IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Muzammel Hossain, Chief Justice

Mr. Justice Surendra Kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Mrs. Justice Syed Mahmud Hossain

Mr. Justice A.H.M. Shamsuddin Choudhury

CRIMINAL REVIEW PETITION NOS.17-18 OF 2013.

(From the judgment and order dated 17.9.2013 passed by the Appellate Division in Criminal Appeal Nos.24-25 of 2013)

Abdul Quader Mollah: Petitioner.
(In both the cases)

=Versus=

The Chief Prosecutor, International Crimes Tribunal, Dhaka: Respondent.
(In both the cases)

For the Petitioner:
(In both the cases)
Mr. Khandker Mahbub Hossain, Senior Advocate (with Mr. Abdur Razzaq, Senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.

For the Respondent:
(In both the cases)
Mr. Mahbubey Alam, Attorney General (with Mr. M.K. Rahman, Additional Attorney General, Mr. Murad Reza, Additional Attorney General and Mr. Momtaz Uddin Fakir, Additional Attorney General, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

Date of hearing. : ***11th and 12th December, 2013.***

J U D G M E N T

Surendra Kumar Sinha,J: These petitions under Article 105 of the Constitution are for review of the judgments of this Division in Criminal Appeal Nos.24 and 25 of 2013. The former appeal was preferred by the Government against inadequacy of sentence passed by the International Crimes

Tribunal No.2, Dhaka in ICT-BD Case No.2 of 2012, and acquittal in respect of charge No.4; the latter appeal was preferred by the convict Abdul Quader Molla against his conviction and sentence passed by the said Tribunal.

Abdul Quader Molla was arraigned before the said Tribunal to face six counts of charges. Charge No.1 is in respect of killing of Pallab, a resident of Taltala, Block-B, Section-11, Mirpur and a student of Mirpur Bangla College; charge No.2 was for the murder of poet Meherunnessa and other members of her family; charge No.3 was for the killing of Khandaker Abu Taleb, an imminent journalist and a lawyer, who is a resident of Section-1, Block-D, Road No.2, Plot No.13, Mirpur; charge No.4 was relating to mass killing at Bhawal Khan Bari and Ghotarchar (Shahid Nagar) of unarmed innocent civilians; charge No.5 was also relating to mass killing of 344 civilians of village Alubdi, (Pallabi, Mirpur)and the last charge was for the killing of Hazrat Ali Laskar, his wife Amena and two minor daughters Khatiza and Tahmina, rape of his three daughters and the killing of his two years old son. All the above incidents took place when the people of the country were fighting against the occupation army of Pakistan for liberation of the country. The petitioner, an activist of Islamic Chhatra Sangh not only collaborated with the anti-liberation force but also directly participated in the killing, rape and other nefarious activities with the

occupation army and the local Biharis, a community of Urdu speaking minority, ostensible tools of their fellow Urdu Speakers of West Pakistani army backed Pakistani occupation army and involved in the atrocities.

These offences were perpetrated in Bangladesh following the onslaught of 'Operation Search Light' from the night following 25th March, 1971 to 16th December, 1971, by the Pakistani occupation army and their collaborators after the declaration of independence of the country by late Sheikh Mujibur Rahman. There were wide spread atrocities like killing of three million people, rape, arson and looting of unarmed civillians, forcing 10 million people to take shelter in the neighbouring country, India. The massacre ravaged Dhaka and other areas of Bangladesh, a display of stark cruelty, more merciless than the massacres by Genghis Khan or at Jallianwala Bagh by the British General Dyer. They did not spare the university teachers, intellectuals and the minority community at large. The International Crimes (Tribunals) Act, 1973 (Act of 1973) was promulgated for the purpose of detention, prosecution and punishment of persons committing atrocities during this period. The prosecution has examined twelve witnesses and the defence examined six. The Tribunal convicted the petitioner in respect of charge Nos.1, 2, 3, 5 and 6 and sentenced him to 15 years rigorous imprisonment in respect of charge Nos.1, 3 and 5 and imprisonment for life in respect of other counts. It,

however, found the petitioner not guilty of charge No.4 and acquitted him accordingly.

This Division upon hearing the appeals held that Criminal Appeal No.24 of 2013 was maintainable, but allowed it by majority by setting aside the judgment and order of acquittal of charge No.4, and found him guilty of the said charge and sentenced him to imprisonment for life. It also sentenced him to death by majority in respect of charge No.6. This Division also dismissed the other appeal filed by the petitioner Abdul Quader Molla unanimously and maintained his conviction in respect of charge No.6. It, however, maintained his conviction and sentence in respect of charge Nos.1, 2, 3 and 5 by majority.

In the petitions though the learned counsel has taken ground Nos.9 and 12 respectively, he has pressed only three points presumably realizing that it would rather be a futile attempt to press other points since those points were raised and decided by this Division while disposing of the appeals. The first point urged is that this Division has committed error of law on the face of the record in failing to appreciate the material contradictions between the depositions of the witnesses and their statements made to the investigation officer of the case and that if such contradictions are taken into consideration, the conviction of the petitioner could not be sustained, not to speak of awarding him a sentence of

death. The second point urged on behalf of the petitioner is that the warrant for execution of the sentence was issued by the Tribunal in violation of rule 979 of the Jail Code, inasmuch as, the sentence was given by this Division and therefore, the sentence could not be executed unless it was communicated by an officer of this Division, which is an error of law. The other point raised on behalf of the petitioner is that in exercise of its inherent powers under Article 104, this Division ought to have afforded the petitioner an opportunity to file a mercy petition in accordance with rule 991(I) and 991(VI) of the Jail Code.

Upon hearing the learned counsel it appears that the learned counsel has practically taken only one point from the impugned judgment of this Division and other points are consequences flowing therefrom, such as, the privileges that are available to the petitioner under the Jail Code, and a technical point as to the Tribunal's propriety in communicating the warrant to execute the sentence. Before entering into the merit of the matter, the learned Attorney General has raised a preliminary point about the maintainability of review petitions. According to him, in view of Article 47A(2) of the Constitution, review petitions are not maintainable from the judgment of this Division, in the absence of any provision for review in the Act XIX of 1973. It is contended that against a conviction or sentence or an

order of acquittal or inadequacy of sentence, there is only one remedy of appeal available to a convicted person and the Government and the informant and the complainant, as the case may be, can prefer an appeal under section 21 of the Act of 1973 before this Division. After the disposal of the appeals, the judgment has attained finality and it cannot be challenged by resorting to the constitutional provision, which has totally been ousted by the Constitution (Fifteenth Amendment) Act, 2011 and the Constitution (First Amendment) Act, 1973 respectively. It is added that no person to whom the Act of 1973 applies shall have the right to move this Division for any of the remedies available under the Constitution other than the one provided in the Act of 1973. On the other hand, the learned counsel for the petitioner has submitted that the review petition is maintainable in view of Article 105 of the Constitution read with Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1998.

When a preliminary objection is raised about the maintainability of a petition or appeal, the court is required to dispose of that point before entering into the merit of the matter. It is because if the petition for review is not maintainable, it would be a futile attempt to enter into the merit of the matter causing wastage of the valuable times of the Court. There is no doubt that the Act of 1973 is a special law, but it is distinguishable from other special laws in operation

because this piece of legislation has been protected in respect of detention, prosecution and punishment of any person, who is a member of any armed or defence or auxiliary forces or any individual, group of individuals or organization who is a prisoner of war for Genocide, Crimes against Humanity or War Crimes and other crimes under International Law. Under the Act-such person cannot challenge the legality of the proceedings on any of the grounds contained in Articles 26, 27, 28, 31, 35, 44 by resorting to Article 102 or other provisions of the Constitution. Sub-clause (2) of Article 47A debars an accused person who is being prosecuted or punished under the Act of 1973 to move the High Court Division for any of the relief(s) available under the Constitution other than the one provided in the Act.

The intention of safeguarding this law is obvious-it is promulgated for trial of a person who has committed offences of Crimes against Humanity or War Crimes and other crimes under International Law. There is however, no prohibition either expressly or by implication to move a review petition from the judgment of this Division on appeal from the judgment of the Tribunal. A plain reading of this non-obstante clause of the Constitution will manifest that a review petition from the judgment of this Division passed on appeal from the judgment of the Tribunal has not been ousted. Alternatively, it may be said that the power of this Division as the appellate

forum to review its judgment has not been ousted either directly or indirectly by Article 47A(2). This will be evident from a close scrutiny of this provision and the Act of 1973.

