

# **International Crimes Tribunal-2 [ICT-2]**

**[Tribunal constituted under section 6 (1) of the Act No. XIX of 1973]**

**Old High Court Building, Dhaka, Bangladesh**

**ICT-BD [ICT-2] Case No. 01 of 2014**

[Charges: Participating, committing, aiding and contributing the commission of offences constituting crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act No. XIX of 1973]

## **Before**

**Justice Obaidul Hassan, Chairman**

**Justice Md. Mozibur Rahman Miah, Member**

**Justice Md. Shahinur Islam, Member**

## **The Chief Prosecutor Vs Moulana Abdus Sobhan**

### **For the Prosecution:**

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Zead-al-Malum, Prosecutor

Me. Sultan Mahmud, Prosecutor

Ms. Tureen Afroz, Prosecutor

Ms. Rezia Sultana, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

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### **For the Accused:**

Mr. Mizanul Islam, Advocate, Bangladesh Supreme Court

Mr. S.M Shahjahan Kabir, Advocate, Bangladesh Supreme Court

Mr. Ehsan Siddique, Advocate, Bangladesh Supreme Court

Mr. Abdus Sattar Palwan, Advocate, Bangladesh Supreme Court

**Date of delivery of Judgment: 18 February 2015**

## **JUDGMENT**

**[Under section 20(1) of the Act XIX of 1973]**

### **I. Introduction**

1. This Judgment is rendered by the Tribunal-2[ICT-2] for the prosecution of a person responsible for the atrocious activities committed in violation of international humanitarian law. The appalling events giving rise to this case took place during the war of liberation of Bangladesh in 1971 in the territory of district Pabna. Moulana Abdus Sobhan who stood trial for the charges framed against him was the

acting district Ameer of Jamat E Islami [JEI] and he allegedly being imbued by the political ideology of JEI collaborated with the Pakistani occupation army in committing the crimes against the pro-liberation civilian population.

2. The charges framed arraign accused Moulana Abdus Sobhan for abetting, facilitating, participating and contributing the commission of offences of crimes against humanity and genocide. The trial took place in presence of the accused. He has been in detention since pre-trial stage. Pursuant to issuance of production warrant the prison authority has produced the accused Moulana Abdus Sobhan today before this Tribunal [ICT-2].

3. In course of trial, both the prosecution and the defence provided effective assistance to go with the proceeding in accordance with law. We appreciate their commendable performance and assistance.

4. Having jurisdiction under section 10(1) (j), section 20(1) and section 20(2) of the International Crimes (Tribunals) Act, 1973[Act No. XIX of 1973] this ‘Tribunal’ known as International Crimes Tribunal-2 [ICT-2] hereby renders and pronounces the following unanimous judgment.

## **II. Formation and Jurisdiction of the Tribunal**

5. The 2nd Tribunal [ICT-2] has been set up on 22 March 2012. The Tribunal is governed by the International Crimes (Tribunals) Act of 1973[Act of 1973] and by the Rules of Procedure 2012 formulated by the Tribunal [ICT-2] under the power conferred in section 22 of the principal Act. Pursuant to the Act of 1973, the Tribunal [ICT-2] has the authority to prosecute persons responsible for the offences enumerated in section 3(2) of the Act committed in violations of international humanitarian law in the territory of Bangladesh in 1971, during the war of liberation. This Tribunal set up under the Act of 1973 is absolutely a domestic Tribunal but meant to try ‘internationally recognized crimes’ or ‘system crimes’ committed in 1971 in the territory of Bangladesh.

6. The Act No. XIX enacted in 1973 is meant to prosecute crimes against humanity, genocide and system crimes as enumerated in the Act committed in violation of customary international law is *ex-post facto* legislation. It is fairly permitted. The 1973 Act of Bangladesh has the merit and means of ensuring the standard of safeguards recognized universally to be provided to the person accused of offences punishable under the Act of 1973.

7. We reiterate that the Act of 1973 has been enacted to prosecute, try and punish not only the armed forces but also the perpetrators who belonged to ‘auxiliary forces’, or who committed the offence as an ‘individual’ or a ‘group of individuals’ or ‘organisation’. It is manifested from section 3(1) of the Act of 1973 that even any person (individual), if he is *prima facie* found accountable either under section 4(1) or 4(2) of the Act of 1973 for the perpetration of offence(s), can be brought to justice under the Act.

### **III. Brief Historical Background**

8. In drawing the historical background, in brief, that ensued the war of liberation of the Bengali nation in 1971 we reiterate that in August, 1947, the partition of British India based on two-nation theory, gave birth to two new states, one a secular state named India and the other the Islamic Republic of Pakistan. The western zone was named West Pakistan and the eastern zone was named East Pakistan, which is now Bangladesh.

9. In 1952 the Pakistani authorities attempted to impose ‘Urdu’ as the only State language of Pakistan ignoring Bangla, the language of the majority population of Pakistan. The people of the then East Pakistan started movement to get Bangla recognized as a state language and eventually turned to the movement for greater autonomy and self-determination and finally independence.

10. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur

Rahman became the majority party of Pakistan. But defying the democratic norms Pakistan Government did not care to respect this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman in his historic speech of 7th March, 1971, called on the Bangalee nation to struggle for independence if people's verdict is not respected. In the early hour of 26th March, following the onslaught of "Operation Search Light" by the Pakistani Military on 25<sup>th</sup> March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

**11.** In the War of Liberation that ensued, all people of the then East Pakistan unreservedly supported and participated in the call to free Bangladesh but a small number of Bangalees, Biharis, other pro-Pakistanis, as well as members of a number of different religion-based political parties, particularly Jamat E Islami (JEI) and its student wing Islami Chatra Sangha (ICS), Muslim League, Convention Muslim League joined and/or collaborated with the Pakistan occupation army to aggressively resist the conception of independent Bangladesh and most of them committed and facilitated as well the commission of appalling atrocities directing civilian population in the territory of Bangladesh, in 1971. This is now a settled history of which this Tribunal takes judicial notice as permitted by the Act of 1973 and the ROP.

**12.** The Pakistani occupation army's terrible brutality directing civilian population of Bangladesh was planned and in furtherance of policy-- the policy to wipe out the pro-liberation Bengali civilians. The Appellate Division, in the case of *Abdul Quader Molla* has observed that –

“The way the Pakistani Army had acted, surpasses anything that could pass for legitimate use of force. It had resorted to wanton murder of civilians, including women and children in a deliberate plan to achieve submission by stark terror.

[Appellate Division, *Abdul Quader Molla* Judgment, 17 September 2013 page 39]

**13.** The atrocities for which the accused Moulana Abdus Sobhan stood trial were not isolated from the policy and plan of the occupation Pakistani army who started its ‘mayhem’ since 25 March 1971 intending to wipe out the pro-liberation Bengali civilians, to resist their aspiration of self determination. The nation fought for the cause of independence and self determination and finally achieved independence on 16 December 1971.

**14.** Enormously grave and recurrent horrific atrocities directing the Bengali civilians in the territory of Bangladesh starting since 25 March 1971 did not thrive to foil the highest sacrifice of the nation. The nation always pays tribute and homage to the blood of millions of patriotic martyrs and innocent defenceless people.

**15.** In 1971, the Pakistani army had no friends in Bangladesh—except a few traitors who took stance against the war of liberation and they belonged to the ideology of pro-Pakistan political parties, e.g Muslim League, the Convention Muslim League, the Jamaat-e-Islami [JEI] and the Nizami-i-Islami. We have already observed in the case of *Muhammad Kamaruzzaman, Ali Ahsan Muhammad Mujahid* that JEI culpably assisted and facilitated the Pakistani occupation army by forming Razakar, Al-Badar-- *Para militia* forces. Accused Moulana Abdus Sobhan being imbued by his pro-religion political ideology along with his loyal people belonging to Razakar force, peace committee, Mujahid force and Biharis allegedly collaborated with the Pakistani occupation army stationed in the geographical area of Pabna district.

**16.** It is now settled history that Jamat E Islami [JEI] with intent to provide support and assistance to the Pakistani occupation army by forming peace committee, armed Razakar and Al-Badar force obtained government’s recognition for those para militia forces. JEI started acting antagonistically since the beginning of the war of liberation and it ended in killing of intellectuals. It is found from a report published in **The Daily Sangram 17 April 1971** that a delegation team comprising of members of Central Peace Committee including Professor Ghulam

Azam [also the then Amir of Jamat E Islami] in a meeting with the Governor of East Pakistan Lt. General Tikka Khan expressed solidarity and their adherence to the armed forces.

**17.** Prosecution avers that accused Moulana Abdus Sobhan by virtue of his potential position in district JEI did not keep him distanced from the strategy of JEI to further the policy and plan of the Pakistani occupation army in carrying out barbaric atrocities against the non combatant pro-liberation civilians that resulted in commission of offences enumerated in the Act of 1973.

**18.** But untold atrocious resistance on part of thousands of local collaborators could not impede the nation's valiant journey to freedom. Undeniably the ways to self-determination for the Bangalee nation was strenuous, swabbed with enormous blood, struggle and immense sacrifices. In the present-day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination. The nation shall remain ever indebted to those best sons and daughters of the soil who paid supreme sacrifices for an indelible motherland – Bangladesh.

#### **IV. Brief account of the Accused**

**19. Accused Abdus Sobhan @ Abul Basar Mohammad Abdus Sobhan Mia @ Moulana Sobhan** son of late Sheikh Md. Naim Uddin and late Nurani Begum of Haji Mohsin Road, Jabalpur Pathartola police station Pabna Sadar district Pabna and North Masimpur, west to Proshanti Bhabon under police station Pabna Sadar district Pabna and at present House No. 7/B, "Mohua" 6<sup>th</sup> floor, Magnolia Apartment, 89 Sen Para Parbata police station Mirpur, Dhaka Metropolitan Police(DMP), Dhaka was born on 19 February 1936, as per prosecution. He obtained 'Aleem' degree from Serajganj Alia Madrasa in 1950, 'Fazil' degree in 1952 and 'Kamil' degree in 1954. He joined Pabna Alia Madrasa as its 'Head Moulana' in 1952. Later he served as the superintendent of Gopal Chandra Institute and Arifpur Ulot Madrasa.

20. Moulana Sobhan was actively associated with student politics. He had acted as the secretary of Pabna district 'East Pakistan Jamiat-e-Talebae Arabia'. He served as the 'Ameer' of Pabna district JEI and later on, he was elected a member of central Majlish e Sura of JEI. In 1962 and 1965 he was elected member of East Pakistan Provincial Assembly. He contested the election held in 1970 for MNA from Pabna-6 constituency but was defeated.

21. In 1971 accused Moulana Sobhan was an active collaborator of the Pakistani occupation armed force and was the secretary of Pabna peace committee first and then its vice-president, prosecution alleges. The accused was a potential organizer of local Razakar force too, prosecution avers. Accused Moulana Sobhan was elected MNA uncontested against the vacant seat in a by election in 1971, prosecution contends.

22. In 1991 accused Moulana Sobhan was elected as an MP and served as the deputy leader of JEI in the Parliament. In 2001 he was elected MP as a candidate of four parties' alliance from Pabna Sadar constituency and currently he is the Naeb e Ameer of central executive council of JEI.

## **V. Procedural History**

### *Pre-trial stage*

23. Since pre-trial stage, accused Moulana Abdus Sobhan has been in detention on an application initiated by the Chief Prosecutor contending that his detention or arrest was indispensable for the purpose of effective and proper investigation.

### **Taking Cognizance**

24. On 12.9.2013 the investigation agency, on completion of investigation in relation to the complaint Register serial no. 15 dated 15.4.2012 submitted 'report' as required under Rule 11 of the ROP to the Chief Prosecutor and then on perusal of the 'report' together with the evidence and documents collected during investigation Chief Prosecutor in his turn submitted the 'formal charge' under section 9(1) of the Act of 1973 on 15.9.2013 alleging that the accused Moulana Abdus Sobhan a potential leader of JEI in Pabna district collaborated with the Pakistani

occupation armed in committing the offences of crimes against humanity, abetted and contributed the commission of atrocious criminal acts in different places of Pabna district and also had conscious ‘complicity’ and ‘participation’ to commit such crimes as specified in section 3(2) of the Act, during the period of War of Liberation in 1971.

**25.** Thereafter, the Tribunal [ICT-1], considering the Formal Charge and documents and statement of witnesses submitted therewith, having found *prima facie* case, took cognizance of offences against the accused Moulana Abdus Sobhan by its order dated 19.9.2013 and also directed the prosecution to submit copy of all the documents it intended to rely upon for providing the same with the accused for preparing defence and fixed the date for hearing on charge framing matter. The hearing took place on several dates.

#### **Charge framing**

**26.** Eventually, the Tribunal [ICT-1] by its order dated 31.12.2014 framed as many as 09 charges alleging the commission of the offences of crimes against humanity and genocide and accused’s abetment, complicity and participation therewith, by rejecting the discharge application initiated by the defence. The charges so framed were read over and explained to the accused Moulana Abdus Sobhan present on dock when he pleaded not guilty. With this the trial of the case commenced.

#### **Transfer of the case record**

**27.** At this stage, the Tribunal [ICT-1] by its order dated 27.3.2014 transferred the case record to this Tribunal [ICT-2] under section 11A of the Act of 1973 for disposal. Tribunal-2 received the case record on 31.3.2014.

#### *Trial Stage*

**28.** Prosecution started examining its witnesses on 07.04.2014, after laying the opening statement as required under the Statute. Prosecution adduced in all 31 witnesses including the IO[s] and seizure witnesses.

Defence duly and extensively cross-examined those witnesses. In this way, prosecution completed presentation of its evidence by examining witnesses on 30.9.2014. Then date 15.10.2014 was fixed for adducing and examining defence witnesses [DWs]. But on the date fixed, the learned defence counsel submitted that he had instruction not to adduce and examine any defence witness and accordingly he pressed for fixing date for summing up [argument]. Accordingly, the Tribunal fixed 02.11.2014 for summing up of the prosecution case.

### **Summing up stage**

**29.** Prosecution started summing up [argument] of its case on 25.11.2014 and concluded on 17.11.2014, taking in all 07 working days. Thereafter, defence started its own summing up on 19.11.2014 and made it concluded on 30.11.2014, taking in all 06 working days. Prosecution then advanced its rebuttal submission and Mr. Ehsan Siddique the learned defence counsel was allowed to place his reply on law points.

**30.** On closure of summing up by both the sides, the Tribunal by its order dated 04.12.2014 kept the case under CAV and the accused Moulana Abdus Sobhan was sent to prison with direction of issuance of production warrant on call.

## **VI. Applicable laws**

**31.** The proceedings before the Tribunal have been guided by the International Crimes (Tribunals) Act 1973, the Rules of Procedure 2012[ROP] formulated by the Tribunal-2 under the powers given in section 22 of the Act. Section 23 of the Act of 1973 prohibits the applicability of the Code of Criminal Procedure, 1898 and the Evidence Act 1872. Tribunal is authorized to take judicial notice of any fact of common knowledge which is not needed to be proved by adducing evidence [Section 19(4) of the Act]. Even the Tribunal shall not be bound by technical rules of evidence and may admit any evidence which it deems to have probative value [section 19(1) of the Act of 1973].

**32.** The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. The defence shall have liberty

to cross-examine prosecution witness on his credibility and to take contradiction of the evidence given by him [Rule 53(ii)]. Defence shall have right to examine witnesses [Section 10(1) (f) of the Act of 1973].

**33.** Cross-examination is significant in confronting evidence. The Act of 1973 provides right of accused to cross-examine the prosecution witnesses. The Tribunal may receive in evidence statement of witness recorded by Magistrate or Investigation Officer only when the witness who has subsequently died or whose attendance cannot be procured without an amount of delay or expense which the Tribunal considers unreasonable [Section 19(2) of the Act]. But in the case in hand no such statement of witness has been received despite prayer on part of the prosecution, on the grounds stated in paragraph 33 of this judgment..

**34.** Atrocities as listed in the charges were committed in wartime situations. One may say that why and how the accused alone is said to be accountable for the crimes narrated in the charges, particularly when the alleged criminal acts could not have been perpetrated by an individual alone. In this regard, the Tribunal notes that in adjudicating culpability of the person accused of criminal acts, context and situations prevailing at the relevant time i.e the period of war of liberation in 1971[ March 25 to December 16 1971] is to be considered.

## **VII. Summing up [Argument]**

### **Summing up by the prosecution**

**35.** Mr. Sultan Mahmud and Ms. Rezia Sultana the learned prosecutors placed the summing up submission chiefly on factual aspects. They have argued that the evidence of witnesses proved the events of criminal acts constituting the offences against civilians as described in the charges framed and accused Moulana Sobhan's participation and complicity therewith. Accused Sobhan by virtue of his political prominence in JEI had acted as a potential aide of the Pakistani occupation army stationed in Pabna district and he by his act, assistance and instigation facilitated the commission of crimes in question by the army.

36. Citing evidence of witnesses, the learned prosecutors argued that most of the witnesses examined are victims and civilians who saw the facts relevant to the attack that resulted in commission of the offences and defence could not dislodge their testimony. Accused Moulana Sobhan was the acting Ameer of Pabna district JEI and thus had played a substantial role in forming local Razakar force [auxiliary force] and had potential position of authority on it. He was the secretary of Pabna district peace committee and next he was made its vice-president.. However, the argument advanced in respect of each charge may be well categorized at the time of adjudicating the charges independently.

37. Mr. Zead-al-Malum the learned prosecutor adding his submission argued that the accused Moulana Sobhan incurred liability also under section 4(2) of the Act of 1973 which refers to the notion of civilians superior responsibility as he was in position of authority over the members of local Razakars, peace committee and Bihari people and the gang of perpetrators carried out the attack under his leadership. Accused's act of ordering, instigation prompted and facilitated the actual perpetrators in committing the offences.

#### **Summing up by the Defence**

38. Mr. Mizanul Islam the learned defence counsel , at the out set of his summing up, submitted that the events as have been placed by the prosecution did not happen in the manner as alleged; that accused Moulana Sobhan had no involvement with the alleged criminal activities constituting the offences, as narrated in the charges framed. The document filed by the prosecution itself does not go with the claim that accused Sobhan was the commander of Razakar in Pabna; that on the date of formation of the peace committee on 5.7.1971, in Pabna, as found from the prosecution document, accused Moulana Sobhan was not in Pabna town and thus forming the committee showing him convener does not prove that he was a leader of Pabna peace committee.

39. The learned defence counsel further submitted that the prosecution documents which have been marked as exhibits need not be discussed as

the same do not relate to the charges. At the same time he conceded that since the plea of alibi too that the defence took during trial has not been substantiated by adducing evidence it may be treated to have been disposed of. The learned defence counsel, on factual aspects, chiefly argued that the prosecution witnesses are not reliable and they have testified being tutored. Seeing the accused Sobhan with the group of army or attackers at the crime sites in committing the crimes as narrated by the witnesses was improbable.

**40.** The learned defence counsel placed argument citing weakness and inconsistencies of testimony of prosecution witnesses to show that the prosecution failed to prove accused Sobhan's involvement with any of events constituting the alleged offences. Fairness of investigation procedure has also been questioned. However, it would be convenient to focus on defence argument together with that of prosecution at the time of independent adjudication of each charge.

### **Rebuttal: prosecution**

#### *Discrepancies*

**41.** Ms. Tureen Afroz the learned prosecutor in advancing rebuttal, submitted that discrepancies occurred in witnesses testimony is insignificant as it may be faded with the passage of time and as such witness's testimony cannot be thrown mere on ground of 'discrepancy' terming it unreliable. In support of her argument she drew attention to an observation made by ICTR Trial Chamber in the case of **Nyiramashuko** [Judgment June 24, 2011 para 179] and **Kupreskic** [ICTY Trial Chamber, judgment October 23, 2001 para 35]

**42.** Learned prosecutor next argued on the issue of 'authority' of the accused over the perpetrators, with reference to charge no.2. She argued that since the detained victim was set free on telephonic call of accused Sobhan he was in position of 'authority' that signifies his status as 'superior'. In this regard she drew further attention to the observation made by this Tribunal in the case of Abdul Alim [Judgment paragraph 366].

*Commanding position on Mujahid force*

**43.** She continued to submit that accused Sobhan had acted in forming 'Mujahid' force, as revealed from testimony of P.W.3 who was a member of Mujahid force. And as such accused was in commanding position of its members. The learned prosecutor however conceded that the accused had no power to recruit a person in Mujahid Bahini.

*Cumulative charging and conviction*

**44.** The learned prosecutor next submitted, with reference to charge no. 6, that cumulative charging and conviction is permissible if the accused is found to have committed the distinct offences under the self same fact. In support of this submission she relied upon a decision in the case of **Nahimana, Barayagwiza** [ICTR Appeal Chamber November 28, 2007, para 1028 and 1029]

**Reply by the defence***Cumulative conviction*

**45.** It has been submitted by the learned defence counsel Mr. Ehsan Siddique, in reply to submission made by the learned prosecutor on point of 'cumulative conviction' that it is not permissible to convict an accused for two offences allegedly committed by the self same act as narrated in the charge framed. In support of his submission the learned defence counsel cited two decisions of ICTR Trial Chambers. He drew attention to the cases of **Kayishema** [judgment 21 May, 1999] and **Akayesu** by the ICTR Trial Chamber [Judgment 2 September 1998], in support of his submission.

**VIII. Legal Aspects**

**46.** Legal aspects involved in all the cases under the Act of 1973 already disposed of by this Tribunal are almost similar, both sides conceded. And the same have already been adjudicated by making vivid discussion in the earlier disposed of cases. The key legal issues already resolved by rendering reasoned finding by this Tribunal [ICT-2], in its earlier cases disposed of were (i) delay in prosecuting the accused, (ii) the tripartite agreement of 1974 is a bar in prosecuting the offences under the Act of 1973, (iii) without bringing the principal perpetrators to justice an

individual cannot be prosecuted as an abettor, (iv) prosecuting the accused is politically motivated, (v) definition and elements to constitute the crimes.

**47.** In the case in hand, either of above issues has been agitated on part of the defence. Therefore, we do not deem it necessary to reiterate any discussion on the settled legal issues. However, it is to be kept in mind significantly that the offence of ‘murder’ as crime against humanity is a quite distinct offence and is known as ‘international crime’ for which an individual may lawfully be prosecuted under the Act of 1973.

**48.** Elements to constitute the offence of ‘murder’ defined in the Penal Code do not conform to the offence of ‘murder’ as crime against humanity as enumerated in the Act of 1973. Non initiation of any case for any of offences alleged under the Penal law immediately after the independence does not create any bar to prosecute an individual under the Act of 1973 which spells different nature of offences and even the delay in prosecuting such individual under this Act never impairs the trial.

### **IX. General Considerations Regarding the Evaluation of Evidence in a case of Crimes against Humanity**

**49.** For various reasons, documented evidence about the commission of the alleged offences and accused's complicity and participation cannot be expected. The offences occurred in war time situation. Besides, already long four decades have been elapsed. The case so far as it relates to the facts of criminal acts constituting the alleged offences thus chiefly rests on oral evidence presented by the prosecution. The locals, relatives of victims and sufferers of atrocious activities came on dock and narrated what they experienced and saw during the horrific attack launched in 1971 in and around their localities. Apart from them some are hearsay witnesses.

**50.** It has already been settled that in a case under the Act of 1973 ‘hearsay evidence’ is admissible and it may be taken into consideration if

supported by other evidence. The phrase 'other evidence' includes relevant facts, circumstances and testimony of ocular witnesses.

**51.** Naturally, due to lapse of long passage of time the witnesses may not be able to memorize the exact date or time or distance or direction of crime sites from one place. However, the core essence of the horrific principal event always remains imprinted in the human memory if a person really had opportunity to see the event of monstrous nature. Thus, their testimony is to be viewed taking all these reality into account and then to assess as to how far the account they made on material facts inspires credence.

**52.** In a criminal trial, two things have to be adjudicated. One is commission of the offence in question and another one is culpability of the person accused of such offence. The case deals with the offences of crimes against humanity. This type of crime is known as 'group crime' or 'system crime' and not an isolated offence punishable under the normal Penal law.

**53.** In committing crimes against humanity the person accused of such crime may not have physical participation. His act or conduct--- amid, prior or subsequent to the event, lawfully makes him responsible for the offence committed by others, if his act or conduct is found to have had substantial effect and contribution on the commission of such crime. It is now settled jurisprudence.

**54.** In many instances, the Defence has alleged inconsistencies and contradictions between the statements made to IO and their evidence at trial. In the instant case, defence, in cross-examination, merely suggests that the witness makes some part of the version narrated in examination-in-chief for the first time before the Tribunal and not elsewhere earlier. With this the defence intends to contradict witness's version with what he stated to IO.

**55.** The Tribunal reiterates that the earlier statement of a witness made to IO was composed by investigating officer and it does not carry any

evidentiary value. First, there has been no mandatory provision of recording statement of witness, during investigation by the IO under the Act of 1973. However, the IO may reduce the statement of any witness in writing as required under section 7(6) of the Act of 1973. Second, there has been no explicit provision as to contradict witness's testimony to what is stated to the IO. Third, mere omission in earlier statement made to non judicial body does not make witness's sworn testimony before the Tribunal tainted and untrustworthy. Fourth, detail precision is not expected to have been narrated to IO by the witness and the IO too might not have inquired into detail exactitude.

**56.** It has already been settled by the Appellate Division, in the case of *Abdul Quader Molla* that the contradiction can be drawn from the statements made by a witness in his 'examination-in-chief' only, not with respect to a statement made to the investigating officer of the case in course of investigation" [Page 196 of the Judgment in *Abdul Quader Molla Case*].

**57.** It has also been observed by the Appellate Division in the case of *Abdul Quader Molla* that "Sub-rule (ii) of rule 53, speaks of 'contradiction of the evidence given by him'. This word 'contradiction' is qualified by the word 'examination-in-chief' of a witness" [Judgment Page 196]. There is no scope to draw contradiction of the statement of a witness made in course of examination-in-chief with his/her earlier statements made to the investigating officer or other agency" [Judgment Page 205].

**58.** It is to be noted that the statements made to IO were not made under solemn declaration and were not taken by any judicial body. In the circumstances, no probative value is attached to the statements made to IO. Tribunal's view is that the truthfulness of direct sworn testimony made before the Tribunal is subject to the test of cross-examination by the defence.

**59.** Therefore, the observation of the Apex Court on the issue of 'contradiction' is inevitably binding upon this Tribunal and thus in

assessing the evidence of witnesses the Tribunal shall remain cautious keeping it in mind that "*there is no scope to draw contradiction of the statement of a witness made in course of examination-in-chief with his/her earlier statements made to the investigating officer or other agency.*"

**60.** ‘Hearsay’ testimony is not inadmissible *per se* in a trial under the Act of 1973. Its probative value is to be evaluated taking other relevant facts and circumstances into account and the other evidence may lend corroboration to the hearsay evidence. Thus, hearsay evidence is to be viewed and weighed in context of its credibility, relevance and circumstances. Keeping this settled legal position in mind the Tribunal will take advantage to weigh the probative value of hearsay evidence of witnesses made before the Tribunal, in relation to charges framed against the accused.

## **X. Formation of ‘Peace Committee’ and status of accused Moulana Sobhan in Pabna district JEI in 1971**

**61.** Prosecution avers that initially, in 1971, accused Moulana Sobhan was the secretary of Pabna Peace committee [first committee] and then he became its vice president [second committee]. In 1971, accused Moulana Sobhan was the acting Ameer of Pabna district JEI. It is admitted. Besides, in support of this pertinent fact showing accused's status and position in 1971 prosecution adduced documentary and oral evidence.

**62.** Role of accused during the war of liberation in 1971 undeniably has to be kept in mind in determining his liability for the offences with which he has been charged. We have already recorded our observation in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 pf 2012, Judgement 09 May 2013, para 89] that-

“in the prosecution of crimes against humanity, principally accused’s status, position, association, authority, conduct, activities, link with the state organization, political party are pertinent issues even prior to the alleged events. In determining alleged culpability of the accused, all these factors have to be addressed and resolved as well.”

**63.** It is now settled history that in 1971 during the war of liberation JEI had played vital role in forming peace committee aiming to provide collaboration with the Pakistani occupation army. JEI did it in furtherance of policy and plan of the Pakistani occupation armed force. Therefore, before adjudicating accused Moulana Sobhan's role as a local potential JEI leader and boss of local peace committee we deem it expedient to look at the role of JEI in 1971. We have made detail discussion based on authoritative sources on this issue in our earlier cases disposed of. Nevertheless we may have a further glance on this issue.

**64.** It is historically settled that JEI had close and culpable association with the Pakistani occupation army aiming to frustrate the aspiration of Bengali nation since the war of liberation ensued, in furtherance of common policy and plan.

**65.** For the reason of being a local mighty personality of political prominence belonging to JEI accused Moulana Abdus Sobhan had enthusiastically opted to take stance against the war of liberation, in the name of preserving solidarity of Pakistan as it has been found proved that he had been in a key position of Pabna district peace committee.

**66.** It is true that mere act of siding with the Pakistani army for preserving solidarity of Pakistan did not constitute an offence of crimes against humanity. But it however portrays one's antagonistic position to the war of liberation. It together with his leading position in Pabna district JEI patently demonstrates that he, in furtherance of policy and plan, enthusiastically collaborated with the occupation Pakistani army in carrying out its barbaric atrocities directing non combatant Bengali civilians.

**67.** Accused Moulana Sobhan was thus not distanced with the policy of JEI and its activities as he was a potential mighty Bengali civilian having political prominence in Pabna district. Taking a particular political

stance intending to preserve Pakistan cannot be termed synonym to the culpable act of being part of plan and policy of the occupation army. But such stance becomes culpable when an individual, on this plea, knowingly facilitates the ‘group of perpetrators’ in accomplishing recurrent mayhem directing innocent and unarmed civilians. There has been nothing to provide indication that in exercise of his position political prominence accused Sobhan had rather demonstrated his capacity in preventing the commission of atrocious activities in his localities.

**68.** However, the accused Moulana Abdus Sobhan had thus a significant association with the local Bihari people, peace committee members, Razakar members, by virtue of his position in district JEI—it may be presumed validly. Political ideology and his position obviously made him culpably associated with them and the army headquartered in the locality of district Pabna. This unambiguous conclusion will get support from the brief discussion to be made hereinafter on the role of JEI in 1971.

**69.** Thus JEI started acting antagonistically since the beginning of the war of liberation and it ended in killing of intellectuals. It is found from a report published in **The Daily Sangram 17 April 1971** that a delegation team comprising of members of Central Peace Committee including Professor Ghulam Azam [also the then Amir of Jamat E Islami] in a meeting with the Governor of East Pakistan Lt. General Tikka Khan expressed solidarity and their adherence to the armed forces.

**70.** Representing the delegation by the then Amir of Jamat E Islami predictably indicates that as an ‘organisation’ JEI, together with other religion based political parties, had endorsed the policy and plan of Pakistani occupation armed force in annihilating the Bengali nation. [See also, ‘Sangbadpatre Muktiyuddher Birodhita: Ekattorer Ghatakder Jaban Julum Sharajantra Chitra’ ( *mser`cĀ gŷhĵi weĵivaxZv: GKvĒĵi i NvZKĵ`i Revb Rjyĵ Iohĵĵi wPI*) : Edited by Dulal Chandra Biswas, Bangladesh Press Institute, March 2013, page 91].

**71. Hussain Haqqani** in his book titled ‘Pakistan between the Mosque and Military’ narrates-

“In addition to motivating the troops with religious frenzy, the regime gave the Jamaat-e-Islami, the various factions of the Muslim League, the Nizam-e-Islami Party, and the Jamiat Ulema Pakistan—the parties that had lost the election to the Awami League—a semiofficial role. Members of these parties formed peace committees throughout Pakistan’s eastern wing, at district and even village levels. These parties functioned as the intelligence network of the Pakistan army.....”

[Source: *Hussain Haqqani, Pakistan between the Mosque and Military*, Carnegie Endowment for International Peace, Washington DC, 2005, page 77]

**72.** Hussain Haqqani, the author of the above cited book was the former adviser to Pakistani Prime Ministers Ghulam Mustafa Jatoi, Nawaz Sharif and Benazir Bhutto. He also served as Pakistan’s ambassador to Sri Lanka from 1992 to 1993. The book is an authoritative and comprehensive account of the origins of the relationship between Islamist groups and Pakistani army.

**73.** The above authoritative narrative demonstrates that JEI, in 1971, had played a ‘semiofficial role’ intending to motivate the troops with religious frenzy and had also affiliated with ‘intelligence network’ that substantially facilitated the army in carrying out atrocious activities. Accused Moulana Sobhan in 1971 was the district Ameer of Panna JEI and was placed in a potential position of Pabna district peace committee.

**74.** Thus, even in absence of any document, accused Sobhan’s role and extent of his association with the occupation army headquartered in the locality of Pabna district may validly be presumed. To be fair, in 1971, during the war of liberation, Jamat E Islami did not only collaborate with the Pakistani occupation army, but it became also a fraction of the Military Government and the army, the history says it.

**75.** It is also a fact of history that Jamat E Islami [JEI] established an alliance with the Pakistani army. Why it preferred to do it? Instead of

party's political activities why JEI did form such alliance with army? *Seyyed Vali Reza Nasr* in his book titled 'Vanguard Islamic Revolution: The Jama'at-Islami of Pakistan' narrates that

“Driven by its dedication to Pakistan's unity and unable to counter the challenge of the Awami League, the Jama'at abandoned its role as intermediary and formed an unholy alliance with the Pakistan army, which had been sent to Dhaka to crush the Bengali nationalists.”

[Source: 'Vanguard Islamic Revolution: The Jama'at-Islami of Pakistan': *Seyyed Vali Reza Nasr*, (Assistant Professor of Political Science at the University of San Diego, Published by University of California Press, Berkeley, Los Angeles, USA in 1994, page 168)]

76. Jamat E Islami with objective to support the Pakistani occupation army endorsed the formation of 'peace committees' in 1971. It would reveal from the dispatch written by **Sydney H. Schanberg** the New Delhi correspondent of **The New York Times**, who was expelled from East Pakistan on June 30, 1971 that-

“Throughout East Pakistan the army is training new para-military home guards or simply arming “loyal” civilians, some of whom are formed into peace committees. Besides Biharis and other non-Bengali, Urdu-speaking Moslems, the recruits include the small minority of Bengali Moslems who have long supported the army—adherents of the rightwing religious parties such as the Moslem League and Jamat-e-Islami.”

