

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Hasan Foez Siddique

Mr. Justice A.H.M. Shamsuddin Choudhury

CRIMINAL APPEAL NO.62 OF 2013.

(From the judgment and order dated 9.5.2013 passed by the International Crimes Tribunal No.2 (ICT-2), Dhaka in ICT-BD Case No.03 of 2012.)

Muhammad Kamaruzzaman:

Appellant.

=Versus=

The Chief Prosecutor, International
Crimes Tribunal, Dhaka, Bangladesh:

Respondent.

For the Appellant:

Mr. Khon. Mahbub Hossain, Senior
Advocate (with Mr. Mohammad Nazrul
Islam, Senior Advocate, Mr. S.M.
Shahjahan, Advocate), instructed by Mr.
Zainul Abedin, Advocate-on-Record.

For the Respondent:

Mr. Mahbubey Alam, Attorney General
(with Mr. Murad Reza, Additional
Attorney General, Mr. Momtazuddin Fakir,
Additional Attorney General, Mr. Ekramul
Hoque, D.A.G., Mr. Bashir Ahmed, A.A.G.,
instructed by Mr. Syed Mahbubur Rahman,
Advocate-on-Record.

**Date of hearing: 5th, 9th, 10th, 11th, 17th June, 2014, 1st, 2nd, 3rd,
7th, 8th, 23rd July, 2014, 2nd, 3rd, 9th, 10th, 16th,
17th September, 2014 and 3rd November, 2014.**

Date of Judgment: 3rd November, 2014.

J U D G M E N T

Surendra Kumar Sinha, J.:

Background: Exploitation and Treachery

The cultural, emotional and racial difference of the people of then East Pakistan and West Pakistan were so clear that no conciliation was at all possible. The

exploitation by the West Pakistanis started from the creation of Pakistan. In the field of employment or recruitment, in economic development, cultural subjugation, everywhere the story was the same. Sheikh Mujibur Rahman's speech on 20th October, 1970, revealed the magnitude of economic exploitation. He pointed out, 'Today barely two dozen families have acquired control over 60 percent of the nation's industrial assets, 80 percent of its banking assets and 75 percent of its insurance assets. Of the development expenditure during the same period, Rs.3,000 crores was spent in East Pakistan as against over Rs.6000 crores in West Pakistan. Over 20 years, West Pakistan had imported goods worth more than Rs3000 crores as against its own foreign exchange earning of barely Rs.1,300 crores'. (Bangladesh Documents. Vol.I: P.105-112)

The people of East Pakistan were the main victims of Ayub Khan's repressive policies. Through out ten-year of his regime, Sheikh Mujibur Rahman was either in prison or his political activities were restricted. In 1966 Sheikh Mujibur Rahman placed his 6-point programme before a convention of the opposition parties in Lahore. This

programme was welcomed by the Bangalees from all walks of life. The results of the elections of December 1970 came as a rude shock to Yahya Khan the military ruler of Pakistan when it was found that despite all odds Sheikh Mujibur Rahman's Awami League had won 160 of 162 National Assembly seats from East Pakistan. On 19 December, 1970, Sheikh Mujibur Rahman declared that the future Constitution of the country would have to be framed on the basis of 6-point programme and that there could be no compromise. (Dawn, Karachi 20 December, 1970). Zulfikar Ali Bhutto declared that without his party's co-operation no Constitution could be framed nor should any Government run at the centre (Dawn, Karachi 21 December 1970).

Yahya Khan announced that the National Assembly session was to be held on 3rd March 1971. On 1 March 1971 Yahya announced that 'regrettable confrontation between leaders of East and West, the National Assembly Session has to be postponed to a later date.' The statement created an impact that shook the very foundation of Pakistan. Sheikh Mujibur Rahman declared: 'This cannot go unchallenged. You see history made if the conspirators fail to come to their senses.' (Ittefaq, Dacca, 2 March

1971) The Awami League called for a country-wide hartal on 6 March 1971 and mass rally on 7 March 1970 in Dacca (Dhaka) to be addressed by Shiekh Mujibur Rahman. The same day (March 6) Yahya Khan appointed Lt. General Tikka Khan as Governor of East Pakistan (Ittefaq, Dacca, 8 March 1971). On March 7, Sheikh Mujibur Rahman made his historic speech in a meeting in Dhaka attended by nearly a million Bangalees. As announced earlier Sheikh Mujibur Rahman spelt out the future action programme in the meeting. The most memorable speech in the history of this nation was delivered by Sheikh Mujibur Rahman. The important portion of his speech were:

- a) If I cannot give any order - if my associates are not available by your side - you must continue the struggle.
- b) Do not pay any revenue or taxes till freedom is achieved
- c) This struggle is for freedom. This struggle is for independence.

(A Tale of Millions; Bangladesh Liberation War-1971, Rafiq-Ul-Islam). From March 8, the movement took a definite shape. The Awami League issued directives to be

followed by everyone. Finally Sheikh Mujibur Rahman asked the Government officers to take orders from him. On 26th March, 1971, Yahya Khan broadcast his first speech announcing the imposition of Martial Law; "We have had enough of administrative laxity and choose," he declared "I shall see to it that this is not repeated in any form or manner". Sheikh Mujibur Rahman was arrested in the midnight but before his arrest he declared the independence of the country and communicated the message to his followers. Meanwhile, artillery shelling was started in different parts of Dhaka. Next episode was the brutality which had ever been witnessed by the people of the globe. In occupied areas of then East Pakistan they established a reign of terror unprecedented in human history.

By creating Al-Badar, Al-Shams, Razakars forces the Pakistani junta succeeded in setting a group of unfaithful Bangalees against vast majority's interest. These auxiliary forces, themselves being Bangalees, could conveniently mix with everyone without arousing any suspicion, collect all information and pass the information to the enemy. They used to identify and

locate Bangalees, especially Bangalee intellectuals who supported the liberation movement. These local enemies ruthlessly eliminated the sympathisers of the liberation struggle. Initially Bangalee intellectuals and professionals were their main targets. Thousands of doctors, engineers, educationists, thinkers and highly skilled personnel were killed by the members of these forces. (Dr. Mazharul Islam, Bangladesh Lanchhita, Dacca, Bangla Academy). Peace committees were also formed at various levels.

How much humanitarian violations the people and the world have experienced in 1971 require no elaboration. This has become a part of the history. I would like to reproduce some remarks and observations of Gary J. Bass for refreshing our memory. 'The slaughter in what is now Bangladesh stands as one of the cardinal moral challenges of recent history, although today it is far more familiar to South Asians than to Americans. It has a monumental impact on India, Pakistan, and Bangladesh-almost a sixth of humanity in 1971. In dark annals of modern cruelty, it ranks as bloodier than Bosnia and by some accounts in the same rough league as Rwanda. (The Blood Telegram, Gary J.

Bass). 'They could see explosions in the sky. 'Dark, dark, dark skies, but with flack' remembers Meg Blood. 'It was not like fireworks. It was continual. It was exploding all over the sky'. The detonations were small, but bright and loud. 'Some of the Banglisis who worked for the Bloods (the Consular General of USA) said that they knew people in the neighbourhoods that were being set aflame, including a poor bazaar area. There were army jeeps moving around. Some of the fires were in nearby places that were heavily populated with extremely poor people'. (Ibid. page 50)

'The Pakistani military had launched a devastating assault on the Benglisis. Truckloads of Pakistani troops drove through the city, only barely slowed by Bengli barricades. U.S. supplied M-24 tanks led some of the troop columns. Throughout Dacca, people could hear the firing of rifles and machine guns. Windows rattled from powerful. Zulfiqur Ali Bhutto, returning to Karachi, supported the crackdown, declaring, 'By the grace of God Pakistan has at least been saved'. Mujib was arrested and the Awami League banned, along with all political activity'. (Ibid. P 53).

The Tribunal has vividly reproduced the remarks and observations of eye witnesses from various books, journals and other medias highlighting the enormity of the brutality. It was observed that the Pak Junta could not perpetrate inhuman violations without active participation of the local right wing religious minded students and politicians. These forces also involved in the blood bath by organizing Razakars, Al-Badar, Al-Shams, Al-Mujahid forces, Peace Committee by shaking hands with the butchers, the glimpses of their remarks are as under:

“To face the situation Razakar Force, consisting of pro-Pakistani elements was formed. This was the first experiment in East Pakistan, which was a successful experiment. Following this strategy Razakar Force was being organised through out East Pakistan. This force was, later on named Al-Badar and Al-Shams and Al-Mujahid. The workers belonging to purely Islami Chatra Sangha were called Al-Badar, the general patriotic public belonging to Jamat-e-Islami, Muslim League, Nizam-E-Islami etc. were

called Al-Shams and the Urdu speaking generally known as Bihari were called Al-Mujahid."

(Sunset at Midday, Mohiuddin Chowdhury, Page 97).

'I decided to join Jamat-e-Islami after my education is over. In 1962 I did my M.A. and joined Jamat-e-Islami in January 1963 as a supporter. (Ibid P.65)... I was selected secretary of District PDM and then District DAC. I was selected secretary and then elected as Amir of District Jamat-e-Islami in 1968. I was holding the post of District Jamat till dismemberment of East Pakistan in 1971. In 1971 when peace committee had been formed to cooperate with Pakistani Army to bring law and order in East Pakistan, I was again elected secretary District Peace Committee.' (Ibid-P.66)

'The Jamat-i-Islami and especially its student wing, the Islami Jamiat-e-Talaba (IJT), joined the military's effort in May 1971 to launch two paramilitary counterinsurgency

Units. The IJT provided a large number of recruits.... The two special brigades of Islamists cadres were named Al-Shams (the sun in Arabic)... A separate Razakars Directorate was established..... Two separate wings Al-Badar and Al-Shams were recognised. Well educated and properly motivated students from the schools and Madrasas were put in Al-Badar wing, where they trained to undertake 'specialised operations' where the remainder were grouped together under Al-Shams, which was responsible for the protection of brigades, vital points and other areas.....

Bangladeshi scholars accused the Al-Badar and Al-Shams militias of being fanatical. They allegedly acted as the Pakistan army's death squads and 'exterminated leading left wing professors, journalists, literateurs and even doctors. (Pakistan between Mosque and Military', Hussain Haqqani, P.79).

'After a meeting with General Tikka Khan the head of the army in East Pakistan, in April

1971, Ghulam Azam, the amir of East Pakistan (GEI), gave full support to the army's action against 'enemy's action against 'enemies of Islam'. Meanwhile, a group of Jama'at members went to Europe to explain Pakistan's cause and defend what the army was doing in East Pakistan..... In September, 1971 the alliance between the Jama'at and the army was made official when four members of Jama'at-e-Islami of East Pakistan joined the military Government of the province....., (Vanguard Islami Revolution; The Jama'at-e-Islami of Pakistan: Sayyed Vali Reza Nasr, P.169).

'On the night between 25/26 March 1971 Tikka Khan struck. Peaceful night was twined into a time of wailing, crying and burning. General Tikka let loose everything at his disposal as if raiding an enemy, not dealing with his own misguided and misled people. The military action was a display of stark cruelty more merciless than the massacres at Bukhara and Bagdad by Chengiz Khan and Halaku

Khan..... General Tikka resorted to the killing of civilians and a scorched earth policy. His orders to his troops were 'I want the land and not the people...' Major General Rao Farman had written in his stable diary, 'Green land of East Pakistan will be pointed red'. It was pointed red by Bengali blood.' (Pakistan between Mosque and Military....P79).

'Al-Badar is believed to have been the action section of Jamat-e-Islami, carefully organised after the Pakistani crackdown last March.' (Bangladesh Documents, Vol-II P 577)

'.....during his visit to Dacca yesterday (December 19) he got the names of these Pakistani army officers who organised the murders, and members of 'Al-Badar' an extremist Muslim Group, who carried out these heinous crimes just before the surrender of Pakistani forces in Dacca. (Ibid. P 572)

When the Pakistani's were overpowered, they left the killing to the fascist 'Al-Badar', the armed wing of Jamat-e-Islami. This fascist

body has already butchered about 200 leading intellectuals, doctors, professors and scientists, including such eminent men like Sahidull Kaiser and Munir Chowdhury. (Ibid, P. 573).

According to prosecution, accused-appellant Kamaruzzaman organized and formed Al-Badar force in greater Mymensingh which includes Sherpur and involved in inhuman acts of mass killing, rape, arson, persecution etc. He was arrested in December, 1974 but later on he was set free after the killing of Sheikh Mujibur Rahman and the change of the government in 1975. He was put on trial before the International Crimes Tribunal No.2 for effective participation of those crimes which are punishable under section 3(2)(a) of the International Crimes (Tribunals) Act, 1973 (the Act of 1973).

Charges

The accusation No.1 against the accused is that he being a chief organizer of Al-Badar force and an activist of Islami Chatra Sangh abducted one Bodiuzzaman of Ram Nagar under Jhenighati police station, brought him to the Ahammed Nagar Army Camp, tortured him the whole night and

shot him to death. The second accusation is that in mid May, 1971, the convict Muhammad Kamaruzzaman in his capacity as organizer of Al-Badar Bahini and leader of Islami Chatra Sangh with his accomplices caused inhuman acts to an intellectual and pro-liberation activist Syed Abdul Hannan, Principal of Sherpur College. The third count of accusation is that on 25th July, 1971, at dawn convict with his accomplices of Al-Badar and Razakars forces accompanied the Pakistani Army (Pak army) with a view to commit large scale massacre, raided Sohagpur Village, attacked unarmed civilians, killed 144 persons and raped the widows of the victims. The fourth accusation is that on 23rd August, 1971, at Magrib prayer time the convict in his capacity as leader of Islami Chatra Sangh and organizer of Al-Badar Bahini instructed his Al-Badar Bahini to apprehend Golam Mustafa, a civilian of Gridda Narayanpur village, took him to college morh (inter-section), and then to the Al-Badar camp set up at the house of Surendra Mohon Saha and on the following night, the victim Golam Mustafa along with one Abul Kashem were shot, of them, Abul Kashem survived sustaining bullet injuries while Golam Mustafa died. The

seventh charge is that on 27th Ramadhan at about 1 p.m. the convict in his capacity as chief organizer of Al-Badar Bahini and leader of Islami Chatra Sangh being accompanied by 15-20 Al-Badar members raided the house of one Tota Mia of Golpajan Road, Kachijhuli, took Tapa Mia and his son Johurul Islam Dara at Al-Badar camp set up at District Council Daak Banglow, and thereafter these persons along with 5 others were taken to Bharamputta river and shot Johurul Islam Dara to death while Tapa Mia survived. The convict was acquitted of charge Nos.5 and 6 and accordingly, it is not necessary to mention the nature of offences allegedly committed by him in respect of those counts.

In this case, the prosecution proposed to apply the doctrine of superior responsibility of accused Muhammad Kamaruzzaman to determine his culpability in the perpetration of the aforesaid crimes. In all counts it is alleged that the acts of the convict attract the offences punishable under section 3(2)(a)(h) of the International Crimes (Tribunals) Act, 1973 (Act of 1973). In support of the charges, the prosecution has examined 18 witnesses and the defence has examined 5 witnesses. Both the

parties also relied upon documentary evidence. The Tribunal after analysing the evidence has found that the accused has incurred individual criminal responsibility in respect of charge Nos.1, 2, 3, 4 and 7 and that he has also incurred 'superior responsibility' for his acts and such responsibility can be taken into consideration as 'aggravating factor' in determining the degree of his culpability. It awarded sentences of imprisonment for life in respect of charge Nos.1 and 7, ten years imprisonment in respect of charge No.2, and death sentence in respect of charge Nos.3 and 4. Accused Mohammad Kamaruzzaman preferred this appeal against the conviction and sentences.

Besides documentary evidence in support of all counts, in support of charge No.1, the prosecution has examined 2 witnesses-Fakir Abdul Mannan (P.W.4) and Md. Hasanuzzaman (P.W.6). In support of charge No.2 the prosecution has examined Md. Monwar Hossain Khan Mohan @ Mohan Munshi (P.W.2), Md. Jahurul Haque Munshi, Bir Bikram (P.W.3) and Fakir Abdul Mannan (P.W.14). In support of charge No.3 the prosecution has examined Mohan Munshi (P.W.2), Shahid Safiruddin (P.W.10), Hasen Banu

(P.W.11), Hafiza Bews (P.W.12) and Korful Bewa (P.W.13). In support of charge No.4, the prosecution has examined Mosharraf Hossain Talukder (P.W.5) and Mojibur Rahman Khan Pannu (P.W.14). In support of charge No.7, the prosecution has examined Md. Hamidul Huq (P.W.1), Md. Abul Kashem (P.W.9), and Dabir Hossain Bhuiyan (P.W.15). Besides, P.Ws.1, 2, 3, Fakir Abdul Mannan (P.W.4), Dr. Md. Hasanuzzaman (P.W.6), Md. Ziaul Islam (P.W.8), P.Ws.14 and 15 made general statements regarding the accused's political background, his role and conduct after the declaration of independence in Sherpur and Mymensingh to corroborate the evidence of the above witness examined in support of each count and also to negate the plea of alibi taken by the accused. They stated that accused was a leader of Islami Chatra Sangh and he raised Al-Badar force in greater Mymensingh, and was involved in all atrocities as leader of Al-Badar force. They narrated the circumstances which compelled the people of Bangladesh to take arms against the Pakistani occupation army and also the role of the convict Muhammad Kamaruzzaman during the liberation struggle after the declaration of independence on 26th

March, 1971 by Sheikh Mujibur Rahman. Most of them are freedom fighters. The prosecution has also proved documentary evidence through Md. Azabuddin Miah (P.W.16), Amena Khatun (P.W.17) and Abdur Razzak Khan (P.W.18) for corroborating the oral evidence against the accused.

P.W.1 stated that he was the elected vice-president of Ananda Mohon College Student's Sangshad, Mymensingh during the liberation period; that he actively participated the students politics after the declaration of 6-points programme in 1966; that in the election held in 1970 Pakistan Muslim League, Jamat-e-Islami, Nezam-e-Islami, PDP contested against the Awami League candidates. Gulam Azam was the leader of Jamat-e-Islami, Hashemuddin was the leader of Muslim League, Monayem Khan was the Governor of East Pakistan, and at that time Muhammad Kamaruzzaman was one of the district level leader of Islami Chatra Sangh, a students wing of Jamat-e-Islami. In 1971, he said, there were two groups, one in support of the liberation of Bangladesh and the other against the liberation struggle, who supported the Pakistani occupation army. He stated that the group which supported the Pakistan's unity supported the mass killing

perpetrated by the Pakistani occupation army. In Mymensingh under the command of Islami Chatra Sangh, the Al-Badar Bahini was formed. Pak occupation army gave them arms and training. The Al-Badar Bahini's main camp was set up in the Mymensingh Zilla Parishad Daak Banglow. Kamruzzaman, Kamran, Ashraf, Didar, Shelly were active leaders of Al-Badar Bahini camp. After the crack down on 25th March night at Dhaka by the Pak army, Mymensingh's people tested the freedom for one month. He organized the Mukthi Bahini by inviting Bangalee EPR and police personnel to join Mukti Bahini. The police and EPR personnel declared their solidarity. When the army entered into Mymensingh town, the Muslim League, Jamat-e-Islami, Islami Chatra Sangh young cadres, Nezam-e-Islami and PDB's workers supported the Pakistani army. The freedom fighters retreated to the villages wherefrom he heard that Kamruzzaman, Shelli, Dedar joined their hands with the Pak occupation army.

P.W.2 was a member of Al-Badar force. He stated that after the crack down on the night following 25th March, the people started coming from Dhaka and at that time he heard about the atrocities of Pakistani army. Kamruzzaman

was a leader of students unit of Sherpur and after the arrival of Pakistani army at Jamalpur, Kamruzzaman invited the elderly people and the students and told them that he would take step for bringing the Pak army at Sherpur from Jamalpur. Thereafter, the Hindus and the Muslims started leaving towards India and on their way Kamruzzaman with his followers prevented them and looted away valuable goods. In the evening Kamruzzaman invited a meeting at Suren Saha's house when he saw that a Pakistani flag was hoisting and the young cadres were with Kamruzzaman. Kamaruzzaman was the leader of students front and lateron he formed a Peace Committee at Suren Saha house and thereafter, he started to commit atrocities in the locality. Kamaruzzaman also set up another camp at G.K School and he was the leader of Badar Bahini.

P.W.3 is a freedom fighter. He stated that after the attack at Dhaka University, EPR Head Quarter, Police Head Quarter by the army and killing many members of the forces, he along with other volunteers resisted the Pak army on 26 and 27 March at Chashara, Dhaka-Narayangonj Highway. After two days they retreated. Thereafter, he

went India for Guerilla training and after completion of training he came to Sherpur and saw that one Kamran was acting as Kamaruzzaman's lieutenant. He stated that Kamaruzzaman was the leader of Islami Chatra Sangh of greater Mymensingh, who formed the Al-Badar, Al-Shams Bahinis at Sherpur. Al-Badar, Al-Shams Bahinis were deployed at different schools of Sherpur and those forces worked with Pak army. In October he camouflaged as a bagger came to Sherpur to oversee the activities of anti-liberation activities and at one point of time, he came to know that Kamaruzzaman set up the Pak army's camp at Surendra Mohon Saha's Noyani Bazar house. At the time of taking information from the said camp he saw that Kamraruzzaman and Major Ayub were approaching towards the first floor and heard the sounds of torture of the victims.

P.W.4 is also a freedom fighter. He narrated the situation then prevailing in the country after 7th March speech of Sheikh Mujibur Rahman. On 26th March, he was at Bandhabathpara village under Jhenaihati police station and on getting the invitation of one Mr. Zaman, he went to the wireless station and on reaching there Mr. Zaman

informed him that the liberation struggle had started. Mr. Zaman handed over a wireless message wherein it was written, 'message to the people of Bangladesh and also of the world-Pakistan armed forces attacked the EPR base at Pilkhana and Police Line at Rajarbag'. He intimated this fact to MPA Nezamuddin of Sherpur. He communicated the message to the Indian authorities and after obtaining training in India, he came to Sherpur in April. He again left for India in the later part of April and resumed the training.

P.W.6 stated that on 25 March, 1971, the Pak occupation army started atrocities upon the unarmed civilians, which news spread all over the country; that being inspired by Bangabandhu's 7 March speech his younger brother Badiuzzaman who was then serving in the Pakistan Navy was taking preparation to join the liberation struggle; that at that time local anti-liberation collaborators like Shanti Committee, Razakars, Al-Badar forces involved in the killing, arson, looting and torture; that the Pak army and Al-Badar force set up camps at different places; that those forces killed pro-

liberation activists and also handed them over to the Pak army who, killed them.

P.W.14, a freedom fighter, stated that after training in India he returned back and on reaching home he heard from his brothers that Kamaruzzaman took possession of Surendra Mohan Saha's house and set up Al-Badar camp there; that Kamaruzzaman was the commander of Al-Badar; that then he heard that the supporters of pro-liberation people were brought to the camp from different areas and that their dead bodies were thrown under the Sheri Bridge after killing.

Charge No.1

P.W.4 stated that during the liberation war period Sayedur Rahman told him that his vhatiji jamai's brother Bodiuzzaman took shelter to the house of Ahmed Ali member; that Hasanuzzaman's father-in-law was Ahmed Ali member who was Sayedur Rahman's khalu; that Ahmed Ali member was a Muslim leaguer and an anti liberation supporter; that as Bodiuzzaman being a Pakistani Navy personnel could not go to India, he took shelter at Ahmed Ali member's house; that one night the members of Badar Bahini and Pak army took Bodiuzzaman to Ahmed Nagar camp

and killed him by torture; that on query by the leaders to Sayedur Rahman about the said incident, Sayedur Rahman told that he heard the incident of killing from Moqbul Hossain; that at one stage he asked Moqbul Hossain about the incident who in reply told him that the story told by Sayedur Rahman was correct. Sayedur Rahman further told him that Moqbul was following Badiuzzaman but on sensing the motive of Al-Badar Bahibi, Moqbul Hossain fled away towards the jute plantations on the plea for urinating; that on query about the persons who were involved in the killing, Sayedur Rahman told that he identified Kamaruzzaman, who was staying at Sherpur. In course of cross-examination, he stated that Ahmed Nagar School was established by Ahmed Ali member where a military camp was set up and that Bodiuzzaman was a resident of Nalita Bari. He could not say how many brothers Bodiuzzaman had.

From his evidence it is evident that he heard about the incident from Sayedur Rahman, who also did not see the incident but he heard the incident from Moqbul Hossain. This Moqbul Hossain, according to this witness is still alive. The prosecution has given no explanation for non-examination of Moqbul Hossain. Therefore, Moqbul

Hossain is the only person who can give correct picture regarding the story of taking of the victim by the Al-Badar force or the army from the house of Ahmed Ali. He is a vital witness for the prosecution but he has been withheld by the prosecution. I fail to understand why the prosecution has given no explanation for non-examination of Moqbul Hossain.

P.W.6 stated that the Pak army set up a big camp at Ahmed Nagar School, which was located nearer to Baman Nagar village and also of his father-in-law's house. He stated that on coming to know about the mass killing of innocent people by the Pak army, his brother went to his father-in-law's house on 29 June, 1971, with a view to collect information (rekey) about the atrocities of the Pak army; that he came to know that at about 11 p.m., 10/11 armed people came to his father-in-law's house and disclosed their identities as freedom fighters; that they called his brother to open the door stating that they were hungry and wanted to eat; that on coming to know about their identity as freedom fighters, Bodiuzzaman came out of the house and talked with them; that his in-law Moqbul Hossain arranged a bench for their sitting and

gave them muri (cereal of rice) for eating and at that time, other in-laws Sayedur Rahman and Jamshed Ali came there with a harican; that Sayedur Rahman having noticed that they were members of Al-Badar Bahini and Kamaruzzaman was with them, Sayedur Rahman and Jamshed Ali attempted to bring his brother back from their grips but failed in their attempts; that Kamaruzzaman approached Bodiuzzaman to accompany them for showing him the Ahamed Nagar camp and took him with them; that at that time they left a magazine with full of bullets on the bench, and on noticing the same Moqbul Hossain followed them with a view to handover the magazine, when he was compelled to follow them; that on sensing their ill motive Moqbul Hossain retreated on the pretext of urinating; that the Al-Badar members tortured his brother the whole night and on the following morning, the labourers who were working at the camp saw Bodiuzzaman who was then standing at Jhenaighati-Sherpur road; that they saw injuries on his person and one of his ears severed; that they killed his brother by shooting and that the labourers who were working there also saw the incident. He further stated that after the liberation, he

went to his father-in-law's house and talked with his in-laws Moqbul Hossain, Sayedur Rahman and Jamshed Ali and also the labourers; that Sayedur Rahman told that he recognized Al-Badar Kamaruzzaman and that on the basis of such information, he instituted a case against Kamaruzzaman and others.

In course of cross-examination he admitted that his brother was not a freedom fighter. He also admitted that Moqbul Hossain is still alive. The defence suggested to him that Bodiuzzaman had an affair with his sister-in-law Sajeda Begum; that whenever he (Badiuzzaman) came on leave, he used to stay at his father-in-law's house; that as he (P.W.4) cheated his father-in-law's family over his marriage, they did not accept the affair between Badiuzzaman and Sajeda favourably; that as his in-laws family was involved in the killing, he did not go to bring his brother's deadbody despite knowing about his death. The defence has admitted the killing of Bodiuzzaman in the hands of Al-Badar force by giving suggestion to the P.W.6, but this witness made a completely different story as regards the purpose of staying Bodiuzzaman in the house of Ahmed Ali member and

the manner of taking and killing the victim by the Al-Badar force.

According to P.W.6, Bodiuzzaman went to Ram Nagar village for the purpose of collecting information about the mass killing of innocent people by Pak army and at that time, on one night the Al-Badar members came in disguise of freedom fighters and took him with them to show the Al-Badar Bahini camp. If he was not a freedom fighter, it was not a believable story that he went to Ahmed Ali's house for collecting information about the activities of anti-liberation forces. On the other hand, P.W.4 stated that Bodiuzzaman went to Ram Nagar of Sayedur Rahman's house for safety, that is to say, Bodiuzzaman took shelter at the house of Ali Ahmed member as the latter being a Muslim League supporter and anti liberation element, Bodiuzzaman thought that Ahmed Ali's house was the safe place for hiding. This was also not a believable story since a camp of Al-Badar force was set up adjacent to Ahmed Ali's house.

Both these witnesses admitted that Moqbul Hossain saw the incident of taking Badiuzzaman by Al-Badar Bahini. Moqbul Hossain is still alive but no explanation

was given for his non-examination to corroborate the evidence of P.W.4 or P.W.6. P.Ws.4 and 6 made two different versions and in presence of such inconsistency, the prosecution ought to have examined Moqbul Hossain for clarification about the purpose for which Badiuzzaman went to the house of Ahmed Ali member on the fateful day and also the manner of taking him by the Al-Badar force. Whether he stayed in that house was for the purpose of collecting materials or for any other purposes or whether the Al-Badar force at all took him in the manner narrated by P.W.6. It is revealed from the evidence that Badiuzzaman was not a freedom fighter. So, he did not come to Ahmed Ali's house for collecting materials regarding the activities of the Al-Badar camp. If that being so, why he came to the house of Ahmed Ali member. Under such circumstances it is a doubtful story that he came to the house of Ahmed Ali member for collecting information. These facts create a reasonable doubt about the manner of incident of killing Bodiuzzaman as narrated by these witnesses. It is also difficult to accept the prosecution version as disclosed from the lips of P.Ws.4 and 6. Both the versions cannot go together. Prosecution

has preferred to examine only two witnesses and one version is inconsistent with the other. Though the defence has admitted the killing of Badiuzzaman by the Al-Badar force, in presence of two different versions, law demands that the accused-appellant should get the benefit of doubt. The prosecution has conducted the case recklessly. It has endeavoured no attempt to collect reliable and corroborative evidence to prove the charge. Both the investigation officers and the prosecutor have not at all applied their mind for proving the charge beyond doubt. Due to their neglects and laches, the convict appellant is entitled to get the benefit of doubt. The Tribunal did not apply its judicial mind in finding the accused guilty of the charge. We hold that the prosecution has failed to prove this charge beyond shadow of doubt against the accused.

Charge No.2

In support of this charge, P.W.2 stated that a camp was set up by the accused at Suren Saha's house which was contiguous to his house; that on the way to his maternal grand father's tailoring shop, he used to peep at the camp to see the activities of Al-Badar Bahini; that on

one of such occasion one Suja wanted to know why he did not come to the camp; that Suja told him that he would face problem if he did not co-operate them; that Suja then represented him to give training to the youngsters since he took training as volunteer earlier; that he was asked to give training to Razakars and Al-Badar forces; that being afraid by the proposal, he fled away from the house; that after three days one Razakar Raja told his father that unless his son had not been handed over to them, they would set ablaze of his house; that he kept himself concealed for some days to other places; that one day he heard that one Natu and Raja demanded Rs.500/- to his mother and threatened her to bring him back; that he could not conceal due to such pressure and returned home; that on the pressure of Kamaruzzaman, his mother brought him to the Nayani Bari camp; that he used to stay till mid night in the said camp and started giving training and parading the new recruitees every day but he was not given any salary; that he wanted to get rid of them and was searching out opportunity to get relieved; that one Samad doctor advised him one day to pretend as gastric ulcer patient by swallowing his prescribed medicine; that

as a per his advice he swallowed the medicine and pretended as a gastric ulcer patient complaining that he had pains on the stomach; that he was allowed to leave the camp temporarily for treatment but Kamaruzzaman thereupon deputed him as guard at the camp of Suren Saha's house; that after 2/3 days of joining, Kamaruzzamna, Kamran and their accomplices ordered to bring Hannan Principal and as a measure of punishment it was directed that he would be compelled to move around the city by shaving his heads; that Hannan Principal's head was shaved in the house of Habib ukil and his face and head were smeared with limepest and soot; that he was tied up with a rope and compelled to walk around the city in such condition and thereafter, Kamaruzzaman narrated the incident to Major Riaz; that as per his (Kamaruzzaman) order, Hannan was taken back to the camp; that after Hannan's rope was untied, the latter rolled down on the floor on senseless condition and after pouring water on his head, he regained his sense and that thereafter Hannan was sent back to his residence.

In course of cross-examination, this witness stated that the Pak army talked with Kamaruzzaman in Urdu; that

after two days of bringing Hannan Principal, Afsar doctor was taken there. The defence suggested to him that he was not a competent witness; that he was compelled to depose on the assurance of Government to give a job for his son Md. Nurun Nabi Khan in the Revenue Office; that his another son Ibrahim was a narcotics peddler and a hijacker and that a case under section 392 of the Penal Code was pending against him and two others. He denied the defence suggestions. On the question of his competency to give training to Al-Badar and Razakars forces, he stated that he was 22/23 years old during the time of liberation struggle; that he underwent three hours training every day as volunteer; and that after the training, he went to Ansar Office for joining as Ansar. He corroborated his earlier statements regarding his training, joining as Ansar and thereafter serving as guard in the camp set up at Suren Saha's house. He reaffirmed his statement that he worked as a Razakar. The defence has in fact admitted his status as guard of Al-Badar camp by giving him suggestion that the place where he performed his duties at Suren Saha's house was not visible from the road. He denied the defence suggestion.

By this suggestion the defence had admitted his claim that he was deputed as guard at Suren Saha's house where the Al-Badar camp was set up. In reply to a query, he stated that after two and half/three months of joining as guard at Al-Badar camp, Major Riaz sustained injury in an explosion.

P.W.3 stated that he came to Suren Saha's house once and heard that Kamaruzzaman and Major Ayub shaved Principal Abdul Hannan's head, roped him and compelled him to move the entire city by smearing his face and head with limepest. In course of cross-examination, he stated that he saw Major Ayub at Suren Saha's camp towards the first week of May and that he was a student of Sherpur College at that time. He denied the defence suggestion that he did not hear such incident.

P.W.14 corroborated the statements of P.Ws.2 and 3 and narrated the incident of persecution of Principal Syed Abdul Hannan by Kamaruzzaman, Kamran etc. In course of cross-examination, he stated that Principal Hannan's residence was at Sheripara; that he went to his residence and that he knew him well. He reaffirmed his statement that Kamaruzzaman was the commander of Razakars but soon

thereafter, he rectified his statement stating that he was the leader of Al-Badar Bahini. The defence suggested to him that he was a jobless poor person; that Awami League people gave him financial support to depose in the case against Kamaruzzaman and that he was taken to Dhaka to depose falsely. He denied the defence suggestions.

The Tribunal on appreciation of the evidence observed that P.Ws.2 and 14 are eye witnesses and saw the event of inhuman acts caused to Principal Abdul Hannan, of them, P.W.2 was a member of Al-Badar Bahini, who worked as guard at the Al-Badar camp of Suren Saha's house for seven months; that naturally, he had the occasion to witness the event; that from the statement of P.W.14 it revealed that he returned to his home in Sherpur from India during the first part of May 1971 and within seven days of his return, he was apprehended and kept at Banthia building; that he was given in the custody of police wherein he was detained for two days and thereafter, he was brought to Ahmed Nagar camp wherefrom he was finally released as per order of Major Reaz. It was further observed that he is a very reliable witness, who witnessed the incident of the event of

forcing Principal Abdul Hannan to walk around the Sherpur town by smearing lime and ink on his face and head. It was further observed that there are uncontroverted evidence of taking Principal Abdul Hannan at the Al-Badar camp of Suren Saha's house and this fact proved that the accused had significant level of influence and authority upon the members of Al-Badar camp by providing encouragement and approval to the actual perpetration of the offence of inhuman acts which acts attract the offence of Crimes against Humanity. The Tribunal further held that though the Act of 1973 does not define 'other inhuman acts', the expression itself signifies that it is of such kind of treatment which is detrimental to physical and mental violence to an individual; that Principal Hannan was predominately an unarmed civilian; and that 'Other inhumane acts' logically encompasses the 'coersive acts' which are injurious to one's physical and mental well being. The Tribunal thereafter came to the conclusion that Principal Syed Abdul Hannan was an educationist, who had supported the pro-liberation Bangalee movement for achieving independence; that in measuring mental harm caused, if his age and status,

pattern of inflicting acts are considered, it would be sufficient to infer the seriousness of the acts of humiliation caused to him. The Tribunal concluded that Principal Abdul Hannan was persecuted by the accused and his acts constituted the offence of 'other inhuman acts', and it may be taken as a part of systematic or organized attack on an educationist and that the accused being a leader of Al-Badar force consciously encouraged and approved the design to perpetrate the criminal acts by Al-Badar members.

It was contended on behalf of the appellant that P.Ws.2 and 14 contradict each other about the place where the victim Principal Abdul Hannan was persecuted and in that view of the matter, the Tribunal acted illegally in convicting the accused relying upon them. It was further contended that non-examination of Principal Syed Abdul Hannan casts serious doubt about the story of persecution to Principal Abdul Hannan. It was further contended that the conclusions arrived at by the Tribunal are based on misappreciation of the evidence and that the Tribunal erred in law in failing to notice that P.W.3 disclosed a

different date of causing persecution to Principal Abdul Hannan by the members of Al-Badar Bahini.

In this case, the prosecution has tried to make out a case that accused Kamaruzzaman being a leader of Al-Badar Bahini of Sherpur could not escape from aggravating criminal liability in respect of crimes committed by the members of his force, inasmuch as, his acts fall within the doctrine of superior responsibility or command responsibility. The Tribunal has exhaustively dealt with the question of superior responsibility and held that the doctrine would be applicable in considering the accused's culpability of the charge. Since a new concept of superior responsibility has been found against the convict appellant on all counts, I am persuaded to discuss this point later on to examine whether or not the acts of the accused attract the doctrine of superior responsibility.

P.Ws.2 and 14 are eye witnesses. P.W.2 was an accomplice of accused Muhammad Kamaruzzaman and he was deputed as guard of Al-Badar camp set up at Suren Saha's house. The defence failed to shake his veracity in any manner as regards his status that he was deputed as guard

of the camp and that he witnessed the incident of persecution and torture. Though the defence gave some suggestions to discredit his testimony, it failed to bring anything to negate his claim that he was not employed as guard in the camp set up at Suren Saha's house. On this question, he was repeatedly cross-examined but the defence could not discredit his veracity. He stated that basically he was in favour of freedom fighters; that after the arrival of Pak army and setting up camps, he went to see the Al-Badar camp; that he was employed in the Al-Badar camp for seven months as guard but he was not given any salary and that he was only provided with better food. He stated that Al-Badar Bahini had no dress; that Razakars were given Rs.700/- as salary per month; that his boss Kamaruzzaman was superior to him, who was staying with Majors. So this witness has also disclosed the role played by the accused Kamaruzzaman. The defence suggested to him that after the liberation, he left the area to save his life from the onslaught of the people since a case for collaboration was instituted against him. This suggestion is very significant and in fact, by giving this suggestion the

defence has practically admitted his status as a member of Al-Badar force he performed as guard of the Al-Badar camp. The defence suggested to him that the place where he was deputed was not visible from the road. By giving this suggestion also the defence has practically admitted his status of guard of Al-Badar force where he was deputed, that is to say, he was performing his duties at the place, which was not visible from the road. The defence failed to elicit any enmity with him. Naturally he is a most reliable witness and the defence has practically admitted the prosecution's claim that P.W.2 was deputed as a guard of Al-Badar camp and that he witnessed all criminal activities of the accused.

P.W.3 is a freedom fighter. Though he is not an eye witness, he has stated that he heard about the incident of humiliation of Abdul Hannan in the first part of November and that the incident had occurred 15/20 days prior to his hearing. So according to him the incident had occurred in mid October. He further stated that he came to Sherpur in disguise of a bagger in October. Thus, he corroborated his earlier statement but there is inconsistency about date of occurrence. It is to be noted

that he has stated a fact which he has heard after arrival to Sherpur. It should be remembered that he was deposing a fact after 40 years about what he heard. Apart from this minor inconsistency, there is no reason to discard his testimony. If he had any ill motive to implicate the accused falsely, he could claim that he witnessed the incident of persecution. He is a literate person. Predictably due to lapse of time, he could not remember the actual date or that he could not follow the exact date from whom he heard. He stated that he took his training at Cherapunji, Meghalaya for one month; that he was included in the Maratha First Battalion, 95 Mountain Brigade and that he was appointed as commanding officer. He further stated that his superior officer Hardev Singh Clay gave him the task of collecting information about Al-Badar camps set up in the border areas and that in pursuance of that direction, in the month of October he entered to Sherpur town in disguise of a bagger and visited the camp set up at Suren Saha's Nayani Bazar. So he is a most trustworthy and reliable witness. He gave a vivid picture about his training and from his veracity, it cannot be said that he was making any tutored version.

As noticed above, P.W.14's claim of witnessing the incident remained uncontroverted. So we find that P.Ws.2 and 14 have corroborated in material particulars and that by P.W.3 corroborated them on the question of persecution except the exact date of persecution. Abdul Hannan was the Principal of Sherpur College. His fault was that he did not carry out the direction of the authority to keep open of the college and resume regular classes. The evidence on record revealed that Principal Hannan's head was shaved, and then his face and head were smeared with colourful stuffs and then he was compelled to move around the city on such condition. Naturally he had been humiliated both physically and mentally to the estimation of the public in general including his students and colleagues. This type of barbarous humiliation on an educationist was an attack on human dignity and honour. The acts of the accused in causing such humiliation to Abdul Hannan was deliberate and intentional only to show that none would be spared in future if he disobeyed the order. It is true that the prosecution failed to examine Abdul Hannan, although he was cited as witness. It should be bone in mind that he was the Principal of a college in

1971. Naturally, the victim was above 40 years old in 1971 and after 40 years he was an octogenarian. This case should not be taken as one of general nature and it should be borne in mind that after so many years, it is not expected from others to depose for the purpose of corroboration. Evidence collection for proving the offences of Crimes against Humanity after 40 years is a hard task for the prosecution for innumerable reasons. It is seen from other jurisdictions that convictions to the perpetrators were given in some cases mainly relying upon documentary evidence. As the victim Syed Abdul Hannan was unable to attend the Tribunal because of his old age and ailments, the prosecution filed an application for using his statement as evidence made to the investigation officer under section 19(2) on the ground that he was so old and sick that it was not possible to produce him before the Tribunal. Though the Tribunal rejected the prayer, on consideration of the evidence of P.Ws.2, 3 and 14, even in the absence of Abdul Hannan, the Tribunal has rightly found the accused guilty of the charge and I find no cogent ground to take a different view.

Charge No. 3

This was one of the most barbarous and horrendous incidents ever happened on earth in this civilized world. This charge relates to mass killing of male members of village Sohagpur commonly known as Bidhaba Palli (widows locality) and rape of widows. The change of the name of the village signifies the enormity of the incident of killing. Almost all male members of the village were brutally killed by the butchers and that's the cause for changing the name of the village. P.W.2 stated that being a guard of the Al-Badar camp, he witnessed the preparation and planning of the killing; that on one day he learnt that accused Kamaruzzaman with his accomplices was holding a meeting on the upper floor of the camp in which he was on duty for operation against the freedom fighters, who according to them, allegedly came to Sohagpur; that as per decision they gheraoed Sohagpur village and Kamaruzzaman was with them; that on the following day, he saw that many deadbodies were brought by trucks to the Pourashava Park; that Mohir Uddin Kazi announced by miking that thousands of deadbodies of freedom fighters had been brought; that at that time his

boss Al-Badar commander Kamaruzzaman swaggered that these persons were killed in the operation and that the Razakars also participated in the operation.

In cross-examination he stated that he was acquainted with accused Kamaruzzaman from his boyhood. It was suggested to him that after the arrival of the Pak army he with his Razakars force regularly looted shops and set them ablaze. By this suggestion the defence has practically admitted his status of working as Razakar in 1971. He stated in reply to a query that he was an Al-Badar and not a Razakar. It was also suggested to him that he continued with the acts of looting till the time of the arrival of the freedom fighters in the locality. He denied the defence suggestion that he left the locality after the liberation of the country for avoiding trial as collaborator. These suggestions supported the prosecution claim that he worked as guard of Al-Badar force camp in 1971. He disclosed elaborately about his role and the manner of witnessing the planning and activities of Kamaruzzaman while he was deputed as a guard of the camp. He stated that when Kamaruzzaman was holding meeting in the Al-Badar camp he was staying in

the ground floor. The defence did not at all challenge his statement. Therefore, his statement remained uncontroverted. Over and above, he has reaffirmed his statements made in chief and the defence fails to discredit his testimony in any manner. The defence endeavored much to negate his claim of giving training and working as guard at the Al-Badar camp but it failed to dislodge his claim. The defence has cross-examined him on unrelated matters without specifically confronting to the incriminating evidence made by him in chief.

Md. Jalal Uddin (P.W.10) is the son of slain victim Shafiruddin of Sohagpur. He narrated the horrific incident committed on 25th July, 1971. According to him, the Pak army along with Al-Badar and Razakar forces entered into Sohagpur village at about 7/7.30 a.m.; that his younger brother Alauddin came hurriedly and intimated that the Pak army, Al-Badar and Razakars forces entered into the village; that on hearing the news he fled away from the house and hid nearer to his house, while his younger brother hid in their granary; that thereafter he heard heavy sounds of firing and after sometimes, when the firing was stopped, he approached towards east from

the eastern side of Suruj Ali's house and saw the deadbodies of Montaz Ali, Shahid Ali, Abul Basher and Hashem Ali, which were then lying on the ground; that from there he hurriedly came to his compound and saw 11 deadbodies, of them, he recognised his father Shafir Uddin, his uncle Kitab Ali, Khadem Munnas Ali, Mohammad Ali, Momin Mia, Kutub Uddin, Rajat Ali, Iman Ali along with some unknown deadbodies; that when he noticed that Iman Ali was still alive, he along with the deceased's wife shifted him on the verandah but before reaching there he died; that they wailed the whole day and thereafter, at dusk some deadbodies were burried in a common graveyard and 4 deadbodies in two other graveyards; that thereafter he along with other seven family members took shelter at Jubli village; that after three days, he returned home and he enquired to the persons present about the massacre; that the elderly people who survived told him that 245 persons were killed in Sohagpur and Venupara villages and that Bokabura, Musa, Kadir doctor, Kamaruzzaman with Pak force committed the massacre. He also stated that Kamaruzzaman was a

leader of Razakars of Sherpur and that all the Razakars had to obey his instructions.

In course of cross-examination he was asked as to whether he knew the victim Rahim Uddin. He replied in the affirmative. He stated that his (Rahimuddin's) wife Karfuri Beugm (P.W.13) is still alive, who is the chairperson of Sohagpur Bidhaba Kallan Samity and that the widows and children of slain victims Jasim Uddin, Seraj Ali, Abul Basher, Saheb Ali, Ayub Ali Munshi, Khajur Ali, Iman Ali, Shamsheer Ali, Katem Ali, Johir Uddin, Hasan Ali, Abdul Latif, Meher Ali, Babar Ali are still alive. By giving this suggestion to this witness, the defence has admitted the killing of those persons at the time, the place and in the manner stated by him. He was thoroughly cross-examined to discredit his veracity that he was not matured enough to witness the incident. The defence failed to bring out anything which would infer that he was an unreliable witness. He denied the defence suggestion that he being a member of a slain family was maintaining contact with freedom fighters and Awami League. By this suggestion, the defence has also admitted that his father was killed. He stated that he

himself is the President of Shahid Paribar Kallan Samity. He stated that after the death of some members of his samity, 40 members are still alive. He reaffirmed his claim that in his area Kadir doctor was a Razakar and Kamaruzzaman was the commander and that only one person commanded the Al-Badar and Razakars forces. He has practically clarified his earlier statement regarding the status of the accused Kamaruzzaman. The defence failed to elicit anything from him by way of cross-examination.

P.W.11 is the wife of slain victim Abdul Latif. She stated that during the relevant time, on 10th Srabon, her husband went for ploughing on the paddy field; that at 9 a.m. she heard the sounds of firing; that on hearing the sounds of firing she along with her child and mother-in-law fled away towards west; that at 4 p.m. she returned home and found the deadbody of her husband lying on the compound with the deadbodies of Ansar Ali and Johurul Huq; that at dusk the deadbodies were buried; that Al-Badar commander Kamaruzzaman, Razakars Nasa, Bokabura, Mozaffar killed her husband; that Kamaruzzaman was the leader of the said force; that on the previous day at about 10 a.m. three army personnel and one Al-Badar

personnel chased a girl and forced her to enter inside her house and then she was ravished by one army man and the other two guarded on the door and thereafter, these two army personnel sexually molested her as well despite her entreaties; that at that time, she was 18 years old. She identified the accused in the dock. She was thoroughly cross-examined by the defence to ascertain whether or not she was the wife of slain victim Abdul Latif but it failed to shake her testimony in any manner. She has reaffirmed her statements in chief. On a query by the defence about her identification of Kamaruzzaman, she replied that she heard from the elderly people that Kamaruzzaman was the leader at that time, who was also with them and that after the liberation, he was detained. She is an illiterate woman and there was no reason on her part to depose against the accused. On a reading of her testimony one can arrive at the conclusion without hesitation that she is a very natural witness. The defence did not deny that her husband Abdul Latif was not killed in the incident of Sohagpur massacre. So, the defence has practically admitted the killing of her husband.

Hafiza Bewa (P.W.12) is the wife of slain victim Ibrahim. She stated that she was 15/16 years old; that the incident took place on 10th Srabon at 7 a.m.; that Panjabees, Al-Badar, Razakars with Sherpur's Kamaruzzaman, who was Al-Badar Bahini's big leader killed her husband at her house; that she heard Kamaruzzaman's name from village elders; that Kadir doctor, Bokabura accompanied the forces; that after entering into her house they struck her with the butt of a gun when she rolled down on the ground and then they physically violated her modesty. When she was deposing she was wailing and the Tribunal recorded her demeanour. On that day, she stated, they also sexually assaulted Karfuli Bewa, Samala Bewa and other women; that Kadir doctor, Bokabura and Kamaruzzaman also joined in the acts of sexual assaults; that besides her husband, her uncle Seraj Ali, Kajur Ali, brother Abul Hossain and others were killed; that the deadbodies of Jalal Uddin and others were buried and at that time, she stated, her heart was piercing. She identified the accused Kamaruzzaman in the dock.

In course of cross-examination, she reaffirmed her statement made in chief. To discredit her veracity the defence asked some irrelevant questions but it failed to shake her testimony in any manner. She stated that since the time of liberation, she knows Kamaruzzaman; that after liberation she saw Kamaruzzaman in the television. She denied the defence suggestion that she was deposing falsely. She volunteered that she disclosed everything to the investigation officer except the incident of rape perpetrated to her and stated that everything could be disclosed other than that of her chastity because of prestige and dignity and that she decided to disclose the same before the Tribunal. The veracity of this witness is so natural that none can harbour any doubt about her capacity to memorise and narrate the horrendous incidents. Even none can term her as a tutored witness on going through her testimony. The defence has not also denied that her husband Ibrahim was one of the victims who was killed at the time of mass killing at Sohagpur.

Karfully Bewa (P.W.13) is the wife of salin victim Ibrahim. She stated that at the time of incident, she was 15/16 years old. According to her, the incident took

place on 10th Srabon at 7 a.m.; that her husband went for ploughing and at that time, she heard the sounds of firing; that she heard that all the persons who were ploughing and seedling were killed there; that the incident took place at Sohagpur Bidhaba Palli; that by leaving the plough in the field her husband returned back home and was anxiously wailing; that at that time two Panjabees along with Nosa, Bokabura, Kamaruzzaman came to her house and asked her husband whether he was a freedom fighter; that her husband was then sitting on the kot; that at that time they told him to come forward and no sooner her husband approached, they shot him on neck and then another shot on the abdomen which caused evisceration; that they killed her sister's husband; that by keeping the deadbodies in the cowshed they left for Nakla; that after three days when she returned back she found that her husband's deadbody was eaten by jackals and dogs and that they burried the skeletons of her husband and then she left for Nakla. She further stated that sometimes thereafter, when she returned back, the Badar and Panjabees started torturing the people; that three days thereafter, when she was at her cowshed, the

Panjabees ravished her and with them, Nasa, Bokabora and Kamaruzzaman were present. She identified the accused in the dock.

In course of cross-examination, she admitted that she is the chairperson of Sohagpur Bidhaba Kallan Samity; that Joritan Bewa, Hasen Banu, Somala Bewa, Jobeda Bewa, Asiron Bewa are members of her samity and that many people used to visit her house to take her interviews. She was thoroughly cross-examined by the defence on different points with a view to discredit her veracity but the defence failed to bring anything inconsistent with her earlier statements. She admitted that in the Bidhaba Palli the army constructed a big house where the Samity's meetings are being held; that when the investigation officer visited the locality, she along with other widows mentioned above made statements to the investigation officer in the office. She reaffirmed her statements made in chief to the effect that Kamaruzzaman was a leader of Al-Badar Bahini and Bokabora, Kadir doctor were with him. The defence did not challenge the death of her husband and therefore, the killing of her husband has been admitted by the defence.

Md. Arshed Ali (D.W.1) is the son of victim Md. Ekabbor Ali. He corroborated the prosecution witnesses about the incident of mass killing at Sohagpur with the exception that he did not implicate accused Kamaruzzaman in the killing and rape. He stated that on that day at mid night at 12, he along with some others buried 7 deadbodies including his father. He further stated that on seeing that his father was shot, he fled away towards the south eastern side and took shelter at Shinghimari canal. He admitted that his father's name was also mentioned in the book written by Abdur Rahman Talukder under the name 'গল্পে গল্পে ইতিহাস মুক্তিযুদ্ধের নলিতা বাড়ি'

In course of cross-examination, he stated that he did not see Kamaruzzaman till the date of his deposition before the Tribunal and that he did not know him. This statement clearly indicated the biasness of the witness, because he was deposing in presence of Kamaruzzaman, but he claimed that he did not see him. Secondly, if he did not know him, how he came to depose in support of Kamaruzzaman is not clear to me? So, he is totally a politically motivated witness. He expressed his ignorance on the question whether Kamaruzzaman was Al-Badar

Bahini's organizer in Mymensingh and a collaborator of Pakistan. Instead of denying the suggestion, he has indirectly admitted the role of Kamaruzzaman, otherwise, he would have said that Kamaruzzaman was not involved in those activities. He did not deny the prosecution's suggestion on the question of accused's status and his role in 1971. He then volunteered that about 10/11 years ago, when Kamaruzzaman contested the election, the local people knew that Kamaruzzaman was a leader of Jamat-e-Islami and before that, nobody knew about him. It was totally absurd explanation that a central leader of a leading political party was not known to the people of the locality at all, even then, he contested the election as a candidate of that political party. So, this witness is totally a biased and motivated witness and no reliance can be given to him.

Md. Kafiluddin (D.W.4) is the brother of Kamaruzzaman. He stated that his brother did not participate in the intermediate examination held in 1971 and thereafter in 1972, he passed the said examination. In course of cross-examination, this witness expressed his ignorance on the question as to whether his brother

was the office secretary of Islami Chatra Sangh in 1971. This reply proves that Kamaruzzaman was a leader of Islam Chatra Sangh in 1971, otherwise his answer would have been in negative. In an another query he expressed his ignorance about the existence of any camp at Surendra Saha's house except the one at Ahmed Nagar. So he is deposing against a fact which has been admitted by the defence as well. The defence has not challenged the prosecution's claim about the use of Surendra Mohan Saha's house as Al-Badar Bahini's camp. He expressed his ignorance on the point that with a view to suppress his brother's activities and participation of crimes which were planned in the said camp he was deposing falsely. According to him, no other army camp was set up in larger Mymensingh. He denied the defence suggestion that Al-Badar Bahini's camp was set up in the house of Suren Saha. He also expressed his ignorance that at the camp set up at Surendra Saha's house freedom fighters and minority community people were tortured and killed. He then volunteered that in the camp set up at Surendra Saha's house, he heard that one commander Kamran was in charge and that he was involved in all activities at

Sherpur. So, this witness has resiled from his earlier statement about the existence of a camp at Surendra Saha's house and also admitted the fact of torture and other criminal activities perpetrated by the Al-Badar Bahini in the said camp.

We noticed from his testimonies that this witness was not steady and strict to his earlier statements. He was making vacillating statements and a witness of such nature cannot be believed and relied upon. He, however, stated that his brother never visited Sherpur during the liberation struggle. This explanation is contrary to the evidence both oral and documentary on record. He admitted that in December, 1971, his brother was arrested from Kamalapur Railway Station. He also admitted that Abdur Rouf, Rezaul Karim, Zainal Abedin, Habibur Rahman, Hobi, Abu Bakar and others were members of Razakars and Al-Badar of Sherpur, but he denied the defence suggestion that these persons were accomplices of his brother. In view of this admission, this witness has practically admitted the prosecution's claim that his brother was the leader of those persons because they were the accomplices of the accused.

The Tribunal upon assessment of the evidence held that mere omission to narrate the events in detail precision is not contradiction and does not impair the witness-testimonies. It was further observed that the inconsistency of a statement of a witness does not necessarily mean that the witness is unreliable. It was further observed that it was unlikely that after the incident, the witnesses would hear more about it from others which might have been occurred at the same place and therefore, while testifying they would reproduce what they had seen and heard, attributing their information. The Tribunal observed that the totality of evidence show a demonstrable link of the accused to the actual commission of Sohagpur massacre. It was further observed that mere non-describing the name of the accused involving him with the commission of the events in the books, exts 'A' and 'B' does not *ipso facto* helps the defence version. Besides, it was observed, the authenticity of the information narrated in exts 'A' and 'B' raised reasonable doubt of the authors themselves, inasmuch as, they were not convinced about what they had described therein. With these observations the Tribunal

discarded exts 'A' and 'B' and found the accused guilty of the charge.

On behalf of the defence it was submitted that it was not probable on the part of the witnesses to identify the accused Kamaruzzaman in the incident of Sohagpur, inasmuch as, the presence of the accused at the scene of crime at Sohagpur is inconsistent with the prosecution evidence. It was further submitted that it was also not probable on the part of P.W.2, who being a security guard would be able to hear the conversations between Kamaruzzaman and other Al-Badar members for attacking Sohagpur village from the ground floor. It was further contended that P.Ws.11, 12 and 13 having not been cited at the initial stage as witnesses, and they having been examined by the investigation officer in course of the trial, their evidence cannot be relied upon. It was also contended that the recognition of Kamaruzzaman by P.W.13 is doubtful one. It was also contended that in view of the evidence of Md. Arshed Ali (D.W.1), who witnessed the incident and whose father was also brutally killed having not recognized Kamaruzzaman, it was unbelievable story that the other witnesses would be able to recognise him.

It is further contended that exts 'A' and 'B' negate the presence of Kamaruzzaman in the crime site and the Tribunal acted illegally in finding the accused guilty of the charge.

The accused has been charged with his complicity of the commission of the offences of mass killing and rape at Sohagpur. Now, it is to be examined as to whether the prosecution witnesses have proved that the accused has planned and conducted to the accomplishment of the substantive horrific crimes that took place at Sohagpur village and that he participated in the commission of those crimes with others. It appears that the defence has not disputed the horrific incident of attack causing indiscriminate mass killing of male members and rape of widows of the victims. There is no doubt that these acts were directed towards the civilian population of village Sohagpur only on the suspicion that freedom fighters took shelter in the village. Defence cross-examined P.W.10 merely to tarnish his credibility. P.W.10 stated in cross that in his locality Kadir doctor was Razakar and Kamaruzzaman was the top commander. P.W.10 was corroborated by P.W.2, who was an accomplice of the

accused. Thus it stands proved that local Razakars force including accused Kamaruzzaman accompanied the gang of perpetrators to the crime site.

Besides, there are unimpeachable evidence that accused Kamaruzzaman was one of the leaders of Islami Chatra Sangh, who organized the Al-Badar Bahini at Sherpur. P.W.1 stated that the occupation army gave them arms and training. Mymensingh District Daak Banglow was converted as the head office of Al-Badar Bahini and that he saw Kamaruzzaman in mid July or in the first part of August 1971 at the head quarter of the camp. It is found from the evidence that Kamaruzzaman was the leader of Al-Badar Bahini. The defence failed to dislodge the prosecution evidence adduced. Almost all witnesses stated that Kamaruzzaman was a leader of Islami Chatra Sangh who formed the Al-Badar Bahini in Mymensingh. Their evidence have been corroborated by the statements of Hussain Haqqani, former Ambassador of Pakistan in the United States, a think-tanker, now Director of South and Central Asia, Hudson Institute, who has narrated in his book as noticed above regarding the purpose for which the Al-Badar force was raised. It has been established by the

prosecution that Kamaruzzaman in his capacity as commander of Al-Badar force used to supervise the Al-Badar camps set up in the greater Mymensingh and that he was one of the planners of his force and also took active part in all activities in order to suppress the liberation struggle. P.W.1 has explained the role of Kamaruzzaman as leader of Al-Badar Bahini and his other activities. He also stated that in Sherpur Kamran managed the Al-Badar camp and at Jamalpur Ashraf was the leader of the camp. He further stated that besides those camps, there were other camps in Mymensingh, Nalita Bari and Fulpur Bulia Madrasha, which were controlled by Kamaruzzaman. There is no denial of the fact that Mymensingh was the larger district of Sherpur and that Kamaruzzaman was the leader of Sherpur Islami Chatra Sangh.

P.W.2 was deputed as guard of the camp set up at Suren Saha's house. He positively asserted that his leader was Kamaruzzaman. It is his claim that he heard the conversations between Kamaruzzaman and other Al-Badar members while they were planning to attack Sohagpur village. It is evident from the materials on record as discussed above that the religious minded right wing

students, the Madrasa based students particularly Islamic Chatra Sangh activists were recruited for raising the Al-Badar, Al-Shams and Razakars forces, as auxiliary forces by the Pak occupation army. P.W.2 acted as a reliable guard of the Al-Badar camp who was a faithful member of Al-Badar force. It was natural on his part to know the discussions and decisions of the leaders of that group from various sources. Because these persons formed the force for achieving one goal - it was to eliminate the freedom fighters from the soil with the help of Pak army. He has narrated the decision taken for attacking the Sohagpur village. He also saw the removal of deadbodies from Sohagpur for the purpose of burrial at Pourashava Park. At one stage the accused said swaggering that in the operation they were killed. P.W.2 made positive statement in this regard. This Statement proved that the accused masterminded the killing and from the statement of the accused which this witness heard, there is no doubt that the accused has also participated in the massacre. Therefore, the objection of the defence has no basis at all.

Though P.W.10 did not claim that he saw the incident of mass killing, he claimed that he heard the incident from village elders. The defence has admitted the killing of mass killing by giving suggestion to him. The role of Kamaruzzaman as leader of Al-Badar force during the relevant time has not been challenged by the defence. P.W.10 being the son of victim Shafir Uddin appears to us a reliable witness and the defence fails to discredit his testimony by cross-examination. More so, he has corroborated P.Ws.12 and 13, who are eye witnesses as regards the manner and the participation of the accused in the commission of crimes.

Similarly P.Ws.11, 12 and 13 are most trustworthy and reliable witnesses. Not only their husbands were brutally killed, they were also sexually molested. They are old women having children and grand children. At this age they did not hesitate to disclose the loss of their chastity in the hands of perpetrators of crimes. It was possible and natural on the part of educated women, particularly those of the developed countries to disclose such incidents, but it was unimaginable that these illiterate old women would come forward to disclose in

detail the acts of violence caused to them at this age. They knew the impact and consequences of their disclosures. Taking the risk of tarnishing their families honour and dignity to the estimation of the local people and their relations, which might also disgrace their next generation, they were not relented, rather disclosed it. It is possible only when they were determined that even at the cost of social strictures, the real story should be disclosed and the perpetrators punished. They did so only to heal their mental shock to some extent. The defence fails to bring out any sort of contradiction of their statements.

As regards the objection regarding the examination of P.Ws.11, 12 and 13, it is on record that they were the victims of the incident. It is natural that these witnesses initially did not want to disclose the events of sexual violence caused to them because they were apprehensive that if in course of cross-examination these facts were disclosed, their descendants might be disgraced. This might be the reason why the prosecution did not cite them as witnesses at the initial stage as they were not willing to disclose this episode. Later on,

they having realized that they should disclose the incident so that the real perpetrators are punished. Even then, they did not disclose the fact of sexual violence to the investigation officer. They disclosed those incidents before the Tribunal and explained the reasons for belated disclosure. There is no legal bar to examine a witness by the parties at any stage of the proceedings. Sub-section (4) of section 9 provides that the submission of list of witnesses and documents shall not preclude the prosecution from calling additional witnesses with prior permission of the Tribunal. The Tribunal on consideration of the gravity of the crimes and on being satisfied with the explanation given by the prosecution by order dated 8th and 9th October, 2012, allowed the prayer and they were examined in camera on 11th October, 2012. The examination of these witnesses in camera presupposed that they did not want to disclose the facts of physical violence caused to them in public and that is why, they were not examined earlier.

The fact of killing of the husbands and relatives of P.W.11, P.W.12 and P.W.13 and committing rape to them as stated by them remained unshaken. P.Ws.11 stated that she

heard from the elders that accused Kamaruzzaman also accompanied the perpetrators. She has testified that local Bangalee perpetrators-Razakars Nosa, Bakabura, Mozaffar, Kadir doctor and the accused accompanied the gang at the time of committing the atrocities. Presence of local Razakars and Al-Badar members at the crime site has not been disputed by the defence. Thus, the presence of the accused with them at the crime site, as heard by P.W.11 from the local elderly people is considered to be believable and natural. More so, P.Ws. 12 and 13 are eye witnesses. They stated that the accused was physically present with other forces. They identified him at the crime site with other accomplices and they also identified him in the dock.

The members of Al-Badar went to lay siege Sohagpur village and Al-Badar commander Kamaruzzaman led the team. Thus not only by organizing and planning of the mass killing, the accused was involved but also that he had accompanied the perpetrators with his Al-Badar force to the crime site. The versions of P.Ws.2, 10, 11, 12, 13 will be considered in the context of the matter. They have testified the events of mass killing and some of

them are victims of horrified incidents. The defence could not discard the very fact of killing of P.W.10's father and the husbands of P.Ws.11, 12, 13. It also failed to discard the P.Ws. 11-13's claim that they were sexually assaulted by the perpetrators.

As regards exts A and B, besides the observations of the Tribunal, I add that the proceedings of this case was initiated in the first part of 2010. Ext. 'A' was published in February, 2012. The author has mentioned some statements of the widows of the victims in his own language. He did not reproduce their statements in verbatim. Naturally there was scope for twisting the statements of the victims. Though the author in his introductory stated that the actrocity was committed by the occupation army in collaboration with some Razakars, he was conspicuously silent about the names of Razakars. It is totally unbelievable story that the victims who are alive and the heirs of the victims would not mention the names of the Razakars, who participated in the incidents, particularly when this Razakars force was raised from the local people. So this book has been published with motive while the trial of the case was in progress with a view

to create confusion about the complicity of the accused. Similarly Ext.'B' was published in February, 2011, in course of the trial of the case. In this book, the author interviewed some persons without giving detail of their identities. Though he imputed the blame of killing upon the Razakars force, lateron he stated that thereafter, the army orchestrated the mass killing. He was also totally silent about the names of Razakars. This speaks volume as to the motive behind the publication of this book in course of the trial of the case.

We may take judicial notice that after August, 1975 killing, the process of distortion of the history of the liberation struggle and also the erasing of the names of Razakars, Al-Badars and the Peace Committee members as collaborators of army started and the process is continuing till now. We noticed in one of the cases heard earlier relating to similar crimes that some witnesses examined on behalf of the defence stated that they did not even hear about the atrocities perpetrated in East Pakistan by Pak army in collaboration with Razakars, Al-Badar, Al-Shams in 1971. In this case also, D.W.5 stated that he never heard that in the larger Mymensingh area

there was existence of any Razakars or Al-Badar member under the name 'Kamaruzzaman'. The prosecution has proved by the old documentary evidence of 1971 showing that Kamaruzzaman was leader of Al-Badar Bahini and that he was arrested in December, 1971 but D.W.5 said that there was no existence of such Razakar in his locality. He was speaking against the admitted fact. Entire world raised voice against those barbaric atrocities by the Pak army with the assistance and collaboration of the local paramilitary forces, but some people of our country still believe that no such atrocities took place at all. There are innumerable reports in the international news papers, Magazines, Journals and Books describing the atrocities of 1971. But it is irony to note that some writers still publish books stating that those crimes were perpetrated by Pak army only.

Therefore, it stands proved beyond reasonable doubt that 144 or more civilians of Sohagpur village were brutally killed; that accused with his force actively participated in the incidents and that the killing was perpetrated pretending that the victims sheltered the freedom fighters. Taking into consideration of the

evidence of P.W.10, P.W.11, P.W.12 and P.W.13 with those of P.W.2, who has testified relating to the design orchestrated at Al-Badar camp set up at Suren Saha's house for launching the attack targeting the freedom fighters at Sohagpur village, there is no doubt that accused Kamaruzzaman was involved in the mass killing and rape which acts were widespread and systematic against civilian population. The accused knew that his conduct in the context was not associated with any armed conflict and even then he participated in the killing. Defence does not dispute the event of mass killing as narrated in the charge.

On an evaluation of the evidence of P.Ws.2, 10, 11, 12 and 13, and the documentary evidence, it is found that an operation was carried out causing killing of hundreds of innocent civilians including the father of P.W.10 and the husbands and relatives of P.W.11, P.W.12 and P.W.13 at Sohagpur village; that the mass killing was planned and organized at the camp set up at Suren Saha's house; that in pursuance of such planning and preparation, the killing was implemented on the following day on 25th July, 1971, by the Pakistani army being accompanied by

Al-Badar and Razakars forces including accused Kamaruzzaman; that after the mass killing, they gang raped the widows of the victims and that such rape continued for days together. It is also proved from the testimony of P.W.2 that the massacre was committed in furtherance of prior plan and design of accused Muhammad Kamaruzzaman at the Al-Badar camp of Suren Saha's house, Sherpur. Thus the accused significantly involved in the event of mass killing and rape committed at Sohagpur village.

The totality of evidence of the witnesses show a direct link of the accused to the actual commission of Sohagpur massacre and rape. There is no reason to discard the evidence of P.Ws.2, 10, 11, 12 and 13, of them, P.Ws. 12 and 13 are an eye witnesses. Besides, P.Ws.1, 3, 4, 6, 8 and 14 have vividly narrated the role and status of accused Muhammad Kamaruzzaman during the relevant time and their evidence have been corroborated by the documentary evidence proved by P.Ws.16 and 18, such as, exts 4, 6, 10, 11, 18, 19. If these evidence are considered with the evidence of P.Ws.2, 10, 11, 12 and 13, a conclusion that can be arrived at is that it is

only accused Kamaruzzaman at whose planning the massacre and rape were perpetrated.

In view of above, on careful assessment of the evidence we hold that the prosecution has proved that the accused Muhammad Kamaruzzaman, a leader of Al-Badar Bahini has organized and planned the mass killing from the camp set up at Suren Saha's house; that he facilitated and launched the attack at village Sohagpur; that in the incident 144 or more unarmed civilians were brutally killed without any excuse; that the widows of the victims were also ravished after the killing; that the subsequent behaviour of the accused that he had shown after bringing the dead bodies to the Municipality Park, Sherpur from the crime site unerringly proved his culpability; that the principal perpetrators were the Al-Badar members of the camp of Suren Saha's house, apart from the Pakistani army and the local Razakars and that the accused Muhammad Kamaruzzaman as leader of Al-Badar force had participated the killing and the rape. The Tribunal, in the premises, is justified in finding the accused guilty of the charge.

Charge No.4

In respect of this charge - the incident of killing Golam Mustafa at Gridda Narayanpur, P.W.2 as guard of Al-Badar camp stated that he saw when Golam Mustafa was taken at the camp by folding his hands back side; that he was tortured and the victim was screaming saying 'মাগো বাবাগো'; that after the torture the victim was kept beside him under the stair; that he wanted to drink water; that one person from Kazir Khamer came to take him back but the victim was not given with him; that the victim's uncle from Kharkharia also came to take him but his request was also denied; that before the dusk, when Major Reaz came Kamaruzzaman told him that one mischievous person (activist of Awami League) was captured; that at that time, Reaz told him that after saying prayer and inspecting another camp he would return; that in the mean time a retired army Nasir came and took Mustafa on blindfolded condition on a rickshaw to Sheri bridge with a gun from the office; that Kamaruzzaman left the office five minutes before and after half-an-hour, Kamaruzzaman and Nasir returned back jointly; that Nasir was telling at that time that sir's (Kamaruzzaman) hand was so accurate and he was brave enough to trigger a gun; that

in the mean time, Reaz returned back and wanted to know about the person who was detained; that Kamaruzzaman replied that Nasir took him; that on hearing the news Major Reaz was furious and wanted to know from him whether Nasir was so powerful than both of them; that at that time Nasir went upstairs, when Reaz struck him with the butt of a gun who rolled down on the ground floor, and that thereafter, Kamaruzzaman with 20/25 armed Razakars force approached towards Nakla. He was cross-examined by the defence and in reply to a query he stated that Al-Badar commander Kamaruzzaman contested 1990 election, but he could not return. I have discussed and evaluated his evidence earlier while considering the charge No.3 and observed that he is a reliable witness.

Mosharraf Hossain Talukder (P.W.5) is the brother of slain victim Golam Mustafa Talukder. He stated that his brother was a student of HSC of Sherpur College and cultural secretary of Chatra Union; that his brother went India on 26th March, 1971, and took training as freedom fighter; that after one and half months his brother returned back and at that time another freedom fighter Asad came to meet him; that as directed by then

government that the students who did not participate in the intermediate exam would be treated as supporters of liberation struggle, his uncle Tofial Islam Talukder, who was a Peace Committee member advised his brother to appear in the examination in order to avoid any complication; that towards the end of the examination on 23rd August, his brother went to purchase a battery from Sherpur College intersection area and at that time, as per order of Sherpur Al-Badar leader Kamaruzzaman, some Al-Badar members took his brother at Al-Badar camp of Suren Saha's house; that on getting such news, his uncle Tofial Islam went to bring back Golam Mustafa and met Kamaruzzaman and made entreaties to Kamaruzzaman for releasing him; that Kamaruzzaman told him that all of them including Golam Mustafa hailed from the same locality and then he advised him to go back without saying anything; that thereafter, his uncle requested the Shanti Committee leader Hamidul Huq for releasing Golam Mustafa; that Hamidul Huq had discussed the matter with Kamaruzzaman and requested him to release him; that on the same night the victim was taken to Sheri Bridge for killing; that Kamaruzzaman along with some Al-Badar

members shot him to death; that one Abul Kashem was also taken with Golam Mustafa on the bridge and he was also shot which caused bullet injuries on his thigh and right hand finger, but miraculously he survived by jumping into the river; that after the liberation Abul Kashem narrated the story to him; that on the following day at noon, one Tara of their village along with some other villagers recovered the deadbody of Golam Mustafa and took him to Kharkhria Bridge; that he saw the deadbody of his brother with bullet injuries on his left leg and chest; and that after the liberation, his father instituted a case against Kamaruzzaman over the said killing.

In cross-examination, he stated that during 1971-1975 Kamaruzzaman was in custody; that his brother Golam Mustafa appeared in the examination from Atar Ali's residence of 'Abeda lodge', who was related to him; that Atar Ali is not alive; that the distance between Suren Saha's house camp and Sheri bridge is two and half/three kilometers; that rickshaws were mainly used as the means of movement in the area. He denied the suggestion that the killers of his brother were mentioned in the book 'একাত্তরের বিজয়গাথা' but Kamaruzzaman's name was not included in

it. By this suggestion, the defence has admitted the killing of Golam Mustafa by the Al-Badar force. He denied the defence suggestion that he did not meet Abul Kashem after liberation or that Abul Kashem narrated to him the manner of killing of his brother. He also denied the defence suggestion that Kamaruzzaman was at home during the period of liberation. The defence failed to discredit his testimony in any manner. His evidence on the point of taking of Golam Mustafa from Sherpur College intersection on 23 August and then taking him at the Al-Badar camp set up at Surendra Mohon Saha's house; and then his uncle Tofail Ahmed went to bring him; and that Abul Kashem who witnessed the incident of shooting narrated to him after the liberation remained unshaken. Rather the defence has admitted the killing of Golam Mustafa.

Mujibur Rahman Khan alias Panu (P.W.14) is a freedom fighter. This witness claimed that he knew Kamaruzzaman and Karman from before as they used to come to their tailoring shop for making trousers and shirts; that after 26 March, under the guidance of Sobader Abdul Hakim, he took training in the deserted house of Ariani Jaminder house; that he along with others went India for training

and returned back in the country for fighting against the Pak army; that on hearing about the illness of his mother, he came home via Hatibazar and Nalita Bari in May from India; that his brother Ansar Ali was a motor mechanics and as he was then repairing army's vehicles, he was acquainted with Major Reaz; that on returning home he heard from his brother and others that Suren Saha's house had been used as Al-Badar camp, and Kamaruzzaman was the commander of Al-Badar Bahini; that he also heard that Kamaruzzaman and others used to bring pro-liberation people in the camp and after killing threw the deadbodies under the Sheri bridge; that after seven days of his return, Kamaruzzaman, Mintu Khondakar, Advocate Tara, Falu Mia and 4/5 others gheraoed their house and freshtened him by folding his hands back side and kept him in the Banthia building Sherpur and that he saw one Liakat who was detained there.

This witness narrated the complicity of Kamaruzzaman in respect all atrocities and his closeness with Major Reaz meticulously. He stated that Kamaruzzaman told Major Reaz that the detained 11 persons including himself were lined up on the road in front of Ahmed Nagor school; that

the accused advised the army major that these persons should not be released; that at that time the accused with his men were taking preparation to shoot them, but Major Reaz prevented them to kill and that as per direction of Reaz, he was released on condition that he would give attendance everyday at Ahmed Nagar camp. He further stated that in May, 1971, he was approaching to Ahmed Nagar camp for giving attendance when he met Golam Mustafa near Khuarpar brick kiln and on query, the latter told him that he (Mustafa) was going for appearing HSC exam; that while he returned at night, he learnt from his brother Ansar Ali Khan that on that day at dusk Kamaruzzaman and his accomplices took Golam Mustafa at Suren Saha's Al-Badar Camp and that on the following day, he came to know that the deadbody of Golam Mustafa was lying under Sheri bridge. He identified the accused in the dock.

He was thoroughly cross-examined by the defence but it did not challenge his statement that Al-Badar commander Kamaruzzaman used to bring the supporters of freedom fighters from different places and threw their deadbodies under Sheri bridge after killing. He

reaffirmed his statement that Kamaruzzaman was the commander of Al-Badar. He denied the defence suggestion that he was a vagrant and that as he was financially weak, Awami League people brought him to give evidence in exchange of money. The defence failed to shake his testimony in any manner particularly the incriminating part of his evidence remained uncontroverted. The defence has also admitted the killing of Golam Mustafa. Apart from their evidence, Al-Haj Asgar Ali (D.W.2) has also admitted the killing of Golam Mustafa but according to him, he was killed by Pak army. He, however, stated that he did not hear that Kamaruzzaman was involved in the killing. He admitted that Mofazzal, Kamran, Suruzzaman, Samedul doctor were collaborators of Pak army.

The Tribunal after assessment of the evidence observed that after bringing Golam Mustafa at the Al-Badar camp his relatives made repeated appeals to Kamaruzzaman to set him free but their attempts were in vain; that it indicated that the accused was concerned in the event of abduction and detention of Golam Mustafa at the Al-Badar camp; that P.W.2 proved that Golam Mustafa was brought to the camp set up at Suren Saha's house and

beaten; that the talk of accused with Major Reaz demonstrated accused's antagonistic attitude towards Golam Mustafa; that the accused allowed Nasir to take Golam Mustafa to Sheri bridge where he was shot to death and that the accused participated in the commission of killing.

On behalf of the defence it was argued that the Tribunal erred in law in believing the presence of Major Reaz on the date of killing of Golam Mustafa which negates the claim of the witnesses, inasmuch as, Major Reaz left Sherpur before the said incident for treatment after sustaining injury earlier. It is further contended that Abul Kashem having not been examined in this case, the Tribunal acted illegally in believing P.W.5. It was further contended that Tofail Ahmed being a member of Peace Committee, it is unbelievable story that on his advice Golam Mustafa would sit in the HSC examination. It is further contended that the manner of taking Golam Mustafa while he went to purchase a battery was not a believable story.

The defence only disputed the date and the complicity of accused in the killing of Golam Mustafa. On

a thorough evaluation of the evidence of P.W.2, it will appear that this witness has seen the manner of bringing Golam Mustafa at Suren Saha's camp and also heard the screaming of Golam Mustafa at the time of torture. According to this witness, the accused ignored the entreaties made by the relatives of Golam Mustafa for his release. He also saw the incident of taking Golam Mustafa by Nasir with a gun and the return of the accused and Nasir jointly at the camp after the killing. He stated that from the utterances of Nasir he was convinced that the accused shot the victim to death. As regards the date of injury of Major Reaz, he stated in cross that after $2\frac{1}{2}$ /3 months of his joining at the Al-Badar camp, Major Reaz sustained injury on mine explosion.

P.W.3 stated that in the Kamalpur battle Major Reaz had sustained injury in the first part of August, 1971. The defence relied on exhibit E(6) 'বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র ১০ম খণ্ড' edited by Hasan Hafizur Rahman wherein the author mentioned that the Kamalpur encounter was held on 6 September, 1971. Taking this statement as the date of sustaining injury of Major Reaz, it is contended by the

defence that the prosecution version of killing of Golam Mustafa when Major Reaz was present at the crime site on 23 August was totally false story and therefore, the prosecution has failed to prove the complicity of the accused. On the other hand, the learned Attorney General submitted that the statement of P.W.3 that Major Reaz sustained injury in first part of August is a misstatement. P.W.2 is an eye witness who saw Major Reaz at the camp on the date of bringing Golam Mustafa. P.W.5 corroborated him.

On a careful consideration of the statement of P.W.3 made in course of cross-examination, it is apparent that his statement regarding the injury of Major Reaz is based on guess. He is not a witness in support of charge no.4. P.W.14 also stated about what he heard from his brother Ansar Ali. The statements regarding Kamalpur encounter in Ext. E(6) are based on interviews of some persons and the author mentioned that the encounter was on 6th September. These are more or less re-collection of the old memories of some persons. Naturally there are some inconsistency about the date on which Major Reaz had sustained injury in the encounter. As per Rules, in assessing the

probative value of direct and indirect evidence, the direct evidence will prevail over indirect evidence. What's more, D.W.2 corroborates P.Ws.2 and 5 so far as it relates to the date of the death of Golam Mustafa. P.W.3 stated about Kamalpur encounter after 40 years of the incident. This discrepancy has occurred in every trials of the offences of Crimes against Humanity because of loss of memory by lapse of time. This should not be taken as a ground for disbelieving a witness.

P.W.2 has vividly narrated the incident as to the manner of taking Golam Mustafa in the camp. We find no inconsistency in the evidence of P.Ws.2, 5 and D.W.2 as regards the date of death of Golam Mustafa. P.W.2 proved that victim Golam Mustafa was beaten and tortured at the camp and that he heard the conversation of accused with Major Reaz which demonstrated his antagonistic attitude towards pro-liberation Bangalee civilians. Apart from the above, the statements of P.W.5 remained uncontroverted. The defence could not shake the pertinent version of the witness that after bringing Golam Mustafa at the camp repeated appeals were turned down by the accused to set him free. P.W.5 heard the event of murder from his

brother Abul Kashem, who somehow managed to survive despite that the perpetrators brought him too with Golam Mustafa to Sheri bridge from the Al-Badar camp set up at Suren Saha's house. These fact lend further assurance as to the fact of abducting and bringing Golam Mustafa to the Al-Badar camp over which the accused Muhammad Kamaruzzaman had significant level of influence and authority. The matter which may be well perceived from the statement of P.W.2 is that Major Reaz did not like the killing of Golam Mustafa, but the accused demonstrated unabated behaviour which resulted the death of Golam Mustafa. We find from the evidence that Golam Mustafa was brought at the Al-Badar Camp keeping on blindfolded condition and Nasir took him at Sheri Bridge with a Chinese gun in his hands. It is also found from the evidence that the distance between the Al-Badar camp and Sheri bridge is two and half kilometers; and that though rickshaws used to ply on this road, Kamaruzzaman used a vehicle at that time. In view of the above, it is not at all difficult on the part of the accused to return back within the time mentioned after the killing.

Thus, the evidence led us to an unerring conclusion that the criminal act of forcible abduction of Golam Mustafa was carried out on the direction of the accused. The fact that the victim's relations Tofael Islam Talukdar and Samidul requested Kamaruzzaman to set Golam Mustafa free was proved by unimpeachable evidence. From the above, we found that the accused Muhammad Kamaruzzaman had also control over the Ahammednagar army camp in Sherpur and he was in a position to ignore the advice the Pakistani army to release detained Golam Mustafa or to be finished. It inevitably indicates his level of influence over the members of Al-Badar and the Pakistani army as well. It is also established that Kamran was his (accused) close associate. D.W.2 Alhaj Askor Ali also admitted in cross-examination that Mofazzal, Kamran, Samidul, Suruzzaman were the notable persons who used to provide assistance to the Pakistani army in 1971.

The evidence of P.W.2 and P.W.5 proved beyond reasonable doubt that Golam Mustafa was abducted and brought to the Al-Badar camp set up at Suren Saha's house by the Al-Badar men. They targeted Golam Mustafa as

because he was a freedom fighter-predictably that he was a pro-liberation progressive minded Bangalee activist. The evidence on record proved beyond doubt that the conversation of accused Kamaruzzaman with major Reaz about Golam Mustafa reflects the antagonistic attitude of the accused; that the accused allowed Nasir to take Golam Mustafa at Sheri bridge for implementing the killing; that the accused went to the crime site a few moment earlier; that both of them returned back jointly after the killing; that Abdul Kashem narrated the incident of shooting to P.W.5 and that after the perpetration of killing the accused came back to the camp. The Tribunal has meticulously considered the evidence and rightly believed the complicity of the accused in the killing of Golam Mustafa. The evidence on record proved beyond doubt that Golam Mustafa was killed in the manner narrated by the prosecution and the accused was involved in the killing.

Charge No.7

In respect of this charge, the killing of Johurul Islam Dara at Golpajan road, though P.W.1 made general statements about his killing, Md. Abul Kashedm (P.W.9)

narrated the incident in detail. He is also a freedom fighter but he could not go to India for training. According to him, when he was listening the Swadin Bangla Betar Kendra, the most popular electromagnetic media of the people at the relevant time as this was the only media from which the people of the country could learn about the operations of the freedom fighters against Pak Junta, one junior student Rashedul saw him. He stated that on the following day 8/9 Al-Badar men gheraoed his room; that they detained him and roommate Kutub Uddin; that on his request they were taken to the Principal's room; that the Principal requested the army Bregadier to release them, but instead the officer handed them over to Al-Badar camp set up at Mymensingh Zilla Parishad Daak Banglow; that the Al-Badar personnel assaulted him; that in the room where he was kept, eight other persons were also detained and that on query to them, he learnt that the Al-Badar men killed many detainees earlier. In respect of the charge, he stated that one night Ashraf, who was known to him, an activist of Islami Chatra Sangh, directed him not to lit on any light inside the room and disclosed him that both Kamaruzzaman and himself were

leaders of Al-Badar force from before; that he knew the persons who were detained in that camp earlier-they were Hamidul Huq, Tepa Mia, Shaheb Ali, Dara, Dabir Uddin; that he heard that Dara Mia was killed; that on 10 December, in the early morning women sweepers who were working there informed that Al-Badar force fled away; that the sweepers brought them out of the room by breaking the lock; that on that day, Mymensingh was liberated; and that Kamaruzzaman and Ashraf controlled Mymensingh as Al-Badar leaders. He was cross-examined by the defence but it failed to bring any inconsistency with his earlier statement. It was suggested to him that he was deposing falsely as he was the Vice-President of Awami League Lawyers' Parishad. He denied the suggestion.

Dabir Hossain Bhuiyan (P.W.15) is also another freedom fighter. He got his training in Meghalaya, India. He was also detained by the Al-Badar members with Selim, Mohon and Didar, and he was brought in the room of Kamaruzzaman at Daak Banglow camp. He stated that he was also blindfolded and taken at the Al-Badar camp; that after his eyes were opened, he saw Kamaruzzaman who was then sitting on a chair; that Kamaruzzaman told Selim

that you performed your responsibility and thereafter Selim took him to another room; that he was severely beaten and tortured there; that he was kept blindfolded condition all the time and wanted to know detail about the freedom fighters; that in course of torture the bandage of one of his eyes was removed, when he saw Hamidul Huq, Tapa Mia, artist Vaskar Rashid and Tapa Mia's son Dara; that at one stage Hamid asked him why he came there; that by pretending to not knowing him, he asked his name; that Kamaruzzaman used to come with interval of 2/3 days in their room and indicated by sign to his activists regarding the detainee who would be taken out of the room; that he noticed that on the following day the said detainee who was taken out did not return back and that this way Tapa Mia, Shaheb Ali, Dara and Abdul Rashid were taken but they did not return back. He also narrated about other incidents and stated that he was detained in the camp for 26/27 days.

In course of cross-examination, he reaffirmed his statement in chief and stated that in 1970 Kamaruzzaman used to come to his book stall 'সাহিত্য ভবন' and from that moment he knew him. He stated that he knew Rashed, Tapa

Mia, Dara, Hamidul Huq from before but he could not say when they were detained. He reaffirmed his earlier statement that after he was taken to the camp, he saw them in the Daak Banglow. He further stated that all of them were kept in one room. He explained that for torturing and killing, a particular detainee was marked and taken out of the room and thereafter, the said detainee never returned back. On further query, he replied that when Brigadier Kader Khan came to inspect the Daak Banglow camp, he along with Hamid and another was detained in the same room. He was cross-examined on irrelevant facts. The defence failed to elicit anything to discredit his testimony.