A subtle analysis of the relevant provisions of the Act of 1973 is relevant for our consideration. Sub-section (3) of section 11 provides that the Tribunal shall-

a) confine the trial to an expeditious hearing of the issues raised by the charges.

b) take measures to prevent any action which may cause unreasonable delay, and rule out irrelevant issues and statements.

This provision clearly manifests that the trial of a case should be concluded expeditiously, and the Tribunal shall guard that any irrelevant issue or statement should not be allowed to be raised which may cause unreasonable delay in the disposal of a case. Section 13 of the Act restricts adjournment of the trial of a case unless the Tribunal is of the opinion that the adjournment is necessary in the interest of justice, that is to say, the Tribunal shall not allow any unnecessary adjournment of the trial of a case. Even a time limit for disposal of an appeal has been specifically mentioned. Of course, this time limit is not mandatory. A combined reading of these provisions suggests the intention of the legislature that the trial of offences specified in the Act of 1973 should

be concluded as early as possible. The object is obvious. There is already delay in undertaking the trial of the offenders of Crimes against Humanity, Genocide, War Crimes etc. because of political polarization in the country after the killing of Sheikh Mujibur Rahman. People of the country want that the perpetrators of these heinous offences should be brought to justice and that the real story of our liberation struggle should be reflected in our nation's history without distortion.

An appeal against a conviction or sentence or an order of acquittal is essentially continuation of the original proceedings and all provisions applicable to the trial of the proceedings are also applicable in an appeal. It is because a vested right in the categories of the persons mentioned in section 21 to avail of the remedy of appeal is given. This is a statutory right and the appeal is one in which the question will be whether the judgment of the Tribunal from which the appeal is sought was right on the materials which the Tribunal had before it. When a right of appeal is conferred by a statute it becomes a vested right. The right of appeal, where it exists, is a matter of substance, not of procedure. To say otherwise, it cannot be said that the appellate court cannot invoke its inherent power if it finds necessary to meet the ends of justice or to prevent the abuse of the process of the court. There is inherent right to a litigant to a judicial

proceeding and it requires no authority of law, to see the correctness of the judgment.

In an appeal entire proceedings are before the appellate authority and it has power to review the entire materials on record subject to limitations prescribed. It has been observed in an unreported case in Shiv Shakti Coop. Housing V. M/s. Swaraj Developers, Civil Appeal No.3489 of 2003 by the Supreme Court of India that '*an appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed ..... A right of appeal carries with it a right of re-hearing in some way, as has been done in second appeals arising under the Code*'. I find no reason to depart from the above view. If a party is affected by an order or judgment of the court, in the absence of specific provision for review, the court has inherent power to review its order or judgment. This Division can exercise inherent power as well. It is now established that inherent powers of the court can be exercised by a court of law at any stage of the proceedings.

We cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If the primary function of the court is to do justice in respect of causes brought before it, then on principle, it is difficult to accede to

the proposition that in the absence of specific provision the court will shut its eyes even if a wrong or an error is detected in its judgment. To say otherwise, courts are meant for doing justice and must be deemed to possess as a necessary corollary as inherent in their constitution all the powers to achieve the end and undo the wrong. It does not confer any additional jurisdiction on the court; it only recognises the inherent powers which it already possesses.

If the law contains no specific provisions to meet the necessity of the case the inherent power of a court merely saves by expressly preserving to the court which is both a court of equity and law, to act according to justice, equity and good conscience and make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the court. It is an enabling provision by virtue of which inherent powers have been vested in a court so that it does not find itself helpless for administering justice. The court can use its inherent powers to fill up the lacuna left by the legislature while enacting law or where the legislature is unable to foresee any circumstance which may arise in a particular case. There is a power to make such order as may be necessary for the ends of justice and to prevent the abuse of the process of the Tribunal. The inherent powers of a Tribunal are in addition to and complementary to the powers expressedly conferred upon it by other provisions of the

Act of 1973. They are not intended to enable the Tribunal to create rights for the parties, but they are meant to enable the Tribunal to pass such orders for ends of justice as may be necessary. Considering the rights which are conferred upon the parties by substantive law to prevent abuse of the process of law, it is the duty of all Tribunals to correct the decisions which run counter to the law.

We are not unmindful that the duty of the Court is not to enlarge the scope of the legislation. A court of law cannot rewrite, recast, or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on a Tribunal or a Court. It cannot add words to a statute or read words into it which are not there. A Court shall decide what the law is and what it should be. A Court of course adopts a construction which will carry out the presumed intention of the legislature but can not legislate itself.

The courts should not give beneficial construction where by giving such construction the court would virtually re-legislate a provision either by addition, alteration or substitution of words-where the words used in a statute are capable of only one meaning from which the court may not depart; and when the provision is plain, unambiguous and does not give rise to any doubt as to its meaning. It has been observed in Chief Justice of A.P. V.

LVA Dikshitulu, AIR 1979 SC 193, that where two alternative constructions are possible, the court must choose the one which would be in accord with other parts of the statute and ensure smooth, harmonious working and eschew the other which leads to absurdity, confusion or fiction, contradiction and conflict between its various provisions, or undermines or tends to defeat or destroy the basic scheme and purpose of the enactment.

There is a presumption that the authors of statutes intend results that are both rational and coherent and that human behaviour is guided by reason and purpose and seldom bizzare. It is, therefore, necessary to apply the principles of logic, both deductive and inductive, particularly in excluding from consideration facts and circumstances which are not relevant for determination of issues raised. ("The Role of Logic" in Reed Dickerson's 'The Interpretation and Application of Statutes'). Where, by use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it may be enforced however harsh or absurd or contrary to common sense the result may be. However, where literal construction would defeat the obvious intention of the legislature and would produce a wholly unreasonable reason, the court must do violence to the words so as to achieve that obvious intention and produce a rational result. (CIT V. National Jaj Traders, AIR 1980 S.C. 485) It is because, it may be presumed that the legislature

does not intend any absurd result. If two interpretations of a provision is possible, the court will lean in favour of that construction which avoids absurdity and ensures smooth working of the system which the statute seeks to regulate.

It has been held in East Pakistan V. Sarafatullah, PLD 1970(SC)514 that it is an established rule that the courts will adopt that construction which will remove the lacuna and advance the purpose and object of the statute. Purpose and policy of law cannot be defeated by dry literal construction of a provision of law. An interpretation which promotes justice and equity should be preferred such construction which would advance the policy of the legislation to extend the benefit rather than the one that curtails the benefit (India V. Pradeep Kumari, AIR 1995 SC 2259). Where the usual meaning of the words do not convey the object or the intention of the legislature, a more extended meaning may be given to them. If in a legislation, the general object of which is to benefit a particular class of persons, any provision is ambiguous so that it is capable to two meaning, one of which is to preserve the benefit and the other to take away the benefit, the meaning which preserves the benefit should be adopted. References in this connection are the cases of Mahadeo Lal V. Administrator General of West Bengal, AIR 1960 SC 936 and AIR Karmachari Sangh V. AIR Ltd., AIR 1988 SC 1325.

Mr. Razzaq submits that even if it is assumed that there is no provision under the Act or the Rules to file a review petition from the judgment of this Division, it can review its judgment for doing complete justice under Article 104 of the Constitution, and in appropriate cases, in order to meet the ends of justice or to prevent abuse of the process of the court, it can exercise its inherent powers. He has further submitted that apart from Article 104, this Division can invoke its inherent powers to review its judgment on the principle of justice, equity and good conscience. In support of his contention he has referred to the cases of Seraj Uddin Ahmed V. AKM Saiful Alam, 56 DLR(AD)41 and M. Amir Khan V. Collector Estate Duty, 14 DLR(SC)276.

In the above cited case of Seraj Uddin Ahmed, a writ petition was filed challenging an order of cancellation of lease in respect of a plot of land in Mohammadpur Housing Estate and allotting the same to writ respondent Nos.7 and 8. The High Court Division upon hearing the parties made the rule absolute declaring the order of cancellation to have been issued without lawful authority. The allotees filed review petitions against the judgment of the High Court Division whose right to the plot was said to have been affected by the judgment. The High Court Division rejected the review petitions summarily observing that petitions for review from judgment passed in writ jurisdiction were not maintainable. This Division was of

the view that the High Court Division was in error in holding the above view, inasmuch as, the court is competent to exercise its discretion in a case where party seeking review of the judgment of a particular court upon placing materials which if would have been before the court the same would have not been the one the court has made and, in such a situation, "*the court for dispensation of justice is quite competent to recourse to a procedure, of which the same is the master, to advance the cause of justice as well as on the ground of equity and good conscience*." The above view supports the views we have expressed in the preceding paragraphs.

