? And what of the widow or widower who seeks solace or financial security by a second marriage within the felony limitation period following the demise of the former spouse? Is he or she not subject to prosecution both unwittingly and unknowingly?

This line of reasoning has theretofore been pondered by this court in *State vs. Jessup*, 98 U. 482, 100 P(2) 969, another Utah unlawful cohabitation case, wherein this court on page 971 states:

“The definition of cohabitation given by our statute is so general that to limit the information to it, word for word, states no more than a class

of crimes. In fact, it is gravely questionable whether the statute states the offense it was intended to cover. It would appear that some attention should have been given to the element of time. If a man marries and lives with a second wife after the death of, or divorce from, his first, he falls within the definition of the statute; yet all must concede that it was not the intention of the Legislature to make such relationships the bases of criminal offenses."

The defendant in the instant case was found guilty under this same statute in 1944 (R. 215-217), and it is apparent by the finding of the jury that his efforts to support his children show a continuity of a holding out of three ostensible marital relationships ad infinitum, or at least until the children of at least two of the families are reared and no longer living with their mother.

The court, in *State vs. Musser*, U., 223 P(2) 193, quoting Justice Jackson in *Musser et al. vs. State of Utah*, 333 U.S. 95, 68 Sup. Ct. 397, 92 L. ed. 562 states:

"Legislation may run afoul of the due process clause because it fails to give adequate guidance to those who would be law-abiding to advise defendants of the nature of the offense with which they are charged or to guide courts in trying those who are accused."

In that case also, the matter arising from an unlawful cohabitation and teaching of polygamy situation, the court held that our conspiracy law, Section 76-11-1(5), Utah Code Annotated, 1953, was void for vagueness and uncertainty, and that it did not inform people

under the jurisdiction of that law as to what constituted the crime of conspiracy. The instant statute would appear to be even more vague and uncertain in that it in no way whatsoever informs the public nor any of them as to the time element, if any, intended by the legislature during which a person could hold out only one person of the opposite sex to be his spouse.

The question would appear to be whether the statute is so vague and ambiguous and indefinite that it fails to define the offense attempted to be charged, and to give reasonable standards for determining by the public the nature of the crime they are prohibited from violating, and by the court as a guide for determination of guilt. Can it be said in view of the wording of Section 76-53-2 that a person living with one person of the opposite sex in 1952 and with another in 1955 is not guilty of an offense, while a person, regardless of marital status, who holds one person of the opposite sex out to be his or her spouse in January of a given year and holds another out as his or her spouse in December of the same year is guilty? Must the cohabitation be simultaneous, concurrent, or is a holding out to the world of two persons as spouses sufficient any time within the four-year limitation period whether concurrent, within a short period of time, or separated by three years and eleven months? The statute gives no guide or limitation whatsoever.

B.

Defendant further contends that the amended information (R. 21-22) and the bill of particulars (R. 23-

24) charge the defendant in one count with the commission of three separate and distinct crimes, to-wit:

a. Cohabiting during the period charged with Amanda Kate Barlow and Maurine Owen;

b. Cohabiting during the period charged with Amanda Kate Barlow and Vio Fraser;

c. Cohabiting during the period charged with Maurine Owen and Vio Fraser.

And the court by its amendments to Instruction No. 3, subparagraph 1:

“That on and between April 30, 1952, and the 31st day of October, 1955, Albert Edmund Barlow did cohabit with more than one person of the opposite sex, to-wit, with any two or more of the following: Maurine Owen, Amanda Kate Kilgrew, and Vio Fraser” (R. 234 and 254),

and Instruction No. 10 (R. 258), where the court amended the instruction by adding, “any two or more of the three women,” to the original instruction, thereby literally and concisely instructing the jury that it need not find the defendant guilty of cohabiting with three women as charged in the information, but of cohabiting with any two of said three.

The court further in its verdict (R. 261-262) does not set out guilty of cohabiting with A and B, A and C, or B and C, but merely guilty as charged, or, in the alternative, not guilty, thereby affirming defendant's contention on his motion to quash that there is more than one crime charged.

