

**International Crimes Tribunal-1 (ICT-1)
Old High Court Building, Dhaka,
Bangladesh**

ICT-BD Case No.03 OF 2015

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

The Chief Prosecutor

Versus

- 1. Mohibur Rahman alias Boro Mia**
- 2. Mujibur Rahman alias Angur Mia, and**
- 3. Md. Abdur Razzak**

Present:

**Mr. Justice Anwarul Haque, Chairman
Mr. Justice Md. Shahinur Islam, Member
Mr. Justice Md. Shohrowardi, Member**

Prosecutors:

Mr. Golam Arif Tipu, Chief Prosecutor with
Mr. Syed Haider Ali
Mr. Rana Das Gupta
Mr. Zead-Al-Malum
Mr. Hrishikesh Saha
Mr. Sultan Mahmud
Mr. Md. Altab Uddin
Ms. Turin Afroz
Mr. Abul Kalam
Ms. Rezia Sultana
Mr. Tapas Kanti Baul

Defence Counsels:

Mr. Golam Kibria, the learned counsel
....for accused Mohibur Rahman alias Boro Mia
Mr. Md. Parvej Hossain, the learned counsel
.....for accused Mujibur Rahman alias Angur Mia
Mr. M. Masud Rana, the learned State defence counsel
.....for accused Md. Abdur Razzak

Date of delivery of Judgment: 1st June, 2016.

JUDGMENT

[Under section 20(1) of the Act No.XIX of 1973]

I. Introductory Words

01. Accused (1) Mohibur Rahman alias Boro Mia son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj, (2) Mujibur Rahman alias Angur Mia son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj, and (3) Md. Abdur Razzak son of late Toij Ullah alias Toij Ali and Khodeja Begum of Village Hossainpur, Khagaura, Police Station Baniachang, District Habiganj have been put on trial before this Tribunal-1 at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973.

02. This International Crimes Tribunal-1 [hereinafter referred to as the "**Tribunal**"] was established under the International Crimes (Tribunals) Act enacted in 1973 [hereinafter referred to as the '**Act of 1973**'] by Bangladesh Parliament to provide for the detention, prosecution and punishment of persons responsible for genocide, crimes against humanity, war crimes and other class crimes committed in the territory of Bangladesh, in violation of customary international law, particularly in between the period of 25 March and 16 December, 1971. However, no Tribunal was set up, and as such, no one could be brought to justice under the Act of 1973 until the government established the Tribunal on 25 March, 2010.

II. Jurisdiction of the Tribunal under ICT Act of 1973.

03. The International Crimes (Tribunals) Act, 1973 states about the jurisdiction of the Tribunal and crimes in section 3 which is as follows:

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

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:-

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement , torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;

(b) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children of the group to another group;

(d) War Crimes: namely, violation of laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave labour or for any other

purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

(f) any other crimes under international law;

(g) attempt, abetment or conspiracy to commit any such crimes;

(h) complicity in or failure to prevent commission of any such crimes."

To our understanding the proper construction of this section should be-

04. Crimes against humanity can be committed even in peace time; existence of armed conflict is, by definition, not mandatory. Neither in the preamble nor in the jurisdiction sections of the Act of 1973 was it mentioned that crime against humanity requires the existence of an armed conflict. Indiscriminate attack on civilian

population based on their political, racial, ethnic or religious identity can be termed as crimes against humanity even if it takes place after 1971. However, no one denies the fact that there was an armed conflict in 1971.

III. Consistency of the Act of 1973 with other Statutes on International Crimes

05. We have already quoted section 3 of the International Crimes (Tribunals) Act, 1973 where jurisdictions of the Tribunal and crimes have been stated. Now let us see the jurisdiction of other International Tribunals and definition of crimes against humanity provided in their Statutes on international crimes.

Article-7 of the Rome Statute

06. According to Article 7 of the Rome Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 3 of the ICTR

07. The International Criminal Tribunal for Rwanda [ICTR] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds of (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts.

Article 5 of the ICTY

08. The International Criminal Tribunal for former Yugoslavia [ICTY] shall have the power to prosecute persons responsible for

the (a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds and (i) other inhumane acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

09. Under the Rome Statute [Article 7] and Statute of the International Criminal Tribunal for Rwanda [Article 3] the jurisdiction of the Tribunals were given to try offences of 'crimes against humanity' such as murder, extermination, deportation, torture, rape etc. of the person/ persons when the offences committed as a **widespread or systematic attack directed against any civilian population on national, ethnic, racial or religious grounds.** According to ICTY [Article 5] existence of armed conflict is the key element to try offences of crimes against humanity, directed against the civilian population.

10. But the Appellate Division of our Supreme Court in the case of **Abdul Quader Molla Vs. Government of Bangladesh**, vis-a-vis has observed to the effect [majority view]:

"Whereas, under our Act, 1973 the tribunal has jurisdiction to prosecute and punish any person irrespective of his nationality who being a member of any armed, defence or auxiliary forces commits, whether before or after the

commencement of the Act, Crimes against Humanity, Crimes against Peace, Genocide and other crimes connected therewith during the period of war of liberation. The offences of murder, extermination, rape or other inhumane acts committed against civilian population or persecutions on political, racial, ethnic or religious grounds are included in the offence of crimes against Humanity. "

"For commission of the said offence [crimes against Humanity], the prosecution need not require to prove that while committing any of offences there must be 'widespread and systematic' attack against 'civilian population'. It is sufficient if it is proved that any person/ persons attack against 'civilian population'. It is sufficient if it is proved that any person/ persons committed such offence during the said period or participated or attempted or conspired to commit any such crime during operation search light in collaboration with the Pakistani Regime upon unarmed civilian with the aim of frustrating the result of 1970 National Assembly

election and to deprive the fruits of the election result." [Pages: 241-242].

11. In view of the above observation of the Appellate Division it is now well settled that in our jurisdiction for constituting the offence of crimes against humanity the element 'the attack must be widespread and systematic against civilian population' is not at all necessary or mandatory.

12. However, after making comparative analysis of the definitions provided for crimes against humanity, crimes against peace, genocide and war crimes under section 3(2)(a), (b), (c) and (d) of the Act of 1973 those are found to be fairly consistent with the manner in which these terms are defined under recent Statutes for the International Criminal Tribunal for the former Yugoslavia [ICTY], the International Criminal Tribunal for Rwanda [ICTR], the International Criminal Court [ICC] Rome Statute, and the Statute of the Special Court for Sierra Leone [SCSL], it can be safely said that the Act of 1973 legislation with its amendments upto 2013 provides a system which broadly and fairly compatible with the current international standards.

13. As per section 3(2) of the Act of 1973 to constitute an offence of crime against humanity, the element of attack directed against any civilian population is required. The "*population*" element is intended to imply crimes of a collective nature and thus

exclude single or isolated acts. Thus, the emphasis is not on the individual victim but rather on the collective, the individual being victimized not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean that the acts must occur on a large scale basis [widespread] or, that there must be some form of a governmental, organizational or group policy to commit these acts [systematic, targeted] and that the perpetrator must know the context within which his actions are taken [knowledge and intent], and finally that attack must be committed on discriminatory grounds in case of persecution.

14. The attack must be directed against any civilian population. The term “*civilian population*” must be interpreted broadly and refers to a population that is predominantly civilian in nature. A population may qualify as “*civilian*” even if non-civilians are among it, as long as it is predominantly civilian. The presence within a population of members of armed resistance groups, or former combatants, who have laid down their arms, does not as such alter its civilian nature.

15. However, for our better understanding it is needed to know the meaning and scope of 'widespread' and 'systematic' attack. '*Widespread*' refers to the large-scale nature of the attack which is primarily reflected in the number of victims. '*Systematic*' refers to

the organized nature of the acts of violence and the *'non-accidental repetition of similar criminal conduct on a regular basis.'*

Widespread is quantitative while systematic is qualitative.

IV. Salient features of ICT Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [ROP, 2010] applicable to trial procedure.

16. The proceedings before the Tribunal shall be guided by the Act of 1973 and International Crimes (Tribunal-1) Rules of Procedure, 2010 [hereinafter referred to as the 'ROP, 2010']. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872. The Tribunal is authorized to take into its judicial notice of facts of common knowledge and some official documents which are not needed to be proved by adducing evidence [sub-sections (3) and (4) of section 19 of the Act of 1973]. The Tribunal may admit any evidence without observing formality, such as reports, photographs, newspapers, books, films, tape recordings and other materials which appear to have probative value [section 19(1) of the Act of 1973]. The Tribunal shall have discretion to consider hearsay evidence too by weighing its probative value as per rule-56(2) of the ROP, 2010. The defence shall have right to cross-examine prosecution witnesses on their credibility and to take contradiction of the evidence given by them before the Tribunal as per rule-53(2) of the ROP, 2010. Accused deserves right to conduct his own case or to have assistance of his counsel [section 17 of the

Act of 1973]. The Tribunal may release an accused on bail subject to conditions as imposed by it as per rule 34(3) of the ROP, 2010. The Tribunal may, as and when necessary, direct the concerned authorities of the government to ensure protection, privacy, and well-being of the witnesses and victims as per rule 58 A of the ROP, 2010.

17. The Act of 1973 is meant to prosecute and try the persons responsible for the offences of crimes against Humanity, genocide and other class crimes committed in violation of customary international law in accordance with the provisions of the said Act. However, the Tribunal is not precluded from borrowing those international references which are not found inconsistent with the provisions of the Act of 1973 in the interest of fair justice.

18. The Act of 1973 has ensured all the universally recognized rights to accused in order to make fair trial. The fundamental and key elements of fair trial are (i) right to disclosure, (ii) holding trial in public, (iii) presumption of innocence of the accused, (iv) adequate time for preparation of defence case, (v) expeditious trial, (vi) right to examine defence witness, and (vii) right to defend by engaging counsel.

19. All the aforesaid rights have been provided to the accused to ensure fair justice. In addition to observation of those elements of fair justice, the Tribunal has adopted a practice by passing an order

that while an accused in custody is interrogated by the investigation officer, at that time, the defence counsel and a doctor shall be present in the adjacent room of the interrogation room, and the defence counsel is permitted to meet the accused during break time and at the end of such interrogation. The doctor is also allowed to check-up the physical condition of the accused, if necessary. All these measures are being taken by the Tribunal to ensure fair investigation as well as trial.

20. Before going into discussion and evaluation of the evidence on record, it is needed to be mentioned here that this Tribunal has already resolved some common legal issues agitated by the defence in the following cases of the Chief Prosecutor vs. Allama Delwar Hossain Sayeedi [ICT-BD Case No. 01/2011], The Chief Prosecutor Vs. Professor Ghulam Azam [ICT-BD Case No. 06/2011], the Chief Prosecutor Vs. Salauddin Qader Chowdhury [ICT-BD Case No. 02/2011] and the Chief Prosecutor Vs. Motiur Rahman Nizami [ICT-BD Case No.03 of 2011]. Apart from this, the Appellate Division of our Supreme Court in the cases of Abdul Quader Molla Vs Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 24-25 of 2013], Muhammad Kamaruzzaman vs. The Chief Prosecutor [Criminal Appeal No. 62 of 2013], Ali Ahsan Muhammad Mujahid vs. The Chief Prosecutor [Criminal Appeal No. 103 of 2013], Salauddin

Qader Chowdhury vs. The Chief Prosecutor [Criminal Appeal No. 122 of 2013], Allama Delwar Hossain Sayedee vs. The Government of the People's Republic of Bangladesh and vis-a-vis [Criminal Appeal Nos. 39-40 of 2013] and Motiur Rahman Nizami vs. The Government of Bangladesh [Criminal Appeal No. 143 of 2014] has also decided the legal issues involved in the cases under the Act of 1973.

V. The settled laws/ issues by the Appellate Division and the Tribunal are as follows:

- i. Customary International Law [CIL] shall not be applied if it is contrary to the Act of 1973;
- ii. There is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation;
- iii. Our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law;
- iv. There is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL;
- v. The inordinate delay in commencing any proceedings under the Act of 1973 *ipso facto* can not be a ground to doubt the truth or veracity of the prosecution case;
- vi. By the amendment of section 3(1) of the Act of 1973 through Act No.LV of 2009 the jurisdiction of the Tribunal

has been extended to try and punish 'any individual,' 'organization' or 'group of individuals' besides any member of any armed, defence or auxiliary forces, irrespective of his nationality who has committed crimes against Humanity mentioned in section 3(2) of the Act of 1973;

vii. The Act of 1973 is a protected law and the moment, sub-section (1) of section 3 was amended by way of substitution, it became part of the Statute and it got the protection of any legal challenge to be void or unlawful or even to have become void or unlawful in view of the provisions of Article 47(3) of our Constitution;

viii. The clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void;

ix. Mere failure of the successive governments to act in accordance with the Act of 1973 for last more than forty years, in no way, gave any right to the accused to be exonerated from being tried for the commission of crimes against Humanity as mentioned in section 3(2) of the Act of 1973;

x. In the Act of 1973, no limitation has been prescribed for initiating proceedings against any individual or group

of individuals or organization or any member of any armed, defence or auxiliary forces irrespective of his nationality for the commission of crimes mentioned in section 3(2) of the Act of 1973;

xi. The Collaborators Order, 1972, a different legislation aiming to prosecute the persons for the offences punishable under the Penal Code, were scheduled in the Collaborators Order, 1972, while the Act of 1973 has been enacted to prosecute and try the persons for crimes against Humanity, genocide and other crimes committed in violation of customary international law [CIL], and as such, there is no scope to characterize the offences indulging in the Collaborators Order, 1972 to be the same offences as specified in the Act of 1973;

xii. The Act of 1973 is a codified law, thus, it is not needed to travel to seek assistance from other trials held or is being held by the tribunals/ courts either under the charter of agreements of the nations or under other arrangements under the mandate of United Nations or other International body, such as Nuremburg trial and the Balkan trials.

VI. Historical Backdrop and Context

21. In August, 1947 the partition of British India based on two-nation theory, gave birth to two new States, one a secular State

named India and the other the Islamic Republic of Pakistan of which the western zone was eventually named as West Pakistan and the eastern zone as East Pakistan, which is now Bangladesh.

22. In 1952, the Pakistan authorities attempted to impose 'Urdu' as the only State language of Pakistan ignoring 'Bangla', the language of the majority population of Pakistan. The people of the then East Pakistan started movement to get Bangla recognized as a State language, eventually turned to the movement for greater autonomy and self-determination and ultimately independence.

23. In the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. Despite this overwhelming majority, Pakistan government did not hand over power to the leader of the majority party as democratic norms required. As a result, movement started in this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7 March, 1971, called on the Bangalee people of the eastern zone to strive for independence if people's verdict would not be respected and power was not handed over to the leader of the majority party. On 26 March, 1971 following the onslaught of "**Operation Search Light**" by the Pakistani Military on 25 March, Bangabandhu Sheikh Mujibur Rahman declared Bangladesh independent immediately before he was arrested by the Pakistani army.

24. In the War of Liberation that ensued, all people of the then East Pakistan wholeheartedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties joined and/ or collaborated with the Pakistan military to actively oppose the creation of independent Bangladesh and most of them committed and facilitated the commission of atrocities in the territory of Bangladesh. As a result, 3 million [thirty lakh] people were killed, more than [two lakh] women were raped, about 10 million [one crore] people deported to India as refugees and million others were internally displaced. It also experienced unprecedented destruction of properties all over Bangladesh.

25. The Pakistan government and the military with the help of some pro-Pakistani leaders set up a number of auxiliary forces, such as, the Razakar Bahini, the Al-Badar Bahini, the Al-Shams, the Peace Committee etc, essentially to collaborate with the Pakistani army in identifying and eliminating all those who were perceived to be sympathized with the liberation of Bangladesh, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and other pro-independence political parties, Bangalee intellectuals and civilian population of Bangladesh. Undeniably the road to freedom for the

people of Bangladesh was arduous and torturous, smeared with blood, toil and sacrifices. In the contemporary world history, perhaps no nation paid as dearly as the Bangalees did for their emancipation.

26. Having regard to the fact that during the period of War of Liberation in 1971 parallel forces i.e Razakar Bahini, Al-Shams, Al-Badar Bahini and Peace Committee were formed as auxiliary forces of the Pakistani armed forces that provided moral support, assistance and substantially contributed and also physically participated in the commission of horrendous atrocities in the territory of Bangladesh. It is the fact of common knowledge that thousands of incidents happened through out the country as part of organized and planned attacks against the pro-liberation Bangalee civilian population, Hindu community, pro-liberation political group, freedom-fighters and finally the 'intellectuals'. We are to search for answers of all these crucial questions which will be of assistance in determining the culpability of the accused persons for the offences for which they have been charged.

VII. Brief Account of the Accused Persons:

27. (i) Accused Mohibur Rahman alias Boro Mia [65] son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj was born on 01 January 1950 at that village Kumurshana. He studied up to class X in

Baniachang Sandalpur BC High School. He was a strong follower of Syed Kamrul Ahsan, a local potential leader of Nejam-e-Islami, a pro-Pakistani political organisation and he and his brothers sided against the war of liberation and joined the local Razakar Bahini, prosecution alleges. His elder brother Kalamdhar was allegedly the Chairman, Peace Committee of Khagaura Union and younger brother Mostofa [now dead] was the commander of Khagaura Razakar camp.

28. (ii) Accused Mujibur Rahman alias Angur Mia [60] son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj was born on 10 March 1955 at said village Kumurshana. He is the younger brother of accused Mohibur Rahman alias Boro Mia. He studied up to class V in Dhulia Ghatua Primary School at Khagaura under Baniachang Police Station of the then Habiganj Sub-Division. He was a committed follower of Syed Kamrul Ahsan, a local potential leader of Nejam-e-Islami, a pro-Pakistani political organisation and he and his brothers took deliberate stance against the war of liberation and joined the local Razakar Bahini, prosecution alleges. According to the prosecution, his elder brother Kalamdhar was the Chairman, Peace Committee of Khagaura Union and his brother Mostofa [now dead] was the commander of Khagaura Razakar camp. After liberation, he started working as a supporter of Jamaat-e-Islami.

29. (iii) Accused Md. Abdur Razzak [63] son of late Toij Ullah alias Toij Ali and Khodeja Begum of Village Hossainpur, Khagaura, Police Station Baniachang, District Habiganj was born on 13 August 1952 at the said village. He did not achieve any education. He is the cousin brother of accused Mohibur Rahman and Mujibur Rahman. He also joined the local Razakar Bahini along with accused Mohibur Rahman, a potential follower of local leader of Nejam-e-Islami, a pro-Pakistani political organisation, prosecution alleges.

VIII. Procedural History

30. Pursuant to warrant of arrest issued by the Tribunal -2 in ICT-BD[ICT-2] Misc. Case No. 01 of 2015, the members of law enforcing agencies having arrested accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak produced them before the Tribunal-2. Out of the 3(three) accused persons accused Md. Abdur Razzak is being defended by State defence counsel Mr. M. Masud Rana.

31. The Chief Prosecutor submitted formal charge under section 9(1) of the Act of 1973 in the Tribunal -2 on the basis of investigation report of the investigation agency. After submission of the formal charge the Tribunal -2, under Rule 29(1) of the Rules of Procedure, 2012 [ROP of the ICT-2] took cognizance of offences, against all the three accused persons, as enumerated in

section 3(2)(a)(g)(h) of the Act of 1973 as required under Rule 30 of ROP , 2012, by its order dated 31.05.2015. Afterwards, the Tribunal-2 transferred the case record to this Tribunal-1 which received the same on 06.09.2015 for hearing the charge matter by re-numbering and re-registering the instant case as ICT-BD Case No. 03 of 2015. Afterwards, two separate discharge petitions were filed on behalf of all the three accused persons. On 16.09.2015 the charge matter and discharge petitions were heard in presence of the learned Advocates of both the parties.

32. Mr. Sultan Mahmud the learned prosecutor drawing attention to the statement of witnesses, the near relatives of victims, submitted that the accused persons were the potential followers of Syed Kamrul Ahsan, a local leader of Nejam-e-Islami, a pro-Pakistani political organisation and also they belonged to local Razakar Bahini having active and culpable association with the Razakar camp set up at village Khagaura under Police Station Baniachang of the then Sub-Division Habiganj. Evidence to be presented in trial would demonstrate it unerringly that the accused persons were the members of local Razakar Bahini and actively collaborated with the Pakistani occupation army in carrying out atrocious activities in 1971 during the war of liberation, in furtherance of annihilation policy of pro-liberation Bengali civilians and to cripple their recognised human rights.

33. The learned prosecutor insisted on framing of charges on collective consideration of the formal charge, statement of witnesses and documents which manifestly indicate that there are sufficient grounds of presuming that the accused persons are criminally liable for the commission of offences as mentioned in section 3(2) of the Act.

34. Conversely, Mr. M. Masud Rana, the learned counsel defending accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia as their engaged counsel and for another accused Md. Abdur Razzak as State defence counsel submitted that the accused persons did not belong to Razakar Bahini, that no document whatsoever has been provided on part of the prosecution to substantiate accused persons' membership in Razakar Bahini, that they were not involved with the alleged events constituting the offences of murder, rape, confinement, abduction and torture, in any manner, that they after liberation have been elected chairman of local union council for several times and that they have been falsely implicated in this case out of local rivalry, therefore, they deserve to be discharged.

35. A criminal trial is a voyage to inquest the truth as to commission of crimes and the role and mode of participation of persons accused of it and the task can be well carried out only on lawful evidence to be presented in course of trial. However, formal

charge, the statement of witnesses and other materials on record *prima facie* demonstrated that the accused persons enthusiastically sided with the locally stationed Pakistani army and culpably collaborated with them by their act and conduct in carrying out horrific activities of killing of non-combatant freedom fighters, brutal sexual ravishment on women belonging to pro-liberation families, wanton destruction and other inhuman acts.

36. In view of the above circumstances this Tribunal-1 on 29.09.2015 having rejected the discharge petitions framed charges against all the accused persons.

IX. Witnesses adduced by the parties

37. The prosecution submitted a list of 19[nineteen] witnesses along with formal charge and documents. But at the time of the trial, the prosecution has examined in all 12 [twelve] witnesses including the investigation officer. The prosecution has also adduced some documentary evidence which were duly marked as exhibits 1-5.

38. It is a settled principle of law, in a criminal case that an accused is not under obligation to prove his innocence. The Tribunal by exercising power conferred under Rule 51A(2) and 53(3) of the International Crimes (Tribunal-1) Rules of Procedure, 2010 allowed the defence to examine maximum number of 07 [seven] witnesses to disprove the prosecution case, though the defence is no longer under the obligation to do so. Besides, the

defence has also adduced some documentary evidence which were duly marked as exhibits Ka-Kha.

X. Defence case of the accused persons

39. Defence case as has been extracted from the trend of cross-examination of prosecution witnesses is that the accused persons did not belong to locally formed Razakar Bahini; that in 1971 accused Mohibur Rahman alias Boro Mia used to provide assistance to freedom-fighters and shelter to Hindu people; that accused Mujibur Rahman alias Angur Mia was minor in 1971 and used to stay at his maternal uncles' home in Habiganj town; that not the accused persons but the two brothers [Kalamdhar and Mostofa] of accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia were Razakars who were killed in 1971 by the freedom-fighters; that the alleged events of crimes happened by the Razakars affiliated with the Razakar camp at Khagaura bazaar and the accused persons had no nexus with the said camp and its activities; that Rajab Ali was killed by Razakars when he had been at Khagaura bazaar and that the accused persons have been falsely implicated in this case out of political rivalry and animosity.

40. In addition to the defence case as transpired from the suggestions put to prosecution witnesses and also from the trend of their cross-examination, the defence by adducing and examining 07[seven] witnesses have asserted further that the event of killing Rajab Ali and abduction of Akal Ali [as listed in charge no.01]

occurred in some other manner and none of the accused persons had complicity therewith; that the group of Pakistani occupation army being accompanied by local Razakars had attacked the locality of Khussa Khagaura that resulted in destruction of civilians' properties as listed in charge no.02 but none of the accused persons was with the group; that no event of alleged rape upon two women happened as narrated in charge no.03 and that the accused persons were not engaged in carrying out the attack in abducting Anfar Ali as listed in charge no.04 as they were not the members of Razakar Bahini formed at Khagaura.

41. The Tribunal notes that the assertion contended in respect of the event narrated in charge no.01, by examining defence witnesses, has not been suggested to any of prosecution witnesses as defence case. Also the assertion made by examining defence witnesses in respect of the event of rape as narrated in charge no.03 is 'negative assertion' which is not found to have been suggested to either of prosecution witnesses.

XI. Burden of the prosecution

42. The prosecution, in the light of the charges framed, is burdened to prove (a) the commission of crimes narrated in charges, (b) mode of participation of the accused persons in committing the crimes for which they have been charged, (c) what was the status and role of the accused persons at the relevant time and how they had maintained association with the Pakistani

occupation army, and (d) the context of carrying out of alleged atrocious crimes directed against civilian population and a particular group of population. In determining culpability of the accused persons prosecution is to establish too that (i) the perpetrators must know of the broader context in which the acts committed, and (ii) the acts must not have been carried out for purely personal motives of the perpetrators.

XII. Summing up of the prosecution case

43. Mr. Sultan Mahmud, the learned prosecutor at the outset of summing up drew our attention to the settled history relating to the context of carrying out atrocious activities directing civilian population in the territory of Bangladesh in 1971 during the war of liberation. He submitted that the crimes for which the accused persons have been charged with were mere a fragmented part of such horrific criminal acts that resulted in killing civilians, destruction of civilians' properties, rape, abduction, causing inhuman torture keeping in confinement.

44. The learned prosecutor then started placing argument in respect of each charge with reference to the evidence presented in trial. The summing up advanced by him centered on core argument that the arraignments narrated in all the four charges and participation and complicity of all the three accused persons therewith have been proved beyond reasonable doubt. However,

argument made in respect of each charge may be well attended while adjudicating the charges independently.

XIII. Summing up the defence case

[On behalf of accused Mohibur Rahman alias Boro Mia]

45. Mr. Golam Kibria, the learned counsel defending the accused Mohibur Rahman alias Boro Mia in advancing summing up submitted that this accused did not belong to Razakar Bahini; that prosecution failed to present any documentary evidence in support of it; that a complaint case initiated by Vingraj Bibi, the wife of victim Akal Ali [as listed in charge no.01] is the foundation of the instant case but all the witnesses cited therein [earlier case] have not been brought in this case. If really this accused was a Razakar he would not have been elected Chairman of Union Council for recurrent terms, the learned counsel added. The learned counsel attacking reliability of witnesses examined by the prosecution placed argument in respect of all the four charges which may be well addressed while adjudicating the charges independently.

[On behalf of accused Mujibur Rahman alias Angur Mia]

46. Mr. Md. Parvej Hossain, the learned counsel defending the accused Mujibur Rahman alias Angur Mia endorsing the argument already made by the learned counsel defending the accused Mohibur Rahman alias Boro Mia submitted that this accused has been prosecuted falsely and out of local political rivalry; that in

1971 he was a student of class VI and used to stay at his maternal uncle Badsha Mia's house in Habiganj and, as such, he had no nexus with the local Razakar Bahini and its activities. The learned counsel questioning the neutrality and competence of the witnesses examined by the prosecution submitted that the story of the event of alleged rape as narrated in charge no.03 is concocted one and that this accused was not involved with the events narrated in charges in any manner.

[On behalf of accused Md. Abdur Razzak]

47. Mr. M. Masud Rana, the learned State defence counsel for accused Md. Abdur Razzak submitted that this accused did not belong to local Razakar Bahini; that the prosecution failed to present any document to substantiate this accused's membership in the local Razakar Bahini; that the reports published in two local newspapers of 2009 [Exhibits Ka and Kha] also show that he was not a Razakar. List of local Razakars would have been collected and adduced before the Tribunal if really this accused had nexus with the local Razakar Bahini.

48. The learned State defence counsel then made categorized argument in respect of the charges. The submission, in essence, is that the prosecution witnesses examined are not reliable and they have deposed being tutored and out of enmity and their testimony suffers from inherent improbability. However, argument laid in

relation to each charge may be well addressed while adjudicating the charges independently.

XIV. Rebuttal by the prosecution

49. Ms. Rezia Sultana, the learned prosecutor, on rebuttal, submitted that the event of rape as listed in charge no.03 happened in war time situation and not in normalcy ; that even a single witness's testimony if found credible may be relied upon in arriving at decision; that the defence failed to negate prosecution case even by examining defence witnesses; that observation of witnesses deposing on dock may vary to each other on a particular fact and in war time situation a witness might not have occasion to see all the phases of an event, and thus, evidence tendered by witnesses needs to be evaluated collectively and in integrated manner; that mere absence of any document or list does not make it untrue that the accused persons belonged to Razakar Bahini, particularly when it stands proved by oral testimony of locals that they were the members of local Razakar Bahini; and that any flaw if found in investigation does not affect the prosecution case.

50. The learned prosecutor by citing observation made by this Tribunal-1 in the case of The Chief Prosecutor Vs. Shamsuddin Ahmed and four others [ICT-BD Case No. 01 of 2015, Judgment on 03 May 2016, Paragraph-56] submitted that mere discrepancy does not render witness's testimony readily unreliable and relying

upon the observations made in paragraph nos. 200 - 338 of the same judgment, the learned prosecutor also submitted that mere denial of testimony by the defence on material particular does not exclude witness's testimony from consideration.

XV. Whether the accused persons can be prosecuted without prosecuting their accomplices

51. The learned defence counsels referring to the evidence on record and rule 36 of ROP, 2010 have raised a legal question that some Razakars and co-perpetrators, who are still alive, accompanied the accused persons at the crime sites in committing the crimes have not been brought to book by the prosecution as well as the investigation agency, and as such, initiation of the proceeding against the present accused persons on the basis of '**pick and choose**' policy is malafide one and it has vitiated the whole trial.

52. It is true that from the testimonies of some prosecution witnesses it is revealed that some armed Razakars and co-perpetrators accompanied the accused persons at the crime sites in committing the crimes. Excepting the present accused persons, none of their accomplices have been brought to justice, but that by itself does not make the horrendous episode of atrocities directing attack on the civilian population constituting the offences of crimes against humanity untrue or give any immunity to the present

accused persons. If the accused persons are found guilty and criminally liable beyond reasonable doubt for their culpable acts, inaction in prosecuting their accomplices cannot be the reason for holding the former innocent or relieved from liability. In this regard we may recall the provision as contained in section 4(1) of the Act of 1973 which states that when any crime as specified in section 3 of the said Act is committed by several persons each of such person is liable for that crime in the same manner as if it were done by him alone. Further, we have no hesitation to hold that rule 36 of ROP, 2010 is not mandatory but directory. Non compliance of the said rule *ipso-facto* does not vitiate the trial.

53. It may be mentioned here that we did not find any provision within the four corners of the Act of 1973 that all the perpetrators of an offence must be tried in one trial, failing which one of the perpetrators against whom if any proceeding is brought that would be vitiated. There is a basic principle of criminal jurisprudence that a man cannot be vexed twice for the same cause of action. But one of the perpetrators of an offence cannot be absolved *ipso facto* for non bringing the other perpetrators in the same trial with him. So, the submission made by the learned defence counsels in respect of this issue has no leg to stand. In this regard we find support from the case of the **Prosecutor vs. Brdjanin [Case No. IT-99-36-T,**

September 1, 2004, para -728] where the ICTY Trial Chamber observed –

“An individual can be prosecuted for complicity in genocide even when the perpetrator of genocide has not been tried or even identified.”

54. The ICTY Trial Chamber in the case of Prosecutor vs. Stakic [Case No. IT-97-24-T, July 31, 2003, para 533] also observed that –

“The trial Chamber is aware that an individual can be prosecuted for complicity even where the perpetrator has not been tried or even identified and that the perpetrator and accomplice need not know each other.”

55. However, the failure of the Investigation Agency and the prosecution in not bringing all the co-perpetrators who are still alive in one trial is no doubt frustrating, disappointing and undesirable. We are constrained to express our dissatisfaction on such unmindful investigation of the case. In this connection we would like to mention that as per sections 9 and 10 of the Act of 1973 the Tribunal is not empowered to initiate any proceeding or frame charge [s] against any person [s], against whom formal charge has not been submitted.