In M. Amir Khan (supra), the question was whether a review petition is available in the absence of any guiding principles. The facts are that, five review petitions were filed under Article 161 of Pakistan's late Constitution. No Act has been passed nor the Supreme Court made any Rules to define or limit its power of review when the petitions were filed during the relevant time. The language of sub-article (3) of Article 163 of the late Constitution was couched in wide terms of the full extent of the power of review contemplated by the Constitution as under:

> "The Supreme Court shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it.....".

It was held by Cornelius, CJ. that if the Supreme Court is vested with full power for doing complete justice, there is no reason why the exercise of that power would not be applicable only in respect of a matter coming up before the Supreme Court in the form of a decision by a High Court. There is no reason why that power in its full scope, should not also be applicable for the purpose of reviewing a judgment delivered by the Supreme Court itself; provided that there be necessity within the meaning of the expression 'complete justice' in exercise of that power. If any material irregularity, is found, and yet "*there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessary be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about justice*". His lordship then approving a dictum of the Judicial Committee of the Privy Council in Northwest Frontier Province V. Suraj Narain Anand, PLD 1949 PC 1, held that the ascertainment of a breach by a mode of interpretation will not in all cases furnish good grounds for interference. For the interpretation of the Constitution and the laws is a function which is vested specifically in the superior courts of the country and while it is true that in doing so they will follow the generally recognized principles applicable to statutory interpretation, in elaboration of the rules contained in the interpretation

of statutes. With the above findings, the review petitions were dismissed.

In appropriate cases, this Division on the doctrine of *ex debito justitiae* may pass any order by correcting mistakes in the judgment but inherent powers of this Division may be invoked only when there does not exist any other provision in that behalf. However, in presence of specific provisions, it cannot invoke its inherent powers under Article 104. This Division can invoke its inherent powers, since the exercise of such powers have not been prohibited by Article 47A(2). Though the Constitution has given wide power to this Division, it generally does not pass any order in contravention of or ignoring the statutory provisions nor the power is exercised merely on sympathy. This power is to be exercised sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing law cannot bring about complete justice between the parties.

Article 104 of the Constitution can be invoked to do complete justice only in a situation where justice cannot be effectively and appropriately dispensed with by the existing provisions of law. It is now established that where the question in dispute can be settled only through the provisions of a statute, its inherent powers cannot be exercised–it is a corrective as well as residuary, supplementary and complementary to the powers specially conferred by the statute. There is no doubt that this

Division has ample power to give such directions as are necessary for ends of justice. This power has been recognized and exercised, by issuing necessary directions to fill in the vacuum till such time the legislature steps in to cover the gap. This power is not restricted by statutory enactments but it should be used sparingly.

So this Division cannot ignore the substantive provisions of statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a super structure. This power cannot be used to supplant the applicable provision to the case. The Supreme Court of India in Poonam V. Sumit Tanwar, (2010) 4 SCC 460 held that in exercise of its powers for doing complete justice the court generally should not issue any direction to waive the statutory requirement. The courts are meant to enforce the law and therefore, are not expected to issue a direction in contravention of law or to direct the statutory authority to act in contravention of law.

Article 104 of the Constitution will have no application in this case for, the Act of 1973 is a protected law. Clause (2) of Article 47A takes away the right to move the Supreme Court for any of the remedies under the Constitution to a person to whom a law specified in clause (3) of Article 47 applies. What’s more, the

right of appeal of a convicted person is given by the Act of 1973 and not by Article 103 of the Constitution. Therefore, if Article 103 is not applicable, Articles 104 and 105 will not also be applicable to review a judgment of this Division passed by it against the judgment of the Tribunal established under the Act of 1973. Naturally, the Supreme Court (Appellate Division) Rules, 1988 will also not be applicable.

Now the question is whether what would be period of limitation for filing a review petition from the judgment of this Division passed against a judgment of the Tribunal set up under the Act of 1973. In the Act as observed above, the trial of a case before the Tribunal shall be held expeditiously without undue delay. Since the scheme and object of the law manifest that the proceedings shall be concluded expeditiously, the period of limitation for filing such review petition shall be as early as possible. As per rules of this Division review petitions shall be filed within thirty days but this period of limitation is not only inconsistent with the provisions of the Act but also not applicable. We are also not unmindful that the convicted person should be given a reasonable time to file a review petition. What is reasonable time is a matter to be considered in the context of the matter. There is no hard and fast rule in this regard. An aggrieved party can file a review petition against any order of the Tribunal within seven days as per Rules framed by it. In the courts

of small causes a period of fifteen days limitation is provided for filing review petition from its judgment. This has been done with a view to secure finality of litigation. In some cases it has been observed that if this bar of time is not placed on the power of review it would mean that a judgment can never become final. Taking into consideration the surrounding circumstances it is our considered view that fifteen days' time will be a reasonable time. This will secure the ends of justice.

It must be borne in mind that, by assumption, every judgment passed by a court is a considered and solemn decision on all points arising out of the case, and further that every reason compels towards the grant of finality in respect of such judgments delivered by a court which sits at the apex of the judicial system. A review cannot be equated with an appeal. It does not confer a right in any way to a litigant. It is now settled point of law that a review of an earlier order is not permissible unless the court is satisfied that material error manifest on the face of the order undermines its soundness or results in miscarriage of justice. A review of judgment in a case is a serious step and the court is reluctant to invoke its power- it is only where a glaring omission or patent mistake or grave error has crept in by judicial fallibility. Despite there being no provision in the Act of 1973 for review from the judgment of this Division on appeal, securing ends of justice a review is maintainable

in exercise of the inherent powers from the judgment of this Division subject to the condition that where the error is so apparent and patent that review is necessary to avoid miscarriage of justice and not otherwise, and the execution of a sentence shall be suspended till the disposal of the review petition if the same is filed within the period as above. In view of what is stated above, we find that the review applications are maintainable. This disposes of the preliminary point.

So after the finality of the judgment, if the jail authority fixes a date for the execution of the sentence in accordance with the orders of the government, the execution of the sentence be postponed till the disposal of the review petition if filed in the meantime. If a review petition is not filed, it can be filed within fifteen days from the date of intimation to the accused about judgment of this Division or from the date of receipt a certified copy of the judgment whichever is earlier. Even if no review petition is filed, ends of justice demands that the death row convict should be informed that he has a remedy for review, and if he expresses his desire to file such petition, fixation of the date for execution of the sentence be made giving him a reasonable time to file the review petition. There is no prescribed rule or law to fix a date for execution of the sentence after the intimation about the confirmation or imposition of death sentence by the highest Tribunal of

the country. The jail authority shall fix the date in accordance with the orders of the Government as per sub-section (3) of section 20 keeping a reasonable time so that the review petition is disposed of. The jail authority should also afford the prisoner an opportunity to file a mercy petition and to inform him about the opportunity of filing a mercy petition.

Mr. Razzaq has submitted that the jail authority in violation of Rule 991(1) and 991(VI) of the Jail Code hurriedly fixed a date for the execution of the sentence without affording the petitioner necessary time required for filing review and mercy petitions as per law. Sub-rule (1) provides that immediately '*on receipt of a warrant for execution consequent on the confirmation by the High Court Division of a sentence of death, the Jail Superintendent shall inform the convict concerned that if he desires to submit a petition for mercy, it must be submitted in writing within seven days of the date of such intimation*'. Sub-rule (VI) provides that after intimation is received '*by government of the rejection by the Privy Council of an application for special leave to appeal or the dismissal of an appeal which has been admitted or if proof is not furnished before the date fixed that necessary papers, instructions and also funds have been sent to a firm of solicitors in England on behalf of the condemned prisoner, the District Magistrate and the Superintendent of the Jail will be informed by telegram and the Superintendent of the*

Jail will be authorized to fix the date of execution not less than twenty one days or more than twenty-eight days ahead of the date on which he receives such intimation'.

Rule 991 of the Jail Code is an enabling provision providing the procedures for dealing with a prisoner whose sentence of death has been confirmed by the High Courts. Under these provisions a condemned prisoner has been given the privilege to file a mercy petition to the Governor-General or His Majesty the King Emperor and also a leave petition to the Privy Council after a death sentence is confirmed by the High Courts. If the convict files a mercy petition, the jail authority will communicate it to the authority and the execution of sentence will be postponed pending a reply from the competent authority is received. If a leave petition is filed through jail, the Superintendent of Jail would communicate the same with a covering letter reporting the date fixed for the execution. The leave petition would be dispatched to England for disposal. The communication and the procedure of filing of such petitions would take some time. Pending a decision on both counts, the execution of sentence by the jail authority was considered to be in violation of the principles of natural justice. The leave petition had to be communicated to UK and the mercy petition to Calcutta (Kolkata). Considering that aspect of the matter, time limit of seven and twenty one days was mentioned in both sub-rules for getting the result of those petitions.

