

International Crimes Tribunal-2 [ICT-2]

[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]

Old High Court Building, Dhaka, Bangladesh

ICT-BD [ICT-2] Case No. 02 of 2014

[Charges: Participating, committing, aiding and contributing the commission of offences constituting crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act No. XIX of 1973]

Before

Justice Obaidul Hassan, Chairman
Justice Md. Mozibur Rahman Miah, Member
Justice Md. Shahinur Islam, Member

The Chief Prosecutor

Vs

Md. Mahidur Rahman & Md. Afsar Hossain @ Chutu

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Sahidur Rahman, Prosecutor

Ms. Tureen Afroz, Prosecutor (Added vide Order No.34, Dated 24.05.2015)

Ms. Rezia Sultana, Prosecutor

.

For the Accused Mahidur Rahman:

Mr. Abdus Sobhan Tarafdar, Advocate, Bangladesh Supreme Court

Mr. Mizanul Islam, Advocate

Mr. Abdus Satter Palwan, Advocate

Mr. Md. Asadul Islam, Advocate

Ms. Kiswary Sultana, Advocate

For the Accused Afsar Hossain Chutu

Mr. Mizanul Islam, Advocate

Mr. Abdus Sobhan Tarafdar [State defence Counsel],

Advocate, Bangladesh Supreme Court

Date of delivery of Judgment: 20 May 2015

JUDGMENT

[Under section 20(1) of the Act XIX of 1973]

Justice Obaidul Hassan, Chairman
Justice Md. Shahinur Islam, Member

I. Introductory Words

1. Accused Md. Mahidur Rahman and Md. Afsar Hossain @ Chutu have been indicted on three counts for the atrocious criminal activities constituting the offences of ‘murder’ and ‘other inhuman acts’ as crimes against humanity committed in the locality under police station Shibganj of the then Chapai Nababganj sub-division in 1971, during the war of liberation of Bangladesh. Prosecution alleges that since prior to the war of liberation the accused persons were involved with the politics of Muslim League and in 1971 they got themselves enrolled as members of local Razakar force, an ‘auxiliary force’ formed to collaborate with the Pakistani occupation armed force in carrying out its activities aiming to annihilate the pro-liberation Bengali civilians, in furtherance of policy and plan.

2. In course of trial, both the prosecution and the defence provided efficient assistance to go with the proceeding in accordance with law by ensuring recognised rights of defence. We appreciate their efforts.

3. The trial took place in presence of the accused persons. They have been in detention since pre-trial stage. Pursuant to issuance of production warrant the prison authority has produced the accused persons today before this Tribunal [ICT-2].

II. Jurisdiction of the Tribunal

4. The Act No. XIX enacted in 1973 is meant to prosecute crimes against humanity, genocide and system crimes as enumerated in the Act committed in violation of customary international law is *ex-post facto* legislation. It is fairly permitted. We reiterate that the Act of 1973 has been enacted to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence as an ‘individual’

or a ‘group of individuals’ or ‘organisation’. The accused persons have been charged for committing the alleged offences as the members of ‘auxiliary force’ the Razakar Bahini.

5. The events narrated in the three charges framed depict a fragmented picture of horrendous atrocities carried out in the territory of Bangladesh in 1971. Thus, the offences for which the accused persons stood trial were not isolated crimes. Rather, those were committed in context of armed conflict. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be brought to justice under the Act.

6. The Tribunal is governed by the International Crimes (Tribunals) Act of 1973[Act of 1973] and by the Rules of Procedure 2012 formulated by the Tribunal [ICT-2] under the power conferred in section 22 of the principal Act. Pursuant to the Act of 1973, the Tribunal [ICT-2] has the authority to prosecute persons responsible for the offences enumerated in section 3(2) of the Act committed in violations of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation. This Tribunal set up under the Act of 1973 is absolutely a domestic Tribunal but meant to try ‘internationally recognized crimes’ or ‘system crimes’ committed in 1971 in the territory of Bangladesh.

7. Now, having jurisdiction under section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973[Act No. XIX of 1973] this ‘Tribunal’ known as International Crimes Tribunal-2 [ICT-2] hereby renders and pronounces the following judgment.

III. Brief account of the Accused Persons

Accused Md. Mahidur Rahman

8. Md. Mahidur Rahman [84] son of late Subedar Ali Biswas of village Dadanchak [Kaitanitola] no.9 UP Durlavpur police station Shibganj district Chapai Nababganj studied up to class IX. In 1971 he used to maintain his livelihood by agricultural activities. He is the father of 01 son and 04 daughters. Since prior to 1971 he was involved with politics of Muslim League. He allegedly joined the Razakar force in 1971 intending to collaborate with the Pakistani occupation army in accomplishing the criminal acts.

Accused Md. Afsar Hossain @ Chutu

9. Md. Afsar Hossain @ Chutu[65] son of late Kutub Uddin Morol and late Ferjan Begum of village Satrashia(Rasunchak), no.8 UP Binodpur, police station Shibganj, district Chapai Nababganj[the then sub-division] studied up to class V. He is the father of 2 sons and 2 daughters. He maintains his livelihood by agriculture activities. Since prior to 1971 he had been an active worker of Muslim League. During the war of liberation in 1971 he allegedly joined the Razakar force intending to collaborate with the Pakistani occupation army in carrying out atrocious activities. .

IV. Procedural History

10. The investigation Agency of the Tribunal started investigation pursuant to information recorded as compliant register no. 31 dated 11.2.2014, in respect of commission of offences enumerated in section 3(2) of the Act of 1973 allegedly perpetrated by (1) Md. Mahidur Rahman and (2) Md. Afsar Hossain Chutu.

11. During investigation, the IO prayed for showing the two persons arrested on 18.9.2014 through the Chief Prosecutor. The Tribunal directed the prison authority to produce them [detained in connection with another case under the Penal, Code] before this Tribunal. Accordingly they were produced before this Tribunal on

23.9.2014 and the Tribunal disallowing the application seeking showing them arrested sent them back to prison and ordered to submit progress report on investigation on 2.11.2014.

12. The IO submitted its report together with documents collocated and statement of witnesses, on conclusion of investigation, before the Chief Prosecutor on 2.11.2014 and thus the Chief Prosecutor informing the Tribunal about submission of report prayed time for placing the formal charge .

13. Finally, the Chief Prosecutor, on the basis of the report and documents submitted therewith by the Investigation Agency, after completion of investigation, submitted the ‘Formal Charge’ under section 9(1) of the Act of 1973 before this Tribunal alleging that the accused by **(1)** Md. Mahidur Rahman and **(2)** Md. Afsar Hossain Chutu , members of Razakar force in 1971 had abetted and committed the offences of crimes against humanity, and they had complicity to commit such crimes narrated in the formal charge during the period of War of Liberation in 1971 around the locality under police station Shibganj of the then sub-division Chapai Nababganj.

14. Thereafter, on 24.11.2014 the Tribunal, under Rule 29(1) of the Rules of Procedure[ROP], took cognizance of offences as mentioned in section 3(2) (a)(b)(g)(h) of the Act of 1973 and also passed an order considering prosecution’s application showing the accused persons arrested in connection with this case..

15. On hearing about charge framing matter, the Tribunal framed charges on three counts against the accused persons on 11 December 2014. The charges so framed were read over and explained in Bengali to the accused persons present in court to which they pleaded not guilty and claimed to be tried and thus the trial commenced.

16. In course of trial, prosecution adduced and examined in all 10 witnesses including the Investigating Officer [IO] intending to substantiate the accusation brought in charge nos. 1 and 2. It however remained abstained from examining any witness in support of charge no.3. Defence duly cross-examined the witnesses.

17. It is to be noted that at a stage of trial Mr. Mizanul Islam the learned Advocate for accused persons discontinued conducting the case on his personal ground. Afterwards, accused Mahidur Rahman engaged Mr. Abdus Sobhan Tarafdar as his counsel. But accused Afsar Hossain Chutu did not have any counsel to defend him. On query, he expressed inability to engage counsel on his own initiation and cost. In this circumstance, the Tribunal engaged Mr. Abdus Sobhan Tarafdar as state defence counsel to defend accused Afsar Hossain Chutu. Accordingly, Mr. Abdus Sobhan Tarafdar conducted the case defending both the accused persons.

18. Defence submitted a list of ten [10] witnesses along with some documents as required under section 9(5) of the Act of 1973. However, on closure of prosecution evidence, defence desired to examine only one (01) witness but eventually on the date fixed the defence refrained from adducing and examining any witness.

19. Finally, both parties have advanced their respective summing up which got ended on 22.4.2015. The Tribunal then kept the case CAV, for delivery of its judgment and sent the accused persons to prison with direction to produce them on call.

V. Applicable laws

20. Provisions as contemplated in the International Crimes (Tribunals) Act 1973 and the Rules of Procedure 2012 formulated by the Tribunal [ICT-2] under the powers given in section 22 of the Act are applicable to the proceedings before the Tribunal. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is

authorized to take judicial notice of fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act].

21. The Tribunal may admit any evidence which it deems to have probative value [Section 19(1) of the Act]. The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. The defence shall have liberty to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)]. Defence shall have right to examine witnesses [Section 10(1) (f) of the Act of 1973].

22. Cross-examination is significant in confronting evidence. The Act of 1973 provides right of accused to cross-examine the prosecution witnesses. The Tribunal may receive in evidence statement of witness recorded by Magistrate or Investigation Officer only when the witness who has subsequently died or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable [Section 19(2) of the Act]. But in the case in hand no such statement of witness has been received.

23. In the judgment of *Abdul Quader Molla* it has been observed by the Appellate Division that “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” **[Page 196 of the Abdul Quader Molla Judgment]**. “There is no scope to draw contradiction of the statement of a witness made in course of examination-in-chief with his/her earlier statements made to the investigating officer or other agency.” **[Page 205 of the Abdul Quader Molla Judgment]**.

24. In the case of *Muhammad Kamaruzzaman* it has also been observed by the Appellate Division that-

“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 [page 107-108-of *Muhammad Kamaruzzaman Judgment*].

25. Both the Act of 1973 and the Rules (ROP) have adequately ensured the universally recognised rights of the defence. Additionally, the Tribunal, in exercise of its discretion and inherent powers as contained in Rule 46A of the ROP, has adopted numerous practices for ensuring fair trial by providing all possible rights of the accused. Since the Act of 1973 is meant to prosecute and try the persons responsible for the offence of crimes against humanity, committed in violation of customary international law, the Tribunal however is not precluded from seeking guidance from international reference and relevant jurisprudence, if needed to resolve legal issues related to adjudication of charges and culpability of the accused.

VI. General Considerations Regarding the Evaluation of Evidence in a case of Crimes against Humanity

26. The accused persons who were allegedly the members of ‘auxiliary force’ as defined in section 2(a) of the Act of 1973 have been charged for the offences enumerated in section 3(2) of the Act of 1973. The offences for which they have been indicted were ‘system crimes’ committed in violation of international humanitarian law in the territory of Bangladesh in 1971.

27. The accused persons have been brought to justice more than four decades after the barbaric offences occurred. The case so far as it relates to the alleged facts of criminal acts constituting the alleged offences is predominantly founded on oral evidence

presented by the prosecution. Mostly the victims and witnesses who allegedly experienced the facts materially related to the principal events came on dock to testify. Together with the circumstances to be divulged it would be expedient to have a look to the facts of common knowledge of which Tribunal has jurisdiction to take into its judicial notice [Section 19(3) of the Act of 1973], for the purpose of unearthing the truth. Inevitably, determination of the related legal issues will be of assistance in arriving at decision on facts in issues.

28. Totality of its horrific profile of atrocities committed in 1971 naturally left little room for the people or civilians to witness the entire events of the criminal acts. Some times it also happens that due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes usually may not be well-documented by post-conflict authorities.

29. We reiterate that section 22 of the Act of 1973 provides that the provisions of the Criminal procedure Code, 1898 [V of 1898], and the Evidence Act, 1872 [I of 1872] shall not apply in any proceedings under this Act. Section 19(1) of the Act provides that the Tribunal shall not be bound by technical rule of evidence and it shall adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value.

30. In adjudicating the atrocious events alleged and complicity of the accused persons therewith we have to keep the ‘context’ in mind in the process of assessment of evidence adduced. The reason is that the term ‘**context**’ refers to the events, organizational structure of the group of perpetrators, *para militia* forces, policies that furthered the alleged crimes perpetrated in 1971 during the war of liberation.

31. It is to be noted too that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration for a finding to be made. This jurisprudence as propounded by our own jurisdiction shall seem compatible to the principle enunciated by *ad hoc* tribunal [ICTR] wherein it has been observed that --“*Corroboration of evidence is not necessarily required and a Chamber may rely on a single witness’ testimony as proof of a material fact. As such, a sole witness’ testimony could suffice to justify a conviction if the Chamber is convinced beyond all reasonable doubt.*” [Nchamihigo, (ICTR Trial Chamber), November 12, 2008, para. 14].

32. In the earlier cases disposed of by this Tribunal in exercise of its jurisdiction it has been settled that hearsay evidence is not readily inadmissible *per se* but it is to be evaluated in light of probability based on corroboration by ‘other evidence’. That is to say, hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value [Rule 56(2) of the ROP]. We have recorded our same view on this issue in the case of *Abdul Quader Molla*. This view finds support too from the principle enunciated in the case of *Muvunyi* which is as below:

Hearsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt. [*Muvunyi*, (ICTY Trial Chamber), September 12, 2006, para. 12]

33. Next, it has already been settled by the Tribunal and the Apex Court as well, in earlier cases, that an insignificant discrepancy does not tarnish witness’s testimony in its entirety. Any such discrepancy, if found, needs to be contrasted with surrounding circumstances and testimony of other witnesses. In this regard, in

the case of **Nchamihigo** it has been observed by the Trial Chamber of ICTR that --

The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses.....The Chamber will compare the testimony of each witness with the testimony of other witness and with the surrounding circumstances.”

[The Prosecutor v. Simeon Nchamihigo, ICTR-01-63-T, Judgment, 12 November 2008, para 15]

34. The alleged events of atrocities were committed not at times of normalcy. The offences for which the accused persons have been charged occurred during war of liberation of Bangladesh in 1971. Requirement of production of body as proof to death does not apply in prosecuting crimes enumerated under the Act of 1973. A victim’s death may be established even by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused constituting the offence.

35. In order to assess the culpability of accused persons, their act and conduct forming part of the attack have to be taken into account to see whether such act or conduct facilitated or substantially contributed to the commission of the crimes alleged. Physical participation to the actual commission of the principal offence is not always indispensable to incur culpable responsibility. The act and conduct of accused are sufficient to form part of the attack if it had a substantial link to the perpetration of the principal crime. It has been observed in the case of **Tadic**, [Trial Chamber: ICTY, May 7, 1997, para. 691] that:

Actual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be ‘concerned with the killing.

36. However, according to universally recognised jurisprudence and the provisions as contained in the ROP of the ICT-2 onus squarely lies upon the prosecution to establish accused persons' presence, acts or conducts, and omission forming part of attack that resulted in actual commission of the offences of crimes against humanity as enumerated in section 3(2) of the Act of 1973 for which they have been arraigned. Therefore, until and unless the accused persons are found guilty they shall be presumed innocent. Keeping this universally recognised principle in mind we shall go ahead with the task of evaluation of evidence provided.

37. The accused persons and the witnesses and victims, as we find in the case in hand, were the residents of the same locality. In absence of anything contrary, it was thus quite natural for the people of being aware as to which persons of their locality were the Razakars.

38. In the case in hand, most of the prosecution witnesses have testified the acts, conducts of the accused persons which allegedly facilitated and substantially contributed to the commission of the principal events. Naturally, considerable lapse of time may affect the ability of witnesses to recall facts they heard and experienced with sufficient and detail precision. Thus, assessment of the evidence is to be made on the basis of the totality of the evidence presented in the case before us and also considering the context prevailing in 1971 in the territory of Bangladesh. Credibility of evidence adduced is to be weighed in context of its relevance and circumstances.

VII. Summing up

Summing up [Argument]: By the Prosecution

39. The learned prosecutor in advancing argument submitted that charge nos. 1 and 2 have been proved beyond reasonable doubt from the evidence of witnesses most of whom are victims. Defence could not dislodge their testimony on material facts relating to complicity and involvement of the accused persons with the

commission of offences for which they have been charged. The certified copy of the judgement [relied upon by the defence] of the High Court Division in a Criminal Appeal being no. 538 of 1973 arising out of the judgment rendered in Special Tribunal Case No. 27 of 1973 by the Special Tribunal Rajshahi under the Collaborators Order 1972 provides corroboration to the fact that the accused persons were the potential members of local Razakar Bahini.

40. The learned prosecutor further argued that the accused persons were previously prosecuted, tried and punished for the offence punishable under section 364 of the Penal Code based on the facts and criminal acts narrated in charge no.3 and for this reason prosecution, in the case in hand, did not adduce any evidence in support of this charge as the prior prosecution for the offence based on same criminal acts creates bar in subsequent prosecution. But such prior prosecution does not stand as bar in prosecuting and trying another distinct offences based on distinct criminal acts and facts, as narrated in charge nos.1 and 2.

Summing up [Argument]: By the Defence

41. The learned defence counsel argued that since the accused persons were prosecuted tried and convicted for the offence based on facts narrated in charge no.3 under the Collaborators Order 1972 they cannot be prosecuted again for the similar criminal acts constituting the offence under the Act of 1973.

42. The learned defence counsel added that the accused persons could have been prosecuted also for the offences narrated in charge nos.1 and 2, if really had they acted in any manner facilitating and contributing to the commission of murder of 24 civilians and destruction of civilians' property [as described in charge nos. 1 and 2]. Two cases were initiated against the accused persons under the Collaborators Order 1972 and finally they were discharged, after

framing charge, under section 494 of the Code of criminal Procedure and since such discharge tantamount to acquittal they cannot be prosecuted twice for the same criminal acts.

43. The learned defence counsel submitted too that the accused persons were not involved with the commission of offences of abduction and killing 24 civilians and destructive activities in any manner. The victims have narrated contradictory statement in respect of role of accused persons with the commission of alleged killing at Binodpur High School. P.W.4, one of victims could not identify the accused persons on dock correctly and thus his testimony implicating the accused persons losses probative value and as such cannot be relied upon.

VIII. Razakar Force: It's Objective in 1971

44. We felt it indispensable to focus on this issue as the accused persons allegedly belonged to local Razakar force in 1971. In assessing the charges brought against them and their alleged culpability and also the motivation of their being associated with the Pakistani army and local Razakars we must have a clear portrayal about the Razakar Bahini and its activities carried out in 1971 in the territory of Bangladesh.

45. It is found from the book titled '*Muktijudhdhe Dhaka 1971*' that in 1971, Jamat E Islami with intent to provide support and assistance to the Pakistani occupation army by forming armed Razakar and Al-Badar force obtained government's recognition for those *para militia* forces. The relevant narration is as below:

*RiqvqtZ Bmjvqgphxi i iy tk chl mgwi K Rvš-
 vK mg_ Kti | Zv` i mnvZvi Rb` Ab`ib` agv` j vbtq
 cŭgZ Mvb Kti kvš- KuvU | cieZxmgvq mk` ; ewnbx
 ivRvKvi I Avje` i Mvb Kti Ges miKvix` KZxAv`vq etj |
 hvtk agv`v intmte cŭvi Yv Puv`vq DMŭagv` Db`v bv mŭpi
 vPov Kti | Avi Gi Avovtj` mb` i mnvZvq Pjvq vbePv`i
 bksm MYnZ`v, jŭ, bvix vbuZb, AcniY I Puv` Av`vq |
 meKl RvZi veteK evvRv`v` i nZ`vKivnq |*

[Source: *Muktijudhha Dhaka 1971*: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289 : Prosecution Documents Volume 03 page 583]

46. The vital role of jamat E Islami [JEI] in creating the Razakar force is also reflected from the narrative of the book titled ‘**Sunset at MIDDAY**’ which articulates as below:

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 organized through out East Pakistan.

[Source: ‘**Sunset at MIDDAY**’ , *Mohi Uddin Chowdhury* , a leader of Peace committee , Noakhali district in 1971 who left Bangladesh for Pakistan in May 1972 [(Publisher’s note): Qirtas Publications, 1998, Karachi, Pakistan, paragraph two at page 97 of the book]

47. The Fortnightly Secret Report on the situation in East Pakistan for the first half of October 1971 demonstrates that even the Pakistan Democratic Party [PDP] was aware of the atrocities committed by Razakars and Jamat E Islami workers on innocent civilians in the rural areas. **Paragraph 2** of the report says

An extended meeting (50) of the Executive Committee of East Pakistan Regional PDP was held on 3.10.71 at Dacca residence of Mr. Nurul Amin with himself in the chair. The meeting discussed the present political situation and deteriorating economic condition of the country and favoured participation in the causing bye elections. Some of the speakers mentioned about atrocities committed by the enemies as well as by the Jamaat-e islami workers and Razakars on innocent people in the rural areas

[Source: **Fortnightly Secret Report** on the situation in East Pakistan for the first half of October 1971: Government of East Pakistan, Home(Political) Department: No. 686(172)-Poll/S(1)]

48. Razakars, an auxiliary force was thus formed to collaborate with the Pakistani occupation army in annihilating the Bengali nation. Pro-Pakistan political parties including Jamat E Islami, Muslim League etc. had played key role in forming this auxiliary force and they symbolized the pro-liberation Bengali people as their ‘*enemies*’ and ‘*miscreants*’.

49. Razakar force was formed in May 1971 with the aim of resisting the ‘*miscreants*’ and to wipe out the ‘*anti state elements*’ with the aid of army [Source: ‘**The Daily Dainik Pakistan**’, 16 May 1971]. Peace Committees were also formed with the identical plan. Ghulam Azam the then Amir of Jamat E Islami and member of Central Peace Committee almost since the beginning of war of liberation started appealing the Pakistan government for arming the people who believed in solidarity of Pakistan and to combat the ‘*miscreants*’ [Source: **The Daily Sangram**, 21 June 1971, **Press conference of Ghulam Azam**; *see also* **The daily Sangram** 20 June 1971].

50. Thus, a call, on part of Jamat E Islami’s the then Amir for arming civilians who believed in so called solidarity of Pakistan rather substantially provided explicit agreement, approval and moral support to the Razakars in carrying out horrific criminal activities.

51. Infamous Razakar Bahini was thus an ‘**auxiliary force**’ as defined in section 2 of the Act of 1973 as it had acted maintaining ‘**static relation**’ with the armed force for ‘operational’ purpose.

IX. Did the accused persons belong to the local Razakar Bahini-- an Auxiliary Force?

52. Prosecution alleges that the accused Mahidur Rahman and Afsar Hossain Chutu were the active members of local Razakar Bahini, the auxiliary force as defined in section 2(a) of the Act of 1973. It has also been contended that prior to 1971 they were active workers of local Muslim League a pro-Pakistan political party who too sided with the Pakistani occupation army, to further their policy and plan.

53. The witnesses have testified consistently the above pertinent fact. Defence did not deny it and even it remained unshaken in their cross-examination. Additionally, it stands firmly proved from the finding made in the judgement of the High Court Division in the Criminal Appeal No. 538 of 1973 [arising out of the judgment convicting and sentencing the accused persons in a case being Special Tribunal Case No. 27 of 1073 under the Collaborators Order 1972].

54. The certified copy of the said judgement has been submitted by the defence intending to show that the accused Mahidur Rahman and Afsar Hossain Chutu were once prosecuted, tried and convicted for the offence based on same facts and criminal acts for which he has been again charged [charge no.3] under the Act of 1973 which is barred under the doctrine of double jeopardy. The issue double jeopardy shall be adjudicated later on. But now it stands proved, from the said judgment that accused Mahidur Rahman and Afsar Hossain Chutu were the members of local Razakar force. The said judgment also demonstrates that in 1971 accused Mahidur Rahman and Afsar Hossain Chutu, in 1971, used to receive pay fixed for a member of Razakar force. The judgment states:

He also says that he himself disbursed pay to the accused Chutu alias Afsar, Alfaz and Mahidur Rahman for the month of September, 1971. Extracts from the pay of Acquittance Roll of Razakars of Shibganj P.S., Rajshahi, for the month of September, 1971 in respect of the accused Mahidur Rahman and 2 others were put in evidence by the prosecution which have been marked as exhibit 3 series. The extract relating to the pay of the accused appellant Mahidur Rahman was marked as Ext.3 (2). It shows that a sum of Rs. 60/- was the salary of the accused Mahidur Rahman which was paid to him on 5.10.71.....Moreover, apart from Ext.3 series there was sufficient evidence to prove that the appellant Mahidur Rahman was a Razakar [**Criminal Appeal No. 538 of 1973, page 8-9 of the certified copy of the judgment dated 01.12.1975**].

55. All these along with their strong pro-Pakistan political affiliation inevitably lead us to the unerring conclusion that accused

Mahidur Rahman and Afsar Hossain Chutu were the members of local Razakar force. It is significant to note that the defence does not dispute it in any manner.

