**5 SCOB [2015] AD 1**

**APPELLATE DIVISION**

**PRESENT**
**Mr. Justice Md. Muzammel Hossain,**
**Chief Justice**
**Mr. Justice Surendra Kumar Sinha**
**Mr. Justice Md. Abdul Wahhab Miah**
**Ms. Justice Nazmun Ara Sultana**
**Mr. Justice Syed Mahmud Hossain**
**Mr. Justice Muhammad Imman Ali**

CRIMINAL APPEAL NO.23 of 2011 (From the judgment and order dated 28.08.2008 passed by the High Court Division in Death Reference No.150 of 2004 heard along with Criminal Appeal No.4739 of 2004, Criminal Appeal No.4740 of 2004, Jail Appeal No.118 of 2006 and Jail Appeal No.597 of 2007 accepting the death reference in part and allowing the appeals.)

**The State** .....Appellant

=Versus=

**Dafader Marfoth Ali Shah and others** .....Respondents

| | |
|---|---|
| For the Appellant | : Mr. Mahbubey Alam, Attorney General with Mr. M. K. Rahman, Additional Attorney General, Mr. Momtazuddin Fakir, Additional Attorney General with Mothahar Hossain Saju, Deputy Attorney General, Mr. Bishwajit Deb Nath, Deputy Attorney General, Mr. Ekramul Haque, Deputy Attorney General with Mr. Md. Masud Hasan Chowdhury, Assistant Attorney General, Mr. Shaikat Basu, Assistant Attorney General, Mrs. Mahfuza Begum, Assistant Attorney General and Mr. Bashir Ahmed, Assistant Attorney General instructed by Mrs. Sufia Khatun, Advocate-on-Record. |
| Government Chief Prosecutor | : Mr. Anisul Huq, Senior Advocate with Mr. Nurul Islam Sujan, Advocate and Mr. Sheikh Fazle-Noor-Taposh, Advocate as Government-Prosecutor. |
| As State Counsel to defend the respondents (appointed by the Court) | : Mr. Abdullah-Al-Mamun, Advocate. |

Date of hearing :15.01.2013, 22.01.2013, 23.01.2013, 29.01.2013, 30.01.2013, 12.02.2013, 13.02.2013, 19.02.2013, 26.02.2013, 27.02.2013, 16.04.2013, 17.04.2013.

Date of judgment : 30.04.2013.

**Evidence Act, 1872**
**Section 57:**
**Courts can take judicial notice of the ordinary course of events. That a matter is judicially noticed means that it is taken as true without the necessity of being formally proved on evidence. Taylor in his Law of Evidence states that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery. Nor is it necessary to prove the course of the heavenly bodies, or the like, that a matter is judicially noticeable means that it is taken without offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. A proclamation of emergency is a matter of general information of which a court can take judicial notice. A matter of public history may be such a fact (Wigmore section 2567). Facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of section 57 of the Evidence Act.**

**... (Surendra Kumar Sinha, J) (Para 15)**

**Penal Code, 1860**
**Section 109:**
**Offence of abetement:**
**In order to implicate a person of an offence as abettor it has to be proved the *actus reus* he has abetted with the necessary *mens rea*. To establish the charge of abetement there must be evidence that an act was abetted and that it was abetted by the person charged with. The act abetted must, moreover, amount to a crime, and in order to connect the abettor with the crime, it is not sufficient to prove that he had taken part in those steps of the transaction which are innocent, but it must also be proved that he had deliberately taken part in those steps of the transaction which constituted an offence. Section 109 may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by illegal omission.**

**... (Surendra Kumar Sinha, J) (Para 23)**

**Penal Code, 1860**
**Section 120A and 120B:**
**The essence of criminal conspiracy is an agreement to commit an illegal act by some persons. A criminal conspiracy by its nature is hatched up in secrecy and direct evidence to prove conspiracy is seldom available. The offence of conspiracy being a making of an agreement to do an unlawful act, it is a matter of inference to be drawn from direct or circumstantial evidence. It can be inferred from the acts and conduct of the parties in agreement of conspiracy that there was an agreement between two or more persons to do one or the other of the acts described in the section. The conspiracy consists not merely in the intention of two or more persons, but in the agreement of**

**those persons to do such acts. So long as such a design rests only in intention, it is not punishable. ... (Surendra Kumar Sinha, J) (Para 34)**

**Penal Code, 1860**
**Section 107, 109 and 120B:**
**Offences created by sections 109 and 120B of the Penal Code are quite distinct though in both, the element of conspiracy is present. There is analogy between these two sections and there may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Second clause of section 107 states that a person abets the doing of a thing who engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy. So, in order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy. Secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing, it is not necessary that the abettor should concert in the offence with the persons who committed it.**
**... (Surendra Kumar Sinha, J) (Para 35)**

**Penal Code, 1860**
**Section 34:**
**Evidence Act, 1872**
**Section 10:**
**The 'common intention' which is a constituent of proving an offence of criminal conspiracy is different from the one 'common intention' used in section 34 of the Penal Code. The expression 'common intention' used in section 10 of the Evidence Act signifies a common intention existing at the time when the thing was said, done or written by one of the conspirators but the 'common intention' referred to in section 34 is doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention. ... (Surendra Kumar Sinha, J) (Para 41)**

**Article 104 of the Constitution:**
**The Constitution is a social document, and Article 104 is not meant for mere adorning the Constitution. The Constituent Assembly felt that a provision like the one should be kept in the Constitution so that in exceptional cases the highest court of the country could invoke its inherent powers. It is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law. Apart from the powers given to this Division by the Constitution, a Court of law always retains some inherent powers. It is, therefore, said, the Court is not powerless to undo any injustice caused to a party. Shutting of judicial eyes even after detection of palpable injustice is in one sense denial of justice. If the Judges do not rise to the occasion to which they are oath bound to do justice, they would commit the similar illegality as the one committed by a litigant. Court's practical approach would be towards doing justice without bothering too much about any one's perception. We should never compromise to do justice. ... (Surendra Kumar Sinha, J) (Minority view)(Para 126)**

**Appellate Division's Rules**
**Rule 13 of Order XXIII and rule 5 of Order XX:**
**The evidence on record proved beyond doubt that the killing was perpetrated in pursuance of a conspiracy and therefore, it is consonance to law and justice that the**

**respondents should be awarded a legal conviction of an offence on the basis of the evidence on record. If a graver sentence is provided for murder in pursuance of conspiracy, the question of prejudice would have arisen. Here the respondents have not acquired any right against the acquittal on the charge of conspiracy. So, even without exercise of inherent power, this Division can alter the conviction of the respondents to one of murder in pursuance of the criminal conspiracy. The appellant has taken ground Nos.II and IV in its concise statement for convicting the accused on the charge of conspiracy. In view of rule 13 of Order XXIII, rule 5 of Order XX of the Appellate Division's Rules are applicable to criminal appeals, and there is no legal bar to convict them even if no leave was granted on this point. This is a settled point and I need not make any observation on this question. In support of the charge, the prosecution has adduced evidence and the accused persons have defended the same. The trial court as well as the High Court Division discussed the evidence in support of this charge but disbelieved the charge on perfunctory grounds. Therefore, there is no legal bar to convict the respondents on the basis of the evidence on record.**

**... (Surendra Kumar Sinha, J) (Minority view)(Para 137)**

**The High Court Division on a misconception of law held that the prosecution has failed to prove the conspiracy. From the evidence as discussed above, if there be any doubt about the conspiracy, it would be difficult to find out a suitable case to prove such charge. The facts found from the materials on record, the barbarity revealed in the commission of the crime and the seriousness of nature of the offence perpetrated by the accused, it would be a travesty irony if the accused persons are not convicted on the charge of conspiracy. With due respect I am unable to endorse the majority opinion that the accused-respondents cannot be convicted on the charge of criminal conspiracy. The question of the benefit of law does not arise at all for simple reason that they were charged with and defended of the charge of criminal conspiracy. If that being the position, the sentence being the same, the question of injustice or prejudice does not arise at all. The respondents cannot be fastened with vicarious criminal liability within the meaning of section 34 of the Penal Code but their conviction would be one under sections 120B read with 302, not under sections 302/34 of the Penal Code.**

**... (Surendra Kumar Sinha, J) (Minority view)(Para 139)**

**F.I.R:**

**Where there is no F.I.R. or where the F.I.R. cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which will have to be assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it.**

**... (Nazmun Ara Sultana, J) (Para 219)**

**Discrepency always occurs even in the evidence of the truthful witnesses:**

**The learned Counsel has contended that these contradictory statements of these P.Ws. reasonably make these witnesses untrustworthy. But we are unable to accept this argument of the learned Counsel in this present case. Considering the very facts and circumstances of this case we rather, are of the view that it was very much natural on the part of the witnesses to make discrepent statements regarding colour of the wearing clothes and the weapons of the assaillants and that these discrepent or contradictory statements of the P.Ws. are so trifling in nature that these cannot raise any suspecion about the truthfulness of the witness or about the occurrence they narrated. The learned Counsel for the accused-respondents has pointed out some other alleged minor**

**discrepent or contradictory statements also in the evidence of the prosecution withnesses, but we do not find any of these alleged discrepent or contradictory statemetns of the prosecution witnesses fatal at all to raise any suspicion about the truthfulness of these witnesss. Discrepency always occurs even in the evidence of the truthful witnesses. It is also settled that one part of evidence of a witness even if is rejected the other part of the evidence of the same witness may be accepted.**

**... (Nazmun Ara Sultana, J) (Para 220)**

**Article 104 of the Constitution:**

**The exercise of the power of doing 'complete justice′ under article 104 is circumscribed by two conditions, (i)that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and (ii) that the order which Supreme Court passes must be necessary for doing "complete justice" <u>in the cause or matter pending before it</u>. Obviously the matter pending before us in this appeal is the acquittal of two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha of the charges under sections 302/34 and 302/109 of the Penal Code. Leave to file this appeal was granted to consider only whether the acquittal of the present two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code was correct and justified. So, obviously, the question whether the acquittal of all the accused persons from the charge of criminal conspiracy-is not at all a matter pending before us. It has already been pointed out above that the present State-appellant or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy-as ordered by a court of law. In the name of doing 'complete justice′ this right of the accused persons now cannot be ignored.**

**... (Nazmun Ara Sultana, J) (Majority view) (Para 239)**

**Considering the above stated facts and circumstances and the legal position we do not find that there is any scope now to convict the accused persons or any of them on the charge of criminal conspiracy by exercising the inherent power of this Division under article 104 of the Constitution. ... (Nazmun Ara Sultana, J) (Majority view) (Para 252)**

## J U D G M E N T

**Md. Muzammel Hossain, C. J.-**

1. I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

**Surendra Kumar Sinha, J**:

2. I have had the privilege of reading the draft copy of the judgment prepared by my learned sister Nazmun Ara Sultana, J. While I fully endorse her view that 'the accused

persons made a conspiracy to kill the four Awami League leaders inside the jail and in pursuance of that conspiracy accused Risalder Muslem Uddin, the present accused respondents Dafader Marfoth Ali Shah and L.S. (Dafader) Abul Hashem Mridha along with two other army personnel' perpetrated the killing in the Dhaka Central Jail on the night following 2nd November, 1975 at around 4 a.m, I am however, unable to endorse her opinion in the operating part of the judgment restoring the respondents conviction passed by the trial court under sections 302/34 of the penal code and her findings that 'The trial Court, therefore, rightly convicted' the respondents. I also fully agree with my learned sister with her concluding opinion that the High Court Division erred in law in acquitting respondents. Since my learned sister has extensively discussed the evidence on record, I will discuss the evidence shortly which are necessary in support of my opinion.

3. A prison is a place in which people are physically confined and usually deprived of a range of personal freedoms. Incarceration in prison is a legal penalty that may be imposed by the Courts for the commission of a crime. Other terms used as penitentiary, correctional facility, remand centre, detention centre, and a gaol or jail. A prison system is the organizational arrangement of the provision and operation of prisons. A prison may also sometimes be used as a tool of political repression to detain political prisoners, prisoners of conscience and enemies of the state, particularly by authoritarian regimes. In times of war or conflict, prisoners of war may also be detained in prisons. The use of capital punishment began to decline in the late 18th century, the prisons are increasingly used by courts as a place of punishment, eventually becoming the chief means of punishing serious offenders. The concept of the prison as a penitentiary (as a place of punishment and personal reform) was advocated by the English jurist and philosopher Jeremy Bentham, among others. Confinement of criminals came to be viewed as an ideal, because it was thought that solitude would help the offender to become penitent and that penitence would result in rehabilitation.

4. Prisons are normally surrounded by fencing, walls, earthworks, geographical features, or other barriers to prevent escape. Multiple barriers, concertina wire, in some cases electrified fencing, secured and defensible main gates, armed guard towers, lighting, motion sensors and roving patrols may also be present depending on the level of security. There are a number of accepted reasons for the use of imprisonment. One approach aims to deter those who would otherwise commit crimes (general deterrence) and to make it less likely that those who serve a prison sentence will commit crimes after their release (individual deterrence). A second approach focuses on issuing punishment to, or obtaining retribution from those who have committed serious crimes. A third approach encourages the personal reform of those who are sent to prison. Finally, in some cases it is necessary to protect the public from those who commit crimes-particularly from those who do so persistently. Although prisons are intended to be institutions where good order prevails, but it is also possible that in certain circumstances the discipline may break down. It is the responsibility of prison administrators to ensure that each arriving prisoner understands what type of behaviour is expected and what acts are forbidden. On top of everything, their personal security is ensured by the State itself. In addition, there must be a clear set of disciplinary sanctions for acts of indiscipline.

5. The modern prison system was born in London, influenced by the utilitarianism of Jeremy Bentham. Bentham's panopticon introduced the principle of observation and control that underpins the design of the modern prison. The notion of prisoners being incarcerated as part of their punishment or detention for the time being and simply as a holding state until trial or hanging or imprisonment was at the time revolutionary. This is when prisons had begun to be used as criminal rehabilitation centers.

6. Political prisoners are not treated as under-trial prisoners nor are they treated as convicted persons. They are kept in prison for alleged violation of prejudicial acts. They are kept separately without mixing with other prisoners. Their status is much higher than an ordinary civilian prisoner. It is the responsibility of the prison authority to ensure their safety and security. Even during medieval period it was inconceivable that a prisoner could be brutally killed by the authority in power. It is always treated as the safest place for all kinds of prisoners and detainees. This has been not only proved untrue in the case in hand, the governments in power instead of putting the killers to justice rewarded them.

7. After the killing of Sheikh Mujibur Rahman, the entire nation was maimed to hear the news of the killing of Syed Nazrul Islam, Tajuddin Ahmed, Captain Monsur Ali and M. Kamruzzaman in their prison cells in the Dhaka Central Jail. The authority remained unmoved and indifferent. Being impelled by conscience, Kazi Abdul Awal (P.W.1), the DIG (Prisons) Dhaka Central Jail, lodged an FIR on 4th November, 1975, being Lalbagh P.S. Case No.11 dated 4th November, 1975, taking risk of his life as the authority in power wanted to suppress the real incident of the killing. He stated that realizing the hatefulness and barbarism and the gravity of the incident, he himself lodged the FIR instead of allowing the Jailor to lodge the same. No investigation was held over the said incident to unearth the names of the assailants, their purpose and intention of the killing. The investigation of the case was postponed sine die by the order of the Government as revealed from the statement of Abdul Kahar Akond (P.W.64). The reason is obvious from all corners the fingers were pointing towards Khandaker Mustaq, his security team deputed at Bangabhaban and his followers as the killers. These killers were staying with Khandaker Mustaq in Bangabhaban forming his security team and associates to consolidate power for running the country.

8. In 1996, when the Awami League, the political party to which these national leaders belonged, formed Government, revived the case. P.W.64 could not trace out the original FIR. Ultimately, he colleted the true copies thereof from two places, one from the Dhaka Central Jail, ext-1 and the other from the judicial record of the Inspector General of Police, ext-3. In due course, he submitted the charge sheet on 15th October, 1998, against the respondents and 18 others. The learned Sessions Judge, Dhaka, received the case record for trial on 24th November, 1998. All 20(twenty) accused including the respondents stood charged under sections 120B and 302/109 of the Penal Code. Accused Moslemuddin was also separately charged under section 302 of the Penal Code. Most of the accused persons including the respondents remained in abscondence. They were tried in absentia. The trial Court as well as the High Court Division, believed the incident of killing but disbelieved the claim of P.W.1 that exts-1 and 3 are the true copies of the FIR. Despite that, the trial Court convicted 15 accused persons including the respondents in absentia and sentenced some of them to imprisonment for life under sections 302/109 of the Penal Code and the respondents with Moslem Uddin @ Moslem Uddin @ Heron Khan @ Moslem Uddin Khan to death under sections 302/34 of the Penal Code. All the accused persons were found not guilty of the charge of conspiracy under section 120B of the Penal Code and acquitted of the said charge.

9. Abdus Samad Azad (P.W.10) was a political prisoner with these leaders during the relevant time stated that after the killing of Sheikh Mujibur Rahman along with his family members on 15th August, 1975, Khandaker Mustaq Ahmed declared himself as President. On 23rd August, 1975, he was arrested by the police and taken to the Police Control Room. On reaching there, he found late Syed Nazrul Islam, late Kamruzzaman, late Tajuddin Ahmed and late Captain Monsur Ali and at 12.30 noon, they were taken to the Dhaka Central Jail.

Md. Nasim (P.w.14), son of late Monsur Ali stated that the killers of Sheikh Mujibur Rahman, namely Khandaker Mustaq, Col. Rashid, Col. Faruq and others took his father into the Dhaka Central Jail and there, they killed his father along with Syed Nazrul Islam, Tajuddin Ahmed and Kamruzzaman.

10. P.W.14 stated that on hearing the news on radio about the killing of Sheikh Mujibur Rahman; the usurpation of power by Khandaker Mustaq and the declaration of Martial Law, he was puzzled for the safety and security of his father as his father was then the Prime Minister of Bangladesh. He shifted his father to a house adjacent to his father's official residence. Then he shifted his father to the house of his maternal uncle Mahbubul Alam at Eskaton at noon. In the meantime Khandaker Mustaq wanted to know the whereabouts of his father. In late evening, the army personnel came in the area. On hearing the news over radio about the formation of the Government by Khandaker Mustaq his father became nervous. Then he shifted his father at night to the residence of a security staff of his father at T & T Colony. Sometimes thereafter, Shah Muazzem Hossain and Obaidur Rahman came to their Eskaton residence and wanted to know the whereabouts of his father. There was exchange of hot words with them. They told him that they were apprehensive of his father's security and they wanted to take him at a secured place for which they wanted to talk with him. They took Monsur Ali to Bangabhaban and there, Khandaker Mustaq offered him to become the Prime Minister. Monsur Ali refused the proposal disdainfully. Then Khandaker Mustaq Ahmed threatened him stating that if he did not accept the proposal, he would face similar fate like the one of 15th August. His father came back and on 22nd August he was arrested.

11. AHS Hasanuzzaman (P.W.31) stated that after taking late Kamruzzaman into jail, he along with Kamruzzaman's wife used to meet him in jail. During the relevant time Kamruzzaman was the party's chief and Sheikh Mujibur Rahman was the President of the country. Khandaker Mustaq earlier requested Kamruzzaman to support him for the post of Prime Minister but Kamruzzaman instead supported Monsur Ali for the office of Prime Minister. So, Khandaker Mustaq was displeased towards Kamruzzaman for not supporting him and the latter was apprehensive that Khandaker Mustaq would take revenge for not supporting him. When these leaders were in such detention, they were brutally killed on 3rd November, 1975.

12. P.W.36 stated that after the killing of Sheikh Mujibur Rahman, the army cordoned their residence and an officer told that all members of the family were put under house arrest. They snapped the telephone link. At 1.30 in the night, Major Dalim with an accomplice came and wanted to know what problem they were then facing. Her father being enraged abused him. On 23rd August, 1975, in the morning, the police took her father with them. Then she came to know that her father was kept in the Dhaka Central Jail. Towards mid October, 1975, she along with her mother went to meet her father in Dhaka Central Jail, when the latter told them that the country was heading towards a direction in which the pro-liberation forces would not be allowed to survive by the new regime.

13. Admittedly, these four leaders were the architects of the liberation of the country and presented to the people the fruits of liberation within a shortest period of time. They organized the unarmed young and adolescent boys to become freedom fighters for liberating the country and fought against an organized Pakistani army equipped with modern sophisticated arms, collected arms for them for fighting with them and convinced the world leaders that they were fighting for political, social and economic independence from the oppressive Government. These leaders were arrested and detained in prison only because

they did not give allegiance to the usurpation of power by Khandaker Mustaq Ahmed and refused to join his Government.

14. The object and purpose behind the killing of the said four leaders are discernible from the testimonies of P.Ws.10, 14 and 36. These leaders not only refused to give allegiance to Khandaker Mustaq's usurpation of power but also refused to join his Government. Naturally, Khandaker Mustaq was not only harbouring hatred towards them, but also realised that these leaders were thorns in his way to run the Government peacefully, and if they were kept alive, they might have mobilized the workers of Awami League after coming out from the prison in future. It is also an undisputed fact that Khandaker Mustaq came to power by killing Sheikh Mujibur Rahman with the help of some aberrated army officers, most of them were involved in the said killing. The evidence on record revealed that the killers of Sheikh Mujibur Rahman were deployed for the security of Khandaker Mustaq Ahmed and stayed with him in Bangabhaban. These are historical facts and the court can take judicial notice of these facts.

15. Courts can take judicial notice of the ordinary course of events. That a matter is judicially noticed means that it is taken as true without the necessity of being formally proved on evidence. Taylor in his Law of Evidence states that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery. Nor is it necessary to prove the course of the heavenly bodies, or the like, that a matter is judicially noticeable means that it is taken without offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. A proclamation of emergency is a matter of general information of which a court can take judicial notice. A matter of public history may be such a fact (Wigmore section 2567). Facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in clauses (1) to (13) of section 57 of the Evidence Act.

16. In the penultimate paragraph of section 57 of the Evidence Act it is stated that "*If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so*". This paragraph does not say whether the court may or may not take notice of any fact, nor does it say or mean that the court shall or may take judicial notice of every matter which comes under the head of description given there. It merely provides that when the court does take judicial notice of the fact of which it is bound to take judicial notice under clauses (1) to (13), then it may refer to appropriate books of reference about those facts. Though the matters of history, literature, science and art are not mentioned in section 57 as matters of which the court may take judicial notice, section 57 is not exhaustive of the facts of which the court may take judicial notice. This paragraph is in accordance with English law, so far as it enables the court to refer the appropriate books or documents of reference upon matters. It is directed to take judicial notice of it in advance of such law, in so far as it permits the court to refer to such books and documents on matters of public history, literature, science or arts.

17. Besides those matters, there may be other facts which are considered too notorious to require formal proof; such matters are, therefore, "judicially noticed". *"Any matter of such common knowledge that it should be an insult to intelligence to require proof of it would probably be dealt with in this way (*Cockle's Cases and Statutes on Evidence, Eighth Edition, page 13)". Of them, historical facts, geographical truths, scientific inventions, socio-economic conditions at a given time, natural phenomena, axiomatic truth, common affairs of life in general knowledge of people, religious history and prevalence of a religious belief and

distinction between ideas of two sects. The courts can take judicial notice of partition of India, the communal disturbance at that time and the consequent insecurity of lives and property of Muslims in India and Hindus in Pakistan and their migration to India and Pakistan etc. (Shiv Nath V. Union of Indai, AIR 1965 SC 1666).

18. In Onkar Nath V. Delhi Administration, AIR 1977 S.C. 1108, Onkar Nath, a Railway employee was convicted by a Magistrate and his conviction was upheld by the appellate Court and the High Court in revision. His conviction was under the provisions of the Defence of India Rules, 1971. The allegation against him is that in violation of the prohibition, the appellant who was a leader of the Railwaymen's Union held a meeting in the Railway yard inciting Railway workers to go on strike from May 8, 1971. The Supreme Court held that facts mentioned in Section 57 of the Evidence Act were not exhaustive and the purpose of this section is to provide that the Court shall take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice. Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public notice. *"Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to the commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual. No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present. The date of poll, the passing away of a man of eminence and events that have rocked the nation, need no proof and are judicially noticed. Judicial notice in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts it is superior to formal means of proof", the court observed.* Accordingly, the supreme Court held that the Courts below were justified in assuming without formal evidence the Railway strike was imminent on May 5, 1974, and that a strike paralysing the civic life of the nation was undertaken by a section of workers on 8th May, 1974.

19. Similarly the general election of Pakistan held in 1970 is a landmark in the history of struggle for the right of self-determination of the people of erstwhile East Pakistan is a historical fact and the court can take its' judicial notice. In the said election Awami League appeared as a single majority party of the National Assembly of Pakistan for the purpose of framing a Constitution so as to ensure the political, social and economic right of the people of East Pakistan. The historical speech of Sheikh Mujibur Rahman on 7th March, 1971, at Race Course Maidan which inspired the people to participate in the struggle for national liberation; the declaration of Independence of Bangladesh on the night following 25th March, 1971, when the Pakistani Army cracked down and committed genocide, rape, arson and crime against peace and humanity; the elected representatives declared and constituted Bangladesh to be a sovereign Peoples Republic on 10th April, 1971, and formed the Government and took oath on 17th April, 1971, at Mujibnagar with the national four leaders, namely, late Syed Nazrul Islam as Acting-President, late Tajuddin Ahmed as Prime Minister, late M. Monsur Ali as Finance Minister and late M. Qamruzzamman as Home and Relief & Rehabilitation Minister are historical facts and the Court can take judicial notice of them.

20. The constitution of the 'Constituent Assembly', the drafting of the Constitution of the Peoples Republic of Bangladesh and adopting it on 4th November, 1972, which came into force on 16th December, 1972, the killing of Sheikh Mujibur Rahman and his family members on 15 August, 1975, by some aberrated army officers; the usurpation of power by Khandaker Mustaq Ahmed after killing Sheikh Mujibur Rahman; the arrest of four national leaders and keeping them in the Dhaka Central jail as they refused to give allegiance to

Khandaker Mustaq's Government and also refused to join his cabinet; the killing of these four national leaders Syed Nazrul Islam, Tajuddin Ahmed, Monsur Ali and M. Kamruzzaman while they were kept as political prisoners in Dhaka Central Jail in the early hours of 3rd November, 1975, when Khandaker Mustaq Ahmed was the President of the country are so notorious facts that those cannot be disputed by any body and if any one disputes these historical events, he will be taken or treated as a person not believing the history behind the sacrifice of millions of martyrs for the liberation, and the sovereignty of Bangladesh.

21. The trial Court committed a fundamental error in convicting the respondents along with 13 others under sections 302/109 of the Penal Code and also convicting the respondents along with Moslem Uddin under sections 302/34 of the Penal Code for the self same incident of murders. This shows that the trial Court was totally confused in the application of an offence of abetment of murder and sharing of common intention by two or more accused persons in the commission of murder in a case. The accused persons cannot be convicted for these two categories of offence for the commission of the self same incident of murders. One or more accused persons can be convicted for the abetment of the offence and the others for sharing common intention. Either they could be convicted under sections 302/109 or under sections 302/34 of the Penal Code if there are legal evidence in support of either of the charges but they could't be convicted on both counts for the same offence of murders committed in course of the same transaction. The High Court Division has totally overlooked this glaring mistake and opted not to express any opinion either due to its ignorance or through inadvertence. In arriving at the conclusion of finding them guilty of those charges, it made inconsistent findings. On perusal of the judgment one can legitimately infer that the learned Judge is a novice judicial officer whose conception in criminal laws is very poor.

22. An abetment is an instigation to a person to do an act in a certain way or aid some other persons in doing an act. It is a preparatory act and connotes active complicity on the part of the abettor at a point of time prior to the actual commission of the offence. To constitute abetement the person must instigate any person to do a particular thing or he must engage with one or more persons in any conspiracy for the doing of that thing or intentionally aids by any act or illegal omission, the doing of that thing. These are the three essential ingredients to constitute abetement as crime. Section 109 is concerned only with the punishment of abetment and lays down nothing more than that if the Penal Code has not separately provided for the punishment of an abetment as such, then it is punishable as provided for the original offence. This section may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of offence or has engaged with one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy some acts or illegal omission takes place or has intentionally made it possible of the commission of an offence by an act or illegal omission.

23. It is to be noted that in order to implicate a person of an offence as abettor it has to be proved the *actus reus* he has abetted with the necessary *mens rea*. To establish the charge of abetement there must be evidence that an act was abetted and that it was abetted by the person charged with. The act abetted must, moreover, amount to a crime, and in order to connect the abettor with the crime, it is not sufficient to prove that he had taken part in those steps of the transaction which are innocent, but it must also be proved that he had deliberately taken part in those steps of the transaction which constituted an offence. Section 109 may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or

illegal omission takes place or has intentionally aided the commission of an offence by illegal omission.

24. Section 34 of the Penal Code embodies the principle of joint liability in doing of a criminal act, the essence of that liability is the existence of a common intention. Section 34 deals with the doing of separate act or acts, similar or diverse, by two or more persons, if done in furtherance of a common intention, each person is liable for the consequence of those as if he had done those himself for 'that act' and 'the act' in the latter part of the section must include the whole section covered by a 'criminal act' in the first part because they refer to it.

25. Section 34 of the Penal Code does not create a substantive offence. If two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it individually. Common intention requires a prior consent or concert or a pre-planning. It is the intention or *mens rea* to commit the offence and the accused can be convicted only if such an intention has been shared by all of them. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop at the instant when such crime is committed.

26. It is difficult, in the premises, if not impossible, to procure direct evidence of such intention. It is similar to that of criminal conspiracy. In most cases, it has to be inferred from the acts or conduct of the accused and other relevant circumstances. So, mere accompanying the other accused may not infer common intention. Existence or otherwise of common intention depends upon facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal offender. Evidence regarding development of common intention to commit an offence graver than the one originally designed, during execution of the original plan, should be clear and cogent. In this connection reference may be given to the cases of Dharam Pal V. State of Haryana, AIR 1978 S.C. 1492 and Abdur Rahman Mondal V. State, 29 DLR (SC) 247.

27. In Dharam Pal, it was observed that the common intention to commit an offence is graver than the one originally designed may develop during the execution of the original plan, that is to say, during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent beyond suspicion, however strong, cannot take place of the proof which is essential to bring home the offence of the accused. In Abdur Rahman, (supra) Ashanuddin Chowdhury,J. observed '*The common intention to bring about a particular result may well develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or incriminating acts must be compatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further, it is essence of section 34 that the person must be physically present at the actual commission of the crime'.(Italics supplied).*

28. The conduct or act of the accused can be gathered and the inference can only be drawn by the manner in which the accused or some of them, arrived on the scene and mounted the attack, the determination and the conduct with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries caused by one or some of them, the acts done by others to assist those causing the injuries, the concerted conduct towards one goal which matter. It is the totality of the circumstances to be taken into consideration in arriving at the conclusion whether the accused

had a common intention to commit an offence with which they could be convicted. It is, therefore, established principle that the pre-arranged plan or even the intention may develop on the spot leading to the commission of the offence. But the crucial circumstance is that the said plan must precede the act constituting the offence. Therefore, before convicting an accused, the court must come to a definite conclusion that the said person had a prior concert with one or more persons for committing the offence.

29. The dominant feature of section 34 of the Penal Code is the element of participation in the entire canvas portraying the actions. The views taken in Abdur Rahman Mandal (supra) have been approved by this Division in a subsequent case in Major Md. Bazlur Huda V. State, ADC vol.VI(A)1. In that case, Sultan Shahriar was not present at or near the place of occurrence–he was at the Radio Station when Sheikh Mujibur Rahman and other members of his family were killed. On behalf of the accused his conviction under sections 302/34 of the Penal Code was challenged on the ground that in view of the admitted fact of his absence at the place of occurrence, his act of participation in the killing does not come within the ambit of section 34 of the Penal Code in the absence of any overt act or any other act of participation in the killing. It was also urged that in order to bring him within the ambit of sharing common intention with other accused persons his participation with other perpetrators in the scene of crime in pre-concerted or pre-arranged plan must be proved. In this connection this Division considered the cases of Barendra Kumar Ghose V. Emperor, AIR 1925 P.C.1, Shreekantiah Ramayya Muni Palli V. State of Bombay, AIR 1955 S.C. 287, Tukhram Gonopat V. State of Maharashtra, AIR 1974 S.C. 514, Jaikrishna Das Monohordas Desai V. State of Bombay, AIR 1960 S.C.889, Ramaswami V. State of T.N. AIR 1976 S.C. 2027, Abdur Rahman Mondal V. State, 29 DLR (SC) 247, Bangladesh V. Abed Ali, 36 DLR (AD) 234, Abdus Samad V. State 44 DLR (AD) 233 and State V. Tajul Islam, 48 DLR 305 and held by majority that in order to bring an accused within the ambit of section 34 of the Penal Code, the presence of the accused at the scene of occurrence must be proved and that his participation, that is to say, overt act either direct or indirect in the commission of the offence in furtherance of the common intention of all must also be proved.

30. Apart from the above, it is to be noted that there are distinguishing features in the applicability of vicarious or joint liability in offences of physical violence and other offences. Sometimes we ignore the difference and in some cases it is held that though the dominant feature is the element of participation in actions, this participation need not in all cases be by physical presence. This Division approved the distinction drawn by the Supreme Court of India in Monohardas Desai (Supra) and Ramaswami Yanangar's (supra) in cases regarding the applicability of section 34 of the Penal Code in respect of offences of physical violence and other offences in Major Bazlur Huda (supra). It is stated that in offences of physical violence, the presence of accused at the scene or, at or nearer to the scene of occurrence is necessary for rendering him liable on the principle of joint liability. The trial Court has totally ignored the applicability of sections 109 and 34 in a given case. The High Court Division ought to have expressed its opinion in this regard.