This is in effect a method of procedure wherein the State charges: "We accuse the defendant of breaking the law by cohabiting with A, B, and C, etc. We do not know which of the women he cohabited with, but if we prove to your satisfaction that he cohabited with any two of the women set forth in the information during the three years period charged (and that cohabitation need not cover the same period), you may find him guilty as charged."

Section 77-21-31, Utah Code Annotated, 1953, entitled "Joinder of Offenses," states:

"The information or indictment must charge but one offense, but the same offense may be set forth in different forms under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count; provided, that an information or indictment for larceny may contain also a count for obtaining money by false pretenses, a count for embezzlement, and a count for receiving or buying stolen property, knowing it to be stolen; that an information or indictment for forgery may contain a count for uttering a forged instrument, knowing it to be a forgery; that an information or indictment for robbery may contain a count for larceny; that an information or indictment for burglary may contain a count for housebreaking and one for larceny, and an information or indictment for housebreaking may contain a count for larceny; that an information or indictment for rape may contain a count for carnal knowledge of a female under eighteen years of age, and that an information or indictment for rape or assault with intent to commit rape, or

carnal knowledge of a female under eighteen years of age, or attempt to commit the crime of carnal knowledge of a female under eighteen years of age, or crime against nature upon any person, or attempt to commit the crime against nature upon any person, may contain also a count for indecent assault.”

It will be noted that the situation at hand does not come within the exceptions listed *supra* nor is the information drawn in more than one count. In *State vs. Jensen*, 74 U. 527, 536, 280 P. 1046, this court goes so far as to hold:

“Under this section, where two or more offenses arise from the same transaction, each punishable as a separate crime, whether all arise from a single act or from successive parts of a whole transaction, they cannot be joined unless permitted by an exception to the prohibition against uniting the offenses or unless they bear the relation of a lesser involved to a greater offense, or the component parts of the crime sought to be charged are themselves crimes.”

The situation in the instant case purporting to arise from various transactions connected only by the alleged presence of the defendant at each transaction must constitute three possible crimes, and all transactions are set forth in one count in the information in distinct violation of Section 77-21-31.

It is plain that under the information in the instant case upon such a finding the jury, if there had been proper evidence, could have determined that the defendant cohabited with one of the women without cohabitation

with either one of the other two of the women, or that he cohabited with any two of the women with the third not being necessary to the case at all. The question arises in one's mind after a thorough reading of the information and the instructions of the court, did the jury find Albert Edmund Barlow guilty of cohabiting with all three of the women in the information or with only two of them, and, if so, which two?

The writer urges that the information contains a joinder expressly prohibited by Section 77-21-31, Utah Code Annotated, 1953, and that the court's denial of defendant's motion to quash was reversible error.

POINT II.

THE COURT ERRED IN DENYING DEFENDANT'S CHALLENGE FOR CAUSE TO JUROR OHRAN. (Assignment of Error No. 7).

In questioning the jury panel on voir dire, Juror Ohran stated he was acquainted with the defendant and defendant had worked for him (R. 39). Later on voir dire on the district attorney's questioning of Juror Ohran regarding his knowledge of defendant and his family life, Juror Ohran by his answers explicitly admitted a pre-conceived opinion as to defendant's marital status:

"MR. ANDERSON: Further, Your Honor, I would like know whether or not Mr. Ohran who apparently has had some acquaintance with the defendant, during that acquaintance became familiar with any of the circumstances relating to Mr. Barlow and his family life that might in any way affect his judgment, one way or the other?

"MR. OHRAN: No, I didn't know at that time. Since that time and I guess I have been a little acquainted with it we have had a girl who is in a similar circumstance work for us and talked about it" (R. 51).

On the basis of this answer, defendant challenged for cause on the ground of preconceived opinion. The following questions and answers followed:

"THE COURT: Mr. Ohran, do you have any knowledge that you would act upon in the trial of this matter, independent from what the evidence might or might not show?

"MR. OHRAN: No. I stated I would judge it on the weight of the evidence, but I do have that knowledge of several people.