56. As regards accused Afsar Hossain Chutu, defence suggested the prosecution witnesses that after the independence, accused Afsar Hossain Chutu was prosecuted under the Collaborators Order 1972 for the offence based on the criminal acts narrated in charge no.2 [in the present case] and as such he cannot be prosecuted and tried again. This issue may be well resolved later on. But now it appears that by putting this suggestion, defence has rather admitted the role of accused Afsar Hossain Chutu which was compatible with the activities carried out by the members of Razakar Bahini. Besides, defence could not dislodge it that accused Afsar Hossain Chutu was a local Razakar, as stated by all the P.W.s. All these together provide irresistible conclusion that accused Afsar Hossain Chutu was also a member of local Razakar Bahini

57. The Razakar force was composed of mostly pro-Pakistani Bengalis. Razakars were actively associated with many of the atrocities committed by the Pakistan Army during the 9-month war of liberation in 1971. On September 7, 1971, Pakistan Defence Ministry through an official order elevated the members of the Razakar Bahini to the status of ‘auxiliary force’ of the Pakistan Armed Forces. Defence does not dispute it.

58. It is also found in a report titled “**Pakistani Regime is Preparing For Long Guerrilla War in East**” published in the New York Times , **July 30 1971** issue (By MALCOLM W. BROWNE) that-

After brief training the recruit is given a rifle.....The Government says it has already recruited more than 22,000 Razakars of a planned force of 35,000.

59. The accused persons were thus given rifle after their training as members of the auxiliary force--‘Razakar Bahini’ and in this way they became infamous armed members of local Razakar Bahini for ‘operational purpose’ maintaining ‘static relation’ with the armed force. We may therefore arrive at a safe and an unerring conclusion that the accused Mahidur Rahman and Afsar Hossain Chutu had acted as the members of an ‘auxiliary force’ under control of Pakistani army for their operational and other purposes.

X. Defence plea of Doctrine of Double Jeopardy in respect of the events narrated in charge nos. 1 and 2.

60. Defence avers that accused persons were previously prosecuted for the criminal acts narrated in charge nos. 1 and 2 under the Collaborators Order 1972 and thus they cannot be put on peril again for the same offence and thus they are entitled to exoneration from these two charges. The doctrine of double jeopardy provides this protection to the accused persons, the learned defence counsel argued.

61. The learned prosecutor submitted that defence could not prove, by providing any relevant document whatsoever, that the accused persons were previously prosecuted, tried and acquitted or convicted for the criminal acts narrated in charge nos. 1 and 2 and thus they cannot have protection of the doctrine of double jeopardy.

62. Before initiating deliberation on adjudication of charge nos. 1 and 2 we consider it appropriate to focus and settle this matter first. This matter is a mixed question of law and facts which require to be determined in light of evidence adduced and settled jurisprudence.

63. It is true that the doctrine of double jeopardy is a **procedural defense** and, in many countries such as the United States, Canada, Japan , India, and Bangladesh it is a constitutional right that forbids an accused from being tried a second time for the ‘same crime’.

Bangladesh Constitution contains a provision [Article 35(2)] that deals with the issue of ‘double jeopardy’ (also known as *ne bis in idem*). This principle essentially means that a person should not be ‘tried’ or ‘punished’ twice for the ‘same criminal acts’ constituting the offence. Thus the legal principle of ‘Double Jeopardy’ is that one can’t be in jeopardy of punishment by the state twice for the offence based on substantially same facts.

64. The Tribunal notes that burden lies upon the defence to prove that the two cases, as referred by the defence, being no. **12 dated 22.1.1972 [GR No. 17.1972]** and **14 dated 7.2.1972[GR No. 56/1972]** lodged with Shibganj Police Station against the accused persons for the offences based on criminal acts under the Collaborators Order 1972 and now they again stands trial for the same criminal acts constituting the offences under the Act of 1973 as narrated in charge nos. 1 and 2 and thus they are now entitled to get the benefit of the doctrine of double jeopardy.

65. In the case in hand, in support of above contention, defence did not furnish any relevant document or authenticated information whatsoever. Defence merely suggested it to the IO that there had been said two cases against the accused persons of which he [IO] was acquainted. The IO [P.W.10] denied it. The IO however admitted that he, during his investigation, knew that the accused persons had been in prison for long time as they belonged to Razakar Bahini.

66. In view of above, for the purpose of effective adjudication of the charge nos. 1 and 2, the Tribunal asked the Sessions Judge, Chapai Nababganj for providing the Tribunal with the case record or necessary information in respect of the above mentioned two cases lodged against the accused persons in 1972. In compliance with Tribunal’s order dated 23.3.2015, Sessions Judge (in-charge)

by its memo no. 1738 dated 5.4.2015 furnished information as below:

- (a) Shibganj Police Station case being no. 12 dated 22.1.1972 [GR No. 17/1972] was disposed of under section 494 of the CrPC by the 1st class Magistrate on 22.2.1977; and
- (b) No record or information in respect of Shibganj Police Station case being no. 14 dated 7.2.1972[GR No. 56/1972] could have been found in the record room of the District Magistrate, Chapai Nababganj.

67. Therefore, it stands patent that there had been one case which was disposed of under section 494 CrPC i.e. without trial and no information about the later one could have been traced due to non availability of the respective record. It is noteworthy that ‘prosecuting a person’ means to institute or conduct legal proceedings against him. Finding a person guilty of offence is founded on lawful trial followed by the final verdict of the court of law. Mere prosecuting him does not *ipso facto* predict that he was guilty of the criminal act constituting offence for which he is prosecuted.

68. In course of argument, the learned prosecutor by drawing attention to the photo copy of the police report submitted in respect of Shibganj Police Station case being no. 12 dated 22.1.1972 [GR No. 17.1972] submitted that this case refers to another event of criminal acts occurred at a different place and it was initiated against many persons including the present accused persons and finally the case was disposed of under section 494 of the Code of Criminal Procedure and not on full trial. The learned prosecutor, on query, submitted that they obtained the above photocopy of the police report from the Superintendent of Police, Chapai Nababganj through official communication made on part of the prosecution.

69. The Tribunal thus emphatically first notes that the above information provides proof of one previous prosecution against the present accused persons. And it was ended in discharge under

section 494 of the CrPC. Second, apart from above information defence could not adduce any evidence, documentary or oral, to substantiate the contention that either of those two cases related to the same criminal acts for which the accused persons have been prosecuted again under the Act of 1973.

70. Next, there has been no authenticated information whatsoever to conclude that the another prosecution [arising out of Shibganj Police Station case no. **14 dated 7.2.1972 & GR No. 56/1972**] was also against the accused persons and the same was ended with pronouncement of judgment of acquittal or conviction.

71. Now, what benefit goes to the accused persons even if we accept the defence submission that this case too was against the accused persons for the criminal acts under the Collaborators Order 1972? We are of the view that mere lodgment of the above mentioned case does not readily lead us to conclude that the accused persons were eventually convicted or acquitted, on full trial and the said case involved the event of criminal acts for which now they again stand trial under the Act of 1973.

72. Besides, none of the prosecution witnesses examined does not appear to have been suggested specifically that the accused persons were previously prosecuted, tried and convicted or acquitted for the criminal acts narrated in charge nos. 1 and 2.

73. For the sake of argument, if we say, accepting defence submission, that the accused persons were previously prosecuted for the offences based on criminal acts and event which are same to that as narrated in charge nos. 1 and 2, the defence cannot have advantage of the canon of double jeopardy as one of those two cases was disposed of under section 494 CrPC and not on full trial and no information as to fate of the another one could have been obtained and defence too failed to establish that it was also against

the accused persons and they faced prosecution for the criminal acts narrated either in charge no.1 or charge no.2.

74. More so, it is a fact of judicial notice that only the persons prosecuted under the Collaborators Order 1972 excepting for the offence of murder, rape, arson and looting were pardoned. Even the Repeal Ordinance dated 31.12.1977 did not allow the persons to walk free who were facing trial for the said offences. Thus, it cannot be said that discharge order under section 494 CrPC was made not in a case related to the offence of murder and as such we find no room too to conclude that the accused persons were previously prosecuted for the event of killing of numerous civilians as narrated in charge no.1, under the Collaborators Order 1972 and afterwards discharged under section 494 CrPC. Besides, a previous prosecution is not a bar to a subsequent prosecution when the previous prosecution was properly terminated other than by judgment of acquittal.

75. It is imperative, therefore, that the former criminal trial had concluded with a verdict of either acquittal or conviction following a trial by a court of competent criminal jurisdiction *intra vires*. Where an accused has been charged with a criminal offence, but the prosecution decides not to proceed with the prosecution, this abstention will not amount to an 'acquittal'. But there has been nothing, on part of the defence, to substantiate that the accused persons were previously prosecuted, tried and a final verdict was rendered, for the offence based on criminal acts described in charge nos. 1 and 2, in either of two cases referred to above.

76. The IO admits that the accused had been in prison for long time as they were Razakars. This admission by itself does not prove with specificity about the previous prosecution the accused had to face in respect of the events narrated in charge nos. 1 and 2. However, he [IO] could have done a more smart exploration into

this matter to unearth the detail in this regard for using it as a tool to refute defence contention.

77. In view of above, we arrive at a finding that the defence has utterly failed to prove that-

(a) The accused persons were previously prosecuted, tried and acquitted or convicted for the same criminal acts, and

(b) That either of the two cases as suggested by the defence involved the event of killing civilians and destructive activities as narrated in charge nos. 1 and 2

(c) Mere admission of the fact by the IO that the accused persons had been in prison for long time [after the independence] as they were Razakars is not the proof of the above two requirements.

78. Accordingly, we find no bar to go ahead with the task of adjudication of the offence and complicity of the accused persons therewith as narrated in charge nos. 1 and 2, in light of evidence adduced before us by the prosecution.

XI. Adjudication of Charge No.1

[Abduction, confinement and torture of 39 civilians of them 24 were killed]

79. Charge: On 06.10.1971 at about 05:00 am accused (1) **Mahidur Rahman** and (2) **Afsar Hossain @ Chutu**], members of Razakar force accompanied the group formed of hundreds of armed members of Razakar force and Pakistani occupation army towards the villages **ChandShikari, Chamatol, Kabirajtola and Eradot Biswasertola** known as the locality siding with the war of liberation and besieging the sites carried out extensive hunt and apprehended (1) Fazlur Rahman (2) Ariful Islam (3) Ayesuddin(4) Ajmal Hossain (5) Rejaul Karim Razzak (6) Parul Hossain (7) Golap Ali (8) Dukhu Mondol (9) Afardi Mondol (10) Saifuddin (11) Fitu (12) Afsar Ali) (13) Md. Zillur Rahman (14) Md. Mokhlesur Rahman(Mokhlu) (15) Md. Raisuddin (16) Kaesuddin(now dead) and (17) Jalal, the civilians belonging to pro-

liberation political group, and then took them forcibly at the field of Binodpur High School where at about 09:30 am accused **(1) Mahidur Rahman** and **(2) Ashraf Hossain @ Chutu** gunned down **12 detained civilians** to death and of the detained civilians- Afsar Ali, Md. Zillur Rahman, Md. Mokhlesur Rahman (Mokhlu) and Md. Raisuddin however survived despite receiving bullet injury.

In conjunction with the same attack, after committing the killing of 12 civilians, the group of perpetrators, with same intent, by launching attack apprehended unarmed pro-liberation civilians and forcibly brought them first at an open field 200 yards west to village ChandShikari where they grilled them, by causing torture, for extracting whereabouts of freedom fighters and their accomplices. On the same day at about 12:30-01:00 pm the detained civilians were then brought to Binodpur High School and were kept confined in a room of the school. The detainees were subjected to torture whole night.

On the following day i.e. on 07.10.1971 at about 4:00 pm the detainees were taken out to the school ground where on approval of accused **(1) Mahidur Rahman** and **(2) Ashraf Hossain @ Chutu**, amongst the detainees Paigam Biswas[now dead], Abul Hossain[now dead], Abdur Rahman[now dead] Jalaluddin, Mahabul, Rostam Ali[now dead], Bilat Ali[now dead] were set free and the rest **15 detainees** were then brought to the southern side of the field where the accused **(1) Md. Mahidur Rahman** and **(2) Md. Afsar Hossain @ Chutu** made them seated in a line and the accused persons and some members of Razakar force gunned down them to death. Md. Fasih Alam @ Sattu. Md. Zakaria and Afzal Hossain [now dead] somehow survived despite receiving bullet injury.

In this way, by launching systematic attack directing civilian population belonging to the pro-liberation group, the accused

persons along with the group of armed Razakars and Pakistani occupation army abducted 39 civilians in two phases, in conjunction with the same attack, and had kept them confined for the purpose of extracting whereabouts of freedom fighters, caused torture to them and of them **24** were shot to death eventually.

Therefore, the accused **(1) Mahidur Rahman** and **(2) Afsar Hossain @ Chutu** have been charged for participation, abetment and substantial contribution to the act of forcible capture of 39 civilians and causing torture upon them constituting the offence of ‘**abduction**’ and ‘**torture**’ as crimes against humanity and also for participation, abetment and substantial contribution to the accomplishment of **killing 24 civilians** constituting the offence of ‘**murder**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act and thus the accused persons incurred liability under section 4(1) of the Act for the above offences.

Witnesses Examined

80. Prosecution, in order to prove the charge, examined 06 witnesses. They are **P.W.1 Ahsan Habib [62]** who is a freedom fighter from village Ekborpur under Shibganj police station. The 05 other witnesses are **P.W.2 Md. Mohbul Haque [62]**, **P.W.3 Raisuddin**, **P.W.4 Jakaria**, **P.W.5 Md. Mokhlesur Rahman** and **P.W.6 Fosi Alam**. All of them are the residents of village Chandshikari, one of crime villages. They too were allegedly taken to Binodpur High School, on forcible capture, by the group of Razakars and Pakistani army. Prosecution relies upon their testimony on material particulars including the facts substantially related to the act of abduction and killing of other detained civilians with which the accused persons had active participation and involvement.

Evidence of Witnesses

81. P.W.1 Ahsan Habib [62] is a freedom fighter from village Ekborpur under Shibganj police station. On 06 October he had been in the locality of village **Balidighi** wherefrom he heard the event from his co-freedom fighters. Thus, his testimony in respect of the event and complicity of the accused persons therewith is hearsay in nature. Apart from this he narrated how and when he received training as freedom fighter and when returned to their locality.

Freedom Fighters' Camp at Binodpur School

82. P.W.1 stated that in the first part of June 1971 they 40 youths under the guidance of Moinuddin doctor went to Gourabagan at Mouhadipur in India where they received training as freedom fighters. In mid July 1971 they returned back and got them stationed at Binodpur High School, nearer to Baliadighi Sona Masjid border. Since mid September, they started going round regularly the localities of Baliadighi, Arpara and Dhobra and some of freedom fighters were assigned as 'sources' in the locality of Binodpur, Monakosha, Dadanchak for collecting information.

83. On 06 October 1971 he [P.W.1] had been around the locality of Baliadighi wherefrom after the dusk, he knew from his engaged sources that the freedom fighters had retreated the locality as in the early morning [of 06 October] about 100-150 Razakars and army men launched an attack by besieging the villages Chandshikari, Chamatola, Eradot Biswasertola, Kabirajtola and Binodpur High School.

Event of forcible Capture and killing at Binodpur High School

84. P.W.1 testified what he heard about the event involving forcible capture of civilians, taking them to Binodpur High School and killing them by gun shot by the group of army and Razakars accompanied by accused Mahidur and Afsar Hossain Chutu. He

stated that on 06 October 1971, Razakar Mahidur and Chutu led by their commander Moazzem bringing the captured civilians made them stand in a line at the field of Binodpur High School and had killed 12 by firing gun shot when 4-5 detainees managed to escape. He [P.W.1] also stated that on the following day, 6-7 detainees, captured on the preceding day, were released and the rest 14-15 detained persons were killed by Razakar Moazzem, Mahidur, Gafur and Afsar Hossain Chutu by gun shot.

Freedom Fighters' Camp at Binodpur School and Attack

85. P.W.2 Mohbul Haque [62] was a resident of village Chandshikari, one of crime villages. He also corroborated the fact of stationing the freedom fighters at Binodpur High School in 1971. He stated that he used to arrange Fooding for the freedom fighters at the camp.

86. According to his testimony, in the early morning of the mid of *Shaban* month of Arabic calendar [corresponding to 06 October 1971] the group formed of Razakars and Pakistani army men had launched attack directing villages **Chandshikari, Chamatola, Kabirajtola and Eradot Biswasertola**. First at about 09-00-10:00 am the Pakistani army and Razakars besieging the house of Jakaria apprehended him, Nazrul, Ettaj and Taslim, Paigam Biswas and Jalal.

87. P.W.2 stated too that next the group of 5/6 Razakars and 10-12 army accompanied by Mahidur, Chutu and Gafur apprehended him[P.W.2], his father Abul Hossain and his brother Mantu @ Qayum and they were first brought to an open field west to their house where his uncle Salimuddin, Afzal Hossain, Senamul, Katlu, Jalal, Rahman, Alkes, Ajahar, Sentu, Sattu were also brought on forcible capture and subjected to torture and at about 12:00-01:00 pm they and all other captured persons were taken to Binodpur High School and were kept detained in a room of the school.

88. Defence simply denied this material fact relevant to the principal event and it could not dislodge it in any manner. Presence of the accused persons with the group of attackers remained unshaken, in cross-examination.

89. P.W.2 stated that on the following day at about 04:00 pm they were taken out of the room [where they were kept detained] and on asking of Razakar Gafur Jola he[P.W.2], his father, Mantu, Paigam, Jalal, Rahman were set free for managing and bringing food materials. When they started moving there from they saw some bullet hit persons lying at the field of the school and of them they could identify **Fazlur Rahman and Ariful**. With this they went into hid inside a sugarcane field and after *Magrib* [dusk] they came out and had buried the dead body of **Nazrul, Ettaj, Taslim, Senamul, Alkes, Ajahar, Sentu** and others.

Freedom Fighters' Camp at Binodpur School and Attack

90. P.W.3 Rais Uddin [74] a resident of village **Chandshikari** under police station Shibganj of the then sub-division Chapai Nababganj is a victim of the attack and has narrated what he experienced and how he eventually survived from the clutch of the perpetrators.

91. P.W.3 stated that residents of their villages **Kabirajtola, Eradot Biswasertola, Chamatola** were the supporters of Awami League and they also stood in support of the war of liberation. In 1971 a camp of freedom fighters was set up at Binodpur High School and they the inhabitants of these four villages used to provide them with rice, pulse etc.

92. The above version that substantially relates to the reason of facing the attack launched by army and Razakars remained undenied in cross-examination.

Attack and abducting the civilians

93. In respect of the event of attack, P.W.3 narrated that at about 5/6 am on 06 October 1971 the Razakars and Pakistani army besieged the villages and at about 6-6:30 am the group formed of Razakars and Panjabees[the army men] cordoned their house when he had been inside as he did not get chance to escape and then Razakars Chutu, Mahidur, Gafur Jola, Moazzem and some other Razakars dragged him[P.W.3] out, beaten him and also took towards the house of Parul [a man], tying his hands up. Then they [the attackers] brought Parul and Golap towards the house of Koyes wherefrom they caught Razzak. Keeping them under vigilance of some Razakars, the army and their accomplice Razakars moved again towards their[P.W.3] village and brought Afsar, Makhlukat, Saifuddin, Ariful, Fazlu, Aeyesuddin, Azmal, Dukhu, Afadi, Fitu and another Afsar ,on capture , to the place where they were kept detained.

Keeping the captured civilians detained at Binodpur High School

94. P.W.3 further stated that the Razakars and the army men took 16/17 captured civilians including him [P.W.3] to Binodpur High School. The Razakars told the army men that all the detained civilians were '**Mukti**' [freedom fighters]. With this he [P.W.3] replied that they were labourers and not '**Mukti**'. Then the Razakars taking them in the field of the school started causing torture to them, on instruction of the Pakistani army.

95. P.W.3 also stated that afterwards, they were taken to the southern part of the school field and Razakar Mahidur, Chutu, Moazzem, Gafur Jola made them stood in a line by making their hands unfastened and instantly Razakar Chutu shot to **Ariful** by a gun and Razakar Mahidur gunned down **Fazlu** to death. Being frightened, seeing this, he [P.W.3] and 3-4 others managed to escape by running towards east of the field when they were

followed by frequent gun shots. Later on, he heard that 12 of detainees who were taken to Binodpur High School on capture were gunned down to death by the Razakars.

96. The above version relating to detaining the P.W.3 including other captured co-villagers and direct participation of accused persons in accomplishing the act of killing detainees by gun shot remained totally unshaken. Defence simply denied it in cross-examination.

Event of abduction

97. P.W.4 Jakaria [62] also a survived victim stated that during the mid of Arabic month ‘*Shaban*’ [in 1971] a group of Pakistani army and Razakars besieged their village at about 5-6 am and about 9-10 am they dragged him, his brothers **Ettaj, Taslim and Nazrul** and other civilians out from their houses and at about 12:00-0100 pm they were taken to Binodpur High School and after the dusk they were kept detained inside the school. On the following day at about 04:00 pm they were taken out and the army men and Razakars allowed **Abul Hossain, Mohbul [P.W.2], Montu, Sayemuddin, Paigam Biswas, Rahman** to walk free as they on asking agreed to bring food materials [rice, pulse, goat]

Event of Killing at Binodpur High School

98. P.W.4 further stated that afterwards they were made stood in a line at the south-east corner of the school wherefrom they saw 10-12 dead bodies lying at the field. Then Mahidur shot **Sentu** to death and Chutu gunned down **Ajahaar** to death. Mahidur also shot to his brother **Ettaj** and Chutu fired to him [P.W.4] causing bullet hit injury to the back of his left chest [**P.W.4 with the permission of Tribunal had shown the mark of said bullet hit injury he received, removing his wearing apparel**]. On receiving bullet shot he fell down. Later on the villagers, after the army and Razakars had left the killing site rescued him and brought him to

his house and then taken to his sister's house at village Gopalnagar, India where he received treatment and returned home after independence.

99. Defence did not cross-examine the P.W.4 on the narration he made. Even it did not deny specifically what this witness narrates in his examination-in-chief..

Killing of civilians on Forcible Capture

100. P.W.5 Md. Mokhlesur Rahman [83] a resident of crime village Chandshikari who was also a survived victim narrated how he along with his brother and relatives were forcibly taken to Binodpur High School on a day of Arabic month *Shaban* in 1971 by the group formed of army, Razakars and accused Mahidur and Afsar Hossain Chutu.

101. According to P.W.5 accused Mahidur gunned down his [P.W.5] brother **Fazlu** to death and his brother's son **Ariful** and **Fitu** were shot to death by accused Chutu at Binodpur High School the killing site. He, to save his own life, had to tell a lie that one of his son was a member of Razakar force as Mahidur made a blow on his face by the firearms in his hand. With this he [P.W.5] was made freed and thus he returned home.

Freedom Fighters camp and attack

102. P.W.6 Fosi Alam [60] a resident of village Chandshikari used to work as a cook at the camp of freedom fighters set up at Binodpur High School. He narrated what happened in the mid of Arabic month '*Shaban*' in 1971. He stated that on that day at about 5:30 am the frightened people of the locality rushed to Binodpur High School and informed that a group of army and Razakars was about to besiege the village. On hearing it freedom fighters Laljan and Mohsin present at the camp asked him to go back home. On coming back home, at about 9-9:30 am he[P.W.6] heard gun firing from the end of Binodpur High School and with this he and his

brother attempted to flee but saw that the attackers had besieged the village and they returned their home.

103. P.W.6 further stated that at about 10-10:30 am Razakar Mahidur, Moazzem Razakar, Ashraf Hossain Chutu Razakar accompanied by two army men entered their home. The army men, seeing them, inquired by saying- **‘who they are’** [*yei admi keya hai*]. With this Ashraf Hossain Chutu replied –**‘they are Mukti** (freedom fighters), **Sir’** [*Yei admi Mukti hai ,sir*]. The army men indicating his [P.W.6] brother told—**‘he is tender aged, leave him’** [*yei admi chchota hai isko chchor do*] and indicating him [P.W.6] told to bring with them. Then Razakar Afsar Hossain Chutu tied down his hands and the attackers brought him at the field west to their home where he found Ettaj, Taslim, Nazrul, Zakir Hossain, Paigam Biswas, Jalal, Abul Hossain, Mahabul[P.W.2], Sayemuddin, Afzal, Senamul, Katlu, Jallu, Rahman, Alkes, Ajahar, Sentu and others detained and he saw the Razakars beating them up. He was also physically tortured there by Razakars and army.

104. The above is the description how P.W.6 was captured forcibly from his home and what role the accused persons had played in accomplishing the act of abduction of villagers including him. The above also depicts that the attackers simultaneously had captured many other civilians whom the P.W.6 found detained at the field west to their home.

105. P.W.6 next stated that at about 12:00-1:00 pm he and other detained persons were taken to Binodpur High School where they were made stood in a line by the side of school building and then at about 05:00 pm they were kept captive inside the school building.

106. In respect of the event he experienced on the following day, P.W.6 stated that at about 04:00 pm they were taken out and made stood in a line at the open field of the school and then accused

Mahidur, Ashraf and Moazzem set Paigam Biswas, Abul Hossain, Mohbul, Sayemuddin, Jallu and Rahman free for bringing food materials[chicken, goat].