31. The offence of murder committed in consequence of a conspiracy and the offence of murder committed in pursuance of common intention by more than one accused persons are in essence, as discussed above, distinct. A criminal conspiracy differs from other offences, that is to say, an intention to do a criminal act is not a crime in itself, until something is done amounting to the doing or attempting to do some act, to carry out the intention; conspiracy on the other hand consist simply in the agreement confederacy to do some act. In a criminal conspiracy, accused persons are often required to do various acts at various stages; even if for

the first time they come into conspiracy, at a later stage they are members of the conspiracy provided their act is calculated to promote the object of the conspiracy: is attracted when an offence of culpable homicide is committed 'in furtherance of common intention' of two or more persons, then every one of them is as such guilty as the other and it is not necessary that every one of them should have participated in the commission of the murder to the same extent. It is thus not consonant to law that after the accused persons were found guilty of criminal conspiracy to kill the four leaders in the Dhaka Central Jail, their conviction under section 302/34 of the Penal Code passed by the trial court could be legally maintainable.

32. The trial court has committed another fundamental error in acquitting the accused persons of the charge of criminal conspiracy. The High Court Division also committed the similar error in maintaining the finding on the charge of criminal conspiracy. Though it maintained the death sentence of Moslem Uddin, acquitted the respondents and Syed Faruque Rahman, Sultan Shahriar Rashid Khan, Bazlur Huda and A.K.M. Mohiuddin Ahmed. On the charge of conspiracy it held that the prosecution failed to prove that the killing was perpetrated in consequence of a criminal conspiracy hatched up in Bangabhaban by Khandaker Mustaq Ahmed, the politicians staying with him and his security team deputed at Bangabhaban or that the killing was implemented and monitored from the Bangabhaban over telephone. It observed that the story of telephonic talk between Bangabahban and the Dhaka Central Jail has not been established to the hilt of the case and that "*the trial court has itself evaluated rightly discarded the testimonies of the witnesses who deposed relating to the deliberations amongst the accused persons inside the Bangabhaban over the killing of the 4 leaders*". The High Court Division concluded its opinion observing that it was not possible or probable on the part of the accused persons staying at Bangabhaban "*to go out of the same at 0.00 hours or afterwards on 03.11.75 because of promulgation of coup-d'etat by Khaled Mosharaff on the same night and the consequent withdrawal of Tank Regiment from Bangabhaban as also for deployment of rival forces lead by the leader of the coup, within the vicinity of Bangabhaban, at 12-1.00 hours of November 3, 1975*".

33. It was contended on behalf of the appellant that the four national leaders were brutally killed as a part of deep rooted conspiracy, which was hatched up in the Bangabhaban by Khandakar Mustaq Ahmed, with the political leaders staying with him and his security team, and there are sufficient evidence in support of the charge of criminal conspiracy both direct and circumstantial, and therefore, the High Court Division acted illegally in acquitting the respondents. On the other hand, learned counsel appearing for the respondents supports the judgment of the High Court Division and submits that the High Court Division as well as the trial court on a proper appreciation of the evidence on record has arrived at a right conclusion that the prosecution has failed to prove the charge of conspiracy on assigning cogent reasons-this finding being concurrent, this Division should not interfere with such finding of fact.

34. Both the High court Division and the trial Court fell in error in failing to notice that conspiracy is a matter of inference deduced from certain acts of persons done in pursuance of an apparent criminal purpose in common between them. In the very nature of the offence, the presence of the accused at the scene of occurrence is not necessary. Section 120A of the Penal Code defines criminal conspiracy, which enacts that when two or more persons agreed or cause to be done an illegal act or an act which is not illegal but by illegal means, such an agreement is designated as criminal conspiracy punishable under section 120B of the Penal Code. The essence of criminal conspiracy is an agreement to commit an illegal act by some persons. A criminal conspiracy by its nature is hatched up in secrecy and direct evidence to prove conspiracy is seldom available. The offence of conspiracy being a making of an

agreement to do an unlawful act, it is a matter of inference to be drawn from direct or circumstantial evidence. It can be inferred from the acts and conduct of the parties in agreement of conspiracy that there was an agreement between two or more persons to do one or the other of the acts described in the section. The conspiracy consists not merely in the intention of two or more persons, but in the agreement of those persons to do such acts. So long as such a design rests only in intention, it is not punishable.

35. The existence of a criminal conspiracy presupposes a guilty state of mind and a situation wherein the concerned accused, pursuant to a predetermined decision, execute a series of acts that constitute a criminal offence. In such case, the acts themselves are of such a character that a participation in those would leave no doubt that the concerned accused were taking part of an offence of criminal conspiracy. Further, offences created by sections 109 and 120B of the Penal Code are quite distinct though in both, the element of conspiracy is present. There is analogy between these two sections and there may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Second clause of section 107 states that a person abets the doing of a thing who engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy. So, in order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy. Secondly, an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing, it is not necessary that the abettor should concert in the offence with the persons who committed it.

36. Whereas, section 120A consist in a mere agreement by two or more persons to do or cause to be done, an illegal act or an act which is not illegal by illegal means. When there is an agreement to commit an offence, the agreement itself becomes the offence of criminal conspiracy. So, distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this criteria. Criminal conspiracy to commit an offence is itself an offence and a person can be separately charged in respect to such a conspiracy. In this connection, reference may be given in the case of Kaher Singh V. State (Delhi Admn), AIR 1988 SC 1883, in which, the distinction of these two offences have been exhaustively dealt with and disagreed with the argument that a party to a criminal conspiracy shall be punished in the same manner as if he had abetted such an offence. It was observed by K. Jagannatha Shetty,J. in paragraph 257:

> "t*he gist of the offence of criminal conspiracy created under section 120-A is a bare agreement to commit an offence. It has been made punishable under section 120-B. The offence of abatement created under the second clause of section 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by the wordings of section 107 (Secondly): "engages in any conspiracy ..... for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy ...." The punishments for these two categories of crimes are also quite different. Section 109, IPC is concerned only with punishment abetments of for which no express provision is made under the Indian Penal Code. A charge under section 109 should, therefore, be along with some other substantive offence committed in consequence of abetment. The offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under section 120B for which a charge under section 109, IPC is unnecessary and indeed, inappropriate."*

37. The distinction is that in the second clause of section 107, a mere combination of persons or agreement between them is not enough-an act or illegal omission must take place in pursuance of conspiracy and in order to doing of the thing conspired for and in the latter offence the mere agreement is enough-if the agreement is to commit an offence. Proof of a conspiracy in most cases depends on inference from the conduct of the conspirators. In Noor Mohammad Yousuf Moin V. State (1970) 1 SCC 696, the Supreme Court of India observed:

> *"Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wide amplitude than abetment by complicity as contemplated by section 107 I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarter or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most case proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both, conspiracy and the offences committed pursuant thereto".*

38. If the conspirator had agreed to the common design it can be presumed that he continued to be a party of criminal conspiracy. Since offence of criminal conspiracy can be proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design, as soon as a charge of criminal conspiracy is brought against accused persons the rules of evidence provided in section 10 of the Evidence Act will come into play. The condition precedent to the application of the rule laid down in section 10 of the Evidence Act is that there should exist a reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, i.e. there should be prima facie evidence that a person was a party to the conspiracy before his act can be used against his co-conspirators. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which, each one of them must be interested. Reference in this connection may be made to the case of Yashpal V. State of Punjab, AIR 1977 SC 2433.

39. Actual proof of conspiracy is not required; even some prima facie evidence leading to a reasonable belief that two or more persons had conspired together is sufficient. It is also well established that conspiracy need not be proved by direct evidence. The same may be proved from the surrounding circumstances and conduct of the accused. As to when conspiracy can be taken as established, it is now settled by judicial pronouncements that there can hardly be direct evidence on this, for the simple reason that conspiracy is not hatched up in public-by its very nature-those are secretly planned. So lack of direct evidence relating to conspiracy by the accused has no significance. It is unnecessary to prove that the parties actually came together and agreed in terms to pursue the unlawful object-there need never have been an express verbal agreement, it being sufficient that there was a 'tacit understanding between the conspirators as to what should be done'. The relative acts or

conducts of the parties must, however, be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. See Shiba Narayan Laxmi Narayan Joshi V. State of Maharashtra, AIR 1980 SC 439 and Noor Mohad. Yousuf (suppra).

40. The conspiracy being hatched up in secrecy, conspirators cannot discuss the plans in the presence of strangers. This privacy and secrecy being the elements of criminal conspiracy, it is difficult to obtain direct evidence in its proof. For a court to believe that two or more persons are members of a conspiracy, if the said condition is fulfilled anything said, done or written by any one of them in reference to their common intention will be evidence against the other; anything said, done or written by one of the conspirators should have said, done or written by him after the said intention was entertained is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.

41. It should be borne in mind that the 'common intention' which is a constituent of proving an offence of criminal conspiracy is different from the one 'common intention' used in section 34 of the Penal Code. The expression 'common intention' used in section 10 of the Evidence Act signifies a common intention existing at the time when the thing was said, done or written by one of the conspirators but the 'common intention' referred to in section 34 is doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention. In the light of the above discussions, it is to be looked into whether the killing of the four national leaders was planned, designed and hatched up in the Bangabhaban by the members of the security team deputed for the security of the President, the political leaders who used to stay with the President and his Military and Civilian Secretaries. On appreciation of ext.36 and other materials on record, the trial Court arrived at the conclusion that Khandaker Mustaq Ahmed, Major Rashid, Capt. Moslem and his four associates were involved in the killing.

42. The trial Court held that the evidence of Mahbub Uddin Ahmed (P.W.20) indicated that the army personnel perpetrated the killing and that Major Dalim was involved; that Major Rashid, Major Shariar, Major Faruq visited Dhaka Central Jail and that they were interested to know the entire episode of events in the Central Jail from Bangabhaban. However, after analysing the evidence of P.W.1, Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3) Mahbbat Ali (P.W.4), Alauddin Sikder (P.W.5), Md. Ismail Hossain Khan (P.W.6), Md. Abdur Rouf (P.W.7), Md. abdul Gahir (P.W.8), Md. Nayeb Ali (P.W.9) and Kazi Abdul Alim (P.W.12), it has arrived at the conclusion that Shah Moazzem Hossain, Obaidur Rahman, Nurul Islam Monzur, Major Faruq, Major Noor, Major Aziz Pasha, Major Mohiuddin, Major Bazlur Huda, Major Sarful Ahmed, Major Shahriar, Captain Nazmul, Captain Majed, Captain Nurul Huda, Captain Kishmat Hashem, Captain Khairuzzaman, Major Rashed Chowdhury, Risalder Moslem and Taheruddin Thakur were not involved in the conspiracy of killing. This finding is self contradictory and misconceived. It failed to comprehend the elements of conspiracy and the evidence required to prove a charge of criminal conspiracy. The findings arrived at after sifting the evidence of P.W.20 and the witnesses examined from Bangabhaban, there is no doubt that all elements of criminal conspiracy to kill the four national leaders in the Dhaka Central Jail by the army officers deputed in the Bangabhaban are present in the case and that the trial court has failed to comprehend the same. The High Court Division also noticed inconsistency in the first part and the latter part of the judgment of the trial Court.

43. In this case the prosecution has examined 3(three) witnesses to prove the meeting of minds by all the conspirators in the Bangabhaban, that is to say, the planning, designing and implementing-they are, Md. Mokhlesur Rahman Bhuiyan (P.W.11), Md. Shakhawat Hossain (P.W.13) and Md. Manik Mia (P.W.18). To prove the previous conduct of the accused persons it has examined 4 witnesses; they are, Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3), Abdus Samad Azad (P.W.10), Md. Nasim (P.W.14) and Mahbubuddin Ahmed (P.W.20). To prove the preparation and execution of the killing pursuant to the conspiracy, the prosecution has examined 8 witnesses; they are- Kazi Abdul Awal (P.W.1), Md. Aminur Rahman (P.W.2), A.T.M. Nuruzzaman (P.W.3), Md. Mokhlesur Rahman (P.W.11), Khan Mohammad Ali Alok (P.W.17), Commodore Golam Rabbani (P.W.21), Md. Yakub Hossain Khan (P.W.34), and Lt. Col. (Rtd) Anwaruzzaman (P.W.46). To corroborate them, it has also examined Md. Nayeb Ali (P.W.8), Dr. Md. Faizuddin Miah (P.W.23) and Syed Mahbub-Al-Karim (P.W.52).

44. Coupled with their evidence, the prosecution has also examined 7 witnesses to prove that the killing squad went from the Bangabhaban to execute the killing and after the killing they returned back to Bangabhaban. Those witnesses are, A.T.M. Nuruzzaman (P.W.3), Mahabbat Ali (P.W.4), Md. Ismail Hossain (P.W.6), Md. Shakhawat Hossain (P.W.13), Khan Md. Alok (P.W.17), Md. Manik Mia (P.W.18), and Commodore Golam Rabbani (P.W.21). The evidence of these witnesses have been corroborated by P.Ws.7, 16, 36, 37 and 46. In support of the circumstantial evidence, the prosecution has examined P.Ws.2, 3, 10, 20, 21, Captain A.M.M. Saifuddin (P.W.26), Oliur Rahman (P.W.28), Col. Safayat Jamil (P.W.29), Shamsher Mobin Chowdhury (P.W.33) and Md. Mostafa (P.W.63). Some of these witnesses, i.e. P.Ws.26, 28, 29, 33 and 63 also proved the subsequent conducts of the conspirators.

45. It is argued on behalf of the respondents that the evidence on record indicated that since 2nd November, 1975, the telephone connection of Bangabhaban was snapped-so, the prosecution story that the conspiracy was hatched up in Bangabhaban and that Khandakar Mustaq Ahmed, Rashid and Faruq compelled the Inspector General (Prisons)(P.W.3) to co-operate the army personnel sent from the Bangabhaban for implementing the killing is an unbelievable story. In this connection, the learned counsel has drawn our attention to the evidence of P.Ws.21 and 29 and the conclusions arrived at by the High Court Division.

46. The High Court Division approved the finding of the trial Court holding that it had rightly discarded the evidence of P.Ws.1-3 as not trustworthy witnesses. Similarly, it discarded P.Ws.4 and 5 on the reasoning that their evidence do not disclose the complicity of the accused persons other than Moslem Uddin. It also discarded P.W.6 on the reasoning that he did not disclose the name of any of the accused persons. It also discarded the evidence of P.W.7 on the reasoning that he had not seen the incident and also discarded the evidence of P.Ws.8, 9 and 10 on the reasoning that they did not disclose the complicity of other accused persons. The High Court Division disbelieved other witnesses along with Md. Yaqub Hossain (P.W.24) on the reasoning that they are not trustworthy witnesses. So, practically the High Court Division has discarded all the prosecution witnesses by ascribing this or that reason apparently without any sound reasoning and thus, this reasonings lack legal foundation. Even then, it maintained the conviction of Moslem Uddin alone-in the one breath it observed that, there is inconsistency in the judgment of the trial Court, and on the other, it itself made inconsistent findings and observations while maintaining the conviction of accused Moslem Uddin. This inconsistency has reflected in its ultimate conclusion in finding the respondents not guilty of the charge. It has illegally given them the benefit of doubt.

47. While disbelieving the charge of conspiracy, the High Court Division after assessing the evidence of P.Ws.29 and 46 came to the conclusion that "*it is very much doubtful as to whether there was at all any telephone link in operation between Bangabhaban and any other part of the city like Central Jail, Dhaka. It is also evidence from the deposition of the witnesses that on the night following 02.11.1975 from 12.00 midnight to 1 a.m. the inmates of Bangabhaban had received the message that their rival force had already been deployed within the vicinity of Bangabhaban and the tanks meant for guarding Bangabhaban had already been withdrawn by their rival force ..... Under the circumstances, the telephonic conversations from Bangabhaban to Central Jail as disclosed by the witnesses is very much difficult to be believed. Moreover, we find no reason to disagree with the learned Sessions Judge who after thorough analysis of their depositions found the testimonies of P.Ws.11, 13, 16, 17, 18 and 34 as unworthy of credence in the first part of his impugned judgment although he has contradicted his own findings at the latter part of the same judgment'*.

48. It failed to notice that identification of all the accused persons in the scene of occurrence or the disclosure of the names of all the accused persons by all the witnesses is not at all relevant and necessary to prove a charge of conspiracy. It failed to notice that a conspirator is an agent of his associates in carrying out the object of conspiracy. So, if the element of constitution of conspiracy is present, all conspirators will be equally responsible for the commission of the offence. There was no disruption of the Bangabhaban's telephone link and the High Court Division on a piecemeal consideration of those two witnesses has arrived at such conclusion over which I will discuss below. Assuming that the telephone link was disconnected, that itself is not a legal ground to disbelieve the charge of conspiracy. Because, before giving the direction over telephone from Bangabhaban, it is found from the evidence of the witnesses that some of the conspirators supervised the arrest of the leaders and tried to compel them to join the Mustaq's cabinet, and when they failed to achieve their goal, they put the leaders in detention. It has also been proved that before the directions were given from the Bangabhaban over phone, there were meetings amongst the conspirators in the Bangabhaban. There are other circumstantial evidence also to link this fact of meetings with the killing as will be evident from the evidence of P.Ws.10, 14, 20, 31 and 36 as discussed above.

49. P.W.11 was an employee of President's Secretariat. He was the Personal Assistant of the Millitary Secretary to the President. He stated that on the night following 2nd November, 1975, at about 7.30 p.m., Captain Moslem came to his room and took him into a room on the first floor and in that room he saw the respondents with other accused persons; that they were discussing about Syed Nazrul Islam, Tajuddin Ahmed, Capt. Monsur Ali and Kamruzzaman; that Major Dalim and Major Rashid wanted to know from him whether he had Dhaka Central Jail's telephone number and then they directed him to supply I.G. (Prisons) and D.I.G. (Prisons) official telephone numbers, the Jailor's residence and official telephone numbers; that he supplied their phone numbers and at that time, they were discussing that the task had to be finished within the same night; that they were quering over telephone about the exact location of the cells where the said leaders were kept in the Dhaka Central Jail; that at that time, he was asked by Major Shahriar to leave the room and stay in his room until further order; that at about 9 p.m. the President's Secretary called him in his office and on reaching there, he found some other persons sitting there and at that time, the defence secretary was talking over telephone regarding the said four political prisoners and, thereafter, the secretary and those persons went to President's bed room; that in the morning he came to know that the four leaders were killed in the Dhaka Central Jail and that on following morning, he came to know that the said accused persons who were staying in Bangabhaban had gone abroad.

50. This witness stated in unequivocal terms that the respondents along with other accused persons were discussing about the four national leaders detained in the Dhaka Central Jail preceding the incident secretly in Bangabhaban. This statement has not been challenged by the defence. This witness also stated that Major Faruq was talking over phone with the Dhaka Central Jail regarding the four national leaders and the defence had not challenged the statement. Therefore, there are uncontroverted evidence that the officers under whom the respondents were deployed were discussing in a room in Bangabhaban regarding four national leaders; that they had contacted the jail authorities through the telephone number supplied by him; that on the same night the leaders were killed in the central jail and that on the following day army officers staying in Bangabhaban left the country.

51. P.W.13 was a Khedmodker (butler man) of Bangabhaban. He stated that he was in Bangabhaban on 20th August, 1975 and in course of his duties he was acquainted with Major Rashid, Major Faruq Rahman, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Sharful, Major Mohiuddin, Major Aziz Pasha, Captain Majed, Marfat Ali, Abul Hashem Mridha, Mahbub Alam Chashi, Taher Uddin Thakur; that they were usually discussing with Khandaker Mustaq; that Taheruddin Thakur and Mahbub Alam Chashi were staying with him since Khandaker Mustaq's family was not staying at Bangabhaban; that on 2nd November, 1975, he came for duty at 2 p.m. and noticed the movements of the army officers with some other unknown persons in the Bangabhaban which appeared to him abnormal; that at 7.30 p.m. he found that the officers were holding meeting in Rashid's room on the 1st floor; that at 12.30 midnight Major Rashid and other army officers including Taheruddin Thakur and Chashi were holding meeting in the President's meeting room; that as desired he served tea to them and at that time Khandaker Mustaq was quering to Rashid about the persons who would go to jail and in reply Rashid told that Captain Moslem Uddin and his team would go; that Major Rashid told him to serve dinner to Moslem Uddin; that he went to Moslem Uddin's room on the ground floor to serve dinner and at that time, the latter refused to take dinner; that Captain Moslem Uddin brought out a bottle of alcohol from the almirah and asked him to serve; that at that time two other persons in civil dress and two lower ranked army personnel were present with him and they jointly consumed alcohol; that at about 3 a.m. he noticed that Captain Moslem Uddin, one person dressed with plain cloth, the respondents and 2/3 other lower ranking army personnel went out of Bangabhaban in a millitary jeep; that thereafter, he along with P.W.18 went in the dining room for taking rest; that at about 6 a.m. Major Bazlul Huda woke him up and directed him to serve breakfast to all persons in the first floor; that he served breakfast to all the army officers and personnel who were then discussing among themselves; that Major Rashid was quering about the fate of 4 leaders staying in the central jail and in reply, Moslem Uddin replied that he finished the job assigned to him; and that from their discussions he learnt that the four national leaders were killed by Moslem Uddin and his team in the Dhaka Central Jail. The statement that at about 3 a.m. the respondents, Captain Moslem Uddin and some other persons left Bangabhaban with an army jeep has not been challenged by the defence.

52. P.W.18 is another Khedmodker of Bangabhaban. He claimed that as he was employed at Bangabhaban from before the killing of Sheikh Mujibur Rahman; he noticed the presence of Major Rashid and other officers in the Bangabhaban in course of his duties; that Mahbub Alam Chashi and Taher Uddin Thakur stayed in Bangabhaban with Khandaker Mustaq in close association; that at that time tanks were deployed around Bangabhaban; that he came on duty at 2 p.m. on 2nd November, 1975 and P.W.13 was with him; that on that day at about 7/7.30 p.m, in the room of Major Rashid, he saw that other officers were also sitting with

him; that at about 12/12.30 at night he noticed that a meeting was going on in the meeting room of Khandaker Mustaq and in the said meeting besides the said army officers, Chashi and Taher Uddin Thakur were also present; that they were talking on different topics and at one stage, Khandaker Mustaq wanted to know from Major Rashid on whom the task of jail was given; that in reply, Rashid told that Captain Moslem and his team were assigned for the job; that things were arranged accordingly and that, soon thereafter, Major Rashid told him to serve dinner to Moslem.

53. The narration of facts regarding holding of meetings twice in Bangabhaban as disclosed by P.Ws.13 and 18 just before the incident of killing are consistent. These witnesses were public servants and there is no reason to disbelieve them particularly when the defence has failed to establish any sort of enmity or biasness to depose falsely against accused persons. Most of their statements relating to the fact of holding meetings secretly about the four national leaders detained in the Dhaka Central Jail suggesting an inference for executing their plan of an illegal act in the Central Jail through Moslem Uddin's team remain uncontroverted. The defence could not shake their testimonies. They are natural and neutral witnesses. They stated facts about what they saw and heard in their ordinary course of official duties. They were corroborated by P.W.11 on the question of discussion amongst the army officers in presence of Khandaker Mustaq, Mahbub Alam Chashi and Taher Uddin Thakur regarding the four national leaders who were detained in the Dhaka Central Jail. According to the prosecution, after these meetings in the Bangabhaban, Major Rashid, Major Faruq, Khandaker Mustaq's team compelled the Inspector General (Prisons) P.W.3, the Deputy Inspector General (Prisons) (P.W.1) and Jailor (P.W.2) to allow Moslem Uddin and his team to enter into the Dhaka Central Jail.

54. P.W.1 in first part of his chief stated that as directed by P.W.3, he came to the Central Jail gate and sat beside him (I.G. Prisons). At that time, many telephone calls came and I.G. (Prisons) received those phones and talked with them. Though he did not disclose the name of the persons with whom I.G. (Prisons) was talking over telephone, but if his statements are considered with those of P.Ws.11, 17, 23, 29 and 34, it could be inferred that P.W.3 was talking with some persons staying in Bangabhaban. More so, if his subsequent statement 'h‰ ih-el p¡-b BC ¢S ¢fËSep ®V¢m-g¡-e ®k¡N¡-k¡N L-l' made in course of his cross examination is considered, there will be no doubt to infer that P.W.3 was directed from the Bangabhaban over telephone just prior to the incident of killing to allow Moslem Uddin and his team to enter into the Central Jail, Dhaka.

55. P.W.2 stated that he was the Jailor of Dhaka Central Jail; that the four leaders of Awami League were sent to Dhaka Central Jail and they were kept in detention as per order of the Government; that on the night fallowing 2nd November, 1975, Major Faruq wanted to know from Bangabhaban over telephone about the exact location of the leaders in jail; that at about 3 a.m., the jail guard on duty informed him over phone that P.W.3 wanted his presence in jail premises without delay; that he immediately came to the jail and at that time, the jail guard informed him that P.W.3 had already reached the jail; that he arranged for the sitting of P.W.3 in the office of P.W.1 and at that time, P.W.3 told him that he was informed from the Bangabhaban that the miscreants might have abducted some prisoners and accordingly directed him to give necessary instructions to his subordinates to remain alert; that in the meantime, P.W.1 reached there and soon thereafter, P.W.3 told them that some army officers headed by Captain Moslem Uddin would come to jail from Bangabhaban and that they should be taken to P.W.1's room. He then went to his room and at that time, Major Rashid wanted to talk with P.W.3 from Bangabhaban. He then intimated the massage to P.W.3 and

the latter came to receive the phone. P.W.1 then talked with Khandaker Mustaq and after telephonic talk, P.W.3 told them that the President directed them to act in accordance with the demand to be made by Moslem Uddin.

56. P.W.3 stated that after the killing of Sheikh Mujibur Rahman the four political leaders were kept in the Central Jail; that on the night following 2nd November at 3 a.m, he received a telephone call and the caller wanted to know about his identity; that he disclosed his identity and then the caller disclosed his identity as Major Rashid who was saying that he was speaking from Bangabhanan; that Major Rashid wanted to know from him whether there was any trouble in the jail; that he expressed his ignorance in that regard and at that time, Major Rashid told him that the miscreants might have abducted some prisoners and instructed him to take precautionary measures for the security of prisoners in the Dhaka Central Jail; that after 3/4 minutes another army officer wanted to know whether he (P.W.3) had taken precautionary measures in the central jail; that realizing the gravity of the information, he intimated P.W.1 about the message received from Bangabhabnan and directed him to come immediately to the jail gate; that he then went to the room of P.W.1 and discussed about the message received from Bangabhaban; that in the meantime, a telephone call came from Bangabhaban when Major Rashid told him that an officer, namely, Captain Moslem would go to the Central Jail from Bangabhaban, who would say something to him and that he should arrange for talking of the said officer with the prisoners Syed Nazrul Islam, Tajuddin Ahmed, Captain Monsur Ali and Kamruzzaman; that on hearing the news, he wanted to talk with Khandaker Mustaq; that then Major Rashid handed over the phone to Khandaker Mustaq; that the latter talked with him for sometime and instructed him to act according to the direction given by Major Rashid; that sometimes thereafter, Captain Moslem reached P.W.1's office room and wanted his identity; that on ascertaining his identity, Moslem Uddin wanted to know about the location of the persons whose names were given from the Bangabhaban; that he reminded Moslem about the message received from Bangabhaban and in reply Moslem told him that 'I would shoot them'; that on hearing about the motive of Moslem, they were perturbed; that he then wanted to talk with Bangabhaban and in the meantime, a message came from the Jailor's room that Major Rashid wanted to talk with him; that on hearing about the news, he went to P.W.2's room and received the phone when Major Rashid asked him whether captain Moslem had reached the jail or not; that he replied that Moslem had reached, but then he wanted to ascertain from the President to know for what purpose captain Moslem was sent to the Central Jail; that he informed the President about the intention of Captain Moslem that he wanted to kill four leaders; that in reply, the President told him that '-p k¡q¡ h¢mu¡-R a¡q¡C qC-hz' and that thereafter he narrated the manner of killing the leaders by Moslem Uddin and his team.

57. P.W.16 stated that he was receptionist-cum-personal assistant attached to Bangabhaban during the relevant time; that he knew the respondents and other accused persons who were moving desperately in Bangabhaban; that on 2nd November, 1975 his duty was from 7.30 a.m. to 2 p.m.; that on that day there was special restriction at the gate of Bangabhaban and that on entering into the office he noticed that army personnel were patrolling around Bangabhaban. He came to know that they were the followers of Major Dalim, Major Rashid; that on 3rd November while he was taking charge from Yaqub Hossain Khan (P.W.34), he came to know that on the previous night four Awami League leaders were killed in the Dhaka Central Jail, that he also came to know from their discussions that followers of Dalim, Rashid, Faruq executed the killing of 4(four) national leaders and that in course of his duty, he came to know from their discussions that the army officers including the respondents killed them.

58. P.W.17 stated that he was appointed as receptionist-cum-personal assistant in the Bangabhaban during the relevant time; that on 3rd November at about 3 a.m., he was asked from President's room to give phone connection with I.G. (Prisons); that when he connected the phone when one person received the phone and on query about his identity the recipient disclosed his identity as the Inspector General (Prisons); that then he told him that Major Rashid would talk with him from the President's room; that thereafter, Rashid talked with him twice and sometimes thereafter, as per direction when he again wanted to connect I.G. (Prisons), he was told that I.G. (Prisons) had left for the Central Jail; that thereafter, he contacted I.G. (Prisons) through the telephone line of the Jailor in the Central Jail; that Major Rashid wanted to know from him as to whether Captain Moslem had reached the jail; that thereafter, as per his direction he connected the telephone line with President when the President talked with him for sometime, and thereafter, he came to know from Pritom Borua that Major Faruq and his team left Bangabhaban with arms and that at about 6 a.m., Major Rashid and other officers including the respondents returned to Bangabhaban who were then looking in fatigued condition. The statements of this witness have not been challenged by the defence.

59. P.W.21 Commodore Goalm Rabbani stated that the respondents and their accomplices were appointed as personal guards of Khandakar Mustaq and that they were performing their duties with heavy arms; that on 3rd November, 1975 at about 2 a.m., he was awakened by a messenger of Khandakar Mustaq intimating that the President was asking him for certain purposes and on getting news, he came out of his room and when he came to the lift, two armed personnel challenged him and after disclosing his identity, he was allowed to proceed; that on reaching the President's room he found Major Rashid and Major Faruq inside the room and they were busy with telephonic talks; that Mustaq queried to him about the whereabouts of the guards staying in Bangabhaban; that when he expressed his ignorance, Mustaq then asked him whether he had any idea that the guards had left Bangabhaban; that he again replied in negative; that then he left for the retiring room; and thereafter, he went to the ground floor of his office for ascertaining the whereabouts of the guards and at that time, he noticed that Resalder Moslem Uddin, Dafadar Mridha and some of their accomplices associates with arms were in restive condition; that sometimes thereafter, Moslem Uddin, Marfat Ali Mirdha and other army personnel went out of Bangabhaban and then other officers left Bangabhaban and that at about 6 a.m. they returned.

60. P.W.34 was the receptionist of Khandaker Mustaq. He stated that in course of duties he noticed that Major Rashid and other officers named by him used to stay in the Bangabhaban; that on 3rd November, 1975, his duty was from 8 a.m. to 2 p.m. and after taking charge from P.W.17, the latter told him that on previous night at 3 a.m. Major Rashid directed him from President's room to connect P.W.3; that accordingly P.W.17 connected the telephone line; that Major Rashid talked with him for some time and then Major Rashid, Dalim, Aziz Pasha, Noor, Majed, Captain Moslem entered into the room of P.W.17 with arms and directed him to connect telephone link with P.W.3; that P.W.17 connected the telephone line but he was informed that P.W.3 had left for the Central Jail; that Major Rashid then directed him to connect with the Central Jail; that P.W.3 received the phone when Major Rashid wanted to know from him whether Captain Moslem had reached the jail; that Major Rashid then instructed P.W.3 to talk with the President and handed over the phone to him and that P.W.3 talked with the President for sometime and then, Major Rashid and others left the room of P.W.17.

61. P.W.36 stated that he came to know that as per orders of the killers of Bangabandhu, such as, Major Rashid, Dalim, Faruq etc., the killing squad of 4/5 persons, headed by captain Moslem Uddin killed the four leaders after entering into the Central Jail. P.W.37 stated that he heard from the Deputy Jailor that the armed personnel came from Bangabhaban and killed the leaders. P.W.46 stated that he heard from P.W.3 that the killers headed by captain Moslem came from Bangabhaban and killed them.

62. P.W.46 stated that the night following 2nd November, 1975, at about 3 a.m., Khandakar Mustaq intimated the I.G. (Prisons) over telephone that the miscreants might have abducted some prisoners for which the security of the Central Jail should be tightened and directed him to ensure the presence of I.G. (Prisons) and D.I.G. (Prisons) in the Central Jail; that after arrival of I.G. (Prisons), Major Rashid told him from Bangabhaban over phone that Captain Moslem and other army personnel went there for discussing about four Awami League leaders; that Khandakar Mustaq then directed I.G. (Prisons) to allow those army personnel to enter into the jail; that sometimes thereafter, the army officers came to the Central Jail from Bangabhaban and expressed their desire to kill four national leaders and that thereafter, they killed the four national leaders.

63. Most of the incriminating statements made regarding the telephonic conversations between the Bangabhaban on the one side and P.ws.1-3 on the other side as disclosed by P.Ws. 3, 11, 17 and 34 remained uncontroverted. All these witnesses are neutral and reliable witnesses who were public servants. The defence failed show any enmity with them. Their claim that they had heard that directions were given from the Bangabhaban to P.Ws.1-3 to allow Moslem Uddin and his team to execute the killing on entering into the Dhaka Central Jail have been corroborated by P.Ws.8, 22 and 52. To avoid repetition, I have refrained from reiterating their statements. P.W.8 claimed that he heard from P.W.2 regarding the telephonic direction given from the Bangabhaban. P.W.23 stated that P.W.1 told him about the direction given by Col. Rashid from the Bangabhaban. P.W.52 also made similar statement that he heard from P.W.1 that Col. Rashid talked over phone from the Bangabhaban to allow the killing squad to enter into the Dhaka Central Jail. Their evidence also remain uncontroverted.