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

56. The accused persons who were allegedly the members of ‘auxiliary forces’ 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.

57. 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. 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.

58. 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.

59. We reiterate that section 23 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 rules 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.

60. 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.

61. 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 as under -

“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].**

62. 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, 2010]. We have already recorded our same view on this issue in different cases. 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]

63. 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]

64. The alleged events of atrocities were committed not at times of normalcy. The offences for which the accused persons have been charged occurred during the war of liberation of Bangladesh in 1971. Requirement of production of dead 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.

65. 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.'"

66. However, according to universally recognised jurisprudence and the provisions as contained in the ROP, 2010 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 and genocide 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.

67. 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.

68. 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 the context of its relevance and circumstances.

XVII. Razakar Bahini: It's Objective in 1971

69. 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.

70. Let us examine some citations from nationally and internationally reputed news reportings as well as citations from

books written by renowned writers to have a true picture about the role of Jamaat-e-Islami during the War of Liberation. In this regard some citations are quoted below:

“The Jamaat-e-Islami and specially its student wing, Islami Jamaat-e-Talaba (IJT) joined the military’s efforts in May 1971 to launch two para military counter insurgency units. The IJT provided a large number of recruits. The two special brigades of Islamist cadres were named Al-shams (the sun in Arabic) and Al-Badr (the moon). A separate Razakars Directorate was established. Two separate wings called Al-Badr and Al-shams were recognized. Well-educated and properly motivated students from the schools and Madrasas were put in Al-Badr wing, where they were trained to undertake specialized operations, where the remainders were grouped together under Al-shams, which was responsible for the protection of bridges, vital points and other areas. Bangladeshi scholars accused the Al-Badr and Al-shams militias of being fanatical. They allegedly acted as the Pakistan army’s death squads and “exterminated leading left wing professors, journalists, litterateurs and even doctors.”

[Source:- “Pakistan between Mosque And Military” -written by Hossain Haqqani, page 79 published in 2005, Washington D.C. USA].

71. The Jamaat-e-Islami, a religion based political party and brain child of controversial Islamist thinker Maulana Maududi was significantly pro-active in its mission to destroy the Bangalee nation in the name of safeguarding Pakistan in collaboration with the Pakistani occupation army. We deem it indispensable to get a scenario on the role and stand of the Jamaat-e-Islami in 1971, particularly when it established various militia Bahinis, namely

Peace Committee, Razakar, Al-Badar, Al-shams and Al-Mujaheed, etc. in association with Pakistani army.

72. The vital role of Jamaat-e-Islami in creating the para-Militia Bahinis is also reflected from the narrative of the book titled “**Sunset at Midday**” which is cited below:

“To face the situation, the Razakar Bahini consisting of pro-Pakistani elements was formed. Al-Badr Bahini was formed mainly with the workers of the student wing of Jamaat-e-Islami, named Islami Chhatra Sangha (I.C.S. now Islami Chhatra Shibir). The general public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami, etc were called Al-shams and the urdu speaking generally known as Biharis were called Al-Mujaheed.”

[Source:- ‘Sunset at Midday’,-written by Mohiuddin Chowdhury, a former leader of Peace Committee of Noakhali District, published in 1998, Karachi, Pakistan.]

73. It is pertinent to state that it is a fact of common knowledge by the people at large that the Pakistani invading force made attacks on Bangalee people on the very night of 25 March 1971 in the name of so called ‘**operation search light**’ and subsequent their further actions were assisted by anti-liberation people like accused-perpetrators. Anti-liberation forces started their atrocious activities from the very day when Pakistani military ruler secretly decided not to handover the power to the party which won majority seats in the general election held in 1970. Early atrocious activities of anti-liberation forces can be authenticated by the statements of some people which have been embodied in **Bangladesher Shadhinata**

Juddya Dalilpatra, Astom Khonda [volume-08] at page nos.301,126 and 90, and Dosom Khonda [volume-10] at page 435 respectively as under :

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74. Regarding numerous atrocious acts committed by Razakars in the territory of Bangladesh after 26 March,1971 a news report

was published on 20 June,1971 in the world famous news paper

"**The Sunday Times**' under the following caption-

" POGROM IN PAKISTAN

**Teachers, Writers, Journalists eliminated
Magistrates shot, Doctors disappear
Gestapo-like raids, rape, extortion."**

In the said report it was narrated to the effect:

".....A new element in the regime of terror is the Gestapostyle pick-up. Some of those wanted for questioning are arrested openly. Others are called to the army cantonment for interrogation. Most of them do not return. Those who do are often picked up again by secret agent known as RAZAKARS, a term used by the volunteers of the Nizam of Hyderabad who resisted the Indian takeover of the State in 1948 Some University teachers reported for duty on 1st June at the instigation of General Tikka Khan, the Martial Law Administrator, but some of them have since fallen into the hands of the RAZAKARS. The activities of RAZAKARS are known, if not overtly approved, by the military administration. Occasionally, they are a source of concern. ----- Organisations caring for the refugees who came into East Pakistan at the time of Partition and the Razakar backed 'Peace Committee' are publishing press notices inviting applications for "allotment" of shops and houses left by Bengalis....."
[Source: Bangladesher Sawdhinata Juddha Dalilpattra: Volume 8, Page 527].

75. 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:

"RugvqfZ Bmj vgx gny hxi i iiy_tK tkI chS@ mgwi K RvS@vK mg_ Kti | Zv`i mnuqZvi Rb` Ab`ib` agvE `j vbtq cUgZ MVb Kti kws@ Kvgu| cieZxmgfq mk`; ewnbx iuRvKvi I Avje`i MVb Kti Ges miKvix`KZx Av`vq Kti | hytK agny intmte cDvi Yv Pwj tq DM0agvE DbY`bv mxi i P0v Kti | Avi Gi Avoutj `mb` i mnuqZvq

*Pvj vq vbiePti bksm MYnZ`v, jly, bvix vbhvZb, AcniY I
PvU Av`vq| mefRI RmZi vefek eyRvxt`i nZ`v Kiv
nq|"*

[Source: *Muktijudhdhe Dhaka 1971*: edited by Mohit Ul Alam, Abu Md. Delowar Hossain, Bangladesh Asiatic Society , page 289]

76. Thus, the above materials have proved that the members of Razakar Bahini committed and conducted various atrocious acts like genocide, murder, abduction, torture and other inhumane acts as crimes against humanity all over the country to implement the common plan and design of Pakistani occupation army, as its auxiliary force.

XVIII. Whether the accused persons belonged to Razakar Bahini

77. Prosecution alleges that the accused persons had committed crimes as narrated in charges framed in exercise of their membership in Razakar Bahini formed in Khagaura and they had close affiliation with the Razakar camp at Khagaura bazaar and activities carried out by it. Prosecution also avers that two other brothers, namely Kalomdhor and Mostofa were the brothers of accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia and they were killed by the freedom-fighters and Mostofa was the commander of Razakar camp at Khagaura bazaar.

78. Defence does not dispute formation of Razakar Bahini in Khagaura and setting up its camp at the house of Sayed Kamrul Ahsan, a leader of local prominence belonging to pro-Pakistan

political party Nezam-e-Islami. Defence does not dispute too that two other brothers of accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia were potential and notorious members of Razakar Bahini formed in Khagaura and they were killed at the fag end of the war of liberation.

79. Defence however disputes that the accused persons did not belong to Razakar Bahini formed at Khagaura and were not associated with any of its activities in any manner. It seems to be negative assertion which need not be proved by adducing evidence. Burden lies upon the prosecution to prove the alleged status of the accused persons in 1971 during the war of liberation and only then we are to proceed examining how far the defence's claim is credibly probable.

80. To prove the fact of accused persons' membership in locally formed Razakar Bahini prosecution relied upon oral testimony of witnesses only. It could not present any kind of documentary evidence in respect of this issue. Indisputably the task of collecting documentary evidence to prove all the facts related to the events alleged, particularly more than long four decades after the atrocities committed was challenging indeed. Necessary documents, by this time, might have been destroyed for various reasons. In this regard we recall the observation of the Appellate Division of the Supreme

Court of Bangladesh **in the case of Allama Delwar Hossain**

Sayedee which is as below:

"In most cases, the perpetrators destroy and/or disappear the legal evidence of their atrocious acts. Normally the investigation, the prosecution and the adjudication of those crimes often take place years or even decades after their actual commission. In Bangladesh this has caused because of fragile political environment and the apathy of the succeeding government. In case of Bangladesh the process has started after 40 years."

[Criminal Appeal Nos. 39-40 of 2013, Judgment 17 September 2014, Page- 43]

81. Therefore, mere absence of any documentary evidence cannot readily forces to the inference that the accused persons did not belong to locally formed Razakar Bahini. We are to see what the witnesses have testified in this regard. Because, the witnesses examined in the Tribunal are the locals of Khagaura and naturally they were in position of being aware about the stance and status of the accused persons in 1971. And it would not be inappropriate to determine this issue even solely on oral testimony presented by the prosecution.

82. We reiterate that the key objective of forming Razakar force was to collaborate with the Pakistani occupation army. In carrying out which activity or executing which plan and policy it [Razakar Bahini] was supposed to collaborate with the Pakistani armed

force? It was formed not for any holy purpose. Its objective was to collaborate with the Pakistani occupation army to wipe out the pro-liberation Bengali civilians.

83. It is a fact of common knowledge now that Razakar Bahini was an armed *para militia* force which was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army and it acted under the government management. What was the objective of forming such *para militia* force in war time situation? Of course, intention was not to safeguard lives and properties of civilians. Rather, it is undisputed that the Razakar force had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had carried out recurrent atrocities committed in a systematic manner against the unarmed Bengali civilians throughout the territory of Bangladesh in 1971. Pro-liberation civilians, freedom-fighters, intellectual group, Hindu community were their key targets.

84. Razakar force was thus formed with intent to provide support and assistance to the Pakistani occupation army and later on it obtained government’s recognition as its *para militia* forces. As members of an auxiliary force, Razakars were provided with training and allocated fire arms. Razakars, an auxiliary force was thus formed to collaborate with the Pakistani occupation army in annihilating the Bengali nation. Pro-Pakistan political parties

including Jamaat-e- Islami, Muslim League, Nezam-e-Islami etc. had played key role in forming this auxiliary force and they symbolized the pro-liberation Bengali people as their '*enemies*' and '*miscreants*'. It is now settled history.

85. In the case in hand, it is further seen that all the events alleged constituting the offences narrated in all the four charges framed happened in the locality of Khagaura under Police Station Baniachang of the then Habiganj Sub-Division and two of four events of attacks alleged happened only by the group of Razakar Bahini formed at Khagaura. The two other events of attacks as narrated in charge nos.02 and 03 alleged carried out by the Pakistani occupation army men accompanied by the Razakars including the accused persons.

86. It appears that defence claims that the Razakars of Khagaura camp had carried out the alleged criminal activities and the accused persons had no nexus with it as they did not belong to this locally formed Razakar Bahini. Presumably, in this way, defence intended to negate the accused persons' involvement with the criminal acts alleged. Complicity and involvement of the accused persons with the crimes alleged may be well adjudicated later on, and not at this segment, on appraisal of evidence presented.

87. In view of above, we may reasonably arrive at finding that Razakar Bahini formed at Khagaura was actively engaged in

carrying out criminal acts alleged. Now let us see what the prosecution witnesses testified in respect of the accused persons' belonging to Razakar Bahini formed at Khagaura.

88. P.W.01 Mostor Ali was 17 years old in 1971. He stated that accused Mohibur Rahman alias Boro Mia along with his siblings supported Sayed Kamrul Ahsan, a candidate from Nizam-e-Islami, a pro-Pakistan political party in 1970's national election who could not succeed. P.W.01 also stated that about one month after arrival of Pakistani occupation army in Habiganj Sayed Kamrul Ahsan was made the leader of Habiganj Sub-Division Peace Committee and he then formed Khagaura Peace Committee making accused Mohibur Rahman alias Boro Mia and his elder brother Kalamdhar Mia its leaders.

89. The above version remained unimpeached and, as such, it proves accused Mohibur Rahman alias Boro Mia's pro-Pakistan stance which negates defence claim that he sided with the war of liberation. Besides, this defence claim does not carry any amount of truth particularly when it stands admitted that his brother Kalamdhar Mia was first a potential man in the local Peace Committee and then member of Razakar Bahini formed later on at Khagaura.

90. Evidence of P.W.01 further demonstrates that after setting up army camp at the then C.O [Circle Officer] office at Baniachang

Sayed Kamrul Ahsan [local leader of Nezam-e-Islami party] brought accused Mohibur Rahman alias Boro Mia, his brothers Mujibur Rahman alias Angur Mia and Kalamdhar, and many others at his house and got them engaged in the Razakar camp set up there and Mostofa, the younger brother of accused Mohibur Rahman alias Boro Mia was made commander of the said Razakar camp.

91. Defence does not dispute that Mostofa, the younger brother of accused Mohibur Rahman alias Boro Mia was the commander of Khagaura Razakar camp. It also lends assurance as to membership of accused Mohibur Rahman alias Boro Mia and his another brother accused Mujibur Rahman alias Angur Mia in the said Razakar Bahini.

92. The above version relating to engagement of the accused persons with the Khagaura Razakar camp reasonably forces to conclude their membership in locally formed Razakar Bahini. Besides, it remained unshaken in cross-examination. Rather, it transpires to have been affirmed too as P.W.01 in reply to defence question put to him stated that there were 20/30 Razakars in the Razakar camp and amongst those Razakars accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak and Abdul Hamid, Monu Mia, Israil, Amrut and others were of their [P.W.01] own village.

93. P.W.02 Kamrunnesa, the daughter of victim Akal Ali[as listed in charge no.01], in cross-examination stated that Kamrul Ahsan's house where Razakar camp was set up could be seen from their house and she knew Razakars Kalamdhar and Mostofa [brothers of accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia] and of them Razakar Kalamdhar was killed two months before the killing of her[P.W.02] father and Razakar Mostofa was killed at the end of the war of liberation.

94. Once again this version of P.W.02 provides unerring indication that accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia, the brothers of those two Razakars did not keep them distanced from siding with the policy and plan of Pakistani occupation army and they as well got themselves engaged in the Razakar camp set up at Khagaura bazaar. Their [P.W.02] house was nearer to the Razakar camp, as stated by P.W.02, and as such, she was likely to know who the Razakars were and who were associated with the said Razakar camp.

95. In addition to above two prosecution witnesses, the other P.W.s, the locals of Khagaura testified seeing the accused persons allegedly accompanying the group of Razakars taking away Akal Ali and Anfar Ali [victims of the event narrated in charge nos. 01 and 04 respectively] to Razakar camp at Khagaura bazaar on

forcible capture. However, their testimony tendered in this regard deserves consideration while adjudicating the respective charges. Now, depending on the version of P.W.01 and P.W.02 as discussed above we arrive at conclusion that the accused persons belonged to Razakar Bahini formed at Khagaura and were significantly associated with the Razakar camp set up at the house of Sayed Kamrul Ahsan nearer to Khagaura bazaar.

96. Defence case, to negate prosecution's contention, that accused Mohibur Rahman alias Boro Mia and Abdur Razzak used to provide assistance to freedom-fighters and shelter to Hindu people, that accused Mujibur Rahman alias Angur Mia was minor and used to stay elsewhere in 1971 may be well determined while adjudicating the charge nos. 01, 02 and 03 on evaluation of evidence presented by the defence as the same involve the merit of prosecution case.

97. At this stage, it stands well proved, in view of discussion made above, that the accused persons were the members of Razakar Bahini formed at Khagaura bazaar under the guidance of Sayed Kamrul Ahsan, a leader of pro-Pakistan political party having local prominence who actively endorsed in setting up Razakar camp at his house, adjacent to Khagaura bazaar and the accused persons were affiliated with the said Razakar camp.

XIX. Adjudication of charges

Adjudication of charge no. 01

[Killing of 02(two) freedom-fighters of village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division]

98. Summary charge: That on 11 November 1971 at about 4.00/4.30 P.M. accused Mohibur Rahman alias Boro Mia, his brother Mujibur Rahman alias Angur Mia and Md. Abdur Razzak being accompanied by a group of armed Razakars raided the house of freedom-fighter Akal Ali at village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division, and sensing it another freedom-fighter Rajab Ali, who had been staying there, when attempted to flee away, accused Mohibur Rahman alias Boro Mia shot him to death with a rifle in his hand. Afterwards, on accused Mohibur Rahman's order, his brother accused Mujibur Rahman alias Angur Mia, accused Md. Abdur Razzak and Abdul Hamid [now dead] entered inside the dwelling hut of said Akal Ali and dragged him [Akal Ali] out and taken him away forcibly to Razakar Camp at Khagaura village where he was subjected to inhumane torture by all the accused persons, scraping the appeal from Vingraj, the wife of Akal Ali, to spare his life. During night all the accused persons and their accomplice other Razakars brought Akal Ali to an unknown place where he was killed brutally and his dead body could not be traced out even. On the following day the dead body of Rajab Ali was buried.

99. Thus, all the three accused persons have been charged for participating, facilitating, abetting and for complicity to the

commission of the offence of 'murder' as crime against humanity as a part of systematic attack directed against non-combatant civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

100. To prove charge no. 01, the prosecution has examined as many as 08(eight) witnesses [P.Ws. 01, 02, 03, 04, 05, 06, 07 and 10]. Before we enter the task of evaluation of evidence adduced, let us first see what the witnesses examined have narrated in the Tribunal.

101. P.W.01 Mostor Ali deposed that in 1971, during the war of liberation his age was about 17 years. In the national election held in 1970 there were two candidates in their Khagaura village, one was Awami League candidate M.A. Rab and another one was Nezam-e-Islami candidate Sayed Kamrul Ahsan. He further deposed that most of their villagers including his elder brother Akal Ali supported the Awami League candidate. Accused Mohibur Rahman alias Boro Mia along with his siblings supported the Nezam-e-Islami candidate. In that election Nezam-e-Islami candidate Sayed Kamrul Ahsan was defeated by huge votes. Since 25 March 1971 at night Pakistani army started mass killing in

Bangladesh and at that time Nezam-e-Islami candidate Sayed Kamrul Ahsan had been staying at Habiganj. After about one month Pakistani army came to Habiganj and made Sayed Kamrul Ahsan the leader of the then Habiganj Sub-Division Peace Committee. Thereafter, Sayed Kamrul Ahsan made accused Mohibur Rahman alias Boro Mia and his elder brother Kalamdhar Mia the leaders of Khagaura Union Peace Committee. Then Pakistani army set up army camp at the then C.O [Circle Officer] office under Baniachang Police Station. Thereafter, Sayed Kamrul Ahsan having brought accused Mohibur Rahman alias Boro Mia and his brother accused Mujibur Rahman alias Angur Mia, Kalamdhar Mia and many others in his house set up Razakar camp there [in the house of Sayed Kamrul Ahsan]. Mostofa, younger brother of accused Mohibur Rahman alias Boro Mia was the commander of that Razakar camp. After start of the war of liberation in 1971, at one stage his [P.W. 01] elder brother Akal Ali along with their neighbour Rajab Ali went to India for participating in the war of liberation.

102. He [P.W. 01] further stated that on 11 November 1971 in the early morning his elder brother freedom-fighter Akal Ali along with freedom-fighter Rajab Ali having come back to their house were staying in the room of Akal Ali where Rajab Ali's wife and children were present. The Razakars having been aware of the staying of

Akal Ali and Rajab Ali in the house of Akal Ali by their source, on that day at about 4.00/4.30 P.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Hamid along with some other Razakars raided their house. At that time freedom-fighter Rajab Ali having come out of the room tried to flee away and then accused Mohibur Rahman alias Boro Mia shot him to death with a rifle in his hand and ordered other Razakars accompanying him to bring out his elder brother Akal Ali from inside his room. Thereafter, the Razakars including accused Mujibur Rahman alias Angur Mia and Abdur Razzak entered into the room of his elder brother Akal Ali. He [P.W.01] saw that incident from inside his room. Within about 3 / 4 minutes said Razakars having tied up his eyes and hands dragged Akal Ali out of his room and took him away to the Razakar camp, scraping the appeal from his first wife Vingraj Bibi, second wife Police Bibi and his minor daughter Kamrunnesa.

103. He [P.W. 01] also deposed that those Razakars having taken his brother Akal Ali to the Razakar camp tortured him inhumanely and from their house they heard the scream when the Razakars were torturing him. The distance between their house and the said Razakar camp was about 200/300 yards. On that day at night the Razakars having taken away his brother Akal Ali to an unknown place killed him and his dead body could not be traced out even.

104. P.W. 01 also testified that after two days of the said occurrence he met his neighbour Taraj Ullah who told him that on which day the Razakars having apprehended his brother Akal Ali took him away to Razakar camp, on that day at night he [Taraj Ullah] had seen that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars had been taking away Akal Ali towards north through the front side of his house. On the following day he and his villager Kazi Sadiqur Rahman along with some others buried the dead body of Rajab Ali. He identified all the three accused persons on the dock.

105. In cross-examination he [P.W. 01] stated that his nickname is Mosrot Ali. They are four brothers and two sisters. His father married three women. He is the son of his younger mother . Sabuz Ali and Sunduri Bibi are his own brother and sister. Akal Ali was the only son of his elder mother. Akal Ali married two women, first wife was Vingraj Bibi who is now dead, and the second wife is Police Bibi. Before she got married with Akal Ali, Police Bibi got married with another man and a child was born in that wedlock.

106. He [P.W. 01] further stated in cross-examination that Sayed Kamrul Ahsan's house is situated towards north from his house and there is no other house in between these two houses. There were 20/30 Razakars in the Razakar camp and among those Razakars,

accused Mohibur Rahman alias Boro Mia, accused Mujibur Rahman alias Angur Mia, accused Abdur Razzak, Abdul Hamid, Monu Mia, Israil, Amrut and others were of their own village. His brother Akal Ali went for participating in the liberation war after about one and half months of the liberation war ensued and since then he did not come back to their house before the date of the incident he narrated. During the war of liberation in 1971 accused Mujibur Rahman alias Angur Mia was in the Razakar camp of their village. He denied the defence suggestion that at that time said accused was in his maternal uncle's house at Topkhana village under Baniachang Police Station. He also stated that he saw the incident from inside his room when the Razakars shot Rajab Ali to death and took away his brother Akal Ali from their house after apprehending him. He denied the defence suggestions that the accused persons were not Razakars and that they were not involved with the incident which he stated in his deposition or that freedom-fighter Rajab Ali was shot to death by the Razakars at Khagaura bazar when he was selling rice. He also denied the defence suggestion that he has deposed falsely.

107. Kamrunnesa as P.W. 02 stated that during the war of liberation in 1971 her age was about 09 years. After about one and half months of the start of the liberation war in 1971, her father Akal Ali along with their neighbour Rajab Ali went out for

participating in the liberation war. Thereafter, on 11 November 1971 in the very early morning her father Akal Ali along with Rajab Ali came back to their house. On that day at about 4.00/4.30 P.M. a group of 8/10 Razakars having come from the Razakar camp set up in the house of Kamrul Ahsan raided their house, and at that time Rajab Ali having come out of their room tried to flee away and then accused Mohibur Rahman alias Boro Mia shot him at his belly with a rifle in his hand and Rajab Ali sustaining bullet injury died on the spot. Then accused Mohibur Rahman alias Boro Mia asked his accomplice Razakars accused Mujibur Rahman alias Angur Mia, Md. Abdur Razzak, Abdul Hamid and other 2/3 Razakars so that her [[P.W. 02] father Akal Ali could not flee away from his room. Thereafter, those Razakars having tied up her father's eyes and hands dragged him out from inside his room . After having brought her father out of his room she, her mother Vingraj Bibi and her step mother Police Bibi crying and touching legs requested accused Mohibur Rahman alias Boro Mia to release her father, but said accused, having paid no heed to their request, along with his accomplice Razakars took away her father Akal Ali to the Razakar camp set up in the house of Kamrul Ahsan.

108. She [P.W. 02] further stated that the Razakars after having taken away her father Akal Ali to the Razakar camp tortured him there inhumanely and then they heard the scream of her father. On

that day at night accused Mohibur Rahman alias Boro Mia having killed her father carried his dead body off and kept concealed it (at this stage this witness was weeping). She also stated that on the next day in the morning the dead body of Rajab Ali was buried by his brother, nephews, her two uncles and other relatives and villagers. She identified all the three accused persons on the dock.

109. In course of cross-examination P.W. 02 stated that on 11 November 1971 in the early morning when her father Akal Ali along with Rajab Ali came back to their house, then she was staying in their house. At the time of incident there were two rooms in their house, in the west bhiti room her grand-father and in the east bhiti room they and her father were staying . Rajab Ali's wife Nasira Bibi is now dead. At the time of incident Rajab Ali had one younger son Aunu aged about 5/6 years and one daughter. On the day of incident she was in their house whole day. Kamrul Ahsan's house, where Razakar camp was set up, could be seen from their house. She knew Kalamdhar and Mostofa and both of them were Razakars. About two months before the killing of her father, freedom-fighters killed Razakar Kalamdhar and at the end of liberation war killed Razakar Mostofa.

110. She [P.W.02] further stated that on the day of incident when the accused persons took away her father after apprehending him, then her uncle Mostor Ali was present in her grand-father's room.

On the day of incident the wife of Rajab Ali along with her children came to their house. She denied the defence suggestions that the accused persons were not Razakars or that they were not involved with the incident which she narrated in her examination-in-chief. She also denied the defence suggestion that she deposed falsely.

111. P.W. 03 Taraj Ullah deposed that he is about 65 years old and during the liberation war of 1971 his age was about 20 years and he is illiterate. On 11 November 1971 at about 4.00 P.M. he went to Khagaura bazaar for shopping . After a while of his going to bazaar, he heard gunshot coming from the western side of the bazaar. And then the people assembled at the bazaar started running hither and thither. Then he went through the road towards the Razakar camp situated at Sayed Kamrul Ahsan's house. Reaching near the house of Kamrul Ahsan, he could see from the bank of pond situated at the western side of his [Sayed Kamrul Ahsan] house that accused Razakar Mohibur Rahman alias Boro Mia, accused Mujibur Rahman alias Angur Mia, accused Md. Abdur Razzak, Abdul Hamid along with some other Razakars were taking away blind folded and cramped handed Akal Ali to the Razakar camp. At that time scream was heard coming from the house of Akal Ali. Then he went to Akal Ali's house and saw the deady of Rajab Ali lying there. He further deposed that then the wife of Rajab Ali informed him that accused Mohibur Rahman alias Boro

Mia having shot her husband Rajab Ali to death took away Akal Ali after tying up his eyes and hands. Then he went to his house.

112. He [P.W. 03] further stated that on the same day [11 November 1971] at about 9.00 P.M. going out of his house he could see by torchlight that 4/5 persons were coming towards his house. He could also see that accused Mohibur Rahman alias Boro Mia, accused Mujibur Rahman alias Angur Mia, accused Abdur Razzak, Abdul Hamid along with some other Razakars were taking away Akal Ali towards north to village Kumursana by tying up his eyes and hands.

113. P.W. 03 also testified that on the next day [12 November 1971] at about 10.00 A.M. he could know from the people that the three accused persons along with Abdul Hamid and some other Razakars having killed Akal Ali carried off and kept concealed his dead body. After two days, he went to Khagaura bazaar, and while he was staying there he saw Mostor Ali, brother of Akal Ali, at about 4.30 P.M., and then he told him that he [Mostor Ali] had seen accused Mohibur Rahman alias Boro Mia, accused Mujibur Rahman alias Angur Mia, accused Abdur Razzak along with Abdul Hamid and some other Razakars taking away Akal Ali in front of his house by tying up his eyes and hands on the date of incident. He identified all the three accused persons on the dock.

114. In cross-examination P.W. 03 stated that the distance between Khagaura bazaar and the place, where he saw the accused persons and Razakars taking away Akal Ali, was about 150/200 feet. On 11 November 1971, there were many people in Khagaura bazaar, but he could not say the total number of those people. The distance between the house of Akal Ali and the place wherefrom he heard scream coming from Akal Ali's house was about 200 feet. He further stated that having gone to Akal Ali's house he saw Mostor Ali, wife of Rajab Ali, two wives and parents of Akal Ali and many others there. The house of accused Abdur Razzak is situated at Hossainpur Mouza of village Khagaura. In 1971, there were 25/30 Razakars in Khagaura Union, and of them, besides the three accused person, there were Amrut, Dudha Mia and Harun, but he could not remember the names of others. In 1971, he was in his locality.

115. He [P.W. 03] denied the suggestion that accused Abdur Razzak was never a Razakar or that this accused is quite innocent. The distance between the house of Akal Ali and the house of Sayed Kamrul Ahsan, where Razakar camp was set up, was about 200 feet, and there was no other house between those two houses. The distance between Khagaura bazaar and the Razakar camp was about 100/150 feet. He denied the suggestion that Rajab Ali was killed at

Khagaura bazaar by the gun-shot of Razakars. He also denied the suggestion that he deposed falsely against the accused persons.

116. Sobuj Ali as P.W. 04 testified that during the war of liberation in 1971 his age was about 11 years and at that time he was a student of Class-III in Eralia Khagaura Primary School. After about one and half months of start of the liberation war in 1971, his elder brother Akal Ali and their neighbour Rajab Ali left their homes in order to participate in the liberation war. In the early morning of 11 November 1971, his brother Akal Ali and Rajab Ali came back to their house. Then the first wife Vingraj Bibi and second wife Police Bibi of his brother Akal Ali, daughter Kamrunnesa, said Rajab Ali and his wife entered the room of his brother Akal Ali, and were staying there secretly whole day. Having got the secret information regarding the staying of Akal Ali and Rajab Ali in the room of Akal Ali, Razakars surrounded that room at about 4.00 P.M. on that day. At that time he [P.W. 04] was staying in the western room of their house. Accused Mohibur Rahman alias Boro Mia, accused Abdur Razzak, Abdul Hamid, Molu and many other Razakars were among those Razakars. At that time accused Mohibur Rahman alias Boro Mia shot Rajab Ali to death at the spot with the rifle in his hand while he [Rajab Ali] was trying to flee away through the western door of Akal Alis' room.

117. P.W. 04 further stated that after killing Rajab Ali, accused

Mohibur Rahman alias Boro Mia, accused Abdur Razzak, Abdul Hamid and Molu entered into the room of Akal Ali. Just after 2/3 minutes, he could see that those Razakars having dragged Akal Ali brought him out to the courtyard of his house by tying up his eyes and hands. Then the first wife Vingraj Bibi, second wife Police Bibi and daughter Kamrunnesa of Akal Ali requested accused Mohibur Rahman alias Boro Mia holding his legs to release Akal Ali, but he removed them by kicking, and asked accused Abdur Razzak, Abdul Hamid and Molu Mia to take Akal Ali away to the Razakar camp quickly.

118. He [P.W. 04] further testified that his elder brother Akal Ali was tortured brutally in the Razakar camp after he having been taken there. At that time they heard the scream of Akal Ali. Having heard the scream, Akal Ali's said two wives and daughter tried to go to the Razakar camp, but Razakars prevented them. Then they returned home. Next day in the morning they heard from the people that in the last night [on the day of apprehending Akal Ali from his house by the Razakars] accused Mohibur Rahman alias Boro Mia, accused Abdur Razzak, Abdul Hamid, Molu Mia and other Razakars having killed his elder brother Akal Ali concealed his dead body. On that day [next day of the incident] they buried the dead body of Rajab Ali in their family graveyard. He identified

accused Mohibur Rahman alias Boro Mia and Md. Abdur Razzak on the dock of the Tribunal.

119. In course of cross-examination P.W. 04 stated that due to fear he could not tell about the incident to anyone at the time of killing Rajab Ali and apprehension of his elder brother Akal Ali. At that time the age of Kamrunnesa, daughter of Akal Ali, was 9[nine] years. The room wherein he was staying at the time of the incident was his father's room. The distance between the Razakar camp and their own house was about 200/300 feet and there was no watercourse between them in 1971.

