

14 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain
-Chief Justice
Mr. Justice Hasan Foez Siddique
Ms. Justice Zinat Ara
Mr. Justice Md. Nuruzzaman

CRIMINAL APPEAL NO.12 of 2015

(From the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal-1 in ICT-BD Case No.05 of 2013.

A.T.M. Azharul Islam. :**Appellant.**

-Versus-

The Chief Prosecutor, International Crimes Tribunal, Dhaka, Bangladesh. :**Respondent.**

For the Appellant. : Mr. Khandaker Mahbub Hossain, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Respondent. : Mr. Mahbubey Alam, Attorney General, Mr. Murad Reza, Additional Attorney General, Mr. Momtaz Uddin Fakir, Additional Attorney General and Mr. Biswajit Devnath, Deputy Attorney General, instructed by Mrs. Mahmuda Begum, Advocate-on-Record.

Dates of Hearing : **18. 06. 2019, 19. 06. 2019, 24. 06. 2019, 25. 06. 2019, 26. 06. 2019, 01. 07. 2019, 02. 07. 2019, 03. 07. 2019, 08. 07. 2019, 09. 07. 2019 and 10. 07. 2019.**

Date of Judgment : **The 31st October, 2019.**

Crimes against Humanity, Genocide and War Crimes; Law of evidence; Hearsay evidence; Abetment; Form of charge in case of mass victims; Probative value of an uncrossed deposition.

Editor's Note:

This criminal appeal has been preferred by the convict appellant A.T.M. Azharul Islam against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No. 1 convicting the appellant on charge nos. 2, 3, 4, 5, 6. The Tribunal acquitted him on charge no.1 and Government did not prefer any appeal against the same.

Charge No. 2: The Appellant was charged for abetting and facilitating the commission of offence of looting, arson and murder of 14 named and other unnamed civilians on 16th April 1971 at Moksedpur village in Dhap Para area in Rangpur as crimes against humanity as specified in sections 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence. Zinat Ara, J. (Minority View) dissented on the conviction and accordingly ordered acquittal.

Charge No. 3: The Appellant was charged for abetting and facilitating the commission of offences of looting, arson and murder of about 1200 unarmed people on 17th April 1971 at Jharuarbeel area in Rangpur as crimes against humanity and also genocide as specified in sections 3(2)(a)(g)(h) and 3(2)(c)(g)(h) respectively and for commission of above offences under sections 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the Appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence. Zinat Ara, J. (Minority View) dissented on the conviction and accordingly ordered acquittal.

Charge No. 4: The Appellant was charged for abetting or conspiracy, persecuting, complicity in or failure to prevent commission of such crimes and the offences of killing of 4 Professors and a wife of one Professor of Rangpur Carmichael College and other inhuman acts on 30th April 1971 at the campus of Carmichael College under Kotwali Police Station of Rangpur as crimes against humanity and genocide as specified under sections 3(2)(a), 3(2)(c), 3(2)(g) and 3(2)(h) and commission of above offences under sections 4(1) and 4(2) of the International Crimes Tribunal Act 1973.

The Tribunal convicted the appellant and sentenced him with death.

The Appellate Division, by majority decision (Syed Mahmud Hossain, C.J., Hasan Foez Siddique, J., Md. Nuruzzaman, J.) affirmed the conviction and maintained the death sentence and Zinat Ara, J. (Minority View) agreed on the conviction but dissented on the sentence and accordingly sentenced him with life imprisonment with a fine of taka 10,000, in default, to suffer rigorous imprisonment for a further period of 2 years more.

Charge No. 5: The Appellant was charged for abetting, facilitating commission of offences of abduction, confinement, torture and rape of many women on between 25th March to 16th December, 1971 at Rangpur Town Hall as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973.

The Tribunal convicted the appellant and sentenced him with rigorous imprisonment for 25 years.

The Appellate Division allowed the appeal unanimously and acquitted the appellant.

Charge No. 6: The Appellant was charged for abetting, facilitating commission of offences of abduction, confinement and torture at Al-Badr Camp, Rangpur as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973 and for the commission of above offences under sections 4(1) and 4(2) of the Act. A civilian Rafiqul Hasan @ Nannu, a first year student of Rangpur Carmichael College was the victim of this offence.

The Tribunal convicted the appellant and sentenced him with rigorous imprisonment for 5 (five) years.

The Appellate Division affirmed the conviction and sentence unanimously.

Majority view

The cardinal principle of assessment of evidence is that the entire evidence is to be considered as a whole and then a decision is to be arrived. There is no scope to consider one statement made in cross-examination in isolation. ... (Para 111)

It is the cardinal principle of law of evidence that hearsay evidence is to be considered together with circumstances and the material facts depicted. If hearsay evidence has probative value then it is admissible in evidence. ... (Para 129)

In order to incur criminal liability in a case of crime against humanity, the accused himself need not participate in all aspects of the criminal conduct. ... (Para 134)

(Per Mr. Justice Syed Mahmud Hossain, CJ)

It is of the essence of the crime of abetment that abettor should assist the principal culprits towards the commission of the offence. Participation *de facto* may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. ... (Para 243)

When a charge involves hundred of victims, it is not at all necessary for the prosecution to narrate the names of all the victims. ... (Para 233)

(Per Mr. Justice Hasan Foez Siddique)

Minority View

In a criminal case the prosecution must prove the charge brought against an accused beyond any shadow of reasonable doubt. Criminal cases are not like civil cases. In criminal case the accused may only take the plea of not guilty and the burden is entirely upon the prosecution to prove its case. Cross-examination is not also necessary on the entire deposition of a witness as it may damage the defence case. Non-cross-examination on a certain fact would not make the deposition of a witness on that point admitted facts. ... (Para 295)

(Per Madam Justice Zinnat Ara)

J U D G M E N T

SYED MAHMUD HOSSAIN,C. J. (Majority View):

1. Partition of India and birth of two nations: Bangladesh had endured a long colonial rule administered by the British from 1757 to 1947. The partition gave birth to two countries—India and Pakistan. In undivided India, the Muslims and the Hindus were two major religious groups. During their regime the British applied the policy “divide and rule” based on religious division. As a result, many riots broke out at that time in which the Hindus and the Muslims killed one another on a large scale. It is in this context that Muhammad Ali Jinnah, the leader of the Muslim League in India, put forward his “Two Nations theory.” This theory was based on the idea that Islam and Hinduism are two different streams which cannot go hand-in-hand. In 1947 India was divided on the basis of the “Two Nations” theory. Pakistan came into existence in two different portions of land comprising East and West Pakistan. In the East Pakistan, East Bengal, a portion of Assam and tribal areas of Chittagong Hill Tracts were included. On the other hand, West Pakistan comprised of four provinces—Punjab, Baluchistan, Sind and the North-West Frontier. After the partition of India, a large number of Hindus of East Bengal migrated to West Bengal and a large number of Bengali

Muslims and non-Bengali Muslims known as Biharis, migrated to East Pakistan. Culturally the Biharis were more akin to the West Pakistanis. They were Urdu speaking people. Muslims left India for Pakistan and Hindus left Pakistan for India. Massive communal violence took place during the process. Millions of lives were lost. Many became homeless, abandoning everything they had behind. In the whole process religious affinity was prioritized over geographical distance and cultural and linguistic differences.

2. Social Exploitation and Language Movement:

Since the very formation of Pakistan, the Western part branded the Eastern part as inferior, because it considered the Muslims in the Eastern Wing subordinate due to their social and cultural affiliation with the Hindu population. Historically, people from various religions had always co-existed peacefully in the East Wing, as they were naturally adopting practices and customs from one another, while tolerating everyone's traditions and beliefs. The West-Pakistani government was critical about the intimacy between the Muslim and the Hindu population. Even though the Muslims of the East Wing supported the partition, they were not willing to give up their own culture or language for the sake of becoming a Pakistani as envisioned by the elite of West-Pakistan.

3. The West-Pakistani government remained insensitive to the cultural sentiments of the East-Pakistani people. The selection of a national Pakistani language became a contentious issue since the onset of its genesis. The West-Pakistan government did not pay any heed to the language that predominated in East-Pakistan, namely Bengali. The number of Bengali speakers were higher in comparison with the number of Urdu speakers. Urdu was the language of the elite, used only by 7% of Pakistanis. In contrast, Bengali was spoken by 56% of Pakistanis. In 1948, the Government of the Dominion of Pakistan ordained Urdu as the sole national language, sparking extensive protests among the Bengali-speaking majority people of East Bengal. Despite constituting a majority of the Pakistani population, Bengalis constituted a small part of Pakistan's military, police and civil services. Ethnic and socio-economic discrimination against Bengali people aggravated and agitations arose in East Pakistan over sectional bias, neglect and insufficient allocation of resources and national wealth.

4. Dhirendranath Dutta, a member of the Pakistan Constituent Assembly, first raised the demand for making Bengali an official language of Pakistan along with Urdu. It was as early as February 25, 1948, that Dutta had raised the question during a session of the Pakistan Constituent Assembly drafting a constitution for newly created Pakistan.

The language movement was one of the first movements against the discrimination against Bengali people.

5. However, Muhammad Ali Jinnah, the First Governor-General of Pakistan, in a meeting in Dhaka, on 21st March, 1948, declared that Urdu and only Urdu shall be the official State Language of Pakistan. Bengali people strongly resisted this declaration. Students and intellectuals of East Pakistan protested and demanded that not Urdu alone but Bangla also should be one of the state languages. That is how the Language Movement began in 1948 in the province known as East Pakistan.

6. The West-Pakistani leaders did not consider this factor while choosing an official language. Mohammed Ali Jinnah the first Governor General, declared on the 24th of March 1948 during a conference in Dhaka University that Urdu will become the State language.

This declaration triggered a great outrage among the people of the Eastern Wing that became to be known as the Bengali Language Movement.

7. Students formed the 'State Language Action Committee' and worked tirelessly to make Bangla one of the state languages of Pakistan. The immediate starting point of the tragedy of 21st February was that on 27th January, 1952, the then Prime Minister of Pakistan Khwaja Nazimuddin announced at a public meeting that Urdu alone should be the state language of Pakistan. The students were infuriated at the announcement because Nazimuddin as chief minister of East Bengal in 1948 signed an agreement with the leaders of State Language Action Committee with a commitment to adopt a resolution of having Bangla as the other state language of Pakistan by the provincial Assembly.

8. Subsequently students of the Dhaka University and Dhaka Medical College took a robust role in the cause of the Language Movement and took a crucial decision and defied the wishes of politicians to violate Section 144 on 21st February, 1952. On their way at the site of the Medical College students' hostel number 12, at 3-30 PM, the police opened fire on the peaceful procession of students by an order of a Magistrate (a West Pakistani). Barkat, Rafiq, Jabbar, Shafiur and Salam, among others, sacrificed their precious young lives for honour and preservation of their mother language, Bangla.

9. This movement ultimately ended in the adoption of Bangla as one of the state languages of Pakistan in 1956. However, the movement was not isolated to this as it sowed the seeds for the independence movement of the Bangladesh which resulted in the liberation of Bangladesh as an independent state in 1971. The great Language Movement had been a historic and significant event in our national history.

10. Economic exploitation by the Pakistanis and Six point demand by the Father of the Nation:

The economic disparity created by the West Pakistanis was very severe. Although most of the foreign currency of Pakistan was earned by exporting jute, which was only cultivated in East Pakistan, the per capita income of East Pakistan was far lower than that of West Pakistan and the difference grew higher as time passed. There was also a huge transfer of capital with negligible transfer of labor from East Pakistan to West Pakistan. Disparity regarding industrial development was also acute. The misery of East-Pakistan was due to the political hegemony of the Western Wing. East-Pakistan faced severe economic exploitation and the relation between the two wings was analogous to the ruthless economic abuse of the British colonial power over the subcontinent. Alike the British, the West-Pakistani government profited from the Eastern Wing but did not invest adequately in its development. The number of East-Pakistanis employed in the Western Wing, particularly in higher respectable positions was insignificant compared to that of West-Pakistanis. Even though the population size of West-Pakistan was smaller compared to that of East-Pakistan after the partition, a major share of national budget (75%) was spent on West-Pakistan, leaving a negligible portion for East-Pakistan. The latter was financially deprived although it was responsible for the generation of 62% of the revenue income. Gross negligence towards the region was evident in the distribution of other resources as well. The Western Wing had 25 times higher military personnel compared to that of the Eastern Wing. The indifference of the West-Pakistan government towards the development of East-Pakistan was visible through the per capita income of that period, which was 32% higher for West-Pakistan during the period of 1959-60 and 61% during 1969-1970. In 1947 there were only nine textile mills in West Pakistan, whereas there were 11 in East Pakistan. In 1971, West Pakistan had as many as 150 mills, but

there were only 26 in East Pakistan. The West Pakistanis actually made East Pakistan a protected market to sell their high priced products that could not compete in the world market.

11. During the war of 1965 between Pakistan and India, East-Pakistan was left with meagre military defense.

In this context, in 1966, Father of the Nation Bangabandhu Sheikh Mujibur Rahman drew up the Six Point Demand (known as the Six Point Movement or Charter of Freedom) to express the demands for economic development for the East Wing. The main features of the six point demand were:

(1) The character of the government shall be federal and parliamentary.

(2) The federal government shall be responsible only for defense and foreign affairs.

(3) There shall be two separate currencies mutually or freely convertible in each wing for each region, or in the alternative, a single currency subject to the establishment of a Federal Reserve System in which there will be regional federal reserve banks.

(4) Fiscal policy shall be the responsibility of the federating units. The federal government shall be provided with requisite revenue resources for meeting the requirements of defense and foreign affairs.

(5) Constitutional provisions shall be made to enable separate accounts to be maintained of the foreign exchange earnings of each of the federating units, under the control of the respective governments of the federating units.

(6) The government of the federating units shall be empowered to maintain a militia or paramilitary force in order to contribute effectively towards national security.

12. The focus of the Six Point Demand was on establishing Pakistan as a Federal State in order to consolidate the autonomy of the East Wing and its control over resources. Other aims of the demand were the creation of two separate currencies for the two wings; independent foreign reserves; East Wing's self-governance over its foreign exchange earnings and taxes from trade. Additionally, to raise and maintain a self-contained armed force in the Eastern Wing as they further demanded access to economic and military resources. The Six Point Demand gathered widespread support from the Eastern Wing but were rejected by the political power of the Western Wing. The Six Point Movement is a significant turnover in the history of Bangladesh. The six-point demand became a core component of the election campaign of Bangabandhu Sheikh Mujibur Rahman during the election of 1970. It embraced his campaign on yielding equal access to economic opportunities for everyone.

13. Agartala Conspiracy Case and 1969 Mass Movement:

The popularity of the Six-Point Demand of Bangabandhu Sheikh Mujibur Rahman instilled fear into the West-Pakistani government during the reign of General Ayub Khan. On the 19th of June 1968, the Ayub Khan government arrested Bangabandhu Sheikh Mujibur Rahman along with 34 other Bengali civil and military officers, charging them with conspiracy against Pakistan. The case is known as the Agartala conspiracy case because General Ayub Khan claimed that Bangabandhu Sheikh Mujib and his political associates were conspiring with the Indian Government in the city of Agartala (Tripura, India) to create an Independent Bangladesh. This case is also known as "State versus Sheikh Mujibur Rahman and others". Ayub Khan's intention to malign Bangabandhu Sheikh Mujibur Rahman while underestimating his popularity, failed. People of East-Pakistan were convinced

that the affair itself was a conspiracy against Bangabandhu Sheikh Mujibur Rahman and against East-Pakistan, and started a movement demanding the unconditional release of Bangabandhu. The revolt of the people of East-Pakistan became more fierce with the passage of time.

14. Different political parties and student organizations started movement throughout the country for autonomy of the East Bengal. People started chanting slogans for self governance. The movement for autonomy paved the way for movement for independence. Agitations by the people started gaining momentum. The six-point demand presented by the Bangabandhu Sheikh Mujibur Rahman became the demand of the people. When movement flared up across East Pakistan, President General Ayub Khan imposed martial law and handed over power to Army Chief General Yahya Khan. During the ongoing movement on 20 January, 1969 one student named Asaduzzaman and on 24 January, 1969 another student Motiur Rahman, were killed by the police. This atrocious act of police infuriated the people more and resulted in renaming "Ayub Gate" at Mohammadpur to "Asad Gate" and naming the garden in front of Bangabhaban as "Motiur Rahman Child Garden". On 15.02.1969 one of the accused persons of Agartala Conspiracy Case, Sergeant Zahurul Haque died after sustaining bullet injury in his prison cell. On 18th February, 1969, Proctor of the Rajshashi University Dr. Shamsuzzoha died when he was hit by bullet fired by the police. The news of the death of Dr. Samsuzzoha added fuel to the ongoing movement. A huge commotion followed and the Pakistan Government was compelled to withdraw the Agartala Conspiracy case on 22nd February of 1969. The next day Bangabandhu Sheikh Mujibur Rahman and all other accused were freed from Dhaka Cantonment. This event heralded the most crucial victory of the people of the East-Pakistan against the Government of West-Pakistan.

15. Through this movement Bangabandhu Sheikh Mujibur Rahman became the unanimous leader of the Bengali nation. On 23rd February 1969 in a felicitation program organized in the Race Course grounds he was conferred the title "Bangabandhu" by the all party student movement parishad.

16. General Election of 1970: After assuming power General Yahya Khan announced the first general election in Pakistan's history, which was scheduled to take place on the 7th of December, 1970. On the 12th of November a devastating cyclone hit the coast of East Pakistan - almost a million people died in one of the world's worst natural disasters. The Pakistani government did nothing for the distressed people. Those who had survived the cyclone fell sick and could not recover due to lack of medicine and started to die from lack of food and water. The Bengalis were enraged at the government's neglect. At this backdrop on the 7th of December, 1970, Pakistan's first General Election was held in a free and fair manner. The Generals of the Pakistan army assumed that a single political party would not obtain a majority, so they would all just fight amongst themselves. The army could use this as an excuse to remain in power and plunder the country. So General Yahya Khan was shocked to see the results of the election which were unbelievable. Out of 162 seats in East Pakistan, Bangabandhu's Awami League got 160 in the National Assembly. Along with the selected female candidates out of 313 seats of Pakistan National Assembly, East Pakistan's Awami League got 167, West Pakistan's Zulfikar Ali Bhutto got 88, and other parties together got the remaining 58. Bangabandhu clearly stated that as people cast their votes in favor of his six points, he would formulate the constitution based on these six points, and the country would be ruled by these six points. The Pakistan army then decided that no matter what, the Bengalis would not be allowed to rule Pakistan.

17. Non-cooperation Movement of 1971:

Following the victory of Bangabandhu Sheikh Mujibur Rahman, leader of Awami League, and his demands for East-Pakistan's development, General Yahya Khan summoned the Sessions of the National Assembly on 03.03.1971. Although Bangabandhu Sheikh Mujibur Rahman repeatedly announced that no harm to sovereignty or the Islamic character of Pakistan would be made, the West Pakistan leadership spread the word that the unity of the country was in danger. Therefore, instead of handing over power to the Awami League, the then President Yahia Khan "postponed the convening of the National Assembly, sine die".

18. When the postponement of the Assembly was announced on the radio, instantaneously the people erupted in protest. Educational institutions, offices, stores-everything were shut down immediately. Thousands of people took to the streets; Dhaka became a city of processions. The people began chanting slogans for independence: "Joy Bangla," "Bir Bangali Ostro Dhoro, Bangladesh Swadhin Koro" (Brave Bengalis, take up arms to liberate Bangladesh). Bangabandhu called a five-day hartal and an indefinite non-cooperation movement in Dhaka and the whole country. Through this non-violent movement, Bangabandhu said that the Pakistani administration was not to be cooperated in any way, and his words brought all of East Pakistan to a standstill. To control the situation, curfew was imposed-the students and the public broke the curfew and took to the streets. There were processions, slogans, rage everywhere, people dying under the army's gunfire-but nobody stopped. On the 2nd of March at the Dhaka University's historical banyan tree, the flag with Bangladesh's map was hoisted. On the 3rd of March at the Paltan Maidan, the Students' League meeting decided that Rabindranath Tagore's "Amar Sonar Bangla" would be Bangladesh's national anthem. After the five-day hartal on the 7th of March, Bangabandhu went to today's Suhrawardy Uddayan to deliver a speech. By then all of East Pakistan was following his rule. Tens of thousands of people came to listen to his speech; Suhrawardy Uddayan was literally turned into a sea of people. Bangabandhu announced in this famous speech, "The struggle, this time, is a struggle for our emancipation. The struggle, this time, is a struggle for our independence." There have been few speeches of this type in the history of the world. The speech brought together all the people and gave them the courage they needed to sacrifice their lives for the independence of their motherland. The people put up barricades to stop the Pakistani military. All over the country, along with black flags, the flags of an independent Bangladesh were flying. Right around this time General Yahya Khan was preparing to start the genocide. General Tikka Khan, known as the Butcher of Baluchistan, was sent to East Pakistan as governor, but none of the Justices in East Pakistan agreed to swear him in. Yahya Khan went to Dhaka on the 15th of March and pretended to have discussions with Bangabandhu while troops were secretly being brought in. War-ships with arms and ammunition tried to dock at the Chittagong port, but the people wouldn't let them. Bhutto joined the conspiracy on the 21st of March and came to Dhaka to pretend to have discussions.

19. The 23rd of March was Pakistan Day, but besides the army cantonment and the Government House, a single Pakistani flag could not be seen anywhere in Bangladesh. At Bangabandhu's house in Dhanmondi that day, the free Bangladesh flag was hoisted while 'Amar Sonar Bangla' was played. The next day was the 24th of March. There was an ominous feel in the country-it was as if the whole country's earth, sky, and air knew what was about to happen and was holding its breath wait.

20. Operation Searchlight:

Operation Searchlight is the planned genocide that took place on the 25th of March 1971 and was undertaken by the West-Pakistani government against its own citizens of the Eastern Wing.

General Yahya Khan conceived a genocide course of action of Bengali nationalists in order to punish the people of East-Pakistan for their denial to follow the orders of the West-Pakistani Government. He arranged a military crackdown to be executed during the night of the 25th of March 1971, which aimed at eliminating the force of Bengali Nationalism from Pakistan. The objective of Operation Searchlight was to eradicate all Bengali Nationalists including political and military oppositions within a month. The intention was to take absolute control over all major cities dominated by the Nationalist rebels. Consequently, the people of East-Pakistan witnessed one of the most cruel genocides in history. Troops from West-Pakistan marched secretly towards East-Pakistan and on the night of the 25th of March 1971, the Pakistani military started their operation in Dhaka, the present capital city of Bangladesh. The same night, Bangabandhu was arrested and taken to West-Pakistan. Before his arrest, Bangabandhu declared the independence of Bangladesh-an Independent sovereign country. The declaration of independence was transmitted throughout East-Pakistan via an E.P.R. transmitter. Although the declaration was made on the 25th of March, its transmission took place after midnight. Since then, the 26th of March is celebrated as the Independence Day of Bangladesh.

21. The victims of this operation originated from all layers of the Bengali social strata. However, certain groups were primarily targeted, such as the students of Dhaka University. Two student dormitories of the Dhaka University were attacked and the Pakistani military killed around 7000 students in cold blood during one night. The military officers forced the students to dig up their own mass graves before murdering them. Teachers and employees of Dhaka University also lost their lives at the hands of the Pakistani military. The Pakistani military did not spare civilians even though the main targets were politicians (especially supporters of Awami League), activists and people demanding independence of the Eastern Wing. Another target was the inhabitants of Hindu majority areas. The Pakistani military killed innocent people, burnt houses and destroyed places of worship of Hindus. Operation Searchlight led to the massacre of 30,000 Bengalis in a week. Almost half of the population of Dhaka fled the city in search for safe shelters elsewhere. Contrary to its objectives, the military operation, in essence designed to exterminate nationalist tendencies, gave rise to the birth of the new nation of Bangladesh. Operation Searchlight created terror but at the same time encouraged the determination of the people of East-Pakistan to secede from the oppressive Central Government. Operation Searchlight implemented its schemes in avoiding international attention as all foreign journalists were deported and radio operations were shut down to prevent any sort of communication. A journalist named Simon John Dring stayed secretly and disseminated information to the world about the genocide and the Liberation War that lasted 9 months in which 3 million Bengali people died. In return for his bravery, Simon Dring won several awards for his contribution and was later solemnly recognized as a citizen of Bangladesh.

22. The Liberation War (March to December 1971):

Following the massacre of the 25th of March 1971, Bengalis started fighting against the Pakistani military with every resource they had. Ordinary Bengalis, especially young people, who had no knowledge or training to fight in a war, risked their lives and the lives of their family members for the sake of making Bangladesh an independent country. Following the “Black Night” of 25th of March, the atrocities of the Pakistani military aggravated. The operation was extended to the entire region of East-Pakistan.

23. The Bengali Nationalists assembled an armed force called “Mukti Bahini” (The Force of Independence). The Bengali military officers of East-Pakistan took charge over the military operations of the Bengali nationalists. They divided East-Pakistan in 11 sectors in order to conduct their guerrilla operations against the West-Pakistani military. In the meantime, the Provisional Government of the People’s Republic of Bangladesh was installed in Mujibnagar. Father of the Nation Bangabandhu Sheikh Mujibur Rahman who was a prisoner of the West-Pakistan government during that time was made the President and Tajuddin Ahmed was made the Prime Minister of Bangladesh. This event led to the official declaration of Bangladesh as an independent state.

24. Refugee Crisis:

While a lot of Bengalis joined the guerrilla force favouring independence, many others, particularly women and children, fled the country and took refuge in the closest neighbouring country-India. According to an estimate, the number of refugees taking shelter in India during the liberation war was about 10 million. The Indian government came under huge pressure to provide resources and space for the refugees. The Prime Minister of India during that period, Indira Gandhi, expressed concern over this issue but continued supporting the people of Bangladesh in their struggle for independence. Refugee camps were built in areas nearby Bangladesh such as West Bengal, Bihar, Assam, Meghalaya and Tripura.

25. The Rajakars:

Political groups based on religious values such as the Jamaat-E-Islami swore allegiance to the West-Pakistani government when the liberation war of Bangladesh began. Despite being Bengalis, the political leaders and supporters of Jamaat-E-Islami collaborated with the Pakistani army in their atrocities against Bengalis. It created branches in both West-and-East-Pakistan with the new objective of creating an Islamic state. When Bengali nationalists demanded separation from West-Pakistan, the Jamaat-E-Islami leaders of East-Pakistan provided full support to the West-Pakistani government. In the name of religion, they betrayed the people of their own land. Their loyalty and support towards the West-Pakistani military was to the extent that they managed to create armed forces of their own that assisted the military operations of West-Pakistan. The latter government established the “East-Pakistan Central Peace Committee” (Shanti Bahini) and made Ghulam Azam, the leader of Jamaat-E-Islami in East-Pakistan, the Chief of Shanti Committee. The Shanti Committee or Bahini was responsible for committing horrendous war crimes, such as killings of civilians and non-combatants and raping Bengali women. One of the main tasks of the Rajakar group the Al-Badar and Al-Shams was to generate lists of the details of freedom fighters, which were consequently entrusted to the West-Pakistani military. The latter identified the families of the aforementioned freedom fighters, tortured them in return for information and eventually killed them. The most horrific transgression committed by the Rajakar groups was the abduction of Bengali women, which were transported to West-Pakistani military camps for the entertainment of Pakistani soldiers. During the liberation war, around 200,000 to 400,000 women became victims of rape and sexual slavery. Al-Badar, which was mainly created by the Islami Chatra Sangha, the student wing of the Jamaat-E-Islami in East-Pakistan, was specifically involved in killing “the intellectual people” (known as Budhijibi in Bengali) such as teachers, scholars and social activists.

26. Atrocities Committed by the Pakistani Army: The West-Pakistani army showed no compassion for Bengalis. The rules of engagement were at no time adhered to. The convoys of the West-Pakistani army would kill civilians without any mercy. They would bring

Bengalis as prisoners and kill them remorselessly in batches. According to witnesses, the West-Pakistani army were having the capacity to torch and murder anyone that was obstructing their way. Their preferred targets were religious minorities such as Hindus. They would kill large number of Hindu men at once and would abduct women and girls.

27. International Support:

Bangladesh received continuous moral support from India since the beginning of the Liberation War. Indira Gandhi, the Prime Minister of India during that time, was able to secure support from the Soviet Union, The United Kingdom and France to ensure that there would be no directives in favour of Pakistan in the United Nations Security Council. In contrast, Pakistan received support from the United States and China. The United States provided ammunition while China provided moral advocacy. In spite of the protection and encouragement from the United States, Pakistan did not have high chances of winning the war because of the Soviet Union which played against the efforts of the United States during the war.

28. The Surrender of Pakistani Army and Victory of Bangladesh:

When West-Pakistan launched attacks against India on the 3rd of December 1971, the Indian military forces joined Bangladeshi guerrilla forces to fight against the West-Pakistani military. The latter did not receive any support during this crucial period of the war although they were expecting military aid from the United States and China. West-Pakistani military camps were attacked and they lost control over their previously captured territories. Consequently, they had to accept defeat and capitulate to the joint forces. Finally, in the afternoon of the 16th of December 1971, General Niazi of West-Pakistan signed the agreement of surrender. After a bloodbath of 9 months, Bangladesh was finally an Independent State. Today Bangladesh, celebrates 16th December as Victory Day.

[Edited and extracted from *Muhammad Zafar Iqbal, History of the Liberation War (Proteeti, Dhaka 2008)*; *Wardatul Akmam, Atrocities against humanity during the liberation war in Bangladesh: a case of genocide (Journal of Genocide Research (2002)*; *1971 Liberation War, birth of Bangladesh and comparison with present day Pakistan (European Foundation for South Asian Studies, Amsterdam 2017)*].

29. Liberation War in the Eyes of Foreign Writers:

(The Duel: Pakistan on the flight path of American power by Tariq Ali, Material Exhibit-II)

Jinnah's Pakistan died on March 26, 1971, with East Bengal drowned in blood. Two Senior West Pakistanis had, to their credit, resigned in protest against what was about to happen. Admiral Ahsan and General Yaqub left the province after their appeals to Islamabad had been rejected. Both men had strongly opposed a military solution. Bhutto, on the other hand, backed the invasion. "Thank God, Pakistan has been saved," he declared, aligning himself with the disaster that lay ahead. Rahman (Bangabandhu) was arrested and several hundred nationalist and left-wing intellectuals, activists, and students were killed in a carefully organized massacre. The lists of victims had been prepared with the help of local Islamist vigilantes, whose party, the Jamaat-e-Islami, had lost badly in the elections. Soldiers were told that Bengalis were relatively recent converts to Islam and hence not "proper Muslims"-their genes needed improving. This was the justification for the campaign of mass rape.

30. The military shelled Dhaka University. Artillery units flattened working-class districts; trade-union and newspaper offices were burned to the ground. Soldiers invaded the women's hostel on the university campus, raping and killing many residents. With the help of the intelligence agencies and local collaborators, mainly Islamist activists, lists of nationalist and Communist intellectuals had been prepared (as in Indonesia in 1965), and they were now picked up and killed. Some had been close friends of mine. I was both sad and angry. I had predicted this tragedy, while hoping it might be avoided.

31. Operation Searchlight was brutal, but ineffective. Killing students and intellectuals did not lead to the quick and clear victory sought by the Pakistani Generals. Once the initial attack had failed, the military with the help of local Islamist volunteers (members of the Jamaat-e-Islami) began to kill. Tens of thousands were exterminated. These were crimes according to any international law.

32. Bangladesh: The unfinished Revolution:
(By Lawrence Lifschultz, *Material Exhibit-III*)

But the national question was not destined to be so easily resolved. The 1970 elections brought a sweeping victory for Sheikh Mujibur Rahman's Awami League in East Pakistan. In the provinces of the Frontier and Baluchistan the National Awami Party (N.A.P.), led by Wali Khan, won control of the Provincial governments. Responsible for the political triumph of the Awami League and the N.A.P. was the fact that both reflected the national aspirations of Bengal, Baluchistan, and the Frontier. Each had laid down as the leading principle of its programme the establishment of broad autonomous rights for the provinces within a democratic republic.

The Awami League won 167 out of the 169 seats from East Bengal in the National Assembly of the unified Pakistan. This constituted an absolute majority in the assembly and meant that Mujibur Rahman should have become the Prime Minister of Pakistan. But, as a Bengali scholar pointed out:

"At that point it was clear that if the elected National Assembly was called into being, the Awami League would easily be able to enact a constitution based on its autonomy programmes, and this would in turn convert Pakistan into nothing more than a loose confederation. As an elite group with high salaries and entrenched privileges, spending more than half the country's yearly budget, the armed forces had a material stake in keeping East Bengal as an integral part of Pakistan."

33. Pakistan's military leadership chose not to transfer power to the elected Awami League administration. Zulfikar Ali Bhutto, leader of Pakistan's People's Party, which had won majorities in the provinces of Sindh and the Punjab with 81 seats in the National Assembly, was instrumental in the military authorities' refusal to convene the National Assembly. In demagogic style Bhutto declared that the Punjab and the Sindh were the 'bastions of power' in Pakistan and that, since his party now dominated those provinces, he would not accept any constitution determined by the 'brute majority' of the Awami League. Bhutto threatened to boycott the assembly if Mujib became Prime Minister on a platform of transforming Pakistan into a loose confederation of provinces.

On March 1st 1971 the martial law authorities announced an indefinite postponement of the date for convening the National Assembly originally scheduled for March 3rd. The reaction in East Pakistan was immediate and violent. Demands for complete independence were issued by the powerful and militant student federation, the Chattra League. The Military Junta of Pakistan entered into new negotiations with the Awami League leadership while a

mass movement based on non-cooperation and strikes crippled East Bengal. The negotiations, however, were merely a ruse for a massive military build-up. On the night of March 25th 1971 the most violent and brutal act of political repression in South Asian history took place. Tanks and armoured personnel carriers of the Pakistan Army rumbled through Dacca. It was remembered as '*Kala Ratri*' or 'The Black Night', and on the first evening alone thousands were killed in the indiscriminate firing and shelling. Details of these events have been extensively published elsewhere.

34. WITNESS TO SURRENDER
(*SIDDIQ SALIK, Material Exhibit-IV*)

These elements were organized into two groups. The elderly and prominent among them formed Peace Committees, while the young and able-bodied were recruited as Razakars (volunteers). The Committees were formed in Dacca as well as in the rural areas and they served as a useful link between the Army and the local people. At the same time, they earned the wrath of the rebels and 250 of them were killed, wounded or kidnapped.

35. Razakars were raised to augment the strength of the West Pakistani troops and to give a sense of participation to the local population. Their manpower rose to nearly 50,000 as against a target of 100,000. In September, a political delegation from West Pakistan complained to General Niazi that he had raised an army of Jamaat-e-Islami nominees. The general called me to his office and said, 'From now on, you will call the Razakars, *Al-Badr* and *Ash-Shams* to give the impression that they do not belong to one single party'. I complied.

(The above book was referred to show that Jamaat-e-Islami and its student front collaborated with the Pakistani Army from the very beginning of the Liberation War of Bangladesh).

36. This criminal appeal under section 21(1) of the International Crimes (Tribunal) Act, 1973 has been preferred by the convict-appellant A.T.M. Azharul Islam against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No.1 in ICT-BD Case No.05 of 2013 convicting the appellant on Charge Nos.2, 3, 4, 5 and 6 for the offences of Crimes against Humanity under section 3(2)(a)(g)(h)(c) read with section 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973 and sentencing him to death in respect of Charge Nos.2, 3 and 4, to 25 years imprisonment in respect of Charge No.5 and to 5 years imprisonment in respect of Charge No.6 under section 20(2) of the said Act of 1973.

37. Appellant A.T.M. Azharul Islam was arrested and produced before the Tribunal on 23.08.2012 in pursuance of warrant of arrest issued against him by the Tribunal.

38. On 18.07.2013, the Chief Prosecutor submitted formal charges under section 9(1) of the Act on the basis of investigation report of the Investigation Agency. In the formal charges, it has been alleged that during War of Liberation in 1971, the appellant as president of Islami Chhatra Sangha, Rangpur Unit had committed crimes against Humanity and Genocide including abetting, aiding, participating, and providing moral support to commit such types of crimes in different parts of Rangpur. On perusal of formal charges, statements of witnesses and documents submitted by the Prosecution, the Tribunal took cognizance of offences as mentioned in section 3(2) of the Act on 25.07.2013 against the accused. The International Crimes Tribunal No.1 directed the prosecution to supply copies of formal

charges, statements of the witnesses and list of witnesses to the appellant for preparation of defence.

39. A.T.M. Azharul Islam denied the charges brought against him. His case was that he was not the Commander of Al-Badr Bahini of Rangpur District during the Liberation War in 1971. It is further contended that he never aided, abetted, facilitated or participated in any offence of crime against Humanity and Genocide as mentioned in the charges. The appellant has been implicated in this case by the present Government for political victimization because the appellant had taken the charge of Secretary General of Jamat-E-Islam after arrest of its Secretary General Ali Ahsan Mohammad Mojahid.

40. *The International Crimes (Tribunals) Act, 1973 (ICTA):*

The perpetrators of crimes of a universally abhorrent nature are *hostis humani generis*-enemies of all people. These crimes include war crimes, genocide, crimes against humanity, aggression, etc. Irrefutably, the war crimes and crimes against humanity committed during the Liberation war of Bangladesh in 1971 exceeded the brutalities and dreadfulness of war crimes committed in contemporary times. With the aim of establishing durable peace and justice, and bringing the perpetrators of atrocities committed during the Liberation war in 1971 to justice, a legislation known as the International Crimes (Tribunals) Act, 1973 ('ICTA') was enacted by our Parliament.

41. The ICT-BD (International Crimes Tribunals-Bangladesh) is a purely domestic tribunal. In other words, it is a national judicial mechanism that has been established to try crimes to an international nature which have been criminalised pursuant to domestic legislation of Bangladesh. Therefore, while the Tribunal's name includes the word "international" and it possesses jurisdiction over crimes, such as crimes against humanity, crimes against peace, genocide and war crimes, it would be wrong to assume that the Tribunal must be treated as an 'international tribunal' as per the International Criminal Tribunal for Rwanda ('ICTR'), International Criminal Tribunal for former Yugoslavia ('ICTY'), Special Court for Sierra Leone ('SCSL'), Extraordinary Chambers in the Courts of Cambodia ('ECCC'), International Criminal Court ('ICC') and others.

42. The legitimacy of the ICTA stems from its adoption by an overwhelming decision of the Bangladesh Parliament, which is a democratically elected body of representatives and constitutionally mandated to enact legislation. As such, the ICT-BD can only be interpreted in light of the framework set out by ICTA, and not any other legal instruments of international nature. It should, however, be noted that ICTA refers to, and expressly adopts, a variety of international legal standards. Nevertheless, respect for a country's domestic sovereignty and its people's democratic will require ICTA to be considered as the first and predominant point of reference.

43. The proceedings before the Tribunal shall commence upon submissions of the "formal charge" by the prosecution prepared on the basis of Investigation Report submitted by Investigation Agency, established under ICTA. The challenge of collecting and organizing evidence is not insurmountable, even after, passage of 40 years. The ICT-BD will consider all probative evidence regardless of its format, unless the rights of the accused are deemed to be prejudiced by the admission of said evidence. Section 19(1) of the ICTA noted that the Tribunal "shall not be bound by technical rules of evidence." Section 19 provides for the possibility of admitting reports, photographs, films and other materials carrying by Rule 44 of

the Rules of Procedure, which notes the Tribunal's discretion to "exclude any evidence which does not inspire any confidence in it."

