

1957

# State of Utah v. Albert Edmund Barlow : Brief of Respondent

Utah Supreme Court

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E. R. Callister; K. Roger Bean; Attorneys for Plaintiff and Respondent;

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UNIVERSITY UTAH

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In the  
Supreme Court of the State of Utah

FILED

JUN 30 1957

STATE OF UTAH,

*Plaintiff and Respondent,*

vs.

ALBERT EDMUND BARLOW,

*Defendant and Appellant.*

Cl

Supreme Court, Utah

Case No.

8533

BRIEF OF RESPONDENT

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In the  
**Supreme Court of the State of Utah**

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STATE OF UTAH,  
*Plaintiff and Respondent,*

vs.

ALBERT EDMUND BARLOW,  
*Defendant and Appellant.*

} Case No.  
8533

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**BRIEF OF RESPONDENT**

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**STATEMENT OF FACTS**

On October 31, 1955, the defendant was charged with the offense of unlawful cohabitation in violation of Section 76-53-2, U. C. A. 1953. He waived preliminary hearing and an information was filed on December 23, 1955. A bill of particulars was demanded on December 31, 1955 and supplied January 13, 1956, along with an amended information. Defendant filed a motion to quash which was heard on January 19, 1956, and denied. Defendant then entered

a plea of not guilty, and a jury trial was had March 12 and 13, 1956. The jury returned a verdict of guilty and sentence was imposed March 22, 1956. The defendant appeals from that conviction and sentence.

The State called 22 witnesses at the trial. The evidence, including the testimony of those witnesses and the stipulations agreed to, showed that within the period charged in the information, and concurrently, the defendant: (1) Was legally married to Amanda Kate Kilgrow Barlow, introduced her to other persons as his wife and was introduced to other persons by her as her husband; (2) Introduced Maurine Owen Barlow to other persons as his wife; (3) Ate his meals in the different homes of Amanda Kate Kilgrow Barlow, Maurine Owen Barlow and Vio Fraser Barlow, respectively; (4) Stayed overnight at the homes of Amanda Kate Kilgrow Barlow and Maurine Owen Barlow and visited frequently at the home of Vio Fraser Barlow; (5) Fathered two children born to Maurine Owen Barlow; (6) Referred to Maurine Owen Barlow's pregnancy as his wife's pregnancy; (7) Was present at the birth of one of the babies born to Maurine Owen Barlow and either stated to the attending doctor that he was the father, or voiced no protest when Maurine so stated; (8) Came and went from the different homes in his automobiles with each of the three women named in the information and on occasion with all three at the same time. Upon this and other evidence in the record, the jury found the defendant guilty of unlawful cohabitation as charged.

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STATEMENT OF POINTS

POINT I.

A.

THE STATEMENT OF THE OFFENSE INVOLVED, SECTION 76-53-2, U. C. A. 1953, CONTAINS AN IMPLIED TIME FACTOR.

B.

THE INFORMATION CHARGES THE DEFENDANT WITH ONLY ONE OFFENSE.

POINT II.

DEFENDANT'S CHALLENGE OF JUROR OHRAN WAS PROPERLY DENIED.

POINT III.

THE JURY WAS SUFFICIENTLY INSTRUCTED AS TO THE MEANING OF THE WORD "COHABIT."

POINT IV.

A.

EVIDENCE DESCRIBING CIRCUMSTANCES EXISTING PRIOR TO THE TIME OF THE OFFENSE CHARGED WAS RELEVANT TO SHOW A CONTINUING CONDITION.



## B.

NONE OF THE EVIDENCE COMPLAINED OF  
BY DEFENDANT WAS HEARSAY.

## POINT V.

THE EVIDENCE IS SUFFICIENT TO SUS-  
TAIN THE CONVICTION.

## ARGUMENT

## POINT I.

## A.

THE STATEMENT OF THE OFFENSE IN-  
VOLVED, SECTION 76-53-2, U. C. A. 1953,  
CONTAINS AN IMPLIED TIME FACTOR.

Section 76-53-2, U. C. A. 1953, reads in part:

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

In his brief defendant argues that the statute does not say  
“at the same time” and is therefore ambiguous. He selects  
by way of illustration the case of a divorcee or widower  
who, within a four year period, marries again and asks  
if they have not in fact violated the statute. The answer  
is no.