"THE COURT: Whatever knowledge you have in reference to Mr. Barlow is through hearsay and gossip that you may have heard?

"MR. OHRAN: And what I have read in the papers.

"THE COURT: And what you have read in the papers?

"MR. OHRAN: Yes.

"THE COURT: And at this time do you still indulge, so far as he is concerned, in the presumption of innocence and presume that he is innocent until he would be proven guilty beyond a reasonable doubt?

"MR. OHRAN: Oh, I think I would.

"THE COURT: Well, I mean is your feeling towards Mr. Barlow at this time that he is pre-

sumed innocent until he is proven guilty beyond a reasonable doubt?

"MR. OHRAN: Yes. I would judge that.

"MR. HATCH: I would ask the Court to ask Mr. Ohran if prior to this time he has formed an opinion as to Mr. Barlow's present marital status?

"MR. OHRAN: No. Just what has been in the paper. I think every informed person in reading it they assume that there is something connected to it.

"THE COURT: Well, Mr. Ohran, you have served as a juror here many times, haven't you, in criminal cases?

"MR. OHRAN: Yes sir.

"THE COURT: And you have heard my statement to the effect that the fact the defendant is charged by the information of the District Attorney is no evidence of his guilt. Would you treat Mr. Barlow with that legal proposition in this matter?

"MR. OHRAN: I think I would.

"THE COURT: And the fact that he has been charged you would not assume from that, that that was any evidence of his guilt or that he was guilty?

"MR. OHRAN: No.

"MR. ANDERSON: Your Honor, the State would resist the challenge that was made. Of course we would leave it up to Your Honor but I think in fairness I should state that.

"MR. HATCH: I should like to ask him one more question.

"THE COURT: You may.

"MR. HATCH: On what basis do you make the statement 'That we had a girl working that was in a similar position or condition' if you have formed no opinion?

"MR. OHRAN: Well this girl's husband was put in jail for that about two months ago.

"MR. HATCH: On the basis of that statement I will renew my motion to challenge for cause.

"THE COURT: Mr. Ohran if you were in the position of this defendant and the State of Utah would you be willing to submit your case to eight men like yourself?

"MR. OHRAN: I think I would.

"THE COURT: I don't think he shows any impartiality" (R. 52-53).

The court denied the challenge by the words, "I don't think he shows any impartiality" (R. 53). The challenge was made not on the basis that the juror was partial, prejudiced or biased, but on the basis he had formed an opinion of the defendant's family situation prior to trial, and that opinion was an opinion of guilt, as evidenced by the following questions and answers:

"MR. HATCH: On what basis do you make the statement 'That we had a girl working that was in a similar position or condition' if you have formed no opinion?

"MR. OHRAN: Well this girl's husband was put in jail for that about two months ago" (R. 53). Thereafter the jury was impanelled after defendant

had exhausted all his preemptory challenges, and Mr. Ohran was a member of that jury.

Section 77-30-19(8), Utah Code Annotated, 1953, states:

“A challenge for implied bias may be taken for all or any of the following causes, and for no other: * * *

“(8) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.”

The defendant contends that in the voir dire set forth supra the juror, Ohran, showed an unqualified opinion that the defendant was “in the same situation as the husband of the girl working for him who had been put in jail for that about two months ago.” While the juror does not say in so many words that he is of the opinion that the defendant is guilty, he indicates he has a girl working for him in the same situation. The court expresses the point at Record 53, line 27, where he states: “I don’t think he shows any impartiality,” when the entire substance and value of our system of trial by jury is the selection of jurors who show an extreme degree of impartiality.

POINT III.

THE COURT ERRED IN GIVING INSTRUCTIONS NOS. 2 AND 5, AND IN FAILING TO DEFINE THE WORD, “COHABITATION,” TO THE JURY. (Assignments Nos. 4, 5 and 6).