64. On an analysis of the evidence of the above witnesses we noticed that there are uncontroverted evidence of P.Ws.11 and 18 that the army officers with other civilians were holding meetings in Bangabhaban prior to the time of incident of killing. P.W.13 has corroborated them. Pursuant to such meetings, for facilitating the entrance of killing squad headed by Moslem Uddin in the Dhaka Central Jail and killing the 4(four) national leaders, directions were given to P.Ws.1-3, firstly, by Rashid and then by Khandaker Mustaq himself. P.Ws.1, 2, 3, 11, 17, 21, 34 and 46 made consistent statements that the killing squad headed by Moslem Uddin came from the Bangabhaban and that as per direction of Khandaker Mustaq, they entered into the Dhaka Central Jail and executed the killing. They have been corroborated by P.Ws.8, 23 and 52. The High Court Division disbelieved the witnesses examined from the Bangabhaban mainly because they did not produce their duty register. This itself is not enough to disbelieve those witnesses, unless their testimonies are tainted by infirmities. What's more, there was gap of about 22 years from the date of occurrence to the date of revival of the case for investigation.

65. Though the Khandaker Mustaq's Government could not remain in power after the killing, the successor Government conducted in business in the similar line and ideology until Bangladesh Awami League came to power in 1996. After the revival of the case, the trial started in 2001. Naturally, the inference that could be drawn is that the succeeding

Government supported the killers, destroyed all corroborating documentary evidence in connivance with them. It will be evident from the fact that the succeeding Government appointed most of the army officers to lucrative posts in the foreign Embassies of Bangladesh. It will not be out of place to mention here that before drawing any adverse inference against the prosecution, one must keep in mind one vital aspect that even after the killing of the four national leaders in the Dhaka Central Jail, the investigation of the case was not allowed to proceed on by the authority in power although Khandaker Mustaq was not in power at that time. This has nakedly focused the intention of the succeeding Government in power. This has not happened even in any ordinary case, particularly in respect of a serious offence like a murder. So it is an unusual case and this case should be considered in the context of the matter that the State machinery wanted to stifle the case at the very initial stage. The killing was executed in pursuance of conspiracy is evident from the conducts of the accused persons and subsequent events after the killing. Admittedly, there was also a conspiracy to protect the said killers. As a part of that conspiracy, the FIR was removed by the interested quarters from the record and that the investigation was postponed sine die.

66. The High Court Division has totally ignored the historical background of the incident of killing and wrongly drawn adverse presumption against the prosecution. Besides, nobody denied that those witnesses were not employed in Bangabhaban at the relevant time. More so, the High Court Division was totally wrong in assuming that there was no telephone link with Bangabhaban, which was allegedly snapped by the Khaled Mosharraf group by a coup d'etat in the meantime. The inference drawn in this regard is based on piecemeal consideration of the evidence of P.W.29. In this regard my learned sister has thoroughly considered his evidence and rightly came to the conclusioin that the telephone connection of Bangabhaban on the night following 2nd November was in operation. I fully agree with her views. There are unimpeachable evidence on record that telephone connection of the Bangabhaban was in operation. It is unbelievable story that the Bangabhaban's telephone link was totally snapped. It should not be ignored that Khandaker Mustaq was acting as President of the country till 4th November, 1974, and it is absurd to believe that while he was performing as President, the Bangabhaban's telephone link would be disconnected. This telephonic direction from Bangabhaban, the holding of meetings in Bangabhaban just before the incident as witnessed by P.Ws.11, 13, 17 and 18, and the subsequent conducts of the respondents and other army personnel sufficiently proved a case of conspiracy that was hatched up in Bangabhaban for executing the killing of four national leaders detained in the Dhaka Central Jail.

67. As regards the prosecution's claim that the killing squad headed by Captain Moslem Uddin went from Bangabhaban at around 3 a.m. of 3rd November, 1975, P.Ws.3, 4, 6, 13, 17, 18 and 21 made statements in that regard corroborating each other. Of them, P.Ws.17, 18 and 21 also deposed that they saw that the army officers returned to Bangabhaban at 6 a.m., when they were seen being seized with fatigue. P.Ws.7, 16, 36, 37 and 46 corroborated their above statements. Among them, the testimonies of P.Ws.3, 6, 7, 13, 16, 18, 36 and 37 remain uncontroverted. P.W.7 stated that within 2/3 minutes of entering into the Dhaka Central Jail, they heard the sounds of firing from the cell of the four leaders; that sometimes thereafter, the armed personnel ran towards the jail gate and that in the evening he came to know from the Jailor and the Deputy Jailors that as per direction of Bangabhaban, Moslemuddin and his team came to jail.

68. It was contended on behalf of the respondents that since Brigadier Khaled Moshrraf took the reins of the country by a *coup d'etat* at zero hours of 2nd November, it was not possible or probable on the part of the army officers and personnel staying at Bangabhaban to

go out from Bangabhaban to implement the killing, inasmuch as, their safety and security was predominant factor at that time. The High Court Division accepted the defence plea observing that the inmates of Bangabhaban having received the message of coup by their rival party, it was not probable for them to move outside the Bangabhaban after 1 a.m. on 3rd November particularly when there was deployment of rival force within the vicinity of Bangabhaban because the situation was such that their personnel security was very much at stake and that it was very much known to them by the withdrawal of the tanks from Bangabhaban.

69. The High Court Division has disbelieved the prosecution case showing some technical loopholes and given the accused persons except one the benefit of doubt ignoring these aspects of the matter. The circumstances leading to the killing of the 4(four) national leaders while in the safe custody of the State must be kept in mind. The accused persons couldn't have implemented the killing unless very high handed powerful State machineries were involved in the conspiracy. Under such circumstances, it is absurd to assume that the corroborating materials would be allowed to remain in the Bangabhaban. The principle that the accused may be given the benefit of doubt is in the interest of justice and it should always be applicable with great circumspection, and not to be allowed as a matter at course, otherwise, its real purpose will be frustrated and the administration of justice will also be defeated. In the facts of the given case the High court Division has wrongly applied the principle in favour of the accused and instead of doing justice, it has defeated the ends of justice by maintaining the trial court's findings that the prosecution has failed to prove that the killing was implemented in pursuance of conspiracy.

70. On the question of conspiracy, before drawing up inference as to whether there was conspiracy to kill the national leaders, besides the above facts, some other vital questions if considered, the decision of the High Court Division would have been otherwise. It failed to direct its attention towards some glaring facts which have nexus with the killing. The answer to these questions would automatically resolve all controversies in dispute. Why Sheikh Mujibur Rahman was killed? Who were responsible for his killing? Who came to power after the said killing? Whether the assumption of power by Khandaker Mustaq was legal? Why the national leaders were taken into custody after the killing of Sheikh Mujibur Rahman? Why the original FIR was not available with the record? Who was benefited by removing the same from the record? Why the investigation of such gruesome murders was stopped? Why an 'eye wash' inquiry was held even after killing of four national leaders in the Dhaka Central Jail? Why these leaders did not give allegiance to Khandaker Mustaq's Government? Why all the officers and army personnel deputed for the security of President in Bangabhaban left the country with their family on 4th November, 1975? Why an aircraft was specially arranged to facilitate their safe exit from Bangladesh? Why these army personnel were absorbed in the Ministry of Foreign affairs while they were staying abroad? Why their appointment letters were carried by an officer of the Ministry of Foreign affairs to Benggazi, Libeya and UK? The trial Court as well as the High Court Division should not ignore these chain of sinister facts.

71. As observed above, the history of the emergence of Bangladesh; the subsequent events after independence, the murder of Sheikh Mujibur Rahman and the persons involved in it; Khandaker Mustaq's usurpation of power violating the constitutional provisions; the change of socio-political condition of the country after the murder of Sheikh Mujibur Rahman; and the killing of the four national leaders in the Central Jail are not only historical facts, these acts and events are interwined with each other, not unrelated. An inference from these facts would lead to the conclusion that the killing was the consequence of a deep rooted

conspiracy which was designed, planned and executed by none other than these persons who were temporarily benefited by the murder of Sheikh Mujibur Rahman. Both the killing were the result of deep conspiracy and they were perpetrated not only for the purpose of usurping power but also to bring about a change in the political atmosphere in the country-to obliterate the spirit of the historic struggle for national liberation, to exterminate pro-liberation forces and in its place, to repatriate the rightist anti-liberation forces in the helm of the affairs of the Government.

72. Section 8 of the Evidence Act embodies the rule of evidence that the testimony of *res jestae* is allowable when it goes to the root of the matter. The motive, the preparation, the existence of a design or plan, the previous and subsequent conducts of the accused are all relevant in one great canvass to kill the 4(four) national leaders. Motive is a state of mind to show the probable existence of *mens rea* of the accused persons which moves them to commit the offence or in the alternative, motive is the reason which prompts the intention of the accused to commit the crime. Though motive is not *sine qua non* for bringing the offence of murder home to the accused, it is relevant and important on the question of intention but the preparation is also obviously important in the consideration of the question whether the accused persons committed a particular act or not, to know whether they took any measures calculated to bring it about within premeditated action preceded not only by impelling motives but by appropriate preparations. The existence of design or plan is usually employed to indicate the subsequent doing of the act planned or designed. Preparation and previous attempts are instances of previous conducts of the accused persons influencing the commission of murders. Subsequent conducts of the accused persons are equally admissible. Coupled with them, the abscondence of the accused persons immediately after the occurrence is a relevant fact to be considered along with other evidence as indicating to some extent their guilty mind.

73. In support of the circumstantial evidence, P.W.2 stated that on 2nd November, 1975, while he was working in his office at Dhaka Central Jail, Major Dalim came there and pressed him to allow him to enter into the Central Jail; that when he told him that without permission of the higher authority, he would not allow him to enter inside the jail; that Dalim forced his entry into the jail and wanted to see the exact location where the Awami League leaders were kept; that finding the ferocious attitude and for fear of reprisal, he took him infront of cell No.15; that Dalim surveyed meticulously the area around the cell and at one stage, he talked with P.W.20, who was also detained as prisoner there and then went away. P.W.3 stated that after the murder of Sheikh Mujibur Rahman, the national leaders were kept in the Dhaka Central Jail and during that time, Major Rashid, Major Dalim, Major Shariar, citing reference of Khandaker Mustaq, used to inquire about the political leaders held as detenus and gave them necessary instructions. The statements of P.W.10 in this regard has been mentioned earlier.

74. P.W.20 stated that he worked as District Magistrate in July, 1975; that during the liberation struggle he was acquainted with Major Dalim; that he was detained in Dhaka Central Jail as detenu in November, 1975; that on 2nd November, Major Dalim visited the Dhaka Central Jail and while the latter was passing in front of his cell, he wanted to know from him the cause of his visit and that Major Dalim made an evasive reply. His evidence remains uncontroverted. Major Dalim had no business to visit Dhaka Central Jail on the previous day of occurrence. He was staying at Bangabhaban with the respondents as a member of the President's security team. This visit just before the occurrence leads us to infer that it was for the purpose of making reconnaissance of the area where the leaders were

detained, that is to say, to make a preliminary survey for millitary operation. This fact leads to the inference that the conspiracy was afoot and this visit was done by a conspirator in reference to their common intention for executing the killing through the members of the conspiracy.

75. P.W.21 stated that after the killing Sheikh Mujibur Rahman, Major Faruqe, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin and other officers and the respondents were staying at Bangabhaban; that after 1/2 days of killing of Sheikh Mujibur Rahman, Khandaker Mustaq gave him a letter to hand over to Captain Monsur Ali; that he directed Major Shariar to accompany him; that he handed over the letter to Monsur Ali and that 1/2 days thereafter, he came to know that the leaders were taken to jail custody. It is evident that on that the army officers staying at Bangabhaban were not in the good book of the army high command as they were transacting business (of the State) by-passing the high command.

76. P.W.26 stated that he was instructed by the authority of Bangladesh Biman flight operation on 3rd November, 1975, at about 11 a.m. that despite suspension of flight operations, he had to operate a special flight; that on his query about the purpose for operation of the special flight, the Operation Officer intimated him that some officers would be flown to Bangkok by an F-27 Craft with captain Azim and captain Ashraf, who were assigned to operate the flight; that at about 9.30/10 p.m. 4th November they landed at Chittagong airport for refuelling the aircraft and reached Bangkok at early dawn of 5th November, 1975; that on the following day, they returned back to Dhaka and after return, he came to know that passengers they had ferried in the flight were the killers of Bangabandhu, such as, Major Rashid, Major Dalim and others; that they fled from the country after killing the four national leaders on the night following 2nd November and that the officers took with them their families including children.

77. P.W.28 stated that in the afternoon of 4th November, then Chief of Protocol of the Ministry of Foreign Affairs Nazrul Islam told him that Col. Rashid and his group would leave Dhaka by a special flight and asked him to talk with Hadayet, then Managing Director of Biman; that he instructed him to take necessary permissions for flying the special flight over Burma and Thailand, and also to contact with the Embassy of Thailand for landing permission of the special flight; that thereafter, acting Foreign Secretary directed Samsher Mobin Chowdhury (P.W.33), the Deputy Chief Protocol officer, to accompany him; that they went to the concerned Embassies for communicating note verbal; that at about 11 p.m. they went to the old Airport where Col. Monnaf received them; that they found Lt. Col. Rashid, Lt. Col. Shariar, Lt. Col. Dalim, Major Bazlul Huda, Lt. Col. Nur Chowdhury, Major Ahmed Saiful Hossain, Captain Marfat Ali, Kismat Hossain, Nazmul Hossain, Ansar, Lt. Col. Pasa, Moslem Mridha and Lt. Col. Faruq amongst the passengers to be flown; that thereafter those army officers boarded the special flight and that on the following morning he came to know that the four leaders were killed in the Dhaka Central Jail on the previous day.

78. P.W.29 stated that after 40 hours of the jail killing, the killers left the country; that he then charged Major General Khalilur Rahman as to why he did not inform about the killing despite that he was then staying in Bangabhaban. P.W.31 stated that Khandaker Mustaq was displeased towards Kamruzzaman as the latter supported Monsur Ali's nomination as Prime Minister and that deceased Kamruzzaman always apprehensive that Khandaker Mustaq would not let him stay alive.

79. P.W.33 corroborated P.Ws.26 and 28 and stated that he accompanied P.W.28 for seeking permission from the Embassies of Burma and Thailand for the operation of the special flight over those countries; that when he was taken into the room by Mahbub Alam Chashi, the latter handed over a list of army officers stating that it was decided that those officers would leave the country, probably for Thailand; that he directed him to take permission for over-flight permission of Burma and landing permission from Thailand; that he handed over some papers and that they went to the Embassies of Burma and Thailand with an army jeep and handed over the letters; that they then went to the airport for intimating the pilot about the permission obtained from the Ambassadors; that the army officers left the country with a special flight from Dhaka Airport; that in April/May, 1976, then Additional Secretary, Ministry of Foreign Affairs told him that as per order of the Secretary, the listed army officers would be posted at different Embassies of Bangladesh and that he would have to carry the appointment letters for handing over to them; that he went to Bengazhaji, Libya and handed over the appointment letters to some officers and that as Major Dalim and Noor were staying in London, he went to U.K. and handed over their appointment letters in the Bangladesh High Commission Office.

80. P.W.63 stated that he was posted to Ministry of Foreign Affairs in 1996; that the investigation officer seized the connected files relating to the absorption of Bazlul Huda, Nur chowdhury, Kismat Hashem, Moslem uddin and Marfat Ali from the Ministry of Foreign Affairs in his presence and that he put his signature in the seizure lists; he proved exts.40, 41, 42, 43 and 44.

81. It is also evident from the record that most of the army personnel deputed for the security of Khandaker Mustaq were involved in the killing of Sheikh Mujibur Rahman and his family members. These security personnel were all along with Khandaker Mustaq Ahmed after 15th August till departure from the country after the killing in the central jail. This is another strong circumstance to link them in the incident of killing. Mustaq Ahmed was hostile towards these leaders as they did not give allegiance to his Government and did not agree to join his cabinet. Naturally, he realized that if these leaders were kept alive, one day they would take revenge against him if the Awami League was able to come to power in the future. So, he chalked out the plan for killing the leaders in jail with his acolytes in a calculated manner. Admittedly, the army personnel attached to Bangabhaban knew that they would become the target of attack by the pro-government forces and accordingly, they left the country by arranging a special flight through Khandaker Mustaq. Khandaker Mustaq wanted a free exit of the officers deputed for his security by arranging a special flight as a condition for surrendering his power. The army officers along with their family left the country within 40 hours of the killing and they remained in abscondence immediately after the occurrence. This fact necessarily showed that they had a guilty mind. This conduct of the army personnel is a circumstance indicating their *mens rea* if considered along with other evidence as discussed above, pointing their guilt is reasonable and realistic.

82. There are also other strong circumstantial evidence, namely, after the arrest of the deceased four leaders, Major Rashid and Major Dalim visited the Police Control Room where they were kept initially. These officers used to inquire about the leaders from the jail authority. Major Dalim visited the Dhaka Central Jail on 2nd November and ascertained the location of the cell where the leaders were detained. There was direction from the Bangabhaban to allow Moslem Uddin and his team to enter into the Dhaka Central Jail just before the killing. Moslem Uddin and his team left Bangabhaban at 3 a.m. of 3rd November,

1975. Moslem Uddin was recognized with arms in his hands when he entered into the Central Jail and that after the killing, he hurriedly left the central jail with the accomplices.

83. The positive case of the prosecution is that the Khandaker Mustaq was the principal conspirator. He had conspired with his political acolytes and security team deputed in the Bangabhaban for exterminating the four national leaders, who appeared to him to be thorns in his way to rule the country as President. An officer in the rank of Deputy Inspector General (Prisons) lodged the FIR on the following day pointing fingers at the security team of the President. It is also an admitted fact that though the FIR was lodged over the killing, the investigation of the case was kept at bay. This suggests that the stream of justice could not have been prevented even after such brutal killing unless very powerful persons were involved in the incident. It is only after a long gap of about 22 years, the case was revived and the investigation started. The case should be considered in the above backdrop.

84. The High Court Division failed to notice that the defence failed to shake the testimonies of the witnesses and that admittedly most of the witnesses examined are neutral and natural witnesses. The defence failed to bring anything adverse to the prosecution case by cross-examining them as to why they deposed against them. The High Court Division wrongly disbelieved P.Ws.11, 13, 16, 17, 18 and 21 for non production of their duty register. If their evidence are not tainted with infirmities or falsehood, there is no earthly reason to discard them. Along with their evidence, the evidence of P.Ws.2, 3, 10, 14, 20, 21, 26, 28, 29, 31, 33, 36 and 63 who deposed on the question of circumstantial evidence to corroborate the charge of criminal conspiracy, led to the inference that the story narrated by them is true and reliable.

85. This defence plea is not at all believable and absurd. If we consider the evidence of P.Ws.29, 42 and 46, it will be evident that Khaled Mosharraf took over the charge as the Chief of Army Staff on 4th November and continued in such position till 6th November, but the killing was perpetrated on the night following 2nd November. P.W.46 clarified the point in controversy in reply to a query made on behalf of Faruq Rahman stating that though the followers of Khaled Moshrraf staged a *coup d'etat* on 2nd November, 1975, they made abortive attempt to enter into Bangabhaban and that on 4th November Khandaker Mustaq gave up power. This witness did not say that Khaled Moshrraf took power on the night following 2nd November. There is evidence on record that the army officers staying at Bangabhaban were heavily armed with tanks. So they managed to keep their influence and power till 4th November morning is evident from the evidence of P.Ws.29 and 46.

86. P.W.29 stated that Khaled Moshrraf gave dead line of 2nd November for bringing the aberrated army officers and personnel under the chain of command; that the tanks should be returned back and then to surrender the unauthorized and unconstitutional Government; that on 2nd November, 1975, two infantry companies were taken back but they could not be given posting. P.W.29 further stated that "বঙ্গভবনের এবং সোহরাওরর্দী উদ্দ্যানের অবস্থানরত ট্যাংকগুলির প্রতিহত করার জন্য দুইটি কোম্পানী পাঠায় একটি সোনারগাও হোটেল রেলক্রসিংয়ে ও অপরটি সাইন্সল্যাবরোটরীর মুখে । তাহারা ৩ নভেম্বর/৭৫ এ পজিশন গ্রহণ করে। লেঃ কর্নেল গফফারের নেতৃত্বে বনানী স্টাফ রোXক্রসিংয়ে একদল সৈন্য পাঠানো হয় যাহাতে ট্যাংক রেজিমেন্ট আমাদের পিছন থেকে আক্রমন করিতে না পারে ।" In reply to a query made on behalf of Faruq Rahman in course of cross-examination, P.W.29 stated that from 4th November morning to 6th November 12 p.m., Khaled Moshrraf was the Chief of Army Staff and that on 4th November, 1975, at about 11 a.m., Khaled Moshrraf entered in the Bangabhaban and that General Khalil was there. Therefore, it is apparent from the evidence of this witness that till

4th November morning Khandakar Mustaq was in power and that Khaled Mosharraf's force could not enter beyond Sohrawarddy Udyan.

87. The control of the areas under the rebel force and the regular force has been clarified by P.w.29. He stated that the rebel forces headed by Col. Rashid deployed tanks not only around Bangabhaban but also at Sohrawarddi Uhyan to avert any counter attack; that the regular force deployed its artillery at Sonargoan railway crossing and Science Laboratory intersection. So, apparently almost half the area of the City, including the entire old Dhaka where the Dhaka Central Jail and the Bangabhaban are housed, were under the control of the rebel force. The regular force controlled the northern portion from the Science laboratory to Sonargaon Hotel. The regular force sent two companies of army to counteract the rebel force, one at the rail crossing of Hotel Sonargaon and another at the intersection of Science Laboratory but they could not take control of the areas controlled by the rebel force. Therefore, it was not at all difficult on the part of the rebel force staying at Bangabhaban to move to the Dhaka Central Jail for implementing the killing plan because the regular force were staying far away either from the Bangabhaban or from the Dhaka Central Jail.

88. The High Court Division failed to notice that most of the members of the security team deployed at Bangabhaban were the killers of Sheikh Mujibur Rahman. After the killing of Sheikh Mujibur Rahman, they enthroned Khandakar Mustaq Ahmed in the office of President and they ruled the country keeping Khandakar Mustaq as a puppet President in their hands. When they had exceeded the limits and the chain of army command was totally broken down, some senior officers including P.W.29 stood in their way. Though Major General Ziaur Rahman was Chief of Army Staff, it is on record that he had hardly any control over the army. The First Bengal Lancers and the Second Field Regiment were under the command of Faruq and Rashid, and Ziaur Rahman had no control over them.

89. P.W.29 stated that though there was direction for returning 30 tanks, which were under the control of Rashid and Faruq, they did not obey the direction and kept all artilleries under them from mid September, 1975. This statement proved that these officers were heavily armed with 30 tanks and two regiments were under their control. This fact proved that till the last moment of their departure from Bangladesh, they tried to assert their power and there was no hurdle for them to move to the Dhaka Central Jail from Bangabhaban for implementing their plan of killing of the four national leaders. The High Court Division did not advert its attention to that direction.

90. Learned counsel for the respondents tried to pursuade us that the defence plea is most probable than that of the prosecution version. The positive defence case is that it was Khaled Mosharraf who was instrumental to the killing of the four national leaders for retaining his power peacefully after the *coup d'etat* along with P.W.29. In support of his contention, he has relied upon the evidence of P.W.52. The statement of this witness that after the *coup d'etat*, Mosharraf in order to consolidate his power might have killed the four leaders after arresting Ziaur Rahman. He clearly stated that it was his assumption. Before the said statement, he stated that the *coup d'etat* was against Mustaq Ahmed but, on the other breath, he stated that the conflict was between Khaled Mosharraf and Ziaur Rahman; that after dethroning Mustaq Ahmed, Syed Nazrul Islam was supposed to be the legal successor in the office of President but, he expressed his ignorance on a query made by the defence that Khaled Mosharraf was the perpetrator. This witness was not a party to any of the groups and whatever statement he made was on guess. The High Court Division erred in giving weight to this solitary statement.

91. However, it is an admitted fact that the killing was perpetrated on the night following 2nd November and that till the departure of the rebel army offers in the afternoon of 4th November, Khaled Mosharraf had no access beyond Science Laboratory inter-section and Sohrawarddy Udyan. The High Court Division impliedly accepted the statement as an admission without giving attention to his entire evidence and the evidence of P.W.42. This defence plea is absurd, hypothetical and full of surmises, inasmuch as, it is not Khaled Mosharraf who wanted to kill the national leaders, rather, it was those rebel force who were supporting Khandaker Mustaq, and this force kept the leaders in detention in the Dhaka Central Jail in order to consolidate Khandaker Mustaq's power and position. Had Khaled Mosharraf been the perpetrator, the Government in power after the death of Khaled Mosharraf could have been prosecuted but in reality, the successor Government wanted to suppress the incident. No one suspected them as killers of the political prisoners staying in the Central Jail at any point of time. Even the relatives of the deceased leaders pointed fingers towards Khandaker Mustaq and his followers.

92. The circumstantial evidence proved beyond doubt that it was the army officers who were deputed for the Khandaker Mustaq's security were the real perpetrators of the crime. Even after the killing, the followers of Khaled Mosharraf stayed in the country and one of them deposed in this case. Though Khandaker Mustaq was dethroned, the force which came to power after killing Khaled Mosharraf could not have been differentiated from Khandakar Mustaq's regime on principle and ideology. They were birds of a same feather as would be evident from their subsequent conduct. The said Government not only wanted to conceal the killing but also stopped the investigation of the case. The difference between the two groups was not on principle but, on the question illegal retention of power. That is why, this succeeding regime rewarded the killers by giving lucrative jobs in foreign missions of Bangladesh abroad.

93. As observed above, there are uncontroverted evidence on record in support of the prosecution case that the killing squad came from the Bangabhaban and after executing the killing, they returned back again to Bangabhaban. In this regard the prosecution has been able to prove this fact by examining P.Ws.3, 4, 6, 7, 13, 16, 17, 18, 21, 36, 37 and 46. Of the witnesses, the testimonies of P.Ws.3, 6, 7, 13, 18, 36 and 37 remain uncontorverted. Their testimonies suggest that the planning, preparation and implementation of the killing was monitored from Bangabhaban. Another vital fact which revealed from the lips of these witnesses is that the killing squad was also fixed by the conspirators earlier and the said killing squad headed by Moslem Uddin executed the killing after coming from the Bangabhaban at around 3 a.m. of 3rd November. The testimonies of P.Ws.3, 4, 6, 7, 13, 16, 17, 18, 21, 36, 37 and 46 lead to an irresistible conclusion that the army officers deputed at Bangabhaban killed the four national leaders. Along with their evidence, the circumstantial evidence proved by P.Ws.2, 3, 10, 20, 21, 26, 28, 29, 31, 33, 36, 63 are so conclusive in nature that the killing was executed by the members of security team of Mustaq. The chain of circumstances is so complete as to leave no scope for drawing any inference other than that it was the respondents and their co-conspirators who killed the national leaders. The observation of the High Court Division that there are missing links in the circumstances is, therefore, misconceived and perverse.

94. Next point urged on behalf of the respondents is that the prosecution has failed to produce the FIR of the case and that the true copies of the same, exts-1 and 3, are spurious papers which cannot be used in the case. It is further contended that the FIR being a vital

document having not been proved in this case, the High Court Division is justified in giving the respondents the benefit of doubt.

95. Admittedly the original FIR was missing from the case record as well as from the police diary. Under the circumstances, the investigating officer seized a true copy of it from the Dhaka Central Jail, ext-1 and another true copy from the judicial record of the office of the Inspector General of Police, ext-3. Both the High Court Division and the trial Court disbelieved these two documents. The High Court Division on examination of ext-1 though found no discrepancy in them, observed that neither of the two could be "*treated as FIR in this case though these two papers, as it could be gathered from the attending circumstances, undoubtedly contains the contents of the report made by P.W.1 first in point of time with Lalbagh Police Station on 04.11.1975 ..... Since neither of the two falls within the purview of the definition of an FIR as contemplated under section 154 of the Code of Criminal Procedure*". The High Court Division then observed, '*from the FIR as claimed by the prosecution Ext-1 which was lodged on 4.11.1975 after the occurrence that piece of paper also testifies that he entered into Central Jail on the fateful night. True, it is the description of Moslem Uddin as disclosed by the prosecution differs from place to place though it could not be proved to the hilt by the prosecution that Moslem Uddin came out of Bangabhaban and entred into Central Jail yet it has been proved that he entered into the Central Jail on the fateful night irrespective of the place he came from, beyond reasonable doubt therefore, Muslemuddin can not absolve his liability in this case*'.

96. The above findings are self explanatory, inasmuch as, they are based on surmises. Though the High Court Division disbelieved exts-1 and 3 as true copies of FIR, accepted the claim of the prosecution that P.W.1 lodged an FIR on the following day of occurrence with Lalbagh police station, and on the other hand, while maintaining the conviction of Moslem Uddin, relied upon the same very FIR, observing that he was an FIR named accused. The High Court Division was of the view that in course of cross-examination, P.W.1 admitted that exhibit-1 did not contain any memo number although he had asserted that at the bottom of this FIR memo number "01/DIG/1/(4) dated Dacca 4.11.75" was mentioned; that he had admitted that the FIR which was seized from his possession by the investigating officer which did not contain the same memo number; that there was overwriting on the date of the said memo number; that though the P.W.1's signature was available in it, the said signature contained the date as 4th November, 1975, which date had no relevance with the accused; that the FIR which was collected from the office of the Inspector General of Police, exhibit-3, was not seized by preparing any seizure list and that Abdul Kahar Akond (P.W.64) did not seize the record from which he had collected ext-3.

97. I find fallacy in these findings. P.W.1 stated that on the following day of occurrence, he lodged an FIR with the Lalbagh police station; that after lodging the FIR, he communicated a copy of the same to all places and kept one copy in Jail which is marked as exhibit-1; that ASP Hafizuddin Dewan (P.W.56) seized a copy of the FIR which he kept with him along with a report submitted by him to I.G. (prisons); that the copy which he kept with him in the Central Jail and in the office of the Inspector General of Police are identical. P.W.64 stated that he collected a true copy of the FIR from the office of the I.G.(Prisons), ext-3. True, the investigation officer did not collect the copy of the FIR from the office of the Inspector General by preparing a seizure list, but this copy was collected from the judicial record of the said office and the contents therein are identical with the other.

98. P.W.64 got the charge of investigation of the case on 18th August, 1996. He gave an explanation for collecting the copy of the FIR stating that when he could not trace out the original FIR either from the Court record or from the case diary, on enquiry he could trace out the true copies of the same which were kept in the offices of Inspector General of Police and the Central Jail and then he collected them from those offices. The explanation appears to be cogent, reliable and trustworthy considering the nature of the offence and the delay in reviving the case for investigation. There was no wrong in his endeavour in collecting the copies. The prosecution also proved the seizure of Registers relating to the fact of lodging of the FIR by P.W.1 with the Lalbagh police station and the entries made in exts.16, 30, and 39, which corroborate the claim of the prosecution. The High Court Division has totally ignored these oral and documentary evidence and upon superficial consideration of the materials on record disbelieved exts-1 and 3 as true copies of the FIR.

99. The High Court Division failed to notice that as per rule 246(a) of the Police Regulations Bengal, 1943, a carbon copy of the FIR is required to be sent by the Officer-in-Charge of the police station to the Superintendent of Police. So, apparently the police authority was required to keep a copy of the FIR of the case. This being a sensational case, instead of keeping a copy of the FIR in the office of the Superintendent of Police, it was kept in the office of the Inspector General of Police. There is nothing wrong in it and the investigation officer has collected the same from the judicial record of the Inspector General of Police. Therefore, there is presumption that it was collected from the legal authority which kept the same, since the original one was missing. Rule 246(a) is reproduced below:

> *"The first page of the first information report viz, that signed, sealed or marked by the complainant or informant under section 154, Code of Criminal procedure shall be treated as the original. It shall be sent without delay to the District Magistrate or the Sub-divisional magistrate, as the case may be, through the court officer. The first carbon copy of the first information shall be sent to the Superintendent. The second copy shall be kept at the police station for further reference. A copy (not carbon) shall be sent to the Circle Inspector direct at the same time as the original and the first carbon copy are despatched to the Court Officer and the Superintendent. In subdivision where there is a Sub-divisional Police Officer two copies of the first information report shall be made out on ordinary papers, by the carbon process, one for the Sub-divisional Police Officer and the other for the Circle Inspetor."*

100. The prosecution adduced secondary evidence to prove the FIR by examining P.Ws.1 and 64. These witnesses explained the cause as to why they produced true copies of the FIR. The maker of the FIR himself deposed and reaffirmed that exts-1 and 3 are the true copies of the FIR and are in verbatim language. He made statements on oath. If a true copy of a document is proved by the maker on oath giving explanation that the original is missing from the record, it satisfies the requirement of secondary evidence within the meaning of section 63 of the Evidence Act. What's more, these exhibits were admitted in evidence without objection by the defence and the Court admitted them as secondary evidence. Where secondary evidence of the contents of a document alleged to have been destroyed/untraceable is admitted by the court of first instance without objection, even without any foundation for the reception of secondary evidence having been laid down, the opponent is estopped from taking any objection to the admissibility of such documentary evidence in the appellate Court. (Biswambhor Singh V. State, AIR 1954 SC 139).

101. Secondary evidence of the existence, condition or contents of the original is admissible when the original has been destroyed or lost, or when, for any other reason not arising from the default or negligence of the party offering secondary evidence of its contents, it cannot be produced within reasonable time. Even oral evidence of the contents of the original document can be proved when the original is admitted to have been lost. This view has been taken by the Judicial Committee of the Privy Council in Pearey V. Nanak Chand, AIR 1948 PC 108. In State of U.P. V. Nagu, AIR 1979 SC 1567, the original dying declaration was lost and not available, it was held by the Supreme Court of India that '*In the circumstances the prosecution was entitled to give secondary evidence which consisted of the statement to the Magistrate as also of the Head constable who had made a copy from the original and testified that the copy was a correct one'*.