120. He [P.W. 04] further stated that the distance between the Razakar camp and Khagaura bazaar was about 200 feet. He denied the suggestions that he did not witness any incident from his room or that accused Md. Abdur Razzak was not a Razakar or that said accused person cooperated the freedom-fighters and he was in support of liberation. He also denied the suggestions that the accused persons are innocent and that he deposed falsely against them.

121. P.W. 05 Md. Khasru Miah stated that his age is about 65 years and he studied upto ClassVIII. On 26 October 1971, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with 15/16 Pakistani army men and some other Razakars committed large scale atrocities in their village

Khagaura, P.W.05 added. After about 15 days of the said incident, freedom-fighters, namely Akal Ali and Rajab Ali came to Akal Ali's home. On that day at about 4.00/4.30 P.M. he heard a gunshot. Later on he came to know that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with some other Razakars had shot freedom-fighter Rajab Ali to death at the house of freedom-fighter Akal Ali and they had also taken away Akal Ali to the Razakar camp after having captured him from his house. Till now, no trace of Akal Ali has been found after he was abducted. He identified all the three accused persons on the dock of the Tribunal.

122. In cross-examination P.W. 05 stated that during the liberation war in 1971 his age was about 20/22 years. The father's name of accused Mohibur Rahman alias Boro Mia is Haji Daras Uddin and he knew his two sons, namely Kalamdhar and Mostofa and he saw them who were very turbulent Razakars, and as such, they were killed by freedom-fighters. He denied the suggestion that accused Mohibur Rahman alias Boro Mia was never a Razakar like his brothers. He further denied the suggestions that during the war of liberation he was minor and he deposed falsely against the accused persons.

123. Md. Shafiq Ali as P.W. 06 deposed that his age is about 61 years and he studied upto Class V. He stated that on 26 October

1971, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with 10/15 Pakistani army men and some other Razakars committed large scale atrocities in their Khagaura village. He further deposed that after about 15 days of the said incident, freedom-fighters, namely Akal Ali and Rajab Ali came to Akal Ali's house. On that day at about 3.30/4.00 P.M., while he was staying in Khagaura bazaar he could see accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with 10/12 Razakars going towards west from the Razakar camp. After about 15/20 minutes he heard a gun-shot. After about 20/30 minutes of hearing gun-shot, he saw accused Mujibur Rahman alias Angur Mia pulling away freedom-fighter blindfolded Akal Ali towards the Razakar camp, and accused Mohibur Rahman alias Boro Mia aimed his rifle at the back side of Akal Ali. No trace of freedom-fighter Akal Ali was found after he was taken away to the Razakar camp. At that time, while he was staying at the bazaar, he asked some passersby, who were passing through the road next to the bazaar, about the gun-shot he heard just before, and then they informed him that accused Mohibur Rahman alias Boro Mia had killed freedom-fighter Rajab Ali by gun-shot. He identified all the three accused persons on the dock of the Tribunal.

124. In cross-examination P.W. 06 stated that in 1971 his age was about 16/17 years. He denied the suggestion that accused Md. Abdur Razzak along with his family provided shelter to Hindu people and assistance to the freedom-fighters during the war of liberation in 1971. He further denied the suggestions that during the war of liberation in 1971, accused Mujibur Rahman alias Angur Mia stayed at the house of his maternal uncle named Badsha Mia and at that time said accused person was minor. He also denied the suggestion that he deposed falsely against the accused persons.

125. Md. Allad Miah as P.W. 07 testified that his age is about 70 years and during the war of liberation in 1971 his age was about 25/26 years. He stated that on 26 October 1971, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with some other Razakars and 15/16 Pakistani army men committed large scale atrocities in their village Khagaura.

126. He [P.W.07] further testified that after about 15 days of the said incident, at about 4.00 P.M. he went to Khagaura bazaar and heard a gun-shot while he was staying in the bazaar. After sometime, he could see accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak and Abdul Hamid along with some other Razakars taking away blindfolded Akal Ali towards the Razakar camp. Then he went to Akal Ali's house and saw the dead body of Rajab Ali there sustaining bullet

injury in the belly lying in front of Akal Ali's room. At that time he came to know from Akal Ali's brother Mostor Ali and Akal Ali's wives, namely Vingraj Bibi and Police Bibi, who were present there, that accused Mohibur Rahman alias Boro Mia had shot Rajab Ali to death. He further testified that no trace of Akal Ali has been found till today after he was taken away to Razakar camp. He identified all the three accused persons on the dock of the Tribunal.

127. In course of cross-examination P.W. 07 stated that he was sitting in a shop situated at the eastern side of Khagaura bazaar wherefrom he heard gun-shot. At that time there were 15/16 shops in that bazaar. The Razakar camp was situated on the western bank of the pond which was 50 yards away towards north from Khagaura bazaar. He further stated that Akal Ali's house was situated 100 yards away towards west from the Razakar camp. He knew Rajab Ali and his family members since before the incident. He [P.W. 07] denied the suggestion that freedom-fighter Rajab Ali was killed by indiscriminate gun-shots of Razakars when he was selling rice in the Khagaura bazaar. He further denied the suggestions that during the war of liberation 1971 accused Mujibur Rahman alias Angur Mia was minor and at that time he used to stay at Baniachang in the house of his maternal uncle Badsha Mia, and that many Hindu families took shelter in the house of that accused person, and that accused Md. Abdur Razzak worked in favour of the liberation war.

He also denied the suggestion that he deposed falsely against the accused persons.

128. P.W. 10 Hazi Mohammad Abdul Mosabber stated that his age is about 65 years and during the war of liberation, 1971 his age was about 21 years. He studied upto Class V in the Chandanpur High School. During the war of liberation in 1971, he had a tiny shop, and at that time he used to live at his village home. On 26 October 1971, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak along with some other Razakars and about 10/12 Pakistani army men having attacked their village Khagaura Eralia committed large scale atrocities there.

129. He [P.W. 10] further stated that on 11 November 1971 it was bazaar day of Khagaura bazaar. On that day at about 4.00/4.30 P.M. he went to that bazaar and opened his shop. Then he heard a gunshot. After about 10/15 minutes he could see that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars having tied up freedom-fighter Akal Ali took away him to the Razakar camp, set up at the house of Kamrul Ahsan, near the Khagaura bazaar. Then he [P.W. 10] went to Akal Ali's house keeping his one younger brother in his shop, and reaching there he found bullet -wounded bloody dead of Rajab Ali lying on the ground in front of Akal Ali's room. Then Akal Ali's wife Vingraj Bibi, Sobuj Ali, Mostor Ali and

some others told them that accused Mohibur Rahman alias Boro Mia had shot Rajab Ali to death, and accused Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars having captured Akal Ali took away him to Razakar camp. Thereafter, the accused persons and other Razakars having taken away Akal Ali to an unknown place killed him and concealed his dead body, and till today his dead body could not be traced. On the next day they buried the dead body of Rajab Ali. He identified all the three accused persons on the dock of the Tribunal.

130. In course of cross-examination P.W.10 stated that in 1971 there were a pond of the mosque, Habiganj road, play ground and a pond at the west, south, east and northern side respectively of Khagaura bazaar. At that time Khagaura bazaar was not so big. The house of Akal Ali was 300 feet far towards west from Khagaura bazaar. In 1971 there were three rooms in Akal Ali's house and at that time besides Akal Ali's wife and children, his father and uncles also used to live in that house. Akal Ali and his brothers and sisters were five in number including his step brother. Akal Ali was the only child of his own mother. His father's name was Sayed Ali. He further stated that when he went to Akal Ali's house, then many others were also present there in addition to three persons whose names he mentioned earlier, but he could not say their names.

131. He [P.W. 10] denied the suggestion that during the war of liberation accused Mohibur Rahman alias Boro Mia provided shelter and assistance to Hindu community people. He also denied the suggestions that he deposed falsely against the accused persons and he did not hear or know the alleged incident of 11 November 1971.

Finding with Reasoning on Evaluation of Evidence

132. Three accused persons, namely Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md.Abdur Razzak have been indicted for the offence of killing two non-combatant freedom-fighters Rajab Ali and Akal Ali of village Khagaura under Police Station Baniachang of the then Habiganj Sub-division. The accused persons being accompanied by a group of Razakars by launching attack at Akal Ali's house committed the offence allegedly on 11 November 1971 at about 04:00/04:30 P.M. In all 08[eight] witnesses have been examined by the prosecution to prove this charge.

133. The learned prosecutor Mr. Sultan Mahmud submitted that in all 08 witnesses have been examined in support of this charge and of those witnesses some are relatives of the victims who naturally saw the event of killing Rajab Ali and taking away Akal Ali on forcible capture. Some of the P.W.s testified facts relevant to the attack that resulted in the killing of the victims, the freedom-

fighters. The accused persons and their cohort Razakars targeted them as they were freedom-fighters. The act of abduction of Akal Ali was chained to his confinement in Razakar camp and killing. Active participation of the accused persons at the first phase of attack is sufficient to render them liable even for the killing of Akal Ali.

134. The learned prosecutor further submitted that defence could not refute the consistent testimony of the P.W.s. Defence does not dispute the fact of killing Rajab Ali and Akal Ali. It simply however claims that the event happened in some other manner and the accused persons were not engaged in carrying out it. But the defence failed to prove its case that it happened in some other manner, even by examining defence witnesses. All the 08 prosecution witnesses examined are quite reliable and competent and there has been no reason to disbelieve them.

135. Finally, it has been submitted that accused Mohibur Rahman alias Boro Mia directly participated in committing the offence of killing Rajab Ali while the two other accused person substantially facilitated, contributed and abetted the principal in accomplishing the crime. In respect of killing Akal Ali, the upshot of his abduction all the three accused persons were participants as they were actively took part in taking away Akal Ali to Razakar camp on forcible capture.

136. On contrary, Mr. Golam Kibria, the learned counsel defending the accused Mohibur Rahman alias Boro Mia submitted that defence does not dispute the killing of Rajab Ali and abduction of Akal Ali—but the event happened in other manner by the group of Razakars as has been testified by the defence witnesses and this accused was not with the group of attackers. It has been further submitted that the P.W.s examined in support of this charge are not truthful and credible as they claim to have witnessed the other events as well as narrated in other charges. Complicity of this accused with the act of killing Rajab Ali has been negated by D.W.02 Md. Harun Mia who happens to be the brother's son of victim Rajab Ali.

137. Mr. M. Masud Rana, the learned State defence counsel defending the accused Md. Abdur Razzak submitted that the witnesses examined by the prosecution in support of this charge are tutored and biased; that many of those witnesses were tender aged in 1971, and as such, naturally are not capable to recollect what happened long more than four decades back; that their testimony suffers from improbability; that they out of conflict and animosity deposed against this accused; that in 1971 this accused was minor and did not belong to Razakar Bahini; that the prosecution witnesses testified even in respect of other events narrated in other charges as well, in addition to this charge, which is improbable.

138. Endorsing the argument advanced by the learned counsels of the above mentioned two accused persons the learned counsel Mr. Md. Parvej Hossain defending accused Mujibur Rahman alias Angur Mia argued that the accused Mujibur Rahman alias Angur Mia was a minor boy in 1971, and as such, it is quite unbelievable that he belonged to Razakar Bahini and he had complicity with the event alleged in any manner.

139. The entire event under adjudication involved the following phases as perceived from the indictment:

- (i) besieging the house of Akal Ali in the afternoon on 11 November 1971,
- (ii) gunning down Rajab Ali to death when he attempted to escape, sensing the attack,
- (iii) taking away Akal Ali to the Razakar camp at Khagaura bazaar on forcible capture from his house,
- (iv) causing torture to Akal Ali in captivity at the Razakar camp, and
- (v) killing Akal Ali by taking him to unknown place in the night.

140. Prosecution examined two younger brothers of victim Akal Ali as P.W.01 and P.W.04 and daughter of victim Akal Ali as P.W.02. They claim to have observed the first phase of the attack that resulted in killing Rajab Ali and taking away Akal Ali on forcible capture to Razakar camp. P.W.03, P.W.06, P.W.07 and P.W.10 are the locals and at the relevant time they had been at Khagaura bazaar and thus had occasion of seeing the act of taking away Akal Ali to Razakar camp, as claimed by them. No direct evidence has been tendered in relation to accomplishment of the act

of killing Akal Ali. However, this phase of attack rests on relevant facts and circumstantial evidence, prosecution contends. Prosecution requires proving the fact of attack, killing Rajab Ali at Akal Ali's house, taking away Akal Ali to Razakar camp, afterwards killing Akal Ali and complicity and participation of the accused persons with the commission of the crimes alleged. Now let us evaluate the evidence presented by the prosecution.

141. Before narrating the event P.W.01 Mostor Ali, the younger brother of victim Akal Ali stated that one month after the Pakistani occupation army stationed in Habiganj Sayed Kamrul Ahsan, the leader of Habiganj Peace Committee formed Khagaura Peace Committee and afterwards, a Razakar camp was set up at the house of Sayed Kamrul Ahsan at Khagaura and made the accused Mohibur Rahman alias Boro Mia its commander. In respect of the location of the Razakar camp where the captured victim Akal Ali was taken away P.W.01 stated in cross-examination too, in reply to question put to him by the defence that Sayed Kamrul Ahsan's house was situated towards north from their house and there was no other house in between those two houses.

142. In respect of affiliation of the accused persons with the Razakar camp set up at the house of Sayed Kamrul Ahsan P.W.01 stated in cross-examination, in reply to question put to him, that the Razakar camp was set up of 20/30 Razakars among whom accused

Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Abdul Hamid, Monu Mia, Israil, Amrut and some others were from their own village. Naturally, P.W.01 had reason of knowing the accused persons even since prior to the event as he [P.W.01] and those Razakars belonged to same village. Besides, this version made in cross-examination rather affirms the accused persons' membership in local Razakar Bahini and their affiliation with the Razakar camp set up in Khagaura at Sayed Kamrul Ahsan's house which was nearer to the house of Akal Ali, one of the victims.

143. P.W.01 Mostor Ali was 17 years old in 1971. He is the younger brother of victim Akal Ali. He is a direct witness to the act of killing Rajab Ali, dragging out of Akal Ali and taking him away to the local Razakar camp which was nearer to their house. According to him [P.W.01] he had been in a room at their house at the relevant time where from he saw the above criminal acts and he also saw the wives and minor daughter of Akal Ali making appeal to the accused and their cohorts to spare Akal Ali defying which he [Akal Ali] was taken away forcibly tying his hands up and blind folded.

144. It is not disputed that the victims were the neighbours to each other. P.W.01 stated that after the war of liberation ensued his [P.W.01] elder brother Akal Ali along with their neighbour Rajab

Ali went to India for joining the war of liberation. Defence does not dispute that the victims Rajab Ali and Akal Ali were freedom-fighters and during the war of liberation they came back home in the early morning of 11 November 1971, the day of event. It has been reaffirmed in cross-examination of P.W.01 when he stated in reply to question put to him by the defence that his brother Akal Ali joined the war of liberation about one and half months after it ensued and he did not come to their home till the date of the event he narrated.

145. Besides, it stands proved from the evidence that the witnesses deposed in the Tribunal are the relatives of the victims, neighbours and locals of the crime site. They are the competent witnesses and they had fair occasion to see the criminal acts done by the accused persons and their cohorts.

146. In respect of the event of attack P.W.01 stated that on that day Razakars got this information[coming back home of Akal Ali and Rajab Ali] through their source and at about 04:00/04:30 P.M. accused Razakar Mohibur Rahman alias Boro Mia, accused Razakar Mujibur Rahman alias Angur Mia, accused Razakar Abdur Razzak and their accomplice Razakars besieged their house and with this Rajab Ali coming out of the shed attempted to run away when accused Mohibur Rahman alias Boro Mia shot him to death and also ordered his cohorts to drag Akal Ali out of the room. With

this accused Mujibur Rahman alias Angur Mia and Abdur Razzak entered inside the room where Akal Ali had been staying. He [P.W.01] saw this phase of the event remaining inside of his room. He could then see the Razakars dragging Akal Ali out tying his hands up and blind folded and they forcibly took him away towards the Razakar camp, scrapping appeal of Akal Ali's wives and minor daughter to spare Akal Ali.

147. The facts of coming back of Akal Ali and Rajab Ali on 11 November 1971, launching attack at Akal Ali's house by a group of Razakars accompanied by the accused persons on the same day in the afternoon, gunning down Rajab Ali to death by accused Mohibur Rahman alias Boro Mia, taking away Akal Ali on forcible capture to local Razakar camp defying Akal Ali's wives' request to spare him have been consistently corroborated by P.W.02 Kamrunnesa, the daughter of Akal Ali. The evidence tendered by P.W.02 demonstrates that she also witnessed all these criminal acts carried out in conjunction with the attack.

148. In cross-examination of P.W.02 it has been affirmed that in the morning of 11 November 1971 her father Akal Ali and Rajab Ali came back home. Akal Ali and Rajab Ali were freedom-fighters, it remained undisputed. Indisputably, it was the reason of carrying out the attack to wipe them out. P.W.02 also stated in cross-examination that at the relevant time her [P.W.02] uncle

Mostor Ali [P.W.01] had been at their house. It lends assurance as to credibility of testimony of P.W.01.

149. P.W.04 Sobuj Ali is another younger brother of victim Akal Ali. In 1971 he was 11 years old. He is a natural witness. The attack of first phase was carried out at their house, and as such, P.W.04 had natural occasion to observe the activities of the group. His testimony in relation to initiating attack at the relevant time by the group of Razakars accompanied by the accused persons, gunning down Rajab Ali to death, taking away Akal Ali, his brother on forcible capture to Razakar camp scraping their request to spare consistently corroborates to what has been testified by his another brother Mostor Ali [P.W.01] and Akal Ali's daughter P.W.02. No amount of doubt could have been created in any manner as to truthfulness of his [P.W.04] version by cross-examining him.

150. Admittedly, P.W.02 Kamrunnesa, the daughter of victim Akal Ali was 09 years old and P.W.04 Sobuj Ali, the younger brother of victim Akal Ali was 11 years old in 1971. But merely for the reason that they were tender aged in 1971, at the relevant time their sworn testimony cannot be turned down. We reiterate that the mere tender age of a witness at the time of the event does not *ipso facto* disqualify him to narrate what he observed or experienced particularly when it inspires credence. In this regard relying on the observation made by the **ICTR Appeals Chamber in the case of**

Gacumbitsi it has been observed by the Appellate Division of the Supreme Court of Bangladesh in the case of **Ali Ahsan Muhammad Mujahid**[**Appeal Judgment**] that –

"In Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A Appeal Chamber found, "it was reasonable for the Trial Chamber to accept witness TAX's testimony despite her young age at the time of the events (11 years old). The young age of the witness at the time of the events is not itself a sufficient reason to discount his testimony." There is no rule requiring the Court to reject per se the testimony of a witness who was child at the events in question. The probative value to be attached to testimony is determined to its credibility and reliability."

[Ali Ahsan Muhammad Mujahid v. Chief prosecutor, Criminal Appeal No. 103 of 2013, Judgment: 16.06.2015, Pages: 166-167]

151. In the case in hand, nothing contrary has been revealed in cross-examination of P.W.02 and P.W.04 which may force to infer that they are incompetent witnesses and their testimony does not carry probative value. In absence of any rational reason we are convinced to rely upon their testimony provided on material particular, chiefly when the same remained undislodged by the defence.

152. To prove this charge, prosecution adduced some locals who have been examined as P.W.03, P.W.06, P.W.07 and P.W.10. They testified what they observed while they had been at Khagaura bazaar on the day and at the relevant time. They do not claim to have seen the act of killing Rajab Ali and Akal Ali. They however tendered evidence on some facts relevant to the attack launched at the house of Akal Ali.

153. The facts of gunning down Rajab Ali and taking away Akal Ali on abduction in the afternoon of 11 November 1971 as have been testified by P.W.01, P.W.02 and P.W.04, the direct witnesses in respect of the first phase of attack get corroboration from the unimpeached evidence of P.W.03 Taraj Ullah who at the relevant time had been at Khagaura bazaar for shopping. According to him, first he heard a gun firing from the western end of the bazaar and then he could see the accused persons and their cohorts taking blind folded and cramped handed Akal Ali to the Razakar camp.

154. It has already been proved that the Razakar camp was nearer to Akal Ali's house. P.W.03 also heard the event of killing Rajab Ali from his wife and how Akal Ali was taken away forcibly when he rushed to Akal Ali's house on hearing cry and found Rajab Ali's dead body lying there. Defence could not refute it. Rather, going to Akal Ali's house on hearing cry and seeing the dead body of Rajab Ali lying there seems to have been affirmed in cross-examination of P.W.03.

155. Defence as it appears that it asserts that the accused persons were not Razakars and accordingly defence suggested it to all the P.W.s and even put question on this negative assertion. But it transpires that in cross-examination, P.W.03 in reply to defence question stated that in 1971 there were 25/30 Razakars in Khagaura Union and of them, in addition to the three accused persons, there

were Amrut, Dudha Mia, Harun and others. Thus it stands affirmed that the accused persons were the members of Razakar Bahini formed of 25/30 Razakars in Khagaura Union.

156. P.W.06 Md. Sahfique Ali testified facts relevant to the event. At the relevant time he had been at Khagaura bazaar when he saw a group of Razakars accompanied by the accused persons moving towards west from the Razakar camp, 15/20 minutes later he heard a gun firing and 20/30 minutes later he saw the armed group of Razakars including accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia taking away Akal Ali with them towards the Razakar camp. P.W.06 does not seem to have made any exaggeration in narrating what he experienced or observed. P.W.06 afterwards learnt that accused Mohibur Rahman alias Boro Mia shot Rajab Ali, a freedom- fighter to death.

157. The above version of P.W.06 remained unimpeached and it provides legitimate corroboration to the fact of launching attack, killing Rajab Ali, taking away Akal Ali to Razakar camp at Khagaura bazaar on forcible capture as already consistently testified by the relatives of the victim Akal Ali.

158. The version of P.W.03 and P.W. 06 gets corroboration from P.W.07 Allad Mia who testified too that on the date of event and at the relevant time while he had been at Khagaura bazaar he heard a gun firing and afterward saw the accused persons and their cohorts

taking away Akal Ali blind folded to the Razakar camp. Then he[P.W.07] rushed to the house of Akal Ali where he found Rajab Ali's dead body lying and learnt from his wives and brother Mostor Ali [P.W.01] that accused Mohibur Rahman alias Boro Mia shot Rajab Ali to death.

159. Finding dead body of Rajab Ali lying at the house of Akal Ali instantly after P.W.03, P.W.06 and P.W.07 saw the accused persons and their cohorts taking away Akal Ali on forcible capture to Razakar camp indubitably suggest the inference that Rajab Ali attempted to escape but could not as he was gunned down to death and after causing his death the accused persons and their cohorts got Akal Ali apprehended therefrom.

160. P.W.10 Hazi Mohammad Abdul Mosabber had a tiny shop at Khagaura bazaar in 1971. Corroborating the P.W.03, P.W.06 and P.W.07 he [P.W.10] described that on 11 November 1971 at about 04:00/04:30 P.M. while he had been at his shop he heard a gun firing and 10/15 later he saw the accused persons and their cohort Razakars taking away Akal Ali to the Razakar camp set up at the house of Sayed Kamrul Ahsan, near Khagaura bazaar. Defence could not controvert this crucial version related to the attack and the criminal acts of the accused persons in accomplishing the principal crime.

161. Thus, it stands proved again that there had been a gun firing before Akal Ali was so taken away on capture to the Razakar camp. Did the said gun firing cause any harm to any body? On totality of evidence including unimpeached ocular testimony of P.W.01, P.W.02 and P.W.04 it stands proved too that the said gun firing caused death of Rajab Ali along with whom Akal Ali had been at his house at the time of attack launched targeting them. P.W.10 also saw the dead body of Rajab Ali lying at the house of Akal Ali when after seeing taking away Akal Ali to Razakar camp went there and learnt from the wife of Akal Ali, Mostor Ali[P.W.01], Sobuj Ali[P.W.04] and other inmates that accused Mohibur Rahman alias Boro Mia shot Rajab Ali to death and accused Mujibur Rahman alias Angur Mia and Md. Abdur Razzak dragged Akal Ali out and took him away to Razakar camp. Thy fact of seeing dead body of Rajab Ali instantly after the attack and learning the event from the inmates of the victims' family as testified by P.W.10 inspire credence as the same was natural. There has been nothing that may taint the truthfulness of the testimony of P.W.10.

162. The facts of gunning down Rajab Ali to death and taking away Akal Ali on abduction in the afternoon of 11 November 1971 by launching attack at the house of Akal Ali have been found proved by the evidence presented by P.W.01, P.W.02 and P.W.04, the direct witnesses. And the evidence tendered by P.W.03,

P.W.06, P.W.07 and P.W.10 on some relevant facts they observed at Khagaura bazaar lends consistent corroboration to it. Hearing gun firing first from the western end of the bazaar and then few minutes later seeing the accused persons and their cohorts taking blind folded and cramped handed Akal Ali to the Razakar camp, are chained together and it strengthens credence of the evidence tendered by the direct witnesses.

163. It has already been proved that the Razakar camp was nearer to Akal Ali's house. P.W.03 also heard the event of killing Rajab Ali from his wife and how Akal Ali was taken away forcibly when he rushed to Akal Ali's house on hearing cry and found Rajab Ali's dead body lying there. Defence could not refute it. Rather, going to Akal Ali's house on hearing cry and seeing the dead body of Rajab Ali lying there seems to have been affirmed in cross-examination of P.W.03.

164. Defence, as it appears, asserts that the accused persons were not Razakars and accordingly defence suggested it to all the P.W.s and even put question on this negative assertion. But it transpires that in cross-examination, P.W.03 in reply to defence question stated that in 1971 there were 25/230 Razakars in Khagaura Union and of them, in addition to the three accused persons, there were Amrut, Dudha Mia, Harun and others. Thus it stands affirmed that

the accused persons were the members of Razakar Bahini formed of 25/30 Razakars in Khagaura Union.

165. Since the fact of killing two civilians is not disputed and the version of P.W.03, P.W.06, P.W.07 and P.W.10, the locals staying at Khagaura bazaar at the relevant time that after seeing the group of Razakars accompanied by accused persons moving towards Akal Ali's house they heard gun firing prompts us to conclude that the accused persons and their cohorts accomplished the killing of Rajab Ali by launching a planned attack. Seeing the accused persons and their cohorts moving later on towards the Razakar camp along with captured Akal Ali renders legitimate inference too that Akal Ali and Rajab Ali were their targets as they were freedom-fighters and they were so targeted on their coming back home.

166. Why the Razakars had attacked Akal Ali's house within couple of hours of the victims' coming back to home? Victims were freedom fighters – it remained undisputed. Context prevailing in 1971 during the war of liberation impels to infer that Razakar Bahini, an auxiliary force formed to act under the control of the Pakistani armed force and the collaborators sided with the Pakistani occupation army obviously had information about the people of their locality who joined the war of liberation and who sided with it.

167. Since the defence does not dispute that in the early morning of 11 November 1971 the victims Akal Ali and Rajab Ali came back to their home it may be irresistibly inferred that the accused persons belonging to local Razakar Bahini and their cohorts got this information which eventually prompted them to design plan to wipe them out bringing at Razakar camp on capture, in furtherance of policy and plan. And accordingly in the afternoon the accused persons and their cohort Razakars besieged the house of Akal Ali in systematic manner and in conjunction with the attack Rajab Ali was gunned down to death by accused Mohibur Rahman alias Boro Mia as he attempted to run away and Akal Ali was forcibly captured and taken away to the Razakar camp and at this stage of attack both the victims were non-combatant and they could not put on show any sort of resistance, evidence presented proves it beyond reasonable doubt.

168. The context prevailing in 1971 in the territory of Bangladesh itself is sufficient to prove that the criminal acts constituting the offence of murder as crime against humanity as specified in section 3(2)(a) of the Act of 1973 were the predictable effect of part of 'systematic attack' committed against 'civilian population'.

169. It may thus be legitimately inferred from the phrase 'committed against any civilian population' as contained in the Act of 1973 that the acts of the accused persons forming part of 'attack'

comprise part of a pattern of ‘systematic’ crimes directed against civilian population. The notion of ‘attack’ embodies the notion of acting purposefully to the detriment of the interest or well being of a civilian population and the ‘population’ need not be the entire population of a state, city, or town or village. Thus, a single act of an accused forming part of attack committed against even a single unarmed civilian causing criminal act constituting the offence enumerated in the Act of 1973 is sufficient for holding him criminally responsible.

170. It is a fact of common knowledge now that Razakar Bahini was an armed *para militia* force which was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army. Under the government management Razakars were provided with training and allocated fire arms. What was the objective of forming such *para militia* force in war time situation? Of course, intention was not to safeguard lives and properties of civilians. Rather, it is now historically undisputed that the Razakar force had acted in furtherance of policy and plan of Pakistani occupation army and in so doing it had carried out recurrent atrocious activities in a systematic manner against the unarmed pro-liberation Bengali civilians through out the territory of Bangladesh in 1971. Pro-liberation civilians, freedom fighters whom they termed

‘miscreants’, intellectual group, Hindu community were their key targets.

171. Victims Rajab Ali and Akal Ali were freedom- fighters and at the relevant time they had been at their native home and were non-combatant while they were attacked by the group of Razakars accompanied by the accused persons. Victims were thus ‘miscreants’ in the eye of Pakistani occupation army and their local collaborators including the auxiliary force like Razakar Bahini.

172. The group formed of accused persons and their cohort Razakars had rather acted as a ‘criminal enterprise’ in carrying out the attack intending to wipe out two non-combatant freedom-fighters whom they treated ‘miscreants’ . It is now settled jurisprudence that culpability for crimes against humanity requires that the accused had the relevant knowledge of the underlying attack. That is, the accused must be ‘aware’ that his actions formed part of the systematic attack against the civilian population or it is to be shown that the accused ‘sharing intent’ joined the enterprise or group in accomplishing the crime. Tangible evidence may not be possible to be adduced to substantiate accused’s ‘knowledge about the intent’ of the enterprise or the fact of ‘sharing intent’ of the enterprise. It may reasonably be inferred from facts and circumstances of the case and accused’s role in each phase of the event of attack. What we see in the charge under adjudication?

173. Who were those Razakars who perpetrated the criminal acts that resulted in death instantly after the attack was launched and just before Akal Ali was taken away on forcible capture? What happened to Akal Ali after he was taken away to Razakar camp? Defence avers by putting suggestion that the accused persons did not belong to local Razakar Bahini, that accused Md. Abdur Razzak and Mujibur Rahman alias Angur Mia rather used to provide assistance to freedom-fighters and that the accused Mohibur Rahman alias Boro Mia was minor in 1971, and as such, they were not involved with the criminal event alleged. Defence further avers that Rajab Ali was shot to death at Khagaura bazaar by Razakars. The witnesses denied all the suggestions. And defence failed to bring anything by cross-examining the P.W.s that may reasonably tend to taint the truthfulness of the prosecution case.

174. We have already recorded our reasoned finding as to the accused persons' membership on local Razakar Bahini and the age of accused Mohibur Rahman alias Boro Mia in 1971. Admittedly, accused Mohibur Rahman alias Boro Mia's elder brothers Kalamdhar and Mostofa were notorious Razakars in the locality who were killed at the ending part of the war of liberation. Thus, it is indeed hard to believe that accused Mujibur Rahman alias Angur Mia, a brother of such notorious Razakars sided with the freedom fighters and used to provide assistance to them, particularly when it

has been proved that they belonged to Razakar force formed in Khagaura Union under Baniachang Police Station of the then Habiganj Sub-Division.

175. In cross-examination of P.W.02 it has been affirmed that in the morning of 11 November 1971 her father Akal Ali and Rajab Ali came back home. Akal Ali and Rajab Ali were freedom-fighters, it remained undisputed. Presumably, it was the reason of carrying out the attack to wipe them out. P.W.02 also stated in cross-examination that at the relevant time her [P.W.02] uncle Mostor Ali [P.W.01] had been at their house. It lends assurance as to credibility of testimony of P.W.01 who also testified the victims' coming back home on the said date in early morning.