[Source: **Sydney H. Schanberg**, **New York Times**, **July 14, 1971**; see also: Bangladesh Documents Vol. I page 414, Ministry of External Affairs, New Delhi

77. Razakar force was formed in May 1971 with the aim of resisting the 'miscreants' and to wipe out the 'anti state elements' with the aid of army [Source: 'The Daily Dainik Pakistan', 16 May 1971]. Peace Committees were also formed with the identical plan. Ghulam Azam the then Amir of Jamat E Islami and member of Central Peace Committee almost since the beginning of war of liberation started appealing the Pakistan government for arming the people who believed in solidarity of Pakistan and to combat the 'miscreants' [Source: **The Daily Sangram**, **21 June 1971**, Press conference of Ghulam Azam; see also **The daily Sangram 20 June 1971**].

78. A call, on part of Jamat E Islami's the then Amir for arming civilians who believed in so called solidarity of Pakistan rather substantially provided explicit agreement, approval and moral support to the Razakars, Al-Badars, Al-Shams, Peace Committees in carrying out horrific criminal activities against the pro-liberation Bengali civilians. This reflects fair *indicia* of significant culpable role of Jamat E Islami [JEI] in 1971 in the territory of Bangladesh.

79. Therefore, by virtue of his potential position in Pabna district JEI the accused Moulana Sobhan thus had conscious and culpable association with the army, peace committee, Razakar force, Mujahid force, local Bihari collaborators. The role of JEI in 1971 indisputably leads us to presume that accused Sobhan consciously sided with the Pakistani occupation army in resisting the war of liberation. Now, in the next segment of our deliberation, this position and stance that the accused Sobhan had in 1971 shall inevitably be taken into account in determining his liability for the offences for which he has been charged with.

## **XI. Way of Adjudication of Charges**

80. The instant case chiefly rests upon ocular testimony. We reiterate that in a case like one in our hand involving adjudication of charges for the offence of crimes against humanity we are to depend upon (i) facts of common knowledge (ii) available documentary evidence (iii) old reporting of news paper, books etc. having probative value (iv) relevant facts (v) circumstantial evidence (vi) careful and rational evaluation of witnesses' version (vii) Political status, position and conduct of the accused at the relevant time and (viii) the jurisprudence evolved on these issues in our Apex Court and the observations of *ad hoc* tribunals as well, if deemed necessary to adjudicate any point of law.

81. Additionally, the role of accused Moulana Sobhan particularly in the locality of Pabna district during the war of liberation in 1971 has to be kept in mind too in determining his liability, if any, for the offences with which he has been charged. In this regard, we have already recorded our

observation in the case of *Muhammad Kamaruzzaman* [ICT-BD Case No.03 of 2012, Judgement 09 May 2013, para 89] that

“in the prosecution of crimes against humanity, principally accused’s status, position, association, authority, conduct, activities, link with the state organization, political party are pertinent issues even prior to the alleged events. In determining alleged culpability of the accused, all these factors have to be addressed and resolved as well.”

### **Adjudication of Charge No.01**

**[Killing 20 civilians including Moazzem Hossain Khan, Motaleb Ahmed Khan and Nazmul Huq Khan at the coal depot, Iswardi]**

**82. Charge:** On 17 April 1971, before Asar prayer accused Moulana Abdus Sobhan, the acting Ameer of Jamat-E-Islami of Pabna district unit and the vice president of Pabna district peace committee being accompanied by his accomplices entering into Iswardi central Jame Masjid [mosque], in execution of a plan, apprehended **Moazzem Hossain** who took shelter there and on accused’s identification, he was dragged forcibly to Iswardi coal depot where he was indiscriminately stabbed to death.

On 18 April 1971 at about 11:00 am accused Moulana Abdus Sobhan being accompanied by Khoda Bakhsh and Biharis again arriving at the mosque apprehended Awami League supporter **Motaleb Khan** and his son **Nazmul Huq Khan** and in similar way forcibly took them to Iswardi coal depot where the accused caused their death by inflicting blow with knife and sword. At the instance of accused Sobhan, Khoda Bakhsh and his Bihari accomplices had killed around 20 unarmed Awami League supporters in between seven days at the Iswardi coal depot.

Therefore, accused Moulana Sobhan has been charged for facilitating and contributing to the commission of abduction, torture and murder as crimes against humanity as specified in section 3(2)(a)(h) of the Act of 1973 which are punishable under section 20(2) of the Act. And thus the accused incurred liability under section 4(1) and 4(2) of the Act.

## Witnesses Examined

83. Prosecution Relied upon P.W.1 ATM Shahiduzzaman Nasim, P.W.2 Tahurul Alam Mollah and P.W.11 Fazlur Rahman Fantu. They have testified what they witnessed in respect of the event of killing and other facts relevant to it, prosecution alleges.

## Evidence Presented

84. Witnesses examined have testified on many other matters, apart from the two events of killing. For the sake of convenience of discussion we prefer to focus on matters testified in a categorized way as below:

*Taking shelter at the central mosque after the army moved towards Iswardi*

85. P.W.1 ATM Shahiduzzaman Nasim [61] was a resident of Sher Shah Road, Iswardi, district Pabna. In 1971, he was SSC examinee from SM High School, Iswardi. Before testifying the principal event, he narrated how the Pakistani occupation army took Iswardi under occupation on 11 April 1971. He stated that soon after the army moved towards Iswardi airport, on 11 April, he at a stage, took asylum in the Iswardi central mosque where he found about 200 people sheltered including his maternal uncle Moazzem Hossain, sister's husband Motaleb Ahmed Khan, sister's son Nazmul Huq Khan Helal, Rafique Patwari, Jasimuddin, Joynal Abedin. He spent night there. His sister's husband Motaleb Ahmed Khan brought meal for him from his home nearer to the mosque.

86. P.W.1 next stated that on 12 April in afternoon the *Imam* of the mosque announced that all of them [the people who took shelter inside the mosque] should talk with strong 'Imaan' [belief] as the Pakistani army and leaders were about to come there [mosque]. On that day, immediately before Asar prayer Moulana Sobhan [accused] arrived there by riding in a white private car and saying Asar prayer with them he [accused] addressed them saying—**'tomorrow on 13 April at any time the Pakistani army will come here to examine your 'Imaan' and the**

**failed persons will be taken away and those who will work with Imaan siding Pakistan will be safe’.**

*Leaving the mosque on 13 April*

87. P.W.1 stated too that on 13 April on advice of his sister’s husband Motaleb Ahmed Khan he went back to their native home at village Babulchara, 07 kilometer away from the mosque [Iswardi]. But his parents expressing worry asked why he had left his sister’s husband and sister’s son.

*Coming towards mosque area on 17 April and seeing the killing of 01*

88. P.W.1 stated that as asked by his parents, he however, on 17 April at about 11:00 am started approaching towards Iswardi by a bicycle. When he arrived at the eastern side of the mosque, half an hour before the *Asar* prayer, he found some Biharis staying at the tin shed shop and a white car by which he saw Sobhan coming there earlier and thus he guessed that Sobhan had come there again.

89. P.W.1 stated further that he could see all these from a hide out [bushy place], 100 feet far from the mosque. Some times later, he saw Moulana Sobhan and his accomplices Jamat member Khoda Bakhsh, Ismail, Hamid @ Haresuddin, Isahaq Ali, Abdur Raqib dragging out his maternal uncle Moazzem Hossain, entering into the mosque and he was forcibly taken to the coal depot. P.W.1 also stated that he could see some Biharis with them [Sobhan and his accomplices] and all of them were equipped with 303 rifles and swords etc.

90. Next, he [P.W.1] saw that Moulana Sobhan taking a sword from someone severely hit to his maternal uncle [Moazzem Hossain] and with this he yelled by saying ‘Allahu Akbar’ and then Sobhan’s accomplices indiscriminately stabbed him to death. Then Sobhan and his accomplices returned to the abandoned shop in front of the mosque. The distance between the coal depot and his hiding place was at best 300 feet. Afterwards, he [P.W.1] returned back his native home and narrated the

event he witnessed to his parents who then started asking him with cry to bring his sister's husband and sister's son back[ from the mosque ].

**91.** The above is the narrative how **Moazzem Hossain** the maternal uncle of P.W.1 was killed brutally. This piece of evidence shows that accused Sobhan was with the group of perpetrators formed of Biharis and he himself actively participated to the commission of the killing civilian dragging him out from the mosque, a holy place.

*Coming again to the mosque area on 18 April and seeing the killing of duo*

**92.** P.W.1 stated that on the following day i.e on 18 April [1971] at about 11:00 am again he came to the place wherefrom he saw the brutal event on the preceding day and he saw Moulana Sobhan and his car there. He could see from a bushy place behind the mosque that Moulana Sobhan and his accomplices were forcibly taking his sister's husband **Motaleb Ahmed Khan** and sister's son **Nazmul Huq Khan @ Helal** out and they were dragged to the coal depot where in similar fashion Moulana Sobhan first hit Motaleb Ahmed Khan by a sword and then his accomplices indiscriminately stabbed him and Nazmul Huq Khan to death.

*Returning back from the killing site area*

**93.** P.W.1 stated that then he [P.W.1] started returning back to home and on the way he met Tahurul Alam [P.W.2 and the son of Moazzem Hossain] and his friend Fazlur Rahman Fantu [P.W.11]. Tahurul told that he could not bring the dead body of Moazzem Hossain as there had been no situation favourable to move to the killing site. Tahurul told that he too saw the event of killing Motaleb Ahmed Khan [son of father's sister] and his son Helal. Emotion choked P.W.1 finally stated that there has been a memorial in honour of 19 martyrs besides the coal depot [in Iswardi].

**94.** Defence could not impeach the above version in any manner. It rather concentrated merely on denying the fact of accused Sobhan's

presence at the crime site and involvement with the commission of the killing.

**95. P.W.2 Tahurul Alam Molla[62]** son of victim Moazzem Hossain was a student of first year, intermediate class in Iswardi Jinnah College in 1971. He was a resident of Sher Shah Road Iswardi. He narrated that in the event of marching the Pakistani army towards Iswardi he went to village Tilakpur where his parents and brothers-sisters took shelter.

*Testimony about the event of 17 April*

**96.** P.W.2 stated that he being accompanied by his friend Fantu[P.W.11] again started approaching towards Iswardi and at about 05:00 pm they arrived near the coal depot and keeping them in hid in a bushy place they saw a white car parked in front of the torture cell and also saw Sobhan [accused] and Motiur Rahman Nizami along with Khoda Bakhsh entering into the mosque. After the prayer [Asar] he saw them coming out and some men were dragging his father [Moazzem Hossain] out of the mosque and were taking him to the coal depot – Moulana Sobhan also with them [perpetrators]. Moulana Sobhan taking a knife from some one stabbed his father when he shouted saying ‘*Allahu Akbar*’ and the Moulana Sobhan’s accomplices stabbed his father to death by indiscriminate hit of knives. He became perplexed seeing his father’s brutal killing. His friend Fantu [P.W.11] consoled him and brought him back to village Tilakpur [**deposing his father’s killing the P.W.2 started shedding tears, at this stage**].

**97.** Defence could not impeach the above piece of testimony by cross-examining the P.W.2. This piece of evidence relating to seeing the Biharis accompanied by Moulana Sobhan taking Moazzem Hossain [father of P.W.2] forcibly from the mosque to the killing site, the coal depot where he was brutally stabbed to death in presence and encouragement of Sobhan corroborates P.W.1 who also had occasion to see the event.

*Testimony about the event of 18 April*

98. P.W.2 also stated that on 18 April 1971, he and his friend came to the place nearer the coal depot intending to recover the body of his father and thus at about 10:00 am they arrived near the coal depot and remaining in the same hiding place they could see Sobhan, Khoda Bakhsh and their accomplices bringing **Motaleb Ahmed Khan** [son of father's sister] and his son **Nazmul Huq Khan** there [coal depot] where they were killed brutally.

99. On seeing this horrific incident they took pledge of taking revenge and started coming back to village home and on the way they met Shahiduzzaman Nasim [P.W.1] and described the event they saw, P.W.2 added. He [P.W.1 Shahiduzzaman Nasim] told that he too saw the event. They three decided to join the war of liberation and eventually in the month of May 1971 they went to India.

*Seeing the event of killing*

100. **P.W.11 Fazlur Rahman Fantu [63]** a resident of thanapara, Iswardi was with P.W.2 Tahurul Alam Molla on 17 April 1971 as we have found from evidence of P.W.2. P.W.11 testified corroborating P.W.2 in respect of seeing the event of killing Moazzem Hossain. P.W.11 also testified that on 18 April 1971 he along with Tahurul [P.W.2] came to the crime site for collecting body of Moazzem Hossain when they saw the act of killing Motaleb Ahmed Khan and his son Nazmul Huq Khan Helal by the accused Sobhan and his accomplices.

101. P.W.11 stated that he saw, from a place where they remained in hide, the accused Sobhan accompanying the group at the crime site the coal depot where he [accused] and his accomplices had killed the victims by hitting indiscriminate sword blow. Afterwards, they returned back to village and on the way they found Shahiduzzaman Nasim [P.W.1] who also informed them, with cry, of the killing of Motaleb and his son Helal.

**Deliberation and Finding with Reasoning**

102. The learned Prosecutor Ms. Rezia Sultana submitted that three relatives of victims have testified as P.W.1, P.W.2 and P.W.11, to prove

this charge. They have unambiguously testified the act of killing of their near ones to which accused Moulana actively participated along with the group of perpetrators. Defence could not shake their testimony, on material particulars and there has been no reason to disbelieve them. More so, the P.W.s are quite familiar with accused Sobhan since prior to the event for the reason of his [accused] local political prominence and as such they were in position to recognize accused Sobhan with the group of perpetrators accompanying it to the crime site, the coal depot nearer to the Iswardi central mosque wherefrom the victims were brought to the killing site..

**103.** Mr. Mizanul Islam the learned defence counsel submitted that the P.W.s have made exaggeration and have falsely implicated the accused Sobhan with the crimes alleged. Defence does not deny the fact of killing but the accused Sobhan had no complicity therewith in any manner. The evidence of P.W.s is inconsistent on material particulars. Seeing the event of killing by the P.W.s from hiding place as alleged is not believable as the distance between the alleged hiding place and the killing site did not make it practicable.

**104.** The Tribunal notes that the prosecution requires proving-

- (i) The victims were forcibly dragged out of the mosque;
- (ii) The group of perpetrators was accompanied by accused Sobhan;
- (iii) The event of killing 03 civilians took place on 17 and 18 April 1971;
- (iv) Accused Sobhan was with the perpetrators at the killing site, the coal depot; and
- (v) Accused Sobhan had acted consciously in facilitating and contributing to the commission of crimes in question.

**105.** Existence of torture camp managed by Khoda Bakhsh, a local non Bengali [Urdu speaking people] at the coal depot nearer to the Iswardi central mosque remains undisputed. Rather, it has been reaffirmed in cross-examination of P.W.11. Defence simply denies accused's involvement with the commission of crimes alleged. Thus, we are to see whether the defence has been able to refute what the P.W.1 and P.W.2 the relatives of victims and eye witnesses to the event of killing on 17

and 18 April 1971 have stated in relation to the perpetration of the killings by the accused and his cohorts.

**106.** P.W.1 was SSC examinee from SM High School, Iswardi in 1971 and thus he used to stay in Iswardi. His native village was Babulchara, few kilometers far from Iswardi. In addition to narrating the event of killing he also stated pre-event facts that ensued due to the rolling of Pakistani occupation army in Iswardi locality on 11 April 1971.

**107.** We have found from the evidence of P.W.1 that he and the people nearer to the Iswardi central mosque took shelter inside the mosque instantly after the army took over Iswardi on 11 April, 1971. Presumably they considered the mosque a safe place as a mosque is known as the temple of blessings of Allah.

**108.** We have found from evidence that on 12 April 1971, few days prior to the event, accused Sobhan visited the mosque and urged the people who took shelter there to remain with Pakistan and also reminded them the consequence of its failure. Naturally, it induced a climate of terror to the people who took asylum there [mosque] treating it the safest place.

**109.** The act of forcible capture of victims from the mosque and taking them to the coal depot the killing site later on was thus inevitably linked to the above conduct of the accused Sobhan. The above conduct forming part of attack, prior to the event of capture and killing the victims, suggests the irresistible conclusion that he[accused] was part to the killing of people selected amongst those who had been in shelter inside the mosque.

**110.** In 1971, accused Sobhan was the acting Ameer of Pabna district JEI. And the role of JEI in 1971 is now historically settled. Since the 'operation search light' on 25 March 1971 night JEI started taking active part in collaborating with the Pakistani occupation army, in the name of Islam and preserving solidarity of Pakistan. JEI not only merely sided

with the Pakistani army; it deliberately and culpably aided the army in annihilating the pro-liberation Bengali civilians, in furtherance of plan and policy.

**111.** It may thus be validly presumed that the victims who took shelter inside the mosque were targeted for their pro-liberation stance and identity. Iswardi was predominantly Bihari populated area in 1971. The Biharis were also hostile and antagonistic to the Bengali civilians. Accused Moulana Sobhan, acting Ameer of Pabna district JEI taking this advantage made him associated with them in carrying out criminal activities including killing of pro-liberation civilians, the evidence presented offers this inference.

**112.** The unimpeached testimony of P.W.1 demonstrates that unarmed civilians took shelter inside the mosque. Accused Sobhan was found coming there and assisting the Biharis in forcibly taking the victims out of the mosque. P.W.1 remaining in a hiding place nearer to the mosque and coal depot had fair occasion to see the horrific event. Presumably, people targeted amongst them taking asylum inside the mosque were killed.

**113.** The charge framed alleges that on accused Moulana Sobhan's identification the victims were so captured from the mosque and at his instance, his accomplices accomplished the actual commission of crimes in question. Accused Sobhan has been indicted for facilitating and contributing to the commission of the offence of murder.

**114.** We have found from cross-examination of P.W.1 that the coal depot the killing site was nearer to the central mosque wherefrom the victims were taken out forcibly. In reply to question put to him by the defence P.W.1 replied that in 1971 he used to carry on his education staying at the home at Sher Shah Road Iswardi. Thus, taking shelter at the mosque, as stated by P.W.1, after the army occupied Iswardi on 11 April 1971 is believable and thus the narration he made in respect of seeing around 200 people taking shelter including his near relatives inspires credence.

P.W.1 Shahiduzzaman Nasim testified how his two near relatives too were forcibly brought to the crime site and were cruelly stabbed to death by accused Sobhan and his accomplices.

**115.** P.W.2 Tahurul Alam Mollah son of Moazzem Hossain [victim] saw that after taking his father forcibly to the coal depot Moulana Sobhan taking a sword from one of his cohorts severely hit to his maternal uncle [Moazzem Hossain] and with this he[victim] yelled by saying ‘Allahu Akbar’ and then Sobhan’s accomplices indiscriminately stabbed him to death

**116.** P.W.2 Fazlur Rahman Fantu is another eye witness who had been with the P.W.1 and saw the events of killing remaining in hiding at a place nearer to the coal depot. The event happened during day time. The witnesses were acquainted with the accused Sobhan since prior to the event. They had reason to recognise the accused Moulana Sobhan accompanying the gang and participating to the commission of the criminal act of killing the captured civilians.

**117.** The act of accused Sobhan, prior to the event of killing, together with the pattern of the criminal acts impels the conclusion that the act of forcible capture of the three victims from the mosque was carried out on ‘approval’ and ‘instruction’ of accused Moulana Sobhan. The witnesses’ evidence also show that after arrival of accused Sobhan at the mosque by a white car the gang started dragging the victims out of the mosque and took them to the coal depot.

**118.** Defence argued that the witnesses made embellishment by implicating accused Sobhan with the commission of the killing. We disagree. It has been proved that accused Sobhan was with the group of perpetrators in all phases of the event and he was found present even at the killing site the coal depot. Why accused Sobhan opted to be with the Bihari people?

**119.** In cross-examination, P.W.1 stated that he did not lodge any case in respect of the event of killing occurred on 17 and 18 April as he had no idea about initiation of case. With this the event of killing happened on 17 and 18 April has rather been reaffirmed by the defence.

**120.** Defence simply denied accused Sobhan's involvement with the event of killing. But it could not controvert what has been stated by P.W.1 as to his seeing the incident of forcibly taking the victims to the killing site from the mosque and killing them there by indiscriminate stabbing and hitting by sword. It remained unshaken too that accused Sobhan was with the group of Bihari perpetrators and he himself physically participated to the commission of the crimes, apart from facilitating and contributing to its commission.

**121.** P.W.11 also stated that he knew Moulana Sobhan as he was a potential leader of Pabna JEI and he was made vice president of Pabna district peace committee. In 1971 he [accused] was elected MNA uncontested against the seat fallen vacant as the elected member joined the Swadhin Bangla government. Thus, P.W.11 had fair reason of recognizing the accused Moulana Sobhan accompanying the gang of killers at the crime site, the coal depot, Iswardi.

**122.** In cross-examination, P.W.11 stated that thanapara was about quarter mile far from the central mosque and Motaleb Khan's [victim] house was about 30-40 hands far from the central mosque. The area around the coal depot near the mosque was mostly bushy. P.W.11 replied to question put to him by the Tribunal that he heard that in the month of November 1971 Moulana Sobhan possibly fled to Pakistan along with Ghulam Azam [JEI Ameer in 1971 and convicted accused by the ICT-1 in a case and died during imprisonment].

**123.** The matters transpired from the above version of P.W.11 made in cross-examination that the witnesses had practicable opportunity of remaining in hiding inside the bushy area near the coal depot. Reason of coming again at the site on 18 April, as stated by P.W.1 and P.W.2 is

quite natural. Coming to collect father's dead body from the killing site on 18 April provided opportunity to P.W.1 and his friend P.W.2 of seeing another event the killing of Motaleb Ahmed Khan and his son Helal. And it has been corroborated by P.W.11 as well.

**124.** The victims were allegedly forcibly dragged from the central Mosque to the torture camp set up at a nearer coal depot. In addition to three victims named in the charge framed in all 20 civilians were so brutally killed within the period of 07 days, the charge framed alleges. The local pro-Pakistan non Bengalee people named Khoda Bakhsh and accused Sobhan and others perpetrated the killing in a concerted manner, the charge framed narrates it.

**125.** Mr. Zead-al-Malum the learned prosecutor submitted that page 44-45 of prosecution document shows that the killing of civilians at the coal depot by taking them on capture from the mosque and places around it took place in between 12 April to 19 April and it proves that the killings occurred in seven days starting from 12 April 1971.

**126.** The charge framed specifically spells two events of killing occurred on 17 and 18 April 1971. The witnesses have testified on these two events. In absence of proof, it is not safe to speculate that even in accomplishing killing of 16-17 other civilians accused Sobhan facilitated and contributed or somehow participated. Speculation cannot take the place of proof.

**127.** However, it may be well conceived from the words 'within seven days' as spelt in the charge framed that it necessarily did not intend to mean that killing of 20 civilians including three victims started from 17 April 1971. Presumably, the P.W.s intended to mean that the killing of 20 civilians occurred in between 07 days. The picture of the memorial in honour of martyrs [page 44-45 of prosecution document volume] shows that 19 civilians including the three victims were killed in between 12 April and 19 April 1971. Of them eight were brought from the mosque

and places around it and the rest were brought from different places on capture.

**128.** P.W.2 stated that on 12 April 1971 he got information that the army accompanied by JEI, Muslim League and Biharis had started killing in Iswardi. With this he consulted his friend Fazlur Rahman Fantu how to bring his father and other relatives back from the central mosque, Iswardi where they took shelter. Accordingly, on 13 April he attempted to move towards the house of his *phupu* [father's sister], near the mosque and on the way an elderly man asked them not to go there as the civilians were being killed at a torture cell set up in an abandoned shed under the headship of Khoda Bakhsh [Bihari] on instruction of Moulana Sobhan and Motiur Rahman Nizami. And then he returned back to Tilakpur.

**129.** P.W.2 heard on 13 April 1971 that civilians were being killed at a torture cell set up at an abandoned shed under the headship of Khoda Bakhsh [Bihari] on instruction of Moulana Sobhan and Motiur Rahman Nizami. This piece of testimony is anonymous hearsay in nature. And it does not have any nexus to what has been testified by P.W.1. In absence of corroboration from other evidence it cannot be taken into account for determining the facts in issue.

**130.** Mere accused Sobhan's concern and participation to the killing of 03 on 17 and 18 April 1971 does not indisputably suggest that he was concerned too even to the act of killing the other civilians occurred on some other days. There has been no evidence before us that could portray with specificity as to the identity of those 16-17 civilians, the date, time and manner of their killing and the group of perpetrators who committed it.

**131.** The charge framed also does not spell anything with specificity in this regard. Accused Moulana Sobhan cannot be responsible for killing of all the 20 civilians. But however, the evidence adduced proves his

visible nexus with the killing of 03 civilians occurred on 17 and 18 April 1971, beyond reasonable doubt.

**132.** The killing of civilians took place in context of war of liberation. The Pakistani army had carried out atrocious activities in the territory of Bangladesh having substantial aid and assistance on part of pro-Pakistan political parties like JEI, Muslim League Nejam E Islami, Convention Muslim League and the local collaborators. It is now undisputed and settled history.

**133.** Just immediately after the Pakistani occupation army occupied Iswardi, accused Sobhan on 12 April 1971 in true sense threatened the people taking shelter inside the central mosque, Iswardi to remain sided with Pakistan, reminding consequence of its failure. Indisputably the accused by such act made him culpably associated with the army and its local collaborators and Biharis, to further plan and policy. We reiterate that the policy and plan of launching attack directing civilian population was to resist the war of liberation and the pro-liberation civilians.

**134.** It may thus be legitimately inferred that being enthused by such culpable and antagonistic attitude, accused Moulana Sobhan participated to the attack that resulted in brutal killing of three pro-liberation defenceless civilians on 17 and 18 April 1971 by the gang of local Biharis. By the act of dragging the victims forcibly out of the mosque, the holy place for prayers, in execution of plan to annihilate them the accused Sobhan and his Bihari accomplices in other words had gravely injured the spirit of Islam and humanity as well.

**135.** As regards mode of liability the learned prosecutor Mr. Zead-al-Malum submitted that in addition to participation and providing order, accused Moulana Sobhan incurred liability also under section 4(2) of the Act of 1973 which refers to civilian superior responsibility as he had authority and commanding position over Khoda Bakhsh and the members of Razakars forming part of the group of perpetrators.

**136.** We are not convinced with the above submission. Admittedly Khoda Bakhsh was a local Urdu speaking people. And there has been nothing before us to show that accused Moulana Sobhan was a commander of local Razakar force. Merely for the reason that accused was a local potential leader of JEI and vice president of Pabna district peace committee he cannot be termed as a commander of Razakar force and the local Bihari people. At best it can be assumed that the accused by virtue of his local pro-Pakistan political prominence had collaboration with them in carrying out the criminal activities.

**137.** Additionally, in view of deliberation made herein above it has been found proved that the accused Moulana Sobhan accompanied the group of perpetrators and participated and facilitated the actual commission of crimes and thus incurred liability under section 4(1) of the Act of 1973 and as such the matter of incurring liability also under the theory of civilian superior responsibility loses significance.

**138.** Integrated evaluation of evidence adduced leads us to conclude that it has been proved beyond reasonable doubt that the three [03] civilians who took shelter at the Iswardi central mosque were killed at the coal depot site nearer the mosque and accused Moulana Sobhan, knowing the consequence, accompanied the gang formed of local Biharis in accomplishing the actual commission of the killings. Not only the accused facilitated and contributed to the commission of the murder, he himself too actively participated to the horrific act of killing the captured victims by hitting sword blow, it stands proved. What ideology had imbued the accused Moulana Abdus Sobhan in being so cruel and pitiless? Did it reflect the quality of any 'Islamist leader'? The sword blow inflicted by him caused brutal death of three civilians. Such brutal blow never goes with the humanity, ideology of the holy religion Islam as well. Therefore, the accused Moulana Abdus Sobhan who was a part of collective criminality incurs liability under section 4(1) of the Act of 1973 for the offence of '**murder**' as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

## **Adjudication of Charge no.2**

### **[Killing of 05 civilians of village Juktitotla]**

**139. Charge:** This charge involves the attack launched on 13 April 1971 at about 09:00 am by a group of Pakistani occupation army accompanied by accused Moulana Abdus Sobhan and Biharis against the civilian population of village **Gopalpur and Baghoir** and after looting and burning down houses of Korban Ali and others they forcibly abducted Tulu Khatun the wife of Taizuddin and his son Israil and brother Taizuddin Pramanik. In conjunction with the attack at about 11:00 the group of attackers forcibly captured Joynuddin Member, Ahsan Ali Engineer, Rustom Ali, Haras Uddin Pramanik and Islami Hossain from village **Juktitola** and made them lined in front of Juktitola Primary School where the army fired at them that resulted in death of **(1) Joynuddin member (2) Ahsan Ali Engineer (3) Ismail Hossain (4) Haras Uddin and (5) Taizuddin**. Detainee Rustom Ali, Israil and Tulu luckily survived with bullet injuries. Therefore, the accused has been charged for substantially contributing to the commission of the offences of abduction, murder and inhuman acts as crimes against humanity enumerated in section 3(2)(a)(g) of the Act of 1973 and thus the accused incurred liability under section 4(1) and section 4(2) of the Act.

### **Witnesses Examined**

**140.** Prosecution adduced three witnesses and they have been examined as P.W.4, P.W.5 and P.W.6. Of these three witnesses P.W.4 and P.W.5 are victims, as alleged. They and P.W.6 had occasion to see the attack and the event of killing and causing physical damage to P.W.4 and P.W.5, prosecution alleges.

### **Evidence presented**

**141. P.W.4 Rustom Ali [65]** a resident of village **Juktitola** is a direct witness to the attack and the event of killing as he survived despite receiving bullet injuries when the army fired to the captured civilians forcibly brought in front of Juktitola primary School. P.W.4 Rustom Ali too was allegedly forcibly taken to the killing site along with other captured civilians. The alleged attack consisted of three phases --forcible

capture, bringing the victims to the crime site and killing them. P.W.4 and P.W.5 however survived despite receiving bullet injuries, the charge framed alleges.

*Forcible capture*

**142.** P.W.4 stated that on 13 April at about 11:00 am when he along with Joynuddin and his son-in-law were returning from Saraghat they saw smoke of fire and frequent gun firing from the end of their village **Juktitola**. With this they went into hid inside a bamboo bush. But the accused Sobhan, seeing them there, made them cordoned by the army and Biharis and then brought them, on forcible capture, in front of Juktitola mosque where they found Tulu [mother of Israil], Israil and his uncle detained. Later on, all of them were brought in front of Juktitola Primary School by an army vehicle [truck] parked in front of the mosque. Moulana Sobhan was also in the truck.

*Event of killing and how the P.W.4 survived*

**143.** P.W.4 further stated that after reaching the school, he found some persons including Haresuddin and Ismail detained there and all of them were asked to line up. Sobhan was making conversation with the army and Biharis. In a bid to escape, Haresuddin and Ismail started running away from the line and then Sobhan Moulana opened fire from his pistol. And thus the shooting left Ismail dead on the spot while bullet injured Hares fell down near a bamboo bridge. But, the Pakistan army and Biharis shot him [Hares] dead on the order of Moulana Sobhan,

**144.** P.W.4 further stated that Sobhan Moulana once again asked them to stand in a line. At one stage, Sobhan Moulana fired two shots at him [P.W.4]. One of the bullets hit him in the left hand and the other in his chest that resulted in breaking of three bones. Then the Pakistan army charged bayonet on his jaws as per his [Sobhan] direction and he became senseless.[**At this stage of deposition made in Tribunal, P.W.4 Rustom started weeping showing his injury marks he received due to bullet hit**].

*Treatment received after the event*

**145.** P.W.4 also stated that he regained his senses around 4:30 pm and one Korban Ali of his village and some other people took him, bullet-injured Israil and Israil's mother to one Tariqul doctor at Ruppur village. Korban Ali told them that he [P.W.4] was about to die unless he was brought there. All other detainees including Joynuddin and his son-in-law were killed. P.W.4 Rustom stated too that he later went to India for treatment and returned to Bangladesh three months before the end of the Liberation War.

**146.** P.W.4 stated in cross-examination that he knew Moulana Sobhan since earlier as he[accused] used to visit their locality in connection with election campaign. In cross-examination, defence suggested that what he stated implicating accused Sobhan was false. P.W.4 denied it. P.W.4 however admitted that he made the narration in respect of the event of capture and killing for the first time before the Tribunal.

**147. P.W.5 Md. Israil [57]** is a direct witness to the event of attack that resulted in killing of three civilians. He was also forcibly captured and brought to the killing site but he could survive despite receiving bullet injuries, he claims. In 1971 he was 13 years old.

*Forcible capture*

**148.** P.W.5 stated that on the day of attack by the group of army accompanied by Moulana Sobhan [accused] he, his uncle Taizuddin and his mother Tulu Begum attempted to escape but eventually they were caught and forcibly brought in front of the mosque by an army vehicle. Moulana Sobhan keeping them there under army vigilance left the place and later on Zainal Thikader @ Joynuddin, his son-in-law and Rustom Ali[ P.W.4] were also brought there and then all of them were taken in front of Juktitola primary school. It was about 11:30/12:00 and they found there some other detained civilians.

*Event of killing and how the P.W.5 survived*

**149.** P.W.5 further stated that they were made stood in a line and he saw Moulana Sobhan having consultation with the army. At this stage two of

detainees attempted to flee and then Moulana Sobhan fired to them with pistol and with this one dies instantly and another one was shot to death when he fell down in a ditch which was 10-15 yards far from the place where they were made stood in a line. On instruction of Moulana Sobhan [accused] the army men fired them by gun and with this they fell down on ground.

*Treatment received after the event*

**150.** P.W.5 stated that he received bullet injury on his abdomen and thigh and became unconscious. His mother too received bullet injury on her legs. At about 04:00 or 04:30 he gained sense and found his cousin brother Korban who then brought him to Tariqul doctor at village Ruppur. His mother and Rustom who received bullet injuries were also brought there.

**151. P.W.6 Korban Ali [77]** stated what he witnessed in respect of killing and physical casualties caused to the captured victims and managing their medical treatment at the house of Tariqul doctor, corroborating P.W.4 and P.W.5.

