

Canada, R. v. Boland

N.B. As per the disclaimer ^[1], 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-374, Ottawa, Ontario, May 16, 1995; footnotes omitted.]

**Court Martial Appeal Court of Canada
Ottawa, Ontario, Tuesday, May 16, 1995**
between:
HER MAJESTY THE QUEEN, Appellant
and
V89 944 991
SERGEANT BOLAND, MARK ADAM, Respondent

JUDGMENT

STRAYER C.J. [...]

FACTS

[...] The respondent Sergeant Boland was in command of one of the sections of 4 Platoon. Matchee and Brown were members of that section. 4 Platoon was commanded by Captain Sox. It was part of 2 Commando company commanded by Major Seward. [...]

Matchee was charged but was later found unfit to stand trial. Brown was convicted of manslaughter and torture. He was sentenced to five years imprisonment and both the conviction and sentence have been confirmed by this Court.

Boland was charged with two offences. The first charge was for the torture of Arone, an offence prohibited by section 269.1 of the Criminal Code as incorporated by section 130 of the *National Defence Act* as an offence under the latter Act. The second charge was that of negligently performing a military duty. Boland pleaded guilty to the charge of torture. The charge of torture was not proceeded with. [...]

The statement of circumstances, with Boland's differing evidence noted, was as follows. During the morning of March 16th Sergeant Boland, who was in poor health, had been told at a meeting of the "O" group, involving section heads and their platoon commander, that certain steps were to be taken concerning the threat of Somali infiltrators coming into the compound. Section commanders were told that the company commander had said: "abuse them if you have to, just make the capture". Boland decided not to pass this on to his men. His section had responsibility for guard duty that evening, including the guarding of any prisoners that might be apprehended. Such prisoners were to be put in an unoccupied machine gun bunker near the compound gate. After Arone was apprehended outside the Canadian compound by a patrol headed by Captain Sox, he was delivered to Boland's

section. At that time Matchee was on duty and Private Brown was present when the prisoner was put in the bunker. At this point the prisoner was bound by his ankles and his wrists and had a baton stuck through his elbows behind his back. Boland arrived shortly before 2100 hours to relieve Matchee. Boland ordered Arone's ankles released and arranged for looser wrist binding. According to the statement of circumstances, while Boland was there "another soldier" secured the riot baton by putting a sash cord over one end of it, putting the cord over a roof beam, and tying it to the other end of the baton. (Boland states that Arone was sitting on the ground with his hands bound and the baton behind his elbows although the precise time of this state of affairs was not clear). While Boland was present Matchee retied Arone's ankles. He removed the "skirt" (some kind of light garment worn by Somalian males) from Arone and tied it around Arone's head. He then proceeded to pour water on Arone's head. Boland told Matchee to stop doing that or he would suffocate Arone. (Boland's version suggests that Matchee may have been trying to give Arone a drink by pouring water on his cheek. Boland also suggested that the blindfolding was proper as a security measure, although it was not explained why a prisoner would be led through Canadian lines without being blindfolded and then blindfolded after having seen the interior of the bunker). Matchee remained for some time during Boland's guard duty lasting from 2100 to 2200 hours. Matchee then left and later returned with Brown who arrived at about 2155 to relieve Boland. In Boland's presence Brown punched Arone in the jaw. (Boland in his account only referred to Brown saying something to Arone). As Boland went off duty at 2200 hours he said to Brown and Matchee: "I don't care what you do, just don't kill the guy." (According to Boland, he said "don't kill him", and this was said "in a facetious sort of way, sarcastic".)