The Tribunal on assessment of the evidence held that considering the context and pattern of offence, the people were not expected to witness the event of abduction, detention at the camp and the killing of the detainees afterwards; that 'complicity' or 'participation' of accused could be inferred from relevant facts and circumstances, which prompted to draw the guilt of the accused; that the delay of forty years after the alleged event is an impediment to collect

direct evidence in support of the charge and that due to long passage of time, the witnesses may not be expected to memorize accurately what they had heard and seen. The Tribunal further observed that P.W.9 was kept detained since 4th December, 1971, at the Zilla Parishad Daak Banglow, Mymensingh; that he heard that before his detention, Hamidul Haque (P.W.1), Tapa Mia, Shahed Ali, Dara and Dabir Hossain Bhuiyan (P.W.15) were detained at the camp and among them, Dara was killed; that from evidence of P.W.1 it is proved that he was also detained at the same Al-Badar camp for 26 days. The Tribunal noted that above significant facts depicted from evidence of P.Ws.1, 9 and 15, who were detained at the Al-Badar camp at Zilla Parishad Daak Banglow proved the position, status and level of authority and influence of accused Muhammad Kamaruzzaman, and the same are fair indicators in arriving at an unerring conclusion that the atrocious criminal acts forming part of attack directed towards the unarmed civilians were routinely carried out in furtherance of organised plan orchestrated at the camp on his (accused) explicit instigation, advice, instruction, encouragement, approval and substantial moral support.

It is contended on behalf of the defence that the prosecution witnesses could not prove the date on which Tapa Mia and his son Dara were taken by the Al-Badar force. It is further contended that the Tribunal erred in law in relying upon P.W.1, inasmuch as, this witness did not see Kamaruzzaman at the time of his detention in the Al-Badar camp. It is further contended that the Tribunal erred in law in relying upon P.W.15, who was released from the camp towards the end of August, 1971 but Dara Mia was taken to the camp in the month of November and therefore, it was not probable on his part to see Dara Mia there.

It is true that P.W.9 has not stated as to the fact of abduction of Dara and his father Tapa Mia, and also the taking them from the camp to the bank of river Brahmaputra by Al-Badar force, but it has been proved from his statement that Dara and his father Tapa Mia were detained at the camp and that Dara was killed later on. This fact itself is sufficient to arrive at the conclusion that the victims were brought there by abduction by the Al-Badar men of the camp. In view of situation then prevailing in 1971, it was not expected

from a person or an unarmed civilian to go or visit an Al-Badar camp on his own accord. P.W.15 Dabir Hossain Bhuyian was also detained at the Al-Badar camp of Zilla Parishad Daak Banglow during the relevant time for 26-27 days. P.W.15 found Hamidul Haque (P.W.1) detained at the camp in July 1971. Thus there are corroborative evidence about the detention of Dara Mia at the camp and that lateron he was taken out of the camp but he did not return back.

On discussing the evidence, we found that Kamaruzzaman was a leader of Al-Badar and not only he planned but also implemented the line of thinking of Pak army, and in doing so, sometimes he acted in such cruel manner, which exceeded the norms of humanity. Even in one incident the Pak army officer did not want to kill the victim but the accused did not obey the advice and perpetrated the killing with the help of a retired army personnel. Though P.W.1 did not specifically implicate Kamaruzzaman in the incident of killing of Dara Mia, he led circumstantial which corroborated the prosecution case about the killing. P.W.9 specifically stated that the other persons including Dara Mia were kept in the

camp and later on he was killed. True, he was told by Ashraf about Kamaruzzaman, but this statement indicated the impartiality of the witness. If he was a biased witness, he could implicate Kamaruzzaman by saying that he saw Kamaruzzaman in the camp. Similarly P.W.1 could also say in the similar manner. Therefore, there is no doubt about their impartiality and neutrality. As regards the statement of P.W.15, as to his date of release, the Tribunal has noticed this fact and observed that this is due to memory loss. I absolutely agree with the finding with the Tribunal.

As observed above, the trials of persons for committing offences of Crimes against Humanity are held after 40 years of the incidents. Naturally the memory of the some witnesses fades by lapse of time though they knew the fact but while disclosing the same made in a different manner. It has happened in all trials of offenders for commission of Crimes against Humanity, War Crimes, Genocide, offenders of First World War, Second World War, Cambodia, Yugoslavia etc. Where the defence has admitted the killing of Dara Mia, mere a minor discrepancy about the date is not sufficient to infer

that testimony of the witness is unreliable. P.W.9's statement about the killing of Dara Mia has not at all been challenged by the defence. He stated that Kamaruzzaman used to visit the camp with a gap of 2/3 days; that as per his indication, the detainees were being taken out of the camp one by one and that those detainees did not return back on the following day. This statement suggested that Kamaruzzaman was the ring leader, who organized the killing and at his direction, the killing were perpetrated and Dara Mia was one of those victims.

In view of the circumstances as conversed above, it can be inferred beyond doubt that the Al-Badar men abducted Dara and his father Tapa Mia and detained at the camp of Zilla Parishad Daak Banglow, Mymensingh; that the said camp was under the control of accused Muhammad Kamaruzzaman; that the detained unarmed civilians were taken on the bank of the river which is located adjacent to the camp as per indication of Kamaruzzaman and gunned them down to death; that Kamaruzzaman was the leader of Islami Chatra Sangh of greater Mymensingh, who raised the Al-Badar force and that the detainee Dara was killed in

the above manner afterwards and his father managed to flee away.

Apart from the oral evidence as discussed above, the prosecution has examined three witnesses to prove documentary evidence in support of all charges. These documentary evidence are relevant for consideration in support of the charges, which corroborated not only the prosecution version but also negated the defence plea of alibi. Azabuddin Mia (P.W.16) proved exhibit-4, the issue of "দৈনিক আজাদ" dated 31st December, 1971, in which, Kamaruzzaman's name appeared in serial No.14 as Al-Badar leader. He also proved exhibit-6, an issue of "দৈনিক সংগ্রাম" dated 16th August, 1971, under the caption "আজাদি দিবসের বক্তব্যে মোমেন শাহীতে কামারুজ্জামান" in which, it was reported that a rally and symposium were held on the occasion of 25th independence day of Pakistan under the banner of Al-Badar Bahini and that the symposium was arranged in the Muslim Institute by Al-Badar's organizer Kamaruzzaman, who presided the said symposium. This document corroborates the claim of the prosecution that the accused was a leader of Al-Badar force and that he was actively

involved in all anti-liberation activities as leader of Islami Chatra Sangh. It is seen from the above that when the people of the country were dedicating their lives for the liberation of the country, the accused Kamaruzzaman aided the Pak army, involved in the killing of the gallant freedom fighters, their relatives, supporters, innocent civilians and raped the widows of the martyrs and justified his actions by organizing symposium. In one incident, he organized the killing of almost all male members of a village only on the suspicion that the freedom fighters took shelter in the village. The cruelty orchestrated by the accused in the killing is compared with none but his own people who are unarmed civilians only to show his allegiance to his masters.

P.W.16 stated that the investigation officer seized the issue of Dainik Purbadesh dated 31st December, 1971, the arrest of 15 collaborators and the issue of Dainik Bangla dated 31st December, 1971, under the caption 15 more collaborators were arrested. In fact he is a seizure list witness and proved the seizure. Md. Abdur Razzak Khan (P.W.18) also proved the seizure of some documentary evidence. He proved the book written by Dr. Ahmed Sharif

'একাত্তরের ঘাতক ও দালালেরা কে কোথায়', which was seized by Monwara Begum. He stated that in this book Kamaruzzaman's role during war of liberation was nakedly focused. He also proved the issue of 'Daily Purbadesh' dated 31st December, 1971, exhibit-10, reporting that Kamaruzzaman as Al-Badar leader of Sherpur was arrested. He further proved the issue of 'Daink Bangla' dated 31st December, 1971, exhibit-11, reporting similar news about the arrest of Kamaruzzaman. He also proved the list of collaborators, Al-Badar, Al-Shams, Razakars, Mujahid forces, exhibit-18, in which, Kamaruzzaman's name appeared in serial No.287 as Al-Badar leader. He stated that in course of investigation he collected the said copy from the Ministry of Home Affairs, Law Division-2. He further stated that the original copy was prepared by the Directorate of NSI on 13th April, 1972. He further stated that he seized copy of the book 'বাংলাদেশে স্বাধীনতার আড়ালে যুদ্ধ' written by professor Abu Sayeed, exhibit-19, in which Kamaruzzaman's name appeared at page 162 as one of the perpetrators of crimes. Besides the above documentary evidence, the prosecution has also proved some other old documentary evidence, showing that Kamaruzzaman was the

leader of Al-Badar force of larger Mymensingh. Therefore, there is no dispute about the status, role and the acts orchestrated by accused Kamaruzzaman during the liberation struggle period.

The defence cross-examined P.W.18 on 12th February, 2013, 14th February, 2013, 19th February, 2013, 20th February, 2013 and the next date was fixed on 24th February, 2013 for further cross-examination but the defence counsel did not appear on that date to cross-examine him and the Tribunal closed his evidence. On perusal of his evidence of P.W.18, it is found that the defence has cross-examined P.W.18 so far as it relates to the statements of P.W.1 and the partial statement made in respect of P.W.2 made to him but it did not cross-examine him in relation to the statements made by other witnesses to him. So, their statements remained unshaken with earlier statements made to him.

It was contended on behalf of the accused that the Tribunal did not afford sufficient time to cross-examine P.W.18 and illegally rejected the prayer for recalling P.W.18 for further cross-examination. On perusal of the order-sheet, we have noticed that the learned counsel for

the accused has not included the entire order sheet of the case. Orders No.1-132 and the order No.141 were included, but the Order Nos.133 to 140 were excluded. When we noticed this defect, we directed the learned counsel of the accused to produce those orders for perusal in order to ascertain whether the Tribunal acted illegally in refusing to recall P.W.18. Though learned counsel assured us that he would produce those orders but ultimately he did not produce them. So, eight orders have not been included purposely and despite direction, the learned counsel for the accused did not produce them. In the absence of those orders, it is difficult to arrive at the conclusion that the Tribunal has acted illegally in rejecting the prayer. Thus, it cannot be said that the Tribunal has illegally rejected the prayer for further cross-examination of the witness. From the trend of the cross-examination of the witnesses it can be inferred that from the beginning of the trial, the defence has been trying to delay the conclusion of the trial. It filed irrelevant applications repeatedly and did not allow the prosecution to proceed with the case to examine the witnesses. It cross-examined witnesses days together

on irrelevant facts leaving aside the points in controversy. It failed to conclude the cross-examination of P.W.18 in 4 days. This conduct of the defence has been reflected in the order sheet.

As noticed above, except P.W.1, the defence has failed to confront the investigation officer, (P.W.18), in respect of the statements made to him by the witnesses in course of investigation. Merely suggestions were given to the witnesses to which they utterly denied. Learned counsel appearing for the accused has drawn our attention to certain statements of some witnesses regarding the time and dates of their presence at the crime site or the manner in which the incidents occurred which they saw or heard from others. These are trifling nature, which can be ignored because of the delay but the defence has totally failed to point out any inconsistency in the evidence of the witnesses with their earlier statements. Learned counsel attempted to draw our attention to the statements of the witnesses recorded by the investigation officer which have been included in part II of the paper book for a comparison with their testimonies made before the Tribunal. We did not allow him to compare those

statements with the testimonies of the witnesses on simple reason that a statement of a witness made to an investigation officer is not an evidence, either under the general law or under the Act of 1973 and the Rules framed thereunder and therefore, there is no scope to draw inference by comparison. If this process is allowed, there will be hardly any difference between the testimony of a witness recorded on oath and a statement recorded by a police officer in course of investigation. The prohibition to use any statement of a witness recorded by a police officer as evidence to prove a charge was intended to recognize the danger of placing implicit confidence in a record more or less imperfectly made by a police officer, who would not necessarily be competent to make an exactly correct record of the statement of a witness with due regard to the provisions of law. Even a novice law student, who has elementary knowledge on criminal law knows that a statement of a witness recorded by a police officer cannot be compared with the testimony of such witness made on oath before the Tribunal.

What's more, rule 47 of the Rules provides that every witness shall swear an oath or make an affirmation

in Form 12 prior to testifying before the Tribunal. Form 12 contains a statement to the effect that 'I swear that the evidence which I shall give in this case before this Tribunal shall be true, that I will conceal nothing, and that no part of my evidence shall be false'. A statement made before a police officer cannot have the sanctity and authenticity in the similar manner of a testimony given by a witness on oath. Section 19(2) of the Act empowers the Tribunal to receive in evidence any statement recorded by an investigation officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers reasonable. So, in exceptional cases of the death of a witness or in case of a witness whose statement was recorded but his attendance before the Tribunal is not practicable for any of the reasons, and if the Tribunal is satisfied with the explanation offered by the prosecution for its inability to produce a witness, it may admit in evidence of any statement of a witness made to an investigation officer and not otherwise.

In this case those eventualities are totally absent and the witnesses are very much available but due to the neglect and intentional laches on the part of the defence, it failed to confront the investigation officer in respect of the statements made to him by the witnesses. It is only in those eventualities, the statement of a witness may be admitted in evidence if the Tribunal is satisfied with the explanation given by the prosecution. Therefore, there is no scope for taking consideration of a statement recorded by an investigation officer for the purpose of comparison with his testimony made on oath.

We have held in Abdul Quader Mollal's case that there is nothing in the Act of 1973 or the Rules guiding the procedure and the manner of use of a statement of a witness recorded by an investigation officer at the trial of a case. "Sub-rule (ii) of rule 53, speaks of 'contradiction of the evidence given by him'. This word 'contradiction' is qualified by the word 'examination-in-chief' of a witness. So, the contradiction can be drawn from the statements made by a witness in his 'examination-in-chief' only, not with respect to a

statement made to the investigating officer of the case in course of investigation', observed by this Division. In the Act of 1973, the investigation officer has given the discretionary power to examine a witness in course of investigation either orally or he may reduce his statement into writing under sub-sections (4) and (6) of section 8. Sub-section (4) says, the investigation officer may examine orally any person who appears to be acquainted with the facts and circumstances of the case in course of investigation. Sub-section (6) states that the investigation officer may reduce into writing any statement made to him in course of examination under section 8. So, recording of the statement of a witness is not mandatory. Therefore, the Tribunal has committed no illegality in not inferring contradiction of the testimonies the witnesses in comparison with their statements. More so, a contradiction between the two statements of a witness cannot be perceived in any manner-it may be inferred if the contradiction is drawn to the witness in accordance with law.

Defence Witnesses

Defence has examined 5 witnesses and exhibited some documents to disprove the charges or in the alternative, it may be said that it has examined witnesses and produced documents in support of its plea of alibi. The evidence of Md. Arshad Ali (D.W.1) has been discussed earlier. He admitted the fact of mass killing of the male members of Sohagpur, Benupara and Kakar Kandi villages on the day mentioned in the charge. He claimed that when the army attacked his house, he took shelter at Singhimari Khal located towards southern western side of his house and after the departure of Pak army, he along with 4/5 others buried 7 deadbodies including his father. He also admitted the formation of Sohagpur Bidhoba Palli by the widows of martyrs. He exhibited two books 'গল্পে গল্পে ইতিহাস মুক্তিযুদ্ধে নলিতা বাড়ী' ext-A and 'মোহাম্মদপুর বিধবা পল্লীর কন্যারা' ext-B. In cross-examination, he stated that he did not see the accused earlier and also did not know him. I have discarded his evidence and observed that he is totally a biased witness. More so, he did not implicate any members of Razakars and Al-Badar forces in the said atrocities. So, practically he was deposing against history of our liberation struggle. Exts 'A' and 'B' also proved that

local Razakars force participated in the massacre but he was silent about their participation. The story of Sohagpur massacre was widely published and it was one of the atrocious inhuman acts perpetrated on this soil and all the reports and books published over the killing pointed fingers at Pak army and Razakars, Al-Badar forces. Exts 'A' and 'B' were published in 2011 and 2012 respectively in course of the trial of the case against accused Kamaruzzaman, and the authors did not mention the names of local Razakars and Al-Badar forces with motive only to create confusion in the minds of the people that the accused was not involved in those atrocities.

Al-haj Askor Ali (D.W.2), a retired teacher also admitted the killing of Golam Mostafa in August 1971, but according to him, Golam Mustafa was killed by Pak army. He was also totally silent about the role of Razakars, Al-Badar forces and Peace Committee members as if there was no existence of these forces during the liberation struggle. I have discussed his evidence earlier and also reproduced the reports published in the international medias and books regarding the role of local paramilitary forces particularly Al-Badar force, who not only

collaborated the Pak army but also acted as 'killing squad' in all crimes, but this witness did not say anything in respect of this force. This shows the purpose for which this witness was examined. Apparently, he deposed in support of the accused being an activist of the same political party. D.W.2 disclosed the names of three persons who had collaborated the Pak army. He is also a politically motivated witnesses is evident from his evidence. I have discarded his evidence earlier on assigning reasons. As observed above, the old documentary evidence proved that Kamaruzzaman was the leader of Al-Badar force and that he was arrested on the charge of collaboration, but D.W.2 stated that the accused had no complicity with Al-Badar or any other anti-liberation forces. It is to be noted that when two disputed facts arise before a Tribunal, one on the basis of old documentary evidence and the other on oral evidence and new documentary evidence published in course of the trial, the old documentary evidence will prevail over the second category of evidence.

Mohammad Hasan Iqbal (D.W.3) is the son of Kamaruzzaman. He exhibited his father's educational

certificates, some books, such as, 'GKvĒti i h̄vcivax̄t`i Z̄wj Kv' Ext. – D, 'h̄vciva MYnZ`v I w̄Prti i Āt̄b|b' Ext. – E, 'tkicj mgq' Ext. – E(1), '%wbK Avgvi t`k' Ext. – E(2), 'ibv½tb gy³t̄mbv 1971' Ext. – E(3), 'GKvĒti i w̄Rq Mv_v' Ext. – E(4), 'gggb̄msn GKvĒi' Ext. – E(5), 'evsj v̄t`tki `v̄axbZv h̄x `wj j cĪ' Ext. – E(6), 'Av̄t̄j vi w̄ḡwQj' Ext. – F, and 'w̄ c̄w̄K`wb Av̄w̄ḡ1966-71' Ext. – G. As observed above, besides the oral evidence, the old documentary evidence of 1971 proved that Kamaruzzaman was the leader of Al-Badar force of the larger Mymensingh area including Sherpur and that he was arrested in December, 1971, as collaborator which is also an admitted fact. Some of the documents were based on distorted facts published after the change of the then government in August, 1975 and repatriation of those who directly worked side by side with Pak army and participated in the offences of Crimes against Humanity. In some other documents, the name of Kamaruzzaman was not mentioned, which did not prove that accused Kamaruzzaman was not involved in those atrocities. Some of them are not relevant for the determination of the points involved in this case. What's more, the authors did not disclose the status of those who were interviewed by them.

Md. Kafil Uddin (D.W.4) is the elder brother of accused Muhammad Kamaruzzaman. I have discarded his evidence earlier. In course of cross-examination, he expressed his ignorance on the question of his brother's status in 1971 that he was the office secretary of East Pakistan Islami Chatra Sangh. Therefore, he did not deny the prosecution's claim that accused Kamaruzzaman being a leader of Islami Chatra Sangh in 1971 formed the Al-Badar force. He, however, admitted that the accused has performed different responsibilities of Jamat-e-Islami political activities at the central level. There is no doubt that the present leaders of Jamat-e-Islami were also activists of Islami Chatra Sangh. On an another query, he had expressed his ignorance that there was existence of any army camps in the greater Mymensingh other than the one at Ahmed Nagar. However, in another query, he expressed his ignorance that in the camp set up at Surendra Saha's house, Muktijuddahs and Hindu community people were tortured there. On the second breath, he admitted that in the said camp, one Kamran was the commander of the ancillary force, who perpetrated all the incidents of Sherpur. Therefore, he not only made

inconsistent statements, he had also impliedly admitted that a camp was set up at Surendra Saha's house, where the Hindu community people and freedom fighters were tortured. He volunteered that his brother was arrested from Kamalapur Railway Station in late December, 1971. By these two statements, this witness has passively admitted the prosecution's claim about the status of the accused in 1971 and the torture, and the planning of the killing of pro-liberation people in the camp set up at Suren Saha's house. He, however, denied the participation of his brother in the atrocities in Sherpur, but in view of his admission of his brother's arrest in 1971, he has admitted this fact also.

Abdur Rahim (D.W.5) made omnibus statement that he did not hear that accused Kamaruzzaman was a Razakar or a Al-Badar leader during the liberation struggle period. He stated that he never heard about the same. Though he claimed that he was a freedom fighter, he admitted that he had no certificate. He expressed his ignorance on the question on whether during the liberation struggle period Razakars, Al-Badars, Al-Shams forces were raised. This statement belies his claim that Kamaruzzaman was not a

leader of Al-Badar. In view of his claim that he had no knowledge about the existence of auxiliary forces raised in 1971, he is a biased witness is apparent. On perusal of the defence evidence, it is evident that the witnesses are not only politically motivated but also made inconsistent statements and no reliance can be placed upon them. The Tribunal has rightly discarded their evidence and I find no cogent ground to hold otherwise.

Superior Responsibility

The Tribunal has accepted the submission of the prosecution that the evidence demonstrate it patently that the accused has been charged with not only for incurring individual criminal responsibility but also liable under the theory of 'civil superior responsibility' under section 4(2) of the Act. This responsibility, it has been observed, can be taken into account as an aggravating fact to assess the degree of accused's participation to the accomplishment of criminal acts. It was further observed that the accused has participated to the commission of crimes in the capacity as superior perpetrator and therefore, he may be held responsible cumulatively under sub-sections (1) and (2)

of Section 4. The Tribunal observed that the definition of 'Superior' is not limited to military superiors, it may also be extended to *de jure* or *de facto* civilian superior. It was further observed that the evidence depicts that the accused was a potential Al-Badar Bahini leader having significant authority and effective control over co-members of Al-Badar force particularly at the camp set up at Suren Saha's house in Sherpur and thereby he incurs 'superior responsibility' for his acts forming part of attack, causing perpetration of substantial crimes by the Al-Badar men of the camp. Such 'superior responsibility' can be taken into consideration under section 4(2) of the Act of 1973 as 'aggravating factor' in determining the degree of his culpability.

In this connection the Tribunal has considered the jurisprudence developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeal Chamber in Prosecutor V. Delalic (Celebici case) Case No.IT-96-21-A) judgment 20 February 2001 and Prosecutor V. Bagilishema, Case No.ICTR-95-IA-T by the International Criminal Tribunal for Rwanda (ICTR). It was further observed that the accused was a commander of the Al-Badar

camp set up at the house of Suren Saha, Sherpur and he was the Al-Badar commander of greater Mymensingh region. The authority of a 'superior' or 'commander' may not be *de jure* in nature, it may be *de facto* too and it is not needed to be proved by any formal documentary evidence. *De facto* nature of superior position can be lawfully inferred even from circumstances and relevant facts depicted from evidence presented. The Tribunal, in this connection has cited the case of The Prosecutor V. *Blagojevic* and *Jokic*, (ICTY) as under:

"A *de facto* commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility."

It was further observed that it is settled both in ICTR and ICTY jurisprudence that the definition of a '**superior**' is not limited to military superiors; it also may extend to *de jure* or *de facto* civilian superiors. (Bagilisheman, Appeals Chamber, July 3, 2002, para 51). It suffices that the superior had effective

control of his subordinates, that is, he had the material capacity to prevent the criminal conduct of subordinates, the Tribunal observed. For the same reasons, 'it does not have to be established that the civilian superior was vested with 'excessive powers' similar to those of public authorities'. The Tribunal took the view that the doctrine of superior responsibility also extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders. It cannot be expected that civilian superiors will have disciplinary power over their sub-ordinates equivalent to that of military superiors in an analogous command position, even no formal letter or document is needed to show the status of 'superior'. In this regard the Tribunal approved the views taken by ICTR Trial Chamber in Prosecutor V. Zigiranyirazo as under:

"It is not necessary to demonstrate the existence of a formal relationship of subordination between the accused and the perpetrator; rather, it is sufficient to prove that the accused was in some position of

authority that would compel another to commit a crime following the accused's order."

Let us now consider the question whether the Tribunal was justified in holding that the accused had incurred aggravating criminal liability for the crimes committed as he had not only participated to the commission of the crimes but that his participation was in the capacity of superior of the perpetrator. To resolve the point it is pertinent to consider section 4 of the Act of 1973 and other connected laws.

Section 4 of the Act of 1973 reads thus:

"4.(1)When any crime as specified in section 3 is committed by several persons, each of such person is liable for that crime in the same manner as if it were done by him alone.

(2) Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or

supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes."

Sub-section (1) relates to joint liability and sub-section (2) speaks of superior or command responsibility to deter human rights abuses. In respect of the question of joint responsibility, I would discuss later on. Let us now take up the issue of superior responsibility as provided under sub-section (2) of section 4. This provision speaks of determining the degree to which a leader can insulate from criminal culpability when the criminal acts were committed by others but were caused by either the leader's lack of diligence or acquiescence leading to subordinates not having scant regard for the dictates of human rights. The history of the doctrine of command responsibility dates back to antiquity. In the bloody aftermath of the World War I, it became apparent that those in military or civilian authority provided a cornerstone for the good conduct of those under their

command, and hence should carry some liability for their actions. (Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in (1920) 14 American Journal of International Law 95). A commission was established by the allies after World War I to assess the responsibility of German officers rightly assumed that a combination of power to intervene, knowledge of crimes and subsequent failure to act should render those concerned liable for the crimes of their subordinates. On the responsibility of the authors of the War and Enforcement of penalties the commission proposed that a Tribunal be established to prosecute those who ordered or abstained from either preventing or repressing violations of the laws or customs of war committed. (Ibid).

Though the idea of an international penal process fizzled out, the Commission's proposals found expression in the subsequent German national trials at Leipzig. (Matthew Lippman, 'Conundrums of Armed conflict: Criminal Defenses To Violations of The Humanitarian Law of War' (1996) 15 Dickinson Journal of International Law 1, 4-20). Two decades later in the aftermath of the World War

II, the concept of superior responsibility was explicitly codified as an international law norm with the adoption of the Nuremberg and Tokyo Charters (Charter of the International Military Tribunal (Nuremberg Charter) at the end of the war).

Command culpability is designed to encourage military commanders and civilian superiors to fulfil their legal duty to control the conduct of combatants. There is an equitable impulse which is satisfied by imposing primary, if not exclusive, responsibility on high-ranking officials in seeking a full rendition of a State's conspiratorial design which may not be clearly and coherently determined in a prolixity of individual prosecutions of low-ranking subordinates. Failure to impose legal control corrodes the integrity of the code of conflict and could contribute to chaotic consequences. The legal duty resting upon superior authorities requires that they take all necessary and reasonable measures to prevent the commission of offences. In the event that such crimes already had been committed, there is a duty to punish the perpetrators.

After the World War II trials, the application of command responsibility went into a freeze. There were no war crimes trials involving the doctrine of command responsibility at the international level for close to five decades. At the municipal level, the only noteworthy event occurred in the aftermath of the publicised My Lai massacre during the Vietnam Conflict. There was considerable discussion on the concept of command responsibility and its application to senior U.S. military commanders. Though disciplinary action was taken against a few senior officers and Captain Medina was tried for a violation of US municipal law under the Uniform Code of Military Justice for the acts of his subordinate, Lieutenant Calley, neither the Medina Case, which resulted in an acquittal, nor the disciplinary action resulted in a significant development of the doctrine.

One jurisprudential line has been to treat it as responsibility of the superior for the crimes committed by his subordinate. (Prosecutor V. Akayesu, Case No ICTR-96-4-T, judgment September 2, 1998). Whereas another has been to treat it as a separate offence of dereliction by

the superior of his duty to properly supervise the subordinates. Recent jurisprudence supports the latter interpretation. (Prosecutor V. Oric, Case No IT-03-68-T judgment June, 30, 2006). In general term, in Oric it was held that four elements must be proved for a person to be held responsible as superior.

(1) An international crime has been perpetrated by someone other than the accused; (2) there existed a superior-subordinate relationship between the accused and the perpetrator; (3) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so and (4) the accused 'as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator'. This standard of *mens rea* applies to both the ICTY and ICTR Statutes. The International Criminal Court (ICC) Statute requires a further element 'of a causal link between the superior's dereliction of duty and the commission of the crime. (Prosecutor V. Bemba, Case No. ICC-01/05-01/08). The ICTY and ICTR Statutes do not distinguish between types of superiors, while ICC Statute Article 28 expressly provides for the

responsibility of both military commanders and persons effectively acting as military commanders and other superiors. Article 28 provides:

"(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (Rome Statute)."

The doctrine of superior responsibility grew out of the military doctrine of command responsibility, and its evolution is informed by this origin. This raises the question on which Article 28 focuses whether the doctrine is suited for the application in a civilian setting. Judicial practice demonstrates that civilians have rarely been convicted under the doctrine and that, when they have, these convictions were generally secondary to their direct responsibility. The analysis gives rise to the question whether the doctrine should be transposed to the civilian sphere. The precedents set by the post-Second World War cases and those from International Military Tribunal for the Far East (Tokyo Tribunal) and the US Military Tribunal at Nuremberg, to a certain degree influenced the drafting to the text of Article 86 (failure to act) of the 1977 Protocol I Additional to the 1949 Geneva Conventions (Additional Protocols I);-

"1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this

Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

The responsibility of the 'superiors' is triggered, according to Article 86(2), concerns the responsibility of military commanders for the crimes committed by subordinates under their command and control, while Article 87(1), which provides 'The High contracting parties and the parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the

conventions and of this Protocol' concerns the responsibility of military commanders for dereliction of duty to control persons under their command or control. (The case against Ariel Sharon: Revisiting the doctrine of Command Responsibility, 34 N.Y.U. J. INT'LL. & POL.797, 840 (2002)). The observations "if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach", is not limited to military commanders, although it has been interpreted as applying primarily to them. Yet the International Law Commission (ILC) had explained that "this principle of responsibility of superiors applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met." (Commentary on the Articles of the Draft Code of Crimes Against the Peace and Security of Mankind, [1996] 2Y.B.INT'L L.COMM'N 25, U.N. Doc.A/CA.4/SER.A/1996/Add.1)

Article 28 of the ICC statute distinguishes the responsibility of military commanders and persons effectively acting as military commanders from the responsibility of other superiors in two respects. First, the standard of *mens rea* required for the latter ("knew, or consciously disregarded information which clearly indicated") is higher than that required for the former ("knew or, owing to the circumstances at the time, should have known"). (Ibid.). Second, civilian superior's responsibility is expressly limited to crimes that are related to the activities within his effective responsibility and control. (Ibid.)

The criminal responsibility of civilians only arose in full force in the ICTY and ICTR. In fact, even the leading post-1990 case on the applicability of the doctrine to civilians, the ICTY's in Celebici, concerned individuals whose statutes were not entirely clear and who operated in the preliminary setting. (Prosecutor V. Delalic, Case No.IT-96-21-T, 610 (Nov. 16, 1998). The ICTY in Celebici and subsequent cases-as well as the ICTR-have posited that the responsibility of civilians for their subordinates' actions is a customary legal

principle, reflected in post-World War II jurisprudence. Yet this jurisprudence does not clearly provide the authority asserted by the ad-hoc Tribunals. The Tribunals themselves have rarely considered the superior responsibility of civilians in purely civilian settings. Despite the absence of express provisions on superior responsibility in its statute, the International Military Tribunal for the Far East (Tokyo Tribunal) convicted a number of individuals- both military personnel and civilians on that basis.

The indictment in the Tokyo Tribunal contained two separate counts that are relevant for present purposes. Count 54 related to "orders, authorizations and permissions", while Count 55 alleged that the accused "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws of war. (1 THE TOKYO JUDGMENT XV-XVI (B.V.A. Roling & C.F. Ruter eds., 1977). The Celebici Trial Chamber cited four convictions by the Tokyo Tribunal as authorities for civilian superior responsibility, namely those of General Matsui, Prime Minister Tojo, Foreign Ministers Hirota and Shigemitsu.

(Prosecutor V. Delalic Case No.IT-96-21-T, Judgment, (Nov. 16, 1998).

General Matsui was, as his title indicates, a military person. (United States V. Araki, judgment of the International Military Tribunal for Far East (Nov. 4-12, 1948). He was the commander of the Shanghai Expeditionary Force and Central China Area Army. Hence, his conviction does not constitute a precedent for the principle of superior responsibility of civilians. The Tribunal found Prime Minister Tojo guilty of war crimes under Count 54 "for the instruction that prisoners who did not work should not eat". (Ibid.).

Foreign Ministers Hirota and Shigemitsu were convicted under Count 55 for their failure to adequately act upon reports of war crimes. The Tribunal found that, when the atrocities continued, Hirota "was content to rely on assurances which he knew were not being implemented" instead of "insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result." (Ibid.). The Tribunal held that the circumstances made Shigemitsu suspicious that the

treatment of the prisoners was not as it should have been, yet he took no adequate steps to investigate the matter. (United States V. Araki, judgment of the International Military Tribunal for the East (Nov.4-12, 1948). The Tribunal emphasized Shigemitsu's failure to take adequate steps to investigate the matter "although he, as a member of Government, bore overhead responsibility for the welfare of prisoners". (Ibid.).

In Celebici, the ICTY also relied on two post-World War II cases heard by National Military Tribunals (Prosecutor V. Delalic, Case No. IT-96-21-T, Judgment, ¶¶ 359-62 (Nov. 16, 1998). One is Flick, (Trial of Friedrich Flick and Five Others, IX L.R.T.W.C. 1, U.S. Mil, Tribunal, (Apr. 20, 1947-Dec.22, 1947) in which a German industrialist was accused, along with his nephew Weiss, of committing War Crimes and Crimes against Humanity through his industrial enterprises by enslaving and deporting members of the civilian populations of occupied territories, enslaving concentration camp inmates, and using prisoners of war in war operations. The U.S. Military Tribunal emphasized "(t)he active steps taken by Weiss with the knowledge and approval of Flick." (Ibid.).

The UN War Crimes Commission's note, on which the Trial Chamber in Celebici relied, says that:

'nothing more than "knowledge and approval" of Weiss's acts on the part of Flick is mentioned in the Judgment, but it seems clear that the decision of the Tribunal to find him guilty was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent'.

Another case cited by the Trial Chamber in Celebici is Roechling, in which German industrialists were found responsible for ill treatment of forced laborers. The French Military Tribunal clarified that the accused's were "not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses. (Germany V. Roechling, indictment and judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany.) The accused's responsibility, at the basis of the conviction in Roechling, appears to have

been based on their direct engagement through the "support" of the crimes. (Ibid.). It may have been more appropriate to classify it as "aiding and abetting". The last segment of the charge, the failure to put an end to the abuses, may be a more useful example of the application of the doctrine of superior responsibility. However, there is some incongruity in holding a person responsible for not putting an end to conduct to which he contributed either actively or tacitly.

In conclusion, the ICTY's assertion in Celebici that superior responsibility was an established principle of Customary International Law with respect to civilian superiors, particularly in civilian settings, is at least open to question. More so, we held earlier that in presence of specific statute for holding trial of the persons involved in crimes against Humanity and other related crimes, Customary International Law does not apply to our Tribunal. The Tokyo judgments, while supporting the notion of civilian superior responsibility but not in a civilian settings, are fraught with difficulties. The other cases do not clearly address superior responsibility and instead focus on direct

responsibility. Be that as it may, the jurisprudence of the ICTY and ICTR in those cases where civilians were indicted under Article 6/7(3) may have created or at least contributed to the development of Customary International Law on the matter.

ICTR Statute Article 6(3) and ICTY Statute Article 7(3) (hereinafter Article 6/7(3)) contain a provision resembling Article 86(2):

The fact that any of the acts referred to in ... the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The ICTY case law to date does not contain any instance of an indictment on the basis of superior responsibility in a civilian settings. The existing case law concerns civilians operating in military settings,

where their civilian status is sometimes almost accidental. In Celebici and Aleksovski, the accused were the *de facto* commanders of prison camps where combatants and civilians were detained. They were responsible for conditions in the camps, with *de facto* authority over the officers, guards, and detainees. In both cases, the accused were held responsible for failing to repress crimes that their subordinates had committed. (Aleksovski, Case No.IT-95-14/1-T; Delalic, Case No.IT-21-T, Indictment, (Nov.10, 1995). They were also held directly responsible for other crimes. In neither case did the ICTY make a clear finding on whether the accused were civilians.

In a few other cases where civilians were indicted under the principle of superior responsibility, they were all acquitted. Moreover, the settings were not civilian. Dario Kordic was a civilian leading militia forces in the Bosnian-Croat community in Bosnia Herzegovina. (Prosecutor V. Kordic, Case No.IT-95-14/2-T, (Feb. 26, 2001)). He was acquitted of responsibility with respect to crimes committed by the militias because he did not possess the authority to prevent the crimes or punish the

perpetrators. Milan Milutinovic was the President of Serbia in 1998 and 1999. He was indicted in connection with crimes committed in the first half of 1999 in Kosovo by the military forces for the Federal Republic of Yugoslavia, those of the Republic of Serbia, and the internal security forces governed by the Serb Ministry of Interior. He was acquitted because he did not have direct effective control over the direct perpetrators of the crimes. (Prosecutor V. Milutinovic, BBC NEWS, Jan.27, 2003). Ljube Boskoski was Minister of Interior of the Former Yugoslav Republic of Macedonia (FUROM). He was indicted for failure to punish his subordinate members of a police unit for crimes they committed in August 2001, of which he came to know only after their commissions. The ICTY Trial Chamber found that Boskoski had the power to control and direct the police (Prosecutor V. Boskoski, Case No. ICTY-04-82-T, Judgment, (July 19, 2008) but that he had taken appropriate measures to trigger an enforcement mechanism against the perpetrators of the crimes, thus discharging his responsibility for the purposes of Article 7(3) of the Statute.

Jean Paul Akayesu was burgomastre of Taba. (Prosecutor V. Akayesu, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998). He was indicated for both direct and superior responsibility for crimes against humanity and war crimes. These are violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2 committed by the Interahamwe, whom the judgment referred to as "armed local militia". According to the indictment, Akayesu knew that the crimes were being committed, facilitated them, and encouraged them. The ICTR expressed some reservation about relying upon superior responsibility with respect to civilians, in view of Judge Roling's opinion in the Tokyo Trial. The ICTR then said that it should examine each case on its merit. (Ibid.). In any event, the ICTR found that "a superior/subordinate relationship existed between the accused and the Interahamwe who were at the bureau communal". The ICTR then puzzlingly noted that there was no allegation in the indictment that the Interahamwe were subordinates of the accused, although the indictment relied on Article 6(3). (Ibid.). Accordingly, it acquitted Akayesu of responsibility as a superior. The

Trial Chamber in Celebici held that the "law does not know of a universal superior without a corresponding subordinate". However, the statement of the Trial Chamber in Akayesu may be related to the procedural defect of the absence in the indictment of the claim that Akayesu was the superior of the Interahamwe or that they were his subordinates.

Juvenal Kajelijeli was *bourgmestre* of Mukingo and founder and leader of the Mukingo Interahamwe. (Kajelijehi V. Prosecutor, Case No. ICTR-98-44A-A, Judgment (May, 23, 2005)). The Trial Chamber convicted him on the basis of both direct and superior responsibility with respect to acts of the Interahamwe. (Prosecutor V. Kajelijelii, Case No. ICTR-98-44-A-T, Judgment and sentence, (Dec. 1, 2003)). However, the Appellate Chamber determined that where convictions are possible under both types of responsibility in relation to the same count based on the same facts, direct responsibility should prevail over superior responsibility to the exclusion of the latter. Accordingly, the ICTR convicted Kajelijeli under Article 6(1) and acquitted him of the charges based on his status as superior. Clement Kayishema was the

prefect of Kibuye. (Prosecutor V. Kayishema & Ruzindana, Case No. ICTR-95-1-A, Judgment, (June 1, 2001). He was convicted of genocide and related crimes, having ordered and orchestrated attacks by both administrative bodies and law enforcement agencies.

Both Tribunals, ICTY and ICTR, have interpreted their respective statutes as permitting the attachment of responsibility to both military and non-military superiors. Two other civilian accused were Serushago and Musema. Omar Serushago was a *de facto* leader of the Interahamwe in Gisenyi. (Prosecutor V. Serushago, Case No. 98-39-S, Sentence, ¶ 29 (Feb. 5, 1999). The ICTR convicted him under both Articles 6(1) and 6(3) of Genocide and Crimes against Humanity for having ordered the Interahamwe to execute victims. Because of the one incident, Serushago was convicted only under Article 6(3). Alfred Musema was the director of the public Gisovu Tea Factory and a member of various regional Government authorities that addressed socioeconomic and developmental matters. According to the indictment, at various locations and times, Musema directed armed individuals to attack Tutsis seeking refuge. He also

personally attacked and killed person seeking refuge; committed acts of rape; and encouraged others to capture, rape and kill Tutsi women. The ICTR convicted Musema of genocide and Crimes against Humanity. Some of the convictions for Crimes against Humanity were quashed on appeal. The Trial Chamber found him responsible under Article 6(1) of the Statute for having ordered and, by his presence and participation, aided and abetted in the crimes. In addition, the Chamber found that Musema incurred superior responsibility under Article 6(3) of the statute with respect to acts by employees of the Gisovu Tea Factory, whom the Chamber identified as Musema's subordinates. (Prosecutor V. Musema, Case No. ICTR-96-13-A, Judgment, ¶¶ 12-16 (Feb. 5, 1999).

In the ICTY, there have been few indictments under the principle of superior responsibility of persons who were clearly civilians. The parties to the conflict in the former Yugoslavia were primarily armed groups. Civilian superiors were, for the most part, members of the top political echelons and in charge of military and paramilitary forces. The successful convictions on the basis of superior responsibility of persons who were not

clearly part of the military hierarchy were of individuals whose civilian status remained undecided and who operated in a paramilitary settings rather than in a civilian one.

In fact, despite repeated statements to the effect that civilian superior responsibility is an established doctrine in the *ad hoc* Tribunals, the entire jurisprudence of the ICTY and ICTR prior to Nahimana offers only two instances of conviction solely on the basis of superior responsibility, both of which concern military or paramilitary persons. Nahimana is the first case in which either Tribunal convicted a civilian solely or even properly on the basis of his superior responsibility in a purely civilian setting. (Nahimana V. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶1044-52 (Nov, 28, 2007). It demonstrates a leveling of the playing field between civilians and military personnel and has been hailed as a "giant leap forward" in the development of the civilian superior responsibility doctrine.

Superior responsibility is incurred only where a legal duty exists to prevent the commission of crimes

(Orić). With respect to persons acting as military commanders, Article 87(1) of Additional Protocol I "provides the basis of, and defines the contours of, the imputed criminal responsibility" under the Statutes of the *ad hoc* Tribunals (Delacic). The *ad hoc* Tribunals have, at numerous times, noted that superior responsibility is a customary legal principle. Even with respect to military settings, Article 87(1) or its customary equivalent can only serve as a source of obligation to prevent violations of the Geneva Conventions and Additional Protocol I. It does not provide a duty to prevent Crimes against Humanity or Genocide nor does it automatically apply during a non-international armed conflict. In Celebici, the ICTY noted that Article 87(1) imposes the duty to prevent the commission of violations of "international humanitarian law." The ICTY's convictions under the doctrine of superior responsibility were, for the most part, limited to violations of the laws or customs of war and to grave breaches of the Fourth Geneva Convention. However, in both Tribunals, the prosecution and the judgments themselves relied on the doctrine of superior

responsibility also with respect to genocide and Crimes against Humanity but did not explain the expansion of the doctrine beyond war crimes but was acquitted of all charges.

From Milutinovic's indictment it is impossible to know which crimes were alleged to him under the doctrine; he was found not to have been a superior at all, so that the question of responsibility for specific crimes did not reach deliberation. (Prosecutor V. Milutinovic, Case No.IT-05-87-T, Judgment, Vol.3 ¶283 (Feb. 26, 2009). The ICTR case law is concerned primarily with Genocide and Crimes against Humanity. As for non-international armed conflicts, the ICTY has ruled that the doctrine applies in those instances, asserting that the principle of superior responsibility international and non-international armed conflicts; while the inclusion of the principle in the statute of the ICTY necessarily indicates that it is regarded as applicable in non-international armed conflicts. At any rate, no parallel obligation expressly existed - at least not until the adoption of the ICC Statute with respect to civilian superiors in a civilian settings. Consequently, both the

jurisprudence and scholars have grappled with identifying sources of civilian superiors duty to control their subordinates.

Prior to the adoption of Additional Protocol Article 87(1), this matter was pertinent also to military commanders. Thus, in *Yamashita*, one of the earliest and most controversial cases in which a person was convicted on the basis of his superior responsibility, the United States Supreme Court relied on a commander's obligation to ensure certain categories of persons' compliance with the laws of war in specific situations in order to establish a general principle of command responsibility in international law. The Court mentioned Article 19 of the Tenth Hague Convention "relating to bombardment by naval vessels, which provides that commanders in chief of the belligerent vessels must see that the above Article 26 of the Geneva Red Cross Convention of 1929, "for the amelioration of the condition of the wounded and sick in armies in the field, makes it the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles of the

convention as well as for unforeseen cases.” (Yamashita V. Styer, 327 U.S. 1, 15-16 (1946)).

It also relied, however, on the failure to observe positive obligations that were not related to the status of superiority, such as the obligation of commanders of occupied territories to maintain public order in the territory and ensure the welfare of protected persons. Superior responsibility, so as not to set an affirmative duty that is too onerous on the superior. Even then, it is necessary to distinguish between an omission which generates direct responsibility and an omission which generates superior responsibility. The former may create an obligation of result, while the latter is an obligation of conduct; the *mens rea* for the former is usually stricter than that of the latter, and only the latter requires establishing a chain of command. The ICTR nonetheless appears to have confused the two. In Kayishema, when identifying the source of obligation to control subordinates in the duty to maintain public order, the ICTR said that the question of responsibility arising from a duty to maintain public order “and any corresponding failure to execute such a duty, is a

question that is inextricably linked with the issue of command responsibility'. This is because under ICTR Statute Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime. (Prosecutor V. Kayishema, Case No. ICTR-95-T. Judgment, ¶202 (May 21, 1999). Yet, an obligation to act is not necessarily - let alone inextricably - linked with the issue of command responsibility. An obligation which is not related to the position of superiority should not trigger the application of the superior responsibility doctrine. (Yael Ronen-Superior Responsibility of Civilians for International Crimes committed in Civilian settings).

For a person to be regarded as a superior, he must have a position of command in a military context or authority a more general term, applicable in both military and civilian settings. (Orić). In addition to authority, "it is necessary that the superiors have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent

and punish the commission of these offences" in a meaningful and effective way. (Halilović). Superior status for the purpose of superior responsibility may also be based on *de facto* authority. This was recognized in Celebići, where the Appeals Chamber noted that reliance on *de facto* powers is essential for enforcement of humanitarian law in contemporary conflicts where "there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitaries groups subordinate thereto. (Delalic)

De facto authority is particularly significant with respect to civilians because in situations of civil structure breakdown, the authority wielded is not embedded in formal legal instruments. The Trial Chamber also ruled that responsibility may be imposed by virtue of a person's *de facto* position as a superior. In Delalic, it was provided that "the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority'. By this, the Trial Chamber meant that "the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control." (Ibid.). In subsequent

cases, however, both the ICTY and the ICTR rejected the requirement of *de jure* authority "trappings" to establish *de facto* authority, (Orić). A comparative analysis of case law is difficult, since references can be found to a variety of different terms that may or may not all amount to superior responsibility, such as effective authority, actual control, *de facto* control.

Article 86(2) of the Additional Protocol I to the Geneva Conventions stipulates that the requirement of authority, in the sense of organizational hierarchy, must neither be set aside nor replaced by powers of influence. Instead, it must be established independently of, and prior to, the exercise of effective control. In other words, while *de jure* authority creates a presumption of effective control, effective control let alone mere influence should not alone create a presumption of *de facto* authority. If mere influence, even of the highest degree, is accepted as a basis for superior responsibility, any civilian held in sufficiently high social esteem would automatically be transformed into a superior, increasing the chance that he be tried as a result of the crimes of others. Provided that other

requirements such as *mens rea* are fulfilled. At the same time, the determination of whether *de facto* authority exists has to be made with flexibility, given that informal structures are central to the question. (Ibid. Yael Romen)

The absence of a clear hierarchy and the often horizontal division of powers in civilian organizations also makes it difficult to distinguish between direct and superior responsibility in a civilian settings. For a person to be held responsible in connection with a particular crime because he failed to exercise his duty as a superior, the facts underlying the duty must exist prior to the commission of the crime. Accordingly, the superior-subordinate relationship-including authority must be established independently of the crime and with respect to the time prior to the commission of the crime. (Prosecutor V. Aleksovski, Case No.IT-95-14/1-A, Judgment, ¶76 (March, 24, 2000). In Blaskic, the ICTY noted that for superior responsibility to attach, both the hierarchy and the dereliction of duty to prevent the crime must have occurred prior to the commission of the subordinate's crime.

In view of Article 28 of the ICC Statute, the expansion of the superior responsibility doctrine to civilians may appear a foregone conclusion. Article 28(a) covers military commanders and civilians acting as military commanders; conversely, Article 28(b) covers civilians acting in a civilian capacity. (Rome Statute, Art. 28(a)-(b)). However, the *travaux préparatoires* focus on the identity of the superiors, not of the subordinates, and leaves unresolved the question of whether Article 28(b) covers all civilian settings or only civilians leading but not embedded in military and paramilitary organizations such as ministers of defense leading the military, ministers of interior leading internal security forces, or militia leaders. (Ibid. Yael Ronen)

In view of the above discussions, it is our considered view that the application of the doctrine to civilian settings is fraught with challenges, the first question is whether it is at all advisable to have a superior responsibility doctrine applicable to civilian settings. Superior responsibility builds on the significance of authority and control in affecting the

conduct of others. These exist in the pyramid-shaped hierarchy of the military, which permits superiors to affect systematically the conduct of their subordinates and thwart the commission of widespread crimes. Superior responsibility is particularly appropriate in the military where it concerns international crimes, which are by definition, committed as part of a widespread or systematic attack or as part of a plan or policy or a large-scale commission of crimes. (Rome Statute).

In the light of the above discussions, let us consider what responsibility the accused as a leader of Al-Badar force had. As noticed above, the military junta with a view to consolidate their power raised Razakars force. Besides, the authority later on raised Al-Badar, Al-shams and Al-Mujahid forces for implementing certain objects. The right wing Islamic minded Islami Chatra Sangh activists were recruited to form Al-Badar force and they were given training and arms by the Pak military. Initially the Razakars force was formed by promulgating an Ordinance namely, 'The East Pakistan Razakars Ordinance, 1971 (East Pakistan Ordinance No.X of 1971). In the preamble, it is said 'to provide for constitution

of a voluntary force in East Pakistan'. A post of 'Director of Razakars' was created who was empowered to control and manage the force. The powers of the Director and other officers were given in section 8 of the Ordinance. Sub-section (2)-(4) are relevant for our consideration:

'8.(1)

(2) The administration of the Razakars shall, under the general control and direction of the provincial government, be vested in the Director.

(3) To assist the Director in the performance of his functions the provincial government may appoint such officers and staff as it may deem fit on such terms and conditions as may be prescribed.

(4) The Director and other officers appointed under this section shall exercise such powers and perform such duties as may be prescribed or as may be directed by the provincial Government."

While raising the Razakars force the nomenclature was taken from the one raised by Nizam of Hyderabad, India in 1947. 'বাংলাপিডিয়া' (Banglapidia) in its volume-12, issued by the Bangladesh Asiatic Society succinctly explained the historical background of using this expression and the manner and purpose for the creation of this force as under:

“ivRvKvi 1971 mvTj gyl “hfxi mgq ev½vj xiv ivRvKvi ktāi mst½ cwiiPZ nq| hxiZ cwKwb mvgwi K ewnbxtK mnvqZv c* vfbī Dfītk” ivRvKvi `j MvZ nq| ‘ivRvKvi’ dvmkã | Gi A_“t^Qvfmex’ | 1947 mvTj fviZ wefvMKvtj Z`vbxšb nvq`fevt`i kvnK wbRvg fviZfī “ nTZ Amb”QK _vKvq fviTZi mvgwi K ewnbxtK cī_wgK cwZivtai Rb` ivRvKvi bvtg GKU t^Qvfmek ewnbx MvB Ktib |

1971 mvTj gyl “hfxi mgq cwKwb mvgwi K ckvmbtK mnvqZv c* vbKfī tg gvfm Lj bvq Lvb Rvnb Avj x tivfwi GKU Avbmi K`vfc 96 Rb cwKwbcsk Kgrwbqtq nvq`fevt`i ‘ivRvKvi’ Gi AbKifY ivRvKvi ewnbx MvB Kiv nq| cieZxngtq t`tki Ab`vb` Astkl ivRvKvi ewnbx Mto tZvj v nq|

c_g chq ivRvKvi ewnbx wQj Gj vKvi kwš-KvgwJi tbZZyaxb | 1971 mvTj i 1 Rb tRbvtij wU°v Lvb ce°cwKwb ivRvKvi AwW°vY 1971 Rvwi Kfī Avbmi ewnbxtK ivRvKvi ewnbxtZ i“cvšwi Z Ktib | Zte Gi tbZZ; wQj cwKwbcsk

̄nvbxq tbZv`i nvfZ| cwk`vbi cūZi ̄v gšbvj q 7 tm̄P̄ Rwi KZ GK
 Aa`v`k etj ivRvKvi ewnbxi m`m̄`i tmbvevnbxi m`m̄`i`tc ̄KwZ t`q|
 ivRvKvi ewnbxi c̄ugK ch̄qi c̄k̄q̄bi tgv` wQj 15 w`b| 1971 mv̄j 14
 Rj vB Kūóqvq ivRvKvi ewnbxi c̄g e`v̄Pi tUms mgvB nq| ceĀj xq সামরিক
 AwabvqK tRbv̄ij G, G, tK w̄bvRx 1971 mv̄j i 27 b̄f̄̄ mv̄v̄i ivRvKvi
 ewnbxi tKv̄cwb Kgv̄v̄i`i c̄g e`v̄Pi tUms t̄k̄l w`vqx K̄Kv̄l qv̄R
 Aw̄f̄e`b M̄hb K̄tib| cieZi` ch̄q ivRvKvi ewnbxi GKw ̄Zšj Aw̄B̄ti i
 gh̄v̄q Db̄Z nq| 1971 mv̄j i 16 w̄tm̄̄ cv̄Kewnbxi Av̄Z̄mgc̄̄yi m̄st̄M
 m̄st̄M ivRvKvi ewnbxi ̄f̄weK w̄ej ȳB N̄t̄U| (gbZv̄mxi gv̄gb)''

After the constitution of this Razakars force, the
 'Ansars Act, 1948' was repealed by section II of the
 Ordinance, and all Ansars, its properties, funds etc.
 stood transferred to and vested in the organisation set
 up by the Ordinance. The powers of the Razakars were
 given in section 6 which provides that they shall
 'perform such duties and exercise such powers as may be
 prescribed'. No other legislation was promulgated for the
 formation and administration of Al-Badar, Al-Shams, Al-
 Mujahid forces etc. Admittedly the military leaders
 formed these paramilitary forces under different names
 with different objects- they were guided and regulated by

the Razakars Ordinance. So under this Ordinance, the Director was the chief executive officer of the forces and under him, there was provision for appointment of officers and staff to perform the organization's functions. This is why one witness said accused Kamaruzzaman was the leader of Al-Badar force, and another witness said he was the commander of Razakars but later on he rectified his statement and stated that he was the commander of Al-Badar force. Another witnesses said, he was the commander of both the forces. All these witnesses practically depicted the correct status and position of the accused. Because all these forces were governed and guided by the Ordinance No.X of 1971. Therefore, he was called as Al-Badar leader or Razakars leader or Al-Badar commander. As per law then prevailing, he performed his responsibilities as Razakars leader or officer.

The Army Act, 1952 was amended by the Central Government's Notification dated 7 September, 1971 providing that all provisions of the Army Act would be applicable to Razakars raised under the Ordinance. This Notification provides inter alia that 'In exercise of

powers conferred by sub-section (1) and Sub-Section (5) of the Pakistan Army Act, 1952 (XXXIX of 1952), the Central Government is pleased to direct that -

- (a) all the officers of the Pakistan Army under whose command any member the Razakars raised under the East Pakistan Razakars Ordinance, 1971 (East Pakistan Ordinance No.X of 1971);
- (b) the officer of the Pakistan Army under whose command any member of the Razakars is placed shall exercise the same powers in relation to that member as he is authorised to exercise under the said Act in relation to a member of the Pakistan Army placed under his command; and
- (c) the operation of the aforesaid Ordinance and of any other enactment for the time being applicable to the Razakars shall be suspended.

Taking these provisions in juxtaposition it is to be examined whether what responsibility the accused had as an Al-Badar force leader? Secondly, whether the accused had command or superior responsibility within the meaning of section 4(2) of the Act of 1973? Though initially the Director of Razakars was the Superior Commander of the

Razakars force, by the Central Government's Notification, the command responsibility of the said force was placed upon the officer of the army under whose command any member of the Razakars raised under the Ordinance. Admittedly accused Kamaruzzaman was not an army officer within the meaning of the Army Act, 1952. He was not a civilian holding high civilian position with command responsibility. He was a commander or an officer of an armed group namely Al-Badar. As discussed above, civilian superiors were members of top political echelons and in charge of both military and para-military forces. So he does not fall under this category. It is not the prosecution case that the accused's subordinates committed the crimes and atrocities and that the accused remained a silent spectator and allowed his subordinates to perpetrate inhuman acts. A conviction on the basis of superior responsibility can be given to those who were not clearly part of military hierarchy were of individuals whose civilian status remained undecided, who operated in a para-military setting rather than in a civilian one.

The prosecution witnesses also did not claim that accused Kamaruzzaman was an army officer or the Director of the Razakars force. The evidence on record revealed that he was the commander of Al-Badar force in larger Mymensingh. In view of this positive claim, it may be taken that he was a regional officer of the Razakars within the meaning of section 2(a) read with section 8(2) of the Ordinance. Though he was called as 'commander', in fact he was an officer of the said forces as evident from an analysis of the Ordinance. Naturally, he had no superior or command responsibility by dint of his office as an officer of the Razakars. But in fact he performed the responsibility as a superior commander by abusing the powers as he was in the good book of the military junta. He was allowed to work according to his whims and volition. But as per law, he was appointed and/or worked and/or performed as an officer to assist the 'Director' of the Razakars forces. The Razakars force, including its commanders and officers, were placed under the command of Pakistan Army under whose command any member of the Razakars was placed. The army officer had exercised the same power in relation to that member as he was

authorized to exercise under the Army Act in relation to a member of the Pakistan Army placed under his command.

As discussed above, the ICC Statute distinguishes civilian settings from the military settings described in Article 28(a) in two respects. The responsibility of superiors in civilian settings covers only instances where the 'crimes concerned activities were within the effective responsibility and control of the superior'. The second difference is the required *mens rea*. Superiors in the military are held responsible if they knew or, owing to the circumstances at the time, should have known, of the crimes. For superiors in civilian settings, the applicable standard is that they knew or consciously disregarded information which clearly indicated the crime. In view of what stated above, it is difficult to approve the views taken by ICTY that a *de facto* commander who lacks from letter of appointment, superior rank but does in reality has effective control over perpetrators of offences could incur criminal responsibility.

More so, ICTY relied on the International Law Commission's commentary on Draft Code of Crimes against Mankind. The ICTY and ICTR based their opinions on the

Customary International Law with respect to civilian superiors particularly in civilian settings. ICTY cited four convictions by the Tokyo Tribunal as authorities for civilian superior responsibility. It also relied on two post world war cases. International law is binding on states, not on persons. Now that an exception of this notion has been made in the case of individuals who commits crimes which-whether at a time of war between sovereign states or not are of such ideologically motivated heinousness as to permit classification as Crimes against Humanity. Crimes of that class are distinguished from acts which may have the same result such as, murder, torture, rape, religious persecution and the like by virtue of the fact that they are perpetrated by state officials or agents, systematically and in furtherance of an unlawful policy of denying to political or racial groups the right to life or physical integrity. They are also distinguished, in practical terms, by perpetrators impunity from domestic law-enforcement measures; he is punished, if at all, only after a change of government by the domestic Tribunal or in a foreign or international court.

It is our considered view that a position of command cannot be determined by reference to formal status alone. The means for the assumption of power is through official delegation of command through relevant legislation or authority accruing from holding a pertinent office. Therefore, I am unable to endorse the views of ICTY and ICTR that mere authority to control actions of others does not preclude a finding of command responsibility and that the criminal liability for command responsibility 'may arise either out of the positive acts of a superior or from culpable omissions, in direct command responsibility'.

Our International Crimes (Tribunals) Act was promulgated to hold trials of individual or group of individuals or organization or any member of any armed, defence or auxiliary forces who has committed in the territory of Bangladesh the offences of Crimes against Humanity, Crimes against Peace, Genocide, War Crimes. It has all trappings of International Law but the Tribunals set up under the Act are domestic Tribunals. The Tribunals are adjudicating offences maintaining all norms of international standard. From the beginning of a

proceedings to the stage of taking cognizance of the offences against an offender, the investigation, the commencement of the proceedings, the provision for defence counsel, the framing of a formal charge, the right given to an offender during trial, the rules of evidence, the provisions for review of any order made by the Tribunal, the provision for affording parties to recall and re-examine any person already examined, the right of appeal against the judgment of the Tribunals and so on, are specifically provided in the Act of 1973 and the Rules framed thereunder. No Statement of a witness is recorded by the Tribunals unless he consents to the correctness and it contains a full and true account of the statement made by him. The said statement is displayed on a monitor and the offender and his counsel can verify the correctness of the statement so that he can rectify the statement or cross-examine the witness on the spot. Similar procedure is applicable in case of the defense witness. So far the quality of trials is concerned, every opportunity is given to the accused to defend themselves. They have access to their lawyers and defence witnesses.

In Ignace Bagilishema, Bourgmestre of Mabanza, was indicted for Genocide and Crimes against Humanity under ICTR statute Articles 6(1) and 6(3). The ICTR acquitted him of all charges because the crimes themselves had not been proved beyond reasonable doubt. In one case the Trial Chamber found that a criminal act had been committed by Subordinates of Bagilishema, but it was not proved that he knew or had reason to know of the crime. ICTR, in the premises, could not apply the doctrine on factual grounds. The Tribunal wrongly applied this case. The other two cases were also based on the jurisprudence of International Law.

The doctrine of command responsibility rests on the presumption that military officers and civilian officials possessing knowledge and authority have the accompanying obligation to curb the transgressions of their troops. Command culpability is designed to encourage fulfilment of this legal duty and a failure to take appropriate measures to punish perpetrators entails individual responsibility. This doctrine cannot be applicable in this case in view of the discussions made above. By the same time we cannot ignore the fact that a position of

command cannot be determined by reference to formal status, particularly in the context of 'operation search light' which resulted in the massacre of innocent civilians, pro-liberation forces, professionals, intellectuals, students, minority community, particularly when General Tikka Khan ordered his forces that 'I want the land and not the people'.

In true sense there was no rule of law in the country in 1971. The country was run by the will of the dictators. This Al-Badar force was raised with the object to exterminate the pro-liberation forces and their supporters. In fact this force acted as the Pakistan Army's 'death squad'. Hussain Haqqani, termed them as such and the prosecution evidence also revealed that the accused's force acted as 'killing squad'. However, taking consideration of the law as stood, and the jurisprudence developed in the international arena, it is difficult to apply the doctrine of 'Superior Responsibility' in this case. Even if it is assumed that the doctrine of 'superior responsibility' can be applied to the accused, the observation that such responsibility can be taken as an aggravating factor in determining the accused's

culpability to the crimes committed by him is based on misconception of law. Both ICTY and ICTR which applied the doctrine did not say so. Those Tribunals said that the superior commanders having effective control over the perpetrators of offences could incur criminal liability. Section 4(2) of the Act of 1973 also provides that in such eventuality the commander or superior officer will be held guilty of crimes specified in section 3 and not otherwise.

Even then the accused cannot escape from the criminal liability since he has directly participated in the commission of some crimes which acts are predominantly aggravating criminal liability and the same will prevail over the notion of superior responsibility. An individual criminal responsibility if proved will be taken as aggravating culpability because in such event the offender directly participates in the commission of crimes and thus the offender's *mens rea* can be inferred from his acts or omissions at the time of commission of the crimes. Accused's participation in respect of charge No.3 is graver offence than his involvement as a superior officer because he perpetrated those crimes in a cold-

blooded manner as per his planning on the previous day with his accomplices. Under the latter eventuality, his responsibility will be such that he has failed or omitted to discharge his duty to control the acts of the persons under his command or failed to take necessary measures to prevent the commission of Crimes against Humanity. He may also be held responsible for aiding and abetting the perpetration of crimes. Apart from the above, he cannot also avoid the criminal responsibility in view of sub-section (1) of section 4 of the Act of 1973.

The Tribunal fell in an error in holding that as superior perpetrator, the accused may be held responsible under section 4(1) of the Act. This sub-section has no nexus with superior responsibility. This sub-section (1) contains a provision resembling that of section 34 of the Penal Code. This sub-section enumerated the general doctrine of joint liability in crime. The only difference is that in sub-section (1) of section 4, the expression 'in furtherance of the common intention of all' has not been used. The legislature has consciously omitted these words because those words are redundant for holding an offender responsible who has committed offences

punishable under sections 3(2), (a), (b), (c), (d), (e), (f), (g), (h) of Act of 1973. The object for which these forces were raised is obvious. The Pak army raised Al-Badar force to act as 'death squad' for exterminating the pro-liberation forces and their supporters and to maintain sovereignty of Pakistan and also to thwart the independence of Bangladesh.

Admittedly, the freedom fighters were fighting with the Pak occupation army for the liberation of the country. The Pak army and its auxiliary forces were engaged in war with the freedom fighters. Naturally this force moved jointly with arms to fight with the freedom fighters. There existed presupposed common object of all the members of the force. In respect of Sohagpur massacre, the accused with his force and the Pak army jointly orchestrated the killing of unarmed civilians on the suspicion that they have sheltered freedom fighters in the village. The very nature of the job of the force in which the accused was engaged presupposed that whenever these forces participated in any encounter or killed a person or set ablaze a house or raped a woman, it were done with the common intention/object of all, and

every one of them is as much guilty as the other, and it is not necessary that every one of them should have participated in the commission of the offence to the same extent and degree as the other person.

More so, the members of these forces were performing their duties as armed forces. While performing their responsibilities, it need not be proved that they committed a murder or rape or so on in furtherance of their common intention. The legislature included this provision to meet a case in which it may be difficult to distinguish between the acts of individual member, or to prove precisely the part taken by each individual. They would be deemed guilty of the offences because the presence of accomplices of the accused or any one of them affords encouragement, protection and support to the persons actually engaged in the commission of the crimes. The provision of section 4(1) requires that when several persons unite to do any criminal act, all those who assist the accomplishment of the object would be equally guilty as if it were done by him alone. It deals with the doing of separate act similar or diverse by several persons, if all are done, each person is liable for the

result of them all, as if he had done them himself, for that act. It is only necessary to prove that the criminal act or crime complained against was done by one of the accused persons.

The Tribunal also based its decision of superior responsibility relying upon exts 4, 6, 12 and material exts I and V. Ext-4 is the issue of Danik Azad dated 31st December, 1971 reported under the caption 'আরও ১৫ জন মীরজাফর ধরা পড়েছে'. In the news it was reported that some collaborators were caught and in the list of collaborators, Kamaruzzaman's name appears in serial No.14 and he was described as Al-Badar. Ext-6 is the issue of Dainik Azad, dated 16th August, 1971, in which it was reported that on the occasion of 25th Independence Day of Pakistan a Symposium was organized in Mymensingh which was presided by Mohammad Kamaruzzaman as the Chief Organizer of Al-Badar force. Ext 12 is the daily statement of Razakars of Netrokona Sub-Division dated 17th October, 1971. These documentary evidence disclosed the accused's status and role as leader of Al-Badar force in 1971, which are strong corroborating evidence to prove his participation of crimes in respect of the charges

brought against him, but these documentary evidence do not prove that accused Kamaruzzaman as commander or in the capacity of command responsibility of Al-Badar force implemented the plans and activities involving the commission of offences in respect of charge Nos.2, 3, 4 and 7 or that he failed or omitted to discharge his duty to maintain discipline, or control or supervision of the actions of the force under his command or that he failed to take necessary measure to prevent the commission of those crimes. Even then, this will not detract the accused of being absolved of the criminal responsibility in respect of charge No.2, 3, 4 and 7. In those counts, especially in respect of charge No.3, the accused was directly responsible for the crimes committed and proved by the prosecution. In respect of other counts we convert the accused Kamaruzzaman's conviction to one under section 3(2) (a) read with section 4(1) of the Act, 1973.

Conclusion

We have held in the case of Abdul Quader Mollah that when a significant period of time has elapsed between the acts charged against the accused and the trial, it is not always reasonable to expect from the witnesses to recall

every detail with precision. Besides, lack of precision or minor discrepancies between the statement of a witness with his prior statement, while calling for cautious consideration, is not regarded in general the testimony of the witness worthy of credit. Over time, the availability and quality of witness testimony naturally erodes due to a variety of factors. Most witnesses are not alive. The living witnesses forget with advancing age. Some witnesses lost interest and some of them no longer willing to recall traumatic events. Another factor that can interfere with the memory of the witnesses is their exposure to different versions of the story told by other persons. We are to evaluate the evidence presented before the Tribunal keeping these inevitable factors in mind together with the settled jurisprudence.

Justice for the victims families remained exclusive. Evidence collection and interpretation in atrocity cases is also complicated by the instability of post-atrocity environments, which results in much evidence being lost or inadequately preserved. The investigation officers and the prosecutors have to trawl through decades-old records, track and verify witnesses. In this connection

Alphons M.M. Orie, a Judge of International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague, in an article on 'Adjudicating Core International Crimes cases in which Old Evidence is Introduced' under the heading "The limits of the Legal Approach to Old Evidence" observed 'It might therefore be that the legal approach does not produce a fully satisfactory answer to the challenges encountered when dealing with 'Old Evidence' about events that have long since passed'.

One of the challenges associated with the delayed criminal justice against the perpetrators of Crimes against Humanity is the location, treatment, assessment of old evidence and apathy of the succeeding governments in power. It is an admitted fact that the members of Peace Committee and the Razakars who actively opposed the liberation struggle and involved in the acts of killing and other activities were allowed to come out of hiding and resume normal life under the rezimes after the assassination of Sheikh Mujibur Rahman in 1975. Some revived Jamat-e-Islami and others joined other political parties. Since then a culture of impunity prevailed and the perpetrators of Crimes against Humanity freely

participated in political life and even went on to hold high posts like Members of Parliament and Ministers.

Those who were in power not only destroyed the legal evidence, they also successfully distorted the history of liberation struggle in collusion with the persons in power and erased their names from this list of collaborators. The trial of offences of Crimes against Humanity are held on the basis of Old evidence after about 40 years of the commission of Crimes. Naturally, it is a difficult task for the prosecution to collect eye witnesses and also to collect undistorted documentary evidence against the perpetrators of those crimes by reason of lapse of time and destruction of legal evidence. This case should be considered in the context of the changed circumstances. Even then there are some strong documentary evidence which proved the status and role of the accused Kamaruzzaman in 1971. Besides the documentary evidence, the prosecution led ocular evidence in support of its case. The witnesses are local and they know the accused from his boyhood. These evidence proved that Kamaruzzaman was leader of Al-Badar force; that he was the planner of the killing and perpetrated the

killing as per such plans and that he was arrested immediate after 16th December, 1971.

Some collaborators voluntarily surrendered to the jail authorities to avoid humiliation but some did not surrender. They were detained by the law enforcing agencies. Accused Kamaruzzaman was one of those dreaded collaborators who fall among the latter categories. Defence did not explain why he was arrested immediate after the independence of the country. This admitted fact negates the plea of alibi taken by the defence. He was the Al-Badar commander and actively organized the Al-Badar force in greater Mymensingh area and conducted the said force. He was one of the planner to implement the Pak occupation army's 'Operation Search Light'. It is on record that all along the accused had discussed with army officers for the implementation of killing, looting and persecution of civilians and pro-liberation minded people.

On the question of probative value of witness evidence, Judge Alphons M.M. Orié argued that even if the evidence of a witness was recorded at a point of time closer to the occurrence, it may enable the comparison of

a witness statement given almost immediately after the event, with the evidence of the same witness given in 40/50 years later. Even if the statement is unreliable, it does not mean that the witness lied but rather that this needs to be further explored so as to discover the exact explanation for its shortcoming. So if, on the basis of an early recording, discrepancies are formed, this does not automatically mean that old evidence is bad. The learned counsel for the defence argued the case as if the accused was tried for commission of offences under the prevailing general criminal laws. The general doctrines and the principles for proving a charge against an accused person on the basis of oral evidence of the witnesses are not applicable in this case. He argued the appeal for days together basing on the general criminal jurisprudence developed in this country. Practically he failed to persuade us on any of the points canvassed. He raised trifling points and made repeated submission on one or two points.

There may be some inconsistency in the prosecution evidence but if we consider exhibits-4, 6, 8, 10, 11, 18 and 19 with the oral evidence, we can safely reach to the

conclusion that accused Kamaruzzaman being a leader of Islami Chatra Sangh raised the Al-Badar force in the larger Mymensingh; that this Al-Badar force perpetrated all inhuman acts in larger Mymensingh and that by dint of his status as Al-Badar leader, he cannot escape from the criminal liability at least in respect of four counts. These documents cannot be doubted as fabricated documents. The prosecution has relied upon old documentary evidence, whereas, the defence has relied upon new documents, some of them were published during the trial of the case and therefore, the old documents will prevail over the new documents. There is no doubt about the genuineness of these old documents.

The Tribunal has meticulously considered the evidence of P.Ws.4 and 6 in support of charge No.1, but we have found some major inconsistency about how and for what reason Bodiuzzaman has taken shelter to the house of Ahmed Ali member and the manner of taking Bodiuzzaman by the accused with his force. It is also not clear from the evidence that he has at all taken shelter in the house of Ahmed Ali. There are also inconsistent evidence in respect of the manner of killing of Badiuzzaman. More so,

the most vital witness Moqbul Hossain who could furnish a correct picture of the incident is alive, but he has not been examined and that the prosecution has given no explanation about his non-examination. The case was conducted in a very half-hazard manner by the prosecution to prove this charge against the accused. Though the defence has admitted the killing of Bodiuzzaman, in view of the inconsistency in the evidence of P.Ws.4 and 6, we are of the view that accused Kamaruzzaman is entitled to get the benefit of doubt in respect of the said charge. In respect of charge No.2, the Tribunal has meticulously considered the evidence of P.Ws.2, 3 and 14 and rightly found the accused guilty of the charge. As observed above, some incriminating evidence of P.Ws.2 and 14 were not at all controverted by the defence. If the documentary evidence are considered with the oral evidence, his culpability is proved beyond any shadow of doubt. In view of the above, we are of the view that the Tribunal is perfectly justified in finding the accused guilty of the said charge.

In respect of charge No.3, we have meticulously considered the evidence of P.Ws.2, 10, 11, 12 and 13.

D.W.2 also admitted the incident of mass killing. The incidents were so brutal and barbaric that it shakes the conscience of the people in general. The accused with his masters and cohorts not only eliminated almost all the male members of Sohagpur village, but also participated in the killing and rape of widows of the victims. The acts of the accused can be comparable with none but beasts. Prosecution examined two eye witnesses of the incidents. They were corroborated by three witnesses. Apart from the oral evidence, the documentary evidence produced by the prosecution proved the status and conduct of the accused during the period of liberation struggle and these documentary evidence are so strong and corroborative about his complicity of the crimes. The incident of mass killing was perpetrated by the active participation of the accused. The Tribunal has rightly found the convict guilty of the charge.

In respect of charge No.4, the Tribunal has believed the complicity of the appellant after assessing the evidence of P.Ws.2, 5 and 14. D.W.2 has admitted the killing of Golam Mustafa. The documentary evidence also corroborates the evidence. The defence fails to shake

their testimony in material particulars. We fully agree with the findings of the Tribunal that the prosecution has proved the charge beyond doubt and the accused is guilty of the charge. So also in respect of charge No.7. In support of this charge, the prosecution has examined P.Ws.1, 9 and 15. The prosecution has also proved by documentary evidence through P.Ws.16 and 18 to prove the conduct and the status of the accused during the whole period of liberation struggle. The Tribunal has rightly found him guilty of those charges.

Sentence

The Tribunal was of the view that the offences of murder are predominantly shocking to the conscience of mankind; that the fierceness of the event of the attack of Sohagpur massacre was launched in such grotesque and revolting manner in which the helpless victims could not save their lives and that the act of massacre and devastation of human honour was diabolic and detrimental to basic humanness. It was further observed that the act of indiscriminate sexual invasion committed on women coupled with mass killing shocks the conscience of human kind and aggravates the pattern of criminal acts and that

the mode of participation of the accused in committing crimes together with his superior position increases his culpability which deserves to be taken into account as aggravating fact. We approve the above views except that of accused's complicity holding superior position increased his culpability.

It is on record that in the Sohagpur massacre almost all male members of the village were brutally killed. The planning and operation was conducted from the Al-Badar camp set up at the house of Suren Saha. He was directly involved in the implementation of the killing and rape and in pursuance of his planning, the incidents were perpetrated. The incidents were so cruel, inhuman and barbarous, the perpetrators not only killed almost all the male members of the village, they also did not spare the widows of the victims, who were also ravished. Even the women who fled away sensing the enormity of the crime and returned back 2/3 days after the incidents in their houses were also not spared. While narrating the horrific incident of killing of her husband and causing violence to her after the killing, P.W.12 was kept in the convulsive gasps under mental distress. The Tribunal

noted down the demeanour while recording her statement. She could not control her emotion even after 40 years. How gruesome incident it was? None can imagine other than the one who has experienced the traumatic incidents. Accused Kamaruzzaman directly participated in these barbarous acts. These acts are comparable with none. Even Nazis did not perpetrate similar nature of brutal acts. Accused Kamaruzzaman did not express any repentance of his criminal acts at any stage of the proceedings for his role rather showed vaunter for his conducts and acts. He led the armed groups to perpetrate the incidents of rampant killing and rape.

The very nature of the incidents proved beyond doubt that the killing was perpetrated systematically in furtherance of a preconcert plan and design upon civilian population. These offences are distinguishable from other incidents of murder perpetrated during the normal condition of the country. No doubt these crimes were committed against humanity because the killing was perpetrated to the innocent unarmed civilians who could not leave the country to avoid the onslaught of the Pak army. The author of ext. 'A' stated that the killing

spree continued for six hours continuously. In Bangladesh Documents, the Al-Badar force organised by the accused was termed as 'Fascist' force, that is, this force was compared with Mussolini's regime in Italy. The nature of the incident orchestrated by the accused with his force has all trappings of 'Genocide'.

The acts of the accused in the formation of Al-Badar force and then his involvement in the participation of the mass killing and rape of the widows of Sohagpur village is inhuman and gruesome. Accused Kamaruzzaman deserves no sympathy for such behavioral pattern of the criminal acts. We find no difference between the conduct of a man and a beast in the perpetration of these crimes. Neither in the Tribunal nor before this Division any argument was made on behalf of the accused to take a lenient view if he was found guilty of the charge. Even under the general law, when a murder is perpetrated in cold blooded and in a calculated manner, the courts normally award a sentence of death on the reasoning that such type of incident shocks the conscience of the society. It has been revealed from the documentary evidence and oral evidence, which described the gruesome

manner of killing as a scene resembling that of the Hindu spring festival, 'the Holy', where the crowd is immersed in red coloured water. The accused and his force killed one by one persons of the village and this killing spree continued for six hours, and bathed with their blood. The killing spree was such as if they were hunting birds and animals. We cannot imagine how the accused being a Bangalee citizen could involve in such gruesome inhuman acts and from such conduct, he does not deserve any compassionate consideration on the question of sentence. The proper and appropriate sentence for his crimes is the extreme one. We cannot think of giving him any lesser sentence at least in respect of this charge which will defeat the ends of justice.

In Abdul Quader Mollah, this Division while awarding the death sentence observed that 'while considering the punishment to be given to an accused person, the court should be alive not only to the right of the perpetrator but also rights of victims of the crime and society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public

abhorrence for the heinous crime committed by the accused person'. The incidents of murder and rape perpetrated at Sohagpur village are much heinous than that of Abdul Quader Mollah. Therefore, it is the most appropriate case in which a sentence of death is the only sentence, which will be just and proper proportionate to the gravity of the crime. The Tribunal is thus justified in awarding him death sentence.

In respect of charge No.4, though the Tribunal was of the view that unless the highest sentence is not awarded to the accused, there would be failure of justice. While assigning the reasons the Tribunal observed that this charge also falls 'within the kind of such gravest crimes which tremble the collective conscience of mankind'. We cannot endorse the views of the Tribunal. The evidence on record revealed that Golam Mustafa was taken, detained and tortured at the camp set up at the house of Surendra Mohan Saha and then he was taken on the Sheri bridge and shot to death. There is no evidence that accused Kamaruzzaman directly participated in the killing. From the evidence of P.W.2, it may be presumed that Kamaruzzaman shot him to death. In the

absence of direct and definite evidence about accused Kamaruzzaman's act of shooting to Golam Mustafa to death, a sentence of forfeiture of life cannot be awarded. The extreme penalty is awarded against an accused person if the act of accused is 'cruel and brutal', and the accused deserved no mercy because he showed no mercy. These ingredients and/or constituents are absent in this charge. Considering the nature of evidence led by the prosecution, the sentence of death is not proportionate to the gravity of the crime. We are of the view that the imprisonment for life is proportionate to the gravity of the crime. Accordingly, we commute his sentence to imprisonment for life. In respect of other two counts, the Tribunal has properly awarded the sentences and we are not inclined to interfere with the same.

Appellant Mohammad Kamaruzzaman is acquitted of charge No.1. His conviction and sentence in respect of charge Nos.2 and 7 are maintained by majority. His conviction in respect of charge No.3 is maintained unanimously but his sentence of death of the said charge is maintained by majority. His conviction in respect of

charge No.4 is maintained by majority but his sentence is commuted to imprisonment for life.

J.

Md. Abdul Wahhab Miah, J: This statutory appeal, by convict Muhammad Kamaruzzaman (hereinafter referred to as the accused), has been filed under section 21 of the International Crimes (Tribunals) Act, 1973 (hereinafter referred to as the Act, 1973) against the judgment dated the 9th day of May, 2013 by the International Crimes Tribunal-2(ICT-2) (hereinafter referred to as the Tribunal) in ICT-BD Case No.03 of 2012 finding him guilty for the ‘crimes against humanity’ enumerated in section 3(2) of the Act, 1973 as listed in charge Nos.1, 2, 3, 4 and 7 and convicting and sentencing him under section 20 thereof to a ‘single sentence of death’ for the crimes as listed in charge Nos.3 and 4 and sentencing him to suffer ‘imprisonment for life’ for the crimes as listed in charge Nos.1 and 7 and sentencing him to suffer ‘imprisonment for 10(ten) years’ for the crimes as listed in charge No.2. The Tribunal further observed that as the convict was ‘sentenced to death’ the sentence of ‘imprisonment for life’ and the sentence of ‘imprisonment for 10(ten) years’ would naturally get merged into the ‘sentence of death’ and the sentence shall be carried out under section 20(3) of the Act, 1973.

I have had the privilege of going through the draft judgment prepared by my learned brother, Surendra Kumar Sinha, J as supplemented by my learned brothers, Hasan Foez Siddique and A.H. M. Shamsuddin Chowdhury, J.J on behalf of the majority. I regret that I could not persuade myself to agree with the findings and decisions given by my learned brothers affirming the order of

conviction and sentence passed against the accused by the Tribunal in respect of the charges of the commission of crimes as listed in charge Nos.2, 4, and 7, and though I would maintain the order of conviction of the accused as to the commission of crimes as listed in charge No.3, I could not agree with the findings and the reasoning given by the Tribunal and my learned brothers in finding the accused guilty of the charge as listed in charge No.3 and the sentence of death awarded to him in respect of the said charge. Therefore, I find no other alternative but to give my own findings and decisions in respect of the allegations of commission of crimes by the accused as listed in charge Nos.2, 3, 4 and 7. However, I am in full agreement with the findings and reasoning with my learned brother, Surendra Kumar Sinha, J in respect of the crime as listed in charge No.1, therefore, I would not add anything in respect of that charge.

Before I proceed to consider the accusation made against the accused chargewise with reference to the evidence on record and the provisions of the Act, 1973, I would like to repeat the background in enacting the Act, 1973 what I stated in the case of Abdul Quader Mollah (Criminal Appeal No.25 of 2013 heard and disposed of analogously with Criminal Appeal No.24 of 2013). The background in enacting the Act, 1973 is historical. In a short compass, it is that free and fair elections for the constitution of a National Assembly were held from 7th December, 1970 to 17th January, 1971 under the Legal Framework Order, 1972 (President's Order No.2 of 1970) for the purpose of framing a Constitution for the then Paskistan and in that election all political parties including the then All Pakistan Awami League participated. Awami League got 167 seats out of 169 seats in the election in the then East Pakistan

and thus emerged as a majority party. The then military Ruler of Pakistan, General Yahia Khan, summoned the elected representatives of the people to meet on the 3rd day of March, 1971 for the purpose of framing a Constitution, but the Assembly so summoned was arbitrarily and illegally postponed for indefinite period. Thereafter, the Pakistan Government by levying an unjust war and committing genocide and by other repressive measures made it impossible for the elected representatives of the people of Bangladesh to meet and frame a Constitution and give themselves a Government. In the circumstances, the people of Bangladesh, having proclaimed their independence on the 26th day of March, 1971 and, through a historic struggle for national liberation, established the independent, sovereign People's Republic of Bangladesh. The Constituent Assembly, which was constituted under President's Order No.22 of 1972 under the nomenclature 'The Constituent Assembly of Bangladesh Order, 1972', for framing a Constitution for the Republic, framed a Constitution which was adopted, enacted and given to ourselves on eighteenth day of Kartick, 1379 B.S. corresponding to the fourth day of November, 1972. It is also a historical fact that from 25th March, 1971 till 16th December, 1971, atrocious and barbarous and inhuman acts were perpetrated on the soil of Bangladesh by Pakistan armed or defence forces and their auxiliaries on a large scale and of a nature that outraged the conscience of mankind. And in order to detain, prosecute or punish any person, who is a member of any armed or defence or auxiliary forces or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law, the first amendment to article 47 of the Constitution by inserting sub-article (3) by Act XV of 1973 giving immunity to the law or any

provision thereof to be enacted from being challenged as void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision thereof is inconsistent with, or repugnant to, any of the provisions of the Constitution was brought. The above amendment to article 47 of the Constitution, by way of addition, was made on 15th July, 1973 and thereafter, the Parliament passed the Act, 1973 which was gazetted on 20th July, 1973 being Act No.XIX of 1973. The Act, 1973 was enacted in line with the provisions of newly inserted sub-article (3) of article 47 of the Constitution making provisions for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law and for matters connected therewith.

It is to be mentioned that the Act, 1973 is the first codified legislation in the world which gave jurisdiction to the Tribunal to be set up under section 6 thereof to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed in the territory of Bangladesh, whether before or after the commencement of the Act, any of the crimes as mentioned in sub-section (2) of section 3. The People's Republic of Bangladesh being an independent and sovereign State, its Parliament had/has every right to enact law, such as the Act, 1973 for the trial of the person(s) who commits or has committed the crimes as mentioned in the Act. So, when we have a codified law, we need not travel to seek assistance from the other trials held or being held by the Tribunals/Courts either under the charter of agreements of the nations or under other arrangements under the mandate of the United Nations or other international body, such as Nuremberg trial and the Balkan trials.

The Act, 1973 is a domestic/municipal law and at the same time is a special law. The Parliament took the care to incorporate all the provisions in the Act, 1973 that are required to prosecute a person who commits or has committed crimes as mentioned in sub-section (2) of section 3 thereof for fair trial including the right of appeal by the accused in case, he is found guilty and sentenced accordingly. The Act has made provisions prescribing the procedure of prosecuting a person(s) guilty for the commission of a crime as mentioned therein, for the setting up of a Tribunal for the trial of such person(s), appointment of prosecutor to conduct the prosecution before the Tribunal, establishment of an Agency for the purpose of investigation into the crimes as specified in section 3 of the Act, the procedure for commencement of the proceedings before the Tribunal, the procedure of trial to be followed by a Tribunal, the powers of the Tribunal, the framing of charges, right of the accused person during trial, the Rules of evidence, giving the Tribunal power to regulate its own procedure and the judgment and sentence to be passed by the Tribunal including the provisions as to how a judgment shall be written and passed. In the case of Abdul Quader Mollah (hereinafter referred to as Quader Mollah), it has been unanimously held that there is no scope of application of the customary international law in respect of the proceedings before the Tribunal for a trial of a person(s) under the Act, 1973. In that case, it has been held that it is the duty of a national Court or a Tribunal to follow the domestic law even if the same is inconsistent with the customary international law in dispensing justice, be it criminal or a civil trial. From the impugned judgment, it appears that the Tribunal instead of sifting the evidence in its entirety in the light of the provisions of the Act, 1973 and the Rules of Procedure framed by it

in arriving at the findings of guilt against the accused in respect of the charges alleged against him proceeded in a manner as if they were holding the trial under the customary international law and relied upon the principles as enunciated by Pre-trial Chamber, Trial Chamber and Appeal Chamber of trials held not under a codified law like the Act, 1973, but under international covenants and under the mandate of United Nations.

