Facts

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: Court Martial Appeal Court of Canada, CMAC-376; footnotes omitted.]

Court Martial Appeal Court of Canada [...]

between:

HER MAJESTY THE QUEEN, Appellant

and

MAJOR A.G. SEWARD, Respondent

REASONS FOR JUDGMENT

CHIEF JUSTICE STRAYER

FACTS

The respondent was the Officer Commanding the 2 Commando unit of the Canadian Airborne Regiment when it was deployed to Somalia in December 1992 as part of a peace-keeping or peace-making assignment. It was generally responsible for maintaining security in the town of Belet Huen and a surrounding area of about 100 square kilometres, its camp being outside the town.

There had been some problems of Somalians infiltrating the Canadian camp. When captured they were normally detained until there was a patrol going into the town which would take them and turn them over to the local police.

On the morning of March 16, 1993 the respondent Major Seward conducted an Orders Group in which he gave orders and “taskings” to his platoon commanders. This included Captain Sox as commander of 4 platoon which was responsible for providing front gate security and the capture of infiltrators in the area. Captain Sox testified that he was told by Major Seward on this occasion that with respect to the capture of infiltrators “I was tasked with to capture and abuse the prisoners”. Captain Reinelt, the respondent’s second-in-command, who was also present, said that Major Seward said ‘you could abuse them’.” Captain Sox was surprised at this directive and asked for clarification. He testified that the clarification he received was as follows:

I was told simply that it meant to rough up and there was something to the effect of “teach them a lesson”.

According to the respondent what he said initially, after instructing Captain Sox to patrol for infiltrators, was:

I don’t care if you abuse them but I want those infiltrators captured.

He further testified that upon Captain Sox requesting clarification as to whether he wanted infiltrators to be abused, his reply was:

No. Abuse them if you have to. I do not want weapons used. I do not want gun fire [...].

Captain Reinelt testified that while he thought the word “abuse” was a “poor choice of words” he understood Major Seward’s intention to be that

[w]hatever force was necessary in the apprehension of the prisoner could be used in terms of capturing.

When one of his section commanders, Sergeant Hillier, asked him what “abuse” meant Sox said that he told Hillier “that it was explained to me as again to rough up”.

Seward admitted in testimony at his trial that nothing during his “training as an infantry officer or [in] Canadian doctrine [...] would permit the use of the word ‘abuse’ during the giving of orders.”

Captain Sox later held his own orders group with the section commanders and Warrant Officer of his platoon, including Sergeant Boland who was in charge of section 3. He testified that in passing on information from the orders group held by Major Seward, he told his group that

We were to send out standing patrols and that we had been tasked to capture and abuse prisoners.

According to Sergeant Boland, commander of section 3 which had been assigned responsibility for gate security from 1800 to 2400 that night, Captain Sox had passed on the information that “the prisoners were to be abused”. After the meeting of this “O” group he discussed this instruction with Sergeant Lloyd, another section commander, and they both said they were not going to pass on that information to their respective sections. However later that evening, after a young Somalian named Shidane Abukar Arone had been captured and was being held by Boland’s section, Boland said to Master Corporal Matchee, a member of his section that Captain Sox had given orders that the prisoners were to be abused.

According to Boland, Matchee’s response to this was to say “Oh yeah!”.

Unfortunately Matchee returned to the bunker where Arone was being held and he and Private Brown proceeded to beat Arone to death. According to Brown, at one point he urged Matchee to stop the beating. Matchee refused, “[b]ecause Captain Sox wants him beaten for when we take him to the police station tomorrow”.

The respondent Major Seward was charged on two counts: that he had unlawfully caused bodily harm to Arone contrary to section 130 of the National Defence Act and section 269 of the Criminal Code of Canada; and that he had negligently performed a military duty imposed on him contrary to section 124 of the National Defence Act. The particulars of this negligence were stated to be that he

by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

He entered pleas of not guilty to both charges. The General Court Martial found him not guilty on the first charge but guilty on the second charge and in respect to the latter he was sentenced to a severe reprimand.

The Crown initially filed a notice of appeal against the acquittal on the first count and with respect to the sentence on the second count. The respondent cross-appealed against the conviction on the second count. However when the appeal came on for hearing the only issue argued by either party was that of the fitness of the sentence on the second count. Although in its factum the Crown had proposed that this sentence should be increased from severe reprimand to that of dismissal from Her Majesty’s service, during argument Crown counsel asked that the sentence be increased to dismissal with disgrace, the maximum sentence provided for an offence under section 124. [...]

Analysis

[...]