Matchee stayed on with Brown for a time after 2200 hours during which time both are said to have hit and kicked Arone. Matchee left and went to the tent of Corporal McKay where he drank beer. Boland arrived at the same tent and had a beer with Matchee and McKay. Matchee said that Brown had been hitting Arone and that he, Matchee, intended to burn the

soles of Arone's feet with a cigarette. Boland is reported to have said "Don't do that, it would leave too many marks. Use a phone book on him." (Boland confirmed this discussion took place, but said he did not believe Matchee and thought he was just trying to get a reaction. He said his own reply was sarcastic and the discussion of the phone book was "flip, banter", there being no phone books available.) In the same conversation Boland told Matchee of the instructions from senior officers that it was all right to abuse prisoners, on which Matchee commented "Oh, yeah!" Again, in parting, Boland said to Matchee "I don't care what you do, just don't kill him". (Boland admitted saying this but explained it thus: "I was sick and tired of the conversation and I just brushed him off with that"). At this point it should have been obvious that Matchee planned to go back to the bunker. Boland himself went to bed without returning to the bunker. Matchee did return to the bunker about 2245 and proceeded, with the acquiescence or assistance of Brown, to beat Arone to death.

Some other evidence introduced on behalf of Boland by examination or cross-examination indicated that in these circumstances a section commander was entitled to go to bed and that any problems experienced by a troop on duty was to be reported to the duty officer who in this case was Sergeant Gresty. Boland testified that he believed Brown to be a "weak" soldier from whom he would not have expected aggressive treatment of a prisoner. He also claimed that he was not aware of the aggressive tendencies of Matchee who had just been assigned to his section. There was however other evidence that Boland "knew what he [Matchee] was like" and that "Matchee's reputation was quite well known within 4 Platoon [...]." This reputation was that "he could be quite a bully".

Boland did, during his evidence in chief, confirm that he had acted negligently. [...]

The Crown, as indicated above, more generally contends that the sentence of ninety days imposed by the General Court Martial was quite inadequate and it should have been at least eighteen months imprisonment. [...]

ANALYSIS

[...]

Adequacy of the Sentence

[...] Apart from the inadequate instructions given by the Judge Advocate, I do not believe it is possible to say that this panel of officers could reasonably have fixed the sentence at only ninety days, whatever view they took of the evidence properly before them. As a minimum it must be recognized that the respondent never disputed the particulars of his offence, namely that he failed to ensure, as it was his duty to do, that Arone was safeguarded. In his own examination in chief he confirmed on several occasions that he had been negligent. The sad but unalterable fact is that that negligence led to the death of a prisoner. Even taking the view of the evidence most favourable to the respondent, the panel was bound to conclude that Boland had strong reason to be concerned about the conduct of Matchee and Brown in respect of a helpless prisoner. Even if the panel believed he did not see Brown strike the prisoner on the first occasion and even if it concluded that Boland disbelieved Matchee's statement that Brown had struck the prisoner after he, Boland, had left, Boland had admitted that he considered Brown to be a "weak" soldier who could surely not be counted on to resist the initiatives of Matchee. He admitted having seen Matchee do life-threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard Matchee speak of intending to burn the prisoner with cigarettes. He thus had good grounds of apprehension as to Matchee's conduct. There was also evidence from even some defence witnesses that Matchee's reputation was well known. Yet, it was clear that Boland had said at least once and probably twice in the presence of Matchee: "I don't care what you do, just don't kill the guy". He gave no proper order to Matchee as to safeguarding the prisoner and left him unsupervised. Nor was it in dispute that it was Boland's responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. Boland failed in that duty, with grave consequences.

I see nothing in the instructions of the Judge Advocate, nor in the sentence, to indicate the General Court Martial had a proper regard to the fundamental public policy which underlies the duty of a senior non-commissioned officer to safeguard the person or life of a civilian who is a prisoner of Canadian Forces, particularly from apprehended brutality or torture at the hands of our own troops. That is this case. There were here no mitigating circumstances such as the presence of an armed or dangerous prisoner, or even one who was physically uncontrollable. These events did not happen in the heat of battle. There was nothing to suggest that this prisoner had caused any harm to any Canadian or to any Canadian military property: indeed he was captured, not in the Canadian compound, but in an abandoned adjacent compound. No one can dispute the difficult and sometimes hazardous circumstances under which Canadian forces were operating in Somalia in general, nor the physical problems which Boland himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others.

