

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

ICT-BD [ICT-1] Case No.01 OF 2016

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

The Chief Prosecutor

Versus

- 1. Md. Moslem Prodhan, and**
- 2. Syed Md. Hussain alias Hossain [absconded]**

Present:

Mr. Justice Anwarul Haque, Chairman
Mr. Justice Md. Shahinur Islam, Member
Mr. Justice Md. Shohrwardi, 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. Md. Altab Uddin
Ms. Tureen Afroz
Mr. Abul Kalam
Ms. Rezia Sultana
Mr. Tapas Kanti Baul

Defence Counsel:

Mr. Abdus Sattar Palwan
... For accused Md. Moslem Prodhan as engaged
defence counsel, and for accused Syed Md. Hussain
alias Hossain [absconded] as State defence counsel.

Date of delivery of Judgment: 19 April 2017.

JUDGMENT

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

Mr. Justice Anwarul Haque, Chairman

Mr. Justice Md. Shahinur Islam, Member

I. Introductory Words

- 1. Accused (1) Md. Moslem Prodhan son of late Labhu Sheikh and late Rezia Akhter of Village Kamarhati, Police Station Nikli,**

District Kishoreganj, and (2) Syed Md. Hussain alias Hossain [absconded] son of late Syed Musleh Uddin and late Syeda Fatema Banu have been put on trial before this Tribunal-1 at the instance of the Chief Prosecutor to answer charges under section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973.

2. 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.

3. 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

destruction, in whole or in part, of 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 crime 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."*

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

4. 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 [section17 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.

5. 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.

6. 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.

7. 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.

8. 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.

IV. Historical Backdrop and Context

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

V. Brief Account of the Accused Persons:

15. Two accused persons have been indicted in this case. Brief account of them is as below:

(i) **Accused Md. Moslem Prodhan (67)** son of late Labhu Sheikh and late Rezia Akhter of village Kamarhati, Police Station Nikli, District Kishoreganj was born on 31.12.1948 . He did not receive any formal education. He is only an alphabet-literate. During the Liberation War of 1971 he [accused Md. Moslem Prodhan] individually and jointly committed a number of crimes of genocide and crimes against humanity in different localities of the then Kishoreganj Sub-Division, and then he was known as 'Razakar Commander' of 'Nikli Union', prosecution alleges. He has been involved in the politics of Bangladesh Nationalist Party [BNP].

(ii) **Accused Syed Md. Hussain alias Hossain [64]** son of late Syed Musleh Uddin and late Syeda Fatema Banu was born on

15.09.1951. His permanent address is village Machihata, Police Station and District Brahmanbaria. His last known current address is House No. 2, Road No. 6, Pink City, Police Station Khilkhet, Dhaka. However, during 1971, he lived at Hoybat Nagar, Police Station Kishoreganj Sadar under the then Kishoreganj Sub-Division of District Mymensingh, prosecution alleges. He passed S.S.C Examination in 1967 from Kishoreganj High School and H.S.C Examination in 1969 from the Gurudoyal College, Kishoreganj. Later, he also passed B.A Examination in 1975 from the same college. During pre-liberation period he was involved with Chhatra League [student wing of Awami League] politics of his college, however, during the Liberation War of 1971, he adopted the ideological position of Pakistan Democratic Party [PDP] and he individually and jointly committed a number of crimes of genocide and crimes against humanity in different localities of the then Kishoreganj Sub-Division, and then he was commonly known as 'Razakar Daroga' of Nikli Thana, prosecution alleges. His eldest brother Syed Md. Hachhan alias Syed Md. Hasan alias Hachhen Ali was tried *in absentia* in ICT-BD Case No. 02 of 2014 and was found guilty of the offences of genocide and crimes against humanity for which he was sentenced to death on 09.06.2015 by the ICT-BD Tribunal-1.

VI. Brief Procedural History

16. The Chief Prosecutor submitted 'formal charge' against 02 [two] accused persons on having considered the investigation report and documents submitted therewith by the Investigating Agency. This Tribunal on 07.01.2016 took cognizance of offences against both the accused persons as mentioned above. Out of the two accused persons accused Md. Moslem Prodhan has been in detention. The accused Syed Md. Hussain alias Hossain neither could have been arrested nor did he surrender.

17. On 07.01.2016 this Tribunal took cognizance of offences, perpetration of which has been unveiled in course of investigation and on 15.02.2016 ordered publication of notice in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the absconding accused Syed Md. Hussain alias Hossain as the execution of warrant of arrest issued against him earlier was found unserved.

18. Accordingly, despite publication of the notice in two daily newspapers namely 'The Daily Ittefaq' and 'The Daily Independent' dated 18.02.2016 and 17.02.2016 respectively the absconding accused Syed Md. Hussain alias Hossain did not make him surrendered, and as such, this Tribunal ordered for holding trial *in absentia* against him and appointed Mr. Abdus Sattar Palwan, Advocate to defend the absconding accused person as State defence counsel. This Tribunal fixed 26.04.2016 for hearing the charge

framing matter and on the date fixed this Tribunal-1 heard the charge framing matter and fixed 09.05.2016 for decision on it.

19. Having considered the submissions made by the learned counsels of both the parties and perused the formal charge and other materials on record we were inclined to frame charge against the accused persons. Accordingly, on 09.05.2016 having rejected the application for discharge of accused Md. Moslem Prodhan we framed 06[six] charges in all against the accused persons.

VII. Witnesses adduced by the parties

20. The prosecution submitted a list of 43 [forty three] witnesses along with formal charges and documents. But at the time of the trial, the prosecution has examined in all 23 [twenty three] witnesses including the investigation officer. The prosecution has also adduced some documentary evidence which were duly marked as exhibits 1-16.

21. However, the defence has examined only one witness as D.W.1. Defence has also exhibited some documents which were duly marked as exhibits Ka- Ga.

VIII. Burden of the prosecution

22. 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.

IX. Summing UP

Summing up by the prosecution

23 Ms. Tureen Afroz, the learned prosecutor started placing summing up by portraying the profile of two accused persons Syed Md. Hussain alias Hossain and Md. Moslem Prodhan who have been prosecuted and tried jointly and of them accused Syed Md. Hussain alias Hossain who remains absconded has been indicted in all the six [06] charges for the offences narrated therein while accused Md. Moslem Prodhan has been indicted for the offences narrated in charge nos. 03 and 05.

24. The learned prosecutor submitted that both the accused persons belonged to Razakar Bahini formed locally and accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana under Kishoreganj District [the then Sub-Division]. Testimony made by the witnesses of the crime locality together

with the documentary evidence as have been relied upon by the prosecution unerringly prove accused persons' active membership and position in the locally formed Razakar Bahini. Besides, even a person in the capacity of an individual can be prosecuted and tried for the offences enumerated in the Act of 1973 if his complicity or participation is found proved, the learned prosecutor added.

25. The learned prosecutor Ms. Tureen Afroz by drawing attention to the testimony tendered and documentary evidence relied upon placed argument in relation to the commission of offences and accused persons' role and mode of participation therewith as narrated in the charges framed together with the settled principles and observations made in the cases of adhoc Tribunals, on some crucial issues.

26. In advancing argument, citing evidence presented, the learned prosecutor Ms. Tureen Afroz submitted that the prosecution has been able to prove all the six charges and liability of the accused persons as arraigned. The learned prosecutor argued that in relation to some charges the accused Syed Md. Hussain alias Hossain himself participated physically and actively and in some cases he, by providing aid and assistance abetted and facilitated the principal perpetrators in accomplishing the actual commission of crimes.

27. The learned prosecutor concluded her argument by emphasizing awarding highest sentence especially for the offences of extermination, genocide and genocidal rape as narrated in charge

nos. 03, 04 and also for killing a non-combatant freedom fighter as narrated in charge no.05. We consider it appropriate and convenient to address the argument advanced together with that made by the defence at the time of adjudicating each charge independently.

Summing up by the Defence

28. Mr. Abdus Sattar Palwan, the learned counsel for accused Moslem Prodhan and also as the state appointed counsel to defend the absconded accused Syed Md. Hussain alias Hossain before advancing argument on charges framed attempted to refute the fact that the accused persons were Razakar Commanders. Prosecution failed to prove it by lawful evidence, and thus, their involvement and complicity with the crimes alleged does not stand believable, the learned counsel added. Oral evidence presented in this regard does not seem to be consistent and believable.

29. Mr. Abdus Sattar Palwan next drawing attention to the evidence tendered by the prosecution and the documents relied upon in support of the charges framed submitted that the witnesses examined by the prosecution are not reliable and their testimony suffers from inconsistencies. The accused persons have been implicated in this case falsely out of local rivalry and they were not affiliated with the local Razakar Bahini. In order to justify the defence case particularly against the charge nos. 03 and 05 the learned defence counsel drew attention also to the documents

submitted and exhibited by examining one witness as D.W.01, on behalf of accused Md. Moslem Prodhan. However, argument placed by the defence in relation to charges may be well addressed at the time of adjudication of each charge independently.

Rebuttal by the Prosecution

30. On rebuttal, Ms. Tureen Afroz, the learned prosecutor agitated six points, in brief. It has been submitted that--

- (1) not only the status the accused persons had in 1971 but their acts and conduct forming part of attack that resulted in commission of the crimes narrated in the charges are to be seen and taken into account, for holding them liable;
- (2) even without being in commanding position of a group or organisation one can incur liability for the commission of crimes under the theory of **JCE** if it is found that he was active and conscious part of the enterprise;
- (3) defence document Exhibit- Ga series published after causing arrest of the accused Md. Moslem Prodhan in connection with this case does not depict complete and absolutely correct narrative, and thus, it is not authoritative;
- (4) in respect of the event narrated in charge no.03 defence does not deny the battle happened in the morning between the freedom-fighters and Razakars and it remains unchallenged too that at the time of cessation of fight the perpetrators by launching attack had deliberately killed

numerous unarmed civilians. Defence failed to create doubt as to killing of those non combatant civilians;

(5) Exhibits-Ka and Kha relied upon by the defence particularly in relation to the event narrated in charge no.05 does not reflect complete and flawless narrative and the narrative made therein cannot turn down the sworn testimony of witnesses readily, especially the testimony of P.W.09, the wife of victim freedom-fighter Abdul Malek; and

(6) the book titled 'Ronangoner Kotha' is based on its author's memory which may naturally be faded with the passage of long time. Killing of Abdul Malek is not denied even in this book although it narrates that Abdul Malek died in the battle. But this book alone does not provide the whole truth. In adjudicating the charge no.05 the status of Abdul Malek at the relevant time is to be taken into account on the basis of evidence tendered by the prosecution.

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

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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].**

37. 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]

38. 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, para15]

39. 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.

40. 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.'"

41. 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.

42. 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.

43. 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.

XI. Objective of forming Razakar Bahini and whether the accused persons belonged to Razakar Bahini formed in Nikli Thana

44. The charges framed arraign that the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan committed the offences alleged in exercise of their membership and position in locally formed Razakar Bahini and they made them culpably associated with the Pakistani occupation army, to further its policy and plan by carrying out atrocious activities directing civilian population under Nikli Thana locality of Kishoreganj Sub-Division [now District] in 1971.

45. The learned prosecutor Ms. Tureen Afroz submitted that the evidence--oral and documentary as well presented shall demonstrate that accused Syed Md. Hussain alias Hossain had been in potential position of Nikli Thana Razakar Bahini and accused Md. Moslem Prodhan also actively associated with it as its potential

member. Defence simply denied their status and position in Nikli Thana Razakar Bahini but it however could not refute it. The prosecution witnesses including victims and freedom-fighters were well acquainted with the identity of the accused persons and they have consistently testified their [accused persons] status in 1971.

46. It has been further submitted by the learned prosecutor that in addition to oral evidence presented documentary evidence Exhibit-9 goes to show that accused Syed Md. Hussain alias Hossain was the 'Razakar Daroga' which signifies his commanding position in the local Razakar Bahini. Exhibit-11 is a list of local Razakars which was prepared prior to initiation of investigation into the offences allegedly committed. Accused Syed Md. Hussain alias Hossain's name finds place in serial no. 8 of this list as 'Razakar Commander'. Exhibit-11 carries probative value and in absence of anything contrary it provides corroboration to oral testimony and Exhibit-9. Accused Md. Moslem Prodhan's membership in Nikli Razakar Bahini gets corroboration from Exhibit-12 series. Additionally, notorious status of an individual that he had in 1971 eventually becomes an anecdote and thus oral testimony tendered in this regard cannot be discarded merely for the reason of absence of adequate documentary evidence.

47. On contrary, Mr. Abdus Sattar Palwan, the learned defence counsel submitted that according to the version of the investigation officer the accused persons were the Razakar commanders of Nikli

Thana Sadar and Nikli Union respectively. But there has been no authoritative document to substantiate it. The list of Razakars Exhibit-12 series does not say that accused Md. Moslem Prodhan was the Commander of Nikli Union Razakar Bahini.

48. Having regard to submission made by both sides, at the out set, it is to be reiterated that it is not correct to say that an accused shall be exonerated if it is not proved that he belonged to Razakar Bahini, an auxiliary force. We reiterate that even a person can be prosecuted and tried for committing offences enumerated in the Act of 1973 if he is found to have had done these in the capacity of an individual. The Act of 1973 permits it.

49. However, since the prosecution alleges that the accused persons being potential Razakars of Nikli Thana Razakar Bahini had carried out the criminal acts constituting the offences alleged let us see how far the prosecution has been able to prove it [status of accused persons in 1971]. And before determining this matter we deem it relevant to focus on the objective of forming Razakar Bahini in 1971.

50. It is a fact of common knowledge that Razakar Bahini was an armed *para militia* force which was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army. What was the objective of forming such *para militia* force in war time situation in 1971?

51. The history says 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 in a systematic manner against the unarmed Bengali civilians through out the territory of Bangladesh in 1971. Pro-liberation civilians, freedom fighters, intellectual group, Hindu community were their key targets. The arraignment brought in the charges framed in the case in hand also reflects it. Thus, the key objective of forming Razakar force was to collaborate with the Pakistani occupation army to further its policy and plan.

52. It is undisputed that as members of an auxiliary force, Razakars were provided with training and allocated fire arms. Razakar Bahini, an auxiliary force was thus formed to collaborate with the Pakistani occupation army in annihilating the Bengali nation. Pro-Pakistan political parties including Jamat E Islami, Muslim League etc. had played key role in forming this auxiliary force and they symbolized the pro-liberation Bengali people as their '*enemies*' and '*miscreants*'. It is now settled history

53. 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].

54. It is found from the book titled '*Muktijudhdhe Dhaka 1971*' that in 1971, Jamaat-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:

**"RvgvqtZ Bmj vgx gy³h³x i i i " t_tK tkI chS²
mvgwiK RvŠZvtK mg_0 Kti | Zvt` i mnvqZvi Rb"**

Ab`vb` agv`j `j vb`q c`gZ MVb Kti kwšZ KigvW|
 cieZx`mg`q mk`z ewnbx ivRvKvi I Avje`i MVb
 Kti Ges miKvix `KZx Av`vq Kti| hy`K ag`K
 vntmte c`viYv Pwj`q DM`ag`q Db`v bv m`oi tP`on Kti|
 Avi Gi Avot`j `mb`i i mrvqZvq Pvj vq vbveP`ti bksm
 MYnZ`v, j`y, bvix vbhv`Zb, AcniY I Pw`v Av`vq|
 me`RI RmZi veteK ey`R`ext` i nZ`v Kiv nq|"

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

55. Thus, the above materials have proved that the members of Razakar Bahini committed and conducted countless 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.

56. In the case in hand, defence does not dispute that infamous Razakar Bahini, an 'auxiliary force' as defined in section 2 of the Act of 1973 was also formed in Nikli Thana locality intending to collaborate with the Pakistani occupation armed force by maintaining 'static relation' for 'operational' purpose.

57. The accused persons were in potential position of Nikli Thana Razakar Bahini which was formed not for any sacred purpose. Obviously the accused persons used to collaborate with the Pakistani occupation army in executing its policy and plan and this crucial matter may be well determined by adjudicating their liability for the alleged offences narrated in the charges framed..

58. The protected persons staying in the territory of Bangladesh in 1971 had to experience dreadful and untold experience of criminal acts done even by the Razakar Bahini alone as its loyalty to Pakistani occupation army together with extreme antagonistic approach to the war of liberation made them culpably stimulated in launching attack directing civilian population.

59. In the case in hand, it is seen that all the events alleged constituting the offences narrated in all the charges framed happened in the Nikli Thana locality and the group formed only of Razakar Bahini committed the crimes alleged in some of charges framed and it indicates the notoriety of Nikli Razakar Bahini to which the accused persons allegedly belonged. However, the local Razakars including the accused persons are also alleged to have contributed and facilitated the Pakistani army in carrying out some barbaric event of killing and atrocious activities.

60. Now let us see what evidence has been presented by the prosecution to substantiate accused persons' membership in Nikli Thana Razakar Bahini. First, it is to be noted that collecting documentary evidence to prove a particular fact related to the status of the accused persons in 1971, predominantly more than long four decades after the atrocities committed was challenging indeed. Necessary documents, by this time, might have been destroyed. In this regard we recall the observation of the Appellate Division 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, Surendra Kumar Sinha, J., page 43]

61. Therefore, in the case in hand, for the purpose of arriving at decision on the matter we are to depend on the testimony of oral witnesses who were reasonably acquainted with the identity of the accused persons beforehand and the documents relied upon by the prosecution in this regard.

62. P.W.01 Badal Chandra Barman, a victim of the criminal act of forceful conversion as arraigned in charge no.01 heard the name of Razakar Commander Syed Md. Hussain from Teku Chairman and afterwards he saw him [accused Sayed Md. Hossain] when their village was attacked.

63. P.W.04 Shamala Barman, another victim of the event as narrated in charge no.01 also corroborates that Teku Chairman and Sanai Razakar came to their house and asked them to get converted

to Islam religion as ordered by Razakar Commander Syed Md. Hussain.

64. The criminal acts as narrated in charge no.01 may be well adjudicated on evaluation of evidence presented. But what we see from the above testimony of two victims of the event of forceful conversion is that accused Syed Md. Hussain alias Hossain was the Razakar Commander and they knew it from the disclosure made by the principal perpetrators. Defence could not refute it.

65. P.W.20 Kashem Ali, a victim of the event narrated in charge no.02 stated in reply to question put to him by the defence that during their detention in Thana he could recognise Razakar Commander Syed Md. Hussain from the conversation made amongst the Razakars.

66. P.W.21 Abdul Ali, an owner of grocery shop nearby Nikli Thana in 1971 stated that since accused [Syed Md. Hossain alias Hossain] very often used to visit his [P.W.21] grocery shop situated adjacent to Thana he [P.W.21] knew him beforehand. P.W.21 too testified that accused Syed Md. Hussain was a Razakar Commander of Nikli Thana.

67. In cross-examination P.W.05 Abdul Hamid, a member of Basu Bahini formed to join the war of liberation stated in reply to defence question put to him that he saw accused Syed Md. Hussain around the locality of Nikli during the election held in 1970 and he also saw accused Md. Moslem Prodhan prior to 1971.

68. P.W.07 Md. Ichob Ali, a member of Basu Bahini [a group of freedom fighters which fought around their locality] testified that in 1971 Razakar accused Syed Md. Hussain used to work as a 'Daroga' in Nikli Thana and accused Moslem Prodhan was the Razakar Commander. In course of spying at different times during the war of liberation he [P.W.07] became acquainted about the identity of accused Syed Md. Hussain and he also knew accused Moslem Prodhan beforehand as he was a resident of their locality.

69. The reason of knowing the identity of accused persons as stated by P.W.05 and P.W.07 inspires credence and their consistent version leads to the conclusion that accused Syed Md. Hussain and Md. Moslem Prodhan were potential and mighty members of Razakar Bahini formed in Nikli Thana.

70. P.W.08 Md Solaiman knew accused Moslem Prodhan beforehand as he used to come Nikli bazaar very often and he heard from P.Ws. 07 and P.W. 10 that accused Syed Md. Hussain was a Razakar Commander.

71. In 1970's election Syed Md. Hussain alias Hossain and Md. Moslem Prodhan had kept them engaged in election campaign in favour of Aftab, a candidate contesting the election with the symbol of 'tiger' around their locality and since then he knew them and he [P.W.10] had occasions of meeting accused Moslem Prodhan at Nikli bazaar --- P.W.10 Abdul Hekim, a member of Basu Bahini [group formed of freedom fighters stationed around the locality of

Nikli Thana] stated. It remained unshaken. P.W.10 saw the accused persons accompanying the group of Pakistani occupation army and Razakars in launching attack [as narrated in charge no.03] which is enough to arrive at conclusion about status and profile of the accused persons.

72. P.W.11 Chanfor Ali, a co-freedom fighter of P.W.10 also testified that they heard from their commander that Razakar Commander Syed Md. Hussain, Md. Moslem Prodhan, their accomplice Razakars and Pakistani occupation army might have attacked their village Gurui. It remained unimpeached. Besides, version of P.W.11 demonstrates that accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan were engaged in carrying out election campaign in favour of one named Kara around their locality in connection with the election held in 1970, and thus, he knew them beforehand. P.W.10, an associate of 'Basu Bahini' [a group of freedom fighters] testified similar version in respect of reason of knowing the identity of accused persons. Consistent version of P.W.10 and P.W.11 adds further credence to the fact that accused persons belonged to locally formed Razakar Bahini and had been in its potential position.

73. Version of P.W.13 Gopal Chandra Das, a freedom fighter of Nikli locality also adds corroboration to the fact that accused Syed Md. Hussain was Razakar Commander of Nikli Thana Sadar and accused Md. Moslem Prodhan was a Razakar and he knew him

[Md. Moslem Prodhan] beforehand as he was a resident of his neighbouring village.

74. P.W.17 A.K Nasim Khan, P.W.18 Md. Sadekujjahan Talukder Noyon and P.W.19 A.K.M Shajahan have testified the event as narrated in charge no.06 and from their consistent version it reveals that accused Syed Md. Hussain alias Hossain was a Razakar Commander and used to act culpably directing civilians aiming to collaborate with the Pakistani occupation army, to further its policy and plan.

75. It transpires from the testimony of P.W.06 whose home was adjacent to Nikli Thana in 1971 that 2/3 months after the war of liberation ensued 50 Razakars came to Nikli from Kishoreganj under the leadership of accused Syed Md. Hussain alias Hossain and they got four bunkers prepared in Nikli Thana Sadar. At that time the people used to say that Syed Md. Hussain alias Hossain was the 'Daroga' of those Razakars and his accomplice Razakars used to abide by him. He [P.W.06] during that time saw accused Syed Md. Hussain around Nikli Thana locality and thus he got acquaintance about him. A local Razakar Asrab Ali[now dead] recruited Razakars and used to arrange their training in the *Eidgah* field near the GC School under leadership of accused Syed Md. Hussain. P.W.06 added. Defence could not refute this account materially related to formation of Razakar Bahini in Nikli Thana under the leadership of accused Syed Md. Hussain alias Hossain.

76. The above unfettered version of P.W.06 provides unerring inference that accused Syed Md. Hussain alias Hossain was a leading and mighty Razakar in Nikli Thana in 1971 and had played significant role in carrying out its activities which made him known as 'Daroga' of Razakars and it indisputably signifies his commandership.

77. In addition to above unimpeached and consistent version of P.W.s in respect of identity and status of accused persons in 1971 what we do get from documentary evidence presented in support of this crucial issue? The report titled *ঊনুত`ি ঈত` গু` ত` ক`* published in **The Daily Purbadesh, 25.03.1972 [Exhibit-2]** narrates as below:

"Gi ctii Aa`vq eo ubg@| eo `ymn| Am`e te`bv
 wea|-| biuckvP Kz`vZ ivRvKvi Avj e`tii `j QjU
 Gj--kKabi gZ Smtq coj Lvqi" j Rvntbi c`Ynxb
 t`nUvi Dci | teqtbUi tLvBq tLvBq t`nUv qZ weqZ
 Kti Rj -v`i `j teqtbUi tcvP Zvi wki`Q` Kti
 Atmik tguj | GLvB tkI bq -- Kz`vZ ivRvKvi
 c`vb wks tnvmb knx`i gZt`n wKkvq cvtqi Zjvq
 tPtc, nvtZi g`vq LuZ gv_v ubtq tmw`b mviv kni
 cqgvj Kti Nji teotquQj | Nji Nji knx`i cneI
 t`nUvK bvbvfvte j wAZ I c`k` Kti `ckwPK
 Dj -v`m tgZvQj |"

78. Prosecution relies upon the above report for the purpose of proving the brutal event and accused Syed Md. Hussain's complicity therewith as narrated in charge no.06. But at the same time the narrative made in this old report also indisputably proves that accused Syed Md. Hussain alias Hossain was a notorious

Razakar Commander and he was known as 'iKs tnuṭmbŌ, presumably for his extreme notoriety and infamous profile. Authoritativeness of this old report could not be shaken by the defence in any manner. Thus, this is enough indeed to prove that accused Syed Md. Hussain alias Hossain was a notorious Razakar Commander in Nikli Thana locality in 1971.

79. Documentary evidence Exhibit-9, Exhibit-11, a list of local Razakars together with the above discussed report Exhibit-2 unerringly prove the commanding position of accused Syed Md. Hussain alias Hossain in the Razakar Bahini formed in Nikli Thana locality. Accused Sayed Md. Hossain's name finds place in serial no. 8 of this list as 'Razakar Commander'. Exhibit-11 carries probative value and in absence of anything contrary it provides corroboration to oral testimony tendered and Exhibit-9.

80. The above deliberation impels an unerring conclusion that the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan were the potential Razakars of Nikli Thana locality in 1971 and accused Syed Md. Hussain was in commanding and dominating position of Nikli Thana Razakar Bahini. It has been well proved too from the consistent and credible oral testimony of competent witnesses and it gets corroboration from the documentary evidence as well. The report titled *Ōhuṭ`i iṭ³ gṽ ṭ`kŌ* published in The Daily Purbadesh, 25.03.1972 [Exhibit-2] seems to be the best and old

evidence to substantiate the notorious status and position of the accused Syed Md. Hussain alias Hossain in Nikli Thana Razakar Bahini.

81. Accused Md. Moslem Prodhan's membership in Nikli Razakar Bahini gets corroboration from Exhibit-12 series, the list of Razakars where his name finds place. This list carries probative value as it is found consistent to what has been testified by the residents of the crime localities. Merely for the reason of absence of any information in this list showing accused Md. Moslem Prodhan as a commander of Nikli Union Razakar Bahini its value is not diminished. Therefore, accused persons' active affiliation, as contended by the prosecution, with the Razakar Bahini formed in Nikli Thana locality in 1971 stands proved.

82. Finally, Razakar Bahini formed in Nikli Thana locality was also not beyond the objective of forming this auxiliary force but was to further plan and policy of the Pakistani occupation army, as depicted from the arraignments alleged. And thus the alleged criminal acts of the Razakars of Nikli Thana were not isolated ones - the same were part of systematic attack directed against civilian population belonging to Bengali nation. Now, on due adjudication of all the charges framed it may be unearthed whether the accused persons, in exercise of their potential position and membership in

locally formed Razakar Bahini were allegedly engaged in carrying out criminal activities around the locality of Nikli Thana in 1971.

XII. Adjudication of Charges

Adjudication of Charge No.01

[Forceful conversion of Hindu religious people to Muslims of village Dampara under Nikli Police Station]

83. Summary charge: That during the mid of August, 1971 under the instruction of Razakar Commander accused Syed Md. Hussain alias Hossain, Shaheb Ali alias Teku Chairman [now dead], leader of local Peace Committee of Dampara, forcefully converted Hindu religious people to Muslims of village Dampara under Nikli Police Station of the then Kishoreganj Sub-Division.

84. Thereby, the accused Syed Md. Hussain alias Hossain has been charged for participating, abetting, facilitating and complicity in committing the criminal acts of forceful conversion of Hindu religious people to Muslims constituting the offence of 'other inhumane act' as crime against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused person has incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

85. Prosecution for the purpose of proving the criminal act of forceful conversion of Hindu religious people of village Dampara

under Police Station Nikli of the then Kishoreganj Sub-Division, in 1971 during the war of liberation, constituting the offence of other inhumane act as crime against humanity has adduced as many as 04[four] witnesses who have been examined as P.W.01, P.W.02, P.W. 03 and P.W.04. These witnesses testified also the event as narrated in charge No. 04. These witnesses testified also the events narrated in charge No. 04. However, here the testimony these witnesses made only in relation to charge no.01 is being portrayed as below, for the purpose of adjudication of the arraignment brought in this charge.

86. P.W.01 Badal Chandra Barman [59], a resident of Village Dampara under Police Station Nikli of District Kishoreganj in narrating the situation prevailing in 1971 around their locality stated that in 1971 he was a student of Class V and many of Hindu families of their village being panicked deported to India and the rest of Hindu families remained stayed at the village. Dampara Union Chairman Teku was also the Chairman of Dampara Union Peace Committee.

87. In respect of the event as listed in charge no.01, P.W.01 stated that in first part of Bangla month Bhadra in 1971 said Teku Chairman along with his group came to their village as sent by Nikli Thana Razakar Commander accused Syed Md. Hussain and asked the Hindu families to get converted to Muslims otherwise they would have killed all of them. With this they agreed to be

converted to Muslims and then they were forced to recite Kalema by Karim Moulavi and got converted to Muslims. They were asked to say prayer keeping cap given to them on head and their names were thus converted to Muslim names and they named him [P.W.01] as Muslem Kha. They asked the Hindu women not to use vermilion and bear conch-bracelet and keep deity in their houses. Then Teku Chairman and his group used to keep vigilance whether they used to say prayer and move like Muslims.

88. P.W.01 finally stated that their village Dampara was predominantly Hindu populated. He [P.W.01] first heard the name of Razakar Commander Syed Md. Hussain from Teku Chairman and afterwards in the month of Ashwin when their village was attacked he saw accused Syed Md. Hussain and knew him.

89. P.W.01 has been cross-examined on behalf of the absconding accused Syed Md. Hussain alias Hossain. P.W.01 expressed his ignorance about the names of this accused's father and native village. In reply to question put to him by the defence P.W.01 replied that no case was initiated over the event he narrated, after independence; that he could not recognise the Razakars accompanying the accused Syed Md. Hussain; that their house was about quarter mile far from Dampara bazaar. P.W.01 denied the defence suggestion put to him that no event as he testified occurred and that he testified falsely and being tutored.

90. P.W.02 Badal Chandra Sutradhor [59/60] is a resident of Village Dampara under Police Station Nikli of District Kishoreganj. In 1971 he was 14/15 years old and used to work as a carpenter. He stated that Madhyao Dampara was a part of Village Dampara where they used to reside in 1971.

91. In narrating the event of forcible conversion to Muslim religion as listed in charge no.01, P.W.02 stated that in the first part of Bangla month Bhadra in 1971, Saheb Ali alias Teku Chairman of Dampara Union and also the Chairman of Peace Committee being accompanied by some cohort Razakars coming to their village told them that Razakar commander accused Syed Md. Hussain had sent them to convey that the Hindus would have to be converted to Islam religion if they liked to remain stayed in the country. Then Karim Moulavi as called by Teku Chairman and his accomplice Razakars helped them in reciting Kalema and thus made them converted to Muslims and asked them to bear caps they had given on their heads. They also prohibited the Hindu women from using vermilion and bearing conch-bracelet. After conversion to Islam religion he [P.W.02] was named as Monir Kha. They used to keep regular vigilance about performing Islam religion by them.

92. On cross-examination on part of the accused Syed Md. Hussain P.W.02 stated that he could not say the name of other Razakars excepting accused Syed Md. Hussain; that he did not see accused Syed Md. Hussain either prior or subsequent to the event.

In reply to defence question P.W.02 stated that in 1971 accused Syed Md. Hussain was a police officer. He denied the suggestion put to him that accused Syed Md. Hussain was not a Razakar and at the time of the event that accused was a police officer. P.W.02 also denied the defence suggestion that no event took place as he testified and that what he testified was untrue and tutored.

93. P.W.03 Kamola Rani Barman [66] is a resident of Village Dampara under Police Station Nikli of District Kishoreganj. In 1971 she was 21 years old and used to stay at her husband Jatindra Chandra Barman's house at Village Dampara. She [P.W.03] stated that in the first part of Bangla month Bhadra in 1971 they the Hindu people [of their village] were forced to get converted to Islam religion by Razakar Commander accused Syed Md. Hussain, Razakar Sanai and some other Razakars on instruction of Teku Chairman and prohibited the Hindu women using vermilion and bearing conch-bracelet and the Hindu males were forced to put on caps on their heads.

94. In narrating the event as arraigned in charge no.04, P.W.03 stated that on 06th day of Bangla month Aswin Sanai Razakar came to their house and asked her husband and others who were got converted to Islam religion to go in front of the house of Bonobasi Sutrodhar, as instructed by Razakar accused Syed Md. Hussain and thus her [P.W.03] husband Jotindra Chandra Barman and others complied with this asking.

95. P.W.03 finally stated that in 1971 Teku Chairman was the Chairman of Peace Committee and accused Syed Md. Hussain was the Razakar Commander of their locality and the events she narrated happened on his instruction. She heard from Sanai Razakar and other Razakars that accused Syed Md. Hussain was the commander of Razakars, but she however did not see him.

96. In cross-examination, P.W.03 stated that Sanai Razakar's house was at the northern side of their village Dampara; that accused Syed Md. Hussain was a police and Razakar Commander as well. She denied the defence suggestion that accused Syed Md. Hussain was not Razakar Commander and what she testified was untrue and tutored.

97. P.W.04 Shamala Barman [65] is a resident of crime Village Dampara .In 1971 she was 20 years old and had been staying at her husband's house at Dampara. In narrating the event [as listed in charge no.01] she [P.W.04] stated that in the first part of Bangla month Bhadra in 1971 Teku Chairman and Sanai Razakar came to their house and asked them to get converted to Islam religion as ordered by Razakar Commander accused Syed Md. Hussain and thus they made them converted to Islam religion by reciting Kalema and males were given caps to put on head and women were prohibited to use vermilion and bearing conch-bracelet and performing religious worship of deity.

98. In cross-examination P.W.04 stated that Sanai of their locality was a Razakar and Teku Chairman was the Chairman of their locality and also the Chairman of Peace Committee. She denied the defence suggestion that accused Syed Md. Hussain was not a Razakar and no such event as she testified happened and what she testified was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

99. The accused Syed Md. Hussain has been arraigned for participating, abetting, facilitating the criminal acts of forceful conversion of Hindu religious people of village Dampara to Islam religion constituting the offence of 'other inhumane act'. The alleged offence happened in the context of the war of liberation in 1971. Four victims have been produced and examined to prove this charge. One Saheb Ali *alias* Teku, a leader of local Peace Committee physically participated in forcing the Hindu civilians of Dampara to get converted to Islam religion under coercion and threat as instructed by the accused Syed Md. Hussain, the charge framed alleges.

100. Learned prosecutor Ms. Tureen Afroz submitted that the population targeted in accomplishing crimes as narrated in charge nos. 01 and 04 was the Hindu religious group of village Dampara and thus causing serious mental harm by act of forceful conversion as narrated in charge no.01 may be adjudicated cumulatively with the charge no.04 which involves

the offences of genocide and genocidal rape. Criminal acts constituting the offences narrated in both the charges were intended to destroy the Hindu community of village Dampara, either whole or in part, in violation of Geneva Convention 1949 and International Humanitarian Law, the learned prosecutor added.

101. Next, it has been argued that testimony of the witnesses in relation to the criminal act of 'forceful conversion' as arraigned in charge no.01 consistently proves the 'intent' of the perpetrators and participation of the accused Syed Md., Hussain who was the Razakar Commander having influence over accomplice Razakars and the persons associated with the local Peace Committee. Such forceful conversion obviously caused grave mental harm to the members of the Hindu community. Defence could not impeach the testimony of the victims in any manner.

102. On contrary, Mr. Abdus Sattar Palwan, the learned state defence counsel submitted that the accused Syed Md. Hussain was a police officer and not the Razakar Commander; that he had no manner of involvement with the act of alleged forceful conversion and that the witnesses testifying the event narrated in charge no.01 are not credible. The charge framed does not

arraign this accused's participation in committing the alleged criminal act constituting the offence of 'other inhuman act'.

103. It appears that charge no.01 relates to the commission of the criminal act of 'forceful conversion' constituting the offence of 'other inhumane act' while the charge no.04 involves the offence of genocide and genocidal rape allegedly committed by the group of Razakars and Pakistani army being accompanied by the accused Syed Md. Hussain. It transpires too that the events narrated in the charge nos.01 and 04 occurred on two distinct dates by launching attack by the different group of perpetrators and thus the act constituting the alleged offence narrated in charge no.01 was not carried out in conjunction with the same attack.

104. However, having regard to submission advanced on part of the prosecution insisting to adjudicate charge no.01 and charge no.04 cumulatively we are of the view that the act of 'forceful conversion' as narrated in charge no.01 needs to be proved first and then the proven act of 'forceful conversion' and accused Syed Md. Hussain's role therewith may be taken into account as relevant to adjudicate and infer the 'intent of the perpetrators' for the purpose of characterizing the criminal acts as the offence of 'genocide' as arraigned in charge no.04.

Now, let us move to evaluate evidence presented in relation to charge no.01, to arrive at finding.

105. The matters to be proved are that-

(i) The Hindu civilians of Dampara were forced to get converted to Islam religion under grave coercion.

(ii) Saheb Ali alias Teku Chairman, a leader of local Peace Committee had acted on instruction of accused Syed Md. Hussain to accomplish the criminal acts.

(iii) The criminal acts were part of systematic attack directing Hindu religious group.

(iv) Such criminal acts forcing the Hindu civilians caused serious mental harm to the victims or affected Hindu civilians intending to demean the religious belief of their own and a serious attack on human dignity;

106. The four prosecution witnesses, the victims of the offence consistently testified how they were forced and coerced to get converted to Islam religion. Their evidence demonstrates that in first part of Bangla month Bhadra[mid of August] in 1971, Saheb Ali alias Teku Chairman, a local leader of Peace Committee along with his cohorts came to their village Dampara as sent by Razakar Commander Syed Md. Hossain and asked the Hindu families to get converted as Muslims otherwise they would have killed them. With this they agreed and then they were forced to recite Kalema by Karim Moulavi and got converted to Islam religion. They were asked to say prayer keeping cap given to them on head and their names were thus converted to Muslim names.

107. It has been further divulged that the Hindu women were asked not to use vermilion and bear conch-bracelet and not to keep deity in their houses. In this way the Hindu women too were threatened to remain abstained from own religious practices.

108. It transpires too from the evidence of P.W.02 Badal Chandra Sutradhor, a victim that Saheb Ali alias Teku Chairman of Dampara Union and also the Chairman of Peace Committee being accompanied by cohort Razakars coming to their village told them that Razakar Commander accused Syed Md. Hussain had sent them to convey that the Hindus would have to be converted to Islam religion if they liked to remain stayed in the country.

109. The above version remained unimpeached and gets corroboration from P.W.04 Shamala Barman, another victim. Thus, a grave threat on part of accused Syed Md. Hussain was conveyed to Hindu civilians of Dampara village that eventually made them compelled to get converted to Islam religion under coercion and duress causing grave violation of their recognised rights to freedom of religion and worship, it stands proved. Inevitably it caused serious mental harm to them.

110. At the same time conveying 'threat' or 'order' to Hindu civilians through Saheb Ali alias Teku Chairman and his cohorts in other words made the accused Syed Md. Hussain a conscious part of the attack that resulted in forced conversion to another religion.

111. Saheb Ali *alias* Teku Chairman was a leader of local Peace Committee. It remained unimpeached. He along with his accomplices going to Dampara village urged the Hindu civilians under duress and coercion to get converted to Islam religion and the Hindu residents of the village were thus forced to religious conversion. It stands proved from the evidence of the witnesses, the victims. Under threat of deportation they had to get converted to Islam religion and remained prohibited in performing ritual worship of deity.

112. Accused Syed Md. Hussain *alias* Hossain was not physically present at the crime site, true. But the uncontroverted testimony of the witnesses speaks of accused's concern and awareness about the attack on fundamental rights of Hindu population as the coercive act was carried out as instructed by him. In 1971, Razakar Bahini and Peace Committee were formed to further indivisible and common purpose of the Pakistani occupation army.

113. Accused Syed Md. Hussain *alias* Hossain was a potential Razakar of the locality and thus accomplishing the act of forcing and coercing the Hindu civilians of Dampara village to get converted to other religion obviously happened on approval and instruction of the accused Syed Md. Hussain *alias* Hossain. Defence could not refute the version made by the victims in this regard.

114. It is to be noted that the accused Syed Md. Hussain *alias* Hossain has been arraigned for committing genocide or mass

killing committed at village Dampara[as narrated in charge no.04] few days subsequent to the event of forceful conversion as narrated in this charge no.01.

115. It transpires from the testimony of P.W.01 Badal Chandra Barman so far as it relates to the event narrated in charge no.04 that the accused Syed Md. Hussain along with some Razakars and Pakistani army men, in conjunction with the attack [as narrated in charge no.04] moved towards neighbouring village Nabinpur by launch and on returning therefrom accused Syed Md. Hussain informed his cohort Razakars and Pakistani army men that all the Hindus of village Nabinpur had fled away. It also transpires from the testimony of P.W.02 Badal Chandra Barman, another victim of the event of attack as narrated in charge no.04 that Teku Chairman was also with the group while it had launched attack directing the village Dampara.

116. The above version of P.W.01 and P.W.02, the direct witnesses to the facts relevant to the attack as narrated in charge no.04 remained uncontroverted. Against this background, we are satisfied that the accused Syed Md. Hussain instigated and abetted the commission of the criminal act of 'forcible conversion' and he did it also in exercise of his influence and domination over the Razakars of Nikli Thana, we conclude. Taking the above piece of unshaken evidence tendered in support of charge no.04 involving alleged commission of genocide or mass killing of Hindu civilians

into account we may arrive at unequivocal conclusion that Saheb Ali alias Teku Chairman was an associate of accused Syed Md. Hussain alias Hossain who was extremely antagonistic to the civilians belonging to Hindu religious group and thus it makes it believable that Saheb Ali alias Teku Chairman and his cohorts on 'instruction' of Razakar Commander accused Syed Md. Hussain alias Hossain forced and coerced the Hindu civilians to get converted to Islam religion.

117. Testimony of P.W.03 Kamola Rani Barman, a resident of crime village demonstrates too that the accused Syed Md. Hussain alias Hossain was the key co-ordinator in conducting the act of forcible conversion. The essence of testimony of P.W.03 corroborates the fact of coercive act of forcible conversion of Hindu civilians of village Dampara to Islam religion as testified by P.W.01, P.W.02 and P.W.04. It remained totally undenied in cross-examination.

118. Besides, afterwards on 06th day of Aswin in 1971 asking the Hindu civilians, who were converted to Islam religion to attend in front of the house of Bonobasi Sutrodhar on instruction of accused Syed Md. Hussain, as testified by P.W.03, remained uncontroverted. This version indisputably adds assurance as to the accused Syed Md. Hussain's culpable concern and contribution in accomplishing the act of forcible conversion of Hindu civilians of village Dampara to Islam religion.

119. The Hindu community of village Dampara was targeted as a part of attack with discriminatory intent on religious and political ground as well. It is a fact of common knowledge that pro-liberation Bengali civilians and Hindu community were the main targets of the Pakistani occupation army and their local collaborators including the auxiliary forces namely, Peace Committee, Razakar Bahini, Al-Badar Bahini in 1971.

120. 'Order ' or 'instruction' may not always be tangible. It may be inferred from facts and circumstances unveiled. In conjunction with the coercive attack, learning the fact of accused Syed Md. Hussain's complicity and facilitation from Saheb Ali alias Teku Chairman who physically came to Dampara village along with his accomplices to cause force and duress to the Hindu civilians to get converted to Islam religion as testified by the P.W.s remained unshaken. We do not find any reason to disbelieve the witnesses, the victims of the grave wrong done to them and there has been nothing in cross-examination which may reasonably indicate that the P.W.s have testified untrue version out of any enmity or grudge. Thus, their testimony inspires credence and carries sufficient probative value.

121. The accused Syed Md. Hussain alias Hossain, a potential Razakar was thus 'concerned' with the actual commission of the event of criminal acts. The Act of 1973 reflects that criminal responsibility for any crime enumerated in the Act of 1973 is

incurred not only by individuals who physically commit that crime, but also by individuals who 'participate' in an 'contribute' to the commission of a crime in other ways, ranging from its initial planning to the execution phase. This view finds support from the observation propounded by **ICTR** in the case of **Rutaganda** which is as below:

"The accused maybe held criminally [responsible] for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts."

[Rutaganda, (Trial Chamber), December 06, 1999, para 35]

122. It appears that the defence failed to dislodge the commission of the alleged event of forced conversion to Islam on instruction of accused Syed Md. Hussain alias Hossain as stated by the P.W.01, P.W.02 and P.W.04. Thus, it cannot be deduced that since accused Syed Md. Hussain alias Hossain did not accompany the group he had no complicity with or did not facilitate in accomplishing the offence of forced conversion. Act of 'instructing' accomplices indisputably made him a conscious part of the enterprise. In this way he too was a 'participant' to the commission of the criminal acts

123. It is now well settled that both positive acts and omissions may constitute 'instigation'. Here, it stands proved from testimony

of the victims that Saheb Ali alias Teku Chairman had acted culpably as 'instigated' and 'instructed' by accused Syed Md. Hussain *alias* Hossain in compelling them to forceful conversion. Defence could not controvert it by cross-examining the prosecution witnesses. Thus, it may lawfully be inferred that the accused Syed Md. Hussain alias Hossain, the 'king' of local Razakars had created an environment permissive of criminal behaviour by his accomplices, the principal perpetrators.

124. It may be noted that the acts of killing, torturing, confining of Hindu civilians and destruction, looting and torching of their properties were part of attack designed on certain policy and plan of Pakistani government, the occupation army and its auxiliary forces in 1971 . It is now historically settled. The coercive force forming part of attack directing the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to spread terror by causing serious 'mental harm' to 'Hindu religious group or the community' by spreading terror.

125. The context existing in 1971 in the territory of Bangladesh itself reflects that the policy of the Pakistani occupation army was adopted by the local pro-Pakistan political organizations, chiefly the Jamaat-e- Islami (JEI) and 'auxiliary forces' and it is sufficient to prove the existence of the notion of 'systematic attack' on Bangladeshi self-determined population in 1971, during the War of Liberation. This context unerringly prompts us in arriving at

decision that the criminal acts forming part of systematic attack committed upon the Hindu religious group of village Dampara constituted the offence of ‘other inhumane act’ as crime against humanity as specified in section 3(2)(a) of the Act of 1973.

126. The criminal acts as found proved were intended to suffocate the Hindu religious group or community of village Dampara by forcing them to abandon their own religious belief, keeping them under coercion and threat and it was done to further policy and plan of Pakistani occupation army to which Peace Committee and Razakar Bahini, an auxiliary force were indivisible part.

127. All the criminal acts as unveiled infringed the fundamental rights of the Hindu community of Dampara village. Coercive climate culminating from the attack caused psychological harassment to the Hindu community of village Dampara which was in fact infringement of their recognised fundamental rights.

128. Anthony Mascarenhas in a report titled ‘**Genocide**’ published in **The Sunday Times**, June 13, 1971 found as below:

“SO THE ARMY is not going to pull out. The Government’s policy for East Bengal was spelled out to me in the Eastern Command headquarters at Dacca. It has three elements: (i) The Bengalis have proved themselves “unreliable” and must be ruled by West Pakistanis (ii) The Bengalis will have to be re-educated along proper Islamic lines. The “Islamisation of the masses” – this is the official jargon – is intended to eliminate secessionist tendencies and provide a strong religious bond with

West Pakistan (iii) When the Hindus have been eliminated by death and flight, their property will be used as a golden carrot to win over the under-privileged Muslim.”

[Source: **Bangladesh Documents Volume I**, page 371: Ministry of External Affairs, New Delhi; *See also* Ali Ahsan Muhammad Mujahid Judgment, ICT-2 para **587**]

129. The above reflects aggressive attitude of the Pakistani occupation army and their local collaborators including the auxiliary forces to the Hindu religious group in 1971. It may be noted that right to religious belief and freedom is inherent in every human being. Intentional attack on such right of Hindu civilians indisputably caused grave 'mental harm' to them.

130. It transpires from evidence tendered that coercive prohibition was imposed upon the Hindu civilians of village Dampara in performing worship even. But the right to worship as one chooses is to perform deep and abiding human need. For no valid necessity the Hindu civilians, the protected persons were deliberately subjected to get converted to other religious belief which constituted the offence of 'other inhumane act', a residual category of crimes against humanity.

131. It is fact of common knowledge that in 1971 during the war of liberation, Razakar Bahini and Peace Committee were formed to collaborate with the Pakistani occupation army in co-ordinated manner. Thus, in absence of anything contrary we are forced to believe the P.W.s who have testified that Saheb Ali alias Teku

Chairman, the local Peace Committee leader forced them on instruction of accused Syed Md. Hussain alias Hossain, a potential local Razakar having position of authority.

132. Forced religious conversion under duress is considered to be a violation of religious freedom. Taking away anyone's right to religious belief under coercion or threat is a grave breach of human right indeed. The right to be free from cruel, inhuman or degrading treatment is recognised in customary international law and is enshrined in international human rights instruments. It has been observed by the **ICTY Appeals Chamber** that-

Cruel and inhumane treatment is defined "as an intentional act or omission, which causes serious mental harm, physical suffering or injury or constitutes a serious attack on human dignity".

[Čelebići Case, Appeal Judgement, ICTY para. 424]

133. By deliberate criminal acts forming part of attack as found proved the Hindu community itself was dehumanized under any yard stick of human rights. It was a blatant infringement of Article 18 of the Universal Declaration of Human Rights. The victims and other Hindu civilians did not make them part of conflict. Rather, they were persons protected under Geneva Convention 1949. The criminal act of forcible conversion harmed humankind as it was intended not to terrorize the local Hindu community only but to destabilize peaceful co-existence of diversity of people.

134. 'Other inhumane acts' is a residual category in the crimes against humanity as specified in the section 3(2)(a) of the Act of 1973. The intentional act of 'forceful conversion' inevitably was an attack to human dignity, right to religion and right to live in happiness and it caused grave mental harm and suffering to the victims of the attack.

135. The criminal acts as found proved were intended to make individuals' fundamental right to maintain normal and smooth livelihood with own religious belief halted and thus it caused enormous 'mental harm' to the victims. The civilians were non combatants. They did not take any corporal part in any kind of armed hostility. Then why the Razakars led and instructed by accused Syed Md. Hussain alias Hossain opted to attack on religious belief of individuals belonging to Hindu community by forcing them to get converted?

136. Context in which the attack was carried out suggests unerring inference that the object of the criminal acts forming part of attack was to terrorize the innocent Hindu civilians, which eventually constituted the offence of 'other inhumane act' as it substantially affected their fundamental right of religion, in violation of international humanitarian law. The attack indeed expresses great contempt for the individuals' right to religion. Such attack was not with the wellbeing of humankind, and as such, it is considered as

‘other inhumane act’ that eventually resulted in grave mental harm to the affected civilians.

137. It is true that accused Syed Md. Hussain alias Hossain did not physically participate to the commission of the principal offence of forceful conversion. But it has however been well proved that it was he who instructed and abetted the commission of such criminal acts by his accomplice Razakars over whom he had influence and domination.

138. It appears from the charge framed that the accused Syed Md. Hussain alias Hossain incurred liability under section 4(1) together with section 4(2) of the Act of 1973 which refers to the theory of civilian superior responsibility. But since it stands proved that on his 'instruction' and 'abetment' the principals accomplished the offence and since such 'instruction' encompasses 'participation' the matter of incurring liability also under the theory of civilian superior responsibility loses impact.

139. Additionally, 'cumulative convictions' under both liabilities is impermissible for the same conduct. However, incurring liability under section 4(2) of the Act of 1973 which corresponds to the theory of civilian superior responsibility together with individual criminal liability under section 4(1) of the Act of 1973 aggravates accused's culpability which may be considered in awarding sentence.

140. On totality of evidence tendered it has been proved beyond reasonable doubt that the Hindu community of village Dampara was forced and coerced to get converted to other religion causing grave mental harm in violation of recognised fundamental rights. It happened in the context of war of liberation of Bangladesh. Accused Syed Md. Hussain alias Hossain, a potential man in local Razakar Bahini was behind the criminal conduct carried out and in this way he was 'concerned' with it, it stands proved. It was quite practicable of knowing, on part of the victims, on whose instruction they were coerced and forced to get converted to Islam religion.

141. In view of deliberation as made above, we arrive at decision that the prosecution has been able to prove beyond reasonable doubt that the instruction, guidance and approval of the accused Syed Md. Hussain alias Hossain forming part of systematic attack substantially facilitated the accomplishment of the criminal acts of 'forceful conversion' causing 'serious mental harm' to the affected Hindu civilians constituting the offence of '**other inhumane act**' and the accused Syed Md. Hussain alias Hossain a conscious part of the enterprise is liable for the crime committed by the principal[s] in the same manner as if it were done by him alone. Therefore, the accused Syed Md. Hussain alias Hossain is held criminally liable under section 4(1) of the Act of 1971 for the offence of '**other inhumane act**' as crime against humanity as

enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Adjudication of Charge No. 02

[Abduction and confinement of victims Budhu, Shundar Ali, Mohar Ali and Md. Kashem Ali of Nikli Thana Sadar]

142. Summary charge: That on 2 September, 1971 at about 11.00 /11.30 A.M. Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort 4/5 Razakars having abducted (1) Budhu [now dead], (2) Shundar Ali [now dead], (3) Mohar Ali [now dead], and (4) Md. Kashem Ali from their respective houses under Nikli Thana Sadar of the then Kishoreganj Sub- Division took them away to Nikli Thana premises and confined them there.

143. Subsequently, on intervention of one local businessman Abdul Ali and having taken three goats and two and a half mounds of rice as consideration from the families of the detained persons released the detainees on condition of giving daily attendance by them to accused Syed Md. Hussain alias Hossain and his cohort Razakars.

144. Thereby, accused Syed Md. Hussain alias Hossain has been charged for participating, abetting, facilitating and complicity in the commission of offences of '**abduction**' and '**confinement**' as crimes against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused person has incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

145. Prosecution, in order to substantiate this charge adduced two witnesses who have been examined as P.W.20, one of the victims and P.W.21, a direct witness to the act of detaining the victims in Nikli Thana. Before we weigh the value of their testimony they made before the Tribunal, for the purpose of arriving at decision let us first see what their sworn testimony states.

146. P.W.20 Kashem Ali [69/70], one of the victims, was a resident of village Pukurpar under Police Station Nikli of the then Sub-Division Kishoreganj. In 1971, he used to reside at their house, about 100/150 yards far from Nikli Thana. He stated that on 16th day of Bangla month Bhadra in 1971 at about 11:00/11:30 AM Nikli Thana Razakar Commander Syed Md. Hussain being accompanied by his 4/5 accomplice Razakars took him, Shundar Ali, Budhu and Mohar away to Nikli Thana on forcible capture from their house. On instruction of accused Syed Md. Hussain his accomplice Razakars started beating detaining them in Thana. Afterwards, Abdul Ali, an owner of a grocery shop nearer the Thana came there and appealed accused Syed Md. Hussain to set them released, P.W.20 added.

147. P.W.20 further stated that on appeal made to release them Razakar Commander Syed Md. Hussain imposed condition to

provide meal for Razakars and then agreeing the demand Abdul Ali, on behalf of them, brought three goats and two and half mounds of rice to Thana and then they were set released on receiving undertaking from them to make appearance in Thana regularly and also to provide information about the freedom-fighters. On being released they [victims] continued to make their attendance in the Thana for about one month as instructed.

148. In cross-examination, in reply to question put to him P.W.20 stated that during their detention in Thana he could recognise Razakar Commander Syed Md. Husain from the conversation made amongst the Razakars. P.W.20 also stated that he saw 4/5 Razakars when they were taken to Thana. With this the fact of taking the victims to Thana becomes affirmed. P.W.20 denied the suggestion put to him that what he testified implicating the accused Syed Md. Hussain was untrue and tutored.

149. P.W.21 Abdul Ali [80] was the owner of grocery shop nearby Nikli Thana in 1971. He testified what he observed in Nikli Thana after taking the victims there on forcible capture and he also stated how he finally got the detained victims released.

150. P.W.21 stated that on 16th day of Bangla month Bhadra in 1971 at about 11:30 A.M he had been at his grocery shop when he saw the Razakars taking Kashem Ali[P.W.20], Shundar Ali[now dead], Mohar Ali[now dead] and Budhu[now dead] to Nikli Thana. With this he [P.W.21] afterwards went to Thana to meet the victims

and appealed the Razakar Commander accused Syed Md. Hussain to set the detained victims released as they were innocent.

151. In respect of reason knowing the accused P.W.21 stated that since accused very often used to visit his[P.W.21] grocery shop situated adjacent to Thana he[P.W.21] knew him beforehand. On his [P.W.21] appeal accused Syed Md. Husain imposed condition of providing one time meal for the Razakars. With this he [P.W.21] brought three goats and two and half mounds of rice form the houses of the victims and on taking it the accused set the victims released with further condition to make attendance in Thana everyday at 04:00 PM and to provide information about freedom fighters.

152. In cross-examination P.W.21 stated that there had been about 200 Razakars in Nikli Thana in 1971; that he [P.W.21] arrived in Thana when the detained victims were subjected to beating; that his grocery shop was about 20 yards far from the Thana. Defence could not refute what the P.W.21 testified in examination-in-chief. Rather, causing physical mistreatment to detained victims in Thana and the effort P.W.21 made to get the victims released has become in other words affirmed. P.W.21 denied the suggestion put to him by the defence that what he stated implicating the accused was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

153. This charge relates to criminal act of detaining four civilians on forcible capture constituting the offences of 'abduction' and 'confinement' as crimes against humanity. The charge alleges too that afterwards the detained victims got released on fulfilling some unlawful conditions and by satisfying unlawful demand and condition of ensuring their attendance at Thana everyday with information about freedom-fighters. Prosecution examined two witnesses including one of the victims [P.W.20]. The other witness who has been examined as P.W.21 is the person who allegedly made initiative for securing conditional release of the detainees. He in 1971 used to run a grocery shop nearby the Nikli Thana building.

154. Ms. Tureen Afroz, the learned prosecutor in advancing argument submitted that the criminal acts constituting the offences of 'abduction' and 'confinement' as crimes against humanity as narrated in this charge no.02 were committed deliberately in violation of International Humanitarian Law. Evidence presented divulges that the wrong done to the victims, the civilians did not end with their conditional release from confinement as they were coerced to provide information of freedom-fighters for next one month, and as such, the wrong or unlawful act in its entirety obviously caused mental harm and detrimental effect on their livelihood which formed part of attack directing civilian population.

155. It has been further submitted by the learned prosecutor that one victim and one who initiated their release from captivity

consistently testified the facts materially related to how the accused Syed Md. Hussain had acted and conducted in keeping the civilians confined on forcible capture and how the victims were compelled and coerced, on unlawful condition, even after their release. Defence could not refute the facts as testified these witnesses in any manner.

156. Mr. Abdus Sattar Palwan, the learned state defence counsel defending the accused Syed Md. Hussain submitted that this accused did not belong to local Razakar Bahini; that prosecution failed to prove his participation and complicity in committing the alleged event and that the witnesses examined in support of this charge are not credible.

157. It is evinced from the testimony of P.W.20 that he and three others were forcibly captured by a group of Razakars led by accused Syed Md. Hussain and were taken to Nikli Thana where they were subjected to beating in detention. It could not be refuted in any manner by the defence. Rather, it gets corroboration from P.W.21, a nearby grocery shop owner, who on seeing the Razakars taking the victims in Nikli Thana appeared there and made an appeal to Razakar Commander accused Syed Md. Hussain for release of the detainees. Thus, the act of 'confinement' of four civilians, the upshot of their 'abduction' stands proved by a natural and competent witness.

158. Evidence of both the prosecution witnesses[P.W.20 and P.W.21] demonstrates that on appeal made by P.W.21 for release of the four detainees accused Syed Md. Hussain, the Razakar Commander demanded goats and big quantum of rice for their consumption and also imposed condition to make attendance [of victims] and to provide information with them [Razakars] about freedom-fighters at Thana everyday and accordingly by providing those objects and executing an undertaking the detainees got released therefrom. Detention and causing beating to the victims were the upshot of the act of their forcible capture to which accused Syed Md. Hussain was a conscious and active part, it stands proved from the evidence tendered.

159. Defence could not impeach the evidence tendered on material particulars. Rather, the fact of detaining and beating the victims in Thana has been affirmed in cross-examination of P.W.20 and P.W.21. Testimony of P.W.21 about seeing the Razakars taking the victims in Thana appears to be quite practicable as he [P.W.21] was the owner of a grocery shop nearby Thana and naturally he had reason of knowing the accused Syed Md. Hussain beforehand, as he testified. Thus, there has been no reason whatsoever to disbelieve his testimony so far it relates to detention of the victims in Thana, the accused's culpable role in beating the victims detaining in Thana and afterwards releasing them on fulfilment of unlawful condition.

160. The victims including P.W.20 were the members of the civilian population as they were people who did not take any active part in the hostilities. Then why they were so detained on forcible capture? There has been nothing to show that either of them was involved in hostilities in any manner or there had been any individual conflict between the detainees and the accused. It is to be noted that even in war time situation a civilian who is not involved in hostilities is protected under the Geneva Convention and unlawful aggression on the object of his livelihood is prohibited.

161. It is now fact of common knowledge that Razakar Bahini was an auxiliary force formed in 1971 aiming to collaborate with the Pakistani occupation army to further its policy and plan. Accused Syed Md. Hussain alias Hossain was a potential Razakar in the locality under Nikli Police Station and he had effective contact and association with the Thana. It stands proved that the accused and his accomplice Razakars for no necessity forcibly captured the four civilians, took them in Thana where they were subjected to physical assault in detention. Presumably, the accused had carried out this act to execute a plan to haul out object of the victims' livelihood and also to extract information about freedom-fighters under coercion.

162. By conducting such act of beating the victims in detention the accused person indisputably had caused mental harm to them as well and under coercion he forced the detainees to provide him with

goats and rice as demanded unlawfully. It was a kind of aggression to livelihood of a civilian. Additionally, under threat and coercion they were made bound to execute undertaking to make their regular attendance in Thana, for no valid reason or necessity.

163. The act of the accused person forming part of attack was thus inhumane in nature, causing suffering and injury to body and to mental health of the victims, we conclude. The accused and his accomplice Razakars exerted pressure and coercion on the civilians detained to act in a particular manner which also formed an 'attack', an unlawful act constituting the offence of other inhumane act as crime against humanity as well.

164. Act of unlawfully detaining four civilians including P.W.20 was a blatant deprivation of members of civilian population of their freedom. Confining civilians unlawfully was a grave breach of the Geneva Conventions of 1949. The key elements to constitute the unlawful detention or confinement are (i) an individual is deprived of his or her liberty, and (ii) the deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.

165. The accused Syed Md. Hussain alias Hossain had the intention to inflict serious physical or mental suffering to the victims keeping them in captivity and that he knew that his act was likely to cause such suffering to the victims and, with that knowledge the accused had acted culpably, the facts unveiled

suggest this conclusion. Initiation made to the accused Syed Md. Hussain on part of P.W.21 to get the detained victims freed patently points to the accused's concern, complicity and participation in conducting the criminal acts.

166. In the case in hand, it stands proved that the victims were subjected to physical assault on being unlawfully detained in Thana and they were intimidated and coerced to comply with unlawful demand of the accused Syed Md. Hussain and his accomplices. The activities as a whole indisputably caused mental harm to the detained civilians.

167. We are of the view that long-lasting effect of such cruel or inhumane treatment to the detained victims does not need to be determined to assess the seriousness of cruelty caused to the victims. We are to see whether the conduct done to the detained victims inflicted mental and physical harm.

168. The act of detaining on forcible capture itself is an act sufficient to cause mental harm. Besides, it stands proved from the testimony of P.W.20 that he and his co-detainees were subjected to beating after taking them in Nikli Thana. That is to say, the victims were subjected to physical torture as well. Purpose of inflicting such mistreatment and severance of such mistreatment are not materially related to the constitution of the offence of torture.

169. But there is no requirement under customary international law that the conduct forming part of act of mistreatment or torture

must be solely perpetrated for one of the prohibited purposes. However, in the case before us it transpires indisputably that the victims were forcibly captured , tortured in detention intending to coerce and intimidate them for providing with some objects and also to keep them in fear all the time which was indeed attack upon their mental integrity and thus seriousness of purpose is immaterial here.

170. It is now jurisprudentially settled that torture as a criminal offence which aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. The accused Syed Md. Hussain and his accomplice Razakars intending to attain unlawful purpose had caused mental and physical assault to the victims in detention which tantamounted to attack upon non combatant civilians. We do not see any legal basis which could be relied upon to justify the victims' deprivation of liberty as protected under international law.

171. Goats and big quantum of rice were the objects which were the means of the victims, the rural residents' regular livelihood. But the accused by beating the victims in unlawful captivity coerced and intimidated to provide those for consumption of Razakars stationed in Nikli Thana. Beatings, unlawful attack on civilians and civilian objects and the unlawful confinement of civilians as found proved were intentional criminal conduct of inhumane character causing mental harm to the victims constituted the offence of other

inhumane act as crime against humanity. Act of intimidation and coercion added further magnitude to such mental and physical torture.

172. The charge framed does not indict the accused to have committed the offence of 'other inhumane acts'. But cumulative analysis of evidence adduced forces to conclude the accused's liability also for the commission of the offence of 'other inhumane act', in addition to the offences of 'abduction' and 'confinement'. Causing physical and mental sufferings in detention to the victims is related to the act of their abduction and confinement, and as such, no prejudice shall be caused to the defence if the accused is found to have had participation even in committing reckless and unlawful acts constituting the offence of 'other inhumane act' as well.

173. There has been no indication that the victims were detained for any valid or lawful necessity or purpose. Rather it transpires from the evidence of victim P.W.20 and a direct witness P.W.21 the victims were so abducted, detained and beaten in captivity and afterwards releasing them on having unlawful gain collectively prove the acts done to the victims were obviously prohibited.

174. The victims were the nearby residents of Nikli Thana. Defence does not dispute it. P.W.21 made initiative to get the detainees released on hearing screaming of the victims. P.W.21 had a grocery shop adjacent to the Nikli Thana. The accused was thus

naturally well known to the victims and P.W.21 as well. The event narrated in this charge also demonstrates how mighty Razakar the accused Syed Md. Hussain was in the locality of Nikli in 1971.

175. It is to be noted that for the accused to incur criminal responsibility in respect of the offences of which he has been charged with, it is incumbent on the prosecution to prove beyond reasonable doubt that he was directly engaged in the hostilities, acting for one of the conflicting parties he sided with to further its respective policy and objectives.

176. In the preceding segment of this judgment we have already rendered our finding that the accused Syed Md. Hussain alias Hossain was a potential Razakar having leading position in the locality of Nikli Thana. Accused Syed Md. Hussain, as unveiled, was extremely antagonistic to the civilian population in the name of siding Pakistani occupation army and he did not keep him distanced from attacking the civilians residing near the Thana to cause their abduction and confinement even for unlawful purpose. The event and act and conduct of the accused Syed Md. Hussain portray his culpable might around the Nikli Thana locality in 1971 which may be taken into account in adjudicating other charges framed.

177. There is no requirement under customary international law that the conduct forming part of act of mistreatment or torture in detention must be solely perpetrated for one of the prohibited purposes. However, in the case before us it transpires indisputably

that the victims were forcibly captured , tortured in detention intending to coerce and intimidate them for providing with some objects and also to keep them in fear all the time which was indeed attack upon their mental integrity and thus seriousness of purpose is immaterial here.

178. The charge framed arraigns that the accused Syed Md. Hussain alias Hossain incurred liability also under section 4(2) of the Act of 1973. It is true that accused was a mighty and potential Razakar in Nikli Thana locality having significant dominance over accomplice Razakars. But here we see that it has been proved that accused Syed Md. Hussain alias Hossain was physically engaged in committing criminal behaviors, by his culpable conduct and act. Therefore, we do not deem it necessary to arrive at finding that he incurred liability also under section 4(2) of the Act of 1973 which corresponds to the theory of civilian superior responsibility together with liability under section 4(1) of the said Act. However, accused's dominating position may be taken into account as an aggravating factor in awarding sentence.

179. On totality of evidence as evaluated above we arrive at decision that prosecution has been able to prove it beyond reasonable doubt that the accused Syed Md. Hussain alias Hossain participated, abetted, contributed, facilitated and also had complicity, by his culpable act and conduct forming part of attack, in the commission of the offences of **'abduction'** , **'confinement'**

and ‘**other inhumane act**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973, to attain unlawful purpose, which are punishable under section 20(2) of the said Act and, therefore, he is held criminally liable under section 4(1) of the said Act.

Adjudication of Charge No.03

[Extermination, torture, plundering and arson committed at village Gurui under Nikli Police Station]

180. Summary Charge: That on 6 September, 1971 at about 07.00 A.M. a group of Pakistani army men accompanied by 70/80 Razakars including Razakar Commander accused Syed Md. Hussain alias Hossain [absconded], Razakar accused Md. Moslem Prodhan and other local collaborators attacked the village Gurui under Nikli Police Station of the then Kishoreganj Sub-Division, and at that time an exchange of gunfire took place between the accused persons and their accomplices and the freedom-fighters and ultimately the accused persons and their accomplices had to move back and took shelter in the nearest *haor* [wet land].

181. On the same day at about 11.00 A.M. the two accused persons and their accomplices again attacked the village Gurui and at that time the freedom-fighters had to move back without any further resistance. Then the accused persons and their said accomplices and Pakistani army men inhumanely tortured the civilians of that village and set fire to the houses after plundering the properties of those civilian people. At that time the accused

Razakar Commander Syed Md. Hussain alias Hossain and accused Razakar Md. Moslem Prodhan and their cohort Razakars with the help of Pakistani army men shot 26[twenty six] civilians of Gurui village to death and then left the crime site at about 01.00 P.M.

182. Thereby, accused (1) Syed Md. Hussain alias Hossain, and (2) Md. Moslem Prodhan have been charged for participating, abetting, facilitating and complicity in committing large scale killing of civilians constituting the offences of extermination, torture, and plundering and arson [other inhuman acts] as crimes against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused persons have incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

183. Prosecution intending to substantiate the charge adduced six witnesses who have been examined as P.W.05, P.W.07, P.W.08, P.W.10, P.W.11 and P.W.12. Of them four are allegedly the members of Basu Bahini, a resistance group formed to combat the Pakistani occupation army and their local collaborators. The two other witnesses are the residents of crime village Gurui. They are relatives of some victims. Before we weigh the value and credence what they testified in the Tribunal let us first see the narratives they have made on oath.

184. P.W.05 Abdul Hamid [66], a resident of village Chetra under Police Station Nikli of District Kishoreganj was a member of Basu Bahini formed to join the war of liberation. In 1971, he was 16/17 years old. He stated that 'Basu Bahini' was headed by Abdul Motaleb alias Basu. During their staying at village Gurui under Police Station Nikli they got information through source that Razakars and Pakistani army along with Nikli Thana Razakar Commander accused Syed Md. Hussain alias Hossain and Razakar accused Moslem Prodhan might have attacked the village Gurui formed of 13 *paras*. With this information on 06 September 1971 they being equipped with ammunition got stationed in the southern part of village Gurui to resist the Pakistani army and Razakars. At about 07:00 AM on the same day accused Syed Md. Hussain alias Hossain and Moslem Prodhan being accompanied by a group formed of 70/80 Razakars and Pakistani army arrived at the ghat of Ichob Ali's house of their village by two boats and one launch. Seeing it they [Basu Bahini] attacked them and exchange of fire took place between two parts. Twenty minutes later the Razakars and Pakistani army retreated to Nerajhuri Haor by launch and boats and got stationed there and they [Basu Bahini] remained at their position.

185. P.W.05 stated that on the same day [06.09.1971] at about 11:00 AM the same group formed of Razakars and Pakistani army accompanied by more Razakars and Pakistani army men had

launched attack directing them[Basu Bahini] at Purba para of village Gurui and they with this started resisting them and at a stage they[Basu Bahini] retreated on instruction of their commander Basu as their ammunitions got exhausted. He[P.W.05] went into hid in a pond at the west of Khalek's house of that village wherefrom later on he could see accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars and Pakistani army men bringing some people at the courtyard of Khalek's house where they were made assembled and afterwards they were shot to death. Before the group had left the site it set the surrounding houses on fire and then moved towards south. Afterwards, he [P.W.05] heard indiscriminate gun firing from the end of southern part of village Gurui and could see flames of fire. Then the Razakars and Pakistani army men moved towards Nikli Thana Sadar by launch and boats.

186. P.W.05 then stated that he came out of the hiding place and moved to the courtyard of Khalek's houses along with Ichob Ali and saw there dead bodies of ten people lying there and of them he could recognise Suruj Ali and Ful Miah and the rest eight were relatives and neighbours of Ichob Ali as told by him [Ichob Ali].

187. P.W.05 continued stating that next he along with Ichob Ali went to Bat Tola in front of Rahmat Ali's house at Dakhkhin para where they met their two co-freedom fighters Abdul Hekim and Chnafor Ali and they found there 16 dead bodies lying there. Abdul Hekim and Chanfor Ali told them that accused Syed Md. Hussain

and Md. Moslem Prodhan and their accomplice Razakars and Pakistani army men shot those 16 people there while they were on move towards Nikli Thana Sadar. Then he[P.W.05], Ichob Ali, Abdul Hekim and Chanfor Ali took shelter at the house of Kali Das Master at the neighbouring village Hiluchia under Police Station Bajitpur.

188. On the following day, they, the members of Basu Bahini went to village Gurui, the crime site where they heard that 2/3 dead bodies were buried by their relatives and then they made the rest of dead bodies floated in the river as there was no people to make them buried, P.W.05 stated.

189. P.W.05 finally stated that he knew accused Md. Moslem Prodhan before hand as he was a resident of his[P.W.05] locality and he[P.W.05] had occasion to meet him at bazaars. And as a member of Basu Bahini he used to mix up with general people in disguise for the purpose of carrying out the act of close watch and as such, he could know the identity of accused Syed Md. Hussain who was a Razakar Commander.

190. In cross-examination it has been affirmed that P.W.05 remained in hiding in the pond known as 'Sagar Dighi' as he stated in reply to question put to him by the defence that he came out of the pond at about 12:00 AM. During staying at village Hiluchia he heard the event of killing his co-freedom fighter non combatant Malek. In respect of reason of knowing the accused persons P.W.05

stated in reply to defence question put to him that he saw accused Syed Md. Hussain around the locality of Nikli during the election held in 1970 and he also saw accused Md. Moslem Prodhan prior to 1971. P.W.05 denied the defence suggestion that what he stated in relation to the events and other material facts was untrue and tutored.

191. P.W.07 Md. Ichob Ali [66] is a resident of village Gurui [Purba Para] under Police Station Nikli of the then Kishoreganj Sub-Division. He was a member of Basu Bahini [a group of freedom-fighters which fought around their locality].

192. In 1971 he joined the Basu Bahini after the war of liberation ensued. Abdul Motaleb alias Basu was the head of Basu Bahini. In 1971 Razakar accused Syed Md. Hussain used to work as a 'Daroga' in Nikli Thana and accused Md. Moslem Prodhan was the Razakar Commander of Nikli Thana Sadar.

193. In respect of the event as narrated in charge no.03, P.W.07 stated that 4/5 days prior to 20th day of Bangla month Bhadra in 1971 they got information that accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars might have attacked their village Gurui. Afterwards, on 20th day of Bhadra at about 07:00 AM those two accused Razakars being accompanied by their accomplice Razakars arrived at the ghat, east to their [P.W.07] house by two boats and a launch. On sensing it they, the members of Basu Bahini started gun firing to resist them and 15/20

minutes later on the face of such resistance the accused persons and their accomplice Razakars reached back Nerajhuri, one mile away at the haor by launch and boats.

194. P.W.07 continued stating that on the same day [20 Bhadra] at about 11:00 AM the group of same Razakars accompanied by the accused persons had again attacked Purba Para of village Gurui. With this intending to resist them they [members of Basu Bahini] launched counter gun firing but at a stage they got reached back for self safety on instruction of their commander Basu as their ammunitions got exhausted. He[P.W.07] thus went into hid inside the water-hyacinth of the pond known as Sagar Dighi, behind the house of Abdul Khalek of their village wherefrom he saw accused Syed Md. Hussain and his accomplice Razakars gunning down 8/10 people to death at the courtyard of Abdul Khalek's house. Then the Razakars moved towards south and few minutes later he could hear gun firing from that end. Afterwards, when the gun firing got paused, he [P.W.07] came out of the pond and then got his co-freedom-fighter Abdul Hamid along with whom he then rushed to the courtyard of Abdul Khalek's house and he found 10 dead bodies including his[P.W.07] uncles Ful Miah, Abu, aunty Jobeda Khatun and his neighbours Lal Hossain, Suruj Ali, Ichchab Ali lying there.

195. P.W.07 next stated that they then moved to Bot Tola at the south of Rahmat Ali's house where they found 16 dead bodies.

Chanfor Ali and Hekim whom they found there present told them that Razakars had shot those 16 people to death. Of those 16 people he knew Aftab Uddin, Rusmot Ali, Muntaj, Sharfat Ali and Sundar Ali. The situation did not allow them to remain there stayed and thus he [P.W.07], Abdul Hamid, Chanfor Ali and Hekim took shelter at the house of Kali Das Master of neighbouring village Hiluchia under Police Station Bajitpur, P.W.07 added.

196. In respect of reason of knowing the accused persons, P.W.07 stated that in course of spying at different times during the war of liberation in 1971 he became acquainted about the identity of accused Syed Md. Hussain and he also knew accused Md. Moslem Prodhan beforehand as he was a resident of their locality.

197. In cross-examination, P.W.07 stated that Basu Bahini was comprised of 21/22 members. He saw accused Syed Md. Hussain first in 1971 and he was a resident of Kishoreganj. P.W.07 stated in reply to defence question that the level of water of the pond where he remained in hiding was about 2 / 2.5 feet below the bank of the pond and Abdul Khalek's house was 20/25 yards far from his [P.W.07] house and Rahmat Ali's house was about 15/20 yards far from that of Abdul Khalek. In this way, the fact of remaining in hiding in the pond as testified by P.W.07 has been affirmed even in cross-examination. P.W.07 however denied defence suggestions that he did not see the event he narrated or he did not join the war of liberation or he did not know the accused persons. P.W.07 also

denied the suggestion that what he testified was untrue and tutored. Defence however does not appear to have cross-examined P.W.07 on facts relevant to the attack and killing at the place and time and thus the same remained unrefuted.

