NO. 49 - HAUPT V. U.S. -

JACKSON OPINION CIRULATED 2/25/47 - RETURNED 2/28/47 - "I agree. C.J."

March 14, 1947

MEMORANDUM TO THE CONFERENCE

Re: No. 49 - Haupt v. United States

On page 1, after referring to the act of the father opening the family door to the son, I am adding the following:

> That act caused, therefore, no more implication that the father was giving his son aid and comfort in a treasonable project than did the meeting of the defendant with the enemy agent in the Cramer case.

W. O. D.

3-1-47

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1946.

Hans Max Haupt, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March —, 1947.]

Mr. Justice Douglas.

There is a close parallel between this case and *Cramer* v. *United States*, 325 U. S. 1.

Two witnesses saw Cramer talking with an enemy agent. So far as they knew the conversation may have been wholly innocent, as they did not overhear it. But Cramer, by his own testimony at the trial, explained what took place: he knew or had reason to believe that the agent was here on a mission for the enemy and arranged, among other things, to conceal the funds brought here to promote the project. Thus there was the most credible evidence that Cramer was guilty of "adhering" to the enemy, giving him "aid and comfort". Article III, § 3 of the Constitution. And the overt act which joined him with the enemy agent was proved by two witnesses. Cramer's conviction, however, was set aside because two witnesses did not testify to the treasonable character of Cramer's meeting with the enemy agent.

Two witnesses saw the son enter Haupt's apartment at night and leave in the morning. That act, without more, was as innocent as Cramer's conversation with the agent. For nothing would be more natural and normal, or more "commonplace" (325 U. S. pp. 34, 35), or less suspicious, or less "incriminating" (325 U. S. p. 24), than the act of a father opening the family door to a son. That act on its face was as innocent as the act of a waitress serving him dinner in a restaurant. But that act, wholly innocent on its face, was shown to be of a treasonable character, not by the two witnesses, but by other evidence: that Haupt

was sympathetic with the Nazi cause, that he knew the nature of his son's mission to this country. Haupt's conviction is sustained, though the conversion of an innocent appearing act into a treasonable act is not made by two witnesses.

The Constitution provides:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Article III, § 3.

As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.

The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*.

The *Cramer* case departed from those rules when it held that "The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness." 325 U. S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into an incriminating one.

The Chief Justice
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from
Douglas, J.

3-1-47

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1946.

Hans Max Haupt, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March —, 1947.]

Mr. Justice Murphy, dissenting.

This case grows out of a singular set of circumstances that, when combined with the serious nature of the alleged crime, warrants our most careful attention. Petitioner's son was tried as a saboteur before a military tribunal, convicted and executed. See *Ex parte Quirin*, 317 U. S. 1. Petitioner, his wife and four others were then jointly tried for treason. All were convicted, petitioner being sentenced to death and his wife to 20 years' imprisonment. *United States* v. *Haupt*, 47 F. Supp. 832; 47 F. Supp. 836. These convictions, however, were reversed upon appeal. *United States* v. *Haupt*, 136 F. 2d 661. Petitioner has now been retried separately for treason; again he has been found guilty, with the sentence being reduced to life imprisonment and a $10,000 fine. 152 F. 2d 771.

Petitioner was charged with having committed three general types of overt acts of treason: (1) harboring and sheltering his son; (2) assisting his son in obtaining reemployment; (3) accompanying and assisting his son in the purchase of an automobile. All of these alleged overt acts were contained in a single count of the indictment and the jury's verdict was a general one. The Court holds, as I understand it, that a fatal deficiency as to any of the alleged overt acts under such circumstances invalidates the conviction. Since the acts relating to the harboring and sheltering

of petitioner's son did not, in my opinion, amount to overt acts of treason, I would accordingly reverse the judgment below, regardless of the sufficiency of the other acts.

The high crime of treason, as I understand it, consists of an act rendering aid and comfort to the enemy by one who adheres to the enemy's cause. *Cramer* v. *United States,* 325 U. S. 1. The act may be one which extends material aid; or it may be one which merely lends comfort and encouragement. The act may appear to be innocent on its face, yet prove to be treasonable in nature when examined in light of its purpose and context.

It does not follow, however, that every act that gives aid and comfort to an enemy agent constitutes an overt act of treason, even though the agent's status is known. The touch of one who aids is not Midas-like, giving a treasonable hue to every move. An act of assistance may be of the type which springs from the well of human kindness, from the natural devotion to family and friends, or from a practical application of religious tenets. Such acts are not treasonous, however else they may be described. They are not treasonous even though, in a sense, they help in the effectuation of the unlawful purpose. To rise to the status of an overt act of treason, an act of assistance must be utterly incompatible with any of the foregoing sources of action. It must be an act which is consistent only with a treasonable intention and with the accomplishment of the treasonable plan, giving due consideration to all the relevant surrounding circumstances. Thus an act of supplying a military map to a saboteur for use in the execution of his nefarious plot is an overt act of treason since it excludes all possibility of having been motivated by non-treasonable considerations. But an act of supplying food to an enemy agent who is also one's son retains the possibility of having a non-treasonable basis even when performed in a treasonable

setting; accordingly, it cannot qualify as an overt act of treason.

It is true that reasonable doubts may be raised as to whether or not the prime motive for an act was treasonous. Yet the nature of some acts is such that a non-treasonous motive cannot be completely dismissed as a possibility. An overt act of treason, however, should rest upon something more substantial than a reasonable doubt. Treason is different from ordinary crimes, possessing unique and difficult standards of proof which confine it within narrow spheres. It has such serious connotations that its substance cannot be left to conjecture. Only when the alleged overt act manifests treason beyond all reasonable doubt can we be certain that the crime of treason will be limited to those whose actions constitute a real threat to the safety of the nation.

Tested by that standard, the conviction in the instant case cannot be sustained. Petitioner, it is said, had the misfortune to sire a traitor. That son lived with petitioner and his wife in their Chicago apartment. After a sojourn in Germany for training as a saboteur, the son returned to the Chicago apartment and began to make preparations to carry out his mission of sabotage. It is claimed that petitioner knew of his son's activities and desired to help him. For six days prior to his arrest, the son lived in petitioner's apartment; he was not secreted in any way, coming and going as he normally would have done.

The indictment alleged that petitioner committed an overt act of treason by sheltering and harboring his son for those six days. Concededly, this was a natural act for a father to perform; it is consistent with parental devotion for a father to shelter his son, especially when the son ordinarily lives with the father. But the Court says that the jury might find, under appropriate instructions,

that petitioner provided this shelter, not merely as an act of an indulgent father toward a disloyal son, but as an act designed to injure the United States. A saboteur must be lodged in a safe place if his mission is to be effected and the jury might well find that petitioner lodged his son for that purpose.

But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how despicable or unlawful it might otherwise be.

49 dis.

Mr. Chief Justice Vinson -

from

Murphy J

Mar. 12