From the charges levelled against the accused, it appears that he was charged with the allegations of committing abduction and murder in charge Nos.1, mass killing and rape in charge No.3, murder in charge Nos.4, 5, 6 and 7, participating and substantially facilitating and contributing to the commission of inhuman acts to Syed Abdul Hannan, the principal of Sherpur College in charge No.2. And no charge was framed against the accused for the commission of crimes against peace, genocide, war crimes, violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949 and any other crimes under international law as mentioned in clauses (b)(c)(d)(e) and (f) of section 3(2) of the Act, 1973. Abduction, murder and rape and “other inhuman acts have been mentioned under the head ‘Crimes against Humanity’ in clause (a) of sub-section (2) of section 3 of the Act, 1973. In our domestic law, namely, the Penal Code except ‘other inhuman act’ abduction, murder and rape have been defined. In the context, it is pertinent to state that the Penal Code has not been made in-applicable in any proceedings under the Act, 1973. So, when, in our domestic law, the offences of abduction, murder and rape have been defined, we need not look to the customary international law or to look to any other jurisdiction for the definition of abduction, murder and rape with which the accused has

been charged. And we have to decide the guilt or innocence of the accused of the charges brought against him keeping in view the definitions of abduction, murder and rape given in the Penal Code along with the other clauses, namely, clauses (a), (h) and other clauses of section 3(2) of the Act, 1973. Since ‘other inhuman acts’ have neither been defined in the Penal Code nor in the Act, 1973, we have to fall back upon the dictionary meaning of the two words ‘inhuman acts.’

The proceedings of the case giving rise to this appeal commenced on 18th December, 2011 with the filing of the formal charge in the form of a petition as required under section 9(1) of the Act, 1973 and rule 18(1) of the International Crimes (Tribunal-2) Rules of Procedure, 2012 submitted by the Chief Prosecutor against the accused alleging commission of crimes under different heads within the meaning of section 3(2) thereof. The Tribunal took cognizance of the crimes as mentioned in section 3(2)(a)(b)(g)(h) of the Act, 1973. Then, after hearing both the sides and on perusal of the formal charges, documents and statements of witnesses, the Tribunal framed 7(seven) charges against the accused relating to the commission of the ‘crimes against humanity’ as specified in section 3(2)(a) of the Act, 1973 or in the alternative for ‘complicity in committing such crimes’ as specified in section 3(2)(a)(g)(h) thereof. The charges were read out and explained to the accused and he pleaded not guilty and claimed to be tried.

From the charges and the impugned judgment, it appears that separate allegations were made against the accused in each of the 7(seven) charges framed against him. The prosecution in all examined 18(eighteen) witnesses to substantiate the allegations made in the respective charge and they were duly

cross examined by the defence. The prosecution produced number of documents which were proved and marked as exhibits. The defence also examined 5(five) witnesss and they were duly cross-examined by the prosecution. The defence also produced documents which were proved and marked as exhibits.

The defence in all the charges was that the accused was innocent of the allegations made against him in the respective charge and that he was implicated in the case falsely for political reason. The defence also took the plea of alibi stating that during the whole period of *muktijoddha*, he was at his village home.

The Tribunal by the impugned judgment found the accused not guilty of the charges listed in charge Nos.5 and 6 and accordingly, acquitted him of the said charges. The Tribunal found the accused guilty in respect of the charges listed in charge Nos.1,2, 3, 4 and 7.

In the above background, it is to be decided in this appeal whether, in view of the evidence adduced by the parties (both the prosecution and the defence), the Tribunal was justified in finding the accused guilty of the charges of the commission of crimes under the Act, 1973 as listed in charge Nos.1, 2, 3, 4 and 7 and whether the Tribunal was justified in sentencing him to death, in the facts and circumstances of the case, and the evidence on record in respect of the charges listed in charge Nos.3 and 4.

Before I proceed to consider the points as formulated hereinbefore, I like to repeat what I said in the case of Quader Mollah that as a human being and as a son of the soil, I have reasons to be shocked and emotional as to the atrocities which were committed on the soil of Bangladesh by the Pakistan armed forces,

its auxiliary forces and other persons, but I am oath bound to faithfully discharge the duties of my office according law and do right to all manner of people according to law, without fear or favour, affection or ill-will. I also deem it necessary to consider the relevant provisions of the Act, 1973 and the Rules framed thereunder by the Tribunal in exercise of its power vested under section 22 of the Act, 1973 under the nomenclature ‘the International Crimes (Tribunal-2) Rules of Procedure, 2012 (hereinafter referred to as the Rules of Procedure) as the credibility of the witnesses both the prosecution and the defence and acceptability of their testimonies and the documentary evidence shall largely depend upon their correct interpretation and appreciation.

Sub-section (2A) of section 6 of the Act, 1973 has provided that the Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial(emphasis supplied).

Original sub-section (1) of section 3 of the Act, 1973 stood as follows:

“3.(1) A Tribunal shall have the power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the following crimes.”

(Crimes have been described in sub-section (2) to the section.)

Sub-section (1) of section 3 was amended on the 14th day of July, 2009 by Act-55 of 2009 as under:

“3.(1) A Tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2).”

Originally the Tribunal was given the jurisdiction to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh, whether before or after the commencement of the Act, any of the crimes as mentioned in sub-section (2) of section 3 of the Act, 1973, but by the amendment, the Tribunal was given the jurisdiction to try and punish any individual or group of individuals, or any member of any armed, defence or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of the Act, any of the crimes mentioned in sub-section (2) thereof.

Sub-section (1) of section 8 has provided that the Government may establish an Agency for the purpose of investigation into the crime specified in section 3; and any officer belonging to the Agency shall have the right to assist the prosecution during trial. Sub-section (2) has provided that any person appointed as a prosecutor would be competent to act as an Investigation Officer and the provisions relating to investigation shall apply to such prosecutor. The other sub-sections of section 8 have dealt with the power of the Investigation Officer to require the attendance of any person before him who appears to be acquainted with the circumstances of the case, power of Investigation Officer to examine orally any person who appears to be acquainted with the facts and circumstances of the case and the provision of reducing into writing any statement made to him in course of examination under the section and the other ancillary provisions such as, punishment of a person who would fail to appear before an Investigation Officer for the purpose of examination or refuse to answer the questions put to him by such Investigation Officer.

It would be beneficial if the section is quoted as a whole, the section reads as under:

“8. (1) The Government may establish an Agency for the purposes of investigation into crimes specified in section 3; and any officer belonging to the Agency shall have the right to assist the prosecution during the trial.

(2) Any person appointed as a Prosecutor is competent to act as an Investigation Officer and the provisions relating to investigation shall apply to such Prosecutor.

(3) Any Investigation Officer making an investigation under this Act may, by order in writing, require the attendance before himself of any person who appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

(4) Any Investigation Officer making an investigation under this Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case.

(5) Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such person:

Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.

(6) The Investigation Officer may reduce into writing any statement made to him in the course of examination under this section.

(7) Any person who fails to appear before an Investigation Officer for the purpose of examination or refuses to answer the questions put to him by such Investigation Officer shall be punished with simple imprisonment which may extend to six months, or with fine which may extend to Taka two thousand, or with both.

(8) Any Magistrate of the first class may take cognizance of an offence punishable under sub-section (7) upon a complaint in writing by an Investigation Officer.

(9) Any investigation done into the crimes specified in section 3 shall be deemed to have been done under the provisions of this Act.”

Section 9 of the Act, 1973 has provided as to when and how the proceedings before a Tribunal shall commence in respect of crimes alleged to have been committed by each of the accused persons and also for fixation of the date of trial of such accused person by the Tribunal, the duty of the Chief Prosecutor as to furnish to the Tribunal a list of the witnesses to be produced along with the recorded statement of such witnesses or copies thereof and copies of the documents, which the prosecution intends to rely upon in support of charges at least three weeks before the commencement of the trial, list of witnesses for the defence, if any, along with the documents or copies thereof, which the defence intends to rely upon to be furnished to the Tribunal and the prosecution at the time of commencement of trial.

Section 10 of the Act, 1973 has provided the procedure of trial to be followed at the trial before the Tribunal. Section 10 reads as follows:

- “10. (1) The following procedure shall be followed at a trial before a Tribunal, namely:-
- (a) the charge shall be read out;
 - (b) the Tribunal shall ask each accused person whether he pleads guilty or not-guilty;
 - (c) if the accused person pleads guilty, the Tribunal shall record the plea, and may, in its discretion, convict him thereon;
 - (d) the prosecution shall make an opening statement;
 - (e) the witnesses for the prosecution shall be examined, the defence may cross-examine such witnesses and the prosecution may re-examine them;
 - (f) the witnesses for the defence, if any, shall be examined, the prosecution may cross-examine such witnesses and the defence may re-examine them;

(g) the Tribunal may, in its discretion, permit the party which calls a witness to put any question to him which might be put in cross-examination by the adverse party;

(h) the Tribunal may, in order to discover or obtain proof of relevant facts, ask any witness any question it pleases, in any form and at any time about any fact; and may order production of any document or thing or summon any witness and neither the prosecution nor the defence shall be entitled either to make any objection to any such question or order or, without the leave of the Tribunal, to cross-examine any witness upon any answer given in reply to any such question;

(i) the prosecution shall first sum up its case, and thereafter the defence shall sum up its case;

Provided that if any witness is examined by the defence, the prosecution shall have the right to sum up its case after the defence has done so;

(j) the Tribunal shall deliver its judgment and pronounce its verdict.

- (2) All proceedings before the Tribunal shall be in English.
- (3) Any accused person or witness who is unable to express himself in, or does not understand, English may be provided the assistance of an interpreter.
- (4) The proceedings of the Tribunal shall be in public:
Provided that the Tribunal may, if it thinks fit, take proceedings in camera.
- (5) No oath shall be administered to any accused person.”

Sub-section (3) of section 11 reads as follows:

“(3) A Tribunal shall-

- (a) confine the trial to an expeditious hearing of the issues raised by the charges;
- (b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.”

Section 16 has clearly provided what shall be stated in the charge brought against an accused. Section 16 reads as follows:

“16.(1) Every charge against an accused person shall state-

- (a) the name and particulars of the accused person;
- (b) the crime of which the accused person is charged
(emphasis supplied);
- (c) such particulars of the alleged crime as are reasonably

sufficient to give the accused person notice of the matter with which he is charged (emphasis supplied).

- (2) A copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide. ”

Section 19 has provided as to the Rules of evidence to be adopted by the Tribunal, the section is as follows:

“19. (1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.”

The following rules of the Rules of Procedure are also very relevant for the disposal of the appeal.

“2(9) “**evidence**” means all statements which the Tribunal permits or requires to be made before it by witnesses, and it includes all other materials, collected during investigation, placed before the Tribunal in relation to matters of fact;”

4. An Investigation Officer shall act and work in accordance with the provisions of sections 8(1), 8(3), 8(4), 8(5), 8(6) and 8(7) of the Act while investigating a case.

5. The Investigation Agency shall maintain a Complaint Register with necessary particulars on putting date and serial numbers of the complaints meant for initiating investigation under the Act.

8(1) The Investigation Officer shall maintain a Case Diary for each case in connection with the investigation mentioning its day to day progress until completion of such investigation .

(2) The Investigation Officer may use the case Diary at the time of deposition before the Tribunal to refresh his memory or to explain any fact entered therein.

(3) The defence shall have no right to examine or use the Case Diary in defence of a case.

(4) The Tribunal may peruse the Case Diary for clarification or understanding of any fact transpired at the time of investigation.

(5) The Tribunal, if it considers expedient, may direct the prosecutors to present progress report of investigation for its perusal.

11. After completion of investigation, the Investigation Officer shall submit an Investigation Report together with all the documents, papers and the evidence collected during investigation of offences (s) as specified in the Act committed by a person(s) before the chief Prosecutor.

12. The Investigation Officer shall prepare more than one set of his Investigation Report together with all the accompanying documents for the purpose of preserving one set in the office of the Investigation Agency.

13. Each and every document, paper and evidence accompanying the Investigation Report under rule 11 and 12 shall be duly authenticated and endorsed by the Investigation Officer who investigated the case.

Sub-rule (2) of rule 43:

“(2) A person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until he is found guilty.”

“50. The burden of proving the charge shall lie upon the prosecution beyond reasonable doubt.”

“51. (1) The onus of proof as to the plea of ‘alibi’ or to any particular fact or information which is in the possession or knowledge of the defence shall be upon the defence.

(2) The defence shall also prove the documents and materials to be produced by them in accordance with the provisions of section 9(5) of the Act.

(3) Mere failure to prove the plea of alibi and or the documents and materials by the defence shall not render the accused guilty(emphasis supplied).”

“53. (i) The testimony of the witness shall be recorded either in Bangla or in English through the process of computer typing or otherwise as the Tribunal directs.

(ii) The cross-examination shall be strictly limited to the subject-matter of the examination-in-chief of a witness but the party shall be at liberty to cross-examine such witness on his credibility and to take contradiction of the evidence given by him.

(iii) The Tribunal shall have jurisdiction to regulate the matter of time management as and when deems necessary, for ensuring effective and expeditious trial.”

“56. (1) The Tribunal shall give due weight to the primary and secondary evidence and direct and circumstantial evidence of any fact as the peculiar facts and circumstances of the case demand having regard to the time and place of the occurrence.

(2) The Tribunal shall also accord in its discretion due consideration to both hearsay and non-hearsay evidence, and the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial.

(3) Any statement made to the investigation officer or to the prosecutor in course of investigation by the accused is not admissible in evidence except that part of the statement which leads to discovery of any incriminating material.”

From the provisions of the Act and the rules of the Rules of Procedure as discussed and quoted hereinbefore, it appears to me that although the Code of Criminal Procedure and the Evidence Act have not been made applicable in case of the proceedings before the Tribunal, in fact, the essence of a fair trial governing the field of criminal jurisprudence as envisaged in the said two laws and the principles of law as propounded by this Court as well as the superior Courts of other jurisdiction has been substantially and clearly infused in the

Act, 1973 and the Rules of Procedure. And I am of the view that in sifting, assessing and weighing the evidence on record, both oral (hearsay and non-hearsay) and documentary, the reliability and probative value as to the hearsay evidence and credibility of a witness with reference to the charges levelled against the accused, we must bear in mind the above mentioned provisions of the Act and the Rules of Procedure, particularly, sub-section (2A) of section 6, section 8, clause (e) of section 10 of the Act, 1973, rules 4, 5, 8, sub-rule (2) of rules 43, 50, 51, 53 and 56 of the Rules of Procedure, besides the other provisions of the Act and the Rules that may appear to be relevant during discussions.

Now, I propose to see the propriety of the findings of guilt arrived at by the Tribunal against the accused and the sentences awarded by it.

As separate charges were framed by the Tribunal accusing the accused with the commission of separate crime as enumerated in section 3(2) of the Act, 1973 over the separate and distinct occurrence and the Tribunal gave its findings and decisions separately in respect of each of the charge, I propose to answer the points formulated hereinbefore chargewise.

Charge No.2:

The charge reads as follows:

“that during the period of War of Liberation, in the afternoon of mid-May, you, being the chief organiser of Al-Badar Bahini as well as leader of Islami Chtra (sic, it would be Chhatra) Sangha or member of group of individuals and your accomplices caused inhuman acts to distinguished pro-liberation intellectual Syed Abdul Hannan the then Principal of Sherpur College, by compelling him walking throughout the town

making him almost undressed and by constant whipping, as he was a gallant supporter of War of Liberation.

Therefore, you Muhammad Kamaruzzaman are being charged for participating and substantially facilitating and contributing to the commission of offence of ‘inhuman acts as crime against humanity’ caused to Syed Abdul Hannan and also for ‘complicity to commit such crime’ as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the A ct.

You are thus liable for the above, offences under section 4(1) of the Act.”

To prove the charge, the prosecution examined 3(three) witnesses, namely: PW2-Md. Monowar Hossain Khan Mohan @ Mohan Munshi, PW3-Md. Zahurul Haque Munshi Bir Protik (Bar) and PW14-Mujibur Rahman Khan @ Panu.

PW2 (Md. Monowar Hossain Khan Mohan @ Mohan Munshi) stated in his examination-in-chief that during *muktijoddha*, he was aged about 22/23 years. During that time, his parents were alive. During *muktijoddha* he used to work in his maternal grandfather’s tailoring shop. Leaving aside the job of tailoring, he took training of *swechchhasebok*. The training was completed 15/20 days before the start of *muktijoddha*. The training was imparted for 3(three) hours everyday at the field of Sherpur Boys’ College. They took training as Sheikh Shaheb told that those who would have training would be given the job as Ansar or Muzahid. After completion of the training, he went to the office of Ansar where he was given a half-pant and a ganji. His homestead was at Bagrakosha. Sheikh Shaheb in his speech over radio in Dhaka told to protect the respective village after taking training as Ansar. Sheikh Shaheb further told not to allow any enemy and Pak Bahini to enter. He (the PW) took

training for 3(three) months and in the training, bamboo lathi was used. After the speech of Sheikh Shaheb on 7th March, the *Darogas* of the Police Station employed them to guard the offices, banks and bridges. 17/18 days thereafter, in the morning of 25th March, the people started walking from Dhaka and some in vehicles, saying that the army were killing the police in East Pakistan and were also blocking the transport. While the PW was on duty, people were saying that the army had already reached Tangail. There was a student organization at Sherpur and the accused was its leader. The army came upto Belta School at Jamalpur, the accused called the elderly people and the students. Then said he (the accused) called the elites of Sherpur which included Jamiruddin Moulana, Mamataj Moulana, Samiul Doctor, Bodi Doctor, Sattar Professor. The accused told them to invite the Pakistan army from Jamalpur. After discussion in the evening, on the next day, 50/60 persons had gone to Jamalpur and talked about the matter and they came back at 2 o' clock by the day. Thereafter, the Hindus and the Muslims of Sherpur started to advance towards India. Those who started to advance for India included Suresh Malaker, Bhengrura, Surendra Mohan Saha, Parimola Saha and the other people in 10/15 vehicles, the accused and others created obstruction on the movement of their vehicles and looted away goods, then said the accused remained standing there. The accused told Suren Saha not to go to India and asked him to sit together. In the evening, the accused sat with Suren Saha at his house, but he (the PW) could not say what decision was taken there. In the morning, he did not see Suren Saha at his house and saw a Pakistani flag hoisting there. He saw the members of the students' organization with the accused in that house. The accused was a big leader. Subsequently, the houses

of the Hindus were occupied by the people coming from the villages. Then again said the accused was a big leader of the students' organization. Samidul Doctor took possession of the house of Panu Karta, the accused kept him (Samiul Doctor) there by forming a Peace Committee with him. Before arrival of the Pakistan army, a brothel quarters, in the local area, was burnt to ashes. After the Pakistan army came, the accused announced through mike that Razakars would be recruited. The accused set up camps for Pakistan army at Nayanibari and at Z. K. High School. After setting the camps, the accused became the big leader of Badar Bahini, Kamran was a small leader. There were camps at Mymensingh, Jamalpur, Sherpur, Nokla, Nalitabari, Sohagpur, Ahmednagar, Katakhal Bridge, Paglanagar, Sreebardi, Bakshiganj, Kamalpur and Jhagrarchar. Major Riaz and Major Ayub set up the camps as desired by the accused and in those camps, the Pakistan army and the Al-Badars used to stay. The camps at the house of Suren Saha and Nayanibari were near the house of the PW. Since the house of Suren Saha was on the way to the tailoring shop of the grandfather of the PW, he could see what was being done there by the army and the Al-Badars. When, one day, he had gone to the Al-Badars' camp at Suren Saha's house, Suja told him why he did not go to the camp and if he did not go to the camp, he would be in difficulties (in the deposition sheet, in Bangla, it has been recorded as: “তুই এই ক্যাম্প আসস না কেন, না আসলে অসুবিধা হবো”). When he (the PW) asked Suja what the difficulties would be, he (Suja) told him that since he took training, he should give training to the boys in the camp. The PW further stated that he was asked to give training to the Razakars and the Al-Badars. The Razakars used to stay at the house of Nizamuddin. On that day, going home, when he (the PW) discussed the matter with his parents,

they told him to flee away. Then he had fled away to Tangarpara and had been stayed there for 3(three) days. After he had been remained hiding for 3(three) days, one Raja, a member of Al-Badars told his (the PW's) father to bring him, otherwise his house would be burnt and also threatened that none of his 3(three) sons would remain alive. Having heard the said information, the PW came to Bhelua and had been stayed there for 2(two) days at the house of Munsur Ukil, then came at the house of Mujibar Rahman, a bank employee. Natu, an Al-Badar and one Raja went to the house of the PW, Natu told the mother of the PW to give him taka 500·00 and also to find out the PW. Thereafter, in the night, the PW was brought from Bhelua. In the morning of the next day, taka 500·00 was given to Natu and Raja by selling ear-ring and a mango tree. Natu and Raja inquired from the mother of the PW whether she knew the accused and they went to her at his order. Then the mother of the PW sat for offering *Nafal Namaj*, he was taken to Nayanibari camp in wet clothes. He had to stay in the camp in the night for some days and he used to come to his house on some days. In the morning, he used to train them and do parading (in the deposition sheet, in Bangla, it has been recorded as “ওদেরকে ট্রেনিং করাই প্যারেড করানো লাগে”). They did not understand the language of the Pakistan army (in the deposition sheet, in Bangla, it has been recorded as: “পূর্ব পাকিস্তানের আর্মিদের কথা ওরা বুঝেনা।”). Samad Doctor was a homeopath and he was an Awami Leaguer. Samad Doctor gave him money to buy glucose. Samad Doctor made *purinda* with the glucose and asked him (the PW) to take those *purinda* and to roll on the floor (in the deposition sheet, in Bangla, it has been recorded as “ত্রিঙলো খাবি আর পড়াগড়ি পাড়াবি”). Later on, a Beluchi army named Aziz asked the

PW why was he doing so?, he replied that he was having stomach pain. That Baluchi army further asked the PW what were those?, he replied that those were *Bilati soda* and those subside pain (in the deposition sheet, in Bangla, it has been recorded as: “এটা বিলাতি সোডা এটা খেলে ব্যাথা কমে”). Thereafter, the PW was sent to the Sadar hospital, where he also rolled on the floor. The Doctor told him that he was suffering from gastric ulcer and there was ulcer in his stomach (নাড়ীতে ঘা হয়েছে). Then they sent the PW to the camp and hearing all these, Major Riaz ordered to release him, but the accused told that he (the PW) would be sitting as a guard at the bottom of the camp at Suren Saha’s house (in the deposition, in Bangla, it has been recorded as “সে সুরেন সাহার বাড়ীর ক্যাম্পের নিচে পাহারাদার হিসেবে বসে থাকবে”) and accordingly, he remained there as a guard (পাহাড়াদার হিসাবে) for 4/5 months, but not more than 7(seven) months. After 2(two) days (no particular date or even month mentioned), he heard the accused, Kamran and many others say that Hannan Principal would have to be moved around the town by shaving his head and besmirching his face tying a rope on his waist (in the deposition sheet, in Bangla, it has been recorded as “দুই দিন পর আমি শুনলাম কামারঞ্জামান, কামরান এবং আরো কয়েকজন বলছে যে, হান্নান প্রিন্সিপালকে মাথা মুড়িয়ে চুন কালি মেখে শহরটা ঘুরাইতে হবে”). Principal Hannan was taken to the house of Habibar Ukil, where his head was shaved, his face was besmirched and a rope was tied on his waist, thereafter he was moved around the town which the PW saw from the gate of the camp. Major Riaz came in the camp and met Kamran who told that the man was Hannan Principal, then Major Riaz told why he was in that condition and ordered to bring him (Principal Hannan) to the camp and accordingly, Principal Hannan was brought to the camp at the

house of Suren Saha with a rope on his waist. Major Riaz said at least 15(fifteen) words to Principal Hannan, but he could not utter a word. When the rope from the waist was unfastened, Principal Hannan fell down on the floor, water was brought from the pond of the house of Suren Saha and it was poured on his head by two aides of Major Riaz. After one hour, Principal Hannan regained sense. The PW categorically stated that Principal Hannan was still alive (in the deposition sheet, in Bangla, it has been recorded as “তিনি এখনও বেচে আছেন”). Major Riaz told the accused, Kamran and other Al-Badars present that Hannan Shaheb was an educated person; they should not have behaved with him in that way. Major Riaz told the accused to board Principal Hannan by his car, then Principal Hannan was taken to his house. Afterwards Major Riaz told the accused, Kamran and the other Al-Badars present there that they had come from far off a place and they would do whatever they would show them and whatever they would tell them, but asked them not to spoil the innocent people

The PW further stated that on that very date (in he deposition sheet, in Bangla, it has been recorded as “ঐ দিনই”), (again no specific date mentioned), the Al-Badars brought Civil Surgeon, Ashkar Doctor, whose wife was a school teacher. Throughout the whole day, many people tried to get Ashkar Doctor released, but Kamran told that nothing could be done till the arrival of the accused. At about 7/8 pm, the accused, the Al-Badar commander, came at the camp when the wife of Ashkar Doctor told him that they used to live side by side why was he doing such thing? His (Ashkar Doctor) wife further told that Civil Surgeon was a good man and on such utterances, Ashkar Doctor was released. After that one Golam Mostafa of Kharkharia was brought to the camp blindfolded and his hands tied from behind (in the deposition sheet, in Bangla,

it has been recorded as “গোলাম মোস্তফার চোখ মুখ, হাত পিছনে বাঁধা ছিল।”). On being beaten, Golam Mostafa was crying and saying ‘মাগো-বাবাগো’. Golam Mostafa was kept below the stair case where the PW was sitting. Golam Mostafa wanted to drink water, but he was not given any water. Someone from Kazir Khamar came to release Golam Mostafa, but he was not released. The uncle of Golam Mostafa came from Kharkharia to get him released, but Golam Mostafa was not released. When, before evening, Major Riaz came, the accused told him that *Bichhun* or *Suba* was held (in the desposition sheet, in Bangla, it has been recorded as “আওয়ামীলীগের বিছুন বা সুবা ধরা পড়ছে”). Major Riaz said that after offering prayer, he would visit another camp and then he would come again. In the meantime, a retired army named Nasir came and he took Golam Mostafa in a rickshaw being blindfolded, Nasir went to Seribridge with a Chinese gun from the office. The accused left the camp 5(five) minutes before. After half an hour, the accused and Nasir entered into the camp together and went to the upper stair. Nasir came down from the upper floor and told that the hands of ‘Sir’ were perfect and he gained courage to shoot from a gun (in the deposition sheet, in Bangla, it has been recorded as: “নাসির উপর তলা থেকে আইয়া কইতাছে স্যারের হাত এখন সই হইছে তখন সাহস হইছে বন্ধুক চলাইতে পারে।”). In the meantime, Major Riaz came and went to the up-stair and asked where the man who was brought was? Kamaruzzaman told that Nasir had taken him away. Then Major Riaz told that did Nasir become more powerful than him (Major Riaz) or the accused? At that time, when Nasir went upper floor, Major Riaz struck him by the butt of the gun and he rolled down on the ground through the stair case (in the deposition sheet, in Bangla, it has been recorded as: “তখন কামারজ্জামান বল্লো ওকে নাসির নিয়ে

গেছে। তখন মেজর রিয়াজ বলে নাসির কি আমার চেয়ে বা আপনার চেয়ে ক্ষমতাবান হয়ে গেল। এই সময় নাসির উপরে গেলে মেজর রিয়াজ তাকে বন্ধুকের বাট দিয়ে আঘাত করলে সে সিঁড়ি দিয়ে গড়িয়ে নিচ তলায় এসে পড়ে।”). Thereafter, Major Riaz went away, the accused told that he had to go Nokla where he had some very urgencies (in the deposition sheet, in Bangla, it has been recorded as “খুব জুরুরী প্রয়োজন আছে”) and then he went towards Nokla accompanied by 20/25 armed Razakars in a truck, one Jahangir also accompanied him. Subsequently, the PW came to know that they brought a man named Sushil from the *Hindu Basthi* situated in between Nurundia and Piarpur and kept him at Nayanibari camp. Later on, the man was brought before Major Riaz. After having a talk with Major Riaz, the accused told the man to be converted as a Muslim and, in fact, he was converted as a Muslim and was named as Mohiruddin Khan and he also offered salat with them and then was brought at the camp of Suren Saha’s house. The accused told Kamran to get him swum in the pond, but the man did not know how to swim and then he was kept sitting on the bank of the pond. The accused came in the late afternoon (in the deposition sheet, in Bangla, it has been recorded as “কামারঞ্জামান বিকালবেলা আসে”), then a hot talk took place between Nasir and Kamran and at one stage, the accused shot dead Mohiruddin (Shushil) with the gun of Nasir.

This PW further stated that thereafter came the turn of football player Kazal (in the deposition sheet, in Bangla, it has been recorded as “এরপর এলো ফুটবল প্লেয়ার কাজলের পালা”). Kazal was brought from Mollahpara and after detaining him throughout the whole day, was released in the evening telling him not to stay at Sherpur area. The accused told Nasir, Mahmud and Kamran

to keep watch on the movement of Kazal and further told if he (Kazal) tried to go to Jamalpur by crossing the river then to kill him in the river and float his dead body in the river. Subsequently, it was known that Kazal was shot dead and his dead body was unavailable. On that very day, Major Riaz was shot at his hand and leg. On telephonic message of his (Major Riaz) sustaining injury, a Helicopter came and Major Riaz was flown away. Before Major Riaz was flown, the accused wrote a letter and gave the same to Kamran and asked him to deliver the same to their 'Sir' (in the deposition sheet, in Bangla, it has been recorded as “আমাদের স্যারকে এই চিঠিটা পৌঁছাবা”), then Joynal said to which sir the letter had to be delivered? The accused replied that Sir, Golam Azam, who, on the other day, had sent a telegram from Dhaka. Thereafter, Kamran left with Major Riaz in the Helicopter and did not come back and he (Kamran) was replaced by Joynal. Previously, Kamran confined a *muktijoddhaa* named Zahurul Munshi. He (the PW) told that he (Zahurul Munshi) was a beggar and on being paid taka 5(five), he went away. Subsequently, when Kamran was replaced by Joynal, Zahurul Munshi used to come to the camp oft and often camouflaging him as a beggar. One day Joynal detained Zahurul Munshi, but on being told that he was a beggar, he was released. Thereafter, Zahurul Munshi came many a time, but he was not detained.

The PW further stated that one day (no date, month or approximate time is mentioned), the PW heard that the accused along with others held a meeting in the upper floor and told that the *muktijoddhaas* were coming to Sohagpur village and that village had to be gheraoed and subsequently (again no date is mentioned), they went to gherao the village, the accused, the commander of Al-Badars, also went. In the morning of the next day, he saw that many dead

bodies were brought in a truck and then the dead bodies were taken to the Park of Poursava. Mohiruddin Kazi announced through mike that they killed thousands of *muktijoddhaas* and brought some dead bodies, then his Sir, Al-Badar Commander (Kamaruzzaman) told that they were killed by going to the operation (in the deposition sheet, in Bangla, it has been recorded as: “তখন আমার স্যার আলবদর কমান্ডার কামারুজ্জামান বলেন যে, অপারেশনে যেয়ে ওদেরকে মেরে ফেলেছে।”). In the operation, the Razakars also took part. *Muktijodddhaa* Kashem Ali of village-Talukpara was apprehended after 5/6 months near Kamalpur camp when he along with 2(two) others had come for operation. The accused shot Kashem and two other by lining them in a row. However, Kashem survived but two others were killed. He did not see the occurrence, but heard from Kashem after liberation of the country. He further stated that he had no demand except justice (in the deposition sheet, in Bangla, it has been recorded as “আমি কিছুই চাই না, বিচার চাই”). He further stated that he was threatened; the windows of his house were broken. He identified the accused in the dock.

In cross-examination, this PW stated that he could not say the date of his birth. He had been working in a school as a *Daptari* since 1990, before that he used to do the job of tailoring and side by side he also used to learn the job of fixation of Telephone Cord. He could not say whether Jatiya Party was in power, but Ershad who was in power in 1990, when he joined as *Daptari*. He could not say who was the Member of the Parliament, sometime said Atique, then said Khurram and again said Atique (in the deposition sheet, in Bangla, it has been recorded as “কখনও বলে আতিক ছিলেন, পরে বলে খররম ছিলেন, পরে আবার বলেন আতিকই ছিলেন।”). He did not vote for Atique, he voted for *Daripalla*. In 1990’s

election, the accused, the Al-Badar commander, was the candidate with the symbol *Daripalla*, but he was not elected. Sherpur New Girls School was started as a lower secondary school (নিম্ন মাধ্যমিক) in 1990, the school is still lower secondary school and he is still working as *Daptari* in the school. Habib Chairman is the president of the Managing Committee of the School. Habib Chairman is an out and out Awami Leaguer (in the deposition sheet, in Bangla, it has been recorded as: “সে পুরা আওয়ামী লীগ”). The Member of the Parliament of his area is Atique from Awami League, in 1990 Atique was also the Member of the Parliament. He went to the school lastly on the 15th instant (examination-in-chief of the PW was completed on 25.07.2012 and the cross examination began on that date) and then said, he came from the school on the 16th instant by filing an application for leave and thereafter came to Dhaka on the 18th instant. Both the president and the Headmaster of the school told him to depose and the Chairman prayed for him. He denied the defence suggestion that it was not a fact that after getting notice as a witness in the case police guarded him. He denied the defence suggestion that it was not a fact that after he had become the witness in the case on behalf of the Government, he became powerful in the area. He denied the defence suggestion that it was not a fact that from 1970 to till the start of *muktijoddha* in 1971, i.e. till the Pakistan army came in the area, Awami League and the pro-liberation forces were in the leadership of the area. He asserted that till the *muktijoddha* started in 1971, the accused and his aides used to rule in the area. Till the start of war, M.P. Khurram of Awami League used to live in Dhaka, the other leaders used to live at Sherpur. He could not say who were the president and the secretary of Awami League, Muslim League and Jamaat-e-Islami during the election. He further stated that he

always remains engaged to earn his livelihood, then said he does the job of a tailor and then again said he did not keep any information about the said facts (in the deposition sheet, in Bangla, it has been recorded as: “আমি পেটের খান্দায় ঘুরি, আমি খলিফার কাজ করি, আমি এগুলোর খবর রাখিনা।”). No salary or allowances was paid for the training which he took before the liberation war. 40/50 others also took training with him and of them, he could remember, the names of Bocha, Abdullah, Rahmatullah, Shahid, Moja, Shafiq and all came back to the country as *muktijoddhaas*. Some trainees joined as Razakars, he also joined as Razakars then said that he was taken by force. During the *muktijoddha*, they were 4(four) brothers and 2(two) sisters and their father was also alive. None of his family was *muktijoddhaa*, he wanted to go to *muktijoddha*, but could not. Initially, he was in favour of *muktijoddha*, when the Pakistan army came and set up various camps, he went to see the Al-Badar camp. He had been working as a guard in the Military and Al-Badar camp for 7(seven) months, he was not paid any salary, but delicious food used to be served. No dress was given, then said the Al-Badars had no dress. The Razakars used to be paid taka 700·00, no Razakar was with him. His ‘boss’, the accused was much above (in the deposition sheet, in Bangla, it has been recorded as: “আমার বস কামারজ্জামান অনেক উপরে”) and he used to stay with the Majors and he could upset Sherpur if he so desired (in the deposition sheet, in Bangla, it has been recorded as: “সে যদি মনে করতো, শেরপুরটাকে উল্টিয়ে দেবে তাই পারতো।”). The residence of the PW was not far away from the Al-Badars camp which he used to guard. The camp was at the house of Suren Saha, while his house was at Bagdasha. After Suren Saha’s house, first there was a school, then the residence of Profulla, the C & B Road,

the houses of Shahabuddin Kerani and then the houses of Bogudey, Aziz, then the house of the PW. He could not say whether those people were pro-liberation or anti-liberation. Sometimes, the *muktijoddhaas* used to come in the area and looked for the Al-Badars and also their camps. He was a marked Al-Badar in the area, but he was taken there by force. He had to go to the camp at Suren Saha's house in the morning and sometime he had to stay there in the night and there was no fixed time. He conducted parade at Nayanibari camp for 15 days and during the parade, no arms were given and he simply did the exercise of left and right (in the deposition sheet, in Bangla, it has been recorded as: “প্যারেডের সময় শুধ লেফট-রাইট করিয়েছি কোন অস্ত্র দেয় নাই।”). No arms were given to him during the period of his duty as a guard and he used to remain sitting with a *lathi*. Neither any arm was given to him for his security at home nor was any guard posted at his house. In the night, the members of the defence party used to guard the entire area. He had fled away from the duty of guard before the *muktijoddhaas* came. Then said he had fled away when the *muktijoddhaas* entered into the area by breaking the Koiroad Bridge. After fleeing away, he took shelter at the house of her maternal grandfather at Kashba. As he was not available after liberation, his brother was arrested, then said it was not correct. He denied the defence suggestion that it was not a fact that he returned to the area after the killing of Sheikh Mujibur Rahman (as recorded in the deposition sheet) and the fall of Awami League Government. Since no case was filed against his boss (the accused) after the liberation of the country, the question of filing of a case against him did not arise at all as he was only a guard. He denied the defence suggestion that it was not a fact that after the Pakistan army had come to Sherpur, he along with his Razakar Bahini

looted Nayanibazar including the shop of Bengura and also set fire in the bazaar. He asserted that he was an Al-Badar not a Razakar. He denied the defence suggestion that it was not a fact that he continued looting till the arrival of the *muktijoddhaas*, i.e. till he had fled away. He denied the defence suggestion that it was not a fact that he had fled away from the area to save himself from the case under Collaborators' Act and from public wrath. He further stated that he had acquaintance with the accused from his boyhood, then said he did not know all the brothers and sisters of the accused and he did not also know the name of any of his (the accused) brothers and sisters. He could not say in which Union his house and that of the accused are situated. Then said his(the PW) house was at Sherpur town, but he could not say whether the house of the accused was at village Bajitkhila, under No.3 Union and he did not also know whether that area was under Poursava or not and then said both of them (the PW and the accused) were the residents of Sherpur Poursava. He did not know in which school the accused pursued his study. He did not know whether during the liberation war he (the accused) was a student of school or college. He first talked to the accused in the camp and not before that. The appearance of the accused was exactly the same as he was in 1971, but was more younger and handsome and had no moustache. During 1970's election, he (the PW) neither attended any meeting and procession of the political parties nor any meeting and procession of any students' organization. In 1970-71, he was not present in any meeting and procession of the accused. He did not know of which school or college the accused was the leader, but he was a big leader of the students' organization at Sherpur. He did not guard any bank or office, but he guarded Seribridge. In his examination-in-chief, he stated

about the calling of the students' leaders by the accused and not about the calling of the elderly people, then said he told about the calling of the elderly people when he (the accused) went to Jamalpur to call the Pak army. Jamiruddin Moulana was a teacher of Bagrasha School and he was the father of two children and he was a quite aged man. Momataj Moulana was a teacher of Victoria School, but he could not say his age. He could not also say the age of Samiul Doctor, Bodi Doctor, Sattar Professor, but they were aged and *murubbis* and all of them were older than Kamaruzzaman. He could not say the place in the town where the meeting was held before going to Jamalpur, then said meeting was held at the house of Panu Karta and he was not present in the meeting. He knew the accused as a big leader since before liberation as his (the PW) elder brother was his companion. He could not say in which month the Peace Committee was formed, he could not also say the date and time of the formation of the Peace Committee. Defence party was formed before the arrival of Pakistan army, Peace Committee was formed thereafter, but he could not remember after how many days, then said after 15/20 days. He never went to the camp at G.K. High School, he could not remember who was the Headmaster of G.K. High School. Except the camp at Suren Saha's house at Nayanibazaar, he did not go to any other camp as mentioned in his examination-in-chief. While he was in the camp at Suren Saha's house, the accused used to come oft and often and sometime, he also used to visit the other camps. He heard that he (the accused) became the big leader of Al-Badar from Mymensingh office, but he could not say when he became the big leader. He could not also say where and how he (the accused) was made the leader of Badar, but he was his sir. When he (the PW) started working at the camp of

Suren Saha's house, he heard that the accused was the leader of Al-Badar. In 1970-71, he did not go to Mymensingh town from his house at Sherpur, he could not say what the distance of Mymensingh town from his house at Sherpur was. The distance of Jamalpur was 12(twelve) miles from Sherpur. The distance of Nokla from Sherpur was 12(twelve) miles, the distance of Nalitabari from Sherpur was 12/13 miles. Sohagpur was within Nalitabari, but he did not go there. During the liberation war, one could go to various camps at Sherpur by bi-cycle, bullock cart or on foot. There was no big army officer at Sherpur area than Major Riaz and Major Ayub. Except his (the PW) sir, even army had no power to set up a camp. He could not say at that moment who was the Chairman of Sherpur Poursava in 1970-71-72. His house was in Ward No.6 of the Poursava, but he could not say in which ward his house was situated during the war. He did not know whether his mother knew the accused. The ear rings of his (the PW) mother was sold in the night to the wife of Faraji at taka less than 200·00, he could not say what the weight of the rings was (দুলের ওজন কলতে পারবনা), he knew the name to whom the trees were sold, but at that moment, he could not say the name, the trees were sold at taka 250·00, he could not say what the price of gold per bhari and the price of the wood per cft was. One jackfruit tree and two mango trees were sold, he could not say how many maunds of wood fetched from the 3(three) trees, he added that the trees sold were old and of the time of his paternal and maternal grand fathers (দাদা-নানার আমলের). He denied the defence suggestion that it was not a fact that at the relevant time, the price of the gold per bhari was taka 120·00 and the price of the fuel wood was taka 2·00 per maund, so it was absolutely unusual and false to arrange taka 500 by selling the ear-rings and the trees. He could not say

in which month and on which date the accused gave announcement through mike that people would be recruited as the Razakars. Tangarpara and Belua are in Sreebardi police station and those villages were 10(ten) miles away from his house. During the liberation war, merely once he fled away to Tangarpara and Belua. Mujibar was an employee of Sonali Bank and then he joined Agrani Bank, Mujibar was not his relative. At that time, there was a Sadar Hospital at Sherpur, but he could not say at that moment, who the senior doctor was (বড় ডাক্তার), he (the PW) was kept in that hospital for one day for treatment and on the next day, army brought him. He denied the defence suggestion that it was not a fact that in 1971, there was no Government hospital as Sadar hospital in Sherpur and that he was never treated there. When the accused used to hold meeting in the first floor at the Al-Badar camp, he (the PW) used to stay in the ground floor (in the deposition sheet, in Bangla, it has been recorded as: “আল-বদর ক্যাম্পে কামারুজ্জামান যখন দোতলায় মিটিং করতেন তখন আমি নীচ তলায় থাকতাম।”). The head of Hannan was not shaved by any barber, one Momin, son of Bucha, a cattle lifter, shaved his head. Principal Hannan and his wife are alive and they live at Sherpur town (in the deposition sheet, in Bangla, it has been recorded as: “প্রিন্সিপাল হান্নান ও তাঁর স্ত্রী বর্তমানে জীবিত আছেন এবং শেরপুর শহরে বসবাস করছেন।”)(emphasis supplied by me). He could not say what his sons were, then said one might be an engineer and another might be a doctor (in the deposition sheet, in Bangla, it has been recorded as “উনার ছেলেরা কে কি করে তা বলতে পারবোনা তবে একজন ইঞ্জিনিয়ার ও একজন ডাক্তার হতেও পারে”). The Pakistan army used to talk in urdu which they could not understand, they (the Pakistan army) used to talk to the accused only. He did not see whether the army used to talk in English (in the deposition

sheet, in Bangla, it has been recorded as: “পাকিস্তান আর্মিরা উর্দু ভাষায় কথা বলতো, আমরা বুঝতে পারতাম না। কামারুজ্জামান সাহেবের সংগেই কথা বলতো। আর্মিরা ইংরেজীতে কথা বলতো কিনা আমি তা দেখিনি।”). Then as it appears from the deposition sheet, some urdu words were told to the PW by the learned defence lawyer and he was asked to tell their meaning, the words were: “উর্দুতেঃ দেখিয়ে হাম বহুত দূরসে এঁহা আঁয়েহে, আপলোগ জ কোচ দেখাইয়েগা, ইয়া জ বোলেঙ্গে হাম উহি করেঙ্গে। বেগুনা লগোকে কিসিতারহে নোকসান না পহচাইয়েগা”, but he could not say the Bangla meaning of those words (in the deposition sheet, in Bangla, it has been recorded as “এই কথা গুলোর বাংলা অর্থ কি আমি বলতে পারবো না।”). Ashkar Doctor was held and brought two days after Principal Hannan had been held and brought. Ashkar Doctor and his son are alive and they live at Sherpur as well as in Dhaka, their address is near the Agriculture College at old cattle market. Ashkar Doctor is not a man of Sreebardi, but he is a man of Sherpur-Police Station. He denied the defence suggestion that it was not a fact that Ashkar Doctor hailed from village-Kalibari under Police Station-Sreebardi. He (the PW) never went to the house of his Sir, the accused. He knew that his (the accused) house was at Bajitkhila Koruitala within Poursava, then said he could not remember at that moment whether it was within Poursava. He denied the defence suggestion that it was not a fact that the house of the accused was at Kumri Mudipara which was 5/6 kilometres away from Poursava or to suppress that he told lie, then said the accused might have another house. He denied the defence suggestion that it was not a fact that whatever he said in his examination-in-chief quoting the wife of Ashkar Doctor was untrue. He denied the defence suggestion that it was not a fact that the accused never lived by the side of Doctor Ashkar or Doctor Ashkar was not a

civil surgeon at that time. He could not remember at that moment after how many days before or after Ashkar Doctor was held, Golam Mostafa of Kharkharia was held, he could not remember the date, Bangla or English (in the deposition sheet, in Bangla, it has been recorded as: “আসকর ডাক্তারকে ধরে আনার কতদিন আগে বা পরে খড়খড়িয়ার গোলাম মোস্তফাকে ধরে আনে তা এই মুহূর্তে মনে নেই, বাংলা বা ইংরেজী দিন তারিখ মনে নেই।”). The age of retired army Nasir was about 55 years, at that time, he was a man of Kharampur. Nasir used to serve in the army and he (the PW) could not say whether he was educated or not.

Nokla was 10/12 miles away from their area. Nurundi was within Jamalpur Police Station, he could not say under which police station Piarpur was situated. He never went to those places. After converting Sushil as a Muslim in the camp of Suren Saha’s house, his ‘Sir’, the accused, took him to the camp at Nayanibari. When Sushil was converted as a Muslim, he (the PW) was present in the camp. After conversion, Sushil stayed at Nayanibari camp for 7/8 days and he did not stay for a single day at the camp of Suren Saha’s house. He could not say the month and the date on which the said occurrences took place. Sushil was converted as a Muslim 10/8 days after the occurrences of Principal Hannan, Ashkar Doctor and Golam Mostafa. Sushil was brought on the previous day and was converted as Muslim on the next day. He denied the defence suggestion that it was not a fact that there was none named Sushil in that area or he was not held and brought or whatever was stated about him was not correct. Mollahpara was $1\frac{1}{2}$ kilometres away from their area. He knew Kazal and his family members of Mollahpara. He could not remember at that moment, the month and the date on which Kazal was held. Kazal was held and

brought 20/25 days after the alleged incident of principal Hannan, Ashkar Doctor, Mostafa and Sushil. He did not see where and how Kazal was shot dead. Major Riaz was injured in the fight at Kamalpur, he could not say the distance of Kamalpur from Sherpur town, he did not know the name of the Police Station of Kamalpur. He could not say at that moment, the date on which the fight at Kamalpur took place, then said Major Riaz was wounded at a mine blast $2\frac{1}{2}$ /3 months after he joined the Al-Badar as a *Darwan*. The army took telephone connection at the Al-Badar camp at Suren Saha's house. There were houses around the house of Suren Saha (in the deposition sheet, in Bangla, it has been recorded as: "সুরেন সাহার বাড়ীর আসে-পাশে ঘর বাড়ী ছিল।"). He denied the defence suggestion that it was not a fact that the road could not be seen from the place where he used to do his duty at Suren Saha's house. During *muktijoddha*, the daily wage of an ordinary labour was taka one and half/two. During *muktijoddha*, one day, he saw *muktijoddhaa*, Zahurul Munshi, but he did not know where his house was. He could not remember at that moment, the day and the month of his detention, then said Zahurul Munshi was detained 3(three) months after he joined as *Darwan* at the Al-Badars' camp at Suren Saha's house, then further said that Zahur was detained once only. After three and half months of his joining as *Darwan* at the Al-Badar camp at Suren Saha's house, the killing of Sohagpur took place. He never went to Sohagpur and never met any one who suffered due to occurrence at Sohagpur. After 6/7 months of the liberation of the country, he met Kashem Shaheb at Sherpur town. He denied the defence suggestion that it was not a fact that whatever he told about Kashem Shaheb was not correct. The camps about which he told

were the camps of Pakistan army and the Al-Badars. The Razakars' camp was separate, Pakistan army had separate camp, such as G.K. High School camp, C.O. Office camp, Nayanibari camp, Kamalpur camp, Jhagrarchar camp, Jamalpur P.T. School camp. The army used to stay at army camp. His 'Sir', the accused did not appoint, transfer the officers of the army, he only used to control the appointment and transfer of the Al-Badars, the Al-Badars had no identity card. Joynul was the Razakar Commander at Sherpur and his (the PW) 'Sir', the accused was the Al-Badar Commander at Sherpur. He could not say the name of the Chairman of the Peace Committee. No guard was employed to guard the arms of the Al-Badars' camp at Suren Saha's house, he (the PW) used to remain seated at the ground floor near the stair case (in the deposition sheet, in Bangla, it has been recorded as: "আমি নিচে সিঁড়ির কাছে বসে থাকতাম"). Then said no arms was used to be kept in that house, arms was used to be kept with the respective person and in the night, the first floor was used to be kept under lock and key, the PW and the other members of the Al-Badar used to stay at the ground floor. He was the only *Darwan* in the camp. There was no arrangement for cooking in the camp. He and his 'sir', the accused fled away together from the camp two days before liberation of Sherpur. He met the accused long after the liberation when he contested in the election. He did not know where his 'Sir', the accused stayed and what he did after the liberation of the country till 1975, i.e. during the reign of Awami League and during this period, he did not meet him (the accused) as well. He could not say whether the accused passed his HSC examination in 1972 from the same college in which he used to study before the liberation of the country or thereafter he passed B.A examination from Dhaka Ideal College and M.A. from Dhaka University in

1975. He denied the defence suggestion that it was not a fact that after liberation, the accused used to visit his area regularly and side by side, he also continued his study, but he being a marked Razakar, he kept himself hiding, for which he did not meet the accused. He did not know whether about 20 years ago, i.e. 1992-1994, any investigation was done about the accused in their area. He talked about the accused first in the D.C.'s office at Sherpur, then he deposed before the Tribunal and after giving statement, he signed a paper and wrote his name as Mohan, but they wrote Al-Badar Mohan. The people of the investigation agency examined him at the D.C. office at Sherpur. He could not say whether the Investigation Officer recorded his statements in a video, he did not see any camera. He denied the defence suggestion that it was not a fact that his statements were recorded in a solitary room, there was no public, only two officers were there, one interrogated him and another typed his statements.

His elder brother with whom the accused had acquaintance is senior to him by 7/8 years, his (the PW) present age is 60/65, then said 63. His elder brother is alive who read up to class-IX, one of his (the PW) sons Nasim is a Government servant and he got the job 8/9 months before in the office of *Naeb*, the full name of his son Nasim is Md. Nurunnabi Khan. He denied the defence suggestion that it was not a fact that as he became a witness in the instant case, his said son was given the job as 4th class employee in the revenue department at Sherpur District on 29.12.2011, though he had no requisite qualification, then said he got the job through examination. He denied the defence suggestion that it was not a fact that his son Ibrahim was a drug dealer and a mugger and he was in jail for long time in a case of that nature. It was not within his knowledge whether one Nazrul Islam of his area on 31.08.2007 filed a case

under section 392 of the Penal Code against his son and two of his accomplices with Sherpur Police Station and whether his son was arrested in that case. He denied the defence suggestion that it was not a fact that there were reportings in the local newspapers that his son Ibrahim was involved with the mugging. He denied the defence that it was not a fact that his elder brother Mahbubul Islam filed Other Class Suit No.278 of 2005 against him in the Court of Senior Assistant Judge, Sherpur for cancellation of deed which is pending. He denied the defence suggestion that it was not a fact that his brothers and sisters deposed against him in that suit. He (the PW) does the job of exorcism in his area. He denied the defence suggestion that it was not a fact that he takes money from the people of the area by practising fraud through exorcism. He denied the defence suggestion that it was not a fact that because of his said fraudulent and principleless activities, his brothers and sisters had cut their relationship with him, then said they had cut their relationship with him as he deposed against the accused, because they have/had relationship with him. He denied the defence suggestion that it was not a fact that the accused had no relationship with his brothers and sisters. He (the PW) married for the 5th time. He first married Moina, she was not given to him as he joined Badar Bahini and then again he married her. He could not say the dates of his marriages. Out of five wives, 3(three) died and 2(two) are alive. He drew his salary from the school on 07.04.2011 by putting his signature and he always drew his salary by putting his signature. In the school record, his educational qualification has been written Class-VIII passed, but he could not say whether his date of birth was written as 01.01.1960. When he was shown salary roll for the month of March, 2011 (in the deposition sheet, in Bangla, it has been recorded as: “সংশ্লিষ্ট

মার্চ/২০১১ এর সেনারী রোল”), he said that he could not read whatever was written there. He did not know whether the military declared through mike that all shall have to sit for the examination or the *muktijoddhaas* sent short note that those who would appear in the examination shall have to face death. He did not know whether the accused refrained himself from appearing in the examination responding to the call of the *muktijoddhaas* or why he refrained himself from appearing in the examination. He denied the defence suggestion that it was not a fact that whatever he stated in his examination-in-chief about the accused as the leader of the Al-Badar, leader of the students’ organization, his (the PW) stay at the Al-Badar camp at the house of Suren Saha or meeting the accused there or whatever he stated involving the accused with the crimes were all false and concocted. He denied the defence suggestion that it was not a fact that he made false and concocted statements before the Tribunal against the accused having financial and other benefits from his enemies and the political rivals as tutored by them. He denied the defence suggestion that it was not a fact that he had no experience whatever he said about the accused and those were not his own words and that he said those being tutored, for which he said different things at different time and whatever he stated before the Tribunal, he did not say so to the Investigation Officer.

It further appears that quoting verbatim the entire statements which the PW made before the Tribunal in his examination-in-chief including the occurrence of principal Hannan’s moving around the different roads at Sherpur town having tied a rope on his waist, his head being shaved and face being besmirched, the apprehending and taking of Golam Mostafa of Kharkharia to the Al-Badar camp at Suren Saha’s house and then torture perpetrated on him

and his subsequent killing, the killing at village-Sohagpur as listed in charge Nos.2, 4 and 3 respectively. Suggestions were given to him that he did not say all those to the Investigation Officer, but he denied the suggestions saying as being not a fact (since suggestions were given to the PW quoting verbatim as stated in his examination-in-chief those are not repeated here for the sake of brevity).

Suggestions were also given to the PW to the effect that he was an opportunist and fortune seeker (in the deposition sheet, in Bangla, it has been recorded as “একজন সুযোগ সন্ধানি-খান্দাবাজ লোক”) before liberation, he was a man of Awami League, during the liberation war, he took the side of Pakistanis and was engaged in looting and now took the side of the Government and deposed falsely against the accused which he denied as not a fact.

PW3—Md. Zahurul Hoque Munshi Bir Protik (Bar), stated in his examination-in-chief that he was born on 30th September, 1950. He was from village-Khamaripara, Police Station-Sreebardi, District-Sherpur. In 1971, he used to serve as a supervisor in the dockyard of EPIDC, Narayanganj. He having been inspired by the speech of 7th March, by Bangabandhu formed Swechchhasebak and Fire Defence so that they could be saved if there was air strike. They continued the training. All on a sudden, on the black night of 25th March, the invading army attacked Razarbag Police Line, Dhaka University, EPR Sadar Daptor and the sleeping Bangalis and in the process, killed 20,000 Police, EPR and Bangali soldiers. This news was spread out in the then East Pakistan. They built resistance at Chashara on Dhaka-Narayanganj High Way on 26th and 27th March, their mental strength was very strong, but they had no idea that they had to fight with 303 Rifle and Mark-4 Rifle in front of the Tank.

After putting resistance for two days, they retreated. By crossing the river-Shitalakha, Awami League leaders: Zuha and Ali Ahmed Chunka gave them direction that to resist the *Pak Hanader Bahini*, they had to take higher training and the Pakistan army had to be faced with heavy arms and then they retreated back and told the general people to take shelter at safe place. He along with others after walking for 4(four) days through Ghorashal (in the deposition sheet, it has been wrongly written as Gorashal) Flag, Shakhipur, Tangail via Mawna, Madhupur, Jamalpur, Sherpur over Sreebardi Police Station, Bakshiganj and Kamalpur reached Mohendraganj, India on 12.04.1971. There he saw Rafique Uddin Bhuiyan, a leader of Awami League of greater Mymensingh and others talking to captain Neogi of BSF. After their discussion was over, the PW gave salam to Rafique Uddin Bhuiyan and told that they 120 in number went there for taking part in *muktijoddha*. Then Rafique Uddin Bhuiyan talked to captain Neogi and made an arrangement for engineering training for 15 days so that they could destroy culverts, bridges on the road and thus create obstacles for the movement of the Pakistan army. After taking training, the PW and others came to Bangladesh and destroyed Fulkerchar bridge, Chhankanda Bridge and Tikarkanda bridge. At Sherpur, he found one Kamran, a member of Badar Bahini who was “টু আইসি” to the accused. Captain Riaz of 31 Beluch Regiment was shot at legs and hands by the *muktijoddhaas* causing injuries while he was inspecting Kamalpur and later on, he went to Pakistan. Kamaruzzaman about which he talked was a leader of Islami Chhatra Sangha of greater Mymensingh and also the founder of Al-Badar and Al-Sams Bahini. Al-Badar and Al-Sams had camps at Korua High School field, Sreebardi Tengarpara High School field, Nur Mohammad High School field at

Bakshiganj. The Pakistan army used to stay at the school boarding, whereas the Al-Badars used to stay by its side by setting up camp. Subsequently, he took guerrilla training at Cherapunji and Tura in India. He was included in Maratha first battalion, 95 Mountain Brigade (L.I) and was appointed as Commanding Guide Officer. His superior officer was Indian Brigadier Hardeb Singh Clay and he gave him the responsibility to give information about the camps of Pakistan army and the Al-Badar Bahini adjacent to Indian Border through camouflaging and accordingly, in October, he dressed him as a beggar and tried to take information as to what was happening and where at Sherpur town and at one stage, he came to know that the accused, the Al-Badar and the Al-Sams Commander of greater Mymensingh, set up a camp for Pakistan army at the abandoned house of Surendra Mohan Saha at Nayanibazar. He camouflaging him as a beggar begged for 4(four) days around the camp and tried to gather information. One day, suddenly, he entered into the said camp and saw one Mohan Munshi (PW2), an Al-Badar, standing with a lathi inside the gate and he (the PW) gave him Salam and then entered inside and saw the accused and Major Ayub going up stair, seeing him the sentry told “কোন হায় কেয়া মাস্তা হায়”, Al-Badar Mohan Munshi (PW-2) and the sentry were found to be restless and when they (the PW and the sentry) went up stair, he heard from the ground floor “আল্লাগো, মাগো, বাচাঁও”. At that time, one Pakistani army came to the ground and assuming him as a beggar ousted him from the camp by holding his neck and then Mohan Munshi told that he (the PW) was a beggar. Subsequently, he on collecting all informations went to a safe place from there. Later on, he came to know from the people that the women and the men who

were in the camp of Suren Saha's house having been taken near Seribridge were killed by bayonet charging and shooting and their dead bodies floated in the water. He came to the camp of Suren Saha's house once only. He heard that the accused and Major Ayub of Pakistan army got principal Hannan moved around the entire town having tied a rope at his waist by shaving his head and besmirching his face as the students of his college did not come to college. He made an ambush on 14th November, at Tikarkandi, Major Ayub went there to see Fulkarchar bridge and on his way back, 13 Pakistan armies including the Major were killed due to the mine blast set up by them. Then he went to Kamalpur and saw 18 women killed by the Pakistan army by torture and rape. There he got the identity cards of two girl students of first year of Mirpur Bangla College. The accused and Major Ayub visited various training camps and announced through mike that those who would help *muktijoddhaas* would not be spared and their houses would be burnt and the chastity of women would be violated. When Mukhles Chairman of Kansha Union Parishad went to Sherpur for depositing taka 50,000.00 for haj, some Al-Badars informed the accused that the Chairman used to help the *muktijoddhaas*, then and there, the Chairman was held and was killed taking him at the cattle hat at Bakshiganj by torture. On 9th December, 1971, when he was staying at Beltia, he went to the camp of Pakistan army at PTI, Jamalpur with a hand written letter of Brigadier Hardeb Singh Clay. He was caught at the sentry post and by searching his body, they got taka 20 and a letter. He went to the camp with the letter by a bicycle by hoisting white flag. He was blindfolded with the said white flag and then after tying hands and legs by the napkin of the waist kept him at the quarter guard at WAPDA camp. A Beluchi army told what is to be done to him

(the PW) (in the deposition sheet, in Bangla, it has been recorded as “ওসকো কেয়া কৰেগা”), then he came to know that colonel Sultan Khan, a Pakistan army and the accused, Al-Badar Commander, went to inspect Jhinai Bridge and no decision would be taken about him (the PW) until their return. At about 1/1:30 p.m., colonel Sultan Khan and the accused returned back. The army gave the letter of surrender carried by the PW to colonel Sultan Khan, reading the letter Col Sultan Khan became furious and struck on his face with the magazine of SMG which was on his shoulder causing the break of 4/5 teeth of the PW and rebuked him in filthy language and ordered to keep him hanging in a reverse way. Then a Pakistani soldier came and pricked his leg with bayonet making his leg as *murubba* when the PW was also tortured by pushing needles into the fingers of his hands, he said that he was an ordinary farmer of the village and he was sent with the letter on threat and that he was not a *muktijoddhaa*; colonel Sultan Khan wrote a reply to the letter of Hardep Singh Clay and asked him (the PW) to carry the same to Hardeb Singh Clay, then the PW resorted to acting and said that he would not go with the letter as if he went there, he would be killed and he expressed his desire to stay in the camp. He (the PW) entered into the camp at 11:00 am and he was released at 11:00 pm along with the bi-cycle. After release, he started for the camp at Beltia peddling the bi-cycle with one leg; on the way to the camp, he saw many dead bodies with bullet injuries tied with the trees on both the sides of the road. He identified the accused in the dock and demanded trial and punishment of the persons guilty of committing crimes against humanity.

In cross-examination, the PW stated that since liberation, he did not file any written complaint against the accused either with any Police Station or in

Court. He gave statements to the Investigation Officer in 2010. The Investigation Officer through the Deputy Commissioner called him to the Dak Banglow of Zila Parishad and recorded his statements along with others. He, of his own initiative, did not file any complaint anywhere as there was no congenial atmosphere or arrangement to do the same. After liberation when the *muktijoddhaas* had come in the area, the anti-liberation forces fled away and many of those who were found were killed by the public by mass beating, He denied the defence suggestion that it was not a fact that the *muktijoddhaas* killed the anti-liberation people who were found available. He denied the defence suggestion that it was not a fact that after liberation of the country, many cases were filed against the persons who committed the crime of looting, torturing, killing and setting fire. He did not know whether after liberation of the country, 37,000 persons were arrested through out the country, but some persons of his area were arrested. He would not be able to show whether any case was filed against the accused under the Collaborators Act. He denied the defence suggestion that it was not a fact that after liberation of the country, the *muktijoddhaas* prepared a list of the anti-liberation people, then said they collected the names of the anti-liberation people from the office of the Deputy Commissioner and in the said list of the Deputy Commissioner's office, the name of the accused was there, but at the moment, he would not be able to show the same. He denied the defence suggestion that it was not a fact that the fact of listing the name of the accused in list of the Deputy Commissioner was untrue. During the liberation war, he moved in different areas of Sherpur. Jamalpur, Mymensingh and Dhaka, the distance of Mymensingh from Sherpur is 69 miles and during the *muktijoddha*, it took 4(four) hours to reach

Mymensingh from Sherpur. In order to go to Mymensingh, one had to come to Jamalpur from Sherpur and then by train to Mymensingh, to come to Jamalpur from Sherpur, a ferry had to be availed. Usually the army used to stay at the big camps, but in case of necessity, they used to stay at temporary camps. The army used to carry food to various camps in the lorry, in case of sustaining injury in the war, the Pakistan army used to take their soldiers to the camps in their own vehicles. After Major Riaz was injured at Kamalpur fighting, he was taken to Jamalpur by a vehicle and from Jamalpur, he along with Al-Badar Kamran went to Pakistan, but he did not know how they went to Pakistan. Seribridge was one kilometre away towards the south from the camp of Suren Saha's house. The incident of sustaining injury by Major Riaz took place in the first part of August (in the deposition sheet, in Bangla, it has been recorded as: “মেজর রিয়াজ হবার ঘটনাটি আগস্টের প্রথম দিককার ঘটনা”). He denied the defence suggestion that it was not a fact that as he was an Awami panthi *muktijoddhaas*, he deposed against the accused with political motive. After taking training in India, he came back to Bangladesh in the month of June and destroyed Fulkarchar bridge, Tikarkandi bridge and Chhankanda bridge. After destroying those bridges, he had again gone to India and took higher training at Cherapunji in India from June, 15 to July 15. He took training at Tura in the month of May for one month and he was included in the Maratha First Battalion 95 Mountain Brigade (LI) on 8th November. He did not see Kamran during the war, but he heard his name, he was an Al-Badar. He saw the accused for the first time in the first week of November in the camp of Suren Saha's house with Major Ayub. At that time, he (the accused) had no moustache, but had a few beard. Before he (the PW) met the accused at the camp of Suren

Saha's house, he heard that he (the accused) was a student of Sherpur College, then Jamalpur College and during his study there, he used to supply pen, paper and khata. The house of the accused was 20 kilometers away from his house and in a different Police Station. During liberation, the accused used to study at Jamalpur and possibly was a student of B.A. with Islamic studies. He did not know what post the accused was holding in Islami Chhatra Sangha in greater Mymensingh during liberation war, but he was Commander of Al-Badar and Al-Sams, then said that he was the Al-Badar Commander at Sherpur and Kamran was his "টু আই সি", then told that the accused was the Al-Badar Commander of greater Mymensingh. In reply to a specific question, such as: প্রশ্নঃ শেরপুরের রাজাকার কমান্ডার কে ছিলেন? the PW replied that the Razakars and the Al-Badars were under the same command, another question was put to the effect: প্রশ্নঃ শেরপুরের আল সামস্‌সের কমান্ডার কে ছিলেন?, he replied that the Razakars, the Al-Badars and the Al-Sams were under the same command and these Bahinis had no separate Commander. Another question was put to the witness to the effect: প্রশ্নঃ কামারুজ্জামান সাহেব কবে, কোথায়, কোন মাস বা তারিখে রাজাকার, আল বদর, আল সামস্‌সের কমান্ডারের দায়িত্ব গ্রহণ করেন?, he replied that he could not say. A few number of army used to stay in the camps mentioned by him in his examination-in-chief, they are the Al-Badars and the Razakars who used to stay in those camps, but he could not say their numbers, the Pakistanis used to stay in those camps in the day and in the night, they used to stay at Jamalpur. He did not enter into those camps, but took informations from out side. He had been in the camp of Suren Saha's house, 10/15 Pak army used to stay there. During liberation war, the accused had no special dress as Al-Badar

commander that the accused was a commander, he perceived from his (Kamaruzzaman) activities and also on his hearsay knowledge. He heard about the incident of Principal Hannan in the first week of November, that occurrence took place 15/20 days earlier; he heard that the incident took place 15/20 days before his hearing. He denied the defence suggestion that it was not a fact that Major Ayub was not killed on the date and in the manner as stated by him in his examination-in-chief, then said, he (Major Ayub) died on 4th December at 11:00 am. He heard from a secret place in the month of July-August that the accused and Major Ayub announced through mike for the consumption of the general people that the houses would be burnt and women would be violated who would help the *muktijoddhaas*. Then said he heard those from a public meeting held at Akbaria Pilot High School under Police Station-Sreebardi. The house of Mukhles Chairman of Kanshar was under Police Station-Jhinaigati and that house was twenty five kilometers away from the house of the PW. The sons of Mukhles Chairman are well established, one is an Upazila Chairman, one is an Advocate and one faced martyrdom and another is madlike. He was not present when Mukhles Chairman was killed, but he heard the same from distance, the occurrence took place in the middle of the month of August. He knew Major Kamrul Hasan Bhuiyan who fought in the 2nd sector, initially the PW was also in that sector. During the liberation war, Major Kamrul Hasan was a student, he (the PW) had close relationship with Kamrul Hasan and still he is close to him. He (Major Kamrul) came to know about the incident of going to Pakistani camp with the letter afterwards. The *Alor Michhil* is a weekly magazine, January issue, 2005 was published with the photograph of the PW in the cover. He (the PW) wrote a poem in that

issue. He read the magazine and also read the essay written by Major Kamrul Hasan Bhuiyan about him. He denied the defence suggestion that it was not a fact that the story of his going to Pakistani camp and coming back therefrom has been stated in a different way and in that essay, there is no mention of the accused in any context then said it was the matter of the writer, then quipped that at that time, the situation of the country was quite different. He denied the defence suggestion that it was not a fact that in order to hide the truth, he gave the explanations. He (the PW) also fought in 11 Sector under the leadership of Colonel Taher Biruttom and after he suffered injury, Wing Commander, Hamidullah Khan Birpratik came in his place. He did not read the book “একাত্তরের উত্তর-রনাজন” written by Wing Commander Hamidullah Birpratik published in Ekushe Boi Mela, 2005, but in many books, his name has been written. He denied the defence suggestion that it was not a fact that as in the book “একাত্তরের উত্তর-রনাজন” story of his going to Pakistani camp with the letter and coming back therefrom has been stated in different way, so he said that he did not read the book. He continued to say that as subsequently Hamidullah Khan joined BNP politics, he might have said about the said fact differently. He heard that “বাংলাদেশের স্বাধীনতা যুদ্ধ দলিলপত্র” has been published in 16 Volumes over the liberation war of Bangladesh under the Government sponsorship, but he could not read those as he could not purchase those for want of money. He denied the defence suggestion that it was not a fact that as in Volume-10 of “বাংলাদেশের স্বাধীনতা যুদ্ধ দলিলপত্র” the story of his (the PW) going to Pakistani camp with the letter of an Indian Brigadier and coming back therefrom has been described in a different way, so he said that he did not read the said volume. He

pleaded his ignorance as to the fact of establishment of any Gona Adalat in 1992 for the trial of the anti-liberation forces, at that time, he was a service holder, if he knew that fact he would have demanded trial of the persons guilty of committing the crimes. He also pleaded his ignorance as to the fact of holding a mass investigation from 1992-1994, at that time, he used to serve at different places, then said during that period, he was an employee of a Korean company at Kushum Hati, Sherpur. He denied the defence suggestion that it was not a fact that he for the first time talked against the accused while he was working for Awami League during 1980's election at its instigation and signal. He denied the defence suggestion that it was not a fact that as per his desire a write-up was included in "চল্লিশ যোদ্ধার যুদ্ধ জয়ের গল্প" published on 26th March, 2011 at the instigation of Awami League (in the deposition sheet, in Bangla, it has been recorded as: "আওয়ামী লীগের প্ররোচনায়"). He asserted that he did not say so at the instigation of any one, he gave his version to the journalists who published the same in the newspaper and he read the write-up. He denied the defence suggestion that it was not a fact that in the write-up, he gave a different story as to his going to Pakistani military camp and his coming back therefrom. He denied the defence suggestion that it was not a fact that in that write-up, he had said something about the accused which he never said anywhere and even before the Tribunal. He denied the defence suggestion that it was not a fact that as he deposed being tutored, he said different things at different time about the accused. He denied the defence suggestion that it was not a fact that neither in that write-up nor in any other write-up, the story of going to the camp of Suren Saha's house in disguise as a beggar was stated nor he said so in the deposition as being tutored. He passed S.S.C. examination in 1972. He had three sons and

two daughters, his son-Monjurul Haque lives at his house. Previously, he was a member of Chhatra League. He pleaded his ignorance whether one Hassen Ali of his area filed a case in the Court of Judicial Magistrate, Sherpur on 06.09.2009 against the *joddha aparadis* alleging looting and arson wherein he was cited as witness No.1, then said nothing was intimated to him about the said case and he knew nothing about the matter. In the affidavit filed by Hassan Ali as complainant, he did not put any signature and the signature appearing in the photostate copy of the 'Halapnama' as shown to him was not his. He knew Saijuddin, son of late Mafizuddin who is a freedom fighter. He did not know whether Saijuddin filed any case on 11.08.2009 against the 'যোদ্ধাপরাধী' under the Penal Code citing him as a witness. He pleaded his ignorance as to whether those two cases were withdrawn after getting benefits from the accused. Suggestions were given to the PW quoting his statements verbatim in his examination-in-chief right from forming Sechchhasebak and fire defence party upto his release from the army camp at Jamalpur and his seeing of the dead bodies with bullet injuries being tied with the trees on both sides of the road on his way after release from the army camp which he denied as being not a fact. The PW also denied the defence suggestion that it was not a fact that whatever he stated in his examination-in-chief about the accused such as a leader of Chhatra Sangha, Al-Badar and Al-Sams and his meeting with him at the camp of Suren Saha's house or his meeting at the PTI army camp at Jamalpur and the allegations of involvement of the accused with the anti-liberation activities were false, concocted and tutored. He denied the defence suggestion that it was not a fact that the allegations made against the accused were unusual and he had no capability and power to take such responsibility. He denied the defence

suggestion that it was not a fact that as the accused criticized Awami League in his writings as a journalist and also in his speeches, statements as a leader of Jamaat-e-Islami, he became the target of Awami League. He denied the last defence suggestion that it was not a fact that he deposed falsely as he got financial benefit as well as with political motive.

PW14, Mujibur Rahman Khan Panu of village Chawk Bazar Police Station and District-Sherpur, stated in his examination-in-chief that his present age is 58 years (the date of his examination-in-chief is 28.11.2012). He is a tailor by profession. He started his job of tailoring in 1970. On 26th March, 1971, at the order of Amjad Hossain, the Convenor of Sherpur Chhatra Sangram Parishad, he made a flag inscribed with Bangladesh's map. He knew the accused and Kamran from before, as both of them used to make their pant and shirt in his tailoring shop. In 1971, Pak Bahini set up their first camp at Nayanibazar Zaminderbari at Sherpur. At that time, he (the PW) along with his companions, Hasan, Nilu and 10/12 others went to Dalu, in Meghalaya Estate, India by crossing Jhinaigati Boarder. After the war started on 26th March, he and many others took training for operating rifle at the abandoned field of Zaminderbari of Araiani under the leadership of EPR Subeder Hakim Shaheb. In the first part of May, on getting information about the illness of his mother, he came to his house at Sherpur via Hatibagar and Nalitabari from India. On coming home, he found his mother and his two brothers, Ansar Ali Khan Montu (motor mechanic) and Munsur Ali Khan. His brother Ansar Ali Khan used to repair the vehicles of the Pak army in front of their camp at Ahammadnagar and in that capacity his brother developed good relationship with Major Riaz of Pak army. On coming home, he heard from his two

brothers and others that Al-Badars' camp was established at the house of Surendra Mohan Saha of the town by occupying the same. The accused was the commander of Al-Badar Bahini. He further heard that the dead bodies of the supporters of the *muktijoddhaas* used to be dumped beneath the Seribridge of the river, Mrigi having been killed after apprehending them from various areas. After 7(seven) days of his coming home, one day, at 7:00 pm, the accused, Mintu Khandaker, Advocate Tara, Holu Miah and 4/5 others with rifle on their shoulders gheraoed their house and in front of his mother tied his hands from behind and took him away and confined him in Banthia building at Sherpur, he also found one Liakat being confined there. Razakars had their camp in Banthia building. After half an hour of his taking there (Banthia building), one Abdus Sattar was brought at that camp and sometime thereafter, Chhana master was also brought there. At one stage, the accused told Tara Ukil to take them at the Al-Badar camp at Suren Saha's house. In reply Tara Ukil stated that some other people were yet to be apprehended and he would take them after apprehending those. As it was late in the night, the accused told Tara Ukil to take the arrestees to the Thana hajat at Sherpur and accordingly, at about 2:30 o'clock in the night, they were taken and confined in the thana hajat. In the thana hajat, the PW also found 7(seven) others of Tikarchar being confined there. After staying for 2(two) days and 2(two) nights, on the next day, at about 11 am, 4/5 Pak army came and they took them to the army camp at Ahmednagar in a vehicle and after disboarding all the 11 persons from the vehicle kept them standing in a row on the road situated on the eastern side of Ahammadnagar School. Sometime thereafter, a Pakistani army came there and asked the name of the PW, the moment he told his name, Mujibur Rahman, he

gave a blow on the right side of his waist by his rifle and of the others, some were kicked and some were slapped. Thereafter, these 11(eleven) persons were kept sitting by the side of a big ditch situated towards the East of the Board Ghar. After a while, an army came and asked them to stand, on hearing the same, all of them stood and started uttering 'Dua Durud'. Within 10(ten) minutes therefrom, Major Riaz, the accused and Kamran came there in a Jeep. Major Riaz forbade shooting them. At one stage, all of them were made standing at the open field behind the Board Ghar and asked their names. The accused told Major Riaz that the PW and the others should not be released, as they being the *muktijoddhaas*, they would cause much harm to them if released. The accused told Major Riaz 2/3 times to 'হালাক (শেষ)' them, after saying this, the accused and Kamran both went away by a Jeep. The PW and others remained sitting behind the Board Ghar upto 5:00 pm. Major Riaz who used to stay at Board Ghar, came out from his room at 5:00 pm and showing the PW and Liakat to a Pak Sena, told him to release them (in the deposition sheet, in Bangla, it has been recorded as: "উস দোনোকো ছেড় দো"). Then Major Riaz called the PW and told him to give hajira every day at Ahmednagar army camp. Thereafter, Liakat and he were sent to his house in a Jeep driven by a Pakistani army driver named Jalaluddin. On the next day, at 7:30 am when the PW went to Ahmednagar camp for giving hajira, he heard from another detainee named Sattar that after they (the PW and Liakat) had gone away, the accused and Kamran again came and at the order of the accused, 4(four) persons of Tikarchar were shot dead in a row in the long ditch, the rest 5(five) were released when the PW was in the camp. Those who were released included Sattar and Chandan Master and all were from Tikarchar. He had to

file hajira regularly at Ahmednagar camp till Sherpur was liberated. In May, 1971, ex-principal of Sherpur College, Syed Abdul Hannan was taken to Al-Badar camp at Suren Saha's house by the accused, Kamran and others. There his head was shaved, face was besmirched and by garlanding him with shoe garland and tying a rope at his waist got him moved on the various roads at Sherpur town from the Al-Badars' camp at Suren Saha's house via Nayanibazar and Tinanibazar which he saw with his own eyes.

The accused, Al-Badar commander, used to torture and kill the *muktijoddhaas* and their relatives after apprehending them from various areas of Sherpur Town. Of the apprehended persons Golam Mostafa of Sherpur, football players-Kazal and Kaiser were killed. In the last part of May, 1971, one day when he had been going to give hajira at the Ahmednagar camp and reached near Khoarpar brick field, he met Golam Mostafa on the road and asked him where was he going?; he replied that he was going to appear in HSC examination, when he (the PW) came back to his house after giving hajira at the camp, heard from his brother Ansar Ali Khan that in the evening of that very date, the accused and his companions apprehended Golam Mostafa and took him to the Al-Badar camp at Suren Saha's house and on the next morning, he heard that the bullet hit dead body of Golam Mostafa was lying beneath Seribridge. He gave statements to the Investigation Officer. He identified the accused in the dock.

In cross-examination, this PW stated that since after liberation war till date, i.e. the date of his examination-in-chief, he has been living in his own locality. Whatever he stated before the Tribunal, he said those to the Investigation Officer only. On 11.12.2012, the Investigation Officer told him

for the first time that he had to depose in the case. 2(two) months before that date, the Investigation Officer had gone to him to examine him, but as Liakat forbade him, so he did not give any statement to him. He gave statements to the Investigation Officer sitting at Sherpur Police Station. He admitted that he did not take part in any war directly and his name was not in the list of the *muktijoddhaas*. He had acquaintance with Liakat Ali, his house is near to his house. Liakat Ali was apprehended on the same day on which he (the PW) was apprehended, but he could not say the time. He and Liakat were detained for 4/5 days. After release from detention till the liberation of the country, neither he nor any one of his family was attacked either by the Razakars or by the Al-Badars or by the anti-liberation forces. He had no land except the homestead. In the voter list, his profession has been written as tailoring. He could not remember his date of birth at that moment. He did not know where the accused used to study and where he (the accused) used to live, when he (the accused) used to make his dress from his (the PW) tailoring shop. The accused and Kamran were of his age. He (the PW) married in 1980, but could not remember the date of his marriage. He could not say in which month in 1971, the army camp was set up in the Zaminder's house at Nayanibazar. He had gone to India 10/15 days after the setting up of the said army camp, then said he had gone to India in May, 1971. He took rifle training from Subedar, Abdul Hakim as stated by him (in his examination-in-chief) was also in the first part of May, he took training possibly for 4/5 days. His brother Ansar Ali Khan Montu had no garrage of his own for repairing the vehicles, his brother was a motor mechanic in C & B. His brother was not given any appointment at the Sena camp, but whenever needed the army used to call him. He (the PW) used to give hajira at

Ahmednagar camp to an assistant to Major Riaz, but he would not be able to tell his name. In 1971, it used to take 2(two) hours to go to Ahmednagar camp from his house by bi-cycle. He could not remember when he saw Major Riaz last, but he did not see him for quite a long time. He could not say whether in the absence of Major Riaz any other officer did his duty in the said camp or he could not say his name. He could not say the date, month in which he was apprehended and taken to Ahmednagar camp as well as his release therefrom. Village–Tikarchar was 7/8 miles away towards the south of Sherpur. He did not know the name of 7(seven) other persons of Tikarchar who were detained at Ahmednagar camp and Sherpur Police Station along with him. The accused told in Bangla to Major Riaz not to release the PW and the other detainees saying that if they were released, they would do harm to them, Major Riaz could understand Bangla to some extent (in the deposition sheet, in Bangla, it has been recorded as “মেজর রিয়াজ কিছু কিছু বাংলা বুঝতেন”). The house of Principal Hannan was at Seripara and he knew him very well, he also visited his house, but could not remember the date of his visit. The occurrence of Principal Hannan took place after his release from Ahmednagar camp, but he could not say after how many days. The house of Kazal was at Mollahpara, Kashba, the house of Kaiser was at Jamalpur, he used to play at Sherpur, he (the PW) did not know his real name. Kazal and Kaiser used to stay together in a mess. He knew that Golam Mostafa had a house at Sherpur town, but he did not know where his village home was. During War, Golam Mostafa used to stay at his village home. As Sherpur was a small town, he knew all most all at that time. In 1970-71, Amjad Hossain was the president of Sherpur thana Chhatra League, but he could not say who the secretary was. The accused was the

president of Islami Chhatra Parishad of Sherpur Police Station. He could not say the name of the president and the secretary of College branch of Chhatra League. He could not say the name of other students' organisation and the names of their leaders. The accused was the commander of Sherpur thana Razakar Bahini, then immediately thereafter said that he (the accused) was the chief of Al-Badar Bahini (in the deposition sheet, in Bangla, it has been recorded as “শেরপুর থানা রাজাকার বাহিনীর কমান্ডার ছিলেন কামারুজ্জামান। পরক্ষণেই বলেন আল-বদর বাহিনীর প্রধান ছিলেন কামারুজ্জামান।”). A specific question was put to the PW to the effect: প্রশ্নঃ কামারুজ্জামান সাহেব কি শেরপুর থানার রাজাকার এবং আল-বদর বাহিনী দুটোরই কমান্ডার ছিলেন? He replied that he did not know whether the accused was the Commander of Sherpur thana Razkar and the Al-Badar Bahini, but he was the Commander of Mymensingh district Razakar and the Al-Badar Bahini. During the liberation war in 1971, he never went to Mymensingh. In 1971, Sherpur was under Jamalpur Sub-Division. He could not say who the Razakar Adjutant and the Al-Badar Commander of Jamalpur Sub-Division was. He could not say who the chief of the Peace Committee of Sherpur Police Station was, he could not also say who was member secretary of Sherpur thana Chhatra Sangram Parishad and where and how Chhatra Sangram Parishad was formed, but there was miking about the formation of Chhatra Sangram Parishad two days before the making of the flag which he heard. Liakat Ali who was apprehended and subsequently released with him was his elder brother-in-law (elder brother of the wife). The same Investigation Officer had gone to him two months before of his giving the statements to him. He denied the defence suggestion that it was not a fact that he was an employed person without any profession and had

no means as well. He denied the defence suggestion that it was not a fact that he was financially very weak and the Awami Leaguers made him agreeable to depose against the accused falsely by giving him financial support or thereafter, he was brought to Dhaka and kept under Government arrangement and gave him training to depose falsely against him. He denied the defence suggestion that it was not a fact that the fact of his going to India or his apprehending during liberation war or his release thereafter all were downright false. He denied the defence suggestion that it was not a fact that during liberation war, he was a child or to hide the said fact, he was not telling his date of birth. He denied the defence suggestion that it was not a fact that he deposed falsely against the accused being tutored by the prosecution and the Awami League. He denied the defence suggestion that it was not a fact that as he was not involved with liberation war, the Investigation Officer did not examine him during investigation. He denied the defence suggestion that it was not a fact that the accused was not against liberation. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that at the order of Amjad Hossain, the convener of Sherpur Chhatra Sangram Parishad, he made flag by inscribing the map of Bangladesh on 26th March or in the first part of May, he came back home at Sherpur from India or the accused, the Al-Badar Commander used to apprehend *muktijoddhaas* and their relatives from various areas of Sherpur town and then tortured and killed them.

FINDINGS:

From this charge as well as from all other charges (including the charges of which the accused has been acquitted by the Tribunal as well as by this Court), it appears that the common facts stated were that (a) the accused was

the chief organiser of Al-Badar Bahini (b) leader of Islami Chhatra Sangha (other facts relate to the particular incident alleged in the particular charge, so those will be considered chargewise with reference to the evidence adduced by the parties). I consider it most crucial to decide these two facts first and see whether the prosecution could establish these two major facts, it is necessary to decide these two facts first, because decision on these two crucial facts shall have bearing in deciding the merits of the prosecution case of the respective charge. And to see this, we need to consider and sift the relevant testimonies of the PWs.

PW1-Md. Hamidul Haque stated in his examination-in-chief that in 1970, the accused was a prominent leader of Islami Chhatra Sangha of Mymensingh District; the accused as well as Kamran, Ashraf, Didar and Sheli was an active leader at Al-Badar camp at the Dak Banglow of Mymensingh Zila Parishad. PW1 also stated that the accused was one of the prominent leaders of Al-Badar. PW2-Monowar Hossain Khan @ Mohan Munshi stated in his examination-in-chief that there was a students' organisation at Sherpur and the accused was its leader. He further stated that the accused was the big leader of the students' organisation and also big leader of greater Mymensingh and also a leader of Badar Bahini. In some places of his examination-in-chief, he termed the accused as the Commander of Al-Badar. PW3-Md. Zahurul Haque Munshi Bir Pratik, stated that the accused was the founder of Al-Badar and Al-Sams. PW3 also described the accused as the Commander of Al-Badar and Al-Sams and he further stated that Kamran was his "টুআইসি". He further stated that the accused was the leader of Islami Chhatra Sangha of greater Mymensingh. PW4-Md. Abdul Mannan, did not say anything about the accused either as an

Al-Badar or a students' leader. PW5-Mosharraf Hossain Talukder said that the accused was the chief of Al-Badar Bahini at Sherpur; he also said that the accused was the chief organiser of Al-Badar Bahini of greater Mymensingh and also a leader of Islami Chhatra Sangha. PW6-Dr. Md. Hasanuzzaman in his examination-in-chief described the accused as a leader of the Al-Badar, at the same time, stated that he did not know the accused personally and did not see him as well and he identified him seeing his photograph in the newspapers (in the deposition sheet, in Bangla, it has been recorded as “আমি ব্যক্তিগতভাবে কামারুজ্জামানকে চিনি না এবং দেখিওনি, পত্র-পত্রিকায় তার ছবি দেখে আসামীকে ডকে সনাক্ত করলাম।”).

PW7, Md. Liakat Ali, said nothing about the accused. PW8 in his examination-in-chief described the accused as the Al-Badar commander and in cross-examination, at some place, described him as the Al-Badar chief. In answer to a specific question, who was the Al-Badar commander of Mymensingh District? he stated that he did not know. Another question was put to him to the effect “প্রশ্নঃ কোথায় বসে কোন তারিখে কামারুজ্জামান আল-বদর প্রধানের দায়িত্ব গ্রহণ করেন তা বলতে পারেন কি?” to which, he replied that he could not say as for long 9(nine) months, he was in India. PW9-Md. Abul Kashem, told that on 9th December, while he was detained at the Al-Badars' camp at the Dak Banglow of Zila Parishad, he heard from the mouth of Ashraf that he and the accused were the leaders of Al-Badar. He further stated that he did not see the accused before and heard his name for the first time on that date; he also stated that the accused and Ashraf, the two leaders of the Al-Badar, used to control Mymensingh. PW10-Md. Jalaluddin stated that the *murubbis* told that Bogabura, Nasha, Quadir Doctor were Razakars and the accused was their chief. He further stated that the

accused was the leader of Razakars of Sherpur District. PW11-Hasen Banu, in her examination-in-chief described the accused as Al-Badar. PW12-Hafiza Bewa in her examination-in-chief described the accused as the big leader of Al-Badars. She further stated that she heard the name of the accused from the *murubbis*. PW13-Karfuli Bewa in her examination-in-chief stated the name of the accused who allegedly accompanied the Punjabis and 3(three) others and entered into her house and killed her husband and allegedly raped her, but did not say his status, but in cross-examination, she stated that she heard the name of the accused, Bogabura, Quader Doctor and Mozaffar as the leader of the Al-Badars in their area. PW14-Majibar Rahman Khan @ Panu stated in his examination-in-chief that the accused was the Al-Badar Commander. PW15-Md. Dabir Hossain Bhuiyan, in his examination-in-chief described the accused as Al-Badar Commander who allegedly saw him at the Al-Badars' camp at the Dak Banglow of Mymensingh Zila Parishad; he also stated that the accused was a leader of Islami Chhatra Sangha. PWs 16 and 17 are the official witnesses and they are the witnesses to the seizure of the daily newspapers from the library of Bangla Academy, the seizure of the photocopies of the other documents and a book from the *muktijoddha Zadughar* and they stated nothing about the accused. PW18-Md. Abdur Razzaque Khan, PPM, the Investigation Officer, stated in his examination-in-chief that from a careful review of the FIR of Keraniganj-Police Station Case No.34 dated 31.12.2007 and review of the history of liberation war, its background and the newspapers including the "Dainik Sangram" during the pre-investigation preparation, it appeared to him that the accused as the president of Mymensingh Islami Chhatra Sangha was directly involved with the commission of crimes against humanity including

murder and mass killing in Mymensingh and Sherpur Districts; he further stated that it was locally known that the accused involved himself with the politics of Islami Chhatra Sangha while he was a student of Class-X of G.K.M Institution and he was in its leadership and the name of the accused also appeared in the list of arrested Al-Badars at page 14 and at serial No.287 (exhibit-‘18’). This PW further stated that he accepted the news item published in the “Daily Bhorer Kagaj” dated 02.11.1977 under the head “বদর বাহিনীর প্রধান সংগঠক কামারুজ্জামানের টর্চার ক্যাম্প” seized by the Investigation Officer, Z.M. Altafur Rahman on 12.04.2011 from the Bangladesh Press Institute (exhibit-‘15’).