It is fundamental to criminal law that all elements  
which constitute an offense must exist concurrently, other-  
wise the offense is not committed. If, for example, A mar-

ries X, cohabits with her and holds her out to the world as his wife, and after her death marries Y, cohabits with her and holds her out as his wife, how could it be said that he has violated the statute? At what point, or over what period of time, has he cohabited with *more than one* person of the opposite sex? At the time he cohabited with X, Y had not entered the picture, and at the time he cohabited with Y, X was dead. There is no concurrence of the two periods of cohabitation and consequently no crime.

The point is illustrated by the familiar requirement that there is no crime unless the intent and the criminal act concur. Section 76-1-20, Utah Code Annotated, 1953; Burdick Law of Crime, Sec. 115. Further illustration lies in the Code section defining first degree burglary, 76-9-1, U. C. A. 1953. If B, carrying a satchel full of nitroglycerin, forcibly breaks and enters in the daytime a structure in which a safe is kept, and conceals himself until dark, at which time he blows the safe and takes the money, he presumably is not guilty of first degree burglary because the breaking and entering was not in the nighttime. Yet nowhere does that section require that all the elements comprising the offense must be present concurrently. That requirement is implied.

In this case the defendant is charged with cohabiting with three women from April 30, 1952 to October 31, 1955, a three and one-half year period. Had the evidence shown that he cohabited with Amanda Kate Kilgrow Barlow in 1952, Maurin Owen Barlow in 1953, and Vio Fraser Barlow in 1954, then at no point within the period charged would he have been cohabiting "with more than one person of the

opposite sex" but the evidence showed that he cohabited with all of them concurrently.

## B.

### THE INFORMATION CHARGES THE DEFENDANT WITH ONLY ONE OFFENSE.

Defendant argues next that he is charged with three offenses because three women were named in the information and there are three possible findings which would sustain a conviction. The answer is that the offense created by the Legislature is cohabitation with more than one person of the opposite sex and proof of concurrent cohabitation with any number from two on up will sustain a conviction.

If the defendant's contention had merit it would be difficult to uphold, for example, the universally accepted method of charging and proving the theft of more than one article in one transaction. The general rule is that where two or more articles are stolen together the theft may, in fact must, be charged in one count. Wharton's Criminal Law, 12th Edition, Section 1171. The rule is the same even where the individual articles stolen are separately owned. *State v. McKee*, (1898), 17 U. 370, 53 P. 733; *State v. Mickel*, (1901), 23 U. 507, 65 P. 484.

Suppose, then, that X steals articles A, B, and C, each worth \$30.00, and is charged in a single count with grand larceny. The value of the articles stolen is one of the elements of the crime to be proved. *State v. Lawrence*, (1951),

... U. . . ., 234 P. 2d 600. There is a dispute in the evidence on whether the defendant purchased the articles. The jury returns a verdict of guilty as charged. There is no way of knowing in such a case whether the jury found that the defendant stole all three articles or only two of them, and if only two, which two. Yet it has not successfully been contended that such a conviction will not stand because the defendant was charged with three crimes. The reason is that the Legislature has said that grand larceny is the felonious stealing, etc. of the personal property of another of a value in excess of \$50.00, and whether the proof shows it to have been one article or three articles is immaterial. The Legislature has likewise said that it shall be a felony to cohabit with more than one person of the opposite sex and it doesn't matter how many more than one. It is the position of the State that the conviction in this case would be an unconditional bar to a subsequent prosecution for unlawful cohabitation alleged to have been committed at the same time as that charged here, whether the women involved were named in this information or not.

## POINT II.

### DEFENDANT'S CHALLENGE OF JUROR OHRAN WAS PROPERLY DENIED.

On voir dire of the jury panel, it was brought out that juror Ohran was acquainted with the defendant, the latter having done some work as a carpenter for Mr. Ohran some three years previously (R. 39). The District Attorney later inquired whether Mr. Ohran during that acquaintance had

become sufficiently familiar with the defendant's family life that his judgment might be affected one way or the other. The record at that point (R. 51) reads:

"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.