The position then prevailing has been changed. Under the changed circumstances the distance for communicating those petitions has shortened considerably, but no corresponding amendment has been made in the Jail Code. Under the prevailing laws, in respect of all penal offences other than the Act of 1973, even after the confirmation of sentence by the High Court Division, the condemned prisoner's right to file an appeal before this Division is guaranteed. Under the Act of 1973, the finality to a sentence is attained after the disposal of an appeal.

These Rules were framed in 1936 and considering the then prevailing facilities, the topographical and geographical conditions of this region, the said time limit of seven days and twenty one days has been mentioned in these provisions. The present condition is totally different. If one looks at the purpose for which these time limit has been mentioned in the Rules, it can be inferred that it is only to afford all privileges to a condemned prisoner to file a mercy or a leave petition to the competent authority after the confirmation of death sentence by the High Courts for ends of justice.

When a sentence of death is passed, the condemned prisoner is confined in a secluded place without waiting for the confirmation of sentence, a cell, apart from all other prisoners. He is kept in isolation and the facilities that are given to a prisoner are restricted to him. The jailor shall have the prisoner stripped and

searched-takes every article of private clothing and other articles from him-gives him a suit of jail clothing. Even visitation by his near ones is also restricted. Naturally a condemned prisoner would pass time with much mental agony and physical restraints. The moment a condemned prisoner is put in such cell, psychologically he is put on mental stress and agony. This mental agony is reached to such an extent that, sometimes some prisoners suffer a stroke and some of them suffer a mental sickness, resulting in loss of life before they are put to gallows. This is why, the Supreme Court of Bangladesh simplified the rules for preparation of paper book and gives special attention to hear death references on priority basis. Rules 979 to 1009 are applicable to such prisoners.

If a death sentence is confirmed by this Division, the prisoner is put on further mental pressure under peril of death. It is not desirable to keep a person in such inhuman condition for indefinite period. He should be informed of his privileges to file a review or a mercy petition, as the case may be, as soon as the intimation about the confirmation of sentence is received by the jail authority and to fix a short date for execution until the existing rules are amended. The petition of review and mercy should be disposed of expeditiously as soon as possible. If the prisoner does not choose to avail of the privileges, the sentence should be executed on the date so

fixed without delay, which have become ineffective under prevailing changed circumstances.

Learned Attorney General submitted that after the communication of the warrant for execution of sentence to the jail authority, two Executive Magistrates in presence of the jail authority intimated the petitioner of his privilege to file a mercy petition to the President but, the petitioner declined to file such mercy petition. According to him, the plea of mercy is taken only to delay the execution of the sentence. Mr. Razzaq does not dispute the submission of the learned Attorney General. His only grievance is that the jail authority is trying to execute the sentence hurriedly. So, before fixation of a date for the execution of the sentence, the petitioner was informed about his privilege to file a mercy petition. Though sub-rule (VI) of Rule 991 authorizes the Superintendent of Jail to fix a date for execution of the sentence not less than twenty one days ahead of the date on which he receives such intimation, this rule has rendered ineffective now.

This time limit of twenty one days mentioned in the rule is for the purpose of enabling the condemned petitioner to move a leave petition before the Privy Council. In this case the appeals have already been disposed of by this Division. The question of disposal of a leave petition does not arise. After the disposal of the appeals, the authority has afforded him opportunity to

file a mercy petition. Section 20(3) of the Act provides that the sentence awarded under the Act of 1973 shall be carried out in accordance with the orders of the Government. Death row convict has a privilege to make a mercy petition and to make a review petition-these are neither constitutional nor statutory rights. However, as a last resort, the convict should not be deprived of these privileges. If he avails of the privileges, the execution of the sentence be postponed until those petitions are disposed of.

On the other point raised by the learned counsel, it would be pertinent to examine some provisions of the Act. Section 6 of the Act enjoins the Government to set up one or more Tribunals, each consisting of a Chairman and not less than two and not more than four other members. The procedure provided for trial of offences under the general or other special laws applicable to Bangladesh are completely different from those provided in the Act of 1973, which is also a special law. Under the Act, the Chief Prosecutor or a Prosecutor appointed by the Government is entrusted with all the powers of investigation of a case with the assistance of an investigation agency and to conduct the prosecution against any person in respect of offences specified in section 3(2). Section 8(4) lays down the powers of the investigation officer. An investigation officer making an investigation in respect of any of the offences committed

under the Act may examine orally any person who appears to be acquainted with the facts and circumstances of the case. The investigation officer may reduce into writing such statement made to him in course of examination under section 8(4) of the Act-he is not bound to record any statement made to him. Chapter II under the heading 'Powers and Functions of the Investigation Agency', of the Rules framed by the Tribunal deals with the procedure for investigation in respect of any offences specified in section 3(2) of the Act. Rule 4 provides that the investigation officer shall act and work in accordance with the provisions of sections 8(1), 8(3), 8(4), 8(5), 8(6) and 8(7) of the Act while investigating a case.

Rule 6 empowers an investigation officer to investigate the facts and circumstances of the case and if necessary take steps for discovery and arrest of the accused. The investigation officer shall also maintain a case diary for each case until completion of such investigation but the said case diary can be used by such officer at the time of his deposition before the Tribunal and the Tribunal has also right to peruse the case diary for clarification or understanding any fact transpired at the time of investigation. The investigation officer may apply through the prosecutor to the Tribunal to commit any accused person in his custody for the purpose of interrogation for proper investigation of the case. Rule 18(2) provides that the investigation officer shall work

with the prosecutor and shall assist the prosecutor in formulating a formal charge against an accused person.

Rule 19 enjoins the Chief Prosecutor to hold further investigation or to stop the investigation being conducted by the investigation officer if the latter does not find prima facie case against an accused person. These provisions show that the powers of the investigation officer in conducting the investigation are to be supervised and regulated by the Chief Prosecutor. So the powers exercisable by the investigation agency are completely distinct from those which are being exercised by an investigation officer under the Code of Criminal Procedure or under any other special laws. More so, the provisions of the Code of Criminal Procedure and the Evidence Act are not applicable to the proceedings under the Act, 1973.

Under the Evidence Act the previous statement of a witness can be used (i) under section 145 to contradict the witness, (ii) under section 155 to impeach his credit, and (iii) under section 157 to corroborate his testimony. Section 162 of the Code of Criminal Procedure provides that no statement made by a person to a police officer in course of investigation under Chapter XIV shall be used for any purpose except by the accused for the purpose of contradicting the witness. Under the Evidence Act, if the accused intends to contradict a witness, his attention must be drawn to that part of the previous statement by

which it is indented to contradict him. There is no corresponding procedure in the Act of 1973 or the Rules. Naturally the procedures of contradicting a witness by a previous inconsistent statement of a witness under the rules of the Evidence Act are not applicable in the proceedings before the Tribunal. Rule 53 (ii) of the Rules states specifically that the cross-examination shall be strictly limited to the subject-matter of the examination-in-chief of a witness.

Now the question is in view of sub-section (2) of section 19, the Tribunal can take judicial notice of any statements recorded by an investigation officer which are inconsistent with the statements made in examination-in-chief before it. Section 19 of the Act and Rule 53(ii) are relevant to address the point raised at the Bar. These provisions read as under:

> *"19.(1) A Tribunal shall not be bound by technical Rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value.*
>
> *(2) A Tribunal may receive in evidence any statement recorded by a Magistrate or an*

Investigation Officer being a statement made by any person who, at the time of the trial, is dead or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable.

(3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(4) A Tribunal shall take judicial notice of official governmental documents and reports of the united Nations and its subsidiary agencies or other international bodies including non-governmental organizations."

Rule 53(ii) states;

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

Section 19(2) shows that the statement recorded by an investigation officer in course of investigation can be used as evidence under two eventualities only-in case of death of the person whose statement has been recorded or when his attendance cannot be procured even after taking necessary measures and the Tribunal is of the opinion that the delay to secure his attendance would be unreasonable.

The expression 'common knowledge' used in sub-section (3) of section 19 denotes facts that are commonly accepted or universally known, such as general facts of history or geography or the laws of the nature. When there is no direct evidence to connect the accused with a particular incident even though the common knowledge points fingers towards the accused, the Tribunals are given liberty to accept secondary sources, such as reports, articles, books, video interviews treating them as corroborating evidence without attempting to collect primary sources of evidence because the lapse of time impacts on the quality of evidence.

