

**IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION**

PRESENT:

Mr. Justice Surendra Kumar Sinha,
Chief Justice
Mrs. Justice Nazmun Ara Sultana
Mr. Justice Syed Mahmud Hossain
Mr. Justice Hasan Foez Siddique

CRIMINAL APPEAL NO.143 OF 2014.

(From the judgment and order dated 29.10.2014 passed by the International Crimes Tribunal No.1, Dhaka in ICT-BD Case No.03 of 2011.)

Motiur Rahman NizamiAppellant.

=Versus=

The Government of Bangladesh, represented by the
Chief Prosecutor, International Crimes Tribunal,
Dhaka, Bangladesh

.....Respondent.

For the Petitioner : Mr. Khondker Mahbub Hossain,
Senior Advocate with Mr. S. M.
Shahjahan, Senior Advocate,
instructed by Mr. Zainul
Abedin, Advocate-on-Record.

For the Respondent : Mr. Mahbubey Alam, Attorney
General, with Mr. Murad Reza,
Additional Attorney General,
Mr. Momtazuddin Fakir,
Additional Attorney General,
Mr. Biswajit Debnath, D.A.G.,
Mr. Ekramul Hoque, D.A.G.,
Mr. Khondaker Diliruzzaman,
D.A.G.,
Mr. Masud Hasan Chowdhury,
D.A.G., and Mr. Bashir Ahmed,
A.A.G., instructed by Mrs.
Mahmuda Parveen, Advocate-on-
Record.

**Date of Hearing : 09.09.2015, 17.11.2015,18.11.2015,
23.11.2015, 24.11.2015, 25.11.2015, 30.11.2015,
01.12.2015, 02.12.2015,07.12.2015 and 08.12.2015.**

Judgment on: 06.01.2016.

J U D G M E N T

Nazmun Ara Sultana, J: This Criminal Appeal under
section 21(1) of the International Crimes (Tribunals)

Act, 1973 has been preferred by the convict appellant Motiur Rahman Nizami against the judgment and order dated 29.10.2004 passed by the International Crimes Tribunal-1 in ICT-BD Case No. 03 of 2011 convicting the accused-appellant on the Charge Nos. 1,2,3,4,6,7,8 and 16 for the offences of Crimes Against Humanity under section 3(2)(a)(g) and (h) read with section 4(1) and 4(2) of the International Crimes (Tribunals) Act, 1973 and sentencing him to imprisonment for life in respect of Charge Nos. 1,3,7 and 8 and to 'death' in respect of Charge No. 2, 4,6 and 16 under section 20(2) of the said Act of 1973.

During the War of Liberation of Bangladesh in 1971, the Pakistani armed forces, with the cooperation and aid of its auxiliary forces namely Rajakars, Al-Badr, Al-shams, committed atrocities, including murder, rape and other crimes against humanity and genocide throughout the whole of Bangladesh. During nine-month long Liberation War of Bangladesh about three million people were killed, nearly a quarter million women were raped and over ten million people were deported to India causing brutal persecution upon them. Following the launching of "Operation Search Light" by the Pakistani military on the night following 25th March, 1971 the Liberation War of Bangladesh started and ended on 16th of December, 1971 with surrender of Pakistani military personnel present in Bangladesh. The people of the then East Pakistan wholeheartedly supported

and participated in the war of liberation of Bangladesh but a small number of Bangalees, Biharis and members of some religion-based political parties collaborated with the Pakistani military to oppose the creation of independent Bangladesh. They co-operated and aided the Pakistani armed forces to commit murder, rape, and other crimes against humanity and genocide. Towards the end of nine-months War, sensing Pakistan's imminent defeat, the Pakistani military with the aid and co-operation of its auxiliary forces namely Razakars, Al-Badr, Al-Shams, systematically rounded up, tortured and killed hundreds of intellectuals of different professions-the nation's brightest luminaries-to intellectually cripple Bangladesh.

After liberation of Bangladesh, in order to bring to justice the perpetrators of the crimes committed during Liberation war of 1971 the International Crimes (Tribunals) Act, 1973 was promulgated. But no tribunal was set up under this Act until 24th March of 2010. On 25th March, 2010 the Government of Bangladesh established International Crimes Tribunal under International Crimes(Tribunals) Act, 1973. (hereinafter referred to as ICT Act).

During the War of Liberation of Bangladesh in 1971 the accused-appellant Motiur Rahman Nizami was the president of All Pakistan Islami Chhatra Sangha, the student wing of the political party Jamaat-e-Islami. Both Jamaat-e-Islami and Islami Chhatra

Shanghha actively opposed the Liberation of Bangladesh and co-operated with the Pakistani army.

On the basis of a complaint register being serial No. 1 dated 21.07.2010 the investigation agency established under the ICT Act held investigation against appellant Motiur Rahman Nizami and after completion of investigation submitted investigation report along with documents to the prosecutors appointed under the ICT Act and on receipt of that investigation report along with the documents the prosecutors prepared formal charges against appellant Motiur Rahman Nizami on the allegations that during the whole period of Liberation War of Bangladesh in 1971 accused Motiur Rahman Nizami aided the Pakistani occupation force and its other auxiliary forces to commit various crimes against humanity and genocide in different places of his home district Pabna and also in Dhaka and other places and as president of Islami Chhatra Shanghha he became ex-officio leader/commander of Al-Badr Bahini which was formed with the members of Islami Chhatra Shanghha and incited, encouraged and provoked the members of Al-Badr Bahini to co-operate with Pakistani Army in committing various crimes against humanity and genocide. On 11.12.2011 the prosecutors submitted the said formal charges to the International Crimes Tribunal (hereinafter referred to as tribunal). The tribunal, after hearing the learned Lawyers of both the parties on charge framing

matter and on perusal of formal charges and the documents, framed 16 charges against the appellant Motiur Rahman Nizami on 28.05.2012 under sections 3(2) (a) (c) (i) (g) (h) read with section 4(1) (2) of the ICT Act punishable under section 20(2) of the said Act. The charges so framed were read over and explained to the accused appellant on dock to which he pleaded not guilty and claimed to have fair justice.

The prosecution examined as many as 26 witnesses and also produced bundle of documentary evidence in order to prove the charges against the accused. From the side of the accused also 3 witnesses were examined and one was produced only on dock and several documents also were produced.

The defence case, as it appears from the trend of cross-examination of the prosecution witnesses as well as from the evidence of defence witnesses was that the accused was never a high command, leader or member of Al-Badr Bahini and he never took part in any atrocities as alleged in the charges framed against him. He never played the role of anti-liberation of Bangladesh, he made no inciting speech in any meeting and never collaborated with Pakistani occupation force to commit atrocities in Pabna district or in any part of Bangladesh. That all the charges brought against him are false, fabricated and motivated. He is innocent.

However, we have heard Mr. Khandker Mahbub Hossain and the Mr. S. M. Shahjahan-the learned senior Advocates for the appellant and Mr. Mahbubey Alam-the learned Attorney General for the respondent at length. The learned Advocates for the appellant have made lengthy submissions contending that in this case the prosecution could not produce any reliable evidence, either oral or documentary, to prove the charges against the appellant, that the witnesses examined by the prosecution are not trustworthy at all, and the documents filed by the prosecution are not dependable at all; that the tribunal has committed wrong and great injustice to find the appellant guilty of the charges and to convict and sentence him relying on those unreliable evidence.

The learned Attorney General, on the other hand, has made lengthy submissions to refute the arguments advanced by the learned counsel for the appellant and has argued that in this case there are overwhelming evidence-both oral and documentary-to prove the charges against the appellant and that all these evidence are most reliable and dependable and that the tribunal has committed no wrong or injustice in relying on these evidence adduced by the prosecution, that the tribunal rightly found the appellant guilty of the charges and rightly convicted and sentenced him.

We have considered the lengthy arguments advanced by the learned counsel of both the sides

attentively and examined the evidence on record minutely-which will be reflected in our discussions made below.

Before we examine the propriety of the conviction and sentences awarded against the accused-appellant Motiur Rahman Nizami by the tribunal we need to assess the **status and role of accused-appellant Motiur Rahman Nizami during the period of Liberation War in 1971.**

Accused-appellant Motiur Rahman Nizami was born at Village Manmothpur under Sathia Police Station of District Pabna. He studied in Boalmari Madrasha at Sathia. He passed Fazil examination in 1961 and got Kamil degree from Madrasha-e-Alim, Dhaka in 1963 and also obtained graduation degree in 1967 from the University of Dhaka as a private student. He was elected member of Parliament twice in 1991 and 2001 and became Minister for Agriculture and then for Industries for the period from 2001-2006 under Bangladesh Nationalist Party (BNP) led government.

It is an admitted fact that accused Motiur Rahman Nizami was the President of Islami Chharta Shanghha- the student wing of Jammata-e-Islami during the War of Liberation in 1971. The D.W. 4 Najibur Rahman @ Najib Momen, the son of the appellant Motiur Rahman Nizami himself has admitted that Motiur Rahman Nazami was the President of East Pakistan Islami Chharta Shanghha during the period from 1966-1967, 1967-68, 1968-69 and thereafter he was President of

All Pakistan Islami Chharta Shangha during the period from 1969 till September, 1971. It is also an admitted fact that the appellant Motiur Rahman Nizami later joined the political party Jammat-e-Islami and became Ameer of its Dhaka city unit and was the member of central executive committee of this political party from 1978-1982. He also held the post of Assistant Secretary General of Jammat-e-Islami from 1983 to 1988. He became the Secretary General of Jammat-e-Islami in December, 1988 and held the said post up to 2000. He became Ameer of Jammat-e-Islami in 2000 and since then he has been holding the post of Ameer of Jammat-e-Islami till today.

The specific allegation of the prosecution is that as the President of All Pakistan Islami Chharta Shangha-the student wing of Jamat-E-Islami, the accused Motiur Rahman Nizami not only co-operated with the Pakistani invading force in committing various crimes against humanity but also masterminded the formation of Al-Badr Bahini and was a leader of this Al-Badr Bahini and having control, authority and supervision over the members of this Al-Badr Bahini he provoked, instigated and encouraged them to cooperate with Pak army to commit various crimes against humanity including killing of intellectuals of the country during Liberation War of Bangladesh. To prove these allegations the prosecution filed several documentary evidence as well as adduced oral evidence before the Tribunal.

The Exhibit-28/3 is a book titled "**Sunset at Midday**" written by Mohiuddin Chowdhury, who was a leader of peace committee of Noakhali district in 1971. This book was published in 1998 from Karachi. At page 97 of this book it has been narrated thus;

"To face the situation Rajakar Force, consisting of Pro-Pakistani elements was formed. This was the first experiment in East Pakistan, which was a successful experiment. Following this strategy Rajakar Force was being organized throughout East Pakistan. This force was, later on named Al-Badr and Al-Shams and Al-Mujahid. The Workers belonging to purely Islami Chhatra Sangha were called Al-Badr; the general patriotic public belonging to Jamaat-e-Islami, Muslim League, Nizam-e-Islami etc. were called Al-Shams and the Urdu-speaking generally known as Bihari were called Al-Mujahid." (underlined for giving emphasis)

The writer of this book "sunset at Midday" is a Bangladeshi. From the note of publisher of this book it appears that the writer of this book left Bangladesh for Pakistan in May, 1972. In this book the writer claimed himself to be a district level leader of political party and peace committee of Noakhali. He also stated that he sided with Pakistan Army and played important role to save Pakistan. So his narration that Al-Badr Bahini was formed with the

members of Islami Chharta Shanghha can be accepted as most trustworthy.

The Exhibit-28/1 is another book titled **"Pakistan between Mosque and Military"** written by Husain Haqqani, published by Carnegie Endowment For International Peace Washington D.C, U.S.A in 2005. At page 79 of this book it has been written thus;

"The Jamaat-e-Islami and especially its student wing, the Islami Jamiat-e-Talaba (IJT), joined the military's effort in May 1971 to launch two paramilitary counterinsurgency units. The IJT provided a large number of recruits. The two special brigades of Islamist cadres were named Al-Shams (the sun, in Arabic) and Al-Badr (the moon)..... A separate Rajakars Directorate was established.... Two separate wings called Al-Badr and Al-Shams were organized. Well educated and properly motivated students from the schools and madrasas were put in Al-Badr wing, where they were trained to undertake 'Specialized Operations,' while the remainder were grouped together under Al-Shams, which was responsible for the protection of bridges, vital points and other areas..... Bangladeshi scholars accused the Al-Badr and Al-Shams militias of being fanatical. They allegedly acted as the Pakistan army's

death squads and 'exterminated leading left wing professors, journalists, litterateurs, even doctors.'

The writer of this book Husain Haqqani is a Pakistani. He started his carrier as journalist, he served as adviser to three Pakistani Prime Ministers. The above citation of this books testifies that Jamaat-e-Islami and its student wing Islami Chharta Shangha played a special role in organizing and establishing the notorious Al-Badr Bahini.

The Exahibit-31 is another book named **"Sectarianism and Politico- Religious Terrorism in Pakistan"** (revised edition in 1993) written by Musa Khan Jalazai. In this book, at page 258, the author wrote thus;

"The campaign confirmed Jamiat's place in national politics, especially in 1971, when Jamiat began to interact directly with the military government of East Pakistan in an effort to crush Bengali nationalism. As a result of these contacts, Jamiat Joined the Pakistani military's effort in May, 1971 to launch two paramilitary counterinsurgency units in East Pakistan, Al-Badr and Al-Shams, to combat Mukti Bahini, the Bengali guerrilla organization. Jamiat provided a large number of recruits for the two units, especially Al-Badr, the decision to join Al-Badr and Al-Shams was taken by Motiur

Rahman Nizami, Jamiat's nazimia'la at the time who stationed at Dacca University." (underlined for giving emphasis.)

Musa Khan Jalazai of Afgan origin is a renowned journalist and researcher in the field of terrorism issues. The contents of this book as quoted above also tells about the role of the appellant during the Liberation War of 1971.

The exhibit-28 is another book titled as **"Vanguard of Islame Revolution"** published in 1994 in the United States of America. Seyyed Vali Reza Nasar wrote this book. At page 66 of this book it is narrated thus;

"The campaign confirmed the IJTs (Islami Jamaat-e-Talabah) in national politics specially in May 1971, when the IJT joined the army's counter insurgency campaign in East Pakistan. With the help of the army IJT organized two paramilitary units, called Al-Badr and Al-Shams to fight the Bangalee guerrillas. Most of the Al-Badr consisted of IJT members who also galvanized support for the operation among the Muhajir community settled in East Pakistan, Motiur Rahman Nizami, the IJT's Nazim-e-Ala (supreme head or organizer) at the time, organized Al-Badr and Al-Shams from Dhaka University."

(underlined for giving emphasis.)

The Exhibit-35 is a book titled "একাগরের ঘাতক দালালেরা কে কোথায়" published in 1987 by "মুক্তিযুদ্ধ চেতনা বিকাশকেন্দ্র". In this book, at page No. 190 there is a list of members of the ICS central committee. In this list the name of the appellant Motiur Rahman Nizami has been mentioned at serial No. 1. The names of other leaders including Ali Ahsan Muhammad Mujahid, Mir Kashem Ali also have been included in this list. In this list these leaders of Islami Chhatra Shanghha have been mentioned as Al-Badr High Command also. This list of Exhibit-35 also indicates that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha and the appellant Motiur Rahman Nizami and other leaders of ICS were the High Command of Al-Badr Bahini.

The Exhibit-42 is a book titled "৭১ এর দশ মাস" written by Robindranath Tribedi on liberation war published in 1997. In this book also the accused appellant Motiur Rahman Nizami has been depicted as the chief of both Islami Chhatra Shanghha and Al-Badr Bahini.

The Exhibit-33 is another book titled "পাবনা জেলার মুক্তি যুদ্ধের কথা" written by Md. Johurul Islam Bishu, published in 2009. At page 58 of this book it has been stated that Al-Badr Bahini was created for the purpose of killing of freedom-fighters and intellectuals and accused Motiur Rahman Nizami was the commander of Al-Badr Bahini.

Exhibt-4/11a is another important piece of documentary evidence which strongly supports the

prosecution case that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha and the leaders of Islami Chhatra Shanghha became ex-officio leaders of Al-Badr Bahini. This Exhibit-4/11a is a news report published in "Dainik Sangram" on 14.11.1971 about a procession of anti-liberation group in Gaibandah District. In this report the president of Islami Chhatra Shanghha of Gaibandah Unit has been mentioned as Al-Badr Commander also. This Exhibit-4/11a-an old document supports also the correctness of other documentary evidence narrated above.

The above mentioned documentary evidence tell sufficiently that Al-Badr Bahini was formed mainly with the members of Islami Chhatra Shanghha. It should be mentioned here that in the cases of Ali Ahsan Muhammad Mujahid and Kader Mollah this Division held earlier that Al-Badr Bahini was formed mainly with the members of Islami Chhatra Shanghha. However, the above mentioned documentary evidence tell also that appellant Motiur Rahman Nizami, as the president of All Pakistan Islami Chhatra Shanghha, had an active role in the formation of Al-Badr Bahini and he himself became the leader/commander of Al-Badr Bahini.

Mr. Khandaker Mahbub Hossain, the learned Advocate for the accused appellant has made argument to the effect that all the above mentioned documentary evidence produced from the side of the

prosecution to prove the status and role of the accused Motiur Rahman Nizami are recent, all being published after 1986 cannot be relied on. The learned Advocate has argued that the prosecution could not adduce a single documentary evidence to show that before 1986 the appellant was ever blamed anywhere by any one to be leader of Al-Badr Bahini. The contention of the learned Advocate is that only when the appellant took active part in politics by participating in the general election of members of parliament in 1986 his opponent and rival party started blaming him as a leader of Al-Badr with oblique motive. The learned Advocate has argued also that the above mentioned documentary evidence specially Exhibit-28, 28/1 and 31 being written by some foreigners cannot be accepted as authentic since none of these foreign authors ever visited Bangladesh even.

But we are unable to accept these arguments of the learned Advocate for the appellant. We cannot ignore the fact that the incidents of this case took place about long 42 years back and the investigation of this case also started about 40 years after those incidents. With the passage of this long period many of the important documentary evidence might have been destroyed. In the circumstances the failure of the prosecution to bring old documents before the court showing involvement of the accused with Al-Badr Bahini should not be considered as fatal if the other

evidence adduced by the prosecution are convincing. The objection as to the authenticity of the Exhibit-28, 28/1 and 31-the books written by some foreign authors also are not acceptable. The authors of all those three books are renowned scholars and they did extensive research works on the liberation war of Bangladesh before writing these books. However save and except these three books the prosecution has adduced some other documentary evidence also as narrated above. One of which is Exhibit-28/3 written by one political leader of Bangladesh who sided with the Pakistani army during the liberation war in 1971 and after liberation of Bangladesh he went away to Pakistan in May, 1972. In this Exhibit-28/3 this author clearly stated to the effect that Al-Badr Bahini was formed with the members of Islami Chhatra Shangha. The Exhibit-35 and Exhibit-33 written/edited by Bangladeshi authors also have supported the prosecution case that the Al-Badr Bahini was formed with the members of Islami Chhatra Shangha and accused appellant Motiur Rahman Nizami was the commander/leader of Al-Badr Bahini.

The Exhibit-4/11a referred to above is an old document of the year 1971 and this document also supports strongly that Al-Badr Bahini was formed with the members of Islami Chhatra Shangha and leaders of Islami Chhatra Shangha became the ex-officio leaders of Al-Badr Bahini.

Besides the above mentioned documentary evidence the prosecution has adduced some oral evidence also which have supported the prosecution case that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha and accused appellant Motiur Rahman Nizami became the leader/ commander of Al-Badr Bahini.

P.W.1 Misbahur Rahman Chowdhury, aged 57 years, is the chairman of the political party "Islami Oikko Jote." This witness has deposed to the effect that he was a member of Islami Chhatra Shanghha in 1971 and that the Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha under the leadership of appellant Motiur Rahman Nizami. This P.W.1 has produced also a photocopy of a letter-the Exhibit-1 and has deposed to the effect that Sirajul Islam Motlubi-the president of Islami Chhatra Shanghha of Moulavibazar Unit came to his house several times in 1971 and finding him not home he left this letter (exhibit-1) for him; that in that letter it was a written to the effect that a decision was taken that the members of Islami Chhatra Shanghha would join Al-Badr Bahini within 10th August, 1971; that in that letter there was a instruction for him (P.W.1) also to join Al-Badr Bahini mentioning that the president of Islami Chhatra Shanghha Motiur Rahman Nizami would be happy if he joined Al-Badr Bahini.

P. W. 12 Dr. Rathindranath Kunda has deposed to the effect that accused Motiur Rahman Nizami was the

president of Islami Chhatra Shanghha and founder of Al-Badr Bahini. In course of cross examination this P. W. 12 stated also that he knew Motiur Rahman Nizami from his student life and that in 1971, from "Daily Sangram" and "Daily Ittefaq" he knew that Motiur Rahman Nizami was the founder of Al-Badr Bahini.

P.W. 13 Shamoly Nasrin Chowdhury aged 71 years is the wife of martyr doctor Abdul Alim Chowdhury who was killed by the members of Al-Badr Bahini immediate before Liberation of Bangladesh. This P.W. 13 Shamoly Nasrin Chowdhury was the head mistress of Udayan High School, Dhaka for 36 years and at present she is the head mistress of "Uddipon Bidyaloy" established by herself. This witness has deposed to the effect that during the war of 1971 she came to know from newspapers and other media that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha and Golam Azam, Motiur Rahman Nizami and Ali Ashan Muhammad Mujahid were the central leaders of this Al-Badr Bahini and that this Al-Badr Bahini, in collaboration with Pakistani occupation army, committed murder, rape, genocide, arson, plundering etc.; that they also came to know from "Shadhin Bangla Betar Kendro", newspaper, leaflet etc. that the members of Al-Badr Bahini, at the instruction of their high command, were killing the pro-liberation people, specially professors, engineers, doctors and

other intellectuals taking them blind-folded to Mohammadpur Physical Training Institute.

P.W. 23 Syeda Salma Mahmud @ Salma Haque aged 64 years, is the wife of another martyr doctor Azaharul Haque, who also was killed by the Al-Badr during the last part of liberation war. This witness also has deposed to the effect that in 1971 they read news in "Dainik Ittefaq" and "Dainik Pakistan" mentioning Motiur Rahman Nizami as the commander of Al-Badr.

The above narrated evidence of P.W. 1, P. W. 12, P.W. 13 and P.W. 23 also strongly support the prosecution case that Al-Badr Bahini was formed with the members of Islami Chhatra Shangha and this accused appellant Motiur Rahman Nizami was the leader/commander of Al-Badr Bahini. Mr. S. M. Shahjahan, the learned Advocate for the appellant has argued before us that the P.W.1 is not at all a reliable witness as he made some incorrect statements before the Tribunal. From the cross-examination of this P.W.1 it reveals that some of his statements which he made in his examination-in-chief were not correct. But those alleged incorrect statements are as regards some other facts and circumstances and not as regards his above mentioned evidence regarding this appellant's status and role. For making some incorrect statements as regards any particular fact or matter the whole evidence of a witness cannot be rendered as incorrect or false. For the reason of

making some incorrect statements only a witness cannot be blamed as a liar and his whole evidence cannot be disbelieved as false. The P.W. 1 is the chairman of a political party and he was also a member of Islami Chhatra Shanghha during the war of 1971. He was actively involved in politics in 1971. We do not find any cogent reason to disbelieve this P.W. 1.

P. W. 12 is a doctor and a responsible man. We find no cogent reason to disbelieve his above mentioned evidence.

The P.W. 13, is a most respectable person of the society. We find no reason to disbelieve her. We accept her evidence that during the Liberation War in 1971 news were published in different newspapers mentioning the accused appellant Motiur Rahman Nizami as leader/commander of Al-Badr Bahini.