The court in instructing the jury as to the elements and nature of the crime of unlawful cohabitation sets forth in Instruction No. 2:

“For the purpose of this case unlawful cohabitation is defined as follows: If any person cohabits with more than one person of the opposite sex such person is guilty of a felony” (R. 254),

and in Instruction No. 3, paragraph 1, uses the wording, “did unlawfully cohabit with more than one person of the opposite sex, to-wit: with two or more of the following,” and then goes on in Instruction No. 5 with its only attempt at definition of the word, “cohabit,” wherein it states:

“You are instructed that the gist of the offense charged of unlawful cohabitation is proved by facts showing a course of conduct, upon the part of the defendant with more than one person of the opposite sex, that to all outward appearances convinces beyond a reasonable doubt, that the parties are living together as husband and wife, and that holding more than one woman out to the world as his wife is sufficient to constitute the offense. And it is not a necessary element of such proof to show sexual intercourse, nor actual attempted marriage, but such matters may be considered by the jury in making a determination of the facts, if shown by the evidence.

“To be cohabitating it is not necessary that the man actually dwell with the women, nor is it necessary that he take his meals with her, nor is it necessary that they be under the same roof, or live in the same house, or that he see her a certain number of days or nights, nor is cohabitation proven by a mere showing of isolated or occasional acts of sexual misconduct * * *”

The effect of these instructions is to purportedly inform the jury of what unlawful cohabitation is, the

court in Instruction No. 2 stating that the crime is "any person who unlawfully cohabits with two or more persons of the opposite sex." Then the court goes forward in defining unlawful cohabitation in a manner which is entirely negative, which sets forth what is *not* necessary to show unlawful cohabitation, but nowhere defines the word, "cohabit," or "cohabitation," and nowhere sets forth the affirmative elements, if any, necessary to constitute cohabitation.

This court and the territorial court before it have defined the word, "cohabit," in various ways, the number of definitions being almost coextensive with the number of illegal cohabitation actions before this court. The sum and substance of the impression left from reading all of these cases indicate "cohabit," as the legislature intended its use in the statute on which the information in this case arises, was meant to live together as man and wife, or to ostensibly hold one of the opposite sex out to the world as one's spouse.

The court in the case at bar states in Instruction No. 5 (R. 256):

"And it is *not* a necessary element of such proof to show sexual intercourse, *nor* actual attempted marriage, but such matters may be considered by the jury in making a determination of the facts, if shown by the evidence.

"To be cohabitating it is *not* necessary that the man actually dwell with the women, *nor* is it necessary that he take his meals with her, *nor* is it necessary that they be under the same roof, or live in the same house, or that he see her a

certain number of days or nights, *nor* is cohabitation proven by a mere showing of isolated or occasional acts of sexual misconduct.”

The portions of Instruction No. 5, together with Instruction No. 2, set forth to the jury what cohabitation is *not*, but reading Instruction No. 5 by itself and Instruction No. 2 by itself, or the instructions as a whole, it is impossible to determine what unlawful cohabitation is, and from what proof or evidence it may be found.

The court in Instruction No. 3, paragraph 1, which is the first element of the crime, requires the jury to find beyond a reasonable doubt that Albert Edmund Barlow did unlawfully cohabit with more than one person of the opposite sex during the period charged, which constitutes merely a rewording together with dates and the name of the defendant of the language of the statute set forth in Instruction No. 2. Instructions Nos. 6, 7 and 8 implicitly set forth that the act of a person in carrying forward his legal and moral duty of caring for and assisting in the upbringing and support of his children does not constitute illegal cohabitation nor in itself evidence thereof.

Defendant contends, despite the language of *State vs. Barlow*, 107 U. 292, 153 P(2) 647, at page 651, citing *U. S. vs. Musser* and several other cohabitation cases under the Edmunds Act, that the word, “cohabit,” as used in our statute is a technical word and not a word of general usage. It is a technical word in that it was placed in the statute and the statute was passed for the admitted purpose of stamping out the practice of polygamy within

the Territory and later the State. The trial court has seen fit to define the word, "cohabit," rather than to stand on the words of the statute, and in doing so gave Instruction No. 5. The Supreme Court of Oklahoma in *Martin vs. State*, 289 P. 787, holds the definition of an offense in a charge must inform the jury what facts are necessary to justify a conviction. Instruction No. 5 merely tends to confuse the jury by stating what facts are not necessary to show cohabitation.

