

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. 04 of 2013

[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

Syed Md. Qaiser

For the Prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Rana Das Gupta, Prosecutor

Mr. Zead-Al-Malum, Prosecutor

Mr. Sultan Mahmud, Prosecutor

Ms. Tureen Afroz, Prosecutor

Ms. Rezia Sultana Begum, Prosecutor

Ms. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

For the Accused:

Mr. SM Shahjahan, Advocate, Bangladesh Supreme Court

Mr. Abdus Sobhan Tarafdar, Advocate, Bangladesh Supreme Court

Date of delivery of Judgment: 23 December 2014

JUDGMENT

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

Justice Obaidul Hassan, Chairman

Justice Md. Shahinur Islam, Member

I. Introductory Words

1. The case in which we are going to render our verdict today involves as many as 16 charges arraigning the accused Syed Md. Qaiser 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 was on bail on ground of his old age complications. On closure of summing up of cases by both sides, the Tribunal sent the accused to prison with direction to produce him on the date to be fixed for pronouncement of verdict. Pursuant to issuance of production warrant the prison authority has produced the accused Syed Md. Qaiser today before this Tribunal [ICT-2].

2. The charges framed against the accused Syed Md. Qaiser relate to the events allegedly committed around the localities of the then Habiganj subdivision and Nasirnagar police station under the then B'baria subdivision. The atrocities were allegedly committed in 1971, during the war of liberation, directing the civilian population, aiming to terrorize and wipe out the pro-liberation Bengali civilians, in furtherance of policy and plan of the Pakistani occupation army.

3. In course of trial, both the prosecution and the defence provided highest assistance to go with the proceeding in accordance with law. We endorse the stamp of our appreciation to their commendable performance and assistance.

4. Now, this Judgement is being rendered by this Tribunal [ICT-2] for the prosecution of person allegedly responsible for the serious offences as

enumerated in the International Crimes (Tribunals) Act 1973 committed in violation of international humanitarian law in the territory of Bangladesh in 1971. 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 notion of fairness and due process as has been contemplated in the Act and the Rules of Procedure, 2012 (ROP) formulated by the Tribunal [ICT-2] under the powers conferred in section 22 of the principal.

6. The Act No. XIX enacted in 1973 is meant to prosecute crimes against humanity, genocide and system crimes 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 crimes against humanity.

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.

8. 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 violation of customary international law during the war of liberation in 1971 in the territory of Bangladesh. Merely for the reason that the Tribunal is preceded by the word “international” and possessed jurisdiction over crimes such as Crimes against Humanity,

Crimes against Peace, Genocide, and War Crimes, it will be mistaken to assume that the Tribunal must be treated as an ‘‘International Tribunal’’.

III. Brief Historical Background

9. 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.

10. 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.

11. 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 25th March, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

12. 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.

13. We may have a fragmented scenario of atrocities committed in 1971 from a report titled ‘**A Country Full of Corpses**’ published in SUMMA Magazine, Caracas, October 1971[**Source:** Bangladesh Documents-Volume II, page 76] speaks that-

“The extermination of the Jewish people by the Nazi regime, the atomic crime of Hiroshima and Nagasaki, the massacre of Biafra, the napalm of Vietnam, all the great genocides of humanity have found a new equivalent: East Pakistan.A pathetic view of the tragedy is given to us by the fact that in a single night in the city of Dacca were killed 50,000 persons by the invading army. Between 26 March—the date of invasion—and this moment, the dead reach more than a million, and every day 30,000 persons leave East Pakistan and take refuge in Indian territory.”

14. 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]

15. The atrocities for which the accused Syed Md. Qaiser 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 stamp out the pro-liberation Bengali civilians. Millions of brave sons and daughters laid

their lives, during the war of liberation for the cause of independence and self determination.

16. In portraying the ferocity of atrocious acts committed during the nine months period of the war of liberation the Appellate Division, in the case of *Abdul Quader Molla* observed that--

“What has happened in Bangladesh is nothing short of genocide. If what Hitler did in Germany and Poland was an example of racial genocide, if the tragedy of Jallianwala Bagh was an example of colonial genocide by the use of armed might, what happened in Bangladesh was no less a case of cultural and political genocide on a scale unknown to history. The whole of Bangladesh became truly a Jallianwala Bagh, hallowed and sanctified by the blood of patriotic martyrs and innocent defenceless people; whose only fault was that they were somewhat different than those who came to rule them from Pakistan.”

[Appellate Division, Abdul Quader Molla Judgment, 17 September 2013, page 42]

17. 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. **Muhammed Zafar Iqbal** in his book titled ‘**History of the Liberation War**’ [translated by Yeshim Iqbal, published in 2008 by Proteeti Muktir Udyog, Dhaka] narrates a paradigm of bravery of sons of this land. It states, citing the book titled ‘**Witness to Surrender, Siddiq Salik** that –

“There is no end to the stories of bravery of these freedom fighters. One small story from a book written by a Pakistani army official goes like this:

‘A young freedom fighter was arrested by the Pakistani army in Rohanpur area of Rajshahi in June 1971. Despite terrible torture, he refused to disclose any information. A Pakistani major finally held a stenguns to his chest and said, answer my question or I’ll kill you right now. The fearless young freedom fighter bent down and kissed the ground of his motherland for the last

time, stood up straight and said, I'm ready to die. My blood will free this country.'

[Source: **Witness to Surrender, Siddiq Salik, page 104**]

18. The author of the book titled "History of the Liberation War" then makes comment of his own that –**"This is what is patriotism, valiance and bravery."** It is now an undisputed history that the local collaborators actively assisted the Pakistani occupation army in accomplishing their policy and plan to annihilate the pro-liberation Bengalee civilians. The local collaborators truly had acted as traitors. It is now a settled history which needs no further document to prove.

19. 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 Al-Badar, a *Para militia* force of the workers of ICS, its student wing. And the AB force had acted as an 'action section' of JEI. Accused Syed Md. Qaiser being imbued by his pro-religion political ideology allegedly formed a private outfit [**Qaiser Bahini**] of his local loyal peoples aiming to provide assistance to the Pakistani occupation army headquartered in the geographical area of Habiganj.

20. The author of the book titled "**History of the Liberation War**", citing **Jagjit Singh Aurora** states an statistics showing the strength of locally formed *para militia* and other forces intending to provide collaboration with the Pakistani occupation army in 1971--

"During the liberation war in Bangladesh, there were about eighty thousand Pakistani soldiers, twenty five thousand militia, twenty five thousand civilian forces, and fifty thousand Razakars, Al-Badr, and Al-Shams members. On the other side there were about one hundred and seventy five thousand freedom fighters. Near the end of the war another two hundred and fifty thousand Indian

soldiers joined the freedom fighters. At the end of the war after the surrender, about ninety one thousand Pakistani prisoners were transported to India”

[Source: Figures from the Fall of Dacca by Jagjit Singh Aurora in the Illustrated Weekly of India, 23 December, 1973]

21. 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

22. Accused **Syed Md. Qaiser (73)** @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser son of late Syed Saiduddin Ahmed and late Begum Hamida Banu of village- Itakhola [Noapara] Police Station- Madhabpur District- Habiganj [at present house no. 21, road no. 06, block-C, Flat no. 3B, Banani, Dhaka, Dhaka Metropolitan Police(DMP), Dhaka] was born on 19 June 1940. He obtained matriculation from Armanitola New Government High School, Dhaka and studied in Jagannath College Dhaka. He however studied up to BA class as found from the registration form filled up and submitted to the Habiganj Election Office. Accused Qaiser is an industrialist and owns a number of industrial concerns.