We find no reason to disbelieve the above mentioned evidence of P.W. 23 also, the widow of a martyr doctor who was killed by the Al-Badrs during the liberation war.

The evidence of above stated 4 witnesses not only support the prosecution case that Motiur Rahnam Nizami was the leader/commander of Al-Badr Bahini but also fill up the deficit of old documentary evidence as to appellant's being leader/commander of Al-Badr Bahini.

The prosecution has produced some newspaper reports which also show that accused appellant Motiur

Rahman Nizami delivered speeches at different places throughout the country at different time during the whole period of liberation war praising the Pakistani Army and asking the members of Al-Badr Bahini and Islami Chhatra Shangha to co-operate with the Pakistani Army in exterminating the pro-liberation people.

The Exhibit-2/22 is an article written by the appellant Motiur Rahman Nizami published in Dainik Sangram on 14.11.1971 under the caption "বদর দিবস: পাকিস্তান ও আলবদর।"

The relevant portion of this article is quoted below:

"হিন্দু বাহিনীর সংখ্যাশক্তি আমাদের তুলনায় পাঁচগুন বেশী। তাছারা আধুনিক সমরাস্ত্রও তারা পাকিস্তানের চেয়ে অধিক সুসজ্জিত। দূর্ভাগ্যবশতঃ পাকিস্তানের কিছু মুনাফিক তাদের পক্ষ অবলম্বন করে ভেতর থেকে আমাদেরকে দুর্বল করতে যড়যন্ত্রে লিপ্ত আছে। তাদের মুকাবেলা করেই তাদের সকল যড়যন্ত্র বানচাল করেই পাকিস্তানের আদর্শ ও অস্তিত্ব রক্ষা করতে হবে।আমাদের পরম সৌভাগ্য বলিতে হবে পাক সেনা বাহিনীর সহযোগীতায় এদেশের ইসলাম প্রিয় তরুণ সমাজ বদর যুদ্ধের স্মৃতিকে সামনে রেখে আল বদর বাহিনী গঠন করেছে। বদর যুদ্ধে মুসলিম যোদ্ধাদের সংখ্যা ছিল ৩১৩ জন। এ স্মৃতিকে অবলম্বন করে তারাও ৩১৩ জন যুবকের সমন্বয়ে এক একটি ইউনিট গঠনের সিদ্ধান্ত নিয়েছে। বদর যোদ্ধাদের যে সব গুনাবলীর কথা আমরা আলোচনা করেছি আল বদরের তরুণ মুজাহিদদের মধ্যে ইনশাআল্লাহ সেই গুনাবলী আমরা দেখতে পাব। পাকিস্তানের আদর্শ ও অস্তিত্ব রক্ষার দৃঢ় সংকল্প নিয়ে আল বদরের যুবকেরা নতুন করে শপথ নিয়েছি যাদের তেজদীপ্ত তৎপরতার ফলে বদর দিবসের কর্মসূচী দেশবাসী দুনিয়ার মুসলমানদের হারানো স্মৃতি তুলে ধরতে সক্ষম হয়েছে। ইনশাআল্লাহ বদর যুদ্ধের বাস্তব স্মৃতিও তুলে ধরতে সক্ষম হবে। আমাদের বিশ্বাস সেদিন আর খুব বেশী দূরে নয় যেদিন বদরের তরুণ যুবকেরা আমাদের সশস্ত্র বাহিনীর পাশে দাড়িয়ে হিন্দু বাহিনীকে পর্যদুস্ত করে

হিন্দুস্থানের অস্তিত্ব বিপন্ন করে সারা বিশ্বের ইসলামের বিজয় পতাকা উড্ডীন করবে। আর সেদিনই পূরণ হবে মুসলমানদের আশা আকাঙ্ক্ষা।"

Exhibit 2/5 is a report narrating a speech of appellant Motiur Rahman Nizami which was published in Dainik Sangram on 05.08.1971. A portion of the said report is quoted below;

"জনাব নিজামী বলেন, দেশপ্রেমিক জনগন যদি পয়লা মার্চ থেকে জীবনের ঝুঁকি নিয়ে দুষ্কৃতিকারীদের প্রতিরোধ করতে এগিয়ে আসতো তাহলে দেশে এমন পরিস্থিতির সৃষ্টি হতে পারতো না। এ প্রসঙ্গে তিনি বলেন, আল্লাহ তার প্রিয়ভূমি পাকিস্তানকে রক্ষা করার জন্য ইমানদার মুসলমানদের উপর দায়িত্ব দিয়েছিলেন। কিন্তু মুসলমানরা যখন রাজনৈতিক সমস্যার মোকাবেলা রাজনৈতিক পন্থায় করতে ব্যর্থ হলো তখন আল্লাহ সেনাবাহিনীর মাধ্যমে তার প্রিয় ভূমির হেফাজত করেছেন। আন্তর্জাতিক খ্যাতি সম্পন্ন ছাত্র নেতা জনাব নিজামী পাক সেনাবাহিনীর প্রশংসা করেন এবং ভবিষ্যতের সকল আভ্যন্তরীণ ও বিদেশী হামলা মোকাবেলা করার জন্য তাদের সাহস ও ত্যাগের জন্য আল্লার কাছে মোনাজাত করেন।

পরিশেষে জনাব নিজামী বলেন পাকিস্তান আল্লাহর ঘর, আল্লাহ একে বার বার রক্ষা করেছেন ভবিষ্যতেও রক্ষা করবেন।"

Exhibit 2/6 is another report about the activity of appellant Motiur Rahman Nizami published in said "Dainik Sangram" on 11.08.1971. The relevant portion of the said report is quoted below:

"পাকিস্তান ইসলামী ছাত্র সংঘের মোমেনশাহী শাখার উদ্যোগে আয়োজিত এক জন সভায় ইসলামী ছাত্র সংঘ প্রধান মতিউর রহমান নিজামী সভাপতিত্ব করেন।... দেশের শত্রুদের খুঁজে বের করা এবং তাদের তালিকাবদ্ধ করার কাজে স্থানীয় কর্তৃপক্ষের সাথে যৌথভাবে কাজ করার জন্য সভার বক্তারা দেশপ্রেমিক জনসাধারণের প্রতি আহ্বান জানান।"

Exhibit 2/8 is another report published in the "Dainik Sangram" on 16.08.1971 which is quoted below.

"জনাব মতিউর রহমান নিজামী বলেন পাকিস্তান কোন ভূখন্ডের নাম নয়। একটি আদর্শের নাম। এই ইসলামী আদর্শের প্রশ্নেই পাকিস্তান সৃষ্টি হয়েছে এবং এই আদর্শই পাকিস্তান কে টিকিয়ে রাখতে সক্ষম।"

Exhibit 2/10 is a report about another speech of the appellant published in the 'Dainik Sangram' on 23.08.1971. The relevant portion of that report is quoted below;

"ছাত্র নেতা নিজামী দ্বিধাহীন কণ্ঠে ঘোষণা করেন যে, শহীদ আলমাদানীর রক্তের প্রতিশোধ নিতে পারলেই তার প্রতি আমাদের শ্রদ্ধাবোধ প্রমানিত হতে পারে। আর এ প্রতিশোধ ইসলামের শত্রুদের সমূলে উৎপাটনের মাধ্যমেই সম্ভব হতে পারে।

তিনি বলেন ইসলামের শত্রুরা আজ হাতে অস্ত্র নিয়েছে। অনেককে শহীদ করেছে। তিনি সতর্ক বাণী উচ্চারণ করে বলেন ইসলামের ইতিহাস শুধু শাহাদাতের ইতিহাস নয়। ইসলামের ইতিহাস শত্রু নিধনেরও ইতিহাস। গাজী হয়ে আল্লার দ্বীনকে গালবে করারও ইতিহাস।

তিনি সবাইকে মাদানীর পথ অনুসরণ করে জেহাদের ময়দানে ঝাপিয়ে পড়ার জন্য আহ্বান জানান।"

Exhibit 2/14 is about a Telegram sent by the appellant which was reported in the "Dainik Sangram" on 04.09.1971. The relevant portion of this report is quoted below;

"তারবার্তায় জনাব নিজামী বলেন যে, পাকিস্তানী ছাত্র সমাজ তার পুত্রের মহান আত্মত্যাগে গর্বিত। ভারতীয় হানাদার ও এজেন্টদের মোকবেলায় মহান শহীদ মিনহাজের গৌরবোজ্জল ভূমিকা অক্ষুন্ন রাখতে তারা বদ্ধ পরিকর।"

Exhibits 18/5, 18/8, 18/12, 18/9 are fortnightly reports on political situation of different periods during the liberation war prepared by Special Branch, East Pakistan, Dhaka. From these exhibits also it appears that appellant Motiur Rahman Nizami, as

president of All Pakistan Islami Chhatra Shanghha, delivered speeches in different meetings of Islami Chhatra Shanghha in different places praising Pakistani army for its timely action and also calling the members of Islami Chhatra Shanghha to co-operate with the Pakistani Army.

From the above mentioned old documentary evidence it is evident that during the Liberation War of Bangladesh the appellant Motiur Rahman Nizami not only sided with the Pak army but also incited the members of Al-Badr Bahini and Islami Chhatra Shanghha to co-operate with the Pak army. The exhibit-2/22-the article written by the accused appellant proves also that accused Motiur Rahman Nizami was highly satisfied with the formation of the Al-Badr Bahini and he praised highly this Al-Badr Bahini and also prayed for success of Al-Badr Bahini in protecting the existence of Pakistan. The above referred old documentary evidence prove sufficiently the role of accused appellant Motiur Rahman Nizami during the Liberation War of Bangladesh. He not only opposed the Liberation of Bangladesh and co-operated with the Pak army but also encouraged and provoked the members of Al-Badr Bahini and Islami Chhatra Shanghha to co-operate with the Pakistani invading force. These documentary evidence coupled with the admitted fact that the appellant Motiur Rahman Nizami was the president of East Pakistan Islami Chhatra Shanghha for three years and thereafter he became the

president of All Pakistan Islami Chhatra Shanghha in the year 1969 and remained as such till September, 1971, and the proven fact that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha, in our opinion, prove sufficiently that appellant Motiur Rahman Nizami was the leader/commander of Al-Badr Bahini and he collaborated with the Pak army and played an active role against the liberation movement of this Country and also instigated, encouraged and provoked the members of Al-Badr Bahini and Islami Chhatra Shanghha to collaborate with the Pakistani Army.

Mr. Khondker Mahbub Hossain, the learned Senior Advocate appearing for the appellant has argued to the effect also that this Division has already found Mr. Ali Ahsan Muhammad Mujahid leader of Al-Badr Bahini and held him responsible for the atrocities committed by Al-Badr Bahini and in this circumstances there is no scope now to hold this present appellant also leader of Al-Badr Bahini. Referring to relevant portion of the judgment passed by this Division in the case of Ali Ahsan Muhammad Mujahid, the learned Advocate has contended that since Ali Ahsan Muhammad Mujahid has been convicted and sentenced to death and has already been executed as the Al-Badr leader there is no scope now for convicting the appellant as Al-Badr leader or commander.

We have considered the above submission of the learned Advocate for the appellant. Admittedly Ali

Ahsan Muhammad Mujahid was the president of East Pakistan Islami Chhatra Shanghha during the period of 1971 and the present appellant was the president of All Pakistan Islami Chhatra Shanghha during that period. Obviously, the status and position of the present appellant was higher than that of Ali Ahsan Muhammad Mujahid. However, in the judgment of Ali Ahsan Muhammad Mujahid this Division did not say that Ali Ahsan Muhammad Mujahid was the sole leader of Al-Badr Bahini. The evidence adduced in this case including the exhibit-4/11a mentioned above, prove that all the presidents of Islami Chhatra Shanghha of different units became ex-officio leaders of Al-Badr Bahini formed with the members of Islami Chhatra Shanghha. So, there is no improbability in the fact that the present appellant also, being the president of All Pakistan Islami Chhatra Shanghha, became one of the leaders of Al-Badr Bahini. This appellant, however, might have enjoyed higher or superior authority as leader of Al-Badr Bahini by dint of his higher position in Islami Chhatra Shanghha.

Mr. Khondker Mahbub Hossain, the learned Advocate has argued also to the effect that it has been well-proved that this appellant was president of All Pakistan Islami Chhatra Shanghha till 30th September, 1971 and thereafter Mr. Tasneem Alam Manzar was elected the president of All Pakistan Islami Chhatra Shanghha. The contention of the learned Advocate is that since this appellant was no

more president of All Pakistan Islami Chhatra Shanghha since after September, 1971 he had no control and command over the members of Al-Badr Bahini after that period. But we cannot accept this argument also of the learned Advocate. This appellant was the president of Islami Chhatra Shanghha for a long period. Firstly he was the president of East Pakistan Islami Chhatra Shanghha for a period of three years and thereafter he was the president of All Pakistan Islami Chhatra Shanghha for another period of two years and thus he had control and authority over the members of Islami Chhatra Shanghha of East Pakistan wing for a long period of five years. The Al-Badr Bahini was formed with the members of East Pakistan Islami Chhatra Shanghha. It cannot be accepted that this appellant lost his leadership/authority/ control over the members of Al-Badr Bahini as soon as he made over his charge as president of All Pakistan Islami Chhatra Shanghha. It is not acceptable that this appellant did not retain any control and authority over the members of Al-Badr Bahini-who were under his leadership for a long period of 5 years as soon as he handed over charge as the president of All Pakistan Islami Chhatra Shanghha. The exhibit 2/22 quoted before, rather, prove that this appellant was very much involved with the Al-Badr Bahini and had authority, control and supervision over the members of this Bahini long after 30th September, 1971 also.

It should be mentioned here that it is not necessary that the leader/commander must be *de-jure* in nature always, it may be *de-facto* too and no formal documentary evidence is necessary to prove the *de-facto* leadership. *De-facto* nature of superior position can be lawfully inferred even from the facts and circumstances revealed from the evidence adduced. In the case of the **Prosecutor V. Blagojevic and Jokic** the International Criminal Tribunal for the former Yugoslavia (**ICTY**) held;

"A *de-facto* commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility."

In another case of **Prosecutor -vs- Delalic** the Trial Chamber of **ICTY** held that a superior may be liable for the acts of his subordinates whether his authority over the subordinates is *de-facto* or *de-jure*, as long as he exercise effective control."

This Division also has held in the cases of Kamaruzzamn and Ali Ahsan Muhammad Mujahid that superior or commander may not be *de-jure* in nature, it may be *de-facto* too and it is not needed to be proved by any formal documentary evidence.

The guiding principle of superior or command responsibility is that the superior/leader must have

effective control over the subordinates. However, we find that accused Motiur Rahman Nizami was the leader of Al-Badr Bahini and he had effective control over the members of this Al-Badr Bahini throughout the whole period of liberation war and he himself collaborated with the Pakistani Army and also encouraged and instigated the members of Al-Badr Bahini to collaborate with Pakistani army who were then committing atrocities in this country in a large scale.

Now we shall examine the propriety of the conviction and sentences awarded against the appellant by the Tribunal on different charges. It has already been mentioned above that the Tribunal framed as many as 16 charges on different allegations against the appellant, but found eight of those charges not proved by sufficient evidence and as such acquitted the appellant of those eight charges. The Tribunal found the charge Nos. 1,2,3,4,6,7,8 and 16 proved against the appellant and convicted and sentenced him on those charges as already mentioned above.

Summary of charge No. 1. (causing arrest, detention, torture and killing of three victims including Kasim Uddin.)

On 04.06.1971 Kasim Uddin, the Head Moulana of Pabna Zilla School and a social worker, was apprehended by Pakistani invading force at the instigation of the accused and he was severely

tortured in presence of the accused in the army camp at Nurpur Wapda Power House in Pabna town as he was perceived to be a supporter of the campaign to free Bangladesh from Pakistani invading force. On 10.06.1971 he was taken to the bank of Isamoti River along with two other persons where they were shot dead at the instance of the accused. Upon these allegations, charge under section 3(2)(a) read with section 4(1) and 4(2) of the ICT Act was framed against this accused-appellant.

The tribunal found this charge No. 1 proved and convicted the appellant under section 3 (2)(a)(g) read with section 4(1) of the ICT Act and sentenced him to imprisonment for life on this charge No. 1.

To prove the charge No. 1 the prosecution has examined 3 witnesses namely the P.W. 4, Mohammad Habibur Rahman, P.W.12 Dr. Rothindranath Kundu, and P.W. 21 Yusuf Ali Biswas and produced some documentary evidence also.

The P.W.4 Mohammad Habibur Rahman aged 56 years is a freedom fighter and the commander of Paban District command of freedom fighters. The relevant portion of the evidence of this P.W. 4 is that while undergoing training in India he came to know that Moulana Kasim Uddin, the head Moulana of Pabna Zila School, was killed. That Shibli, son of Moulana Kasim Uddin was his close friend. After returning from India he went to the house of Moulana Kasim Uddin to meet Shibli on the midnight of 19th August and Shibli

at that time told him that on 4th June, 1971 his father told him that Motiur Rahman Nizami listed his (Moulana Kasim Uddin's) name for killing as pro-liberation supporters and asked him (Shibly) to escape from the house; Moulana Kasim Uddin also went out of the house to escape by riding on a bus, but he was apprehended by Pakistani invading force at the instance of some Jammata-e-Islami supporters and was taken to Nurpur Army camp; that Shibli and his family members went to that Army camp to release Moulana Kasim Uddin where they saw Motiur Rahman Nizami entering that Army camp. They cried out and requested Motiur Rahman Nizami to release Kasim Uddin but Motiur Rahman Nizami told Shibli's mother sarcastically to ask her husband to give training to the freedom fighters; that on 10th June, 1971 Moulana Kasim Uddin was taken to a bamboo bush on the bank of Isamati River along with two other persons from Nurpur Army camp and were shot dead there by Pakistani invading force. That Shibli told him also that getting that news he (Shibly) along with others of their family went there and saw grave of Moulana Kasim Uddin and at that time they heard from the local people that Motiur Rahman Nizami was present at the time of killing of Moulana Kasim Uddin. This P. W. 4 has deposed further that during Liberation War of 1971, from the month of April till 16th December, the Al-Badrs, Rajakar and Pakistani armed forces committed atrocities in Pabna District killing about

15000 people, committing rape of about 1000 women, burning thousands of homestead and causing deportation of about 8-10 lacs of people from Pabna to India; that at that time accused Motiur Rahman Nizami was the president of All Pakistan Islami Chhatra Shanghha and on his order the Al-Badr and Pakistani invading force committed those atrocities; that they caught some members of Al-Badr and Rajakar and recovered some I.D. Cards with the signature of Motiur Rahamn Nizami. This P. W. 4 has stated further that during the period of Liberation War he saw some articles written by Motiur Rahman Nizami and Mowlana Abdus Sobhan along with their photographs in the newspaper namely "Daily Sangram". This witness stated also that his friend Shibli along with his family members went away to America about 15 years ago and they are now residing there. In cross examination this witness has stated that accused Motiur Rahman Nizami usually used to reside in Dhaka and go to Pabna twice or thrice a month.

Evidently this P. W. 4 is a hearsay witness as regards the incident of killing of Mowlana Kasim Uddin as stated in Charge No. 1. From the side of the defence the credibility of this P. W. 4 has been questioned seriously. Mr. S. M. Shajahan, the learned Advocate for the appellant has argued before us to the effect that the evidence of P. W. 4 regarding his hearing about the incident of killing of Mowlana Kasimu Uddin from his son Shibli is totally false,

that Shibli knowing about this evidence of P. W. 4 before the Tribunal, has denied the alleged fact of his telling about his father's killing to P. W. 4 and about the alleged involvement of the appellant in that killing. In support of this argument the defence appears to have filed a document which has been marked as exhibit-BG. This exhibit is an issue of the "Weekly Bangla Patrika" published from USA wherein an interview of Mr. Shibli, son of Mowlana Kasim Uddin was published. It appears that in that interview Mr. Shibli has denied the evidence of P. W. 4 Habibur Rahman and stated that he never told Habibur Rahman about killing of his father and that they were not told by anybody anytime that accused Motiur Rahman Nizami was involved in the murder of his father. However, it appears that the tribunal did not rely on this exhibit-BG on the reasoning that it was published after 5 months of the deposition made by the P. W. 4 before the tribunal. From the side of the appellant it has been argued before us that it is an admitted fact Mr. Shibli is now residing in USA and the exhibit-BG, a reputed registered Newspaper was published from the USA and that if at all this news report was false a rejoinder would have been issued by Mr. Shibli.

P. W. 12 Dr. Rothindranath Kundo, a doctor who was posted in Dhaka central jail at the time of giving deposition, is another hearsay witness. He has deposed to the effect that his boyhood friend Shawpon

told him in last week of August, 1971 that on 10th June, 1971 Moulana Kasim Uddin, a teacher of their school along with two others, being blind-folded, were taken to eastern side from western side in an army jeep and at that time Shawpon could see Motiur Rahman Nizami sitting in that jeep with Pakistani army. During cross-examination this witness has stated also that he knew Motiur Rahman Nizami since his student life and that Motiur Rahman Nizami was the founder of Al-Badr Bahini which he knew from "Daily Songram" and "Daily Ittefaq" in 1971. However, it appears that the above statement of P. W. 12 which he deposed before the Tribunal was not stated before the I. O. of this case-the P. W. 26. This P. W. 26, during cross-examination, has admitted that he examined P. W. 12 but he did not state before him that Shawpon told him that on 10th June, 1971 Moulana Kasim Uddin along with two other persons, being blind-folded, was taken to eastern side from western side in a Army jeep and at that time Shawpon could see Motiur Rahman Nizami sitting in front seat along with Pakistani army.

The P. W. 21 Md. Yousuf Ali Biswas has deposed to the effect that on 30.12.1970 he joined Pakistan army but he escaped from that service when Pakistani invading force made an attack on them and he came back to his locality. That on 9th June, 1971 he was staying in the house of his friend Arshad Ali at village Madhpur where he and his other friends

decided to go to India to have heavy arms after getting training in India for combating the Pakistani occupation force. That on 10th June, 1971 they had gone to Madhpur Bazar to have breakfast at about 7.00 /8.00 A.M. At that time they could see two Pakistani army pickup vans coming from Pabna and stopped at the intersection of Madhpur; they saw Motiur Rahman Nizami sitting in the front seat of a Pickup van with one Pakistani major. He further saw three persons also sitting in the back seat of that van being blind-folded accompanied by Pakistani invading force. After a while Motiur Rahman Nizamin showed a sign fingering at the street of Sathia. Then the pickup van started going towards Sathia. About 15-20 minutes after they heard numerous sounds of firing from the bank of Isamoti River. Feeling insecured they had gone into hiding in a hut. 10-15 minutes later they saw those pickup vans moving towards Pabna and at that time also they saw Motiur Rahman Nizami beside a Pakistani Major sitting in one of those pickup vans which were then going towards Pabna. After departure of those pickup vans they went to Madhpur Bazar and heard local people telling that three persons were killed on the bank of Isamoti River. They then went to the spot and saw dead-bodies of three Bangalees lying in a hole. He then got down in that hole, took off black cloths from the faces of those dead-bodies and then identified Moulana Kasim Uddin, the Head Moulana of Pabna Zilla School. The dead bodies of two

other persons could not be identified by him; that the local people were telling each other that Motiur Rahman Nizami brought the Pakistani army and killed them.