44. No one can be convicted unless the charge brought against him is proved "beyond reasonable doubt". This is the normal and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. This norm, due to its settled nature, does not need to be embodied in ICTA for the Tribunal to remain bound to respect it.

45. The Tribunal's legal framework reflects this commitment to proof beyond reasonable doubt. Rule 50 requires the burden of proving the charge to lie upon the prosecution. More recently, the Tribunal adopted Rule 43(2) which states that a person charged with crimes as described under section 3(2) of the Act shall be presumed innocent until found guilty.

46. Before considering the charges seriatim, it would be proper to have a brief account of the appellant A.T.M. Azharul Islam.

On 28.02.1952, A.T.M. Azharul Islam was born in Rangpur. He took his early education in 1968 from Rangpur Zilla School.

During General Election of 1970 convict-appellant was a leader of ICS (Islami Chhatra Sangha) and in this respect there are oral and documentary evidence.

47. P.W.3, Moklesur Rahman Sarker is from Police Station Badargonj. He stated in his examination-in-Chief that he knew A.T.M. Azharul Islam because in 1971 he came to their locality to campaign in favour of the candidate of Jamat-E-Islami. He denied the suggestion that the statement that this witness knew Jamat leader because he came to this witness's locality to campaign in favour of the candidate of Jamat-E-Islami is false, concocted, imaginary and not true.

48. P.W.4, Meseruddin was the Principal of Badargonj Degree College in 1970. He was the student of Carmicheal College. He stated regarding existence of Islami Chhatra Sangha in that College saying that at that time there were student wings of Ayub Khan's NSF and Islami Chhatra Sangha of Jamat-E-Islami. Referring to the General Election of 1970, P.W.4 stated that during that election A.T.M. Azharul Islam came to campaign in favour of the candidate of Jamat-E-Islami as a student leader of Jamat-E-Islami and as a resident of that locality.

49. The convict appellant is from Badargonj and in the election of 1970, the jamat candidate was also from Badargonj and regarding the same, he stated that during that election Mir Afzal Hossain, the candidate of Jamat-E-Islami hailed from Badargonj. Suggestion was given to P.W.4 from defence to the effect that convict appellant did not participate in election campaign, but P.W.4 denied the suggestion and stated that it is not a fact that A.T.M. Azharul Islam did not participate in the election campaign as a student leader of Jamat-E-Islami in 1970. In cross-examination, P.W.4 asserted that convict-appellant was a student leader of Carmicheal College, Rangpur. He further stated that he saw the convict-appellant as a student of HSC in Carmicheal College, Rangpur.

50. P.W.5, Md. Abdur Rahman, is also from Badargonj. Regarding the political status of the appellant in 1971, he stated in cross-examination that it is not a fact that he did not know A.T.M. Azharul Islam in 1971. But he did not know whether A.T.M. Azharul Islam knew him or not. This witness spontaneously stated that as a leader of the locality, he is known by all but he did not know whether the leaders know everybody. This witness further stated in

cross-examination regarding participation of the appellant in election campaign in 1970 saying that the appellant took part in the campaign of election of 1970 as a worker of Jamat-E-Islami. He denied that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jamat-E-Islami. P.W.5 stated that the appellant was the President of Islami Chhatra Sangha and he was a student of Carmicheal College which he knew from before.

51. P.W.6, Md. Mokbul Hossain is also from Badargonj P.S. He stated in his examination-in-chief that during the election of 1970, A.T.M. Azharul Islam along with Afzal Hossain and Moklesur Rahman came to their area to campaign in the election. He knew Azharul Islam from that time. P.W.6 denied the suggestion of the defence stating that A.T.M. Azharul Islam did not come with Afzal Hossain and Moklesur Rahman to campaign in their area in the election of 1970. He denied that the statements that A.T.M. Azharul Islam came to their locality during the election campaign in 1970 and he knew him beforehand were concocted and not correct.

52. P.W.7, Md. Aminul Islam was declared hostile. In his cross-examination by the prosecution he stated that he came to depose in the case brought against A.T.M. Azharul Islam for the atrocities committed by him during the War of Liberation in 1971.

53. P.W.8, Md. Mojibur Rahman Master is from Badrgonj. He is a B.A. B.Ed. In 1971 he was a teacher of Syampur High School at Badargonj. At that time he was aged about 33/34. He stated in his examination-in-Chief that during the National and Provincial Assembly Elections, the candidates of Jamat-E-Islami were Muklesur Rahman and Mir Afzal Hossain respectively. He further deposed that he campaigned in favour of the candidates of Awami-League and that on the other hand, A.T.M. Azharul Islam campaigned in favour of the candidates of the Jamat-E-Islami. He further stated in his examination-in-chief that he was saying about Azaharul Islam whom he knew from before 1971. A.T.M. Azharul Islam was a student of Rangpur Carmicheal College. He was the President of Islami Chhatra Sangha of Carmicheal College Branch and he was an Al-Badr Commander in 1971. No suggestion was given to him to the effect that the aforesaid statement was false and concocted and rather, suggestion was given to him that he did not disclose the aforesaid fact to anybody.

54. P.W.9, Sova Kar, used to live in the campus of Carmicheal College with her martyred brother Chitty Ranjan Roy. Regarding convict-appellant, she stated that she could recognize one of the persons standing and that he was A.T.M. Azharul Islam, who was a leader of Islami Chhatra Sangha. Suggestion was given to her (P.W.9) that those statements were tutored by her brother Shattaya Ranjan Roy and the Investigation Officer of the case which she denied. No suggestion was given to her to the effect that the appellant was not a leader of Islamic Organization in Carmicheal College.

55. P.W.12, Md. Rafiqul Islam @ Nannu was aged about 18 years at the relevant time. He stated in his examination-in-chief that he was involved in the politics of Student League. He used to go to Carmicheal College. At that time, A.T.M. Azharul Islam was the 2nd year student of science of the intermediate section of the college and that the appellant was involved in the politics of Islami Chhatra Sangha. When this witness used to go to Rangpur Press Club to read newspaper, he met A.T.M. Azharul Islam and his friends there. In 1971 he had an altercation with A.T.M. Azharul Islam in connection with political affairs of the country. He further stated that A.T.M. Azharul Islam was not only the President of Islami Chhatra Sangha of Rangpur District but he was also Al-Badr Commander. He further stated that he came to know from his neighbours that A.T.M. Azharul Islam used to maintain

contact with Pak-Army in the Cantonment by riding his 50 C.C. motorcycle. Suggestion was given to this witness regarding those statements but this witness asserted that his statements are true.

56. P.W.13, is Advocate Rathis Chandra Bhowmic. His father was the President of Awami Krisak League in 1971. He stated that his father was in hospital due to bullet injury by Pak-Army. He stated in his examination-in-chief that those who went to hospital to see his father stated that A.T.M. Azharul Islam, President of Islami Chhatra Sangha of Rangpur Branch was involved in murder and torture. Suggestion was given to him regarding the aforesaid statement but he denied the suggestion.

57. P.W.16. is A.Y.M. Moazzem Ali, son of martyred Zorses Ali. He stated in his examination-in-chief that after Liberation, this witness came to know from Montu doctor about the persons responsible for torturing and killing of his father and others in Rangpur Cantonment. He told him that many from Islami Chhatra Sangha were involved in the torture and murder and that among them President of Islami Chhatra Sangha, A.T.M. Azharul Islam was also there. He stated that Montu doctor died in 1989. He denied the suggestion of the defence regarding the aforesaid statement.

58. P.W.17, Tapan Kumar Adhikari was a student of Carmicheal College. His father and brother were abducted by Pak-Army on 28.03.1971. He stated in his examination-in-chief that when they went to meet with Montu doctor he told them about the torture on them in Rangpur Cantonment and Montu doctor also told that the people of Islami Chhatra Sangha used to go there. Among them A.T.M. Azharul Islam, the President of Islami Chhatra Sangha was present there. The students of Islami Chhatra Sangha used to consult with the Pak-Army. No suggestion was given to this witness to the effect that those are false and concocted and rather, suggestion had been given as to whether he disclosed those facts to anybody and this witness stated that it is not a fact that he did not state the aforesaid facts to others.

59. P.W.19, S.M. Idris Ali, Investigating Officer, collected several documents and of them two have been marked as Exhibits-13 and 16. Exhibit-13 is a newspaper report published in the "Daily Sangram on 13.09.1971 and Exhibit-16 is the report of the Special Branch of police for the month of October, 1971.

Relevant portion of Exhibit-13 is quoted below:

“রংপুর জেলা ইসলামী ছাত্র সংঘের সভাপতি জনাব আয়ম আলী ও শহর ছাত্র সংঘের সভাপতি জনাব আজাহারুল ইসলাম এক বিবৃতিতে শহীদ মেসবাহ উদ্দিনের শাহাদাতে গভীর শোক প্রকাশ করেন। ”

Relevant portion of Exhibit-16 is quoted below:

Activities of Islami Chhatra Sangha (ICS):

21. on 17.10.1971, a conference (100) of Pakistan ICS, Rangpur Branch was held in Rangpur Town with A.T.M. Azharul Islam (ICS) in the chair. Amongst others, Ali Ahsan Md. Mujahid, Acting President EPICS addressed the conference explaining the present situation of the country and urging the party workers to mobilise the youths of Islamic spirit and launch strong movement against Anti-Islamic activities. He also urged them to form Al-Badr Bahini at different levels for defending the country from internal and external attack.”

60. The aforesaid oral and documentary evidences clearly show that the convict-appellant was a leader of ICS, the Student Wing of Jamat-E-Islami and was known in the locality as leader of ICS and worked for candidate of Jamat-E-Islami in National Election of 1970.

He was not an ordinary worker rather a leader of ICS, the Student Wing of Jamat-E-Islami and actively worked for Jamat-E-Islami since 1970.

61. Role of the convict-appellant prior to 16.04.1971:

Prior to incidents of 16th, 17th and 30th April,1971(in respect of the Charge Nos.2, 3 and 4 respectively) the convict-appellant aided Pakistani Army in committing atrocities. The freedom fighters resisted against Pak-Army at Badargonj but failed. On 8th April,1971, Pak-Army raided Badargonj Thana. At that time, local collaborators aided and supported Pak-Army while Army occupied Badargonj Thana on 8th April,1971.

62. Regarding the aforesaid resistance of freedom fighters and occupation of Badargonj Thana by Pak-Army, P.W.4, Md. Meseruddin who was the retired Principal of Badargonj College stated that A.T.M. Azharul Islam along with Pak-Army took control of Badargonj Town and occupied the houses of Jagodish Babu, a rich man of the town and that the Offices of Shanti Committee and Rajaker were established in that house. In cross-examination he stated that it is not a fact that he did not state those facts earlier to anybody.

63. P.W.8, Md. Mojibur Rahman Master is from Badargonj. He is a B.A. B.Ed. In 1971 he was a teacher of Syampur High School at Badargonj. He stated that on 08.04.1971, the people of Shanti Committee occupied the house of Jagodish Babu and established the Office of Peace Committee in that house and meetings were regularly held there. Bachu Mia Paiker, Wahidul Hoque Chowdhury, Mir Afzal Hossain and Doctor Abdul Bari were the leaders of the said Peace Committee. A.T.M. Azharul Islam used to remain present in those meetings of Peace Committee occasionally. This witness further stated that he also came to know that A.T.M. Azharul Islam regularly went to Cantonment and met the Pak-Army there. Suggestion was given to this witness regarding the aforesaid statement which he made in his examination-in-chief but he replied that it is not a fact that A.T.M. Azharul Islam did not go to Cantonment to contact the Pak-Army.

64. The aforesaid fact clearly shows that convict-appellant aided Pakistani Army in committing crimes against humanity even prior to 16.04.1971.

The appellant was acquitted of Charge No.1 and Government did not prefer any appeal against the acquittal given in respect of Charge No.1. Therefore, we refrained from considering Charge No.1.

Charge No.2.

65. On 16th April,1971 at about 1.00 p.m. you A.T.M. Azharul Islam being the President of Islami Chhatra Sangha, Rangpur Unit, along with the armed members of Jammamat-E-Ialami, Islami Chhatra Sangha and Pakistani Army, in continuation of your planning and blue-print, having arrived at your area named Taxerhat Relgumti under Badargonj Police Station by a train, proceeded towards Moksedpur Dhap Para and on the way the Pakistani Army with the help of you and your said accomplices plundered many houses situated beside the road and then set them on fire. Thereafter, you and your said accomplices having reached at Dhap Para area attacked village Moksedpur and started firing indiscriminately and as a result, unarmed civilians namely, (1)Jangoli Bhorosha, (2) Kerad Hossain alias Bishu, (3) Mst. Chini Mye, (4) Ammye, (5) Momtaz Uddin, (6)Mowlovi Abdul Quddus Ali, (7)Tamir Uddin alias Tamiz Uddin, (8)Moriom Nessa Kalti Mye, (9)Sarijannessa alias Sukhi Mye, (10) Yusuf Ali (sustained bullet injury but died after Liberation), (11)Shadhina, (12) Azizar Rahman alias Khoka, (13) Zahir Uddin and (14)Osman Ali and others were killed.

66. Therefore, you are hereby charged for abetting and facilitating the commission of offences of looting, arson and murder as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the Act. You are also liable for commission of above offences under sections 4(1) and 4(2) of the Act.

67. In the instant charge, the occurrence took place on 16.04.1971 and the witnesses deposed before the Court from 26.12.2013 onwards. In this connection, it is to be mentioned here is that the World War II trials of alleged German war criminals have continued for many decades after Nuremberg. In Germany and Italy, for example, cases have continued to be tried into 2011. Since the *Einsatzgruppen* trials in 1948 and, the beginning of the *Auschwitz-prozess* in Frankfurt in the early 1960s, the German Courts in particular have increasingly faced difficulties concerning both the credible identification of accused persons, especially because they were for the most part relatively low level perpetrators rather than prominent public figures, and also the connection of individual accused to specific criminal acts.

68. Falsification or substitution of identity documents, together with the difficulty of witnesses in identifying a person 20 years or more after they saw them in a Wehrmacht or SS uniform in a camp or killing site, proved to be stumbling blocks in a number of cases. The chaos following World War II contributed to the ability of some individuals to credibly establish false identities. In one of the most notorious cases, a famous German journalist in Hamburg simultaneously pursued his professional career in that city while under criminal investigation for war crimes in Frankfurt under a different name. It was only much later that his dual identity was revealed.

69. *John Demjanjuk* was taken as a prisoner of war by German forces in the Ukraine in 1942. Recruited by the SS in the POW Camp in *Chelm*, *Demjanjuk* then served as a guard in various concentration camps. His 1942 SS-ID, or *Dienstausweis*, provided important documentary evidence in his subsequent prosecutions, both for purposes of identification and for establishing where he served.

What is known with certainty is that *Demjanjuk* emigrated to the United States after World War II and was less than candid about his activities during the war.

70. *Demjanjuk's* legal difficulties in the United States began in 1977, when he was accused of being a war criminal and citizenship revocation proceedings began against him. In 1981, he was stripped of his United States citizenship and in 1983, Israel requested extradition on the grounds that Ivan "John" *Demjanjuk* was the notorious *Sobibor* camp guard known as "Ivan the Terrible." *Demjanjuk* fought the extradition request for several years, notably on the grounds that he was not in fact the man who had been known as "Ivan the Terrible" and that the Israeli authorities had mistakenly identified him as such. Whether or not this identification was correct eventually turned out to be far from easy to establish beyond a reasonable doubt, but in 1986, *Demjanjuk* was deported to stand trial in Israel.

71. *Demjanjuk's* defence that he had been inaccurately identified as "Ivan the Terrible" proved to be in vain. Numerous *Sobibor* survivors identified him in the Israeli courtroom as such, and he was convicted on this basis in 1988. *Demjanjuk* appealed and new evidence indicated that "Ivan the Terrible" was in fact a different person, *Ivan Marchenko*. *Demjanjuk* had been wrongly identified by numerous witnesses. The Israeli Supreme Court overturned his conviction, and in 1993, he was returned to the United States.

72. His legal troubles did not end here, however, as in 2001, he was again accused in the United States of having served as a guard at the Sobibor and Flossenburg camps. He contested this accusation but in 2005, a deportation order was issued, against which he appealed.

73. Deported to Munich in 2009, *Demajanjuk* again stood trial, this time before a German court, where he was charged as an accessory to the murder of 29,000 persons at Sobibor. Unlike the trials of the 1960s, the prosecution did not connect him to specific crimes but rather to his role at Sobibor. They alleged that by working as a guard at a death camp, he was a participant in the killings that took place there. When he was convicted in May 2011, the BBC commented that this was the first time that such an argument had been accepted by a German court. [David Cohen on the Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases]

74. In order to prove charge No.2, the Prosecution examined 6 witnesses of whom P.Ws.3 and 6 are eye-witnesses.

P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali aged about 59 years hails from village Uttar Ramnathpur, under P.S. Badargonj under District-Rangpur. He is a farmer by occupation. He deposed that on 16.04.1971 a train from Rangpur arrived at rail gate No.6 which is adjacent to Taxerhat and Pakistani Army, A.T.M. Azharul Islam and other accomplices of Jamet-E-Islami came there. Appellant A.T.M. Azharul Islam and his accomplices and Pakistani Army got down from train and advanced towards the north. On their way, they set houses on fire beside the road and started firing at random. After that, they came to the village of this witness via Millardanga. Seeing the Pakistani Army coming to their village, his mother, brothers and two sisters fled away from their village to Pathnerhut and the appellant and his father Momtaz Sarker stayed back to protect their houses. As soon as Pakistani Army and their accomplices surrounded their village, he concealed himself in a bush and his father was caught hold of by the Pakistani Army while his father started fleeing away. He saw from inside the bush that appellant-A.T.M. Azharul Islam knocked down his father when he caught hold of his (appellant) legs and then Pakistani Army shot him dead. He knew A.T. M. Azharul Islam as he came to campaign in their locality in the election of 1970. He saw from inside the bush that they also killed Munshi Quddus of their village. Soon after departure of Pakistani Army and their accomplices, this witness saw fifteen dead bodies at different places of their village. Of them the dead bodies of his father Momtaz Ali Sarker, Quddus Munshi, Zahiruddin, Chini Mye, Ammye, Jangli Bhorosha, Bishu, Tamir Uddin, Abu, Tina, Kalti Mye, Shadhina and Yusuf Ali were there. After that, when the villagers gathered there he heard from them that the baby came out from the womb of Kalti Mye when she sustained bullet injury. He came to know from Aminul (P.W.7) and Yeahya that Pakistani Army also killed Yusuf. He identified the appellant in the dock.

75. In cross-examination, this witness stated that Millardanga is an intersection and that a rice mill was there. This witness spontaneously stated that there is a mass-graveyard (বধ্যভূমি) there after 1971. He also stated that Millardanga was about 1 kilometre off from their house. On the date of occurrence more than 100 Pakistani Army came by train at the rail gate and they came down from the train. He knew village Moksedpur. In cross examination, he also stated that Moksedpur-Dhap Para Mass Graveyard is also known as Moksedpur village. He denied the suggestion that on the date of occurrence, he did not go to Mondol Para of Radhanagar with his mother. The deposition of this witness revealed that several unarmed civilians were killed in this incident as stated in Charge No.2. His evidence revealed that the

appellant was a member of a killing party and there is a Mass-Graveyard (বধ্যভূমি) in Moksedpur-Dhap Para.

76. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that the evidence adduced by this witness should be discarded because he claimed to have seen the appellant getting down from a train from a distance of 5/6 kilometres which is humanly impossible.

77. We have considered the evidence of this witness and found that nowhere in his evidence he claimed to have seen the appellant getting down from a train from a distance of 5/6 kilometres. This portion of the evidence adduced by P.W.3 is hearsay evidence and as such, on this score his entire evidence cannot be discarded.

78. Mr. Mahbub Hossain further submits that this witness hails from Uttar Ramnathpur and that the occurrence took place in Moksedpur and as such, he changed the place of occurrence which is fatal for the prosecution.

79. We have carefully scanned the evidence of P.W.3 and found that Dhap Para was about 1 kilometre to the north-west of his village. He further stated that he knew village Moksedpur and Moksedpur-Dhap Para Mass Graveyard was also known as Moksedpur village.

80. Having gone through the entire evidence of P.W.3, we find that Dhap Para and Moksedpur are situated within the vicinity of Uttar Ramnathpur. This witness in cross-examination stated that Dhap Para is about one kilometre to the north-east of their house. This witness also clarified about the place of occurrence by stating “মোকসেদপুর- ধাপপাড়া বধ্যভূমিকে মোকসেদপুর গ্রাম বলা হয়”। Moreover, during cross-examination this witness was asked about the topography of the land between Dhap Para and Uttar-Ramnathpur. This topographical description of this witness on 05.03.2014 cannot be the same during the War of Liberation in 1971. Therefore, we are of the view that the question of shifting the place of occurrence by this witness did not arise. Moreover he lost his father on the date of occurrence and as such, his evidence should not be taken lightly.

81. P.W.4, Md. Meseruddin aged about 66 years deposed that his occupation was teaching. He retired from service as acting Principal of Badargonj Degree College. During the election of 1970, A.T.M. Azharul Islam campaigned in favour of the candidate of Jammata-E-Islami. Pakistani Army, appellant A.T.M. Azharul Islam and his accomplices arrived at rail gate No.6 from Rangpur by a train and got down there on 16.04.1971. They advanced towards Moksedpur of Ramnathpur Union. On their way, they set the houses on fire and opened fire at random on both sides of the road. The people of the locality became afraid and they started fleeing away towards Uttar Moksedpur and Dhap Para area in order to save their lives and then Pakistani Army and A.T.M. Azharul Islam and his accomplices surrounded that village and killed fifteen persons. Of them there were Jangali Bhorosha, Bishu, Momtaz, Anu Mye, Kalti Mye and Tamir Uddin and others. At the time of occurrence Kalti Mye was nine months pregnant and her baby came out from her womb when she sustained gun shot. Martyred Jangali Bhorosha was the father of his paternal aunt. He deposed that he himself did not see the said occurrence, but he heard the same from Aminul (P.W.7), Mokles (P.W.3), Mokbul (P.W.6), Azmal Khan and many others.

82. In cross-examination, he denied the suggestion that in 1970 A.T.M. Azharul Islam did not campaign in the election as student leader of Jammata-E-Islami. In cross-examination, he further stated that he did not know from which educational institutions and in which years A.T.M. Azharul Islam passed different examinations but he saw him as a student of HSC in Carmichael College in 1970. No suggestion was given to him to the effect that out of enmity he deposed against this appellant.

83. Mr. Khandaker Mahbub Hossain, submits that during cross-examination P.W.4 admitted that 2/3 sons of Jongli Barosha are still alive but the prosecution did not examine such vital witnesses which creates doubt about the prosecution story. It is cardinal principle of law of evidence that each and every witness is not required to be examined. It is the quality of the evidence and not the quantity of the evidence which is required in a criminal case. There is no earthly reason to discard the evidence of P.W.4 for non examination of 2 living sons of Jongli Barosha and as such non-examination is not at all fatal to the prosecution.

84. P.W.5, Md. Abdur Rahman aged about 58 years deposed that on 16.04.1971, they had gone to Taxerhat to see the incident that took place on the previous day. At about noon when they were about to return home they saw a train arrive at rail gate No.6 from Rangpur. They concealed themselves in a nearby pond from where they saw the train stop at rail gate No.6. After that, Pakistani Army, appellant Azharul Islam and many supporters of Jammata-E-Islami came down from the train. They advanced towards Taxerhat. Observing the arrival of Pakistani Army and their accomplices including the appellant A.T.M. Azharul Islam, this witness came back to his village. Sometime afterwards, he saw flame of fire at Dhap Para and heard sound of firing coming from there. At about 5.00 p.m. Pakistani Army and their accomplices went back by that train. After that, P.W.5 and others went to Taxerhat and heard from the persons gathered there that many houses were set on fire and many people were killed at Dhap Para. After that they went to Dhap Para and found many people crying, of whom, one Aminul told them that fifteen people including his aunt were killed. They also found about one hundred and fifty houses burnt and five dead bodies and the other dead bodies had been taken away by their relatives. After seeing the occurrence he came to his house and heard from his brother and other villagers that A.T.M. Azharul Islam along with his accomplices and Pakistani Army committed the killing at Dhap Para. He has identified the accused in the dock.

85. No suggestion was given to him that he did not see A.T.M. Azharul Islam and others coming down from the train on 16.04.1971. In cross-examination he stated that in 1970 the appellant A.T.M. Azharul Islam campaigned in the election as a worker of Jammata-E-Islami. He denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jammata-E-Islami. In cross-examination, he further stated on 16.04.1971 when Pakistani Army came to rail gate No.6, he concealed himself in a pond under the water-hyacinth. He also denied the suggestion that he did not see or hear about the occurrence of Dhap Para. He also denied the suggestion that being tutored he told that on 16.04.1971 the appellant accompanied the Pakistani Army. He also denied the suggestion that on 16.04.1971, the appellant A.T.M. Azharul Islam did not go to the place of occurrence or that he did not participate with the Pakistani Army in the killings at Dhap Para.

86. Admittedly, P.W.5 is an eye-witness so far as it relates to arrival of Pakistani Army and A.T.M. Azharul Islam at rail gate No.6 by a train from Rangpur on 16.04.1971. The rest of the evidence adduced by this witness is hearsay but he had corroborated the evidence of

eye-witnesses, P.W.3, Muklesur Rahman Sarker and P.W.6 Md. Mokbul Hossain and as such, his evidence cannot be discarded on the ground that he is a hearsay witness.

87. P.W.6, Md. Mokbul Hossain aged about 66 years and he was a farmer by occupation. He deposed that during the election of 1970, A.T. M. Azharul Islam came to their area with Afzal Hossain and Moklesur Rahman to campaign in the election. Appellant A.T.M. Azharul Islam and Pakistani Army arrived at rail gate No.6 of Taxerhat by a train on 16.04.1971 and got down there from the train and advanced towards Taxerhat and set houses on fire of that locality and fired shots there. As soon as Pakistani Army and the appellant came to their village, he (P.W.6) and his mother started running towards Dhap Para and at one stage his mother was unable to run and told him to flee away and she would come later. At that time, he started running through 'Ayl'(আইল). After a while, he heard sound of firing and then he looked back and saw that A.T.M. Azharul Islam and 2 Pakistani Army fired shots at his mother who fell to the ground after making a loud cry. He saw that the Pakistani Army killing one Tamiz and then he concealed himself in a ditch for about three hours and thereafter he saw by raising his head from inside the ditch that appellant A.T.M. Azharul Islam and Pakistani Army set houses on fire of Dhap Para, Mrida Para, Thonthoni Para and Molla Para and killed 14/15 persons by firing shots. After that A. T. M. Azharul Islam and Pakistani Army went towards Taxerhat. Then the people of the village returned home. Then he and his uncle came to Dhap Para and saw there 4/5 persons killed. They were Jongli Bhorosha, Bishu, Shukhi Mye, Kalti Mye, Chini Mye and Tomizuddin. He and his uncle heard from the persons gathered there that the appellant and Pakistani Army committed the killing and arson. After that, he and his uncle brought the dead body of his mother to the house and buried her there. He identified the accused in dock.

88. In cross-examination, he denied the suggestion that A.T.M. Azharul Islam did not come to their area to campaign in the election or that this witness deposed so on being tutored. He also denied that the statement that on 16.04.1971 during the War of Liberation, A.T.M.Azharul Islam came to Taxerhat rail gate No.6 was untrue and that the aforesaid statement was tutored. He also denied the suggestion that he did not see the occurrence from the ditch of Folydari River. He denied the suggestion that A.T.M. Azharul Islam did not go to Taxerhat with Pakistani Army.

89. Admittedly, P.W.6 is an eye-witness to the occurrence and that his mother was brutally killed at that time and as such, his evidence should be relied upon and moreover credibility of the witness could not be shaken by the defence by cross-examining him.

90. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that this witness claimed to have seen the appellant and Pakistani Army coming to Taxerhat Rail Gate No.6 which was about 3/3.5 kilometres away from the place of occurrence and as such, his evidence should be disbelieved. We have gone through the entire evidence of P.W.6 and found that no where he claimed to have seen the appellant and the Pakistani Army getting down from train at Taxerhat Rail Gate No.6. His evidence in this respect is hearsay but with regard to the occurrence that took place in Dhap Para and Moksedpur, P.W.6 Md. Mokbul Hossain is an eye-witness.

91. The learned Counsel further submits that the appellant claimed that he knew A.T.M. Azharul Islam since 1970 as he participated in the election campaign for Jamat-E-Islami candidate but in cross-examination he stated that he could not remember the number of his children and the name of the leader of the Muslim League and as such the evidence should be

discarded as a whole. Admittedly, the appellant, A.T.M. Azharul Islam was involved in the killing of the mother of this witness and as such, it is natural that being the son, he could not forget the name of the killer of his mother. Therefore, his deposition before the Tribunal that he knew A.T.M. Azharul Islam since 1970 as he participated in the election campaign of Jammata-E-Islamicandidate cannot be brushed aside. He also stated that he saw at the back side that A.T.M. Azharul Islam and two Pakistani Army fired shot at his mother who fell to the ground making a loud cry. A son cannot forgive the killers of his mother and as such, the evidence adduced by P.W.6 is most natural and there is no ground at all to discard his evidence.

92. P.W.7 Md. Aminul Islam, who was declared hostile vividly described the entire occurrence committed by Pakistani Army and their local cohorts in which his aunt Kalti Mye was killed. But he did not mention the name of A.T.M. Azharul Islam and in reply to the cross examination by the prosecution, he stated that it is not a fact that his aunt Moriomnessa alias Kalti Mye was killed in presence of the appellant A.T.M. Azharul Islam. It is apparent that intentionally this witness did not mention the involvement of the appellant. P.W.4 Meseruddin stated that he heard about the incident from P.W.7 Aminul Islam. P.W.5 Abdur Rahman also stated that P.W.7 Aminul Islam told about the incident to him. P.W.8 also told that P.W.7 informed him about the incident and the said P.W.8 stated as follows:

“আমিনুল ইসলামের কাছে জানতে পারি ঐ গোলাগুলির সাথে এটিএম আজাহারুল ইসলাম সংশ্লিষ্ট ছিল।”

93. P.W.8, Md. Mojibur Rahman Master aged about 73 years stated that during the period of Liberation War his age was about 34/35. He further stated that he is a B.A. B.Ed. He had been serving in Shaympur High School of Badargonj during the War of Liberation. On 16.04.1997, he came to know that a train from Rangpur arrived at rail gate No.6 of Taxerhat. The Pakistani Army and members of Jammata-E-Islami including A.T.M. Azharul Islam alighted from the train and advanced towards the Moksedpur by firing shots. At that time, the local people became afraid and started running here and there and 15 persons were killed by gun shots of Pakistani Army and members of Jammata-E-Islami. Of the 15 persons, there were women and babies. One of them was Kalti Mye. When he went to the place of occurrence, he heard from Moklesur Rahman (P.W.3), Mokbul (P.W.6) and Aminul (P.W.7) that accused A.T.M. Azharul Islam was involved in the killing. He knew the appellant A.T.M. Azharul Islam before 1971, who was a student leader of Carmichael College Unit and a Commander of Al-Badr Bahini in 1971. He identified the accused in the dock.

94. In cross-examination, he denied the defence suggestion that he did not know about the occurrence of 16.04.1971 from Moklesur Rahman (P.W.3), Mokbul (P.W.6) and Aminul (P.W.7). In cross-examination he further stated that Taxerhat is about 5 miles away from Badargonj Bazar.

95. P.W.11, Md. Shakhawat Hossain @ Ranga is aged about 57 years. During the War of Liberation he was aged about 15 years. He used to reside with his elder brother at his house at Gupta Para, Rangpur. At that time, he was a student of Class-VIII of Rangpur Zilla School. He came to know that accused A.T.M. Azharul Islam was involved in the killing of Dhap Para, Jharuarbeel and other places. He identified the accused in dock. No question was put to him in cross-examination regarding the facts which werestated in his examination-in-chief. Those statements made in the examination-in-chief remained uncontroverted. Apart from the oral evidence, International Crimes Tribunal No.1 also considered exhibits 13 and 16, relevant portion of which we have already quoted in the judgment earlier.

96. Having considered the evidence of 6 witnesses, we find that the evidence of the witnesses are consistent and they corroborated each other. P.W.3, Moklesur Rahman Sarker and P.W.6, Mokbul Hossain are eye-witnesses to the occurrence. P.W.3 lost his father during the occurrence and P.W.6 lost his mother at the same occurrence. P.W.5 is partly an eye-witness and partly hearsay witness of the occurrence. The remaining witnesses are hearsay witness. P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali supported Charge No.2 and narrated the alleged incidents that took place on 16.04.1971. What is important to mention here is that P.W.5 Abdur Rahamn is an eye-witness of the part of the incident and hearsay in respect of part of the occurrence. He also corroborated the evidence adduced by P.Ws.3 and 6. P.W.4 Md. Meseruddin, P.W.8, Md. Mojibur Rahman Master and P.W.11, Md. Shawkat Hossain alias Ranga are hearsay witnesses and they corroborated the instant charge and they also corroborated the evidence adduced by P.Ws.3 and 6. P.Ws.3, 4, 5, 6, 8 and 11 directly implicated the appellant with the offences of arson and murder as narrated in the instant charge. All the 6 witnesses had been able to prove Charge No.2 against appellant beyond reasonable doubt. During Liberation War, appellant A.T.M. Azharul Islam was the President of Islami Chhatra Sangha, Rangpur Unit. From the aforesaid witnesses, P.Ws.3, 4, 5, 6, 8 and 11 along with exhibits-13 and 16, it appears that during Liberation War, 1971, the appellant A.T.M. Azharul Islam was a leader of Islami Chhatra Sangha, the Student Front of Jammata-E-Islami.

97. We, however, noticed some minor inconsistencies and contradictions in the evidence of 6 prosecution witnesses but the cardinal principle of assessment of evidence is that the entire evidence of a witness is to be considered and that a conclusion is to be arrived later. We are of the view that the insignificant inconsistencies in the evidence of the witness should be discarded. In this connection, we have gone through the judgment of the ICTR Appeals Chamber which held in the Case of *Mikaeli Muhimana V. The Prosecution* under:

“The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony.” [ICTR Appeals Chamber, judgment of May 21, 2007, para-99]

In the case of *Motiur Rahman Nizami vs. The Government of Bangladesh, represented by the Chief Prosecutor, International Crimes Tribunal, Dhaka, Bangladesh, (2017) 2 Law Messenger (AD)446 at paragraph 224*, it has been held as under:

“It has already been observed earlier that the alleged incidents of this case took place long 42 years before. With the passage of this long 42 years many of the documentary evidence might have been destroyed. In an old case like the present one the prosecution faces great challenges in producing necessary evidence, both oral and documentary. Most of the witnesses also, in such old case, are not available due to various reasons, many necessary witnesses may die within such a long period, many others, due to old age, become unable to depose before the court/tribunal and many other witness, for various reasons, may be unwilling to depose against a particular accused after such a long period. However, in this case the prosecution has examined so many witnesses who have deposed before the court supporting the prosecution case. There can be some contradictions or discrepancies in the evidence of the witnesses who depose before the court/tribunal after such a long period. In the present case we have scanned the evidence of the prosecution witnesses attentively. Though there are some minor contradictions and discrepancies in their evidence considering the very fact that these witnesses have deposed before the tribunal after a long period of 42 years, we do not think that these minor discrepancies and contradictions in the evidence of the prosecution witnesses are fatal at all and these can raise any suspicion or doubt about the truth of their evidence or about the trustworthiness of the witnesses.”

98. In respect of appreciation of evidence adduced by P.W.3 and P.W.6, the eye witnesses, we may rely on the principle expounded in the case of *State of Uttar Pradesh V. Krishna Master and others*, (2010) 12 S.C.C. 324 wherein in paragraph Nos.23 and 24, it has been stated as under:

“23. The record of the case shows that this witness Jhabbulal was cross-examined at great length. He was subjected to gruelling cross-examination which runs into 31 pages. The first and firm impression which one gathers on reading the testimony of this witness is that he is a rustic witness. A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to gruelling cross-examination should be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime.

24. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.”

99. In view of the discussion of the evidences both oral and documentary, we find that the prosecution had been able to prove beyond reasonable doubt the incident dated on 16.04.1971, Thus the appellant is criminally liable under sections 4(1) and 4(2) of the Act of 1973 and we find him guilty for substantially abetting and facilitating the actual commission of the offences of murder and arson as crimes against Humanity as specified in section 3 (2)(a)(g) and (h) of the Act of 1973 which are punishable under section 20(2) of the Act.

Charge No.3

100. That on 17th April, 1971 between 12.00 noon to 5.00 p.m. you A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur Unit, along with the armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistani Army, in continuation of your planning and blue-print, with intent to destroy, in whole or in part, a Bangalee national group and a Hindu religious group, made wide-spread attack by setting fire to the villages of Jharuarbeel area namely, Hajipur, Jharuapara, Bujruk Bagbar, Ramkrishnapur, Balapara, Bujruk Hajipara, Bairagi Para, Sarder Para, Ramkrishnapur Baniapara, Ramkrishnapur Bithhipara, Jogipara, Khorda Bagbar and Khalisha Hajipur, and then the unarmed civilians of those villages being frightened took shelter at the Jharuarbeel. At that time, you and your said accomplices having surrounded the Jharuarbeel killed about 1200 unarmed women, men, students, babies, etc. by firing indiscriminate shots and, you also having caught hold of about 200 Hindu people and students therefrom took them to unknown place and then killed them. At the time of said atrocities, many houses of that area were plundered and set on fire by you and your accomplices.

101. Therefore, you are hereby charged for abetting and facilitating the commission of offences of looting, arson and murder as crimes against humanity and also genocide as

specified in section 3(2)(a)(g)(h) and 3(2)(c)(g)(h) respectively of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the Act. You are also liable for commission of above offences under section 4(1) and 4(2) of the Act.

102. In order to bring home Charge No.3, the prosecution examined 5 witnesses, P.Ws.3, 4, 5, 6 and 8 and presented documentary evidence Exhibits-13 and 16.

103. P.W.3, Moklesur Rahman Sarker alias Md. Mokles Ali, aged about 56 years is a farmer by occupation. This witness deposed that he came to know that during War of Liberation 2 trains came and stopped at Jharuarbeel which is to the south of their village and that about 1000/1200 people were killed. He identified A.T.M. Azharul Islam before the Court. During cross-examination no question was put to this witness about aforesaid statement which he made in examination-in-Chief and thus those statements remained unchallenged. During cross-examination, he stated that Jharuarbeel is about 7 kilometers away towards north-east from their houses.