The statements of the witnesses are recorded by the investigation officers in the most haphazard manner. Officers conducting the investigation not unnaturally record what seem in their opinion material to the case at that stage and omit many matters equally material and, it may be, of supreme importance as the case develops. Besides, in most cases they are not experts of what is and what is not evidence. The statements are recorded hurriedly subject to frequent interruptions and suggestions from by-standers. All they cannot in any sense be termed depositions for, they are not prepared in the way of depositions, they are not read over to nor are they signed by the makers of the statements. There is no guarantee that they do not contain much more or much less than what the witness has said. Normally during

investigation, it is the question posed to the witness that triggers the witness' mind and memory. The witness hardly ever produces information spontaneously. Suppose an incident lasted for about 5/6 hours or even more. The situation was so complex that it would have been easy to write a book about that episode alone. The witness disclosed about what he was asked pinpointing a particular fact. Obviously further questioning is necessary to reticence all information from him. So leading questions which have not been banned at Tribunals are not only suggestive because the answer is included in it–the witness will then narrate by memorizing the old facts.

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

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

It is to be remembered that the object of cross-examination is to bring out desirable facts of the case modifying the examination-in-chief. The other object of cross-examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness. In examination-in-chief a witness discloses only a part of the necessary facts, not merely because the witness is a partisan of the party calling him but also his evidence is given only by way of answers to specific questions, and the prosecuting counsel producing him usually calls for nothing but the facts favourable to his party. Cross-examination, then has for its utility, the extraction of the remaining qualifying circumstances of the testimony given by the witness in his examination-in-chief.

Mr. Razzaq argued that the expressions "the party shall be at liberty to cross-examine such witness on his credibility" are sufficient to infer that the Rules have not debarred the Tribunal to take into consideration the statements of any witness made in the course of investigation to the investigation officer. The law as it stands, it is difficult to accept his contention. The basic principles of interpretation of statutes is that laws should be construed to carry out the intention of the legislature. The function of the court is to interpete a

statute according to its intent. When the words are clear and unambiguous, it would not be open to courts to adopt any hypothetical construction. (Pakistan V. Akhlaque Hossain, 17 DLR(SC)545).

It should be borne in mind that apart from contradiction, the credibility of a witness may be determined by way of cross-examination in respect of his integrity, his ability to disclose facts, his consistency in his statement. This follows that in determining the credit of a witness various considerations have to be looked at by the Tribunal. In every case it is seen, a witness mixes a certain amount of untruth in his evidence even when he gives to substantiate a correct account. Part of this admixture of falsehood may be the result of inadvertence and may be the very natural vagaries of observation and memory. Obviously they should not affect the credibility of a witness at something by way of exaggeration, but even an exaggeration that is intentional could be discouraged without impairing the acceptability of the rest of the evidence provided that these super additions did not go to the root of the matter.

Where the only witness, alleged to be an eye witness, is found to be highly interested in the prosecution, these facts are not by themselves sufficient for holding that he has also lied while narrating the principal events because the maxim "*falsus in uno, falsus in omnibus*", has not been universally accepted by the jurists of this sub-continent.

One American author has stated that '*the maxim is in itself worthless; first in point of validity .... and secondly, in point of utility because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore, it is superfluous form of words*'. Where on the scrutiny of evidence, one finds that on the whole the evidence is more false than true, it would be dangerous to act upon it. A witness is normally to be considered independent, unless he springs from sources which are likely to be tainted and he has no enmity against the accused to wish to implicate him falsely. The testimony of an eye witness which is natural as to the occurrence and whom one would expect to have seen the occurrence, cannot be doubted only because he happens to be related, or otherwise, to the party on whose behalf he gives evidence.

An eye witness who is a relative of the victim is a competent witness but his evidence cannot be accepted without close and careful examination if it is found that other witnesses were present at the scene of crime but the prosecution has withheld them without any reasonable explanation, or unless the evidence of this witness is shaken by cross-examination or his demeanour is such as to lead one to the inevitable conclusion that he has perjured himself-no court is entitled to discard evidence which are merely speculative. In order to judge the credibility of a witness the court is not confined only to observe the way

in which the witness has deposed or the demeanour of the witness. It is open to the court to look into the surrounding circumstances as well as probability so that it may form a correct idea of the trustworthiness of a witness. The truthfulness or reliability of a witness must be tested by surrounding circumstances brought out in evidence.

If there is any matter against a witness, no adverse inference can be drawn against him unless he has been given an opportunity to explain it. But in respect of crimes committed under the Act of 1973, because of the influx of time, most of the eye witnesses are not available and in some cases the witnesses are not willing to depose for fear or reprisal or for any other cause or the witness has lost interest by efflux of time. In respect of charge No.6, P.W.3 is the only surviving witness of the family. There was no scope to witness the incident by anyone other than this witness. The defence failed to shake her testimony in any manner. Mr. Razzaq finds it difficult to point out any inconsistency in her statements in the course of cross-examination. He, however, submitted that it was due to the fault of the defence counsel. P.W.3 was thoroughly cross-examined by the defence for two days but the defence failed to extract any inconsistency from her statements made in the Tribunal in any manner.

A witness can be held unreliable or his testimony can be deemed not credible if; (a) his statement is inherently improbable or contrary to the course of nature, that is to say, he says that he has identified the accused by face in darkness, or that he has recognized his voice from a mile away, or that he has seen the accused killing the deceased with a dao whereas the medical evidence proved that the deceased succumbed to bullet injury; (b) his deposition is contradictory or inconsistent i.e. at one place he says that "X" was the murderer but in another breath, he says it was 'Y'; (c) if he is found to be biased or partial in relation to the parties in the cause; (d) his demeanour, whilst under examination, is found abnormal or unsatisfactory. None of the above conditions is present in this case.

Apart from what is stated above, in the case in hand there are some uncontroverted, incriminating circumstantial evidence which corroborated the testimony of P.W.3. Therefore, there is no scope under the rules of evidence to infer contradiction in the statements of the witnesses with what they have stated to the investigation officer. This Division on a thorough assessment of the evidence of the witnesses came to a definite conclusion by majority that the witnesses are reliable and natural. There is no scope to infer otherwise in a review petition. In view of what is stated above, we are of the view that this Division has committed no error of law in holding

that the cross-examination of a witness shall be strictly confined to the subject matter of the statements made in examination-in-chief of a witness. There is thus no merit in the contention of the learned counsel for the petitioner.

The Tribunal, as per law, is not bound to follow the rules of evidence which are normally applicable in proof of a fact. It may admit a photograph or a news paper reporting or an article in a magazine in proof of a fact, if such fact is relevant to connect the accused with the incident for which he is being tried. The technical rules for admitting digital evidence are also not applicable and it can take films and tape recording statements, even a statement recorded by the investigation officer of any witness, who is dead or whose presence cannot be procured without delay and if the Tribunal feels that his statement is relevant to corroborate a fact in issue or which it deems to have probative value. This is because the trials are being held at a belated stage; most of the material evidence are lost in many cases; most of the members of the family were killed and the neighbouring witnesses escaped to avoid similar eventuality; the surviving witnesses are not interested to disclose the real incident because of the harrowing incidents of brutalities perpetrated against unarmed innocent people of the country by an organized armed force with the help of Razakars, Al-

Badr, Al-shams and Peace Committee members for causes mentioned above.

Criminal law generally, whether municipal or international do not recognize the doctrine of limitation for trial of persons for War Crimes, Genocide and Crimes against Humanity. For this reason some serious violations that occurred in World War-11 in 1940s and in Indonesia in 1960s are being investigated and prosecuted now after lapse of time. In Bangladesh and Combodia, the incidents occurred in 1970 and 1971. The perpetrators are old, victims and their family members are also old although their wounds have not been healed up-the younger generation have limited knowledge of the atrocities caused by the perpetrators. Thus the focus is on the use of old evidence in respect of these crimes. Alphos M M Orie, a Judge of the International Criminal Tribunal for the former Yugoslavia wrote in an article titled 'Adjudicating Core International Crimes Cases in which Old Evidence is introduced', that if someone gives testimony in court, it is quite hard to say whether it is old or fresh evidence. The legal approach does not produce a fully satisfactory answer to the challenges encountered when dealing with old evidence about events that have long since passed. The meaning of the word 'evidence' differs from one legal system to another. In case of inconsistent testimony with prior statements it was observed in some cases that this was due to 'societal pressure on the witnesses'.