From the side of the appellant it has been argued that this P. W. 21 Yousuf Ali Biswas is not at all a reliable witness inasmuch as he was produced before the Tribunal at a very belated stage by the prosecution to fill up the lacuna. It has been pointed out before us from the side of the appellant that this P. W. 21 was not cited in the original list of the witnesses; that about 22 months after submission of investigation report and after examination of 17 prosecution witnesses, on 26.07.2013 only, the prosecution filed a list of additional witnesses including this P. W. 21. Mr. S. M. Shahjahan, the learned Advocate for the appellant has argued that this P. W. 21 is not at all a reliable witness, rather is a tutored witness, examined to fill up the lacuna. It has also been argued that the evidence of this P. W. 21 is not believable at all inasmuch as it was not possible for this P. W. 21 sitting in a tea stall to identify the appellant sitting in the front seat of a running jeep. It has been further argued from the side of the appellant that the evidence of this P. W. 21 that he found three dead bodies in a hole and after untying the black cloths from their eyes he could recognize Moulana Kasim Uddin-is false in view of the evidence

of P. W. 26-the investigation officer who, during cross-examination, has stated that during his investigation he got information that one Shahed Ali went to the place of occurrence at first and going there he found that all the three dead bodies (including that of Moulana Kasim Uddin) were buried. It has been contended that in that circumstances it was not possible for P. W. 21 to identify the dead body of Moulana Kasim Uddin and as such his evidence cannot be given any reliance at all.

However, from the narration of the evidence of P. W. 4, 12 and 21, whom the prosecution examined to prove the charge No. 1 against the accused appellant, it appears that out of these three witnesses two are hearsay witnesses. P. W. 4 and P. W. 12 admittedly, did not see the alleged incident of killing of Moulana Kasim Uddin, rather they have claimed to have heard about that incident from others. P. W. 4 claimed that he heard about this incident from Shibli, son of Moulana Kasim Uddin. But From the side of the defence a News Paper published from USA containing an alleged interview of Shibli, son of Moulana Kasim Uddin, the exhibit BG, has been produced which show that Shibli has denied this P. W. 4's evidence that he heard about the killing of Moulana Kasim Uddin from him. In that interview-the exhibit-BG Mr. Shibli stated also that they were never told by anybody that accused Motiur Rahman Nizami was involved in the murder of their father

Moulana Kasim Uddin. Of course, the authenticity of this defence exhibit-BG is not beyond question. It has come before the tribunal that Moulana Kasim Uddin had another son named G.S.M.A Chisti who has been residing in Pabna, but the prosecution did not/could not produce this gentleman G.S.M.A Chisti before the Tribunal to depose in support of this prosecution case. From the side of the prosecution though it has been argued that this G.S.M.A Chisti is not an eye witness of the killing of Moulana Kasim Uddin and that is why he was not produced before the Tribunal, this plea of the prosecution is not acceptable at all in view of the fact that the prosecution has relied on the evidence of hearsay witnesses namely P. W. 4 and P. W. 12 to prove the charge No. 1 against the accused appellant. The non-examination of G.S.M.A Chisti-the son of Moulana Kasim Uddin before the Tribunal cannot be ignored, rather it is fatal for the prosecution. Being the son of Moulana Kasim Uddin this G.S.M.A Chisti could have been most natural and believable witness. It might be that G.S.M.A Chisti did not see the alleged incident of killing of his father Moulana Kasim Uddin with his own eyes, but must have heard about the same immediately after that occurrence from other eye witness including the P. W. 21. The non-coming of this G.S.M.A Chisti-the son of Moulana Kasim Uddin coupled with the other facts and circumstances pointed out above-very reasonably

raises suspicion about the truth of the allegations made in the charge No. 1.

The prosecution has adduced some documentary evidence also as regards the killing of Moulana Kasim Uddin which have been marked exhibit in this case. But in none of these exhibits there is anything stating or indicating that accused Motiur Rahman Nizami was involved in the murder of Moulana Kasim Uddin.

In view of the above evidence and the facts and circumstances our considered opinion is that the prosecution could not prove the charge No. 1 against the accused appellant beyond all reasonable doubt. We therefore, find that the tribunal was not justified in finding the accused appellant guilty of the offence of killing of Moulana Kasim Uddin as stated in charge No. 1. We hold that the charge No. 1 being not proved beyond all reasonable doubt the accused appellant is entitled to get acquittal from this charge.

The summary of charge No. 2 (Conspiracy, mass-killing, rape and other crimes against humanity in villages Bousgari, Ruposhi and Demra of Sathia Police Station of District-Pabna)

On 10.05.1971, accused Motiur Rahman Nizami invited the inhabitants of village Baousgari under Sathia police station, district Pabna, to gather at Baousgari Ruposhi Primary School at around 11.00 A.M. for a meeting, where the accused made a speech

telling the villagers that soon Pakistani Army would arrive there to secure "peace" in that area. Thereafter, on 14.05.1971 at about 6.00/6.30 A.M. Pakistani Army arrived there along with Rajakars and Asad, an accomplice of the accused. They surrounded the villages Baousgari, Ruposhi and Demra and then picked up about 450 civilians who were all shot dead. The entire operation was carried out pursuant to pre-arranged plan to indiscriminately eliminate unarmed civilians. After killing them, the Pakistani Army and Rajakars then raped about 30-40 women, as a result of which, many of the raped victims were forced to leave the country and, as such, effectively deported to India as refugees. The said Rajakars, comprised of the followers of the accused, were organized under the direction of the accused. Thus, the accused has been charged for commission of offences of conspiracy, murder, rape and deportation as specified under section 3(2) (a) and (g) read with section 4(1) and 4(2) of the ICT Act.

The Tribunal has found this charge No. 2 proved and convicted the appellant under section 3(2) (a) (g) read with section 4(1) of the ICT Act and sentenced him to death.

To prove this Charge No. 2 the prosecution has relied on the evidence of P.W. 9 Md. Aynul Haque, P.W. 11 Md. Shamsul Haque, P.W. 17 Zamal Uddin and P.W. 18 Md. Zahirul Haque.

P.W. 9 Md. Aynul Haque is an aged man of 72 years and a retired School teacher. This witness has deposed to the effect that on 10th May, 1971 he went to his school (Ruposhi Government Primary School) and saw 10/12 persons along with the Head Master of the school sitting there. That he came to know from the Head Master that those persons came there for forming peace committee. At that time the Head Master showed him Motiur Rahman Nizami who was among those 10/12 persons. This witness has stated also that among those persons he knew "Dalal" Asad since before who was an agent of Pakistani army. That thereafter, on 13th May, 1971, Thursday he went to Demra Hat and from there he came to know that the Pakistani Military would come there on the next date. Thereafter, on the next day, on 14.05.1971 at about 6/6.30 a.m. his maternal uncle told them that the Pakistani army arrived there and surrounded the villages Demra, Rupashi and Boushgari. He along with others then went out of their house to save their lives. At about 11/11.30 a.m he saw a helicopter flying away and thereafter the firing started and flames and smoke were being seen. At about 12/1 p.m a man came out from the surroundings and told them that many people were killed there. That on the next date, on 15th May, in the morning he came back to his village Boushgari and saw there 300/350 dead bodies including the dead bodies of this maternal uncle Asgar Ali Pramanik, uncle A.K.M Fakir, cousin Ahes Fakir, Afil Fakir,

Jamal uddin Pramanik, Azahar Ali Pramanik, his student Moksed Ali, Ram Jogonnath Roy, Boloram Roy, Monindranath Nandi, Dilip Kumar Roy, Nirmelondunath Roy, Ghora Babu and Abdul Jabbar. That the name of the place of that occurrence was Puger of Boushgari village. Subsequently that place was named as "Boushgari Bodhya Bhumi"; that he, with the help of local people, buried the dead bodies of his relatives in the graveyard. He also buried the dead bodies of the Hindus. The dead bodies of other Muslims were taken away by their relatives. On the same date, in the afternoon, he came to know that Pakistani army raped women most of whom were ultimately deported to India. That the said "Dalal" Asad and his accomplices showed the Pakistani army the directions of their village.

In cross-examination this P.W. 9 has stated also that throughout the whole period of 9 months of Liberation War in 1971 he was the teacher of Ruposhi Primari School. From the lengthy cross-examination of this P.W. 9 nothing material came out to make his evidence unbelievable.

The P.W.11 Md. Shamsul Haque @ Nannu aged about 60 years, a resident of Police Station Sathia, District- Pabna is a lawyer by profession who practices in Pabna District Court and also is a member of Supreme Court Bar Association. This witness has deposed to the effect that he was a student of B.A. class in Pabna Edward College when the

Liberation War started and he took part in Liberation War. The evidence of this witness relevant for the charge No. 2 are as follows;

In 1971, on 23rd March, they, under the leadership of Edward College Chhatro League formed Bangladesh Liberation force in Pabna District. On 24th March they came to know from shop keeper Sekendar Ali that Motiur Rahman Nizami, the President of Islami Chhatra Shanghha along with others formed an anti Liberation Cell to co-operate and help the Pakistani army. That on 26th March, 1971 the people of Pabna District along with Police, EPR and retired Army Personnel formed a defence cell to counter the Pakistani army and consequently on 27th March, 1971 Pabna was freed from Pakistani occupation army through a armed resistance. Thereafter Motiur Rahman Nizami, Moulana Abdus Sobahan, Moulana Ishaq and Rafiqunnabi @ Bablu and others fled away from Pabna.

The other portion of the evidence of this P.W. 11 relevant for this charge No. 2 is as follows:

On 10th May, 1971 at about 10/11 a.m. accused Motiur Rahman Nizami, Moulana Abdus Sobahan, Moulana Ishaq, Rafiqunnabi @ Bablu, infamous collaborator Asad came to Rupashi Primary School and there accused Motiur Rahman Nizami told the Headmaster of that school and others that Pakistani army would come there soon for securing peace. That he (witness) was then at Demra village and getting that news of coming of Motiur Rahman Nizami and others he went to Ruposhi

Primary School and saw Motiur Rahman Nizami and others coming out from the office of headmaster of that school and going towards Sathia; at that time, on his query, Headmaster of that school told him that Motiur Rahman Nizami told them that the Pakistani Army would come there soon for forming a peace committee. That 4 days thereafter, on 14th may, 1971, after 'Fazar azan', Motiur Rahman Nizami and others along with the Pakistani armed forces surrounded village Ruposhi, Boushgari and Demra and murdered many innocent people by firing shots. That in that incident about 450 people including Asgar, Ahez, waz, Appel, Eken, Abdul, Mokshed, Khorshed, Abul, Zamiran, Khudhe Roy, Boloram Roy, Dilip Kumar Roy, Manindhra Nath Nandi, Alam Pramanik, Molom Pramanik were killed. That the said attack of Pakistani army was pre-planned, systematic and widespread; that during that incident the Pakistani Armu and their collaborators Nizami and his Associates burnt 137 homesteads, shops, educational institutions, mosques by setting fire. At that time they also committed rape on 30/40 women including Shikha and Shila-two college girls who were taken away by the Army and could not be traced out later; that at the time of said incident he (witness) was residing in the house of his friend Benu Roy; that at dawn he heard some sound of brushfire and realized that the Pakistani Army had attacked that area; he then came out of that house in order to escape and saw Motiur Rahman Nazami

and others with Pakistani army. That Pakistani army were firing at the people as per showing of Motiur Rahman Nizami and others; he then, for his safety, took shelter in a drain within a paddy field and from there also he could see that occurrence. That after departure of Pakistani army he entered the village and saw the atrocities committed by the Pak army. This witness has deposed further to the effect that in the middle part of May, 1971 Motiur Rahman Nizami along with 100/150 Rajakars opened a "Rajakar Camp" at Sathia Pilot High School and in that occasion Motiur Rahman Nizami gave a speech stating that freedom fighters and the pro-liberation people were to be killed and the young boys would have to be admitted in Rajakar Bahini. This witness has deposed further that in the middle of May, 1971 the president of all Pakistan Islami Chhatra Shangah Motiur Rahman Nizami established an Al-Badr camp at Pabna Alia Madrasha and from that camp the Al-Badr, at the instruction of Motiur Rahman Nizami, committed murder, looting, torture and other crimes against humanity in different places of the district Pabna; that Motiur Rahman Nizami used to go to Rajakar camp at Sathia Pilot High School often and as per his instruction the commander of that camp, namely Samad Fakir, used to commit various crimes against humanity; that as he (witness) was a student of Sathia Pilot School he went near the Sahtia Pilot High School on the date when the Rajakar camp was

opened in that school and after that opening function he heard about that function from the people who attended that function. This witness has deposed further to the effect that Motiur Rahman Nizami, as the president of All Pakistan Islami Chhatra Shangha, formed the Al-Badr Bahini with the members of Islami Chhatra Shangha and he was the chief of Al-Badr Bahini, that as per his instruction the Al-Badrs committed various types of crimes against humanity during the period of Liberation War in 1971; that immediate before the Liberation of Bangladesh the Al-Badr Bahini, in order to make this country intellectually cripple, killed the intellectuals-the luminaries of this country in the "Badhya Bhumi" at Rayer Bazar and other places of the country. This P.W. 11 has been cross-examined at length by the defence, but nothing material came out from his cross-examination to make his evidence false or unbelievable.

P.W. 17 Md. Jamal Uddin aged 60 years has deposed to the effect that he is a freedom fighter and was deputy commander of Mukti Joddha Sangshad, Sathia Upazila. In 1971 he was a candidate of S.S.C. examination from Dhulaura High School. He participated in Liberation War. The necessary portion of the evidence of this P.W. 17 relevant for charge No. 2 is as below;

that he (P. W. 17) heard from the Head Master of Ruposhi primary school that in the first part of

May, 1971 Motiur Rahman Nizami, the president of Islami Chhatra Shanghha along with other local members of Jamaat held a meeting at Ruposhi Primary School for forming Al-Badr and Rajakar Bahini; thereafter on 14th March, 1971, at dawn, the Pak army, the local Rajakars and Al-Badrs under the leadership of Motiur Rahman Nizami surrounded villages Ruposhi, Demra and Boushgari and killed unarmed 450 persons by firing and burnt 200/300 houses, bazars etc. looted many houses and also raped women. This witness has deposed further to the effect that he was a commander of freedom fighter, he came to know from the apprehended Rajakars and Al-Badrs that at the advice and direction of accused Motiur Rahman Nizami, the atrocities were committed at different places.

P.W. 17 also has been cross-examined at length by the defence but nothing material came out from his cross-examination to make his evidence unbelievable.

P. W. 18 Md. Jahirul Houqe aged 67/68 years also is a freedom fighter and commander-in-charge of Sathia command of Bangladesh Mukti Jodhaya Shanshad. In 1971 he was the head master of Rajnarayanpur Girls School under Bera Police Station. This witness has deposed to the effect that he came to know from Aynul Hoque, a teacher of Ruposhi Primary School that on 10.05.1971 Motiur Rahaman Nizami along with 10/12 collaborators came to Rupohsi Primary School and held a discussion there with the head master and others and told that the Pakistani army would come there

soon for forming a peace committee and also Rajakar and Al-Badr Bahini; at that time Motiur Rahman Nizami instructed all to cooperate with the Pak army in all respect. This witness has deposed further to the effect that on 13.05.1991 he along with some others were staying at the house of Shahid Abdul Jabbar at village Boushgari for taking preparation for Liberation War. On 14.05.1971, after Fazar prayer, he woke up hearing sounds of firing and he then came out of the house and from behind a bush by the side of a road he saw Motiur Rahman Nizami, Asad, Kader, Sattar and other collaborators along with Pak army proceeding towards the village by firing indiscriminately; seeing that he along with his other companions fled away and 6/7 hours later he came back and saw about 400 dead bodies of Hindu and Muslim men and women; that at that time he came to know from the public present there that the Pak army, at the instruction of Motiur Rahman Nizami and in his presence, murdered those people by firing indiscriminately. That he then identified 50/60 dead bodies including those of Abdul Jabbar, Azgar Ali, Moksed Ali, Idris Ali, Eken Ali, Malom Pramanik and his bother Kalom Pramanik, Wazuddin, Sree Balaram Das, Upendranath, Jitendranath. This witness has deposed to the effect also that on 11 or 12th May Motiur Rahman Nizami, the then president of Islami Chhatra Shanghha and Ishaq Mowlana along with 100/150 Rajakars and Al-Badrs opened a Rajakar camp at Sathia

Pilot High School and in his opening speech Motiur Rahman Nizami told that the freedom fighters and the pro-liberation people would have to be killed and that the local youths would have to be admitted to Rajakar and Al-Badr Bahini; that he heard about this occurrence from Md. Tofazzel Hossain-a teacher of Sathia High School and some others.

This witness also has been cross-examined on all material points by the defence but nothing material could be extracted from him to make his evidence unbelievable.

From the above narration of the evidence adduced by the prosecution it appears that to prove the charge No. 2 the prosecution has examined as many as three eye witness of the occurrence of 14.05.1971 and also one hearsay witness to corroborate the eye witnesses. From the above narration it appears that P. W. 9 Aynul Hoque who also was a teacher of a school at that relevant time, has deposed to the effect that he himself saw the accused Motiur Rahman Nizami holding a meeting with the Head Master of Ruposhi Primary School for the purpose of forming a peace committee by the Pak army. This witness has further narrated the incident of mass killing at the villages Ruposhi, Baoshgari and Demra on 14.05.1971. This witness though did not name this accused Motiur Rahman Nizami while narrating the incident of 14.05.1971, the other two witnesses namely P. W. 11 Md. Shamsul Hoque and P. W. 18 Md. Zahirul Hoque have

specifically mentioned the name of accused Motiur Rahman Nizami while narrating the incident of mass-killing in the villages Boushgari, Ruposhi and Demra on 14.05.1971. Both these witnesses have deposed to the effect that this appellant Motiur Rahman Nizami was not only present but was actively involved in that incident of 14.05.1971 at villages Boushgari, Ruposhai and Demra. Both these witnesses have deposed to the effect that the Pak army committed that incident of mass-killing by firing indiscriminately at the instruction of this accused appellant Motiur Rahman Nizami. From the side of the defence though some alleged contradictions in the evidence of these witnesses have been pointed out but we do not think that these alleged contradictions are fatal at all to make their evidence unbelievable. From the side of the appellant it has been argued before us that the above witnesses, P. W. 9, P. W. 11, P. W. 17 and P. W. 18 have made some contradictory statements as regards the purpose of holding meeting by the appellant in Ruposhi Primary School on 10.05.1971. Mr. S.M.Shahjahan the learned Advocate for the appellant has pointed out that some of these witnesses have deposed to the effect that in that meeting this accused appellant told about forming of peace committee by Pak army and some of the witnesses have deposed to the effect that the appellant held that meeting for forming Rajakar and Al-Badr Bahini and has argued that these contradictory statements of

these witnesses have made the prosecution story that accused Motiur Rahman Nizami held a meeting on 10.05.1971 in Ruposhi Primary School and gave a speech there stating that soon the Pakistani army would arrive there to secure peace in that area- false. But this argument of the learned Advocate for the appellant is not acceptable at all. The alleged contradictions pointed out from the side of the appellant is not at all important or serious in nature. It is a fact of common knowledge that the invading Pak army, with the cooperation of local collaborators, formed Rajakar Bahini, Al-Badr Bahini etc. in all most all the areas of this country during liberation war in 1971. In the district Pabna also Rajakar, Al-Badrs and other auxiliary forces were formed by the Pak army with the cooperation of local collaborators. In these facts and circumstances the telling by some of the above witnesses before the Tribunal that in the meeting of 10.05.1971 appellant Motiur Rahman Nizami told about formation of Rajakars and Al-Badr Bahini also-is not fatal at all and this does not make the prosecution case of holding a meeting by the appellant Motiur Rahman Nizami on 10.05.1971 in the Ruposhi Primary School for the purpose of formation of peace committee by the Pak army-false or unbelievable at all.

The learned Advocate for the appellant has made argument to the effect that among the four prosecution witnesses, who deposed about the alleged

incident of 14.05.1971 in the villages Boushgari, Ruposhi and Demra, P. W. 9 only is the inhabitant of that area, but this witness did not implicate the appellant in the said incident of 14.05.1971. The contention of the learned Advocate is that in this circumstance the evidence of P. W. 11 and P. W. 18, who, admittedly, were not inhabitants of that area, cannot be relied upon. The learned Advocate for the appellant has pointed out that both the P. W. 11 and P. W. 18 claimed that on 14.05.1971 they were present at the place of occurrence incidentally and has argued that where the local witness namely P. W. 9 has elaborately narrated the incident without implicating the appellant in that incident the evidence of this P. W. 11 and P. W. 18-two outsiders implicating the accused appellant in that incident cannot be and should not be relied upon at all. The learned Advocate for the appellant has argued further that the appellant was a mere student at that time and it was quite absurd that the members of Pakistani military obeyed the order of this appellant and opened fire indiscriminately towards the people of those three villages as per instruction of this appellant. But we are unable to accept these arguments also of the learned Advocate. P. W. 11 Md. Shamsul Hoque is an Advocate and P. W. 18 Md. Zahirul Hoque is a Head Master of a School and both of them are freedom fighters and took active part in the War of Liberation of Bangladesh. They deposed before the

tribunal on oath explaining how they were in that area at the time of that incident and narrated how they saw the appellant Motiur Rahman Nizami along with the Pak army while they were committing atrocities in those three villages. P. W. 9 Aynul Hoque though did not name the accused appellant Motiur Rahman Nizami while narrating the said atrocities of 14.05.1971 but he deposed to the effect that four days before this occurrence accused Motiur Rahman Nizami held a meeting at Ruposhi Primary School and delivered a speech there to the effect that Pak army would come soon to that area for forming a peace committee. This evidence of P. W. 9 shows that accused Motiur Rahman Nizami had close contact with the Pak army and he co-operated with them. However, it may be that P. W. 9 Aynul Hoque missed to identify this appellant Motiur Rahman Nizami while atrocities were being committed in those three villages by the Pak army along with its local collaborators, but for this reason of non-telling the name of accused Motiur Rahman Nizami by the P. W. 9 Aynul Hoque the evidence of P. W. 11 and P. W. 18-the other two eye witnesses-cannot be disbelieved. It should be pointed out here that these 3 witnesses-the P. W. 9, P. W. 11 and P. W. 18 saw the occurrence of 14.05.1971 in 3 villages from different places and not from the same place and as such it was not unnatural at all that all these 3 witnesses might not see all the perpetrators of those atrocities. So, we

find no reason to disbelieve these two witnesses. P. W. 17 Md. Jamal Uddin though is a hearsay witness but he has deposed to the effect that he heard about the atrocities committed in the villages Boushagari, Ruposhi and Demra from other eye witnesses and also heard that Motiur Rahman Nizami was involved in that atrocities. It should be mentioned here that the ICT Act and ICT Rules have made the hearsay evidence admissible. Of course before placing reliance on any hearsay evidence the Tribunal is to assess its accuracy or otherwise and being convinced about the accuracy of hearsay evidence the Tribunal can take it into consideration. We have examined the evidence of this hearsay witness P.W. 17 and also the other evidence and facts and circumstance brought on record. We do not find any thing or any reason to hold the evidence of this hearsay witness not trustworthy. Rather, we find that the evidence of other eye witnesses also have corroborated the evidence of this hearsay witness P.W. 17.

As against the P.W. 18 another objection raised from the side of the appellant is that this witness was cited as a witness long after commencement of the trial of the case. But we find no illegality in it, section 9(4) of the ICT Act has allowed calling in additional witnesses with the permission of the tribunal, at any stage of the trial. The P.W. 18 was examined by the prosecution with the permission of the tribunal. Defence also cross-examined this

witness at length. As against the P.W. 11 allegation from the side of the appellant is that after giving evidence before the Tribunal this witness gave a video interview, which was available in "You tube", an online media, denying the allegations made against this appellant and stating that being pressurized he deposed before the Tribunal against him. Admittedly the P.W. 11 has denied this so-called video interview by calling a press conference. In the circumstances this alleged "Video interview" of P.W. 11 does not deserve any consideration at all. From the side of the appellant some other alleged discrepancies as to dates of some events etc in the evidence of these P.Ws have been pointed out before us. But we do not find any of this alleged discrepancies fatal at all. These witnesses have deposed before the Tribunal long 40 years after the incident narrated. With the passage of this long period of 40 years the memories of these witness have faded, no doubt. So it is most natural that there may occur some minor discrepancies in their evidence.