*Attack at village Sara Gopalpur*

**152.** P.W.6 Korban Ali [77] stated that on 13 April at about 08:00-08:30 am Moulana Sobhan, Khoda Bakhsh and about 100 Pakistani army attacking their village[Sara Gopalpur] started burning down houses of civilians and killing people by indiscriminate gun firing. On 'seeing' this horrific killing and destructive activities he became panicked and went into hid inside a bush near Juktitola primary School.

*Seeing the event of killing*

**153.** P.W.6 further stated that from the hiding place he could see the army, accused Sobhan and their Bihari cohorts bringing his uncle Taejuddin, Tulu Khatun, her son Israil, Joynuddin, Rustom by military vehicle in front of the school. He saw the Biharis bringing Ismail and Haresuddin too there on capture. All of the detained persons made stood in a line. Ismail and Haresuddin attempted to flee but Moulana Sobhan

shot them to death. Later, Moulana Sobhan and army men fired to the detained person by gun and had left the place.

*Rescuing the bullet injured victims*

**154.** P.W.6 finally stated that after the attackers had left the crime site he came out of the hiding place and found Rustom [P.W.4], Israil [P.W.5] and Rustom's mother Tulu Khatun in injured condition and thus he and his accomplices brought them to Tariqul doctor of village Ruppur for their treatment. Keeping them there under treatment he returned back to his own village and found the house of his own and those of others burned down by Moulana Sobhan and his accomplices and the attackers had killed his neighbours Haran Fakir, Razzak, Keru.

**Deliberation and Finding with Reasoning**

**155.** Ms. Rezia Sultana the learned prosecutor argued that this charge rests upon the evidence of P.W.4, P.W.5 and P.W.6. Of these three witnesses P.W.4 and P.W.5 survived, despite the attack directed against them and thus they are the best witnesses to prove the crime in question and accused's involvement therewith. The learned prosecutor also submitted that P.W.4 and P.W.5 knew Sobhan since earlier as he [accused] was a leader of JEI and contested election held in 1970. They narrated the event of attack, killing and involvement of Sobhan therewith. The fact of killing civilians remained affirmed. The army men the principals had carried out the criminal activities on instruction and instigation of accused Moulana Sobhan and thereby he substantially contributed to the commission of the offence, the evidence demonstrates beyond reasonable doubt.

**156.** The learned prosecutor further submitted that P.W.6 too claims to have had seen, from hiding place, the army accompanied by accused Sobhan bringing the captured victims in front of Juktitola primary school and it relates to the Ist part of the event—the forcible capture. Army entrance in the crime village on 13 April has been affirmed in cross-examination of P.W.6. Commission of atrocious activities by the army and Biharis in and around village Juktitola has been re-affirmed too in

his cross-examination. It will be found proved that accused Sobhan remained present at the crime site with the Pakistani army, in launching attack that resulted in killing in question.

**157.** On contrary, the learned defence counsel Mr. Mizanul Islam submitted that the witnesses examined in support of this charge cannot be relied upon as they made exaggeration that makes their testimony tainted on material particular. The charge framed does not speak of accused Sobhan's direct participation to the alleged killing. But the witnesses deliberately embroidered on this particular by claiming that accused Sobhan himself shot to the detainees to death. It thus creates significant doubt as to presence of accused Sobhan with the army and Biharis at the crime site.

**158.** The learned defence counsel however submitted that the event alleged might have occurred but accused Moulana Abdus Sobhan was not with the group of army in accomplishing the crime. The witnesses had no reason to recognise the accused. Thus and since the charge framed does not allege that accused Sobhan himself gunned down the captured victims to death their testimony in this regard carries no value.

**159.** The Tribunal notes that the phases of event alleged are **(i)** the forcible capture of victims from two different places, **(ii)** bringing them in front of Juktitola primary school and finally **(iii)** committing the act of firing gun shot that resulted in killing of three detainees and the rest three including P.W.4 and P.W.5 survived despite receiving bullet injuries. The group of attackers formed of Pakistani occupation army and Biharis. Accused Moulana Sobhan had accompanied the group in carrying out the entire activities, the charge alleges.

**160.** Prosecution significantly relied upon P.W.4 and P.W.5 to prove the event and accused's liability. The event alleged occurred during day time and thus the witnesses had occasion to see who acted in which manner in accomplishing the offence in question. Accused Moulana

Sobhan has been indicted for substantially contributed to the commission of the crime. In view of above, prosecution requires proving that-

- (i) the fact of forcible capture of civilians including P.W.4 and P.W.5
- (ii) the fact of looting and burning down civilians' houses by the attackers
- (iii) commission of the act of killing by gun firing in front of Juktitola Primary School
- (iv) P.W.4 and P.W.5 survived despite receiving bullet injuries
- (v) whether the accused Moulana Sobhan accompanied the group of army the principals
- (vi) How the accused had acted in contributing to the commission of the offence
- (vii) whether the accused participated directly in killing the captured civilians

**161.** Defence suggested P.W.5 that his uncle Taizuddin was not killed as alleged and he died in the house of his in-laws before the war liberation ensued. P.W.5 denied it. Despite suggesting specifically defence could not bring anything before us even by cross-examining P.W.5 and P.W.4 that Taizuddin died before the war of liberation and was not killed. We therefore, do not find any reason to exclude the unimpeached evidence of P.W.4 and P.W.5 so far as it relates to the event of killing three civilians including Taizuddin.

**162.** By the corroborative evidence of P.W.4 and P.W.5 it has been proved that they and four others were brought to Juktitola primary school on forcible capture where they found accused Moulana Sobhan consulting with the army men. Two of detainees attempted to escape but failed as they were shot to death by accused Sobhan and army. The perpetrators then made them stood in a line and fired to them by gun and with this they receiving bullet injuries fell down on ground and became unconscious.

**163.** Presence at the crime site with the principal perpetrators and having consultation with them immediate before gunning down the detainees to death was such a culpable conduct of accused Moulana Sobhan that made him knowingly 'concerned' with the act of killing. Accused's above conduct thus offers irresistible conclusion that he substantially 'contributed' to the commission of the crimes in question.

**164.** The learned defence counsel argued that P.W.4 admits the suggestion put to him in cross-examination that for the first time he narrated on the accused's involvement with the event before the Tribunal. Presumably defence attempted or intended, by putting such suggestion, to show inconsistencies between what he stated to the IO and that he made in Tribunal.

**165.** But we have already observed in the case of *Syed Md. Qaiser* [judgment para-68] relying on the observation of the Appellate Division made in the case of *Abdul Quader Molla* that mere omission in earlier statement made to non judicial body does not make witness's sworn testimony before the Tribunal tainted and untrustworthy. Detail precision is not expected to have been narrated to IO by the witness and the IO too might not have inquired into detail exactitude. It has already been settled by the Appellate Division, in the case of *Abdul Quader Molla* that the contradiction can be drawn from the statements made by a witness in his 'examination-in-chief' only, not with respect to a statement made to the investigating officer of the case in course of investigation" [Page 196 of the Judgment in *Abdul Quader Molla Case*].

**166.** It has also been observed by the Appellate Division in the case of *Abdul Quader Molla* that "there is no scope to draw contradiction of the statement of a witness made in course of examination-in-chief with his/her earlier statements made to the investigating officer or other agency" [Abdul Quader Molla Judgment ; Appellate Division, Page 205]. It is to be noted that the statements made to IO were not made under solemn declaration and were not taken by any judicial body. In the circumstances, no probative value is attached to the statements made to IO.

**167.** However, the Tribunal is empowered to peruse the statement of witnesses made to the IO forming part of investigation. It will appear, on perusal, that the witness stated the event and accused's complicity even to the IO, though not in detail precision. First, the witness who is a less literate person might not have understood what the defence suggested to

him. Presumably, since he was before the Tribunal for the first time and thus he meant his narration made before it as his 'first time' version. But on contrast it is seen that he made it described too even to the IO. Thus merely on the basis of his above admission of the defence suggestion he cannot be termed to have made untruthful version or any exaggeration on material particular in the Tribunal.

**168.** Besides, a person may not describe in detail about an event to the IO and non disclosure of a material fact earlier to any non judicial body does not taint his sworn testimony made before a court of law. It is to be seen whether his sworn testimony inspires credence. P.W.4 was also forcibly brought to the killing site, on capture, and he eventually survived despite receiving bullet injuries. Naturally, he had fair occasion to see what happened within his eyesight. We do not find any reason to disbelieve him. Additionally, defence could not impeach what P.W.4 stated on material particular.

**169.** Despite receiving bullet injuries P.W.4, P.W.5 and the mother of P.W.5 survived, the evidence demonstrates. It gets corroboration from the evidence of P.W.6 Korban Ali who subsequent to the event rescuing them from the crime site brought to Tariqul doctor at village Ruppur for medical treatment.

**170.** In cross-examination, P.W.5 stated in reply to question put by the defence that his uncle Taizuddin was killed in the month [Bangla] of Chaitra. It has been re-affirmed too in cross-examination that P.W.5, his mother and Rustom [P.W.4] had been in the same room for treatment in the house of Tariqul doctor. Thus, and admitting the fact of getting treatment due to receiving bullet injuries offers further assurance to the fact of their being captured and brought to the killing site.

**171.** The evidence of P.W.4 and P.W.5—the victims also demonstrates that accused Moulana Sobhan had active part in all phases of the attack—abduction and killing. The group of attackers was formed of Pakistani army and Biharis. Naturally, during the early part of their

occupation in Pabna district the army was not acquainted with the localities and the peoples to be targeted. Accused's potential position in district JEI makes it further believable that he actively accompanied the group of army in launching effective attack.

**172.** P.W.5 was 13 years old in 1971. The learned defence counsel argued that this witness is not supposed to narrate exactly what he witnessed even if any such event really happened long more than four decades ago as he was a tender aged boy at the relevant time. He had no fair reason to recognise the accused Moulana Sobhan.

**173.** In cross-examination, P.W.5 in respect of reason of knowing Moulana Sobhan stated that he knew Moulana Sobhan since prior to 1971 as his mother told that Moulana Sobhan contested election and used to make campaign seeking vote for the symbol 'balance'[Daripalla]. Mother of P.W.5 was also captured along with P.W.5 and survived receiving bullet injuries. It was thus likely of being aware about identity of Moulana Sobhan. Besides, evidence of P.W.5, in this regard, gets corroboration from the evidence of co-detainee P.W.4 Rustom who also recognised Moulana Sobhan while actively accompanying the group of army, at the time of committing the act of forcible capture and killing.

**174.** Therefore, the fact that the identification of the accused Sobhan by the witnesses cannot be termed as the product of the witness's own recollection and thus his truthfulness and the reliability of his observations cannot be questioned as well. Besides, '**knowing of**' accused does not speak of witnesses' personal acquaintance with the accused. It is undisputed that accused Moulana Sobhan was a man of potential political prominence in the locality of Pabna district since prior to 1971 as he contested election as a candidate of JEI. Accused's personal profile and local prominence made him known to the people of the locality. In this regard we may recall the observation of the ICTR Trial Chamber in the case of *Kayishema* which is as below:

“It is apparent that when the witnesses stated that they ‘knew’ the accused, they were not always referring to personal acquaintance or friendship. Rather, the witnesses were sometimes referring to ‘knowing of’ or ‘knowing who the accused was’ due to his prominence in the community.”  
[*Kayishema*, ICTR Trial Chamber, 21 May 1999, para 458]

**175.** The attack was directed against the civilians in systematic manner that eventually caused deaths and serious bodily injuries. Thus, the act of accused’s culpable presence with the group of perpetrators formed part of attack that resulted in serious civilians’ casualties and damage.

**176.** It may be indisputably inferred from the evidence adduced that the purpose of forcible capture of civilians including P.W.4 and P.W.5 was not only to spread terror among the civilian population but to cause the death of detained pro-liberation persons.

**177.** Evidence of P.W.4 and P.W.5 depicts that the accused Sobhan himself directly participated to the commission of the killing as he fired gun shot to them due to which they received bullet injuries and became senseless. It is true that this version does not go with the narration made in the charge framed as the accused has been indicted for ‘substantial contribution’ to the commission of the offence of murder and damages caused to civilians. However, for the reason of mere exaggeration on a matter involving mode of participation, testimony of a witness cannot be turned down in its entirety. We are to determine whether accused Moulana Sobhan actively and sharing *mens rea* accompanied the actual perpetrators in bringing the victims forcibly to the crime site where some of detainees were killed.

**178.** On integrated evaluation and having observed the demeanor of the witnesses and listened to their oral testimony, we are convinced that the witnesses who are the survived victims of the attack are credible and they did not attempt to invent facts on material particular

**179.** The jurisprudence makes it clear that ‘**committing**’ is not limited to direct and physical perpetration and that other acts even can constitute

direct participation in the *actus reus* of the crime. The question of whether an accused had acted with his own hands, *e.g.* when killing people, is not the only relevant criterion. Since it has been proved beyond reasonable doubt from the unshaken testimony of P.W.4 and P.W.5 that the accused Moulana Sobhan was ‘**concerned**’ with the act of ‘abduction’ and also with the act of killing as he in all phases of the attack remained ‘present’ with the actual perpetrators the army men we conclude that he was involved in ‘committing’ the act of actual killing of defence less civilians as well. Thus, he cannot evade the responsibility of the commission of the crime in question. It may be presumed that sharing intent of the perpetrators he accompanied them and by his conduct substantially contributed to the commission of crime..

**180.** The charge framed alleges that the perpetrators burned down the houses of Korban Ali [P.W.6] and others and looted valuables. But the evidence of P.W.4 who claims to be an eye witness to the event of attack does not spell anything about looting valuables and burning down houses of civilians.

**181.** P.W.5, another direct witness to the event of attack that resulted in the act of abduction of civilians including him simply states that on arriving at village Baghoil the army started burning down houses on Sobhan’s ‘instruction’. This version seems to be unspecified. How he [P.W.5] saw the accused Sobhan so providing instruction to the army, the principal perpetrators? This crucial question remained unanswered although it stands proved that accused Moulana Sobhan was with the group of perpetrators at the time of launching ‘attack’.

**182.** P.W.6 Korban Ali stated that the group of attackers chiefly formed of army men accompanied by Sobhan [accused] and Khoda Bakhsh [Bihari] by launching attack burned down houses of the locality and killed many people by indiscriminate gun firing. After going into hid being panicked by the horrific killing and destruction carried out at village Sara Gopalpur naturally he had no opportunity of seeing who participated in which manner in accomplishing the crime.

**183.** P.W.6 claims that on 'seeing' horrific killing and destructive activities he became panicked and went into hid inside a bush near **Juktitola** primary School. In such an extremely panicking situation it was impractical of having opportunity of seeing who participated in which manner in carrying out the criminal act of killing civilians and destructing civilians' property in village Sara Gopalpur. Besides, it is beyond the charge framed.

**184.** In respect of the event of killing in front of **Juktitola Primary School**, corroborating P.W.4 and P.W.5 the two victims, P.W.6 stated that all of the detained persons made stood in a line in front of Juktitola Primary School. Detainee Ismail and Haresuddin attempted to flee but Moulana Sobhan shot them to death. Later, Moulana Sobhan and army men fired to the rest detained persons by gun and had left the place.

**185.** But the charge framed does not allege accused Sobhan's direct participation to the accomplishment of the killing. He has been charged for 'substantially contributing' the commission of the offence in question. P.W.6 thus seems to have made embellishment in respect of accused Sobhan's mode of participation.

**186.** The event of killing is not disputed and the charge framed too alleges that the principal perpetrators were the army men. Evidence led by the prosecution in this regard remained unimpeached. The learned defence counsel conceded it. At the time of initiation of the attack P.W.6 had been in hiding inside a bush near Juktitola primary School wherefrom he saw the army men the principal perpetrators, accused Sobhan and Biharis bringing the victims in front of the school, on capture. It gets corroboration from the victims P.W.4 and P.W.5.

**187.** It is to be noted that for holding the accused liable for the offences it is not necessary to show that the accused had directly participated to the commission of the crime in question. It has been found proved beyond reasonable doubt that the accused Moulana Sobhan, sharing common intent, consciously accompanied the group of army and Biharis to the crime site and his conduct as depicted from evidence of P.W.4,

P.W.5 and P.W.6 indisputably proves that he [accused] substantially assisted and contributed to the actual commission of the offence of killing. And the accused Sobhan did it in exercise of his leading position in Pabna district JEI that effectively sided with the Pakistani occupation army, in furtherance of common plan and policy.

**188.** The learned prosecutor Mr. Zead-al-Malum argued that accused Moulana Sobhan incurred liability also under section 4(2) of the Act which refers to the theory of civilian superior responsibility as he had effective control over the members of the group, in addition to individual criminal liability.

**189.** It appears that the group of perpetrators formed of Biharis and the Pakistani occupation army had carried out the attack. The accused Moulana Sobhan accompanied the group and had substantially contributed and assisted the perpetrators in committing the criminal acts that resulted in murder of civilians, it stands proved. But we fail to understand how the accused had authority over the armed force and Biharis. The members of armed force were not accused's subordinate and the accused had neither *de facto* nor *de jure* control and command over them.

**190.** Thus, merely for the reason that the Bihari people sided with the army and accused accompanied the army to the crime site it cannot be inferred in any manner that the accused had 'control' over the 'group of attackers'. We are not at all with the devious argument advanced by the learned prosecutor. Even accused's significant influence over the local Biharis and other class of pro-Pakistan group and the army stationed in Pabna does not stimulate to conclude that the accused had 'effective control' over them, in exercise of 'superior position'. It is to be noted that "*substantial influence over subordinates that does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising superior criminal responsibility*". [Celebici, Appeal Judgement, ICTY Appeal Chamber, para. 266]

**191.** On totality of evidence of P.W.4, P.W.5 and P.W.6 we conclude that prosecution has been able to prove it beyond reasonable doubt that P.W.4 and P.W.5 however survived despite receiving bullet injuries and they being rescued by P.W.6 Korban Ali and others underwent long term medical treatment at the house of Tariqul doctor at village Ruppur. It is a fact materially related to the principal event of killing.

**192.** It stands proved too that on the date and time the Pakistani army, Biharis accompanied by accused Moulana Abdus Sobhan forcibly brought the pro-liberation civilians including P.W.4 and P.W.5 in front of Juktitola Primary School where culpable presence and conduct of the accused forming part of the attack substantially facilitated and contributed the principal perpetrators in committing the offence of murder of detainees. Therefore, the accused Moulana Abdus Sobhan incurs liability under section 4(1) of the Act of 1973 for the offence of ‘**murder**’ of unarmed civilians as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act as he was ‘concerned’, by his presence and conduct, with its commission.

### **Adjudication of Charge No. 03**

#### **[Abduction, confinement and torture]**

**193. Charge:** On any day , during the last week of April 1971 at around 08:00 am accused Moulana Sobhan the acting Ameer of Pabna district JEI being accompanied by Khoda Bakhsh, Biharis and the Pakistani army by launching attack looted and torched the house of Alauddin of village **Aronkhola** and searched for Alauddin. Afterwards, at about 09:00 am the group accompanied by the accused Sobhan also set the house of **Riazuddin Mondol** on fire and looted the valuables. In conjunction with the same attack the group of attackers also set fire to other houses of the crime village.

On 16 May 1971 at around 11:00 am the accused Moulana Sobhan along with his Bihari accomplices again by launching attack apprehended Joynuddin @ Jhoru and Ansar commander Alauddin Mia from the

village Aronkhola and kept them detained at the Zilla Parishad Duk Bungalow in Iswardi. Afterwards, on request on part of Khoda Bakhsh the accused released them on 19 May 1971.

Therefore, the accused Moulana Sobhan has been charged for facilitating and substantially contributing to the commission of the offence of **abduction, confinement and torture** as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act and thus he incurred liability under section 4(1) and 4(2) of the Act.

### **Witnesses Examined**

**194.** The charge framed narrates two parts of attack. The first attack happened on any day during the last part of April 1971 and it involves causing destructive activities. Intention of this attack was to apprehend Alauddin Mia [father of P.W.8]. And the second part involves the event of abduction and confinement of **Joynuddin @ Jhoru and Alauddin Mia**. Prosecution avers that both the attacks were chained together as the intention of the attackers was to apprehend Alauddin Mia and Jhoru Mondol. Both the attacks were carried out at village Aronkhola, on two different dates. Prosecution, in order to prove this charge, adduced and examined Ashraf Uddin [57] the son of Alauddin Mia, a victim, as P.W.8 who allegedly saw the attackers abducting his father from Aronkhola Bazaar. P.W.9 is Riazuddin Mondol who is a victim of destructive activities allegedly carried out during the first part of the attack.

### **Evidence presented**

**195. P.W.8 Ashraf Uddin [57]** is the son of victim Alauddin Mia. In 1971 he was 12/13 years old. He narrated what he saw happening during the attack. In respect of the first part of the attack, he stated that his father was Ansar commander and on any day during the mid part of Bangla month Baishakh at around 08:00 am the Pakistani army accompanied by Moulana Sobhan, Biharis came to their house and

searched for his father but they started looting and burning their house as they could not find his father available. They then [the attackers] burned down the house of **Joynuddin Jhoru** finding him not available. The attackers also carried out wanton destructive activities including looting and burning houses of the Hindu civilians of their village.

**196.** In respect of the event of abduction that allegedly took on 16 May 1971 P.W.8 stated that on that day while he had been at Aronkhola Bazaar at around 10/11 am, he saw that Moulana Sobhan, Khudu Khan and their 15-20 accomplices [Razakars] encircled a tea stall wherefrom they captured his [P.W.8] father [Alauddin Mia] and Joynuddin Jhoru and took them to the army and Razakar camp set up at Iswardi Duk Bungalow.

**197.** P.W.8 further stated that local top people approached for their [abductees] release but failed. Three days after their [victims] abduction they along with his uncle Jalaluddin, wife and mother of Jhoru went to Kasimuddin of Masuriapara who then brought them to Khoda Bakhsh[a local potential Bihari people] at Iswardi and appealed him for initiating their [abductees] release. But expressing inability, Khudu Kha advised them to approach Moulana Sobhan. With this, his[P.W.8] uncle Jalaluddin along with Al-Enteja one of their relatives in Pabna met Moulana Sobhan and on their appeal he[ Sobhan] agreed to set the detainees free and asked Khudu Kha to release his father[Alauddin] and Jhoru and asked his uncle to meet Khudu Kha in Iswardi.

**198.** P.W.8 also stated that accordingly his and Jhoru's relatives met Khudu Kha at the Razakar camp set up at Duk Bungalow where he [Khudu Kha] after having conversation with the Pakistani army eventually released his father Alauddin and Jhoru. They [the released detainees] could not stand even and thus they were brought to home there from by a cot.

**199. P.W.9 Riazuddin Mondol [72]** was a resident of village Aronkhola. According to charge framed, during the first attack that took

place in the mid of Bangla month Baishakh the group of attackers set his house on fire and looted the valuables, and in conjunction with the same attack the group of attackers also set fire to other houses of the crime village. In narrating the attack that occurred on this day P.W.9 stated that at about 08:00 am the Pakistani army accompanied by Moulana Sobhan, Khoda Bakhsh and some Biharis finding no trace of Alauddin [father of P.W.8] came to their house and searched for his brother Joynuddin @ Jhoru but finding him not available they [perpetrators] set their house on fire. They also looted and burned down the neighbours' houses.

**200.** In respect of forcible capture of victims from Aronkhola bazaar, P.W.9 stated that during the first part of Bangla month Jaistha at about 10:00-1030 am Moulana Sobhan, Khoda Bakhsh and some members of Razakar force came to Aronkhola 'cattle haat' and started hunting him[P.W.9], Alauddin Mia and Jhoru. At a stage getting Alauddin and Jhoru on hand at a tea stall they started them beating and inquired about the rifles they had. Then they forcibly took Alauddin and Jhoru at the Razakar camp of Khoda Bakhsh in Iswardi and there from they were taken to Iswardi Duk Bungalow.

**201.** P.W.9 also stated that he and local leading people appealed for release of the detainees. Two days after their detention, on advice of local people Alauddin's brother Jalaluddin, his wife and son, his [P.W.9] mother and wife of Jhoru moved to Kasimuddin of Masuriapara and requested release of the detainees. But he advised to meet Khoda Bakhsh and accordingly on that day Alauddin's brother and wife of Jhoru along with Kasimuddin met Khoda Bakhsh in Iswardi and made their appeal. With this Khoda Bakhsh told that he had nothing to do of his own and advised to meet Sobhan Moulana.

**202.** P.W.9 further stated that accordingly Jalaluddin the brother of Alauddin went to Pabna and taking Al-Enteja one of his relatives with him met Moulana Sobhan who on listening them told that – **' you go back home, I am telling Khoda Bakhsh and the army at Duk Bungalow over telephone so that they can set Alauddin and Jhoru at**

**liberty”**. With this they [who met Moulana Sobhan] returned back and informed them the decision of Moulana Sobhan about causing release of the detainees. Accordingly, his [P.W.9] mother, wife of Jhoru and wife of Alauddin accompanied by Jalaluddin met Khoda Bakhsh at the Razakar camp who taking them all with him went to the army camp set up at Iswardi Duk Bungalow and after having consultation with the army Alauddin and Jhoru were set freed and they were brought back to home by a cot and by a rickshaw as they were found sprinkled with blood. He [P.W.9] saw them brought back as at that time he had been at home. They [detainees] told that Moulana Sobhan, Khoda Bakhsh, Razakars, Biharis and army caused inhuman torture upon them by whipping and charging bayonet, during detention and inquired about the rifles allotted in their [detainees] name.

**203.** Defence could not impeach the testimony of P.W.8 and P.W.9 on material particular. It simply denied what they narrated in examination-in-chief, predominantly about complicity of accused with any of phases of attack.

### **Deliberation and Finding with Reasoning**

**204.** Ms. Rezia Sultana the learned prosecutor submitted that P.W.8 and P.W.9 the near relatives of victims have testified the event of abduction, confinement and release of victims. Making the detained victims released on Sobhan’s approval signifies not only his position of authority but also his active approval of victims’ confinement and causing torture upon them. Besides, the evidence adduced proves that the accused Moulana Sobhan participated actively by accompanying the group of perpetrators in launching attack for searching the victims and then he was a complicit too in causing forcible capture of victims from Aronkhola cattle haat. Evidence of P.W.9 shows that the victims were sprinkled with blood when they were set freed from the army camp. It proves that during captivity the victims were subjected to brutal torture.

**205.** On contrary Mr. Mizanul Islam argued that accompanying the group by the accused to cause forcible capture of victims from

Aronkhola cattle haat is not believable. Accused was a potential political man having position of authority and as such he was not supposed to have had acted directly in abducting the victims. P.W.8 was a boy of mere 08 years and it gets support from his voter list the photocopy of which has been filed by the defence. Thus the narration P.W.8 made in Tribunal does not bear credibility.

**206.** At the out set we express our disagreement to the submission advanced by the learned defence counsel questioning credibility of P.W.8 on ground that in 1971 he was a boy of mere 08 years. First, showing age or date of birth in the voter list cannot be accepted as a conclusive proof of one's age as in our society there has been a practice of showing incorrect age, for various reasons. Besides, merely on ground of tender age, at the relevant time, a witness cannot be termed untruthful if on integrated evaluation his sworn testimony inspires credence and carries probative value.

**207.** Next, the learned defence counsel argued that since accused Moulana Sobhan was in leading position of district JEI he was not supposed to accompany the Biharis and the small fishes in accomplishing the act of abduction of the victims. We disagree with this speculative argument. Accused Sobhan was not in superior position of the perpetrators. He had acted as an 'individual' although in exercise of his position in district JEI. We are to see on effective evaluation of evidence adduced whether the accused Moulana Sobhan truly had accompanied the group of attackers and was 'concerned' with the commission of the offences alleged, by his act and conduct.

**208.** The charge framed narrates two events. The first one was the attack aiming to hunt the victims and finding them unavailable the group of perpetrators had carried out destructive activities in their houses. Few days later, the group accompanied by accused Moulana Sobhan had allegedly abducted the victims finding them sitting at a tea stall at Aronkhola cattle haat. The P.W.8 and P.W.9 testified the two events including the facts significantly related to their release from captivity.

**209.** What was the objective of hunting the victims by launching attack first at their village and why they were forcibly captured on another day when they were found available at a tea stall at Aronkhola cattle haat? It reveals from the testimony of P.W.9 that the victims were forcibly captured, detained and tortured as they were members of Ansar force and they had rifles allotted in their name. Objective of detaining them was to have trace and capture of the said rifles.

**210.** It stands proved from the evidence of P.W.8 and P.W.9 that the group of Pakistani army accompanied by Moulana Sobhan, Khoda Bakhsh and some Biharis first launched attack at the house of Alauddin and Jhoru at their village Aronkhola. But finding them unavailable they carried out destructive activities by looting and burning down their houses and that of other civilians of the village. At this phase of attack accused Moulana Sobhan was with the group---the unimpeached evidence of P.W.8 and P.W.9 demonstrates it patently. Defence could not shake their testimony in this regard in any manner. This event happened in the last part of April 1971[mid of Bangla month Baishakh].

**211.** In cross-examination, P.W.8 stated that his father had been working as Ansar commander since 8-10 years prior to 1971. He could not recall the name of the man who helped Moulana Sobhan, Khudu Kha and their accomplices in getting his father and Jhoru identified at the tea stall. P.W.8 also stated in reply to question put to him by the defence that Moulana Sobhan did never go to their house excepting the day as he narrated in his examination-in-chief.

**212.** With this it becomes re-affirmed that accused Moulana Sobhan was with the group of army and Biharis when they had launched attack their house in search of his father Alauddin. It stands affirmed too that father of P.W.8 and Jhoru were forcibly captured from a tea stall at Aronkhola bazaar by accused Moulana Sobhan, Khudu Kha and their cohorts.

**213.** The second phase of the attack that took place on 16 May 1971 was chained to the earlier attack as both the attacks were aimed to extract

information about the rifles allotted to the detainees---commander and member of Ansar force respectively. It may be validly presumed that Ansar commander Alauddin and Jhoru were specifically targeted by the perpetrators. It transpires from the evidence of P.W.8 and P.W.9 that pursuant to premeditated plan the group formed of Biharis, accused Sobhan and Khoda Bakhsh finally apprehended them from Aronkhola cattle haat and took them forcibly first at the Razakar camp in Iswardi and then at Duk Bungalow, Iswardi. It stands proved too that accused Moulana Sobhan was actively involved with the act of forcible capture of the victims.

**214.** It is evinced that the relatives of the detained victims first moved to Khoda Bakhsh a potential Bihari aide of the Pakistani occupation army stationed in Iswardi seeking release of victims. But they did not get response. Rather, Khoda Bakhsh advised them to meet Moulana Sobhan. It indicates that accused Moulana Sobhan had significant influence over Khoda Bakhsh a top Bihari aide of the army, in resolving the matter of release of a detainee.

**215.** What happened next? It is found from evidence of P.W.9 that Moulana Sobhan who on listening the relatives of victims told them--**“you go back home, I am telling Khoda Bakhsh and the army at Duk Bungalow[in Iswardi] over telephone so that they can set Alauddin and Jhoru at liberty”**.

**216.** The evidence of P.W.9 depicts that pursuant to talk with accused Sobhan the relatives met Khoda Bakhsh who consulted the army stationed at Iswardi Duk Bungalow and then the detainees were released. It offers indisputable conclusion that the accused Sobhan by virtue of his political prominence was in position to influence the army and local Biharis even to cause release of civilians from captivity. But such capacity of the accused to influence one's release from captivity by itself does not prove that he had 'effective control' over the army or the Biharis. The occupation army in 1971 for obvious reason had to seek assistance and guidance from local collaborators and potential pro-

Pakistan people especially belonging to the ideology of JEI to carry out its activities including killing, detaining, torturing pro-liberation civilians. It may be validly presumed that accused Sobhan's leading position in district JEI made him capable providing approval of one's release.

**217.** It has been proved beyond reasonable doubt that Alauddin and Jhoru got release from captivity few days after their forcible capture and during their captivity they were subjected to inhuman torture. It is found from evidence of P.W.9 that the detainees were found sprinkled with blood when they were set freed from the army camp. Naturally, there has been no direct evidence as to who caused such brutal torture upon them. But the sequenced facts lead us to conclude that accused Moulana Sobhan was a conscious part even to the act of their confinement and torture as it was the outcome of victims' abduction in committing which accused had a substantial contribution.

**218.** Act of accompanying the group in capturing the victims forcibly from Aronkhola haat and participating the attack prior to their capture made it proved that accused Moulana Abdus Sobhan was actively concerned in launching attack which was intended to get the victims captured and he later on culpably accompanied the group in effecting forcible capture of the victims from Aronkhola cattle haat. The act of such abduction had causal link to the act of causing torture upon the victims in captivity. It has been proved beyond reasonable doubt from evidence and circumstances revealed.

**219.** Participating to the act of forcible abduction of the victims leading to their protracted detention and causing physical torture upon them offers unerring conclusion that the accused Sobhan had knowledge about the consequence of his act. Releasing the detainees rested on the wish of accused Moulana Sobhan, the evidence demonstrates it clearly. This conduct of accused subsequent to the event of abduction made him liable even for the act of victims' detention and torture caused to them. From this point of view we conclude that the accused Moulana Abdus Sobhan

is found liable under section 4(1) of the Act of 1973 for substantially facilitating and contributing to the commission of the offences of **abduction, confinement and torture** as crimes against humanity as enumerated in section 3(2)a)(g)(h) of the Act of 1973, by his participation and conduct which are punishable under section 20(2) read with section 3(1) of the Act.

### **Adjudication of Charge No. 04**

#### **[Murder of 06 civilians at village Shahpur]**

**220. Charge:** The charge narrates that on 11 April 1971 in the afternoon a group of Pakistani army made its station at Iswardi airport and places around it. Accused Sobhan and his accomplices Khoda Bakhsh and Biharis designed plan with them [army] to annihilate listed pro-liberation people, freedom fighters and members of the Hindu community and accordingly under accused's leadership, on 2 May 1971 after Fazar prayer the group formed of Khoda Bakhsh Khan, local Biharis and army men had launched attack at the village **Shahpur** when the army men gunned down **(1) Chand Ali Pramanik, (2) Akhtar Pramanik, (3) Anar Pramanik and (4) Hamejuddin Pramanik** to death. In conjunction with the attack they also killed **(5) Rajob Ali Biswas and (6) Shamsul Huq** the residents of the same village at around 07:00 am

On the same day and in conjunction with the same attack the group of attackers looted valuables from 10-15 houses including that of Chand Ali Pramanik, Principal Toyob Hossain and Rahman Sarder and then set the houses on fire.