It is only fair to note the good, and in some respects remarkably good, record of the respondent both prior to going to Somalia and in Somalia itself. He carried out some exercises involving great courage and initiative. Reports indicate that since his conviction and sentencing he has shown a positive attitude and received good performance evaluations. (Although automatically demoted, upon sentence of incarceration, to the rank of private, he has since earned a promotion to corporal). He has also suffered a major financial loss due to his demotion. Regrettably, none of this can adequately offset, for sentencing purposes, his very serious failure to ensure the safety of a prisoner.

The argument has also been made that more senior officers were even more responsible for this deplorable situation and that Boland should not bear the burden. Reference is made to the order or message said to have been passed on from the company commander that it was all right to abuse prisoners. In the case of Boland this argument as to the greater

responsibility of superiors cuts two ways. Private Brown, one of the lowest ranking persons involved, has been convicted of manslaughter and torture and sentenced to five years. Boland, his immediate commanding officer who admitted to negligence in not preventing Brown's criminal actions, was sentenced to ninety days. There appears to be a disparity between these sentences. To the extent that justification is sought in the superior "order" to abuse prisoners, Boland to his credit recognized this to be an improper order and at one point at least decided not to pass it on. Therefore he can hardly invoke it as a defence. With respect to the responsibility of Boland's superiors, and the charges, verdicts, and sentences concerning various commissioned officers, at least some of these remain under appeal and will have to be dealt with on their own terms at the appropriate time.

It has also been argued since that since Boland has already served his sentence the court should not return him to prison. This is certainly a matter for serious consideration but it can not be elevated into a rule of law, particularly where the initial sentence was for only ninety days. To accept that in such circumstances such a person could not be returned to prison after an appeal would mean that Crown appeals against such sentences would normally be pointless, the processes of appeal necessarily consuming more time than the sentence itself. This circumstance is not of itself a sufficient reason for refusing to increase the sentence. At the same time it is obvious that Crown appeals from such short sentences should be expedited far more than has this one, and this Court stands ready to assist if so requested.

I agree with the Crown's submission that the offence itself could readily warrant a sentence of eighteen months. I believe however that, having regard to all the circumstances, including the respondent's good record both before and after this event and the fact that returning him to prison will cause greater hardship than if he had served the whole of his sentence at one time, a sentence of one year incarceration should be imposed.

DISPOSITION

The Crown's application for leave to appeal the sentence will be granted, the appeal will be allowed, and the sentence of imprisonment will be increased to one year.

Discussion

1. Which rules of international humanitarian law (IHL) did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27 ^[2], 31 ^[3], 32 ^[4])
2. Was Boland a hierarchical superior of those who tortured and killed Arone?
3.
 - a. Did Boland know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? Did he take all feasible measures in his power to prevent the breach? (P I, Art. 86(2) ^[5])
 - b. Did Boland have only command responsibility for the crime or was he also a co-perpetrator, accomplice or instigator?
 - c. How do you explain, taking into account the circumstances described in the Boland decision, that the authorities dropped the charge of torture, even though the Court considered in the case against Seward that Boland "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" [See Canada, R. v. Seward ^[6]]?
 - d. Did the Court apply the correct test under IHL for assessing the knowledge and intent of Boland? Does IHL lay down such tests? Does it leave States entirely free in this regard?
 - e. Is torture a grave breach of IHL? (GC I-IV, Arts 50 ^[7]/51 ^[8]/130 ^[9]/147 ^[10] respectively) Did Canada violate IHL by not prosecuting Boland for torture? (GC I-IV, Arts 49 ^[11]/50 ^[12]/129 ^[13]/146 ^[14] 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 punished for the separate breach of negligently performing their duty as commanders?
5. Does Boland's sentence seem appropriate to you? What factors need to be taken into