Mr. S. M. Shahjahan, the learned Advocate for the appellant has made argument to the effect also that some old documentary evidence were produced before the tribunal from both the sides and those were marked exhibits, but none of those documentary evidence supports the prosecution case that this appellant was involved in the incident of villages Boushgari, Ruposhi and Demra. Referring to exhibit-C

the learned Advocate has argued that this Exhibit-C is a report sent by police superintendent, Pabna to the Deputy secretary of Ministry of Home wherein the list of Rajakars, Al-Badr and Al-Shams of Pabna District was included but in that list of exhibit-C the name of the appellant does not appear. The contention of the learned Advocate is that this exhibit-C proves that the appellant was not at all a Rajakar or Al-Badr as claimed by the prosecution. But we do not accept this argument of the learned Advocate. Admittedly this list of Rajakar, Al-Badr and Al-Shams contained in exhibit-C is not a complete list, so the absence of the name of the appellant in this list does not make the evidence of the prosecution witnesses false or unbelievable at all. The other documentary evidence, referred to by the learned Advocate for the appellant are some books marked exhibit-33 and exhibit-D. In these books the incidents of the village Boushgari, Ruposhi and Demra have been narrated but the involvement of the appellant in those incidents has not been mentioned in these books. But we do not think that the absence of name of the appellant in these books makes the evidence adduced by the prosecution before the tribunal false. There might be so many reasons for not mentioning the name of the appellant in those books.

However, we find that the Tribunal did not commit any wrong or illegality in relying on the

P.Ws. 9,11,17 and 18 and in finding the charge No. 2 proved on the basis of the evidence of these 4 prosecution witnesses. In our opinion the tribunal rightly found the charge No. 2 proved beyond all reasonable doubt and rightly convicted and sentenced the appellant on this charge No. 2.

Summary of charge No. 3: (Committing different crimes against humanity at Physical Training Institute, Mohammadpur, Dhaka

As a leader of Islami Chhatra Shanghha [ICS] accused Motiur Rahman Nizami along with other leaders of Jamaat-e-Islami started to pay visit to Physical Training Institute, Mohammadpur, Dhaka since early May 1971 and the said institute was turned into a training centre for various auxiliary forces including Rajakar and Al-Badr. Subsequently, it was also used as a Detention Camp and a Torture Cell. In the said Torture Cell many victims were always liquidated after inhuman torture. As a Chief of Al-Badr accused Motiur Rahman Nizami conspired with Pakistani army officers to commit different crimes against Bangalees during his visit to this Physical Training Institute, as a result of which the auxiliary forces along with Pakistani invading force committed different crimes against Humanity all over the country. Thus, the accused has been charged for physical participation and also for substantially contributing to the commission of offences of torture, murder, rape as crimes against Humanity

under section 3(2)(a), 3(2)(g) and 3(2)(h) read with section 4(1) and section 4(2) of the Act.

The Tribunal has found this charge No. 3 against the appellant proved and convicted him under section 3(2)(a)(g)(h) read with section 4(1) 4(2) of the ICT Act and sentenced him thereunder to imprisonment for life.

The Tribunal has relied upon the evidence of P.W. 2 Johir Uddin Jalal @ Bichchhu Jalal, P.W. 3 Md. Rustum Ali and P. W. 13 Shaymoli Nasreen Chowdhury for finding the appellant guilty of this charge No. 3.

P.W. 2 Johir Uddin Jalal @ Bichchhu Jalal, aged 57 years has deposed to the effect that in 1971 he used to reside at Circuit House at new Easkaton Garden, Dhaka with his father who was then serving as an superintendent of police in the detective branch of police department; he was then a student of class-IX. That at present he is a member of executive committee of the Central Command Council of freedom fighters.

The evidence of this P.W. 2 relevant for the charge No. 3, are stated below.

That on 11 April, 1971, 8/10 persons from a nearby army camp went to their Circuit House and entered into the flat of Azizul Haq Bachchu at 3rd floor; at that time his father showed him Motiur Rahman Nizami, the president of Islami Chhatra Shangha who came to that circuit house with those

8/10 persons; at that time his father showed him Ali Ahsan Mohammad Mujahid also, another leader of Islami Chhatra Shanghha and told him that those two leaders of Islami Chhatra Shangah were collaborating with the Pakistani army in committing various crimes; his father cautioned him also telling that if those persons could know about their activities against the Pakistani army, they would apprehend them. That in order to escape from being caught by those persons he (P.W.2) fled away from house on 12 April and joined Liberation War. That he took training under leaders Major Khaled Mosharraf and Major Haider in Tripura, India and then came back to Dhaka and started guerrilla attacks on Pak army, Al-Badrs and Rajakars in different places. That he was given the responsibility to keep watch on Physical Training Institute at Mohammadpur where the Head Quarter of Al-Badrs was established; that Golam Azam, Motiur Rahman Nizami, Ali Ahsan Mohammad Mujahid and others along with Pakistani army would hold meeting in that Al-Badr head quarter. That Al-Badrs, after receiving training from Pakistani army, at the instruction of Motiur Rahman Nizami and Ali Ahsan Mohammad Mujahid, used to round up and take the pro-liberation people and other professionals including doctors, writers, journalists, Freedom Fighters and other professionals blind-folded to that Al-Badr head quarter at Mohammadpur Physical Training Institute and used to torture them there brutally. That Rustum Ali (P.W.3)

used to give those informations to them at their camp at Keraniganj. That they were then getting news that Al-Badr commander Motiur Rahman Nizami, Ali Ashan Mohammad Mujahid and their accomplices, holding musk of black cloth, used to bring the pro- liberation people to the said physical training institute; that after liberation of Bangladesh, on 17th December they went to that Al-Badr head quarter at Mohammadpur and found slaughtered dead bodies and 9 severed heads of human. From there they went to "Rayer Bazar Itakhola" and saw there many dead bodies with bullet injuries.

The P. W. 3 Md. Rustom Ali Mollah aged 58 years has deposed to the effect that in 1971, during liberation war, he used to reside at Mohammadpur Physical Training College with his father who was then Peon/security Guard of that college. That on 26th March, 1971 the Pakistani army established a camp in that Mohammadpur Physical Training Institute and they kept many persons including 150 EPR personnel confined there. That some intellectuals, artists, doctors also were kept confined in that camp. Subsequently those persons were killed after inhuman torture. That the Pakistani army used to bring many women also in that camp and raped them, the women who resisted, were tortured and killed. That 4/5 months after establishment of that camp a training center for Rajakars and Al-Badrs was started there. That one day, after starting of that training center, while he was going out of that camp for shopping he saw Motiur

Rahaman Nizami, Golam Azam and Ali Ahsan Mohammad Mujahid coming there by an army pickup. That the Rejakars and Al-Badrs, who were then on duty in that training center, told him at that time that those three persons were their leaders and he (P.W.3) then recognized those three persons on that day for the first time; he heard from others that those three persons came to that training center thereafter also, but he himself did not see them to come there after that day. This witness has stated also that entering the training center those 3 persons went to the office of the colonel and stayed there for $1\frac{1}{2}$ hours; that he heard that those three persons came to that training center more than once and talked with Rajakars and Al-Badrs there and also went to the office room and talked there for $1\frac{1}{2}$ hours.

This P.W. 3 has deposed to the effect also that six months after starting of Liberation War he, with an intention to join liberation war, left the house and started for Bakutta freedom fighter's camp; on the way he met freedom fighter Bichchhu Jalal who told him that he did not require to join Liberation War, rather he should stay there and give them informations about the camp in physical training centre and accordingly he came back and kept supplying news about that camp to them. That thereafter within 2-10 days Bichchhu Jalal informed him that they would attack that camp, but ultimately

they could not attack that camp as the number of Rajakers and Al-Badrs staying in that camp was huge. This P.W. 3 has deposed further that 10 days before the Liberation of Bangladesh the Pak Army along with Rajakars and Al-Badrs brought intellectuals, artists, Bengali Girls, Bengali army men and freedom fighters to that camp and tortured them inhumanly and later they murdered them and left their dead bodies at Rayar Bazar "Badhhya Bhumi". That on the date of liberation, at evening, the Rajakars and Al-Badrs left that camp, but before leaving that camp also they slaughtered a bengali doctor there; that the Rajakars and Al-Badrs shaved there beard before fleeing away from that camp; that on the next day of liberation he recovered nine severed heads of human from that camp and also 100/150 gouged human eyes from the brick filed of Rahim Bepari and handed over those to P.W. 2 Jahir Uddin Jalal.

The P.W. 13 Shyamoli Nasrin Chowdhury has deposed that she came to know from various articles published in various newspapers that intellectuals including doctors, engineers, journalists and literators, were taken blind-folded to Mohammadpur Physical Training Institute where they were killed after torture.

Besides the above oral evidence the prosecution has also relied on a documentary evidence the exhibit no. 35, a book titled একাত্তরে যাতক ও দালালরা কে কোথায় edited by

doctor Ahmed Sharif, Mr. Nuruzzaman and Shariar Kabir published in 1987.

From the side of the appellant it has been argued to the effect that the above evidence adduced by the prosecution could not prove the charge No. 3 beyond all reasonable doubt. Mr. S. M. Shahjahan, the learned Advocate for the appellant has made argument to the effect also that the charge No. 3 is vague which does not tell sufficiently what offence actually has been alleged against this appellant in that charge. It has also been argued that the P.W. 2 and P.W. 3 did not state the material statements- which they made before the Tribunal-to the investigation officer and for this reason also their evidence cannot be relied on. The learned Advocate for the appellant has argued also that to prove the charge No. 3 the prosecution did not examine some vital witnesses, namely the then principle of that physical training institute who is still alive and also Raham Ali-the father of this P.W.3 who was then an employee of the physical training institute and who also is still alive. The learned Advocate for the appellant has argued that the P.W. 3, admittedly, was a little boy of 14 years only at that relevant time and the examination of the P.W. 3 leaving his father and also the then principle of that physical training institute, who could have been the most competent witnesses in this case, very reasonably raises suspicion about the truth of the prosecution case. It

has also been argued from the side of the appellant that the prosecution could not produce a single documentary evidence to show that this appellant ever went to physical training institute during the liberation war in 1971, that the exhibit-35 does not disclose anything to the effect that this appellant Motiur Rahman Nizami ever went to physical training institute, Mohammadpur in 1971.

We have considered the above arguments of the learned Advocate for the appellant and examined the above narrated evidence of P.W. 2, P.W.3 and P.W. 13. The allegation which has been made in this charge No. 3 against the appellant is that the appellant along with other leaders of Jaamat-E-Islami visited physical training institute at Mohammadpur many times and there appellant Motiur Rahman Nizami conspired with the Pakistani army officers to commit different crimes against Bangalees and as a result of that conspiracy the Pakistani invading force along with their auxiliary forces committed different types of crimes against humanity in all over the country. Evidently this charge No. 3 does not state the alleged crimes specifically. The allegation which appears to be specific in this charge No. 3 is that this appellant Motiur Rahman Nizami used to go to that Mohammadpur physical training institute and there he met Pakistani army officers and made conspiracy with them to commit various crimes. But from the above narrated evidence of P.W. 2, P.W. 3

and P.W. 13 it appears that the P.W. 3 only has deposed to the effect that during the Liberation War in 1971 he saw this appellant Motiur Rahman Nizami along with Golam Azam and Ali Ahsan Mohammad Mujahid to come to the physical training Institute at Mohammadpur only one day. This P. W. 3 though has deposed also to the effect that he heard from others that subsequently also this appellant Motiur Rahman Nizami came to that physical training centre more than once and talked with the Rajakars and Al-Badrs and also met the army officers in the office room of Colonel and stayed there for one and half hours but there is no corroboration of these evidence of p.w.3. The P.W. 2 also though has deposed to the effect that this appellant Motiur Rahman Nizami along with Golam Azam and Ali Ahsan Mohammad Mujahid and others would hold meeting with the Pakistani army at that physical training institute at Mohammadpur and that at the instructions of the appellant Motiur Rahman Nizami and Ali Ahsan Mohammad Mujahid the Al-Badrs used to round up pro-liberation people and other professionals and bring them blind-folded to that physical training institute and torture them brutally but this P.W. 2 did not claim that he himself saw this appellant to commit those crimes. Rather, the P.W. 2 has stated that they were getting news that Al-Badr commander Motiur Rahman Nizami and Ali Ahsan Mohammad Mujahid and their accomplices, holding musk of black cloth, used to bring the pro- liberation

people to the said physical training institute. The P.W. 13 has stated only that she came to know from various articles published in various newspapers that intellectuals were used to be taken to Mohammadpur Physical Training Institute blind-folded and were tortured and killed there. This P.W. 13 did not state anything entangling the appellant in the alleged crime narrated in charge No. 3. So it appears that to prove the charge No. 3 against the appellant the only evidence is that the P.W. 3 saw him one day only to come to that physical training Institute at Mohammadpur along with two other leaders. The other portion of the evidence of the P.W. 3 is hearsay. Though the hearsay evidence also has been made admissible in ICT Act, it must be found reliable in consideration of other facts and circumstances. The P.W. 3 did not disclose the names of the persons from whom he heard that this appellant went to that physical training institute more than once and had talked with army officers and Rajakars and Al-Badrs. We cannot ignore the fact also, as pointed out by the learned Advocate for the appellant, that some other persons, named above, who could have been the most competent witnesses, were not examined by the prosecution in spite of the fact that those persons are still alive. The P.W. 2 also could not name the persons from whom he allegedly got the news about this appellant's going to Mohammadpur Physical Training Institute and having talked with Pakistani

army and Rajakars and Al-Badrs there. So it appears that the only evidence to substantiate the charge No. 3, which we can rely upon, is the evidence of P.W. 3 to the effect that one day he saw this appellant Motiur Rahman Nizami and two others to come to Physical Training Institute at Mohammadpur and talk with Pakistani army there. But this evidence only, in our opinion, is not sufficient at all to prove the charge No. 3 against the appellant. In the charge No.3 it has been stated to the effect that as a result of conspiracy made by this appellant Motiur Rahman Nizami with the Pakistani army, the auxiliary forces along with Pakistani invading force committed different crimes against humanity all over the country. This vary allegation is vague as no particulars have been stated in this charge as to what were those crimes and on whom and in which place and at what point of time those crimes were perpetrated.

However, we find that the evidence adduced by the prosecution before the Tribunal to prove the charge No.3 is are very meagre which do not prove this charge beyond all reasonable doubt. It should be mentioned here that the prosecution has filed some documentary evidence also including the exhibit No. 35 as mentioned above, but in none of these documentary evidence also there is anything to the effect that this appellant Motiur Rahman Nizami used to visit Physical Training Institute at Mohammadpur

and there he made conspiracy with the Pakistani army to commit crimes against humanity. So our considered opinion is that the charge No. 3 has not been proved beyond all reasonable doubt by sufficient evidence. The Tribunal was not right to convict and sentence the appellant on charge No. 3.

The appellant Motiur Rahman Nizami is found not guilty of the charge No. 3 and be acquitted of that charge.

Summary of Charge No. 4: (Committing murders, rape and persecution in village Karamja) On or about 24/25 April, 1971, on the direction and planning of accused Motiur Rahman Nizami, he [accused] with the help of local Rajakars including Rajakar Afzal killed Habibur Rahman Sarder of Purbo Karamja at the bus stand allegedly for helping the freedom-fighters. Thereafter, sequence to his same plan, in early morning of 08.05.1971, a member of Al-Badr Bahini namely Rafiqunnabi Bablu along with Rajakars and Pakistani Army reached village Karamja and surrounded the house of Megha Thakur and killed Megha Thakur, Sosthi Halder, Abu Halder, Daru Thakur, Kartik Halder, Suresh Chandra Halder, Deju Halder, Mohammad Fakir Chand, Santi Halder and Murali Das in that house by firing shots. Tara Halder was injured and he somehow managed to escape. Later on, members of Pakistani Army with the help of Rajakars raped Shebani, the daughter of said Megha Thakur, his son's wife and two other Muslim women. After departure of

the Pakistani Army, the Rajakars looted away the belongings of Megha Thakur and destroyed the house of Wahed Pramanik by setting it on fire. Therefore, the accused has been charged for commission of offences of murder, rape and persecution under section 3(2) (a) (g) and (h) read with section 4(1) and 4(2) of the ICT Act.

The tribunal found the appellant guilty of the charge No. 4 also and convicted him under section 3(2) (a) (g) (h) read with section 4(1) of the ICT Act and sentenced him to death.

To prove the charge No. 4 the prosecution has examined 4 witnesses namely P. W. 5 Mohammad Nazim Uddin Khattab, P.W. 7 Prodip Kumar Day, P.W. 17 Mohammad Jamal Uddin and P.W. 19 Mohammad Shama Fakir.

The P.W. 5 Mohammad Nazim Uddin Khattab aged 63 years, is a resident of Koromja Modhya Para village of District-Pabna. This witness has deposed to the effect that during the Liberation War in 1971 he used to supply food to the Freedom Fighters. The relevant portion of the evidence of this P.W. 5, necessary for adjudication of this charge No. 4 may be summarized as below;

On 25th April 1971 at about 10 a.m. Choukider Pocha Biswas informed this witness (P. W. 5) that accused Motiur Rahman Nizami would hold a meeting at board office and they would have to go there; that this witness along with other 7/8 persons then went

to board office and saw that the accused Motiur Rahman Nizami was holding a closed door meeting there. That half an hour after Motiur Rahman Nizami and others came out of that room; Motiur Rahman Nizami then told them that if they joined freedom fighters their parents and siblings would be killed and their houses would be burnt; that 3 days thereafter, on 28th April, 1971, at about 8 a.m. his maternal uncle Habibur Rahman Sarder along with another freedom fighter Akkas Ali was going towards C & B Bus stand. On the way, at the instruction of accused Motiur Rahman Nizami, the collaborators Afzal and others and the Pak army caught his maternal uncle Habibur Rahman and Akkas Ali and killed them by gun shot at the bus stand. Being informed about that incident he, with the help of local people, brought the dead body of his maternal uncle to his maternal grand father's house; thereafter he, as per his maternal grand mother's advice, fled away. This witness has deposed to the effect also that on 8th May, 1971 there committed mass-killing, rape plundering, arson in his village; in that night Pronob and Dulal, son and grand son of Jamindar Shoilendra Bhattacharja slept in his (P.W. 5) house; after "Azan of Fazr" prayer they woke up hearing hue and cry and they then proceeded towards the Jamindar house and he saw the mother of Pronob Bhattacharjo unclothed and shouting in front of the gate of their house; he saw Al-Badr Rafiqunnabi Bablu also standing

beside that lady; Moslem, Asad, Afzal and Pak army were standing beside him; that seeing that occurrence he came back and advised Pronob and Dulal to flee away; he asked his parents and siblings also to flee away and accordingly all then fled away; he himself also them fled away from the house and went to "Catajholra field;" a little while after Pronob and Dulal also came there ; they then heard sound of firings; they proceeded towards Jamindar house and on the way they saw Tara Halder in bleeding condition. That Tara Halder then told them that in presence of Motiur Rahman Nizami the Pakistani army along with other collaborators caught him (Tara Halder) along with his brother Shasti Halder, brothers son Adu and Kartik, grand father Shammi Halder, Jamindar Shoilendranath Bhattacharya @ Mega Thakur, Koru Thakur, Abu Jafar, Mohammad Ali, Chandra Das, Suresh Chandra Halder and Fakir Chand and others and made them standing in a line in front of prayer house of Shoilendranath Bhattacharya @ Mega Thakur and killed them by brush fire and causing injuries with bayonet; he (P. W. 5) was injured but somehow managed to escape. That Zafor also was rescued from there by his father-in-law Moslem. That they saw the dead bodies of those persons lying on the ground with bleeding injuries; that entering into Jamindar's house they saw that Shibani, the daughter of Jamindar and the daughter-in-law of Jamindar and wife of one Asgar Ali were raped. That after that occurrence

Pronob and Dulal along with their family members, who were still surviving, went away to India. The P. W. 5 has deposed also that those dead bodies were then buried.

P.W. 7 Prodip Kumar Dev, aged about 62/63 years also is an inhabitant of Karamja village. This witness has deposed to the effect that at dawn of 8th May, 1971 he climbed up a litchi tree of Megha Thakur to pluck litchi and at that time he saw the Pakistani Army surrounding the house of Mega Thakur. That Pakistani army entered into that house and assaulted the inhabitants of that house and thereafter murdered them in front of the mandir by firing shots. That Megha Thakur, Diyu Thakur, Koru Thakur, Shasti Halder, Shanti Halder, Adu Halder, Kartik Halder, Suresh Halder, and his paternal uncle Murali Chandra were among the persons who were murdered by the Pak army. That Tara Halder, who also was a target of killing, luckily escaped; that at the time of that killing Sukkur, Afzal, Asad, Moslem and others were present there; that he then fled away from there. The prosecution declared this witness hostile. But by cross examining this witness the prosecution could not extract anything from this witness showing involvement of this accused appellant in the occurrence of 8th May, 1971 in village Karamja

P.W. 17 Mohammad Jamal Uddin, aged 60 years, has deposed to the effect that he is a freedom fighter and Ex-Deputy Commander of "Sathia Upazila Freedom

Fighter Council." That in 1971 he was a candidate of S.S.C examination from Dhulaura High School; that during the liberation war he fought at Faridpur, Bera, Vangura, Shajatpur and in other areas within Sathia Police Station. About the incident of 8th May in the village Karamja this witness deposed only to the effect that in the year 2000, in the month of December, under leadership of the then State Minister Professor Abu Syed, the local Police recovered some skulls and bones of human being from a ditch by the side of the house of Megha Thakur; that at that time the local people told that in the month of May, 1971 after Fazar prayer, the Pakistani army, under the leadership of local Rajakar Motiur Rahman Nizami, surrounded that house of Megha Thakur and murdered 9 unarmed innocent people and in that incident the daughter and daughter-in-law of Megha Thkur were raped. This witness has deposed also that as a commander of a group of freedom fighters he could know from the apprehended Rajakers and Al-Badrs that as per the direction of accused Motiur Rahman Nizami all the atrocities were committed at different places of Pabna District including the area of Sathia Police Station.

P.W. 19 Abu Shama Fakir aged about 70/71 years is a resident of village Talot of Police Station Sathia, District- Pabna. This witness has deposed to the effect that during the Liberation War of 1971 he started procuring people for joining liberation war.

That on 28th April, 1971 at about 9/10 a.m while he was returning home he saw a army van going from east towards Sathia and he then took shelter in a bush by the side of the road and from there he saw accused Motiur Rahman Nizami sitting beside an Army officer in that army van; at that time he saw also that Habibur Rahman and Akkas were going from west to east and having seen the Army vehicle they went into hiding behind a tree by the side of that road, and at that time that army vehicle stopped there and then accused Motiur Rahman Nizami told something to the army officer sitting beside him and then two army men got down from that vehicle and shot Habibur Rahman and Akkas to death and thereafter that army vehicle went back towards east. That he then went to that place of occurrence and saw the dead bodies of Habibur Rahman and Akkas with bullet injuries; he then went to the house of Habibur Rahman and told the brother of Habibur Rahman and other relatives about the said occurrence. This P.W. 19 has further deposed that on 8.05.1971, after Fazr prayer, he heard sound of heavy firing coming from village "Karomja" and being frightened he went into hiding in a bamboo bush and about 1 hour thereafter the firing was stopped; he then went to village Karomja and saw the dead bodies of 9 persons including Megha Thakur, Diyu Thakur, Kuru Thakur, Shanti Thakur, Kartik Halder, Shonto Halder, Murali, Lokkhi Halder and Fakir Chand with bullet injuries lying beside the prayer room of

the house of Megha Thakur; that those dead bodies were subsequently buried in a well; the dead body of Fakir Chand was buried in a graveyard and that of Murali Mali was buried in a hole. That at that time he came to know from people present there that the daughter and daughter-in-law of Megha Thakur were raped at that time by Pakistani army men and Rajakars. That he came to know also that those atrocities were committed as per showing of accused Motiur Rahman Nizami and others.