The Supreme Court of Nevada in *State vs. Green*, 202 P. 368, states:

"Instructions should be so unequivocal that a jury of laymen can experience no doubt as to their significance."

The Supreme Court of Idaho in *State vs. Wheeler*, 220 P(2) 687, states:

"Instruction that is apt to confuse jury or requires an involved explanation and is ambiguous should not be given."

We contend that the court having chosen to define "cohabitation" and by doing so in a negative aspect is bound by its instructions, and Instruction No. 5, together with Instruction No. 2, Instruction No. 3, paragraph 1, and Instructions Nos. 6, 7 and 8, has so confused the jury that the layman can experience nothing but doubt as to the significance of the words, the facts and the evidence necessary to prove them.

POINT IV.

THE COURT ERRED IN ALLOWING IN EVIDENCE TESTIMONY AND EXHIBITS OUTSIDE THE PERIOD

CHARGED IN THE INFORMATION, AND IN ALLOWING TESTIMONY BASED ON HEARSAY AND CONCLUSIONS. (Assignments of Error Nos. 2 and 3).

A.

The court erred in allowing in evidence testimony and exhibits outside the period charged in the information. The information as amended charges defendant with the crime of illegal cohabitation between the dates of April 30, 1952, and October 31, 1955 (R. 21), and the court in its Instruction No. 10 instructs the jury:

“You are instructed that the conduct of the defendant and other persons showing his relationship, if any, to Kate Amanda Kilgrow, Maurine Owen and Vio Fraser, *between the dates set forth in the information* is the only evidence that may be considered by you in this matter, and evidence of cohabitation or lack thereof during any other period is incompetent and immaterial, and that unless you find the defendant to have cohabited with any two or more of the three women set forth in the information *between the dates set forth in the information*, you must find the defendant not guilty.”

Despite the limitation and the wording of Instruction No. 10, the court allowed in evidence over the objection of defendant the following documents and testimony relative to said documents:

1. Exhibit 36, a school census card containing alleged birth dates of nine children outside of the period charged, this evidence being also secondary evidence based on hearsay as discussed in Part B of this point (R. 157-158), and duly objected to by defendant.

2. Exhibits 37 and 38, school census cards containing information which is wholly outside of the period charged in the information, the latest date thereon being April 20, 1952, also over the objection of defendant (R. 189).

3. Exhibit 39, medical records and testimony relative to said records (R. 204-205) over the objection of defendant, although seven of the eight pages of this exhibit refer to times and dates outside of the period charged, and sheet number one of the exhibit is immaterial as to the defendant. Further, with the exception of testimony regarding visits to children of the defendant by the defendant at 50 Granite Avenue, Exhibit 39, together with Exhibits 37 and 38 (school census reports discussed in 2 above), there is nothing in the record to connect the defendant with Vio Fraser during the period charged.

4. The court allowed Mrs. Annie Roll to testify with reference to the *wives* of the defendant and conversations relative thereto over the objection of the defendant (R. 161-163), and relating to times outside the period charged in the information by several years.

B.

The court admitted hearsay evidence and conclusion evidence over the objections of the defendant that was prejudicial to the defendant.

Despite the court's Instruction No. 10 and the objections of the defendant, the court allowed much evidence consisting of hearsay and conclusions. While instances of

such evidence run all through the record, the following examples are outstanding:

1. At page 88 of the record and subsequent thereto, the court allowed the witness, Shirley Broadbent, to testify regarding a conversation with a child as to a genealogical report and as to whom the child considered its mother and father, despite the fact that the child was born prior to Barlow's incarceration in 1945 as stipulated by counsel.

2. The court admitted Exhibit 15, the copy of a birth certificate of a female child dated March 13, 1955, over the objection of the defendant (R. 147-149), although testimony of Doctor Andresen (R. 147-149) indicates that information thereon as to the parents of the child was obtained from a person or persons other than the defendant. Quoting from the record:

“Q. At that time did you have occasion to talk with the defendant concerning the paternity and maternity of this child?