23. It is alleged that Syed Md. Qaiser became associated with the politics of **Convention Muslim League** in 1962 and was elected Member of Sylhet District Board in 1966 and occupied the chair till 1971. Qaiser contested Provincial Assembly Election in 1970 as an independent contestant and was defeated. During the war of liberation in 1971 he was allegedly associated with the local occupation army and carried out atrocious criminal activities throughout the period of war in the localities of Habiganj and Brahamanbaria sub-division[now district] , as alleged by

the prosecution. Instantly either before or after the victory achieved on 16 December 1971, accused Qaiser allegedly went into hiding and fled to London, UK, quitting Bangladesh.

24. Prosecution also alleges that the accused Syed Md. Qaiser returned back home in 1978. In 1979 he contested second parliamentary election as an independent candidate and was elected in Sylhet-17 constituency and afterwards joined the Bangladesh Nationalist Party [BNP] and became the president of Habiganj district BNP. In 1982 he became the joint secretary general of BNP [Shah Azizur Rahman group]. Afterwards, he joined the Jatio Party of General Ershad and was elected as president of Habiganj Jatio Party. In 1986 and 1988 he was elected Member of Parliament contesting the Jatio Parishad election as a candidate of Jatio Party, in Habiganj-4 constituency [Madhabpur-Chunarughat]. Later on, he became the state minister for the Agricultural Ministry. In 1991, 1996 and 2001 he contested the parliamentary elections as a candidate of Jatio Party, but was defeated. At a stage, he, quitting jatio Party, joined PDP.

V. Procedural History

Pre-trial stage

25. At pre-trial stage, an application under Rule 9(1) of the Rules of Procedure [ROP] was initiated by the Chief Prosecutor on 15.5.2013 seeking arrest of the accused Syed Md. Kaiser contending that his detention or arrest was indispensable for the purpose of effective and proper investigation. The Tribunal [ICT-2] on hearing the application by its order issued warrant of arrest in execution of which the law enforcement agency caused his arrest on 21.5.2013 and produced him before this Tribunal on 22.5.2013 and then was sent to prison by rejecting an application seeking his bail.

26. Subsequently, on 05.8.2013 the Tribunal [ICT-2] by its order dated 05.8.2013 allowing application seeking bail, released the accused Syed Md. Qaiser on conditional bail, taking his physical condition into account. Since then the accused Syed Md. Qaiser had been staying at house no. 21,

road no. 06, block-C, Flat no. 3B, Banani, Dhaka, till closure of the proceeding of this case.

27. On 22.9.2013 the investigation agency, on completion of investigation 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 10.11.2013 alleging that the accused Syed Md. Qaiser as the organiser of 'Qaiser Bahini' and a potential associate of Razakar force and the Pakistani occupation armed force and also as a member of a group of individuals had committed the offences of crimes against humanity, abetted and contributed the commission of atrocious criminal acts in different places of the then Habiganj sub-division and Brahmanbaria sub-division and also had conscious 'complicity' to commit such crimes as specified in section 3(2) of the Act, during the period of War of Liberation in 1971.

Trial Stage

28. Thereafter, the Tribunal [ICT-2], considering the Formal Charge and documents and statement of witnesses submitted therewith, having found *prima facie* case, took cognizance of offences against the accused Syed Md. Qaiser 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, before the hearing on charge matter took place.

29. Eventually, the charge matter hearing started on 17.12.2013 and continued for couple of days. On 26.12.2013 defence submitted an application seeking discharge of the accused Syed Md. Qaiser. Defence pressed the application on 13.01.2014 by advancing its submission contested the charge framing matter. The Tribunal, on hearing both sides, on charge framing matter, fixed 30.01.2014 for order.

30. The Tribunal by its order dated 30.01.2014 eventually framed as many as 16 charges alleging the commission of the offences of crimes against humanity and genocide and accused's complicity and participation therewith, by rejecting the discharge application initiated by the defence. With this the trial of the case commenced.

31. Prosecution started examining its witnesses on 09.03.2014, after laying the opening statement as required under the Statute on 04.03.2014. Prosecution adduced in all 32 witnesses including the IO and seizure witnesses of whom 31 have been examined and one has been tendered. Two female witnesses [P.W.5 and P.W.10] have been examined in camera. Defence duly cross-examined those witnesses, excepting the tendered witness. In this way, prosecution completed presentation of its evidence by examining witnesses on 23 July 2014.

Application under section 19(2)

32. At the fag end of closure of prosecution witnesses, prosecution prayed, by filing an application under section 19(2) of the Act of 1973, for admitting the statement made to IO of six witnesses into evidence on the ground that three are now dead and three could not be brought for their ailment.

33. On hearing both sides, the Tribunal rejected the prayer as it found from the papers annexed with the application that the IO, before submitting report to the prosecution on completion of investigation, was very much aware of death of three witnesses she examined. But unpredictably, the IO cited them as witnesses, knowing them dead. The intention of the section 19(2) does not appear to be compatible with this situation. Besides, rationally a dead person cannot be cited as witness. But it has been done which is deprecated indeed. The three other witnesses are not in position to stand on dock, as contended by the prosecution. But this does not go with the intent of the section 19(2). Accordingly Tribunal refused to take statement of any of these six witnesses made to IO into evidence.

34. Defence did not submit any list of witnesses as required under section 9(5) of the Act of 1973 and finally the learned defence counsel explicitly refrained from adducing and examining any witness in support of defence case. Therefore, on the same day and after closing of adducing evidence, prosecution with the leave of the Tribunal started placing summing up [argument] of its case.

Summing up stage

35. Prosecution started summing up [argument] of its case on 23.07.2014 and concluded on 07.8.2014, taking in all 06 working days. Thereafter, defence started its own summing up on 07.08.2014 and made it concluded on 19.08.2014, taking in all 06 working days. At this stage, prosecution, with the leave of the Tribunal, extended its rebuttal, particularly on law points.

36. On closure of summing up by both the sides, the Tribunal by its order dated 20.8.2014 kept the case under CAV with further order to keep the accused Syed Md. Qaiser in prison till delivery of judgment. Thus, the accused was sent to prison, cancelling his conditional bail with direction to provide him with necessary medical support and treatment as and when needed for him, even in BSMMU Hospital, if felt necessary

VI. Applicable laws

37. 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].

38. 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].

39. 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..

40. 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

Summing up: By the prosecution

41. Mr. Rana Das Gupta the learned prosecutor started placing summing up by portraying the profile of the accused Syed Md. Qaiser that he had in 1971. Citing testimony of prosecution witnesses and the books proved and marked as exhibits the learned prosecutor submitted that being imbued by the ideology of Muslim League the accused Qaiser not only took stance against the war of liberation but also participated, by his conscious act and conduct, in committing numerous crimes around the localities of Habiganj

and B'baria in 1971. The accused fled the country at the end of the war of liberation and returned in 1978. Meanwhile he was prosecuted and tried [in absentia] under the Collaborators Order 1972. Trial in his absentia under the Collaborators Order 1972 may be considered as an incriminating fact that fairly lends assurance to his culpable role that he had in 1971.