From the above narration of the evidence of P.W. 5, P. W. 7, P. W. 17 & P. W. 19 it appears that among these 4 witnesses the P.W. 19 Abu Shama Fakir only has claimed to have witnessed the occurrence of 28.04.1971 with his own eyes. Among the other 3 witness the P.W. 7 Prodip Kumar did not say anything implicating the appellant Motiur Rahman Nizami in the alleged occurrence of 28th April, 1971 or in the occurrence of 8th May, 1971. This witness has been declared hostile by the prosecution. The other 2 witness-P.W. 5 & P.W. 17 are hearsay witnesses. These 2 witnesses have deposed before the court implicating the appellant in both those occurrence claiming that they heard about those occurrence from others. The hearsay evidence though is admissible in the cases under the ICT Act, but the Tribunal/Court should carefully consider as to whether the hearsay witnesses can be relied on or not; considering the other evidence and the facts and circumstances the

Tribunal is to weigh and evaluate the hearsay evidence. In this case, from the narration of the evidence of P. W. 5, P. W. 7, P. W. 17 and P. W. 19 it appears that there is practically no eye witness of the occurrence of 8th May, 1971. The P. W. 9 Md. Abu Shama Fakir only has deposed to have witnessed the occurrence of 28.04.1971 i. e. killing of Habibur Rahman and Akkas. This only eye witness adduced by the prosecution to prove the charge No. 4 did not claim that he witnessed the occurrence of 8th May, 1971 also with his own eyes, rather this witness has stated that he heard about the occurrence of 8.5.1971 from others. It is true that the P. W. 19 and also the P. W. 5 deposed to the effect that immediately after the occurrence of 8th May, 1971 they went to the place of occurrence and saw the dead bodies lying there but these witnesses did not say that they saw this occurrence with their own eyes, rather they stated that they heard about that occurrence from the local people present there who told them that the said occurrence took place in presence of the accused Motiur Rahman Nizami at his instruction. P. W. 17 Md. Jamal Uddin has stated to the effect that in the year 2000 while some skulls and bones of human being were recovered from inside a hole by the side of the house of Megha Thakur under the leadership of the then State Minister Professor Abu Syed the local people present there told them that in the year 1971, in the month of May, after Fazar Prayer the Pak army, under

the leadership of accused Motiur Rahman Nizami surrounded the house of Megha Thakur at Karamja village and killed 9 innocent persons and also raped the daughter and daughter-in-law of Megha Thakur. From the evidence of this P. W. 17 and also other witnesses narrated above it appears that some eye witnesses of these occurrence of 8th May, 1971 are still alive. But the prosecution could not produce a single eye witness of the occurrence of 8th May, 1971 at village Karamja. The P. W. 19 though has claimed that he saw the occurrence of killing of Habibur Rahman and Akkas on 28.04.1971 with his own eyes but the defence has raised some questions as to the truth of the evidence of this P. W. 19 Mohmamad Abu Shama Fakir. It has been alleged from the side of the appellant that in fact Habibur Rahman and Akkas Ali were not at all killed by Pak Army or by their auxiliary forces during the war of 1971. To substantiate this allegation the defence has referred to the evidence of P. W. 26-the investigating officer. During cross examination this P. W. 26 has stated that during his investigation he got a list of martyr of Karamja village from the Deputy Commissioner but Habibur Rahman and Akkas were not named in the said list. The learned Advocate for the appellant has also drawn our notice to the exhibit-33, a book titled "যুদ্ধ অপরাধ গনহত্যা ও বিচারের অন্তিম" written by M. A. H. Hasan and pointed out that in this book though other occurrences took place in the

village Karamja in 1971 have been narrated in details, this alleged incident of killing of Habibur Rahman and Akkas Ali has not been mentioned in this book. The learned Advocate has argued that this fact also very reasonably raises suspicion about the evidence of P. W. 19 as to the killing of Habibur Rahamn and Akkas Ali. The above contention of the appellant, in our opinion, cannot be brushed aside in view of the fact that save and accept only one witness the prosecution could not adduce any other witness to prove the alleged killing of Habibur Rahamn and Akkas as per showing of the accused Motiur Rahman Nizami. In view of the facts and circumstance, our considered opinion is that the alleged killing of Habibur Rahman and Akkas by the Pak army as per showing of appellant Motiur Rahman Nizami on 28th April, 1971 has not been proved beyond all reasonable doubt. It should be mentioned here that in the charge framing order it has been stated that Habibur Rahman and Akkas were killed as per planning and direction of Motiur Rahman Nizami on or about 24/25 April, 1971. The charge was so framed by the Tribunal on perusal and examination of the evidence on record. So it is obvious that the evidence on record says that the occurrence of killing of Habibur Rahman and Akkas took place on 24 or 25th April, 1971, but the P. W. 19 Md. Abu Shama Fakir-the alleged eye witness of the alleged killing of Habibur Rahamn and Akkas has stated before the Tribunal that occurrence of killing

of Habibur Rahman and Akkas took place on 28th April, 1971. This fact of inconsistency also raises suspicion about the truth of the evidence of P. W. 19 as to the alleged killing of Habibur Rahman and Akkas.

The occurrence of 8th May, 1971 in village Karamja, no doubt, has been proved sufficiently by the evidence of P. W. 5, 7, 17 and 19 and by some documentary evidence produced by the prosecution. But from the above narration of the evidence adduced by the prosecution it appears that the prosecution could not adduce a single eye witness to prove the involvement of this accused appellant Motiur Rahman Nizami in the said atrocities committed in village Koromja on 8.05.1971. The prosecution could not produce any documentary evidence also to prove the involvement of this accused appellant in the said occurrence of 08.05.1971 in village Koromja.

In the circumstances we find that the tribunal was not correct and justified at all to hold this accused appellant Motiur Rahman Nizami guilty of the charge No. 4 and thereby to sentence him on that charge. In view of the facts, circumstances and the evidence stated above our considered opinion is that the prosecution could not prove the charge No. 4 against the appellant Motiur Rahman Nizami beyond all reasonable doubt by adducing reliable and convincing evidence. In the circumstances we find the accused-

appellant Motiur Rahman Nizami not guilty of charge No. 4. and hence he be acquitted of the said charge.

Summary of charge No. 6: (Murder of 30+22 unarmed civilians at village Dhulaura)

On 27.11.1971 around 3.30 A.M accused Motiur Rahman Nizami along with Rajakars and members of Pakistani invading force raided the house of Dr. Abdul Awal and other adjacent houses in the village- Dhulaura on the pretext to find out freedom fighters. At about 6.30 A.M the accused along with his accomplices caught hold of a number of men, women including children and placed them all together in the field of Dhulaura School where they all (about thirty unarmed villagers) were indiscriminately killed by gun-shots.

After departure of Pakistani invading force, accused along with his accomplice Rajakars caught twenty two persons, who survived from the hands of Pakistani invading force and took them to the bank of Isamoti River where they all were brutally killed. Thus, the accused has been charged for commission of offence as specified in section 3(2)(a) read with section 4(1) and 4(2) of the ICT Act.

The Tribunal found this charge No. 6 against the appellant Motiur Rahman Nizami proved and convicted him under section 3(2)(a) read with section 4(1) of the ICT Act and sentenced him thereunder to death.

To adjudicate this charge No. 4 the Tribunal appears to have relied upon the evidence of 3

witnesses, namely P.W. 6 Mr. Shajahan Ali, P.W. 8 Mohammad Khalilur Rahman and P.W. 17 Jamal Uddin.

P.W. 6 Mr. Shajahan Ali is aged 64 years. This witness has deposed to the effect that he is a cripple freedom fighter. That on 28th November, 1971 he went to Dhulaura village and there he took part in a fight against Pak army. During that fight he along with other 8 freedom fighters was caught by the Pak army in the later part of the night. They were beaten and thereafter, as per instruction of accused Motiur Rahman Nizami and Sattar Rajakar he along with four other freedom fighters was taken to the bank of river. At that time accused Motiur Rahman Nizami was present there. That he was inflicted injuries with bayonet and his throat was cut by a knife; other freedom fighters also, who were taken along with him to that river side, were killed by bayonet charge. That later the public took him to the house of one Ranjit Sarker of village FulBari and from there he was taken to Pabna Hospital. After taking treatment for one month at Pabna Hospital he was sent to Dhaka Medical College Hospital where he was under treatment for 4 years. This witness has deposed also that in that fight 300/400 people of Dhulaura village were killed. In course of cross-examination this witness has stated that he passed S.S.C examination in 1972 from Miapur Hajee Jasim Uddin High School, Pabna and in 1973 he was appointed in Sonali Bank, Dhaka and 2 years later he was transferred to Pabna Sonali Bank,

Bera Branch; that while he was serving at that Branch he and the branch Manager Mokbul Shaheb of that branch were removed from service on the charge of defalcation of money. From the lengthy cross-examination of this P.W. 6 nothing material came out to make this witness unreliable.

P.W. 8 Md. Khalilur Rahman aged 63/64 years has deposed to the effect that during the Liberation War in 1971, in the month of June, he went to India and got training in different places of India for joining Liberation War and thereafter, in the month of October 1971, he along with 9 others came back to Bangladesh and stayed inside Bangladesh for 24 days, but as they were feeling insecured they went back to India and later they again entered Bangladesh and came to Pabna District. That on 27th November, 1971, at about 12/12.30 A. M. at night, he went to the house of Doctor Abdul Awal at Dhulauri village within police station Sathia; that in that night, at about 3.30 a.m., he got sound of boot of Pakistani Army and then opening a window he saw the accused Motiur Rahman Nizami along with Pakistani invading force and some Rajakars coming towards that house; he then went out of that room through the northern door and then heard sound of several firings and also heard people telling "hands-up"; that he then realized that they were surrounded and then he climbed up a banyan tree to the west of the house of Awal shaheb and hid there. That from that banyan tree, at dawn, he saw

that the surrounded people, both male and female, were sitting under that banyan tree. He saw also the Rajakars snatching away the ornaments from the women. He saw also that two young ladies were taken by the Pak Army to a room from where the sounds of their crying was coming and he could realize that those young ladies were being raped. That at that time he saw also that accused Motiur Rahman Nizami was telling the Rajakars to apprehend and bring the males and accordingly the Rajakars apprehended the males and took them towards the primary school to the south of that banyan tree. That at about 9/9.30 a.m he (P.W.8) got down from that banyan tree and came to know from the local people that the militaries left that place. He then went to the bank of Isamoti River and saw there 25/30 dead bodies lying. He also saw that 4 of his associate freedom fighters were killed and 2 were still alive one of whom was Shajahan and other was Majed. That the throat of Shajahan was cut and Majed was injured by bayonet charge on his belly. This witness further deposed to the effect that he knew accused Motiur Rahman Nizami from before and that his house was within 1 kilometer distance from that of Motiur Rahman Nizami.

This P.W. 8 was cross-examined at length on behalf of the defence, but nothing material came out to make his evidence unbelievable.

P.W. 17 Md. Jamal Uddin, a man of 60 years, is a freedom fighter. The necessary portion of the

evidence of this P.W. 17 relevant for the charge No. 6 may be summarized thus;

that in 1971, on 27th November, he along with other freedom fighters, in different groups, was staying at village Dhulaura. That getting that news, at about 2.30/3.00 A.M., at night, the Pakistani invading force along with Rajakars and Al-Badrs, under the leadership of Motiur Rahman Nizami surrounded that village and killed 9 freedom fighters and 14 other unarmed innocent people by firing shot and also set fire to the houses of that area. That among those freedom fighters who were then caught by the Pak army, one Shajahan Ali is still alive and he is known as "গলাকাটা শাহজাহান আলী"; that he (P.W. 17) heard from that Shajahan Ali that he was taken to the bank of Isamoti river and was slaughtered by Satter Rajakar in presence of accused Motiur Rahman Nizami and at his instruction, but by the grace of Allah Shajahan Ali survived. This witness has further deposed to the effect that he, as the commander of a group of freedom fighters, could know from the apprehended Rajakars and Al-Badrs that the atrocities in different places of Pabna district including Sathia police station were committed at the advice and instruction of accused Motiur Rahman Nizami.

The defence has cross-examined this P.W. 17 at length, but nothing material came out from his cross-examination to make his evidence unbelievable.

From the above narration of evidence of the P.W. 6 P.W. 8 & P.W. 17 it appears that among these 3 prosecution witnesses the P.W. 6 and P.W. 8 are eye witnesses of the occurrence of 27th November, 1971 at village Dhulaura. P.W. 6 Shajahan Ali is not only the eye witness of that occurrence, but he is also one of the victims of that occurrence. The P.W. 17 Jamal Uddin being a freedom fighter, took position along with other freedom fighters in the village Dhulaura in that night of occurrence and he heard about that occurrence in details from the eye witnesses.

Mr. S. M. Shahjahan, the learned Advocate for the appellant has raised some questions as to the truth of the evidence of these 3 witnesses by pointing out some alleged contradictions in their evidence and also some alleged improbabilities in their evidence. The learned Advocate has alleged that as to the number of victims of the occurrence of Dhulaura village these 3 prosecution witnesses have made contradictory statements, that the P.W. 6 has stated that about 300/400 inhabitants of Dhulaura village were killed in that occurrence, but P.W. 8 and 17 has stated to the effect that 25/30 inhabitants of the Dhulaura village were killed in that occurrence. It is true that the P.W. 6 stated before the tribunal that 300/400 persons were killed in that occurrence of Dhulaura village. But it has come on record that this P.W. 6 was attempted to be killed by the Pak army and their accomplices, but he

luckily survived with cut throat injury and was immediately, after the departure of Pak army and their accomplices, taken to hospital. So it is not unnatural at all that he could not know the exact number of the victims of that occurrence. So we do not think that the above statements of this P.W. 6 are fatal at all for the prosecution.

The learned Advocate for the appellant has argued to the effect that the P.W. 6 though stated that on 28th November 1971 a gunfight took place between freedom fighters and Pakistani military in the village Dhulaura, but P.W. 8 and P.W. 17 did not state so. But we find that both these P.W. 8 and P.W. 17 stated clearly that in that night the Pak army and their auxiliary forces including Motiur Rahman Nizami killed 9(nine) freedom fighters and other innocent people by gun fire. In this circumstance we do not think that the non-mentioning of the very words "there was gunfight in between the freedom-fighters and Pak-army" specifically by the P.W. 8 and P.W. 17 raises any doubt about the alleged incident in village Dhulaura or about the credibility of these prosecution witnesses.

The learned Advocate for the appellant has questioned the veracity of P.W. 8 and the truth of his evidence that in the night of occurrence at village Dhulaura, at about 3.00 a.m. he saw the appellant and others through the window of a room. The learned Advocate has pointed out that this P.W.

8, during cross-examination, stated to the effect that in the night of occurrence of village Dhulaura, at about 3.00 a.m. there was moon light and he saw the appellant and others with the help of moon-light. The learned Advocate has submitted that this very statement of P. W. 8 is absolutely false as in that very night, at about 3.00 a.m. there was no moon in the sky as in that night moon set long before that time. To substantiate this submission the learned Advocate has referred to exhibit-G (বাংলা ১৩৭৮ সালের পঞ্জিকা গননায় উত্তম সিংহ) and has submitted that this exhibit-G shows that on that night following 27th November, 1971 moon set at about 1.23 a.m. The learned Advocate has contended that this exhibit-G proves sufficiently that the evidence of P. W. 8 that he saw the appellant in that night with the help of moon light is totally false and proves also that this P. W. 8 is a liar. But we are unable to accept this argument of the learned Advocate. The P. W. 8 gave evidence before the tribunal long 40 years after that occurrence of village Dhulaura. It is very natural that a witness while giving evidence about any particular occurrence after such a long period he may make some discrepant or incorrect statements. In this particular case the P. W. 8 might have seen the appellant in the night of occurrence by any other means-might be with help of the light carried by other assailants who came with the appellant, but in course of cross-examination before the tribunal he

missed to recollecting that. However, it appears that this P.W. 8 stated further to the effect that seeing the accused Motiur Rahman Nizami and others with the Pak Army, at 3.30 a.m. in the night he climbed up a banyan tree and remained there in hiding and from there, at dawn, he saw Motiur Rahman Nizami again with the Pak army committing that atrocities.

The learned Advocate has questioned the credibility of P.W. 6, a cripple freedom fighter, by pointing out some alleged inconsistency in his evidence. This witness deposed to the effect that after being wounded in the occurrence of Dhulaura he took treatment in Dhaka Medical College Hospital for 4 years, and during cross-examination this witness stated also that he passed the S.S.C examination from Miapur High School, Pabna in 1972. The contention of the learned Advocate for the appellant is that these are absolutely contradictory statements and as such are false, that it was not possible for this P.W. 6 to appear in S.S.C. examination in the year 1972 from Pabna if he was actually under treatment in Dhaka Medical College Hospital for 4 years. But we do not accept this contention of the learned Advocate for the appellant. P.W. 6 did not say that he was staying in Dhaka Medical College Hospital for 4 years, rather he stated that he took treatment for 4 years from Dhaka Medical College Hospital. It was not impossible at all that this P.W. 6, who was taking treatment from Dhaka Medical College Hospital, would be able to

appear in S.S.C. examination from Pabna district. The learned Advocate for the appellant has also pointed out that this P.W.6, during cross-examination, admitted that after liberation war while he was serving as cashier in Sonali Bank, Pabna Branch, he along with the manager of that bank was dismissed from service on the allegation of fund embezzlement. But for this reason only we cannot not find this P.W. 6 not trustworthy. This P.W. 6, undisputedly, is a cripple freedom fighter, he was not only tortured by the Pakistani army but his throat was also cut by Pakistani army and luckily he survived. Now he is known as "গলাকাটা শাহজাহান ". We do not find any cogent reason to disbelieve this P.W. 6.

From the side of the appellant, with reference to exhibit No. BT-a video clip, it has been argued also that this P.W. 6, during an interview, admitted that this appellant was not involved in the occurrence of Dhulaura village. But we are unable to put any reliance on this exhibit-BT, specially in consideration of the fact that this P. W. 6, while deposing before the Tribunal, was not questioned by the defence anything as to this exhibit No. BT.

The learned Advocate for the appellant has referred also the defence exhibit No. F, a book titled (একাত্তর'র মুক্তিযুদ্ধের স্মৃতি কথা) written by freedom fighter Rezaul Karim and has argued that although the incident of village Dhulaura has been vividly described in this book, this appellant has not been

named in that book. The learned Advocate's contention is that this exhibit-F proves that this appellant Motiur Rahman Nizami was not involved in the occurrence of village Dhulaura. But this argument also can not be accepted. In this case three freedom fighters have deposed before the Tribunal narrating the incident of village Dhulaura implicating the appellant in that incident. The non-mentioning of the name of the appellant by one person in his book cannot make the evidence of these three witnesses before the Tribunal false. There can be various reasons for which an author of a book does not or can not mention any particular person in his book. Referring to defence exhibit-C, which is "পাবনার এসপি কর্তৃক স্বরাষ্ট্র মন্ত্রণালয়ের ডেপুটি সেক্রেটারি বরাবরে ২৬/০৯/১৯৭২ তারিখে ৬৭৯০/ই-স্মারক মূলে প্রেরিত প্রতিবেদন যাহাতে পাবনা জেলার স্বাধীনতা বিরোধী রাজাকার, আলবদর, আল সামসদের তালিকার ফটোকপি" the learned Advocate for the appellant has argued that this exhibit-C- an admitted document-also testifies against the prosecution case as it does not include the name of this appellant. But we are unable to accept this argument also of the learned Advocate. This exhibit-C is an incomplete list of Rajakar, Al-Badr and Al-Shams of Pabna district. The non-inclusion of the name of the appellant in this list does not prove at all that this appellant did not collaborate with the Pakistani invading force and did not take part in the incident of Dhulaura village with them. In this case there are sufficient evidence to prove that this appellant Motiur Rahman Nizami

used to reside at Dhaka during the Liberation War of Bangladesh and he used to go to Pabna often and committed the atrocities as described in various charges framed against him. So in the circumstances the non-inclusion of the name of the appellant in this exhibit-C does not prove at all that the appellant was not involved in the incident of Dhulaura village. The learned Advocate has referred to exhibit-33 also-a book titled "পাবনা জেলার মুক্তিযুদ্ধের কথা" written by freedom fighter Johirul Islam Bishu and also the exhibit-A-a book titled "পাবনার ইতিহাস" written by Doctor M. Abdul Alim and contended that since in none of these books the appellant has been mentioned to have been involved in the incident of Dhulaura village, the oral evidence which the prosecution has adduced before the tribunal cannot be relied on. But we do not accept this contention also of the learned Advocate, we have already observed above that there can be various reasons for which an author may not mention the name of any particular person in his book and the non-mentioning of the name of any accused in any book does not make the convincing evidence against him before court false. The learned Advocate for the appellant has argued also that the P. Ws. 6, 8 and 17 did not state before the investigation officer some of the statements which they made before the Tribunal and in the circumstances their statements made before the Tribunal are not believable at all. But these arguments also of the

learned Advocate cannot be accepted. The non-mentioning of any particular fact before the investigating officer by any witness does not make his statement before the court/tribunal false. For various reasons a witness may omit to mention that particular fact to the investigation officer, it might also be that the investigation officer did not ask him as to that particular fact, or it might be that the witness actually stated that fact to the investigating officer but the investigating officer omitted to record that statement. However the non-mentioning of any fact or anything before the investigating officer by a witness does not necessarily make the evidence of that witness before the Court/Tribunal false if the evidence of that witness before the court/tribunal is otherwise convincing and trustworthy. In this particular case all the above mentioned three prosecution witnesses, namely P. W. 6, P. W. 8 and P. W. 17 are freedom fighters and they have narrated the incident of Dhulaura in details. We have found all these 3 witnesses trustworthy and their evidence convincing.

However from the above discussions it is evident that the Tribunal did not commit any wrong in finding the appellant Motiur Rahman Nizami guilty of this charge No. 6 and therefore sentencing him to death on that charge.

Summary of Charge No. 7. (Complicity in torture and murder of Sohrab Ali at village Brishalikh)After

midnight, on 03.12.1971, on receiving information from accused Motiur Rahman Nizami and the Rajakars, the Pakistani Army surrounded the village Brishalikka and arrested Sohrab Ali from his house at about 5.30 A.M. and brought him to the road and tortured him there inhumanly and asked questions about whereabouts of his son Md. Abdus Selim Latif. Failing to extract information, he was shot at and killed in presence of his wife and children. Thus, the accused has been charged for complicity in torture and murder of the above victim-the crimes against Humanity under section 3(2)(a)(h) read with section 4(1) and 4(2) of the ICT Act.

The Tribunal has found this charge No. 7 against the appellant proved and convicted him under section 3(2)(a)(h) read with section 4(1) of the ICT Act and sentenced him to imprisonment for life.

To adjudicate this charge No. 7 the Tribunal has relied on the evidence of P.W. 14 Md. Abdus Selim Latif, P.W. 15 Md. Aminul Islam Dablu, P.W. 16 Md. Jane Alam @ Janu and P.W. 22 Md. Shajahan Ali.

P.W. 14 Md. Abdus Selim Latif, aged 59/60 years is the son of victim Shorab Ali. This witness has deposed to the effect that he was a student of Intermediate first year in 1971; that during Liberation War of 1971 he along with his other friends, with the intention to join Liberation War, formed volunteers group with retired army men, EPR, police and started preliminary training. That after

declaration of independence by Banga Bandhu on 26th March, 1971, they procured some arms and ammunitions from local police station and other places and were prepared for Liberation War. That in the first week of April they got a news that the Pakistani Army was taking preparation to go to Nagarbari by a ferry and they then made an ambush at Nagarbari Ferry Ghat; that the Pakistani army then started firing on them from plane and as such they had to retreat and the Pakistani army captured "Nagarbari Ferry Ghat".