198. P.W.08 Md Solaiman [66] is a resident of village Gurui, the crime village under Police Station Nikli of the then Kishoreganj Sub-Division. In 1971 he had been living at their own house at village Gurui consisted of 13 Paras. He is the son of one of the victims of brutal mass killing. He is a direct witness to the facts relevant to the event of attack as narrated in charge no.03.

199. P.W.08 stated that on 20th day of Bangla month Bhadra in 1971 at about 07:00 A.M a group of Razakars and Pakistani occupation army arrived at the ghat of Ichob Ali's house at their village by one launch and two boats and on seeing it he rushed to his house and informed it to his father who then asked him [P.W.08] to go into hid. Then he [P.W.08] went into hid in the pond nearby their house and few minutes later he could hear gun firing between the group of Razakars and Pakistani army and Basu Bahini which sided with the war of liberation. Basu Bahini knew that on that day the Razakars and Pakistani army might have attacked Gurui village, and thus, they stayed positioned at the village Gurui to resist them. He [P.W.08] knew Hamid Ali, Ichob Ali and many others belonging to Basu Bahini. After the gun firing got paused he

[P.W.08] came out of the pond and discovered that Razakars and Pakistani army reached back at Nerajhuri Haor, one kilometre far.

200. P.W.08 further stated that on the same day [20 Bhadra] at about 11:00 AM the group formed of Pakistani army and Razakars again came at the ghat of Ichob Ali's house by launch and boats and started exchanging gun firing with Basu Bahini. He [P.W.08] with this again went into hid in the pond west to Khalek's house. Few minutes later he sensed that Basu Bahini reached back as gun firing got stopped. Then he saw remaining in hiding in the pond that Razakar Commander accused Syed Md. Hussain and Razakar accused Md. Moslem Prodhan and their accomplice Rzakars and Pakistani army bringing his [P.W.08] father and some neighbours who were made assembled in front of Khalek's houses and then they gunned them down to death. Next, some of their accomplice Razakars set the houses on fire. Then the group moved towards south and few minutes later he could hear gun firing from that end and at a stage it got stopped and he could see movement of people and thus he came out of the pond, the hiding place and found bullet hit dead bodies of 10 people including his father, neighbours Abu, Ful Miah lying at the courtyard of Khalek's house. Therefrom he [P.W.08] moved to Bot Tola, adjacent to Rahmat Ali's house where he discovered 16 bullet hit dead bodies including Aftab Uddin, Jinnat Ali, Suruj Ali and all the victims were inhabitants of their village. P.W.08 also stated that he then took shelter at village

Barmai under Police Station Bajitpur and on the following day [21 Bhadra] he came back to his own home at village Gurui and buried the body of his father with the help of his uncle and some others. 2/3 more dead bodies could be buried and the rest of dead bodies were made floated at Haor by the members of Basu Bahini and some locals.

201. As regards reason of knowing the accused persons P.W.08 stated that accused Md. Moslem Prodhan used to come to Nikli bazaar very often and thus he knew him beforehand. Abdul Hekim and Md. Ichob Ali, the members of Basu Bahini told him after the event that one of the two Razakar Commanders who were giving instruction to their accomplices [during the attack] was accused Syed Md. Hussain.

202. In cross-examination, defence could not refute the testimony made in relation to launching attack and causing death of civilians including the father of P.W.08. It has been affirmed that at the time of attack P.W.08 remained in hiding in a pond nearby the crime site as he stated in reply to defence question that the level of water of the pond where he remained in hiding was about three feet below from the bank and where he [P.W.08] stayed in hiding the level of water was up to his chest. P.W.08 however expressed ignorance about the places where the members of Basu Bahini went into hid. P.W.08 also stated that he saw accused Md. Moslem Prodhan even prior to the event and he was a resident of Nikli. The group of

attackers was formed of about 60/70 Pakistani army and Razakars. Basu, the commander of Basu Bahini died two years after independence of Bangladesh. P.W.08 denied defence suggestions that he did not know or see the accused persons and what he testified implicating the accused persons was untrue and tutored.

203. P.W.10 Abdul Hekim [71] is a resident of village Gurui under Police Station Nikli of the then Kishoreganj Sub-Division. He joined the war of liberation as an associate of 'Basu Bahini' [a group of freedom fighters] formed under the leadership of Abdul Motaleb alias Basu of their locality. He testified facts relevant to the events narrated in charge nos. 03 and 05, as a direct witness.

204. P.W.10 stated that on a day in the Bangla month Bhadra in 1971 their leader Basu informed them that Razakar accused Syed Md. Hussain and Razakar accused Md. Moslem Prodhan and their accomplice Razakars and Pakistani army might have attacked their village Gurui, and thus, they on instruction of Basu got positioned at diverse places of village Gurui. P.W.10 further stated that on 20th day of Bhadra [1971] at about 07:00 AM accused Syed Md. Hussain and accused Md. Moslem Prodhan being accompanied by Razakars and Pakistani army men arrived at the ghat of Ichob Ali's house by a launch and two boats. At that time he [P.W.10] had been at Bot Tola, Purba Para of village Gurui. Pakistani army and Razakars started gun firing on getting down at the said ghat and with this they [the members of Basu Bahini] also started counter

gun firing directing them. 15/20 minutes later the Pakistani army and Razakars reached back at Nerajhuri Haor, about one kilometer far.

205. P.W.10 went on to state that on the same day i.e 20 Bhadra at about 11:00 AM, the Pakistani army and Razakars again arrived at the ghat of Ichob Ali's houses and had launched attack and they [the members of Basu Bahini] started resisting them. But 10/15 minutes later when their ammunitions got exhausted their commander Basu asked them to go into hid as they can. Then he [P.W.10] went into hid in a pond, west to Rahmat Ali's house wherefrom, few minutes later he heard gun firing and saw flame of fire from the north end. He also could see the Pakistani army men and accused Syed Md. Hussain and accused Md. Moslem Prodhan and their accomplice Razakars bringing some persons at Bot Tola, southern side of Rahmat Ali's house where they made assembled and gunned them down to death there, one by one. Then the Pakistani army men and Razakars setting the surrounding houses including the house of Rahmat Ali on fire moved towards north. 15/20 minutes later he[P.W.10] coming out of the pond as he could not sense movement of the group rushed to Bot Tola where he found 16 bullet hit dead bodies lying there. Of them, he could recognise Jinnat Ali, Rusmot Ali and Gatu. His [P.W.10] co-freedom fighters Chanfor Ali, Ichob Ali and Abdul Hamid also arrived there and then Ichob Ali and Abdul Hamid told him that

they found 10 more dead bodies lying in front of Khalek's house at Purba Para of village Gurui. Then they four returned back to their camp at the house of Kali Das Master at village Hiluchia under Police Station Bajitpur, P.W.10 added.

206. P.W.10 next stated that on the following day i.e 21 Bhadra[1971] at about 08:00/09:00 AM he along with some members of Basu Bahini went to village Gurui when they found 2/3 dead bodies buried and the rest bodies were lying there as there was none to arrange their burial. Then they made those dead bodes floated in the river taking by boat.

207. In respect of reason of knowing the accused persons P.W.10 stated that in 1970's election accused Syed Md. Hussain and accused Md. Moslem Prodhan had kept them engaged in election campaign in favour of Aftab, a candidate contesting the election with the symbol of tiger around their locality and since then he knew them. Besides, he [P.W.10] had occasions of meeting accused Md. Moslem Prodhan at Nikli bazaar.

208. In cross-examination, P.W.10 stated that he went into hid in the pond at about 09:00/09:30 AM and came out therefrom at about 12:00/12:30 PM; the length of the pond was about half kilometre; that he could not say whether any other remained in hiding in the said pond; the water level of the pond was one and half to two feet from the pond's bank. In this way the fact of P.W.10's remaining in hiding in the pond, on the face of attack has been re-affirmed in

cross-examination. Defence does not dispute the attack launched that resulted in killing of numerous civilians as testified by the P.W.10. In reply to defence question put to him P.W.10 also stated that accused Syed Md. Hussain was the son of Moslem Uddin Moulana of Kishoreganj and in 1971 he had occasion seeing him.

209. P.W.10 denied the defence suggestions put to him that he did not see any event ; the civilians of village Gurui were killed as a result of front fight with Razakars and Pakistani army ; that freedom fighter Abdul Malek died due to bullet hit during front fight and that what he testified implicating the accused persons was untrue and tutored.

210. **P.W.11 Chanfor Ali [73]** is a resident of village Gurui under Police Station Nikli of the then Sub-Division Kishoreganj. In 1971 he was an associate freedom-fighter of Basu Bahini.

211. P.W.11 testified that in 1971 while they being stationed around the locality of Nikli were engaged in freedom fight they heard from their commander Basu that Razakars accused Syed Md. Hussain and Md. Moslem Prodhan and their accomplice Razakars and Pakistani occupation army might have attacked their village Gurui. With this their commander instructed them to remain alert and prepared.

212. Then on 20th day of Bangla month Bhadra [1971] at about 07:00 A.M accused Syed Md. Hussain and Md. Moslem Prodhan being accompanied by their accomplices and Pakistani army men

arrived at the ghat of freedom fighter Ichob Ali's house at Purba Para by a launch and two boats and started gun firing. At that time they had been staying at Bot Tola, south to Rahmat Ali's house wherefrom they [Basu Bahini] started resisting the group [attackers] by counter gun firing. About 15/20 minutes later, the group of attackers reached back to one kilometre north of Nerajhuri Haor.

213. P.W.11 went on to narrate further that on the same day at about 11:00 A.M the group formed of Razakars and Pakistani army men again came to Ichob Ali's house's ghat by launch and boats when they[members of Basu Bahini] had been staying about 50/60 yards far from Ichob Ali's house's ghat, in front of Khalek's house. The Pakistani army men and Razakars on getting down from launch and boats started gun firing and they [Basu Bahini] too started counter gun firing to resist them [attackers]. About 15/20 minutes later their commander [Basu Bahini] asked them to go into hid wherever they could to save their lives as their ammunitions got exhausted. Then he [P.W.11] went into hid in a pond known as Sagar Dighi, south to Rahmat Ali's house wherefrom he saw flames of fire from the end of north and also heard indiscriminate gun firing. He [P.W.11] also saw accused Syed Md. Hussain , Md. Moslem Prodhan and their accomplices bringing 15/20 people at Bot Tola, south to Rahmat Ali's house and made them assembled there and then accused Sayed Md. Hossain , Md. Moslem Prodhan,

their accomplice Razakars and Pakistani army men shot those detained persons to death there. And then the group leaving the site moved towards north and on their way back they set the surrounding houses on fire. Few minutes later he [P.W.11] sensing departure of the group of attackers came out of the pond and arrived at Bot Tola where he met his co-freedom fighter Hekim[P.W.10] and found 16 bullet hit dead bodes lying there. Of them he [P.W.11] could recognise Jinnat Ali, Yakub Ali and Rusmot Ali. During his[P.W.11] staying at Bot Tola his two other co-freedom fighters Abdul Hamid and Ichob Ali arrived there and they told that they saw 10 more bullet hit dead bodes lying in front of Khalek's house, P.W.11 added.

214. P.W.11 then stated that from Bot Tola he along with Hamid, Hekim and Ichob Ali went back to their camp at the house of Kali Das Master at village Hiluchia under Police Station Bajitpur.

215. In relation to facts relevant to the event P.W.11 stated that on the following day i.e on 21st day of Bangla month Bhadra[1971] at about 08:00/09:00 AM he along with some of co-freedom-fighters of Basu Bahini came to Bot Tola , south to Rahmat Ali's house and that relatives of three persons killed there made arrangement for their burial and they[P.W.11 and his co-freedom fighters] made the rest of dead bodies including the dead bodies found in front of Khalek's house as well floated in the haor taking by boats.

216. In respect of reason of knowing the accused persons, P.W.11 stated that accused Syed Md. Hussain and Md. Moslem Prodhan were engaged in carrying out election campaign in favour of one named Kara around their locality in connection with the election held in 1970, and thus, he knew them beforehand.

217. In cross-examination P.W.11 stated in reply to defence question put to him that Rahmat's house was at north to that of Khalek and Ichob Ali's house situated at north of Khalek's house, Nikli Thana Sadar was about three kilometres north to their house at Paschim Para. P.W.11 expressed ignorance as to in which month he joined the freedom fight. Remaining in hiding in the pond known as Sagar Dighi as stated in examination-in-chief has been re-affirmed as P.W.11 stated in reply to defence question that he went into hid in the pond at about 11:00/11:30 AM and came out therefrom at about 12:00 A.M.

218. P.W.11 also stated in cross-examination that he gets allowance as a freedom-fighter and excepting relatives of freedom fighter Ichob Ali relative of no other freedom-fighter was killed in conjunction with the attack he narrated. He also stated on cross-examination that it was the Bangla month of Sravan when their commander Basu told them about the apprehension of the attack at village Gurui by Razakars and Pakistani army. He could not name the other Razakars excepting the accused persons. Defence finally suggested P.W.11 that he did not see the accused persons on the

day of event as he did not know them and accused Syed Md. Hussain was not a Razakar, he did not see anything relating to the event and what he testified implicating the accused persons was untrue and tutored. However, defence does not appear to have cross-examined P.W.11 to refute the fact of launching attack that resulted in killing of numerous civilians including a non-combatant freedom fighter as testified.

219. P.W.12 Jafor Ali [71] is a resident of village Gurui under Police Station Nikli of the then Kishoreganj Sub-Division. He is a direct witness of facts relevant to launching attack that resulted in killing of numerous civilians including his mother and relatives as narrated in charge no.03.

220. P.W.12 stated that on 20th day of Bangla month Bhadra in 1971 at about 07:00 A.M he had been at their house wherefrom he saw that a group of 50/60 Razakars arrived at the ghat of Ichob Ali's house and then exchange of gun firing took place between them and the freedom fighters stationed at their village since prior to the attack and with this he went into hid in Sagar Dighi, a pond situated behind their house. Ten minutes later the Razakars reached back to Nerajhuri Haor, one kilometre far. He came out of the pond. But the freedom-fighters continued their staying at their village, P.W.12 added.

221. P.W.12 also stated that at about 11:00 A.M, on the same day the Razakars again had launched attack after arriving at Ichob Ali's

house's ghat and exchanged gun firing with freedom-fighters which continued for 10/15 minutes. He [P.W.12] then fled to the southern part of their village. At a stage the freedom fighters retreated therefrom and Razakars Syed Md. Hussain and Md. Moslem Prodhan and their accomplice Razakars started moving towards south when they set the surrounding houses on fire. On seeing it he [P.W.12] went into hid in the pond known as Sagar Dighi, west to Rahmat Ali's house wherefrom he could hear gun firing and see flames of fire from the north end of the village. He could also see that accused Syed Md. Hussain and Md. Moslem Prodhan, their accomplice Razakars and Pakistani army men forming the group bringing his[P.W.12] mother, relatives and other residents of their village at Bot Tola forcibly and making them assembled there Razakars and Pakistani army men gunned down them to death. He [P.W.12] then saw those Razakars and Pakistani army men setting the house of Rahmat Ali and others on fire and at that time Razakars accused Syed Md. Hussain and Md. Moslem Prodhan shot his detained mother Saheda Banu to death there.

222. Then the Razakars and Pakistani army moved towards north leaving the crime site and afterwards on seeing the freedom-fighters Chanfor Ali and Abdul Hekim present at Bot Tola he [P.W.12] came out of the pond and appeared at Bot Tola where he found dead bodies of 16 civilians including his mother, uncles Sonam Uddin and Abul Hossain and cousin brother Rusmot Ali.

Freedom-fighters Ichob Ali and Abdul Hamid also appeared there and informed them that they found 10 bullets hit dead bodies of civilians lying in front of the house of Khalek of their village. Then he [P.W.12] went away to his maternal grand father's house at village Barmai under Police Station Bajitpur.

223. P.W.12 further stated that on the following day i.e on 21st day of Bhadra, 1971 at about 09:00 AM he came back to their village Gurui and was making arrangement for burial of his relatives and mother who were killed at Bot Tola on the preceding day. At that time Basu, the commander of Basu Bahini and his co-freedom fighters came there and due to scarcity of proper arrangement they made the dead bodies floated in haor taking those by boats. Then he [P.W.12] again went back to his maternal grandfather's home.

224. In cross-examination P.W.12 stated that their house was about 10/15 cubits far from that of Ichob Ali; that the freedom-fighter Hamid was a resident of village Chetra; that before he met freedom-fighters Hamid and Ichob Ali at Bot Tola he had occasion of meeting them at about 07:00 AM in front of Ichob Ali's house after gun firing got paused.

225. The fact of P.W.12's remaining in hiding in the pond appears to have been affirmed as the P.W. 12 in reply to defence question stated that he on the day of attack launched went into hid in the pond nearby Rahmat's house and came out therefrom at 01:30 PM.

P.W.12 denied the defence suggestions that he did not know the accused persons; that he is not a resident of Purba Para and none of his relatives was killed as he testified and that what he testified was untrue and tutored. Defence however could not refute what has been testified by the P.W.12 in relation to launching attack that resulted in killing numerous defenceless residents of village Gurui.

226. As regards reason of knowing the accused persons P.W.12 stated that accused Md. Moslem Prodhan was a neighbour of his[P.W.12] sister's husband Rahmat Ali, a Razakar at Nikli Thana Sadar and thus he knew accused Md. Moslem Prodhan beforehand.P.W.12 also stated that he knew accused Syed Md. Hussain as identified by him.

Finding with Reasoning on Evaluation of Evidence

227. Ms. Tureen Afroz, emphatically submitted that both the accused persons culpably and actively participated in committing the horrific acts directing the Hindu civilians and it has been proved by the unimpeached testimony of direct witnesses, the freedom-fighters and the event of attack happened when the freedom-fighters reached back after continuing fighting with Razakars and Pakistani army. The civilians were not engaged in fighting at 'Purba para' and they were deliberately killed during cessation of the fight.

228. The learned prosecutor went on to state that in addition to the oral testimony presented the documents Exhibits- 12 and 13 relied

upon by the prosecution also impel it indisputably that on the alleged date and time, during cessation of fighting, the Razakars had attacked the civilians of village Gurui and set the houses of civilians on fire and the attack resulted in mass killing which constituted the offence of extermination together with the offences of arson and torture as crimes against humanity.

229. On contrary, Mr. Abdus Sattar Palwan, the learned counsel defending both the accused persons submitted that the accused persons were not engaged in any fighting as narrated in the charge; that the accused persons did not belong to local Razakar Bahini and that it was not practicable to see how the civilians died and thus testimony tendered in this regard does not carry value.

230. Next, it has been submitted too that the civilians of the village Gurui died during the fighting happened, and thus no offence was committed. It is specific defence case. The learned counsel in support of his submission drew attention to the segment narrating the 'Gurui battle' in the book titled ' *ibw/†bi w` b,†jv`* ' [Exhibit-Ka] authored by AKM Anwarul Haque Alim Uddin.

231. The event involving large scale killing of civilians of village Gurui happened after the encounter between a group of Razakars and Pakistani army and Basu Bahini, a resistance group came to cessation. In all six witnesses have been examined to prove this charge. Of them P.W.05, P.W.07, P.W.10 and P.W.11 were the members of Basu Bahini who claim to have observed facts relevant

to the attack and in addition to narrating it they also testified how they encountered the group of Razakars and Pakistani army and why they eventually had to reach back. P.W.08 and P.W.12 are the residents of the village Gurui who allegedly had occasion of observing the acts forming part of attack that resulted in killing of 26 villagers including their relatives.

232. In view of above, we must not keep the testimony of those witnesses so far it relates to the encounter that took place twice on the day of event of killings happened directing civilians aside. Because, the testimony tendered in respect of facts prior, amid and after the event seems to be closely related to each other for the purpose of determining the commission of the offences alleged and liability of the accused persons therewith.

233. On the day of event and before the act of killing villagers took place armed encounter ensued between the group formed of Razakars and Pakistani army and Basu Bahini, an organized resistance group in the locality of village Gurui. The fight happened in two phases on the same day. On the face of resistance of Basu Bahini, during the first phase of fight that ensued in early morning, the group formed of Razakars and Pakistani army reached back to haor.

234. But the battle between them ensued again on the same day at about 11:00 AM. And at a stage of this second phase of battle the Basu Bahini had to reach back as their ammunitions capacity got

exhausted and the members of this Bahini went into hid wherever they could. Thus, the battle ceased. But what happened next? Did the group of Razakars and Pakistani army go back leaving the site or the locality of village Gurui? What was the reason of reaching back of Basu Bahini?

235. P.W.05 Abdul Hamid, a member of Basu Bahini engaged in fighting against the group of Pakistani army and Razakars testified that at a stage of encounter they had to retreat on instruction of their commander Basu as their ammunitions got exhausted. P.W.07 , P.W.10 and P.W.11 also the members of the said Basu Bahini corroborate it as they consistently testified that 10/15 minutes after second encounter they had to go into hid as their ammunitions got exhausted. Both the P.W.07 and P.W.10 remained in hiding inside a pond, west to Rahmat Ali's house.

236. P.W.05, P.W.07, P.W.10 and P.W.11 were the members of Basu Bahini who were engaged in encountering the group of Pakistani army and Razakars twice on the same day. Defence does not dispute it. The corroborative evidence of above P.W.s demonstrates that taking advantage of Basu Bahini's reaching back during second time encounter at Purba Para of village Gurui the group of perpetrators had attacked the non combatant civilians. The above four P.W.s, the members of Basu Bahini observed the activities of the group of perpetrators accompanied by the accused

persons remaining in hiding in a pond. Defence could not impeach it.

237. It transpires that P.W.05 Abdul Hamid went into hid in a pond at the west of Khalek's house of the village under systematic and organised attack wherefrom he could see accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars and the Pakistani army men bringing some people at the courtyard of Khalek's house where they were shot to death. Before the group had left the site it set the surrounding houses on fire and then moved towards south, P.W.05 could see it. Defence could not impeach it in any manner. There has been nothing to deduce that it was not practicable of observing the act and conduct of perpetrators that resulted in killing several civilians, remaining in hiding inside the pond.

238. P.W.07 Md. Ichob Ali who also remained in hiding inside the water-hyacinth of the pond known as Sagar Dighi, behind the house of Abdul Khalek of their village also observed the accused Syed Md. Hussain and his accomplice Razakars gunning down 8/10 people to death at the courtyard of Abdul Khalek's house.

239. P.W.10 Abdul Hekim and P.W.11 Chanfor Ali also could see the Pakistani army men and accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars bringing 15/20 people at Bot Tola, south to Rahmat Ali's house and made them assembled there and then accused Syed Md. Hussain, Md. Moslem

Prodhan and their accomplice Razakars and Pakistani army men gunning down those detained persons to death there.

240. Unshaken testimony of P.W.05 and P.W.07 , the direct witnesses to the core criminal acts of the perpetrators indisputably proves the act of killing 8/10 people at the courtyard of Abdul Khalek's house by bringing them there on forcible capture. Similarly the testimony of P.W.10 and P.W.11, the two other direct witnesses establishes the act of killing 15/20 villagers by bringing them at Bot Tola, south to Rahmat Ali's house.

241. Thus, the event of killing 26 non combatant villagers happened in conjunction with the same attack which could be observed by the four members of Basu Bahini who due to their reaching back had to go into hid inside a big pond, nearer to the killing site. The attack was launched in day time. Thus and taking the nature of hiding place into account it may safely be said that it was practicable of seeing the activities carried out by the perpetrators.

242. It is evinced from the testimony of PW.05, P.W.07, P.W.10 and P.W.11, the members of Basu Bahini that halting resistance against the group of Pakistani army and Razakars they went into hid wherever they could. And remaining in hiding in pond and other places they had occasion of seeing the activities carried out directing the villagers. Their testimony on material particulars gets corroboration from the evidence of P.W.08 and P.W.12, villagers

and relatives of victims as they consistently testified what they observed in conjunction with the attack conducted.

243. P.W.08 Md. Solaiman is the son of one of the victims stated that on the same day [20 Bhadra] at about 11:00 AM the group formed of Pakistani army and Razakars again came at the ghat of Ichob Ali's house by launch and boats and started exchanging gun firing with Basu Bahini. He [P.W.08] with this again went into hid in the pond west to Khalek's house. Few minutes later he sensed that Basu Bahini reached back as gun firing got stopped. Then he saw remaining in hiding in the pond that Razakar Commander accused Syed Md. Hussain and Razakar accused Md. Moslem Prodhan and their accomplice Razakars and Pakistani army bringing his [P.W.08] father and some neighbours who were made assembled in front of Khalek's houses and then they gunned them down to death. Next, some of their accomplice Razakars set the houses on fire.

244. P.W.12 Jafor Ali, a resident of village Gurui also went into hid in the pond known as Sagar Dighi, west to Rahmat Ali's house, sensing the attack, wherefrom he could also see the accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars and Pakistani army men forming the group bringing his [P.W.12] mother, relatives and other residents of their village at Bot Tola forcibly and making them assembled there Razakars and Pakistani army men gunned down them to death. He [P.W.12] then saw those

Razakars and Pakistani army men setting the house of Rahmat Ali and others on fire and at that time Razakars accused Syed Md. Hussain and Md. Moslem Prodhan shot his detained mother to death there. Defence could not refute this pertinent version relating to killing civilians.

245. Testimony of P.W.08 and P.W.12 demonstrates that accused Syed Md. Hussain, Md. Moslem Prodhan and their accomplice Razakars and Pakistani army men forming group actively participated, assisted and aided to bring the villagers including relatives of P.W.08 and P.W.12 at the places they testified on forcible capture and making them assembled there gunned them down to death. P.W.08 and P.W.12 are residents of village Gurui which faced the attack. P.W.08 lost his father and P.W.12 lost his mother and some relatives during the attack. Presumably, P.W.08 and P.W.12 could save their lives as they went into hid sensing the attack which enabled them to observe the criminal activities conducted by the perpetrators.

246. Defence does not dispute the killing of those villagers as testified by P.W.08 and P.W.12. Besides, it could not be shown by the defence that it was rather impracticable of seeing the act of killing even remaining in hiding place, the pond which was nearer to the killing sites.

247. Now, another pertinent question comes forward. Did the witnesses really know the accused persons beforehand or had they

any rationale reason of recognizing the accused persons accompanying the perpetrators in conducting the attack?

248. P.W.05, P.W.07 P.W.10 and P.W.11 were the members of Basu Bahini, a resistance group of Pakistani occupation army and their local collaborators. Naturally, they were acquainted with the local potential collaborators or members of Razakar Bahini, an auxiliary force of Pakistan occupation army stationed around the locality of the then Kishoreganj Sub-Division. Besides, let us see what the P.W.s stated in respect of reason of knowing the accused persons.

249. P.W.05 Abdul Hamid testified that accused Md. Moslem Prodhan was a resident of his [P.W.05] locality and he [P.W.05] had occasions of meeting him at bazaars. And also as a member of Basu Bahini he [P.W.05] used to mix up with general people in disguise for the purpose of carrying out the act of close watch made him able to know the identity of accused Syed Md. Hussain who was a Razakar Commander. P.W.07 Ichob Ali, another member of Basu Bahini in course of spying at different times during the war of liberation in 1971 he became acquainted about the accused Syed Md. Hussain and he also knew accused Md. Moslem Prodhan beforehand as he was a resident of their locality.

250. In respect of reason of knowing the accused persons P.W.10 Abdul Hekim, another member of Basu Bahini also knew the accused persons beforehand as they used to get engaged in

carrying out election campaign in favour of Aftab [in 1970] around their locality. Besides, he [P.W.10] had occasions of meeting accused Md. Moslem Prodhan at Nikli bazaar. P.W.11 Chanfor Ali, a member of Basu Bahini also claims the similar reason of knowing the accused persons before hand

251. As regards reason of knowing the accused persons P.W.08 Md. Solaiman stated that accused Md. Moslem Prodhan used to come to Nikli bazaar very often and thus he knew him beforehand. Abdul Hekim [P.W.10] and Md. Ichob Ali [P.W.07], the members of Basu Bahini told him after the event that one of the two Razakar Commanders who were giving instruction to their accomplices [during the attack] was accused Syed Md. Hussain. Hearsay evidence of P.W.08 so far it relates to presence of accused Syed Md. Hussain with the group in conducting attack carries probative value. For unshaken and rational testimony of P.W.07 and P.W.10 provides corroboration to it.

252. As regards reason of knowing the accused persons P.W.12 Jafor Ali stated that accused Md. Moslem Prodhan was a neighbour of his [P.W.12] sister's husband Rahmat Ali, a Razakar at Nikli Thana Sadar and thus he knew accused Md. Moslem Prodhan beforehand. It remained unshaken.

253. Therefore, the testimony of the 04 members of Basu Bahini [P.W.05, P.W.07, P.W.10 and P.W.11] and two villagers [P.W.08 and P.W.12] in relation to knowing the accused persons beforehand

inspires credence as it provides rational reasoning. Defence could not shake it in any manner by cross-examining these witnesses. Thus, recognizing the accused persons accompanying the perpetrators in carrying out criminal activities that resulted in killing large number of non combatant civilians of village Gurui and devastating acts seem to be practicable.

254. It also transpires that after the group of perpetrators had left the site, P.W.08 came out of hiding place and found bullet hit dead bodies of 10 people including his [P.W.08] father, neighbours Abu, Ful Miah lying at the courtyard of Khalek's house. Then he [P.W.08] moved to Bot Tola adjacent to Rahmat Ali's house where he discovered 16 bullets hit dead bodies including Aftab Uddin, Jinnat Ali, Suruj Ali and all the victims were inhabitants of their village. Discovering 26 bullets hit dead bodies at two places instantly after the group of Razakars and Pakistani army had left the site as testified by P.W.08 remained unimpeached, and thus, this fact proves the large scale killing of innocent villagers which was the upshot of attack launched directing them.

255. It also transpires from the testimony of P.W.05, P.W.08, P.W.11 and P.W.12 that on the following day [21 Bhadra] they buried 2/3 dead bodies including father of P.W.08 at village Gurui and the rest of the dead bodies were made floated at Haor by the members of Basu Bahini and some other people. This fact relevant to the principal fact remained unshaken too, and as such, it adds

further assurance as to the fact of mass killing happened on the preceding day at village Gurui.

256. Defence claims that the civilians of village Gurui died during the battle happened at village Gurui and were not killed in the manner as alleged in the charge framed. In support of this specific case defence relied upon the narratives made in the book titled ‘i b½tbi w` b,tjv’ [Exhibit-Ka] authored by a freedom-fighter who was engaged in Gurui battle against Razakars and Pakistani army.

257. What is depicted from the narratives made in this book is that civilians of the village Gurui were deliberately killed. List of civilians so killed brutally finds place at page 53 of this book. Narratives made in this book do not impel any indication that those civilians were combatant and took active part in encountering the Razakars and Pakistani army. Rather, the narratives made therein clearly suggest that these civilians were forcibly taken out of their houses and then gunned down to death. At page 51 of the book [Exhibit-Ka] it has been narrated that-----

ò.....e½tZ wfRB cvoiq D½V 2/3 uJ emio cvi ntq
 f`L½Z cvB 1uJ jvk c½o exfrmi " tc g½U½Z c½o Av½Q/
 e½tZ cvi Z½K R½ešZ c½o½q gvi v ntq½Q| uK exfrm `k"
 !

258. At page 52 of the book [Exhibit- Ka] it has also been narrated too that --

òK½Q u½q f`L½Z cvB A½bK,tjv ubi½n
 tjvK½K `uo w`½q teta GKm½_ `va Ki [K½i½q] e½kdv½ti
 nZ½v K½i½Q|&G cvoiq Avgiv 25 R½bi jvk

*t`L†Z cıB| Gfvte gıby gıby†K nZ`v K†Z cı†i Zı
Avqv†`i K† bvi | AZ†Z †Qj | 0*

259. The narrative made in the book [**Exhibit-Ka**] relied upon by the defence itself proves that numerous non-combatant civilians were brutally killed and thus they cannot be said to have died in battle as a party to the encounter. Therefore, we are not with the submission advanced by the learned defence counsel that those civilians died during the fighting, and as such, no offence was committed. It may safely be concluded that the perpetrators by taking advantage of the space they got during cessation of battle became extremely antagonistic to the non-combatant civilians which imbued them to carry out the systematic attack directing civilian population of the village Gurui that resulted in horrific mass killing and we have got it proved by the evidence adduced and circumstances unveiled.

260. Mr. Abdus Sattar Palwan, the learned defence counsel, in support of the defence case that the civilians of the village Gurui died in battle also drew our attention to some narratives made in reports published in some newspapers which have been proved and exhibited by D.W.01, the sole defence witness.

261. The learned prosecutor, in reply, submitted that those reports also demonstrate that there had been a battle and during cessation of the battle the group of attackers formed of Pakistani army and Razakars had launched attack directing unarmed civilians of the

village Gurui who were not active part of the battle and the attack resulted in mass killing.

262. The defence document a report titled ‘ Gurui Massacre Happened On This Day Of 1971’ happened on this day of 1971’ published in the ‘Citizen Times’ on 06 September, 2015 [Exhibit-Ga series: defence documents volume page 34] also narrates the attack directing civilians of village Gurui. The report says-

"Meanwhile, a motor launch loaded with Pakistani army and several local collaborators (razakars) reached at river-ghat of north side of the village. They entered the village started off arbitrary looting. Freedom fighters arrived in the place of occurrence by two boats. They creep into the village and waged battleThe confrontation prolonged for almost 90 minutes. Shortfall of ammunition and dysfunction of weapons compelled the freedom fighters to retreat at one point. Demise of the fellow soldiers doubled the rage of invaders. They opened indiscriminate shooting at innocent and unarmed inhabitants of the village with reinforced strength....."

263. The above demonstrates how the battle at village Gurui was waged, how long it continued, why the freedom fighters had to reach back and what happened next directing the civilian population of the village Gurui. The narratives made in the above report rather provide assurance that the unarmed civilians were deliberately killed by launching systematic attack and they did not

die in the battle field. The narratives made in the above report also demonstrate that the group of attackers was formed of Pakistani army and Razkars, the local collaborators.

264. Defence document the report titled *Ô, iB MYnZ`v w emÕ* published from Kishoreganj in the *ÔkZvãxi KÚÕ*, dated 07 September, 2015[**Exhibit-Ga series**, defence documents volume page-35], the report titled *ÔAvR , iB MYnZ`v w emÕ* published in the daily *Ômsev` cÛZw`bÕ* dated 06 September, 2015[**Exhibit-Ga series**: defence documents volume page-33], the report titled *Ô, iB MYnZ`v w em AvRÕ* published in the national daily ‘mgKvj’ dated 06 September, 2015[**Exhibit-Ga series**: defence documents volume page-32] and the report titled *Ô, iB MYnZ`v w em AvRÕ* published in the national daily ‘B†ËdvK’ dated 06 September, 2015[**Exhibit-Ga series**: defence documents volume page-32] consistently corroborate the event of deliberate mass killing of unarmed civilians of village Gurui who were not the party to the battle and the attack was deliberately launched when the battle came to cessation.

265. In view of above and having regard to the unshaken account made by the prosecution witnesses in respect of the attack and mass killing we are not with the submission advanced by the learned defence counsel that no offence was committed as the villagers died in battle. The documents relied upon by the defence do not suggest

to conclude it. Rather the same admit the accomplishment of the crimes for which the accused persons have been arraigned.

266. It transpires from the evidence tendered that the group of Razakars and Pakistani army accompanied by the accused persons instead of quitting the battle site, despite reaching back of Basu Bahini, their counterpart started conducting attack directing civilians of village Gurui which caused death of 26 civilians, wanton destruction of civilians livelihood, violating the prohibition and norms as laid down in international humanitarian law.

267. It is to be noted that even in war time situation non combatant civilians are entitled to protection and act attacking their fundamental rights of livelihood is prohibited. Causing death of a combatant member of resistance group, during encounter or fight, does not constitute an offence. But what we see in the case in hand? The victims were non combatant civilians and they were deliberately killed by launching attack.

268. It transpires that on failure to capture any member of Basu Bahini, the group being accompanied by accused Syed Md. Hussain and Md. Moslem Prodhan, two potential Razakars of Nikli Thana, became aggressive to the unarmed civilian population of the village Gurui that resulted in large scale killing of civilians and devastating act. Participation of accused Syed Md. Hussain, a leading Razakar of Nikli Thana locality in committing the act of killing civilians, by launching attack also reflects his antagonistic attitude to the pro-

liberation people. Besides, already in adjudicating charge no.02 we have rendered our finding based on evidence that this accused imposing unlawful condition of providing information about freedom fighters set the four detained civilians released. And he did it under coercion, intimidation and on taking object of victims' livelihood as ransom.

269. Now for holding the accused persons liable it is not necessary to show that they were the actual perpetrators. It is to be seen whether their conduct and act had any substantial effect on the commission of the principal crimes. In this regard the ICTR has observed in the case of *Seromba* that-

“Aiding and abetting must have a substantial effect on the commission of the crime, but does not necessarily constitute an indispensable element, i.e. a conditio sine qua non, of the crime.”

[Seromba, ICTR Trial Chamber, December 13, 2006, Para. 307]

270. It is not necessary to ask whether the accused persons physically participated to the commission of the large scale killing of civilians. The focus of enquiry should be whether in acting or failing to act, the accused persons provided assistance, moral support or culpable encouragement to the principals to commit the alleged criminal acts constituting the offence for which they have been indicted.

271. Further, it is not required as well to establish by which act or conduct the accused persons aided and abetted the group of perpetrators. It is to be seen whether the accused persons were with the group of attackers sharing its intent or whether they remained present with the group intending to provide moral support and encouragement. The **ICTR Trial Chamber** has observed in the case of *Kajelijeli*, that-

“The contribution of an aider and abettor....., may take the form of practical assistance, encouragement or moral support.....,”

**[Kajelijeli, ICTR Trial Chamber),
December 1, 2003, Para. 766]**

272. During war, civilians are generally vulnerable to attack and soldiers engaged in fighting are generally not vulnerable because they have the means to resist the attacks. But in the case in hand, it transpires that the non combatant villagers did not have the capability to defend themselves, in situations of the encounter that took place between the group of perpetrators and the Basu Bahini. And thus aggressive and deliberate attack was conducted directing those vulnerable villagers, taking advantage of reaching back of Basu Bahini.

273. We reiterate that in 1971 during the war of liberation the Pakistani occupation army was not well familiar to the locality or the civilians of a particular village to be targeted. We may thus

fairly infer that the Razakars led by accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan accompanying the Pakistani occupation army substantially aided, abetted, encouraged and facilitated in committing horrific mass killing of unarmed civilians.

274. Further, the act of aid and assistance need to be inferred in light of totality of facts. The accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan being the potential Razakars of Nikli Thana could have encouraged the Pakistani occupation army to go back from the site as their counter part Basu Bahini eventually reached back, after 15 minutes' encounter. But it did not happen. Rather, the group being accompanied by the accused persons had launched attack directing civilians in violation of customary international law and thereby it may be lawfully inferred that he accused persons, the leading Razakars had tacit approval in conducting such attack, and thus, they cannot be absolved of liability of the upshot of such attack.

275. It is to be noted that the combination of leading position of the accused persons in Razakar Bahini, an auxiliary force formed to collaborate with the Pakistani occupation army and their physical presence at the crime site with the group of attackers rationally allows the inference that non-interference on part of the accused persons in other words amounted to tacit approval and encouragement in carrying out the attack directing civilians. This

view finds support from the observation of the **ICTR Appeals Chamber** made in the case of *Muvunyi* which is as below:

“An accused may be convicted of aiding and abetting when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime. In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence at or very near the crime scene.....”

[Muvunyi, ICTR Appeals Chamber, August 29, 2008, Para. 80]

276. Either party engaged in fighting may get reached back for various reasons or the battle may come to cessation at a stage. But in any of such circumstances either party engaged in fighting cannot initiate any prohibited act directed against the civilians who were not active part to the fight happened. In the case before us, it stands proved that during second time fight the Basu Bahini retreated and its members went into hid wherever they could. In such circumstances intervention by the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan, the local mighty Razakars could have had a decisive effect in sparing innocent human lives. But omission in doing so was culpable in nature indeed which substantially facilitated in carrying out the attack directing the

civilians of village Gurui that resulted in killing of numerous civilians. ICTR has observed in the case of **Rutaganda**, that-

“This act or omission [for the crime of extermination] includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.”

**[Rutaganda, (Trial Chamber),
December 6, 1999, Para. 84]**

277. The revenge and abhorrence arising out of failure to liquidate the counter part, the Basu Bahini led the group of Razakars and Pakistani army engaged in fighting with them prompted to conduct attack upon the civilian population that resulted in large number of killings and systematic brutality, we may validly presume it, in view of facts divulged from the evidence tendered.

278. We reiterate that there has been an absolute prohibition against targeting non combatant civilians in customary international law, in war time situation. But the perpetrators accompanied by the accused persons in the name of combating their counter part had launched deliberate attack directing civilian population, even after cessation of the fight they fought against Basu Bahini, an organized resistance group.

279. It is evinced that the group of Pakistani army and Razakars being accompanied by accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan started attacking the innocent unarmed

villagers. Why they did it? They could have attacked the members of their counter part, the Basu Bahini. But they aggressively opted to attack directing civilians with the intention to wipe out the non combatant civilians around the locality, the facts unveiled suggests to conclude it.

280. The group of perpetrators being accompanied by the accused persons presumably thought that the population of the locality of village Gurui where they were engaged in encountering the Basu Bahini sided with the freedom fighters or pro-liberation group and it imbued them in conducting deliberate attack intending to wipe out the non combatant villagers. It was the *actus reus* of the attack. The accused persons were quite aware of the criminal intent of the group of perpetrators and they also knew that their actions assisted in the commission of the crime.

281. On totality of facts proved we find that the accused persons, the mighty and notorious Razakars of Nikli Thana participated in a **JCE** [joint criminal enterprise] in killing the civilians of village Gurui. Taking the large scale killings occurred together with the fact of the large number of armed assailants forming group into account we arrive at the only reasonable inference that all those who participated in the **JCE** intended to kill civilians on a mass scale. Accordingly, we conclude that the accused persons, their cohort Razakars and Pakistani occupation army intentionally

participated in a **JCE** to kill members of civilian population on a mass scale.

282. The accused persons thus committed the offence of 'extermination' as a crime against humanity through their conscious and culpable participation in the **JCE**. Given the manner and situation in which the attacks were conducted and the number of victims we find it beyond reasonable doubt that the Pakistani occupation army and Razakars accompanied by the accused persons intentionally participated in a mass killing of members of the civilian population.

283. The perpetrators in the name of engaging in fighting with their resistance group had conducted such attack directed against civilian population which blatantly violated the fundamental rights of civilians of the crime village who were not engaged in fight with them. And the perpetrators being accompanied by the accused persons did it not only by causing death of civilians but also by causing plundering and burning down their livelihoods. Such deliberate criminal acts committed in violation of international customary or treaty law crossed the level of gravity of other acts constituting the offences of crimes against humanity. The attack was collective in nature which resulted in large scale killing. Accused Syed Md. Hussain and Md. Moslem Prodhan were active and culpable part of the collective attack stands proved from the evidence evaluated above.

284. Specific minimum number of victims is not required to constitute the offence of extermination. It does not suggest that a lower number of victims would disqualify that act as “extermination” as a crime against humanity, nor does it suggest that such a threshold must necessarily be met. It is now well settled.

285. Scale of crimes may make it impracticable to require a high degree of specificity as to who had killed which victim, in conjunction with the attack. But it , in the case in hand, remained undisputed that 26 civilians of village Gurui were gunned down to death by bringing them at two places on forcible capture when the accused persons were with the perpetrators, as found proved from the evidence. It is now settled jurisprudence that extermination is to be interpreted as murder on a larger scale - mass murder. It is to be seen whether the act used to carry out the offence of extermination involved an element of mass destruction which is not required for murder. In the case before us, it stands proved that the deliberate and systematic attack resulted in killing of 26 non combatant villagers who were not party to the conflict.

286. Large number of killing civilians happened by the group of Razakars and Pakistani army who prior to the attack directing the civilian population was engaged in fighting with Basu Bahini, an organized resistance group. The facts and circumstance lead to infer that the intent of the group of perpetrators was to eliminate a number of civilians knowing the consequence of their act carried

out and the accused persons accompanying the group thus were part of the murderous enterprise. All these collectively constituted the offence of ‘extermination’ as crime against humanity. What is ‘extermination? The **ICTR Appeals Chamber** observed in the case of *Seromba* that-

“The Appeals Chamber recalls that extermination as a crime against humanity under Article 3(b) of the Statute is the act of killing on a large scale. The Appeals Chamber stresses that in the jurisprudence of both ad hoc Tribunals, the necessary actus reus underlying the crime of extermination consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.”

[Seromba, ICTR Appeals Chamber, March 12, 2008, Para. 189]

287. As regards element to constitute the offence of ‘extermination’ it has been observed by **ICTR Appeals Chamber** that--

“.....very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder.”

**[Ntakirutimana and Ntakirutimana,
(Appeals Chamber), December 13,
2004, Para, 516]**

288. Therefore, it is now settled that murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a ‘mass scale’.

289. The expression ‘large scale’ or ‘large number’ does not suggest a numerical minimum. Extermination may be committed intending to bring about the death of a large number of individuals. *Mens rea* of the offence of ‘extermination’ refers to measures against individuals intending to cause their death. It is now settled that ‘extermination’ requires that the perpetrators intended to commit acts directed at a group of individuals collectively, and whose effect was to bring about a mass killing.

290. In the case before us, it transpires that purpose of conducting attack was to achieve destruction by deliberate killing of significant number of villagers as the group of perpetrators formed of Pakistani army and Razakars, the counter part of Basu Bahini considered them to be the people providing shelter to Basu Bahini, we may presume it lawfully.

291. It is evinced that the perpetrators being aided and assisted by the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan, potential Razakars, also had carried out devastating activities by plundering and arson which together with the act of mass killing indisputably caused grave mental harm to the survived villagers and relatives of the victims, cumulative evaluation of facts unveiled from evidence suggests this inference.

292. It is evinced that in conjunction with the attack P.W.05 heard indiscriminate gun firing from the end of southern part of village Gurui and could see flames of fire and then the Razakars and Pakistani army men moved towards Nikli Thana. Presumably on the way of going back from the crime site the perpetrators had carried out such destructive activities.

293. The fact of conducting destructive activities gets corroboration from P.W.11 and P.W.12, two direct witnesses who testified that they remaining in hiding in the pond saw flames of fire from the end of north as the Razakars and Pakistani army men had set the house of Rahmat Ali and others on fire.

294. We reiterate that causing harm by plundering and burning down the properties of civilians indeed involved serious despondency to the victims of the attack. Destruction of houses and belongings of innocent civilians by such criminal acts was indeed expresses great contempt for the people and their normal livelihood and it constituted the offence of 'other inhumane act'.

295. Therefore, causing such deliberate mental harm, in conjunction with the attack, constituted the offence of other inhumane act as well. Thus, the purpose of the attack upon the civilians who did not take any active part in hostilities was unlawful and grave violation of Geneva Convention 1949 and International Treaty laws which provide protection to non combatant civilians.

296. It is immaterial to show that either of the accused persons himself had gunned down the victims. Act and conduct of the accused persons are reasonably sufficient to establish their 'concern' and 'participation' with the commission of the mass killing, as an accomplice. The group of Pakistani army obviously had to borrow guidance and assistance from the accused persons, the local potential Razakars accompanying them in causing forcible capture of the victims before they were gunned down to death.

297. The act of accompanying the group of perpetrators and remaining present at the crime site made the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan consciously 'concerned' with the mass killing and destructive activities constituting the offence of other inhumane act. It has been found proved too that devastation of the civilians' properties as ancillary to the event of mass killing, the principal act was also carried out which aggravates the pattern of the attack.

298. It is now settled that 'perpetration' refers to commission of offence individually (by one person alone and directly), jointly with

another person, or through another person. While 'participation' refers to act of inducing, aiding, abetting, encouraging or otherwise assisting the commission of a crime or the facilitation thereof.

299. The uncontroverted evidence presented impels the conclusion that the accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan 'participated' in committing crimes in question, by act of encouragement, assistance and accompanying the Pakistani occupation army to the crime site.

300. Besides, it transpires patently that the accused persons knowingly and consciously participated in perpetrating the event of mass killing. Participation of the accused persons in effecting the act of bringing civilians on forcible capture behind the house of Abdul Khalek of village Gurui stands proved by the consistent testimony of P.W.07 and P.W.08.

301. Another direct witness P.W.11 also could see accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan and their accomplices bringing 15/20 people at Bot Tola, south to Rahmat Ali's house and then these two accused persons and their accomplice Razakars and Pakistan army men shot those detained persons to death there.

302. The above uncontroverted pertinent fact as divulged from the testimony tendered leads to the conclusion that the accused persons did not merely accompany the Pakistani occupation army to the

crime site, rather they consciously participated to the commission of horrific killings, by their act of assistance and aiding.

303. It appears that the defence merely attempted to deny what the prosecution witnesses testified. But it failed to shake its truthfulness. Besides, all the witnesses examined seem to be natural and direct witnesses to material facts and there has been nothing to allow their consistent testimony to go on air. We are forced to concede with the argument advanced by the prosecution that the accused persons' presence with the group of attackers is sufficient to prove their 'participation' in the commission of the offence of mass killing and lack of specificity as to which assailant actually had killed which detained victim does not make the accused persons absolved of liability.

304. In 1971, the entire territory of Bangladesh had to face atrocious attacks by the Pakistani occupation army who had carried out crimes against the non combatant civilians on having active collaboration and assistance of Razakars, an auxiliary force which eventually became an infamous armed organization for 'operational purpose' maintaining 'static relation' with the armed forces. The Razakar Ordinance 1971 goes to show that the members of the Razakar force were under command of Pakistani army and they used to actively collaborate with the Pakistani army stationed around a particular locality.

305. The accused persons have been indicted to have incurred liability under section 4(1) and 4(2) of the Act of 1973. Accused Syed Md. Hussain alias Hossain was a Razakar Commander and Md. Moslem Prodhan too was a potential Razakar. Naturally, they might have had influence over the Pakistani army. But since they formed part of a group of 70/80 Pakistani army and Razakars it cannot be assumed that they had effective control and command over the entire group formed principally of Pakistani army men, and thus, the accused persons cannot be held liable under section 4(2) of the Act of 1973 which corresponds to the theory of superior responsibility.

306. In view of above deliberation made on evidence adduced we arrive at decision that the prosecution has been able to prove it beyond reasonable doubt that -

- (i) on the day as narrated in charge framed there had been fight between the group formed of Pakistani army and Razakars accompanied by accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan and Basu Bahini, a locally formed resistance group of freedom-fighters in the locality of village Gurui;
- (ii) at a stage of second time encounter the Basu Bahini retreated and its members went into hid ;
- (iii) in such situation instead of going back, the group of Pakistani army and Razakars started attacking the civilians and in conjunction with the attack 26 civilians were detained on forcible capture and were brought at two places—Abdul Khalek’s house and Bot Tola near

Rahmat's house where they were brutally gunned down to death;

- (iv) accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan remained actively present with the group of attackers and aided, assisted and substantially contributed to the perpetration of the large scale killing constituting the offence of 'extermination' and also 'other inhumane acts' they did it knowing the consequence of their act and conduct; and
- (v) The accused persons were conscious and active part of the enterprise, sharing *mens rea* of the group of attackers, and thus, they are criminally liable under the theory of **JCE [Basic form]**.

307. Therefore, on extensive appraisal of the evidence tendered we come to decision that the accused (1) Syed Md. Hussain alias Hossain[absconded], and (2) Md. Moslem Prodhan are found liable for participating, abetting, facilitating and also for complicity in committing large scale killing of members of civilian population, by launching attack, constituting the offences of '**extermination**' and '**other inhumane acts**' 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, and therefore, they incurred liability under section 4(1) of the said Act.

Adjudication of Charge No.04

[Genocide, extermination, rape, abduction, confinement and torture committed at village Dampara under Nikli Police Station]

308. Summary Charge : That on 23 September, 1971 at about 12.00/01.00 P.M. Pakistani army along with accused Razakar Commander Syed Md. Hussain alias Hossain and a group of 50/60

Razakars including local collaborator Shaheb Ali alias Teku Chairman [now dead] having come to mostly Hindu populated village Dampara under Nikli Police Station of the then Kishoreganj Sub-Division gathered 39 [thirty nine] Hindu male people in front of the yard of the house of Banabashi Sutradhar and confined them there. Meanwhile, the accused Syed Md. Hussain alias Hossain along with some Pakistani army men and Razakars committed rape on some Hindu women of that village. Thereafter, at about 04.00 P.M. accused Syed Md. Hussain alias Hossain and his accomplice Razakars and Pakistani army men having taken away the detained 39 Hindu civilians came to Nikli Thana and kept them confined there. In the evening, the accused and his accomplices mercilessly tortured those Hindu detainees in Nikli Thana.

309. Thereafter, on the same day at about 08.00/08.30 P.M the accused Syed Md. Hussain alias Hossain along with some Razakars, with intent to destroy, in whole or in part, the Hindu religious group, having taken 35 detainees of the 39 detained Hindu civilians away from Nikli Thana to Nikli Moha Shoshan, situated just at the other side of the river, shot them there and out of said 35 detainees 34 detainees were instantly killed there and the rest one became severely injured who could manage to flee away from there but succumbed to his injuries later.

310. On the following day [24.09.1971] at about 11.00 / 12.00 P.M. the accused Syed Md. Hussain alias Hossain forcibly took

Rois Uddin and Babar Ali [both are dead] away to said Moha Shashan and forced them to carry and dump the dead bodies of the victims to Ghorautra river. Because of being under aged, 4[four] other detained people were released later.

311. Thereby, accused Syed Md. Hussain alias Hossain has been charged for participating , abetting, facilitating and complicity in the commission of offences of genocide, extermination [large scale killing of civilians], rape, abduction, confinement and torture as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of the 1973 which are punishable under section 20(2) of the said Act for which the accused has incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

312. Prosecution in order to prove the arraignment brought in charge no.04 has adduced in all 05 witnesses who have been examined as P.W.01, P.W.02, P.W.03, P.W.04 and P.W.06. Of them P.W.03 and P.W.04 are the victims of sexual violation and the others are the locals of the crime sites, and thus, had occasion to observe the acts carried out in conjunction with the attack, prosecution alleges. Let us first see what they narrated on dock before we arrive at finding on appraisal of it.

313. P.W.01 Badal Chandra Barman [59], a resident of village Dampara under Police Station Nikli of District Kishoreganj in

narrating the situation prevailing in 1971 around their locality stated that in 1971 he was a student of class V. P.W.01 is a direct witness to facts materially related to the commission of the principal offence as he too was allegedly detained with other civilians.

314. In describing the event narrated in charge no.04, P.W.01 stated that on 06th day of Bangla month Ashwin in 1971 at about 02:30/03:00 P.M Nikli Thana Razakar Commander accused Syed Md. Hussain being accompanied by 50/60 Razakars and Pakistani army men arrived at Dampara bazaar ghat by a launch. 20/25 Razakars and the Pakistani army men got down of the launch and the rest of Razakars and Pakistani army men came to the ghat of Banabasi Sutradhar's house by the launch. The Razakars and army men who got down at the Dampara bazaar ghat forcibly brought 10/12 Hindu civilians in front of the house of Banabasi Sutradhar from that bazaar on capture. And the Razakars and Pakistani army men who came to the ghat in front of Banabasi Sutradhar's house took him [P.W.01] and 25/27 male Hindu civilians in front of Banabasi Sutrodhar's house on capture and kept all of them assembled there. At that time an elderly woman Bishi Sutradhar [now dead] coming to them informed that Razakars and Pakistani army men were causing torture to their female inmates. But they could not take any step as they were kept detained.

315. P.W.01 next stated that afterwards accused Syed Md. Hussain along with some Razakars and Pakistani army men moved towards neighbouring village Nabinpur by launch and on returning therefrom accused Syed Md. Hussain informed his cohort Razakars and Pakistani army men that all the Hindus of village Nabinpur had fled away. Then the Razakars and Pakistani army men asked to take them the 39 civilians detained there to Nikli Thana by boats terming them 'Malaun'. And then they were taken to Nikli Thana by a big boat under guard of two armed Razakars. The Pakistani army men and other Razakars along with accused Syed Md. Hussain had left the site for Nikli Thana by launch.

316. In respect of what happened next to taking them at Nikli Thana P.W.01 stated that 35 adult detainees were made seated in two lines at the veranda of Thana and he [P.W.01], tender aged Badal Sutradhar, Gopal Sutradhar and Sunil Barman got seated beneath a tree in front of Thana. One hour later those 35 detainees were tied up by rope together and the Razakars started beating them by stick and bayonet causing severe injury. Later on the Razakars and Pakistani army men took those detainees away therefrom by boat and they four were kept detained in the lock up of Thana. Half an hour later they heard gun firing and one hour after the Razakars and the Pakistani army men who took the detainees away by boat returned back to the Thana and were conversing amongst

themselves that the detainees they took away by boat were killed at the crematory.

317. P.W.01 Badal Chandra Barman also stated that on the following morning at about 09:00/10:00 A.M an army Major and accused Syed Md. Hussain came to them and wanted to know whether they intended to go back home and then they set them released from lock up, and thus, they four returned back home. On returning home he[P.W.01] visited the house of Kamini Barman[now dead] when he found Kamini Barman, one of 35 detainees who were shot by gun firing taking at the crematorium on the preceding day, had been able to escape despite receiving bullet hit injury in hand, crossing the river by swimming. He [P.W.01] also found his neighbours Kamola Barman, Samala Barman, Shova Rani Sutradhar and other Hindu women in injured condition as they were subject to physical invasion by the Razakars and Pakistani army men on the preceding day. Village doctor Dharendra Chandra Acharja provided them necessary treatment.

318. In respect of identity of the detainees, P.W.01 stated that the 34 detainees who were killed by Razakars and Pakistani army men taking them at the crematorium included Banabasi Sutradhar, Sunil Sutradhar, Anil Sutradhar, Madhu Sutradhar, Surendra Sutradhar, Abinash Sutradhar, Aradhan Sutradhar, Kartik Sutradhar, Sudhir Sutradhar, Manindra Sutradhar, Sirish Sutradhar and Rajani Barman of their village Dampara. P.W.01 finally stated that their

village Dampara was predominantly Hindu populated. He [P.W.01] heard the name of Razakar Commander accused Syed Md. Hussain from Teku Chairman and afterwards in the month of Ashwin when their village was attacked he saw accused Syed Md, Hussain and knew him.

319. P.W.01 has been cross-examined on behalf of the absconding accused Syed Md. Hussain. P.W.01 expressed his ignorance about the name of this accused's father and native village. In reply to question put to him by the defence P.W.01 stated that no case was initiated over the event he narrated, after independence; that he could not recognise the Razakars accompanying the accused Syed Md. Hussain; that their house was about quarter mile far from Dampara bazaar and that the ghat of Banabasi Sutradhar's house was adjacent north to their house.

320. P.W.01 also stated in reply to question put to him by the defence that there had been some Razakars when Bishi Sutradhar informed them about causing torture to Hindu women and at about 08:00 P.M the 35 detained persons were tied down at the veranda of Thana. P.W.01 denied the defence suggestion put to him that no event as he testified occurred or that he was not detained and that he testified falsely and being tutored. Defence however does not appear to have denied specifically the phases of attack happened as testified by the P.W.01 and the version made on material particulars remained uncontroverted.

321. P.W.02 Badal Chandra Sutradhor [60] is a resident of village Dampara under Police Station Nikli of District Kishoreganj. In 1971 he was 14/15 years old and used to work as a carpenter. He stated that Madhya Dampara was a part of village Dampara where they used to reside in 1971.

322. In respect of the event of attack as listed in charge no.04, P.W.02 stated that on 06th day of Bangla month Ashwin in 1971 at about 02:30/03:00 P.M Razakar Commander Syed Md. Hussain and Teku Chairman being accompanied by 60/65 Razakars and Pakistani army men arrived at Dampara bazaar ghat by a launch. 20/25 Razakars and army men getting down of the launch detained some Hindu civilians from the bazaar and brought them forcibly in front of the house of Banabasi Sutradhar. Razakars and army men coming by the launch at the ghat of the house of Banabasi Sutradhar captured him [P.W.02] and some other male Hindus and brought them at the place in front of Banabasi Sutradhar's house where they [detained persons] were kept under guard of two armed Razakars and at a stage one woman Bishi Sutradhar coming to them informed that Razakars and army men were causing physical invasion to Hindu women. Then 30/35 Razakars and army men moved to their neighbouring village Nabinpur by the launch and half an hour later they came back and started conversing that 'Malauns [Hindus] of village Nabinpur had fled away'.

323. P.W.02 continued narrating that then on instruction of Razakar Commander accused Syed Md. Hussain 39 detained Hindu civilians including him were taken away to Nikli Thana under guard of two armed Razakars by a boat—it was about dusk. Few minutes later, Razakars and Pakistani army men arrived at Nikli Thana by the launch and then on instruction of accused Syed Md. Hussain the Razakars and Pakistani army men, keeping him and three others segregated, tied down the rest 35 detainees with rope at the veranda of Thana. Considering tender age, he [P.W.02] and three other detainees were made seated beneath a tree in front of Thana where the 35 detained persons were subjected to beating by Razakars and Pakistani army men with stick and bayonet and then they took them away by boat and they four [P.W.02 and three other detainees] were kept detained at the Thana lock up. At about 08:00/08:30 P.M he heard indiscriminate gun firing and about one hour later the Razakars and the Pakistani army men accompanied by Syed Md. Hussain came back to Thana and started conversing that they had annihilated 35 ‘Malauns’ [Hindus].

324. On the following morning at about 09:00/10:00 Razakar Commander accused Syed Md. Hussain and one Pakistani army man came to them and wanted to know whether they would be able to go back home. They replied in positive, and thus, on getting release he , Badal Barman[P.W.01], Gopal Sutradhar and Sunil Barman returned back home, P.W.02 stated.

325. P.W.02 also stated that the 35 detained Hindus who were killed included his father Aradhan Sutradhar, his elder brother Kartik Sutradhar, his cousin brothers Sudhir Sutradhar, Monindra Sutradhar , Shirish Sutradhar, Sukumar Sutradhar and Moni Sutradhar, his brother-in-law Madhu Sutradhar, his nephews Khitish Sutradhar, Nitish Sutradhar, Surendra Sutradhar and many others of their locality.

326. On returning home he[P.W.02] learnt that Kamini Barman[now dead], one of the 35 detainees who were taken by boat from Thana to annihilate them, returned back home despite receiving bullet hit injury in hand, by swimming the river, P.W.02 stated. He [P.W.02] also found his neighbour Kamola Barman [P.W.03], Shamala Barman[P.W.04] and many other Hindu women in indisposition condition due to persecution the army men and Razakars had caused to them on the preceding day and they told that Razakars and army men had seized their supreme honour. Later, doctor Dharendra of their village provided them necessary treatment. P.W.02 also stated that afterwards he heard that Razakars and army men after causing death of the 34 detainees made their dead bodies floated in the river.

327. On cross-examination on part of the accused Syed Md. Hussain P.W.02 stated the he could not say the name of other Razakars excepting accused Syed Md. Hussain; that he did not see accused Syed Md. Hussain either prior or subsequent to the event.

In reply to defence question P.W.02 stated that in 1971 accused Syed Md. Hussain was a police officer; that their house was about 40 yards far from the ghat of Banabasi Sutradhar's house.

328. P.W.02 also stated in reply to defence question put to him that the Pakistani army men and Razakars had captured 10/12 civilians from Dampara bazaar who were taken in front of Banabasi Sutradhar's house and 27 people including him[P.W.02] were captured from Madhya Dampara. P.W.02 denied the suggestion put to him that accused Syed Md. Hussain was not a Razakar and at the time of the event the accused was a police officer. P.W.02 also denied the defence suggestion that he was not detained; that he did not see the event; that no event took place as testified and that what he testified was untrue and tutored. Defence does not appear to have denied specifically what has been testified by the P.W.02 on material particulars relevant to the principal event of killing and causing physical invasion upon the Hindu women, in conjunction with the attack.

329. P.W.03 Kamola Rani Barman [66] is a resident of village Dampara. In 1971 she was 21 years old and used to stay at her husband Jotindra Chandra Barman's house at village Dampara. She is a victim of physical invasion caused upon her in conjunction with the attack.

330. P.W.03 in respect of the event of attack as listed in charge no.04 stated that on 06th day of Ashwin in 1971 Sanai Razakar

came to their house and asked the male Hindus to go with him to the place in front of the house of Banabasi Sutradhar for getting their identity card prepared. And thus Sanai Razakar and his cohort Razakars took away her husband Jotindra Chandra Barman, her father Avi Chandra Barman and father-in-law Jogindra Chandra Barman to the place in front of the house of Banabasi Sutradhar. After taking away the male inmates only she and her mother had been staying at home. On the same day in the afternoon some Razakars along with Sanai Razakar came to their house and caused brutal physical invasion upon her [P.W.03]. At that time Razakars also tortured Shamala Barman, Shova Rani Sutradhar, Bhanumoti Sutradhar and other women apart from her. Due to such 'torture' inflicted they the ravished women became unconscious. On the following day at about 10:00 A.M, Badal Sutradhar [P.W.02], Badal Barman [P.W.01], Gopal Sutradhar [now dead] and Sanu Barman [now dead] came to their house and arranged her treatment by calling a doctor. She [P.W.03] knew from those four people that her husband, father, father-in-law and others who were kept detained in front of Banabasi Sutradhar's house were later on killed taking them to the crematorium.

331. P.W.03 finally stated that Teku Chairman was the Chairman of Peace Committee and accused Syed Md. Hussain was the local Razakar Commander. She heard from Sanai Razakar and other

Razakars that accused Syed Md. Hussain was the commander of Razakars, but she however did not see him.

332. In cross-examination, P.W.03 stated that Sanai Razakar's house was at the northern side of their village Dampara; that accused Syed Md. Hussain was a police man and Razakar Commander as well; that she could not name the Razakar who ravished her. P.W.03 stated that her heart got broken when she recalled the event [at this stage P.W.03 started shedding tears]. It has been re-affirmed in cross-examination that on the following day she was treated by a doctor. P.W.03 denied the defence suggestion that accused Syed Md. Hussain was not a Razakar Commander and what she testified was untrue and tutored.

333. P.W.04 Shamala Barman [65] is a resident of crime village Dampara .In 1971 she was 20 years old and had been staying at her husband's house at Dampara village. She is another victim of grave sexual invasion committed upon her in conjunction with the attack by the Pakistani army and Rzakars.

334. In respect of the event as narrated in charge no.04, P.W.04 stated that on 6th day of Bangla month Ashwin in 1971 in the afternoon Sanai Razakar [now dead] and his cohort Razakars took away her husband Abhoy Chandra Barman and her father Rasik Chandra Barman in front of the house of Banabasi Sutradhar telling them that Hussain Daroga [accused] had called them there. After they were taken away she [P.W.04] had been in the house alone. On

the same day afterwards Sanai Razakar came to their house along with some Pakistani army men and seized her honour. On the following day at about 11:00 AM her neighbours Badal Barman [P.W.01], Badal Sutradhar [P.W.02] and Gopal Sutradhar arranged her treatment by calling Dhiru doctor. She knew from them [P.W.01 and P.W.02] that her husband and her father detained on the preceding day were killed at Nikli crematorium by gun shots. She[P.W.04] herself did not see accused Razakar Syed Md. Hussain, but she heard from Sanai Razakar and Teku Chairman that all the criminal activities happened on his[accused Syed Md. Hussain] instruction [at this stage P.W.04 started crying profusely].

335. In cross-examination P.W.04 stated that Sanai of their locality was a Razakar and Teku Chairman was the Chairman of Peace Committee. She had occasion to meet Kamola Rani Barman[P.W.03] on the following day and she[P.W.04] was treated at her home and that Kamola Barman's house and that of their own were intervened by 10 houses. P.W.04 in reply to defence question put to her stated that 2/3 Pakistani army men and Razakar ravished her and she could not identify any of them. P.W.04 denied the defence suggestion that accused Syed Md. Hussain was not a Razakar and no such event as she testified happened and that what she testified was untrue and tutored.

336. P.W.06 Md. Taher Ali [59] is a resident of village Kamarhati under Police Station Nikli of the then Kishoreganj Sub-

Division. In 1971 he was 14/15 years old. Their house was adjacent to Nikli Thana. In addition to activities relating to organizing Razakars in Nikli he [P.W.06] testified some crucial facts relating to the event narrated in charge no.04 involving detaining Hindu civilians and killing them afterwards to which he was a direct witness.

337. P.W.06 stated that 2/3 months after the war of liberation ensued in 1971 about 50 Razakars came to Nikli from Kishoreganj under the leadership of accused Syed Md. Hussain and they got four bunkers prepared in Nikli Thana Sadar. At that time the people used to say that accused Syed Md. Hussain was the 'Daroga' of those Razakars and his accomplice Razakars used to obey him. He [P.W.06] during that time saw Razakar accused Syed Md. Hussain around Nikli Thana locality and thus he got acquaintance about him. A local Razakar Ashrab Ali[now dead] recruited Razakars and used to arrange their training in the Eidgah field near the G.C School under the leadership of accused Syed Md. Hussain.

338. In respect of the event as narrated in charge no.04, P.W.06 stated that on the 06th day of Bangla month Aswin[1971] just before the dusk he had been staying at Nikli bazaar adjacent to Nikli Thana when he saw the Razakars bringing about 30/35 Hindu civilians having caps on heads kept detained at Nikli Thana. Accused Syed Md. Hussain was known as the commander of those Razakars. After keeping the Hindus brought there on capture the

Razakars became so active and then he [P.W.06] came back home. In the night at about 08:00/08:30 P.M he[P.W.06] heard indiscriminate gun firing and uproarious noise from the end of crematorium, north-west to their home, and thus, they being panicked laid down on floor of their house.

339. P.W.06 also stated that on the following morning at about 07:00/08:00 AM he along with many others went to the Shoshankhola [crematorium] where they found dead bodies of 34 persons who were brought on the preceding evening at Nikli Thana on capture. He [P.W.06] knew 2/3 persons of them beforehand. Then he came back home therefrom. On the same day at about 02:00 P.M when he had been at Nikli bazaar Rais Uddin[now dead] and Babar Ali[now dead] told him that they dropped the 34 dead bodies he[P.W.06] saw on the preceding day in the river Ghorautra taking those to the east from the crematorium by boat.

340. In cross-examination done on part of accused Syed Md. Hussain, P.W.06 stated that accused Syed Md. Hussain was the commander of Razakars in Nikli Thana and none of their union was Razakar commander. In reply to defence question put to him P.W.06 stated that the Razakar camp was set up at the place about 200 yards far from their house; that the *Shoshankhola* [crematorium] was at west-north corner from their house, about 300 yards away, and that Nikli Thana was situated at Nikli bazaar. P.W.06 however expressed ignorance about the names of 2/3

detainees whom he could recognise. P.W.06 denied the suggestion put to him by the defence that accused Syed Md. Hussain was not a Razakar; that he did not know him and what he testified implicating accused Syed Md. Hussain was untrue and tutored.

Finding with Reasoning on Evaluation of Evidence

341. This charge involves the event of attack directing the Hindu civilians of village Dampara under Police Station Nikli that allegedly resulted in indiscriminate killing of Hindu civilians, rape, abduction, confinement and torture. A group formed of Pakistani occupation army and 50/60 Razakars accompanied by the accused Syed Md. Hussain alias Hossain and local collaborator Teku Chairman had launched the attack intending to destroy the local Hindu religious group, in whole or in part, the charge framed arraigns. Accused Syed Md. Hussain, commander of local Razakar Bahini has been charged to have had participated, facilitated and abetted the accomplishment of the principal crimes by launching such systematic and designed attack in 1971 during the war of liberation, and thus, he incurred liability also under section 4(2) along with section 4(1) of the Act of 1973, the charge framed alleges.

342. Drawing attention to the evidence presented in support of this charge Ms. Tureen Afroz, the learned prosecutor submitted that the target of the attack launched was the Hindu population of village Dampara and 39 Hindu civilians were forcibly captured of

whom 34 were killed, four tender aged detainees were set at liberty afterwards and one escaped despite receiving bullet hit injury. Sexual invasion was also committed on Hindu women, in conjunction with the attack and the totality of the facts together with the criminal act of forceful conversion of Hindu civilians of village Dampara which happened few days back impels the conclusion that the intent of the perpetrators was to destroy the Hindu religious group, the learned prosecutor added.

343. The learned prosecutor went on to submit that the accused Syed Md. Hussain alias Hossain had a substantive role in carrying out the attack and his culpable act and conduct forming part of the attack made him 'participant' in the commission of the crimes as he knowing consequence of his act had deliberately accompanied the group intending to facilitate in accomplishing the crimes. The attack and the facts materially related to the killing, sexual invasion, causing serious mental and physical harm have been proved by the unshaken testimony of victims and other witnesses. All the elements are found to exist to constitute the offence of 'genocide'.

344. Mr. Abdus Sattar Palwan, the learned state defence counsel defending the absconding accused Syed Md. Hussain alias Hossain submitted that this accused has been falsely implicated with the alleged event. Accused's participation with the commission of the crimes could not be proved by credible evidence and he was not

with the group at the relevant time, and thus, he deserves acquittal of this charge.

345. Four of the five prosecution witnesses are victims and the survived inhabitants of the crime village who came on dock and described what they observed and experienced while the attack was launched and also subsequent to the attack. This charge rests on ocular evidence which needs to be shown credible. This burden lies upon the prosecution. However, in arriving at decision and finding on this charge bringing arraignment against the accused prosecution requires proving the following matters:

- (i) alleged attack was launched on the date and time at the village Dampara which was Hindu dominated;
- (ii) intention of such attack was to destroy the Hindu religious group, in whole or in part;
- (iii) the attack resulted in abduction, torture and killing of numerous Hindu civilians;
- (iv) the victims of the horrific attack were Hindu civilians which leaves the conclusion that the targets of the massacres were members of a Hindu religious group ;
- (v) accused in the capacity of commander of local Razakar Bahini accompanied the group of attackers formed of Razakars and Pakistani occupation army;
- (vi) the witnesses knew the accused Syed Md. Hussain alias Hossain beforehand; and
- (vii) accused by his act or conduct participated, abetted and facilitated the commission of the crimes alleged;

346. At the out set we reiterate that it is now settled, by the verdicts of *ad hoc* Tribunals (**ICTY, ICTR**) that even a single piece of evidence that is relevant will be relied upon to determine culpability of the accused. Additionally, this Tribunal (ICT-1) is not bound by the strict rules of evidence and that in any case, probative value of testimony of even a single witness is to be weighed and accordingly, acceptance of and reliance even upon uncorroborated evidence, *per se*, does not constitute an error in law, in finding an accused guilty under the Act of 1973.

347. It is evinced from the testimony of P.W.01, a direct witness that a group formed of 50/60 Razakars and Pakistani army men accompanied by accused Syed Md. Hussain had launched attack on 06 Ashwin in 1971 at about 2:30/03:00 P.M on arriving at Dampara bazaar ghat by launch. The fact of launching attack remained uncontroverted. It stands corroborated by P.W.02, another victim of the attack. Defence simply suggested P.W.01 and P.W.02 that no such event they narrated happened or they [P.W.01 and P.W.02] were not detained, in conjunction with the attack.

348. Defence does not appear to have denied the fact that the accused Syed Md. Hussain alias Hossain was with the group of perpetrators at the crime site. Rather, it transpires that in reply to question put by the defence in cross-examination P.W.01 and P.W.02 as well stated that they could not recognise the other Razakars accompanying the accused Syed Md. Hussain at the time

of the event of attack. In this way it has been re-affirmed that accused Razakar Syed Md. Hussain alias Hossain was with the group of perpetrators.

349. It also transpires from the testimony of P.W.01 and P.W.02, two detainees that the group formed of Pakistani occupation army and Razakars accompanied by the accused first arrived at Dampara bazaar ghat by launch. Part of the group got down of the launch and the rest of the group moved to the ghat at Banabasi Sutradhar's house by the launch. The first part of the group of perpetrators forcibly brought 10/12 Hindu civilians in front of the house of Banabasi Sutradhar from that bazaar on capture and second part of the group of perpetrators brought 25/27 Hindu civilians including P.W.01 and P.W.02 at a place in front of Banabasi Sutradhar's house on forcible capture and kept all of them detained there.

350. In conjunction with the attack and keeping them detained in front of Banabasi Sutradhar's house, it transpires from the evidence of P.W.01 that accused Syed Md. Hussain along with some Razakars and Pakistani army men moved towards neighbouring village Nabinpur by launch and on returning therefrom accused Syed Md. Hussain informed his cohort Razakars and Pakistani army men that all the Hindus of village Nabinpur had fled away.

351. The above version remained unimpeached and it indicates how extremely antagonistic attitude the accused and his cohort Razakars had against the members of Hindu religious group. It

together with the fact of detaining 39 Hindu civilians indisputably suggests the unerring inference that target of the perpetrators was the civilians belonging to Hindu religious group.

352. Detaining 39 civilians of Hindu community of village Dampara including P.W.01 and P.W.02 by the group of perpetrators accompanied by the accused Syed Md. Hussain remained unshaken. Defence does not dispute the fact of taking away the detained civilians to Nikli Thana.

353. P.W.01 and P.W.02 were forcibly captured along with other Hindu detainees and were taken to Nikli Thana. Naturally, they had occasion of seeing the acts and conduct of the perpetrators. The testimony of P.W.01 proves accused Syed Md. Hussain's presence with the group of perpetrators formed of Pakistani occupation army and Razakars. Defence could not refute it.

354. It is true that on cross-examination P.W.01 and P.W.02, two detainees expressed their ignorance about the name of this accused's father and his native village. But it does not *ipso facto* prove that P.W.01 and P.W.02 could not recognise the accused accompanying the group formed of Pakistani army and Razakars. Accused Syed Md. Hussain was the commander of Razakars formed in the locality of Nikli Thana. Besides, it may be reasonably presumed that the accused's visible association with the Pakistani army and the activities he carried out even in committing the offences as already found proved [charge nos. 01, 02 and 03]

obviously made them [P.W.01 and P.W.02] and the locals reasonably acquainted with the Razakar commander of notoriety. Besides, being detained for long time with the group of perpetrators might have made space to P.W.01 and P.W.02 of knowing the accused's name and identity.