104. P.W.4, Md. Meseruddin aged about 66 years deposed that on 17.04.1971 at about noon a train from Parbatipur arrived at rail gate No.6 and a non-Bengali, Bachhu Khan, Quamruzzaman MPA, Badrul, Nayeem Kazi along with many others and Pakistani Army alighted from the train and advanced towards Bakshigonj Ghat under Bishnupur Union. Seeing them coming he and his father, uncle, brother and other members of their family proceeded towards Jharuarbeel and then he saw that another train coming from Rangpur arrived at rail gate No.10. The appellant A.T.M. Azharul Islam and his accomplices along with Pakistani Army alighted from that train and advanced towards Bakshigonj. After that, both the trains were taken to rail gate No.7. The appellant and his accomplices encircled 6 villages of their Union. The villagers of those villages started fleeing away and many took refuge in Jharuarbeel. This witness saw A.T.M. Azharul Islam wearing white trouser and shirt and he was with Pakistani Army. At that time, he saw appellant A.T.M. Azharul Islam and Pakistani Army who were setting houses on fire of the innocent people and firing shots randomly. About 1200 people were killed by bullet shots around Jharuarbeel. Of them Pran Krishna Master, Minajul Islam BSc, Alauddin, Azadul, Faezuddin and his son Nur Islam, Asad Boksh were killed. Many dead bodies of the Hindu Community were also found at the place of occurrence. The appellant and his accomplices chased many villagers and assembled them at rail gate No.7. After that, according to the order of the accused A.T.M. Azharul Islam and the said Bachhu Khan, more than two hundred youths, among the assembled villagers, were taken towards Parbatipur after boarding them in a train. Among those persons his cousins Sambaru and Islam, Abu Bakar Siddeique and two guards of railway were butchered and their dead bodies were thrown out from the train on south side of Ghora Doba Rail Bridge. His cousin Sambaru got married recently and on hearing the news about his death, his wife committed suicide by hanging. Soon after the Liberation War, the accused absconded. He identified the appellant in the dock.

105. In cross-examination this witness stated that he did not know in which years and from which educational institutions A.T.M. Azharul Islam passed his examinations, but in 1970 he saw him (appellant) as student of HSC of Carmichael College. He further stated in cross-examination that village Ram Krishanpur is situated towards north of Jharuarbeel. There were some bushes in Jharuarbeel in 1971. He deposed that he knew Bachhu Khan and Badrul since he was a student of Intermediate of Parbatipur College. He then deposed that most of the villagers took shelter in Jharuarbeel for their safety and some took shelter in bushes around their houses and Jharuarbeel is situated in the middle of those 6 villages

surrounded by the appellant and his accomplices. On seeing the accused and Pakistani Army getting down from the train, he, his father and others took refuge in Jharuarbeel. He denied the defence suggestion that only Pakistani Army and non-Bengalis committed the atrocity in Jharuarbeel and A.T.M. Azharul Islam was not there. He also denied the suggestion that he deposed falsely.

106. Mr. Khandaker Mahbub Hossain, learned Counsel for the appellant, submits that P.W.4 stated in his evidence that Jharuarbeel is about 3 kilometers away from his residence and as such he did not have the occasion to see the occurrence of Jharuarbeel.

107. In cross-examination, P.W.4 in unequivocal terms stated that Jharuarbeel is about 2 kilometers away to the south of their house and that Pakistani Army, A.T.M. Azharul Islam and his accomplices encircled 6 villages of their Union, Ramnathpur. The names of villages are Ramkrishnapur (village of the appellant), Kismat Ghatabeel, Ghatabeel, Doani Hajipur, Khalisha Hajipur and Khord Bagbar. He then deposed that as soon as the Pakistani Army and A.T.M. Azharul Islam and his accomplices attacked those villages, the villagers took refuge in Jharuarbeel as there were many bushes so that the villagers could conceal themselves in those bushes. He also deposed that the Jharuarbeel was in the middle of the aforesaid 6 villages surrounded by Pakistani Army and A.T.M. Azharul Islam. He further deposed that when A.T.M. Azharul Islam and Pakistani Army alighted from the train and advanced towards their village, he, his father and others took shelter in Jharuarbeel.

108. From the aforesaid deposition of P.W.4, it is crystal clear that P.W.4 was present at Jharuarbeel on the date of occurrence and he witnessed the atrocities committed there. Therefore, the submission made by the learned Counsel for the appellant does not stand to reason.

109. Mr. Khandaker Mahbub Hossain, learned Counsel for the appellant further submits that P.W.4 during his cross-examination admitted that A.T.M. Azharul Islam was not involved in the occurrence of the Jharuarbeel.

110. We have considered the entire cross-examination of P.W.4, who in many places of the cross-examination stated about direct participation of A.T.M. Azharul Islam in the occurrence. In cross-examination, he stated that “ইহা সত্য নহে যে, ঝাড়ুয়ার বিলের হত্যাকাণ্ড কেবলমাত্র পাকিস্তানি সেনারা অবাকালিরা সংগঠিত করে বা সেখানে এ টি এম আজহারুল ইসলাম ছিল না বা এই মামলায় তাকে মিথ্যাভাবে জড়ানো হয়েছে।”

During cross-examination, he also deposed that “নামাজ শেষে এ টি এম আজহারুল ইসলাম ও বাচ্চু খাঁন হুকুম দিয়ে বলে যে, ‘ইন্দু আদমিরা’ একধার হও, যুবক আদমি একধার হও, স্টুডেন্ট আদমি একধার হও।” P.W.4 stated those statements in cross-examination with respect to the occurrence that took place on 17.04.1971.

111. Having considered the entire deposition of P.W.4, we are of the view that the Tribunal committed mistake in recording the statement of P.W.4 that “ঝাড়ুয়ার বিলের ঘটনার সহিত এটিএম আজহারুল ইসলাম সম্পৃক্ত ছিল না” The Tribunal through inadvertence did not mention the words “ইহা সত্য নহে” before the said statement. The cardinal principle of assessment of evidence is that the entire evidence is to be considered as a whole and then a decision is to be arrived. There is no scope to consider one statement made in cross-examination in isolation.

112. P.W.5, Abdur Rahman aged about 58 years deposed that a train arrived at rail gate No.10 from Rangpur on 17.04.1971 and another train arrived at rail gate No.6 from

Parbotipur on the same date. About 100/150 persons wearing uniform and civil dress alighted from the train, which came from Parbotipur and went to Bakshigonj and encircled Jharuarbeel. About 100/150 persons got down from another train and advanced towards Bakshigonj. They encircled the villages and the villagers started running here and there and at that time many people were telling that A.T.M. Azharul Islam and Pakistani Army came from Badargongj and encircled Jharuarbeel. The persons who came to Bakshigonj from 2 trains encircled 5 villages and started firing shots and then came to Jharuarbeel where 500/600 people concealed themselves in bushes. At that time P.W.5 saw accused A.T.M. Azharul Islam in Jharuarbeel. Because of indiscriminate firing of shots about 400 people were killed in Jharuarbeel. Minhajul Islam was a teacher of Badargongj High School. He was killed in Jharuarbeel. The people of Islami Chatra Sangh told that Minhajul Islam should not be allowed to survive and if he was allowed to survive, he might cause harm to them. After that, the persons wearing uniform and civil dresses chased about 1200 people and assembled them to rail gate No.7. Meanwhile, the aforesaid 2 trains were taken to rail gate No.7 from rail gate Nos.6 and 10 and connected them to each other and steps were taken to board them (the people assembled) in the trains. Then Shamsuddin Master, the then house-tutor of the appellant, requested the persons wearing uniforms, Bachhu Khan and accused A.T.M. Azharul Islam to give him 10 minutes' time to say 'Asr' prayer. The persons present there including the Hindus after performing ablution stood up for prayer. After the end of the prayer, the appellant, Bachhu Khan and Pakistani Army chose about two hundred youths and the Hindus, among the persons assembled there, and picked them up in the train and took them away. On the way when the train stopped near Ghoradoba Bridge, five persons of the train were killed and their dead bodies were thrown out therefrom, and among them there were Sombaro, Islam, Abu Bakkar Siddique and two railway guards and the remaining persons were missing. He identified the accused in the dock.

113. During cross-examination, this witness stated that when they were running to and fro, he saw A.T.M. Azharul Islam and Pakistani Army at Jharuarbeel. At that time A.T.M. Azharul Islam told this witness to mingle with the people present there. This witness also mingled with the people assembled there and Pakistani Army and A.T.M. Azharul Islam drove them towards rail line.

114. What is remarkable to note here is that this witness did not make the above statement during examination-in-chief. The defence to its peril asked question following which the above statement was made by this witness. Even no denial was given to the statement during cross-examination. He further stated in cross-examination that A.T.M. Azharul Islam participated in the election campaign of 1970 and denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign as a worker of Jamaat-E-Islami.

115. Mr. Khandaker Mahbub Hossain, learned Counsel, submits that P.W.5, Md. Abdur Rahman is a tutored witness, who did not state how he came to know the appellant in 1971. From the evidence of P.W.5, we find that he stated in cross-examination that A.T.M. Azharul Islam as a worker of Jammat-e-Islami took part in the election campaign in 1970. He denied the suggestion that A.T.M. Azharul Islam did not participate in the election campaign of 1970 as a worker of Jammat-e-Islami. Therefore, it appears that from the cross-examination of P.W.5 that he knew the appellant since 1970 when he came to the locality of this witness to campaign in favour of the candidate of Jammat-e-Islami.

116. Mr. Khandaker Mahbub Hossain further submits that it was difficult for P.W.5 to identify the appellant in Jharuarbeel where according to this witness indiscriminate firing

resulted in the killing of 400 persons and as such, his evidence should be left out of consideration.

117. During cross-examination, he stated “ছুটাছুটির এক পর্যায়ে আমি ঝাড়ুয়ারবিলে গেলে দেখি যে, পাকিস্তানি আর্মি তাদের সাথে থাকা এটিএম আজহারুল ইসলাম সেখানে উপস্থিত। তখন এটিএম আজহারুল ইসলাম আমাকে বলে উপস্থিত লোকজনের দলে ঢুকে যেতে, আমি ঐ দলে ঢুকে পড়লে দলের সকল লোকজনকে তাড়া করে পাকিস্তানি আর্মি ও এটিএম আজহারুল ইসলাম রেল লাইনের দিকে নিয়ে যেতে থাকে।”

118. In view of the aforesaid statement of P.W.5, in cross-examination, it is crystal clear that P.W.5 was in Jharuarbeel on the date of occurrence and he could identify the appellent.

119. P.W.6, Md. Mokbul Hossain aged about 64 years deposed that on the following day i.e. 17.04.1971 a train from Rangpur and another train from Parbotipur arrived at their area. Pakistani Army and appellent A.T. M. Azharul Islam alighted from one of the two trains and went to Jharuarbeel and killed about 1200 people there and many people were driven away which he heard from others. He identified the accused in dock.

120. In cross-examination he denied that A.T.M. Azharul Islam did not come to his locality in 1970 to participate in the election campaign or he did not know him and that the aforesaid statements were tutored to him. He also denied the suggestion that A.T.M. Azharul Islam did not come to their locality on 16th and 17th April, 1971.

121. P.W.8 Mojibur Rahman Master is aged about 77 years. During the War of Liberation, he was aged about 34/35 years. He is a B.A. B. Ed. He deposed that during Liberation War, he was a teacher of Shampur High School at Badargonj. He is a freedom fighter. On 17.04.1971, a train arrived from Parbotipur and stopped at rail gate NO.6 near Korotoa Bridge and another train arrived from Rangpur and stopped at rail gate No.10. Pakistani Army and non-Bengali Bachhu Kha, Quamruzzaman MPA, Nayem Kazi and leaders of Jammata-E-Islami were in the train which came from Parbatipur and Pakistani Army and appellent A.T.M. Azharul Islam and other leaders of Jammata-E-Islami were in the train which came from Rangpur. After that, Pakistani Army and their accomplices alighted from both the trains and encircled the villages, namely, Burjuk Hajipur, Kismat Ghatbeel, Ramkrishnapur and Khord Bagbar and fired shots randomly and set houses of the villages on fire. The residents of those villages took refuge in neighbouring Jharuarbeel and then Pakistani Army and their accomplices went to Jharuarbeel and killed more than 1200 people who took refuge there including Minhajul B.Sc., Prankrishna Master and his (P.W.8) student Nuruddin. They erected a monumental stone locally at the place of occurrence. He went to Taxerhut in the afternoon and heard there from the U.P. Chairman of Badargonj, Abdul Jabbar Sarker and an organizer of freedom-fighters, Professor Meser Uddin that accused A.T.M. Azharul Islam had been involved in the said brutalities. Bacchu Mia Paiker, Wahidul Huq Chowdhury, Mir Afzal Hossain, Dr. Abdul Bari were leaders of the Shanti Committee. Appellent A.T.M. Azharul Islam occasionally attended the meeting of the Shanti Committee. He also deposed that he used to know the accused before 1971. The appellent was a student of Rangpur Carmichael College and he was the President of Islami Chhatra Sangha of that College Unit and he was also a Commander of Al-Badr Bahani. He identified the accused in the dock.

122. In cross-examination, he stated that A.T.M. Azharul Islam of whom he was stating was known to him before 1971. A.T.M. Azharul Islam was a student of Rangpur Carmichael College and he was the President of Islami Chhatra Sangha, Carmichale College Branch and

he was Al-Badr Commander during 1971. He also stated in cross-examination that A.T.M. Azharul Islam was present before the Tribunal on that day. He also denied the suggestion that on 17.04.1971 Abdul Jabbar Sarker and freedom fighter organizer, Meseruddin did not tell him about the occurrence that took place on 17.04.1971. He also denied the fact that A.T.M. Azharul Islam did not go to Rangpur Cantonment to contact the Pakistani Army.

123. Deceased Abdul Jabbar was a local politician and Union Parishad Chairman for 30 years. He made a statement to the Investigating Officer and since he is dead his statement has been marked as Exhibit-27 under section 19(2) of the International Crimes Tribunal Act.

124. The defence filed a written objection on the ground that long before completion of investigation, Abdul Jabbar Sarker died and as such, his statement cannot be received under section 19(2) of the Act.

125. Sub-section (2) of section 19 of the ICT Act runs as follows:

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

Having gone through Sub-Section (2) of section 19 of the ICT Act, we find that any statement recorded by a Magistrate or Investigating Officers of a person who at the time of trial is dead may be received in evidence. Therefore, contention raised from the defence as regards admissibility of exhibit-27 is devoid of any reason.

126. The statement contained in exhibit-27 relating to charge No.3 is quoted below:

“১৭ই এপ্রিল, ৭১ পার্বতীপুর হইতে ১টা ট্রেন যোগে পাকিস্তানী হানাদার বাহিনী তাদের এদেশীয় দোসরদের সহায়তায় আবঙ্গালী বাচ্চু খান, এমসিএ কামরুজ্জামান বদরু, নঈম কাজীদের সঙ্গে নিয়া পাবতীপুর হইতে এবং রংপুর হইতে পাকিস্তানী হানাদার বাহিনী তাহাদের এদেশীয় দোসর এবং এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় অন্য ১টা ট্রেনযোগে বদরগঞ্জে প্রবেশ করে পার্বতীপুরের ট্রেনটি ৬নং ট্যাক্সেরহাট রেলগেট করতোয়া ব্রীজের কাছে থামাইয়া পাকিস্তানী হানাদার বাহিনী তাহাদের এদেশীয় দোসর এবং এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় দক্ষিণ দিকে বিধুপুর ইউনিয়নের বকসিগঞ্জ ঘাটে হাটিয়া যায়। রংপুরের ট্রেনটি বদরগঞ্জ বৈরাগীর গেটে থামাইয়া পাকিস্তানী সেনাবাহিনী এটিএম আজহারুল ইসলাম ও সহযোগীরা পায়ে হাটিয়া দক্ষিণ দিকের বকসিগঞ্জ এলাকা হইতে আওয়ামীলীগ সমর্থিত ও হিন্দু অধ্যুষিত রামকৃষ্ণপুর, কিসমত ঘাটাবিল, খলিশা হাজীপুর, খোর্দ বাগবাড়, বুজবুক বাগবাড়, হাজীপুর মৌজার সমস্ত গ্রাম ঘেরাও করে এবং ঘরবাড়ী জ্বলাইয়া দেয় ও এলোপাথারী গুলি করতে থাকে। এলাকার লোকজন দৌড়াইয়া ঝাড়ুয়ার বিল নিরাপদ মনে করিয়া সেখানে আশ্রয় নিতে থাকে। তখন আমিসহ আরো অনেক লোকজন ঝাড়ুয়ারবিলের দক্ষিণ পূর্ব ঝোপঝাড়ের মাঝে লুটাইয়া ছিলাম। গুলির শব্দ শোনার পর দেখি যে এলাকার লোকজন দিশেহারা হইয়া ঝাড়ুয়ারবিলের বিভিন্ন স্থানে দৌড়াদৌড়ি করিয়াছে। ঐ সময় বিলের দক্ষিণ পূর্ব হইতে এটিএম আজহারুল ইসলামের যোগসাজসে এবং একতায় পাকিস্তানী দখলদার বাহিনী ও তাদের এদেশীয় দোসররা উত্তর দিকে গুলি করিতে করিতে অগ্রসর হয়। তাহারা ঝাড়ুয়ার বিল এবং তার আশে পাশে প্রায় ১২ শত এরও বেশি নিরীহ নিরস্ত্র নারী, পুরুষ, শিশু ও ছাত্রদেরকে বিক্ষিপ্তভাবে গুলি করিয়া নির্মমভাবে হত্যা করে। তাহাদের মধ্যে বদরগঞ্জ হাইস্কুলের মিনহাজুর ইসলাম বিএসসি, তার চাচা আলাউদ্দিন, প্রাণকৃষ্ণ মাষ্টার, মেহের উদ্দিন প্রফেসরের মামাতো ভাই এমাজ উদ্দিন সহ তাহার ১৬ জন আত্মীয় শহীদ হন এই নারকীয় হত্যাকাণ্ডের সময় আমি ঝাড়ুয়ার বিলের বর্তমান স্মৃতি ফলকের অনুমান ২০০ গজ দক্ষিণ পূর্ব পাড়ে ঝোপঝাড়ের ভিতর লুকাইয়া থাকা অবস্থায় পাকিস্তানী দখলদার বাহিনী ও তাহাদের এদেশীয় দোসরদের সহিত এটিএম আজহারুল ইসলাম সহ কয়েকজন সিভিল পোষাকধারীদেরকে দেখিয়াছি এবং এটিএম আজহারুল ইসলামকে চিনিয়াছি। বর্তমান স্মৃতিস্তম্ভ সংলগ্ন কাচা রাস্তার উপর অসংখ্য নিরীহ নিরস্ত্র বাঙ্গালীকে তাহারা হত্যা করে। এটিএম আজহারুল ইসলাম এই গণহত্যায় পাকিস্তানী দখলদার বাহিনীকে রাস্তা দেখাইয়া নিয়া আসে এবং গণহত্যায় প্রত্যক্ষ এবং সরাসরি সহায়তা করিয়াছে। চ

127. In respect of Charge No.3, P.W.4 Meser Uddin and P.W.5, Abdur Rahman are eye-witnesses. Abdul Jabbar whose statement has been marked as exhibit-27 was also eye-

witness. 3 other witnesses (P.Ws.3, 6 and 8) are hearsay witnesses. There is no contradiction in their depositions regarding involvement of the convict-appellant. We have already stated the status of the appellant as ICS leader relying upon exhibits-13 and 14. The offences committed in respect of Charge No.3 are heart rending. What is curious to note here is that the defence does not deny the aforesaid incident of killing. Moreover, involvement of the convict-appellant had been clearly proved by the witnesses and the Tribunal committed no illegality in convicting and sentencing him and there is no reason to interfere with the judgment of the Tribunal.

128. In the case of *Prosecutor V. Jean-Paul Akayesu, Case No. ICTR-96-4-T*, the issue of passage of time, trauma and memory as impacting witness testimony have been considered. In this case, the defence had argued that there had been systematic collusion among prosecution witnesses to provide false testimony. The court responded, however, by pointing out other factors that could produce the kinds of inconsistencies noted by the Defence. The judgment notes that such discrepancies could be due to the fallibility of perception and memory and the operation of the passage of time:

“The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony [.....] Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony.”

129. It is contended on behalf of the defence that P.Ws.3, 6 and 8 are hearsay witnesses and that their evidence is inadmissible. We have already found that the evidence of these hearsay witnesses had been corroborated by 2 eye-witnesses (P.Ws.4 and 5). If the evidence of 3 hearsay witnesses has probative value, their evidence cannot be brushed aside. It is the cardinal principle of law of evidence that hearsay evidence is to be considered together with circumstances and the material facts depicted. Hearsay evidence is admissible and the Court can rely on it provided it has probative value.

130. In this connection, we may rely on Rule 56(2) of the Rules of Procedure, which provides that 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 safely at the end of the trial.

131. The above view finds support from the principle enunciated in the case of *Prosecutor V. Tharcisse Muvunyi*, which is quoted as below:

“The Chamber’s discretion to admit any relevant evidence which it deems to have probative value also implies that while direct evidence is to be preferred, 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 the credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.” [*Prosecutor V. Tharcisse Muvunyi, ICTR Trial Chamber, September 12, 2006, para-12*]

132. In the instant case, the appellant is being tried long after 4 decades of the atrocities committed. In such cases, direct evidence may not be available. Therefore, even anonymous hearsay evidence can be relied on without any corroboration.

133. It has been argued on behalf of the defence that the appellant was not directly involved in the commission of atrocities as mentioned in Charge No.3. This contention is devoid of reason as we have already found that eye-witnesses P.Ws.4 and 5 stated that accused A.T.M. Azharul Islam was directly involved in the commission of atrocities of arson and killing.

134. Over and above, in order to incur criminal liability in a case of crime against humanity, the accused himself need not have to participate in all aspects of the criminal conduct. Therefore, the accused is criminally liable under section 4(1) of the Act of 1973 and the Tribunal rightly found him guilty for substantially abetting and facilitating the actual commission of the offence of murder and arson as crimes against Humanity as specified in section 3 (2)(a)(c)(g) and (h) of the Act.

Charge No.4

135. On 30th April, 1971 between 09.00 P.M. to 12.00 P.M. at night you A.T.M Azharul Islam, being the President of Islami Chhatra Sangha of Rangpur District Branch, along with armed cadres of Jamaat-E-Islami, Islami Chhatra Sangha, under your leadership, accompanied by Pakistani occupation forces having entered the campus of Carmichael College under Kotwali Police Station of Rangpur District abducted Professor Chitta Ranjon Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Odhikary, Professor Kalachand Roy of Rangpur Carmichael College and Monjusree Roy, wife of Professor Kalachand Roy from their homes situated inside the college boundary. The above abducted persons were taken to nearby Domdama Bridge beside western part of Dhaka to Rangpur road at Badhya Bhumi, Mouja-Taluk Dhormadas under Tapat Union of Kotwali Police Station of Rangpur district where all unarmed civilians were killed by you and your accomplices in a pre-planned manner.

136. Therefore, you are hereby charged for abetting or conspiracy, persecuting, complicity in or failure to prevent commission of such crimes and the offences of killing and other inhuman acts as crimes against humanity and genocide and thereby you have substantially contributed to the commission of offences of crimes against humanity and genocide as specified under section 3(2)(a), 3(2)(c), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the Act.

You are also liable for commission of above offences under sections 4(1) and 4(2) of the Act.

137. For the purpose of proving Charge No.4, the Prosecution examined 7 witnesses. Of them P.W.9, Sova Kar, P.W.10, Ratan Chandra Das are partly eye-witnesses of the heart rending occurrence and P.W.4 Md. Meseruddin, P.W.8, Md. Mojibur Rahman Master, P.W.13 Advocate Ratish Chandra, P.W.11 Md. Sakhawat Hossain @ Ranga, P.W.12, Md. Rafiqul Hassan @ Nannu are hearsay witnesses of the occurrence.

138. P.W.4, Md. Meseruddin aged about 66 years deposed that he came to learn that during Liberation War A.T.M. Azharul Islam abducted and killed 4 teachers of Rangpur

Carmichael College, namely, Chitta Ranjon Roy, Kalachan Roy, Sunil Baron Chakraborty and another teacher and the wife of Kalachan Roy. He further deposed that after the Liberation War A.T.M. Azharul Islam absconded. After the changeover of 1975, A.T.M. Azharul Islam became active with politics of Jammata-E-Islami.

139. In cross-examination he denied suggestion that in 1970, A.T.M. Azharul Islam did not participate in the election campaign as a student leader of Jammata-E-Islami. In cross-examination, he further stated that he is not aware from which educational institutions and in which years A.T.M. Azharul Islam passed different examinations but he saw him (appellant) as a student of Carmichael College in 1970. At one stage, this witness stated that as he became witness of this case, the people of Jammata-E-Islami and Islami Chhatra Sibir started threatening him and even threatened to kill him. He denied the suggestion that the teachers of Rangpur Carmichael College were not killed. No suggestion was put to this witness in cross-examination to the effect that there was no incident of killing of the teachers of Carmichael College.

140. P.W.8, Md. Mojibur Rahman Master aged about 77 years deposed that he passed B.A. examination from Rangpur Carmichael College in 1968. After Liberation of the country he met Professor Nurul Islam at Rangpur town and came to know from Professor Nurul Islam and other people with him that on 30.04.1971, the Pakistani Army and A.T.M. Azharul Islam had abducted Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjan Roy and Ram Krishna Adhikari, the teachers of Rangpur Carmichael College and wife of Kalachand Babu and ultimately, they all were butchered by them near Domdama Bridge.

141. He further deposed that he used to know A.T.M. Azharul Islam since before 1971 as he (appellant) was a student of Rangpur Carmichael College and President of Islami Chhatra Sangha of Carmichael College Unit and a Commander of Al-badr Bahini in 1971. He identified A.T.M. Azharul Islam in the dock.

142. In cross-examination he denied the suggestion that A.T.M. Azharul Islam did not abduct Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjan Roy, Ram Krishna Adhikari and wife of Kalachand Babu, teachers of Rangpur Carmichael College who were killed near Domdama Bridge by firing bullets.

He (P.W.8) heard the incident of the said killing and involvement of the convict appellant but no question was put to him to the effect that he had not heard the incident from Professor Nurul Islam or anybody.

143. P.W.9, Sova Kar aged about 62 deposed that during the War of Liberation in 1971, she was about 19 years old. She deposed that she passed the H.S.C Examination from Rangpur Carmichael College. At present, she is a retired nurse. During the War of Liberation, she used to live in the house with her brother professor Chitta Ranjan Roy, a Teacher of Mathematics Department of the said college, located on the college campus. On 30.04.1971 at about 10.30/11.00 p.m. she was studying in her room. Kanon Bala, sister-in-law of her brother, was also studying and the door of the house was closed. At that time she could realize that some persons were rapping on the door of the Professor Abdul Jalil. There was a door between the two houses. Sukur Mia, a relative of Professor Jalil then opened the door and after that, 5/6 Pakistani armed Army personnel entered into the house. Then Pakistani Army men crossed the bamboo fence and entered into their house. As many as three Pakistani Army men entered into her room and asked her and Kanon Bala to stand up in a line and meanwhile 2/3 other Pakistani Army personnel entered into the room of their brother Chitta

Ranjan and apprehended him and took him near them. The Pakistani Army also brought her young brother Nittaya Ranjan there who was sleeping at that time. After that, the Pakistani Army blindfolded her brother Chitta Ranjan and tied his hands behind his back. At that time, a Pakistani Army man grabbed her ear rings. Another Pakistani Army man took away her biology box kept on the bed. At that time, Pakistani Army personnel asked her brother about his name but he could not answer being nervous. Then the Pakistani Army grabbed and took her brother Professor Chittya Ranjon Roy in a military vehicle standing outside the house. At the relevant time, she came by the side of the window to see where her brother was being taken. Then she could see through the window that some Bangalee people were standing near the army vehicle. Of whom, she could identify appellant A.T.M. Azharul Islam, a leader of an Islamic Student Organization of their college. Appellant A.T.M. Azharul Islam was her class-mate and she could recognize him by outer side light of their house. After that, his brother Chittya Ranjon Roy was taken in the said army vehicle and then the vehicle departed from that place. She further deposed that Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikary were also the teachers of Carmichael College. Of them, Ram Krishna Adhikary was staying in their house in that fateful night. Both of them used to stay in the guest house located on the campus. When Liberation War started they used to live in different places. Professor Ram Krishna Adhikary was staying in their house on that night because on the following day it was scheduled to pay the salaries of the teachers. When Professor Ram Krishna opened the back door of the house and tried to escape, Pakistani Army Men also apprehended and took him in the said military vehicle. She further deposed that when Pakistani Army took away her brother and Professor Ram Krishna Adhikary, they cried the entire night. On the following morning Ratan Das, a cook of the guest house of the college, who used to live in the house of Professor Kala Chand Roy at the relevant time, came to their house and on his query, she informed him about the occurrence of the previous night in detail. Then Ratan Das also disclosed to her that the Pakistani Army apprehended Professor Kalachand Roy, his wife Monjusree Roy and another teacher Sunil Baron Chakraborty and took them away. Professor Kalachand Roy had two minor children and Ratan stayed with the said minor children at that house during the whole night and in the morning Professor Reaz and his wife who were the neighbours of Professor Kalachand took the said minor children, and then Ratan came to their house. Ratan also disclosed to her that when the Pakistani Army were picking up Professor Kalachand he saw some Bangalee civilian people and he could recognize A.T.M. Azharul Islam, who was a leader of Islamic Student Organization. Then this witness disclosed to Ratan that she could also identify accused Azharul Islam.

144. She further deposed that she asked Ratan to make contact with Salauddin, a student of her brother to get information about her brother and other teachers. Salauddin had contact with many in the cantonment. Then Ratan contacted Salauddin who told him that after collecting information from the cantonment he would give it to them. About 2 hours later Salauddin came to their house and informed that none of the Professors was alive and they were killed near Dom Doma Bridge. The people of neighbouring village saw the dead bodies and covered those by earth after digging a hole. Because of the prevailing situation Professor Jalil and Professor Reaz advised them to go somewhere in a village. After that, She, Kanon Bala, her younger brother and Ratan went to village home of the Post Master of Carmichael College by a bullock-cart. Nittaya and Ratan returned to the house of her brother after taking them to the house of the Post Master. As it was not safe to stay in that village, they went to the village home of Aynudden, the Bearer of the college and stayed there for about two months. After a few days, Professor Jalil and Professor Reaz sent them with Moslem Alam, another teacher of the college, who had been transferred from there to Dhaka. Lastly they went to their village at Nandipara, Perojpur. After some days she went to India with other

family members and joined a camp of female freedom-fighters at Kobra in India and took nursing training. P.W.9 Sova Kar identified accused A.T.M. Azharul Islam in the dock.

145. In cross-examination, she stated that it is not a fact that A.T.M. Azharul Islam was not a student of Science Group of Charmichael College in 1970 session. She also denied the suggestion that when her brother Chitta Ranjan Roy was abducted by Pakistani Army, A.T.M. Azharul Islam was not with them. She also denied the suggestion that A.T.M. Azharul Islam never attended class with her or appeared in examination or the person whom she identified in the dock had been implicated at the instance of Investigation Officer and her brother Nittaya Ranjan Roy. She also deposed that the pattern of the house in which they staying was like 'L'. She also denied that the aforesaid statement was made by her at the instigation of the Investigation Officer and her brother Nittaya Ranjan Roy.

146. P.W.9 is a natural witness and before the Tribunal she drew a sketch map from where her brother was abducted and she saw the occurrence. No question was put to her to the effect that the aforesaid sketch map drawn by her and marked as exhibit-L by the Tribunal is not correct. The incident as mentioned in charge No.4 is so horrendous that it did not fade out of her memory. The defence contended that the statement of P.W.9 is contradicted by the documentary evidence. The defence further contended that during her testimony, she stated that her SSC session in Rangpur Carmichael College was 1970-1971 but from Exhibit-19(1) it transpires that her SSC session was 1969-1970 and P.W.9 claimed that the appellant was her classmate but exhibit-19(1) shows that they were from different sessions. We shall consider this question later while considering the documentary exhibits.

147. P.W.10, Ratan Chandra Das is aged about 61 years. He was aged about 18 years during War of Liberation. He deposed that during War of Liberation, he lived in Carmichael College campus as cook of Professor Sunil Baron Chakraborty and Professor Ram Krishna Adhikari. As soon as the Liberation War started Professor Sunil and Professor Ram Krishna left the college campus and took refuge in a nearby village. He (P.W.10) then used to stay in the house of Professor Kalachand. After a few days, it was disclosed that the salaries of the teachers would be given. Professor Sunil Baron and Professor Ram Krishna went to college campus and came to know that classes of college would be resumed soon. Then Professor Sunil went to the house of Professor Kalachand and Professor Ram Krishna went to the house of Chitta Ranjan Roy and they were staying in the said houses. He further deposed that probably on 15th Baishakh of 1971 at night after dinner, Professor Kalachand, his wife Monjusree, Professor Sunil and he himself were discussing the current situation of the country. At about 9.30/10.00 p.m. they heard rap on the door and hearing the said sound Professor Kalachand opened the door and then some Pakistani Army and 4/5 Bangalee civilian people entered into the room. Of whom he could recognize appellant A.T.M. Azharul Islam. The Pakistani Army blindfolded Sunil Baron Chakraborty and Kalachand Roy. After that, Pakistani Army took Sunil Babu and Kalachand into the army vehicle and at that time Monjusree, the wife of Kalachand Babu, held the legs of army personnel and requested them to release her husband and then the Pakistani Army also took her in the vehicle. He further deposed that during the night he stayed at the house of Professor Kalachand with two children of Professor Kalachand. On the following morning Professor Reaz, another teacher of the college and his wife took the said children to their house. After that, he went to the house of Professor Chitta Ranjan Roy and called Sova Kar who opened the door. He came to know from Sova Kar that the Pakistani Army apprehended his brother, Professor Chitta Ranjan Roy and Professor Ram Krishna and she inquired of him whether there was any Bangalee with the Pakistani Army and then he replied that there were some Bangalees with

the Pakistani Army and he could recognize the appellant A.T.M. Azharul Islam. After that, Sova Kar asked him to make contact with a student who had connection with the Army in the Cantonment to know about the whereabouts of the persons abducted. He then made contact with the said student who informed him (P.W.10) that he would go to Cantonment to collect information about the persons abducted. After about 2 hours, the said student informed that the persons abducted were killed near Domdama Bridge. Hearing the news, he, Kanon Bala, Nittaya and Sova Kor went to the village home of the Post Master of the college. As the situation aggravated, they went to the village home of Aynuddin, a Bearer of the college. After some days when one of the teachers of the college had been transferred to Dhaka, they came to Dhaka with him. After reaching Dhaka, the said teacher made arrangement for Sova Kar and others to go to their village home from Sadarghat by launch. Initially, they went to Hularhat by launch. From there they went to Nandipara by a boat. This witness stayed in the house of Sova Kar for some days and then he went to his village home, Chandrapara. He identified A.T.M. Azharul Islam in the dock.

148. During cross examination, he denied the suggestion that in 1971 he was not in Rangpur and that the aforesaid statement is false, concocted and tutored. He also denied suggestion that among the Bangalees, he could not recognize one and his name was A.T.M. Azharul Islam. In cross-examination, he further narrated that he told that there were some Bangalees and he could recognize A.T.M. Azharul Islam. He also denied the suggestion that he could not identify the appellant in the dock but he could do so as he was tutored to say so. He also denied the suggestion that he was not the cook of Professor Sunil Babu and Professor Ram Krishna Roy or that he could not recognize A.T.M. Azharul Islam or he did not know him. No suggestion was given to him that he had enmity or conflict of interest with convict appellant or out of grudge he deposed against the appellant.

149. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that P.W.10 did not specify how he came to know the appellant in 1971 and that it appears that he is a tutored witness. Having gone through his evidence, we find that he being the cook of Professor Sunil and Professor Ram Krishna used to stay in the college campus. A person staying in college campus is supposed to know the student leaders of the college. Having gone through his entire evidence, we find that he is the most natural witness. A prudent man after going through his evidence will not hesitate to accept it as true.

150. Mr. Mahbub Hossain further submits that P.W.10 did not know the name of the Principal of Carmichael College and as such, his evidence should be discarded. Admittedly, the masters of the witness were abducted on the fateful night of the occurrence and he was supposed to know the persons responsible for abducting his masters and for not remembering the name of the Principal, his evidence as regards identification of the appellant during the fateful night could not be discarded altogether.

151. P.W.11, Sawkat Hossain alias Ranga stated in his examination-in-chief that while in Rangpur he came to know that A.T.M. Azharul Islam was involved in the killing of intellectuals during the Liberation War of 1971. He identified the accused appellant in dock. No question was put to him that he had not heard about the fact of killing of intellectuals and involvement of A.T.M. Azharul Islam with it.

152. P.W.12, Rafiqul Islam Nannu aged about 62 years stated that he passed H.S.C. examination in 1972. During the War of Liberation, he was aged about 18 years. During 1971, he used to stay in the house of his elder brother Sajjad. He deposed that as he (P.W.12)

was involved with the politics of Student League, he used to go to Carmichael College in 1969-1970. At that time, the appellant A.T.M. Azharul Islam was the 2nd year student of Science group of that college and he was also involved in the politics of Islami Chattra Sangha. P.W.12 used to go to Rangpur Press Club to read newspaper and there he used to meet A.T.M. Azharul Islam and his friends. He also deposed that A.T.M. Azharul Islam was not only the President of Islami Chattra Sangha of Rangpur District Unit but he was also the Al-Badr Commander of Rangpur Branch. He also deposed that A.T.M. Azharul Islam was involved in the killing of intellectuals and that A.T.M. Azharul Islam is present in the dock before the Tribunal.

153. In cross-examination he denied the suggestion that A.T.M. Azharul Islam was not involved in the killing of intellectuals and the statement made by him in respect of involvement of the appellant in the killing of intellectuals is tutored and concocted. He also denied the suggestion that all the statements made against A.T.M. Azharul Islam were tutored, concocted and motivated.

154. P.W.13, Advocate Ratish Chandra Bhowmik is aged about 55 years. He deposed that soon after the Liberation of the country, he came to know that on 30.04.1971 in pursuance of the plan of the appellant A.T.M. Azharul Islam, Kalachand Babu, Sunil Baron Chakraborty, Chitta Ranjon Roy and Ram Krishna Adhikary, the teachers of Rangpur Carmichael College were killed near Domdoma Bridge.

155. Having scrutinized the evidence of the witnesses, it is apparent that P.W.9, Sova Kar and P.W.10, Ratan Chandra Das are eye witnesses of the occurrence of abduction of the victims and A.T.M. Azharul Islam was known to them and they could identify him who accompanied the Pakistani Army at the time of abduction.

156. P.W.9, Sova Kar, an eye-witness to the occurrence recognized convict-appellant when her brother Chitta Rajan Roy and another teacher Ram Krishna Adhikary were abducted. She also stated that she could recognize the appellant A.T.M. Azharul Islam, the leader of Islami Chattra Sangha standing among the persons outside their house. She also stated that the appellant used to study with her. She further stated that light was always there in front of their houses and that she recognized A.T.M. Azharul Islam in that light. P.W.9 Sova Kar passed Secondary School Examination in the year 1969.

157. Exhibit-19 in serial No.9 shows that she passed the SSC examination in 1969 from Jessore Board. In her application in Serial No.10, she clearly stated that she was a student of Carmichael College in the year 1969-1971 and the said application, which was filed on 28.01.1971, was duly signed by the Principal of the College on 18.02.1971. Thus it has been proved beyond doubt that she was supposed to appear in HSC examination in the year 1971 and she was a student of the session of 1969-1971.

