

International Crimes Tribunal-1

Old High Court Building, Dhaka, Bangladesh

ICT- BD [ICT-1] Case No. 10 of 2016

Present:

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

Chief Prosecutor

vs.

(1) Md. Esahaque Shikder
(2) A.Gani alias A. Gani Howlader
(3) Md. Awal alias Awal Moulovi
(4) Md. A. Sattar Pada, and
(5) Solaiman Mridha alias Soleman Mridha

Order No. 04

Date: 08.03.2017

Mr. Zead-Al-Malum, Prosecutor

..... For the prosecution

Mr. Md. Abdus Salam Khan, Advocate

..... For accused Md. Esahaque Shikder

Mr. Md. Amir Hossain Sarker Manik, Advocate

.....For accused Md. A. Sattar Pada

Mr. Abdus Sattar Palwan, Advocate

.....For accused A. Gani alias A. Gani Howlader, Md. Awal alias
Awal Moulovi and Solaiman Mridha alias Soleman Mridha.

[Decision on charge framing matter]

Today is fixed for passing decision on charge framing matter, and as such, the record is taken up for order. All the 05[five] accused persons are being defended by their respective learned counsels as mentioned above.

At the out set, it is to be noted that the 'formal charge' was submitted by the prosecution before this Tribunal against 05(five) accused persons and this

Tribunal on 17.11.2016 took cognizance of offences against all the accused persons and then the case came to the stage of charge hearing matter and on 09.01.2017 charge framing matter was heard.

The case involves the criminal acts forming part of systematic attack constituting the offences as enumerated in the International Crimes (Tribunals) Act, 1973 [Act No. XIX of 1973] perpetrated in 1971 during the war of liberation of Bangladesh. The accused persons are alleged to have committed many such offences in different localities of Patuakhali Sadar Police Station. We deem it expedient to provide a brief context of the case, succinct arguments put forward by the prosecution and defence before this Tribunal, before we render decision on charge framing matter.

1. Introductory words

This International Crimes Tribunal-1 (hereinafter referred to as the “Tribunal”) has been set up under the International Crimes (Tribunals) Act enacted in 1973 (hereinafter referred to as the “Act”) by Bangladesh Parliament. The Act which is meant for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law is *ex-post facto* legislation. It is to be noted that the ICTY, ICTR and SCSL, the Adhoc Tribunals backed by the United Nations (UN) have been constituted under their respective retrospective Statutes. Only the International Criminal Court [ICC] is founded on prospective Statute [Rome Statute]. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognized universally to be

provided to the person accused of crimes against humanity, genocide, war crimes and other crimes under international law.

2. Brief Historical Background

The dreadful systematic events constituting the offences of crimes against humanity as narrated in the formal charge allegedly occurred in different localities of Patuakhali Sadar Police Station were part of horrific atrocious activities carried out in 1971 during the war of liberation directing the unarmed pro-liberation civilians in furtherance of common plan and design of Pakistani occupation army.

The undisputed history says that atrocious and dreadful crimes were committed during the nine-month-long war of liberation in 1971, which resulted in the birth of Bangladesh, an independent State and the motherland of the Bengali nation. Some three million people were killed, nearly a quarter million women were raped and over 10 million people were forced to deport to India to escape from brutal persecution at home, during the nine-month battle and struggle of Bangalee nation.

The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman became the majority party of Pakistan. But defying the democratic norms Pakistan government did not care to respect this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7th March,

1971, called on the Bangalee nation to struggle for independence if people's verdict was not respected. In the early hour of 26th March, 1971 following the onslaught of "Operation Search Light" by the Pakistani Military on 25th March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

The 'operation' was designed to disarm and liquidate Bengali policemen, soldiers and military officers, to arrest and kill nationalist Bengali politicians, soldiers and military officers, to arrest and kill and round up professionals, intellectuals, civilians belonging to Hindu community and students. Afterwards, actions in concert with its local collaborators belonging to Razakar, Al-Badar and the key pro-Pakistani political organizations Jamaat-e-Islami (JEI) and Nejam-e-Islami were intended to stamp out the Bengali national liberation movement and to mash the national feelings and aspirations of the Bangalee nation.

The Pakistan government and the military formed Peace Committee as an 'associate organization' and number of auxiliary forces such as the Razakar, the Al-Badar, the Al-Shams, etc, essentially to act as a collaborating team with the Pakistani occupation army in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and Bangalee intellectuals and unarmed civilian population of Bangladesh.