355. P.W.06 Md. Taher Ali is a vital witness to the material fact of the accused person's association with the Pakistani army and his position in locally formed Razakar Bahini. In respect of knowing the accused Syed Md. Hussain beforehand the testimony made by P.W.06 carries much credence as their [P.W.06] home was adjacent to Nikli Thana.

356. His [P.W.06] testimony in this regard demonstrates that 2/3 months after the war of liberation ensued in 1971, about 50 Razakars coming to Nikli from Kishoreganj under the leadership of accused Syed Md. Hussain got four bunkers prepared in Nikli Thana Sadar. At that time the people used to say that accused Syed Md. Hussain was the 'Daroga' of those Razakars and his accomplice Razakars used to obey him. He [P.W.06] during that time saw Razakar accused Syed Md. Hussain around Nikli Thana locality and thus he got acquaintance about him.

357. Now what the P.W.06 testified about the fact relevant to the event and the accused's complicity therewith? Testimony of P.W.06 proves that on the 06th day of Bangla month Aswin [1971] just before the dusk while he had been staying at Nikli bazaar

adjacent to Nikli Thana he saw the Razakars bringing about 30/35 Hindu civilians having caps on heads and they were kept detained at Nikli Thana and accused Syed Md. Hussain was the commander of those Razakars.

358. It has been affirmed in cross-examination that accused Syed Md. Hussain was the commander of Razakars in Nikli Thana and none of their union was Razakar commander. It has also been unveiled in cross-examination that their [P.W.06] house was about 200 yards far from the Razakar camp set up at the place. The above version of P.W.06 made in cross-examination adds assurance to what has been testified in respect of knowing the accused Syed Md. Hussain and his position in locally formed Razakar Bahini.

359. Thus, knowing the accused since prior to the event and taking the detainees in Nikli Thana by the Razakars under the leadership of accused Syed Md. Hussain as testified by P.W.06 inspires credence and it provides corroboration to what has been narrated by P.W.01 and P.W.02 in respect of accused Syed Md. Hussain's presence with the group of perpetrators in launching attack at their village Dampara.

360. What happened to the 39 Hindu civilians after taking them to Nikli Thana on forcible capture? On the following morning four of the detainees including P.W.01 and P.W.02 were set at liberty from Nikli Thana captivity, presumably considering their tender age. Thus, P.W.01 and P.W.02 had opportunity of seeing and

experiencing what happened to the detainees after taking them in Nikli Thana.

361. Consistent testimony of P.W.01 and P.W.02 unerringly demonstrates that in Nikli Thana 35 detainees were subjected to physical assault tying them up by rope that resulted in severe injury. Later on Razakars and Pakistani army men took those detainees away therefrom by boat and they four [P.W.01, P.W.02 and two others] were kept detained in the lock up of Nikli Thana. Half an hour later they heard gun firing and one hour after the Razakars and the Pakistani army men who took the detainees away by boat returned back and were conversing amongst themselves that the detainees they took away by boat were killed at the crematorium.

362. The version of P.W.01 and P.W.02 in relation to killing the detained Hindus after bringing them at Nikli Thana on forcible capture gets corroboration from P.W.06 who also stated that on the following morning at about 07:00/08:00 AM he along with many others went to the Shoshankhola [crematorium] where they found dead bodies of 34 persons who were brought on the preceding evening at Nikli Thana on capture. He [P.W.06] knew 2/3 persons of them beforehand. Then he came back home therefrom. On the same day at about 02:00 P.M when he had been at Nikli bazaar Rais Uddin[now dead] and Babar Ali[now dead] told him that they dropped the 34 dead bodies he[P.W.06] saw on the preceding day

in the river Ghorautra taking those to the east from the crematorium by boat. Thus, the fact of killing 34 detained Hindus taking them at the crematorium, the killing site, stands proved.

363. What happened to one of the 35 detainees who were taken to the crematorium? It transpires that on returning home on release P.W.02 learnt that Kamini Barman[now dead], one of the 35 detainees who were taken by boat from Thana to annihilate them returned back home despite receiving bullet hit injury in hand, by swimming the river. Thus, P.W.02 naturally had opportunity of learning how and where the act of killing happened. This piece of version of P.W.02 who was also kept detained with the victims up to a significant phase remained unimpeached. Besides, this version of P.W.02 adds corroboration to P.W.06 who also found 34 dead bodies at the killing site on the following morning.

364. It also transpires that after causing death of the detainees their dead bodies were made floated in the river. Killing 34 Hindu civilians naturally could not be observed by any people. But the material facts forming stringent chain indisputably prove that none but Razakars and Pakistani army men who were engaged in committing the acts of causing the victims' detention in Nikli Thana on forcible capture eventually perpetrated the principal offence in execution of their plan and special intent.

365. In addition to detaining and killing Hindu civilians what other criminal activities were committed in conjunction with the

attack? Who were the victims of such criminal acts? The charge framed alleges that the perpetrators formed of Razakars and Pakistani army accompanied by accused Syed Md. Hussain alias Hossain, the Razakar commander committed rape on Hindu after causing forcible capture of male Hindus.

366. In relation to physical invasion committed upon the Hindu women, in conjunction with the attack P.W.03 and P.W.04, the two victims are the key witnesses. Due to social ostracism it is difficult indeed for the victims of war time sexual violence to narrate the trauma they sustained. However, P.W.03 and P.W.04 came before the Tribunal and narrated how they were seriously harmed. Testimony on material particular made by P.W.01 and P.W.02, two of the four released detainees goes compatibly with the testimony of those two victims.

367. It transpires from corroborative testimony of P.W.01 and P.W.02 that when the Razakars and Pakistani army brought Hindu civilians including them [P.W.01 and P.W.02] at the place in front of Banabasi Sutradhar's house on forcible capture and kept all of them assembled there under guard of two armed Razakars an elderly woman Bishi Sutradhar coming to them informed that Razakars and Pakistani army men were causing torture to their female inmates. But they, the detainees could not take any step against it.

368. Defence simply denied it in cross-examination. But it however could not impeach the above version of P.W.01 and P.W.02. What really happened to Hindu women after the instant worry Bishi Sutradhar had expressed to the male Hindu detainees as testified by P.W.01 and P.W.02?

369. P.W.03 Kamola Rani Barman, one of the victims in describing the grave harm committed on her honour stated that after taking away the male inmates only she and her mother had been staying at home. Afterwards, on the same day in the afternoon some Razakars along with Sanai Razakar came to their house and caused brutal physical invasion upon her [P.W.03]. At that time the Razakars also tortured Shamala Barman [P.W.04], Shova Rani Sutradhar, Bhanumoti Sutordhar and other women apart from her. Due to such 'torture' inflicted they the ravished women became unconscious.

370. How P.W.03 knew Sanai Razakar and accused Syed Md. Hussain alias Hossain? It transpires from her cross-examination that Sanai Razakar's house was at the northern side of their village Dampara and the accused Syed Md. Hussain was a police man and Razakar Commander as well. Defence could not bring anything which may reasonably create doubt as to reason of knowing those Razakars beforehand by the P.W.03.

371. In cross-examination, P.W.03 stated that she could not name the Razakar who ravished her and at a stage of replying the

question put to her by the defence she [P.W.03] started shading tears by stating that her heart got broken down when she recalled the event. Such demeanor of P.W.03 full of pains speaks a lot. In this way the act of causing sexual violence upon her stands affirmed. It is not required to show that accused Syed Md. Hussain physically participated in committing the act of sexual violence. Presence and participation of the accused in any of phases of the attack with the group of perpetrators is sufficient to expose his liability even for all the criminal acts conducted in conjunction with the attack.

372. P.W.04 Shamala Barman, another victim of grave sexual invasion categorically stated that after the male members of their family including her husband were taken away she [P.W.04] had been in the house alone. On the same day afterwards Sanai Razakar came to their house along with some Pakistani army men and seized her honour. It could not be refuted by the defence. Rather , the core essence of this piece of evidence of P.W.04 seems to have been affirmed in cross-examination as P.W.04 in reply to question put to her by the defence stated that 2/3 Pakistani army men and Razakar ravished her and she could not identify any of them.

373. Therefore, it stands proved that after detaining the male Hindus on forcible capture only their female inmates had been at their respective house and taking this advantage the perpetrators started committing physical invasion upon them and on sensing it

an elderly Hindu woman Bishi Sutradhar, finding no other way, rushed to the detainees and informed them of it. Thus, it may also be validly inferred that the act of sexual violence was committed upon the vulnerable and panicked Hindu women under a coercive situation and also by taking advantage of absence of the male inmates who were already taken away on forcible capture.

374. In conjunction with the attack, Hindu women including the P.W.03 and P.W.04 were severely bodily harmed by the Razakars and Pakistani army men-- it stands proved from their unshaken and consistent testimony on material particular. Already it has been proved that accused Syed Md. Hussain was the local Razakar Commander having close association with the Pakistani occupation army and he actively remained present at the crime site with the group of perpetrators by providing culpable assistance and aid and thus his 'concern' and 'culpable engagement' in launching attack directing the Hindu civilians are sufficient to establish his liability even for the act of rape or sexual violence upon Hindu women, in conjunction with the attack.

375. P.W.01 and P.W.02 were the detainees who were also taken away to Nikli Thana along with other detained Hindu civilians. Of them 34 detainees were killed by Razakars and Pakistani army in the night taking them to the crematorium. It already stands proved. P.W.01 and P.W.02 and two others got released from captivity on the following morning, considering their tender age. Defence could

not impeach it in any manner. What the P.W.01 and P.W.02 observed and learnt in relation to the attack occurred on the following day on returning home?

376. On the following day, on returning home P.W.01 and P.W.02 found their neighbours Kamola Rani Barman [P.W.03], Shamala Barman [P.W.04], Shova Rani Sutradhar and other Hindu women in indisposition condition and they [victims] told that Razakars and Pakistani army men had seized their supreme honour as they were subjected to physical invasion by the Razakars and Pakistani army men on the preceding day.

377. P.W.01 and P.W.02 being neighbours of the victims naturally had opportunity of hearing the harm caused to the victims, in conjunction with the attack happened on the preceding day. It remained undisputed that village doctor Dharendra Chandra Acharja provided the victims with necessary treatment. In the absence of anything contrary, it may safely be inferred that the victims and other women became in indisposition condition due to the sexual violence done upon them.

378. No woman shall opt to stain her self honour by narrating untrue story of sexual violence committed upon her. Naturally the P.W.03 and P.W.04, the victims could not recognise the actual perpetrators. But they however recognised that Razakars and Pakistani army men had attacked their honour and sexually ravished them that resulted in their injurious condition.

379. It also transpires that P.W.03 lost her conscious due to the ravishment committed upon her. It indicates the degree of invasion done to the Hindu women. Mere failure to recognize the accused person accompanying the perpetrators in committing sexual violence does not absolve the accused of liability as it has been proved that he actively remained present with the group and provided substantial facilitation in carrying out criminal acts, in conjunction with the attack, with special intent.

380. 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.

381. In the case in hand, pattern and extent of the attack suggest that using the act of rape upon Hindu women as a weapon the perpetrators intended to break-down their community which signifies their 'special intent'. Sexual violence committed in conjunction with the attack was an integral part of the process of destruction, specifically targeting Hindu women and contributing to the destruction of the Hindu religious group.

382. In a precedent-setting case, the **ICTR** found **Jean-Paul Akayesu** guilty of a number of crimes of genocide, including rape,

in its judgment. A report published in **The New York Times** dated **05.09.1998** on the verdict pronounced convicting **Jean-Paul Akayesu** by the **ICTR** speaks as below:

“Yesterday he was sentenced to life in prison, the maximum punishment at the tribunal. The greater impact of the court’s Akayesu decision will likely be seen in the area of rape and sexual violence. The court declared that rape may constitute genocide if committed with intent to destroy a particular group.....The court also issued the first definition of rape under international law. It called rape “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. Coercive circumstances need not include physical force, the court said. Threats and intimidation would qualify.”

[When Rape Becomes Genocide ; The New York Times, September 05, 1998]

383. The evidence of the two victims namely P.W.03 Kamola Rani Barman and P.W.04 Shamala Barman belonging to Hindu community of village Dampara depicts that they were subjected to physical invasion, in conjunction with the horrific attack that indisputably resulted in a coercive situation around the crime site. Detaining Hindu civilians, searching Hindu civilians of neighbouring place, conducting criminal act of physical invasion upon the Hindu women collectively speak of reigning, intimidating and coercive situation which were calculated to destruction of the Hindu religious group.

384. Evidence of P.W.01 Badal Chandra Barman and P.W.02 Badal Chandra Sutradhor goes to show that an elderly woman Bishi Sutradhar coming at the place where they and other Hindu civilians were kept detained told that their female inmates were being physically invaded and tortured by Razakars and Pakistani army men. P.W.01 along with three other tender aged detainees including P.W.02 were set at liberty, after taking them at Nikli Thana and on return home on the following day P.W.01 found his neighbours Kamola Barman [P.W.03], Shamala Barman, Shova Rani Sutradhar and other Hindu women in injured condition as they were subject to physical invasion by the Razakars and Pakistani army men on the preceding day and they had to undergo treatment by village doctor Dharendra Chandra Acharja. P.W.02 one of the spared detainees on returning home also heard from those victims about the physical invasion done to them and other Hindu women on the preceding day, in conjunction with the attack. Testimony of P.W.01 and P.W.02 on material particular seems to be pertinent to prove the act of sexual violence done upon the Hindu women which remained unshaken.

385. It may be reiterated that the evidence tendered by the prosecution if not refuted in cross-examination by the defence must generally be accepted by the court to be true unless it is considered to be unbelievable or contradicted by other evidence. The manifold purposes of cross-examination are well recognized. The main

among them are: **(a)** To discredit or impeach the testimony of a witness; **(b)** To support some assertions favorable to the defence; or **(c)** To bring out some independent evidence favorable to the defence.

386. But what we see in the case in hand? We find that the defence could not refute it in any manner. The forced sexual violence, using it as a tool, committed upon Hindu women was intended to bring about the physical destruction of Hindu religious group. We may safely conclude that the criminal act of sexual violence committed upon the women due to their membership in Hindu religious group was a constituent part of genocide.

387. Obviously the accused Syed Md. Hussain alias Hossain being a leading and potential Razakar accompanied the group of attackers merely not as a spectator. His role facilitating the criminal act of forcible conversion of the Hindu civilians of the same village Dampara which took place few days back as found proved[as narrated in charge no.01] inevitably lends irresistible assurance to conclude that he had an active and culpable part of the entire criminal conduct directing the Hindu civilians, knowing consequence. Further, it has been unveiled that the attack was calculated and intended to cause destruction of the Hindu religious group of village Dampara.

388. ‘Serious bodily harm’ as found in section 3(2)(c)(ii) includes rape and sexual violence as well. On this score as well physical

invasion or sexual violence committed the offence of under coercion on the Hindu women of the crime village deserves to be characterized as 'genocide. On this score the 'serious bodily and mental injury' caused to Hindu women, members of a particular religious group, by act of physical invasion or sexual violence constituted the offence of 'genocide'. In defining 'serious bodily harm' the **ICTR** observed in the case of *Gacumbtsi* that -

“Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable.”

[Gacumbtsi, ICTR Trial Chamber, June 17, 2004, Para. 291]

389. In defining 'serious bodily harm', same view has been taken by the **ICTR** in the case of *Rutaganda* which is as below:

“.....serious bodily or mental harm” to include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.”

[Rutaganda, ICTR Trial Chamber, December 6, 1999, Para. 51]

390. It is to be noted that the term 'genocide' is often meant to extinct or an attempt to extinct a 'religious group' or 'group' protected under the Genocide Convention 1948. Rape even if does not kill the victim, may fall under the category of the offence of

genocide as it causes 'serious bodily and mental harm' to members of the 'group' targeted. Pakistani occupation army and their local collaborators considered Hindus to be subhuman. With intent to destroy this group the perpetrators being accompanied by the accused Syed Md. Hussain alias Hossain, a Razakar Commander committed rape of sexual violence as an effective tactic of genocide. Such horrific collective criminal act damaged the social standing as well of the survivors including P.W.03 and P.W.04.

391. We are convinced to recognize that rape and sexual violence are considered to be destructive when they occur within the context of attack intending to commit killing significant number of civilians of any of protected 'groups' as mentioned in the Act of 1973 constituting the crime of genocide.

392. It stands proved that rape upon Hindu women was committed in conjunction with the criminal act of detaining the 39 Hindu male civilians of village Dampara that eventually resulted in killing of 34 Hindus, and thus, it was rather genocidal rape as it was chosen as one of the worst ways of inflicting 'serious bodily injury and mental harm' upon the women presumably due to their membership in Hindu religious group intending to cause destruction of religious belief, the will to live, and of life itself of the victims belonging to a protected group. Rape or sexual violence committed upon the Hindu women including P.W.03 and P.W.04 may thus be validly viewed as a crime perpetrated against a 'group' and not against an

individual woman, and therefore, the rape committed upon Hindu women was 'genocidal rape' indeed. .

393. The offence of 'Genocide' thus includes killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the group's physical destruction when the criminal acts in perpetrating those crimes are aimed to destroy a particular group protected under the Act of 1973 and the Genocide Convention 1948 as well.

394. Act of sexual violence committed upon the Hindu women, in conjunction with the attack, by creating a coercive and horrific situation formed an integral part of the course of destruction of a group. For rape and sexual violence not only resulted in physical and psychological destruction of Hindu women but by such acts grave harm was caused to their families and their communities and thus it was intended to the destruction of the Hindu religious group, in whole or in part. It is not needed to show that the destruction the perpetrators sought was directed at every member of the Hindu religious group of the crime village. The facts and number of victims together demonstrate that the intention was to destroy a substantial part of the Hindu religious group of the crime village.

395. It is to be noted that the crimes with which the accused is charged were committed in the course of the war of liberation in 1971 in the territory of Bangladesh and the attack was carried out

by the group formed of members of Razakar Bahini, an auxiliary force and Pakistani occupation army men and the accused took active and culpable part in the capacity of commander of the said auxiliary force in launching attack directing the Hindu civilians, by his acts which were closely related to the policy and plan of the Pakistani occupation army.

396. It is now settled jurisprudence that an ‘attack’ is a course of conduct involving the commission of acts of violence. It may be unerringly concluded that the attack formed of acts of violence was deliberately directed against the Hindu community of crime village Dampara. ‘Hindu religious group’ does not mean the entire Hindu population of the crime site, the village Dampara. A significant number of Hindu civilians is sufficient to form a ‘Hindu religious group’. Totality of the evidence tendered suggests irresistible conclusion that the target was the Hindu religious group and the attack was intended to annihilate this group residing at village Dampara, in whole or in part.

397. The basic notion of ‘genocide’ is: indiscriminate and systematic destruction of members of a group because they belong to that group. Thus, merely the number of individuals of Hindu group killed cannot be the only objective for an inference as to constitution of genocide. The relevant provisions of section 3(2)(c) of the Act of 1973 are as follows:

“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, as such :

- (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; and*
- (v) forcibly transferring children of the group to another group.”*

398. The meaning of ‘genocide’ as contained in the Act of 1973 seems to be in conformity with the Article 6 of the Rome Statute. Genocide is ‘an offence of the most extreme gravity.’ It is now settled that genocide constitutes the ‘crime of crimes’. Causing serious bodily or mental harm’ as contained in section 3(2) (c) (ii) is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, combined with beatings, threats of death, and harm that damages health or causes serious injury to members of the targeted national, ethnic, racial , religious or political group.

399. In the case in hand, it is evinced that the attack was organized and systematic ; that target was the Hindu religious group of village Dampara; that in conjunction with the attack Hindu

women including P.W.03 and P.W.04 were subjected to sexual abuse ; that 39 Hindu civilians were taken away on forcible capture to Nikli Thana ; that 35 detainees were taken to crematorium where 34 were gunned down to death and 01 managed to escape despite receiving bullet hit; that 04 of the detainees including P.W.01 and P.W.02 were set free considering their tender age. P.W.06 saw the group of Pakistani army and Razakars accompanied by accused Syed Md. Hussain taking the detained Hindu civilians at Nikli Thana which proves the accused's active and culpable 'concern' and 'participation' in the whole criminal enterprise.

400. In view of above deliberation based on evidence tendered by direct witnesses we are forced to conclude that the victims of the horrific attack were Hindu civilians which leave the conclusion that the targets of the massacres were 'members of a Hindu religious group'. Indisputably the victims, the Hindu residents of village Dampara were protected civilians and there has been nothing to show that they took active part in hostilities. **ICTY Trial Chamber** in the case of *Strugar* observed that -

“As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat

by sickness, wounds, detention or any other cause.”

[Strugar, (Trial Chamber), January 31, 2005, Para. 282]

401. Barbarity of organized criminal acts forming ‘attack’ was aimed to cause destruction of the members of collectivity i.e ‘Hindu religious group’ of Dampara village. The attacks were carried out against individuals of a collectivity i.e Hindu religious group which obviously undermined the fundamental basis of the social order of a particular group of civilian population, we are forced to conclude. Killing Hindu civilians by launching systematic attack was intended to destroy a substantial part of the local Hindu community of a particular geographical area, the village Dampara—it may be concluded irresistibly.

402. It may be noted that an act of designing plan usually is not tangible and cannot be explicitly known to persons other than the persons involved with it. It is thus quite immaterial to ask for proof to establish it. It may be fairly assumed that without a common and premeditated plan such organized and horrific pattern of collective attack in accomplishing the act of mass killing targeting a religious group of village Dampara could not have been initiated and executed by the perpetrators belonging to local Razakar Bahini and Pakistan occupation army. Targeting the Hindu community of the crime village pursuant to such premeditated plan indicates their 'special intent' of launching such attack.

403. The barbaric event happened in war time situation. The event involved brutal mass killing which happened not within the sight of people. It stands proved that the detained civilians could not have been traced since they were taken away by the group of perpetrators accompanied the accused Syed Md. Hussain alias Hossain to the killing site. It was thus naturally not practicable to discover the dead bodies of the victims. Thus proof of recovery of dead bodies of victims is immaterial to establish the fact of such mass killing. In this regard ICTY observed in the case of *Brdanin* that--

“The Trial Chamber concurs with the Tadic Trial Chamber that: ‘Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.’”

[Brdanin, ICTY Trial Chamber, September 1, 2004, Para. 383]

404. The cumulative effect of the atrocities including killing, causing mental and bodily harm and sexual abuse directing the Hindu community of the crime village inevitably imprints an unmistakable notion that the aim and intent of the perpetrators was to destroy the ‘Hindu religious group or community’, in part. This notion is qualified as ‘genocidal intent’ as required to constitute the offence of ‘genocide’, we conclude.

405. It is now well settled that targeting part of the community qualifies as substantial, for the purpose of inferring the ‘genocidal intent’. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.

406. The term ‘in whole or in part’ refers to the intent of the perpetrator[s], not to the result of the attack conducted. It is not necessary to show that the perpetrators achieved the final result of the destructive activities carried out directing a protected group in order to constitute the crime of genocide. It is enough to have committed any prohibited act with the clear intention of bringing about the total or partial destruction of a protected group and such intention obviously is to be inferred from facts and circumstances and acts done to the members of a group protected.

407. In the case before us, it stands proved that the result of the attack launched achieved was rather partial destruction which is sufficient to prove that the special intent of the perpetrators was to destroy the entire group. The intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group. In the case of *Jelisi*, (**Trial Chamber: ICTY**), December 14, 1999, Para. 83 it has been observed that

“.....the geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region or even a municipality.....it is

accepted that genocide may be perpetrated in a limited geographic zone.”

408. In the case in hand, a significant number of civilians of Hindu religious group became prey of killing, sexual violence, serious bodily and mental harm. The perpetrators had conducted those collective criminal acts with 'special intent' targeting Hindu community of the crime village. Genocide is, by nature, a collective crime, committed with the collaboration of many participants. The organizers and planners must necessarily have a discriminatory motive behind committing the crime of genocide. Hateful conduct of the perpetrators in conjunction with the attack as found proved constituted an integral part of the proof of existence of a genocidal intent of the attackers.

409. Accused Syed Md. Hussain alias Hossain had played a key coordinating role and his 'participation' was of an extremely significant nature which substantially facilitated the accomplishment of the crimes directing civilians of Hindu community of village Dampara. Accused himself culpably accompanied the group presumably to guide the Pakistani army, moved to neighbouring village Nabinpur to cause forcible capture of Hindu civilians, aided the group, by his act and conduct, in taking the detained civilians away to Nikli Thana and then to crematorium where the 34 detainees were shot to death.

410. The notion of ‘committing’ has been resolved by the **ICTR Appeals Chamber** in the case of **Gacumbitsi** by observing as below:

“In the context of genocide, however, ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime.”

[Gacumbitsi, ICTR Appeals Chamber, July 7, 2006, Para. 60]

411. Evidence presented leads to unerring conclusion that accused Syed Md. Hussain alias Hossain was present at the crime site to guide and supervise the massacre, and participated in it actively by segregating the Hindu civilians on forcible capture so that they could be killed. The **ICTY Trial Chamber** in the case of **Stakic** observed that-

“The Trial Chamber prefers to define ‘committing’ as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others.”

[Stakic, ICTY Trial Chamber , July 31, 2003, Para. 439]

412. Therefore, culpable role the accused played in conjunction with the attack being present with the group of attackers at the

crime site constituted 'committing' the offence of genocide. Thus, we are persuaded to observe that the accused had direct participation in the *actus reus* of the crime. As a result it is not required to show his direct participation in the commission of crimes. 'Committing' may be done individually or jointly with others. Accused had incurred liability under the theory of **JCE [Basic Form]**. It is now settled that participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability.

413. The accused Syed Md. Hussain alias Hossain has been indicted to have incurred liability also under section 4(2) of the Act of 1973 which refers to the civilian superior responsibility, together with the individual liability under section 4(1) of the said Act. It is true that the accused was a potential member of the local Razakar Bahini. But the attack, as found proved from the evidence presented, was carried out by the group formed of Razakars and Pakistani army directing the Hindu civilians of village Dampara. The evidence tendered also suggests the conclusion that the accused remaining with the group of attackers at the crime site provided contribution, assistance and facilitation in accomplishing the criminal acts and such role makes him liable under section 4(1) of the Act of 1973 and not under the theory of civilian superior responsibility.

414. Totality of evidence demonstrates that being in leading position of locally formed Razakar Bahini accused Syed Md. Hussain alias Hossain also incurred liability as aider and abettor of the crimes committed, by his act and conduct. In this regard we recall the observation of the ICTY made in the case of *Blagojevic and Jokic* which is as below:

“Aiding and abetting genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.”

[Blagojevic and Jokic, ICTY Trial Chamber , January 17, 2005, Para. 777]

415. Accused as a co-perpetrator participated in the common design whereby such participation took the form of assistance in, or a substantial contribution to, the execution of the common plan or purpose of liquidating civilians of Hindu religious group of village Dampara. It already stands proved that few days prior to the event of attack the Hindu civilians of village Dampara were forced to get converted to Islam religion, on instruction of the accused Syed Md. Hussain alias Hossain under coercion and threat. And accordingly the accused has been found criminally liable for this criminal act constituting the offence of ‘other inhumane act’ [as arraigned in charge no.01]. Taking it into account together with the evidence tendered it may safely be concluded that the accused participated

and substantially facilitated even in accomplishing the criminal acts that resulted in abduction, torture, sexual abuse and killing of Hindu civilians of the same village Dampara.

416. The evidence tendered by P.W.01 Badal Chandra Barman also demonstrates that in conjunction with the attack the accused and his cohort Razakars moved towards neighbouring village Nabinpur in search of Hindu civilians. It indisputably reflects the intent and antagonistic attitude of the group of perpetrators to which the accused was an active and conscious part. It proves the accused's participation in the attacks intent of which was to destroy, in whole or in part, the protected Hindu religious group. It is manifested that the accused was well aware that his actions were part of a wider context of killing and massacres.

417. In the case of **Akayesu**, the **ICTR Trial Chamber** defined a religious group as 'one whose members share the same religion, denomination or mode of worship' [**Akayesu, ICTR -96-4-T, Judgment: 02 September 1998, Para 515**]. Others have defined religious groups as a community united by a single, spiritual ideal.

418. Here in the case before us all the victims belonged to Hindu religion who shared common religion and mode of worship, defence does not dispute it. All the victims were the residents of village Dampara which was predominantly Hindu populated. Pattern of attack and other circumstances unveiled prompt to conclude that the intent of the perpetrators was to destroy the Hindu

religious group of the crime locality to further policy and plan. This genocidal intent gets further assurance from the proved criminal act of forceful conversion of Hindu civilians of village Dampara which happened in the mid of August, 1971[as narrated in charge no.01, few days back of the event of attack narrated in this charge.

419. Given the manner in which the attacks were conducted and the number of the victims we find it proved beyond reasonable doubt that the accused Syed Md. Hussain alias Hossain and the members of the group intentionally participated in a mass killing mission of members of the Hindu religious group, and thus, the accused is criminally liable based on his participation in a joint criminal enterprise [JCE] to destroy the Hindu religious group constituting the offence of 'genocide'.

420. Mass rape or sexual abuse on women belonging to a protected group during war time situation in fact results in mass trauma, and as such, is a form of destruction of a group. The devastation that follows rape or sexual violence makes it a particularly effective tool of genocide as it destroys the morale of the victim women, their family and the entire community they belong as well. Systematic crimes directed against men and women on account of their membership in a particular religious group may thus be characterized as an offence of 'genocide' as defined in section 3(2) (c) (i)(ii) of the Act of 1973.

421. The testimony of direct witnesses to the material facts relevant to the attack indisputably demonstrates that the accused Syed Md. Hussain alias Hossain had carried out acts intending to assist, encourage or lend moral support to the commission of crimes as he as an active and potential member of local Razakar Bahini was quite aware about the consequence of his acts and conducts which had a substantial effect upon the perpetration of the crime of a large scale killing of Hindu civilians.

422. Accused Syed Md. Hussain alias Hossain was a mighty man of locally formed Razakar Bahini --we have already found it proved. He knowingly and culpably accompanied the group of Pakistani army and Razakars intending to guide the Pakistani army men to the crime site and facilitate the accomplishment of atrocities directing the Hindu community of village Dampara. It is to be noted that even an individual forming part of the group of perpetrators may be held guilty of genocide if he is found to have had knowledge that he was participating in a larger plan to destroy the group.

423. In perpetration of this nature of crime directing civilians due to their membership in a particular 'group', in violation of international humanitarian law, many actors might have played many and distinct roles forming part of attack. The proved facts materially related to the killing indisputably offer convincing suggestion that the accused had conscious 'concern' and

'participation' in committing the act of forcible capture of Hindu civilians, causing sexual violence upon Hindu women by creating coercive situation and killing as well, and thus, he is found liable for the commission of all the criminal acts of the enterprise with 'genocidal intent'. In this regard, we may recall the observation of 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]

424. An accomplice shall mean a person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out or in effectively committing it-- it is now well settled. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide.

425. Accused Syed Md, Hussain alias Hossain is alleged to have had incurred liability also under section 4(2) of the Act of 1973 which refers to the theory of civilian superior responsibility, presumably his commandership in locally formed Razakar Bahini. But it has been proved that the group of attackers formed not exclusively of Razakars. It included the Pakistani occupation army, and thus, naturally it cannot be said that the accused, a commander of Razakar Bahini, an auxiliary force had any degree of effective control and command over the Pakistani army. Guiding and assisting do not denote 'effective control', and thus, the accused was not in a position to command and control the Pakistani army, the principal perpetrators. Therefore, we are not convinced to find the accused liable under section 4(2) of the Act of 1973 together with section 4(1) of the said Act.

426. What we find to have been proved in this case? In view of deliberation made above it stands proved beyond reasonable doubt that --

- (i) the Hindu religious group was the target of the attack;
- (ii) the group of attackers formed of Pakistani occupation army, Razakars and the Razakar Commander accused Syed Md. Hussain alias Hossain who did not keep him distanced from the group till the act of killing happened;
- (iii) all the victims belonged to Hindu community;
- (iv) 39 Hindu civilians were forcibly captured and were taken to Nikli Thana;

- (v) numerous Hindu women were sexually ravished, in conjunction with the attack;
- (vi) four detainees were set at liberty on the following morning;
- (vii) 34 detainees were killed taking them to a crematorium and one could escape despite receiving bullet injury;
- (viii) intent of the attack was to destroy the Hindu religious group;
- (ix) collectivity of criminal acts directing the civilians of Hindu religious group constituted the offence of 'genocide under section 3(2)(c)(i) (ii) of the Act of 1973; and
- (x) accused Syed Md. Hussain alias Hossain was conscious, active and culpable part of collectivity of the criminal acts.

427. It is now settled that complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. The accused person knowing the intent behind the crimes committed accompanied, aided, facilitated by his culpable act and conduct.

428. On totality of evidence as evaluated above together with the settled legal proposition we come to the conclusion that it has been proved beyond reasonable doubt that the act and conduct of the accused Syed Md. Hussain alias Hossain and his conscious and culpable presence with the group of attackers leading and guiding them to the main action was part of a vast murderous enterprise in which numerous Hindu civilians were killed, Hindu women were

raped, serious bodily and mental harm was caused and all these were aimed to further the intent to destroy the Hindu religious group, presumably in part, and the same constituted the offence of 'genocide'.

429. In view of above, accused Syed Md. Hussain alias Hossain incurred liability under section 4(1) of the Act of 1973 for his act of participating, abetting, facilitating and complicity in the commission of mass killing of Hindu civilians and mass rape together with serious bodily and mental harm upon numerous Hindu women as part of systematic attack and with intent to destroy the Hindu religious group, in whole or in part, constituting the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Adjudication of Charge No. 05

[Abduction and murder of freedom-fighter Abdul Malek of village Purbogram under Nikli Police Station]

430. Summary charge: That on 19 October, 1971 in the afternoon freedom-fighter Abdul Malek being unarmed went to his house situated at village Purbogram under Nikli Police Station of the then Kishoreganj Sub-Division to meet his wife and children. Being informed about Abdul Malek's presence at his own house and upon instruction of accused Razakar Commander Syed Md. Hussain alias Hossain, accused Razakar Md. Moslem Prodhan along with 4/5 Razakars having captured the freedom-fighter Abdul Malek from

his house on that day at about 05.30 P.M. took him away in front of the house of Debendra Chandra Nath [now dead] and upon instruction of accused Syed Md. Hussain alias Hossain accused Md. Moslem Prodhan shot him [Abdul Malek] to death there. On the following day [20.10.1971] the dead body of Abdul Malek was buried in his uncle-in-law Abdur Rahim Peon's [now dead] house at Gurui village.

431. Thereby, accused (1) Syed Md. Hussain alias Hossain, and (2) Md. Moslem Prodhan have been charged for participating, abetting, facilitating and complicity in the commission of offences of murder and abduction as crimes against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused persons have incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

432. Prosecution to prove this charge involving the act of killing a non-combatant freedom-fighter taking him away on forcible capture from his house adduced and examined in all 07 witnesses [P.W.05, P.W.07, P.W.09, P.W.10, P.W.11, P.W.13 and P.W.14] including the wife of martyr freedom-fighter. Excepting P.W.09, all other witnesses testified what they heard and also narrated the relevant facts. P.W.09 however testified what she witnessed in respect of the act of forcible capture of her husband, prosecution

avers. However, let us first see what the P.W.s have testified before we weigh and evaluate the same.

433. P.W.05 Abdul Hamid [66], a resident of village Chhetra under Police Station Nikli of District Kishoreganj was a member of Basu Bahini formed to join the war of liberation. In 1971 he was 16/17 years old. He stated that 'Basu Bahini' was headed by Abdul Motaleb alias Basu. During their staying at village Gurui under Police Station Nikli they got information through source that Razakars and Pakistani army along with Nikli Thana Razakar Commander accused Md. Hussain alias Hossain and Razakar accused Md. Moslem Prodhan might have attacked the village Gurui formed of 13 paras. With this information, on 06 September 1971 they being equipped with ammunition got stationed in the southern part of village Gurui to resist the Pakistani army and Razakars.

434. In addition to the event narrated in charge no.03, P.W.05 testified what he heard about the killing of freedom fighter Abdul Malek as narrated in this charge. P.W.05 stated that on 19 October, 1971 he knew that on instruction of Razakar Commander accused Syed Md. Hussain accused Razakar Moslem Prodhan gunned down non-combatant freedom-fighter Abdul Malek to death in front of Debendra Nath's house.

435. In respect of the action taken by Basu Bahini on getting the information about the killing of Abdul Malek, P.W.05 stated that

they, the members of Basu Bahini in collaboration with Cobra Bahini attacked Nikli Thana Sadar and on failing to face such attack accused Syed Md. Hussain and his accomplice Razakars had to flee away in night quitting Nikli. In this way Nikli Thana got liberated and on the following day they hoisted there the flag of independent Bangladesh. They buried the dead body of Abdul Malek with the aid of his relatives at the graveyard of village Gurui, P.W.05 added.

436. P.W.05 Abdul Hamid finally stated that he knew accused Md. Moslem Prodhan before hand as he was a resident of his[P.W.05] locality and he[P.W.05] used to meet him at bazaars. And as a member of Basu Bahini he [P.W.05] used to mix up with general people in disguise for the purpose of carrying out the act of close watch, and as such, he could know the identity of accused Syed Md. Hussain who was a Razakar Commander.

437. In cross-examination it has been affirmed that P.W.05 during his staying at village Hiluchia wherefrom he heard the event of killing his co-freedom fighter non-combatant Abdul Malek as stated in examination-in-chief. Seeing and knowing the accused Syed Md. Hussain and Md. Moslem Prodhan before hand around the locality of Nikli as testified has also been affirmed in cross-examination. P.W.05 denied the defence suggestion that what he stated in relation to the events and other material facts were untrue and tutored.

438. P.W.07 Md. Ichob Ali [66] is a resident of village Gurui [Purbo Para] under Police Station Nikli of the then Kishoreganj Sub-Division. He was a member of Basu Bahini [a group of freedom fighters which fought around their locality].

439. P.W.07 in respect of the event narrated in this charge no.05 stated that they got information that accused Syed Md. Hussain and accused Moslem Prodhan and their accomplice Razakars forcibly captured non-combatant freedom-fighter Abdul Malek from his house and took him away to Nikli Thana Sadar where he was gunned down to death. On getting this information, their commander Basu instructed them to launch attack Nikli, and thus, after the dusk they the members of Basu Bahini and Cobra Bahini jointly attacked Nikli Thana Sadar and at a stage of attack the Razakars had fled away therefrom. On the following morning they hoisted the flag of independent Bangladesh at Nikli, and thus, Nikli got liberated. Afterwards, they took the dead body of Abdul Malek to Gurui village and buried it, P.W.07 added.

440. In respect of reason of knowing the accused persons P.W.07 stated that in course of spying at different times during the war of liberation he became acquainted about the Razakar Commander accused Syed Md. Hussain and he also knew accused Md. Moslem Prodhan beforehand as he was a resident of their locality.

441. In cross-examination, P.W.07 stated that Basu Bahini was comprised of 21/22 members; that he saw accused Syed Md.

Hussain first in 1971 and he was a resident of Kishoreganj. P.W.07 denied the suggestion that what he testified was untrue and tutored. Defence however does not appear to have cross-examined P.W.07 on facts relevant to the attack and killing at the place and time and thus the same remained unrefuted.

442. P.W.09 Rabeya Akter [62] is a resident of village Nikli Purbogram under Police Station Nikli of the then Kishoreganj Sub-Division. She is the wife of martyr freedom-fighter Abdul Malek, the victim of the event as narrated in charge no. 05. In 1971 she had been staying at her conjugal home in Nikli. She is a direct witness to the act of forcible capture of her husband that eventually resulted in his killing.

443. P.W.09 stated that her husband Abdul Malek was an employee of telephone department and he intending to join the war of liberation went to India, after the war of liberation ensued and on receiving training there he joined the ‘Cobra Bahini’ of Beer Bikram Matiur Rahman.

444. In testifying relevant facts P.W.09 stated that on 1st Kartik [1971] in early morning there had been a fight in Nikli Thana Sadar between freedom-fighters of ‘Cobra Bahini’ and Razakars and her [P.W.09] husband Abdul Malek participated the fighting which continued till noon. ‘Cobra Bahini’, at noon got stationed on the bank of the river, east to Nikli Thana Sadar. On the same day in the afternoon her husband came to house to meet her and few minutes

later Razakar accused Md. Moslem Prodhan being accompanied by 4/5 accomplice Razakars coming to their house told that Razakar Syed Md. Hussain had sent them to take away her husband Abdul Malek with them to Nikli Thana and then they detained her non-combatant husband and forcibly took him away. 6/7 minutes later she[P.W.09] heard gun firings and with this she moved to the place in front of Debendra Nath's house at their village where she found her husband's dead body receiving bullet hit injury on head and then she came back home.

445. P.W.09 further stated that in the night of the same day fighting started between Razakars and 'Cobra Bahini'-- 'Basu Bahini' in Nikli Thana Sadar which continued till mid night. At the time of fazar prayer she [P.W.09] heard people chanting slogan 'Joy Bangla' from the end of Nikli Thana Sadar. In the morning her uncle-in-law Abdur Rahim Peon told the Basu Bahini to lay her husband's dead body to rest at village Gurui. Then her husband's dead body was taken therefrom to village Gurui where they buried it.

446. As regards reason of knowing the accused persons P.W.09 stated that at the time of taking away her husband accused Md. Moslem Prodhan told that Razakar accused Syed Md. Hussain asked him to take away Abdul Malek with them, and as such, she could know the name of accused Syed Md. Hussain. Accused Md. Moslem Prodhan was a resident of their locality, and as such, she

knew him beforehand, P.W.09 added. Finally, P.W.09 sought justice by shedding tears on dock.

447. In cross-examination, P.W.09 stated that her conjugal home was about half mile far from the house of Debendra Nath and Nikli Thana Sadar; that she also saw accused Md. Moslem Prodhan around the locality after her marriage. Defence suggested P.W.09 that her husband died in conjunction with the fighting with Razakars and Pakistani army; that her husband was not forcibly taken away or killed as she testified. P.W.09 denied it blatantly. P.W.09 also denied the defence suggestion that what she testified implicating the accused persons was untrue and tutored as accused Md. Moslem Prodhan rendered decision against them in village mediation over a dispute. Defence however does not dispute the fact that victim Abdul Malek was a freedom fighter and was associated with the 'Cobra Bahini'.

448. P.W.10 Abdul Hekim [71] is a resident of village Gurui under Police Station Nikli of the then Kishoreganj Sub-Division. He joined the war of liberation as an associate of 'Basu Bahini' [a group of freedom-fighters] formed under the leadership of Abdul Motaleb alias Basu of their locality. He testified facts relevant to the events narrated in charge nos. 03 and 05.

449. In respect of the event involving killing Abdul Malek, a freedom- fighter as narrated in charge no.05, P.W.10 testified that on 1st day of Bangla month Kartik, after Asar prayer their

commander Basu informed them that accused Md. Moslem Prodhan and his accomplice Razakars had killed freedom-fighter Abdul Malek on instruction of accused Syed Md. Hussain. Then at about 09:00 P.M. they the members of Basu Bahini in coordination with Cobra Bahini [a group of freedom fighters] attacked the Razakars staying at Nikli Thana Sadar and since mid night they were not getting any sound and thus they remained stayed at their own position as ordered by their commander. At dawn they moved to Nikli Thana when they found that the Razakars had fled away therefrom. With this they hoisted flag of independent Bangladesh by chanting slogan 'Joy Bangla'. Then they went to the place in front of Debendra Nath's house where they found Abdul Malek's dead body lying and they buried the same at village Gurui as requested by his uncle.

450. In respect of reason of knowing the accused persons P.W.10 stated that in 1970's election accused Syed Md. Hussain and Md. Moslem Prodhan had kept them engaged in election campaign in favour of Aftab Kara, a candidate contesting the election with the symbol of tiger around their locality and since then he knew these two accused persons. Besides, he [P.W.10] had occasions of meeting accused Md. Moslem Prodhan at Nikli bazaar.

451. In cross-examination, defence does not dispute the attack launched that resulted in killing of non combatant freedom fighter Abdul Malek as testified by the P.W.10. In reply to defence

question put to him P.W.10 also stated that accused Syed Md. Hussain was the son of Moslem Uddin Moulana of Kishoreganj and in 1971 he had occasion of seeing him.P.W.10 denied the defence suggestions put to him that freedom fighter Abdul Malek died due to bullet hit during front fight and that what he testified implicating the accused persons was untrue and tutored.

452. P.W.11 Chanfor Ali [73] is a resident of village Gurui under Police Station Nikli of the then Sub-Division Kishoreganj. In 1971 he was an associate freedom-fighter of Basu Bahini. In respect of the event narrated in charge no.05 involving killing non combatant freedom fighter Abdul Malek P.W.11 is a hearsay witness.

453. P.W.11 stated that on 1st day of Bangla month Kartik [1971] their commander Basu made it conveyed to them that Razakar accused Md. Moslem Prodhan and his accomplice Razakars on instruction of Razakar accused Syed Md. Hussain detained Abdul Malek, a freedom-fighter and shot him to death in Nikli Thana Sadar. Then on instruction of their commander[Basu Bahini] they along with Cobra Bahini[group formed of freedom-fighters] had attacked jointly Nikli Thana Sadar and surrounding areas at about 08:00/08:30 P.M and the attack continued till 12:00 PM / 01:00AM and they could not sense presence of Razakars. Then they remained stayed at their own position on instruction of their commander. In the morning they moved to Nikli Thana where they found no Razakar as they all fled away therefrom. Then they hoisted national

flag of Bangladesh in Nikli Thana by chanting slogan 'Joy Bangla' when their commander Basu was with them. Now Basu Commander is dead, P.W.11 added.

454. In respect of reason of knowing the accused persons P.W.11 stated that accused Syed Md. Hussain and Md. Moslem Prodhan were engaged in carrying out election campaign in favour of one named Kara around their locality in connection with the election held in 1970, and thus, he knew them beforehand.

455. In cross-examination, defence suggested P.W.11 that he did not know the accused persons and accused Syed Md. Hussain was not a Razakar and that what he testified implicating the accused persons was untrue and tutored. However, defence, does not appear to have cross-examined P.W.11 to refute the fact of about launching attack that resulted in killing of numerous civilians including a non-combatant freedom fighter as testified.

456. P.W.13 Gopal Chandra Das [67] is a resident of village Mohammadpur under Police Station Nikli of the then Kishoreganj Sub-Division. In 1971 he was a freedom-fighter of 'Cobra Bahini'. On receiving training in India he returned back in the month of July 1971 and had participated freedom-fights at different places being associated with 'Cobra Bahini' led by Matiur Rahman, P.W.13 stated.

457. He [P.W.13] is a hearsay witness in respect of the event of killing his co-freedom fighter Abdul Malek, in addition to the fact

of killing he testified facts related to the event and Nikli fight that allegedly happened after the killing.

458. P.W.13 stated that on 19 October 1971 they the members of 'Cobra Bahini' led by Matiur Rahman had attacked the Razakars from the east end of Nikli Thana Sadar. Accused Syed Md. Hussain was the commander of Nikli Thana Razakar Bahini and accused Md. Moslem Prodhan was the Razakar commander of Nikli Thana Sadar Union. They and their accomplice Razakars staying at bunkers at bazaar adjacent to Nikli Thana started resisting them [Cobra Bahini] when they got positioned at a place about half kilometre far. The fight continued till afternoon and at a stage they [Cobra Bahini] reached back as war strategy.

459. P.W.13 next stated that on the same day in the afternoon their co-freedom-fighter Abdul Malek [victim] being non-combatant went to his house at village Purbogram to meet his wife and children. At about 05:30 P.M. he heard a gun firing from the end of Debendra Chandra Nath's house and he learnt that Razakars had killed Abdul Malek by gun shot on the road in front of the house of Debendra Chandra Nath. On hearing it he [P.W.13] and his co-freedom fighters Enamul Haque and Azizul Haque [P.W.14] rushed to Abdul Malek's house when they found Abdul Malek's wife crying and she described that in the afternoon Razakar accused Md. Moslem Prodhan and his accomplice Razakars had taken her husband away on forcible capture towards the house of Debendra

Chandra Nath as they were told by Razakar Commander accused Syed Md. Hussain to take him with them. The wife of the victim also disclosed that few minutes after her husband was taken away forcibly Razakar accused Md. Moslem Prodhan shot him to death in front of Debendra Chandra Nath's house.

460. What happened next after the dusk on that day? P.W.13 stated that after sundown [on 19 October, 1971] freedom fighters of 'Basu Bahini' had attacked Nikli Thana Sadar from the south end while they the members of 'Cobra Bahini' joined the attack from the east end of Nikli Thana Sadar. On the face of their joint and forceful attack the Razakars along with the accused Md. Syed Md. Hussain and Md. Moslem Prodhan had quitted Nikli Thana Sadar in mid night. On the following morning they rushed to Nikli Thana Sadar and hoisted national flag of Bangladesh by chanting 'Joy Bangla' slogan. Afterwards they came in front of Debendra Chandra Nath's house where they found the members of Basu Bahini taking the dead body of martyr Abdul Malek therefrom to lay it to rest at village Gurui.

461. In respect of reason of knowing the accused persons P.W.13 stated that he heard from the members of 'Cobra Bahini' that accused Syed Md. Hussain was the Razakar commander of Nikli Thana and accused Md. Moslem Prodhan was a resident of his neighbouring village , and thus, he]P.W.13] knew him beforehand.

462. In cross-examination it has been affirmed that P.W.13 went to India for receiving training and then he returned back and joined the 'Cobra Bahini' as its member. In reply to question put to him P.W.13 stated that three freedom-fighters embraced martyrdom in the fight happened in Nikli and Abdul Malek was killed taking him away forcibly from his house. Thus the fact of killing Abdul Malek as testified in examination-in-chief stands affirmed even in cross-examination. Defence chiefly suggested P.W.13 that what he testified implicating the accused persons was untrue and tutored. P.W.13 denied it.

463. P.W.14 Azizul Haque [61] is a resident of village Nikli Purbogram under Police Station Nikli of the then Kishoreganj Sub-Division. In 1971 he on receiving training in India returned back in the month of July and participated freedom fight as a member of 'Cobra Bahini' led by Matiur Rahman Beer Bikram, P.W.14 stated.

464. In respect of Nikli fight and moving of Abdul Malek, a freedom fighter of 'Cobra Bahini' to his own house on the day of event, P.W.14 stated that in the early morning of 19 October, 1971 they the 40/50 members [freedom-fighters] of 'Cobra Bahini' led by their commander Matiur Rahman had attacked the Razakars stationed at bunkers in Nikli Thana Sadar and bazaar adjacent to it from the east end and with this the Razakars started counter attack directing them. The fight continued till noon and then they [Cobra Bahini] got reached back to Purbogram as strategy of war and

remained stayed there. Afterwards their co-freedom fighter Abdul Malek, being non-combatant, with the consent of their commander moved to his house at the south of village Purbogram to meet his wife and children.

465. P.W.14 next stated that on the same day [19 October 1971] at about 05:00/05:30 P.M. they heard gun firing from west end of village Purbogram and few minutes later they learnt from the locals that Razakars had killed their co-freedom-fighter Abdul Malek. On hearing it he along with his co-freedom fighters Gopal Chandra Das [P.W.13] and Enamul Haque rushed to Abdul Malek's house when Abdul Malek's wife Rabeya Akter [P.W.09] described that Nikli Sadar Union Razakar Commander accused Md. Moslem Prodhan and his cohorts coming to their house told that they had been instructed by Nikli Thana Razakar Commander Syed Md. Hussain to take away her [P.W.09] husband with them, and thus, the Razakars forcibly took away her husband despite his refusal and then he was shot to death at the place in front of Debendra Chandra Nath's house. On hearing it they [P.W.14 and his co-freedom fighters] returned back to their position place.

466. P.W.14 further narrated how they in collaboration with Basu Bahini [another group of freedom-fighters] had attacked the Razakars again after the dusk. P.W.14 stated that after the sunset on 19 October 1971 'Basu Bahini' from the south end of Nikli Sadar and 'Cobra Bahini' from the east end of Nikli Sadar had attacked the

Razakars stationed in Nikli Thana Sadar. The Razakars started counter attack as well. The fight continued till mid night as the counter attack on part of Razakars got ceased. In the early morning they heard from locals that the Razakars including accused Syed Md. Hussain and Md. Moslem Prodhan had quitted Nikli Thana Sadar as they failed to sustain on the face of attack. Then they [Cobra Bahini and Basu Bahini] moved to Nikli Thana, chanting 'Joy Bangla' slogan, where they hoisted national flag of Bangladesh. On their way back therefrom they discovered bullet hit dead body of Abdul Malek lying on the road south to the house of Debendra Chandra Nath's house and the members of 'Basu Bahini' took the dead body to village Gurui to lay it to rest there.

Finding with Reasoning on Evaluation of Evidence

467. This charge entails the event of brutal and deliberate killing of a non combatant freedom-fighter belonging to 'Cobra Bahini' which remained stationed around the locality of Nikli Thana Sadar aiming to resist the Razakars. The act of alleged killing was accomplished after taking away Abdul Malek from his house when he was on visit it to meet his wife and children, being non-combatant. Accused Md. Moslem Prodhan and his accomplices committed the offence on instruction of accused Syed Md. Hussain alias Hossain, the charge arraigns.

468. Ms. Tureen Afroz, the learned prosecutor submits that this charge arraigns both the accused persons. The event of killing of a

non-combatant freedom fighter Abdul Malek was carried out taking him away forcibly from his house by accused Md. Moslem Prodhan and his accomplices on instruction of accused Syed Md. Hussain alias Hossain, the Commander of Nikli Thana Razakar Bahini. The wife of the victim P.W.09 Rabeya Akter testified how her husband was forcibly taken away from their house by accused Md. Moslem Prodhan and his accomplices. Defence could not refute her testimony. Testimony of P.W.09 also demonstrates that the attack was launched on instruction of accused Syed Md. Hussain alias Hossain.

469. It has been further argued that the victim was a freedom-fighter and engaged in fighting against Razakars in the morning of the day of the event but at the time of his forcible capture from his house he was non-combatant, and thus, he was a member of civilian population, and thus, killing him by launching attack at his house was in violation of customary international law which constituted the offence of crime against humanity. Mere fact that on the day of the event of killing there had been a battle in the morning against the Razkars does not indicate that the victim died in battle.

470. The learned prosecutor went on to submit that during cessation of the battle, the victim laying his arms came to his house to meet her wife and children and taking this advantage the accused persons designed plan to wipe out the victim. The wife of the victim and co-freedom-fighters of the victim have consistently

corroborated it. Defence could not impeach their testimony on material particulars in any manner. Thus, the same cannot be allowed to go on air merely on the basis of narratives made in the books and reports published in newspapers relied upon by the defence, treating the same to be authoritative.

471. On contrary, Mr. Abdus Sattar Palwan, the learned counsel defending both the accused persons submitted that admittedly a battle occurred on the day in the locality of Nikli Thana and victim Abdul Malek was a freedom-fighter who died in the battle field when he was engaged in the fighting, and as such, no offence was committed. Abdul Malek was not killed in the manner alleged. The documents which are relied upon by the defence and the prosecution's document as well shall demonstrate it clearly that victim freedom-fighter Abdul Malek died in battle field. The accused persons thus cannot be held responsible for the death of Abdul Malek.

472. Of the witnesses examined in support of this charge, P.W.09 Rabeya Akter is the wife of martyr Abdul Malek who had occasion of seeing the accused Md. Moslem Prodhan and his accomplices taking away her husband forcibly. P.W.05, P.W.07, P.W.10 and P.W.11, the members of 'Basu Bahini' are hearsay witnesses about the fact of killing of freedom-fighter Abdul Malek who belonged to 'Cobra Bahini'. P.W.13 and P.W.14 were the members of 'Cobra Bahini' and they allegedly heard about the event of killing of their

co-freedom-fighters Abdul Malek taking him from his wife [P.W.09] and later on they discovered the dead body of the victim and buried the same at village Gurui.

473. Prosecution requires proving the following facts materially related to the event alleged:

- (i) At the relevant time 'Basu Bahini', a group of freedom-fighters remained stationed at village Gurui;
- (ii) Victim Abdul Malek was a member of 'Cobra Bahini';
- (iii) 'Cobra Bahini' got engaged in fight against Razakars on the day of the event and the fight continued till afternoon;
- (iv) Victim Abdul Malek went to his house on the day of the event, in the evening to meet his family, being non-combatant;
- (v) Victim Abdul Malek was taken away from his house on forcible capture;
- (vi) Accused Md. Moslem Prodhan and his accomplice Razakars had committed the act of such forcible capture on instruction of accused Syed Md. Hussain alias Hossain;
- (vii) Few minutes later captured victim Abdul Malek was gunned down to death at a place in front of Debendra Chandra Nath's house.

474. Evidence presented demonstrates that Nikli fight as narrated in this charge happened in two phases. First one ensued in the early morning of 19 October 1971 and it continued till afternoon as the 'Cobra Bahini' got reached back and remained stayed at village Purbogram. And the second phase of fight started after the dusk on

the same day when 'Cobra Bahini' and 'Basu Bahini' jointly attacked the Razakars stationed in Nikli Thana Sadar and it continued till mid night.

475. It transpires from the testimony of P.W.05, a freedom fighter of 'Basu Bahini' that they got stationed on 06 September 1971 in the southern part of village Gurui under the Police Station Nikli to resist the probable attack at the village by the Pakistani army and Razakars. Defence could not refute it. Unimpeached evidence of P.W.07, P.W.10 and P.W.11, the members of 'Basu Bahini' demonstrates that they joined the fight in collaboration with the 'Cobra Bahini' against the Razakars stationed in Nikli Thana Sadar on the same day after the dusk.

476. The offence under adjudication involving the event of killing Abdul Malek taking him away forcibly from his house occurred in the evening i.e in between the time of reaching back of 'Cobra Bahini' at village Purbogram and the next attack against the Razakars launched jointly by 'Cobra Bahini' and 'Basu Bahini'. Now let us see what happened before the second fight ensued after the dusk.

477. P.W.13 and P.W.14 were the members of 'Cobra Bahini' and they testified the fight they fought against the Razakars on 19 October 1971 since early morning to afternoon, till they reached back to village Purbogram. Their testimony also impels that victim

Abdul Malek was one of their fellow freedom fighters belonging to 'Cobra Bahini'.

478. It is evinced from the testimony of P.W.13, a member of 'Cobra Bahini' that the fight they fought on 19 October 1971 against Razakars headquartered at Nikli Thana Sadar continued till afternoon and then they reached back to village Purbogram as war strategy. P.W.14 another member of 'Cobra Bahini' was also engaged in the fight corroborates it. Defence could not controvert this version in any manner. What happened next?

479. Afterwards on the same day, in the evening their co-freedom fighter Abdul Malek, being non-combatant, with the consent of their commander moved to his house at the south of village Purbogram to meet his wife and children. It was not unnatural to express desire of meeting wife and children as the place the 'Cobra Bahini' remained stayed was nearer to the house of Abdul Malek. Presumably Abdul Malek's moving towards his house reached to the knowledge of Razakars headquartered at Nikli Thana Sadar which facilitated designing a plan of attacking Abdul Malek to accomplish his killing on forcibly capture from his house.

480. After arriving at house Abdul Malek was taken away on forcible capture and then was shot to death at the place in front of Debendra Chandra Nath's house, the charge framed arraigns. P.W.09, the wife of the martyr Abdul Malek is the best witness who

had opportunity of observing the act and conduct carried out in forcibly taking away her husband from their house.

481. At the relevant time P.W.09 Rabeya Akter, the wife of the victim had been staying at her conjugal home which was about half mile far from the house of Debendra Chandra Nath and Nikli Thana Sadar. It remained affirmed in cross-examination of P.W.09. Killing of Abdul Malek was perpetrated at a place in front of Debendra Chandra Nath's house and it happened 6/7 minutes after taking the victim away forcibly. This uncontroverted version leads to the inference that the victim was shot to death on the way to Nikli Thana at a place nearer to the conjugal home of P.W.09.

482. Testimony of P.W.09 demonstrates that at the time of taking away her husband accused Md. Moslem Prodhan told that accused Syed Md. Hussain had asked him to take away Abdul Malek with them, and as such, she could know the name of accused Syed Md. Hussain and accused Md. Moslem Prodhan was a resident of their locality, and as such, she knew him beforehand. Defence could not bring anything by cross-examining P.W.09 that she had no rational reason of knowing the accused Md. Moslem Prodhan beforehand. Thus and since this accused was a resident of the same locality it was practicable of recognizing accused Md. Moslem Prodhan while he led the group in taking away her husband forcibly.

483. P.W.09 did not claim that she knew accused Syed Md. Hussain since prior to the event. Her narrative made on dock impels

that she could know his [accused Syed Md. Hussain] name as accused Md. Moslem Prodhan, at the time of attack, told that Razakar Syed Md. Hussain had sent them to take away her [P.W.09] husband with them. We have already found that accused Syed Md. Hussain was a potential Razakar having significant domination over the Razakars stationed in Nikli Thana. The report titled *ô hı̄t`i i t̄³ ḡ t`k ô* published in the daily Purbodesh dated 25.03.1972[Exhibit-2] relied upon by the prosecution to substantiate the charge no.06 goes to show that accused Syed Md. Hussain was the ‘King’ of Razakars in Nikli Thana locality. Therefore, any unlawful act directing civil population, to further policy and plan, might not have been conducted by his fellow Razakars without knowledge, consent, approval and instruction of accused Syed Md. Hussain.

484. It also stands proved that all the P.W.s on the following morning after the victory they achieved fighting the Razakars headquartered at Nikli Thana Sadar found the dead body of martyr Abdul Malek lying at the place in front of Debendra Chandra Nath’s house. It provides corroboration to what has been testified by P.W.09, the wife of the victim. We have found that P.W.09 testified that her husband was shot to death at the said place as she discovered his dead body lying there, after taking him away forcibly.

485. It also transpires from the testimony of P.W.09, the wife of the victim that on the following morning Basu Bahini as told by her [P.W.09] uncle-in-law Abdur Rahim took her husband's dead body therefrom to lay it to rest at village Gurui. Corroborative and consistent testimony of all the P.W.s proves it that the dead body of Abdul Malek was taken to village Gurui by the 'Basu Bahini' to lay it to rest there.

486. Finding bullet hit dead body of Abdul Malek and taking it to village Gurui to lay it to rest there are the crucial facts which are materially related to the act of killing him by taking him there on forcible capture from his house.

487. Defence does not dispute the attack launched that resulted in killing of non combatant freedom-fighter Abdul Malek as testified by P.W.10. However, it suggested that freedom-fighter Abdul Malek died due to bullet hit during front fight. But this mere suggestion in absence of any basis or evidence does not attack the truthfulness of the event of killing, by launching systematic attack at the house of the victim Abdul Malek.

488. How the 'Cobra Bahini' and 'Basu Bahini' reacted on hearing the brutal killing of a non combatant freedom-fighter Abdul Malek? What happened next? Facts unveiled suggest to infer that naturally, both the 'Cobra Bahini' and 'Basu Bahini' became revengeful on getting information about brutal killing of their non-combatant co-fighter Abdul Malek, and thus, they planned to attack

Nikli Thana Sadar where the Razakars led by accused Syed Md. Hussain remained stationed. Testimony of P.W.s, the members of both the resistance groups i.e. 'Basu Bahini' and 'Cobra Bahini' consistently proves it. Defence could not impeach it in any manner. Besides, there has been no earthy reason of disbelieving them.

489. What happened to Razakars after the freedom-fighters had attacked them jointly? Evidence of P.W.s engaged in the said fight demonstrates that after continuing fight against the Razakars it came to cessation in the mid night and in the early morning the freedom-fighters got Nikli Thana Sadar freed as they found that the Razakars they resisted had quitted Nikli Thana Sadar and then the freedom-fighters hoisted there the national flag of Bangladesh, chanting 'Joy Bangla' slogan. Defence could not create any amount of doubt on it by cross-examining the witnesses examined.

490. It is true that Abdul Malek was a member of 'Cobra Bahini' formed of freedom-fighters. He was engaged in fighting against Razakars, in the early part of 19 October 1971. But his death did not happen in the battle field. After reaching back to village Purbogram, at a stage of fight he came to his house, being non combatant, on having consent of his commander to meet his wife and children. Defence suggested that freedom fighter Abdul Malek died in battle field when he as a combatant member of a counter party engaged in front fight. But no reasonable indication

whatsoever has been revealed from the trend of cross-examination of prosecution witnesses to make this defence case believable.

491. It stands proved too that he was shot to death as he was taken away forcibly from his house by the Razakars .When a member of a resistance group stays with his family being non combatant he may be termed as a member of civilian population, we consider it in view of jurisprudence propounded in this regard. We recall the observation made by the **ICTY** in the case of **Strugar** which provides assurance to our view. The observation states that-

“As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part on the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.”

[Strugar, (Trial Chamber), January 31, 2005, Para. 282]

492. Despite being a member of adversary the victim Abdul Malek obviously was *hors de combat* when he became prey of the attack which did not take place in battle field. Attack was directed against non combatant Abdul Malek who had been at his home to meet his wife and children and this ‘situation’ covers the phrase ‘any other cause’ as contained in the above observation.

493. Besides, victim Abdul Malek came to his house to meet his family laying down his arms which made him *hors de combat* as well. It is now well settled that those actively involved in a

resistance movement can qualify as victims of crimes against humanity. We find substance in what has been submitted by the learned prosecutor, on this matter. The 'specific situation' of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. This view finds support from the following decision of the **ICTR:**

“As noted in Blaškić Judgement, ‘the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.’”

[Bisengimana, (Trial Chamber), April 13, 2006, Para. 49]

494. The attack directing him was not for any lawful purpose or necessity as he was non combatant at the time of attacking him to accomplish his forcible capture. Thus, the act of attack upon the victim treating him an adversary was absolutely prohibited in customary international law. Rather, it was a systematic attack against a non combatant freedom-fighter forming part of civilian population as it was intended to further the plan or policy of annihilating pro-liberation civilians -- facts and circumstances lead us to conclude it.

495. The systematic attack resulted in brutal killing of a civilian Abdul Malek. It is not required to cause death of a number of civilians by launching such attack to characterize the offence as

crimes against humanity. Even a single murder if it was done in context of war or conflict by launching systematic attack directing civilian population it may be characterized as an offence of crimes against humanity. This view finds support from the observation of the **ICTR** made in the case of **Seromba** that-

“A single murder may constitute a crime against humanity if it is perpetrated within the context of a widespread or systematic attack.”

[Seromba, (Trial Chamber), December 13, 2006, Para. 357]

496. Accused Syed Md. Hussain alias Hossain was not with the group of attackers, true. Be that as it may how can he be said to have had participation in perpetrating the crimes alleged? The charge framed arraigns that on his ‘instruction’ accused Md. Moslem Prodhan and cohort Razakars were engaged in perpetrating the crime. P.W.09, the wife of the victim witnessed how her husband was forcibly taken away from their house and by whom. We have found it from the testimony of P.W.09 that accused Md. Moslem Prodhan whom she knew beforehand coming to their house told that they were instructed by accused Syed Md. Hussain to take her [P.W.09] husband away with them. This version remained unimpeached.

497. Who the accused Syed Md. Hussain alias Hossain was? He was a potential Razakar having influence over his accomplice Razakars headquartered in Nikli Thana Sadar and all the Razakars

were engaged in carrying out atrocious acts directing civilian population to further their 'common purpose', as we have already found it in adjudicating charge nos. 03 and 04. Even from a report published in the daily Purbodesh, Exhibit-2 it transpires that he was the '**King**' of Razakars of Nikli Thana Sadar. All these cumulatively suggest validly that the act of killing non combatant freedom-fighter Abdul Malek on forcible capture from his house would not have occurred without approval, encouragement and facilitation on part of accused Syed Md. Hussain alias Hossain.

498. Already it has been proved too that accused Syed Md. Hussain alias Hossain played a potential role in carrying out attacks as narrated in charge nos. 03 and 04. Presumably, accused Md. Moslem Prodhan and his accomplices would not have forcibly captured and killed Abdul Malek without endorsement, instruction and encouragement of accused Syed Md. Hussain alias Hossain. After cessation of fight in the afternoon the accused Sayed Md. Hossain might have had information of Abdul Malek's coming at his home in the evening and then he made his accomplices including accused Md. Moslem Prodhan engaged to execute the culpable plan of capturing Abdul Malek forcibly from his house.

499. In view of above it is thus hard to believe that the event of killing Abdul Malek on forcible capture happened beyond knowledge and endorsement of accused Syed Md. Hussain alias Hossain. The act of 'instruction' or 'encouragement' may not be

tangible and it may be safely inferred from facts and circumstances divulged. Act of endorsing or encouraging cohorts to go on with unlawful acts may be provided even remaining far from the crime site which constitutes 'participation'. The participation in the commission of the crime does not require actual physical presence or physical assistance at the crime site.

500. Defence case is that the victim Abdul Malek, a freedom-fighter belonging to 'Cobra Bahini' died in front fight and he was not killed in the manner alleged. In support of it defence relied upon the book titled 'শিখর' [16 December 1999] edited by Kamrul Hassan [Exhibit-Kha: defence documents volume page-51]. The book narrates that—

০.....তেজ ৩ নিউক্লিয়ার চক্কর" ইংরেজি বইক মার্গে হয
 'i" nq/ Dfq cঞ তম্বব, wj Pj tZ Pj tZ mÜv
 নিউক্লিয়ার | পিই বইক তত্ত্ব অব্ধম Nb AÜKvi | kT "
 এম্বনব্র অব্ধম্বগচ ক্ৰি | 19 অষ্টেই 1971 গ্ৰ ন্য
 ঐক্ৰজ x/ নব্র`vi গ্ৰ ঐক্ৰজ xi অব্ধব্ধক ড্ৰেইঞ্জ Z ন্য
 jvj mH®LWPZ মেজ cZvKv/ knx` nb Avt গ্ৰত্ৰ K,
 গ্ৰZ (, i " B), bUzI ত্ৰন্য.....০

501. First, the above report demonstrates that the battle started at 03:00 P.M and continued till dusk. It also states that four including Abdul Malek embraced martyrdom. It is not disputed that on the day of battle happened in Nikli freedom fighter Abdul Malek died.

502. Prosecution alleges that he was killed by taking him away forcibly from his house when he came to his house to meet his wife and children, during the time of cessation of battle. The above

report relied upon by the defence does not narrate whether Abdul Malek died in front fight. Thus, and since there has been no reason of discarding the testimony of P.W.09, the wife of victim Abdul Malek, terming untrue the narrative which apparently lacks of manner of Abdul Malek's death we are not convinced to accept the same as authoritative one in support of the defence case.

503. Besides, another defence document a book titled 'ibw½tbi w b, tjt v' [Exhibit-Ka: defence documents volume page-17] authored by AKM Anwarul Haque Alim Uddin narrates that—

" i " Bi emyl wKj xi gyt hrvxt`i `j iv`Zvi
 cWg cvk w tq cWRkb wbtq AvbgwmbK `gy 1/2
 Uvi w tK wKj x Avµgb KitZ AMhi nq| Zviv
 µijs Kti cKzcvtoi tMvi`vb chSZ tcStQ
 dvqwis`ii" Kti| mvt_ mvt_ Dfq ct¶i gta`
 Zgy hy`ii" ntq hvq| GKUvrv cWq 2 Nuv hy
 Pjt |....."

504. The above narrative impels that the battle continued till 03.00-04.00 P.M. while the Exhibit-Kha narrates something different. Which one is authoritative? Exhibit-Ka narrates that freedom fighter Abdul Malek alias Malu embraced martyrdom but it does not state specifically that he died in front fight. Thus, and since Exhibit-Ka and Exhibit-Kha do not seem to be authoritative and sourced we cannot arrive at finding as to manner of death of Abdul Malek taking the narratives made therein into account, turning down the evidence presented by the prosecution, especially the testimony of P.W.09, the wife of the victim Abdul Malek.

505. We are also with the submission made by the learned prosecutor that the author of the book [Exhibit-Ka] himself admits his shortcoming in making narrative in the book and that the defence document Exhibit-Kha does not depict complete and actual picture of the event. The book titled ‘*ibw½tbi w` b ,tj v*’ Exhibit-Ka is ‘memoires’ which may naturally suffer from flaws and incompleteness due to lapse of long passage of time although the narrative made therein does not deny the killing of Abdul Malek.

506. It has been proved that freedom fighter Abdul Malek died on the day of battle happened in Nikli. It is to be noted that P.W.09 testified how her husband Abdul Malek was forcibly taken away by accused Md. Moslem Prodhan and his accomplices as instructed by the accused Syed Md. Hussain alias Hossain from their house in the evening. Be that as it may, the victim’s status at the relevant time was a member of civilian population and he was killed by launching attack at his house when he had been there to meet his wife and children.

507. The attack was launched on instruction of accused Syed Md. Hussain alias Hossain as told by accused Md. Moslem Prodhan, P.W.09, the wife of the victim testified. This piece of crucial version remained unshaken. In the absence of any reason whatsoever it cannot be allowed to go on air and thus and other circumstances lead us to conclude that the attack was conducted on instruction of the accused Syed Md. Hussain alias Hossain and

thereby he was a part of the enterprise and in this way he 'participated' to the commission of the crimes and thus he cannot be absolved of liability.

508. Accused Syed Md. Hussain alias Hossain was thus liable as a 'participant' under the theory of Joint Criminal Enterprise [JCE] as he was quite aware of the attack and within his knowledge and on his encouragement and approval the attack was conducted upon a non combatant member of a resistance group by his cohort Razakars over whom he [Syed Md. Hussain alias Hossain] had significant influence and domination. In an article titled '**Crimes against Peace in the Tokyo Trial**' published in the book '**Historical War Crimes Trials in Asia**', 2016 Torkel Opsahl Academic EPublisher Brussels **XUE Ru** emphasizes that --Joint Criminal Enterprise is a theory of common purpose liability which permits the imposition of individual criminal liability on an accused for his knowing and voluntary participation in a group acting with a common criminal purpose or plan. As Gideon Boas, James L. Bischoff and Natalie L. Reid note:

" The advantage of JCE lies in its utility in describing and attributing responsibility to those who engage in criminal behavior through oppressive criminal structures or organizations, in which different perpetrators participate in different ways at different times to accomplish criminal conduct on a massive scale.[Gideon Boas,

James L. Bischoff and Natalie L. Reid, Forms of Responsibility in International Criminal Law, vol. 1, Cambridge University Press, Cambridge, 2007, p. 9.].

509. Failure in getting substantive feedback in front fight against the group of freedom-fighters that happened during the morning of the day the Razakars headed by accused Syed Md. Hussain alias Hossain designed plan of attacking at the house of freedom-fighter Abdul Malek to cause his forcible capture intending to annihilate him, it may safely be concluded from totality of evidence presented.

510. The pattern in committing the killing of a non-combatant freedom-fighter Abdul Malek on forcible capture from his house, as already proved is fair indicative of existence of common plan, design or purpose, and thus, the accused Syed Md. Hussain alias Hossain who did not physically participate in accomplishing the killing can be held liable under the theory of **JCE** which conforms to the liability described in section 4(1) of the Act of 1973.

511. In addition to accused Md. Moslem Prodhan's physical participation to the commission of the killing by launching systematic attack accused Syed Md. Hussain alias Hossain is found to have had participation by his conscious act or conduct to further the object of the local Razakars who were engaged in front fight under the leadership of accused Syed Md. Hussain alias Hossain.

512. In view of above we arrive at an irresistible conclusion that the accused Syed Md. Hussain alias Hossain being the 'King' Razakar of Nikli Thana by instructing the principals took consenting part in an unlawful common enterprise and accused Md. Moslem Prodhan and his accomplice perpetrators being active members of the enterprise acted in furtherance of common purpose and plan. In execution of such instruction and encouragement of the 'King' Razakar accused Syed Md. Hussain alias Hossain the perpetrators had carried out the killing of a non-combatant freedom-fighter taking away him on forcible capture from his house.

513. Thus, it may be lawfully inferred that accused Syed Md. Hussain alias Hossain abetting and substantially facilitated the commission of the crime, by act of providing 'instruction' and 'encouragement' knowing consequence of such act. The charge framed alleges that the accused Syed Md. Hussain alias Hossain abetted the group of Razakars, the principals in carrying out the attack and thereby substantially facilitated the actual commission of the offence of killing. It is to be noted that the act of abetment need not be tangible one. It is to be inferred from circumstances and relevant facts including the act and conduct of the accused. It has been held by the **ICTY Trial Chamber** in the case of *Simic, Tadic, and Zaric* that

“The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.”

[Simic, Tadic, and Zaric, (Trial Chamber), October 17, 2003, Para. 162]

514. It is true that accused Syed Md. Hussain alias Hossain did not physically participate to the commission of the crime under adjudication. But the facts and circumstances unveiled from evidence tendered does not force us to believe that the attack was launched without the approval and knowledge of the accused Syed Md. Hussain alias Hossain as he was the ‘King’ Razakar of Nikli Thana. We have already got from the unshaken testimony of the victim’s wife [P.W. 09] that coming to their house accused Md. Moslem Prodhan and his accomplice Razakars took her husband away on forcible capture as asked by accused Syed Md. Hussain alias Hossain. All these cumulatively suggest unerring inference that on abetment and substantial facilitation of the accused Syed Md. Hussain alias Hossain the criminal act was carried out by launching attack.

515. Additionally, since accused Syed Md. Hussain alias Hossain, for the reason of his dominant position in local Razakar Bahini, indisputably knew the plan of launching attack at non-combatant freedom-fighter Abdul Malek’s house and since knowing it he did

not prevent the group of his accomplice Razakars we may unerringly conclude that he [accused Syed Md. Hussain alias Hossain] too was a consenting part of the enterprise. It is to be noted that such act of 'inaction' encompasses a significant act on part of the accused having dominance over accomplices that substantially facilitated the actual accomplishment of the crime of murder and thus accused Syed Md. Hussain alias Hossain cannot be absolved of responsibility. In some circumstances even such 'inaction' is considered as an act forming part of attack when it is found proved that the accused had domination over the principals.