From the relevant testimonies of the PWs as discussed hereinbefore, it appears that PW5 stated that the accused was the chief of Al-Badars and that he was the chief organiser of the Al-Badar Bahini of greater Mymensingh. But in 1971, this PW was a student of Class-VII only of Sherpur G.K. High School (as stated by him in his examination-in-chief). He also stated that when his brother came back from India after taking training there for about $1\frac{1}{2}$ month, they all were staying at their village home and in cross-examination, he categorically stated that during the war in 1971, their house in the town (Sherpur Town) was vacant and he used to oversee the same after gape going by bi-cycle. In his cross examination, he categorically stated that his brother deceased Mostafa appeared in the HSC examination from Sherpur town staying in the residence of one Atar Ali, a Fufa by village courtesy. So, it was not possible for him to have the knowledge or to have any idea as to the fact of chief organiser of the Al-Badar Bahini or the chief of Al-Badars. Although in cross-examination, PW8 stated that in 1971, the accused was the chief of Al-

Badars, to a specific question put to him to the effect: “প্রশ্নঃ ময়মনসিংহ জেলার আল-বদর কমান্ডার কে ছিলেন?” he replied “জানিনা”, Then another question was put to him to the effect: “কোথায় বসে কোন তারিখে কামারজ্জামান আল-বদর প্রধানের দায়িত্ব গ্রহণ করেন তা বলতে পারেন কি?”, he replied “বলতে পারবনা। কারণ দীর্ঘ নয় মাস আমি ভারতে ছিলাম।” And as such, his testimonies cannot, at all, be accepted to prove the fact that the accused as the chief organiser or the chief of Al-Badars. Besides, PW18, the Investigation Officer in his cross-examination clearly admitted that he did not collect any official order to show that in 1971, the accused carried out his activities as the chief organiser of the Al-Badars. And though on a specific question put to the PW to the effect of which area the accused was the chief organiser of Al-Badars, he replied Mymensingh-Sherpur and then said he investigated as to when, on which date and sitting where, the accused got the responsibility of the chief organiser of Al-Badars of Mymensingh and Sherpur, he could not say any specific date. The news item published in the “Daily Bhorer Kagaj” under the head “বদর বাহিনীর প্রধান সংগঠক কামারজ্জামানের টার্চার ক্যাম্প” (exhibit-‘15’) published on 20.11.2007, in no way, can be accepted as document for the proof that the accused was the chief organiser of Al-Badar Bahini or was the chief of Al-Badars, in view of the testimony of PW18, in his cross-examination to the effect “দালিলিক প্রমানাদির অষ্টম খন্ডের ২৭৪৮ পৃষ্ঠায় প্রদর্শনী-১৫ এ ভোরের কাগজ পত্রিকায় প্রকাশিত খবরটি স্বাধীনতার ৩৭ বছর পর ২০০৭ সালে প্রকাশিত হয়। ঐ প্রতিবেদনের যথার্থতা আমি যাচাই বাছাই করিনি। এই প্রতিবেদনের প্রতিদেদকে আমি পরীক্ষা করিনি। এই প্রতিবেদনে সূত্র উল্লেখ যে তথ্য বলা হয়েছে তা সূত্রে বর্ণিত গ্রন্থ ‘একাত্তরের ঘাতক দালালরা কে কোথায়’ (১৯৮৭ সংস্করণ) এর ১১১-১১২ পৃষ্ঠায় উল্লেখ নাই।” The whole prosecution case that the accused was the chief organiser of Al-Badar Bahini falls through when PW18

in unequivocal language stated in his cross-examination that during investigation, he got the organisational structure of Al-Badars and in the organisational structure, there was no mention of the post of chief organiser (in the deposition sheet, in Bangla, it has been recorded as “আমি তদন্তকালে আল-বদরের সাংগঠনিক কাঠামো পেয়েছি। এই কাঠামোয় ‘চীফ অর্গানাইজার’ বলে পদের কোন উল্লেখ নেই।”). The fact that the accused was the chief organiser of the Al-Badars is belied by the further testimony of PW18 in his cross-examination to the effect: “হ্যাঁ, ইহা আমি তদন্তে পেয়েছি যে, ১৯৭১ সালের ২২ এপ্রিল জামালপুরে আশরাফ হোসেনের নেতৃত্বে আল-বদরের কার্যক্রম শুরু হয়। এটা ঠিক যে, আমি তদন্তে আরো পেয়েছি যে, ১৬ মে ১৯৭১ শেরপুর (ময়মনসিংহ জেলায়) আল-বদরদের ট্রেনিং শুরু হয় তখন ছাত্র সংঘের সদস্য সংখ্যা ছিল ৪৭ জন এবং আল-বদরের প্রথম কমান্ডার ছিলেন কামরান। . . . আমি তদন্তে পেয়েছি যে, মোমেনশাহী জেলা ইসলামী ছাত্র সংঘের সভাপতি মোঃ আশরাফ হোসেনের নেতৃত্বে জামালপুর আল-বদর বাহিনী গঠিত হয়।” And when PW18 was cross-examined on exhibit-‘19’, a book written by Professor Abu Sayeed, an ex-Minister of Awami League Government and an Awami League leader (as stated by PW18), he stated that at page 162 of that book, it has been written that Ashraf Hossain was the founder of Badar Bahini and the chief of Mymensingh District. PW18 further admitted in his cross-examination that in the 3rd Volume of the background of the history of *Mohan muktijoddha* of Bangladesh at pages 606-610 in the book ‘আল-বদর’ by giving reference to Major Riaz, it has been written that he without obtaining the permission of the high command formed Al-Badar Bahini at Sherpur of which Kamran was the first commander (in 1971, Sherpur was under Jamalpur Sub-Division), in the same volume at page 631, it has been written that Al-Badar Bahini was first formed at Jamalpur and that Al-Badar Bahini was formed under the leadership

of Md. Ashraf Hossain, the then president of Momenshahi Islami Chhatra Sangha after the Pakistan army occupied Jamalpur on 22nd April. He further admitted that at page 109 of the book ‘একাত্তরের ঘটক ও দালালরা কে কোথায়’ (exhibit-‘8’), the name of Ashraf Hossain has been mentioned as the president of Mymensingh Islami Chhatra Sangha and again in the last line of page 111 upto the first part of page 112, the accused has been described as the chief of Mymensingh Islami Chhatra Sangha. The specific case of the prosecution is that Al-Badar Bahini was formed by the Islami Chhatra Sangha, in other words, the members of the Islami Chhatra Sangha were the members of Al-Badar Bahini. When, in so many times and so many places, in the background of the history of the *Mohan muktijoddha* of Bangladesh filed by the Investigation Officer and in the other documents produced by the prosecution, it has been mentioned that Ashraf Hossain was the president of Momenshahi Islami Chhatra Sangha and he formed the Al-Badar Bahini at Jamalpur (then Sherpur was a police station and it was under Jamalpur Sub-Division) under his leadership and that Al-Badar Bahini was formed at Sherpur on 16th May, 1971 and its first commander was Kamran, the question of the accused to be the chief organiser of Al-Badar Bahini of Mymensingh District or the Al-Badar chief either of Mymensingh or Sherpur does not arise at all. For the discussion made above, I am constrained to hold that the prosecution totally failed to prove that the accused was the chief organiser of Al-Badar Bahini or the chief of Al-Badar Bahini.

Now another follow up question comes for consideration is whether the accused was the commander of Al-Badar Bahini as stated by the PWs noted hereinbefore or whether he was at all an Al-Badar during the liberation war.

Besides the above oral evidence, documentary evidence produced on behalf of the prosecution in the case are exhibits-‘4’, ‘6’, ‘8’, ‘10’, ‘11’, ‘18’ and ‘19’. Exhibit-‘4’ is an attested copy of a news item under the head ‘আরও ১৫ জন মীরজাফর ধরা পড়েছে’ published in the “Daily Azad” dated 31.12.1971 wherein the name of the accused has been mentioned as an Al-Badar along with the other Razakars and nothing more. Exhibit-‘6’, a news item published in the “Daily Sangram” dated 16.08.1971 shows that one Kamaruzzaman presided over a symposium on the 25th Azadi Dibash of Pakistan allegedly held at the local Muslim Institute at Mymensingh, wherein he has been described as the chief organiser of Al-Badar Bahini, but except the name, no other particulars were mentioned. In view of my finding hereinbefore that the prosecution failed to prove that the accused was the chief organiser of Al-Badar Bahini or the chief of the Al-Badars; the contents of this exhibit that the accused presided a symposium as the chief organiser of Al-Badar Bahini does not stand scrutiny and so cannot be accepted. Exhibit-‘8’ is the book under the title “ঘাতক ও দালালরা কে কোথায়” edited by Dr. Ahmed Sharif, Kazi Nuruzzaman and Shahriar Kabir, published in 1989 and at page 1858 of the paper book, Part-IV, it has been written that with the establishment of Al-Badar Bahini as *Swechchhasebak* Bahini at Jamalpur, the leaders of Jamaat-e-Islam felt that by giving arms to Chhatra Sangha, they could engage them against the anti-liberation activists and they could also be used as the special squad for killing the intellectuals. Firstly on experimental basis, the activists of Islami Chhatra Sangha of Mymensingh District were organised as Al-Badar Bahini by Kamaruzzaman, the present central publicity secretary of Jamaat-e-Islami and

the then chief of Islami Chhatra Sangha as its Director. It has further been written that under the leadership of the accused, all the activists of Islami Chhatra Sangha of Mymensingh District were included in the Al-Badar Bahini. And in the book, there is also the reference of the news item published on 16.08.1971. But when Al-Badar Bahini was first formed at Jamalpur under the leadership of Ashraf, the president of Momenshahi Islami Chhatra Sangha, where was the scope on the part of the accused to be its Director or to include the activists of Chhatra Sangha as Al-Badars by him as stated in exhibit-‘6’. Exhibit-‘10’ is the attested photostat copy of the news item published in the “Daily Purbadesh” dated 01.12.1971 under the head ‘দীন মোহাম্মদসহ আরো ১৫জন দালাল গ্রেফতার’. This news item was published on the basis of a Government hand out and the name of the accused appeared there at serial No.14 as Al-Badar, Sherpur, Mymensingh. Exhibit-‘11’ is the attested photostat copy of the same news item published in the “Daily Dainik Bangla” dated 31.12.1971 under the head ‘আরো ১৫ জন দালাল গ্রেফতার’. Exhibit-‘18’ is a list of the arrested persons who were collaborators, Al-Badars, Al-Sams, Razakars and others and at serial No.287, the name of the accused has been mentioned showing him as Al-Badar at Dhaka central jail. Exhibit-‘19’ is the book ‘বাংলাদেশের স্বাধীনতা যুদ্ধের আড়ালে যুদ্ধ’ written by professor Abu Sayeed, an ex-Minister of Awami League Government and a leader of Awami League and at page 2167 of Part-IV of the paper book under the head ‘আল-বদর হাই কমান্ডের নেতৃত্ব’ the name of the accused has been mentioned at serial No.5 without any other particulars, however, within the bracket it has been written as ‘বদর বাহিনীর চীফ অর্গানাইজার’ and at the same page against the name of Ashraf Hossain within the bracket, it has been

written ‘বদর বাহিনীর প্রতিষ্ঠাতা ও ময়মনসিংহ জেলা প্রধান’. Of these exhibits, I find no reason to disbelieve exhibit-‘4’, ‘10’, ‘11’ and ‘18’ to come to the conclusion that the accused was an Al-Badar during the *muktijoddha*. My reason to rely upon these exhibits is that the news item published in those newspapers were at a time when even the law to try the offenders who committed the crime against humanity, in 1971, i.e. the Act, 1973 was not enacted. More so, I find no reason for the newspapers, namely, the “Dainik Azad”, the “Daily Purbadesh” and the “Dainik Bangla” to publish false news against the accused. It may further be stated that the source of publication of the news vide exhibits-‘10 and 11’ are the Government hand out. It is necessary to keep on record that it was never the case of the defence that besides the accused, there was any other Kamaruzzaman either at Sherpur or at Mymensingh. That the accused was an Al-Badar has been proved by the evidence of DW4-Md. Kafiluddin, the full brother of the accused. He stated in his cross-examination to the effect “ইহা সত্য যে, ১৯৭১ সালের ডিসেম্বর মাসের শেষে আমার ভাই কামারুজ্জামান গ্রেফতার হন। (নিজে বলেন) ১৯৭১ সালে ডিসেম্বর মাসের শেষের দিকে আমার ভাই কামারুজ্জামান ঢাকায় এলে কমলাপুর রেল স্টেশন থেকে সন্দেহ মূলকভাবে গ্রেফতার হন। এর ৭/৮ দিন পর জেল খানা থেকে আমার ভাই পোস্ট কার্ডে চিঠি লিখে এ বিষয়টি আমাকে জানায়। তারপর আমি ঢাকায় যাই। আইনজীবীদের সংগে যোগাযোগ করি গ্রেফতারের তিন মাস কি সাড়ে তিন মাস পরে মুক্তি পায়।” This testimony of DW4 clearly corroborates exhibit-‘18’ as discussed above. It is true that exhibit-‘18’ was filed much later, i.e. only on 24.09.2012 by filing an application, though the Investigation Officer received the same from the concerned Ministry, namely, the Ministry of Home Affairs, in 2010, the Tribunal allowed the prayer on 29.01.2013. I do not also see any reason to doubt its factual basis as there are names of other Al-Badars, Razakars, Al-Sams total number being 1180. In view of the evidence

of DW4, the genuineness of exhibit-‘18’ cannot also be doubted for the reason that the original lying with the Ministry of Home Affairs was not called for and the officer who attested the same, was not cited as a witness as argued by the learned Advocate for the accused. Had the accused not been Al-Badar why he should be arrested in the last part of December, 1971 and then be in jail *hajat* for $3\frac{1}{2}$ months. In the context, it may further be stated that though the defence, in cross-examining the PWs and by examining DW4, Md. Kafiluddin, tried to assail the fact that the accused was not involved with students politics; fact remains that he was a student of Intermediate Class, either of Asheque Mahmud College, Jamalpur or Nasirabad College, Mymensingh and the very fact that he was an Al-Badar as found hereinbefore, proves beyond reasonable doubt that he was a member of the then Islami Chhatra Sangha, whose activists were the members of Al-Badar Bahini. Further the Investigation Officer (PW18) in his examination-in-chief clearly stated that it was locally known that the accused involved himself with the politics of Islami Chhatra Sangha while he was a student of class-X of G.K.M. Institution. However, the testimonies of the PWs that the accused was an Al-Badar Commander are based on mere supposition and assumption and without having any factual basis.

From the impugned judgment, it appears that the Tribunal without deciding the crucial facts whether the accused was the chief organiser of Al-Badar Bahini or its chief or an Al-Badar Commander with reference to the evidence on record proceeded to decide the merit of the respective charge accepting the statements of the PWs that he was the chief organiser of the Al-Badar or its chief or an Al-Badar Commander though the defence by cross-

examining the PWs and giving suggestions to them and also by examining DW4 tried to establish that the accused was neither the chief organiser of Al-Badar Bahini nor its chief nor an Al-Badar Commander either at Mymensingh or at Sherpur and thus made a fundamental mistake in sifting and weighing the evidence adduced in the case. (These findings that the accused was neither the chief organiser of Al-Badar Bahini nor an Al-Badar Commander, but an Al-Badar in 1971 shall be referable and applicable in respect of all the charges).

In this charge, the specific allegations against the accused were that in the afternoon of mid-May, during the period of liberation, he as the chief organiser of Al-Badar Bahini as well as leader of Islami Chhatra Sangha or member of group of individuals and his accomplices caused inhuman acts to Syed Abdul Hannan, the then principal of Sherpur College, a distinguished pro-liberation intellectual “by compelling him walking throughout the town making him almost undressed and by constant whipping as he was a gallant supporter of war of liberation” and that he participated and substantially facilitated and contributed to the commission of the offence of ‘inhuman acts as crime against humanity’ to Syed Abdul Hannan.

Let us see how far the prosecution witnesses have been able to prove the allegations against the accused. In respect of this charge as well as charge Nos.3 and 4; PW2 has been figured as the key witness to prove the fact that the accused was the chief Al-Badar Commander at Sherpur. I have already found that the accused was neither the chief of Al-Badar Bahini nor the chief organiser of Al-Badar nor an Al-Badar commander, but was an Al-Badar. It may be stated that all the occurrences alleged in the charges listed in charge Nos.2, 3 and 4 took place either at Sherpur town under Police Station, Sherpur

or at village-Sohagpur, under Police Station Nalitabari under the then Jamalpur District. So far as the allegations made in charge Nos.3 and 4 are concerned, I shall refer to the evidence of PW2 when I deal with those two charges separately. But before I consider and sift evidence of PW2 with regard to the allegations made in this charge, I would like to see first whether this PW can at all be accepted as a natural and truthful witness to depose in respect of the 3 (three) charges (charge Nos.2, 3 and 4).

PW2 stated in his examination-in-chief that during *muktijoddha*, he was aged about 22/23 years. He used to work at the tailoring shop of his grandfather and he, leaving aside the job of tailoring, took training of *swechchhasebok* for 3(three) hours everyday at the field of Sherpur Boys' College. The training was completed 15/20 days before the beginning of *muktijoddha*. He took training as Sheikh Shaheb told that those who would have training would be given the job as Ansar or Muzahid. After the Pak Bahini had come, at Sherpur, the accused announced through mike that Razakars would be recruited. The accused set up a camp for Pakistan army at Nayanibari, another camp was set at G. K. High School. After setting up the camps, the accused became the big leader of Badar Bahini, Kamran was a small leader (in the deposition sheet, in Bangla, it has been recorded as “কামরান ছিল ছুড়ু (ছোট) নেতা ছিল।”). The camps at the house of Suren Saha and Nayanibari were near his house. As the house of Suren Saha was on the way to the tailoring shop of his grandfather, he (the PW) could see what the army and the Al-Badars used to do there. One day when he had gone to the Al-Badar camp at Suren Saha's house, Suja told him why he did not go to the camp and if he did not go to the camp, he would be in difficulties (in the deposition sheet, in

Bangla, it has been recorded as “সুজা বলে তুই এই ক্যাম্পে আসিস না কেন, না আসলে অসুবিধা হবো”). When he asked Suja what the difficulties would be, he (Suja) told him that since he took training, he should give training to the boys (পোলপানদের) in the camp. Suja further asked him to give training to the Razakars and the Al-Badars. Razakars used to stay at the house of Nizamuddin. On that day, going back home, when he (the PW) discussed the matter with his parents, they told him to flee away. Then he had fled away to Tangarpara and stayed there for 3(three) days. After 3(three) days, one Raja, a member of Al-Badars told the father of the PW to bring him (the PW), otherwise his (the father of the PW) house would be burnt and also threatened that none of his 3(three) sons would be alive. Having heard the said information, the PW came to Bhelua and stayed there for 2(two) days at the house of Munsur Ukil, then came at the house of one Mujibar Rahman, a bank employee. Then Natu, another Al-Badar and Raja went to the house of the PW, Natu told his (the PW) mother to give him taka 500·00 and also to find out the PW. Thereafter, in the night, he was brought from Bhelua (in the deposition sheet, in Bangla, it has been recorded as “এর পর রাত্রিতে আমাকে ভেলুয়া থেকে নিয়ে এলো”). In the morning of the next day, taka 500·00 was given to Natu and Raja by selling the ear-rings of his mother and a mango tree. Natu and Raja told his mother did she know the accused? and they had come at his order. Then the mother of the PW sat for offering *Nafal Namaj* and he was taken to Nayanibari camp in wet clothes (as per the testimony of the PW army camp was set up at Nayanibari). Sometime, he had to stay in the camp in the night and sometime, he would come to his house. He used to train them (in the deposition sheet, in Bangla, it has been recorded as “সকালে ওদেরকে

ট্রেনিং করাই”)। Samad Doctor was a homeopath, he was an Awami Leaguer. Samad Doctor told him to bring glucose and then said he (Samad Doctor) gave him money to bring glucose. Samad Doctor made *purindas* by the glucose and asked him to take those *purindas* and then to roll on the floor (in the deposition sheet, in Bangla, it has been recorded as “আমাকে বলে ঐগুলো খাবি আর গড়াগড়ি পাড়বি”). Later on, a Beluchi army named Aziz asked the PW why he was doing so, he replied that he was having stomach pain. The Beluchi army further asked the PW what those were, he replied that those were *Bilati soda*, those subside pain (In the deposition sheet, in Bangla, it has been recorded as: “এটা বিলাতি সোডা এটা খেলে ব্যাথা কমে”). Thereafter, he was sent to Sadar hospital where he also rolled on the floor. The Doctor told him that he was affected with gastric ulcer and there was ulcer in his stomach (in the deposition sheet, in Bangla, it has been recorded as “ডাক্তারে কইলো গ্যাসটিক আলসার হয়ে গেছে। নাড়ীতে ঘা হয়ে গেছে।”). Then they brought him to the camp and hearing all these, Major Riaz ordered to release him, but the accused told that he (the PW) would be sitting as a guard at the bottom of the camp at the house of Suren Saha and accordingly, he remained there as guard for 4/5 months, but not more than 7(seven) months.

The story told by the PW right from his talk with Suja upto his deployment as a guard at the house of Suren Saha appears to me absolutely a cock and bull story and was concocted just to fit him to depose against the accused by showing him as a guard at Suren Saha’s house in respect of the 3(three) occurrences which allegedly took place at Sherpur Town (including the instant charge) and at Sohagpur under Sherpur and Nalitabari, Police Stations respectively, my reasons for holding so are:

(a) As per his own claim, he used to do the job of tailoring at the shop of his grandfather and leaving that job, he took training as *swchachhasebak* at the field of Sherpur Boys' College and the alleged training was completed 15/20 days before the beginning of the *muktijoddha*. In cross-examination, he stated that 40/50 others also took training with him and from the trainees, a good number from their area joined as Razakars and he also joined as Razakar and then said he was taken by force (in the deposition sheet, in Bangla, it has been recorded as “ঐ ট্রেনিং থেকে আমাদের এলাকা থেকে বেশ কয়েকজন রাজাকারে যায়। আমি ও যোগ দেই, তবে আমাকে জোর করে নিয়ে গেছে।”). If he joined as Razakar, he was supposed to be in the Razakars camp at Nizamuddin's house or the other Razakars' camp at Banthia Building at Raghunathpur Bazaar. Then why he should be peeping or endeavouring to see what were happening at the Al-Badars' camp at Suren Saha's house or what the Al-Badars and the army used to do there and where the scope was on the part of Suja to tell him why he did not go to the camp at Suren Saha's house (it was an Al-Badars' camp) and if he did not to go the camp, he would be in difficulties and therefore, his other stories of his fleeing away from his house and then coming back after 3(three) days and then demand of taka 500 from his mother by Al-Badar Natu and also to find him out and then payment of the said amount by selling the ear-rings and a mango tree and then taking him to the army camp at Nayanibari in wet clothes even after payment cannot be believed. In the context, it is very pertinent to state that PW2 in his examination-in-chief clearly stated that the Razakars used to stay at the house of Nizamuddin and PW14 stated that there was a Razakar camp at Banthia Building, Raghunathpur Bazaar.

(b) In 1971, taka 500.00 was a very big amount and it sounds absurd that such an amount would be paid to the Al-Badars: Natu and Raja by selling ear-rings of the mother of PW and a mango tree when he himself joined as Razakar and allegedly made available to them (Natu and Raja).

(c) The story of making *purindas* by the glucose by Dr. Samad, a homeopath and rolling of the PW on the floor taking the *purindas* and then taking him to Sadar hospital, Sherpur is all the more absurd,

because as per own claim of the PW, Dr. Samad was an Awami Leaguer, so question of presence of an Awami Leaguer at Sherpur Town and visiting at an army camp is simply unbelievable and is an absurdity on the face of it. I do not also find any reason for Dr. Samad to visit an army camp in 1971, being an Awami Leaguer and that too to have a plan to salvage a man of the stature of the PW.

(d) The PW being a tailor in the tailoring shop of his maternal grandfather and an illeterate person (he specifically stated in his examination-in-chief that “আমি লেখা পড়া করিনি”) and having no political link, in no way, could be such an important person that the accused would send Al-Badars: Natu and Raja to take him to the Al-Badar camp at Suren Saha’s house, (it is the specific case of the prosecution that the Al-Badars’ camp was set up Suren Saha’s house) and then again if the accused sent Natu and Raja for the PW, he would have straightway reported to the Al-Badar camp at Suren Saha’s house, but as per the own version of the PW, he was taken to Nayanibari camp which was an army camp and he allegedly stayed till he was sent to hospital.

(e) It is the consistent and persistent case of the prosecution that the activists of Islami Chhatra Sangha were the members of the Al-Badars and although in his cross-examination, PW2 first admitted that he joined as Razakar, subsequently he stated that he was not a Razakar, but Al-Badar in the area (in the deposition sheet, in Bangla, it has been recorded as “আমি এলাকায় একজন চিহ্নিত আলবদর ছিলাম, আমাকে জোর করে সেখানে নেয়”). That he was an Al-Badar is totally lie. In 1971, the PW was 22/23 years and he was not a student of any school or college and admittedly was working at the tailoring shop at his maternal grandfather, so the question of his being a student and an activist of Islami Chhatra Sangha, a student wing of then Jamaat-e-Islami and thus, to become an Al-Badar does not arise at all.

From the evidence of PW2, it is clear that he could not give any specific date and even approximate time with reference to any month when he heard the accused, Kamran and others that principal Hannan would be moved in the town

by shaving his head and besmirching his face, but by no logic, it coincides with the time, i.e. middle of May as alleged in the charge. This PW told the story of his being employed as a guard at the Al-Badar camp at Suren Saha's house after being allegedly released from hospital without giving specific date and approximate time and it is also not possible to come to any finding as to time with reference to any date or month when he joined the Al-Badar camp at Suren Saha's house for the reasons that as per his own statement, the camp at Suren Saha's house was set up after the army was invited to Sherpur after 26th March, 1971. Another army camp was set up at Nayanibari allegedly by the accused and both these camps were near the house of the PW and on his way to the tailoring shop of his grandfather, he could see what the army and the Al-Badars used to do there and one day, he went to the said camp, but he did not say any span of time of his such seeing and going to the camp with reference to days or months and even approximate period such as seven days, fifteen days or one month and then story of his being taken away to Nayanibari camp where he stayed allegedly for a considerable period of time as it appears from his testimony and then the absurd story of his deployment as a guard at the Al-Badars' camp at Suren Saha's house which has already been discussed hereinbefore.

In his statement made to the Investigation Officer, the PW told different names (they are Jabbar, Gazi, Gani, Fazar, Baddi (Mirganj) and Shadhu (Mirganj)) who told his parents to allow him to join the Al-Badars' camp at Suren Saha's house and gave a totally different story of his being sick and then his admission at Sherpur Hospital. In this statement before the Investigation Officer, he stated that the accused gave him the job of a peon at the Al-Badars'

camp and his job was to cleanse the tables, the charis and the room and to bring food and to do duty at the gate as well, whereas in his deposition, he stated that he was deployed as a guard to be seated at the bottom of the camp. There are also material contradictions between the testimonies of PW2 and those of PW14 as to the place where principal Hannan was allegedly shaved and besmirched. PW2 categorically stated in his examination-in-chief that principal Hannan was taken to the house of Habibar Ukil where his head was shaved and he was besmirched, whereas PW14 said that principal Hannan was taken to the Al-Badars' camp at the house of Suren Saha where his head was shaved and face was besmirched and from that camp, he was compelled to move on the different roads of Sherpur town via Nayanibazaar and Tinanibazaar, whereas PW2 in his examination-in-chief stated that principal Hannan was brought to Suren Saha's house subsequently at the order of Major Riaz.

For all these reasons my irresistible conclusion is that PW2 was never deployed at Suren Saha's house as a guard as alleged by him and he cannot be accepted as a natural and truthful witness to prove the charges as alleged in charge Nos.2, 3 and 4. From the judgment of the Tribunal, it appears that it believed the testimonies of PW2 as true and relied upon him heavily in coming to the findings of guilt against the accused in respect of all the 3(three) charges (charge Nos.2, 3 and 4) without considering whether he could be accepted as a natural and truthful witness in view of his improbable and absurd stories as stated by him in his examination-in-chief as pointed out hereinbefore. The Tribunal was oblivious of the established legal principle that in relying upon testimonies of a witness, his naturality and credibility as a witness to the occurrence are two important elements.

Though I have found that PW2 was not at all deployed as a guard at Suren Saha's camp and was not a natural witness, yet I would consider his testimonies about this charge. He stated in his examination-in-chief that after two days (no date and even any approximate time by referring to month is mentioned), he heard the accused, Kamran and few others say that Hannan principal would have to be moved in the town shaving his head and besmirching his face. Principal Hannan was taken to the house of Habibar Ukil where his head was shaved, his face was besmirched and thereafter, he was moved in the town tying a rope on his waist which he saw from the gate of the camp. He further stated that Major Riaz came in the camp and met Kamran who told that the man was Hannan principal, then Major Riaz told why he was in that condition and ordered to bring him (Principal Hannan) to the camp and accordingly, Principal Hannan was brought to the camp at the house of Suren Saha tying a rope on his waist. Major Riaz said at least 15(fifteen) words in English to Principal Hannan, but he could not say a word. When the rope on the waist was unfastened, Principal Hannan fell down on the floor, then water was fetched from the pond of the house of Suren Saha and poured it on the head of Principal Hannan by two aides of Major Riaz and after one hour, Principal Hannan regained sense. Major Riaz told the accused, Kamran and other Al-Badars present there that Hannan Shaheb was an educated person, they should not have behaved with him in that way. Major Riaz told the accused to board Principal Hannan to his car and then Principal Hannan was taken to his house. Afterwards, Major Riaz told the accused, Kamran and the other Al-Badars that they had come from far off a place and they would do whatever they would be shown and told them, but asked them not to spoil the

innocent people. This PW categorically stated that Principal Hannan was still alive (in the deposition sheet, in Bangla, it has been recorded as “তিনি এখনও বেচে আছেন”) (the other testimonies of PW2 shall be referred to and discussed in connection with the respective charge as listed in charge Nos.3 and 4).

This PW was cross-examined by the defence on this charge. In cross-examination, he stated that after Suren Saha's house, there is a school, then the house of Profulla, then the C & B Road, then the houses of Shahabuddin Kerani, Bogu Dey, Aziz, then the house of the PW. Suggestion was given to this PW to the effect that it was not a fact that the road could be seen from the place where he used to do his duty at the house of Suren Saha which he denied. The suggestion read with the evidence that there was a School and there were other houses surrounding the house of Suren Saha, it was not possible for PW2 to see the occurrence, even if it is conceded for argument's sake that he was the guard at the Al-Badar's camp at Suren Saha's house. In cross-examination, this PW also reasserted that Principal Hannan and his wife are still alive and they live at Sherpur Town. The PW further stated that he could not say what his sons were, then said one son might be an engineer and one son might be a doctor, but none of them has been examined in the case. That Principal Hannan is alive is also an admitted fact. The prosecution itself filed an application on 08.10.2012 under section 9(4) of the Act, 1973 for permission to produce him as additional prosecution witness and the Tribunal vide its order No.58 dated 09.10.2012 allowed the application, but the prosecution without producing him as witness before the Tribunal filed another application on 16.01.2013 under section 19(2) of the Act, 1973 to receive his statement made to the Investigation Officer on the ground of his illness. The Tribunal vide order

No.93 dated 20.01.2013 rejected the application. In this regard, it may be stated that though Principal Hannan is admittedly alive and he is the person who was allegedly humiliated by compelling him to move around Sherpur Town by shaving his head and besmirching his face. I wonder why he was not examined at the earliest point of time by the Investigation Officer. PW18, the Investigation Officer, himself admitted in his cross-examination that he could not examine professor Syed Abdul Hannan before submission of his report (the investigation report was submitted by him on 30.10.2011). He stated that the reason for non-examination of professor Syed Abdul Hannan by him has been mentioned in the CD and then said he could not examine professor Syed Abdul Hannan on 14.09.2010 as he was seriously ill, but if that be true, he could examine Syed Abdul Hannan on other dates when the investigation report was submitted long after 1(one) year from 14.09.2010. It may be stated that PW18 was appointed as the Investigation Officer of the case on 25.03.2010 and he joined the Sangstha on 28.03.2010 and he was given the charge of investigation of the case on 21.07.2010 and he submitted his report to the chief prosecutor on 30.10.2011, so if professor Syed Abdul Hannan was sick on 14.09.2010 what prevented him from examining him within the next 13 (thirteen) months. This shows how negligent the Investigation Officer was. In this regard, it may be stated that PW2 who candidly stated that Syed Abdul Hannan was alive, did not say that he was ill. PW14 also categorically stated that he knew principal Hannan very well and he visited his house did not also say that he was ill. Besides the above, the evidence of PW2 in respect of this charge cannot be believed as he did not say a word about this incident to the Investigation Officer while he was examined by him. If PW2 was a guard at the Al-Badars'

camp at Suren Saha's house and if he had heard and seen the incident as claimed by him, he was not supposed to forget that and if it were a fact, he would have definitely stated the same to the Investigation Officer. This will be clear if we have a look at the statements recorded by the Investigation Officer which reads as follows:

আমার নাম মোঃ মনোয়ার হোসেন খান মোহন @ মোহন মুন্সী তবে সকলেই মোহন মুন্সী হিসাবে আমাকে চিনে ও জানে। ১৯৭১ ইং সালে আমার বয়স ছিল অনুমান ২১/২২ বৎসর। আমি বর্তমানে আবু বকুর মেমোরিয়াল স্কুলে দণ্ডুরীর চাকুরী করি। নয়আনী বাজারে আমার নানা মৃত শরীফ হোসেন চৌধুরীর দর্জির দোকান ছিল। ১৯৭১ ইং সালে আমি নয়আনী বাজারে নানার উক্ত দর্জির দোকান দেখাশুনা ও কাজ শিখতাম। আমার বড় ভাই ময়নাও ঐ দোকানে কাজ করতো। ঢাকার গন্ডগোলের অনুমান ১০/১২ দিন পর জামালপুরে পাক বাহিনী আসার পর শেরপুরের সামিউল ডাক্তার, জমিরউদ্দিন মওলানা (ভিক্টোরীয়া স্কুলের শিক্ষক ছিল)সহ আরো অনেকে জামালপুর থেকে খান সেনাদের শেরপুরে নিয়ে আসে। পাক বাহিনী শেরপুরে আসার ২ দিন আগে কামারজ্জামান (তখন কলেজে লেখাপড়া করতো) জামাতের ছাত্রদের নিয়া বটতলার পানু কর্তার বাড়ীতে মিটিং করিয়া শেরপুর শহরের খরমপুরে অবস্থিত বেশ্যাপাড়া আশুন দিয়া পোড়ায় দেয়। এর ২ দিন পর পাক বাহিনী শেরপুরে আসিয়া জিকে স্কুল ও সিও অফিসে ক্যাম্প করে। পাক বাহিনীর অফিসার ছিল মেজর রিয়াজ। পরে পানু কর্তার ঐ বাড়ীটি পিস কমিটির অফিস বানায়। সামিউল ডাক্তার পিস কমিটির সভাপতি ছিল।

পাক বাহিনী শেরপুরে আসার পর একদিন রাতে আমি ও অন্যান্য অনেক লোক নয়আনী বাজার লট করি। লুটপাটের সময় ভেংগুরার দোকান থেকে আশুন লাগে ও পুরা বাজারটি আশুনে পুড়ে যায়। পাক বাহিনী শেরপুরে আসার অনুমান ২০/২২ দিন পূর্বে সুরেন্দ্র মোহন সাহা ও তার পরিবার পরিজন সহ অনেক হিন্দু লোক শেরপুরের ঢালু বর্ডার দিয়ে ভারতে চলিয়া যায়। পাক বাহিনী আসার পর সুরেন্দ্রমোহন সাহার বাড়ীতে আলবদর বাহিনী ও নিজামউদ্দিন আহমেদ (সাবেক এমপি) এর বাড়ীতে রাজাকার ক্যাম্প তৈরী করে। কামারজ্জামান আলবদর বাহিনীর কমান্ডার ছিল। সে সুরেন্দ্র মোহন সাহার বাড়ীর আল বদর ক্যাম্পে বাড়ীর দোতলায় সিড়ি দিয়ে উঠে হাতের ডান দিকের রুমে পশ্চিম মুখী হয়ে বসত। ঐ অফিসে আলবদর কামরান (শেরীপাড়া), মাসুদ (শেরীপাড়া), রাজা (নকলা), নাটু (কসবা), শাকের (জুগ্নিপাড়া), বর্তমানে পীরালী করে, নাসির (খরমপুর) সহ প্রায় ১০/১২ জন নিয়া প্রায় প্রতিদিন কামারজ্জামান সেখানে মিটিং করতো। দিনের বেলায় সবসময়ে ৩/৪ জন অফিসে থাকতো। কামারজ্জামান কোন দিন সকালে, কোন দিন দুপুরে আবার কোন দিন সন্ধ্যার পরে আসতো। আলবদর অফিসের চার্জে থাকতো কামরান পিতা-ফজলুররহমান, সাং-শেরীপাড়া, শেরপুর। সে দেশ স্বাধীন হওয়ার আগেই পাকিস্তান চলে যায়। বর্তমানে কেহই তাহার বাড়ীতে নাই।

শেখ মুজিবুর রহমান সাহেবের ভাষণের পর যে ভাষণে শেখ সাহেব বলেছিল “তোমাদের হাতে মারবো না, ভাতে মারবো, পানিতে মারবো, আমার বাঙালী না খেয়ে থাকবে না, তাদের বেতন দিতে হবে, তোমরা এলাকায় ডিফেন্স পার্টি তৈরী করো, যার যা আছে তাই নিয়া তৈরী হও।” ঐ ভাষণের পর আমি ও মোস্তফা, শফিকুর, রুহুল সর্ব সাং-বাগরাকশা ও আরও অন্যান্য জায়গার আমার বয়সী প্রায় ৩০ জন নিজাম উদ্দিনের ভাই মুক্তিযোদ্ধা হযরত এর নেতৃত্বে শেরপুর বয়েজ কলেজ মাঠে আনসাররা আমাদেরকে বাশের লাঠি দিয়া প্রায় ২৫ দিন ট্রেনিং করায়।

সুরেন্দ্র মোহন সাহার বাড়ীতে আলবদর বাহিনীর অফিস হওয়ার পর আমাদের গ্রামের জব্বার, গাজী, গনি, ফজর, বদ্দি(মিরগঞ্জ), সাধু (মিরগঞ্জ)গন আমার বাড়ীতে আসিয়া আমার বাবা মাকে বলে মেহানকে আমাদের বাহিনীতে যোগ দিতে বলো। আমার আন্না শ্রীবদী গ্রামের মুনসুরকে দিয়ে (বর্তমানে শেরপুরে উকিল) আমাকে সংবাদ দিলে আমি শেরপুরে আসি। তাহারা আমাকে নয়আনী বাড়ী যখানে পাক বাহিনী থাকতো সেখানে এনে আমাকে আলবদর বাহিনীতে ভর্তি করায়। পরদিন নয়আনী বাড়ীর (বর্তমানে ভিপি অফিস অবস্থিত) মাঠে রাজাকারদের সাথে আঃ আজিজ খান পাকিস্তানী আর্মি (যার ঘাড়ে একটি পিতলের শাপলা ফুল থাকতো) প্যারেড করতো। প্যারেড করানোর সময় বলতো বামে ঘুর, ডানে ঘুর, আগে চল। ৮/৯ দিন ট্রেনিং করার পর আমি অসুস্থ হইয়া পড়লে শেরপুর হাসপাতালে আমাকে ভর্তি করে। সুস্থ হওয়ার পর কামারঞ্জামান পিতা-ইনসান আলী, সাং-মুদীপাড়া ইউনিয়ন বাজিতখোলা, শেরপুর আমাকে নিয়া সুরেন্দ্র মোহন সাহার বাড়ীতে অবস্থিত আলবদর অফিসে পিয়নের চাকরী দেয়। আমার কাজ ছিল রোজ সকালে তাদের অফিসের টেবিল চেয়ার মোছা, ঘর পরিষ্কার করা, খাবার দাবার এনে দেওয়া এবং গেটে ডিউটি করা। সারাদিন ডিউটি করে রাত্রে কোন দিন ৮/৯ টা বা ৯/১০ টার সময়ে বাড়ী চলে যেতাম। সুরেন্দ্র মোহন সাহার বাড়ীর দোলতায় উঠার সিড়ির ডান পার্শ্বে ফাকা জায়গায় বিভিন্ন জায়গা থেকে আওয়ামী লীগের লোকজন ধরে এনে আটকে রাখত ও মারপটি করতো। ঐ ফাকা জায়গাটি সাটার দিয়ে আটকাইয়া রাখতো। একদিন ডাঃ আসকর আলী, ঐ সময় তিনি জামালপুর সদর হাসপাতালে চাকরী করতেন। ছুটিতে তিনি শেরপুরে বাড়ীতে আসলে তাকেও ধরে এনে ৩/৪ দিন ঐ জায়গায় আটক রেখে মারধর করে পরে কামারঞ্জামান ছেড়ে দেয়। অনেক লোককে সন্ধ্যার পর সেখান থেকে নিয়ে মৃগীনদীর উপরে শেরী ব্রীজে নিয়া গুলি করে নদীতে ফেলে দিত। অনেককে আবার পাগলার মুখে (ঝিনাইগাতি) নিয়া গুলি করিয়া নদীতে ফেলে দিত। যাদেরকে ঐ অফিস হইতে বাহির করিয়া নিয়া যাইতো তাদের অনেকের মাথায় কালো কাপড়ের টুপি পরাইতো আবার কখনো কাপড় দিয়া চোখ বাধিয়া পিটমোড়া দিয়া বাধিয়া নিয়া যাইতো। আলবদর বাহিনী যাহাদেরকে ধরতো তাহাদেরকে নয়আনী বাড়ীতে মারধর করে আনতো, আবার এখানে এনেও মারতো। অনেককে নীচতলার পূর্ব দিকের রুমের ভিতর নির্যাতন করতো। যাহাদের শরীরের রক্ত ঘরের মেঝেতে ও দেওয়ালে লাগিয়া থাকিত। কামরানের মুখ হইতে শুনিয়াছি কামারঞ্জামান ময়মনসিংহ জেলার আলবদর বাহিনীর কমান্ডার ছিল। সে শেরপুর, জামালপুরের বিভিন্ন এলাকার আলবদর ও রাজাকার ক্যাম্প ঘুরে ঘুরে খোজখবর নিত।

আগস্ট’৭১ মাসের শেষের দিকে সন্ধ্যার পরপর গৃদা নারায়নপুরের মোস্তফাকে আলবদররা শেরপুর শহর থেকে ধরে সুরেন্দ্র মোহন সাহার বাড়ীর বদর অফিসে নিয়ে আসে। কামারঞ্জামান দাড়াইয়া থাকিয়া বদর

নাসির ও মাসুদকে দিয়ে ভীষণভাবে পিঠাইয়া আধমরা করিয়া ফেলে। এর কিছুক্ষণ পর উচা লম্বা একজন লোক সেখানে আসিয়া মোস্তফাকে ছাড়িয়া দেওয়ার জন্য কামারঞ্জামানের নিকট অনেক অনুরোধ করে কিন্তু মোস্তফাকে ছাড়ে না। পরে রাত্র অনুমান ১২ টার দিকে কালো কাপড়ের জম টুপি পরাইয়া বদর অফিস হইতে নিয়া যায়। পরে দিন শুনি মোস্তফাকে শেরীব্রিজে নিয়া গুলি করে মেরে ফেলেছে। তার লাশ নদী থেকে তার আত্মীয় স্বজন নিয়া গেছে।

নভেম্বর' ৭১ মাসের প্রথম সপ্তাহের দিকে সুরেন্দ্র মেহান সাহার বাড়ীতে অবস্থিত আলবদর ক্যাম্পের সামনের রাস্তা হইতে একজন ফকিরকে পাকিস্তানী আর্মির মেজর আইয়ুব, কামারঞ্জামান ও আলবদর কামরান (শেরীপাড়া), মাসুদ(শেরীপাড়া), রাজা (নকলা), নাটু(কসবা) গণ ধরিয়া বদর অফিসে নিয়ে আসে। কামারঞ্জামান ও মেজর তাকে অনেক প্রশ্ন করে। তখন আমি কামারঞ্জামানকে বলি সে তো ফকির, প্রায়ই এখানে সে ভিক্ষা করতে আসে, সে মুক্তি না। এই কথা পর একজন আর্মি তাহার পাছায় লাথি দিয়া বলে “শালা ভাগ যাও”। তখন সে চলিয়া যায়। দেশ স্বাধীন হওয়ার পর জানতে পারি যে, ঐ লোকটি শ্রীবদীর মুক্তিযোদ্ধা কমান্ডার জহরুল মুন্সী।

বিএনপি জামাতের ইলেকশনের সময় কামারঞ্জামান দাড়িপাল্লা মার্কা নিয়া ইলেকশন করে। তখন তার সাথে আমার দেখা হয় কিন্তু সে আমার সাথে কোন কথা বলে নাই। সুরেন্দ্র মোহন সাহার মেয়ে মীনা ফারাহ ২০০৭ সালে তত্ত্বাবধায়ক সরকারের সময়ে তাদের বাড়ীতে বসে আমাকে মুক্তিযুদ্ধের সময়ের কথা জিজ্ঞাসা করে। আমি আপনাকে যা বললাম, সেইসব কথা মীনা ফারাহকেও বলি। তিনি আমার কথা রেকর্ড করেন ও ছবিও তোলেন।

এই আমার জবানবন্দী।”

By stating the facts *verbatim* as stated by PW2 regarding this charge, his attention was drawn by giving suggestion that he did not tell those facts to the Investigation Officer which he denied as being not a fact. But as the defence could not cross-examine PW18 fully, it could not take the contradictions from him as to whether the PW told the incident alleged in this charge during his examination by him. It may further be stated that the Investigation Officer could be fully examined as regards the testimony of PW1 only.

From order No.117 dated 24.02.2013, it appears that the date was fixed for further cross-examination of PW18. The accused was produced before the Tribunal from the jail hajat. On behalf of the accused, two defence Counsel, namely: Mr. Mohammad Tariqul Islam and Mr. Mohammad Sajjad Ali

Chowdhury, were present (in the Act, 1973, the defence lawyers have been described as Counsel) and they on behalf of Mr. Mohammad Kafiluddin Chowdhury, the Senior Counsel for the defence (as noted in the order sheet), prayed for adjournment for the day as he could not come to the Tribunal for unavoidable circumstances, the prayer was opposed by the prosecution and the Tribunal refused the prayer for adjournment with the following observations:

“On the last occasion, the Tribunal categorically expressed its view that for no reason it would adjourn the hearing of the case unless it is extremely necessary. Mr. Mohammad Kafiluddin Chowdhury, the learned Counsel for the defence, has abstained from appearing to the Tribunal without any valid reason, thus the prayer for adjournment is refused. The cross-examination of PW18 is thus closed.

To 26.02.2013 for examination of Dw as ordered earlier.”

From the order dated 24.02.2013, it is clear that though two defence Counsel were present before the Tribunal, it did not ask them to cross-examine PW18. The Tribunal did not also ask the accused as to whether in the absence of his Senior Counsel, he himself would cross-examine PW18. In this regard, it may be pointed out that section 17(2) of the Act, 1973 has clearly provided that “(2) An accused person shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.” From order Nos.118 and 119 both dated 25.02.2013, it further appears that two applications were filed on behalf of the defence: one for allowing the defence Counsel to ask questions to the Investigation Officer (PW18) as quoted in the application. But the Tribunal rejected the same on the ground that since the cross-examination of the Investigation Officer was closed on 24.02.2013, there was no scope to cross-examine the Investigation Officer by re-calling him. The Tribunal further

observed that on earlier occasions, in other cases, similar prayer was rejected. The second application was filed by the defence under rule 46A of the Rules of Procedure to permit the defence to submit some additional documents and to provide a list of additional defence witnesses, on hearing the parties, the next date, i.e. 26.02.2013 was fixed for order. From order No.120 dated 25.02.2013, it further appears that an application was filed on behalf of the defence for recalling the order dated 24.02.2013 closing the cross-examination of the Investigation Officer (PW18) on the ground that the conducting defence Counsel could not appear on the date fixed for further cross-examination of the Investigation Officer on account of a day-long hartal and that the order closing the cross-examination of PW18 would cause prejudice to the defence, as the defence could not cross-examine him to take contradictions of the testimonies of PWs 3-15 made before the Tribunal and to the Investigation Officer. The Tribunal by order of the same date rejected the application on the ground that there was no provision either in the Act, 1973 or in the Rules of Procedure for re-calling an order passed by the Tribunal, that from the record, it appeared that the Investigation Officer was examined on 11.02.2013, that after the Investigation Officer testified for long 3(three) hours, the defence started cross-examining him and continued for 4(four) days and took about 10(ten) hours. The Tribunal further observed that 13.02.2013 was fixed for further cross-examination of the Investigation Officer, the defence Counsel including the conducting Counsel Mr. Kafiluddin Chowdhury remained absent on the ground of "terror activities" in the city as cited by the other Counsel of the defence team and the Tribunal had to adjourn the case "by expressing its stiff stand in respect of adjournment on such ground"; on 18.02.2013 the conducting defence

Counsel Mr. Kafiluddin Chowdhury and no other Senior defence Counsel appeared before the Tribunal again citing ‘security reason’ as Jamaat-e-Islami had called a ‘hartal’ on that date. However, the Tribunal had “to once more adjourn the matter of further cross-examination of the I. O.” with a caution that the cross-examination would be closed if the conducting defence Counsel remained absent during any future hartal, but on 24.02.2013, the defence again prayed for adjournment on the ground of hartal. “However, for ends of justice the Tribunal allowed time up to 02:00 pm as sought by Mr. Tarikul Islam, the junior defence Counsel who moved for adjournment. But at 02:25 pm when the Tribunal started its proceedings, no Counsel including the conducting Counsel was found present. Mr. Sajjad Ali Chowdhury, a junior member of the team informed the Tribunal that despite communicating the directive of the Tribunal given in the morning session, the conducting defence Counsel could not appear. With this and keeping the provision as contained in section 11(3) of the Act, 1973 in mind the Tribunal ordered closing of cross-examination of P.W.13 (sic, it would be PW18) observing that despite clear directives the conducting defence Counsel did not mind to show respect to it which tantamount to disobeying the Court . . . contradicting statement of prosecution witnesses by the Investigation Officer relates to procedure laid down in the Code of Criminal Procedure, 1898 which shall not apply in any proceedings under the Act of 1973.” (I shall discuss the question as to the implication of the contradiction of the prosecution witnesses in between their statements made before the Tribunal and to the Investigation Officer recorded by him during investigation in a case under the Act, 1973 later on at an appropriate place). The Tribunal further observed that the defence already cross-examined PW18

for long 10(ten) hours while he has been examined by the prosecution for three hours and thus adequate time has been afforded to the defence to cross-examine PW18.

The Tribunal finally concluded:

“The matter of contradiction may be well perceived by the Tribunal by using the statement of witnesses made to IO even without contradicting it by the IO and thus there has been no likelihood of *causing prejudice* to the defence, in the event of failure to contradict the statement of witnesses made before the Tribunal with that made earlier to the IO.”

In the context, it is necessary to keep on record that while cross examination of PW18 was closed by the order dated 24.02.2013, the Tribunal did not at all give so many reasons as given in rejecting the prayer for re-calling PW18. In fact, in the rejecting order, the prayer for re-calling new reasons has been assigned. It may further be stated that as no appeal has been provided for in the Act, 1973 against any interim order passed by the Tribunal, the accused had no other alternative but to remain satisfied with the order of the Tribunal rejecting the prayer for re-calling PW18.

As I have already found that the Tribunal neither asked the learned Counsel of the defence who were present before it nor the accused to cross-examine the Investigation Officer, fair trial as spelt out in section 6(2A) of the Act, 1973 was not meted out to the accused. Though it is difficult to say in a compact way or in a compact language what fair trial is, but it definitely embraces the right of the accused to cross-examine the prosecution witnesses, particularly, the Investigation Officer. It needs further to be mentioned that the accusations with which the accused was charged, involve capital sentence and in all fairness, the accused should have been asked whether he was willing to cross-examine the PW as his senior Counsel failed to appear to cross-examine

PW18. More so, when the defence witnesses were yet to be examined (this finding on fair trial shall be referable and applicable in respect of the other charges and the other PWs as well). I do not also find any rational in the view taken by the Tribunal that as the defence cross-examined PW18 for 10(ten) hours, so adequate opportunity was given to the defence to cross-examine PW18. I have perused the partially done cross-examination of PW18, it has not appeared to me that the defence made any unnecessary cross-examination.

The very fact that PW2 did not say a word to the Investigation Officer as to his hearing that the accused, Kamran and some others say that principal Hannan would have to be moved in the town by shaving his head besmirching his face and then the 'inhuman act' committed to principal Hannan by moving him on the different roads at Sherpur town after shaving his head and besmirching his face and the fact of bringing him to the Al-Badars' camp at Suren Saha's house, talking of at least 15(fifteen) words in English by Major Riaz to him and then pouring of water on his head when he lost sense after the rope on the waist was unfastened and then sending him to his house by the vehicle of Major Riaz renders his testimony before the Tribunal totally lie and a concocted and manufactured one only to implicate the accused falsely with the commission of the crime alleged in this charge. The non-mentioning of the above facts to the Investigation Officer is a serious omission and is surely a material contradiction and that clearly makes the testimony of PW2 in that regard doubtful, benefit of which must go to the accused. But the Tribunal did not at all consider the contradictions of the PW in the statements made before it and the Investigation Officer in evaluating his statements so far as this charge is concerned though in the order dated 25.02.2013, it observed that the matter

of contradiction may be well perceived by the Tribunal by using the statement of witnesses made to the Investigation Officer even without contradicting it by the Investigation Officer. Finally, considering the testimonies of the PW in its entirety (both examination-in-chief and in cross-examination), I find substance in the suggestion given by the defence to the PW that “ইহা সত্য নয় যে, আমি একজন সুযোগ সন্ধানি খান্দাবাজ লোক, স্বাধীনতা যুদ্ধের পূর্বে আমি আওয়ামীলীগের পক্ষে ছিলাম, যুদ্ধের সময়ে পাকিস্তানীরা যখন দখল করে তখন তাদের পক্ষে থেকে লুটপাট করেছি এবং স্বাধীনতার পরে এখন সুযোগ বুঝে সরকারের পক্ষ নিয়ে কামারজ্জামানের বিরুদ্ধে মিথ্যা সাক্ষ্য দিলাম।” And I conclude that the Tribunal was not at all justified to put any reliance upon the testimonies of the PW in arriving at the finding of guilt against the accused of this charge.

PW3-Md. Zahurul Haque Munshi Bir Pratik, an anonymous hearsay witness, so far as this charge is concerned, stated in his examination-in-chief that after taking higher guerilla training at Cherapunji, India, he was included in Maratha First Battalian, 95 Brigade (L.I) and was appointed as commanding guiding officer and accordingly, he took his responsibility. His superior officer was Indian Brigadier, Hardeb Singh Clay who gave him the responsibility to gather informations about the camps of Pakistanis and the Al-Badars adjacent to the boarder through camoufledge and inform him accordingly. As per the instruction of his superior, in the month of October, he camoufledging him as a beggar tried to gather informations as to what were happening at Sherpur Town (in the deposition sheet, in Bangla, it has been recorded as “সেই মোতাবেক আমি অক্টোবরে ভিক্ষুক সেজে ছদ্মবেশে শেরপুর শহরে কোথায় কি হচ্ছে এ সব তথ্য নেওয়ার চেষ্টা করি) and during that time, once he came to Suren Saha’s house and then heard that the accused and Major Ayub of Pakistan army got principal Hannan walked

throughout the entire town by shaving his head and besmirching his face and by tying a rope on his waist as the students of his college did not come to the college. This is the only testimony of PW3 in his examination-in-chief about this charge. He did not say anything as to how and from whom he heard the said fact and even did not say that he heard so from the public. This hearsay of PW3 is absolutely anonymous and such type of anonymous hearsay evidence by no logic can be treated as a corroborative evidence of PW2 so far as this charge is concerned as found by the Tribunal. It is true that hearsay evidence has been made admissible in case of trial under the act, but that does not include this kind of anonymous evidence. In the context, it may be stated that by sub-rule (2) of rule 56 of the Rules of Procedure both hearsay and non-hearsay evidence have been made admissible in the case of trial under the Act, 1973. In this sub-rule, it has been clearly stipulated that the reliability and probative value in respect of hearsay evidence shall be assessed and weighed separately at the end of the trial. In this regard, it needs be mentioned that in rule 2 of the Rules of Procedure although as many as 26 definitions have been given, but the hearsay evidence has not been defined. So, as of necessity, we have to see the dictionary meaning of the word hearsay and take the aid of other authors in seeing the proper meaning of the word hearsay in legal parlance.

In Black's Law Dictionary, 9th Edition, it has been said as follows:

“1. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence. 2. In federal law, a statement (either a verbal assertion or nonverbal

assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R.Evid. 801(c) □ Also termed hearsay evidence; secondhand evidence.”

As per Taylor “In its legal sense, ‘Hearsay’ Evidence is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person”(Taylor on Evidence, 9th Edition, 368).

So, whatever PW3 said is anonymous hearsay evidence, and as admittedly he did not mention any one’s name, the question of judging or considering the credibility of “some one other than the witness” or “some other person” than the PW does not arise at all. And as per sub-rule (2) of rule 56 of the Rules of Evidence, the reliability and probative value of the hearsay evidence of PW2 shall have to be assessed and weighed separately at the end of the trial. I am of the view that the reliability and probative value of hearsay evidence shall depend upon the truthfulness of a witness, in other words, on the credibility of the witness. And in assessing and weighing the hearsay evidence, regard must be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise in evaluating the weight, if any, to be attached to admissible hearsay evidence. (These findings on hearsay evidence shall be referable and applicable in respect of the other PWs of all the charges as well). The hearsay testimony of PW3 becomes more unworthy of belief when he said in his cross-examination that he was included in Maratha First Battalian 95 Brigade (LI) on 8th November, and that he saw the accused with Major Ayub for the first time in the first week of November and that he heard the incident of principal Hannan in the first week of November, and he

heard that the occurrence took place 15/20 days before his hearing, whereas the specific case of the prosecution is that the occurrence took place in the middle of May. What more, PW3 stated that they are the accused and Major Ayub who got principal Hannan moved in the whole of the town by shaving his head and besmirching and fastening a rope on his waist, whereas PW2 said that he is Major Riaz who brought principal Hannan at Suren Saha's camp. But the Tribunal without considering these glaring inconsistencies and contradictions of the testimonies of PW3 accepted his anonymous hearsay testimony as corroboration of the testimonies of the alleged eye witnesses, namely, PWs 2 and 14.

PW14-Majibar Rahman Khan Panu, so far as this charge is concerned, stated in his examination-in-chief that the accused, Kamran and others took principal Hannan to the house of Suren Saha in May, 1971 (nothing is mentioned in which part of the month), where his head was shaved, face was besmirched and was garlanded by shoes garland and a rope was tied on his waist and then got him moved on various roads of Sherpur town starting from the Al-Badars' camp at Suren Saha's house via Nayanibazaar and Tananibazaar which he himself saw.

Let us see whether this PW can at all be believed to be an eye witness to the occurrence. To see this, we are to go to charge No.5 which reads as follows:

“that during the period of War of Liberation, in the middle of *Ramadan* at about 07:30 pm you being the chief organier of Al-Badar Bahini as well as leader of Islami Chatra Sangha or member of group of individuals and your 4/5 accomplices apprehended Md. Liakat Ali and Mujibur Rahman Janu (sic, it would be Panu, PW14) from their houses

located in the area of 'Chakbazar' under police station and district Sherpur and brought them to the Rajaker camp housed in the 'banthia building' at Raghunathpur Bazar wherein confining them they were subjected to torture. Thereafter, they were sent to police station wherein they kept detained for 04 days and then on your order they and 11 other civilians were shifted to 'Jhinaigati Ahmed Nagar Army Camp'. Thereafter, they were brought to a ditch behind the Ahamed Nagar UP office and then segregating three from the line the rest were gunned down to death and at the time of causing death by gun shot you and your accomplice one Kamran were present there.

Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of 'murder as crime against humanity' and also for 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act."

In support of this charge, the prosecution examined 2(two) witnesses: PW7-Md. Liakat Ali and PW14 Majibar Rahman Khan Panu who were allegedly "apprehended" by the accused as the chief organiser of Al-Badar Bahini as well as leader of Islami Chhatra Sangha or member of group of individuals and his 4/5 accomplices from their houses located in the area of 'chakbazar' under the police station and District Sherpur and were taken to the Razakar camp mentioned in the charge. The Tribunal disbelieved the testimonies of these PWs (PWs 7 and 14) and acquitted the accused of this charge with the findings:

"408. According to P.W.14 the event of their detention took place in the month of May, 1971. The month of May, 1971 did not correspond to the Arabic month of Ramadan in 1971. While P.W.7 testified that the event

of their alleged abduction and detention took place one month prior to independence was achieved (November 1971).

409. Thus evidence of P.W.7 and P.W.14, on crucial fact relating to the principal event of murder of their co-detainees as narrated in the charge no.5 inevitably becomes glaringly contradictory, not merely inconsistent. We are not ready to accept that such contradiction between their testimonies, on material fact, might have occurred due to memory failure due to lapse of long passage of time, as argued by the learned prosecutor. Such contradictory statement significantly impairs their testimony they have made about the fate of the rest of their co-detainees from Tikarchar. P.W.7 and P.W.14, as claimed by the prosecution, are the witnesses who have stated material facts related to the principal crime of murder of their co-detainees at the camp. But statement of P.W.14 as to month of his detention at the camp and release there from grossly fluctuates from that as narrated in the charge framed.

410. In narrating the date of an incident, discrepancy of few days naturally may occur, in one's testimony, chiefly for the reason of lapse of long passage of time. But deviation of six months, as found from P.W.14's statement, cannot be considered as mere 'memory failure', particularly when P.W.7, on cross-examination, stated that event of their detention took place one month before the independence [November 1971]. Tribunal also notes that P.W.14 categorically stated that within seven days of his return, in May, 1971, from India he was apprehended and brought to Banthia building camp. If it is so, we do not find rationale to infer that such discrepancy of long six months occurred in his testimony is merely due to failure of his memory for the reason of lapse of long passage of time.

411. We are thus not persuaded with the argument advanced by the learned prosecutor that it is a mere inconsistency and as such it does not tarnish the testimony of P.W.14 in its entirety made in relation to charge no.5. Because the story of his having learning the principal event of murder of 08 co-detainees at the Ahammednagar camp stems from the

very fact of his [P.W.14] and P.W.7' detention at the camp and release there from.

412. The charge narrates that the alleged killings occurred in the month of *Ramadan* 1971. But P.W.14 stated that after his release from Ahammaednagar camp, on the following day [in the month of May 1971] he went to the camp to show up as directed and then had heard from Sattar [detainee] that on the preceding day, four detainees from *Tikarchar* were gunned down to death on instruction of Kamaruzzaman [accused]. P.W.14 also stated that the rest 05 detainees were set freed during his presence at the camp.

413. Since the charge discloses that the alleged event of murder of civilian detainees at Ahammadnagar army camp took place in the month of Ramadan in 1971 the above version of P.W.14 appears to be unrealistic and tainted by reasonable doubt, for the reasons stated above. P.W.7 has not however narrated anything as to the fate of the other detainees. Merely for the reason that P.W.14 had fair occasion to know the accused and his accomplice Kamran since prior to the event as they used to get their clothes made at his [P.W.14] shop it cannot be concluded that the version relating to charge no.5 made by him is free from reasonable doubt.

414. The charge narrates that out of 11 detainees three were freed and the rest 08 were gunned down to death. But according to P.W.14 on the following day [in the month of May 1971] he had heard of murder of 04 detainees that took place on the preceding day [in the month of May 1971] under Kamaruzzaman's [accused] instruction. Thus the charge does not appear to have been proved by the testimony of P.W.7 and P.W.14. Their evidence seems to be patently incongruous with the narration made in the charge. The fact that they were abducted and detained at the camp and afterwards released, as has been stated by them appears to have been tainted by conspicuous doubt.

415. On careful appraisal of evidence of P.W.7 and P.W.14 we find substance in what has been argued by the learned defence counsel. Prosecution appears to have been miserably failed to prove the charge by

adducing credible and consistently chained evidence. However, the event of murder of detainees at the Ahammednagar camp, as narrated in the charge no.5 remains undisputed. For the reason of glaring lack of credibility of statement made by P.W.14 on material fact, we consider it precarious to act on rest of his [P.W.14] statement made involving the alleged act or conduct on part of accused constituting his link to the actual commission of the principal event of criminal acts of murder of detainees at Ahammednagar camp. Prosecution has utterly failed to prove the complicity of the accused with the perpetration of the crime alleged in charge no.5. The accused Muhammad Kamaruzzaman, as a result, is not held criminally liable for the criminal act of murder as crimes against humanity as listed in charge no.5.”

In view of the finding of the Tribunal as to the veracity of the testimonies of PW14 in respect of charge No.5, I fail to understand how it could accept him as a truthful eye witness to the occurrence as alleged in this charge. PW14 cannot be believed for the further reason that though he deposed in respect of charges as listed in charge Nos.2, 4 and 5 which took place at different time and on different dates, in respect of all the 3(three) charges, he mentioned the time of occurrence, the month of May.

The prosecution case cannot be believed for the further reason that PWs2 and 14 made contradictory statements regarding the place of occurrence where principal Hannan was taken and his head was shaved and face was besmirched. PW2 stated that principal Hannan was taken to the house of Habibar Ukil where his head was shaved, face was besmirched and a rope was tied on his waist and then he was moved in the town, whereas PW14 stated that principal Syed Abdul Hannan was taken to the house of Suren Saha where his head was shaved, face was besmirched and he was garlanded with shoes garland and a rope was tied on his waist. The very fact that PWs 2 and 14 clearly

contradicted each other about the place of shaving and besmirching, i.e. the place where principal Hannan was taken first makes their claim of seeing the occurrence totally doubtful.

There is another pertinent thing. This is a well recognized principle of criminal jurisprudence that in order to substantiate a charge against the accused, the prosecution must produce the best possible available evidence. As already stated earlier as per the testimony of PW2, principal Hannan is alive. In cross-examination, though PW2 first stated that he could not say what the sons of principal Hannan were, then said one of his sons might be an engineer and another son might be a doctor, but neither principal Hannan nor any one of his family members (his wife and sons) has been examined by the prosecution. In the application filed by the prosecution for receiving the statement of principal Syed Abdul Hannan under section 19(2) of the Act, 1973, it was claimed that he was ill and he lost his memory and in support of the statements, some medical papers were filed but no witness was examined either to prove those medical certificates or to prove that he was ill. PW14 clearly stated that in his cross-examination that “প্রিন্সিপাল হান্নান সাহেবের বাসা ছিল শেরীপাড়ায়। আমি তার বাসায় গিয়েছি। আমি তাকে ভালভাবে চিনি, তবে কবে গিয়েছি তা স্মরণ নেই।” From this, it is clear that principal Hannan is well known to him and had he ill he would have said so. So, the reason for non-examination of principal Hannan as shown by the prosecution does not appear to me *bonafide* and the Tribunal rightly rejected the prayer of the prosecution to receive his statement recorded by the Investigation Officer under section 19(2) of the Act, 1973.

It also appears to me that to be a principal of a college in 1971 was very big thing, but to substantiate the allegations made in this charge that principal

Syed Abdul Hannan being “a gallant supporter of war of Liberation” was subjected to the alleged ‘inhuman act’ none from the college, i.e. the other teachers of the college and the staff has been examined by the prosecution. PWs 2, 3 and 14 did not also say a word that principal Hannan was a gallant supporter of war of liberation. Had the prosecution case that he was compelled to walk ‘throughout the town making him almost undressed and by constant whipping’ been true, it would have been witnessed by hundreds of people of Sherpur town, but none of the elites from Sherpur town was also examined. And this very fact itself creates a doubt about the whole prosecution case alleged in this charge. In the majority view, it has been observed that it should be born in mind that Syed Abdul Hannan was the principal of a college in 1971, naturally was above 40 years old in 1971 and after 40 years, he was an octogenerian, but I failed to find out any evidence whatsoever from the record that in 1971, principal Syed Abdul Hannan was aged about 40 years or above and none of the prosecution witnesses examined in support of the charge mentioned his age and even in the charge itself, his age has not been mentioned. The Investigation Officer did not also say anything in his evidence as to the age of Principal Abdul Hannan. In the statements recorded by the Investigation Officer (statement has been incorporation in the paper book, part II), there is no mention of the age of Syed Abdul Hannan as well. Therefore, in the absence of any material on record whatsoever, it cannot be said that he was too old and octogenerian as observed in the judgment of the majority. When the victim himself is alive, he did not come to depose, I do not consider it proper to rely upon the evidence of PWs 2, 3 and 14, in view of their state of evidence as discussed hereinbefore. However, I fully agree with the Tribunal

that the act of shaving head of any person and besmirching his face, be it principal of a college or professor or any other citizen and then compelling him to move around the town with a rope tied on the waist is definitely an act of 'other inhuman acts' within the meaning of section 3(2)(a) of the Act, 1973, but my conclusion is that the prosecution failed to prove the charge against the accused as listed in charge No.2.

The Tribunal found the accused guilty of this charge without considering the evidence on record in its entirety with refererence to the facts and circumstances of the case, the credibility of the prosecution witnesses and also the reliability and probative value of hearsay and non-hearsay evidence as discussed above. The finding of the Tribunal that "The unshaken fact of taking Principle Syed Abdul Hannan to the Al-Badr camp at Shuren Saha's house indubitably prompts us to conclude that the accused had significant level of influence and authority over the members of Al Badr of the camp" is based on total non-application of mind to the facts and circumstances of the case discussed above and non-consideration of the crucial fact that the prosecution failed to prove that the accused was the chief organiser of Al-Badar as alleged in the charge.

For the reasons stated hereinbefore, I hold that the prosecution totally failed to prove the charge brought against the accused under section 3(2)(a)(h) of the Act, 1973 beyond reasonable doubt and he is entitled to be acquitted of the charge and he is found not guilty of this charge and accordingly, acquitted of this charge.

Charge No.3:

The charge reads as follows:

“that during the period of War of Liberation, on 25.7.1971 in the early morning, you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra Sangha and or member of group of individuals advised your accomplices belonging to Al-Badar and Razaker Bahini who accompanied the Pak army in contemplating and taking steps towards commission of ‘large scale massacre’, by raiding the village Sohagpur and accordingly they launched a planned attack and causing murder of unarmed civilians namely (1) Niamot Ali (2) Komedi Ali (3) Raham Ali (4) Montaj Ali (5) Abul Bashar (6) Shaded Ali (7) Qari Hasen Ali (8) Iman Ali (9) Ibrahim (10) Safar Uddin (11) Beyahat Ali (12) Rahimuddin (13) Babar Ali (14) Kutumuddin (15) Kitab Ali (16) Mohammad Ali (17) Momin Ali (18) Munnas Ali (19) Safiruddin (20) Rejat Ali (21) Abdul Quddus (22) Hafejuddin (23) Malek Fakir (24) Khejur Ali (25) Ali Hossain (26) Jamiruddin (27) Ansar Ali (28) Latif Ali (29) Hassan Ali (30) Bashira (31) Akber (32) Sahuruddin (33) Jahur Uddin (34) Seraj Ali (35) Moyej Uddin (36) Nekbar Ali (37) Narun Ali (38) Dudu (39) Abdul Majid (40) Salam (41) Nur Mohammad (42) Kancha Sheikh (43) Abdur Rahman (44) Sahar Talukder and 120 others and committed rape upon women. Since the havoc, the village is known as ‘Bidhoba Palli’ (Widows village).

Therefore, you Muhammad Kamaruzzaman are being charged for participating substantially facilitating and contributing to the commission of offences of ‘murder as crime against humanity’ and also for ‘complicity to commit such crime’ as specified in section 3(2)(a)(h) of the Act, 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.”

To prove this charge, the prosecution examined 5(five) witnesses, namely: PW2-Monowar Hossain Khan @ Mohan Munshi, PW10-Md. Jalaluddin, PW11-Hasen Banu, PW12-Hafiza Bewa and PW13-Karfuly Bewa.

Of these five witnesses, the testimonies of PW2 have been reproduced while dealing charge No.2. Therefore, I am not reproducing the testimonies of PW2 herein again, but I shall refer the relevant portion of the testimonies of PW2 as and when necessary in discussing the merit of the case of the prosecution in respect of this charge.

PW10–Md. Jalaluddin, aged about 62 years (as recorded in the deposition sheet) of village-Sohagpur, under Police Station-Nalitabari, District-Sherpur, stated in his examination-in-chief that on 25th July, 1971 at 7/7:30 am, the members of Pak army along with the members of the Al-Badars and the Razakars entered into village-Sohagpur. His younger brother, Alaluddin ran to him and told him the said fact. Hearing the said information, he (the PW) ran to a distant place and hid himself. His younger brother also hid himself in a paddy stake. Thereafter, he heard the sound of heavy firing. Sometime thereafter, when the firing stopped, he went towards the East of the house of Suruj Ali and saw four dead bodies lying. Those who were lying dead were Montaj Ali, Shaheed Ali, Abul Bashar and Hashem Ali. From there, he ran to the courtyard of their house and saw 11(eleven) dead bodies lying there. Of the dead bodies, his father Safiruddin, elder paternal uncle, Kitab Ali, his maternal cousins-Munnas Ali, Muhammad Ali, Momin Mia, Kutumuddin, Rezat Ali, Iman Ali and some other unknown persons were there. Of them, Iman Ali had been found moving, his wife and the PW took him to the Varendra where he breathed last. He cried throughout the whole day, then in the evening, dug small ditches and in one ditch buried 7(seven) dead bodies, in another ditch buried 3(three) dead bodies and in another ditch buried one dead body, then they took shelter at village-Jugli. After 3(three) days of the occurrence, he came back home and

wanted to know from the people (in the deposition sheet in Bangla, it has been recorded as “মানুষের কাছে জানতে চাই”) how the occurrences took place. The *murubbis* of the area who survived told that 245 people of Sohagpur and Benupara were killed. The *murubbis* further told that Bogabura (at some places, it has been written as Bokabura), Nasha, Quadir Doctor were Razakars and their chief was the accused. They came with Pak Sena to the village and committed the massacre. The accused was the leader of the Razakars of Sherpur District and the Razakars used to abide by his command. In 1971, many occurrences took place. The Al-Badars and the Razakars also burnt the house of Kedarnath of village-Sohagpur and killed five persons of that house and of them, two were killed by bayonet. There was a camp of the Al-Badars, the Razakars and the Pak Sena at Nalitabari under Sherpur District. There was another camp at Sherpur Dak Banglow. He saw the accused many times after 1971 as he held many meetings. The accused was identified in the dock.

In cross-examination, the PW stated that he did not depose in any Court in any other case except the instant one. He denied the defence suggestion that it was not a fact that he filed a case against Suruj Ali, a witness of this case in 1993 or he deposed in that case. Then said Suruj Ali filed a case against him in 2003 in which he was acquitted. He did not know whether he was a witness in the case filed by the wife of Ataur Rahman. He denied the defence suggestion that it was not a fact that he had the fame in the area as a litigant and Tadbirbaj. He knew Rahimuddin who embraced martyrdom in the occurrence narrated by him (in the deposition sheet, in Bangla, it has been recorded as: “আমার বর্ণিত ঘটনায় শহীদ রহিমুদ্দিনকে চিনি”). Karfuli Bewa is his (shaheed Rahimuddin) wife who is alive and she is the president of Sohagpur *Bidhaba Kallan Samity*. The wives

and the children of shaheed Jasimuddin, shaheed Siraj Ali, shaheed Abul Bashar, shaheed Shaheb Ali, shaheed Ayub Ali Munshi, shaheed Khejur Ali, shaheed Iman Ali, shaheed Shamser Ali, shaheed Khatem Ali, shaheed Jahiruddin, shaheed Hasan Ali, shaheed Abdul Latif, shaheed Meher Ali and shaheed Babar Ali are alive. His (the PW) younger brother, Alal was younger to him by 3/4 years. Mafizuddin, another brother was younger to Alal. In 1971, he (the PW) was aged about 19/20 years, but he could not say his date of birth. In his voter I.D. card his profession and date of birth have been written. Without seeing the I.D. card, he could not say whether his date of birth was recorded there as 08.03.1945. The house of Akkas Ali was to the South-West of his house and that of Suruj Ali was to the East, the house of Mofiz was to the South of his house. He did not know the name of the owner of the house at Jugli where he took shelter. Village Jugli was about $2\frac{1}{2}$ kilometers away towards the East-South from their village under Police Station-Haluagate. He went to the said village in the night of the occurrence with his mother, brother and the neighbours, then said on the date of occurrence, they went to village-Jugli in the night on foot and they reached there at $3\frac{1}{2}$ o'clock in the night. On their way, he did not meet any one as the area was desolate. The occurrence took place on Tuesday. Razakar Bakabura, Nasha and Quadir Doctor hailed from their area. In 1971, Kadir Doctor was aged about 40 years and the age of Bakarbura and Nasha was about 45 years. He could not say what the age of the accused was in 1971. Long after liberation, he saw the accused for the first time in a meeting of their party near the Dak Banglow of Sherpur town. He could not say who the president of the meeting was and who spoke. He denied

the defence suggestion that it was not a fact that he could identify the accused as he was shown to him by the Investigation Officer after his arrest. Immediately, after liberation of the country, neither he nor his mother or any one of his family gave any interview or statement to any newspaper about the killing of Sohagpur, then said he does not read newspapers. He denied the defence suggestion that it was not a fact that as a member of the martyr family, he maintains liaison with the *muktijoddhaas* or the Awami Leaguers. He himself is the president of a registered organization named *Shaheed Paribar Kallan Samity*. This was registered at any time in 1978 or near to it and presently, he is the Secretary of the organization. Hajera Khatun was its president who is now dead. The total members of the Samity is 40, he could not say the names of all the members of the Samity. Karfuli, Nur-e-ban, Hafiza, Shamala, Jaritan, Fatema, Asia are the members of the Samity. He denied the defence suggestion that it was not a fact that the Samity run under his leadership is a fake one and he, by using this Samity, makes various tadbirs and takes financial help. He denied the defence suggestion that it was not a fact that since liberation, the Samity under the leadership of Karfuli has been working for the welfare of the widows. He asserted that the Samity under the leadership of Karfuli has no registration, rather his Samity is registered. He asserted that *Bidhaba Kallan Samity* was established in 2004 and he functioned as its secretary. He denied the defence suggestion that it was not a fact that *Bidhaba Kallan Samity* was not established in 2004 under the leadership of Kurfuli Bewa and that he did not function as its secretary. He knows *muktijoddhaa*, Abdur Rahman Talukder of his area, he (*muktijoddha* Abdur Rahman Talukder) did not go to him (the PW) to take information before

writing his book, then said he (Abdur Rahman Talukder) might have gone to any one of his organization. He heard that Abdur Rahman Talukder has written a book on *muktijoddha* of Nalitabari, but he did not read that book. He denied the defence suggestion that it was not a fact that since no incident involving the accused had been mentioned in the book so he said that he had not read the book. He further stated that in the last part of 2011, Journalist Mamunur Rashid had gone to their area. Mamunur Rashid being accompanied by Kurfuli Bewa, the president of '*Bidhaba Kallan Samity*' recorded the statements of the members of many martyr and he (the PW) also gave statement to him. He heard that Mamunur Rashid has written book over the incident of Sohagpur *Bidhaba Palli*, but he neither saw nor read the book. He denied the defence suggestion that it was not a fact that since no incident involving the accused had been written in that book, he said that he had not read the same. He admitted that previously, he did not file any complaint or give any statement anywhere accusing the accused prior to his deposing in Court, then said since opportunity of trial has been created so he deposed. He denied the defence suggestion that it was not a fact that he did not mention the name of the accused to the Investigation Officer. He denied the defence suggestion that it was not a fact that keeping him under Government management, the name of the accused was tutored to him. Quadir Doctor of their area was a Razakar and the accused was the big Commander. There was only one Commander for the Al-Badars and the Razakars. He could not say who was the Amir of Jamaat-e-Islami or the president of Muslim League. The house of Kedarnath was burnt at the last part of the month of Bhadra by the Razakars and the Al-Badars. He could not say the corresponding English calender month of the last part of

Bhadra. The house of Kedarnath was ½ mile away from their house and he went there after the house was burnt, 5(five) persons were also killed and of them, he could mention the name of three. He could not say who was the chief of the Al-Badars and the Razakars' camp at Nalitabari, he could not also say who was the Commander of the Razakars or the Al-Badars in that camp. The Pak Senas came to the place of occurrence from Telikhali camp which was five kilometers away to the north of Sohagpur, Telikhali camp was under Police Station Haluagate. He denied the defence suggestion that it was not a fact that whatever he stated as to his hearing about the name of the accused from the *murubbis* were not correct or it was a part of political conspiracy of Awami League Government, or he being a person without any profession and properties and a *tadbirbaj* mentioned the name of the accused as per plan of Awami League on getting financial and other benefits. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that the Al-Badar Bahini entered into their village or on going to the courtyard of his house, he saw 11 (eleven) dead bodies lying or in another ditch, he buried three dead bodies or the *murubbis* of the area who survived informed him that 245 persons of Sohagpur and Benupara were killed or the *murubbis* told him that Bakabura, Nasha, Quadir Doctor were the Razakars and their head was the accused, or they committed the massacre in the village by bringing the Pak army or the accused was a leader of the Razakars of Sherpur District or the Razakars used to move at his command or in 1971, many occurrences took place or the house of Kedarnath at village-Sohagpur was burnt to ashes by the Al-Badars, the Razakars and five persons of that house were killed and of them, two were killed by bayonet charging or there was a

camp of the Al-Badars, the Razakars and the Pak army at Nalitabari under Sherpur District or there was a camp at Dak Banglow, Sherpur or he saw the accused many times after 1971 in holding meetings.

PW11-Hasen Banu (examined in camera), aged about 58 years (as recorded in the deposition sheet), wife of shaheed Abdul Latif, stated in her examination-in-chief that during the *muktijoddha*, in the morning of 10th Sraban, her husband went to village-Sohagpur for ploughing, at that time, she was taking preparation for cooking at her house. She heard the sound of firing at 9 am, then she along with her child in her lap, her parents-in-laws had fled away towards the West of their house. When she returned back to her house at 4 pm, she saw the dead body of her husband lying in the courtyard along with two others, then she went to the dead body of her husband and found that a bullet came out piercing naval of the body of her husband. The other dead bodies lying were of her nephew (brother's son) named Ansar Ali and one Zahurul Haque. Subsequently, in the evening, the dead bodies were buried. The accused, the Al-Badar, the Razakars: Nasha, Bogabura, Muzaffar killed her husband, the accused was a big leader and he made the conspiracy and killed her husband and many others on Tuesday, 10th of Srabon. On the previous day, i.e. on 9th Srabon at about 10 (no am or pm is mentioned), 3(three) armies and the Al-Badars chased a girl into her room and one Pak Sena violated her. Two others showed her (the PW) gun standing on the door of the room, then she was standing inside her room, later on, they entered into the room and violated her, she entreated them, but could not save herself. At the time of war, she was 18 years old. She demanded justice for loosing her chastity and also for the murder of her husband. The PW identified the accused

in the dock. She further stated that she gave statement to the Investigation Officer.

In cross-examination, the PW stated that she could not remember in which year, she was married, but she was only 11(eleven) years old. She could not say the year of her birth, she could not say on what date and in which month, she was deposing, then said it was about 2 o'clock. She could not read the watch, she had no education. Her eye sight was not clear (in the deposition sheet, in Bangla, it has been recorded as: “আমি চোখে ঘোলা ঘোলা দেখি”), so she could not identify the photograph shown to him, she does not use spectacles. She never heard the name of journalist, Mamunur Rashid. Many people went to *Bidhaba Palli* and she talked to them, but she did not know whether Mamunur Rashid went there. She could not remember whether one year before her photograph was taken. If she keeps a thing at a place, next moment, she forgets that (in the deposition sheet, in Bangla, it has been recorded as: “আমি একটি জিনিস এক জায়গায় রাখলে একটু পরেই ভুলে যাই”). She has a daughter, she (the PW) is illiterate, she could not say the year of birth of her daughter. At the time of liberation war, they had no landed property and her husband used to work at the land of others and at present, they have also no landed property. Since after liberation, she used to work as a maid at the house of others, she also worked in Dhaka. On the date of occurrence, she was at home and her husband was in the *bandha*. He went to the *bandha* to plough the land which he took as barga from his brother-in-law (ননদের জামাই). Nobody told her to depose in the case. She came as she heard that the Government was trying the case (in the deposition sheet, in Bangla, it has been recorded as: “আমি শুনছি সরকার বিচার করতাকে, সেই শুনেই

আমি আইছি’). Then said she heard so about two years before. She came to Dhaka 3(three) days before. She told 6(six) others to come to Dhaka as a chance for trial was available, then a few of them came to Dhaka (in the deposition sheet, in Bangla, it has been recorded as “আমি ছয়জনকে বলছি বিচারের একটা সুযোগ পাওয়া গেছে চল ঢাকায় যাই তখন আমরা কয়েকজন ঢাকায় আসছি”), Karfuli Bewa had come, she could not say the name of others who came to Dhaka. Then said after coming to Dhaka, they are staying together. The Investigation Officer had gone a few days before and she told him about the occurrence. The Investigation Officer did not bring her, she and others came of their own accord. She could not say whether the Investigation Officer had gone 8/10 days before or more than 8/10 days before. When the Investigation Officer examined her, others were present, but she could not say whether they were Awami Leaguers or BNP. She denied the defence suggestion that it was not a fact that she got rice and wheat from the Government. She gets taka 100 only per month as widow allowance and nothing more. On the date of occurrence, a paternal cousin through village courtesy named Siraj was present, but she could not tell his father’s name, no other paternal cousin was present. The girl who was chased to her house at Kakarkandi was chased from Sohagpur, she did not know the name of her parents, because she did not see the girl before. She could not say the distance of Kakarkandi from Sohagpur. As she had no relative at Sohagpur, so she did not go there. She could not say whether the girl was elder or younger to her in age. She could not say the names of the *muktijoddhaas* of Sohagpur area. Those, who were killed, were killed as *muktijoddhaas*. She denied the defence suggestion that it was not a fact that on the date of occurrence, she was not cooking at the room of shaheed Shahed Ali Khan. She denied the defence

suggestion that it was not a fact that her husband was working as a day labourer in the land of Hasen Ali, then said Hasen Ali was her brother-in-law (আমার ননদের জামাই). Hasen Ali and her husband died together on the same land. It was not a fact that her husband was killed by military only, the Razakars and the Al-Badars also killed him. She denied the defence suggestion that it was not a fact that only Quadir Doctor and the Beharis were with the Punjabis, Nasha, Bogabura, Muzaffar and the Al-Badars were also involved. A specific question was put to the PW to the effect: প্রশ্নঃ তদন্ত কর্মকর্তা কি?, She replied that she did not know, then on the question put by the Tribunal, she said that Investigation Officer was a man. Another specific question was put to the PW to the effect: প্রশ্নঃ ডকে সনাক্তকৃত আসামী কে আপনি কবে থেকে চেনেন?, she replied that after liberation of the country, she heard from the *murubbis* that the accused in the dock was a big leader and after liberation, he was held at Sherpur. She denied the defence suggestion that it was not a fact that she did not hear the fact that the accused was arrested. After the accused had been arrested, she did not go to see him, she heard the fact of arrest of the accused from many persons, but she could not tell the name of any one. She could not say where, how and on which date the accused made the conspiracy, but she told that he (the accused) was involved with the occurrence. She denied the defence suggestion that it was not a fact that taking the advantage of her financial and social weak position and by giving her financial benefit and showing her the greed of more future benefit, Awami League set her to depose against the accused. She denied the defence suggestion that it was not a fact that the Awami Leaguers in collaboration with the Government officials had brought her to Dhaka and gave training to depose and, in fact, she so deposed. She

denied the defence suggestion that it was not a fact that the accused was shown to her by the Government officials under a special arrangement or for which she could identify him in the dock. She could not say how much fare she paid to come to Dhaka from Nalitabari. She denied the defence suggestion that it was not a fact that she did not tell the Investigation Officer that at the time of occurrence, she had fled away with the child in her lap or on returning home at 4 pm, she saw the dead bodies of her husband and two others lying in the courtyard or one of the dead body was of her nephew, Ansar Ali and the other one was of Zahurul Haque or the accused, Al-Badar, murdered her husband through conspiracy or the Al-Badars chased a girl into her room or she could not save herself by entreating. She denied the defence suggestion that it was not a fact that she neither saw the occurrence nor heard about the occurrence or for which she said different things at different time or whatever she stated implicating the accused were not correct. She admitted that it was a fact that till that day (the date of her examination and cross examination) she did not make any complaint any where against the accused, then she quiped that as there was no arrangement for trial before.