107. P.W.6 further stated that next, he[P.W.6], Nazrul, Jakir, Senamul, Ettaj, Taslim, Jalal, Afzal, Katlu, Alkes, Sentu, Azahar, Akalu, Gudar, Kasimuddin were made stood in a line when they saw 10-12 dead bodies lying 15-20 haat far from them. Detainee **Sentu** was taken in front of the lone and asked to sit him there and then Razakar Chutu gunned him down to death and Razakar Mahidur had killed **Ajahar** by gun firing. Similarly, detainee **Ettaj** was also shot to death by Afsar Hossain Chutu and in this way they had killed all the detainees. But he and Zakir Hossain son of Wajed Ali fell down receiving bullet hit injury and lost their sense. Next, he discovered him at the house of his uncle at Sarsani under district Maldah, India, on regaining sense. He heard that he was recovered by his uncle from the killing site. Finally, P.W.6 stated that 12/13 detained civilians who were with him were killed on the day of the event.

108. Defence simply denied what has been narrated by the P.W.6 in respect of the act of abduction, detention and killing of civilians including P.W.6 and participation and substantial contribution of accused persons to the commission of the principal crimes, by their act and presence at the killing sites. But it could not shake the above testimony materially related to the perpetration of the killing and complicity of the accused persons therewith, in any manner.

109. The version made by P.W.6 depicts that many of captured civilians were kept detained inside the Binodpur High School, on their forcible capture. On the following day, in evening, they were taken out and some of them were made freed for bringing food materials and some became prey of the act of killing. A group of Razakars formed of accused Mahidur Rahman and Afsar Hossain Chutu physically participated to the commission of the killing and

P.W.6 and detainee Zakir Hossain survived despite receiving bullet hit injury, it transpires from the evidence of P.W.6.

Freedom Fighters Camp at Binodpur High School under Attack

110. P.W.8 Mohsin Ali [78] a freedom fighter and a resident of village Binodpur narrated how the camp set up at Binodpur High School came under attack by the army and Razakars on 06 October 1971. In the face of the attack they had to retreat, P.W.8 stated. Defence could not refute this crucial and relevant fact.

Deliberation & Finding with Reasoning

111. Prosecution claims its success in proving the offence of killing civilians by taking them to Binodpur High School on forcible capture and complicity of accused persons therewith by adducing evidence of reliable witnesses including the survived victims. The learned prosecutor submitted that the testimony of witnesses could not be impeached by the defence and there has been no reason whatsoever to disbelieve them.

112. The learned Prosecutor further submitted that P.W.3, P.W.5 and P.W.6, the survived victims, consistently narrated how the accused persons participated to the act of killing the detained civilians at Binodpur High School. Hearsay testimony of P.W.1 shall seem to have been corroborated by the evidence of eye witnesses. Being the members of local Razakar force the accused Mahidur Rahman and Afsar Hossain Chutu actively and knowingly accompanied the group of attackers formed of Pakistani occupation army and Razakars in accomplishing the principal crimes. Even the evidence demonstrates their physical participation to the commission of killing that took place on the following day.

113. Conversely, Mr. Abdus Sobhan Tarafdar the learned defence counsel, along with other issues, stressed on the legal position on the matter of previous prosecution and conviction of an individual which stands as a bar to subsequent prosecution when it relates to

the offence based on same criminal acts. But already we have recorded our finding that neither of the accused persons was prosecuted, tried and convicted or acquitted under the Collaborators Order 1972 for the criminal acts[narrated in charge nos. 1 and 2] for which now they have been charged and tried again under the Act of 1973.

114. The learned defence counsel next argued that since admittedly the accused persons were prosecuted, tried and convicted for the event of killing 04 civilians [**as narrated in charge no.3**] under the Collaborators Order 1972 they could have been prosecuted and tried too even for the offence of killing narrated in charge no.1 under the said Order, if really had they involvement with its commission in any manner. Non initiation of prosecution under the Order of 1972 for the criminal acts constituting the offence of killing narrated in charge no.1 creates truthfulness of the event and complicity of the accused persons therewith.

115. The learned defence counsel, by drawing attention to the testimony of P.W.4 and P.W.6 submitted that their testimony in relation to which accused had killed which detainee suffers from glaring inconsistency and thus it creates doubt as to accused persons' presence at the crime site. Besides, P.W.4 Jakaria who allegedly managed to survive despite receiving bullet injury could not identify the accused persons correctly on dock and thus his statement implicating the accused losses probative value.

116. At the out set, the Tribunal disagrees with the defence contention by observing that in no way, previous prosecution and conviction for the criminal acts constituting the offence of abduction with intent to murder of four civilians [**as narrated in charge no.3**], punishable under the Penal Code, exonerates the accused persons of being prosecuted for the offences based on quite distinct criminal acts constituting the event of killing 24 civilians.

117. At the same time it cannot be a valid argument now that since they were not prosecuted for the offence, based on criminal acts narrated in charge no.1, under the Collaborators Order 1972 together with the previous accusation brought there under the accused persons are now exempted of being prosecuted for the offence based on their distinct criminal acts constituting another event of murder of numerous civilians [**narrated in charge no.1.**

118. Now let us evaluate the evidence led by the prosecution in support of the event narrated in charge no.1. It transpires that the whole event [**narrated in charge no.1**] of attack involved different phases. The group of attackers, by launching attack to crime villages, apprehended pro-liberation civilians, took them forcibly to Binodpur High School and killed them after keeping detained there. The act of killing took place on two consecutive days. The killing site was Binodpur High School field. The group of attackers allegedly formed of Pakistani occupation army, members of local Razakars including accused Mahidur Rahman and Afsar Hossain Chutu. The accused persons allegedly physically participated to the commission of killing at Binodpur High School. Prosecution thus requires proving that-

- (a) The civilians were taken to Binodpur High School on forcible capture
- (b) The detainees were killed there on two consecutive days
- (c)The group of attackers formed of army and local Razakars including the accused persons
- (d) The accused persons, apart from their physical participation, abetted and substantially facilitated to the commission of the crimes, by their presence and acts.
- (e) The accused persons were the part of plan of collective criminality.

119. It is found from evidence that the planned attack was initiated targeting the freedom fighters camp at Binodpur High School. Presumably intending to materialize the plan of apprehending the

pro-liberation civilians of the crime villages the attackers first opted to disperse the freedom fighters staying at their camp. P.W.1 a freedom fighter heard the attack directing the freedom fighters' camp from his 'source' after the dusk, on the day of event of attack. It remained unshaken that the freedom fighters stationed at Binodpur High School retreated in the face of attack launched by a group formed of about 100-150 Razakars and army men.

120. Defence did not deny the hearsay version of P.W.1 specifically. Rather it stands reaffirmed in cross-examination when the P.W.1 states, in reply to question put to him, that he heard the event from freedom fighter Mozammel Haque and Sahabul Haque. Even the event of killing civilians becomes admitted by the defence suggestion put to P.W.1. The hearsay narration made by P.W.1 on material particulars in examination-in-chief remained totally unimpeached. There has been no reason to disbelieve the hearsay testimony on the event of attack that resulted in killing and complicity of accused persons therewith. Besides, his hearsay version gets corroboration from the evidence of other witnesses who are survived victims.

121. P.W.2 Mohbul Haque [62] was a resident of village Chandshikari, one of crime villages. He also corroborated the fact of stationing the freedom fighters at Binodpur High School in 1971.

122. P.W.2 Mohbul Haque is one of survived victims. He , his father Abul Hossain and his brother Mantu @ Qayum were forcibly taken away to Binodpur High School by the group of Razakars accompanied by Mahidur, Chutu and Gafur at about 12:00-01:00 pm[on 06 October 1971] and were kept detained, along with other captured civilians in a room of the school, as stated by P.W.2.

123. Escaping from captivity from Binodpur High School as stated by P.W.2 and seeing the dead bodies of some persons captured on

the preceding day lying in the filed could not be refuted in any manner. Defence simply denied it. On cross-examination, P.W.2 stated that he moved for village Kurit after burial of the bodies of persons as he stated. The place where he saw the dead bodies lying was at a place on the way to Binodpur High School from his house. It proves the act of killing civilians on the day they were forcibly captured.

124. As regards reason of knowing the accused persons, in cross-examination, P.W.2 stated that he had never gone to the houses of accused persons prior to 1971 or the accused persons had never visited their house. It alone does not affect the credibility of testimony made by P.W.2 in respect of the act of abduction, torture, confinement accomplished by the group of attackers accompanied by Razakars Mahidur and Chutu as the defence failed to refute this material fact, by cross-examining the P.W.2.

125. The Tribunal further notes that mere visiting house of each other alone may not make someone able to be acquainted to each other. One may have some other reason of being familiar with the accused persons. Admittedly, the accused persons were the members of local Razakar force and they were the residents of neighbouring villages and as such P.W.2 naturally knew the accused persons, it may be validly presumed. Besides, defence did not put suggestion to P.W.2 that he could not recognise the accused accompanying the group of attackers.

126. The unimpeached version of P.W.2 a victim demonstrates how the perpetrators had forcibly captured him [P.W.2], his father and relatives along with other villagers, in conjunction with the planned attack, and were taken to Binodpur High School where they were kept captive. Defence simply denied this material fact relevant to the principal event of killing and it could not dislodge it in any manner. Presence of the accused persons with the group of attackers remained unshaken, in cross-examination.

127. P.W.2 could identify some bullet hit body of some persons including **Fazlur Rahman and Ariful** lying at the field of the school. This fact together with the undisputed fact of burial of the dead body of **Nazrul, Ettaj, Taslim, Senamul, Alkes, Ajahar, Sentu** and others they found them there lying proves it unerringly that on the preceding day and prior to his [P.W.2] and some other detainees' release on the following day the perpetrators who brought them there, on forcible capture, had gunned them down to death. P.W.2 does not claim to have witnessed the killing, true. But this fact unveiled from his evidence indisputably proves that the intention of abduction of civilians was to cause their death.

128. Defence, as it appears, neither denied nor dislodged the version made by **P.W.3** portraying the stance the inhabitants of the four villages took in support of the war of liberation. Presumably the stance the inhabitants of these villages took made the local Razakar force hostile towards them which prompted them to target them and the freedom fighters' camp at Binodpur High School and under the guidance of local Razakar force the Pakistani army had launched attack on 06 October 1971 directing those villages, in furtherance of policy and plan. Thus the attack was planned to which the accused persons, the members of local Razakar bahini were active part.

129. In cross-examination, defence could not impeach the version made by P.W.3 relating to the act of taking him and others on forcible capture to Binodpur High School where the accused persons and their cohorts gunned down some of detainees to death. Rather, the fact of shooting targeting him[P.W.3] becomes affirmed as P.W.3 stated in reply to question put to him that it was about 09:00-09:30 am when the accused fired to them , as he stated [in examination-in-chief].

130. P.W.4 Jakaria[62] a resident of village Chandshikari one of crime villages narrated how he and his brothers were taken to

Binodpur High School, on forcible capture along with other civilians by the group of Razakars and Pakistani army and how they and other captured civilians were kept detained inside Binodpur High School. He and **Fosi Alam** however miraculously survived despite receiving bullet knock, P.W.4 stated and it remained totally unshaken. Defence could not shake the credibility of his testimony in any manner.

131. It also appears that P.W.4 does not claim that at the time of dragging him out the accused persons were with the group of Razakars and army men. He however implicates accused persons with the act of killing **Sentu, Ajahar and Ettaj** by gun shot. The Tribunal notes that mere wrong identification of accused persons on dock by this P.W.4 itself alone does not make his testimony on material particulars untrue. There has been no convincing evidence that even after the event occurred the witness had frequent occasions of seeing the accused persons. Thus it may safely be concluded that the failure of witness to correctly identify the accused persons in dock happened due to fallibility of his memory which was quite natural.

132. P.W.4, at the end of examination-in-chief, could not correctly identify the accused persons standing on dock and chiefly for this reason defence opted not to cross-examine him on his statement made in examination-in-chief. Failure to identify the accused persons on dock renders his testimony implicating the accused persons with the killing untruthful, the learned defence counsel argued.

133. It is to be noted that in-court identification evidence is often unreliable evidence because human perception and recollection are prone to error. A witness identifying an accused in dock as the person whom he saw at the scene of the crime or in circumstances

connected with the crime may not always be able to recollect physical features of accused he saw at the scene of the crime.

134. Tribunal notes that one's appearance and figure change with time. There is nothing before us to show that during last four decades, after the event alleged, P.W.4 had frequent occasion to see the accused persons. Defence did not put question about it to this witness in cross-examination. Thus, incorrect identification of accused persons on dock may naturally happen due to lapse of long passage of time.

135. Next, the P.W.4 might have made exaggerated statement by implicating the accused persons directly with the act of killing. We are to take other evidence into cumulative account to see whether the accused persons accompanied the group of attackers formed of local Razakars and army men in committing the criminal acts constituting the principal crime, the killing of numerous non combatant civilians and whether they remained present at the killing site.

136. It shall appear that what the P.W.4 stated in respect of forcible capture of civilians including him, taking them forcibly to Binodpur High School, killing the detainees by gun shot on the following day and the fact of his survival despite receiving bullet injury appear to have been corroborated by the other witnesses. Thus, mere failure of P.W.4 to correctly identify the accused persons on dock as the accomplices of the attackers does not disprove their absence in the crime site and such failure alone cannot be an indicator of resolving culpability of the accused persons.

137. Long four decades after the event of horrific killing, traumatized victims may not be able to memorize exactly as to who gunned down whom to death when they were made stood in a line. Integrated evaluation of evidence of P.W.4 and P.W.6 provides

irresistible conclusion that accused Mahidur Rahman and Afsar Hossain Chutu were at the crime site along with their cohorts and they had physically participated to the commission of killing the detained civilians brought at Binodpur High School on the preceding day, on capture.

138. Even if the accused persons are not found to have had physical presence at the crime site and direct participation to the killing by gunning down the detained civilians to death they shall be held responsible for their culpable acts and presence with the perpetrators forming part of the attack in accomplishing the act of abduction that eventually resulted in killing of detained civilians. In that case their presence with the group of attackers was not at all innocent as they belonged to local Razakar Bahini the object of forming which was to act under the command of armed force, to further policy and plan of annihilating the pro-liberation Bengali civilians.

139. The Prosecution's burden in every case under the Act of 1973 includes the need to prove that the offence has been committed and also that its commission was facilitated, contributed and abetted by the accused, by his act or conduct forming part of attack or physical participation. The defence does not deny the commission of offence alleged, but asserts that the prosecution has not been able to prove that the accused persons were the persons who facilitated and participated to the commission of the offence or was involved with its perpetration in any manner.

140. It is now settled that eyewitness's identification is direct evidence against the accused which, if believed, resolves a matter in issue – that the accused was the person who committed the crime in question.

141. P.W.4 could not positively identify the accused persons he had seen at the relevant time along with the group of attackers while deposing in court. But if the claim of seeing the accused at the

crime scene or committing criminal acts substantially facilitating the perpetration of the principal crime alleged is believed, failure to correctly identify the accused on dock, long four decades after the event happened, does not render the testimony of such seeing the accused persons present at the killing site at the relevant time readily untrue.

142. Thus, the primary and core issue pertains to the involvement of the accused persons, who are said to be the accomplices of the perpetrators forming the group of attackers.

143. The factual matrix proved by the prosecution unerringly point towards the accused persons as the active accomplices of the perpetrators forming the group of attackers, i.e. there is no escape from the conclusion that the crime was committed on substantial contribution and assistance of the accused persons.

144. Defence argued that the testimony of P.W.4 and P.W.6 in relation to which accused had killed which detainee suffers from glaring inconsistency and thus it creates doubt as to accused persons' participation and presence at the crime site.

145. We are not ready to accept the above argument. We are to keep in mind that the event happened in startling context and narration made by the witnesses in court chiefly on core aspect of the event may remain still alive in their memory. Research on human cognition suggests that a piece of information, once it is stored in long-term memory, stays alive.

146. Undeniably failure of eye witness to recall exact precision of an event including the acts of perpetrators facilitating the commission of the crimes that took place long couple of decades ago usually happens due to fallibility of human memory. But it is to be seen whether the essence of his narration relates to the core

aspect of the event in describing which he stands on dock. Aspects which were central to the event remains ever encoded in human memory as the same formed part of the context of the event.

147. Some of the witnesses examined in the Tribunal are the victims of the crimes alleged. Criminal acts caused to them in abducting, torturing, confining naturally made them severely traumatized which facilitated to retain mainly the core aspect in their memory alive even after long four decades. The accused persons were well acquainted to them and the phase of abduction happened in day time. Thus they had fair occasion to see the accused persons accompanying the group of attackers in materializing the act of their forcible capture.

148. The description the witnesses made in Tribunal may suffer from exaggeration but it however does not readily taint the core aspect of the event experienced that remains retained in their long-term memory. The facts about an event attacking their lives as narrated by P.W.3, P.W.5 and P.W.6 the direct witnesses thus cannot be excluded terming unreliable, we conclude. Memories about such horrific event placed in their long-term memory are easily retrievable.

149. Episodic memories are inextricably bound up with a specific time, place, and emotional state in the individual's life history. Collectively, the amalgam of this information constitutes a memory episode. Thus, episodic memory provides, in other words, an autobiographical framework that permits recollection of personally-experienced activities and the time and context in which they occurred. Keeping all these in mind, we are to evaluate the evidence of direct witnesses the victims examined by the prosecution.

150. P.W.5 Md. Mokhlesur Rahman [83]`a resident of crime village Chandshikari narrated how he along with his brother and relatives were forcibly taken to Binodpur High School on a day of Arabic month *Shaban* in 1971 by the group formed of army Razakars and accused Mahidur and Afsar Hossain Chutu. He is thus a direct witness to the criminal activities leading to the killing which provides corroboration to the evidence of other direct witnesses, on material particular.

151. P.W.5 had reason of being acquainted with the accused persons since prior to the event as he stated that he knew Mahidur as he was cousin brother of his [P.W.5] brother's son-in-law and accused Chutu son of Kutub Jola was a resident of his neighbouring village. Apart from mere denial, defence could not impeach what the P.W.5 stated on material particulars including the reason of his having prior acquaintance about the accused persons.

152. In cross-examination, P.W.5 denied the suggestion put to him by the defence that Mahidur and Chutu did not gun down Fazlu, Ariful and Fitu to death adding by shedding tears that he finished his age and thus he did not tell a single lie. The Tribunal takes note of this demeanour of P.W.5 for assessing his credibility.

153. We do not find any earthly reason to disbelieve P.W.5 who is an elderly resident of the crime village and had opportunity to see the act of abducting his brother and relatives including him. Thus, we get it unerringly proved from his unimpeached testimony that accused Mahidur Rahman and Afsar Hossain Chutu the members of local Razakar force accompanied the group of attackers and they actively participated in taking the abductees at Binodpur High School where the P.W.5 witnessed the accused persons causing death of three detainees by gun shot.

154. The fact of abduction of **Fazlu, Ariful and Fitu** and taking them forcibly to Binodpur High School by the group of attackers

who were accompanied by accused Mahidur and Chutu gets corroboration from the testimony of **P.W.3 Raisuddin**, resident of village Chandshikari who was also an abductee but somehow managed to escape from the grip of the killing squad, from Binodpur High School. P.W.3 also saw the act of gunning down Fazlu, Ariful and Fitu before he managed to escape, PW.3 stated. In narrating it P.W.3 stated that Mahidur gunned down **Fazlu** to death when Chutu caused death of **Ariful** by gun shot. This version stands consistent with that made by P.W.5 another survived detainee.

155. Tribunal notes that discrepancy if found in testimony made by survived detainees as to which accused had killed which detainees seems to be natural for the reason of lapse of long passage of time. The core particular is the presence of armed accused at the killing site and whether they had killed the detained civilians. Some of survived abductees have testified before the Tribunal in respect of their experience, chiefly based on episodic memory. Exactitude of the event of killing, the witnesses may not always be able to recall with detail precision. But their narration stored in their episodic memory has reliably portrayed the event of abduction followed by the event of killing and accused persons' culpable complicity and participation therewith.

156. It reveals from the evidence of P.W.5 that in 1971 he used to cook food for the freedom fighters stationed at Binodpur High School. On 06 October 1971 in the early morning, in conjunction with the attack, he was brought to Binodpur high school, on forcible capture where he and other captured persons were kept detained and were subjected to torture. Naturally, P.W.5 had opportunity to experience what happened to the detainees and who were affiliated with the criminal activities carried out there.

157. According to P.W.5, on the following day, in evening they were taken out to the field of Binodpur High School where he saw

some dead bodies lying there. The Razakars and army men made them stand in a line and Razakar Mahidur and Chutu had killed three detainees including his [P.W.5] brother Fazlu by gun shot. Razakar Chutu struck him with the gun on his face that resulted in injury. Then he managed his release by telling a lie to the accused Mahidur that he [P.W.5] had a son who belonged to Razakar Bahini. This piece of unimpeached evidence provides proof of killing the detained civilians on the preceding day. Defence could not impeach it in any manner, by cross-examining the P.W.5.

158. P.W.6 Fosi Alam [60] a resident of village Chandshikari used to work as a cook at the camp of freedom fighters set up at Binodpur High School. He narrated what happened in the mid of Arabic month Shaban in 1971. It transpires from his evidence that on the day of the event of attack, at about 10-10:30 am when he had been at his home Razakar Mahidur, Moazzem Razakar, Ashraf Hossain Chutu Razakar accompanied by two army men entered their home. It is found that on asking and facilitation the army men took him to Binodpur High School on forcible capture.

159. Evidence of P.W.6 a survived victim also demonstrates that the accused Chutu termed P.W.6 as '*Mukti*' [freedom fighter] before accomplishing the act of his capture. It reflects the accused's antagonistic mindset towards the war of liberation and the pro-liberation civilians. Defence could not dislodge the above pertinent version that leads to the conclusion that the accused persons actively and culpably facilitated the act of abduction of civilians. Seeing the other detainees at Binodpur High School where they were subjected to torture by Razakars and army, as stated by the P.W.6, remained totally unshaken..

160. The above is the unshaken and credible description of how P.W.6 was captured forcibly from his home and what role the accused had played in accomplishing the act of his abduction. The

above also depicts that the attackers simultaneously had captured many other civilians whom the P.W.8 found at the field west to their home.

161. The accused Mahidur Rahman and Afsar Hossain Chutu were thus with the group of attackers formed of army men and local Razakars at all phases of the event—starting from the act of abduction of civilians to the execution of the detained persons at Binodpur High School field. It stands proved from the evidence of witnesses of whom some were the survived victims. Act of accompanying the troops in launching attack and presence at the crime sites with the perpetrators sufficiently indicate the conscious participation of accused persons in accomplishing the principal offence of murder of numerous civilians, by sharing common intent.

162. We have found it proved from the evidence of P.W.8 a freedom fighter staying at the camp set up at Binodpur High School that the group of army and Razakars on 06 October 1971, in the early morning, had first attacked the camp of freedom fighters set up at Binodpur High School when the freedom fighters staying there tried to resist the attackers but eventually failed and retreated. Presumably, the attackers made plan to get the freedom fighters' camp captured first and they did it and afterwards had launched systematic attack directing civilians of the crime villages around the Binodpur High School that resulted in killing of numerous pro-liberation civilians, on forcible capture.

163. Attack directing the freedom fighters camp at Binodpur High School was linked to criminal activities carried out afterwards directing civilians of the villages. Thus the attack was a planned collective criminality. P.W.9 Daud Hossain a near relative of victim stated that on 06 October 1971 39 civilians of their village were apprehended by the group of Razakars. Defence could not refute it. Rather, it has been admitted as P.W.9 in reply to question

put to him stated that on 06 October 1971 the group formed of Pakistani army and Razakars had launched attack directing villages Chandshikari, Eradot Biswasertola, Kabirajtola, Chamatola. Therefore, its stands proved that an attack was launched on the date directing the crime villages that resulted in forcible capture of 39 civilians followed by brutal killing of many of them.

164. Evidence adduced before the Tribunal leaves no doubt that the Pakistani army accompanied by their local collaborators belonging to Razakar force Brought many pro-liberation civilians on forcible capture to Binodpur High School where the accused persons gunned many of them down to death. Perceptibly they did it sharing intent of the Pakistani army the principals.

165. The Razakar Ordinance 1971 goes to show that the members of the Razakar force were under command of Pakistani army and they used to actively collaborate with the army stationed around a particular locality. The villages under attack were predominantly populated by pro-liberation civilians and freedom fighters.

166. We have got it proved particularly from the evidence of P.W.8 Mohsin Ali a freedom fighter that the freedom fighters had temporarily stationed at Binodpur High School and in the early morning of 06 October 1971 they withdrew them from the camp and had retreated towards Jaminpur camp nearer Indian border as the Binodpur camp faced an attack by an organised group of local armed Razakars.

167. Naturally, the Pakistani occupation army was not at all familiar with the communications and locations of villages or the information as to where a particular group of civilians used to reside and who were to be targeted for annihilation. The local Razakars used to accompany the Pakistani army and thereby substantially urged and facilitated to them to perpetrate the attack targeting the pro-liberation non combatant civilians. The history

says that this was the primary pattern of the act of collaboration provided with the army by the Razakar Bahini, in addition to commit systematic criminal activities of its own.