"MR. ANDERSON: You have no direct knowledge of his family circumstance?

"MR. OHRAN: No, I don't know Mr. Barlow's family at all."

Defense counsel then challenged Mr. Ohran for cause and the court proceeded to make further inquiry in order to determine whether he was in fact biased. The record continues (R. 52-53):

"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 presumed 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."

At no time did Mr. Ohran express an unqualified opinion on the guilt or innocence of the defendant or demonstrate that he had formed such an opinion. On the contrary, his answers show that any notion he had concerning the defendant's marital status was the result of newspaper reading and hearsay. He acknowledged having had conversations with a girl who said her husband had been put in jail, apparently for the same offense. But the record does not show, as stated in defendant's brief at page 19, 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'." The most the record shows

on this point is that Mr. Ohran was acquainted with people who had been involved more or less intimately in situations which may have grown out of the offense with which the defendant was charged.

The defendant's argument that Mr. Ohran was not impartial cannot stand in the face of the answers given by him to questions from the court. The above quoted portions of the record show statements by the challenged juror that he would act on the evidence produced in court and not on some other basis (R. 40); that he had no knowledge of the defendant's family circumstances (R. 51); that he had no knowledge upon which he would act independent from what the evidence might show, and that he would judge the matter on the weight of the evidence (R. 52); that he presumed the defendant to be innocent and would so presume until it was proved otherwise beyond a reasonable doubt (R. 52); that he had not formed an opinion as to the defendant's marital status (R. 52); that the fact that the defendant was charged with an offense by the District Attorney would not be any evidence to him of the defendant's guilt (R. 53), and that if he were in the defendant's position he would be willing to submit his case to eight men like himself (R. 53).

The trial court's inadvertent statement that Mr. Ohran showed no *impartiality* rather than no *partiality* lends no support to the defendant's contention. The judge previously had used the one term for the other but had corrected himself (R. 47, lines 28 to 30), and it is obvious from that which precedes the statement relied on that the judge meant to say, I don't think he shows any *partiality*.



Our statutes on challenge to the jury support the position of the state on this point. Section 77-30-19, U. C. A. 1953, so far as is pertinent, provides:

“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.”

Section 77-30-21, U. C. A. 1953, states:

“In a challenge for implied bias one or more of the causes stated in section 77-30-19 must be alleged. In a challenge for actual bias the cause stated in section 77-30-18 (2) must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public journals or common notoriety; provided, it appears to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters submitted to him. The challenge may be oral, but must be entered in the minutes of the court or noted by the reporter.”

Upon application of either or both statutes to the facts of this case it becomes clear that juror Ohran was competent to serve. He had neither formed nor expressed an unqualified opinion or belief on the defendant's guilt or innocence, and any tentative opinion he had formed was based on rumor, newspaper articles or common notoriety.

It has for years been the law in this state that it is an unqualified opinion as to the guilt or innocence of an accused which disqualifies a juror and in the absence of such an opinion he is competent to serve. *People v. O'Loughlin* (1882), 3 U. 133, 141, 1 P. 653. This court has further held that where a juror expresses a willingness to follow the directions of the court in deciding the issue, he is not disqualified because of prior answers indicating bias. *State v. DeWeese* (1918), 51 U. 515, 172 P. 290, 293. In *State v. BeBee* (1946), 110 U. 484, 175 P. 2d 478, 482, the *O'Loughlin* and *DeWeese* cases were cited with approval and after discussing the statutes above quoted (U. C. A. 1943 citations), this court held that a jurymen who had formed an opinion based on newspaper articles and rumors was nevertheless competent to render a fair and impartial verdict, and was properly retained on the panel. See also *State v. Musser* (1946), 110 U. 534, 175 P. 2d 724, 738.

Assuming, for purposes of argument, that juror Ohran had formed a fixed opinion on the marital status of the defendant, there could have been no prejudice to him. His marital status was not in issue except with relation to the rule that a man is presumed to cohabit with his legally married wife, *United States v. Clark* (1889), 6 U. 120, 21 P. 463, and the judge omitted to instruct the jury on this point (R. 237). Moreover, it was stipulated at the trial that defendant was lawfully married to the Amanda Kate Kilgrow Barlow named in the information (R. 32, 33, Exhibit 1) and there thenceforth was no dispute for the jury on that point.