42. The learned prosecutor went on to submit that the accused Qaiser was actively involved in forming peace committee, an anti-liberation organisation to assist the Pakistan army. The accused also founded a private outfit after his name with his loyal men and the 'force' was known as 'Qaiser Bahini' and it actively collaborated with the Pakistan army in committing crimes against humanity and genocide in Habiganj and B'baria. P.W.3 Tajul Islam an accomplice [member of Qaiser Bahini] of the accused vividly described the formation of Qaiser Bahini, role of the accused and his [accused] affiliation with the Pakistani army in perpetrating indiscriminate atrocious activities directing pro-liberation civilians.

43. It would be evident from the testimony of P.W.3 that this private outfit was equipped with special uniform and arms, the learned prosecutor added. The book titled '**Associates of Pakistani Army 71**' [edited by ASM Shamsul Arefin] sheds light on Qaiser's role in 1971. It narrates that Qaiser organised a killing squad in Habiganj named 'Qaiser Bahini'. He [Qaiser] was very trusted to Pakistani army officers in Habiganj and it made him able in getting one Pistol as presented to him [Qaiser] by the local army in recognition of his 'good performance'.

44. On legal issues, the learned prosecutor submitted to adopt the argument made in earlier cases. Additionally, it has been argued that there has been no bar in prosecuting the accused Qaiser as an individual under the Act of 1973 despite the fact that he was prosecuted and tried under the Collaborators Order, 1972. The offences mentioned in the Act of 1973 are quite distinct from that mentioned in the Collaborators Order, 1972. The instant case thus cannot be said to be barred under the doctrine of double jeopardy.

45. Mr. Rana Das Gupta, the learned prosecutor, in advancing argument citing evidence presented, submitted that the prosecution has been able to prove the charges framed against the accused Syed Md. Qaiser. He argued that in relation to some charges the accused himself participated physically and actively and in some cases he, by providing aid and assistance, abetted the principal perpetrators in accomplishing the actual commission of crimes. The learned prosecutor concluded his argument by emphasizing rationalization of awarding 'compensation' as well for the offence of mass rape as narrated in charge nos. 8 and 12. The learned prosecutor's argument advanced in relation to all the charges may conveniently be addressed together with that advanced by the defence, in adjudicating each charge independently.

Summing up by the defence

46. Mr. SM Shahjahan the learned defence counsel, at the outset of his summing up, submitted that the social position of the accused Qaiser in 1971 does not impact on the allegations brought against him. It is to be looked into how far the prosecution has been able to prove those accusations and thus it is not necessary to focus on what the accused Qaiser was in 1971 as emphasized by the prosecution. The accused was elected Member of Parliament for twice, during the post liberation period, and had been in the cabinet of Ershad government with reputation and efficiency. It would be found that no one came with any information as required under rule 2(6) of the ROP for initiating investigation on any of alleged events. It leads to believe that initiation of investigation was *malafide* and on the basis of incorrect and inadequate information and materials collected from the district administration of Habiganj. Prosecution failed to adduce and examine the relatives of victims who could have been the competent witnesses, particularly in relation to charge no.16 involving the alleged event of 'genocide'. Testimony of alleged eye witnesses suffers from improbability and infirmity.

47. Mr. SM Shahjahan then started placing his argument on each charge. In doing so, the learned counsel placed argument and logic, mainly citing weakness and inconsistencies of testimony of prosecution witnesses to

show that the prosecution failed to prove accused Qaiser's involvement with any of events constituting the alleged offences. It would be convenient to focus on his argument together with that of prosecution at the time of independent adjudication of each charge.

48. It has been argued further by the learned defence counsel that for the purpose of acting on hearsay evidence the person from whom the witness heard what he stated before the court of law was needed to be examined. But the prosecution failed to bring and examine any of such persons from whom the witnesses allegedly heard or learnt what they have narrated before the Tribunal. And as such the hearsay testimony of witnesses, though admissible in a trial under the Act of 1973, does not carry value and it deserves exclusion from consideration.

49. Conceding the inapplicability of the Evidence Act, the learned defence counsel, drawing attention to the principle propounded by the Appellate Division in the case of **Abu Taher Chowdhury & ors v. State** reported in **42 DLR, 1990, page 253**, argued that evidence of eye witness cannot be readily accepted to be true. Its credibility is to be assessed and if it suffers from infirmity and improbability, considering surrounding circumstances, it loses its probative value.

50. In reply to submission advanced on part of the prosecution, in respect of awarding 'compensation' together with the sentence as punishment, the learned defence counsel submitted that the Statute itself does not provide any such provision and the provision as contained in the ROP, in this regard, cannot override the Statute.

Rebuttal: Prosecution

51. Ms. Tureen Afroz, the learned prosecutor submitted that the 'impossibility theory' as agitated by the defence shall not affect the evidence presented by the prosecution, in support of the charges. Defence argued that many more evidences and witnesses could have been brought, to prove the charges. But it is immaterial to speculate what other evidence could have been placed or brought before the Tribunal. Prosecution is not

required to get involved in an expedition of speculating on alternative evidences. It simply requires proving its case on the basis of evidence presented before the Tribunal. In support of her argument the learned prosecutor has cited a decision of ICTR made in the case of *Kajelijeli* of ICTR Appeal Chamber, May 23, 2005, para 74.

52. Ms. Tureen Afroz also argued that the 'Qaiser Bahini' was an '**auxiliary force**' as defined in section 2 of the Act of 1973 as it had acted maintaining '**static relation**' with the armed force for '**operational**' purpose. 'Qaiser Bahini' was rather an 'auxiliary force', though not formally placed under control of armed forces and thus it aggravates the status of this '**force**' or '**voluntary corps**' of which the accused Qaiser was the '**leader**'. The Tribunal however deems it expedient to focus on the above points agitated by the prosecution in the respective segment of this judgment.

VIII. Legal Aspects

53. Legal aspects involved in all the cases under the Act of 1973 before 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 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. Therefore, we do not deem it necessary to reiterate the extensive discussion on the settled legal issues. However, in the case in hand, the defence argued that the accused Syed Md. Qaiser was prosecuted and tried under the Collaborators Order, 1972 and thus he cannot be placed on trial again for the same offence and thus the instant case is barred by the doctrine of 'double jeopardy' as reflected in Article 35(2) of our Constitution. On this issue too, we have made discussion, taking the fact of earlier prosecution

under the Collaborators Order, 1972, in passing the order framing charges by giving reasons. Now, we simply prefer to reiterate this issue in brief, in the case in hand.

54. It appears that the accused Syed Md. Qaiser was prosecuted, tried and eventually acquitted of the charge under the Collaborators Order of 1972. The photocopy of certified copy of the judgment dated 19.12.1972 in the Special Tribunal Case No. 37 of 1972 passed by the Special Tribunal, Sylhet submitted by the defence shows Qaiser's acquittal of the charge under the said Order of 1972. It is to be noted that the trial took in *absentia*.