158. On the other hand, exhibit-22 reveals that convict-appellant appeared in the SSC examination on 04.04.1968 and his Registration number was 10000 of 1966-1967. His elective subjects for SSC examination were Mathematics, Physics, Chemistry and Biology. Exhibit-22(2) is the Tabulation Sheet of SSC examination of the convict-appellant. Exhibit-20(1) is the Tabulation Sheet of the convict-appellant A.T.M. Azharul Islam. The said Tabulation Sheet is for HSC examination Part-I, 1969 and the name of the centre had been mentioned as Carmichael College, Rangpur and his group is mentioned as Science Group.

159. From these exhibits, it appears that he was admitted in Carmichael College in 1969 after passing the SSC examination. On the other hand, P.W.9 got admission in the year 1969 after passing SSC examination in 1968. But the Tabulation Sheet of HSC examination Part-I of 1969 of the convict appellant showed that he only appeared in one subject and not in other subjects. Since he did not pass Part-I of HSC examination, he stayed back in the 1st year and thus when Sova Kar got admitted in 1968, the convict-appellant became her classmate. An admit-card (exhibit-23) was issued for examination which was to commence on 06.05.1971. This also shows that the convict-appellant stayed back in the 1st year as he did not pass the 1st part of the examination of 1969 and he had to attend classes in 1970-1971 and the admit-card was issued to appear in the examination on 06.05.1971 and this examination is for the student who was in final year of HSC class. In admit-card (exhibit-23) his registration was changed as private candidate. It may be mentioned here that he filed an application to appear as a private candidate on 14.01.1971 and on the same day a Lecturer of Carmichael College gave a certificate to the effect that the appellant diligently and regularly pursued his studies and he chose elective subjects as Economics, Civics and Islamic History (Exhibit-23(1)).

160. Sova Kar (P.W.9) filed an application on 28.01.1971 to the Controller of examination of Rajshahi Board to appear in the HSC examination mentioning the name of her institution as Carmichael College in Session 1969-1971 and the admit-card of the appellant which was issued with Registration No.10000 of 1966-1967 and the Tabulation Sheet of the HSC Part-I in 1969 also shows his Registration No.10000 of 1967. Therefore, there is no doubt he was a student of Carmichael College and applied to appear as private candidate after shifting from Science Group to Humanities Group.

161. Though he applied to appear as private candidate admit-card was issued before examination with old registration number which was mentioned as student of Carmichael College.

162. Abdul Jobber (since dead) made statement to the Investigating Officer in support of Charge Nos.2, 3 as well as Charge No.4. His statement supporting Charge No.4 is quoted below:

“রংপুর শহরের মুক্তিযুদ্ধের পক্ষের বুদ্ধিজীবীদের হত্যার পূর্ব পরিকল্পনা ও নীল নকশা বাস্তবায়নের লক্ষ্যে ৩০শে এপ্রিল ১৯৭১ রাত অনুমান ৯/৯.৩০ ঘটিকার সময় এটিএম আজহারুল ইসলাম পাকিস্তানী দখলদার বাহিনী সাথে নিয়া কারমাইকেল কলেজের ক্যাম্পাসের ভিতরের বাসা হইতে উক্ত কলেজের অধ্যাপক কালাচাঁদ রায়, সুনীল বরন চক্রবর্তী, চিত্ত রঞ্জন রায়, রামকৃষ্ণ অধিকারী ও অধ্যাপক কালাচাঁদ রায়ের স্ত্রীকে ধরিয়া নিয়া দমদমা ব্রীজের নিকট গভীর রাতে গুলি করিয়া হত্যা করে। যাহা আমি লোক মুখে শুনিয়াছি।”

163. Having gone through the evidence, we find that Sova Kor (P.W.9) and Ratan Chandra Das (P.W.10) had given vivid description of the incident. The defence did not deny the incident that the teachers of Rangpur Carmichael College were brutally killed on the date of occurrence.

164. Mr. Khandaker Mahbub Hossain, learned Counsel, appearing on behalf of the appellant, submits that only the convict-appellant was not present at the time of occurrence. P.W.9, Sova Kor and P.W.10 Ratan Chandra Das are natural witnesses and more so they corroborated each other and there is no reason to disbelieve them. Admittedly, the convict-appellant was the President of ICS in Rangpur Town which is not denied.

165. Having gone through the evidence, we have no hesitation to hold that the prosecution successfully proved the charge that on 30.04.1971 at about 11.30 p.m. A.T.M. Azharul Islam along with Pakistani Army raided the houses of Professor Chitta Ranjan and Professor Kalachand and abducted them and another two teachers Ram Krishna Adhikari and Sunil Baron Chakraborty and thereafter they were killed near Domdoma Bridge. There is no doubt that A.T.M. Azharul Islam was present when the victims were abducted and he was an active accomplice of Pakistani occupation Army. He gave assistance and encouragement and moral support to the co-perpetrators, the Pakistani occupation Army in committing the offence of Genocide as specified in section 3(2)(c)(i)(g) and (h) of the ICT Act,1973 read with section 4(1) of the said Act.

166. Mr. Khandaker Mahbub Hossain, learned Counsel for the convict-appellant, submits that Pakistani Army is the principal offender and that leaving them behind only an abettor has been brought for trial and as such, he cannot be held responsible for the charge alleged in this connection. It has been held by the Appeals Chamber of ICTY, in the case of *Prosecutor V. Radislav Krstic* that-

“A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.”Accordingly, the Trial Chamber’s conviction of Krstic as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead. [April 19, 2004 Para 143 of the judgment]:

167. In the case of *Prosecutor v. Tharcisse Muvunyi (ICTR, Trial Chamber)* it has also been held that-

“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. Although the terms aiding and abetting may appear synonymous, they are in fact different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. Thus, individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both” [Para-471]

168. In the case of the *Prosecutor V. Jean-Paul-Akayesu (ICTR Trial Chamber)*, it has been held that-

“[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.” [Para-484].

169. The appellant accompanied the Pakistani Army, the principal offenders and as such, the appellant could not have a different intent. The evidence of P.W.9 and P.W.10 revealed that the appellant and the principal offenders attacked with common intent and participated in the killing.

Charge No.5.

170. That between 25th March to 16th December,1971 you A.T.M Azharul Islam as the President of Islami Chhatra Sangha, a student wing of Jammata-e-Islami of Rangpur District Branch, along with local Behari, workers and leaders of Jammata-e-Islami and Islami Chhatra Sangha, under your leadership, collected locations of pro-liberation supporters and supplied the same to the Pakistani Occupation force at Rangpur cantonment. Thereafter, many of the pro-liberation unarmed civilians and their family members were abducted, confined and

tortured thereof. At your instancemany women were confined and subsequently raped by Pakistani Occupation Forces and were also killed. In the first week of August, 1971 by your instigation, victim Monchura Khatun was raped at her father-in-law's house and she was taken to Rangpur Town Hall where she was repeatedly raped by Pakistani invading force, one after another and she was kept confined in Rangpur Town Hall for nineteen days. Victim Monchura Khatun became pregnant and subsequently had a miscarriage followed by torture and she was released from Rangpur Town Hall as she fell seriously ill. During her confinement in Town Hall she observed, through window, heinous offences and crimes against humanity committed by Al-Badr and Pakistani Occupation force upon the men and women who were brought to Rangpur Town Hall by your instigation.

171. Therefore, you are hereby charged for abetting, facilitating commission of offences of abduction confinement, torture and rape as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes (Tribunals) Act which are punishable under section 20(2) of the Act.

172. Before evaluating evidence of the witnesses in respect of charge No.5, let us have a glance on the case in *Prosecution V. Kunarac et. al, IT-96-23-T, para 679, the International Criminal Tribunal for the former Yugoslavia (ICTY)* considered the issue of assessing credibility; memory loss, passage of time and trauma as impacting witness testimony. "The Trial Chamber regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by the accused Kunarac is concerned. In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac [.....] As already elaborated above, the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and precise minutiae of these events and does not regard their existence as necessarily destroying the credibility of other evidence as to the essence of the events themselves."

173. Taking into consideration the above opinion it is to be seen whether the Prosecution has been able to prove Charge No.5.

174. In order to bring home this charge, the prosecution examined 6 witnesses of whom, P.W.1 is victim Monsura Khatun who is aged about 60. She deposed that during the War of Liberation in 1971, she was aged about 17 and at that time she had no issue. During the War of Liberation, she was at the residence of her husband. During the War of Liberation of 1971, her husband went to India. Her husband left her behind in her father-in-law's house. Her husband was an activist of Awami League and she was a dealer of rice. Before leaving for India, her husband gave her Tk.1600/-. During the month of Bhadra in 1971 there was a cigarette factory to the south of their house and in that factory, there was non-Bengali Darwan (gateman). The Darwan was an activist of Jammata-E-Islami. The said Darwan came to know that her husband had gone to India for joining Liberation War. As per information of the said Darwan, on 7th/8th Bhadra at about 8-9 p.m. Pakistani Army, Rajaker and AL-Badr came to their house in two vehicles. Hearing the sound of firing, the people started running to and fro to save their lives. At that time, she was inside the house and her father-in-law was in the courtyard. The Pakistani Army, Rajakers and AL-Badrs surrounded their house and apprehended her father-in-law. After that, they started beating him. On seeing the incident, she became afraid and started running towards the house of Rahman, a neighbor. At that time, 3 Pakistani Army personnel and a Bangalee started chasing her. As soon as, she reached the

house of Rahman, she found no one there as the inmates of the said house had already taken refuge elsewhere. The Pakistani Army and the Bangalee captured her and sexually abused her one after another despite her request that she was carrying 6 months pregnancy. Hearing whistle blow of another Pakistani Army man, the said Pakistani Army men made her free and they asked the Bangalee addressing A.T.M. Azharul Islam to bring her with them. Then she could understand that the man was A.T.M. Azharul Islam. After that, Pakistani Army men and A.T.M. Azharul Islam took her in her father-in-law's house. In her father-in-law's house, she found her father-in-law lying on the ground like a dead man. The Pakistani Army, the Rajakars and AL-Badrs asked her about the name of her husband and his whereabouts. She replied that the name of her husband Md. Mostafa but she did not know whereabouts her husband. At that time, one of the Rajakars gave 'lathi' blow on her waist. Then they asked her where she had kept bombs. In reply, she said that she never saw bombs. After that, they plundered their house and looted the belongings of the house including gold and cash money. Presuming her father-in-law dead, the Pakistani Army men took him in their vehicle and she was also picked up in the army vehicle. On the way, they threw away the body of her father-in-law beside a road and she was taken to Rangpur Town Hall. In the Town Hall, she found 7/8 other women. The Pakistani Army used to sexually abuse her and the other women confined in the Town Hall every night. During the day time, she used to see accused A.T.M. Azharul Islam at the Town Hall to have talked with the Pakistani Army. When they went out with their vehicle and returned to Town Hall with young boys and girls, the young boys were tortured and the women were sexually abused by the Pakistani Army men. Being sexually abused, she had a miscarriage. After that, as per advice of two Bangalee Rajakars, she was released from the Town Hall and she came back to her house after 19 days. After coming back to her house, she saw that her father-in-law was seriously ill and eventually he died while he was under treatment. After the Liberation of the country her husband met her at his sister-in-law's house and after getting treatment she was taken to their house by her husband.

175. During cross-examination, P.W.1 admitted that her date of birth was correctly written in the National ID card and the voter list. She also admitted that the date of birth of her elder daughter Setara Begum is correctly written in the National ID card. She gave birth of three more daughters, namely, Jaytun, Diljahan and Guljahan after the birth of Setara Begum. Jaytun was born after one year of Setara, Diljahan was born after one year of Jaytun and Guljahan was born after one year of Diljahan. Her two sons namely, Din Mohammad and Monsur Ali were born two years after birth of Diljahan. According to the voter list (exhibit-D), the date of birth of P.W.1 is 01.01.1945 which is admitted by her and as such, she was 26 years old in 1971 although she claimed that she was only 9 yers at the time of marriage. Exhibit-F, NID of Setara Begum, shows that she was born on 01.01.1964 which is admitted by P.W.1. The defence exhibits-D and E show that P.W.1 lied about her age and the age of her children before the Tribunal.

176. In cross-examination, she then admitted that soon after meeting the Investigation Officer, her elder son got a job. Din Mohammad, her 4th son, before his getting a job used to ply rickshaw and also used to engage in agricultural works. She further admitted that her younger son Monsur Ali used to ply rickshaw and that she did not know whether he was also getting any Government job. From the aforesaid admission of P.W.1, it appears that her 1st and 4th son got job after she met with the Investigation Officer. She also stated that she did not know whether her son Monsur Ali was in the process of getting Government job. The aforesaid admissions of P.W.1 show that she was enticed to depose before the Tribunal in lieu of getting service of her sons.

177. P.W.1 during examination-in-chief claimed herself as 'Birongona' (বীরঙ্গনা) but P.W.19, the Investigation Officer, during examination-in-chief admitted that at the time of investigation, he did not collect any list of 'Birongona' (বীরঙ্গনা) of Kashma village under Rangpur District. From the discussion made above, it is crystal clear that P.W.1 testified falsely before the Tribunal. She falsely testified regarding her age and children which created serious doubt about the prosecution story as regards involvement of the appellant in the occurrence and as such, it is difficult to rely upon her evidence.

178. P.W.2, Md. Mostafa Mia is aged about 75 years deposed that he was a freedom fighter. He deposed that he studied upto class-V. As soon as the Liberation War was started, he went to India for participating in the Liberation War. After independence of the country, he came home but saw none of his inmates in the house. His neighbors informed him that his father died due to torture of the Pakistani Army and his wife was in the house of his sister Julekha. After that, he went to his sister's house and met his wife who narrated the whole incident to him. P.W.2 further deposed that the Pakistani Army did not know the location of his house and his father's house. Accused A.T.M. Azharul Islam and Darwan Mostaque identified his house and they brought the Pakistani Army. At this stage, the witness started weeping.

179. In cross-examination, P.W.2 denied that he was not a freedom fighter and that his wife was not a 'Birongona' (বীরঙ্গনা). He, however, admitted in cross-examination that his name was not included in the names of freedom fighters and that the name of his wife was also not included in the list of 'Birongona' (বীরঙ্গনা). In cross-examination, he stated that in India he had been in charge of cooking in the different camps of freedom fighters and that the official would say that the person engaged in cooking for freedom fighters is also a freedom fighter. He denied the suggestion that he did not go to India or that he did not return home from India after independence of the country. He denied the suggestion that A.T.M. Azharul Islam till date did not go to their locality. He also denied that A.T.M. Azharul Islam did not go to their house with Pakistani Army on the date of occurrence.

180. Mr. Khandaker Mahmud Hossain, learned Counsel, appearing on behalf of the appellant, submits that P.W.2 is a hearsay witness in relation to charge No.5 and he is the husband of P.W. Monsura Khatun, who testified falsely before the Tribunal and as such, the testimony of P.W.2 does not inspire confidence and hence liable to be discarded by this Court.

181. P.W.2 is a hearsay witness in relation to Charge No.5. He is the husband of P.W.1. P.W.2 heard about the incident from P.W.1. P.W.2 during examination-in-chief claimed himself as freedom fighter but from the defence exhibits-'G' and 'H', it appears that his name was neither listed as freedom fighter by Bangladesh Muktiyuddah Sangsad, Rangpur nor in the Gazette Notification of Badargonj Upazila Parishad published in 2005. From the trend of cross-examination as discussed above, we find that it is very difficult to rely on the evidence adduced by P.W.2. Moreover, as we have disbelieved the evidence adduced by P.W.1 with regard to involvement of the appellant in the occurrence we do not find any ground to give any credence to the deposition of P.W.2.

182. P.W.4, Md. Meseruddin aged about 64 is a teacher by occupation. He retired as Principal-in-charge of Badargonj Degree College in 2009. He obtained M.A. degree from Rajshahi University in Political Science in 1974. He deposed that 2 days after independence of the country he returned from freedom fighters' camp at India. He came to know that young

boys and girls were taken to Rangpur Town Hall where they were tortured in various ways. He went to Rangpur Town Hall and found so many alamats like women's sarees, blouses, patikots and decomposed bodies of the women. He further deposed that he heard that wife of Golam Mostafa was violated by Pakistani Army and A.T.M. Azharul Islam. Accused A.T.M. Azharul Islam was known to him since 1970 when he came to Badargonj for election campaign in favour of Jammet-E-Islami candidate.

183. P.W.4 is a hearsay witness. After returning home he heard that women and young people were detained in Rangpur Town Hall. The appellant and Pakistani Army used to torture them. He also heard that wife of Mostafa, a freedom fighter, was raped by the Pakistani Army and the appellant and consequently, her six months old baby was aborted. Deposition of P.W.4 is not reliable as he has not specified from whom he heard about the involvement of the appellant in the alleged incident.

184. P.W.8, Mojibur Rahman Master aged about 58 years stated in his examination-in-chief that after liberation of the country, he came to Rangpur on 22.12.1971 to see the Rangpur Town Hall and found blood-stain marks sarees, blouses and patikots of women and also found blood-stain marks on the wall of Town Hall and many dead bodies of the women floating in a well (কুয়া) beside the town hall. At that time, Golam Kibria and Abdul Mannan, two Awami League leaders, and many others were also present there. They informed him that appellant A.T.M. Azharul Islam aided the Pakistani Army in bringing the women to Town Hall from various places. Then, he went to village Kamal Kasna and heard from Golam Mostafa about the torture and sexual violence on his wife by the Pakistani Army and accused A.T.M. Azharul Islam and that his wife was confined for 19 days in Rangpur Town Hall.

185. P.W.8 is a hearsay witness. He heard from Golam Kibria and Abdul Mannan that the appellant was involved in detaining, torturing and abusing women in Rangpur Town Hall. From the trend of his examination-in-chief and cross-examination, it is difficult to rely on his evidence. The prosecution did not examine Golam Kibria and Abdul Mannan. It appears from exhibit-25, the memo dated 16.09.2012 containing information about A.T.M. Azharul Islam that P.W.8 did not implicate the appellant in the incident in relation to charge No.5 and as such, the hearsay evidence of P.W.8 is not reliable.

186. P.W.11, Md. Shakhawat Hossain alias Ranga deposed that he heard that during Liberation War accused A.T.M. Azharul Islam used to visit the torture cell of Pakistani Army and that he helped the Pakistani Army in capturing freedom loving people and to collect young women.

187. P.W.11 is a hearsay witness in relation to charge No.5. He heard that the appellant used to visit torture-cell of Pakistani Army and aided to handover beautiful women to Pakistani Army, P.W.11 did not disclose any source from where he received the information that the appellant was involved in the incident of charge No.5.

188. P.W.12, Md. Rafiqul Islam Nannu deposed that A.T.M. Azharul Islam used to make contact with Pakistani Army in the Cantonment. He was also involved in torturing women in Rangpur Town Hall. He denied the suggestion that he deposed falsely at the instance of interested quarter to victimizethe appellant.

189. P.W.12 is a hearsay witness in relation to charge No.5. He heard from his neighbours that the appellant was involved in torturing women in Rangpur Town Hall. However, the prosecution did not examine any of his neighbours.

190. On scrutiny and examination of the evidence, we find that P.W.1 who is the victim of the occurrence clearly stated that she was raped. But she could not prove that the appellant abetted the same. P.Ws.2,4, 8, 11 and 12 are hearsay witnesses.

191. In this connection, we are inclined to refer to the case of *Prosecutor V. Tharcisse Muvunyi*(ibid) wherein paragraph-11, it has been held as under:

“In General, the Chamber can make a finding of fact based on the evidence of a single witness if it finds such evidence relevant and credible. It follows that the Chamber does not necessarily require evidence to be corroborated in order to make a finding of fact on it. Indeed, the Appeals Chamber has held that corroboration is not a rule of customary international law and as such shall ordinarily not be required by Trial Chambers. With respect to sexual offences, Rule 96(i) specially provides that the Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence.”

192. The case referred to above reveals that corroboration of the evidence of the victim of rape is not necessary. But in respect of the charge No.5, we find that it is difficult to rely upon the evidence of victim P.W.1. As such, the aforesaid case has no manner of application in respect of charge No.5.

193. Therefore, the prosecution miserably failed to bring home charge No.5 against the appellant.

Charge No.6

194. That in the month of mid November,1971 you A.T.M. Azharul Islam gave a hard slap on the face of victim Shawkat Hossain @ Ranga due to chanting “Joy Bangla” slogan by him and used filthy language to him. You were known to the victim as his brother Rafiqul Hasan @ Nannu was involved in student politics.

195. In continuation to that affect you A.T.M Azharul Islam with the help of Al-Badr Bahini, under your leadership, abducted civilian Rafiqul Hasan @ Nannu, a 1st year student of humanity group in Rangpur Carmichael College and also a worker of Chhatra League of the same college branch, from Bathpatree Mour in Rangpur town at about 09.00 A.M and took him to Al-Badr camp and thereafter he was taken to Shahid Muslim Chhatrabas, the then Al-Badr camp, where he was kept confined and severely tortured and subsequently he was released from the camp with the help of one non-Bangalee named Nasim Osman known to his elder brother Md. Sajjad Jahir (now dead) but he became maimed due to severe torture.

196. Therefore, you are hereby charged for abetting, facilitation commission of offences of abduction, confinement and torture as crimes against humanity as specified in sections 3(2)(a), 3(2)(g) and 3(2)(h) of the International Crimes Tribunal Act,1973 which are punishable under section 20(2) of the Act. You are also liable for the commission of above offences under sections 4(1) and 4(2) of the Act.

197. In order to bring home charge No.6, the prosecution examined 2 witnesses, who are the victims of the occurrence.

198. This charge consists of two incidents. The Tribunal disbelieved the first incident but believed the second incident. Therefore, we refrained from discussing the evidence with regard to the first incident.

199. P.W.11, Md. Shakhawat Hossain @ Ranga is aged about 57 years. During the War of Liberation in 1971, he was aged about 16 years. At that time, he used to reside with his elder brother at Guptapara. During the occurrence, he was a student of Class-VIII of Rangpur Zilla School. He deposed that Rafiqul Islam Nannu, his elder brother was involved in student politics since 1969.

200. In respect of the second incident, he deposed that on 01.12.1971 at about 9 a.m. his elder brother Rafiqul Islam Nannu went to Zerin tailors situated at Beth Pottee Intersection of Rangpur town to bring cloths of his sister-in-law. As soon his brother reached near tailor-shop some persons wearing black cloth attacked and dragged his brother Nannu to the nearby Rajakar Camp. AL-Badr Commander A.T.M. Azharul Islam eventually came to the said camp. According to the instruction of the appellant, A.T.M. Azharul Islam his brother was taken to the AL-Badr Camp at Central Road, Rangpur. Members of AL-Badr Bahani severely tortured him under the leadership of A.T.M. Azharul Islam in the said camp and at one stage his brother lost his senses. On hearing the said incident, his elder brother Sazzad Zahir went to the AL-Badr Camp and requested A.T.M. Azharul Islam to release his brother Rafiqul Islam Nannu but the appellant did not pay heed to the request. After that, his brother took help of Nasim Osman, a non-Bengali and at his request his brother was subsequently released from the said camp. After that, he was taken to their house and got treatment. After regaining senses his brother disclosed about the occurrence to the inmates of the house. Because of the said torture his brother became a disabled person and he could not move freely.

201. He denied the defence suggestion that in order to victimize the accused politically he deposed falsely and that the appellant A.T.M. Azharul Islam was not a leader of AL-Badr Bahini.

202. P.W.12, Rafiqul Islam Nannu deposed that he was involved in student politics of Chhatra League in 1969-1971. At that time, he used to go Rangpur Carmichael College campus and A.T.M. Azharul Islam was a student of science group of Class-XII of that college. He further deposed that he used to go to Rangpur Press Club for reading newspaper where he met the appellant A.T.M. Azharul Islam and his friends. In respect of the second incident, he stated that on 01.12.1971 he went to Beth Pottee area in Rangpur Town. As soon as he reached Zarin tailor shop, some Rajakar captured him and dragged him to a nearby Rajakar Camp. After some times, the appellant A.T.M. Azharul Islam came there and according to his order he (P.W.12) was taken to AL-Badr Camp situated at Rangpur Central Road by a rickshaw. In that camp, he was tied and hung from a ceiling-fan. A.T.M. Azharul Islam and others beat him with electric-wires and he lost his senses at some point of time because of torture. On getting the information, his elder brother Sazzad Zahir came to the camp and requested the appellant A.T.M. Azharul Islam to free him but to no avail. Then his brother Sazzad went to a local leader of Pakistani Peoples Party (P.P.P.), Nasim Osman, who had good relation with victim's family. Nasim and Sazzad went to the camp and requested A.T.M. Azharul Islam to release him and on the request of Nasim Osman, the appellant A.T.M. Azharul Islam freed him in an unconscious condition. He was then taken to their house and after getting treatment, he regained his senses. Because of torture, he became

almost disable and had been living in a miserable condition due to his impairment. He further stated that he lost ability to work and needed help of another person for movement.

203. In Charge No.6, two incidents have been mentioned. The International Crimes Tribunal found that the first incident could not be proved and as such, we refrained from giving any finding in respect of first incident of Charge No.6. From the judgment of the Tribunal, it appears that in respect of second incident of Charge No.6 no date has been mentioned. The prosecution in the midst of the trial filed an application to correct the charge inserting the date 1st December,1971 which was opposed by the defence. The Tribunal kept the said application with the records.

204. It appears from cross-examination of P.W.12 that the defence did not challenge the date of occurrence, that is, 1st December,1971. In the second incident of Charge No.6 as narrated by P.Ws.11 and 12 the defence cross-examined the witnesses on the issue. Therefore, it cannot be said that the defence has been prejudiced in not mentioning the date of occurrence in the charge.

205. In respect of 2nd part of Charge No.6, P.W.12 is an injured witness and he vividly disclosed the torture inflicted upon him. The evidence of P.W.12 in respect of 2nd part of Charge No.6 was corroborated by P.W.11. On consideration of the evidence of the prosecution witnesses, namely, P.Ws.11 and 12, the Tribunal rightly convicted the appellant and sentenced him and there is no reason to interfere with the judgment and sentence passed by the Tribunal.

Sentence:

206. It is the duty of the Courts/Tribunals to award sentence commensurate with the gravity of the crimes. Imposition of lesser sentence causes injustice not only to the victims of crime but also to the whole society. In the case in hand, the appellant has been awarded death sentence by the Tribunal on 3 charges, namely, murder, plunder, arson at village Moksedpur (charge No.2), murder, genocide, plunder and arson in Jharuarbeel and neighbouring villages (charge No.3), genocide, abduction and murder of 4 teachers of Rangpur Carmichael College and another, wife of a teacher, who belonged to Hindu Community (charge No.4).

207. As a leader of Islami Chhatra Sangha and Al-Badr A.T.M. Azharul Islam played significant role in the atrocities and aided Pakistani occupation Army in committing horrific crimes.

208. In charge No.2, the appellant was directly involved in the gruesome killing of 15 persons at village Moksedpur. Apart from that, the appellant is responsible for the killing of Momtez Ali Sarker, father of P.W.2 and Munshi Abdul Quddus.

209. In charge No.3, he actively participated in the killing of 1200 civilians in Jharuarbeel, a wetland in Rangpur's Badargonj Upazila. Terrified of the marauding Pakistani Army and its Collaborators, the villagers left their home and took shelter at Jharuarbeel but men, women and children from dozens of villages still could not save themselves from the cold-blooded savagery on the Summer noon of April 17, 1971.

210. Pakistani Army and members of Islami Chhatra Sangha including A.T.M. Azharul Islam surrounded the villagers crouching in the swamp bushes and unleashed a blood

bath. Within 5 (five) hours they killed 1200 innocent people. The man who planned it all is A. T. M. Azhar and he himself took part in the massacre. He and his men also picked up more than 200 Hindu people and students from the area and killed them after taking them in an unknown place. Among the 1200 people who died in Jharuarbeel on April 17, 1971, the names of 400 people could be collected.

211. The atrocities committed in Jharuarbeel surpassed the genocide committed by the American Army in MYLAI. The MYLAI massacre was the Vietnam war mass murder of unarmed South Vietnamese civilians, by U.S. troops in Son Tinh District, South Vietnam, on 16th March, 1968. Between 347 and 504 unarmed people were killed by U.S. Army soldiers. Victims included men, women, children and infants. Some of the women were gang-raped and their bodies mutilated as were children as young as 12.

212. In charge No.4, the appellant abetted the abduction and slaughtering of four teachers of Rangpur Carmichael College, namely, Professor Chitta Ranjan Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Adhikary and Professor Kalachand Roy including Monju Sree Roy, wife of Professor Kalchand Roy. The way, in which, four Professors were killed resembles the killing of the intellectuals immediately before our independence.

213. The offences committed by the appellant were no less heinous than those other sentenced to death for committing similar offences against humanity and hence there exists no reason why a sentence lesser than death sentence should be inflicted on him. His culpability was even worse. The commission of series of crimes of the most cruel and inhuman nature by the appellant may be considered as aggravating circumstances for the purpose of awarding him maximum sentence of death.

214. The appeal is allowed in part. Appellant A.T.M. Azharul Islam is acquitted of Charge No.5. His conviction in respect of charge Nos.2, 3, 4 and 6 is maintained. His sentence of death in respect of charge Nos.2, 3 and 4 is maintained. His sentence of 5 years is maintained in respect of charge No.6.

CJ.

Hasan Foez Siddique, J :

215. I have had the benefit of going through the draft judgment and order prepared by the learned Chief Justice. Whiling endorsing the view expressed by the learned Chief Justice, I would like to add a few words expressing my thoughts.

216. Crimes against Humanity, Genocide and War Crimes as defined in the International Crimes (Tribunal) Act, 1973 can not be compared with ordinary crimes. As per provisions of the Act and relevant Rules it is the duty of the International Crimes Tribunal, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit. In this case considering the facts, evidence and circumstances, the Tribunal convicted appellant under Section 3(2)(a)(c)(i) (g) and (h) and awarded death sentence in charges No.2,3 and 4 and also awarded sentence of 25 and 5 years imprisonment in charges No.5 and 6 respectively.

217. I shall confine my discussion only in respect of charges No.2, 3 and 4 brought against the appellant since learned Chief justice in his praisable judgment proposed to be delivered elaborately has discussed the facts, evidence, relevant laws and citations to draw

conclusion of the case in respect of all the charges. Since I fully agree with the findings and conclusions arrived at by the learned Chief Justice who considered the evidence elaborately I shall not discuss the evidence and its probative value adduced by the parties again.

218. The trial of this case was heavily based on documents and on the testimonies of eye witnesses as well as circumstantial evidence. From oral and documentary evidence it appears that appellant A.T.M. Azharul Islam was the President of the then Islami Chattra Sangha (ICS), Rangpur town Unit and in 1971, he was a student of Carmichael College, Rangpur. Ext 16, fortnightly report on the political situation for the second half of October, 1971, of the Special Branch of Police of the then East Pakistan, which is an old document, shows that the appellant was an ICS leader. Relevant portion of the said report was as follows:

Activities of Islami Chhatra Sangha (ICS):

“On 17.10.1971, a conference (100) of Pakistan ICS, Rangpur Branch was held in Rangpur town with ATM Azharul Islam (ICS) in the chair. Amongst others, Ali Hasan Md. Mujahid, Acting President. EPICS addressed the conference explaining the present situation of the country and urging the party workers to mobilise the youths of Islamic Spirit and launch strong movement against anti-Islamic activities. He also urged them to form Al-Badr Bahini at different levels for defending the country from internal and external attack.”

219. ICS was the student organization of Jamat-e-Islami, Pakistan and ‘the Dainik Sangram’ was their official newspaper. On 13th September, 1971, ‘the Dainik Sangram’ published a news report under the caption, “রংপুরে দুষ্কৃতিকারীদের হাতে মেসবাহ উদ্দিনের শাহাদত”. In that news item it was inter alia, stated,

“রংপুর জেলা ইসলামী ছাত্র সংঘের সভাপতি জনাব আজম আলী ও শহর ছাত্র সংঘের সভাপতি জনাব আজহারুল ইসলাম এক বিবৃতিতে শহীদ মেসবাহউদ্দিনের শাহাদতে গভীর শোক প্রকাশ করেছেন। বিবৃতিতে তারা হুঁশিয়ারী উচ্চারণ করে বলেছেন, শহীদ মেসবাহ উদ্দিনের মত ইসলামী আন্দোলনের দু একজন মুজাহিদকে হত্যা করে দুষ্কৃতিকারীরা ইসলামী আন্দোলনের বিরূপ অভিযানকে বাধাগল করতে পারবে না। বিবৃতিতে ছাত্র নেতাদ্বয় বলেন যে, ভারতীয় চররা এ ধরনের নাশকতামূলক তৎপরতা চালিয়ে কিছুতেই তাদের হীন অভিসন্ধি হাসিল করতে পারবে না ”

220. Almost all the prosecution witnesses in their testimonies stated that the appellant was ICS leader of Rangpur town unit in 1971. In view of the evidence, there is no doubt that the appellant was ICS leader of Rangpur town unit.

221. In the case of Ali Ahsan Md. Mujahid V. The Chief Prosecutor, International Crimes Tribunal reported in 20 BLC(AD) page 266 it was observed by this Division that the members of Islami Chattra Sangha were emerged as “Al-Badr Bahini”. Exhibit 16 series of the cited case were the identity cards of Al-Badr Force. In those identity cards it was stated that,-

“The bearer of this card belongs to the AL-BADAR FORCE” is a composition of the youths aspiring to implement the ideology of Pakistan and highly imbued with the national consciousness. This FORCE has been extending all out co-operation to the Pakistan Army. The AL-BADAR is a symbol of fear and indomitable challenge to the miscreants and Indian infiltrators.”

222. In that case it was further observed that the Badr Bahini was organised for a common purpose and its member committed offence of crimes defined in the ICT Act. They took every possible steps to destroy the people’s will and, thereby, fought against our motherland and mercilessly killed the people since the people supported the struggle for creation of Bangladesh. They did not and could not know that united Pakistan had been

finished just after starting the fire of machine guns and tank shells by Pak army on the night of 25th March 1971. In his book “the Cruel Birth of Bangladesh” Archer K. Blood, the then American Consul General in Dhaka narrated that, “ we spent a good part on the night of March 25-26 on the flat roof of the house, watching with horror the constant flash of tracer bullets across the dark sky and listening to the more ominous clatter of machine gun fire and the heavy clump of tank guns”. That was the dealing of the Pakistan Army with their own countrymen on the night of March 25, 1971. Such aggressive invasion against the people of the country itself was a crime. The appellant, an well educated young man, witnessed of the genocide committed by Pakistan Army in his soil.

223. The stories of genocide committed by Pakistan Army and their collaborators were published in the hundreds of newspapers almost all over the world. Only few news reports, out of those publications, are quoted here:

The New York Post.

Tuesday, March 30, 1971

The Army’s American M 24 Tanks, Artillery and Infantry destroyed large parts of East Pakistan’s largest city and provincial capital.

“The chief targets were the University, the populous old city where Sheikh Mujibur Rahman and his Awami League were strongest, and the industrial areas on the outskirts of the city of 1.5 million people.

Parhaps 7000 persons were killed in the provincial capital alone.

Touring the still burning battle areas Saturday, and Yesterday, one found the burnt bodies of some students still in their dormitory beds. The tanks had made direct hits on the dormitories.”

The Washington Daily News, June 15,1971

Slaughter in East Pakistan

“Eye witnesses reports, one more ghastly than another, continue to filter out of East Pakistan, telling of the massacre of the Bengali people by the Pakistan Army.

Naturally, the military regime of President Yahya Khan denies it is committing selective genocide. But evidence mounts that it is cold bloodedly murdering minority Hindus, Bengali separatists, intellectuals, doctors, professors, students- in short those who could lead a self governing East Pakistan.”

The New York Times, June 16, 1971

Appalling Castastrophe

“Hiroshima and Nagasaki and vividly remembered by the minds eye primarily because of the moral means that brought holocaust to those cities. Statically comparable disasters in Humburg and Dresden are more easily forgotten, they were produced by what we already then conceived of a “conventional” methods.

Against this back ground one must view appalling Catastrophe of East Pakistan whose scale is so immense that it exceeds the colorimeter capacity by which human sympathy is measured. No one can hope to count the dead, wounded, missing homeless or sticken whose number grows each days.”

The Newsweek, June 28, 1971

“The Terrible Blood Bath of Tikka Khan that the Pakistani Army is visiting a cheadful blood bath upon the people of “East Pakistan is also affirmed by newsmen and others who have witnessed the flight of a 6 million terrified refugees into neighbouring India, Newsweek’s Tomy Clifton recently visited India’s refugee-clogged border regions and tabled the following report:

Anyone who goes to the camps and hospitals at along India’s border with Pakistan comes away believing the Punjabi Army capable of any atrocity, I have seen babies who have been

shot, men who have had their backs whipped raw. I've seen people literally struck dumb by the horror of seeing their children murdered in front of them or their daughters dragged of into sexual slavery. I have no doubt at all that there have been a hundred "Mylais" and "Lidices" in East Pakistan- and I think, there will be more

Other foreigners too, were dubious about the atrocities at first, but the endless repetition of stories from different sources convinced them. "I am certain that troops have thrown babies into the air and caught them on their Bayonets," says Briton, John Hastings, a Methodist missionary who have lived in Bengal for twenty years. "I am certain that troops have raped girls repeatedly, then killed them by pushing their Bayonets up between their legs.

All this savagery suggests that the Pakistani Army is either crazed by blood list or, more likely is carrying out a calculated policy amounting to genocide against the whole Bengali population."

The Guardian, London, March 31, 1971

A Massacre in Pakistan

"Only now are we getting Pakistani facts to abet fears. President Yahya Khan has written to suppress these facts, filling his air wares and press with evasive propaganda, deporting every journalist he could find. But a few independent escaped this net and their stories- just emerging- seek with horror: crows indiscriminately machine gunned, student hostels razed by shells, shanty towns burned and bombed, civilians shot dead in their beds. We do not yet know the fate of those arrested in East or the true level of resistance through the province. But we do know first hand and reliably that many unarmed and unready Bangalies have died."

The Guardian Weekly, April 4, 1971

A cry for help

"The situation in Bangladesh is worsening day by day and it is a pathetic and heartrending spectacle, for there is hardly a liberation movement of the twentieth- century that can claim such unanimous support from people of all classes, nor one that was ever so ill- prepared and ill- equipped to fight for its rights."

The New Statesmen, April 16, 1971

The Blood of Bangladesh

"If blood is the price of a people's right to independence, Bangladesh has overpaid. Of all the recent struggles to bring down governments and charge frontiers in the name of national freedom the war in East Bengal may prove the bloodiest and briefest."

The Sunday Times, June 13, 1971

Genocide

By Anthony Mascarenhas

"West Pakistan's Army has been systematically massacring thousands of civilians in East Pakistan since the end of March. This is the horrifying reality behind the news blackout imposed by President Yahya Khan's government since the end of March. This is the reason why more than five million refugees have streamed out of East Pakistan into India, risking cholera and famine.

The army has not merely been killing supporters of the idea of Bangladesh, an independent East Bengal. It has deliberately been massacring others. Hindus and Bengali Muslims, Hindus have been shot and beaten to death with clubs simply because they are Hindus. Villages have been burned."