168. Thus, it may irresistibly be inferred that the reason of launching attack against the pro-liberation civilians of the crime villages was intended to abduct, confine and torture leading to brutal killing of non combatant pro-liberation civilians, in furtherance of policy and plan of the Pakistani occupation army and it happened in collaboration with the local Razakar members including the accused persons. The attack was designed, we presume unerringly. It was aimed to narrow down the significant local influence of pro-liberation Bengali civilians and freedom fighters of the crime locality. **Husain Haqqani** made it clear in the narratives made in his book titled '**Pakistan- between Mosque and Military**'. It reads as below:

The army decided to raise a Razakar (volunteer) force of one hundred thousand from the civilian non-Bengalis settled in East Pakistan and the pro-Pakistan Islamist group.....The Razakars were mostly employed in areas where army elements were around to control and utilize themThis force was useful where available, particularly in the areas where the rightist parties were in strength and had sufficient local influence [**Husain Haqqani, Pakistan-between mosque and military, page 79 see also**]

169. Forming temporary freedom fighters' camp at Binodpur School in July 1971 which continued its activities till the attack on 06 October 1971 by the group of army accompanied by local Razakars by itself proves that the localities around the Binodpur School were dominated by the pro-liberation civilians.

170. It has been reaffirmed in cross examination of P.W. 9 that the freedom fighters camp at Jominpur nearer the Indian border was about three kilometer far from Binodpur School. Presumably, the freedom fighters and the pro-liberation people used to carry out their activities by staying around the localities of Binodpur union.

We may thus safely conclude that this was the reason of launching attack on 06 October 1971 when the attackers on apprehending the civilians of crime villages brought them to Binodpur School after disbanding the freedom fighters stationed there.

171. We are to see, according to section 3(1) of the Act of 1973, whether the acts of accused persons, the members of ‘auxiliary force’ did horrible things can be prosecuted as international criminal acts, even though they themselves did not orchestrated the larger plan of horrific violence. We are to appraise whether their terrible criminal acts rose to the level of international crimes, especially crimes against humanity.

172. In the context of crimes against humanity, it is not the plan of an individual perpetrator of a crime that constitutes this element of the crime. Rather, this element concerns a policy of a group, a ‘State or group policy’. The accused persons had done the criminal acts not pursuant to the policy and plan of their own. They were the members of ‘auxiliary force’ which was under command of the armed force and as such they had consciously and actively participated to the attack knowing well about such policy and also on endorsement of the armed force. Thus, their criminal acts were aimed to further the policy and plan of annihilating the pro-liberation Bengali civilians.

173. Taking the acts and conduct of the accused persons unveiled from evidence of the victims we conclude that the accused persons substantially contributed to the ‘group crime’ and their contribution was ‘*intentional*’ and with the ‘*aim of furthering*’ the criminal activity of the group. Being the members of local Razakar Bahini accused Mahidur Rahman and Afsar Hossain Chutu spontaneously, intentionally and knowing the consequence got associated with the group of perpetrators. Their criminal acts were manifestly part of ‘group plan’. They were the ‘minor players’, true. But their acts

were sufficiently and substantially linked to the group plan concerning the attack which in true sense allowed the group plan to be seen as the plan of the individual actor as well. Pattern of the acts of accused persons were well fitted into a group's plan.

174. The attack to which the accused Mahidur Rahman and Afsar Hossain Chutu were part was thus systematic and planned which was against the non combatant civilians of the crime villages. Their intent was to cause substantial harm to the pro-liberation civilians and the people who actively sided with the war of liberation of Bangladesh. We may thus unerringly conclude that the accused persons had shared 'intent' of the group of attackers in launching the 'attack' on the civilian population of which their culpable acts were part.

175. It is now jurisprudentially settled that the offence of murder as a crime against humanity does not require the prosecution to prove that the accused personally committed the killing. Personal commission is only one of the modes of responsibility. It is to be noted that the alleged crimes as enumerated in section 3(2)(a) of the Act of 1973 were committed in furtherance of attack directed against the civilian population. It is not the 'act' but the 'attack' is to be systematic in nature and even a single act of accused person forms part of the 'attack'. It has been propounded in the case of *Deronjic* [ICTY Appeals Chamber, July 20, 2005, para. 109] that—

All other conditions being met, a single or limited number of acts on [the accused's] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.

Thus, we are to see how the accused persons acted or conducted in forming part of 'attack' that resulted in commission of the principal criminal acts directing the non combatant civilians

176. ‘Participation’ includes both direct participation and indirect participation. It has been observed in the case of **Kvocka** that

“It is, in general, not necessary to prove the substantial or significant nature of the contribution of an accused to the joint criminal enterprise to establish his responsibility as a co-perpetrator: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.”[**Kvocka et al., (Appeals Chamber), February 28, 2005, para. 421**]

177. ‘Committing’ connotes an act of ‘participation’, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts, whether individually or jointly with others. It has been observed in the case of **Stakic**, [ICTY Trial Chamber, July 31, 2003, para. 528] that

A crime can be committed individually or jointly with others, that is, there can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.

178. In light of above principle, act and conduct of accused Mahidur Rahman and Afsar Hossain Chutu as demonstrated particularly from the evidence of victims prompt to the conclusion that accused persons had played active and culpable role in locating the pro-liberation civilians that substantially lent support and abetment in committing the forcible capture of numerous unarmed civilians that eventually led to their brutal killing at Binodpur High School.

179. We are persuaded to infer that objective of creating the Razakar Bahini was not to guard lives and properties of civilians. Rather, it had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had committed atrocities in a systematic manner against the unarmed Bengali civilians through

out the territory of Bangladesh in 1971. It forces to conclude that the accused Mahidur Rahman and Afsar Hossain Chutu being the local members of infamous Razakar Bahini did not keep them distanced from being involved with atrocious activities.

180. Undeniably, under the horrific context the specific offences were committed by the Pakistani occupation army and their local collaborators including the members of auxiliary force directing pro-liberation civilians and the crimes were not isolated in nature. It happened randomly, to further policy and plan to wipe out the aspiration of self-determination of Bengali nation. Thus, we safely conclude that the crimes committed during that period of war of liberation in 1971 in the territory of Bangladesh were the consequence of part of a “systematic” attack directed against the unarmed Bengali civilian population. This ‘context’ itself prompts even a person of common prudence that the offences of ‘crimes against humanity’ as mentioned in section 3(2)(a) were inevitably the effect of part of widespread or systematic attack

181. On cumulative evaluation of evidence presented before us, we conclude that it has been proved beyond reasonable doubt that by launching systematic and planned attack, first numerous pro-liberation civilians were apprehended by the group of attackers formed of army and Razakars including the accused persons who substantially facilitated in committing such forcible capture of non combatant civilians. It also stands proved from the evidence presented that accused Mahidur Rahman and Afsar Hossain Chutu were part of the ‘common plan’ as they had accompanied the group formed of army men and local Razakars in accomplishing the act of abduction of pro-liberation civilians and taking them to Binodpur High School where they were kept confined and then gunned down to death which tantamount to their ‘participation’.

182. It depicts too from the evidence that the event of killing happened on two consecutive days, after abducting many civilians from the crime villages on 06 October 1971. It has been proved from the evidence of P.W.3, P.W.5 and P.W.6 the survived victims who had occasion to see many dead bodies lying in the field of the School when on the following day they were taken out of their captivity. It has been further proved beyond reasonable doubt by their direct evidence that on the following day, in addition to physical presence at Binodpur High School the killing site the accused Mahidur Rahman and Afsar Hossain Chutu participated and culpably facilitated to the actual perpetration of killing the detainees, by their notorious act and conduct. It sufficiently proves accused persons involvement with all the phases of the entire event of killing the persons brought forcibly at Binodpur High School on 06 October 1971. The accused persons were thus ‘concerned with the commission’ of the offence of murder alleged. In this way, the accused Mahidur Rahman and Afsar Hossain Chutu participated, abetted and substantially contributed to the accomplishment of **killing 24 civilians** the outcome of systematic attack constituting the offence of ‘**murder**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) read with section 3(1) of the Act and thus the accused persons incurred liability under section 4(1) of the Act for the above offences.

XII. Adjudication of Charge No.2

[Other inhuman act committed in two villages]

183. Charge: On **13.10.1971** at about **12:00/12:30 pm** accused (1) **Md. Mahidur Rahman** and (2) **Md. Afsar Hossain @ Chutu** being accompanied by an armed group of Razakars directed a systematic attack at villages Kabirajtola and Eradot Biswasertola known as the locality of supporters of freedom fighters and then being divided into groups, the accused persons led the armed Razakars first in accomplishing the destructive acts of pillaging and burning down the houses of civilians of village **Kabirajtola**. The

destructive activities continued for 1 ½ -2 hrs and then the accused persons led the gang of perpetrators and being divided into groups moved towards the village **Eradot Biswasertola** where they carried out wanton destructive activities by looting and burning down the houses of civilians that resulted in deportation of the civilians. Therefore, the accused persons have been charged for participating, abetting and substantially contributing to the commission of the offence of ‘**other inhuman acts**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and thus the accused persons incurred liability under section 4(1) of the Act for the offences.

Witnesses Examined

184. This charge involves wanton destructive activities directing civilians’ property constituting the offence of ‘other inhuman act’. The event of attack allegedly happened on 13 October 1971. The group of attackers formed of accused persons and their accomplice Razakars. The perpetrators allegedly attacked two villages – **Kabirajtola and Eradot Biswasertola** under police station Shibganj of the then sub-division Chapai Nababganj and committed pillaging and burning down civilians’ property. Prosecution, in order to prove this charge, adduced three witnesses who have been examined as P.W.7, P.W.8 and P.W.9. Of these three witnesses P.W.7 Md. Khudi is the son of Bilat Mondol whose house was allegedly burnt down and looted. P.W.8 Mohsin Ali and P.W.9 Daud Hossain of village Eradot Biswasertola testified some facts related to the principal events.

Evidence presented

185. P.W.7 Md. Khudu [70] is an inhabitant of village **Kabirajtola**. On the date of occurrence and at the relevant time he had been at his own home, he stated. In narrating the attack launched, P.W.7 stated that at about 12:30 pm Razakars Mahidur, Chutu and Moazzem came to their home, looted their belongings

and set his and his brother's house on fire. Thereafter, they [Razakars] had attacked 40 families of their village and had set their houses on fire. P.W.7 also stated that next, the Razakars committed destruction by looting and arson at village **Eradot Biswasertola**.

186. P.W.8 Mohsin Ali is a valiant freedom fighter. He was a resident of village **Eradot Biswaser Tola** under police station Shibganj, the then sub-division Chapai Nababganj. He narrated some crucial facts relevant to the act of launching attack by the local armed members of Razakar force who carried out destructive activities around their locality on 13 October, 1971. At the same time he described some crucially relevant facts.

187. P.W.8 stated that on 13 October 1971 he along with his co-freedom fighters came to his own locality from Jaminpur near the Indian border and on the way to his home he saw some armed Razakars including Mahidur, Chutu, Moazzem, Gafur, Kubed standing at a place near the house of Bilat Mondol [father of P.W.7]. Afterwards, they saw fumes of fire from the end of Bilat Mondal's house when they were on the way to Jaminpur.

188. P.W.8 further stated that afterwards at about 02:00 at night he came to his village to make a round and entering his village he saw the houses of their villages burnt down. He then started searching his mother and at a stage he found his mother crying inside a bamboo bush behind their house. His mother told that she could recognise Chutu amongst three of Razakars who had burnt down their house. With this he [P.W.8] departed to Jaminpur nearer to Indian border along with his mother and keeping her there with other family members he went to freedom fighters camp.

189. P.W.9 Daud Hossain [61] was a resident of village Eradot Biswasertola [Binodpur Union] under police station Shibganj of the

then Chapai Nababganj sub-division. He stated that on 06 October 1971 in the early morning he had fled to Jominpur a place nearer the Indian border as the Pakistani occupation army accompanied by members of auxiliary force Razakar Bahini attacked the four villages including Chandshikari and Chamatola. During his staying at Jominpur he used to come to his native house to meet his mother occasionally.

190. Defence could not dislodge the above version. Even the same is not found to have been denied even in cross-examination. Rather, the fact of taking refuge at Jominpur pursuant to the attack occurred on 06 October has been re-affirmed in cross-examination.

191. P.W.9 further stated that on 13 October when he was coming to his own village from Jominpur to meet his mother but he had to flee on hearing that a group of Razakars was approaching towards their village. It was about 12:30 pm. On hearing it he moved towards a bamboo bush wherefrom he saw the Razakars moving towards the house of Bilat Mondol [father of P.W.7]. He could recognise Habu Razakar, Razakar commander Moazzem, Mahidur and Chutu accompanying the group of Razakars. Then feeling insecure he started moving towards Jaminpur on his way he saw Bilat Mondal's house on fore.

192. P.W.9 also stated that he could see the fumes of fire from the houses of village Eradot Biswasertola even from Jaminpur when it was 03:00 pm. With this he became anxious for his mother and at about -6:00-07:00 pm he came to their house and found it burnt down. His mother started crying seeing him and aunt Kadbanu told that about a group of 20-25 Razakars had brunt down their houses and she could recognise Chutu and Habu accompanying the group. His another aunt also told that she could recognise Mahidur and Razakar commander Moazzem as his[Moazzem Razakar] house was adjacent to her father's house and Mahidur very often used to visit the house of one Gajlu of their village.

193. In cross-examination, in reply to question elicited to him P.W. 9 stated that camp of freedom fighters existed at Binodpur School since July 1971 to 06 October 1971. Presumably, the camp discontinued as the Pakistani army and Razakars had attacked it in the early morning of 06 October 1971, as stated by P.W.8. Defence could not dislodge what has been stated , on this matter, by P.W.8

Deliberation and Finding with Reasoning

194. The learned prosecutor argued that by direct testimony of P.W.7, P.W.8 and P.W.9 it has been proved beyond reasonable doubt that a group of Razakars was by launching attack had committed destructive activities directing houses and property of pro-liberation civilians of crime villages Kabirajtola and Eradot Biswasertola. Mother of P.W.8 and P.W.9 could recognise the accused persons accompanying the group of perpetrators. Defence failed to dislodge the testimony of these witnesses and they are the natural witnesses. Even by putting suggestion to the witnesses defence has rather admitted that accused Chutu and his accomplices were prosecuted after the independence for the event alleged. However, defence failed to submit any document to substantiate any such previous prosecution for the atrocious attack as narrated in charge no.2.

195. The learned defence counsel, on contrary, submitted that out of three witnesses examined in support of this charge only P.W.7 is a eye witness and two others are hearsay. Narration made by P.W.7 is improbable as in the face of attack that resulted looting and burning down none is supposed to remain stayed at home. Seeing Bilat Mondal's [father of P.W.7] house on fire even from Jaminpur which was three kilometer far from the crime village, as stated by P.W.9 also suffers from improbability. Besides, the evidence adduced by the prosecution does not prove it beyond reasonable

doubt that the accused persons were involved or had complicity with the commission of actual crimes.

196. At the out set it is to be noted that in war time situation, the act of setting civilians' houses on fire, carrying out destructive activities directing them and their property by armed group of perpetrators are not such events which were would have occurred in presence of direct witness. Such organised and systematic attack may be reasonably proved by facts relevant to the principal offence. The three witnesses examined in support of charge no.2 were the residents of the crime villages. They narrated some facts which were substantially related to the commission of the principal event and complicity of the accused persons there with.

197. It now well settled that prosecution is not required to show that the accused himself physically participated to the actual commission of the crime. It is enough to show that the accused substantially encouraged, endorsed and approved the commission of the crimes, by his acts and conduct. It is not necessary to ask whether the accused physically participated to the commission of the crime. The focus of enquiry should be whether in acting or failing to act, the accused provided assistance to or encouraged the principals to commit the alleged criminal act constituting the offence.

198. We are to resolve first the act of launching attack that resulted in burning houses and properties of civilians of the crime villages. Next, it is to be seen whether the accused persons participated to the criminal acts or were part of the attack against the civilians.

199. Defence does not dispute the act of launching attack that resulted in destruction of civilians' property causing grave mental harm to them. It simply denied that the accused persons were not involved with such criminal activities in any manner and the PWs

had no reason of being acquainted with identity of the accused persons.

200. P.W.7 is a direct witness who had natural opportunity to see the attack and criminal acts done by accused persons who in a systematic manner looted the belongings of many families of crime villages and set the houses on fire. Defence could not impeach the commission of destructive activities and complicity of accused Mahidur Rahman and Afsar Uddin and their accomplices therewith as testified by P.W.7. There has been no reason to exclude his testimony.

201. Defence argued that it was improbable to see the criminal acts, remaining present at own house as he[P.W.7] did neither resisted the perpetrators nor he attempted to go into hid, in the face of the attack.

202. We disagree. From a rational point of view, a sudden attack might not have left chance for the P.W.7 to go into hid instantly and thus seeing the attackers looting belongings and burning down their house, remaining present at home, as stated by P.W.7 does not stand as an improbable story, as argued. Next, in a horrific and perplexed situation occurred due to the terrorizing attack P.W.7 a non combatant civilian naturally had nothing to do excepting to act as a mere spectator. Presumably, somehow he [P.W.7] had opportunity of seeing the destructive activities when he had been at some place of their house. Besides, defence did not cross-examine the P.W.7 to shake the credibility of what he stated in examination-in-chief. We think that instead of narrating the fact of his seeing the act of looting and burning down their houses with detail precision P.W.7 simply described the core essence of the event he witnessed and merely for this reason his testimony does not go on air. .

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203. In cross-examination, P.W.7 stated in reply to question elicited to him by the defence that 10-15 Razakars were not accompanied by Pakistani army when they entered their village. Defence however could not dislodge what has been stated by P.W.7 on material particulars.

204. Defence however admitted the commission of the event of destructive attack and accused Chutu's complicity therewith by putting suggestion to P.W.7 that after the independence, a case was lodged against Chutu and others for the criminal acts carried out at villages **Eradot Biswasertola, Kabirajtola and Chandshikari**. P.W.7 admits the lodgment of such prosecution. But this admission is not enough of being exonerated from this charge as the defence could not show, by adducing documentary or oral evidence, that accused Chutu was not only prosecuted but he was acquitted or convicted after full trial.

205. The attack was launched by a group of Razakars accompanied by accused Mahidur Rahman and Afsar Hossain Chutu and they participated to the commission of destructive activities. Evidence on material fact as stated by P.W.8 lends corroboration to it. We have found that P.W.8, on the day of event and just before the destructive activities occurred, saw some armed Razakars including Mahidur, Chutu, Moazzem, Gafur, Kubed standing at a place near the house of Bilat Mondol [father of P.W.7]. Afterwards, they saw fumes of fire from the end of Bilat Mondal's house when they were on the way to Jaminpur.

206. Defence could not however dislodge that P.W.8 had seen the group formed of armed Razakars including accused Mahidur and Chutu amid the event occurred. This version together with what this witness heard from his mother, after the attack, together establishes it indisputably that at the relevant time the group of local members of Razakar Bahini had carried out wanton

destructive activities by launching attack against the civilians of the crime villages.

207. Defence could not impeach the facts materially related to the event of destructive activities, as narrated by P.W.8, a natural witness. Rather, defence has admitted the act of launching attack by Razakar Chutu and his accomplices by putting suggestion that after independence, accused Chutu and his accomplices were prosecuted for the event of attack causing wanton destruction of civilians' property. However, P.W.8 denied this suggestion.

208. At about 12:30 on the day of event happened, P.W.9 also saw the Razakars moving towards the house of Bilat Mondol [father of P.W.7] and he could recognise Habu Razakar, Razakar commander Moazzem, Mahidur and Chutu accompanying the group of Razakars. Direct evidence on this material particular provides corroboration to what has been testified by P.W.7 and P.W.8 in relation to the fact of attack and accused persons active complicity therewith.

209. In cross-examination, in reply to question put to him P.W.9 stated that Jominpur was a place nearer Indian border and there had been a freedom fighters camp; distance between crime villages and Jominpur was about 3 kilometer. Thus, it stands believable that P.W.9 very often used to come to his native village to meet his mother even after he had fled to Jominpur, after the attack occurred on 06 October.

210. Presumably, in fear of worst consequence, on seeing the group of armed Razakars around own locality, P.W.9 went back to Jaminpur and on the same day after the dusk he again came to his native house and witnessed the destructive activities

211. It transpires from the evidence of P.W.9 that a group of 20-25 Razakars had burnt down their houses and his aunt could recognise Chutu and Habu accompanying the group of perpetrators. And his another aunt could recognise Mahidur and Razakar commander Moazzem as his[Moazzem Razakar] house was adjacent to her father's house and Mahidur very often used to visit the house of one Gajlu of their village.

212. In cross-examination, P.W.9 stated that Gajlu's house was located five houses after their own house. Naturally, it made the aunt of P.W.9 of having reason to see the accused Mahidur very often coming to the house of Gajlu. Therefore, hearing the fact of recognizing the accused Mahidur accompanying the group of Razakars from his aunt as stated by P.W.9 inspires credence.

213. P.W.9 and his mother had to depart as the terrorizing activities causing looting and burning down houses. Defence could not dislodge it. It stands admitted too in cross-examination, in other words, that P.W.9 had to depart to Jaminpur quitting his native house in the face of attack launched on 06 October 1971. Even the same is not found to have been denied even in cross-examination. Rather, the fact of taking refuge at Jominpur pursuant to the attack occurred on 06 October has been re-affirmed in cross-examination.

214. Defence does not dispute in any manner that in 1971 the accused Mahidur and Chutu were the members of local Razakar bahini. Rather, it stands proved from the finding made by the High Court Division in its judgment in the case being Criminal Appeal No.538 of 1973 arising out of the judgment of conviction and sentence in a case under the Collaborators Order 1972.

215. Defence suggested the P.W.s that after the independence achieved accused Afsar Hossain Chutu and his accomplices were prosecuted for the criminal event narrated in charge No.2. This defence case rather adds further assurance to accused persons'

involvement with the destructive criminal activities that resulted in violation of civilians' fundamental rights causing harm to their property and normal mental state.

216. The group of perpetrators formed of local Razakars and accused persons accompanied the group towards the crime villages, the charge framed alleges and already we have found it proved by the evidence of reliable and direct witnesses. The accused persons have been arraigned of participating, abetting and substantially contributing to the commission of wanton destructive activities constituting the offence of 'other inhuman acts'.

217. The terrorizing atrocity occurred in two villages—Kabirajtola and Eradot Biswasertola. We reiterate that 'other inhuman acts' is a residual category in the crimes against humanity as specified in the section 3(2) of the Act of 1973. The intentional act of destruction of houses and shops by plundering and burning inevitably was an attack to human dignity, right to live in happiness and it caused grave suffering to the victims of the attack.

218. Intentional terrorizing activities of wanton destruction do not seem compatible with the humanity and it is considered as grave violation of international humanitarian law, as it happened during war time. It was rather against humanity and fundamental rights of normal livelihood of civilians. We consider such devastating destructive acts as quite incompatible with the norm of humanity and international humanitarian law.

219. It transpires from evidence of P.W.8 that after the event of wanton destructive activities, he [P.W.8] along with his mother deported to Jaminpur village nearer to Indian border. Presumably, the terror extended through destructive activities forced their displacement. P.W.9 also stated in cross –examination that they being forcibly displaced used to stay at Jaminpur village. This village was nearer the Indian border. It stands proved. P.W.8 and

his mother and other inmates were forced to stay elsewhere leaving own home or village and belongings under a situation of fright and horrific terror which constituted the act of forcible displacement causing serious mental harm.

220. It is to be noted that ‘deportation’ is among the acts which may cause serious bodily or mental injury.’ The Eichmann Judgement rendered by the Jerusalem District Court on 12 December 1961 had included ‘deportation’ among the acts that could constitute serious bodily or mental harm. The criminal acts causing immense mental anguish to the inhabitants of the crime villages, by carrying wanton destructive activities, made them eventually obliged to deport abandoning their property and their belongings obviously constituted serious mental harm, and it included the offence of ‘other inhuman act’.

221. Destruction of civilians’ property by launching attack, in furtherance of policy and plan, indubitably had detrimental effect on individuals’ fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims. The civilians were non combatants. The object was to terrorize the innocent civilians, which eventually constituted the offence of ‘other inhuman act’ as it substantially affected their fundamental right to property and safety, in violation of international humanitarian law.

222. Causing harm by plundering and burning down the properties of civilians indeed involved serious despondency to the victims of the attack. Physical injury or harm might not have caused to any individual by such extensive destruction. But weight is to be given to the malicious intent behind such destructive activities. Destruction of numerous houses and belongings of innocent civilians by launching such organised attack was indeed express great contempt for the people and their normal livelihood.