55. The learned defence counsel argued that the accused could have been prosecuted for the criminal acts as narrated in the charges framed too by this Tribunal, under the Collaborators Order 1972, if actually had his involvement with any of events constituting the offence of murder, torture, looting, arson, in any manner. It has been further argued that prosecuting the '**same offence**' even under different legislation is barred by the doctrine of '*double jeopardy*' as contemplated in Article 35(2) of the Constitution. An individual prosecuted and tried under the Collaborators Order, 1972, for the similar act of providing assistance to and collaboration with the Pakistani occupation army cannot be prosecuted and tried twice as it is barred by the doctrine of double jeopardy. On this ground too, the accused deserves acquittal.

(i) Collaborators Order 1972 and prosecuting the present accused under the said Order

56. On going through the judgment dated 19.12.1972 in Special Tribunal Case No. 37 of 1972 under the Collaborators Order 1972 [photocopy of certified copy submitted] it appears that 04 persons including Syed Md. Qaiser were prosecuted and tried for the event of killing of husband, son and '*bhagina*' [sister's son] of the complainant and the incident allegedly took place on 10th of Jaistha 1378 BS [corresponding to last part of May, 1971]. The accused persons allegedly accompanied the Pakistani occupation army the principal perpetrators in committing the said killing.

After trial all the accused persons were acquitted. It is to be noted that Syed Md. Qaiser remained absconding and the trial was held in *absentia*.

57. Now, the ‘formal charge’ [under the Act of 1973] before us, as submitted by the Chief Prosecutor on the basis of investigation carried out by the Investigation Agency depicts that Syed Md. Qaiser was allegedly involved with as many as 17 events occurred on different dates in 1971 and at different place under Habiganj sub-division constituting the offences as enumerated in the Act of 1973, either physically or by his act of abetment or complicity. The formal charge does not include the event of alleged murder for which Syed Md. Qaiser and three others were prosecuted and tried under the Collaborators Order, 1972.

58. Next, the offence of ‘murder’ under the Collaborators Order 1972 was an offence defined in the Penal Code. On contrary, 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. 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.

(ii) Doctrine of Double jeopardy

59. Besides, it is now settled that the term ‘offence’ (*dicta*) refers to the legal characteristics of an offence and not the facts on which it is based. It is true that the Article 35(2) of the Constitution of Bangladesh prohibits prosecution and punishment for twice for the ‘**same offence**’. But on mere reading of the preamble of the Collaborators Order, 1972 it cannot be said that the offences punishable under it are qualified to be the ‘offences’ as enumerated in the Act of 1973.

60. It appears that the instant proceeding has not been initiated on the basis of the allegation or the fact of the earlier proceeding [under the Collaborators Order 1972] and thus the instant proceeding under the Act of 1973 initiated on the basis of different events of criminal acts

constituting distinct offences cannot be said to be barred by the double jeopardy prohibition.

61. We have already observed, in resolving the issue of double jeopardy, in the case of *Md. Abdul Alim* [Judgment 09 October 2013, para 103] that

“Additionally, the offences enumerated in the Act of 1973 are quite distinct from those scheduled in the Order of 1972. The Tribunal, in determining the issue of ‘double jeopardy’, is concerned with offences or crimes as clearly refer to the Act of 1973 and not the Collaborators Order 1972”.

62. In view of above discussion we do not find force in what has been argued by the defence. Rather, we are of the view that the present case involves separate and distinct criminal offences (*i.e.* separate defining elements) under the Act of 1973 and thus instant prosecution there under against accused Syed Md. Qaiser does not at all violate the double jeopardy prohibition.

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

63. The case so far as it relates to the facts of criminal acts constituting the alleged offences is chiefly founded on oral evidence presented by the prosecution. The locals, relatives of victims and sufferers of atrocious activities came on dock and described what they experienced and saw during the atrocious attack launched in 1971 in and around their localities. Apart from them some are hearsay witnesses. 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.

64. The witnesses testified the events they experienced long more than four decades ago. Naturally, due to lapse of long passage of time they 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, it is to be viewed taking all these reality into account and then to assess as to how far their testimony on material facts inspires credence.

65. 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. 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.

66. In seeking to establish the truth in its judgment, the Tribunal has relied as well on indisputable facts and on other authoritative elements relevant to the case even if these were not specifically tendered in evidence by either party during trial.

67. In many instances, the Defence has alleged inconsistencies and contradictions between the statements made to IO and their evidence at trial. The Tribunal notes that the earlier statement of a witness made to IO was composed by investigating officer and it does not carry any evidentiary value.

68. 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. 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. 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]**.

69. The Appellate Division, in the case of *Abdul Quader Molla* has observed that

“ Even if it is assumed that contradiction of the statements witnesses can be drawn in the manner provided under section 145 of the Evidence Act, it may best be said that the witnesses omitted to make some statements before the investigating officer as they were not asked properly, and those omissions cannot altogether be treated or witnesses can be drawn in the manner provided under section 145 of the Evidence Act, it may best be said that the witnesses omitted to make some statements before the investigating officer as they were not asked properly, and those omissions cannot altogether be treated or termed as contradiction within the meaning of sub-rule (ii) of rule 53 of the Rules. The contradiction can only be drawn from statements made by the witnesses in course of their examination-in-chief. **[Justice S.K Sinha, Judgment Page 198,199]**

70. 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]**. 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.

71. 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."*

72. 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. The matter of weighing hearsay evidence depends as to what extent the question of hearsay evidence is clarified by other evidence and it is proved to be reliable. In this regard, the decision in the case of *Limaj* it has been observed that "whether any weight, and if so, what weight will attach to [hearsay opinion] will depend to what extent the question of hearsay is clarified by other evidence and it is shown to be reliable [Archbold International criminal Courts: page 751: 9-104: HEARSAY].

73. 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 'Qaiser Bahini' [in Habiganj]: Accused's role and activities

74. What was the role of the accused Syed Md. Qaiser during the period of war of liberation in 1971? What were his activities? What was his stance and role? Had he founded any private outfit after his name? If so, what was its objective? Had he link, in any manner, with the Pakistani

occupation army and other *para militia* forces formed intending to implement organizational policy or plan or common purpose? Before adjudicating the charges framed all these pertinent matters related to all the charges have to be resolved.

75. Prosecution avers that the accused Sayed Md. Qaiser formed a ‘force’ of his trusted followers of his locality and it was named as ‘Qaiser Bahini’. Objective of forming such ‘force’ was to collaborate with the occupation Pakistani army in carrying out atrocities directing the pro-liberation civilians, prosecution alleges. It would appear from all the charges framed that the events narrated therein involve ‘participation’ of accused Qaiser and the members of ‘Qaiser Bahini’ in the form of providing active and conscious support and facilitation which substantially contributed to the actual commission of offences alleged.

76. Conversely, Mr. SM Shahjahan the learned defence counsel submitted that the social position of the accused Qaiser in 1971 does not impact on the allegations brought against him. It is to be looked into how far the prosecution has been able to prove those accusations and thus it is not necessary to focus on what the accused Qaiser was in 1971, as emphasized by the prosecution. It would be found that no one came with any information as required under rule 2(6) of the ROP for initiating investigation on alleged events. It leads to believe that initiation of investigation was *malafide* on the basis of untrue and insufficient information and materials collected from the district administration of Habiganj.