Disposition of application for leave and of sentence appeal

The Court is of the view that the appeal raises substantial issues and therefore leave to appeal sentence must be granted. [...]

In interpreting the panel’s findings of fact from the record in a manner most favourable to the respondent, it is legitimate to note some of the instructions given by the Judge Advocate to the panel on the requirements of a finding of guilt on count 2. For example he stated to the panel:

If you have a reasonable doubt that the conduct of or words used by Major Seward, in the context of all the circumstances of this case, did amount to an instruction to his subordinates to abuse prisoners then you must give him the benefit of that doubt and the prosecution will not have proven this essential ingredient of the offence charged.

The panel nevertheless convicted on count 2. To instruct the panel on the concept of “negligence” in section 124 on which the second count was based, the Judge Advocate stated:

To go further into the factors which constitute negligence I tell you that as a matter of law the alleged negligence must go beyond mere error in judgement. Mere error in judgement does not constitute negligence. The alleged negligence must be either accompanied by a lack of zeal in the performance of the military duty imposed or it must amount to a measure of indifference or a want of care by Major Seward in the matter at hand or to an intentional failure on his part to take appropriate precautionary measures.

The panel obviously found there to be such negligence. [...]

In short the panel must be taken to have concluded that the respondent did issue an “abuse” order and that his doing so was no mere error in judgment. He himself confirmed that he was taking a “calculated risk” in doing so and that nothing in his training or in Canadian doctrine would permit the use of that word during the giving of orders.

A major issue in this appeal has been the extent, if any, to which the panel of the General Court Martial or this Court on appeal should take into account, with respect to sentence, the disastrous events which followed the giving of this order. It is said on behalf of the respondent that since he was acquitted on count 1 (the charge of causing bodily harm to Shidane Abukar Arone) the death of Arone through abuse at the hands of the respondent’s subordinates could not be a circumstance to be taken into account with respect to sentence. While the panel was excluded, the prosecutor argued forcefully that it should be instructed, in the matter of sentence, that the consequences which followed upon the giving of the respondent’s order were relevant, particularly because they reflected a breakdown in discipline to which the order must be taken to have contributed. Part of that breakdown in discipline involved the beating to death of Arone. The Judge Advocate did not accept this position and in fact instructed the panel as follows:

[...] Mr. President and Members of the Court, I instruct you as a matter of law that because of your finding of not guilty on the first charge that you are not to consider as an aggravating factor when deciding punishment the bodily harm or death suffered by Mr Arone and the prosecutor’s comments in respect thereof.

The only reference the Judge Advocate made to the prosecutor’s position was the lengthy enumeration of some eighteen factors the panel should consider in sentencing, including “consequences of his negligence”. This was neither explained nor elaborated upon.

In my view this was a serious defect in the instruction by the Judge Advocate to the panel. In this respect he did not, I believe, have adequate regard to the stated particulars of the offence upon which the respondent had just been convicted: namely, that he had negligently performed a military duty in that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

This count addressed a failure in command. The evidence when interpreted reasonably and in a way most favourable to the respondent amply demonstrates that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent’s subordinates. This not only contributed to the death, of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately finding themselves facing serious charges. Some have gone to prison as a result. These matters all properly related to the charge, as particularized, that the respondent “failed to properly exercise command over his subordinates”. This was never specifically and seriously addressed by the Judge Advocate in his instructions on sentence. I am of the view that given the obvious findings of fact which the panel did make, and taking the most benign view of the evidence, it is impossible to think that a properly instructed panel would have accorded the derisory sentence of a severe reprimand.

The Judge Advocate failed to give any direction to the panel with respect to another relevant matter, namely the sentences of other service personnel already convicted in respect of the same chain of events. He did, at the request of the prosecutor, place before the panel the fact that Private Elvin Kyle Brown and former Sergeant Boland had been convicted of what he described as “breaches of discipline” for which Brown was sentenced to five years imprisonment and Corporal Boland was sentenced to ninety days detention. [...] The Judge Advocate gave no hint as to what use the panel might make of this information. In fact the circumstances of conviction and sentence of former Sergeant Boland were highly relevant. Both he and Seward were convicted under section 124 of negligent performance of a military duty. Like the respondent, Boland was not directly involved in the infliction of injury on Arone. Like the respondent, Boland was guilty of a failure to exercise properly his command, but neither was convicted of being a party to the actual torture and death of Arone. In the case of the respondent, by his acquittal on count 1 he must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner. In one important aspect of course the respondent’s position was less reprehensible than Boland’s: Boland was found by this Court to have had ample means of knowing that Arone was in immediate danger at the hands of his men and he had the opportunity to intervene but did not. Indeed some of his comments to Matchee and Brown directly condoned extreme abuse short of killing Arone.