“A. No. While waiting—”

3. The court allowed Mrs. Arpin (R. 167-168) to testify as to knowing the children from hearing their mother call them, and further to testify as to the name of the mother from what she had heard the mother called not in the presence of the defendant, all over the objection of the defendant.

4. The court, over the objection of the defendant, admitted Exhibit 36, a school census card (R. 157-158), despite the fact that the information thereon was ob-

tained by a conversation with a person other than the defendant and not in the defendant's presence:

"Q. Now did you have occasion to speak with anyone at the home in order to obtain the information contained on Exhibit 36?

"A. Well, I spoke to Mrs. Barlow.

"Q. And did you obtain the information contained on the card, Exhibit 36, from Mrs. Barlow?

"A. Yes.

"Q. And what was the first name of the Mrs. Barlow to whom you spoke?

"A. Maurine.

"Q. And what information did you obtain from her at that time?

"MR. HATCH: Objection as hearsay not in the presence of the defendant, Your Honor.

"THE COURT: Well is it different than what is on this card?

"Q. No. We will offer the card, Exhibit 36. Now have you had opportunity to see it, Mr. Hatch?

"MR. HATCH: I have had opportunity to see it, yes.

"Q. We will offer Exhibit 36.

"MR. HATCH: I object to it as being hearsay, a matter obtained from a person not the defendant and put on the card.

"Q. We think, Your Honor—

"THE COURT: May I see the card?

“Q. We think it is a fact as explained during this mornings session —

“THE COURT: The objection will be overruled. It will be received in evidence.

“Q May it be shown to the jury, Your Honor? That is all we have of this witness” (R. 157-158).

The above exhibits and testimony, which the defendant insists were improperly allowed to go to the jury, were highly prejudicial, and had the effect of giving to the jury for consideration facts which arose in some cases years prior to the period charged in the information, which the jury could not help but consider with the evidence submitted as to the defendant's association with his children during the period charged, and thereby infer a relationship with the women named in the information which is in no way confirmed by the evidence.

The court further, by inconsistencies in its ruling as to materiality of evidence arising from the limitation dates set forth in the information, and in the court's Instruction No. 10, confused the jury as to what it may or may not consider. For example, on page 125 of the record the court in the following language sustained defendant's objection to all the birth certificates prior to the first date charged in the information:

“MR. HATCH: Your Honor, I must renew my objections to its materiality. All of these birth certificates which Mr. Anderson just handed me are dates previous to the prior conviction in this matter. I think that has already been determined and is immaterial to this case as not

being in the period charged, or as evidence probative to the period charged.

“THE COURT: I think that objection is well taken and I have that in mind on your other exhibit, Mr. Anderson, that any of those that are prior to April 30th, 1952, at least, as to the birth of the child named I believe are immaterial.

“MR. ANDERSON: Well we seek, Your Honor, by proffering those, we have withdrawn those which the evidence does not show were residing at the homes mentioned during the period charged in the Information. We have done that. We feel that with respect to the balance of the birth certificates the evidence that these are the children of these women and the evidence that these children were living there that the birth certificates are some evidence from which an inference could be drawn that a relationship of mother and child continued during the period in question.

“THE COURT: Well as far as these exhibits that you have just mentioned and those you had this morning that I took under advisement I’m going to sustain Mr. Hatch’s objection to all of those which bear a date of birth of the child named therein earlier than April 30th, 1952. The others I will still retain my ruling as a matter of advisement to determine on this prima facie showing that he seeks to make” (R. 125).

and then at page 189 of the record overrules defendant’s objections and admits documents referring to a date earlier than April 30, 1952, thereby implying to the jury that they may consider any and all evidence and nullifying the effect of all admonitions of the court striking any testimony or part of the record.

POINT V.