PW12-Hafiza Bewa, aged about 56 years (as recorded in the deposition sheet), wife of shaheed Ibrahim, stated in her examination-in-chief that during the war, she was aged about 15/16 years. On 10th Srabon, 1971 at 7 am, the Punjabis along with the Al-Badars, the Razakars and the accused, the big Al-Badar leader of Sherpur, killed her husband at their house at village Sohagpur. She heard the name of the accused from the *murubbis*. Quadir Doctor and Bogabura were with the Pak army. The Pak army entered into her room and fell her down on the ground by hitting her with a gun and then violated her (in

the deposition sheet, it has been noted that the witness was shedding tears ceaselessly). On that day many other women, such as, Karfuli Bewa, Shamola Bewa were also violated. Quadir Doctor, Bogabura violated them. She further stated that the accused was also with them (in the deposition sheet, in Bangla, it has been recorded as: “কাদির ডাক্তার, বকাবুড়া এরা ইজ্জত নষ্ট করে শেরপুরের কামারজ্জামানও নাকি এদের সংগে ছিল”). Besides her husband, many others of the village including her paternal uncles-Siraj Ali, Khejur Ali and her brother-Abul Hossan were killed. Jalaluddin (PW10) and others buried those dead bodies. She further stated that she could not bear the sufferings (in the deposition sheet, in Bangla, it has been recorded as “কষ্টে আমার বুক ফেটে যাচ্ছে”). The accused was identified in the dock. She demanded justice for the killing of her husband and for the cost of her chastity. She further stated that she gave statement to the Investigation Officer.

In cross-examination, the PW stated that she has a son named Nuruzzaman, aged about 25/30 years and he lives with her, he is married. Nuruzzaman knows to sign his name only, he works in a garments, but could not say where. He (Nuruzzaman) has been working in the garments for the last $1/1\frac{1}{2}$ years, previously, he used to work at the land of others. They have no landed property, she maintained her by working as a maid in the house of others. One month before of the occurrence, she was married to Ibrahim, the name of the father of his son is Abu Siddique. She does not know any one as Sarafat and she was not married to any one named Sarafat. She could not say the date, the month and the year of her marriage with Abu Siddique. She does not know any one named Hasen Banu and she has met Hasen Banu in the

Tribunal. She has heard that she is from village Kakarkandi. She could not say the year of the occurrence in which her husband was killed as stated by her in Court, but that was on 10th Srabon at 7 am being Tuesday. Her husband was shot dead when he was entering into the house running from *Bondha*. Her husband went to *Bondha* to work in the land of her paternal uncle-Delwar, her paternal uncle died subsequently. None went to work with her husband, but in the *Bondha* many people were killed. Her first husband-Ibrahim had a sister and he had no brother. The name of the sister was Khatemon. She does not know the name of her father-in-law and mother-in-law, they died when their son was younger. She could not say the name of the paternal uncles (চাচা ও জ্যাঠা) of Ibrahim. Ibrahim had a one-roomed thatched house and he was illiterate. The original house of Ibrahim was at village Gaffargaon, subsequently, he settled at their village, then said Ibrahim settled at village Sohagpur before her marriage. A specific question was put to the PW to the effect: “প্রশ্নঃ স্বাধীনতার পর আপনাদের এলাকায় সাংবাদিক বা অন্য পেশার মানুষজন গিয়েছিল, আপনি কি তাদের কাছে কোন সাক্ষাৎকার দিয়েছিলেন?”, she replied that 14/15 days before a person named Razzaque had gone to her and she gave interview to him and then said he was a *Daraga*. The PW volunteered that the *Daraga* did not tell her that she would have to come to Dhaka to depose in the case and she came to Dhaka of her own accord. Then said she came to Dhaka 5/6 days after she had talk with *Daraga*, then again said he could not say after how many days she came to Dhaka, but she has been staying in Dhaka for 5/6 days. Another specific question was put to the PW to the effect: “প্রশ্নঃ আপনার সঙ্গে ঢাকা আসার সময় করফুলি বেওয়া, জরিতন বেওয়া, হাসেন বানু, সমলা বেওয়া, আছিরন বেওয়া গং ছিল কি?”, she replied that Karfuli Bewa came

with her and they were staying together. She could not say in which station she got down in Dhaka, then said they were the village women, so they could not say the name of place. She came to Dhaka by bus. She cannot tell time reading the watch, she is illiterate, she does not know how to read the watch and tell about time through guess. She does not know the counting of Bangla month, then said she can not remember. She did not know the date of the Bangla month of the day of his examination before the Tribunal. Since after liberation, she has been living at village Sohagpur. The Investigation Officer examined her by calling her at Modhutilla, before that she was never called. At the time of her examination, other people were also present, but she did not know them. At the time of her examination, Karfuli Bewa, Jaritan Bewa, Hasen Banu, Shamala Bewa and Achhiran Bewa were not present. She could not say how many persons were examined by the *Daroga* on that day or how long she was present there (Madhutilla). The house of Quadir Doctor is at Kandipara and that of Bogabura at Benupara and their houses were less than half a mile away from her house. She knew both of them and saw them. She could not say what the distance of the house of the accused from her house was, but that was towards the South-West at Sherpur. She could not say who was the Commander of the Razakars and the Al-Badars at Nalitabari or Chairman of the Peace Committee. Since after liberation of the country, she knows the accused, she saw him in the TV. She denied the defence suggestion that it was not a fact that she maintains her life on people's help as well as on the help of the Government. She gets taka 1,200·00 in a year, i.e. taka 100·00 per month. She denied the defence suggestion that it was not a fact that the Government used to give her rice and wheat etc every month. She denied the defence suggestion that it was not a fact

that the Government and the Awami Leaguers gave her allurements of various financial help and social benefits and then brought her to Dhaka and gave her training for long time and succeeded to tell the name of the accused through her mouth. She denied the defence suggestion that it was not a fact that previously she did not hear the name of the accused. She denied the defence suggestion that it was not a fact that she could identify the accused in the dock as he was shown to her under a special arrangement made by the Government. She admitted that it was a fact that since after the liberation of the country till she gave her statements to the *Daroga*, she did not lodge any allegation to anybody against the accused. She denied the defence suggestion that it was not a fact that she told that she heard that the accused also accompanied Bogabura and Quadir Doctor at the time of committing the crime as being tutored. She denied the defence suggestion that it was not a fact that she had no paper to show that she was the wife of shaheed Ibrahim. She denied the defence suggestion that it was not a fact that whatever she stated before the Tribunal implicating the accused was false and concocted. She denied the defence suggestion that it was not a fact that during the war, the accused did not go to Nalitabari. She denied the defence suggestion that it was not a fact that she did not tell the Investigation Officer that the Punjabis, the Al-Badars, the Razakars along with the accused, the big leader of the Al-Badars of Sherpur, killed her husband at their house at Sohagpur or she heard the name of the accused from the *murubbis* or Quadir Doctor, Bogabura violated her chastity and the accused was also with them. Then of her own accord, she stated that everything could not be said to the Investigation Officer as it was a matter of prestige and dignity and she thought she would tell everything in Court, so she told all those

before the Tribunal (in the deposition sheet, in Bangla, it has been recorded as:

“(নিজে বলেন), তদন্তকারী কর্মকর্তার কাছে কি সব কিছু বলা যায়, মান ইজ্জতের ব্যাপার, ভাবছিলম সব কিছুই আদালতে বলব তাই এই কথাগুলি এখানে বলছি”). At the time of war, there was no electricity in their area.

PW13-Karfuli Bewa, aged about 62 years (as recorded in the deposition sheet), stated in her examination-in-chief that at the time of occurrence, she was about 25 years old. On 10th Srabon, 1971, being Tuesday, her husband went to *Bondha* for ploughing, then she heard the sound of firing there. Those, who were ploughing and weeding out paddy saplings, were killed in that condition. The occurrence took place at Sohagpur which is now known as *Bidhaba Palli*. Her husband came home leaving aside ploughing and was saying alas! alas! (in the deposition sheet, in Bangla, it has been recorded as: “আমার স্বামী হাল ছেড়ে দিয়ে বাড়ীতে চলে এসে হায় হায় করছিল।”). Then two Punjabis came into the room accompanied by Nasha, Bogabura and the accused. Pakistani army told her husband that he was a ‘mukti’ (in the deposition sheet, in Bangla, it has been recorded as “পাকিস্তানী সেনারা তখন আমার স্বামীকে বলল তুম মুক্তি হে”). Her husband was sitting on the chowki, they (the Pakistani army) asked him to go near to them and when her husband went to them, they shot him on the neck, they shot him also at the belly causing his intestine out. They also killed the brother-in-law of her husband (in the deposition sheet, in Bangla, it has been recorded as “আমার স্বামীর বোন জামাইকে মেরে ফেলে”). They (the PW and others) had gone to Nokla keeping the dead bodies under a cover in the cattle shed. On return after 3(three) days, she found that the dead body of her husband was eaten up by foxes and dogs, then they after keeping the skull, the bone of the

hands under earth again went to Nokla (in the deposition sheet, in Bangla, it has been recorded as “তখন মাথার খুলি, হাতের হাড় মাটি চাপা দিয়ে খুয়ে নকলা চলে যাই”). When later on the PW came back, the Al-Badars and the Punjabis again started torturing. Then said when she returned home after 3(three) days and was standing in the cattle shed, the Punjabis violated her chastity. The Punjabis were accompanied by Nasha, Bogabura, Muje and the accused. She identified the accused in the dock. She demanded justice for the killing of her husband and for the cost of her chastity. She further stated that she gave statements to the Investigation Officer.

In cross examination, the PW stated that she was the president of Sohagpur *Bidhaba Kallayan Samity*. Jaritan Bewa, Hasen Banu, Shamala Bewa, Zubeda Bewa, Acchiran Bewa are the members of the Samity. Many people came to her for interview. She did not know whether any one named Mamunur Rashid had come and took their interview one year before. She did not know whether the photograph as printed on the book under the title ‘সুহাগপুরের বিধবা কন্যারা-১৯৭১’ as shown to her was the photograph of Mamunur Rashid. She did not know whether he (Mamunur Rashid) took interview of 14(fourteen) persons including Nureman, Shamala Bewa, Jamila Khatun, Hajera Bewa. She did not know journalists Moni, Babul and she did not also know whether they accompanied Mamunur Rashid. She is illiterate and she cannot say whether their autobiography have been written in that book or not. She denied the defence suggestion that it was not a fact that as nothing was written in that book about the accused, so she said that she did not know anything about the book. During the occurrence, in 1971, her husband was a cultivator. During the war, her husband purchased some lands, but those were

not registered. Presently, except the homestead, they have 10 kathas of land in the *Bondha*. After her husband was killed, she husked paddy, did the job of cleansing field, collected ear of paddy and in this way, she earned her livelihood (in the deposition sheet, in Bangla, it has been recorded as “স্বামী যুদ্ধের সময় শহীদ হওয়ার পর ধান ভেঁজেছি, ক্ষেত বেছেছি, ধানের (হিজা) ছড়া কুড়িয়েছি এভাবেই জীবন ধারণ করছি”). She is the mother of two daughters and a son. One daughter died after she was married. The name of his son is Kafil and the names of the daughters are Mairam and Mohiron. Mairam died. They were born through the wedlock of her first husband, shaheed Rahimuddin. Subsequently, she was married to Altaf and through their wedlock; she gave birth to one son named Akram. Neither her first husband nor her 2nd husband nor she herself is literate. Bogabura hailed from village Kakarkandi, she could not say the distance of that village (Kakarkandi) from their village. The house of Hafeza Bewa was at a long distance towards the North of her house. The house of Hasen Banu is adjacent to Kakarkandi Bazar, one mile away from her house. She knew Bogabura before war, he did not come to her house, but she saw him around her house. At the time of occurrence, he was old. She could not say the date and year of her first and 2nd marriage. She could not say the date, month and year of her sons’ (Kafil and Akram) date of birth. She could not also say the date, the month and the year of death of her daughter-Mairam. She has no idea about the year, the month and the date of Bangla or English calendar. Since after the liberation, she has been staying at her house. She admitted that since after liberation, till the date (she was cross-examined on 15.10.2012), she did not lodge any complaint against the accused either with the Police Station or with any other authority. She did not know the name of the complainant of the

instant case, but she came to depose against the accused (Kamaruzzaman). None told her to depose in the case, she came of her own accord to depose, then said Jalal brought them to depose and then said Jalal told her to come to Dhaka. Jalal told them to come to Dhaka two days before, then said Habi accompanied her, then again said except Habi and Jalal, none came with her and they were staying together. She did not see Jaritan or any one else at the place where she is staying. The total number of the members of the Samity, of which she is the president, would be 30/35. Whatever Government help comes to the Samity, is distributed amongst its members by the Chairman and the Members of the Union Parishad. Neither the Government officials nor the Investigation Officer went to her house to know about the incident. On a specific question put to the PW whether she herself filed any application to any Government Officer or the Investigation Officer regarding giving evidence in this case, she replied that an Officer named Razzaque had gone to their area and examined her and she replied to him to his queries. The date on which she was examined, Jaritan, Hasen Banu, Hafiza and other members of the Samity were present. They hold meetings in a big room erected by the Bangladesh army at the *Bidhaba Palli* and they were examined there. That big ghar is at a long distance from her room, that place is also known as Modhutila and then said after examining them, they were brought to Dhaka. She did not know whether during giving statements except the members of the Samity many others were present. She did not know the accused before the war, but she came to know him afterwards, then said she came to know the accused 3/4 months after the liberation of the country when he along with many others walked by the side of her house. She did not know who were the leaders of

Awami League, Muslim League, Jamaat-e-Islam of their area during the war, then said she was a 'বউ মানষ' so, she did not know all those. She could not say who the leaders of the Al-Badars, the Razakars and the Peace Committee at Nalitabari were. She knew Bogabura, Nasha and Quadir Doctor. She heard the name of the accused, Bogabura, Quadir Doctor and Mozaffar as the leaders of Al-Badar of her area, she did not know the name of any other person except them. She could not say the name of any big *muktijoddaa* of her area. She denied the defence suggestion that it was not a fact that taking the advantage of her financial and social weak condition, the local Awami League leaders gave her financial benefit and allured her to go to the Investigation Officer to give statements or in the same way other members of the Samity were also taken to the Investigation Officer to give statements or those who agreed to depose falsely were brought to Dhaka. She denied the defence suggestion that it was not a fact that since 28.09.2012, she was kept under the supervision of the Government and was given training to say the name of the accused or as a part of that training, the accused was shown to her under a special arrangement, for which she could identify him before the Tribunal. She denied the defence suggestion that it was not a fact that previously, she never heard the name of the accused and she never saw him and did not also tell about him to any body. She denied the defence suggestion that it was not a fact that whatever she deposed before the Tribunal implicating the accused was false. She denied the defence suggestion that it was not a fact that she was not a *pardanshin* woman. She admitted that she did not tell the Investigation Officer that at the time of the occurrence, she was 25 years old, then said of her own accord that she was not asked about her age. She denied the defence suggestion that it was not a

fact that she did not tell the Investigaton Officer that on 10th Srabon, being Tuesday, 1971, her husband had gone to *bondha* for ploughing or then she heard the sound of firing in *bondha* or those who were ploughing or those who were picking paddy saplings were killed in their respective place or her husband by leaving aside the plough went home and was saying Alas! Alas! or two Punjabis entered into the room accompanied by Nasha, Bogabura and the accused or the Pakistani army told her husband that he was a mukti or when her husband was sitting on the chowki, they told friend come here (in the deposition sheet, in Bangla, it has been recorded as ‘বন্ধু এখার আসো’) or when her husband went to them, they shot him on the neck or then again they shot on the belly causing intestine out or subsequently, she came home, then also the Al-Badars and the Punjabis started toturing or after three days when she came home and was standing in the cattle shed, the Punjabis violated her chastity or at that time Nasha, Bogabura, Muza and the accused accompanied the Punjabis.

FINDINGS:

The allegations made against the accused in this charge was that on 25.07.1971, early in the morning, he as the chief organiser of the Al-Badar Bahini as well as leader of Islami Chhatra Sangha and or member of group of individuals advised his accomplices belonging to the Al-Badars and the Razakars Bahini who accompanied the Pak army in contemplating and taking steps towards commission of large scale massacre by raiding village-Sohagpur and accordingly, they launched a planned to attack and caused murder of unarmed civilians being 164 in total including 44 named (names are omitted) civilians in the charge and also committed rape upon women, since the havoc,

the village is known as ‘*Bidhaba Palli*’ (widows village). In the charge, no allegation has been made that the accused, in fact, participated in the actual commission of the mass killing as well as rape upon women. The accused has been implicated in this charge as adviser of his accomplices who belonged to the Al-Badars and the Razakars and “for participating substantially facilitating and contributing to the commission of offences of ‘murder as crime against humanity’ and also for ‘complicity to commit such crime’ as specified in section 3(2)(a)(h) of the Act, 1973 which are punishable under section 20(2) read with 3(1) thereof.

Let us consider and sift the evidence and see whether the prosecution has been able to prove its accusation against the accused alleged in this charge beyond reasonable doubt.

PW2 who was allegedly a guard at the Al-Badars’ camp at Suren Saha’s house stated in his examination-in-chief that one day, he heard the accused and others to hold a meeting at the upper floor of the camp and say to *gherao* village-Sohagpur, as *muktijoddhaas* were coming to that village and subsequently, they went to *gherao* the said village and the accused as the Al-Badar commander also went there; that in the morning, he saw many dead bodies brought by truck which were taken to the Poura Park and Mahiruddin Kazi informed through miking that thousands of *muktijoddhaas* were killed and some dead bodies were brought; that his sir, the accused, the Al-Badar commander, told that he went to the operation and killed them (in the deposition sheet, in Bangla, it has been recorded as “তখন আমার স্যার আলবদর কমান্ডার কামারুজ্জামান বলেন যে, অপারেশন যেয়ে ওদেরকে মেরে ফেলেছো”), that the Razakars also took part in the operation. PW2 is a witness to the planning chalked out at

the Al-Badars' camp at Suren Saha's house to *gherao* village-Sohagpur and the subsequent execution of the planning and the Tribunal also believed his testimony to that effect. Admittedly, he did never go to village-Sohagpur either on the date of occurrence or on any other day.

While dealing with charge No.2, I have given my finding that PW2 was not at all deployed as a guard at the Al-Badars' camp at Suren Saha's house and that he was not a natural, credible and trustworthy witness, yet let us see how far his testimonies, if it is assumed that he worked there as a guard for 7(seven) months (as deposed by him), are acceptable so far as this charge is concerned.

The testimonies of PW2, as summerised hereinbefore so far as this charge is concerned, do not appear to me acceptable. The reasons for holding so by me are as follows:

- (a) PWs 10, 11, 12 and 13 are none else, but the son and the widows respectively of the persons, who are killed in the incident that took place on 25th of July, 1971. PW10, Md. Jalaluddin, son of shaheed Safiruddin who allegedly saw the occurrence by hiding himself at a distant place and saw the dead bodies including the dead body of his father after the massacre and they burried the dead bodies in the evening after wailing throughout the whole day and then took shelter at village-Jugli, i.e. he remained present at village-Sohagpur right from the firing till the evening, did not say a word that the army, the Razakars and the Al-Badars, who did the massacre, brought any truck with them or they took the dead bodies by the truck, but this PW in his examination-in-chief stated that many dead bodies were taken to Sherpur by truck.
- (b) None was examined to corroborate the version of PW2 that after the mass killing, the dead bodies were taken to Sherpur town by truck

and then those were taken to Poura Park. Had the dead bodies been taken to Sherpur town and then to Poura Park as stated by PW2, it would have been seen by many people and the prosecution would have been able to examine someone to that effect. Further if so many dead bodies were taken to Sherpur town, those would have been dumped at some place, if they would have been not burried. Further the prosecution never made out any such case. PW11 Hasen Banu, PW12 Hafiza Bewa and PW13 Karfuli Bewa, who are the widows of shaheed Abdul Latif, shaheed Ibrahim and shaheed Rahimuddin respectively, in the similar way, did not say a word that the army, the Razakars and the Al-Badars, who did the massacre, took any dead body by a truck to Sherpur Town. PW11, Hasen Banu stated in her examination-in-chief that at 9 am, while she was preparing for cooking heard the sound of firing and fled away with her child in lap and the parents-in-law towards the West of their house and when she returned home at 4:00 p.m. and saw the dead body of her husband along with others and in the evening, they burried the dead bodies, but did not say the said fact as stated by PW2. PW12, Hafiza Bewa, in her examination-in-chief stated that her husband was killed by the Punjabis, the Al-Badars, the Razakars and the accused, the big Al-Badar leader of Sherpur and she did not say that they came with a truck and that after killing took any dead body along with them by the truck. PW13, Karfuli Bewa, who claimed to have witnessed the killing of her husband and was also allegedly violated during the occurrence on 25th July, 1971, stated in her examination-in-chief that after the massare, they had gone to Nokla keeping the dead bodies in the cattle shed and after 3(three) days when she came back, she found that the dead body of her husband was eaten up by the foxes and the dogs and then she got the skull and the bone of the hands of her husband burried and then again went to Nokla, but did not say like PWs10, 11 and 12 that the army and their accomplices came with a truck and took the dead

bodies by a truck to Sherpur town or any other place, when the son and the wives of the victims who were present at the place of occurrence and buried the dead bodies after the massacre, she did not say any thing about taking the dead bodies by the Punjabis, the Al-Badars, the Razakars. I wonder how PW2 could say so. In the context, it may also be stated that the other PWs, who hailed from Sherpur and other Police Stations under the then Jamalpur Sub-Division (Sherpur became a district subsequently), who deposed in respect of other charges, did not also say a word that they had ever heard that after the massacre, the dead bodies were brought to Sherpur town by a truck and then those were taken to Poura Park and some how dumped at a particular place at Poura Park or at any other place at Sherpur town.

- (c) The Investigation Officer, in his report submitted to the Chief Prosecutor and in his testimonies before the Tribunal, did not also say about the fact of taking the dead bodies by the Punjabis and their accomplices by a truck to Sherpur town, the announcement by Mohiruddin Kazi through miking that thousands of *muktijoddhaas* were killed and some dead bodies were brought and taken to Poura Park as stated by PW2.
- (d) PW2 in his examination-in-chief stated that on the next day of the occurrence, Mohiruddin Kazi announced through mike that thousands of *muktijoddhaas* had been killed and some dead bodies were brought, whereas the prosecution case as listed in charge No.3 is that 164 persons were killed in the massacre. The Investigation Officer in his examination-in-chief stated that during investigation, he came to know that in total 187 people (both men and children) were killed at Sohagpur on the date of occurrence and a musolium had been built there inscribing the names of 64. PW10 in his testimony mentioned about 15(fifteen) dead bodies and also mentioned the names of some of them killed in the massacre. PW10 also stated that the *murubbis* who survived told that 245 persons had

been killed at Sohagpur and Benupara on the date of occurrence. PW11 stated about 3(three) dead bodies including her husband. PW12 stated about 4(four) persons including her husband and further stated that many others had been also killed without mentioning any number or figure.

- (e) In cross-examination, PW2 stated that he would have to stay in the ground floor of the Al-Badars' camp when the accused used to hold meeting at the first floor (in the deposition sheet, in Bangla, it has been recorded as “আল-বদর ক্যাম্পে কামারুজ্জামান যখন দোতলায় মিটিং করতেন তখন আমি নিচ তলায় থাকতাম।” in another place of his cross-examination, he stated that he used to remain seated at the down stair near the staircase (in the deposition sheet, in Bangla, it has been recorded as “আমি সিঁড়ির কাছে বসে থাকতাম।”), if that be so, how he could hear about the discussion made in the meeting at the first floor that the accused and others said that they would *gherao* Sohagpur-village as the *muktijoddhaas* were coming there. In 1971, technology was not so developed that he would be able to hear the discussion made in the first floor sitting at the ground floor through any technological device. Further discussion of the meeting was not definitely made by using any loud speaker or mike making it audible by a person at the ground floor. PW2 further stated that the Pakistan army used to speak in urdu which they could not understand and they (the Pak army) used to talk to the accused only, he did not see whether the army used to speak in english or not. From the defence two urdu sentences were uttered to the accused as quoted below:

“উর্দুতে: দেখিয়ে হাম বহুত দূরসে এঁহা আঁয়েহে, আপলোগ জ কোচ দেখাইয়েগা, ইয়া জ বোলেঙ্গে হাম উহি করেঙ্গে। বেগুনা লগোকে কিসিতারহে নোকসান না পহচাইয়েগা।” and then he was asked to say their meaning, but he said “এই কথা গুলোর বাংলা অর্থ কি আমি বলতে পারবোনা।”, so even if it is accepted for the sake of argument that the accused as an Al-Badar commander had intimacy with the army at Sherpur as testified by the PW, he (the PW) had no chance to know about the subject matter of the discussion between

the accused and the Pakistan army.

- (f) It is also a fact that PW2 admitted that he himself was a Razakar and after liberation of the country, he had fled away and now had become the most trustworthy witness of the prosecution posing him as a guard in the Al-Badars' camp at Suren Saha's house. If he were a Razakar, the question of guarding at the Al-Badars' camp would not arise at all. It is also interesting that this PW posed to be the witness of the three occurrences, namely: the inhuman behaviour to principal Hannan, mass killing at Sohagpur-village and the killing of Golam Mostafa. This shows his over zealousness and partisanship to depose in the case.
- (g) Surprisingly, in his statement to the Investigation Officer, PW2 did not say a word about the incident of Sohagpur including his hearing from a meeting held at the upper floor of the camp that the accused and others said that they would *gherao* Sohagpur-village as the *muktijoddhaas* were coming to that village; these omissions of the PW in not saying a word about the Sohagpur incident are very vital omissions which were nothing, but serious material contradictions and such contradictions made his testimony unworthy of belief.

The Tribunal accepted PW2 as the most trustworthy witness and relied heavily on his testimonies to connect the accused with the planning and execution of the massacre at village-Sohagpur. The Tribunal accepted him (the PW) as an Al-Badar completely forgetting that it was the specific case of the prosecution case that the Al-Badar Bahini was formed with the members of Islami Chhatra Sangha and admittedly PW2 was not a member of Islami Chhatra Sangha. In the majority view, heavy reliance has been also put upon PW2 to find the accused guilty of this charge. Neither in the Tribunal nor in the majority view, the apparent exegerations and the material contradictions, in the statements of PW2 made before the Tribunal and the statement made to the

Investigation Officer as pointed out hereinbefore and the overall facts and circumstances of the case, have been considered in accepting him as a truthful witness.

That PW2 was a set up biased and partisan witness is apparent from the further fact that he in his cross-examination out of zeal stated that “ওরা আমার বস অনেক উপরে থাকে। আমার বস কামারুজ্জামান অনেক উপরে। মেজরদের সঙ্গে থাকত। সে যদি মনে করতো, শেরপুরটাকে উলটিয়ে দেবে তাই পারতো।” This was simply a guessed and a biased wishful comment made by PW2, but the Tribunal accepted his comment as the most precious one as it observed “This version depicts the superior position and level of authority of accused, Kamaruzzaman over the Al-Badar members of the camp in Sohagpur including the Pakistani occupation army.” In coming to the above conclusion, the Tribunal did not at all consider the relevant evidence of the PWs as to the formation of the Al-Badar Bahini at Sherpur, Jamalpur and Mymensingh which have been discussed earlier while deciding the question whether the accused was the chief organiser of the Al-Badar Bahini. The defence gave suggestion to the PW to the effect that whatever he stated in his examination-in-chief, he did not say so to the Investigation Officer, which he denied as being not a fact. But on a mere perusal of the statements of the PW recorded by the Investigation Officer (the statements recorded by the Investigation Officer have been quoted hereinbefore), it would appear that he did not at all say the most important material fact to the Investigation Officer that he heard the accused and others to say to *gherao* village-Sohagpur as *muktijoddhaas* were coming to that village and also the fact of carrying out the operation at village-Sohagpur by the accused along with others and also bringing of the dead bodies to Sherpur town by a truck.

It is true that PW2 was examined by the Investigation Officer after 40(forty) years and the concept of old evidence as developed in criminal jurisprudence may be invoked in considering his testimony testified by him before the Tribunal, but how it would come that he forgot to tell such a heinous and horrendous incident, i.e. the massacre that was committed at village-Sohagpur and the commission of rape upon women of that village to the Investigation Officer. It may further be stated that the span of gap between the examination of the accused by the Investigation Officer and his deposition before the Tribunal is only 1(one) year and 7(seven) months (PW was examined by the Investigation Officer on 14.09.2010 and he deposed in the case on 25th July, 2012). Had he been a guard at the Al-Badars' camp at Suren Saha's house and had he heard the said facts, he would have surely said those facts to the Investigation Officer. The omission in not saying the said facts to the Investigation Officer was very vital and serious in nature and the same amounts to serious material contradiction and that makes his testimony before the Tribunal absolutely doubtful and renders him as the most unworthy witness of belief, therefore, his testimonies regarding this charge cannot be believed. But in believing his testimonies, the Tribunal did not consider those vital omissions made by PW2 while he gave his statements to the Investigation Officer as minor discrepancies and inconsistencies and thus fell into an error in finding the accused guilty of this charge relying on PW2.

The other witnesses examined in support of this charge are PWs 10, 11, 12 and 13. Before I proceed to consider the testimonies of these PWs, I make it very clear that the incident that took place on 25th July, 1971 at village-Sohagpur is horrendous and heart breaking, but the question is whether the

accused had any advisory role on the Al-Badars and the Razakars, his alleged accomplices to accompany the Pak army “in contemplating and taking steps towards the commission of ‘large scale massacre’ in raiding village-Sohagpur and in launching a planned attack and causing the murder of the unarmed civilians being 160 in number and in committing rape upon women and thereby whether he participated and substantially facilitated and contributed to the commission of murder as crime against humanity as alleged in the charge.

PW10 is the son of shaheed Safiruddin Kazi who was killed on 25th July, 1971. He stated in his examination-in-chief that the Pak army along with the Al-Badars, the Razakars and the Al-Sams entered into Sohagpur at about 7 or 7:30 am and when his younger brother told him the said fact coming running, he ran to a distant place and hid him and heard the heavy sound of firing and after the firing was stopped, he went to the East of the house of Suruj Ali and saw four dead bodies. He saw 11(eleven) other dead bodies in their courtyard including the dead body of his father. After wailing throughout the whole day, they burried the dead bodies in the evening and then took shelter at village Jugli. 3(three) days after the occurrence, when he came back home and wanted to know from others how the massacre took place, the *murubbis* who were alive told that 245 persons of village-Sohagpur and Benupara were killed, the *murubbis* further told that Bogabura, Nasha, Quadir Doctor were Razakars and the accused was their chief and they came with the Pak army and committed the massacre, then said that the accused was a leader of Sherpur District Razakars and Razakars were under his command (in the deposition sheet, in Bangla, it has been recorded as “কামারুজ্জামান শেরপুর জেলা ভিত্তিক একজন রাজাকারের নেতা ছিলেন। ওনার কথায় রাজাকাররা উঠা-বসা করত।”). In cross-examination, this PW admitted

that in the last part of 2011, Journalist Manunur Rashid went to their area and he (Mamunur Rashid) accompanied by Karfuli Bewa, the president of *Bidhaba Kallan Samity* recorded the statements of many members of the shaheed families and he (the PW) also gave statements to said Manunur Rashid. He heard that Manunur Rashid wrote a book over the incident of Sohagpur, but he did not read the book. He denied the defence suggestion that as nothing was stated in that book about the accused, so he said that he had not read the book. He also admitted that previously, he had not filed any complaint against the accused implicating him with the occurrence.

From the above testimonies of PW10, it is *prima facie* clear that he did not see the actual part of the occurrence and he could not also recognise any one who took part in the operation with the Pak army and he allegedly heard the names of 3(three) Razakars: Bogabura, Nasha and Quadir Doctor; the accused as their chief who allegedly came with the Pak army, from the *murubbis* after 3(three) days of the occurrence. It is further necessary to state that hearsay testimony of this PW is absolutely anonymous as he did not say the name of any of the *murubbis* who told him the said fact. That Bogabura and Nasha were Razakars has been said by PW11, but except this PW, none said that the accused was the chief of Razakars, Bogabura, Nasha and Quadir Doctor and that he was a leader of Sherpur District Razakars and the Razakars were under his command. In cross-examination, this PW further asserted that Quadir Doctor of their area was a Razakar and the accused was the big commander. Then said there was only one commander for the Razakars and the Al-Badars, he could not say who the chief of the camps of the Razakars and the Al-Badars at Nalitabari (Sohagpur is under police station Nalitabari) was, he

could not also say who the commander of the Razakars or the Al-Badar at Nalitabari camp was. PW11 also described the accused as Al-Badar. In the context, it may be stated that although PW14 in his cross-examination stated that the accused was the Thana Razakar Commander of Sherpur, then immediately said that he was the chief of Al-Badar Bahini (in the deposition sheet, in Bangla, it has been recorded as “শেরপুর থানা রাজাকার বাহিনীর কমান্ডার ছিলেন কামারুজ্জামান। পরক্ষণেই বলেন আল-বদর বাহিনীর প্রধান ছিলেন কামারুজ্জামান”). This is also contrary to the prosecution case as in none of the charges, it was ever alleged that the accused was a Razakar and was the leader of Razakars or the chief of Razakars. As stated hereinbefore, in all the charges, it was alleged that the accused was the chief organiser of the Al-Badars as well as leader of Islami Chhatra Sangha. However, in this charge, it was added that he had his accomplices in Razakar Bahini as well. At the risk of repetition, it is necessary to state that the activists of Islami Chhatra Sangha were the members of the Al-Badars. In the context, it is also necessary to state that the Razakars, a voluntary force was raised in the then East Pakistan by East Pakistan Ordinance No.X of 1971 and was gazetted in the Dhaka Gazette, Extraordinary on August 2, 1971, whereas, the Al-Badars force was formed with the members/activists of Islami Chhatra Sangha without any backing of law. It may further be stated that no witness has stated that the members of the Al-Badars were also known or identified as Razakars, or the Razakars were under the command or under the control of the Al-Badars. In the context, it is very pertinent to state that PW2 in his cross-examination categorically stated that Joynal was the Razakar commander of Sherpur and the Razakars used to stay at the house of Serazuddin, M.P. PW14 stated that there was a Razakar camp at

Banthia Building, Raghunathpur Bazaar. In this regard, it may further be stated that PWs 1, 9 and 15, who were allegedly arrested by the Al-Badars at Mymensingh and then were detained at the Al-Badar's camp (their evidence will be considered while dealing with charge No.7) at the Dak Banglow, Mymensingh Zila Parishad and allegedly met the accused there, stated that the accused was an Al-Badar commander there. They did not say a word that they ever saw any association of the accused with the Razakars. So, the question of the accused to be the chief of Razakars: Bogabura, Nasha and Quadir Doctor, does not arise at all. The testimony of the PW that the accused was the chief of Razakars: Bogabura, Nasha and Quadir Doctor and that he was a leader of Sherpur Razakars and the Razakars were under his command, is absolutely without any factual basis whatsoever. And it appears to me that he was made to say that the accused was the chief of Razakars of Sherpur including Razakars: Bogabura, Nasha and Quadir Doctor, just to substantiate the allegations made in the charge that he had his accomplices in the Razakars as well. It may further be stated that the Investigation Officer neither in his report nor in his deposition stated that the accused was also Razakars' chief at Sherpur.

Suggestion was given to the PW that he did not tell the name of the accused to the Investigation Officer which he denied as being not a fact. As already stated hereinbefore, the contradiction, in the statements made by the PW to the Investigation Officer and the statements made before the Tribunal, could not be taken from the Investigation Officer due to the fact that his cross-examination was closed due to the absence of the learned Counsel for the defence. So, I find no other alternative but to look at the statements made by PW10 before the Investigation Officer on 30.10.2010, in view of the order of

the Tribunal dated 25.02.2013 (relevant portion of the order has been quoted earlier while dealing with charge No.2). In his statements to the Investigation Officer, he simply stated:

“... খান সেনাদের সাথে রাজাকার নছা, বকাবুড়া, সিদ্দিক মেস্বার, কাদের ডাক্তার, মোজাফফর সহ আরো অনেকে ছিল বলিয়া পরে শুনিয়াছি।”

Thus it is clear that the PW did not at all mention the name of the accused along with Razakars: Nasha, Bogabura and Quadir Doctor to the Investigation Officer who allegedly accompanied the Pak army on the date of the occurrence, but before the Tribunal, he mentioned the name of the accused as the chief of the said Razakars. And this is a very vital omission and amounts to serious material contradiction and thus makes his testimony unworthy of belief that the *murubbis* told that the accused was the leader of those Razakars and he accompanied the Pak army, but the Tribunal did not at all notice and consider this serious material contradiction between the statements of PW10 made before the Tribunal and to the Investigation Officer. When the PW could specifically mention the names of Razakars: Nasha, Bogabura, Quadir Doctor, Siddique Member and Mozaffar to the Investigation Officer, I do not see any reason on his part to omit the name of the accused, had he heard so from the *murubbis* as stated by him in his examination-in-chief. In this regard, it may be stated that there is clear uniformity with the statements made before the Tribunal and the statements recorded by the Investigation Officer so far the names of Razakars: Nasha, Bogabura, Quadir Doctor are concerned and this clearly shows that the *murubbis* did not tell the name of the accused as the chief of Razakars: Nasha, Bogabura and Quadir Doctor and accompanied the Pak army and did the massacre. The mention of the name of the accused as the

chief of Razakars: Nasha, Bogabura and Quadir Doctor, was an afterthought. So, the testimonies of this PW cannot be believed and relied upon.

PW11, Hasen Banu, wife of shaheed Abdul Latif, in her examination-in-chief, stated that on 10th Srabon, during the *muktijoddha*, hearing the sound of firing at 9 am, she had fled away towards the West along with her child in her lap and the parents-in-law. When she came back to her house at 4 pm, she saw the dead body of her husband along with two others, her paternal cousins were at home, amongst the dead bodies, one was her nephew Ansar Ali and another was of Zahurul Haque. The dead bodies were buried in the evening. She stated that the accused, the Al-Badar leader, Razakars: Nasha, Bogabura and Mozaffar killed her husband. The accused was a big leader and he conspired to kill her husband and others. On the previous day, i.e. on 9th Srabon at 10 am, three armies and the Al-Badr's chased a girl to her room and a Pakistani army violated her, two others remained standing on the door and showed her the gun while she was standing inside the room, those two also entered into the room and violated her. She entreated not to violate her, but they did not spare her. In cross-examination, she stated that her eye sight was not clear (in the deposition sheet, in Bangla, it has been recorded as: “আমি চোখে ষোলা ষোলা দেখি”). So, she could not say whose photograph was, as shown to her. She never heard the name of journalist, Mamunur Rashid, that many people came to the *Bidhaba Palli* and they talked to them, but she did not know whether Mamunur Rashid went to them, that she could not remember whether any one took her photograph one year before. She could not say the name of the *muktijoddhas* of Sohagpur area. It was not a fact that only Quadir Doctor and the Biharis were with the Punjabis and then said Nasha, Bogabura, Muzaffar and the Al-

Badars were also involved with the killing. On a specific question put to this PW to the effect when she knew the accused identified by her in the dock, she replied that after liberation, she heard from the *murubbis* that the accused in the dock was a big leader and after liberation, he was apprehended at Sherpur. She denied the defence suggestion that it was not a fact that she did not hear that the accused was arrested and then asserted that she heard the news of arrest of the accused from the mouth of many people, but could not say their names. She could not say where, on which date and how the accused conspired to kill her husband, but the accused was involved with the occurrence. Suggestion was given to her that she did not tell the Investigation Officer that at the time of occurrence, she had fled away with the child in her lap or she came back at 4 pm and saw the dead body of her husband and two others in their courtyard or one of the dead bodies was of her nephew Ansar Ali and another was of Zahurul Haque or the accused conspired to kill her husband or the Al-Badars chased a girl into her room or she entreated, but she was not spared which she denied. She denied the further defence suggestion that it was not a fact that she neither saw the occurrence nor heard about the same or for which she said different versions at different time or whatever he stated implicating the accused was incorrect. She further stated that it was a fact that till date (the date of her examination in Court), she did not file any complaint against the accused any where and then quipped that as there was no arrangement for trial before.

From the testimony of this PW, it is clear that she was not present at the place of occurrence and she neither saw the accused nor the other persons who took part in the massacre. As per her own statement, she had fled away with her child in her lap and her parents-in-law after hearing the sound of firing, but

she specifically mentioned the name of the accused as Al-Badar along with Razakars: Nasha, Bogabura, Muzaffar who murdered her husband, she branded the accused as a conspirator for murdering her husband. She did not say how and from whom she came to know the name of those persons including the accused as the murderer of her husband. On a specific question put to her to the effect, প্রশ্নঃ ডকে সনাত্তকৃত আসামীকে আপনি কবে থেকে চেনেন?, she replied that after liberation of the country, she heard from the *murubbis* that the accused was a big leader and that after liberation, he was held at Sherpur (in the deposition sheet, in Bangla, it has been recorded as “উত্তরঃ দেশ স্বাধীন হলে আমরা মুরুব্বিদের কাছে শুনেছি যে ডকে থাকা আসামী বড় নেতা ছিলেন এবং স্বাধীনতার পর তিনি শেরপুরে ধরা পড়েছেন।”). She could not say where, on which date and how the accused conspired to murder her husband. So, the testimonies of the PW that the accused murdered her husband by hatching conspiracy cannot be believed. More so, there is no *iota* of evidence or material on record such as enmity or any other discord or rivalry with the accused and his family with the accused for which he would conspire to murder her husband. It may further be stated that the husband of the PW was a cultivator and he allegedly had gone to Sohagpur-village for ploughing, whereas, the accused was a student of intermediate class. Like PW13 (which will be discussed later on), this PW gave a new story that on the previous day of the occurrence, i.e. the 9th day of Srabon 3(three) armies and the Al-Badars chased a girl to her room and they violated her, subsequently she was also violated which was neither stated by PWs 10, 12 and 13 nor was the case of the prosecution. The specific case of the prosecution was that the Punjabis, the Al-Badars and the Razakars went to Sohagpur-village only one day, i.e. on 10th Srabon, 1971 (27.05.1971), but she added the said new story. But this addition

of chasing of a girl to the room of the PW by the armies and the Al-Badars on the previous day of the occurrence, did not destroy her assertion made in her examination-in-chief that Al-Badar, Kamaruzzaman murdered her husband. The defence by cross-examining this PW could not assail this portion of the testimony of PW11.

In cross-examination, no suggestion was also given to her that she did not mention the name of the accused as the murderer of her husband. Her statement made to the Investigation Officer that “আমার চাচাতো ভাইদের থেকে জানবার পাইছি যে, পাক্কাবীদের (খান সেনাদের) সাথে আসা নসা ও মোজাফফর রাজাকাদের নেতা আছিল শেরপুরের বদর কামারজ্জামান।” shows that she also asserted the name of the accused as Al-Badar to the Investigation Officer. In cross-examination, she also asserted that it was not a fact that her husband was murdered only by the military. She further asserted that it was not a fact that not only Quadir Doctor and the Beharis were with the Punjabis but also Nasha, Mozaffar and the Al-Badars were with him. It is necessary to state that this PW along with PWs 12 and 13 was examined by the Investigation Officer on 28.09.2012. On behalf of the defence, a point was raised that such belated examination of a witness and then examination in the Tribunal as additional witness is not permissible in law. In Quadir Mollah’s case also this point was raised, but I discarded the point on the view that section 9(4) of the Act clearly permits such recourse. And I do not see any reason to take a different view in this case. Thus, a scrutiny of the testimonies of this PW shows the involvement of the accused as an Al-Badar (In this regard, my finding in charge No.2 may be seen) with the murder of her husband along with others at village-Sohagpur which has been proved beyond reasonable doubt, though his physical presence at the spot is a bit doubtful.

PW12, Hafija Bewa, stated in her examination-in-chief that on 10th Srabon, 1971 at 7 am, the Punjabis, the Al-Badars, the Razakars and the accused, the big Al-Badar leader of Sherpur, murdered her husband at their house at Sohagpur. She heard the name of the accused from the *murubbis*. She further stated that Quadir Doctor, Bogabura accompanied the Pak army, that the Pak army after entering into their house struck her by a gun and after having lain her on the ground violated her (the Tribunal noted that the witness shed tears ceaselessly). Many women including Karfuli Bewa (PW13), Shamala Bewa, were also violated, then said Quadir Doctor and Bogabura violated them and added that possibly, the accused was with them (in the deposition sheet, in Bangla, it has been recorded as “শেরপুরের কামারজ্জামান ও নাকি এদের সংগে ছিল।”). She further stated that except her husband, her paternal uncles: Seraj Ali, Khejur Ali, brother-Abul Hossain and many others were killed. Jalaluddin (PW10) and others buried the dead bodies. In cross-examination, she stated that the house of Quadir Doctor was at Kandipara and that of Bogabura was at Benupara and their houses were less than $\frac{1}{2}$ a mile away from her house. The house of Quadir Doctor was towards the North of her house and that of Bogabura towards the North-West and she knew both of them and saw them. She could not say the distance of the house of the accused from her house, but said it was on the South-West at Sherpur. She could not say who were the Razakar commander, the Al-Badar commander and the Chairman of Peace Committee at Nalitabari. She could know the accused after liberation of the country. She further stated that after liberation, she saw the accused in Television (in the deposition sheet, in Bangla, it has been recorded as “দেশ স্বাধীন

হওয়ার পর থেকে কামারজ্জামানকে চিনি। দেশ স্বাধীন হওয়ার পর আমি টিভিতে কামারজ্জামানকে দেখেছি।”)। Suggestion was given to her that she did not tell the Investigation Officer that the Punjabis, the Al-Badars, the Razakars and the accused, the big leader of Al-Badars at Sherpur murdered her husband at Sohagpur or she heard the name of the accused from the *murubbis* or Quadir Doctor, Bogabura violated her and possibly, the accused of Sherpur was also with them which she denied as being not a fact. Then she voluntarily said that the fact of violation could not be said to the Investigation Officer as those were matter of shame but thought to tell everything in Court. This PW was examined by the Investigation Officer (PW18) on 28.09.2012 after examination of 9(nine) prosecution witnesses. I consider it necessary to quote the entire statements of this PW made to the Investigation Officer to test the veracity of her testimonies before the Tribunal. In the context, the order passed by the Tribunal on 25.02.2013 is referable. The statements read as follows:

“আমার নাম হাফিজা বেওয়া। যুদ্ধের সময় আমার বয়স অনুমান ১৫/১৬ বৎসর ছিল। যুদ্ধের কিছুদিন আগে আমার বিবাহ হয়। আমার স্বামীর বাড়ী গফরগাঁও। সে আমাদের বাড়ীতেই থাকত। যুদ্ধের সময় শ্রাবন মাসের ১০ তারিখ মঙ্গলবার সকাল অনুমান ০৭.০০ টার সময় রাজাকার কাদির ডাক্তার ও বগাবুড়া কয়েকজন পাকবাহিনী (পাঞ্জাবী) নিয়া আমাদের গ্রামে আসে। আমার স্বামী ভয়ে দৌড় দিলে পাকবাহিনী (পাঞ্জাবী) আমার স্বামীকে গুলি করে মারে। ঐ দিন আমার স্বামী ছাড়াও আমার দুই চাচা সিরাজ আলী, খেজুর উদ্দিন, চাচাতো ভাই আবুল হোসেন, জেঠাতো বোনের জামাই জসিম উদ্দিন, জেঠাতো ভাই আইয়ুব আলী মওলানাকে পাকবাহিনী (পাঞ্জাবী) গুলি করিয়া মারে।

আমার স্বামীকে হত্যা করার পর একজন পাকসেনা (পাঞ্জাবী) ঘরে ঢুকে বন্ধুক দিয়ে আমার বুকে আঘাত করে আমাকে মাটিতে ফেলে আমার ইজ্জত মারে। সেদিন খানসেনা ও রাজাকাররা আমাদের গ্রামের করফুলী বেওয়া, শমেলা ও আরো কয়েকজন মহিলার ইজ্জত মারে। আমাদের পাড়ার জালাল উদ্দিন ও অন্যান্য লোকেরা ১টি গর্ত করে সবাইকে গর্তের ভিতর মাটি দেয়।

পরে লোকজনের মুখ থেকে জানবার পাইছি রাজাকার কাদির ডাক্তার ও বগাবুড়াদের নেতা আছিল শেরপুরের কামারজ্জামান।

পরবর্তীতে আবু সিদ্দিক এর সহিত আমার বিবাহ হয়। সেই ঘরে এক ছেলে আছে।

আমার স্বামী হত্যাকারী ও আমার ইজ্জত নষ্টকারীদের বিচার চাই।”

One very significant thing is that after giving statement to the Investigation Officer, the PW laughed and the Investigation Officer clearly noted the same as under:

“এই আমার জবানবন্দী। হাসে”.

From the statements made to the Investigation Officer, it is *prima facie* clear that this PW specifically stated the names of Quadir Doctor and Bogabura who came to their village with the Punjabis and a Punjabi army violated her. However, she told that she heard from others that the accused of Sherpur was their leader. But while she deposed in the Tribunal, she stated that the accused, big leader of Al-Badar along with the Punjabis, the Al-Badars and the Razakars, murdered her husband at their house, but then said that she heard the name of the accused from the *murubbis* without mentioning the name of any of the *murubbis*, so her hearsay statement is absolutely anonymous. And then specifically stated that she was violated by Pak army and the others (including Karfuli and Shamala) were violated by Quadir Doctor and Bogabura. It may be stated that PWs 10 and 11 stated that Quadir Doctor, Nasha and Bogabura were Razakars. At the risk of repetition, it is stated that it was never the case of the prosecution that the accused was a Razakar or he was a Razakar commander, rather it is the consistent case of the prosecution that the accused was the chief organiser of Al-Badars, so the question of the accused being a leader of Quadir Doctor and Nasha who were Razakars does not arise at all (in this regard finding on the point in respect of PW10 shall be applicable and referable). The omission on the part of PW12 implicating the accused with the murderer of her husband during the massacre committed on the date of occurrence in her statement to the Investigation Officer is a very vital and

material omission and that must be treated as a material contradiction which shakes the credibility of her testimony in the Tribunal that the accused accompanied the murderers, namely: the Punjabis, the Razakars, Quadir Doctor and Bogabura or that he was present at the place of the occurrence.

PW13, Karfuli Bewa, stated in her examination-in-chief that on the date of occurrence, her husband had gone to the *bondha* for ploughing, she heard the sound of firing from the *bondha*, people were murdered in *bondha* while they were engaged in ploughing the land and planting paddy saplings; seeing the condition, her husband came home saying Alas! Alas!, then two Punjabis came to her room, Nasha, Bogabura and the accused also accompanied them. Her husband who was sitting on the *chowki* was shot on his neck and then on belly causing his intestine out. Her brother-in-law (sister's husband) was also murdered. They had gone to Nokla keeping the dead body in the cattle shed and on coming back after 3 (three) days, found that the dead body of her husband was eaten up by the foxes and the dogs and then the skull and the bone of the hands of her husband were buried and then again she went to Nokla. Thereafter, when she again came back, those Al-Badars and the Punjabis started torturing. Then said after 3(three) days when she again came back home and was standing in the cattle shed, the Punjabis violated her. This time also Nasha, Bogabura, Muze (Mozaffar) and the accused were with the Punjabis. I consider it necessary to quote the relevant portion of the testimony of PW13 *verbatim* which reads as follows:

“আমরা লাশ গোয়াল ঘরে ঢেকে রেখে নকলা চলে যাই। তিন দিন পরে ফিরে দেখি আমার স্বামীর লাশ, শিয়াল, কুকুরে খেয়ে ফেলেছিল। তখন মাথার খুলি, হাতের হাড় মাটি চাপা দিয়ে খুয়ে নকলা চলে যাই। পরে আবার যখন আসলাম তখনও এই বদর ও পাঞ্জাবীরা আবার অত্যাচার শুরু করে। তিন দিন পর আমি

যখন বাড়ীতে আসি তখন আমি গোয়াল ঘরে দাড়িয়ে ছিলাম তখন পাঞ্জাবীরা আমার ইজ্জত নষ্ট করে। তখন পাঞ্জাবীদের সঙ্গে ছিল নসা, বগাবুড়া, মোজে এবং কামারজ্জামান।”

The above testimonies of PW13 show that the Punjabis, Nasha, Bogabura and the accused came to village-Sohagpur thrice and, in fact, she was violated when the the Punjabis, Nasha, Bogabura and the accused came on the 3rd occasion. But the prosecution case was that the accused on 25.07.1971 advised his accomplices, belonging to the Al-Badars and the Razakars, who accompanied the Pak army to Sohagpur-village, committed the crime of mass killing and rape on women. The prosecution case is far from the testimony of PW13. PWs10, 11 and 12 also testified that the Punjabis, the Al-Badars and the Razakars came to Sohagpur only one day, i.e. on 25th July, 1971. This PW is the president of Sohagpur *Bidhaba Kallan Samity*, she admitted in her cross-examination that many people went to her to take interview, but she did not know whether Mamunur Rashid went to her to take any interview. When she was shown the photograph of Mamunur Rashid by showing the book “সোহাগপুরের বিধবা কল্লারা-১৯৭১”, (written by Mamunur Rashid), she said that she did not know whether the photograph on the book was of Mamunur Rashid. PW10, who hails from the same village and the son of one of the victims of the massacre, in his cross-examination clearly stated that in the last part of 2011, Journalist Mamunur Rashid had gone to their area, Mamunur Rashid accompanied by Karfuli Bewa, the president of *Bidhaba Kallan Samity* went to their area and Mamunur Rashid recorded the statements of the members of many shaheed families and he (the PW) himself also gave statement to him (Mamunur Rashid) and he heard that Mamunur Rashid wrote a book over the incident of the *Bidhaba Palli* of Sohagpur and this shows that PW13 did not tell the truth

that she did not give any interview to Journalist Mamunur Rashid or she did not know him. Suggestions were given to her that she did not tell the Investigation Officer that on 10th Srabon, 1971, her husband went to *bondha* for ploughing or that her husband came home from *bondha* leaving aside the plough and was saying alas! alas! or then two Punjabis entered into the room accompanied by Nasha, Bogabura and the accused or the Pakistan army shot her husband on his throat or later on, at the belly causing his intestine out or when she came back subsequently, they started torture or after 3(three) days when she came home and was standing in the cattle shed the Punjabis violated her or Nasha, Bogabura, Muze and the accused were with them which she denied as being not a fact. So, like the other PWs, I find no other alternative but to refer to the statements made by this PW to the Investigation Officer on 28.09.2012, in view of the order of the Tribunal dated 25.02.2013. The statements read as follows:

“আমার নাম করফুলী বেওয়া। যুদ্ধের সময় আমার বয়স অনুমান ২১/২২ বৎসর ছিল। তখন আমার দুই মেয়ে এক ছেলে আছিল। যুদ্ধের সময় শ্রাবণ মাসের ১০ তারিখ মঙ্গলবার সকাল অনুমান ০৮.০০ টার দিকে আমাদের পাশের গ্রামের রাজাকার নছা ও বগাবুড়া সহ আরো ৮/১০ জন রাজাকাররা একদল খানসেনাদের নিয়া আমাদের বাড়ী চারদিক দিয়া ঘেরাও করে বাড়ীর ভিতরে দুইজন খানসেনা ঢুকে আমার স্বামীকে ঘর থেকে বের করে এনে বাড়ীর উঠানে গুলি করে মারে। ঐ দিন খান সেনারা আমার স্বামীর ননাসের জামাই জসিম উদ্দিন ও ৫/৬ জনকে গুলি করে মারে। এরপর একজন খানসেনা ও নছা রাজাকার আমার কোলে থাকা মেয়ে মরিয়মকে কাড়িয়া নিয়া মিল্লা মারে (ঢিল) উঠানে ফেলে দিয়ে আমাকে ঘরের ভেতরে নিয়ে একজন খানসেনা আমার ইজ্জত মারে। খানসেনারা চলে গেলে আমার স্বামীর লাশ কাথা দিয়ে ঢেকে গোয়াল ঘরে রেখে নকলা চলে যাই। তিনদিন পর বাড়ীতে আসিয়া দেখি শিয়াল কুকুরে আমার স্বামীর শরীরের মাংস খেয়ে ফেলেছে। আমি মাথার খুলি, পায়ের হাড় ও অন্যান্য হাড় কুড়িয়ে গর্ত করে মাটি চাপা দিয়া নকলা চলিয়া যাই।

পরে লোকজনের বগল থেকা জানবার পাইছি রাজাকার নসা ও বগাবুড়াদের নেতা আছিল শেরপুরের কামারঞ্জামান।

আমার স্বামী হত্যাকারী ও আমার ইজ্জত নষ্টকারীদের বিচার চাই।”

A mere reading of the statements of the PW recorded by the Investigation Officer as quoted hereinbefore, it is *prima facie* clear that she did not at all mention the name of the accused as a companion of the Punjabis and the Razakars, namely, Nasha and Bogabura; what she said was that the accused was the leader of Razakars, Nasha and Bogabura. As found earlier that the accused was simply an Al-Badar, the question of his being leader of Razakars, Nasha and Bogabura, does not arise at all (In this regard the finding given while discussing the testimonies of PWs 10, 11 and 12 shall be referable and applicable).

It is true that this PW was examined by the Investigation Officer after 41 years from the date of occurrence, but her age as recorded by the Tribunal in the deposition sheet as well as by the Investigation Officer show that she was 62 years only, and her testimonies (examination-in-chief and cross-examination) show that she was a very alert woman and she is also the president of *Bidhaba Kallan Samity*. The statements of this PW made before the Investigation Officer clearly show that they are the Razakars: Nasha and Bogabura who accompanied the Pak Sena, i.e. the Punjabis. It may be further stated that in her examination-in-chief, PW13 clearly stated the names of Nasha and Bogabura, the other PWs, namely: PWs 10, 11 and 12 told the names of Nasha, Bogabura, Quadir Doctor. Further when she specifically could say the names of Razakars: Nasha and Bogabura, there was no reason to omit or forget the name of the accused as their companion or his presence at the place of the occurrence. The omission in not mentioning the name of the accused to the Investigation Officer was a serious and vital omission and that amounts to a material and vital contradiction between her statements made

before the Tribunal and to the Investigation Officer. It may further be mentioned that this PW was examined by the Investigation Officer on 28.09.2012 and she was examined in the Tribunal on 15.10.2012 only after 16(sixteen) days, so when she deposed in the Tribunal, her memory was very fresh and there was no difficulty to remember what she stated to the Investigation Officer 16(sixteen) days before. Reading the testimonies of the PW before the Tribunal and the statements recorded by the Investigation Officer, it *prima facie*, appears to me that the name of the accused was added as an afterthought just to implicate him with the occurrence of Sohagpur.

In this regard, reference may be also made to exhibit-‘B’, the book written by Mamunur Rashid ‘সোহাগপুরের বিধবা কন্যা-১৯৭১.’ In this book, the interview of this PW has been published, but she mentioned the name of none except the Pakistani militaries who committed the massacre, but while she deposed in the Tribunal as PW13, she mentioned the name of the accused along with Nasha and Bogabura. It is to be further noted that this PW specifically stated that they are the Punjabis who violated her. So, I find it difficult to rely upon the testimony of this PW that the accused accompanied the Razakars: Nasha, Bogabura, Muze, the Al-Badr and the Pak army while the massacre took place at Sohagpur and she was violated.

DW1, Md. Arshed Ali, is the son of shaheed Ekabbar Ali who was also murdered on the date of occurrence stated in his examination-in-chief that on 10th Srabon, 1971, being Tuesday, the Pakistan Bahini committed the massacre at villages: Sohagpur, Benupara and Kakarkandi and his father was also murdered. On seeing his father shot inside their home at 8/8:30 a.m, he took shelter at Shinghimari khal towards the West-South of their house. Hundreds of

men and women of villages: Sohagpur, Benupara and Kakarkandi also took shelter in khal. Before sun set, he having been informed that the Pak army had left the area, he came home and saw many dead bodies in scattered condition including the dead body of his father. After burrying the dead bodies around 12 o' clock in the night, they along with many others (men and women) took shelter at the house of one of his relatives at Kakarkandi, Uttar village. The PW further stated that they were the settlers in the area. Fachi Chairman, Najir Master, Quadir Doctor and Nasha wanted to evict them from their hearth and home due to the previous enmity and all of them were Pakistani Dalal and the collaborators of Pak army and they are the persons who got the incident happened by influencing the Pak army. He further stated that they branded them (the PW and others) as *muktibahini* to the Pak Bahini. He further stated that they always used to co-operate with the *muktijoddhaas* and in the book 'গল্পে গল্পে ইতিহাস মুক্তিযুদ্ধে নালিতাবাড়ী' written by *muktijoddhaa* Abdur Rahman Talukder, the name of his father along with 79 others have been mentioned who embraced martyrdom. He proved the book as exhibit-'A'. He also proved the book 'সোহাগপুরের বিধবা কন্যারা' written by Journalist Mamunur Rashid as exhibit-'B'. He read the book and in the book, there are interviews of the widows. The DW does not appear to me to be an independent witness as he stated in his cross-examination that 1(one) year before Kafiluddin, the elder brother of the accused told him to depose in favour of the accused and then said he (Kafiluddin) brought him to Dhaka on 02.03.2013 (the DW was first examined on 06.03.2013) to depose. It also appears to me a bit unusual when he said that till the moment, he did not see the accused and does not know him though the accused was admittedly in the dock, while he was deposing.

Be that as it may, the testimonies of this DW, in no way, help the accused to prove his innocence in view of the testimony of PW11 discussed above.

From the testimonies of the 4(four) PWs, namely: PWs10, 11, 12 and 13, it appears to me beyond doubt that if any body accompanied the Pakistani Military at Sohagpur on the date of occurrence, they were Razakars: Nasha, Quadir Doctor, Bogabura and Mozaffar (Muze) and they did the massacre and violated women including PWs 12 and 13. (PW11 was allegedly violated by the Pak army on the previous day, i.e. 9th Srabon).

In view of my finding while dealing with charge No.2 that the accused was neither the chief organiser of the Al-Badar Bahini nor the chief of the Al-Badars, but an Al-Badar only, he could not, and did not have any advisory role or control over the Al-Badars in contemplating and taking steps towards the commission of 'large scale massacre' by raiding village-Sohagpur on 25.07.1971 as alleged in the charge. And since the accused was neither a Razakar nor its commander, he could not also have and did not have any such advisory role or control over the Razakars as alleged in the charge. The prosecution through PW2 tried to prove that the accused was involved with the planning in raiding village-Sohagpur, but I have already discarded his evidence, he being not a natural and most unworthy witness. The prosecution through PW1 tried to prove that the accused was one of the prominent leaders of the Al-Badars of greater Mymensingh and being stationed at the Al-Badars' camp at the Dak Banglow of Mymensingh Zila Parishad used to chalk out various anti-liberation plans and the Al-Badars in the camp used to go for

various operations in the night, but it failed, as PW1 is also not found to be a truthful witness (evidence of this PW will be discussed in dealing with charge No.7)

The Tribunal devoted much of its time dealing with the question of superior liability in order to fix the accused liable with the culpability of the crime alleged in this charge on the assumption that he was a leader of Al-Badars or an Al-Badar commander and thus, he had significant influence and authority over the fellow Al-Badars of the camp at Suren Saha's house at Sherpur town without deciding firstly whether he was at all the Al-Badar leader or in other words an Al-Badar commander at Sherpur. The Tribunal simply accepted the testimony of PW2 that the accused was the Al-Badar commander of Sherpur without considering whether his such version was at all acceptable in view of the other positive evidence that he is Kamran who was the Al-Badar commander at Sherpur and, in fact, the Al-Badar Bahini was formed by him at Sherpur and thus, made a fundamental mistake in coming to the finding that he being the leader of the Al-Badars failed to prevent the commission of the crimes at Sohagpur on the date and time mentioned by the prosecution. In view of my finding that the accused was only an Al-Badar and not the chief organiser of Al-Badar Bahini or the chief of the Al-Badars or an Al-Badar commander, I do not consider it necessary to dwell on the question of superior liability.

Conclusion:

The testimonies of PW11 have proved beyond reasonable doubt that the accused, an Al-Badar at Sherpur, was involved with the murder of her husband along with others on the date of occurrence that took place on 25.07.1971 at

village-Sohagpur though his physical presence, at the spot, is a bit doubtful and thus, he has committed the offence within the meaning of sections 3(2)(a)/4(1) of the Act, 1973 and accordingly, he is found guilty under the said sections and not under section 3(2)(a)(h) thereof as found by the Tribunal. In the facts and circumstances of the case, the evidence on record as discussed hereinbefore and the finding that the presence of the accused at the spot is a bit doubtful, I am of the view that proper justice would be meted out if he is sentenced to suffer imprisonment for life instead of death as awarded by the Tribunal. And accordingly, the order of conviction passed by the Tribunal under this charge against the accused is maintained with the modification of the sentence that he be sentenced to imprisonment for life.

Charge No.4

The charge reads as follows:

“that during the period of War of Liberation, on 23.08.1971 at the time of Magrib prayer you being the chief organiser of Al-Badar Bahini as well as leader of Islami Chatra (sic, it would be Chhatra) Sangha and or member of group of individuals instructed the members of Al-Badar Bahini to apprehend Golam Mostafa, a civilian, son of late Asir Uddin of village Gridda Narayanpur, Mostafabg thana road, Police Station and District-Sherpur and accordingly, from the place known as ‘*college morh*’ at about 7:30 to 11:00 am he was brought to the Al-Badar Camp which was set up in the house of one Surendra Mohan Saha. Thereafter, Tofael Ahmed, uncle of the apprehended person came to you and requested to set him at large. But in the night, you and your Al-Badar Bahini brought Golam Mostafa and one Abul Kasem to the ‘Serih Bridge’ and gunned them down that caused death of Golam Mostafa but Abul Kasem survived as he could jump to the river even having gunshot injury on his fingers.

Therefore, you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of ‘murder as crime against humanity’ and also for ‘complicity to commit such crime’ as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.
”

To prove this charge, the prosecution examined 3(three) witnesses, viz PWs 2, 5 and 14. Of these 3(three) PWs, I have already reproduced the evidence of PWs 2 and 14 in connection with charges as listed in charge Nos.2 and 3 respectively. I shall consider and sift the relevant evidence of these PWs while giving finding as to the proof and disproof of the allegations made in this charge. I shall now see the evidence of PW5-Mosharraf Hossain Talukder only.

PW5-Mosharraf Hossain Talukder, aged about 56 years (as recorded in the deposition sheet), stated in his examination-in-chief that in 1971, they had 4(four) brothers and 3(three) sisters, shaheed Golam Mostafa Talukder was their eldest brother. In 1971, he (the PW) was a student of class-VII of Sherpur G.K.High School, he used to study in that school living at Sherpur town. In 1971, Golam Mostafa was a student of 2nd year HSC, science group in Sherpur College. Golam Mostafa was the literary secretary of chhatra Union, Sherpur College. He used to write regularly for Rajshahi Betar and also used to study literature. Golam Mostafa had left for India after 26th March, 1971 (no specific date or approximate time has been mentioned) and after taking training for *muktijoddha* came at their village home after 1/1 $\frac{1}{2}$ months with arms. At that time, they all were living at their village home. A few days after *muktijoddha*,

Asad came to his village home and met Golam Mostafa. After 26th March, 1971, before intermediate examination, the Pakistan Government announced through mike that the students who would not appear in the intermediate examination would be branded as anti-Pakistani and would be treated as Mukti Bahini. Tofael Islam Talukder, the paternal uncle of the PW, who was a member of the Peace Committee, told his elder brother to appear in the examination assuring that he would look into the matter if he faced any difficulty. Thereafter, his brother appeared in the examination. At the last part of examination, on the 23rd day of August, 1971, during magrib prayer when his elder brother Golam Mostafa went to a grocery shop at Sherpur Collegemor for buying battery for radio, at the order of the accused, Sherpur Al-Badars' chief, some Al-Badars apprehended his brother and took him to the Al-Badars' camp at Suren Saha's house. On coming to know of the said fact, they informed the matter to their paternal uncle Tofael Islam Talukder who went to the Al-Badars' camp and saw his brother Golam Mostafa there and talked to him. After talking sometime, he (Tofael Islam) asked his brother to offer two *rakat nafal* prayers and accordingly, he (Golam Mostafa) offered the prayer, then his paternal uncle saw the accused in the camp. The accused was in the first floor of the camp, whereas his brother Golam Mostafa was at the ground floor, his paternal uncle Tofael Islam entreated the accused to release his brother, his uncle told the accused that he (Tofael Islam), Mostafa and the accused were the men of the same area, the accused told his paternal uncle not to repeat what he said and asked him (paternal uncle) to leave the place (in the deposition sheet, in Bangla, it has been recorded as: “তার পর বলেন কামারজ্জামান তুমি-আমি, মোস্তফা তো একই এলাকার। তারপর কামারজ্জামান সাহেব আমার চাচাকে বলেন যে, যা

বলেছেন আর বলবেন না এখন এখান থেকে চলে যান।”). Then his paternal uncle, Tofael Islam went to Doctor Samidul Haque, leader of the Peace Committee and told him the incident and requested him to take necessary steps to release Golam Mostafa, Doctor Samidul Haque contacted the accused and requested him to release Golam Mostafa. In that very night, the accused with some members of the Al-Badar Bahini took his brother to Seri bridge at Sherpur on the river Mrigi. One Abul Kasem was also taken on the bridge along with Golam Mostafa. At first, the muscle beneath the thigh of the right leg of Golam Mostafa was cut by bayonet and then he was shot dead. Abul Kasem saved his life by jumping into the river, though the shot hit the fingers of his right hand (in the deposition sheet, in Bangla, it has been recorded as: “সেখানে গোলাম মোস্তফার সাথে মোঃ আবুল কাশেমকেও বিজের (sic) উপর নিয়ে যাওয়া হয়। সেখানে প্রথমে ডান পায়ের উরুর নিচের মাংশ পেশী বেয়নেট দিয়ে কেটে ফেলা হয় এবং এর পর তাকে গুলি করে হত্যা করা হয়। আবুল কাশেমের ডান হাতের আঙ্গুলে গুলি লাগে এবং তিনি নদীতে ঝাপ দিয়ে প্রাণ বেঁচে যান”). On the next day of the occurrence, i.e. on the 24th day of August before noon, some villagers including one Tara Bhai of their village brought the dead body of Golam Mostafa at their village home at Kharkharia from the bank of the river to the East-North corner of Seri Bridge. He (the PW) saw the dead body of his brother, there was no flesh beneath the knee of the right leg of his brother and there was mark of bullet injury on the chest. After liberation, Abul Kashem met them (the PWs) and narrated the incident of killing of Golam Mostafa. Possibly after liberation, his (the PW) mother or father as informant filed a case with the Police Station against the accused and others accusing them for the killing of Golam Mostafa. In the last part of 2011, September-October, he gave

statements to Abdur Razzaque, Investigation Officer of the International Crimes Tribunal sitting at Sherpur Sadar Police Station praying for proper justice. He demanded the trial of the accused who was the chief organiser of Al-Badar Bahini of greater Mymensingh, chief of Sherpur Al-Badar Bahini and leader of Islami Chhatra Sangha, the controller of torture camp of the Al-Badars of that area and the killer of his brother shaheed Golam Mostafa for committing crimes against humanity in 1971. He further stated that he saw the accused first 3/4 years before 1971 when he attended a religious meeting at Teghoria Madrasa (in the deposition sheet, in Bangla, it has been recorded as: “১৯৭১ সালের ৩/৪ বছর আগে তেঘরিয়া মাদ্রাসায় আমি ধর্ম সভায় যাই এবং সেখানে প্রথম কামারুজ্জামান সাহেবকে দেখি”). He identified the accused in the dock.

In cross-examination, the PW stated that he passed S.S.C. examination and he was a contractor by profession. In 1971, they and the accused were not the inhabitants of the same Union, but they were the inhabitants of the adjacent Union. Home of Kamaruzzaman was $1\frac{1}{2}$ kilometer away from their village home. Since before 1971, he knew the accused and his brother, but he did not know his name. He knew the brother of the accused, because he did the job of helper (যোগান) in making tin roof in their house at town, the tin-shed room was possibly built in 1970. During the liberation war, in 1971, their residence in the town was vacant, some time he used to come by bi-cycle to oversee the same (in the deposition sheet, in Bangla, it has been recorded as: “১৯৭১ সালে যুদ্ধকালীন সময়ে আমাদের শহরের বাড়ী খালিছিল, মাঝে মধ্যে আমি সাইকেলে করে দেখে আসতাম।”). Their residence in the town was looted, but was not set on fire; he did not know who and on which date looted their house. In 1971, many people of their ancestry

including his father and paternal uncles were at their village home. Except Golam Mostafa, none of their ancestry directly took part in the *muktijoddha*. He did not know whether from the ‘স্বাধীন বাংলা বেতার কেন্দ্র’ and the *muktijoddhaas* through their various sources sent information to the examinees in every house that those who would take part in the higher secondary certificate examination would be marked as anti-liberation forces and appropriate steps would be taken against them and the examination would also be cancelled. He did not know whether, because of the contradictory publicity as to the participation in higher secondary certificate examination, a few numbers of examinees took part in the examination. He did not know whether after liberation of the country, higher secondary certificate examination which took place in 1971 was cancelled and fresh examination was held in May, 1972. He did not know what the accused used to do in 1970-71, then said the accused was in jail during the period, 1972-75. His (the PW) mother was the convener of *Gatak Dalal Nirmul* Committee of Sherpur area till her death, but he could not say when that committee was formed. In 2008’s election, the accused contested as a candidate from Jamaat-e-Islami in their area and he lost to Awami League candidate. He did not know whether the accused got the highest vote in the polling centre of his (the PW) area. He denied the defence suggestion that it was not a fact that their family was known as family of Awami League or during the election Awami League candidate used to visit their house and consult them or present MP, Atique shaheb stays at their house when he goes to the area. He denied the defence suggestion that it was not a fact that he became the president of the Managing Committee of shaheed Golam Mostafa High School in 2012 at the recommendation of the MP. The proposal of the

Managing Committee of the School along with the recommendation of the M.P was sent to the authority as per the rules. His brother Golam Mostafa appeared in the HSC examination, in 1971, living at Sherpur town, not from their residence but from 'Abeda Lodge', the residence of Atar Ali. Atar Ali Shaheb was Fufa by village courtesy, Abeda was his wife. Atar Ali and his wife died but their children are alive. The name of one of the sons of Atar Ali is Atiqur Rahman Dulal aged about 60 years, another son-Bachhu aged about 57 years. He did not know whether the name of another son is Liton or he works as journalist in the Bangladesh Observer, the name of another son is Manzu, aged about 50 years, but he does not know whether he lives in Dhaka or not. The distance of the house of Atar Ali from the 'College moor' is $2\frac{1}{2}$ kilometers. Sherpur Police Station is just opposite to their (the PW) residence at Sherpur town and Sherpur Dak Banglow is by the side of the Police Station. In 1971, there was no shop around their residence, but there were shops at thana mor. Teghoria Madrasa is $2\frac{1}{2}$ kilometers away from their village home. He could not say who was the chief principal or superintendent of the Madrasa at the relevant. He did not know whether there was any miking or any leaflet for holding the religious meeting in the Madrasa (Teghoria). He went to attend the religious meeting with the people of his village. He could not remember who of their village accompanied him. He could not say when the religious meeting was started and when it ended, he went to attend the meeting in the evening and stayed there for about 3(three) hours and while remained in the meeting many persons gave speeches, but he could not tell their names. He could not remember who presided over the meeting, he could not say what the season at

the time of the meeting was: summer, winter or rainy and at the relevant time, there was no electricity in their area. At the time of delivery of speech in the meeting by the accused, he was introduced by mentioning his name and no post or any other special identity was mentioned. He could not remember who the chief guest or the special guest of the meeting was. He denied the defence suggestion that it was not a fact that neither he nor the accused went to the religious meeting of Teghoria Madrasa or he did not see the accused there. He did not know in which class or school the accused used to study at the relevant time. He could not say in which class he himself used to study at that time (in the deposition sheet, in Bangla, it has been recorded as “ঐ সময় আমি কোন ক্লাসে পড়তাম তা সঠিকভাবে বলতে পারব না।”). At the relevant time, the accused had no beard and could not say whether he had moustache. He could not remember whether he attended any others religious meeting before or after that religious meeting (in the deposition sheet, in Bangla, it has been recorded as: “আমি উক্ত ধর্ম সভার পূর্বে বা পরে অন্য কোন ধর্ম সভায় গিয়েছি কিনা মনে নেই।”). The radio for which battery his brother went to the collegemor, Sherpur was in their village home (in the deposition sheet, in Bangla, it has been recorded as “আমার ভাই যে রেডিওর ব্যাটারী কেনার জন্য শেরপুর কলেজ (sic) মোড়ে গিয়েছিলেন সেই রেডিওটা আমাদের গ্রামের বাড়ীতে ছিল।”). He could not remember who the owner of the shop was to which his brother went to purchase the battery for the radio and he (the PW) never went to that shop. He could not remember how many shops were there at the Collegemor in 1971, but presently there are many shops. He had been to the Collegemor many times before or after liberation of the country. He denied the defence suggestion that it was not a fact that in 1971, there were 20/25 shops at the

Collegemor, Sherpur and as the shop keepers would not say about the abduction of his brother from there, so he said that he could not remember the shop and number of the shop owners. He himself did not see the accused to pass order to apprehend and take his brother from the collegemor. The house of Suren Saha was about 250/300 feet away, from the collegemor. The distance of the collegemor, Sherpur from their (the PWs) village home was about 5(five) miles. After sun set, rickshaw and bi-cycle were used as the transport for going to the collegemor from their village home. He could not remember who and when gave the information at their village home about the abduction of their brother; after getting the information of abduction, he did not go to Sherpur. After abduction of his brother, he went to Sherpur only after liberation of the country. Seri bridge was $2\frac{1}{2}$ /3 kilometers away towards the South from Suren Saha's house, generally rickshaw was used to be used for going to Seri bridge from Suren Saha's house. He went to Suren Saha's house after liberation of the country, then said did not go inside the house, but saw from outside. He did not know what was to the South of Suren Saha's house, to the North of Suren Saha's house there was a vacant land, then there was a tin-shed, then the Nayanibazar road, there is a 'gali' from the northern side of Suren Saha's house upto the road of Nayanibazar. The house of MP, Nizam is to the East of that 'gali' and there are houses of others as well. He did not know whether to the adjacent West of Suren Saha's house there were houses, shops and the go-down of roads and Highway. He did not also know whether the area of Suren Saha's house was densely populated or whether there was any vacant field. On getting information about the abduction of his elder brother, his mother, elder

paternal cousin (জেঠাতো ভাই) Abdur Rahman and many others tried to go to Sherpur, his mother came back from Bajeetkhila, because of imposition of curfew and he could not say when his brothers reached Sherpur and could not also say those who went to Sherpur when they came back. Abul Kashem about whom he spoke in his examination-in-chief was not known to their family from before, he hails from different police station. After liberation, he heard from Abul Kashem that his house was at village-Rani Sheemul under Police Station-Sreebardi, but he (the PW) never went to his house and he could not also say the distance of the house of Abul Kashem from his house. He did not know the name and the identity of the members of the family of Abul Kashem. He could not remember whether in 1971, there was electric light at Seri Bridge. He could not say the date on which his brother was abducted and killed and till date, he could not know in what manner and in what route his brother was taken to Seri Bridge. He never saw bayonet. He denied the defence suggestion that it was not a fact that the fact of cutting the muscle with bayonet was incorrect and was unusual. He could not say who the head master of the school was in which he read when he went to attend the religious meeting at Tegharia Madrasa. He could not say at that moment the English year of the death of his father. He could not show any paper to the Court as to the filing of any case with the Police Station or with any other legal authority accusing the accused for the killing of Golam Mostafa. He never saw any paper about the case filed by his father or mother against the accused as stated by him in his examination-in-chief. He did not know whether that case was filed against 11 persons accusing Kamran as accused No.1, but he heard that the case was filed accusing the accused as accused No.1. He denied the defence suggestion that it was not a

fact that as the name of the accused was not mentioned in that cause as an accused, he has hidden all the papers of that case. There was a *muktijoddha* organiser at Sherpur named Emdadul Haque Hira. He did not know whether in 1971, the house of Emdadul Haque Hera was occupied by the anti-liberation forces after looting. He did (08.02.2015) not know whether after liberation of the country Emdadul Haque Hira filed any case under the Collaborators Act implicating 150/200 anti-liberation forces who committed the offences of looting and setting fire and other criminal acts. He denied the defence suggestion that it was not a fact that as the name of the accused was not mentioned as an accused, so he pleaded his ignorance about the said case. He did not depose against the accused any where except the instant case. When he gave statements to the Investigation Officer, the Officer-in-Charge of Sherpur Sadar Police Station along with another was present, but he did not know the other person. When he had heard that the Investigation Officer came to Sherpur for investigation, he of his own accord and gave the statements to him going to the Police Station. He did not know whether his statements were recorded in the video. He gave the statements to the Investigation Officer in the last part of 2011. Thereafter, he did not meet the Investigation Officer or he did not give further statements. After recording his statements, the Investigation Officer read out the same to him and took his signature. The day, Golam Mostafa was abducted; he had an examination, but he (the PW) could not say the subject of the examination and in which part of the day, it was scheduled to be held. Recently, he has heard the name of Muntasir Mamun, a teacher of Dhaka University, but he does not know him personally. He did not know whether Muntasir Mamun wrote books on *muktijoddha* after making research. He did

not read the book ‘একাত্তরের বিজয় গাঁথা’ edited by Muntasir Mamun. He denied the defence suggestion that it was not a fact that as, in the book, some other person has been mentioned as the killer of his brother instead of the accused, he said that he did not read the book. He did not know whether the Investigation Officer examined anyone else of his ancestry. He denied the defence suggestion that it was not a fact that for political reason and to getting business facilities, he deposed falsely about the killing of his brother after 40(forty) years. He denied the defence suggestion that it was not a fact that on the date of occurrence, the Pak army apprehended his brother from the examination hall while he was appearing in the examination and there were newspapers reporting in that respect, even then he told lie. He denied the defence suggestion that it was not a fact that his brother was not abducted at the time and from the place as per order of the accused as stated by him. He denied the defence suggestion that it was not a fact that he could not say on which day and from where his brother was abducted; then he asserted that he stated the date and the place from where his brother was abducted; he would not be able to say only the ‘বার’. He did not give any statement before the *Gono Adalat* formed in 1992 or before the *Gono Tadanta* Commission formed in 1994. He denied the defence suggestion that it was not a fact that the accused was neither against liberation nor Razakar nor Al-Badar. He did not know whether the accused led a normal life after liberation of the country, passed higher secondary certificate examination in 1972 living in the local area and passed MA examination in 1975. He denied the defence suggestion that it was not a fact that during the liberation war, the accused was at his village home. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer

that the accused was in the first floor in the camp whereas, his brother was in the ground floor or then said to the accused, you, I and Mostafa were from the same area or then the accused told his paternal uncle not to repeat what he said and asked him to leave the place or there at first muscle from the lower portion of the thigh of the right leg was cut by bayonet or after liberation Abul Kashem met them and narrated the fact of killing of Golam Mostafa or he saw the dead body of his brother and also saw that there was no flesh beneath the knee of the right leg and there was mark of bullet injury on the chest or after liberation, possibly his mother or father as informant filed a case with the Police Station accusing the accused along with others for the killing of Golam Mostafa or the accused was the chief of Sherpur Al-Badar Bahini and leader of Islami Chhatra Sangha and controller of Al-Badar torture camp of that area and that he went to attend the religious meeting at Teghoria Madrasa 3/4 years before 1971, where he saw the accused first. He denied the last defence suggestion that it was not a fact that he did not meet a person named Abul Kashem of a different Police Station or he did not hear from him about the killing of his brother and all these were false, concocted, *malafide* and collusive.

FINDINGS:

The accusation against the accused in this charge is that on 23.08.1971, at the time of Magrib prayer, he being the chief organiser of Al-Badar Bahini as well as leader of Islami Chhatra Sangha and or member of group of individuals instructed the members of Al-Badar Bahini to apprehend Golam Mostafa, a civilian, son of late Asir Uddin of village Gridda Narayanpur, Mostafabag thana road, Police Station and District-Sherpur and “accordingly, from the ‘college morh’ at about 7:30 to 11:00 a.m (sic, it would be p.m.), he

was brought to the Al-Badars' camp which was set up in the house of one Surendra Mohan Saha." Thereafter, Tofael Ahmed, uncle of Golam Mustafa, came to the accused and requested him to set Golam Mostafa at large. But in the night, the accused and his Al-Badar Bahini took Golam Mostafa and one Abul Kashem to Seri Bridge and gunned them down causing the death of Golam Mostafa, but Abul Kashem "survived as he could jump to the river even having gunshot injury on his fingers." The further common accusation was that the accused substantially participated, facilitated and contributed to the commission of offence of 'murder as crime against humanity' and had also 'complicity to commit such crime' as specified in section 3(2)(a)(h) of the Act, 1971 punishable under section 20(2) read with section 3(1) thereof.

Earlier (while dealing with charge No.2), I have already found that PW2, Mohan Munshi, was not a guard at the Al-Badars' camp at Suren Saha's house and also not a natural and trustworthy witness, yet let us have a look at his testimonies so far as this charge is concerned. He stated in his examination-in-chief that Golam Mostafa of Kharkharia was brought to the Al-Badars' camp at the house of Suren Saha. It may be stated that no specific date even any approximate time with reference to any month or any part of the month was mentioned by PW2 as to the apprehending and bringing Golam Mostafa to the camp. He further stated that Golam Mostafa was blindfolded and his hands were tied from behind and being beaten, he was crying and saying "মাগো-বাবাগো" and he (in the deposition sheet, in Bangla, it has been recorded as "গোলাম মোস্তফার চোখমুখ, হাত পিছনে বাঁধা ছিল, তাকে মারপিট করা হচ্ছিল, সে মাগো-বাবাগো বলে চিৎকার করছিল।") was kept just below the stair case where the PW was sitting.

Golam Mostafa wanted to drink water, but no water was given to him. A man came from Kazirkhamar to get him released, but he was not released. The paternal uncle of Golam Mostafa also came from Kharkharia to get him released, but he was not released. Before evening, when Major Riaz came, the accused told him that *Bichhun* or *Suba* of Awami League was apprehended; Major Riaz told that after prayer he would visit another camp, then he would come back to the camp. In the meantime, a retired army named Nasir came and took Golam Mostafa blindfolded in a rickshaw. He further stated that Nasir took a *chaina* gun from the office with him and took him to Seri Bridge. The accused had left the camp 5(five) minutes before. After $\frac{1}{2}$ an hour, the accused and Nasir entered into the camp together and went to the upper floor. Nasir coming from the upper floor told that the hand of sir was perfect and he had the courage to operate the gun (in the deposition sheet, in Bangla, it has been recorded as “নাসির উপর তলা থেকে আইয়া কইতাছে স্যারের হাত এখন সই হইছে এখন সাহস হইছে বন্দুক চলাইতে পার”). Meanwhile Major Riaz came and went upwards and enquired where the man whom was brought was? The accused told that Nasir had taken him, then Major Riaz told did Nasir become more powerful than him (Major Riaz) or the accused? At that time, when Nasir went upwards Major Riaz struck him with the butt of a gun and being struck, he (Nasir) rolled down to the ground floor by the stair, then Major Riaz went away and the accused said that he had to go to Nokla as he had urgent business there. Thereafter, the accused started for Nokla with 20/25 armed Razakars by a truck and one Jahangir accompanied him.

Let us see how far these testimonies of PW2 are acceptable. Like charge Nos.2 and 3, this PW substantially and materially deviated from his statements made to the Investigation Officer while he deposed before the Tribunal as PW2 and added something new to what he stated to the Investigation Officer. This will be clear if we look at the relevant portion of the statements of PW2 so far as this charge is concerned made to the Investigation Officer (the entire statements has been quoted earlier) which are:

“আগস্ট’ ৭১ মাসের শেষের দিকে সন্ধ্যার পরপর গুদা নারায়ণপুরের মোস্তফাকে আলবদররা শেরপুর শহর থেকে ধরে সুরেন্দ্র মোহন সাহার বাড়ীর বদর অফিসে নিয়ে আসে। কামারজ্জামান দাড়াইয়া থাকিয়া বদর নাসির ও মাসুদকে দিয়ে ভীষণভাবে পিঠাইয়া আধমরা করিয়া ফেলে। এর কিছুক্ষণ পর উচা লম্বা একজন লোক সেখানে আসিয়া মোস্তফাকে ছাড়িয়া দেওয়ার জন্য কামারজ্জামানের নিকট অনেক অনুরোধ করে কিন্তু মোস্তফাকে ছাড়ে না। পরে রাত্র অনুমান ১২ টার দিকে কালো কাপড়ের জম টুপি পরাইয়া বদর অফিস হইতে নিয়া যায়। পরে দিন শুনি মোস্তফাকে শেরী ব্রিজে নিয়া গুলি করে মেরে ফেলেছে। তার লাশ নদী থেকে তার আত্মীয় স্বজন নিয়া গেছে।”

From the above, it is clear that PW2 did not tell the Investigation Officer that Golam Mostafa was brought to the Al-Badars’ camp at Suren Saha’s house blindfolded and his hands were tied from behind and that beaten in that condition by unnamed persons, he was crying and saying “মাগো-বাবাগো” and he was kept below the staircase where the PW was sitting, that Golam Mostafa wanted to drink water, but no water was given to him, that some one from Kazirkhamar and the paternal uncle of Golam Mostafa from Kharkharia came to the camp and they tried get him released, but he was not released and that before evening, when Major Riaz had come in the camp, the accused told him that *Bichhun* or *Suba* of Awami League was apprehended and that Major Riaz told that after offering prayer, he would visit another camp and then would come back to the camp. He did not also tell the Investigation Officer the other

facts stated in his examination-in-chief right from taking of Golam Mostafa by a retired army, Nasir and then return of the accused and Nasir together to the camp and the striking of Nasir by Major Riaz by the butt of a gun and his (Nasir) rolling down to the ground floor. He did not tell the Investigation Officer that after Major Riaz had left the camp, the accused left for Nokla with 20/25 armed Razakars by a truck.