102. There is no dispute that ext-3 was collected from the office of the I.G. (Prisons). The defence did not challenge the statement of P.W.64 about the collection of the copy. He was confronted only that it was not seized by preparing a seizure list and that he did not seize the record with which it was kept. These facts do not disprove the positive assertion of P.W. 64 unless his statement is challenged. More so, P.W.1 corroborated him stating that this copy and the other copy seized from jail are identical. P.Ws.1 and 64 corroborated the collection of the true copies of the FIR from the said offices. P.W.64 proved the copy recovered from the judicial record of Inspector General of Police and the defence failed to shake his testimony. The grounds on which they have been discarded are not cogent and legal, and the defects are trifling in nature. It failed to consider the nature of the offence, the power and influence of the accused persons during the time, their involvement in the case, the situation prevailing in the country during the relevant time and the delay in reviving the case by surpassing a path strewn with thorns of prickles.

103. What is more, admittedly the Lalbagh police recorded the case as Lalbagh P.S. Case No.11 dated 4th November, 1975, in pursuance of the FIR lodged by P.W.1. Therefore, I find nothing wrong, rather the date mentioned in it after the signature of P.W.1 in exhibit-1 was correct one with reference to the case registered with the Lalbagh police station. These facts coupled with the testimony of P.W.64 led us to infer that the High Court Division erred in disbelieving the prosecution's claim of collection of the true copies of the FIR, exts-1 and 3. The learned Judges failed to notice that exhibit-1 was seized by P.W.64 and the defence did not challenge his testimony on the question of seizure of the copy from Dhaka Central Jail. Therefore, fact remains that P.W.64 seized a true copy of the FIR, ext-1, from the custody of the Central Jail authority and collected another copy from the office of the I.G. of Police which are identical and legally admitted into evidence.

104. Apart from what P.Ws.1 and 64 had stated, Md. Aminur Rahman (P.W.2) stated that on 4th November, P.W.1 lodged an FIR with the Lalbagh Police Station regarding the killing of the 4 (four) national leaders and that two Magistrates, thereupon, prepared inquest reports on the dead bodies inside the Dhaka Central Jail in the evening of the same day. The defence did not controvert those statements. A.T.M. Nuruzzaman (P.W.3) made similar statement and the defence has not also challenged the same. Md. Sohrab Hossain (P.W.44) stated that the investigation officer Abdul Kahar Akond seized a register, ext.16, from Lalbagh Police Station, in which serial No.1454(3) contains case No.11 dated 4th November, 1975 under section 302 of the Penal Code; the place of occurrence was shown as Dhaka Central Jail and that the name of the informant was A.K. Awal, DIG (prisons). These statements have not been challenged by the defence.

105. Md. Abdul Malek (P.W.50) proved the G.R. Register, ext-30, stating that in serial 10698, Lalbagh P.S. Case No.11 dated 4th November, 1975 under section 302 of the Penal Code was mentioned. This statement has also not been challenged. Md. Ashraf Uddin (P.W.59) stated that Abdul Kahar Akond came to Dhanmondi Police Station (by this time Dhanmondi Police Station started functioning bifurcating Lalbagh Police Station) for seizing Lalbagh Police Station's Khatian Register which was produced by S.I. Sohrab Hossain (P.W.44), wherein serial No.1454 contained Lalbagh P.S. Case No.11 dated 4th November, 1975 and that informant's name was mentioned as A.K. Awal, DIG (Prisons). Md. Mohibul Hossain (P.W.62) also stated that Kazi A. Awal, DIG (prisons) lodged Lalbagh P.S. Case No.11 dated 4th November, 1975, under section 302 of the Penal Code which statement had not also been controverted. So we find from the evidence P.Ws.2, 3, 44, 50, 59 and 62 that they have corroborated the statements of P.Ws.1 and 64.

106. The object of filing an F.I.R is to set the process of criminal law in motion and the investigating agency to obtain information about the criminal activity, so as to able to take proper steps for tracing out and bringing to book the persons involved in the crime. However, this F.I.R is not an evidence, though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can be used as a previous statement for the purpose of either corroboration under section 157 of the Evidence Act or for contradiction under section 145 of the maker. It cannot be used for the purpose of corroborating or contradicting other witnesses. There is no hard and fast rule in recording an FIR. A massage given to the local police station even if cryptic, if it discloses a cognizable offence may constitute an FIR within the meaning of section 154. A telephonic message to the police station which has been recorded by police officer and started investigation basing upon the said message if it discloses a cognizable offence, the police can treat it as an FIR. If the object of an FIR is to set the criminal law in motion, there is no difficulty to treat exts 1 and 3 as FIR which were collected from public offices and all elements of treating it as such are present and basing upon which, the investigation officer reopened the case and started the investigation.

107. Having found that P.W.1 made an FIR with Lalbagh Police Station and that the contents in Exts.1 and 3 are identical, and P.Ws.1, 2, 3, 44, 50, 59 and 64 having corroborated each other, the memo in ext-1 might have been overwritten by any interested quarter or the person concerned who was entrusted to keep it with the record and inadvertently he might have given a number which did not tally with the previous one, and then he rectified the same. An explanation could have been given if the stream of justice was allowed to proceed as usual but, this was an exceptional case. Due to lapse of time, most of the corroborating evidence were lost or destroyed. So this overwriting in the memo does not make it's contents doubtful. These exts-1 and 3 are the true copies of the FIR is evident from the fact that P.W.1 mentioned only Moslem Uddin's name. If he had any ill motive to manufacture a true copy of the FIR for the purpose of the case, he could have included the names of all other accused persons. He was a top ranking responsible officer and an independent witness. The defence failed to reveal anything by cross-examining him about any sort of biasness against the accused or any sort of interest in the case or motive to depose falsely or his inclination towards prosecution.

108. The High Court Division failed to notice another aspect. P.W.1 deposed in the case after 22 years of the incident and the investigation officers had to search at different places for tracing out the copy of the F.I.R. The decisions considered by the High Court Division are based on the facts of those cases, which are quite distinguishable from the facts and

circumstances of the present one. The High court Division itself admitted that this is an exceptional case and that "*it is a gruesome murder it was not allowed to be proceed with for long 21 years because of the existence of a hostile atmosphere, therefore, mere delay in examination of the witnesses will not cast any doubt in the testimonies of the witnesses of this case, as was available in that particular case*", it has illegally discarded the FIR. The explanation given by P.W.1, who was a responsible officer having no nexus with the four national leaders, the explanation is cogent, reasonable and satisfactory. More so, ext.1 which was sized from the office of the Dhaka Central Jail, where the occurrence was committed and it is natural that the Central Jail authority had preserved a copy of it with a view to obviate any future controversy.

109. The High Court Division failed to consider another aspect while disbelieving the complicity of the respondents. Moslem Uddin could not alone have executed the killing by entering into a most secured place like the Dhaka Central Jail. Admittedly, huge number of security personnel with arms were deployed there for the security of the prisoners. It was not possible on his part to enter into the Dhaka Central Jail at dead of night unless the jail authority was compelled to allow him and his team. It is also not possible on his part to execute the killing in presence of I.G. (Prisons), DIG (Prisons) and other high officials unless they were compelled to allow them to enter into the Central Jail for implementing the killing.

110. This Moslem Uddin and the respondents were also in the company of the President's security team. The defence did not dispute this fact. If Moslem Uddin was staying in Bangabhaban with other conspirators, how a member of the conspiracy could alone be convicted excluding other conspirators? A conspirator is an agent of other conspirators and vice versa. In the premises, the conclusion arrived at by the High Court Division that Moslem Uddin was alone responsible in the killing is simply absurd and contrary to the provisions of law. It is also admitted fact that more than one army officers were involved in the killing in two groups. So naturally, the respondents cannot avoid their complicity in the conspiracy.

111. The High Court Division though noticed one important documentary evidence proved by P.W.1, a report submitted by him to the I.G (Prisons) on 5$^{th}$ November, 1975, exhibit-2, did not, however, express any opinion with regard to this document. Both in the FIR and in this report, there are positive statements that captain Moslem Uddin led the killing squad to the Dhaka Central Jail, who came from Bangabhaban. In exhibit-2, he stated that on the basis of intimation given by the Inspector General (Prisons), he reached the Dhaka Central Jail on the fateful night and at that time, he was asked by the latter to proceed towards the Dhaka Central Jail gate as directed from the Bangabhaban; that he witnessed the telephonic conversation between the President and the I.G. (prisons) and thereafter, the latter told him that one captain Moslem with some army personnel would come to the central jail; that it was directed from the Bangabhaban to comply with what he (captain Moslem) wanted to do and that the detenus Tajuddin Ahmed, Monsur Ali, Syed Nazrul Islam and M Kamruzzaman should be shown to him. The High Court Division failed to notice that P.W.1 submitted the inquiry report as per direction of P.W.3, who in turn forwarded the same along with his forwarding report, ext-6, to the Secretary, Ministry of Home Affairs. So, P.W.3 also corroborated P.W.1 and the defence did not challenge the same.

112. Thus, the trial Court and the High Court Division upon superficial consideration of the materials on record illegally discarded exhibits-1 and 3. Had there been any interpolation in the contents of exhibit-1 or exhibit-3, the High Court Division would have been justified in discarding them, but in the absence of anything in this regard and in presence of

uncontroverted evidence on record about seizure and collection of the true copies of the FIR, I find no cogent ground to disbelieve the claim of the prosecution that exts-1 and 3 are the true copies of the FIR lodged with the Lalbagh Police Station on the following day of occurrence by P.W.1 narrating the incident of killing and that after lodging the same, P.W.1 kept a copy of the same in the Dhaka Central Jail and sent a copy to the Inspector General of Police. The trial Court also believed the claim of P.W.1 that he lodged an FIR with Lalbagh police station over the killing of 4 leaders on 4th November, 1975 and that P.W.64 investigated the case on the basis of the said FIR.

113. The above facts are so consistent to link the respondents in the killing of the four national leaders that in pursuance of a pre-planned conspiracy for the killing of the national leaders, the security team headed by Moslem Uddin implemented the killing. It is an admitted fact that most of the army officers and personnel were absorbed in the Ministry of Foreign Affairs and posted in different Embassies of Bangladesh abroad instead of putting them to justice. The above facts proved that the succeeding Government in power not only showed special favour to them but also rewarded them. This absorption of the known killers in the Ministry of Foreign Affairs and posting them in different Embassies of Bangladesh suggested that they had influence over the Government, even after Khandaker Mustaq was dethroned. This fact itself indicates a strong circumstance which the court can take judicial notice as a historical fact. These series of acts are considered cumulatively lead to the inference that there was common design of all accused persons to kill the leaders in the central jail and that in consequence of that design, the conspirators had executed the killing.

114. The High Court Division disbelieved the circumstantial evidence on the reasonings that there are missing links in the chain of events and that as no appeal was preferred against the charge of acquittal of criminal conspiracy, their conviction under section 302/109 of the Penal Code is also not sustainable in law. True, no appeal was preferred against the order of acquittal of the accused persons on the charge of criminal conspiracy but, this itself is not a legal ground to shirk its responsibility even if there are sufficient evidence in support of the charge.

115. The High Court Division fell in an error in acquitting all the accused persons except one merely on the ground that the State did not take step against the order of acquittal.

116. This finding of the High Court Division is palpably illegal and against law. While administering justice it assigned a reason which has no sanction of law. There is no dispute that a heinous crime was committed on the night following 2nd November, 1975 in the Dhaka central Jail at prisoners cell in which the four national leaders were brutally murdered by armed army personnel. The question is whether the murders were perpetrated in pursuance of a conspiracy or in pursuance of a common intention of the accused respondents and others. To say otherwise, in which manner the murders were perpetrated. Both the trial Court and the High Court Division believed the prosecution case so far the place, the time and the murder is concerned. If on an analysis of the evidence on record if it is found that the prosecution has proved that there was conspiracy to kill the leaders and in pursuance thereof, the killing was perpetrated, all accused persons could not avoid criminal liability. If, however, the evidence of record proved that there was no conspiracy but, the killing was committed by several persons in furtherance of common intention of all, all the accused persons cannot be convicted because the common intention requires participation in the crime.

117. The High Court failed to notice that the acquittal was in respect of a charge on a misconception of law. If the material evidence on record are sufficient to come to the conclusion that the killing was perpetrated in consequence of a conspiracy, it has all the powers to award legal conviction altering the finding since the trial court framed a charge of conspiracy against the accused persons and the accused persons have been afforded opportunity to defend the same. The High Court Division, under such circumstances, has power to alter the finding of the trial court under section 423(b)(2) of the Code of Criminal Procedure and award conviction in accordance with law. It is settled law that if a palpable illegality is apparent in the trial Court's judgment while hearing an appeal from conviction, the appellate court can pass appropriate conviction for ends of justice on reappraisal of the evidence on record.

118. Similarly, this Division has the power to alter the finding of the High Court Division and determine the offence committed by the respondents because the appellate court has the power to 'alter the finding maintaining the sentence' without an appeal being filed by the State on the charge of conspiracy. The only bar is, no alteration can be made to the detriment of the accused persons but in this case the accused persons will not be prejudiced thereby, since they have defended the charge. The fundamental principle underlying sections 221-223 of the Code of Criminal Procedure is that an accused person can be convicted of a particular offence only if he was charged with the same. Exceptions to this principle are laid down by sections 234-239 read with section 535, which empower the trial court, in cases specified, to convict an accused person with respect to an offence even though he was not changed with the same. The ordinary rule that the accused cannot be convicted of any offence with which he is not charged is circumscribed by exceptions. The power of the appellate court under section 423(b)(2) is, however, subject to the condition that the appellate court cannot enhance the sentence imposed by the trial court.

119. The appellate court has power to alter the finding of the trial court and convict the accused person on the basis of the evidence on record. Section 423(b)(2) enjoins the appellate court to find the proper offence of which the accused person could be held to be guilty. No restriction is placed on the power of the appellate court to alter the finding to any that it considers suitable to the purpose. The expression 'alter the finding' contemplates only an alteration of the finding of conviction which was appealed against and which was the subject matter of appeal.

120. In Ramdeo Rai Yadav V. State of Bihar, AIR 1990 S.C. 1180, Ramdeo Rai Yadeb and three others were charged under section 396, in the alternative under section 302 of the Indian Penal Code. The trial court convicted all accused under section 396. The High Court found Ramdeo Rai Yadav alone guilty of offence under section 302 by altering his conviction. The Supreme Court held that the appellant couldn't be said to have been prejudiced by the alteration of the conviction in view of the specific alternative charge. The argument advanced on behalf of the convicted accused that there was an acquittal was found of no merit at all.

121. In Tilkeswor V. Bihar State, AIR 1956 S.C. 238, the appellants were charged under section 302/34 and convicted of the said charge. On appeal the High Court converted the conviction to one under section 326/149. It was contended before the High Court that there was no power in the court to substitute section 149 for section 34. The Supreme Court repelled the contention observing that the law on the point was settled in Willie Slancy V. State of M.P., AIR 1956 S.C. 116. In Brathi V. State of Punjab, (1991) 1 SCC 519, the appellant and his uncle were tried under section 302 of the Indian Penal Code. The trial court

acquitted the appellant's uncle but convicted the appellant under section 302. The Order of acquittal became final because State did not choose to challenge it in appeal. The appellant, however, preferred an appeal against his conviction. The High Court on sifting the evidence held that the fatal blow was given by the appellant's uncle and since the appellant was charged under section 302/34, he could not be convicted under section 302. However, the High Court held that the eye witnesses had given a truthful account of the occurrence and the appellant's uncle had actually participated in the commission of the crime along with the appellant. Since no appeal was filed by State against acquittal of appellant's uncle, High Court maintained the appellant's conviction under section 302/34. The Supreme Court held that in the matter of appreciation of evidence, the powers of the appellate court are as wide as that of the trial court and the High Court was, therefore, entitled in law to review the entire evidence and to arrive its own conclusion about the facts and circumstances emerging therefor. The Court further held that '*when several persons are alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under sub-section(1)(b) of section 386 of the Code to find out on an appraisal of the evidence who were persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a State appeal it was entitled to determine the actual offence committed by the convicted persons.*'

122. Even where a charge was framed against an accused person in respect of an offence, he may be convicted for lesser offence provided the case attracts section 237 and 238 of the Code of Criminal Procedure. It is said, if the graver charge gives to the accused notice of all circumstances going to constitute the minor offence. In G.D. Sharma V. State of U.P., AIR 1960 S.C. 400, three appellants who were tried separately. Two accused were convicted under section 467 and the other under section 467/471 of the Indian Penal Code and sentenced them accordingly. They preferred four appeals against their convictions in the High Court. The High Court by setting aside the conviction directed their retrial observing that at the trial a charge in the alternative under sections 467 and 477A should be framed against two accused and a charge of abetment in the alternative of offences under sections 467 and 477A should be framed against one namely OM Prakash. The High Court was of the opinion that the acquittal of accused under section 120B, was correct in the absence of sanction. Accused persons challenged the order of remand in the Supreme Court. The supreme Court set aside the order of remand and directed the High Court to re-hear the appeals observing that "*The provisions of Ss.236 and 237 are clear enough to enable a court to convict an accused person even of an offence with which he had not been charged if the court is of the opinion that the provisions of S.236 apply, that is to say, if a single act is or a series of acts are of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, then the accused can be charged with having committed all or any of such offences, and any number of such charges can be tried at once; or he may be charged in the alternative with having committed some one of the said offences and by virtue of the provisions of S.237 the accused although charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S.236, can be convicted of the offence which he is shown to have committed, although he was not charged with it*".

123. Admittedly, in this case except Resalder Mosleh Uddin, none of the prosecution witnesses has been able to recognize the respondents either in the Dhaka Central Jail gate or at the scene of occurrence. They were seen in the company of Resalder Mosleh Uddin in Bangabhaban on the fateful night and preceding to the date of occurrence when the conspiracy was afoot. We found that the respondents were parties to the criminal conspiracy hatched up at Bangabhaban for implementing the killing at Dhaka Central Jail. If the

conspiracy is proved, there is no legal bar to award a legal conviction to the accused-respondents. Even if no formal charge is framed or there is omission to frame a charge unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction in view of section 535 of the Code of Criminal Procedure.

124. The object of framing a charge is to enable an accused person to known the substantive charge which he will have to meet at the trial. References in this connection are the case of V.M. Abdul Rahman V. King Emperor, AIR 1927 P.C. 44 and B.N. Srikantiah V. Mysore State, AIR 1958 S.C. 672. The Judicial Committee of the Privy Council held that 'the bare fact of such omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships view, may be supported by the creative provisions of Ss.535 and 537'.

125. It was urged on behalf of the appellant that even if no appeal was preferred against the acquittal of the charge of criminal conspiracy, this Division in exercise of its inherent power can convict the respondents. In this connection, it was submitted that this Division should take judicial notice of the adverse situation then prevailing during the relevant time in conducting and prosecuting the case–the State was not interested to proceed with the case and its machinery did not co-operate with the special public prosecutor in conducting the case on behalf of the prosecution and under such circumstances, no appeal could be filed against the said charge as the State did not instruct the special prosecutor for filing appeal. In the premises, it is argued that it is a fit case in which this Division ought to have evaluated the evidence on the charge of criminal conspiracy in the interest of justice. In support of the contention, the learned Attorney General has referred some decisions.

126. In view of the position of law discussed above, there is no legal bar to convict the accused-respondents on the charge of conspiracy. However, since both the parties have argued at length on the question of invoking inherent powers and cited certain decisions, I feel it proper to address the question. The Constitution is a social document, and Article 104 is not meant for mere adorning the Constitution. The Constituent Assembly felt that a provision like the one should be kept in the Constitution so that in exceptional cases the highest court of the country could invoke its inherent powers. It is conceived to meet the situations which cannot be effectively and appropriately tackled by the existing provisions of law. Apart from the powers given to this Division by the Constitution, a Court of law always retains some inherent powers. It is, therefore, said, the Court is not powerless to undo any injustice caused to a party. Shutting of judicial eyes even after detection of palpable injustice is in one sense denial of justice. If the Judges do not rise to the occasion to which they are oath bound to do justice, they would commit the similar illegality as the one committed by a litigant. Court's practical approach would be towards doing justice without bothering too much about any one's perception. We should never compromise to do justice.

127. In this connection, I would like to quote an observation of Benjamin Cardozo in People V. John Defore, 242 N.Y.13, 17-28. '*The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need the law shall not be flouted by the insolence of office*'. The powers of this Division is to ensure due and proper administration of justice. There is, therefore, no denial of the fact that in appropriate cases ends of justice warrants the exercise of this power. If we do not invoke the inherent powers in appropriate cases, there is no need for keeping this provision in the Constitution.

128. In Mahmudul Islam's Constitutional Law of Bangladesh, Third Edition, it is stated in paragraph 5.196 under the heading "power to do complete justice", that this Division has the power to issue such orders or directions as may be necessary for doing complete justice in any cause or matters pending before it. The author on consideration of the observations made by this Division and the Supreme Court of India in Khandker Zillul Bari V. State, (2009) 17 BLT(AD)28, Shahana Hossain V. Asaduzzaman, (1995) 47 DLR(AD)155, Karnataka V. Andhra Pradesh, (2000) 9 SCC 572 and Abdul Malek V. Abdus Salam 61 DLR (AD) 124 stated that this conferment of power is under special circumstances and for special reasons having the concept of justice being the predominant factor behind the inclusion of such provision in the Constitution. This power can be exercised in a matter or cause in pending appeal when this Division finds that no remedy is available to the appellant though gross injustice has been done to him for no fault or laches of his own. This power is not circumscribed by any limiting words. This is an extraordinary power conferred by the Constitution and no attempt has been made to define or describe complete justice.

129. If a substantial justice under law and on undisputed facts can be made so that the parties may not be pushed to further litigation, a recourse to the provision of Article 104 may be justified. There are cases where the High Court Division did not take into consideration certain affidavits, this Division had considered them in exercise of its inherent powers for doing complete justice. See(Ekushey Television v. Dr. Chowdhury Mahmud Hasan, 55 DLR(AD)26). It was observed by this Division in National Board of Revenue V. Nasrin Banu, 48 DLR(AD)171, that "*Cases may vary, situations may vary and the scale and parameter of complete justice also vary. Sometimes it may be justice according to law, sometimes it may be justice according to fairness, equity and good conscience, sometimes it may be justice tempered with mercy, sometimes it may be pure commonsense, sometimes it may be the inference of an ordinary reasonable man and so on.*" Speaking about the extent of power to be exercised, this Division in Naziruddin V. Hameeda Banu, 45 DLR(AD)38, observed–

> *Considering the vagaries of legal proceedings and the technicalities involved in adjudication, article 104 of the Constitution has invested as a measure of abundant caution, the last Court of the country with wide power, so that it may forestall a failure of justice and to do complete justice in an appropriate case. It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified. Complete justice may not be perfect justice, and any endeavour to attain the latter will be an act of vanity.*

130. In State Vs. Muhammad Nawaz, 18 DLR(SC)503, out of 28 accused persons tried by the Sessions Judge under sections 302/307/323/148 of the Penal Code, he acquitted 10 accused and convicted 18 for murder and other minor offences. It sentenced to death two accused persons while rest to imprisonment for life and also imprisonment for a shorter period against all the accused. The High Court upheld the conviction and sentence of seven accused and acquitted rest, of them, two were those who had been sentenced to death. The convicted seven filed leave petition in the Supreme Court. Supreme Court granted leave and by the said order leave was also granted to the State against the said order of acquittal of remaining eleven. Objection was raised on behalf of the accused persons in respect of the appeal by State on the ground that the leave petition by the State was barred by 76 days and they were not afforded any opportunity when the leave was granted. The Supreme Court

observed that the State's appeal was liable to be dismissed on the ground of limitation. It, however, noticed that the High Court illegally failed to convict three accused who had admittedly been present at the spot and two others who were assailants of a witness and convicted by the trial court. The Supreme Court suomoto issued notice against them who had secured order of acquittal in exercise of powers under Article 61 of the Constitution. It was observed that '*the error being patent on the record of this case*' the respondents being represented by a lawyer, '*the case against these five respondents calls for consideration by us along with the appeal of the seven convicts*' and sentenced two of them to life sentence and rest to one and half years. The Supreme Court passed the sentence in exercise of inherent powers.

131. In Bangladesh V. Dhaka Lodge, 40 DLR(AD)86, some documents which were filed on behalf of the Government in the trial Court were not exhibited by it on the reasoning that they were filed after closure of the evidence. The trial Court dismissed the suit of the respondent but the High Court Division decreed the suit. This Division allowed the appeal for doing complete justice observing that "*the constitutional obligation of this court is to do complete justice in the cause or matter and while doing so it has become imperative for giving due consideration to these annexures to clarify the factual position which in the final analysis can be given by the trial Court*".

132. Similar views have been expressed in Raziul Hasan Vs. Badiuzzaman Khan, 16 BLD(AD)253. In that case appellant Raziul Hasan was in the Foreign Service, and before the Administrative Tribunal moved by the respondent Badiuzzaman, the appellant Raziul Hasan could not defend his case and that despite assurance given by Ministry of Foreign Affairs, his case was not placed before the Tribunal. The Administrative Tribunal gave relief in favour of the respondent No.1 and the Administrative Appellate Tribunal dismissed the appellant's appeal on the ground of limitation. This Division gave relief to the appellant on the reasonings as under:

> "*We now find that no remedy is available to the appellant, though a gross injustice has been done to him for no fault or laches of his own. A valuable right accrued to the appellant in law and fact should not be lost. In that view of the matter we thought it to be a most appropriate case to exercise our jurisdiction under Article 104 of the Constitution. It will not be out of place to say that Article 32(2) of the Constitution of India invests the Supreme Court of India not only with the writ jurisdiction but also with the power to issue directions, orders or writs in any matter. Thus the Indian Supreme Court possesses original jurisdiction. But in the scheme of our Constitution we can only do complete justice under Article 104 of the Constitution in a matter or cause which is pending in appeal under Article 103 of the Constitution. A substantial injustice having been done to the appellant we feel that the jurisdiction under Article 104 of the Constitution should be exercised in the facts and circumstances of this case.*"

133. It is to be noted that judiciary works to maintain social justice and fairness in accordance with law. In doing justice-judiciary does not believe in misplaced sympathy. The above views have been correctly explained in Balaram Prashed Agarwal V. State of Bihar, (1997) 9 SCC 338. Facts in that case are that one Kiron Devi committed suicide. According to the prosecution, Kiron Devi's in-laws and her husband forced her to commit suicide by jumping in a well. Police eventually submitted charge-sheet under sections 498A, 302/34 and 120B of the Indian Penal Code against her husband and in-laws. The trial Court framed charge under sections 302/34 of the Penal Code against the accused persons. It acquitted the accused persons although it held that there was evidence on record that the members of the

family of the accused used to assault the victim; that they also used to demand dowry from her; that threats were given by the accused to the victim that they would kill her and get her husband married to another woman, but since in the meantime seven years elapsed it held that Kiron Devi might have been killed for the sake of dowry cannot be raised. The Supreme Court after appraisal of the evidence came to the conclusion that though the accused persons were rightly found not guilty of the charge of murder, there were sufficient evidence on record in support of the charge under section 498A for the offence of cruelty by husband or relatives of husband of the woman; that despite no charge was framed against them on that count, in exercise of power under Article 142 of the Constitution it might itself examine the question of culpability of the accused for the said offence in the light of the evidence on record so as to obviate protraction of trial and multiplicity of the proceedings. "*It is now well settled that in exercise of powers under Article 142, appropriate orders can be passed (See E.K. Chandrasenan V. State of Kerala, (1995) 2 SCC 99) in the interest of justice in cases which brought before this court. We have been taken through the relevant evidence on record we find that the prosecution has been able to bring home the guilt of the accused under section 498A I PC*" the court observed.

134. In Chandrakant Patil V. State, (1998) 3 SCC 38, four accused persons were found guilty under section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and sentenced to five years rigorous imprisonment. In an appeal from conviction, the Supreme Court of India issued notice upon the convicted persons for enhancement of sentence. On behalf of the accused persons it was contended that in view of section 377(3) of the Code of Criminal Procedure 1973, the High Court could not enhance the sentence without affording the accused a reasonable opportunity of showing cause and in which case, the accused might plead for his acquittal and for reduction of the sentence and in that view of the matter, the court had no power to enhance the sentence. It was held that the Supreme Court has power to pass any order and this power is not circumscribed by any restriction such as section 19 of TADA "*no enactment made by the Central Act or State Legislation can limit or restrict the power of this court under Article 142, though while exercising it the court may have regard to statutory provisions*" and enhanced the sentence to ten years imprisonment.

135. In Mohd. Anis V. Union of India, 1994 Supp(1)SCC 145 it was observed that "*This power has been conferred on the Apex Court only and the exercise of that power is not dependent or conditioned by any statutory provision. The constitutional plenitude of the powers of the apex Court is to ensure due and proper administration of justice and is intended to be co-extensive in each case with the needs of justice of a given case and to meet any exigency. Very wide powers have been conferred on this Court for due and proper administration of justice and whenever the Court sees that the demand of justice warrants exercise of such powers, it will reach out to ensure that justice is done by resorting to this extraordinary power conferred to meet precisely such a situation*."

136. On an analysis of the above cases, we find that in Balaram Prashad Agarwal (supra), the accused persons who were not even charged under section 498A were found guilty of the said offence by the Supreme Court after having noticed from the materials on record that there was grave error in not convicting them under section 498A on the reasoning that the power of the highest court was not circumscribed by any statutory limitation; that a remand order would defeat the ends of justice, and that would foster the multiplicity of proceedings. In Muhammad Nawaz (Supra), the Supreme Court of Pakistan convicted five accused persons who were acquitted by the High Court, although State did not file appeal. While convicting them, the Supreme Court issued notice upon them and heard their counsel. The statements of law argued in those cases are sound, cogent, in conformity with law and I find

no reason to take a different view. State is not required to file an appeal against the acquittal on the charge of conspiracy.

137. The evidence on record proved beyond doubt that the killing was perpetrated in pursuance of a conspiracy and therefore, it is consonance to law and justice that the respondents should be awarded a legal conviction of an offence on the basis of the evidence on record. If a graver sentence is provided for murder in pursuance of conspiracy, the question of prejudice would have arisen. Here the respondents have not acquired any right against the acquittal on the charge of conspiracy. So, even without exercise of inherent power, this Division can alter the conviction of the respondents to one of murder in pursuance of the criminal conspiracy. The appellant has taken ground Nos.II and IV in its concise statement for convicting the accused on the charge of conspiracy. In view of rule 13 of Order XXIII, rule 5 of Order XX of the Appellate Division's Rules are applicable to criminal appeals, and there is no legal bar to convict them even if no leave was granted on this point. This is a settled point and I need not make any observation on this question. In support of the charge, the prosecution has adduced evidence and the accused persons have defended the same. The trial court as well as the High Court Division discussed the evidence in support of this charge but disbelieved the charge on perfunctory grounds. Therefore, there is no legal bar to convict the respondents on the basis of the evidence on record.

138. The gist of the offence of criminal conspiracy being an agreement to break the law, it is found from the evidence that the army personnel deputed in the Bangabhaban convened meetings several times for executing the killing. Some of them visited the Dhaka Central Jail and then chalked out the plan and design, and constituted two killing squads for the purpose. They compelled the jail authority to allow the killing squad to enter into the Dhaka Central Jail with arms. They had compelled the jail authority to segregate the four leaders and keep them in one cell. It is also on record that two groups executed the killing-the first group headed by the Moslem Uddin shot at the four prisoners from short range with the arms carried by them and some time thereafter, the second group entered into the Dhaka Central Jail and in order to ensure the death of the leaders, charged bayonets upon them. The respondents being party to the conspiracy, they are agents in the objects of conspiracy, the identification of Moslem Uddin at the jail gate before shooting at the political prisoners should be taken as done by all the respondents as well. It is immaterial whether the respondents were not recognized at the Dhaka Central Jail. It also makes no difference as to their non-identification. They monitored everything over telephone from Bangabhaban. The acts which followed the killing i.e. fleeing away of the killers with their family members to Bangkok by arranging a special flight, are strong circumstances to link them in the killing. Therefore, all elements to constitute criminal conspiracy to kill the leaders in the Dhaka Central Jail are present in this case. The prosecution has been able to prove the charge of conspiracy by direct as well as circumstantial evidence beyond reasonable doubt against the respondents.

139. This case is standing on a better footing in view of the fact that a proper charge of criminal conspiracy was framed by the trial court and the accused respondents had defended the charge. In this Division as well as in the High Court Division, they were represented by a lawyer and the point in question was raised and heard. The commission of the offence is same and therefore, there is no need for alteration of the charge. It is found from the appraisal of the evidence that the accused persons perpetrated the killing in pursuance of conspiracy and since conspiracy has been proved, the same set of accused persons cannot be legally convicted for an offence of sharing the common intention of all in respect of the same incident. The High Court Division on a misconception of law held that the prosecution has failed to prove the conspiracy. From the evidence as discussed above, if there be any doubt about the conspiracy, it would be

difficult to find out a suitable case to prove such charge. The facts found from the materials on record, the barbarity revealed in the commission of the crime and the seriousness of nature of the offence perpetrated by the accused, it would be a travesty irony if the accused persons are not convicted on the charge of conspiracy. With due respect I am unable to endorse the majority opinion that the accused-respondents cannot be convicted on the charge of criminal conspiracy. The question of the benefit of law does not arise at all for simple reason that they were charged with and defended of the charge of criminal conspiracy. If that being the position, the sentence being the same, the question of injustice or prejudice does not arise at all. The respondents cannot be fastened with vicarious criminal liability within the meaning of section 34 of the Penal Code but their conviction would be one under sections 120B read with 302, not under sections 302/34 of the Penal Code.