223. The crime villages were dominated by freedom fighters and pro-liberation Bengali civilians and the sites were nearer to Indian border. The accused persons and their accomplices even despite absence of any direction from the locally stationed army had launched destructive attack to further the plan of their own, directing the civilian population. It cannot be supposed that all criminal activities the members of Razakar force had carried out on army's command alone intending to terrorize the civilians staying at villages. They [Razakars] made them engaged in all kinds of criminal activities even on the plan of their own. Major General Rao Farman Ali termed the Razakars at village levels as 'destabilizing elements' and members of 'indiscipline force'. Quoting Rao Farman Ali, **B.Z Khasru** in his book titled '**Myths Facts Bangladesh Liberation War**' narrates that-

Farman Ali [Major General Rao Farman Ali] said the army would leave fighting the guerrillas to the newly armed Bengali "Rasikars"[Razakars], numbering 60,000. The Rasikars, raised at village levels for guard duty with only ten days' training, did not constitute a disciplined force. However, they were a destabilizing element—living off the land, able to make life-and-death decisions by denouncing collaborators and openly pillaging and terrorizing villagers without restraint from the army. [**Myths Facts Bangladesh Liberation War ; B.Z Khasru**; 2010, page295]

224. On totality of evidence as discussed above we conclude that it has been proved beyond reasonable doubt that on 13 October 1971 during day time a group of armed Razakars accompanied by accused Mahidur Rahman and Afsar Hossain Chutu had launched the attack directing two villages and destructed, looted and burned down houses and belongings of numerous civilians. The destructive act was wanton, as it transpires from evidence.

225. Terrorizing situation occurred due to the pattern of attack it was not practicable to see which accused had burned down whose house. It is immaterial to prove that the accused persons directly participated to the criminal act of looting and arson. Their

presence with the group of attackers by itself is sufficient to conclude that on their tacit endorsement, abetment and substantial contribution to the accomplishment of the entire destructive activity and thus they are equally responsible with the perpetrators who actually committed the act of looting and arson of civilians' property. All the persons belonging to Razakar Bahini forming the group were thus equally involved with the indiscriminate destructive activities including looting and plundering the properties of civilians. The members of the group of perpetrators, therefore, were united in their common intention.

226. The accused Mahidur Rahman and Afsar Hossain Chutu, potential members of local Razakar Bahini by accompanying the armed group of Razakars and providing culpable assistance to the principals were thus part to the systematic attack that resulted in 'other inhuman act' as crime against humanity. Accused Mahidur Rahman and Afsar Hossain Chutu are thus found guilty for participating, abetting and substantially contributing to the commission of the offence of '**other inhuman acts**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and thus they incurred liability under section 4(1) of the Act for the offences.

XIII. Adjudication of Charge No. 3

['Abduction', confinement', 'torture' and 'murder' of Kalumuddin Mondol and three others]

227. Charge: On **02.11.1971** in between 02:00 pm[noon] and any time at night of **03 .11.1971** accused **(1) Md. Mahidur Rahman and (2) Md. Afsar Hossain @ Chutu** being accompanied by an armed group formed of 30-35 members of Razakar force attacked the houses of Kalumuddin Mondol, Md. Abdur Rashid , Gajal and Ilias Mondol of village Sherpur Vandar under police station Shibganj, the then sub-division Chapai Nababganj and on apprehending them started to cause torture, destructed their houses

by looting valuables and burning the same down . Then the accused persons and their accomplices brought the apprehended civilians forcibly to Razakar camp set up at Adina Fazlul Haque College where they were subjected to inhuman torture and then they were taken the army camp at Shibganj CO office. On the following day i.e. on 03.11.1971 the detained civilians were subjected to barbaric torture whole day and at night they were brought to a place adjacent to the mango garden of Jagircot para where they were shot to death. After the independence, their decomposed bodies could be identified seeing their wearing apparels and were in a mass grave behind the CO office.

Therefore, the accused persons have been charged for participating abetting, contributing and substantially facilitating the commission of the offence of '**abduction**', '**confinement**', 'torture' and '**murder**' and also the offence of 'other inhuman acts' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1972 which are punishable under section 20(2) read with section 3(1) of the Act and thus you the accused persons incurred liability under section 4(1) of the Act for the above offences

Deliberation and Finding with Reasoning

228. Prosecution abstained from adducing any evidence in support of the **charge no.3** mainly on revelation of the fact, during trial, that the accused persons were previously prosecuted, tried, convicted and sentenced under the Collaborators Order 1972 for the offence of abduction with intent to murder punishable under section 364 of the Penal Code and the accused persons were so previously convicted for the same criminal acts as narrated **in charge no.3.**

229. On careful appraisal of the charge no.3 framed by the Tribunal and the certified copy of the judgement of the High Court Division in Criminal Appeal NO.538 of 1973 arising out of the judgement

passed under the Collaborators Order 1972 by the Special Tribunal No. 11 Rajshahi in Special Tribunal case No. 27 of 1973 it transpires that the accused persons were so prosecuted tried and convicted for the offence based on the facts and criminal acts narrated in charge no.3. They were sentenced to suffer imprisonment for life which, it appears, remained affirmed by the High Court Division. Prosecution however, finally conceded with the fact of such previous prosecution, trial and conviction for the same offence though under a different legislation.

230. In view of above, we must stamp our view with gross disappointment that the above facts barring subsequent prosecution of the accused persons for the criminal acts narrated in charge no.3 could have been unearthed during investigation. Failure on part of the IO to discover this crucial issue appears to be a hefty kick to the task of investigation.

231. Astonishingly, the defence too did not raise this issue at the stage of charge framing hearing. Even the accused persons did not make disclosure about it when the three charges framed were read over and explained to them in Bangla. Earlier disclosure of this matter along with relevant document substantiating it would not have made space of framing **charge no.3** concerning the criminal acts of the accused persons for which they have already been prosecuted, tried and convicted though under a different legislation.

232. The copy of judgment in Criminal Appeal NO.538 of 1973 demonstrates that the accused Mahidur Rahman and Afsar Hossain Chutu were prosecuted, tried and convicted under the Collaborators Order 1972, for the criminal acts constituting the offence of murder of Kalimuddin, Rashid and two others. They were indicted for committing the offence punishable under section 364 of the Penal Code. That is to say they had acted in committing abduction of victims that resulted in their death. They belonged to Razakar force

at the relevant time and had collaborated with the army in accomplishing the murder of captured victims.

233. Both the accused persons were convicted and sentenced to suffer imprisonment for life for the above offence. Their appeals were dismissed by the High Court Division and thus they had to suffer the sentence awarded to them. Prosecution does not dispute the fact of their being prosecuted tried and punished for abduction and causing death of victims Kalimuddin, Rashid and two others under the Collaborators Order 1972.

234. From the copy of the judgement in appeal it appears that the event of abduction of victims happened on 27 October 1971 while the **charge no.3** framed in the case in hand narrates 02 and 03 November 1071 as the date of the event. But however, the charge framed by the Tribunal depicts that it is founded on the same criminal acts for which the accused persons have already been prosecuted, tried and punished, though under a different law. Can now they be prosecuted and tried again for the same criminal acts under the Act of 1973?

235. The Tribunal notes that accused persons' previous conviction under the Collaborators Order 1972 precludes the Tribunal from reassessing the same issue founded on the very same facts as in earlier proceedings which formed the basis of a conviction, even under a different law.

236. Previously determined issue cannot be dealt with in a second trial as the same has been adjudicated by a court of law, the Tribunal formed under the said Order of 1972 which awarded sentence upon the accused persons. The offence[as narrated in charge no.3] under adjudication under the Act of 1973 is founded on the same criminal acts which constituted the offence punishable under section 364/149 of the Penal Code for which they were prosecuted, tried, convicted and punished under the Order 1972.

237. Prosecution, understandably for this reason refrained from adducing and examining any witness to prove the allegation based on same criminal acts constituting the offence of murder as crimes against humanity as narrated in charge no.3. The accused persons could not have been indicted for the offence narrated in charge no.3 if the defence would raise this matter at an early stage together with necessary documents. Additionally, we deprecate the grave carelessness of the Investigation officer who failed to identify this crucial matter in his investigation.

238. Admittedly Kalumuddin and three others were the victims of the event of killing for which the accused persons have been charged [**charge no.3**] in the case in hand. It transpires from the certified copy of the judgment of the High Court Division in Criminal Appeal No.538 of 1973 [arising out of the judgment of the Special Tribunal, Rajshahi in a case arising out of Shibganj Police Station Case no. 24 of 72] that the accused persons and four others were previously prosecuted, tried and three of them including the present two accused were sentenced to imprisonment for life under section 364 of the Penal Code for the offence based on criminal acts as narrated in the charge no.3 in the case in hand under the Act of 1973. Laysuddin son of victim Kalumuddin was the complainant of the previous prosecution initiated under the Collaborators Order 1972. It is not disputed

239. In cross-examination, the IO [P.W.10] admits that, in course of investigation, he examined three relatives of victims Kalumuddin and three others including said Laysuddin, Rokeya Begum and Bogi Begum when Laysuddin disclosed that accused persons faced a previous prosecution for the event of killing his father and three others [as narrated in charge no.3] but he [Laysuddin] however could not say anything about the fate of that case. The Tribunal notes that the statement of said Laysuddin reduced in writing by the IO does not demonstrate any revelation at

all about initiation of previous prosecution in 1972 against the accused persons for the event of said killing.

240. First, why the IO did not care to get the information about previous prosecution over the same event reduced in writing in the statement made by Layaesuddin? Being a long experienced officer working in the Police department the IO was supposed to know that no person can be prosecuted twice for the offence based on same criminal acts. Absence of any satisfactory clarification as to non recording of such vital information renders IO's gross slackness and inefficiency. It was his duty to ascertain the truthfulness of the information provided by Layaesuddin as to previous prosecution over the same event of killing, by collecting necessary documents and authenticated information from authoritative sources. Carelessness the IO has shown is indefensible on all scores. We are not ready to accept the clarification the IO has given in his cross-examination that he tried but failed to collect any such relevant and necessary document.

241. Second, despite knowing this pertinent information why the IO opted to submit report arraigning the accused again without holding any further effective investigation on the issue of previous prosecution on the event of killing four persons including the father of Layaesuddin. The investigation done by the IO does not reflect his due care and competence. Rather, he has made a futile and bewildering effort by placing a report accusing the accused persons for the criminal acts for which they have already been prosecuted, tried and punished, though under a different legislation. We seriously deprecate the manner the IO has done the task of investigation as he has submitted a gravely misleading investigation report so far as it relates to the event narrated in charge no.3.

242. When the IO, during investigation, had information from Layaesuddin about the alleged previous prosecution for the event

narrated in charge no.3 he should have opted to explore necessary information by keeping it in mind that no one can be prosecuted tried and punished twice for the same offence. This is the fundamental notion of the doctrine of double jeopardy. **Friedland, Martin** in his book '*Double Jeopardy*' narrates-

The origins of the double jeopardy rule are in both Roman and Greek law but gained more widespread use under 12th century English law. At that time there were two different court systems - ecclesiastical and the king's court, and there was concern about whether someone convicted in the church run court could subsequently be tried in the king's court. By the middle of the following century the principle of double jeopardy had emerged to mean that a defendant could only be prosecuted once, no matter what the verdict [**Friedland, Martin "Double Jeopardy" Clarendon Press, Oxford, 1969, p.5**].

Thus, subsequent prosecution for the self same criminal acts already adjudicated in an earlier proceeding finding the accused persons guilty is not permissible. In such situation, the accused person gets protection of the doctrine of double jeopardy.

243. The Tribunal notes that if the defence could not be able to submit the certified copy of the judgment of the High Court Division affirming the conviction and sentence awarded to the accused persons, the prosecution would have taken step adducing and examining witnesses, in support of the charge no.3 in the case in hand and in that case reassessing the guilt of accused persons once again, for the offence based on same criminal acts could have caused serious peril to them which is barred by the doctrine of double jeopardy as reflected in the Article 35(2) of our Constitution.

244. Decision finding the accused persons guilty for the killing of 04 civilians was pronounced by a Judicial Tribunal formed under the Collaborators Order 1972 having jurisdiction over the cause

and it disposed of all the matters once and for all which cannot be afterwards re-litigated except on Appeal. Admittedly the accused Mahidur preferred appeal against the judgment of the trial court convicting and sentencing him to suffer imprisonment for life before the High Court Division. And admittedly the Appellate court by its judgment dated 01.12.1975 affirmed the decision on conviction and sentence awarded by the trial court.

245. The accused persons were prosecuted for and convicted of the offence scheduled in the Collaborators Order 1972 but based on the same event as described in the charge no.3 under the Act of 1973. Therefore, the accused Mahidur Rahman and Afsar Hossain Chutu thus have a right to be protected from multiplication of prosecutions for the same criminal acts which allegedly facilitated the commission of the offence of murder of civilians as narrated in charge no.3. Additionally, **section 26 of the General Clauses Act, 1897** reads:

Provision as to offences punishable under two or more enactments. – Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

246. An examination of the entire scheme of the Order of 1972 leaves no manner of doubt that the tribunals formed under the said Order dealt with the offences scheduled therein which were committed in 1971 during the war of liberation against the non combatant civilians. .

247. In view of above, we are of the view that the accused persons who have now been prosecuted under the Act of 1973 for the event of killing 04 civilians as narrated in charge no.3 is entitled to the protection of the doctrine of double jeopardy as reflected in Article 35(2) of our Constitution. Accordingly we refrain from re-assessing

the issues involved in the event narrated in charge no.3 and in this way and with the above finding this charge is dropped accordingly.

248. Before we depart, we feel it expedient to observe that in fact the Investigation Agency formed under section 8(1) of the Act of 1973 is responsible to investigate and to make diligent scrutiny on the investigation done by an investigation officer into the crimes enumerated in section 3 of the Act. It thus cannot evade the gross negligent and disappointing performance on part of an officer of the agency in carrying out the task of investigation in relation to any case. From now on, the Investigation Agency is expected to assign such an officer of the Agency who is competent, efficient and well acquainted to fundamental issues involved in unearthing the truthfulness of the event and complicity of suspected person therewith, for holding investigation into crimes as enumerated in section of the Act of 1973.

XIV. Investigation Procedure

249. Mr. Abdus Sobhan Tarafdar the learned defence counsel, seriously questioning the fairness of the investigation, submitted that admittedly the IO [P.W.10] , during investigation, examined and recorded statement of 35 witnesses but he placed statement of 21 witnesses only. The IO did not clarify the reason of not placing their statement along with the report. It creates doubt as to fairness of investigation.

250. The learned defence counsel further argued that the IO admits that witness Laysuddin made disclosure about earlier prosecution in respect of the event of killing 04 civilians[as narrated in charge no.3]. Laysuddin [the informant of the case against the accused persons under the Collaborators Order 1972] has been cited as witness in the case in hand. But he did not state anything to the IO about the previous prosecution against the accused persons. Instead of taking care in carrying due investigation on it the IO submitted

report arraigning the accused persons for the offence for which they were previously prosecuted, tried and convicted under the Collaborators Order 1972 showing wrong date of commission of the offence. Such carelessness on part of the IO and the flaw revealed in investigation on the event narrated in charge no.3 naturally questions the fairness of investigation even on the event narrated in charge nos. 1 and 2.

251. The learned defence counsel drawing attention to the testimony of witnesses argued that prosecution failed to prove the event of killing and destructive activities by looting and pillaging as their testimony suffers from inconsistencies on material particulars. The evidence adduced by the prosecution does not prove it beyond reasonable doubt that the accused persons were involved or had complicity with the commission of actual crimes. However, submission advanced by the defence may be well addressed at the time of adjudication of charges.

252. It appears that the learned defence counsel depending on admission of the IO and the Judgement of the High Court Division affirming the conviction and sentence against the accused person in a previous prosecution under the Collaborators Order 1972 attempted to argue that the entire investigation procedure was flawed and creates doubt as to truthfulness of the events for which accused have been arraigned [charge nos. 1 and 2]. Besides, the IO did not cite all the witnesses he examined.

253. Yes, already we have recorded our reasoned finding that investigation over the event narrated in charge no.3 was absolutely flawed and the IO failed to act with due diligence. But this cannot be the yardstick of assessing the fairness of totality of investigation particularly that has been done in respect of the event described in charge nos. 1 and 2.

254. Mere non-citing some witnesses despite being examined during investigation does not render the entire investigation flawed. We agree with the concluding submission by Ms. Tureen Afroz the learned prosecutor that Investigation Officer does not act like a post office that he is supposed to place all the materials he collects. Only the relevant documents or materials he places together with the investigation report. Additionally, defence did not put any suggestion to the IO that non-citing some of witnesses examined was intended to hide the falsity even of the alleged crimes as narrated in charge nos. 1 and 2.

XIV. Conviction

255. For the reasons recorded in our Judgement and having considered all evidence and arguments advanced by both sides, we find the accused Md. Mahidur Rahman and Md. Afsar Hossain Chutu---

[Charge No.1]: GUILTY of the offence of participating, abetting and substantially contributing the commission of ‘**murder**’ as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and they be **convicted** and sentenced under section 20(2) of the said Act.

[Charge No.2]: GUILTY of the offence of participating, abetting and substantially contributing the commission of ‘**other inhuman act**’ as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and they be **convicted** and sentenced under section 20(2) of the said Act

256. In respect of **Charge No.3**, prosecution abstained from examining any witness to substantiate this charge. Besides, we, in view of finding recorded herein above, refrain from re-assessing the issues involved in the event narrated in charge no.3. Since prosecuting the accused persons for the offence narrated in charge no.3 being barred by the doctrine of double jeopardy as discussed above, this charge thus stands dropped accordingly.

XV. Sentence

257. The learned prosecutor, during the closing submission, urged highest punishment taking the gravity of offences and mode of participation of the accused persons who are found to have had complicity and participation to the commission of offences proved.

258. Conversely, the learned defence counsel submitted that since the accused persons were previously prosecuted, tried, convicted and sentenced although for the distinct criminal acts deserve acquittal as they could have been prosecuted and tried even for the offences narrated in charge nos. 1 and 2 of which now they have been arraigned and acquittal of accused persons shall set an example.

259. At the out set, we prefer to stamp our view, disagreeing the defence submission, that a court of law is not supposed to set an 'example' by acquitting the accused persons, on the ground, not warranted by law, agitated by the learned defence counsel. The Tribunal a court of law is to act in accordance with law and on the basis of evidence and materials presented before us. Already the accused persons have been found guilty beyond reasonable doubt, on diligent appraisal of evidence and circumstances led by the prosecution

260. In 1971 the entire territory of Bangladesh was under atrocious attack of the Pakistani army who had carried out crimes against the non combatant civilians having collaboration and assistance of Razakars and other para militia forces. The Razakar force was an auxiliary force formed aiming to assist the army and it was under control of the army for static purpose.

261. The accused persons belonged to Razakar force and they used to collaborate with the army locally, in committing crimes. The criminal events that resulted in murder of numerous civilians and

causing mental and physical harm to the civilians were the fragmented portrait of the total horrific attack against the Bengali non combatant pro-liberation civilians in the territory of Bangladesh in 1971. From this point of view the accused persons were the small fishes and they had no significant profile. Perceptibly they as individuals got them enrolled in Razakar force intending to side with the Pakistani army, to further policy and plan. But it does not diminish their responsibility as it has been proved that they actively aided, abetted, participated and contributed to the commission of the alleged killing of civilians.

262. The accused persons are found to have had participation to the commission of the criminal acts as accomplices of the principal perpetrators the Pakistani occupation army and they did so in context of war of liberation. They consciously made them part of common plan of collective criminality that eventually resulted in killing of numerous pro-liberation civilians as already found.

263. The accused persons were local level offenders belonging to Razakar Bahini, an auxiliary force. Admittedly this auxiliary force had acted under the command of Pakistani armed force. It reveals that they accompanied the group of army and commander and members of local Razakar bahini in abducting the civilians that eventually resulted in killing many of detainees [**as narrated in charge no.1**]. It stands proved that they were the part of the attack which was systematic. The evidence presented goes to show that they even had played vital role in accomplishing the act of forcible capture of the civilians from their houses. Presumably they had acted in such culpable manner to get the pro-liberation civilians identified and finally killed them by gun firing at the field of Binodpur High School, under the command of army.

264. Actual commission of killing was perpetrated by the members of Razakars including the accused persons and their commander

Moazzem by gun firing, we have found. None of witnesses claims that the army men had killed the detainees by gun firing. Cumulative evaluation of evidence prompts us to conclude that the accused persons' enthusiastic and culpable acts facilitated the accomplishment of killing the detained civilians.

265. The accused persons could have acted shielding the inhabitants of their locality even remaining under the command of armed force. There has been nothing to show that the accused persons were forced to join the Razakar Bahini. Presumably, intending to siding with the Pakistani occupation army to further their policy and plan they got them affiliated with this auxiliary force with culpable mindset. Thus, and since the role they had played as the members of infamous Razakar Bahini in accomplishing the actual crime [**narrated in charge no.1**] we conclude that they made them deliberately associated with the horrific attack knowing the consequence of their acts of extreme notoriety.

266. Perpetration of horrendous criminal activities including killing and other inhuman acts at rural level would not have been easier without the active assistance and support on part of the members of local infamous Razakar Bahini. Activities of Razakar Bahini added untold ferocity to the attack launched by the Pakistani occupation army against the civilians, during the war of liberation in 1971. Letters of law does not consider the level of the offender, in awarding sentence. It considers the level and gravity of the offence for which the offender is found guilty. The offence proved was of a gravest nature that shakes human conscience, the humanity and civilization. Indeed they deserve highest sentence i.e capital punishment.

267. P.W.1 Ahsan Habib, in cross-examination, stated that he did not see the accused persons till 1987-88 and he heard that till that time the accused persons had been in jail as they were members of

Razakar force. P.W.3 Raisuddin also stated in reply to question put to him by the defence that he, after the independence, first saw the accused persons in 1988. This consistent version of the above P.W.s revealed in their cross-examination lends assurance that the accused persons suffered the sentence awarded in the said case under the Collaborators Order 1972.

268. However, we consider it just to take the admitted fact into account that the accused persons were convicted and sentenced to imprisonment for life under the Collaborators Order 1972 as the offence was based on the same facts and criminal acts narrated in charge no.3 prosecution of which again under the Act of 1973 is found barred under the doctrine of double jeopardy. Admittedly, they suffered the sentence so awarded.

269. Admittedly, previous prosecution, conviction and sentence awarded to the accused persons involved killing of 04 civilians in 1971. In the case in hand, the accused persons have been found guilty for similar[not same] offence based on their distinct vicious criminal acts involving brutal killing of numerous civilians happened in 1971 at Binodpur High School. Now, justice be met if the previous sentence of imprisonment for life suffered by the accused persons under the Collaborators Order 1972 is taken into consideration, in awarding sentence for the offence as narrated in **charge no.1.**

270. In respect of the event narrated in **charge no.2** it has been proved that the group of attackers formed of local Razakars including the accused persons. No army was associated with this attack. Accused persons have been found guilty for carrying out wanton destructive activities including looting and arson by launching attack to the houses of non combatant civilians. The criminal acts indisputably resulted in grave mental harm and violation of fundamental right of civilians. The attack was thus

designed by the local Razakars to which the accused persons were active part. This event indubitably proves that accused persons were notorious Razakars of their locality in 1971 and they deliberately considered the pro-liberation civilians with extreme hostility and antagonistic mindset provoked them in carrying out such barbaric destructive activities.

271. In view of discussion made herein above and considering the nature and proportion to the gravity of offences and also keeping the factors as discussed above into account we are of the view that justice would be met if the accused Md. Mahidur Rahman and Md. Afsar Hossain Chutu who have been found guilty beyond reasonable doubt for the crimes proved [**charge nos. 1 and 2**] is **condemned and sentenced** as below, under the provision of section 20(2) of the Act of 1973:

SENTENCE

That the **accused (1) Md. Mahidur Rahman [84]** son of late Subedar Ali Biswas of village Dadanchak [Kaitanitola] no.9 UP Durlavpur police station Shibganj district Chapai Nababganj and **(2) Md. Afsar Hossain @ Chutu[65]** son of late Kutub Uddin Morol and late Ferjan Begum of village Satrashia(Rasunchak), no.8 UP Binodpur, police station Shibganj, district Chapai Nababganj are found **guilty** of the offences of **‘murder’[charge no.1]** as **‘crimes against humanity’** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 Accordingly, they be convicted and condemned to the **‘sentences of imprisonment for life till death’** under section 20(2) of the Act of 1973:

Accused **(1) Md. Mahidur Rahman and (2) Afsar Hossain Chutu** are also found **guilty** of the offences of **‘other inhuman act’ [charge no.2]** as **‘crimes against humanity’** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 Accordingly, they be convicted and condemned to the **‘sentence of imprisonment for 5[five] years** under section 20(2) of the Act of 1973.

The sentence of imprisonment as awarded above **in respect of charge nos. 1 and 2** shall run **concurrently**. This sentence shall be carried out under section 20(3) of the Act of 1973.

The sentence awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012(ROP) of the Tribunal-2[ICT-2] and the convict persons be sent to the prison with a conviction warrant accordingly.

Charge no.3 being barred by the doctrine of double jeopardy as discussed above, stands dropped accordingly.

Let copy of the judgment be sent also to the District Magistrate, Dhaka for information and causing necessary action.

Let certified copy of the judgment also be furnished to the prosecution and the convicted accused persons at once.

Justice Md. Mozibur Rahman Miah, Member

272. This is the tenth judgement being delivered by this Tribunal today. In the previous judgments' so delivered by this Tribunal Defence had tried their best to portray the accused stood for trial was not aligned with any auxiliary or anti-liberation forces most of whom found to have faught tooth and nail against the birth of this nation. Those notorious forces, Razakar, Al-Badr, Al-Shams, Peace committee and Islami Cetra Shangha become the house hold name to all over the country as well as most of the parts of the world for earning infamy for blatantly collaborating the Pakistani invading forces during our war of liberation steered specially under the direct patronage of Jammata-E-Islami, a religious based communal political party that was then hell bent to keep an un-divided Pakistan.