176. Attacking credibility of some of prosecution witnesses it has been submitted on part of the defence that they testified even in respect of the events narrated in other charges as well, in addition to this charge, which is improbable.

177. The Tribunal notes that the witnesses examined by the prosecution, it transpires, are from the crime locality of Khagaura. It also appears from the evidence presented that the crime sites the house of Akal Ali, Khagaura bazaar and the house of Anfar Ali [the victim of the event as listed in charge no.04] were closer to each other and the Razakar camp set up at the house of Sayed Kamrul Ahsan was adjacent to Khagaura bazaar. Defence does not dispute

it. Thus, it was not impracticable seeing the facts relevant to the principal crime of killing Rajab Ali, abducting Akal and Anfar Ali as those happened in day time as the witnesses deposing on dock being the locals had been at Khagaura bazaar at the relevant time. Defence could not refute their presence at Khagaura bazaar and crime locality at the relevant time.

178. The thing to be done is that truthfulness of the testimony of the witnesses is to be weighed rationally. Besides, excepting the relatives of Akal Ali the other witnesses merely testified what they saw remaining present at Khagaura bazaar adjacent to Akal Ali's house. Similarly, the witness [P.W. 06 Md. Shafiq Ali] testifying the facts relevant to abduction, confinement and torture of Anfar Ali [as listed in charge no.04] was a neighbour of the victim and he as a natural witness came on dock even to describe what he experienced in relation to the said event as well. Therefore, merely for the reason that many of prosecution witnesses testified more than one of the events alleged they cannot be termed unreliable and tutored.

179. Admittedly, accused Mohibur Rahman alias Boro Mia was elected Chairman of Khagaura Union Council for recurrent terms. But such act and position subsequent to the commission of the alleged offences in 1971 cannot absolve him of the liability if he is

found responsible for the crimes committed. Thus, we are not with the argument advanced on part of the defence.

180. Defence adduced and examined in all 07 witnesses. But in view of settled principle first we are to see how far the prosecution has been able to prove its case. In a criminal trial, burden squarely lies upon the prosecution and mere failure of proving defence case, if any, does not provide benefit to prosecution. Only once the prosecution case is proved, question of assessing defence case agitated comes forward to be determined, in light of probability and evidence tendered by it. This is the principle.

181. However, before we enter in assessing the above aspect involving defence case let us see what happened to the abducted Akal Ali. When and how he was killed? Who participated or facilitated the act of killing Akal Ali?

182. Defence does not dispute the act of taking away Akal Ali to Razakar camp at Khagaura bazaar and since then he could not have been traced. Indisputably the act of killing Akal Ali was the upshot of his unlawful and forcible capture from his house. Defence however avers, by examining defence witnesses that Akal Ali was abducted in some other manner and the accused persons were not with the group of attackers in accomplishing the offence.

183. We have already got it affirmed that the Razakar camp set up at the house of Sayed Kamrul Ahsan at Khagaura bazaar was

nearer to the house of victim Akal Ali. And thus it was practicable to hear the scream of detained victim when he was subjected to brutal torture in captivity, as testified by P.W.01 and P.W.04.

184. It transpires from cross-examination of P.W.02, the daughter of victim Akal Ali as well that Sayed Kamrul Ahsan's house where the Razakar camp was set up could be seen from their house.

185. It has also been affirmed in cross-examination of P.W.03 that distance between the house of Akal Ali and the house of Sayed Kamrul Ahsan where the Razakar camp was set up was about 200 feet and there was no house in between those two houses.

186. P.W.01 learnt from Taraj Ullah [P.W.03] that at night, on the day Akal Ali was taken away to Razakar camp, he [Taraj Ullah] saw the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak and their cohort Razakars taking away Akal Ali towards north through the front side of his house. It is a fact that happened couple of hours subsequent to taking away Akal Ali at the Razakar camp and keeping him confined there. P.W.01 is a hearsay witness in respect of this fact. But P.W.01's hearsay evidence carries probative value as he heard it from P.W.03 Taraj Ullah who deposed that on the day of the event at about 09:00- PM while he came out of his house he saw by torchlight accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak and their accomplice

Razakars taking away Akal Ali blind folded and tying his hands up towards north to village Kumursana. Defence could not refute it. And there has been no reason to exclude this version treating unreliable.

187. All the P.W.s testified that Akal Ali could not have been traced since he was taken away to Razakar camp at Khagaura bazaar on forcible capture from his house. We unerringly conclude that causing death of detained Akal Ali was the upshot of his forcible capture which has been proved beyond reasonable doubt. Already it stands proved too that the accused persons accompanying the group of Razakars actively and culpably participated in causing capture of freedom-fighter Akal Ali. Causing death of Akal Ali is inevitably chained to the act of his abduction and captivity at Razakar camp.

188. On appraisal of evidence tendered by the prosecution it is evinced that the defence failed to negate the fact that in the afternoon of 11 November 1971 an attack was launched at the house of Akal Ali, rather it stands proved that by launching attack at Akal Ali's house his co-freedom fighter Rajab Ali was gunned down to death by accused Mohibur Rahman alias Boro Mia when he attempted to flee sensing the attack and in conjunction with the attack accused Mujibur Rahman alias Angur Mia and Abdur Razzak and their cohorts dragged Akal Ali out of his dwelling shed

and was taken away to the Razakar camp set up at the house of Syed Kamrul Ahsan which was nearer to Akal Ali's house and adjacent to Khagaura bazaar. Thus the accused persons actively and culpably participated and facilitated to the commission of killing Rajab Ali and unlawfully taking away Akal Ali to Razakar camp.

189. In the absence of anything contrary, accused persons thus shall also be held responsible for causing death of detained Akal Ali. Act of accused persons in materializing abduction and confinement of Akal Ali itself provides their nexus even to the act of committing the murder, the principal crime. Besides, seeing the accused persons and their cohorts in the night of the day of the event taking away Akal Ali from the Razakar camp to some other place as testified by P.W.03 unambiguously prompts to infer the accused persons' conscious knowledge, intent and complicity also in accomplishing the act of killing Akal Ali. Besides, the act of abduction of Akal Ali from his house was followed by his confinement in Razakar camp and causing his death and since the accused persons are found to have had active participation in effecting the act of abduction, by launching systematic attack, they cannot evade responsibility of causing death of detained Akal Ali as well.

190. In the case in hand, defence, intending to negate the manner of the event and complicity of the accused persons with the

commission thereof narrated in charge no.01, adduced four witnesses who have been examined as D.W.01, D.W.02 ,D.W.04 and D.W.07.

191. It is to be reiterated too that during the trial the defence bears no onus of proof of the facts in order to avoid conviction. But, during the trial, the accused may adduce evidence, including evidence of *alibi*, in order to raise reasonable doubt regarding the case for the prosecution. It must be stressed, however, that the failure of the defence to submit credible and reliable evidence of the accused's *alibi* must not be construed as an indication of his guilt.

192. At the outset, the Tribunal notes that the 'defence case' always is to be attributed from the suggestion put to the prosecution witnesses by the defence. In the name of asserting defence case the prosecution cannot be put under surprise by claiming quite new averment by examining defence witnesses. In evaluating defence evidence we are to examine whether the version they made before the Tribunal is consistent to what has been suggested to prosecution witnesses by the defence.

193. D.W.01 Khorshed Ali, examined on behalf of accused Mujibur Rahman alias Angur Mia, claims that that a group formed of six Razakars including Mostofa, Molu, Israil, Rusmot Ali and Chau Mia one day in 1971 started chasing his [D.W.01] father

Abdul Kadir alias Chou Mia when he had been at Khagaura bazaar and with this Chou Mia by running from bazaar arrived at the courtyard of Rajab Ali's house when the Razakars had fired four gunshots one of which hit Rajab Ali and his [D.W.01] father managed to go into hid inside a room of Rajab Ali's house.

194. D.W.02 Md. Harun Mia, examined on behalf of accused Mohibur Rahman alias Boro Mia, also claims that in 1971 the group formed of Razakars including Mostofa, Rusmot Ali, Israil, Molu and Abdul Hamid started chasing Chau Mia with indiscriminate gun firing which eventually hit Rajab Ali who had been at his house at that time. Akal Ali being feared jumped into the pond seeing the Razakars and then the Razakars apprehending Akal Ali from the pond took him away to the Razakar camp and since then he could not have been traced. According to D.W.01 Rajab Ali succumbed to injuries on the following day on the way of taking him to Sylhet for treatment.

195. Mere parrot like description of a story does not *ipso facto* negate the truthfulness of the prosecution case, particularly when the event of killing Rajab Ali and Akal Ali and accused persons' complicity therewith has been proved beyond reasonable doubt, through lawful evidence presented.

196. First, it transpires that none of the prosecution witnesses examined in respect of this charge no.01 has been suggested, as

defence case, the manner of the event as has been stated by D.W.01 Khorshed Ali, D.W.02 Md. Harun Mia, D.W.04 Abdur Nur Mia and D.W.07 Dewan Oliur Rahman. Prosecution remained unnoticed of this defence case. Second, none of the D.W.s stated the date and time of the event disclosing a different manner of commission of the act of killing Rajab Ali and Akal Ali. Third, it is not clear at all whether D.W.01 and D.W.02 saw or heard the event they described.

197. Defence is at liberty to adduce evidence in support of its case suggested to the prosecution, during cross-examining the P.Ws. But the description as has been offered by D.W.01, D.W.02, D.W.04 and D.W.07 is absolutely beyond the defence case suggested to the P.W.s.

198. It transpires that defence suggested P.W. 03 Taraj Ullah that Rajab Ali was killed at Khagaura bazaar by the gunshot of Razakars. Defence case put to P.W.07 in the form of suggestion says that Rajab Ali was killed by indiscriminate gun-firing of Razakars when he was selling rice at Khagaura bazaar. Therefore, the description the D.W.01, D.W.02, D.W.04 and D.W.07 made in relation to killing Rajab Ali and abducting Akal Ali does not go with the defence case put to P.W.s in the form of suggestion, during cross-examination. Rather, the description the D.W.s made seems

to a futile attempt to negate the prosecution case so far as it relates to the event narrated in charge no.01.

199. Now, let us see whether the D.W.01 is a credible witness and whether the description he made favouring the accused persons inspires credence. According to D.W.01 his father Chou Mia was being chased by a group of Razakars led by Razakar Mostofa with indiscriminate gun firing. Why he was being so chased? According to D.W.01 his father Chou Mia used to provide aid to the freedom fighters and this was the reason of chasing him with indiscriminate gun firing. D.W.04 also described similar version. Thus, according to D.W.01 and D.W.04 the intention of the group of armed Razakars was to wipe out Chou Mia.

200. But what happened to Chou Mia? D.W.01 claims that his father Chou Mia went into hid inside a room of Rajab Ali's house, at a stage of being chased and a gun firing hit Rajab Ali which caused his death eventually. Is it believable? If really Chou Mia was the target of the group of attackers he would not have been spared despite going into hid or the attackers did not go back without accomplishing their intention to wipe out Chou Mia.

201. Next, the story the D.W.01 described inspires no credence at all. In cross-examination, D.W.01 admits that his father Chou Mia died 15/16 years back [in 2000/2001] when he was 120 years old. If it is so, in 1971 Chou Mia, the father of D.W.01 was 91 years old.

Was it possible for a man of 91 years of age to be associated actively with the alleged act of providing aid to the freedom fighters? Was it practicable that a man of 91 years old was being chased by the Razakars he managed to escape by running from the grasp of armed Razakars, if really he was so targeted? The answer is simply 'no'. It was impracticable indeed. D.W.01 thus appears to have described a cock and bull story coming on dock by providing deliberate favour, hiding the truth, to the accused persons intending to negate their involvement with the commission of the event.

202. According to D.W.04 the group of Razakars finding Akal Ali in front of them who being feared jumped into the pond apprehended him and took him away to Razakar camp. Why the Razakars apprehended Akal Ali leaving their target Chou Mia abandoned? It was not at all difficult to cause their target Chou Mia's forcible capture who was chased with indiscriminate gun firings if really the attack was initiated targeting Chou Mia. It remained unexplained. The story as described by D.W.04 does not seem to be believable and D.W.04 came on dock to depose untrue story intending to save the accused persons, it may be presumed validly.

203. The evidence tendered by D.W.07 Dewan Oliur Rahman, a resident of village Khussa Khagaura that one day four men including Mostofa were on chasing Chou Mia with gun firing when

a shot from the gun hit some one else and then they apprehended Akal Ali was futile and could not make the defence case probable that the accused persons were innocent and have been implicated falsely with the event of killing Rajab Ali and Akal Ali.

204. Evidence tendered by D.W.07 suffers from significant ambiguity as he did not say on which date, how and wherefrom Akal Ali was so apprehended and where he was taken away, who sustained bullet hit injury and what happened to Chou Mia, the target of the attackers.

205. The version made by D.W.07 demonstrates that no event of arson happened in their locality. But it seems to be contradictory to what has been testified by some of D.W.s according to whom the event of attack by the Pakistani army men accompanied by Razakars that resulted in destruction of houses of M.A Rab, Nuruzzaman and Dr. Saleh. Therefore, though the defence had examined seven witnesses, the evidence of none of them was of any assistance for establishing the innocence of the accused persons.

206. Apart from claiming the different manner of the event, by examining the D.W.s, the further defence case as has been extracted from the trend of cross-examination of P.W.s are that (i) accused Md. Abdur Razzak used to provide assistance to freedom-fighters and sided with the war of liberation in 1971, (ii) that accused

Mujibur Rahman alias Angur Mia was minor in 1971(iii) that accused Mohibur Rahman alias Boro Mia was also minor in 1971 and that he used to provide shelter and aid to the people belonging to Hindu community in 1971.

207. It remained not proved that in 1971 accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia were minor. More so, none of the D.W.s examined could say on which date the event of killing Rajab Ali and Akal Ali occurred, and as such, they were not at all acquainted with the event narrated in charge no.01, we conclude.

208. Additionally, there has been no evidence with specificity that despite being minor in 1971 accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia used to provide aid, support and shelter to freedom fighters and the people belonging to Hindu community. Thus, this defence case does not stand on leg at all.

209. Defence also took *plea of alibi* that at the relevant time accused Mujibur Rahman alias Angur Mia had been at his maternal uncle's house at village Topkhana, under Baniachang Police Station. It is to be noted too that prosecution's burden never lessens for the reason of success or failure to prove the *plea of alibi*. It has been observed by the **ICTR Appeals Chamber** that-

“The only purpose of an alibi is to cast reasonable doubt on the Prosecutor’s allegations, which must be proven beyond reasonable doubt. In alleging an alibi, the accused merely obliges the Prosecution to demonstrate that there is no reasonable likelihood that the alibi is true.”

[Nahimana, Barayagwiza and Ngeze, (Appeals Chamber), Judgment: November 28, 2007, Para- 417]

210. In support of *plea of alibi* D.W.04 Abdur Nur Mia and D.W.05 Tahir Ali claim in their deposition that in 1971 accused Mujibur Rahman alias Angur Mia used to reside at his maternal uncle’s house at Baniachang. But this version even if taken to be true does not prove that accused Mujibur Rahman alias Angur Mia was not at the crime locality at the relevant time i.e on the day of event happened. Besides, there has been no indication that it was absolutely impracticable for this accused to remain available at Khagaura, even allegedly on staying in Baniachang. It thus transpires that the version made by D.W.s asserting the accused’s absence at Khagaura at the relevant time suffers from glaring non-specificity. The *plea of alibi* is not at all well founded and provides no reasonable hint even in favour of it.

211. Burden of proving the *plea of alibi* is rather heavy. Tribunal notes that since the prosecution succeeds in discharging the burden it is incumbent on the accused who adopts the *plea of alibi*, to prove it with absolute certainty so as to exclude the possibility of

his presence at the crime site or locality. It is now jurisprudentially settled that when the prosecution has been able to prove accused person's presence at the crime site and complicity with the offence alleged by reliable evidence, the court of law normally would be slow in believing any counter-evidence to the effect that the accused was elsewhere at the relevant time when the event happened.

212. But in the case in hand, the evidence adduced by the defence is not of such quality that may create reasonable doubt as to presence of the accused Mujibur Rahman alias Angur Mia at the crime site with the group of attackers, on the date and at the relevant time.

213. In the case in hand, the defence, as it appears, has failed to prove the *plea of alibi* with certainty to exclude the possibility of presence of accused Mujibur Rahman alias Angur Mia. Therefore, claim of remaining elsewhere or in Baniachang, at the relevant time, does not come into play, in any manner, to negate the prosecution case and this accused's complicity with the commission of the crime as already the prosecution succeeds to prove the event of killing and the accused person's complicity and participation therewith beyond reasonable doubt.

214. *Plea of alibi* is for the accused to establish by affirmative and definite evidence which has not been led in the present case. Thus, the *plea of alibi* and the statement of D.W.s in this regard do not inspire any amount of credence and it does appear to be a futile effort to evade from the charges brought against accused Mujibur Rahman alias Angur Mia.

215. Finally, the D.W.s claim that the accused persons did not belong to locally formed Razakar Bahini. It is a negative assertion which is not required to be proved by adducing evidence. The burden is upon the prosecution to prove their membership in local Razakar Bahini and already in our preceding deliberation we have recorded our reasoned finding that they were the notorious members of locally formed Razakar Bahini and had culpable affiliation with the Razakar camp housed at the residence of Sayed Kamrul Ahsan, near Khagaura bazaar. Defence could not impeach it, and thus, the claim of D.W.s that in 1971 accused Mohibur Rahman alias Boro Mia and accused Mujibur Rahman alias Angur Mia were minor does not go with the truth.

216. In view of above deliberation rendered on rational evaluation of evidence led by prosecution we conclude that the event of attack that resulted in killing Rajab Ali, taking away Akal Ali to Razakar camp and then he was killed taking him to unknown place as narrated in the charge framed has been proved beyond reasonable

doubt. It stands proved too that the accused persons actively participated and facilitated to the accomplishment of the crimes, to further policy and plan. All the three accused persons were part of the 'criminal mission' that eventually materialized a 'group crime' directing civilian population. Defence failed to cast any amount of doubt to prosecution case proved, by adducing oral evidence. Prosecution succeeds by discharging burden lies on it and not on such failure of the defence.

217. It is now settled that to prove the offence of murder as crime against humanity recovery of dead body is not required. First, taking away Akal Ali to some other place in the night from the Razakar camp indicates the commission of the act of murder at unknown place and it happened secretly. Context prevailing in 1971 during the war of liberation did not allow the civilians to see such brutal killing carried out directing civilian population.

218. We reiterate that the crimes under adjudication were not isolated crimes and the same were committed in war time situation in violation of customary international law and in grave breaches of Geneva Convention, 1949 and in a case involving the offence of murder being a 'system or group crime' committed in 1971 during the war of liberation prosecution is not required to prove the recovery of dead body of victim annihilated on forcible capture. What jurisprudence has been evolved in this regard? **In Milorad**

Krnojelac, the ICTY Trial Chamber, in respect of *corpus delictus* (proof of death) held that:

"Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered..... the fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber".

[Prosecutor V. Milorad Krnojelac, Case No. IT-97-25-T, Judgment : 15 March 2002, Para-326]

219. The charge under adjudication involves killing of two non-combatant freedom-fighters whose status at the relevant time was part of civilian population. Mere number of victims does not play role in fixing the offence as crime against humanity. What needs to be seen are that the conducts of the accused which formed part of the attack and whether the attack was ‘directed against civilian population’ which refers to organized and systematic nature of the attack causing acts of violence even to a single member belonging to civilian population. In this regard we recall the observation made by the **Appeals Chamber of ICTR in the case of Nahimana, Barayagwiza and Ngeze** that –

“.....a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.”

[Nahimana, Barayagwiza and Ngeze, Judgment: November 28, 2007, Para- 924]

220. The victims, at the relevant time, were no longer bearing arms and were *hors de combat*, due to their being detained. In this regard the principle enunciated by the **ICTY Trial Chamber** is as below:

“.....the definition of a ‘civilian’ is expansive and includes individuals who at one time performed acts of resistance, as well as persons who were hors de combat when the crime was committed.”

[Prosecutor v. Fatmir Limaj, Case No. IT-03-66-T, Judgment: 30 November 2005, Para-186]

221. On totality of evidence and circumstances divulged eventually we conclude that the prosecution has been able to prove the commission of the crimes and the accused persons' participation' and 'complicity' therewith beyond reasonable doubt. Act and conduct of the accused persons formed part of attack which was systematic and designed indeed directing unarmed civilians. Accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak, the potential members of locally formed Razakar Bahini, being part of the 'criminal enterprise' accompanied the group of attackers by sharing common intent of committing the crimes. It has been found proved beyond reasonable doubt that all the three accused persons by their acts, conducts and act of common 'understanding' participated,

facilitated, abetted and had complicity to the commission of such crimes. Therefore, the accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak who were part of 'collective criminality' incur liability under section 4(1) of the Act of 1973 and are held responsible accordingly for the offence of 'murder' as crime against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Adjudication of charge nos. 02 and 03

222. The incidents of the charge nos. 02 and 03 allegedly took place on the same date i.e. 26 October 1971 in the same village i.e. Khagaura under Baniachang Police Station one after another in conjunction with same attack. In the both incidents the accused persons are also same. More so, the prosecution has examined common witnesses to prove these two charges. So, to avoid the repetition of evaluation on evidence of the witnesses examined by the prosecution and for proper adjudication both charge nos. 02 and 03 are taken up together for adjudication.

Charge no. 02

[Wanton destruction, plundering and arson in the house of Major General (retired) M.A. Rab and neighbouring houses of Hindu community at village Khagaura under Baniachang Police Station]

223. **Summary charge:** That on 26 October 1971 at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak being accompanied by a

group of 10/15 Razakars and 10/12 Pakistani army men attacked the house of Major General (retired) M.A. Rab at village Khagaura under Baniachang Police Station of the then Habiganj Sub-Division, looted households and set five tin shed huts on fire and in conjunction with the attack the said accused persons and the group by launching attack to the neighbouring houses belonging to civilians of Hindu community, carried out wanton destructive activities by looting households and setting the houses on fire.

224. Thus, all the three accused persons have been charged for participating, facilitating, abetting and for complicity to the commission of offences of 'other inhumane acts' as crimes against humanity as part of systematic attack directed against non-combatant civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the Act.

Charge no. 03

[Rape committed upon two women, namely Abeda Khatun alias Aksi and Agarchand Bibi of village Khagaura under Baniachang Police Station].

225. Summary charge: That on 26 October 1971 at about 2.00 P.M. , after the attack the accused persons participated in launching it at about 10.00 A.M. on the same day at the house of Major General [retired] M.A. Rab at village Khagaura, accused Mohibur

Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak guided the 'group' the said accused persons accompanied to the houses of Ahlad Mia alias Allad Mia and victim Abeda Khatun alias Aksi, the wife of Manjob Ali at village Khagaura Beripar under Police Station Baniachang of the then Habiganj Sub-Division where on their active facilitation and as identified by the accused persons two Pakistani army men committed rape upon Abeda Khatun alias Aksi at her dwelling hut even in presence of her ailing husband and daughter Joyful Bibi, Keeping them in fear under gun point. In conjunction with the event , with the assistance of the accused persons, two other Pakistani army men also sexually ravished Agarchand Bibi [18], the younger sister of Ahlad Mia alias Allad Mia, and then the accused persons and the group had left the site at about 3.00 P.M. Subsequent to the event the victims disclosed the barbaric wrongs done to them. The disgrace sustained compelled the victim Agarchand Bibi to commit suicide, a few days after the event.

226. Thus, all the three accused persons have been charged for facilitating, abetting and substantially contributing and also for 'complicity' to the commission of offence of 'rape' as crime against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which

the accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

227. To prove charge nos. 02 and 03, the prosecution has examined as many as 9[nine] live witnesses [P.Ws. 01, 03, 04, 05, 06, 07, 08, 10 and 11]. Before we enter the task of evaluation of evidence adduced, let us first see what the witnesses examined have narrated in the Tribunal in respect of both the charges.

228. P.W. 01 Mostor Ali deposed that in 1971 during the war of liberation his age was about 17 years. In the national election held in 1970 there were two candidates in their Khagaura village, one was Awami League candidate M.A. Rab and another one was Nezam-e-Islami candidate Sayed Kamrul Ahsan. He further deposed that most of their villagers including his elder brother Akal Ali supported the Awami League candidate. Accused Mohibur Rahman alias Boro Mia along with his siblings supported the Nezam-e-Islami candidate. In that election Nezam-e-Islami candidate Sayed Kamrul Ahsan was defeated by huge votes.

229. He [P.W. 01] further deposed that on 25 March 1971 at night Pakistani army started mass killing in Bangladesh and at that time Nezam-e-Islami candidate Sayed Kamrul Ahsan had been staying at Habiganj. After about one month Pakistani army came to Habiganj and made Sayed Kamrul Ahsan the leader of the then

Habiganj Sub-Division Peace Committee. Thereafter, Sayed Kamrul Ahsan made accused Mohibur Rahman alias Boro Mia and his elder brother Kalamdhar Mia the leaders of Khagaura Union Peace Committee. Then Pakistani army set up army camp at the then C.O [Circle Officer] office under Baniachang Police Station. Thereafter, Sayed Kamrul Ahsan having brought accused Mohibur Rahman alias Boro Mia and his brothers accused Mujibur Rahman alias Angur Mia, Kalamdhar Mia and many others in his house set up Razakar camp there [house of Sayed Kamrul Ahsan]. Mostofa, younger brother of accused Mohibur Rahman alias Boro Mia was the commander of that Razakar camp. After start of the war of liberation in 1971, at one stage his [P.W. 01]elder brother Akal Ali along with their neighbour Rajab Ali went to India for participating in the war of liberation.

230. He [P.W. 01] further stated that on 11 November 1971 at about 4.00/4.30 P.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Hamid along with some other Razakars attacked their house and having killed Rajab Ali in their house abducted his [P.W. 01] brother Akal Ali and took away him to the Razakar camp, and at night they killed him taking him away to an unknown place.

231. He [P.W. 01] further stated that about 15 days prior to the above mentioned incident, accused Mohibur Rahman alias Angur

Mia and Abdur Razzak along with some other Razakars having accompanied some Pakistani army men with them from Baniachang army camp came to the house of Colonel M.A Rab in three boats, plundered 05[five] rooms of Colonel M.A Rab and then set them on fire. Thereafter, they having gone to Hindu Para, adjacent to Colonel M.A Rab's house, plundered about 10/12 houses and then set them on fire. Then the Razakars and Pakistani army men went to Kamola Mia's house situated at Dakkhin Hati on the bank of embankment, where they also plundered houses and set them on fire. Thereafter, they having gone to Nuruzzaman's house, situated at Uttar Hati on the bank of embankment, set the house on fire. He [P.W.01] heard that at that time Pakistani army with the assistance of accused Mohibur Rahman alias Boro Mia had committed rape on two women of Uttar Hati. Of them one was the unmarried sister of Allad Mia, namely Agarchand Bibi, and the other one was the wife of Manjob Ali. Later, he heard that Agarchand Bibi committed suicide intaking poison. He identified all the three accused persons on dock of the Tribunal.

232. In cros-examination P.W.01 stated that his nickname is Mosrot Ali. They are four brothers and two sisters. His father married three women. He is the son of his younger mother. Sobuj Ali and Sunduri Bibi are his own brother and sister. Akal Ali is the only son of his elder mother. Akal Ali married two women, first

one was Vingraj Bibi who is now dead, and the second wife is Police Bibi. Before she got married with Akal Ali, Police Bibi got married with another man and a child was born in that wedlock. He further stated that Sayed Kamrul Ahsan's house is situated towards north from his house and there is no other house in between these two houses. There were 20/30 Razakars in the Razakar camp and among those Razakars, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Abdul Hamid, Monu Mia, Israil, Amrut and others were of their own village.

233. He [P.W. 01] denied the suggestions that Pakistani army after setting up their camp at Baniachang and Razakar camp at their village, the people of their village and surrounding villages being afraid of fled away and they [P.W. 01 and his family members] also left their village. During the war of liberation in 1971, accused Mujibur Rahman alias Angur Mia was staying at the Razakar camp situated in their village. He denied the suggestions that accused Mujibur Rahman alias Angur Mia was never a Razakar and that during the war of liberation, 1971 he was a minor boy, and that said accused was not involved with the incident that he narrated. He also denied the suggestions that accused Md. Abdur Razzak was never a Razakar and that he was never involved with the incident that he narrated and that he is innocent. He further denied the suggestion that he deposed falsely against the accused persons.

234. Taraj Ullah as P.W. 03 testified that he is about 65 years old and during the war of liberation in 1971 his age was about 20 years and he is illiterate. On 11 November 1971 at about 4.00 P.M. he could see near the house of Sayed Kamrul Ahsan, where Razakar camp was set up, that accused Razakars Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak along with some other Razakars were taking away blindfolded and cramped handed Akal Ali to that Razakar camp. Later, the wife of Rajab Ali informed him that accused Mohibur Rahman alias Boro Mia having shot her husband Rajab Ali to death took away Akal Ali after tying his eyes and hands.

235. He [P.W. 03] further testified that about 15 [fifteen] days prior to the said incident, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Abdul Hamid and some other Razakars having accompanied Pakistani army men with them from Baniachang went to the house of M.A Rab in three boats and plundered his house and then set it on fire. At that time they also having plundered 8/10 houses of Hindu Para, adjacent to the house of M.A Rab, set them on fire. Then they also having gone to Kamola Mia's house plundered his house and set it on fire.

236. He [P.W. 03] also stated that thereafter, the accused persons and Razakars also having gone to Uttar Beripar [northern bank of embankment] looted the house of Nurzzaman and set it on fire, and

then Pakistani army men committed rape on two women of Uttar Beripar, of them one was the wife of Monjur Ali [Manjob Ali] and the other one was the sister of Allad Mia. Later on he heard that the sister of Allad Mia committed suicide intaking poison. He identified all the three accused persons on dock of the Tribunal.

237. In course of cross-examination P.W. 03 stated that having heard about the said incident from Allad Mia and Kamola Mia, he went to the house of M.A Rab on the same day in the afternoon. The distance between his house and M.A Rab's house is a quarter mile. The distance of the house of M.A Rab from the Razakar camp was less than a quarter mile. The distance of Uttar Beripar from their house is about 200/250 feet. Kamola Mia is now dead about whom he stated. Accused Abdur Razzak's house is situated at village Khagaura under Hossainpur Mouza. In 1971, there were about 25/30 Razakars in Khagaura Union, and of them there were Amrut, Dudha Mia, Harun Mia, who are now dead, besides the three accused persons. He further stated that in 1971 he was in his locality.

238. He [P.W. 03] he denied the suggestions that accused Md. Abdur Razzak was never a Razakar and that he provided assistance to the freedom-fighters and gave shelter to the people of Hindu community during the war of liberation and that accused Md.

Abdur Razzak is quite innocent. He also denied the suggestion that he deposed falsely against the accused persons.

239. P.W. 04 Sobuj Ali stated that during the war of liberation in 1971 his age was about 11 years and at that time he was a student of Class III in Eralia Khagaura Primary School. After about one and half months of start of the liberation war in 1971, his elder brother Akal Ali and their neighbour Rajab Ali left their houses in order to participate in the war of liberation.

240. He [P.W. 04] further stated that in the early morning of 11 November 1971 his brother Akal Ali and that Rajab Ali came back to their house. On that day at about 4.00 P.M. accused Mohibur Rahman alias Boro Mia, Abdur Razzak, Abdul Hamid, Molu and many other Razakars surrounded their house and then accused Mohibur Rahman alias Boro Mia shot Rajab Ali to death on the spot with rifle in his hand while he [Rajab Ali] was trying to flee away. Thereafter, they having abducted Akal Ali took away him to the Razakar camp.