Therefore, accused Moulana Abdus Sobhan has been charged for substantially participating, facilitating and contributing to the commission of offences of 'murder' 'arson', 'looting' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and thus he incurred liability under section 4(1) and 4(2) of the Act.

### **Witnesses Examined**

**221.** Prosecution adduced and examined three witnesses to prove this charge. They are P.W.3 Md. Abu Asad, P.W.7 Jahanara Begum and

P.W.12 Abdur Rahman Sarder. P.W.3 Md. Abu Asad was a member of Mujahid force in 1971. He in addition to the event narrated in this charge described the misdeeds of the accused he had committed. Prosecution considers him [P.W.3] a star witness in this case. P.W.7 Jahanara Begum the wife of victim Rajab Ali Biswas testified the event of killing her husband. P.W.12 Abdur Rahman Sarder testified the material facts related to the event of attack and killing civilians.

### **Evidence presented**

#### *A member of Mujahid Force*

**222. P.W.3 Md. Abu Asad [62]** was a member of Mujahid force in 1971. He knew accused Sobhan since prior to 1971 as he was Pabna district Ameer of JEI. In 1971, at the relevant time he was stationed at the army camp set up at Paksey locality under Iswardi police station. P.W.3 stated that he and others were forced to stay there at the tents under armed vigilance of army and Biharis as they were directed by Sobhan

#### *Accompanying the troops towards village Shahpur*

**223.** In narrating the attack in question, P.W.3 stated that on 2 May[1971] in the early morning Panjabi army men along with some of members of Mujahid force including him started moving towards village Shahpur by some trucks to further an operation. Accused Moulana Sobhan also accompanied them by riding on his private car. They arrived on the bank of river *Sutagang* and as the vehicles could not cross the river the army men accompanied by Sobhan moved towards village Shahpur keeping him [P.W.3] and some others to guard the vehicles there and at that time he saw a list in the hand of Sobhan. 10-15 minutes later, he could hear frequent gun firing as the army entered into the village and also saw the fumes of fire, the people fleeing dispersed. The village [Shahpur] was about 20-25 yards far after crossing the river.

#### *Saw the troops returning from the crime site*

**224.** P.W.3 next stated that at about 03:00-03:30 pm he saw the army men and Sobhan returning back taking the looted goods with them and

then they returned to their camp. Later on, he learned from other members of Mujahid force who participated in carrying out the operation that the army, during the attack had killed 20-25 civilians of them he could recall the name of Chand Ali, Rajab Ali and Shamsul. He also heard the army men conversing joyfully how they violated the women [during the attack].

### *Husband's association with pro-liberation activities*

**225. P.W.7 Jahanara Begum** [65] the wife of victim Rajab Ali Biswas narrated how her family faced the attack and why and how the perpetrators had killed her husband and Shamsul the friend of her husband. In 1971 she [P.W.7] was 22 years old and got married eight years before the war of liberation in 1971. She studied up to primary level. She stated that her husband was a local Awami League leader and associated with the activities of '*Sadhinota Sangram Parishad*'. During the war of liberation she used to assist the freedom fighters by keeping their arms hidden and cooking foods for them.

### *Attack & seeing killing husband*

**226.** In respect of the event of attack, P.W.7 stated that on 2 May 1971 after Fazar prayer she heard gun firing and with this the Pakistani army and accused Sobhan besieging their village [Shahpur] started coming towards *Paschim para*. At that time Shamsul Huq the friend of her husband had been at their house along with his [Shamsul Huq] family. Her husband's younger brother Sadek Ali Biswas, her elder daughter Razia Sultana quitted the house, in fear, along with Shova the daughter of Shamsul Huq as the squad of army and Moulana Sobhan had set the house of their neighbour Principal Toyobur Rahman on fire. She [P.W.7] too became panicked and thus went into hid inside a nearer bamboo bush, behind their house, along with her husband, husband's friend Shamsul Huq and in-laws. But Sobhan and the army encircled them as they could see them and on Sobhan's identification, when the army men attempted to shoot her husband she begged her husband's life wrapping Sobhan's legs. But Sobhan kicked her aside and instantly the

army shot her husband to death and they also gunned down Shamsul Huq to death.

**227.** The above is what the P.W.7 witnessed. In cross-examination, P.W.7 stated that she knew Sobhan since prior to the event as he used to come their locality seeking vote for Khudu Khan a candidate in 1970 election. This version gets credence when it is considered with the testimony of P.W.3 an accomplice of the attackers who narrated that accused Sobhan accompanied the group of army towards the village Shahpur. Therefore, the version made by P.W.7 in respect of reason of knowing the accused seems to be convincing.

#### *Hearing about other civilians' killing*

**228.** P.W.7 also testified what she heard, after the perpetrators had killed her husband and husband's friend. She stated that the army had shot her neighbours Rahim Sarder, Mahmud Sarder, Chand Ali Pramanik, Aktar Pramanik, Anar Pramanik, and Hamejuddin Pramanik to death as identified by Sobhan, on the same day. The perpetrators continued their operation till even after Zohar prayer. Later on, her husband's body was brought to her parental village Maniknagar where he was buried. P.W.7 also stated that she saw Sobhan in 1970 when he used to come their locality for election campaign.

#### *Attack & seeing killing of uncle*

**229. P.W.12 Abdur Rahman Sarder [66]** is a resident of village **Shahpur**. He narrated some facts relevant to the attack that resulted in killing of civilians. He stated that on 2 May 1971 in the early morning he heard frequent gun firing from the west end of their village. With this he asked the family members to go to safe place and he along with his uncle Mohammad Ali came out to the road to see what was happening. Arriving there [road] he saw the house of Principal Toyob on fire. At that time hearing two gun shots he instantly went into hid inside a nearby bamboo bush wherefrom he saw Moulana Sobhan accompanied by 20/25 army men and 5/6 plain dressed men coming towards their house

and **Sobhan** identifying his uncle Mohammad Ali **told—“This is a tree [hierarchy] of Awami League and he cannot be allowed to survive, finish him”**. With this the army gunned down his uncle to death and then entering their house they looted the valuables and then burned down the house.

#### *Hearing killing of others*

**230.** P.W.12 further stated that being panicked he remained in the hiding place till 01:00 pm and later on coming out there from he along with his another uncle Bakul Sarder came nearer to the body of Mohammad Ali. He also saw the dead bodies of Rajab Ali and Shamsu lying 20-30 yards far. The wives of Rajab Ali and Shamsu were crying holding their dead bodies. The wife [P.W.7 Jahanara Begum] of Rajab Ali told that he [Rajab Ali] was killed on instruction of Sobhan.

### **Deliberation and Finding with Reasoning**

**231.** The learned prosecutor Ms. Rezia Sultana argued that the evidence of P.W.3, P.W.7 and P.W. 12 proves this charge involving killing civilians. P.W.7 is the wife of victim Rajab Ali and she testified how her husband was killed by Sobhan and the army. Killing other civilians took place at different place but in conjunction with the same attack and P.W.7 had learnt about killing of other civilians later on. P.W.12 is the son of victim Ali Sarder. He narrated the event of killing his father and uncle that happened during the attack. He saw it remaining in hide out. P.W.3 is a member of Mujahid Bahini which had acted in aid of Pakistani occupation army in 1971. He stated the happening of the attack to further design and plan and accused Sobhan’s concern therewith.

**232.** The learned defence counsel Mr. Mizanul Islam submitted that P.W.12 made exaggeration as it was not practicable to see the event remaining in the hiding place. P.W.7 and P.W.12 had no reason to recognise accused Sobhan as claimed. Statement made by P.W.12 in examination-in-chief and in cross-examination creates doubt as to his capacity of knowing Sobhan since earlier. Prosecution failed to provide

evidence as to designing 'plan'. Only two of victims have testified and the IO did not examine the relatives of other victims.

**233.** The learned defence counsel further submitted that investigation done on the event narrated in this charge was *malafide* and the emotion the P.W.7 had shown in testifying in the Tribunal was 'tutored' too. Since presence of accused Moulana Sobhan with the principals at the crime site is tainted by reasonable doubt the benefit of it goes in favour of the accused.

**234.** At the out set we deprecate the submission made by the learned defence counsel that the emotion the P.W.7 had shown in testifying in the Tribunal was 'tutored'. P.W.7 is the wife of a victim. The Tribunal indeed notes that she, carrying immense trauma, came on dock to narrate how her husband Rajab Ali Biswas was brutally killed. As trier of fact the Tribunal is to weigh her testimony keeping evidence of other witnesses and circumstances into account in order to arriving at a finding as to commission of the offence and accused's complicity therewith. But one's emotion revealed in making testimony of a traumatized witness in a court of law cannot remain unnoticed terming it 'tutored'.

**235.** Next, we disagree with the defence submission that only two of victims have testified in support of the charge and the IO did not examine the relatives of other victims and investigation done on this charge was *malafide*. It is to be noted that the crime under adjudication was a 'group crime' occurred in war time situation in 1971. The offence was not an isolated crime punishable under the Penal Law. Accused Moulana Sobhan has been indicted for participating and contributing to the commission of 06 civilians, in conjunction with the attack. Defence does not dispute the killing of 06 civilians. It simply denies accused's involvement with it.

**236.** Already more than long four decades have been elapsed after the event occurred. Nevertheless two relatives of 02 victims have been adduced and examined as witnesses who in addition to the event of

killing of their near ones testified facts related to the attack that resulted in killing of other victims. Therefore, a mere non-citing or examining relative of other victims does not render the event under adjudication untrue. Besides, even testimony of a single witness if it carries probative value and inspires credence is sufficient to establish the charge. In no way the investigation done on the event narrated in this charge can be viewed as *malafide*. Submission of the learned defence counsel attacking fairness of investigation does not stand.

**237.** Now, we are to first adjudicate the commission of the offences alleged. Then it is to be unearthed whether the accused Moulana Abdus Sobhan was with the group of perpetrators. It is also to be resolved whether the criminal acts were carried out to further the framework of common plan and design. Finally, it is to be seen how the accused had acted to further the plan and design in accomplishing the crimes in question.

**238.** P.W.3 was a member of Mujahid force in 1971, in Pabna locality. Evidence of P.W.3 demonstrates that on 2 May 1971 in the early morning the Pakistani occupation army along with some of members of Mujahid force including him[P.W.3] and accused Moulana Abdus Sobhan riding on vehicles arrived on the bank of river *Sutagang* and as the vehicles could not cross the river the army accompanied by Sobhan moved towards village Shahpur, the crime site keeping him[P.W.3] and some others to guard the vehicles parked there and 10-15 minutes later, he could hear frequent gun firing as the army entered into the village and also saw the fumes of fire, the people fleeing dispersed. The village [Shahpur] was about 20-25 yards far after crossing the river.

**239.** The above version of P.W.3 who was an accomplice of the group of attackers remained unshaken. Now one may question as to validation of taking evidence of an accomplice into account and may urge for his prosecution too instead of citing him a witness. Similar question arose in the case of *Syed Md. Qaiser* wherein this Tribunal observed:

"Proviso of sub-section (5) of section 8 of the Act of 1973 extends something like 'safeguard' to a person so examined by the investigation officer, if any of his answers incriminates or tends to incriminate him. In such case, the *proviso* states it patently that no such answer shall subject him to any arrest or prosecution against him in any criminal proceeding. An accomplice of the accused person naturally is well acquainted with the facts of the case and he is bound to answer to question put to him, during investigation. ....On plain construal, understandably the intention of the *proviso* of sub-section (5) of section 8 of the Act of 1973 is to provide 'safeguard' aiming to ensure unearthing the truth in respect of the facts of the case even through examining a person making statement incriminating him. ....The proviso of sub-section (5) of section 8 of the Act of 1973 immunises a person of being prosecuted for any incriminating statement or answer made by him in reply to question put to him under sub-section (5) of the Act by the investigation officer. ....Intention of providing such safeguard is to make space for a person to come on dock to depose even if his statement made to IO incriminates or tends to incriminate him and thus no prosecution shall be initiated against him.....Be that as it may, any such person examined by the investigation officer is not debarred from deposing before the Tribunal and his testimony made before it cannot be excluded from consideration.[Syed Md. Qaiser, Judgment para 951-953]

**240.** In view of above we do not find any bar taking the evidence of P.W.3 into consideration. It appears that the defence has not been able to cast doubt on his sworn testimony so far as it relates to launching attack, accused Moulana Sobhan's active presence at the crime site along with the group of Army. Accused Moulana Abdus Sobhan was thus an active accessory to the perpetration of killing, by launching concerted attack.

**241.** Defence simply denied what has been testified by P.W.3 in respect of arrival of the group of attackers on the bank of river wherefrom it accompanied by accused Sobhan moved towards village Shahpur and few minutes later he [P.W.3] heard frequent gun firing and saw the fumes of fire. This version of P.W.3 depicts accused Sobhan's concern and participation to the attack which remained unshaken.

**242.** It has been re-affirmed in cross-examination that P.W.3 was a member of Mujahid force in 1971. Additionally, in reply to question put to him by the defence P.W.3 stated that he was compelled to join

Mujahid force by accused Sobhan. It signifies Sobhan's culpable encouragement in getting enrolled in Mujahid force in 1971 and he [P.W.3] thus was compelled to join the Mujahid force intending to provide assistance to the Pakistani army stationed locally. Although there can be no reason to say that accused Sobhan had authority and control over this force.

**243.** Thus, it stands proved that P.W.3 accompanied the gang of attackers formed of army, members of Mujahid force and accused Sobhan. P.W.3 had no occasion to witness the criminal acts done at the village that resulted in killing, looting and destruction. P.W.3 however stated that after entrance of the group of attackers into the crime village he could hear frequent gun firing and saw fumes of fire. In cross-examination, P.W.3 stated in reply to question elicited to him by the defence that he could not recall the name of other members of Mujahid force participating the operation carried out on 2 May 1971 in village Shahpur with the group of army. Thus, it stands proved and affirmed that the troop accompanied by accused Sobhan and members of Mujahid force had launched the attack directing the civilians of village Shahpur.

**244.** It is now settled that even a single act of an individual--amid, prior of subsequent to the commission of the principal crime forms part of attack. What we see in the case in hand? Evidence of P.W.3 an accomplice of the attackers demonstrates that accused Sobhan actively and consciously accompanied the troops towards the village Shahpur the crime site. This is sufficient to conclude that accused sharing intent of the principals accompanied them to the crime site. It may be presumed that the criminal activities were carried out under the guidance of accused Sobhan who was with the perpetrators.

**245.** It is not necessary to show how accused Sobhan participated in committing the actual crime or whether he himself had killed any civilian. Some members of Mujahid force too moved towards the crime site with the troops and later on P.W.3 heard from them about the killing of civilians including Chand Ali, Rajab Ali and Shamsul. On rational

evaluation of his testimony we are of the view that P.W.3 is a credible witness as he did not make exaggeration of any kind. He simply narrated what he witnessed.

**246.** Why the army had to borrow aid and assistance from local collaborators in carrying out the attack against civilians of a village? In 1971 the Pakistani army for obvious reasons was not familiar with the topography and the people of the locality and thus it had to get aid in marching towards any particular locality within the geographical area of Pabna district in accomplishing the crimes.

**247.** Who aided them in making their move? History says the local Bengali collaborators, people belonging to pro-Pakistan ideology and members of various forces had acted as aides of the army. There has been no reason to think that accused Sobhan with a pious intent accompanied the troops towards the crime village. Accused Moulana Sobhan was the acting Ameer of Pabna district JEI and a potential person of local peace committee in 1971. Role of JEI during the war of liberation in 1971 is not unfamiliar. It may thus be validly concluded that sharing intent of the perpetrators accused Sobhan accompanied them in launching attack and remained present at the crime site that had substantial effect to the actual commission of offences. He[accused] did it intending to provide aid and encouragement to the principals.

**248.** Testimony of P.W.3 predominantly proves accused's presence with the gang of attackers at the crime sites. It together with his hearsay testimony as to killing civilians further suggests accused's involvement with the actual commission of the killing. Accused's conduct and presence at the crime site along with the group of perpetrators is a manifestation of his part to 'collective criminality' and indeed it proves his 'participation' as well to the commission of the crimes. It is not required to show that accused himself physically perpetrated the criminal act. This view finds support from the observation of the ICTY Appeal Chamber made in the case of *Tadic* which is as below:

“Most of these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although some members of the group may physically perpetrate the criminal act (murder . . .), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less -- or indeed no different -- from that of those actually carrying out the acts in question.”  
**[Judgment, Tadic ; IT-94-1-A, ICTY Appeals Chamber, 15 July 1999, para 191**

**249.** P.W.3 accompanied the group of attackers. It remained affirmed in his cross-examination. Defence merely denied what the P.W.3 an accomplice of the group of perpetrators stated. Thus, his sworn testimony proves Sobhan’s participation to the attack that resulted in brutal killing of civilians.

**250.** Now let us have look to the commission of the offence of killing alleged. Before we enter into deliberation on it, we reiterate that an individual even for his single act or conduct, prior, amid or subsequent to the commission of the offence may be held responsible for such ‘system crime’, if such act or conduct had substantial contributing effect on the commission of offences by the principal perpetrators.

**251.** It is to be perceived on rational evaluation of evidence and circumstances whether such act or conduct abetted the principals on the commission of the crime. Let us have a look, though not obligatory, to the jurisprudence settled in respect of ‘abetting’ and ‘aiding’ the principals in committing the offence of crimes against humanity. The **ICTY Trial Chamber**, in the case of **Milorad Krnojelac** has observed

“It must be demonstrated that the aider and abettor carried an act which consisted of practical assistance, encouragement or moral support to the principal offender. The act of assistance need not have actually caused the act of the principal offender, but it must have had substantial effect on the commission of the crime, by the principal offender. The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender.”

[ICTY Trial Chamber, IT-97-25-T, Prosecutor v. **Milorad Krnojelac**, Judgment 15 march 2002, paragraph 88]

**252.** Evidence of P.W.7 the wife of a victim demonstrates that sensing the attack she [P.W.7] became panicked and thus went into hid inside a nearer bamboo bush, behind their house, along with her husband, husband's friend Shamsul Huq and in-laws. But accused Sobhan and the army surrounded them as they could see them and on Sobhan's identification, when the army men attempted to shoot her husband she begged her husband's life wrapping Sobhan's legs. But Sobhan kicked her aside and instantly the army shot her husband to death and they also gunned down Shamsul Huq to death.

**253.** The above version does not suffer from any infirmity. It remained unimpeached. There has been no reason to disbelieve her. From her evidence it stands proved that accused Moulana Sobhan not only accompanied the troops but he actively aided and contributed too to the commission of killing, by his conduct and act. It may be lawfully inferred from evidence of P.W.7 that the accused Sobhan by his extreme antagonistic and culpable act he had shown to the P.W.7 refusing her appeal to spare her husband's life deliberately aided, abetted and facilitated to the perpetration of the killing. And thus the accused cannot evade responsibility of the criminal act. It is immaterial to ask for his physical participation to its commission.

**254.** Let us have a look, though not obligatory, to the jurisprudence settled in respect of 'abetting' and 'aiding' the principals in committing the offence of crimes against humanity. The **ICTY** Trial Chamber, in the case of **Milorad Krnojelac** has observed:

"It must be demonstrated that the aider and abettor carried an act which consisted of practical assistance, encouragement or moral support to the principal offender. The act of assistance need not have actually caused the act of the principal offender, but it must have had substantial effect on the commission of the crime, by the principal offender. The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender."

[ICTY Trial Chamber, IT-97-25-T, Prosecutor v. **Milorad Krnojelac**, Judgment 15 march 2002, paragraph 88]

**255.** We have found it proved that the accused Moulana Sobhan , by his act and conduct as revealed from the evidence of P.W.7 facilitated physical perpetration of criminal acts constituting the offence of murder and, in violation of International humanitarian law and thus the accused aided and substantially contributed to the commission of crimes. The accused Sobhan is also found to have had ‘participation’ to the commission of the actual crime, by his culpable act and conduct as depicted from evidence of P.W.7, a natural witness.

**256.** It is to be noted that ‘participation’ refers to act of ordering, soliciting, inducing, aiding, abetting, or otherwise assisting the commission of a crime or the facilitation thereof. The evidence of P.W.7 impels to conclude that the accused Sobhan ‘participated’ in committing crimes in question, by act of encouragement, assistance, inducement and accompanying the principals to the crime sites.

**257.** Defence suggested the P.W.7 that her husband was killed by the local naxalites [people belonging to underground Naxal force] on a different date and not on the date and in the manner she described. P.W.7 denied it. Defence, in support of this specific case, suggested to P.W.7, could not bring anything favourable in cross-examination of witnesses, although failure to prove any defence case is not a decisive factor in finding the accused guilty.

**258.** In cross-examination, P.W.7 stated that her husband and Professor Toyob Ali Pramanik the brother of Ibrahim Pramanik were the leaders of the freedom fighters for whom she used to cook food at her house [during the war of liberation]. The army entered their village from the northern direction of their village [Shahpur].

**259.** It is thus evinced from the above version that her husband and his friend were shot to death by the army men, on identification of Sobhan, for the reason that they were actively associated with the war of liberation. However, at the time of the event they were non combatant.

**260.** Killing husband of P.W.7 was chained to other killings occurred in conjunction with the same attack and by the same group of perpetrators. In cross examination of P.W.7 it has been confirmed that freedom fighters were allied with their house and seemingly this was the reason of besieging the village Shahpur. P.W.7 knew Sobhan since earlier. It remained unshaken. Her husband was killed in presence of her and thus she is a natural witness and there has been no reason whatsoever to disbelieve her.

**261.** P.W.12 is a relative of another victim Mohammad Ali. On the day of the event, hearing two gun shots he instantly went into hid inside a nearby bamboo bush wherefrom he saw Moulana Sobhan accompanied by 20/25 army men and 5/6 plain dressed men coming towards their house and accused Sobhan identifying his uncle Mohammad Ali told—**“This is a tree [hierarchy] of Awami League and he cannot be allowed to survive, finish him”**. With this the army gunned down his uncle to death and then entering their house they looted the valuables and then burned down the house.

**262.** Defence could not dislodge the above version in any manner. In 1971 P.W.12 was 23 years old and he knew accused Sobhan since 1970 when he [accused] used to come at Shahpur Primary School in connection with election campaign. It could not be refuted. Besides, accused Sobhan was a man of significant political prominence in Pabna district and thus P.W.12 being an adult person of the locality naturally knew the accused Sobhan. Therefore, the testimony of P.W.12 so far as it relates to seeing the accused with the group of army inspires credence. Besides, seeing the accused Sobhan with the group of army at the crime site has already been corroborated by P.W.3, an accomplice.

**263.** P.W.12 saw the accused Sobhan with 20/25 army men and 5/6 plain dressed men who came to their house and accused Sobhan’s identifying his uncle Mohammad Ali told—**“This is a tree [hierarchy] of Awami League and he cannot be allowed to survive, finish him”**. With this

the army gunned down his uncle to death and then entering their house they looted the valuables and then burned down the house.

**264.** The above crucial unshaken version leads us to conclude that the reason of targeting Mohammad Ali was that he was with pro-liberation political party and accused Sobhan belonging to JEI knew it well. The utterance the accused had made on seeing victim Mohammad Ali was indeed inciting, encouraging that inevitably facilitated the commission of actual offence of Mohammad Ali's killing.

**265.** It is not necessary to show that Mohammad Ali would not have been so gunned down to death without such culpable and instigating utterance of the accused Sobhan present at the crime site. But the utterance the accused had made obviously had acted as a factor that 'substantially contributed' to the act of killing Mohammad Ali Sarder. Such inciting utterance of accused formed part of attack. And it is sufficient for holding the accused liable. In this regard it has been observed in the case of *Kordic and Cerkez* that

“While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.”

[*Kordic and Cerkez*, ICTY Appeals Chamber, December 17, 2004, para. 27; See also *Limaj et al.*, ICTY Trial Chamber, November 30, 2005, para. 514 ]

**266.** P.W.12 is a direct witness to the event of killing his uncle Mohammad Ali. He saw it remaining in hiding place which was closer to the site where the victim was shot to death by the army on instruction of accused Sobhan. Testimony of P.W.12 in respect of seeing the event of killing Mohammad Ali, a part of the horrific attack' remained unshaken. After the group of attackers had left the site, P.W.12 came out of the hiding place and saw the dead bodies of his uncle, Rajab Ali and Shamsu. The wife of Rajab Ali [P.W.7 Jahanara Begum] told that on instruction of Sobhan the army men had killed her husband.

**267.** All the killings occurred in conjunction with the same attack which was launched by the same group formed of army, members of Mujahid force and accused Sobhan. It already stands proved from evidence of P.W.3 a member of Mujahid force accompanying the troops. Evidence of P.W.7 provides corroboration to it. Therefore, seeing the accused Sobhan with the army who shot Mohammad Ali Sarder to death on substantial and culpable instigation of accused Sobhan, as stated by P.W.12 carries sufficient credence. And his hearsay testimony in respect of killing of Rajab Ali gets corroboration too from the evidence of P.W.7.

**268.** P.W.12 also stated that afterwards he also saw the dead bodies of Chand Ali Pramanik, Anar Pramanik, Aktar Pramanik and Hamejuddin lying near the house of Haru Bepari. He also saw the in-laws of Rajab Ali taking his [Rajab Ali] dead body to Maniknagar for burial. He and his uncle Bakul buried the dead body of Mohammad Ali inside their house. All these material post-event facts provide corroboration to the fact of concerted attack launched that resulted in horrific killings.

**269.** P.W.12 denied the suggestion put to him that on 02 May 1971 the accused Sobhan did not go to their locality along with the army. But however, in cross-examination, P.W.12 stated that prior to or after 02 May 1971 the Pakistani army had never gone to their locality. On 02 May 1971, the army entered their village [Shahpur] from the western end of the village on foot. With this the act of launching attack by the army on 02 May 1971 seems to have been re-affirmed by the defence.

**270.** The learned defence counsel argued that prosecution failed to provide any kind of evidence to prove the fact of designing plan and accused's involvement therewith. In this regard, the Tribunal notes that designing plan cannot be tangible. It is not necessary to prove, by adducing evidence, that a plan was orchestrated on 15 April at the camp. The act of designing plan is to be inferred. Mere absence of evidence as to designing plan of attack the fact of event resulted from the attack does not go on air. It is now well settled that existence of plan may be

deduced even from the co-operation of several persons to carry out a criminal undertaking.

**271.** Pattern of attack and the identity of victims as depicted from evidence presented lead to an unerring inference that the attack was to further premeditated and designed plan to which Sobhan was an active part, as he is found present with the attackers at the crime sites and had acted culpably.

**272.** On totality of evidence adduced it may be validly inferred that accused Moulana Abdus Sobhan had acted as a co-perpetrator and thus cannot evade the responsibility of criminal acts done by the other members or the principals of the group. Accused Sobhan knowing the consequence and sharing intent of the group of army accompanied them to the crime site, we may validly conclude. In this way the accused rendered coordinated criminal cooperation within the framework of a common plan or design and thus he too was responsible for the whole criminal activities.

**273.** The testimony made by the witnesses does not indicate that the accused suddenly and incidentally made him associated with the attack. The pattern of attack as found from the evidence of P.W.3, P.W.7 and P.W.12 was planned indeed. And thus accused Sobhan was concerned with both the preparatory and execution phases. The entire attack was in fact committed within the framework of a designed plan to which accused was a part.

**274.** Now it is not essential to be proved by evidence that accused Sobhan was involved in orchestrating the plan of attack. It already stands proved that the accused knowingly participated to the commission of the offences, by his act and presence. It is now settled that where an accused is found guilty of having committed a crime, he cannot at the same time be convicted of having planned the same crime. Involvement in the planning may however be considered an aggravating factor.

**275.** Thus, even in absence of any proof as to his involvement with 'designing plan' the accused cannot be exonerated from the liability for his act that had substantial effect in committing the crimes. Additionally, an accused cannot be held responsible both for planning and participation to the commission of the offence. In this regard we recall the decision in the case of **Kordic and Cerkez**, which is as below:

“A person found to have committed a crime will not be found responsible for planning the same crime.”

[*Kordic and Cerkez*, ICTY Trial Chamber, February 26, 2001, para. 386]

**276.** The learned prosecutor submitted that since accused Moulana Sobhan led the group of Pakistani occupation army to the crime site along with a list of targeted civilians and ordered to kill them he incurred liability also under the doctrine of civilian superior responsibility.

**277.** The submission is totally misconceived. The group of attackers formed of Pakistani army and members of Mujahid force. Accused accompanied them to the crime site and actively and consciously aided, facilitated them and participated in committing the criminal acts constituting the offence of murder of defenceless civilians. By virtue of local pro-Pakistan political prominence accused Sobhan accompanied the army, we validly infer. Accused's intention was to facilitate the commission by providing aid and assistance and he did so, we have found it proved. But it would be totally wrong and misconceived to say that the accused had acted as a 'superior' of the group of army. Thus the submission made by the prosecution deserves to be turned down.

**278.** On integrated evaluation of evidence we eventually come to the conclusion that on 02 May 1971 the group of army accompanied by accused Moulana Sobhan and members of Mujahid force had launched attack at the village Shahpur and the target of the attack was to annihilate the pro-liberation civilians. Presumably, it was impracticable for the group of army trace the locality and the potential pro-liberation people, particularly within three weeks of their entry in Pabna and thus it had to borrow substantial contribution and facilitation on part of the accused

Sobhan a potential leader of district JEI in carrying out the criminal acts to further plan and policy. It has been proved beyond reasonable doubt from the evidence of P.W.7 and P.W.12 that in conjunction with the attack the army men had gunned down the civilians to death on identification, instruction and culpable inducement of the accused Moulana Sobhan.

**279.** Evidence of P.W.7 carries probative value and conforms to the evidence of P.W.3. Accused Moulana Sobhan was thus knowingly concerned with the premeditated attack and 'participated' to the act of killing civilians, it stands proved. Since already it has been proved that accused Moulana Abdus Sobhan was an active part of the attack launched by the troops as he remained present with them at the crime site, it may unerringly be concluded that he [Sobhan] by virtue of his pro-Pakistan political prominence in Pabna district substantially facilitated, contributed and participated in accomplishing the killing of pro-liberation civilians by the group of army at village Shahpur constituting the offence of '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act and therefore he is found **liable** under section 4(1) of the Act of 1973 .

### **Adjudication of Charge No. 05**

**[Killing civilians at villages Kulnia, Dogasi and Dogasi Paschim Para]**

**280. Charge:** This charge involves the attack launched by a group of 200 Pakistani army accompanied by accused Moulana Sobhan on 11 May 1971 at about 11:00 am against the civilians of village **Kulunia** under police station Pabna Sadar that resulted in killing of Samajuddin Pramanik and Hasina the wife of Aminuddin when Rahatunnesa the wife of Samajuddin received bullet injury and eventually died within few days. In conjunction with the attack the attackers by launching attack in village **Dogasi** at about 12:00 pm killed Giripodo Saha and set the house and temple of Haripada Saha on fire. Benu Saha and Haripada Saha were also gunned down to death by the army and then on the same day

attacking **Dogasi Paschim para** killed Chad Ali and some other civilians at Dogasi Jame Mosque near the house of Chad Ali and also burned down his house. Therefore, the accused Moulana Abdus Sobhan has been charged for abetting and facilitating the commission of offences of murder as crimes against humanity, specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act and thus he incurred liability under section 4(1) and 4(2) of the Act.

### **Witnesses Examined**

**281.** This charge rests upon oral testimony. The charge framed alleges that accused Moulana Sobhan accompanied the troops towards the crime sites and thus he abetted and facilitated the group in carrying out atrocious criminal activities that resulted in killing of defenceless civilians. The attack allegedly took place in between 11:00 am and 12:00 pm at villages **Kulunja, Dogasi and Dogasi Paschim para**. Prosecution in order to prove this charge relies upon the testimony of three witnesses and they are P.W.13 Abdul Matin, P.W.15 Momtaj Uddin Montu and P.W.21 Shahidullah @ Shahid. They allegedly witnessed the attack and the accused accompanying the troops in committing killing some of civilians. These witnesses are the residents of the crime villages.

### **Evidence of Witnesses**

**282. P.W.13 Md.Abdul Matin [76]** is a resident of village **Kulunja**. He is the brother of victim Samajuddin Pramanik. He narrated what he witnessed in respect of the event that occurred at village Kulnja. On 11 May 1971 he had been staying at his home. At about 11:00 he saw the Pakistani army moving towards their village by 8/9 vehicles with frequent gun firing cordoning the village, P.W.13 stated. With this he, his brother Samajuddin Pramanik and his brother's wife Rahatunnesa went into hid inside a bamboo bush. He [P.W.13] was at a place a bit far from his brother and brother's wife. He saw the army men gunning down his brother and neighbor Hasina to death and his brother's wife fell down receiving bullet injury. At about 04:00 pm they brought his brother's wife to Pabna Sadar hospital for treatment but 8-10 days later she died.

**283.** In respect of killing other civilians, in conjunction with the same attack and by the same group of perpetrators, P.W.13 also stated what he learnt. He stated that afterwards the group of army went to one Khoda Bakhsh's house in the village and killed a man named Wajuddin, who had taken shelter there. Then Sobhan [accused] along with the Pakistani army moved towards village **Dogasi**. Later on he learnt that the army had shot dead eight or nine people in village Dogasi, including Haripada, Benu and Chand Ali Pramanik.

**284. P.W.15 Momtaj Uddin Montu** a freedom fighter testified that he had a meeting with student leader **Shahidullah [P.W.21]** and five/seven others at a primary school at their neighbouring village **Kulunia** on 11 May 1971. They, from the school, had seen a Pakistani army convoy accompanied by Sobhan [accused] approaching around 11:30am and as the convoy stopped near the school, they hid in a bush adjacent to Samajuddin's house wherefrom he saw Samajuddin coming out of his house to hide inside a bamboo orchard, but the Pakistani army shot him dead as Sobhan made a signal with his hand. The Pakistan army had also shot Rahatan and Hasina, wives of Samajuddin and Aminuddin respectively, Hasina died on the spot, while Rahatan succumbed to her injuries after a few days, P.W.15 added.

**285.** In respect of other killing happened during the attack P.W.15 stated that afterwards Sobhan and the army had gone to the house of Khoda Bakhsh and killed several people including Wajuddin there and he witnessed this event remaining in hiding inside a bush which was around 50/100 yards away from the killing spot.