Boland’s sentence was therefore an important point of comparison which should have been explained to the panel, unless one is to believe that there can be no comparison between the sentences of officers and of non-commissioned officers. Boland’s sentence being relevant to the fixing of a sentence for the respondent, it is also important to note that, since the respondent’s trial and sentencing, Boland’s sentence was increased from three months detention to one year imprisonment. If Boland’s sentence is to influence that of the respondent’s, it should now be seen as indicating an increase in the sentence of the latter.

I have concluded that the sentence of a severe reprimand should be set aside because it is not a fit sentence. It is clearly unreasonable and clearly inadequate on the facts which the General Court Martial must be taken to have found, on facts which were amply proven but not referred to in the faulty instruction by the Judge Advocate, and on the criteria which were or should have been put before the panel by the Judge Advocate. To reiterate, the panel found him guilty of negligently performing a military duty as particularized in count 2 namely:

“[i]n that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.” [...]

In a passage frequently quoted by military lawyers, Lamer C.J.C in *R v. Généreux* said:

“to maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, *frequently punished more severly than would be the case if a civilian engaged in such conduct*“. (emphasis added.)

I think it is fair to assume that in any well-run civilian organisation an order given by a mid-level executive, leading to such disastrous consequences for his subordinates and the organisation, would rate more than a negative comment in his personnel file, the equivalent of a “severe reprimand”.

The Crown asked at trial for a sentence including dismissal with disgrace and a “short period of imprisonment commensurate with the gravity of his offence”. While its factum filed in this Court proposed an increase of sentence from severe reprimand to that of dismissal from Her Majesty’s service, at the hearing of the appeal Crown counsel said that the sentence should instead be increased further to dismissal with disgrace, which is the maximum sentence provided under section 124. As noted earlier we ensured that counsel had a further opportunity, in response to our questions, to react to the possibility of the maximum sentence being imposed or some lesser sentence which would still represent an increase.

After considering all the submissions, I have concluded that an appropriate sentence would be a short term of imprisonment which I would fix at three months together with dismissal from Her Majesty’s Service. This is not the maximum sentence, as called for by the Crown, of dismissal with disgrace, nor is it the maximum term of imprisonment possible for this offence which could be any term for less than two years. I believe this falls within the acceptable range of sentences, having particular regard to the sentence imposed on Boland by this Court of one year imprisonment. Certainly a severe reprimand as imposed by the General Court Martial does not fall within such a range when one considers the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of Arone, unlike Boland’s proximity and means of knowledge of what was likely to occur, Seward was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put on him a higher standard of care, a standard which he did not meet.

While I recognize from the evidence before the Court Martial that 2 Commando was working under great difficulties, those difficulties did not include active warfare. Nothing suggests that the infiltrator problem represented any serious threat to the lives or security of Major Seward’s unit. What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada. [...]

I believe that the sentence of three months imprisonment with dismissal would be a fit sentence. [...]

Signed by B.L.Strayer C.J.

Discussion

1. Which rules of IHL did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27, 31, 32)
2. Was Seward a hierarchical superior of those who tortured and killed Arone?
3.
    a. Did Seward know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? In the Court’s opinion? In your opinion? How can Seward be considered “neither to have intended nor to have been capable of reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner” if he told them to “abuse them”? Did the Court apply the correct test under IHL for assessing the knowledge and intent of Seward? (P I, Arts 86(2) and 87(3))
    b. Did Seward take all feasible measures in his power to prevent the breach?
    c. Did Seward have only command responsibility for the breach or was he also a co-perpetrator, accomplice or instigator? Did he not actually order his subordinates to commit the breach?
    d. How do you explain, taking into account the circumstances described in the three cases (**see** Canada, R. v. Brocklebank and Canada, R. v. Boland), that Seward was found not guilty of the charge that “he had unlawfully caused bodily harm to Arone”? Did Canada violate IHL by acquitting him? Can a State violate its international obligations through an acquittal delivered by an independent and impartial court? Is it not sufficient to prosecute in order to uphold international law? (GC I-IV, Arts 49/50/129/146 respectively)
4. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or may

be simply punished for the separate breach of negligently performing their duty as commanders?

5. Does Seward's sentence seem appropriate to you? What factors need to be taken into consideration?
6. What are the objective factors that might have led these individuals to commit the crimes?