140. It should be borne in mind that the definition of the words used in the Penal Code in sections 6 to 52A is one of the most important things. It defines with almost punctilious precision the meaning of various terms which are then used as terms of art everywhere in the Code, both in defining the offences as well as in describing their inter-relations and differences. The object of the definitions is to avoid the perplexing variety of senses. Where the enactment itself provides a definition of the offence, the court should look into the meaning of the offence assigned to the term by the statute itself for interpreting that offence used in the statute. Section 2 of the Penal Code asserts that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of which he shall be guilty within Bangladesh. The object of this section is to declare the liability of every person, irrespective of rank, nationality, caste or creed, to be punished under its provisions. Therefore, all infractions of law as laid down in the Penal Code shall only be punished in the manner therein laid down. An offence is what the Legislature classes as punishable. Any act or omission can be classed as an offence is in itself an offence within the meaning of section 40. There are three elements of an offence; first, the act; secondly, the mens rea; and thirdly, the harmful social consequences of the act which is why the law makes it culpable. As criminal justice requires clear demonstration of facts, it requires also clear enunciation of law, for no one can be convicted of a doubtful offence. Therefore, I fail to understand how the act of the accused which falls under one definition of offence can be taken as another offence under different definition, and the accused persons be convicted for the offence which does not cover definition of such offence. It is illegal and not permissible in law. A court of law cannot convict an accused in respect of an offence which he has not committed.

141. Before concluding, I would like to say that the basic fundamentals of administration of justice are that no man should suffer because of the mistake of the court. No man should suffer by technical procedure of irregularities. Rules or procedure are handmaids of justice and not the mistress of the justice. If a man is wronged, so long it lies within the human machinery of administration of justice, that wrong must be remedied. An irregular order of a court of unlimited jurisdiction can be set aside by it on the application either under the rules of court dealing expressly with setting aside orders for irregularity or *ex debitio justitiae* if the circumstances warrant. Judicial vacillations undermine respect of the judiciary and judicial institutions, denuding thereby respect for law and the confidence in the even-handedness in the administration of justice. (A.R. Antulay V. R.S. Nayak, (1988) 2SCC 602.

142. For the reasons stated above, conviction of the respondent passed by the trial court is altered to one of section 120B read with section 302 of the Penal Code. The sentence of death awarded to the respondents by the trial Court is restored.

143. ***Md. Abdul Wahhab Miah, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

144. ***Nazmun Ara Sultana, J.-*** This criminal appeal by leave, at the instance of the State, has been filed against the judgment and order dated 28.08.2008 passed by a Division Bench of the High Court Division in Death Reference No.150 of 2004 heard together with 4 other criminal appeals filed by the convicted accused persons accepting the death reference in part and rejecting the same with respect to the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and thereby acquitting them from the charges levelled against them and allowing all the 4 appeals.

145. The prosecution case, in short, was that on 3rd November, 1975, at about 3.00 A.M. the then Inspector General of Prisons Mr. Nuruzzaman Howlader received several telephone calls from army personnel at Bagabhaban who told him that some armed miscreants might enter the jail and take away some prisoners forcibly and asked him to go to Dhaka Central Jail immediately. I.G. (Prisons) then informed D.I.G. (Prisons) Mr. Kazi Abdul Awal about those telephonic messages over telephone and asked him to go to Central Jail immediately and he himself also went to Central Jail, Dhaka. Upon arrival at the Jail I.G. (Prisons) Mr. Nuruzzaman and D.I.G. (Prisons) Kazi Abdul Awal took seat in the office of D.I.G. (Prisons). There also I.G. (Prisons) received various telephone calls; sometimes thereafter accused Captain Muslem Uddin along with 4 other armed personnel arrived at the Jail Gate, but they did not disclose their names to the persons attending the Jail Gate; D.I.G. (Prisons) Kazi Abdul Awal asked those army personnel to put their signatures in the register maintained for the purpose at the Jail Gate; those army personnel then put their signatures in the register at Jail Gate and then entered into the Jail; they wanted to know who Mr. Nuruzzaman was, Mr. Nuruzzaman-the I.G. (Prisons) disclosed his identity and those armed personnel then inquired as to whether they had kept aside those persons who were asked to be kept segregated. Mr. Nuruzzaman wanted to know the purpose of such segregation of those persons and the armed personnel then disclosed that they would be done to death; hearing such reply the I.G. (Prisons) Mr. Nuruzzaman wanted to have a telephone call to the President; at that time the jailor also received a telephone call from President Mostaq Ahmed who desired to have a talk to I.G. (Prisons) Mr. Nuruzzaman and ultimately there was talk between the President Mostaq Ahmed and I.G. (Prisons) Mr. Nuruzzaman over telephone; that President Mostaq Ahmed ordered I.G. (Prisons) over telephone to allow those 5 army personnel to do whatever they wanted to do; thereafter the second gate inside the jail was opened and the said 5 army personnel along with Mr. Nuruzzaman entered inside the jail; the D.I.G. (Prisons) Kazi Abdul Awal also followed Mr. Nuruzzaman and those army personnel. Having entered inside the jail those 5 armed personnel enquired as to why there was delay; immediately thereafter the Deputy Jailor, Habilder and some wardens had informed that those persons had been segregated. The accused Muslem Uddin and his 4 other armed companions then went to the spot where those 4 persons namely, Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A. H. M. Kamruzzaman-the four leaders-were brought as ordered and a few minutes thereafter the I. G. (Prisons), D.I.G (Prisons) and others heard sounds of opening shots from firearms; some time thereafter the assailants decamped from the scene in a hurry; thereafter, Mr. Nuruzzaman and Kazi Abdul Awal returned to office and offered Fazar prayer there; at that time they came to know that another group of armed personnel had arrived at the scene of occurrence to ensure the death of those four leaders and seeing that out of those four leaders two were still alive they caused their death by bayonet charges; that the I.G. (Prisons) and the D.I.G. (Prisons) being puzzled and knowing not what to do left the office for their respective residence and again returned at 8/9 A.M. to the Jail Gate. D.I.G. (Prisons) Kazi Abdul Awal then talked with Colonel Rashid over telephone to know the course of action at that situation and Major Rashid ordered not to move the dead bodies; at around mid-

day on the same day the I.G. (Prisons) along with D.I.G. (Prisons) went to the Secretary, Ministry of Home Affairs and apprised him of the incident but he also failed to give any satisfactory solution, rather he asked to hand over the dead bodies to their respective relations after concluding post mortem examination; that at that time the Secretary, Ministry of Home Affairs had telephonic calls with the Superintendent of Police, Deputy Commissioner, Civil Surgeon and others over the incident; that the dead bodies of four slain leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A. H. M. Kamruzzaman were handed over to their relatives after holding of postmortem examination and thereafter D.I.G (Prisons) Kazi Abdul Awal, as the informant, lodged the F.I.R. with Lalbagh Police Station on 04.11.1975 stating the fact of killing of four leaders inside Dhaka Central Jail by armed personnel; that on 05.11.1975 the informant submitted a detailed report also about that jail killing addressing the Inspector General of Prison.

146. On the basis of the F.I.R. lodged by the D.I.G. (Prisons) Kazi Abdul Awal, Lalbagh Police Station Case No.11 dated 04.11.1975 was registered, but the investigation of that case remained suspended for many years till 17.08.1996. Subsequently on the order of the Government, investigation of that case was started on 18.08.1996. The investigating officer-P.W.64 Abdul Kaher Akand, the Assistant Superintendent of Police, C.I.D. Bangladesh took over the charge of investigation on that day. He found record of the corresponding G.R. case No.10698 of 1975 missing and the original F.I.R. was not found. The record of G.R. case, however, was subsequently reconstructed. After completion of investigation the investigating officer submitted charge sheet being No.370 dated 15.10.1998 under sections 120B/302/448/109 and 34 of the Penal Code against 21 accused persons including the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha.

147. The case was ultimately taken up for trial in the court of Metropolitan Sessions Judge, Dhaka. Charge under section 120B of the Penal Code was framed against 20 accused persons since one accused Aziz Pasha died in the meantime and charge under sections 302/109 of the Penal Code was framed against 19 accused persons except accused Risalder Moslem Uddin who was charged under section 302 of the Penal code. The charges so framed were read over to the accused persons who were present in the court. These accused persons pleaded not guilty and claimed to be tried.

148. The prosecution examined as many as 64 witnesses to prove the charges framed against the accused persons. The defence examined none. The accused persons present on dock were examined under section 342 of the Code of Criminal Procedure.

149. The defence case, as it appears from the trend of cross-examination of the prosecution witnesses and also from the statements made by the accused persons under section 342 of the Code of Criminal Procedure, was that at about 12 midnight to 1.00 A.M. of 03.11.1975 Khaled Mosharaf proclaimed a coup d' etat and thereby he along with P.W.29 Colonel Safayet Jamil withdrew the Tanks Regiment from Bangabhaban at 12 to 1.00 A.M. on 03.11.1975 and that it was the four leaders of Awami League who were the legitimate successors to the Government after killing of Bangabandhu Sheikh Mujibur Rahman and therefore Khaled Mosharaf and his partymen with a view to serving their peaceful tenure of office, had killed the four leaders inside the Central Jail and that the innocent accused persons were falsely implicated in this case.

150. However, the trial court, on consideration of evidence adduced by the prosecution and the facts and circumstances, convicted the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and Risalder Moslem Uddin @ Muslem Uddin @ Hiron Khan @ Muslem Uddin Khan under sections 302/34 of the Penal Code and sentenced all of them to death with fine by the judgment and order dated 20.10.2004. The trial court convicted these 3 accused persons along with 12 others under sections 302/109 of the Penal Code also and sentenced them to imprisonment for life with fine of Tk.10,000/- (ten thousand) each. The trial court found accused Major Md. Khairuzzaman, A. K. M. Obaidur Rahman, Shah Moazzem Hossain, Nurul Islam Monzur and Taher Uddin Thakur not guilty of the charge under sections 302/109 of the Penal Code and acquitted them of the said charge. The trial court found all the accused persons not guilty of the charge under section 120B of the Penal Code and acquitted them of the said charge.

151. This judgment and order of conviction and sentence of the trial was sent to the High Court Division under section 374 of the Code of Criminal Procedure for confirmation of the death sentences and accordingly Death Reference No.150 of 2004 was registered. The other convicted accused namely, Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin preferred Criminal Appeal Nos.4739 of 2004, 4740 of 2004 and Jail Appeal Nos.118 of 2006 and 597 of 2007 respectively.

152. The State or none from the deceased's family preferred any appeal against the judgment and order of acquittal of all the accused persons from the charge under section 120B of the Penal Code or against the order of acquittal of the aforesaid 5 accused persons from the charge under sections 302/109 of the Penal code.

153. However, the High Court Division heard the death reference along with aforesaid 4 appeals together and by its impugned judgment and order dated 28.08.2008 rejected the death reference so far as it relates to the present accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and acquitted them of the charges levelled against them. The High Court Division allowed the 4 appeals also preferred by Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin and acquitted all of them from the charges levelled against them. The High Court Division accepted the death reference in part and confirmed the conviction and sentence of death imposed upon the accused Risalder Moslem Uddin.

154. The state has filed this present criminal appeal challenging the acquittal of the accused respondents Dafader Marfoth Ali Shah and L. D. (Dafader) Md. Abul Hashem Mridha only. It should be mentioned here that the State though filed criminal petition for leave to appeal against the order of acquittal of Lt. Col. (released) Syed Faruk Rahman, Lt. Col. (released) Sultan Shahriar Rashid Khan, Major (retd.) Bazlul Huda and Major, (Retd.) A. K. M. Mohiuddin passed by the High Court Division by the same impugned judgment but these 4 accused having been convicted and sentenced to death in the Bangabandhu murder case being already hanged to death on 28.01.2010 upon confirmation of their death sentence by the Appellate Division those Criminal Petitions for leave to Appeal abated.

155. However, leave for filing this present appeal was granted by this Division by the order dated 11.01.2011 in Criminal Petition for Leave to Appeal No.316 of 2009 to consider the grounds agitated from the side of the leave petitioner-State which are quoted below:-

I. Because the High Court Division delivered its judgment by misreading, misquoting and misunderstanding the evidence on record especially that of P.W.29 and P.W.52 as such the judgment is perverse;

II. Because the High Court Division erred in law by not properly applying the well settled principles of law regarding circumstantial evidence and arrived at a wrong conclusion;

III. Because the High Court Division failed to appreciate the abundance of evidence on record proving the circumstances and establishing a chain between them and arrived at a wrong conclusion causing serious miscarriage of justice;

IV. Because the prosecution case that:-

(a). In order to kill the four national leaders in Dhaka Central Jail a killing squad was formed under the leadership of Risalder Moslemuddin with Dafader Marfoth Ali and Lance Dafader Abul Hashem Mridha amongst others as its members in pursuance to the said motive;

(b). The information that a squad had been sent to kill was communicated by the accused persons to the Dhaka Central Jail authority over telephone; having been proved by evidence of the witnesses a clear chain of circumstances was established to prove the guilt of the accused persons which was unfairly and injudiciously disregarded by the High Court Division.

V. Because there are serious points of law involved in this case mostly relating to the law of evidence which need to be considered and examined by the highest court of judicature to secure the ends of justice.

156. The learned Attorney General, Mr. Mahbubey Alam and the learned Senior Counsel Mr. Anisul Huq have made lengthy submissions before us on behalf of the State-appellant while Mr. Abdullah-Al Mamun, the learned Advocate appointed by the Court as State Counsel to defend the accused-respondents has made elaborate submission on behalf of both the absconding accused-respondents.

157. The learned Attorney General has placed before us the impugned judgment of the High Court Division, that of the trial court and also the evidence on record and has argued that in this case there is abundance of evidence to prove the charges against the present two accused-respondents. The learned Attorney General has referred to the relevant portion of the evidence of P.Ws.1, 2, 3, 11, 13, 16, 17, 18, 21, 26, 28, 29, 33 and 34 and has argued that these evidence, if considered together, prove sufficiently that these two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha were involved in the killing of four national leaders inside the Dhaka Central Jail, but the High Court Division on misreading and mis-appreciation of these evidence and without having taken the attending facts and circumstances into consideration passed the impugned judgment of acquittal most erroneously and unjustly. The learned Counsel has argued that the reasons which the High Court Division assigned for rejecting the evidence of above prosecution witnesses and for not finding the prosecution witnesses trustworthy-were not cogent at all and as such not acceptable. The learned Counsel has submitted more specifically that the High Court Division disbelieved the telephonic conversations between Khandaker Mustaque Ahmed-the then President and Colonel Rashid and P.W.3 I.G. (Prisons) Mr. Nuruzzaman on mis-appreciation of evidence of P.W.29 Colonel Shafayeth Jamil and P.W.46 Lt. Colonel (Rtd.) Anwaruzzaman and thus failed to arrive at a correct decision; that the telephonic conversations between the I.G. (Prisons) and the president Khandaker Mustaque Ahmed and Colonel Rashid on that fateful night was most vital part of evidence for deciding the guilt of

the accused, but the High Court Division disbelieving the telephonic conversation has committed serious error in coming to the decision. The learned Counsel has argued also that the High Court Division discarded the evidence of P.Ws.1, 2, 3, 11, 13, 16, 17 and 18 for minor discrepancies and also for the absence of some registers from both the Dhaka Central Jail and Bangabhaban without considering at all the fact that the investigation of this case started long 21 years after the incident of jail killing and after such a long period it was not possible on the part of the investigating officer and the prosecution to get those registers. The learned Counsel has argued also that the High Court Division made self contradictions by believing the evidence of some prosecution witnesses while affirming the conviction of accused Moslem Uddin and by disbelieving the same evidence of the same P.Ws. in acquitting the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha. The learned Attorney General has argued that the evidence of the prosecution witnesses have proved a strong circumstance which is consistent with the guilt of the accused-respondents and are wholly inconsistent with their innocence, but the High Court Division has totally ignored all the circumstantial evidence and also the legal aspect relating to circumstantial evidence and thus illegally acquitted the accused-respondents.

158. Mr. Anisul Huq, the learned Government Chief Prosecutor has made submission on the charge of criminal conspiracy brought against all the 20 accused persons in this case. It has already been mentioned before that the trial court found this charge of criminal conspiracy under section 120B of the Penal Code not substantiated and therefore, acquitted all the 20 accused persons from that charge, but the Government did not file any appeal against that order of acquittal of the accused persons from the charge under section 120B of the Penal Code. Before the High Court Division also, as it appears, no submission was made from the State-respondents on this charge of criminal conspiracy. However, before this Division the learned Counsel for the State-appellant has made a lengthy submission on the charge of criminal conspiracy contending that this Division, exercising its power of doing complete justice under Article 104 of the Constitution, can consider now whether the charge of criminal conspiracy was proved and if this Division finds that in this case there are sufficient evidence to prove the charge of criminal conspiracy then this Division can pass appropriate order at this stage also. Both Mr. Anisul Huq and the learned Attorney General, after making elaborate discussion on evidence on record, have argued that these evidence have proved sufficiently that there was a criminal conspiracy to kill the four leaders inside the jail and that all the 21 charge sheeted accused persons were involved in that criminal conspiracy, but the trial court most erroneously found that the charge of criminal conspiracy was not proved. The learned Counsel for the State-appellant has pointed out the relevant portion of evidence of some P.Ws. before us and argued that there are overwhelming evidence on record to prove that the accused persons made the criminal conspiracy to kill the four national leaders inside the jail. Mr. Anisul Huq has contended that in the circumstances where there are overwhelming evidence on record to prove the charge of criminal conspiracy for killing the four national leaders inside the jail this Division-the apex court of the country-cannot refuse to consider these evidence and to make a correct decision as regards this charge of criminal conspiracy-only for the reason that there was no appeal against the order of acquittal from this charge of criminal conspiracy-specially in this very case of gruesome, barbaric and heinous killing of four national leaders inside the jail. By citing several decisions of the apex court of this region Mr. Anisul Huq has argued that it is a most appropriate case where this Division can exercise its power of doing complete justice by convicting the accused involved in this criminal conspiracy and sentencing them appropriately.

159. The learned Attorney General also has submitted that this Division in exercising its power under Article 104 of the Constitution can, after issuing a notice against the absconding accused, consider now whether the charge of criminal conspiracy was proved by the evidence on record and can pass appropriate order. The learned Attorney General has made submission to the effect also that if this Division is reluctant to convict the accused persons for the charge of criminal conspiracy under section 120B of the Penal Code for the reason that no appeal was filed against the order of acquittal of the accused from this charge of criminal conspiracy this Division can discuss and consider the evidence on record in support of the charge of criminal conspiracy and can make correct observations and findings as to this charge of criminal conspiracy-at least. The learned Attorney General also has made submission to the effect that considering the very nature of the offence of gruesome and barbaric killing of four national leaders inside the jail this Division-the apex court of the country-cannot be reluctant to make correct observations and findings as regards the charge of criminal conspiracy for the reason only that the State did not file any appeal against the order of acquittal from the charge of criminal conspiracy in time.

160. Mr. Abdullah-Al-Mamun, the learned State Counsel appointed by the court to defend the absconding accused-respondents also has made very lengthy submissions supporting the impugned judgment of the High Court Division and also trying to controvert the submissions of the learned counsel for the State-appellant. The learned state Counsel for the accused-respondents has argued that in this case there is, practically, no cogent evidence to prove the involvement of the accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha in the incident of killing of four leaders inside jail and as such the High Court Division rightly acquitted these two accused-respondents. The learned Counsel has contended that the evidence produced by the prosecution before the trial court were not at all cogent and reliable; that the witnesses whom the prosecution relied on for proving the charge against the accused-appellants were not trustworthy at all; that the High Court Division rightly found that the prosecution witnesses were not trustworthy and their evidence, as such, could not be relied on. The learned Counsel for accused-respondents has pointed out that the trial court also in the first part of its judgment stated that the P.Ws. on whom the prosecution relied on to prove the charges against the accused persons, were not trustworthy at all. Mr. Abdullah-Al Mamun has argued much on some alleged discrepant and contradictory statements of the prosecution witnesses. He has pointed out some alleged discrepant statements of the prosecution witnesses from the Dhaka Central Jail as to the colour of the uniform of the assailants and also as to the weapons the assailants carried and also as to putting of their signatures in the jail register and argued that these discrepant and contradictory statements of the P.Ws. reasonably raise suspicion about the trustworthiness of these prosecution witnesses. The learned Counsel has questioned also the competency of the prosecution witnesses who claimed themselves to be the employees of Bangabhaban at that relevant time pointing out some alleged discrepancies in the statements of P.Ws.11,13,16,17,18,21 and 34 and also pointing out the fact that the prosecution could not bring any written document to prove that these P.Ws. were employees of Bangabhaban at that relevant time. The learned Advocate has argued that these P.Ws. were not at all employees of Bangabhaban and as such are not competent and reliable at all and their evidence cannot be considered for proving the charges against the accused-respondents. The learned Counsel has argued that the High Court Division duly weighed and sifted the evidence of prosecution witnesses and there is no misreading, misquoting and misinterpretation of the evidence on record by the High Court Division; that the High Court Division committed no illegality in discarding the evidence of P.Ws.1-3 and P.Ws.11,13,16,17,18,21 and 34 as unworthy of credence; The learned Counsel for the accused-respondents has argued that there is no cogent

evidence at all on record to prove the presence of these two accused-respondents in the place of occurrence or to prove that these accused-respondents in any way were involved in the incident of jail killing of four leaders and in the circumstances the High Court Division rightly acquitted these two accused-respondents of the charges levelled against them.

161. As against the submissions of the learned Counsel for the State-appellant as to the charge of criminal conspiracy the learned State Counsel for the accused-respondents has submitted that since the State did not file any appeal against the order of acquittal of the accused persons from the charge of criminal conspiracy passed by the trial court and since in this appeal also no such ground was taken and since in the leave granting order also there is nothing as regards the charge of criminal conspiracy this Appellate Division now cannot look into this charge of criminal conspiracy and cannot make any order as to this charge. The learned Counsel has argued that the trial court, on elaborate discussion and consideration of the evidence adduced by the prosecution, clearly found that the charge of criminal conspiracy was not proved at all and accordingly acquitted all the accused persons of the charge under section 120B of the Penal Code but the State or anybody else did not raise any question as to these findings and decision of the trial court regarding the charge of criminal conspiracy at any stage before and as such at this stage, in the absence of the accused persons, this Division cannot entertain this plea of the State-appellant that the charge of criminal conspiracy was proved in this case. Mr. Abdullah-Al Mamun has contended that in the above facts and circumstances there is no scope now for this Division to entertain the argument of the learned Counsel for the State-appellant for making observations and decisions as to the charge of criminal conspiracy and for making order convicting and sentencing the accused persons on this charge of criminal conspiracy.

162. Before considering the submissions of the learned Counsel of both the sides we need to State the material portion of the evidence of some of the prosecution witnesses. It has already been mentioned above that in this case the prosecution has examined as many as 64 witnesses. Out of these 64 witnesses the P.Ws.1 to 9 and 12 are the I.G.(Prisons), D.I.G. (Prisons) (the informant), Jailor, Deputy Jailors and other the then employees of Dhaka Central Jail. The P.Ws.10,19 and 20 are three detenues who were in Dhaka Central Jail in that fateful night of killing of four leaders inside Dhaka Central Jail. The P.Ws.11,13,16,17,18,21 and 34 are the witnesses from Bangabhaban. The P.Ws.14,15,30,31,35,36 and 38 are relations of slain leaders and some are the then state ministers and member of Parliament-whose evidence are not important for this present appeal. The P.Ws.26,28 and 33 have deposed as regards the fleeing away of the accused persons abroad on the next day of jail killing. The evidence of P.W.29 Colonel Shafayet Jamil and P.W.46 Colonel Anwarruzzaman will have to be discussed and considered as the High Court Division has relied on the evidence of these witnesses for disbelieving the credibility of other prosecution witnesses. The rest of the witnesses are mainly police and formal witnesses-the evidence of whom are not required to be stated in this judgment. So, in this judgment we shall discuss the relevant portion of the evidence of P.Ws.1 to 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 26, 28, 33, 34 and P.Ws.29 and 46 only.

163. P.W.1, Kazi Abdul Awal-the informant of this case has deposed before court to the effect that he has retired from service as I.G.(Prisons) and that in November, 1975 he was posted at Dhaka Central Jail as Deputy Inspector General of Prisons. That in the night following 2nd November, 1975, at dawn of 3rd November he came to jail gate by the car of I.G. (Prisons) Mr. Nuruzzaman Howlader. That after arriving at jail while he was sitting with I.G. (Prisons), I.G. (Prisons) received several telephone calls and talked over telephone. That

thereafter Captain Muslem Uddin with other four sepoys came to jail gate and after writing their names in the jail gate as per his asking they entered inside the jail and asked who Mr. Nuruzzaman was. Mr. Nuruzzaman disclosed his identity and then those army personnel asked Mr. Nuruzzaman whether those persons-who were told to be kept segregated-had been segregated or not. Mr. Nuruzzaman enquired them for what purpose those persons were to be segregated and those army personnel told that they would be shot to death. Mr. Nuruzzaman then told that he would talk to President over telephone and accordingly a telephone call was made to President from the office of D.I.G (Prisons). After a while another telephone call came from President Khandaker Mustaque Ahmed to the office of jailor for Mr. Nuruzzaman and Mr. Nuruzzaman then went to that office room of the jailor and received that phone call and talked to President over telephone and thereafter, on his asking Mr. Nuruzzaman told him that the President directed him to allow those army personnel to do what they wanted to do. That thereafter the 2nd gate of the jail was opened and those army personnel went inside the jail and Mr. Nuruzzaman and he himself (the witness) also went inside the jail with those army personnel. That those army personnel at that time enquired why so much time was being taken and told also that they finished within three minutes at the house of Sheik Mujib. That at that time he (the witness) wanted to come out of the jail, but Mr. Nuruzzaman prevented him from coming back. That at that time deputy jailor, habildar and some wardens informed that those persons were kept aside and then Muslem Uddin and his four accomplices went to that place where those four national leaders were kept. Thereafter they heard the sounds of firing and then Muslem Uddin and his other accomplices hurriedly went out of the jail. The witness then went to his office and after offering Fajor prayer he heard that some other army personnel also came to see whether those four leaders were alive still then and seeing 2 of them alive they caused their death by Bayonet charges. That he (the witness) being bewildered could not decide what to do and he and the I.G. (Prisons) then went away from the jail and subsequently at about 8/9 A.M. they again came back to jail and after consultation with each other he talked to Major Abdur Rashid over telephone who told him not to move the dead bodies of those four slain national leaders which remained lying there. Thereafter at noon, on that day, he and I.G. (Prisons) went to Home Secretary and told him about the incident but Home Secretary also could not give any advice. But on the next date Home Secretary told them to hand over those dead bodies to their respective relatives after concluding post mortem examination of those. Thereafter the Home Secretary himself contacted with the Deputy Commissioner, Civil Surgeon and others and all of them extended all co-operations and the dead bodies were then handed over to their relatives after postmortem examinations. That Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were those four national leaders who were killed inside the jail in that fateful night.

164. P.W.1 deposed further to the effect that on the next date, on 4th November, he lodged the ejher with Lalbagh Police Station. That he sent the copies of that ejher to different places one of which was kept in the jail. This witness has identified the copy of that ejher kept in the jail which was marked as exhibit-1 and his signature thereon was marked as exhibit-1/1 as per his identification. This witness deposed also that on the next dated on 05.11.1975 he submitted a detailed report to I.G. (Prisons) about that occurrence and as per identification of the witness the said report has been marked as exhibit-2 and his signature thereon as exhibit-2/1. This witness has identified another copy of the F.I.R. which was kept in the judicial record of the case and that copy has been marked as exhibit-3.

165. This witness has been cross-examined at length on behalf of the accused persons, but from the very lengthy cross-examination of this witness nothing material came out to raise

any suspicion as to the truth of what he stated in his examination-in-chief about the killing of four national leaders inside Dhaka Central Jail in the night following 2nd November, 1975, at dawn of 3rd November, 1975 by some army personnel including accused Resalder Moslem Uddin.

166. P.W.2 is Md. Aminur Rahman. This witness has deposed to the effect that he has retired from service as D.I.G (Prisons). He was posted at Dhaka Central Jail as jailor from 2nd February, 1975 to 10th January, 1976. That in the later part of August 1975 four leaders of Awami League namely, Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman along with some other leaders and workers of Awami League were sent to Dhaka Central Jail by the then Government. They were under detention order of the Government. That Major Dalim, Major Rashid, Major Shahriar and Major Farooque on behalf of the then President Khandaker Mustaque Ahmed used to take informations of those arrested political leaders very often from Bangabhaban. That in the afternoon of 2nd November, 1975 while he was working in his office room Major Dalim with arms came to jail and threatened him and compelled him to allow him to enter inside the jail. That Major Dalim wanted to see the Awami League leaders who were confined in the jail at that time and he then took Major Dalim to cell No.15 and Major Dalim visited that place. That during that visit, at one stage, Major Dalim met the former police super of Dhaka District Mr. Shahabuddin and talked to him and thereafter he went out of the jail. That on that very date, in the night, Major Farooque from Bangabhaban telephoned him to know about the Awami League leaders who were inside the jail. That thereafter at dawn of 3rd November at about 3 A.M. the jail guard informed him over telephone that the I.G. (Prisons) asked him to come to jail gate immediately and also ordered for strengthening the security of the jail. That he then hurriedly came to jail gate at about 3.15 A.M. and knew from the jail guard that the I.G. (Prisons) had already arrived at jail gate. He then went to jail gate and received I.G. (Prisons) and took him to the office room of D.I.G. (Prisons). That I.G. (Prisons) at that time informed him that he received a telephone call from Bangabhaban that some miscreants from out side might take away some prisoners from the jail forcibly. The I.G. (Prisons) told the witness to make all the officers and employees of the jail alert and told also that the D.I.G. (Prisons) Kazi Abdul Awal had already been informed who would come to the jail gate within a while. That the D.I.G. (Prisons) Kazi Abdul Awal then arrived at jail gate and went to his office room where I.G. (Prisons) also was sitting; that as per instruction of I.G. (Prisons) the witness made all the officers and employees of the jail alert by ringing alarm bell and then Deputy Jailors Abdul Zahid, Md. Tayeb Ali Mollah, Md. Abdur Rouf, Md. Amanullah and Md. Iqbal Hossain came to jail gate. Dr. Rafiq Ahmed, the Assistant Surgeon of Dhaka Central Jail along with two other doctors also came to jail gate. Some other employees and guards also came to jail gate. That at that time the I.G. (Prisons) received telephone call from Bangabhaban. I.G. (Prisons), after receiving that telephone call, told them that one Captain Moslem along with other army personnel would come to jail gate and instructed them to take those army personnel to the office room of D.I.G. (Prisons). That thereafter at about 4 A.M. Captain Moslem along with four other armed army personnel came to jail gate and the witness received them at jail gate and took the signatures of all those army personnel in the gate register and thereafter took them to office room of the D.I.G. (Prisons) where I.G. (Prisons) was sitting. That at that time I.G. (Prisons) was talking over telephone. The witness then went to his own office room and at that time he received a telephone call from Major Rashid from Bagabhaban who wanted I.G. (Prisons) to talk and he then informed the I.G. (Prisons) about that telephone call and I.G. (Prisons) came to his room and received that telephone call. I.G. (Prisons) wanted to talk to President Khandaker Mustaque Ahmed over telephone and talked to President also addressing him “Sir”. After that telephone call I.G.

(Prisons) told them that President Khandaker Mustaque Ahmed directed him to do as per instructions of those army personnel. That at that time Captain Muslem threatened I.G. (Prisons) and D.I.G. (Prisons) and ordered them to go inside the jail and accordingly they all went inside the jail. That Captain Muslem and the other four army personnel were wearing "khaki" and black uniforms and none of them had any batch on their shoulders. That entering inside the jail Captain Muselm ordered to bring four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman in one room and accordingly I.G. (Prisons) instructed him (the witness) to bring all those four leaders in one room. Thereafter he (witness) with the help of other jail employees brought all those four leaders from different rooms to the room No.1 to the east of cell No.15 and then informed the I.G. (Prisons) about the segregation of those leaders and hearing that news Captain Muslem and the other army personnel went to that room No.1 hurriedly and murdered all those four leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing indiscriminately and thereafter ran away to jail gate and then went out of the jail. This witness deposed further to the effect that after a while when he was preparing for Fazar prayer one jail guard informed him that four other armed army personnel came to jail gate. He then went to jail gate and those army personnel ordered him to take them inside the jail to see whether those leaders died or not. That out of fear the guard opened the jail gate and those army personnel went to the place of occurrence and struck the dead bodies with bayonet in presence of him (witness) and other employees and thereafter those army personnel ran away from the jail. This witness deposed also that this incident of jail killing was written in the report book of the jail on 03.11.1975. That on 03.11.1975 at about 11 A.M. he (the witness) himself along with Subader Abdul Wahed Mridha went to room No.1 where dead bodies of four leaders were lying and they then kept all those dead bodies facing north with the help of other jail employees and kept the wrist watches, rings, handkerchiefs of slain leaders in his office room. That on 04.11.1975, after lodging of the F.I.R. by D.I.G. (Prisons) Kazi Abdul Awal, 2 magistrates went to the jail at evening time and held inquest of the dead bodies and thereafter in the night of 04.11.1975 the postmortem examinations also of those four dead bodies were held by civil surgeon, Dhaka along with other doctors. Thereafter on 05.11.1975 the dead bodies were handed over to their respective relatives as per instruction of the Government.

167. This P.W.2 also was cross-examined at length by the learned advocates of the accused persons, but from the lengthy cross-examination of this witness also nothing came out to make the above evidence of this witness unbelievable or false.