THE EVIDENCE, IN VIEW OF THE COURT'S INSTRUCTIONS, IS INSUFFICIENT TO SHOW COHABITATION BETWEEN THE DEFENDANT AND ANY TWO OF THE WOMEN NAMED IN THE INFORMATION DURING THE PERIOD SET FORTH IN THE INFORMATION. (Assignment of Error No. 8).

The relationship of father and child between the defendant and the children shown in the evidence in this case is admitted. The court in Instruction No. 6 (R. 257), Instruction No. 7 (R. 257), Instruction No. 8 (R. 257), and Instruction No. 9 (R. 258), instructed the jury that neither the relationship between father and children nor the efforts of the defendant to carry forth the duties and obligations both legal and moral arising from this relationship is any part of cohabitation, nor in itself evidence thereof.

It has been stipulated that the defendant, Albert Edmund Barlow, was convicted of illegal cohabitation with the three women named in the instant information in 1944, and was incarcerated for his crime in 1945. The court instructed the jury in Instruction No. 10 (discussed supra) that the conduct of the defendant and others between the dates set forth in the information is the only evidence that may be considered in this matter.

Considering the record as a whole, in view of these instructions, there is little or no evidence showing a course of conduct between the defendant and the women in the information or any of them on which the jury could make a finding of cohabitation, especially in view

of the negative aspects of the court's attempted definition of the crime in Instructions Nos. 2 and 5.

True, there is abundant evidence of continual efforts by the defendant to support and instruct his children, to provide a place for them to live, but there is no evidence to prove beyond a reasonable doubt or even by a preponderance that the defendant was cohabiting with two or more of the women named in the information.

With regard to Amanda Kate Barlow, the testimony of Bruce Andresen (R. 75-86), Shirley Broadbent (R. 86-95), Alhona Barlow (R. 102-109), and David Barlow (R. 110-120), shows the defendant to have been frequently on or near the premises at 44 West 6025 South, Murray, Utah, and shows the children at that address to have been the children of the defendant, but shows no connection whatsoever between Albert Edmund Barlow and Amanda Kate Barlow who resided at that address during all or any part of the period charged in the information.

The testimony of David Eccles (R. 95-101) shows Mr. Barlow to have been interested in the house, which was purchased by Wolrab, Inc., and that Amanda Kate Barlow was the president of Wolrab, Inc.

With respect to Maurine Owen and the premises at 1538 South 4th East, the testimony of Evelyn Clampitt (R. 126-145) shows the defendant to have been at the home at 1538 South 4th East at infrequent intervals, assisting in the repair of the premises and directing and supervising the children, and on occasion eating there. The only two times that the defendant is connected with

Maurine Owen were, on one occasion when he rode with them to the hospital (R. 129), and another occasion when Mr. Barlow was called to the house due to the fact that one of the children (a 13-year old boy) had broken or injured his arm (R. 140).

Doctor Carl Andreasen testified (R. 146-150) as to being present when the defendant was there at the time of a birth, but testified he had no conversation with the defendant (R. 147).

The testimony of Francis Stokes Zitting (R. 150-152) showed no connection between the defendant and Maurine Owen during the period charged. The testimony of Annie Timms and Barbara McMillen (R. 152-158) showed taking of school census reports, the admissibility of which is discussed in a previous point in this brief showing nine of the birthdates thereon to be outside of the period charged. The testimony of Annie Roll (R. 159-166), Sarah Arpin (R. 166-170), Edmund Barlow (R. 170-176), shows no connection between Maurine Owen and the defendant during the period charged, with the exception of visits by the defendant to 1538 South 4th East to look after the welfare and upbringing of the children and occasional meals.

The testimony of Maurine Owen (R. 177-187) is to the effect that she was the mother of the children living at that address and that Barlow had attempted to support the children although Maurine was largely self-supporting, that he called around to assist in the support and upbringing of the children during the period charged,

but showing no evidence of cohabitation during the period charged other than support and upbringing of the children.