## POINT III.

THE JURY WAS SUFFICIENTLY INSTRUCT-  
ED AS TO THE MEANING OF THE WORD  
"COHABIT."

The defendant maintains that the court erred in failing to more fully define the word "cohabit" to the jury. This contention has no merit. Like many other offenses, unlawful cohabitation consists of a course of conduct and the prohibited course of conduct was explicitly set forth to the jury in instruction number 5. Further, the word itself has a usual, generally accepted meaning, presumably familiar to the jurors and is not a technical word. *State v. Barlow* (1944), 107 U. 292. 153 P. 2d 647, 651, and authorities there cited.

## POINT IV.

## A.

EVIDENCE DESCRIBING CIRCUMSTANCES  
EXISTING PRIOR TO THE TIME OF THE  
OFFENSE CHARGED WAS RELEVANT TO  
SHOW A CONTINUING CONDITION.

Defendant complains specifically of Exhibits 36, 37, 38 and 39 and the testimony of Mrs. Annie Roll (R. 159). In order for the State to prove a case it had to show a course of conduct by which the defendant was "\* \* \* living, to all intents and purposes, so far as the public could see, as husband and wife \* \* \*" with more than one woman. *United States v. Cannon* (1885), 4 U. 122, 7 P.

369. It was thus relevant to show the existence of a household and family being held out to the world with each of the women named in the information, and the school records tended to show that relationship. That some of the information shown on the school records (Exhibits 36, 37 and 38) deals with conditions outside the period is immaterial. The testimony showed that the information was gathered and the records compiled within the period set forth in the information.

To the extent that the records deal with a condition that existed prior to the period charged, such a condition may be shown where there exists a probability that the condition continued to exist. On this point Wigmore on Evidence, 3rd Edition, Section 437, states:

“When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance *at a later period.*”

The hospital records referred to, Exhibit 39, are evidence of a family relationship between the defendant, Vio Fraser Barlow and their children prior to and during the period charged, and other evidence showed that this relationship continued during the period charged. It is true that defense counsel objected to their admission as hearsay, but those entries signed by the defendant were not hearsay, and counsel's objection was not specific but was addressed to the group of records. They were therefore properly admitted.

With respect to the testimony of Mrs. Annie Roll (R. 159-166), it, too, was relevant to show a condition that existed at one time and which other evidence tended to show still existed.

Again assuming, for argument, that the exhibits and testimony complained of were improperly admitted, the defendant was not prejudiced thereby. It was his theory in the trial, and is yet, that his course of conduct, to which the State pointed as evidence of guilt, was entirely innocent by reason of his efforts to fill the role of a father to his children. His prior conviction for this offense was admitted and there was no attempt made to conceal the existence of the family relationships which the school and hospital records tended to show.

Finally, on the point of relevance, the court instructed the jury as follows:

“And Instruction No. 10 I have amended to: You are instructed that the conduct of the defendant and other persons showing his relationship, if any, between Kate Amanda Kilgrow, Maurine Owen and Vio Fraser between April 30, 1952, and the 31st day of October, 1955, is the only evidence thaat [sic] can be considered by you in this matter and evidence of cohabitation during any other period is incompetent and immaterial, and unless you find the defendant to have cohabited with any two or more of the three women between the dates set forth in the information you may find the defendant not guilty. (Instruction No. 10, as amended R. 234.)”

By this instruction the jury were clearly advised of the evidence they could and could not consider in their deliber-

ations. There can be no question that the evidence dealing with conditions prior to April 30, 1952, was considered only for the proper purposes for which it was introduced.

B.

NONE OF THE EVIDENCE COMPLAINED OF  
BY DEFENDANT WAS HEARSAY.

The statements of defendant's daughter, Alhona, testified to by Shirley Broadbent (R. 86-95) were not introduced testimonially, i. e., to prove the truth of the statement, but as circumstantial evidence. It was relevant to show who this girl thought her father and mother were; it was evidence of the family relationship. The hearsay rule is not applicable to such testimony. Wigmore on Evidence, Third Edition, Sections 1788 and 1789.