The memory of the witnesses who are still alive may be affected. They have spoken extensively with other victims or potential witnesses. Archives where these documents have been preserved have been destroyed by the interested persons taking advantage of change of political scenario. Potential witnesses have moved on to such an extent in their lives that they do not wish to reopen a traumatic past by co-operating with the prosecuting agency. So, witnesses' evidence may be compromised by memory loss, a re-characterization of what happened helped along by express or implicit pressure from peers and interested groups, or unavailability. The prosecution banks upon one or two witnesses, reports, analyses, commentaries and documentaries approaching the problems from all angles. Upon consideration of these factors this Division in its majority opinion observed:

> "*There is no provision either in the Act or the Rules affording guidance for the investigating officers similar to those provided under sections 161 and 162 of the Code of Criminal Procedure (the Code) and rule 265 of Bangladesh Police Regulations, Part One, for recording statements of witnesses in course of investigation of a case. Under section 161 of the Code, a police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case and he may*

reduce into writing such statement made to him, and if he does so he shall make a separate record of the statement. Similarly rule 265 enjoins the police officers to record or note the statement of any witness examined by them. It further provides that the investigating officer should record statements in the language of the witness and it should be in full containing all the relevant facts connected with the case. During the trial 'the court shall refer to these statements at the request of the defence and shall also furnish with the copies thereof'.

"According to proviso of section 162 of the Code, when a witness is called for, the prosecution in the trial, any part of his statement, if duly proved, may be used by the accused and with the permission of the court by the prosecution, to contradict such witness in the manner provided by section 145 of the Evidence Act. This enables the prosecution to explain the alleged contradiction by pointing out that if any part of the statement used to contradict be read in the context of any other part, it would give a different meaning; and if so read, it would explain away alleged contradiction. If one could guess the intention

of the Legislature in framing section 162 of the Code in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during the investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence.

"This provisions of the Code are not applicable in view of section 23 of the Act, 1973, which debarred from applying the provisions of the Code and the Evidence Act in the proceedings under the said Act. The Rules are totally silent as to the manner of examination of a witness by the investigating officer. It may be either orally or in writing. Even if it is in writing, there is nothing in the Rules therein guiding the procedure and the manner of use of the earlier statement of such witness in course of the trial. Sub-rule (ii) of rule 53, speaks of 'contradiction of the evidence given by him'. This word 'contradiction' is qualified by the word 'examination-in-chief' of a witness. So, the contradiction can be drawn from the statements made by a witness in his 'examination-in-chief' only, not with respect to a statement made to

the investigating officer of the case in course of investigation."

The next question for consideration is whether there is error apparent on the face of the record which calls for interference of the impugned judgment. It is an established jurisprudence that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only against patent error of law. Where without any eleborate argument one could point to the error and say that here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions to be entertained about it, a clear case of error apparent on the face of the record would be made out. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected but does not include the correction of any erroneous view of law taken by the Court.

Further, it has now been settled that an error is necessary to be a ground for review but it must be one which is so obvious that keeping it on the record will be legally wrong. The moot point is, a party to a litigation is not entitled to seek a review of judgment merely for the purpose of rehearing or a fresh decision of the case. The power can be extended in a case where something obvious has been overlooked-some important aspects of the matter has not been considered, the court can reconsider the matter. There are exceptional cases where the court

can remedy its judgment. In the alternative, it may be said that the error must also have a material real ground on the face of the case. A petition over ineffectually covered ground or minor mistakes of inconsequential import does not call for review.

This Division has repeatedly held that the court should not be oblivious of the theme that when the finality is attached to the judgment delivered by a court, particularly the judgments at the apex level of the judicial hierarchy, upon a full-fledged hearing of the parties, a review petition being neither in the nature of a rehearing of the whole case nor being an appeal against judgment, review is not permissible only to embark upon a reiteration of the same contention which were advanced at the time of hearing of the appeal, but were considered and repelled in the judgment under review. It was also expressed that while dispensing justice, it is the duty of the court to resolve the issue of law properly brought before it and once it is done, the finality is reached and then a review cannot be made on any grounds whatsoever. It is because of the fact that an opinion pronounced by this Division which stands at the apex of the judicial hierarchy should be given finality and any departure from that opinion will be justified only when circumstances of a substantial and compelling character make it necessary to do so. A finality of the judgment will not be reopened except where a glaring omission or patent mistake or grave

error apparent on the face of the record has crept in by judicial fallibility.

Thus, the powers of review can be exercised sparingly within the limits of the statute. In the realm of law the courts and even the statues lean strongly in favour of finality of decisions legally and properly made. If the cases are reopened on flimsy grounds which have already been addressed by the courts then there will be no end to the litigation. That is why, the power of review is restricted by given guidelines of the apex courts of the sub-continent. The above views have been expressed in the cases of Major Bazlul Huda Vs. State, 63 DLR(AD)62, Messrs Thungabhandra Industries Limited V. The Government of Andhra Pradesh, AIR 1964 SC 1372, Sheonandan Paswan V. State of Bihar, AIR 1983 SC 1125, Secretary, Ministry of Finance V. Md. Masdar Hossain, 21 BLD(AD) 126, Earshed Ali Shikder V. State, 56 DLR(AD)87, Ekushey Television Ltd. Vs. Dr. Chowdhury Mahmood Hasan, 55 DLR(AD)26, Mohd. Amin Khan V. Controller of Estate Duty, PLD 1962(SC) 335, Zulfiqur Ali Bhutto V. State, PLD 1979 SC 741, Mohd. Hussain V. Ahamad Khan, 1971 SCMR 29, Fazle Karim Vs. Government of Bangladesh, 48 DLR(AD)178, Tarique Rahman Vs. Government of Bangladesh, 63 DLR(AD)162, Modern India Caterers V. Lieutenant Governor, 1980 SC 674 and G.L. Gupta V. D.N. Mehta, AIR 1971 SC 2162. We find no error of law in the judgment that call for review of the same.

The power of the President to commute any sentence though is not subject to any constitutional or judicial restraints. It is intended to afford relief from undue harshness arising out of evident mistake. This is an executive power. The proceedings for commutation of sentence by the President being an executive character, a condemned prisoner has no right to insist on an oral hearing. The manner of consideration of such petition lies within the discretion of the President. Death row convicts are afforded such privilege of filing of a mercy petition as a last resort on humanitarian consideration, but it cannot be equated with a right of appeal which is a statutory right. The President may or may not commute the sentence but in respect of an appeal, the appellate court can set aside the conviction on a reappraisal of the evidence afresh. It is in rarest of the rare cases a mercy petition or a review petition is allowed.

A right is a protection that cannot be taken away, but a privilege is different. They generally are limited in scope, and can sometimes be overborne or waived by other considerations. Rights are legal, social, or ethical principles of freedom or entitlement; that is, rights are the fundamental normative rules about what is allowed of people or owed to people, according to some legal system, social convention, or ethical theory. Rights are of essential importance in such disciplines as law and ethics, especially theories of justice and deontology.

There are different categories of rights, of them, we are concerned with legal rights, which are based on a society's customs, laws, statutes or actions by legislature. Legal rights are sometimes called civil rights or statutory rights and are culturally and politically relative since they depend on a specific societal context to have meaning. On the other hand, a privilege is a special entitlement to immunity granted by the State or another authority to a restricted group, either by birth or on a conditional basis. It can be revoked in certain circumstances. In modern democratic states, a privilege is conditional and granted only after birth. By contrast, a right is an inherent, irrevocable entitlement held by all citizens or all human beings from the moment of birth.

While arguing about the applicability of Jail Code in respect of a convict under the provisions of Act, 1973, a subtle point was raised at the Bar as to whether Bengal Jail Code has any force of law. This is totally based on a wrong notion and this Code is very much holds the field until a new legislation is promulgated under the changed circumstances. This Code has all trappings of law and it is being followed by the jail authorities. The expression "Code" means a collection or system of laws. It comes from Roman Law; the collection of laws and constitutions made by order of Emperor Justinian is distinguished by application of 'The Code' by way of eminence; (Jowitt,

"The Dictionary of English Law, 1959, Vol.I, page-399"). But etymologically it is derived from Latin Codex, the stock or stem of tree- originally it meant the board covered with Wax on which the ancients originally wrote. It is usually used for the body of laws established by the legislative authority of the State and designated to regulate completely, so far as a statute may, the subject to which it relates. It is, therefore, a law- there is no dispute about it, for example; the Code of Criminal Procedure; the Code of Civil Procedure; the Penal Code etc.