The relevant portion of the evidence of this witness necessary for adjudication of this charge No. 7 may be summarized as below;

that he took active part in different operations during the Liberation War in 1971; in one of such operations on 15.08.1971 he was caught hold by the Rajakars and Al-Badrs and tortured inhumanly; while he was thus being tortured along with others in August, 1971 by the Pakistani army he saw this appellant Motiur Rahman Nizami present there with the army officers. That being not successful to extract any information from him the Pakistani army threw him in Jamuna river after torturing him inhumanly, but somehow he survived and managed to go to a house by swimming across the river in that night. Thereafter, on the next morning, the inmates of that house took him to his house. After taking treatment for 10/15 days he along with his father, cousin Alluddin, Harun-or-Rashid and some others went away to India

and joined Maloncha Camp at sector No. 7 where he got professor Abu Syed as adviser of that sector. That after obtaining a special training there he along with others came back to Bangladesh and started fighting with Pakistani army, Rajakars, Al-Badrs in different places.

That on 2nd December, 1971 his father Sohrab Ali came back home from India; the local members of Al-Badr Bahini communicated that news of his father's coming back to Motiur Rahman Nizami, the chief of Al-Badr Bahini. On 3rd December, at dawn, the Al-Badrs and Rajakars and Pakistani army jointly surrounded there village Bishalikha and burnt many houses of that village and apprehended his father from his house and took him to the road and there they tortured him brutally and also wanted to know from him about the whereabouts of this witness and being failed to extract any information about this witness they murdered his father by firing shots. The witness has stated that he knew about that occurrence from his mother, Asgor Munshi, Ohed Ali Pramanik, Shajahan Ali (P. W. 22) and others; that he came to know that at the instruction of accused Motiur Rahman Nizami the Al-Badrs, Rajakars and Pakistani army murdered his father brutally. This witness has deposed further that except his father some other persons also of their village namely Monu, Shasti Pramanik, Vadu Pramanik, Gyanendra Nath Halder and many others were

killed by those Al-Badrs, Rajakars and Pakistani army.

This witness has been cross-examined at length on behalf of the defence, but nothing material came out from his cross-examination to make his evidence unbelievable or false.

P. W. 15 Md. Aminul Islam Dablu aged about 45/46 years is the younger brother of P. W. 14 and son of victim Sohrab Ali Pramanik. This witness has deposed to the effect that at the time of liberation war he was aged about 3 years; that after being grown up he came to know that his father martyr Sohrab Ali Pramanik and elder brother Md. Abdus Salim Latif participated in Liberation War; that his elder brother Abdus Salim Latif along with others was caught by the Rajakars and Al-Badrs on 15th August, 1971 and was taken to the army camp at Nagarbari Ghat and at that time his elder brother Abdus Salim Latif saw there accused Motiur Rahman Nizami talking with Pakistani army; thereafter the Pakistani army started torturing his brother inhumanly and subsequently his brother was thrown in the river, but luckily his brother survived and came back home. That 10/15 days thereafter his brother and father along with others went away to India and after taking training there his brother came back to Bangladesh and took part in liberation war in different places within Bangladesh. That on 2nd December, 1971 his father also came back home from India; that the local Al-Badrs and Rajakars

then informed Motiur Rahman Nizami about his father's coming back and thereafter on 3rd December, 1971, at dawn, the Al-Badrs and Rajakars and Pakistani army surrounded the village Bishalikha and took away his father from house and killed him by gun shot after torturing him on the road; that Monu, Shasti, Vadu, Gyanendra Nath Halder and many other innocent persons of that village also were killed and 70/75 houses were set on fire. This P. W. 15 has stated that he heard about these occurrence from his mother, siblings and the neighbours. The defence cross examined this witness also at length but could not shake what he deposed in his examination in chief.

P. W. 16 Md. Jane Alam aged 59/60 years is a freedom fighter and resident of village Bishalikha. This witness has deposed to the effect that after getting training in India he along with 50/60 others came back to Bangladesh. On second December, 1971 at about 10.00 p.m. they went to their village and at about 1/1.30 a.m. at night he reached his house. On the next day, on 3rd December, 1971 when his parents went to the cowshed to give food to cattle they saw Rajakars, Al-Badrs and Pak army moving through the road. That his father then told him to flee away and he then went away to their camp by crossing river. That on the next date at about 12/12.30 P. M. after the departure of Rajakars and Pak army they came back to their village and heard that Sohrab Ali was murdered by bayonet charge and also by firing shots.

That Shasti, Vadu, Manu, Profullo, Pintu and many others also of their village were killed and 70/72 houses of their village were burnt. That he then heard from the elderly people of their village that the said atrocities were committed by the Rajakers, Al-Badrs at the instruction of accused Motiur Rahman Nizami.

From the cross-examination of this witness also nothing material came out to make this witness unreliable.

P.W. 22 Md. Shajahan Ali aged about 69/70 years, a resident of Bishalikha village is an eye witness of the occurrence stated in the charge No. 7. This witness has deposed to the effect that his cousin Abdus Selim Latif (P.W. 14) is a freedom fighter who was apprehended by Rajakars and Al-Badrs during the Liberation War and tortured by Pakistani army. That Abdus Selim Latif and his father martyr Sohrab Ali along with 20/25 persons went to India for getting training for Liberation War. That on 2.12.1971 his uncle martyr Sohrab Ali came back to his village from India. On the following day i. e. on 3.12.1971, just before 'Azan' of 'Fazr' prayer he woke up hearing a big sound and then opening the door of his room he saw Rafiq-un-Nabi Bablu, Asad along with other members of Rajakar and Al-Badr Bahini dragging out his uncle Sohrab Ali from his room and taking him to the road. That he (the witness), and his aunt (wife of Sohrab Ali) and other members of the family of

Sohrab Ali went to that road and saw accused Motiur Rahman Nizami standing there along with Pakistani army, Rajakars and Al-Badrs. That he then realized that as per direction of accused Motiur Rahman Nizami his uncle was apprehended; that keeping himself in hiding in a bumboo bush he saw also that accused Motiur Rahman Nizami told the army men something by gesture and then and there one Pakistani army man shot 2/3 rounds bullets at his uncle Sohrab Ali who then fell down on the ground. That 5/6 minutes after that occurrence the accused along with Pakistani army, Rajakars and Al-Badrs left that place of occurrence and he then saw his uncle dead. That at that time he heard sounds of firing coming from 'Hindu Para' and saw the houses of Hindu Para burning; they then took the dead body of Sohrab Ali to his house. This witness has deposed also that thereafter he went to 'Hindu Para' and saw there 7/8 dead bodies of un-armed Hindus lying on the road and many houses burnt; that at that time one woman told them that under the direction and in presence of accused Motiur Rahamn Nizami Pakistani army, Rajakars and Al-Badrs set fire to Hindu's Houses and killed 7/8 Hindus by firing shot and raped some women also.

During cross-examination this P.W.22 has stated that accused Motiur Raham Nizami came to their village 4/5 times since his uncle left for India. He has stated also that after Liberation of the country he narrated the occurrence of killing Sohrab Ali to

his son Abdus Selim Latif (P.W. 14). This witness has denied the defence suggestion that Sohrab Ali was not killed on 3.12.1971, rather he died long after the liberation of Bangladesh.

Form the above narration of the evidence of the P.Ws. 14, 15, 16 and 22 it appears that among these 4 witnesses P.W. 22 Md. Shajahan Ali is the eye witness of the occurrence of killing of Sohrab Ali. The other 3 witnesses, of whom two are sons of martyr Sohrab Ali, have deposed fully corroborating the P.W. 22 the eye witness. The defence cross-examined all the 4 witnesses elaborately but could not shake their evidence. Of course, from the side of the defence some points were raised questioning the veracity of these witnesses. The learned Advocate for the appellant has argued before us to the effect that there are some facts and circumstances which prove that Sohrab Ali was not killed at all in 1971, rather he died long after 1971. Referring to defence exhibit-H-the voter list of Shambhupur, Bera, Pabna prepared by the election commission the learned Advocate has pointed out that in this voter list the date of birth of Suraiya Sohrab, the youngest daughter of Sohrab Ali has been mentioned as 31.12.1976. The learned Advocate's contention is that this Exhibit-H proves that Sohrab Ali died long after 1971 otherwise the date of birth of his youngest daughter would not have been recorded as 31.12.1976. But we can not accept this argument of the learned

Advocate for the appellant, specially in view of the evidence of above stated prosecution witnesses. It can not be claimed that in the voter list prepared by the Election Commission, the dates of birth of the voters are always entered/recorded correctly. The learned Advocate has also referred to a list of freedom fighters published by gazette notification dated 22.11.2005 wherein the name of Md. Abdus Selim Latif, son of Sohrab Ali (P.W. 14) has been entered as a freedom fighter. In this list the father's name of freedom fighter Abdus Selim Latif has been mentioned as Sohrab Ali only. The contention of the learned Advocate is that if Sohrab Ali was at all killed in 1971, as claimed by the prosecution, he would have been designated as martyr in this list of freedom fighters. But this fact of non-mentioning the word "Martyr" before the name of Sohrab Ali in this list of freedom fighters can not be a conclusive proof of the defence claim that Sohrab Ali was not killed in the year 1971. It can not be said with certainty that all the entries of this list of freedom fighters are correct. This list of freedom fighters appears to have been published by a gazette notification on 22.11.2005 only. The defence does not claim that Sohrab Ali was alive on that date also i. e. on 22.11.2005. So, the non-mentioning of the word "late" even before the name of Sohrab Ali in this Voter list indicates reasonably that all the entries of this list of freedom fighters are not correct. In

the circumstances this voter list can not be relied on to disbelieve the evidence of prosecution witnesses, specially the eye witness P.W. 22.

From the side of the appellant some alleged discrepancies in the evidence of above mentioned P.Ws. 14,15,16 and 22 have been pointed out and argument has been made that these discrepant statements of these P.Ws. have not only made their evidence unbelievable but have also disproved the prosecution case narrated in charge No. 7

But we are unable to accept this argument also of the learned Advocate for the appellant. The alleged discrepancies which have been pointed out by the learned Advocate for the appellant may be listed as below;

- (i) P. Ws. 14 and 15 deposed to the effect that their father Sohrab Ali were tortured brutally and thereafter was shot dead. P. W. 16 stated that Sohrab Ali was charged with bayonet and thereafter he was killed by firing shots and P. W. 22 deposed to the effect that Sohrab Ali was hit indiscriminately with the bottom of rifle and thereafter he was killed by firing shot.

We find no material contradiction or discrepancy in the above evidence of P. Ws. 14, 15, 16 and 22.

(ii) P. W. 14, 15 and 22 though deposed to the effect that on 3rd December, 1971 Sohrab Ali was killed by the Rajakars, Al-Badrs and Pakistani army in presence of appellant Motiur Rahman Nizami as per his instruction but from the evidence of P. W. 16 it appears that Sohrab Ali was killed on 4th December, 1974.

It is true that as per the evidence of P. W. 16- a hearsay witness, Sohrab Ali was killed on 4th December, 1971. But we do not think this discrepancy at all material to raise any suspicion about the prosecution case of killing of Sohrab Ali by the Pak army and their auxiliary forces Rajakars and Al-Badrs at the instruction and in presence of appellant Motiur Rahman Nizami. We should keep in mind that these witnesses deposed before a Tribunal about the occurrence which took place long about 42 years before. With passage of this long time of about 42 years the memory of witnesses faded. In the circumstances it is not unnatural at all that there may be some variations or discrepancies in the evidence of witnesses about a particular incident/occurrence. To prove the charge No. 7 four witnesses have been examined by the prosecution, three of whom have rightly stated the date of killing of Sohrab Ali before Tribunal. One witness only namely P. W. 16 has stated the date of that

occurrence as 4th December instead of 3rd December. We do not think that mentioning of such an incorrect date of the occurrence by a single witness raises any suspicion or doubt about the prosecution case.

The learned Advocate for the appellant has questioned the credibility also of the above witnesses. The learned Advocate has pointed out that the P. W. 14 has stated to the effect on 15.08.1971 while he was on his way to collect informations he and his cousin Alauddin were caught by the members of Al-Badrs and Rajakars and were taken to Nagarbari army camp and there they were tortured and at that time he saw accused Motiur Rahman Nizami there talking with an army officer, but the prosecution Exhibit No. 2/9, a news report dated 17.08.1971 published in the Daily 'Shangram' shows that on 15.08.1971 the appellant delivered a speech at a public meeting in Dhaka. The learned Advocate has argued that it was not possible at all that the appellant, who delivered a speech at a public meeting on 15.08.1971 in Dhaka, 200 kilometer away from Nagarbari army camp, could remain present at that Nagarbari army camp on that very day i. e. on 15.08.1971. The contention of the learned Advocate is that the above statement of the P. W. 14 that he saw this appellant talking with an army officer at Nagarbari army camp on 15.08.1971 is totally false. But we are unable to accept this argument also of the learned Advocate. The P. W. 14 has deposed thus;

“১৯৭১ সালের আগস্ট মাসের সম্ভবত ১৫ তারিখ আব্দুল লতিফ মির্জা সাহেবের নির্দেশে বেরা থানা রেকি করতে যাই। যাওয়ার পথে এল, এস, ডি লঞ্চঘাটে আমি এবং আমার চাচাতো ভাই আলাউদ্দিন মতিউর রহমান নিজামী সাহেবের অনুগত আলবদর ও রাজাকারদের হাতে ধরা পড়ি।আরো দেখি এক আর্মি অফিসারের সাথে মতিউর রহমান নিজামী কথা বলছে।”

(underlined for giving emphasize)

Evidently, this P.W. 14 did not claim that the said day was exactly 15.08.1971, rather he clearly stated that 'probably' it was 15.08.1971. We have already mentioned above several times that the witnesses have deposed in this case long 42 years after the narrated occurrences. So it is most natural that they would not be able to state the exact dates of all the occurrences correctly. However, we do not think that this P.W. 14 has made any false statement at all.

As regards the P.W. 15 the allegation of the learned Advocate for the appellant is that as per the exhibit No. I-voter list of Brishalikhha Upazila this P.W 15 was born on 1.09.1971 and as such at the relevant time he was only 90 days old. We do not understand why the learned Advocate has made this a point. The P.W. 15 has clearly stated that after being grown up he knew about this occurrence from his mother, siblings and neighbours. We find no absurdity in the evidence of P.W. 15.

As regards P.W. 22 the learned Advocate for the appellant has submitted that this witness was not included in the list of witnesses initially, but after examination of 9 prosecution witnesses this P.W. 22 was made a witness in this case. The learned Advocate has contended that this witness was produced before the Tribunal at a very belated stage to fill up the lacuna, that in fact this P. W. 22 is a tutored witness. To substantiate this argument the learned Advocate has pointed out that though this witness has claimed that the victim Sohrab Ali was his uncle and he is the resident of Brishalikha village, but during cross-examination he asserted that he did not know any girl of his village named Suraiya Sohrab. It has come in evidence that this Suraiya Sohrab is the youngest daughter of victim Sohrab Ali. The learned Advocate's contention is that this fact that this P.W. 22 does not know Suraiya Sohrab-the daughter of victim Sohrab Ali-proves sufficiently that this witness is a got-up witness, he is not a relation of Sohrab Ali and not even a resident of Brishalikha village and as such is evidence as to the alleged killing of Sohrab Ali can not be relied on at all. But we are unable to accept this argument also of the learned Advocate. The very name "Suraiya Sohrab" indicates that it is the full name of the girl. In the voter list-the defence Exhibit-H, this name Suraiya Sohrab has been recorded. This girl might have any nick name by which

she is known to relations and close persons. It may be that the P.W. 22 knew Suraiya Sohrab by her nick name only. So the only fact that the P.W. 22, during cross-examination, said that he did not know Suraiya Sohrab-does not make this witness untrustworthy at all. From the side of the appellant it has also been argued that this P.W. 22 could not tell the informations about some other events of that relevant time correctly and as such his evidence about the alleged killing of Sohrab Ali can not be relied on. But we are unable to accept this argument also of the learned Advocate. It can not be expected that everyone should recollect each and every events of long 40 years before correctly.

However we have scrutinized the evidence of this P. W. 22 attentively, but do not find anything cogent to disbelieve him or to believe the defence contention that he was a tutored witness and deposed lie before the Tribunal.

However, we find that the prosecution has proved this charge No. 7 also against the appellant beyond all reasonable doubt by adducing reliable and convincing evidence. The Tribunal, therefore, rightly found the appellant Motiur Rahman Nizami guilty of this charge and rightly convicted and sentenced him on this charge.

The summary of charge No. 8:(Killing of Bodi, Rumi, Jewel and Azad at MP Hostel, Nakhalpara, Dhaka)

On 30.08.1971 accused Motiur Rahman Nizami being the president of Islami Chhatra Sangha as well as head of the Al-Badr Bahini accompanied by Ali Ahasan Muhammad Mujahid, Secretary of the East Pakistan Islami Chhatra Shangha, visited the army camp at old MP Hostel, Nakhalpara, Dhaka where the accused verbally abused detained Jalal, Badi, Rumi, Jewel and Azad. Accused asked Pakistani Army Captain to kill all of them before the proclamation of general amnesty by the President. Subsequently, all of them were killed, except one, following instigation of the accused. The accused, therefore, was charged under section 3(2)(a) read with section 4(1) and 4(2) of the ICT Act.

The Tribunal has found this charge No. 8 proved and convicted the accused appellant under section 3(2)(a) read with section 4(1) of the ICT Act and sentenced him there under to imprisonment for life.

To prove this charge No. 8 the prosecution has relied mainly upon the evidence of P.W. 2 Johir Uddin Jalal @ Bichchhu Jalal and some documentary evidence. We have already narrated some of the evidence of this P.W. 2 while assessing the status and role of this accused appellant. The relevant portion of the evidence of this P.W. 2 necessary for adjudication of this charge No. 8 is summarized as below:

That in 1971 the father of this P.W.2 was serving in the detective branch of the police department as superintendent of police and was posted

at Dhaka and this witness used to reside with his father at the New Easkaton Garden Circuit House; he was then a student of class IX; at present he is a member of the executive committee of Central Command Council of Freedom Fighters. That one day, on 11th April, 1971, 8/10 persons from a nearby Pakistani army camp entered their circuit house and went to the flat of A.S.P Azizul Haqu Bacchhu; at that time his father showed him Motiur Rahman Nizami, the then president of Islami Chattra Shanghha and also Ali Ashsan Mohammad Mujahid, another leader of Islami Chattra Shanghha- who came to their circuit house with those 8/10 persons and told him that those two person were men of notorious character and that being defeated in the election they started collaborating with the Pakistani army and taking part in many atrocities with the Pakistani army. That at that time his father told him also that they might apprehend him if they could know about his activities. Thereafter on 12th April, this witness fled away from house and joined Liberation War. That after obtaining training from India he came back to Dhaka and started guerrilla attack on Pakistani army, Al-Badrs and Rajakars. That on 30th August 1971 while he was near the house of one Doli Asad at 90 New Easkaton Road for procuring informations the Rajakars recognized him and caught him and then handed over him to the army. That the army then took him to house No. 112, West Nakhalpara and kept him confined there. On that

day, at about 7 P.M, the Pakistani army brought 8/10 inhumanly tortured and severely injured persons to that house; among those injured persons he could recognize Bodi, Rumi, (son of "Shahid Janani" Jahanara Imam) Asad and Juel all of whom took training with him in India. That he also could recognize singer Altab Mahmud who also was severely tortured. This witness has narrated the injuries he found on the bodies of thoses inujured persons thus;

"মুক্তিযোদ্ধা বদির দুই আঙ্গুল কেটে দিয়েছে, ডান হাত ভেঙ্গে দিয়েছে এবং মেরুদণ্ড বাট দিয়ে পিটিয়ে কুজো করে দিয়েছে। মুক্তিযোদ্ধা আজাদের ও একই অবস্থা। মুক্তিযোদ্ধা রুমির চেহারা বিকৃত, তাকে চেনাই যাচ্ছিল না, তার ও আঙ্গুল কেটে দিয়েছিল এবং পা ভেঙ্গে দিয়েছিল। সুরকার আলতাফ মাহমুদের হাতের কবজি কোপানো ছিল, আঙ্গুল গুলো কাটা ছিল, ওনার ঠোঁট দুটো শসার মত ফুলা ছিল। মুখমন্ডলে রক্ত জমাট হয়ে ফুলে উঠেছিল। ওনার ও মেরুদণ্ড বাট দিয়ে পিটিয়ে ভেঙ্গে দিয়েছিল। মুক্তিযোদ্ধা জুয়েল ভাইয়ের দুই আঙ্গুল কেটে দিয়েছিল। তার বাম কান দিয়ে রক্ত ঝড়ছিল। তার ও মেরুদণ্ড ভেঙ্গে দিয়েছিল।"

This P. W. 2 stated also that Juel told him that Motiur Rahman Nizami, Ali Ashsan Mohammad Mujahid and other Al-Badrs would kill them within 2/3 days; that while Juel was telling him about the tortures perpetrated on them, accused Motiur Rahman Nizami, Ali Ashsan Mohammad Mujahid, Chowdhury Moinuddin and Ashraf along with captain Quiyum came there and entered the room of captain Quiyum; captian Quiyum then called him by sending a Habilder; that captain Quiyum took his signature on a blank paper and then started torturing him inhumanly; since he was not

disclosing any informations even then, accused Motiur Rahman Nizami took the pistol from his west and started striking on the wrists of his to arms by that pistol causing bleeding injuries. That Motiur Rahman Nizami was telling that if he did not disclose anything, his mother and sisters would be brought to that camp and tortured; that at that time Ali Ashan Mohammad Mujahid, taking an arm from Chowdhury Moinuddin, struck him on his head and he then fell down on the floor and was bleeding. He was then taken back again to that room where the other injured persons were kept confined. That in that room also they all were tortured, and being failed to extract any informations from them Motiur Rhaman Nizami and others were telling that they all would have to be killed before declaration of general amnesty by the President on 5th September. This witness has deposed further that after sometime captain Quiyum took him to the room of colonel Hezazi where he saw his neighbour Punjabi ADC C.M. Afzal sitting, who told him that he came there to take him back. That colonel Hezazi then took his signature on a blank paper and handed over him to ADC Afzal and he then came back to circuit house with ADC Afzal and two days thereafter he went away to India and joined Melaghar camp at Tripura. This witness deposed also that he again came back to Dhaka and inquired about Rumi, Bodi, Juel, Azad- the freedom fighters who were captured by the Pak army, but did not get any information of them;

that they then realized that before declaration of clemency by the President accused Motiur Rahman Nizami, Ali Ashan Muhammad Mujahid and others killed them and concealed their dead bodies.

Besides the P W. 2 the Tribunal has relied on a documentary evidence, the exhibit-37, a book titled "৭১ এর দিন গুলি" written by Jahanara Imam-the mother of martyr Rumi. In that book it has been narrated that Rumi, Juel, Azad and others were taken to Nakhalpara M. P. Hostel and were tortured there and those tortured boys could not be traced out any more.