168. P.W.3, A. T. M. Nuruzzaman has deposed to the effect that on 3.11.1975 he was posted at Dhaka as I.G. (Prisons). That after the murder of Bangabandhu and his other relations in 1975 some political leaders were kept detained inside the Dhaka Central Jail and during that period Major Farooque, Major Rashid, Major Dalim, Major Shahrier, on behalf of the then President Khandaker Mustaque Ahmed, used to take information about those detained political leaders from Bangabahban. That in the night following 2nd November, 1975 at about 3 A.M. he received a telephone call from Major Rashid from Bangabhaban who wanted to know from him whether there was any problem with Dhaka Central Jail and also informed him that they had information that some armed miscreants might take away some prisoners forcibly showing arms and also asked him to make the jail alert immediately. That the witness then telephoned to the jail gate and informed the warden on duty about that telephone call and told him also to inform that to the jailor immediately. That 3/4 minutes later he received another telephone call from another army personnel from Bangabhaban who enquired as to whether he made the Dhaka Central Jail alert about security and told him also

to go to the jail to see its security; that he then informed the D.I.G. (Prisons) Kazi Abdul Awal about that telephonic massages and asked him to go to jail gate immediately. Thereafter he went to Dhaka Central Jail and saw that jailor Aminur Rahman also reached there who told him that he had already made all alert about security of the jail. In the meantime D.I.G. (Prisons) Kazi Abul Awal also reached there. That he (the witness), D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman then went to the office room of D.I.G. (Prisons) where he told them about the massages he received from Bangabhaban over telephone. That in the meantime telephone call from Bangabhaban again came and Major Rashid informed him over telephone that one Captain Muslem would go to Central Jail and he would talk to him and asked him also to allow Captain Muslem to talk to Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman. He (the witness) then wanted to talk to President Khandaker Mustaque Ahmed and Major Rashid then gave the telephone to President Khandaker Mustaque Ahmed and President Khandaker Mustaque Ahmed told him to do what Major Rashid asked him to do. That thereafter Captain Muslem reached the office of D.I.G. and enquired about him and getting his identity Captain Muslem asked whether the persons-the names of whom were supplied from Bangabhaban-had been kept aside. That on his asking Captain Muslem told that he would shoot them. That he, (the witness), D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman got puzzled and nervous. D.I.G. (Prisons) Kazi Abdul Awal started trying to contact President Khandaker Mustaque Ahmed over telephone, but in the meantime some one informed the witness that Major Rashid had telephoned in the telephone of the room of jailor and wanted to talk with I.G.(Prisons) and the witness then went to the office room of jailor and Captain Muslem and his other four armed companions also went to that room of the jailor. That Major Rashid from Bangabhaban asked him (the witness) over telephone whether Captain Muslem reached at jail and he then told Major Rashid that he could not understand what Captain Muslem was telling and he wanted to talk to President and Major Rashid then gave the receiver to President Khandaker Mustaque Ahmed and he then told President Khandaker Mustaque Ahmed that Captain Muslem was telling that he would kill Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by shooting. That in reply President Khandaker Mustaque Ahmed told him that what Muslem Uddin told would have to be done. That the witness then told D.I.G. (Prisons) and jailor Aminur Rahman what President told. That all of them then got puzzled and bewildered and could not understand what had to be done. That in the meantime Captain Muslem and his other companions cordoned them and ordered them to take them where those persons were kept. That Captain Muslem and his four companions were then taken to the place where those four leaders were kept. That he (the witness) heard Captain Muslem shouting and saying "hurry up." That the jailor then, at gun point, brought those four leaders to one room and the witness then heard the firing sounds and also sound of crying. That Captain Muslem and his other companions had sten gun, S.L.R. etc. with them. That after firing, Captain Muslem and his four companions went away to jail gate hurriedly without telling anything to the witness or others. He (the witness) and D.I.G. (Prisons) then went to the office room of D.I.G. (Prisons) and stayed there bewildered, speechless for about one hour. That in the meantime one of the jail staff came to them and informed them that one nayek A. Ali by name with 4/5 other armed personnel went to the place inside the jail where four leaders were shot and struck four leaders with bayonet and thereafter left the jail. He (the witness) thereafter, with the help of one prison warden, went to his government quarter.

169. This witness further deposed to the effect that subsequently he went to his office and discussed the incident with D.I.G. (Prisons) Kazi Abdul Awal and also talked to Major Rashid over telephone. At about 10.30 A.M. he along with D.I.G. (Prisons) Kazi Abdul Awal went to the Home Ministry and met Home Secretary and informed him about the incident in

detail. On 05.11.1975 he submitted a written report about the incident to Home Secretary. On 04.11.1975 he, on consultation with D.I.G. (Prisons) Kazi Abdul Awal, decided to file a case and asked D.I.G. (Prisons) to lodge ejher with Lalbagh P.S. and accordingly on 04.11.1975 D.I.G. (Prisons) lodged ejher with Lalbagh P.S. This witness deposed further to the effect that on 05.11.1975 Brigadier Khaled Mosharaf called him and D.I.G. (Prisons) at Bangabhaban and accordingly he and D.I.G. (Prisons) went to Bangabhaban at 10 P.M. at night on that very date and they narrated the occurrence to Khaled Mosharaf and also the Air force Chief and Navel Chief and two other Colonels. Those army personnel asked them to submit written reports about that incident and they submitted written reports accordingly. Those army personnel recorded their oral version about that incident also. As per identification of this witness the written report which this witness submitted to the Home Secretary on 05.11.1975 has been marked as exhibit-6 and his signature thereon as exhibit-6/1.

170. This P.W.3-the then I.G. (Prisons) also has been cross-examined at length on behalf of the accused persons. But from the lengthy cross-examination of this witness also nothing material came out to raise any suspicion about the truth of the evidence of this witness.

171. P.Ws.4, 5, 6, 9 and 12 were jail guards while P.Ws.7 and 8 were Deputy Jailors of Dhaka Central Jail at that relevant time of jail killing. All these witnesses also have deposed stating the incident of jail killing corroborating the evidence of P.Ws.1, 2 and 3. P.W.4, Mohobbat Ali has deposed to the effect that in the night following 2nd November, 1975 he was on duty as jail guard in the jail gate of Dhaka Central Jail from 3.00 A.M. to 6.00 A.M.. That at about 3.00 A.M. jailer Aminur Rahman came out of his government residence within jail premises and told them that I.G. (Prisons) and D.I.G. (Prisons) also were coming to jail and subsequently I.G. (Prisons) also came to jail. That jailor Aminur Rahman told him that 4/5 armed army personnel would come to jail from Bangabhaban and ordered him to open the jail gate when they came. That sometime after that 5 armed army personnel wearing black uniforms came to jail gate and asked to open the gate and he then opened the gate as per order of jailor. That those army personnel had Sten gun, Chines rifles in their hands. That subsequently he as per order of the jailor opened the 2nd gate also of the jail and I.G. (Prisons), D.I.G. (Prisons) and jailer Aminur Rahman with those armed army personnel entered inside the jail and after a while thereafter they heard sounds of firing and then those armed army personnel went away from jail hurriedly; that he then came to know that four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman died. That sometimes after this occurrence four other persons wearing black uniforms came to jail gate and asked for opening the gate and the witness then with the permission of jailor Aminur Rahman opened the gate and those persons entered inside the jail and 5/7 minutes thereafter they came out of jail and ran away from the jail. That at that time he informed jailor Aminur Rahman that the names of the persons who entered inside the jail were not written and jailor shaheb then told him to write the names of Captain Muslem in the register and he accordingly wrote the name of Captain Muslem in the register of the jail gate. As per identification of this witness the said register of the jail gate has been marked as exhibit-7.

172. The P.W.5, Alauddin Sikder deposed to the effect that on 3rd November, 1975 from 2.00 A.M. to 4.00 A.M. he was on duty in the main gate of Central Jail as gate sentry and at about 3.00 A.M. I.G.(Prisons) Mr. Nuruzzaman, D.I.G. (Prisons) Kazi Abdul Awal and jailor Aminur Rahman came to main gate of the jail and then went to the office and sometimes thereafter five army personnel wearing khaki and black uniforms came to the jail gate by jeep

and they entered inside the jail. That in the meantime since his duty period was over he was handing over the charge to the sentry Kazi Abdul Alim and at that time they heard firing sounds from inside the jail; within a short time thereafter those armed army personnel came out from inside the jail and left the jail through main gate. That he then came to know that those armed army personnel murdered four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing. That subsequently he knew also from habilder Nayeb Ali that other four armed army personnel came to jail and caused the death of those four leaders by bayonet charges. That he also knew from other officers that one army officer Captain Muslem by name with his other army companions committed that killing.

173. P.W.6 Md. Ismail Hossain deposed to the effect that on 2nd November, 1975 he was posted at Dhaka Central Jail as jail guard. On that day he was on duty from 6.00 A.M. to 12.00 P.M. in the main gate of the jail and subsequently he again was on duty in the main gate from 9.00 P.M. to 11.00 P.M. on the same date and after the duty hour he went back to his house and fall asleep. At about 4/4.15 A.M. in that very night following 2nd November, he heard ringing sound of alarm bell from Dhaka Central Jail and he then hurriedly came to the main gate of Dhaka Central Jail and knew from jail guard Mohabbat Ali that 5 armed army personnel from Bangabhaban came to jail and entering inside the jail murdered Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman by firing shots and then left the jail. That thereafter at about 4.30/4.45 A.M. while he was still at jail gate four other army personnel wearing khaki uniforms came to the jail gate and one of them put his signature in the In-Out Register as K. Ali and thereafter those four army personnel went inside the jail and made bayonet charges on those four leaders and thereafter went away. That he knew also that one of the five army personnel who came to the jail was Captain Muslem Uddin. This witness deposed also that on 4th November in the evening while he was on duty at jail the dead bodies of three leaders were handed over to their respective relatives and the dead body of Kamruzzaman was handed over to his relative on 5th November, in the morning. This witness has identified the gate register of the Dhaka Central Jail which has been marked as exhibit-8. On the identification of this witness the signatures of "K. Ali" appeared at pages-144 and 145 of this register have been marked as exhibits-8/1 and 8/2. From the cross-examination of this witness also nothing material came out to make the evidence of this witness unbelievable.

174. P.W.7 Md. Abdur Rouf was posted as Dhaka Central Jail from April 1973 to September 1976 as Deputy Jailor. This witness deposed to the effect that in the night following 2nd November 1975 at about 3.00 A.M. one jail guard came to his government residence and awoke him from sleep and told him that I.G. (Prisons) Nuruzzaman Howlader, D.I.G. (Prisons) Kazi Abdul Awal and Jailor Aminur Rahman had come to jail and they told him and other Deputy Jailors to go to jail gate. He then hurriedly came to the jail gate and on his asking one of the jail guard on duty told him that I.G. (Prisons), D.I.G. (Prisons), Jailor and some army personnel wearing khaki uniforms were sitting in the office room of D.I.G. (Prisons). He then went to the office room of Deputy Jailor and saw there Deputy Jailor Abdul Zahid, Tayeb Ali Mollah, Amanullah Sarker and Iqbal Hossain sitting. 5/10 minutes thereafter one jail guard told them that I.G. (Prisons), D.I.G. (Prisons) and Jailor with those persons wearing khaki uniforms went inside the jail and they asked them also to go inside the jail. That they-the 5 Deputy Jailors also then went inside the Central Jail. That entering new jail they saw the other officers there. 2/3 minutes thereafter they heard firing sounds from the room where Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were kept. Sometimes thereafter they saw 4 persons wearing kahki uniforms

came out of that room and running away towards the jail gate and thereafter they left. That on the next morning at about 8.00 A.M. while he came to office he knew from his colleagues that those 4 leaders were shot dead. That on 04.11.1975 in the evening time he heard from the Jailor and Deputy Jailors that Captain Muslem Uddin along with four other army personnel, at the instruction from Bangabhaban, came to the jail in the night following 02.11.1975. From the cross-examination of this witness also nothing material came out.

175. P.W.8 Md. Abdul Zahir-another the then Deputy Jailor of Dhaka Central Jail has deposed to the effect that he was posted at Dhaka Central Jail as Deputy Jailor from 1974 to 1977. That on 2nd November, 1975 in evening he went back to his residence from the jail. At about 4.00 A.M. in that night jail guard awoke him from sleep and told him that I.G. (Prisons), D.I.G. (Prisons) and Jailor were at office and they told him to go there. That at that time he heard also alarm sound from the jail. He then came to the jail and was informed by the orderly of D.I.G. that I.G.(Prisons) and D.I.G. (Prisons) were talking with some army personnel in the office room of D.I.G. He then went to his office and saw there some of his colleagues sitting. That 15/20 minutes thereafter one jail guard informed him that jailor shaheb was sitting in his office room. He then went to the office room of jailor and jailor informed him that 5 army personnel came and they told I.G. (Prisons) and D.I.G. (Prisons) that they would talk with some prisoners. That 15/20 Minutes thereafter they were informed by one jail guard that those 5 army personnel along with I.G. (Prisons), D.I.G. (Prisons) and Jailor went inside the jail. That he along with his other colleagues also then entered inside the jail and saw that those 5 army personnel with I.G. (Prisons), D.I.G. (Prisons) and Jailor were going to new jail. He followed them. As soon as he reached the gate of the new jail area he heard sounds of firing from Division-I of new jail and after a little time those 5 army personnel came out of the new jail and went out of the jail. That he then went to the office room of the jailor and wanted to know what happened and the jailor told him that Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman were shot dead. He then came back to this office and sometimes later he again went to the office room of the jailor who informed him then that four other army personnel also came to the jail and went inside the jail to be sure about death of those four leaders and thereafter they went away. That at that time jailor shaheb informed him also that I.G. (Prisons) had talked with President Mustaque Ahmed and other senior army officers over telephone several times. That he stayed at jail upto 7.00 A.M. and thereafter came back to his house. That subsequently he came to his office and knew from jailor that the dead bodies of those four leaders were still lying in that condition. At about 4.00 P.M. the inquest and postmortem examination of those four dead bodies were held inside the jail. On 05.11.1975 the dead bodies of those 4 leaders were handed over to their relatives.

176. P.W.9 Md. Nayeb Ali was the chief jail guard of Dhaka Central Jail at that relevant time. This witness deposed to the effect that in the night following 02.11.1975 from 3.00 A.M to 6.00 A.M. he was on duty at Dhaka Central Jail. That 4/5 other sepoys also were on duty along with him during that time. That while they were deputed on duty after signing in the duty book they heard alarm bell ringing and he then made all the sepoys on duty alert. That at that time he saw I.G., D.I.G., Jailor, Deputy Jailors and four other armed persons wearing black and khaki uniforms entering inside the new jail. That jailor shaheb at that time asked him to open ward No.1 but he told that he had 200/300 keys with him and did not know which was the right one. That “subader shaheb” then took the bag containing those keys from him and opened the ward No.1 as per instruction of jailor shaheb. At that time Syed Nazrul Islam and Tajuddin Ahmed were in that ward No.1. As per direction of jailor shaheb, “subader shaheb” brought Kamruzzaman shaheb from ward No.2 and Mansur shaheb from

ward No.3 to that ward No.1 and made them all sit in one cot where Syed Nazrul Islam used to sleep. That as soon as all those 4 leaders sat on that cot the armed personnel opened brush fire on them and thereafter they left the jail. That seeing that scene of brush firing and blood he went to the verandah of the new jail and remained sitting there. That a few minutes thereafter "subader shaheb" came to room No.1 and stayed there ½/1 minute and thereafter went away. 10/15 minutes thereafter 4 other army personnel with bayonets came to the new jail and entered inside the room No.1 and started striking those 4 leaders with bayonets and thereafter they left that place.

177. The P.W.10 Abdus Samad Azad was in Dhaka Central Jail as a detenue in that fateful night. This witness has deposed to the effect that in 1971, after formation of Mujibnagar Government, he worked as a moving Ambassador with the rank and status of a Minister and also as Advisor to Mujibnagar Government. That before declaration of Mujibnagar Government there were difference of opinion between Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman and Khandaker Mustaque Ahmed, Mahbub Alam Chashi and Taher Uddin Thakur. That in 1973 he was in charge of Ministry of Agriculture as Minister. After the incident of 15th August, 1975 he was confined in house arrest. On August 23, 1975 he along with those 4 leaders was brought to police control room where they found Major Rashid with movie camera. That Major Rashid told them that they would be put to firing squad. Thereafter at about 12.30 A.M. they were shifted to Dhaka Central Jail. At that time Aminur Rahman was the jailor and M. A. Awal was the D.I.G. (Prisons). That he was shifted to new jail cell in room No.1. Syed Nazrul Islam, Tajuddin Ahmed, Korban Ali, Sheikh Abdul Aziz along with 4 others were confined in room No.2. Secretary Asaduzzaman, Mofazzal Hossain Maya, Kamruzzaman and others were also confined in room No.2. He himself, Captain M. Mansur Ali, Amir Hossain Amu, Syed Hossain, Abdul Quddus Makhan and others were kept in room No.3 of new cell. That on November-1, 1975 they heard from the jail people that some of them would be released and some would be transferred elsewhere. In the morning of 2nd November the jail authority informed them that after evening, on that day, some army officer would come to jail and would visit the place where they were kept and actually in that evening they saw some army officers visiting the jail. In the later part of the night following 2nd November at about 3/4A.M. the alarm (f¡Nm¡ O¾V¡) rang and thereafter they saw the I.G. (Prisons), D.I.G. (Prisons) and Jailor with some Military Officers. That the jail authority took Captain Mosnur Ali from room No.3 to room No.2 and Sheikh Abdul Aziz from room No.1 to room No.3 and thereafter they heard sounds of brush firing, In the morning, at the time of serving breakfast, the sepoys informed them that the army personnel killed the four leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman inside the room No.1 by brush firing. That on 3rd November, 1975 they were under lock-up the whole day and night. That they were not allowed to see the dead bodies of four leaders. The dead bodies of four leaders were lying inside the jail the whole day of 4th November.

178. From the cross-examination of this witness also nothing material came out.

179. The P.W.11 Mokhlesur Rahman Bhuiyan is the Personal Assistant to Joint Secretary (Admn) of the Ministry of Chittagong Hill Tract Affairs. This witness deposed to the effect that in 1972, he was appointed as typist in the President Secretariat. In 1975 he was posted as P/A of the Military Secretary to the President namely Brigadier Masrurul Hoque. That on 15th August, 1975 at about 3.00 P.M. entering Bangabhaban he found Khandaker Mustaque Ahmed as President. At that time he saw Taher Uddin Takur, A. K. M. Obaidur Rahman, Shah Mouzzaman Hossain, Mahbub Alam Chasi, Major Farooque, Major Rashid, Major

Dalim, Major Bazlul Huda, Major Noor, Major Aziz Pasha, Major Rashed Chowdhury, Major Shahriar, Resalder Moslem and some others present at Bangabhaban; since then those army officers had been living in Bangabhaban. That on November 2nd, 1975 at about 7.30 P.M. he was brought to the 1st floor of Bangabhaban by Captain Muslem Uddin. He saw Major Farooque, Major Rashid, Major Dalim, Major Noor, Major Bazlul Huda, Major Aziz Pasha, Major Mohiuddin, Major Sharful Hossain, Captain Mazed, Captain Khairuzzaman, Lieutenant Kismat, Lieutenant Nazmul, Dofader Marfat Ali, Office Assistant Abul Hashem Mirdha, Major Shahriar and many others in that room. That they were talking about Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman who were confined in Dhaka Central Jail at that time; that Major Dalim and Major Rashid enquired him whether he had any telephone number of Dhaka Central Jail and he replied that he had. That he was then asked to supply the telephone numbers of both residence and office of I.G. (Prison), D.I.G. (Prison) and Jailor of Dhaka Central Jail quickly and accordingly he supplied those telephone numbers to Major Shahriar. That at that time he heard discussion about Dhaka Central Jail in that room and also heard to tell that the task of Dhaka Central Jail would have to be completed within that very night; that he also heard Major Farooque talk over telephone to Dhaka Central Jail, that Major Farooque was asking where the detenues were kept inside the jail. At that time Major Shahriar told him to go back to his office room and also told not to leave the office without their permission. He then came to his office. Thereafter at about 9.00 P.M. in that very night the Military Secretary to President called him to his office room. Reaching that office room of the Military Secretary to the President he saw there Taher Uddin Takur, A.K.M. Obaidur Rahman, Shah Muazzam and Nurul Islam Manjur sitting. That thereafter the Military Secretary talked to President over telephone and then told those four persons to go to the bed room of the President. That at about 11.00 P.M. in that very night he went away to his quarter within Bangabhaban. On 3rd November, 1975 he heard that Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman were killed inside the Dhaka Central Jail. Thereafter in the night of that very day the army officers who were residing at Bangabhaban went away abroad.

180. This P.W.11 was cross-examined on behalf of almost all the accused persons extensively. From the side of the accused persons repeated suggestions were put to this witness to the effect that in that night following 2nd November, 1975 after 6.00 P.M. he was not at all present in Bangabhaban and that he was not at all asked by any of the accused persons to supply the telephone numbers of the I.G. (Prisons), D.I.G. (Prisons) and jailor since there was separate section with sufficient employees including several telephone operators who used to deal with the telephone numbers etc. However this P.W.11, in course of cross-examination, has stated that he was posted in Bangabahban from 1972-1998 and that though his office hours usually was upto 6.00 P.M., he had to stay in Bangabhaban long after that time also when required. In course of cross-examination this witness has stated also that Resalder Muslem was not staff of Bangabhaban. This witness denied the defence suggestion that that he did not know Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha since before and that he did not see those accused persons in Bangabhaban in the night following 2nd November, 1975.

181. The P.W.12 Kazi Abdul Alim was another jail guard of Dhaka Central Jail at that relevant time of occurrence. This witness also has deposed to the effect that on 2nd November, 1975 from 4.00 P.M. to 6.00 P.M. he was on duty at the outer gate of Dhaka Central Jail and after completion of his duty he went back to the barrack. That he was scheduled to resume his duty at 4.00 A.M. of 3rd November, 1975, but before that at about 3.00 A.M. he heard alarm bell (f¡Nm¡ O¾V¡) from the jail and then rushed to the jail gate

and saw there I.G. (Prisons) Mr. Nuruzzaman, D.I.G. (Prisons) Kazi Abdul Awal and Jailor Aminur Rahman and other officers. Jailor Aminur Rahman instructed him to inform them immediately if any outsider came. After a while five army personnel wearing black khaki uniform came to jail gate by a open jeep and being informed about that the I.G. (Prisons), D.I.G. (Prisons) and Jailor ordered to open the gate and those five army personnel entered inside the jail. Sometimes after that they heard firing sounds from inside the jail and subsequently those army personnel went away from the jail. That sometimes after that four other armed army personnel came to the jail and entered inside the jail and later they came out of the jail and went away; that he then heard that four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman were killed.

182. From the cross-examination of this P.W.12 also nothing material came out in favour of the defence.

183. The P.W.13 Md. Shawkat Hossain deposed to the effect that he was appointed as "Khedmatgar" in the Ganabhaban in 1973 and after 15th August, 1975 after the killing of Bangabandhu Sheikh Mujibur Rahman and his other family members he along with some others were transferred to Bangabhaban. That on 20th August 1975 he and other "khedmatgar" Manik were engaged on duty of the president Khandaker Mustaque Ahmed. That during his such duty he knew Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Bazlul Huda, Major Mohiuddin, Major Sharful, Major Rashed Chowdhury, Captain Mazed, Captain Muslem Uddin, Dofader Marfat Ali, L.D. Abul Hashem Mridha. That during his duty in Bangabhaban he knew Taher Uddin Takur and Mahbub Alam Chashi also. That on 2nd November 1975 at 2.00 P.M he went to Bangabhaban for performing his duty and at that time he saw the army personnel whom he named before and some other army personnel in Bangabhaban in busy condition. That at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Mohiuddin, Major Rashed Chowdhury, Major Sharful, Captain Mazed and Captain Muslem Uddin holding meeting in the room of Major Rashid. Thereafter at about 12/12.30 A.M. in that very night he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Bazlul Huda, Major Rashed Chowdhury, Major Sharful, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Taher Uddin Takur and Mahbub Alam Chashi holding meeting in the meeting room of President Khandaker Mustaque Ahmed in the 3rd floor. That he himself and "khedmatgar" Manik went inside that meeting room for serving tea. At that time President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and in reply Major Rashid told that Captain Muslem Uddin and his men would go there. That Major Rashid told him (the witness) then to serve the meal to Muslem. The witness then came to the ground floor and took meal from pantry room and went to the room of Captain Muslem Uddin. But Captain Muslem Uddin told that he would not take meal; Captain Muslem Uddin then brought out a bottle of wine from the almirah and he (the witness) took a glass from almirah and pour wine in that glass; that there were two other army personnel of lower rank also present in that room and they all drank wine with Muslem Uddin. That he (the witness) thereafter went away to the meeting room of 3rd floor. That after the end of the meeting President Khandaker Mustaque Ahmed went away to his bed room along with Major Rashid, Major Farooque, Taher Uddin Takur and Mahbub Alam Chashi and he (the witness) then came away to the ground floor; that at about 3.00 A.M. in that night he saw Captain Muslemuddin, Dofader Marfat Ali, L.D. Abul Hashem Mridha and 2/3 other army personnel of lower rank going out of Bangabhaban by army jeep. Sometimes thereafter Major Bazlul Huda and Major Shahriar also went out of Bangabhaban by another army jeep. The witness and "khedmatgar" Manik then fell asleep in the dining room. At about 6.00 A.M. Major

Bazlul Huda awoke him from sleep and told him to serve breakfast to all in the second floor. The witness then went to the room of Captain Muslem Uddin with breakfast and saw there Major Rashid, Major Farooque Rahman, Major Dalim, Major Shahriar, Major Rashed Chowdhury, Major Mohiuddin, Captain Mazed and Captain Muslem Uddin gossiping; that while he was serving breakfast to them, he heard Major Rashid asking about the big 4 of jail and in reply Captain Muslem Uddin telling that all were finished in jail. That he (witness) then went away from there and came to pantry in the ground floor; on that very day they were not released from duty. This witness has further stated to the effect that subsequently from the conversations of the army officers he could know and also heard that four national leaders Syed Nazrul Islam, Tajuddin Ahmed, Mansur Ali, and Kamruzzaman were killed by Captain Muslem Uddin and his other men by shooting inside the jail. That at 7/7.30 P.M. on 3rd November Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Mohiuddin, Captain Mazed and some other army personnel went away from Bangabhaban and thereafter at about 9.00 P.M., in that night, he (the witness) also went away from Bangabhaban after finishing his duty and on the next day on 4th November at 2.00 P.M. the witness again came to Bangabhaban and heard that the said army officers and their companions went away abroad.

184. This witness also has been cross-examined on behalf of the all the accused persons thoroughly. During cross-examination suggestions were put to this witness to the effect that he did not know any of the army officers whom he named in his examination-in-chief and that what he deposed in his examination-in-chief were all false and that he was not on duty at all in Bangabhaban on 2nd/3rd November, 1975. This witness denied all these defence suggestions. From the lengthy cross-examination of this witness nothing material came out to prove the evidence of this witness false or to prove this witness not trustworthy.

185. The P.W.16 Abdul Quiyum Choudhury was a receptionist-cum-P.A. to the President in 1975. This witness has deposed to the effect that in Bangabhaban he was assigned with the job of connecting personal telephone of the President. That during his duty in Bangabhaban he saw Major Dalim, Major Rashid, Major Aziz Pasha, Major Rashed Chowdhury, Major Mohiuddin, Major Ahmed Sharful Hossain, Major Shahriar, Major Frooque, Captain Mazed, Lieutenant Kismat, Lieutenant Nazmul Hossain, Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. Abul Hashem Mridha and others roaming in Bangabhaban with pomp and power. That Taher Uddin Takur and Mahbub Alam Chasi also used to come to Bangabhaban frequently and they used to telephone to different places from Bangabhaban and also give different instructions and orders sitting in the room of President at Bangabhaban; that in the later part of October, 1975 there was prevailing an unusual situation in Bangabhaban; on 2nd November, 1975 his duty in Bangabhaban was from 7.30 A.M. to 2.00 P.M.; that after performing his duty on that day he went away from Bangabhaban. Thereafter on the next day on 3rd November he came to Bangabhaban at 2.00 P.M and heard from Yakub that in the previous night four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman were killed inside the jail and that Major Dalim, Major Farooque and Major Rashid group had committed that killing. That Khan Mohammad Ali Olock told Yakub about this fact in the morning at the time of change of duty. That Khan Mohammad Olock told Yakub that president Mustaque and Major Rashid had talked to I.G. (Prisons) at jail in that night and they were seen very busy and atn the dawn Major Rashid and the other men of their party were seen entering Bangabhaban in sweating condition. That Yakub told him also that he himself also could know from the conversation of Major Dalim, Major Rashid and Major Farooque and others that they committed the killing incident inside the jail. This P.W.16 deposed also that he himself also could know from the conversation of

the said army personnel that they committed the jail killing in the previous night. That on that day President Mustaque Ahmed, Taher Uddin Thakur also were seen anxious. That though his duty period was upto 8.00 P.M. he had to remain on duty till 11.00 P.M. in that night.

186. This witness also has been cross-examined at length on behalf of the accused persons, but nothing material came out from his cross-examination to make his evidence false or to support the defence suggestion that he is a tutored witness and has deposed falsely as per the instruction of the prosecution.

187. The P.W. 17 Khan Mohammad Ali Olock deposed to the effect that in 1972 while he was a student of Dhaka University he was appointed as L.D. Assistant in the President Secretariat and was assigned with the duty of personal assistant of Mohammad Hanif-the personal assistant of President Bangabandhu Sheikh Mujibur Rahman. In 1975 he along with three others was posted as receptionist-cum-P.A. and they worked as such in the Ganabhaban. After 15th August 1975 he was posted in Bangabhaban. That at that time Major Farooque, Major Rashid, Major Shahriar, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha, Captain Muslem Udding would reside in Bangabhaban in different V.I.P. rooms. That Taher Uddin Takur and Mahbub Alam Chashi also used to stay with Khandaker Mustaque Ahmed in Bangabhaban all the time. That in the night following 2nd November, 1975 he had telephone duty at Bangabhaban. In that night at 3.00 A.M. he was asked to connect the I.G. (Prisons) by telephone and when I.G.(Prisons) was connected he asked I.G. (Prisons) to talk with Major Rashid and they had talked for few moments. After sometimes Major Rashid again asked him to give telephone connection to I.G. (Prisons) and he then phoned to the residence of the I.G. (Prisons) but he was informed that I.G. (Prisons) went to jail. Thereafter he gave telephone connection to the phone of D.I.G. (Prisons) and Major Rashid then talked. Sometimes thereafter Major Rashid, Major Farooque, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha came to his room in armed condition and told him to connect I.G. (Prisons) by telephone. The witness then tried to connect I.G. (Prisons) but could not get line and then he connected the phone of jailor and told him that Major Rashid would talk to I.G. (Prisons). I.G. (Prisons) then talked to Major Rashid over telephone and Major Rashid wanted to know whether Captain Muslem Uddin reached the jail. Thereafter Major Rashid told him (the witness) to give connection to President Mustaque Ahmed and accordingly he gave telephone connection to President Mustaque Ahmed and President Mustaque Ahmed talked to I.G. (Prisons). As soon as President Mustaque Ahmed finished his talk Major Rashid and others went away inside Bangabhaban. That sometimes thereafter Pritom Barua informed him that Major Farooque, Major Dalim, Major Rashid and others were going outside Bangabhaban. He (the witness) also then saw the going out of those army personnel from Bangabhaban. That subsequently at about 6.00 A.M. Major Rashid, Major Dalim, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Rashed Chowdhury, Major Aziz Pasha, Major Ahmed Sharful, Captain Mazed, Captain Muslem, Lieutenant Kismat, Lieutenant Nazmul, Abul Hashem Mridha, Dafader Marfoth Ali came back to Bangabhaban in very tired condition. At about 8.00 A.M. he handed over his duty to Yakub Uddin Khan and at that time he narrated the whole occurrence to Yakub Khan; that on the next day he knew that Tajuddin Ahmed, Syed Nazrul Islam, Captain Mansur Ali and Kamruzzaman were killed inside the jail by those army personnel and they also fled away abroad.

188. From the lengthy cross-examination of this witness also nothing material came out to make the evidence of the witness false or to support the defence case. This witness has denied

the defence suggestion that he has deposed falsely at the instruction of others and that he was not on duty in Bangabhaban on 02.11.1975.

189. The P.W.18 Md. Manik Meah deposed to the effect that he was a "khedmatgar" in Ganabhaban in 1973 and after the assassination of Bangabandhu he was posted at Bagabhaban as "khedmatgar" of President Khandaker Mustaque Ahmed. That during his tenure in Bangabhaban he saw Major Rashid, Major Farooque, Major Shahriar, Major Dalim, Major Mohiuddin, Major Bazlul Huda, Major Ahmed Sharful, Captain Mazed, Captain Muslem Uddin, Abul Hashem Mridha, Marfat Ali Shah and some other officers in Bangabhaban. Mahbub Alam Chashi and Taher Uddin Thakur also used to stay in Bangabhaban with President Khandaker Mustaque Ahmed. That on 2nd November, 1975 at 2.00 P.M. he came to duty at Bangabhaban; Shawkat Hossain also was with him on duty at that time. At about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Dalim, Major Mohiuddin, Captain Muslem Uddin sitting in the room of Major Rashid. At about 12.00/12.30 A.M. in that very night there was an urgent meeting in the meeting room of President Khandaker Mustaque Ahmed. That in that meeting all those army personnel and Mahbub Alam Chashi and Taher Uddin Thakur also were present. In that meeting all were seen agitated. President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and Major Rashid replied that Captain Muslem and his men would go inside the jail. Major Rashid then told him (the witness) to serve meal to Captain Muslem and Shawkat went to serve meal; that at about 1.00/1.30 A.M. he (witness) saw Major Rashid, Major Farooque, Mahbub Alam Chasi and Taher Uddin Takur to go to the bed room of President Khandaker Mustaque Ahmed. That at about 3.00 A.M. in that very night Captain Muslem Uddin, Marfot Ali Shah, Abul Hashem Mridha and two other army personnel and one men in civil dress went out of Bangabhaban by a army jeep. By another jeep Major Bazlul Huda and Shahriar shaheb also went out of Bangabhaban. Thereafter at about 6.00 A.M. Major Bazlul Huda awoke them from sleep and told them to serve breakfast to Captain Muslem Uddin. The witness and Shawkat then made breakfast ready and took that to the room of Muslem Uddin and saw there Major Rashid, Major Farooque, Major Shahriar, Major Bazlul Huda, Major Dalim, Major Mohiuddin and some other army officers gossiping with Captain Muslem. Major Rashid asked Captain Muslem "জেল খানায় কি বড় চারটা শেষ।" In reply Captain Muslem told "pÉ¡l ph ®noz"; that he then came out of that room after they finished their breakfast; that on that day he (the witness) was not released from duty. That from the conversation of army officers he knew that the four Awami League leaders Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman were killed inside the jail by shooting and he then realized clearly that the said army officers along with Mahbub Alam Chashi and Taher Uddin Thakur made conspiracy with President Khandaker Mustaque Ahmed to kill those four leaders. That on that evening at about 7.00/7.30 P.M. some of those army officers with their families left Bangabhaban. On the next day coming to duty at Bangabhaban he heard that those army officers left the country and went away abroad.