It is stated that the following Acts and Regulations regulate the establishment and management of jails, the confinement and treatment of persons therein, and the maintenance of discipline amongst them; (a) The Prisons Act, No.IX of 1894, as amended, (b) The Prisoners Act No.V of 1871 as amended (section 15), (c) The Prisoners Act, No.III of 1900, as amended, (d) Regulation No.III of 1818 (Bengal Code) for the confinement of State prisoners, (e) Act XXIV of 1855, an Act to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts; (f) Act VIII of 1897, the Reformatory School Act, as amended; ((g) Act IV of 1912, the Lunacy Act, as amended; (h)Act IV of 1909, the Whipping Act, as amended; (i) Bengal Act, No.II of 1922, the Bengal Children's Act, as amended; (j) Act XXV of

1934, the Factories Act, as amended etc. are compiled in it.

In the preamble it is provided that the provisions of the Civil Procedure Code (Act V of 1908), the Code of Criminal Procedure (Act V of 1898) as amended and the Penal Code (Act XLV of 1860) as amended, which relate to the confinement of prisoners, the execution of sentences, appeals, lunatics, and the like, must also be compiled with in connection with prison administration. Though in the Act of 1973, the provisions of Code of Criminal Procedure and the Evidence Act are made inapplicable by section 23, it is totally silent about the inapplicability the Bengal Jail Code. This Bengal Jail Code being a compilation of previous laws for the superintendence and management of jails is the only piece of rules on the subject prevailing and is being followed by jails throughout the country.

The prisoners either under trial or convicted are dealt with in accordance with these Rules. There is no doubt that it is practically an obsolete Rules but in the absence of anything to govern the practices of the jails, it is no doubt applicable to jails subject to certain limitations. The provisions of the Penal Code which are not inconsistent with the provisions of Act of 1973, are applicable to the proceedings of the Tribunal. What is more, the Act of 1973 and the Rules made thereunder provide for the jurisdiction of the Tribunals; the

liability for the crimes; the constitution of the Tribunals; the appointment of the prosecutors and the investigation officers; the commencement of the proceedings; the procedure of trial; the powers of Tribunals; the provision for defence of an accused person; the restriction on adjournments; the mode of use of statements or confessions of accused persons; the procedure for pardon of an approver; the framing of charge; the right of accused person during trial; the protection of the witnesses; the rules of evidence; the judgment and sentence; the right of appeal, the powers of the Tribunals to frame Rules and the execution of sentence etc. But it is totally silent about the management, confinement and treatment of prisoners. In absence of any provisions in the Act of 1973 and the Rules framed thereunder in respect of the confinement and treatment of both under trial and convicted prisoners. After the conviction and sentence, a warrant of sentence is issued and a copy is communicated to jail authority. Naturally the jail authority will arrange his confinement in jail in accordance with the Jail Code. Thus there is no doubt that the provisions of the Jail Code will hold the field subject to certain limitations. It is provided that the provisions of the Act of 1973 shall have effect notwithstanding anything inconsistent therewith contained in any other laws for the time being in force. The Rules framed thereunder are merely the detailed provisions to

carry out the purposes of the Act. As there is no provision in the Act dealing with the under trial and convicted prisoners. Therefore, the provisions of the Act and the Rules are supplementary to the Jail Code. The question of inconsistency does not arise at all since the Act does not provide any provisions to regulate the maintenance and confinement of a prisoner after arrest or conviction.

On the question of sentence the learned counsel raised two points. Firstly, it is contended that natural justice equity and ends of justice demands that the sentence should be commuted to life since the sentence of death has been awarded relying upon a single witness. This submission is devoid of substance. In respect of charge No.6, it is true that there is one eye witness but, there are strong circumstantial evidence to corroborate the evidence of P.W.3. It was found that this witness is trustworthy, natural and wholly reliable one and that there were strong circumstantial evidence to corroborate her testimony. Considering the brutality of the incidents we awarded the sentence of death, which according to us, was proportionate to the gravity of the crimes. It was contended that the sentence was harsh. What is fair play, moral, humane or inoffensive or harsh to the conscience in one country is not necessarily so in another values, standards, and principles. They vary from place to place and from time to time. The penalty of cutting off hands

and feet for theft has been abolished as contrary to humanity by Europian community and our country. The philosophy behind it is that it is a violation of the principles of natural justice or human rights. On the other hand, the death penalty for murder and other heinous crimes have been retained by Asian and Africa countries including Bangladesh and some states in the United States. According to our standards, the cutting off of hands and feet is an inhuman punishment while breaking of the neck is not.

There is no doubt that murder is a worse crime than theft and no argument is advanced for or against the retention of the death penalty. The point is not, however, whether the punishment is permissible as being in accordance with the standards of humanity, and the problem is thus to decide what is human punishment and what is not. Our law says hanging is humane but the European countries, which have abolished death penalty, might say that it is not. It is thus evident that all standards are relative, and that in deciding what punishment is contrary to humanity, the standards of Bangladeshi Law and of Bangladesh Constitution are to be applied. The conclusion that can be arrived at is that natural justice, equity and good conscience, morality and humanity in the contexts referred above must mean Bangladeshi as to what those virtues comprise as interpreted by our laws; and not some

absolute platonic 'Form', that is superhuman, eternal and international.

Secondly, it is contended that this Division committed error of law in imposing death sentence to the petitioner without any finding that the sentence awarded by the Tribunal was "manifestly inadequate" and "unduly lenient". In this connection, learned counsel has referred to two cases, Ram Narain V. State of UP, 1970(3) SCC 493 and Madho Ram V. State of UP, AIR 1973 SC 467.

In Ram Narain, eight accused persons forming an unlawful assembly with the common object of killing the deceased Bitta committed the murder. The trial court sentenced them to imprisonment for life. Complainant took a revision petition for enhancement of the sentence in respect of three accused persons who were assailants according to him and the appellants before the Supreme Court. The High Court allowed the revision and enhanced the sentence to one of death. The High Court observed that the murder was cold blooded and a premeditated one and that three appellants inflicted fatal injuries to Bitta and deserved the extreme penalty of death. In the context of the matter, the Supreme Court held that in the case of murder, the discretion is limited to two alternatives for the sentence that could be either death or imprisonment for life. The proper exercise of discretion is to be exercised on a proper consideration of all the relevant facts and circumstances keeping in view of the broad

objective of sentence being neither too severe nor lenient. "*It is only when the sentence appears on the facts and circumstances of the case to be so manifestly inadequate as to have resulted in failure of justice that enhancement of sentence may be justified by the appellate court*". The court observed. Under the existing law in cases of murder "*it is necessary for the court to give reasons for not imposing the extreme penalty of death and the discretion of the court in awarding the lesser penalty is, therefore, wider than before the amendment of the law in this respect*". The Supreme Court interfered with the sentence mainly on the reasonings that the exercise of discretion by the High Court could not be described to be contrary to the recognized principle, and the State did not consider that the ends of justice required enhancement of the sentence but, the High Court interfered with at the instance of the informant.

In the latter case, similar views have been expressed. It was observed "*it is no doubt true that the question of a sentence is a matter of discretion and when that discretion has been properly exercised along accepted judicial lines, an appellate court should not interfere to the detriment of an accused person except for very strong reasons which must be disclosed on the face of the judgment. If a substantial punishment has been given for the offence of which a person is guilty, after taking due regard to all relevant circumstances normally there should*

be no interference by an appellate court. On the other hand, interference will be justified when the sentence is manifestly inadequate or unduly lenient in the particular circumstances of the case". In that case it was found that the appellant suddenly without any warning attacked the deceased who was unarmed. From the nature of the injury described in the post mortem report, it was observed that the blow must have been inflicted by the accused with considerable force. The trial court sentenced the accused to imprisonment for life. The High Court did not agree with the lesser sentence in the circumstances of the case and was of the view that the sentence imposed by the trial court was 'unduly lenient' and 'manifestly inadequate' and enhanced the sentence to one of death. The Supreme Court affirmed the sentence of death.

The statement of law argued in those cases are not applicable since the law in India has been amended on the question of awarding a sentence of death to a person. Section 354(3) of the Indian Code of Criminal Procedure provides 'in the case of sentence of death, special reasons for such sentence' should be given. Whereas, in our corresponding provision the language used in section 367(5) is quite distinct which provides, "*If the accused is convicted of an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the court shall in its, judgment state the reasons for the sentence awarded*". The

language used in sub-section (2) of section 20 of the Act is in *pari-materia* with section 367(5) of the Code. It is not stated that in case of awarding sentence of death special reasons should be assigned by the court. Under the sentencing principles of India, the imposition of lesser sentence is the rule and the imposition of the maximum sentence is an exception and therefore, while awarding the maximum sentence the court is required to assign special reasons. In those cases the trial courts on proper assessment of evidence was of the view that they were fit cases for awarding a sentence of imprisonment for life, which was the rule. In exceptional cases only a death sentence may be awarded on assigning special reasons. Even then the Supreme Court maintained the death sentence in the later case. In respect of the Act of 1973, the language is couched in the similar manner which states '*(2) upon conviction of an accused person, the Tribunal shall award sentence of death or such other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper*'.