241. He [P.W. 04] further stated that about 15[fifteen] days prior to the said incident accused Mohibur Rahman alias Boro Mia, Abdur Razzak, Abdul Hamid, Molu Mia and other Razakars went to Baniachang, and from there they went to the house of Colonel M.A Rab with Pakistani army men in three boats. Reaching the house of Colonel M.A Rab, they looted his house and burnt five

rooms by setting on fire. Just after that, they looted 20[twenty] houses of the Hindu Para near the house of Colonel M. A Rab and then set them on fire.

242. P.W. 04 also stated that thereafter, accused Mohibur Rahman alias Boro Mia, Abdur Razzak, Abdul Hamid and Molu Mia along with other Razakars went to the house of Kamola Mia. Reaching Kamola Mia's house they also plundered his house and set it on fire. Then they having gone to Beripar [bank of embandment] tortured many people and looted many houses there, and at that time they set 5[five] houses of Nuruzzaman on fire. Thereafter, accused Mohibur Rahman alias Boro Mia and Md. Abdur Razzak abetted and facilitated Pakistani army men in committing rape on two women, of them one was the sister of Allad Mia and the other one was the wife of Monjur Ali [Manjob Ali]. Later on, he came to know that the sister of Allad Mia had committed suicide intaking poison. He identified accused Mohibur Rahman alias Boro Mia and Md. Abdur Razzak on dock of the Tribunal.

243. In cross-examination he [P.W.04] stated that he did not witness the incident of taking the Pakistani army men to the house of Colonel M.A Rab by Razakars, but he heard it from Khasru Mia. He did not witness the incident of looting and setting fire to the houses of Hindu Para, adjacent to the house of Colonel M.A Rab ,

but he heard it . He also heard about the incident of committing rape on two women at the Beripar. He heard about the incident from Allad Mia. He denied the suggestions that accused Md. Abdur Razzak was never a Razakar and that he was a supporter of liberation and that he provided assistance to the freedom-fighters during the war of liberation. He also denied the suggestion that he deposed falsely against the accused persons.

244. Md. Khasru Mia as P.W. 05 deposed that his age is about 65 years and he studied upto Class VIII. He belongs to village Khagaura Razpara under Baniachang Police Station, District Habiganj. Since his early age he took his education having been staying in the house of his maternal uncle General M.A Rab of village Khagaura. After completion of his studies he ran his maternal uncle's rice mill staying at his house.

245. He [P.W. 05] further stated that on 26 October 1971 at about 10.00 A.M. he heard that Pakistan army had come to their locality. Then he along with his another maternal uncle Abdur Rahim [brother of General M.A Rab], his wife Aruna Begum, mother Rashida Begum, sister Firoza Begum and their maid servant Chaur Bibi went to a neighbouring house of his maternal uncle. At that time his maternal uncle Abdur Rahim asked him to go to their house to lock their rooms.

246. He [P.W. 05] further stated that while he was going to his maternal uncle's house, he could see three boats were anchoring close to the edge of a pond towards south of his maternal uncle's house. Accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with about 15/16 Pakistani army men and some Razakars were on those boats. At that time hearing a gunshot, he went into hid in a bush which was towards north of his maternal uncle's house. Then the accused persons along with those Pakistani army men and Razakars having attacked plundered his maternal uncle General M.A Rab's house and then set his five rooms on fire. Thereafter, they also set fire to 15/16 houses of Hindu Para, adjacent to his maternal uncle's house. Among those 15/16 houses there were the houses of Rama Kanta Dev, Rabindra Kanta Dev, Monindra Dev and Umai Dev.

247. P.W. 05 also stated that then the accused persons and those Pakistani army men and Razakars went to the house of freedom-fighter Kamola Chaiman, situated at different Para of the same village after about one hour of looting and setting fire to the houses of his maternal uncle and Hindu Para. They also set fire to Kamola Chairman's house and tortured many people there.

248. He [P.W.05] has further deposed that thereafter they went to the house of Nuruzzaman Chairman, situated at Uttar Para of the same village, and also set 5/6 houses on fire there. Then they went

to the house of Allad Mia of the same village where sister of Allad Mia and wife of Monju [Manjob Ali] were raped. Afterwards, at about 3.00 P.M. they having left their village went towards Baniachang. He identified all the three accused persons on the dock of the Tribunal.

249. In course of cross-examination P.W. 05 stated that during the war of liberation in 1971 his age was about 20/22 years, and at that time he had been in their house. He denied the suggestion that during the war of liberation all the inhabitants of their Khagaura village joined the Razakar Bahini. The father's name of accused Mohibur Rahman alias Boro Mia is Hazi Daras Uddin. He knew Hazi Daras Uddin's two sons, namely Kalamdhar and Mostofa who were turbulent Razakars, and that is why freedom-fighters had killed them.

250. He [P.W. 05] denied the suggestion that accused Mohibur Rahman alias Boro Mia was never a Razakar like his brothers. Kamola Chairman died 5/6 months ago. He denied the suggestions that during the war of liberation accused Mujibur Rahman alias Angur Mia was a minor boy and at that time he [accused] along with his mother used to live in the house of his maternal uncle Badsha Mia. He further denied the suggestions that during the war of liberation accused Md. Abdur Razzak provided shelter to many Hindu families and that he worked infavour of freedom-fighters and

that he provided assistance to the freedom-fighters. The bush where he went into hid was about 20/25 feet far from his maternal uncle's house. Besides him, Shafiq Ali, Kamola Chairman and others also witnessed the incident of attacking his maternal uncle's house by the Razakars and Pakistani army. He denied the suggestion that he deposed falsely against the accused persons.

251. P.W. 06 Md. Shafiq Ali testified that his age is about 61 years and he studied upto Class V. On 26 October 1971 at about 10.00 A.M. he went to the field next to their house for grazing their cattle. Then he heard 2/3 gunshots. Then by running he went to the bank of pond of General M.A Rab's house wherefrom he witnessed that through the canal three boats were anchoring close to the southern side of the house of General M.A Rab. At that time he could see accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some Razakars and 10/15 Pakistani army men on those boats. Thereafter, the accused persons along with those Razakars and Pakistani army men went to the house of General M.A Rab. He witnessed that incident from a bush on the bank of the pond of General M. A Rab where he went into hid.

252. P.W. 06 further stated that he also witnessed that at that time the Razakars and Pakistani army men having plundered M. A Rab's house set his five rooms on fire. After that, they set fire to 10/12

houses of Hindu Para, adjacent to the north of General M. A Rab's house. The houses of Roma Chandra Dev, Monindra Chandra Dev, freedom fighter Rabindra Chandra Dev and many others of that Hindu Para were set on fire. He also witnessed those incidents from inside the bush. Thereafter, the accused persons along with their accomplice Razakars and Pakistani army men were going back from the house of General M.A Rab in the same boats by which they came.

253. He [P.W. 06] also stated that then he came out from the bush and went to his house, and told his paternal uncle, paternal aunt, maternal uncle [Lvjy] , maternal aunt [Lvjv] and other inmates of their house that the Pakistani army had come to their village and asked them all to flee away leaving the houses. After about 15/20 minutes of his reaching home, he saw that the people of their Para were running hither and thither. Then he witnessed that through the canal situated at the northern side of their Para the accused persons and their accomplice those Razakars and Pakistani army men came to their Para. Then he also witnessed that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars having captured some elderly men from the northern part of their Para were bringing them towards their house. Among those elderly men there were Kalai Ullah, Ershad Ullah, Abdul Motalib, Mazid and Sad Ullah. He

further testified that the accused persons and those Razakars brought those captured people to the courtyard of his grand-father Yakub Ullah's house. At that time his grand-father was staying in his house. Then they brought out his grand-father from his room and assembled him with those captured elderly men. He [P.W. 06] witnessed those incidents hiding behind a room of their house. At that time accused Mohibur Rahman alias Boro Mia told the Pakistani army men that all the captured people including his [P.W. 06] grand-father were Malaun [Hindus], kill them. Then one Pakistani army man having slapped accused Mohibur Rahman alias Boro Mia told him that all the captured people were bearded men, release them. While the Razakars and Pakistani army men having released the captured people were leaving his grand-father's house, accused Mohibur Rahman alias Boro Mia told his accomplice Razakars that his [P.W. 06] grand-father's son Kamola Mia was a freedom-fighter, set his house on fire. Then 2/3 Razakars setting fire to Kamola Mia's house left the place and went towards north .

254. He [P.W. 06] further stated that after their departure he brought out his mother, paternal aunt and other relatives from the rooms to the place of incident when the room of Kamola Mia was burning which they then extinguished with water. After about 10/15 minutes, he also went towards north of their village and saw that the Razakars and Pakistani army having crossed the canal attacked

the Uttar Para. Then he could see that the inhabitants of Uttar Para were running hither and thither and after about 1 / 2 minutes he could also see flame of fire at Uttar Para. Then he came to know from the people present at the northern bank of the canal that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with other Razakars and Pakistani army men had set fire to the house of freedom-fighter Nuruzzaman of Uttar Para and two women were raped at Uttar Para, of them one was Allad Mia's sister Agarchand Bibi and the other one was the wife of Manjob Ali. He also testified that on the day of said incidents [26.10.1971] at about 3.00 P.M. he saw the accused persons and their accomplice Razakars and Pakistani army men going towards west by boats through the same canal. He identified all the three accused persons on the dock of the Tribunal.

255. In cross-examination P.W. 06 stated that in 1971 his age was about 16/17 years. He denied the suggestion that in 1971 his age was 7/8 years. Their house and General M. A Rab's house are situated in the same village. The distance between these two houses is about 500 feet. The distance between their house and the field where he went to graze the cattle was about 400 feet. The distance between the house of General M.A Rab and the ghat [quay] where the accused persons anchored their boats was maximum 50/60 feet. Freedom-fighter Nuruzzaman's house is about 1000 feet far from

their house. Freedom-fighter Nuruzzaman was once chairman of their union. Abdul Khaleque was the other name of Kamola Mia who was also chairman of their union and he was his own uncle.

256. He [P.W. 06] denied the suggestion that during the war of liberation in 1971 accused Abdur Razzak along with his family gave shelter to Hindu people and provided assistance to the freedom-fighters. He further denied that during the war of liberation in 1971 accused Mujibur Rahman alias Angur Mia was a minor boy and at that time he was staying in the house of his maternal uncle Badsha Mia. At the time of incidents there were ponds in the house of General M. A Rab, one was at the east and the other one was at the west.

257. P.W. 06 further stated that General M.A Rab was unmarried. One boy named Ain Uddin, now dead, used to stay in General M. A Rab's house. Ledhu Mia, brother of General M. A Rab , used to live at their home. At the time of incidents Ledhu Mia had a son named Khokon who is now in Saudi Arabia. One sister of General M. A Rab used to live near his house who often came to General M. A Rab's house. He denied the suggestion that he deposed falsely against the accused persons.

258. Md. Allad Miah as P.W. 07 stated that his age is about 70 years and during the war of liberation in 1971 his age was about 25/26 years. On 26 October 1971 at about 10.15 A.M. accused

Mohibur Rahman alias Boro Mia , Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars and 15/16 Pakistani army men set fire to the house of General M. A Rab of Khagaura village. He saw the flame of that fire from his house. Then they also set fire to 15/16 houses of Hindu Para adjacent to the house of General M.A Rab.

259. He [P.W. 07] further stated that thereafter, they [accused and their accomplices] having gone to the house of freedom-fighter Kamola Mia assaulted some people and then set Kamola Mia's house on fire. Then the accused persons and their accomplice Razakars and Pakistani army men went to the house of Nuruzzaman situated at Uttar Para of their village by boat, and set five rooms of said Nuruzzaman on fire. Thereafter, they went to the house of Manjob Ali which was just after 5/6 houses from there, and Pakistani army men committed rape on Manjob Ali's wife there.

260. P.W. 07 also stated that after that, they went to their [P.W. 07] house situated towards north just after 7/8 houses from that place. Then being afraid of he went into hid behind a room situated at the eastern side of their house. Then accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia facilitated the Pakistani army men to go into their room. He further stated that the Pakistani army men having gone into their room raped his sister

Agarchand Bibi, who had been in that room, and tortured her. On that day, the accused persons along with their accomplice Razakars and Pakistani army left their village by boats. He identified all the three accused persons on the dock of the Tribunal.

261. In course of cross-examination P.W. 07 stated that he knew the freedom-fighters, namely Akal Ali, Rajab Ali, Kamola Mia and Nuruzzaman of their locality. He also knew Mostofa who was the Razakar Commander of their locality and his brother Kalamdhar. The distance between their house and the house of General M. A Rab was about 500 yards. General M. A Rab was unmarried. In 1971, Abdur Rahim, younger brother of General M. A Rab used to live in the house of General M. A Rab, and his nephew [own sister's son] Khasru Mia used to run a rice mill set up in the house of General M. A Rab. Khasru Mia's house was situated towards south of the house of General M. A Rab.

262. He [P.W.07] further stated that he himself did not witness the incidents of setting fire to the houses of General M. A Rab and Hindu Para, but he heard the same and also saw the flame of fire at the places of incidents at the time of said incidents. He further stated that he himself witness the incident of setting fire to the house of freedom-fighter Nuruzzaman. He had been in their house when the Pakistani army men raped Manjob Ali's wife. Manjob Ali's wife and other inmates of their house told them on the very

day of the incident that Pakistani army men had committed rape on Manjob Ali's wife. He also told about the said incident to others before. At the time of incident his sister Agarchand Bibi was unmarried. After the incident, his sister Agarchand Bibi committed suicide intaking poison.

263. In cross-examination he [P.W. 07] also stated that the houses of General M. A Rab and Kamola Mia are situated towards south of their house. The house of Nuruzzaman is situated towards north about 250/300 yards far from the house of General M. A Rab. He denied the suggestions that in 1971 accused Mujibur Rahman alias Angur Mia was minor and at that time he did not stay in his locality and that he used to stay in his maternal uncle Badsha Mia's house at Baniachang. He further denied the suggestions that during the war of liberation in 1971 many Hindu families took shelter in the house of accused Mujibur Rahman alias Angur Mia, and that accused Abdur Razzak worked infavour of liberation. He also denied the suggestion that he deposed falsely against the accused persons.

264. P.W. 08 Joyful Bibi deposed that her age is about 56 years, and during the war of liberation 1971 her age was about 11 years. On 26 October 1971 at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars and 10/15 Pakistani army men having attacked and plundered the house of Rab set it on

fire, and also plundered many houses of Hindu Para adjacent to Rab's house and set fire to those houses. Then they went to Kamola Mia's house and set it on fire. Thereafter, they went to the house of freedom-fighter Nuruzzaman at Beripar [bank of embankment] and tortured people there and set fire to the houses. Their house and the house of freedom-fighter Nuruzzaman were situated side by side. She further deposed that she herself saw from their house the incident of torturing people and setting fire to the house of freedom-fighter Nuruzzaman by the accused persons and their accomplice Razakars and Pakistani army men.

265. She [P.W.08] further stated that thereafter, accused Mohibur Rahman alias Boro Mia along with two Pakistani army men came to their [P.W. 08] house. At that time, being afraid of she entered their room and hid herself under the quilt of her ailing father Manjob Ali who had been lying inside that room, and from there she could see that accused Mohibur Rahman alias Boro Mia entered their room with two Pakistani army men and then the said accused leaving the two army men inside the room went out, and then those two Pakistani army men raped her mother Abeda Khatoon Aksi. Both the Pakistani army men went away after about half an hour of torturing her mother in their room.

266. P.W. 08 also stated that accused Mujibur Rahman alias Angur Mia took Pakistani army men to the house of Agarchand

Bibi, adjacent to their [P.W. 08] house, and showed Agarchand Bibi to the Pakistani army, and then the Pakistani army men raped her. Agarchand Bibi herself told her [P.W.08] about the said incident. After a couple of days of that incident Agarchand Bibi committed suicide intaking poison. Afterwards, at about 3.00 P.M. of the same day, the accused persons along with their accomplice Razakars and Pakistani army left their village in three boats. She identified all the three accused persons on the dock of the Tribunal.

267. In cross-examination P.W. 08 stated that at 9.00 A.M. on the day of incident she had been in their own house. She has gone to the house of General M.A Rab, but on the date of incident she did not go to his house. General Rab had two brothers and one sister. General Rab was confirmed bachelor. At the time of incident there was only one room of her father in their house. She has denied the suggestions that accused Abdur Razzak was not a Razakar in 1971 and at that time he was infavour of the freedom-fighters and that he used to provide assistance to the freedom-fighters and that he gave shelter to many people of Hindu community. The father's name of Agarchand Bibi is Aftab. She denied the defence suggestions that the accused persons are quite innocent and she deposed falsely against them.

268. Hazi Mohammad Abdul Mosabber as P.W. 10 testified that his age is about 65 years and during the war of liberation in

1971 his age was about 21 years. He studied upto Class V in Chandanpur High School. During the war of liberation in 1971, he had a tiny shop, and at that time he used to live in his village home. On 26 October 1971 at about 10.00 A.M. he came on the road adjacent to his house which was headed towards the bazaar. When he came on the road he saw that three boats reached near the house of Colonel Rab. At that time he could also see that from those boats accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars and 10/15 Pakistani army men came to the house of Colonel Abdur Rab, and then they plundered his house and then set his [Colonel M.A Rab] five rooms on fire. They also set fire to 10/12 houses of the Hindu Para adjacent to his house. After that incident when the Razakars and Pakistani army left that place at about 11.00/11.30 A.M., then he went to the house of Colonel Abdur Rab. Then Colonel Abdur Rab's newpnew [sister's son] Khasru, brother Abdul Rahim Ledhu Mia and some other persons, who had been in the house of Colonel Abdur Rab, informed him that Razakars accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars plundered the house of Colonel Abdur Rab and then set it on fire at the time of the incident.

269. P.W. 10 further stated that thereafter those Razakars and Pakistani army men riding three boats went to the house of Kamola Mia Chairman which was situated at the eastern side of the house of Colonel Abdur Rab. Then he [P.W. 10] went into hid inside a bush on the road which went to the bazaar. The Razakars and Pakistani army men having gone to the house of Kamola Mia Chairman captured some people and plundered his house and then set it on fire. Among the people who were captured from the house of Kamola Mia Chairman, Shafiq Ali, Sadullah, Mazidullah and some others told him about the said incident later. Then he went to his own house.

270. He [P.W.10] further testified that thereafter those Razakars and Pakistani army men riding on those boats came to the ghat [quay] of their house from Kamola Mia Chairman's house. The accused persons along with those Razakars and Pakistani army men having come to their house plundered his shop. Thereafter, they having gone to the house of freedom-fighter Nuruzzaman, which was situated towards north from their house, looted his house and set it on fire.

271. P.W. 10 also stated that after the said incident, he heard that accused Mohibur Rahman alias Boro Mia along with 2/3 Pakistani army men having gone to the house of Manjob Ali, that accused person entered two Pakistani army men into the room of Abida

Khatun alias Aksi Bibi, wife of Manjob Ali and then those Pakistani army men raped Aksi Bibi. Thereafter, accused Mujibur Rahman alias Angur Mia along with two Pakistani army men having gone to the house of Allad Mia that accused person entered those two Pakistani army men into the room of Allad Mia and then those Pakistani army men committed rape upon Agarchand Bibi, younger sister of Allad Mia. On that day at about 3.00 P.M. the accused persons along with their accomplice Razakars and Pakistani army men left their village toward west. After that incident when they went to the houses of Manjob Ali and Allad Mia they heard about the incidents of rape from Manjob Ali, Allad Mia, Golam Hossain, Nur Hossain, rape victims Aksi Bibi and Agarchand Bibi. He identified all the three accused persons on the dock of Tribunal.

272. In cross-examination P.W.10 stated that Colonel Rab's house was situated about 400 feet far towards west-south from his house. He denied the suggestions that he did not witness the incident of 26th October, 1971 and that he was not present at the place of that incident. He further denied the suggestions that he did not hear about the incident of rape of two women and that he did not know about it. He further stated that the house of Colonel Rab and the houses of Hindu people are situated side by side.

273. He [P.W. 10] further stated in cross-examination that in 1971, there were 10/12 houses in Hindu Para. The houses of Moni Das, Karmakar, Bazendra Das, Rabi Das and Bhanu Das among the houses of Hindu people which were set on fire. Colonel Rab although lived at Dhaka. In 1971, during the war of liberation, Colonel Rab was in India. At that time Colonel Rab's brother Abdul Rahim alias Ledhu Mia along with his family used to live in the house of Colonel Rab. He denied the suggestion that no incident took place in the house of Colonel Rab and that he did not go to Colonel Rab's house after the alleged incident. He denied the suggestion that he deposed falsely against the accused persons.

274. P.W.11 Golam Hossain stated that his age is about 61 years and he hails from village Khagaura Beripur under Baniachang Police Station. During the war of liberation in 1971, Nuruzzaman Chairman, Manjob Ali, Allad Mia, Anfar Ali and others used to live at Uttar Para of Beripar. In the first part of Bangla month Kartik in 1971 at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars and 12/14 Pakistani army men arrived at the ghat of the house of Colonel M.A Rab in three boats. Then they having gone to the house of Colonel M.A Rab plundered his house and set his five rooms on fire. Thereafter, they having

gone to Hindu Para, adjacent to Colonel M.A Rab's house, plundered about 10/15 houses and then set them on fire.

275. P.W. 11 further stated that in conjunction with the same attack on that day [in the first part of Bangla month Kartik in 1971] at about 11.30 A.M. the accused persons and those Razakars and Pakistani army men having gone to Dakkhin Para of Beripar assaulted people there and plundered the house of Kamola Mia and then set it on fire. Thereafter, at about 1.00 P.M. they went to Uttar Para of Beripar and set fire to five rooms of Nuruzzaman. Then accused Mohibur Rahman alias Boro Mia along with two Pakistani army men went to the house of Manjob Ali of Uttar Para and entered those army men into his [Manjob Ali] room. At that time Manjob Ali was lying in his room being sick. Then those two Pakistani army men committed rape on Aksi Bibi, wife of Manjob Ali. Accused Mujibur Rahman alias Angur Mia along with two Pakistani army men went to the hosue of Allad Mia of Uttar Para and entered those army men into his [Allad Mia] room. Then those two Pakistani army men raped his [Allad Mia] sister Agarchand Bibi. Thereafter, the accused persons and their accomplice Razakars and Pakistani army men at about 3.00 P.M. went away towards west in their three boats. After a few days of that incident Agarchand Bibi committed suicide.

276. In cross-examination P.W. 11 stated that Colonel M.A Rab's house was situated 700 feet far from their house. In 1971, boat was the only means to go to Baniachang Thana Sadar from the house of M.A Rab, at that time there was no road communication there. In 1971, there were twenty rooms in Colonel M.A Rab's house including the houses of Hindu Para. He denied the suggestion that accused Abdur Razzak and Mujibur Rahman alias Angur Mia were not involved with the incident taken place in the house of Colonel M.A Rab.

277. He [P.W. 11] further stated in cross-examination that in 1971 there were 4/5 rooms in the house of Manjob Ali, and at that time Manjob Ali and his brothers were four in number and Manjob Ali was the youngest among them. Two brothers of Manjob Ali died before the war of liberation and the other brother died after the liberation of the country. In 1971, Manjob Ali used to live in the eastern bhiti of the same house. The wives of other brothers of Manjob Ali also used to live in the same house, but none of them is alive now. In 1971, there were two rooms in Allad Mia's house.

278. He [P.W. 11] further denied the suggestion that he made untrue and tutored statement about the incidents of committing rape upon Agarchand Bibi and Aksi Bibi. He further denied that accused Mohibur Rahman alias Boro Mia assisted the freedom-fighters and gave them shelter, and that he deposed falsely being tutored.

Finding with Reasoning on Evaluation of Evidence

279. Charge nos. 02 and 03 have been taken up together for conjoint adjudication, for convenience of discussion and decision on evaluation of evidence adduced as it appears that the events narrated in those charges involve criminal acts allegedly committed on the same day and in conjunction with the same attack by the same group of attackers although the accused persons have been indicted by framing two independent charges.

280. Tribunal notes that the event narrated in charge no.02 involves the criminal acts of wanton destruction of civilians' properties allegedly committed on 26 October at about 10:00 A.M. directing attack at the locality of village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division by the group of Razakars and Pakistani army men constituting the offences of 'other inhuman acts' as crimes against humanity.

281. The learned prosecutor Mr. Sultan Mahmud submitted that defence does not dispute the event of attack that resulted in wanton destruction of civilians' properties. Defence simply dispute the accused persons' presence at the crime site with the group of attackers. The report published in a newspaper [Exhibit-2/2] also demonstrates that a group of Pakistani occupation army accompanied by local Razakars had carried out the attack. P.W.05 and P.W.06 are direct witnesses who testified the event of attack

and complicity of accused persons therewith. Defence could not impeach what has been testified by the witnesses implicating the accused persons.

282. The learned defence counsels defending all the three accused persons submitted that the event of attack by a group of Pakistani army accompanied by some Razakars as arraigned in this charge is not disputed. Defence disputes that none of the accused persons was with the group of attackers as they did not belong to local Razakar Bahini. Testimony of P.W.s and that of D.W.s if compared to each other, complicity of the accused persons with the alleged event does not seem to be proved, Mr. M. Masud Rana, the learned State defence counsel for accused Md. Abdur Razzak added. He further submitted that some of the P.W.s are anonymous hearsay witnesses and narration made in Exhibit-1 [seizure list] is contradictory to the version of P.W.05 and testimony of P.W.09 and P.W.10 is contradictory to each other, on material particular.

283. The event narrated in charge no.03 involves the event of attack launched around the neighbouring locality of the same village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division and this attack was allegedly carried out on 26 October 1971 at about 02:00 P.M. following the attack occurred few hours back on the same day as narrated in charge no.02. In carrying out this attack the Pakistani army men allegedly

committed 'rape' upon two women as substantially assisted by the accused persons accompanying them.

284. In respect of the event narrated in charge no.03 involving the offence of rape it has been argued by the learned prosecutor that P.W.07 and P.W.08 are direct witnesses to the facts materially relevant to the principal offence of rape committed upon two women, in conjunction with the attack that started in morning on the day the event narrated in charge no.02 happened. The other witnesses heard the fact of abusing two women by the Pakistani army men from the victims and their relatives and as such their hearsay testimony carries probative value.

285. It has been argued by the learned prosecutor that P.W.07 and P.W.08 are direct witnesses to the facts materially relevant to the principal offence of rape committed upon two women, in conjunction with the attack that started in the morning on the day the event narrated in charge no. 02 happened. The other witnesses heard the fact of abusing two women by the Pakistani army men from the victims and their relatives, and as such, their hearsay testimony carries probative value.

286. The learned prosecutor further submitted that defence adduced and examined two witnesses who stated that no such event of rape happened. But such mere saying that the act of rape did not happen does not render the testimony of prosecution witnesses who

happen to be near ones of the victims. The evidence of P.W.s rather proves it beyond reasonable doubt that the accused persons accompanying the group of attackers had provided aid and substantially facilitated the Pakistani army men in accomplishing the act of sexual ravishment upon two women of the locality under systematic attack. Defence could not controvert the testimony tendered by the prosecution witnesses in any manner and there has been no reason to exclude their evidence.

287. It has been argued on part of the defence that the alleged event of rape is a concocted and improbable story; that prosecution failed to prove the fact of alleged rape and the accused persons' complicity therewith; that committing rape in presence of husband and daughter was rather quite impracticable; that it remained unexplained as to where the other Pakistani army men forming the group were when two army men were allegedly engaged in committing the crime of rape being allegedly aided by the accused persons. Defence by examining D.W.s has been able to negate the alleged event of rape.

288. It appears that to prove both the charges prosecution adduced 09 witnesses who have been examined as P.W.s 01, 03,04,05,06,07,08,10 and 11. All of them have testified both the events narrated in charge nos. 02 and 03. Now let us evaluate the

testimony the witnesses have made in relation to the events narrated in both the charges [charge nos. 02 and 03].

289. Prosecution requires proving the commission of the offences first and then needs to establish how the accused persons had acted to get them 'concerned' in facilitating and aiding the commission of the offences of 'other inhuman acts' and 'rape' as alleged by launching attack at the village Khagaura under Police Station Baniachang of the then Sub-Division Habiganj. Prosecution chiefly depends upon oral testimony of witnesses from the crime village including the near relatives of rape victims and affected civilians.

290. P.W.01 Mostor Ali is a resident of crime locality and in 1971 he was 17 years old. In respect of the first phase of the attack as narrated in charge no.02 P.W.01 stated that 15 days prior to the event of killing his brother Akal Ali and Rajab Ali, freedom-fighters that happened on 11 November 1971, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak being accompanied by their accomplice Razakars and Pakistani army men of Baniachang army camp by launching attack plundered the house of Colonel M.A Rab and set it on fire and then the group plundered 10/12 houses of Hindu Para, adjacent to Colonel M.A Rab's house and then set them on fire. The group of attackers also destructed the houses of Kamola Mia and Nuruzzaman by plundering and setting those on fire.

291. It is not clear whether P.W.01 saw the event he described as above or heard it. However, P.W.01 next stated that he heard that during the attack launched Pakistani army men committed rape upon two women of Uttar Hati with the assistance of accused Mohibur Rahman alias Boro Mia and the victims were Agarchand Bibi, unmarried sister of Allad Mia and another one the wife of Manjob Ali. P.W.01 does not claim to have witnessed any of phases of the event or acts of the accused persons related to the principal crimes. Presumably P.W.01 is a hearsay witness although he did not disclose as to from whom he heard the event. However, his hearsay evidence if it is even deemed to be anonymous may be taken into account if the same is found to have been corroborated by 'some other evidence'. Thus, in assessing probative value of the testimony of P.W.01 we are to look at what has been testified by other witnesses.

292. P.W.03 Taraj Ullah also appears to be hearsay witness as he simply stated the commission of criminal acts of destruction of houses of M.A Rab, civilians of adjacent Hindu Para, Nuruzzaman and Kamola Mia by setting those on fire by the group of Razakars and Pakistani army men accompanied by the three accused persons. P.W.03 also stated the commission of rape upon two women of Uttar Beripar, of them one was the wife of Monjur Ali [Manjob Ali] and the other one was the sister of Allad Mia, by the Pakistani

army men. But he [P.W.03] did not make it clear whether he saw the event he narrated or heard it.

293. However, in cross-examination, P.W.03 stated in reply to question put to him that having heard the event from Allad Mia [brother of one of the rape victims] and Kamola Mia, a victim of destructive activities caused to his household, went to the house of M.A Rab in the afternoon on the same day. Thus, it impels the conclusion that P.W.03 as a local had occasion of learning the event of attack that resulted in wanton destruction of civilians' properties and sexual ravishment upon two women when instantly after the events occurred.

294. It is to be borne in mind that in a horrific war time situation all the habitants of a locality under attack might not have opportunity to observe the attack or acts of the perpetrators. Hearing the atrocious activities from the victim and relative of victim instantly after the accomplishment of the crimes, as stated by P.W.03, forces to conclude that P.W.03 as an inhabitant of the locality under attack seems to be natural and believable witness. And thus the hearsay testimony of P.W.03 carries probative value and inspires credence.

295. The evidence of P.W.03 goes to show that the concurrent attack was launched by the group of Razakars and Pakistani army

men accompanied by the three accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak that resulted in massive destruction of houses of Colonel M.A Rab, Kamola Mia, Nuruzzaman and several houses of adjacent Hindu Para and also in committing rape upon two women with the active assistance and aid of the accused persons.

296. Md. Allad Mia, brother of rape victim Agarchand Bibi testified as P.W.07. For the purpose of assessing probative value of hearsay evidence of P.W.01 and P.W.03 we need to get his [P.W.07] evidence evaluated first.

297. P.W.07 Md. Allad Mia is the brother of Agarchand Bibi, one of the rape victims. He stated that on 26 October 1971 at about 10:15 A.M. a group of Razakars and Pakistani army accompanied by the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md.Abdur Razzak, by launching attack, set the house of M.A Rab on fire and he saw the flames of fire from his [P.W.07] house. P.W.07 also testified that the group also set fire to 15/16 houses at adjacent Hindu Para, houses of freedom- fighter Kamola Mia and Nuruzzaman of their village.