190. This P.W.18 also has been cross-examination at length on behalf of the accused persons. But from the lengthy cross-examination of this witness also nothing material came out to make the evidence of this witness unbelievable.

191. The P.W.19 Khandaker Asaduzzaman was the secretary of Jute Ministry in 1975. After 15th August, 1975 he was arrested along with others and was detained in Dhaka Central Jail. This witness deposed to the effect that he was kept in room No.2 of Dhaka Central Jail along with Mr. A.H.M. Kamruzzaman, Mr. Mofazzal Hossain Chowdhury Maya, Bir Bicram Mr. Mohiuddin Ahmed and in room No.1 Syed Nazrul Islam, Mr. Tajuddin Ahmed, Mr.

Korban Ali, Mr. Abdul Quddus Makhan and Sheikh Abdul Aziz were kept while in room No.3 Captain Mansur Ali, Mr. Abdus Samad Azad, Mr. Shamsuzoha and some others were kept. That during the period from 31st October, 1975 to 2nd November, 1975 he saw Major Dalim inside the jail. That in the night following 2nd November, 1975 he heard alarm bell (f¡Nm¡ O¾V¡) and he woke up from sleep. Thereafter jailor came to their room and called away Kamruzzaman from that room to room No.1. After a while they heard firing sounds which continued for 4/5 minutes. Thereafter the assailant party went away; they heard groaning sounds from room No.1. After a while they again heard sounds of somebodies' entering in room No.1 and could know later that there were bayonet charges to ensure the death. That on the next day on 3rd November, 1975 they were kept confined inside the cell the whole day. On 4th November, 1975 they were allowed to come out of the cell and could know from guards that the dead bodies of Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali, and A. H. M. Kamruzzaman were taken out of jail gate. That he could know also that Captain Muslem was the leader of the assailant party. From the cross-examination of this witness also nothing material came out.

192. The P.W.20 Mahbubuddin Ahmed, Bir Bikrom was a police superintendent in 1975. This witness also was arrested after assassination of Bangabandhu Sheikh Mujibur Rahman and his other family members and was kept in the central jail in cell No.15. This witness deposed to the effect that on 2nd November, 1975 before lock up Major Dalim came in front of his cell and he (the witness) asked him why did he come there and Major Dalim replied that he came there to see whether the lights were in order or not. This witness stated also that in 1971 he fought together with Major Dalim in sector No.2. That in the night following 2nd November, 1975 at about 3.00 A.M. the alarm ring (f¡Nm¡ O¾V¡) of the jail rang and he (the witness) woke up from sleep; that he then heard firing sounds and also sound of groaning. That sometimes thereafter he heard sounds of bayonet charges also. After "fazar azan" somebody told them that four persons were killed. On 3rd November, 1975 he was called to jail gate to meet some visitors and at the time of going to jail gate he saw four dead bodies of Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali, and Kamruzzaman lying. Next day, after evening, they heard that the dead bodies were taken away. From the cross-examination of this witness also nothing material came out.

193. The P.W.21 Commodere Golam Rabbani was the A.D.C. to the President at Bangabhaban during that relevant time. This witness has deposed to the effect that he served as A.D.C. to the President at Bangabhaban since December, 1974 for a period of 2 years 7 months and during that period he used to reside at Bangabhaban; that after the killing of Bangabandhu and his family members Major Farooque, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Nazmul, Kismat, Hashem, Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Abul Hashem Mridha and many others used to reside at Bangabhaban. That 2/1 days after the killing of Bangabandhu President Mustaque Ahmed sent a letter to Captain Mansur Ali and he (the witness) himself and Major Shahriar took that letter to Captain Mansur Ali. That 2/1 days thereafter they came to know that four Awami League leaders Captain Mansur Ali, Syed Nazrul Islam, Tajuddin Ahmed, and Kamruzzaman were sent to jail. This witness deposed to the effect also that the army officers who used to reside at Bangabhaban by- passing army command were being tried to be taken back to barrack by army head quarter and in the later part of October, 1975 there was a hint that the army head quarters would take action against those army personnel. That during that time Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Mridha and their other companions used to stay armed all the time. They used to stay in Bangabhaban as the personal guards of President Mustaque Ahmed. That in the night

following 2nd November, 1975 at 11.00 P.M. he fell asleep in his bed room at 1st floor of Bangabhaban. At about 2.00 A.M. in that night one messenger of President Mustaque Ahmed awoke him from sleep and told him that President Mustaque had called him. He then was going to the room of President Mustaque at 4th floor by lift and coming out of the lift he saw 2 armed army personnel who challenged him and getting his identity allowed him to go; he then went to the room of President and saw there Major Rashid and Major Dalim who were busy with making telephone calls to different places. The President then asked him about the guards and he replied that he did not know whether the guards went out of the Bangabhaban. That sometimes thereafter he (the witness) went to his office room to enquire about the guards and at that time he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha along with others in a very restive condition. Sometimes thereafter Muslem Uddin, Marfoth Ali Shah and Abul Hashem Mridha along with some others were found going out of Bangabhaban. Subsequently other officers also went out of Bangabhaban. At 6.00 A.M., in the morning, he (the witness) saw those officers and others came back to Bangabhaban. That in the meantime they knew that four leaders Captain Mansur Ali, Syed Nazrul Islam, Tajuddin Ahmed and Kamruzzaman were killed inside the jail and that Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha and some others killed them. That the officers and others who were involved in the killing of 15th August, 1975 and 3rd November, 1975 went abroad on 3rd November.

194. This witness also has been cross-examined at length on behalf of the accused persons. During cross-examination this witness has denied the defence suggestion that he did not see Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha in Bangabhaban on that day and that they never resided at Bangabhaban and never came out of Bangabhaban and then went back to Bangabhaban.

195. This witness, the A.D.C. to President denied the defence suggestion also to the effect that Khaled Mosharaf, with a view to capture power, killed the leaders inside jail.

196. The P.W.26 Captain A.M.M. Saifuddin is a retired pilot of Bangladesh Biman. This witness has deposed to the effect that on 3rd November, 1975 at 11.00 A.M. he was informed that he would have to take some army officers to Bangkok by a special flight as safety pilot and subsequently at 9.30/10.00 P.M., on that very date, they went to Chittagong from Dhaka with some passengers by plane and from Chittagong they flew for Bangkok and reached Bangkok on 4th November. On 6th November he came back to Dhaka and after reaching Dhaka he came to know that the passengers whom they took to Bangkok were involved in the killing of Bangabandhu and his family members and also in the killing of four leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman. That about 30/35 passengers were in that plane.

197. P.W.28 Mr. Waliur Rahman was a director of Foreign Ministry. The materials part of his evidence is that on 3rd November, 1975 at about 5.00 P.M. acting Secretary of Foreign Ministry Mr. Nazrul Islam informed him that Lieutenant Colonel Rashid and some other persons of his group would go out of the country by a special flight on that day and asked him to take necessary permission from Burma and Thailand Embassy and accordingly he and Shamsher Mobin Chowdhury did all the needful and then at 10.00 P.M., in that very night he went to old airport and saw there Lieutenant Colonel Rashid, Lieutenant Colonel Shahriar, Lieutenant Colonel Bazlul Huda, Lieutenant Colonel Nur Chowdhury, Major Ahmed Sharful Hussain, Captain Marfat Ali, Kismat, Hashem, Nazmul Hussain Ansar, Lieutenant Colonel

Pasha, Moslem, Mridha and Lieutenant Colonel Farooque who left the country by the special flight. On the next morning he heard about the killing of four leaders inside the jail.

198. The P.W.33 Mr. Shamser Mubin Chowdhury, the Secretary, Foreign Ministry, deposed to the effect that at the time of occurrence he was working as Deputy Chief of Protocol in the Foreign Ministry. That on 3rd November, 1975 at 9.30 A.M. he was called to Bangabhaban by the Foreign Secretary Nazrul Islam and there he was given a list of army officers by Mahbub Alam Chashi and told to arrange their going away abroad and accordingly he did all needful. That he also went to the airport and learnt that all the army officers who prepared for going abroad already crossed the immigration area and entered inside. That thereafter in 1976, in the month of April he went to different countries and handed over some appointment letters to those army officers who left the country for their appointments in different Embassies of Bangladesh in different countries as per direction of the then Foreign Secretary.

199. The P.W.34 Md. Yeakub Khan has deposed to the effect that he was working as a receptionist at Bangabhaban at the time of occurrence. That he was given duty to operate the personal telephone of the President Khandaker Mustaque Ahmed. That during his tenure at Bangabhaban he found Major Rashid, Major Dalim, Major Noor, Aziz Pasha, Captain Moslem and other army officers residing at Bangabhaban. That on 3rd November, 1975 his duty period at Bangabhaban was from 8.00 A.M. to 2.00 P.M. and while he took over his duty from Khan Mohammad Ali Olock (P.W.17) the later informed him that in the previous night at about 3.00 A.M., major Rashid from President's room told him to give telephone connection to I.G. (Prisons) and he gave telephone connection at the residence of I.G. (Prisons) and Major Rashid then talked to I.G. (Prisons) and sometimes thereafter Major Rashid, Major Dalim, Major Aziz Pasha, Major Noor, Major Mazed came to the room of Khan Mohammad Ali Olock in armed condition and told him to connect I.G. (Prisons) over telephone again and accordingly Khan Mohammad Ali Olock again telephoned in the residence of I.G. (Prisons) but I.G. (Prisons) was not at home at that time and Khan Mohammad Ali Olock was informed that I.G. (Prisons) went to jail; that as per direction Khan Mohammad Ali Olock then gave telephone connection to jail and Major Rashid then asked I.G. (Prisons) whether Captain Muslem went to jail; Major Rashid told also I.G. (Prisons) to talk to President Mustaque Ahmed and accordingly I.G. (Prisons) talked to President Mustaque Ahmed when he was given telephone connection to President Mustaque Ahmed. That thereafter Major Rashid and others went away. This P.W. 34 deposed also that Khan Mohammad Ali Olock told him also that at dawn he saw Major Rashid and his other party men to return to Bangabhaban. This witness has stated further to the effect that he himself also could gather from the conversations of Major Rashid, Major Dalim, Aziz Pasha, Major Noor, Captain Muslem that those army personnel, in conspiracy with President Khondaker Mustaque Ahmed, killed four leaders Tajuddin Ahmed, Syed Nazrul Islam, Kamruzzaman and Captain Mansur Ali and that on the next day while he came to duty he knew that the said army personnel went abroad. During cross-examination this witness has denied the defence suggestion that he is a tutored witness.

200. These are the evidence which the prosecution has relied on to prove its case that all the accused persons made a criminal conspiracy to kill four Awami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman inside the Dhaka Central Jail and in pursuance to this conspiracy a killing squad was formed under the leadership of Risalder Muslem Uddin with Dafader Marfoth Ali and Lance Dafader Abul Hashem Mridha and others and in the night following 2nd November, 1975 at about 4 A.M.

the said killing squad entered inside Dhaka Central Jail and committed murder of the said four Awami League leaders by shooting with fire arms and subsequently another team of army personnel also went inside Dhaka Central Jail and made the death of those 4 leaders confirmed by inflicting bayonet charges on their bodies.

201. From the above discussion of evidence of the prosecution witnesses it appears that the P.Ws.1 to 9, 10, 12, 19 and 20 have deposed corroborating this prosecution case to the extent that in that fateful night of the occurrence accused Resalder Muslem Uddin along with four other army personnel entered into Dhaka Central Jail and killed four Awami League leaders by shooting with fire arms and subsequently another team of army personnel made the death of those four Awami League leaders confirmed by inflicting bayonet charges on their bodies. The P.W.1-the then D.I.G. (Prisons), the P.W.2-the then Jailor of Dhaka Central Jail and the P.W.3-the then I.G. (Prisons) deposed to the effect also that in that fateful night of occurrence, before the incident of killing of 4 leaders, there were several telephonic conversations between I.G. (Prisons) and accused Major Rashid and President Khondaker Mustaque Ahmed from Bangabhaban. The P.W.3 I.G. (Prisons) deposed to the effect also that accused Major Rashid informed him over telephone that Captain Muslem Uddin would go to jail and instructed him to allow Captain Muslem Uddin to talk to 4 leaders Sayed Nazrul Islam, Captain Monsur Ali, Tajuddin Ahmed and A.H.M. Kamruzzaman inside jail. The P.Ws.1-3 deposed to the effect that after his arrival at jail Captain Muslem Uddin, on their asking, told that they would kill the four leaders and that I.G. (Prisons) informed this very statement of accused Captain Muslem Uddin to Major Rashid and also President Khondaker Mustaque Ahmed over telephone and being thus informed even about this statement of accused Captain Muslem Uddin, Major Rashid and President Mustaque Ahmed instructed I.G. (Prisons) to allow Captain Muslem Uddin to do what he wanted to do. These evidence of the P.Ws.1, 2 and 3 have been corroborated by the evidence of P.W.17 Khan Mohammad Ali Olok-a receptionist-cum-telephone operator of Bangabhaban. The P.W. 17 deposed to the effect that in the night following 2nd November, 1975 he had telephone duty at Bangabhaban and in that night, at 3.00 P.M. he was asked from President's room to give telephone line to I.G. (Prisons) and accordingly he gave telephone line to I.G. (Prisons) at his residence and I.G. (Prisons) talked to Major Rashid for sometime and thereafter also Major Rashid again talked to I.G. (Prisons) over telephone and this time since I.G. (Prisons) was not at his residence he gave telephone connection to the phone of D.I.G. (Prisons). That sometimes thereafter Major Rashid, Major Farooque, Major Dalim, Major Bazlul Huda, Major Rashed Chowdhury, Major Aziz Pasha came to his room in armed condition and told him to connect I.G. (Prisons) through telephone; that he then tried to connect I.G. (Prisons) but getting no line he ultimately gave line to the phone of jailor and Major Rashid then talked to I.G. (Prisons) through the telephone of jailor and Major Rashid at that time wanted to know whether Captain Muslem Uddin reached the jail; that thereafter Major Rashid told him (P.W.17) to give telephone connection to President Mustaque Ahmed and accordingly P.W.17 gave telephone connection to President Mustaque Ahmed and President Mustaque Ahmed then talked to I.G. (Prisons). The P.W.17 deposed also that sometimes thereafter he saw Major Rashid, Major Dalim, Major Farooque going out of Bangabhaban and later at about 6.00 A.M. he saw those army personnel and Risalder Muslem Uddin, Dafader Marfat Ali, Abul Hashem Mridha and others come back to Bangabhaban in very tired condition. This P.W.17 stated also that on the next morning, while he handed over duty to P.W.34 Yakub Hussain Khan he informed him about this telephonic conversations of President Mustaque Ahmed and Major Rashid with I.G. (Prisons). P.W.34 has corroborated the P.W.17 mentioning that he heard about these telephonic conversations from P.W.17. P.W.16 also has deposed to the effect that he heard about these telephonic conversations between

Bangabhaban and Dhaka Central Jail from P.W.34 Yakub Hussain Khan who heard about that from P.W.17 Khan Md. Ali Olok.

202. All the witnesses from Bangabhaban also, namely, the P.W.11 Mokhlesur Rahman Bhuiyan, P.W.13 Md. Shawkat Hossain, P.W.16 Abdul Quiyum Choudhury, P.W.17 Khan Mohammad Ali Olok. P.W.18 Md. Manik Meah, P.W.21 Commodere Golam Rabbani and P.W.34 Md. Yeakub Hussain Khan deposed in support of the prosecution case to the extent that all the accused persons made conspiracy to kill the four leaders inside the jail and in pursuance of that conspiracy Resalder Muslem Uddin, the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha and some other army personnel were sent to Dhaka Central Jail at about 3.00 A.M. in the night following 2nd November, 1975. The P.W.11 deposed that in the fateful night of jail killing, at about 7.30 P.M., he saw all the accused persons including accused Resalder Muslem Uddin, accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Md. Abul Hashem Mridha on the 1st floor of Bangabhaban talking about Syed Nazrul Islam, Captain Mansur Ali, Tajuddin Ahmed and Kamruzzaman who were confined in Dhaka Central Jail at that time and that at that time, at the asking of Major Dalim and Major Rashid he supplied them with the telephone numbers of both the residence and office of I.G. (Prisons), D.I.G. (Prisons) and Jailor of Dhaka Central Jail. This witness deposed to the effect also that at that time he heard the accused persons to discuss about Dhaka Central Jail and also to tell that the task of Dhaka Central Jail would have to be completed within that very night and also heard Major Farooque to talk over telephone to Dhaka Central Jail and to ask where the detenues were kept inside the jail. The P.W.13 deposed to the effect that in the fateful night of occurrence at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, major Noor, Major Mohiuddin, Major Rashed Chowdhury, Major Sharful, Captain Mazed and Captain Muslem Uddin holding meeting in the room of Major Rashid and thereafter at about 12/12.30 A.M. in that very night he saw those army personnel and also Taher Uddin Thakur and Mahbub Alam Chashi holding meeting in the meeting room of President Khandaker Mustaque Ahmed in the 3rd floor of Bangabhaban and that in that meeting he himself and other "khedmatgar" Manik while were serving tea he heard Khandaker Mustaque Ahmed asking Major Rashid who would go to jail and in reply Major Rashid to tell that Captain Muslem Uddin and his men would go there. This P.W.13 deposed also that at about 3.00 A.M. in that very night he saw Captain Muslemuddin, Dafader Marfoth Ali. L.D. Abul Hashem Mridha and 2/3 other army personnel of lower rank going out of Bangabhaban by a army jeep and sometimes thereafter Major Bazlul Huda and Major Shahriar also went out of Bangabhaban by another army jeep and thereafter at about 6.00 A.M. Major Bazlul Huda awoke him from sleep and told him to serve breakfast to all in the 2nd floor. That he then went to the room of Captain Muslem Uddin with breakfast and saw there Major Rashid, Major Farooque Rahman, Major Dalim, Major Shahriar, Major Rashed Chowdhury, Major Mohiuddin, Captain Mazed and Captain Muslem Uddin and heard Major Rashid asking about the "big four" in the jail and in reply Captain Muslem Uddin telling that all were finished in jail. The P.W. 16 deposed to the effect that during his duty in Bangabhaban he saw all the accused persons roaming in Bangabhaban with pomp and power and that in the later part of October, 1975 there was prevailing an unusual situation in Bangabhaban; that on 2nd November, 1975 after performing his duty he went away from Bangabhaban at 2.00 P.M. and thereafter on the next day he came to Bangabhaban at 2.00 P.M. and heard from Yakub about the killing of four leaders inside the jail and heard also that Major Dalim, Major Farooque and Major Rashid group had committed that killing. This P.W.16 has corroborated also the evidence of P.W.17 mentioning that P.W.17 Khan Mohammad Ali Olok narrated those to P.W.34 and P.W.34 subsequently told him about that.

The evidence of p.W.17 has already been stated above. The P.W.18 deposed to the effect that during his tenure in Bangabhaban he saw Major Rashid, Major Farooque, Major Shahriar, Major Dalim, Major Mohiuddin, Major Bazlul Huda, Major Ahmed Sharful, Captain Mazed, Captain Muslem Uddin, Abul Hashem Mridha, Marfat Ali Shah and some other officers to stay in Bangabhaban; that in the night following 2nd November, 1975 at about 7.00/7.30 P.M. he saw Major Rashid, Major Farooque, Major Bazlul Huda, Major Shahriar, Major Dalim, Major Mohiuddin, Captain Muslem Uddin sitting in the room of Major Rashid and subsequently in that very night at about 12.00/12.30 A.M. he saw those army personnel holding a meeting in the meeting room of President Khandaker Mustaque Ahmed and in that meeting all of those army personnel were found agitated and at that time President Khandaker Mustaque Ahmed asked Major Rashid who would go to jail and Major Rashid replied that Captain Muslem and his men would go insdie the jail and that subsequently at about 3.00 A.M., in that very night, he saw Captain Muslem Uddin, Marfoth Ali Shah, Abul Hashem Mridha and two other army personnel to go out of Bangabhaban by a army jeep and later by another jeep Major Bazlul Huda and Major Shahriar also went out of Bangabhaban. Thereafter at about 6.00 A.M. Major Bazlul Huda awoke them from sleep and told them to serve breakfast and while he and P.W.13 Shawkat was serving breakfast in the room of Muslem Uddin they saw there Major Rashid, Major Farooque, Major Shahriar, Major Bazlul Huda, Major Dalim, Major Mohiuddin and some other army officers and at that time Major Rashid asked Captain Muslem whether "the big four" in the jail were finished and in reply Captain Muslem Uddin told all were finished. The P.W.21 Commodere Golam Rabbani-the A.D.C. to the President deposed to the effect that after the killing of Bangabandhu and his family members Major Farooque, Major Rashid, Major Dalim, Major Shahriar, Major Noor, Major Mohiuddin, Major Aziz Pasha, Captain Mazed, Nazmul, Kismat, Hashem, Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Hashem Mridha and many others used to reside at Bangabhaban. This witness deposed also that the army officers-who used to reside in Bangabhaban bypassing army command-were being tried to be taken back to barrack by army head quarter and in the later part of October, 1975 there was a hint that the army head quarter would take action against that army personnel. That during that period Resalder Muslem Uddin, Dafader Marfoth Ali and Dafader Mridha and their other companions used to keep armed all the time and they used to stay in Bangabhaban as the personal guards of Prdsident Mustaque Ahmed. This P.W.21 deposed further that in the night following 2nd Novembr, 1975 at about 2.00 A.M. one messenger of President Mustaque Ahmed awoke him from sleep and told him that President Mustaque had called him and he then went to the room of President Mustaque and saw there Major Rashid and Major Dalim who were busy making telephone calls and that the President asked him about the guards and he replied that he did not know whether the guards went out of Bangabhaban. That sometimes thereafter he went to his office room and at that time he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha along with others in a very restive condition and a little time thereafter he saw Resalder Muslem Uddin, Marfoth Ali Shah and Abul Hashem Mridha along with some others going out of Bangabahaban and subsequently he saw some other officers also going out of Bangabhaban and later at about 6.00 A.M., in the morning, he saw all those army personnel to come back to Bangabhaban. This witness deposed also that in the meantime they could know that Resalder Muslem Uddin, Dafader Marfoth Ali Shah and Abul Hashem Mridha and some others killed the four leaders inside the jail. This witness deposed also that the army personnel and others who were involved in the killing of 15th August, 1975 and 3rd November, 1975 went abroad on 3rd November. The P.W.34 deposed to the effect that during his tenure at Bangabhaban he found Major Rashid, Major Dalim, Major Noor, Major Aziz Pasha, Captain Muslem and other army officers residing at Bangabhaban and that on 3rd November, 1975 at 8.00 A.M. while he took over his duty from P.W.17 Khan Mohammad

Ali Olok the later informed him about the telephonic conversations of President Mustaque Ahmed and Major Rashid with I.G. (Prisons) in the previous night.

203. The above narrated evidence of P.Ws.11, 13, 16, 17, 18, 21 and 34 coupled with the eivdence of P.Ws.1 to 9, 10, 12, 19 and 20-as narrated above-support the prosecution case strongly that the accused persons made a conspiracy to kill the four Awami League leaders inside the jail and in pursuacne of that conspiracy accused Resalder Muslem Uddin, the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha along with two other army personnel were sent to Dhaka Central Jail in the night following 2nd November, 1975 at about 4.00 P.M. and all these five members of this killing squad entered inside the jail and killed the four Aweami League leaders Syed Nazrul Islam, Tajuddin Ahmed, Captain Mansur Ali and Kamruzzaman by shooting with fire arms and subsequently, within a short time, another team of army personnel entered the Dhaka Central Jail and inflicted bayonet charges on the bodies of slain leaders to ensure their death.

204. The trial court though appears to have rasied some questions in the first part of his judgment about the credibility of the above mentioned prosecution witnesses but ultimtately believed the above narrated evidence of these P.Ws. and relying on these evidence convicted and sentenced 15 accused persons including the present accused-respondents-as already mentioned above. But the High Court Division-the appellate court-did not believe the P.Ws.1 to 3 and the other prosecution witnesses from Bangabhaban. The High Court Division though has accepted the prosecution case that the accused Resalder Muslem Uddin along with some other army personnel murdered four Awami League leaders inside the jail at about 4.00 A.M. in the night following 2nd November, 1975 as true and therefore confirmed the conviction and sentence of the accused Resalder Muslem Uddin, but has disbelieved almost all the above mentioned prosecution witnesses.

205. The High Court Division has disbelieved the P.W.1-the informant and also an eye witnesses of the occurrence of jail killing mainly on the ground that "he (P.W.1) had disclosed many a thing before the court which were not there in the purported F.I.R."

206. It should be mentioned here that in the F.I.R.—the P.W.1 stated thus:

> "on 03.11.1975 at about 4.00 A.M. one army officer wearing khaki uniform giving his identify as Captain Muslem Uddin attached to Bangabhaban accompanied by four army personnel wearing khaki uniforms came to the jail. They were armed with Sten gun and S.L.R. etc. They entered into the jail and killed four persons, namely, Mr. Tajuddin Ahmed, Mr. Monsur Ali, Mr. Syed Nazrul Islam and Mr. A. H. M. Kamruzzaman. More details about the incident will be furnished in due course. The incident has been reported verbally by the Inspector General of Prisons to the Secretary of the Ministry of Home Affairs yesterday (03.11.1975). The dead bodies of four persons are still lying in the jail, necessary action may kindly be taken in the matter."

207. During examination before the court this P.W.1 has proved that detailed report mentioned in the F.I.R. which he submitted on 05.11.1975 to the Inspector General of Police narrating about the telephonic conversations between I.G. (Prisons) and accused Major Rashid and President Khandaker Mustaque Ahmed in that fateful night of occurrence and also narrating the occurrence of jail killing in details-which has been marked as ext.2.

208. However, the High Court Division did not place reliance on the evidence of P.W.1 for the reason also that the F.I.R. did not contain name of the accused persons except Captain Muslem Uddin. These reasons assigned by the High Court Division for disbelieving the evidence of P.W.1 cannot be accepted in the given facts and circumstances of the case. It is a settled position of law that an F.I.R. does not require to contain all the details about the occurrence. The F.I.R. generally is lodged immediate after an occurrence to start the investigation in the matter, the details of the occurrence may be disclosed at a later stage during investigation. However, in this particular case considering the very nature of the occurrence of jail killing we are of the view that the non-mentioning of the fact of telephonic conversations between accused Major Rashid and President Mustaque Ahmed from Bangabhaban and the P.W.3 I.G. (Prisons) in that fateful night of occurrence cannot be a reason for not believing the P.W.1-who lodged the F.I.R. within a short time of the occurrence of jail killing mentioning that he would submit a detailed report about that incident afterwards. This P.W.1, in his deposition before the court, did not name any other accused persons except accused Muslem Uddin. He named accused captain Muslem Uddin only stating that Captain Muslem Uddin himself disclosed his identity as Captain Muslem Uddin. This P.W.1 though stated also that Captain Muslem Uddin and his other companions put their signatures in the Gate register, but it cannot be expected that seeing the singatures (which might be initials only) the names and other identities of the signatories could be ascertained. In the circumstances how the High Court Division could say that this P.W.1 cannot be believed for the reason also that the F.I.R. did not contain the name of other accused persons except accused Captain Muslem Uddin.

209. The High Court Division has disbelieved the P.W.2-the then jailor of Dhaka Central Jail Md. Aminur Rahman also, but we fail to find out from the impugned judgment of the High Court Division any reason for which the High Court Division disbelieved this P.W.2. The High Court Division stated thus:-

> "We do not find this witness (P.W.2) a trustworthy one because his disclosure amounts to travesty of truth."

210. We have examined the evidence of this P.W.2 minutely. We do not find anything to say that this P.W.2 is not trustworthy. We don't understand why the High Court Division made this comment that the evidence of P.W.2 "amounts to travesty of truth."

211. The High Court Division disbelieved the P.W.3-the then Inspector General of Prisons also stating to the effect that the F.I.R. did not disclose any reference whatsoever about the telephonic conversation from Bangabhaban with him at the Central Jail and that the alleged detailed report submitted by him one day after- on 05.11.1975-the ext.6 containing details about the telephonic conversation of the accused persons from Bangabhaban with this P.W.3 and others at the central jail was fabricated one-created subsequently for the purpose of this case. The High Court Division disbelieved this ext.6 for the reason only that in the F.I.R. there was no disclosure about the telephonic conversation between the accused persons from Bangabhaban and this P.W.3. We cannot agree with the High Court Division on this point also. The only fact of non-disclosure about the telephonic conversation in the F.I.R.

cannot prove this ext.6 false and fabricated. In this case, in the very F.I.R., it was stated clearly that a detailed report about the occurrence would be submitted afterwards. Moreover this fact of telephonic conversations between the accused persons from Bangabhaban and the I.G. (Prisons) have been corroborated by the P.W.17-the then telephone operator of Bangabhaban-a most competent witness. The High Court Division disbelieved this P.W.17 Khan Mohammad Ali Olock also on the contention that there was no proof to prove that this P.W.17 actually was an employee of Bangabhaban at that relevant time. The High Court Division pointed out that the attendance register for the employees of Bangabhaban of that relevant time was not produced by the prosecution before the court to prove that this P.W.17 was actually an employee of Bangabhaban at that relevant time. The High Court Division, obviously, did not take into consideration at all the fact that the investigation of this case started long 21 years after the alleged occurrence and in that circumstances it might not be possible for the prosecution to find out the relevant attendance registers of the employees of Bangabhaban. In this connection it is also mentioned here that the High Court Division has commented that the non-production of gate register of the Dhaka Central Jail containing the signatures of the assailants warranted an adverse presumption under section 114(g) of the Evidence Act. The High Court Division has stated that according to the P.W.1 all the 5 assailants who committed murder of four leaders put their signatures in the gate register before their entrance inside the jail and in the circumstances those gate registers could have been most vital document to connect all the 5 assailants in this case. This time also the High Court Division did not take into consideration at all the fact that the investigation of this case started long 21 years after the occurrence and in the circumstances it might not be possible on the part of the prosecution to find out that gate register of Dhaka Central Jail. The High Court Division, obviously, did not consider also that the signatures or initials only of the assailants in the gate register might not be sufficient for ascertaining the name and identity of those assailants and in that circumstances the non-production of gate register was not fatal at all-specially where neither the F.I.R. nor any of witnesses from jail named any accused person excepting accused Risalder Muslem Uddin only.

212. It appears that the High Court Division has disbelieved the evidence of the prosecution witnesses from Bangabhaban, namely, P.Ws.11, 13, 16, 17, 18, 21 and 34 relying on some statements of P.Ws.21, 29 and 46 also. Taking into consideration some statements of these P.Ws.21, 29, and 46 the High Court Division arrived at the findings that in the very night of occurrence there was no telephone connnection at Bangabhaban as that was snapped by the rebel group of brigadier Khaled Mosharraf and that brigadier Khaled Mosharraf proclaimed coup in the night following 2nd November, 1975 and withdrew two Infantry company from Bangabhaban at about 1.00 A.M. of that very night and the inmates of Bangabhaban having received a message of the coup by their rival party was not in a position to move outside Bangabhaban after 1.00 A.M. in that night following 2nd November, 1975. On these findings and observations the High Court Division disbelieved all the evidence regarding telephonic conversations between I.G. (Prisons) and Major Rashid and President Khandaker Mustaque Ahmed and also regarding going out of army personnel including the present accused-respondents from Bangabhaban in that fateful night of occurence. Before weighing these findings and observations of the High Court Division we require to state the relevant portion of the evidence of P.Ws.29 and 46 here.

213. P.W.29 Colonel Safayet Jamil (Rtd.) who was posted at Dhaka as 46 Brigade Commander at the time of occurrence-deposed to the effect that after 15th August, 1975 Khandaker Mustaque Ahmed became the President of Bangladesh and Khandaker Mustaque Ahmed and his associates-the assailants Major Rashid, Major Farooqur Rahman, Major

Dalim, Major Shahriar, Major Noor Chowdhury, Major Rashed Chowdhury, Major Huda, Major Ahmed Sharful Hossain, Major Aziz Pasha, Lieutenant Kismot, Lieutenant Ansar, Resalder Muslem and others used to reside at Bangabhaban. That on 1st November, 1975 Khaled Mosharaff, Brig. Nurazzaman and he (the witness) himself had a meeting at the office of the Chief of General Staff where they decided that in the night following 2nd November, 1975 at 12.00 hours two Infantry company under him would be withdrawn from Bangabhaban and taken to the Cantonment and that it was the hint or proclamation of the coup. That subsequently in the night following 2nd November, 1975 at 12.00/1.00 A.M. two Infantry company from Bangabhaban were withdrawn; that in order to disconnect the rebels staying at Bangabhaban one battalion of soldiers was sent to Bangabhaban under the leadership of Captain Hafizulla. Captain Hafizulla snapped the telephone connection for disconnecting Khandaker Mustaque from the rebel officers. This P.W.29 deposed also that at dawn of 3rd November, 1975 there started oral fight (h¡LkÜ) between them and the rebel group residing at Bangabhaban over telephone, but all the attempts for negotiation failed and they then gave intimation of Air Strike and then Khandaker Mostaque Ahmed demanded safe passage of rebels through General Osmani and they agreed to avoid further bloodshed as they knew that subsequently the rebels could be brought back to country through Interpol; that the rebels were then sent to Bangkok with the help of Chief of Air force A.B.M. Toab. That Major Rashid, Major Farooque Rahman, Major Shahriar, Major Dalim, Major Noor, Major Huda, Major Rashed Chowdhury, Major Ahmed Sharful Hossain, Captain Mazed, Lieutenant Anser, Lieutenant Kismot, Resalder Muslem and Sarwaer and Captain Jaman left the country. During cross-examination this witness denied the defence suggestion to the effect that he himself and Khaled Mosharaf committed that jail killing with a view to capturing power.