273. Those notorious forces launched crack down on the innocent Bangalee civilians fiercely and had collectively and systematically unleashed cold-blooded savagery across the country that left three

million civilians killed and a quarter million women got ravished, ten million people deported to India and innumerable civilians had been displaced from their hearth and home. For obvious reason there appears no need to offer personal account of the accused stand trial before us because of the role he had played during our liberation war as admittedly both are the members of Rajakar force.

274. Also at the onset, learned Defence Counsel while placing his summing-up submission candidly admitted that, both the accused were member of Razakar forces. People know what perfidious role Razakar had played during our war of liberation. Nevertheless, documents produced by the Defence (Additional Defence Documents, that encompasses Judgement passed in Criminal Appeal no.538 of 1973 by the High Court Division) manifestly shows that, these two accused were awarded transportation for life (presently sentence for life) finding them committing crimes as collaborators under article 11(a) of Bangladesh Collaborators (special Tribunal, Order, 1972, (PO 8 of 1972) read with section 364/149 of the Penal Code) which they served with.

275. But here, the accused are facing trial for not accompanying any anti-liberation forces during our war of liberation. Reasonably, The International Crimes (Tribunals) Act, 1973 does not permit any individual to be adjudicated for merely being associated with any auxiliary force as expounded in section 2(a) of the said Act let alone any other anti-liberation forces stated above. Rather, an individual or group of individuals will be liable to be prosecuted and punished only if he is found guilty for committing Crimes as set out in section 3(2) of the said Act.

276. For such obvious legal compulsion, we don't have any scope to prosecute any individual or group of individuals for being his mere collaboration with any auxiliary force or other anti-liberation forces who had directly participated against our war of liberation. In view of what have discussed above the accused, now being prosecuted were unquestionably the member of Razakars, an

‘auxiliary force’ created through a legislation under East Pakistan Razakars Ordinance, 1971 that came in to force on August, 2, 1971, even though they started their heinous operation across the country from the early part of May, 1971.

277. History dictates, those who had joined such auxiliary forces or any anti liberation forces, apart from killing millions of innocent civilians, ravishing women, plundering and perpetuating arson attack had also brought irreparable damages to this nation in the nine months long war that caused enormous devastation on our socio-economic perspective and routing out the brightest son of this soil belonging to different discipline with an aim to keep the nation meritless by actively collaborating the Pakistani Invading forces and in maximum cases had directly participated in those savagery, else nation would not have lost such a huge pro-liberation civilians and faced such a colossal damage in nine month long war.

278. Most significantly, at the summing up hearing, Defence did not raise any legal submission on the maintainability of the instant proceedings as had often been done in the cases disposed of earlier before this Tribunal being advanced on the part of Defence calling for no necessity to reopen such point here. Besides, our Hon’ble Appellate Division by pronouncing its land mark judgement in Abdul Quader Molla’s Case dated.17-09-2013 in Criminal Appeal no.24-25 of 2013 as well as judgement dated.12-12-2013 in Criminal Review Petition nos.17-18 of 2013 has settled a range of substantive and procedural issues enumerated in various sections in the Act of 1973 so evolved before us during the trial proceeding.

279. I firmly believe, The International Crimes Tribunal Act (Act no.XIX of 1973) is absolutely a self-contained enactment passed by our sovereign Parliament far back in 1973 and the *ratio decidendi* that already settled by our Hon’ble Appellate Division on various legal issues in the aforesaid appeal and review and most recently in Muhammad Kamaruzzaman case(Judgement passed on Criminal

Appeal no.62 of 2013 dated.03/11/2014 and that of Criminal Review no.08/2015 dated. 05/4/2014 make the said Act of 1973 more resourceful and transparent particularly question of applicability of diverse provision of Evidence Act in prosecuting the offenders under this Act for perpetrating crimes against humanity.

280. In such a legal parlance, I am not inclined to harp on the observation and decision passed by the trial chamber or appeal chamber of different UN funded foreign Tribunals(ICTY, ICTR, SCSL, ECCC etcetera) where offenders of Crimes against humanity, genocide or war crimes have been prosecuted, as the provisions so laid down in different sections of our Act is adequate enough to address any contentious point and the latest judgments of our Hon'ble Appellate Division pointed out above has already dispelled the controversy that may have cropped up in future between the parties on any legal issues. Certainly, we can be enlightened and immensely benefited in following the jurisprudence those foreign Tribunal has resolved, especially in respect of the term 'Crimes' (as enumerated in section 3(2) of Act of 1973) which are international in nature and mode of liability for such Crimes(as enumerated in section 4(1) and 4(2) of Act of 1973) to be incurred by the accused. But with the passage of time when a series of judgments have already been passed by both the Tribunals followed by our Hon'ble Appellate Division, it may not be so inevitable to draw the reference lay down by the foreign tribunals in each and every issue.

281. Now I would like to focus on the adjudication of crime alleged to have committed by the accused as arraigned against the accused by the prosecution which is the core intent before me and in doing so I have had the privilege to go through the Judgement to be delivered by my learned brothers, Obaidul Hassan, J and Md. Shahinur Islam, j. I fully endorse with the view my learned brothers have taken with regards to the adjudication in charge no.1. I do also agree with the findings of conviction and sentence they propose in

respect of that charge but still, I put in my independent views and offer observation on adjudicating the charge concurring with my learned brothers. But, I regret, I could not be at one to the observation and findings my learned brothers propose as regards to charge no.2. I am also not in term with the very wording “-Dropped” my learned brothers have used while adjudicating charge no.3. Hence, I put across my own views and reasoning which I find myself pertinent in adjudicating charge no.2 and charge no.3.

282. Keeping in view of such legal proposition, I hereby pronounce my following part where I adjudicate the charges and address other ancillary points so raised during the course of trial proceedings:

283. Adjudication of charge no.1: (Abduction, torture on several civilians and Killing of 24 un-armed Civilians)

Brief account of Charge : In this particular charge accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu have been arraigned for committing murder to as many as 24 unarmed civilians in two different phases.

284. First, it is alleged, around 5:00am on 06-10-1971, the accused in collaboration with Pakistani Army and local Razakars besieged four villages namely, Chandshikari, Chamatol, Kabirajtola and Erdatbiswasertola to haunt down inhabitants siding with war of liberation and captured 17 civilians who were then forced to move towards *Binadpur* High School when at 9:30 am accused Md. Mahidur Rahman and Afsar Hossain Chutu gunned 12 of those captives down with their rifles though detainees Afsar Ali, Md. Zillur Rahman, Md. Mokhlesur Rahman(Mokhu) and Md. Raisuddin escaped bullet hit.

285. Second, on accomplishing killing of 12 unarmed Civilians as stated above, the same group of perpetrators took refuge a host of unarmed civilians of the same localities and kept them confined inside *Binadpur* High School where they were subjected to inhuman torture for whole night for not revealing the whereabouts

of freedom fighters and eventually, at 4:00 pm on 07/10/1971 those detainees were taken out of the school and 15 of them were brought to the southern side of the school field when the accused and some Razakars targeting the detainees opened fire with their rifles leaving 12 of them killed instantly on the spot and the rest 3 (three) named, Md. Fasih Alam alias Sattu, Md. Zakaria and Afzal Hossain narrowly survived receiving bullet injuries. On accomplishing such a design, the accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu have been charged for abetting and substantially contributing to the accomplishment of killing of 24 civilians constituting the offence of murder as Crimes against humanity as enshrined in section 3(2) (a) (g)(h) of the International Crimes (Tribunals) Act, 1973 incurring liability under section 4(1) of the Act that are punishable under section 20(2) thereto.

286. Evidence led by the Prosecution :

Prosecution has placed their reliance on the oral testimony of 7 Prosecution witnesses (hereinafter referred to as 'PW') of whom 5 are alleged to be sighted witnesses. As stated in the penultimate paragraph, event of killing of 24 unarmed Civilians having been occurred in two different occasions by the same group of perpetrators in the vicinity of *Binadpur* High School. Espousing those two events, Prosecution has produced live witnesses as victims who had survived such killing besides hearsay witnesses and following are the relevant portion of the testimony of those witnesses deposed at the trial:

287. While narrating the first event alleged to have occurred in the morning on 6 October, 1971 one **Raisuddin**, in his examination in chief (hereinafter referred to as 'Chief') claimed to have apprehended by the accused appeared as **Pw-3** and stated that, he along with 16/17 civilians were brought to *Binadpur* High School on capture by the Pakistani Army, Razakars and accused who inflicted inhuman torture upon them at the order of Pakistani forces and Razakars and at one point, all the captives were lined up when

accused Afsar Hossain alias Chutu (hereinafter referred to as 'Chutu') fired at Ariful and accused Md. Mahidur Rahman (hereinafter referred to as 'Mahidur') fired at Fazlu and the duo died instantly on the spot. He goes on to state that, seeing that horrible killing, he for the sake of his life ran away when the accused fired at him though it missed the target that saved his life. He also mentioned the name, Zinnur, Kayesuddin, Makhlukat and Afser who had also escaped gun firing like him. Afterwards, he came to learn, apart from the civilians who could escape gun firing, all other captives numbering 12 had been gunned down to death by the Razakars-the pw concluded.

288. This Pw was duly cross examined (herein after referred to as 'Cross') by the Defence. In reply to one question put in cross, this Pw averred, it was 9:00/9:30 in the morning when he had been shot at. While this Pw was questioned about the recognition of accused he asserted to have seen the accused in 1988 after liberation. Aside from that, drawing attention to almost entire part of whatever stated by this pw in his chief, Defence put suggestion claiming those to be untrue -which he denied.

289. Then comes one **Md. Mokhlasur Rahman**, deposed as **Pw-5** who claimed to have escaped gun firing that had perpetuated by the Razakars and the accused on the unarmed Civilians in the morning on 06/10/1971. On that fateful event, his full brother, Fazlu and nephews, Ariful and Fitu had been killed before his very eyes by the accused- this Pw alleged in his chief. He clearly corroborated Pw-3 as regards to the killing of Fazlu by accused Mahidur and that of Ariful and Fitu by accused, Chutu. While testified about the recognition of the accused he claimed to have known accused, Mahidur as he (accused) is his relation while accused, Chutu resided in the village next to him whose father's name is Kutubuddin though the local people would call him Kutub zola. He admitted to have seen the accused 40 years ago though expressed doubt of having every possibility of not recognizing them now for going his eyesight strained.

290. In reply to cross this Pw stated that, he could not recall whether any case had ever been filed after liberation concerning the incidents he described in his chief. In his own volition, he readily asserted that he could not recount the exact quantum of prostration when he says his prayer for, he has to offer *Shuhu Shejda* (for purifying mistaken prayer) He further stated in reply to cross, he could no recollect any incident instantly of its happening which he could memorize later on. He denied a Defence suggestion that, he was not 83/84 years old, and clarified it might be varied by one or half year though asserted, he was born in the year of 1935/36.

291. He flatly denied a suggestion put by the Defence that neither accused Mahidur killed his brother, Fazlu nor accused Chutu killed his nephews, Ariful and Fitu rather in an emotion choked voice he exclaimed "I am now at the decay I did not tell lie." As did earlier, the Defence herein also has drawn attention to the incriminating part of the chief of this pw, and put suggestion thereof by claiming those to be untrue and discloses for the first time before this Tribunal -which he denied.

292. Insofar as regards to the second events alleged to have occurred at 4:00 pm on 07/10/1971, Prosecution has produced two victims who had witnessed gruesome killing perpetrated on 12 unarmed civilians while they were accompanying them(deceased) though survived with bullet injuries testified as ocular witnesses.

Of them, one **Zakaria** deposed as **Pw-4** who in his chief stated that, he along with his three full brothers, Ettaz, Taslim and Nazrul were forcibly captured from his house by the member of Pakistani Army and Razakars so did to Paigum, Zalal, Abul Hossain, Habibur Rahman, Saimuddin, Afzal, Katlu, Sentu, Azhar, Fasi Alam alias Satu and made all of them stand near the vacant field located at the western side of their house where they were subjected to inhuman torture.

293. He further stated, around 12:00/1:00 pm all of them were brought to *Binadpur* High School where they were kept confined

inside a room for the whole night. At 4:00 pm on 07/10/1971, all the detainees were taken out from the school of whom the Razakars set Abul Hossain, Mahubul, Mantu, Syimuddin, Paigum Biswas and Rahman free to gather Lentil, rice and goat as of their feed and the rest detainees were then lined up in the south-western part of the school. At this, accused Mahidur shot Sentu and his brother Ettaz while accused Chutu shot Azhar. Chutu then fired him (this Pw) which hit left side of his rib and the bullet pierced through the front side leaving him unconscious though he recovered from his wound subsequently with the treatment arranged by his relatives taking him to India-Pw continued (At this, the witness displayed the bullet hit mark to the Tribunal by putting off his shirt.)

294. Nearly all the captives including his three full brothers had been killed at that barbarous operation perpetrated by Razakars, led by the accused though, he and one Fasi Alam Satu could survive such killing receiving bullet injuries -Pw concluded. This Pw could not identify the accused on the dock properly while he was asked to that effect by the Prosecution.

295. In cross, a question and a suggestion were put to this Pw. In reply to the question, he asserted that, he came to Dhaka 15-20 days before. He also denied the suggestion to the effect that, what he has stated in his chief was tutored one and was untrue.

296. Md. Fasi Alam alias Shatu who also survived from the crime scene with bullet injuries along with *Zakaria* (Pw-4) testified as **Pw-6**. On plain reading of his chief it appears, this Pw has supported all the incriminating portion of what Pw-4 narrated in his deposition with small variation to what Pw-4 stated as regards to killing of Sentu, Azher and Ettaz shot by accused Mahidur and Chutu. The deposition of this Pw-6 came reverse with that of the deposition of Pw-4 to the extent of killing of those three deceased.

297. This Pw too received bullet injuries at his left hand and back side so shot by accused Chutu (This Pw also showed the mark of his injuries before the Tribunal.) This Pw also went unconscious with

bullet hit and stated to have recovered from such wound upon taking treatment from India and asserted that, on the very date of event, 12/13 civilians had been killed. This Pw further asserted that, he knew the accused before as both of them (accused) would reside near his village.

298. In reply to cross, this Pw asserted that, a road runs between his house and Mahubul(Pw-2).He stated further, the house of Raisuddin(Pw-3) is 15-20 rashi(1rashi= 80 hand I,e, 1 hand= 18”) away from his house while the house of Zakaria (Pw-4) locates at the eastern side of his house. Apart from those, Defence has given various suggestion quoting those from the version made by this pw in his chief and then claimed those to be untrue as well as has disclosed for the first time before the tribunal-which this Pw denied.

299. Now, the Testimony of one named **Mohubul Haque** can be looked in to. This Witness deposed as **Pw-2** who claimed to have captured from his house by the accused, member of Pakistani forces and local Razakars. On capture, he was paraded along with other civilians who were also apprehended by the same group of perpetrators towards a vacant field located in the western side of his house where all the captives went through severe torture.

300. This Pw goes on to state that, around 12:00/1:00 pm all the detainees including him were then kept confined inside the school and on the following day at 4:00 pm he along with his father Abul Hossain, Mantu, Jalal, Rahman and Paigam Biswas were set free on condition of bringing rice, lentil and goat for their feeding. He stated further that, while they were moving for bringing those articles they saw several bullets hit dead bodies were lying scattered in the school field which the dogs were licking out of whom he could recognize the dead bodies of Fazlur Rahman and Ariful.

301. Out of fear he then holed up inside a sugar cane field though after Magrib Prayer local people were conversing that, many

civilians had been killed and on coming out from his hideout he together with others then took step for the burial of the dead bodies including the dead bodies of Nazrul, Ettaz, Taslim, Senamul, Alkes, Azhar, Sentu and many more-Pw concluded.

302. This Pw in reply to cross asserted that, before 1971 he did neither go to the house of the accused nor they (accused) ever came to his house. He denied a suggestion that he saw the accused in the Tribunal for the first time after liberation though asserted to have seen the accused 10-15 years before. He also denied a suggestion that he did not know the accused during liberation war. Besides, drawing attention to the incriminating part of the chief, defence made suggestion claiming those statements made in the chief to be untrue and he (Pw) never came across the incidents he disclosed in the chief-which the Pw denied.

303. Prosecution has also adduced one **Ahsan Habib** who deposed as **Pw-1** supporting the charge. His testimony itself reveals he is mere a hearsay witness who narrated both the incidents so made out in the charge. While giving testimony regarding the first incident he stated in his chief that, while he was staying at *Balidighi* on 6/10/1971, he in the evening came to learn that, the members of Pakistani army, Rajakars and the accused led by Razakar Commander, Moazzem Hossain had apprehended 16/17 civilians of *Chandshikeri* village and brought them to the east-southern side of *Binadpur* High School and started causing inhuman torture upon them and at one point of such torture, accused Mahidur, Chutu and Razakar Gafur Zola gunned 12 civilians down to death though 4/5 detainees escaped death by fleeing the crime scene. Those who had survived are Afser, Raisuddin, Zinnur, Kayesuddin and Mokhles –Pw continued..

304. This Pw further stated, in the evening following 7/10/1971 he also came to learn the same group of perpetrators on 06/10/1971 captured 20/21 civilians of whom the Razakars released 6/7 of them and rest 14/15 civilians were then brought to the south-

eastern corner of the school field when Razakar Moazzem, accused Mahidur, Gafur and accused Afsar gunned them down. Out of those victims Zakaria and Fasi Alam Shatu though received bullet injuries but eventually they survived-Pw concluded.

305. In cross examination this Pw claimed to have heard the incidents he deposed from freedom fighters, Mozammel Haque and Sahubul Haque. In another question this Pw asserted, he did not see the accused soon after liberation rather saw them in the year of 1987-88. In reply to another question put in cross, he stated that, he heard that both the accused were detained in jail custody till 1987-88 for being Razakars. Apart from that, he denied suggestions that he did not draw any allowances as freedom fighter or that he was born in 1967.

306. Prosecution has relied upon the testimony of **Daud Hossain** who appears to be a hearsay witness deposed as **Pw-9**. He testified that, he remained in his village when the members of Pakistani Army and Razakars surrounded four villages including his village, *Eradatbiswasertola* and started pounding mortar shell on those villages since dawn on 06/10/1971 when he fled his house and went to *Zaminpur* located near Indian boarder. While narrating first incident of the charge, he stated that, when the Razakars had besieged his village they apprehended 39 civilians from there of whom his uncle, Godor Ali was with them.

307. He stated further that, while staying at *Zaminpur* he on 8/10/1971 came to learn from the local people that 17/18 civilians including his uncle and close relatives had been killed and subsequently on 9/10/1971 he returned his house and buried the dead body of his uncle- Pw completed.

308. On the heels of taking control of four villages by the members of Pakistani Army and Rajakars at the time of Occurrence as spelt out in the charge, Defence put a question to this Pw-9 in cross about the situation prevailed among the civilians at that juncture. In reply to such question, this Pw asserted that, some civilians were

then fleeing helter-skelter and those who could not flee were being caught in the hands of Rajakars.

309. A part from that oral testimony, prosecution has drawn our attention to page no.7 of the judgement passed in Criminal Appeal no.538 of 1973 by the Hon'ble High Court Division whereby sentence of Life imprisonment awarded by the learned Judge, Special Tribunal no.11, Rajshahi against accused Mahidur stood maintained. When asked about the purpose of drawing the attention of this Tribunal on showing such single page of a judgement, learned Prosecutor simply failed to elaborate anything making it totally redundant for any consideration.

310. Submission by the Prosecution at summing up:

Mr. Shahidur Rahman, learned Prosecutor on taking us to the corroborative testimony of live witnesses very strenuously submits that, all those witnesses very emphatically supported the charge of abduction, confinement, torture and ultimately murder of as many as 24 unarmed civilians so perpetrated by the accused and local Rajakars through convincing evidences.

311. Insofar as regards to the first event in which 12 unarmed Civilians were killed, Pw-3 and Pw-5 stood victims of torture and eye witnesses of the event and both had witnessed the very horrific killing of Ariful and Fazlu in full views. Of those two witness, Pw-5, Mokhlesur Rahman saw how his full brother, Fazlu and two Nephews Ariful and Fitu had been gunned down to death by the accused before his very eyes.

312. Learned Prosecutor argues further that, this Pw managed to save his own life upon falsifying to the accused that, his son had joined Rajakar force which was pathetic for him and there is no earthly reason to disbelieve his naïve and innocent revelation about the gruesome killing he witnessed as well as his escape.

313. Totally espousing the above testimony of Pw-5 another victim, Raisuddin deposed as pw-3 affirmed the prosecution case

who had run away having been scared on seeing the firing at Ariful and Fazlu by the accused -learned Prosecutor further added. Learned Prosecutor goes on to submits that, Pw-3 gave a horrible description as he had also been shot at by the accused when fleeing the crime site and ultimately survived and his such narration cannot be brushed aside as he named Zinnur, Kayesuddin, Makhlukat(Pw-5) and Afser who too survived gun shot from same crime site and his such testimony finds support from the testimony of Pw-1.

314. Learned Prosecutor next submits that, in similar vein Pw-4 and Pw-6 who sustained bullet injuries also gave a hair raising description of the killing perpetrated by the accused to another 12 unarmed Civilians around 4:00 pm on 07/10/1971 who were captured a day before and supported the prosecution case.

315. There cannot be any reason to raise any doubt about the veracity of their testimony as Pw-4 himself witnessed how his three full brothers named Ettaz, Taslim and Nazrul had been killed one after another before his very eyes and Pw-6 being the associate of Freedom Fighter easily fell prey to the target of Anti- Liberation force, Rajakar and thus obviously was captured for elimination by the accused –learned Prosecutor averred further.

316. Most importantly, from the testimony of Pw-4 and Pw-6 it appears that, both these Pw's were gunned down by the accused but luckily survived and returned at death's door and still bearing the brunt of bullet injuries in his body and their corroborative testimony clearly proves that all their associates that is, 12 unarmed civilians who were captured along with them had been killed – learned prosecutor continues to submit.

317. Quoting the testimony of Pw-2, Md. Mahubul Haque learned Prosecutor vehemently submits that, this witness supported the event in to to as ocular witness so far as regards to the capture and torture of other Civilians including him who were eventually gunned down on 07/10/1971 at 4:00 pm and his(Pw-2) testimony has been fully corroborated by Pw-6 who has asserted that, this

Pw(Pw-2) along with others captives were set free in order to bringing some food items for the accused and Razakars.

318. Learned Prosecutor next submits that, though this Pw did not witness any of the two events of killing that left 24 civilians dead but since he remained one of the captives and accused had apprehended him together with other civilians and subsequently found the dead body of those co-detainees he accompanied, moment before, so it can plainly be comprehended that, there is none other than the accused who accomplished the killing to those civilians.

319. As regards to the testimony of Pw-1 learned Prosecutor submits that, though he appears to be a hearsay witness but he categorically stated the name of the deceased killed by the accused in two separate events as well as the name of Pw-4 and Pw-6 survived in such killing with bullet injuries creating no doubt about it.

320. Learned Prosecutor finally submits that, Defence has utterly failed to shake or impeach or create any iota of doubt about the prosecution case as well as on the assertion of any of those Pw's who thoroughly led the case by cross examining them making the case proved beyond reasonable doubt thereby the accused undeniably deserved to be convicted and should be meted out adequate sentence.

321. Defence Contention :

By contrast, Mr. Abdus Sobhan Tarafder, learned defence counsel contradicts the submission so advanced from the prosecution side. Though he could not elaborate to how the prosecution has failed to lead the prosecution case through its witnesses testified in support of this charge (Charge no.1) but he tried to give emphasis on some procedural flaws purported to have occurred in the pre-trial stage that seriously creates suspicion in the prosecution case. In that score, he first pointed out that, the very Investigation officer in

course of his investigation admittedly recorded the statements of 35 persons but he submitted the statement altogether 21 of them- which is beyond his authority.

322. Mr. Tarafder in that score submits that, the Investigation officer has got no right to act in his sweet will by retaining the statement of rest 14 persons with him and his such hide and seek policy very reasonably cast doubt about the fairness of his investigation.

323. According to Mr. Tarafder, Since the statement of those 14 persons could not have been placed before the Tribunal let alone produced its makers before it, the Tribunal has been made to keep in total dark about the stand of those 14 persons that ensued genuine apprehension that, those 14 persons did not make any statement implicating the accused or support the prosecution case. Sensing such loopholes afterwards, the Investigation officer in an ill motive intentionally refrained from submitting those statements to the learned Chief Prosecutor which deserves interference by this Tribunal that ultimately vitiate the prosecution case-he argues further.

324. In his next leg of argument learned Defence counsel contends that, most of the prosecution witnesses while giving testimony before this Tribunal supporting the charge, have disclosed facts incriminating the accused for the first time which are totally absent in their earlier statements made to the Investigation officer –which should be considered as contradiction and accused is entitled to the benefit out of it.