298. Seeing flames of fire from the house of M.A Rab at the relevant time proves the act of committing destructive activities by launching attack. And since the acts of the accused persons in facilitating the Pakistani army men to commit sexual ravishment

upon his younger sister Agarchand Bibi which he had occasion to see was chained to the phase of attack of causing destructive activities it may be lawfully presumed that then the accused persons as well were with the group even in causing vicious activities by launching attack upon the houses of Colonel M.A Rab, civilians' of Hindu Para, Kamola Mia and Nuruzzaman.

299. The act of causing wanton destruction by setting fire on the houses of several civilians of village Khagaura becomes affirmed as P.W.07 in reply to question put to him stated that he himself did not witness the incident of setting fire to the houses of M.A Rab and Hindu Para, but he heard of it and also saw the flames of fire at places of incidents when it occurred. It emerges from cross-examination of P.W.07 that he himself witnessed the event of setting fire to the house of freedom fighter Nuruzzaman.

300. It reveals from the evidence of P.W.07 that Nuruzzaman's house is near to Manjob Ali's house and there had been 7/8 houses in between that of P.W.07 and Nuruzzaman. Defence could not controvert it. Thus seeing the act of setting the house of freedom-fighter Nuruzzaman on fire as unveiled in cross-examination is quite believable.

301. Hearsay testimony of P.W.01 and P.W.03 so far as it relates to the attack involving wanton destructive activities by setting households of numerous pro-liberation civilians and the act of

committing coercive sexual invasion upon two women in conjunction with the concurrent attack in the locality of village Khagaura carries probative value as it is found well linked with the accused persons' presence with the group of attackers at the crime sites which was an indisputable indication of their culpable act and conduct, proved by the direct evidence of P.W.07.

302. Presence of accused persons with the group formed of Razakars and Pakistani occupation army at the crime sites, as proved from the evidence of P.W.01, P.W.03 and P.W.07 does not match with their innocence. Obviously, keeping eyes on the objective of forming Razakar Bahini in 1971, we may safely conclude that the accused persons belonging to local Razakar Bahini did not accompany the gang for any holy purpose. Rather, they accompanied them consciously intending to provide assistance, aid and substantial contribution for the perpetration of crimes by launching attack directing civilian population, we infer it unerringly.

303. The Tribunal reiterates that in 1971 during the war of liberation, the Pakistani occupation army, for obvious reason, was not at all acquainted and familiar with geographical location of certain places, language and people belonging to pro-liberation ideology. The history says that the local collaborators belonging to Razakar, Al-Badar, Peace Committee and other forces actively

aided the Pakistani army of being acquainted with these which were essentially required for carrying out atrocious attack directing the civilian population. It happened too in launching attack directing the pro-liberation civilians of village Khagaura, we validly infer. Local mighty Razakars including the accused persons enthusiastically and actively guided and assisted the gang of Pakistani army men in carrying out their 'mission', it is proved unequivocally from the evidence and circumstances divulged .

304. Evidence of P.W.01, P.W.03 and P.W.07 gets consistent corroboration from what has been testified by P.W.05 Md. Khasru Mia, sister's son of Colonel M.A Rab of village Khagaura as he[P.W.05] stated that on 26 October 1971 at about 10:00 A.M. he saw the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak were with 15/16 Pakistani army men and some Razakars coming by boats to their village and plundering and setting the houses of M.A Rab, 15/16 houses of adjacent Hindu Para, houses of freedom-fighters Kamola and Nuruzzaman. P.W.05 saw all those acts remaining in hiding inside a bush at the north of their house [M.A Rab's house].

305. Was it practicable for P.W.05 to observe and experience the criminal activities of the accused persons and their cohorts remaining in hiding? In cross-examination in reply to question put to him P.W.05 stated that the bush wherein he remained in hiding

was about 20/25 feet far from his maternal uncle's [M.A Rab] house and besides him, Md. Sahfiq Ali [P.W.06], Kamola Chairman [now dead as stated by P.W.05] and others also witnessed the incident of attacking M.A Rab's house by the Razakars and Pakistani army men. Thus, it stands affirmed that P.W.05, a direct witness had fair opportunity to observe the attack directing Colonel M.A Rab's house. Besides, defence could not dislodge the above pertinent version relating to launching attack and destructive activities by plundering and setting the houses of pro-liberation civilians on fire.

306. Md. Sahfiq Ali, a resident of the crime village also witnessed the attack, P.W.05 stated in cross-examination. Md. Shafiq Ali has deposed as P.W.06. It transpires that P.W.06 at the relevant time on hearing 2/3 gun shots he went towards the bank of pond of General M.A Rab's house wherefrom he saw the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Md. Abdur Razzak and their cohorts arriving by boats. He [P.W.06] then saw them setting M.A Rab's house and the houses of adjacent Hindu Para on fire.

307. It got affirmed in cross-examination of P.W.06 that General M.A Rab's houses was maximum 50/60 feet far from the 'ghat' where the accused persons and their cohorts anchored their boats and the distance between the house of General M.A Rab and that of

their[P.W.06] own was about 500 feet. Therefore, it was quite practicable of observing the group coming and attacking the house of General M.A Rab from the place on the bank of pond of General M.A Rab's house, as stated by P.W.06 and it is compatible and consistent with what has been testified by P.W.05 and P.W.07 in relation to launching attack by the accused persons and their cohorts accompanying the Pakistani army men at the relevant time that resulted in wanton destruction of civilians' houses by setting those on fire.

308. The testimony of P.W.06 also demonstrates that at a stage of attack he[P.W.06] saw, remaining in hiding behind a dwelling shed of their house, the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Md. Abdur Razzak and some other Razakars got Kalai Ullah, Ershad Ullah, Abdul Motalib, Mazid and Sad Ullah, the elderly people of their Para assembled at the courtyard of his [P.W.06] grand-father Yakub Ullah's house bringing them there on forcible capture where accused Mohibur Rahman alias Boro Mia told the army men with them to kill those people terming them '*malaun*' [Hindu]. But one Pakistani army man slapping accused Mohibur Rahman alias Boro Mia asked him to set them released as the captured people were bearded men. Forcible capture of some elderly people as stated by P.W.06 gets

corroboration from the evidence of P.W.10, a resident of the crime village.

309. Defence could not dislodge the above version which depicts extreme antagonistic and culpable mindset of the accused persons towards who sided with the liberation war. Besides, this version provides strong corroboration to the description made by other direct witnesses in relation to the attack, criminal acts and the accused persons' conduct and act of accompanying the troops at the sites.

310. It also transpires too from the evidence of P.W.06 that on instruction of accused Mohibur Rahman alias Boro Mia his accomplice Razakars set fire to the house of his[P.W.06] grand-father's son Kamola Mia, a freedom-fighter while the accused persons, their accomplice Razakars and Pakistani army men were leaving his[P.W.06] grand-father's house by setting the captured people released.

311. P.W.06, at a stage of attack, also saw the house of Kamola Mia burning and the Razakars and Pakistani army men attacking Uttar Para of the same village and such attack forced the inhabitants running hither and thither and few minutes later he [P.W.06] saw the flames of fire at Uttar Para. It could not be shaken in any manner by the defence. This uncontroverted version of P.W.06

ৱম) Ges KfYp Gg G ietK mnKvix meWabvqK (G'wm ÷ 'uU ৱম-Bb-
ৱম) gfbvbxZ Kiv nq/''

[Source: A report titled *ôvsj v`tki`-taxbZv mk`-msMôgi GK wbfZPvix tmbv bvqK tRbvij ie exi DĒgô* published in **The Daily Janapad, 03 May 2006: Prosecution Documents Volume- page 16]**

314. The above reflects the heroic and patriotic role and contribution of valiant freedom-fighter Colonel M.A Rab Bir Uttam. Defence too does not dispute it. It may thus be unerringly inferred that this was the reason of targeting Colonel M.A Rab's native home at village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division, to further policy and plan of the Pakistani occupation army and the members of notorious Razakar Bahini, an auxiliary force formed to collaborate with them, substantially aided and assisted in launching the attack. The attack launched on 26th day of October 1971 as evinced from the testimony of prosecution witnesses gets corroboration from the following narrative made in a report titled *ôgnvb`-taxbZv w em I tgRi tRbvij (Aet) tgnv`\$ Avāy ie, exi DĒgô* published in the Daily 'Protidiner Bani'[*côZw`tbi evWj*], 01 April 2003 [Exhibit-2/2]:

"KfYp Gg G ie gnyphx tbZZj:côv`tbi Rb" 10B KmĒR (26 A±vei) Zwi`L LvMvDov Zvü Môtgi emotZ cvKtmbvív tctUvj tXtj Av. b jvM`tq cvDvU Ni Rnyj tq fw`\$fZ Kti | Z` msMôKv`j Zvü meRwYô FvB Rbve Gg G iing NUbvUí eYðv t`b | wZvb Rvrbv th, cvKevmbx embqvPs _vbr t`tK PviwU tbsKv`thv`M Môtgi w`tK mKuj `kUvq Avm`Z _v`K | Zv`i c_cô kR wntmte mv_x nq Môtgi wKQz ivRvKvi Avi KvVLv`tj i tgSj fx wmw`K Avj x `vjvj | cvKtmbv `j `t`_t`K evox j`' Kti wj Qto | j`'P`Z wj`Z cv`tki emoi GKwU tg`tq gviv hvq | kã i`tb Ges tbsKvi AvMgb j`' Kti Pv`i gny w`tq evoxi gvqv tQto axti axti Rieb w`tq Ab`I AvZ`Mvcb Ktib | `ô`b ch\$Z emZ emwU

১৯৭১ সালের ২৮ অক্টোবর/ কুমিল্লা গণমাধ্যমে প্রকাশিত একটি প্রতিদিনের বানি
 পত্রিকায়।”

[Source: A report titled *গণমাধ্যমে প্রকাশিত একটি প্রতিদিনের বানি* (Aet) *গণমাধ্যমে প্রকাশিত একটি প্রতিদিনের বানি* ie, *খবর* published in the Daily ‘Protidiner Bani’ [১৯৭১ সালের ২৮ অক্টোবর], 01 April 2003 : Prosecution Documents Volume page 19]

315. Defence does not challenge the authoritativeness of those two reports. The essence of the above report depicts that-

- (i) on 28 October 1971 at about 10:00 A.M. the attack was launched;
- (ii) the group of attackers formed of Pakistani army men stationed in Baniachang Police Station Sadar and some local Razakars[of Khagaura];
- (iii) the attackers came at the crime site by boats; and
- (iv) Colonel M.A Rab’s house and the houses of pro-liberation and Hindu civilians were burnt down by the attackers.

316. The core essence as depicted from the above report seems to have been based on narration made by M.A Rahim, the brother of Colonel M.A Rab Bir Uttam and the report also speaks that at the initial phase of the attack M.A Rahim went into hid elsewhere for two days. It is also found from cross-examination of P.W.10 Hazi Mohammad Abdul Mosabber that at the relevant time Colonel M.A Rab’s brother Abdur Rahim used to live in the house of Colonel M.A Rab and this fact makes it believable that on the face of the attack M.A Rahim went into hid elsewhere for two days, as the report speaks. Thus, naturally M.A Rahim could not narrate the detail precision in respect of the entire attack that continued till

03:00 P.M. But however, the report provides further corroboration to the evidence of the witnesses particularly who have testified in respect of the attack that resulted in wanton destruction of civilians' properties by burning and presence of the accused persons at the crime sites with the group.

317. P.W.08 Joyful Bibi is the daughter of one of the rape victims namely Abeda Khatun alias Aksi. In 1971 she was 11 years old. Victim Nuruzzaman was their neighbour, she stated. She [P.W.08] herself saw from their house the incident of torturing people and setting the houses of their neighbour Nuruzzaman on fire by the accused persons and their accomplice Razakars and Pakistani army. Defence could not refute this crucial version of a direct witness in any manner.

318. P.W.10 Hazi Mohammad Abdul Mosabber is a resident of the crime village. On the day of event of attack he was on the road headed towards bazaar, and as such, he had occasion of observing the group formed of Pakistani army and accompanied by Razakars Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Md. Abdur Razzak and some other Razakars arriving at the site by boats and attacking the house of Colonel M.A Rab set it and 10/12 houses of Hindu Para adjacent to his [Colonel M.A. Rab] house on fire. After the group had left the place he went to the houses of Colonel M.A Rab when the inmates informed that the

accused persons and some other Razakars had plundered their house and set it on fire.

319. The above version of P.W.10, a direct witness demonstrates that they being neighbours had occasion of observing the group coming at the site by boats being accompanied by the accused persons. It together with what he heard from the inmates of Colonel M.A Rab's family and the version of P.W.08 relating to seeing the accused persons, their accomplice Razakars and Pakistani army men torturing people and setting the houses of their neighbour Nuruzzaman on fire proves the presence and culpable conduct of the accused persons with the group of attackers that substantially facilitated the commission of destructive activities. Defence could not impeach it in any manner. Besides, on cross-examination, P.W.10 stated that Colonel M.A Rab's house was about 400 feet far from that of his [P.W.10] own and the Hindu Para and Colonel M.A Rab's houses were situated side by side. Thus, it was quite practicable to observe what he[P.W.10] testified in relation to coming the group at the relevant time , launching attack and the act of setting the houses of Colonel M.A Rab and Hindu civilians on fire.

320. It is also evinced from the testimony of P.W.10 that the Razakars and Pakistani army, in conjunction with the attack, plundered his [P.W.10] shop, burnt down and looted the house of

freedom-fighter Nuruzzaman situated towards north to their [P.W.10] house. It remained unimpeached by the defence.

321. P.W.11 Golam Hossain, a resident of village Khagaura consistently corroborates by testifying that on the day and at time a group formed of accused persons, their accomplices and Pakistani army men arriving by boats had launched attack directing the village Khagaura and had carried out massive destructive activities by burning and plundering houses of pro-liberation civilians, then the houses of civilians of Hindu Para, freedom-fighters Nuruzzaman and Kamola Mia.

322. Presumably P.W.11 being a resident of the village which was attacked had fair reason to know the event he narrated. Besides, defence failed to bring anything by cross-examining him that he had no reason to hear or see the event he described. Rather, it reveals from cross-examination even that he [P.W.11] was a nearer neighbour of Colonel M.A Rab. Defence simply suggested that accused Mujibur Rahman alias Angur Mia and Md. Abdur Razzak were not involved with the event he [P.W.11] testified. Thus, his [P.W.11] testimony being corroborated by the evidence of other direct witnesses carries probative value and inspires credence.

323. The offence of 'other in human act' is a criminal act other than the acts constituting the offences enumerated in the Act of 1973. It is a residual category of the offences of crimes against

humanity. Destruction of civilians' properties is indeed a grave violation of fundamental rights of protected persons. The horror created through such criminal acts by launching a systematic attack caused serious mental harm to the affected civilians and the community as well. Such inhumane act affects the normal livelihood of civilians who were not directly involved in the hostility and forces the affected civilians and the community they belong to invite the days to come with immense mental agony.

324. Obviously, the Pakistani army men were not acquainted at all with the location of houses of Colonel M.A Rab, other freedom-fighters and pro-liberation people and Hindu Para of village Khagaura, thus they had to carry out the intended act of burning their houses, by borrowing some one's active assistance and signal. Presumably, the accused persons accompanying the Pakistani army men did it enthusiastically. The prosecution witnesses, particularly the direct witnesses from the crime village, have consistently testified the presence of the accused persons with the group. We find no reason to exclude their ocular testimony so far as it relates to the act of carrying destructive activities by burning the houses and households of defenceless civilians.

325. The facts, context and habitation of the witnesses around the geographic area of village Khagaura under Police Station Baniachang of the then Habiganj Sub-Division rather made it likely

for them to 'know' the accused persons as they had pro-Pakistan political prominence in the local community, even since earlier. We are thus satisfied that the witnesses did not make an attempt to mislead the Tribunal by saying that they saw accused persons accompanying the group of Pakistani army, in carrying out the attack.

326. Defence does not attack the truthfulness of the event of carrying destructive activities directing civilians' properties at village Khagaura. Causing harm by plundering and burning properties of civilians indeed involved serious despondency and disadvantage to the victims of the attack carried out with the aid and active assistance of the accused persons accompanying the group. 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.

327. The massive and malicious intentional destruction of homes and properties of civilian population was obviously detrimental to their customary livelihood and a blatant denial of their fundamental rights. Such terror inducing destructive acts were aimed to intimidate the non-combatant pro-liberation civilians, by launching attack, we conclude. The act of 'destruction' was carried by launching systematic attack with intent to destroy or damage

extensively the properties of civilians and such extensive damage was not justified even by military necessity.

328. The attack was organised and planned and knowing the consequence of the attack the accused persons accompanied the Pakistani army men to the crime sites. Thus, it is reasonable for the Tribunal to conclude, on the basis of the totality of the evidence on the trial record, that the accused persons culpably accompanied the group to participate in the attack directed at the pro-liberation civilians of the village Khagaura and the neighbouring locality on 26 October 1971. There is nothing before us that can demonstrate this conclusion to be unreasonable.

329. Defence simply denied the accused persons' complicity with the event and the attackers. The issue is the presence of the accused persons with the group and not whether they physically participated to the commission of principal crimes at the crime sites.

330. Presence of the accused persons at the crime sites with the group, as already proved, fanned the flames of grave inducement on commission of wanton destruction at village Khagaura, by accomplishing the act of burning down the targeted houses of non-combatant pro-liberation civilians. The first phase of the event of attack relates to wanton destructive activities directing civilians' properties indisputably intended to cause severe mental harm and the perpetrators did it with the aid and assistance of the accused

persons accompanying them by terrorizing the normal livelihood of non-combatant civilians.

331. Totality of the evidence presented before us lawfully forces to deduce the inference that the conduct of the accused persons had an encouraging or approving effect on the entire group of perpetrators and the effect thereof was substantial as they knew the upshot of their conduct and criminal intention of the Pakistani occupation army. Of course, by choosing to be present at the crime sites accompanying the group principally formed of Pakistani army men the accused persons rather took a positive and culpable stance forming part of systematic attack in accomplishing the mission which contributed to the commission of destructive activities.

332. It has already been proved that there had been a Razakar camp set up at the house of Sayed Kamrul Ahsan, adjacent to Khagaura bazaar and the accused persons had active and close affiliation with that camp and its activities. The report titled *উগ্রব* *ভারতীয় সৈন্যের* *সহায়তা* *প্রদানের* *বিস্তারিত* *বর্ণনা* *১৯৭১* *খ্রিস্টাব্দে* *২৬* *অক্টোবর* *তারিখে* *খাগোড়া* *গ্রামে* *পাকিস্তানি* *সৈন্য* *দ্বারা* *কৃত* *আক্রমণ* *এবং* *সহায়তার* *বিবরণ* *১৯৭১* *খ্রিস্টাব্দে* published in the Daily 'Protidiner Bani' [উগ্রব ভারতীয় সৈন্যের সহায়তা প্রদানের বিস্তারিত বর্ণনা ১৯৭১ খ্রিস্টাব্দে ২৬ অক্টোবর তারিখে খাগোড়া গ্রামে পাকিস্তানি সৈন্য দ্বারা কৃত আক্রমণ এবং সহায়তার বিবরণ ১৯৭১ খ্রিস্টাব্দে], 01 April 2003 [Exhibit-2/2] narrates that the local Razakars were with the group of Pakistani army men when they had launched attack on 26 October 1971 at about 10:00 A.M. at village Khagaura as their guiding associates. The report does not state the names of local Razakars, true. But inadequacy of information in this report does

not override the legitimate inference based on direct evidence that the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Md. Abdur Razzak and other Razakars accompanied the Pakistani army men at the crime sites.

333. Why the group of members of Pakistani occupation army and their collaborators belonging to local Razakar Bahini, an armed auxiliary force, had carried out the attack directing unarmed civilians of village Khagaura? Had such attack any nexus with the policy and plan of the Pakistani occupation army?

334. The history says that 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 Pakistani army. 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. It is indeed a settled history now that the Pakistani occupation army with the aid of its auxiliary forces and pro-Pakistan political organizations implemented the commission of atrocities in 1971 in the territory of Bangladesh in furtherance of following policies:

- Policy was to target the self-determined Bangladeshi civilian population.
- High level political or military authorities, resources military or other were involved to implement the policy.
- Auxiliary forces were established in aiding the implementation of the policy.
- The regular and continuous horrific pattern of atrocities were perpetrated against the targeted non-combatant civilian population.

335. The Razakar force formed in Khagaura village under Baniachang Police Station of the then Habiganj Sub-Division was also not away from the objective of forming Razakar Bahini, an auxiliary force, to further plan and policy of the Pakistani occupation army and this auxiliary force accordingly had carried out or aided the armed force to carry out criminal activities around the locality of Khagaura under Baniachang Police Station in 1971.

336. And thus the criminal acts of the group formed of Pakistani army men and Razakars including the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak and their accomplice Razakars directing the civilian population of village Khagaura was not isolated ones -- it was part of 'systematic attack' directed against 'civilian population' belonging to Bengali nation.

337. It stands proved that the attack launched directing the civilians of village Khagaura was unlawful and in violation of international humanitarian law as it resulted in the wanton destruction of civilians' normal livelihood causing serious mental injury and it also resulted in the extreme assault on two defenceless women. Totality of evidence presented demonstrates that the group of perpetrators accompanied by the accused persons made the civilian population and defenceless civilians the *object* of acts of violence and thus it may lawfully be concluded that the accused

persons and all the members of the group consciously and with intent acted knowing its consequence, to further policy and plan.

338. The finishing phase of the attack involved the untold sexual invasion committed upon two women of the village Khagaura by the Pakistani army men. It happened on active aid and assistance of accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia just before the group had left the sites by boat, the charge no 03 alleges. All the P.W.s described what they observed and heard of the event of rape upon two women in addition to testifying what they experienced, saw and heard of the event narrated in charge no.02.

339. P.W.07 Md. Allad Mia, the brother of victim Agarchand Bibi and P.W.08 Joyful Bibi, the daughter of another victim Abeda Khatun alias Aksi are the key witnesses to the event of committing rape upon those two women, in conjunction with the attack, as narrated in charge no.03. They testified some pertinent facts they observed relevant to the principal crime and the accused persons' complicity therewith. This phase of attack happened on the same day at the ending phase of the attack that was started with carrying out wanton destruction of civilians' properties by setting those on fire.

340. P.W.07, in respect of attack at their house followed by the wanton destructive activities carried out directing civilians'

properties around their locality, stated that Manjob Ali's [husband of rape victim Abeda Khatun alias Aksi] house was nearer to the house of Nuruzzaman and Pakistani army men committed rape upon Manjob Ali's wife and then they came to their house situated towards north just 7/8 houses therefrom [Manjob Ali's house]. With this he being feared went into hid behind a room at the eastern side of their [P.W.07] house. The accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia aided the Pakistani army men to get entered inside their room and raped his [P.W.07] sister Agarchand Bibi who had been inside the room. P.W.07 also stated that the accused persons, their accomplices and Pakistani army men left their village by boat on that day.

341. Committing rape upon Manjob Ali's wife as stated by P.W.07 has become re-affirmed as he [P.W.07] stated in reply to question put to him that Manjob Ali's wife and their family inmates told them on the very day of the event that Pakistani army men had committed rape upon Manjob Ali's wife.

342. The criminal act of sexual invasion committed upon the victims in the backdrop of war of liberation by the members of the Pakistani occupation army at the behest of the accused could reasonably be established even by the relevant facts as heard and seen by the surrounding people, we are of firm view .

343. It was impracticable for the Pakistani army men knowing the presence of women at their houses. Entering inside the dwelling shed of victim Angarchand Bibi provides valid indication that the Pakistani army men opted to enter therein as aided, assisted and provoked by the accused persons. The P.W.07 one of male members of the family could not resist the perpetrators and the accused Razakars from committing such grave invasion upon his younger sister despite knowing the consequence of entering of the army men inside his sister's dwelling shed. Coercive and horrific atmosphere did not permit him to come forward to save his sister's supreme honour. What a tragedy!

344. Hearsay testimony of P.W.01 and P.W.03 so far as it relates to the attack involving wanton destructive activities by setting fire to households of numerous pro-liberation civilians and the act of committing coercive sexual invasion upon two women in conjunction with the concurrent attack in the locality of village Khagaura carries probative value as it is found well linked with the accused persons' presence with the group of attackers at the crime sites which was an indisputable indicia of their culpable act and conduct, proved by the direct evidence of P.W.07 Md. Allad Mia.

345. In respect of the attack launched at their house P.W.08 Joyful Bibi [daughter of rape victim Abeda Khatun alias Aksi] testified that accused Mohibur Rahman alias Boro Mia

accompanied by two Pakistani army men came to their house and being feared she [P.W.08] entering inside their dwelling shed got herself hidden lying with her ailing father under a quilt and then she could see the accused Mohibur Rahman alias Boro Mia entering their room with two Pakistani army men and leaving them there the accused quitted. Then the army men raped her mother Abeda Khatun alias Aksi and about after half an hour the army men had left.

346. P.W.08 also heard the event of committing sexual ravishment from the victim Agarchand Bibi, their next door neighbour, by the Pakistani army men on active assistance of accused Mujibur Rahman alias Angur Mia, in conjunction with the same attack. Agarchand Bibi couple of days after the incident committed suicide by taking poison.

347. Defence could not impeach the above testimony of P.W.08, a competent and direct witness to the act of grave sexual abuse caused to her mother. Hearing the event of committing rape upon the neighbour Agarchand Bibi as stated by P.W.08 also remained totally unshaken. We do not find any earthly reason of disbelieving her. Merely for the reason that at the time of the event in 1971 P.W.08 was 11 years old her testimony cannot be brushed aside, particularly if it inspires credence and carries probative value. In this regard relying on the observation made by the **ICTR Appeals**

Chamber in the case of *Gacumbitsi v. Prosecutor* it has been observed by the Appellate Division of the Supreme Court of Bangladesh in the case of **Ali Ahsan Muhammad Mujahid**[Appeal Judgment] that –

" In Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A Appeal Chamber found, "it was reasonable for the Trial Chamber to accept witness TAX's testimony despite her young age at the time of the events (11 years old). The young age of the witness at the time of the events is not itself a sufficient reason to discount his testimony." There is no rule requiring the Court to reject per se the testimony of a witness who was child at the events in question. The probative value to be attached to testimony is determined to its credibility and reliability."

[Ali Ahsan Muhammad Mujahid v. Chief Prosecutor, Criminal Appeal No. 103 of 2013, Judgment 16.6.2015, Pages 166-167]

348. The proven fact of accompanying the group towards the crime sites provides rational indication that the accused persons, instead of withdrawing them from the group, guided the group of Pakistani army men in furtherance of an evil design. The Pakistani army men, the principal offenders, were not at all familiar with the locality and it were the accused persons who as collaborators of the Pakistani occupation army guided them consciously and actively towards the house of the victims intending to facilitate the offenders in accomplishing their lust which was indeed another blatant attack directing civilians.

349. The version of P.W.07 made in relation to the attack that resulted in commission of grave sexual abuse caused to wife of Manjob Ali and also to his [P.W.07] younger sister inspires credence. At the relevant time he [P.W.07] had been at their house and remained in hiding inside a different room and presumably he had opportunity of observing the acts of the accused person that facilitated the Pakistani army men in entering inside the room where his sister had been staying.

350. Defence could not impeach this version closely related to the commission of the principal crime. P.W.07 could have stated falsely or by making exaggeration that the accused persons themselves committed the act of rape upon his sister and not the Pakistani army men. But he did not claim so. We may thus safely conclude that P.W.07 testified what he really experienced and observed at the time of the event happened.

351. Next, being the brother of victim he [P.W.07] naturally had fair reason of knowing the extreme wrongs done to his sister from her although for obvious reasons he [P.W.07] is not expected to narrate before us the vivid description of the untold wound his sister sustained by laying down her supreme wealth. Besides, social ostracism prevents a person in making disclosure of such a traumatic event that grabbed the supreme honour of his dear younger sister.

352. Besides, the act of sexual abuse happened inside the room. No one had occasion to see it. But the unimpeachable version of seeing the Pakistani army men entering inside the room on being aided and assisted by the accused as stated by P.W.07 inevitably leads to the conclusion that extreme sexual assault was caused to his sister Agarchand Bibi.

353. P.W.07, the brother of victim Agarchand Bibi and P.W.08, the daughter of another victim Abeda Khatun alias Aksi of course did not come on dock to testify falsely. No sensible person would prefer to stigmatize his or her near and dear one by bringing a false accusation of gross sexual abuse on her. It is not at all believable that P.W.08 came on dock with an untrue story of the sacrifice her mother laid for the cause of nation's independence.

354. P.W.05 also stated that the group of Razakars and Pakistani army men accompanied by the accused persons finally moved to the houses of Allad Mia and Manjob Ali of the same village where sister of Md. Allad Miah [P.W. 07] and wife of Manjob Ali were raped and then the group had left their village at about 03:00 P.M. This version remained totally unshaken in cross-examination. Thus the event of committing sexual invasion upon two women in conjunction with the attack by the same group stands proved.

355. Presence of the accused persons combined with their culpable act and conduct at the crime sites with the principal

perpetrators, the Pakistani army men, as proved, obviously had an encouraging or approving effect on the physical perpetrators that amounted to instigating or aiding and abetting. The act of the accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia in facilitating the commission of the act of sexual ravishment upon two women, in conjunction with the attack, by its consequences, objectively formed part of attack.

356. Defence could not dislodge it that at about 03:00 P.M. on that day after the accused persons, their accomplices and the Pakistani army men had left the site P.W.10, a resident of the village Khagaura, learnt the event of sexual invasion committed on Abeda Khatun alias Aksi and Agarchand Bibi by the Pakistani army men from Md. Allad Mia [P.W. 07, brother of victim Agarchand Bibi] and Manjob Ali [husband of victim Abeda Khatun alias Aksi] and others. Hearsay evidence of P.W.10 in this regard carries probative value as he [P.W.10] heard it from the near relatives of the victims almost instantly after the perpetrators had left the crime sites and his [P.W.10] evidence gets corroboration from what has been testified by P.W.07 Md.Allad Mia, the brother of victim Agarchand Bibi.

357. It is now settled jurisprudence that hearsay evidence even if it is anonymous is not inadmissible *per se* provided if it gets corroboration from other evidence. P.W.11 Golam Hossain was a

nearer neighbour of Colonel M.A Rab. Naturally, he had occasion to learn the event of attack from the people of the locality. In addition to the event of attack that resulted in destruction of houses and properties of civilians by burning P.W.11 also stated the fact of committing rape upon Abeda Khatun alias Aksi and Agarchand Bibi at their houses by the Pakistani army men accompanied and assisted by the accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia, at the finishing phase of the attack. It also transpires from the evidence of P.W.11 that few days after the event victim Agarchand Bibi committed suicide. This version of P.W.11 carries probative value, in view of context, circumstances and pattern of attack, from the evidence of P.W.05, P.W.07 and P.W.08, the direct witnesses to crucial facts relevant to the commission of the principal offence of rape proves conscious and culpable concern in accomplishing the act of sexual ravishment upon two women by the Pakistani army men.

358. As regards submission on inconsistency advanced by Mr. M. Masud Rana, the learned State defence counsel for the accused Md. Abdur Razzak it is to be noted first that 'inconsistency' is not synonymous to 'contradictory'. Next, it is to be kept in mind that the witnesses came on dock to describe their traumatic experience long more than four decades after the atrocious events happened. Inconsistency may naturally occur in their sworn testimony.

359. Besides, observation of witnesses in respect of a certain fact may naturally vary due to various reasons including the situation existing in 1971 and pattern of attack launched. A civilian of the locality under attack might not have had opportunity to observe the entire phase of the attack and a particular material fact observed by him or her is to be considered together with other facts unveiled. In this regard we find substance in what has been submitted by Ms. Rezia Sultana, the learned prosecutor. It is to be noted too that an insignificant discrepancy does not tarnish witness's testimony in its entirety. Any such discrepancy needs to be contrasted with surrounding circumstances and testimony of other witnesses.