516. It appears that according to charge framed accused Syed Md. Hussain alias Hossain incurred liability under section 4(1) together with section 4(2) of the Act of 1973 which corresponds to the theory of civilian superior responsibility for the crimes committed. We have found that the accused Syed Md. Hussain alias Hossain was a potential Razakar of Nikli Thana and had substantial influence over the local Razakars. It has been proved that the accused Syed Md. Hussain alias Hossain approved and endorsed the execution of plan of killing Abdul Malek, a non-combatant freedom fighter and thereby he abetted and contributed to the actual commission of the crime. True, in this way accused Syed Md. Hussain alias Hossain incurs liability also under section 4(2) of the Act of 1973 which corresponds to the theory of civilian superior

responsibility together with section 4(1) of the said Act but it may be taken into account as an aggravating factor only.

517. However, the Tribunal is authorized to consider both forms of responsibility in order to have a full reflection about the extent of culpability of the accused Syed Md. Hussain alias Hossain in light of the facts. But however, ‘cumulative convictions’ under both liabilities is impermissible for the same conduct. Incurring liability under civilian superior responsibility together with individual criminal liability aggravates accused’s culpability which may be considered in awarding sentence.

518. Besides, in view of deliberation made herein above it has been found proved that the accused Syed Md. Hussain alias Hossain ‘instructed’ the group of perpetrators accompanied by accused Md. Moslem Prodhan in conducting the attack that resulted in killing of Abdul Malek and thereby substantially facilitated the actual commission of crimes, and thus, incurred liability under section 4(1) of the Act of 1973, and as such, the matter of incurring liability also under the theory of civilian superior responsibility loses significance.

519. Evidence tendered in support of this charge demonstrates beyond reasonable doubt that the intent of the accused Syed Md. Hussain alias Hossain, Md. Moslem Prodhan and their accomplice Razakars, by carrying out the criminal acts forming attack, was to cause killing of non-combatant freedom fighter Abdul Malek on

forcible capture from his house and eventually they committed the crime, in violation of laws of war and customary international law.

520. Thus, we conclude that the prosecution has been able to prove beyond reasonable doubt that the accused Syed Md. Hussain alias Hossain and accused Md. Moslem Prodhan participated, facilitated, abetted and contributed to the commission of the killing, and thus, each of them is equally liable for the crimes committed in the same manner as if it were done by each of them alone. Thus, the accused Syed Md. Hussain alias Hossain and accused Md. Moslem Prodhan are held **guilty** for participating, abetting, facilitating and complicity in the commission of offences of '**abduction**' and '**murder**' as crimes against humanity as part of systematic attack directed against unarmed civilian 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 for which the accused persons have incurred liability under section 4(1) of the said Act.

Adjudication of Charge No.06

[Other inhumane acts by causing degrading mistreatment to the dead bodies of two freedom-fighters]

521. Summary Charge: That on 20 November, 1971 freedom-fighter Khairul Jahan with a group of 22 freedom-fighters took position at Nandania village and another freedom-fighter Md. Selim with a group of 15 freedom-fighters took position at village Pyrabhanga village both under Hossainpur Police Station of the

then Kishoreganj Sub-Division. Meanwhile, the local Razakars informed the Pakistani occupation army and the Razakars about the presence of the said two freedom-fighters at Nandania and Pyarabhangra villages. Being informed about it on 26 November, 1971 in the morning Razakars accompanied by Pakistani occupation army surrounded the villages Nandania and Pyarabhangra with the help of accused Razakar Commander Syed Md. Hussain alias Hossain. Being informed about the matter, freedom-fighters Khairul Jahan and Md. Selim along with their group of freedom-fighters crossed the Pyarabhangra bridge and took position in the jungle and paddy-field situated beside Nath Bari. Then gunfire exchanged between Pakistani occupation army along with Razakars and the freedom-fighters. In this armed battle, freedom-fighters Khairul Jahan and Md. Selim were killed along with other freedom-fighters, namely Khairul son of Abdur Rashid and Jalal Uddin son of Aftab Uddin both of village Pyarabhangra.

522. Later, on order of the Razakar Commander accused Syed Md. Hussain alias Hossain the Razakars accompanying the said accused dragging out the dead bodies of two freedom-fighters, killed in armed battle, out of the paddy field threw the same to the road towards Hossainpur and at about 02:30-03:00 PM on the same day, on order of accused Syed Md. Hussain alias Hossain his accomplice Razakars tying the legs of the dead bodies up to the backside of the jeep of Pakistani occupation army started moving

ruthlessly through the brick surfaced road to the house of Shafi Chairman wherefrom two dead bodies were shifted to Kishoreganj town by rickshaw and were dumped in front of Islamia Boarding under old Thana area. On the same day, after Asar prayer infamous collaborator Moulana Athar Ali came there and spitting on the dead bodies of two freedom-fighters killed in armed battle started uttering that -"It is the blessings of Allah, they are 'kafir', 'kafir', they are enemies of Pakistan and our sons had killed them" and saying this he also kicked the dead body of freedom-fighter Khairul Jahan by expressing abhorrence. At night the dead bodies were made disappeared. Even on searching their dead bodies could not be found. After independence those two freedom-fighters were declared as 'Bir Protik' by the government of the People's Republic of Bangladesh.

523. Thereby, accused Syed Md. Hussain alias Hossain is charged for participating, abetting, facilitating and complicity in the commission of offences of other inhumane acts [causing blatant indignity and inhumane hatred to dead bodies] as crimes against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused person has incurred liability under section 4(1) and 4(2) of the said Act.

Evidence of Witnesses Presented

524. Prosecution adduced five witnesses who have been examined as P.W.15, P.W.16, P.W.17, P.W.18 and P.W.19 to prove this charge. Of them P.W.18 happens to be the younger brother of victim martyr freedom-fighter Khairul Jahan, Beer Protik. The witnesses chiefly testified how the dead bodies of martyr Khairul Jahan and Md. Selim were subjected to degrading mistreatment and complicity of the accused Syed Md. Hussain alias Hossain therewith. Now let us see what the witnesses narrated on dock.

525. P.W.15 Md. Sohrab Uddin [62] is a resident of village Pyrabhanga under Police Station and District [now] Kishoreganj. In 1971 he used to reside at their house at village Pyrabhanga situated adjacent east to the Hossainpur road. His testimony includes chiefly two matters—battle happened at Pyrabhanga and dragging on dead bodies of two freedom-fighters died in battle.

526. P.W.15 stated that on 26 November, 1971 at about 09:30/10:00 A.M. Pakistani army accompanied by Razakars arrived near Nath Bari of village Pyrabhanga. 2/3 days prior to their arrival there freedom-fighters got stationed at different places at their village. Pakistani army and Razakars coming at their village started gun firing directing the freedom fighters and then the freedom fighters too started resisting them by counter gun firing. At that time he [P.W.15] had been at their house when during the fight all of their family members laid down on ground for self defence. The fight continued for 2/3 hours. After the gun firing came to

cessation he [P.W.15] saw, through the fence of their house, 3/4 Razakars bringing two dead bides on Hossainpur road dragging those from the paddy field nearer to their house and then tying their legs up behind an army jeep dragged them on through brick spread road in front of Shafi Chairman's houses, about one kilometre far. Afterwards, he [P.W.15] came out of their house after Pakistani army and Razakars quitted their village and other villagers also came to the road when it was about 04:00/04:30 PM.

527. P.W.15 next stated that he heard from the locals appeared on the road that on that day Pakistani army accompanied by Razakar commander accused Syed Md. Hussain and his accomplice other Razakars had attacked the freedom-fighters coming to their village. Freedom-fighters Khairul of their neighbouring village Latifpur and Selim of Kuliarchar died in the fight and their dead bodies were dragged on tying up behind a Pakistani army jeep.

528. In cross-examination it has been affirmed that the house of P.W.15 situated adjacent east to Hossainpur road and Kishoreganj Sadar was about four kilometres away from their house. Defence, it appears, simply suggested that what he [P.W.15] testified implicating the accused Syed Md. Hussain alias Hossain was untrue and tutored. P.W.15 denied it. Any effective effort does not appear to have been made on part of the defence intending to impeach what has been testified on material particulars by cross-examining this P.W.15.

529. P.W.16 Md. Bachchu Mia [61] is another resident of village Pyrabhanga where the fight between freedom-fighters and Pakistani army and Razakars happened. In 1971, he remained associated with his father's business and used to stay at their own house at Pyrabhanga situated about 20 cubits east to Hossainpur road. He is a direct witness to the act of dragging on two dead bodies of freedom-fighters died in battle by tying them up behind a Pakistani army jeep.

530. P.W.16 stated that few days prior to 9th day of Bangla month Agrahayan in 1971 the freedom-fighters got stationed at their village. On the 9th day of Agrahayan in 1971 at about 09:00/10:00 A.M. Pakistani army and Razakars arriving in front of Nath Bari at village Pyrabhanga started gun firing directing the freedom-fighters and with this the freedom-fighters also started resisting them by counter gun firing. At that time they [P.W.16 and other members of his house] went into hid inside a trench at their house which they got prepared 5/7 days back for self defence as Pakistani army used to move through Hossainpur road.

531. P.W.16 next stated that the fight continued for two/two and half hours. After cessation of gun firing he[P.W.16] saw, through the fence of house, Razakars bringing dead bodies of freedom-fighters Khairul and Selim on Hossainpur road from the paddy field and then he saw them dragging on the dead bodies therefrom towards the house of Shafi Chairman tying those up behind a

Pakistani army jeep. After the Pakistani army and Razakars had left the place he [P.W.16] came out and saw the Hossainpur road wrapped up with blood. He then heard from the locals appeared there that on that day in the morning Razakars and Pakistani army led by accused Hussain had attacked the freedom-fighters coming at their village.

532. In cross-examination P.W.16 stated that the house of Shafi Chairman was about one kilometre far from that of his own. Defence does not appear to have made attempt to refute what has been testified by him on material particular. It simply suggested that what has been testified implicating the accused Syed Md. Hussain was untrue and tutored. P.W.16 denied it.

533. P.W.17 A.K Nasim Khan [57] is a resident of 395, Sholakia, Kishoreganj Sadar. In 1971, he used to live with his parents at their house adjacent to the mosque located at Nilganj road morh, Kishoreganj Sadar. He was a student of class VII in 1971.

534. P.W.17 stated that on 26th November, 1971 at about 04:00 P.M. while he was playing with his friends on the road nearby their residence he saw a demo of Razakars moving towards old Thana taking dead body on a rickshaw. Seeing this he returned back home and later on he came to know that 10/15 Razakars led by Razakar Commander accused Syed Md. Hussain had taken two dead bodies by rickshaw to old Thana and those included their neighbour

elder brother freedom-fighter Khairul Jahan and another freedom-fighter Selim of Kuliarchar. Accused Syed Md. Hussain was the Razakar Commander in 1971, P.W.17 added.

535. In cross-examination, in reply to question put by the defence P.W.17 stated that their house was about 1/1.5 kilometres far from Pyarabhangra village; that the house of martyr freedom-fighter Khairul Jahan was situated about 30/40 yards far from their [P.W.17] house; that Syed Hassan, the elder brother of accused Syed Md. Hossain was also a Razakar. Instead of refuting what the P.W.17 testified on material particular by cross-examining him defence simply put suggestion that what he testified implicating the accused Syed Md. Hussain was untrue and tutored. P.W.17 blatantly denied it.

536. P.W.18 Md. Sadekujjahan Talukder Noyon [58] is the younger brother of victim martyr freedom-fighter Khairul Jahan. In 1971 he used to stay with his parents at their house 'Talukder Lodge' in Kishoreganj Sadar. He was a student of class VII in 1971.

537. P.W.18 stated that in 1971 his elder brother Khairul Jahan Talukder [22/23] was a student of first year in Mymensingh Polytechnic Institute. At the end of April, 1971 Khairul Jahan went to India intending to join the war of liberation and on receiving training there he returned back Bangladesh and participated freedom-fight at different places. But however they [P.W.17 and

his family] did not have any communication with him [Khairul Jahan].

538. In respect of the event P.W.18 stated that on 26 November, 1971 at about 04:00 P.M. he had been staying at his father's shop at Kishoreganj Thana Sadar when he heard from locals that his elder brother Khairul Jahan Talukder died during the fight happened at village Pyarabhangra against Pakistani army and Razakars. Then he along with his sister's husband Asaduzzaman Anwar went back to their house. P.W.18 further stated that arriving at their house he saw some Razakars led by Razakar Commander accused Syed Md. Hussain besieging their house 'Talukder Lodge'. Accused Syed Md. Hussain wearing a khaki pant wrapped up with blood stain entering inside the house told his[P.W.18] mother that -- ' You had sent your son to join Mukti Bahini, now see we have killed your son, look at his blood. We have demonstrated his dead body to the people of the town taking by rickshaw'. On hearing it his [P.W.18] mother started crying and got fainted. Then accused Syed Md. Hussain destructed valuables of their house finding his [P.W.18] father not available and then had quitted, P.W.18 added.

539. P.W.18 went on to state that on the same day i.e on 26 November, 1971 after the dusk he heard that dead bodies of his brother Khairul Jahan Talukder and another freedom-fighter Selim of Kuliarchar were kept dumped in the field of Islamia Boarding [where a Razakar camp existed] adjacent to *Saheedi Mosque* in

Kishoreganj town. On hearing it he[P.W.18] taking some other persons with him rushed there but he could not see any dead body there and since then dead bodies of the victims could not be traced even.

540. In respect of reason of knowing the accused Syed Md. Hussain P.W.18 stated that he knew him beforehand as his father Syed Mosleh Uddin was the Chairman of Peace Committee of the then Kishoreganj Sub-Division.

541. P.W.18 proved the photocopy of a report published on 25.03.1972 in the Daily Purbodesh as Exhibit-2. He stated that the Investigating Officer [IO] seized the main report published in the said daily which was kept preserved with him and after getting its photocopy the main copy was given to his jimma. P.W.18 also proved the seizure list and his signature therein as Exhibit-1 and 1/1 and Jimmanama and his signature therein as Exhibit-3, 3/1.

542. In cross-examination, P.W.18 stated that their house was about half kilometre far from old Thana; that the village Pyarabhanga was about four kilometres away from their house and that the copy of daily Purbodesh was seized [by the IO] in presence of Abdul Mannan, the Imam of the local mosque. P.W.18 denied the suggestion put to him that what he testified implicating the accused was untrue and tortured. Defence however does not appear to have made effort to impeach what he testified in relation to material particular.

543. P.W.19 A.K.M Shajahan [61] is a resident of 380/1, Puran Thana, Kishoreganj Sadar. In 1971 he used to reside at the said residence and was a student of class X. Their house was situated to the east of Islamia Boarding at Puran Thana locality. A Razakar camp was set up at the said boarding [Islamia Boarding].

544. In respect of the event P.W.19 stated that on 26 November 1971 at about 04:00/04:30 PM he heard from locals that Razakar Commander accused Syed Md. Hussain and his accomplice Razakars had kept dead bodies of two freedom-fighters left in the field in front of Islamia Boarding. On hearing this he [P.W.19] rushed there and he found two dead bodies lying there. One dead body was of Khairul Jahan, the elder brother of his [P.W.19] friend Kajol.

545. In respect of further observation he experienced there P.W.19 stated that he saw the Razakars surrounding the dead bodies of the duo. And after Asar prayer Moulana Athar Ali [now dead], a notorious collaborator being accompanied by some other people came to the dead bodies and started spitting on them in presence of many people and by kicking the dead bodies he uttered-- ' they are kafirs, Allah has showered blessing, they are the enemies of Pakistan, they have been killed by our troops'. At that time the people present there were conversing among them that freedom-fighter Khairul Jahan and another freedom-fighter died in battle happened at Pyrabhanga and then accused Syed Md. Hussain after

roaming around Kishoreganj town taking their dead bodies in rickshaw had dumped those in front of the field. He [P.W.19] also heard from locals that another dead body was of freedom fighter Selim of Kuliarchar. Then he [P.W.19] went to the mosque to say Magrib prayer and afterwards coming out of the mosque he could not see the dead bides in the field.

546. In cross-examination, P.W.19 stated that their house was about 40 yards far from the Saheedi mosque. Defence simply put suggestion that what he testified implicating the accused Syed Md. Hussain was untrue and tutored. P.W.19 denied it. Defence however does not appear to have made any attempt to controvert what the P.W.19 observed and heard in relation to the event.

Finding with Reasoning on Evaluation of Evidence

547. This charge involves grave mistreatment on dead bodies of two freedom fighters died in a battle against Pakistani occupation army and Razakars at village Pyarabhanga under Hossainpur Police Station of the then Kishoreganj Sub-Division. It is not disputed that two valiant freedom-fighters Khairul Jahan of Kishoreganj town and Md. Selim of Kuliarchar died in the battle field. Sacrificing life in the battle filed while combating the opponent for the cause of independence of dear mother land, Bangladesh obviously was gallant deed for which not only their dear and near ones but the nation shall ever remain swollen with pride. The State has recognised their brave sacrifices by honouring them with

posthumous "Beer Protik" award, and thus, they shall remain ever alive in the compassion of the nation.

548. But the hateful severe mistreatment caused on the dead bodies of those two brave freedom-fighters died in the Pyarabhangra battle as narrated in this charge indisputably shocks the relatives of the victims, the nation and the humanity as well. Accused Syed Md. Hussain alias Hossain, the Razakar Commander has been indicted to have had actively and notoriously carried out extreme mistreatment on their dead bodies with untold hatred.

549. Ms. Tureen Afroz, the learned prosecutor in advancing argument on this charge submitted that grave inhumane treatment was done upon the dead bodies of two valiant freedom-fighters who died in Pyarabhangra battle. Accused Syed Md. Hussain alias Hossain showing extreme hatred had committed such inhumane acts upon the dead bodies and even he culpably facilitated to get the dead bodies disappeared. Such inhumane treatment done upon the dead bodies inevitably caused grave mental harm to the relatives and the civilians who witnessed to happen such barbaric inhumane activities which constituted the offence of 'other inhumane act' as crime against humanity.

550. It has been further submitted by the learned prosecutor that the accused person's physical participation in committing the inhumane criminal acts has been proved from the testimony of the witnesses examined and the documents relied upon by the

prosecution. Defence could not shake the evidence presented in support of the brutal event arraigned in this charge. Showing disrespect to dead body and obstructing its burial are prohibited in international humanitarian law, the learned prosecutor added.

551. On contrary, Mr. Abdus Sattar Palwan, the learned state defence counsel defending the accused Syed Md. Husain alias Hossain submitted that the accused was not involved with the criminal acts alleged in any manner; that the two freedom-fighters died in battle field and that the witnesses testified in support of this charge are not credible.

552. A battle happened between the freedom-fighters and Pakistani occupation army and Razakars at Pyarabhanga. Defence could not impeach it in any manner. P.W.15 and P.W.16 are the residents of village Pyarabhanga and they at the relevant time used to stay at their respective houses situated nearer to Kishoreganj bound Hossainpur road. It is evinced from their testimony that freedom fighters got stationed around the village Pyarabhanga since few days prior to the fight happened. Presumably, Pakistani army and Razakars became aware of being there of freedom-fighters which made them imbued to annihilate them, their counterpart, and thus, a front fight ensued on 26 November 1971, as testified by the P.W.15 and P.W.16. Defence could not refute that on that day Pakistani army and Razakars had carried out a fight against the freedom-fighters.

553. Besides, fighting with the Pakistani army and Razakars at Pyarabhanga on 26 November 1971 gets corroboration also from the narrative made in the report titled *ওহাৎ ই ইৎ গ্যে তঁ কওঁ* published in **The Daily Purbadesh dated 25.03.1972 [Exhibit-2]**. P.W.18, the younger brother of martyr freedom fighter Khairul Jahan had kept a copy of the daily Purbadesh preserved with him. He while proving the report published therein presented it [the original copy of the daily] for Tribunal's perusal. The investigation officer after seizing the copy of the said daily Purbadesh gave it back to him [P.W.18] by preparing Jimmanama.

554. It is to be noted that under section 19(1) of the Act of 1973 such old report published in daily news paper tendered on part of the prosecution deserves to be admitted into evidence. The above old report published in a national daily on 25.03.1972 carries probative value as it potentially mirrors the facts materially related to the criminal acts narrated in the charge framed. In determining the arraignment we consider it just and lawful to take the account narrated in the report together with the ocular evidence presented. Defence does not attack the authoritativeness of the narratives made in this report **[Exhibit-2]**.

555. What happened in conjunction with the fight at Pyarabhanga and how the valiant freedom fighters Khairul Jahan and Md. Selim embraced heroic martyrdom for the cause of Bengali nation? How

the fight eventually ended? The report **Exhibit-2** narrates a lot in this respect which is as below:

০..... Avav NbUvi gtaB tm Gtm tMj c'vivfv/2vi
 iYtq̃t̃ | thvM w̃j mv_xt`i mstM Drmvin Dīxcbvq
 kĪ" t̃i Nvtqj Kti Pj t̃jv | Ggwb mgtq t`Lt̃jv GK`j
 Lvb tmbv Zvt`i Pricvk w̃Nti td̃t̃j t̃Q | mvgbv mvgwb hy
 Pj t̃jv At̃bKq̃Y at̃i | mvgtb tcQtb PZ̃R t`t̃K et̃j U ewó
 ew̃Z ñt̃Z _vKj gỹ³thvxt`i Dci | ZeyZviv AnePj fite
 jot̃jv, kĪ" t̃i mvaikx Avμgbt̃K c̃āZnZ Kit̃Z t̃Rvi
 c̃Póv Pvjvj, w̃KŠ' weavZv evg | Zvt`i t̃Mvjv_wj d̃yt̃q
 t̃Mj | g̃vM̃Rb kb̃" | G Ae`vq `t̃j i Ab`t̃i i q̃vi w̃PŠZvq
 _vqi " j Avi tm̃ij g `Rb Rxẽt̃bi S̃yK w̃bj | w̃b̃t̃Riv Gw̃Mt̃q
 `t̃j i Avi meib̃t̃K tcQtb m̃ti hvlqvi m̃thvM Kti w̃j |
 Ggwb Kti GK mgq tm̃ij g aiv coj cvk ew̃nbxi nvt̃Z |
 Avi Lvqi " j! -- tm Lvb tmbv`i nvt̃Z aiv w̃t̃q Kvc̃y" t̃li
 gZ`t̃K t̃Wt̃K bv Gtb gỹt̃Z[©]t̃M̃bW P̃vR[©]Kti emj | GKUv
 gỹZ[©]gṽt̃ | iayGKUv c̃P̃Ū kã--, ci q̃t̃yB me tkl |
 ṽx̃bZv msM̃t̃gi NUbveūj GKw̃ D³/₄j Rxẽt̃bi mgw̃B NUj
 অখ্যাত পলকx c'vivfv/2vi Lt̃j i aṽti 26 b̃t̃f̃x̃t̃i i m̃h̃[©]w̃Z
 mKṽt̃j | ০

556. The above narrative portrays a heroic ending of the lives of two gallant freedom-fighters—Khairul Jahan and Md. Selim. The report sketching the narrative of ‘Pyarabhanga fight’ occurred on 26 November 1971 was published within three months and nine days after achievement of our independence. The oral evidence tendered on material facts tends to show authoritativeness of the narration made in the report. Thus, it stands proved that valiant freedom-fighters Khairul Jahan and Md. Selim laid their lives in the fight that occurred at Pyarabhanga on 26 November 1971. The

nation must and must demonstrate modest salute to their sacrifices they laid for the cause of our independence and emancipation.

557. What happened next? How the dead bodies of the two brave martyrs were dealt with? The charge framed alleges that after Khairul Jahan and Md. Selim, two freedom-fighters died in Pyarabhangra battle, on instruction of accused Syed Md. Hussain alias Hossain their bodies were tied up to the backside of a jeep of Pakistani occupation army and then were dragged on ruthlessly through the brick surfaced road to the house of Shafi Chairman.

558. Testimony of P.W.15 and P.W.16, the residents of village Pyarabhangra where the battle happened demonstrates that after cessation of fight 3/4 Razakars brought two dead bodies on Hossainpur road dragging those from the paddy field nearer to their house and then tying their legs up behind a Pakistani army jeep they dragged them on in front of Shafi Chairman's house moving through brick spread road. P.W.15 and P.W.16 observed it remaining in hiding in their houses which were adjacent to Hossainpur road. Defence could not bring anything by cross-examining them which can lead to infer that it was not practicable of seeing any such activities staying at their houses.

559. It is also evinced that Razakars and Pakistani army led by accused Syed Md. Hussain alias Hossain had attacked the freedom-fighters stationed at village Pyarabhangra. P.W.15 and P.W.16 heard it from the locals appeared on the road wherefrom the dead bodies

were dragged on tying up with a jeep. It remained totally unimpeached. Therefore, it stands proved that the accused Syed Md. Hussain alias Hossain was actively engaged in the fight against the freedom-fighters. As a member of an auxiliary force of Pakistani occupation army he might have had participation in the fight against the freedom fighters. Engaging in fight against counter part does not constitute offence, true. But what he did, after cessation of fight? It transpires that he actively participated in accomplishing the act of dragging the dead bodies of the duo tying those up behind a jeep and thereby had committed grave disrespect upon the dead bodies of two freedom-fighters died in the battle which was absolutely unlawful and attack against human dignity. His culpable encouragement and aggression pregnant of perverted thoughts made it possible to drag the dead bodies of two freedom-fighters died in battle tying those behind an army jeep, we conclude.

560. The charge framed next alleges that from the place in front of Shafi Chairman's house the two dead bodies were shifted to Kishoreganj town by rickshaw and were made dumped in the field in front of Islamia Boarding under old Thana area of Kishoreganj town.

561. The direct testimony of P.W.17, a resident of Kishoreganj Sadar adjacent to the mosque located at Nilganj road morh demonstrates that that accused Syed Md. Hussain alias Hossain was

with the group of Razakars when the dead bodies of freedom fighter Khairul Jahan and another freedom fighter Md. Selim of Kuliarchar were taken by rickshaw towards old Thana locality. This version remained unshaken.

562. If the above unimpeached version of P.W.17 is considered together with that of P.W.19 so far it relates to seeing the dead bodies dumped in the field in front of Islamia Boarding it shall unerringly suggest the conclusion that none but the Razakars led by accused Syed Md. Hussain alias Hossain had dumped the dead bodies there bringing by rickshaw. Besides, defence could not controvert that the dead bodies of Khairul Jahan and Md. Selim, two brave freedom fighters were taken there by rickshaw.

563. In addition to the oral testimony tendered on this crucial phase of the brutal event the report **Exhibit-2** narrates as below:

*ÔGi cti i Aa'iq eo ubg@/ eo `ymn/ Amæ te`br weai-
biuckvP Kz'vZ ivRvKvi-Avj e`tii `j QjU Gj --kKubi
gZ Smtq coj Lqiq "j Rvntbi cYnxb t`nUvi Dci/
teqtbti tLvbq tLvbq t`nUv qZ weqZ Kti Rj - vti `j
teqtbti tcvP Zvi iki+"Q` Kti Atµvk tgluj | GLvbb
tkl bq -- Kz'vZ ivRvKvi cåvb µKs tnvmb knx`i gZt`n
wiKkvq cvtqi Zjvq tPtc, nvtzi gJvq LwUZ gv_v ubtq
tmw`b mviv kni cqgvj Kti Nji temotqij | Nji Nji
knx`i cieT t`nUvK bvbvfvte jwAZ I cOk@ Kti
`ckµPK Dj - vtm tqtZij | 0*

564. The monstrosity the accused Syed Md. Hussain alias Hossain committed upon the dead body of martyr Khairul Jahan was blatant

attack against human dignity indeed. No sane person can move around in public keeping legs on one's dead body and taking his cut off head in hand, by rickshaw. Dead body of human being of any community deserves to be duly respected and disposed of according to his or her religion. The living persons observing and experiencing such beastly mistreatment committed upon dead bodies obviously sensed seriously harmed. Act of hatred and aggression upon one's dead body is serious felony causing grave violation of human dignity which constitutes the offence of 'other inhumane act' as crimes against humanity.

565. Geneva Conventions 1949 prohibit disrespect to the battlefield dead. In view of hateful acts unveiled in the case in hand denoting gross degrading treatment to corpse of two freedom fighters died in battle field it is imperative to note that the Geneva Conventions 1949 explicitly provide that prevailing forces must "search for the [enemy's] dead and prevent their being despoiled." But in the case before us the accused Syed Md. Hussain alias Hossain by his severe hateful acts exposed the dead bodies of the victims in a public place and thereby caused shock public civility and also prevented lawful right of burial.

566. What happened when the Razakars came to the house of freedom-fighter Khairul Jahan's house in Kishoreganj town, on the day of the event of committing degrading treatment upon the dead

bodies of Khairul Jahan and Md. Selim, also killed in the Pyarabhanga fight?

567. We have found it from the evidence of P.W.18, the younger brother of martyr freedom fighter Khairul Jahan that accused Syed Md. Hussain coming to their house aggressively disclosed the fate of dead Khairul Jahan with extreme hatred to his [P.W.18] mother with spiteful utterance -' You had sent your son to join Mukti Bahini, now see we have killed your son, look at his blood. We have demonstrated his dead body to the people of the town taking by rickshaw'. No human being is supposed to act in the way the accused did.

568. Above hateful and extremely unkind conduct the accused Syed Md. Hussain alias Hossain had shown to Khairul Jahan's mother with such hatred utterance gets further corroboration from the narrative made in the report titled *Ôhuf`i i t`3 gy t`k0* published in **The Daily Purbadesh dated 25.03.1972**, Exhibit-2 which states that-

Ô--tZvi tQtj tK Avgiv RevB Kti GtmuQ !--uK
 nek/m nt"Q br ?-- GB `vL Lvqi " tj i i³ ! --
 Gevi nek/m nt"QZ! t` Gevi Nti tKv_vq uK AvtQ
 tei Kti t`--bBtj --
 weMZ Omeyk btfat weKj | tmw`b uKtkviMÄ
 gjvKqv cvovq ÔZij k`vi wfj vûq `wotq K_v_tj v
 ej uQj `vbxq ivRvKvi câvb I ZrKij xb
 uKtkviMtÄi uKs-tvrtmb knx` gy`thv×v `d KgvÜvi
 Lvqi "j Rvntbi gvûK| bicii gL cÿi gZ`y
 msev` I m` `bnZ cÿi i³ t`tL tmw`b cvlvbx

gvtqi ü`q Avil cvlvY ntq MtqQj | we`sq te`bv
 Avi NUbvi AvKw`\$KZvq wZwb tever ntq MtqQj b/
 tever `wó tgtj GK`#ó tPtq t`LwQj b bicii Rvgr
 Kvcfo ZviB Av`tiii `jvj Lvqi "tji PvcPvc
 i³/ó

569. Before making the dead bodies disappeared those were then taken in the field in front of Islamia Boarding in Kishoreganj town. Why the dead bodies of two freedom-fighters were taken there? What happened to those dead bodies next and how those were treated? These pertinent questions need to be resolved to arrive at decision as to the intent of the accused and his accomplice Razakars.

570. It transpires from the testimony of P.W.18 and P.W.19 that the field of Islami Boarding where the dead bodies were brought and dumped was adjacent to *Saheedi Mosque* in Kishoreganj town and there existed a Razakar camp in Islami Boarding. Presumably, the accused opted to make the dead bodies dumped in the field of Islamia Boarding as it was a place predominantly controlled by Razakars and pro-Pakistan people. And the accused thus considered this place proper for demonstrating hatred upon the dead bodies in the manner he and his accomplices desired, it may be lawfully inferred. How cold-blooded and aggressive the accused was!

571. The cruel and hateful utterance of accused Syed Md. Hussain alias Hossain demonstrating his wearing apparels wrapped with the blood of Khairul Jahan who embraced martyrdom in the war field was a serious attack not only to human dignity but it had also

caused serious ‘mental harm’ to the gravely stunned mother and dear ones of martyr Khairul Jahan. Infliction of inhumane acts upon the dead body of any human being is a serious attack upon the human dignity, we emphatically conclude. How such cruel act impacted upon others? The report titled *শহীদী ইতিহাসে গুরুত্বপূর্ণ* published in **The Daily Purbadesh dated 25.03.1972, Exhibit-2** also states that –

*ওঁ-ফাখ্‌জব্‌ মসমুতগি‌ এখি‌ তমবুব‌ লব্‌জি‌ "ত্‌জি‌ বক্‌জি‌
 ত্‌ত্‌নি‌ গ্‌ব‌ অ্‌ক্‌ল‌ জ্‌ব্‌আব্‌ব্‌ক্‌ অ্‌বি‌ ম্‌খ্‌গ্‌ব্‌ন্‌খ্‌ অ্‌গ্‌ব্‌ব্‌ব্‌ক্‌
 ত্‌ম্‌ব্‌ গ্‌ক্‌ াক্‌ক্‌বি‌ম্‌আেব্‌ম্‌ ত্‌ক্‌ব্‌ক্‌ "ত্‌ল‌ অ্‌গ্‌ব্‌ত্‌
 র্‌র্‌ফ্‌জ‌ ন্‌ত্‌ক্‌ অ্‌জ্‌ত্‌ক্‌" ই‌অ্‌ "ওঁদব্‌ল্‌ব্‌ অ্‌ক্‌ওঁ ত্‌দ্‌জ্‌
 ল্‌ব্‌জি‌ "ত্‌জি‌ ােত্‌ন্‌খ্‌ অ্‌ব্‌জ্‌বি‌ চ্‌ওঁ ক্‌ব্‌ব্‌ াব্‌তে‌'ব্‌
 ক্‌ত্‌ি‌ওঁজ্‌ |ওঁ*

572. Thus, the inhumane and degrading treatment caused to the dead body of martyr freedom fighter Khairul Jahan made the people of Kishoreganj sternly shocked and stunned as well and it inflicted countless mental harm to them. The dear ones of the victims and the people of Kishoreganj obviously feel pride of martyrdom of Khairul Jahan, but it is hard to accept by them the conduct and inhumane treatment done upon the dead body of a freedom-fighter. No norm of civility and human rights endorse such degrading treatment upon one’s dead body. It stands proved that the accused Syed Md. Hussain alias Hossain was actively and consciously engaged in making a serious degrading and hateful attack on the brave freedom-fighter Khairul Jahan’s dead body.

573. What sort of conduct constitutes disrespect? Does disrespect upon dead body cause mental harm to other civilians? No one shall disagree that disrespectful and degrading treatment on the corpse of two freedom-fighters died in battle field was an explicit attack on the human dignity. Indisputably dignity of the human dead body is inseparable from the dignity of the living person.

574. The body of a deceased must be treated with honour and respect as it symbolizes the person once he lived. It stands well proved that the accused Syed Md. Hussain alias Hossain being accompanied by his cohorts actively created a situation to commit the act of outrage upon the dead bodies in addition to extreme degrading treatment he himself committed upon the dead bodies which constituted blatant attack upon the personal dignity of two freedom-fighters. Mistreating a dead body amounts to human rights violation of near ones of the deceased as well, we emphatically note.

575. What does misconduct with regard to corpses actually mean? Mistreatment with corpses covers a highly inappropriate treatment which infringes the notion of humanity. The accused Syed Md. Hussain alias Hossain had knowingly conducted brutal degrading dealing with the dead bodies using it as a tool of hate campaign not only against the freedom-fighters but the Bengali nation as well. In the name of siding with the Pakistani occupation army and showing perverted gratification to them the accused Syed Md. Hussain alias

Hossain, a potential Razakar made him imbued in conducting such untold inhumane acts.

576. By allowing the dead bodies to be dumped in the field of Islamia Boarding where a Razakar camp existed accused Syed Md. Hussain alias Hossain explicitly provided space to express hatred not only on corpses but to their near and dear ones as well. It was thus rather an attack directed against pro-liberation civilian population.

577. It is to be noted that suffering and harm may be caused to third party as well by committing inappropriate and unlawful act against others. In this regard we recall the proposition propounded by the **ICTR** in the case of **Kayishema and Ruzindana** wherein it has been observed that--

"The Chamber is in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends."

[Kayishema and Ruzindana, ICTR Trial Chamber, May 21, 1999, Para. 153]

578. We are of the view that even violence committed upon dead body causes harm to others and the community the dead person[s] belonged. *In the case of Kamuhanda, ICTR Trial Chamber* observed that Kayishema and Ruzindana states:

“In the Niyitegeka [sic] Judgment, Trial Chamber I has found that by perpetrating gross acts of sexual violence upon a dead woman’s body, the Accused caused mental suffering to civilians, his actions constituted a serious attack on the human dignity of the Tutsi community as a whole, and that these acts were part of a widespread and systematic attack against the civilian Tutsi population on ethnic grounds.”

[Kamuhanda, ICTR Trial Chamber, January 22, 2004, Para. 718]

579. The above observation patently establishes that causing violence of any kind upon dead body causes serious mental harm also to civilians and relatives of the dead person. Therefore, in view of above we are unambiguously persuaded in arriving at decision that the accused Syed Md. Hussain alias Hossain by his act of violence, aggression and hatred upon the dead bodies caused serious mental harm to civilians and human dignity and he had conducted such acts knowingly intending to use it as a tool of spreading hate campaign. And since the criminal acts done had caused grave mental harm to civilians and relatives of the victims obviously the same constituted the offence of ‘other inhumane acts’.

580. It is evinced from the testimony of P.W.18, the younger brother of martyr Khairul Jahan that the village Pyarabhanga was

about four kilometres far from their house in Kishoreganj town. P.W.17 saw the demo of Razakars led by accused Syed Md. Hussain alias Hossain moving towards Islamia Boarding at old Thana locality of Kishoreganj town by rickshaw. It remained uncontroverted.

581. The above material fact thus unerringly suggests the conclusion that the accused being accompanied by his accomplices designed and made the act of taking the dead bodies by dragging to Kishoreganj town happened tying their legs up behind an army jeep, in absence of anything contrary it may be safely presumed. For the act of roaming around Kishoreganj town displaying the dead bodies carrying by rickshaw had a nexus with the act of dragging the dead bodies first from Pyarabhanga, the battle field.

582. Dumping the dead bodies in the field in front of Islamia Boarding stands proved as P.W.19 found two dead bodies lying there and one of whom was Khairul Jahan, the elder brother of his [P.W.19] friend Kajol. P.W.18 the younger brother of Khairul Jahan on hearing from locals also rushed to the said field after dusk but could not find the bodies there.

583. P.W.19, a direct witness to the hateful activities upon the dead bodies after dumping those in the field of Islamia Boarding. He saw the Razakars surrounding the dead bodies of the duo there. His testimony also demonstrates how aggressively the human dead

bodies were subjected to grave abhorrent treatment in attendance of many people, after Asar prayer.

584. P.W.19 however could not find the dead bodies he saw lying in the field after he came out of the mosque saying Magrib prayer. P.W.18 corroborates this version. Therefore, we may safely infer that the dead bodies were taken away therefrom just immediate before dusk. Admittedly, the dead bodies of Khairul Jahan and Md. Selim could not have been traced since then. The accused and his accomplices in this way thus prevented due burial of the dead bodies even which also covers the act of gross mistreatment with corpses.

585. It is hard to believe how a Moulana [Moulana Athar Ali who is now dead] thought it just and compatible with the spirit of religion Islam to carry out hateful acts by spitting and kicking on the dead bodies with haughty utterance – “they are Kafirs, Allah has showered blessing, they are the enemies of Pakistan, they have been killed by our troops’. What a beastly aggression on corpses! We find no language to condemn it. No sane human being is expected to display such aggression on corpses even in the name of siding with either party to conflict or war.

586. Accused Syed Md. Hussain alias Hossain by his grave culpable act and conduct forming part of attack thus substantially facilitated and contributed to the perpetration of such cruel and unkind aggression against humanity demonstrated in the field in

attendance of many people who had to remain as mum spectators. It stands proved that the degrading inhumane acts committed upon the dead bodies were witnessed by many people as it happened in public. In the case of **Muvunyi**, it has been observed by the **ICTR** that –

“If the inhumane act is witnessed by a third party, ‘an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.”

[Muvunyi, ICTR Trial Chamber, September 12, 2006, Para. 529]

587. We are convinced to infer on the strength of the testimony of P.W.18 and P.W.19, two direct witnesses to untold beastly conduct of the accused Syed Md. Hussain alias Hossain who knew it well that his act was likely to cause serious mental harm to Khairul Jahan’s relatives including his mother. The accused made the dead bodies dumped in the field of Islamia Boarding intending to display gross disrespect upon dead bodies of two freedom-fighters. Accused Syed Md. Hussain alias Hossain did it deliberately and knowingly intending to cause mental suffering and hurt to the civilians and relatives of two valiant freedom-fighters who died in

battle field for which the accused incurred criminal liability. We are with the submission made by the prosecution in this regard.

588. Accused Syed Md. Hussain alias Hossain was a leading and potential Razakar of the locality and the facts divulged impels that he himself got physically engaged in committing the unlawful acts constituting the offence of 'other inhumane acts'. The facts do not expose him to incur liability also under the theory of civilian superior responsibility as enumerated in section 4(2) of the Act of 1973. Thus, it will not be inappropriate if he is not held liable also as a 'superior'.

589. On appraisal of evidence tendered we arrive at decision that the prosecution has been able to prove beyond reasonable doubt that the accused Syed Md. Hussain alias Hossain deliberately, knowingly committed gross misconduct and extremely unkind mistreatment upon the dead bodies of two freedom fighters Khairul Jahan[Beer Protik] and Md. Selim [Beer Protik] who laid their lives in the battle field and thereby caused serious mental harm to their relatives and the civilians in presence of whom such beastly acts were carried out.

590. In view of deliberation made above accused **Syed Md. Hussain alias Hossain** is thus found criminally liable for participating, abetting, facilitating and complicity, by his act and conduct forming part of attack directed against civilian population, in the commission of offences of '**other inhumane acts**' [causing

blatant indignity and inhumane hatred upon dead bodies] 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 for which he has incurred liability under section 4(1) of the said Act.

XIII. Conclusion

591. The blood-soaked history of the birth of our dear motherland—Bangladesh says that ‘genocide’, crimes against humanity’ and diabolical atrocious activities in Bangladesh began on the nigh of 25 March, 1971 with the launch of ‘Operation Searchlight’, as the Pakistani occupation army started in collaboration with the pro-Pakistan political parties i.e Jamaat-e-Islami [JEI], Muslim League etc. and their local collaborators directing Bangali pro-liberation civilian population.

592. In accomplishing this aim and policy the Pakistani occupation army started acting together with the Razakar Bahini, an auxiliary force and *para militia* forces like Al-Badar, Al-Shams and Peace Committee, it is now undisputed fact of common knowledge. By forming those auxiliary squads the Pakistani occupation army started acting together in perpetrating the criminal acts by launching systematic attack throughout the territory of Bangladesh in 1971. Providing support and assistance to the Pakistani occupation army in carrying out its atrocious activities with intent to liquidate the pro-liberation civilians and freedom-fighters

terming them 'anti-state elements', 'miscreants', was the key purpose of forming those auxiliary forces.

593. In the case in hand, the truth as unveiled is that accused persons got themselves closely and culpably associated with the Pakistani occupation army and Razakar Bahini formed locally. The case involved joint trial of two accused –Md. Moslem Prodhan and absconding accused Syed Md. Hussain alias Hossain.

594. It has been proved that target of organized or systematic and planned attack was the Hindu community and pro-liberation unarmed civilians, the residents under the Police Station Nikli of the then Kishoreganj Sub-Division. The six charges framed arose from some particular events occurred in the rural locality under Police Station Nikli, in the context of the War of Liberation in 1971 and the accused Syed Md. Hussain alias Hossain arraigned of all the six charges and accused Md. Moslem Prodhan arraigned of two charges[charge nos. 03 and 05] have been found to have had participation and complicity in accomplishing the alleged crimes , by their act and conduct forming part of systematic attack, in exercise of their potential membership in and affiliation with the locally formed Razakar Bahini.

595. In the case in hand, all the attacks were launched in day time. The event of attack as narrated in charge no.04 involving the offence of genocide ended in killing of 34 detained Hindu civilians in the night. Perpetration of the offences [as narrated in charge

nos.03, 04, 05 and 06] happened in extreme diabolical way. The accused persons were conscious and culpable part of the common design and criminal enterprise. Their culpable acts and conduct as have been found proved formed part of attack which was intended to wipe out the Hindu civilians, freedom fighters and pro-liberation civilians.

596. It has been proved that the group formed of Pakistani occupation army, accused persons and their accomplice Razakars had conducted the attack directing the civilians of village Gurui [as narrated in charge no.03] ; that the group formed of Pakistani occupation army, accused Sayed Md. Hussain alias Hossain and his accomplice Razakars had carried out the attack directing the Hindu civilians of village Dampara that resulted in killing of 34 Hindu civilians[as narrated in charge no.04] and sexual invasion committed on Hindu women in conjunction with the attack. Both the accused persons are found to have had participation in committing killing an unarmed freedom fighter on abduction [as narrated in charge no.05]. Accused Syed Md. Hussain alias Hossain being enthused by the policy and plan of the Pakistani occupation army had done grave inhumane treatment, showing extreme brutality, on the corpses of two freedom-fighters who died in battle and thereby caused serious mental harm to the relatives of the victims and civilians [as narrated in charge no. 06].

597. It has also been proved that within few days of committing the criminal act of forceful conversion of Hindu civilians to Muslims of village Dampara [as narrated in charge no.01], the accused Syed Md. Hussain alias Hossain accompanied the group of perpetrators in committing the offence of genocide, by actively facilitating the killing of 34 Hindu civilians with intent to destroy the religious group they belonged, in whole or in part.

598. Criminal acts the accused persons committed to further policy and plan of the Pakistani occupation army in the locality under Nikli Thana of the then Kishoreganj Sub-Division[now District] in 1971 constituted the offences of ‘genocide’ and ‘crimes against humanity’ which remind once again how horrendous atrocities were committed directing non-combatant civilians, on discriminatory grounds by the Pakistani occupation army and their local collaborators belonging to Razakar Bahini during the war of liberation in 1971 in the territory of Bangladesh.

599. Conducting such planned and systematic attacks directing civilian population would not have been possible without active, culpable and enthusiastic support, encouragement and assistance of the accused persons belonging to locally formed Razakar Bahini who knowingly participated in the enterprise.

600. In the judgment of Criminal Appeal Nos. 24-25 of 2013 [*Abdul Quader Molla Case*] **Justice Surendra Kumar Sinha**, at the very outset, narrates the following sourced observation -

“The birth of Bangladesh has been preceded by injustice; false promise and economic and social abuse suspending the session of the elected National Assembly of 1970 sine die followed by the persecution of the legally elected people entitled to form the Government and frame the Constitution, by resorting to commit mass killing, rape and arson by an illegal regime headed by a usurper. These atrocities were perpetrated by the Pakistan’s occupation army with their cohorts, i.e., the Rajakar, Al-Badr, Al-shams and various other local killing squads in 1971. Although the killing of unarmed civilians during late March seemed abrupt and sporadic, it soon became a planned act of violence with operation ‘Search Light’ enforced at midnight, on 25th March, 1971 as part of the central planning and conspiracy hatched at Larkana.....”

[Source: S.A. Karim, Triumph and Tragedy: The University Press Limited 2009 p.172-176., quoted Mohammed Asghar Khan, Generals in Politics: Pakistan 1958-1982, p.28)]

601. In the case in hand, the offences proved for which both the accused persons are found to have had complicity and participation were not divisible from the horrendous atrocities committed in the territory of Bangladesh in 1971 during the war of liberation as reflected from the above sourced information.

602. We consider it indispensable to note that in disposing of 27 cases both the Tribunals[ICT-1 and ICT-2] found how barbaric the local collaborators belonging to Razakar Bahini, Al-Badar Bahini

and Peace Committee were in 1971 in executing the policy of wiping out the unarmed pro-liberation Bengali civilians, members of Hindu religious groups, intellectuals, and freedom fighters, in collaboration with the Pakistani occupation army which by beginning 'Operation Searchlight' in the night of 25 March, 1971 continued carrying horrific criminal acts directing Bangali civilian population for long nine months. Finally, in remembrance of such horrific atrocious activities that resulted in 'genocide', mass killing, sexual invasion, torture, confinement the day of 25th March has been declared '**Genocide Day**'. This laudable recognition obviously will make especially the new generation enthused to go with the spirit of the war of liberation and it shall inspire them to be acquainted with the history of our hard earned independence indeed.

603. We have already rendered our decision, on adjudication of all the 06 charges, holding the absconding accused Syed Md. Hussain alias Hossain criminally liable under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in all the 06 charges [offence of 'genocide', 'other inhumane act', 'abduction', 'confinement', 'extermination' and 'murder' as crimes against humanity] and he be convicted for the offences proved.

604. At the same time, accused Md. Moslem Prodhan has been found criminally liable under section 4(1) of the Act of 1973 for the

commission of crimes proved as listed in 02 charges i.e. charge nos. 03 and 05 [offences of ‘extermination’, ‘abduction’ and ‘murder’ as crimes against humanity] and he be convicted for the offences proved accordingly.

XIV. Verdict on conviction

605. For the reasons set out in our Judgement and having considered all evidence and arguments, we find—

Accused (1) Syed Md. Hussain alias Hossain [Absconding] in,

Charge No.01: GUILTY of facilitating in the commission of the offence of ‘**other inhumane act**’ as crime against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Syed Md. Hussain alias Hossain [Absconding] in,

Charge No.02: GUILTY of participating, abetting, contributing, facilitating and also for complicity in the commission of the offences of ‘**abduction**’, ‘**confinement**’ and ‘**other inhumane act**’ as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Syed Md. Hussain alias Hossain [Absconding] and (2) Md. Moslem Prodhan in,

Charge No.03: GUILTY of participating, abetting, facilitating and also for complicity in the commission of the offences of '**extermination**' and '**other inhumane acts**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Syed Md. Hussain alias Hossain [Absconding] in,

Charge No.04: GUILTY of participating , abetting, facilitating and also for complicity in the commission of the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Syed Md. Hussain alias Hossain [Absconding] and (2) Md. Moslem Prodhan in,

Charge No.05: GUILTY of participating, abetting, facilitating and also for complicity in the commission of the offences of '**abduction**' and '**murder**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and they be convicted and sentenced under section 20(2) of the said Act.

Accused (1) Syed Md. Hussain alias Hossain
[Absconding] in,

Charge No.06: GUILTY of participating, abetting, facilitating and also for complicity in the commission of offences of ‘**other inhumane acts**’ [causing blatant indignity and inhumane hatred upon dead bodies] as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be convicted and sentenced under section 20(2) of the said Act.

XV. Verdict on sentence

606. Ms. Tureen Afroz, the learned prosecutor concluded her argument by making submission that accused Syed Md. Hussain alias Hossain who has been arraigned for committing the crimes narrated in all the six charges should face the highest sentence, being a sentence of death, as he is proved to have had abetted, substantially facilitated and participated to the commission of horrific criminal acts constituting the offences of causing atrocious torture, mental harm, mass killing , abduction, confinement. His proved active participation in committing genocide and genocidal rape directing Hindu civilians by launching systematic and planned attack in collaboration with the Pakistani occupation army as narrated in charge no.04 as well justifies the highest sentence. Accused Syed Md. Hussain alias Hossain’s dominant position in Nikli Thana Razakar Bahini together with the mode of his

participation in committing, abetting and substantially contributing to the actual perpetration of crimes which have been proved beyond reasonable doubt enhances his liability.

607. Drawing attention to the potential status of accused Md. Moslem Prodhan in Nikli Razakar Bahini the learned prosecutor submitted that this accused who has been indicted in two charges deserves highest sentence as he too had culpably and actively participated in perpetrating the barbaric crimes of mass killing as narrated in charge no.03 and he is found to have had physical participation in accomplishing the killing of non-combatant freedom fighter Abdul Malek as narrated in charge no.05. Pattern and extent of the crimes committed together with this accused's mode of participation justifiably suggests capital punishment.

608. If now the highest sentence is awarded to the accused persons, considering the gravity and extent of the crimes proved, victims and relatives of the victims shall find a bit respite even long more than four decades after the untold trauma, pain and harm they sustained with the grave and atrocious crimes committed by the accused persons and their accomplices in collaboration with the Pakistani occupation army, the learned prosecutor concluded her argument emphasizing this final submission, in respect of awarding sentence.

609. What we have found proved, in the case in hand, are that in 1971 both the accused persons were potential Razakars of Nikli

Thana Razakar Bahini, an auxiliary force of the Pakistani occupation army who started executing its policy and plan by committing genocide on the black night of 25th March 1971. The accused persons consciously made them part of common plan of collective criminality that eventually resulted in killing of numerous pro-liberation civilians as already found.

610. However, already the accused persons have been found guilty beyond reasonable doubt, on integrated evaluation of evidence presented before us by the prosecution and circumstances unveiled. In the case in hand, most of the witnesses examined by the prosecution to substantiate the charges framed are from the crime localities, victims and freedom-fighters. The accused persons were well acquainted with them. Already we have found that the accused persons were potential and notorious Razakars of Nikli Thana locality. The documentary evidence tendered by the prosecution also corroborates it unerringly.

611. What are the objects of ‘punishment’? In this regard we recall the observation made by the Appellate Division of Bangladesh Supreme Court as to the factors to be considered in inflicting punishment. In the **Criminal Review Petition No. 62 of 2015** [*Ali Ahsan Muhammad Mujahid 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 wrongdoing; 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”.

[Appellate Division, Hasan Foez Siddique, J, Judgment 18.11.2015 page 21]

612. We also reiterate that in awarding sentence, the Tribunal, must eye on the nature, seriousness and extent of the offences committed, their scale, the role the convicted accused had played and mode of his participation to the perpetration of the crimes proved.

613. Needless to say that commission of offences as specified in the Act of 1973 itself portrays enormity, gravity and diabolical nature of the crimes. It has been found too that the accused persons were

the men of extreme notoriety around the localities of the Nikli Thana who were consciously associated with the Pakistani occupation army intending to further their policy and plan by carrying out atrocious activities in violation of international humanitarian law. However, let us have a glance to the factors unveiled which may reasonably justify the sentence to be awarded to the convict accused persons.

614. Accused Syed Md. Hussain alias Hossain alone has been indicted in **charge nos. 01 and 02** which involve the offences of crimes against humanity. It has been proved that accused Syed Md. Hussain alias Hossain culpably abetted and facilitated the execution of the unlawful act of forceful conversion of Hindu civilians of village Dampara to Islam religion [as narrated in charge no.01] and he actively participated in detaining civilians on unlawful capture in Nikli Thana and thereby caused mental harm to the victims, we have found it already proved. It is to be noted that causing inhuman treatment under coercion in captivity to a defenceless protected civilian to obtain information constitutes a blatant attack on human dignity indeed [as narrated in charge no.02].

615. Charge no.06 involving the criminal act of brutal treatment and disregard to the corpses of two freedom-fighters died in the battle field constituting the offence of ‘other inhumane act’ also arraigns the accused Syed Md. Hussain alias Hossain and accusation stands well proved. Nature of the criminal act and mode

of the accused's participation therewith reflects his extreme atrocious and aggressive mindset to the pro-liberation Bengali people. Extreme degrading treatment on the corpses done by the accused Syed Md. Hussain alias Hossain was patently in violation of Customary International Humanitarian Law.

616. Charge no.04 involves the offence of killing 34 Hindu civilians, committing sexual invasion, in conjunction with the attack launched at village Dampara. The accused Syed Md. Hussain alias Hossain and his accomplice Razakars accompanied the group of Pakistani army in carrying out the designed attack directing the Hindu civilians. We have recorded our reasoned finding that the criminal acts forming part of systematic attack constituted the offence of 'genocide' and 'genocidal rape' and the accused Sayed Md. Hussain alias Hossain not only accompanied the group of attackers but culpably and actively participated and facilitated the attack that ended in killing of 34 detained Hindu civilians. It is now settled that the gravity of the crimes committed by the convicted person stems from the degree of his participation in the crimes. The offences as listed in this charge no.04 relate to the commission of killing 34 Hindu unarmed civilians with extreme barbaric pattern and the convict accused Syed Md. Hussain alias Hossain , as found proved, was knowingly engaged and concerned even in all the phases of the attack including the phase of killing the abductees captured forcibly.

617. The assistance the convict accused Syed Md. Hussain alias Hossain provided to the Pakistani army men and his accomplices had a “substantial effect” on the commission of the crime of sexual invasion. This convict accused had thus acted as accessory to the principals in committing the event of rape, in conjunction with the attack at village Dampara [as listed in charge no.04], it stands proved beyond reasonable doubt.

618. The event [narrated in charge no.04] as has been proved is a petit scenario of widespread genocide committed in the territory of Bangladesh in 1971, during the war of liberation. Some of survived detainees captured together with the detainees killed came on dock and narrated the traumatic episode they experienced. Nature and pattern of the crime proved [narrated in charge no.04] and the liability the accused Syed Md. Hussain alias Hossain incurred does not justify any kind of mitigation, in respect of awarding sentence.

619. Another convict accused Md. Moslem Prodhan has been indicted jointly with accused Syed Md. Hussain alias Hossain only in charge nos.03 and 05 which involve mass killing at village Gurui and killing of an unarmed freedom-fighter on abduction respectively.

620. The event of mass killing at village Gurui was the upshot of systematic attack launched by the group formed of accused persons, their accomplice Razakars and Pakistani army[**as narrated in charge nop.03**].The attack resulted in killing of 26

civilians. The accused persons are found to have had active and culpable participation in accomplishing the horrific atrocious act of killing, in exercise of their membership and dominance in the local Razakar Bahini. And they did it to further the policy and plan of the Pakistani occupation army execution of which was started on the night of 25 March 1971 by launching attack known as ‘Operation Searchlight’. Mode of participation of the accused persons as found proved in committing the offence of large scale killing as narrated in charge no.03 indisputably aggravates their culpability. Wiping out 26 unarmed civilians of a village was a large scale barbaric killing, infringing prohibition recognised in International Humanitarian Law and Laws of War.

621. The extremely tragic experience the witnesses testified before the Tribunal indisputably increases the gravity of the barbaric offences committed as listed in charge no.03. Severe brutality of the criminal acts forming part of systematic attack as unveiled resulted in horrendous killing of large number of unarmed civilians of village Gurui which pricks not only the judicial conscience but even the conscience of the humankind.

622. In respect of **charge no.05** involving killing of a non combatant freedom fighter Abdul Malek on taking him away from his house forcibly both the convict accused persons have been found criminally liable. Such act of killing a non-combatant freedom fighter who at the relevant time was not engaged in

fighting was grave violation of laws of war and prohibition enshrined in the international humanitarian law. Convict accused Md. Moslem Prodhan physically participated in committing the crime and convict accused Sayed Md. Hussain alias Hossain by his conduct and act forming part of arrack was a conscious part to it, it stands proved.

623. It is to be noted that the crime of murder, as listed in charge no.05 indisputably contravened the basic rule of international humanitarian law similar to the safeguards against wilful killing, as prohibited in each grave breach provision of the Geneva Conventions.

624. Culpable act of active and direct participation of convict accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan in causing death of non-combatant freedom-fighter Abdul Malek by gunshot [as listed in charge no.05], as already proved, reflects their extreme antagonistic and notorious attitude and gross abuse of their membership in local Razakar Bahini which constitutes an aggravating factor.

625. The gravest nature of the offences of ‘extermination’, ‘genocide ‘and ‘murder’ and the accused persons’ participation and complicity therewith as already found proved [as narrated in charge nos.03, 04 and 05] shakes human conscience, the humanity and civilization. These proved indictments also demonstrate the accused persons’ close and culpable affiliation with the Pakistani

occupation army, as collaborators. The accused persons were the willing participants in all the brutal attacks upon non-combatant civilians as narrated in these three charges proved. We consider it just to take all these factors into account too for weighing the aggravating circumstances, for the purpose of awarding sentence.

626. We reiterate that the Tribunal constituted under the Act of 1973 does have an obligation to award appropriate punishment so as to respond the victims' cry for justice and the untold trauma they and their near and dear ones have sustained. We must keep in mind too, in awarding sentence, public abhorrence of the crimes proved needs a reflection the court's verdict in the measure of punishment.

627. In view of above discussion and considering the nature and proportion to the gravity of offences and also keeping the factors as discussed above into account we are of the view that justice would be met if the convict accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan who have been found guilty beyond reasonable doubt for the crimes proved are **condemned and sentenced** as below, under the provision of section 20(2) of the Act of 1973:

Hence it is

ORDERED

That accused Syed Md. Hussain alias Hossain [absconding] son of late Syed Musleh Uddin and Syeda Fatema Banu of Village Machihata, Police Station and District Brahmanbaria, at present

House No.2, Road No. 6, Pink City, Police Station Khilkhet, Dhaka is held guilty of the offence of '**other inhumane act**' as 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 suffer rigorous imprisonment for 07[seven] years under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held guilty of the offences of '**abduction, 'confinement' and 'other inhumane act**' as 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 he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 05[five] years under section 20(2) of the said Act.

Accused (1) Md. Moslem Prodhan son of late Labhu Sheikh and late Rezia Akhter of Village Kamarhati, Police Station Nikli, District Kishoreganj, and (2) Syed Md. Hussain alias Hossain [absconding] are held guilty of the offences of '**extermination**' and '**other inhumane acts**' as 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 they be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held guilty of the offence of '**genocide**' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 04** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

Accused (1) Md. Moslem Prodhan, and (2) Syed Md. Hussain alias Hossain [absconding] are held guilty of the offences of '**abduction**' and '**murder**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 05** and they be convicted accordingly and sentenced thereunder to suffer imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held guilty of the offences of '**other inhumane acts** [causing blatant indignity and inhumane hatred upon dead bodies] as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 06** and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 10[ten] years under section 20(2) of the said Act.

The sentence of death awarded as above in respect of charge no. 03 be executed by hanging the convict accused Md. Moslem

Prodhan by the neck or by shooting him till he is dead, as decided by the government.

The sentence of death awarded as above in respect of charge nos. 03 and 04 be executed by hanging the convict accused Syed Md. Hussain alias Hossain by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convict accused persons as above shall run concurrently.

However, as and when any sentence of death awarded to convict accused (1) Md. Moslem Prodhan, and (2) Syed Md. Hussain alias Hossain as above will be executed, the other sentence of death and sentence of imprisonment awarded to them as above would naturally get merged into the sentence of death executed.

The sentence of death and sentence 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.

Since the convict Syed Md. Hussain alias Hossain has been absconding, the sentence of death and sentence of imprisonment awarded to him as above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

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 provisions of section 21 of the International Crimes (Tribunals) Act, 1973.

The convict accused Md. Moslem Prodhan be sent to the prison with conviction warrant accordingly.

Issue conviction warrant against the convict absconding accused Syed Md. Hussain alias Hossain.

The Secretary, Public Security Division, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the convict absconding accused Syed Md. Hussain alias Hossain, if necessary with the help of the Inter-Pol.

Let certified copy of this judgment be provided to the prosecution and the convict accused Md. Moslem Prodhan free of cost, at once.

If the absconding convict accused Syed Md. Hussain alias Hossain is arrested or surrenders within 30[thirty] days of the date of order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Syed Md. Hussain alias Hossain be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrant of the convict accused Syed Md. Hussain alias Hossain to the (1) Secretary, Public Security Division, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka, and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

Justice Md Shohrowardi, Member

628. Accused (1) Md. Moslem Prodhan (67) son of late Labhu Sheikh and late Rezia Akhter of village Kamarhati, Police Station-Nikli, District Kishoreganj and (2) accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station, and District Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka have been put on trial before this Tribunal at the instance of the Chief Prosecutor to answer the charges framed against them under section 3(2)(a)(c)(g)(h) of the International Crimes (Tribunals) Act, 1973 for which they incurred the liability under section 4(1) and 4(2) of the said Act which is punishable under section 20(2) of the said Act.

629. This International Crimes Tribunal-1 [herein after referred to as “the Tribunal”] was created under Section 3 of the International Crimes (Tribunals) Act, 1973 [hereinafter referred to as the “Act of

1973’] which is an ex-post-facto legislation for detention, prosecution and punishment of any individual or group of individuals, organization or any member of any armed, defence or auxiliary forces, irrespective of his nationality who commits or has committed crimes against humanity, crimes against peace, genocide, war crime and other class crimes in violation of customary international law particularly during the War of Liberation in 1971 in the territory of Bangladesh, whether before or after the commencement of this Act. However, no Tribunal has been set up under section 3 of the Act of 1973 for which no one could be brought to justice under the Act of 1973 until created this Tribunal on 25th March 2010.

630. At the very outset, it is noted that the International Crimes (Tribunals) Act, 1973 is a constitutionally protected special legislation enacted for the trial of the crimes as specified in Section 3(2) of the said Act. In Article 111 of the Constitution, the legislature adopted the principle “Star Decisis” and in view of the provision provided in Article 111 of the Constitution of the People’s Republic of Bangladesh each member of this Tribunal is oath-bound to follow the law declared by our Hon’ble Appellate Division. Proviso to Section 20(1) of the said Act has given discretion to each member of this Tribunal to deliver a judgment of his own and this discretion must be exercised by each member or members of this Tribunal following the principle “Star Decisis”

which holds that a court decision in a particular case must comport with the previous decisions made by our Apex Court. Judicial discretion is a very broad and complex concept because of the different set of decisions made by the judges.

631. In this respect, I recall the observation of Justice John Marshall, Chief Justice of the Supreme Court of the United States, made in the case of *Osborn vs Bank of the United States*, wherein his Lordship observed in the following term;

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

632. Mere writing a separate judgment following the principle provided in Section 20(1) of the Act of 1973 is not a dissenting judgment unless the ultimate or final decision substantially differs from the decision arrived at by majority members of the Tribunal. Without assigning any good reason, it is not legally permissible to

hold that a judgment prepared by any other member of this Tribunal under Section 20(1) of the Act of 1973 is a dissenting judgment. Each member of this Tribunal is independent and not subordinate to any other member or members of this Tribunal for which the legislature made provision in Section 20(1) of the Act of 1973 giving discretion to each member of this Tribunal to deliver a judgment of his own based on his/her good reasoning.

633. Jurisdiction of the Tribunal under the Act of 1973.

Section 3 of the International Crimes (Tribunals) Act, 1973 gives this Tribunal the jurisdiction for trial of the international crimes as specified in Sub-Section 2 of Section 3 of the Act of 1973 and Section 3 of the Act of 1973 is quoted below;

Section 3

“3 (1) A Tribunal shall have the power to try and punish any individual or group of individuals, [or organization], 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 detenués, 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 the commission of any such crimes;”

634. In the instance case, charge No. 1 relates to forceful conversion of Hindu religious people of Dampara village under Nikli Thana of the then Kishoreganj Sub-Division to Muslim constituting the offence of other inhumane acts as crimes against humanity, charge No.2 relates to commission of the offence of abduction and confinement of four civilians of the locality of Nikli Sadar Union, charge No. 3 relates to the commission of the offence of extermination, torture, plundering and arson (other inhumane acts) as crimes against humanity, charge No. 4 relates to the commission of the offences of genocide and extermination [large-scale killing of civilians], rape, abduction, confinement and torture as crimes against humanity, charge No. 5 relates to commission of offences of abduction and murder as crimes against humanity, charge No. 6 relates to the commission of offences of other inhumane acts [causing blatant indignity and inhumane hatred to dead bodies] as crimes against humanity. Except charge No. 4, all

the charges relate to the commission of the offence of crimes against humanity for which at the very outset it is required to see as to what are the elements of the offence of crimes against humanity.

635. Jurisprudentially, the offences of crimes against humanity are heinous crime usually committed by several persons against the civilian population in a wartime situation or in an armed conflict, although it also happened to the civilian population in peach time. The multiplicity of the perpetrators and the victims distinguished the offence of crimes against humanity from the offences as defined in the National Penal Code of the civilized States. Crimes against humanity are most cruel, barbaric and heinous offence committed on a large scale against humanity.

636. In the case of Abdul Quader Mollah vs The Chief Prosecutor reported in 22 BLT (AD) 8 at page 119, para 210 Mr. J. Surendra Kumar Sinha, as his Lordship was then, interpreted the notion “crimes against humanity” in the following language;

“The term of Crimes against Humanity has come to mean anything atrocious committed on a large scale. These crimes are committed against the civilian population during the war or persecution on political or racial or religious grounds in execution of any crime. These offences by nature are heinous.”

637. Subsequently in the case of Salauddin Quader Chowdhury vs The Chief Prosecutor reported in 67 DLR(AD) 295 at Page- 351

Para 167 Mr. Surendra Kumar Sinha, Hon'ble C.J reiterated the above view as regards the notion "crimes against humanity" and observed that;

"Crimes against humanity and genocides are a heinous form of crime that could possibly exist in the human civilization. Throughout the ages in every civilization, these crimes are considered as the most atrocious, appalling and terrible acts and extremely hatred by each and every one."

638. In the case of the Chief Prosecutor vs. Abdul Quader Mollah reported in 22 BLT (AD) 8, at Page-81 Para 146 it has been further observed that

"The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II world. It suggests, in at least two distinct ways, the enormity of those offenses. First, the phrase "crimes against humanity" suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings."

639. In this respect, I recall my earlier observation made in the Case of Chief Prosecutor vs Idris Ali Sarder, ICT –BD Case No 06 of 2015, Judgment dated 5 .12.2016, Para 586 wherein it has been observed that-

“Under section 3(2)(a) of the Act of 1973, the following are the elements of “ crimes against humanity.”

- There must be an attack,
- The attack must be directed against any civilian population.
- The notion “any civilian population” includes “any civilian”
- The “civilian” character of the attacked population applies both in war and peacetime.
- Status of the victim is not the criteria to determine the “civilian”, but the actual role of the victim at the time of the commission of the crimes is the main essence to be considered.
- The perpetrators of the crimes need not be members of the State or organization but include any person who acts to implement or support the policy of the state or the organization.
- In the course of the attack, the accused persons committed any of the offence as specified in section 3(2) (a) of the Act of 1973.”

640. In the case of Chief Prosecutor Vs. Abdul Kader Molla reported in 22 BLT(AD) 8 our Apex Court held that provision of Public International Law is not ipso facto applicable in the International Crimes Tribunal, Bangladesh, which is a domestic Tribunal. Subsequently, in the review case of Muhammad Kamruzzaman Vs. The Chief Prosecutor reported in 35 BLD (AD) 158 our Apex Court reiterated the same view. It is now settled

jurisprudence that only in the context of Customary International Law the widespread or systematic attack is the element of crimes against humanity.

641. In this respect, I also recall my earlier observation made in the Case of Chief Prosecutor vs Idris Ali Sardar, ICT –BD Case No 06 of 2015, Judgment dated 5 .12.2016, Para 528 wherein it has been observed that-

“This Tribunal was created under the authority of the Act of 1973 and in the meantime our Hon’ble Appellate Division in several judgments interpreted the provisions of the Act of 1973 and in view of the provision of Article 111 of the Constitution of the People’s Republic of Bangladesh all Courts including this Tribunal is legally bound to follow the law declared by our Apex Court. In the case of the Chief Prosecutor vs. Abdul Quader Mollah reported in 22 BLT(AD) 8, on behalf of convict Abdul Quader Mollah it was vehemently urged before the Hon’ble Appellate Division that “ the Tribunal failed to consider that Customary International Law (CIL) applies to the appellant’s case and as the constituents of CIL are absent in the case, it committed fundamental error in convicting the appellant for Crimes against Humanity” and our Apex Court considering the submissions advanced on behalf of the appellant, at para 151 [Majority view, judgment delivered by Mr. Justice Surendra Kumar Sinha, as his Lordship was then], held that “So there is no doubt that the Act of 1973 has primacy over CIL and CIL

will be applicable, so far as it is not inconsistent with the Act.” Therefore, at the time of adjudication of the charges framed against the accused person, this Tribunal is not legally permitted to travel beyond the Act of 1973 and in view of the above decision made by our Apex Court, this Tribunal may look at the jurisprudence evolved by the ICTY, ICTR, and ICC but cannot arrogate the jurisdiction of those Tribunals, as if, this Tribunal delivers its judgment relying on the provisions as contained in the Statutes of ICTY, ICTR, and ICC and the Rules made thereunder.”

642.A brief account of the accused persons

(i) Accused Md. Moslem Prodhan [in custody]

Accused Md. Moslem Prodhan (67) son of late Labhu Sheikh and late Rezia Akhter of village Kamarhati, Police Station-Nikli, and District-Kishoreganj was born on 31.12.1948. He did not receive any formal education. He is only an alphabet-literate. During the War of Liberation in 1971, accused Md. Moslem Prodhan individually and jointly committed crimes of genocide and crimes against humanity in different localities of the then Kishoreganj Sub-Division, and then he was known as 'Razakar Commander' of 'Nikli Union', the prosecution alleges. He has been involved in the politics of Bangladesh Nationalist Party [BNP].

(ii) Accused Syed Md. Hussain alias Hossain [absconded]

Accused Syed Md. Hussain alias Hossain [64] son of late Syed Musleh Uddin and late Syeda Fatema Banu was born on 15.09.1951. His permanent address is village Machihata, Police Station, and District Brahmanbaria. His last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka. However, during 1971, he lived at Hoybat Nagar, Police Station-Kishoreganj Sadar under the then Kishoreganj Sub-Division of District Mymensingh, the prosecution alleges. He passed S.S.C Examination in 1967 from Kishoreganj High School and H.S.C Examination in 1969 from the Guru Dayal College, Kishoreganj. Later, he also passed B.A Examination in 1975 from the same college. During pre-liberation period he was involved with the politics of Chhatra League [student wing of Awami League] of his college, but during the War of Liberation in 1971, he adopted the ideological position of Pakistan Democratic Party [PDP] and he individually and jointly committed crime of genocide and crimes against humanity in different localities of the then Kishoreganj Sub-Division, and then he was commonly known as 'Razakar Daroga' of Nikli Thana, prosecution alleges. His eldest brother Syed Md. Hachhan alias Syed Md. Hasan alias Hachhen Ali was tried *in absentia* in ICT-BD Case No. 02 of 2014 and was found guilty of the offence of genocide and crimes against humanity for which he was sentenced to death on 09.06.2015 by the ICT-BD Tribunal-1.

643. Brief Procedural History

It appears 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 places under the then Kishoreganj Sub-Division by the local Razakars accompanied by the Pakistani occupation army, the Investigating Agency submitted its investigation report finding both 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 both the accused persons submitted a single 'formal charge' with a view to prosecuting them jointly.

644. Thereafter, on 07.01.2016 this Tribunal took cognizance of offences against both the accused persons as mentioned above. Out of the two accused persons, accused Md. Moslem Prodhan has been in detention. Another accused Syed Md. Hussain alias Hossain neither could have been arrested nor did he surrender. On 07.01.2016 this Tribunal took cognizance of offences, perpetration of which has been unveiled in course of investigation and on 15.02.2016 ordered for publication of notice in two daily newspapers as required under Rule 31 of the International Crimes (Tribunal-1) Rules of Procedure, 2010 against the absconding accused Syed Md. Hussain alias Hossain as the execution of warrant of arrest issued against him earlier was found unserved.

Accordingly, despite the publication of the notice in two daily newspapers namely, 'The Daily Ittefaq' and 'The Daily Independent' dated 18.02.2016 and 17.02.2016 respectively the absconding accused Syed Md. Hussain alias Hossain did not surrender and as such, this Tribunal ordered for holding the trial *in absentia* against him and appointed Mr. Abdus Sattar Palwan, Advocate to defend the absconding accused as State defence counsel. This Tribunal fixed the next date on 26.04.2016 for hearing the charge framing matter and on the date fixed this Tribunal-1 heard the charge framing matter and on 09.05.2016 this Tribunal framed charge against them.

Witnesses adduced by the parties

645. The prosecution submitted a list of 43 witnesses along with formal charge and documents out of which prosecution examined only 23 PWs and the defence counsel engaged on behalf of the accused Md. Moslem Prodhan and the state defence counsel engaged on behalf of accused Syed Md. Hussain alias Hossain has cross-examined all the prosecution witnesses. D.W.1 was examined on behalf of accused Md. Moslem Prodhan and the prosecution declined to cross-examine D.W.1.

Defence case:

646. From the trend of cross-examination, the defence case as it appears is that the accused persons were not Razakar at the time of

Great War of Liberation in 1971 and the prosecution failed to exhibit any reliable documentary evidence to prove that the accused persons were Razakar or Razakar Commanders in 1971 and after long 45 years of the alleged offences, mere oral testimony is not enough to prove that the accused persons committed the alleged offences as Razakar or Razakar Commander. It is argued by the defence that the Pakistani army committed the alleged offences. It is the further case of the defence that accused persons were not involved with the alleged offences and they also not aided, abetted, facilitated or participated in the commission of any crimes as alleged by the prosecution and the prosecution with an ulterior motive examined only rival political persons of the locality of the alleged crime sites who are inimical to the defence. All the allegations brought against the accused persons involving the offence of genocide and crimes against humanity are false, politically motivated and the offences as narrated in the charges have been committed by the Pakistani army and the offences did not take place in the manner as alleged by the prosecution. The defence also suggested that the victims of the alleged offences as narrated in charge Nos. 3 and 5 were killed by the Pakistani army at the time of battle, which has been denied by the prosecution witnesses.

The burden of proof and the right of the accused persons:

647. The fundamental principle of criminal jurisprudence is that the prosecution is legally bound to prove the charges to the hilt beyond all reasonable doubt against the accused persons. The Evidence Act, 1872 and the Code of Criminal Procedure, 1898 shall not apply in any proceedings of this Tribunal and in view of the provision provided in Section 19 of the Act of 1973 “the tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure.” Jurisprudentially, the accused persons are presumed to be innocent until the prosecution proved their guilt beyond all reasonable doubt. Under the Act of 1973, the accused persons are not bound to prove any fact and the burden of proof always lies upon the prosecution. In view of the provision as provided in Section 17 of the Act of 1973 during trial the accused persons shall have the right to give any explanation relevant to the charges framed against them and shall have the right to present evidence at the trial in support of their defence and to cross-examine any witness called by the prosecution.

Recognition of the accused persons

648. The learned Prosecutor Ms. Tureen Afroz appearing along with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and his father was also Chairman of the infamous Peace Committee of the then

Kishoreganj Sub-Division and his brother Syed Md. Hachhan alias Md. Hasan alias Hachhan Ali was also a Razakar and at the time of War of Liberation in 1971 they had actively collaborated with the Pakistani occupation army for which accused Syed Md. Hussain alias Hossain and his family members were known to the locals of the Kishoreganj and Nikli Thana Sadar and eye witnesses P.Ws 1,2,5 to 8, 10 to 14 and 17 to 21 recognized accused Syed Md. Hussain alias Hossain as the perpetrator of the crimes narrated in the charges. Thus the P.Ws 1,2,5 to 8, 10 to 14, and 17 to 21 proved beyond reasonable doubt that accused Syed Md. Hussain alias Hossain was known to them before the occurrences and they rightly recognized accused Syed Md. Hussain alias Hossain as the perpetrator of the crimes narrated in the charges. The learned Prosecutor further submitted that accused Md. Moslem Prodhan as local was known to the P.Ws 5, and 7 to 14 before the occurrence and as locals of the crime sites and direct witness they correctly recognized accused Md. Moslem Prodhan at the time of the occurrence.