325. Learned Counsel without mentioning any particular prosecution witness also submits that, from the trend of evidence adduced, it proves the witnesses are tutored one and it seems they somehow gained over in giving testimony against the accused as Pw-1 in his cross, categorically stated that, the relatives of the civilians who had been killed in the event have still been residing in their area –but surprisingly enough, they were not made

witnesses. Finally learned Counsel ended his summing up contending that, Prosecution could not prove its case by convincing evidence and thus the accused is liable to be acquitted.

326. Analysis of Evidences and Evaluation:

On careful perusal of charge framed, it figures out, accused have been indicted for leading a group of perpetrator comprising members of Pakistani Army and Razakars in apprehending civilians who had sided with the liberation war on cordoning off four different villages and eventually killed 24 innocent civilians in two different points in time and severely tortured to many. In proving the charge as many as five prosecutions witnessed who claimed to have apprehended, tortured, remained present in the crime site and witnessed the horrific scene of killing turned up which I have described in details in the foregoing paragraphs.

327. Against this backdrop, now I try to sift their evidences to find out the reliability of the charge levelled against the accused. From the charge I find, the alleged offences were committed in two different phases, one in the morning on 06/10/1971 and the other one in 4:00pm on 07/10/1971 and with regard to very month or date of occurrence most of the witnesses named it at middle part of *Lunar* month, *Shaban* in their respective deposition which remained unshaken and perceived to be correct.

328. Amongst the sighted witnesses Pw-3, Raisuddin in his deposition named the civilians who were captured by the accused including him and how his other co-detainees were brutally tortured before being killed. This Pw was able to witness the killing of co-detainees, Ariful and Fazlu perpetrated by accused Chuttu and Mahidur before being fled the crime scene so did Zinnur, Kayesuddin, Makhlukat and Afsar. Subsequent to that, he claimed to have heard the killing of 12 Civilians in that butchery.

329. As regards to killing of 10 unarmed Civilians though he could not see those killing except the two but such killing of 10 unarmed

civilian cannot be distrusted. His such assertion could not have been discarded by the defence in any manner, as he himself accompanied all those deceased moment before he ran away for his own survival and he himself had viewed the killing of Ariful and Fazlu.

330. Then again, this witness has rightly recognized the accused and from the cross examination it appears, the defence could not shift this witness from his such material assertion of his testimony in any way making his testimony trustworthy and credible one.

331. In similar manner, if we take in to notice of the entire deposition of Pw-5 we clearly find that these accused were involved in the direct killing of unarmed civilians perpetrated in the morning of 06/10/1971. This Pw has not only supported to what Pw-3 narrated about the killing of Ariful and Fazlu by the accused rather, he himself as the co-detainees had to witness the killing of his full brother, Fazlu and two nephews Ariful and Fitu perpetrated by accused Mahidur and Chuttu. This very witness had to escape from the death row upon falsifying that his son was in the Rajakar force.

332. It was quite natural for a human being to take resort to such falsehood to escape from blood bath when his three blood relations were being killed before his very eyes. But what has derived from his such heart wrenching revelation is that, the accused had directly killed those three innocent civilians and they had immense allegiance towards Rajakar force- an anti liberation forces that was directly involved in widespread killing of innumerable civilians throughout the entire period of liberation war.

333. It is worthwhile to mention here that, this witness did not mention the number of Civilians killed in the event but that very numerical omission does not *ipsofacto* vitiate or negate the killing of 12 civilians as pressed in the charge nor it can in any way absolve the accused from committing such atrocious offence of murder.

334. Deposition shows, this witness was not asked to identify the accused on dock for his old age ailments as he admitted in his chief to have suffered from hearing impairment and having strained eyesight but he in his chief also vividly clarified how he knew both the accused 40 years back which appears to be based on facts and true though with no deviation in cross. His last reply upon a suggestion in cross that he articulated in emotion choked voice bears most significant indication about the killing of his full brother and nephews.

335. Invariably, I as a judge of the Tribunal must take note of the demeanour of such aged witness who is now running 85 years. I seem of his such wailing at the fag end of his deposition for his dear ones who had met a tragic death before his eyes as honest and naïve admission of the event whose life is now at the decay. Most importantly, Defence has utterly failed to discard the assertion that, those three civilians were neither the relations of Pw-5 nor they had been killed by the accused in the manner so particularize by those two witnesses in their respective chief. Rather, the defence has made suggestion on some incriminating portion of the chief claiming those to be disclosed for the first time before the tribunal - which the Pw denied.

336. Apart from that, nothing could be shaken from these witnesses about what they stated in their respective testimony implicating the accused. Mere putting suggestion to the witness on drawing attention to the incriminating portion of the chief with an intent to just invite denial from the Pw's will not serve any purpose to the Defence until and unless they (Pw's) could be shifted from their assertion implicating the accused with the commission of crime or of shake the credibility of respective Pw's.

337. Unfortunately, the endeavour so resorted, on the part of the Defence while cross examining most of the Pw's manifest so, as it neither impinge the credibility of the witness whatsoever nor shake the Pw's in recognizing the accused. In such a view of above

discussion, it can reasonably be held that, these two witnesses have palpably proved the charge beyond any shadow of doubt.

338. *Per contra*, insofar as the testimony of Pw-4 and Pw-6, we find both had survived the killing spot with bullet injuries shot by the accused, they alleged. These two witnesses were the sighted witnesses to the killing event that took place at 4:00 pm on 07/10/1971. Out of those two Victims, Pw-4 himself lost his three full brothers named Ettaz, Taslim and Nazrul in that grisly carnage. He had also been shot at by accused Chuttu which struck left side of his rib and pierced through front side of the body.

339. Before being so injured with bullet shot, he witnessed how Sentu, Ajhar and Ettaz were gunned down by accused, Mahidur and Chuttu standing in the same crime site. At last, this Pw stated that in that event virtually all the captives who were apprehended day before and were tortured, had been liquidated by the accused. While this Pw was asked to identify the accused he could not identify them properly and perhaps for this, Defence did not feel it necessary to ask any question on material particulars.

240. In similar manner, Pw-6 narrated how all the captives were killed before his eyes one after another by the accused on the very date and place of event. He himself survived killing with bullet injuries so shot by accused, Chutu. This Witness also asserted that almost all the civilians numbering 12 who were captured day before had been killed in that ghastly bloodbath.

341. On careful perusal of cross of those two witnesses, it does not appear to me that any question was put to this pw that has ever shaken the robustness of this witness as regards to the allegation of direct involvement of the accused in the killing of as many as 12 unarmed civilians and of sustaining bullet injuries by the pw's. Even then, from their (Pw-4 & Pw-6) testimony one discrepancy has caught my sight that is, from whose shot Sentu, Azhar and Ettaz were killed as Pw-4 and Pw-6 gave divergent version over

viewing the firing by the accused consequent which those three deceased were killed.

342. In this regard it may be recalled that, Pw-4 and Pw-6 both were shot soon after those three deceased were gunned down. At this, they were profoundly devastated on seeing the brutal killing just being done around them and both of them went unconscious moment they were shot by the accused and regained consciousness as well as recovered from injuries after a prolong treatment.

343. Out of sudden shock and passage of long time of over 40 years their memory could have naturally been faded away having not unusual for them to exactly recall that horrible scene and exactly particularize the perpetrators firing. But such minor omission in memorizing the firing event could in no way impinge their corroborative testimony when they steadfastly asserted it was the accused who killed 12 innocent civilians by turn and both of them were shot by none other than by accused, Chuttu.

344. Then again, from the testimony of Pw-4 we find that he could not identify the accused on dock. In this regard it would not be out of place to mention that, there is no strait jacket formula in the Act or Rules of Procedure guiding the adjudication making accused must be identified on the dock. Obviously, his such inability does not construe that he absolutely failed to identify the accused. What I saw, this Pw had been showing Chuttu as Mahidur and that of Mahidur as Chuttu.

345. It is to be remembered that, this witness is deposing against the accused who had killed his 3 full brothers long after 43 years where absolute and perfect identification is not so paramount in an adjudication being proceeded under this Act for seeking justice against the murderer as he might not have met them over such long time for some obvious reasons which might generate difficulties in identifying the accused instantly but mere misidentification of the accused will in no way create any suspicion in his firm assertion

over the killing of 12 innocent civilians when he himself sustained bullet injuries by the accused out of same event of carnage.

346. Prosecution has relied upon the testimony of Pw-2 as of hearsay witness as he did not witness the killing event of 12 civilians rather heard it. From the testimony of this witness it appears that, he was apprehended with the civilians on 6/10/1971 mostly whom were killed on 07/10/1971 in other words, it can be said that this witness has deposed supporting the second event so made out in the charge who too stands an ocular witness to the extent of apprehending and torturing the civilians by the accused and Razakars prior to those killing.

347. Furthermore, the testimony of this Pw denotes, he was set free for collecting food items for the accused and their cohorts but after Magrib prayer, upon information, he found the dead bodies of his co-detainees including the dead bodies of Ettaz, Taslim, Azahar, Sentu and then accomplished their burial. His above testimony has abundantly corroborated the assertion of Pw-4 and Pw-6, victims of the said event having no reason to shrug off his affirmation on the pretext of hearsay witness.

348. While approached for bringing food items so ordered by the accused, this Pw saw several bullet hit dead bodies lying scattered in the field of the school which the dogs were licking up among whom he could identify Fazlur Rahman and Ariful. Insofar as regards to releasing this witness for bringing food items as well as saw the dogs licking the dead bodies in the school field, it has also echoed by Pw-4 and Pw-6 in their respective testimony.

349. Again, it appears from the testimony of Pw-3 and Pw-5 that, they were in the killing spot as of detainees when the killing of Ariful and Fazlu was perpetrated. This Pw saw the dead bodies licking by dogs on the following day that is, on 7/10/1971. From the combine testimonies of Pw3 - Pw6 it can legally be perceived, both the events of killing were perpetrated as figured in the charge and the accused were directly involved with such killing and this

Pw-2 though was not a sighted witness to the killing event but his testimony is more than trustworthy which has reinforced the testimony of other Pw's and make the charge proved.

350. Apart from that, I have carefully perused the evidences of Pw-1 so banked upon by the prosecution who appears to have heard both the events of killing as figured in the charge. He in his deposition has mentioned the name of 24 deceased murdered in those two events but I do not find from whom he had gathered the information of those killings.

351. Mere having knowledge about the killing will not suffice to make the testimony believable until and unless it carries any credence. So, the testimony of this witness is of no use for the prosecution even if, it will in no way affect the prosecution case in proving this particular charge when there remained a number of ocular witnesses and victims to the events who have successfully proved the Prosecution case.

352. Mode of Liability accused incurred

By all indication and in view of the corroborative evidences of Pw2 – Pw6, discussed above and on weighing their reliability and cumulative consideration thereof, it is my considered view that, Prosecution has succeeded in proving accused, Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu actively participated in the forcible abduction and torture of civilians constituting the offence of Crimes against humanity as well as killing of 24 unarmed Civilians and thereby substantially abetted, and actively contributed the actual commission of offence of '**murder**' that also constituting the offence of 'Crimes against humanity' as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Md. Mahidur Rahman** and **Md. Afsar Hossain alias Chutu** incurs criminal liability under section 4(1) of the Act also.

353. Verdict on Conviction: In view of what has been discussed above, basing on evidence and submissions of learned Advocates

of the contending parties I find accused **Md. Mahidur Rahman** and **Md. Afsar Hossain alias Chutu** Guilty of the offence of abduction, torture and murder as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

354. Verdict on Sentence: Evidence led me to believe that, all the 4(four) victims turned out as Pw3 – Pw6 had just fallen prey to the revengeful lust of the accused. Of those 4 victims, Pw4 and Pw-6 are still suffering the bullet wounds which have made their lives totally crippled who are now eking out their living on the alms of local people as the bullet injury has made them incapacitated which is shame for the nation as they had supported liberation war and toiled for the freedom fighters which was their only blunder.

355. As it has been found, the accused did not spare anybody whom they had captured. It is not the case that, those deceased killed in the event were so influential leader of Awami League(The party that led the war of liberation and achieved it gloriously) or valiant Freedom Fighters of the locality. Rather, those who were killed in the hand of the accused were simple peasants like those of Pw3-Pw6 whose only dream to see the country liberated from the invading Pakistani Army and sensibly sided with liberation war but irony is that, they had to sacrifice their lives in the hand of their fellow countrymen so brutally.

356. Admittedly, both the accused were Rajakars and what nefarious crimes the Razakar forces had played during our Liberation war has widely been propagated all over the world after the verdict against the member of those notorious Rajakars, Al-Badr started delivering by the Tribunals so upheld by the Hon’ble Appellate Division sending most of the accused to the gallows finding them guilty. And in prosecuting the offenders every legal process enshrined in the legislation has been exhausted where defence has been provided with all opportunity which is rare in the world where the proceeding against war criminal was held or still

going on. What I find in the case in hand, both the accused as the member of notorious Razakar force were involved in widespread killing of 24 unarmed Civilians in a systematic manner.

357. Wiping out the Bengalee pro-liberation civilians was the mission and vision of the accused who actively participated in the killing mission of Rajakar force. They are the traitors and such a monster that, they did not even hesitate to kill three full brothers at a row before the very eyes of their other sibling for nothing but only to appease their mentor, Pakistani invading forces expressing no remorse for their such beastly acts as yet.

358. It is found, the accused resorted to cruel torture and killed 24 unarmed civilians dastardly which portray their perfidious role in eliminating pro-liberation civilians. The fault of those 24 unarmed and innocent civilians were that, they had sided with our Liberation war and craved for achieving their most cherished independent motherland. But the accused did not make their dream come true and liquidated them so cowardly.

359. Indubitably, Accused committed very despicable crime by savagely killing 24 unarmed civilians that warrants only sentence of death. But record produced by the Defence shows that, these two accused had earlier been sentenced to imprisonment for life by the Special Tribunal no-II, Rajshahi finding them guilty under Article 11(a) of Bangladesh Collaborators (Special Tribunal) Order, 1972 read with section 364/149 of BPC so upheld by the High Court Division by its Judgement dated on 01-12-1975 which both the accused served. As stated earlier, the severity of crime the accused had committed cannot equate with any other punishment other than to send them gallows. However, record speaks further both the accused has reached at the fag end of their life who spent maximum period of their life within the four wall of prison cell and now posses a very poor physique. All the above reality impel me to deduce that, justice will be deemed to have been served if their past long term incarceration be considered as extenuating factors from

awarding them capital punishment. Therefore, accused **Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu** be condemned to a single sentence of imprisonment for Life till their natural death for the crimes of abduction, torture and ‘murder’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

360. Adjudication of charge no.2:

(Act of destruction at Villages *Kabirajtola* and *Ebedat Biswasertola*)

Brief account of Charge : Precisely, In this charge accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu have been implicated for leading a systematic attack at villages *Kabirajtola* and *Ebedat Biswasertola* with an armed group of Razakar force around 12:00/12:30pm on 13/10/1971 being divided in to two groups and accomplished destructive acts of plundering and burning down the houses of a slew of civilians belonged to supporters of Freedom Fighters that lasted for almost two hours that resulted in deportation of the civilians and by this, the accused Md. Mahidur Rahman and Md. Afser Hossain alias Chutu have been charged for abetting, participating and substantially contributing to the commission of offence of “Other inhumane acts’ as Crimes against humanity as enshrined in section 3(2) (a) (g)(h) of the International Crimes (Tribunals) Act,1973 incurring liability under section 4(1) of the Act that are punishable under section 20(2) thereto.

361. Evidence Led by Prosecution:

To support the charge, prosecution has placed its reliance on the oral testimony of 7 Witnesses of whom 3 claimed to have been ocular witnesses. I seem it expedient to look in to the deposition of those sighted witnesses first. Of them, one **Md. Khudi** deposed as **Pw-7** claimed to have stayed in his house when accused together with Razakar Moazzem pierced in to it and looted all the

belongings. He went on to state that, at one stage of pillage accused Mahidur torched the house of his younger brother, Badal and so did to his house by accused, Chutu. After burning their houses down, accused and Razakar, Moazzem then made wanton destruction to the houses of as many as 40 natives of his neighborhood and set those houses aflame by turn-pw further added. He also mentioned the name of his relatives whose houses had been burned in to ashes in that disparaging event.

362. Afterwards, in the same style accused and the member of Razakar rolled in to the village, *Eradat Biswasertola* and set many houses afire after looting the valuables there from-Pw continued. This Pw also revealed the name of the victims devastated in that arson attack. This Pw also admitted, at present he could not recognize the accused though he knew them in 1971.

363. In reply to cross, this Pw admitted to have heard about a case that was filed after liberation war against the accused and others implicating them with the atrocious acts he mentioned in his chief. He denied a suggestion put by the Defence that he did not know the accused. He also deliberately asserted in reply to cross that, when Razakars had entered in to their village no Pakistani army was with them nor did they enter in to the villages of *Eradat Biswashertola* and *Chandshikeri*. Besides, attention was drawn by the Defence to the incriminating part of his chief and claimed those to be untrue and have disclosed for the first time- which this Pw denied altogether.

364. Prosecution then Produced **Mohshin Ali** hails from *Eradat Biswashertola* who claimed to be a freedom fighter deposed as **Pw-8**. While describing the incidents he stated that, on that very date of event he was on patrol duty with other freedom fighters at village, *Kabirajtola* and saw 4/5 Razakars near a road. He next stated that, while they were about to return to their *Muktijoddah* camp at *Zaminpur* he again saw the accused with Razakar, Moazzem,

Kubed and Gafur standing with arms and moment thereafter, he saw the house of Billat Mandal burning away.

365. He then goes on to state that, at 2:00 am he further came back to his village on a patrol duty and found most of the houses of the village including him were burned down when he was looking for his elderly mother and at one point, found his mother and aunts crying at a bamboo clump. His mother then reported that, the person who would frequent to take meal in her house burned their house down in spite of craving him not to carry out such destruction and that person is none other than accused, Chutu-Pw continued. Thereafter he accompanied his mother to *Zaminpur* where his other relatives were living from earlier and on putting his mother at *Zaminpur* he along with his co-freedom fighters then went back to the camp- Pw concluded.

366. In cross examination, the Defence has mostly confined its attention to the incident alleged to have occurred on 06/10/1971 as well as the existence of *Muktijoddah* Camp and operation carried out there from by putting question to this Pw. Aside from that, some questions have been put regarding the topographical feature of the crime site. Further, attention was drawn by the Defence to the incriminating part of his chief and claimed those to be untrue and his mother had never told him what he stated to have heard from her and have disclosed those for the first time- which this Pw denied all, suggested.

367. Next comes one **Daud Hossain** who hails from crime village, *Erdat Biswasertola* testified as **Pw-9**. This Pw in his chief stated that, he on 13/10/1971 came to his house at *Erdat Biswasertola* from *Zaminpur* to see his mother when he was informed by a little girl that the Razakars had entered in to the village, *Kabiraztola* and hearing so, he came out his house and saw from a bamboo clump that the members of Razakar force were approaching towards the house of Billat Ali of whom he had recognized Razakar Commander , Moazzem, Habu Razakar and the accused. He then

set off for *Zaminpur* feeling unsafe to stay there and on his way, he saw the house of Billat Ali burning and after reaching at *Zaminpur* he could also see the flame billowing from the house of Billat Ali- Pw continued.

368. He stated further that, he came to learn from the fleeing people at *Zaminpur*, member of Razakars had burned down the houses of village, *Eradat Biswasertola* and he (this pw-9) even could see the flame of fire billowing from the village till 3:00pm. Having been terrified about the state of his mother he then came back to his house from *Zaminpur* in the evening and found his house and those of his neighbors burned in to ashes- pw further added.

369. He then found his mother wailing and his aunt, Kad Banu then informed him that Razakars numbering 20-25 had torched their houses among whom she could recognize accused Chutu and Habu Razakar while his another aunt reported him that she could identify accused, Mahidur and Razakar Commander, Moazzem Hossain as his (Moazzem) house was beside her father's house while accused Mahidur often came to the house of one Gazlu, a native of the same village- Pw concluded.

370. In reply to cross, this pw stated that *Zaminpur* camp was around three to three and a half kilometer away from his house. He also admitted that his house(*Erdat Biswasertola*) had not been spotted from *Zaminpur* where he was staying during liberation war. He asserted to have seen accused, Chutu in the locality 4/5 years after liberation. As did to other Pw's, Defence herein also drew the attention to the incriminating part of his chief and claimed those to be untrue as well as have disclosed for the first time- which this Pw denied all, suggested.

371. Prosecution has then produced one **Ahsan Habib**, testified as **Pw-1** whom Prosecution termed as hearsay witness. In his chief he stated, he came to learn, both the accused, Razakar Moazzem, Gafur, Afser and Pakistani army carried out wanton looting in 70-

80 houses at villages, *Kabirajtola* and *Ebadat Biswasertola* and set those houses afire. He also mentioned the name of the victims who had become victims of such destructions. It appears Defence did not put any question to this Pw on the material particulars while cross examining him.

372. Another hearsay witness for this charge named **Zakaria** has also deposed as **Pw-4**. Insofar as regards to the event, he just stated, after 5-7 days on arriving in India, he heard Razakars and members of Pakistani Army had looted two villages, *Kabirajtola* and *Eradatbiswaser Tola*. Here also, no question has been put to this Pw on what he stated in his chief relating to the event.

373. Mokhlesur Rahman deposed as **Pw-5** in his chief has merely stated that, after 5-7 days of getting the event occurred dated.06/10/1971 when his brother, Fazlu was killed before his eyes perpetrated by accused Mahidur, he heard accused, Mahidur, Razakar, Gafur and others looted the houses of villages, *Kabirajtola* and *Eradatbiswaser Tola* and set those villages afire. Likewise, no question has been put to this Pw on what he stated in his chief relating to the event.

374. To support this charge one **Md. Fasi Alam alias Shatu** has deposed as **Pw-6** as of last Pw. This Pw while testifying in support of charge no.1 claimed to have sustained bullet injuries shot by accused, Chutu and was taken to India for treatment. While giving deposition supporting this charge he went on to state that, he returned home one and half month after liberation and while he was staying there in India he heard that, Rajakars had plundered both the villages, *Kabirajtola* and *Eradatbiswaser Tola* sometime after he had sustained bullet injuries. This Pw has also faced no question by Defence on this point in Cross examination.

375. Submission advanced by the Prosecution at Summing up:

Learned Prosecutor while initiating his submission takes us to the corroborative evidences of Pw7-Pw9 who supported each other as

regards to the pillage and burning houses carried out in two different villages by the accused alongside Razakars. Pointing to the testimony of Pw-7, son of Billat Ali Mandal whose house was also set afire by the accused and their cohorts, learned Prosecutor then submits that, this Pw himself remained present when his house and many of his neighbor's were being looted and then torched by the accused.

376. Learned Prosecutor then averred that, his(pw7) testimony can't be set at naught as both the pw-8 and pw-9 in their respective testimony concurred so who found his(pw7) house burning while they(pw8 & pw9) were approaching towards *Zaminpur* spotting the accused and other Razakars standing near the house of Billat brandishing arms.

377. Learned Prosecutor next submits that, Pw-8 and Pw-9 are also victims of the event as their respective houses were also burned in to ashes even though they were not present when such arson attack was carried out to their houses but they both saw the accused and other Razakars beforehand while they (Pw8-Pw9) were rolling back to *Zaminpur* and heard the name of the accused from their mother and aunts which remained unshaken.

378. Learned Prosecutor then argued that, the testimony of those three witnesses cannot be disbelieved rather they should be considered as most innate and dependable witnesses as they cannot belie about the burning of their own houses. Furthermore, though out of those three witnesses Pw-8 and Pw-9 had heard the name of the accused igniting their house from their respective mother subsequently but it was not their only source of knowing the name of accused in burning down their houses but they themselves spotted the accused wielding arms moment they (Pw's) had moved towards *Zaminpur* which clearly imply those accused had orchestrated the massacre in those two villages, *Kabirajtola* and *Eradatbiswaser Tola*.

379. Insofar as regards to the testimony of Pw-1, Pw-4, Pw-5 and Pw-6 learned Prosecutor very steadfastly submits that, though all those witnesses are hearsay but their testimony supporting the event cannot be brushed aside as the same would appear to be true if entire deposition of those 4 witnesses are taken in to account. Moreover, none of those witnesses were cross examined by the Defence on the point of what they have stated relating to the charge leaving their assertion about the knowledge as well as the event proved –prosecutor further averred.

380. At last, learned Prosecutor contends that, Prosecution has been able to prove the charge beyond any shadow of doubt and since Pw-7 to Pw9 are the victims of arson and looting and all hailed from two affected villages, *Kabirajtola* and *Eradatbiswaser Tola* and they named other victims of those two villages and Defence has utterly failed to shake their assertion, so it can safely be said that their (Pw7-Pw9) testimony are credible and trustworthy and since all the Pw's have palpably proved the charge so, the accused are liable to convicted.

381. Defence Contention at Summing-up.

Conversely, Mr. Tarafder, learned Defence counsel, very resolutely differs to what the learned Prosecutor contends supporting the charge with the proposition that, Pw7 - Pw9 are not at all ocular witnesses and firmly asserts, they are all hearsay witnesses like Pw-1, Pw4-Pw6 and their testimony can in no way be believed. He then argues that, though Pw-7 defends himself as ocular witness but it is next to believe, in as much, it was impracticable for him (pw7) to witness attacking and burning down 40 different houses of his village keeping himself confined at single place.