The language is so clear that in convicting the accused person death sentence is the proper one, and if the Tribunal feels that a lesser sentence is to be awarded, it shall assign reasons therefor and in such case, it shall consider the gravity of the crime and the culpability of such accused person. The Tribunal has totally ignored the above principles and the position of

law and imposed the lesser sentence on assigning a reason which does not carry the true intent of the sentencing principle. The principles of sentencing procedure, are uniform in our country and the court while awarding a sentence shall consider (a) the nature of the offence, (b) the culpability of the offender, (c) the circumstances of its commission, (d) the age and character of the offender, (e) the injury to individuals or to society, (f) effect of the punishment on the offender, amongst many other factors which would ordinarily be taken in mind.

Considering the nature of the offence and culpability of the petitioner in respect of charge No.6, this Division observed that while deciding just and appropriate sentence to be awarded for any of the offences to any accused person, the aggravating and mitigating factors and circumstances in which the crimes have been committed are to be balanced in a proportionate manner. The petitioner, it was observed, has committed worst and barbarous types of Crimes against Humanity. He took active role in the killing of almost the entire family except one, and participated in the incident of rape of innocent victims. His acts are comparable to none. Entire world raised voice against the barbaric Crimes against Humanity perpetrated in Bangladesh. Justice demands that it should impose a sentence befitting to the perpetration of the crime so that it reflects public abhorrence of crime. Cases of murders in a cold and calculated manner without

provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent persons. More so, the accused expressed no repentance for his conduct at any stage. His direct participation in the incident was cruel and brutal. Considering the nature of the offence, this Division by majority was of the view that the sentence of death was just and proper proportionate to the gravity of the crime.

It was further observed that while considering the punishment to be given to an accused person, the court should be alive not only to the right of the perpetrator, but also rights of the victims of the crime and the society's reasonable expectation from the court for the proportionate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused person. This Division observed:

"We noticed the atmosphere that was prevalent during the recording of the evidence of P.W.3 from the note sheet of the tribunal. She was narrating the events of brutal killing of her mother and siblings; two of them were so much ravished that they fell into the jaws of death and the other-a child of two years was dashed to death. She was lamenting at the time of deposing as evident from the remarks noted by the tribunal like a baby, and then lost her sense. A pathetic heart-breaking atmosphere seized the proceedings of the tribunal. If one reads her testimony it will be difficult to control

emotion. The murders were extremely brutal, cold blooded, diabolical, revolting so as to arouse intense and extreme indignation of the community. It was perpetrated with motive. On a close reading of the evidence of P.W.3 one can instantaneously arrive at a conclusion that there is something uncommon about the incidents of murder which render sentence of imprisonment for life inadequate and deserve for a death sentence.

"The term of Crimes against Humanity has come to mean anything atrocious committed on a large scale. These crimes are committed against civilian population during war; or persecution on political or racial or religious grounds in execution of any crime. These offences by nature are heinous. In the instant case, the appellant along with his cohorts attacked the house of Hazarat Ali Laskar, killed his wife, raped two minor daughters and then killed them with a minor son only because he supported the Awami League and was an admirer of Sheikh Mujibur Rahman. These nafarious acts were perpetrated in a preplanned manner and in doing so, the appellant, who led the team exceeded all norms of humanity. He was involved in Islami Chhatra Sangh and Jamat-e-Islami politics from before the 1970 general election at Mirpur and accordingly, he had harboured grudge against Hazrat Ali Lasker. The aim of the perpetrators was to wipe out the family of Hazrat Ali Lasker, but incidentally P.W.3 survived. The horrible picture of the carnage that had been unleased was so brutal that the sentence of death is to be taken as the proper sentence. If no such sentence is passed in the facts of the case, it will be difficult to inflict a death sentence in

other cases. The appellant participated in the incident in a planned and concerted manner with his cohorts and therefore, he cannot escape the maximum sentence for the offence he committed despite finding that the offences committed by the appellant are predominantly shocking the conscience of mankind.

"The appellant did not show any sort of repentance any point of time for his acts and deeds. The learned counsel for the appellant also did not pray for awarding the minimum sentence in case the Government's appeal against the sentence is found maintainable. There is no cogent ground to take lenient view in awarding the sentence. Therefore, the sentence of imprisonment of life awarded to the appellant in respect of charge No.6 is based on total non application of mind and contrary to the sentencing principle. Awarding of a proper sentence in the facts of a given case is to assist in promoting the equitable administration of the criminal justice. Punishment is designed to protect society by deterring potential offenders. P.W.3 is a natural witness and it is only possible eyewitness in the circumstances of the case who cannot be said to be interested. In such incident, death sentence is the only proper sentence.

'While awarding the sentence of imprisonment for life, the tribunal was of the view that the 'sentences must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender'. This finding is inconsistent and not inconformity with law. If the gravity of the offence is taken as the basis for awarding sentence to the appellant, it is one of the

fittest case to award the appellant the highest sentence in respect of the charge no.6 in which the killing and rape were brutal, cold blooded, diabolical and barbarous. If the tribunal does not award the maximum sentence considering the gravity of the charge, it will be difficult to find any other fit case to award such sentence'.

It is feebly contended by Mr. Razzaq that the sentence of death having been awarded by this Division, the warrant of execution of the sentence ought to have been issued and served by this Division, and in this case since the warrant having been issued by the Tribunal in violation of law, the sentence cannot be legally executed. In this connection he has drawn our attention to rule 979 of the Jail Code. The execution of the sentence should be postponed till a fresh warrant is communicated by an officer of this Division, it is finally contended.

Rule 979 provides that when a prisoner is sentenced to death, the police officer who attends the trial shall at once inform the Superintendent of Jail in writing of the sentence that has been passed by the court, and, if the sentence is passed by the Sessions Judge, that officer will issue a warrant of commitment pending confirmation of sentence by the High Court Division. When the sentence has been confirmed by the High Court Division or passed by it a warrant for execution of the sentence will be transmitted by the Sessions Judge or an officer of the High Court Division, as the case may be, to the

Superintendent of Jail in which the person for sentence is confined. So this provision shows that in both the cases, where the sentence has been confirmed by the High Court Division or the sentence has been given by it, the warrant of execution shall be transmitted by the Sessions Judge or an officer of the High Court Division, as the case may be. In this case, this Division passed the death sentence and after the judgment, the Tribunal communicated the said sentence. There is no provision in this rule that if the communication of the sentence is made by an inferior Tribunal, it will be illegal or void. This is merely an irregularity and this will not be said to be ineffective. The legislature has used the expression 'will be' in respect of communication of the sentence. So, if the inferior Tribunal communicates the warrant as per direction of this Division, it cannot be said that the warrant was inoperative. This is a mere technical formality.

From the above conspectus we sum up our opinion as under. The review petitions are maintainable. A review petition should not be equated with an appeal. In criminal matters, the power of review must be limited to an error which have a material, real ground on the face of the case. The finality attached to a judgment at the apex level of the judicial hierarchy upon a full fledged hearing of the parties should be re-examined in exceptional cases and a review is not permissible to embark upon a reiteration of the same points.

The period of limitation provided in the Appellate Division rules will not be applicable in respect of a review petition from a judgment on appeal under the Act of 1973. The period of limitation is fifteen days and the review petition should be disposed of on priority basis. If a warrant of death for execution is communicated to the Jail authority after it is confirmed or imposed by this Division, the condemned prisoner should be afforded an opportunity to file a mercy petition and he should also be afforded an opportunity to meet his near ones before the execution of the sentence. If the jail authority fixes a date for execution of the sentence, the same cannot be taken as has been done hurriedly. If any review or mercy petition is filed or pending, the sentence cannot be executed unless the petitions are disposed of. So, the period of seven days or twenty one days mentioned in sub-rules (I) and (VI) of rule 991 of the Jail Code have no force of law under the changed conditions.

For the reason stated above, we find no merit in these review petitions. The petitions are accordingly dismissed on merit.

C.J.

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The 12th December, 2013
Mohammad Sajjad Khan

APPROVED FOR REPORTING