649. The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of the accused persons submitted that P.Ws 1, 2, 5, 6, 17 and 18 were minor at the time of War of Liberation in 1971 for which it is not at all believable that they could recognize accused Syed Md. Hussain alias Hossain who was admittedly an inhabitant of Kishoreganj Sadar. He further submitted that the

events narrated in charge Nos.3 and 4 admittedly happened at the time of joint attack of the Pakistani army and the Razakars and it is not at all believable that in a wartime situation while the Pakistani army and the Razakars jointly attacked the freedom fighters and the Hindus of Dampara, the witnesses recognized the perpetrators who were not known to them. Thus the evidence of the prosecution witnesses as regards the recognition of the accused persons are not at all believable and the witnesses examined by the prosecution totally failed to recognize the accused persons as perpetrators of the crimes narrated in the charges.

650. Now the question has arisen as to whether the prosecution witnesses presented to the Tribunal could recognize the accused persons at the time of occurrence. To resolve the issue it is required to examine the evidence of the prosecution witnesses which they have been testified before this Tribunal as regards the recognition of the accused persons.

651. The prosecution examined P Ws 1 to 21 to prove that the accused persons were known to the witnesses before the alleged occurrences as narrated in the charges.

652. P.W 01 Badal Chandra Barman [59] of Dampara village stated that he is a businessman of dried fish. At the time of the Great War of liberation in 1971, he was aged about 14 years. At that time, he used to live in his village home at Dampara along with his parent

and was a student of class five. He stated that he heard the name of Razakar Commander Syed Md. Hussain alias Hossain from Teku Chairman, and subsequently on 6th Bangla month Ashwin in 1971 when the Razakars and the Pakistani army attacked their village, he saw accused Syed Md. Hussain alias Hossain and recognized him. He also stated that while he was confined in Nikli Thana, Razakar accused Syed Md. Hussain alias Hossain came to him and other minor detainees and wanted to know as to whether they want to go to their home. During cross-examination of P.W1, in reply to a question put to him by the defence, he stated that at the time of occurrence he could not recognize any other Razakars who were present along with accused Syed Md. Hussain alias Hossain.

653. PW.2 Badal Chandra Sutradar [59/60] of Dampara village was aged about 14/15 years at the time of War of Liberation in 1971 and at that time he used to live in his house at Madhya Dampara. He is a Carpenter since 1971. He stated that in the first part of Bangla month Vadra in 1971, Teku Chairman along with other Razakars came at village Dampara and told the villagers that Razakar Commander Syed Md. Hussain alias Hossain sent them to inform that if the Hindus want to reside in this country, they have to be converted themselves to Muslim. At that time, Teku Chairman and his cohort Razakars called Karim Maulavi who converted P.W2 and other Hindus to Muslim by reciting Kalema. He further stated that on 6th Bangla month Ashwin in 1971 at about 3.00 pm the

Razakars and the Pakistani army having abducted 39 Hindus including P.Ws1, 2 and two other minor boys from Dampara confined them in Nikli Thana. At about 8/ 8.30 pm, he heard the sound of gunshots and after one hour Razakar Commander Syed Md. Hussain alias Hossain along with other Razakars and the Pakistani army came back at Nikli Police Station and were discussing amongst themselves that they had gunned down 35 male Hindus to death. In the next day at about 9/10.00 am Razakar Commander accused Syed Md. Hussain along with a Pakistani army came to the minor detainees at Nikli Police Station and asked them as to whether they were able to go to their home or not.

654. P.W 3 Kamala Rani Barman of Dampara village stated that in 1971 she used to reside in the house of her husband at Dampara village. She heard from Shanai Razakar and other Razakars that accused Syed Md. Hussain alias Hossain was the Commander of the Razakars but she did not see him.

655 P.W 4 Shamala Barman [65] of Dampara village stated that in 1971 she was aged about 20 years and used to live at the house of her husband at Dampara and her husband was a fisherman. She stated that she did not see the Razakar accused Syed Md. Hussain alias Hossain, but heard from Shanai Razakar and Teku Chairman that the occurrences as narrated in charge Nos. 1 and 4 took place at the order of accused Syed Md. Hussain alias Hossain.

656. P.W5 Abdul Hamid [66] of Cetra village was aged about 16/17 years at the time of War of Liberation in 1971. Now he is a retired School teacher. In 1971 he used to live in his Cetra village and at that time he took part in the War of Liberation as a member of the Basu Bahini. He stated that accused Moslem Prodhan was known to him before the occurrence and reason was that both of them were inhabitant of the same area and they used to meet at Bazaar. He recognized accused Syed Md. Hussain alias Hossain while he collected the information of Razakars as a source of Basu Bahini and came to know that he was a Razakar Commander. During cross-examination of P.W5, he affirmed that house of Syed Md. Hussain alias Hossain was situated at village Hazrat Nagar of Kishoreganj Sadar Thana and his father's name is Musleh Uddin. He also affirmed that at the time of General Election in 1970 for the first time he saw accused Syed Md. Hussain alias Hossain, and that he also saw accused Md. Moslem Prodhan before the occurrence.

657. P.W 6 Md. Taher Ali [59] of Kamarhati village was aged about 14/15 years at the time of Great War of Liberation in 1971 and at that time, he was residing along with his parent at Kamarhati village which was situated adjacent to Nikli Thana. At that time he was a cultivator. He stated that at that time the locals used to say that accused Syed Md. Hussain alias Hossain was a Daroga of the Razakars who along with about 50[fifty] Razakars came at Nikli from Kishoreganj after 2/3 months of initiating the War of

Liberation and his cohort Razakars used to follow his instructions. At that time he saw accused Syed Md. Hussain alias Hossain at Nikli Thana area for which he could recognize him. At the time of War of Liberation, local Razakar Ashraf Ali (now dead) under the leadership of accused Syed Md. Hussain alias Hossain used to recruit the Razakars and trained them at Idgah Math which was situated adjacent to G.C. School. In cross-examination in reply to a question put to him by the defence, he affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. He also affirmed that the name of the father of accused Syed Md. Hussain alias Hossain is Musleh Uddin. He stated that name of his Union is the Nikli Sadar Union.

658. P.W 7 Md. Ichab Ali [66] of Gurui East Para stated that he used to reside at his Gurui village in 1971 which was situated adjacent to the west side of Nerajuri haor(wetland) and there were 13 Paras in his village. In 1971 he took part in the War of Liberation under the leadership of freedom fighter Abdul Motaleb alias Basu and as a source of freedom fighters, he used to identify the different position of Razakars for the operational purpose for which he could identify Razakar Commander Syed Md.Hussain alias Hossain and accused Md. Moslem Prodhan was known to him as local before the occurrence. At the time of cross-examination in reply to a question put to him by the defence, he stated that at the time of War of Liberation in 1971 for the first time he saw accused

Syed Md. Hussain alias Hossain and his house was situated at Kishoreganj.

659. P.W 8 Md. Solaiman [66] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time, he was residing in his house situated to the west side of Nerajuri haor(wetland). He stated that accused Md. Moslem Prodhan used to come at the Nikli Bazaar for which he was known to him. The freedom fighter Hekim[P.W10] and Ichab Ali[P.W7] informed him that accused Syed Md. Hussain alias Hossain was one of the Razakar Commander among the two Razakar Commanders who attacked the freedom fighters at the time of the Gurui battle. During cross-examination in reply to a question put to him by the defence, he stated that he could not remember as to whether he saw accused Syed Md. Hussain alias Hossain, but affirmed that he saw accused Md. Moslem Prodhan before the occurrence and his house was situated at Nikli village. The defence suggested that accused Md. Moslem Prodhan had given a decision against him in a salish for which he deposed falsely against accused Moslem Prodhan which has been denied by him.

660. P.W 9 Rabeya Akter, wife of Martyr Abdul Malek of Nikli Purbagram village used to reside in the house of her husband at Nikli Purbagram village. She stated that while the Razakars forcibly abducted Abdul Malek, accused Md. Moslem Prodhan

told that Razakar accused Syed Md. Hussain alias Hossain instructed them to take away Abdul Malek for which accused Syed Md. Hussain alias Hossain was known to her. Accused Md. Moslem Prodhan was an inhabitant of the same locality for which he was known to P.W9. At the time of cross-examination, she stated that her house was situated a half mile far from Nikli Thana Sadar and Kamarhati was situated to the a half mile west side from her house and after her marriage she also saw accused Md. Moslem Prodhan. She also stated that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. She affirmed that except accused Md. Moslem Prodhan other Razakars were not known to her. The defence suggested that accused Md. Moslem Prodhan had given a decision against her for which she deposed falsely against him which has been denied by her. She also stated that her father's house was also situated at Nikli Purbagram village.

661. P.W 10 Abdul Hekim [71] of Gurui village stated that he took part in the War of Liberation in 1971 as member of Basu Bahini under the leadership of Abdul Motaleb of his locality. He claimed that in 1970 one Aftab Kara contested in the general election with the symbol Tiger and at that time, the accused persons took part in the election campaign on his behalf for which they were known to him. Besides, accused Md. Moslem Prodhan used to come at Nikli Hat and met with him for which he was known to him. At the time of cross-examination, P.W10 stated that house of accused Syed Md.

Hussain alias Hossain was situated at Kishoreganj and his father's name is Muslem Uddin Maulana and also affirmed that at the time of Liberation in 1971 he saw accused Syed Md. Hussain alias Hossain.

662. P.W 11 Chanfor Ali [73] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time he used to reside in his house. He stated that he took part in the War of Liberation under the leadership of Commander Basu. He claimed that in the year 1970 one Kara of his locality contested in the general election with symbol Tiger and the accused persons took part in the election campaign on his behalf for which the accused persons were known to him before the occurrence.

663. P.W 12 Jafor Ali [71] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time, he used to live in his house at Gurui village. He stated that the house of accused Md. Moslem Prodhan was situated near the house of his brother-in-law Razakar Rahmat Ali which was situated adjacent to Nikli Thana. He (P.W12) used to go to the house of his brother-in-law Rahmat Ali before he (Rahmat Ali) joined the Razakar bahini. At that time his brother-in-law Rahmat Ali introduced him with accused Syed Md. Hussain alias Hossain for which accused Syed Md. Hussain alias Hossain was known to him before the occurrence. During cross-examination of P.W 12, he stated that his

house was situated at East Para of Gurui village and house of accused Syed Md. Hussain alias Hossain was situated at Kishoreganj.

664. P.W 13 Gopal Chandra Das [67] of Mohammadpur village stated that in 1971 he used to reside in his Kashebpur village which is now known as Mohammadpur. He stated that he is a freedom fighter and at the time of battle he heard from the freedom fighters of Kubra Bahini that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and house of accused Md. Moslem Prodhan was situated at his adjacent village for which he was known to him before the occurrence. He also stated that accused Md. Moslem Prodhan was a Razakar. In reply to a question put to him by the defence, he stated that father's name of accused Syed Md. Hussain alias Hossain is Musleh Uddin and house of P.W13 was situated to the quarter kilometer west side from Nikli Thana.

665. P.W 14 Azizul Haque [61] of Nikli Purbagram village was S.S.C candidate at the time of War of Liberation in 1971 and at that time he used to reside in his village home. He stated that he is a freedom fighter and at the time of War of Liberation, he heard from different sources and the locals that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. He claimed that Nikli Thana Sadar Union Razakar Commander

accused Md. Moslem Prodhan was an inhabitant of his adjacent village for which he was known to him before the occurrence. During cross-examination of P.W14 in reply to a question put to him by the defence, he stated that his date of birth is 09.05.1955 and the name of the father of accused Syed Md. Hussain alias Hossain is Maulana Musleh Uddin. He also stated that Nikli Thana building was situated to the quarter kilometer west side from his village and his house was situated to the north side of Purbagram. At the time of cross-examination, in reply to a question put to him by the defence, he stated that father's name of accused Syed Md. Hussain alias Hossain is Musleh Uddin and his house was situated about quarter kilometer far from Nikli Thana building.

666. P.W 15 Md. Sohrab Uddin[62]of Pyarabhanga village was a student of Class VII of Latifpur Junior High School at the time of Great War of Liberation in 1971 and at that time he used to reside at his Pyarabhanga village. He stated that on 26.11.1971 at about 4/4.30 pm he along with other locals came out on the road from their houses and heard from the locals that the Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort Razakars and the Pakistani army came at Pyarabhanga village and attacked on the position of freedom fighters. During cross-examination, in reply to a question put to him by the defence, he stated that his house was situated to the about four kilometers east side from Kishoreganj Sadar.

667. P.W 16 Md. Bachchu Mia [61] of Pyarabhanga village was a businessman in 1971 and he used to live in his home at Pyarabhanga village which was situated about 10 yards far from Hossainpur- Kishoreganj road. He stated that while the Pakistani army left the battlefield of Pyarabhanga village, he came out from his house and saw the blood on the Hossainpur road and at that time the locals also came there. He heard from the locals present there that under the leadership of Razakar Hussain, his cohort Razakars and the Pakistani army attacked the freedom fighters in his village. During cross-examination in reply to a question put to him by the defence, he stated that his house was situated to the about three kilometers east side from Kishoreganj Sadar.

668. P.W 17 A.K. Nasim Khan [57] of Sholakia village was a student of Class VII of Kishoreganj Government High School in 1971 and used to reside in his Sholakia village which was situated adjacent to Nilganj Road Crossing Mosque. Now he is a representative of Bangla Vision, Kishoreganj District and former President of Kishoreganj Press Club. He stated that in 1971 accused Syed Md. Hussain alias Hossain was the Razakar Commander of Kishoreganj Sub-Division. During cross-examination, he stated that Syed Hassan, elder brother of accused Syed Md. Hussain alias Hossain was also a Razakar and his house [P.W17] was situated to the about a half kilometer south side from old Thana.

669. P.W 18 Md. Sadekujahan Talukder Noyan [58] of Sholakia village and brother of Martyr Khairul Jahan Talukder was a student of Class VII in 1971 and at that time he used to reside in his house “Talukder Lodge” of Sholakia village along with his parent. His house was situated to the a half kilometer west side from “Shahidi Mosque” of Kishoreganj Sadar. In 1971 Md. Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of Peace Committee of Kishoreganj Sub-Division for which accused Syed Md. Hussain alias Hossain was known to him. During cross-examination, in reply to a question put to him by the defence, he stated that his house was situated to the about a half kilometer south side from Old Thana.

670. P.W 19 A.K.M. Shajahan[61] of 380/1, Kishoreganj Old Thana Sadar was a student of Class X of Kishoreganj Azimuddin High School in 1971. At that time, he used to reside in his house which was situated adjacent to old Thana and east side of Islamia Boarding wherein Razakar Camp was built. He stated that accused Syed Md. Hussain alias Hossain, son of Maulana Musleh Uddin was a Razaka Commander. During cross-examination, in reply to a question put to him by the defence, he stated that his house was situated about forty yards far from Shahidi Mosque.

671. P.W 20 Kashem Ali[69/70] of Pukurpar village of Nikli Thana stated that in 1971 he was a cultivator and at that time he

used to reside along with his family members in his house which was situated to the about 100/150 yards south side from the Nikli Thana. He stated that accused Syed Md. Hussain alias Hossain was a Razakar Commander of Nikli Thana. In reply to a question put to him by this Tribunal, he stated that while he was confined in Thana, he heard the conversation of the Razakars for which he could recognize Razakar Commander Syed Md. Hussain alias Hossain.

672. P.W 21 Abdul Ali [80] of Baniahati village stated that at the time of Great War of Liberation in 1971 he used to reside in his house. At that time, he had a grocery shop at Nikli Bazaar near Thana. Since he had a shop adjacent to Thana, Syed Md. Hussain alias Hossain used to come to his shop for which before the occurrence accused Syed Md. Hussain alias Hossain was known to him. During cross-examination, in reply to a question put to him by the defence, he stated that his shop was situated 20[twenty] yard far from Thana building.

673. It is noted that before the War of Liberation in 1971 accused Syed Md. Hussain alias Hossain used to reside at Kishoreganj Sadar along with his parent. His father late Maulana Syed Musleh Uddin was the Chairman of the infamous Peace Committee of the then Kishoreganj Sub-Division and his elder brother Syed Md. Hachhan alias Syed Md. Hasan alias Hachhen Ali was tried in absentia in the ICT-BD Case No. 2 of 2014 by this Tribunal and

was found guilty of the offence of genocide and crimes against humanity committed in the locality of Tarail Police Station of the then Kishoreganj Sub-Division. Accused Md. Moslem Prodhan used to reside at Nikli Thana Sadar before the War of Liberation in 1971. These are admitted facts.

674. P.W15 Md. Sohrab Uddin of Pyarabhangra village of Kishoreganj Thana stated that he heard from the locals that accused Syed Md. Hussain alias Hossain was the Razakar Commander. In cross-examination he stated that his house was situated to the about four kilometers east side from Kishoreganj Sadar. P.W16 Md. Bachchu Mia of Pyarabhangra village stated that he heard from the locals that accused Syed Md. Hussain alias Hossain was a Razakar. In cross-examination he stated that his house was situated to the about three kilometers east side from Kishoreganj. P.W17 A.K. Nasim Khan and P.W18 Md. Sadekujjahan Talukder Noyan stated that his village Sholakia was situated to the about a half kilometer south side from Nikli Thana. P.W17 stated that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Kishoreganj Sub-Division and in cross-examination he stated that his elder brother Hassan was also a Razakar. P.W18 stated that Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of the Peace Committee of Kishoreganj Sub-Division for which accused Syed Md. Hussain alias Hossain was known to him. P.W19 A.K.M. Shajahan of Old Kishoreganj Thana

stated that his house was situated adjacent to Kishoreganj Old Thana and accused Syed Md. Hussain alias Hossain, son of Maulana Musleh Uddin was a Razakar Commander.

675. It transpires that P.Ws 17,18 and 19 were the resident of Kishoreganj Sadar Thana and used to reside adjacent to Kishoreganj Old Thana and late Maulana Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of the Peace Committee of Kishoreganj Sub-Division and Md. Hassan, brother of accused Syed Md. Hussain alias Hossain was also a Razakar. Prosecution witnesses presented to the Tribunal proved that accused Syed Md. Hussain alias Hossain was a local of Kishoreganj Sadar before 1971 and he, his father Musleh Uddin, Chairman of the Peace Committee of Kishoreganj Sub-Division and his family members were known to the locals before the War of Liberation in 1971.

676. P.W 6 Md. Taher Ali stated that his village Kamarhati was situated adjacent to Nikli Thana and after 2/3 months of the initiation of the War of Liberation in 1971 under the leadership of accused Syed Md. Hussain alias Hossain a group of 50(fifty) Razakars came at Nikli from Kishoreganj Sadar and set up four bunkers at Nikli Thana Sadar and he heard from the locals that he was a Daroga of those Razakars and his cohort Razakars used to follow his instructions and the Razakars were trained under his

leadership at Eidgah Math near G.C. School and at that time, he saw him at Nikli Thana area for which he was known to P.W6. The defence by cross-examining P.W 6 affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and his father's name is Musleh Uddin.

677. P.W1 Badal Chandra Barman, P.W2 Badal Chandra Sutradhar and P.W3 Kamala Rani Barman stated that while in the first part of Bangla month Vadhra in 1971 Teku Chairman along with other Razakars came at Dampara village, he[Teku Chairman] stated that Razakar Commander Syed Md. Hussain alias Hossain sent them to convert the Hindus to Muslim, and later, on 6th Bangla month Ashwin in 1971 at about 3.00 pm accused Syed Md. Hussain alias Hossain, his cohort Razakars and Pakistani army having attacked Dampara Bazaar and Dampara village abducted 39 Hindus and confined them in Nikli Thana and the defence by cross-examining P.Ws1 and 2 affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. At the time of cross-examination, he also affirmed that he saw accused Syed Md. Hussain alias Hossain at the time of occurrence at the crime site. P.W4 Shamala Rani Barman stated that while Teku Chairman along with his cohort Razakars in the first part of Bangla month Ashwin in 1971 came at Dampara and converted the Hindus of Dampara to Muslim, she heard from Teku Chairman that accused Syed Md. Hussain alias Hossain was the Commander of Razakars.

P.W 1 claimed that at the time of the event of abduction of Hindus as narrated in charge No. 4, he saw accused Syed Md. Hussain alias Hossain at Dampara village and could recognized him. P.Ws 1 and 2 also claimed that they saw him while they were confined in Nikli Thana.

678. Out of 20 witnesses examined by the prosecution, P.Ws 1 to 4 are the witnesses of the events narrated in charge Nos. 1 and 4 and inhabitants of Dampara village which was situated about 4(four) kilometers far from Nikli Thana. P.Ws 5, 7, 10, 11, 13, 14 are freedom fighters. P.W 6 was the resident of Kamarhati village which was situated adjacent to Nikli Thana. P.W5 Abdul Hamid, a freedom fighter of Cetra village stated that Moslem Prodhan was known to him before the occurrence as local and the villagers of Cetra used to come at Nikli Bazaar. He claimed that father's name of accused Syed Md. Hussain alias Hossain is Musleh Uddin and his house was situated at Hazrat Nagar village of Kishoreganj Sadar and at the time of General Election in 1970 for the first time he saw accused Syed Md. Hussain alias Hossain. P. W. 7 stated that at the time of War of Liberation in 1971 as a source of freedom fighters, he used to identify different position of Razakars for which he could recognize accused Syed Md. Hussain alias Hossain, and accused Md. Moslem Prodhan was known to him as local before the occurrence narrated in charge No. 3.

679.P.W8 Md. Solaiman of Gurui village stated that accused Md. Moslem Prodhan used to come at Nikli Bazaar for which he was known to him and he heard from freedom fighters Hekim[P.W10] and Ichab Ali[P.W7] that accused Syed Md. Hussain alias Hossain was one of the Razakar Commander among the two Razakar Commanders who attacked the freedom fighters at the time of Gurui battle. The defence by cross-examining P.W8 affirmed that accused Md. Moslem Prodhan was known to P.W8 before the occurrence. P.W9 Rabeya Akter, wife of freedom fighter Abdul Malek of Nikli Purbagram village stated that her house was situated adjacent to the house of accused Moslem Prodhan and her father's house was also situated at Nikli and at the time of cross-examination, the defence suggested that due to previous enmity, P.Ws 6 and 9 deposed falsely against accused Moslem Prodhan and thereby admitted that accused Md. Moslem Prodhan was known to them.

680. During cross-examination of P.W6, the defence suggested that in 1971 or at any other time he did not directly see accused Syed Md. Hussain alias Hossain which has been denied by P.W 6. P.W 6 specifically stated that after 2/3 months of the initiation of the War of Liberation in 1971 accused Syed Md. Hussain alias Hossain along with about 50 other Razakars came from Kishoreganj at Nikli Sadar and set up four bunkers at Nikli Thana Sadar and at that time he also saw accused Syed Md. Hussain alias Hossain at Nikli Thana

area for which he was known to P.W 6 before the occurrence. The above statement of P.W6 has not been disputed by the defence and by cross-examining P.W 6, the defence affirmed that accused Syed Md. Hussain alias Hossain was Razakar Commander of Nikli Thana.

681. It is very pertinent that late Maulana Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of infamous Peace Committee of the then Kishoreganj Sub-Division and his elder brother Syed Md. Hachhan alias Syed Md. Hasan alias Hachhan Ali was also a local Razakar in 1971 and he was convicted by this Tribunal for committing the offence of genocide and crimes against humanity committed in Tarail Thana of the then Kishoreganj Sub –Division and since his father was a leader of infamous Peace Committee of the then Kishoreganj Sub-Division, accused Syed Md. Hussain alias Hossain as Razakar also participated in different battles along with the Pakistani army and the Razakars against the freedom fighters. On scrutiny of the evidence of the prosecution witnesses, it reveals that before the War of Liberation in 1971 accused Syed Md. Hussain alias Hossain used to reside at Kishoreganj Thana Sadar and he was brought up there along with his parent and family members and he was known to P.Ws 17, 18, 19 and other locals of Kishoreganj Sadar before the War of Liberation in 1971 and P.Ws 15 and 16 also heard from the locals of Pyrabhanga village that Razakar accused Syed Md.

Hussain alias Hossain took part in the Pyarabhanga battle against the freedom fighters.

682. P.W10 Abdul Hekim and P.W11 Chanfar Ali, freedom fighters of Gurui village stated that in the General Election of 1970 one Aftab Kara contested in the election from their locality and at that time accused persons took part in the election campaign on his behalf for which accused persons were known to him. P.W12 Zafor Ali of Gurui village stated that house of accused Md. Moslem Prodhan was situated near the house of his brother-in-law Razakar Rahmat Ali which was situated adjacent to Nikli Thana and he used to go to the house of his brother-in-law before he [Rahmat Ali] joined the Razakar bahini. At that time, his brother-in-law Rahmat Ali introduced him with accused Syed Md. Hussain alias Hossain for which both the accused persons were known to him before the occurrence. P.W13 Gopal Chandra Das is a freedom fighter of Mohammadpur village and he stated that at the time of War of Liberation in 1971 he heard from the freedom fighters of Kubra bahini that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and Moslem Prodhan was known to him as an inhabitant of the adjacent village. P.W14 Azizul Haque is a freedom fighter of Nikli Purbagram village who stated that at the time of War of Liberation in 1971 he came to know from the difference sources and the locals that accused Syed Md. Hussain alias Hossain was Razakar Commander of Nikli

Thana and accused Md. Moslem Prodhan was known to him as an inhabitant of the adjacent village. During cross-examination of P.W14, he affirmed that at the time of War of Liberation in 1971 house of accused Syed Md. Hussain alias Hossain was situated about quarter kilometer far from Nikli Thana.

683. P.W 17 A.K. Nasim Khan of Sholakia village stated that accused Syed Md. Hussain alias Hossain was Razakar Commander of Kishoreganj Sub-Division and the defence by cross-examining P.W17 affirmed that his elder brother Syed Hasan was also a Razakar. P.W18 Md. Sadekujjahan Talukder Noyan, an inhabitant of Sholakia village and brother of Martyr Khairul Jahan Talukder stated that after killing his brother Khairul Jahan Talukder, accused Syed Md. Hussain alias Hossain came to his house to show his abhorrence and cruelty to his [P.W17] family members and Syed Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of the infamous Peace Committee of Kishoreganj Sub-Division and before the occurrence accused Syed Md. Hussain alias Hossain was known to him.

684. P.W20 Kashem Ali was one of the victim of the event of abduction and confinement as narrated in charge No. 2. He stated that his house was situated about 100/150 yards far from Nikli Thana and while the Razakars confined him in Thana, he heard the conversation of the Razakars for which he could recognize Razakar

Commander Syed Md. Hussain alias Hossain. P.W 21 Abdul Ali stated that at the time of War of Liberation in 1971 he had a grocery shop adjacent to Nikli Thana and at that time, accused Razakar Commander Syed Md. Hussain alias Hossain used to come to his shop for which before the occurrence as narrated in charge No.2, accused Syed Md. Hussain alias Hossain was known to him and by cross-examining P.W21, the defence affirmed that Razakar accused Syed Md. Hussain alias Hossain was known to him (P.W21) before the occurrence.

685. On scrutiny of the evidence presented to the Tribunal, it further reveals that accused Syed Md. Hussain alias Hossain came at Nikli Thana Sadar after 2/3 months of the initiation of the War of Liberation in 1971 and set up bunkers at Nikli Thana Sadar as Razakar Commander. The offences alleged in the charge Nos. 1 to 5 happened at Nikli Thana Sadar and adjacent areas after about 3/4 months of his arrival at Nikli Thana Sadar and at the relevant time, the locals and the freedom fighters of the crime sites were very much aware of him. P.Ws 1 and 2 claimed that while they were confined in Nikli Thana, they saw accused Syed Md. Hussain alias Hossain in Nikli Thana. P.Ws 5, 6, 7,8,10,11,12,13 and 14 were also locals of adjacent Nikli Thana Sadar and as freedom fighter and local there was good reasons for them to recognize accused Syed Md. Hussain alias Hossain. The defence by cross-examining P.W5 affirmed that house of accused Syed Md.

Hussain alias Hossain was situated at Hazrat Nagar village of Kishoreganj Sadar and villagers of his Cetra village used to go to Nikli Bazaar for shopping. It further reveals that the accused persons took part in the election campaign in the General Election of 1970 in the locality of Nikli Sadar on behalf of one Aftab Kara for which they were known to the locals of Nikli Thana Sadar before the War of Liberation in 1971.

686. P.W9 is the wife of freedom fighter Abdul Malek and at the time of abduction of Abdul Malek from his house, she was present at her house. P.Ws 5,7,8,10,11 and 12 claimed to be the direct witnesses of the events narrated in charge No. 3. P.W 5 Abdul Hamid was an inhabitant of Cetra village and P.Ws 7, 8, 10, 11 and 12 were inhabitant of Gurui village which was situated adjacent to Nikli Thana Sadar. P.Ws 5, 7, 8, 10 and 11 are freedom fighters and P.W 12 is the son of Martyr Shaheda Banu.

687. On evaluation of the evidence of prosecution witnesses presented to the Tribunal it is found that before initiation of the War of Liberation in 1971 accused Syed Md. Hussain alias Hossain used to reside at Kishoreganj Sadar along with his parent and after 2/ 3 months of the initiation of the War of Liberation in 1971 he came at Nikli Thana Sadar, and before Nikli Thana Battle, he used to reside at Nikli Thana Sader and accused Md. Moslem Prodhan was a local of Nikli Thana Sadar and before the

commission of the alleged offences, accused Syed Md. Hussain alias Hossain was known to the locals of Kishoreganj Thana Sadar and both the accused persons were known to the local freedom fighters and locals of Nikli Thana Sadar.

688. In view of the above evidence, facts and circumstances of the case, findings and reasoning, I am of the view that P.Ws 1, 2, 5 to 8, 10 to 14, 17 to 21 correctly recognized accused Syed Md. Hussain alias Hossain and P.Ws 3,4,9,15 and 16 were also well aware about Razakar Commander accused Syed Md. Hussain alias Hossain at the time of occurrences as perpetrator of the crimes as narrated in the charges and P.Ws 5, and P.Ws 7 to 14 as locals correctly recognized accused Md. Moslem Prodhan at the time of occurrences as perpetrator of the crimes as narrated in charge Nos. 3 and 5.

Whether the accused persons belonged to local Razakar Bahini

689. The learned Prosecutor Ms. Tureen Afroz appearing on behalf of the prosecution submitted that at the time of Great War of Liberation in 1971 accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and accused Md. Moslem Prodhan was the Razakar Commander of Nikli Sadar Union and the prosecution examined P.Ws 1,2,4,5 to 12, and 15 to 21 to prove that accused persons were the Commander of Razakars and the prosecution also exhibited the Daily Purbadesh

dated 25.03.1972 which was marked as exhibit-2, Magistrate's General Register of Cases Cognizable by Police which was marked as exhibit-9, Lists of Razakars dated 04.12. 2013 which was marked as exhibits 11 and 12 to prove that accused Syed Md. Hussain alias Hossain was a "King Razakar" in 1971. The learned Prosecutor finally submitted that the prosecution by examining both oral and documentary evidence proved beyond reasonable doubt that the accused persons were Razakar Commander in 1971.

690. The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of the accused persons submitted that the Razakars were appointed under the East Pakistan Razakars Ordinance, 1971 but the prosecution totally failed to exhibit any reliable documentary evidence to prove that the accused persons were appointed as Razakar or Razakar Commander in 1971 and without proof of any reliable documentary evidences it is not legally permissible to hold that the accused persons were Razakar or Razakar Commanders in 1971.

691. To resolve the issue as to whether the accused persons were Razakars or Razakar Commanders at the time of Great War of Liberation in 1971, it is required to examine both documentary and oral evidence of the prosecution witnesses testified as regards the status of the accused persons at the relevant time in 1971.

692. P.W 01 Badal Chandra Barman [59] of Dampara village stated that on 6.9.1971 at about 2 ½ / 3.00 pm Nikli Thana Razakar Commander accused Syed Md. Hussain alias Hossain along with other Razakars and Pakistani army having attacked Dampara village abducted the about 39 Hindus including him and confined them in Nikli Thana. He also stated that after killing 34 Hindu detainees at cremation ghat, on the next day at about 9/10 am a Major of the Pakistani army and the Razakar Commander Md. Hussain came to the minor detainees in Nikli Thana and asked them as to whether they wanted to go to their home or not. Thereafter they released them and the four minor detainees came back to their houses.

693. PW.2 Badal Chandra Sutradar [59/60] of Dampara village stated that in the first part of Bangla month Vadra in 1971, Teku Chairman along with other Razakars came at Dampara village and told the villagers that Razakar Commander Syed Md. Hussain alias Hossain sent them to inform that if the Hindus wanted to reside in this country, then they had to be converted themselves to Muslim. He also stated that on 6th Ashwin in 1971 Razakar Commander accused Syed Md. Hussain alias Hossain, other Razakars and Pakistani army having attacked Dampara Bazaar and Dampara village abducted 35 Hindus including himself and confined them in Nikli Thana and after killing 34 Hindu detainees at cremation ghat, on the next day at about 9/10.00 am Razakar

Commander accused Syed Md. Hussain alias Hossain along with a Pakistani army came to minor detainees at Nikli Police Station and asked them as to whether they were able to go to their home or not and the minor detainees replied positively. Thereafter the Razakars and the Pakistani army released the minor detainees.

694. P.W3 Kamala Rani Barman of Dampara village stated that in 1971 she used to reside in the house of her husband at Dampara village. In the first part of Bangla month Vadra in 1971 at the order of Teku Chairman, Razakar Commander Syed Md. Hussain alias Hossain, Shanai Razakar along with other Razakars brought Karim Maulavi and converted the Hindus of her village to Muslim. She also stated that accused Syed Md. Hussain alias Hossain was the Razakar Commander of the locality.

695. P.W4 Shamala Barman [65] of Dampara village stated that in the first part of Bangla month Vadra in 1971 Teku Chairman and Shanai Razakar came to their houses and informed that Razakar Commander Syed Md. Hussain alias Hossain sent them to tell the Hindus to be converted to Muslim and bringing Karim Maulavi converted them to Muslim by reciting Kalema.

696. P.W5 Abdul Hamid [66] of Cetra village stated that on 6.9.1971 while they took position at Gurui village, he came to know through a source that accused Syed Md. Hussain alias Hossain, Razakar Commander of Nikli Thana and Moslem Prodhan, Razakar

of Nikli Thana along with other Razakars and the Pakistani army might attack Gurui village which was situated to the west side of Nerajuri haor (wetland) under Nikli Thana. He recognized accused Syed Md. Hussain alias Hossain while he collected the information about the Razakars as a source of Basu Bahini and came to know that he was a Razakar Commander.

697. P.W6 Md. Taher Ali [59] of Kamarhati village stated that 2/3 months after initiation of the War of Liberation in 1971 under the leadership of accused Syed Md. Hussain alias Hossain about 50 Razakars came at Nikli from Kishoreganj and set up four bunkers at Nikli Thana Sadar. At that time the locals used to say that accused Syed Md. Hussain alias Hossain was a Daroga of those Razakars and his cohort Razakars used to follow his instructions. At that time, he saw accused Syed Md. Hussain alias Hossain at Nikli Thana area for which he could recognize him. At the time of War of Liberation, local Razakar Ashraf Ali (now dead) under the leadership of accused Syed Md. Hussain alias Hossain used to recruit the Razakars and trained them at Idgah Math which was situated adjacent to G.C. School. He also stated that accused Syed Md. Hussain alias Hossain was also known as Commander of those Razakars. In cross-examination in reply to a question put to him by the defence, he affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana,

698.P.W7 Md. Ichab Ali [66] of Gurui East Para village stated that at the time of Great War of Liberation in 1971 Razakar accused Syed Md. Hussain alias Hossain used to work as Daroga of Nikli Thana and accused Md. Moslem Prodhan was the Razakar Commander of Nikli Thana Sadar. In 1971 at the time of War of Liberation as a source of freedom fighters, he used to identify the different position of Razakars for the operational purpose for which he could identify accused Razakar Commander Syed Md. Hussain alias Hossain and accused Md. Moslem Prodhan was known to him as local.

699. P.W8 Md. Solaiman [66] of Gurui village stated that on 20th Bangla month Vadhra in 1971 at about 11.00 am he saw that Razakar Commander accused Syed Md. Hussain alias Hossain, other Razakars, and the Pakistani army having captured his father along with other villagers took away them in front of the house of Khaleque and gunned down them to death and a few Razakars set fire to the houses. Razakar accused Md. Moslem Prodhan was known to him since he used to come at the Bazaar. The freedom fighter Hekim [P.W10] and Ichab Ali[P.W7] informed him that accused Syed Md. Hussain alias Hossain was one of the Razakar Commander who attacked the freedom fighters.

700. P.W9 Rabeya Akter, wife of Martyr Abdul Malek of Nikli Purbagram village stated that on first Bangla month Kartik in 1971

in the afternoon, her husband Abdul Malaque came to his house to see her. After some time, Razakar accused Md.Moslem Prodhan along with 4/5 armed Razakars came to her house and told that Razakar accused Syed Md. Hussain alias Hossain sent them to take away Abdul Malek.

701. P.W10 Abdul Hekim [71] of Gurui village stated that in 1971 one day of Bangla month Vadra Basu, the head of Basu Bahini informed him that Razakar accused persons, their cohort Razakars, and the Pakistani army might attack Gurui village.

702. P.W11 Chanfor Ali [73] of Guri village stated that at the time of the War of Liberation in 1971 he heard from his Commander Basu that the Pakistani army, Razakar accused persons and other Razakars might attack Gurui village.

703. P.W13 Gopal Chandra Das [67] of Mohammadpur village stated that he heard from the freedom fighters of Kubra Bahini that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and accused Md. Moslem Prodhan was the Razakar Commander of Nikli Sadar Union. House of accused Md. Moslem Prodhan was situated at his adjacent village for which he was known to him before the occurrence.

704. P.W14 Azizul Haque [61] of Nikli Purbagram village stated that at the time of War of Liberation, he heard from different sources and the locals that accused Syed Md. Hussain alias Hossain

was the Razakar Commander of Nikli Thana. He claimed that Nikli Thana Sadar Union Razakar Commander accused Md. Moslem Prodhan was an inhabitant of the adjacent village for which he was known to him before the occurrence.

705. P.W15 Md. Sohrab Uddin [62] of Pyarabhanga village stated that on 26.11.1971 Friday at about 9.30/10.00 am Pakistani army and the Razakars came near the house of Nath Bari of Pyarabhanga village. At about 4/ 4.30 pm after the battle of Pyarabhanga village he along with other locals came out on the road from their houses and heard from the locals that the Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort Razakars and the Pakistani army came at Pyarabhanga village and attacked the position of freedom fighters.

706. P.W16 Md. Bachchu Mia [61] of Pyarabhanga village was a businessman in 1971 and he used to live in his home at Pyarabhanga village which was situated about 10 yards far from Hossainpur- Kishorgonj road. He heard from the locals that under the leadership of Razakar Hussain, his cohort Razakars and the Pakistani army attacked the freedom fighters in his village.

707. P.W17 A.K. Nasim Khan [57] of Sholakia village stated that in 1971 accused Syed Md. Hussain alias Hossain was the Razakar Commander of Kishoreganj Sub-Division. During cross-examination of P.W17, he affirmed that Syed Hassan, elder brother

of accused Syed Md. Hussain alias Hossain was also a Razakar. During cross-examination of P.W17, the defence suggested that accused Syed Md. Hussain alias Hossain was not Razakar or he was a Police Officer which has been denied by him.

708. P.W18 Md. Sadekujahan Talukder Noyan [58] of Sholokia village stated that on 26.11.1971 at about 4 pm, he was present in the shop of his father situated at Kishoreganj Thana Sadar. At that time, he heard from the locals that his elder brother Khairul Jahan Talukder became Martyr at the time of the war of Pyarabhanga between the freedom fighters and the Pakistani army and the Razakars. At that time, he went to his house along with his brother-in-law Asaduzzaman and saw that a few Razakars under the leadership of accused Razakar Commander Syed Md. Hussain alias Hossain encircled his house and he also saw the marks of blood on the light brown color (Khaki) pant of accused Syed Md. Hussain alias Hossain. In 1971 Md. Musleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of Peace Committee of Kishoreganj Sub-Division for which accused Syed Md. Hussain alias Hossain was known to him.

709. P.W19 A.K.M. Shajahan [61] of 380/1, Old Kishoreganj Thana Sadar stated that on 26.11.1971 at about 4/4.30 pm while he was present at his house, he heard from the locals that Razakar Commander accused Syed Md. Hussain alias Hossain, son of

Maulana Musleh Uddin, Chairman of Peace Committee along with his cohort Razakars having killed two freedom fighters kept their dead bodies in the field situated in front of the Islamia Boarding (Razakar Camp).

710. P.W 20 Kashem Ali [69/70] of Pukurpar village of Nikli Thana stated that on 16th Bangla month Vadra in 1971 at about 11/11.30 am the Razakar Commander Syed Md. Hussain alias Hossain along with his 4/5 cohort Razakars having detained him from his house confined him along with other 3/ 4 persons in Thana and at the order of Razakar Commander Syed Md. Hussain alias Hossain, his cohort Razakars physically tortured them. In reply to a question put to him by this Tribunal he stated that while he was confined in Thana, the Razakars talked amongst themselves for which he could recognize Razakar Commander Syed Md. Hussain alias Hossain.

711. P.W21 Abdul Ali [80] of Baniahati village stated on 16th Bangla month Vadra in 1971 at about 11/13 am he was present in his grocery shop and saw that the Razakars having detained Kashem Ali (P.W20), Sundar Ali (now dead), Mohar Ali (now dead) and Bodu (now dead) confined them in Nikli Thana. At that time, he went to Thana to see them and since they were innocent, he requested Razakar Commander Syed Md. Hussain alias Hossain to release them. Since he had a shop adjacent to Thana, accused

Syed Md. Hussain alias Hossain used to come to his shop for which before the occurrence accused Syed Md. Hussain alias Hossain was known to him.

Findings and decision of the Tribunal

712. It is noted that out of 18 P.Ws examined by the prosecution to prove that the accused persons were Razakar Commander in 1971, P.Ws 1, 2, 4 are the victims of the events narrated in charge Nos. 1 and 4. P.W 5 Abdul Hamid is a freedom fighter of Cetra village and P.Ws 7, 8, 10 and 11 are freedom fighters of Gurui village and they took part in the Gurui battle of Nikli Thana and the prosecution witnesses claimed that both the accused persons took part in Gurui battle along with other Razakars and the Pakistani army against the freedom fighters. P.W 6 Md. Taher Ali was a resident of Kamarhati village of Nikli Thana Sadar. P.W12 Jafor Ali of Gurui village is the son of Martyr Shahada Banu who was allegedly killed after the Gurui battle by the Razakars and the Pakistani army. P.W 9 Rabeya Akter is the wife of Martyr Abdul Malek, a freedom fighter of Nikli Purbagram village of Nikli Sadar Thana. P.W13 Gopal Chandra Das and P.W 14 Azizul Haque are the freedom fighters of Kubra bahini who took part in the Nikli Thana Battle against the Razakars. P.W 15 Md. Sohrab Uddin and P.W16 Md. Bachchu Mia were the inhabitants of Pyrabhanga village, a battlefield, where the freedom fighters Khairul Jahan

Talukder and Selim were gunned down to death by the Razakars and the Pakistani army. P.W 17 A.K Nasim Khan and P.W18 Md. Sadekujjahan Talukder Noyon were inhabitants of Sholakia village of Kishoreganj Sadar Thana and P.W18 is also the brother of Martyr freedom fighter Khairul Jahan Talukder. P.W 19 A.K.M. Shajahan was the inhabitant of Kishoreganj Sadar. P.W 20 Kashem Ali is the victim of the event narrated in charge No. 2 and P.W21 Abdul Ali had a grocery shop in 1971 at Nikli Bazaar adjacent to Nikli Thana Sadar.

713. On scrutiny of the evidence of the prosecution witnesses, it transpires that P.Ws 1 and 2 were confined in Nikli Thana Sadar at the time of the commission of the alleged offence of genocide as narrated in charge No. 4. P.W 1 claimed that after killing 35 detainees at cremation ghat, on the next day Razakar accused Syed Md. Hussain alias Hossain and a Pakistani army man came to him and wanted to know as to whether he and other minor detainees were able to go to their houses and during cross-examination of P.W1 in reply to a question put to him by the defence, he affirmed that he could not recognize any other Razakar except Razakar Commander accused Syed Md. Hussain alias Hossain. P.W 2 Badal Chandra Sutradhor in examination –in-chief stated that after killing 35 detainees at the cremation ghat, on the next day while he was confined in Nikli Thana, Razakar Commander Syed Md. Hussain alias Hossain along with a Pakistani army man came to

him to know as to whether he and other minor detainees were able to go to their houses and during cross-examination of P.W2 in reply to a question put to him by the defence, he affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. P.W 4 Shamala Barman claimed that at the time of occurrence as narrated in charge No. 1, Teku Chairman came to her house at Dampara village and told that Razakar Commander Syed Md. Hussain alias Hossain instructed them to forcefully convert the Hindus of Dampara village to Muslim. During cross-examination, in reply to a question put to P.W3 Kamala Rani Barman by the defence, she affirmed that accused Syed Md. Hussain alias Hossain was the Police and Razakar Commander.

714. P.W 5 Abdul Hamid is a freedom fighter of Gurui village and took part in Gurui battle. He stated that on 06.9.1971 while he was present at Gurui village he came to know through the source of freedom fighters that Nikli Thana Razakar Commander Syed Md. Hussain alias Hossain and Nikli Thana Razakar Moslem Prodhan along with other Razakars and the Pakistani army might attack Gurui village. P.W 6 Md. Taher Ali of Kamarhati village of Nikli Thana Sadar stated that after 2/3 months of the initiation of the Great War of Liberation in 1971 under the leadership of accused Syed Md. Hussain alias Hossain about 50 Razakars came at Nikli from Kishoreganj and set up four bunkers at Nikli Thana Sadar. At

that time, locals used to say that accused Syed Md. Hussain alias Hossain was the Daroga of those Razakars and his cohort Razakars used to follow his instructions and at that time he also saw him at Nikli Thana Sadar and the local Razakar Ashraf Ali (now dead) used to recruit and trained the Razakars in the Eidgah field under the leadership of Syed Md. Hussain alias Hossain and he was also known as a Commander of Razakars. During cross-examination of P.W6 in reply to a question put to him by the defence, he affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and except Razakar Commander Syed Md. Hussain alias Hossain there was no other Razakar Commander at Nikli and there was no Razakar Commander in his Nikli Sadar Union.

715. P.W7 Md. Ichab Ali is a freedom fighter of Gurui village and took part in Gurui battle. He stated that accused Md. Moslem Prodhan was the Razakar Commander of Nikli Thana Sadar and before 4/ 5 days of 20th Bangla month Vadhra in 1971 he got the information that Razakar accused Syed Md. Hussain alias Hossain and Moslem Prodhan along with their cohort Razakars might attack Gurui village. P.W 8 Md. Solaiman is the son of Martyr Madhu Mia of Gurui village and he stated that at the time and place of the event narrated in charge No. 3, Razakar Commanders Syed Md. Hussain alias Hossain and Moslem Prodhan along with their cohort Razakars and the Pakistani army having captured his father along

with other villagers from their houses confined them in front of the house of Abdul Khaleque of Gurui village and gunned down all the detainees to death. He also stated that at the time of occurrence as narrated in charge No. 3, the freedom fighters Hekim[P.W10] and Ichab Ali [P.W7] informed that accused Syed Md. Hussain alias Hossain was one of the Razakar Commander amongst the two Razakar Commanders who were instructing other Razakars.

716. P.W9 Rabeya Akter, wife of Martyr freedom fighter Abdul Malek stated that on first Kartick in 1971 Razakar Md. Moslem Prodhan along with other 4/5 Razakars came to their house at Nikli Purbagram village and informed that Razakar Syed Md. Hussain alias Hossain Daroga instructed them to take away her husband Abdul Malek to Nikli Thana. During cross-examination of P.W9, in reply to a question put to her by the defence, she affirmed that accused Syed Md. Hussain alias Hossain Daroga was Razakar Commander of Nikli Thana and there was no Razakar Commander in his Union and she also affirmed that she could not recognize any other Razakars except accused Md. Moslem Prodhan.

717. P.W10 Abdul Hekim stated that at any day of Bangla month Vadhra in 1971 Basu, Commander of Basu bahini informed them that he (Basu) came to know that Razakar accused Syed Md. Hussain alias Hossain and Razakar accused Md. Moslem Prodhan along with other Razakars and the Pakistani army might attack

Gurui village. P.W11 took part in Gurui battle. He stated that in 1971 while he took part in the Great War of Liberation he came to know from his Commander Basu that Pakistani army and the Razakar accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan along with other Razakars might attack Gurui village. P.W 12 Jafor Ali stated that accused persons were Razakars in 1971. P.W13 Gopal Chandra Das took part in Nikli Thana battle against the Razakars. He stated that accused Syed Md. Hussain alias Hossain was a Razakar Commander of Nikli Thana Sadar and accused Moslem Prodhan was the Razakar Commander of Nikli Thana Sadar Union. P.W 14 Azizul Haque of Nikli Purbagram village is a freedom fighter of Kubra bahini and he stated that Rebaya Akhter, wife of Abdul Malek informed him that accused Md. Moslem Prodhan, Razakar Commander of Nikli Sadar Union along with other Razakars came to her house and told that accused Syed Md. Hussain alias Hossain, Razakar Commander of Nikli Thana instructed him [Md. Moslem Prodhan] to take away freedom fighter Abdul Malek.

718. P.W 15 Md. Sohrab Uddin of Pyarabhanga village of Hossianpur Thana stated that accused Syed Md. Hussain alias Hossain, Razakar Commander of Kishoregonj along with other Razakars and the Pakistani army attacked the freedom fighters in his village. P.W16 Md. Bachchu Mia of Pyarabhanga village stated that after killing freedom fighter Khairul Jahan and Selim in the

Pyarabhangra battle, he came out from his house and heard from locals present there that under the leadership of accused Syed Md. Hussain alias Hossain, Razakars, and the Pakistani army attacked the freedom fighters in his village.

719. P.W17 A.K. Nasim Khan of Sholakia village stated that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Kishoreganj Sub-Division and in reply to a question put to him by the defence, he affirmed that his brother Syed Hassan was also a Razakar. P.W18 Md. Sadekujahan Talukder Noyon of Sholakia village is the brother of freedom fighter Khairul Jahan Talukder. He stated that accused Syed Md. Hussain alias Hossain was a Razakar Commander in 1971 and his father Md. Musleh Uddin was the Chairman of Peace Committee of the then Kishoreganj Sub-Division. P.W 19 AKM Shajahan stated that Maulana Md. Musleh Uddin, father of Razakar Commander Syed Md. Hussain alias Hossain was the Chairman of Peace Committee and he, his cohort Razakars having killed two freedom fighters dumped their dead bodies in the field situated in front of the Islamia Boarding[Razakar Camp] of Kishoreganj Sadar.

720. P.W 20 Kashem Ali, a victim of the event of abduction and confinement as narrated in charge No. 2, stated that while he was confined in Nikli Thana, at the order of Razakar Commander Syed Md. Hussain alias Hossain his cohort Razakars had beaten them.

P.W21 Abdul Ali who had a grocery shop adjacent to Nikli Thana Sadar stated that he requested Razakar Commander Syed Md. Hussain alias Hossain to release the four detainees while they were confined in Nikli Thana.

721. On scrutiny of the evidence of prosecution witnesses presented to the Tribunal, it reveals that although the defence denied that the accused persons were not Razakars or they were also not Razakar Commanders, but by cross-examining P.Ws 1,2,3,6 and 9, the defence affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana Sadar. Although the learned prosecutor submitted that accused Md. Moslem Prodhan was the Razakar Commander of Nikli Sadar Union, but P.Ws 6 stated that there was no other Razakar Commander at Nikli except accused Syed Md. Hussain alias Hossain and P.W9 Rabeya Akter, wife of freedom fighter Abdul Malek stated that there was no Razakar Commander in 1971 at the Nikli Sadar Union.

722. Exhibit 2, the Daily Purbadesh dated 25.05.1973 and the exhibit 9 General Register of the Cognizable Case are old documents. On perusal of the exhibits 2, 9 and 11 and the evidence presented to the Tribunal it appears that accused Syed Md. Hussain alias Hossain was the “King Razakar” of the then Kishoreganj Sub-Division and his father Md. Musleh Uddin was the Chairman of the Peace Committee of the then Kishoreganj Sub-Division and

his elder brother Syed Md. Hachhan alias Md. Hasan alias Hachhan Ali was also a Razakar and all the family members of accused Syed Md. Hussain alias Hossain actively collaborated with the Pakistani army at the time of Great War of Liberation in 1971. Exhibit-12 speaks that accused Md. Moslem Prodhan was a Razakar Commander.

723. On the evaluation of the evidence presented to the Tribunal, it reveals that P.Ws 1,2,3,4,5,6,8,9,13,14, 15,,17,18,19, 20 and 21 stated that accused Syed Md. Hussain alias Hossain was a Razakar Commander. P.Ws 5, 9, 10, 11 and 12 stated that accused Md. Moslem Prodhan was a Razakar at the time of Great War of Liberation in 1971 and P.Ws 7,8,13 and 14 stated that accused Md. Moslem Prodhan was the Razakar Commander, but P.Ws 6 and 9 stated that there was no Razakar Commander at the Nikli Sadar Union. P.W6 was an inhabitant of Kamarhati village of Nikli Sadar Union and P.W9 was also an inhabitant of Nikli Sadar Union and she is the wife of freedom fighter Abdul Malek and both of them were well conversant as to whether there was any Razakar Commander in their Nikli Sadar Union.

724. In view of the above evidence, facts and circumstances of the case, I am of the view that the prosecution witnesses proved beyond reasonable doubt that both the accused persons were Razakar in 1971 and accused Syed Md. Hussain alias Hossain was the Razakar

Commander of Nikli Thana and accused Md. Moslem Prodhan was a potential Razakar of the Nikli Sadar Union and both of them actively collaborated with the Pakistani occupation army at the time of Great War of Liberation in 1971 in the locality of the alleged crime sites.

Charge No. 01

[Forceful conversion of Hindu religious people of Dampara village under Nikli Police Station to Muslim]

725. That during the mid of August in 1971 under the instruction of Razakar Commander accused Syed Md. Hussain alias Hussain, Shaheb Ali alias Shaheb Ali alias Chairman [now dead], leader of local Peace Committee of Dampara forcefully converted Hindu religious people of Dampara village under Nikli Police Station of the then Kishoreganj Sub-Division to Muslim.

726. Thereby, accused Syed Md. Hussain alias Hossain has been charged with participating, abetting, facilitating and complicity in committing the criminal acts of forceful conversion of Hindu religious people to Muslim constituting the offence of 'other inhumane act' as crimes against humanity as part of systematic attack directed against unarmed civilians 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 for which the accused person has incurred liability under section 4(1) and 4(2) of the said Act.

Evidence presented to the Tribunal

727. To prove the event narrated in charge No. 1, the prosecution examined P.Ws 1, 2, 3 and 4.

728. P.W 01 Badal Chandra Barman [59] of Dampara village stated that he is a businessman of dried fish. At the time of the Great War of liberation in 1971, he was aged about 14 years and at that time he used to live in his village home at Dampara along with his parent and was a student of class five. At that time, the Hindu families of his village used to live with apprehension and many Hindu families left for India. At the time of War of Liberation in 1971, Shaheb Ali alias Teku Chairman of Dampara Union was also the Chairman of the Peace Committee of Dampara Union.

729. As regards the event narrated in charge No 1, he stated that in the first part of the Bangla month Vadra in 1971, Shaheb Ali alias Teku Chairman came at Dampara along with his cohort Razakars and told the Hindus of Dampara that accused Syed Md. Hussain, Razakar Commander of Nikli Thana sent them to convert the Hindus to Muslim failing which all of them would be gunned down to death and due to fear of their lives, the Hindus of Dampara agreed to be converted to Muslim, and then they called one Karim Maulavi who converted the Hindus to Muslim by reciting the Kalema, and had given each male a cap to have their prayer, and after converting the Hindus to Muslim, they renamed each of the Hindu. P.W1 stated that he was renamed as Muslim Khan. The

Razakars ordered the females not to put on Vermilions and Shakhas and not to keep any idols of god and goddess in their houses. Thereafter Shaheb Ali alias Teku Chairman and his cohort Razakars used to look after the Hindus to be ensured as to whether the Hindus of Dampara were performing their prayer and following the rituals as the Muslim or not.

730. **PW.2** Badal Chandra Sutradar [59/60] of Dampara village was aged about 14/15 years at the time of War of Liberation in 1971 and at that time he used to live in his house at Madhya Dampara. He is a Carpenter since 1971. He stated that Madhya Dampara was Hindu inhabited area. The Muslims used to live to the north, south and east side of Madhya Dampara and a river was situated to the west.

731. As regards the event of forceful conversion of Hindus to Muslim as narrated in charge No. 1 he stated that in 1971 Shaheb Ali alias Teku was the Chairman of Dampara Union and he was also the Chairman of the Peace Committee of that Union and used to move along with the Razakars. In the first part of Bangla month Vadra in 1971, Shaheb Ali alias Teku Chairman along with other Razakars came at Dampara village and told the villagers that Razakar Commander Syed Md. Hussain sent them to inform the Hindus that if the Hindus want to reside in this country, they had to be converted themselves to Muslim. After that, Shaheb Ali alias Teku Chairman and his cohort Razakars called Karim Maulavi who

converted P.W 2 and other Hindus of Dampara to Muslim by reciting Kalema and had given each of them a white cap to wear to have their prayer. They also forbade the Hindu females not to put on Vermilion and Shakas and also destroyed the idols of the god and goddess and the holy books of Hindu religion kept in their houses. After conversion, P.W2 was renamed as Monir Kha. Subsequently, the Razakars used to come to their houses to be ensured as to whether they were following the rituals of Islam.

732. **P.W 3** Kamala Rani Barman [66] of Dampara village stated that in 1971 she was aged about 21 years and used to reside in the house of her husband at Dampara village. In the first part of Bangla month Vadra in 1971 at the order of Shaheb Ali alias Teku Chairman, Razakar Commander Syed Md. Hussain and Shanai Razakar along with other Razakars brought Karim Maulavi and converted the Hindus of her village to Muslim. They instructed the male Hindus not to put on white cap and ordered the Hindu women not to put on Vermilions and Shakhas.

733. Regarding the event narrated in charge No. 1, P.W4 Shamala Barman [65] of Dampara village stated that in 1971 she was aged about 20 years and at that time she used to live at the house of her husband at Dampara and her husband was a fisherman. Now he is working in the house of others. In the first part of Bangla month, Vadra in 1971, Shaheb Ali alias Teku Chairman and Shanai

Razakar came to their houses and informed that Razakar Commander Syed Md. Hussain sent them to tell the Hindus to be converted to Muslim and bringing Karim Maulavi converted them to Muslim by reciting Kalema and after converting Hindus to Muslim, they gave a white cap to each of them and ordered the Hindu women not to put on Vermilion and Shakas and not to do worship of god and goddess.

734.The learned Prosecutor Ms. Tureen Afroz appearing with another learned prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that the prosecution examined P.Ws 1 to 4, victims of the forceful conversion of Hindu religious people of Dampara village to Muslim who proved that during mid of August in 1971 as per instruction of Razakar Commander accused Syed Md. Hussain alias Hossain, Shaheb Ali alias Teku Chairman [now dead], Chairman of the Peace Committee of Dampara Union with intent to destroy the Hindu religious group in whole or in part forcefully converted Hindus of Dampara village to Muslim which caused serious mental harm to the members of Hindu religious group. She further submitted that the defence by cross-examining P.Ws 1 and 2 affirmed that at the relevant time the Hindus of Dampara village was forcefully converted to Muslim. Thus the prosecution proved the event of forceful conversion amounting to the offence of genocide as specified in Section 3(2)(c)(ii) of the

Act of 1973 against the accused person beyond all reasonable doubt.

735. The learned defence counsel Mr. Abdus Sattar Palwan as state defence counsel appearing on behalf of accused Syed Md. Hussain alias Hossain submitted that admittedly the accused person was not present at the time of occurrence at the crime site of alleged occurrence of forceful conversion of Hindu religious people of Dampara village to Muslim and the prosecution also failed to adduce any witness to prove that accused Syed Md. Hussain alias Hossain instructed other Razakars to forcefully convert the Hindus of Dampara village to Muslim and the prosecution totally failed to prove the charge of forceful conversion of Hindu religious people of Dampara village to Muslim against the accused person beyond all reasonable doubt and he prayed for the acquittal of the accused Syed Md. Hussain alias Hossain from the charge leveled against him.

Evaluation of the evidence and findings with reasoning

736. On scrutiny of the evidence of P.Ws 1 to 4 it reveals that they are victims of the event narrated in charge Nos. 1 and 4, and all of them were inhabitants of Dampara village, crime site of the event narrated in charge Nos. 1 and 4. At the time of occurrence P.Ws 1 and 2 were aged about 14 years, P.Ws 3 and 4 were aged about 21 and 20 years respectively and accused Syed Md. Hussain alias

Hossain was not personally known to them at the time of occurrence as narrated in charge No.1 and he was also not present at the crime site.

737. P.W 1 stated that after conversion of Hindus to Muslim, Shaheb Ali alias Teku Chairman renamed him as Muslim Khan and during cross-examination, P.W2 stated that after forceful conversion P.W1 was renamed as Muslim Khan and by cross-examining P.W2, the defence affirmed that P.W 1 and 2 were converted to Muslim. P.W 2 also stated that after conversion, he was renamed as Monir Khan which has not been disputed by the defence. Furthermore, the defence did not cross-examine P.Ws 1 to 4 as regards their statement made relating to the event narrated in charge No.1.

738. Islam is the religion of voluntary, monotheistic and unconditional faith to Almighty Allah and his Holy Prophet Hazrat Mohammad (sm.) [peace and blessings be upon him]. There is no compulsion in Islam. Islam is a religion of faith, peace, and tolerance and following the principle “to you be your religion, and to me be mine”. During the Prophet’s lifetime and soon afterward, the entire Arabian Peninsula was for the first time in its history unified in one just and egalitarian rule of law and divine religion. The Arabs accepted Islam willfully after hearing the Quran, seeing

the example of the Holy Prophet in his Sunnah (Way) and his companions, and witnessing the Islamic system.

739. Prophet Hazrat Mohammad (sm)[peace and blessings be upon him] himself was a very kind and peace loving person. He treated everyone, young, sick, old and infirm with kindness and great respect. He was spreading the word of God, because he was changing, for better, the lives of many Arabs for which some Arabs felt that by the teachings of Mohammad (sm)[peace and blessings be upon him]their old idols were losing power, they disliked Prophet Mohammad (sm)[peace and blessings be upon him]. These angered enemies of Islam started to harass him in every way they knew.

740. It is remembered that an old woman in Mecca used to throw rubbish on the pathway of Prophet Mohammad (sm)[peace and blessings be upon him] whenever he passed her house on the way to the mosque. Even when the old woman threw rubbish on him, he would pass silently without showing any anger or annoyance which was a daily event. One day when the Prophet Mohammad (sm)[peace and blessings be upon him] was passing by, the woman was not present there to throw the rubbish for which he stopped and asked the neighbour about her well-being, and wondering why she wasn't dropping any rubbish on him. The neighbour informed the Prophet Mohammad (sm)[peace and blessings be upon him]that the

woman was sick on bed. The Holy Prophet politely asked permission to visit the woman. When he was allowed, he entered the house; the woman thought that he had come there to take his revenge when she was unable to defend herself due to her sickness. But the Holy Prophet Mohammad (sm) [peace and blessings be upon him] assured her that he had come to her, not to take any revenge, but to see her and to look after her needs, as it was the command of Almighty Allah that if anyone is sick, a Muslim should visit him/her and should help him/her if his/her help is needed.

The old woman was so amazed by this kindness and love of the Holy Prophet, she realized his Prophet Hood and understood that he was truly the Prophet of Almighty Allah and Islam was the true religion. She accepted Islam at once.

741. In the case of *The Chief Prosecutor Versus Delowar Hussain Sayeedi*, International Crimes Tribunal-1 (ICT-1) , ICT-BD Case No. 01 OF 2011, date of delivery of Judgment 28 February, 2013 considered the offence “forceful conversion” as “inhumane act, torture and mental persecution which fall within the purview of crimes against humanity” and held that-

“It is found on the solid evidence that during the War of Liberation the accused under coercion and threat compelled a good number of Hindu Community people to convert religious belief which is considered as an inhuman act,

torture and mental persecution which fall within the purview of crimes against humanity. Our Holy Quran teaches us not to impose any sort of pressure upon the followers of other religion because Islam was preached only by rational appeal and not by coercion or threat”.

742. On scrutiny of the evidence of the prosecution witnesses, it transpires that P.Ws 1,2 and 4 stated that at the order of Razakar Commander Syed Md. Hussain, Shaheb Ali alias Teku Chairman forcefully converted them to Muslim and P.W 3 stated that at the order of Shaheb Ali alias Teku Chairman, Razakar Commander Syed Md. Hussain converted the Hindus to Muslim. Evidence of P.Ws 1,2 and 4 as regards forceful conversion of Hindus of Dampara to Muslim are consistent and corroborated by each other, but the statement made by P.W3 as regards forceful conversion was not corroborated by any other witness. On the evaluation of the evidence of the prosecution witnesses presented to the Tribunal, it reveals that the defence did not dispute the forceful conversion of Hindus of Dampara to Muslim and the defence also did not cross-examine the P.Ws 1, 2 and 4 as regards forceful conversion, but by cross-examining P.W2 the defence affirmed that after forceful conversion to Muslim P.W1 and 2 were renamed as Muslim Khan and Monir Khan respectively.

743. It transpires that at the time of forceful conversion of the Hindu religious people of Dampara village to Muslim, accused Syed Md. Hussain alias Hossain was not present at the crime site

but during the mid of August in 1971, he sent Shaheb Ali alias Teku Chairman and other Razakars to convert the Hindus of Dampara to Muslim. After forceful conversion of Hindus of Dampara to Muslim accused Syed Md. Hussain alias Hossain along with his cohort Razakars and a group of Pakistani army attacked Dampara Bazar and Dampara village on 23.09.1971 at about 12/10 pm and having abducted 39 male Hindus including P.Ws 1 and 2 confined them in Nikli Thana and subsequently killed them at cremation ghat except P.Ws 1, 2, two other minor detainees and Kamini Barman [now dead]. It also appears that Sanai Razakar who was present at the time of forceful conversion of Hindus of Dampara to Muslim also committed rape upon the Hindu women of Dampara as narrated in charge No. 4 and perpetrators of the crimes narrated in charge Nos. 1 and 4 belonged to the same criminal enterprise.

744. The offence “forceful conversion” fall within the purview of other inhumane acts which is an international crime happened in a wartime situation and it is also an organized or group crime and the presence of all accused persons at the crime site is not required inasmuch as many perpetrators participate in different phases of the occurrence. P.Ws 1,2 and 4 stated that as per instruction of accused Syed Md. Hussain, Shaheb Ali alias Teku Chairman (now dead), Chairman of the Peace Committee of the Dampara Union, crime site of the event narrated in charge No. 1 and other Razakars

forcibly converted the Hindus of Dampara to Muslim. In view of the above Razakar Commander accused Syed Md. Hussain alias Hossain is equally liable along with Shaheb Ali alias Teku Chairman (now dead) and other Razakars who actually carried out the instruction of accused Syed Md. Hussain alias Hossain.

745. In this respect I recall the observation of our Apex Court made in the case of Motiur Rahman Nizami vs The Chief Prosecutor, Criminal Appeal (A) 143 of 2014, Judgment dated 06.01.2016 pdf page 114 wherein it has been observed that

“It should be mentioned here that the actual physical presence at the time of commission of any crime is not necessary for finding an accused guilty of that crime, if it is proved that the accused had any sort of complicity in commission of that crime, he can be found guilty of that crime even if his physical presence at the time of commission of that crime is not proved.”

746. It is proved beyond all reasonable doubt that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and Shaheb Ali alias Teku was the Chairman of the Peace Committee of Dampara Union under Nikli Thana and as Razakar Commander accused Syed Md. Hussain alias Hossain had control over Shaheb Ali alias Teku Chairman and he instructed Shaheb Ali alias Teku Chairman, Chairman of the Peace Committee of the Dampara Union and other Razakars to forcefully convert the Hindus of Dampara Union to Muslim and the Shaheb Ali alias

Teku Chairman (now dead) and his cohorts Razakars executed the order of accused Syed Md. Hussain alias Hossain by forcefully converting the Hindus of Dampara to Muslim. Thus accused Syed Md. Hussain alias Hossain substantially contributed, abetted, facilitated and had complicity to the commission of the offences of forceful conversion which is considered as other inhumane acts and mental persecution which fall within the purview of other inhumane acts as crimes against humanity.

747. Thus, prosecution witness Nos. 1,2 and 4 proved beyond reasonable doubt that under the instructions of Razakar Commander Syed Md. Hussain alias Hossain one day at mid of August in 1971, Shaheb Ali alias Teku Chairman [now dead], Chairman of the Peace Committee of the Dampara Union and his cohort Razakars forcefully converted the Hindu religious people of Dampara village under Nikli Police Station of the then Kishoreganj Sub-Division to Muslim and thereby accused Syed Md. Hussain alias Hossain abetted, facilitated, contributed and had complicity in committing the offence of forceful conversion of Hindu religious people of Dampara village to Muslim and committed the offence of other inhumane acts as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Charge No. 02

748. [Abduction and confinement of victims Budhu, Shundar Ali, Mohar Ali and Md. Kashem Ali of Nikli Thana Sadar]

749. That on 2 September in 1971 at about 11.00 /11.30 A.M. Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort 4/5 Razakars having abducted (1) Budhu [now dead], (2) Shundar Ali [now dead], (3) Mohar Ali [now dead] and (4) Md. Khashem Ali from their respective houses under Nikli Thana Sadar of the then Kishoreganj Sub-Division took them away to Nikli Thana premises and confined them there. Subsequently, on the intervention of one local businessman Abdul Ali and having taken three goats and two and a half maund of rice as consideration from the families of the detained persons released the detainees on condition of giving daily attendance by them to the accused Syed Md. Hussain alias Hossain.

750. Thereby, accused Syed Md. Hussain alias Hossain has been charged with participating, abetting, facilitating and complicity in the commission of offences of abduction and confinement as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act for which the accused person has incurred liability under section 4(1) and 4(2) of the said Act.

Witnesses presented to the Tribunal

751. To prove the event narrated in charge No. 2, the prosecution examined only P.Ws 20 and 21.

752. P.W 20 Kashem Ali[69/70] of Pukurpar village of Nikli Thana stated that in 1971 he was a cultivator and at that time he used to reside along with his family members in his house which was situated to the about 100/150 yards south side from the Nikli Thana. He stated that on 16th Bangla month Vadra in 1971 at about 11/11.30 am the Razakar Commander Syed Md. Hussain alias Hossain along with 4/5 cohort Razakars having detained him from his house took away to Nikli Thana and confined him along with other 3/ 4 detainees in Thana. Sundar Ali, Bodu, and Mohar were also confined at Nikli Thana along with him and at the order of Razakar Commander Syed Md. Hussain alias Hossain, his cohort Razakars physically tortured them. At that time, Abdul Ali, a grocery shopkeeper of adjacent Thana came at Thana and wanted to know as to why they were beaten and requested Razakar Commander Hussain to release them. At that time, he replied that he will release them on condition that they had to provide a dinner for all the Razakars in the evening. While Abdul Ali informed the matter to the detainees, they agreed to that condition. Thereafter Abdul Ali brought three goats and two and a half maund of rich and had given those to Razakar Commander Hussain and after executing bonds, the Razakars released the detainees and directed them to appear at Thana every day at 4.00 pm and also directed to

give the information about the freedom fighters. After that, they used to appear at Thana once a day for about a month as per the direction of accused Syed Md. Hussain alias Hossain.

753. During cross-examination, he stated that his house was situated in the Nikli Sadar Union and while he along with others were taken to Thana, 4/5 Razakars were present there. In reply to a question put to him by the defence, he stated that on the date of occurrence, firstly he saw accused Syed Md. Hussain alias Hossain and before that he did not see him. In reply to a question put to him by this Tribunal he stated that while he was confined in Thana, he heard the conversion of the Razakars for which he could recognize Razakar Commander Syed Md. Hussain alias Hossain. In reply to a question put to him by the defence, he affirmed that Sundar Ali of Pukurpar, Bodu of Kamarhati and Mohar of Baniahati village were also abducted and confined along with him. Kamarhati was situated adjacent to north side from his village and Baniahati was situated to the 200/250 yards north side from his house. During cross-examination of P.W20, the defence suggested that Razakars did not detain him or no bond or ransom was taken from him or accused Syed Md. Hussain alias Hossain was not a Razakar or he was a Police Officer which has been denied by P.W20.

754. P.W 21 Abdul Ali [80] of Baniahati village stated that at the time of the great War of Liberation in 1971 he used to reside in his

house. At that time, he had a grocery shop at Nikli Bazaar near Thana. He stated that on 16th Bangla month Vadra in 1971 at about 11.30 am he was present in his grocery shop and saw that the Razakars having detained Kashem Ali (P.W20), Sundar Ali (now dead), Mohar Ali (now dead) and Bodu (now dead) confined them in Nikli Thana. At that time, he went to Thana to see them and since they were innocent, he requested Razakar Commander Syed Md. Hussain alias Hossain to release them. Since he had a shop adjacent to Thana, accused Syed Md. Hussain alias Hossain used to come to his shop for which before the occurrence accused Syed Md. Hussain alias Hossain was known to him. While he requested accused Syed Md. Hussain alias Hossain to release the detainees, he imposed a condition to provide food once for all the Razakars. Thereafter he brought three goats and two and a half maund of rice from the house of detainees and handed over those to accused Syed Md. Hussain alias Hossain. After that accused Syed Md. Hussain alias Hossain released the detainees in his (P.W21) custody on the condition that every day at 4.00 pm they had to appear at Thana to give information about the freedom fighters.

755. During cross-examination of P.W 21 in reply to a question put to him by the defence, he affirmed that while the Razakars tortured the detainees, he went to Thana and his shop was situated about 20 yards far from Nikli Thana building. He also stated that none of the family members of the detainees came to him to release them and

none of the detainee was a freedom fighter. There was a Razakar Commander at Nikli Thana Sadar who came from Bhairab but he could not recognize the name of that Razakar Commander. During cross-examination, the defence suggested that accused Syed Md. Hussain alias Hossain was not Razakar or he was a Police Officer or he had no shop in 1971 adjacent to Nikli Thana or he did not see the occurrence or none of the detainee was released in his custody which has been denied by P.W21.

Evaluation of the evidence and findings with reasoning

756.The learned Prosecutor Ms. Tureen Afroz appearing with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that at the time of occurrence, accused Syed Md. Hussain alias Hossain along with his 4/5 cohort Razakars having abducted four civilians including P.W 20 from their houses confined them in Nikli Thana of the then Kishoreganj Sub-Division and having taken three goats and 2 ½ maund of rice as ransom from the family members of the detainees released them and the P.Ws 20 and 21 proved the event of abduction and confinement as narrated in charge No.2 against the accused Syed Md. Hussain alias Hossain beyond all reasonable doubt.

757.The learned defence counsel Mr. Abdus Satter Palwan appearing on behalf of the absconding accused Syed Md. Hussain alias Hossain as state defence counsel submitted that at the time of

occurrence, the witnesses were not known to accused Syed Md. Hussain alias Hossain and the prosecution got up a concocted story of abduction and confinement to harass the accused Syed Md. Hussain alias Hossain and falsely implicated him in the instant case. P.W21 admitted that before the alleged occurrence accused Syed Md. Hussain alias Hossain was not known to him. He further submitted that the prosecution failed to examine any relation of the alleged detainees in support of the charge framed against the accused person and the prosecution also totally failed to prove the charge of abduction and confinement as narrated in charge No. 2 beyond all reasonable doubt against the accused person.

758. P.W 20 Kashem Ali stated that Sundar Ali, Bodu, and Mohar were also abducted and confined along with him, and P.W21 Abdul Ali stated that the Razakars having abducted Kashem Ali [P.W20], Sundar Ali [now dead], Mohar Ali[now dead] and Bodu[now dead] confined them in Nikli Thana. By cross-examining P.W20, the defence affirmed that Sundar Ali of Pukurpar, Bodu of Kamarhati village and Mohar of Baniatati village were abducted and confined along with him at Nikli Thana, and in reply to a question put to P.W21 by the defence, he also affirmed that while the Razakars confined and tortured four detainees in Nikli Thana, he went there. It is found that Sundar Ali, Mohar Ali and Bodu who were abducted from their houses and

subsequently tortured while they were confined in Nikli Thana are now dead.

759. On evaluation of the evidence it is found that out of four detainees, the prosecution examined P.W20 Kashem Ali of Baniahati village which was situated to the about 100/150 yards south side from Nikli Thana, and at the relevant time P.W21 Abdul Ali had a grocery shop adjacent to Nikli Thana and they are very reliable and competent witnesses to deposed as regards the event of abduction and confinement narrated in charge No.2. The defence by cross-examining P.W20 affirmed that Sundar Ali of Pukurpar, Bodu of Kamarhati, and Mohar of Baniahati village were also abducted along with him. During cross-examination of P.W20, the defence suggested that the Razakars did not detain him or no ransom or bond was taken from him which has been denied by P.W20. During cross-examination of P.W21, the defence suggested that in 1971 he had no shop adjacent to Nikli Thana which has been denied by him, but by cross-examining P.W21, the defence affirmed that while the Razakars had beaten the four detainees in Nikli Thana, he went to Thana and his shop was also situated about 20 yards far from Nikli Thana Building and thereby the defence admitted that the four persons were confined in Nikli Thana.