It is a fact of common knowledge that during Liberation War Rumi, the son of renowned writer Jahanara Imam along with his other friends, who took part in Liberation War and participated in many guerrilla operations against Pakistani invading forces, Rajakars and Al-Badrs in Dhaka, were apprehended by the Pakistani army and their auxiliary forces and were taken to army camp at Nakhalpara M. P. Hostel and were tortured there severely and ultimately they were killed and could not be traced out any more. This fact of common knowledge does not require formal proof, tribunal can take judicial notice of such facts of common knowledge-according to the ICT Act. However, in this case the prosecution requires to prove that this accused appellant Motiur Rahman Nizami had involvement in torturing and killing of Bodi, Rumi, Juel and Azad and to prove this fact the prosecution has examined only one

witness, the P. W. 2 Jahiruddin Jazal @ Bichchhu Jalal. It should be mentioned here that there is no prohibition in law in convicting any accused on the basis of testimony of a single witness if the testimony of a single witness is considered by the Court/Tribunal trustworthy and convincing. The above narrated evidence of P. W. 2 Jairuddin Jalal-a veteran freedom fighter is convincing. We find no reason not to rely on the evidence of this witness. From the above stated evidence of this P. W. 2 it appears that this appellant Motiur Rahman Nizami along with other Al-Badr leaders went to the M. P. Hostel at Nakhalpara and there he abused the severely tortured freedom fighters and he himself also tortured the P. W. 2 in order to extract informations from him and being failed told the Pakistani army to liquidate those tortured freedom fighters before declaration of general amnesty by the President on 5th September. These evidence of P. W. 2 show that this accused appellant was actively involved in torturing and killing Bodi, Rumi, Juel and Azad-as narrated in this charge No. 8. We do not find anything not to believe the above evidence of this P. W. 2. This P. W. 2 Jahiruddin Jalal @ Bichchhu Jalal is a veteran freedom fighter who took part in many guerrilla operations against the Pakistani invading force and its auxiliary forces in Dhaka. It has already been mentioned earlier that the above evidence of this P. W. 2 was accepted by this Division earlier in the

case of Ali Ahsan Muhammad Mujahid who was convicted and sentenced in a separate case on similar allegations by the tribunal and that judgment and order of the tribunal was affirmed by this Division in appeal. However, in this present case also we have carefully considered the evidence and also the competence and trustworthiness of this P. W. 2 and found nothing to disbelieve this witness. The evidence of this P. W. 2 has proved sufficiently that this accused appellant Motiur Rahman Nizami was involved in torturing the above named boys-the guerrilla fighters and also in killing them. We have already found that the appellant Motiur Rahman Nizami, being president of all Pakistan Islami Chhatra Shangha, was the leader of Al-Badr Bahini formed with the members of Islami Chhatra Shangah and he also collaborated with the Pakistani army and opposed the Liberation War of Bangladesh. This fact of this accused appellant's being leader of Al-Badr Bahini and associate of Pak army supports the truth of the evidence of P. W. 2, as narrated above. It should also be borne in mind that the Pakistani invading force were strangers to this country who came to the then East Pakistan from West Pakistan, and as such, without the help and connivance of the people of this region, it would not have been possible for them to identify the freedom fighters and other pro-liberation people and kill them. Definitely with the help of the people of this region

the Pakistani invading force apprehended Bodi, Rumi, Juel and Azad and tortured them and killed. The accused-appellant Motiur Rahman Nizami was a leader of Al-Badr Bahini and took side with the Pakistani invading force and opposed the liberation war. All these facts support to the truth of the above stated evidence of P. W. 2. It is true that the prosecution could not produce any evidence before the tribunal to prove that this accused appellant Motiur Rahman Nizami himself tortured and murdered Bodi, Rumi, Juel and Azad. But the above stated evidence of the P. W. 2 coupled with facts that this appellant was leader of Al-Badr Bahini and he co-operated with the Pakistani army, prove sufficiently that this appellant was involved in the torture and murder of those boys. It should be mentioned here that the actual physical presence at the time of commission of any crime is not necessary for finding an accused guilty of that crime; if it is proved that the accused had any sort of complicity in commission of that crime he can be found guilty of that crime even if his physical presence at the time of commission of that crime is not proved. However, in the present case it has been proved beyond reasonable doubt that Bodi, Rumi, Juel and Azad were tortured inhumanly and kept confined in Nakhalpara M. P. Hostel within the knowledge of this accused appellant and this accused appellant himself also went to that Nakhalpara M. P. Hostel and abused those tortured boys and at that

time he himself also tortured the P. W. 2 mercilessly and also told the Pakistani army to kill all those tortured boys before declaration of clemency by the President. All these facts, in our opinion, conclusively prove that this appellant Motiur Rahman Nizami was actively involved in the torture and murder of Bodi, Rumi, Juel and Azad.

From the side of the accused appellant it has been argued before us that this P. W. 2 is not at all reliable witness. To substantiate this argument it has been pointed out before us that this witness did not state to the investigating officer some of his statements which he deposed before the tribunal. It is true that from the evidence of P. W. 26-the investigating officer-it has come before the tribunal that this P. W. 2 did not state before the investigating officer to the effect that Motiur Rahman Nizami struck on his wrists with the pistol causing bleeding injuries. But there is no denial of the fact that this P. W. 2 stated before the investigating officer about the presence of accused Motiur Rahman Nizami in the M. P. Hostel at Nakhalpara and about his abusing the tortured boys Bodi, Rumi, Juel, Azad and also about his telling the Pakistani army to liquidate the tortured boys before declaration of clemency by the president.

Referring to defence Exhibit Nos. K, L, M-a book titled "সহীদ আবদুল আলীম চৌধুরী জুয়েলের জীবন বৃত্তান্ত", a news report dated 01.11.2011 published in the Daily Prothom Alo, and a

book titled "শহীদ আলতাফ মাহমুদের জীবন বৃত্তান্ত" এবং "আলতাফ মাহমুদ এক ঝরের পাখি" respectively Mr.S.M. Shahjahan, the learned Advocate for the appellant has argued that in all these exhibits there are description of the alleged incidences of capture, torture and killing of Rumi, Juel and Altaf Mahmud by the Pakistani army and their auxiliary forces, but in none of these books it was at all mentioned that this P. W. 2 Jahir Uddin Jalal @ Bichchhu Jalal was present in that army camp at Nakhalpara. But this argument of the learned Advocate is not acceptable in view of the fact that according to the evidence of P. W. 2 he was taken to that army camp of Nakhalpara on 30th August, 1971 and was kept confined there for a few hours only and on the same date he was taken back from there by one Pakistani ADC namely C. M. Afzal who happened to be his next door neighbour.

From the side of the appellant it has been pointed out that this P. W. 2 though has stated before the tribunal that he passed the S.S.C. examination from Shaleha High School as a private candidate in the year 1972, but the defence exhibit No. BS, the tabulation sheet of S.S.C. examination of 1972 shows that this P. W. 2 did not appear in S.S.C. examination in 1972. The learned Advocate for the appellant has contended that this fact also proves that this P.W. 2 is a liar. But we do not think that this exhibit-BS is sufficient to prove the P.W. 2 a liar. This Exhibit-BS has not been shown to this

P.W.2 while he was cross-examined by the defence. So he did not get any opportunity to explain this discrepancy.

From the side of the appellant it has also been pointed out that this P.W.2, during cross-examination, stated that after Liberation War he visited Rumi's house and met his parents. The learned Advocate has argued that since, admittedly, Rumi's father died before liberation of Bangladesh this statement also of this P.W.2 proves that he is a liar. But we are unable to accept this argument also of the learned Advocate. P. W. 2 visited Rumi's house long 42 years before. After such a long period he might have committed a mistake in mentioning the period of his going to Rumi's house.

However, considering the evidence of this P.W.2 and facts and circumstances discussed above we find that the tribunal rightly found accused-appellant guilty of the charge No. 8 also. We find no wrong in the findings and decision of the tribunal as regards the charge No. 8. In our opinion the tribunal rightly convicted and sentenced the appellant on charge No. 8.

Summary of charge No. 16: (Committing genocide by killing professionals and intellectuals)

Towards the end of liberation war, when defeat of Pakistani occupation army and auxiliary forces was imminent, accused Motiur Rahman Nizami and his organizations Islami Chhatra Shanghha and Al-Badr

Bahini mounted Gestapo like attacks to devoid Bangladesh of professionals and intellectuals, amongst others, by selective elimination of respected professionals and intellectuals; they found their homes, dragged out them, often blind-folded, tortured them inhumanly and murdered them brutally and their dead bodies were then dumped in mass-graves and other places. Such attacks were largely carried out on or around 14th December 1971. Thus, the accused was charged for genocide under section 3(2)(e)(i) read with section 4(1) and 4(2) of the ICT Act.

The Tribunal has found this charge No. 16 also proved against the accused appellant and convicted him under section 3(2)(a)(h) read with section 4(2) of the ICT Act and sentenced him thereunder to death.

It is now fact of common knowledge that towards the end of the liberation war of Bangladesh the infamous Al-Badr Bahini, pursuant to the plan of Pakistan Government to make this country intellectually cripple, killed hundreds of intellectuals of different professions most brutally. The members of ruthless Al-Badr Bahini, in a pre-planned way, systematically rounded up, tortured and killed the nation's brightest luminaries. They brutally killed hundreds of the intellectuals of different professions including the university teachers, doctors, engineers, artists, literatis and journalists after lifting up them from their respective houses or other places, often blind-folded

and torturing them inhumanly. The ruthless paramilitia Al-Badr Bahini unleashed terror throughout the country during the liberation war by committing various atrocities including murder, rape, arson, plundering etc. and towards the end of war they committed these most heinous and most cruel crimes—the killing of intellectuals in a pre-planned way. From the side of the prosecution innumerable documentary evidence including old newspaper reports were produced before the tribunal which were marked exhibits. These documentary evidence show how brutally the members of ruthless Al-Badr Bahini killed the best sons and daughters of this soil taking them away blind-bolded and perpetrating inhuman torture upon them and thereafter dumped their dead bodies in Rayer Bazar “Badhya Bhumi” and other mass graves. We may reproduce here some of the newspapers reports on the killing of intellectuals published immediately after liberation of Bangladesh.

The “Dainik Ittefaq” in its issue dated 19.12.1971 published a news as under:

“ সোনার বাংলায় মানবেতিহাসের নৃশংসতম হত্যায়ত্ত
সাংবাদিক, সাহিত্যিক, অধ্যাপক, চিকিৎসক ও বুদ্ধিজীবীসহ শতাধিক সোনার দুলাল
নিহত।

(ইত্তেফাক রিপোর্ট)

সে এক বীভৎস করুণ কাহিনী। পাকিস্তানী সামরিক জাভার পতন ও তার
দখলদার সশস্ত্র বাহিনীর আত্মসমর্পনের পূর্ববর্তী কয়েক দিনে তাদের পক্ষপুষ্ট
দোসর চরম ধর্মীয় ফ্যানাটিক জমাতে ইসলামী ও সমমনোভাবাপন্ন পন্থীদের চন্ড
বাহিনী আল-বদর, আল-সামস, ঢাকার বুদ্ধিজীবী, সাংবাদিক, সাহিত্যিক,
অধ্যাপক, লেখক, চিকিৎসক, রাজনীতিক, কৃষিবিদ, বিজ্ঞানীকে গ্রেফতার ও

অপহরণ করিয়া ছিল। তাহাদের প্রায় সকলেই জঘন্যতম ঘাতকদের হাতে প্রাণ হারাইয়াছেন। ফেরাউনের আমল হইতে হিটলারের গ্যাস চেম্বার পর্যন্ত বহু অমানুষিক ও লোমহর্ষক হত্যাকাণ্ডের কাহিনী আমরা শুনিয়াছি। কিন্তু সোনার বাংলার এই সোনার সন্তানদের হত্যাকাণ্ড বিশ্বের সকল জঘন্যতম হত্যাকাণ্ডের ম্লান করিয়া দিয়াছে। ঢাকার মোহাম্মদপুরের নিকটে রায়ের বাজারে পার্শ্ববর্তী নিম্নাঞ্চল এই পরিকল্পিত ও নৃশংস সশস্ত্র হত্যাকাণ্ড

খন্দক, নালা-ডোবা, ইটের গাদা ও গর্তে কোথাও অনাবৃত এবং কোথাও সামান্য মাটি চাপা দেওয়া অবস্থায় ছড়াইয়া ছিটাইয়া পড়িয়া রহিয়াছে। সবগুলি মৃত দেহের চোখ বাঁধা, বুক, মাথায় অথবা পিঠে গুলি, বেয়নেটের আঘাতের চিহ্ন এবং দুই হাত পিছনে শক্ত করিয়া বাধা। অনেকগুলির চোখ উপড়াইয়া ফেলা হইয়াছে। অনেকগুলি মৃত দেহ ইতিমধ্যেই কাক, চিল, কুকুর-শিয়ালের আহারে পরিণত হইয়াছে এবং ঐসব মৃত দেহের শুধু কঙ্কাল ছড়াইয়া পড়িয়া রহিয়াছে।

শুক্রবার অপরাহ্নে ঢাকার কতিপয় সাংবাদিক কোন একসূত্রে আভাস পাইয়া এই মধ্যভূমিতে গিয়া ইতিহাসের এই নির্ভূরতম হত্যাকাণ্ডের আলামত দেখিতে পান। অতঃপর গতকাল (শনিবার) ভোরে স্থানীয় ও বহু সংখ্যক বিদেশী সংবাদপত্র, রেডিও নেটওয়ার্ক ও টেলিভিশন প্রতিনিধি বধ্যভূমি পরিদর্শন করিতে যান। নিহতদের আত্মীয় স্বজন ও বন্ধু বান্ধব এই সংবাদ পাইয়া তাঁহাদের অনুসন্ধান করেন। বধ্যভূমি দৃশ্য দেখিয়া অনেকেই জ্ঞান হারান ও মুর্ছিত হইয়া পড়ে।”

(Vide Ali Ahsan Muhammad Mujahid -v- Chief Prosecutor, 20 BLC (AD) page 226.)

“**The Observer**”, in its issue of 5th January, 1972 published the following news;

“**Al-Badr victim Bodies of 4 DU teachers identified.**

(By its Staff Correspondent)

Four of seven bodies recovered by the police on Tuesday were identified as those of Dacca University teachers Dr. Serajul

Huq Khan, Dr. Faizul Mahi, Mr. Santosh Chandra Bhattacharjee and Dacca University's Medical Officer Dr. Murtuza.

They were, among many intellectuals, kidnapped and taken to unknown destination by Pakistan Army backed Al-Badar goondas on the eve of surrender of the occupation forces in Bangladesh.

All the seven bodies were exhumed and recovered on Tuesday afternoon from a field near a mazar, on the outskirts of the city.

The bodies all decomposed were taken to Dacca Medical College Hospital for post mortem. While four of the bodies could be identified by their relations, the three other bodies were yet to be identified.

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It may be recalled that nine eminent teachers of Dacca University and the University's Medical Officer Dr. Mohammad Murtuza were lifted from their respective places on December 14 when the city was under curfew.

The intellectuals lifted are all believed to have been killed.

Those lifted by Al-Badr goondas included Dacca Medical College professors, students, lawyers and Government officials,

besides eminent member of the teaching profession."

In the impugned judgment of the tribunal also some news reports on intellectuals killing have been quoted. A portion of the report titled "**Butchery By Al-Badr**" published in the "**PATRIOT**", **New Delhi** on 23.12.1971 is quoted below:

" When the Pakistani were overpowered, they left the killing to the fascist Al-Badr, the armed wing of Jamaat-e-Islami. This fascist body has already butchered about 200 leading intellectuals, doctors, professors and scientists including such eminent men like Shahidullah Kaiser and Munir Chowdhury."

A report of Fox Butterfield on intellectuals killing was published in "**New York Times**" on 03.01.1972. Some portion of that report is quoted below;

" Dressed in black sweaters and khaki pants, members of the group known as Al-Badr rounded up their victims on the last three nights of the war. Their goal, captured members have since said, was to wipe out all Bengali intellectuals who advocated independence from Pakistan and the creation of a secular non-Moslem

State..... If war had not been ended when it did, many Bengali believe, Al-Badr would have succeeded. The bodies of 150 persons, many with their fingers chopped off or finger nails pulled out, were found in the brick yard. Hundreds more were believed buried in 20 mass graves in nearby field."

From the side of the defence the killing of intellectuals by the members of Al-Badr Bahini towards the end of liberation war has not been denied. But the defence plea is that the accused Motiur Rahman Nizami was not involved in anyway in the killing of intellectuals by the members of Al-Badr Bahini.

However, we have already found that the appellant Motiur Rahman Nizami, being the president of All Pakistan Islami Chhatra Shanghha, became the ex-officio leader of this Al-Badr Bahini and he retained his leadership and had effective control on the members of Al-Badr Bahini till the last day of liberation war. We have to adjudicate now whether the appellant was involved in anyway in the killing of intellectuals by the members of Al-Badr Bahini or whether he has incurred any responsibility for those crimes or whether he can be held liable for the killing of intellectuals by the members of Al-Badr Bahini.

To adjudicate this charge No. 16 the tribunal has relied on the oral evidence of three witnesses namely P. W. 1, P. W. 13 and P.W. 23.

P. W. Misbahur Rahman Chawdhury is the president of Islami Oikko Jote. We have already narrated some of his evidence while assessing the status and role of the accused Motiur Rahman Nizami. This P. W. 1 has deposed in support of this charge No. 16 also. He has stated to the effect that during the Liberation War of 1971 accused Motiur Rahamn Nizami was the chief of Al-Badr Bahini; that in the month of December, 1971 until victory, the members of Al-Badr Bahini collaborated directly and indirectly with the Pakistani army and having made list of the intellectuals killed them.

P.W. 13 and P.W. 23 also have deposed in support of this charge No. 16. We have already considered some part of the evidence of these 2 witnesses also while assessing the status and role of the accused appellant. P.W. 13 Shamoli Nasrin Chowdhury is the wife of martyr Dr. Abdul Alim Chowdhury. There is no denying of the fact that Dr. Abdul Alim Chowdhury was killed brutally by the Al-Badrs immediate before liberation of Bangladesh. The material part of the evidence of this P.W. 13 relevant for adjudication of this charge No. 16 is summarized as below:

On 15th December, 1971, in the afternoon, some members of Al-Badr Bahini came to the house of P. W. 13 by a microbus which was painted with mud, and

knocked the door and told by shouting to open the door; the witness then saw through the window that 3 Al-Badrs with arms were standing. Ultimately those Al-Badrs entered into the house and said to her husband "hands up". That at that time those Al-Badrs told also that under the direction of their high command Motiur Rahman Nizami they came there to take away him; thereafter they took away her husband blind-folded. This witness has deposed further that she waited the whole night for her husband's coming back, but he did not; that on 16th December and 17th December, 1971 they tried to find out her husband but failed. That on 18th December, 1971, in the morning, they came to know that many dead bodies were lying at Rayer Bazar "Bodhya Bhumi". Thereafter her husband's younger brothers Hafiz Chowdhury, Hakim, Momin and other relatives went to "Rayer bazaar Bodhya Bhumi" and found the dead body of her husband and also the dead bodies of Dr. Fazle Rabbi, journalist Salina Parvin and many others. That all those dead bodies bore marks of brutal torture. The dead body of her husband was brought home. This witness described the dead body of her husband thus:

"তার দুই হাত পিছনে নিয়ে দড়ি দিয়ে বাঁধা ছিল, গামছা দিয়ে চোখ বাঁধা ছিল, সারা শরীরে বেয়োনেটের অসংখ্য আঘাত ছিল, অসংখ্য গুলিতে বুক বাজরা ছিল। মানুষ কিভাবে আর একটি মানুষকে এভাবে মারতে পারে?"

The P. W. 13 has deposed further that subsequently she could know from the newspapers that one Delowar, who could escape death and could come

back alive from the "Bodhya Bhumi" wrote to the effect that intellectuals of different professions including doctors, engineers, journalists, literatis were taken to Mohammadpur Physical Training Institute blind-folded and there they were tortured inhumanly during the whole night and in the early morning they were taken to "Rayer Bazar Bodhya Bhumi" and were killed there by brush fire. This witness has stated also that she has been waiting for justice for the killing of her husband and other intellectuals for long 42 years and she wants highest penalty of death sentence for the members of Al-Badr Bahini who committed those killing and their high command. During cross-examination this witness has stated also that in 1971 she came to know from different newspapers that accused Motiur Rahman Nizami was the founder of Al-Badr Bahini and also high command of that Bahini.

The credibility of the P.W. 13 has been questioned before us by pointing out that this witness gave some interviews to different TV channels about killing of her husband and also wrote a book titled "৭১ এর শহীদ ডা. আলীম চৌধুরী", but in none of those interviews and in the book she mentioned that this appellat was involved in the killing of her husband. But it appears that in course of cross-examination this witness has stated that in all those interviews given to different Television Channels she mentioned about this accused Motiur Rahman Nizami, but

subsequently she found that those Television Channels edited her those interviews and deleted her statements about the accused Motiur Rahman Nizami and others. During cross-examination this witness has stated also that in her book titled "৭১ এর শহীদ ডা. আলীম চৌধুরী" she did not mention that accused Motiur Rahman Nizami was involved in the killing of her husband and explained that if the name of accused Motiur Rahman Nizami and other Al-Badr's would have been mentioned in that book that book could not be published at that relevant time in 1991. In reply to another question as to whether in the second edition of this book published in 1997, while the Awami League was in power, the name of this accused was mentioned, this witness stated to the effect that the articles of that book were not amended at the time of publishing the second addition and the articles which were included in the 2nd edition of this book were not about the killing of her husband, rather those were about his life and deeds.

From the side of defence allegation also was raised to the effect that this witness did not mention before the investigating officer that at the instruction of the accused Motiur Rahman Nizami her husband was abducted and killed. This witness has denied this defence allegation and stated that before the investigating officer also she stated that at the instruction of this accused the Al-Badr's abducted and killed her husband. This witness has denied the

defence suggestion that the accused Motiur Rahman Nizami was not involved in any way with the killing of her husband.

We do not find any cogent reason to disbelieve this P. W. 13. It has already been mentioned above that this P. W. 13 is a most respected person in the society, she was the head mistress of a renowned school at Dhaka town for long 36 years and at present also she is the head mistress of another school established by herself. She has explained why she did not mention the name of this appellant in her book (৭১ এর শহীদ ডা. আলীম চৌধুরী) We find this explanation quite reasonable and trustworthy. The alleged non-mentioning of the name of this appellant before the investigating officer by this witness also is not fatal in view of her assertion that she actually stated before the investigating officer that at the instruction of accused Motiur Rahman Nizami the Al-Badr abducted and killed her husband. Moreover we have already observed earlier that the absence of any particular statement, which a witness stated before the court/tribunal, in his/her earlier statements recorded by the investigating officer, cannot always conclusively prove that the witness actually did not make that particular statement before the investigating officer. There can be various reasons for the absence of that particular statement of the witness in his/her earlier statement made before the investigating officer. It might be that the witness

omitted to make those statements before the investigating officer as he/she was not asked properly by the investigating officer or it might be that the witness actually made that statement before the investigating officer, but the investigating officer omitted to record the same.

The P. W. 13 has deposed before the tribunal on oath. We find no cogent reason to disbelieve her.

P.W. 23 Syeda Salma Mahmud @ Salma Haque is the wife of another martyr Dr. Azharul Hoque who also was killed brutally by the Al-Badr on 15th November, 1971. The material part of her evidence relevant for this charge No. 16 is as follows;

on 15th November, 1971 at 6.00 a.m. she (P.W. 23) sent Shahadat, their servant, to the laundry for taking 'apron' of her husband, but Shahadat came back without the 'apron' and informed them that Pakistani army and some armed Bangalees made a cordon there. Her husband then made a telephone call to hospital authority from his landlord's house to send an ambulance to take him to hospital. Thereafter her husband and their next-door neighbour martyr Dr. Humayun Kabir were waiting at the front of their house for the ambulance to go to hospital. That she then saw that the Pakistani army and the armed Bangalees were abducting her husband Dr. Azaharul Hoque and Dr. Humayun Kabir at gun point. That at that time she tried to resist the abductors, but failed; that some armed Bangalees pushed her to her

house at gun point and on her query those armed Bangalees told her that they were the members of Al-Badr Bahini and as per the direction of their high command Motiur Rahman Nizami they came there to take away her husband Dr. Azaharul Hoque and Dr. Humayun Kabir. This witness has deposed further that on the following day i.e. on 16 November, 1971 they were informed that the dead bodies of her husband and Dr. Humayun Kabir with bullet injuries were recovered from a drain under the culvert situated beside Notre Dame College, Dhaka. That her bother then brought her husband's dead body from morgue and subsequently the dead bodies of her husband Dr. Azaharul Haque and Dr. Humayun Kabir were buried at Azimpur grave yard. During cross-examination, in reply to a question put by the learned defence lawyer, this witness has stated that Mr. Shahariar Kabir took her interview before publishing his book titled "বাংলাদেশের মৌলবাদ ও সাম্প্রদায়িকতা" and during that interview she told Mr. Shahariar Kabir that at the time of abduction of her husband the abductors told her that as per the direction of Al-Badr high command Motiur Rahman Nizami they were taking away her husband.