The Expression, Stockholm, April 12, 1971

Mass murders in Bengal

"Hundreds of thousands of people are fleeing from their homes, starvation threatens. The hostilities are directed against the majority of the country's population under the motivation that the unity of Pakistan must be preserved. The military regime is using violence to sweep

aside the result of the country's first general parliamentary elections. The rulers were not prepared to swallow the consequences of this election; instead they set the military machinery going. It is obvious that this method will never lead to the reunification of East and West Pakistan. Ruthless occupation are drawn out war; these are the only alternatives”.

This is a policy that must be condemned.”

The Djakarta Times, April 15, 1971

Stop this Genocide

“Politicians, teachers, students, doctors, engineers and even unarmed civilians, including women and children are wiped out in East Pakistan. Will the Muslim world in general, suffer this? Does Islam permit Killing of unarmed Muslims by armed Muslims? Can Islamic principles justify, the suppression by a minority of a majority demand for social and economic justice.

Muslim states should act quickly and see that good Muslims are not massacred by fellow Muslims.”

The Palaver Weekly. Ghana, July 8, 1971

East Pakistan cry for help

“On March 25, 1971 under cover of darkness, one of the most gruesome crimes in the history of mankind was perpetrated by a blood- thirsty military junta against a whole population of seventy five million, constituting the majority of the people of Pakistan.

Many newspapers, reputed for their objectivity, have come out with documentary evidence in the form of photographs and eye-witness reports one of the greatest genocide exercises in the annals of man.”

Those are the real pictures of the soil belonged to the appellant. The appellant, knew very well about the actual situation prevailing in his mother land after 25th March 1971.

224. M. Rafiqul Islam, Professor of Macquarie University in his book “National Trials of International Crimes in Bangladesh” has observed:

“The indiscriminate extermination of the distinct national groups of civilian population, particularly the Hindus as a religious group and pro-independence people as a political group has been the deliberate policy of the Pakistani occupation army and its local para-militia forces and collaborators throughout the territory of Bangladesh during its liberation war.”

225. 10th March, 1971:

That is, fifteen days before 25th March, 1971, a meeting of Provincial of Mazlish-e-Sura and District Nazems of the then East Pakistan Islami Chattra Sangha (ICS) was held in Dhaka. In that meeting, ICS, upon elaborate discussion of the situation prevailing at that time in the country, resolved that there were 3(three) ways, according to them, to overcome the situation, those were:

১। পরিস্থিতি নিজে গতিতে চলতে দিয়ে বিচ্ছিন্নতাবাদীদের সঙ্গী হয়ে যাওয়া।

২। পরিস্থিতি নিজে গতিতে চলতে দেয়া এবং নিরপেক্ষ ভূমিকা পালন করা।

৩। পরিস্থিতির মোড় ঘুরিয়ে দেয়া। ”

226. It was decided by the ICS that “ পাকিস্তানের অক্ষুন্নতা ও মজলুম জনগণের হেফাজতের জন্য ব্যস্ত ময়দানে অবতীর্ণ হয়ে নিজের দায়িত্ব পালন করা। ----চারদিন ধরে ব্যাপক আলোচনা পর্যালোচনার পর ছাত্রসংঘের এই গুরুত্বপূর্ণ বৈঠকে এই সিদ্ধান্ত হয় যে, ইসলামী ছাত্রসংঘ পাকিস্তানের অক্ষুন্নতা ও জনগণের জানমাল ও ইজ্জত হেফাজতের জন্য সামনে অগ্রসর হবে। ”

(Material exhibit-7, Al-Badr-translated version.)

227. From the evidence of P.W.4 Principal Messer Uddin, P.W.8 Mujibur Rahman Master and P.W.9 Sova Kor it appears that A.T.M. Azharul Islam (the appellant), at the relevant time, was leader of ICS of Rangpur town unit and Carmichael College, Rangpur

branch. He was a resident of village Lohanipara under the Badargonj Police Station, Rangpur. It is evident that he participated in election campaign as ICS leader in support of Jamate Islami candidates of then Pakistan National Assembly and Provincial Assembly election held in 1970. He was previously known to the P.Ws.3, 4, 5, 6, 8, 9 and 10. Of them, P.W.9 Sova Kor was his classmate.

228. From the evidence of P.W.4 Principal Messer Uddin and P.W.8 Mujibur Rahman, it appears that 26th March, 1971 Captain Anwar and some force of No.3 East Bengal Regiment took shelter at Union land office of village Teksorhat under the Ramanathpur Union, Badargonj, Rangpur. It is evident that the Pak-army attacked them and compelled them to leave the area.

229. 3rd April, 1971:

Pak-army killed 10(ten) unarmed civilians of Mahigonj who were 1) Santi Chaki, 2) Khurrom, 3) Moharrom, 4) Advocate A.B.Y. Mafuz Ali @ Jarjesh 5) Dulal, 6) Durgadas Adhikari, 7) Uttom Adhikari, 8) Khitish Adhikari, 9) Gopal Adhikari and 10) Pagla Dorbesh as evident from the evidence of P.Ws.8, 13, 16 and 17.

8th April, 1971:

Few members of Bengal Regiment were killed and Captain Anwar was injured by the Pakistani Army. On the same day, that is, on 08.04.1971, member of Peace Committee took over the possession of the house of Jagadish Babu of Badargonj Bazar. Thereafter, the appellant and other members of Peace Committee started using that house for holding their meetings.

15th April 1971:

The Pak-army and local collaborators burnt some area of Ramanathpur Union and killed 1) Zoman, 2) Bhulu Bawla, 3) Mosaru Kaitta and 4) Kandu of Ramnathpur Union as stated by P.Ws.4 and 5.

16th April 1971:

The appellant A.T.M. Azharul Islam and Pak-army in a train from Rangpur rushed to Rail gate No.6 situated near Teksorhat and got down from the train. They proceeded towards Moksedpur area of Ramnathpur Union and started firing abruptly and set fire to the nearby houses of unarmed civilians and, thereafter, they started firing targeting Uttor Moksedpur and Dhappara area. Pak-army and appellant surrounded those villages and killed 15(fifteen) unarmed civilians who were: 2) Kuddus Munshi, 3) Jahir Uddin, 4) Chinimy, 5) Ammy, 6) Jongli Varosha, 7) Bishu, 8) Tamir Uddin, 9) Abu, 10) Tina, 11) Kulti My, 12) Shadina, 13) Yousuf Ali, 14) Sokimy 15) Tomizuddin..

230. Mamtaz Uddin Sarder, father of P.W.3 Moklesh @ Mokles Ali, holding the legs of appellant A.T.M. Azharul Islam, begged apology to save his life but the appellant kicked him and Pak-army shot him, consequently, he died. P.W.3 Mokles saw that occurrence. Beside him, P.W.6 Md. Mokbul Hossain and his mother also tried to escape. P.W.6 took shelter in a ditch but his mother failed to escape. This witness saw the appellant and two Pak-army to shoot his mother who died receiving bullet injury. Those two witnesses, that is, P.Ws.3 and 6 are the eye witnesses of the occurrences of killing of their father and mother respectively.

231. They also saw the dead bodies of the other victims as mentioned above. The act of these two witnesses in running away to save their own lives and not going forward to help the victims at the time of the incident is a most probable and natural human conduct which most men faced in such situation would resort to.

232. 17th April 1971:

The Pak-army and the appellant again went to the area and surrounded six villages of Badorgonj, Rangpur. People of those villages took shelter in Jharuarbeel. Pak-army abruptly started firing targeted at the unarmed civilians of those villages. Consequently, 1200 unarmed civilians were killed in the spot. P.W.4 Principal Meser Uddin in his testimony stated that he himself saw the appellant A.T.M. Azharul Islam with those Pak-army wearing white coloured shirt and pant. In his evidence, he has stated, “আশেপাশের এলাকার লোকজন ছুটাছুটি শুরু করে এবং অনেকেই ঝাড়ুয়ার বিলে গিয়ে আশ্রয় নেয়। এ সময় আমি আমার বাবাকে হাত দিয়ে ধরে রাখি এবং এ টি এম আজহারুল ইসলামকে সাদা পেন্ট শার্ট পড়া অবস্থায় পাক সেনাদের সঙ্গে দেখি। তখন পাক সেনারা নিরীহ জনসাধারণের বাড়ী ঘরে অগ্নি সংযোগ করে এবং তাদের উপর এলোপাতাড়ি গুলি করতে থাকে এবং উক্ত গুলিতে ঝাড়ুয়ার বিলের আশেপাশের প্রায় ১২০০ লোক নিহত হয়।” The appellant and Pak-army compelled innumerable people to gather at Rail gate No.7. At that time, the appellant’s teacher Shamsuddin Master requested the appellant to allow them to say their Asar prayer. After completion of Asar prayer, the appellant A.T.M. Azharul Islam and one Bachchu Khan divided Hindus, young people and students in different categories. Of them, they, taking 200 young people in the train, started proceeding towards Parbortipur. At that time they also killed Sombaro and Ismail, cousin of P.W.4. Abu Bakkar Siddique, two security guard of Railway and threw their dead bodies in a ditch near Railway bridge. Knowing about the fate of Sombaro, his wife Marzina committed suicide. Remaining civilians are still untraced. This witness had described the physical feature of the accused appellant. Aforesaid testimony of P.W.4 was fully corroborated by another eyewitness P.W.5 Md. Abdur Rohman saying that he himself saw appellant A.T.M. Azharul Islam with Pak Army at Jharuarbeel while said massacre was going on. In his cross-examination he specifically stated, “ছোটাছুটির এক পর্যায়ে আমি ঝাড়ুয়ার বিলে গেলে দেখি যে, পাকিস্তানী আর্মি ও তাদের সাথে থাকা এটিএম আজহারুল ইসলাম সেখানে উপস্থিত। তখন এটিএম আজহারুল ইসলাম আমাকে বলে উপস্থিত লোকজনের দলে ঢুকে যেতে। আমি ঐ দলে ঢুকে পড়লে দলের সকল লোকজনকে তাড়া করে পাকিস্তানী আর্মি ও এটিএম আজহারুল ইসলাম রেল লাইনের দিকে নিয়ে যেতে থাকে।” He also said that when Shamsuddin Master requested A.T.M. Azharul Islam and Bachchu Khan to allow them to say Asar prayer, they allowed 10(ten) minutes time for them to say Asar prayer. At that time, some Hindu people also participated in Asar prayer but after completion of the prayer, Bachchu Khan and the appellant compelled the young people and Hindu people present there to enter into the train who were about 200 in number. On the way, they killed Sombaru, Islam, Abu Bakkar Siddique and two security guard of the train. Those 200 people are still untraced. There is nothing significant to infer that there was enmity between these two witnesses and the appellant. Those two eye witnesses categorically stated that on 17.04.1971, the appellant, along with Pak Army, went at the place of occurrence through a train and he getting down from the train, participated, helped and facilitated the Pakistan Army to commit such genocide in Jharuarbeel, consequently, about 1200 unarmed civilians including children women and old men were brutally killed. Jharuarbeel was laden with numerous dead bodies. There was nothing left in Jharuarbeel except the dead bodies and blood.

233. While making his submission Mr. Kh. Mahbub Hossain admitted the facts of massacre committed in Jharuarbeel but simply submitted that the appellant was not present at Jharuarbeel at the time of commission of such massacre. In this charge the prosecution failed to narrate the names of the victims of Jharuarbeel massacre. It was not at all necessary when the charge involve hundreds of victims. In this regard Ntakirutimana and Ntakirutimana, Case

No. ICTR-96-17-A Appeal Chamber observed that in situations in which the crimes charged involve hundreds of victims, such as where the accused is alleged to have participated “as a member of an execution squad” “or as a member of a military force”, the nature of the case might excuse the prosecution from specifying every single victim that has been killed or expelled. In Gacumbisti (Case No. ICTR-2001-64-A, Appeals Chamber, Judge Shahabuddin also observed that is settled Jurisprudence that, in the case of mass killing, individual victims do not have to be specifically referred to in the indictment.

234. However, collecting names and particulars of 368 unfortunate unarmed civilians one S.M. Abraham Lincoln in his book “মুক্তিযুদ্ধের আঞ্চলিক ইতিহাস রংপুর” and Mukul Mostafaez in his book “মুক্তিযুদ্ধে রংপুর” published a list of 368 victims of the said saddest occurrence of Jharuarbeel. Names of those unfortunate victims were as follows:-

“1. Most. Jannatun Nessa (12), daughter of Md. Mohor Uddin, of village Khalishahazipur Kutirpar; 2. Md. Abbas Ali, (15) son of Md. Mohor Uddin, of village Khalishahazipur Kutirpar; 3. Most. Zohra Khatun (16), daughter of Md. Abdur Rahim, of village Khalishahazipur Kutirpar; 4. Md. Shamsul Islam (19), son of Md. Abdur Rahim, of village Khalishahazipur Kutirpar, 5. Md. Somser Ali (35), son of Md. Tasir Uddin, of village Khalishahazipur Kutirpar; 6. Most. Nazira Begum (22), wife of Md. Shomser Ali, of village Khalishahazipur Kutirpar; 7. Md. Kafil Uddin (65), son of Md. Alef Uddin, of village Khalishahazipur Kutirpar; 8. Md. A. Bari (35), son of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 9. Md. Kosidol (30), son of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 10. Most. Bana Pon (40), wife of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 11. Most. Abia Khatun (25), wife of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 12. Most. Anisa Khatun (07), daughter of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 13. Most. Rokshana Khatun (01), daughter of Md. Kafil Uddin, of village Khalishahazipur Kutirpar; 14. Most. Hamida Khatun (18), wife of Md. A. Bari, of village Khalishahazipur Kutirpar; 15. Md. Anowarul Haque (03), son of Md. Abdul Kashem, of village Khalishahazipur Kutirpar; 16. Md. Abdul Mondol (35), son of Hesab Uddin, of village Hazipur Jhakuapara; 17. Md. Kashem Ali (16), son of Apaan Ullah, of village Khalishahazipur Kutirpar; 18. Md. Joymuddi (22), son of Bishru, of village Khalishahazipur Kutirpar, 19. Md. Foez Uddin (60), son of Md. Fajil Uddin, of village Khalishahazipur, 20. Md. Anam Uddin (42), son of Md. Khottu Miah, of village Khalishahazipur, 21. Sree Keshob Chandra (50), son of Sree Rum Chandra, of village Khalishahazipur, 22. Sree Nrittunjoy (50), son of Sree Ram Chandra, of village Khalishahazipur, 23. Sree Satish Chandra Roy (25), son of Tailokkha Chandra Roy, of village Khalishahazipur, 24. Sree Provash Chandra Roy (25), son of Sree Satish Chandra Roy, of village Khalishahazipur, 25. Md. Mohaimin (20), son of Barek Sarder, of village Khalishahazipur, 26. Md. Azahar Ali (55), son of Tonej Uddin, of village Khalishahazipur, 27. Md. Esmail Hossian (45), son of Md. Abul Hossain of village Khalishahazipur, 28. Md. Tunu Gachua (40), son of Golam Mostafa, of village Khalishahazipur, 29. Md. Afel Uddin (55), son of Md. Ashraf Ali, of village Khalishahazipur, 30. Md. Abbas Ali (60), son of Amir Uddin, of village Khalishahazipur, 31. Sree Sidam Chandra (42), son of Sree Janki Chandra, of village Khalishahazipur, 32. Sree Vobesh Chandra (30), son of Sree Satish Chandra, of village Khalishahazipur, 33. Sree Atul Chandra (30), son of Janki Chandra, of village Khalishahazipur, 34. Sree Peri Mohon Roy (80), son of Joykista,, of village Khalishahazipur, 35. Sree Shyama Charan (12), son of Sree Tarapada, of village Hazipur Paikpara, 36. Sree Noren Chandra Roy (13), son of Monmohon Chandra Roy, of village Hazipur Paikpara, 37. Sree Gora Chandra (35), son of Horendra Nath Roy, of village Hazipur Paikpara, 38. Sree Pran Kirshno Rai 39. Sree Darpa Chandra (45), son of Harikanta, of village Hazipur Paikpara, 40. Md. Mofizal (32), son of Md. Shahidul Haque of village Hazipur Paikpara 41.

Md. Shafiar Rahman (16), son of Md. Abdus Shobhar, of village Hazipur Paikpara, 42. Most. Nazira Khatun (17), daughter of Md. Azizar Rahman of village Hazipur Paikpara, 43. Most. Shafia Khatun (45), daughter of Md. Mofiz Uddin, of village Hazipur Paikpara, 44. Md. Liakot Ali (26), son of Md. Mofiz Uddin, Ramkrishnapur Khiarpara, 45. Md. Mahatab Uddin (70), son of Hazi Md. Mozaffar, of village Hazipur Paikpara, 46. Most. Aftabonnessa(42), daughter of Md. Momtaz Uddin, of village Hazipur Paikpara, 47. Most. Momeza Khatun (40), daughter of Md. Shafi Uddin, of village Hazipur Paikpara, 48. Most. Labli Khatun (38), daughter of Md. Fazar Uddin, of village Hazipur Paikpara, 49. Most. Shahida Khatun (25), daughter of Md. Afzal Hossain, of village Hazipur Paikpara, 50. Most. Moslema Khatun (24), daughter of Md. Mojibur Rahman, of village Hazipur Paikpara, 51. Md. Shomser Ali (20), son of Md. Yeaz Uddin, of village Khalisha Hajipur, 52. Md. Amzad Ali (45), son of Md. Baser Uddin, of village Hazipur Paikpara, 53. Md. Shamsuddin (45), son of A. Karim Uddin, of village Hazipur Paikpara, 54. Md. Ekramul Haque (35), son of Md. Vola Miah, of village Hazipur Paikpara, 55. Md. Bodiuzzaman (30), son of Md. Afiz Uddin , of village Hazipur Paikpara, 56. Md.Mofazzal Hossain (32), son of Md. Abdus Sobhan, of village Hazipur Paikpara, 57. Md. Shahabuddin (28), son of Md. Nezam Uddin, of village Hazipur Paikpara, 58. Sree Debendra Nath Roy (22), son of Chandi Prosad Roy, of village Hazipur Paikpara, 59. Sree Horendra Nath Roy (25), son of Sree Darikanath Roy, of village Hazipur Paikpara, 60. Sree Ramna Kantha (28), son of Sree Sushil Sutradhor, of village Hazipur Paikpara, 61. Sree Harikanta(32), son of Sree Jogesh Chandra of village Hazipur Paikpara, 62. Md. Ohidul Huq (45), son of Md. Abdul Gaffar Prang of village Ramkrishnapur Masandoba, 63. Md. Omar Ali (33), son of Md. Abdul Gaffar Prang of village Hazipur Paikpara, 64. Md. Rajab Ali (25), son of Md. Abdul Gaffar Prang of village Hazipur Paikpara, 65. Md. Abdul Mazid Prang (22), son of Md. Abdur Rashid Prang of village Hazipur Paikpara, 66. Md. Iman Ali (35), son of Abdul Mia of village Hazipur Paikpara, 67. Delbar Hossain (48), son of Jabir Uddin of village Hazipur Paikpara, 68. Ahammad Ali (27), son of Md. Jamir Uddin, of village Bashupara Parbortipur, 69. Md. Mahatab Uddin (65), son of Md. Choyen Uddin, of village Ramkrishnapur Jhakuapara, 70. Md. Jametullah(70), son of Md. Jeharotullah, of village Hazipur Paikpara, 71. Md. Sahazuddin (25), son of Md. Solaiman of village Hazipur Paikpara, 72. Most. Sajeda Khatun (45), daughter of Md. Solaiman of village Hazipur Paikpara, 73. Md. Abdur Rashid (35), son of Md. Monir Uddin of village Ramkrishnapur Jhakuapara, 74. Md. Ekabbor Ali (25), son of Md. Kafil Uddin, of village Ramkrishnapur Jhakuapara 75. Md. Mofez Uddin (65), son of Md. Choyen Uddin of village Ramkrishnapur Jhakuapara 76. Md. Tanna Chowkidar (65), son of Abdullah, of village Ramkrishnapur Jhakuapara, 77. Md. Atiar Rahman (25), son of Md. Ain Uddin, of village Ramkrishnapur Jhakuapara, 78 Md. Ain Uddin (65), son of (unknown), of village Ramkrishnapur Jhakuapara 79 Md. Mokbul Hossain (30), son of Md. Jabir Uddin of village Ramkrishnapur Jhakuapara, 80. Md. Fazlul Huq (26), son of Md. Kobbad Ali of village Ramkrishnapur Mashandoba, 81. Md. Emaj Uddin (25), son of Md. Gafur of village Ramkrishnapur Mashandoba, 82. Md. Somchar Uddin (32), son of Sofar Uddin of village Ramkrishnapur Mashandoba, 83. Md. Menhajul Islam (45), son of Md. Mofizuddin of village Ramkrishnapur Sarkarpara, 84. Md. Alauddin (50), son of Okibullah of village Ramkrishnapur Sarkarpara, 85. Md. Azadul Huq (30), son of Md. Afaz Uddin of village Ramkrishnapur Sarkarpara, 86. Md. Islam Uddin(30), son of Md. Hossen Ali of village Ramkrishnapur Sarkarpara, 87. Md. Somobay Mia (30), son of Md. Kailta Mamud of village Ramkrishnapur Sarkarpara, 88. Md. Akbor Ali (40), son of Md. Mahatab Uddin of village Ramkrishnapur Sarkarpara, 89. Md. Nur Mohammad (32), son of Md. Khidir Uddin of village Ramkrishnapur Sarkarpara, 90. Md. Khairul Islam (25), son of Md. Khidir Uddin of village Ramkrishnapur Sarkarpara, 91. Md. Yousuf Uddin (70), son of Md. Kasimuddin of village Ramkrishnapur Sarkarpara, 92 . Md. Jashim Uddin (20), son of Kharia Sarker of

village Ramkrishnapur Balapara, 93. Md. Bharu Mia (45), son of (unknown) of village Ramkrishnapur Balapara, 94. Most. Futala Begum (40) daughter of Md. Nazir Sarder of village Ramkrishnapur Balapara, 95. Md. Nur Islam (25), son of Md. Foyez Uddin of village Ramkrishnapur Balapara, 96. Md. Moyez Uddin (40), son of Ponir Gachua of village Ramkrishnapur Balapara, 97. Md. Taillah Mia (45), son of Md. Nasar Uddin of village Ramkrishnapur Balapara, 98. Md. Syed Ali (25), son of Obej Uddin of village Ramkrishnapur Balapara, 99. Md. Abdul Gafur (35), son of Md. Rotibullah of village Ramkrishnapur Balapara, 100. Md. Bhulu Mia (55), son of Md. Nezan Uddin of village Ramkrishnapur Bittipara, 101. Md. Juman Ali (18), son of Md. Johurul Huq, of village Ramkrishnapur Bittipara, 102. Md. Masharu Mia (65), son of (unknown) of village Ramkrishnapur Bittipara, 103. Md. Kandu Mia (55), son of Md. Kanchia Prang of village Ramkrishnapur Bittipara, 104. Md. Tamir Uddin (65), son of Md. Nasar Uddin, of village Ramkrishnapur Bittipara, 105. Md. Wahidul Huq (25), son of Md. Tonna Fakir, of village Ramkrishnapur Bittipara, 106. Md. Changtu Mamud (50), son of (unknown) of village Khordda Baghbar, 107. Most. Rahela Khatun (50), daughter of Md. Ashraf Ali, of village Khordda Baghbar, 108. Sree Keshob Chandra Roy (60), son of Hor Gobinda Roy, of village Bujrugh Baghbar Brishnapur, 109. Sree Montu Sarker (30), son of Sree Krishta Sarker, of village Khordda Baghbar, 110. Sree Surendra Nath Roy (40), son of Sree Dhoni Ram Roy, of village Khordda Baghbar, 111. Sree Dodi Ram Roy (80), son of unknown, of village Bujrugh Baghbar, 112. Sree Avoy Charan (40), son of Sree Kandura Chandra, of village Ramnathpur Kumarpara, 113. Most. Moriyam Nessa (23), daughter of Md. Yeakub Ali, of village Uttor Moksedpur, Dhappara, 114. Md. Avrosa Sarker (70), son of Md. Nimutullah, of village Uttor Ramnathpur Hazipara, 115. Most. Sorizon Nessa (50) daughter of Vorosa Sarker, of village Uttor Ramnathpur Hazipara 116. Md. Kerad Hossain (50), son of Nimutullah, of village Uttor Ramnathpur Hazipara 117. Md. Chinimy (50), son of Md. Ashraf Ali, of village Uttor Ramnathpur Hazipara, 118. Most. Amena Khatun (65), wife of unknown, of village Uttor Ramnathpur Hazipara, 119. Md. Shahzahan Ali (33), son of Dr. A. Gafur, of village Uttor Ramnathpur Hazipara, 120. Md. Momtaz Uddin (60), son of Md. Uzir Mamud, of village Uttor Ramnathpur Hazipara, 121. Md.A. Kuddus, (38), son of Md. Taslim Uddin, of village Uttor Ramnathpur Hazipara, 122. Md. Abu Bakkar Siddique (45), son of Md. Hamidullah Prang, of village Uttor Ramnathpur Hazipara, 123. Md. Kina Mamud, (45), son of Md. Aynullah Prang, of village Uttor Ramnathpur Hazipara, 124. Sree Dodiram (45), son of unknown, of village Mondalpara, Brishnapur Union, 125. Md. Badiuzzaman (21), son of Hazi Romiz Uddin, of village Khalisha Hazipur, 126. Shams Uddin (40), son of late Karim Baksh, of village Khalisha Hazipur, of village Khalisha Hazipur, 127. Mohaimin (42), son of late unknown, of village Khalisha Hazipur, 128. Amzad Uddin (40), son of Baser Mamud, of village Khalisha Hazipur, 129. Shamsar Ali (35), son of Shahaz Uddin, of village Khalisha Hazipur, 130. Foyez Uddin (38), son of late Fazil Uddin, of village Khalisha Hazipur, 131. Shahabuddin (35), son of Nizam Uddin, of village Khalisha Hazipur, 132. Abul Kashem (40), son of late Afan Uddin, of village Khalisha Hazipur, 133. Joyef Uddin, son of late Ayen Uddin, of village Khalisha Hazipur, 134. Sree Mritunnjoy Roy (40), son of late Ramchandra Roy, of village Bujrokh Hazipur, 135. Sree Keshob Chandra Roy (45), son of late Ram Chandra Roy, of village Bujrokh Hazipur, 136. Satish Chandra Roy, son of late Tailakkha Roy, of village Buzruk Hazipur, 137. Probesh Chandra Roy (17), son of Satish Chandra Roy, of village Bujruk Hazipur, 138. Atul Chandra (30), son of Lalith Chandra Roy, of village Bozruk, 139. Lalith Chandra Roy (55), son of late Gopi Chandra Roy, Buzrok Hazipur, 140. Pran Krishna Master (45), son of--- of village Krishnapur Buzrok Hazipara, 141. Sreedam Nath (30), son of Janoki Nath, of village- Hazipur, 142. Mohfel Uddin (20), son of late Shobhan Dafadar, of village- Parbotipur, Hazipara, 143. Ashwini Kumar Roy (42), son of Jogeshwar Roy, of village Khalisha Hazipur, 144. Sree Haripada, son of late Rampada,

of village Khalisha Hazipur, 145. Pran Krishna Sutar (45), son of late Goda Keshta, of village Khalisha Hazipur, 146. Sree Vhobani Chandra Biswas (40), son of late Razchandra Biswas, of village Bujrok Hazipur, 147. Sree Bongsha Chandra Biswas (35), son of Raj Chandra Biswas, of village Bujrok Hazipur, 148. Lalit Chandra (45), son of late Kina Chandra, of village Bujrok Hazipur, 149. Haripada, son of late Kina Chandra, of village Bujrok Hazipur, 150. Anil Chandra (45), son of Darika Babu, of village Bujrok Hazipur, 151. Kafil Uddin (55), son of late Alek Uddin, of village Hazipara, 152. Bala Pon, wife of Kafil Uddin, of village Hazipara, 153. Kasidol (25), son of Kafil Uddin, of village Hazipara, 154. Rabeya (20), daughter of Kafil Uddin, of village Hazipara, 155. Azizul (11), son of -- of village Hazipara 156. Furkuni (9), daughter of Kafil Uddin, of village Hazipara, 157. Rafia (14), son of Kafil Uddin, of village Hazipara, 158. Rokeya (12), son of Kafil Uddin, of village Hazipara, 159. Momena (09), son of Kafil Uddin, of village Hazipara, 160. Mojibur Rahman (45), son of Mofiz Uddin, of village Hazipara, 161. Moslema Khatun (30), wife of Mojibur Rahman, of village Hazipara, 162. Motiar Rahman (20), son of Mojibur Rahman, of village Hazipara, 163. Mosiar Rahman, son of Mojibur Rahman, of village Hazipara, 164. Tonni (10), daughter of Mojibur Rahman, of village Hazipara, 165. Halima Khatun (40), wife of Abdul Bari, of village Hazipara, 166. Shomser Ali (55), son of Tasir Uddin, of village Hazipara, 167. Abdul Mondal, son of Sohob Uddin, of village Hazipara, 168. Bishadu Bormon, son of Pran Gopal Bormon, of village Hazipara, 169. Suresh Chandra Bormon, son of Haripada Barmon, of village Hazipara, 170. Wahidul Haque (45), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 171. Rajob Ali (18), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 172. Omar Ali (35), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Masandoba, 173. Abdul Majid, son of Abdur Rashid Pramanik, of village Ramkrishnapur Masandoba, 174. Fazlul Haque son of late Soleman Pramanik, of village Ramkrishnapur, 175. Delowar Hossain (45), son of late Soleman Pramanik, of village Ramkrishnapur, 176. Iman Ali (30), son of late Abdul Miah, of village Ramkrishnapur, 177. Nasir Uddin (45) of village Bujrook Hazipur, 178. Abdul Jabbar (35), of village Bujrook Hazipur, 179. Alauddin (40), of village Bujrook Hazipur, 180. Prankrishna Master (45) of village Bujrook Hazipur, 181. Ramendu (35), of village Bujrook Hazipur, 182. Gonesh Chandra (35), of village Bujrook Hazipur, 183. Kaltu Sarder (35), of village Bujrook Hazipur, 184. Shoshi Doctor, (48), of village Bujrook Hazipur, 185. Ananda Mohon (40), of village Bujrook Hazipur, 186. Ramananda (38), of village Bujrook Hazipur, 187. Taruni @ Bang (30), of village Bujrook Hazipur, 188. Anil Master (48), of village Bujrook Hazipur, 189. Horlochon Sheel (45), of village Bujrook Hazipur, 190. Lolin Sheel (42), of village Bujrook Hazipur, 191. Haripada (45), of village Bujrook Hazipur, 192. Pano Sheel (40), of village Bujrook Hazipur, 193. Shoshee Mohonta, of village Bujrook Hazipur, 194. Biroh Mahanta (42), of village Bujrook Hazipur, 195. Mono Mahanta (38), of village Bujrook Hazipur, 196. Mohindra (32), of village Bujrook Hazipur, 197. Shukra (22), of village Bujrook Hazipur, 198. Montu Mahanta (25), of village Bujrook Hazipur, 199. Binod Mahanta (40), of village Bujrook Hazipur, 200. Babu Mahanta (5) (child of Binod Mohonta, of village Bujrook Hazipur, 201. Peri Mohon (42), of village Bujrook Hazipur, 202. Shoshi Mohon (35), of village Bujrook Hazipur, 203. Shyamapada (52), of village Bujrook Hazipur, 204. Gora Joytish (55), of village Bujrook Hazipur, 205. Debendra Dash (40), of village Bujrook Hazipur, 206. Noren (52), of village Bujrook Hazipur, 207. Rup Narayan (45), of village Bujrook Hazipur, 208. Bhubani Chandra (55), of village Bujrook Hazipur, 209. Lalit Das (55), of village Bujrook Hazipur, 210. Choyon Das (55), of village Bujrook Hazipur, 211. Pulin Das (60), of village Bujrook Hazipur, 212. Prankrishna Sutrodhar (55), of village Bujrook Hazipur, 213. Lutfu Khatun (7), daughter of Ajgor Ali of village Bujrook Hazipur, 214. Darpa Chandra (65), of village Bujrook Hazipur, 215. Mritunjoy (42), of village Bujrook Hazipur, 216. Keshob Chandra (45), of village Bujrook

Hazipur, 217. Azahar Ali (38), of village Bujrook Hazipur, 218. Tunu (35), of village Bujrook Hazipur, 219. Alef Uddin (46), of village Bujrook Hazipur, 220. Barun(2)(child), son of Satish Bairagi of village Bujrook Hazipur, 221. Afsar Ali (30), of village Ramkrishnapur Baniapara, 222. Dinesh Master, of village Ramkrishnapur Baniapara, 223. Mahtab Uddin (50), of village Ramkrishnapur Baniapara, 224. Jeharat Ullah (35), of village Ramkrishnapur Baniapar, 225. Afiz Uddin (34), of village Ramkrishnapur Baniapara, 226. Choyen Uddin (45), of village Ramkrishnapur Baniapara, 227. Akbor Hossen (40), of village Ramkrishnapur Baniapara, 228. Falta Mia (45), of village Ramkrishnapur Baniapara, 229. Tamir Uddin (55), of village Ramkrishnapur Baniapara, 230. Ovoy Chandra (40), of village Ramkrishnapur Baniapara, 231. Kandu Sheikh (32), of village Ramkrishnapur Baniapara, 232. Bhulu Mia (30), of village Ramkrishnapur Baniapara, 233. Jotsna Begum (18), of village Ramkrishnapur Baniapara, 234. Menhajul Master (55), of village Ramkrishnapur Baniapara, 235. Yousuf (40), of village Ramkrishnapur area Baniapara 236. Esamuddin (32), of village Ramkrishnapur area Baniapara, 237. Fatema Khatun (22), of village Ramkrishnapur area Baniapara, 238. Alauddin (60), of village Ramkrishnapur area Baniapara, 239. Sombaru (40), of village Ramkrishnapur area Baniapara, 240. Mokbul Hossain (35), of village Ramkrishnapur area Baniapara, 241. Khairul Alam (40), of village Ramkrishnapur area Baniapara, 242. Nur Mohammad (45), of village Ramkrishnapur area Baniapara, 243. Ekabbor Ali (40), of village Ramkrishnapur Baniapara, 244. Sazzadi Begum (32), of village Ramkrishnapur Baniapara, 245. Unma Chowkider (48) of village Ramkrishnapur Baniapara, 246. Abdur Rashid (42), of village Ramkrishnapur Baniapara, 247. Abdul Mondal (35), of village Ramkrishnapur Baniapara, 248. Shomser Ali (35), of village Ramkrishnapur Baniapara, 249. Abul Mamud (40), of village Ramkrishnapur Baniapara, 250. Emazuddin (52), of village Ramkrishnapur Baniapara, 251. Fazlul Hoque (45), of village Ramkrishnapur Baniapara, 252. Rahela Khatun (18), of village Ramkrishnapur Baniapara, 253. Wahidul Huq (45), of village Ramkrishnapur Baniapara, 254. Azab Ali(42), of village Ramkrishnapur Baniapara, 255. Omar Ali (35), of village Ramkrishnapur Baniapara, 256. Dilder Ali (32), of village Ramkrishnapur Baniapara, 257. Iman Shah (55), of village Ramkrishnapur Baniapara, 258. Abdul Bari (35), of village Ramkrishnapur Baniapara, 259. Abdul Majid (32), of village Ramkrishnapur area Baniapara, 260. Atahar (45), of village Ramkrishnapur area Baniapara, 261. Anjuara Begum (22), of village Ramkrishnapur Baniapara, 262. Monjuara Begum (18) of village Ramkrishnapur Baniapara, 263. Akhtara Khatun(40), of village Ramkrishnapur Baniapara, 264. Nalo Begum (35), of village Ramkrishnapur Baniapara, 265. Monjila Khatun (30), of village Ramkrishnapur Baniapara, 266. Afjalun Ked (32), of village Ramkrishnapur Baniapara, 267. Nindu Mia (45), of village Ramkrishnapur Baniapara, 268. Wahidul Hoque (40), of village Ramkrishnapur Baniapara, 269. Sapud Mia (40), of village Ramkrishnapur Baniapara, 270. Mofazzal Dafadar (48), of village Ramkrishnapur Baniapara, 271. Shams Mia (30), of village Ramkrishnapur Baniapara, 272. Ekramul Huq (42), of village Ramkrishnapur Baniapara, 273. Korban Ali (45), of village Ramkrishnapur Baniapara, 274. Bodiuzzaman(35), of village Ramkrishnapur Baniapara, 275. Momen(8), of village Ramkrishnapur Baniapara, 276. Shamsuddin Mia (32) of village Ramkrishnapur Baniapara, 277. Kashem (28), of village Ramkrishnapur area Baniapara, 278. Jogpu Mia (32), of village Ramkrishnapur area Baniapara, 279. Amjad Hossain (45), of village Ramkrishnapur area Baniapara, 280. Foez Uddin (41), of village Ramkrishnapur area Baniapara, 281. Khorshed Lohani (45), of village Lohanipara, 282. Kharia (55), son of Jamir Uddin, of village Gopalpur, Shampur, Rangpur, 283. Alauddin (40), son of Abdul Sobhan, of village Bashantapur, Shampur, Badargonj, Rangpur, 284. Tonna Chowkidar (55), son of late Abdulla, of village Ramkrishnapur, Jhakuapara, 285. Ainuddin (42), son of Aman of village Ramkrishnapur, Jhakuapara, 286. Atiar Rahman(32), son of Aunuddin of village

Ramkrishnapur, Jhakuapara, 287. A. Rashid(42), son of Monir Uddin, of Ramkrishnapur Jhakuapara, 288. Mahaj Uddin (35), son of Soleman of village Ramkrishnapur, Jhakuapara,

289.Sajeda Khatun (22), wife of Soleman of village Ramkrishnapur, Jhakuapara, 290.Mahatab Uddin(42), son of Choyen Uddin of village Ramkrishnapur, Jhakuapara, 291. Jometullah (47), son of late Jehartullah of village Ramkrishnapur, Jhakuapara, 292.Mofez (43), son of Choyen Uddin, of Ramkrishnapur, Jhakuapara, 293.Ekabbar Ali, son of Kafil uddin , of Ramkrishnapur, Jhakuapara, 294. Akbar Ali (32), son of Mahatab , of Ramkrishnapur, Jhakuapara, 295.Nur Mohammad, son of Bidir Uddin, of Ramkrishnapur, Bidirpara, 296.Khairul (32), son of bidir Uddin, of village Ramkrishnapur, Bidirpara, 297.Sahidar Rahman (55), son of Hessha Paikar, of village Ramkrishnapur Noyapara, 298.Ohidul Haque (32), son of Goffar, of village Ramkrishnapur Mashandoba, 299. Omar Ali (42), son of Goffar, of village Ramkrishnapur Mashandoba, 300. Rojob Ali (30), son of Goffar, of village Ramkrishnapur Mashandoba, 301. Delbar (25), son of Soleman, of village Ramkrishnapur Mashandoba, 302.Emaj (22), son of Gafur, of village Ramkrishnapur Mashandoba, 303. Fazlul Haque (19), son of late Kobat Ali, of village Ramkrishnapur Mashandoba, 304.Liakot (18), son of late Mofiz, of village Ramkrishnapur Mashandoba, 305.Mahatab (34), son of Hazi Mojib, of village Ramkrishnapur Khiyarpara, 306. Mokbul Hossain (45), son of Jabir Uddin , of village Ramkrishnapur Moddyapara, 307.Alauddin (48), Rajibullah, of village Ramkrishnapur Baniapara, 308.Menhajul Islam (55), son of Mofiz Uddin, of village Ramkrishnapur Baniapara, 309. Sombaru (22), son of Kalta, of village Ramkrishnapur Baniapara, 310.Mojid (32), son of A. Rashid, of village Ramkrishnapur Baniapara, 311. Azadul , son of Afaz, of village Ramkrishnapur Baniapara, 312. Islam, son of Hosain Chaprashi, of village Ramkrishnapur Baniapara, 313.Modi, son of Sobhan, of village Ramkrishnapur Baniapara, 314.Foyzuddin, son of Panchkari, of village Ramkrishnapur Balapara, 315. Islam (33), son of Atkur Uddin, of village Ramkrishnapur Balapara, 316.Adab Baksh (33), son of Foez Uddin, of village Ramkrishnapur Balapara, 317. Tonna Mamud (48), son of Akabbar Rahman, of village Ramkrishnapur Balapara, 318. Fatulli, wife of Nazir Hossain, of village Ramkrishnapur Balapara, 319. Shahidar Rahman (32), son of Rahe Miah, of village Ramkrishnapur Balapara, 320. Veru Miah (55), son of Sahar Miah, of village Ramkrishnapur Balapara, 321.Iman (18), son of Abdullah, of village Ramkrishnapur Mashandova, 322.Shomser (33), son of Chapar Miah, of village Ramkrishnapur Mashandova, 323. Joyjuddin (42), son of Banech, of village Bangarpar, 324. Azizar Rahman (52), son of Jahir Uddin, of village Uttar RAmpara, Parbotipur, Dinajpur, 325. Ohidul Haque, son of Nomer Miah, of village Uttar Rampara, Parbotipur, Dinajpur, 326. Abu Bakkar (55), son of Jamir, of village Uttar RAmpara, Parbotipur, Dinajpur, 327. Momeja Khatun (24), wife of Safi Uddin, of village Ghotabil Khiarpara, 328. Shahida (22), wife of Afzal, of village Ghotabil Khiarpara, 329. Sabila, daughter of Safiuddin, of village Ghotabil Khiarpara, 330. Atarul, son of Momtaz, of village Ghotabil Khiarpara, 331. Lalmai, son of Fazar Miah, of village Ghotabil Khiarpara, 332. Fatema , wife of Mahatab, of village Ghotabil Khiarpara, 333. Moslema, wife of Kohor Miah, of village Ghotabil Khiarpara, 334. Anju Ara, wife of Hobi Miah, of village Ghotabil Khiarpara, 335. A.Karim, son of Sahaj Miah, of village Ghotabil Khiarpara, 336. Munja Khatun, wife of Sahaj Miah, of village Ghotabil Khiarpara, 337. Tulli Mai (24), of village Ghotabil Khiarpara, 338. Somjan (18), daughter of Mojibur, of village Ghotabil Khiarpara, 339. Anjan, daughter of Mojibur, of village Ghotabil Khiarpara, 340. Kafil Uddin, son of Anej Miah, of village Ghotabil Kutirpara, 341. Sohidul (45), son of Kafil Uddin, of village Ghotabil Kutirpara, 342.Fuljan Mai (24) daughter of Kafil Uddin, of village Ghotabil Kutirpara, 343. Ashra (18), daughter of Kafil Uddin, of village Ghotabil Kutirpara , 344. Enteja Khatun (22), son of Kafil Uddin, of village Ghotabil Kutirpara, 345. Majeda (15), daughter of Kafil Uddin, of village Ghotabil

Kutirpara, 346. Anifa (12) daughter of Kafil Uddin, of village Ghotabil Kutirpara, 347. Hamida (22), wife of A. Bari, of village Ghotabil Kutirpara, 348. Kumaresh Chandra (24), son of Bhupen, of village Kishmot Bhotabil, 349. Mohesh (32) son of Velshu Chandra, of village Kishmot Bhotabil, 350. Ratan Chandra (38), son of Bhaduram, of village Kishmot Bhotabil, 351. Beren (36), son of Bhaduram, of village Kishmot Bhotabil, 352. Gonesh (18), son of Bhaduram, of village Kishmot Bhotabil, 353. Dhiren (15), son of Ajit, of village Kishmot Bhotabil, 354. Upen (18), son of Budaru, of village Kishmot Bhotabil, 355. Md. Mofazzal (42), son of A. Sobhan, of village Dapakol Balapara, Parbotipur, Dinajpur, 356. Badiuzzaman (55), son of Haji Ramiz Uddin, of village Khalisha Hazipur, 357. Sree Debendra Nath, son of Chandi Proshad, of village Gotabil, 358. Horendra Nath Sarkara (32), son of unknown, of village Ghotabil, 359. Md. Amzad (35), son of Based, of village Khalisha Hazipur, 360. Md. Shamsar (38), son of Reyaz (Buda), of village Khalisha Hazipur, 361. Nomer (22), of village Hazipur, 362. Ohidul Haque (38), son of late Abdul Gaffar Pramanik of village Ramkrishnapur Mashandoba, 363. Omar Ali (35), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Mashandoba, 364. Rajab Ali (18), son of late Abdul Gaffar Pramanik, of village Ramkrishnapur Mashandoba, 365. Abdul Majid (15), son of Abdur Rashid Pramanik, of village Ramkrishnapur Mashandoba, 366. Fazlul (30), son of late Kobad Uddin, of village Ramkrishnapur Mashandoba, 367. Delowar Hossain (45), son of late Soleman Pramanik, of village Ramkrishnapur Mashandoba, 368. Iman Ali (43), son of Abdul Miah, of village Ramkrishnapur Mashandoba.”