It is alleged that the information contained on Exhibit 15 is hearsay. This exhibit is a photostat of a birth certificate and is admissible as a copy of an official public record (see discussion on school records, below). But it is worth noting here that not all relevant parts of the record dealing with its admission are quoted in defendant's brief. Dr. Carl Andreasen was the witness on the stand and his testimony begins at R. 146. He testified that he attended the birth of a child to Maurine Barlow and filled out a certificate of birth. The record then shows (R. 148) :

“Q. And calling your attention to what has been marked for identification as State's Exhibit 15

I will ask you, sir, if that is a photostat of the certificate which you filled out?

"A. It is.

"Q. And where did you obtain the information contained on that certificate?

"A. From the people present during the birth of this child.

"Q. And who were those people?

"A. The defendant and Maurine Barlow.

"Q. And who, sir, is listed as the father of that child on that certificate?

"A. Albert E. Barlow.

"Q. And from whom did you obtain that information?

"A. I couldn't say whether the man or the woman that was present gave it to me. I obtained the information while waiting, which wasn't long.

"Q. And calling your attention to the name of the mother which appears upon that certificate is your answer to that the same?

"A. Yes, it is. The maiden name only is listed on it.

"Q. And this was a female child born March 13th, 1955?

"A. Yes.

"Q. Is that your signature that appears thereon, Doctor?

"A. Yes.

"Q. We will offer at this time, Your Honor, State's Exhibit 15."

It is clear that aside from the new born baby, only the witness, the defendant and Maurine Barlow were present. If

the witness received the information from the defendant, it was an admission. If he received it from Maurine Barlow, it was an implied admission. Either alternative is an exception to the hearsay rule.

The objection to the testimony of Mrs. Arpin (R. 168) has no validity. The name by which other persons refer to someone is a fact and testimony concerning it is introduced not to prove that it is his correct name but that he is known by that name. Wigmore, *supra*, Sections 1788, 1789.

Section 78-25-3, U. C. A. 1953, reads:

“Entries in public or other official books or records, made in the performance of his duty by a public officer of this state or by any other person in the performance of a duty specially enjoined by the law, are prima facie evidence of the facts stated therein.”

Boards of education were required by law to cause a school population census to be taken in the spring of 1954 (Laws of Utah 1953, First Special Session, Chapter 31, Section 1) and the fall of 1955 (Laws of Utah 1955, Chapter 90, Section 1). Such school census records thus come within the statute above quoted and are not subject to the hearsay objection. See *Richfield Cottonwood Irrigation Company v. City of Richfield*, (1934), 84 U. 107, 34 P. 2d 945; *In Re Marks* (1936), ... Pa. ..., 183 Atl. 432; *Bozicevich v. Kenilworth Mercantile Company* (1921), 58 U. 458, 199 P. 406.

With respect to the arguments advanced at pages 28 and 29 of defendant's brief concerning alleged inconsisten-



cies in the court's rulings on exhibits dealing with a period of time prior to April 30, 1952, it is difficult to understand the defendant's position. The documents discussed at R. 189, and there admitted into evidence were school records, not birth certificates, and defense counsel withdrew his objection to the birth certificates involved at R. 208-212.

## POINT V.

### THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

Viewed as a whole, the testimony of the 22 witnesses called by the State, the school records, birth certificates, marriage certificate, contract, hospital records and stipulations entered into constitute an unmistakable mosaic of guilt on the part of the defendant. As recited in respondent's statement of facts, his conduct over the period of time set forth in the information added up to only one thing—the holding out to the world of three women, each as his wife.

With but very few exceptions, every indication from which one would normally conclude that his next door neighbor and the woman living with him are husband and wife was put in evidence in this case with respect to the defendant and the three women named in the information. He ate with them, stayed overnight with them, came and went from the homes with them, introduced them as his wives and was introduced by them as their husband, directed activities in and around the homes, directed the

children, transacted important business with them, and fathered their recently born children in the case of two of them.

We submit that the State has proved the course of conduct on defendant's part which the unlawful cohabitation statute prohibits.

### CONCLUSION

The judgment of the lower court should be affirmed.

Respectfully submitted,

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