760. On scrutiny of the evidence, it transpires that P.W21 Abdul Ali is an old man of about 80 years and he stated that in 1971 he had a shop adjacent to Nikli Thana and accused Syed Md. Hussain alias Hossain used to come to his shop for which he was known to him before the occurrence and in reply to a question put to P.W20 Kashem Ali by this Tribunal, he stated that while he was confined in Thana, he heard the conversation of Razakars and recognized the Razakar Commander accused Syed Md. Hussain alias Hossain. In view of the above evidence, it is proved beyond reasonable doubt that at the time of occurrence P.Ws 20 and 21 correctly recognized accused Syed Md. Hussain alias Hossain as the perpetrator of the crimes narrated in charge No.2.

761. On a careful examination of the evidence of P.Ws 20 and 21, it reveals that the defence got the opportunity to cross-examine the P.Ws 20 and 21 to discredit their statement. During cross-examination of P.Ws 20 and 21, the defence by giving suggestion to them denied their statement made in examination –in-chief relating to the event narrated in charge No.2 but the defence failed to bring out any material contradiction or inconsistency to their statement made in examination –in- chief.

762. Prosecution witnesses proved beyond reasonable doubt that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and he also set up Razakar Camp at

Nikli Thana Sadar. P.Ws 20 and P.W21 stated that P.Ws 20 and three other detainees were confined in Nikli Thana and after taking ransom from their relations accused Syed Md. Hussain alias Hossain released them. P.W 21 Abdul Ali is an old man of 80 years and the defence by cross-examining him affirmed that at the relevant time in 1971 he had a shop adjacent to Nikli Thana and on scrutiny of his evidence it appears that he made a very natural statement as regards witnessing the event of abduction and confinement as narrated in charge No. 2. Since P.W 20 is the victim of the abduction and confinement as narrated in charge No. 2 and P.W 21 had a shop at the relevant time adjacent to Nikli Thana, there was good reason for them for witnessing the occurrence as narrated in charge No. 2 for which I find good reason to believe their evidence to find the accused Syed Md. Hussain alias Hossain guilty of the offences narrated in charge No.2.

763. In view of the above evidence, facts and circumstances of the case I am of the view that the prosecution has been able to prove the instance charge beyond all reasonable doubt against accused Syed Md. Hossain alias Hossain. Thus, he is found guilty of substantially abetting, participating, facilitating and complicity in the commission of offences of abduction and confinement as crimes against humanity as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Charge No. 03**[Persecution, torture, plundering and arson committed at village Gurui under Nikli Police Station]**

764. That on 6 September in 1971 at about 07.00 A.M. a group of Pakistani army men accompanied by 70/80 Razakars including Razakar Commander accused Syed Md. Hussain alias Hossain [absconded], Razakar accused Md. Moslem Prodhan and other local collaborators attacked the village Gurui under Nikli Police Station of the then Kishoregonj Sub-Division, and at that time an exchange of gunfire took place between accused persons and their accomplices and the freedom-fighters and ultimately accused persons and their accomplices had to move back and took shelter in the nearest *haor* [wetland].

765. On the same day at about 11.00 A.M the accused persons and their accomplices again attacked the village Gurui and at that time the freedom-fighters had to move back without any further resistance. Then the accused persons and their said accomplices and Pakistani army men inhumanely tortured the civilians of that village and set fire to the houses after plundering the properties of those civilian people. At that time accused Razakar Commander Syed Md. Hussain alias Hossain and accused Razakar Md. Moslem Prodhan and their cohort Razakars with the help of Pakistani army men shot 26[twenty-six] civilians of Gurui village to death and then left the crime site at about 01.00 P.M.

766. Thereby, accused (1) Syed Md. Hussain alias Hossain, and (2) Md. Moslem Prodhan have been charged for participating, abetting, facilitating and complicity in committing large-scale killing of civilians constituting the offence of extermination, torture, and plundering and arson [other inhumane acts] as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act for which the accused persons have incurred liability under section 4(1) and 4(2) of the said Act.

Witnesses presented to the Tribunal

767. To prove the event narrated in charge No. 3, the prosecution examined P.Ws 5, 7, 8 and 10 to 12.

768. P.W5 Abdul Hamid [66] of Cetra village was aged about 16/17 years at the time of War of Liberation in 1971. Now he is a retired School teacher. In 1971 he used to live in his Cetra village and at that time he took part in the War of Liberation as freedom fighter of the Basu Bahini. The head of Basu Bahini was Abdul Motaleb @ Basu. On 6.9.1971 while they took position at Gurui village, he came to know through a source that accused Syed Md. Hussain alias Hossain, Razakar Commander of Nikli Thana and Moslem Prodhan, Razakar of Nikli Thana along with other Razakars and the Pakistani army might attack Gurui village which

was situated to the west side of Nerajuri haor (wetland) under Nikli Thana and there were 13 Paras (area) within Gurui village.

669. Regarding the event narrated in charge No. 3, he stated that hearing that information, on 6.9.1971 in the morning, they took position to the south side of Gurui village to attack Pakistani army and the Razakars. At 7.00 am a group of 17/18 Razakars and the Pakistani army under the leadership of accused Syed Md. Hussain alias Hossain and Razakar Commander Md. Moslem Prodhan came at the Jetty [boathouse] of Ichab Ali, a co-freedom fighter of Gurui village, by two boats and a launch wherefrom they came at South Para and the members of the Basu Bahini proceeded towards the north side from the south and attacked the Razakars and the Pakistani army. At that time both the Pakistani army, Razakars and the freedom fighters exchanged gunshots. After about 20 minutes, Razakars and the Pakistani army moved back by launch and boat and took shelter at Nerajuri haor[wetland] and the freedom fighters of Basu Bahini remained on their position.

770. He further stated that at about 11.00 am on the same day, the aforesaid Razakars and the Pakistani army along with other Razakars again attacked the freedom fighters of Basu Bahini at East Para of Gurui village and the freedom fighters also attacked the Razakars and the Pakistani army. At one stage, due to shortage of ammunition, the freedom fighters of Basu Bahini moved back to

save themselves as per order of their Commander. In the above situation, he hide under the bush of the water of pond situated to the west side of the house of Khaleque of Gurui village. After sometimes, he saw that Razakar accused Syed Md. Hussain alias Hossain and Md Moslem Prodhan along with other Razakars and the Pakistani army having captured some people confined them in the yard of Khaleque and gunned down them to death and set fire to the neighboring houses including the house of Abdul Khaleque and went to the south side. Subsequently, he heard the gunshots and flame of fires from the south side. After sometimes, the locals told that the Razakars and the Pakistani army went to Nikli Thana Sadar by launch and boat.

771. He also stated that thereafter P.W5 came out from the bush of the pond and met with co-freedom fighter Ichab Ali[P.W7] and both of them went to the house of Khaleque and saw that 10(ten) dead bodies were lying there. He recognized the dead bodies of Suruj Ali and Ful Miah amongst the dead persons, and other dead persons were relatives of Ichab Ali and his neighbours as told by Ichab Ali. Thereafter he and Ichab Ali [P.W7] went at under the banyan tree situated in front of the house of Rahmat Ali of South Para of Gurui village and saw co-freedom fighter Abdul Hekim [P.W10] and Chanfar Ali [P.W11] and also saw 16 dead bodies under the banyan tree. At that time Abdul Hekim and Chanfar Ali informed him and Icab Ali that accused Syed Md. Hussain alias

Hossain and accused Md. Moslem Prodhan along with other Razakars and the Pakistani army gunned down those 16 civilians under the banyan tree on their way to Nikli Thana Sadar. Thereafter he, Icab Ali [P.W 7], Abdul Hekim [P.W10] and Chanfar Ali [P.W11] took shelter in the house of Kalidas Master of Hiluchia village adjacent to Bajidpur Thana wherein they also met with the members of Basu Bahini and told them about the aforesaid killing. In the next date, the freedom fighters of Basu Bahini came back at Gurui village and heard that 2/3 dead bodies were taken by their relatives and had been buried. Due to shortage of people, he along with others having taken other dead bodies of the Martyrs by boat floated those dead bodies in the water of haor (wetland).

772. During cross-examination of P.W5, he stated that his Cetra village was situated within the Gurui Union. He could not say as to whether any Pakistani army or Razakar was killed at the time of Gurui battle. In reply to a question put to him by the defence, he further stated that house of Ichab Ali [P.W7] was situated to the west side of Nerajuri haor and north side of the East Para of Gurui village. There was a road to the west side of the house of Ichab Ali and house of Abdul Khaleque was situated to the south side of the house of Ichab Ali. House of Rahmat Ali was situated to the south side of the house of Abdul Khalaque and in 1971 there were 7/8 houses between those two houses. He affirmed that at about 12.00 am on that day he came out from the pond, and that Gurui village

was situated to the two miles south- west side of Hilucia village and there was a small river between those two villages. Gurui was situated to the about a kilometer southeast side of Cetra village. In reply to a question put to him by the defence, he stated that the name of the father of accused Syed Md. Hussain alias Hossain is Musleh Uddin and his house was situated at Hazrat Nagar village of Kishoreganj Thana. At the time of the general election in 1970 for the first time, he saw accused Syed Md. Hussain alias Hossain at Nikli area. He also affirmed that before the occurrence, he also saw accused Moslem Prodhan. The villagers of Cetra used to come at Hilucia Bazaar and Nikli Bazaar for shopping. Cetra was situated about 3 (three) kilometers far from Hilucia Bazaar. During cross-examination of P.W5, the defence suggested that he was not a member of Basu Bahini or he did not take part in the battle as stated by him or Gurui battle was started at 7.00 am and ended at 9.00 am which has been denied by P.W5.

773. P.W7 Md. Ichab Ali [66] of Gurui East Para village stated that he used to reside at his Gurui village in 1971 which was situated to the west side near Nerajuri haor(wetland) and in 1971 there were 13 Paras in his village. In 1971 he took part in the War of Liberation under the leadership of freedom fighter Abdul Motaleb @ Basu. He stated that at the time of Great War of Liberation in 1971 Razakar accused Syed Md. Hussain alias Hossain used to work as Daroga of Nikli Thana and accused Md.

Moslem Prodhan was the Razakar Commander of Nikli Thana Sadar.

774. As regards the event narrated in charge No. 3, he stated that in 1971 before 4/5 days of 20th Bangla month Vadra, he got the information that accused Syed Md. Hussin alias Hossain and accused Md. Moslem Prodhan along with their cohort Razakars might attack their Gurui village. On 20th Bangla month Vadra at 7.00 am in 1971, the accused persons along with their cohort Razakars came at the Jetty [boathouse] situated to the east side of their house with two boats and a launch. At that time, the freedom fighters of Basu Bahini started gun firing on the position of Razakars and after exchange of gunshots of about 15/20 minutes, the Razakars moved back and took shelter one mile far from there in the Nerajuri haor(wetland). At about 11.00 am accused persons and their cohort Razakars again attacked East Para of Gurui village and after exchange of gunshots due to shortage of ammunition at the order of Commander Basu, the freedom fighters moved back and he hide under the bush of the water of the pond situated to the back side of the house of Abdul Khaleque of Gurui village wherefrom he saw that accused Syed Md. Hussain alias Hossain along with other Razakars gunned down 8/10 people to death at the yard of the house of Khaleque and thereafter the Razakars went to the south side and he also heard the sound of gunshots from the south side. While the sound of gunfire

stopped, he came out from the pond and met with Abdul Hamid [P.W5], a freedom fighter of Basu Bahini, and he along with Abdul Hamid went to the yard of Abdul Khaleque and saw 10(ten) dead bodies. He identified the dead bodies of his uncle Ful Mia and Abu, aunt Jubeda Khatun and his neighbour Lal Hossain, Suruj Ali and Ichab Ali amongst the 10(ten) dead bodies.

775. He further stated that thereafter from the house of Abdul Khaleque, he along with Abdul Hamid [P.W5] went to the south side at under the banyan tree situated at the house of Rahmat Ali and saw that 16 dead bodies were lying there. He heard from Chanfar Ali (P.W11) and Hekim (P.W10) who were present there that the Razakars killed those 16 civilians by gunshots. He could identify the dead bodies of Aftabuddin, Rosmat Ali, Montaz, Sharfat Ali and Sundar Ali amongst those dead bodies. Since there was no scope to stay there, he along with Abdul Hamid, Chanfor Ali and Hekim took shelter at Hilucia village of adjacent Bajidpur Thana. On the next day, he along with those 3 persons and other members of Basu Bahini went to the Gurui village and buried 2/3 dead bodies and floated dead bodies of other Martyrs in the haor (wetland).

776. During cross-examination of P.W 7, he could not say as to whether any Pakistani army or Razakar was killed or not. He stated that Purbapara was situated to the west side of Nerajuri haor

(wetland) and Sagardiri was situated to the west side of East Para of Gurui village and his house was situated to the north side of East Para of Gurui village. In reply to a question put to him by the defence, he stated that house of Abdul Khaleque was situated to the 20/25 yard south side from his house and the house of Rahmat Ali was situated to the 15/20 yard south side from the house of Abdul Khaleque. Hilucia village was situated to the one and a half/ two kilometers south- west side from Gurui village and Cetra was situated to the two kilometers north-west side from Gurui and Nikli Sadar was situated 4/5 miles far from Gurui.

777. P.W 8 Md. Solaiman [66] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time, he was residing in his house situated to the west side of Nerajuri haor (wetland). In 1971, there were 13 Paras within Gurui village. He stated that on 20th Bangla month Vadhra at 7.00 am in 1971 Pakistani army along with Razakars came at the Jetty [boathouse] of Ichab Ali of Gurui village with two boats and a launch and seeing the Razakars and the Pakistani army, he went to his house by running and informed the matter to his father. At that time, his father instructed him to flee away for which he hid under the bush of water of the fringe of Sagardari [pond]. After sometimes, he heard the sound of gunshots of Basu Bahini and Pakistani army and Razakars. The freedom fighters of Basu Bahini came to know earlier that the Pakistani army and the Razakars might attack Gurui

village for which they took position at Gurui village to counter attack them. Ichab Ali [P.W7], Hamid Ali [P.W5] and many other freedom fighters of Basu Bahini were known to him. After exchange of gunshots of about 15/20 minutes, he came out from the pond and saw that the Pakistani army and the Razakars having moved back took shelter to one kilometer far from there in the Nerajuri haor(wetland)

778. He further stated that on the same day at about 11.00 am Pakistani army and the Razakars again came back at the Jetty [boathouse] of Ichab Ali [P.W7] by launch and boat and the freedom fighters of Basu Bahini and the Pakistani army and the Razakars started gun firing. At that time, he hid under the bush of the water of the pond situated to the west side of the house of Khaleque. After some time when the gunfire stopped, the freedom fighters of Basu Bahini moved back. After that, he saw from the pond that the accused persons, other Razakars, and the Pakistani army having captured his father along with other villagers took away them in front of the house of Khaleque and gunned down them to death and a few Razakars set fire in the houses and thereafter Razakars and the Pakistani army went to the south side and after some time he also heard the sound of gunshots from the south side.

779. He also stated that after that, he came out from the pond and went to the yard of Abdul Khaleque and saw 10 dead bodies including dead body of his father. He also saw the dead body of his neighbour Abu, Ful Mia, but he could not recognize other dead bodies. At that time, he saw the freedom fighters Hamid [P.W5] and Ichab Ali[P.W7] who were the members of Basu Bahini. Subsequently, he went at under the banyan tree situated beside the house of Rahmat Ali and saw 16 dead bodies were lying there. He could identify the dead bodies of Aftabuddin, Jinnat Ali, and Suruj Ali amongst the 16 dead bodies and all of them were the inhabitant of Gurui village. Thereafter he took shelter at Barmai Para of Bajitpur Thana. On the next day, he came back at his home and buried the dead body of his father with the help of his uncle and others and they also buried other 2/3 dead bodies, but due to shortage of the arrangement, freedom fighters of Basu Bahini floated dead bodies of others Martyr in the water of Nerajuri hoar(wetland).

780. During cross-examination of P.W8, he stated that his house was situated to the south side of the house of Ichab Ali and his village was situated to the west side of Nerajuri haor and Sagardari was situated to the west side of his village and house of Abdul Khalaque was situated after 3(three) houses from his house and house of Rahmat Ali was situated to the 60/70 yards south side from the house of Khalaque. He did not see anyone to

hide behind the house of Abdul Khalaque. He could not say as to whether any of the Pakistani army or Razakar was killed at the time of Gurui battle. He stated that his village was situated to the one kilometer south-west side from Hilucia. In reply to a question put to him by the defence, he stated that he could not remember as to whether he saw accused Syed Md. Hussain alias Hossain, but he affirmed that before the occurrence, he saw accused Moslem Prodhan and his house was situated at Nikli village. In reply to a question put to him by the defence, he affirmed that 60/70 Pakistani army and the Razakars took part in the Gurui battle. He affirmed that freedom fighter Basu died after two years of Independent of Bangladesh. The defence suggested that he did not see accused Md. Moslem Prodhan or accused Md. Moslem Prodhan had given a decision in a salish of his village against him for which he deposed falsely against accused Md. Moslem Prodhan which has been denied by him. He could not say who was the Razakar Commander of Kishoreganj Sub- Division and stated that there was no Razakar Commander in his Union.

781. P.W 10 Abdul Hekim [71] of Gurui village stated that he took part in the War of Liberation in 1971 as member of Basu Bahini under the leadership of Abdul Motaleb of his locality. In 1971 one day of Bangla month Vadra Basu, the head of Basu Bahini informed him that Razakar accused persons, their cohort Razakars and the Pakistani army might attack Gurui village and at the order

of Basu, head of Basu Bahini, they took position at different places of Gurui village. On 20th Bangala month Vadra in 1971 at about 10.00 am accused-persons, other Razakars, and the Pakistani army came at the Jetty [boathouse] of the house of Ichab Ali with two boats and a launch. At that time, he took position at East Para of Gurui village. The Pakistani army and the Razakars started gun firing and the freedom fighters of Basu Bahini also counter-attacked and after an exchange of gun firings of 15/20 minutes, the Razakars moved back to one kilometer far in the Nerajuri haor (wetland).

782. As regards the event narrated in charge No. 3, he further stated that at about 11.00 am Pakistani army and the Razakars again came at the Jetty [boathouse] of Ichab Ali and at that time, the freedom fighters also started gun firing. After 10/15 minutes, due to the shortage of ammunitions, the Commander of Basu Bahini instructed freedom fighters of Basu Bahini to move back. At that time, he took shelter under the bush of the water of pond situated to the west side of the house of Rahmat Ali. After sometimes, he heard sound of gunshots from the north side and saw the flames of fire and also saw that the Pakistani army and the accused persons having captured several persons confined them in front of the house of Rahmat Ali and after sometimes heard the sound of gunshots and saw that one of the detainees fall down on the

earth. After that, the Pakistani army and the Razakars set fire in the adjacent houses and went to the north side.

783. He also stated that after 15/20 minutes, he came out from the hiding and went in front of the house of Rahmat Ali and saw that 16 bullets pierced dead bodies were lying there. He stated that he could identify the dead bodies of Zinnat Ali, Rosmat Ali, and Gotu amongst the 16(sixteen) dead bodies. After sometimes he saw co-freedom fighter Chanfor Ali[P.W11], Ichab Ali[P.W7] and Abdul Hamid [P.W 5]. Freedom fighter Ichab Ali and Hamid informed him that 10(ten) dead bodies were lying in front of the house of Khaleque of East Para of Gurui village. After that, he and other three freedom fighters took shelter in their camp situated in the house of Kalidas Master of Hilucia village of Bazidpur Thana. On the next day at about 8/9 am, he along with other members of Basu Bahini came back at Gurui village and saw that 2/3 dead bodies were buried and due to shortage of manpower, the dead body of other Martyrs were floated in the water of the river.

784. During cross-examination of P.W10, he stated that his house was situated at north Para of Gurui and Nikli Thana was situated to the 3/ 3 ½ kilometers north side from his village and Hilucia Bazaar was situated to the about ½ kilometer south side from his village and the villagers of his Union used to go to Hilucia Bazaar. Gurui was situated to the west side of Nerajuri haor and

house of Ichab Ali was situated to the north side of Gurui village and the Sagardari was situated to the west side of the house of Ichab Ali and house of Ichab Ali was situated to the 80/90 yards south side from the house of Abdul Khalaque and house of Rahmat Ali was situated after 4/5 houses from the house of Abdul Khalaque. He affirmed that at about 9/ 9.30 am he hid in the pond. He stated that he could not say as to whether any other person except he was in hiding while he was in hiding in the Sagardari. He affirmed that none of the Razakar or Pakistani army was killed at the time of Gurui battle. He also affirmed that in Gurui battle none of his relation was killed. The Mosque (Masjid) Para was situated to the 70/80 yards west side from the house of Rahmat Ali. In reply to a question put to him by the defence, he stated that except two accused, he could not say the name of other Razakars of Nikli Thana. During cross-examination, he affirmed that father of accused Syed Md. Hussain alias Hossain is Musleh Uddin and his house was situated at Kishoreganj, but he could not say the name of his village. In reply to a question put to him by the defence, he affirmed that at the time of Great War of Liberation in 1971, he saw accused Syed Md. Hussain alias Hossain. During cross-examination, the defence suggested that he did not take part in the Gurui battle or no occurrence took place as stated by him or the dead bodies which he saw at Gurui village were killed at the time of battle between the freedom fighters and the Pakistani army

and the Razakars or accused Syed Md. Hussain alias Hossain was not a Razakars or he was a Police Officer which has been denied by P.W10.

785. P.W 11 Chanfor Ali [73] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time he used to reside in his house. He stated that he took part in the War of Liberation under the leadership of Commander Basu and during the War of Liberation he heard from his Commander Basu that the Pakistani army, Razakar accused persons and other Razakars might attack Gurui village for which his Commander instructed the members of Basu Bahini to take preparation for battle.

786 Regarding the event narrated in charge No. 3, he stated that on 20th Bangla month Vadra in 1971 at about 7.00 am Pakistani army, other Razakars came at the Jetty [boat house] of Ichab Ali of Purba Para of Gurui village with two boats and a launch. At that time, he along with other freedom fighters took position to the south side of the house of Rahmat Ali of East Para of Gurui village and the members of Basu Bahini also started gunfire to save them. After an exchange of gunfire of about 15/20 minutes, the Razakars and the Pakistani army moved back to one kilometer north in the Narajori haor(wetland).

787. He further stated that on that date at about 11.00 am, the army and the Razakars again came back at the Jetty [boathouse] of Ichab

Ali with two boats and one launch. At that time, P.W11 and other freedom fighters took position in front of the house of Abdul Khaleque which was situated to the 50/60 yards south side from the house of Ichab Ali. The Pakistani army and the Razakars coming at the Jetty [boathouse] of Ichab Ali started gun-firing and freedom fighters also started counter-firing. After an exchange of gunfire of about 15/20 minutes, due to shortage of ammunition, the freedom fighters of Basu Bahini at the order of their Commander moved back. At that time, he hid under the bush of the water of the pond and at that time he heard the sound of gunshots from the north side and flames of fire and also saw that the accused persons, Pakistani army and the other Razakars having captured 15/20 civilians confined them at south side of the house of Rahmat Ali and the accused persons, other Razakars and Pakistani army gunned down 15/20 people to death. After that, they went to the north side and at that time they also set fire to the adjacent houses.

788. Subsequently, he came out from the hiding and went to the south side of the house of Rahmat Ali and saw freedom fighter Hekim and 16 dead bodies. At that time, his co-freedom fighter Ichab Ali [P.W7] and Abdul Hamid [P.W5] also came at under the banyan tree who informed that they also saw 10 (ten) dead bodies in front of the house of Abdul Khaleque. He recognized the dead bodies of Zinnat Ali, Yeakub Ali and Rusmat Ali amongst 16 dead bodies at under the banyan tree of the house of Rahmat Ali. At that

time, he and 3(three) freedom fighters took shelter in the house of Kalidas Master of Hilucia village of Bazitpur Thana.

789.He also stated that on 21st Bangla month Vadra in 1971 at about 8/9 am, he along with other freedom fighters of Basu Bahini came at Gurui village at under the banyan tree situated to the south side of the house of Rahmat Ali and saw that relations of Martyrs made arrangement for burial of 3(three) dead bodies and other dead bodies were lying there for which he along with other freedom fighters took the 13(thirteen) dead bodies of Martyrs by two boats and also took 10(ten) dead bodies from the front side of the house of Abdul Khaleque by the same boats and floated those dead bodies in the water of haor (wetland).

790.During cross-examination of P.W11, he stated that his house was situated at west Para of Gurui village and there was no Razakar in his Union and the banyan tree was situated to the south side of the house of Rahmat Ali. Mosque Para was situated to the west side of Sagardari and his house was situated at the West Para of Gurui village. Nikli Thana was situated to the 3 (three) kilometers west side from his house. He affirmed that he did not go to India for training, and that at about 11/11.30 am he hid in the Sagardari and he came out from the hiding at about 12/30 pm. He could not say the name of any other person who hid in the pond. He affirmed that he is getting allowances as the freedom fighter.

He also affirmed that none of the relation of any freedom fighter was killed except the relation of co-freedom fighter Ichab Ali [P.W7]. He could not say as to whether any Razakar or Pakistani army was killed at the time of Gurui battle. The defence suggested that he is not a freedom fighter or he did not take part in any battle under the leadership of Basu or no occurrence took place as stated by him or he did not see any accused or they were not known to him or on the day of occurrence he did not see the accused persons or accused Syed Md. Hussain alias Hossain was not a Razakars or he was a Police Officer which has been denied by P.W11.

791. P.W 12 Jafor Ali [71] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time, he used to live in his house at Gurui village. He stated that in 1971 on 20th Bangla month Vadra at about 7.00 am while he was present at his house at Gurui village he saw that about 50/60 Razakars came down from a launch and two boats at the Jetty [boathouse] of Ichab Ali (P.W7) and at that time the Razakars and the freedom fighters exchanged gun-firing for which he hid in Sagardigi situated behind his house and gun-firing continued up to 10 minutes. Thereafter the Razakars moved back and took shelter to one kilometer far in the Narajuri haor(wetland). After that, he came out from Sagardigi and went to his house. At that time, the freedom fighters took position at Gurui village.

792. As regards the event narrated in charge No. 3, he stated that at about 11.00 am on that day, the Razakars again came at the Jetty [boathouse] of Ichab Ali and started gun-firing on the position of the freedom fighters. At that time he fled away to the south side of Gurui village. After an exchange of gun-firing of about 10/15 minutes, the freedom fighters moved back. At that time accused persons along with their cohort Razakars set fire to the neighbouring houses and went to the south side from the north for which again he hid in the Sagardigi situated to the west side of the house of Rahmat Ali of Gurui village wherefrom he heard the sound of gun firing from the north side and saw the flame of fire. He also saw that the accused persons along with their cohort Razakars and the Pakistani army chasing his mother along with his relations and the locals confined them under the banyan tree situated at the house of Rahmat Ali and the Razakars and the Pakistani army gunned down them to death. He also saw that Razakars and the Pakistani army set fire in the house of Rahmat Ali and his neighbour and the accused persons gunned down his mother Saheda Banu to death. Thereafter the Razakars and the Pakistani army went to the north side.

793. He further stated that while he was in hiding in Sagardigi, he saw freedom fighter Chanfor Ali [P.W11] and Abdul Hekim [P.W10] under the banyan tree of the house of Rahmat Ali and seeing them, he went there and saw 16 dead bodies including the

dead bodies of her mother, uncle Sunamuddin and Abul Hossain, and paternal cousin Rosmat Ali. At that time freedom fighters Ichab Ali [P.W7] and Hamid [P. W. 5] came there and informed that they saw 10(ten) bullets pierced dead bodies in front of the house of Khaleque of Gurui village. After that, he took shelter along with his father in the house of his maternal grandfather at Barmai village of Bazitpur Thana.

794. He also stated that on 21st Bangla month Vadra in 1971 at about 9.00 am he came back at Gurui village from the house of his maternal grandfather and took arrangement for burial of the dead bodies of his mother and uncle Sunamuddin. At that time Basu, head of Basu Bahini along with his co- freedom fighters came under the banyan tree and due to shortage of arrangement of the burial of the dead bodies, freedom fighter Basu along with his co-freedom fighters took all those dead bodies by boat and floated those dead bodies in the water of haor (wetland).

795. During cross-examination of P.W 12, he stated that his house was situated at East Para of Gurui village and house of accused Syed Md. Hussain alias Hossain was situated at Kishorganj and his house was situated 10/ 15 hands far from the houses of freedom fighter Ichab Ali [P.W7]. In reply to a question put to him by the defence, he stated that at the time of occurrence none of the Pakistani army or Razakar was killed. During cross-examination,

the defence suggested that he did not see the accused persons or the accused persons were also not known to him in 1971 which has been denied by him. The defence also suggested that none of his relation was killed at the time of the occurrence as stated by P.W12 which has been denied by him. In reply to a question put to him by the Tribunal, he stated that in 1971 there were several huts between the house of Rehmat and Khalaque. House of Hamid was situated at Cetra village. He affirmed that there was no Razakar in his village. He further stated that he hid in Sagardari at about 11.00 am and came out from the hiding at about 1.30 pm.

Evaluation of the evidence and findings of the Tribunal

796. The learned Prosecutor Ms. Tureen Afroz appearing with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that on 06.09.1971 at about 11.00 am while the accused persons, their cohort Razakars and the Pakistani army second time attacked the freedom fighters at Gurui village, after exchange of gun-firing of about 15 minutes, the freedom fighters moved back without any further resistance. Thereafter the accused persons, their cohort Razakars and the Pakistani army men having captured 26 (twenty-six) civilians of Gurui village from the houses confined them at the house of Abdul Khaleque and under the banyan tree of the house of Rahmat Ali of Gurui village and gunned down all of them to death and the accused persons directly

participated in the killing of 26(twenty-six) civilians of Gurui village and set fire to the houses of Abdul Khaleque, Rahmat Ali and other villagers of Gurui village and committed the offence of extermination, torture, plundering and arson [other inhumane acts] as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act. The prosecution by examining P.Ws 5,7,8,10,11 and 12 proved the charge beyond all reasonable doubt.

797.The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of accused Md. Moslem Prodhan as engaged counsel and on behalf of accused Syed Md. Hussain alias Hossain as state defence counsel submitted that admittedly at the date and time of occurrence a battle took place in Gurui village of Nikli Thana in between freedom fighters and the Razakars and the Pakistani army and the alleged victims died at the time of Gurui battle and after 45 years of the alleged occurrence, due to political reason the prosecution concocted a false story of large scale killing and failed to prove the charge against the accused persons beyond all reasonable doubt.

798. On scrutiny of the evidence of prosecution witnesses presented to the Tribunal, it appears that out of 6(six) witnesses examined by the prosecution, P.Ws 5,7,10 and 11 are freedom fighters of Basu Bahini and all of them took part in Gurui Battle. P.Ws 7, 10 and 11

are the inhabitants of Gurui village and P.W5 was the inhabitant of Cetra village of Gurui Union. It also appears that the crime sites of the event narrated in charge No. 3 are the houses of Abdul Khaleque and Rahmat Ali. P.W 5,7 and 8 claimed that they saw the killing of the civilians happened in the yard of the house of Abdul Khaleque and P.Ws 10, 11 and 12 claimed that they saw the killing of civilians happened at under the banyan tree of the house of Rahmat Ali. P.W 8 Md. Solaiman is the son of Martyr Madhu Mia and P.W12 Jafar Ali is the son of Martyr Shaheda Begum and both of them are resident of Gurui village. The perpetrators also killed two uncles and one cousin of P.W12. P.W7 Chanfor Ali claimed that the perpetrators gunned down his two uncles Ful Mia and Abu, and aunt Jubeda Khatoon and three neighbours.

799. It reveals that house of Abdul Khaleque and Rahmat Ali are the two crime sites of the event narrated in charge No.3 and house of Rahmat Ali was situated to the south side of the house of Abdul Khaleque and between these two houses, there were several houses and house of Abdul Khaleque is the first crime site and after killing ten civilians at the house of Abdul Khaleque, the Razakars and the Pakistani army went to the south side and having captured sixteen civilians of Gurui village from the houses killed them at under the banyan tree of the house of Rahmat Ali.

800. As regards the killing of ten civilians happened at the house of Abdul Khaleque, P.W5 freedom fighter Abdul Hamid stated that

he took part in the Gurui Battle and at the time of the second attack on 6th September in 1971 at about 11.00 am at the order of his Commander Basu due to shortage of ammunition, he hide under the bush of the water of the Sagardari [a pond] situated to the west side of the house of Khaleque and saw that the accused persons, their cohort Razakars and Pakistani army men having captured some civilians confined them in the house of Khaleque and gunned down them to death and set fire to the neighbouring houses including the house of Abdul Khaleque and after sometimes while the Razakars and the Pakistani army left the crime site, he went to the house of Abdul Khaleque and saw 10 (ten) dead bodies including the dead bodies of Suruj Ali and Ful Mia, dead bodies of the relatives of freedom fighter Ichab Ali[P.W7] and his neighbours. P.W7 freedom fighter Ichab Ali stated that he took part in the Gurui Battle and at the time of the second attack, on 20th Bangla month Vadhra at about 11.00 am due to shortage of ammunition at the order of his Commander Basu, he hide under the bush of the water of the Sagardari [a pond] situated to the back side of the house of Abdul Khaleque of Gurui village wherefrom he saw that accused Syed Md. Hussain alias Hossain and other Razakars gunned down 8/10 civilians to death at the yard of the house of Abdul Khaleque. When the perpetrators left the crime site, they went to the house of Abdul Khaleque and saw 10(ten) dead bodies including the dead bodies of his uncle Ful

Mia and Abu, aunt Jubeda Khatun and his neighbours Lal Hossain, Suruj Ali and Ichab Ali.

801. P.W 8 Md. Solaiman of Gurui village stated that on 20th Bangla month Vadhra in 1971 at about 1100 am at the time of the second attack of the Razakars and Pakistani army, he hide under the bush of the water of Sagardari[a pond] situated to the west side of the house of Abdul Khaleque and saw that accused persons, other Razakars, and the Pakistani army men having captured his father Modhu Mia along with other villagers confined them in front of the house of Abdul Khaleque and gunned down all of them to death and set fire to the houses. While the perpetrators left the crime site, he went there and saw the dead bodies of his father, his neighbour Abu, Ful Mia but could not recognize other dead bodies and at that time he also saw freedom fighters Hamid [P.W5] and Ichab Ali [P.W 7] there. P.W 10 Abdul Hekim stated that he took part in the Gurui Battle and after the occurrence, while the Razakars and the Pakistani army left the house of Rahmet Ali he went there and saw 16(sixteen) dead bodies. At that time freedom fighters Ichab Ali [P.W7] and Hamid [P.W5] informed that ten bodies were lying in front of the house of Khaleque of East Para of Gurui village.

802. P.W 11 Chanfar Ali, freedom fighters of Basu Bahini stated that he took part in the Gurui Battle and while the Razakars and the Pakistani army left the crime site, he went to the south side at under

the banyan tree of the house of Rahmet Ali and saw 16(sixteen) dead bodies. At that time, his co-freedom fighters Ichab Ali [P.W 7] and Hamid [P.W5] informed that they saw 10(ten) dead bodies in front of the house of Abdul Khaleque. After that, he along with other freedom fighters took shelter at village Hilucia of Bazitpur and on the next day at about 8/9.00 am, he came back at Gurui village and took the dead bodies from the front side of the house of Abdul Khaleque by boat and floated those dead bodies in the water of haor(wetland). P.W12 Jafar Ali stated that while the Razakars and the Pakistani army left the crime site, he went at under the banyan tree and saw sixteen dead bodies there. At that time, freedom fighters Ichab Ali [P.W7] and Hamid [P.W5] informed him that they saw ten dead bodies including the dead bodies of his [P.W12] mother in front of the house of Abdul Khaleque.

803. P.W 10 Abdul Hekim of Gurui village and the freedom fighter of Basu Bahini claimed to be the direct witness of the killing of 16 civilians of Gurui village. He stated that he took part in the Gurui Battle and on 20th Bangla month Vadra in 1971 at about 11.00 am while the Razakars and the Pakistani army second time attacked the freedom fighters, due to the shortage of ammunitions, the Commander of Basu Bahini instructed the freedom fighters to move back. At that time, he took shelter under the bush of the water of the pond situated to the west side of the house of Rahmat Ali. After

sometimes, he heard the sound of gunshots from the north side and saw the flames of fire. He stated that while he was in hiding he saw that the Pakistani army and the accused persons having captured several persons confined them in front of the house of Rahmat Ali and after sometimes heard the sound of gunshots and saw that one of the detainees fall down on the earth. After that, the Pakistani army and the Razakars set fire in the adjacent houses and went to the north side. He also stated that after 15/20 minutes, he came out from the hiding and went in front of the house of Rahmat Ali and saw that 16 bullets pierced dead bodies were lying there. He claimed that he could identify the dead bodies of Zinnat Ali, Rusmat Ali, and Gotu amongst the 16(sixteen) dead bodies.

804. P.W 11 Chanfor Ali of Gurui village is a freedom fighter of Basu Bahini and claimed to be the direct witness of killing sixteen civilians who were gunned down to death at under the banyan tree. He stated that on 20th Bangla month Vadra in 1971 at about 11.00 am while the Pakistani army and the Razakars second time attacked the freedom fighters, he hid under the bush of the water of the pond and at that time, he heard the sound of gunshots and saw the flames of fire from the north side. At that time, he also saw that the accused persons, the Pakistani army and other Razakars having captured 15/20 civilians confined them to the south side of the house of Rahmat Ali of Gurui village and the accused persons, other Razakars, and Pakistani army gunned down 15/20 people to

death. After that, the perpetrators went to the north side and at that time they also set fire to the adjacent houses. Subsequently, he came out from the hiding and went to the south side of the house of Rahmat Ali and saw freedom fighter Hekim [P.W10] and 16 dead bodies. He recognized the dead bodies of Zinnat Ali, Yeakub Ali and Rusmat Ali amongst the 16 dead bodies.

805. P.W 12 Jafor Ali of Gurui village and son of Martyr Shaheda Bhanu stated that on 20th Bangla month Vadra in 1971 at about 11.00 am while the Razakars and the Pakistani army second time attacked freedom fighters he was present at his house and at the time of gun-firing between the freedom fighters and the Razakars he fled away to the south side of his Gurui village. After exchange of gun-firing of 10/15 minutes, the freedom fighters moved back. At that time accused persons along with their cohort Razakars set fire to the neighbouring houses and went to the south side from the north for which again he hid in the Sagardigi situated to the west side of the house of Rahmat Ali of Gurui village wherefrom he heard the sound of gun firing from the north side and saw the flame of fire. At that time, he also saw that the accused persons along with their cohort Razakars and the Pakistani army chasing his mother along with his relations and the locals confined them at under the banyan tree of the house of Rahmat Ali and the Razakars and the Pakistani army gunned down them to death. He also saw that Razakars and the Pakistani army set fire to the houses of

Rahmat Ali and his neighbours and the accused persons gunned down his mother Saheda Banu to death. Thereafter the Razakars and the Pakistani army went to the north side. He further stated that while he was in hiding in Sagardigi, he saw freedom fighter Chanfor Ali [P.W11] and Abdul Hekim [P.W10] at under the banyan tree of the house of Rahmat Ali and seeing them, he went there and saw 16 dead bodies including the dead bodies of her mother, uncle Sunamuddin and Abul Hossain, and paternal cousin Rosmat Ali.

806. Regarding the killing happened at under the banyan tree of the house of Rahmat Ali of Gurui village, P.W5 Abdul Hamid who is a retired School teacher and a freedom fighter of the Basu Bahini stated that he took part in the Gurui Battle and on 6. 9.1971 at the time of the second attack of the Razakars and the Pakistani army, he hide under the bush of the water of the pond and while the Razakars left the crime site , he came out from the pond and went to the house of Khaleque along with Ichab Ali [P.W7]and therefrom he and Ichab Ali [P.W7] went at under the banyan tree situated in front of the house of Rahmat Ali of South Para of Gurui village and saw freedom fighters Abdul Hekim [P.W10]and Chanfor Ali [P.W11]and also saw 16 dead bodies were lying under the banyan tree. At that time Abdul Hekim and Chanfor Ali informed him that accused persons along with other

Razakars and the Pakistani army gunned down 16 civilians under the banyan tree on their way to Nikli Thana.

807. P.W 7 Md. Ichab Ali of Gurui East Para village is a freedom fighter of Basu Bahini. As regards the killing of sixteen civilians who were gunned down to death at under the banyan tree of the house of Rahmat Ali, he stated that he took part in the Gurui Battle and on 20th Bangla month Vadhra in 1971 after killing civilians of Gurui village while the Razakars and the Pakistani army left the crime site, he along with Abdul Hamid(P.W5) came out from the hiding and went to the house of Abdul Khaleque. Thereafter from the house of Abdul Khaleque, he went to the south side at under the banyan tree situated at the house of Rahmat Ali and saw that 16 dead bodies were lying there. He heard from Chanfor Ali (PW.11) and Abdul Hekim (P.W10) who were present there that Razakars killed those 16 civilians by gunshots. He could identify the dead bodies of Aftabuddin, Rusmat Ali, Mumtaz, Sharfat Ali and Sundar Ali amongst those dead bodies.

808. P.W 8 Md. Solaiman of Gurui village and son of Martyr Madhu Mia stated that at the time of second attack of Razakars and Pakistani army on 20th Bangla month Vadhra in 1971 at about 11.00 am he hide under the bush of water of the bank of the pond situated to the east side of the house of Abdul Khaleque and after killing the civilians of Gurui village while the accused persons, other Razakars, and the Pakistani army left the crime site, he came

out from the pond and went at the yard of Abdul Khaleque and subsequently he went under the banyan tree situated beside the house of Rahmat Ali and saw that 16 dead bodies were lying there and he could identify the dead bodies of Aftabuddin, Jinnat Ali, Suruj Ali amongst the 16 dead bodies and all of them were the inhabitants of Gurui village.

809.P.W 5 Abdul Hamid is a freedom fighter of Basu bahini and claimed that he took part in Gurui battle and during cross-examination of P.W5, the defence suggested that he was not a member of Basu bahini or he also did not take part in the Gurui Battle or Gurui Battle took place from 7.00 am to 9 am which has been denied by P.W5 and except denial of the presence of the P.W5 near the crime site at the relevant time, the defence failed to bring out any inconsistency as regards the presence of the P.W5 near the crime site. He is a local freedom fighter and the defence could not bring out any inconsistency as regards his participation in Gurui battle for which, I am of the view that P.W5 was present at the relevant time near the crime site. P.W7 Md. Ichab Ali was an inhabitant of Gurui village and the Gurui battle took place at the jetty (boathouse) of his house and it is quite natural that the inhabitant of Gurui village who was present at or near the crime site witnessed the occurrence. The perpetrator also killed his two uncles, aunt and three neighbours. During cross-examination of

P.W7, no suggestion was given to him denying his presence near the crime site which was situated adjacent to his house.

810. P.W 8 Md. Solaiman of Gurui village is the son of Martyr Madhu Mia. As regards witnessing the occurrence as narrated in charge No. 3, he stated that while at about 7.00 am on the date of occurrence the Razakars and the Pakistani army came at the jetty(boathouse) of Ichab Ali [P.W7] he saw the perpetrators, and on the same day at about 11.00 am while the Razakars and the Pakistan army second time attacked the freedom fighters at the jetty (boathouse) of the house of Ichab Ali, he hide under the bush of the water of the Sagardari and witnessed that the accused persons and other Razakars having captured his father along with other civilians confined them at the house of Abdul Khaleque and set fire and gunned down them to death. During cross-examination in reply to a question put to him by the defence, he affirmed that house of Abdul Khaleque was situated to the south side after 3 houses from his house. No suggestion was given to P.W8 denying his presence near the crime site. The house of Abdul Khaleque, one of the crime site of the event narrated in charge No. 3 was situated near the house of P.W8 and the defence failed to assail his statement made as regards his presence near the crime site.

811. At the time of cross-examination of P.W10 Abdul Hekim, the defence suggested that the victims of Gurui village were killed at

the time of Gurui battle. The suggestion of the defence to P.W10 regarding the cause of killing of civilians has been denied by P.W10 and no evidence was presented to the Tribunal by the defence regarding the cause of killing of civilians of Gurui village as claimed by the defence and thereby the defence admitted the killing of Gurui village. P.W11 Chanfar Ali and P.W12 Jafor Ali are the inhabitant of Gurui village. During cross-examination, in reply to a question put to P.W.11 by the defence, P.W11 affirmed that he is now getting the allowances as a freedom fighter and except the relations of co-freedom fighter Ichab Ali, no relation of any other freedom fighter was killed at the time of occurrence and it is an admitted fact that P.W11 Chanfor Ali is a freedom fighter. The defence suggested that he did not see the occurrence which has been denied by P.W11 but the defence failed to bring out any inconsistency to his statement made as regards his presence near the crime site.

812.P.W 12 Jafor Ali stated that on 20th Bangla month Ashwin in 1971 at about 11.00 am while the Razakars and the Pakistani army second time attacked the freedom fighters, he hide in the Sagardari situated to the west side of the house of Rahmat Ali and saw that accused persons and other Razakars and the Pakistani army having captured his mother and other relations confined them at under the banyan tree of the house of Rahmat Ali and gunned down them to death and by cross-examining P.W12, the defence affirmed that at

about 11.00 am he hide in the Sagardari, a pond, situated near the house of Rahmat Ali and came out from the pond at about 1.30 pm.

813. On the evaluation of the evidence, it is found that P.Ws 5, 7, 10, 11 are freedom fighters and they took part in Gurui battle. P.Ws 8 and 12 are the sons of Martyrs who were gunned down to death at Gurui village after Gurui battle. The houses of P.Ws 7,8,10, 11 and 12 were situated at Gurui village adjacent to the crime sites and they stated that before Gurui battle, they got the information that the Pakistani army and the Razakars might attack freedom fighters for which they made preparation to attack the Razakars and the Pakistani army and admittedly on the day of occurrence, a battle took place at Gurui village for which there is no doubt about the presence of P.Ws 5,7,8 and 10 to 12 near the crime site at the relevant time and I am of the view that P.Ws 5,7 and 8 witnessed the killing happened in the yard of the house of Abdul Khaleque and P.Ws 10 to 12 witnessed the killing happened at under the banyan tree of the house of Rahmat Ali of Gurui village.

814. In view of the above facts and circumstances of the case, I am of the view that P.Ws 5, 7, 8 and 10 to 12 were present near the crime site at the relevant time and they witnessed the killing of Gurui village. The defence by cross-examining the prosecution

witness No.10 tried to make out a defence case to the effect that the victims were killed at the time of Gurui battle which has been denied by P.W10. The defence is not bound to prove any fact but when the defence suggested a specific defence case to the prosecution witness and if the witnesses denied the same, the accused persons are bound to prove the same. It is a settled principle. The prosecution witnesses did not admit the defence case and the accused persons failed to prove the defence case by adducing legal evidence. The killing of the civilians of Gurui village is an admitted fact, but the reason was denied by the defence. Mere denial of the evidence of the prosecution witnesses will not negate the positive evidence of prosecution witnesses unless the defence by cross-examining P.Ws could bring out any inconsistency to their statement made in the examination-in- chief.

815. In this respect, I recall my earlier observation made in the case of the Prosecutor vs. Idris Ali Sardar, ICT-BD Case No. 06 of 2015, judgment dated 05.12. 2016, Para 751 wherein it has been observed in the following language;

“Now it is a settled jurisprudence that mere denial of the prosecution evidence by the defence will not negate the incriminating evidence of the prosecution witnesses unless by cross-examining the witnesses, the defence could bring out any favourable statement and made out any material contradiction to the statement made in examination-in-chief. The main purpose of cross-examination is to elicit favourable

facts from the witnesses or to impeach the credibility of the testifying witnesses to lessen the weight of unfavourable testimony. During the trial of the case, the defence got the opportunity to test the veracity of the witnesses and the accuracy of their evidence, but practically the defence remain silent to cross-examine the prosecution witnesses regarding incriminating evidence and impliedly accepted the evidence of the prosecution witnesses.”

816. On scrutiny of the evidence of the prosecution witnesses, it transpires that the defence did not dispute the killing of 26 civilians of Gurui village. The defence case is that the victims were killed at the time of Gurui battle for which the instant proceeding is legally barred against the accused persons.

817. On evaluation of the solid evidence presented to the Tribunal it is found that the civilians who were gunned down to death at the house of Abdul Khaleque and at under the banyan tree of the house of Rahmat Ali were the inhabitants of Gurui village and after Gurui battle while the freedom fighters moved back to save themselves, the accused persons, their cohort Razakars and the Pakistani army men failed to capture the freedom fighters who took part in Gurui battle and to take revenge having captured the unarmed innocent civilians of Gurui village from the houses confined them at the house of Abdul Khaleque and at under the banyan tree of the house of Rahmat Ali of Gurui village. P.Ws 5, 7, 8 stated that after killing the civilians at the house of Abdul

Khaleque, the Razakars and the Pakistani army moved to the south side and thereafter they heard the sound of gunshots. P.Ws 10, 11 and 12 stated that before killing the civilians at under the banyan tree of the house of Rahmat Ali, they heard the sound of gunshots from the north side and it is proved beyond reasonable doubt that after killing the civilians at the house of Abdul Khaleque the accused persons, their cohort Razakars and the Pakistani army men moved to the south side and killed other civilians at under the banyan tree of the house of Rahmat Ali. The prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that the house of Rahmat Ali was situated to the south side of the house of Abdul Khaleque. P.Ws 5,7 and 8 witnessed the killing happened at the house of Abdul Khaleque and P.Ws 10, 11 and 12 saw the killing took place at under the banyan tree of the house of Rahmat Ali. It was not possible for all the witnesses to witness both the killings which took place one after another in a wartime situation in difference places. Thus, the prosecution successfully proved the killing of 26(twenty-six) innocent unarmed civilians of Gurui village against the accused persons beyond all reasonable doubt.

818. It transpires that P.Ws 10,11 and 12 are the direct witnesses of the killing of 16 civilians who were killed at under the banyan tree of the house of Rahmat Ali and P.Ws 5,7 and 8 are the circumstantial witnesses of the killing of sixteen civilians and at the relevant time, they were in hiding near the crime site and while

the accused persons, other Razakars and the Pakistani army men left the crime site, they came under the banyan tree situated at the house of Rahmat Ali of Gurui village and saw that 16 dead bodies were lying there. P.Ws 7,8 and 10 to 12 recognized the dead bodies of Aftabuddin, Rusmat Ali, Mumtaz, Sharfat Ali, Sunder Ali, Jinnat Ali, Suruj Ali, Gotu, Yeakub Ali, Shaheda Banu, Sunam Uddin and Abul Hossain who were gunned down to death at under the banyan tree of the house of Rahmat Ali of Gurui village. P.Ws 5,7 and 8 recognized the dead bodies of Ful Mia, Abu, Jubeda Khatoon, Lal Hossain, Suruj Ali, Ichab Ali, Modhu Mia who were gunned down to death at the house of Abdul Khaleque. All the victims who were gunned down to death at Gurui village were unarmed civilians of Gurui village and they did not take part in any hostility against the accused persons and the instant proceedings was legally initiated against them.

819. On the evaluation of the evidence presented to the Tribunal it transpires that P.Ws 10,11, and 12 stated that the accused persons, their cohort Razakars and the Pakistani army men having captured the civilians of Gurui village confined them at under the banyan tree situated at the house of Rahmat Ali of Gurui village and the accused persons, their cohort Razakars and the Pakistani army men gunned down them to death and set fire to the houses of the civilians of Gurui village. P.Ws 5,7 and 8 stated that accused persons having captured the civilians from their houses confined

them at the house of Abdul Khaleque and gunned down them to death there. Thus the accused persons directly took part in the killing of all the civilians of Gurui village.

820. The defence suggested that the Martyrs were killed at the time of Gurui battle which has been denied by the witnesses, but no suggestion was given to the effect that the Martyrs were freedom fighters or they took part in the hostilities at the time of Gurui Battle. P.Ws 5, 7,8,10 to 12 stated that on 6.9.1971 at about 11.00 am while the Razakars and the Pakistani army second time attacked the freedom fighters, after exchange of gun-firing, the freedom fighters moved back. Thereafter, the accused persons, other Razakars and the Pakistani army men having captured the civilians from the adjacent houses gunned down them to death at the yard of the house of Abdul Khaleque and under the banyan tree of the house of Rahmat Ali and set fire to the houses and thereafter went to the north side towards Nikli Thana. On scrutiny of the documentary evidence presented to the Tribunal it appears that exhibit 12 series, exhibits 13, 15 and the defence document exhibit Ka (page 1-18) also corroborated the evidence of prosecution witnesses.

821. It also transpires that the Gurui Battle took place at the jetty [boat-house] of the house of Ichab Ali[P.W7] which was situated to the west side of Gurui village and the house of Rahmat Ali wherein the sixteen civilians were gunned down to death was

situated at South Para of Gurui village and the defence by cross-examining P.W10 affirmed that house of Ichab Ali was situated to the about 80/90 yard south side from the house of Khaleque and house of Rahmat Ali was situated after 4/5 houses from the house of Khaleque. Thus it is crystal clear that civilians of Gurui village were killed at different places than the battlefield. The prosecution witnesses stated that at the time of the second attack of Razakars and the Pakistani army, the freedom fighters moved back, and after Gurui Battle the accused persons, their cohorts Razakars, and the Pakistani army having captured the civilians of Gurui village from the houses confined them at the house of Abdul Khaleque and at under the banyan tree situated at the house of Rahman Ali of Gurui village and all the victims were innocent civilians and at the time of occurrence they did not take part in any hostilities against the accused persons, their cohort Razakars, and the Pakistani army. It is proved beyond reasonable doubt that the crime sites of the event narrated in charge No. 3 and Gurui Battle Field were situated in different places and the 26(twenty-six) civilians of Gurui village were killed after the Gurui Battle and the accused persons directly participated in killing all the civilians of Gurui village.

822. In the instant charge, it is alleged that the accused persons committed a large scale killing of civilians constituting the offence of extermination as crimes against humanity.

“Extermination” is a legal term originated from the Latin term “exterminatus” the past participle of “exterminare” which means “drive away, expel, drive beyond boundaries or destroy utterly. The Latin word “exterminare” was formed from the prefix ex (“out of” or “outside”) and “terminus” (“boundary”).

823. Different dictionaries defined and explained the term “extermination” which is as under;

Cambridge Advanced Learners. Dictionary, Third Edition explained “extermination,” as “to kill all the animals or people in a particular place or of a particular type.”

English Oxford Dictionaries defined “extermination” as “killing, especially of a whole group of people or animals or complete destruction.”

Thesaurus used “extermination” as “complete annihilation, disintegration, liquidation, destruction, devastation, eradication, extinction, extinguishment, extirpation, obliteration.”

Marrim-Webster Dictionary used “extermination” as “to destroy or kill (a group of animals, people etc.) completely.”

Vocabulary com used “extermination” to mean “kill en mass; kill on a large-scale; kill many.”

The Free Dictionary used the word “extermination” to mean “to get rid or destroy completely.”

Dictionary com. explained “extermination” as “to get rid of by destroying; destroy totally; extirpate.”

Samsad English-Bengali Dictionary used the word “exterminate” to mean “to destroy completely.”

824. Extermination and murder both involve killing and has been specified in Section 3(2)(a) of the Act of 1973 as crimes against humanity. Extermination differs from murder on the basis that the perpetrators carried out killing on a large scale. Extermination involves killing by the perpetrators in the context of mass killing. The perpetrator need not carry out much killing personally; he only needs to know the context of mass killing. Extermination is murder on a large-scale. The Act of 1973 did not specifically define the term “murder” and “extermination.” Article 7(2) (b) of the Statute of ICC expressly included “intentional infliction of the condition of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. “

825. The ICTR Trial Chamber I in the Case of the Prosecutor Versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated 02 September 1998, Para 591 distinguished extermination from murder and observed that-

“The Chamber considers that extermination is a crime against humanity, pursuant to Article 3(c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.”

826. The ICTR Trial Chamber I in the Case of the Prosecutor Versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated 02 September 1998, Para 592 defined the following essential elements of extermination:

- I. the accused or his subordinate participated in the killing of certain named or described persons;
- II. the act or omission was unlawful and intentional.
- III. the unlawful act or omission must be part of a widespread or systematic attack;
- IV. the attack must be against the civilian population;
- V. the attack must be on discriminatory grounds, namely; national, political, ethnic, racial, or religious grounds. ’’

827. In the case of Prosecutor v. Milomir Stakic, Case No.: IT-97-24-A, Judgment dated 22 March 2006, the ICTY Appeals Chamber in Para 259 held that

Accordingly, the Appeals Chamber concurs with the finding of the Trial Chamber in the instant case that knowledge of a “vast scheme of collective murder” is not an element required for extermination, a crime against humanity. The actus reus of extermination is “the act of killing on a large scale.” The actus reus also includes “subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death”. The mens rea required for extermination is that the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of

people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths.

828. In the case of Prosecutor v. Milomir Stakic, Case No.: IT-97-24-A, dated 22 March 2006, the ICTY Appeals Chamber in Para 260 also considered the mens rea of extermination and observed in the following language;

“The mens rea of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths. This intent is a clear reflection of the actus reus of the crime. The Appeals Chamber notes, however, that there is no support in customary international law for the requirement of intent to kill a certain threshold number of victims, as suggested here by the Appellant. This is consistent with the fact that there is no numerical threshold established with respect to the actus reus of extermination”.

829. The ICTR Appeals Chamber in Ntakirutimana Case No. ICTR 96-17-A **Appeal** judgment dated December 13, 2004, at Para 561 similarly observed that-

“Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder. The Appeals Chamber agrees with the Trial Chamber that the crime of extermination is the act of killing on a large scale. The expressions “on a large scale” or “large number” do not, however, suggest a numerical minimum.”

830. The ICC Trial Chamber in the Case of Prosecutor vs Radovan Karadzic, Case No. ICC-95-5/18-T 185, Judgment dated 24 March

2016, Para 483 emphasized on the “actus reus” of extermination which includes killing of large number of victims and observed that-

“The actus reus of extermination consists of “the act of killing on a large-scale”. This involves “any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals”. In determining what is sufficient for a finding that a large number of individuals were killed, the Tribunal’s jurisprudence has consistently held that there is no minimum numerical threshold of victims that must be reached. Furthermore, it is not necessary that the victims of extermination be precisely identified by name, and it suffices to establish that killings occurred on a mass scale. An assessment of whether the element of “massiveness” has been met must be made on a case by case basis, taking into account all the relevant factors. Relevant factors include, for example, the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity. There is no requirement to establish that there was a “vast scheme of collective murder”.

831. Mens rea of extermination is to kill a large number of civilians, but intent to destroy, in whole or in part, a national, ethnical, racial, religious or political group is the means rea of genocide. The ICC Trial Chamber in the Case of Prosecutor vs Radovan Karadzic, Case No. ICC-95-5/18-T 185, Judgment dated

24 March 2016, Para 485 distinguished the offence extermination from genocide and held that

“The men's rea of extermination requires the intention that a large number of individuals be killed. In line with jurisprudence on the actus reus, the men's rea of extermination similarly does not require the intent to kill a certain threshold number of victims. Additionally, there is no requirement that the act of extermination be carried out with the intent to destroy the group or part of the group to which the victims belong, or pursuant to a pre-existing plan or policy.

832. In the case of Kayishema and Razindana, ICTR Trial Chamber, Case No. ICTR-95-1, 1 June 2001, para 147 observed that,

“An individual may be prosecuted for the crime of extermination for a single killing if that killing form[s] part of a mass killing event and the murder took place in the context of mass killing.”

833. In Vasilyevite the ICTY Trial Chamber, Case No. ICTY-98-32, 25 February 2004, para 229 held that-

“Responsibility for one or a limited number of such killings is insufficient for a successful prosecution for the crime of extermination. The scale of the killing required for extermination must be substantial yet it is possible that a limited group may be targeted and this group may be made up of only a relatively small number of people. It is enough that a numerically significant part of the population is targeted.”

834. In the case of Prosecutor V. Momcilo Krajisnik, Case: IT-00-39-T, Judgment Dated 27 September 2006, Para 710 the Trial Chamber I of ICTY as regards the elements of extermination made observation in the following term;

“The Chamber further finds that the victims referred to above were either captured or detained at the time of their killing or otherwise not taking active part in the hostilities. The Chamber finds that the killings were part of the widespread and systematic attack against the Muslim and Croat civilian population. The Chamber, therefore, finds that all the above incidents constitute extermination as a crime against humanity”.

835. It is settled jurisprudence that extermination is the act of killing on a large scale. The actus reus of extermination consists of any act, omission, or combination thereof which resulted directly or indirectly in the killing of a large number of civilians. The mens rea of extermination is that the perpetrators committed the act or omission with the intent to kill civilians on a large scale or with knowledge that deaths of a large number of civilians were a probable consequence of the act or omission. There is no minimum number of victims that will meet the threshold for extermination but circumstances of the killings are to be evaluated on a case-by-case basis to arrive at a conclusion as to whether the offence committed by the perpetrators constitute extermination. Prosecution

witnesses presented to the Tribunal proved beyond reasonable doubt that the accused persons, their cohort Razakars, and the Pakistani army killed 26(twenty six) detained civilians including women of Gurui village. Thus it is legally inferred that the accused persons had the intent to kill a large number of civilians.

836. To constitute an offence of crimes against humanity it is required that the perpetrators committed the offence against civilian population but in the Act of 1973 the legislature did not define the term “civilian population “ and in the Penal Code also there is no definition of the term “civilian population”. As per provision of Section 3 (2) (e) of the Act of 1973 violation of any humanitarian rules applicable in armed conflicts laid down in Geneva Convention of 1949 are crimes within the jurisdiction of this Tribunal. In the absence of any definition of “civilian population”, the definition of the civilian population adopted by the International Tribunals constituted for trial of international crimes may be relied on by this Tribunal. In the Case of Radovan Karadzic as referred herein above as regards “civilian population,” the Trial Chamber of ICC observed in the following language;

“For the purpose of Article 5 of the Statute, an attack can be considered to have been directed against a civilian population if the civilian population was the “primary rather than an incidental target of the attack”. In order to determine whether the attack was so directed, the Appeals Chamber has identified a non- exhaustive list of relevant factors, such

as the means and method used during the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance to the assailants at the time of the attack, and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. The term “population” does not mean that the entire population of the geographical entity in which the attack is occurring was subjected to the attack. However, the attack must have targeted more than “a limited and randomly selected number of individuals” within the population’

837. International humanitarian law protects those who do not take part in the fighting at the relevant time such as civilians, medical and religious military personnel. It also protects those who have ceased to take parts, such as wounded, shipwrecked and sick combatants and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction. It is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals, and ambulances must all be protected.

838. There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families. The law sets out a number of clearly recognizable symbols which can be used to identify protected persons, places, and objects. The main emblems are the Red Cross, the Red Crescent and the symbols identifying the cultural property and civil defence facilities.

839. In the Fourth Geneva Convention, 1949, the High Contracting Parties for the purpose of establishing a Convention for the protection of the civilian person in time of war made provision for the protection of civilian population. In Article 4 of the said convention it is mentioned as follows:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in the case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State, who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in the application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.”

840. In Article 50 of the Additional Protocol I to the Geneva Convention 1949, the term “civilian and civilian population” has been defined as under;

“Article 50- Definition of civilians and the civilian population.

- A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A 1), 2), 3) and 6) of the Third Convention and in Article 43 of this Protocol. In the case of doubt, whether a person is a civilian, that person shall be considered to be a civilian.
- The civilian population comprises all persons who are civilians.
- The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”

841.As per provision of Article 51 of the said Protocol I, the civilian population or any individual civilian is a protected person which runs as follows;

“Article 51- Protection of the civilian population

- The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
- The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate

attacks are:

- those which are not directed at a specific military objective;
- those which employ a method or means of combat which cannot be directed at a specific military objective; or

- those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8) Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations which respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

842. In section 3(2)(a) of the Act of 1973, the Legislature included the notion “murder” as “crimes against humanity” committed “against any civilian population” In the case of Prosecutor –Vs- Radovan Karadzic, Case No. IT-95-5118-T dated 24.3.2016, the Trial Chamber of ICC made following observations as regards “civilian population”.

“The meaning of civilian for the purposes of unlawful attacks on civilians stems from Article 50(1) of Additional Protocol I which provides that a “civilian is any person who does not belong to one of the categories of persons referred to in

Article 4(A)(1), (2), (3) and (6) of the Third [Geneva] Convention and in Article 43 of [Additional] Protocol [I]. This is a negative definition of “civilian” as it includes anyone who is not a member of the armed forces or an organised military group belonging to a party to the conflict. Article 50(1) of Additional Protocol I also provides that in the case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I continues until such time as they take direct part in hostilities, that is until they engage in acts of war which, by their very nature and purpose, are likely to cause actual harm to the personnel or material of the enemy forces. Thus, in order to establish that unlawful attacks against civilians have been committed, the Chamber has to find that the victims of these attacks were civilians and that they were not participating in the hostilities.”

843. In the case of Radovan Karadzic, as regards civilians or civilian population, the ICC Trial Chamber further observed that-

“To constitute an unlawful attack on civilians, the Prosecution has to show that it was directed against individual civilians or the civilian population. Whether this is the case can be determined by a number of factors, including the means and methods used in the course of the attack, the status and the number of victims, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the incident, the nature of the acts of violence committed, the indiscriminate nature of the weapons used, and the extent to which the

attacking force has complied or attempted to comply with the precautionary requirements of the law of war. In this respect, the jurisprudence is also clear that both indiscriminate attacks and disproportionate attacks may qualify as attacks directed against civilians or give rise to an inference that an attack was directed against civilians. This is to be determined on a case by case basis, in light of the available evidence.”

844. Prosecution witnesses presented to the Tribunal proved beyond all reasonable doubt that the accused persons, their cohort Razakars and the Pakistani army on the date, after Gurui Battle forming part of a criminal enterprise sharing the common criminal intent of all to commit the crimes having captured 26[twenty six] civilians of Gurui village from the houses confined them at the house of Abdul Khaleque and at under the banyan tree of the house of Rahmat Ali of Gurui village under Nikli Thana of the then Kishoreganj Sub-Division and gunned down all of them to death and the accused persons directly participated in capturing and killing the unarmed civilians which proved beyond reasonable doubt that the accused persons had the intent to kill a large number of civilians which attracts the threshold of the offence extermination as crimes against humanity.

845. In view of the above evidence, facts and circumstances and the proposition of the law I am of the view that the prosecution successfully proved the instance charge beyond all reasonable doubt against accused Syed Md. Hussain alias Hossain and accused

Md. Moslem Prodhan and both the accused persons directly participated, facilitated and had complicity to the commission of offences of extermination and arson [other inhumane acts] as crimes against humanity as specified in Section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under Section 20(2) of the said Act.

Charge: 04

[Genocide, extermination, rape, abduction, confinement and torture committed at village Dampara under Nikli Police Station]

846. That on 23 September in 1971 at about 12.00/01.00 P.M. Pakistani army along with accused Razakar Commander Syed Md. Hussain alias Hossain and a group of 50/60 Razakars including local collaborator Shaheb Ali alias Teku Chairman [now dead] having come to mostly Hindu populated Dampara village under Nikli Police Station of the then Kishoreganj Sub-Division gathered 39 [thirty nine] Hindu male people in front of the yard of the house of Banabashi Sutradhar and confined them there. Meanwhile accused Syed Md Hussain alias Hossain along with some other Pakistani army men and Razakars committed rape on Hindu women of that village. Thereafter, at about 04.00 P.M. accused person and his accomplice Razakars and Pakistani army men having taken away the detained 39 Hindu civilians came to Nikli Thana and kept them confined there. In the evening accused Syed Md. Hussain and

his accomplices mercilessly tortured those Hindu detainees in Nikli Thana.

847. Thereafter, on the same day at about 08.00/08.30 P.M. the accused person along with some other Razakars, with intent to destroy, in whole or in part, the Hindu religious group, having taken 35 detainees of the 39 detained Hindu civilians away from Nikli Thana to Nikli Moha Shoshan situated just at the other side of the river, shot them there and out of said 35 detainees, 34 detainees were instantly killed there and the rest one became severely injured who could manage to flee away from there but succumbed to his injuries later. On the following day [24.09.1971] at about 11.00 / 12.00 P.M the accused person forcibly took Rois Uddin and Babar Ali [both are dead] away to said Moha Shashan and forced them to carry and dump the dead bodies of the victims to Ghorautra river. Because of being under aged, 4[four] other detained children were released later.

848. Thereby, accused Syed Md. Hussain alias Hossain has been charged with participating , abetting, facilitating and complicity in the commission of offences of genocide, extermination [large scale killing of civilians], rape, abduction, confinement and torture as crimes against humanity as part of systematic attack directed against unarmed civilians as specified in section 3(2)(a)(c)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the

Act for which the accused person has incurred liability under section 4(1) and 4(2) of the Act.

849. To prove the events narrated in charge No. 4, the prosecution examined P.Ws 1 to 4 and 6.

850. P.W 01 Badal Chandra Barman [59] of Dampara village stated that he is a businessman of dried fish. At the time of the Great War of liberation in 1971, he was aged about 14 years. At that time, he used to live in his village home at Dampara along with his parent and was a student of class five. At that time, the Hindu families of his village used to live with apprehension and many Hindu families left for India.

851. As regards the event of abduction and rape narrated in charge No. 4, he stated that on 6th Bangla month Ashwin in 1971 at about 2.30/03.30 pm the Razakar Commander accused Md. Hussain of Nikli Police Station along with 50/60 other Razakars and Pakistani army came at Dampara bazaar jetty [boathouse] by a launch and 20/25 Razakars and Pakistani army come down from the launch, and the other Razakars and Pakistani army anchored at the jetty [boathouse] of Bonabashi Sutradhar. The Razakars and Pakistani army who got down at Dampara Bazaar jetty [boathouse] having captured 10/12 Hindus from bazaar brought them in front of the house of Bonabashi Sutradhar. The Razakars and Pakistani army who anchored at the jetty [boathouse] near the house of Banabashi Sutradhar having captured 25/27 Hindus including P.W 1 brought

them in front of the house of Banabashi Sutradhar and confined them. At that time, an aged lady of that village namely Bishi Sutradhar (now dead) came to the detainees and told that the Razakars and the Pakistani army were torturing the Hindu females. P.W 1 also stated that since the detainees were confined, they were unable to take any step.

852. He further stated that thereafter, amongst those Razakars and the Pakistani army, accused Syed Md. Hussain alias Hossain along with other Razakars and the Pakistani army went to the neighboring village Nabinpur by launch and after sometimes came back at Dampara and accused Syed Md. Hussain alias Hossain informed his cohort Razakars and the Pakistani army that all the Hindus of Nabinpur fled away, and the Pakistani army pointing the detainees who were confined in front of the house of Bonabashi Shudtradar told to bring all of them to the Nikli Police Station by boat and the Pakistani army and the Razakar Syed Md. Hussain alias Hossain went to Nikli Police Station by launch. Thereafter, all the detainees were taken to Nikli Police Station by a boat guarded by two armed Razakars. As per order of the Pakistani army and the Razakars, 35 aged detainees sat in 2/3 (two/three) lines at the corridor of Nikli Police Station and they instructed P.W1, Badal Sutradhar(P.W2), Gopal Sutradhar and Sunil Varman to sit under a tree in front of the Nikli Police Station.

853. As regards the event of genocide narrated in charge No 4, P W 1 stated that after one hour, the Razakars tied 35 detainees with rope and by beating with sticks and thrusting with bayonets injured them and the Razakars and the Pakistani army took the injured detainees by boat and the 4 (four) minor detainees were locked up in the Police Station. After half an hour, P.W1 heard the sound of gunshots and after one hour of the gunshots, Razakars and the Pakistani army who took the detainees by boat came back at Nikli Police Station and were discussing amongst themselves that the detainees who were taken by boat, had been gunned down to death at the cremation ghat.

854. He also stated that on the next day at about 9/10 am a Major of the Pakistani army and the Razakar Commander Syed Md. Hussain alias Hossain came to the minor detainees and asked them as to whether they wanted to go to their home or not. Thereafter they released them and the four minor detainees came back to their houses. After returning to their houses, they went to the house of Kamini Barman(now dead) and saw that out of 35 detainees, one of them who was shot along with the 34 detainees at the cremation ghat escaped sustaining gunshot injury on his hand and by swimming across the river and came back. Then the P.W1 came back to his house and saw his neighbour Kamala Barman [P.W3], Shamala Barman [P.W4], Shubash Rani Sutradar who were tortured yesterday by the Razakars and the Pakistani army, and the

village doctor Dharendra Chandra Acharja treated the female victims. P.W1 could identify Bonobashi Sutradar, Sunil Sutradar, Anil Sutradar, Madhu Sutradar, Surendra Sutradar, Abinash Sutradar, Aradhan Sutradar, Kartik Sutradar, Sudhir Sutradar, Monindra Sutradar, Shirish Sutradar, Razani Barman of Dampara amongst the 34 detainees who were gunned down to death at the cremation ghat.

855. He stated that his Dampara village was mainly a Hindu inhabited area and only the Hindus used to reside there. He heard the name of Razakar Commander Syed Md. Hussain alias Hossain from Teku Chairman, and subsequently in the Bangla month Ashwin in 1971 when the Razakars and the Pakistani army attacked their village, P.W1 saw accused Syed Md. Hussain alias Hossain and recognized him.

856. During cross-examination of P.W1, in reply to a question put to him by the defence, he stated that during the regime of Pakistan, accused Syed Md. Hussain alias Hossain was a Daroga of Police, but he could not say who was the Razakar Commander of Nikli Sadar Union. He stated that the Nikli Sadar Union was situated three kilometers far from the Dampara Union, Karimganj Thana was situated to the west, the Shingpur Union was situated to the east and Karpasha Union was situated to the west side of Dampara Union. He could not recognize other Razakars who were present

along with Razakar Commander Syed Md. Hussain alias Hossain at the time of occurrence. The Dampara Bazaar was situated to the about quarter mile south side from his house and the house of Banabashi Sutradar was situated adjacent to his house. He stated that Nikli Thana Sadar was situated about 3 kilometers far from his house and at the time of occurrence, there was only one way to go to Thana by boat. While Bishu Sutradar informed them about the torture of Hindu women only one /two Razakars were present there. He affirmed that at about 8.00 pm the 35 detainees were tied at the corridor of Thana. The defence suggested that no occurrence took place as stated by P.W 1 or he was not detained or accused Syed Md. Hussain alias Hossain was not known to him or he never saw accused Syed Md. Hussain alias Hossain which has been denied by P.W1.

857. **PW.2** Badal Chandra Sutradar [59/60] of Dampara village was aged about 14/15 years at the time of War of Liberation in 1971 and at that time he used to live in his house at Madhya Dampara. He is a Carpenter since 1971. He stated that Madhya Dampara was Hindu inhabited area. The Muslims used to live to the north, south and east side of Madhya Dampara and a river was situated to the west.

858. As regards the event of abduction and rape narrated in charge No. 4, P.W2 stated that on 6th Bangla month Ashwin in 1971 at

about 2.00/2.30 pm Razakar accused Syed Md. Hussain alias Hossain and Teku Chairman along with 60/65 Razakars and the Pakistani army came at Dampara Bazaar by launch and 20/25 Razakars and the Pakistani army come down from the launch and having captured several male Hindus from Dampara Bazaar brought them in front of the house of Bonabashi Sutradar of Dampara and the said launch anchored at the jetty [boathouse] of the house of Bonabashi Sutradar and the Razakars and the Pakistani army having captured several male Hindus along with P.W2 from the Madhya Dampara village confined them in front of the house of Bonabashi Sutradar under guard of the armed Razakars. One point of time, Bishi Sutradar of Dampara came to them and informed that the Pakistani army and the Razakars were destroying the honour of the Hindu women. Thereafter 30/35 Razakars and the Pakistani army went to adjacent village Nabinpur by launch and returning after 1 ½ hour at Dampara village told amongst themselves that all Hindus of Nabinpur fled away. Thereafter, Razakars and Pakistani army at the order of the Razakar Commander Syed Md. Hussain alias Hossain in the evening sent 39 detainees including him to Nikli Thana guarded by two armed Razakars and after some times, other Razakars and the Pakistani army also came back at Nikli Thana by launch.

859. As regards the event of confinement and torture narrated in charge No. 4 , P.W2 stated that thereafter at the order of Razakar

Commander Syed Md. Hussain alias Hossain, the other Razakars, and the Pakistani army tied 35 male detainees by rope at the corridor of Nikli Police Station except 4 (four) minor detainees. Since four detainees were under aged, the Razakars instructed them to sit under a jackfruit tree in front of Nikli Police Station. The Razakars and the Pakistani army by beating 35 detainees with sticks and thrusting with bayonets injured them. Thereafter the Razakars and the Pakistani army took away 35 detainees by a boat from Thana and locked up the four minor detainees at Nikli Police Station.

860. He further stated that at about 8/ 8.30 pm, he heard the sound of gunshots and after one hour of gunshots, Razakar Commander Syed Md. Hussain alias Hossain along with other Razakars and the Pakistani army came back at Nikli Police Station and were discussing amongst themselves that they had gunned down 35 male Hindus to death. In the next day at about 9/10.00 am Razakar Commander accused Syed Md. Hussain alias Hossain along with a Pakistani army came to minor detainees at Nikli Police Station and asked them as to whether they were able to go to their home or not and the minor detainees replied positively. Thereafter the Razakars and the Pakistani army released the minor detainees and P.W2, Badal Barman (P.W1), Gopal Sutradar, and Sunil Sutradar came back to their houses.

861. He also stated that his father Aradan Sutradar, his elder brother Kartik Sutradar, his paternal cousin Shudir Sutradar, Monindra Sutradar, Shirish Sutradar and maternal cousin Shukumar Sutradar and Moni Sutradar, his brother-in-law Madhu Sutradar and nephew Kshitish Sutradar, Nitis Sutradar and Sures Sutradar had been killed amongst the 35 detainees. After returning to his house, P.W 2 heard that out of 35 detainees who were taken by boat to kill, one Kamini Barman [now dead] was injured sustaining gunshot but by swimming across the river and came back. After coming to his house, he saw his neighbour Kamala Barman [P.W3], Shamala Barman [P.W4] and many other Hindu women who were tortured yesterday by the Razakars and the Pakistani army. The village doctor Dharendra Nath (now dead) treated the victims who told that the Pakistani army and the Razakars tortured them. He also heard that the Razakars and the Pakistani army threw the dead bodies of 34 detainees in the Ghorautra River.