With respect to Vio Fraser, the testimony of Anna Johnson (R. 187-188) and Ruth Johanson (R. 188-189), shows a school census enumeration with all birthdates being outside the dates charged in the information. The testimony of Maxine Christensen (R. 189-191), Susan Barlow (R. 191-194), and Vio Fraser (Barlow) (R. 194-200), shows visitations by the defendant to 50 Granite Avenue at intervals during the period charged for the purposes of upkeep of the premises, providing support for the children, but shows no connection between Vio Fraser and the defendant for the period charged other than support of children conceived and born prior to the period charged.

The testimony of Betty Maack (R. 201-203), Frances Willey (R. 203-205), and Virginia Wallgren (R. 206-207) identifies certain hospital records discussed prior hereto in this brief, all of which are outside the period charged.

The evidence of all the witnesses, together with the evidence by defense witnesses, Herbert Maw (R. 214-218) and Arlene Mitchell (R. 218-226) shows a continued effort by the defendant to support the children conceived and born outside the period with which defendant is charged with cohabitation, but shows no evidence whatsoever of cohabitation between the defendant and any of the three women, with the exception of birth of children to Maurine Owen as evidenced by Exhibit 15. However, the evidence is such that the admission of evidence

outside the period charged and the period barred by the statute of limitations makes it such that the defendant is prejudiced by a jury's inability to ignore the admitted three-family status of the defendant in years prior to the period charged, and the defendant is convicted solely upon his efforts to care for the children he was instrumental in bringing into this world prior to the period charged in the information.

CONCLUSION

The defendant contends that it is apparent from a review of the record and the discussion of Points 1 to 5, covering nine assignments of error, that Albert Edmund Barlow was convicted of an offense that is unconstitutional due to the ambiguous nature of the statute under which he is charged, as discussed in Part A of Point 1; also, that the defendant has been convicted of one and possibly more of three crimes attempted to be charged in one count, in definite violation of Section 77-21-31, Utah Code Annotated, 1953; that he was tried before a jury containing one member who by his own statements had a preconceived opinion as to defendant's guilt; that the jury was instructed in such a manner that on reading the instructions as a whole a layman could have no idea of what the charge consisted of, and must necessarily from the language of the instructions be confused as to what constitutes cohabitation, and therefore as to what constitutes illegal cohabitation; that the jury was further allowed over objections of the defendant to hear evidence and to examine documents which tended to show a

relationship between the defendant and the women charged in the information at times far removed from the period of April 30, 1952, to October 31, 1955, and were then instructed that the only evidence they could consider was evidence within the period charged. They were further instructed that evidence of a father-child relationship and evidence of the father's attempts to support, advise and contribute to the rearing of the children was not in itself any indication of the relationship between the defendant and the mother of the children, testimony as to the father-child relationship constituting a great part of the entire record.

The defendant contends:

1. That he was convicted under an invalid statute.
2. That he was tried before a jury, a member of which had expressed a preconceived opinion of the defendant's guilt not arising from the evidence.
3. That the defendant was tried on three crimes unlawfully charged under one information, and in a single count, and that the verdict does not apprise the defendant as to whether he was convicted of cohabitation with all the women, with any two of the women, or with which two of the women.
4. That the instructions read as a whole, and more particularly those instructions discussed in Point 1-B, Point 3 and Point 5 of this brief when considered as a whole, as the jury was instructed to do, could only tend to confuse the jury as to what proof or evidence was

necessary to show cohabitation with any of the women named in the information or with all of them.

5. That the jury was allowed to hear and consider evidence, both oral and documentary, which was so far removed from the crime charged that it was immaterial; that such evidence was prejudicial to defendant, tending to show an unlawful relationship at a time other than the time charged; that without such evidence there was no evidence upon which the jury could determine a verdict of guilt.

Defendant contends that if this court determines the statute is unconstitutional as set forth in Point 1 of this brief, the matter must be reversed and dismissed, and if the court determines that the defendant was charged with more than one crime, or was tried before a prejudiced jury, or that the jury was not properly instructed, or that the court allowed immaterial and prejudicial evidence to be considered by the jury, that the matter must be reversed and remanded for new trial with instructions.

Respectfully submitted,

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