On behalf of the accused, it was argued that as per prosecution case, victim Golam Mostafa was apprehended from the collegemor on 23.08.1971 at 7:30 pm to 11:00 pm and was brought to the Al-Badars' camp and was gunned down in the night near Seri Bridge, but PW2 stated that when Major Riaz came to the camp before evening, the accused told him the fact of arrest of Golam Mostafa, and Major Riaz told that after offering prayer, he would visit another camp and then would come again, but in the meantime, one retired army Nasir came to the camp and took Golam Mostafa blindfolded in a rickshaw and that Nasir took a chinese gun from the office and went to Seri Bridge and 5(five) minutes before the accused had gone and all these happened much before 12 o'clock in the night. Whereas, in the statements made to the Investigation Officer, the PW stated that at about 12 o'clock in the night, Golam Mostafa was taken away from the Al-Badars' office by putting death cap without mentioning who took him and all these show that Golam Mostafa was never taken to the camp after being allegedly apprehended at the Collegemor as alleged by the prosecution and the PW lied before the Tribunal. It was further argued that there is contradiction in between the statements of PWs 2 and 3 as to the presence of Major Riaz at the Al-Badars' camp at Suren Saha's house and this also makes the testimony of PW2 regarding this charge doubtful.

PW3 in his cross-examination stated that Major Riaz was injured at Kamalpur war and from there he was taken to Jamalpur by a vehicle and from Jamalpur, he went to Pakistan with Al-Badar, Kamran, but he could not say how they went to Pakistan. He further stated that Major Riaz was injured in an incident which took place in the first part of August, whereas PW2 stated in his examination-in-chief that on that date (in the testimony no date has been mentioned and in Bangla it has been recorded as “সেদিন”), Major Riaz was shot at his hand, leg and after making a telephone call a helicopter came and he was taken away and in his cross-examination, the PW stated that Major Riaz was injured in a mine blast $2\frac{1}{2}$ /3 months after he joined the Al-Badars’ camp as *Darwan*. The fact that Major Riaz was injured in the war at Kamalpur in the first part of August is clearly corroborated by the documentary evidence exhibit-‘G5’ ‘Bangladesh at War’ a book written by Major General A. K. M. Shafiullah, former chief of Bangladesh army Staff. At page 195 of the book, it has been clearly stated that Kamalpur war took place from 31st July to 1st August, 1971. If Kamalpur war had taken place from 31st July to 1st August, 1971 and Major Riaz had gone to Pakistan immediately after being injured, then how PW2 could hear the conversation between the accused and Major Riaz regarding Golam Mostafa after he was allegedly taken to the Al-Badars’ camp at Suren Saha’s house on 23rd August, 1971 and this also makes his testimony in that respect false and the case of the prosecution involving the accused doubtful. But the Tribunal accepted the testimony of PW2 in respect of this charge as if those were Gospel truth without considering the apparent major vital material contradictions in between his statements made before the

Tribunal and the Investigation Officer and his credibility as a witness as discussed while dealing with charge No.2.

PW5, Mosharraf Hossain Talukder, is the full-brother of deceased Golam Mostafa. Admittedly, he is a hearsay witness. He stated in his examination-in-chief that in 1971, he was a student of class-VII of Sherpur G.K.High School, he used to study living at Sherpur town. His elder brother shaheed Golam Mostafa was a student of 2nd year HSC, science group of Sherpur College. After 26th March, 1971, Golam Mostafa had gone to India and came to their village home with arms after 1/1 $\frac{1}{2}$ month taking training on *muktijoddha*. At that time, all of them were staying at their village home. After 26th March, 1971 before the intermediate examination when the Pakistan Government announced through miking that the intermediate examinees who would not appear in examination would be taken that they took stand against Pakistan and that they would be regarded as *muktibahini*. His paternal uncle, Tofael Islam Talukder who was a member of the Peace Committee told his brother to appear in the examination assuring him that he would take care of him in case any difficulty arose and accordingly, his brother took part in the examination. Towards the end of examination, on 23rd August, 1971 during magrib prayer when his brother Golam Mostafa went to a grocery shop at the collegemor, Sherpur town to purchase battery for radio, at the order of the the accused, the Al-Badar chief, some Al-Badars apprehended him and took him at the Al-Badars' camp at Sherpur, knowing that fact his paternal uncle Tofael Islam was informed who went to the Al-Badars' camp and talked to Golam Mostafa. The accused was in the first floor; his brother was in the ground floor.

Tofael Islam requested the accused to release Golam Mostafa. As in spite of the request by Tofael Islam, the accused did not release Golam Mostafa, he (paternal uncle) approached Dr. Samidul Haque, the leader of the Peace Committee to release Golam Mostafa who also requested the accused to release Golam Mostafa, but he was not released and in that very night, the accused with some Al-Badars took Golam Mostafa to Seri Bridge over the river Mrigi where Golam Mostafa was shot dead after cutting his muscle from the thigh of the right leg by bayonet. One Md. Abul Kashem was taken with Golam Mostafa who was also shot, but he (Abdul Kashem), saved himself by jumping into the river though bullet hit the fingers of his right hand. After liberation, Abul Kashem saw them and told the incident of the killing of Golam Mostafa. On the next day, i. e. on 24th August, the dead body of Golam Mostafa was brought to their village home at Kharkharia before noon by one Tara Bhai and others of their village from the East-North corner of the bank of the river. He saw the dead body of his brother, there was no flesh below the knee of his right leg and there was bullet injury on his chest.

Let us see first how far the story of taking of Golam Mostafa at the Al-Badars' camp at Suren Saha's house by the Al-Badars at the order of the accused, was practicable and believable. This PW in his examination-in-chief categorically stated that when Golam Mostafa came to their village home after 1/1 $\frac{1}{2}$ months taking training in India on *muktijoddha* in 1971, then all of them were staying at their village home. In cross-examination, he also reasserted the same fact. He further stated that many people of their ancestry including his father and paternal uncles stayed at their village home. During the liberation

war, in 1971, their house at Sherpur town was vacant, sometime; he used to come to see the house by bi-cycle. He further stated that Golam Mostafa appeared in the HSC examination in 1971 not from their house but from the house of Atar Ali which was known as Abeda lodge. Atar Ali was his 'Fufa' by village courtesy and Abeda was his wife. Atar Ali and his wife are dead, but their children are alive. The house of Atar Ali was $2\frac{1}{2}$ kilometers away from the collegemor and the collegemor was 5(five) miles away from their village home. The radio, for which his brother went to the collegemor to purchase battery, was at their village home (in the deposition sheet, in Bangla, it has been recorded as “আমার ভাই যে রেডিওর ব্যাটারী কেনার জন্য শেরপুর কলেজ (sic) মোড়ে গিয়েছিলেন সেই রেডিওটা আমাদের গ্রামের বাড়ীতে ছিল।”). It is absolutely unnatural and absurd that when the family members of Golam Mostafa were staying at their village home and he was allegedly appearing in HSC examination and the radio was at village home, he would go to the collegemor $2\frac{1}{2}$ kilometers away from the house of Atar Ali (staying where he was appearing in examination) to purchase battery for that radio. What more, when the PW in his cross-examination stated that he used to come to Sherpur town by bi-cycle after gape (in the deposition sheet, in Bangla, it has been recorded as “মারো মধ্যে”) to oversee their residence at Sherpur town. It may further be stated that the PW further stated that the collegemor was 5(five) miles away from their village. It also sounds to me to be more absurd that Golam Mostafa who allegedly went to India after 26th March, 1971 and took training on *muktijoddha* would appear in the HSC examination when from ‘স্বাধীন বাংলা বেতার কেন্দ্র’ as well as the *muktijoddhaas* were sending various messages that those who would appear in

the intermediate examination would be treated as anti-liberation forces and action would be taken against them, even approached by his paternal uncle who was allegedly a member of the Peace Committee and such absurdity creates a *prima facie* doubt about the very story of apprehending of Golam Mostafa by the Al-Badars from the collegemor and then taking him to the Al-Badars' camp at Suren Saha's house at the order of the accused. Merely because suggestion was given to this PW that the Pak Senas apprehended Golam Mostafa from the examination hall while he was appearing in examination on the date of occurrence and that news was reported in the newspaper does not mean that the fact of appearance of Golam Mostafa stood proved and the prosecution would be absolved from the onerous task of proving its case beyond reasonable doubt (see rule 50 of the Rules of Procedure). In the context, it may be stated that although sub-rule (1) of rule 51 has clearly spelt out that the onus of proof as to the plea of *alibi* or to any particular fact or information which is in the possession or knowledge of the defence shall be upon the defence, sub-rule (3) thereof has provided that mere failure to prove the plea of *alibi* and or the documents and materials by the defence shall not render the accused guilty. Sub-rule (2) of rule 43 has further provided that a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty. Suggestion was given to the PW that he did not tell the Investigation Officer the story as stated by him in his examination-in-chief that the accused was in the first floor of the camp and his brother was in the ground floor upto the story that he saw the accused first 3/4 years before 1971 at a religious meeting at Teghoria Madrasa which he denied as being not a fact, but on a persual of the statements of PW5 recorded

by the Investigation Officer, it appears that he did not say so to him. The testimony of PW to the effect that he saw the the accused first 3/4 years before 1971, at a religious meeting of Teghoria Madrasa when he went there to attend the meeting does not inspire any confidence to me. My reasons are: (i) in 1971, the PW was a student of class-VII, so 3/4 years before 1971, he was a student of Class-III/IV and hardly was aged about 8/9 years, (in the deposition sheet, his age has been recorded as 56 years and in the statement recorded by the Investigation Officer on 16.09.2011 his age has been recorded as 54 years), the Madrasa was $2/2\frac{1}{2}$ kilometers away from his village home and in cross-examination, he stated that he went to attend the meeting with the villagers, is it believable that a minor boy of Class-III/IV would be allowed by his guardian to go with the villagers to attend a religious meeting when his father was alive and he had his elders including Golam Mostafa, (ii) the evidence on record abundantly show that in 1971, the accused was a student of intermediae class either at Asheque Mahmud College, Jamalpur or Nasirabad College at Mymensingh and 3/4 years before he was at best a student of Class-IX or X, so it is unbelievable that a student of Class-IX or X would be allowed to address a religious meeting of a Madrasa, (iii) in cross-examination, the PW stated that in the said religious meeting, the accused delivered speech and before speech, he was introduced by mentioning his name. Interestingly, he could not say who the other speakers were and who the Chairman of the meeting was, but he remembered the name of the accused only. All these show that the PW was somehow bent upon to implicate the accused with the murder of his brother, Golam Mostafa. He appears to be a partisan witness, therefore, I do not feel it

safe to rely upon his testimonies to believe the prosecution case that Golam Mostafa was apprehended from the collegemor on the date of occurrence and was taken to the Al-Badars' camp at Suren Saha's house and from there he was taken to Seri Bridge and was shot dead. It is true that hearsay evidence has been made admissible in respect of a case under the Act, 1973 by sub-rule (2) of rule 56 of the Rules of Procedure, but that does not mean that such evidence has to be accepted on their face value. The reliability and probative value of the hearsay evidence has to be assessed and weighed considering the overall facts and circumstances of the case and the credibility of a witness as well. But a reading of the judgment of the Tribunal, it appears that it accepted the hearsay evidence of PW5 without considering the improbability of the prosecution case as stated by him, the material contradictions in the statements made before the Tribunal and the Investigation Officer and his testimony in cross-examination.

The next witness to be considered is PW14, Mujibur Rahman Panu. This PW is also a hearsay witness. This PW in his examination-in-chief stated that one day in the last part of May, 1971 while he was going to Ahmednagar camp to give *hajira* and reached near Kharpar brickkilon, he met Golam Mostafa and on being asked where he was going, Golam Mostafa replied that he was going to appear in the HSC examination. After giving *hajira* in the camp while he returned home in the night came to know from his brother Ansar Ali that in the evening of that day, the accused and his accomplices apprehended Golam Mostafa from the road (no specific place mentioned) and took him to the Al-Badars' camp at Suren Saha's house and in the next morning, he (the PW) heard that the bullet hit dead body of Golam Mostafa was lying beneath the Seri Bridge whereas, as per the prosecution case and also the evidence of PW5,

Golam Mostafa was apprehended on 23.08.1971 and was killed in the night of that day. Earlier, I discussed the evidence of this PW in detail in respect of charge No.2 and I found him not a trustworthy witness. It may further be stated that the allegation in charge No.5 was that the accused as the chief organiser of Al-Badar Bahini as well as leader of Islami Chhatra Sangha or member of group of individuals and his 4/ 5 accomplices apprehended the PW and one Liakat from their houses and took them to Razakars' camp at 'Banthia Building' at Raghunathpur Bazaar and after confining them there, were tortured and thereafter, they were sent to the Police Station and after confining them there for 4(four) days, at the order of the accused, the PW, Liakat and 11(eleven) civilians were shifted to 'Jhinaighati Ahmednagar Army camp. Thereafter, they were taken to a ditch behind Ahmednagar UP office and then segregating three from the line the rest were gunned down to death and at the time of causing death by gun shot, the accused and his accomplice one Kamran were present. PW14 further deposed that eventually, he and Liakat were released by Major Riaz on the condition that he would give hajira at the Ahmednagar army camp and accordingly, he used to give hajira in the said army camp, but this version of the PW was disbelieved by the Tribunal. Therefore, I find no reason to believe the testimony of this PW that in the last part of May, while he was going to give hajira at Ahmednagar army camp, he met Golam Mostafa who told him that he was going to appear in H.S.C. examination and he heard from his brother Ansar Ali that in the evening of that date, the accused and his accomplices apprehended Golam Mostafa from the road and took him to the Al-Babars' camp at Suren Saha's house. The Tribunal though disbelieved PW14 in respect of charge No.5, believed his testimony as

to the alleged “acts and conducts of the accused, he experienced during his detention at the army camp.” It may further be stated that the Tribunal itself disbelieved the fact of meeting of PW14 with Golam Mostafa on the date of his abduction, on his way, to Ahmednagar army camp.

From the evidence of PW5, it further appears that one Abul Kashem was taken to Seri Bridge along with Golam Mostafa and was shot, but could save him by jumping into the river. PW5 heard about the incident of shooting of his brother at Seri Bridge from Golam Mostafa. From the cross-examination of the PW, it appears that Abul Kashem hails from village-Rani Shimul under Police Station-Sreebardi, District Sherpur, but he was not examined in the case and no explanation was also given by the prosecution for his non-examination. To me, it appears that he (Abul Kashem) was the best person to depose in the case as to the actual offender causing his death. And non-examination of Abul Kashem clearly creates an adverse presumption against the prosecution case of killing Golam Mostafa in the manner and at the time mentioned in the charge and the benefit of such presumption must go to the accused. But the Tribunal has not at all considered this serious *lacuna* in the prosecution case.

DW2, Al-haj Moulavi Mohammad Ashkar Ali, aged about 70 years, a retired school teacher, stated in his examination-in-chief that the house of Golam Mostafa and his one are adjacent villages in the same Union. He joined Kharkharia Junior Girls’ School adjacent to the house of Golam Mostafa as religious teacher. He has intimacy with the family of Golam Mostafa as the younger sister of Golam Mostafa was his student and his father Asiruddin was also a school teacher and he regularly visits their house. In the last part of August in 1971, on a Friday morning, he heard that Golam Mostafa was killed

by Pakistan army. Hearing the said news, he went to the house of Golam Mostafa and he waited long time, his dead body was brought at jumma prayer's time. He waited at the house of Golam Mostafa upto Janaja prayer which was held after Asar prayer and he participated in *Janaja*, *Janaja* was led by Syed Shaheb, the maternal grandfather of Golam Mostafa. After liberation, he was appointed as the Imam of the Mosque adjacent to the house of Golam Mostafa by replacing the then Imam Moulavi Abdur Rahim, he being a Jamaat-e-Islami supporter. He specifically stated that since the killing of Golam Mostafa, he never heard from his parents and from the villagers that the accused was involved with his murder. In cross-examination by the prosecution, he categorically stated that among the persons who collaborated the Pak army in 1971, Mozzafar, Kamran, Suruzzaman, Samidul Doctor were prominent. He emphatically denied the prosecution suggestion that the accused as the leader of Razakars and the Al-Badars collaborated with the Pak army. He further stated that they never heard that the accused was the leader of Al-Badars. He denied the defence suggestion that he suppressed facts being influenced by the accused and his men and also for pecunary benefit. The PW being a man of the adjacent village of the same Union and an Imam of the mosque adjacent to the house and also an ex-teacher of Kharkharia Junior Girls' School renamed as shaheed Golam Mostafa Junior Girls' School appears to be a natural witness. The prosecution by cross-examining him could not extract anything from him that he ever heard from the parents of Golam Mostafa and others of the village that the accused was responsible for his murder. The statements made by this PW in his examination-in-chief to the effect “১৯৭১ সালে আগস্ট মাসের শেষ দিকে শুক্রবার সকালের দিকে আমি শুনতে পাই খড়খড়িয়ার গোলাম মোস্তফাকে পাকিস্তানী সেনারা মেরে ফেলেছে।

মোস্তফা হত্যার পর থেকে আমি কখনও তার মা-বাবা পাড়াপড়শিদের কাছে মোস্তফা হত্যার সাথে কামারুজ্জামান নামক কোন ব্যক্তি জড়িত ছিলেন বলে আমি শুনিনি।” remained firm and unshaken in cross-examination. The Tribunal did not at all consider the above testimony of DW2 in arriving the finding of guilt against the accused. The Tribunal simply considered the fact that DW2 admitted in his cross-examination that Kamran, Samidul, Mozzafar, Suruzzaman were the notable persons who used to provide assistance to the Pakistan army in 1971.

From the impugned judgment, it appears that the Tribunal accepted the testimonies of PW2 and PW5 as sacrosanct in respect of the allegations made in this charge without considering the apparent improbability in the prosecution case and the material contradictions in the testimonies of PWs 2, 5 and 14 and *interse* material contradiction in the statements made in the Tribunal and to the Investigation Officer. It further appears that the Tribunal failed to consider the relevant material testimonies of PWs 2 and 5 in their cross-examination. The Tribunal simply relied upon the testimonies of these PWs in their examination-in-chief and then believed their testimonies as if there was no cross-examination on the finding that the defence could not refute their versions. The findings of the Tribunal that

“In the case in hand the facts we have found proved from evidence presented are:

- (i) that the victim Golam Mostafa was abducted and brought to Al-Badar camp;
- (ii) that he was so brought at the camp by Al-Badar men;
- (iii) that despite approaching to accused Muhammad Kamaruzzaman by two local members of peace committee the victim was not set free;
- (iv) that conversation with Major Riaz about detainee Golam Mostafa reflects antagonistic attitude of the accused;

- (v) that the accused allowed and approved Al-Badar man Nasir to bring Golam Mostafa to Seri Bridge [crime site];
- (vi) that the accused and Nasir came back to the camp together after killing of Golam Mostafa;
- (vii) that the accused failed to prevent the commission of the event of killing, despite the fact that he had significant authority and control over the Al-Badar men.”

are based on non-consideration of the material evidence of PWs 2 and 5 in their cross-examination as have been pointed out hereinbefore and also on non-consideration of the fact that PW2 could not be and cannot be accepted as a guard at the Al-Badars' camp at Suren Saha's house and thus, a natural witness to the occurrence, but the Tribunal accepted him as an Al-Badar and as a guard as well in that camp and thus, made a fundamental error in accepting his evidence as true. From the finding of the Tribunal, it further appears that the Tribunal sifted the burden on the defence to prove that he was not involved with the occurrence or that he was innocent in total disregard to sub-rule (2) of rule 43 and rule 50 of the Rules of Procedure.

In view of the discussion made above, I am constrained to hold that the prosecution failed to prove the allegations made in this charge against the accused that at his instruction, the members of the Al-Badar Bahini apprehended Golam Mostafa from the collegemor on 23.08.1971 at about 7:30 pm to 11:00 pm and was taken to the Al-Badars' camp at Suren Saha's house and from there he was taken to Seri Bridge on the river Mirigi and then was gun down and therefore, he is entitled to be acquitted of this charge and accordingly, he is acquitted.

Charge No.7

The charge reads as follows:

“that during the period of War of Liberation, on 27 Ramadan at about 01:00 pm you being chief organiser of Al-Badar Bahini as well as leader of Islam Chatra Sangha or member of group of individuals being accompanied by 15-20 armed Al-Badar members raided the house of one Tepas Mia of village Golpajan Road, Kachijhuli, police station-Kotawali under district Mymensingh abducted Tepas Mia and his elder son Zahurul Islam Dara and took them to Al-Badar camp situated at District Council a Dak Bangalaw. On the next early morning the Al-Badars took them along with five others to the bank of river Brahmaputra. After tying their hands they were lined up and at first Tepas Mia was attempted to be charged with bayonet but he escaped by jumping to river. The Al-Badars fired gun shots in the result Tepas Mia received injury on the leg and he managed to escape. But the rest 06 unarmed civilians were charged with bayonet to death.

Therefore you Muhammad Kamaruzzaman are being charged for substantially participating, facilitating and contributing to the commission of offence of murder as ‘crime against humanity’ and also for ‘complicity to commit such crime’ as specified in section 3(2)(a)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

You are thus liable for the above offences under section 4(1) of the Act.

Thus you have committed offences under section 3(2)(a)(h) which are punishable under section 20(2) read with section 3(1) of the Act.

The aforesaid charges of crimes against humanity and also complicity to the commission of such crimes described under section 3(2)(a)(h) of the Act are punishable under the provisions of section 20(2) read with section 3(1) of the Act which are within the cognizance and jurisdiction of this Tribunal. And we hereby direct you to be tried by this Tribunal on the said charges. You have heard and understood the aforesaid charges.”

To substantiate the charge, the prosecution examined 3(three) witnesses, namely: PW1-Md. Hamidul Haque, PW9-Md. Abul Kashem and PW15-Md. Dabir Hossain Bhuiyan.

PW1-Md. Hamidul Haque, aged about 61 years (as recorded in the deposition sheet), stated in his examination-in-chief that he studied in Ananda Mohan College, Mymensingh and then Dhaka University. During liberation war, he was the elected VP of Ananda Mohan College Chhatra Sangad. In 1971, he was aged about 22/23 years and the student of honours class. He involved himself with the students' politics actively after the declaration of 6(six) points in 1966 and in course of time, he became the Assistant Secretary of Chhatra League of greater Mymensingh District and also discharged the functions as secretary-in-charge. In 1970's National Assembly Election, he worked for the Mymensing District Awami League candidates; the opponents were the then Pakistan Muslim League, Jamaat-e-Islami, Nejam-e-Islami, PDP. At that time Golam Azam was the leader of Jamaat-e-Islami, Hashem Uddin and Fazlul Kader Chowdhury were the leaders of Muslim League and Munaem Kha was the Governor of East Pakistan, the accused was one of the principal leaders of Mymensingh District Islami Chhatra Sangha, a student organization of Jamaat-e-Islami. He saw the accused last in the middle of the month of July or the first part of the month of August, 1971 at the District Headquarters of the Al-Badar Bahini, Mymensingh, at the Dak Banglow of Zila Parishad, Mymensingh and then after day 40(forty) years in the dock. The Al-Badar Bahini was formed at Mymensingh under the leadership of Islami Chhatra Sangha; Pakistan occupation forces gave them arms. The main camp of the District Al-Badar Bahini was at the Dak Banglow of Mymensingh Zila

Parishad and the active leaders of the camp were the accused, Kamran, Ashraf, Didar and Sheli. Besides them, Hannan Shaheb of Muslim League, Shamsuddin @ Suruj Ukil, Moulana Faizur Rahman, the then Imam of Boramasjid were the all time collaborators of Pakistan army. After the crack down on 25th March, 1971 in Dhaka, though Dhaka was under the occupation of Pakistan army, Mymensingh was free for about 1(one) month. He himself was a *muktijoddha*. The Pakistani supporters were not active in Mymensingh town after the crack down on 25th March, but after the army had entered into the city, they (the PW) left the town for village. Then, the anti-liberation forces, Muslim League, Jamaat-e-Islami, the youths of Islami Chhatra Sangha, Nejam-e-Islami, leaders of PDB actively co-operated with the Pakistan army. They heard from the village that the leaders of Islami Chhatra Sangha, the accused, Sheli, Didar, Yousuf had developed intimacy with the Pak army. They (the PWs) set up camps in the village area for *muktijoddha*. He joined BLF, i.e. Mujib Bahini under the leadership of late Abdur Razzaque and late Syed Ahmed and they raised Mujib Bahini camp for *muktijoddha*. When they were organizing *muktijoddha* under the leadership of BLF and FF, the Pakistan army became active to eliminate the *muktijoddhaas* in the rural areas. More than one armed auxiliary forces were created as aides of Pakistan army, such as, Razakars, Al-Badars and Al-Sams. In the first part of July, he entered into Bangladesh with a team of Mujib Bahini and they were entangled with a few fights with the Pakistan army in the char area of Mymensingh. Later on, he and late *muktijoddha* Ohid entered into Mymensingh town to recky the town in the night and took shelter in the residence of Engineer Rafiq Hasanat, the son-in-law of late the then Member of Parliament Mosharraf Hossain Akand. At

that time, the wife of Mosharraf Hossain Akand was also staying in that residence and they were planning to go to India along with her. Al-Badar Tarek, Mohan and Sarwar of that area had come to know that they (the PW and others) were staying in the house of Rafiq Hasanat. The Al-Badar and the Pakistan army gheraoed the residence of Rafique Hasanat and arrested the PW and *muktijoddhaa* Taher and took them blindfolded. After about 24 hours, their eyes were opened, then they could understand that they were at the Al-Badars' camp at the Dak Banglow of Mymensingh Zila Parishad, they were tortured there in blindfolded condition and were told to get ready for death and were asked to say '*Doa Dorud*'. At that time, Brigadier Qader Khan, Commander of Pak army of Mymensingh Zone came to the Al-Badars' camp on a surprise visit. The PW, Abu Taher and Dabir Bhuiayn were produced before Brigadier Qader Khan. On getting the identity of the PW, Brigadier Qader Khan said "don't kill him', Hamid is a reputed student leader, he will organise public opinion in favour of Pakistan." Thereafter, he was given some sort of release, i.e. kept him as a captive in the camp under surveillance (in the deposition sheet, in Bangla, it has been recorded as: "তখন আমাকে একধরনের মুক্তি দিয়ে ঐ ক্যাম্পে নজর বন্দীকরে রাখেন।"). The accused, who was known to him from before came and saw him in the camp, told him to work and fight to save Pakistan, he (the accused) further asked the PW to take part in the fight for eliminating the *muktijoddhaas*. The Pakistanis and the Al-Badars in general thought that he (the PW) was convinced by their words. He (the PW) by making friendship convinced Al-Badar Sultan of the camp in favour of *muktijoddhaa*. Late Abdur Razzaque, the leader of Mujib Bahini sent one Md. Moula, a member of Mujib Bahini to Mymensingh to make plan to free the PW. Possibly, he (the PW)

remained captive in the Al-Badars' camp for 26 days. During his captivity under surveillance in the camp, he could move within the camp as they believed him and taking that advantage, he had the chance to talk with everybody. He marked that the accused, one of the prime leaders of Al-Badar Bahini, used to chalk out various anti-liberation plan and in the night, the Al-Badars of that camp used to go for various operations. He heard from Al-Badar Sultan that Kamaruzzaman took part in the operation at Ananda Mohan College in which Shahed Ali, a bearer of the Degree College Hostel was killed and Doctor Sirajuddin, principal of the college was tortured by the Al-Badars and the Pak Bahini. After liberation of the country, principle Sirajuddin told him about the incident, presently, principal Sirajuddin is sick and, in fact, he is in death bed and staying in Dhaka. While he was in that camp, a big massacre took place at Nalitabari, Sohagpur now known as *Bidhaba Palli*, another massacre was committed at village-Baroitola under Sadar Police Station, District-Kishoregonj. All the operations of the Al-Badar Bahini in greater Mymensingh were carried out from the regional office of Al-Badar Bahini at the Dak Banglow of Mymensingh Zila Parishad in liasion with the Pak army. Dara, son of Tapa Mia of Mymensingh town was killed. Tapa Mia was also targetted to be killed, but luckily he was saved. The Al-Badars aso killed Shahed Ali, a national level sports man. While he (the PW) was in the Al-Badar camp, the accused had gone to Pakistan and after he came back from Pakistan told his experience there to the members of the Al-Badar Bahini and he inspired them to eliminate the *muktijoddhaas* and protect Pakistan and expressed his determination in that respect. The accused was the leader of both the wings, political and arms. While he was in the Al-Badars' camp as a

captive, he planned to flee away and Al-Badar Sultan helped him in chalking out the plan. As per the plan, Sultan took him to Boramasjid near the Zila Parishad for offering prayer. Sultan told him to wait with a faithful rickshaw puller with a rickshaw at a place near Boramasjid. He (the PW) after offering first rakat of magrib prayer came out from the masjid and after a while Sultan also came out from the masjid. Then they boarded the rickshaw at Kachan ghat and went to a place where Moula was waiting with a boat from before and by that boat, they went to Shumbhuganj, while staying at Shumbhuganj, sent a person to Mymensingh town to know its condition and came to know that after the PW had fled away from the Al-Badars' camp, the Al-Badars made operations at various places of Mymensingh town to find him out. The Al-Badars assumed that he (the PW) was staying at Gulkibari, Mymensingh. The Al-Badar killed one Tunu while raided the house of the owner of Mizan Arts at Gulkibari. He was told that all the operations were carried out under the direct supervision of the accused. There was Al-Badars' camp at Sherpur under the leadership of Kamran, there was an Al-Badar camp at Jamalpur under the leadership of Ashraf, besides, at the thana level also there were camps at Nalitabari and Fulpur Boalia Madrasa and these camps were supervised by Kamaruzzaman. He demanded punishment of Kamaruzzaman as he committed the crimes against humanity. During the *muktijoddha* innumerable *muktijoddhaas* including, Tunu of Mymensingh, Shahed Ali, Dara were killed and many had to leave the country and many were untraceable and there were also massacre throughout the country and their blood should be rewarded. In cross-examination, the PW stated that he passed HSC examination in 1968 in 2nd Division, he lost all his certificates. He was in jail for long time then said he

was in jail under all the Governments: Bangladesh Nationalist Party, Awami League and Jatiya Party. He passed honours with 3rd class from Ananda Mohan College in 1972 or in 1973. Before publication of the result, he took provisional admission in Dhaka University in the department of history in 1973, then said he did not participate in any examination in Dhaka University and did not pass M.A. He was arrested in 1974. He denied the defence suggestion that it was not a fact that once, he fled away from thana and subsequently, again from Mymensingh jail by digging tunnel, but admitted that he fled away secretly during the Government of Khandaker Mostaque Ahmed. He knew the accused from 1968-69. He assumed that time, the accused was a student of Nasirabad College Mymensingh town, the distance of that college was $1\frac{1}{2}$ mile from his college. So far he (the PW) heard, the accused used to stay in lodging. He could not remember what post the accused was holding in Islami Chhatra Sangha in 1970 and then said possibly either the post of president or the secretary or any other important post. He could not say who the president, the secretary, the treasurer and the publicity secretary and holding the other important posts of Mymensingh District, Mymensingh town and Nasirabad College branch of Islami Chhatra Sangha at that time were. His village home was under Police Station-Tarail, District-Kishoregonj, 60 miles away from Mymensingh town, he used to study staying at hostel, whereas the accused was from Sherpur. The house of the accused was 30/35 miles away from Mymensingh town and his (the PW) house was less than 100 miles from the house of the accused. He could not say at that moment what speeches were delivered by the accused in which area and for which candidate in 1970's

election. In 1970, the accused was a local leader, so his speeches were not supposed to come in the newspaper and no such speech came up in the newspaper. He (the PW) never attended any meeting of the accused and he also did not know in what capacity the accused used to deliver speeches, but he was holding important post. His (the PW) political activities were confined to greater Mymensingh area. He did not know the procedure of electing leaders of Islami Chhatra Sangha; he did not know whether there was any post like 'important post' in the organogram of Chhatra Sangha, but the public perception was that he was holding an important post, then said this was the publicly published about the accused in 1970-71.

He (the PW) did not get any certificate from any military authority after taking training during the *muktijoddha*. He received the certificate as a member of B.L.F. under the signature of late Abdur Razzaque and Taslim Ahmed, the then secretary to the Ministry of Home Affairs. The Pak Bahini looted away goods from his house at Sadar under Tarail Police Station, but did not set fire, at the time of looting, none was present in the house and all were at their village home, he did not remember the date of looting. Amongst his brothers and sisters, only one brother was held and taken away by the men of Moulana Atahar Ali and was released after detaining one or two days. He was detained in the Al-Badars' camp being blindfolded and was tortured and given death threat. The injury caused on the PW was so grievous that the Al-Badars had to take him to a Doctor, A. R. Khan for treatment and that happened after 4/5 days of his arrest. The two who were arrested with him were released on the very day of the visit of Brigadier Qadir Khan to the camp at his order. He was confined for 4/5 days in a room at the first floor of the Dak Banglow, in fact, it

is a lock up. He was produced before Brigadier Qadir Khan from the lock up. The accused did not stay in any room around the room of the PW and he used to stay in another room, but he could not say its number. Two/three days after his arrest, the accused saw him in lock up. Sometime, he (the PW) used to meet the accused and talk to him at the drawing room at the ground floor of the camp while he was a captive there. The accused did not wear any military dress, but used to wear usual dress. At that time, the accused had no beard, sometime, he (the accused) used vehicle, but he could not say who the owner of the vehicle used by him. Generally, the accused used Jeep. During his (the PW) captivity in the camp, the accused had gone to Pakistan, but could not say the date. He could not also say on guess after how many days of his arrest, the accused had gone to Pakistan. In the last part of the month of July, the accused was telling his experience of visiting Pakistan sitting in the drawing room of the first floor of the Dak Banglow which he heard. He denied the defence suggestion that it was not a fact that he was the enlisted contractor of LGRD Ministry. He does not know the residence of Dr. Serajuddin in Dhaka, last he met him 2(two) years before at a function at Ananda Mohan College, Mymensingh. He does not know the father's name of Tunu who was allegedly killed at Gulkibari while searching for him (the PW). After *muktijoddha*, he visited the house of Tunu near Ananda Mohan College many times. Tunu was possibly killed after a few days of his (the PW) fleeing away. He could not remember at that moment, the date of death of Tunu, but he came to know about the date of his death from his family members, then stated that the occurrence took place in the month of July. He did not know the date and the month of the killing of Dara, son of Tapa Mia. He could not also remember

whether Dara was killed while he was a captive in the camp at the Dak Banglow or after he had come out therefrom. After liberation, he met the members of the family of Dara more than once and could know the date of his killing, but now he could not remember. He did not know in which year, the accused used to read in 1971. He did not also know the name of any army officer under the command of Brigadier Quadir Khan, he could not say which regiments were working at Mymensingh town when he came to re-occupy it. They were taken from the residence of Rafique Hasanat after they had lunch. They (the PW and others) possibly had come there (the residence of Rafique Hasanat) one or two days before, then said they had come out on the road camouflaging without any arms with them. When they were apprehended and taken from the residence of Rafique Hasanat, they did not put any resistance, but raised hue and cry. They did not flee away from the residence where they took shelter as there was no scope to do so. His name is not in the record of *muktibahini*, he does not know whether the name of Taher is in that record or not. Except the accused, Altab Moulana, Suruj Ukil and Moulana Faizur Rahman were above fifty years, then said the age of Suruj Ukil might be a bit less. At that time, the accused was aged about 22/23 years. He could not remember the name of the District Ameer, town Ameer and other leaders of Jamaat-e-Islami. He could not also say the name of Jamaat leaders of greater Mymensingh including Jamalpur, Sherpur and Kishoregonj. Then said he knows the name of professor Mahatab only who was the Ameer of Jamaat-e-Islami of Kishoregonj Sub-Division. He did not know the name of the Razakar Adjutants of Mymensingh District and its Sub-Divisions. It was publicly publicised that the accused was the Al-Badar Commander of greater

Mymensingh; he did not know who the chief of the Al-Badar Bahini of Mymensingh town was. It was also publicly publicised that Kamran was the chief of Sherpur; he could not remember who the chief of Jamalpur, Al-Badar was. While he was a captive in the Dak Banglow of Zila Parishad, another man named Dabir Bhuiyan was also captive in his room. He did not know who else was arrested and was captive. He did not know where, when and from whom, the accused took training. He had no idea about the political discipline of Jamaat-e-Islami and Islami Chhatra Sangha (in the deposition sheet, in Bangla, it has recorded as: “জামাতে ইসলামী এবং ইসলামী ছাত্র সংঘের রাজনৈতিক নিয়মানুবর্তিতা ও শৃংখলার বিষয়ে আমার কোন ধারণা নাই।”). He had no paper to prove that the accused was the Al-Badar Commander. The accused was not given the sole charge of the political activities of Jamaat-e-Islami of the entire greater Mymensingh in 1971, so far he knows, the sole responsibility of Islami Chhatra Sangha in greater Mymensingh was given to the accused. He knew Ashraf of Jamalpur, Kamran of Sherpur, Didar of Mymensingh and Sheli as they all were the residents of the same town. He could not say whether Ashraf was senior or junior to the accused. He did not know what post Ashraf held in Jamaat or Islami Chhatra Sangha. He did not also know what post he (Ashraf) was holding in Al-Badar Bahini, he knew that Ashraf was a student and he heard that he was student of Ashek Mahmud College of Jamalpur, but could not say of which year, so far he knew Ashraf hailed from Jamalpur. Kamran of Sherpur was of the same age of the accused, he (the PW) had acquaintance with Kamran and was of the same age of the PW, then said in 1971, Kamran possibly was a student of Sherpur College, but he did not know of which year. Kamran held a post in Islami Chhatra Sangha, but could not say the name of

the post, he (Kamran) was also a prominent leader of Al-Badar, but could not say the name of the post held by him. He did not lodge any complaint till date against the accused and the other known and recognised Al-Badars. He (the PW) has been living in Dhaka since 1992. He did not lodge any written complaint before the *Gono Adalat* set up in Dhaka in 1992, but he gave some points on being asked by Dr. Ahmed Sharif. He did not also depose before the *Gono Adalat*. He presumed that a *Gono Tadanta* Commission was formed in 1994 in respect of the *Ghatak-Dalal* and the *Joddha Aparadhais* of 1971. He neither lodged any complaint nor gave any statement before the *Gono Tadanta* Commission. He did not know whether *Gano Tadanta* Commission visited Mymensingh or not. Al-Badar Sultan whom the PW inspired for *muktijoddha* was from Gafargaon, at that time, he was a student, but could not say of which college. Al-Badar Sultan subsequently joined *muktijoddha* and after liberation, he was locally enlisted as a *muktijoddha*. He admitted that the fact of his arrest was a memorable incident, but he could not remember the date on which he was arrested during the *muktijoddha* and the date of his fleeing away. He knew A.A.M. Abdus Sakur, the then Headmaster of Mymensingh Zila School. So far he knew, he is alive and he is the father-in-law of the sister of Minister, Ashraf. He heard that Abdus Sakur wrote many books, but he did not know whether he wrote any book under the title “ময়মনসিংহ ৭১”. He denied the defence suggestion that it was not a fact that as in the book “ময়মনসিংহ ৭১” no incident as narrated by him has been mentioned and that no where in the book, the accused has been mentioned as an anti-liberation force, he said that he did not read the book. Sohagpur was under Police Station Nalitabari. He does not know *muktijoddhaa* Abdur Rahman Talukder of Nalitabari so well; he knew *muktijoddhaa* Najmul

Ahsan who faced martyrdom in the *muktijoddha*. He did not know whether Abdur Rahman Talukder and shaheed Nazmul Ahsan were co-fighters. He did not know whether Abdur Rahman Talukder wrote a book under the title “মুক্তিযুদ্ধে নালিতাবাড়ী”, then said he did not read the book, so he does not know what is written there. He never went to Sohagpur and never talked to the people who suffered. He does not know journalist Mamunur Rashid, he does not know as to whether he has written a book under the title “সোহাগপুরের বিধবা কন্যারা, ১৯৭১”. He denied the defence suggestion that it was not a fact that he told some persons that he had fled away from the Al-Badars’ camp with the papers and then to some others that he had fled away from the mosque. He denied the defence suggestion that it was not a fact that there was much publicity in the area that during the war of liberation, he had changed his side and voluntarily went to the army camp at the Dak Banglow of Zila Parishad and took stand for his own benefit and then left the camp through mutual understanding. He denied the defence suggestion that it was not a fact that because of the said incident, the *muktijoddhaas* never accepted him as a *muktijoddhaa*. He denied the defence suggestion that it was not a fact that his arrest by the Pak army or by the Al-Badar and his captivity at Zila Parishad and then his fleeing away from there was a mere story. He denied the defence suggestion that it was not a fact that as the story of his arrest or fleeing away was not a fact, so he could not say his date of arrest and date of fleeing away. He did not know whether after liberation, the accused read in Nasirabad College in 1972 or appeared in HSC examination in 1972, but he (the accused) was not seen in the area at that time. He he did not know whether the accused passed HSC examination from Nasirabad College appearing in the examination

held in the month of May, 1972. He did not know whether the same HSC examination was scheduled to be held in August, 1971 and whether some participated in that examination. He did not know whether after the beginning of liberation war in 1971, the accused had left Mymensingh town for his village home at Bajitkhila under Sherpur and as there was risk in the communication system during the war and also injunction of the *muktijoddhaas*, he (the accused) did not take part in the HSC examination held in August, 1971. He did not know whether after passing HSC examination in 1972, the accused got him admitted as a regular student in Dhaka Ideal College and passed out in 1974 from there and then took admission in Dhaka University in the department of Journalism and passed in 1975 as a regular student. He denied the defence suggestion that it was not a fact that during the liberation war and thereafter, the accused led a normal life and pursued his education as usual. He denied the defence suggestion that it was not fully correct that after liberation, he (the PW) led a hiding life and with gape he had to stay in jail on being arrested and he always remained in police panic. In the book under the title ‘ময়মনসিংহ চরিতাবিধান’ published by Mymensingh District Administration in 1989, his autobiography, as narrated by him, has been printed, but some wrong informations have been given there. He read the book, in the book, his date of birth has been mentioned as 27.04.1952, but that is not consistent. In book, the year of his passing HSC examination has been correctly written as 1968. He gave corrigendum to Darji Abdul Wahab Shaheb, the writer of the book ‘ময়মনসিংহ চরিতা বিধান’, but till date the book was not published with corrigendum, he could not remember the corrigendum given by him. In the greater Mymensingh area, many cases were filed under the

Collaborator Act and in those cases, the number of the accused were from 150 to 200, many accused surrendered in those case pursuant to the notice issued by the Court and many were arrested. He did not know whether the accused was made an accused in those cases or not, then said that he heard that the accused was also made an accused. He denied the defence suggestion that it was not a fact that he did not hear that the accused was made an accused in those cases. After liberation of the country, the then Government appointed a high powered committee to identify the collaborators throughout the country for trial under the Collaborators Act and he could not say whether in the list prepared by the Government on the basis of the report of the said high powered committee, the name of Nurul Amin figured at serial No.1, but his name was in the list. He could not say whether 53 persons including the names of Zulmat Ali Khan and Hafizuddin Ahmed of greater Mymensingh were mentioned in the list, but there were many names including those two. He heard that the name of the accused was in that list, then said he did not see the list. He denied the defence suggestion that it was not a fact that he did not hear that the name of the accused was in the list. He knows Dr. M.A. Hasan, he is very much active for the trial of the *Joddhaaparadhis*. He did not read the book written by him under the title “যুদ্ধাপরাধ, গণহত্যা ও বিচারের অন্বেষণ”, but saw the book at the residence of one of his relatives, the book was published in 2001. A book under the title “বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র” in 15 Volumes was published in 1984 by the Ministry of Information, Government of Bangladesh. He gave many interviews on the liberation war, but he did not know whether in the 9th volume under the Chapter ‘ময়মনসিংহের ইতিহাস’ of “বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র” his interview has been published. He denied the defence suggestion that it was not

a fact that Siraj Uddin Shaheb, the then principal of Ananda Mohan College, is in good health and he is living in Dhaka, and as he refused to depose against the accused in the manner as desired by them, he deposed that he was sick. He denied the defence suggestion that it was not a fact that he (the PW) did not meet the accused or he (the PW) was acquainted with the accused prior to June, 1969-70 while he was a student of Nasirabad College. He did not know whether in 1969-70, the accused was a student of Asheque Mahmud College and that he could not pass HSC examination in that year as he failed to appear in the practical examination due to his illness. He denied the defence suggestion that it was not a fact that the accused had left Mymensingh for his village home when the non co-operation movement started after few months of his admission in Nasirabad College. He denied the defence suggestion that it was not a fact that he never met the accused during the period 1969-71 or subsequently also, he did not meet him. He denied the defence suggestion that it was not a fact that he saw the accused physically for the first time when he (the accused) was shown to him at the safe home by the people of the investigation agency. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that he was a freedom fighter and that after crack down on 25th March, the Pakistani supporters were not active in Mymensingh town and after the army had entered into the town, they left for village and that then anti-liberation forces, Muslim League, Jamaat-e-Islami, the youths of Islami Chhatra Sangha, Nejam-e-Islam and the leaders and workers of PDP actively co-operated the Pak army and that they heard from villagers that the leaders of Islami Chhatra Sangha, namely, the accused, Sheli, Didar and Yousuf developed close intimacy with Pak army. He denied the

defence suggestion that it was not a fact that he did not tell the Investigation Officer that he and late *muktijoddha* Ohid entered into Mymensingh town to reky in the night. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that they along with the wife of Mosharraf Shaheb were planning to go to India. He denied the defence suggestions that he did not tell the Investigation Officer that while blindfolded, they were tortured and were told to get ready for death and to say *Doa Dorud* and at that time, Pak army Commander of Mymensingh area Brigadier Quader Khan came on a surprise visit to the camp and then the PW, Abu Taher and Dabir Bhuiyan were produced before him and Brigadier Quader Khan knowing the identity of the PW released him in somewhat manner and kept him in the camp as a captive under surveillance. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that then the Pakistani and the general Al-Badars thought that he (the PW) was convinced by their words and he (the PW) by making friendship convinced Al-Badar Sultan of the camp in favour of *muktijoddha*. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that though he was a captive under surveillance, he used to move around the camp, as they believed him and thus he got the chance to talk with every body, then he marked that the accused, one of the prominent leaders of the Al-Badars used to chalk out various anti-liberation plan and in the night, the Al-Badars of the camp used to go for various operations. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that he heard from Al-Badar Sultan that the accused took part in the operation of Ananda Mohan College, Mymensingh or after liberation of the country, principal Siraj Uddin

told him about the said incident or presently, he (principal Serajuddin) is sick and so to say in death bed and is living in Dhaka. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that all the operations of the Al-Badars of greater Mymensingh used to be conducted from the regional Sadar Daptar of the Al-Badars at the Dak Banglow of Zila Parishad in co-ordination with the Pak army or Dara, son of Tapa Mia of Mymensingh town was killed or they also wanted to kill Tapa Mia, but he was saved luckily. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that the Al-Badars were inspired to protect Pakistan and eliminate the *muktijoddhaas* and expressed promise in that respect and that the accused was the leader of both the wings: political and arms. He also denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that Al-Badar, Sultan helped him in chalking out the plan or as per the plan, Sultan took him for offering prayer to the Boramasjid near Zila Parishad or Sultan told him to wait with a faithful rickshaw puller with a rickshaw at a place near the masjid or after offering the first rakat of magrib prayer, he came out of the mosque and some time thereafter, Sultan also came out from the masjid or thereafter, they in a rickshaw from Kacharighat, Mymensingh went to a place where Moula had been waiting in a boat and by that boat they went to Shambhuganj or while they were staying there at the village, they sent men to Mymensingh town to know its condition. He denied the defence suggestion that it was not a fact that he did not tell the Investigation Officer that he was informed that the operations which were carried to find him out were carried out under the direct supervision of the accused. He denied the defence suggestion that it was not a

fact that he did not tell the Investigation Officer that there were Al-Badar camps at Sherpur under the leadership of Kamran, at Jamalpur under the leadership of Ashraf and besides those camps, there were Al-Badar camps at Nalitabari and Fulpur Boalia Madrasa and these camps were used to be supervised by the accused. During the liberation war, the Razakars, the Al-Badars and the members of the Peace Committee used to hold meeting with the Pak army officers to mobilise public opinion which were used to be reported in the newspapers. He would not be able to show any newspaper at that moment to show that the accused held meeting with the officers of Pak army. Then said he knew that the accused formed Al-Badar Bahini first at Mymensingh, but he could not say the date. He would not be able to show any paper at that movement with whom the accused formed the Al-Badar Bahini. After liberation of the country, many books have been written on liberation war and there books written on their area as well. He read the books under the title: “মুক্তিযুদ্ধের সংগৃহিত ইতিহাস ও আনন্দমোহন কলেজে মুক্তিযুদ্ধের ইতিহাস” written by Professor Bimol Dey. He denied the defence suggestion that it was not a fact that he would not be able to show any book where the name of the accused has been mentioned. He did not submit any application to the investigation agency demanding trial of the accused, but he gave statements. While he gave statements to the Investigation Officer, he did not file any document or paper to prove that the accused was involved. He denied the defence suggestion that it was not a fact that there was no proof with him except his verbal words that the accused was a *Joddhaaparadi*. Previously, he did not depose in any Court against the accused. He himself did not file any case against the accused after liberation. He denied the defence suggestion that it was not a fact that at the

signal and instigation of the Indian Government present Awami League Government concocted the instant false case just to stop the accused to take anti-Indian role as after liberation of the country, he joined the profession of journalism and wrote many articles against the aggression of India. He denied the defence suggestion that it was not a fact that during the liberation war, in 1971 the accused was not an Al-Badar leader or he did not commit any crime against humanity. He denied the defence suggestion that it was not a fact that the statements made by him against the accused were false, concocted and collusive or he deposed having benefit from the Government. He denied the defence suggestion that it was not a fact that the names mentioned by him in his examination-in-chief, such as, Al-Badar Sultan, co-joddha Abu Taher, Commander Moula, Wahid and Babu Mannan are all imaginary. He denied the defence suggestion that it was not a fact that during 1970's election, the accused was not one of the prominent leaders of Islami Chhatra Sangha, a student organization of Mymensingh, Jamaat-e-Islam. He denied the defence suggestion that it was not a fact that neither he nor his family suffered anything in 1971 or he was not a *muktijoddha* or his certificate as Mujib Bahini was not also genuine. He denied the defence suggestion that it was not a fact that he deposed against the accused for political reason. He denied the defence suggestion that it was not a fact that whatever he stated in his examination-in-chief implicating the accused was not correct or not based on facts.

PW9-Md. Abul Kashem, aged about 62 years (as recorded in the deposition sheet), of 19/2 Makarjani Lane, Nowmahal, Mymensingh Town, stated in his examination-in-chief that in 1971, he was a student of 2nd year in I.

Ad. in Junior Training College, Mymensingh. After 25th March, 1971 when massacre was going on in Dhaka, training of the *muktijoddhaas* was also going on in Mymensingh Zila School field and he took training there. Thereafter, he tried to go to India, but did not get the chance. Subsequently, he contacted company Commander Babu Mannan to go to India for taking part in *muktijoddha*, but he could not go to India as well. Because of his joining *muktijoddha*, his father was apprehended by Pak army and the Razakars from his house and was taken away. However, with the help of the local member, they could succeed to release their father from Razakars' camp. In the month of November, 1971 he joined company Commander Nowajesh Ali Bachhu who was a member of EPR. Nowajesh Ali gave him an address of an employee of Mymensingh Telegraph office and told him that if he saw him (the employee of Telegraph office), he would give him a *naksha* and a packet and to that end, he came to Mymensingh town on 3rd December, 1971 and boarded at room No.1 of his college hostel. On that very day, he contacted the man in the Telegram office and after collecting a *naksha* and a packet of paper from him returned back to his hostel. On that date, a junior student named Kutubuddin was with him in the hostel and hostel Super Professor Lutfar Rahman was also in the hostel. In the evening of that day, when they were listening to the program of 'স্বাধীন বাংলা বেতার কেন্দ্র', then his (the PW) teacher Lutfar Rahman Shaheb cautioned him that the sound of the radio should not go outside. At that time, another junior friend, Rashedul Haque saw that they (the PW and his junior friend) were listening the program of 'স্বাধীন বাংলা বেতার কেন্দ্র'. On the next morning, at about 8/9 a.m. an armed team of the Al-Badars entered into the hostel and gheraod the room of the PW, of them, he knew one Abdul Majid.

The PW thought that they might have come to get his help to join *muktijoddha*, but they apprehended him and also his companion Kutubuddin. On the request of the PW, both of them were taken to the room of the principal of the college. On their request, the principal of the college telephoned the Brigadier of Pak army in charge of Mymensingh and requested him to release them, but the Brigadier asked the principal to hand them over to the Al-Badars, then they (the Al-Badars) blindfolded both of them and took them in a rickshaw to a place and after their eyes were opened there, they found that it was a room in the first floor of the Al-Badars' camp at Dak Banglow of Mymensingh Zila Parishad. Then they could perceive that Rashedul Haque got them arrested by informing the Al-Badars' camp. The Al-Badars assaulted Kutubuddin in front of the PW and when he wanted to ask them something, they also assaulted him and then both of them were taken in room No.2 of the first floor and detained them there. Besides them, there were 8(eight) other persons in the room. Seeing so many pairs of sandals by the side of the bath room when the PW asked the 8(eight) other detainees in the room, they told them that the Al-Badar killed the corresponding number of persons of the pairs of the sandals. In the evening of 4th December, a man was brought to the camp and was kept tied with the iron rod of the window, the man was saying *Kalema*. At that time, 2/3 Al-Badars came and beat the man and one of the Al-Badars struck twice on his chest by a bayonet, another Al-Badar came and asked to unfasten him and take him down stair, then blood was oozing from body of that man. Sometime, after the man was taken to the downstairs, he heard a sound of firing, then they were passing their time in panic. On 8th December, one Al-Badar told them through the window that out of 13, 10 were listed to be killed, possibly that Al-Badar

knew the PW and he told him that he (the PW) was very much in the list of ten, the face of that man was covered at that time. In the early morning of 9th December, the PW heard the sound of firing from the other bank of the river Brahmaputra adjacent to the Dak Banglow. Black out was going on in the town in the evening, the windows of their room were covered by black colour. At about 8/9 o'clock in the night, 3/4 armed persons entered into their room covering their face, but except one, the whole face was not covered was Ashraf and he was known to him from before. Ashraf was a leader of Islami Chhatra Sangha. Ashraf ordered them not to lit the inside light and also not to move and said that in the room, they were two leaders of the Al-Badars, he himself and the other one the accused. He (the PW) did not see the accused before and heard his name for the first time on that day. He heard the name of the persons who were previously detained and they were: Hamidul Haque, Tapa Miah, Shahed Ali, Dara and Dabiruddin. He also heard that Dara was killed. In the morning of 10th December, the women who used to do the job of cleansing came and told them to go out as all the Al-Badars had fled away and they freed them from the camp by breaking the lock and accordingly, they (the PW and others) went out. That day (10th December) Mymensingh town was liberated. The accused and Ashraf, the two Al-Badar leaders, used to control Mymensingh. While he was detained in the camp, he heard that many people were used to be killed on the bank of the river adjacent to the Dak Banglow every night and that area was a *বধ্যভূমি*. He demanded punishment of the persons who were involved with the commission of crimes against humanity. The Investigation Officer examined the PW on 16.09.2010, at the Dak Banglow of

the Deputy Commissioner, Mymensingh. He identified the accused in the dock saying that it was that Kamaruzzaman whom he saw in the Television.

In cross-examination, the PW stated that he did not tell in any book written on the history of *muktijoddha* what he deposed in the Tribunal. His name is not in the list of the *muktijoddhaas* as he did not take any training going to India. They are five brothers neither their parents nor any of the brothers has been listed in the list of *muktijoddhaas*. The hostel from which he was arrested was a residential hostel and all the students including the PW were resident students. The hostel Super was a bachelor at that time and he used to stay in the hostel. Normalcy did not prevail either in the college or in the hostel on the day on which he was apprehended, but officially, it was a working day (in the deposition sheet, in Bangla, it has been recorded as: “আমাকে যে দিন ধরে নিয়ে যায় সেদিন কলেজ ও হোস্টেল স্বাভাবিক ছিল না তবে সরকারীভাবে খোলা ছিল”). He was the permanent boarder of the room in which he stayed and its key used to be kept with him. The distance of his village home from the college was more than 5(five) miles, all the students of the college being resident students, they had to stay in the hostel. He used to come to the hostel after gap from his village home as at that time most of the students did not stay in the hostel. Hostel Super, Lutfar Rahman is sick and he is living at his residence in town. Then said he (Lutfar Rahman) is sick for a long time, but could not say how long Meherunessa, the wife of Lutfar Rahman was also a teacher of the college at the time of the occurrence and he was present along with the other teachers, while they (the PW and the other one) were taken to the room of the principal. Meherunessa is alive, but she has been suffering from paralysis for long. He denied the defence suggestion that it was not a fact that Lutfar Rahman and

Meherunessa were not sick. At the time of the occurrence, Mr. Abdul Bari was the principal of the college, it was not a fact that he was alive, he asserted that he (Abdul Bari) died long before. His (the PW) friend, Kutubuddin is alive and presently, he is engaged in teaching profession. He (the PW) would not be able to tell the name of the 8(eight) persons detained with him after such a long delay. He could not also say the name of the person who was tied with the iron rod of the windows in the Dak Banglow. He could not say the date and the month on which Hamidul Haque, Tapa Miah, Shahed Ali, Dara and Dabiruddin were detained at the Al-Badar camp in the Dak Banglow and when they were released. There was no scope of filing any complaint to the Investigation Officer or to any one else for the taking away of his father after apprehending him and also torturing him. In 2011, he was elected as the vice-president of Mymensingh District Ainjibi Samity as a candidate from Sammilita Ainjibi Samannay Parishad. He denied the defence suggestion that it was not a fact that Sammilita Ainjibi Samannay Parishad is run under the leadership of Awami League. He got the appointment as Assistant Public Prosecutor during the regime of the present Government. He denied the defence suggestion that it was not a fact that he was holding the post of vice-president of Mymensingh District Awami Ainjibi Parishad. He denied the defence suggestion that it was not a fact that on 9th December, 1971, Ashraf did not tell the name of the accused or he did not tell that as leaders of Al-Badar they used to control Mymensingh. He denied the defence suggestion that it was not a fact that he deposed in the case with political motive and under the request and pressure of the political leaders of the present Government and also to please them. He denied the defence suggestion that it was not a fact that his statements as to his

attempt to go to India to participate in the *muktijoddha* or his participation in the *muktijoddha* within the country were false. He denied the defence suggestion that it was not a fact that his demand for trial was the reiteration of the political slogan of Awami League.

Suggestions were also given to the PW quoting *verbatim* the statements made by him in his examination-in-chief right from the fact of training of the *muktijoddhaas* in the field of Mymensingh Zila School upto the fact of his hearing the sound of firing in the morning of 9th December, on the other side of the bank of the river, Brahmaputra adjacent to the Dak Banglow and that the accused and Ashraf as the two leaders of Al-Badars used to control Mymensingh to the effect that he did not make those statements to the Investigation Officer, which he denied as being not a fact (suggestions are not quoted to shorten the judgment, but shall be referred to in the context of the findings of the guilt or innocence of the accused in respect of charge No.7).

PW15, Dabir Hossain Bhuiyan, aged about 65 years (as recorded in the deposition sheet) of 111, A.B. Guha Road, Police Station-Kotwali, Mymensingh, stated in his examination-in-chief that in 1971, they had a book shop at C.K. Ghose Road under the name 'United Book Corporation' and he used to manage this book shop, Pak Bahini bombed at Shambhuganj, Gudaraghat, on 23/24 April. After the bombing, his parents along with his younger brothers and sisters went to village and since then he had no communication with them. There was a room behind the book shop and he used to stay in that room. In the first part of May, he had come to Dhaka on foot from Mymensingh after facing many sufferings and thereafter, he went to Agartala, India from Dhaka via Akhaura and he stayed there for 3/4 days and

then joined Melaghar, the training camp of *muktijoddhaas*. He took training there, Melaghar was 30/35 miles away from Agartala. He was given the responsibility to organise the *muktijoddha*. In the first part of July, he came to Dhaka from Agartala and then went to Mymensingh. He was given the responsibility of hoisting the flag of ‘স্বাধীন বাংলা’ at Mymensingh town on the independence day of Pakistan. 100 *muktijoddhaas* also came with him from India, they went to Gafargaon via Narsingdi. A *muktijoddhaa* named Didar was staying at Mymensingh, but he did not know that in the meantime, he had become an Al-Badar. While he (Didar) had come from Agartala, he gave the PW an address of a Homeopath Medicine Shop owned by them at ‘স্বদেশী বাজার’, Mymensingh. After coming to Mymensingh in the last part of July, one day at about 4/4½ pm, when he went to the Homeopath Medicine Shop of Didar at ‘স্বদেশী বাজার’ to see him and was standing in front of that shop 6/7 armed persons in white dress came to him and blindfolded him and boarded him in a rickshaw and took him to the Dak Banglow of Zila Parishad in front of thana ghat. After his eyes were opened there, he could understand that it was the Dak Banglow of Zila Parishad. There he saw the accused, the Al-Badar Commander, whom he knew from before, as he used to go to their shop to purchase books. The accused also used to sit oft and often in another book shop named ‘সাহিত্য ভবন’ 100 yards away from the shop of the PW. Thereafter Sheli, Mohan and Didar leaders of Islami Chhatra Sangha took him to the room of the accused, also a leader of Islami Chhatra Sangha in the Dak Banglow being blindfolded and when his eyes were opened, he saw the accused sitting in a chair. The accused told Sheli to take him (the PW) saying to do his (Sheli)

duty. Then Sheli took him from there and again blindfolded him and took him to another room where he was beaten heavily. He used to be beaten everyday in a routine way and tried to gather various informations about the *muktijoddhaas*. At one stage, after opening his eyes, in the room, in which he used to be beaten, he saw students' leaders, Hamidul Haque, Tapa, Shilpi (ভাস্কর) Rashed, Dara, son of Tapa Miah and football player Shahed Ali. At one stage, Hamid asked him why he (the PW) was there, but he (the PW) pretended not to know him (Hamid) and asked him (Hamid) who was he, as he could not recognise him. The accused used to visit the room where they were detained giving a gap of 2/3 days and pointing some one, he used to say to take him (in the deposition sheet, in Bangla, it has been recorded as: “সেখানে মাঝে মধ্যে ২/৩ দিন পর পর কামারুজ্জামান সাহেব যেতেন এবং দেখিয়ে বলতো ‘একে নিয়ে নিবা’”) and in this way, the man who used to be pointed out by the accused could not be seen in the camp on the next day and in the process Tapa, Shahed Ali, Dara, Rashed had been taken away from the camp and none of them was seen in the camp thereafter. One Al-Badar of Bagaitapur of Nalitabari who used to stay in the camp, on being asked told that those who had been taken away were no more. The PW was released in the last part of August, in 1971. One day, (no specific date is mentioned) in the evening, a big officer of Pak army named Brigadier Qadir Khan came to the place where the PW was detained, the accused was also present. At one stage, the Brigadier asked the accused whether there was any complaint against the persons confined there, then the accused pointing at the PW told that except that he took part in the *muktijoddha*, there was no other complaint against him. On being asked his name by Brigadier Qadir Khan, the PW told his name and Hamid also told his name in English and introduced

himself as a students' leader. Brigadier Qadir Khan told “ডেইন্ট কিল হিম, হি ইজ এ স্টুডেন্ট লিডার” Brigadier Qadir Khan said more words in English, the meaning of which was that Hamid had organising capacity and he should be used. Brigadier Qadir Khan pointing at the PW told the accused ‘আভি উসকো ছোড় দো’ and then he was released. He was detained in the Dak Banglow for 26/27 days and after release, he went to their residence and then took treatment. 2/1 days after the Al-Badar used to come to inquire as to whether he was staying at his residence or not. In the meantime, Hamid identified himself with the Al-Badar and at one stage, he (the PW) heard that he had fled away to India from Baromasjid with Al-Badar Sultan of Gafargaon. He gave statements to the Investigation Officer in September, 2010, at Mymensingh circuit house. He identified the accused in the dock.

In cross examination, the PW stated that he has been living in Dhaka with his family for the last 8(eight) years and sometime, he goes to Mymensingh. He is a business man and had done various businesses at various times and he also did the job of a contractor. Presently, he is leading a retired life and his daughter looks after his business. Since 1996, he is not associated with any political party, previously, he was an Awami Leaguer. Due to the differences with Awami League, he joined Krishak Sramik Janata League of Quader Siddique, but due to the differences of opinion there, he gave up that politics. He denied the defence suggestion that it was not a fact that for businesses, he also joined BNP. Towards 1970, the accused used to come to his book shop and also the book shop ‘সাহিত্য ভবন’ and prior to that he never saw him. He did not know where and in which college, the accused used to study at

that time. Since before the *muktijoddha*, he used to stay at Mymensingh at the address given by him, then said he along with 4(four) brothers and parents used to live in the house at that address. At that moment, he would not be able to show any paper in support of his statement that he used to manage a book shop. In 1970, the accused had no beard and mustache, but now in dock he has both. He had no paper to show that he joined *muktijoddha* and took training. The distance of the Dak Banglow from their residence at Mymensingh town was 2(two) kilometers and that of the homeopath shop of Didar was $1\frac{1}{2}$ kilometers. In 1970-71, he (the PW) was not involved with any politics and presently he also not involved with politics. Haluaghat is the boarder gate way to go to India from Mymensingh. The other part of India is the state of Meghalaya. He could go to India from Mymensingh via Haluaghat within less than $\frac{1}{5}$ th time than going Dhaka from Mymensingh and then to India-via-Akhaura. Didar who subsequently turned to be Al-Badar was from Gafargaon under District of Mymensingh. He did not know in which route Didar had gone to Agartala, India and through which route, he came back. Didar had come to Bangladesh 6/7 days before he (the PW) came, but he could not remember the date on which Didar had come to Bangladesh. He did not know when Didar had gone to India and how long he stayed there. He (the PW) stayed in India for about 25(twenty five) days. Before war, he had no acquaintance with Didar. He could not also say what Didar used to do before and after the liberation of the country. He did not make any complaint against Didar anywhere after liberation of the country and since liberation till date, he did not meet Didar. He was taken blindfolded towards 20-22 of the month of July, 1971, but he

could not say what was the ‘বার’ or at what time or the specific date of his taking away. He could not also say the specific date and time of his release. He did not go to the shop of Didar giving him any prior intimation, he went there on foot that area was known to him, then *suo muto* said (in the deposition sheet, in Bangla, it has been recorded as “নিজে বলেন”) by the shop of Didar, he meant the shop of his brother-in-law, who occupied the hindu property by force, but he could not say the name of its original owner. The brother-in-law of Didar was also an Al-Badar, but he could not remember his name. He could not also say on which date the shop was occupied. He knew Shilpi Rashid, Tapa Miah, Dara, son of Tapa Miah and Hamidul Haque from before, he could not say when they were apprehended. He saw them in the Dak Bangloo after he was detained there and all of them were detained in the same room, but the detaining authorities used to take away different person at different time for their necessity such as for interrogation, torture or for killing. He had no talk with the other detainees as to the fact when and from where they were apprehended. Subsequently, he also met Tapa Miah, but did not ask him on which date he was apprehended. He denied the defence suggestion that it was not a fact that in the Dak Banglow, the accused had no room. Except him (the PW), none of his family went to *muktijoddha* and his (the PW) name is not in the list of the *muktijoddhaas*. After release from the camp, he used to live at both the places: his residence and the shop. Sometime, the Al-Badars used to come and enquire about him, no guard was deployed for him. Hamid was confined in the camp for 15 days more after his release. In a question put by the Tribunal, the PW stated that “টু কোর্টঃ আমরা ক্যাম্পে আটক থাকাকালীন সময়ে যে রুমে আটক ছিলাম তার বাইরে আমাদের বিচরন করার কোন সুযোগ ছিল না।” He did not know whether

Hamid could move in the camp after his (the PW) release. He had heard that while Hamid was allegedly detained, he used to address various road side meetings with the Al-Badars in favour of Pakistan. He could not say how many days before of purchasing books from his shop, the accused became the leader of Islami Chhatra Sangha or whether the accused was holding any post or was in any committee, but he was a big leader. He could not also say when the accused became a big leader. He could not say who the president or the general secretary of any party and the students' organisation of Mymensingh District was. Advocate Aftabuddin was either the president or the secretary of the local Peace Committee. He did not know who the Commander of the Razakars and the Al-Sams Bahini of Mymensingh District and Mymensingh Town respectively was or where their office or camps were. He could not also say who the president and the secretary of Islami Chhatra Sangha of Mymensingh District and Mymensingh Town respectively was in 1971. He could not say who the Al-Badar Commander of Mymensingh District and Mymensingh town was respectively, but the accused was the leader of the Al-Badars. Nothing was written on the body of the accused to show that he was holding the post of the Al-Badar Commander or holding any other post of Al-Badars or any mark or dress. When his (the PW) eyes were opened in front of the accused, he saw him (the accused) sitting in the chair, but he (the PW) did not see any arms with him. Subsequently, one day, he saw arms on his (the accused) shoulder. He denied the defence suggestion that it was not a fact that the statement made by him that he saw arms on the shoulder of the accused was false and concocted. He could not say who the leaders of Islami Chhatra Sangha of Ananda Mohan College, Nasirabad College and Aktaruzzaman College of Mymensingh Town

were. After liberation of the country, he did not file any complaint against Didar, Mohan and Sheli and did not file any case till date. After liberation of Mymensingh on 11th December, 1971, the *muktijoddhaas* set up a camp at Teachers' Training College, Mymensingh, but he did not know whether the *muktijoddhaas* made any list of the persons who committed criminal offences during the *muktijoddha*. He did not make any complaint to them against anybody for inclusion in the list. Till date he did not file any case anywhere against the accused. He did not know whether the Government published any book in 15 Volumes on the history of *muktijoddha* or whether there is any writing on Mymensingh in that book. During the war, he did not hear the name of the then Headmaster of Mymensingh Zila School, Mr. A.A.M. Abdus Shakur. He did not also know whether Abdus Shakur wrote any book under the title 'ময়মনসিংহ একাত্তর' or he did not read the book. He denied the defence suggestion that it was not a fact that since the incidents narrated by him have not been stated in that book, so he said that he did not read the book that he did not know Abdus Sakur. In the first part of last December, the Deputy Commissioner called him and told him that he would have to depose in the case, but he (the Deputy Commissioner) did not give him any paper. Prior to that, none told him to depose. Hamid was not in the same camp of the PW. He denied the defence suggestion that it was not a fact that whatever he stated about *muktijoddha* and as to the fact of his going to India were untrue. He could not say whether the residence in which he lives at Mymensingh was a vested property or not, but asserted that it was his purchased property, then said his father purchased the same during Pakistan period. Subsequently, there was a suit over the property and the person who won the case sold the same to

Suruzzaman and in the last part of 2000, he (the PW) purchased the same from Suruzzaman by a registered kabala. He denied the defence suggestion that it was not a fact that the property was a vested property and they were the illegal possessors therein. He denied the defence suggestion that it was not a fact that after coming to power when the present Government took steps to return back the vested property, he in order to keep the property under illegal possession, approached the Awami League or they assured him that the house would be given to him or for that he at the dictation of Awami League deposed falsely making concocted story. After 1996's election, he resigned from the post of social welfare secretary of Mymensingh District Awami League, in 2000 possibly for 5/6 months he joined the party of Bangabir Quader Siddiqui, in 2006, he contested in the Parliament Election from that party. He denied the defence suggestion that it was not a fact that he was an opportunist for which he could not stick to any political party. He denied the defence suggestion that it was not a fact for strategic reason, he made the statements that presently, he is not doing any business or he does not do politics or to do away with the bad name that he is an opportunist. He denied the defence suggestion that it was not a fact that he made his fortune in 1971 joining hands with the Pakistanis. He denied the defence suggestion that whatever he stated about his detention in Mymensingh Dak Banglow and implicating the accused there were false, concocted and motivated or whatever he stated about the coming of the accused to his book shop or whatever he stated implicating him were untrue. He denied the defence suggestion that it was not a fact that it was untrue that he had gone to India via Akhaura and from there, he came to Mymensingh with the task of hoisting 'স্বাধীন বাংলা দেশের' flag or the fact of his arrest from the shop

of Didar. He denied the defence suggestion that it was not a fact that during war, the accused was not in Mymensingh or he was not an anti-liberation force or he was not a leader of Al-Badar or that after liberation, the accused led a normal life and pursued his study.

It further appears that on behalf of the defence suggestions were given to the PW quoting *verbatim* statements made by him in his examination-in-chief right from the story that in 1971, he used to run or manage a book shop upto end of his statement that or at one stage, he heard that Hamid had fled away to India from Baromasjid with Al-Badar Sultan of Gafargaon to the effect that he did not say all those to the Investigation Officer, he denied those as not being a fact (the suggestions are not reproduced for the sake of brevity of the judgment. However, relevant omissions of the statements of the PW shall be referred to while discussing his credibility as a witness). The PW denied the last defence suggestion that it was not a fact that he deposed falsely as tutored by Awami League having benefit from it.

OTHER WITNESSES:

PW16, Md. Azabuddin Miah, Assistant Librarian, Bangla Academy, stated in his examination-in-chief that he works in the newspaper section of the Library at Bangla Academy. He supplies the daily newspapers: the weeklies, the monthly magazines and the periodicals preserved in the library on demand of the readers and the researchers who come to the newspaper section of Bangla Academy. The newspapers published since 1964 have been preserved in the library of Bangla Academy. On 23.10.2011, Abdur Razzaque Khan, the Investigation Officer of the Investigation Agency seized 255 paper cuttings of various daily newspapers and the weeklies from him at Bangla Academy. He

proved the seizure list as exhibit-‘1’ and his signature therein as exhibit-‘1/1’.

Serial number No.83, in Part-2, pages 515-516 of the seizure list of paper cutting is the attested photocopy of the news item under the head ‘ডোমারে জেনারেল নিয়াজি’ published in the Daily Sangram dated 04.11.1971, he proved the same as exhibit-‘2’.

Serial No.123, in Part-2, pages 558-559 of the seizure list of the paper cutting is the attested photocopy of the news item under the head ‘ঢাকা, ময়মনসিংহ ও টাঙ্গাইলে আরো শান্তি কমিটি গঠিত’ published in the Daily Azad dated 22.05.1971. He proved the same as exhibit-‘3’.

Serial No.227, in Part-2, pages 694-695 of the seizure list is the attested photocopy of the paper cutting of news item under the title ‘আরো ১৫ জন মির্জাফর ধরা পড়েছে।’ published in the Daily Azad dated 31.12.1971. He proved the same as exhibit-‘4’.

On 15.05.2011, Abdur Razzaque Khan, the Investigation Officer of the Investigation Agency, seized the two paper cuttings of two dailies at Bangla Academy from him, he proved the seizure list as exhibit-‘5’ and his signature therein as exhibit-‘5/1’.

Serial No.56 in Part-8, page 2709 of the seizure list is the attested photocopy of the paper cutting of the news item under the head ‘আজাদি দিবসের বক্তব্যে মমেনশাহীতে কামারজ্জামানকে অভিনন্দন’ published in the Daily Dainik Sangram dated 16.08.1971, he proved the same as exhibit-‘6’.

In cross examination, the PW stated that he did not read the reports published in the newspapers which have been marked as exhibits. He did not have the authority to make any comment about the correctness of the reports. He denied the defence suggestion that it was not a fact that the exhibits were created collusively.

PW-16 was examined on recall. On recall, he stated that on 08.03.2012, Abdur Razzaque Khan, the Investigation Officer of the Investigation Agency, seized the attested copies of the original news item published in the Daily Purbadesh on 31st December, 1971 under the head ‘দীন মোহাম্মদসহ আরো ১৫ জন দালাল গ্রেফতার’ and in the Daily Dainik Bangla under the head ‘আরো ১৫ জন দালাল গ্রেফতার’ preserved in the library of Bangla Academy. The copies were attested by the head Librarian. He proved the seizure list as exhibit-‘9’ and his signature therein as ‘9/1’. He proved the attested copies of the newspapers as exhibits-‘10’ and ‘11’ within the bracket, it has been written as ‘ইং ২৮/১/২০১৩ তারিখে দাখিলকৃত অতিরিক্ত দলিল প্রমানাদির পৃষ্ঠা ৯-১১ জন্ম তালিক.

In cross examination, the PW stated that it was a fact that the news item published in the ‘Dainik Azad’ vide exhibit-‘4’ and the news item published in the ‘Dainik Purbadesh’ and the ‘Dainik Bangla’ as proved on the date as exhibits-‘10 and 11’ were same news item published on the same day, but under a different title. A specific question was put to the PW to the effect “প্রশ্নঃ এই পত্রিকা দুটি কে এবং কবে সংগ্রহ করেছেন?” In reply, he stated that Bangla Academy preserved those two papers after purchase. Another question was put to him the effect “প্রশ্নঃ রিপোর্ট দুটির সঠিকতা এবং যথার্থতা সম্পর্কে আপনার কোন জ্ঞান আছে কি?” and he replied in the negative saying that he was not supposed to have such knowledge.

PW17, Amena Khatun, stated in her examination-in-chief that she is working as the documentation officer in *Muktijoddha Zadughar* and under her supervision all the research documents and the papers and documents concerning *muktijoddha* are preserved in *Zadughar*. She performs the duty as

the head of her department. She has been working in that post since 1996. On 03.03.2011, Monowara Begum, the Investigation Officer of the Investigation Agency, seized the photocopies of the documents mentioned in the seizure list from his department of the *Muktijoddha Zadughar*. She proved the attested copy of the seizure list as exhibit-‘7’ and her signature therein as exhibit-‘7/1’. She proved the book ‘একাত্তরের ঘাতক ও দালালরা কে কোথায়’ edited by Dr. Ahmed Sharif, Kazi Nuruzzaman and Shahriar Kabir published in February, 1989 as listed at serial No.4(11)(Volume-II) of the seizure list. He proved the same as material exhibit-‘8’ (the relevant portion of the book is the last para of page 111 to the first para of page 112).

In cross-examination, this PW stated that she had no knowledge of all the contents of the documents mentioned in the seizure list. At page 109 of material exhibit-‘8’ it is written ‘২২ এপ্রিল জামালপুর পাক বাহিনী পর্দাপনের পর পরই মোমেনশাহী জেলা ইসলামী ছাত্র সঙ্গের সভাপতি জনাব মোঃ আশরাফ হোসেনের নেতৃত্বে আল-বদর বাহিনী গঠিত হয়।’ Generally, the president is treated as the head of an organization.

PW18, Abdur Razzaque Khan, PPM, is the Investigation Officer of the *Tadanta Sangstha*, International Crimes Tribunal, Dhaka. He stated in his examination-in-chief that he was appointed as the Investigation Officer by the Government of Bangladesh vide Memo No.স্বঃ মঃ (আইন-২)/তদন্তকারী সংস্থা/১-৫/২০১০/১০১ dated 25.03.2010 of the Ministry of Home Affairs and accordingly, he joined the *Tadanta Sangstha* of the International Crimes Tribunal, on 28.03.2010 and he is still working in the post. During preparation for the investigation of the case, he read various books and the relevant portions of the various newspapers on the history of ‘*Mohan muktijoddha*’ and its background

and reviewed those. He was given the charge of investigation of the case from the *Tadanta Shangstha* on 21.07.2010. He reviewed the First Information Report (FIR) of Pallabi Police Station Case No.60(1)2008 very minutely judicial record of which was sent to the *Tadanta Shangstha* by the Registrar of the International Crimes Tribunal on 21.07.2010 and having found ingredients under section 3(2) of the Act, 1973 against Matiur Rahman Nizami, Ali Ahsan Mohammad Mujahid, Md. Kamaruzzaman (the appellant herein) and Abdul Quader Mollah started investigation into the case under bidhi 6 of the Bidhimala framed on 15.07.2010 for the commission of the crimes under the said section of the Act. On review of the FIR of Keraniganj Police Station Case Nos.34 dated 31.12.2007 under sections 447/448/436/302/109/114 of the Penal Code, judicial records of which were also sent to the *Tadanta Shangstha* by the International Crimes Tribunal, it appeared that the name of the accused was mentioned at serial No.4 in the column of accused. During investigation, he reviewed the FIR of Pallabi Police Station very minutely and the history of *muktijoddha* of Bangladesh, its background and the daily newspapers including the 'Dainik Sangram', it appeared to him that after 25th March, 1971 till 16th December, 1971 the accused as the president of Islami Chhatra Sangha, Mymensingh District was directly involved with the crimes against humanity such as murder, massacre in collaboration with the Pak army at Mymensingh and Sherpur and thus committed the crimes within the meaning of section 3(2) of the Act, 1973, so for the proper and effective investigation into the case he filed application to the Chief Prosecutor on 22.07.2010 for showing the accused along with 3(three) other, namely: Matiur Rahman Nizami, Ali Ahsan Md. Mozahid and Abdul Quader Mollah arrested. On such application, the

Tribunal passed order on 02.08.2010 for arresting the accused and to keep them detained in the jail hazat. During investigation of the case against the accused (Kamaruzzaman), he examined the witnesses at Sherpur on 14.09.2010 as to the commission of crimes by him during the *muktijoddha* in 1971 and recorded their statements. On 15.09.2010, he visited the broken part of old Seri Bridge situated towards the South of Sherpur town, 'Banthia Building' at Roghunathpur Bazaar, where Razakars' camp was set up in 1971 and the house of Surendra Mohan Saha at Nayanibazar where the accused set up the Al-Badar camps and took still photograph of those places. On investigation locally, he came to know that the accused while was the student of class-X of G.K.M Institution, Sherpur involved himself with the politics of Islami Chhatra Sangha and became its leader. On 29.06.1971, Badiuzzaman, an organiser of *muktijoddha*, son of Md. Fazlul Haque of village Kalinagor, under Police Station-Nalitabari, District-Mymensingh having fled away from his area took shelter at the house of Md. Moqbul Hossain, at village Ramnagar under Police Station-Jhinaighati, the paternal uncle-in-law of his elder brother, Dr. Hasanuzzaman. The PW went to the house of Moqbul Hossain on 15.09.2010 and examined him (Md. Moqbul Hossain) and Fakir Abdul Mannan and recorded their statements. He examined Dr. Hasanuzzaman, the elder brother of Shaheed Badiuzzaman at Jamalpur and recorded his statements. On 16.09.2010, he visited the *বধ্যভূমি* on the bank of the river Brahmaputra adjacent to the Circuit House, Mymensingh town and also the Dak Banglow of Mymensingh. He examined the victim of torture at the Circuit House and the Dak Banglow and recorded their statements. On 30.10.2010, he investigated about the massacres that took place on 25th July, 1971 at village-Sohagpur,

under Police Station-Nalitabari, presently known as *Bidhaba Palli*. During investigation, he came to know that under the leadership of the accused, the Razakars in collaboration with the Pak army killed 187 men and children of village-Sohagpur and a *Sreeti Falak* has been built there inscribing the name of 69. He examined the relatives of the victim of the massacre and the widows of the shaheeds and recorded their statements. On 16.09.2011 he examined Mosharraf Hossain Talukder, brother of shaheed Golam Mostafa of Sherpur about the killing of Golam Mostafa on 23.08.1971 and recorded his statement. On the basis of an application filed on 29.09.2011 to the Chief Prosecutor, International Crimes Tribunal for taking the accused under *hefajat* for 3(three) days for interrogation for the sake of proper and effective investigation, the Tribunal by its order dated 14.06.2011 allowed the prayer and then the accused was interrogated in the safe home and during interrogation, he divulged important information which have been reflected in the investigation report. In order to assist the PW in the overall investigation of the case, requisition was given to the Investigation Officer, Monowara Begum vide Memo dated 15.02.2011 and she on 03.03.2011 seized the book ‘একাত্তরের যাতক ও দালালেরা কে কোথায়’ edited by Dr. Ahmed Sharif, Kazi Nuruzzaman and Shariar Kabir which has been mentioned in the seizure list and the documentary evidence of Volume-I, page at 3 serial No.4 (11). On 03.03.2011, Monowara Begum also seized ‘একাত্তরের সিভিল ও সামরিক প্রশাসন নেত্রকোনা মহকুমার ফাইল-২’ of various dates from the *Muktijoddhaa Zadughar*, which contained the daily statements of the Razakars of Netrokona and the same also contains the information about the supply of arms and ammunition to the Al-Badars. He proved the attested photocopy of the statement of different dates (15.10.1971-07.11.1971)

(Volume-I, pages 199-203, 205-209, 214-217, 219-223, 224-230), as exhibit-‘12’ series and the signature of Monowara Begum as exhibit-‘7/2’. On 09.06.2011, he seized the book “Sun Set at Midday” (A Memoir) (relevant page of the book at page 97) written by Mohiuddin Chowdhury published by Kirtas Publications, Karachi, Pakistan, in December, 1998 and the book “The Vanguard of The Islamic Revolution The Jama’at-I Islami of Pakistan” written by Seyyed Vali Reza Nasr published in 1994 from the University of California (relevant page of the book is at page 66 para 3) from Sagar Publishers, 26, Natak Swarani, New Baily Road, Dhaka. He proved the seizure list as exhibit-‘13’ and his signature therein as exhibit-‘13/1’. He accepted the newspaper clipping published in the daily ‘ভোরের কাগজ’ dated 02.11.2007 under the caption ‘বদর বাহিনীর প্রধান সংঘটক কামারুজ্জামানের টর্চার ক্যাম্প’ seized by the Investigation Officer, Z.M. Altafur Rahman on 12.04.2011 from Bangladesh Press Institute as documentary evidence. He proved the seizure list and the signature of the seizing officer as exhibits-‘14 and 14/1’ respectively (Volume-8, page 2738) and the attested photocopy of the seized paper cutting as exhibit-‘15’ (Volume-8, pages 2748 and 2749). On 15.05.2011, he seized the attested copy of a news item published in ‘Daily Sangram’ on 16.08.1971 from Bangla Academy (which has already been proved and marked as exhibit-‘6’). He proved his signature in the seizure list as exhibit-‘5/2’ (Volume-VIII, page 2707). He examined Mina Farah, daughter of late Surendra Mohan Saha, wife of Farhad Reza of Nayanibazar, Sherpur on 20.06.2011, at present Road No.4/1, House No.41, Flat No.D/1, Police Station-Dhanmondi, (presently living in New York, the United States of America) and recorded her statements. During the recording of the statements, Mina Farah gave the PW a book written by her

under the title ‘যুদ্ধে যুদ্ধে জীবন’ (first published February, 2010) which he seized. He proved the seizure list dated 20.06.2011 and his signature therein as exhibits-‘16’ and ‘16/1’ respectively (Volume-8, page 2762). He proved the book ‘যুদ্ধে যুদ্ধে জীবন’ as exhibit-‘17’ (relevant page 220, para 2). On 23.10.2001, he seized 255 paper cuttings from Bangla Academy by a seizure list. He proved the seizure list and his signature therein as exhibit-‘1/2’. During investigation, he received Memo No.স্বঃ মঃ(আইন-২)/তদন্ত-যুদ্ধাপরাধ(তথ্য/উপাত্ত/১-১১/২০১০/৪৭৩ dated 01.12.2010 from আইন শাখা-২, the Ministry of Home Affairs, issued pursuant to Memo No.আন্তঃঅপরাধিঃ/তদন্ত-১৯৪ dated 29.11.2010 sent by the *Tadanta Shangstha* to the Cabinet Secretary, Cabinet Division. At serial No.4 of the said Memo, there was list of the arrested collaborators and other Government officers. He examined the same and included it in his case diary. On 14.01.2013, he filed a photocopy of the said Memo in the office of the Chief Prosecutor in connection with the case. He proved the original copy of the list prepared by the Director, NSI, Bangladesh dated 13.04.1972 as exhibit-‘18’, the headline of the list is “list of arrested persons as Collaborators.” At serial No.287A of page 14, the name of Kamaruzzaman (the accused), son of Insan Ali, village Bajitkhila, Sherpur, Mymensingh, has been mentioned as an arrested Al-Badar. From the evidence, oral and documentary, collected by him during on spot investigation, it was *prima-facie* proved that the accused committed the crimes against humanity including mass killing and also aided and abetted the commission of those crimes as enumerated in section 3(2) of the Act, 1973 and accordingly, he submitted his investigation report to the Chief Prosecutor of the Tribunal on 30.10.2011. After submission of the

investigation report on 30.10.2012, more additional evidence surfaced against the accused accordingly, he, on 07.06.2012, 28.09.2012 and 11.11.2012 recorded the statements of a few more witnesses and on 08.03.2012 seized the photocopy of the clipping of the news published in the first page of the first column of the 'Daily Purbadesh' dated 31.12.1971 under the head 'দীন মোহাম্মদসহ আরো ১৫ জন দালাল গ্রেফতার' and on the same day by the same seizure list also seized the photocopy of the first page of the daily 'Dainik Bangla' published on the same day containing the news under the head 'আরো ১৫ জন দালাল গ্রেফতার' from Bangla Academy as additional evidence. In both the news clippings, the name of the accused was mentioned. He proved his signature in the seizure list as exhibit-'9/2'. On 30.01.2013 he seized the book under the title 'বাংলাদেশের স্বাধীনতা যুদ্ধের আড়ালে যুদ্ধ' written by Professor Abu Sayeed, from Sagar Publishers, Natak Swarani, Dhaka. He proved the seizure list and his signature therein as exhibits-'19 and 19/1'. He proved the book as material exhibit-'9' (relevant page 162, 2nd line of first paragraph).