360. We are not with the defence argument that some of witnesses are hearsay in nature and thus their testimony deserves to be excluded. We reiterate that it is now well settled that even anonymous hearsay testimony is admissible and carries probative value if it is corroborated by some other evidence. Besides, evidence of even a single witness is sufficient to prove facts relevant to the principal event of crime. It is to be noted that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence is clear that corroboration is not a legal requirement for a finding to be made. In this regard **ICTR Trial Chamber** 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."

[The Prosecutor v. Simeon Nchamihigo, Case No. ICTR-01-63-T, Judgment: November 12, 2008, Para- 14]

361. This view finds support also from the decision of **ICTY Appeals Chamber in the case of Kordic and Cerkez**, wherein it has been observed that-

"The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence".

[Case No. IT-95-14/2-A, Judgment: 17 December 2004, Para- 274]

362. Defence by examining three witnesses as D.W.02, D.W.04 and D.W.06 admits the fact of launching attack by the Pakistani army and Razakars directing the houses of civilians including the houses of M.A Rab and Nuruzzaman. But the D.Ws, the locals of the crime site deliberately remained far from disclosing the event of rape committed in conjunction with the attack, by making mere 'negative assertion' nevertheless the defence could not impeach the event of committing rape by cross-examining the P.W.s.

363. D.W.02 Md. Harun Mia admitted that Razakars and Pakistani army men had launched attack in the Bangla month Bhadra [in 1971] directing civilians' houses including that of Colonel M.A Rab. Although he [D.W.02] remained silent as to the act of committing rape upon Abeda Khatun alias Aksi, the wife of

Manjob Ali and Agarchand Bibi, the sister of Md. Allad Mia [P.W.07] of their locality by the Pakistani army men, at the concluding phase of the attack launched. Presumably, D.W.02 deliberately suppressed the half-truth. But he, as a resident of the crime locality, was supposed to be aware of the criminal acts done in carrying out the attack causing grave wrong to two women as well.

364. D.W.05 Tahir Ali claiming him to be the uncle of Md. Allad Miah and his sister Agarchand Bibi stated that in 1971 Agarchand Bibi was 08 years old and no army man went to the house of Agarchand and Aksi, the wife of Manjob Ali, his neighbour and he[D.W.05] did not see or hear the event of committing rape upon them. Agarchand Bibi got married 10 years after independence and one year after she committed suicide. D.W.05 also claims that the accused persons were not Razakars.

365. Surprisingly, D.W.05 remained totally silent as to the attack by the Pakistani army men accompanied by Razakars directing the houses of civilians including that of M.A Rab that resulted burning down properties which is admitted by D.W.02, D.W.04 and D.W.06, the residents of the same locality. Hiding this fact mere describing negative assertion as to the event of rape upon two women of their locality is nothing but a calculated attempt to distort the truth intending to put the accused persons aside. D.W.05 thus

cannot be relied upon at all and his version in no way taints the truthfulness of the event of rape as has already been proved through lawful evidence presented by the prosecution.

366. Version of D.W.05 made in cross-examination tends to reflect patently that he was with lie. According to D.W.05 he arrived in Dhaka in the morning on the day fixed for his deposition [to be made in Tribunal] and straightway came to the Tribunal and none had brought him to Dhaka, that none told him to depose in the Tribunal, that arriving in Dhaka he told the name of advocate to the rickshaw puller who then took him to his [advocate] house. Admittedly D.W.05 is an illiterate person. This version itself together with what negative assertion he made in examination-in-chief turned down his credibility as a truthful witness.

367. D.W.06 Md. Gias Uddin, a resident of village Khussa Khagaura, similarly admits the attack launched by the Pakistani army and Razakars that resulted destruction of houses of their own, M.A Rab, Nuruzzaman and Dr. Abu Saleh, without implicating the accused persons as the accomplices of the Pakistani army. However, D.W.06 stated that he did not see or learn the event of committing rape upon Agarchand and his neighbour Manjob Ali's wife.

368. D.W.06 was 10/11 years old in 1971. His tender age at the relevant time does not render him incompetent, true. But it is to be

assessed whether he saw or heard the event and whether he had reason of recognizing the Razakars he named as accomplices of Pakistani army. All these remained unanswered. It is not clear too that D.W.06 had occasion to see the attack he testified.

369. D.W.06 claims that the accused persons were students in 1971 and had not been at their locality. Remaining away from the crime locality is a *plea of alibi* which needs to be proved with absolute certainty. It is settled legal proposition. But it transpires that in cross-examination D.W.06 stated that he could not say where the accused persons studied and used to stay in 1971 as it was not his concern. Be that as it may, we may safely infer that D.W.06 is not a competent and reliable witness and the testimony he made in examination-in-chief in respect of accused persons' being away from their locality goes on air and inspires no credence at all.

370. In conjunction with the attack launched Agarchand Bibi and Abeda Khatun alias Aksi, wife of Manjob Ali were sexually ravished by the Pakistani army men on facilitation of the accused persons, the charge framed alleges. Conversely, defence avers that no such event of rape happened. It is a negative assertion which is not required to be proved by adducing evidence. Burden lies upon the prosecution to prove the truthfulness of this fact. Prosecution, as already found on integrated evaluation of evidence, has been able to

prove this fact by adducing evidence. And the defence got due opportunity by cross-examining the prosecution witnesses to refute and negate this fact but it failed. Therefore, mere claim of D.W.06 that he did not see or hear the event of rape upon the wife of Manjob Ali and Agarchand Bibi who were their neighbours does not act in any manner to negate the event of rape committed in conjunction with the attack.

371. The two local daily newspapers, Exhibit-Ka and Exhibit-Kha narrate the news in relation to a press conference held in 2009 where some one spoke about accused Mohibur Rahman alias Boro Mia terming him not a Razakar. The press meet, as it appears, was arranged over of the clash between two groups of the locality and thus naturally may be presumed that the person who spoke citing credential of accused Mohibur Rahman alias Boro Mia was not a neutral and impartial person and rather he did it siding with Mohibur Rahman alias Boro Mia. Therefore, the news item in respect of a press meet favouring accused Mohibur Rahman alias Boro Mia cannot be considered to be authoritative one and accordingly it does not repudiate the fact of accused Mohibur Rahman alias Boro Mia's membership in locally formed Razakar Bahini.

372. There is no indication that accused Md. Abdur Razzak withdrew him from the group after the destructive activities carried

out at the first phase of the attack. It has already been proved that the entire group of attackers accompanied by the accused persons had left the site only on accomplishing the act of sexual invasion on two women. P.W.04 Sobuj Ali is a heresy witness. He learnt that accused Md. Abdur Razzak also abetted the Pakistani army men in committing rape upon two women. In cross-examination P.W. 04 stated that he heard it from Khasru Mia. Thus matter of hearing the event as testified by P.W.04 carries probative value and inspires credence when it is considered together with other circumstances unveiled.

373. On integrated evaluation of evidence presented and circumstances unveiled the Tribunal concludes that the rape that took place was a direct consequence of culpable instigation and facilitation on part of the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak due to their closeness in time and space between the instigation and the actual commission of the beastly act of sexual ravishment upon the victims. Accused persons' act and conduct together with their presence with the group outside the dwelling shed of the victims after facilitating smooth entrance of the principal offenders the Pakistani army men inside the shed thus had a significant legitimizing or encouraging effect on the principal perpetrators in carrying out the principal criminal act of mass rape.

374. The accused persons thus substantially contributed and prompted the Pakistani army men to cause their entrance into the shed of the victims who were brutally violated by them. Accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak were the men who triggered, by their deliberate and culpable act of assistance, the Pakistani army men, the principals in carrying out such barbaric activities.

375. It stands proved that the accused Mohibur Rahman alias Boro Mia and Mujibur Rahman alias Angur Mia and Md. Abdur Razzak did not withdraw them from the conduct of the group of principal perpetrators, the Pakistani army. They remained with the Pakistani army men even while attacking the houses of the victims. And their culpable act indisputably suggest that they wished to assist and encouraged the commission of the crime by the Pakistani army men as they facilitated the smooth entrance of Pakistani army men inside the dwelling shed of the victims which was chained to the act of commission of the principal offence of rape. From this point of view accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak had conscious concern and participation to the actual commission of extreme sexual abuse as well, knowing the consequence of their act and are found criminally responsible, although they did not physically

commit the crime of rape. It has been observed by the **ICTY Trial Chamber in the case of *Tadic*** that-

“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”

[Prosecutor v. Tadic, ICTY Trial Chamber, Case No. IT- 94-1-T, Judgment: 7 May 1997, Para- 692]

376. Act of accompanying the Pakistani army men and providing active assistance in causing their entrance inside the dwelling shed of the victims had an boosting effect that may be validly viewed as their 'participation' as abettor and contributor in committing the crime of mass rape upon two defenceless women, under coercive situation. In this regard we recall the observation of **ICTY Trial Chamber in the case of *Tadic*** which is as below:

“ when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.”

**[Prosecutor Vs. Tadic, ICTY Trial Chamber,
Case No. IT-94-1-T, Judgment: 7 May 1997,
Para-690]**

377. 'Abetting' needs involvement but not more than encouraging, or being sympathetic to, the commission of a particular act. The acts of abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime. In the case in hand, it has been proved that the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak by their act of assisting the Pakistani army men and remaining present at the crime sites after causing smooth entrance of Pakistani army men to the dwelling sheds of the victims had significantly abetted and aided the Pakistani army men, the principals in committing mass sexual abuse upon two women and of course it was made happened by creating horror and coercive situation.

378. True that P.W.08 Joyful Bibi who was 11 years old in 1971 had been in hiding under a quilt at the dwelling shed with her ailing father Manjob Ali while the Pakistani army men committed sexual ravishment upon her [P.W.08] mother Abeda Khatun alias Aksi. One can say that it was not practicable to commit such a crime in presence of victim's daughter and husband.

379. An offence of rape normally happens in sly, true. But we should not forget it that the wrong grabbing the supreme honour of

a woman was done in war time situation and in conjunction with an organised and systematic attack by the Pakistani occupation army being aided and abetted by their collaborators belonging to Razakar Bahini.

380. It has been found proved that the entire attack continued till 03:00 P.M. starting from 10:00 A.M. and the act of sexual ravishment upon two women was committed at the finishing phase of the attack as guided, aided, assisted and abetted substantially by the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak when extreme horror still existed around the locality. Naturally the coercive atmosphere and horrific situation existing around the locality due to unlawful attack directing civilian population did not allow anyone to resist any of the perpetrators from committing wrong to his or her dear one.

381. Rape or sexual violence, either in war time or in peace time, is a beastly act of robbery that takes away the thing that cannot be given back. Mass rape is graver than murder. The event of committing rape by Pakistani army men on the victims, as evinced, once again proves that the Pakistani occupation army had carried out such monstrous activities intending not to put grave wound to the victims only but to provide a message of intimidation to the pro-liberation civilians and the society. The perpetrators were thus

synonym of 'beast' indeed and the accused persons were their active aiders and abettors who as well incur liability.

382. The research on war time rape shows that in war time, the soldiers assume the use of rape as an effective weapon of launching attack not simply against an individual, but against social and gender stigmas aiming for the advancement of societal break-down. When rape is used as a weapon instead of a bullet, the weapon continues to exert its effect beyond the primary victim and it eventually outrages the civility.

383. Act of providing active assistance and aid by accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak, as already evinced, substantially facilitated the commission of rape upon two women thus formed part of attack which was directed not only on the person of the victims but it aimed to cripple the integrity of a family, a community and the society. Act of rape abusing human rights of victims, in war time, was most grave and justifiably proscribed. It was not an isolated incident of rape. It formed an attack against women, in order to send a message of intimidation to the pro-liberation Bengali civilians. The perpetrators had carried out the act of sexual violence with the substantial aid of the accused person as an instrument of threat to the civilians who took stance in favour of war of liberation.

384. It has been proved too that victim Agarchand Bibi committed suicide few days after she was ravished. Defence does not dispute it. This fact itself is sufficient proof of being abused by the Pakistani army men on the day and time. This fact aggravates the extent of the wrong done to her [Agarchand Bibi].

385. Rape is an aggression that is articulated in a sexual manner under conditions of coercion. Raising shout by the victim forces us to conclude that the attackers, the Pakistani army men, attacked her in a violent sexual manner under coercion. Act of rape imprints an unending and life-long horror that continues to attack victim's cerebral entity.

386. For an accused to incur criminal responsibility under section 4(1) of the Act of 1973, prosecution requires to show that the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak had substantially contributed to, or their act or conduct had a substantial effect on the consummation of the offence of rape. Evidence presented transpires patently that these accused persons accompanied the principal offenders, the Pakistani army men towards the dwelling sheds of the victims and they facilitated their entrance thereto. Presumably, they did also to keep the Pakistani army men guarded.

387. We may thus safely infer that their act and conduct were 'specifically directed' to the actual commission of the criminal act

constituting the offence of mass rape. It may also be reasonably deduced that accused persons did not keep them distanced from the group of perpetrators till it had left the crime sites at 03:00 P.M. after commission of the offence of rape upon two women and thus they are also held criminally responsible for facilitating the act of mass rape.

388. It is to be noted that an accused may aid and abet at one or more of the phases of the crime or underlying offence and lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs. Thus, all the three accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak incurred liability similar to that incurred by the principals.

389. All the three accused persons had acted as 'approving spectators' which did not require their actual participation in the commission of the crime. It may legitimately be inferred that the Pakistani army men had acted in such beastly manner on the accused persons' approval and encouragement that tantamounted to 'aiding' and 'abetting'. Tribunal notes that defying the Article 27 of fourth Geneva Convention, 1949 providing war time protection to women, the Pakistani occupation army had committed indiscriminate sexual violence upon the helpless women with the substantial aid and assistance of their local collaborators.

390. 'Participation' does not refer to physical participation alone. The offence of crimes against humanity is recognised as 'system crime' or 'group crime' committed in violation of international humanitarian law and in grave breaches of Geneva Convention 1949. Thus, the three accused persons being the members of a group of perpetrators might have participated in carrying out attack in varied ways or by their different act or conduct and even an individual's conscious presence in the group sharing its intent makes him liable for the principal crime committed by the other members of the group. Accordingly all the members of the group are held equally responsible for the crimes committed. It is now settled jurisprudence.

391. It is hard to believe that the accused persons were sensible human beings. Excepting a beast no one can endorse, by aiding and assisting, the commission of such barbaric sexual abuse upon a defenceless woman particularly in presence of her daughter and ailing husband. Victim Agarchand Bibi could not bear the trauma and wound inflicted to her and eventually within couple of days of the attack she opted to bring cessation of her life, by committing suicide. What a sacrifice Agarchand Bibi laid for the cause of independence!

392. On careful appraisal it appears that the defence could not impeach the facts materially related to the events of wanton

destruction and act of committing rape, in any manner. Mere denial is not sufficient to exclude one's testimony if it inspires credence. Even trustworthiness of witnesses particularly the direct witnesses to material facts could not be diminished by cross-examining them. Putting suggestion which has been denied by the P.W.s that the accused were not Razakars and were not involved in committing the events of attack does not go with the object of cross-examination. Thus, and in absence of any earthly reason mere denial of what has been testified by the witnesses does not diminish its value and credence. In respect of object of cross-examination the **Appellate Division of the Supreme Court of Bangladesh in its judgment in the case of Allama Delwar Hossain Sayedee** observed as below:

"It is to be remembered that the object of cross examination is to bring out desirable facts of the case modifying the examination-in-chief and to impeach the credit of the witness. The other object of cross examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness."

[Criminal Appeal Nos. 39-40 of 2013, Judgment: 17 September 2014, Page- 138-139]

393. In the light of deliberation made above on evaluation of evidence presented it stands proved beyond reasonable doubt that -

(i) The attack in two phases on the same day in between 10:00 A.M. and 03:00 P.M. was launched directing civilians of the locality of village Khagaura.

(ii) A group of Razakars and members of Pakistani occupation army accompanied by the accused persons carried out the attack.

(iii) First, by launching attack the group had carried out wanton destruction by setting fire to the house of Colonel M.A Rab, houses of civilians of adjacent Hindu Para, the houses of freedom-fighters Nuruzzaman and Kamola Mia of the locality.

(iv) In course of second phase of the attack the Pakistani army men committed mass rape upon two women-- Abeda Khatun alias Aksi and Agarchand Bibi of village Khagaura as guided, substantially assisted and abetted by the accused persons.

(v) The group came from Baniachang by boats at the crime site and they had left it after carrying out those criminal activities.

(vi) Pakistani occupation army had their station at Baniachang and the Razakars including the accused persons substantially contributed and facilitated them in accomplishing the crimes proved by accompanying them culpably and by their conduct and act as well.

394. On integrated and careful evaluation of evidence presented on trial we come to decision that it has been proved beyond reasonable doubt that the accused persons knowingly and consciously facilitated and abetted the perpetration of wanton destructive activities indisputably with malicious intent by launching attack directing civilian population of village Khagaura. And such vicious destruction was committed intending to intimidate the pro-liberation civilians that had detrimental effect on

individuals' fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims. The object of such destructive activities was to terrorize the innocent civilians, which eventually constituted the offence of 'other inhumane act' as it substantially affected their fundamental right to property and safety for which the accused persons are held criminally liable.

395. It has also been proved beyond reasonable doubt that the accused persons by their conscious act and conduct assisted, abetted and substantially contributed to the accomplishment of the barbaric act of mass rape upon two women of Khagaura village under extremely coercive and terrorizing atmosphere, by launching attack at their houses with the active aid and assistance of the accused persons. Act of assistance and conduct of the accused persons forming part of attack provided to the Pakistani army men, the principal perpetrators were directed not only on the persons of the victims but it aimed to cripple the integrity of the victims' family, a community and the society. And thus the accused persons are also held criminally responsible for the offence of 'rape' as well.

396. In view of above, we conclude that accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak had complicity and also participated and significantly facilitated, contributed and abetted the principals in

committing the act of wanton destruction of civilians' properties causing grave mental harm to the affected individuals constituting the offence of 'other inhumane act' as crime against humanity [as listed in charge no. 02] as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the Act, and as such, they incur liability under section 4(1) of the Act.

397. Accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak are also held liable for 'facilitating', 'abetting' and 'substantially contributing' and also for 'complicity' to the commission of offence of 'rape' as crime against humanity [as listed in charge no. 03] as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the Act, and as such, they incur liability under section 4(1) of the Act.

Adjudication of charge no. 04

[Abduction, confinement and torture of Anfar Ali of village Khaguara under Baniachang Police Station]

398. Summary charge: That one day during mid of Bengali month Bhadra in 1971 at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak being accompanied by a group of 10/12 armed Razakars, by launching attack, forcibly took away Anfar Ali from his dwelling hut to Razakar camp at Khagaura village under Baniachang Police Station of the then Habiganj Sub-Division, on

forcible capture where he was subjected to inhumane torture and physical assault that resulted in fracture of one of his hands, by keeping him detained there for one day and one night. Afterwards, Anfar Ali was brought back therefrom to his house in critical condition by some Razakars. Anfar Ali had to spend his life in paralytic condition and 2/3 years back he died.

399. Thus, all the three accused persons have been charged for participating, facilitating, abetting and substantially contributing and also for 'complicity' to the commission of offences of 'abduction', 'confinement' and 'torture' as crimes against humanity as part of systematic attack directed against unarmed civilians as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act for which the accused persons have incurred liability under section 4(1) of the Act.

Evidence of Witnesses Presented

400. To prove charge no. 04, the prosecution has examined 05(five) witnesses [P.Ws. 06, 07, 09, 10 and 11]. Now let us see what the witnesses have stated in the Tribunal.

401. P.W.06 Md. Shafiq Ali deposed that his age is about 61 years and he hails from village Khagaura Eralia under Baniachang Police Station, District Habiganj . The house of Anfar Ullah [Anfar Ali] was situated on the other side of the canal which was in the

north side of Uttar Para of their village. Anfar Ullah [Anfar Ali] used to help freedom-fighters and chant slogan 'Bangladesh Zindhabad'.

402. He [P.W. 06] further stated that in 1971, one day during mid of Bengali month Bhadra, accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, accused Mohibur Rahman alias Boro Mia's brother Razakar commander Mostofa along with some other Razakars having gone to the house of Anfar Ullah [Anfar Ali] abducted him and took him away to Razakar camp . That Razakar camp was situated at the north side of Khagaura bazaar. The Razakars having taken Anfar Ullah [Anfar Ali] to the Razakar camp tortured him there, and they heard the scream of him, resulting from torture, from the bazaar. Then the wife of Anfar Ullah [Anfar Ali] went to that Razakar camp. Then he [P.W.06] could see accused Mohibur Rahman alias Boro Mia and his brother Razakar commander Mostofa pushing Anfar Ullah's[Anfar Ali] wife drove her out. Then she went back to their house by weeping .

403. He [P.W. 06] further deposed that on the next day in the morning he came to know that accused Mohibur Rahman alias Boro Mia, Abdur Razzak, Mujibur Rahman alias Angur Mia and Razakar commander Mostofa having broken Anfar Ullah's [Anfar Ali] hands and legs left him at the back side of his house on that

day at about 10.00/11.00 A.M. On hearing this news, they having gone to the back side of Anfar Ullah's [Anfar Ali] house found him [Anfar Ullah] wounded condition, and then on query Anfar Ullah [Anfar Ali] told them that the above mentioned three accused persons along with Razakar commander Mostofa having broken his hands and legs left him at the back side of his house. He identified all the three accused persons on the dock of the Tribunal.

404. In cross-examination he stated that the distance between his house and the house of Anfar Ullah [Anfar Ali] is about one quarter mile. He could not say the date and time when Anfar Ullah [Anfar Ali] was abducted by the accused persons. In 1971, his [P.W. 06] age was about 16/17 years.

405. He [P.W. 06] denied the suggestion that accused Abdur Razzak along with his family provided shelter to Hindu people and assistance to the freedom-fighters during the war of liberation in 1971. He further denied the suggestion that during the war of liberation in 1971, accused Mujibur Rahman alias Angur Mia stayed at the house of his maternal uncle named Badsha Mia and at that time that accused person was minor. He also denied the suggestion that he deposed falsely against the accused persons.

406. Md. Allad Miah as P.W. 07 testified that his age is about 70 years and during the war of liberation in 1971 his age was about 25/26 years . In 1971, during mid of Bengali month Bhadra accused

Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak, Abdul Hamid, Mostofa along with some other Razakars having abducted Anfar Ullah [Anfar Ali] of their locality from his house took him away to Razakar camp. On the next day in the morning, the accused persons and Razakars having broken Anfar Ullah's [Anfar Ali] hands and legs left him at the back side of his house. He identified all the three accused persons on the dock of the Tribunal.

407. In course of cross-examination he stated that the house of Anfar Ullah [Anfar Ali] is situated towards north after two rooms of their house. He could not say the date when the incident took place in the mid of Bengali month Bhadra in 1971 as he narrated. In 1971, Anfar Ullah [Anfar Ali] provided assistance to the freedom-fighters.

408. He [P. W. 07] denied the suggestions that in 1971 accused Mujibur Rahman alias Angur Mia was minor and at that time he did not stay in his locality and he used to stay in his maternal uncle Badsha Mia's house at Baniachang. He further denied the suggestions that during the war of liberation in 1971 many Hindu families took shelter in the house of accused Mujibur Rahman alias Angur Mia, and that accused Abdur Razzak worked infavour of liberation. He also denied the suggestion that he deposed falsely against the accused persons.

409. P.W. 09 Raju Bibi stated that her age is about 68 years and her husband's house is situated at village Eralia Beripar [Uttarpara], Police Station Baniachang, District Habiganj. She resides in her husband's house. In 1971, during the war of liberation, she also used to live in her husband's house.

410. He [P.W.09] further stated that one day during mid of Bengali month Bhadra in 1971 at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars having come to her husband's house captured her husband Anfar Ullah [Anfar Ali] and took him away to the Razakar camp set up in the house of Sayed Kamrul Ahsan, and at time she was in her husband's house, and while the accused persons were taking away her husband she was going after the accused persons and Razakars, but accused Mujibur Rahman alias Angur Mia pushed her down. Then she went to the Razakar camp following the accused persons. The accused persons and Razakars inhumanely tortured her husband after having taken him away to the Razakar camp, and she heard his scream.

411. P.W. 09 further stated that on the following day at about 10.00 A.M. accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia, Abdur Razzak and other Razakars left her husband in wounded condition at the back side of their house.

She also stated that she saw the accused persons and Razakars while they were leaving her wounded husband at the back side of their house. Then she went to the back side of their house and found her husband there whose right hand was fractured and whole body was bloody. Then she along with the neighbours took her wounded husband in their room and then he was treated by a doctor. She identified all the three accused persons on the dock of the Tribunal.

412. In cross-examination she stated that accused Abdur Razzak's house is situated at Khagaura Uttarpara towards north of their house, and there is a field in between their house and accused Abdur Razzak's house. At the time of the incident, Saur Mia and Abdul Hamid were among the Razakars who accompanied the accused persons, but she could not recognise the other Razakars. She knows Sayed Kamrul Ahsan who is a man of Saheb Bari. His house is situated near their house. She further stated that Bhola dakter treated her husband. Her father's house is situated after two houses of her husband's house. As her husband was infavour of freedom-fighters, the Razakars having captured her husband took him away. At the time of the incident her age was about 15/20 years. She got married with Anfar Ullah [Anfar Ali] about 8/10 years before the incident. At the time of the incident she had a child aged about 4/5 years. She knows accused Mujibur Rahman alias

Angur Mia who is a brother of accused Mohibur Rahman alias Boro Mia.

413. P.W. 09 denied the suggestions that the accused persons are quite innocent and they were never Razakars and they were never involved with the incident what she narrated. She further denied the suggestion that she deposed falsely against the accused persons.

414. Hazi Mohammad Abdul Mosabber as **P.W. 10** deposed that his age is about 65 years and during the war of liberation in 1971, his age was about 21 years. He studied up to Class V in Chandpur High School. During the war of liberation in 1971, he had a tiny shop, and at that time he used to live at his village home.

415. He [P.W. 10] further deposed that in 1971, in the mid of Bengali month Bhadra accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars having captured Anfar Ali from his house took him away to their Razakar camp. At that time he [P.W. 10] was at Khagaura bazaar. The Razakars in front of them took away Anfar Ali to the Razakar camp. As Anfar Ali's wife Raju Bibi was running after the Razakars while they were taking away Anfar Ali to the Razakar camp, accused Mohibur Rahman alias Boro Mia pushed her down on the ground.

416. P.W. 10 also stated that the accused persons and Razakars after having taken away Anfar Ali to the Razakar camp, he heard

scream coming from the Razakar camp. Then they came back home along with Anfar Ali's wife. In the next morning accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Abdur Razzak along with some other Razakars left Anfar Ali at the back side of his house. Then hearing the scream of Anfar Ali's wife Raju Bibi, he along with Golam Hossain and Allad Miah went to the house of Anfar Ali and found Anfar Ali there who was in bloody condition and his right hand was fractured . Then they brought wounded Anfar Ali inside his room, and then Anfar Ali told them that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak had caused him bleeding injury by torturing and broken his right hand. Then Bhola dakter treated him. He further deposed that after the incident Anfar Ali being disabled was alive for a long time. He identified all the three accused persons on the dock of the Tribunal.

417. In course of cross-examination P.W. 10 stated that he had been in Khagaura bazaar while Anfar Ali was taken away on capture by the accused persons and Razakars, and then he [P.W. 10], Golam Hossain, Allad Miah, Shafiq Ali, Sadulla and many others witnessed that incident. He denied the suggestions that he did not witness the incident of taking away Anfar Ali on capture nor he heard it nor he knew about it beforehand. He further denied the suggestions that the accused persons are innocent and they were

not involved with the incident and he deposed falsely against the accused persons out of enmity.

418. P.W.11 Golam Hossain stated that his age is about 61 years and he hails from village Khagaura Beripar under Baniachang Police Station. During the war of liberation in 1971, Nuruzzaman Chairman, Manjob Ali, Allad Miah, Anfar Ali and others used to live at Uttar Para of Beripar.

419. He [P.W.11] further stated that one day during mid of Bangla month Bhadra at about 10.00 A.M. on hearing scream of Anfar Ali's wife he went to Anfar Ali's house and saw there that accused Mohibur Rahman alias Boro Mia, Abdur Razzak, Abdul Hamid [not accused] along with some other Razakars having captured Anfar Ali took him away to the Razakar camp set up in the house of Kamrul Ahsan. While the accused persons and Razakars having captured Anfar Ali were taking him away to the Razakar camp, his [Anfar Ali] wife was going after them and when she reached near the Razakar camp the accused persons and Razakars pushed her down and then she came back to her house. The accused persons and Razakars having detained Anfar Ali in the Razakar camp tortured him whole night and on the following day in the morning they left him at the back side of his house. He further stated that then he [P.W. 11], Allad Miah and Mosabbir having gone to the back side of Anfar Ali's house found Anfar Ali there in bloody

condition and his right hand broken. Then they took Anfar Ali to his room and then a doctor treated him.

420. In cross-examination P.W.11 stated that Anfar Ali's house is situated five houses far from their house. At the time of incident there was one room in Anfar Ali's house. There were 10/15 houses around the house of Anfar Ali. The distance between the house of Anfar Ali and Kamrul Ahsan is about 500 feet. He further stated that he saw Kamrul Ahsan. In 1971, there was only one bazaar in their Khagaura Union and Kamrul Ahsan's house was situated towards north-west from that bazaar.

421. He [P.W. 11] denied the suggestions that accused Abdur Razzak was not involved with the incident of taking away Anfar Ali on capture and that what he deposed is untrue and tutored. Anfar Ali's wife Raju Bibi had one sister and one brother. Anfar Ali married three women. Anfar Ali died after 15 years of the war of liberation. He denied the suggestions that no incident of abduction and torture of Anfar Ali took place and that he deposed falsely.

Finding with Reasoning on Evaluation of Evidence

422. This charge involves the acts of torture to Anfar Ali, a civilian of village Khagaura, keeping confined on abduction from his house. The accused persons have been indicted for participating, facilitating, contributing and also for complicity to the commission of the criminal acts constituting the offences above.

423. The learned Prosecutor Mr. Sultan Mahmud argued that the event of forcible capture of Anfar Ali, taking him away to Razakar camp, causing torture to him keeping him confined there has been proved by the wife of victim who has testified as P.W.09 Raju Bibi. The other witnesses examined in support of this charge also corroborate the act of taking away Anfar Ali to the Razakar camp at Khagaura bazaar by the group of Razakars accompanied by the accused persons. The victim died few years back. The P.W.s also heard from the victim instantly after his release as to how he was brutally treated in captivity at the Razakar camp. Their testimony could not be shaken by the defence in any manner. The accused persons directly participated in committing the crimes narrated in charge no.04, as proved from the evidence presented.

424. Conversely, defence in their respective argument submitted that the prosecution witnesses examined are not reliable and their testimony is contradictory to each other and that prosecution failed to prove that the accused persons were with the group of Razakars in abducting Anfar Ali, by adducing reliable and neutral witnesses.

425. Prosecution examined in all 05 [five] witnesses to prove this charge and they have been examined as P.W.06, P.W.07, P.W.09, P.W.10 and P.W.11. Of them P.W.09 Raju Bibi is the wife of victim Anfar Ali and the others are residents of the crime locality and have testified the facts relevant to the criminal activities of the

accused persons chained to the act of abduction, confinement and torture alleged. Victim Anfar Ali is not alive now. However, let us assess the evidence presented by the prosecution who is burdened to prove the arraignment alleged and complicity of the accused persons therewith.

426. P.W.06 Shafique Ali is a resident of village Khagaura. He stated that the house of Anfar Ali [victim] was situated on the other side of the canal north to Uttar Para of their [P.W.06] village. Anfar Ali used to assist freedom- fighters and chanting slogan 'Bangladesh Zindhabad'.