862. During cross-examination of P.W 2, he stated that Shaheb Ali @ Teku was the Chairman of Dampara Union in 1971 and he was also Chairman of Peace Committee of that Union. He affirmed that there was Razakar in his Dampara Union but there was no Razakar Commander in his Union and accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana. In reply to a question put to him by the defence, he affirmed that at the time of occurrence he saw accused Syed Md. Hussain alias Hossain at the

place of occurrence, but before and after that he did not see him. He could not say the name of other Razakars who came at the place and time of occurrence except accused Syed Md.Hussain alias Hossain. He could not say the name of the father of accused Syed Md. Hussain alias Hossain or the name of his village. He affirmed that in 1971 accused Syed Md. Hussain alias Hossain was a Police Officer. He stated that his neighbour Badal Chandra Barman[P.W2] was renamed as Muslim Khan and his house was situated to the about 150 yards north side from Dampara and in between these, there was houses and the house of Banabasi Sutradar was situated to the 40 yards west side from his house. He affirmed that the army and the Razakars having detained 10/12 persons from Dampara Bazaar Launch Ghat taken away them in front of the house of Banabasi Sutradar and he also affirmed that about 27 persons including him were detained from Madhya Dampara and none of the detainee was a freedom fighter. The defence suggested that accused Syed Md. Hussain alias Hossain was not a Razakar or at the time of occurrence he was a Police Officer which has been denied by P.W2. He stated that Kamala Barman [P.W3] and Shamala Barman [P.W4] were senior to him.

863. **P.W 3** Kamala Rani Barman of Dampara village stated that in 1971 she used to reside in the house of her husband at Dampara village. She stated that on 6th Bangla month Ashwin in 1971 Shanai Razakar came to her house and told the converted Hindus to go to

the in front of the house of Bonabashi Sutradar to collect their cards (identity card). At that time, Shanai Razakar and other Razakars captured her husband Jatindra Chandra Barman, Avi Chandra Barman, father of P.W3, Jagindra Chandra Barman, father-in-law of P.W3 and took them to the in front of the house of Bonabashi Sutradar. After initiation of the War of Liberation in 1971 father of P.W3 took shelter at the house of P.W3 along with her younger sister considering the security of their life. Since in the meantime, her younger sister got married; she went to the house of her father-in-law. After taking the male Hindus from her house, her mother stayed at her house. On the same day at afternoon Shanai Razakar [now dead] along with other Razakars came to her house and the Razakars brutally tortured her and many women of Dampara village including Shamala Barman[PW.4], Shoba Rani Sutradar, Bhanumati Sutradar and consequently they became unconscious.

864. In the next day at about 10.00 am Badal Sutradar [P.W2], Badal Barman[P.W1], Gopal Sutradar(now dead) and Sonu Barman(now dead) came to her house and by bringing a doctor treated them. P.W3 came to know from the above 4(four) persons that her husband, her father and father-in-law who were abducted from the house of Bonabashi Sutradar, all of them were gunned down to death at Nikli cremation ghat.

865. During cross-examination of P.W3, she stated that her husband was the only son of his parent and in Bangla month Sraban in 1971 her father came to the house of her husband along with her sister. She affirmed that accused Syed Md. Hussain alias Hossain was a Police and also a Razakar Commander. She could not say the name of Razakar who tortured her. The Doctor came to her house after one day of the occurrence and thereafter she regained her sense. One day after the occurrence she met with Badal Chandra Barman [P.W1] and Badal Chandra Sutradar [P.W2], brother of her husband and they are junior to her. The defence suggested that she did not hear the name of accused Syed Md. Hussain alias Hossain or as tutored by others she deposed falsely implicating the name of accused or accused person was not a Razakar which has been denied by P.W3.

866. **P.W 4** Shamala Barman [65] of Dampara village stated that in 1971 she was aged about 20 years and used to live at the house of her husband at Dampara and her husband was a fisherman. Now he is working in the house of others. She stated that on 6th Bangla month Ashwin in 1971 at noon while she was present in her house at Dampara village, accused Shanai Razakar (now dead) along with his cohort Razakars came to her house and told that accused Hussain Dharoga sent them and they took her husband Avoy Chandra Barman, Rashik Chandra Barman, father of P.W4 who came to visit her house, to the in front of the house of Bonabashi

Sutradar. Thereafter P.W 4 stayed alone in her house. After sometimes, Shanai Razakar and other Pakistani army came to her house and tortured her. On the next day at about 11.00 am her neighbour Badal Barman [P.W1], Badal Sutradar [P.W2], Gopal Sutradar having brought Bhiru Doctor treated the female victims. P.W 4 came to know from them that her husband and father who were abducted yesterday had been gunned down to death at Nikli cremation ghat. She stated that she did not see the accused Razakar Syed Md. Hussain alias Hossain, but heard from Shanai Razakar and Teku Chairman that at the order of accused Syed Md. Hussain alias Hossain, the above-mentioned occurrences took place.

867. During cross-examination of PW.4, she stated that her father's house was situated at Boraibari village of Karimganj Thana. She could not say the name of any Razakar of his Union except Shanai Razakar. She affirmed that Teku Chairman was the Chairman of her locality and he was also Chairman of Peace Committee. House of Kamala Rani Barman [P.W3] was situated after 10 houses from her house and she is not her relation. She stated that on the day of occurrence, she did not meet with Kamala Rani Barman [P.W3], but affirmed that after one day of the occurrence when she became mentally sound she met with Kamala Rani Barman. After the occurrence, the doctor treated her in her house. House of Badal Chandra Barman [P.W1] was situated after 4/5 houses from her house and house of Badal Chandra Sutradar[P.W2] was situated

after the 8/10 houses from her house and both of them were junior to her. She affirmed that at the time of the occurrence, 2/3 Pakistani army, and the Razakars tortured her, but she could not recognize them. The defence suggested that she did not hear the name of accused Syed Md. Hussain alias Hossain which has been denied by P.W4. The defence also suggested that accused Syed Md. Hussain alias Hossain was not Razakar which has been denied by her but stated that she heard that he was a Daroga. The defence suggested that no occurrence took place as stated by her or she deposed as tutored by others which has been denied by her.

868. P.W 6 Md. Taher Ali [59] of Kamarhati village was aged about 14/15 years at the time of Great War of Liberation in 1971 and at that time, he was residing along with his parent at Kamarhati village which was situated adjacent to Nikli Thana. At that time, he was a cultivator. He stated that 2/3 months after initiation of the War of Liberation in 1971 under the leadership of accused Syed Md. Hussain alias Hossain about 50 Razakars came at Nikli from Kishoreganj and set up four bunkers at Nikli Thana Sadar. At that time, the locals used to say that accused Syed Md. Hussain alias Hossain was a Daroga of those Razakars and his cohort Razakars used to follow his instructions. At that time, he saw accused Syed Md. Hussain alias Hossain at Nikli Thana area for which he could recognize him. At the time of War of Liberation, local Razakar Ashraf Ali (now dead) under the leadership of accused Syed Md.

Hussain alias Hossain used to recruit the Razakars and trained them at Idgah Math which was situated adjacent to G.C. School.

869. As regards the event of abduction, confinement, torture and genocide narrated in charge No. 4, P.W6 stated that on 6th Bangla month Ashwin in 1971 before evening he was present at Nikli Bazaar which was situated adjacent to Nikli Thana and saw that those Razakars having abducted 30/35 Hindus from Dampara who at that time were wearing caps confined them in Nikli Thana. Accused Syed Md. Hussain alias Hossain was also known as Commander of those Razakars. After confining the detainees, they became active. At that time, he came back to his house. At about 8/8:30 pm on that day he heard the sound of heavy gunshots from the cremation ghat situated to the northwest side of their house and also heard the scream of the victims. At that time, due to fear of their life he and his family members lied on the ground. On 7th Ashwin at 7/8 am, he along with many others went to cremation ghat and saw 34 dead bodies. He claimed that 30/35 Hindus who were abducted from Dampara area and confined in Nikli Thana were killed at cremation ghat and before the occurrence he knew 2/3 of them. Thereafter, he came back to his house. While he was present at Nikli Bazaar at about 2.00 pm on that date, Raisuddin (now dead) and Babar Ali (now dead) informed him that they had

taken 34 dead bodies from cremation ghat by boat and thrown down those dead bodies in the Ghurautra river.

870. In cross-examination, in reply to a question put to him by the defence, he affirmed that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana, but he could not say the name of Razakar Commander of the then Kishorganj Sub-Division. He affirmed that there was no Razakar Commander at the Nikli Union. He confirmed that the Razakar Camp was situated 200 yards far from their house and the cremation ghat was situated 300 yards far from their house. Gurautra River was situated to the 1 ½ kilometer east side from their house. Dampara was situated to the about 3 kilometers east –west side from their house, and that Nikli Thana was situated within Nikli Bazaar. He denied the suggestion that in 1971 he did not see accused Syed Md. Hussain alias Hossain. He affirmed that the name of the father of accused Syed Md. Hussain alias Hossain is Musleh Uddin. He also denied the suggestions that accused Syed Md. Hussain alias Hossain was not Razakar or he was a Police Officer. He stated that the name of his Union is the Nikli Sadar Union.

Evaluation of the evidence and findings of the Tribunal

871. The learned Prosecutor Ms. Tureen Afroz appearing with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that at the time of Great War of Liberation

in 1971, the Hindus of Dampara village were the special target of the Razakar Commander accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army for which on 23.9.1971 in the afternoon, accused person, his cohort Razakars and the Pakistani army having jointly attacked Dampara Bazaar and Dampara village captured 39 Hindus and confined them in front of the house of Banabashi Sutradhar of Dampara village of Nikli Thana and after that, the Razakars and the Pakistani army committed rape on the Hindu women of Dampara village. Thereafter, at the order of Razakar Commander Syed Md. Hussain alias Hossain and the Pakistani army, the other Razakars having abducted 39 Hindus from the house of Banabashi Sutradhar of Dampara village confined them in Nikli Thana and after inhumane torture to destroy the Hindu religious group, in whole or in part, having taken away 35 detainees except four minor detainees from the Nikli Thana to cremation ghat, gunned down 34 Hindus to death except Kamini Barman(now dead) who sustaining gun-short injury on his hand across the river by swimming and came back to his house. She also submitted that the prosecution by adducing P.Ws 1 to 4 and 6 who are direct witnesses of the event of abduction, rape, confinement and torture and by exhibiting exhibits 12,13 and 15 proved the charge against the accused persons beyond all reasonable doubt. She further submitted that the perpetrators had the special intend to kill the Hindus of

Dampara and they only abducted and killed the Hindus without causing any harm to the Muslim and thereby committed the offence of genocide as specified in section 3(2)(c) (i)(ii)(g)(h) of the Act of 1973.

872. The learned defence counsel Mr. Abdus Satter Palwan appearing on behalf of the accused person as State defence counsel submitted that admittedly at the time of Great War of Liberation in 1971, P.W1 Badal Chandra Barman and P.W2 Badal Chandra Sutradhar were minor, aged about 14 years and before the occurrence, P.Ws 1 to 4 did not see accused Syed Md. Hussain alias Hossain and he was also not known to P.Ws 1 to 4 and 6. P.Ws 3 and 4 have specifically stated that they could not recognize the perpetrators who committed rape upon them and after long 45 years of the alleged occurrence, the prosecution made out a concocted story of genocide and abduction, rape, confinement, torture as crimes against humanity and falsely implicated the accused Syed Md. Hussain alias Hossain in the instant charge who was not a local of the crime site before or at the time of the commission of the alleged offences and the prosecution totally failed to prove the charge against accused Syed Md. Hussain alias Hossain beyond all reasonable doubt.

873. It is noted that out of 5 P.Ws examined by the prosecution, P.Ws 1 and 2 are the victims of the events of forceful conversion,

abduction and confinement as narrated in charge Nos. 1 and 4. P.Ws 3 and 4 are the victims of the events of forceful conversion and rape as narrated in charge Nos. 1 and 4. P.W3 is also the wife of Martyr Jatindra Chandra Barman and daughter of Martyr Avi Chandra Barman. P.W4 is also the wife of Martyr Avoy Chandra Barman and daughter of Martyr Rashik Chandra Barman. P.W6 was an inhabitant of Kamarhati village which was situated adjacent to Nikli Thana Sadar.

874. The offences as narrated in charge No. 4 alleged to have been committed in different phases. In the first phase, on 6th Bangla month Ashwin corresponding to 23rd September in 1971 at about 2.30/3.00 pm accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army having captured 39 Hindus from Dampara Bazaar and Dampara village confined them in front of the house of Banabashi Sutradhar. In the second phase, the same group of perpetrators allegedly committed rape upon the innocent Hindu women of Dampara. In the third phase, in the afternoon on the same date, the accused person, his cohort Razakars and Pakistani army having abducted 39 Hindus confined them in Nikli Thana and inhumanely tortured them. In the last phase, on the same day at about 8/8.30 pm, the same group of perpetrators having forcibly taken 35 detainees except four minor detainees from Nikli Thana gunned down them to death at cremation ghat except Kamini Barman (now dead) and on the next day, dumped the dead bodies

of 34 detainees in the Ghurautra River. Since four detainees were under aged, on the next day of killing the detainees, the perpetrators released four minor detainees.

875. P.W 1 Badal Chandra Barman is the victim of abduction and confinement and as regards the event of abduction narrated in charge No. 4, he stated that on 6th day of the Bangla month Ashwin in 1971 at about 2.30/03.30 pm the Razakar Commander accused Syed Md. Hussain alias Hossain of Nikli Police Station along with 50/60 other Razakars and Pakistani army having attacked Dampara bazaar and Dampara village captured 35/39 Hindus including him and having brought them in front of the house of Banabashi Sutradhar of Dampara village confined them there. Subsequently, the Pakistani army pointing the detainees who were confined in front of the house of Bonabashi Shudtradar instructed the Razakars to bring all of them to the Nikli Police Station by boat and the Pakistani army and the Razakar accused Syed Md. Hussain alias Hossain went to Nikli Police Station by a launch. All the detainees were taken to Nikli Police Station by a boat guarded by two armed Razakars and confined them in Nikli Thana.

876. As regards the event of abduction as narrated in charge No. 4, P.W2 Badal Chandra Sutradhar stated that on 6th Bangla month Ashwin in 1971 at about 2.00/2.30 pm Razakar accused Syed Md. Hussain alias Hossain and Teku Chairman along with 60/65

Razakars and the Pakistani army having attacked Dampara Bazaar and Dampara village captured several male Hindus along with him and confined them in front of the house of Bonabashi Sutradhar of Dampara village under the guard of the armed Razakars. Thereafter, Razakars and Pakistani army at the order of the Razakar Commander Syed Md. Hussain alias Hossain in the evening having abducted 39 detainees including him from Dampara took them to Nikli Thana guarded by two armed Razakars and confined them in Nikli Thana. After some times, other Razakars and the Pakistani army also came back at Nikli Thana by launch. In reply to a question put to him by the defence, he affirmed that the army and the Razakars having captured 10/12 persons from Dampara Bazaar Launch Ghat took them in front of the house of Banabashi Sutradhar and he also affirmed that about 27 persons including him were captured from Madhya Dampara.

877. P.W 3 Kamala Rani Barman stated that on 6th Bangla month Ashwin in 1971 Shanai Razakar came to her house and told the converted Hindus to go to the in front of the house of Bonabashi Sutradhar to collect their cards (identity card). At that time, Shanai Razakar and other Razakars captured her husband Jitendra Chandra Barman, Avi Chandra Barman, father of P.W3, Jagindra Chandra Barman, father- in- law of P.W3 and took them to the in front of the house of Bonabashi Sutradhar of Dampara village. P.W4 Shamala Barman stated that on 6th Bangla month Ashwin in 1971

at noon while she was present in her house at Dampara village, Shanai Razakar (now dead) along with his cohort Razakars came to her house and told that accused Hussain Dharoga sent them and they took her husband Avoy Chandra Barman, Rashik Chandra Barman, father of P.W4 who came to visit her house, to the in front of the house of Bonabashi Sutradhar. P.W6 Md. Taher Ali stated that on 6th Ashwin in 1971 before evening he was present at Nikli Bazaar which was situated adjacent to Nikli Thana and saw that Razakars who came at Nikli Thana Sadar 2/ 3 months ago from Kishoreganj having abducted 30/35 Hindus from Dampara confined them in Nikli Thana.

878. P.Ws 1 to 4 are the witnesses of rape as narrated in charge No. 4 and P.Ws 3 and 4 are the victims of rape. P.W1 Badal Chandra Barman stated that while the Razakar accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army having captured Hindus confined them in front of the house of Bonabashi Sutradhar, an aged lady of Dampara village namely Bishi Sutradhar (now dead) came to the detainees and told that the Razakars and the Pakistani army were torturing the female Hindus, and that since the detainees were confined, they were unable to take any step. He also stated that after releasing from the captivity of Razakars, he came back to his house from Nikli Thana and saw his neighbour Kamala Barman [P.W3], Shamala Barman [P.W4], Shubash Rani Sutradhar who were tortured yesterday by the Razakars and the

Pakistani army, and the village doctor Dhirendra Chandra Acharja treated the female victims. In reply to a question put to him by the defence, P.W1 affirmed that while Bishi Sutradhar informed them about the torture of Hindu women only one /two Razakars were present there.

879. As regards the event of rape narrated in charge No.4, P.W2 stated that while the perpetrators confined the Hindus of Dampara including him in front of the house of Banabashi Sutradhar, one Bishi Sutradhar of Dampara came to them and informed that the Pakistani army and the Razakars were destroying the honour of the Hindu women. He also affirmed that while he came back to his house from the captivity of Razakars, he saw his neighbour Kamala Barman [P.W3], Shamala Barman [P.W4] and many other Hindu women who were tortured yesterday by the Razakars and the Pakistani army. The village doctor Dhirendra Nath (now dead) treated the victims who told that the Pakistani army and the Razakars tortured them.

880. P.W 3 Kamala Rani Barman of Dampara village is the victim of rape as narrated in charge No. 4 and she stated that on the same day after noon Shanai Razakar [now dead] along with other Razakars came to her house and the Razakars brutally tortured her and many women of Dampara village including Shamala Barman [PW.4], Shoba Rani Sutradhar, Bhanumati Sutradhar and

consequently they became unconscious. At the time of cross-examination in reply to a question put to her by the defence, she stated that she could not say the name of Razakar who tortured her and the Doctor came to her house after one day of the occurrence and thereafter she regained her sense. She met with Badal Chandra Barman [P.W1] and Badal Chandra Sutradhar [P.W2] one day after the occurrence.

881. P.W 4 Shamala Barman [65] of Dampara village is the victim of rape as narrated in charge No. 4 and she stated that after taking away her husband and father, she stayed alone in her house. After sometimes, Shanai Razakar and other Pakistani army came to her house and tortured her. On the next day at about 11.00 am her neighbour Badal Barman [P.W1], Badal Sutradhar [P.W2], Gopal Sutradhar having brought Bhiru Doctor treated the female victims. She stated that on the day of occurrence, she did not meet with Kamala Rani Barman [P.W3], but affirmed that after one day of the occurrence when she became mentally sound, she met with Kamala Rani Barman. After the occurrence, the doctor treated her in her house. She affirmed that at the time of the occurrence, 2/3 Pakistani army, and the Razakars tortured her, but she could not recognise them.

882. On scrutiny of the evidence of P.Ws 1 to 4 and 6 made relating to the event of abduction, it transpires that at the time of cross-

examination, the defence did not dispute the evidence of P.Ws 1 to 4 made relating to the event of abduction as narrated in charge No. 4. The defence only suggested that they were not confined or they did not see any occurrence or the occurrence did not take place as stated by them. Although by giving suggestion to P.W 6, the defence denied his evidence but failed to bring out any inconsistency or contradiction in his statement made in examination –in-chief. The defence did not dispute the abduction of 39 Hindus from Dampara village. By cross-examining P.Ws 1 to 4 and 6, the defence tried to make out a case that they did not see accused Syed Md. Hussain alias Hossain at the time of occurrence or at the time of occurrence they could not recognise him as they did not see him before the occurrence which has been denied by those witnesses.

883. P.Ws 1 and 2 stated that after confining the Hindus in front of the house of Banabashi Sutradhar, an aged lady Bishi Sutradhar [now dead] came to the detainees and informed that the Razakars and the Pakistani army were torturing the Hindu females of Dampara. In reply to a question put to P.W3 by the defence, she stated that she could not say the name of any Razakar who torture her. During cross-examination, P.W4 affirmed that at the time of occurrence, 2/3 Pakistani army men and Razakars tortured her, but she could not recognise them. In view of the above evidence of P.Ws 1 to 4, I am of the view that the prosecution witness presented to the Tribunal could not recognise the perpetrators who committed

rape upon the Hindu women of Dampara village including P.Ws 3 and 4. The defence by cross-examining P.Ws 3 and 4 affirmed that at the time of occurrence, they along with other women of Dampara village were tortured brutally.

884. On scrutiny of the evidence of P.Ws 1 to 4 it transpires that at the time of cross-examination of P.Ws 3 and 4, the defence denied their statement made in examination –in-chief relating to the event narrated in charge No. 4, but no suggestion was given to them that P.Ws 3 and 4 were not tortured by the Razakars and the Pakistani army. The defence did not dispute the statement of P.Ws 1 and 2 made relating to the event of rape upon Hindu women of Dampara village. The defence by cross-examining P.Ws 1 to 4 could not bring out any inconstancy to their statement made in examination – in-chief. P.Ws 1 to 4 proved beyond reasonable doubt that at the date and time of occurrence the Razakars and the Pakistani army committed rape on the Hindu women of Dampara village.

885. In the case of Jean- Paul Akayesu, the ICTR Trial Chamber defined “rape as a physical invasion of a sexual nature committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which include rape, as any act of sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not

involve penetration or even physical contact.” [Prosecutor vs Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgment dated 02.08.1998, para 688, Trial Chamber]

886. In wartime situation, “the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body..... The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” (Elements of crimes (<https://web.archive.org/web/2008120123345>)).

887. In this respect I recall my earlier observation made in the case of the Chief Prosecutor vs Idris Ali Sardar, ICT-BD Case No.06 of 2015, Judgment dated 05.12.2016 wherein it has been observed that

“The term rape, sexual assault, and sexual violence are often used interchangeably, but there is no universally accepted definition of wartime rape. At the time of War of Liberation in 1971, the top-down policy of the Pakistani army created a culture of impunity. The girls and young women were particularly targeted by the Pakistan army and its auxiliary

force and they committed rape as a tactic of war to humiliate, dominate, instill fear in, disperse forcibly relocate the members of Hindu religious group. The victims of wartime rape are usually civilian women or girls. The purposes of wartime rape are (a).To conquering territory by expelling the population from the country. (b) To eliminating cultural and religious tradition. (c) As a metonymic celebration of territorial acquisition, and (d) For intimidation, humiliation, degradation or destruction of a family.”

888. It is noted that P W 3 and 4 stated that the Razakars and the Pakistani army severely tortured them and they did not say that they were raped. In our conservative society, the rape victims usually used the word “torture instead of rape” and jurisprudentially the words “torture and rape” is also used alternatively.

889. In this respect, I recall my earlier observation made in the case of the Chief Prosecutor vs Idris Ali Sardar, ICT-BD Case No.06 of 2015; Judgment dated 05.12.2016 Para 820 wherein it has been observed that

“As a human being, different people react differently to a given situation or type of situations and there is no clear-cut standard form of human behavioral response when a witness is confronted with a strange or startling or frightful experience. Witnessing crimes in a wartime situation is an unusual experience which elicits different reactions from the witnesses.”

890. The ICTY Trial Chamber in the Case of Prosecutor vs Anto Furundzija, Case No.: IT-95-17/1-T, Dated 10 December 1998 finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

891. On a careful examination of national laws on rape, the ICTY Trial Chamber in the Case of Prosecutor vs Anto Furundzija, Case No.: IT-95-17/1-T, Dated 10 December 1998 has found that-

“Although the laws of many countries specify that rape can only be committed against a woman, others provide that rape can be committed against a victim of either sex. The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ. There are also jurisdictions which interpret the actus reus of rape broadly. The provisions of civil law jurisdictions often use wording open for interpretation by the courts. Furthermore, all jurisdictions surveyed by the Trial Chamber require an

element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless. Some jurisdictions indicate that the force or intimidation can be directed at a third person. Aggravating factors commonly include causing the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.”

892. The ICTY Appeals Chamber in the Case of Prosecutor vs Anto Furundzija, Case No.: IT-95-17/1-T, Dated 21 July 2000 has affirmed the above view of Trial Chamber and observed that-

“It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”

893. The defence suggested to P.W3 that she deposed falsely as tutored by others to be financially benefited which has been denied by P.W3. Although by giving suggestion to P.W 3, the defence denied her statement made in examination-in-chief relating to the event narrated in charge No. 4, but did not dispute the events narrated in charge No.4 and by cross-examining P.W3, the defence

affirmed that after one day of the torture by the Razakars while doctor came to her house, she regained her sense and she also affirmed that P.W3 was tortured by the Razakars. The defence suggested to P.W4 that occurrence did not take place as stated by her or she was not tortured which has been denied by P.W4, but it transpires that by cross-examining P.W4 the defence affirmed that after one day of the occurrence, she met with Kamala Rani Barman [P.W3] and doctor also came to her house after one day of the occurrence and thereby the defence admitted that P.W 4 was tortured.

894. Jurisprudentially, all international crimes are a group or organised crimes and many perpetrators participate in different phases of the occurrence. It is not required that all the perpetrators took part in all the phases of the events. It is proved beyond reasonable doubt that under the leaderships of Razakar Commander accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army forming part of a criminal enterprise sharing the common criminal intent of all to commit crimes attacked the Dampara bazaar, Nobipur and Dampara village and the same group of Razakars and the Pakistani army men committed rape upon the Hindu women of Dampara. Accused Syed Md. Hussain alias Hossain accompanied and lead the group of perpetrators who committed the offence of rape. He substantially abetted and contributed to the commission of rape upon Hindu women of

Dhampara. Thus accused Razakar Commander Syed Md. Hussain alias Hossain is equally liable for committing rape upon the Hindu women of Dampara village.

895. In this respect, I recall my earlier observation made in the case of the Chief Prosecutor Vs Idris Ali Sardar, ICT –BD Case No. 06 of 2015, Judgment dated 05.12.2016 para **850** wherein it has been observed that-

”The offence narrated in charge No. 3 was committed in a wartime situation and crimes against humanity are an organized or group crime. It is not required that the perpetrators himself committed the offence. The mere presence of the accused at the crime site along with the group of perpetrators sharing the common criminal intent to commit the crime is sufficient to bring the accused within the criminal net. Even, the presence of the perpetrators at the crime site is not required to find the accused liable under Section 4(1) of the Act of 1973.”

896. In section 3(2)(a) of the Act of 1973 the legislature included the offences of “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” in the offence of crimes against humanity. At the time of enactment of the Act of 1973, the legislature included

the offence of “rape” in the category of the offence of crimes against humanity and “causing serious bodily or mental harm to members of the groups” has been included in the offence of genocide. At the time of legislation, the legislature was well aware of those offences which are distinct offence. The application of the Penal Code has not been excluded in the proceeding of this Tribunal. In the Act of 1973, the term “rape” has not been defined for which in the absence of any definition of rape, the definition of rape given in the Penal Code may be taken in aid.

897. In this respect, I recall the observation of our Apex Court made in the case of Abdul Quader Molla, reported in 22 BLT (AD) 8, Para 143, wherein Mr. Justice Surendra Kumar Sinha, as his Lordship was then, who delivered the unique majority view as regards applicability of the Penal Code observed in the following language;

“True, in the Act, 1973 the offences of ‘Crimes against Humanity’ ‘genocide’ and ‘war crimes’ have not been defined. In offence of Crimes against Humanity, some offences like rape, murder, abduction, confinement, extermination, enslavement etc. have been included, of them, the appellant was in fact tried and convicted for murder and rape. Similarly in respect of ‘genocide’ and ‘war crimes,’ some offences have been included as constituents of those crimes but the appellant has not been tried in respect of those offences. In the absence of a definition of those crimes, we are unable to follow the definition given in the Rome Statute

as submitted by the learned Counsel for the appellant. The offences of murder and rape mentioned in the Act have been defined in our Penal Code and the definition of those offences given in the Penal Code may be taken in aid since this Code has not been excluded by the Act. Besides, almost all laws prevailing in our country are codified laws, these laws have been promulgated following the concepts, principles, rules and traditions of English Common Law, or in the alternative, it may be said that the concepts, principles, rules and traditions of English Common Law, have penetrated into our jurisprudence and the fabric of our judicial system. The definitions given in respect of these offences in those laws are identical. Therefore, there is no bar to taking the definitions of those laws mentioned in Act, 1973.”

898. In the Case of the Prosecutor vs. **Jean-Paul Akayesu, ICTR-96-4-T**, the ICTR **Trial Chamber I** without arriving its own finding as regards the “causing serious bodily or mental harm to members of the groups” in Para 503 quoted the observation made in the Adolf Eichmann’s case who was convicted for crimes of genocide against the Jewish people under another legal definition wherein the District Court of Jerusalem stated in its judgment of 12 December 1961 that-

“serious bodily or mental harm to members of the group can be caused by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their

degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture”

899. In this respect, I recall my earlier observation made in the Case of Chief Prosecutor vs Idris Ali Sardar, ICT –BD Case No 06 of 2015, Judgment dated 5 .12.2016, Para 824 wherein it has been observed that-

“Abduction, confinement, torture, rape and other inhuman acts” are distinct offences and in Section 3(2)(a) of the Act of 1973, those offences have been included in the offence of crimes against humanity. Since the Legislature included those offences in crimes against humanity, there is no scope to merge those offences with genocide. The duty of this Tribunal is only to adjudicate the charges framed against the accused in accordance with the Act of 1973, not to legislate as per its own wisdom. “

900. In the case of the Prosecutor -vs. - Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, at Para 2580, The ICC Trial Chamber after careful analysis of the evidence as regards the elements of causing serious mental or bodily harm to the members of the group observed that

”the Chamber found that a large number of Bosnian Muslims and Bosnian Croats were subjected to cruel treatment, including torture, beatings, as well as physical and psychological abuse. ...The Chamber also found that prominent Bosnian Muslims and

Bosnian Croats, including professionals and leaders, were targeted for such treatment. Following these acts, the Chamber found that many detainees bore serious injuries, had visible wounds, were unable to walk or talk for days, and suffered long-term psychological and physical effects. These acts were found to cause serious mental or physical suffering or injury.”

901. Both the Tribunals constituted under section 3 of the Act of 1973 consistently adjudicated the offence “rape” as crimes against humanity and the majority members of this Tribunal in the case of the Chief Prosecutor Vs Idris Ali Sardar, ICT-BD Case No.06 of 2015 adjudicated the offence “rape” as genocide without following the principles settled by both the Tribunal.

902. As regards the event of confinement, torture and killing of the Hindus as narrated in charge No. 4, P.W1 Badal Chandra Barman stated that after one hour of their confinement in Nikli Thana, the Razakars tied 35 detainees with rope and by beating with sticks and thrusting with bayonets injured them and the Razakars and the Pakistani army took away the injured detainees from Nikli Thana by boat and the 4 (four) minor detainees were locked up in the Police Station. After half an hour, he heard the sound of gunshots and after one hour of the gunshots, Razakars and the Pakistani army who took the detainees from Nikli Thana by boat came back at Nikli Police Station and were discussing

amongst themselves that the detainees who were taken by boat, had been gunned down to death at the cremation ghat and after returning to their house, they went to the house of Kamini Barman (now dead) and saw him out of 35 detainees who were shot at the cremation ghat. In reply to a question put to P.W1 by the defence, he affirmed that at about 8.00 pm the 35 detainees were tied at the corridor of Thana.

903. Regarding the confinement, torture and killing of detainees who were confined in Nikli Thana, P.W2 Badal Chandra Sutradhar stated that after confining the detainees in Nikli Thana at the order of Razakar Commander accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army tied 35 detainees by rope at the corridor of Nikli Police Station except 4 (four) minor detainees. Since four detainees were under aged, the Razakars instructed them to sit under a jackfruit tree in front of Nikli Police Station. The Razakars and the Pakistani army by beating 35 detainees with sticks and thrusting with bayonets injured them. Thereafter the Razakars and the Pakistani army took away 35 detainees by a boat from Thana and at about 8/ 8.30 pm, he heard the sound of gunshots and after one hour of gunshots, Razakar Commander Syed Md. Hussain alias Hossain along with other Razakars and the Pakistani army came back at Nikli Police Station and were discussing amongst themselves that they had gunned down 35 male Hindus to death. After returning to his house, P.W 2

heard that amongst the 35 detainees who were taken away from Nikli Thana by boat to kill, Kamini Barman [now dead] was injured sustaining gunshot but by swimming across the river and came back to his house. He also heard that the Razakars and the Pakistani army threw the dead bodies of 34 detainees in the Ghorautra River. In reply to a question put to him by the defence, he affirmed that at the time of occurrence he saw accused Syed Md. Hussain alias Hossain at the place of occurrence, but before and after that he did not see him. He could not say the name of other Razakars who came at the place and time of occurrence except accused Syed Md. Hussain alias Hossain. Thus the defence by cross-examining P.W 2 affirmed that P.W 2 recognized the accused person as the perpetrator of the crimes narrated in charge No. 4.

904. As regards the killing of Hindus who were abducted from Dampara village and confined in Nikli Thana, P.W3 Kamala Rani Barman stated that after abducting the detainees, on the next day at about 10.00 am Badal Sutradhar [P.W2], Badal Barman[P.W1], Gopal Sutradhar(now dead) and Sonu Barman(now dead) came to her house and by bringing a doctor treated them. P.W3 came to know from the above 4(four) persons that her husband, her father and father-in-law who were abducted from the house of Bonabashi Sutradhar, all of them were gunned down to death at Nikli cremation ghat. P.W 4 Shamala Barman stated that after abducting the detainees, on the next day at about 11.00 am her neighbour

Badal Barman [P.W1], Badal Sutradhar [P.W2], Gopal Sutradhar having brought Bhiru Doctor treated the female victims. She came to know from them that her husband and father, who were abducted yesterday, had been gunned down to death at Nikli cremation ghat.

905. P.W 6 Md. Taher Ali stated that after confining the detainees, the Razakars became active. At that time, he came back to his house. At about 8/8:30 pm on that day, he heard the sound of heavy gunshots from the cremation ghat which was situated to the north-west side of their house and also heard the scream of the victims. On 7th Ashwin at 7/8 am, he along with many others went to cremation ghat and saw 34 dead bodies. He claimed that 30/35 Hindus who were abducted from Dampara area and confined in Nikli Thana were gunned down to death at cremation ghat and before the occurrence he knew 2/3 of them. He also stated that while he was present at Nikli Bazaar at about 2.00 pm on that date, Raisuddin (now dead) and Babar Ali (now dead) informed him that they had taken away 34 dead bodies from cremation ghat by boat and had thrown down those dead bodies in the Ghurautra River.

906. As regards the religious group identity of the victims who were gunned down to death at cremation ghat, P.W1 Badal Chandra Barman stated that he could identify Bonabashi Sutradhar, Sunil Sutradhar, Anil Sutradhar, Madhu Sutradhar, Surendra Sutradhar, Abinash Sutradhar, Aradhan Sutradhar, Kartik Sutradhar, Sudhir

Sutradhar, Monindra Sutradhar, Shirish Sutradhar, Razani Barman of Dampara village amongst the 34 detainees who were gunned down to death at the cremation ghat. P.W 2 Badal Chandra Sutradhar stated that he could identify his father Aradan Sutradhar, his elder brother Kartik Sutradhar, his paternal cousin Shudir Sutradhar, Monindra Sutradhar, Shirish Sutradhar and maternal cousins Shukumar Sutradhar and Moin Sutradhar, his brother-in-law Madhu Sutradhar and nephew Khitish Sutradhar, Nitis Sutradhar and Sures Sutradhar amongst 35 detainees. He also stated that after returning to his house from the captivity, he heard that amongst the 35 detainees who were taken by boat to kill, Kamini Barman [now dead] was injured sustaining gunshot and by swimming across the river and came back.

907. Regarding the religious group identity of the victims, P.W 3 Kamala Rani Barman claimed that he heard from four minor detainees who on the next day came back from the captivity of Razakars and Pakistani army that her husband, father, father-in-law and other detainees who were abducted from the in front of the house of Bonabashi Sutradhar were gunned down to death at cremation ghat. P.W4 Shamala Barman stated that she came to know from the minor detainees who on the next day came to their house that her husband and father who were abducted yesterday, had been gunned down to death at Nikli cremation ghat. P.W6 Md. Taher Ali of Kamarhati village stated that on 6th Bangla month

Ashwin in 1971 before evening he was present at Nikli Bazaar which was situated adjacent to Nikli Thana and saw that the Razakars having abducted 35 Hindus, who at that time were wearing caps, confined them in Nikli Thana and on the next day saw the dead bodies of 34 Hindus at cremation ghat. On the evaluation of the evidence of the P.Ws 1 to 4 and 6 it reveals that all the victims who were abducted from Dampara and confined in Nikli Thana Sadar and subsequently gunned down to death at the cremation ghat are Hindu, a religious group, which attracts the provision of section 3(2)(c)(i) of the Act of 1973.

908. As regards the identification of the perpetrators of the crimes narrated in charge No. 4, P.W1 Badal Chandra Barman stated that in the first part of Bangla month Vadhra in 1971 while Teku Chairman along with his cohort Razakars came to forcefully convert the Hindus of Dampara, he told that accused Syed Md. Hussain alias Hossain, Razakar Commander of Nikli Thana instructed them to forcefully convert the Hindus of Dampara to Muslim and subsequently on 6th Bangla month Ashwin in 1971 while along with army attacked his Dampara village he saw and recognised accused Syed Md. Hussain alias Hossain. He also stated that on the next day of killing the detainees, at 9/10.00 am one Major of the Pakistani army and the Razakar accused Syed Md. Hussain alias Hossain came to them in Nikli Thana and released them. P.W 2 Badal Chandra Sutradhar stated that in the first part of

Bangla month Vadhra in 1971 while Teku Chairman and other Razakars came at Dampara to forcefully convert the Hindus to Muslim he told the Hindus of Dampara that Razakar Commander Syed Md. Hussain alias Hossain instructed them to convert the Hindus to Muslim. Subsequently on 6th Bangla month Ashwin in 1971, at the time of abducting the Hindus of Dampara, he saw accused Syed Md. Hussain alias Hossain at Dampara and P.W2 also saw him while he was confined in Nikli Thana. During cross-examination of P.W2, in reply to a question put to him by the defence, P.W2 affirmed that accused Syed Md. Hussain alias Hossain was a Razakar Commander and he could only recognise accused Syed Md. Hussain alias Hossain at the place of occurrence and in 1971 he was a Police Officer. The defence by cross-examining P.W2 affirmed that at the time of occurrence he recognized accused Syed Md. Hussain alias Hossain as perpetrator of the crimes narrated in charge No.4.

909. P.Ws 3 and 4 stated that they heard the name of accused Syed Md. Hussain alias Hossain, but did not see him. P. W. 6 Md. Taher Ali was a local of Nikli Thana Sadar and at the relevant time, he saw accused Syed Md. Hussain alias Hossain at Nikli Thana area. P.W6 stated that accused Syed Md. Hussain alias Hossain was the Commander of Razakars who confined the Hindus of Dampara in Nikli Thana. He also claimed that under the leadership of accused

person, local Razakar Ashraf Ali used to recruit and trained the Razakars in the Eidgah Math.

910. On the evaluation of the evidence of the P.Ws 1,2,3,4 and 6 it reveals that P.Ws 1 to 4 and 6 were well aware of the accused Syed Md. Hussain alias Hossain before the occurrence happened and reason was that before the occurrence as narrated in charge No. 4, at his instruction, local Sanai Razakar and Teku Chairman, Chairman of the local Peace Committee forcefully converted the Hindus of Dampara including P.Ws 1 to 4 to Muslim and the Hindus of Dampara village were the special target of accused person and his cohort Razakars. P.W6 claimed that before the occurrence he saw accused Syed Md. Hussain alias Hossain at Nikli Thana. It appears that Madhya Dampara village was a Hindu populated area and the Hindus of Dampara were terrified by the accused person and his cohort Razakars before the occurrence as narrated in charge No. 4. Exhibit 12 series, exhibits 13 and 15 also corroborated the evidence of P.Ws 1 to 4 and 6. In view of the above evidence, I am of the view that P.Ws 1, 2 and 6 correctly recognised the accused Syed Md. Hussain alias Hossain at the time of occurrence as perpetrator of the crimes as narrated in charge No. 4.

911. On appraisal of the evidence of P.Ws 1 to 4 and 6, it transpires that P.Ws 1 to 4 and 6 are the witnesses of the abduction of about

39 Hindus, and P.Ws 1,2 and 6 are also the witnesses of confinement. P.Ws 1 and 2 are the witnesses of torture of the victims who were confined in Nikli Thana and there is no direct witness to the event of killing 34 Hindus of Dampara village. The Hindus were gunned down to death at cremation ghat at night in a wartime situation and while the Razakars and the Pakistani army men killed 34 Hindus at cremation ghat they confined the four minor detainees in Nikli Thana, and Kamini Barman who was taken away along with other Hindus from Nikli Thana to cremation ghat for killing, escaped sustaining gunshot injury on his hand, is now dead. Gopal Sutradhar and Sunil Burman, two minor victims, who were abducted along with P Ws 1 and 2 are also now dead. Although there is no direct witness of killing 34 Hindus, but the killing is the outcome of the abduction.

912. P.Ws 1 and 2 stated that Madhya Dampara of Dampara village was a Hindu inhabited area and only the Hindus used to reside there. The perpetrators did not cause any harm to any Muslim. In view of the above evidence, it is legally inferred that accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army men had the special intent to destroy the Hindus of Dampara village, in whole or in part, for which the perpetrators only abducted the Hindus of Dampara and subsequently killed them which attracts the threshold of genocide.

913. During cross-examination, the defence suggested that P.W 1 was not confined and no occurrence took place as stated by him, which has been denied by P.W1 but by cross-examining P.W1, the defence affirmed that at about 8.00 pm the 35 detainees were tied at the corridor of Nikli Thana and the defence did not dispute the statement of P.W1 as regards the abduction, rape, torture, confinement and killing of 34 Hindus and by cross-examining P.W1, the defence totally failed to bring out any inconsistency to his statement made in examination-in-chief.

914. At the time of cross-examination of P.W2, the defence suggested that he was not confined or he did not see any occurrence or occurrence did not take place as stated by him which has been denied by P.W2. By cross-examining P.W 2, the defence affirmed that at the time of occurrence, P.W2 recognised accused Syed Md. Hussain alias Hossain who along with the army and the Razakars having captured 10/12 persons from Dampara village confined them in front of the house of Banabashi Sutradhar of Dampara and about 27 persons including P.W2 were captured from Madhya Dampara. The defence did not dispute the statement of P.W2 made as regards the abduction, rape, confinement, torture and killing narrated in charge No.4 and also failed to bring out any contradiction or inconsistency to his statement made in examination –in-chief.

915. P.W 6 Md. Taher Ali is a very important witness to the event of abduction, confinement and killing as narrated in charge No.4. During cross-examination of P.W 6, the defence suggested that he deposed falsely as tortured by others to be financially benefited which has been denied by him. By giving suggestion to P.W 6, the defence denied his statement made in examination-in-chief but did not dispute the evidence of P.W6. P.W6 Md. Taher Ali stated that on 6th Bangla month Ashwin in 1971 at about 8:30 pm he heard the sound of heavy gunshots from the cremation ghat which was situated to the west side of their house and also heard the sound of the screams of the victims. On 7th Ashwin in 1971 at 7/8 am, he along with many others went to cremation ghat and saw 34 dead bodies were lying there. He also stated that 30/35 Hindus who were abducted yesterday from Dampara and confined in Nikli Thana were gunned down to death at cremation ghat. During cross-examination in reply to a question put to him by the defence, he stated that the cremation ghat was situated to the 300 yard west-north side from his house. Thus by cross-examining P.W6, the defence affirmed that it was possible to hear the sound of gunshots and screams of the victims from the house of P.W 6.

916. On scrutiny of the evidence of P.Ws 1 to 4 and 6 it reveals that P.Ws1 and 2 are the victims of the event of abduction and confinement narrated in charge No.4. P.W2 is the son of Martyr Haradhan Sutradhar and brother of Kartik Sutradhar and his nine

close relations were abducted along with him, and subsequently gunned down to death at the cremation ghat which was situated 300 yards far from the house of P.W6. P.W3 is the victim of the event of rape narrated in charge No. 4. Razakars and the Pakistani army men also abducted her husband Jatindra Chandra Barman, her father Avi Chandra Barman and father-in-law Jagindra Chandra Barman along with other Hindus who were abducted from Dampara village and gunned down to death at cremation ghat. P.W4 is the victim of rape and wife of Martyr Avoy Chandra Barman and daughter of Martyr Rashik Chandra Barman who were abducted along with other Hindus from Dampara village and subsequently gunned down to death at cremation ghat. By cross-examining P.Ws 1 to 4 and 6, the defence could not bring out any inconsistency to their statement made in examination-in-chief. I do not find any reason to disbelieve their evidence and they narrated the true picture of the events narrated in charge No. 4 and their evidence inspires confidences to find the accused Syed Md. Hussain alias Hossain guilty of the offence as narrated in charge No.4.

917.It may be mentioned here that at the time of Great War of Liberation in 1971, the Hindus of Bangladesh were the special target of the Pakistani occupation army and its auxiliary forces and they have decided to destroy the Hindu religious group in whole and the events narrated in charge No. 4 is one of the example of the horrific acts of the Pakistani army and the

Razakars committed upon the Hindus of Bangladesh. In this respect, it is very pertinent to quote the report of Senator Edward Kennedy who in the summary of his report dated November 1, 1971 submitted to the U.S. Government mentioned that

“the countless eye-witnesses, journalistic accounts, reports of international agencies such as the World Bank and additional information available to the subcommittee document the reign of terror which grips East Bengal (East Pakistan). Hardest hit has been done to the members of the Hindu community who have been robbed of their lands and shops, systematically slaughtered, and in some places, painted with yellow patches marked “H.” All of this has been officially sanctioned, ordered and implemented under martial law from Islamabad.”

918. B.N. Mehrish in War Crimes and Genocide at page 173 para-33 stated that “What has happened in Bangladesh is nothing short of genocide. If what Hitler did in Germany and Poland was an example of racial genocide, if the tragedy of Jallianwala Bagh was an example of colonial genocide by the use of armed might, what happened in Bangladesh was no less a case of cultural and political genocide on a scale unknown to history. The whole of Bangladesh became truly a Jallianwala Bagh, hallowed and sanctified by the blood of patriotic martyrs and innocent defenseless people; whose only fault was that they were somewhat different than those who came to rule them from Pakistan. If Bangladesh has survived the onslaught and has been able to confine more than three divisions of

Pakistan's Army to cantonments and towns, it is because the people of Bangladesh, who laid down their lives at the altar of freedom to pay the price of liberty in the coin of blood and sufferings and did not permit the Pakistani troops to clamp colonial rule on the 75 million people of Bangladesh.”

919. Under Section 3(2) (c) of the Act of 1973, the main essence of the crime of genocide is “intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group”. It is not required that the perpetrators committed the offence in a broad geographical area. If the prosecution proved that the perpetrators killed a considerable number of victims or at least a substantial part of the group in a limited geographical area with the intent to destroy the group, in whole or in part, the offence will attract the provision of section 3(2)(c)(i) of the Act of 1973. In the instant case in hand, the perpetrators of the crime attacked the Dampara Bazaar, Dampara and Nobinpur villages, a limited geographical area, and having captured 39 Hindus with intent to destroy the Hindu religious group, in whole or in part, killed 34 Hindus, substantial number of Hindus, and as such covered by Section 3(2) (c)(i) of the Act of 1973.

920. The definition of genocide provided in the CPPCG is reproduced verbatim in the Act of 1973 except the words “political group”, Article 6 of the Rome Statute of the International Criminal

Court (ICC), Article 4 of the Statute of the International Tribunal for the Former Yugoslavia (ICTY) and Article 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) are the replica of the definition of genocide as provided in the CPPCG. The offence of genocide can be perpetrated only against individuals properly classified as belonging to national, ethnic, racial, or religious groups. Group status is not always an easy question to answer. The first trial on genocide was held by ICTR in the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 545, wherein the ICTR, Trial Chamber I interpreted the genocidal intent of accused to destroy the protected group and observed that;

“On the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”

921. In the case of the Prosecutor versus Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated: 02 September 1998, para 545, the ICTR Trial Chamber I considered special intent of the perpetrators as element of the crime of genocide and observed that

“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. The special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

922. Subsequently, in the Case of Bagosora, the ICTR affirmed the above view and held that -

“The perpetrator must act with the intent to destroy at least a substantial part of the group”. [Case No. ICTR-98-41, Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, ICTR Trial Chamber, December 18, 2008, Para 2115] “In part’ required the intention to destroy to considerable of individuals who are part of the group.” [Kayishema and Razindana, Trial Chamber, May 21, 1999, Para.97, Case No. ICTR-95-1]

923. In the Case of Prosecutor vs Rutaganda, Case No. ICTR-96-3, 156, Judgment dated December 6, 1999, ICTR Trial Chamber held that

“The concepts of national, ethnical, racial and religious groups have been researched extensively and ... at present,

there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social, and cultural context.”

924. The ICTY Trial Chamber in the Case of Jelisić considered that to constitute an offence of genocide it is not necessary that the perpetrators committed the offence in a broad geographical region and held that -

“It is accepted that genocide may be perpetrated in a limited geographic zone. The geographical zone in which an attempt to eliminate the group is made may be limited to the size of a region or.....a municipality.” [Case No. IT-95-10, Jelisić Trial Judgment dated December 14, 1999, Para 83, ICTY Trial Chamber]

925. The offence of genocide distinguishes itself from other international crimes by protecting a group as mentioned in Section 3(2)(c) of the Act of 1973. It is not the victim in his individual capacity but as a member of a certain group that determines the crime of genocide. In the case of the Prosecutor vs. Musema, Case No. ICTR-96-13-A, Trial Judgment 27 January 2000, Para 165 the ICTR Trial Chamber held that “the victim of the crime of genocide is, therefore, the group itself and not the individual alone; the individual is just an element of the group.” Furthermore; the victim is singled out not by reason of his individual identity, but

rather on account of his being a member of a national, ethnical, racial or religious or political group.

926. In the case of Prosecutor vs. Radislav Krstic, Judgment dated 02.08.2001, Case No. IT-98-33-T, Trial Chamber, ICTY interpreted the notion “protected group” and opined that “National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous... The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the second world war, as ‘national minorities,’ rather than to refer to several distinct prototypes of human groups.”

927. In the Case of the Prosecutor vs. Stakic, Case No. IT-97-24-A, Appeals Judgment (22 March 2006), Para 20, the ICTY explained the importance of the group identity of the victims of the crimes of genocide and opined that;

“Article 4(...) defines genocide as one of the several acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group as such.’ The term “as such” has great significance, for it shows that the offense requires intent to destroy a collection of people who have a particular group identity.”

928. “Intent to destroy, in whole or in part” of the protected group is the main essence of the Act of 1973, CPPCG, Statute of ICTR, Statute of ICTY and ICC. The ICTR made a significant role in developing the jurisprudence of the law on “genocide” and in the case of Muvunyi held that –

“At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group, regardless of the number of victims actually involved” and further emphasized that “an accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.” [Muvunyi, ICTR Trial Chamber, September 12, 2006, Para.479, Case No. 2000, 55-A-T].

929. In the Case of Muhimana, the ICTR Trial Chamber emphasized that “complete annihilation of a group” is not the essence of the crimes of genocide and observed that

“In proving the intent to destroy ‘in whole or in part,’ it is not necessary for the prosecution to establish that the perpetrator intended to achieve the complete annihilation of a group.” [Muhimana, ICTR Trial Chamber, April 28, 2005, Para.498, ICTR Case No. 95-1B-T]

930. Subsequently, in the Case of Seromba, the ICTR reiterated the above view made in Muhimana and held that –

“To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world...”[Seromba,

ICTR Trial Chamber, December 13, 2006, Para 319, ICTR-2001-66-1]

931. On scrutiny of the provision contained in CPPCG, the ICTY Trial Chamber in the case of Prosecutor vs. Radislav Krstic, Judgment dated 02.08.2001, Case No. IT-98-33-T, Para 585 observed that

“The Genocide Convention itself provides no indication of what constitutes intent to destroy “in part”. The preparatory work offers few indications either. The draft Convention submitted by the Secretary-General observes that “the systematic destruction even of a fraction of a group of human beings constitutes an exceptionally heinous crime”. Early commentaries on the Genocide Convention opined that the matter of what was substantial fell within the ambit of the judges’ discretionary evaluation. Nehemiah Robinson was of the view that the intent to destroy could pertain to only a region or even a local community if the number of persons targeted was substantial. Pieter Drost remarked that any systematic destruction of a fraction of a protected group constituted genocide.”

932. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 551, the ICC Trial Chamber considered the “intent” of the notion “genocide” and held that

“The specific intent to destroy the group “as such” makes genocide an exceptionally grave crime and

distinguishes it from other serious crimes, such as persecutions as a crime against humanity. The term “as such” has great significance as it shows that the crime of genocide requires intent to destroy a collection of people because of their particular group identity based on nationality, race, ethnicity, or religion. “

933. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 555, the ICC Trial Chamber further observed that “ it is well established that where a conviction for genocide relies on the intent to destroy a group “in part”, such part must be a substantial part of the whole protected group. The targeted portion must be a “significant enough portion to have an impact on the group as a whole”. The Krstic Appeal Chamber stated that in determining substantiality, the following considerations can be made:

“The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group or is essential to its survival that may support a finding that the part qualifies as substantial within the meaning of Article 4.”

934. The ICTY Trial Chamber in the Case of Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-T Judgment of 12 December 2012, Para 749 interpreted the term “in whole or in part” and observed that –

“The term “in whole or in part”, relates to the requirement that the perpetrator intended to destroy at least a substantial part of a protected group. While there is no numeric threshold of victims required, the targeted portion must comprise a “significant enough [portion] to have an impact on the group as a whole”. Although the numerosity of the targeted portion in absolute terms is relevant to its substantiality, this is not dispositive; other relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion, and whether the targeted portion of the group is “emblematic of the overall group, or is essential to its survival”, as well as the area of the perpetrators’ activity, control, and reach.”

935. In the case of the Prosecutor -vs- Radovan Karadzic, Case No. IT-95-5/18-T, Judgment dated 24.03.2016, Para 550, the ICC Trial Chamber also emphasized on the cumulative assessment of the evidence in arriving at a correct decision as regards genocidal intent of the perpetrators and held that”

“in assessing evidence of genocidal intent, a Chamber should consider whether “all of the evidence, taken together, demonstrates a genocidal mental state”, instead of considering separately whether an accused

intended to destroy a protected group through each of the relevant acts of genocide. Where direct evidence of genocidal intent is absent, the intent may still be inferred from all the facts and circumstances. Factors relevant to this analysis may include but are not limited to the general context, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy. Display of intent through public speeches or in meetings may also support an inference as to the requisite specific intent. “

936. On a careful appraisal of the evidence it is found that the perpetrators committed rape upon the Hindu women of Dampara village and except rape they did not cause any other form of torture or cruel treatment to the Hindu women of Dampara village which proved that the perpetrators had the intent only to commit rape upon Hindu women of Dampara village. Mere commission of rape upon members of any protected group will not attract the threshold of the offence of genocide. Evidence presented to the Tribunal suggest that the accused person and other perpetrators had the special intent to destroy the Hindu religious group in part and by killing members of the Hindu religious group, they implemented the top-down policy of the Pakistani occupation army and committed the offence of genocide.

937. In view of the above evidence, facts and circumstances of the case, the proposition of law and the finding it is proved beyond all

reasonable doubt that on 23.9.1971 at about 2/2.30 pm accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army forming part of a criminal enterprise sharing the common criminal intent of all to commit the crimes having attacked Dampara Bazaar, Dampara and Nobinpur villages captured 39 Hindus and confined them in front of the house of Banabashi Sutradhar of Dampara village and the Razakars and the Pakistani army committed rape upon the Hindu women of Dampara village including P.Ws 3 and 4. On the same day in the evening, the same group of perpetrators, in the same manner, having abducted 39 Hindus including P.Ws 1 and 2 confined them in Nikli Thana and inhumanely tortured 35 Hindus except four minor detainees and at about 8.00 pm on that day the accused Syed Md. Hussain alias Hossain, his cohort Razakars and the Pakistani army men with intent to destroy the Hindu religious group, in whole or in part, having taken away 35 Hindu detainees except P. Ws. 1,2, Gopal Sutradhar (now dead) and Sunil Sutradhar [now dead] from Nikli Thana to Nikli cremation ghat gunned down 34 detainees to death except Kamini Barman [now dead] and on the next day dumped the dead bodies of those victims in the Ghurautra River. Accused Razakar Commander Syed Md. Hussain alias Hossain directly participated in committing all the offences narrated in charge No.4 except rape.

938. Thus the prosecution witnesses presented to the Tribunal proved the instant charge against accused Syed Md. Hussain alias Hossain beyond all reasonable doubt and he is criminally responsible for participating, facilitating and complicity to the commission of the offences of genocide and abduction, confinement, torture, and abetted and had complicity in committing the offence of rape as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the Act of 1973 which is punishable under section 20(2) of the said Act.

Charge No. 05

[Abduction and murder of freedom fighter Abdul Malek of village Purbogram under Nikli Police Station]

939. That on 19 October in 1971 in the afternoon freedom-fighter Abdul Malek being unarmed went to his house situated at village Purbagram under Nikli Police Station of the then Kishoreganj Sub-Division to meet his wife and children. Being informed about Abdul Malek's presence at his house and upon instruction of accused Razakar Commander Syed Md. Hussain alias Hossain, accused Razakar Md. Moslem Prodhan along with 4/5 Razakars having captured the freedom-fighter Abdul Malek from his house on that day at about 05.30 P.M. took away him in front of the house of Debendra Chandra Nath [now dead] and upon instruction of accused Syed Md. Hussain alias Hossain, accused Md. Moslem Prodhan shot him [Abdul Malek] to death there. On the following

day [20.10.1971] the dead body of Abdul Malek was buried in his uncle -in-law, Abdur-Rahim Peon's [now dead] house at Gurui village.

940. Thereby, (1) accused Syed Md. Hussain alias Hossain, and (2) accused Md. Moslem Prodhan have been charged with participating, abetting, facilitating and complicity in the commission of offences of murder and abduction as crimes against humanity as part of a systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act for which the accused persons have incurred liability under section 4(1) and 4(2) of the Act.

941. To prove the event of abduction and murder as crimes against humanity as narrated in charge No.5, the prosecution examined P.Ws 5, 7, 9, 10, 11, 13 and 14 and on behalf of accused Md. Muslem Prodhan, the defence examined D.W 1 Md. Din Islam Bachchu[46], son of accused Md. Moslem Prodhan and the prosecution declined to cross-examine him.

942. P.W5 Abdul Hamid [66] of Cetra village was aged about 16/17 years at the time of War of Liberation in 1971. Now he is a retired School teacher. In 1971 he used to live in his Cetra village and at that time he took part in the War of Liberation along with the Basu Bahini. The head of Basu Bahini was Abdul Motaleb @ Basu. He stated that on 19.10.1971 he came to know that at the

order of Razakar Commander Syed Md. Hussain alias Hossain, Razakar Commander Md. Moslem Prodhan killed unarmed freedom fighter Abdul Malek of Purba Gao village of Nikli Thana in front of the house of Debendra Nath and hearing this information he and others communicated with the freedom fighters of the Kubra Bahini. On the same day in the evening, the freedom fighter of Basu Bahini and Kubra Bahini jointly attacked Nikli Thana Sadar and failing to protect the Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort Razakars fled away from Nikli Thana at night. Thus Nikli Thana Sadar became free of enemy. On the next day, he and other freedom fighters hoisted the flag of independent Bangladesh at Nikli Thana. He also stated that he along with the relation of Martyr Malek and other freedom fighters took the dead body of Martyr Abdul Malek at Uttarpara graveyard of Gurui village and buried there.

943. During cross-examination of P.W5, he stated that at about 3.00 pm while he was present at Hilucia village, he heard the information about the killing of freedom fighter Abdul Malek, but he could not say the exact time of the killing and Nikli Thana Sadar was situated about 6/7 kilometers far from Hilucia. During cross-examination of P.W5, the defence suggested that freedom fighter Abdul Malek was killed at the time of battle which has been denied by him.

944. P.W 7 Md. Ichab Ali [66] of Gurui East Para village stated that he used to reside at his Gurui village in 1971 which was situated to the west side near Nerajuri haor(wetland). In 1971 he took part in the War of Liberation under the leadership of freedom fighter Abdul Motaleb alias Basu. As regards the killing of freedom fighter Abdul Malek, he stated that on the next day of Gurui battle in the evening he got information that the accused persons along with their cohort Razakars having abducted unarmed freedom fighter Abdul Malek from his house took away him to Nikli Thana Sadar and gunned down him to death and after getting the information, the Commander of Basu Bahini instructed them to attack Nikli and on that day in the evening, the freedom fighters of Basu Bahini and Kubra Bahini jointly attacked Nikli Thana Sadar and during attack, one point of time the Razakars fled away. On the next day in the morning, the freedom fighters hoisted the flag of independent Bangladesh at Nikli and having taken the dead body of Abdul Malek from Nikli buried his dead body at Gurui village.

945. P.W 9 Rabeya Akter, wife of Martyr Abdul Malek, of Nikli Purbagram village used to reside in the house of her husband at Nikli Purbagram village. Her husband was an employee of Telephone Department in 1971. She claimed that after initiating the War of Liberation in 1971, her husband went to India to take training and after taking training he joined the War of Liberation as

a freedom fighter of Kubra Bahini under the leadership of Motiar Rahman. In 1971 on first Bangla month Kartik in the morning her husband Abdul Malek took part in Nikli Thana Sadar Battle against the Razakars which continued till noon. At about noon, the members of Kubra Bahini took shelter to the east side of the river situated to the east side of Nikli Thana Sadar.

946. As regards the event of abduction and murder of freedom fighter Abdul Malek, she stated that on first Bangla month Kartik in 1971 in the afternoon, her husband Abdul Malek came to his house to see her. After some time, Razakar accused Md. Moslem Prodhan along with 4/5 armed Razakars came to her house and told that Razakar accused Syed Md. Hussain alias Hossain sent them to take away Abdul Malek and the aforesaid Razakars forcibly abducted unarmed freedom fighter Abdul Malek from his house. After 6/7 minutes of the abduction of Abdul Malek, she heard the sound of several gunshots and she went in front of the house of Debendra Chandra Nath of her village and saw the dead body of Martyr Abdul Malek. After that, she came back from there. On that day after Ashar prayer, again battle took place between the freedom fighters of Kubra and Basu Bahinies and the Razakars which continued till late night and before fazar prayer he heard the slogan of "Joy Bangla." Subsequently, in the morning of 2nd Bangla month Kartik, his uncle Abdur Rahim requested the freedom fighters of Basu Bahini to bury the dead body of Abdul

Malek at Gurui village and subsequently the freedom fighters of Basu Bahini buried his dead body at Gurui village. While accused Md. Moslem Prodhan and his cohort armed Razakars forcibly abducted Abdul Malek, accused Md. Moslem Prodhan told that Razakar accused Syed Md. Hussain alias Hossain instructed them to take away him. Accused Md. Moslem Prodhan was an inhabitant of the same locality for which he was known to P.W 9.

947. During cross-examination of P.W 9, she stated that her father's house was also situated at Nikli Purbagaon and Nikli Sadar was situated to the ½ kilometer north- west side of her house and the house of Debendranath was situated to ½ kilometer west- north side of her house. She could not say the name of the father of accused Syed Md. Hussain alias Hossain and the name of his village; subsequently she stated that she heard from the locals that house of Syed Md. Hussain alias Hossain was situated at Kishoreganj. She affirmed that Kamarhati village was situated to the ½ kilometer west side from her house and that after her marriage she saw accused Md. Moslem Prodhan in the locality. She affirmed that accused Syed Md. Hussain alias Hossain Daroga was the Razakar Commander of Nikli Thana. She also stated that there was no Razakar Commander in her union. During cross-examination, the defence suggested that her husband was not abducted from his house or he was not unarmed or her husband was killed at the time of battle between Razakars and the freedom

fighters or at the time of occurrence, she was present at the house of her father which has been denied by P.W9. She could not say as to whether any other person was killed on the day of occurrence except her husband. She affirmed that Gurui village was situated on the about 3/3 ½ miles south side from her village. She affirmed that except accused Md. Moslem Prodhan other Razakars were not known to her. She stated that accused Md. Moslem Prodhan did not take part in any Salish in her locality. During cross-examination, the defence suggested that accused Moslem Prodhan had given a decision against them in a local Salish for which as tutored by others, she falsely deposed against the accused persons to be financially benefited which has been denied by P.W9.

948. P.W 10 Abdul Hekim [71] of Gurui village testified that he took part in the War of Liberation in 1971 as freedom fighters of Basu Bahini under the leadership of Abdul Motaleb of his locality. On first Bangla month Kartik in 1971 after Achar prayer, his Commander Basu informed that at the order of Razakar accused Syed Md. Hussain alias Hossain, accused Md. Moslem Prodhan and other Razakars killed freedom fighter Abdul Malek at Nikli Thana Sadar. On that date, at about 9.00 pm the freedom fighters of Basu Bahini and the Kubra Bahini jointly attacked Nikli Thana Sadar on the position of Razakars and at midnight they did not hear any sound of Razakars, and at the order of their Commander , they remained on their position. In the morning they saw that all the

Razakars fled away and thereafter the freedom fighters hoisted the flag of independent Bangladesh and uttered the slogan “Joy Bangla.” Subsequently, they came in front of the house of Debendra Chandra Nath and saw the dead body of freedom fighter Abdul Malek and at the request of the uncle of Abdul Malek they buried the dead body of freedom fighter Abdul Malek at North Para of Gurui village.

949. During cross-examination, the defence suggested that freedom fighter Abdul Malek was killed at the time of battle or he did not hear anything as regards killing of Abdul Malek or he did not see the dead body of Abdul Malek which has been denied by P.W10.

950. P.W 11 Chanfor Ali [73] of Gurui village was a cultivator at the time of War of Liberation in 1971 and at that time, he used to reside in his house. He stated that he took part in the War of Liberation under the leadership of Commander Basu. As regards the event narrated in charge No. 5, he stated that on first Bangla month Kartik in 1971, his Commander Basu informed him and other freedom fighters that at the order of accused Syed Md. Hussain alias Hossain, accused Md. Moslem Prodhan and other Razakars killed freedom fighter Abdul Malek at Nikli Thana Sadar and Commander Basu instructed them to go to Nikli at night and Commander Basu also communicated with the freedom fighters of

Kubra Bahini. The freedom fighters of Basu Bahini and Kubra Bahini at about 8/8.30 pm jointly attacked Nikli Thana and the adjacent area which continued up to 12/1 am and thereafter they did not hear the gun firing of the Razakars and at the order of Commander Basu, they remained in their position and in the morning entered into the Nikli Thana and saw that the Razakars fled away. At that time, by uttering slogan "Joy Bangla" they hoisted the flag of independent Bangladesh. He stated that Basu, Commander of Basu Bahini, is now dead.

951. P.W 13 Gopal Chandra Das [67] of Mohammadpur village stated that in 1971 he used to reside in his Kashebpur village which is now known as Mohammadpur. After initiation of the War of Liberation in 1971, he along with a group of 19 persons including Abdul Malek, Enamul Hoque, Azizul Hoque of Nikli Purbagram, Arab Ali of Dampara, Suvas Chandra of Kashebpur village went to India to take training of War of Liberation and after taking training possibly in the month of July they came back at Batcara of Sector No. 5 and he took part in the War of Liberation under the leadership of Matiur Rahman as freedom fighters of Kubra Bahini.

952. He further stated that on 19th October in the early morning, the freedom fighters of Kubra Babini under the leadership of Commander Matiur Rahman attacked the position of the Razakars

from the east side of Nikli Thana. At that time accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana and accused Md. Moslem Prodhan was the Razakar Commander of Nikli Sadar Union. At the time of the attack, the Razakars took position at Nikli Thana Sadar and in the bunkers of bazaar situated adjacent to Nikli Thana and under the leadership of accused persons, the Razakars attacked the position of freedom fighters and the freedom fighters took position at about ½ kilometer far from the Razakars. One point of time, as a tactic of battle, in the afternoon the freedom fighters moved back to the east side of Purbagram village. On that day at about noon freedom fighter Abdul Malek of Purbagram went to his house to see his wife and children. At about 5.30 pm he heard the sound of a gunshot from the side of the house of Debendra Chandra Nath. After sometimes he heard from the locals that the Razakars gunned down freedom fighter Abdul Malek to death in front of the house of Debendra Chandra Nath.

953. He also stated that hearing about this incident, he along with his co-freedom fighters Enamul Hague and Azizul Haque [P.W14] went to the house of Abdul Malek. At that time, his wife was crying and told that Razakar accused Md. Moslem Prodhan along with his cohort Razakars forcibly abducted Abdul Malek at noon from his house and took him towards the house of Debendra Chandra Nath. At the time of abducting the freedom fighter Abdul Malek, accused Md. Moslem Prodhan told that Razakar Commander Syed Md.

Hussain alias Hossain instructed them to take away Abdul Malek. She also informed that after abducting her husband, accused Md. Moslem Prodhan gunned down him to death in front of the house of Debendra Chandra Nath.

954. Regarding the second attack of the freedom fighters, P.W13 stated that on 19th October in 1971 after evening freedom fighters of Basu Bahini started gun firing on the position of Razakars from the south side of Nikli Thana Sadar and the freedom fighters of Kubra Bahini attacked Nikli Thana from the east side. Due to combined attack of those freedom fighters, Razakar accused Syed Md. Hussain alias Hossain and Md. Moslem Prodhan along with their cohort Razakars in the midnight fled away from the Nikli Thana. On the next day in the early morning, they went to Nikli Thana Sadar and uttering the slogan “Joy Bangla” hoisted the flag of independent Bangladesh. Thereafter he came back in front of the house of Debendra Chandra Nath and saw that the members of the Basu Bahini having taken the dead body of freedom fighter Abdul Malek buried at Guria village.

955. During cross-examination of P.W13, he stated that Purbagram village was situated about ½ kilometer far from his village and Ghurachand High School was situated to the west side of Purbagram and the Nikli Thana building was situated to the about 200/300 yards west side from that school. House of Debendra

Chandra Nath was situated at Pancharhati which was situated to the ½ kilometer west side of Keshabpur. During cross-examination, in reply to a question put to him by the defence, P.W13 stated that Abdul Malek, Matiur Rahman, Nanu Mia and Megu Mia were killed in Nikli Battle and after that, he voluntarily stated that out of those 4 freedom fighters, three of them were killed at the time of battle, and Abdul Malek was gunned down to death after abducting him from his house. He also stated that the nickname of Abdul Malek was Malu. The defence suggested that he did not go to the house of freedom fighter Abdul Malek or his wife was not known to him or at the time of occurrence he was not present at Nikli or he did not take part in the battle or freedom fighter Abdul Malek was killed at the time of battle or the accused persons were not Razakars which has been denied by P.W13.

956. P.W 14 Azizul Haque[61] of Nikli Purbagram village was S.S.C candidate at the time of War of Liberation in 1971 and at that time, he used to reside in his village home. He stated that he along with Abdul Malek, Enamul Hoque, Subash Das, Gopal Chandra Das [P.W13], Arab Ali along with a group of 19 people went to India to take training and after taking training they came back in Bangladesh in the month of July and took part in the War of Liberation under the leadership of Matiur Rahman Beer Bikram who lead the Kubra Bahini.

957. As regards the event narrated in charge No. 5, he stated that on 19.10.1971 in the early morning under the leadership of Matiur Rahman, about 40/50 freedom fighters of Kubra Bahini attacked the position of Razakars from the east side of Nikli Thana Sadar. The Razakars took position at Thana Sadar and different bunkers of Nikli Bazaar. At that time the Razakars also counter-attacked which continued up to noon. At afternoon, as a tactic of battle the freedom fighters moved back and took position at Purbagram village and after sometimes his co-freedom fighter Abdul Malek being unarmed with the leave of his Commander Matiur Rahman, went to his house to meet his wife and children.

958. He further stated that on 19.10.1971 at about 5/ 5.30 pm while he along with other freedom fighters took position at Purbagram village, he heard the sound of gunshots from the west side of that village. After sometimes, he heard from the locals that the Razakars killed freedom fighter Abdul Malek. Thereafter he along with his co-freedom fighters Gopal Chandra Das [P.W13] and Enamul Hoque went to the house of freedom fighter Abdul Malek. At that time, Rabeya Akter [P.W9], wife of Abdul Malek informed that Razakar Commander accused Md. Moslem Prodhan along with his cohort Razakars came to her house and told that the Razakar Commander Syed Md. Hussain alias Hossain instructed them to abduct Abdul Malek and while Abdul Malek refused to go along with the Razakars, they forcibly abducted him. She also informed

that Razakars having abducted her husband from her house gunned down him to death in front of the house of Debendra Chandra Nath. Thereafter he came back at Purbagram village.

959. He also stated that on 19.10.1971 after evening, the freedom fighters of Basu Bahini under the leadership of Basu attacked Nikli Thana Sadar from the south side and freedom fighters of Kubra Bahini attacked Nikli Thana Sadar from the east side on the position of Razakars. At that time, Razakars also counter-attacked which continued up to midnight. In the early morning, the freedom fighters heard from the locals that the Nikli Thana Razakar Commander Syed Md. Hussain alias Hossain and the Nikli Sadar Union Razakar Commander accused Md. Moslem Prodhan along with other Razakars fled away from Nikli Thana Sadar. Thereafter the freedom fighters of Kubra Bahini and Basu Bahini uttering the slogan "Joy Bangla" hoisted the flag of independent Bangladesh at Nikli Thana Sadar. Thereafter they went to the house of Debendra Chandra Nath and saw the dead body of freedom fighter Abdul Malek on the road situated to the south side of the house of Debendra Chandra Nath and the freedom fighters of Basu Bahini took his dead body for burial at Gurui village.

960. During cross-examination of P.W14, in reply to a question put to him by the defence, he stated that his date of birth is 09.5.1955 and the name of the father of accused Syed Md. Hussain alias

Hossain is Maulana Musleh Uddin. He stated that Nikli Thana building was situated to the quarter kilometer west side from his village and his house was situated to the north side of Purbagram and the house of Abdul Malek was situated to the south side. In reply to a question put to him by the defence, P.W14 stated that house of Debendra Chandra Nath was situated to the quarter kilometer west side from the place where Kubra Bahini took position and house of Abdul Malek was situated to the about ½ kilometer south side from the place where the freedom fighter of Kubra Bahini took position at the time of attacking the Razakars. In reply to a question put to him by the defence, he affirmed that at the time of battle three freedom fighters were killed and freedom fighter Abdul Malek was killed as stated by him. The defence suggested that he did not take part in the Nikli battle or he was not present at the time of Nikli battle or at the time of Nikli battle he was in India or on the date of occurrence he did not go to the house of Abdul Malek or he did not meet with the wife of Abdul Malek or the accused persons were not known to him which has been denied by him.

961.D.W. 1 Md. Din Islam Bachchu[46], son of accused Md. Moslem Prodhan stated that after reading several books and newspapers relating to the “Nikli Battle of 1971,” he came to know that freedom fighter Abdul Malek alias Malu became Martyr in the Nikli Battle and he also produced the Magazines

titled “ibv½†bi w`b,†jv,” “ †MŠiev½b” and news reports published in different newspapers which were marked as exhibits-Ka, Kha, and Ga series.

Evaluation of the evidence and findings of the Tribunal

962. The learned Prosecutor Ms. Tureen Afroz appearing along with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the prosecution submitted that on 19.10.1971 after Nikli Thana Battle, in the afternoon, unarmed freedom fighter Abdul Malek went to his house at Nikli Purba Gao village to see his wife and children and being informed about Abdul Malek’s presence at his house, Razakar Commander Syed Md. Hussain alias Hossain instructed Razakar accused Md. Moslem Prodhan and his cohort Razakars to take away Abdul Malek from his house. Thereafter being so instructed Razakar accused Md. Moslem Prodhan and other 4/ 5 armed Razakars having forcibly abducted unarmed freedom fighter Abdul Malek from his house gunned down him to death in front of the house of Debendra Chandra Nath(now dead) and thereby the accused persons committed the offence of abduction and murder as crimes against humanity and the prosecution by adducing P.Ws 5,7,9,10, 11, 13 and 14 and exhibiting exhibits 13 and 14 proved the event of abduction and murder as crimes against humanity beyond all reasonable doubt against the accused persons.

963. The learned defence counsel Mr. Abdus Satter Palwan appearing on behalf of accused Md. Moslem Prodhan as engaged counsel and on behalf of the absconding accused Syed Md. Hussain alias Hossain as State defence counsel submitted that admittedly on the date of occurrence, a battle took place at Nikli Thana Sadar between the freedom fighters and the Razakars and freedom fighter Abdul Malek took part in Nikli Thana Battle and he was killed by the Pakistani army at the time of Nikli Thana Sadar battle but after 45 years of the alleged occurrence the prosecution having concocted a false story of abduction and murder falsely implicated the accused persons in the instant case and the prosecution failed to prove any direct witness of the alleged killing and totally failed to prove the charge of abduction and murder against the accused persons beyond all reasonable doubt. He further submitted that exhibits Ka, Kha and Ga proved beyond reasonable doubt that freedom fighter Abdul Malek became Martyr at the time of Nikli Battle and accused persons are not criminally liable for his killing as alleged by the prosecution.

964. It is noted that out of seven prosecution witnesses presented to the Tribunal, P.W 9 is the wife of Martyr Abdul Malek and only direct witness to the event of the abduction of freedom fighter Abdul Malek and there is no direct witness of killing. P.Ws 5, 7, 10 and 11 are freedom fighters and all of them took part in the second battle of Nikli Thana. P.Ws 13 and 14 are also freedom fighters and

claimed that they took part in both the battle of Nikli Thana and heard about the killing of co-freedom fighter Abdul Malek from P.W9, wife of Abdul Malek. P.W5 stated that he heard from the locals about the occurrence. P.Ws 10 and 11 claimed that they heard about killing of freedom fighter Abdul Malek from Basu, Commander of the freedom fighters of Basu Bahini and after hearing the information about the killing of Abdul Malek, on the date of occurrence after evening all of them attacked the position of Razakars who took position at Nikli Thana Sadar and consequently in the midnight the Razakars fled away from the Nikli Thana Sadar and on the next day in the morning the freedom fighters hoisted the flag of Independent Bangladesh at Nikli Thana Sadar.