77. It is true that it is to be determined as to how far the prosecution has been able to discharge its burden in proving the arraignment brought against the accused. But we are not with the misconceived submission advanced by the learned defence counsel that focusing on social position and role of the accused Qaiser in 1971 does not impact on the allegations brought against him. Admittedly, the accused Qaiser was elected Member of Parliament for twice and had been in the cabinet of Ershad government. He has been arraigned for act and conduct that had allegedly facilitated

and contributed to the accomplishment of crimes committed in 1971 during the war of liberation as narrated in the charges framed. His position, status and/or conduct subsequent to 1971 do not deserve consideration for determining his culpability for the past acts.

78. It is a settled jurisprudential axiom that subsequent good conduct or act does not absolve a person accused of an offence committed. The offences alleged were not isolated crimes. All these occurred in a context of war of liberation that was ensued following the ‘operation search light’ on 25 March 1971, in furtherance of a policy and organized plan. Thus, context and nature of crimes make it indispensably pertinent and necessary to identify what the accused Qaiser was in 1971 and what was his role and political ideology.

79. Before we enter into evaluating evidence presented for adjudication of charges and accused’s culpability we deem it appropriate to focus on the position and role of accused that he had, by virtue of his political ideology and own might, in his and around his locality in district Habiganj and B’baria. There had been no existence of alleged ‘Qaiser Bahini’ in any part of the country in 1971, excepting the locality of Habiganj and B’baria, according to averment of the prosecution. It was a ‘force’ or a ‘group’ formed of accused’s own local loyal followers and its activities were merged with that of Razakar force and peace committee, prosecution alleges. Thus, naturally there may not be any government document in this regard. But there have been some documentary evidence presented by the prosecution, apart from oral testimony in support of formation and existence of such a local ‘force’ predominantly which was a private outfit of the accused Qaiser and had acted as a ‘notorious squad’ in 1971. Additionally, prosecution relies upon some documents as have been exhibited to show that the accused pioneered the formation of ‘Qaiser Bahini’ of his own local followers. Apart from this, prosecution also relies upon some of witnesses who naturally had occasion to become aware of formation of this private outfit, as the residents of the same and neighbouring locality.

80. P.W.1 Qazi Kabiruddin is one of star witnesses in this case. He was a valiant freedom fighter of ‘S force’ [the force commanded by Major (later on Major General) K.M Shafiullah] and sub-sector commander of sector-3. Before he received training as freedom fighter he had occasion to remain in and around his own locality under district Habiganj. He testified some pertinent relevant facts in respect of forming ‘Qaiser Bahini’ of accused’s own trusted men as he[accused] being imbued by pro-Pakistan political ideology took the stance against the war of liberation and the people in support of it . He also testified how the accused and his force were involved with the atrocious acts directing unarmed civilians as narrated in some of charges. P.W.1 also provided a vivid description of grounding of the freedom fighters in Habiganj,

81. On **April 12**, 1971, he [P.W.1] heard that the Peace Committee, an anti-liberation power, of Habiganj sub-division had been formed at Qaiser’s house and Qaiser had become a member of the committee. P.W.1 Kabiruddin also stated that on **April 14** he heard that Qaiser and his brother Faisal had been passing on information to the Pakistani army in Brahamanbaria. Subsequently, they under the leadership of KM Shafiullah had gone to Qaiser’s house. But they, finding Qaiser and his brother not available, picked up their father Syed Sayed Uddin, who was a Convention Muslim League leader.

82. P.W.1 also stated that he heard on **April 15** that Qaiser formed ‘**Qaiser Bahini**’ with 400/500 villagers of his locality at Madhabpur in Habiganj. Qaiser had also formed a Peace Committee in Madhabpur and became its president.

83. P.W.2 Mohammad Ali Tipu [64] is the son of late Advocate Mostafa Ali [president of Awami League, Habiganj District, till his death, since 1958 and was elected MNA from Habiganj-Lakhai-Madhabput constituency in 1970 election]. In addition to describing the activities of organising the war of liberation in Habiganj sub-division, he narrated, on 12 April 1971 they knew about the formation of ‘peace committee’ of Habiganj sub-division in a meeting held at the house of accused’s father

Sayed Sayeduddin at Noapara and accused Qaiser was made a member of this committee. They came to know too that the Pakistani army had come and settled at B'baria. Meanwhile, a force named '**Qaiser Bahini**' was formed under leadership of accused Qaiser, P.W.2 added.

84. Defence simply denied the above version. It could not dislodge what has been stated by the P.W.2 in respect of formation of 'Qaiser bahini' headed by accused Qaiser and also the fact that the accused belonged to sub-divisional peace committee, as its member.

85. P.W.3 Tajul Islam [83] is another star witness in this case. He was a member of notorious 'Qaiser Bahini' which carried out mayhem siding with the Pakistan occupation army in and around Habiganj and B'baria during the War of Liberation in 1971. He testified how he got involved with the Qaiser Bahini formed by his 'boss' Syed Md. Qaiser, the accused.

86. P.W.3 Tajul Islam [83] a resident of village Haripur police station Nasirnagar, district [now] B'baria was a member of local peace committee. He testified that on **14 April** 1971 he attended a meeting held at the house of a Muslim League leader Moulavi Manjur Ali [maternal uncle of the accused] and in that meeting accused Qaiser who also attended it was made chief adviser of the peace committee and he[P.W.3] was made its member.

87. P.W.3 further stated as a direct witness to the birth of a local notorious force known as 'Qaiser Bahini' that at that meeting [**on 14 April 1971**] accused Qaiser suggested forming a force after his own name pursuant to which he [accused], on the following day, by holding a meeting formed 'Qaiser Bahini' of his 500-600 followers from villages Itakhola, Bejura, Khatura, Belghar etc. He [P.W.3] also attended that meeting and joined the 'Qaiser Bahini', as its member.

88. Thus, P.W.3 is a direct and star witness as regards formation of 'Qaiser Bahini' and his testimony lends potential support to what has been testified by P.W.1 and P.W.2, in respect of formation of 'Qaiser Bahini' as accused's private outfit.

89. **P.W.12 Goura Prasad Roy** a pro-liberation activist in Habiganj testified that when B'baria was under occupation of the Pakistani army, peace committee was formed in Habiganj by convening a meeting and accused Qaiser was included as one of its member. Qaiser was entrusted with the task of maintaining contact with the Pakistani occupation army. He [P.W.12] got all these information through the local leaders of Chatra League. P.W.12 further stated that meanwhile Qaiser formed a force of his loyal men which was named as 'Qaiser Bahini'.

90. As a pro-liberation activist P.W.12 had reason and source to have all these information, at the initial stage of war of liberation. Besides, 'formation' of a 'force' becomes perceptible to others through its activities. Almost in respect of all the events narrated in the charges framed it has been alleged that the group of perpetrators was accompanied and guided by 'Qaiser Bahini'. Thus, objective of forming such a local private outfit was to provide substantial assistance to the Pakistani army in accomplishing the criminal acts directing the civilian population.