382. Learned Counsel goes on to submits that, this Pw admitted to have stayed at his house when it along with other houses of his village and that of *Eradatbiswaser Tola* were being burned down which is beyond natural phenomena. At the fag end of the chief, this Pw categorically stated that at present he could not recognize

the accused though he knew both of them in 1971 though offering no clarification about the impediment he may have encountered in not recognizing the accused before this Tribunal which casts reasonable doubt about his entire testimony – learned Counsel further added.

383. While refuting the veracity of the testimony of both Pw-8 and Pw-9 learned Defence Counsel steadfastly submits that, their testimony cannot be taken in to consideration as they are not credible witnesses at all as they banked upon their respective mothers in making the accused implicate with the commission of arson attack in their houses which they (Pw's) revealed for the first time before this Tribunal. Since those material facts are not there in their earlier statement made to the Investigation Officer so very perceptibly both the Pw's deposed so before the Tribunal in an afterthought manner with intent to make the prosecution case proved, and nothing more –learned Prosecutor further averred.

384. According to Learned Prosecutor, though both the witnesses in their respective testimony claimed to have spotted the accused together with other Razakars near the house of one Billat Ali (father of Pw-7) at Village, *Kabirajtola* but none of them ever saw the accused torching his(Billat Ali) house and mere noticing the accused standing at a certain place do not automatically make them liable for committing the crime of looting and burning of houses until and unless strong circumstantial evidence led so.

385. Furthermore, Pw-9 in his chief even stated that, he could see the smoke billowing from the burning house of Billat Ali, though in his cross examination he asserted that, his village (*Eradat Biswaser tola*) is three and half kilometer away from *Zaminpur* where *Kabirajtola* (house of Billat Ali) is next to his village, so it is located even far from his own village. If that so, then his testimony of burning the house of Billat Ali and to see such billowing of smoke from that house on staying nearly 4 kilometer

away is nothing but hollow speech - learned Prosecutor further submits.

386. While advertizing to the evidence of Pw-1, Pw4 - Pw6 learned Prosecutor vehemently submits that, though those are all hearsay witness but what they have stated in their respective chief are all tutored one. It appears from the trend of stating the event by those witnesses they were set to utter on that event and nothing more, as none of those witnesses have ever disclosed the source of their knowledge about the arson attack alleged to have been launched in two different villages. Learned Defence Counsel wrapped up his submission praying for acquitting the accused alleging that Prosecution with an ulterior motive has just entangled the accused with this crime which they utterly failed to prove.

387. Analysis of Evidences and Evaluation:

Charge itself depicts accused being accompanied by Rajakars launched a systematic attack to the villages, *Kabiraztola* and *Eradat Biswaser tola* on the day and time of event so set out in the charge and carried out wanton destruction by looting and burning down innumerable houses therein. Three witnesses claimed to have become direct victims out of such devastations. Amongst them, **Pw7** Md. Khudi remained present when his own house was set on ablaze by the accused.

388. This Pw not only saw his house burning down by the accused even he spotted accused attacking as many as 40 other houses in his neighborhood and set those afire one after another. He also named some of the victims of his locality whose houses were also burned down but none of them turned up as witness before us. Pw continued to state that, the Razakars then entered the village, *Eradat Biswasertola* and caused destruction by looting many houses and then torched those mentioning the name of the victims too.

389. From his subsequent narration it could not be dispelled whether he saw the event (occurred at *Eradat Biswasertola*) or heard it from anybody. I also do not find whether accused had accompanied the Razakars when they rolled in to village, *Eradat Biswasertola* and none of the victims of that village so mentioned by this Pw also showed up as witness. His testimony further shows, the accused and Razakar, Moazzem totaling 3 at first entered his house and continued destruction to 40 houses in his village and afterwards at village *Eradat Biswasertola* which sounds totally impracticable and unbelievable in as much as, it is absolutely absurd that, none of the villagers of those two villages had come forward to ward off those only three arsonists from saving their hearth and home.

390. Then again, from his testimony it remains unclear what he did when the plundering was going unabated in his house followed by burning it down as he has not stated, the accused on brandishing arms entered his house that had frightened him to resist the accused or there was none in the entire neighborhood when the arson attack was launched.

391. I also do not find any reason he assigned for not recognizing the accused so mentioned in his chief as the Pw totally kept mum offering any clarification to what prevented him in recognizing the accused which alternatively make his alleged assertion of knowing the accused in 1971 imaginary. It rather construes, only to implicate the accused with the commission of alleged offence that have taken place in the year 1971, he in a pre-planned manner claimed to have known the accused in 1971. Given the above scenario, no reliance can be placed on the testimony of this Pw to connect the accused with the commission of crime and the charge as has been levelled, totally falls through.

392. On meticulous reading of the testimony of **Pw-8** I find that, this Pw was a Freedom Fighter and hails from village *Eradat Biswasertola* and was attached with *Zaminpur* Freedom Fighters'

Camp during war of liberation from where his village *Eradat Biswasertola* and that of *Kabirajtola* were three and half kilometer away. He on the alleged date of event was on patrol duty at village *Kabirajtola* as freedom fighter accompanied by other fellow Freedom Fighter carrying arms and around 12:00 noon he found accused and other armed Razakars numbering 4/5 standing near the house, Bilat Mandal and moment thereafter, found the house burning.

393. From the above version, it become obvious, this Pw had only seen the accused and other Razakars standing, not seen them (accused) in torching the house of Bilat Ali and keeping the accused standing, this Pw and other freedom fighters started returning back to their *Zaminpur* camp. Moreover, it is beyond natural human conduct a group of armed freedom fighters will not react on seeing a house burning right after their very eyes and they will just watch it as silent bystanders and then preferred it convenient to retreat to their camp keeping the victims in distress situation.

394. His next testimony of returning his village at 2:00 midnight and found his own house and those of others burned in to ashes and that of came to learn the name of accused as arsonists from his elderly mother also sounds totally ridiculous. As per the term of charge alleged plundering and burning down the houses in village, *Kabirajtola* and *Eradat Biswasertola*- this pw belonged, took place between 12:00pm and 2:00pm when he along with his co-freedom fighters were staying there. So, he had not been noticed of such wanton destruction, if it at all occurred and had watched the burning of the house, Bilat Ali of that village only cannot be accepted as true.

395. Further, he (pw-8) alleged to have left his elderly mother in his house alone and had it been so, then no concern had instilled in his mind about her safety and that of his own house while he was witnessing the house of Billat Mandal burning and leaving behind

all anxiety, he could prefer to go back *Zaminpur* and he had to learn the name of accused, Chutu as arsonist afterwards from his mother - sounds very distrustful and the very facts he uttered about recognizing accused Chutu by his mother seems to be a well crafted story.

396. Those very vital vagueness that have cropped up from his (Pw8) testimony remained unanswered from the prosecution side when they were asked to convince on those points. Consequently, the way this pw tried to incriminate the accused with the commission of alleged crime through his testimony sounds completely doubtful and it can safely be perceived that, this witness is not a credible one and no reliance can be placed on his testimony.

397. Again, I have perused the statement, this Pw made before the Investigation Officer (shortly 'IO') earlier on 08/04/2014. I become astounded to find such stark contrast in between such statement and that of his testimony made subsequently before this Tribunal as regards to the commission of event. There is nothing in his statement that, he had ever found the house of Billat Mandal burning while he along with his co-freedom fighters were on petrol duty at that village *Kabirajtola* or that he had returned his home at 2:00 midnight and knew from his elderly mother about the devastation perpetuated by accused Chutu in his village including his own house.

398. It is worthwhile to mention here that, I in my installment of earlier two judgments passed in Mir Quasem Ali's case and Syed Md. Kaiser's case had consciously observed that, the statement made before the IO would have no bearing in the subsequent testimony made before the Tribunal by the same persons when turned up as witness provided, the Tribunal assume exclusive authority in weighing the acceptability and the truthfulness of such evidence.

399. On the same note, the tribunal will not be oblivious in verifying his (Pw's) earlier statement given to the IO and make comparison with that of the testimony- which is absolutely a judicial statement as it is made on taking oath before the Tribunal and if the Tribunal finds glaring exaggeration in the material particulars of his evidence Tribunal can brush aside such testimony.

400. What I find in the testimony of this Pw, he has totally spun a new story while giving evidence before this Tribunal departing from his earlier statement on material particulars plainly just to implicate this accused with the commission of Crime and resorted to such falsehood. In view of above discussion, I totally refuse to accept the testimony so made by Pw-8 and thus, I hold, prosecution has miserably failed to prove this charge through the evidence of this Pw.

401. Having been gone through the testimony of **Pw-9** whom prosecution has also relied as sighted witness, I find he has adopted similar tactic of Pw-8 in incriminating the accused. in the similar vein of Pw-8, he also found the accused and other Razakars approaching towards the house of Billat Ali and moment thereafter saw it burning but curious enough, he in his statement earlier made before the IO did not utter a single word about noticing the accused heading towards the house of Billat Ali, let alone burning of his house.

402. Even, in his testimony (Chief) before us, he did not hesitate to utter that, from *Zaminpur* he could see the flame billowing from the particular house of Billat Ali which is above three and a half kilometer away from *Zaminpur* though, in reply to cross, this Pw categorically admitted that, their village houses could not be seen from *Zaminpur* where he (Pw9) was staying during liberation war. Albeit, this Pw in his chief did not implicate the accused finding the accused in torching of Billat's house but his very chief in that direction of seeing the flame from Billat's house, mentioned above,

is glaring exaggeration of his statement made to the IO and can be termed invented one.

403. Furthermore, this Pw has also sounded same as of Pw-8 in finding his house burned down then came to know the name of the accused- responsible for gutting his house from some Kad Banu(now deceased) and from an anonymous aunt. But nothing sorts of these remained in the statement he made earlier to the IO. And what he described about anonymous aunt- the source of recognizing those accused cannot be found out as prosecution did not produce that anonymous aunt to support the facts and make the accused identified by her and as a result, his testimony turned out to be an omnibus utterance.

404. In this Panorama, I am of the view that, sometimes a witness cannot state before the Tribunal exactly to what a witness had earlier stated before the IO. There can be insignificant discrepancies in between the statement made earlier to the IO and that of subsequent testimony deposed before the Tribunal which is considered to be very minor omission but insofar as material particulars through which a accused is being prosecuted and likelihood to be convicted a witness who is actually privy to such event would never depart from material particulars, in other words, he in no way be deviated from his earlier statement. But what I found from the testimony both from Pw-8 and Pw-9, a complete departure from their earlier statement on material particulars made to the IO which invariably vitiate the prosecution case relating to this charge.

405. I am completely at one to what the learned Defence Counsel submits as regards to the acceptability of the testimony of Pw-1 and Pw4-Pw6 so far as regards to proving this charge. The very tone and tenor of the testimony of all those Pw's appeared for supporting this particular charge also impel me to believe that, they have been tutored to what they deposed before the Tribunal which lacks credibility. They were made to state as per the intent of the

prosecution, as none of those witnesses did utter how they had been abreast with the event. Thus, the testimony of those four anonymous hearsay witnesses can never be taken in to account.

406. Then again, from the testimony of Pw-1, pw4-Pw6 it further appears to me, that all have just made a sweeping statements about burning of the houses at *Kabirajtola* and *Eradat Biswasertola* referring no authenticated sources in support of their respective testimony as to from whom these witnesses have heard the incident of such arson attack leaving their statement regarding the charge untrue. So, in such a posture, no reliance can be placed on the testimony of those anonymous hearsay witnesses. Hence, I am of the view that, any anonymous hearsay statements that lack any sorts of sources or having no strong circumstantial basis will carry any evidentiary value.

407. Further, with the cumulative observation of the above testimonies made by Pw7- Pw9, I do also very reasonably come to a conclusion that, Prosecution has completely failed to support the charge of looting, and burning down the houses at *Kabirajtola* and *Eradat Biswasertola* by those three alleged ocular witnesses, as their evidences proved to be far from reliable one.

408. Findings:

In such a landscape, it is my considered view that, Prosecution has utterly failed to discharge the burden of proving this charge. Hence, accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu is found **not guilty** of carrying out destructive activities by plundering and burning down the houses of civilians constituting the offence of ‘Other inhumane acts’ as “**Crimes against humanity**” as enshrined in section 3(2) (a)(g)(h) of the Act of 1973 and therefore they be acquitted of the charge.

409. Adjudication of charge no.3:

(Abduction, confinement, torture, murder and other inhumane acts committed to Kalumuddin Mondol, Md. Abdur Rashid, Gajal and Illius Mondol of Village Sherpur Vandar)

Brief account of Charge:

Both the accused were indicted for apprehending Kalumuddin Mondol, Md. Abdur Rashid, Gajal and Illius Mondol from their respective houses of village Sherpur Vandar at 2:00pm on 02/11/1971 and were first taken to Razakar Camp at Adina Fazlul Huq College and thereafter Shibganj CO(Circle Officer's) office where they were subjected to inhuman torture and thereby on the following day they were also subjected to barbaric torture for entire day and at night they were brought near a mango garden of *Jagircot Para* where they were shot to death and by this, the accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu have been charged for abetting, participating, contributing and substantially facilitating to the commission of offence of abduction, confinement, torture, murder and Other inhumane acts as **Crimes against humanity** as enshrined in section 3(2) (a) (g)(h) of the International Crimes (Tribunals) Act, 1973 incurring liability under section 4(1) of the Act that are punishable under section 20(2) thereto.

410. Role of Prosecution to support the Charge :

In fact, to countenance this particular charge, the prosecution has not adduced any witness nor produced any documents to prove the events alleged to have set out in the charge and eventually, the allegation so levelled by the prosecution against the accused in the charge just falls through. In essence, there appears no inevitability to discuss further on that charge other than simply acquitting the accused of the charge. Because, it is the settled jurisprudence of Administration of Criminal justice a Trial of a Criminal Case is considered to be start from the very date of framing of charge and

since prosecution has failed to proceed with the trial by adducing or producing any evidence in proving this particular charge in that case, the accused will stand acquitted.

411. Findings :

In view of what have stated above, I am of the opinion that, Prosecution has plainly failed to prove this charge. Hence, accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu is found **not guilty** of abetting, participating, contributing and substantially facilitating to the commission of offence of abduction, confinement, torture, murder and Other inhumane acts as **Crimes against humanity** as enshrined in section 3(2) (a) (g) (h) of the International Crimes (Tribunals) Act, 1973 and therefore, they be acquitted of the charge.

412. Evaluation on Defence Contention of having effect on other two charges :

Fact remains, some suspicions have cropped up in the event of backing out the prosecution from making the charge no.3 proved at the last moment by not adducing any Witnesses. Defence also in its submission at summing-up has deliberately drawn our attention on such failure on the part of the prosecution and very steadfastly submits that, the other two charges (charge no.1 & 2) – for which the accused are also being prosecuted have surely been stained by that.

413. The Defence intended to submit that, Prosecution had arraigned the accused with Charge no.3 in which they had earlier been prosecuted, punished and eventually served the sentence. In spite of having full knowledge about all these facts, prosecution had purposefully put these accused again on trial on self same crime and had the Defence not produced the certified copy of that judgement (as Additional Defence Document) these accused would have faced trial twice for same offence that would have resulted in miscarriage of justice.

414. Learned Defence Counsel next contends that, after producing that additional documents, Prosecution could sense its foul play and then retreated from producing witnesses who had been kept prepared for being produced as they had been referred in the list of witnesses for producing as prosecution witnesses. In such a scenario, learned Defence counsel stoutly submits that, taking that vital suppression of facts in to judicial notice so adopted by the prosecution, this Tribunal may kindly acquit the accused from charge no 1 and 2 too.

415. In fact, while adjudicating a case we very sparingly and meticulously consider all the materials placed before us keeping in mind that provision of section 20(2) of the Act mandates capital punishment if a particular charge is proved against any offender stands trial under section 3(2) of the Act.

416. Obviously, it is the bounden duty on the part of the prosecution and the respective Investigation officer to meticulously examine the relevant documents as well as carefully weigh the statement of persons who are privy to the incriminating facts and to record it, if needed be, before producing such documents as well as referring the persons as witness to the Tribunal. The Tribunal can never go beyond documentary and oral evidences placed before it by the contending parties and have to adjudicate the case exclusively basing on those evidences and materials on record.

417. Certainly, we cannot play down the suspicion instill in the mind of the Defence regarding the fairness of the investigation and subsequent framing of charge no.1 and 2 against the accused already faced trial now awaiting verdict which has aroused for the mishandling by the Prosecution while dealing charge no.3. Having been appraised of such facts, we have with utmost importance perused the Certified copy of the judgement dated.01/12/1975 passed by the High Court Division in Criminal Appeal no.538 of 1973 (Produced by the Defence as Additional Defence Document that allowed by us on.05/03/2015) which apparently shows that,

prosecution was going to put those accused on trial for the crime in which they have already been sentenced and suffered.

418. To dispel any controversy about the suspicion of the Defence, we in our own volition called for the record of Shibganj Police station Case no.12 dated.22/01/1972 corresponding to GR case no.17 of 1972 as well as Shibganj Police station Case no.14 dated.07/02/1972 corresponding to GR case no.56 of 1972 that cropped up upon the suggestion put to the IO by the Defence claiming those to be in respect of Charge no.1 and 2 which has ended vide order of discharge by the concerned Court. In no time, we asked for the record and on meticulous perusal of records so produced, we do not find any material substance of the proposition so advanced by the Defence.

419. Shabby investigation by the Investigation Officer :

Regrettably, the very Investigation Officer, Z.M. Altafur Rahman recorded the statement of Md. Laysuddin for the instant case and forwarded him as witness who has been listed as Witness no.15 in the list of witness lying with the Tribunal. Fact remains, that Md. Laysuddin stood as informant in previous case for the killing of his father, his full brother, uncle and cousin and had deposed as Pw-1 amongst 9 witnesses before the Special Tribunal no.2, Rajshahi whereby the accused were sentenced for life imprisonment as stated above. This IO (deposed as Pw-10 before this Tribunal) in reply to cross has admitted that, said Laysuddin while giving statement to him had informed that he(Laysuddin) had filed that case against the accused and others for the killing of his father and other family members.

420. I have also carefully perused the statement of Md. Laysuddin recorded by Investigation Officer, Z.M. Altafur Rahman on 17/4/2014. That Md. Laysuddin though has been shown as witness no.15 to be produced before this Tribunal but for the reason, best known to the Prosecution ultimately has not been produced as witness in this case. But interesting enough, in his statement made

before the IO though there remains a vivid description about the capture and killing of his father, full brother, uncle and cousin but in that recorded statement there is total suppression regarding the subsequent filing of cases by him and awarding of life sentence to the accused by the Tribunal at Rajshahi, upheld by the High Court Division followed by serving such sentence by the accused.

421. The aforesaid circumstances prove it untrue, that Md. Layesuddin had concealed to the IO in revealing all those facts. Rather, in the very reply to cross this IO (as Pw-10) manifestly admitted that, during investigation Md. Layesuddin had revealed him about the filing of the case standing himself as informant implicating the accused and others for the killing of his father and his close relatives. In that case, question naturally ensue, what had prevented him (IO) to record those vital statement then. It is because if so written, it would not be possible for him to show the accused implicated with the crimes for which charge no.3 has been pressed.

422. In such a posture, it cannot be hard to comprehend that, Layesuddin had also informed the IO about the fate of that case. Because, it would sounds ridiculous that Layesuddin had only informed to the IO about filing of the case but not about the fate (judgement & its carrying out) of the said case. But it is legally perceived, the IO very intentionally showing no regard to the administration of justice and court of law refrained from writing down a vital piece of information (Conviction and sentence of the accused in earlier case) while recorded the statement of Md. Layesuddin and dared to submit investigation report implicating the accused with the killing of self same deceased.

423. Then again, evidence of Investigation Officer deposed as Pw-10 shows that, he recorded the statement of 35 persons but record shows he submitted statements allover 24 of them before the prosecution. Under the provision of section 8(6) of the Act of 1973 the Investigation Officer has been empowered to write down the

statement of any person who is familiar with the event. Obviously, an investigation officer records the statement of any person when he finds incriminating part in it otherwise, he will never feel it urge to record such statement. But moment he recorded the statement a duty rest upon him to forward it to the prosecution for being placed before the Tribunal enables it to exert its power under section 11(a) of the Act of 1973, if needed be. But Investigation Officer simply crosses its limit by not forwarding the statement of remaining 11 persons in the 'list of the witnesses' submitted before this Tribunal.

424. Had it been the case aforementioned, this very IO must be answerable for his utter negligence of duty. For the sake of conclusive and unquestionable investigation of such extremely sensitive cases involving Crimes against humanity, genocide that usher the Tribunal in arriving correct decision and to mete out fair justice such IO should be relieved from assigning with any further investigation of any case triable by ICT. The investigation Agency which has been assigned to conduct investigation of the war time crimes under the provision of section 8 of the Act of 1973 cannot be absolved of its responsibility too for endorsing such an incompetent and irresponsible Police officer to investigate such highly important case for which the nation had to wait for long 41 years.

425. In view of the above discussions and observation, it would be wise and justifiable if that police officer is relieved from further investigating of any case to be placed before the Tribunal for prosecution. Hence, the authority concerned will take appropriate steps in that regard.

426. Now I will address the concern of the Defence who claimed to have ramification of such negligence of the investigation officer upon other two charges, the accused being prosecuted. It is to be borne in mind that, we are adjudicating the charges which have been arisen out from distinct crimes. Each of the charge, we do adjudicate in line with the evidence on record placed in support of

that individual charge. So, if we do not find any convincing evidence in support of any individual charge in that case prosecution case will fail automatically.

427. Similarly, if any document or evidence is produced in course of trial by any contending parties that ever denote, the accused had earlier been prosecuted and punished for committing similar sorts of offence for which he is going to be tried before the Tribunal again, the Tribunal then must take appropriate steps in preventing such apparent injustice. But until and unless such sorts of evidence can be shown or produced, we will definitely go by the evidences so placed before us by the parties to adjudicate a particular charge.

428. Therefore, the apparent laxity of the investigation officer in investigating the crime basing which charge no.3 has been arraigned against the accused, though prosecution has eventually failed to prove the charge will have no bearing in adjudicating other two charges. Given the above discussion, the alleged contention of the Defence of having probable impact on other two charges in the event of failure of the Prosecution for not adducing evidences in support of chargeno.3 as well as capricious investigation thereof by the IO- has no leg to stand, not well founded and thus rejected.

429. In any case, whatever may have the reason for the prosecution in not leading charge no.3 by adducing evidences that is up to them. But fact remains, we had framed the charge having been primarily convinced with the materials placed by the prosecution. Obviously, we are to dispose of the charge independently like other two charges where adducing evidences by the prosecution would have been the core issue in proving that particular charge which would follow its consequence. Defence account cannot dictate the fate of a prosecution case. As, the prosecution has failed to prove the guilt of the accused against an independent charge, this Tribunal framed, the consequence would be pure and simple acquittal of the accused.

430. In such a posture, I once again, do not find any option but to discharge the accused from the charge. As a result, accused Md. Mahidur Rahman and Md. Afsar Hossain alias Chutu is found not guilty of abduction, confinement, torture, murder as well as ‘other inhumane acts’ as “Crimes against humanity” and therefore they be acquitted of the charge.

TRIBUNAL’S ORDER ON SENTENCE SENTENCE

That the accused (1) **Md. Mahidur Rahman [84]** son of late Subedar Ali Biswas of village Dadanchak [Kaitanitola] no.9 UP Durlavpur police station Shibganj district Chapai Nababganj and (2) **Md. Afsar Hossain @ Chutu[65]** son of late Kutub Uddin Morol and late Ferjan Begum of village Satrashia(Rasunchak), no.8 UP Binodpur, police station Shibganj, district Chapai Nababganj are found **UNANIMOUSLY guilty** of the offences of ‘**murder**’[charge no.1] as ‘**crimes against humanity**’ enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 Accordingly, they be convicted and condemned to the ‘**sentences of imprisonment for life till death**’ under section 20(2) of the Act of 1973:

Accused (1) **Md. Mahidur Rahman** and (2) **Afsar Hossain Chutu** are also found **BY MAJORITY guilty** of the offences of ‘**other inhuman act**’ [charge no.2] as ‘**crimes against humanity**’ enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 Accordingly, they be convicted and condemned to the ‘**sentence of imprisonment for 5[five] years**’ under section 20(2) of the Act of 1973:

The sentence of imprisonment as awarded above **in respect of charge nos. 1 and 2** shall run **concurrently**. This sentence shall be carried out under section 20(3) of the Act of 1973.

The sentence awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012(ROP) of the Tribunal-2[ICT-2] and the convict persons be sent to the prison with a conviction warrant accordingly.

Charge no.3 being barred by the doctrine of double jeopardy as discussed above, stands dropped accordingly, by **MAJORITY**.

Let copy of the judgment be sent also to the District Magistrate, Dhaka for information and causing necessary action.

Let certified copy of the judgment also be furnished to the prosecution and the convicted accused persons at once.

Justice Obaidul Hassan, Chairman

Justice Md. Mozibur Rahman Miah, Member

Justice Md. Shahinur Islam, Member