965. As regards the event of abduction and murder of freedom fighter Abdul Malek, P.W9 Rabeya Akter, wife of Martyr Abdul Malek of Nikli Purbagram stated that on first Bangla month Kartik in 1971 after Nikli Thana Battle, in the afternoon, her husband Abdul Malek came to his house to see her. After some time, Razakar accused Md. Moslem Prodhan along with 4/5 armed Razakars came to her house and told that Razakar accused Syed Md. Hussain alias Hossain instructed them to take away Abdul Malek and the aforesaid Razakars forcibly abducted unarmed freedom fighter Abdul Malek from his house. After 6/7 minutes of abduction, she heard the sound of several gunshots and went in

front of the house of Debendra Chandra Nath of her village and saw the bullet pierced the dead body of freedom fighter Abdul Malek. She also stated that while the Razakars forcibly abducted Abdul Malek, accused Md. Moslem Prodhan told that Razakar accused Syed Md. Hussain alias Hossain instructed them to take away Abdul Malek for which accused Syed Md. Hussain alias Hossain was known to her. Accused Md. Moslem Prodhan was an inhabitant of the same locality for which he was known to P.W9. During cross-examination of P.W9, she stated that the house of Debendranath was situated to the ½ kilometer west- north side of her house and that except accused Moslem Prodhan other Razakars were not known to her. During cross-examination, the defence suggested that accused Moslem Prodhan had given a decision against them in a local Salish for which as tutored by others, she falsely deposed against the accused persons to be financially benefited which has been denied by P.W9 and by giving suggestion to P.W9, the defence admitted that accused Md. Moslem Prodhan was known to P.W9 before the occurrence. The defence only denied the statement of P.W9 but failed to bring out any contradiction or inconsistency to her statement made relating to abduction and killing of Abdul Malek.

966. P.W 5 Abdul Hamid [66] of Cetra village stated that on 19.10.1971 he came to know that at the order of Razakar Commander Syed Md. Hussain alias Hossain, Razakar Commander

Md. Moslem Prodhan killed unarmed freedom fighter Abdul Malek of Purba Gao village of Nikli Thana in front of the house of Debendra Nath. In reply to a question put to P.W5 by the defence, he stated that at about 3.00 pm he got the information about the killing of Abdul Malek, but he could not say the exact time. At the time of cross-examination, the defence only denied the statement of P.W5 but did not cross-examine him as regards the statement made in examination –in-chief.

967. As regards the killing of freedom fighter Abdul Malek, P.W7 Md. Ichab Ali [66] of Gurui East Para village stated that on the next day of Gurui battle, in the evening he got information that the accused persons along with their cohort Razakars having abducted unarmed freedom fighter Abdul Malek from his house took away him to Nikli Thana Sadar and gunned down him to death. On the next day having taken the dead body of Abdul Malek from Nikli buried his dead body at Gurui village. It transpires that P.W7 stated that one day after the occurrence of Gurui village, he heard the information about the killing of Abdul Malek, but it appears that killing of Gurui village took place on 06.09.1971 and the freedom fighter Abdul Malek was killed on 19.10.1971 for which statement of P.W7 relating to killing of Abdul Malek cannot be relied on.

968. P.W 10 Abdul Hekim [71] of Gurui village is a freedom fighter. As regards the killing of Martyr Abdul Malek, he stated that

on first Bangla month Kartik in 1971 after Achar prayer, his Commander Basu informed that at the order of Razakar accused Syed Md. Hussain alias Hossain accused Md. Moslem Prodhan and other Razakars killed freedom fighter Abdul Malek at Nikli Thana Sadar. Subsequently, they came in front of the house of Debendra Chandra Nath and saw the dead body of freedom fighter Abdul Malek and at the request of the uncle of Abdul Malek they buried the dead body of freedom fighter Abdul Malek at North Para of Gurui village. During cross-examination, the defence suggested that freedom fighter Abdul Malek was killed at the time of battle or he did not hear anything as regards the killing of Abdul Malek or he did not see the dead body of Abdul Malek which has been denied by P.W10. Except denial of the statement of P.W10, the defence did not cross-examine P.W10 as regards his statement made in examination –in-chief.

969. P.W 11 Chanfor Ali [73] of Gurui village stated that he took part in the War of Liberation under the leadership of Commander Basu. As regards the event as narrated in charge No. 5, he stated that on first Bangla month Kartik in 1971 in the evening the Commander of Basu Bahini informed him and other freedom fighters that at the order of accused Syed Md. Hussain alias Hossain, accused Md. Moslem Prodhan and others Razakars killed freedom fighter Abdul Malek at Nikli Thana Sadar. During cross-examination of P.W11, the defence only denied the statement of

P.W11 made in examination –in-chief but did not dispute the killing of Abdul Malek.

970. P.W 13 Gopal Chandra Das [67] of Mohammadpur village stated that on 19.10.1971 at about noon freedom fighter Abdul Malek of Purbagram went to his house to see his wife and children. At about 5.30 pm he heard the sound of a gunshot from the side of the house of Debendra Chandra Nath. After sometimes he heard from the locals that the Razakars gunned down freedom fighter Abdul Malek to death in front of the house of Debendra Chandra Nath. He also stated that hearing about this incident, he along with his co-freedom fighters Enamul Hague and Azizul Haque [P.W14] went to the house of Abdul Malek. At that time, his wife was crying and told that Razakar accused Md. Moslem Prodhan along with his cohort Razakars forcibly abducted Abdul Malek at noon from his house and took him towards the house of Debendra Chandra Nath. At the time of abducting the freedom fighter Abdul Malek accused Md. Moslem Prodhan told that Razakar Commander Syed Md. Hussain alias Hossain instructed them to take away Abdul Malek. She also informed that after abducting her husband, accused Md. Moslem Prodhan gunned down Abdul Malek to death in front of the house of Debendra Chandra Nath. On the next day, he went in front of the house of Debendra Chandra Nath and saw that the members of the Basu Bahini took the dead body of freedom fighter Abdul Malek for burial at Gurui village. During cross-examination

in reply to a question put to him by the defence, P.W13 stated that Abdul Malek, Matiur Rahman, Nanu Mia and Megu Mia were killed in Nikli Battle and after that, he voluntarily stated that out of those 4 freedom fighters, three of them were killed in the Nikli Battle, and Abdul Malek was gunned down to death after abducting him from his house. He also stated that the nickname of Abdul Malek was Malu. The defence suggested that freedom fighter Abdul Malek was killed at the time of battle which has been denied by P.W13. During cross-examination, the defence failed to bring out any inconsistency to his statement made in examination – in-chief.

971. P.W 14 Azizul Haque[61] of Nikli Purbagram village stated that on 19.10.1971 in the afternoon, his co-freedom fighter Abdul Malek being unarmed with the leave of his Commander Matiur Rahman, went to his house to meet his wife and children and at about 5/ 5.30 pm while he along with other freedom fighters took position at Purbagram village, he heard the sound of gunshots from the west side of that village. After sometimes he heard from the locals that the Razakars killed freedom fighter, Abdul Malek. Thereafter he along with his co-freedom fighters Gopal Chandra Das [P.W13] and Enamul Hoque went to the house of freedom fighter Abdul Malek. At that time, Rabeya Akter [P.W9], wife of Abdul Malek informed that Razakar Commander accused Md. Moslem Prodhan along with his cohort Razakars came to her house

and told that the Razakar Commander Syed Md. Hussain alias Hossain instructed them to abduct Abdul Malek and while Abdul Malek refused to go along with the Razakars, they forcibly abducted him. She also informed that Razakars having abducted her husband from her house gunned down him to death in front of the house of Debendra Chandra Nath.

972. He further stated that after the second attack of the freedom fighters, in the midnight the Razakars fled away and after that, they went to the house of Debendra Chandra Nath and saw the dead body of freedom fighter Abdul Malek on the road situated to the south side of the house of Debendra Chandra Nath. In reply to a question put to him by the defense, he affirmed that at the time of battle three freedom fighters were killed and freedom fighter Abdul Malek was gunned down to death as stated by him. By cross-examining P.W14, the defence could not bring out any inconsistency to his statement made in examination –in-chief.

973. On scrutiny of the evidence of the prosecution witnesses presented to the Tribunal, it reveals that P.W9 Rabeya Akhter stated that Razakar accused Md. Moslem Prodhan along with other 4/5 cohort armed Razakars on the date of occurrence in the afternoon came to her house and told that Razakar accused Syed Md. Hussain alias Hossain instructed them to take away Abdul Malek and accused Md. Moslem Prodhan along with 4/5 armed

Razakars forcibly abducted unarmed freedom fighter Abdul Malek from his house. The above statement of P.W9 as regards involvement of the accused persons in abducting Abdul Malek is corroborated by P.Ws 13 and 14 who after hearing the information about the killing of Abdul Malek, went to her house and heard about the occurrence from P.W9 Rabeya Akhter. P.W5 Abdul Hamid, P.W10 Abdul Hekim, and P.W11 Chanfar Ali also stated that they heard that being instructed by Razakar Commander Syed Md. Hussain alias Hossain, his cohort Razakar accused Md. Moslem Prodhan killed unarmed freedom fighter Abdul Malek in front of the house of Debendra Chandra Nath.

974. P.W 13 Gopal Chandra Das and P.W14 Azizul Haque stated that on 19.10.1971 in the early morning they, freedom fighter Abdul Malek and other freedom fighters of Kubra Bahini under the leadership of their Commander Motiur Rahman attacked the Razakars who took position at Nikli Thana Sadar and the battle continued till noon and after battle, freedom fighter Abdul Malek with the leave of their Commander Motiur Rahman in the afternoon went to his house to see his wife and children. P.W9 stated that on first Bangla month Kartik in 1971 in the morning her husband Abdul Malek took part in Nikli Thana Battle against the Razakars which continued till noon. Thereafter her husband came to his house to see her. During cross-examination of P.Ws 9,13 and 14, the defence remained completely silent about their above

evidence and did not cross-examine those witnesses as regards their evidence to the effect that freedom fighter Abdul Malek after Nikli Thana Battle, in the afternoon went to his house to see his wife and children for which I am of the view that freedom fighter Abdul Malek after Nikli Thana Battle, in the afternoon went to his house to see his wife and children.

975. On evaluation of the evidence it transpires that on 19.10.1971 in the early morning a battle took place at Nikli Thana Sadar between the freedom fighters and the Razakars and freedom fighter Abdul Malek took part in Nikli Battle which continued till afternoon and in that battle the freedom fighters attacked the Razakars who took position in the bunkers set up at Nikli Thana Sadar and Nikli Bazaar. P.Ws 13 Gopal Chandra Das and P.W 14 Azizul Haque, freedom fighters of Kubra bahini, took part in Nikli Battle along with freedom fighter Abdul Malek. They stated that at about 2.00 pm on the day of occurrence the freedom fighters moved back to the east side of Purbagram village as a tactic of battle. After that, their co-freedom fighter Abdul Malek being unarmed went to his house to see his wife and children. In reply to a question put to P.W 13 by the defence, he stated that Nikli Thana Building was situated to the west side from Purbagram. P.W9 Rabeya Akter stated that on first Kartik in the afternoon, her husband came to her house to see her. It is the consistent evidence of the prosecution that on first Kartik after Nikli Battle, in the afternoon freedom fighter

Abdul Malek being unarmed went to his house to see his wife and children and accused Md. Moslem Prodhan and his cohort Razakars being instructed by Razakar Commander Syed Md. Hussain alias Hossain abducted unarmed freedom fighter Abdul Malek from his house and gunned down him to death in front of the house of Debendra Chandra Nath of Pancharhati village.

976. P.W 9 Rabeya Akhter stated that after 7/8 minutes of abducting unarmed freedom fighter Abdul Malek, she heard the sound of gunshots and after that, she went to the house of Debendra Chandra Nath of her village and saw the bullet priced dead body of her husband. During cross-examination of P.W9, in reply to a question put to her by the defence, she stated that Nikli Thana was situated to the about a half kilometer north- west side of her house and house of Debendra Chandra Nath was situated to the about a half kilometer west- north side of her house. House of P. W.9 was situated at village Nikli Purba Gao. In reply to a question put to P.W13 Gopal Chandra Das by the defence, he stated that house of Debendra Nath was situated at Pancharhati. During cross-examination, in reply to a question put to P.W14 Azizul Haque stated that house of Debendra Nath was situated to the about quarter kilometer west side from the place of Purba Gao wherein the freedom fighters of Kubra Bahini took position in the afternoon and he affirmed that three freedom fighters were killed at the time of Nikli Thana Sadar Battle and freedom fighter Abdul

Malek was killed as stated by him. In reply to a question put to P.W13 Gopal Chandra Das by the defence, he stated that Abdul Malek, Matiur Rahman, Nanu Mia and Megu Mia were killed in the Nikli Battle and after that, he voluntarily stated that out of those 4(four) freedom fighters, three of them were killed at the time of Battle and Abdul Malek was gunned down to death after abducting him from his house.

977. No suggestion was given by the defence to the prosecution witnesses to the effect that house of Debendra Chandra Nath of Pancharhati was the battlefield of Nikli Battle. The defence suggested that freedom fighter Abdul Malek was killed at the time of battle which has been denied by the witnesses and no direct or hearsay witness was presented to the Tribunal by the defence to prove the defence case. It is an admitted fact that Nikli Battle took place at Nikli Thana Sadar, and dead body of freedom fighter Abdul Malek was found at the house of Debendra Chandra Nath of Pancharhati for which it is crystal clear that Nikli Battle Field and the house of Debendra Chandra Nath of Panchahati, crime site of the event narrated in charge No.5, are two different places and Abdul Malek was not killed during Nikli Thana Battle.

978. P.W 9 Rabeya Akter, P.W13 Gopal Chandra Das, and P.W14 Azizul Haque stated that unarmed freedom fighter Abdul Malek was abducted by armed Razakars from his house. P.W9 Rabeya

Akter stated that at the time of the abduction, accused Md. Moslem Prodhan told that Razakar Commander Syed Md. Hussain alias Hossain instructed him to abduct freedom fighter Abdul Malek and the defence by cross-examining those witnesses totally failed to bring out any inconsistency to their above statement. In view of the above evidence, I am of the view that unarmed freedom fighter Abdul Malek was abducted from his house situated at Nikli Purba Gao village, and Nikli Thana Sadar, Nikli Battle Field, was situated to the about a half kilometer north –west side of the house of Abdul Malek and at the time of abduction and killing, he was an unarmed civilian and did not take part in any hostility against the accused persons.

979. On perusal of defence documents i.e. exhibit- Ga series it appears that the said news reports were published in the year 2015 after the arrest of accused Md. Moslem Prodhan at his instance and no direct or hearsay witness was examined by the defence corroborating the content of exhibit Ka and Kha. P.W 9 Rabeya Akter is the direct witness of the event of the abduction of her husband freedom fighter Abdul Malek and the defence by cross-examining failed to discredit her statement. On careful scrutiny of her statement, I do not find any inconsistency in her statement made regarding the killing of her husband and there is no reason of false implication of the accused persons.

980. On the evaluation of the evidence, it transpires that P Ws 5, 9,10,11,13 and 14 are the indirect witnesses of killing unarmed freedom fighter Abdul Malek and the prosecution could not examine any direct witness of killing. Globally, in the trials of international crimes, hearsay evidence is admissible. In section 19 of the Act of 1973 ,the legislature made provision to admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape- recordings and other materials as may be tendered by it, which it deems to have probative value and Rule 44 is consonant with the provision of section 19 of the Act of 1973 wherein it has been provided that admission and non-admission of the evidence is the absolute discretion of the Tribunal.

981. In Rule 56(2) of the International Crimes [Tribunal-1] Rules of Procedure, 2010 provision is made to consider both hearsay and non-hearsay evidence and the provision of Rule 56 of the International Crimes [Tribunal 1] Rules of Procedure, 2010 is quoted below;

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

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

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

982. In this respect I recall the observation of our Apex Court made in the case of Abdul Quader Mollah reported in 22 BLT(AD) 8 at para 289 page 389 wherein it has been observed that:-

“So far as the complaint against hearsay is concerned, the same falls through instantaneously once it is reckoned that the Act, which has engendered a special law, has made hearsay evidence admissible.

Parliament in its wisdom had done so reckoning that procuring direct eye witnesses to prove atrocities that pervaded during our Glorious War of Liberation would be difficult, if not impossible. In this regard, as in other regards too, our Parliament followed Nuremberg Charter, which also made hearsay evidence admissible, followed by Rome Statute and the statutes of other Tribunals set up at the instance of the United Nations to try people accused of Crimes against Humanity.”

983. In the case of the Prosecutor vs. Jean-Pierre Bemba Gombo [Case No. ICC-01/ 05-01/08 Para 47, judgment dated 15th June 2009] the ICC Pre-Trial Chamber II considered the indirect evidence although in the Statute of ICC or ICC Rules of Procedure nothing has been expressly provided as regards indirect evidence. The ICC Pre-Trial Chamber II observed that;

“The Chamber identifies the Disclosed Evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of the United Nations (the “UN”), Non-Governmental Organizations (the “NGO” or “NGOs”) and media reports. Pursuant to rule 76 of the Rules, evidence may also be oral, in particular when it is rendered by witnesses called to testify, or written, such as copies of witness statements, material covered by rule 77 of the Rules, such as books, documents emanating from various sources, photographs, and other tangible objects, including but not limited to video and /or audio recorded evidence. In this regard, the Chamber notes that neither party relied on live witnesses during the Hearing” and in paragraph No. 51 in the referred case the Pre-Trial Chamber further held that “As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence.”

984. In the case of Muvunyi, the Trial Chamber of ICTY considered the hearsay evidence and accepted the same in support of other credible witnesses and observed in the following language;

"Hearsay evidence is not per se inadmissible before the Trial Chamber. However, in certain circumstances, there may be a 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]

985. In the case of Prosecutor-vs Zlatko Aleksovski, Case No. ICTY IT 95-14/1-AR 73, the Appeal Chamber of ICTY made following observation as regards hearsay evidence;

“Accordingly, Trial Chambers have a broad discretion under Rule 89 (C) to admit the relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend on upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is “first-hand” or more removed, are also relevant to the probative value of the evidence. The fact that

the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to the evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend on upon the infinitely variable circumstances which surround hearsay evidence.”

986. The events narrated in charge No. 5 relates to “abduction and murder” as “crimes against humanity” has been specified in section 3(2)(a) of the Act of 1973 which is punishable under Section 20(2) of the said Act. In view of the provisions provided in Section 3(2)(e) of the Act of 1973 violation of any humanitarian rules applicable in armed conflicts laid down in Geneva Conventions of 1949 are crimes within the jurisdiction of this Tribunal. Article 3(1) (a) of the Geneva Convention Relative to the Protection of Civilian Persons in a time of War of August 1947 prohibits violence to life and persons, the particularly murder of all kinds, which provides that:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be

treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above- mentioned persons:

(a) violence to life and person, in particular, the murder of all kinds, mutilation, cruel treatment, and torture;

(b) the taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted Court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

987. *Hors de combat*, literally meaning “outside” the fight,” is a French term used in diplomacy and international law to refer to the

persons who are incapable of performing their ability to wage war. Examples include fighter pilots or aircrews parachuting from their disabled aircraft, as well as sick, wounded, detained, or otherwise disabled. Person hors de combat are normally granted special protections according to the law of war, sometimes including prisoners of war status, and therefore officially become non-combatants. Under the Geneva conventions, unlawful combatants or hors de combat are granted the same privilege and to be treated with humanity while in captivity but until lawful combatants, they are subjected to trial and punishment, which includes capital punishment. [en.m.wikipedia, org.]

988. Article 41 of the Additional Protocol I to the Geneva Conventions defines the notion “horse de combat” which reads as follows;

“Article 41: Safeguard of an enemy horse de combat.

- A person who is recognized or who, in the circumstances, should be recognized to be horse de combat shall not be made the object of attack.
- “A person is hors de combat’ if:
- he is in the power of an adverse Party;
- he clearly expresses an intention to surrender, or
- he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; “

Provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse party under unusual condition of combat which prevents their evacuations as provided for in Part II, section I, of third Convention, they shall be released and all feasible precaution shall be taken to ensure their safety.”

989. Prosecution witnesses proved beyond all reasonable doubt that accused Syed Md. Hussain alias Hossain was a Razakar Commander of Nikli Thana and accused Md. Moslem Prodhan was a potential Razakar of Nikli Thana Sadar and at the relevant time, Razakar Commander accused Syed Md. Hussain alias Hossain had control over accused Md. Moslem Prodhan and other Razakars of Nikli Thana and on 19.10.1971 in the morning a battle took place at Nikli Thana Sadar between the freedom fighters and the Razakars which continued till noon and freedom fighter Abdul Malek and many other freedom fighters took part in that battle against the Razakar accused persons and their cohort Razakars for which it is legally inferred that since Abdul Malek took part in Nikli Thana Battle against the Razakars, Razakar Commander accused Syed Md. Hussain alias Hossain having infuriated upon him instructed his cohort Razakar accused Md. Moslem Prodhan and other Razakars to abduct and kill freedom fighter Abdul Malek. The reason of killing freedom fighter Abdul Malek is that in the

morning of the date of occurrence he took part in the Nikli battle against the accused persons and other Razakars and exhibits 13 and 14 are corroborative evidence of the event of abduction and murder narrated in charge No.5.

990. Crimes against humanity are organized or group crimes committed against the civilian population and many perpetrators participate in different phases of the occurrence. The presence of all the accused persons at the crime site is not the essence of the international crimes. Even in the absence of any proof of the physical presence of accused at the crime site he can be legally held guilty of the offence if it is proved that he had substantially contributed or facilitated to the commission of the offence.

991. In this respect I recall the observation of our Apex Court made in the case of Motiur Rahman Nizami vs The Chief Prosecutor, pdf page 114 wherein it has been observed that

“It should be mentioned here that the actual physical presence at the time of commission of any crime is not necessary for finding an accused guilty of that crime; if it is proved that the accused had any sort of complicity in commission of that crime he can be found guilty of that crime even if his physical presence at the time of commission of that crime is not proved.”

992. To arrive at a decision as regards the culpability of accused person, his acts or substantial link to the perpetration of the principal crime is required to be assessed to see as to whether such

act or link facilitated or substantially contributed to the commission of the crimes. In the Tadic Case, it has been observed that-

Physical participation in 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. [Tadic Trial Chamber: ICTY, Judgment dated May 7, 1997, Para. 691]

993. In the instant charge, it has been alleged that the accused persons and their cohort Razakars having abducted unarmed freedom fighter Abdul Malek from his house gunned down him to death in front of the house of Debendra Chandra Nath of Pancharhati. To constitute an offence of murder as crimes against humanity it is not required that the perpetrators killed a large number of victims belonging to the civilian population. In this regard, I recall the observation made by the Appeals Chamber of ICTR in the case of Nahimana, Barayagwiza and Ngeze wherein it has been observed 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.” [Appeals Chamber, ICTR,

Judgment dated Nahimana, Barayagwiza, and Ngeze, Judgment, November 28, 2007, para. 924]

994. On a careful scrutiny of the evidence presented to the Tribunal, it transpires that P.Ws 5, 9, 10, 11, 13 and 14 made incriminating statement implicating the accused persons and during cross-examination, the defence merely denied their statement by giving suggestion to them but could not bring out any discrepancy or inconsistency to their statement made in the examination in chief relating to the event narrated in charge No. 5. Consistent evidence of the prosecution is that Nikli Thana Battle took place at Nikli Thana Sadar between the freedom fighters and the Razakars, and after the battle, unarmed freedom fighter Abdul Malek was gunned down to death at the house of Debendra Chandra Nath of Pancharhati. The defence suggested that freedom fighter Abdul Malek was killed during Nikli Thana Battle by the Pakistani army which has been denied by the witnesses. The defence case suggested to the prosecution witnesses has been denied by them and no evidence was presented to the Tribunal by the defence to prove the defence case.

995. Mere denial of the evidence of prosecution witnesses will not negate the evidence of the prosecution unless the defence by cross-examining the prosecution witnesses brings out any material contradiction or inconsistency to their statement. Evidence of P.Ws 5, 9, 10, 11, 13 and 14 made relating to the event of abduction and

killing of Abdul Malek are consistent and the defence by cross-examining them failed to discredit their statement made in the examination in chief.

996. In this respect, I recall the observation of our Appellate Division made in the Criminal Review Petition Nos. 17-18 of 2013 preferred by Abdul Quader Molla wherein our Apex Court observed that

“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. The other object of cross-examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness.”[Abdul Quader Molla, Criminal Review Petition Nos. 17-18 of 2013, Judgment page 35]

997. In view of the above findings, facts and circumstances of the case and the proposition of law, evidence of P.Ws 5, 9, 10, 11, 13 and 14 inspires confidence of this Tribunal and can be legally relied on to find the accused persons guilty of the offence of abduction and murder as narrated in charge No. 5.

998. The prosecution witnesses proved beyond reasonable doubt that Razakar Commander accused Syed Md. Hussain alias Hossain instructed Razakar accused Md. Moslem Prodhan and his cohort Razakars to abduct freedom fighter Abdul Malek from his house and accordingly accused Md. Moslem Prodhan along with his

cohort armed Razakars having forcibly abducted unarmed freedom fighter Abdul Malek from his house gunned down him to death in front of the house of Debendra Chandra Nath of Pancharhati and executed the instruction of Razakar Commander Syed Md. Hussain alias Hossain. Although there is no direct witness of killing, but the prosecution witnesses presented to the Tribunal proved the abduction. It is proved that after 7/8 minutes of abduction, Abdul Malek was gunned down to death. The killing of unarmed freedom fighter Abdul Malek is the outcome of abduction. Razakar accused Md. Moslem Prodhan along with 4/5 armed Razakars having forcibly abducted unarmed freedom fighter Abdul Malek from his house gunned down him to death at the house of Debendra Chandra Nath of Pancharhati and executed the instruction of Razakar Commander accused Syed Md. Hussain alias Hossain and both of them are equally liable for killing unarmed civilian Abdul Malek.

999. In view of the above evidence, facts and circumstances of the case and the proposition of law, the prosecution proved the instant charge against the accused persons beyond all reasonable doubt and both the accused Syed Md. Hussain alias Hossain and accused Md. Moslem Prodhan is held responsible for the commission of the offence of abduction and murder constituting the offence of crimes against humanity as enshrined in Section 3(2)(a)(g)(h) of the Act of 1973 which is punishable under Section 20(2) of the said Act.

Charge No. 06**[Other inhumane acts caused to the dead bodies of two freedom-fighters]**

1000. That on 20 November in 1971 freedom-fighter Khairul Jahan with a group of 22 freedom-fighters took position at Nandania village and another freedom fighter Md. Selim with a group of 15 freedom-fighters took position at village Pyarabhanga both under Hossainpur Police Station of the then Kishoreganj Sub-Division. Meanwhile, the local Razakars informed the Pakistani occupation army and the other Razakars about the presence of the said two freedom-fighters at Nandania and Pyarabhanga villages. Being informed about it on 26 November in 1971 in the morning Razakars accompanied by Pakistani occupation army surrounded the villages Nandania and Pyarabhanga with the help of accused Razakar Commander Syed Md. Hussain alias Hossain. Being informed about the matter, freedom-fighters Khairul Jahan, and Md. Selim along with their group of freedom-fighters crossed the Pyarabhanga Bridge and took position in the jungle and paddy-field situated beside Nath Bari. Then gunfire exchanged between Pakistani occupation army along with Razakars and the freedom-fighters. In this armed battle, freedom-fighters Khairul Jahan and Md. Selim was killed along with other freedom-fighters, namely Khairul son of Abdur Rashid and Jalal Uddin son of Aftab Uddin both of village Pyarabhanga.

1001. Later, on the order of the Razakar Commander accused Syed Md. Hussain alias Hossain, other Razakars accompanying the accused person dragging out the dead bodies of two freedom fighters killed in armed battle, out of the paddy field threw the same to the road towards Hossainpur and at about 2:30-03:00 PM on the same day, on the order of accused Syed Md. Hussain alias Hossain his accomplice Razakars tying the legs of the dead bodies on the backside of the jeep of Pakistani occupation army started moving ruthlessly through the brick surfaced road to the house of Shafi Chairman wherefrom two dead bodies were shifted to Kishoreganj town by rickshaw and were dumped in front of Islamia Boarding under old Thana area. On the same day, after Asar prayer infamous collaborator Maulana Athar Ali came there and spitting on the dead bodies of two freedom fighters killed in armed battle started uttering that -"It is the blessings of Allah, they are 'kafir', 'kafir', they are enemies of Pakistan and our sons had killed them" and saying this he also kicked the dead body of freedom-fighter Khairul Jahan by expressing abhorrence. At night the dead bodies were made disappeared. Even on searching their dead bodies could not be found. After independence, those two freedom fighters were declared as 'Bir Protik' by the government of the People's Republic of Bangladesh.

1002. Thereby, accused Syed Md. Hussain alias Hossain has been charged with participating, abetting, facilitating and complicity in

the commission of offences of other inhumane acts [causing blatant indignity and inhumane hatred to dead bodies] as crimes against humanity as part of a systematic attack directed against unarmed civilians as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act for which the accused person has incurred liability under section 4(1) and 4(2) of the Act.

1003. To prove the event narrated in a charge No. 6, the prosecution examined P.Ws 15 to 19.

1004. P.W 15 Md. Sohrab Uddin[62]of Pyarabhang village was a student of Class VII of Latifpur Junior High School at the time of great War of Liberation in 1971 and at that time he used to reside at his Pyarabhang village. He stated that on 26.11.1971 Friday at about 9.30/10.00 am Pakistani army and the Razakars came near the house of Nath Bari of Pyarabhang village. Before 2/ 3 days of the arrival of the Pakistani army and Razakars at Pyarabhang village, the freedom fighters took position in that village in different places.

1005. As regards the battle of Pyarabhang village, he stated that on 26.11.1971 Pakistani army and the Razakars attacked Pyarabhang village and started gun-firing on the position of freedom fighters and the freedom fighters also counter- attacked. At that time, he was present in his house along with his family members and laid down on the earth to save themselves. The gun-firing continued up

to 2 /3 pm. While the gunfire stopped, he saw through the hole of the boundary of his hut that 3/ 4 Razakars having dragged out two dead bodies from the paddy field had thrown down those dead bodies on Hossainpur brick surfaced road and tying the legs of the dead bodies on the back side of the jeep of the Pakistani army started moving ruthlessly through the brick surfaced road towards the house of Shafi Chairman situated about one kilometer far from there. After that, the Pakistani army and the Razakars left Pyarabhanga village. At about 4/ 4.30 pm he along with other locals came out on the road from their houses and heard from the locals that the Razakar Commander accused Syed Md. Hussain alias Hossain along with his cohort Razakars and the Pakistani army attacked the position of freedom fighters. He also heard that the dead bodies of freedom fighters Khairul Islam of adjacent village Latifpur and another freedom fighter possibly Selim Uddin of Kuliarchar were taken tying their legs on the backside of the jeep of the Pakistani army. He also stated that the Razakars and the Pakistani army killed those two freedom fighters at the time of battle as stated by him.

1006. During cross-examination of P.W15, he stated that Pyarabhanga village was situated within No. 8 Maira Union which was situated 4(four) kilometers far from Kishoreganj Sadar. During cross-examination, in reply to a question put to him by the defence, he stated that he does not know as to whether accused Syed Md.

Hussain alias Hossain was a Police Officer or not. The defence suggested that accused Syed Md. Hussain alias Hossain was not known to him or he deposed falsely to be financially benefited which has been denied by P.W 15. He also stated that Kishoreganj Sadar was situated 4(four) kilometers far from his house and Hossainpur road was situated to the west side of his house and at that time there was no tree in his house. In 1971 the Razakars also killed Chairman Shafi. The defence suggested that he did not hear the name of the accused person which has been denied by him.

1007. P.W 16 Md. Bachchu Mia [61] of Pyarabhangra village was a businessman in 1971 and he used to live in his home at Pyarabhangra village which was situated about 10 yards far from Hossainpur- Kishoreganj road. At that time, he had 2(two) small huts in his house and fence of those huts were made of jute sticks and tall grasses. He stated that before few days of 9th Agrahayan in 1971 the freedom fighters took position in his village and on 9th Agrahayan in 1971 at about 9/10 am the Pakistani army and the Razakars came in front of the house of Nath Bari of Pyarabhangra village and started gun-firing on the position of freedom fighters and the freedom fighters also counter- attacked. At that time he along with his family members took shelter in a hole inside his hut. Since the Pakistani army used to come through Hossainpur road they dug the hole about 5/7 days before the occurrence to save themselves. While the gun-firing stopped, he saw through the

hole of the fence of his hut that the Razakars having dragged out the dead bodies of freedom fighters Khairul Islam and Selim from the paddy field had thrown down those dead bodies on the Hossainpur road and tying those dead bodies on the back side of the jeep of Pakistani occupation army started moving ruthlessly through the brick surfaced road towards the house of Shafi Chairman. While the Pakistani army left the battlefield, he came out from the house and saw the blood on the Hossainpur road and at that time the locals also came there. He heard from the locals present there that under the leadership of Razakar Hussain, his cohort Razakars and the Pakistani army attacked the freedom fighters in his village.

1008. During cross-examination of P.W16, he stated that Kishoreganj Sadar was situated to the east and 3(three) miles far from his house and house of Shafi Chairman was situated less than a kilometer far from his house and he was the Chairman of his Union in 1971. The defence suggested that he did not see or hear the occurrence which has been denied by him.

1009. P.W 17 A.K. Nasim Khan [57] of Sholakia village was a student of Class VII of Kishoreganj Government High School in 1971 and used to reside in his village Sholakia which was situated adjacent to Nilganj Road Crossing Mosque. Now he is a representative of Bangla Vision, Kishoreganj District and former

President of Kishoreganj Press Club. He stated that on 26.11.1971 at about 4.00 pm he along with his other friends were playing on the road adjacent to their house and saw that the Razakars dumping dead body on a Rickshaw started procession towards old Thana for which due to fear of his life, he came back to his house. Subsequently, he came to know that under the leadership of Razakar Commander Syed Md. Hussain alias Hossain about 10/15 Razakars dumping dead bodies of freedom fighters Khairul Jahan, elder brother of his locality and Selim of Kuliarchar on that Rickshaw moved towards old Thana.

1010. During cross-examination of P.W17, he stated that his house was situated adjacent to Kishoreganj–Hossainpur road and to the about 1/1.5 kilometer west side from Pyarabhangra village and the old Thana was situated to the about ½ kilometer east side from his house. His house was situated to the 30/40 yards south side from the house of freedom fighter Khairul Jahan. He also affirmed that Syed Hassan, elder brother of accused Syed Md. Hussain alias Hossain was also a Razakar. During cross-examination of P.W17, the defence suggested that accused Syed Md. Hussain alias Hossain was not Razakar or he was a Police Officer or no occurrence took place as stated by him which has been denied by him.

1011. P.W 18 Md. Sadekujjahan Talukder Noyan [58] of Sholakia village was a student of Class VII in 1971 and at that time he used to reside in his house “Talukder Lodge” at Sholakia village along with his parent. His house was situated to the half kilometer west side from “Shahidi Mosque” of Kishoregang Sadar. As regards the event narrated in charge No 5, he stated that on 26.11.1971 at about 4 pm he was present in the shop of his father situated at Kishoregang Thana Sadar. At that time, he heard from the locals that his elder brother Khairul Jahan Talukder became Martyr in the Pyarabhangra battle took place between the freedom fighters and the Pakistani army and the Razakars. At that time, he went to his house along with his brother- in- law Asaduzzaman and saw that a few Razakars under the leadership of accused Razakar Commander Syed Md. Hussain alias Hossain encircled his house and he also saw the marks of blood on the light brown colour (Khaki) pant of accused Syed Md. Hussain alias Hossain. At that time, he [accused person]entered the house of P.W18 and told his mother that “ †Zvi †Q†j †K gyEevnrbx†Z cvw†qWQwj , GB †`L †Zvi †Q†j †K nZ`v K†i G†mWQ, GB †`L Zvi i³ | Zvi jvk wi· vq K†i mviv kni N†i†q gvby†K †`wL†qWQ|” At that time, his mother started crying loudly and became senseless. Thereafter accused Syed Md. Hussain alias Hossain searched his house to capture the father of P.W18. Since he was not present in his house, accused Syed Md. Hussain alias Hossain and his cohort Razakars plundered the valuables of the house of P.W 18.

1012. He also stated that on 26.11.1971 in the evening he heard that the dead body of his brother Khairul Jahan Talukder and freedom fighter Selim of Kuliarchar had been kept at Islamia Boarding (Razakar Camp) near Shahidi Mosque situated at Kishoreganj town. At that time, there was a field in front of said Razakar Camp. After Magrib prayer he along with others went there but did not see the dead body of his brother and subsequently he could not trace out the dead body of his brother. In 1971 Md. Mosleh Uddin, father of accused Syed Md. Hussain alias Hossain was the Chairman of Peace Committee of Kishoreganj Sub-Division for which accused Syed Md. Hussain alias Hossain was known to him. He stated that during the investigation, the Investigation Officer seized a copy of "Daily Purbadesh" dated 25.3.1972 which was kept in his custody and the same was marked as exhibit -2.

1013. During cross-examination of P.W 18, he stated that old Thana was situated to the about ½ kilometer south side from his house but the same was not situated beside Kishoreganj-Hossainpur road, and Pyrabhanga village was situated about 4 kilometers far from his house. In reply to a question put to him by the defence, he stated that at the time of seizing " the Daily Purbadesh", Abdul Mannan, Imam of local Mosque was present there. The defence suggested that his brother was not killed on the day of occurrence as stated by him or he did not see or hear the occurrence or accused

Syed Md. Husain alias Hossain was not known to him or he did not see him which has been denied by P.W18.

1014. P.W 19 A.K.M. Shajahan [61] of 380/1, Old Thana Sadar was a student of Class X of Kishoreganj Azimuddin High School in 1971. At that time, he used to reside in his house which was situated adjacent to old Thana and east side of Islamia Boarding wherein Razakar Camp was built. He stated that on 26.11.1971 at about 4/4.30 pm while he was present at his house, he heard from the locals that Razakar accused Syed Md. Hussain alias Hossain, son of Maulana Mosleh Uddin, Chairman of Peace Committee along with his cohort Razakars having killed two freedom fighters dumped their dead bodies in the field situated in front of the Islamia Boarding (Razakar Camp). At the time, he went there to see those dead bodies and saw the dead bodies of freedom fighters Khairul Jahan, a friend of his elder brother Kazal, and another person.

1015. He further stated that on that day after Ashar prayer, the infamous collaborator Maulana Atahar Ali (now dead)along with others came out from the “Shahidi Mosque” and in presence of many people expressed his hatred by spitting and kicking on those dead bodies and told that “they are Kafer” they are enemy of Pakistans. It is the blessings of Allah, our Joyans killed them” which has been recorded in the deposition sheet in Bangla as “I iv Kṛṭdi, Avjvni ingZ nṭqṭ0, I iv cṃK~Zvṭbi kĪŒ I ṭ`iṭK Avqvṭ`i ṭRvqvbi v

nZ"v K†i†Q|” At that time, the locals present there told that the Razakar accused Syed Md. Hussain alias Hossain having killed freedom fighters Khairul Jahan and Selim in the Pyarabhangha battle dumped their dead bodies in the field situated in front of Islamia Boarding. Thereafter he went to Shahidi Mosque for Maghrib prayer and while he came back after Magrib prayer, he did not see those two dead bodies.

1016. During cross-examination of P.W 19, he stated that his house was situated about 40 yards far from the “Shahidi Mosque.” During cross-examination, the defence suggested that accused Syed Md. Hussain alias Hossain was not Razakar or he was a Police Officer or he did not hear the occurrence or accused Syed Md. Hussain alias Hossain was not involved with the occurrence which has been denied by him.

Evaluation of the evidence and findings of the Tribunal

1017. The learned Prosecutor Ms. Tureen Afroz appearing along with another learned Prosecutor Mr. Tapas Kanti Baul on behalf of the Prosecution submitted that freedom fighter Khairul Jahan Talukder and Selim were killed on 26.11.1971 at about 2.30 pm in the Pyarabangha Battle of Hossainpur Thana and after the battle, at the order of Razakar Commander Syed Md. Hussain alias Hossain, his cohort Razakars having dragged out the dead bodies of those two freedom fighters, killed in armed battle, out of the paddy

field threw those dead bodies on the Hussainpur brick surface road and at the order of accused Syed Md. Hussain alias Hossain, his cohort Razakars tying the legs of those two freedom fighters on the back side of the jeep of the Pakistani occupation army moved ruthlessly up to the house of Shafi Chairman wherefrom dead bodies of those two freedom fighters having shifted on a rickshaw rounded Kishoreganj town and dumped those dead bodies in the field situated in front of the Islamia Boarding of Old Kishoreganj Thana and after Ashar prayer infamous collaborator Maulana Atahar Ali [now dead] came there and spitting and kicking on the dead bodies of those two freedom fighters expressed his abhorrence and at night the dead bodies were made disappeared and on searching, dead bodies of two freedom fighters could not be traced out. Thus the accused persons committed the offence of other inhumane acts[causing blatant indignity and inhumane hatred to dead bodies] as crimes against inhumanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and the prosecution by examining P.Ws 15 to 19 and exhibiting “Daily Purba Desh” dated 25.3. 1972 i.e. exhibit-2 proved the event of other inhumane acts as crimes against humanity as narrated in charge No.6.

1018. The learned defence counsel Mr. Abdus Sattar Palwan appearing on behalf of absconding accused Syed Md. Hussain alias Hossain as State defence counsel submitted that allegedly the dead bodies of two freedom fighters having tied on the back side of the

jeep of the Pakistani army moved ruthlessly and while the dead bodies of two freedom fighters were allegedly dumped in the field situated in front of the Islamia Boarding of Kishoreganj Old Thana, one Maulana Atahar Ali(now dead) allegedly kicked and had shown disrespect to those dead bodies and since Maulana Atahar Ali is now dead, the prosecution after 45 years of the alleged occurrence concocted a false story of causing blatant indignity and inhumane hatred to the dead bodies as other inhumane acts as crimes against inhumanity only to harass and humiliate the accused person in the instant case and the witnesses examined by the prosecution were minor at the relevant time and they could not recognize the perpetrators of the alleged crime as narrated in charge No.6 and thus the prosecution failed to prove the charge against the accused person and he prayed for acquittal.

1019. To prove the event narrated in charge No.6, the prosecution examined P.Ws 15,16,17,18 and 19, out of which P.Ws 15 and 16 are the resident of Pyarabhangra village, the battlefield, where the freedom fighters Khairul Jahan Talukder and Selim were killed at the time of Pyarabhangra battle took place between the freedom fighters and the Razakars and the Pakistani army. P.Ws 17 and 18 are the resident of Sholakia village. P.W18 is the brother of freedom fighter Martyr Khairul Jahan Takukder. P.W19 is a resident of 380/1, Old Thana which was situated adjacent to Old Thana and east side of Islamia Boarding wherein the dead bodies of

two freedom fighters were allegedly dumped by accused Syed Md. Hussain alias Hossain.

1020. On a careful scrutiny of the evidence it transpires that after Pyarabhangra battle at about 4.00 pm P.W15 came out from his house and heard from the locals present there that Razakar Commander Syed Md. Hussain alias Hossain and his cohort Razakars attacked the freedom fighters and killed freedom fighters Khairul Jahan Talukder and Selim and P.W16 also saw through the hole of the fence of his hut that the Razakars having dragged out dead bodies of freedom fighters Khairul Jahan Talukder and Selim from the paddy field tying those dead bodies on the back side of the jeep of the Pakistani army were going towards east side and while the Razakars left the battlefield, he came on the Hossainpur road and saw blood on the road and heard from the locals that under the leadership of accused Hussain, Razakars and the Pakistani army attacked the freedom fighters.

1021. P.W 17 stated that on 26.11.1971 at about 4 pm while he was playing on the road adjacent to his house situated at Kishoreganj Thana Sadar saw that Razakars having dumped dead body on a Rickshaw started a procession towards old Kishoreganj Thana and subsequently heard that accused Syed Md. Hussain alias Hossain and his cohort Razakars dumping the dead bodies of freedom fighters Khairul Jahan Talukder and Selim on that Rickshaw moved

towards old Thana. P.W 18 stated that being informed about the killing of his brother Khairul Jahan Talukder on the date of occurrence after 4 pm he went to his house and saw that a few Razakers under the leadership of Razakar Commander Syed Md. Hussain alias Hossain entered his house and also saw blood on the light brown colour (Khaki) pant of accused person who told to the mother of P.W 18 that he killed her son which has been recorded in the deposition sheet in Bangla as“ †Zvi †Q†j †K gyEevnb†Z cvW†q†Q†j , GB †`L †Zvi †Q†j †K nZ`v K†i G†m†Q, GB †`L Zvi i³ | Zvi j vk wi· vq K†i mviv kni N†i†q gvby†K †`wL†q†Q|”

1022.P.W 19 stated that on 26.11.1971 at about 4.30 pm while he was present in his house situated at near the Islamia Boarding, a Razakar camp, he heard that accused person and his cohort Razakars having killed two freedom fighters dumped their dead bodies in the field situated in front of the Islamia Boarding, a Razakar camp, and after that he went there and saw the dead bodies of freedom fighters Khairul Jahan, a friend of his elder brother, and another person, and after Ashar prayer, the infamous collaborator Maulana Atahar Ali (now dead) expressed his abhorrence by spitting and kicking on those dead bodies

1023. On scrutiny of the documentary evidence presented to the Tribunal, it reveals that at the relevant time several reports were also published in different local newspapers regarding the

inhumane hatred to the dead bodies of two freedom fighters and the report dated 25.3. 1972 published in the “Daily Purbadesh” was marked as exhibit 2 and relevant part of the said report is quoted below;

“KL`vZ ivRvKvi c`avb wks tnv`mb knx` i gZt` n wi Kkvq cvtqi
 Zj vq tPtc, nv`Zi g`Vvq LwUZ gv_v wbtq tmw` b mviv kni
 cqgvj Kti Nti tewotqWQj | Nti Nti knx` i cweI t`nUvtK
 bvbvfvte j wAZ I c` kK Kti `ckwPK Dj vt`k tgZ wQj |”

1024. On careful appraisal of the above evidence, it transpires that during cross-examination of P.Ws 15, 16, 17, 18 and 19 the defence by giving suggestion to them merely denied their statement and could not bring out any inconsistency or contradiction in their statement made in the examination- in- chief to discredit their evidence. P.Ws 15 and 16 were the inhabitant of Pyrabhanga village and the two freedom fighters were killed adjacent to their houses for which there was a good reason for witnessing and hearing the occurrence as stated by them. P.W 17 was an inhabitant of Kishoreganj Sadar Thana and at the time of cross-examination he affirmed that his house was situated beside the Kishoreganj-Hossainpur Road for which it was possible for him to see the accused person who dumping those dead bodies on a Rickshaw were going from Hussainpur towards old Kishoreganj Thana which was situated about a half kilometer far from his house. P.W 18

claimed that being informed about the killing of his brother freedom fighter Khairul Jahan Talukder, he came back to his house and saw accused Syed Md. Hussain alias Hossain and his cohort Razakars in his house. P.W 19 claimed that his house was situated to the east side of Islamia Boarding where the dead bodies of two freedom fighters were dumped for which it was possible for him to see the dead bodies of two freedom fighters and hear about the occurrence from the locals present there. In the above evidence, facts and circumstances, I am of the view that the P.Ws 15, 16, 17, 18 and 19 saw and heard about the occurrence as narrated in charge No. 6 and their evidence inspires confidence to find the accused Syed Md. Hussain alias Hossain guilty of the offence of other inhuman acts (causing blatant indignity and inhumane hatred to dead bodies) as crimes against humanity.

1025. On the evaluation of the evidence of the prosecution witness Nos. 15,16,17 and 19 it reveals that the freedom fighters Khairul Jahan Talukder and Selim were killed at about 3.00 pm during Pyarabhangra battle of Hossainpur Thana of the then Kishoreganj Sub-Division and after battle, the Razakars having dragged out the dead bodies of those two freedom fighters from the paddy field had thrown down those dead bodies on the Hussainpur brick surfaced road and tying those dead bodies on the backside of the jeep of the Pakistani army started moving ruthlessly through the brick surfaced road towards the house of Shafi Chairman

which was situated about a half kilometer far from the Pyarabhangra Battle Field and on the same day at about 4.00 pm, the Razakar Commander accused Syed Md. Hussain alias Hossain along with his 10/15 cohort Razakars having shifted the dead bodies of those two freedom fighters on a Rickshaw reached at Sholakia wherefrom they started towards Kishoreganj Old Thana and at about 4/4.30 pm the dead bodies of those two freedom fighters were dumped in the field situated in front of the Islamia Boarding which was situated adjacent to Kishoreganj Old Thana. After Asar prayer infamous collaborator Maulana Atahar Ali [now dead] came there and spitting on the dead bodies of two freedom fighters killed in armed battle started uttering that –“ It is the blessing of Allah, they are ‘ kafir’, ‘ kafir’, they are enemies of Pakistan and our sons had killed them” and saying this he also kicked the dead bodies of freedom-fighters Khairul Jahan Takukder and Selim by expressing abhorrence. Subsequently, on searching their dead bodies could not be traced out for which accused Syed Md. Hussain alias Hossain is also liable for the disappearance of the dead bodies of two freedom fighters.

1026. Under Section 3(2)(e) of the Act of 1973 violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 is an offence which is also relevant to the charge No. 6 for which provision of Section 3(2)(e)(f)(g)(h) of the Act of 1973 is quoted blow;

Section 3(2)(e)(f)(g)(h) of the ACT of 1973

3(2)(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.

1027. The obligation to take all possible measures to prevent the dead from being despoiled or pillaged was first codified in the 1907 Hague Convention (X). Subsequently, it has been codified in the Geneva Conventions and in Article 34 of Additional Protocol-I in general terms of “respecting” the dead, which includes the notion of preventing the remains from being despoiled. The obligation to take all possible measures to prevent the dead from being despoiled or the prohibition of the despoliation of the dead is set forth in numerous military manuals of a civilized country. The despoliation of dead bodies is an offence under many national legislation of the civilized state. In the Pohl case in 1947, the US Military Tribunal at Nuremberg stated that robbing the dead “is and always has been a crime.” The prohibition of mutilating dead bodies in international armed conflict is covered by the war crime of “committing outrages

upon personal dignity” under the Statute of the International Criminal Court, which according to the elements of crimes also applies to dead persons. The obligation to take all possible measures to prevent the dead from being despoiled in non-international armed conflict is set forth in Additional Protocol II.

1028. In Article 15 of the Geneva Convention For The Amelioration of The Condition of the Wounded AND Sick in Armed Forces In The Field Of August 12, 1949, The High Contracting Parties provided provision “to search for the dead and prevent their being despoiled”. Article 15 of the said convention is quoted below;

Article 15

“At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged or local arrangements made, to permit the removal, exchange, and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for

the passage of medical and religious personnel and equipment on their way to that area”.

1029. In Article 17 of the Geneva Convention For The Amelioration Of The Condition Of The Wounded AND Sick in Armed Forces In The Field Of August 12, 1949, The High contracting Parties made provision for burial or cremation of the dead based on the religion of the deceased and the said provision is quoted below;

Article 17

“Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming the death, establishing identity and enabling a report to be made. One-half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In the case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honorably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be

found. For this purpose they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves together with particulars of the dead interred therein”.

1030. In Article 34 to the Protocol Additional To The Geneva Convention of 12 August 1949, AND Relating To The Protection of Victims of International Armed Conflicts (Protocol I) provision has been provided to respect the dead bodies who died for reason related to occupation or hostilities and the said Article is quoted below;

“Article 34-Remains of deceased

- The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth

Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

- As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order.
 - to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
 - to protect and maintain such gravesites permanently;
 - to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2(b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of the five years from the date of the offer and upon due notice to the home country, adopt the arrangements and laid down in its own laws relating to cemeteries and graves’.

1031. In Article 8 of the Additional Protocol II of the Geneva Convention also made provision to search for the dead to prevent their being despoiled and decently dispose of them. Article 8 of the said Protocol is quoted verbatim as under;

“Article 8-Search

Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.”

1032. In Article 120 of the Geneva Convention To The treatment of Prisoner of War of August 12, 1949, the High Contracting Parties made provision for burial or cremation of dead body of a prisoner of war and protection of graves which runs as follows;

“Article 120

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates in the form annexed to the present Convention or lists certified by a responsible officer, of all

persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau be established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honorably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In the case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war

interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.”

1033. In Article 16 of the Geneva Convention, I Relative To The Protection of Civilian Persons In Time Of War Of August 12, 1949 (Geneva Convention IV) The High Contracting Parties made provision to take steps to protect the killed and the said provision runs as follows;

“Article 16

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other person exposed to grave danger, and to protect them against pillage and ill-treatment. “

1034. In the early 7th century, the first Caliph, Abu Bakr, whilst instructing his Muslim army, laid down the following rules concerning warfare:

“Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kills a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire,

especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone." [Aboul-Enein, H.Yousuf, and Zuhur, Sherifa, Islamic Rulings on Warfare, p. 22 Strategic Studies Institute, US Army War College, Diane Publishing Co., Darby PA, ISBN 1-4289-1039-5.]

1035. In view of the above evidence, I am of the view that accused Syed Md. Hussain alias Hossain along with his cohort Razakars and the Pakistani army on the date and time having attacked the freedom fighters in the Pyarabhangra battlefield killed the freedom fighters and after battle, the Razakars tying the dead bodies of freedom fighters Khairul Jahan Talukder and Selim on the back side of the jeep of the Pakistani army ruthlessly moved through the brick surfaced road from Pyarabhangra village of Hossainpur Thana to the house of Shafi Chairman which was situated about a half kilometer far from the Pyarabhangra battlefield and thereafter Razakar Commander accused Syed Md. Hussain alias Hossain dumping those dead bodies on a Rickshaw rounded up to Kishoreganj Sadar and created panic in the locality. The accused Syed Md. Hussain alias Hossain and his cohort Razakars by mutilating the dead bodies of two freedom fighters expressed their abhorrence and cruelty to the freedom fighters and the pro-liberation people of the locality. Exhibit 2, the Daily Purbadesh

dated 25.3.1972 is an old document and corroborates the evidence of P.Ws 15 to 19.

1036. A dead has no enemy and under the Customary International Law, it is the bounded duty of the authorities to search for the dead and prevent their being despoiled who died at the time of hostility. The parties to the conflict shall ensure that the dead are honorably interred, if possible according to the rites of the religion to which they belonged and their graves are respected, properly maintained and marked so that they may always be found. Mutilation of the dead who died at the time of hostility or battle is violence to life and cruel treatment to the dead amounted to torture.

1037. Unimpeachable evidence presented to the Tribunal proved beyond reasonable doubt that under the instruction of accused Syed Md. Hussain alias Hossain his cohort Razakars after Pyrabhanga battle, tying the dead bodies of two freedom fighters killed in armed battle on the backside of the jeep of the Pakistani army ruthlessly moved up to a half kilometer and thereafter Razakar Commander accused Syed Md. Hussain alias Hossain shifting those dead bodies on a rickshaw rounded Kishoreganj town and dumped those dead bodies in the field situated in front of the Islamia Boarding of Kishoreganj Sadar and mutilated those dead bodies, but the Pakistani army men did not take part in mutilating the dead bodies of the freedom fighters. Only accused Syed Md. Hussain

alias Hossain and his cohort Razakars took part in mutilating the dead bodies of two freedom fighters and they were cruelest than the barbaric Pakistani occupation army men and their cruelty exceeded all rules of humanity.

1038. It reveals that Martyr freedom fighters Khaiurl Jahan Talukder and Selim, and accused Razakar Commander Syed Md. Hussain alias Hossain are Muslim but accused Syed Md. Hussain alias Hossain in the name of Islam and to protect so-called Pakistan took part in the war against Bangladesh, and those two freedom fighters took part in the War of Liberation of Bangladesh for the independence of their motherland and laid down their lives. Islam has categorically prohibited its followers from mutilating the corpses of their enemies and instructed its followers to return the corpses of the enemies to their relations and to show respect to the dead, but the accused person violating the rules applicable in armed conflicts laid down in the Geneva Conventions of 1949 committed the offence of other inhumane acts[causing blatant indignity and inhumane hatred to dead bodies] as crimes against humanity.

1039. Thus the prosecution witness Nos. 15 to 19 proved the instant charge against the accused Syed Md. Hussain alias Hossain beyond all reasonable doubt and he committed the offence of “other inhumane acts” (causing blatant indignity and inhumane hatred to

dead bodies) constituting the offence of crimes against inhumanity as specified in Section 3(2)(a)(e)(g)(h) of the Act of 1973 which is punishable under Section 20(2) of the said Act.

Liability of accused persons

1040. In the charges framed against the accused persons, it is alleged that the accused persons incurred liability under section 4(1) and 4(2) of the Act of 1973. Section 4(1) of the Act of 1973 speaks about the liability of several persons who committed any of the crime as specified in Section 3(2) of the Act of 1973 and in Section 4(2) of the Act of 1973 the legislature adopted the principle “command or superior responsibility.”

1041. The Pakistani army was the operational commander of the auxiliary force i.e. Razakar, Al-Badr and Al-Shams. In reply to a question put to the Investigating Officer P.W 23 ASP Hari Debnath stated that Captain Durrany was the Commander of Pakistani army of Nikli Thana area. It is an admitted fact that the Pakistani army and Razakars jointly committed the offences narrated in charge Nos. 3, 4 and 6. Prosecution witnesses presented to the Tribunal proved beyond reasonable doubt that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana but while he committed the offence as narrated in the charges Pakistani army had direct control over Razakar Commander accused Syed Md. Hussain alias Hossain.

1042. In this respect, I recall my earlier observation made in the Case of Chief Prosecutor vs Idris Ali Sardar, ICT –BD Case No 06 of 2015, Judgment dated 5 .12.2016, Para 605 wherein it has been observed that-

“The Governor of East Pakistan, Lieutenant General Tikka Khan promulgated the East Pakistan Razakar Ordinance, 1971. The Ordinance stipulated the creation of a voluntary force to be trained and equipped by the Provincial Governor. Razakars, Al-Badr, and Al-Shams were locally recruited by the Shanti Committee which was formed by several pro-Pakistani leaders and Urdu-speaking migrants who lived in Bangladesh. The Razakars, Al-Badr, and Al-Shams were under Pakistani Army command and also trained by them to prevent the independence of Bangladesh. The Razakar force was organized into several brigades armed with Light Infantry weapons provided by Pakistani Army and acted as an auxiliary force to the Pakistani Army. The Razakar, Al-Badr, and Al-Shams were placed under the command of Pakistani Army, and they along with Pakistani Army jointly committed crimes against humanity, war crimes, genocide and other inhuman acts during the War of Liberation of Bangladesh in 1971.”

1043. The Pakistani Army recruited the Razakars, Al-Badr, and Al-Shams under the Razakars Ordinance, 1971 and set up training schools and trained the said forces as a paramilitary force and the young officers of Pakistani Army were appointed as Razakar Group

Commander. Lt General A.A.K Niazi in his book titled “The Betrayal of East Pakistan Page-87” narrated that “seventy percent of the target ceiling of 50,000 Razakars, spread over all the districts of the province, was achieved. Battle schools were established to train Razakar platoon and company commanders. To provide an effective command structure to this organization, about sixty young officers were selected to be appointed as Razakar Group Commanders. Page-79. He further added, “Since the East Pakistan Civil Armed Forces had disintegrated, local Razakars, mainly consisting of ex-Biharis and loyal East Pakistanis have trained initially to man the border outposts and fall back on to the strong points and fortresses manned by the regular Army. The officers were from the regular Army. They did an admirable job. They gave a tough fight to the Mukti Bahini and fought minor patrolling and tactical actions.”

1044. In this respect, I recall my earlier observation made in the Case of Chief Prosecutor vs Idris Ali Sardar, ICT –BD Case No 06 of 2015, Judgment dated 5 .12.2016, Para 765 wherein it has been observed that-

“Joint Criminal Enterprise” notion is a mode of criminal responsibility of several persons which was evolved in the post world war trials of international crimes and developed in the judgment of Tadic Case by the ICTY and followed by the ICTR, ICC, and other Tribunals. Provision provided in Section 4(1) of

the Act of 1973 and “Joint Criminal Enterprise” are two separate modes of criminal responsibility of several persons. Under JCE theory, the perpetrators act on the basis of a “common design or ‘common enterprise’ and with a common criminal intent”. “Joint Criminal Enterprise” notion has no direct nexus with the provision provided in section 4(1) of the Act of 1973 inasmuch “common design or common criminal intent” of the perpetrators which are the essence of JCE, are not the element of Section 4(1) of the Act of 1973. Since “CIL will be applicable, so far as it is not inconsistent with the Act of 1973”, accused Idris Ali Sardar incurred the liability under Section 4(1) of the Act of 1973, not under any form of “Joint Criminal Enterprise”.

1045. In the Case of the Chief Prosecutor Versus Md. Sakhawat Hossain, ICT-BD [ICT-1] Case No.04 OF 2015, accused Md. Shakhawat Hossain was the Razakar Commander of Chingra Razakar Camp and he was convicted under Section 4(2) of the Act of 1973 on the ground that “he..... committed the offences without any help of Pakistani Occupation army”. In this respect, I recall my earlier observation made in Para 1137 of the above-mentioned case wherein it has been observed that-

“I have rendered my reasoned findings that all the convicted accused persons consciously forming part of a criminal enterprise sharing the common criminal intent of all convicts committed the offences without any help of Pakistani Occupation army and all the victims of the crimes were civilian. It is proved beyond

all reasonable doubt that the convict Md. Sakhawat Hossain was the Razakar Commander of Chingra Bazaar Razakar Camp and other convicted accused persons were the Razakars and close accomplices of Razakar Commander Convict Md. Sakhawat Hossain who is the mastermind and principal perpetrator of all offences proved beyond all reasonable doubt and all other convicted accused persons played a secondary role and committed the offences as per order of their Commander convict Md. Sakhawat Hossain. “

1046. In the above premises, it appears that fact of the case of Md. Sakhawat Hossain and the instant case is not similar and clearly distinguishable for which I am of the view that the principle adopted by me in the Case of Md. Sakhawat Hossain as regards the provision of Section 4(2) of the Act of 1973 is not applicable in the instant case due to distinguishing facts. It is already held that accused Syed Md. Hussain alias Hossain was the Razakar Commander of Nikli Thana of the then Kishoreganj Sub-Division and accused Md. Moslem Prodhan was a potential Razakar but fact remains that at the relevant time Captain Durrany of Pakistani army was the Commander of Nikli Thana area and the Pakistani army was also the operational commander of the auxiliary force. It is well proved that the accused persons, their cohort Razakars, and the Pakistani army forming part of a criminal enterprise sharing the common criminal intent of all committed the offences as narrated in charges. In view of the above evidence, fact, and circumstances of

the case, findings and reasoning I am of the view that the accused persons have incurred the liability under Section 4(1) of the Act of 1973.

Verdict on conviction

In view of the above facts and circumstances of the case and evidence, both oral and documentary and the submission of the parties and reasons set out in the judgment I find-

(1)Accused Syed Md. Hussain alias Hossain
[64][absconding]in-

Charge No.1: **Guilty** of the offence of forceful conversion of Hindu religious people to Muslim constituting the offence of 'other inhumane acts' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and he be convicted and sentenced under section 20(2) of the said Act.

(1)Accused Syed Md. Hussain alias Hossain
[64][absconding]in-

Charge No.2: **Guilty** of the offences of abduction and confinement as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and he be convicted and sentenced under section 20(2) of the said Act.

(1) Accused Md. Moslem Prodhan (67) and (2) accused Syed Md. Hussain alias Hossain [64][absconding]in-

Charge No.3: **Guilty** of the offences of extermination and arson [other inhumane acts] as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and both of them be convicted and sentenced under section 20(2) of the said Act.

(1) Accused Syed Md. Hussain alias Hossain [64][absconding]in-

Charge No.4: **Guilty** of the offences of genocide and abduction, confinement, torture, and rape as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 and he be convicted and sentenced under section 20(2) of the said Act.

(1) Accused Md. Moslem Prodhan (67) and (2) accused Syed Md. Hussain alias Hossain [64][absconding]in-

Charge No.5: **Guilty** of the offences of abduction and murder as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and both of them be convicted and sentenced under section 20(2) of the said Act.

(1) Accused Syed Md. Hussain alias Hossain [64][absconding]in-

Charge No.6: **Guilty** of the offence of “other inhumane acts” (causing blatant indignity and inhumane hatred to dead bodies) as crimes against inhumanity as specified in Section 3(2)(a)(e)(g)(h) of the International Crimes (Tribunals) Act, 1973 and he be convicted and sentenced under section 20(2) of the said Act.

Verdict on sentence

1047. In awarding sentence this Tribunal consistently following the principle “sentence.... proportionate to the gravity of the crime” as in Section 20 of the Act of 1973, the legislature adopted the principle of “proportionality.” This Tribunal will also consider the public abhorrence of the crimes, facts, and circumstances of the case and shall award a sentence proportionate to the gravity of the crimes. In awarding sentence, this Tribunal is consistently following the principle “stare decisis” which means that law must be certain and for that purpose, the earlier decisions of the highest Courts of the country should be followed unless the circumstance and the legal position demand that it should be departed from. Provision provided in Section 20 of the Act 1973 is directory but limited to the words “just and proper” proportionate to the gravity of the crimes committed.

1048. In this respect, I recall my earlier observation made in the case of Chief Prosecutor vs. Idris Ali Sardar, ICT-BD Case No.06

of 2015, judgment dated 5.12.2016 **Para 893 wherein** it has been observed that

“In Section 20 of the Act of 1973, the Legislature provided a provision in awarding sentence for commission of the crimes as specified in Section 3(2) of the said Act. Under the Act of 1973, this Tribunal has limited discretion in awarding sentence inasmuch as the Legislature made provision in section 20 of the said Act directing the Tribunal to award “sentence of death or such other punishment proportionate to the gravity of the crimes as appears to the Tribunal to be just and proper.” The words “just and proper” used in section 20 of the Act of 1973 relates to the “gravity of the offence.” Crimes are only to be measured by the injury done to the victims and the society. The discretion of the Tribunal under section 20 of the said Act is not wide but limited to the words “punishment proportionate to the gravity of the crimes as appears to the Tribunal to be just and proper.”

1049. In the case of Prosecutor VS Mico Stanisic Stojan Zupljanin, Case No.IT-08-91-T, Judgment dated 27 March 2013, the ICTY Trial Chamber II at Para 896 considered the “aggravating circumstances” in awarding the appropriate sentence and observed that –

“The jurisprudence of the Tribunal has identified potentially aggravating factors, such as the accused’s abuse of his superior position, the length of time during which the crime continued, active and direct criminal participation if linked to a high-ranking position of command, premeditation and motive, the zealotry with which a crime was committed, a

discriminatory state of mind where discrimination is not an element of the offence, the violent and humiliating nature of the acts and the vulnerability of the victims, the status of the victims, their age and number, and the effect of the crimes upon them, the character of the convicted person, and the circumstances of the offences generally. Intelligence and good education have been considered to be possible aggravating factors because such persons should have been able to understand the circumstances and foresee the consequences of their conduct.”

1050. In this respect, I also recall my earlier observation made in the case of the Chief Prosecutor Vs Idris Ali Sardar, ICT-BD Case No.06 of 2015, judgment dated 5.12.2016, para 911 wherein it has been observed that

“Genocide is the cruelest, heinous, brutal and barbaric crime committed with intent to destroy the Hindu religious group, in whole or in part, and only the death sentence is proportionate and will match the offence of genocide committed by the convict”.

1051. The above view of this Tribunal also gets support from the decision arrived at by our Apex Court made in Criminal Review Petition No. 58 of 2016, Mir Quasem Ali –Versus-The Chief Prosecutor, International Crimes Tribunal, Judgment dated 30th August 2016 wherein our Apex Court observed that-

“The court is only concerned with the culpability to the petitioner and the law governing on the sentencing

principles. Crimes against humanity are taken as serious types of offence. The word 'humanity' signifies humanness-mankind collectively. The term 'crimes against humanity' has come to mean anything atrocious committed on a large scale. These crimes are committed against the civilian population during the war. These offences by nature are heinous. If any person commits crimes against humanity and if the court finds that the offender directly participated in such crimes the court is left with little discretion in awarding the minimum sentence particularly in respect of serious crimes.”

1052. In the case of Prosecutor VS. Mico Stanisic Stojan Zupljanin, Case No.IT-08-91-T, Judgment dated 27 March 2013, the ICTY Trial Chamber II at Para 892 regarding the principle of sentencing observed that -

“The inherent gravity of an offence is the primary consideration in determining a sentence. When assessing the gravity of the offence; a Trial Chamber must take into account the totality of the criminal conduct of the convicted person. In doing so, the Chamber must consider the cruelty, the nature and circumstances of the crimes, the position of authority and degree of participation of the convicted person in the perpetration of those crimes, the number of victims, and the effect of the crimes upon the broader targeted group. The Appeals Chamber has also held that the consequences of the crime upon the victims directly injured, namely the extent of the long-term physical, psychological, and emotional suffering of the

victim, is always relevant to sentencing. Further factors, such as the effects of the crime on relatives of the immediate victims, may also be considered.

1053. Unimpeachable evidence presented to the Tribunal proved that the convicts directly participated in killing 26 (twenty-six) civilians of Gurui village under Nikli Thana of the then Kishoreganj Sub-Division, a large-scale killing, constituting the offence of extermination as crimes against humanity. Convict Syed Md. Hussain alias Hossain directly participated in committing the offences of abduction, confinement, and torture of 39 Hindus and to destroy the Hindu religious group, in whole or in part, he along with his cohort Razakars and the Pakistani army men killed 34 Hindus of Dampara of Nikli Thana at cremation ghat. The prosecution also proved the event of abduction and murder of freedom fighter Abdul Malek of Nikli Purba Gao village against the convicts. Convict Syed Md. Hussain alias Hossain committed the cruelest offences blatant indignity and inhumane hatred to dead bodies of two freedom fighters Khairul Jahan Talukder and Selim, forceful conversion of Hindu religious people of Dampara village to Muslim, and abduction and confinement of innocent civilians of the locality of Nikli Thana. The offence of extermination as crimes against humanity committed by the convicts as narrated in charge No.3 and genocide committed by convict Syed Md. Hussain alias

Hossain as narrated in charge No.4 are the cruelest, brutal and barbaric crimes.

1054. Except the European countries, all over the world, the death sentence is consistently awarding for the commission of the grave offences. The convicts directly participated in killing 26 innocent civilians, a large-scale killing, of Gurui village under Nikli Thana of the then Kishoreganj Sub-Division and committed the offence of extermination as crimes against humanity. The convict Syed Md. Hussain alias Hossain with intent to destroy the Hindu religious group of Dampara Bazaar, Dampara and Nobinpur villages, in whole or in part, directly participated in killing 34 Hindus and committed the offence of genocide.

1055. In view of the above evidence, facts and circumstances of the case, the proposition of law and the findings I am of the view that only the death sentence is proportionate and will match the offences of “extermination as crimes against humanity” committed by convicts and genocide committed by convict Syed Md. Hussain alias Hossain.

Accordingly, I do hereby render the following ORDER ON SENTENCE.

Hence it is

ORDERED

That accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka is held guilty of the offence of forceful conversion of Hindu religious people to Muslim constituting the offence of 'other inhumane acts' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 1 and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 7(seven) years under section 20(2) of the said Act.

That accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka is held guilty of the offences of abduction and confinement as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in charge No 2 and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 5(five)years under section 20(2) of the said Act.

That accused (1) Md. Moslem Prodhan (67) son of late Labhu Sheikh and late Rezia Akhter of village Kamarhati, Police Station-Nikli, District Kishoreganj and (2) accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka are held guilty of the offences of extermination and arson [other inhumane acts] as crimes against humanity as specified in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.3** and both of them be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

That accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka is held guilty of the offences of genocide and abduction, confinement, torture and rape as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.4** and he be convicted accordingly and sentenced thereunder to death under section 20(2) of the said Act.

That accused (1) Md. Moslem Prodhan (67) son of late Labhu Sheikh and late Rezia Akhter of village Kamarhati, Police Station-Nikli, District Kishoreganj and (2) accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka are held guilty of the offences of abduction and murder as crimes against humanity as specified in section 3(2)(a)(g) (h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.5** and both of them be convicted accordingly and sentenced thereunder to suffer imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

That accused Syed Md. Hussain alias Hossain [64][absconding] son of late Syed Musleh Uddin and late Syeda Fatema Banu of village Machihata, Police Station and District-Brahmmanbaria, his last known address was House No. 2, Road No. 6, Pink City, Police Station-Khilkhet, Dhaka is held guilty of offence of “other inhumane acts” (causing blatant indignity and inhumane hatred to dead bodies) as crimes against inhumanity as specified in Section 3(2)(a)(e)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge No.6** and he be convicted accordingly and sentenced thereunder to suffer rigorous imprisonment for 10(ten) years under section 20(2) of the said Act.

The above-mentioned sentences of death be executed by hanging the accused persons convicted as above by the neck or by shooting them till they are dead, as decided by the government.

The sentences of imprisonment awarded to the convict Syed Md. Hussain alias Hossain as above shall run concurrently.

However, as and when any sentence of death awarded to convicts as above will be executed, another sentence of death and/or sentence (s) of imprisonment awarded to them as above would naturally get merged into the sentence of death executed.

The sentences 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 Act of 1973.

THE TRIBUNAL'S ORDER ON SENTENCE

That accused Syed Md. Hussain alias Hossain [absconding] son of late Syed Musleh Uddin and Syeda Fatema Banu of Village Machihata, Police Station and District Brahmanbaria, at present House No.2, Road No. 6, Pink City, Police Station Khilkhet, Dhaka is held **UNANIMOUSLY guilty** of the offence of '**other inhumane act**' as 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 **UNANIMOUSLY** thereunder to suffer rigorous imprisonment for 07 [seven] years under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held **BY MAJORITY guilty** of the offences of '**abduction, 'confinement' and 'other inhumane act'** as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and held **BY MINORITY guilty** of the offences of '**abduction**' and '**confinement**' as 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 he be convicted accordingly and sentenced **UNANIMOUSLY** thereunder to suffer rigorous imprisonment for 05[five] years under section 20(2) of the said Act.

Accused (1) Md. Moslem Prodhan son of late Labhu Sheikh and late Rezia Akhter of Village Kamarhati, Police Station Nikli, District Kishoreganj, and (2) Syed Md. Hussain alias Hossain [absconding] are held **UNANIMOUSLY guilty** of the offences of '**extermination**' and '**other inhumane acts**' as crimes 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 they be convicted accordingly and sentenced **UNANIMOUSLY** thereunder to death under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held **BY MAJORITY guilty** of the offence of 'genocide' as enumerated in section 3(2)(c)(i)(ii)(g)(h) of the International Crimes (Tribunals) Act, 1973 and held **BY MINORITY guilty** of the offences of 'genocide' and 'abduction', 'confinement', 'torture' and 'rape' as crimes against humanity as specified in section 3(2)(a)(c)(i)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no.04** and he be convicted accordingly, and sentenced **UNANIMOUSLY** thereunder to death under section 20(2) of the said Act.

Accused (1) Md. Moslem Prodhan, and (2) Syed Md. Hussain alias Hossain [absconding] are held **UNANIMOUSLY guilty** of the offences of 'abduction' and 'murder' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 05** and they be convicted accordingly and sentenced **UNANIMOUSLY** thereunder to suffer imprisonment for life i.e. rest of their natural life under section 20(2) of the said Act.

Accused Syed Md. Hussain alias Hossain [absconding] is held **BY MAJORITY guilty** of the offences of 'other inhumane acts' [causing blatant indignity and inhumane hatred upon dead bodies] as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the International Crimes (Tribunals) Act, 1973 and held **BY MINORITY guilty** of the offence of 'other inhumane

acts' [causing blatant indignity and inhumane hatred to dead bodies] as crimes against humanity as enumerated in section 3(2)(a)(e)(g)(h) of the International Crimes (Tribunals) Act, 1973 as listed in **charge no. 06** and he be convicted accordingly and sentenced **UNANIMOUSLY** thereunder to suffer rigorous imprisonment for 10[ten] years under section 20(2) of the said Act.

The sentence of death awarded as above in respect of charge no. 03 be executed by hanging the convict accused Md. Moslem Prodhan by the neck or by shooting him till he is dead, as decided by the government.

The sentence of death awarded as above in respect of charge nos. 03 and 04 be executed by hanging the convict accused Syed Md. Hussain alias Hossain by the neck or by shooting him till he is dead, as decided by the government.

The sentence of imprisonment awarded to the convict accused persons as above shall run concurrently.

However, as and when any sentence of death awarded to convict accused (1) Md. Moslem Prodhan, and (2) Syed Md. Hussain alias Hossain as above will be executed, the other sentence of death and sentence of imprisonment awarded to them as above would naturally get merged into the sentence of death executed.

The sentence of death and sentence 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.

Since the convict Syed Md. Hussain alias Hossain has been absconding, the sentence of death and sentence of imprisonment awarded to him as above shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

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 provisions of section 21 of the International Crimes (Tribunals) Act, 1973.

The convict accused Md. Moslem Prodhan be sent to the prison with conviction warrant accordingly.

Issue conviction warrant against the convict absconding accused Syed Md. Hussain alias Hossain.

The Secretary, Public Security Division, Ministry of Home Affairs and the Inspector General of Police [IGP] are hereby directed to ensure the apprehension of the convict absconding accused Syed Md. Hussain alias Hossain, if necessary with the help of the Inter-Pol.

Let certified copy of this judgment be provided to the prosecution and the convict accused Md. Moslem Prodhan free of cost, at once.

If the absconding convict accused Syed Md. Hussain alias Hossain is arrested or surrenders within 30[thirty] days of the date of order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Let a copy of this judgment together with the conviction warrant of the convict accused Syed Md. Hussain alias Hossain be sent to the District Magistrate, Dhaka for information and necessary action.

Let a copy of this order be sent together with the conviction warrant of the convict accused Syed Md. Hussain alias Hossain to the (1) Secretary, Public Security Division, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka, and (2) Inspector General of Police [IGP], Police Head Quarters, Dhaka for information and compliance.

(Justice Anwarul Haque, Chairman)

(Justice Md. Shahinur Islam, Member)

(Justice Md Shohrowardi, Member)