**286.** In narrating post-event experience involving atrocities carried out at villages Dogasi, Dogasi Paschim Para P.W.15 stated what he saw after its commission. He stated that the Pakistani army approached towards village Dogasi and around 12:00 pm they heard gunshots and saw fumes of fire from the end of that village. As the attackers had left the locality around 1:30pm, he and his associates saw the bodies at Kulnia before reaching Dogasi.

**287.** P.W.15 went on to state that as they entered Dogasi, they saw two bodies at Haripada Saha's home yard and found his house and temple torched. They had then approached Dogasi Bazar and found the bodies of Haripada and Renu Saha on a road. They had also gone to the western part of their village where they found six bodies on the corridor of Dogasi Jame Masjid [mosque] and found the body of Hekmat's mother beside the mosque. They also found a minor boy beside her body who was Hekmat's son. Probably, the grandmother of the boy was shot dead while fleeing, but the boy survived mysteriously. P.W.15 also stated that he along with his associates had left for India the following day[12 May 1971] and after receiving training they returned back to take part in the war of liberation.

**288. P.W.21 Shahidullah @ Shahid** a freedom fighter made almost a similar account about the killings committed at villages Kulnia, Dogasi and Dogasi Paschim para occurred on May 11, 1971 linking accused Moulana Abdus Sobhan with the crimes.

**289.** According to P.W.21 Shahid, in the morning of 11 May 1971 he and some youths including Momtaj Uddin Montu [P.W.15] had been at a primary school at **Kulunia** as they were holding a meeting there for organising youths to join the war of liberation when they saw Sobhan going towards village Dogasi from Pabna town around 10:00am and within 20 to 25 minutes they had seen the car return. Within half an hour on seeing the army vehicles and the white car approaching the primary school they went into hid inside a bamboo orchard where from he saw the army led by Moulana Sobhan going to the house of Samajuddin and as they opened fire, Samajuddin was running towards a bush. Moulana Sobhan gave a signal with his hand pointing at Samajuddin and with this the army shot Samajuddin to death, P.W.21 added.

**290.** P.W.21 further stated that the army then had left the locality for neighbouring village Dogasi village. When they had come out from hiding, they found three more bodies there, he said.

**291.** P.W.21 does not claim to have witnessed the criminal acts carried out at villages Dogasi and Dogasi Paschim para. However, P.W.21 stated that he along with others had gone to Dogasi after the army and the white car of Sobhan had left the locality around 2:30pm. They had found there two bodies beside a burned temple in the village and two more bodies inside Dogasi Bazar. When they had visited the western part of the village, they found six to seven bodies inside a mosque.

**292.** In addition to the event narrated in the charge framed, P.W.21 also made a vivid description how his father Sheikh Kobad Ali was tortured and killed by the Razakars and the army in presence of Moulana Sobhan, during the first week of September 1971. But this event is beyond the charge framed and has not been investigated and as such it deserves exclusion from adjudication

### **Deliberation and Finding with Reasoning**

**293.** The learned prosecutor submitted that the event of killing civilians of villages Kulnia, Dogasi and Dogasi Paschim para by the group of army accompanied by accused Moulana Sobhan has been proved by the evidence of P.W.13, P.W.15 and P.W.21. Defence merely denied accused Sobhan's presence at crime sites with the army the principals. The attack that resulted in killing of unarmed civilians could not be refuted in any manner.

**294.** The learned defence counsel, on contrary, submitted that the evidence of witnesses examined is contradictory on material particular. Victim Chand Ali was not allegedly killed in 1971 as the voter list goes to show that his son Ekram was born in 1977. P.W.13 does not claim that accused Sobhan was with the group of army when they shot Samajuddin and Hasina to death. Description of the crime site [village Kulnia] and the fact of seeing the alleged event as stated by prosecution witnesses are not believable. P.W.21 had not been in the locality on the date of alleged event. And as such evidence implicating accused Sobhan with the alleged event is tainted by untruthfulness.

**295.** At the outset it is to be noted that from the trend of cross-examination of witnesses and the argument advanced by the learned defence counsel it stands conceivably understood that the event of attack that resulted in killing civilians of villages Kulunia, Dogasi and Dogasi Paschim Para by the group of army is not disputed. Defence pertinently attacked the credibility of witnesses' testimony on accused Moulana Sobhan's alleged presence with the group of attackers.

**296.** The Tribunal notes that a crime against humanity is a 'group crime' and is carried out in execution of a concerted plan. It is not necessary to show that all the members of the group had participated to its commission. It is sufficient to show that the accused had acted in such a manner that substantially facilitated the commission of the crime alleged and his act or conduct formed part of the attack. For holding the accused Sobhan liable for the abetting or facilitating the principal perpetrators prosecution requires proving that accused Sobhan accompanied the group of army as a complicit in accomplishing the crimes..

**297.** The version of P.W.13 an eye witness does not demonstrate that accused Moulana Sobhan accompanied the perpetrators the group of army or some how participated in committing the killing Samajuddin Pramanik and Hasina. But surprisingly in next breath P.W.13 claims that the group of army then [after killing Samajuddin Pramanik and Hasina] went to one Khoda Bakhsh's house in the village and killed a man named Wajuddin and there from accused Sobhan along with the Pakistani army moved towards village **Dogasi**.

**298.** How P.W.13 knew or saw the group moving towards village **Dogasi**, from the house of Khoda Bakhsh along with accused Sobhan? It is not clear at all. Mere telling a version on oath in a court of law cannot readily be considered to be evidence carrying probative value. Testimony is to be weighed rationally in light of probability. If really had the accused Sobhan accompanied the troops he could have been seen present even at the site where the army gunned down Samajuddin

Pramanik and Hasina to death. But P.W.13 does not claim accused's presence with the troops the principals.

**299.** P.W.13 next stated that Moulana Sobhan and the army entered the house of Chand Ali Pramanik at village Dogasi Paschim para and they burnt it and gunned down 4/5 civilians including Chand Ali Pramanik to death. Event of killing is not disputed. However, prosecution requires showing accused's complicity or involvement with its commission, we have already observed.

**300.** But there has been no indication which may validly offer an inference that P.W.13 had reason to know that accused Sobhan was with the troops even when they marched towards village Dogasi Paschim Para. P.W.13 did not see the dead body of Wajuddin and others. He simply heard the event of killing from people. This version lacks specificity and anonymous hearsay in nature. Besides, P.W.13 does not state that he heard from the people that accused Sobhan accompanied the troops or participated to the commission of the crimes, by his act and conduct.

**301.** Evidence of P.W.13 however proves the fact of launching attack that resulted in killing civilians and the group of perpetrators formed of Pakistani occupation army. His evidence does not depict accused Sobhan's complicity or participation in any manner with the attack and criminal acts carried out by the army.

**302.** P.W.15 Momtaj Uddin stated that at about 11:00-11:30 am seeing an army convoy coming forward they, jumping through the window of Kulunia primary school, went into hid inside a jungle adjacent to Samajuddin's house. He saw from the hiding place that Samajuddin was trying to go into hid behind a bamboo bush but on signal of Moulana Sobhan the army gunned down him to death.

**303.** The above version does not corroborate to what has been testified by P.W.13 an eye witness. According to P.W.13, he saw the event of

killing Samajuddin Pramanik and Hasina remaining in hiding inside a bamboo bush adjacent to Samajuddin's house when they were shot to death by the army men. Testimony of P.W.13 does not depict accused's presence at the crime site. Testimony of P.W.13 and P.W.15 suffers from glaring inconsistency on material particular and thus creates reasonable doubt as to presence of the accused with the group of army, as claimed by P.W.15.

**304.** P.W.15 stated in cross-examination that Samajuddin's house was located 200-250 yards far from Kulnia primary school and the bamboo bush where they remained in hiding was adjacent west to Samajuddin's house. P.W.21 Shahidullah @Shahid an associate of P.W.13 also stated that on 11 May 1971 they assembled at Kulnia primary school 200-300 yards north to Samajuddin's house.

**305.** Tribunal notes that in a situation of attack and on seeing the army convoy arriving in front of the school field, as stated by P.W.15 it was impracticable to go into hid at a place adjacent to Samajuddin's house which was 200-250 yards far from Kulnia primary school. Going into hid crossing long about 250-300 yards would have left a risk of their being captured by the army. Thus going into hid at a place adjacent to Samajuddin's house as claimed by P.W.15 becomes reasonably suspicious. Be that as it may, version of P.W.15 as to seeing the event of killing Samajuddin and Hasina by the army on accused Sobhan's signal also suffers from reasonable doubt.

**306.** Why the P.W.15 had been at Kulnia primary school on 11 May 1971 at the relevant time? According to him he and his pro-liberation associates including P.W.21 Shahidullah @Shahid assembled there for holding a meeting there. According to the testimony of P.W.21, on seeing the army convoy coming nearer to the school they came out of the school and went into hid inside a bamboo bush which was '200-300 feet far from Samajuddin's house'. This version does not seem to be consistent to what has been testified by his associate P.W.15. According to P.W.15 the bamboo bush inside which they remained in hiding was

‘adjacent to Samajuddin’s house’. That is to say significantly discrepant version on the distance between Samajuddin’s house and the bamboo bush where P.W.15 and P.W.21 claim to have had gone into hid makes the narration they made on seeing the event of killing Samajuddin and Hasina unreliable.

**307.** The above glaringly contradictory version on material particular makes it patently doubtful as to remaining into hiding inside bamboo bush adjacent to Samajuddin’s house leaving their position at Kulnia primary school. Therefore, seeing the event of killing Samajuddin and Hasina on signal of accused Sobhan, as claimed by P.W.15 and P.W.21 inspires no credence at all.

**308.** P.W.13 stated that on the following day [12 May 1971] he and his associates went to India and received training there as freedom fighter and returned back on 28 July 1971. In cross-examination P.W.13 stated that on 22 August 1971 he again went to India for having higher training in Deradoon. Shahidullah [P.W.21] the brother of Habibur Rahman was not with him when he [P.W.13] went to India.

**309.** Prosecution does not dispute that Md. Habibur Rahman Habib is the younger brother of P.W.21 Md. Shahidullah @ Shahid and Md. Habibur Rahman Habib deposed as P.W.4 in the case of *Chief Prosecutor v. Matiur Rahman Nizami* [ICT-BD [ICT-1] Case No. 03 of 2011]. Defence submitted photocopy of certified copy of Md. Habibur Rahman’s deposition he made in the said case.

**310.** The learned defence counsel, citing version of Md. Habibur Rahman in the said case, submitted that he stated that on 11 April the Pakistani army took Pabna under their occupation and then he and his elder brother Shahidullah[P.W.21] along with 3-4 hundreds students went to India and took refuge at Kechuadanga camp under district Shikarpur. In cross-examination P.W.21 stated that he returned back to Pabna on instruction of Shahabuddin Chuppu the then district president of Chatra League and during August-September and he again went to India.

**311.** The learned defence counsel submitted that the sworn testimony of Habibur Rahman the brother of P.W.21 in the case of *Matiur Rahman Nizami* goes to show that instantly after rolling of Pakistani occupation army in Pabna on 11 April, 1971 P.W.21 had gone to India and on 11 May 1971 he [P.W.21] had not been around the locality of Pabna. Under this circumstance, the testimony of P.W.21 claiming himself present around the crime site on 11 May 1971 becomes gravely doubtful.

**312.** The learned prosecutor Ms. Tureen Afroz submitted that testimony of Habibur Rahman that he made in another case before the Tribunal-1 is an extraneous material and does not impact the testimony of P.W.21. Thus the same cannot be taken into account for the purpose of showing inconsistency.

**313.** We are not convinced with the submission advanced by the learned prosecutor. Habibur Rahman is the brother of P.W.21. Brother's sworn testimony though made in another case is a public document and the case in which he testified has already been disposed of on pronouncement of judgment by Tribunal-1. Habibur Rahman's testimony that he made in the case of *Nizami* thus cannot be termed extraneous material. It is connected with a particular fact being dealt with in the case in hand. For the purpose of unearthing the truth on any relevant fact this Tribunal [ICT-2] as the trier of fact may take such a document into account.

**314.** We have found from evidence of P.W.15 that P.W.21 did not go to India with him [P.W.15] on 12 May 1971. Rather, it transpires from the sworn testimony of his [P.W.21] elder brother Md. Habibur Rahman that he made in the case of *Matiur Rahman Nizami* goes to show that P.W.21 Md. Shahidullah along with his elder brother went to India instantly after 11 April 1971, after the Pakistani army rolled into Pabna.

**315.** Thus, it is revealed that P.W.21 Md. Shahidullah @Shahid had not been around the locality of Pabna on 11 May 1971 when the event of attack as alleged in this charge [charge no.05] took place. Be that as it may, his [P.W.21] presence at Kulunia primary school, going into hid

inside a bamboo bush adjacent to Samajuddin's house and seeing the event of killing Samajuddin and Hasina , as stated by him [P.W.21] seems to be untrue. At the same time testimony of P.W.15 who narrates similar version as an associate of P.W.21 about seeing the event of killing by the army on accused Sobhan's signal stands unreliable too.

**316.** In view of above, we are not convinced to rely upon P.W.15 and P.W.21 as they are found to have made irrational and untrue version and they did it to link the accused Sobhan with the crimes in question. In addition to the event narrated in the charge, P.W.21 also described the attack on his father who was allegedly killed by Razakars in presence of accused Sobhan. This allegation involving the event of his father's killing is beyond the charge framed. And as such it does not deserve adjudication.

**317.** It is now firmly settled that for the accused to be criminally culpable his conduct must have been proved, beyond a reasonable doubt, to have contributed to, or have had an effect on, the commission of the crime. But the prosecution has utterly failed to prove by credible evidence that accused accompanied the group of army and encouraged or facilitated them, by his conduct, in accomplishing the criminal acts remaining present at the crime sites.

**318.** On evaluation testimony of P.W.13 an eye witness it stands proved that the group of army by launching attack gunned down Samajuddin and Hasina to death. Accused Sobhan's presence with the troops at the crime site could not be proved. It also reveals from her testimony as to what she heard after the event. His testimony on post-event experience demonstrates that the perpetrators had killed many other civilians at villages Dogasi and Dogasi Paschim Para by the same group of attackers. But there has been no indication with specificity that accused Moulana Sobhan had been with the group of perpetrators.

**319.** Totality of evidence prompts to the conclusion that the prosecution has failed to prove, beyond reasonable doubt, accused Moulana Abdus

Sobhan's complicity or concern to the commission of the offences in any manner. And thus the benefit of such doubt inevitably goes in favour of the accused. Accordingly accused Moulana Abdus Sobhan **cannot be held liable** for the offence of '**murder**' of civilians as crimes against humanity the outcome of the attack launched directing the villages Kulunia, Dogasi and Dogasi Paschim Para, as narrated in this charge.

### **Adjudication of Charge No.06**

**[Killing hundreds of civilians at 15 villages under police station Sujanagar]**

**320. Charge:** This charge involves the event of simultaneous attack in several villages on 12 May 1971 that resulted in mass killing of civilians constituting the offence of murder as crimes against humanity and also the offence of genocide as specified in section 3(2)(a)(g)(h) and 3(2)(c)(g)(h) of the Act of 1973. The charge framed alleges that on 12 May 1971 a group of 300 members of Pakistani occupation army accompanied by accused Moulana Abdus Sobhan the acting Ameer of Pabna district JEI and vice-president of Pabna district peace committee by launching attack, with intent to destroy the Bangalee national group and Hindu religious group either whole or in part, to villages **Momrajpur, Kuripara, Tarabaria, Fokitpur, Satbaria, Kandarpur, Sindurpur, Nishchintapur, Gupinpur, Harirampur, Shyamnagar, Narohati, Singhanagar, Bhatpara** under police station Sujanagar district Pabna abducted 400 leaders and workers of Awami League, supporters of the war of liberation and people belonging to Hindu community and killed them. In conjunction with the attack the perpetrators burned down and plundered several houses. Therefore, the accused has been charged for abetting and facilitating commission of the offences of '**murder**' as crimes against humanity and also for the offence of '**genocide**' which are punishable under section 20(2) of the Act and the accused thus incurred liability under section 4(1) and section 4(2) of the Act of 1973.

## **Witnesses Examined and Documentary Evidence Adduced**

**321.** This charge chiefly rests upon oral testimony of 07 witnesses. They are P.W.22 S.M Shamsul Alam, P.W.23 Md. Khorshed Alam, P.W.24 Md. Shamsul Alam, P.W.25 Abdul Baten, P.W.28 Md. Fazlul Haque, P.W.29 S.K Shahidullah and P.W.21 Md. Shahidullah @ Shahid. They were the residents of some of crime villages under Sujanagar police station, at the relevant time. They have testified what they allegedly witnessed in relation to some material facts linked to the event of attack that resulted in indiscriminate killing of unarmed pro-liberation civilians and the people belonging to Hindu community. Prosecution intended to add corroboration to oral testimony on the event of attack alleged by relying upon two documents [prosecution documents volume page nos. 76 and page 17-18]. Prosecution claims that the attack launched continued till 2:00 pm starting from 06:00 am and the witnesses examined had occasion to see it from hiding places and seeing dead bodies of civilians lying here and there subsequent to the event proves the fact of carrying out the atrocious attack against civilians of the crime villages which were neighbouring to each other.

## **Evidence presented**

**322. P.W.22 S.M Shamsul Alam [66]** is a resident of village **Tarabaria**. In 1971 he was an SSC examinee. He stated that in 1971 most of inhabitants of Sujanagar union were affiliated to Awami League and leaders and workers of Awami League used to organize and train the pro-liberation people of this locality. Many freedom fighters and the displaced people used to go to India through this locality.

*Seeing the event of attack that resulted in killing of 04 in front of Fokitpur Union Parishad office*

**323.** P.W.22 stated that on 12 May 1971 in the early morning he heard gun firing from village Momrajpur of their union and with this he and the people started fleeing. Informing the entry of the army around their locality to the people he went into hid inside a sugarcane field crossing the road in front of **Fokitpur** union Parishad office wherefrom he could

see the group of army coming towards Momrajpur by vehicles. He also saw a white vehicle in front of army vehicles carrying Moulana Sobhan. The army intercepted some civilians on the road in front of union Parishad office. At a stage, Moulana Sobhan got down of his vehicle and had conversation with the army and with this the army men gunned down 04 civilians to death there. One of them was **Madan** a peon [daptari] of Satbaria High School. He [P.W.24] heard from Khorshed of village Fokitpur when he was fleeing through the front of his hiding place that **Chetan, Ratan** and **Ghugri** were shot to death in front of union Parishad office.

*Seeing fume of fire and hearing gun firing from neighbouring villages*

**324.** P.W.22 also stated that he, remaining in hiding place, saw fume of fire from the end of villages **Tarabaria, Fokitpur and Satbaria**. After killing 04 civilians in front of Fokitpur union Parishad office the army convoy moved towards the village Sindurpur, Kanadarpur. Half an hour later, he saw, from his hiding place, the army men taking some people tied by rope around their waist towards Sindurpur, Kanadarpur. Next, he heard gun firing from village **Sindurpur** and **Kandarpur**.

*Coming out from hiding place*

**325.** P.W.22 further stated that he, Khorshed, Bhajon and some other came out of their hiding place, half an hour later and went towards the village **Kadua** wherefrom they could hear gun firing till 01:00 pm. At about 02:00 pm the Pakistani army returned back to Pabna and then they came nearer to the union Parishad office where they found Khabir, Dabir, and Rosai digging a ditch. He [P.W.24] told them to bury the four killed in front of Union Parishad office there.

*Seeing dead hundred bodies lying on the bank of river adjacent to village Sindurpur*

**326.** In respect of the rest of the event of attack that resulted in killing and destructive activities in some other neighbouring villages, P.W.22 is

a hearsay witness. He stated that at about 04:00-04:30 pm[on the day of the event] he moved to village **Sindurpur** where he heard that the army men caused beastly torture upon the women, Mostafa Khabir and Razakars the accomplices of Moulana Sobhan and the army looted the houses of Hindus. He [P.W.22] also saw, going to the bank of river Padma [adjacent to village **Sindurpur**], some bullet hit dead bodies lying on the boat. The locals dumped the dead bodies of about 100 civilians most of them were about to go India to take refuge.

*Seeing dead bodies in village **Kandarpur** and destructive activities in village **Tarabaria***

**327.** P.W.22 stated that after dusk he visited the locality of village **Kandarpur** where he found many dead bodies. He with the help of locals dumped 17-18 dead bodies in a big ditch. At about 08:00-08:30 pm he came to his own home at village **Tarabaria** and found their houses burned down. Later on, he heard that many civilians were killed at village Kuripara. At about 10:00 pm they arrived at village **Shyamnagar** where he heard that inmates of Mollabari and 10-12 civilians including Mohiruddin of village **Gupinpur** were killed by the Pakistani army. P.W.22 also testified what he heard concerning the killing civilians at villages **Kuripara, Shyamnagar, Gupinpur.** Defence could not shake it.

**328.** The above piece of evidence relating to learning the simultaneous organised attack on the same day and by the same group of attackers directing the crime villages that resulted death of more than hundred civilians is hearsay. But the defence could not impeach it by cross-examining the P.W.22 in any manner.

**329.** P.W.22 also stated that on the following day he with the help of the principal of Satbaria College and relatives of victims prepared a list of 170-172 victims. However, according to different sources the number of victims now stands at 143.

**330.** P.W.22 stated that he knew accused Moulana Sobhan since earlier as he was a leader of JEI and he used to attend meetings around their locality with his accomplices.

*Seeing the attack and killing of 04 in front of Fokitpur Union Parishad Office*

**331. P.W.23 Md. Khorshed Alam[63]** a retired police constable from Fokitpur, stated that Sobhan[accused] formed Peace Committee and Razakar Bahini, two anti-liberation forces, at Singhanagar village of Satbaria union in 1971. In respect of the event of attack P.W.23 stated that around 6:00am on May 12, 1971, hearing frequent gunshots he [P.W.23] came out of his house and saw people fleeing the village, saying the Pakistani army had attacked their village. He too started running with them for saving life. Then he hid in a sugarcane field beside the union Parishad office at their village[Fokitpur] as he saw a white car along with four/five army vehicles near the office. Moulana Sobhan, clad in white Panjabi, got down from the white vehicle and talked with some army men who also got down from their vehicles. And then, they [army men] opened fire on several people, who immediately collapsed on the ground. A few minutes later, he[P.W.23] accompanied by Bhajon Saha, Budhishwar Saha and Balai Saha, who also had been hiding with him, came out and found the bodies of Madan Kumar Sarker, Chetna, Ratan and Ghughria lying in front of the office.

**332.** Some times later, he [P.W.23] saw the vehicles rolling out towards **Sindurpur and Kandarpur** villages adding that he had seen another group of 30-40 army men taking some 40 to 50 captured people towards those villages, P.W.23 stated.

*Post attack experience*

**333.** P.W.23 next stated that after sometime, he met Shamsul Alam [P.W.24] near the sugarcane field and together they returned to Fokitpur after the Pakistani army had left the locality around 2:00 pm. Later, they went to **Sindurpur** where one Budhishwar Biswas informed them that many people were killed, women were violated and houses were burnt

down in their village. Moulana Sobhan was present at the crime scenes when the atrocities were committed, P.W.23 added quoting Budhishwar.

**334.** He [P.W.23] and Shamsul [P.W.24] visited several other villages on that day and saw many dead bodies there. They also helped people of those villages bury the bodies; we have found it from the evidence of P.W.23.

**335.** P.W.23 also stated that they had seen bodies lying on the bank of the river Padma and on some boats in the river. Over 100 people were killed there and most of the victims were on their way to India to take refuge. He [P.W.23] and Shamsul [P.W.24] visited several other villages on that day and saw many dead bodies there. They also helped people of those villages bury the bodies. The following day, he along with Shamsul, Fazlul Haque, the then principal of Satbaria College, and the victims' families estimated that the death toll of that day was 170-175, added P.W.23.

#### *Event of killing father*

**336. P.W.24 Shamsul Alam[57]** the son of a martyr described how his father was tossed two or three feet in the air before thudding to the ground when the Pakistani army shot him to death at the instruction of JEI leader accused Abdus Sobhan on May 12, 1971. P.W.24 stated that his father Mohiduddin Pramanik was an influential Awami League leader of **Satbaria Union**, and many residents of their village were involved with the party.

#### *Attack and seeing the accused with the group*

**337.** P.W.24 stated that hearing heavy gunfire around 6:00am on May 12, 1971 from the west of their village and seeing the fume of fire, people started running in different directions to save their lives. His [P.W.24] grandfather asked them to go to Gajnar Beel, 7-8 km from their village. But his father and he [P.W.24] stayed at home, as his father refused to leave the house. **Around 12:00 noon**, the Pakistani army and

Sobhan, riding in two vehicles, arrived at their house, adjacent to Zilla Parishad road.

**338.** P.W.24 further stated that seeing Sobhan Moulana his father raised his hands and approached them. But Sobhan Moulana pointed a finger at his father and told the army that he was a leader. With this, the Pakistani army opened fire on his father who was tossed two or three feet in the air before thudding to the ground when the Pakistani army shot him to death at the instruction of Sobhan. '**See, how Joy Bangla is**'-- said Sobhan Moulana as he kicked his father's body two or three times, added P.W.24 claiming to have seen the event from a distance of 50 yards. The Pakistani troops also set their houses on fire and left the village at about 2:00pm.

#### *Reason of Knowing Accused*

**339.** In respect of reason of knowing accused Moulana Sobhan P.W.24 stated that he knew Sobhan since earlier as he held different gatherings [political] in Satbaria of district Pabna. About two days before the killing, his father told him that Sobhan had become the secretary of Pabna Zilla Peace Committee, an anti-liberation force in 1971.

#### *Post attack experience*

**340.** Breaking down in tears, P.W.24 stated that to save their lives, his grandfather took his hand and ran into a nearby sugarcane field while the occupation army started shooting at them. But bullets missed them, and they saved themselves hiding in the sugarcane field. After coming out of the field, they heard that some villagers including Bajju Pramanik, Jhoru Mondol, Mujibur Sheikh and Rajab Pramanik were also killed by the Pakistani army.

**341. P.W.25 Abdul Baten [60]** testified how accused Abdus Sobhan had abetted and facilitated the Pakistani army in committing mass killing at several villages under Sujanager police station of district Pabna in 1971.

*Seeing the attack and event of killing 04 civilians*

**342. P.W.25 Abdul Baten [60]** stated that he had witnessed the killing of four people by the Pakistani occupation army at the instruction of Sobhan on May 12, 1971, in conjunction with the attack.

**343.** He [P.W.25] testified that the army had attacked their village at 6:00 am that day and caught his father Madari Mondol and Uncle Laskar Mondol. He however, had taken shelter at a garden behind Basu Saha's house where many people including Chetna, Ratna, Ghughria and Modon remained in hiding. He [P.W.25] along with Chetna, Ratna, Ghughria and Modon had decided to go to Narohati Beel. But four army vehicles had stopped near them on the way and Sobhan [accused] was in one of those vehicles. Showing Chetna, Ratna, Ghughria and Modon, Moulana Sobhan told the Pakistani army '**Those 'malauns'** [ a racial and derogatory word to mean Hindus] **are people of Joy Bangla,'**' and instantly with this the Pakistani army opened fire and killed them on the spot and he[P.W.25] witnessed the killing from behind a rain tree on the west side of the road.

**344.** He [P.W.25] became fainted seeing the killing and after some time he regained consciousness and went to his cousin late Azhar Mondal's house in Upendranagar. He returned to his home after the Pakistani army had left the village around 2:00 pm and begun searching for his father and uncle.

*Post event experience*

**345.** P.W.25 further stated that around 4:00pm [on the same day] he heard that about 20-25 people were killed at village **Kandarpur** and then he went there and found bullet-hit Afsar of **Kuripara** village and Obaidullah of **Momrajpur** village. He also found his father and uncle in a state of unconsciousness. He with the help of one Naren Biswas took his father and uncle back to home. On his way to home he saw many bodies on the bank of the river [Padma] near **Sindurpur** village, P.W.25 added.

*Seeing the attack and killing at Kuripara*

**346. P.W.28 Md. Fazlul Haque [74]** testified that Pabna JEI leader Moulana Abdus Sobhan had accompanied the group of around 300 Pakistani army men during a coordinated attack against several villages under police station Sujanagar that left 170 to 175 people dead on May 12, 1971.

**347.** In narrating the event of killing at village **Kuripara** P.W.28 stated that being panicked he was fleeing from his Nishchintapur village towards Kakuri village when he had seen a white vehicle and several army vehicles in front of **Kuripara Primary School**. Then he saw Moulana Sobhan talking with Pakistani army near the white vehicle and he also saw 30 to 40 people including Khandoker Obaidullah, Seken and Entaz detained and tied. After some time he had heard gunshots and when the Pakistani army had left, he found bullet-hit Seken, Mani and Entaz lying in front of the school.

**348.** P.W.28 Fazlul Haque, an organizer of the Liberation War in Pabna stated that he had left the area for Chinakhara village and returned to Satbaria the next day. He had also visited many of villages affected by the horrendous attack and prepared a list of 170/175 victims. However they could not enlist the unidentified victims.

**349.** P.W.28 also stated that Sobhan was the general secretary of Pabna Peace Committee, an anti-liberation platform and Pakistani army Captain Jayedi was its chairman, adding that Sobhan became its vice-chairman later. Moulana Sobhan was very fluent in Urdu and Arabic, which helped him establish a good bond with the Pakistani army. All these are not disputed.

*Attack and killing at village Nishchintapur*

**350. P.W.29 S.K. Shahidullah [68]** was a resident of village Nishchintapur. He is the younger brother of victim Obaidullah. Corroborating the act of launching attack on 12 May 1971 P.W.29 stated

that he had been at an abandoned kitchen of his uncle Bishu Khandoker as a massacre was carried out in 4/5 villages including their one on the preceding day. In the early morning, on sensing the attack, he could see through the fence of the hut the army men forcibly taking civilians towards Nishchintapur primary School. His [P.W.29] aunt advised him to go into hid and with this started returning to his home through the sugarcane field. On arriving at his home he heard from his mother that his brother Obaidullah had been taken forcibly.

**351.** P.W.29 further stated that his mother advised him to go into hid. Suddenly Seken's wife rushed to their house and informed that her husband, Moni and one Entaj were killed by the army. He then went into hid inside a nearby sugarcane field where from he sensed hearing sound of vehicles that the attackers had left the site and then he came out of the sugarcane field and found bodies of Seken, Moni and Entaj lying in front of Nishchintapur Primary School.

**352.** P.W.29 stated that at about 03:00 pm [on the day of attack] he started rushing towards village Satbaria when he knew that the army had left the site and on the way at village Fokitpur he saw 4/5 people bringing his [P.W.29] brother in a door sheet. Later on, he from his brother and the locals that the massacre was carried out in presence of accused Sobhan.

**353.** P.W.29 also stated that he learned the act of indiscriminate killing of civilians happened in villages Fokitpur, Kandarpur, Satbaria, Gupinpur, Bhatpara, and Kuripara. Finally, P.W.29 stated that he knew Moulana Sobhan and everybody knew him as he was a leader of JEI.

**354.** Defence could not impeach the facts relevant to the attack as has been testified by P.W.29. It however, simply denied accused Sobhan's involvement with commission of offences remaining present at the crime sites with the perpetrators.

## **Deliberation and Finding with Reasoning**

**355.** The learned prosecutor Mr. Sultan Mahmud argued that P.W.22, P.W.23, P.W.24, P.W.25 and P.W.29 who have been examined in support of this charge are the relatives of victims of the attack which was directed against civilian population of 15 villages. They have testified the event of killing occurred at village Fokitpur, Gupinpur, Kuripara, Nishchintapur. The crime villages were closely distanced to each other and the attack was carried out concurrently by the same group of perpetrators. Accused Moulana Sobhan accompanied the troops and abetted them in committing the crimes. Evidence of witnesses in respect of seeing dead bodies in the crime villages proves that they were so killed in conjunction with the same attack and by the same group of perpetrators.

**356.** The learned prosecutor further submitted that the events of killing civilians in front of Fokitpur primary school, Gupinpur, Kuripara, Nishchintapur that have been testified by direct witnesses go to show that on accused's substantial contribution the army had committed the dreadful criminal acts. The witnesses who remained in hiding at the relevant time had fair occasion to see it. Their testimony in this regard remained unshaken and there has been no reason to disbelieve them. The killings which have been testified by direct witnesses were chained to other killing as it took place at other villages on the same day and by the same group. A report published in a daily news paper in 2007 [**Exhibit-5; page 45 of prosecution documents**] also shows accused Sobhan's involvement with the indiscriminate killing of unarmed pro-liberation civilians of those villages..

**357.** On contrary, the learned defence counsel Mr. Mizanul Islam submitted that the event of attack might have occurred but the perpetrators were the Pakistani army and as an individual accused Sobhan had no complicity with them and in launching the attack that allegedly resulted in killing civilians. The witnesses examined had no opportunity of seeing the entire attack and as such were not in position to

see the activities carried out by the group of perpetrators and as such it is impracticable to say that accused Sobhan accompanied the troops in carrying out the entire attack.

**358.** The learned defence counsel also submitted that the narrative made in a report published in a daily news paper in 2007 and also in the ‘Gono Tadanta Commission Report’ [the documents have been **Exhibited**] is based on version of one Bishu. But he has not been cited and examined as witness and thus the narrative made therein is not authoritative and as such it cannot be treated to have supported accused’s involvement or concern with the crimes alleged. Village Satbaria one of alleged crime villages was not in existence in 1971 and as such testimony concerning the event allegedly happened at that village is untrue.

**359.** The Tribunal notes that this charge involves an attack directing civilian population of 15 villages under Satbaria Union Parishad and Sujanagar police station that resulted in indiscriminate killing of hundreds of defenceless pro-liberation civilians. The principal attackers were the Pakistani army and accused Sobhan allegedly abetted and facilitated the commission of the crimes in question, by his conduct and act of accompanying the perpetrators to the crime sites. .

**360.** To prove this charge, prosecution relies upon oral testimony of the witnesses examined. Of them some had witnessed part of attack and some had seen dead bodies lying scattered at different villages after the attackers had left the sites. Most of the witnesses examined to substantiate this charge are relatives of victims and residents of crime villages.

**361.** The event of attack might have occurred but the perpetrators were the Pakistani army and as an individual accused Sobhan had no complicity with them and in launching the attack that allegedly resulted in killing civilians, the learned defence counsel submitted. This submission leads us to conceive that trend of cross-examination of prosecution witnesses remained concentrated mainly to refute and make

unreliable what has been stated in respect of accused's concern and involvement.