Incontrovertibly the way to self-determination for the Bangalee nation was strenuous, swabbed with enormous blood, strive and sacrifices. In the

present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination. The events alleged in the formal charge constituting the offences of crimes against humanity occurred in different localities of Patuakhali Sadar Police Station mirror a partial scenario of totality of horrendous activities accomplished in violation of customary international law with the culpable facilitation and assistance provided by the local collaborators.

3. Brief account of the accused persons

(i) Md. Esahaque Shikder

Accused Md. Esahaque Shikder [83], son of late Osman Shikder alias Afsher Shikder and late Abetun Nesa of Village Gilabonia, Police Station Patuakhali Sadar , District Patuakhali, at present near western Zia Road, Police Station Patuakhali Sadar, District Patuakhali was born on 10.05.1932 [according to his NID]. He was a supporter of Convention Muslim League prior to 1971. During the war of liberation in 1971, as a member of local Razakar Bahini he committed different offences of crimes against humanity at Village Itbaria under Patuakhali Sadar Police Station, prosecution alleges. At present he is involved in the politics of Bangladesh Nationalist Party [BNP].

(ii) A. Gani alias A. Gani Howlader

Accused A. Gani alias A. Gani Howlader[72], son of late Kasem Howlader and late Syatun Nesa of Village Galachipa, Police Station Patuakhali Sadar, District Patuakhali was born on 26.02.1943 [according to his NID].

Prior to 1971 he was a supporter of Convention Muslim League. In 1971, during the war of liberation he joined the local Razakar Bahini and committed different offences of crimes against humanity at Village Itbaria under Patuakhali Sadar Police Station, prosecution alleges. Now he is involved in the politics of Bangladesh Nationalist Party [BNP].

(iii) Md. Awal alias Awal Moulovi

Accused Md. Awal alias Awal Moulovi [69], son of late Nur Ahmmad and late Azimon Nesa Begum of Village Galachipa, Police Station Patuakhali Sadar, District Patuakhali was born on 03.04.1947 [as per his NID]. Prior to 1971 he was a supporter of Convention Muslim League. During the war of liberation in 1971, he joined the local Razakar Bahini and committed different offences of crimes against humanity at Village Itbaria under Patuakhali Sadar Police Station, prosecution alleges. At present he is involved in the politics of Bangladesh Nationalist Party [BNP].

(iv) Md. A. Sattar Pada

Accused Md. A Sattar Pada [65], son of late Fazle Karim Pada alias Fazlu Pada and late Jamina Khatun alias Ful Bhanu Khatun of Village Sharikkhali, Police Station Patuakhali Sadar, District Patuakhali, at present near western side of Shishu Park, Police Station Patuakhali Sadar, District Patuakhali was born on 03.05.1951 [according to his NID]. Prior to 1971 he was a supporter of Convention Muslim League. In 1971, during the war of liberation he joined the local Razakar Bahini and committed different offences

of crimes against humanity at Village Itbaria under Patuakhali Sadar Police Station, prosecution alleges. Now, he is involved in the politics of Bangladesh Nationalist Party [BNP].

(v) Solaiman Mridha alias Soleman Mridha

Accused Solaiman Mridha alias Soleman Mridha [86], son of late Hachon Ali Mridha and late Hakim Janbibi of Village Ballav, Police Station Patuakhali Sadar, District Patuakhali was born on 08.07.1929 [as per his NID]. Prior to 1971, he was a supporter of Convention Muslim League. During the war of liberation in 1971, he joined the local Razakar Bahini and committed different offences of crimes against humanity at Village Itbaria under Patuakhali Sadar Police Station, prosecution alleges. At present he is involved in the politics of Bangladesh Nationalist Party [BNP].

4. Brief Procedural History

The Chief Prosecutor submitted 'formal charge' against 05 [five] accused persons on having considered the investigation report and documents submitted therewith by the Investigating Agency. This Tribunal on 17.11.2016 took cognizance of offences against all the accused persons as mentioned above. On 09.01.2017 this Tribunal -1 heard the charge framing matter and fixed 08.03.2017 for decision on it.

The record goes to show that on holding investigation on some atrocious events allegedly committed in 1971 during the war of liberation in systematic manner directing unarmed civilians in different localities of Patuakhali Sadar

Police Station by the local Razakars accompanied by the Pakistani occupation army, the Investigating Agency submitted its investigation report finding all the accused persons' *prima facie* responsible for the atrocities before the Chief Prosecutor.