235. Jharuarbeel massacre was one of the most horrific and saddest incident of cold blooded massacre in the history. They were the worst victims of the Genocide committed by Pakistan Army taking aid of the local culprits. They brutally killed most of the people who took shelter in Jharuarbeel. From the names and age of the victims it appears that rifles and machine guns of Pak Army did not select their victims. They killed women, children and old men. They dired against defenseless citizens. The world shocked seeing the harrowing accounts of genocide perpetrated against the unarmed people of Badargonj. It was widespread killing of civilians and the atrocities on massive scale. The people of the whole world were stunned by the brutality committed by Pakistan Army. Slaughtering of civilians in Jharuarbeel was only for mere sake of slaughter. On 24th April, 1971, the Daily Anandabazar published as news report with following language, “পূর্ব বংগে গণহত্যা সম্পর্কে বৃটিশ পার্লামেন্টের প্রশাসনিক দলীয় সদস্য মিঃ ব্রুস ডগলাস ম্যান এর বক্তব্য ।

“ভিয়েতনামে “মাইলাই” একটি ব্যতিক্রম, আর গোটা পূর্ববঙ্গই মাইলাই- বায়াফার সঙ্গে তুলনা করেছেন। কিন্তু শ্রী ম্যানের মতে, বায়াফার সঙ্গে পরিস্থিতির তুলনাই হয় না। বায়াফাতে পূর্ববাংলার মত এক নির্বাচন হয়নি।”

236. The My Lai massacre was one of the most horrific of violence committed against unarmed civilians during Vietnam War. A company of American soldiers brutally killed most of the people women, children and old men in the village of My Lai on March, 1968. More than 500 people were slaughtered in the My Lai massacre. In Jharuarbeel, Pakistan Army accompanied with the appellant and other collaborators slaughtered 1200 civilians.

237. The Guardian, London, May 27, 1971 published a news report regarding brutality committed by the Pakistan Army in Bangladesh. A portion of said news item was as follows:

“Villages have been surrounded, at any time of day or night, and the frightened villagers have fled where they could, or been slaughtered where they been found, or enticed out to the fields and mown down in heaps, women have been raped, girls carried of barracks, unarmed peasants battered or bayoneted by the thousands.

The pattern after seven weeks, is still the same. Even the least credible stories of babies thrown up to be caught on bayonets, of women stripped and bayoneted vertically, or of

children sliced up like meat, are credible not only because they are told by so many people, but because they are told. By people without sufficient sophistication to make up such stories for political motives.”

238. In spite of looking dead bodies of 1200 children, women, old men and other civilians, the conscience of the appellant did not restrain him to aid the Pak Army to kill his own teachers of Carmichael College. The appellant assisted, lend encouragement and supported to the commission of such genocide. In Kayishema and Ruzindana ICTR-95-1 Appeals judgment observed that presence as an “approving spectator” in the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct, is also abetting and aiding to the commission of a crime. 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. Even after the occurrence of genocide in Jharuarbeel the appellant on 30.04.1971 went to the residence of his teachers along with Pak Army for abducting and killing them.

30th April 1971:

At about 10.30- 11.00 p.m. on 30.04.1971 Pak-army and the appellant surrounded the houses of professors of Carmichael College and confined professor Chitta Ranjon Roy, brother of P.W.9 Suva Kor , Professor Kalachand Roy , Professor Ram Krishna Adhikari and Sunil Baron Chakraborty . They abducted those professors of Carmichael College and, thereafter, killed them near Damdoma bridge. At the time of confining and abducting Professor Chitta Ranjon Roy, his sister P.W. 9 Sova Kor herself saw the appellant along with Pak-army. She identified the appellant with the help of street light. P.W. 9 in her testimony stated that appellant A.T.M. Azharul Islam was her classmate at Carmichael College . So, he was previously known to her. P.W. 10 Ratan Chandra Das, who was the cook of Professor Sunil and Ram Krishna, had also been able to identify the appellant at the time of confinement and abduction of those victims. P.W.9 and 10 proved that the appellant aided, supported, encouraged and prompted the Pakitani Army to commit such brutal killing.

239. From the occurrences dated 03.04.1971, 08.04.1971, 15.04.1971, 16.04.1971, 17.04.1971 and 30.04.1971 it appears that there was a continuing news of terror in Rangpur area. Aforesaid killings of those defenseless people became a habit of Pak army like smoking cigarettes or drinking wine. Those genocide and genocidal atrocities were perpetrated by the Pak army in collaboration with the human being like the appellant as evident from evidence of P.Ws. 3, 4, 5, 6 ,9 and 10 who are the eye witnesses of the occurrences. The Pakistan Army, taking aid of the collaborators, killed three million people during the holocaust in 1971. For month after month in all the regions of Bangladesh the massacres went on. Four hundreds of years, the name of Chenghis Khan has echoed through history as a byword for cruelty and butchery. In the 20th century it seems a Pakistani namesake of the great killer is determined to out do his grisly predecessor. Jharuarbeel incident was one of those thousands of incidents committed in Bangladesh by Pak Army in collaboration with some collaborators of this soil. The incident of Jharuarbeel was cold blooded savagery and such deliberate killings were occurred on a massive scale. Such barbaric, gruesome and brutal crime which the Pak Army committed with aid of the appellant is comparable with Hitler’s gas chamber genocide. The offences committed by the Pak army, with aid of the appellant, at Jharuarbeel, Ramnathpur, Mokshedpur, Carmical College teachers residence were undoubtedly heinous, atrocious, cruel and those were widespread and systematic attack targeting the civilian population. Particularly, massacre of Jharuarbeel was deliberate crime of crimes which was of the worst heinous form that could possibly exist in the human civilization. The appellant

acted with knowledge of the broader context of the attack on the civilians gathered in Jharuarbeel.

240. There are overwhelming evidence of Jharuarbeel massacre. It was a senseless slaughter of men, women and children. When international community came to help the helpless people of Bangladesh the appellant aided the Pakistan army and participated in the occurrence of Jharuarbeel which is considered as the most atrocious, appalling and terrible killings.

241. Professor Rafiqul Islam in his book, “National Trials of International Crimes in Bangladesh,” considering the cases of Prosecutor V. Dusko Tadic (ICTY Appeals Chamber), Prosecutor V. Mitar Vasiljevic (IT-98-32-T), Prosecutor V. Milomir Stakic (IT-97-24A), Prosecutor V. Radaslav Brdarin (IT-99-36-A) observed that the *actus reus* and *mens rea* of joint Criminal Enterprise are based on some objective elements:

“• A plurality of persons in any form and structuring it in an organised military, political, or administrative setup is not necessary and its *mens rea* is the shared intent as co-perpetrators to perpetrate a certain crime/s;

• A common plan, design, or purpose to commit a crime’s, which need not be formally pre-arranged, understood, or agreed between the accused and the principal perpetrator/s of the crime as it can be executed extemporaneously and inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise’; its *mens rea* is the personal knowledge of the accused proved by witness testimonies or reasonable inference from the relevant circumstances revealing the intent to further the common plan, design, or purpose;

• Direct and/or indirect participation of the accused in the common plan, design, or purpose and its *mens rea* is the intentional participation in and contribution to the criminal activities of the group.

•The crime committed must form a part of the common plan, design, or purpose regardless of whether its perpetrator is a member of JCE and in case of non-member perpetrators, *actus reus* may be inferred from relevant circumstances such as the accused or other JCE member/s closely cooperated with the non-member principal perpetrator in order to materialise the common criminal purpose; hence a JCE member may be held responsible for crimes perpetrated by a non-member, who does not necessarily share the *mens rea* of JCE members.

• The link between the accused and the crimes of the principal perpetrator/s is the actual contribution of the accused to the commission of the crimes, not the JCE membership of the perpetrator/s. In other words, the JCE liability purports to reflect the exact degree of responsibility for JCE members who in some way made it possible for the principal perpetrator/s to physically carry out the crimes within the common plan of JCE.”

242. In Prosecutor V. Bisegimana (Case No. ICTR-00-60-T) Trial Chamber observed that the prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter’s actual commission of crime. In Kajelijeli (Case No. ICTR-98-44A-A) Appeals Chamber and Nabimana, Barayagwiza and Ngeze (ICTR-99-52-A) Appeals Chamber consistently held that “a Trial Chamber is in the best position to evaluate the probative value of evidence and that it may, depending on its assessment, rely on a single witness’s testimony for the proof of a material fact”. In this case, the ICT scanning the evidence of the eye witnesses, particularly, P.W.3 Moklesur Rahman, P.W.4 Meseruddin, P.W.5 Abdur Rohman, P.W.6 Mokbul Hossain, P.W.9 Shova Kor and P.W.10 Ratan Das

and circumstances observed that the prosecution has been able to prove that the appellant personally being present in the crime scene at the time of commission offences, committed or aided, abetted and assisted to commit crimes against humanity and genocide. In the case of Prosecutor V. Bagilibema, Case No. ICTR-95-1A-A Appeals Chamber held that it is well settled that ‘ the testimony of a single witness on a material fact may be accepted as evidence without the need for corroboration. P.Ws 3 and 6 proved the presence and activities of the appellant regarding the killings of 15 unarmed civilians dated 16.04.1971, P.Ws. 4 and 5 proved the activities and presence of mass massacre of 1200 unarmed civilians at Jharuarbeel on 17.04.1971. Even after observing the ocean of blood and large scale massacre at Jharuarbeel the appellant’s conscience did not strike him which clearly indicated the lacking of human quality of the appellant. Does Islam permit such killings? Naturally Hindu teachers of Carmichael College were not known to the Pakistan Army. P.Ws. 9 and 10 proved that the appellant personally being present helped, added and assisted the Pak Army going to the residences of the Professors and abducted them and, thereafter, killed them brutally. His participation has substantially contributed to and has had substantial affect on the consummation of a crime under the statute.

243. It is of the essence of the crime of abetment that abettor should assist the principal culprits towards the commission of the offence. Participation *de facto* may sometimes be obscure in detail, it is established by the presumption *Juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. From the evidence of P.Ws. 3, 4,5 6, 9 and 10 that the appellant not only gave assistance, he participated in the acts of commission of the offences. When a person who abets the commission of an offence is present and helps in the commission of the offence, he is guilty of such offence. In the case of Semanza Vs. Prosecutor, Case No. ICTR-97-20A (Appeal Chamber), it was held,

“For an accused to be convicted as perpetrator or co-perpetrator of genocide, it is not necessary that he or she fulfils a ‘key coordinating role’ or that a ‘high level genocidal plan’ be established even if the existence of a plan to commit genocide can be useful to prove the specific intent required for genocide”.

244. Moreover, it has been observed by the ICTY in Prosecution V. Radoslav Brdanin that existence of a pre- arranged common plan or policy is not necessary for crimes against humanity, which can be committed extemporaneously and inferred from the fact that a plurality of persons act in unisons to put into effect a joint criminal enterprise. In Kadar Molla’s case reported in 22 BLT (AD-8) it was observed by this Division that-

a) “the terrible brutality of the Pakistan army was preplanned and in furtherance of a government policy to wipe out the pro-independence Bengali ‘civilians, including women and children in a deliberate plan to achieve submission by stark terror’.

b) any argument in terms of the requirements of law and the 1973 Act ‘that there must be existence of prior plan or policy and that there must be an attack on political, racial, ethnic or religious grounds are not only misleading but also foreign to the Act, 1973; and

c) there was no need to prove that there was any predetermined plan and/or policy for the attack as it was enough to prove that any person committed such offence during the liberation war period or participated or attempted or conspired to commit any such crime in collaboration with the Pakistani regime upon the unarmed civilian as a part of an orchestrated collective punishment aimed to defuse and frustrate the independence of Bangladesh.”

245. In Akayesu (Case ICTR -96-4-T Trial Chamber) the Trial Chamber noted that in the absence of a confession or other admission, it is inherently difficult to establish genocidal intent of an accused. At the same time, it noted that a Chamber may make a valid inference

about the mental state of the accused on the basis of a number of factors. Thus, where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the facts and circumstances. In Mpambara (Case No. ICTR01-65-T) Trial Chamber observed that intent may be proven by drawing inferences from circumstantial evidence, such as any connection to a wide-scale attack against the targeted group.

246. Testimonies of the witnesses, circumstances, previous and past conduct of the appellant before and after Jharuarbeel massacre as reflected in the evidence, it appears that the findings and conclusion arrived at by the Tribunal as to the culpability and criminal responsibility of the appellant in respect of Ramnathpur, Jharuarbeel massacre and killing of teachers of Caramical College are based on evidence. Pak Army and the appellant persecuted and murdered civilian populations solely on political reason.

247. It is obligatory on the part of the Court to keep in mind the impact of the offence on the society and its ramification including the repercussion on the victims. It is the duty of the Court to award proper sentence having regard to the nature of the offence and depending upon the degree of criminality the manners in which those were committed and all attended circumstances. In view of the facts and circumstances, I do not find any wrong in the ultimate decision of the Tribunal.

Md. Nuruzzaman, J.

248. I have had the advantage of going through the judgments proposed to be delivered by Syed Mahmud Hossain, the learned Chief Justice and Zinat Ara, J. I concur with the judgment and order passed by the learned Chief Justice.

Zinat Ara, J. (Minority View):

249. This appeal has been filed by the convict-appellant, A.T.M. Azharul Islam (hereinafter referred to as the appellant/ convict- appellant/condemned-prisoner) against the judgment and order dated 30.12.2014 passed by the International Crimes Tribunal No.01, Dhaka (hereinafter referred to as the Tribunal) in ICT-BD Case No. 05 of 2013 finding the convict-appellant guilty of charge Nos. 2, 3, 4, 5 and 6 brought against him under the International Crimes (Tribunals) Act, 1973 (shortly, the Act of 1973) and convicting and sentencing him to death in respect of charge Nos. 2, 3 & 4 and convicting and sentencing him to rigorous imprisonment for 25 (Twenty five) years in respect of charge No. 5 and rigorous imprisonment for 5(five) years in respect of charge No. 6.

250. I have had the privilege of going through the judgment proposed to be delivered by the learned Chief Justice, Syed Mahmud Hossain. But, with due respect, I am unable to concur with the judgment so far as it relates to affirmation of conviction and sentence of the appellant on charge Nos. 2 and 3 and sentence on charge No. 4 of the Tribunal in ICT-BD Case No. 05 of 2013.

251. For the sake of better understanding of my adjudication of the appeal on charge Nos. 2 and 3, the said charges are quoted below:

Charge No.2

“On 16.04.1971 at about 1.00 P.M. accused A.T.M. Azharul Islam being the President of Islami Chhatra Sangha, Rangpur Unit, along with armed members of Jamaat-Islami, Islami Chhatra Sangha and Pakistani army, in continuation of their planning and blue-print, having

arrived at his area named Taxerhut Railgomti under Badorgonj Police Station by a train, proceeded towards Moksedpur Dhap Para and on the way the Pakistani army with the help of the accused and his said accomplices plundered many houses situated beside the road and then set them on fire. Thereafter, the accused and his accomplices having reached at Dhap Para area attacked the village Moksedpur and started firing indiscriminately and as a result unarmed civilians namely, (1) Jangoli Bhorosha (2) Kerad Hossain alias Bishu (3) Mst. Chini Mye (4) Ammye (5) Momtaz Uddin (6) Mowlovi Abdul Quddus Ali (7) Tamir Uddin alias Tamiz Uddin (8) Moriom Nessa Kalti Mye (9) Sarijannessa alias Sukhi Mye (10) Yusuf Ali [sustained bullet injury but died after Liberation] (11) Shadhina (12) Azizar Rahman alias Khoka (13) Zahir Uddin (14) Osman Ali and others were killed.

252. Thus, the accused has been charged for abetting and facilitating the commission of offences of murder, plundering and arson as crimes against Humanity as specified in section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973”.

Charge No.3

253. “On 17.04.1971 between 12.00 noon and 5.00 P.M. accused A.T.M. Azharul Islam being the president of Islami Chhatra Sangha, Rangpur unit, along with armed members of Jamaat-e-Islami, Islami Chhatra Sangha and Pakistaniarmy, in continuation of their planning and blue-print, with intent to destroy, in whole or in part, a Bangalee national group and a Hindu religious group, made attack widespreadly by setting fire to the villages of Jharuarbeel area namely, Hajipur, Jharuapara, Bujruk Bagbar, Ramkrishnapur, Balapara, Bujruk Hajipara, Bairagi Para, Sardar Para, Ramkrishnapur, Baniapara, Ramkrishnapur Bithhipara, Jogipara, Khorda Bagbar and Khalisha Hajipur and, then the unarmed civilians of those villages being frightened took shelter at the Jharuarbeel. At that time, the accused and his said accomplices having surrounded the Jharuarbeel killed about one thousand and two hundred unarmed women, men, students, babies, etc. by firing indiscriminate shots and they also having caught hold of about more than two hundred Hindu people and students there from took them to unknown place and then killed them. At the time of said atrocities, many houses of that area were plundered and set on fire by them. Thus, the accused has been charged for abetting and facilitating the commission of offences of plundering, arson and murder as crimes against Humanity and also genocide as specified in section 3(2)(a)(c)(g)(h) read with section 4(1) and 4(2) of the Act of 1973.”

Arguments of the Appellantside on Charge Nos. 2 and 3

254. Mr. Khondker Mahbub Hossain, the learned Advocate for the appellant, at the very beginning submits that the appellant side does not deny the atrocities of Pakistani army (shortly, Pak army) with the help of some evil persons of our soil during liberation war, committing offences like murder, plundering and setting fire to houses (arson) as crimes against humanity but adds that the convict-appellant was a boy of 18/19 years at the relevant time and he was neither a perpetrator nor an abettor/facilitator of any of those offences.

255. Mr.Hossain takes us through the judgment and order of conviction and sentence of the appellant passed by the Tribunal, the testimonies of the witnesses, other materials on record and put forward the following arguments before us:

1) Charge Nos. 2 and 3 were brought against the convict-appellant for his individual responsibility/liability but not for superior command responsibility. Therefore, the prosecution has to prove the said charges against the convict-appellant beyond any shadow of

reasonable doubt in view of the provision of rule 50 of the International Crimes (Tribunal-1) Rules of Procedure, 2012 (hereinafter referred to as the Rules).

2) On charge No.2, the learned Judges of the Tribunal have relied on the depositions of P.W.3-Moklesar Rahman Sarker, P.W.4-Md. Meser Uddin, P.W.5-Md. Abdur Rahman, P.W.6-Md. Mokbul Hossain, P.W.7-Md. Aminul Islam, P.W.8-Md. Mujibur Rahman Master and P.W.11- Md. Sakhawat Hossain alias Ranga, while convicting and sentencing the appellant on this charge. But, reliance upon the depositions of the aforesaid witnesses was erroneous as the testimonies of the witnesses were inconsistent in material particulars and it was not humanly possible for the eye-witnesses i.e. P.W.3 and P.W.6 to witness the incident, which is evident from their testimonies. Their depositions were not true and thus, not worthy of credence.

3) The Tribunal convicted and sentenced the appellant on charge No.3 relying on the depositions of P.W.3-Moklesar Rahman Sarker, P.W.4-Md. Meser Uddin, P.W.5-Md. Abdur Rahman, P.W.6-Md. Mokbul Hossain, P.W.8-Md. Mujibur Rahman Master but from the depositions of the aforesaid witnesses it appears that the versions of the said witnesses were discrepant in material particulars and were not worthy of credence.

4) The versions of prosecution witnesses on both charge Nos.2 and 3 as well as other charges were discrepant in three ways,- the first being their stories as placed before the Tribunal are inconsistent/contradictory with the previous statements made before the Investigating Officer during investigation stage, the second being the testimonies as made before the Tribunal by different prosecution witnesses are inconsistent/ contradictory with each other and the third being the depositions made before the Tribunal in their examination-in-chief and cross-examinations are discrepant in material particulars.

5) An investigation report dated 16.09.2012 (exhibit No. 25) as adduced by the prosecution, clearly shows that the appellant was not found involved in the war crimes of 1971.

6) The prosecution could not place any iota of documentary evidence like newspaper cutting, books, etc printed during liberation war and immediately after liberation up to 1975 or onwards at least for a period of 40 years, that the appellant was involved in abetting and facilitating the commission of offences of plundering, arson, rape and murder by Pak army during liberation war. Thus, the convict-appellant ought to have been found not guilty by the Tribunal of all the charges brought against him.

7) Relatives of the deceased persons were not mostly examined in the Tribunal to prove the prosecution case. The evidence of the relatives examined was not credible.

8) Most of the hearsay witnesses did not state the name/names of the person/persons from whom they had heard the incident. Where the witnesses claimed to have heard the incident from certain persons, the depositions of the said persons were not credible.

9) The most important and natural eye-witness P.W.7 Aminul Islam did not mention the name of the appellant at all, although he was the most natural eye-witness and he vividly narrated the incident.

10) The Tribunal failed to appreciate that the ingredients of crimes against humanity were not brought home against the convict-appellant by the prosecution. The Tribunal relying on the discrepant testimonies of the witnesses erroneously found the appellant guilty.

11) The prosecution witnesses were partisan.

12) From the testimonies of the witnesses it was found that the appellant was only a boy of 18/19 years old and so, it was/is not believable that a boy of 18/19 years old would lead and command Pak army in series of incidents.

13) The judgment and order of conviction and sentence of the appellant has been passed by the Tribunal ignoring series of material contradictions and inconsistencies in the evidence on record. The Tribunal also ignored that it was humanly impossible for the eye-witnesses to

witness the incidents as narrated by them and, as such, the appeal is liable to be allowed and the order of conviction and sentence of the appellant is liable to be set aside.

256. Mr. Hossain, in fact, made lengthy and threadbare submissions on contradictions, inconsistencies, etc. of the witnesses and exhibited documents on both charge Nos.2 and 3 as well as other charges. But, I do not like to elaborate the same at this stage to avoid unnecessary repetition thereof as the testimonies of the witnesses would be examined and assessed independently by me at the time of my deliberation.

Arguments for the Chief Prosecutor

i.e. the Respondent on Charge Nos. 2 and 3

257. Mr. Mahbubey Alam, the learned Attorney General, representing the Chief prosecutor of the Tribunal, on the other hand, takes us through the testimonies of the witnesses, other materials on record and submits on charge Nos. 2 and 3, as under:

a. There are no material contradictions in the testimonies of the witnesses. The minor contradictions or omissions are not fatal to the prosecution case. During cross examination, the defence failed to bring out any material or gross inconsistency/contradiction in the depositions made by the witnesses. Therefore, the Tribunal following and relying upon the war tribunal cases of Delwar Hossain Sayedee, reported in 15 ADC 593, Ali Ahsan Md. Mujahid, reported in 20 BLC (AD) 266, Salauddin Quader Chowdhury, reported in 67 DLR (AD) 295, Motiur Rahman Nizami, reported in 13 ADC 607, Mir Quasem Ali, reported in 2 Law Messenger (AD) 364 and the unreported judgment and order dated 03.11.2014 passed by this Division in the case of Quamaruzzaman, legally found the appellant guilty of charge Nos. 2 and 3 and convicted and sentenced him thereunder. There is hardly any scope to interfere with the judgment and order of conviction and sentence of the Tribunal.

b. The incidents took place 41/43 years back. Therefore, it is quite natural that the witnesses may not remember every detail of the incidents and there would be minor contradictions and omissions in the depositions of witnesses due to lapse of such a long period.

c. The eye-witnesses at the time of giving their depositions in court supported the prosecution case without any discrepancy that condemned-prisoner A.T.M Azharul Islam (Azhar) was the leader of Islami Chhatra Shanga, Carmichael College, Rangpur. He on 16/04/1971 at about 1.00 pm actively abetted Pak army in the killing of (1)Jangoli Barasha, (2) Kerad Hossain alias Bishu (3) Mst. Chini Mye (4) Ammye, (5) Momtaz Uddin (6) Mowlovi Abdul Quddus Ali (7) Tamir Uddin alias Tamiz Uddin (8) Moriom Nessa Kalti Mye (9) Sarijannessa alias SukhiMye (10) Yusuf Ali [sustained bullet injury but died after liberation] (11) Shadhina (13) Azizar Rahman alias Khoka (13) Zahir Uddin (14) Osman Ali and others and also abetted Pak army in setting fire at various houses at Dhap Para, Moksedpur. Thus, the Tribunal rightly found him guilty of the charges of abetting and facilitating the commission of offences of murder, plundering and arson i.e. crimes against humanity and convicted and sentenced him under section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973.

d. The prosecution also proved that on 17.04.1971 between 12.00 noon and 5.00 pm the convict-appellant abetted and facilitated the commission of offences of murder, plundering and arson i.e. crimes against humanity at Jharuar Beel. So, the Tribunal rightly found him guilty of the charges under section 3(2)(a)(g) and (h) read with section 4(1) of the Act of 1973 and convicted and sentenced him thereunder.

e. The prosecution examined as many as seven witnesses to bring home charge No.2 against the appellant. Among them P.W.3 Moklesar Rahman Sarker, P.W.6 Md.

Mokbul Hossain, P.W.7 Md. Aminul Islam are eye-witnesses relating to this charge. These witnesses well proved the charge against the appellant beyond any shadow of reasonable doubt. Moreover, their depositions are also corroborated by P.W.4, P.W.5, P.W.8 and P.W.11, who heard the incident immediately after the occurrence.

f. The prosecution also examined 5 witnesses so far as it relates to charge No.3 against the appellant. Among them P.W.4 Md. Meser Uddin and P.W.5 Md. Abdur Rahman are eye-witnesses to the occurrence and they categorically in a voice supported the prosecution case against the appellant. P.W.3, P.W.6 and P.W.8 are hearsay witnesses, who heard the incident immediately thereafter. They also corroborated the depositions of P.W.4 and P.W.5.

g. The appellant does not deny the historical facts but denies his involvement in the charges brought against him as an abettor/facilitator of the above offences committed by Pak army.

h. Applications of the provisions of the Code of Criminal Procedure, 1898 and the Evidence Act, 1872 have been specifically excluded by the Act of 1973.

i. Moreover in the case of the Chief Prosecutor Vs. Abdul Quader Mollah, International Crimes Tribunal, Dhaka reported in 22 BLT (AD)08, it has already been decided that the accused should not be allowed to take contradiction between the depositions of witnesses made before the Tribunal and their previous statements made during investigation. Therefore, the appellant was not legally allowed to take contradictions of the statements made before the Tribunal with their previous statements made during investigation.

j. Under rule 53 of the International Crimes (Tribunal-1) Rules of Procedure, 2012, historical facts need not be proved. However, the culpability of an accused relating to the charges brought against him has to be proved by the prosecution beyond reasonable doubt. In this case, the prosecution could prove the same beyond reasonable doubt.

k. The Tribunal while deciding the case correctly noted that the incident took place in 1971 and witnesses were examined before the Tribunal in 2012 i.e. about 41/43 years after. The witnesses who had seen the incident did not come forward to depose in the Tribunal for fear of reprisal previously and due to such delay most of the material evidence has been destroyed by reason of death of some vital witnesses and change of political atmosphere during intervening period.

l. In the circumstances, the prosecution has collected the best evidence which is available to prove the charges. Therefore, the Tribunal considering the facts, circumstances and the materials placed before it believed the witnesses adduced by the prosecution as reliable. So, it should not be ignored considering the fact that a huge number of persons were brutally killed, some women were raped and many houses were destroyed by fire. The appellant actively abetted in the perpetration of the offences for which he has been charged with and convicted.

m. The appellant failed to show any reasonable ground or material contradiction in the depositions of witnesses so as to disbelieve them.

258. In the above circumstances, the appeal is liable to be dismissed.

Mr. Mahbubey Alam, in detail, read out the relevant incriminating part of the depositions of witnesses in support of his arguments.

However, I do not like to discuss the detail of the said arguments to avoid unnecessary repetition as I intend to assess the evidence independently while deciding the appeal under consideration.

Reply of the Appellant side

259. In reply Mr. Khondker Mahbub Hossain, contends as under:

I. Rule 44 of the Rules provides that the Tribunal should exclude any evidence which does not inspire any confidence in it. Rule 56(1) provides that the Tribunal shall give due weight to the circumstantial evidence of any fact of the case. Rule 50 provides that the burden of proving the charge shall lie upon the prosecution beyond reasonable doubt.

II. The prosecution could not produce any document to the effect that any case/GD was filed/ entered against the appellant immediately after liberation war or within a period of about 40 years since liberation.

III. The prosecution brought allegations against the appellant for the commission of offences on 16.04.1971; 17.04.1971 and 30.04.1971 i.e the second and the last week of April, 1971 and August, 1971 and Mid November, 1971. Out of those five incidents, the appellant has been awarded sentence of death for first three incidents. It appears from the documents submitted by the prosecution that the Al-Badar was established at the end of May, 1971. Exhibit 13 was published on 13.09.1971 and Exhibit 16 was prepared on 17.10.1970. Therefore, it can be safely concluded that the appellant was convicted and sentenced to death for the incidents, when Al-Badar was not even established.

IV. There are number of decisions to the effect that when the question of awarding death sentence comes, the court should be extremely careful. In a case involving capital punishment, the Court should not lightly accept the plea of involvement of the accused without excluding all other rival theories as to the innocence of the accused. If there is any iota of doubt as to the guilt of the accused, the Court should take lenient view in awarding sentence.

V. The prosecution-respondent relying upon the cases of Delwar Hossain Sayedee reported in 15 ADC 593, Ali Ahsan Md. Mujahid reported in 20 BLC (AD) 266, Salauddin Quader Chowdhury reported in 67 DLR (AD) 295, Motiur Rahman Nizami reported in 13 ADC 607 and Mir Quasem Ali reported in 2 Law Messenger (AD) 364 and an unreported judgment and order dated 3.11.2014 passed by this Division in the case of Quamaruzzaman asked for considering 'Old evidence' and the involvement of Islami Chhatra Shangha in the context of 1971 as the facts of common knowledge. But the appellant has been specifically charged for abetting and facilitating commission of offences of murder, rape, abduction, arson as crimes against humanity and genocide. So, in order to determine his culpability, the prosecution-respondent was/is liable to prove specific occurrence with the help of oral, documentary and circumstantial evidence, which it failed to prove beyond reasonable doubt. The convict-appellant was/is the victim of political vendetta. Had he not held the leading position of opposition political party, he would not have been implicated in the instant case.

VI. The prosecution-respondent, excluding all other the then leaders and activists of Jamaat, chose an intermediate student aged 18/19 years, who has now become a leader of opposition political party. Therefore, the trial of the appellant can be safely termed as 'selective prosecution'.

VII. The findings of the Tribunal, that all the living witnesses have directly implicated the appellant with the offences of arson, plundering and murder as narrated in charge Nos. 2 and 3 and that the learned defence counsel has cross-examined these living witnesses thoroughly, but could not shake their evidence and, as such, there is no reason to disbelieve their evidence are totally based on misreading of evidence on record. The Tribunal utterly failed to consider that the testimonies of the eye-witnesses are unreliable, tutored and unnatural, they made serious contradictory depositions and, as such, their depositions had no probative value.

VIII. In the facts and circumstances, the judgment and order dated 30.12.2014 passed by the Tribunal finding the appellant guilty of charges brought against him and

convicting and sentencing him thereunder to death is based on surmise and conjectures without considering gross contradictions and unreliability of the witnesses and of Exhibits. Therefore, it is erroneous and liable to be set aside by allowing the appeal.

Reply of the Prosecution side

260. Mr. Mahbubey Alam, in his reply, finally submits that the Tribunal in consideration of the evidence on record believed testimonies of the witnesses to be natural and the Tribunal correctly observed that there were only some minor inconsistencies and contradictions while convicting and sentencing the condemned-prisoner. So, there is no reason to interfere with the self-contained and well-reasoned judgment and order of conviction and sentence on the charges brought against the convict-appellant. Therefore, the appeal is liable to be dismissed.

Examination of Records

261. I have examined the depositions of prosecution witnesses, the exhibited documents as adduced by the prosecution, the judgment and order of conviction and sentence of the Tribunal and the other connected materials on record. I have also gone through the relevant provisions of law.

Deliberation of the Court

262. The history of partition of India and birth of two countries- India and Pakistan, the history of our liberation war, genocide committed by Pak army with the aid of Rajakar, Jamaat-E-Islami, Islami Chhatra Sangha, Shanti Committee, Al-Badar, Al-Shams, etc, Freedom Fighters' role in liberation war and eventual liberation and freedom of Bangladesh have been discussed by my learned brother elaborately at the beginning of the judgment. So, it needs no further discussion. However, before starting my deliberation I must say that the barbaric act of Pak army in committing rape, genocide (mass killing), arson, plundering i.e. crimes against humanity during the war of liberation of Bangladesh with the help of some evil persons of our soil causing immense human sufferings are absolutely condemnable. However, while deciding the case, I must confine myself in assessing the evidence adduced by the prosecution judiciously without any favour towards anyone in accordance with the Act of 1973 and the Rules made thereunder.

Charge No. 2

263. The date, time and place of occurrence of charge No.2 are on 16.04.1971 at about 01:00 pm for mass killing at Dhap Para, Moksedpur and plundering and arson of many houses from taxerhut on the way to Dhap Para, Moksedpur.