**362.** The charge framed indicts the accused cumulatively for abetting and facilitating the commission of '**murder**' as crimes against humanity and also for the committing the offence of '**genocide**'. Prosecution thus requires proving-

- (i) the fact of launching attack
- (ii) the group of attackers formed of army
- (iii) the attack resulted in indiscriminate killing of hundreds of civilians
- (iv) accused Moulana Sobhan accommodated the group of attackers
- (v) accused Sobhan by his act and conduct abetted and facilitated the principals in committing the horrific killings
- (vi) had the attackers targeted a 'group' with intent to destroy it either whole or in part ?

**363.** It has been found proved from the consistently corroborating evidence of P.W.22, P.W.23, P.W.24, P.W.25 and P.W.29 that on 12 May 1971 in the early morning the group of attackers formed of Pakistani army had launched attack at their villages.

**364.** Sensing the attack with frequent gun firing the people started fleeing, **P.W.22** stated. According to **P.W.23**, at the relevant time on hearing frequent gunshots he came out of his house and saw people fleeing the village, saying the Pakistani army had attacked their village. **P.W.24** also testified that hearing heavy gunfire around 6:00am on May 12, 1971 from the west of their village and seeing the fume of fire, people started running in different directions to save their lives. Corroborating these witnesses, **P.W.25** stated that he had taken shelter at a garden behind Basu Saha's house as the army had attacked their village at 6:00am that day and caught his father Madari Mondol and Uncle Laskar Mondol. Due to the massacre happened in their village on the preceding day **P.W.29** had been at an abandoned kitchen of his uncle Bishu Khandoker's house and In the early morning of 12 May 1971, on sensing the attack, he could see through the fence of the hut the army men forcibly taking civilians towards **Nishchintapur** primary School.

**365.** The version of P.W.s the direct witness to the attack launched at their villages remained unimpeached. In horrific situation occurred in the event of such an organised attack naturally the people around the sites under such attack preferred to go into hid and as such they may not have witness the entire attack. The above version concerning part of attack justifiably suggests the conclusion that an organised and concerted attack was launched directing their villages.

**366.** On careful evaluation of evidence and having regard to argument advanced on part of the defence it transpires that the event of attack that resulted in indiscriminate killing of hundreds of unarmed civilians remained undisputed. It transpires that criminal acts happened at 15 villages, in conjunction with the attack and it continued till 02:00 pm. The nature and extent of such *systematic* and *concerted* attack naturally did not leave opportunity to any of residents of seeing and experiencing the entire attack that resulted in killing of hundreds of civilians occurred in 15 villages.

**367.** Testimony of P.W.22 demonstrates that he, remaining in hiding place, also saw fume of fire from the end of villages **Tarabaria, Fokitpur and Satbaria**, after seeing the event of killing 04 civilians in front of **Fokitpur** union Parishad office. This unshaken version provides indication that the perpetrators had launched concerted and concurrent attack directing several villages.

**368.** We are not convinced with the defence submission that in 1971 the village Satbaria, one of crime sites, was not in existence as already it was grabbed by river erosion. It transpires that in cross-examination, P.W.23 Md. Khorshed Alam in reply to question put to him by the defence stated that in 1971 the village **Satbaria** was so grabbed in part due to river erosion. However, there had been CO Office, TEO Office, and Sanitary Office etc. in the locality of Satbaria in 1971. P.W.28 Fazlul Haque too stated similar version in cross-examination. Thus, and in absence of any document on part of the defence it may at best be said that part of the village Satbaria was grabbed by river erosion. Partial non existence of the village Satbaria, for the above natural

reason, does not render the attack around this village untrue or reasonably doubted.

**369.** P.W.22 on sensing the attack went into hid inside a sugarcane field crossing the road in front of **Fokitpur** union Parishad office wherefrom he could see the group of army approaching towards **Momrajpur** by vehicles accompanied by accused Moulana Sobhan and the army intercepted some civilians on the road in front of union Parishad office when Moulana Sobhan getting down of his vehicle had conversation with the army and with this the army men gunned down 04 civilians to death there. One of them was **Madan** a peon [daptari] of Satbaria High School. He [P.W.24] heard from Khorshed [P.W.23] of village Fokitpur when he was fleeing through his hiding place that **Chetan, Ratan** and **Ghugri** also were shot to death in front of union Parishad office.

**370.** It is to be noted that the Appellate Division in the Criminal Review Petition Nos. 17-18 of 2013 preferred by *Abdul Quader Molla* observed:

“It is to be remembered that the object of cross examination is to bring out desirable facts of the case modifying the examination-in-chief. The other object of cross-examination is to bring out facts which go to diminish or impeach the trustworthiness of the witness.”[*Abdul Quader Molla, Criminal Review Petition Nos. 17-18 of 2013, Judgment page 35*]

**371.** But the defence did not deny the above version made by P.W.22 categorically. Besides, it remained unimpeached. By cross-examining P.W.22 defence could not bring anything impeaching trustworthiness of what he has testified. Therefore, it stands proved that at the initiation of the attack accused Moulana Sobhan had been with the group of army and his conduct as has been testified by the P.W.22 unerringly proves that intending to provide substantial assistance and guidance accused Sobhan consciously accompanied the principals, knowing the consequence of his act. Presumably the perpetrators opted to keep the accused Sobhan with them as they considered him a trusted aide for the reason of his being a potential leader of Pabna district JEI.

**372.** Had the P.W.22 reason to know and identify the accused Sobhan? P.W.22 stated that he knew Moulana Sobhan since earlier as he was an older resident of their union; he was a leader of JEI and used to attend meetings around their locality. Defence could not refute it. In cross-examination, P.W.22 stated that Sobhan's house was at village Harirampur. Defence does not dispute that P.W.22 joined the war of liberation as freedom fighter and in 1971 he was 22 years old. All these cumulatively lead to infer that P.W.22 was familiar with the accused Moulana Sobhan and thus could recognise him when he [P.W.22] saw the group of army accompanied by him moving in his own white vehicle.

**373.** The event of killing 04 civilians in front of **Fokitpur** Union Parishad office has been corroborated by P.W.23 Md. Khorshed Alam. He also remaining in hiding in a sugarcane field adjacent to the union Parishad office saw the army vehicles along with a white car coming near the office when Moulana Sobhan getting down from the white vehicle talked with some army men who then got down from their vehicles and opened fire on several people, who immediately collapsed on the ground. Later on, coming out of the hiding place he found the bodies of Madan Kumar Sarker, Chetna, Ratan and Ghughria lying in front of the office.

**374.** Evidence of P.W.25 also depicts how Madan Kumar Sarker, Chetna, Ratan and Ghughria became victims of the horrific killing [**at Fokitpur**]. It transpires from the evidence of **P.W.25 Abdul Baten**, a resident of village Fokitpur that the army had attacked their village at 6:00am and caught his father Madari Mondol and Uncle Laskar Mondol. But he however he took shelter at a garden behind Basu Saha's house where he found many people including Chetna, Ratna, Ghughria and Modon remained in hiding.

**375.** He [P.W.25] along with Chetna, Ratna, Ghughria and Modon had decided to go to Narohati Beel, being feared with the attack. But four army vehicles had stopped near them on the way and Sobhan [accused]

who was in one of those vehicles, showing Chetna, Ratna, Ghughria and Modon told the Pakistani army **'Those 'malauns'[a racial and derogatory word to mean Hindus] are people of Joy Bangla',**” and instantly with this the Pakistani army gunned them down to death on the spot and he [P.W.25] witnessed the killing from behind a rain tree on the west side of the road.

**376.** Defence could not impeach the above version of P.W.25 concerning the killing of 04 civilians by the army on substantial instigation of accused Moulana Sobhan, in front of Fokitpur Union Parishad Office.

**377.** P.W.25 stated that he knew Moulana Sobhan. In cross-examination, he stated that originally Moulana Sobhan was a resident of village Harirampur and subsequently due to river erosion they had shifted to village Tailakunda. Thus, the capacity of P.W.25 of being familiar with the identity of the accused Sobhan, in other words, becomes affirmed.

**378.** Defence simply denied what has been testified by P.W.25 in respect of accused's presence and culpable conduct forming part of attack against the civilians belonging to Hindu community. The antagonistic utterance **“those 'malauns'[a racial and derogatory word to mean Hindus] are people of Joy Bangla”** that the accused had made leads to the conclusion that he [accused] was familiar with the locality and the people residing around it. At the same time such culpable utterance leading to the killing of 04 Hindu civilians substantially assisted, facilitated and induced the army the principals.

**379.** Integrated evaluation of evidence of P.W.22, P.W.23 and P.W.25 impels beyond reasonable doubt that at the beginning of the attack the group of army accompanied and guided by accused Moulana Sobhan while on march to crime villages had gunned down 04 Hindu civilians on substantial instigation and culpable encouragement of accused Moulana Sobhan.

**380.** Evidence of P.W.22 demonstrates that the army convoy, after killing 04 at Fokitpur, moved towards the village **Sindurpur,**

**Kandarpur** and half an hour later, he saw, from his hiding place, the army men taking some people tied by rope around their waist towards Sindurpur, Kandarpur. Next, he heard gun firing from village **Sindurpur** and **Kandarpur**. Thus, it is inferred that the attackers being divided in groups had initiated concurrent attack directing villages which were closely distanced to each other.

**381.** Accused Moulana Sobhan was part of the entire attack and thus was linked to atrocities carried out concurrently. For it has been proved from ocular account of eye witnesses [P.W.22, P.W.23 and P.W.25] that accused Sobhan was present with the group of army at **Fokitpur** site where 04 were killed and he had active participation, by his conduct, to its commission by the army men. Thus, it lends unerring assurance that the accused Sobhan was consciously concerned with the act of launching the whole attack, endorsing its purpose and plan.

**382.** P.W.24 Md. Shamsul Alam a resident of village **Gupinpur** testified how the perpetrators had killed his father. It transpires from his evidence that at around 12:00 noon, the Pakistani army and accused Moulana Sobhan, riding in two vehicles, arrived at their house, adjacent to Zilla Parishad road. Seeing Sobhan Moulana his [P.W.24] father raising hands approached them. But Sobhan Moulana pointed a finger at his father and told the army that he was a '**leader**'. With this, the Pakistani army opened fire on his father who was tossed two or three feet in the air before thudding on the ground when the Pakistani army shot him to death on accused's instruction and then accused Sobhan started uttering -'**See, how Joy Bangla is**', kicking his father's body two or three times. P.W.24 saw the event from a distance of 50 yards. The Pakistani troops also set their houses on fire and left the village at about 2:00pm.

**383.** Defence simply denied the above version. But it could not bring anything contrary to what he testified in respect of his seeing the event of killing his father on substantial instigation of accused Sobhan, by cross-examining P.W.24. In respect of reason of knowing accused Moulana Sobhan P.W.24 stated that he knew Sobhan since earlier as he held

different gatherings in Satbaria of Pabna. About two days before the killing, his father told him that Sobhan had become secretary of Pabna Zilla Peace Committee, an anti-liberation force in 1971. In cross-examination, in reply to question put to him by the defence, P.W.24 stated that he saw Moulana Sobhan attending meetings around their locality in 1971. Thus, P.W.24 had reasonable capacity of identifying the accused Sobhan—it has been re-affirmed even in cross-examination. .

**384.** We have found from the evidence of P.W.24 that most of the inhabitants of their village **Gupinpur** were affiliated with Awami League politics and his father was an influential leader of Satbaria Union Awami League. Defence does not dispute it. As a result the reason of targeting Mohiduddin Pramanik the father of P.W.24 Md. Shamsul Alam stands clear. Presumably accused Moulana Sobhan acting Ameer of district JEI was familiar with the potential pro-liberation people of the crime villages. History says, in 1971 JEI sided with the Pakistan occupation army intending to annihilate the pro-liberation civilians and to resist the war of liberation. All these together with the testimony of P.W.24 lead us to conclude that accused Sobhan, knowing the consequence, was consciously concerned with the entire attack, to further plan and policy.

**385. P.W.28 Md. Fazlul Haque [74]** had served as the founder principal of Satbaria College for long 35 years since 1966. In 1971 he was the chief of Satbaria Union *Sangram Parishad*. His evidence demonstrates that being panicked on sensing the attack with frequent gun firing at their neighbouring village **Momrajpur** he attempted fleeing from his village **Nishchintapur** towards village Kachuria when on his way he had seen a white vehicle and several army vehicles parked in front of **Kuripara** Primary School.

**386.** It is also found that on seeing the army convoy, P.W.28 then went into hid inside a jungle beside a nearby mosque wherefrom he saw Moulana Sobhan talking with Pakistani army near the white vehicle. He also saw 30 to 40 people including Khandoker Obaidullah, Seken and

Entaz detained and tied. After some time he had heard gunshots and when the Pakistani army left, he saw the army men dragging Obaidullah[brother of P.W.29], Afsar and others towards Satbaria and later on, coming in front of the school he found bullet-hit **Seken, Mani and Entaz** lying in front of the school.

**387.** P.W.28 also stated that Sobhan was the general secretary of Pabna Peace Committee, an anti-liberation platform and Pakistani army Captain Jayedi was its chairman, adding that Sobhan became its vice-chairman later. Moulana Sobhan was very fluent in Urdu and Arabic, which helped him establish a good bond with the Pakistani army. P.W.28 was familiar with the identity of accused Sobhan. Admittedly accused Sobhan was associated with the politics of JEI and had been playing key role in Pabna district. As an educationist and the founder Principal of Satbaria College P.W.28 thus had fair reason of ‘knowing’ accused Sobhan.

**388.** Defence plainly denied the version of P.W.28 on material particular. It did not make any effort to refute what the P.W.28 has testified about his seeing the event, by cross-examining him. Accused’s presence and his conduct as depicted from evidence of P.W.28 suggest the irresistible conclusion that accused Sobhan did not merely accompany the group of army, he rather actively and knowingly accompanied them for providing facilitation and assistance to the principals in accomplishing the crimes.

**389.** In cross-examination, in reply to question put to him by the Tribunal P.W.28 replied that **Kuripara** Primary School was about 70-80 yards away from the place where he remained in hiding. Thus, it was rather practicable for P.W.28 of seeing the event of killing which was carried out by the army when the accused Sobhan was also with them, in front of Kuripara Primary School, in conjunction with the coordinated attack. It also transpires even from the evidence of P.W.28 that the army men had moved to the sites by their vehicles and accused Sobhan was with them on his own white vehicle.

**390.** Post-attack experience that the witnesses have testified is materially relevant to the attack that resulted in death of hundreds civilians of many other villages. Naturally, it was not practicable for any particular person to witness the entire attack. The claim of seeing dead bodies of civilians lying scattered and the presence of sign of destructive activities around the villages under attack as testified by P.W.22, P.W.23, P.W.24 and P.W.25, after the attackers had left the sites indisputably forces to conclude that the perpetrators had carried out concurrent organised attack directing those villages. Besides, defence does not dispute the attack that resulted in horrific 'large scale killing' of civilians in those villages.

**391.** P.W.22, half an hour after the killing of 04 in front of **Fokitpur Union Parishad office** saw, from his hiding place, the army men taking some people tied by rope around their waist towards **Sindurpur, Kandarpur**. Next, he heard gun firing from village **Sindurpur** and **Kandarpur**. It thus indicates that those two villages were also targeted by the attackers. P.W.22 also saw, going to the bank of river Padma [adjacent to village **Sindurpur**], some bullet hit dead bodies lying on the boat. The locals dumped the dead bodies of about 100 civilians most of them were about to go India to take refuge.

**392.** On the day of attack, after dusk, P.W.22 on visiting the locality of village **Kandarpur** found many dead bodies. He with the help of locals dumped 17-18 dead bodies in a big ditch. At about 08:00-08:30 pm [on the day of the event] P.W.22 came to his own home at village **Tarabaria** and found their houses burned down. Later on, he heard that many civilians were killed at village **Kuripara**. At about 10:00 pm they arrived at village **Shyamnagar** where he heard that the inmates of Mollabari and 10-12 civilians including Mohiruddin were killed.

**393.** The above unimpeached version relates to what the P.W.22 witnessed at these villages, after the attackers had left. Finding numerous bodied at villages **Kandarpur, Tarabaria, Shyamnagar, and**

**Gupinpur**, as stated by P.W.22 is an unerring indication of launching simultaneous attack directing all these villages.

**394.** P.W.23 has also corroborated the attack directing the village **Sindurpur**. He [P.W.23] and Shamsul [P.W.24] visited several other villages on that day and saw many dead bodies there. They also helped people of those villages bury the bodies. It is found from unshaken testimony of P.W.23. Killing of some villagers including Bajju Pramanik, Jhoru Mondol, Mujibur Sheikh and Rajab Pramanik were also killed by the Pakistani army, during the attack, P.W.24 stated. It remained unimpeached.

**395.** At around 4:00 pm [on the same day] P.W.25 heard that about 20-25 people were killed at village **Kandarpur** and then he went there and found bullet-hit Afsar of **Kuripara** village and Obaidullah of **Momrajpur** village. He also found his father and uncle in a state of unconsciousness. He with the help of one Naren Biswas took his father and uncle to home. On his way to home he saw many bodies on the bank of the river [Padma] near **Sindurpur** village, P.W.25 added. This version concerning post-event experience remained totally unshaken and even could not be denied too.

**396.** In case of such a massive attack directing 15 villages no individual was expected to witness the entire event happened around those villages. The people could reasonably learn and see the post event consequences only subsequent to the event. It seems to be natural. Therefore, the hearsay testimony of P.W.22, P.W.23, P.W.25 and P.W.28 so far as it relates to learning the attack directing other villages and seeing numerous dead bodies there on the same day inspires credence. And the post-event experience described by these witnesses did not face any attack in their cross-examination and as such it inspires credence.

**397.** Post-attack narrative as has been testified by P.W.29 lends corroboration to other witnesses' testimony on this particular. It transpires that P.W.29 also could see the army men forcibly taking

civilians towards Nishchintapur primary School. Returning from sugarcane field where he remained in hiding he heard from his mother that his brother Obaidullah had been taken forcibly. Coming out of the sugarcane field he found bodies of Seken, Moni and Entaj lying in front of Nishchintapur Primary School. After the army had left the site he [P.W.29] on the way to village Fokitpur he saw 4/5 people bringing his [P.W.29] brother carrying on a door sheet. Defence could not bring anything, by cross-examination, to refute the above version.

**398.** The post event narrative as made by witnesses provides strong corroboration to the fact of mass killing and wanton destruction carried out by launching organised attack which was chained to seeing the accused Sobhan and the army moving towards villages **Sindurpur, Kandarpur and other villages**, after accomplishing the killing of 04 in front of **Fokitpur** Union Parishad Office, as stated by P.W.22 and P.W.23.

**399.** The fact of seeing the accused Moulana Sobhan departing the crime site, the place in front of Fokitpur Union Parishad office along with the army, as stated by P.W.22 irresistibly forces to conclude that accused Sobhan was actively 'concerned' with the entire concerted attack directing many villages.

**400.** It stands proved by the evidence of witnesses on material facts that the perpetrators had launched concurrent attack targeting several villages under police station Sujanagar intending to accomplish same plan and policy. It has been proved beyond reasonable doubt from the evidence of the witnesses examined that the attack resulted in death of hundreds of non combatant civilians of several villages.

**401.** The description the witnesses narrated in respect of their seeing the event of killing of civilians at some villages and the post event devastation and numerous dead bodies they found around the other crime villages proves the commission of the event of massacre that continued for couple of hours.

**402.** In conjunction with the attack, some of witnesses had opportunity of seeing the accused Sobhan accompanying the group of army and showing culpable conduct that substantially facilitated and abetted the principals on commission of the crimes. Taking the pattern of the attack into account the Tribunal notes that evidence in respect of seeing the accused at some of crime sites with the army is sufficient to make him liable even for the entire attack that continued for couple of hours and resulted in killing hundreds of civilians. Detail and direct evidence is not expected to be available to prove accused's complicity with the entire attack directing 15 villages. It is to be seen whether accused's presence and conduct he had shown at some of crime sites were reasonably chained with the killing civilians at some other villages. In order to get it resolved let us have look to the testimony of the direct witnesses on material particular.

**403. P.W.22** and **P.W.23** who had occasion to witness the event of killing in front of **Fokitpur** Primary School testified how it was perpetrated and how the accused Moulana Sobhan had facilitated the principals in its commission. It gets further corroboration from the testimony of another direct witness the **P.W.25** who was with Chetna, Ratna, Ghughria and Modon and they were about to go to Narohati Beel. But on their way, the army accompanied by accused Sobhan intercepted them when he [P.W.25] managed to go into hid behind a rain tree where from he saw that showing Chetna, Ratna, Ghughria and Modon-- Moulana Sobhan told the Pakistani army **“Those 'malauns' [ a racial and derogatory word to mean Hindus] are people of Joy Bangla”--** and instantly with this the Pakistani army opened fire and killed them on the spot. This event of killing occurred in front of Fokitpur Primary School.

**404. P.W.24** described how the perpetrators, the army accompanied by accused Sobhan had brutally killed his father Mohiduddin Pramanik who was an influential Awami League leader of **Satbaria Union**

**405. P.W.28** narrated, as direct witness, material facts chained with the principal event of killing occurred in front of Kuripara Primary School. He saw the group of army accompanied by accused Sobhan coming in

front of school boarding on vehicles taking 30-40 detained persons with them. Then he had heard gunshots and when the Pakistani army had left the site, he found bullet-hit Saken, Mani and Entaz lying in front of the school. Thus it stands proved too that accused actively accompanied the troops even to the site at village **Kuripara**.

**406.** In view of above, it appears that amongst the witnesses relied upon by the prosecution P.W.22, P.W.23 and P.W.25 are the direct witnesses to the event of killing happened in front of **Fokitpur** Primary School when they saw the accused Sobhan culpably present with the group of army. Killing civilians at village **Satbaria** and **Kuripara** by the same group accompanied by the accused Sobhan has been testified by P.W.24 and P.W.28. Therefore, these events of killing civilians happened in three villages, in conjunction with the same attack and by the same group of attackers prove it beyond reasonable doubt that accused Sobhan was 'concerned' with the criminal acts forming part of entire attack, sharing intent of the principal perpetrators.

**407.** Accused used to move by a white color vehicle of his own in 1971. It stands proved and affirmed in cross-examination of prosecution witness. He [accused] appeared at **Fokitpur** by his own vehicle, being accompanied by the army convoy as found from evidence. Why the accused accompanied the army convoy? The act of accompanying the organised group of army itself is a proof of accused Sobhan's conscious part to the attack.

**408.** It is to be noted that the essence of argument advanced on part of the defence is that the accused Moulana Sobhan was not with the group of perpetrators and he did not take part to the commission of the event of massacre.

**409.** Defence took the *plea of alibi* by suggesting P.W.22 and P.W.24 that Moulana Sobhan's daughter died on 11 May 1971 and her funeral ceremony took place on 12 May 1971 and Moulana Sobhan had conducted the Janaja prayer as Imam. By asserting such plea of *alibi*

defence intended to show that on 12 May 1971 accused Moulana Sobhan had been 'elsewhere' than at the site of the crimes alleged when they were committed.

**410.** The settled legal position is that the fate of prosecution i.e adjudication of guilt or innocence does not depend upon success or failure of defence in proving its own defence or plea of *alibi*. However, the plea of *alibi* has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused in the crime locality. But in the case in hand, it appears that the defence did not make effort to prove the plea of *alibi*. And even in course of summing up, the learned defence counsel for unknown reason did not make submission on this matter. However, it may be presumed that the defence made an effort, by taking such plea of *alibi*, to keep the accused distanced from the liability for the offence for which he has been indicted.

**411.** Principal perpetrators were the members of Pakistan occupation army. Local individuals affiliated to JEI, auxiliary forces used to collaborate with the army in carrying out such horrific criminal activities in 1971 in the territory of Bangladesh. It is now settled history of which we take judicial notice. Accused Sobhan was not an exception. He being the district Ameer of JEI had thus naturally being imbued by the ideology and policy of JEI acted significantly in aid of the army, in furtherance of common policy and purpose and thereby he consciously made him part to the attack by the army.

**412.** It is to be noted that even in absence of any proof as to physical participation of accused with any of killings he can be held responsible if it is found to have had substantially facilitated and contributed to the commission of the crimes. We are to see first the commission of the offence of alleged 'large scale killing' that was resulted by simultaneous attack directing the civilian population



**416.** Defence could not show that the accused refuting the above report published in 2007 in a national daily implicating him with the mass killing happened in 1971 around the locality of police station Sujanagar submitted any rejoinder. The narrative alone is not the proof of accused's culpability, true. But it lends strong assurance to the evidence provided by P.W.s on material particulars related to the event of attack that resulted in killing of numerous civilians. The pattern of attack together with the above report forces to conclude that the attack was pre-concerted and designed to which accused Moulana Sobhan was a part. And accused's act of accompanying the troops towards the crime sites, as already proved, obviously formed part of attack, in furtherance of plan, common propose and understanding.

**417.** It is true that mere act of siding with the Pakistani army for preserving solidarity of Pakistan did not constitute an offence of crimes against humanity. But it did not mean that the accused Moulana Sobhan was provided with a license to actively and knowingly collaborate with the occupation Pakistani army in carrying out barbaric atrocities directing non combatant Bengali civilians. Accused Sobhan was the vice president of Pabna peace committee. The document also proves it. Presumably accused Sobhan by virtue of his political prominence and position in the local peace committee actively aided the occupation army in carrying out its criminal activities.

**418.** The narrative made by **Hussain Haqqani** in his book titled "**Pakistan--Between Mosque and Military**" merits considerable attention. The narrative portrays the role of the pro-Pakistan political parties in forming peace committee, even at village levels, with a designed objective of assisting the Pakistani troops. **Hussain Haqqani** narrates that-

“ On addition to motivating the troops with religious frenzy, the regime gave the Jamaat-e-Islami, the **various factions of the Muslim League**, the Nizam-e-Islam Party, and the Jamiat Ulema Pakistan—the parties that had lost the election to the Awami League—a semiofficial role. The members of these parties formed peace

committees throughout Pakistan's eastern wing [Bangladesh], at district and even village levels. These parties functioned as the intelligence network of the Pakistan army.....”

[Source: **Hussain Haqqani** in his book titled “*Pakistan- Between Mosque and Military*”, page 77, also Maniruzzaman, Bangladesh Revolution, page 101

**419.** The above narrative thus portrays the role of JEI which culpably sided with the Pakistani occupation army, being prompted by religious frenzy. Accused Moulana Sobhan was in potential position of district JEI in 1971. The evidence presented leads us to infer that he knowingly used to assist the occupation army, in exercise of his political prominence and made him concerned with the commission of systematic crimes by the army.

**420.** Accused Moulana Abdus Sobhan has been indicted for abetting and facilitating commission of the offences of **murder** as crimes against humanity and also for the offence of ‘**genocide**’. But the prosecution has failed to establish the constituent elements of the offence of ‘genocide’. The evidence presented before us does not show the ‘group requirement’ and the ‘intent requirement’ the necessary elements to characterize the killing of civilians as the offence of ‘genocide’. However, it has been found proved beyond reasonable doubt that the attack resulted in ‘large scale killing’ which may lawfully be characterized as the offence of ‘**extermination**’.

**421.** It is now settled that the offence of ‘extermination’ as crime against humanity involves killing within the context of a systematic attack against the civilian population, and the requirement of the offence of ‘extermination’ is that the killings occur on a ‘**mass scale**’.

**422.** The expression ‘large scale’ or ‘large number’ does not suggest a numerical minimum. ‘Extermination’ may be committed intending to bring about the death of a ‘large number’ of individuals. The attack resulted in death of hundreds of civilians of many villages. The intent of

the perpetrators was to accomplish ‘large scale killing’ of civilians belonging to ‘pro-liberation’ class of the targeted villages.

**423.** The pattern and feature of the killings lead us to conclude that it was a ‘large scale killing’ having all the required elements to constitute the offence of ‘**extermination**’ [an aggravated form of murder] as crime against humanity. The intent of the perpetrators was to kill civilians on massive scale which was carried out in the sites nearer to each other for couple of hours, with similar pattern of killings.

**424.** Accused’s act, conduct and presence with the principal perpetrators leading to the core action to the commission of the principal crime was part of a vast murderous enterprise in which a larger number of civilians were systematically killed, it is proved. Accused abetted and substantially facilitated the group of army pursuant to a common ‘understanding’—the pattern of attack and accused’s act and conduct forming part of attack lead to conclude it.

**425.** We are convinced to record our finding that the accused Moulana Abdus Sobhan , for his participation to the attack in question and also for his acts, conduct and culpable association with the army the principal attackers is criminally responsible for all the criminal acts resulting from the criminal plan and design and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of these acts forming the concurrent attack. This view is in conformity to the provisions in respect of liability contained in section 4(1) of the Act of 1973. Accused Moulana Abdus Sobhan , by his acts, conducts and act of common ‘understanding’ abetted, facilitated and participated the commission of ‘large scale killing’ of civilians of numerous villages under police station Sujanagar of district Pabna . Therefore, the accused Moulana Abdus Sobhan who was a part of collective criminality incurred liability under section 4(1) of the Act of 1973 for the offence of ‘**extermination**’ as **crimes against humanity** as enumerated in section 3(2)(a)(g)(h) of the

Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

## **Adjudication of Charge no.07**

### **[Abduction and killing civilians at Bharara and at village Debottor]**

**426. Charge:** This charge involves the act of abduction followed by killing civilians. It narrates that in between 08:00 am of 20 May 1971 and 02:00 pm of 21 May 1971 the group of Pakistani army led by accused Moulana Abdus Sobhan the then acting Ameer of Pabna district JEI had picked up Rustom Sheikh and others of village Bharara under Pabna Sadar Police station, took them to the field of Bharara High School and then to Nurpur Power Station and then to the southern part of Debottor Bazaar under Atgharia police station where 19 civilians including Abdul Jabbar, Seraj Sheikh, Nurul Islam, Sheikh Rustom Sheikh and Abdul Majidul Sheikh were systematically killed. Therefore the accuse Moulana Abdus Sobhan has been charged for abetting and facilitating the commission of offences of murder, abduction and torture as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act and thus he incurred liability under section 4(1) and also under section 24(2) of the Act.

### **Witnesses Examined**

**427.** Prosecution, in order to prove this charge, depends upon the testimony of P.W.16, P.W.17 and P.W.18. Prosecution avers that of these three witnesses P.W.17 Ali Rana Sheikh is the son of victim Rustom Sheikh, P.W.16 narrated the act of killing Majid as he came to the place in front of the mosque where the detained persons were taken there, P.W.18 Abdul Aziz is one of civilians forcibly captured by the group of attackers who has testified the killing of Majid.

### **Evidence presented**

**428. P.W.17. Ali Rana Sheikh [56]** testified in respect of killing his father and five paternal uncles after the Pakistani army led by Jamaat-e-

Islami leader Abdus Sobhan took them away forcibly from their village during the liberation war.

**429.** P.W.17 Ali Rana Sheikh a resident of village **Bharara** stated that at around 8:00am of the fifth day of Bangla month Jaistha [1971], the occupation troops besieging their village under the leadership of Sobhan Moulana, entered their home and detained his father Rustom Sheikh, uncles Jabbar Sheikh, Nurul Sheikh, Seraj Sheikh, Abdul Majid Sheikh, Taleb Sheikh and others before taking them to Bharara Shahi Masjid.

**430.** P.W.17 also stated that the Pakistani army also took Seraj Sheikh, Delbar Sheikh, Gedan Sarder, Khedan Sheikh, his son Kader Sheikh, Hakim Sarder, Keta Sarder, Akbar Sheikh, Harun-or-Rashid Sheikh, Manik Kha, Utken Sheikh, and others to the place in front of the mosque, on capture. When his uncle Abdul **Majid Sheikh** started 'altercating' with Moulana Sobhan in front of the Shahi Masjid, the Pakistani army shot him dead following Sobhan Moulana's direction. P.W.17 claims that he witnessed the killing from the side of the mosque.

**431.** In respect of reason of knowing the accused Moulana Sobhan, P.W.17 stated that Moulana Sobhan used to visit their locality very often in connection with the election in 1970 and as such he knew him [accused].

**432.** In cross-examination, P.W.17 admitted that Bander Ali was a Razakar and he was killed by the freedom fighters for leading the massacre happened in their locality in 1971. He also stated in cross-examination that he knew Natub Ali Karikor of their village who was the chairman of the peace committee of their union and he saw him present at the field of Bharara Shahi mosque [where the detained persons were brought first]

**433.** P.W.17 stated what he learned about killing of civilians at village Debottor from Seraj, Delbar Sheikh and Akbar Sheikh who eventually survived even after receiving bullet hit. P.W.17 stated that he heard that

around 12:00 pm, all the detainees were taken to Nurpur Power Station, where they were subjected to torture. The next day, 11 victims were taken to Debottor village, where they were sprayed with bullets. However, Seraj Sheikh was set at liberty as he became sick due to torture caused to him.

**434.** P.W.17 stated too that the residents of Debottor village rushed the killing site as the Pakistani army led by Moulana Sobhan left the killing site and found there bodies of six detainees—his uncles Seraj Sheikh, Jabbar Sheikh, Nuru Sheikh, Taleb Sheikh, Utken Sheikh and Gedon Sarder—who were killed there. This above natural version on material particular remained undisputed as the defence did not deny it in cross-examination.

**435.** P.W.17 learnt about the killing at village Debottor from the victims Seraj Sheikh, Akbar and Delbar who readily survived despite receiving bullet injury.

**436.** About the remaining four detainees who survived even after receiving bullet injury, P.W.17 stated that his father Rustom Sheikh died in nearby Ekdanta village three or four days later and bullet-hit Manik Kha died in Sreepur village after the same period of time, while Akbar and Delbar died five or six days later in their Bharara village.

**437. P.W.16 Akkas Sheikh [65]** is the brother of one victim Utken Sheikh of Pabna Sadar. P.W.16 stated that in the morning of the fifth day of Bangla month Jaistha, the Pakistani army, accompanied by **Sobhan**, besieged their Bharara village. Moulana Sobhan, along with the military men, picked up people from different homes of the village and forcibly took them in front of the Bharara Masjid.

**438. P.W.16** further stated that he saw Moulana Sobhan taking away his brother Utken Sheikh from their home to the mosque. He [P.W.16] also went to the mosque following his brother and found his maternal grand-

father Khedan Sheikh, maternal uncle Kader Sheikh along with other detainees. In the mosque premises, Sobhan read out the names of some detainees from a list and Sobhan's cohorts separated them identifying as the supporters of Awami League. The name of **Majid Sheikh** was called thrice and then he responded. With this Moulana **Sobhan ordered** the Pakistani army **to kill him** and the troops shot him dead on the spot.