91. In addition to the oral testimony as discussed above the books which have been proved and marked as Exhibits also lend support to the role of the accused in founding the 'Qaiser Bahini', a private 'squad'. The book titled '**Associates of Pakistan Army 1971**' [**Material Exhibit-Ga**] authored by A.S.M Shamsul Arefin demonstrates that the accused Qaiser was closely associated with the Pakistani army and he himself organised a private squad known as 'Qaiser Bahini' and was engaged in carrying out atrocious activities, by collaborating with the occupation army. The local army commander, in recognition of his 'performance', presented him a pistol. [**'Associates of Pakistan Army 1971', A.S.M Shamsul Arefin, book's page 93**]

92. For what ‘performance’ a pistol was presented to the accused Qaiser by the local commander of army? The narration made in the book titled *গণহত্যা নিরীমা তরজি* authored by *তকল দরতজি গজনি* gives its answer, by citing a report published in the daily **Janakantha** on 02 February 2001. Page 122 of the book narrates that –

*ওগ্ৰােচঃ ডেত্রজিবি তবিব্রব্রোব িবেব্রম িম্গ` মস`
ডিবি তবি এো তওত্জ িম্গ` ত্গব্রব্রস্ ক্রিব্রবি 71 গি
গ্ৰহ্য প্জিব্রত্জিব্র চিব্রবেব্রব্র িব্রত্গ রম`খক্চ্য I
আব্র`ডোব নিব্র`ত্জ িব্রহ্রভ ক`িব্রু ম্ভো ত্জিব্র | ZLb
ক্জিব্রডোব িবেব্রম ক`িব্রত্ভ ম্ভ্রভ্রভ্র আিব্রখি তওত্জ ত্গরি
গ্ৰব্রক H এব্রব্রবি ক্গিব্রুবি িন্রভ্রভ্র ক`িব্রু Z`বি ক
কিZ| হ্র্যখি ম্গ্গ Hমে ক`িব্রু গ্ৰভ্রথ্রব্র I
ফ্রিZম্গ্গ িন্র`য্চ্যিব্র-গ্গিব্রব্র`ি ঐক্ৰিব্রবি এব্রব্রখি ঐ
িব্রত্গ গ্`ি নিব্রভ্র Z্ভ্র িZ| I`ি`ক চিেZখ্রভ্র
িব্রহ্রভ্র, অ` I িজ ক্ভি নZ`ব কিব্র ন্রভ্রভ্র | Rব্রব্র তম্ভ্রQ,
GRb` চিব্রবেব্রবি চ` t_ভ্র ZLb িম্গ` ত্গব্রব্রস্
ক্ৰিব্রব্রভ্র ক্চ্য`বি িন্রভ্রভ্র 1ি ি`-j ডেব্রবি ত`ব্র
নq|0*

93. Narration made in the above book also demonstrates that the Pakistani army had occupied Shaestaganj and other localities of Habiganj on 29 April 1971, with the assistance of ‘Qaiser Bahini’. Defence does not refute the authenticity of all these information portraying accused’s role in 1971. Even, it could not be shown on part of the defence that the accused protested the report published in the daily **Janakantha** on 02 February 2001 at any point of time during last thirteen years. Be that as it may, the information divulged from the above book based on a report published in 2001 in a daily news media offers unerring conclusion that the accused Qaiser by founding a private squad had actively guided and assisted the occupation army in carrying out atrocious activities and the accused became culpably associated with them since its rolling into localities of the then Habiganj sub-division.

94. What was the objective of forming such local armed *para militia* force? Was it to protect civilians and their rights from any kind of criminal transgression? No, it was created for ‘operational’ and ‘static’ purpose of the Pakistani occupation army in the locality of Habiganj sub-division and Nasirnagar police station under B’baria sub-division, the evidence

infamous group being led and actively guided by the accused Qaiser participated to the commission of atrocious activities, by accompanying the Pakistani occupation army at different localities of Habiganj sub-division and B'baria sub-division. The book titled *Ógy²hÿi ~ÿiKIPÎ ubhvZb I MYnZ'vÓ, Rq`ÿj tnv#mb* together with the testimony of all the witnesses demonstrates it sufficiently. According to P.W.3 he also participated in many 'operations' carried out by this group in collaboration with the army. We do not find any earthly reason to disbelieve him.

98. P.W.3 Tajul Islam was a cohort of accused Qaiser. Defence could not refute the fact of his being an accomplice of accused Qaiser in 1971. One may question why he was on dock to depose against accused Qaiser? What was his interest? P.W.3 also deserves to be prosecuted for his act and conduct in 1971, defence argued. In this regard, the Tribunal is of view that first, the matter of prosecuting an individual lies with the Investigation Agency and the Prosecution. Second, there has been no bar in taking evidence of a person who by making statement to the IO incriminates or tends to incriminate him with the fact of the case for which he has not been charged with. Third, evidence of such accomplice may be taken into consideration if it inspires credence.

99. We are to look how far the sworn testimony provided by a witness unfolds the truth and whether the person making such testimony is credible. It is to be noted that at the end of his deposition before the Tribunal, P.W.3 Tajul Islam regretting his action [in 1971] begged forgiveness from the affected people and the government for his 'misdeeds' during the war of liberation and he was on dock to testify the truth out of remorse. Defence, by cross-examining him, could not bring any reasonable indication as to any unfair interest on part of this witness in making deposition as a prosecution witness.

100. It is quite patent too that by getting himself involved with the local peace committee, accused Qaiser was actively against the war of liberation and started acting to frustrate the aspiration of Bengali nation by

maintaining close and culpable association with the Pakistani occupation army. He had acted being imbued by extreme antagonistic attitude towards the pro-liberation civilians, in furtherance of common policy and plan.

101. Activities of the ‘Qaiser Bahini’, a para *militia* force founded locally after the name of the accused, as found in the case in hand, remained concentrated within the territory of the then sub-divisions Habiganj and B’baria. However, the activities were aimed to further the policy and plan of the Pakistani occupation army. Accused Syed Md. Qaiser having local political prominence thus formed a private outfit after his name intending to actively collaborate with the Pakistani occupation army in accomplishing its criminal acts targeting the non combatant pro-liberation civilians and people belonging to Hindu religion around Habiganj and B’baria, in furtherance of its policy and plan, prosecution alleges.

102. The accused admittedly belonged to the ideology of politics of **Convention Muslim League**. Prosecution alleged that the way the ‘Qaiser Bahini’ used to act in the territory of Habiganj and B’baria, resembled to that the other *para militia* forces like Razakar and Al-Badar opted, in identifying and eliminating all those who were perceived to be pro-liberation, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League.

103. For the reason of being a local mighty political personality of prominence belonging to Convention Muslim League’s politics accused Qaiser had enthusiastically opted to take stance against the war of liberation, in the name of preserving solidarity of Pakistan. Also he had played a key role in forming local peace committee and he was associated with its activities. 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 he 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. In this regard, 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

104. Accused Qaiser too was a potential mighty Bengali civilian having political prominence in his locality and in Habiganj sub-division [now district]. He could have demonstrated his capacity in preventing atrocious activities. Instead of doing it, he rather became enthused to form a private squad with his loyal men intending to aid the occupation army, the peace committee and local Razakars. Forming such a private loyal force of 400-500 men by itself speaks a lot about the role of accused Qaiser in 1971. Nature and activities of this ‘private squad’ indicate that its objective was to annihilate the pro-liberation civilians.