At the outset, I would like to note that while deciding the merit of the charge, the learned Judges of the Tribunal have not made any elaborate discussion pointing out the contradictions/omissions, etc. of the witnesses. Tribunal observed that:

“We find some minor inconsistencies and contradictions among the evidence of the above mentioned prosecution witnesses but an assessment is to be made on the basis of the totality of the evidence presented in the case. The Tribunal, however, is not obliged to address insignificant inconsistencies, if occur in witnesses' testimonies. In this context, we may refer to the decision of ICTR Appeals Chamber held in the case of Muhimana as under:

“The Appeals Chamber reiterates that a trial chamber does not need to individually address alleged inconsistencies and contradictions and does not need to set out in detail why it accepted or rejected a particular testimony.”

[ICTR Appeals Chamber, judgment May 21, 2007, para-99]

(Underlined by me)

264. However, under rule 53 of the Rules, which is the law of our land, “the party shall be at liberty to cross examine such witness on his credibility and to take contradiction of the evidence given by him.”

Therefore, I am of the view that in order to decide whether the contradictions are minor or major, those contradictions ought to have been addressed by the Tribunal, at least for the purpose of enabling the appellate court to assess the nature of those contradictions or omissions or inconsistencies.

265. Be that as it may, before entering into the merit of the charge under consideration, I would like to quote firstly, the provision of rule 53 of the International Crimes (Tribunal-1) Rules of Procedure, 2012 which was prevalent during trial and at the time of pronouncement of judgment and till date. The provisions of this rule read as under:

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

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

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

(Bold, emphasised)

266. Therefore, under rule 53(2) of the Rules the Tribunal has to allow cross examination on the **credibility** of the witnesses. So, evidently, it has to consider and decide the credibility of the witnesses. There is no scope to decide otherwise.

In the above context, I would like to discuss the credibility of the witnesses first.

267. P.W.3 Moklesar Rahman Sarker is a prosecution eye-witness of the case. This witness stated on oath-“১৯৭১ সালের ১৬ই এপ্রিল তারিখে রংপুর থেকে একটি ট্রেন টেকশোরহাট সংলগ্ন ৬নম্বর রেল গেইটে পৌঁছে। উক্ত ট্রেনে পাকিস্তান আর্মি, এটিএম আজহারুল ইসলাম এবং আরো জামায়াত ইসলামীর লোকজন সে জায়গায় আসে...পাকিস্তান আর্মি, এটিএম আজহারুল ইসলাম এবং জামায়াত ইসলামীর লোকজন তখন উক্ত ট্রেন থেকে নেমে উত্তর দিকে অগ্রসর হতে থাকে এবং পথের দুই ধারে বাড়ি ঘর আগুন দিয়ে পুড়িয়ে দেয় এবং গুলি ছুড়তে থাকে। ফলে মানুষজন ভয়ে এদিক সেদিক পালাতে থাকে। তারপর তারা মিলেরডাঙ্গা হয়ে আমাদের বাড়ি ও গ্রামে এসে পৌঁছায়। পাকিস্তান আর্মি ও তাদের সহযোগীরা আমাদের গ্রামের দিকে আসা লক্ষ্য করে আমার মা, দুই ভাই ও দুই বোন ০৪ কিলোমিটার উত্তর দিকে পাঠানোর হাট নামক এলাকায় চলে যায়, আমি ও আমার বাবা বাড়ি পাহারা দেওয়ার জন্য বাড়িতে থেকে যাই। পাকিস্তানী আর্মি ও তাদের সহযোগীরা আমাদের গ্রাম ঘেরাও করে ফেললে আমি একটি ঝোপের মধ্যে লুকিয়ে পড়ি এবং আমার বাবা পালাতে গিয়ে তাদের হাতে ধরা পড়ে। তখন আমি ঝোপের ভিতর থেকে দেখতে পাই যে, আমার বাবা এটিএম আজহারুল ইসলামের পা ধরলে তিনি ধাক্কা দিয়ে ফেলে দেন এবং তখন পাকিস্তানী আর্মিরা আমার বাবাকে গুলি করে হত্যা করে। আমি জামায়াত নেতা এটিএম আজহারুল ইসলামকে চিনতাম কারণ তিনি ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে ভোট চাইতে আমাদের এলাকায় এসেছিল। আমি ঝোপের ভিতর থেকে আরো দেখতে পাই যে, আমাদের গ্রামের মুন্সী কুদ্দুসকে তারা একই ভাবে হত্যা করে। পাকিস্তানী আর্মি ও তাদের সহযোগীরা চলে যাওয়ার পরে আমাদের গ্রামের বিভিন্ন জায়গায় ১৫ জনের লাশ পড়ে থাকতে দেখি। তাদের মধ্যে আমার বাবা মমতাজ আলী সরকার, কুদ্দুস মুন্সী, জহির উদ্দিন, চিনি মাই, আম মাই, জঙ্গলি ভরসা, বিষু, তমির উদ্দিন, আবু, টিনা, কালটি মাই, সাধিনা, ইউসুফ আলী ছিল।...”

During cross examination, he stated that- “পরে গ্রামের লোকজন জমায়েত হলে তাদের কাছে শুনি... আমরা তিন ভাই দুই বোন। আমার ভাই বোনদের মধ্যে সবচেয়ে বড় মোজাম্মেল সরকার, এরপর আমি। আমার পরে আমার এক ছোট ভাই ও দুই বোন রয়েছে। আমার বড় ভাই বর্তমানে জীবিত আছেন।

“৬ নম্বর রেল গোমটি হতে ৪/৫ কিলোমিটার উত্তরে ধাপপাড়া অবস্থিত। ধাপপাড়া থেকে ০১ কিলোমিটার উত্তর-পশ্চিম দিকে আমাদের বাড়ি। ধাপপাড়া থেকে আমাদের বাড়িতে যেতে মাঝে অনেকগুলি বাড়ি ঘর আছে, সে বাড়িগুলোর মধ্যে নূরুন্-মন্ডল, মজিবর, নূর আলম, তহিদুল ডাক্তার, শহিদুল মন্ডল, আশিক আলী মন্ডল ও আরো অনেকের বাড়ি ঘর আছে।... আমি কুলে লেখাপড়া করি নাই। আমার বড় ভাই ও ছোট ভাই লেখাপড়া করেছে।...”

(Underlined by me)

268. Thus, from his deposition, the following facts stand revealed:

(I) This witness did not mention the time of occurrence. He did not even mention if the incident took place in the morning, noon, afternoon, evening or at night.

(II) The house of this witness was/is at least 3/4 kilometers far from No. 6 Goumti/Rail Gate.

(III) The witness did not say that he had seen or heard the incident from any one. He gave testimony before the Tribunal in such a manner, which shows that he has seen the whole incident himself, including getting down of Azhar from the train with Pak army and others. Thus, his deposition about this part of the incident is vague.

(IV) It is humanly impossible to see or recognize any person from a distance of 3/4 kilometers with naked eyes. So, testimony of this witness to the effect that A.T.M Azharul Islam got down from the train with Pak army is concocted.

(V) P.W.3 started giving deposition on oath before the Tribunal with falsehood. It is true that if a part of deposition of a witness is found to be false, it would not make the evidence of such witness as false in entirety. However, it creates a serious doubt about the genuineness of the rest part. So, the rest part must be assessed very cautiously by the court while dealing with such witness.

(VI) Subsequent part of deposition of P.W.3 shows that his mother, two other brothers including his elder brother and sisters all left for Pathan Hat after Pak army came to their village and their house. But, this witness remained in the house with his father and witnessed the incident.

(VII) This witness stated that he was 56 years old on the date of his deposition on 05.03.2014. So, he was a boy of only 12/13 years old at that time. Therefore, if all others left their house including his mother and elder brother out of fear of Pak army and their accomplices, there was no earthly reason for him to stay with his father. It is not a natural human conduct.

(VIII) He admitted that,- “আমার মা মারা যাওয়ার তারিখ মনে নাই, তবে মা মারা যাওয়ার এখনো দুই বছর পূর্ণ হয় নাই। আমার বিয়ের তারিখ মনে নাই, তবে ১৯৭৫ সালে আমার বিয়ে হয়েছিল। আমার ছেলে মেয়ের জন্ম তারিখ আমি বলতে পারব না, তবে সেগুলি সব লেখা আছে।.....” He also deposed that,- “আমাদের গ্রামের মসজিদের ওয়াকফ সম্পত্তি নিয়ে একটি ফৌজদারী মামলায় ৩১ জন আসামীর মধ্যে আমিও আসামী ছিলাম।” and that “আমি জামায়াত নেতা এটিএম আজহারুল ইসলামকে চিনতাম কারণ তিনি ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে ভোট চাইতে আমাদের এলাকায় এসেছিল।.....” (vide cross-examination)

(IX) This witness was unable to remember the date of his mother’s death, which occurred within two years, the date of his marriage and also the dates or years of birth of his son and daughter. Therefore, it is totally unbelievable that he would remember the exact date of occurrence i.e. 16.04.1971, though, he may only remember the year of 1971, because it is an important year due to liberation of Bangladesh, our beloved country.

(X) He is/was an accused of a criminal case.

(XI) His elder brother is alive but neither his elder brother nor any member of his family came forward to support the prosecution case that only P.W.3 remained with his father while all other members of the family left their house at the time of occurrence. Even as a hearsay witness none of the family members came forward to depose before the Tribunal.

(XII) From his evidence it is found that the house of the witness is at North Ramnathpur, P.S-Badarganj, District-Rangpur and his father's name is Momtaz Ali Sarkar. But, the place of occurrence of charge No.2 about firing and killing is Dhap Para, Moksedpur. So, it is not believable that he saw the incident of Dhap Para, Moksedpur a different village.

(XIII) The incident of killing at North Ramnathpur of Badarganj is not at all included in charge No.2.

(XIV) According to P.W.3, his father's name was/is Momtaz Ali Sarkar and not Momtaz Uddin as mentioned in the charge. But Momtaz Uddin of Moksedpur and others were killed by Pak army according to charge No.2 and not Momtaz Ali Sarker of North Ramnathpur.

(XV) The witness mentioned that his name was/is Moklesar Rahman Sarker @ Md. Mokles Ali but he did not say that his father's name was Momtaz Ali Sarkar alias Momtaz Uddin.

269. In consideration of the totality of deposition of P.W.3 and for the reasons discussed hereinabove, I am of the considered view that the evidence of P.W.3 is neither believable nor credible. So, his testimony has no probative value.

270. P.W.6 Md. Mokbul Hossain is a prosecution eye-witness. He stated that “১৯৭০ সালে যে নির্বাচন হয় সেই নির্বাচনে আফজাল হোসেন, মোখলেছুর রহমানের সঙ্গে এটিএম আজহারুল ইসলাম নির্বাচনী প্রচারণার কাজে একাধিকবার আমাদের এলাকায় আসে। তখন থেকেই তাকে আমি চিনি। ১৯৭১ সালে ১৬ই এপ্রিল তারিখে মুক্তিযুদ্ধের সময় এটিএম আজহারুল ইসলাম পাক সেনাদের সাথে ট্রেনে করে টেকশোর হাটের ৬নং রেল গোমটিতে আসে। তারা ট্রেন থেকে নেমে টেকশোর হাটের উত্তর দিকে ধাবিত হয় এবং ঐ এলাকার বাড়ি ঘরে অগ্নিসংযোগ ও গোলাগুলি করে। পাক সেনারা ও এটিএম আজহারুল ইসলাম আমাদের গ্রামে আসলে আমি আমার মাকে নিয়ে ধাপপাড়ার দিকে দৌড়াইতে থাকি। আমার মা এক পর্যায়ে দৌড়াইতে না পারিয়া আমাকে বলে তুমি দৌড়ে পালাও আমি ধীরে ধীরে রাস্তা দিয়ে যাব। আমি তখন ক্ষেতের আইল দিয়ে দৌড়াইতে থাকি, কিছুদূর যাওয়ার পরে গুলির আওয়াজ শুনি। আমি ফিরে দেখি এটিএম আজহারুল ইসলাম ও দুই জন পাক সেনারা আমার মাকে গুলি করেছে। আমার মা আত্মচিৎকার দিয়ে মাটিতে পড়ে মারা যায়। আমি জীবন ভয়ে ফলিমাড়ি নদীর দিকে দৌড় দেই। মাঝ পথে দেখি এটিএম আজহারুল ও পাক সেনারা তমিজ নামে এক লোককেও গুলি করে হত্যা করে। আমি ঐ নদীর পাশের গর্তে লুকাই। সেখানে আনুমানিক তিন ঘণ্টা লুকিয়ে ছিলাম। তারপর মাথা উচু করিয়া দেখি এটিএম আজহারুল ইসলাম ও পাক সেনারা ধাপপাড়া, মুন্না পাড়া, ঠনঠনি পাড়া, মোল্লা পাড়ার বিভিন্ন বাড়ি-ঘরে অগ্নিসংযোগ করে এবং প্রায় ১৪/১৫ জন লোককে গুলি করে হত্যা করে। এরপরে এটিএম আজহারুল ইসলাম ও পাক সেনারা টেকশোর হাটের দিকে চলে যায়। এরপরে গ্রামের লোকজন গ্রামে ফিরতে শুরু করে। আমিও গ্রামে ফিরার পথে মামার সঙ্গে দেখা হয়। মামাসহ আমি ধাপপাড়ায় আসি। সেখানে এসে দেখি ৪/৫জন লোককে হত্যা করা হয়েছে।

During cross examination on 30.03.2014, he stated that “ আমরা চার ভাই, কোন বোন নাই। আমার এক ছেলে এক মেয়ে। When cross-examination resumed on the next day that is on 31.03.2014, he stated that,- “আমার প্রথম স্ত্রীর নাম ছিল মোসলেমা, সে আমার কাছ থেকে তালুক নেয় ১৯৭১ সালে যুদ্ধের সময়, তার বাবার ইচ্ছায়। ফজিলা খাতুন নামে আমার আরেক জন স্ত্রী ছিল। সে বর্তমানে আমার সাথে নাই, অন্যের সাথে চলে গেছে। আমার বর্তমান স্ত্রীর নাম রেহেনা। বর্তমান স্ত্রীর ঘরে দুই মেয়ে আছে, তাদের নাম মাজিদা ও মনিজা। ফজিলা খাতুনের ঘরে এক ছেলে, তার নাম নূরুলবী, এক মেয়ে মঞ্জিলা। নূরুলবীর বর্তমান বয়স ৩৩ কিনা তাহা আমি বলতে পারব না। মঞ্জিলা নূরুলবী থেকে বয়সে বড়। সঠিক ভাবে স্মরণ করতে না পারায় গতকাল আমি বলেছি আমার এক ছেলে এক মেয়ে আছে। মতিয়ার, মজিবুর, আমজাদ ও আমি মকবুল এই আমার চার ভাই। আমার বাবারা দুই ভাই ছিলেন। আমার তিন ভাই ১৯৭১ সালের পূর্বেই মারা গিয়েছে। ১৯৭১ সালে আমি অন্যের জমি চাষাবাদ করতাম। আমি লেখাপড়া জানি না। ১৯৭১ সালের ১৬ই এপ্রিল কি বার ছিল তাহা আমি বলতে পারব না। বর্তমানে আমি অন্যের বাড়িতে কৃষি কাজ করি। ১৯৭০ সালে আমাদের এলাকায় মুসলিম লীগের নেতা কে ছিল তাহা আমার স্মরণ নাই। আমাদের বাড়ি ৮নং ইউনিয়নে অবস্থিত। ১৯৭০/৭১ সালে আমাদের ইউনিয়নের চেয়ারম্যান ছিল জহির

উদ্দিন। বর্তমানে আমাদের ইউনিয়নের চেয়ারম্যানের নাম জাহাঙ্গীর। আমার বাড়ি থেকে ৬নং রেল গোমটি দক্ষিণে আনুমানিক তিন/সাড়ে তিন কিলোমিটার দূরে হবে। ঐ রেল গেইট ও আমার বাড়ির মাঝখানে বাড়ি-ঘর ছিল তবে এখনকার থেকে কম। আমি এটিএম আজহারুল ইসলামের বাড়িতে কখনও যাই নাই তাই তার বাড়ি চিনি না, তবে শুনেছি তার বাড়ি লোহানি পাড়ায়।১৬ই এপ্রিল ১৯৭১ সালে আমি যখন আমার মাকে রাস্তায় ছেড়ে ক্ষেতের আইল দিয়ে যাচ্ছিলাম তখন ক্ষেতের মধ্যে ফসল ছিল কিনা তাহা আমার স্মরণ নাই। আমি যখন আইল দিয়ে যাচ্ছিলাম তখন আমার মা যে রাস্তা দিয়ে যাচ্ছিল সেই রাস্তা থেকে আমাকে দেখা যেত না, কেননা ঐ সময় আমি হামাগুড়ি দিয়ে লুকিয়ে যাচ্ছিলাম, তবে আমি রাস্তার লোক চলাচল দেখতে পাচ্ছিলাম। মাকে রাস্তায় রেখে দৌড়ে আধা কিলোমিটার দূরে নদীর কাছে যাই।

আমি ফিরে দেখি এটিএম আজহারুল ইসলাম ও দুই জন পাক সেনারা আমার মাকে গুলি করেছে।...

271. It appears from the above testimony of P.W.6 that in the examination-in-chief he stated that he was running through the ail of fields (জমির আইল) and he saw A.T.M. Azharul Islam with Pak soldiers shooting and killing his mother. But, according to charge No.2, the convict-appellant A.T.M. Azharul Islam being President of Islami Chhatra Sangha helped Pak army for committing the offences of plundering, setting fire and killing. There is no allegation that A.T.M. Azharul Islam himself shot at the mother of Md. Mokbul Hossain.

Moreover, during examination-in-chief he stated that he was running through the ail of fields (জমির আইল) and heard the sound of shots. It is impossible to see who had shot at a person if anyone looks back after hearing the sound of shots. Therefore, this witness exaggerated about seeing Azharul to fire shot at his mother.

He could not even remember the number of his own children. During cross-examination he told before the Tribunal that he has one son and one daughter but from later part of his testimony it is found that he had/has several children. He is illiterate and could not say “১৯৭১ সালের ১৬ এপ্রিল কি বার ছিল আমি বলতে পারবো না।” So, it was impossible for him either to remember or to say the date of occurrence unless he is tutored.

At the time of examination-in-chief he stated that he was running but during cross examination, he stated that he was crawling, which is contradictory to each other.

Further he stated that he took shelter in a hole of a river side and was hiding himself for 3 hours and then looked out. If he was hiding himself there for 3 hours, it was not possible for him to witness various incidents of 16.04.1971 and that too of several villeges namely, Dhap Para, Murdapara, Thonthonipara and Mollapara as stated by him. He also stated that he and his maternal uncle came to the place of occurrence and heard that A.T.M Azharul Islam with the help of Pak army committed the offences of killing, setting fire. During cross-examination, he admitted that his maternal uncle is still alive but his maternal uncle Abdul Kaleque was not examined by the prosecution.

It is hardly believable that he would know the name of A.T.M. Azharul Islam and recognize him, who is a person from another locality/area. No doubt, he is a tutored witness.

272. Considering the totality of the testimony of Md. Mokbul Hossain, I am constrained to hold that his deposition is exaggerated, not natural and contradictory with the deposition made in the examination-in-chief and cross-examination. It was not possible for him to see the incidents for the reason discussed above. Therefore, his deposition as to charge No.2 is not believable. It may be mentioned that he did not also state the time of occurrence of charge No.2. Thus, his deposition has no probative value.

273. P.W.7 Aminul Islam is another prosecution eye-witness. In his examination-in-chief he stated- “মুক্তিযুদ্ধের সময় আমি পড়াশোনা করতাম এবং আমি মুক্তিযুদ্ধের একজন সংগঠক ছিলাম। ১৯৭০ সালে আমাদের এলাকায় জামায়াতে ইসলামীর প্রার্থী ছিলেন আফজাল হোসেন এবং মোখলেছুর রহমান এবং আওয়ামী লীগের প্রার্থী ছিলেন আনিছুল হক চৌধুরী ও মজিবুর রহমান মাস্টার।

১৯৭১ সালের ১৬ই এপ্রিল দুপুরের দিকে রংপুর থেকে একটি ট্রেন পাকিস্তানী আর্মি ও তাদের এদেশীয় দোসর সহ সেই ট্রেনে টেকশোর হাট ৬নং রেল গোমটিতে এসে দাঁড়ায় এবং ট্রেন থেকে নেমে তারা সকলেই উত্তর দিকে অগ্রসর হতে থাকে এবং

রাস্তার দুই ধারে অবিস্তৃত বাড়ি ঘর অগ্নিসংযোগ এবং এলোপাতারি গুলি করতে করতে ধাপপাড়া গ্রাম ঘেরাও করে ফেলে। ঐ সময় আমার চাচা ইউসুফ আলীর বাড়িতে একটি মাটির ঘরে আমার বড় আশ্মা (চাচী) মরিয়ম নেছা ওরফে কালটি মাই, যিনি নয় মাসের অন্তঃস্বস্তা ছিলেন এবং আমি অবস্থান করছিলাম। তারপর আমার চাচী আশ্মা বলে পাকিস্তানী আর্মিরা খুব কাছাকাছি এসে গেছে, চলো আমরা বাড়ি থেকে পালিয়ে যাই। আমার বড় আশ্মা বাড়ি থেকে বের হয়ে যায় কিন্তু আমি ঘরেই অবস্থান করতে থাকি। বাড়ি সংলগ্ন রাস্তায় পাকিস্তানী আর্মিরা আমার বড় আশ্মাকে ধরে ফেলে। তখন আমার বড় আশ্মা পাকিস্তানী আর্মিদের পা জড়িয়ে ধরে চিৎকার করে বলে, আমি নয় মাসের অন্তঃস্বস্তা, আমাকে মেরো না- আমাকে মেরে ফেললে আমার গর্ভের সন্তানও মারা যাবে। আমি তখন মাটির ঘরের জানালা দিয়ে ঐ ঘটনা দেখছিলাম। পিছন দিক থেকে একজন পাক সেনা এসে আমার বড় আশ্মাকে গুলি করে। বড় আশ্মা মারা যায় এবং তার গর্ভের সন্তানটি নষ্ট হয়ে যায়। এরপর পাকিস্তানী আর্মিরা সেখান থেকে আরো উত্তর দিকে অগ্রসর হতে থাকে। পাকিস্তানী আর্মিরা আমাদের গ্রামে এলে আমার চাচা ইউসুফ আলী আত্মরক্ষার জন্য বাড়ির কাছে একটি বড় বট গাছের উপরে আশ্রয় নেয়। আমার বড় আশ্মাকে গুলি করে হত্যা করার পর পাকিস্তানী আর্মিরা ঐ স্থান থেকে আরো উত্তর দিকে চলে গেলে আমার চাচা ইউসুফ আলী গাছ থেকে নেমে বাড়িতে আসে, বাড়ির অবস্থা দেখার জন্য। তিনি তার নিজ ঘরে ঢুকে দেখেন তার জীবিকা নির্বাহের মাছ ধরা জাল ও টেবিলে রক্ষিত একটি রেডিও পাকিস্তানী আর্মিরা নিয়ে গেছে। পাকিস্তানী আর্মিরা কিছু সময় পরে যখন পুনরায় গ্রামের দিকে ফিরে আসছিল তখন আমার চাচা রাস্তায় গিয়ে পাকিস্তানী আর্মিদের ঐ জাল ও রেডিওটি ফেরত দেওয়ার জন্য অনুরোধ করে। আমি তখন বাড়ির বাহিরে ঝোপের মধ্যে লুকিয়ে দেখছিলাম। তখন একজন পাকিস্তানী আর্মি বলে ম্যাগা বুট বাদ বলেগা-এই কথা বলে তাকে গুলি করে হত্যা করে। ঐ দিন আমার চাচা ও বড় আশ্মাসহ প্রায় ১৫ জনকে ঐ পাকিস্তানী আর্মি ও তাদের এদেশীয় দোসররা হত্যা করে। যারা নিহত হয়েছিলেন তাদের মধ্যে জঙ্গলী ভরসা, আম মাই, চিনি মাই, বিষু, ওসমান আলী, ছহির আলী, জহির আলী, মৌলভী আব্দুল কুদ্দুস, মমতাজ, তমির উদ্দিন, আজিজার রহমান খোকা, সাধিনা, আমার চাচী মরিয়ম নেছা কালটি মাই, চাচা ইউসুফ আলী ছিলেন।”

274. Thereafter, this witness was declared hostile by the prosecution as he did not mention the name of the appellant. During cross examination by the prosecution he stated-
 “.....আমি পাকিস্তানী আর্মিদের সাথে আসা এদেশীয় দোসরদের কারো নাম বলতে পারব না। আমার মনে কোন ভয় কাজ করছে না। মুক্তিযুদ্ধের সংগঠক হিসাবে নিজ এলাকায় যারা মুক্তিযুদ্ধের পক্ষে এবং যারা বিপক্ষে ছিল তাদের নাম জানা স্বাভাবিক এবং আমার নিজ এলাকার মুক্তিযুদ্ধের ইতিহাস মুক্তিযুদ্ধ সময়কালীন সময় হতে এ পর্যন্ত আমাদের এলাকার সকলে জানে আমিও জানি। আমার এলাকায় যে সমস্ত রাজনৈতিক দল আছে সে সমস্ত দলগুলো সম্পর্কে জানি এবং সেই সমস্ত দলের নেতা কর্মীদের ভূমিকা সম্পর্কে আমার যথেষ্ট জ্ঞান আছে। ১৯৭১ সালে মুক্তিযুদ্ধ চলাকালীন সময় স্বাধীনতা বিরোধী রাজনৈতিক দলের নেতাকর্মীদের আমি চিনি, তাদের নাম ও ভূমিকা সম্পর্কেও জানি। আমার এলাকা বদরগঞ্জের ১৯৭১ সালের মহান মুক্তিযুদ্ধের সময় স্বাধীনতা বিরোধী জামায়াতে ইসলামীর ছাত্র সংগঠন ইসলামী ছাত্র সংঘের নেতা এটিএম আজহারুল ইসলাম সাহেবের মামলায় তার বিরুদ্ধে সাক্ষ্য দিতে এসেছি। এটিএম আজহারুল ইসলাম ১৯৭০ সালের নির্বাচনে জামায়াতে ইসলামীর প্রার্থীর পক্ষে নির্বাচনী প্রচারণায় আমাদের এলাকায় গিয়েছিলেন কিনা তাহা আমার জানা নাই। ইহা সত্য নহে যে, আমি মুক্তিযুদ্ধের সংগঠক হিসাবে নিজেকে দাবী করে মুক্তিযুদ্ধ চলাকালীন সময়ে আমার গ্রামে পাকিস্তানী আর্মিদের এদেশীয় সহযোগীদের প্রকৃত নাম গোপন করিয়াছি। ইহা সত্য নহে যে, আমার চাচী মরিয়ম নেছা ওরফে কালটি মাইকে পাকিস্তানী আর্মিরা তাদের এদেশীয় দোসর আসামী এটিএম আজহারুল ইসলামের উপস্থিতিতে এবং তার নির্দেশে হত্যা করা হইয়াছে, তাহা আমি গোপন করিয়াছি।”

So, this eye-witness, who is a very close-relative of deceased victim Yusuf Ali(Chacha) and kaltimai(Chachi) did not support the prosecution case that the appellant was involved in the incident of charge No. 2.

275. P.W.4 is Md. Meser Uddin and he is hearsay witness to this charge. Vital part of his testimony is that ল...ঐ নির্বাচনে জামায়াতে ইসলামীর প্রার্থীদের পক্ষে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামীর ছাত্র নেতা হিসাবে এবং ঐ এলাকায় (বদরগঞ্জ থানাধীন) তাহার বাড়ি হওয়ায় তিনি তাদের পক্ষে সক্রিয় ভাবে নির্বাচনী প্রচারণায় অংশ নেয়।...আমার বাড়ি থেকে পূর্ব দিকে ৩ কিলোমিটার দূরে ১০ নং রেল গেইট। আমাদের বাড়ি থেকে ৩ কিলোমিটার দক্ষিণ দিকে ঝাড়ুয়ার বিল। ১৫ই এপ্রিল ১৯৭১ সালে পাক বাহিনী ও তাদের এদেশীয় দোসরেরা রামনাথপুর ইউনিয়নের আমাদের পাড়াসহ কয়েকটি পাড়ায় অগ্নিসংযোগ করে এবং জ্বন্মন, ভুলু বাউলা, মুসারো কাইলটা এবং কান্দুকে হত্যা করে। পরদিন ১৬ই এপ্রিল রংপুর থেকে একটি ট্রেনে করে পাক বাহিনী ও এটিএম আজহারুল ইসলামের নেতৃত্বে তার সহযোগীরা ৬নং রেল গেইটে আসে। ট্রেন থেকে নেমে ঐ পাক বাহিনী এবং এটিএম আজহারুল ইসলাম সহ উত্তর দিকে রামনাথপুর ইউনিয়নের মোকছেদপুর এলাকার দিকে অগ্রসর হতে থাকে এবং দুই পাশের বাড়ি-ঘরে অগ্নিসংযোগ ও গুলি বর্ষণ করতে থাকে। উক্ত এলাকার লোকজন ভয়ে আতংকিত হয়ে জীবন বাঁচানোর জন্য উত্তর মোকছেদপুর এবং ধাপপাড়া এলাকার দিকে পালাতে থাকে। তখন পাক বাহিনী ও এটিএম আজহারুল ইসলাম এবং তার সহযোগীরা ঐ গ্রাম ঘেড়াও করে ১৫ জনকে হত্যা করে। যাদেরকে হত্যা করে তাদের মধ্যে জঙ্গলী ভরসা, বিষু, মমতাজ, আনু মাই, কালটি মাই, তমির উদ্দিন ছিল। ঘটনার সময় কালটি মাই নয় মাসের গর্ভবতী ছিল।

তাকে যখন গুলি করা হয় তখন তার পেটের বাচ্চা বের হয়ে যায়। শহীদ জঙ্গলী ভরসা আমার আপন চাটীর বাবা। এই ঘটনা আমি নিজে দেখি নাই, তবে আমিনুল, মোখলেছ, মকবুল, আজমল খান সহ আরো অনেকের নিকট থেকে ঐ ঘটনার কথা আমি শুনেছিলাম।.....

During cross-examination P.W.4 stated that “জঙ্গলী ভরসার দুই বা তিনজন ছেলে বর্তমানে জীবিত আছে। তাদের নাম সম্ভবত আব্দুল হালিম ও আবু তাহের।”

Thus, it is evident that,-

(I) This witness is a hearsay witness on charge No.2 and that he heard the incident from Aminul, Mokles, Mokbul and Ajmal Khan.

(II) The testimony of P.W.3 Moklesar Rahman Sarker and P.W.6 Mokbul Hossain are not believable for the reasons discussed earlier.

(III) The other vital witness P.W.7 Aminul Islam (P.W.7) who had witnessed the entire incident, did not at all mention the name of A.T.M Azharul Islam as an abettor or facilitator of the offences charged with. The hearsay witness shall corroborate the eye-witness from whom he has heard the incident. Unless the eye-witness in his testimony states the name of an accused, the testimony of a person who claims to have heard it from him cannot be believed. In this case, the victim is a close relative of P.W.7 and he vividly described the incident, but he did not mention the name of the convict-appellant to fasten him with the charge. The prosecution has failed to explain as to why P.W.7 did not mention the name of Azhar. We find no reason as to why this witness would not disclose the name of Azhar if Azhar was physically present at the time of occurrence and abetted Pak army. There is no scope to presume that this witness did not mention the name of Azhar intentionally if we consider his testimony as a whole.

(IV) Ajmal Khan has not been examined by the prosecution.

(V) According to charge No.2 Jangoli Bhorosha was killed on 16.04.1971. His two sons named Abdul Hakim and Abu Taher are still alive but they were not examined by prosecution.

Therefore, the testimony that P.W-4 heard the name of A.T.M. Azharul Islam from Aminul and others cannot be true.

276. P.W.5 Md. Abdur Rahman stated that “ আমার বাবাকে কে মেরেছে তাহা আমি নিজে দেখি নাই, আমার বাবাও আমাকে বলে নাই। সাক্ষী পরে বলেন যে, ঘটনার সময় আমাকে আমার বাবা বলেন নাই, তবে পরে বাবা আমাকে ঘটনার কথা বলেছেন। লোকমুখে শুনে পাই যে, আমার বাবা গুলিবিদ্ধ হইয়া আহত হয়েছেন। পরে আমরা আহত অবস্থায় তাকে উদ্ধার করি, কিন্তু সূচিকিৎসা করতে না পারায় স্বাধীনতার পরে তিনি মারা যান। আমার বাবা আমাকে বলেন বাঙ্গালীই আমাকে গুলি করেছে, হত্যা করার জন্য নয় শাস্তি দেওয়ার জন্য।

Thus, it appears that this witness did not mention the date, time and place of occurrence of killing his father Yusuf Ali Sarkar. It is also found that his father was alive but he did not utter the name of the person who was responsible for his father’s injury. This witness testified that his father had died for lack of proper treatment. This is evident that he did not support the prosecution case about involvement of the appellant in the killing of his father on charge No.2.

277. P.W.8 Mojibur Rahman Master is the last prosecution hearsay witness. He was the General Secretary of Awami League, Badarganj in 1970. He stated that “...জাতীয় পরিষদে ও প্রাদেশিক পরিষদে জামায়াতে ইসলামীর প্রার্থী ছিলেন যথাক্রমে মোখলেছুর রহমান এবং মীর আফজাল হোসেন। আমি আওয়ামী লীগের প্রার্থীদের পক্ষে নির্বাচনী প্রচারণা কাজে অংশ নেই, অন্যদিকে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামী প্রার্থীদের পক্ষে নির্বাচনী প্রচারণায় অংশ নেয়। নির্বাচনে আওয়ামী লীগের উভয় প্রার্থী জয় লাভ করেন।..... “ ১৬ই এপ্রিল আমি জানতে পারলাম যে, রংপুর থেকে একটি ট্রেন ৬নং রেল গোমটি টেকশোর হাটের নিকট এসে থামে। ঐ ট্রেন থেকে পাকিস্তানী আর্মি, জামায়াতে ইসলামীর লোকজন ও এটিএম আজহারুল ইসলাম নেমে উত্তর দিকে মোকশেদপুর গ্রামের দিকে গুলি করতে করতে অগ্রসর হয়। ঐ সময় ভয়ে এলাকার লোকজন ছোট্টাছুটি শুরু করলে পাকিস্তানী আর্মি ও জামায়াতে ইসলামীর লোকজনের গুলিতে ১৫জন লোক নিহত হয়। নিহতদের মধ্যে নারী ও শিশুও ছিল। নিহতদের মধ্যে একজনের নাম আমার মনে আছে, তার নাম কালটি মাই। পরবর্তীতে আমি ঘটনাস্থলে গেলে মোখলেছুর রহমান, মকবুল এবং আমিনুল ইসলামের কাছে জানতে পারি যে, ঐ

গোলাগুলির সাথে এটিএম আজহারুল ইসলাম সংশ্লিষ্ট ছিল। Thus, it appears that he did not witness the incident of 16 April, 1971. Subsequently, he came to know about the incident from Moklesar Rahman Sarker, Mokbul and Aminul.

I have already found that testimonies of Moklesar Rahman Sarker and Mokbul Hossain are not believable and P.W.7 Aminul has not at all mentioned the name of A.T.M. Azharul Islam as an abettor or facilitator of the offence.

(All underlined by me)

Therefore, it is not believable that he heard the name of the appellant from these witnesses.

278. P.W.11 is Md. Sakhawat Hossain alias Ranga is a hearsay witness. In examination-in-chief he has stated that, “আমি পরবর্তীতে আরো শুনি যে, এটিএম আজহারুল ইসলাম ১৯৭১ সালে বদরগঞ্জের ঝাড়ুয়ার বিল ও ধাপের পাড় এলাকাসহ বিভিন্ন এলাকায় সংঘটিত হত্যাকাণ্ডের সাথে জড়িত ছিল।”

This witness did not mention the date and time of occurrence of Dhap Para and also from whom he had heard the incident of Dhap Para and Jharuar beel. Therefore, his testimony has no probative value so far as it relates to charge No.2.

Charge No. 3

279. The date, time and place of occurrence of charge No. 3 are on 17.04.1971 between 12.00 noon and 5.00pm at Jharuar Beel and neighboring villages. The offences are murder, genocide, plundering and arson.