**439.** P.W.16 stated too that the other detainees were then taken to Nurpur Power station in Pabna by the army vehicles. He **heard** it two hours after the detainees were so taken to Pabna. In cross-examination P.W.16 stated that he heard it from Natub Ali Karikor, his neighbour [chairman of union peace committee as found from evidence of P.W.17].

**440. P.W.16** testified what he heard about the killing of detained persons that took place at village Debottor. He stated that on the following day[12 May, 1971] at about 10:00-10:30 am the 11 detained persons were taken to a bamboo clump at village Debottor where 06 died including his brother Utken Sheikh due to gun shot and 04 however survived despite receiving bullet injury . One elderly detainee named Seraj was set at liberty. He [P.W.16] heard the event of killing from said Seraj when he returned back home.

**441.** P.W.16 stated that he knew accused Sobhan since earlier as he used to visit their locality in connection with election campaign.

**442.** Defence could not refute what has been testified by P.W.16 on material particular including the event of abduction and killing in front of Bharara Shahi mosque. Defence even did not specifically deny the version so far as it relates to hearing the event of killing occurred at village Debottor.

**443. P.W.18 Abdul Aziz [62]** is a resident of village **Bharara**. He was also forcibly taken in front of Bharara mosque along with other detained civilians. He testified linking the accused Sobhan with the abduction and subsequent killing of the detainees.

**444. P.W.18** stated that in the morning of the fifth day of Bangla month Jaistha [1971], he found the Pakistani army vehicles and a white car parked beside the home of his neighbour Delbar Sheikh. He saw Moulana Sobhan and Bander Chairman getting down from the white car, and Sobhan Moulana, along with six-seven army men, entered Delbar Sheikh's house and brought him out by the army men. On seeing him [P.W.18] Sobhan took him too with Delbar and marched to west of the village along with the army men. At a stage, the army also captured Seraj Sheikh from his home. Next, Gedan Sarder, Kadu Sheikh, Keta Sarder, Rustom, Majid, Jabbar Sheikh, Taleb Sheikh, Akbar Sheikh, Harun Sheikh, Manik Kha and Utken Sheikh were also forcibly picked up from their house the same way and taken in front of Bharara Shahi Masjid where they found 10-12 army vehicles parked.

**445. P.W.18** also stated that they [detainees] were made stood in a line and Moulana Sobhan read out Delbar's name from the paper in his hand. Those whose names were announced [by Sobhan] in this way were put in a separate line. At one point, as **Majid Sheikh** [a detainee] responded when his name was called for the third time, the Pakistani army **killed** him following Sobhan's order. Then, 17 detainees were taken to Pabna by army vehicles.

**446.** About the killing of detained persons at village **Debottor** P.W.18 stated that he **heard from Delbar** one of detainees who somehow survived despite receiving bullet-hit that the 17 were first taken to Nurpur Power Station, Pabna and were kept detained there. On the next day, 11 detainees were taken to Debottor village and Seraj Sheikh was released at Debottor Bazaar. The remaining 10 detainees were sprayed with bullets beside a bamboo bush near Debottor Bazaar. He [P.W.18] also heard from Delbar that the Pakistani army opened the fire on the direction of Moulana Sobhan and with this, six detainees were killed on spot, and four including Delbar were injured, and they died after a few days.

**447.** The above version appears to have been merely denied in cross-examination. But the defence could not bring anything that may reasonably taint the credence of what has been testified by P.W.18, on material particular.

### **Deliberation and Finding with Reasoning**

**448.** The learned prosecutor submitted that the three witnesses examined, to prove this charge, are the witnesses to material facts related to the entire event of attack that resulted in killing of civilians detained on capture. Accused Sobhan was with the group of army while the act of abduction took place. It has been proved by the evidence of P.W.17 and P.W.16. Majid one of detained persons taken in front of Bharara mosque was gunned down to death on accused Sobhan's direction. It has been proved by P.W.17 and P.W.18. Defence could not dislodge the fact of taking the rest of detained persons to Nurpur Power Station army camp.

**449.** The learned prosecutor went on to submit that the detainees were taken to Debottor bazaar on the following day where some of detainees were killed and some could survive even receiving bullet injury. It remained undisputed. Involvement of accused Sobhan with the act of abduction and the conduct that he had shown in causing the killing of Majid in front of Bharara mosque were chained to the final killing at Debottor bazaar. Accused's conduct and act in accomplishing the act of abduction is by itself formed part of attack and as such he is responsible for the act of killing selected pro-liberation civilians.

**450.** On contrary, the learned defence counsel submitted that the testimony of P.W.16 and P.W.17 in relation to fact of alleged 'capture' of civilians suffers from discrepancies. Accused Moulana Sobhan did not accompany the troops in committing the act of abduction alleged. Rather, the evidence suggests that it was one Bander Ali who actively accompanied the group of attackers. There has been no evidence to show accused's involvement with the act of killing the detained civilians at

Debottor bazaar. P.W.17 was a minor boy in 1971 and as such not competent to memorize what he witnessed.

**451.** The alleged event of attack involved three phases. **First**, abduction of pro-liberation civilians from their houses by the group of army accompanied by accused Sobhan. **Second**, the detained civilians were taken to the field of Debottor Shahi mosque where Majid one of detainees was killed. **Third**, the detainees were taken to the army camp at Nurpur Power Station, Pabna wherefrom on the following day they were taken to the killing site at village Debottor where the perpetrators set Seraj one of detainees at liberty as he was an elderly man and had killed 06 by gun shot and 04 survived despite receiving bullet injuries.

**452.** Naturally, no one had occasion to see what happened at the army camp and how the killing of detainees took place at village Debottor, on the following day. The act of abduction was thus chained to the act of killing the detained civilians with which the attack was eventually ended. However, the killing the detained civilians remained undisputed.

**453.** The P.W.s had opportunity to see the act of abduction and the killing of Majid one of detainees in front of Bharara Shahi mosque. In respect of the killing some other detainees at Debottor village on the following day the P.W.s stated what they learned from the detainees survived readily. Now let us resolve how far the prosecution has been able to prove accused Sobhan's complicity and involvement with the attack.

**454.** First part of P.W.17's version relates to forcible capture of his father and paternal uncles and taking them to the field of Bharara Shahi Masjid. P.W.17 claims that at the relevant time he had been at their home and as such he had opportunity of seeing the act of such forcible capture.

**455.** P.W.17 saw his uncle Abdul **Majid Sheikh [a detainee]** started 'altercating' with Moulana Sobhan in front of the Shahi Masjid and then

the Pakistani army gunned him down to death following Sobhan Moulana's direction.

**456.** P.W.17 claims that he witnessed the killing from the side of the mosque. Defence simply denied this crucial version. But it could not impeach it in any manner by cross-examining the P.W.17. Evidence of P.W.17 which carries probative value proves accused Sobhan's active and culpable presence in the field of Bharara Shahi mosque where the detained persons were brought and made assembled and at a stage the army gunned down Majid one of detainees to death on Sobhan's direction.

**457.** Moulana Sobhan's presence in the field of Bharara mosque gets assurance from the fact that Razakar Bander Ali was also with the group of attackers in abducting the civilians and Natub Ali Karikor of their village who was the chairman of the peace committee remained present at the place in front of Bharara mosque where the detained persons were taken first

**458.** Defence by submitting photo copy voter list [submitted on 15.9.2014, at the fag end of trial] showing P.W., 17's date of birth as 01.2.1966. Depending on this paper learned defence counsel argued that in 1971 P.W.17 was a minor boy of 05 years and as such he had no reason to know the accused and witness the event occurred.

**459.** We are not convinced with the defence submission. First the photocopy of alleged voter list does not appear to have been authenticated by the appropriate authority and as such cannot be taken into account. Second, the same has not been furnished to the Tribunal in compliance with the provisions contained in section 9(5) of the Act of 1973. Third, trend of showing incorrect date of birth either in the voter list or any other document is frequently experienced in our society. Taking all these factors into consideration we exclude this paper from consideration.

**460.** The version the P.W.17 made in his cross-examination that Razakar Bander Ali led the group of attackers in abducting the civilians and Natub Ali Karikor of their village who was the chairman of the peace committee remained present at the field of Bharara Shahi mosque. This version rather affirms the fact of launching attack that resulted in forcible capture of many civilians on 21 May 1971 and the group of army was accompanied by local collaborators. Defence simply denied the reason of knowing the accused Sobhan, as stated by the P.W.17. But it could not be dislodged in any manner.

**461.** Therefore the unimpeached version of P.W.17 that the group of army under the leadership of Sobhan Moulana entered their home and detained his father Rustom and others inspires credence.

**462. P.W.16** is the brother of Utken Sheikh one of victims. According to him the group accompanied by accused Moulana Sobhan took away his brother Utken Sheikh from their home before his eyes to the mosque and he [P.W.16] also went to the mosque following his brother

**463.** In the mosque premises, Sobhan read out the names of some detainees from a list and Sobhan's cohorts separated them identifying as the supporters of Awami League. It indicates that the pro-liberation civilians were the targets of the perpetrators. And the accused had acted actively in providing assistance to the principal perpetrators the army men. The name of **Majid Sheikh, a detainee** was called thrice and on his response accused Moulana **Sobhan ordered** the Pakistani army **to kill him** and the troops shot him dead on the spot.

**464.** The above corroborates the evidence of P.W.17 about the taking of captured civilians in front of Bharara Shahi mosque by the group of army accommodated and assisted by accused Sobhan. The narration made by P.W.16 in respect of killing Majid and accused Sobhan's role and conduct in facilitating its commission gets corroboration from the evidence to P.W.17. Similar version has been testified by P.W.18 who was also taken in front of Bharara Shahi mosque along with other detainees, on capture.

**465. P.W.18**, about the reason of knowing accused Moulana Sobhan stated that he knew him [accused Sobhan] as he used to visit the house of Kafiluddin doctor of their village in connection with election campaign. In cross-examination, P.W.18 stated that he could recall that Moulana Sobhan and Amjad Saheb contested the election in the year before the war of liberation.

**466.** In cross-examination, in reply to question put to him by the defence P.W.18 stated that on the fifth day of Bangla month Jaistha [1971] he saw Ali Rana Sheikh [P.W.17] near the Bharara Shahi mosque. This version provides corroboration to the fact of P.W.17's presence near the Bharara mosque which made him able to see the criminal activities by the perpetrators including the killing of Majid and as such the evidence of P.W.17 carries probative value.

**467.** Direct testimony of P.W.18 also proves that accused Moulana Sobhan substantially facilitated and abetted the army men to gun down Majid, a detainee to death. Defence could not cast doubt to the corroborative evidence of these three witnesses about the abduction of civilians, killing of detainee Majid and accused's participation and involvement with it.

**468.** Thus, it stands proved that the accused Moulana Abdus Sobhan by his act of accompanying the troops at the abduction phase and also by his act of facilitating the principals in committing the killing of Majid a detainee was consciously concerned with the entire attack. And the accused had acted in such culpable manner knowing consequence and sharing intent of the principals.

**469.** P.W.17 does not claim that he heard too that in accomplishing the killing at village Debottor accused Sobhan remained present there accompanying the group of army.

**470.** In cross-examination, P.W.16 stated that he learned the taking of detained civilians to Nurpur power station army camp from Natub Ali

Karikor, one of his neighbours [chairman of union peace committee as found from evidence of P.W.17]. With this it stands proved that the detained persons were taken to the army camp set up at Nurpur power station, Pabna. This fact materially related to the event of killing detained civilians at Debottor provides corroboration to what the P.W.16 stated about his learning the event of killing 06 including his brother Utken Sheikh from Seraj an elderly detainee who was set at liberty.

**471.** The act of abduction, taking the detainees at a place in front of the mosque, Killing Majid[uncle of P.W.17] in front of the mosque, taking the detainees to Nurpur army camp, killing them , on the following day, at village Debottor were chained together. All these criminal acts formed a complete attack.

**472.** The evidence presented does not demonstrate that the accused Sobhan was concerned with all the phases of attack. But for holding the accused liable for the offences his complicity or involvement by act or conduct with any of phases is sufficient to establish his ‘participation’ or concern. For concern with any of phases formed part of attack that resulted in killing the detained civilians.

**473.** It has already been proved that the accused was with the group of army in carrying out the act of forcible capture of civilians, taking them in front of the mosque where on his substantial contribution and instigation the army gunned down Majid Sheikh the uncle of P.W.17 to death.

**474.** P.W.18 heard from Delbar one of survived detainees that the detained persons taken to the army camp at the army camp at Nurpur Power Station, Pabna were brought to Debottor Bazaar, on the following day, where the Pakistani army shot them and with this six detainees were killed on the spot while four died later, and one Seraj Sheikh was released as he was old.

**475.** The rest of detainees were taken to Nurpur power station army camp. It remained undisputed. The army had killed six of those detainees, on the following day at village Debottor—defence does not dispute it, presumably none of witnesses implicates the accused with this killing. But it is not necessary to show accused's physical presence or concern with it, for holding him liable.

**476.** According to the settled jurisprudence, if it is found that the act and conduct that the accused had shown by accompanying the group of attackers and remaining present with them in accomplishing the act of abduction of civilians from their homes and then killing one of detained persons Majid he can be held responsible for the outcome of the entire attack. For the accused had conscious participation to the act of abduction of pro-liberation civilians that eventually led to their confinement at the army camp and killing on the following day.

**477.** On integrated evaluation of evidence presented we conclude that the prosecution has been able to prove beyond reasonable doubt that accused Moulana Abdus Sobhan the then acting Ameer of Pabna district JEI , in furtherance of policy and plan, had accompanied the group of Pakistani army in causing forcible capture of pro-liberation civilians of village Bharara, bringing them in front of Bharara Shahi mosque wherein on his culpable facilitation and inducement the army men gunned down Majid one of detainees.

**478.** It stands proved too that the selected pro-liberation detainees were then taken to the army camp at Nurpur Power Station, Pabna by army vehicles and on the following day they were brought at Debottor bazaar where some of the detainees were gunned down to death and some could survive although died within few days as they received bullet injuries.

**479.** Accused Moulana Abdus Sobhan's physical presence and participation at the second crime site does not appear to have been proved. But as already viewed that accused's act and conduct prior to the killing at Debottor formed part of attack and since his act and conduct in

effecting abduction of civilians was chained even to the killing that happened at village Debottor by the army he [accused] can be lawfully held responsible for the entire attack that resulted in killing of detained civilians. Accused Moulana Abdus Sobhan is therefore found liable under section 4(1) of the Act of 1973 for abetting and facilitating the commission of the offences of '**abduction**' and '**murder**' as crimes against humanity as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973, by his participation and conduct which are punishable under section 20(2) read with section 3(1) of the Act.

### **Adjudication of Charge No.08**

#### **[Abduction, torture and murder at Radha Gobinda Mandir at village Kuchiamara]**

**480. Charge:** This charge alleges that on any day of first week of September 1971 at about 02:00 pm a group of Razakars accompanied by accused Moulana Abdus Sobhan came at the Razakar camp at **Dublia bazaar** by a vehicle and then apprehended **(1) Kalimuddin Kha** along with another person from the tea stall of Gobinda and brought them to the Razakar camp where they were subjected to torture. Afterwards, in evening the accused and his accomplices went towards Pabna town along with the apprehended civilians. On the following day at about 10:00 am the accused and his accomplices took the detainees to Radha Gobinda Mandir at village **Kuchiamara** under Pabna Sadar police station and shot them to death. Therefore, the accused Moulana Sobhan has been charged for abetting and facilitating the commission of the offences of abduction, torture and murder as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 which are punishable under section 20(2) of the Act and thus the accused incurred liability under section 4(1) and 4(2) of the Act.

#### **Witnesses Examined**

**481.** In order to prove this charge, prosecution adduced two witnesses who have been examined as P.W.19 and P.W.20. Of them P.W.19 Nizamuddin Khan is the brother's son of victim Kalimuddin. He claims

to have witnessed both parts of the event. P.W.20 Hossain Sarder testified the fact of coming accused Moulana Sobhan at Dublia Bazar and the killing site the temple at village Kuchiamara, prosecution claims.

### **Evidence Presented**

**482.** The charge involves two parts—abduction of Kalimuddin and another civilian from Dublia bazaar and killing them at the temple at village Kuchiamara, on the following day. The charge framed alleges that on forcible capture the detainees were taken towards Pabna town.

**483. P.W.19 Nizamuddin Khan [61]** is the brother's son of victim Kalimuddin. In 1971 he was 17-18 years old. He stated that there had been a Razakar camp set up at Sadullahpur Union Parishad Office at Dublia bazaar. His [P.W.19] uncle Kalimuddin Khan was a retired member of armed force in 1971 and he used to act saving the Hindu community and helping the freedom fighters.

**484.** In respect of the event of forcible capture, P.W.18 stated that on any day during the first week of September at about 02:00 pm while his uncle was taking tea sitting at the tea stall of Gobinda at Dublia bazaar he [P.W.19] saw a jeep arriving at Dublia bazaar Razakar camp and instantly the camp commander Samad, Razakars Palu, Kader, Momtaj accompanied by Moulana Sobhan came to the tea stall and apprehended Kalimuddin and took him to the Razakar camp. With this he [P.W.19] and others sent some innocent people to the camp for knowing the condition of his uncle. They on returning there from informed that the Razakars were beating up his [P.W.19] uncle. At about dusk, he saw Moulana Sobhan and Razakars taking apprehended Kalimuddin and another one by the jeep towards Pabna town, P.W.19 added

**485.** P.W.19 further stated that on the following day he and some of their family met Naimuddin the brother of Kalimuddin at village Sreekole. Naimuddin along with 10-15 persons including Hossain Sarder and him started towards village 'Kuchiamara'. When they arrived at a place nearer

to the Kuchiamara Kali Mandir[temple] at about 09-10 am they saw a vehicle arriving in front of the Kali Mandir[temple] and also saw the armed Razakars taking his uncle inside the Kali Mandir. They could see it remaining in hiding inside a bush. After taking his uncle inside the Kali Mandir they heard 5-7 gun firing and instantly after it Moulana Sobhan along with Razakars went towards Pabna. Then they came out of the hiding place and entered into Kali Mandir where he found his uncle [Kalimuddin Khan] lying dead sprinkled with blood. They brought the body of Kalimuddin to village Sreekole and buried them there. Finally P.W.18 stated that he knew accused Moulana Sobhan.

**486. P.W.20 Hossain Sarder [100]** is a resident of village Sreekole. He stated that on any day during the last part of Bangla month Vadra [in 1971] Kalimuddin had been at the tea stall of Gobinda. Moulana Sobhan arrived there by a vehicle and got Kalimuddin apprehended by Samad Razakar and took him to Razakar camp and at about dusk took him [Kalimuddin] to Pabna.

**487.** P.W.20 next stated that on the following day Nizamuddin Khan and Akkas came to Naimuddin Khan's house and they together moved towards Kuchiamara to have trace of abducted Kalimuddin. He [P.W.20] followed them. On arriving at a place near the Kuchiamara temple they saw a vehicle arriving in front of the temple and with this they remained in hiding and saw Moulana Sobhan and his accomplices Razakars taking Kalimuddin inside a building and sometimes later they heard gun firings and then Moulana Sobhan went towards Pabna by the vehicle. They entered the temple and found three dead bodies including Kalimuddin. They brought the body of Kalimuddin to village Sreekole where he was buried. P.W.20 also stated that he knew Moulana Sobhan since earlier.

**488.** In cross-examination P.W.20 stated that he did not go to the tea stall of Gobinda [at Dublia bazaar] on the day preceding to bringing body of Kalimuddin to village Sreekole. He did not know at which place in Pabna Kalimuddin was taken but he heard that he was taken to Pabna. P.W.20 admitted that one had to go to Pabna by crossing the localities of

Sreekole, Patoa, Dublia bazaar, Koladi, Naldah, Khayersuti and the village Kuchiamara situated to north of village Sreekole

### **Deliberation Finding with Reasoning**

**489.** The learned prosecutor argued that the act of abduction of Kalimuddin Khan and another from Dublia Bazaar by the group of Razakars led by accused Moulana Sobhan has been proved by P.W.19, an eye witness. P.W.19 and P.W.20 on the following day saw the accused Moulana Abdus Sobhan with the perpetrators at the temple at village Kuchiamara. Defence could not impeach the testimony of these witnesses in respect of material facts that prove accused's concern and participation to the commission of the principal crime at the temple.

**490.** Conversely, the learned defence counsel submitted that the testimony of P.W.19 suffers from exaggeration and the event did not take place in the manner alleged. P.W.19 found only one killed at Kuchiamara temple while according to P.W.20 three bodies were found inside the temple. P.W.19 was not a credible and competent and he had no reason to recognise accused Sobhan. According to P.W.19 the group accommodated by accused Sobhan moved towards Pabna along with captured Kalimuddin and another one. But on the following day he [P.W.19] and others moved towards the temple at village Kuchiamara to have trace of the detained persons as claimed by P.W.19. Thus claim of going to Kuchiamara and seeing the alleged killing becomes reasonably doubtful as it remained unexplained as to the reason of moving towards Kuchiamara even when they knew that the abducted persons were taken to Pabna. The event of killing might have taken place but the accused Sobhan had no nexus with it in any manner.

**491.** It is to be noted that the charge framed alleges that accused Moulana Sobhan was with the Razakars in committing the act of abduction of the victim Kalimuddin and another one who were first taken to Dublia Bazaar Razakar camp; and then the captured victims were taken to Pabna town on a vehicle by accused Sobhan and his

accomplices. On the following day the victim Kalimuddin and two others were found murdered at the temple at village Kuchiamara, the charge framed avers. The group of attackers formed of Razakars and accused Moulana Abdus Sobhan accompanied them to both the sites and thereby abetted and facilitated the perpetrators in committing the crimes, prosecution alleges.

**492.** It is not clear from the version made in examination-in-chief by P.W.20 whether he saw the act of abducting Kalimuddin or heard about it. But it transpires from the version made on cross-examination that P.W.20 did not see the event of abducting Kalimuddin from Dublia bazaar.

**493.** In cross-examination P.W.20 stated that he did not go to the tea stall of Gobinda [at Dublia bazaar] on the day preceding to bringing body of Kalimuddin to village Sreekole from the temple at village Kuchiamara. He did not know at which place in Pabna Kalimuddin was taken but he heard that he was taken to Pabna. From whom he heard it? His testimony does not provide any indication in this regard. Thus, the testimony of P.W.20 so far as it relates to the event of forcible capture implicating accused Moulana Sobhan deserves to be excluded from consideration.

**494.** According to P.W.19 at about dusk, he saw Moulana Sobhan and Razakars taking apprehended Kalimuddin and another one by a jeep towards Pabna town from Dublia Bazaar Razakar camp. But surprisingly both the P.W.s stated that on the following day they moved towards village Kuchiamara for having trace of abducted Kalimuddin the victim.

**495.** P.W.19 simply stated that he knew accused Sobhan since earlier. But his testimony does not reveal the reason of knowing the accused since earlier. If it accepted to be true that on forcible capture the captured victims Kalimuddin and another one were taken to Pabna town by a white vehicle why they, on the following day moved to village Kuchiamara? This crucial question remained unanswered.

**496.** Without any reason or basis whatsoever they moved to the temple at village Kuchiamara in search of victim who was allegedly brought to Pabna town. Therefore, their testimony made in this regard seems to be reasonably doubted. We find substance in submission made on part of the defence in respect of seeing what happened at the temple at village Kuchiamara, on the following day.

**497.** P.W.19 claims that accused Sobhan and his accomplices took the two detained victims to Pabna town by a white vehicle. We have already found that accused Sobhan used to move by his white colour private car. Does the seating capacity of a vehicle like car or jeep make it possible to move along with accomplices and two detained persons?

**498.** P.W.20 stated that they [including P.W.19] remained in hiding at a place near the Kuchiamara temple and sensing arrival of a vehicle there they saw accused Moulana Sobhan and his accomplices Razakars taking Kalimuddin inside a building[temple].

**499.** According to P.W.19 when they arrived at a place nearer to the Kuchiamara Kali Mandir [temple] at about 09-10 am[on the following day] they saw a vehicle arriving in front of the Kali Mandir[temple] and also saw the armed Razakars taking his uncle Kalimuddin inside the Kali Mandir. They could see it remaining in hiding inside a bush, P.W.19 added.

**500.** But P.W.19 does not state that he saw accused Sobhan too getting down from the vehicle that allegedly arrived in front of the Kali Mandir. He saw the armed Razakars taking his uncle inside the Kali Mandir, getting down from the vehicle. And instantly after 5-7 gun firing, he saw Moulana Sobhan and Razakars returning back to Pabna [by the vehicle] coming out of the Mandir. Was it rational to see the accused coming out of the Mandir if he was not seen entering inside the temple? Thus, accused's presence at the temple as stated by the P.W.19 stands doubtful.

**501.** P.W.20 stated that they saw 3 bodies inside the Mandir sprinkled with blood. But P.W.19 does not state that he saw bodies of another two persons there. If the version of P.W.20 is considered to be true naturally the question arises as to when, how and by whom two other persons were brought inside the temple? And when the accused Sobhan came there and remained inside the Mandir?

**502.** Further, was it possible for accused, his accomplices Razakars to come at the Mandir along with three detained persons by one vehicle? We have found from evidence of P.W.20 that the village Kuchiamara was on the way to Pabna town. The captured victims could have been killed in Pabna town had they really been taken to Pabna town by a vehicle, as stated by P.W.19. Bringing the victims to Kuchiamara Mandir, on the following day, as described by P.W.19 and P.W.20 suffers from reasonable doubt.

**503.** The victim Kalimuddin might have been forcibly captured and taken to Razakar camp at Dublia bazaar and his dead body might have been found inside the Kuchiamara temple. But the narration made by P.W.19 so far as it relates to taking him to Pabna town by a white vehicle by a group of Razakars accompanied by accused Sobhan and seeing the accused Sobhan with the group of Razakars at the Kuchiamara temple bringing three detainees including Kalimuddin there by a single vehicle appears to be impractical and concocted intending to implicate the accused Moulana Sobhan with the alleged act of abduction and killing.

**504.** On totality of evidence adduced we are of the view that the prosecution has failed to prove the event that resulted in killing civilians occurred in the manner as alleged in the charge framed. Accused Moulana Abdus Sobhan's involvement or complicity to any of phases of the event does not appear to have been proved beyond reasonable doubt. Testimony of P.W.19 and P.W.20 seems to be contradictory to each other on material particular and it also suffers from reasonable doubt as their testimony stands irrational in establishing accused's nexus with the

commission of the crime in question. As a result, accused Moulana Abdus Sobhan **cannot be held liable** for the offence of '**abduction**', '**torture**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973.

**Adjudication of Charge No.09**  
**[Murder of 04 detained civilians at Iswardi Duk Bungalow]**

**505. Charge:** This charge arraigns accused Moulana Abdus Sobhan for abetting and facilitating commission of offence of plundering, arson, abduction, confinement, torture and murder as crimes against humanity. On **21.11.1971** at about 10:00 am accused Moulana Sobhan being accompanied by 50/60 Razakars had allegedly attacked the villages **Betbaria and Ramnathpur** under police station Iswardi of district Pabna and they plundered 10/12 houses of civilians including Shafiuddin Pramanik, Sabed Ali Pramanik, Kabiruddin Sarder, Tofazzal Biswas and set their houses on fire. In conjunction with the attack they [the group of attackers] abducted **Shafiuddin Pramanik, Bhadu and Boyna** of village **Betbaria** and **Osman** of village **Ramnathpur** and took them to CSD godown at Iswardi near the house of Moulana Isahaq Razakar and had kept them confined there. Three days after, accused and his accomplices took those 04 detained civilians at Iswardi Duk Bungalow where they were tortured to death. Therefore, the accused Moulana Abdus Sobhan incurred liability under section 4(1) and section 4(2) of the Act of 1973 for the commission of offences as specified in section 3(2)(a)(g)(h) of the Act which are punishable under section 20(2) of the Act.

**Witnesses examined**

**506.** In order to substantiate this charge prosecution adduced and examined two witnesses - one as P.W.10 and another one as P.W.14. The civilians from two villages were taken away on capture on 21 November 1971 and subsequently they were tortured to death in captivity. The witnesses chiefly narrate the event of forcible capture of 04 from village Ramnathpur and Betbaria.

## Evidence Presented

**507. P.W.10.Mst. Sanowara Begum [56]** is the cousin sister of victim Osman of village Ramnathpur. She narrated how Razakars had picked up and tortured her paternal cousin on instruction of accused Abdus Sobhan at Ramnathpur in Pabna in late October of 1971.

**508.** P.W.10 stated that on **12<sup>th</sup> day of Bangla month Kartik [corresponds to the end of October, 1971]** at about 7:00am, Sobhan along with one Khudu Kha and local Razakars attacked the village Betbaria and looted, torched the houses of Shafiuddin, Sadek and others. Later, they [attackers] went to village **Ramnathpur** and from her [P.W.10] paternal house they [attackers] caught her cousin Osman. Accused Sobhan told-- 'You gave shelter to freedom fighters, entertained them with food and helped them. Now I will let you know the consequence of giving shelter.'

**509.** P.W.10 went on to state that on Sobhan's direction, Razakars and Biharis started torturing him [Osman] indiscriminately, tying him with a mango tree of their house and made his hands tied behind his back. Accused's fellows started looting valuables on Sobhan's instruction and had kept the same in a big car. They also got her cousin with three others of Betbaria--Bhadu, Shafi and Boyna--into that car and took them to village Muladuli, P.W.10 added.

**510.** The detainees were kept in a Razakar camp set up next to one Isahaq Razakar's house. Sanowara's [P.W.10] family members requested Isahaq to set Osman free but he did not. The four detainees were later taken to Iswardi Duk Bungalow. Her uncle and relatives learnt from locals that the detainees were tortured to death at the bungalow on instruction of Sobhan Moulana. And body of Osman could not be traced even

**511.** P.W.10 stated that she saw Sobhan first during the 1970 election when he led the campaign for Khudu Kha in Pabna.

**512. P.W.14 Md. Azizul Sarder [54]** is the son of Sabed Ali of village Ramnathpur whose house was allegedly plundered and burned down by the group of attackers. P.W.14 stated that 50/60 Razakars accompanied by Sobhan had besieged their house around 8:30am on **30 October 1971** and started torturing their family members while his brother was tied with a mango tree. They looted their house and took away valuables before burning it down. Afterwards, they took his [P.W.14] brother away on a Razakars' vehicle. When he went near the vehicle to get his brother released, he saw detained Shafi, Boyna and Bhadu of Betbaria village on that vehicle. The detainees were taken to Muladuli Razakar camp.

**513.** P.W.14 further stated that his father and another brother had gone to Muladuli camp that evening and earnestly requested Isahaq Ali, local chairman of the Peace Committee to get Osman released.

### **Deliberation and Finding with Reasoning**

**514.** The learned prosecutor submitted that the attack directing the civilians, taking 04 on forcible capture to Razakar camp have been proved by the evidence of P.W.10 and P.W.14. Defence could not shake their testimony. Their evidence also proves that accused Moulana Sobhan was also with the group of attackers and as such he cannot evade the responsibility of killing the civilians in captivity.

**515.** On contrary, the learned defence counsel submitted that the version of the witnesses examined in respect of the date of the event differs from that stated in the charge framed. Evidence of the witnesses examined does not prove accused's presence with the group of perpetrators in committing the act of abduction of civilians. None of the witnesses states that the inmates of the affected families did go to the vehicle by which the captured victims were taken. But P.W.10 and P.W.14 who were admittedly tender aged moved towards the vehicle. It was not natural and as such does not inspire credence. Razakars and Biharis might have committed the act of forcible capture of civilians as alleged but the

accused was not with them. Testimony of witnesses in this regard suffers from reasonable doubt. The learned counsel further submitted that there has been no evidence to show that the accused was a part to the event of killing the detained civilians in captivity.

**516.** The chain of events as narrated in the charge framed involves abduction of 04 civilians from village Betbaria and Ramnathpur. On capture, the victims were first taken to the Razakar camp at Muladuli where they were tortured in captivity of three days. Finally, the detainees were brought to the Duk Bungalow at Iswardi where they were tortured to death. Accused Sobhan has been indicted for abetting and facilitating the commission of the offences in question.

**517.** The prosecution requires proving --(i) The commission act of abduction of 04 civilians from their houses , (ii) Who were the perpetrators?(iii) The accused Sobhan accompanied the group to the site wherefrom the victims were forcibly captured, (iv) Commission of the act of killing of detained civilians and (vi) The accused was a part to act of the commission of killing

**518.** Two witnesses have been examined, to substantiate this charge. P.W.10 a resident of village Ramnathpur is the cousin sister of victim **Osman** and P.W.14 is the brother of said victim Osman. In 1971 at the relevant time they were 12-13 years old. They claim to have witnessed the act of forcible abduction of the victims including their brother Osman. In respect of subsequent phases of the event, they narrated what they heard later on from their elderly relatives. The bodies of the victims could not be traced. Prosecution, on Tribunal's query, failed to clarify why any of relatives of three other victims have not been cited and examined as witnesses, in support of this charge.

**519.** At the outset, we reiterate that recovery of dead body is not required to prove the act of killing as such nature of offence happened in context of war and it was not an isolated murder but it occurred pursuant to systematic attack directed against civilian population. We also reinforce

that in proving 'group crime' and liability of an accused therewith even a single act or conduct of accused -- amid, prior or subsequent to the principal event is suffice to connect him with its commission, if such act or conduct had substantial effect on the commission of the principal crime. Physical participation in all aspects of the chained events need not be proved. It is now well settled.

**520.** The act of abduction on forcible capture was causally linked to the event of detention and killing of victims, true. Considering the context prevailing in 1971 we are convinced that there might not have been direct evidence to substantiate the fact of causing torture in detention and causing their death there. The P.W.s have testified what they heard, in this regard. But the source of such learning seems to have not been specified.

**521.** However, accused Sobhan's 'concern' or 'participation', by act of abetment and facilitation, if found proved, in committing the act of abduction on forcible capture of victims from their houses is suffice to prove his 'concern' even to the act of their detention and killing, perpetrated subsequently. But the prosecution must ably prove that accused's act, conduct and presence formed part of attack in committing the act of abduction, as an accomplice of the group formed of 50-60 Razakars and local Isahaq Razakar.