427. P.W.06 in narrating the event of attack stated that one day in the mid of Bangla month Bhadra in 1971 accused Mohibur Rahman alias Boro Mia , Mujibur Rahman alias Angur Mia, Md. Abdur Razzak, Razakar commander Mostofa being accompanied by their accomplice Razakars took away Anfar Ali to Razakar camp situated at the north of Khagaura bazaar on forcibly picking him up from his house. It is not clear whether P.W.06 was a direct witness to the act of abduction he testified. In cross-examination, P.W.06 stated that he could not say the date and time when Anfar Ali was so abducted and his[P.W.06] house was about one quarter mile far from that of Anfar Ali.

428. In view of above, presumably P.W.06 had occasion to hear the event of abduction from the locals. The charge framed alleges

that after keeping the detained Anfar Ali the Razakars set him at liberty. Naturally, P.W.06 and other locals inevitably might have had opportunity to learn from the victim as to what happened to him after he was taken away to Razakar camp.

429. It is evinced from the testimony of P.W.06 that after setting Anfar Ali release, on the following day, he [P.W.06] went to Anfar Ali's house when he found him in wounded condition and heard from him the fact of causing him torture in captivity by the accused persons and Razakar Mostofa that resulted in fracture of his hands and legs. This version remained unimpeached in cross-examination.

430. P.W.07 Md. Allad Miah was a neighbour of victim Anfar Ali. He [P.W.07] corroborates the fact of releasing Anfar Ali after causing severe cruelties to him in captivity. Victim Anfar Ali was engaged in providing assistance to the freedom fighters—it becomes affirmed in his cross-examination. We may thus validly presume that this was the reason of taking him away to Razakar camp on capture.

431. P.W.09 Raju Bibi, the wife of the victim Anfar Ali is a key witness in support of this charge. On the day of the event and at the relevant time she [P.W.09] had been at her husband's house. She testified that the accused persons and their cohorts took her husband away to Razakar camp set up at Sayed Kamrul Ahsan's house on forcible capture and that she was pushed down by accused

Mujibur Rahman alias Angur Mia as she too attempted to go after the Razakars. Then she [P.W.09] rushed to the Razakar camp following the accused persons and after taking her husband there she heard his scream as he was subjected to torture there.

432. Defence could not refute the above pertinent version which proves the act of confinement and causing torture as well as her [P.W.09] husband actively sided with the freedom fighters. Besides, in cross-examination it has been re-affirmed as P.W.09 stated in reply to defence question that Bhola doctor treated her husband [victim] and her husband was in favour of freedom-fighters. Thus, it stands proved again that Anfar Ali was taken away by the accused persons and their cohorts to Razakar camp on forcible capture where he was subjected to brutal torture. The reason was that the victim sided with the freedom fighters.

433. P.W.09, in cross-examination stated that she knew accused Mujibur Rahman alias Angur Mia who happened to be the brother of accused Mohibur Rahman alias Boro Mia and their [P.W.09] house and the house of accused Md. Abdur Razzak was intervened by a field. That is to say it was practicable for P.W.09 to recognize the accused persons who along with their cohorts had carried out the act of her husband's abduction. Therefore, the testimony of P.W.09 arraigning the accused persons for her husband's abduction carries probative value and inspires adequate credence.

434. Defence does not appear to have been able to shake the fact of victim's release on the following day. According to P.W.09, the wife of the victim, she saw the accused persons and their accomplices at about 10:00 AM on the following day leaving her husband abandoned at a place behind their house. It remained unshaken. Defence could not bring anything contrary, by cross-examining P.W.09, which may cast any degree of doubt on this version.

435. P.W.09, the wife of victim, testified that they found her husband in wounded condition and they arranged for his treatment by a doctor. It proves that in confinement, victim was brutally physically tortured. Besides, this version gets corroboration from the testimony of P.W.06 who also, on the following day, found the victim at his house in tortured and wounded condition. Thus finding the victim in severely injured condition after his release on the following day from the Razakar camp indisputably proves that the victim was brutally subjected to inhumane physical cruelties in captivity.

436. P.W.10 Hazi Mohammad Abdul Mosabber, a local had occasion to witness the act of taking away the victim Anfar Ali by the accused persons and their cohorts to the Razakar camp as at the relevant time he had been at Khagaura bazaar. P.W.10 also saw the wife of the victim running after the Razakars while they were

taking away the victim to the Razakar camp. He [P.W.10] also heard scream from the Razakar camp after the victim was taken there. It gets corroboration from the version of P.W.09, the wife of the victim. Defence could not refute the above version of P.W.10 which crucially relates to the act of abduction, confinement and torture.

437. It is also evinced from the testimony of P.W.10 that on the following day victim Anfar Ali was left abandoned behind their house by the accused persons and their accomplices and afterwards on hearing scream he [P.W.10], Golam Hossain [P.W.11], Md. Allad Miah [P.W.07] rushed to the victim's house where they found him in blood wrapped condition having his right hand fractured. Victim Anfar Ali described how he was tortured in the Razakar camp by the accused persons. It was natural to hear from the victim as to what happened to him in captivity at the Razakar camp. It is also found from the evidence of P.W.10 that the victim due to the torture caused to him remained disabled for long time.

438. It has been re-affirmed in cross-examination that at the time of taking the victim away to the Razakar camp he [P.W.10] had been at Khagaura bazaar. It adds further assurance as to the version relating to seeing the accused persons and their cohorts taking away the victim to the Razakar camp at Khagaura bazaar. Besides, it gets corroboration from the evidence of P.W.11 Golam Hossain,

439. P.W.11 Golam Hossain, a resident of village Khagaura Beripar, on the day of event at about 10:00 AM on hearing cry rushed to the house of Anfar Ali when he saw the accused persons and their accomplice Razakars taking away Anfar Ali on forcible capture to the Razakar camp and the Razakars pushed the wife of the victim down when she attempted to go after them.

440. P.W.09, the wife of the victim and P.W.11, a neighbour of the victim are the direct witnesses to the act of abduction and their version in this regard together with the fact of leaving injured victim behind his house on the following day, as has been proved unambiguously, establishes that the victim was subjected to inhumane cruelties in captivity.

441. It transpires that in reply to defence question P.W.11 stated that the Razakar camp set up at Kamrul Ahsan's house was about 500 feet far from the house of victim Anfar Ali. It prompts us to believe it to be true that it was practicable for the accused persons and their accomplices to get the injured victim out of the camp and leave him behind his house.

442. The event consisted of three phases-

- (i) First, the act of abduction, by launching attack, at victim's house.
- (ii) Second, keeping the victim detained at Razakar camp.

(iii) Third, inflicting degrading physical torture to the victim.

443. The charge framed alleges that on the following day the victim was brought back and left abandoned behind his house by the accused persons and their cohorts. It has been proved beyond reasonable doubt, in view of deliberation made above on evaluation of evidence adduced.

444. The witnesses examined testified that they found the victim, after his release, in severely wounded and blood wrapped condition and heard from him what happened to him in captivity. There has been no reason to exclude their sworn testimony which does not suffer from any inconsistency.

445. It is to be noted that all the three phases of the event are chained together. Naturally none had opportunity to see how the detained victim was subjected to torture. It may be fairly proved from the evidence as to in which condition the witnesses examined found him [victim] and what they learnt from him, after his release. Evidence presented on it together with that presented in respect of act of abduction cumulatively provides an unerring collusion about the fact of causing brutal torture to the detained victim in captivity. Besides, the witnesses examined testified that they found the victim, after his release, in severely wounded and blood wrapped condition and heard from him what happened to him in captivity.

446. In view of above deliberation based on rational evaluation of evidence adduced we conclude that since Anfar Ali sided with the freedom-fighters he was taken away to Razakar camp on abduction by the accused persons and their accomplice Razakars who keeping him detained there for one day when he was subjected to inhumane torture, presumably for extracting information about the freedom fighters and on the following day he was released and was left abandoned behind his house. The wife of the victim, neighbours and locals found the victim in severely wounded and blood wrapped condition, after his release—it stands proved.

447. We reiterate that the criminal acts and wrongs were done not only to the victim but to the human dignity as well. The acts constituting the offences proved were gravely detrimental to the fundamental human rights of protected persons in war time situation. The attack was thus not an isolated one. It was rather directed against the civilian population in 1971 during the war of liberation intending to intimidate coercion, terror, to further policy and plan of the Pakistani occupation army.

448. The accused persons by their act of accompanying the group of Razakars and presence at the crime site substantially facilitated and aided the group, as co-perpetrators, in accomplishing the act of abduction and confinement. At the same time their conduct at these phases indisputably contributed and substantially facilitated the act

of causing torture to the detained victim at the Razakar camp. Accordingly, even in absence of any direct evidence as to causing torture in captivity the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak are found criminally responsible also for the act of causing inhumane torture to the victim in confinement.

449. The primary purpose of unlawful act of causing severe torture keeping a pro-liberation unarmed civilian detained at Razakar camp and releasing him on the following day was to spread terror among the civilian population as well which was violation of international humanitarian law and the laws or customs of war, context of the attack impels to infer it. The accused persons being the members of locally set up Razakar camp accompanied the group of ‘attackers’ and thereby they substantially abetted and facilitated in accomplishing the criminal acts by the group, to further common objective, we conclude .

450. We reiterate that all legal authorities agree that where a common design of a group of attackers exists and the group has carried out its purpose, then no distinction can be drawn between the ‘finger man’ and the ‘trigger man’. This view finds support from the observation made by the **ICTY Appeals Chamber, in the case of *Tadic***, that-

“Although only some members of the group may physically perpetrate the criminal act (murder,

extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.”

[ICTY Appeals Chamber, Tadic Case No. IT-94-1-A, Judgment 15.7.1999, Para- 191]

451. It is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case. The unveiled facts of the present case, examined in light of the above principles, do not leave any doubt that all the members of the group of perpetrators including the accused persons accompanying the group had a common objective in committing the act of unlawful abduction of Anfar Ali, keeping him detained at Razakar camp and causing brutal cruelties to him. Each one of the accused persons thus participated in the crime, facts and evidence presented lead to conclude it.

452. The act of all the three accused persons as proved in taking away the victim Anfar Ali on capture obviously had a substantial effect even on the victim’s confinement and causing torture on him in captivity. Accused persons’ act of presence at the crime site by accompanying the group of Razakars forming part of attack was rather an act of ‘abetment’ which is liable to be punished as there

had been a 'causal connection' between such act of 'abetment' and the act of causing torture keeping the victim detained at the camp.

453. On totality of evidence adduced it has been proved beyond reasonable doubt that accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak and their accomplices initiating a designed attack forcibly took away Anfar Ali, a pro-liberation civilian, caused inhumane physical and mental harm to him keeping him detained at the local Razakar camp for one day and finally set him free in blood wrapped and gravely wounded condition and thus all the three accused persons incurred liability under section 4(1) of the Act of 1973. By their respective conduct as discussed above accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak participated, abetted, facilitated, contributed and had complicity to the commission of the offences of 'abduction', 'confinement' and 'torture' as crimes against humanity as specified in section 3(2) (a) (g)(h) of the Act of 1973 which are punishable under section 20(2) of the said Act.

XX. Conclusion

454. It is to be noted that to qualify as a crime against humanity, the crimes enumerated in section 3(2)(a) of the Act of 1973 must be committed against any 'civilian population'. An "attack against a civilian population" means the perpetration against a civilian

population of a series of acts of violence, or of the kind of mistreatment referred to in clause (a) of section 3(2) of the Act of 1973. Conducts constituting 'Crimes' committed against 'civilian population' refers to organized and systemic nature of the attack causing acts of violence to the number of victims.

455. The offences as 'crimes against humanity' must be shown to have been committed within a context so that it can be distinguished from isolated crime. In the case in hand, the Tribunal notes that the atrocious activities constituting the offences as crimes against humanity as enumerated in the Act of 1973 for which all the three accused persons have been found criminally responsible happened in the context of the war of liberation in 1971. The crimes proved were not isolated crimes. Those were group or system crimes directed against civilian population.

456. Section 3(1) of the Act of 1973 provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' or 'organisation' including any 'member of auxiliary force' who commits or has committed, in the territory of Bangladesh any of the crimes mentioned in section 3(2) of the Act of 1973, apart from any member of armed or defence forces. We have already resolved in our foregoing deliberations that the accused persons were the members of local Razakar Bahini and were consciously engaged in carrying out the above crimes, already

proved. Accused persons' conscious and culpable conduct, as have been found from the evidence tendered---all point to their unerring guilt which is well consistent with their 'complicity' and 'participation' in the commission of the crimes proved.

457. The offences proved involve the act of murder, devastating destruction of civilians' properties, rape, abduction, confinement and torture. All these crimes occurred around the locality of Khagaura under Police Station Baniachang of the then Sub-Division Habiganj. It has been found proved that excepting the events narrated in charge nos. 02 and 03 the accused persons being the members of the group of Razakars had carried out the attacks as narrated in the charge nos. 01 and 04.

458. We have recorded our reasoned finding that the accused persons belonged to locally formed Razakar Bahini and they were closely affiliated with the Razakar camp set up at Sayed Kamrul Ahsan's house, adjacent to Khagaura bazaar which was nearer to the crime sites. The accused persons being the members of local Razakar Bahini, an auxiliary force of Pakistani occupation army, enthusiastically carried out attacks [as narrated in charge nos. 01 and 04] by forming group of armed Razakars and they culpably accompanied the Pakistani occupation army stationed in Baniachang in launching attacks as narrated in charge nos. 02 and

03, by act of aiding, abetting and facilitating substantially to further policy and plan.

459. The accused persons being the members of local Razakar Bahini took extremely culpable stance against the pro-liberation civilians of the locality to further objective of formation of Razakar force. The arraignments proved demonstrate that the accused persons being imbued with this objective targeted noncombatant freedom-fighters, pro-liberation civilians of the locality. They had attacked two non-combatant freedom-fighters on the day they returned home that resulted in their killing to which the accused persons actively participated [as listed in charge no.01]. The accused persons had acted in accomplishing the killing of two non-combatant freedom-fighters as the trusty henchmen of the Pakistani occupation army in furtherance of common policy and design of annihilating the freedom fighters whom they termed 'miscreants'.

460. The accused persons also substantially aided and abetted the Pakistani occupation army in launching attack at the houses of potential pro-liberation personalities of the locality [as listed in charge no.02]. And intending to terrorize and intimidate the civilians the accused persons by their beastly conduct substantially abetted and facilitated the commission of the offence of sexual ravishment upon two women which was rather a barbaric attack to human dignity and the entire civilian population indeed [as listed in

charge no.03].On active inducement, approval and endorsement of all the three accused persons all those criminal activities were carried out there, it stands proved.

461. The facts and circumstances unveiled from the evidence tendered precisely suggest that by sharing intent of the group of perpetrators the accused persons accompanied the Pakistani occupation army men for providing them moral support, encouragement and approval in committing the criminal acts constituting the offence of rape. Knowledge of an accused about the intent of the principal offender cannot be tangible. It is to be inferred from the evidence tendered. In the case in hand, the accused persons were aware of the criminal intent of the principals, the Pakistani occupation army men and despite knowing it they provided assistance and aid to them in perpetrating the principal offence of rape [as listed in charge no.03], the evidence adduced suggests this conclusion.

462. The accused persons did not spare a pro-liberation civilian who was forcibly taken away at their camp where in captivity he was subjected to brutal cruelties that resulted in his prolonged disability [as listed in charge no.04]. Such criminal act was intended to intimidate the pro-liberation civilians and to extend a message as to their horrific authority they exercised being under the control of the armed force. Offences of such nature bring harm not

only to human rights, but also and most especially they undermine the fundamental basis of the social order of protected civilian population.

463. It is now historically settled that the Razakar Bahini, an auxiliary force, in 1971 during the war of liberation, substantially collaborated with the Pakistani armed forces and in many cases deliberately participated by forming group of Razakars and had carried out untold and countless criminal activities directing civilian population in the territory of Bangladesh.

464. The events constituting the crimes, in the case in hand, are mere fractional depiction of the horrendous atrocious activities that resulted in killing three million Bengali pro-liberation civilians , massive destruction, grabbing supreme honour of hundreds of thousands women. The role the accused persons had played in launching attacks to the perpetration of the crimes already proved were thus directed against the entire Bengali nation as well.

465. All the organised criminal activities and unlawful acts constituting the offences proved for which the accused persons have been charged with did not happen in seclusion. Those were carried out in broad day light and the context prevailing at that time and the notoriety of Razakar Bahini naturally did not allow any body to resist the attacks. Accused persons had acted deliberately as

part of 'collective criminality' in accomplishing the purpose of attacks, being aware of consequence of their acts.

466. Accordingly, the accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak are held criminally responsible under section 4(1) of the Act of 1973 for the commission of the crimes proved as listed in charge nos.01 [offence of murder], charge no.02 [offence of other inhumane act], charge no.03 [offence of rape] and charge no.04 [offences of abduction, confinement and torture] as crimes against humanity.

XXI. Verdict on conviction

467. For the reasons set out in this judgment and having considered all evidence, both oral and documentary, and arguments presented this Tribunal-1 unanimously finds all the three 03[three] accused persons, namely (1) Mohibur Rahman alias Boro Mia, (2) Mujibur Rahman alias Angur Mia and (3) Md. Abdur Razzak in-

Charge No.01: GUILTY of the offences of participating, facilitating, abetting and also for complicity to the commission of the offence of '**murder**' as crime against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge No.02: GUILTY of the offences of participating, abetting, contributing, facilitating and also for complicity to the commission of the offences of '**other inhumane acts**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge No.03: GUILTY of the offences of facilitating, abetting, contributing and also for complicity to the commission of the offence of '**rape**' as crime against humanity as enumerated in section 3(2)(a)(g))(h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Charge No.04: GUILTY of the offences of participating, facilitating, abetting, contributing and also for complicity to the commission of the offences of '**abduction**', '**confinement**' and '**torture**' as crimes against humanity as enumerated in section 3(2)(a)(g) (h) read with section 4(1) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

XXII. Verdict on sentence

468. Mr. Sultan Mahmud and Ms. Rezia Sultana, the learned prosecutors closed their summing up by making emphatic submission that the accused persons should face the highest

sentence, being a sentence of death, as they are proved to have had participation, substantial contribution, facilitation in accomplishing the killing of two non-combatant freedom- fighters. The accused persons substantially aided and provided culpable assistance to the commission of conscious criminal acts constituting the offences of rape [as listed in charge no.03] and they consciously participated and contributed to the commission of offences as narrated in charge nos.02 and 04 involving the criminal acts of wanton destruction , abduction, confinement and torture.

469. It was further submitted that the accused persons, the notorious members of Razakar Bahini formed in Khagaura under Police Station Baniachang of the then Habiganj Sub-Division, had carried out atrocious activities in furtherance of common purpose and design. Pattern of attacks that resulted in brutal killing of two non-combatant freedom-fighters [as listed in charge no.01] deserves to be considered as an ‘aggravating factor’ in awarding the highest sentence.

470. Conversely, the defence chiefly submitted that the accused persons were not with any such criminal activities for which they have been indicted and they had no nexus with the local Razakar camp as they did not belong to the locally formed Razakar Bahini. Prosecution failed to prove the membership of the accused persons

in Razakar Bahini and the arraignment brought against them by natural and neutral witnesses, and thus, they deserve acquittal.

471. At the out set, in respect of objects of ‘punishment’, we recall the observation made by the Appellate Division of the Supreme Court of Bangladesh as to the factors to be considered in inflicting punishment. In the **Criminal Review Petition No. 62 of 2015 [Ali Ahsan Muhammad Mujahid's case]** the **Appellate Division** observed that Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, appearing before the British Royal Commission on Capital Punishment, stated his views on this point as under:

“Punishment is the way in which society expresses its denunciation of wrong-doing; and in order to maintain respect for law; it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else----- . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not”.

[Criminal Review Petition No. 62 of 2015, Judgment: 18 November 2015, Pages: 21-22]

472. Based on the evidence before us in this case, the convicted accused persons, the members of local Razakar Bahini, an auxiliary force formed to act under the Pakistani occupation army were the ‘participants’ of a joint mission in accomplishing the act of killing two non-combatant freedom-fighters. The attack launched happened in day time directing the house of freedom-fighter Akal

Ali would not have been possible unless there was a co-ordination between the members of the joint criminal enterprise [JCE]. It is also evinced that all the three convicted accused persons being accompanied by their cohort Razakars participated in accomplishing the crimes [as listed in charge no.01], by their act and conduct.

473. It is to be noted that the expression '*committed*' occurred in section 4(1) of the Act of 1973 includes participation and tends to cover the necessary elements of JCE, especially JCE categories 1 and 3. In line with the recognized principles almost common to all legal systems, a person who takes 'consenting part' in the commission of the crime or who is found to have had 'nexus' with the 'enterprise' involved in the commission of crime or who is found to have had affiliation with an 'organisation or group' engaged in the activities of committing crime, is equally guilty together with the 'principal[s]'

474. Inherent pattern and extent of killing and the class the victims belonged to suggest the conclusion that the crimes as listed in charge no. 01 were perpetrated by a 'collective enterprise' or 'organised squad' formed of local infamous Razakars including the convicted accused persons. They deliberately participated in launching the unlawful act of attack that resulted in killing Rajab Ali and abduction of Akal Ali.

475. Victim Rajab Ali was shot to death instantly on launching attack by the convict accused Mohibur Rahman alias Boro Mia when he [victim] attempted to flee away. The two other convicted accused persons Mujibur Rahman alias Angur Mia and Md. Abdur Razzak and their cohorts presumably were aware of the consequence of their act of accompanying the group and thus they all took conscious 'consenting part' in committing the crime [as listed in charge no.01].

476. Next, all the convicted accused persons were engaged, by their act and conduct, in abducting Akal Ali from his house knowing the consequence of such unlawful act. Apprehended Akal Ali was first taken to Razakar camp at Khagaura bazaar wherefrom he was taken to unknown place and since then could not be traced even. Presumably, Akal Ali, a co-freedom fighter of Rajab Ali too was killed and thus his killing was chained to the act of his forcible capture by the accused persons and their accomplice Razakars who certainly knew the virtual certainty that the death of the detained Akal Ali would result from their culpable actions. In this way all the three accused persons knowing the consequence of their acts consciously abetted, facilitated and contributed to the principal[s] in committing the principal crime, the murder of Akal Ali, we concluded it.

477. However, evidence presented demonstrates patently that convicted accused Mohibur Rahman alias Boro Mia directly participated in causing death of Rajab Ali by gunning him down, at the initial phase of the attack while the two other convicted accused persons and their cohorts were at the crime site and the circumstances unveiled suggest that they by their active companionship substantially abetted, facilitated and contributed to the perpetration of the criminal act of killing Rajab Ali.

478. It is to be noted that the crime of murder, as listed in charge no.01 indisputably contravened a basic rule of international humanitarian law similar to the safeguards against wilful killing, as prohibited in each grave breach provision of the Geneva Conventions.

479. In the case in hand, the seriousness of the crimes and the extent of the involvement of convict accused Mohibur Rahman alias Boro Mia in their commission are factors to be considered in awarding sentence. It is to be noted that the determination of the gravity of the crimes proved requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused person[s] accompanying the group of attackers in the crime.

480. Culpable act of active and direct participation of convict accused Mohibur Rahman alias Boro Mia in causing death of non-

combatant freedom- fighter Rajab Ali by gunshot [as listed in charge no.01]reflecting his extreme antagonistic attitude and gross abuse of his membership in local Razakar Bahini constitutes an aggravating factor.

481. At the same time, convict accused Mujibur Rahman alias Angur Mia and Md. Abdur Razzak's participation in facilitating, abetting and contributing to 'murder', as a crime against humanity, constitutes a very serious offence and a gross violation of international humanitarian law, true. But they were not the principal offenders and they had acted as aider and abettor to facilitate the commission of the crime by the principal, and thus, they incurred 'accessory liability'. It is to be noted that difference between 'committing' a crime and other forms of 'participation' such as aiding and abetting lies in the fact that-

"The aider and abettor is always an accessory to a crime perpetrated by another person, the principal."

[Posecutor v. Tadic, Case No. IT-94-1-A, ICTY Appeals Chamber, Judgment: 15 July 1999, Para-229.]

482. Therefore, 'direct participation' of convict accused Mohibur Rahman alias Boro Mia in causing death of Rajab Ali heightens his criminal responsibility. While the two other convicted accused persons are found to have had aided, abetted, facilitated and contributed to the commission of the said criminal act [as listed in charge no.01].

483. It has been proved beyond reasonable doubt that the Pakistani occupation army stationed in Baniachang Police Station of the then Habiganj Sub-Division had launched attack being accompanied by the convicted accused persons and other local Razakars [as listed in charge no.02]. The attack remained not disputed. What was the target of this attack? It has been depicted that houses of prominent pro-liberation civilians including Colonel MA Rab [the second-in-command of the war of liberation] and the neighbouring houses belonging to civilians of Hindu community were devastatingly destructed by act of looting and burning.

484. Obviously the convicted accused persons and their accomplice Razakars aided the Pakistani occupation army by providing substantial assistance and contribution in carrying out the attack [as listed in charge no.02] as the Pakistani army men were not acquainted with the locality and houses of those persons of prominence sided with the war of liberation, we have already rendered this finding based on evidence. The attack was indeed a massive violence to lives and persons which was seriously detrimental to recognised fundamental rights aiming to have an effect on the normal livelihood of civilian population by diffusion terror and intimidation.

485. The convicted accused persons accompanied the Pakistani army men to the houses of victims of sexual abuse [as listed in

charge no. 03]. Why they guided the Pakistani army men in entering the houses of victims? Knowing the consequence of their unlawful act they did it consciously intending to facilitate and abet the commission of criminal act of grabbing supreme honour of two defenceless women [as listed in charge no.03]. What imbued them to act in such extremely villainous manner? Only a man of gravely perverted mindset opts seeing women of own locality ravished and fatally debased.

486. It is to be noted that many of the witnesses who have testified before the Tribunal had seen and experienced criminal acts and the conduct of convict accused persons consisting of practical assistance, encouragement or moral support to the principals i.e. Pakistani army men in committing the principal crimes [as listed in charge no.03] which could not be refuted at all by the defence.

487. The assistance the convict accused persons provided to the Pakistani army men had a “substantial effect” on the commission of the crime of rape. All the three convict accused persons had acted as accessory to the principals in committing the event of rape [as listed in charge no.03], it stands proved beyond reasonable doubt.

488. It has been found proved too that the accused persons and their accomplices committed the crime of wilfully causing serious injury to the body of a protected person Anfar Ali keeping him in captivity at the Razakar camp [as listed in charge no.04] which

constituted an intentional act aiming to cause serious mental and physical injury.

489. The accused Mohibur Rahman alias Boro Mia, Mujibur Rahman alias Angur Mia and Md. Abdur Razzak and their accomplice Razakars had committed the act of abduction of Anfar Ali which was chained to the act of causing cruel treatment in confinement in concerted manner. The accused persons had effective affiliation with the Razakar camp at Khagaura bazaar where keeping the victim detained inhumane act was caused to him. Accused persons were thus the participants deliberately and not accidentally in attacking Anfar Ali, a protected person. Causing inhumane cruelties in captivity to a defenceless protected civilian constituted a blatant attack on human dignity indeed [as listed in charge no.04].

490. The punishment must, in a case relating to offences of crimes against humanity as enumerated in the Act of 1973, reflect both the calls for justice from the persons who have, directly or indirectly, been victims of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and atrocious crimes [genocide, murder, rape, torture, other inhumane acts etc.] committed during war of liberation in 1971.

491. We reiterate that in awarding sentence in a case involving offence of murder enumerated in the Act of 1973 we should keep in mind that the punishment to be awarded must promote the rule of law and the realization that violations committed in 1971 during the war of liberation do not deserve any degree of compassionate view.

492. The Appellate Division of the Supreme Court of Bangladesh also observed in the **Criminal Review Petition No. 62 of 2015** [*Ali Ahsan Muhammad Mujahid's case*] that -

"While awarding the sentence, the Court must take into consideration the unbearable pains, tears rolling down the cheeks and sufferings of the widows and children of the victims who cried for getting justice for about 43 years".

[Criminal Review Petition No. 62 of 2015, Judgment: 18 November 2015, Page-28]

493. It is now settled that the sentence to be awarded in a case involving the offences of severe nature as enumerated in the Act of 1973 must be proportionate to the gravity of the crimes proved. It has been echoed in the observation of the Appellate Division of the Supreme Court of Bangladesh in the **case of Motiur Rahman Nizami** which is as below-

"It is the solemn duty of the courts to award proper sentence commensurate with the gravity of the crimes. Inappropriate lesser sentence causes injustice not only to the victims of crimes but sometimes to the whole society."

[Criminal Appeal No. 143 of 2014, Judgment: 06 January 2016, Page 152]

494. In the light of reasons conversed above together with the observations of our Apex Court as cited we are of the view that the mode of participation and culpable conduct of convict accused Mohibur Rahman alias Boro Mia in perpetrating the crimes intensify his criminal responsibility which justifiably prompts to award highest punishment to him for the crimes proved [as listed in charge no.01]. It may be mentioned here that this accused person expressed no repentance for his such conduct at any stage, and we do not find any mitigating factor to award lesser sentence to convict accused Mohibur Rahman alias Boro Mia other than death. At the same time, we consider it appropriate to condemn two other convict accused Mujibur Rahman alias Angur Mia and Md. Abdur Razzak to the sentence of imprisonment as they incurred ‘accessory liability’ for the crimes proved [as listed in charge no.01]

495. In relation to charge nos. 02 and 04 we are of considered view that it would be just to condemn the three convict accused persons to the sentence of imprisonment to be awarded as below, chiefly considering the nature and gravity of the offences. Similar view is considered justified to be adopted in awarding sentence of imprisonment as below in respect of the offences proved [as listed in charge no.03] considering the mode and level of participation of the convicted accused persons.

Accordingly, we do hereby render the following **ORDER ON SENTENCE.**

Hence it is

ORDERED

That accused (1) Mohibur Rahman alias Boro Mia son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj is held guilty of the offence of crime against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 01** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act; **AND**

Accused (2) Mujibur Rahman alias Angur Mia son of late Daras Uddin and Khodeja Khatun of Village Kumurshana, Police Station Baniachang, District Habiganj, and (3) Md. Abdur Razzak son of late Toij Ullah alias Toij Ali and Khodeja Begum of Village Hossainpur, Khagaura, Police Station Baniachang, District Habiganj are also held guilty of the offence of crime against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 01** and both of them be convicted accordingly and sentenced thereunder to imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak are held

guilty of the offences of crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 02** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 10[ten] years under section 20(2) of the said Act.

Accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak are held guilty of the offence of crime against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 03** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 20[twenty] years under section 20(2) of the said Act.

Accused (1) Mohibur Rahman alias Boro Mia (2) Mujibur Rahman alias Angur Mia, and (3) Md. Abdur Razzak are held guilty of the offences of crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed **in charge no. 04** and all of them be convicted accordingly and sentenced thereunder to rigorous imprisonment for 07[seven] years under section 20(2) of the said Act.

The sentence of death awarded to the convicted accused Mohibur Rahman alias Boro Mia **in charge no. 01** as above be executed by hanging him by the neck or by shooting him till he is dead, as decided by the government.

The sentences of imprisonment awarded to the convicted accused persons as above shall run concurrently.

However, as and when the sentence of death awarded to the convicted accused Mohibur Rahman alias Boro Mia will be executed, the other sentences of imprisonment awarded to him as above would naturally get merged into the sentence of death executed.

The sentence of death and sentences of imprisonment awarded as above under section 20(2) of the International Crimes (Tribunals) Act, 1973 shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

The convicts are at liberty to prefer appeal before the Appellate Division of the Supreme Court of Bangladesh against their conviction and sentence within 30[Thirty] days of the date of order of conviction and sentence as per provision of section 21 of the International Crimes (Tribunals) Act, 1973.

The convicts be sent to the prison with conviction warrants accordingly.

Let certified copy of the judgment be provided to the prosecution and the convicts free of cost at once.

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

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md. Shohrowardi, Member)