In cross-examination, the PW admitted that on some days, during examination of the witnesses, he remained present in the Tribunal and heard the statements made by the witnesses in their examination-in-chief and cross-examination. He denied the defence suggestion that it was not a fact that he only reviewed the writes-up, the books and the newspapers which favoured the prosecution and then compiled those writes-up, the books and the newspapers in 3(three) Volumes under the head 'বাংলাদেশের স্বাধীনতার ইতিহাস ও তার পটভূমি' and submitted those to the Chief Prosecutor which has been placed before the Tribunal. In nowhere of the 3(three) Volumes of the background of the history,

the name of the accused has been mentioned. ‘বাংলাদেশের স্বাধীনতা যুদ্ধের দলিলপত্র’ has been edited by Poet Hasan Hafizur Rahman. The explanation of the historical background as stated at pages 301-303 in the second volume has been edited from the book ‘স্বাধীনতা যুদ্ধের দলিলপত্র’ edited by Poet Hasan Hafizur Rahman. He did not know whether Poet Hasan Hafizur Rahman was pro-liberation or anti-liberation force, but he was one of the 18 (eighteen) intellectuals who gave statements on 25th June, 1967 to boycott Rabindra Sangit. Although in the book ‘মুক্তিযুদ্ধে ঢাকা’ in Volume-III, pages 582-589 of the historical background of the liberation filed by him, there are mention of many matters, nothing has been mentioned about the accused. From pages 606-610 of the 3rd Volume in the book ‘আল-বদর’ by referring to Major Riaz, it has been written that he without taking permission of the high command formed Al-Badar Bahini at Sherpur on 16.05.1971, of which, Kamran was the first Commander, in the same volume at page 631, it has been written that Al-Badar Bahini was first formed at Jamalpur. It has further been stated that after Pakistan army took over control of Jamalpur on 22nd April, Al-Badar Bahini was formed under the leadership of Md. Ashraf Hossain, the then president of Momesahi Islami Chhatra Sangha. No reference has been mentioned in the book “একাত্তরের যাতক ও দালালরা কে কোথায়” (exhibit-‘8’), in respect of the writings about the accused. At page 109 of the book, the name of Ashraf Hossain, has been mentioned as the president of Islami Chhatra Sangha, again at the last line of page 111 up to the first part of page 112 of the same book, it has been written that the accused was the chief of Mymensingh Islami Chhatra Sangha. There is some dissimilarities between the book “একাত্তরের যাতক ও দালালরা কে

কোথায়” (exhibit-‘8’) of 1989 edition and 1987 edition. He did not verify the dissimilarities between the two publications and the credibility of the 2(two) publications by any expert or historian. Mr. Shahariar Kabir who was involved with the editorial board of the two publications of the book has been made a witness in the case. He denied the defence suggestion that it was not a fact that Shahariar Kabir has not been cited as a witness in the case. He did not collect any official order that in 1971, the accused carried out his activities as the principal organizer of Al-Badars. On a question put to the PW to the effect “প্রশ্নঃ কামারুজ্জামান সাহেব আল-বদরের কোন এলাকার প্রধান সংঘটক ছিলেন?” he replied that he was the chief organiser of Al-Badar of Mymensingh-Sherpur area. He investigated as to when, on which date and at what place, the accused got the responsibility as the chief organiser of Al-Badar of Mymensingh and Sherpur, but he could not say any specific date. They did not get any list of the Razakars and the Al-Badars prepared in 1972, as the concerned Deputy Commissioner intimated that those lists were destroyed when ‘চার দলীয় জোট সরকার’ had come to power (2001). Innumerable cases were filed against the Al-Badars and the Razakars and he investigated into the matter, but he did not get paper of any case. He submitted the book “একাত্তরের (sic) যাতক ও দালালেরা” written by Azadur Rahman Chandan to the prosecution, but he could not say whether that book was filed before the Tribunal or not. He reviewed the book and the documents seized vide exhibit-‘7’, at page 414 of the book, the name of the accused has not been mentioned as Al-Badar. In exhibits-‘2’ and ‘3’ of second volume of the documentary evidence nothing has been stated about the accused. He did not get any information from the Adalat whether subsequently any legal step

was taken against the accused pursuant to exhibit-‘4’. He denied the defence suggestion that it was not a fact that it was his presumption that Kamaruzzaman mentioned in exhibit-‘4’ was accused-Kamaruzzaman. In exhibit-‘4’ after the name Kamaruzzaman, father’s name and address have not been mentioned, but it has been written ‘Al-Badar’, Mymensingh. In exhibit-‘6’ no organizational identity of Kamaruzzaman has been mentioned. During investigation, he did not see the organisational structure of the Al-Badars. He denied the defence suggestion that it was not a fact in the organisational structure of the Al-Badars, there being no post of chief organiser, he said that he did not see the organisational structure of the Al-Badars. In the news item published in the daily ‘Sangram’ on 16.08.1971 (exhibit-6), there is no mention of the name of the sender of the Telegram. A specific question was put to the PW to the effect: “প্রশ্নঃ এই সংগ্রাম পত্রিকায় (প্রদর্শনী-৬) প্রকাশিত খবরটির তার বার্তা কে কি ভাবে গ্রহণ করেছিলেন তা আপনি তদন্ত করেছিলেন কি?” and he replied that during investigation, he wrote letter to the concerned authorities of the ‘Dainik Sangram’ to supply them the copies of the ‘Dainik Sangram’ published during the period of 1970-1975, but they informed that they had no copy of the ‘Dainik Sangram’ published during the period of 1970-1975. He denied the defence suggestion that it was not a fact that in 1971, the telecommunication system of the then East Pakistan was in broken condition. He denied the defence suggestion that it was not a fact that at that time, telecommunication system was faulty. He does not know whether sometime wrong informations are provided in the newspapers at different time for political and other reasons and whether sometime mistake occurs. The writing on exhibit-‘6’ “দৈনিক সংগ্রাম তারিখঃ ১৬/৮/১৯৭১” were typed by him. He denied the defence suggestion that it was not

a fact that the report published in exhibit-‘6’ was wrong. The news item published in exhibit-‘4’ and in exhibits-‘10’ and ‘11’ are same and similar, but the title is different. (The Tribunal has noted that the cross examination regarding exhibit-‘4’ shall be applicable in case of exhibits-‘10’ and ‘11’). The news item published in the daily ‘Bhorer Kagaj’ as contained in exhibit-‘15’ at page 2748 of the eighth volume of the documentary evidence was published in 2007, i.e. after 37 years after liberation. He did not verify the truth or falsity of the said report; he did not also examine the reporter of the report. The information given in the report is not at pages 111-112 of the reference book “একাত্তরের ঘটক দালালরা কে কোথায়” published in 1987, although in the report reference has been given to those pages of the book. He inquired from Nalitabari Police Station about the case mentioned in the report, but they could not give any information. He denied the defence suggestion that it was not a fact that he got information about the case mentioned in the report or as the name of the accused was not mentioned there, he told that he did not get any information. He did not examine Professor Sayed Abdul Hannan before submission of the investigation report, but he examined him later on. The reason for non examination of Syed Abdul Hannan has been mentioned in the CD, then said he could not examine Sayed Abdul Hannan on 14.09.2010 as he was seriously ill. He did not examine local Awami League leader Ziaul Hoq by referring whom some facts have been stated about the accused in exhibit-‘15’. Emdadul Hoq Hira died before 2010 and he examined his wife. He did not know whether Emdadul Hoq Hira filed Sherpur Police Case Nos.23(3) of 72 and 20(3) of 72 with Sherpur Police Station against the local Razakars, the Al-Badars and 147 others for attacking his house as well as the houses of his

neighbours and also for causing damages thereto. He denied the defence suggestion that it was not a fact that charge sheets were submitted in those two cases, but as the name of the accused was not mentioned in the charge sheets, he stated that he had no knowledge about the said cases. He never examined Mushfiquzzaman, a teacher of Hajee Jalal Mohmud College of 'Sherpur Nakla' who has been quoted in the report. He did not examine the truck driver who has also been quoted in the report and did not investigate into the incident as narrated by the truck driver, only the reporter could say about the truth and the propriety of the report. On 27.01.2013, he filed some additional documents before the Tribunal through the Prosecutor which he got from the Ministry of Home Affairs vide its forwarding letter dated 01.12.2010. In column No.3 of the forwarding letter, there is mention of the list of the members of the Razakars, the Al-Badars, the Al-Sams and the Peace Committee of different Districts (those were received from the Home Ministry's record of 1972-1973). In column 4 of the forwarding letter, there are lists of the collaborators and other Government officers who were arrested from Dhaka District. He did not submit the list of column-3 of the forwarding. He denied the defence suggestion that it was not a fact that as the name of the accused did not appear in the list, so he did not submit the same. The document filed by him as exhibit-'18' through the prosecution is an attested copy received from the Ministry of Home Affairs, the date of attestation is illegible. He did not cite the officer who attested the same as a witness. He denied the defence suggestion that it was not a fact that the address and the name of the father written at the bottom of the list against the name, Kamaruzzaman at serial No.287 are not of the present accused. He got the list mentioned in exhibit-'18' 11(eleven)

months before the submission of investigation report in 2010. He denied the defence suggestion that it was not a fact that the name of the accused has been mentioned in the list through manipulation. He denied the defence suggestion that it was not a fact that he suppressed facts as to the step taken against Kamaruzzaman as mentioned in the list, as no evidence would be available there against the accused-Kamaruzzaman. He denied the defence suggestion that it was not a fact that it was not clearly mentioned wherefrom the documents vide exhibit-‘16’ were seized. He admitted that there is no signature in the seizure list of the person who allegedly produced the documents. The two other witnesses mentioned in the seizure list are the two constables who serve under him and no date has been mentioned under their signatures. He denied the defence suggestion that it was not a fact that the statements made by him in his examination-in-chief that Mina Farah gave him the book ‘যুদ্ধে যুদ্ধে জীবন’ were untrue. He denied the defence suggestion that it was not a fact that he did not mention in his examination-in-chief what Mina Farah gave him, as that would go against the prosecution. He denied the defence suggestion that it was not a fact that he did not examine Mina Farah and other seizure list witnesses in the case, as the truth about the seizure list would be unearthed. He did not find the truth of the statements made in the first line of the second para at page 220 of exhibit-‘17’ to the effect “আমাদের বাসায় আল-বদর হেড কোয়ার্টারের খবর বেতার মারফৎ ছড়িয়ে গেল”, then said during investigation, he did not find truth of the second part of the above statements, i.e. “উক্ত খবরটি বেতার মারফত ছড়িয়ে গেল”. Exhibit-‘17’ is a memoir type book of the writer (‘স্মৃতিচারণ মূলক বই’). He admitted that it is true that the book was first published after 39 years of the

liberation. He did not know whether the writer of the book Mina Farah has been living abroad 30/32 years, but she has been living abroad for long. He did not verify where and when she wrote the book. He denied the defence suggestion that it was not a fact that whatever has been written in the book about the accused has been written at the signal of a special quarter or those have no basis and are untrue. He denied the defence suggestion that it was not a fact that the statements made in exhibit-‘8’ and exhibit-‘15’ are *malafide* and have been made out of from enmity have been made and have got no factual basis or there is no truth in it. The writer of exhibit-‘19’, Professor Abu Sayed is an ex-Minister of Awami League Government and a leader of Awami League, he takes part in various talk show in television, he lives in Dhaka and sometime goes to his village home at Pabna, he has not been cited as a witness in the case. He (the PW) did not verify from where the writer got the relevant information mentioned in the book (exhibit-‘19’). He admitted that it was a fact that in 2nd line at page 162 of the book by the side of the name of Kamaruzzaman, the words chief organiser have been written, but it has not been written of which area or no political identity has been mentioned. In the same line it has been written that Ashraf Hossain was the founder of Badar Bahini and Chief of Mymensingh District. He denied the defence suggestion that it was not a fact that as there was no truth and factual basis of the book vide exhibit-‘19’, he did not cite its writer as a witness in the case. During the liberation war, Sherpur was a Police Station under Jamalpur Sub-Division. It is true that in the papers annexed at pages 433, 558, 559, 585, 632, 657, 662, 673, 674, 684 and 711 of the second volume of the documents although there are names of many others including Kamran, the name of Kamaruzzaman has not

been mentioned, similarly, in the papers annexed at pages 1144, 1145, 1146, 1147-1169 of the 3rd volume of the documents, there are writings about the activities of the Razakars, the Al-Badars and the Al-Sams at Mymensingh and at other different areas of the country and although the names of many people have been mentioned, the name of Md. Kamaruzzaman has not been mentioned. Likewise in the papers annexed to the documents in the 4th, 5th, 6th, and 7th Volume of the documents, nothing has been stated implicating the accused and in the ID cards of the Al-Badars as shown in the 6th Volume, there is no signature of the accused. In the newspapers reporting annexed to pages 2710 and 2713 of the 8th volume of the documents, there is no mention about the involvement of the accused. He denied the defence suggestion that it was not a fact that it was untrue that the accused was the president of Mymensingh Islami Chhatra Sangha and he said that fact for the first time before the Tribunal. He admitted that it was a fact that he could not collect any information based on historical fact that in 1971 the accused was the president of Mymensingh District Islami Chhatra Sangha, but that fact came to his notice from the fax message sent by the Superintendent of Police, Special Branch, Jamalpur on 20.01.2012, which he stated in Tribunal in his deposition. He denied the defence suggestion that it was not a fact that the fax message sent by the District Superintendent of Police was not based on facts or collusive. During investigation, he found that the accused was the Al-Badar Commander of Sherpur, but he did not find who were the president and the secretary of Islami Chhatra Sangha, Sherpur Branch. He did not also find who were the secretary of Mymensingh Islami Chhatra Sangha or the president and the Secretary of Mymensingh town Branch, he could not also say who were the

commander of the Al-Badars and the Razakars of Jamalpur or the president and the Secretary of the Islami Chhatra Sangha of Jamalpur. He could not say who were the Razakar Adjutants of Mymensingh District and Jamalpur Sub-Disivion. He could not ascertain the fact in which year the accused used to read in class-X, but he passed SSC examination from G.K.M. Institution in 1967. He neither visited that school nor examined any class mate of the accused or any teacher or employee of that school. He denied the defence suggestion that it was not a fact that the statements made by him that the accused was involved with the politics of Islami Chhatra Sangha while he was a student of School were false. He did not read the book ‘গল্পে গল্পে ইতিহাস, মুক্তিযুদ্ধে নালিতাবাড়ী’ written by *muktijodddhaa* Abdur Rahman Talukder and he had no idea about the writer of the book. He denied the defence suggestion that it was not a fact that as there was no mention of the facts in the book collected by him during investigation; he told that he did not read the book. He did not cite the Superintendent of Police, Special Branch, Jamalpur, who sent the so-called report on 20.01.2012 a witness in the case. He had talks with the local widows when he had gone to *Bidhaba Palli* on 30.10.2010 for investigation. At that time, he had talks with the widows: Asia, Most. Nur-A-Man, Eshaton, Hasna Ara, Ajufa, Lakajan, Fuljan, Dilatmoni, Fatema Khatun, Hazera Begum, Hazera, Zahura, Jamela, Amena and recorded their statements. He did not take any permission of the Tribunal in recording the statements of the additional witnesses. He recorded the statements of Syed Abdul Hannan on 07.06.2012, and those of Karfuli Bewa, Jubeda Bewa, Asiron Bewa, Hafiza Bewa, Jaritan Bewa and Hasen Banu on 28.09.2012 sitting at the rest house Echo-Park, Modhutila under Police Station-Nalitabari. Modhutila Echo-Park is 20

kilometers away towards the West-North from Sohagpur *Bidhaba Palli*. He does not know whether this Echo-Park is managed privately or the same is run on commercial basis. He did not know whether there is an establishment built by the Government at Sohagpur *Bidhaba Palli* for holding meeting of the organisations run by the widows for their welfare. On a question put by the Tribunal as to why Sohagpur is called *Bidhaba Palli*, the PW replied that on 25th July, 1971 the Pak Sena, the Razakars and the Al-Badars attacked Sohagpur village and killed unnumbered men rendering many women widow and since then the village is known as *Bidhaba Palli*. He denied the defence suggestion that it was not a fact that as on 30.10.2010, the inhabitants of the *Bidhaba Palli* did not tell the name of the accused, he did not record the statements of any the widows. On 02.10.2012, he filed application to the Chief Prosecutor to show the additional witnesses as witnesses in the Tribunal. In the investigation report submitted on 30.10.2012, he cited Jalaluddin (the PW), Saiful Islam @ Imu Sheikh (not examined) and Suruz Ali (not examined) from Sohagpur *Bidhaba Palli* as witnesses. He denied the defence suggestion that it was not a fact that on 02.10.2012 when Jalaluddin (PW10) deposed before the Tribunal, he (the PW) was present in the Tribunal. He denied the defence suggestion that it was not a fact that he, on hearing the testimonies of Jalaluddin in his examination-in-chief and cross-examination and having heard the names of the above mentioned widows in his cross-examination recorded the statements of 7(seven) widows showing anti-date as additional witnesses and then submitted their statements. During investigation, he traced Serajuddin Shaheb ex-principal of Ananda Mohan College, but he being very sick, did not record his statements, then said he could not say whether presently, he is alive

or dead. The accused passed HSC examination in 1972 from Nasirabad College, Mymensingh. He did not know whether HSC examination of 1972 was held in the month of May. During investigation, he did not visit Nasirabad College. He did not examine any class mate of the accused of Nasirabad College or any teacher or any employee of that college to ascertain what his political role was in 1970-71. During investigation, he found that the date of birth of the accused was 04.07.1952. He did not know whether HSC examination was held in July-August, 1971 which was cancelled and then HSC examination was held in the month of May, 1972. A specific question was put to the PW to the effect that whether during investigation, he found that because of the injunction given by the *muktijoddhaas* the accused did not appear in the HSC examination held in July-August, 1971, he replied that he did not investigate into the matter.

During investigation, he found that the Al-Badars started their functioning at Jamalpur on 22.04.1971 under the leadership of Ashraf Hossain. It is correct that during investigation, he found that the training of Al-Badars was started at Sherpur (then under Mymensingh District) on 16.05.1971, then the number of Islami Chhatra Sangha was 47 and the first commander of the Al-Badars was Kamran. During investigation, he got the organisational structure of the Al-Badars and in that structure, there was no post like the chief organiser. During investigation, he found that initially, the Al-Badars used to wear *kurta* and *pajama*, subsequently, they used to wear *fouzi* dress. During investigation, he found that Al-Badar Bahini was formed at Jamalpur under the leadership of Md. Ashraf Hossain, president of Mymensingh District Islami Chhatra Sangha. He did not verify whether in 1971, the month of Ramadan

was October-November. He denied the defence suggestion that it was not a fact that the accused got admitted in Dhaka University in 1975 and passed M.A. examination in 1978 were untrue and not based on facts. Then he asserted that the accused got admitted in Dhaka University on 18.04.1975 in the first part of M.A. in the department of Mass Communication and Journalism and second part of M.A. on 10.08.1976 in the same department. He admitted that as per his demand, Dhaka University supplied those facts in writing, but he did not cite the informer of the said facts as a witness in the case. He did not read the book ‘একাত্তরের যুদ্ধাপরাধীদের তালিকা’ edited by Jahangir Alam. He denied the defence suggestion that it was not a fact that although there is mention of 100 persons of Mymensingh area in the book, but as the name of the accused has not been mentioned; he told that he did not read the book, though he had read the same. He did not read the book ‘ময়মনসিংহ একাত্তর’ written by A.N.M. Mohammad Abdus Shakur. He denied the defence suggestion that it was not a fact that he had read the book, but as the name of the accused has not been mentioned there, he told that he did not read the same. He heard the name of Dr. M. A. Hasan, but he did not know whether he (Dr. M. A. Hasan) was very much active for the trial of the *Joddha Aparadhis*. He (Dr. M. A. Hasan) might have written a book under the title ‘যুদ্ধাপরাধ গণহত্যা ও বিচারের অন্বেষণে’, but he (the PW) did not read the same. He denied the defence suggestion that it was not a fact that he had read the book, but as the name of the accused has not been mentioned there, he told that he did not read the book. He knows Montasir Mamun, he did not read the book ‘একাত্তরের বিজয় গাথা’ edited by him published in 1992. He denied the defence suggestion that it was not a fact that as at pages

30, 54 and 56 of the book, nothing has been said about the accused, he told that he did not read the book though he had read the same. He did not read the book 'সোহাগপুরের বিধবা কন্যা, ১৯৭১' written by Journalist Mamunur Rashid. He denied the defence suggestion that it was not a fact that as nothing has been said in the book about the accused, so he told that he did not read the book, though he had read the same.

PW1, Md. Hamidul Haque, did not tell him during the investigation that after the crack down on 25th March, the Pakistani supporters were not active in Mymensingh town, but after Pak army had entered into the town, they left for village and then anti-liberation forces: Muslim League, Jamaat-e-Islami, the youths of Islami Chhatra Sangha, Nezam-E-Islam and the leaders and the Workers of PDB actively co-operated with the Pak army and that they heard from the village that the accused, Sheli, Didar , Yousuf, the leaders of Islami Chhatra Sangha had developed intimacy with the Pak army, but told that the prime companies of the accused were Ashraf of Jamalpur, Kamran of Sherpur and Didar, Sheli and Yousuf of Mymensingh. PW1 did not tell him during investigation that he and deceased *muktijoddha* Ohid entered into the Mymensingh town to recky in the night, but told that he along with *muktijoddha* Ohid entered into Myemensingh town to attack it. PW1 did not tell him during investigation that they along with the wife of Mosharraf Shaheb were planning to go to India, PW1 did not tell him during investigation that while being blindfolded, he was tortured and was also asked to get ready for death and to say *Doa Dorud*, but told that he was kept blindfolded for 24 hours. PW1 did not tell him during investigation that then Brigadier Quadir Khan, the Commanding officer of Pak army of Mymensingh area came on a sudden to

visit at the Al-Badars' camp and then he along with Abu Taher and Dabiruddin Bhuiyan were produced before him or Brigadier Quader Khan on coming to know about the identity of PW1 gave him some sort of release, i.e. kept him in the camp as a captive under surveillance, but told that after keeping him blindfolded for 24 hours, he was produced before Brigadier Quader Khan with open eyes and Brigadier Quader Khan addressed him (PW1) in english that "Don't kill him Hamid is a reputed student leader, he will organise public opinion in favour of Pakistan." PW1 did not tell him during investigation that then the Pakistanis and the general Al-Badars assumed that he was convinced by their words or he by making friendship convinced Al-Badar, Sultan of the camp, in favour of *muktijoddha*, but told that while in the Al-Badars' camp, he inspired an Al-Badar named Sultan in favour of *muktijoddha*. PW1 did not tell him during investigation that as a captive under surveillance in the camp, he used to move around the camp as they believed him and in the process, he had the chance to talk to every body or he noticed that the accused a prominent leader of Al-Badar used to chalk out various plan against *muktijoddha* and in the night, the Al-Badars of the camp used to go for various operations, but told that the prominent members of the Joint Command of Mymensingh Al-Badar Bahini and the Pak Bahini were the accused, Brigadier Quader Khan, Muslim League leaders Hannan and Moulana Faizur Rahman and they often used to chalk out plan for massacre. PW1 did not tell him during investigation that he had heard from the mouth of Sultan, an Al-Badar that the accused took part in the operation of Ananda Mohan College or after liberation of the country principal Sirajuddin told him about the incient. PW1 did not tell him during investigation that the accused inspired the Al-Badar Bahini to protect Pakistan

and to eliminate the *muktijoddhaas* and that he expressed his promise to that end or the accused was the leader of both the Wings: political and arms, but told that after visiting West-Pakistan, he stated his experience of visiting West Pakistan in a discussion meeting of the Al-Badars and asked them to take part in any drive to protect Pakistan. PW1 did not tell him during investigation that they went to Shambhuganj by boat or while staying at the village sent men to Mymensingh town to know its position. PW1 did not tell him during investigation that they (the men who were allegedly sent to Mymensingh Town) told him (PW1) that the operations which were carried out to spot him out were carried out under the direct supervision of the accused, but told that after he had fled away, the Al-Badars and the Pakistan army made a good number of raids to arrest him. PW1 did not tell him during investigation that besides there were Al-Badars' camp at the thana level, namely, Nalitabari and Fulpur Bolia Madrasa and these camps were used to be supervised by Kamaruzzaman.

PW2, Md. Monowar Hossain Khan Mohan @ Mohan Munshi, did not tell him during investigation that he took the training of *Swechchhasebak* leaving aside the job of tailoring or his training was completed 15/20 days before the beginning of *muktijoddha*, but told that after the speech of Bangabandhu Sheikh Mujibar Rahman on 7th March, he, Mostafa, Shafiqur, Ruhul, all of village-Bagraksha and others of his age of different places under the leadership of Hazrat, the brother of Nizamuddin were trained by the Ansars with bamboo *lathi* for 25 days. PW2 did not tell him anything during investigation about the conversion of Sushil of Hindupara or the killing of football player, Kazal. PW2, did not tell him during investigation that they

used to be trained for 3(three) hours everyday or Sheikh Shaheb told that those who would have training would be given job in Ansar or Mujahid for which he took training or after training he went to the Ansar office, where he was given a half pant and a ganji or told not to allow the enemy and Pak Bahini to enter or he took training for 3(three) months or after the speech of Sheikh Shaheb on 7th March, the *Darogas* of the Police Station posted them for guarding office, bank, bridge or 17/18 days after in the morning of 25th March, people started walking on foot from Dhaka, some going on by vehicle saying that the army in East Pakistan were killing the police, stopping the vehicles or while they were doing the duty people were saying that Pak army had come up to Tangail or thereafter a students' organisation at Sherpur whose leader was the accused or army came up to Belta School, Jamalpur or thereafter, the accused called the elderly people and the students or Zamiruddin Moulana, Momataj Moulana, Samidul Doctor, Badi Doctor, Sattar Professor and the other elites of Sherpur were called or after calling them the accused told them to invite the East Pakistan army from Jamalpur or after discussion in the evening, on the next morning, 50/60 persons had gone to Jamalpur and talked over the matter or after disucssion, they came back around 2 o'clock or thereafter the Hindus, the Muslims of Sherpur started for India or those who started for India included Suresh Malakar, Bhengura, Surendra Mohan Saha, Parimol Saha and others in 10/15 vehicles or on their way the accused along with others obstructed their vehicles and looted away their goods or the accused was standing there or the accused told Suren Saha to sit and discuss the matter and asked him not to go to India or he was also present there, but he could not go or in the evening, the accused sat with Suren Saha in his house for discussion or he could not say

what decisions were taken there, but in the morning, he saw that Suren Saha was not in the house, and a Pakistani flag was hoisting or he saw the members of the students' organisation with the accused in that house or the accused was the big leader or subsequently, the people from the villages occupied the houses of the Hindus or the accused was a big leader of the students organisation or the accused formed Peace Committee with Samidul Doctor and kept him in the house or the accused announced through mike that people would be recruited as Razakars or the accused set up a camp for army at Nayanibazar or another camp at G.K. School or after setting up the camp, the accused was the big leader of Al-Badar Bahini or Kamran was its small leader (in the deposition sheet, in Bangla, it has been recorded as “কামরান ছিল ছুডু (ছোট) নেতা ছিল”) or there were camps at Mymensingh, Jamalpur, Sherpur, Nokla, Nalitabari, Sohagpur, Ahmednagar, Katakhal Bridge, Paglanagar, Sreebardi, Bakshiganj, Kamalpur, Jhagrarchar or Major Riaz and Major Ayub set up camps at places as desired by the accused or in those camps, the East Parkistan Army or the Al-Badars used to stay, but he (PW2) told that he heard from the mouth of Kamran that the accused was the Commander of Mymensingh District Al-Badar Bahini and the accused used to move around the camps of the Al-Badars and the Razakars at Sherpur and Jamalpur to take information.

As discussed in detail while dealing with charge No.2 the defence could not cross-examine PW18 fully and consequently could not bring on record the contradictions in between the statements of the PWs (except PW1 and partly of PW2) made before the Tribunal and to the Investigation Officer during investigation as due to the absence of the learned Counsel of the defence the Tribunal by its order dated 24.02.2013 closed his cross-examination.

Answer to the legal question as to the entitlement of an accused in a case under the Act, 1973 to cross-examine the prosecution witness and to take contradictions from the Investigation Officer of his statement made to him from those before the Tribunal (this will be referable and applicable in respect of the PWs examined in the respective charge):

Before giving finding on charge No.7, the last charge, a very pertinent legal question, namely, the extent of entitlement of the accused to cross-examine a prosecution witness in order to bring contradictions in between the statements made before the Tribunal and the Investigation Officer needs be addressed.

In the context, it may be stated that in the case of Quader Mollah, it was observed that *“The Tribunal did not consider the omissions of PW6 (of Quader Mollah’s case) in not stating the facts to the Investigation Officer as pointed out hereinbefore which were material omissions and amount to contradictions and thus made him an unreliable witness. The Tribunal, as it appears, failed to consider the purport of cross examination. If the evidence of a witness in cross examination is not considered, assessed and weighed with his evidence in his examination-in-chief then cross examination shall be totally meaningless and there would be not need of cross examination. The Tribunal also failed to consider that the contradictions of a witness between his testimony made in Court and the statements made to the Investigation Officer shake his credibility as a witness. In this regard, I may conveniently refer to sub-rule (II) of rule 53 of Rules of procedure which is as follows:*

“The cross examination shall be strictly limited to the subject in matter of the examination-in-chief of a witness, but the party shall be at liberty to cross examine such witness on his credibility and to take contradiction of the evidence given by him.”

The contradictions between the testimony of PW6 (of Qudader Mollah’s case) in Court and the statements made to the Investigation Officer as pointed out hereinbefore, rendered him as an untruthful witness and consequently, he cannot be accepted as an eye witness to the occurrence. The Tribunal in assessing and sifting the evidence of PW6 while arriving at the finding of guilt against the accused in respect of charge No.5 failed to consider the contradictions as pointed out hereinbefore in its proper perspective keeping in view the above quoted provisions of the rule.”

But, in view of the fact that in the instant case, the Tribunal did not consider the material omissions of the concerned PWs examined in support of the charge though their attentions were drawn during cross-examination as to the omissions made by them while they were examined by the Investigation Officer; though PW18, the Investigation Officer, could not be cross-examined in respect of PWs 3-15 due to the closure of his cross-examination by the Tribunal vide order dated 24.02.2013 (this point has been dealt with in detail while deciding charge No.2), I feel it necessary to dwell on the point in a detailed manner.

To understand the implication of sub-rule (ii) of rule 53 of the Rules of Procedure in cross-examining a prosecution witness, some other provisions of the Act and the rules of the Rules of Procedure have to be read very carefully. Section 8(4) of the Act, 1973, has clearly provided that any Investigation Officer making an investigation under this Act may examine orally any person

who appears to be acquainted with the facts and circumstances of the case. Sub-section (6) of the section has provided that the Investigation Officer may reduce into writing any statement made to him in the course of examination under this section. And the detailed procedures to investigation have been provided in Chapter-II of the Rules of Procedure. Of the rules, in this Chapter, rule-4, sub-rules (1) (2) (4) of rule 8 and rule 11 are very relevant for our purpose.

A combined reading of section 8(4)(6) of the Act and the rules mentioned above (at the beginning of the judgment section 8 and the rules have been quoted) *prima-facie* show that the Investigation Officer is to record the statements of the witnesses examined during his investigation. The very provision in sub-rule (1) of rule 8 that the Investigation officer shall maintain a Case Diary for each case in connection with the investigation mentioning its day to day progress until completion of such investigation and the provisions in sub-rule (2) that he may use the case diary at the time of deposition before the Tribunal to refresh his memory or to explain any fact therein and in sub-rule (4) thereof that the Tribunal may peruse the Case Diary for clarification or understanding of any fact transpired at the time of investigation shows the importance of the recording of the statements of the witnesses during investigation by the Investigation Officer. Therefore, the Investigation Officer cannot record it in a haphazard or undisciplined manner. A reading of rule 11 of the Rules of Procedure makes it further clear that it is obligatory upon the Investigation Officer to record the statements of the witnesses during the investigation as it says:

“After completion of investigation, the Investigation officer shall submit an Investigation Report together with all the documents, papers and the evidence collected during investigation of offence(s) as specified in the Act committed by a person(s) before the Chief Prosecutor.”

Sub-section (3) of section 9 of the Act has clearly stipulated that the Chief Prosecutor shall, at least three weeks before the commencement of the trial, furnish to the Tribunal a list of witnesses intended to be produced along with the recorded statements of such witnesses or copies thereof and copies of documents which the prosecution intends to rely upon in support of such charges. And this shows that the recording of the statements of the witnesses during investigation is a must and the Tribunal should have a previous idea about the statements of the witnesses recorded during investigation and the other materials against the accused before the commencement of the trial. And this is all the more necessary to frame formal charge against the accused as provided in rule 18(1) of the Rules of Procedure which reads as follows:

“18(1). Upon receipt of report of investigation of offence(s), the Chief Prosecutor or any other Prosecutor authorized by him shall prepare a formal charge in the form of a petition on the basis of the papers and documents and the evidences collected and submitted by the Investigation Officer and shall submit the same before the Tribunal.”

Sub-section (2) of section 16 of the Act has mandated that a copy of the formal charge and a copy of each of the documents lodged with the formal charge shall be furnished to the accused person at a reasonable time before the trial; and in case of any difficulty in furnishing copies of the documents, reasonable opportunity for inspection shall be given to the accused person in such manner as the Tribunal may decide.

All these provisions of the Act and the rules show that there is no scope on the part of the Investigation Officer to be negligent in recording the statements of a witness during investigation of a case and the accused must have a chance to go through the statements of the witnesses both before the framing of charge and the trial as well.

Section 10. 1(e) of the Act, 1973 reads as follows:

“10.(1)(e) the witnesses for the prosecution shall be examined, the defence may cross-examine such witnesses and the prosecution may re-examine them”.

A mere reading of the section shows that the legislature has not put any limitation on the defence to cross-examine a prosecution witness, so if a narrow meaning is given to sub-rule (ii) of rule 53 of the Rules of Procedure that the cross-examination cannot be made beyond the subject matter of the examination-in-chief of a prosecution witness, it would be against the spirit of section 10(e) of the Act. Again the very provision in sub-rule (ii) of rule 53 that *“but the party shall be at liberty to cross-examine such witness on his credibility and to take contradiction of the evidence given by him”* clearly shows that the defence is entitled to cross-examine a witness as to the omissions made by him to the Investigation Officer in the statements recorded during investigation and the statements made before the Tribunal to shake his credibility. And if that recourse is not allowed, the credibility of a prosecution witness and veracity of his statements made before the Tribunal can never be tested and if that cannot be done fair trial as mandated in sub-section 2(A) of section 6 of the Act, 1973 read with sub-rule (4) of rule 43 of the Rules of Procedure shall be a far cry and the cross-examination will be made farcical

leaving the accused at the mercy of the prosecution witness who may say anything and everything at the time of trial. Reducing into writing the statements of the witnesses examined by the Investigation Officer during investigation as provided in section 8(6) of the Act shall be meaningless rendering that provision of the statute nugatory. Therefore, I am of the view that the Tribunal was wrong in giving a finding in its order dated 25.02.2013 to the effect *“It is to be noted that contradicting statement of prosecution witnesses by the Investigation Officer relates to procedure laid down in the Criminal Procedure Code, 1898 which shall not apply in any proceedings under the Act of 1973 (section 23 of the Act of 1973)”* and also in not taking into consideration, the contradictions in the statements of the witnesses made before the Tribunal and the Investigation Officer in spite of its observation on that very date (25.02.2013) that *“The matter of contradiction may be well perceived by the Tribunal by using the statement of witnesses made to IO even without contradicting it by the IO and thus there has been no likelihood of causing prejudice to the defence, in the event of failure to contradict the statement of witnesses made before Tribunal with that made earlier to the IO.”*

FINDINGS ON CHARGE NO.7:

The accusation against the accused in this charge was that during the period of War of Liberation, on 27th Ramadan at about 01:00 pm the accused being the chief organiser of Al-Badar Bahini as well as leader of Islam Chhatra Sangha or member of group of individuals being accompanied by 15-20 armed Al-Badar members raided the house of one Tapa Mia of Golpajan Road, Kachijhuli, Police Station-Kotwali, District-Mymensingh abducted him and his elder son Zahurul Islam Dara and took them to the Al-Badars' camp at District

Council Dak Bangalow. On the next early morning, the Al-Badars took them along with five others to the bank of the river Brahmaputra. After “tying their hands, they were lined up” and at first Tapa Mia was attempted to be charged with bayonet, but he escaped by jumping into the river. The Al-Badars fired gun shots “in the result Tapa Mia received injury on the leg and he managed to escape.” But the rest 6(six) unarmed civilians were charged with bayonet causing their death.

As already stated earlier, 3(three) witnesses, who were examined to substantiate the charge, are: PW1-Md. Hamidul Haque, PW9-Abul Kasem and PW15-Dabir Hossain Bhuiyan.

Let us examine how far these witnesses proved the accusation brought against the accused.

PW1-Md. Hamidul Haque, claimed to be a *muktijoddha*. He stated in his examination-in-chief that during the *muktijoddha*, he was the elected vice-president of Ananda Mohan College Chhatra Sansad, Mymensingh. He involved himself with politics actively after the declaration of 6(six) points. In 1970's National Assembly Election, he worked for Mymensingh District Awami League candidates, political parties who contested in the election against them were Pakistan Muslim League, Jamaat-e-Islami, Nejam-e-Islami, Pakistan Democratic Party, at that time, Golam Azam was the leader of Jamaat-e-Islami, Hashem Uddin and Fazlul Kader Chowdhury were the leaders of Muslim League, the accused was one of the prominent leaders of Mymensingh Islami Chhatra Sangha, a student organization of Jamaat-e-Islami. He met the accused last in the middle of July or the first part of August, 1971, at the Dak Banglow of Zila Parishad, the Headquarters of Mymensingh

District Al-Badar Bahini and then after 40(forty) years in the dock. The Al-Badar Bahini was formed at Mymensingh under the leadership of Islami Chhatra Sangha, Pakistan occupation forces gave them arms. The main camp of the Al-Badar Bahini was at Dak Banglow of Mymensingh Zila Parishad. The active leaders of the said camp were: the accused, Kamran, Ashraf, Didar and Sheli. Besides them, Hannan of Muslim League, Shamsuddin @ Suruj Ukil, Moulana Faizur Rahman, the then Imam of Boramasjid, were the all time collaborators of Pakistan army. After the crack down on 25th March, 1971, the Pakistan supporters in Mymensingh were not active, but after the army had entered into Mymensingh town, they left the town for village. He heard from the village that the leaders of Islami Chhatra Sangha, the accused, Sheli, Didar, Yousuf had developed intimacy with the Pak army. He further stated that he set up F.F. camps at Dhalu, Barangapara and Shibbari, the boardering area near Haluaghat, then he under the leadership of late Abdur Razzaque and late Syed Ahmed joined B.L.F., i.e. Mujib Bahini and they set up Mujib Bahini camp for *muktijoddhaas*. When they were organizing *muktijoddha* under the leadership of BLF and FF, the Pakistan army became active to eliminate the pro-liberation forces in the rural areas. As auxiliary forces of Pakistan army, various armed Bahinis were created, amongst them, there were the Razakars, the Al-Badars and the Al-Sams. He entered into Bangladesh in the first part of July with a leader of Mujib Bahini and they fought some battles with the Pakistan army at the char area of Mymensingh. Later on, he along with late *muktijoddhaa* Ohid entered into Mymensingh town to *recky* in the night. They took shelter at the residence of Engineer Rafiq Hasanat, the son-in-law of late Mosharraf Hossain Akand, the then Member of the National Assembly. The wife of Mosharraf

Hossain was also staying at that residence and they were planning to go to India. The Al-Badar and the Pakistan army gheraoed the house of Rafique Hasnat and apprehended the PW and *muktijoddhaa*, Taher and took them blindfolded. After about 24 hours, their eyes were opened, then they could understand that they were at the Al-Badars' camp at Dak Banglow of Mymensingh Zila Parishad. They were tortured in blindfold condition and were told to get ready for death and were asked to say 'Doa Durud'. At that time, Brigadier Quader Khan, commander of Pak army of Mymensingh Zone came to the Al-Badars' camp on a surprise visit, the PW, Abu Taher and Dabir Bhuiayn were produced before Brigadier Quadir Khan. On getting the identity of the PW, Brigadier Quadir Khan said "don't kill him, Hamid is a reputed student leader, he will organise public opinion in favour of Pakistan." Thereafter, he was given some sort of release, but kept him in the camp as a captive under surveillance. The accused, who was known to him from before, saw him in the camp and told him to work and fight to save Pakistan. The accused also asked him (the PW) to take part in the fight for eliminating the *muktijoddhaas*. The Pakistanis and the Al-Badars in general thought that he (the PW) was convinced with their words and he by creating friendship convinced Al-Badar Sultan of the camp in favour of *muktijoddha*. While he was a captive under surveillance, he used to move around the camp and in the process, he could talk to every body in the camp. He noticed that one of the prominent leaders of the Al-Badars, namely, the accused used to chalk out various plans against *muktijoddhaas* and in the night, the Al-Badars of the camp used to go for various operations. He heard from Al-Badar Sultan Khan that the accused took part in the operation at Ananda Mohan College in which

Shahed Ali, a bearer of the Degree College Hostel was killed and Doctor Sirajuddin the principal of the college was tortured by the Al-Badars and the Pak Bahini. After liberation of the country, Principal Sirajuddin told him about the incident, presently, he is sick and in fact, he is in death bed and staying in Dhaka. While he was in the camp at Dak Banglow, a big massacre took place at Sohagpur under Police Station Nalitabari, now known as *Bidhaba Palli* and another killing took place at village-Baroitola under Sadar Police Station of Kishoregonj District. He further stated that all the operations of the Al-Badar Bahini in greater Mymensingh were carried out from the regional office of the Al-Badar Bahini at Dak Banglow of Mymensingh Zila Parishad in liaison with the Pak army. Dara, son of Tapa Miah of Mymensingh town was killed. Tapa Miah was also targetted to be killed, but he was saved luckily. Shahed Ali, a sportsman of national level was also killed by the Al-Badars. The accused was the leader of both the wings: political and arms. Eventually, he could flee away from the camp with the help of Al-Badar Sultan while he went to say magrib prayer at Boramasjid near Zila Parishad. After he fled away from the Al-Badar camp, the Al-Badars carried out various operations at Mymensingh town to find him out on the idea that he was staying at Gulkibari, Mymensingh town and he was informed that all these operations were carried out under the direct supervision of the accused. One Tunu was killed during the raid of the house of the owner of Mizan Arts at Gulkibari.

In cross-examination, he stated that he did not know the date and the month in which Dara, son of Tapa Miah was killed and he did not also remember correctly whether Dara was killed during his captivity in the Dak Banglow or after he went out of the Dak Banglow. After the *muktijoddha*, he

visited the house of Tunu (Tunu was allegedly killed at Gulkibari, Mymensingh town during the raid by the Al-Badars in search of the PW after he fled away from the camp) many times near Ananda Mohan College. Tunu was possibly killed after few days of his fleeing away, but at that moment, he could not remember the date of death of Tunu though he came to know about his date of death from the members of his family, then said the occurrence took place in the month of July (in the deposition sheet, in Bangla, it has been recorded as “আমি পালিয়ে যাওয়ার সম্ভবত কয়েকদিন পরে টুনুকে হত্যা করা হয়। এই মুহূর্তে আমার মনে নেই টুনুর মৃত্যু দিবস কবে তবে আমি টুনুর পরিবারের লোকদের কাছ থেকে আমি জেনেছি, এখন তারিখ মনে নেই। তবে ঘটনাটি জুলাই মাসে হয়েছে”). After liberation of the country, he saw the family members of Dara many times and he could know the date of killing of Dara, but at that moment, he could not remember the date of his killing (in the deposition sheet, in Bangla, it has been recorded as: “টেপা মিয়ার ছেলে দারাকে কবে হত্যা করা হয় সে তারিখ ও মাস আমার জানা নাই। এটাও আমার ঠিক মনে নাই আমি ডাক বাংলোয় বন্দি থাকা অবস্থায় নাকি বাইরে আসার পরে দারাকে হত্যা করা হয়। স্বাধীনতার পরে আমি একাধিকবার দারাদের পরিবারের লোক-জনের সঙ্গে দেখা করেছি ও দারার হত্যার তারিখ জেনেছিলাম কিন্তু এখন মনে নেই।”).

The specific case of the prosecution was that Tapa Miah and his son Dara were apprehended from their residence at Golapjan Road, Mymensingh town and then taken to the Al-Badars’ camp at Mymensingh Dak Banglow on 27th Ramadan and then on the next morning, they were taken to the bank of the river Brahmaputra along with five others and they were charged with bayonet causing their death, but Tapa Miah was luckily saved as he jumped into the river.

Mr. S.M. Shahjahan, learned Advocate, for the accused, has emphatically asserted that 27th Ramadan corresponds to 20th November, 1971 (as per the English Calender) as verified and ascertained by him. The learned Attorney General could not dispute that 27th Ramadan does not correspondent to 20th November, 1971. As per the own version of the PW, in his examination-in-chief that he entered into Bangladesh with a team of Mujib Bahini in the first part of July and after some fights with Pakistan army at the char area of Mymensingh entered Mymensingh town with late *Muktijoddhaa* Ohid to recky in the night and while was staying at the residence of Engineer Rafique Hasnat was arrested by the Pakistan army and the Al-Badars and he was detained at the Al-Badars' camp at the Dak Banglow of Zila Parishad for about 26 days. In cross-examination, he also admitted that he fled away from the camp and the date of his fleeing away can be stretched maximum upto the first week of August and by no calculation it can be 20th November, 1971 or any part of November. Further he himself admitted in his cross-examination (relevant portion has been quoted hereinbefore) that the incident of killing of Tunu took place in the month of July and that the incident of killing took place possibly few days after he had fled away from the camp, so the question of his knowing about the fact of killing Dara, son of Tapa Mia and that Tapa Mia was also targetted to be killed, but he was saved luckily does not arise at all and this *prima facie* shows that he lied before the Tribunal.

In cross-examination, this PW stated that he was in jail for long time and then said he was in jail during all the Governments: BNP, Awami League and Jatiya Party. Then said he was arrested in 1974. Though he denied the defence suggestion that once he had fled away from Police Station and

subsequently, he fled away from Mymensingh District Jail by digging tunnel, admitted that he fled away secretly during the regime of Khandaker Moustaque. That being the antecedent of the PW, his testimony in respect of the accused cannot be accepted without a grain of salt. Further though he claimed to be a *muktijoddha*, he admitted in his cross-examination that he did not take any certificate from any army authority after taking training during the *muktijoddha*, but said that he received the certificate as the member of BLF from late leader Abdur Razzaque and the then home Secretary, Tashlim Ahmed. He further stated that his name is not in the record of *muktibahini*. He does not also know whether the name of Taher was in the record of *muktibahini*. The very fact that his name is not in the record of *muktibahini* also creates a doubt whether he was at all a *muktijoddha*.

In cross-examination, the PW further stated that he could not remember the name of the post held by the accused in Islami Chhatra Sangha in 1970, then said possibly either the president or the secretary or any other important post, he could not say who were the president, the secretary, the treasurer, the publicity secretary and holding the other important posts of Mymensingh District Islami Chhatra Sangha. He did not know in which year the accused used to read in 1971. It was publicly known that the accused was the Al-Badar commander of greater Mymensingh, he did not know who was the chief of Al-Badar Bahini of Mymensingh town. It was publicly known that Kamran was the chief of Sherpur Al-Badar Bahini. He had no paper to prove that the accused was the Al-Badar commander. He further stated that the incident of his arrest was a memorable event, but he could not remember on which date he was arrested during *muktijoddha* and the date on which he fled away from the

Al-Badars' camp. A man who could not say such memorable days of his life could not be believed in respect of his other testimonies in respect of the accused as stated by him in his examination-in-chief involving him with the incident as alleged in this charge and the other charges, particularly when he said that he could not remember the name of the post held by the accused in Islami Chhatra Sangha. The PW further stated that he has been living in Dhaka since 1992, but he did not lodge any written complaint with the *Gono Adalat* set up in 1992 in Dhaka, but he gave some points on being enquired by Dr. Ahmed Sharif, he did not give any evidence before the *Gono Adalat*. He did not file any complaint against any of the known Al-Badars including the accused. Besides, he did not tell the Investigation Officer that when he was allegedly in the Al-Badars' camp as a captive under surveillance he had the chance to move in the camp and to talk with every body and then he noticed that the accused one of the prime leaders of the Al-Badars' camp used to chalk out various anit-liberation operations and in the night, the Al-Badars of that camp used to to for various operaton. It is also a fact that the Tribunal disbelieved PW1 so far his testimony in respect of charge No.6 is concerned. This charge relates to be abduction of Tunu in the month of November, 1971 by one Didar at the alleged instruction of the accused and then his taking away to the Al-Badar camp at the Dak Banglow of Zila Parishad along with one Jahangir and subsequently, Tunu was tortured to death. The finding of the Tribunal regarding charge No.6 is as under:

“424. It appears that the testimony that has been made by P.W.1 in relation to charge no.6 does not speak of specificity. From whom and when the P.W.1 heard the event? Where Tunu was killed? Is there

evidence to show that Tune was brought to the Al-Badar camp housed in Zilla Parishad Dak Bungalow, Mymensingh? In cross-examination, in reply to question put to him by the defence, P.W.1 stated that Tunu was killed few days after he had escaped from the camp. P.W.1 also stated that after the war of liberation he visited the family members of the deceased Tunu and heard the event from them. If it is so, why P.W.1 could not narrate what he had heard, in detail?

425. According to P.W.1 he was brought to the camp at the end of July 1971 and was kept detained there for 26-27 days. But according to the indictment, the alleged event took place in the month of November 1971. If it is so, the fact of learning the event of killing Tunu, as deposed by P.W.1 does not inspire credence of any degree, particularly when he [P.W.1] failed to state when he heard the event.

426. P.W.1 stated that the accused used to maintain close and significant association with the camp of Al-Badar and was involved with the act of designing plans of carrying out 'operations' at night. Merely this piece of statement does not ipso facto prove that Tunu was also brought to the camp and was killed on approval or instruction of the accused, particularly when it is a fact of common knowledge that apart from members of auxiliary forces, Pakistani occupation troops also had killed numerous civilians by carrying out operations by their own. In absence of proof of bringing and torturing the victim Tunu at the camp we are not agreed with the unfounded argument advanced by the learned prosecutor that since the accused Muhammad Kamaruzzaman was associated with Al-Badar camp and he had authority and influence over it he is criminally responsible for the crime alleged.

427. It is true that mode of participation may be proved by evidence, direct, hearsay or circumstantial. But so far the charge no.6 is concerned we do not consider it just and safe to act relying solely on anonymous and unspecified hearsay version of P.W.1 to presume that the accused contributed to the commission of murder of Tunu. The fact that Tunu was murdered by Al-Badar remains undisputed. But in view of above reasons, we are constrained to arrive at a decision that there has been no

evidence or circumstance that could prompt us to infer culpability of the accused Muhammad Kamaruzzaman with the commission of murder of Tunu as listed in charge no.6. Consequently, we are persuaded to pen our view that the prosecution has utterly failed to prove culpability of the accused in relation to charge no.6 and thus the accused is found not guilty accordingly.”

After these quoted findings of the Tribunal about the credibility of the testimonies of PW1, I do not find any further justification to give more reasons to disbelieve the PW so far as this charge is concerned.

PW9-Md. Abul Kashem, claimed that he joined *muktijoddha* staying within the country and as he joined *muktijoddha* his father was taken away by the Pak Sena and the Razakars from his house, but he (the PW) succeeded to release his father in collaboration with the local member. Subsequently, in the month of November, 1971, he joined company commander Nowajesh Ali Bachchhu who was an EPR man. Nowajesh Ali Bachchhu gave him an address of an employee of Mymensingh Telegram office and told him that if he saw him (the employee of Telegram office), he would give him a *naksha* and also a packet and accordingly, he came to Mymensingh town on 3rd December, 1971 and boarded at room No.1 of his college hostel, namely, Mymensingh Junior Training College. On that very day, he contacted the man in the Telegram office and after collecting a *naksha* and a packet from him, he returned back to his hostel. Another junior student named Kutubuddin and hostel Super Lutfar Rahman were also in the hostel. In the evening of that day, when they were listening to the program of ‘স্বাধীন বাংলা বেতার কেন্দ্র’, his teacher Lutfar Rahman Shaheb cautioned him and told him that the sound of the radio should not go outside. At that time, another junior friend, Rashedul Haque saw that they (the

PW and junior friend Kutubuddin) were listening the program of ‘স্বাধীন বাংলা বেতার কেন্দ্র’. On the next morning, at about 8/9 a.m. an armed team of the Al-Badars entered into the hostel and gheraod the room of the PW; of them he knew one Abdul Majid. He thought that they had come to get his help to join *muktijoddha*, but they apprehended him and his companion Kutubuddin. On the request of the PW, both of them were taken to the room of the principal of the college. On their request, the principal of the college telephoned the Brigadier of Pak army in charge of Mymensingh and requested him to release them, in reply the Brigadier asked the principal to hand them over to the Al-Badars, then they (the Al-Badars) binldfolded both of them and took them in a rickshaw to a place and after their eyes were opened there, they found that it was a room in the first floor at the Al-Badars’ camp at Dak Banglow at Mymensingh Zila Parishad. Then they understood that Rashedul Haque got them apprehended by informing the Al-Badars’ camp. The Al-Badars assaulted his companion Kutubuddin in his presence and when he (the PW) wanted to ask some thing, he was also assaulted and then both of them were pushed into room No.2 of the first floor. Besides them, 8(eight) other persons were also detained in the room. In the evening of 4th December, a man was brought to the camp and was tied with the iron rod of the window and the man was saying *Kalema*. At that time, 2/3 Al-Badars came and beat the man and one of the Al-Badars struck twice on the chest of that man by a bayonet, another Al-Badar came and asked to unfasten and to take him down stair, blood was oozing from the body of that man. A few while then, after the man was taken to the downstair, he heard a sound of firing. Since early morning of 9th December, the PW heard the sound of firing from the other bank of the river Brahmaputra

adjacent to the Dak Banglow. At 8/9 o'clock in the night, 3/4 armed persons with their faces covered except one entered into their room, the man whose face was not covered was Ashraf and he was known to him from before. Ashraf was a leader of Islami Chhatra Sangha. Ashraf ordered not to lit the inside light and not to move as well and said that they were two, in the room, he himself and another person named Kamaruzzaman (the accused) and that both of them were the leaders of the Al-Badars. He never saw the accused before and heard his name for the first time. The persons, who were confined in the camp before, were: Hamidul Haque, Tapa Miah, Shahed Ali, Dara and Dabiruddin. He also heard that Dara was killed. In the morning of 10th December, the women who used to to the job of cleansing came and told them to go out as all the Al-Badars fled away and they (the women) freed them by breaking the lock of the camp and accordingly, they went away. On that day (10th December), Mymensingh town was freed. The accused and Ashraf, the two Al-Badar learders, used to control Mymensingh. He further stated that while he was confined in the camp, he heard that every night, many people used to be killed on the bank of the river adjacent to the Dak Banglow.

Let us scrutinise how far the testimonies of this PW as stated by him in his examination-in-chief can be believed.

The story of the PW that he was apprehended by the armed Al-Badars from the hostel of Mymensingh Junior Training School and then he was taken at the Al-Badar camp at Zila Parishad Dak Banglow appears to me ex-facie unnatural, improbable and an absurd one for 3(three) reasons: (i) he did not say the name of the employee of the telegram office from whom he was supposed to take the *Naksha* and the packet, (ii) he did not say to whom the *Naksha* and

the packet to be delivered after he received those or what to be done by the said *Naksha* and the packet after taking delivery from the man (iii) if he really joined company commander Nawajish Ali Bachchhu and at his command took delivery of the *Naksha* and the packet, he was not supposed to go back to the hostel and over stay there and listen to “স্বাধীন বাংলা বেতার কেন্দ্র” merily.

Further suggestion was given to this PW to the effect that he did not tell the Investigation Officer what he stated in his examination-in-chief about his taking of training at the Mymensingh Zila School field along with other *muktijoddhaas* and that though he tried to go to India, he did not get any chance or subsequently, he contacted company commander Babu Mannan to go to India to join *muktijoddha*, but he could not go or subsequently, he joined company commander Nowajesh Ali Bachchhu an EPR man or that he gave him an address of a man employed at Mymensingh Telegram office and asked him to see him in the month of November, 1971 up to his arrest by the Al-Badars, the hearing of the sound of firing from the bank of the other side of the river Bramaputra in the morning of 9th December and that the accused and Ashraf, two Al-Badar leaders used to control Mymensingh which he denied as being not a fact. But the fact remains that he gave an altogether a different story to the Investigation Officer while he was examined by him. He said that on 3rd December, runner Abdur Rahim whom he met in his area asked him to bring a packet from the Telegram office in the town and did not say of any *Naksha* and he did not at all say that he joined company commander Nawajesh Ali Bachchhu who asked him to go to the Telegram office to bring the *Naksha* and the packet. He also gave a totally different story as to his joining *muktijoddhaa* and taking training. It also sounds to be ridiculous that the accused came with

Ashraf and two others with arms in the night of 9th December to the room of the Pak army with his face covered and Ashraf told not to lit the inside light and told that the accused was with him. As it is the specific case of the prosecution that the accused was the chief organizer of Al-Badar Bahini or he was the chief of Al-Badars or at least an Al-Badar Commander, so the question of coming to the room of PW9 at the Dak Banglow covering his face does not arise at all. More so, when PW1 claimed that he used to meet the accused in the drawing room at the Dak Banglow at the ground floor regularly and that the accused used to address the other Al-Badars in the camp to encourage them to fight for Pakistan and to eliminate the *muktijoddhaas*, there could not be any reason on the part of the accused to cover his face apparently to hide his identity. Besides, PW9 in his cross-examination categorically stated that he could not say the date and the month in which Hamidul Haque, Tapa Mia, Shahed Ali, Dara and Dabiruddin were detained at the Al-Badars' camp at the Dak Banglow and when were they released.

For the above reasons, the testimony of PW9 that he was apprehended and then detained in the Al-Badars' camp at the Dak Banglow of Mymensingh Zila Parishad cannot be believed, so also his other testimonies about the accused as Al-Badar and his activities in the Al-Badars' camp at the Dak Banglow. From the impugned judgment, it appears that the Tribunal believed the testimonies of PW9 as stated by him in his examination-in-chief on the finding that "The above material versions depicting the fact of PW9's confinement at the camp and activities carried out by it remains totally unchallenged" without caring to consider the absurdity in the story of his coming to Mymensingh to collect the map and the *Naksha* from an unnamed

employee of the Telegram office, Mymensingh and then staying in the hostel even after taking delivery of the packet and the *Naksha* and material contradiction of the man who actually allegedly asked him to collect those (the *Naksha* and the map) from the employee of the Telegram office.

PW15, Dabir Hossain Bhuiyan, also claimed that he was detained at the Al-Badars' camp at the Dak Banglow of Myemensingh Zila Parishad on being arrested in the last part of the month of July, 1971. But the very story of his arrest by 6/7 plain dressed armed persons in front of homeopath shop of Didar at 'স্বদেশী বাজার', Mymensingh in the last part of July, appears to me *ex-facie* doubtful. In cross-examination, the PW categorically stated that before going to the shop of Didar, he did not give him any prior information, if that be so, how 6/7 plain dressed armed persons could know that he would be there at that time. It is not the case that when he had gone there, he saw Didar and he identified him to the plain dressed armed persons and got him arrested. The PW cannot be believed for his other apparent material contradictory statements in between the examination-in-chief and the cross-examination, such as, in examination-in-chief, he stated that on the date of his arrest, he had gone to Swadeshi bazaar to see Didar at their homeopathy shop as per the address given by him at Agartala, but in cross-examination, he stated that by the shop of Didar, he meant the shop of his brother-in-law, then said it was a Hindu property which his brother-in-law occupied by force. He further stated that the brother-in-law of Didar was also an Al-Badar, but he could not remember his name. In cross-examination, he categorically stated that subsequently, he met Tapa Miah, but he did not enquire from him when he was abducted. The story of arrest of the PW and his confinement at the Al-Badars'

camp at the Dak Banglow of Zila Parishad cannot be believed for the further reason that the prosecution case was that the house of Tapa Miah was raided on 27th Ramadan corresponding to 20th November, 1971 and he and his elder son, Dara were abducted and taken to the said Al-Badars' camp and on the next day, in the morning, the Al-Badars took them along with 5(five) others to the bank of the river Brahmaputra area and they were charged with bayonet, but Tapa Mia escaped by jumping into the river and thus, saved him though he suffered bullet injury while the Al-Badars fired gun shot at him, but others were killed, but as per his own version, he was arrested in the last part of July and released at the last part of August, but curiously enough, he categorically stated that while detained in the Al-Badars' camp at the Dak Banglow of Zila Parishad, he saw Tapa Miah and his son Dara along with others. Not only that he further stated that he also saw Hamidul Haque (PW1) while PW1 claimed that he was released either in the last part of July or first part of August. The testimony of this PW that he saw Tapa Miah and Dara in the camp also falsified the prosecution case that Tapa Miah and his son Dara were abducted on 29th Ramadan and was killed on the next morning. For the same reason, the other part of the prosecution story as stated by him that along with Dara, 5(five) other unnamed persons were also bayonet charged to death cannot be believed.

Considering the prosecution case, it appears to me that the most vital person to depose in the case was Tapa Miah who could luckily save himself by jumping into the river and whom PWs 1 and 15 met after liberation of the country, but the prosecution neither examined him nor gave any explanation for his non-examination. It may be stated that it is not the case of the

prosecution that Tapa Miah died in the meantime. And non-examination of Tapa Miah creates a very strong adverse presumption about the prosecution case and the benefit of such presumption must go to the accused, but the Tribunal did not at all consider this vital lapse on the part of the prosecution.

Suggestion was given to this PW that what he stated in his examination-in-chief, he did not say those to the Investigation Officer while he was examined by him, which he denied. In this regard, it may be stated that although this PW in his cross-examination stated that he saw Shilpi Rashid, Tapa Miah, his son Dara and Hamidul Haque in the camp after he was confined in the Dak Banglow, he in his statement before the Investigation Officer, did not at all say the name of those persons.

The claim of the PW that in the first part of May, 1971, he had gone to Dhaka on foot from Mymensingh and then from Dhaka went to Agartala via Akhaura also sounds absurd in the context of the circumstances that prevailed in the country at that point of time particularly in Dhaka. My reason for holding so are two folds: (i) it is a common knowledge that after crack down by the Pakistani army on 25th March, 1971, people started leaving Dhaka for their safety and when he was staying at Mymensingh relatively a much safer place, it is unbelievable that he would dare to go to Dhaka risking his life, that also on foot, (ii) he in his cross-examination clearly stated that Haluaghat border was the border road to go to India from Mymensingh, the other part of India was Meghalaya State and he could go to India from Mymensingh via Halughat within less than $\frac{1}{5}$ th time than to go to India via Dhaka-Akhaura, if that be so, shall one prefer to choose the long time consuming route than to the

short time consuming route? So, it creates a serious doubt whether he at all had gone to India for taking training for *mutkitjoddha*. His claim to be a *muktijodddhaa*, cannot be also believed as he himself admitted that his name was not in the list of *muktijodddhaas*. Considering all these, it appears to me that PW15 was not a trustworthy witness and his testimonies cannot be believed to come to any finding of guilt against the accused in respect of this charge. But in accepting the evidentiary value of this PW, the Tribunal did not at all consider the facts and circumstances of the case and the improbability in his story of going to India, his arrest from Swadeshi Bazaar and the material contradiction with the testimonies of the other PWs pointed out hereinbefore forgetting the mandate given in rule 50 of the Rules of Procedure and sub-rule (2) of rule 43 thereof (the rules have been quoted at the beginning of the judgment). The Tribunal itself found that *“We are quite convinced to exclude the statement made by P.W.15 so far it relates to seeing Dara and his father Tepa Mia detained in the same room of the camp, during his (P.W.15) detention there. Because according to P.W.15 he himself was brought to the camp on 20/22 of July 1971 and kept there detained for 26-27 days. Therefore, naturally P.W.15 was not supposed to see Dara and his father Tepa Mia detained there on 27 Ramadan in 1971 [corresponding to November 1971]. This is glaring contradiction which taints his above version. Gross variation occurred in his testimony in narrating the month of finding Dara and his father detained at the camp cannot be viewed casually.”* Even then I failed to understand how the Tribunal could rely upon the testimony of PW15 in finding the accused guilty of this charge.

The observations of Tribunal to the effect:

“Keeping concentration on the narration made in the charge framed the Tribunal notes that the success of prosecution in proving the instant charge depends on some relevant facts which are (i) the criminal act of abduction of Dara and his father Tapa Mia was carried out by the accused and his accomplices or accused had ‘complicity’ in committing the criminal act; (ii) Dara and his father Tapa Mia was brought to the Al-Badar camp at Zilla Parishad Dak Bungalow, Mymensingh and were kept detained there; (iii) afterwards they including other detainees were brought to the bank of river Brahmaputra by Al-Badars; (iv) Dara and three other detainees were gunned down to death there and Tapa Mia managed to escape.

Considering the context and pattern of offence people are not expected to witness the event of abduction, detention at the camp and killing of the detainees afterwards. ‘Complicity’ or ‘participation’ of accused may be well inferred and well perceived from relevant facts and circumstances which prompts not to draw any other hypothesis excepting the guilt of the accused, despite lack of explicit evidence may not be available and the witnesses before the Tribunal, due to lapse of long passage of time, may not be expected to memorize accurately what they had heard and seen.”

are the result of non-application of mind to the material evidence as referred to and discussed hereinbefore. The Tribunal accepted the testimonies of PWs 9 and 15 on their face value without considering the most pertinent and important thing whether they were at all trustworthy people to be believed in view of the inherent absurdity in their story of arrest by the Al-Badars and then detention in the Al-Badars’ camp at the Dak Bungalow of the Zila Parishad and also that of PW1 without considering his antecedent and the inherent inconsistencies and material contradictions in his examination-in-chief and cross-examination and the material contradictions in the statements made before the Tribunal and to the Investigation Officer.

In considering the evidence of PWs 1, 9 and 15 in respect of this charge, we must also take into consideration the occurrences which allegedly took place at Sherpur Town under Sherpur Police Station and at village-Sohagpur under Nalitabari Police Station both under Sherpur District as listed in charge Nos.2, 3 and 4. PW2 figured as a key witness in respect of those 3(three) charges and, in fact, the prosecution has projected him as all knowing person and the Tribunal relied heavily upon his testimonies that he was an Al-Badar and also a guard at the Al-Badars' camp at Suren Saha's house, but this PW never said in his testimonies either in examination-in-chief or in cross-examination that the accused ever left Sherpur and went to Mymensingh. Not only that, PW2 in his statement made before the Investigation Officer clearly stated that “কামারজ্জামান কোন দিন সকালে, কোন দিন দুপুরে আবার কোন দিন সন্ধ্যার পরে আসত।” if that be so, how the accused could be a prominent Al-Badar leader at the Al-Badars' camp at the Dak Banglow of Zila Parishad, Mymensingh and how PWs 1, 9 and 15 could see him there and how he could be connected with the alleged occurrences or the activities of Al-Badars at the Al-Badars' camp at the Dak Banglow of Mymensingh Zila Parishad; which witnesses of the prosecution side are to be believed, PW2 or PWs1, 9 and 15, but it appears that the Tribunal did not at all consider this broad factual aspect of the case in believing the testimonies of PWs 1, 9 and 15 in coming to the finding of guilt against the accused of this charge.

For the discussions made above, my considered view is that the prosecution failed to prove the allegations made in this charge against the accused beyond reasonable doubt and he is found not guilty of this charge and accordingly, he is acquitted of the charge.

In the result, the appeal is allowed in part. The appellant is found not guilty of the charges listed in charge Nos.1, 2, 4 and 7 and accordingly, he is acquitted of these charges.

The appellant is found guilty under sections 3(2)(a)/4(1) of the Act, 1973 of charge No.3 instead of section 3(2)(a)(h) thereof as found by the Tribunal and he is sentenced to suffer imprisonment for life instead of sentence of death as awarded by the Tribunal.

J.

Hasan Foez Siddique, J:

I have had the privilege of going through the draft judgments prepared by my noble and learned brethren, Hon'ble Mr. Justice Surendra Kumar Sinha and Hon'ble Mr. Justice Md. Abdul Wahhab Miah. Every bit of the opinion of Mr. Justice Sinha is based on law and evidence. There can, therefore, be no question of any disagreement therewith. I fully endorse the opinion expressed therewith.

However, I would like to add few words of my own in respect of the allegation of genocide committed in the village Sohagpur, that is, for charge No.3.

Islam demands "Death for Death" with the provision of payment of "blood money". Some modern Humanists used to press for "death in no case" or "God Alone Can Take Life Because He Alone Gives it" . Many humane movements and sublime souls have cultured

the higher consciousness of mankind, chased death penalty out of half the globe and changed world view on its morality . "Every saint has a past and every sinner of future" strikes a note of reformatory potential even in the most ghastly crime. This axiom is a vote against death and hope in "life". The two antithetical views, held by the Abolitionists and Retentionists, cannot be accepted as correct. If, notwithstanding the view of Abolitionist to the contrary, a very large segment of people, the world over, including the sociologists, legislatures, jurists, Judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of the society. The Supreme Court of India, in Ediga Annamma (AIR 1974 SC 799) while noticing the social and personal circumstances, possessing an extenuating impact, has highlighted that death penalty may not be a time barred punishment in some frightful areas of barbarous murder. Illustratively, the Court has mentioned that the brutal features of the crime and the hapless and helpless state of the victims. Justice Stanely Mosk of California uttered in a death sentence case, "as Judge I am bound to the law

as I find it to be and not as I fervently wish it to be" . (The Yale Law Journal No.6 page 1138).

Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

"Punishment is the way in which society expresses its denunciation of wrong-doing; and in order to maintain respect for law; it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else-----
---. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not".

The Bachan Singh (AIR 1980 SC 898) made out the formula of "the rarest of rare cases" for imposing death sentence. Such formula came up for consideration in the Machhi Singh and others reported in AIR 1983 S.C. 957. It was an extraordinary

brutality. Machhi along with accomplices killed 17 people in a village. In that case the court put itself in the position of the "community" and observed that though the "community" revered and protected life because "the very humanistic edifice is constructed on the foundation of reverence for life principle" it may withdraw the protection and demand death penalty:

"----- It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment where the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime; ----- for instance: When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community."

Krishna Iyer, J in Shive Mohan Singh (AIR 1977 SC 949) quoted following passage:

"----- Judges must enforce the laws, Whatever they be, and decide according to the best of their lights". In Rajendra Prasad (AIR 1979 S.C.916) Krishna Iyer observed, "The searching question the judge must put to himself is: What then is an extraordinarily reasonable as to validate the wiping out of life itself and with it the great rights which inhere in him in the totality of facts, the circle being drawn with ample relevant" He observed that the "robes" are a repository of many rare qualities but shall add to its repertory latest developments in sentencing wisdom".

Now, we shall see what actually happened on 25.07.1971 in the village Sohagpur under Nalitabari Police Station of the then Mymensingh District, at present Sherpur District, which is adjacent Police Station of Sherpur.

The appellant in support in his defence, produced a book named "গণহত্যা বনাম জৈব জৈব" written by Abdur Rahman Talukder, Exhibit-B". The writer narrated the story of massacre committed at village Sohagpur under caption "মুন্সিগঞ্জের ময়নামত". He compared the said massacre with the massacre of Jalianwalabag, Amritashar, India and the massacre committed by Hitler and his Nazi Force during Second World War.

He mentioned the names of 80 unfortunate people in his book who were killed in the morning of 25.07.1971. They were:

- | | | |
|------------------|--------------------|---------------------|
| 1. Meris Prabil | 28. Nalu | 55. Ansar Ali |
| 2. Chat Patta | 29. Kashimuddin | 56. Jahur Uddin |
| 3. Kitab Ali | 30. Fazar Ali | 57. Ekabbar Ali |
| 4. Md. Ibrahim | 31. A. Khaleque | 58. Jaher Ali |
| 5. Moslem | 32. A. Barek | 59. Esub Ali |
| 6. Rejot Ali | 33. Rahom Ali | 60. Umarudi, |
| 7. Shahr Ali | 34. Satu Miah | 61. Ali Hossain |
| 8. Newaz Ali | 35. Jasim Uddin | 62. Habej Uddin |
| 9. Nawab Ali | 36. Rahim Uddin | 63. Jamiruddin |
| 10. Kashem Ali | 37. Siraj Ali | 64. A. Kuddus |
| 11. Hazrat Ali | 38. Shaheb Ali | 65. Meher Ali |
| 12. Imman Ali | 39. Ibrahim Khalil | 66. Halim Uddin |
| 13. Siraj Ali | 40. Khejur Ali | 67. Sabordhan Sadhu |
| 14. Moyen Uddin | 41. Ayub Ali | 68. Kaincha Dewan |
| 15. Safir Uddin | 42. Maleque Fakir | 69. Nur Mohammad |
| 16. Kitab Ali | 43. Hazrat Ali | 70. Manik Miah |
| 17. Mohammad Ali | 44. Shamsar Ali | 71. Shahor Ali |
| 18. Abdul Mannaf | 45. Abul Hossain | 72. Safar Uddin |
| 19. Momin Miah | 46. Tona Sheikh | 73. Ashraf Ali |
| 20. Kadu Miah | 47. Fazal Talukder | 74. Mofizuddin |
| 21. Imman Ali | 48. Hatem Ali | 75. Sher Mamud |

Munshi

| | | |
|------------------|-----------------|-------------------|
| 22. Montaz Ali | 49. Nekhbor Ali | 76. Shamsul Haque |
| 23. Shahid Mia | 50. Babor Ali | 77. Rahmat Ali |
| 24. Abul Bashar | 51. Hossain Ali | 78. Alim Uddin |
| 25. Shafar Uddin | 52. Shaheb Ali | 79. Nazrul Islam |
| 26. Abdur Rahman | 53. Hasen Ali | 80. Jahar Uddin |
| 27. Hurmuz Ali | 54. A. Lafif | |

He also stated that along with those hapless and helpless people of village Sohaghpur around 100 other people were killed in that morning. From the names of those unfortunate people mentioned in the aforesaid list it appears that out of 80 victims 77 were Muslims inasmuch as Pakistani army claimed that they lunched operation searchlight to protect Islam, Muslims and Pakistan. The most brutal armed anti-civilian state machinery in modern times, taking help of auxiliary forces and local collaborators, committed such genocide.

Besides, the prosecution witnesses, the appellant's witness No.1 Md. Arshad Ali (D.W.1), who was one of the eye witnesses of the said genocide, gave vivid description of such extra-ordinary brutality including killing of his father. D.W.1, in his deposition, inter alia, said, *ÔNUbvi w`b mKvj Abgyb mvZUv mvto mvZUvi mgq tmvrvMcj Mvtgi w`K t_tK ,wj i kã i`btZ cvB| ZLb Avt^-Avt^-,wj i kã*

evotZ _vKtjv| GK chiq mKvj AvUuv mto AvUuvi mgq Avgv`i evotZ cvK tmbviv Gtm
 Avgvi evetK evoxi wfZi _wj Kti nZ`v Kti | Avgvi evetK _wj KitZ t`tL Awig evoxi cwog
 -`wY w`tk wmsingwo Lvij i gta` Avktq tbB| tmvnmCj, tebcvov, KvKiKw` cfwZ Mtgi
 kZkZ bivx cj`l t`sto Gtm H Lvij Avktq Mhb Kti | mU`vi cteLei cvB th cvK tmbviv
 Ptj tMtQ| ZLb Awig evotZ Avm, evoxi Avtk cvtk wewB Ae`nvq Qovtbn AtbK jvk t`Ltz
 cvB, hvi gta` Avgvi evevi jvkl wQj | Hw`b w`evMZ ivZ 12Uvi gta` Awig msMxq Avtiv 4 / 5
 Rb Avgvi wZvi jvkmn tgvU 7wU jvk mgwnZ Kwi | ivZ mto 12Uvi w`tk jvk _tjv `vdtbi ci
 Avgiv AtbK tjvk bivx cj`l KvKiKw` DEi Mtg Avgvi GK AvZtqi evotZ Avktq tbB| 0
 This is an admission on behalf of the appellant about
 the genocide committed at village Sohagpur.

Out of 18 prosecution witnesses, P.W. 10 Jalal
 Uddin in his evidence, inter alia, said, " Avgvi bvg tgrt
 Rvjvj Dwi`b | Avgvi wZvi bvg knx` Dwi`b|wKvbn- Mtgt tmvnmCj, DctRjv- bwj Zveov,
 tRjv- tkicj | 1971 mtj i 25tk RjvB cvwkw` tmbv ewnbxi m`m`iv Avj -e`i ivRvKvi
 ewnbxi m`m`i`i`k wbtq mKvj Abgvb mvZUv ev mto mvZUvq tmvnmCj Mtg tXvtK| Avgvi
 tQvU fvB Avj vDwi`b t`Sio`q Gtm Avgv`K etj cvK tmbv l Avj -e`i, ivRvKvi ewnbx Avgv`i
 Mtg Xtk tMtQ| ZLb Awig t`Sio`q GKUz`ji wMtq GKwU RvqMvq jvk`tq _wK| Avgvi tQvU
 fvB avtbi gvpvi gta` jvk`q _vtK|Zvici cPU _wj i ka`i`btZ cvB| wKQY ci _wj i ka`eU
 ntj GKUz`ce`k mj`R Avjxi evoxi ce`cvtk`wMtq t`wL 4wU jvk cto AvtQ| hvi v tmLvtb
 gZ Ae`nvq ctoWj Zvt`i bvg gjs`R Avj x, kvnx` Avj x, Avej evmvi l nvtkg Avj x| tmLvb
 t`tk t`sto Awgv`i evoxi Awl`bvq wMtq t`wL tmLvtb 11wU jvk cto AvtQ| Zvi gta` Avgvi
 evv mudi Dwi`b , Avgvi tRvV wKZve Avj x, Avgvi gvgvZ fvB tgvbn Avj x, tgvnvq` Avj x, gvgb
 wgv, KUg Dwi`b, tiRZ Avj x, Bgvb Avj x mn Avtiv bvg bv Rvbn KtqKRtbi jvk cto AvtQ|
 Gt`i gta` t`Lv tMj Bgvb Avj x gti bvB, tm bovPov KitQ| ZvtK Zvi `x Ges Awig wbtR `Rtb

wgtj aivawi Kti evi v`vq tkvqvj vg| evi v`vq tbi qvi mvf_ mvf_ tm gZi eiY Kti | Zvici
 mviv w`b Kvbwkwui ci mU`v tejvq tQvU tQvU MZ©Kti GKB MfZ©7wU jvk ti tL MYKei
 w`j vg| Avfi Kiu MfZ©3wU jvk I Aci MfZ©1wU jvk ti tL gwU Pvcv w`j vg| Zvici Avgv`i
 Mtg tQto Avgiv RMwj Mtg Avktj wbj vg| H Nubvi 3 w`b ci evoxZ wdti Awm Gtm gvbfti
 Kvto RvbftZ PvB nZ`vKvfti Nubv wKfvte NftuQ| Gj vKvi GKRB gj`weY tkbxi hviv tetP wQj
 Zviv Rvbvq ctq 245 Rb tjvKtK Nubvi w`tb tmvnmCj I tebcvov Mtg nZ`v Kiv ntqtQ|
 gj`weYiv ejtjv eKv epv, bmv , Kw`i Giv ivRvKvi wQj , GB ivRvKvfti`i c`avb wQj
 Kvgv`3/4vgvb| Zviv cvK tmbv`i wbtq Gtm GB Mtg nZ`v hA Pjvq| Kvgv`3/4vgvb tkicj
 tRjv wfiEK GKRB ivRvKvfti i tbZv wQtj b| I bvi K_vq ivRvKvi iv DVv emv Ki Z|0

P.W.11 Hasen Banu, wife of Abdul Latif, one of the victims of the said massacre, deposed, inter alia, - 0 Avgvi bvg nftmb evbj| eqm 58 eQi| Avgvi`v`gx knx` Ave`j j wZd|
 gv`3h`xi mgq kfeb gvftmi 10 Zwi tL mKvj tejv Avgvi`v`gx tmvnmCj Mtg wMftq wQj nvj Pvl
 KitZ| Awg ZLb evoxZ ivbwe KitZ hw`Qj vg| mKvj 9Uvi w`tK tMvj v_wj i ka tcj vg| Awg
 ZLb Avgvi ev`Pv tKvtj wbtq kji o kvi wo mn evoxi cv`og w`tK cvj tq hvB| Gici weKvj 4Uvq
 Awg evoxZ wdti Gtm t`wL DVvftb Avgvi`v`gxi jvk cto Avto Zvi mstM Avtiv`B Rfti jvk
 cto wQj | ZLb`v`gxi jvftki Kvto wMftq t`wL bwfi w`tK_wj XtK wctv w`tq tewitq
 tMftQ| evoxZ Avgvi PvPvZ fvBtqiv wQj | HLvftb Avtiv hvfti jvk cto wQj Zvt`i gta` GKRB
 Avgvi fwiZRv Avbmvi Avj xi jvk wQj | Avfi Kiu jvk wQj Rti`j nftki | cieZwZ mUvi w`tK
 jvk_wjtjv gwUPvcv t`qv nq| Avj -e`i Kvgv`3/4vgvb, ivRvKvi bmv, eKvepv, tgvRvddi Giv
 Avgvi`v`gxtK nZ`v Kfti tQ| Kvgv`3/4vgvb eo tbZv AwQj | tmB Iohsj Kti Avgvi`v`gxmn
 AftbKti g`j evi w`b kfeb gvftmi 10 Zwi tL nZ`v Kfti tQ| AvftMi w`b 9 kfeb Abgyb 10 Uvi
 w`tK wZb Rb Awg©Ges Avj -e`i GKiu tgtqtK avl qvBqv Avgvi Nti wftZti XKvq Ges
 GKRB cvK tmbv H tgtqUvi B3/4Z bo Kti | evKx`BRb Nti i`gvfti`wotq AvgvftK e`K

t`Lvq| Awg ZLb Nti wfZti `mtoq uQj vg| cti Zviv Nti wfZti XkK| GB `BRb tjvK
 cti Avgvi B3/4Z bó Kti | Awg AfbK Abpq webq Kti Zvt`i nvZ t`tk i`v cvBwb| hfxi
 mgq Avgvi eqm uQj AvbgwbK 18 eQi |Awg Avgvi m`gnwb I `v`gx nZ`vi wePvi Pvb|
 Avmvgx Kvgvi "3/4vgvb Wtk mbr³ | 0

P.W.12 Hafiza Banu, wife of another victim Ibrahim in her evidence, inter alia, said, "1971 mtj i
 kreb gvami 10 Zwi tL mKvj 7 Uvi mgq cvAvexiv Avj -e`i, ivRvKvi mn tkicfi Kvgvi "3/4vgvb
 Avj -e`tii eo tbZv Avgvi `v`gxK tmvnmCj Mtg Avgvt`i evoxZ nZ`v Kti | Kvgvi "3/4vgvtbi
 bvg gj "weYt`i KvQ t`tk i`tbwQ| Kw`i Wv³vi, eMvepv Giv cvK emnbxi mstM uQj | Gici
 cvK emnbx evoxZ XkK e`K w`tq AvgvtK AvNvZ w`tq gvutZ tdtj w`tq Avgvi B3/4Z bó Kti
 (G mgq mv`x Afsvi avivq Kw`uQj b)| tmw`b Kidj x tel qv , mgjv tel qv mn AfbK
 gvujvi B3/4Z bó Kti uQj | Kw`i Wv³vi , eMvepv Giv B3/4Z bó Kti tkicfi Kvgvi "3/4vgvbI
 bwK Gt`i mstM uQj | Avgvi `v`gx Qvovl H Mtg Avgvi Pvpv imivR Avj x, tLRj Avj x, Avgvi
 fvB Avej tnvtmb mn AfbKtK nZ`v Kti | Rvj vj Dw`b I Ab`vb` tjvtKiv GB jvk,tjv gvud
 t`q| Kto Avgvi eK tdtU hv`"Q| Avmvgx Kvgvi "3/4vgvbtk Wtk mbr³ | Awg `v`gx nZ`vi wePvi
 Pvb Ges Avgvi B3/4Znmbi wePvi Pvb| 0

P.W.13 Korfuly Bewa wife of another victim Rahim Uddin, in her evidence, inter alia, said, "1971 mtj Avgvi
 `v`gx kreb gvami `k Zwi tL g1/2j evi w`b et` (gvv) nvj Pvl Ki tZ tM uQj | ZLb et`i gta`
 tMvj v,wj i ka`i btZ cvB| hviv nvj Pvl Ki tZ uQj Zvt`i tK HLvtbB gvi tQ| hviv Rvjv (avtbi
 Pvi v) fv1/2tZ uQj Zvt`i tK tmLvtbB ,wj Kti gvi uQj | GB NUbwU NtU eZgvtb tmvnmCj
 weaev cj tZ | Avgvi `v`gx nvj tQto w`tq evoxZ Pj Gtm nvq nvq nvq Ki uQj | Zvici cvAvex
 `BUv Nti AvBj , Zvt`i mstM Avmtj v bmv, eMvepv, Kvgvi "3/4vgvb| cwK`vbx tmbviv ZLb Avgvi
 `v`gxK ej -Zg gv³ tn| hLb Avgvi `v`gx tP`Ki Dci etm uQj ZLb ej uQj eUz Gavi Avtmv|

Avgvi ṽḡx Iṽi KvṽQ tMṽj cṽi Avgvi ṽḡxṽK I iv Mj vq ṽwj Kṽi | cṽi Avṽi KUv ṽwj Kṽi
 tctṽU GṽZ bṽwofwṽo me tṽwṽtṽq hvq | Avgvi ṽḡxi tṽvb RṽgvBṽṽK tḡṽi tdṽj | Avgiv jvk
 tMṽqvj Nṽi tXṽṽK tiṽṽL bKj v Pṽj hvB | wZb w`b cṽi wdṽi t`wL Avgvi ṽḡxi jvk wkqvj , KKṽi
 tLṽtṽq tdṽj wQj | ZLb gvṽvi Lwj , nvṽZi nvo gwṽU Pvcv w`ṽq ṽṽq bKj v Pṽj hvB | cṽi Avevi hLb
 Avmj vg ZLbI GB e`i I cvÄvexiv Avevi AZ`vPvi `ii` Kṽi | wZb w`b ci Awḡ hLb evoxṽZ Avṽm
 ZLb Awḡ tMṽqvj Nṽi `wMṽṽq wQj vg ZLb cvÄvexiv Avgvi B³/₄Z bó Kṽi | ZLb cvÄvexṽ` i mṽṽM
 wQj bmv, eMvṽpv Ges Kvḡvi³/₄vgvb | Avṽmvgx WṽṽK mbv³ | Awḡ Avgvi ṽḡx nZ`v I Avgvi
 B³/₄Znvbxi wṽPvi PṽB | Ó

Those are the evidence of extreme brutality, cold blooded savagery and horrendous crimes against humanity of Pakistani Army and Al Badr Bahini in the name of Islam and security of Pakistan. The crime indulged by them is undoubtedly gruesome, cold - blooded, heinous, atrocious, cruel and calculated manner without any provocation whatsoever.

Now, I shall deal with the material evidence which is necessary to be considered to ascertain as to whether the appellant was any way involved in such barbaric genocide or not. In other words, whether the appellant had committed offence charged or not.

The International Crimes (Tribunals) Act, 1973 provides special provisions about Rules of evidence which are as follows:

19.(1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to

the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers periodical and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.

(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nation and its subsidiary agencies or other international bodies including non-governmental organisations.

In view of special provision about Rules of evidence let us examine the relevant evidence.

It appears that the appellant's full brother D.W.4 Md. Kafiluddin deposed that their village home is situated in Kumri Mudipara, under Sherpur Police

Station and, at the relevant time, the appellant was a student of Nasirabad College, Mymensingh. He admitted that his brother appellant was arrested in the last part of December, 1971. The documentary evidence produced by the prosecution regarding the arrest of the appellant are as follows:

News published in "the Dainik Azad" in its 31.12.1971 issue (ext.4) was as under:

ÒAvi I 15 Rb gxi Rvdi aiv ctofo|Ó

XvKv 30tk wWtm† | G chS-Avi I KtqKRb `vj vj aiv ctofo| bxtP Zvt`i bvg t`qv tMj |

1|

.

.

14| Kvgvi "3/4vqvb Avj -e`i, gqgbmsn|Ó

In "the Dainik Purbodesh" (ext.10) such news was published as under:

"`xb tgvnvg† mn Av†iv 15Rb `vj vj tMdZvi Ó,

XvKv, 30tk wWtm† (wewc AvB) | nvbv`vi ewnbxi Av†iv 15 Rb `vj vj †K tMdZvi Kiv n†qfo| AvR GK mi Kvix n`vÓ AvD†U GK_v Rvbtbv nq|

Giv n†j vt

(1)

.

.

.

(14) Kvgvi "3/4vqvb, Avj e`i tki cj, gqgbmsn|Ó

In "the Dainik Bangla" published on 31.12.1971, (ext.11) the relevant news was as under:

chain of circumstantial evidence consistent with the hypothesis of the guilt of the accused.