105. It has been proved that accused Qaiser was first made member of Habiganj peace committee. P.W.1 heard it. Qaiser Bahini formed of trusted followers of Qaiser and he was made president of peace committee, Madhabpur. P.W.1 heard it. Defence could not dislodge this version. P.W.1 got all this information naturally from their sources as he at that time was engaged in organising war of liberation, by grounding of the freedom fighters in Habiganj. Defence could not refute it.

106. 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 on record to show that the ‘Qaiser Bahini’ was formed for any pious objective. Defence could not refute the fact of formation of ‘Qaiser Bahini’ under the leadership and persistent guidance of the accused Qaiser.

107. Defence however could not impress that the said infamous outfit was founded for protecting the civilians from any kind of harm. Rather, it has been divulged from evidence presented by the prosecution that by founding a private outfit after his name, accused Qaiser started providing substantial contribution, support and guidance to the Pakistani occupation army stationed in the Habiganj and B’baria subdivision, in carrying out their horrific atrocities and orchestrating the design of launching attack directing defenceless unarmed civilians.

108. The admitted fact of holding trial in absence of Syed Md. Qaiser under the Collaborators Order 1972, immediately after the independence, is another pertinent relevant fact that leads to conclude his hostile and culpable role he had played by founding ‘Qaiser Bahini’ in 1971 in his locality. He thus was a potential and trusted aide of the Pakistani army in Habiganj, to further common policy and purpose. It may thus legitimately be presumed that in this way accused Qaiser, in exercise of his local prominence, stepped forward to assist orchestrating the attacks by the occupation army against pro-liberation Bengali civilians.

109. Ms. Tureen Afroz, the learned prosecutor argued that the ‘**Qaiser Bahini**’ was an ‘**auxiliary force**’ as defined in section 2 of the Act of 1973 as it had acted maintaining ‘**static relation**’ with the armed force for ‘**operational**’ purpose . It was a locally formed militia and voluntary corps fulfilling the conditions provided in Article 1 of the Hague

regulations concerning the Laws and Customs of War on land. It is evident that in carrying out atrocities directing civilians as narrated in all the charges framed this *'militia'* having specific uniform and emblem had acted under directives and command of the accused Qaiser to collaborate with the Pakistani occupation army. It is true that 'Qaiser Bahini' founded by the accused himself locally. But it was rather an 'auxiliary force', though not formally placed under control of armed forces and thus it aggravates the status of this '**force**' or '**voluntary corps**' of which the accused Qaiser was the '**leader**'.

110. We do not agree with the argument advanced by Ms. Tureen Afroz. We have already found that Qaiser Bahini' was a private outfit founded by accused Qaiser intending to actively collaborate with the Pakistani army in Habiganj and B'baria. Oral testimony demonstrates that this 'force' was equipped with arms, brown colour uniform having distinct emblem. But merely for these reasons the 'outfit' [Qaiser Bahini] cannot be branded as an 'auxiliary force' as defined in section 2 of the Act of 1973. The 'force' [Qaiser Bahini] was not placed under formal control of the armed forces. 'Qaiser Bahini' was a locally formed 'squad' of Qaiser's loyalists with intent to collaborate with the armed forces, in 1971 and in doing so it presumably had to maintain static relationship with the occupation army, true. But in absence of anything showing its formal placement under the armed forces it does not fall within the definition of 'auxiliary force'.

111. Besides, for showing the aggravated status of this force [Qaiser Bahini] prosecution does not require showing that the 'force' was an 'auxiliary force' as defined in section 2 of the Act of 1971. It is incorrect to make speculative argument that the activities carried out by the 'Qaiser Bahini' may be mitigated if it [force] is not considered as an 'auxiliary force'. The way it collaborated with the army, in carrying out atrocities and what it did, to further plan and policy of the occupation army, as a locally formed outfit of accused Qaiser shall be taken into account for assessing the intrinsic gravity of the offences alleged and accused's role and mode of participation that may eventually lead to fix the aggravating

factors, through the process of rational and integrated evaluation of evidence presented before the Tribunal.

XI. Way of Adjudication of Charges

112. The instant case chiefly rests upon ocular testimony. Many of witnesses examined by the prosecution, as it appears, have narrated more than one event including relevant facts. Considering the context prevailing in war time it was impracticable to witness the detail of the events occurred. It should be kept in mind that the alleged incidents took place 42 years back, in 1971 and as such memory of live witness may have been faded. Invaluable documents could have been destroyed. Collecting and organizing evidence was a real challenge for the prosecution. Therefore, 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.

113. 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.”

Adjudication of Charge No.1

[Murder and other inhuman acts caused to civilians at a place nearby Islampur Police post and Kazibari village]

114. Charge: On 27 April 1971 in between 1:30 and 03:00 pm the accused Syed Md. Qaiser being accompanied by the members of his 'Qaiser Bahini' and a group of Pakistani occupation army arrived at a place nearby *Islampur* police post under Islampur police station under the then B'baria sub-division where following his[accused] instruction the army gunned down one Shahjahan Chairman to death and then the group moved towards *Kazibari* locality under the same police station and on the way, following his[accused] order the army caused torture to one Naeb Ali a pro-liberation people and in conjunction with the event the group launched attack directing civilians of *Kazibari* locality and looted households of 15 civilians and destructed properties by setting fire to civilians' houses. Therefore, the accused Syed Md. Qaiser has been charged for **abetting, facilitating and contributing** the actual commission of offence of '**murder**' as **crime against humanity** or in the alternative, for **abetting, facilitating and contributing** the actual commission of offence of '**other inhuman acts**' as **crime against humanity** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus the accused incurred liability under section 4(1) of the Act.

Witnesses

115. In order to prove this charge, prosecution depends upon the testimony of P.W.1, P.W.3, P.W.6, P.W.7, P.W.12, P.W.14, P.W.17 and P.W.19. Of them P.W.1 is a valiant freedom fighter who had been in different localities of Habiganj sub-division during the early part of the war of liberation and as such had occasion to know and see the movement and activities of Pakistani army being guided and accompanied by the accused Qaiser and his force formed after his name, prosecution alleges. P.W.19 is the victim of torture as alleged in the charge framed.

116. P.W.6 is the eye witness to wanton destruction carried out in Madhabpur Bazaar, prosecution alleges. P.W.7 was an activist taking side

with the war of liberation and as such made a corroborative statement as to movement of the Pakistani army on the 27 April towards village Islampur, prosecution claims.

117. P.W.3 Tajul Islam a member of ‘Qaiser Bahini’ testified the formation of Qaiser Bahini a private outfit of accused Qaiser and this force was formed aiming to collaborate with the Pakistani occupation army in committing crimes directing civilian population. He and P.W.7, P.W.12, P.W.14 and P.W.17 simply testified the fact of moving the army accompanied by the accused and his force Qaiser bahini towards Madhabpur on the date alleged.

118. The material particular as divulged from the evidence of P.W.7 and P.W.19 lends sturdy corroboration to the material fact related to the principal offence and accused’s role and complicity therewith, prosecution alleges. However, let us see what the witnesses have testified before the Tribunal, to get the portrait about the alleged role and liability of accused Syed Md. Qaiser for the offences narrated in this charge adjudicated.