The Chief Prosecutor considering the nature, pattern of the alleged atrocious events and culpable participation and involvement of all the accused persons preferred to submit a single 'formal charge' with a view to prosecute them jointly.

It appears that the 'formal charge' submitted discloses that the accused persons allegedly participated or facilitated or abetted or aided or had complicity in the commission of the alleged offences and they appear to have allegedly acted in furtherance of common plan and design to the accomplishment of such offences, and therefore, all the 05[five] accused persons may be jointly prosecuted as permissible under Rule 36 of the Rules of Procedure, 2010 of this Tribunal-1.

5. Submission advanced by the prosecutor

Mr. Zead-Al-Malum, the learned prosecutor made his submission, drawing our attention to the documents and statement of witnesses collected during investigation. He submitted that all the 05[five] accused persons belonged to local Razakar Bahini. They along with their accomplices belonging to Razakar Bahini and Pakistani occupation army had systematically and deliberately carried out atrocious activities directing pro-liberation

civilians in different localities of Patuakhali Sadar Police Station. Role of all the accused persons in accomplishing the alleged crimes in 1971 during the war of liberation was culpable and in furtherance of common plan and design of the Pakistani occupation army. The attacks as demonstrated in the formal charge involve the offences of crimes against humanity and all the accused persons actively participated, abetted, aided, facilitated and had complicity in the commission thereof.

The learned prosecutor further submitted that all the 05[five] accused persons were the members of local infamous Razakar Bahini, an auxiliary force of Pakistani occupation army, and in 1971 the Razakar Bahini was formed intending to collaborate with the Pakistani occupation army in carrying out horrific atrocious activities in furtherance of common plan and design of annihilating the pro-liberation Bengali civilians and freedom- fighters. The accused persons need to be indicted for the offences they had committed in the context of war of liberation in 1971 in the territory of Bangladesh.

6. Submission advanced by the defence side

Mr. Md. Abdus Salam Khan, the learned counsel appearing on behalf of accused Md. Esahaque Shikder submitted that accused Md. Esahaque Shikder is quite innocent and he was not involved with any offences as mentioned in the formal charge submitted by the prosecution and he was not a member of local Razakar Bahini.

Mr. Md. Abdus Salam Khan further submitted that the allegations set up in the formal charge do not disclose or state specificity of general particulars

and the required elements to constitute the offences as enumerated in section 3(2) of the Act of 1973. The formal charge is based on vague and unspecified allegations and it does not disclose the mode of participation of the accused Md. Esahaque Shikder with the alleged unlawful acts. This accused is quite innocent and he has been falsely implicated in this case, and as such, he is liable to be discharged.

Mr. Abdus Sattar Palwan, the learned counsel appearing on behalf of accused A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulovi and Solaiman Mridha alias Soleman Mridha by filing an application seeking discharge of these three accused persons also submitted that these accused persons are quite innocent and they were not involved with the criminal acts as mentioned in the formal charge submitted by the prosecution.

Mr. Abdus Sattar Palwan further submitted that unexplained inordinate delay of more than four decades occurred in prosecuting the accused persons impairs the truthfulness of the arraignment brought and it reflects political motive too. Such inordinate delay of more than 40 years should have been explained in the formal charge submitted under section 9(1) of the Act of 1973 which is the foundation of the case, and as such, these three accused persons are liable to be discharged.

It may be mentioned here that no submission was made on behalf of accused Md. A. Sattar Pada on charge framing matter nor any application for time was filed on behalf of this accused person.

7. Deliberation and decision with reasoning

We have meticulously gone through the formal charge, statement of witnesses and the documents submitted. It appears that the prosecution by submitting formal charge alleges that the accused persons participated, facilitated, abetted, aided, contributed and had complicity in the commission of crimes as enumerated in the Act of 1973, by their acts and conducts forming a part of systematic attack directing civilian population in 1971 during the war of liberation in different localities of Patuakhali Sadar Police Station. All the accused persons have been proposed by the prosecution to be indicted for the alleged events of attacks constituting the offences of crimes against humanity as narrated in the formal charge.