Now let us examine the evidence as to the activities and conduct of the appellant during the War of Liberation in Mymensingh and Sherpur areas which may help us to draw conclusion whether he had involvement in the massacre committed in the village Sohagpur or not. We shall also try to get the answer to the question, "Who was he?" during the war of liberation. Documentary evidence in this regard are:

"The Dainik Sangram" dated 16.08.1971 (ext.6) wherein a news was published under caption, *ÓAvRv`x w`etmi e³e` tgv`gbkvnxtZ Kvgvi "3/4vgvbÓ*

Contents of the said news were:

ÒcwmK`v#bi 25 Zg AvRv`x w`em Dcj t¶¶ MZ k#bevi tgv`gbkvnx Avj -e`i ewnbxi Df`v¶M wgvQj I wmt#úwRqvg AbyôZ nq| `nvbxq gmvj g BbióWJDtU AvtqwmRZ GB wmt#úwRqvtg mfvcmZZj Ktib Avj -e`i ewnbxi msMVK Rbve Kvgvi "3/4vgvb| GK Zvi evZ¶q cKvk wmt#úwRqvtg wewfbae e³v t`k¶K a¶k Kivi loht¶š;wj ß `kgbt`i m#ú¶K© mZK@vbx cKvk Ktib|Ó This news item proved that the appellant was organiser of Al Badr Bahini.

In her book *Òhtx` ht`x RrebÓ* (ext.7) Meena Farah daughter of Suren Saha, inter alia, narrated; *ÓAvgrv`i evmvq Avj e`i tnW tKvqvUv¶¶i Lei teZvi gvídZ Qwo¶q tMj | wbcymvrv, ej ej tgv`dv, dWUK gvj vKvi, tP¶rgj Kvi "qvmn Avtiv A¶bK¶K nZ`v Ktib¶Q cvK ewnbx| Avgrv`i ewno¶Z `Zix tRj Lvbvq e>`xt`i¶K titL AZ`vPvi Ges nZ`vi Rb` c¶Z Ktib R%bK Kvgvi "3/4vgvb|Ó*

She has given descriptions what she saw and heard during the war of liberation from different sources. From the contents of the said book it seems to us that during war of liberation she used to maintain daily dairy.

Now let us examine the oral evidence regarding activities of the appellant during war of liberation.

Appellant's brother D.W.4 Kafiluddin admitting some facts, inter alia, said, "Bnv mZ" th, mfi>'a mnvi evoxZ cvK ewnbx Ges Avj e`i ewnbxi GKWJ K`vau wQj |0 Thereafter, he said, (wbR etj b) 0i#bwQ GB K`vau i GKRB KgvUvi wQj Zvi bvg Kvgivb tm tkicfi GB mKj NUbv NwUqfQ|0 That is, occurrences committed in Sherpur are admitted.

P.W.1 Md.Hamidul Haque was the then Vice President of student union of Mymensingh Ananda Mohon College Student Union. In his evidence he said that appellant was student of Nasirabad College and leader of Islami Chhattra Sangha, student organization of Jamat-e-Islami. That is, appellant was an educated man and conscious about the national politics. This witness was a freedom fighter. He was arrested by Al-Badr Bahini and Pakistani Army from the house of one Rafiq Hasnat. He was confined in Al Badr Camp at Mymensingh Dak-bungalow for about 26 days. In his deposition he, inter alia, said,

0—ZLb Kvgi^{3/4}vgrb wQtb RvgrtZ Bmj vgrx Qv¹ msMVb Bmj vgrx Qv¹ msfNi gqgbmsfni tRjv
ch¹qi Ab²Zg tbZv|

—1971 mvtj i ga² RjvB A_{ev} AvMó gvtmi c²g w¹ tK Kvgi^{3/4}vgrb mvtnefK gqgbmsn
Avj e¹i ewnbxi tRjv m¹i `Bi , tRjv cwil¹ i WvK evsjvq me¹kl t¹Lv n¹q¹Qj Ges AvR
ZvtK 40 eQi c¹i Avevi (W¹tK) t¹Lj vg|

— gqgbmsn tRjv cwil¹ i WvK evsjvq tRjv Avj -e¹i ewnbxi c¹vb K¹v¹ú wQj | H Avj
e¹i ewnbxi K¹v¹ú GKwJF wj Wvi wQtb Kvgi^{3/4}vgrb, Kvgivb, Avki¹vd, w¹`vi , tkvjv c¹f¹wZ
e¹w³iv |

— ZLb H K¹v¹ú Avgvi ce¹cwi wPZ Kvgi^{3/4}vgrb G¹m Avgvi msfM t¹Lv K¹ib Ges cwK¹-v¹bi
c¹t¹q¹ cwK¹-v¹bi K¹i¹v Kivi Rb¹ j ovB Pwj t¹q th¹Z etj b| g¹y³thv¹x¹t¹ i tK D¹t¹Q¹ Kivi
msM¹tg kixK n¹Z Avnevb Rvbvb|

— ZLb Avig j¹ q¹ Kwi Avj e¹i ewnbxi Ab²Zg c¹vb tbZv Kvgi^{3/4}vgrb mvtne g¹y³h¹x¹ w¹etivax
w¹ewf¹b¹Acv¹t¹ik¹bi cwil¹ K¹ibv K¹ibZb Ges iv¹Z tejv H K¹v¹ú Avj e¹i iv w¹ewf¹b¹Acv¹ik¹tb
thZ|

—GB Acv¹ik¹ b¹ t¹jv Kvgi^{3/4}vgrb mvtne¹ c¹Z¹ q¹ ZI¹ jeav¹tb cwil¹ Pwj Z nq etj Zviv Avgv¹tK
Rvbvq|

— G Qvovl _vbn ch¹q¹ bwj Zvevox I dj¹ cj¹ tevqvj¹ qv gv¹ t¹mvq Avj e¹i K¹v¹ú wQj | GB
K¹v¹ú t¹jv Kvgi^{3/4}vgrb mvtne ZI¹ jeav¹tb K¹ibZb| 0

P.W.2 Monwar Hossain Khan Mohan @ Mohan Munshi,
getting appointment as security guard in the house of
Suren Saha by the appellant, worked there for about 7
seven months and saw the activities of the appellant
and his Badr Bahini closely. He, inter alia, stated:

| ZLb wi qvR tgRi eTj vAwg bvgvR cto Ab" GKwU K"vpu t`tL Zvici Avmtev| Gi gta"
 Avti KRb wi UvqvWAwg bwmv Avtm| tm tgv`dvtk tPvL evav Aeavvq wi Kmvq Kti wbtq hvq|
 bwmv Avdm t`tK GKwU Pvqbv e`K mstM Kti tmwi wvR hvq| Kvgi "3/4vqv K"vpu t`tK 5
 wgvU Avtq Pti hvq| Avav Nuv cti Kvgi "3/4vqv Ges bwmv GKB mstM K"vpu Xtk Dci
 Zjvq Pti hvq| bwmv Dci Zjv t`tK AvBqv KBtZtQ m'viti nvZ GLb mB nBtQ GLb mvm
 nBtQ e`K Pvj vBtZ cvti b-----|

— Kvgi "3/4vqv eTj Avgvi bKjv thtZ nte lLvtb Lp Ri"ix ctqvRb AvtQ| GKwU UvtK
 Kti 20/25 Rb mk`i vRvKviti mstM wbtq bKjvi Dti tk` i lqvbnq|

— Kvgi "3/4vqv সাহেব , নাসির, মাহমুদ, Kvgi vb এদেরকে বল্লো কাজলের গতিবিধি লক্ষ্য রাখতে।
 যদি সে b`x পার হয়ে জামালপুর যাবার চেষ্টা করে তাহলে, তাকে নদীতেই শেষ করে দিয়ে ভাসিয়ে দিবা,
 পরে জানা যায় তাকে গুলি করে হত্যা করা হয়, আর লাশ পাওয়া যায়নি।

— mti`' m'vni evotZ K"vpu Avgvi mvZ gvm _vKvvtj Kvgi "3/4vqv ctqB AvmZv gvS
 gtav Ab" K"vpu cwi`kfb thtZb|

— Kvgi "3/4vqv সাহেব কাশম সহ বাকী দুজনকে একসঙ্গে দাঁড় করিয়ে গুলি করে কাশম বেঁচে যায়
 বাকী দুজন মারা যায়।

— K"vpu Kivi qigZv wQj GKgvI Avgvi m'vi Kvgi "3/4vqvbi Avi Kvti v wQj bv, AwgP l bv|

— tkiccti Avj e`i KgvUvi wQtj b Avgvt`i m'vi Kvgi "3/4vqv|

— আমার বস Kvgi "3/4vqv AtbK উপরে। মেজরদের সংগে থাকতো। সে যদি মনে করতো,
 শেরপুরটাকে উলটিয়ে দেবে তাই পারতো।

— K"vpu t`tK Awg Ges Avgvi m'vi Kvgi "3/4vqv GK mstM cvvj tqwQ| tkicj `faxb nl qvi
 `Bw`b AvtM Avgiv cvvj tqwQ|0

P.W.3 Commander Md. Jahurul Haque Munshi Bir
 Protik in his deposition, inter alia, said:

0—tkicj Gtm t`mL Kvgivb bvtg GKRB e`i ewnbxi tjk vK wQj tm Kvgvi“3/4vgtbi Uz AvB
wm|

— Avg Kvgvi“3/4vgtbK me©c_g mfi>`a tgnb mnvi evoxi K`vtu tgRi AvBqtei mstM
t`LwQj vg btfat gvtmi c_g mBvtn|

— enEi gqgbmstni Avj e`i KgvUvi wQtb Kvgvi“3/4vgtb| 0

P.W.14 Mozibur Rahman @ Panu, a freedom fighter, in
his evidence inter alia, said;

0—Kvgvi“3/4vgtb mvtne Avj e`i ewnbxi KgvUvi wQtb| Avg i bZ cvB th, weifbaeGj vKv
t`K gw³htxi mg_Rt`i ati Gtb nZ`v Kti gMx b`xi tkix eRi wtp Zvt`i jvk tdtj w`Z|

—Avg evoxZ Avmvi 7w`b ci mUv 7 NuUKvq Kvgvi“3/4vgtb, wgtLz L`Kvi, G`WtfvtKU Zviv,
Bmywqv I Avtiv 4/5 Rb ivBtdj Kvti wbtq Avgvt`i evox tNivl Kti AvgvtK Avgvi gvtqi
mvgtb t`K wv tgvov Kti teta tkicji evbw_qv wewi tq wbtq AvUtk ivtL|

—ivZ ntq tMj cti Kvgi“3/4vgtb Zviv DuKj tK aZt`i tK tkicj _vbi nvRtZ wbtq ivLtz
ej tj ivZ 2.30 NuUKvi mgq Kvgi“3/4vgtbi wbt`k Avgvt`i tK _vbn nvRtZ wbtq AvUtk tq ivLv
nq| _vbn nvRtZ wbtq wJKvi Pti i Avtiv 7 RbtK AvUK Ae`nvq t`Ltz cvB| GLvtb Avgiv
`Bw`b `B ivl` _vKvi ciw`b tejv 11Uvq 4/5 Rb cvK Avg©Gtm Avgvt`i tK MvotthvM
Avg`bMi Avg©K`vtu wbtq hvq|

— Gi wKQY ci tevW`Nti i cte©cvtk GKw MZP cvtk Avgvt`i 11RbtK ewmtq ivtL|

—Gi wgtbu`tkK Gi gta` Rxtc Kti tgRi wivqr, Kvgi“3/4vgtb I Kvgivb mn tmLvtb Avtm|

—GB chq Kvgi“3/4vgtb mvtne tgRi wivqrK etj Gt`i tK Qvov hvte bv, Giv gw³thv`v
Gt`i tK Qvotj Avgvt`i AtbK wZ nte| Zivci Kvgi“3/4vgtb mvtne tgRi wivqrK 2 / 3
evi etj Gt`i tK nvj vK (tkl) Kti t`b|

— Ges Kvgi“3/4vgtbi wbt`k wJKvi Pti i Pvi RbtK j at MZP gta``vD Kwitq wj Kti nZ`v
Kiv nq|0

Another freedom fighter P.W.15 Dabir Hossain Bhuiyan, who was arrested and confined in District Board Dak-bungalow, Mymensingh, in his deposition, inter alia, said,

ও — তমলুতব আমগ অব্জ-ে`ি কগ্ৰুবি কবিগি^{3/4}বগ্ৰবতক ত`লত্জ চব| আমগ কবিগি^{3/4}বগ্ৰবতক চে[©] ত_তক্ৰ ঐপ্ৰভ্ৰব্গ----|

— অব্গবি হল্ৰ তপ্ৰল ল্ৰ্জ ত`গ্ৰ জল্ৰ ত`লত্জ চব কবিগি^{3/4}বগ্ৰব ম্ৰনে তপ্ৰতি এম্|

— তমলুতব অব্গতক চিত্ৰি`ব ঐ`উব গ্ৰদক গ্ৰি`উ কিত্ৰি Ges গ্ৰ³ত্ৰব্গ`ঐ ঐ ব্ৰেফ্ৰেজ_`ঐ` ত্ৰবি তপ্ৰব কিত্ৰি| ত্ৰ ঐ`গ্ৰ অব্গতক গ্ৰি`ত্ৰ তমলুতব GK চ্ৰেগ্ৰ অব্গবি তপ্ৰলি এবাব ল্ৰ্জ ত`এবি চি আমগ তমলুতব ওট্ৰত্ৰব ন্ৰগ্`জ নক, ত্ৰউচ ন্ৰগ্ৰ, ঐক্ৰি` (ফ্ৰি`ঐ) ঐক্` Ges ত্ৰউচ ন্ৰগ্ৰি তও্ৰ্জ `বিব্ৰক ত`লত্জ চব|

— GK চ্ৰেগ্ৰ ঐে`ম্ৰব্গবি ম্ৰনে কবিগি^{3/4}বগ্ৰবতক ঐ`আম্ৰ ক্ৰি গ্ৰ` ঐ ঐে`ত্ৰ ত্ৰব্ৰ আফ্ৰিব্ৰম্ৰ আত্ও ঐক্ৰব জল্ৰ কবিগি^{3/4}বগ্ৰব অব্গতক ত`ল্ৰেগ্ৰ এত্ৰ ত্ৰ গ্ৰ³ত্ৰে` AskMhb ক্ৰিত্ও, G ওবব আবি ত্ৰব্ৰ আফ্ৰিব্ৰম্ৰ ত্ৰব|

— ঐে`ম্ৰব্গবি ক্ৰি` ঐ ল্ৰব অব্গতক ত`ল্ৰেগ্ৰ কবিগি^{3/4}বগ্ৰবতক এত্ৰ, ওআফ্ৰ ডম্ৰক্ৰ তও্ৰে ত`বও|

Those are the evidence regarding the conduct and activities of the appellant during the War of Liberation. Conduct, which destroys the presumption of innocence, can be considered as relevant. Conduct previous or subsequent is relevant as it throws light upon a fact in issue or relevant facts. No doubt the prosecution has to prove the case beyond reasonable doubt but when the prosecution has established all the circumstances connecting the accused with a crime

and in the absence of any explanation, the conduct of the accused cannot be ignored.

Knowing fully well about the brutality committed by the Pak army started on the night of March 25, 1971, which was an act of treachery unparalleled in contemporary history, a programme of calculated genocide, this appellant invited brute Pak army at Sherpur. There is no reason to believe that before such invitation, he had no definite knowledge about genocide and atrocities committed by Pakistani Army in Dhaka and other parts of the country. Without helping the unfortunate helpless countrymen, he extended his hands to help the killers and accordingly helped them to establish camp at different places of Sherpur and Nalitabari Police Stations. Utter disrespecting the heroes fought in the war of "Badr" under the leadership of our great Prophet Hazrat Mohammad (P.b.u.H.) they named their forces as "Al Badr".

P.W.10 Jalaluddin, P.W.11 Hasen Banu, P.W. 12 Hafiza and P.W.13 Korfully Bewa, in their testimonies, disclosed that along with Pak army the appellant and others were present at the time of commission of massacre in the village Sohagpur. They killed the unarmed innocent villagers and raped many

unfortunate women. Conduct and the activities of the appellant during the war of liberation and other evidence, direct and circumstantial, clearly established that the evidence of P.W.s 10, 11, 12 and 13 are reliable. This charge has also been proved from the evidence of the appellant's accomplice P.W. 2 Mohon Munshi. This witness told about the fact of hatching conspiracy and plan of the appellant and others to attack Sohagpur and, subsequent event, after commission of such heinous massacre. He deposed, -

ÓGKw` b` i` b` t` Z` cvB` Kvgvi` 3/4vgyb` mn` Ab` iv` Dci` Zj` vq` wguUs` Kti` Ges` etj` tmrvnMcyj` MíguUtZ` gy` 3` thv` xviv` AvmtQ` H` MíguUtK` tNivl` Ki` tZ` nte|` cieZx` tZ` Zviv` H` MíguUt` tNivl` Ki` tZ` hvq` Avj` e` i` ewinbxi` KguUvi` Kvgi` 3/4vgyb` mvtnel` hvq|` ciw` b` mKvj` tejv` t` wL` UxtK` Kti` AtbK` ,` tj` v` j` vk` wbtq` Avtm` Ges` tm` ,` tj` v` cti` t` cSi` mfvi` cvtK` wbtq` hvq` Ges` gwni` Dwi` b` KvRx` gvBK` tgi` Rvrvq` nvRvi` nvRvi` gy` 3` thv` xv` tgi` tdtj` wQ` wKQyj` vk` wbtq` GtmiQ|` ZLb` Avgvi` m` vi` Kvgi` 3/4vgyb` etj` b` th,` Acvtiktb` thtq` It` i` tK` tgi` tdtj` tQ|` GB` Acvtiktb` ivRvKviivl` wQj` |` 0` That is, he heard the conversations of the appellant and others at the time of making conspiracy, plan and decision to effect operation in the village Sohagpur. He specifically said that appellant Kamaruzzaman himself rushed to that village to participate in the operation. He also saw the dead bodies of some victims brought by the killers from Sohagpur to Sherpur after completing operation to exhibit those deadbodies to the people claiming that

they had killed the freedom fighters which proved the allegation of involvement of the appellant in the genocide committed in the village Sohagpur. Conspiracy, previous conduct, preparation and plan mentioned above are the circumstantial evidence to connect the appellant with the occurrence. The post crime conduct of the appellant is also relevant.

Evidence of P.WS.2, 10, 11, 12, 13 and other circumstantial evidence clearly proved that the appellant, his Badr Bahini and Pak army were collectively and individually responsible for genocide committed at Sohagpur. We have critically gone through the evidence of all the witnesses and have thoroughly scanned the same, except some minor discrepancies there are no serious material discrepancies in the evidence warranting to completely discard their evidence. There is no reason to doubt the credibility of all these witnesses including P.W.2 Mohon Munshi.

Considering the oral and documentary evidence together with the pre and post operation conduct and activities of the appellant during War of Liberation in the area we have no hesitation to hold that the prosecution has been able to prove that the appellant, his ruthless Al Badr Bahini and the most

brutal armed anti-civilian Pakistani Army perpetrated genocide in the village Sohagpur. It was cold blooded savagery. The crime was enormous in proportion. The appellant, being an active leader of Al-Badr Bahini, whole heartedly tried his best to resist the war of Liberation and actively participated in the crimes against humanity. He was key organiser of Al-Badr Bahini of Sherpur Nalitabari area responsible for abducting, torturing and killing freedom fighters and general people during the War of Liberation. Without taking any steps to prevent commission of crimes against Humanity he extended his hands to help the brutal Pak Army and hatched conspiracy to commit such crimes and he himself participated in the commission of crimes against humanity. It is evident that the appellant led the local Badr Bahini, a killing squad to thwart the birth of Bangladesh as an independent nation in the globe. Does it not depict the extreme depravity of the appellant? In our view it does. Thousands of freedom fighters sacrificed their lives to resist such brutalities but the appellant helped those brutes and killed his own countrymen and freedom fighters along with them. The murders in the village Sohagpur were committed for a motive which evinces

total depravity and those were committed in course of betrayal of the motherland.

If we look into the manner in which the crime was committed, the weapon used, the brutality of the crime, number of persons murdered, the helplessness of the victims, the unbearable pains and sufferings of the raped women, widows and their children, we cannot come to any other conclusion except one, the Tribunal arrived at to award the capital sentence to the appellant. The barbaric, gruesome and heinous type of crime which the appellant and others committed is a revolt against the society and an affront to human dignity. It is the duty of the court to impose a proper punishment depending upon the degree of criminality. The Tribunal rightly did so.

J.

A.H.M. SHAMSUDDIN CHOUDHURY, J.

While I whole heartedly concur with the findings, analyses of evidence, interpretation of laws, my learned brother, Surendra Kumar Sinha, J, has arrived at and of course the sentence he has handed down, I am nonetheless, unable to be at one with his finding on "superior command responsibility".

Before I embark upon a detailed analyses to lend support to my synthesis that the concept of "superior command responsibility" is squarely applicable in the instant case, this needs to be reminisced that we did, in the case of Kader Molla-V-Chief Prosecutor, 22 BLT (AD) 8, unequivocally pronounce that notwithstanding the nomenclature of the International Crimes (Tribunal) Act, 1973, (henceforth the Act) it is very much a municipal legislation and that the law, the progeny Tribunals are to follow, are nothing but the municipal laws of Bangladesh while trying those accused of crimes indexed in the Act.

Persuasive Authority of UN Tribunals

I also wish to place with profound emphasis that for the reason stated above, we can not look at what are expressed at the International War Criminal Court (ICC) or International War Crimes Tribunal former Yugoslavia (ICTY) or International War Crimes Tribunal, Rwanda (ICTR) statutes, Special Court for Sierra Leon (SCSL)

but must concentrate our attention to what have been figured in our own statute.

That said, however, as this concept is new to our jurisdiction, we can take in aid decisions arrived at by the Courts / tribunals at other jurisdictions, including decisions taken by UN sponsored ad-hock tribunals so far and only to the extent that the language in their statutes are in similar terms with ours, treating them, however, as persuasive authorities.

While analysing the law relating to "superior command responsibility" we are to direct our attention primary on the English Common Law concept of actus reus, because "superior liability", is an offence that is committed without any overt act and as such, it marks deviation from the general proposition that failing to stop a crime doe not amount to an actus reus of crime.

The English Common Law maxim "actus non facit reum, nisi mens sit rea, must also not be overlooked, as mens rea is requirement to be

proved in every case except absolute liability offences.

Actus reus by Omission

As a general principle, as enunciated through the English Common Law, a person may not be convicted of a crime unless the prosecution have proved that he has (a) caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs which is forbidden by criminal law and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. (Smith and Hogan, Criminal Law, 11th Edition, page 34)

It is, however, not always possible to separate actus reus from mens rea (ACELYNCH, "The mental element of in the Actus Reus, 1982 98 LQR 109).

Sometimes a word which describes the actus reus, or part of it, implies a mental element, without which mental element an actus reus can not simply exist.

Since the actus reus includes all the elements in the definition of the crime, except the mental element, it follows that actus reus is not merely an act, it may indeed, consist in a state of affairs, not including an act at all (Much more often, the actus reus requires proof of an act or an omission (conduct)). Usually it must be proved that the conduct had a particular result, which crimes are known as result crimes, but there are crimes where actus reus need not cause any result, which are known as "conduct crimes".

Kenny, an acclaimed authority on criminal Jurisprudence, defined actus reus as "such result of human conduct as the law seeks to prevent".

The actus reus then is made up, generally, but not invariably, of conduct and sometimes its consequences and also of the circumstances in which the conduct takes place (or which constitute the state of affairs) in so far as they are relevant. Circumstances, like consequences are relevant if they are included in the definition of the offence.

A crime may be so defined that it can be committed although there is no "act" (overt act is the phrase we often use), in the sense considered above. There may be no necessity for any "willed muscular movement". Instead it may be enough if a specified state of affairs is proved to exist. These offences are often called "status offences" or "situation offences".

Actus reus without muscular movement also embraces situation whereby an actus reus can also be constituted by omission or non-action.

Examples of actus reus by omission, though did exist, were very rare indeed under the Common Law.

In one case a police officer was convicted for failing to perform his duty to preserve "The Queen's Peace" by protecting a citizen who was being kicked to death. (Dytham 1979 3 ALL ER 641).

Under the Common Law principle a citizen is guilty of an offence if he fails to respond to a constable's call for assistance in keeping the peace (Brown, 1841 Car of M 314).

However, statutes in the UK frequently impose duties upon people to do something, or face punishment for omission, thereby creating new actus reus by omission. So, under the Children and Young Persons Act, 1933, a person, legally liable to maintain a child, commits an offence where he fails to provide him with adequate food, clothing, medical aid or lodging.

In his book "Digest of the Criminal Law", Author Stephen states, "It is not a crime to cause death or bodily injury, even intentionally, by any omission".

In illustrating this view, Stephen gave an example in following terms:

"A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence".

Stephen than indexed cases where omission can constitute actus reus, stating that if A in the example, was B's parent, A would have a duty to act and would be guilty of murder.

The Courts in the UK have long accepted without debate that the offences of murder and manslaughter are capable of commission by omission, or non-action whereas they have assumed that assault at Common Law requires an act.

Glanville Williams, so far as statutory offences are concerned, suggested that the question is one of construction - Is the verb, in its context, properly construed to include an omission?

He then states; "In my opinion the Courts should not create liability for omissions without statutory authority. Verbs used in defining offences and prima facie implying active conduct should not be stretched by interpretation to include omission. In general the Courts follow this principle. They do not say, for instance, that a person "wounds another by failing to save him from being wounded, or damages a building by failing to stop a fire. At least this has never been decided. (1982 Cr. L. R. 773)

Prof Williams, however, has himself pointed out that the Courts often have held offences to

be capable of being committed by omission or non-action, although the enactment did not expressly provide so.

In the United Kingdom, most cases of homicide resulted in conviction for manslaughter, although in *Gibbins and Proctor* (1918 13 Cr.A. Ref. 134, CCA) a man and a woman with whom he was living were convicted of murder of the man's child by withholding food. The Court held that by living with the man and by receiving money from him for food the woman had assumed a duty towards the child. The Court of Criminal Appeal held that the Judge was right in directing the Jury that the accuseds were guilty of murder if they withheld food with intent to cause the child grievous bodily harm as a result of which she died.

Since most of the cases of omission or non-action have concerned homicide, the duties so far recognised are to preserve life. Parents owe such a duty to children.

In *Marriott* (1838 8 C & P 425,) it was held that a person who has undertaken to care for a helpless and infirm relative, who has become

dependent on him, may be held to owe a duty, particularly where he is to receive some reward for caring for the other in Common Law.

In *Nichols* (1874 13 Cox cc 75) a grandson was held to have owed such a duty to his grandmother.

In *Instant* (1893 1 QB 450) the person who was the deceased person's niece, lived in the deceased person's house and consumed food provided at the deceased person's expense, but did not supply any to the deceased, as a result of which he died, the niece was held liable.

In *Pittwood* (1902 19 TLR 37), a railway crossing gate-keeper opened the gate to let a car pass and then went off to his lunch, forgetting to shut it again. Ten minutes later a haycart, while crossing the line, was struck by a train. The gate-keeper was convicted of manslaughter. These cases were based on liabilities under the Common Law.

So, what the above discussions convey is that there are instances that under the Common Law as well as statutory schemes, omission or non-action, rather than overt act, can constitute

actus reus of various offences, particularly the offences of murder and manslaughter and that there are numerous statutes in the UK under which omission, as opposed to overt act, may constitute actus reus for various offences, homicidal offences in particular.

Whether S. 4(2) Created Actus reus by
Omission

To assess whether or not Section 4(2) of the Act makes omission a constituent part of a Crime against Humanity, we need to scan the text figured therein, which is for that purpose reproduced below verbatim:

"Section 4(2): Any Commander or superior officer who orders, permits, acquiesces or participates in the commission of any crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his

subordinates, whereby such persons or subordinates or any of them commit any such crime, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes".

It can be said without a blink that Section 4(2) contemplates two types of actus reus, one being founded on "overt act", and the other being on "mere omission". This Section makes certain omissions part of actus reus of Crimes against Humanity.

Phrases such as "acquiesces" "fails or omits to discharge his duty to maintain, discipline, or to control or supervise the actions of the persons under his Command or his subordinates or any of them, or who fails to take necessary measures to prevent the commission of such crimes", in Section 4 ordains unambiguous sermon that an offence contemplated by one type of situation is such that omission alone constitutes its actus reus and it is this type of offence

which is known by the term "superior command responsibility".

Now, the primordial question is what the legislators meant by the words "Commander" "or Superior Officers" in section 4(2)? Did they intend to point their fingers towards the commanders or superior officers in the armed forces alone?

As, for obvious reasons, there exist no authority from our superior Courts in this respect, we can look for overseas authorities, inclusive of those that emanates from Nuremberg, Tokyo and the UN sponsored ad-hock tribunals such as ICTY, ICTR, SCSL and of course ratio expressed by the ICC, only, of course, so far as, and to the extent, that their statutory languages are in similar terms with ours. For this purpose it is incumbent upon us to comb their statutory languages, bearing, however, in mind that they are of persuasive authority only.

Comparison between S. 4(2) and Articles 6(3),
7(3), 28

Superior's liability as per the Statute of the ICTY has been specified in Article 7(3) of the Statute in following terms:-

"The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof".

Article 6(3) of the ICTR statute is also phrased in identical terms and, hence it is unnecessary to reproduce it.

UN Tribunals Interpretation on Articles 6(3),
7(3) and 28

The Trial Chamber of ICTY in prosecutor-V-Kordic and Carkez (Trial Judgment, February 26, 2001, para 401) ordained that the prosecution

must prove the following three elements to succeed in invoking the concept of command responsibility as per Article 7(3) of the ICTY Statute, upon an accused;

(1) The existence of a superior-subordinate relationship, (2) Knowledge of the superior that his subordinate is about to commit or has committed a crime and (3) failure of the superior to prevent or punish the commission of the crime.

The same view was echoed by the Trial Chamber in Prosecutor-V-Limaj, (ICTY Trial Judgment 30th November 2005, para 520), Prosecutor-V-Oric, (ICTR Trial Judgment 30th June 2006, para 294), Prosecutor-V-Brima, (SCSL decision on Defence motion for judgment of Acquittal Pursuant to Rule 98, March 31, 2006, para-328), Prosecutor -V- Brima, (SCSL Trial Judgment, June 20, 2007, Para 781), Prosecutor - V - Fofana and Kandewa, (SCSL Trial Judgment, 2nd August 2007, Para 235).

These elements are reflected in Article 28 of the ICC Statute and have achieved the status of Customary International Law to be applied in both international and non-international armed

conflict (ICRC, Customary International Law, 2005, P 558).

The ICTY in the Appellate Judgment in Prosecutor-V-Delalic held that the threshold for determining command responsibility is whether the superior exercises effective control over the subordinate, regardless of the nature of that authority. (February 20, 2001, para 256 and also Article 28 of the Rome Statute).

The Appeal Chamber also emphasised that absence of substantial influence or persuasive ability as a form of control, would render insufficient the purpose of accusing a person of command responsibility.

Through its Trial Judgment, the ICTY Trial Chamber held in Prosecutor - V- Oric (supra, para 311), expressed that in order to establish superior-subordinate relationship, the subordinates must be sufficiently identified.

The principal perpetrators need not be identified by name and that the group or the unit they belonged to does not need to be identified. Same was the view of the Appeal Chamber in

Prosecutor -V-Blagojevic and Jokic (Appeal Judgment, 9th May 2007, para 287), and the Trial Chamber in Prosecutor-V-Hadzihasanovic and Kibura (Trial Judgment 15th March 2006, para 90).

The Appeal Chamber in Oric (3rd July, 2008) emphasised the importance of establishing, as a minimum, the existence of the culpable subordinates within the unit or group. In that case the Appeal Chamber reversed the conviction because of the Trial Chamber's failure to identify any culpable subordinate, whether by name, membership of a unit or group under the accused's Command.

The ICC also, in Prosecutor -V-Katanga and Ngudjolo (30th September 2008, ICC-01/04-01/07-717, para-35 and 48) arrived at similar decision.

In Oric, although the Trial Chamber established the existence of the Military Police as an entity, and repeatedly referred to its responsibilities, it only identified two commanders within the Military Police who were alleged to have been subordinates of the accused, but who were not themselves the perpetrators or

the crime. Nobody else, not even by mere reference to their membership in the Military Police, was so identified. The Appeal Chamber had this to say, "Nowhere in the Trial Judgment did the Trial Chamber mention other potentially culpable members of the Military Police nor did it suggest that unidentified military policemen were implicated in the crime at issue". (Para 35).

In addition, the Trial Chamber did not adequately explain how the unidentified commanders, who were under the alleged control of the accused, were criminally liable for the conduct of the perpetrators (Prosecutor-V-Katanga and Ngudjolo, ICC, Supra).

The Appeal Chamber of ICTY in Prosecutor -V-Delalic (supra, para 197) endorsing the Trial Chamber's finding on this issue in Prosecutor -V-Delalic, (Trial Judgment 16th November, 1998, paras 377-378 and 395), expressing that effective control is the material ability to prevent and punish the commission of offences.

The same view was also iterated by the ICTY Appeal Chamber in Prosecutor -V- Kordic and Carkez (ICTY Appeal Judgment, 17th December 2004, para 840), the ICTY Trial Chamber in Prosecutor-V-Blaskic (ICTY, Trial Judgment, 3rd May, 2000, para-301), the Appeal Chamber of ICTR in Prosecutor-V-Ntagerura (ICTR, Appeal Judgment, 7th July 2006, Para 342), the ICTR's decision on Tharcisse Muvunyi's motion for Judgment of acquittal pursuant to Rule 98 bis, 13th October 2005, para 49, ICTR's Judgment and sentence in Prosecutor-V-Karera (7th December 2007, para 564), SCSL's Trial Chamber's Judgment in Prosecutor-V-Brima (SCSL Trial Judgment, 20th June 2007, para 784), SCSL's Trial Judgment in Prosecutor -V-Fofana and Kondewa, *supra*).

All these decisions convey that such material ability is the minimum requirement for the recognition of a superior subordinate relationship for the purpose of Article 7(1) of the ICTY Statute and Article 6(3) of the ICTR Statute.

In Prosecutor-V-Hadzihasanovic, (Appeal Judgment 22nd April, 2008), the ICTY Appeal Chamber reversed the Trial Chamber's order of conviction because the Appeal Chamber found that this condition of "material ability", had not been met, (para - 231) and hence reversed the Trial Chamber's finding that the accused had effective control over the EL-Mujahedin detachment between 13th August and 1st November 1993.

In Prosecutor-V-Ntagerura, the ICTR Trial Chamber (Trial Judgment, 25th February, 2004, para 628), expressed that to prove accused's effective control, it will not suffice to demonstrate that he had general influence over them, even substantial influence.

The Appeal Chamber of ICTR in Prosecutor-V-Nahimana (Appeal Judgment, 28th November 2007, para 882) also expressed same view. It was nevertheless, emphasised that a commander does not need to have any legal authority to prevent or punish the acts of his subordinate.

In Prosecutor-V-Brima, the Appeal Chamber of SCSL, supra, held that a superior is one who possesses the power or authority to either prevent subordinates' crimes or punish the subordinate after the crime has been committed. The power or authority may arise from a de jure or a de facto command relationship. Whether it is de jure or defacto, the superior-subordinate relationship must be one of effective control, however short or temporary in nature, and "effective control refers to material ability to prevent or punish criminal conduct" (Brima, Appeal Judgment, 22nd February, para 257). The ICTR Trial Chamber in Prosecutor-V-Semanza (ICTR Trial Judgment, 15th May 2003, para 402) and in Prosecutor -V- Kajelijeli (ICTR Judgment 1st December, 2003, para 774), also arrived at the same equation.

The Appeal Chamber in Brima, supra, made it clear that whether a superior exercises effective control is a question of fact on a case by case basis and that indications for effective control include "the formality of the procedure used for

the appointment of a superior, the power of the superior to issue order or take disciplinary action, the fact that the subordinate shows greater discipline in the superior's presence, the level of profile manifested through public appearance and statements, or the capacity to transmit reports to competent authorities for the taking of relevant measures.

It was also expressed in Brima that in irregular armies, the level of effective control can be assessed by examining factors such as whether the superior "had first entitlement to the profits of war, such as looted property and natural resources; exercised control over the fate of vulnerable persons such as women and children had independent access to and/or control of the means to wage war, including arms and ammunitions, and communication equipment; rewarded himself with positions of power and influence; had the capacity to intimidate subordinates into compliance and was willing to do so; ... was protected by personal security guards, loyal to him, fuels or represents the

ideology of the movement to which the subordinates adhere; and, whether, the superior interacts with external bodies or individuals on behalf of the group.

It has been established by a host of decisions that the effective control must refer to the time of the commission of the alleged crimes, and the same cannot be extended to acts committed before the accused's assumption of superior status, although prior or subsequent acts may be relevant for evidentiary purposes. (Prosecutor-V-Hadzihasanovic and Kubvra ICTY, decision on interlocutory appeal challenging Jurisdiction in relation to command responsibility, 16th July 2003, para 51, Prosecutor-V-Oric, ICTY, Trial Judgment, supra, Prosecutor-V-Brima, SCSL, Trial Judgment, supra).

In Blaskic, (ICTY, 29th July 2004, para 69), the appellant argued "that to establish that effective control existed at the time of the commission of subordinates' crimes, proof is required that the accused was not only able to

issue orders but that the orders were actually followed".

The Appeals Chamber considered that "this provides another example of effective control exercised by the commander. The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators, where appropriate".

With the above quoted observation the Appeal Chamber of ICTY dismissed the convict's appeal.

The Trial Chamber of ICTY in Prosecutor-V-Delalic (16th November 1998) held that a superior may be liable for the acts of his subordinate whether his authority over the subordinates are defacto or dejure, as long as he exercises effective control.

Thus formal designation as a commander should not be considered to be sine quo non for command responsibility.

It was also observed that these commanders would escape liability if a formal letter of authority are to be treated as a prerequisite to enforcing humanitarian law.

This takes account of the fact that in many contemporary conflicts defacto command structure exists in which the commanders have no formal commission or appointment.

For such reasons the Appeals Chamber of the ICTR in *Gakumbitsi-V-Prosecutor* (ICTR, Appeal Judgment 7th July 2006, para 143) held that Trial Chamber erred in finding that there was no effective control on the basis that the dejure control had not been__established, without considering whether the accused had defacto control.

Although dejure authority is neither required nor sufficient to establish superior-subordinate relationship, it may be presumed that the existence of dejure authority prima facie results in effective control, unless proof to the contrary is produced (*Brima, supra*, para 784 and

Prosecutor-V- Muvunyi ICTR, 12th September 2006, para 51 and 475).

However, Appeals Chambers' Judgment clearly state that de jure authority does not relieve the prosecution of its burden to prove that the accused had effective control. (Prosecutor-V-Hadzihasanovic and Kubera ICTY, supra): it merely provides a prima facie assumption of effective control and more evidence for such finding is required. (Prosecutor-V-Hadzihasanovic and Kulura, ICTY, Appeal Chamber, supra, para 21, Prosecutor-V-Oric, Appeal Judgment, supra.

In Prosecutor-V-Blagojevic and Jokic, (ICTY Appeal Judgment, 9th May 2007), the Appeal Chamber held that the accused, in his capacity of commander of a brigade, had de jure control over his subordinates within the Brigade, but not effective control because his subordinates were acting under direction of the Main Staff.

In Prosecutor-V-Fofana and Kondewa (Appeal Judgment SCSL, 28th May 2008, para 214) the Appeal Chamber of SCSL confirmed the Trial Chamber's finding that the accused's de jure status as high

priest of all the Kamajors in the country did not by itself give him effective control over the Kamajors.

The latter position was also adopted by the ICTR Appeal Chamber in Prosecutor - V-Muvunyi (September 12, 2006, para 475). It was held that while the formal legal status of the accused may be relevant to the determination of effective control, the power to prevent or punish cannot be inferred solely on the basis of the existence of formal status".

In Nahimana, the so called Media case, the Appeals Chamber of ICTR over turned the Trial Chamber's finding that the accused had affective control which was solely based on its finding that the steering committee, of which the accused was a member, had a de jure control position over RTLM at the time the crimes were committed. No evidence had been produced demonstrating the existence of effective control of this committee or the accused himself during the time of killing (Prosecutor-V-Nihimana, "Media Case", Appeal Judgment, 28th November 2007, para 635).

Civilian-V-Military Superior

With respect, I find it incongruous to lend support to my learned brother Surnedra Kumar Sinha, J's view that "the application of the doctrine (of command responsibility) in civilian settings is fraught with challenge", nor can I agree with his assertion that "it is open to question as to whether it is at all advisable to have a superior responsibility doctrine applicable to civilian settings".

As the decisions that stemmed from ICC and such UN sponsored ad-hock tribunals as ICTR, ICTY and SCSL have persuasive authority, and as the text in the relevant Articles of their Statute are similar to that of our section 4(2), except the "knowledge" element, it is worth while to examine the authorities that have been engendered by their decision on superior responsibility, and hence, the same are elaborated below.

ICC, ICTR, ICTY and SCSL on Civilian Superior
Responsibility.

Civilian and Political Leaders that exercise effective control over subordinates may also be superiors for the purpose of command responsibility (Prosecutor-V-Delalic, ICTY, Appeal Judgment 20th February, para 195-196, Prosecutor-V-Aleksovski, ICTY Appeal Judgment, 24th March, 2000, para-76, Prosecutor-V-Kayishima and Ruzindana, ICTR, Trial Judgment May 21, 1999, para-213, Prosecutor-V-Musema, ICTR, Trial Judgment, 27th January - 2000, para-148, Prosecutor-V-Fofana and Kondewa, Trial Judgment, supra).

Trial Chambers of both ICTR and ICTY expressed that the use of the generic term, "Superior" coupled with its juxtaposition to the individual criminal responsibility of "Heads of States or Governments" or "responsible Government Officials" reflect the intention of the drafters to make Article 6(3) and 7(3) applicable to "Political Leaders and Other Civilian Superiors in position of authority" (Prosecutor-V-Delalic, ICTY, Trial Judgment, 16th November, 1998, para

356, Prosecutor-V-Kayishema and Ruzindana, ICTR, Trial Judgment, supra).

In Prosecutor-V-Karemera, (ICTR, decision on motion for Judgment of acquittal, 19th March 2008, para-15) it was held that the above decision is consistent with Customary International Law.

Such civilian superiors must, however, exercise powers of effective control over their subordinates before they will be held responsible for the acts of such subordinates. (Prosecutor-V-Musema, ICTR Trial Judgment, supra, para 141, Prosecutor-V-Basilishema, ICTR, Trial Judgment, 7th June 2001, para 42, 43, Prosecutor-V-Brima, SCSL, Appeal Judgment, supra, 257, ICC Statute, Article-28).

The Appeal Chamber of SCSL stated that the test of effective control is the same for military and civilian superiors, (Prosecutor-V-Brima, SCSL, supra, para-275, Prosecutor-V-Fofana and Kendewa, SCSL, Appeal supra, para-175).

However, the ICTR Appeal Chamber in Prosecutor-V-Bagilishema (Appeal Judgment, 3rd July, 2002, para 55), Prosecutor-V-Kajelijeli

(Appeal Judgment of ICTR, May 23, 2005, para 87), Prosecutor-V-Nahimana, (Appeal Judgment, supra, para 605), expressed that the control exercised by a civilian superior need not be of the same nature as that exercised by a military commander.

In addition to Delalic and Aleksovski, the ICTR in Prosecutor-V-Kayishema and Ruzindana, (ICTR Trial Judgment of 21st May 1999, para 214) also expressed similar view. The ICTR in its decision on Motion for Judgment of acquittal, dated 19th March 2008, at para-15 observed that this view was consistent with Customary International Law.

In Prosecutor-V-Musema, supra and Prosecutor-V-Bagilishema, the ICTR observed that if civilian superiors exercise power of effective control over their subordinates, they can also be responsible under superior command responsibility.

The Appeal Chamber of the SCSL in Prosecutor-V-Brima, (22nd February 2008, para 257) and in Prosecutor-V-Fofana and Kondewa, supra, stated that the test of effective control is the same

for military and civilian superiors, confirming thereby the superior command responsibility of the civilians.

The Appeal Chamber in respect to Zegnil Delalic, the so call Celebici case, made the following observation in respect to civilian superior liability; "Based on analysis of World War II jurisprudence the trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in position of authority. The Appeal Chamber finds no reason to disagree with the trial Chambers analyses of this jurisprudence. The principle that military and other superior may be held criminally responsible for the acts of their subordinates is well established in conventional and customary law. The standard of control reflected in Article 87(3) of the Additional Protocol I may be considered as customary in nature. In relying upon the wording of Articles 86/87 of the additional protocol I, to conclude that it is

clear that the term superior is sufficiently broad to encompass a position of authority based on the existence of defacto powers of control, the trial chamber properly considered the issue in finding the applicable law.

Command, a term which does not seem to present particular controversy in interpretation, normally means powers that attached to a military superior, whilst the term control, which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect the Appeal Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control in determining questions of responsibility it is necessary to look to effective exercise of power or control and not to the formal titles".

At another stage, the Appeal Chamber stated "having concluded that the actual exercise of authority in the absence of formal appointment is sufficient for the purpose of incurring criminal

responsibility, provided that the de facto superior exercises actual powers of control, the trial Chamber consider the argument of Muci that he had no formal authority. It looked at the following factors to establish that Muci had de facto authority the Appeal's Chamber considers that it has not been shown that the trial chamber erred in accepting the evidence which led to the finding that Muci was commander of the camp and as such exercised command responsibility". The trial chamber made the following observation; "The defence is not disputing that there is a considerable body of evidence that Zdrkvko Muci was the acknowledged commander of the prison camp. Instead the defence submits that the prosecution has to provide evidence which proves beyond reasonable doubt that the dates during which Muci is alleged to have exercised authority in the Celebici Prison Camp. The trial chamber agrees that the burden of proving that Muci was the commander of the Celebici Prison Camp and that the standard of prove in this respect is beyond reasonable doubt.

However, the issue of the actual date on which Muci became a commander is not a necessary element in the discharge of this burden of prove. Instead, the issue is whether he was, during the relevant period, as set forth in the indictment, the commander of the prison camp".

The Appeal Chamber, as such, found no reason to interfere with the Trial Chamber's above conclusion.

In the light of the above observation of the trial and the appeal Chamber, unequivocally affirming a civilian person's superior command responsibility, I am of the view that it is irrelevant whether ICTY made a clear finding on whether the accused in Celebici case (Prosecutor-V-Delalic) were civilian or not.

The ICTR Trial Chamber in Prosecutor -V-Musema convicted the accused, Musema, who as the director of a tea factory and a member of various regional Government authorities, was clearly a civilian, of superior responsibility for the Crimes against Humanity committed by the

employees of the said tea factory, who were found to be Musema's subordinates.

Different Standard for Civilian Superior

By holding that control exercised by a civilian superior need not be of the same nature as that exercised by a military commander (Prosecutor-V-Bagilishema, supra, Prosecutor -V-Kajelijeli,) supra, the ICTR Appeal Chamber did extend superior command responsibility to civilians, though with lesser standard compared to that applicable to military superiors.

High preponderate authorities show that a distinction must be made between military and civilian superiors in terms of their obligation to prevent or punish. Whilst a military commander must take all necessary and reasonable measures to prevent or punish criminal acts committed by their subordinates, non-military superiors are only expected to have known or consciously disregarded information which clearly indicated that their subordinates were committing or about to commit crimes.

The nature of military service and discipline is consistent with the expectation that superior military officers have a more active duty to inquire about the possible criminal behaviour of men under their command and to prevent or punish such behaviour (Prosecutor -V- Muvunyi, September 12, 2006, para 473).

Article 28 of the Rome Statute, adopts a mental standard for superiors other than a military commander or persons effectively acting as military commanders, declaring them to be criminally liable only if they "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit crimes".

No Direct Relationship Needed

In Prosecutor-V-Delilic, the Appeal Chamber of the ICTY, supra, para - 254, 255, endorsed the Trial Chamber's finding that a commander may be responsible for the actions of his subordinates, even when there is not a direct relationship, "So long as the fundamental requirement of an effective power to control the subordinates, in

the sense of preventing or punishing criminal conduct, is satisfied".

In Prosecutor-V-Kordic and Cerkez, the Appeal Chamber of the ICTY stated that as a matter of law, command responsibility is not limited geographically or to direct subordinates (17th December 2004, para 828).

Various decisions confirmed that superior-subordinate relationship does not need to be immediate in nature to hold a Commander liable for the acts of his subordinates, as long as there is effective control, regardless of whether the subordinates are immediately answerable to that superior or more remotely under his command. (Prosecutor-V-Strugar, ICTY Trial Judgment, 31st January 2005, para 363, Prosecutor-V-Halilovic, ICTY, Trial Judgment, 16th November 2005, para 63, Prosecutor-V-Oric, Trial Judgment, Supra, para-311).

Likewise, it is immaterial whether the subordinate is held to have participated in the Commission of Crime, as a principal perpetrator or through intermediaries, as long as his

criminal responsibility is established beyond reasonable doubt. (Prosecutor-V-Oric, Appellate Judgment, supra, para-20).

In line with that approach, an accused may be held responsible as a superior not only where a subordinate committed a crime referred to in the statute, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime. (Nahimana-V-Prosecutor, ICTR, Appeal Judgment, supra, para 485, Prosecutor -V-Blagojevic and Jokic, ICTY, Appeal Judgment, supra, para 280, Prosecutor-V-Oric, Appeal Judgment, supra, para-21).

Multiple and Ad-hock Superiors

More than one superior may be liable for the same crime committed by subordinates.(Prosecutor-V-Aleksovski, Trial Judgment, supra, para 106).

The Trial Chamber of SCSL in Prosecutor-V-Brima, Supra, para 786, held that "Superior responsibility is not excluded by the concurrent responsibility of other superiors in a chain of command.

If a superior has functioned as a member of a collegiate body with authority shared amongst various members, the power or authority actually devolved on an accused may be assessed on a case by case basis, taking into account the cumulative effect of the accused's various function".

The Trial Chamber in ICTY in Prosecutor-V-Kunarac (February 22, 2001, para 399) recognised that a superior would be criminally liable for the actions of those that are temporarily or on an ad-hock basis under his effective control.

The Appeal Chamber of SCSL also affirmed the Trial Chamber's view which was in similar terms.

Prosecutor-V-Brima, (Appellate Judgment, supra, para 257).

Mens Rea for Superior Responsibility

Whether mens rea aspects as are applicable to ICTY, ICTR, SCSL or ICC cases are also applicable in our Tribunals cases, is, obviously an inquisitive question.

While ICC Statute and statutes of those ad-hock tribunals explicitly require the prosecution to prove that the "superior commander" knew or

"had reason to know that his subordinates were about to or have committed offences punishable under the statutes", our Section 4(2) does not say so, and is rather silent on the mental element. As our Tribunals are to follow our municipal laws, provisions in those UN drafted statutes or of Customary International Law are not importable. Does it, then, mean the doctrine of strict liability applies to our situation?

All serious offences and most minor offences require that the accused had blameworthy state of mind, i.e the fault element. Strict liability offences are exceptions. The traditional jargon for the state of mind, which must be proved to secure conviction, is mens rea.

Prof Richard Card, present author of "Card, Cross and Jones Criminal Law, defines mens rea stating, "The expression mens rea refers to the state of mind expressly or impliedly required by the definition of the offence charged. This varies from offence to offence but typical instances are intention, recklessness and knowledge" (12th Edition, Page 57).

Usually "intention" or "recklessness" or even, in appropriate cases, negligence are the attributes of mens rea or guilty mind.

The maxim, "actus non-facit reum nisi mens sit rea" denotes that no person is guilty unless his mind is guilty, meaning that proving actus reus is not enough, the defined state of mind must also be proved.

Whether mens rea is required to prove a case against an accused, and what constitutes mens rea for the given offence, is to be ascertained from the language in the statute. If the statute makes it clear that the prosecution need not prove any guilty mind for a given offence, it is deemed to be a strict liability offence (For 125 years "Prince" has been regarded as a leading case on strict liability (1875 LR 2 CCR 154)).

Existence of mens rea can also be implied and the Court may presume its existence as, Wright J, stated in Sherras - V- De Rutzen: "There is a presumption that mens rea, or evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence: but that

presumption is liable to be displaced either by the words of the statute creating the offence or by subject matter with which it deals, and both must be considered".

One of the principal method of determining if the presumption of mens rea has been displaced is by reference to statutory formula. Supreme importance is to be attached to the statute.

Obviously, Section 4 does not, unlike Articles 6(3) and 7(3) of the ICTR and ICTY statute or Article 28 of Rome Statute, express necessity of knowledge. Can it be implied? The answer depends on whether Section 4(2) has negatived such implied application. If it has, cadit questio. Hence it is imperative to ascertain whether implication has been denied or not. In my quest for an answer, I scanned text of Section 4(2) meticulously, but found nothing to conclude that implied application of mens rea has been displaced by Section 4(2). Rather by using such phrases as "acquiesces", "fails to take necessary measures to prevent the commission of such crimes", implies that Section 4(2)

contemplates that the accused must have knowledge of the commission of such crimes.

Thus the general principle should apply which says Courts would be very slow to infer that Parliament had intended to do away with mens rea and would not do so in the absence of clear language in the statute to that effect, because the general perception, as quoted above, is that nobody should be treated as guilty unless his mind is guilty.

Given that Section 4 makes one liable to punishment when he fails to prevent offences by his subordinates, every reasonable person would ask how can a person prevent such acts by his subordinates if he is unaware of the same. It would be in total defiance of logic to say otherwise. From that point of view it can quite aptly be assumed that in drafting Section 4(2) the Legislators intended that people charged under Section 4(2) would be them who, knew or ought to have known about the criminal activities of his subordinates, but remained indifferent.

So, I am of the view that though not expressed, mens rea in the form of knowledge, is to be presumed.

Existence or absence of mens rea is always to be gathered from evidence, as a person's mind cannot be read otherwise.

Summing Up

Now the discussions figured above can be summed up in following terms:

(1) To prove command responsibility against an accused three elements, such as, (i) existence of a superior subordinate relationship, (ii) knowledge of the superior that his subordinate is about to commit or has committed a crime, (iii) failure of the superior to prevent or punish commission of the crime.

(2) The superior-subordinate relationship must be sufficiently identified: the principal perpetrators, however, need not be identified by name, or their group or unit of belonging.

- (3) Culpable subordinates must be identified, either by name, membership of a unit or group.
- (4) Effective control of the superior is to be established by proving his material ability to prevent and punish the commission of the offences.
- (5) Proving general influence, even of substantial nature will not suffice to establish effective control.
- (6) The Commander does not need to have any legal authority to prevent or punish the acts of the subordinate.
- (7) Although possession of power or authority to either prevent subordinates' crimes or to punish the subordinates after the crimes have been committed, is a *sine qua non* for establishing superior status, the power or authority need not be *de jure* as it may arise from a *de facto*

command relationship, which may be of short or temporary duration.

(8) Whether a superior exercises effective control is a question of fact, to be determined on a case by case basis and the indications include (a) the formality of the procedure used for appointment of a superior, (b) the power of the superior to issue order or take disciplinary action, (c) the fact that the subordinates show greater discipline in the presence of the superior, (d) the level of profile manifested through public appearance and statement, (e) the capacity to transmit reports to competent authorities for taking relevant measures.

(f) In irregular armies effective control can be assessed by examining factors such as whether the superior had first entitlement to the profits

of war such as looted property and natural resources, exercised control over the fate of vulnerable persons such as women and children ... had independent access to and/or control of the means to wage war, including arms and ammunitions and communication equipments, had the capacity to intimidate subordinates into compliance, rewarded himself with position of power and influence, was protected by personal security guards, fuels or represents the ideology of the movement to which the subordinates adhere, whether the superior inter acts with external bodies or individuals on behalf of the group.

(g) Effective control must refer to the time of the commission of the crimes, and cannot be extended to acts committed before the accused's assumption of superior status: proof

is need to show that the accused was not only able to issue order but that the orders were actually followed.

(h) The indicators of effective control are more a matter of evidence than of substantive law and those indicators are limited to showing that the accused had the power to prevent, or (after the subordinates had already committed the offences) to punish or initiate measures leading to proceedings against the subordinates where appropriate.

(j) Formal designation as a commander is not a sine qua non as defacto authority suffices.

(k) It is recognised that in many contemporary conflicts defacto command structures exists in which commanders have no formal commission or appointment.

(L) The Tribunal can not acquit an accused just because there is no

evidence of de jure control, without considering whether the accused had de facto control.

(m) De jure authority, though not an essential prerequisite, it may, nevertheless, be presumed that the existence of de jure authority, prima facie, results in effective control, unless proof to the contrary is adduced. De jure control, however, does not relieve the prosecution of its burden to prove effective control beyond reasonable doubt, as it merely provides grounds for a prima facie assumption of effective control: more evidence for such a finding is required.

(n) Formal legal status of the accused, though not conclusive, may be relevant in determining effective control.

(p) Civilians and political leaders that exercise effective control over

subordinates may also be superiors. ICTR's and ICTY's enunciation that text in their Articles 6(3) and 7(3) respectively, clearly ordains that the draftsman intended to bring political leaders and other civilian superiors within the concept of command responsibility, is applicable to our Section 4 equally well.

(Q) Test of effective control is same for military and civilian superiors, though control exercised by a civilian superior need not be of the same nature as exercised by a military commander, which implies that a civilian superior is more vulnerable.

Superior command responsibility applies to civilian superiors as much the same is applicable to military bosses, without distinction. The view that it applies to military situation is bereft of authority.

(r) While a military commander must take all necessary and reasonable measures to prevent or punish, non-military superiors are only expected to have known or consciously disregarded information as to the Crimes. This also puts the non-civilian superior on a worse position. This is because military are expected to adhere to greater discipline.

(s) A superior may be liable even when there is no direct superior-subordinate relationship, so long as the fundamental requirement of an effective power to control subordinates is satisfied.

(t) Command responsibility is not limited geographically or to direct subordinates.

(u) So long as there is effective control. Superior-Subordinate relationship need not be immediate or

proximate, and it is of no consequence whether the subordinates are immediately answerable to him or more remotely under his command.

(v) More than one superior may be liable as superior responsibility is not excluded by the concurrent responsibility of other superiors in a chain of command, and the fact that a superior acted as a member of a collegiate body with shared authority amongst various members, the power or authority actually devolved on an accused may be assessed on a case by case basis, taking into account the cumulative effect of the accused's various function.

VI) To procure conviction, the prosecution must prove that the accused knew or ought to have known of the offences his subordinates committed or were about to commit.

Point that flows from above Sum-UP

With the preceding findings and the summing up, as above, I am naturally unable to lend any support to the following observations, my learned brother Surendra Kumar Sinha, J. has expressed, at different places of the judgment, "The doctrine of superior responsibility grew out of the military doctrine of command responsibility and its evolution is informed by this origin. This raises the question on which Article 28 focuses whether the doctrine is suitable for the application in a civilian setting".

"The responsibility of the superior is triggered, according to Article 86(2), concerns the responsibility of military Commanders for the Crimes committed by subordinates under their command and control, while Article 87(1) which provides "The High contracting parties and parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where

necessary, to suppress and to report to competent authorities breaches of the convention and of this protocol concerns the responsibility of military commanders for dereliction of duty to control persons under their command or control. (The case against Ariel Sharon: Revisiting the doctrine of Command Responsibility)“.

The observations quoted above indicate purely academic and metaphysical exercise, discarding applicability of the statutory requirement under Section 4 of the Act to a civilian superior in a civilian setting. I find no reason as to why and how superior responsibility of civilian persons can be deemed to have been excluded by Section 4(2) of the Act, or even by Articles 6(3) or 7(3) of the ICTR and ICTY statutes and why this doctrine should not apply to a civilian if he leads other civilians or para militia outfits for a mission of carnage as happened in 1971 where Razakars, Al-Badars and Al-Shams were composed of civilians and para militia detachments for such purposes and, our Parliament enacted section 4(2) of the Act having

this fact in their minds, making no concession for civilian superiors in civilian settings. When our Parliament, in its wisdom, enacted section 4(2), by drawing no difference between military and civilian superiors, and when acclaimed International Law Jurists, in drafting Articles 6(3) and 7(3) of the ICTR and ICTY statutes respectively and Article 28 of the ICC statute, made no attempt to exclude civilian superiors in civilian settings, it is, in my introspection, inassiduous to subscribe to the view that superior responsibility is not suitable in civilian settings.

I am also unable to agree with the learned brother's assertion, "Judicial practice demonstrates that civilians have rarely been convicted under the doctrine".

I have already cited with annotations in the preceding paragraphs numerous instances of convictions that had been handed down to civilians for breach of superior responsibility by ICC, ICTR, ICTY and SCSL.

In any event, this question can not, in my understanding, be raised in the context of 1971 Bangladesh when civilians, as members of Razakars, Al-Badars, Al-Shams took part in the holocaust of petrifying dimension in civilian settings, bearing in mind that superior command responsibility, irrespective of whether the same vests upon military or civilian, is not based on metaphoric notion, but on statutory prescription.

Does Yamashita Principle Apply to Civilia ?

True it is that while the Tokyo Tribunal convicted Yamashita, for breach of superior responsibility, i.e, for failing to stop his subordinates from perpetrating atrocities over the prisoners of war, the IMT in Nuremberg did not convict any one for such an omission, but the Soviet Judges insisted that the accuseds should be declared guilty simply on the basis of the positions or posts they held, which approach also received some support, but in the wake of obstinate opposition to this idea by Donnedieu and Biddle, the Tribunal eventually backed out from that stand.

(The Nuremberg Tribunal and International Law, George Ginsburgs, 1990, page 152).

Had the Soviet Judges' approach been accepted, that would have heralded Nuremberg IMT's move to punish for pure omission in similar manner that Yamashita was convicted of by the Tokyo Tribunal, for pure omission, which conviction remained undisturbed by the US Supreme Court where a habeas corpus application was moved. This would also be an example of convicting civilian superiors for omission by the IMT in Nuremberg.

This was really the Soviet stand throughout as is evident from the Moscow Declaration (mooted primarily by the USSR) of 1943 to the effect that "Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in atrocities, massacre and executions, will be Judged and punished".

Insertion of the phrases, "consenting part" is easily decipherable.

This is, arguably, the first articulation of civilian command responsibility in the modern time in the realm of crimes against humanity.

Offence for breach of command responsibility has very lucidly been described by the US Military Tribunal in Nuremberg in following terms in United States -V-Welhelm Von Leeb (High Command Case), "Under basic principles of command authority, and responsibility, an officer who merely stands by while his subordinates execute a Criminal order of his superiors, which he knows is criminal, violates a moral obligation under international law. By doing nothing he can not wash his hands off international responsibility".

Although Yamashita was a military officer and was convicted for failing to stop military personnel under his command, it is quite obvious from the following observation of the US Supreme Court, made while rejecting Yamashita's habeas corpus petition,

that the US Supreme Court did not mean to cluster it within the military commanders only;

"A person in a position of superior authority should be held individually responsible for giving the unlawful order to commit a crime, and he should also be held responsible for failure to deter the unlawful behaviour of subordinates if he knew they had committed or were about to commit crimes, yet failed to take necessary and reasonable steps to prevent their commission or to punish those who had committed them". (R-V-Yamashita, 1946 327 US1).

The phrase "a person" transmits an unintigritable message that command responsibility is not for the military personnel only.

Although Tokyo Tribunal's Judgment in Yamashita had holed up barrages of controversies, its contribution to humanitarian jurisprudence is

undeniable for through this judgment that Tribunal granted modern recognition to the concept of criminal liability for "permitting", as distinct from "intending", atrocities, better known as the "command responsibility, which half a century later would become the basis for the Hague Tribunal's indictment of Dr. Radovan Karadzic and Ratko Mladic, and of course that of Slobodan Milosevic.

This is not to be forgotten that as the President of the Bosnian Serb administration and the architect of its ethnic policies; Karadzic bore superior responsibility in his capacity as the president, i.e. a civil office holder. He has, with other, been indicted with several charges, including that of superior responsibility.

Richard Gladstone, the South African Judge, appointed as the Tribunal Prosecutor, when seeking leave to proceed with an investigation into crimes against humanity allegedly committed by Radovan Karadzic and Ratko Mladic the army commander and Miko

Stanisic, the Home Minister, reminded the Court of, what he termed as the "salutary command responsibility rule" for political and Military Leaders, adopted at the Tokyo trial of Yamashita and approved by the US Supreme Court.

The operative indictment as it stands today was confirmed on 31st May, 2000 and stems from the consolidation of two indictments of 1995.

First indictment against Dr. Radovan Karadzic and his co-accused military commander Ratko Mladic were on the basis of the doctrine of superior responsibility.

Although the marathon trial of Dr. Radovan Karadzic at the ICTY is still in progress, and the verdict is forecasted to be pronounced in summer of 2015, this case is of particular importance from the point of view of a civilian person's liability under the doctrine of superior responsibility. Dr. Karadzic, who was the President of Bosnian Serb administration, was indicted before the ICTY as a co-

accused with General Ratko Mladic, the former army commander. The first indictment against Karadzic was confirmed by ICTY on 25th July, 1995 with 16 counts of genocide and other offences. He was not at that stage, however, accused of direct overt act, but was indicted on the basis of the doctrine of superior responsibility, punishable under Article 7(3) of the ICTY Statute.

A second indictment was placed and the same was confirmed by ICTY on 16th November 1995, by which, he was accused of being responsible for the summary execution of thousands of Bosnian Muslims. In the second indictment Karadzic and General Mladic were accused of direct participation and, in the alternative, of superior responsibility for the acts of their subordinates, pursuant to Article 7(3) of ICTY Statute.

Nobody can predict the outcome of the trial. But the very fact that ICTY confirmed the indictments based on superior responsibility, against a civil leader, what Dr. Karadzic was (he was not an army

commander), goes a long way to vindicate the claim that there exists no foundation for the attribution that superior responsibility is apposite to army commanders only, not to civilian superiors.

It is to be noted that as per the ICTY rules, the trial chamber had to be satisfied after examination of evidence presented by the prosecution that "there are reasonable grounds for believing that the accused has committed the crimes charged in the indictment".

So the ICTY was prima facie satisfied on the allegation of superior responsibility as levelled against this civilian leader.

Slobodan Milosevic, the former Yugoslavian Leader, whose trial by the ICTY was dubbed as the "trial of the 21st century, was indicted for, amongst others, superior command responsibility.

He, a legally qualified person, became President of the biggest bank in Yugoslavia before becoming President of the Communist Party and of the country, was a civilian and his trial, though the same could

not be concluded as he died before it reached finality, charging him on three counts of superior responsibility, allegedly committed in three regions, Kosovo, Croatia and Bosnia, by itself reflects the generally held conviction that the offence of superior responsibility is not compartmentalised for defence personnel only, but extends to civilian superiors equally well.

It is worth mentioning that the case of Karadzic, having been remitted by the ICTY Appeals Chamber, the trial is still in progress in the trial Chamber.

This is also to be borne in mind that Slobdan Milosevic, the former Yugoslav President, was charged for superior responsibility, because although, as the head of the state, he was well aware of the atrocities, he never reprimanded or punished the known perpetrators. Unfortunately his death brought the trial to a halt, depriving the world of what ICTY would have expressed on his alleged command

responsibility in civilian capacity, in civilian settings.

Fact, however, remains that he was charged for breach of superior responsibility, which reflects the general perception among those who matters that this kind of responsibility is not to be narrowed down for military commanders exclusively.

What I have figured above are sufficient enough to swing me to the irresistible and, indeed, immutable equation that superior responsibility can not be a confine for military commanders only and that neither ICC nor ICTR nor ICTY nor SCSL had so restricted it's application and Section 4 of the Act has definitely contemplated so.

Although Article 86 of the Additional Protocol 1 to the Geneva Convention of 1949, has no relevance whatsoever to the issue before us and, in view of our clear and unambiguous finding in Quader Molla-V-the Chief Prosecutor (22 BLT (AD) 8) that no provision of any international or

multinational treaty can be enforced by our municipal Courts unless the same is made part our law by legislation or Ordinance, our Courts/Tribunals can not take notice of it, save for the purpose of interpretation of statute only, where relevant, even this bit of international instrument, which has been reproduced by my learned brother S.K. Sinha, J, himself, goes to deprecate the view that the applicability of the doctrine of command responsibility in civilian setting is questionable, because there is nothing in Article 86 of the Protocol to say that it is limited to military commanders.

I cannot also subscribe to the view that while the ICTY in Prosecutor-V-Delalic, and subsequent cases and, the ICTR "have posited that the responsibility of civilians for their subordinates' action is a customary legal principle (ibid) reflected in (Post-World War 1)

Jurisprudence, yet this Jurisprudence does not clearly provide the authority asserted by the ad-hoc Tribunals, or that Tribunals themselves have rarely considered the superior responsibility of civilians in purely civilian settings".

There are many instances of civilians having been convicted after the cessation of the Second Great War. The fact that many civilian had been convicted under the doctrine of superior command responsibility, provide, high preponderant authority for the proposition that the superior command responsibility is indeed grounded in Customary International Law. By the time ICTY and ICTR tried these cases, the Tokyo Tribunals ratio assumed the status of Customary International Law.

Facts pertaining to the indictment and conviction of Japan's War time Ministers Hirota and Shigemitsu in the case of United States-V-Araki, November-12, 1948, leaves no doubt whatsoever that command responsibility extends to civilians as wells as they, two non-military persons, were convicted for their failure to act

to prevent atrocities and maltreatment of prisoners of war. Conviction of Friedrich Flick by the US Military Tribunal (20th April - 22nd December, 1947), a case that ICTY relied on in *Prosecutor-V-Delalic, supra*, was surely based on his superior responsibility as he failed to prevent his nephew, Weiss, from enslaving civilian population in occupied territories.

Although there is no doubt that superior responsibility is an established principle of Customary International Law, Section 4 of the Act has made it part of our municipal law as much as Articles 6(3) 7(3) and Article 28 of ICTR, ICTY and ICC Statutes made it part of their law, which are the indicia of those tribunals' sources of power. These instruments do not make any distinction between military and civilian for the purpose of liability nor do they express or even imply that civilian superiors are absolved of such liability.

Irrespective of whether the ICTY made a clear finding or not on the status of the accused in Celebic case (*Prosecutor-V-Delalic*) *supra*, and in

Prosecutor-V-Aleksovski, supra, the ICTY's unambiguous and undistorted finding in both the cases that civilian and political leaders that exercise effective control over subordinates may also be superior, can not be overlooked.

It has quite distinctively been proclaimed by the ICTY in its trial Judgment dated 16th November 1998, in para 356 in Prosecutor-V-Delalic that the use of the generic "superior coupled with its juxtaposition to the individual criminal responsibility of "Heads of State or Government" or "responsible Government Officials" reflects the intention of the drafters to make Article 6(3) and 7(3) applicable to political leaders and other civilian superiors in position of authority" (para 356).

In the context of Delalic case, it should also be born in mind that whether or not the accused was an army man, he was, at the relevant time deployed in a job of civilian nature as a de-facto commander of a prison camp, and hence he was working in a civilian setting, in the same

way an army officer, when deployed as a prison supremo, acts in a civilian setting.

My learned brother S.K. Sinha, J. cited a few cases where civilians were eventually acquitted. But their acquittal did not hinge upon the ground that superior responsibility does not extend to civilian people. Acquittal of these people were based on various other grounds. Even Jean Paul Akayesu was not acquitted of superior responsibility but on the ground that there was no allegation in the indictment that interahamwe were subordinates of the accused. So he was acquitted on a purely technical procedural ground.

When my learned brother S.K. Sinha, J. accepts that in *Nahimana-V- Prosecutor, supra*, the ICTR convicted a civilian, accused of superior responsibility ground, in a purely civilian setting, no question on this point, is in my view, apposite.

Keeping my above views in mind, when I scan the provisions as figured in Section 4(2) of the Act, I find nothing whatsoever to be led to the

conclusion that superior command responsibility was meant to encapsulate military superiors only. Such a connotation is neither explicit in the said section, nor can this notion be implied. The language is so clear and unambiguous that we can interpret it without any internal or external aid but by giving ordinary natural meaning to the phrases inserted therein, and I do it because it is abundantly clear to me that the legislators had no intention whatsoever of restricting superior command responsibility to the army exclusively.

As I have already cited a number of decisions from UN created ad-hock tribunals covering this particular area of law, I need not and should not repeat them except asserting that those decisions lend overwhelming support to the view that superior command responsibility is applicable to military personnel as much as to civilians and in civilian settings and that assumption of command over subordinates can be de-facto as much as it can be de jure, and that whether such superior Command position existed or not in a given

situation is always a question of fact to be decided by dissection of evidence in case by case basis.

Raising questions as to the applicability of superior responsibility to civilians in the context of Section 4(2) of our Act, would, in my view, be tantamount to question the propriety of Parliament's competence in enacting Section 4(2) of the Act.

While under the doctrine of Judicial review of legislation we can nullify an Act of Parliament, we can do so only if the same is repugnant to a provision of the Constitution.

Section 4(2) explicitly makes a superior liable in a situation where the latter "acquiesces" with a crime committed by his subordinates or fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates or fails to take necessary measures to prevent the commission of such crime or punish culprit subordinates. There is nothing in the section to confine its

application to the military hierarchy only, or creating any distinction between "military" and "civilian" superiors.

This follows that it is impossible on my part to be at one with my learned brother's view that, as he expressed, "Superior responsibility exists in the pyramid - shaped hierarchy of the military", or that (referring to Rome Statute) "superior responsibility is particularly appropriate in the military where it concerns international crimes".

We must not be oblivious of the fact that, we are to act in accordance with the provisions that have been laid down by our Parliament vide the Act which, if meant to bring only military superiors under this responsibility, would have so expressed. Likewise if the drafters of Articles 6 and 7 of the ICTR and ICTY or Article 28 of the ICC Statute respectively, so intended, they would have stipulated so.

Was Appellant a Superior per S.4(2)?

Let me now concentrate on the question whether in the light of the above discussed

jurisprudential perspective as well as in the light of the factual findings arrived at by the Tribunal below, the Tribunal was right in finding the appellant, Mohammad Kamruzzaman, guilty of breach of superior responsibility, under section 4(2) of the Act, or otherwise.

To locate the correct answer, it is inevitable to look at the evidence on defacto superiority as well as the instruments that created Razakar, Al Badre para militia.

Creation of Razakars

Facts, as are not in dispute, are that with a view to suppress and annihilate the aspiration of the people of the then East Pakistan under the leadership of Bangabandhu Sheikh Mujibur Rahman, to achieve independence from Pakistani colonial yoke, the Pakistani occupying authorities set up, through an ordinance, initially a para-militia outfit, naming the same, "Razakars", by inducting into it those people, who were not, numerically, of large number, who were opposed to the idea of a State for the people of the then East Pakistan. While most of them were from the political party

named, "Jamate Islami", people from other pro-Pakistani parties, such as Nezami Islami, Muslim League also supplied men to Razakar outfits.

Although they were not merged with traditional armed forces, they were equipped with fire arms and maronated with crush training courses. The ordinance that animated the said para militia, was titled, "East Pakistan Razakars Ordinance 1971, the preamble of which vested it with virtually para militia status by stating, "to provide for Constitution of a voluntary force in East Pakistan".

The outfit was to be headed by a Director, under whom several officers and staff were to be appointed by the Government to assist the Director in the performance of his functions. (Section 8 of the Ordinance).

The Director and other officers were appointed under the Ordinance to "exercise such powers and perform such duties as (may be) prescribed by the provincial Government".

At its inception it was placed under the Peace Committees of the respective areas.

Although no Ordinance or legislation was mooted to set up two more para-military outfits, namely, Al-Badar and Al-Shams, they were also de facto brought under the Ordinance. In September, by another Ordinance, the Razakars were glorified with the status of armed forces personnel.

Even though the Ordinance created one post of Director for the whole of the occupied "Bangladesh", there were other officers and staff under him. So, from the hierarchical point of view, the Director was the ultimate and the top brass, for the whole of occupied Bangladesh de jure. But the evidence prove that there were sub-superiors under him as, naturally, it was not possible for only one Chief Commander to perform command duties for the whole of the occupied territory. As the Ordinance created posts for "Officers" also under the sole Director, it would, in the natural way, follow that these officers had de jure or at least defacto duty to act as regional superiors.

The fact that the Ordinance created one post of Director for the entire occupied territory and

then officers under him, and also staff all over, coupled with the fact that the above mentioned prosecution witnesses found the appellant to be in the leading chair, such an inference that the latter was in fact de jure head of the two outfits in the district concerned faces no stumbling block whatsoever.

If witnesses testify that a given person headed the local unit of the outfits, in the backdrop of the fact that the Ordinance created posts of officers under one solitary Director, then there is no need to establish by any document or any evidence that the given person was so appointed. As stated above, the ICTY and ICTR held that no evidence of formal appointment or designation is needed.

It is worth mentioning that in our part of the world, the term officer bears a special significance in that this attribution only applies a person with superior status, i.e. a white colour personnel with a lot of clout. This legacy from the colonial era, when the British Roy applied their dominance over their subjugated

Indian subjects through privileged "civil servants" known as "officers" still subsists. In the context of the culture that prevails in this sub-continent, no low level functionary is ornamented with this term. I do also take special notice of the fact that our section 4(2), in variance with Articles 6(3) and 7(3), did not restrict the liability to commanders only but also extend the same to "superior officers" as well. Inclusion of "superior officers" has particular significance because the Ordinance created posts of officers as well. As the Ordinance created no post of superior officers, the legislators must have meant all officers to be superiors because the ordinance created officers only, not superior officers and the staff, who were below the officers. In any event, testimony of these two prosecution witnesses leave no doubt whatsoever that the appellant was at least the de facto commander of the units concerned in the area, if not a de jure one.

It has been quite categorically affirmed by the SCSL Appeal Chamber in Brima, supra, ICTR in

Semenza, and Kajchjcli, supra, ICTY in Delalic, supra that for the purpose of implicating a person for his responsibility as a commander over his subordinates, a de facto commandership will suffice.

This finding on law by the ICTY is, in my view, in wholesome consonance with the language in Section 4(2) of the Act, reproduced above and as far as the factual position is concerned, overwhelming weight of evidence prove beyond any shadow of doubt that the appellant in any event, was defacto commander, if not dejure.

As a matter of fact my learned brother S.K. Sinha, J. himself accepts that "All these witnesses practically depicted correct status of the accused" and that "As per law then prevailing, he performed his responsibilities as Razakars leader or officer". My learned brother also accepts that "The evidence on record revealed that he was the commander of Al-Badre force in larger Mymensingh".

He also states, "But in fact he performed the responsibility as a superior commander. This was

abuse of the powers as he was in the good book of the military Junta. He was allowed to work according to his volition".

My learned brother also states, "But as per law he was appointed and/or worked and/or performed as commander to assist the Director of the Razakars forces".

With respect; I am to express that having accepted all these, it would a contradiction in terms to conclude that the appellant cannot be brought under the canopy of superior responsibility.

Acceptance that, (with which I totally agree), "But as per law he was appointed and/or worked and/or performed as Commander to assist the Director of the Razakar Forces", is in my view, tantamount to accepting that the appellant was actually de jure sub-commander under the supreme commander and hence, saying that he had no command over his subordinates would be self contradictory.

Accepting that, (with which also I cannot disagree), "But in fact he performed the

responsibility as a superior commander. This was abuse of the powers as he was in the good book of the military Junta", in my view definitely means accepting that he was a de facto commander as he was so allowed by the Junta.

If he was really allowed by the Junta, being in their good book, to perform as a superior commander with the blessings of the Junta, then he must be deemed to have been a de facto commander, even if he had done so by abusing his powers.

De facto, connotes factual position, no matter whether that was by abuse of power or not.

I would also rely on the ICTY decision in *Aleksovski* and SCSL decision in *Brima* where it has been held that command responsibility may be shared by other members in a situation of collegiate responsibility and that superior responsibility is not excluded by concurrent responsibility of other superiors in a chain of command.

In finding that the appellant did not have command responsibility my learned brother relied

on "(b)" of the Gazette notification of 7th September 1971, which provides, "the officers of Pakistan Army under whose command any member of the Razakars is placed shall exercise the same powers in relation to that member as he is authorised to exercise under the same Act in relation to a member of the Pakistan Army placed under his command".

True it is that the members of the Razakars were placed under the command of Pakistan Army officers by 7th September notification, but it is equally true that, as Mr. Muntasir Mamun, a distinguished historian, stated in "Banglapidia", the 7th September amendment also bestowed on Razakars the status of army personnel, and those who under the Razakars Ordinance were appointed as "Officers" of Razakars, under the 7th September notification assumed the status of army officers.

So, the situation since 7th September was such that a Razakar officer was of course placed under a Pak Army Officer's Command. But to say that the Razakar officers were thereby stripped of command responsibility from over his subordinate Razakar

staff, would be, in my view, erroneous, because within the Pakistan army structure, where four kind of personnel exists, namely (1) Commissioned Officers, (2) Junior Commissioned Officers, (3) Non-Commissioned Officers, (4) Jawans or Seppys, even a non-Commissioned Officer exercises command over the sepoy's under his command even though such a Junior Commissioned or a Non-Commissioned Officer himself remains subject to the command of a Commissioned Officer. A chain of command is thereby formed from top to the bottom, consisting intermediate commanders between the highest and the lowest in the chain.

The chain of command, be it in the army, police or in civilian situation, is such that an officer, who commands his subordinates is also subject to command by his superior. That is why it is called chain of command: a Command in succession from the top to the lowest ladder of officerdom.

As such, it can not, in my view be said that since the appellant himself was under command of

an army officer, he could not command his subordinates.

The finding on collegiate responsibility, as enunciated in Brima, supra, goes hands in gloves with this factuality where chain of command exists.

So, if it is accepted, as my learned brother also has done, that the appellant was a Razakar officer (officer carrying a white colour clout), rather than a Razakar staff, that would naturally follow that the appellant also had command responsibility over Razakar staff under him in the then Greater Mymensingh region, notwithstanding that he himself was subject to the command of a Pak Army Officer.

The Tribunal below, was, as such, in my view, in the right track in finding the appellant guilty for superior responsibility as well under section 4(2) of the Act, as there are overwhelming evidence to show that he acquiesced with the offences his subordinates committed and/or failed or omitted to discharge his duty to control or supervise the action of the persons

under his command or his subordinates whereby such persons or subordinates or any of them committed such crimes, or failed to take necessary measures to prevent the commission of such crimes.

Evidence on Factual Superiority

Depositions of P.Ws.2, 10, 11 and 12 are particularly decisive to ascertain whether the appellant acted as and /or was regarded as a superior commander by those who mattered.

P.W.10 testified that the appellant was a leader of Razakars of Sherpur and that all Razakars obeyed him, re-instating at a later stage that in his area Kadir Doctor was a Razakar and Kamaruzzaman was the commander and that only one person commanded both Razakar and Al-Badre forces, while P.W.2, who was an Al-Badre member himself at that time, said the appellant was the commander of Al-Badre outfits.

P.Ws. 11 and 12 also described the appellant as Al-Badre commander, adding that crimes were committed by Al-Badres.

The Tribunal below, before which these witnesses deposed must have had found them credible as they relied on their testimony. In their deposition, they narrated the state of affairs as they directly saw and observed, which was that the appellant was in the helm of Razakars and Al-Badre outfits in their district, and it is the appellant who controlled and led them who were his subordinates in these two outfits in the district concerned.

Evidence on Subordinates' Criminality

As a member of the final Court of fact, bearing in mind that this is not an appeal under Article 103 of the Constitution but under a special law, which made this Division the forum of first ndeed, final appeal, I scanned the lower Tribunal's evaluation of evidence quite extensively and intensively and remain satisfied that the Tribunal below scanned the evidence in vivid details with meticulous objectivity and ingenuity, applying the correct burden and standard of proof.

As I can see from paragraphs 608-623 of the lower Tribunal's judgment and also from the recorded evidence, they were quite diligent in observing the demeanour of the witnesses and assessing the probative value of the evidence, quite impeccably.

I am, nevertheless, inclined to add the following evidential findings;

I find P.W.10's version unimpeachable to lead to the conclusion that Razakar and Al-Badre members, who were subject to the appellant's command and directions, defacto or dejure or both, as evidence discussed above confirm, inundated themselves with plethora of offences punishable under the Act, and that, though the appellant had no overt act in the commission of those offences, he did, nonetheless, do nothing to prevent them which were committed to his knowing.

His deposition to the effect that Al-Badresand and Razakars burnt Kedar Nath's dwelling in Shohagpur and killed 5 people therein, by itself goes a long way to enable the

Tribunal to find the appellant guilty under Section 4(2) of the Act, because evidently (as discussed above) those Razakars were under his suzerainty and, as he, being in the know of the atrocities committed by those under him failed to prevent their acts. Hence, as the evidentially proven Al-Badre, Razakar commander of the region covering Sherpur, the appellant is liable under section 4(2) for his omission or failure to act, notwithstanding absence of his overt act in the commission.

P.W.9 also, in his deposition, furnished an excruciating version of how Al-Badre members at their camp at Mymensingh District Council Bungalow, killed several people and tormented several others, in which the appellant played no active part.

It is obvious from PW 9's testimony that the appellant did not stop it.

As the killers and torturers were of the area under the appellant's command, as inundation of evidence substantiates, section 4(2) applies against him for the crimes described by this

witness, who himself directly witnessed the event in which one of those killed was bayoneted through the chest.

It is, therefore, my incrucifixionable conclusion that guilt under Section 4(2) has been proved against the appellant.

Nuremberg Jet Flies High

The Nuremberg Legacy, distilled from the work and words of Justice Robert Jackson, may be simply stated: "crimes against humanity will only be deterred when their petetrators-be they political leaders, field commanders or soldiers and policemen - are given pause by the prospect that they will henceforth have no hiding place; that legal nemesis may some day, somewhere overtake them".

What sets a crime against humanity apart, both in wickedness and in the need for special measures of deterrence, is the simple fact that it is a crime of unforgivable brutality ordained by a Government - or at least by an organisation exercising political power. It is not the mind of individual torturer but

the fact that these individuals is part of the apparatus of a state which makes crime so horrific and locates it in different dimension from ordinary criminality. Can crimes of this blackness be forgiven or at least allowed to go unprosecuted? The only answer of prudence would 'No'. Prosecution is the only real means of retribution, and certainly offers any hope of deterring such crimes in future.

Nuremberg Tribunal's following observation shall, at all times to come, dominate not only international criminal law, but also all municipal criminal Courts and prosecuting functionaries;

"Not only would it not be unjust to punish those who committed these crimes, but it would be unjust to leave unpunished the evil they committed".

Justice Jackson's following imperishable utterance also shall always survive as the light house for all criminal Courts, domestic or international; Courts try cases, Cases try Court".

"We must never forget that the record on which we Judge these defendants today, is the record on which history will Judge us tomorrow".

The prosecuting authorities and the Courts, world wide, shall, surely, also not forget Antonio Cassese's (1st Hague Trib President) observation that "The only civilised alternative to this desire for revenge is to render justice"

(Antonio Cassese's 1st Report to UN General Assembly in 1994).

Reasons for Capital Sentence

As professor Ashworth aptly stated, sentencing is the most difficult aspect in a criminal trial No doubt, sentencing capital offenders in a country that allows death sentence is all the more difficult and mind blowing.

Having gone through comparative sentencing policies in capital offences in various jurisdiction, it is my firm understanding that the trail that Indian higher judiciary follows, is the possible best

one. It is based on the principle balancing and in doing so Indian judiciary peddle the normative that while life is precious and should not be taken away through judicial device in ordinary circumstances, there are cases when nothing short of death sentence is conducive. Indian Supreme Court by various decisions have laid down guide lines. Actually, the Indian legislative scheme requires the Courts to do the balancing in murder cases, which is such that while retaining death sentence, the scheme makes it the sentence of last, rather than of first, resort.

Although Indian Supreme Court ordain that capital punishment shall be awarded only in the rarest of the rare cases, instances of death sentence confirmation is, by no account , insignificant. Indian system is humane enough not to send all murderers to the gallows, yet resolute enough to award ultimate sentence if the offence appears to be too gruesome. Thus, when ordinary

killers are spared of their necks socially repulsive felons are not.

In deciding on the sentence of this appellant, I, for myself, have given extensive thought about what would be conducive and proportionate.

As are done in most jurisdictions, I have taken into account the aggravating and, possible mitigating circumstance-have reminisced the impact the acts of this felon entailed during our Glorious War of Liberation, having, of course, regard to one of history's worst ever genocide that took place in Bangladesh in 1971 which rocked the world.

I have scanned the his acts left behind on the surviving victims, families of murdered victims and, of course on the country as a whole, as I am required by the principle followed globally in sentencing.

I kept in mind what people with great endowment, reverence, wisdom and fully matured thoughts observed from time to time. I read with keen devotion and introspection the following observation of the

universally acclaimed jurist, who specialise on crimes against humanity, Sir Geoffrey Robertson, QC who suggested application of retributive norm of sentencing for the offenders whose crimes touch the righteous people all over the world;

"If the crimes of such individuals are the most heinous of all, because they touch not only the families of victims but decent people throughout the world, then some retribution is required".

(Geoffrey Robertson, Q.C. page 330 of his book Crimes Against Humanity, New Edition).

In affirming the capital sentence, I do echo the observation the Nuremberg Tribunal and the US prosecutor scripted, as quoted above.

We must not be over compassionate when sentencing a felon of the appellant's type, but must think of the trail of horror his acts left behind for successive of generations. We must be firm enough to

pass extreme sentence if that be proportionate to the gravity of the offence.

It is a pathetic episode of our history that such a human monster was allowed to escape the rigour of Justice for so many decades, for which blames fall squarely upon those who usurped power unconstitutionally for many years after killing the Founding Father of the Nation, Banga Bandhu Sheikh Mujibur Rahman and tried to put the clock back to pre 1971 state.

For all I have stated above, I remain indubitably convinced that the interest of justice can only be met if this appellant is shown the gallows.

J.

COURTS ORDER

For the reasons to be assigned later on, this appeal is allowed in part. Appellant Muhammad Kamaruzzaman is acquitted of charge No.1. His conviction and sentence in respect of charge Nos.2 and 7 are maintained by majority.

His conviction in respect of charge No.3 is maintained unanimately but his sentence of death of the said charge is maintained by majority. His conviction in respect of charge No.4 is maintained by majority and his sentence is commuted to imprisonment for life.

J.

J.

J.

J.

The 3rd November, 2014
Mohammad Sajjad Khan

APPROVED FOR REPORTING