280. P.W.4 Meser Uddin is an eye-witness on charge No.3. He stated that— “১৯৭০ সালের সাধারণ নির্বাচন অনুষ্ঠিত হয়। উক্ত নির্বাচনে আমাদের এলাকায় জাতীয় পরিষদ সদস্য হিসাবে আওয়ামী লীগ প্রার্থী ছিলেন জনাব নুরুল হক এডভোকেট এবং জামায়াতে ইসলামীর প্রার্থী ছিলেন মোখলেছুর রহমান এবং প্রাদেশিক পরিষদের নির্বাচনে আওয়ামী লীগের প্রার্থী ছিলেন এলাহী বক্স সরকার এবং জামায়াতে ইসলামীর প্রার্থী ছিল মীর আফজাল হোসেন। উক্ত নির্বাচনে আওয়ামী লীগের ঐ দুই প্রার্থী বিজয়ী হন। ঐ নির্বাচনে জামায়াতে ইসলামীর প্রার্থীদের পক্ষে এটিএম আজহারুল ইসলাম জামায়াতে ইসলামীর ছাত্র নেতা হিসাবে এবং ঐ এলাকায় (বদরগঞ্জ থানাধীন) তাহার বাড়ি হওয়ায় তিনি তাদের পক্ষে সক্রিয় ভাবে নির্বাচনী প্রচারণায় অংশ নেয়।.....আমার বাড়ি থেকে পূর্ব দিকে ৩ কিলোমিটার দূরে ১০নং রেল গেইট। আমাদের বাড়ি থেকে ৩ কিলোমিটার দক্ষিণ দিকে ঝাড়ুয়ার বিল।.....১৯৭১ সালের ১৭ই এপ্রিল তারিখে দুপুরের দিকে একটি ট্রেন পার্বতীপুর থেকে এসে ৬নং রেল গেইটের কাছে দাঁড়ায়। তারপর ঐ ট্রেন থেকে অবাস্তালী বাচ্চু খান, কামরুজ্জামান এমপিএ, বদরুল, নয়িম কাজীসহ আরো অনেকে এবং খান সেনারা বিষ্ণুপুর ইউনিয়নের বকশীগঞ্জ ঘাটের দিকে চলে যায়। তাদের এ ধরনের আসা দেখে আমি, আমার বাবা, চাচা, ভাই সহ বাড়ির লোকজন ঝাড়ুয়ার বিলের দিকে সরতে থাকি। ঐ সময় দেখতে পাই যে, রংপুরের দিক থেকে আরেকটি ট্রেন ১০নং বৈরাগির গেইটে এসে দাঁড়ায় এবং ঐ ট্রেন হতে এটিএম আজহারুল ও তার সহযোগীরা পাক বাহিনীসহ নেমে তারাও বকশি গঞ্জের দিকে অগ্রসর হতে থাকে। পরে উভয় ট্রেনকে ৭নং রেল গেইটের কাছে এনে দাঁড় করায়। তারা আমাদের ইউনিয়নের ছয়টি গ্রাম কৌশলে চারিদিক থেকে ঘিরে ফেলে। তখন গ্রামের লোকজন ও উক্ত গ্রামে আশ্রয় নেওয়া আশেপাশের এলাকার লোকজন ছুটাছুটি শুরু করে এবং অনেকেই ঝাড়ুয়ার বিলে গিয়ে আশ্রয় নেয়। এসময় আমি আমার বাবাকে হাত দিয়ে ধরে রাখি এবং এটিএম আজহারুল ইসলামকে সাদা পেট শার্ট পড়া অবস্থায় পাক সেনাদের সঙ্গে দেখি। তখন পাক সেনারা নিরীহ জনসাধারণের বাড়ি-ঘরে অগ্নিসংযোগ করে এবং তাদের উপর এলাপাথাড়ি গুলি করতে থাকে এবং উক্ত গুলিতে ঝাড়ুয়ার বিলের আশেপাশে প্রায় ১২০০ লোক নিহত হয়। নিহতদের মধ্যে প্রাণ কৃষ্ণ মাস্টার, মিনাজুল ইসলাম বিএসসি, আলাউদ্দিন, আজাদুল, ফয়েজ উদ্দিন ও তার ছেলে নূর ইসলাম, আসাদ বকশ ছিলেন। ঘটনাস্থলে অসংখ্য হিন্দু সম্প্রদায়ের মানুষের লাশ দেখা যায়। এটিএম আজহারুল ইসলাম তার সহযোগী ও পাক সেনারা গ্রামের অসংখ্য লোককে তাড়া করে ৭নং রেল গেইটের কাছে জড়ো করে। এসময় আসরের নামাজের সময় হলে প্রাইমারী স্কুলের শিক্ষক শামসুদ্দিন মাস্টার আসরের নামাজ পড়তে চাইলে নামাজ পড়ার অনুমতি দেয়। নামাজ শেষ হলে এটিএম আজহারুল ইসলাম ও বাচ্চু খাঁন হুকুম দিয়ে বলেন যে, ইন্দু আদমিরা* একধার হও, যুবক আদমি একধার হও, স্টুডেন্ট আদমি একধার হও। এদের মধ্যে দুইশতের অধিক যুবককে ট্রেনে তুলে পার্বতীপুরের দিকে নিয়ে যায়। তাদের মধ্যে আমার খালাতো ভাই সম্মারু, আমার পাড়ার জেঠাতো ভাই ইসলাম, আবু বক্কর সিদ্দিক ও রেলের দুইজন নিরাপত্তা কর্মীকে জবাই করে হত্যা করে ঘোড়া ডোবা রেল ত্রীজের দক্ষিণ পাশে ফেলে যায়।..... ১৯৯৬ সালে এটিএম আজহারুল ইসলাম ও আমি রংপুর-২ বদরগঞ্জ, তারাগঞ্জ আসনে জাতীয় সংসদ নির্বাচনে প্রতিদ্বন্দিতা করি।

পরবর্তীতে জামায়াতে ইসলামীর প্রার্থী হিসাবে এটিএম আজহারুল ইসলাম ২০০১ এবং ২০০৮ সালে ঐ একই এলাকা থেকে নির্বাচনে প্রতিদ্বন্দ্বিতা করি।” ঝাড়ুয়ার বিল আমাদের বাড়ির দক্ষিণে আনুমানিক দুই কিলোমিটার দূরে অবস্থিত। আমাদের বাড়ি ও ঝাড়ুয়ার বিলের মাঝখানে একটি পাড়া আছে এবং ঐ পাড়ায় অনেক বাড়ি ঘর ছিল। পার্বতীপুর থানা ৬নং রেল গেইট হতে পশ্চিমে আনুমানিক ১০ কিলোমিটার দূরে। ১৯৭১ সালে ঝাড়ুয়ার বিলে ঝোপঝাড় ছিল, তার মধ্যে কিছু উঁচু গাছ ছিল এবং কিছু নিচু গাছ ছিল।

During cross-examination he stated, “ঝাড়ুয়ার বিলের ঘটনার সহিত এটিএম আজহারুল ইসলাম সম্পৃক্ত ছিল না।”

281. From the material incriminating part of the above testimony, it transpires that on 17.04.1971 one train came from Parvatipur to Rail Gate No. 6 and another train came to Bairagirgate/Rail Gate No. 10 from Rangpur and A.T.M. Azhar with Pak army got down from the later and proceeded to Bakshiganj. This witness earlier said that his house is 3 kilometers far from Rail gate No.10, so it is not humanly possible for him to recognize A.T.M. Azharul Islam at the time of getting down from the train at Rail Gate No.10. He further stated that he saw A.T.M. Azharul Islam wearing white colour pant and shirt with Pak soldiers. But, from the prosecution evidence exhibit-26, it appears that the convict-appellant A.T.M. Azharul Islam used to wear black dress during the war of liberation in 1971.

282. Thus, the deposition of P.W.4 and the written report i.e exhibit-26 are absolutely inconsistent with one another. Possibly, white colour pant and shirt was introduced as a measure of recognition. A person with the black dress cannot be recognized even from a short distance. However, with white dress also a person can not be recognized from a long distance of 3 kilometers far from the place of occurrence. The prosecution’s own witness, P.W.5 stated that he could not recognize any one from a distance of $1\frac{1}{2}$ kilometers. It needs to be mentioned that according to this witness his house is 3 kilometers east from Rail Gate No. 10 and 3 kilometers south from the Jharuar Beel. He did not clearly state wherefrom he saw the incident of Jharuar Beel. Moreover, it appears that he contested the National Elections with the convict-appellant in 1996, 2001 and 2008. Therefore, he has strong political rivalry/enmity with the convict-appellant.

Thus, I am of the view that the testimony of this witness so far as it relates to charge No.3, against the appellant is doubtful and has no probative value.

283. P.W.5 Abdur Rahman claimed himself to be an eye-witness to the incident of 17.04.1971. He stated that-“১৯৭১ সালের ১৭ই এপ্রিল তারিখে একটি ট্রেন রংপুর থেকে এসে ১০নং রেল গেইটে এবং অপর ট্রেনটি পার্বতীপুর থেকে ৬নং রেল গেইটে এসে দাঁড়ায়। পার্বতীপুর থেকে যে ট্রেনটি এসেছিল সে ট্রেন থেকে আনুমানিক দেড়শত লোক নেমে দক্ষিণ দিকে চলে যায় এবং তারা বালা পাড়া, বাগবাগ, বুগবাগ হয়ে বকশীগঞ্জ গিয়ে ঝাড়ুয়ার বিল ঘেরাও করে। ঐ লোক গুলোর মধ্যে অনেকের পড়নে খাকী পোষাক এবং অনেকের পরনে সিভিল পোষাক ছিল, আমি অনেক দূর থেকে দেখার কারণে তাদেরকে চিনতে পারি নাই। আমি ঐ সময় ১০নং রেল গেইট থেকে আনুমানিক দেড় কিলোমিটার দূরে অবস্থান করছিলাম। ঐ খাকী পোষাক ধারী ও সিভিল পোষাক পরিহিত লোকজন যখন বকশীগঞ্জের দিকে যাচ্ছিল তখন লোকজন ভয়ে পূর্ব দিকে পালাচ্ছিল। ঐ সময় ১০নং রেল গেইটে অবস্থানরত ট্রেন হতে এক/দেড়শ লোক নেমে দক্ষিণে বকশীগঞ্জের দিকে রওনা হয়। ঘেরাও-র মধ্যে পরে গ্রামের সাধারণ মানুষ দিশেহারা হয়ে এদিক-সেদিক ছোটাছুটি করতে থাকে। তখন অনেকেই বলাবলি করতে থাকে যে, বদরগঞ্জ হতে জামায়াতে ইসলামীর সমর্থক লোকজন, এটিএম আজহারুল ইসলাম ও পাক সেনারা এসে ঘেরাও করেছে তোমরা সেদিকে কেন যাচ্ছ। ৬নং রেল গেইট ও ১০ নং রেল গেইটের ট্রেন থেকে নেমে খাকী পোষাক ধারী ও সিভিল পোষাকের লোকজন বকশীগঞ্জ অভিমুখী হইয়া দুই দিক থেকে পাঁচ ছয়টি মৌজা ঘেরাও করে এলোপাতারি গুলি করতে থাকে। এক পর্যায়ে খাকী পোষাক ধারী ও সিভিল পোষাকের লোকেরা এলোপাতারি গুলি করতে করতে ঝাড়ুয়ার বিল এলাকায় আসে। তখন সেখানে আনুমানিক ৫০০/৬০০জন লোক ঝোপের মধ্যে লুকিয়ে ছিল। সেখানে এক/দেড় ঘণ্টা গুলি বর্ষণ করে। আমি ঝাড়ুয়ার বিলে ঐ সময় এটিএম আজহারুল ইসলামকে দেখতে পাই। ঐ গুলি বর্ষণের কারণে শুধুমাত্র ঝাড়ুয়ার বিলে আনুমানিক ৪০০ লোক মারা যায়। ঝাড়ুয়ার বিলে অবস্থানরত অপর এক/দেড়শত লোককে ধাওয়া করে পার্বতীপুরে নিয়ে যাওয়ার জন্য ট্রেনের দিকে নিয়ে যায়, অন্যান্য লোকজনদের সাথে। মিনাজুল ইসলাম বদরগঞ্জ হাই স্কুলের একজন শিক্ষক ছিলেন। তাকে ঐ ঝাড়ুয়ার বিলে হত্যা করা হয়। ইসলামী ছাত্র সংঘের লোকেরা বলে মিনাজুল ইসলামকে বাঁচতে দেওয়া উচিত হবে না, সে বেঁচে থাকলে

আমাদের ক্ষতি হতে পারে। ঐ খাকী পোষাক ধারী ও সিভিল পোষাকের লোকজন আনুমানিক প্রায় ১২০০ লোককে ৭নং রেল গেইটের কাছে নিয়ে এসে জড়ো করে, এই সময় ৬নং ও ১০ নং রেল গেইটে অবস্থানরত দুইটি ট্রেনকে ৭নং রেল গেইটে এসে সংযুক্ত করা হয়। সংযুক্ত করে ঐ সকল লোককে ট্রেনে উঠানোর উদ্যোগ নেওয়া হয়। সেই সময় শামসুদ্দিন মাস্টার যিনি এটিএম আজহারুল ইসলামকে প্রাইভেট পড়াতেন। তিনি আসরের নামাজ পড়ার জন্য খাকী পোষাক ধারী ব্যক্তিদের, বাচ্চু খান ও এটিএম আজহারুল ইসলামের নিকট অনুরোধ করেন। এটিএম আজহারুল ইসলাম খাকী পোষাকধারী লোকজনদের কিছু বললে নামাজের জন্য ১০ মিনিট সময় দেওয়া হয়। তখন শামসুদ্দিন মাস্টার হাত তুলে বলেন যারা যারা নামাজ পড়তে চান তৈরি হয়ে নেন। তখন উপস্থিত সকলেই যাদের মধ্যে অনেকেই হিন্দু ছিলেন তারাও অজু করে নামাজের সারিতে দাড়িয়ে যান। নামাজ শেষ হলে এটিএম আজহারুল ইসলাম ও বাচ্চু খান উপস্থিত লোকজনদের বলেন হিন্দু আদমি এক ধার হও, যুবক আদমি একধার হও। তারপরে বেছে বেছে প্রায় দুইশত যুবক ও হিন্দুকে এটিএম আজহারুল ইসলাম, বাচ্চু খান ও পাক সেনারা ট্রেনে তোলে এবং তাদেরকে নিয়ে যায়।

ঐ ট্রেনটি খোলাহাটির নিকটে ঘোড়াডোবা ব্রীজের কাছে গেলে ট্রেনটি থামে এবং ঐ ট্রেন থেকে পাঁচ জনকে হত্যা করে ফেলে দেওয়া হয়। যার মধ্যে ছিল সন্দারো, ইসলাম, আবু বক্কর সিদ্দীক এবং অপর দুইজন ছিল ট্রেনের নিরাপত্তা কর্মী। ট্রেনে করে অন্যান্য যাদের নিয়ে যাওয়া হয়েছিল আজ অবদি তাদের কোন সন্ধান পাওয়া যায়নি।

284. Thus, this witness also did not state the time of occurrence and he stated that he was one and half kilometers far from the Rail gate and that he could not recognize the persons who got down from the train and they were in khaki and civil dresses.

Moreover, the depositions of P.W.4 and P.W.5 are also inconsistent with each other about Asarer namaz incident and involvement of the appellant.

Further, during cross-examination this witness clearly stated that-“ আমি লেখাপড়া করি নাই। আমি ইংরেজী বার মাসের নাম জানি না। ইংরেজী কোন মাসের কত তারিখে আমি বিয়ে করেছি তাহা আমি বলতে পারব না। আমার বাবার ভাইও নাই, বোনও নাই। আমার বিমাতার ঘরে তিন ভাই এক বোন এবং আমরা আপন তিন ভাই, চার বোন।”

It is not humanly possible for a person to state the English dates of 17.04.1971, 15.04.1971 and 16.04.1971 in detail (vide examination in chief) who does not know the names of months of English calendar year and also the name of month of his marriage in English, unless he is tutored by someone.

Further, he stated that when the army started firing, he had gone towards the Jharuar Beel, where firing was going on. This is against human nature.

Furthermore, he stated that “..... ১৯৭০ সালে আমি কোন রাজনৈতিক দলের সাথে জড়িত ছিলাম না, তবে ছাত্রলীগের মিছিল মিটিং করলে অংশ নিতাম। ১৯৭০ সালে ছাত্র লীগের নেতা কে ছিল তাহা আমি বলিতে পারিব না। জামায়াতে ইসলামের নেতা কে ছিল তাহা আমি বলতে পারব না,” Thus, it appears that he had participated in the rallies of Chattra League but he could not say the name of the leader of Chattra League and even the name of the leader of the Jammati Islami. So it is not believable that he would be able to say the name of A.T.M. Azharul Islam, a member of Islami Chattra Shanga, unless he is tutored by someone. This shows that he is a tutored witness so far as it relates to his deposition about the involvement of the appellant, his recognition of him and the dates mentioned by him. Thus, deposition of this witness so far as it relates to the involvement of the convict-appellant on charge No. 3 has no probative value.

285. P.W.3 Moklesar stated that “ আমি আরো শুনেছি পাই যে, যুদ্ধ চলাকালীন সময়ে আমাদের গ্রামের দক্ষিণ দিকে ঝাড়ুয়ার বিল নামক জায়গায় দুই দিক থেকে দুইটি ট্রেন এসে থামে এবং দিনে ও রাতে মিলে প্রায় হাজার বারশ লোককে হত্যা করে।”

This witness did not see the incidents and he heard that about 1200 persons were killed at Jharuar Beel. He did not also state the date, time of occurrence on charge No. 3. He stated that “দিনে ও রাতে মিলে প্রায় ১২০০ লোককে হত্যা করে”. But in the charge it has been stated that the occurrence took place between 12 noon and 5.00 pm. Therefore, it was not at night as stated by him. So, he could not prove the involvement of the convict-appellant in the occurrence at Jharuar Beel. Moreover, earlier at the time of discussions on charge No.2, I have already found that his testimony is not worthy of credence relating to charge No.2. P.W.3 Moklesar

Rahman Sarker's testimony has no probative value so far as it relates to charge No.3 against the appellant.

286. P.W.6, Mokbul Hossain is a hearsay witness relating to charge No.3. He stated that- "পরের দিন ১৭ই এপ্রিল একটি ট্রেন রংপুর থেকে অপর আরেকটি ট্রেন পার্বতীপুর থেকে আমাদের এলাকায় আসে। একটি ট্রেন থেকে এটিএম আজহারুল ইসলাম ও পাক সেনারা ঝাড়ুয়ার বিলের দিকে যায় এবং সেখানে আনুমানিক ১২০০ লোককে হত্যা করে এবং কিছু লোককে ধরে নিয়ে যায় তাহা আমি লোক মুখে শুনেছি।"

Thus, his testimony relating to charge No.3 is hearsay and he did not say wherefrom he heard the incident. He did not also state the time of occurrence. So, his deposition relating to charge No.3 has no probative value as well.

287. P.W.7 Aminul Islam did not mention about any involvement of A.T.M. Azharul Islam on charge No.3 or on any other charges.

P.W.8 Mojibur Rahman Master, on charge No.3, has stated that,- "পরদিন ১৭ই এপ্রিল একটি ট্রেন পার্বতীপুরের দিক থেকে এসে ৬নং রেল গেইটের কাছে করতোয়া ব্রীজের নিকট এসে থামে এবং অপর আরেকটি ট্রেন রংপুর থেকে এসে ১০নং বৈরাগী রেল গেইটের নিকট থামে। পার্বতীপুর থেকে যে ট্রেনটি আসে সেই ট্রেনে পাকিস্তানী আর্মিদের সাথে আবাসুলী বাচ্চু খান এবং জামায়াতে ইসলামের এমপি কামরুজ্জামান এবং অপর জামায়াত নেতা নঈম কাজী ছিল। রংপুর থেকে যে ট্রেনটি আসে সেই ট্রেনে পাকিস্তানী আর্মিদের সাথে এটিএম আজহারুল ইসলামসহ অপর কয়েকজন জামায়াতে ইসলামীর নেতা ছিল। উভয় ট্রেন থেকে নেমে পাকিস্তানী আর্মি ও তাদের সহযোগীরা দক্ষিণে বুজরুক হাজীপুর, কিসমত ঘাটাবিল, রামকৃষ্ণপুর, খোর্দ বাগবাড় ঐ সমস্ত গ্রাম ঘেরাও করে এলোপাতারি গুলি করে ও বাড়ি-ঘরে অগ্নিসংযোগ করে। ঐ সময় আক্রান্ত গ্রাম সমূহের লোকজন নিরাপদ আশ্রয়ের জন্য পার্শ্ববর্তী ঝাড়ুয়ার বিলে আশ্রয় গ্রহণ করেন। পাকিস্তানী সেনাবাহিনী ও তাদের সহযোগী জামায়াতের কর্মীরা ঝাড়ুয়ার বিলে গিয়ে আশ্রয় গ্রহণকারী প্রায় বারশত এর উর্ধ্বে মানুষকে নির্বিচারে হত্যা করে। ঝাড়ুয়ার বিলে নিহতদের মধ্যে মিনহাজুল বিএসসি, প্রাণকৃষ্ণ মাস্টার এবং আমার ছাত্র নূর উদ্দিন ছিল। ঘটনাস্থলে আমরা স্থানীয়ভাবে স্মৃতিফলক নির্মাণ করেছি, বর্তমানে সরকার কর্তৃক একটি স্মৃতিসৌধ কমপ্লেক্স নির্মাণের কাজ চলছে। আমি বিকাল বেলা টেকশোর হাটে গেলে বদরগঞ্জ ইউনিয়নের চেয়ারম্যান আব্দুর জব্বার সরকার ও মুক্তিযুদ্ধের সংগঠক অধ্যাপক মেহের উদ্দিনের কাছে শুনি যে, ঐ হত্যাকাণ্ডের সাথে এটিএম আজহারুল ইসলাম জড়িত ছিল।"

This witness stated that he heard the incident from P.W.4 Meser Uddin and one Abdur Jabbar Sarker. But earlier with detailed discussions I found that the testimony of Md. Meser Uddin has no probative value. Abdur Jabbar Sarker could not be examined by the prosecution side since he had died.

Therefore, the deposition of P.W.8 is not worthy of credence so far as it relates to charge No.3 against the appellant.

288. P.W.11 is Md. Sakhawat Hossain alias Rangais a hearsay witness. In examination-in-chief he has stated that,- "আমি পরবর্তীতে আরো শুনি যে, এটিএম আজহারুল ইসলাম ১৯৭১ সালে বদরগঞ্জের ঝাড়ুয়ার বিল ও ধাপের পাড় এলাকাসহ বিভিন্ন এলাকায় সংঘটিত হত্যাকাণ্ডের সাথে জড়িত ছিল।"

However, this witness did not mention the date and time of occurrence of Jharuar Beel and also from whom he had heard the incident of Jharuar Beel. Therefore, his deposition has no probative value so far as it relates to charge No.3.

The Tribunal rightly has not considered the evidence of P.W.11 while deciding the merit of charge No.3.

289. Thus, considering the totality of evidence on record, I am of the view that there are material contradictions/ discrepancies as well as unreliability in the testimonies of the witnesses.

(All underlined by me)

Charge Nos.2 and 3 exhibited documents and another book

290. I have already discussed the credibility-cum-probative value of the witnesses.

Now, I would like to discuss the exhibits having any link/connection with the charge Nos.2 and 3 brought against the appellant and I would further like to refer another book on the associates of Pak army.

It appears from exhibit No. 1, a seizure list containing a secret report, that on 17.10.1971 a conference of Islami Chhatra Sangha (shortly, ICS) Rangpur Branch was held in Rangpur town with A.T.M Azharul Islam in the chair. Exhibit No. 13, a newspaper report dated 13 September, 1971 of Daily Sangram, shows that a condolence meeting of ICS was held on 12 September, 1971 at Rangpur town and in that meeting Azharul Islam, President of ICS Rangpur town, had expressed his condolence about the killing of two Muzahids.

From exhibit No. 16, it transpires that there was a meeting of ICS on 17.10.1971 with A.T.M Azharul Islam in the Chair, who had explained the situation of the country and urged the party workers to mobilize the youth of Islamic spirit and launch a strong movement against anti-Islamic activities.

Thus, from the above three documents, it appears that convict-appellant was the President of ICS Rangpur town, at least from September, 1971. However, these three documents do not show the involvement of the convict-appellant with the offences of charge Nos.2 and 3 brought against him.

From exhibit No. 25, it appears that a confidential letter was issued on 16.09.2012 by the Additional Inspector General of Police, wherein he sent a report on the subject,—"৭১ এ দখলদার পাকিস্তান হানাদার বাহিনীর দোসর জনাব এটিএম আজহারুল ইসলাম, জামায়াতে ইসলামীর কেন্দ্রীয় সহকারী সেক্রেটারী জেনারেল পরবর্তীতে ভারপ্রাপ্ত আমীর, পিতা মৃত-ডাঃ নাজির হোসেন, সাং-বাতাসন লোহানী পাড়া, বর্তমানে বালুয়া ভাটা প্রফেসর পাড়া, থানা-বদরগঞ্জ, জেলা-রংপুর এর বিরুদ্ধে ১৯৭১ সালে মহান মুক্তিযুদ্ধের সময় সংঘটিত গণহত্যা ও মানবতাবিরোধী অপরাধ তদন্তের স্বার্থে তাহার "Personal Profile" ও অন্যান্য তথ্যাদি সরবরাহ প্রসঙ্গে।"

291. In this report it is written that the convict-appellant completed SSC from Rangpur Zilla School, HSC & Degree from Rangpur Carmichael College and M.A. from Rajshahi University (?). In paragraph 7(L)(M)(N) it is written-

“৭। মুক্তিযুদ্ধকালীন তার ভূমিকা

ক। ১৯৭১ সালের পূর্বে কোন রাজনৈতিক দলের সাথে সংশ্লিষ্ট ছিলেন এবং উক্ত রাজনৈতিক দলে তার ভূমিকা।

খ। ১৯৭১ সালে রাজনৈতিক ভূমিকা

১৯৭১ সালের পূর্বে কোন রাজনৈতিক দলের সহিত সংশ্লিষ্টতার বিষয়ে কোন তথ্য পাওয়া যায়নি। তবে ১৯৭১ সালে ইসলামী ছাত্র ফ্রন্টের নেতা ছিলেন বলে স্থানীয় ভাবে জানা যায়।

তিনি ১৯৭১ সালে স্বাধীনতা যুদ্ধের সময় কারমাইকেল কলেজের ছাত্র হিসাবে কলেজের আশপাশ এলাকায় ও লোহানী পাড়া ইউনিয়নসহ রংপুর ও দিনাজপুর জেলায় বিচ্ছিন্নভাবে মুক্তিযুদ্ধের স্বপক্ষের লোকজনের উপর বিভিন্ন ধরণের জুলুম, অত্যাচার, সম্পদ লুণ্ঠনসহ নির্যাতন চালিয়েছেন মর্মে স্থানীয় মুক্তিযোদ্ধা ও জনসাধারণের নিকট হতে জানা যায়।

কোন তথ্য পাওয়া যায়নি।”

গ। ১৯৭১ সালে গণহত্যা, ধর্ষণ, অগ্নি সংযোগ এবং লুটপাটের মত কার্যক্রমে জড়িত থাকলে বা সমর্থন দিয়ে থাকলে তার সুস্পষ্ট বিবরণ

Thus, it appears from exhibit No. 25 that no information was found about the appellant's involvement in 1971 in genocide, rape and arson.

292. However, from the deposition of Md.Sakhawat Hossain recorded in this exhibit, it was found that Rofiqul Hasan Nannu was tortured by the appellant. For this offence separate charge i.e. charge No.5 was brought against the appellnat.

In Exhibit No. 26 it is mentioned about convict-appellant that,- “মুক্তিযুদ্ধকালীন তিনি কালো কাবলী পোষাক পরিধান করতেন এবং তার একটি মোটর সাইকেলের সামনে পাকিস্তানী পতাকা লাগিয়ে এলাকায় চলাফেরা

করতেন বলে জানা যায়।” “১৭ ই এপ্রিল/১৯৭১, বদরগঞ্জ উপজেলার বাডুয়ার বিলে পাকসেনারা কয়েকশত লোক হত্যা করে, ও হত্যাকাণ্ডে তিনি ইন্ধন দেন বলে গোপনসূত্রে জানা যায়।”

Thus, in this exhibit it is mentioned that the appellant instigated the killing of several hundred persons on 17 April 1971 at Jharuar Beel. But in this report the name of source i.e. the persons who narrated this incident has not been mentioned. Further, it is not mentioned here that the appellant himself was present at Jharuar Beel at the time of occurrence. Thus, it appears that, even in the **report, dated 22 July, 2012 prepared long after 40 years from the date of occurrence**, the involvement of Azharul on charge Nos. 2 and 3 has not been clearly mentioned.

293. Moreover, the exhibits 25 and 26 have been prepared recently in the year 2012 respectively by police and NSI. It should not be given much importance as it is not an old document and not prepared immediately after liberation. However, from the old documents exhibits 1, 13 and 16 it is only found that Azharul Islam was a leader of Islami Chhatra Sangha. But merely because he was the leader of Islami Chhatra Sangha, it would not make him guilty of the offences charged with. Every charge must be established against him individually by the prosecution.

Further it may be mentioned that from the Book named “Associates of Pakistan Army, 1971” compiled and edited by A S M Shamsul Arefin, published by Bangladesh Research and Publications and others (firstly published in December, 2008), it transpires that the names of main 45 associates of Pak army were included in it with the offences committed by them but the name of the convict-appellant is not mentioned in this book relating to any incident of war crimes.

Conclusion on charge Nos.2 and 3

294. Admittedly, no case was filed by anyone against the appellant till the date of filing of the case in the year 2012 and some other cases in 2010 and 2011 vide exhibit No.25.

It is a historical fact of which judicial notice may be taken that Bangladesh achieved its liberation after the liberation war on 16 December, 1971. The political scenario changed after the brutal killing of Bangabandhu Sheikh Mujibur Rahman, father of our nation, on 15.08.1975. There was absolutely no reason not to file any case against the convict-appellant within the period of 16.12.1971 up to 14.08.1975 i.e. within 3½ years. During the relevant period of 3½ years, the evil collaborators/ abettors/ facilitators of crimes against humanity i.e. Rajakar, Al-Badars, Al-shams and others were hiding themselves. It is also the case of the prosecution that the appellant was hiding himself from the date of liberation of 1971 till the change of political scenario in 1975. There was unusual negligence in not filing cases immediately after liberation by anyone, including close relatives of the victims of crimes against humanity and delaying in filing the case for 40 years. Due to such inordinate delay in filing of the case, there is every possibility of destroying the evidence of the offences committed during the liberation war on the one hand and on the other, there is also possibility of creation of concocted case against the appellant as well.

295. In a criminal case the prosecution must prove the charge brought against an accused beyond any shadow of reasonable doubt. Criminal cases are not like civil cases. In criminal case the accused may only take the plea of not guilty and the burden is entirely upon the prosecution to prove its case. Cross-examination is not also necessary on the entire deposition of a witness as it may damage the defence case. Non-cross-examination on a certain fact would not make the deposition of a witness on that point admitted facts.

For example, if a witness did not say the means of recognition of a person at night or whether it was possible to recognize a person from a certain distance or how he came to know a certain person etc., it is not necessary for the defence to cross-examine a prosecution

witness on those matters because the reply may bring out some facts which the prosecution had failed to bring out at the time of examination in chief. Such cross-examination would not help an accused rather damage the defence case. The defence would only argue on the said facts at the time of arguments to bring out the lacuna of the prosecution.

296. Rule 50 of the Rules provides,- “The burden of proving the charge shall lie upon the prosecution beyond reasonable doubt.” Thus, in the instant case the prosecution must prove the charges against the convict-appellant beyond any shadow of reasonable doubt.

Rule 56 of the Rules provides as under:

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

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

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

(Bold by me)

Therefore, under rule 56 of the Rules regard must be given relating to time and place of occurrence and all evidence and circumstances must be considered.

297. I have already seen that the Tribunal considered the testimony of the prosecution witnesses as reliable. However, from the detailed discussions made hereinbefore, it is found that there are material contradictions/inconsistencies/ omissions in the depositions of the witnesses. The credibility of the witnesses is also doubtful. Moreover, it is also found that some witnesses did not mention the time of occurrence, some wrongly mentioned the time of occurrence in part and a witness mentioned the incident of killing at Uttar Ramnathpur but the incident of said charge was at Dhap Para, Mokshedpur. Ignoring the said contradictions/ omissions/ inconsistencies/ unreliabilities of the witnesses and the documentary evidence as discussed, the Tribunal erroneously decided the convict-appellant guilty of charge Nos. 2 and 3 and convicted him thereunder, which cannot be sustained.

I would further like to note that meanwhile many decisions have been passed by this Division, which is binding upon all lower courts including the Tribunal. So, I do not think it necessary to discuss the decisions as referred to by the Tribunal in this case i.e. International Tribunal of Rwanda, International Criminal Tribunal for Former Yugoslavia, etc.

298. The Appellate Division in the case of *Abdul Quader Mollah Vs The Chief Prosecutor, International Crimes Tribunal, Dhaka*, reported in 22 BLT (AD) 541, regarding contradictions in the depositions of witnesses made during investigation and before the Tribunal, decided as under:

“41. Reading section 19(2) and rule 53 (ii), a conclusion that can be arrived at is that statement of a witness recorded by an investigation officer could be admitted in evidence if his presence before the Tribunal could not be procured or that he is not alive, otherwise not. Contradicting the statements of a witness can be drawn subject to the condition that it must be strictly limited to the subject-matter of the examination-in-chief only. Apart from contradiction of his earlier statements made to an investigation officer, a witness’ credibility can be impeached by extracting his knowledge about the subject on which he deposed, his motives to depose in the case, his interest, his inclination, his means of obtaining correct facts to which he deposes, the manner in which he has used those means, his powers of

discerning facts in the first instance, his capacity for retaining and describing them etc. The witness may also be cross-examined for the purpose of ascertaining his credibility.”

Thus, the convict-appellant did not get any opportunity to take contradiction of witnesses with that of their previous statements made during investigation.

299. Be that as it may, in view of the discussion made hereinbefore, I am of the view that the contradictions, omissions, human impossibility to see the occurrence, etc. as discussed hereinbefore create a serious doubt about the credibility of the witnesses and that the prosecution failed to prove charge Nos. 2 and 3 against the convict-appellant beyond reasonable doubt. Thus, the judgment and order of conviction and sentence on charge Nos.2 and 3 is erroneous, and, as such, liable to be interfered with.

In such view of the matter, the appeal is liable to be allowed in part and the order of conviction and sentence dated 30.12.2014 passed by the International Crimes Tribunal No.1, Dhaka in ICT-BD Case No.05 of 2013 so far as it relates to charge Nos. 2 & 3 i.e. charges under section 3(2)(a)(c)(g) and (h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 are liable to be set aside.

Sentence on charge No.4

300. Before entering into the sentence relating to charge No. 4, firstly I would like to reproduce charge No. 4 which is quoted below:

“On 30 April, 1971 between 09.00 P.M. and 12.00 P.M. accused A.T.M. Azharul Islam, being the president of Islami Chhatra Sangha of Rangpur district branch, along with armed cadres of Jamaat-e-Islami, Islami Chhatra Sangha, accompanied by Pakistani occupation forces having entered the campus of Rangpur Carmichael College abducted Professor Chitta Ranjan Roy, Professor Sunil Baron Chakraborty, Professor Ram Krishna Adhikary, Professor Kalachand Roy of Rangpur Carmichael College and Monjusree Roy, wife of Professor Kalachand Roy from their houses situated inside the college boundary and thereafter they all were killed by the accused and his accomplices in a pre-planned manner.”

At the outset, I would like to mention that I agree with the decision of my learned brother about the convict-appellant being guilty of charge No. 4. However, with due respect I am unable to concur with the affirmation of sentence of death as proposed by my learned brother on this charge No.4 for the reasons discussed hereinafter.

P.W.4, P.W.8, P.W.11, P.W.12 & P.W.13 are all hearsay witnesses. I do not like to discuss their testimonies. I already discussed the credibility of most of them earlier. Moreover, their testimonies have already been discussed by my learned brother. So, I would confine myself to the eye-witnesses only.

P.W.9 Suvakar, an eye-witness, has proved the prosecution case as has been decided by my learned brother.

301. However, P.W.10 Ratan Chandra Das stated that he could recognize one Bangalee namely, Azhar at the time of abduction of Sunil Babu, Kalachand Babu and his wife Monjusree Roy by Pak army. But during cross-examination he stated that “১৯৭০/৭১ সালে কারমাইকেল কলেজের ছাত্রলীগ বা ছাত্র ইউনিয়নের সভাপতি এবং সাধারণ সম্পাদক কে ছিলেন তাহা আমি বলতে পারবো না।..... “১৯৭১ সালে মুক্তিযুদ্ধের সময় কার মাইকেল কলেজের অধ্যক্ষ কে ছিলেন তাহা আমি বলতে পারব না.....।”

He claims himself to be a cook at the house of Carmichael College Teacher Sunil Babu and Ram Krishna Babu. But, this witness could not say the names of the President and General Secretaries of Chhatra League and Chhatra Union and the Principal of Carmichael College. So, it is not understood how he could know the name of Azhar. His deposition relating to the incident of abduction of Sunil Babu, Monjusree Roy wife of Professor Kalachand Roy and Kalachand Roy by Pak army may be believed but his testimony about

Azharul's recognition by him in the incident appears to be unreliable and tutored as suggested by the defence.

However, on the night of 30.04.1971 Chittra Ranjon Roy and Ram Krishna Adhikary were abducted from the house of Chittra Ranjon Roy and on the very same night Sunil Baron Chakraborty, Kalachand Roy, Monjusree Roy wife of Kalachand Roy were abducted from the house of Kalachand Roy. Therefore, I may safely conclude that A.T.M. Azharul Islam was involved as an abettor in both the abduction incidents.

302. Be that as it may, it is evident from the testimony of other eye-witness P.W.9 Suvakar that the Pak army abducted her brother Carmichael College teacher Chittra Ranzan Roy and another teacher Ram Krishna on the night of occurrence in presence of her another brother Nitro Ranzan Roy and her brother's sister-in-law Kannon Bala. But neither Nitro Ranzan Roy, full brother of Chittra Ranzan Roy nor his sister-in-law Kannon Bala has been examined by the prosecution.

From the deposition of this witness it is found that his brother Nitro Ranzan Roy was/is still alive and his another brother Shotto Ranzan Roy was/is present in court and that Shotto Ranzan Roy was/is the Investigation Officer of investigation side of Antorjatic Oparad Tribunal though he was not engaged in the instant case. Therefore, other eye-witnesses present were neither produced nor examined in the Tribunal. They were withheld for reasons best known to the prosecution.

It transpires from exhibit No. 26 as under:

“৩) রংপুর কারমাইকেল কলেজে ০৬ জন শিক্ষক এবং ০৫ জন ছাত্রকে ৩০ শে এপ্রিল ১৯৭১ তারিখে আজাহারুল এর নির্দেশে আলবদর বাহিনীর লোকেরা ধরে নিয়ে গিয়ে নিকটস্থ দমদমা ব্রিজের কাছে হত্যা করে বলে জানা যায়।”

303. Therefore, it appears that according to prosecution's own document dated 22.07.2012 six teachers and five students of Carmichael College were abducted by Al-Badar Bahini at the instruction of A.T.M Azharul Islam on 30.04.1971.

But, from quotations of judgment in the case of Motiur Rahman Nizami Vs Government of Bangladesh, reported in 2 LM (AD) 446, it appears that Al-Badar was established in May, 1971.

Whereas, the charge on the incident dated 30.04.1971 i.e. charge No.4 against the convict-appellant is that four teachers of Carmichael College and wife of one teacher were abducted by Pak army with the help of the convict-appellant. Thus, it appears that there are minor inconsistencies in the prosecution's documentary evidence and oral evidence. Though such inconsistencies may not be fatal to the prosecution case but at the time of awarding capital punishment it ought not to be overlooked.

The Tribunal passed the judgment and order of conviction and sentence of the appellant's death on 30.12.2014. So, he is in condemned cell suffering the pangs of death for about 5(five) years.

Further, from the judgment of the Tribunal it is found that the appellant was born on 25 February, 1952. So, at the time of occurrence his age was only 19 years. Therefore, now he is an old man of about 67/68 years. In such a scenario, if a sentence of imprisonment for life is awarded to him, there is no scope of his coming out of the jail after serving the sentence of imprisonment for life.

304. Thus, considering the totality of the aforesaid facts and circumstances, I am of the view that justice would be sufficiently met if the sentence of death is commuted to one of imprisonment for life with fine on charge No. 4.

305. My decision

Charge No.2

The appeal be allowed in part and the order of conviction and sentence of the convict-appellant/condemned-prisoner for the offences of murder, plundering and arson at Dhap Para, Moksedpur as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 (charge No. 2) be set aside and thus, he be acquitted of the said charge.

Charge No.3

The appeal be allowed in part and the order of conviction and sentence of the convict-appellant/condemned-prisoner for the offences of murder, genocide, plundering and arson in Jharuarbeel and neighbouring villages as crimes against humanity as specified in section 3(2)(a)(g) and (h) of the International Crimes (Tribunals) Act, 1973 (charge No. 3) be set aside and he be acquitted of the said charge.

Charge No.4

I agree with the decision of the learned Chief Justice about the affirmation of conviction of the convict-appellant for the offence of genocide, abduction and murder of 4(four) teachers of Rangpur Carmichael College and another, wife of a teacher as specified in section 3(2)(c)(i)(g) and (h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 (charge No.4). But I respectfully differ with the sentence of affirmation of death. Therefore, the sentence of death of the condemned-prisoner be commuted to imprisonment for life with a fine of Tk. 10,000/- (ten thousand), in default, to suffer rigorous imprisonment for a further period of 2(two) years more.

Charge No.5

I agree with the decision of the learned Chief Justice.

Charge No.6

I agree with the decision of the learned Chief Justice.

J.

Order of the Court

The appeal is allowed in part. Appellant A.T.M. Azharul Islam is acquitted of Charge No.5. His conviction in respect of charge Nos.2 and 3 is maintained by majority. His conviction in respect of charge Nos.4 and 6 is maintained. His sentence in respect of charge Nos.2, 3 and 4 is maintained by majority. His sentence in respect of charge No.6 is maintained.