The allegations brought do not constitute isolated crimes. Those are alleged to have been committed in war time situation directing civilians in systematic manner. The undeniable context prevailing in 1971 in the territory of Bangladesh is itself sufficient to the unerring inference of a 'widespread and systematic attack' on Bangladeshi self-determined population. Therefore, the offences committed under this context and in violation of customary international law during 1971 liberation war, patently demonstrate that those were of course consequence of part of a 'widespread' or 'systematic' attack directed against the unarmed civilian population. Under section 19(1) of the Act of 1973, the Tribunal can take judicial notice of the above context that must prompt a person of common prudence that the offences of crimes against

humanity as mentioned in section 3(2)(a) of the Act of 1973 were inevitably the effect of part of widespread or systematic attack.

Prosecution, at this stage, alleges that the accused persons belonging to local Razakar Bahini accompanied the group of Razakars and Pakistani occupation army which had committed the offences of crimes against humanity, in conjunction with the attack. *Prima facie* the formal charge, statement of witnesses and documents submitted demonstrate accused persons' culpable complicity, act and conduct with the perpetration of offences alleged. But however, culpability and role of them or any of them can be well adjudicated only on holding trial. And till then they shall be presumed innocent.

It is now settled that the offences of genocide and crimes against humanity are considered as 'group crime' and these are not perpetrated by a single individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed. In this regard, the Tribunal notes that in adjudicating culpability of the person accused of offences, context and situations prevailing at the relevant time i.e the period of war of liberation in 1971[March 25 to December 16, 1971] together with his acts, conducts, attitude and association of any organization, if any, are to be considered. It may be well resolved on evaluation of evidence to be presented during trial.

We are not with the submission extended by the learned defence counsel Mr. Abdus Sattar Palwan on point of delay in prosecuting the accused persons.

As regards delay in prosecuting the suspect offenders we reiterate that the victims of systematic and organised diabolical atrocities committed in 1971 within the territory of Bangladesh in violation of customary international law need justice to heal. State has an obligation to remedy serious human rights violations. Bangladesh recognizes Article 8 of the Universal Declaration of Human Rights [UDHR] and Article 2(3) of the International Covenant of Civil and Political Rights [ICCPR] which ensure the right to an effective remedy for the violation of human rights. And in providing effective remedy to the victims and their families, delay itself cannot stand as a bar in prosecuting an individual offender under the Act of 1973.

At this stage, it cannot be determined conclusively whether the accused persons belonged to local Razakar Bahini. It is a question of fact that can be effectively resolved only on trial and considering the totality of evidence to be provided by the prosecution. Besides, it would be relevant to reiterate that the Act of 1973 is meant to prosecute and punish not only the armed forces and the perpetrators who belonged to ‘auxiliary forces’, but also to prosecute and punish an ‘individual’ or member of ‘group of individuals’ who committed the offences enumerated in the Act of 1973. It is quite manifested from section 3(1) of the Act of 1973 that even any person (individual or member of group of individuals), if he is *prima facie* found individually criminally responsible for the offence(s), can be brought to justice under the Act of 1973. Already it has been well resolved.

It is settled that mere framing charge does not prove one's guilt. The accused persons shall be presumed innocent until they are found guilty of the offences alleged. However, now, we are convinced, on going through the statement of witnesses and materials on record, to *prima facie* conclude that there have been sufficient grounds of proceeding.

At this stage, the formal charge and the statement of witnesses *prima facie* demonstrate that the accused persons enthusiastically sided with the policy and plan of the Pakistani occupation army and had allegedly carried out horrific activities of crimes against humanity and other inhumane acts, and as such, the submission made by the learned defence counsels seeking discharge of the accused persons does not deserve consideration, and therefore, the application seeking discharge of the accused A. Gani alias A. Gani Howlader, Md. Awal alias Awal Moulavi and Solaiman Mridha alias Soleman Mridha is hereby rejected.

Accordingly, now we proceed to read out the charges framed. On perusal of the formal charge, statement of witnesses along with other documents submitted by the prosecution we are of the view that there are sufficient and substantial materials and grounds before the Tribunal to frame charges against accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulavi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha for the offences allegedly committed during the war of liberation in 1971 as specified under section 3(2)(a)(g)(h) of the Act of 1973 for which they are alleged to be criminally liable under section

4(1) of the said Act. The charges are thus framed against them in the following manner:

Charges

We,

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

Of the International Crimes Tribunal -1

Hereby charge you, accused (1) Md. Esahaque Shikder, son of late Osman Shikder alias Afsher Shikder and late Abetun Nesa of Village Gilabonia, Police Station Patuakhali Sadar , District Patuakhali, at present near western Zia Road, Police Station Patuakhali Sadar, District Patuakhali (2) A. Gani alias A. Gani Howlader, son of late Kasem Howlader and late Syatun Nesa of Village Galachipa, Police Station Patuakhali Sadar, District Patuakhali (3) Md. Awal alias Awal Moulovi, son of late Nur Ahmmad and late Azimon Nesa Begum of Village Galachipa, Police Station Patuakhali Sadar, District Patuakhali (4) Md. A Sattar Pada, son of late Fazle Karim Pada alias Fazlu Pada and late Jamina Khatun alias Ful Bhanu Khatun of Village Sharikkhali, Police Station Patuakhali Sadar, District Patuakhali, at present near western side of Shishu Park, Police Station Patuakhali Sadar, District Patuakhali, and (5) Solaiman Mridha alias Soleman Mridha, son of late Hachon Ali Mridha and late Hakim Janbibibi of Village Ballav, Police Station Patuakhali Sadar, District Patuakhali as follows:

Charge No. 01

[Confinement, torture, arson, looting and murder committed at Village Itbaria under Patuakhali Sadar Police Station]

That on 04.05.1971 at about 10.00 A.M. while the local Razakar Bahini under the leadership of Motahar Khondaker [now dead], the then president of Patuakhali Sadar Thana Peace Committee and member of Patuakhali District Peace Committee along with a group of Pakistani occupation army arrived at the bank of river adjacent to Itbaria Board School by boat, under the leadership of you Razakar accused (1) Md. Esahaque Shikder along with you Razakar accused (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulovi (4) Md. A. Sattar Pada (5) Solaiman Mridha alias Soleman Mridha and your cohort Razakars welcomed them there.

Thereafter, you the accused persons, Razakars and the Pakistani occupation army jointly started launching attack at Itbaria village under Patuakhali Sadar Police Station, District Patuakhali and then started looting, setting fire, confining and killing unarmed civilians with indiscriminate gun shots. During said attack you the accused persons and your accomplice Razakars and Pakistani occupation army looted about 12/15 houses, tortured about 20/25 persons, bodily injured about 10/15 persons and killed 17 persons [the names of the victims and the particulars of the damaged houses have been narrated in the formal charge].

Therefore, you accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulovi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha are hereby charged for participating, abetting, facilitating , contributing and complicity in the

commission of offences of confinement, torture, murder and other inhumane acts [looting and arson] 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 you the accused persons have incurred liability under section 4(1) of the said Act.

Charge No. 02

[Abduction, confinement, torture and rape committed in the Patuakhali Circuit House]

That after the commission of offences as crimes against humanity at village Itabaria on 04.05.1971 as narrated in charge no. 01, on the same day [04.05.1971] at about 05.30 P.M. you the Razakars accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulovi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha and your accomplice Razakars and Pakistani occupation army having abducted already detained about 15 women [names of the victims are narrated in the formal charge] from the said Itabaria village and forcibly took them away to the Joint Camp of Razakars and Pakistani army set up at the Patuakhali Circuit House, and keeping them in captivity there you the accused persons and your accomplice Razakars and Pakistani occupation army men tortured and raped them in turn, and as such, all the victim women became sick. Thereafter, the detained victim women were set free on different dates, lastly on 14.05.1971.

Therefore, you accused (1) Md. Esahaque Shikder (2) A. Gani alias A. Gani Howlader (3) Md. Awal alias Awal Moulovi (4) Md. A. Sattar Pada, and (5) Solaiman Mridha alias Soleman Mridha are hereby charged for participating, abetting, facilitating, contributing and complicity in the commission of offences of abduction, confinement, torture and rape 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 you the accused persons have incurred liability under section 4(1) of the said Act.

The charges so framed have been read over in English and explained in Bengali in open court.

You all the 05[five] accused persons have heard and understood the aforesaid charges which have been read over in open court in your presence.

Question: Do you plead guilty or not?

Answer:

The charges so framed have been read over in English and explained in Bengali to all the 05[five] accused persons present on dock, to which they pleaded not guilty and claimed to be tried.

Let 26.04.2017 be fixed for opening statement and examination of prosecution witnesses. The trial shall be continuing on every working day until further order. Prosecution is directed to submit copy of all the documents it relies upon, for the purpose of furnishing the same with the defence, if

meanwhile the same are not supplied to the defence. At the same time the defence counsels are directed to submit list of witnesses along with documents, if any, which they intend to rely upon, as required under section 9(5) of the Act of 1973 on or before the date fixed.

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md. Shohrowardi, Member)