From the side of the appellant it has been pointed out before us that in the book "বাংলাদেশের মৌলবাদ ও সাম্প্রদায়িকতা" written by Mr. Shahariar Kabir the name of this appellant has not been mentioned at all though in that book the incident of killing of the husband of this P. W. 23 Dr. Azaharul Hoque and another

martyr Dr. Humayun Kabir has been narrated. It has been argued before us that this fact very reasonably raises suspicion about the credibility of the P. W. 23. The learned Advocate for the appellant has alleged also that this P. W. 23 also did not state before the investigating officer that her husband was abducted at the instruction of this appellant. This witness, of course, while deposing before the tribunal, denied this allegation and asserted that before the investigation officer also she told that at the instruction of the accused Motiur Rahman Nizami the Al-Badr's abducted her husband.

Before we proceed further we need to state about the evidence adduced by the defence. It has been mentioned earlier that from the side of the defence three witnesses were examined and one was tendered only and also some documentary evidence were produced which were marked exhibits.

The D. W. 1 K. M. Hamidur Rahman aged about 66 years is an inhabitant of Pabna town and also a practicing lawyer in Pabna Judge Court. This witness has deposed to the effect that he was a freedom fighter and took active part in liberation war and fought against the Pak army in different places in 1971. As to the accused-appellant this witness has stated to the effect that he did not get any complain from anybody to the effect that this accused appellant took part in any crimes against humanity within the Police Station Sathia of District Pabna.

This witness has stated further that after liberation of Bangladesh he saw the accused Motiur Rahman Nizami to move freely within his area and also in Paban town.

During cross-examination this D. W. 1 has stated that he does not know what the appellant was in 1971 or what he used to do during that period or what his political identity at that time was. (১৯৭১ সালে তিনি কি ছিলেন বা তিনি কি করতেন বা তার কোন রাজনৈতিক পরিচয় ছিল কিনা তাহা আমার জানা নাই।)

D. W. 2 Md. Shamsul Alam aged about 62 years is an inhabitant of village Gobindha, Police Station Pabna Sadar, District-Pabna. He was a freedom fighter. This witness also has deposed to the effect only that during liberation war in 1971 he received hundreds of complain against many persons but he did not get a single complain against accused Motiur Rahman Nizami; that after liberation war he along with their commanders Iqbal Hossain and Mokbul Hossain Sontu travelled different areas including Sathia, Sujanagar, Bera and at that time also people made complain to them against many persons who committed various crimes during the liberation war but at that time also none made any complain to them against accused Motiur Rahamn Nizami.

D. W. 3 Md. Abdus Salam Mukul has been tendered only.

D. W. 4 Md. Nazibur Rahman @ Najib Momen aged 32 years is the son of accused-appellant Motiur Rahman Nizami. He is a Barrister. He has deposed to the

effect that he made a thorough investigation about the allegations brought against the accused appellant Motiur Rahman Nizami; he examined various books, government and non-government documents etc. on liberation war of Bangladesh and also met the relatives of freedom fighters and the martyrs who were killed during the liberation war and found that all the allegations brought against the accused Motiur Rahman Nizami were absolutely false; that after liberation of Bangladesh though innumerable news, articles and books etc. were published on liberation war and the perpetrators who took part in various atrocities during the liberation war and though so many cases also were instituted against those persons but in none of those news, books, articles and cases the name of the accused Motiur Rahman Nizami was mentioned. This D. W. 4 has produced some documentary evidence also which have been marked exhibit.

However, it appears that none of the witnesses examined from the side of the appellant was at all competent to deny the specific allegations brought against the appellant. The D. W. 1 and D. W. 2 did not state anything to the effect that they saw or heard even about the occurrences narrated in this case. What these two witnesses have deposed before the tribunal is that they never got any complain against the accused Motiur Rahamn Nizami. These statements of these two witnesses cannot negate the

definite evidence of the eye witnesses of these occurrences and other documentary evidence as discussed above. The D. W. 4, a young man of 32 years only though has deposed to the effect that he made an extensive research work on the liberation war of Bangladesh and consulted many books, articles, news on liberation war but did not find anywhere anything as to the involvement of his father in the crimes as alleged in this case, but these statements of this D. W. 4 also cannot make the positive evidence adduced by the prosecution false. The documentary evidence produced by the D. W. 4 to show that before 1986 the accused Motiur Rahman Nizami was not named anywhere as leader of Al-Badr or as perpetrator of war crimes also cannot be accepted as sufficient to negate the positive evidence adduced by the prosecution as discussed above. So, obviously, the evidence adduced by the defence neither make the evidence produced by the prosecution false nor prove the innocence of the accused and as such these evidence are of no help for the accused.

From the side of the defence some DVD's containing interview of some persons also were produced before the tribunal, but it appears that the tribunal did not take into consideration those DVDs at all by making observations thus;

"..... the source of interview, from where, when and in what manner those interviews were taken, has not been

disclosed by the defence, and as such, this DVDs deserve no consideration."

We find this observations of the tribunal quite justified. This DVD's were not shown to any of the witnesses of the prosecution even. These DVDs deserve no consideration.

However, besides the direct evidence of the prosecution witness Nos. 1, 13 and 23, as narrated above, the tribunal appears to have applied the doctrine of "superior responsibility" to determine the liability of the appellant in the commission of the brutal crimes of intellectuals killing. The tribunal held;

" the accused's authoritative position on Al-Badr both de-jure and de-facto, is a clear indication that he had effective control and authority over the members of Al-Badr, the "action section" of Jamaat-e-Islami, and thus he cannot be relived from responsibility of planned crimes committed by Al-Badr men with whom he had a relationships."

"The accused as chief of Al-Badr Bahini exercised his superior status but he never tried to prevent his subordinates from committing atrocities. Thus he is criminally liable under section 4(2) of the Act."

The concept of "superior responsibility" is new in our jurisdiction. Section 4(2) of the ICT Act, has introduced this concept of superior or command responsibility in our jurisdiction. Section 4(2) of the ICT Act is quoted below.

Section 4(2) of the ICT Act.

"Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes."

The words 'commander' or 'superior officer' have not been defined or spelled out in this section 4 or in any other section of this Act. There is nothing also in this section or in any other section of this Act to confine these words 'commander' or 'superior officer' appearing in section 4(2) to the military hierarchy only or creating any distinction between

military and civilian superiors. If the legislators of this Act had any intention to confine the application of this theory of "command" or "superior responsibility" to military hierarchy only they would have expressed that clearly. The preamble of this International Crimes (Tribunal) Act, 1973 (ICT Act) indicates clearly that the words 'commander' and 'superior officer' mentioned in section 4(2) denote both military and civilian superior. In the preamble of this ICT Act it has been stated "Whereas it is expedient to provide for the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law and for matters connected therewith; It is hereby enacted as follows:"

The use of the word 'persons' without any classification in the above quoted preamble of ICT Act also suggests that the criminal liability mentioned in section 4(2) is applicable to civilian superiors also.

Different International Criminal Tribunals, viz **ICTY** (International Criminal Tribunal for former Yugoslavia) **ICTR** (International Criminal Tribunal for RWANDA) **SCSL** (Special Court for Sierra Leon) and other International Criminal Tribunals have developed the concept of 'superior or command responsibility,' which are also in their respective statute, largely. We may refer here some of the

decisions of International Criminal Tribunals of different countries.

The **ICTY** and **ICTR** in many cases have held that civilians and political leaders that exercise effective control over subordinates may also be superiors for the purpose of command responsibility. (**Persecutor -v- Delalic, ICTY, appeal judgment, Prosecutor -v- Aleksovski, ICTY, appeal judgment, Prosecutor -v- Kayishima and Ruzibana, ICTR, trial judgment, Prosecutor -v- Musema, ICTR, trial judgment, Prosecutor -v- Fofana and Kondewa, trial judgment**).

In **Prosecutor -v- Musema, and Prosecutor -v- Bagilishema**, the **ICTR** observed that if civilian superiors exercise power of effective control over their subordinates they can also be responsible under superior command responsibility.

The **ICTR** appeal chamber in **Prosecutor -v- Bagilishema** expressed also that the control exercised by a civilian superior need not be of the same nature as that exercised by military commander.

The trial chamber of **ICTY** in prosecution **-v- Delalic** held that a superior may be liable for the acts of his subordinates whether his authority over the subordinates is de-facto or de-jure, as long as he exercises effective control.

In prosecution **-v- Brima**, the **Appeal Chamber of SCSL** held that the superior is one who possesses the power or authority to either prevent subordinates'

crimes or punish the subordinates after the crime has been committed. The power or authority may arise from a de-jure or de-facto command relationship. Whether it is de-jure or de-facto, the superior subordinate-relationship must be one of effective control, however short or temporary in nature, and "effective control refers to material abilities to prevent or punish criminal conduct."

In Prosecution -v- Aleksovaski, trial judgment it was held that more than one superior may be liable for the same crime committed by subordinates.

The trial chamber of **SCSL in Prosecution -v- Brima** held that "Superior responsibility is not excluded by the concurrent responsibility of other superior in a chain of command.

The above referred decisions of ICTR, ICTY and SCSL have settled that (i) the doctrine of command responsibility is also applicable to political leaders and other civilian superiors in position of authority, (ii) a civilian superior need not to be official superior of the perpetrators, rather a de-facto command over the perpetrators is enough to hold someone responsible, (iii) a civilian superior may be liable for the crimes of his subordinates as long as he exercises effective control, and (iv) more than one superiors may be liable for the same crime committed by the subordinates.

This Division, in earlier cases of Ali Ahsan Muhammad Mujahid and Kamaruzzaman accepted the

position that the "superior officer" mentioned in section 4(2) of the ICT Act includes civilian superiors also both de-facto and de-jure. It is now, in our jurisdiction also, an established position that "superior officers" mentioned in section 4(2) of the ICT Act include any civilian superior having effective control over the subordinates and also that a civilian superior need not to be de-jure, rather a de-facto civilian superior also may incur the responsibility of the crimes perpetrated by his subordinates in the situations mentioned in section 4(2) of the ICT Act.

Section 4(2) of the ICT Act, quoted above, explicitly makes a superior liable in a situation where the latter "orders" or "acquiesces" a crime committed by his subordinates or fails to take necessary measures to prevent the commission of such crime. In this case we have found that accused Motiur Rahman Nizami was ex-officio leader of Al-Badr Bahini and he had effective control over the members of Al-Badr Bahini. It has been argued from the side of the appellant that after 30th September, 1971 the accused was no more president of All Pakistan Islami Chhatra Shangha and as such it cannot be held that the appellant was ex-officio leader of Al-Badr Bahini and had effective control over the members of this Bahini after 30th September, 1971. We have already considered this argument of the learned Advocate for the appellant and found that the appellant retained his

leadership and control over the members of Al-Badr Bahini after 30th September, 1971 also. In the above referred decision of the **ICTY in Prosecution -v- Delalic** it was held that a superior may be liable for the crimes committed by his subordinates whether his authority over the subordinates is de-facto or de-jure, as long as he exercises effective control.

It is a proven fact that Al-Badr Bahini was formed mainly with the members of Islami Chhatra Shanghha. The evidence adduced by the prosecution, which we have already discussed while assessing the status and role of the appellant, have proved sufficiently that the appellant Motiur Rahman Nizami, being the president of Islami Chhatra Shanghha became the ex-officio leader of Al-Badr Bahini and he had authority and effective control over the members of this Bahini till the last day of liberation war. From the side of the prosecution so many documentary evidence have been produced which proved that during liberation war of Bangladesh this accused-appellant was a very much active student leader, he travelled throughout the country and held meetings in different places and gave speeches in those meetings praising the Pakistani army and urging the members of Islami Chhatra Shanghha and Al-Badr Bahini to co-operate with the Pakistani army to exterminate the so-called betrayers (pro liberation Bangalees). We have mentioned some of these speeches of the appellant while assessing his status and role during liberation

war. The exhibit-2/22 is an article written by the appellant Motiur Rahman Nizami and was published on 14.11.1971 i.e. in the last part of liberation war. In that article the appellant wrote to the effect that unfortunately some betrayers of Pakistan having taken side of India were involved in the conspiracy to make Pakistan weak and as such the ideology and existence of Pakistan had to be protected after having foiled their conspiracy. In that article he also expressed his great satisfaction for the formation of Al-Badr Bahini and also praised and encouraged the members of Al-Badr Bahini. This article, the exhibit 2/22, was written by the appellant in the middle of November, 1971 when, undisputedly grave atrocities including mass killing, rape and other crimes against humanity were being committed throughout the country by the Pakistani army with the aid and co-operation of their auxiliary force Al-Badr. The appellant Motiur Rahman Nizami being a very active political leader at that time, had full knowledge about those atrocities. But in spite of that he, instead of prohibiting or discouraging the members of his Al-Badr Bahini, had continued giving speeches praising and encouraging them and also urging them to co-operate with the Pakistani army. In those speeches he addressed the pro-liberation people and freedom fighters as "betrayers" "miscreants", "enemy of the country," "agent of India" etc. and urged the Al-Badrs and

Rajakars to take revenge and to exterminate the enemies of the country. These speeches of the appellant and the facts and circumstances prove sufficiently that this accused appellant Motiur Rahman Nizami acquiesced or tacitly accepted all the atrocious activities including killing of intellectuals by the members of his Al-Badr Bahini during the period of liberation war.

The decisions of various International Criminal Tribunals namely ICTY, ICTR, SCSL etc. have settled that to make an accused liable for the crimes of his sub-ordinates under the theory of superior responsibility it must be proved that the superior had effective control over the subordinates. The above mentioned exhibit 2/22 and other speeches delivered by the appellant in different meetings praising and encouraging the members of Islami Chhatra Shanghha and Al-Badr Bahini and also directing them to co-operate with the Pakistani occupation forces prove that this appellant had control over the members of Al-Badr Bahini even after 30th September, 1971.

It should be mentioned here that in this case it has been proved well that this accused appellant Motiur Rahman Nizami aided the Pakistani force in the mass-killing of about 450 unarmed civilian in the villages Boushgari, Ruposhi and Demra on 14.05.1971 and he himself also took active part in that holocaust of 14.05.1971. In this case it has also

been proved that in the occurrence of mass killing in village Dhulaura and in the murder of Shorab Ali at village Bishalikha this appellant took active part with the Pakistani army. The evidence of P. W. 2. Zahiruddin Jalal @ Bichchhu Jalal-a veteran freedom fighter-has proved also that this appellant Motiur Rahman Nizami was involved in torturing and killing of four freedom fighters namely Bodi, Rumi, Jewel and Asad. These facts that the appellant himself also committed series of crimes of grave nature during the period of liberation war-very reasonably suggest that the appellant acquiesced in the commission of intellectuals killing by the members of Al-Badr Bahini.

The evidence of P. W. 13 Shamoli Nasrin Chowdhury, a most trustworthy witness, has proved also that the appellant gave order also to the members of Al-Badr Bahini for killing the intellectuals. This fact clearly proves that the appellant has incurred the liability of the crimes of intellectual killing under section 4(2) of the ICT Act.

From the side of the appellant it has been argued before us that the very framing of charge No. 16 was illegal. It has been pointed out that the investigating officer submitted investigation report on 30.10.2011 in which there was no allegation against the appellant in relation to intellectuals killing, and in the formal charge also submitted

before the tribunal the prosecution did not propose the charge No. 16, but the tribunal framed this charge No. 16. The learned Advocate for the appellant has argued that despite having no material before it the tribunal most arbitrarily framed the charge No. 16 and as such it cannot be said that the charge No. 16 was framed rightly. But we cannot accept this argument for the learned Advocate of the accused-appellant. The tribunal, on examination of investigation report, formal charges and other materials on record, found sufficient materials for framing this charge No. 16. We have found that during trial of this case sufficient evidence came in support of this charge No. 16. In this circumstances it cannot be accepted that the charge No. 16 was framed illegally or unjustly.

Mr. Khondker Mahbub Hossain, the learned Advocate for the appellant has made argument to the effect that the documentary evidence of the prosecution itself namely exhibit-35 and also the defence exhibit-BT have proved that the conspiracy to commit killing of intellectuals of this country was done by others and not the appellant. The learned Advocate has elaborated his submissions stating that in the exhibit No. 35, which was edited by Mr. Shahariar Kabir and others, it is stated that the conspiracy to commit intellectuals killing was done at the office of "Observer newspaper" specifically in the room of Mr. Hamidul Hoque Chowdhury and that the

defence exhibit-BT proves that a list of intellectuals, who were killed, was recovered from the residence of Khan A Sabur. The learned Advocate has contended that these two exhibits falsify the prosecution's allegation that the appellant made conspiracy to kill the intellectuals and he was involved in the killing of intellectuals by the Al-Badrs.

But we do not find this argument of the learned Advocate of much weight. Some others also might have any involvement in the conspiracy of killing of intellectuals, but that does not exonerate the appellant from his criminal liability in killing the intellectuals which has been proved before the tribunal by sufficient evidence.

The learned Advocate for the appellant has argued also to the effect that from the evidence of the prosecution itself and also from some documentary evidence filed on behalf of the defence it has been proved sufficiently that Al-Badr Bahini was raised, commanded and controlled by Pakistani military. The learned Advocate has pointed out that the prosecution itself also, in the petition for formal charges, stated to the effect that one Mr. Riaz Hossain Malik, an officer of the Pakistani occupation army, informally started to raise Al-Badr forces and one Mr. Kamran was designated as its first commander. The learned Advocate has contended that the tribunal without taking into consideration all these facts and

the relevant documentary evidence of both the prosecution and defence, most unjustly and illegally held that the appellant was head of Al-Badr Bahini.

In reply, the learned Attorney General has made submissions to the effect that it was not claimed by the prosecution that Pak army did not raise, command and control the Al-Badr Bahini, but it was the specific case of the prosecution that the Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha and the appellant, being the president of Islami Chhatra Shanghha, became ex-officio leader of Al-Badr Bahini and this case of the prosecution has been proved by sufficient evidence.

We have considered the above arguments of the learned Counsel of both the sides. In this case it has been proved beyond all reasonable doubt by sufficient evidence that Al-Badr Bahini was formed with the members of Islami Chhatra Shanghha-of which this appellant was the president for a long period of five years. The evidence adduced by the prosecution and the facts and circumstances revealed therefrom have proved sufficiently that this appellant also had effective control over the members of Al-Badr Bahini. The fact that the Al-Badr Bahini was raised and controlled by the Pak army does not disprove the fact that this appellant also, being president of Islami Chhatra Shanghha, became a leader of Al-Badr Bahini and he also had control on the members of Al-Badr Bahini. It appears from the decisions referred to

above that more than one person can be superiors and can hold effective control on the same subordinates and more than one superior may be liable for the crime committed by the subordinates.

Mr. S. M. Shajahan the learned Advocate for the appellant has made argument to the effect also that in this case it has come in evidence that as many as 42 cases were filed immediate after liberation of Bangladesh on the intellectuals killing, but in none of those cases this appellant was implicated as an accused. The learned Advocate has argued also that several ID Cards of Al-Badrs have been produced in this case by the prosecution and those have been marked exhibit also but none of those ID Cards bears the signature of the appellant. The learned Advocate's contention is that the absence of the name of the appellant in those 42 criminal cases as accused and also the failure of the prosecution to produce a single ID Card of any Al-Badr with the signature of this appellant tell strongly that this appellant was not involved in the killing of intellectuals and he was not also the leader of Al-Badr Bahini.

But we are unable to accept this argument also of the learned Advocate for the appellant. In this case sufficient evidence and facts and circumstances have come before the tribunal which have proved sufficiently that this appellant was a leader of Al-Badr Bahini and he had control on the members of Al-

Badr Bahini and he had complicity also in the killing of intellectuals by the Al-Badr Bahini. In the circumstances the alleged non-implication of this appellant in the alleged earlier cases does not relieve him of the liability in intellectuals killing which has been proved in this case by sufficient evidence. The failure of the prosecution to produce any ID Card of any Al-Badr with the signature of the appellant is not fatal at all for the prosecution- especially in consideration of the fact that those ID Cards were issued long 42 years before.

It has already been observed earlier that the alleged incidents of this case took place long 42 years before. With the passage of this long 42 years many of the documentary evidence might have been destroyed. In an old case like the present one the prosecution faces great challenges in producing necessary evidence, both oral and documentary. Most of the witnesses also, in such old case, are not available due to various reasons, many necessary witnesses may die within such a long period, many others, due to old age, become unable to depose before the court/tribunal and many other witness, for various reasons, may be unwilling to depose against a particular accused after such a long period. However, in this case the prosecution has examined so many witnesses who have deposed before the court supporting the prosecution case. There can be some contradictions or discrepancies in the evidence of

the witnesses who depose before the court/tribunal after such a long period. In the present case we have scanned the evidence of the prosecution witnesses attentively. Though there are some minor contradictions and discrepancies in their evidence considering the very fact that these witnesses have deposed before the tribunal after a long period of 42 years, we do not think that these minor discrepancies and contradictions in the evidence of the prosecution witnesses are fatal at all and these can raise any suspicion or doubt about the truth of their evidence or about the trustworthiness of the witnesses.

However considering the evidence adduced by the prosecution, both oral and documentary as discussed above, we also find that in this case it has been proved beyond all reasonable doubt that accused Motiur Rahman Nizami, being the leader of Al-Badr Bahini, had authority and effective control over the members of this Bahini and he acquiesced all their atrocious activities including the intellectuals killing. It has been proved further that the accused-appellant gave order to Al-Badrs to kill Martyr Dr. Abdul Alim-the husband of P. W. 13 and accordingly the Al-Badrs took away Dr. Abdul Alim from his house on 15.12.1971 and killed him brutally. The appellant thus has clearly incurred the criminal liability for the crimes of intellectuals killing by the Al-Badrs.

So, we find that the tribunal has rightly convicted and sentenced the appellant on charge No. 16 also.

Before parting with we need to write few words about sentence. It is the solemn duty of the courts to award proper sentence commensurate with the gravity of the crimes. Inappropriate lesser sentence causes injustice not only to the victims of crimes but sometimes to the whole society. In the present case the appellant has been awarded death sentences on three charges, viz mass killing, rape and other crimes against humanity in villages Boushgari, Ruposhi and Demra (charge No. 2), murder of 52 unarmed civilians in village Dhulaura (Charge No. 6) and planned killing of intellectuals-the best sons and daughters of this country. (Charge No. 16). All these crimes were extremely cruel and horrendous in nature. Not only the near and dear ones of the victims of these crimes were shocked but also the whole society was terribly shocked by the commission of these crimes. The whole society has been waiting for the proper punishment of the perpetrators of these crimes for a long period. The commission of these crimes-even the slightest complicity in these most cruel, gruesome and barbarous crimes warrants death sentence only. There is no mitigating circumstances to reduce the death sentences, rather there are aggravating circumstances. In this case the appellant has been found to have committed series of crimes of extremely

cruel and inhuman nature during the period of Liberation War, and he has been awarded 5 separate sentences for 5 different crimes in this instant case. The commission of series of crimes of most cruel and inhuman nature by an accused may be considered as aggravating circumstances for awarding him the maximum sentence.

However, the tribunal has sentenced the appellant to death rightly.

In view of above discussions it is

ordered,

that the appeal is allowed in part. The appellant Motiur Rahman Nizamn is acquitted of charge Nos. 1, 3 and 4. His conviction and sentences in respect of charge Nos. 2, 6, 7, 8 and 16 are maintained.

CJ.

J.

J.

J.