214. The P.W. 46 Lieutenant Colonel (Rtd.) Anwaruzzaman deposed to the effect that in 1975 he, as a Major, was posted at Reverine Support Unit at Sadarghat, Dhaka. That the then Vice President Syed Nazrul Islam was his "Fufa". That on 3.11.1975 at 10.00/11.00 A.M. he was informed by his paternal uncle late Asaduzzaman over telephone that in the night following 02.11.1975 there was firing inside Dhaka Central Jail and asked to take information about that, but as he was busy, he sent one habilder to take information; but that habilder could not get any information. That on 03.11.1975 Khaled Mosharof proclaimed coup and as such he (the witness) himself could not come out of his unit. That on 04.11.1975 he again sent another person to Dhaka Central Jail but that person informed him that his "Fufa" and other leaders were well. Thereafter he was called to Dhaka Cantonment and at the time of his return in the evening, he went to jail and could know that in the night following 02.11.1975 the four leaders were killed inside jail. In course of cross-examination this witness stated that on 02.11.1975 Khaled Mosharof proclaimed coup, but they could not capture Bangabhaban; that on 03.11.1975 Khondaker Mustaque Ahmed was compelled to give up power and that on 02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from central jail for the sake of his personnal security.

215. From the above narrated evidence of P.W.29 Colonel Safayet Jamil it is evident that this P.W.29 did not state at all that the telephone connections of Bangabhaban were snapped in the night following 2nd November, 1975, rather this witness by deposing that at dawn of 3rd November, 1975 they had oral fight (h¡Lk¤Ü) with rebel group residing at Bangabhaban over telephone-has confirmed that in the night follwoing 2nd November, 1975 the telephone connections of Bangabhaban were intact. Obviously the High Court Division ignored this very clear statement of P.W.29 that in the dawn of 3rd November, 1975 they talked to the inmates of Bangabhaban over telephone. It appears that the High Court Division has relied on

the evidence of P.W.21 Commodere Golam Rabbani also to come to the finding that in the fateful night of occurrence there was no telephone connections in Bangabhaban. This P.W.21-the A.D.C. to the Presidnet Khandaker Mostaque Ahmed-deposed to the effect that in the fateful night of occurrence, at about 2.00 A.M. one messenger of President Mostaque Ahmed awoke him from sleep and informed him that he was called by the President. The High Court Division inferred that the President could talk to his A.D.C.-the P.W.21-over telephone and since the President did not do that, rather sent a messenger to call A.D.C. it indicated that the telephones of Bangabhaban were not in operation in that night following 2nd November, 1975. But we are unable to accept this inference arrived at by the High Court Division. It cannot be accepted that the President had to communicate with his A.D.C. through telephone all the time and he was not supposed to call his A.D.C. by sending a messenger. The calling of his A.D.C. by the President by sending a messenger is no proof of disconnection of telephone lines of Bangabhaban in that fateful night of occurrence. Moreover, as we have already pointed out above, the evidence of P.W.29-whom the High Court Division has relied on-has proved sufficiently that in the night of occurrence i.e. in the night following 2nd November, 1975 the telephone connections of Bangabhaban were intact.

216. Relying on the evidence of P.Ws.29 and 46 the High Court Division came to the findings also that in the night following 2nd November, 1975 brigadier Khaled Mosharaf proclaimed coup and withdrew two Infantry company from Bangabhaban and thus the inmates of Bangabhaban received a message of coup by their rival party in that very night and in that circumstances it was not possible on the part of the inmates of Bangabhaban to go out of Bangabhaban in that night following 2nd November, 1975 and then again to return to Bangabhaban in the early morning of 3rd November, 1975. The High Court Division thus disbelieved the evidence of the P.Ws. regarding going out of army personnel including accused Resalder Muslem Uddin and the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha from Bangabhaban in that night following 2nd November, 1975 and also their subsequent coming back to Bangabhaban in the dawn of 3rd November, 1975. But on scrutiny of the evidence of P.Ws.29 and 46 we are unable to agree with these findings also of the High Court Division. The P.W.29 though stated to the effect that in the mid night following 2nd November, 1975 two Infantry company from Bangabhaban were withdrawn, but this statement does not prove that the control of Bangabhaban was taken over by the group of brigadier Khaled Mosharraf in that very night and that the withdrawl of two Infantry company only from Bangabhaban was sufficient to give a message of coup by the rival party to the inmate of Bangabhaban. Rather, the clear statement of P.W.46 in his examination-in-chief to the effect that on 03.11.1975 Khaled Mosharraf proclaimed coup suggests that in the night following 2nd November, 1975 there was not prevailing any such situation in Bangabhaban for which the army personnel residing at Bangabhaban did not dare to go out of Bangabhaban. This P.W.46, in course of cross-examination, though stated that on 02.11.1975 Khaled Mosharaf proclaimed coup, but they could not capture Bangabhaban and that on 02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from central jail for the sake of his personal secutiry, but considering the other statements made by this P.W.46 himself in his examination-in-chief we are unable to accept these very statements of P.W.46 made in course of cross-examination as correct. In his examination-in-chief-the P.W.46 stated that in the morning of 3rd November, 1975 he was informed by his relative that in the previous night there was firing inside Dhaka Central Jail and was asked to take information about that, but as he was busy he sent one habilder to take information. In view of these statements of this P.W.46 it is evident that the question of taking information of Dhaka Central Jail on 2nd November, 1975 did no arise at all and as such the statement of this P.W.46 that on

02.11.1975 the situation of Dhaka town was such that it was not possible on his part to collect information from Dhaka Central Jail for the sake of his personal security-which he made in course of cross-examination-is not acceptable at all.

217. The High Court Division though has drawn some adverse inference taking into consideration some particular statements of P.Ws.29 and 46 and thus disbelieved the prosecution witnesses but it did not consider why so many witnesses including very responsible witness like P.W.21 Commodere Golam Rabbani-the then A.D.C. to the President-would depose lie against the accused persons. This P.W.21, on taking oath, deposed to the effect that in the night following 2nd November, 1975 at about 3.A.M. he saw Resalder Muslem Uddin, Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha (the present 2 accused-respondents) and other army personnel to go out of Bangabhaban and subsequently to come back to Bangabhaban. We find no reason to disbelieve these evidence of this P.W.21 Commodere Golam Rabbani. We do not find any reason to disbelieve the other P.Ws. also of whom P.Ws.1 to 3 also were responsible officers of Government. None of the above mentioned prosecution witnesses could have been shown by the defence to have any enmity or ill feelings with any of the accused persons or to have any other reason for deposing falsely against the accused persons. However, we are unable to accept the reasonings the High Court Division has assigned in its impugned judgment for disbelieving the prosecution witness-as cogent or convincing.

218. It appears that the High Court Division has dwelt much on the F.I.R. and ultimately has concluded thus:

> "..... neither Ext.1 nor ext.3 can be treated as F.I.R. in this case though these two papers, as it could be gathered from attending circumstances, undoubtedly contains the contents of the report made by P.W.1 first in point of time with Lalbagh Police Station on 04.11.1975."

219. Obviously the High Court Division has committed a mistake here. In this case it was stated by the prosecution itself that the original F.I.R. which was lodged by the P.W.1 with Lalbagh Police Station on 04.11.1975 was found missing from the record of the G.R. case concerned while the case was taken up for investigation after a long period of 21 years and that the ext.1 and ext.3 were two copies only of the said F.I.R. procured from two different places. The High Court Division believed that these Ext.1 and ext.3 "undoubtedly contains the contents" of the original F.I.R. lodged by the P.W.1 and also has taken into consideration the contents of these ext.1 and ext.3. We fail to understand why the High Court Division then wrote so many pages on these ext.1 and ext.3 where the prosecution itself made these two papers exhibited as the copies only of the original F.I.R. The ext.1 and ext.3, admittedly, are the copies only of the original F.I.R and these were never tried to be put as the F.I.R. The High Court Division, however, has appreiciated the correct legal position that where there is no F.I.R. or where the F.I.R. cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which will have to be assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it.

220. Mr. Abdullah-Al-Mamun, the learned defence Counsel has tried much before us to discredit the prosecution witnesses by pointing out some alleged contradictory or discrepent statements of these witnesses. The learned Counsel has pointed out that the P.Ws.1 to 9 and 12 made some discrepent statements regarding colour of the wearing uniforms of the assaillants and also regarding the kind of the weapons they carried. The learned Counsel has

contended that these contradictory statements of these P.Ws. reasonably make these witnesses untrustworthy. But we are unable to accept this argument of the learned Counsel in this present case. Considering the very facts and circumstances of this case we rather, are of the view that it was very much natural on the part of the witnesses to make discrepent statements regarding colour of the wearing clothes and the weapons of the assaillants and that these discrepent or contradictory statements of the P.Ws. are so trifling in nature that these cannot raise any suspecion about the truthfulness of the witness or about the occurrence they narrated. The learned Counsel for the accused-respondents has pointed out some other alleged minor discrepent or contradictory statements also in the evidence of the prosecution withnesses, but we do not find any of these alleged discrepent or contradictory statemetns of the prosecution witnesses fatal at all to raise any suspicion about the truthfulness of these witnesss. Discrepency always occurs even in the evidence of the truthful witnesses. It is also settled that one part of evidence of a witness even if is rejected the other part of the evidence of the same witness may be accepted.

221. Mr. Abdullah-Al-Mamun has tried to discredit the P.W.17 making argument to the effect that from the evidence of the P.w.3 it is evident that all the telephonic conversations between Major Rashid and I.G. (Prisons) were made through direct telephones, but P.W.17 claimed that all the telephonic conversations between Bangabhaban and Central Jail were made through P.B.X. number operated by him. But we are unable to accept this argument also of the learned Counsel. We do not find that the evidence of P.W.3 prove conclusively that the telephonic conversations between him and the accused Major Rashid and President Khandaker Mustaque Ahmed were made directly and not through P.B.X number.

222. Mr. Abdullah-Al-Mamun has given much importance on the fact that P.Ws.11 and 17 could not say the name of the then military sceretary to the President correctly and has aruged that this fact also suggests that these two P.Ws.11 and 17 were not employees of Bangabhaban. But we are unable to accept this argument also of the learned Cousel for the defence. These two P.Ws. were employees of Bangabhaban long 21 years before. So, it was not unnatural at all that they might not recollect the name of military secretary to the President correctly. Mr. Abdullah-Al-Mamun has argued to the effect also that the evidence of P.Ws.16 and 34 if considered togather will show that the P.W.17 was not on duty in the Bangabhaban in the night of occurrence. But we find this argument also of the learned Counsel of the accused-respondents not correct. We have minutely examined the evidence of P.Ws.16, 17 and 34-the 3 receptionists-cum-P.A. and found that it was clearly proved that the P.W.17 Khan Md. Ali Olok was on duty in Bangabhaban in the night following 2nd November, 1975 and on the next morning at about 8.00 a.M. he handed over his duty to P.W.34 Yakub Hossain Khan.

223. The learned Counsel for the accused-respondents has argued also that the defencne case has been supported by the evidence of the own witness of the prosecution and in the circumstances, according to settled principle of law the accused persons are entitled to get benefit of boubt. In support of this argument the learned Counsel has cited several decisions also. The learned Counsel has referred to certain portion of the evidence of the P.W.52 Syed Mahbub-Al-Karim, Special Officer to slain leader Syed Nazrul Islam which is quoted below:-

> "মোশতাক সরকারের বিরূদ্ধে অভূথান ঘটানোর পরে, জিয়াউর রহমানকে বন্দী করার পরে, খালেদ মোশারফ গংরা অভূথানের মাধ্যমে প্রাপ্ত ক্ষমতা নিরস্কুশ ভাবে ধরিয়া রাখার জন্য সেই মুহুca fËç rja¡u বৈধ দাবীদর জেল খানায় থাকা নজরুল ইসলাম সাহেবদের হত্যার ষড়যন্ত্র করা হয় বলিয়া আমার ধারনা ।"

224. Mr. Abdullah-Al-Mamun has argued that this very statement of the own witness of the prosecution has strongly supported the defence case that Khaled Mosharraf and his partymen proclaimed a coup and that it was the four leaders of Awami League who were the legitimate successors to the government after killing of Bangabandhu and, therefore, Khaled Mosharaff and his partymen, with a view to securing their peaceful tenure of office, had killed those 4 leaders inside the Central Jail and the innocent accused persons have been falsely implicated in this case. But we are unable to accept this argument also of the learned Counsel in view of this very statement itself of P.W.52. The above quoted statement of P.W.52, evidently, was a mere assumption of the witness himself-it was neither from his knowledge nor he was a witness of any such occurrence; this witness did not or could not say anything else also to show that his such assumption was correct. Moreover, the above quoted statement of the P.W.52 itself shows that it does not at all support the defence case, becuase in the above quoted statement of P.W.52 it was clearly told that it was the assumption of witness that after materializing the coup against Mustaque Government and after arresting Ziaur Rahman, Kahled Mosharraf and others, with a view to securing their power which they captured through coup, made conspiracy to kill Syed Nazrul Islam and others inside the jail-who were legitimate claiments of the power. Evidently, according to this statement of P.W.52 the conspiracy to kill the four leaders inside the jail was hatched by Khaled Mosharaff and his partymen after they materialized the coup against Mustaque Government and arrested Ziaur Rahman. But undisputedly the four leaders were killed inside the jail in the night following 2nd November, 1975 before the coup by Khaled Mosharraf was materialized and also before the arrest of Ziaur Rahman. So, evidently, the above quoted statement of P.W.52 does not support the defence case at all and also is of no help for the defence.

225. The other points raised by the learned State-Counsel for the accused-respondents have already been answered before while discussing about the impugned judgment of the High Court Division.

226. However, in view of the above discussion it is evident that in this case it has been proved by sufficient evidence that in the night following 2nd November, 1975 at about 4.00 P.M. the accused Resalder Muslem Uddin along with the present accused-respondents Dafader Marfoth Ali Shaha and L.D. (Dafader) Abul Hashem Mridha and two other army personnel entered inside the Dhaka Central Jail and there they killed four Awami League learders by shooting with fire arms. The evidence of P.Ws.1-10, 12, 19 and 20 to the effect that in the night following 2nd November, 1975 at 4.00 A.M. accused Risalder Muslem Uddin along with 4 other army personnel entered inside Dhaka Central Jail and killed 4 leaders Sayed Nazrul Islam, Captain Mansur Ali, Tazuddin ahmed and A.H.M. Kamruzzaman by shooting with fire arms-coupled with the evidence of P.Ws.13, 17, 18 and 21 to the effect that in that fateful night of occurrence at about 3.00 A.M. they saw accused Risalder Muslem Uddin and the present 2 accused respondents Dafader Marfoth Ali Shaha and L.D. (Dafader) Abul Hashem Mridha along with 2 other army personnel to got out of Bangabhaban by a army jeep and subsequently at 6.00 A.M. they saw those army personnel to come back to Bangabhaban prove sufficiently that the present 2 accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha also were with accused Risalder Muslem Uddin at the time of alleged occurrence and were actively involved in the murder of 4 leaders inside the jail. These 2 accused-respondents remained absconding althrough till date and their such absconsion also very reasonably tells infavour of their guilt. The trial court, therefore, rightly convicted and sentenced the present accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha. The High Court Division, evidently, has

committed wrong and injuscitce in finding these two accused-respondents not guilty and thereby in acquitting them of the charges levelled against them.

227. Before parting with this judgmnet we shall have to deal with another important question as agitated from the side of the State-appellant. It has already been stated above that in this case though charge under section 120B of the Penal Code was framed against all the accused persons by the trial court, but the trial court found this charge not proved and consequently acquitted all the accused persons of the charge of criminal conspricy. Against this order of the trial court acquitting the accused persons of the charge of criminal conspricy neither the State preferred any appeal nor any relatives of the four slain leaders preferred any revision. At the time of hearing of the death reference and appeals filed by some of the convicted accused persons before the High Court Division the State-respondents though appeared and contested, but this time also the State did not raise any question even against the acquittal of the accused persons from the charge of criminal conspricy. Before this Divsion also, at the time of seeking leave to appeal against the acquittal of the present two accused respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha-the Sate-petitioner did not raise any question against the acquittal of the accused persons from the charge of criminal conspricy. But at the time of hearing of this appeal, for the first time, the learned Counsel for the State-appellant have made submission regarding the charge of criminal conspiracy and have also prayed for conviction of the accused persons on the charge of criminal conspricy also. Both Mr. Anisul Huq and the learned Attorney General Mr. Mahbubey Alam have made elaborate submissions to the effect that in this case there are overwhelming evidence on record to prove the charge of criminal conspiracy against the accused persons and in the circumstances, considering the very nature of the offence of gruesome and barbaric killing of 4 national leaders inside jail, this Division-the apex court of the country, by exercising its power of doing complete justice under Article 104 of the Constitution, can now consider whether the charge of criminal conspiracy was proved and if finds this charge of criminal conspiracy proved then can pass appropriate order at this stage also.

228. Criminal conspiracy has been defined in section 120A of the Penal Code as under:-

> "When two or more persons agree to do, or cause to be done,-
>
> (1). an illegal act, or
>
> (2). an act which is not illegal by illegal means, such an agreement is desingated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

229. In this present case, from the evidence narrated above, we, in agreement with the learned Counsel for the State-appellant, find that there are sufficient evidence to prove that there was a criminal conspiracy to kill the 4 leaders inside jail. The evidence of the P.Ws.1-3 and 17-whom we have found trustworthy-have proved sufficiently that in the fateful night of occurrence, before the assailants accused Risalder Muslem Uddin and others came to the jail, several telephone calls from Major Rashid and others from Bangabhaban came to I.G. (Prisons) and that Major Rashid informed I.G. (Prisons) over telephone that Riselder Muslem Uddin would go to jail and asked I.G. (Prisons) to allow him to talk to 4 leaders and later Major Rashid asked I.G. (prisons) whether Risalder Muslem Uddin reached to the jail and asked I.G. (Prisons) to allow them to talk to 4 leaders and that after the arrival of accused

Risalder Muslem Uddin and his accoplices to jail Major Rashid and President Khandaker Mustaque Ahmed, being informed by the I.G. (Prisons) that Risalder Muslem Uddin wanted to kill the 4 leaders, told I.G. (Prisons) to allow Risalder Muslem Uddin to do what he wanted to do. These evidence of the P.Ws.1-3 and 17 lead to the only inference that there was a criminal conspiracy to kill 4 leaders inside the jail. The evidence of P.W.11, P.W.13 and P.W.18 to the effect that in the fateful night of occurrence they saw the accused persons holding meeting and discussing about the 4 leaders confined in the jail and also heard President Khandaker Mustaque Ahmed to ask who would go to jail and in reply Major Rashid to tell that Risalder Muslem Uddin and his men would go to jail-also, coupled with the other evidence, support the charge of criminal conspiracy. The evidence of P.W.17 to the effect that in the night of occurrence, sometime after 3.00 A.M., Major Rashid, Major Farooque, Major Dalim, Major Bajlul Huda, Major Rashed Chowdhury and Major Aziz Pasha came to his (P.W.17's) room in armed condition and told him to connect I.G. (Prisons) by telephone and while got telephone connection Major Rashid asked the I.G. (Prisons) whether Captain Muslem Uddin reached to the jail-coupled with the other evidence mentioned above-strongly supports the prosecution case that there was an agreement among the accused persons to kill the 4 leaders inside the jail by sending the killing squad of Risalder Muslem Uddin and his men. The evidence of P.Ws.26, 28, 29 and 33 narrated above have proved that the accused persons left the country together on the very next day of the occurrence. This fact of fleeing away of the accused persons together on the very next day of the occurrence also supports the prosecution case that the accused persons together hatched criminal conspiracy to kill the 4 leaders inside the jail.

230. Considering all these evidence and facts and circumstances we are of the opinion that in this case there are sufficient evidence-both direct and circumstantial-to prove the charge of criminal conspiracy.

231. Now the pertinent question is whether at this stage, this Division can make any order convicting and sentencing the accused persons or any of them on the charge of criminal conspiracy by exercising its power of doing complete justice under Article 104 of the Constitution.

232. Article 104 of the Constitution Provides:

> "The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pedning before it, including orders for the purpose of securing the attendence of any persons or the discovery or production of any document."

233. This article of the Constitution has invested the last court of the country with wide power of issuing necessary directions, orders etc. for doing complete justice in appropriate cases. The exercise of this power, however, *"is circumscribed only by two conditions, first is, that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and the other is that the order which Supreme Court passes must be necessary for doing 'complete justice' in the cause or matter pending before it.*" (**vide Chandrakant Patil V. State, (1998)3 SCC 38)**. *'Complete justice'*, however, has not been defined or described in this article of the Constitution. Mr. Mahmudul Islam in his "Constitutional Law of Bangladesh" (First Edition) at page-536 para:5.200 has stated thus:-

> *"Power to do 'complete justice' is an extraordinary power given to the highest tribunal of the land and the power is to be exercised sparingly and in*

*exceptional circumstances to remove manifest and undoubted injustice. Facts may be of such varied pattern, that it is difficult to lay down any fixed principles for doing 'complete justice'. All that can be said is that 'complete justice' should be done not according to the personal views of the judges, but in exceptional circumstances on clear showing of injustice for the removal of which the existing laws have not made any provision."*

234. In the case of **AFM Naziruddin V. Hameeda Banu reported in 45 DLR(AD)38** this Division observed:-

*"It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court. If a substantial justice under law and on undisputed facts can be made so that parties may not be pushed to further litigation then a recourse to the provision of article 104 may be justified."*

235. In **Prem Chand Garg V. Excise Commissioner (AIR 1963 SC 996)** the Indian Supreme Court held:-

*"an order which this Court can make in order to do 'complete justice' between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."*

236. In a subsequent case of **Union Carbide Corp. V. Union of India (AIR 1992 SC 248**) the Indian Supreme Court observed that in order to preclude the exercise of this constitutional power the prohibition of the statutory law must be *"shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory prohibitions override a constitutional provisions. Perhaps, the proper way of expressing the idea is that in exercising powers under article 142 and in assessing the needs of 'complete justice' of a cause or matter, the apex court will take note of the express provisions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly"*.

237. Doing **'**complete justice′ does not contemplate doing justice to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice′.

238. In the present case, as it has already been mentioned above, the trial court acquitted all the accused persons of the charge of criminal conspiracy. Against this order of acquittal from the charge of criminal conspiracy the State had a right to seek remedy in appeal as per statutory provisions or by filing a recision by any of the relatives of the slain leaders. But none of the aggrieved parties including the State-informant filed any appeal or revision against that order of acquittal from the charge of criminal conspiracy within the statutory period of limitation or even beyond the statutory period of limitation. Even before the appellate court-which heard the death reference and some appeals filed by the convicted accused persons against the judgment of the trial court the State-respondents, though contested, but did not raise any objection against the order of acquittal from the charge of

criminal conspiracy. Even at the time of seeking leave to appeal before this Division against the judgment of the appellate court the State-leave petitioner did not raise any question against that order of acquittal from the charge of criminal conspiracy. Leave to appeal was granted only to examine whether the order of acquittal of present two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha from the charges under sections 302/34 and 302/109 of the Penal Code passed by the High Court Division was correct and justified. In the present appeal, therefore, the only matter for our consideration is the propriety of the impugned acquittal of these two accused-respondents of the charges under sections 302/34 and 302/109 of the Penal Code only. But at the time of hearing of this appeal, for the first time, the learned Counsel for the State-appellant have questioned the acquittal of all the accused persons from the charge of criminal conspiracy by the trial court and submitted that by exercising the power under article 104 of the Constitution this Division now, considering the overwhelming evidence on record, can convict and sentence the accused persons on the charge of criminal conspiracy.

239. But it has already been pointed out above that the exercise of the power of doing 'complete justice′ under article 104 is circumscribed by two conditions, (i)that it can be exercised only when Supreme Court otherwise exercises its jurisdiction and (ii) that the order which Supreme Court passes must be necessary for doing "complete justice" in the cause or matter pending before it. Obviously the matter pending before us in this appeal is the acquittal of two accused-respondents Dafader Marfoth Ali Shah and L.D. (Dafader) Abul Hashem Mridha of the charges under sections 302/34 and 302/109 of the Penal Code. Leave to file this appeal was granted to consider only whether the acquittal of the present two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code was correct and justified. So, obviously, the question whether the acquittal of all the accused persons from the charge of criminal conspiracy-is not at all a matter pending before us. It has already been pointed out above that the present State-appellant or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of criminal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appeal time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy-as ordered by a court of law. In the name of doing 'complete justice′ this right of the accused persons now cannot be ignored.

240. In the case of **AFM Naziruddin V. Mrs. Hameeda Banu (45 DLR(AD) 38)** this Division has cautioned the exercise of power of doing complete justice thus:

> *"In the name of 'complete justice' if a frequent recourse is made to article 104 then this Court will be exposed to the opprobrium of purveyor of "palmtree justice".* In that case this Division observed also thus *"in the name of complete justice the Appellate Division may not grant relief which the Court of first instance will not be able under the law to grant, otherwise no litigant, in search of complete justice will rest till he reaches the end of the long tunnel of litigation in this Court."*

241. The learned Counsel for the State-appellant have cited several cases of the apex courts of this region where the apex courts exercised the power of doing 'complete justice′ by issuing necessary orders. The learned Counsel have cited the cases of **D.M Prem Kumari V. Divisional Commissioner, Mysore and others, ((2009)12 SCC 267), Gannysons Ltd. V. Sonali Bank, ((37 DLR(AD)42), Balram Prasad Agrawal V. State of Bihar, ((1997)9 SCC 338), Raziul Hasan V. Badiuzzaman Khan, (48 DLR(AD)71), AFM Naziruddin V.**

**Mrs. Hameeda Banu, (45 DLR(AD)38), Bangladesh Vs. Mashiur Rahman, (50 DLR(AD)205), State Vs. Muhammad Nawaz, (18 DLR(SC)503) and Chandrakant Patil V. State, ((1998) 3 SCC 38)**.

242. We have gone through all these judgments and found that the facts and circumstances of all these cited cases were completely different from the facts and circumstances of the present case. In all those cases the Supreme Court exercised the power of doing **'**complete justice**'** in the matters which were pending before the Supreme Court for decision.

243. In **D.M. Prem Kumari V. Divisional Commissioner, Mysore,** the Supreme Court, considering the peculiar facts and circumstances of the case, instead of deciding the matter on merits-which might have gone against appellant Prem Kumari, directed the respondent authorities to save appellant's wrong appointment as primary school teacher, without treating it as a precedent in order to do complete justice. In that case the matter for decision of the court was whether the writ petitioner-appellant's appointment as a primary school teacher was lawful.

244. In **Gannysons V. Sonali Bank,** Sonali Bank obtained a decree in a suit for foreclosure of mortgage of the property of Gannysons (which was being treated as an abandoned property) and levied execution of the decree. Gannysons filed objection against the decree under section 47 of the Code of Civil Procedure and the matter came up before the Appellate Division which decided the dispute in favour of Gannysons. But Gannysons filed a review petition on the ground that the order of the court was not fully in conformity with the decision. In allowing the review, the court in exercise of the power under article 104 gave relief to Gannysons declaring that the property of Gannysons was not an abandoned property-against the fundamental principle of our legal system of granting relief only to the person approaching the court seeking it. The court exercised this power saying that Gannysons had already suffered and to compel it to further litigation in the form of a suit for declaring that the properties in question were not abandoned property would result not only in further harassment but also long delay and deprivation of the enjoyment of the property.

245. In **Balaram Prasad Agrawal V. State of Bihar**, the accused persons were charge-sheeted under sections 498-A, 302 and 120-B of Indian Penal Code. But the trial court framed charge only under section 302 of IPC which was not found proved on trial by the trial court and the trial court acquitted the accused persons from that charge under section 302 of IPC, but the trial court, in its judgment made some observations to the effect that the evidence on record showed that the accused persons used to torture the victim wife in various way. The complainant-the father of the victim filed revision against the acquittal of the accused persons which ultimately came before the Supreme Court of India. Considering the facts and circumstances and evidence on record, the Supreme Court, instead of remanding the case for retrial, itself framed charge against the accused persons under section 498-A and on consideration of the evidence on record found the accused persons guilty under the said section and accordingly convicted and sentenced them. In that case it was held that in the circumstances of the case, the Supreme Court can itself examine the question of culpability of the accused for offence under the said section so as to obviate protraction of trial and multiplicity of proceedings against the accused.

246. In **Raziul Hasan V. Badiuzzaman Khan**, the respondent Badiuzzaman Khan filed a case before the Administrative Tribunal praying for a declaration that he had been the

Director/Deputy Secretary with effect from 18.04.1981 or in the alternative from 29.06.1981 and also for a declaration that the placement of Raziul Hasan and another above him in the seniority list was illegal and void. The Administrative Tribunal allowed that case. After disposal of that administrative tribunal case Raziul Hasan, being informed about that judgment of the Administrative Tribunal, filed an appeal before the Administrative Appellate Tribunal which was dismissed as time barred. Thereafter, Raziul Hasan came to this Division with a petition for leave to appeal and leave was granted to consider the case of the appellant Raziul Hasan for doing complete justice under article 104 of the Constitution. Ultimately this Division, on hearing both the parties, found that the appellant Raziul Hansal was senior to respondent and that a gross injustice had been done to him for no fault or latches of his own and held that since a valuable right accrued to the appellant in law and fact it was the most appropriate case to exercise the jurisdiction under article 104 of the Constitution and consequently remanded the case to the Administrative Tribunal to reconsider its order as to the gradation list only.

247. In **AFM Naziruddin V. Mrs. Hameeda Banu**, the appellant during the subsistence of his marriage with the defendant built at his cost a house on the land belonging to the defendant. Subsequently the relationship became strained and ended in dissolution. The appellant filed a suit for declaration that he is the irrevocable licensee of his wife and the real owner of the suit house. The suit was decreed by the trial court, but was dismissed by the High Court Division. This Division, considering the facts and circumstances of the case, made a rough and ready adjustment of the claims of the parties and ordered that the appellant will retain his possession in that floor of the suit building where he was then residing with no right to transfer his possession, the respondent may recover possession thereof any time within one year from date on payment of Tk.6,00,000/-(the construction cost of the building) in default of which the appellant would have only right to live in that floor of the building where he was then residing during his life time.

248. In **Bangladesh V. Mashiur Rahman**, an ex-parte decree was challenged on the ground of being obtained by fraud by filing miscellaneous case under Order IX rule 13 of the Code of Civil Procedure. The trial court dismissed that miscellaneous case though found that fraud seemed to have been practised. The High Court Division also dismissed the miscellaneous appeal filed against the judgment of the trial court. The case ultimately came up before this Division. This Division having found that fraud was practised upon court in obtaining that ex-parte decree set aside that ex-parte decree though the application for setting aside that ex-parte decree was barred by limitation for doing complete justice by preventing abuse of the process of law.

249. In the case of **State V. Muhammad Nawaz** the Supreme Court, issued suo moto notices to the accused persons who were improperly acquitted by the High Court and ultimately, after hearing, convicted and sentenced some of those accused persons exercising its power under article 104 of the Constitution. In that case 28 persons were tried for offences under sections 148, 333, 307 and 302 of the Penal Code read with section 140 of the Penal Code by the trial court. The trial court acquitted 10 persons and convicted 18 of the accused. Munammad Nawaz and Fazal Ilahi-the two accused persons were sentenced to death while the rest were awarded sentences of transportation for life. On appeal the High Court upheld the convictions and sentences of 7 of the convicts and acquitted the rest. The two accused who were awarded death sentences were also among those acquitted. The 7 persons whose appeal was dismissed by the High Court were granted special leave to appeal and by the same order, leave was also granted to the State to appeal against the acquittal of the remaining 11

persons by the High Court. Ultimately the Supreme Court, on objection raised from the accused persons rejected the appeal preferred by the State on the ground that it was barred by limitation. However, the Supreme Court found out that "the High Court purported to adopt two criteria for convicting some of the accused persons. They held that 6 of the accused who had admitted their presence during the occurrence and had raised the plea of self-defence, should be convicted along with those who were named by the injured P.Ws. as their own assailants. While giving effect to these findings, however, the High Court committed an error in so far as, inadvertently, it failed to record convictions against three of those 6 who had admittedly been present at the spot at the relevant time and 2 others who had been named by Raja P.W. as his own assailants, those 5 being included among those who were convicted by the trial judge." On such findings the Supreme Court held, "the error being patent on the record in this case, this Court should have suo motu issued notices to those of the respondents who had secured an acquittal from the High Court as the result of the above mentioned error." The Supreme Court ultimately, after hearing the learned Counsel for those acquitted accused persons convicted and sentenced some of them.

250. In the case of **Chandra Kant Patil V. State ((1998)3 SCC 38)** the Supreme Court of India, considering the very grave nature of the offence committed, enhanced the sentences of the accused-appellants by exercising its power of doing complete justice.

251. Obviously in all these above cited cases, excepting the case of **State V. Muhammad Nawaz**, the apex courts exercised the power of doing complete justice in the matters pending before the court and in very exceptional circumstances. In the case of **State V. Muhammad Nawaz** the Supreme Court exercised the power of doing complete justice to rectify the patent error made inadvertently by the High Court. So none of these cited cases is of any help for the learned Counsel of the State-appellant to support their argument that in the present appeal filed challenging the acquittal of two accused-respondents from the charges under sections 302/34 and 302/109 of the Penal Code the other accused persons-who were acquitted by the trial court from the charge of criminal conspiracy-can be convicted now on the charge of criminal conspiracy.

252. However, considering the above stated facts and circumstances and the legal position we do not find that there is any scope now to convict the accused persons or any of them on the charge of criminal conspiracy by exercising the inherent power of this Division under article 104 of the Constitution.

253. However, this appeal is allowed. The impugned judgment of the High Court Division, so far as it relates to the accused-respondents Dafader Marfoth Ali Shah and L.d. (Dafader) Abul Hashem Mridha is set aside. The order of conviction and sentence of these two accused-respondents passed by the trial court is maintained.

254. ***Syed Mahmud Hossain, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.

255. ***Muhammad Imman Ali, J.-*** I have gone through the separate judgments prepared by Surendra Kumar Sinha, J. and Nazmun Ara Sultana, J. I agree with the reasoning and findings given by Nazmun Ara Sultana, J.