**522.** Both the witnesses claim that accused Sobhan accompanied the group of 50-60 Razakars in accomplishing the act of abduction. We agree that only the inmates of victims' family had occasion to see how the victims were so captured and forcibly taken away. But how the P.W.10 and P.W.14, who were minor in 1971, could say on dock that accused Sobhan accompanied the group of perpetrators? What rational made them able to recognise and identify the accused Moulana Abdus Sobhan?

**523.** There has been nothing on record that can give rise to reasonable inference that they were justifiably acquainted with the identity of

accused Sobhan, even since prior to the event. P.W.10 stated that she saw Sobhan first during the 1970 election when he led the campaign for Khudu Kha in Pabna. But in cross-examination she stated that the accused Sobhan did not visit their place any other time excepting on 12 Kartik in 1971 [the date of alleged event of abduction], as stated by P.W.10. Be that as it may, the reason of knowing accused Sobhan as stated by P.W.10 stands untrue.

**524.** We have found from evidence of P.W.10 that at the time of launching attack she and other family members could not go outside. It was natural. But it seems to be quite unnatural when P.W.10 claims that she started crying to get her brother [Osman] released when Moulana Sobhan and his accomplices were about to move towards Muladuli along with her brother Osman and three other captured, by a single vehicles along with looted valuables.

**525.** It is quite unbelievable that the elderly family members remained inside the house and only a minor girl of 12-13 years of age came forward to save or get release of a captured victim. Neither P.W.10 nor P.W.14 stated that at the moment of taking away the captured victims towards Muladuli, on capture by a car the adult members of their family also came out and had attempted to get Osman released. Thus, claim of seeing the perpetrators accompanied by Sobhan taking the victims away by a single vehicle, as stated by P.W.10 and P.W.14 does not inspire any credence. Be that as it may, how P.W.10 and P.W.14 became aware, at the time of the event of abduction that one of perpetrators was accused Sobhan? Prosecution failed to satisfy this crucial question, during its summing up.

**526.** P.W.10 claims to have had seen two vehicles while the group had taken the victims towards Muladuli. Of the two, one was white vehicle owned by Moulana Sobhan. How P.W.10 knew that the said white vehicle belonged to Moulana Sobhan, particularly when she had never seen him prior to the event, as stated by her in cross-examination.

**527.** Apart from this, P.W.14 who claims too to have had seen the attackers taking away the captured victims has not stated that he saw even a white vehicle, at the relevant time. But according to him, at that time the captured victims were taken by a vehicle and he rushed to it for getting his brother Osman released. Besides, it is quite unbelievable that the accused moved towards Muladuli taking four detainees, by a car along with looted valuables and accomplices as stated by P.W.14.

**528.** In view of above, we are prompted to conclude that the account of rushing towards the vehicle or vehicles, as stated by P.W.s, to get captured Osman freed is simply a fictional version intending to incriminate Sobhan with the event of abduction. Had the P.W.14 really saw the attackers taking the victims away towards Muladuli he would have surely seen the white vehicle as well there.

**529.** Besides, at the age of 12-13 they naturally were not familiar with identity of accused Sobhan. Thus, their version incriminating the accused Sobhan with the event of attack that resulted in victims' abduction, on forcible capture does not carry probative value.

**530.** Hearsay testimony so far as it relates to the event of taking the victims to Iswardi Duk Bungalow and causing their death there P.W.10 stated that on Sobhan's instruction Razakars and Biharis had killed the detained victims. First, how the P.W.10 became aware that the detainees including her brother were killed on accused's 'instruction'? Next, P.W.14 the brother of victim Osman does not narrate so.

**531.** Both the P.W.10 and P.W.14 were minor in 1971 and they merely heard the event of taking the victims to Iswardi Duk Bungalow where they were killed. Their hearsay testimony, in this regard, is anonymous and gets no corroboration from other evidence. Rather, their hearsay evidence so far as it relates to the event happened at Iswardi Duk Bungalow does not match to each other which creates glaring doubt as to truthfulness of such hearsay evidence. Finally, the date of the event alleged as narrated by both the P.W.s significantly differs from that as

stated in the charge framed. There has been no satisfactory explanation in respect of this grave flaw, on part of the prosecution.

**532.** We are thus not forced to act upon such uncorroborated and anonymous hearsay testimony. Therefore, accused's involvement with the event occurred at Iswardi Duk Bungalow stands not proved. Prosecution has utterly failed to prove accused Sobhan's involvement even with this part of charge concerning killing of detainees in captivity, by any reliable evidence and circumstances.

**533.** The act of abduction had a causal link to the detention of victims leading to their killing. It stands proved that 04 victims were taken to Muladuli first by the group of Razakars on forcible capture. But accused's involvement therewith could not have been proved beyond reasonable doubt by any lawful evidence. As a result, the accused cannot be linked to the event of victims' detention and their killing. The accused Moulana Abdus Sobhan thus **cannot be held liable** for the offences of '**abduction**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973.

## **XII. Contextual requirement to characterize the offence as crimes against humanity: Context prevailing in 1971 in the territory of Bangladesh**

**534.** The notion of crimes against humanity [CAH] refers to 'group crime' or 'system crime' which is not perpetrated by a single individual. But however, an individual may be held liable for participation to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed. Such act of conduct must form part of the 'attack'

**535.** The offence of 'crimes against humanity' must be committed as a part of the attack or had occurred as a consequence of the attack. And the 'attack' must be 'systematic' when it refers to a deliberate pattern of conduct. The charges before us for adjudication do not relate to isolated crimes. The events alleged occurred 'systematically' and in war time

situation directing non combatant pro-liberation civilians, in furtherance of policy and plan. Since the accused has been prosecuted for specific offences of 'Crimes against Humanity' under the Act of 1973 which were committed during the war of liberation 1971, it is obvious that they were committed in the context of the 1971 war of liberation.

**536.** The existence of a policy or plan may thus be evidentially relevant, but it is not a legal element of the crime. The acts of the accused must be part of the attack against the civilian population, but they need not be committed in the midst of that attack. It is the 'attack', not the acts of the accused, which must be directed against the target population, and the accused need only know that his 'acts' is part thereof.

**537.** "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in section 3(2) of the Act against any 'civilian population', and it may be pursuant to or in furtherance of a State or organizational policy to commit such 'attack'.

**538.** The context prevailing in 1971 in the territory of Bangladesh:

- (a) Policy was to target the self-determined Bangladeshi civilian community
- (b) High-level political or military authorities, resources military or other were involved to implement the policy
- (c) Auxiliary and para militia forces were established in aiding the implementation of the policy
- (d) The regular and continuous brutal nature of atrocities committed against the targeted non combatant civilian population

**539.** The above historically undisputed context by itself is sufficient to prove the existence of a 'widespread and systematic attack' on Bangladeshi self-determined population in 1971. Therefore, under the above context the specific offences committed as 'Crimes against Humanity' during 1971 independence war in any part of the territory of Bangladesh, patently demonstrate that those were of course consequence

of part of a 'widespread' or 'systematic' attack directed against the unarmed civilian population intending to wipe out pro-liberation civilians and non-combatant freedom fighters. Defence does not dispute the above context prevailing in 1971 in the territory of Bangladesh.

**540.** The Tribunal thus notes that the offences of crimes against humanity as enumerated in section 3(2)(a), were committed in the geographical area of district Pabna in 1971 under the above context which were inevitably the effect of part of 'widespread' or 'systematic' attack against the civilian population.

### **XIII. Had the accused 'superior' or 'commanding' authority over the army, Razakars and Biharis?**

**541.** Mr. Zead-al-Malum the learned prosecutor submitted that accused Moulana Sobhan in exercise of his superior position and authority over the Razakars, Biharis and the army had substantially contributed to the commission of the offences and thus incurred liability also under section 4(2) of the Act of 1973. He argued that the act of showing and identifying the pro-liberation civilians, guiding the group of army towards the crime site and ordering and instigating to perpetrate the crimes in question are fair *indicia* of his commanding position over them. The learned prosecutor emphasized that since the accused Sobhan was the vice president of Pabna district peace committee and the acting Ameer of Pabna district JEI he had 'effective control' over the Razakar force, Biharis and even the army whom he provided with substantive aid in carrying out atrocities he incurred liability under the theory of civilian superior responsibility which refers to section 4(2) of the Act of 1973..

**542.** Mr. Ehsan Siddique the learned defence counsel, in reply to submission on the concept of civilian superior responsibility advanced by the learned prosecutor Mr. Zead-al-Malum submitted that according to the charges framed the group of attackers formed of Pakistani occupation army, local Razakars and Biharis for the purpose of carrying out the attacks. There had been no superior subordinate relationship between the accused and the Razakar force nor did the accused have any

form of 'effective control' on them. Being a civilian the accused had no manner of commanding authority over the Pakistani armed force. Mere accompanying the army and Razakar force even in the capacity of the acting Ameer of Pabna district JEI does not offer to infer that in respect of all the attacks launched, accused Moulana Abdus Sobhan had led them in exercise of his position of authority.

**543.** Having regard to the atrocities proved and the manner the accused got him involved with it and his political profile in 1971 we disagree with the submission advanced by the learned prosecutor. On which organisation or group the accused had 'superior position'? A civilian is not supposed to have had commanding position on the armed force in 1971. He was not a member of Razakar and as such naturally had no effective control on them. The Bihari people [Urdu speaking people] did not belong to any specific organisation. However, they actively sided with the army, Razakars and pro-Pakistan organisations, true. But merely for this reason accused Sobhan cannot be termed to be an individual having commanding or superior position over this class of people nor the Biharis were accused's subordinates. For the same reason he cannot be held as the 'commander' or 'superior' of Razakar members, although they were his accomplices in carrying out many of criminal acts proved.

**544.** The term 'accomplice' is not synonym of the word 'subordinate'. Accused had nexus with the Biharis, Razakars who in fact had acted as his accomplices and not as his 'subordinates'. And thus we cannot infer that there had been even a *de facto* superior-subordinate relationship between the accused and his 'accomplices', the Bihari people and members of Razakars.

**545.** For holding the accused liable for the offences it is not necessary to show that he had been in superior position of those pro-Pakistan people belonging to those organizations and auxiliary force. It is enough to prove how the accused participated or committed the acts constituting the offences even in the capacity of an individual.

**546.** We have already recorded our reasoned and definite finding in respect of mode of liability of accused Moulana Abdus Sobhan in adjudicating all the charges. The charges framed allege that he remained present at the crime sites with the principal perpetrators and by act and conduct he participated, abetted, facilitated and contributed to the commission of offences for which he has been found guilty and thereby incurred individual liability. Therefore, it seemed to be redundant to insist again on proving accused's superior' position over the perpetrators, in the name of placing argument on 'law point' on the basis of misconceived notion.

**547.** By virtue of his potential position in district JEI the accused Sobhan had conscious association with the army, peace committee, Razakar force, Mujahid force, local Bihari collaborators. Indisputably under his approval, guidance and endorsement the local Biharis, members of peace committee and Razakar force might have collaborated with the occupation army in carrying out criminal acts against the pro-liberation civilians.

**548.** Even substantial influence alone on the principals does not prove accused's 'effective control' on them. In this regard, we agree with the submission extended by the learned defence counsel that in absence of authority of effective control over the members of the group of attackers the accused cannot be said to have had 'commanding position over them. It is to be noted that "substantial influence over subordinates that does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising superior criminal responsibility.[*Celebici* Appeal Judgement, ICTY Appeal Chamber, para. 266].

#### **XIV. Investigation Procedure**

**549.** Mr. Mizanul Islam, the learned defence counsel questioning the fairness of investigation procedure argued that the Investigation Officer did not make any effective effort in citing the members of victims'

family as witnesses to the event narrated in charge no.4. The IO submitted unfounded report in respect of the event narrated in charge no. 6. Investigation done on the event narrated in this charge was perfunctory as the IO admittedly did not visit all the crime villages. The IO purposefully omitted to submit statements of some of witnesses examined during investigation. The books and report published in a national daily news paper relied upon by the prosecution, as collected by the IO did not narrate accused's involvement with any of alleged crimes. The IO could not collect any document whatsoever to show that accused Moulana Abdus Sobhan was somehow linked to local Razakar force.

**550.** The Tribunal notes that the task of investigation on the event constituting the offence of crimes against humanity committed in 1971 has been done under the provisions as laid down in the Act of 1973. It is to be noted that the investigation officer is a mere formal witness. Any procedural flaw even if found in the task of investigation does not necessarily impair the merit of the case.

**551.** Besides, it is significant to note that the task of investigation under the Act of 1973 is a quite unique and challenging task for the officer assigned with it, particularly long four decades after the events occurred. Facing this reality and challenge the Investigation Agency constituted under the Act of 1973 has been carrying out the task of investigation under the guidance of Coordinator .The 'report' submitted by the Investigator arraigning the accused Moulana Abdus Sobhan does not relate to the offences punishable under the normal Penal Law. It relates to the commission of 'group crimes' committed in violation of customary international law.

**552.** Let us have glance to the task of investigation done by the investigation officers **P.W.30 Md. Matiur Rahman** and **P.W.31 Md. Noor Hossain**. The first IO P.W.30 Md. Matiur Rahman [Additional Superintendent of Police and now retired] an investigator of the Investigation Agency constituted under section 8(1) of the Act of 1973

was entrusted with the duty of investigation. As stated by P.W.30, he initiated investigation against the accused Moulana Abdus Sobhan in relation to the complaint register serial no. 15 dated 15.4.2012. It appears from the testimony of P.W.30 that during investigation that started on 15.4.2012, he had gone through various sources, books, and documents; visited the crime sites; seized documents from different organizations by preparing seizure lists on various dates. During his investigation, he prayed through the Chief prosecutor on 22.9.2012 for showing the accused arrested as he was then detained in connection with Pabna Police Station case no. 6 dated 2.4.2012. Pursuant to order No. 131(3) dated 28.1.2013 of the Investigation Agency he handed over the task of investigation to Md. Noor Hossain [P.W.31], P.W.30 stated.

**553. P.W.31 Md. Noor Hossain** the second IO on taking the responsibility of investigation visited the crime sites in Pabna, examined witnesses including relatives of victims and sufferers of atrocities and reduced their statement in writing, on different dates. He also seized documents and materials from the library of the Investigation Agency and Bangla Academy Library, by preparing seizure lists on various dates. On conclusion of investigation he [P.W.31] submitted report in the office of the Chief Prosecutor as required under Rule 11 of the ROP on 12.9.2013 together with documents collected and statement of witnesses.

**554.** We reiterate that Rule 2(6) of the ROP defines ‘complaint’ on the basis of which investigation is to be done. Under Rule 2(6) a ‘complaint’ is defined as “*any information oral or in writing obtained by the Investigation Agency including its own knowledge relating to the commission of a crime under section 3(2) of the Act*”. That is to say, the Investigation Agency is authorized to initiate investigation by any of its investigator predominantly on information it obtains.

**555.** There has been no legal obligation in obtaining information only in writing from an individual. Thus, it is clear that obtaining Information oral or in writing including own knowledge of Investigation Agency authorizes the agency to initiate the investigation process. In the case in

hand, it appears that presumably the compliant register was numbered on the basis of 'information' the Investigation Agency 'obtained' on its own knowledge, for the purpose of initiating investigation.

**556.** Section 8 of the Act of 1973 and the Chapter II of the ROP deal with the procedure of holding investigation and it appears that the IOs [P.W.30 and P.W.31] accordingly have done the task of investigation. The 'report' arraigning the accused Moulana Abdus Sobhan for the offences enumerated in the Act of 1973 submitted by the Investigation Agency before the Chief Prosecutor under Rule 11 of the ROP, in true sense, is the foundation of the case. On receipt of such 'report' the Chief Prosecutor is authorized to examine it and documents, materials submitted therewith and to decide whether 'Formal Charge' is to be submitted under section 9(1) of the Act of 1973. However, the Chief Prosecutor eventually submitted the 'formal charge' before the Tribunal, arraigning the accused Moulana Abdus Sobhan for the atrocities committed in 1971 around the district Pabna.

**557.** The learned defence counsel chiefly questioned, during the summing up of case, the fairness of investigation on the event of killings narrated in **charge nos. 4 and 6**. Defence doubts the investigation on these events on the ground that the IO did not examine relatives of all the victims of the event narrated in **charge no.4** and they have not been cited as witnesses and the IO did not visit all the crime villages for unearthing the truthfulness of the attack launched directing the civilian population as narrated in **charge no.6**

**558.** The charge involving the event of large scale killing of hundreds of civilians in 15 villages as narrated in **charge no. 6** has already been adjudicated by recording the reasoned findings. Thus, without going into merit of the event narrated in this charge we simply conclude that mere non-citing the relatives of all victims as witnesses has not caused any prejudice to the defence or taints the task of investigation in any manner. And even failure to visit all the 15 crime villages by the IO does not render the truthfulness of the large scale killing as narrated in the **charge no.6**.

**559.** First, the people living around the localities of the crime sites may not be available due to lapse of long passage of time. Second, for obvious reason the sense of fear might have made the persons belonging to victims' family unintended to face the IO. Next, the Tribunal notes that it was not necessary to examine relatives of all the victims to ascertain the *prima-facie* truthfulness of the event of attack directing all those villages that resulted in large scale killing of hundreds of civilians.

**560.** The settled principle is that even a single witness is sufficient to prove an offence. There could be no reason to say, considering the context in 1971, that all the members of victims' family had occasion to witness the concurrent and planned attack directing civilian population of 15 villages. Since, already it has been adjudicated based on evidence produced by the prosecution that the event of mass killing occurred in those villages, as narrated in **charge no.6** it is quite immaterial to question the investigation on it on ground of failure to visit all the 15 crime villages and non citing the relatives of all victims. Therefore, we do not agree with what has been submitted by the learned defence counsel. The investigation done by the IOs [P.W.30 and P.W.31] cannot be termed 'unfair' and 'ineffective' causing any prejudice to the defence.

**561.** The task of investigation under the Act of 1973 fundamentally relates to the process of collecting documentary evidence, recording statement of witnesses if found available and *prima facie* truthful, identifying the event[s], crime site[s] and casualty caused by the alleged criminal acts and also to identify whether the criminal acts alleged fall within the definition as enumerated in section 3(2) of the Act of 1973 and accused's involvement or participation or complicity therewith.

**562.** In a case involving the offences of crimes against humanity occurred four decades ago there is likelihood of some lapses on the part of the investigating agency. But it is now well settled that such lapses, if they are insignificant, do not defeat the cause of justice. No significant flaw has been found in the investigation from which adverse inference can be drawn against the truthfulness of the events narrated in charge

nos. 4 and 6 and accused's concern and participation therewith. The Tribunal notes that the Investigation Officers [P.W.30 and P.W.31], in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out their investigation on completion of which 'report' was duly submitted before the Chief Prosecutor.

## **XV. Conclusion**

**563.** The evidence presented by the prosecution demonstrates that the group of perpetrators engaged in committing the offences proved formed of Pakistani army, local Biharis, Razakars, members of Mujahid force. Accused Moulana Abdus Sobhan had accompanied the group in launching the attacks that resulted in killing, large scale killing, massive destruction of civilians' property, abduction, confinement and torture. We may justifiably conclude that the accused did not remain present at the crime sites with the principal perpetrators not as mere spectator. He, sharing intent of the principals, abetted, encouraged, induced and substantially facilitated the commission of crimes proved. In relation to some charges proved, the accused is found to have had participated and substantially contributed, by his act or conduct forming part of attack, to the actual commission of the crimes.

**564.** It has already been resolved in our foregoing deliberations that accused Moulana Abdus Sobhan was a potential man of political prominence around the localities of district Pabna. In 1971 he was the acting Ameer of district JEI and was made vice-president of Pabna district peace committee, an anti-liberation organisation which was set up intending to collaborate with the Pakistani occupation army. For obvious reason accused Sobhan achieved significant trust of the army stationed in Pabna district for his political ideology and extreme antagonistic mind set towards the war of liberation and the people associated and sided with it.

**565.** Section 3(1) provides jurisdiction of trying and punishing even any 'individual' or 'group of individuals' including any 'member of auxiliary

force' who commits or has committed, in the territory of Bangladesh any of crimes mentioned in section 3(2) of the Act, apart from member of armed or defence forces.

**566.** Already we have recorded our reasoned finding based on the evidence, oral, documentary and circumstantial, led by the prosecution and the sourced documents that the accused Moulana Abdus Sobhan's , active and visible association with the locally headquartered army was the fair indicative of his high level of culpability. Accused's conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found---all point to his unerring guilt which is well consistent with his 'concern' and 'participation' in the commission of the crimes proved.

**567.** On rational and integrated evaluation of evidence provided by the prosecution, we have already concluded that the accused Moulana Abdus Sobhan was 'concerned' as a 'participant' and had also abetted, facilitated and substantially contributed to the commission of the offences in relation to **charge nos. 1, 2, 3, 4, 6 and 7[in all 06 charges]**.

**568.** The offences for which the accused Moulana Abdus Sobhan has been found criminally responsible were the part of horrendous systematic attack against the civilian population committed in context of the war of liberation in 1971 in the territory of Bangladesh. The objective was to wipe out the Bengali nation by resisting in achieving its independence. According to section 4(1) of the Act of 1973 the accused Moulana Abdus Sobhan has incurred individual criminal liability for the commission of crimes already proved.

**569.** Accused Moulana Abdus Sobhan is also found to have had participation to phase or phases of the events constituting the principal crimes. In respect of some events of brutal killing of civilians [narrated in **charge nos. 4 and 6**] it has been found proved that the accused consciously and knowing the consequence accompanied the group of army towards the killing sites and induced and facilitated them in

committing the principal crimes. The accused Moulana Abdus Sobhan is also found to have had physically participated in committing the offence of brutal murder of civilians at Iswardi coal depot [as narrated in **charge no.1**]. In respect of **charge nos. 2, 3 and 7** accused is found to have had substantially contributed and abetted the principals in perpetrating the offences. Accordingly, accused Moulana Abdus Sobhan has been held criminally responsible under section 4(1) of the Act of 1973 for the commission of crimes proved as listed in **charge nos. 1,2,3,4,6 and 7**[in **all 06 charges**].

## **XVI. VERDICT ON CONVICTION**

**570.** For the reasons recorded in our Judgement and having considered all evidence and arguments advanced by both sides, we find the accused Moulana Abdus Sobhan---

**[Charge No.1]: GUILTY** of the offence of participating the commission of **'murder'** as crimes against humanity as enumerated in section 3(2)(a)(h) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.2]: GUILTY** of the offence of substantially facilitating and contributing the commission of **'murder'** as crimes against humanity as enumerated in section 3(2)(a)(g) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.3]: GUILTY** of the offence of substantially facilitating and contributing the commission of **'abduction', 'confinement' and 'torture'** as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.4]: GUILTY** of the offence of substantially facilitating, contributing and participating to the commission of **'murder'** as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.5]: NOT GUILTY** of the offence '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and thus he be **acquitted** thereof

**[Charge No.6]: GUILTY** of the offence of abetting, facilitating and participating the commission of '**extermination**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.7]: GUILTY** of the offence of abetting, facilitating the commission of '**abduction**' and '**murder**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and he be **convicted** and sentenced under section 20(2) of the said Act.

**[Charge No.8]: NOT GUILTY** of the offence of '**abduction**', '**torture**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and thus he be **acquitted** thereof

**[Charge No.9]: NOT GUILTY** of the offence '**abduction**' and '**murder**' as crimes against humanity as specified in section 3(2)(a)(g)(h) of the Act of 1973 and thus he be **acquitted** thereof.

## **XVII. VERDICT ON SENTENCE**

**571.** Mr. Sultan Mahmud and Ms. Tureen Afroz the learned Prosecutors finally submitted that accused Moulana Abdus Sobhan must face the maximum sentence, being a sentence of death, as he is proved to have had abetted, substantially facilitated, contributed and participated to the commission of horrendous criminal acts constituting the offences of brutal murder, abduction, confinement, torture and large scale killing of civilians, by launching systemic and premeditated attack in collaboration with the Pakistani occupation army stationed in the locality of Pabna district in 1971.

**572.** The extent of notoriety the accused had shown in committing, abetting and substantially contributing to the actual perpetration of crimes particularly the ‘murder’ and ‘large scale killing’ of hundreds of non combatant pro-liberation civilians enhances his liability. The horrific pattern of killing of pro-liberation non combatant civilians including the mass killing in many villages **[as narrated in charge nos.1, 4 and 6]** deserves to be taken into account as ‘aggravating factor’ in awarding the highest sentence, the learned prosecutors argued.

**573.** Only the highest sentence would be just and appropriate to punish those crimes for which the accused has been charged. The crimes for which the accused is liable caused incalculable torment to the victims and their relatives. Overall magnitude of the crimes leaves no room to award sentence other than the maximum punishment, the learned prosecutors also added.

**574.** On contrary, defence, did not place any submission on sentencing matter. It has been simply submitted that the accused Moulana Abdus Sobhan was not with the principal perpetrators in committing any such criminal activities in any manner and he had no nexus with the army and did not have concern with any of crimes in question. Prosecution failed to prove the accusation brought against him and thus Moulana Abdus Sobhan deserves acquittal.

**575.** In adjudicating the charges framed it has been found that the accused Moulana Abdus Sobhan had collaborated with the Pakistani occupation army with extreme ferocity in carrying out appalling activities directing pro-liberation civilians around the locality of district Pabna. It stands proved. Now let us record our reasoned view in respect of awarding sentence for the offences proved.

**576.** The Tribunal notes that commission of offences as specified in the Act of 1973 itself portrays enormity, gravity and diabolical nature of the crimes. We reiterate that in awarding sentence, the Tribunal, must eye on

the nature and magnitude of the offences committed, their scale, the role the convicted accused that he had played and mode of his participation to the perpetration of the crimes proved. At the same time the trauma and harm sustained by the victims and their families also significantly act in assessing the gravity of offences. A sentence therefore must always reflect the inherent level of gravity of a crime.

**577.** The way the accused Moulana Abdus Sobhan participated and facilitated the commission of the crimes proved inevitably aggravates his liability. We fail to understand how the accused Sobhan being a Bengali Muslim actively aided, abetted and facilitated the commission of such crimes with extreme cruelty against the non combatant civilians of his own locality. Did it match to humanity?

**578.** Accused Moulana Abdus Sobhan was the acting Ameer of Pabna district JEI, an Islamist political party. That is to say he was in leading position of JEI in 1971 and his position speaks that he had to work with the Islamic spirit and philosophy. But did he do it? No, rather dumping the holy spirit of Islam he opted to become a man of extreme notoriety around the locality of Pabna as he consciously and actively aided, abetted, assisted and substantially facilitated the Pakistani occupation army in committing the horrific atrocious acts constituting the offence of murder, large scale killing, massive destruction. Accused's role thus impels the conclusion that JEI to which the accused Sobhan belonged was a 'criminal organisation'.

**579.** The holy religion Islam encourages to practice the value of faith, integrity, self-discipline, self-restraint, loving-kindness and it also encourages and teaches human beings to refrain from sinful acts and live life in moderation. But we have found it proved that the accused Moulana Abdus Sobhan knowingly participated and encouraged and induced the principal perpetrators in committing the horrendous sinful acts. Accused's attitude and role that he had in 1971 did not go with the philosophy and spirit of true Islam. In disguise of spirit of Islamic leadership accused Moulana Abdus Sobhan remained culpably closer to the Pakistani occupation army, Razakar force which were engaged to

wipe out the pro-liberation Bengali civilians, in furtherance of policy and plan.

**580.** Accused Abdus Sobhan was not a low-level offender. His position in JEI in Pabna district in 1971 and potential affiliation with the district peace committee aggravates his level as an offender. It is now settled that the gravity of the crimes committed by the convicted person stems from the degree of his participation in the crimes. It stands proved from the evidence that by getting actively involved with the locally stationed Pakistani occupation army , Biharis, Razakars accused Sobhan was visibly intended to collaborate with the Pakistani occupation army since its rolling into Pabna, in carrying out dreadful killings, abduction confinement , torture, mass killing, with extreme fierceness .

**581.** P.W.11 Fazlur Rahman Fantu, in cross-examination, in reply to question put to him by the Tribunal stated that he heard that in the month of November 1971 Moulana Sobhan[accused] had gone to Pakistan along with Ghulam Azam[the then Ameer of JEI]. It is to be noted that Ghulam Azam died recently in imprisonment as he was convicted by the Tribunal-1 for the atrocities committed in 1971. It together with the fact of fleeing to Pakistan with Ghulam Azam fairly indicates accused's level of position in JEI and association with its Ameer who was the mastermind of forming Razakar force, an auxiliary force to collaborate the Pakistani occupation army. It also aggravates accused's level of criminal responsibility.

**582.** The criminal acts constituting the offences of crimes against humanity are currently considered to be particularly odious offenses because they constitute a serious attack on human dignity or a grave humiliation of one or more human beings.

**583.** Already we have recorded our finding that the accused Moulana Abdus Sobhan is guilty for the offences narrated in **charge nos. 2, 3 and 7** as he substantially contributed to the principals in perpetrating the

criminal acts, by his act of abetment and facilitations. That is to say, accused was 'concerned' to the commission of these crimes. The offences as listed in **charge nos. 1,4 and 6** for which accused Moulana Abdus Sobhan has also been found guilty indubitably fall within the kind of such gravest crimes which trembles the collective conscience of mankind.

**584.** In respect of the event of killing civilians [**charge no.1**] dragging them out of the Iswardi central mosque he and his accomplices are found to have had caused their horrendous death by inflicting indiscriminate sword blow. What a brutality! It is hard to believe indeed that the accused was a man of slightest humanity and kindness.

**585.** In committing the event of killing of defenceless pro-liberation civilians as narrated in **charge no.4** the accused guided and actively induced the group of army, by antagonistic act and conduct, in accomplishing the crimes of extreme brutality. Accused was extremely hostile to the victims, the pro-liberation civilians and he did not respond to appeal and feeble cry of **P.W.7 Jahanara Begum** the wife of Rajab Ali one of victims of village Shahpur, the evidence presented proves it. The attack was planned and systematic to which accused was a part.

**586.** It has been found proved too that the accused Moulana Abdus Sobhan had actively and knowingly contributed, induced the group of army by his act and conduct in carrying out the attack that resulted in killing of hundreds of civilians of 15 villages as narrated in **charge no.6**.

**587.** It is true that the accused Abdus Sobhan is now a man of advanced age. But he has been prosecuted and tried for the appalling atrocities committed in 1971, during the war of liberation. Neither the Act of 1973 nor the Rules define the factors which may be taken into account by the Tribunal in mitigation of a sentence. It is to be noted that mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.

**588.** It is now settled that premeditated or enthusiastic participation in a criminal act causing grave casualty to the humanity necessarily reveals a higher level of criminality on the part of the participant. In the case in hand, it has been found proved that the attacks resulted in killing of civilians of village Shahpur [**charge no.4**] and large scale killing carried out in 15 villages [**charge no.6**] were to further premeditated plan and design to which accused Sobhan was an active part.

**589.** Advanced age of an accused does not readily warrant some mitigation of the sentence His advanced age with other factors thus carries very limited weight in mitigation. Therefore, considering the mode of participation and magnitude of crimes proved we are not convinced to take his old age into account as a mitigating factor, in awarding sentence.

**590.** In view of above discussion and considering the nature and proportion to the gravity of offences and also keeping the factors as discussed above into account we are of the view that justice would be met if the accused Moulana Abdus Sobhan who has been found guilty beyond reasonable doubt for the crimes proved is **condemned and sentenced** as below, under the provision of section 20(2) of the Act of 1973:

## **SENTENCE**

That the accused **Abdus Sobhan @ Abul Basar Mohammad Abdus Sobhan Mia @ Moulana Sobhan** son of late Sheikh Md. Naim Uddin and late Nurani Begum of Haji Mohsin Road, Jabalpur Pathartola police station Pabna Sadar district Pabna and North Masimpur, west to Proshanti Bhabon under police station Pabna Sadar district Pabna and at present House No. 7/B, "Mohua" 6<sup>th</sup> floor, Magnolia Apartment, 89 Sen Para Parbata police station Mirpur, Dhaka Metropolitan Police(DMP), Dhaka is found **guilty** of the offences of '**murder**', '**abduction**', '**confinement**', '**torture**' and '**extermination**' as '**crimes against humanity**' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 1,2,3,4,6 and 7 [06**

**charges]**. Accordingly, he be convicted and condemned to the sentence as below for these six charges, under section 20(2) of the Act of 1973:

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.2;**

Sentence of **imprisonment for 5[five] years** for the crimes as listed in **charge no.3;**

**AND**

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.7;**

The sentence of imprisonment as awarded above **in respect of charge nos. 2, 3 and 7** shall run **concurrently**.

That the accused Abdus Sobhan @ Abul Basar Mohammad Abdus Sobhan Mia @ Moulana Sobhan is also found **guilty** of the offence of **'murder'** and **'extermination'** as 'crimes against humanity' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 1,4 and 6**. Accordingly, he be convicted and condemned to the **sentence as below:**

**'Sentence of death'** for the crimes as listed in **charge no.1** and he be hanged by the neck till he is dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

**'Sentence of death'** for the crimes as listed in **charge no.4** and he be hanged by the neck till he is dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

**AND**

**'Sentence of death'** for the crimes as listed in **charge no.6** and he be hanged by the neck till he is dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

The **'sentences of death'** as awarded above, in respect of **charge nos. 1, 4 and 6** will get merged.

However, as the convict Abdus Sobhan @ Abul Basar Mohammad Abdus Sobhan Mia @ Moulana Sobhan has been condemned to **'sentences of death'**, as above, the **'sentences of imprisonment'** awarded in respect of charge nos. **2,3 and 7** will get merged into the **'sentences of death'**. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused Abdus Sobhan @ Abul Basar Mohammad Abdus Sobhan Mia @ Moulana Sobhan is found **not guilty** of offences in respect of charge nos. **5,8 and 9** and thus he be **acquitted** thereof.

The sentence awarded shall commence from the date of this judgment as required under Rule 46(2) of the Rules of Procedure, 2012(ROP) of the Tribunal-2[ICT-2] and the convict be sent to the prison with a conviction warrant accordingly.

Let copy of the judgment be sent also to the District Magistrate, Dhaka for information and causing necessary action.

Let certified copy of the judgment also be furnished to the prosecution and the accused at once.

**Justice Obaidul Hassan, Chairman**

**Justice Md. Mozibur Rahman Miah, Member**

**Justice Md. Shahinur Islam, Member**