Evidence Presented

119. P.W.1 Qazi Kabiruddin who took part in the war of liberation under “S Force” led by Major KM Shafiullah [subsequently Major General] narrated vivid description of atrocities he witnessed and heard, directing civilians around the localities of Habiganj and B’baria, during the early part of the war of liberation in 1971.

120. As regards the event narrated in charge no.1, P.W.1 stated that on April 27 he and one Harun were assigned to gather information about Qaiser [accused], Faisal and the Pakistani army. When they approached the village Chandura [Pw`ij], they found there 50/60 civilians, including Qaiser and Pakistani army. At one stage, 30/35 Pakistani army personnel along with 25/30 members of Qaiser Bahini started marching towards Islampur [Bmj vgcj] and they [P.W.1 and his fellows] started following them secretly. When the joint force -- Pakistani army and Qaiser Bahini -- guided by Qaiser arrived near Islampur [Bmj vgcj] around

2:30pm, they saw Shahjahan, the then chairman of Budunti [eysi] Union Parishad. Qaiser shouted at Shahjahan saying, **“He is a pro-liberation man, shoot him”**. Shahjahan appealed for his life. But ignoring the appeal a Pakistani army man shot him to death.

121. The group of attackers then upon instruction from Qaiser burned down the homes of Kabiruddin and other pro-liberation civilians at Uttar Kazibari [DEi KIRewo]. On their way to Kazibari, Qaiser’s accomplices also tortured one farmer named Nayeb Ali following his [accused] order. P.W.1 also stated that he saw the group of attackers, following them secretly, looting cattle and other belongings from the houses before burning those of civilians of Kazibari village to ashes.

122. P.W.3 Tajul Islam a member of ‘Qaiser Bahini’ testified the formation of Qaiser Bahini a private outfit of accused Qaiser. He testified a vivid description about the misdeeds of the accused Qaiser, his boss. He is a star witness in this case. Defence could not refute that P.W.3 was not an accomplice of accused Qaiser and as such had reason to experience and see many of dreadful misdeeds the accused had committed, by providing contribution, assistance and guidance to the Pakistani occupation army.

123. P.W.3 stated that on 27 April, 1971 Qaiser and his 15-16 accomplices including members of ‘Qaiser Bahini’ had guided the Pakistani army moving to Madhabpur, welcoming them from Shahbajpur, B’baria.

124. P.W.6 Md. Yakub Ali[63] a local of crime site Madhabpur stated that accused Qaiser formed a private outfit after his name and it was known as ‘Qaiser Bahini’ aiming to assist the Pakistani occupation army. On 27 April 1971 he had been at his house at Madhabpur. On being feared, hearing frequent gunshot and seeing flame of fire from the end of Madhabpur Bazar, he went into hid at a place nearer to Madhabpur bazaar, P.W.6 stated, adding that at about 04:00-04:30 pm he saw, from his hiding place, the men of Qaiser Bahini and Pakistani occupation army looting and burning the shops of Bazaar and after carrying out operation

around Madhabpur bazaar on 27 April the men of Qaiser Bahini had moved towards north of Madhabpur Bazar.

125. Defence simply denied the above version. But it however could not controvert it in any manner, by cross-examining the P.W.6

126. P.W.7 Shah Hassan Ali [59] son of a martyr Shah Firoz Ali was actively associated with the activities of Habiganj ‘Chatra Sangram Parishad’ and the activities carried out at the control room set up by the local Awami League leaders at the house of Mostafa Ali in Habiganj town. He stated that on 27 April 1971 at about 2:30-03:00 pm they learnt at the control room that the Pakistani troop was marching towards Islampur from Shahbajpur. This version provides corroboration to the fact of marching the troops towards Islampur on 27 April.

127. P.W.12 Goura Prasad Roy a pro-liberation activist in Habiganj testified some relevant facts. He stated that when B’baria was under occupation of the Pakistani army, peace committee was formed in Habiganj by convening a meeting and accused Qaiser was included as one of its member. Qaiser was entrusted with the task of maintaining contact with the Pakistani occupation army. He got all these information through the local leaders of Chatra League. P.W.12 further stated that meanwhile Qaiser formed a force of his loyal men which was named as ‘Qaiser Bahini’.

128. The above version remained totally unshaken. However, defence simply denied it, in cross-examination of P.W.12

129. P.W.12 further stated that on 24 April 1971 Qaiser and members of his Bahini had met the army at their camp at Shahbajpur and welcoming them, approached to make a move towards Madhabpur which was not too far from Shahbajpur. P.W.12 testified too that on 27 April 1971 in the evening Qaiser, his force and the army forming group came to Madhabpur Bazaar and carried out devastating activities there till 28 April.

130. P.W.14 Md. Nayeb Ali [son of late Kalon Ali] was a freedom fighter. He was entrusted with the assignment of collecting information from the localities between Noapara and Madhabpur under sector 3 which was under command of Major Shafiullah. He stated that on 27 April 1971 Qaiser, his 'force' and the Pakistani occupation army marched towards Madhabpur through the Dhaka-Sylhet highway and when they arrived at Islampur they faced extensive resistance on part of the freedom fighters.

131. He [P.W.14] came to know from one source of Kazi Kabiruddin [P.W.1] that during the attack launched, Shahjahan Chairman was gunned down to death by the army, injury was inflicted to Nayeb Ali [P.W.19] and the house of Kazi Kabiruddin [P.W.1] was burnt down.

132. Defence does not deny it. And it could not be controverted in any manner by the defence. Thus, learning the events of killing, wanton destruction and causing physical harm to civilians in violation of international humanitarian law, as narrated in the charge framed, stands credible.

133. P.W.17 Md. Ful Mia was a freedom fighter under sector no.3 commanded by Major Shafiullah. He had been around the locality of Habiganj at the relevant time. On 27 April, when he along with his team had been in Surma and Goasnagar area, he saw flames of fire from Islampur and Madhabpur.

134. P.W.19 Nayeb Ali a victim of torture testified that the Pakistani army tortured him in B'baria in 1971 on being identified as a supporter of war of liberation, by the accused Syed Mohammad Qaiser. He stated that Qaiser, his associates and the Pakistani army also looted and torched many houses, including theirs, in and around their village, Islampur and in Bijohnagar of Brahamanbaria.

135. P.W.19 stated that in mid-Baishakh [end of April] in 1971, on hearing frequent gunshots he went to a nearby street when he saw Qaiser[accused] and his force marching towards north, chanting slogan

'Pakistan Zindabad', 'Naraye Takbir' along with the Pakistani army and local Peace Committee members.

136. P.W.19 also stated that as he greeted [Salam] Qaiser Shaheb, he didn't respond. When he again greeted him, Qaiser Shaheb said '**he is a man of Mujib [Sheikh Mujibur Rahman]**', and then a Pakistani army man struck him with the rifle butt and thus he fell down by the roadside. He almost lost consciousness, as other Pakistani army men also tortured him. Then Qaiser, his force and the occupation army, leaving him there, marched eastward before looting their houses and houses of freedom fighter Kazi Kabir Uddin [P.W.1] of North Kazibari. He was then taken to a safe place by local people later.

Deliberation and Findings with Reasoning

137. Mr. Rana Das Gupta, the learned prosecutor argued that it has been proved beyond reasonable doubt that the Pakistani troop accompanied by the accused Qaiser and his force 'Qaiser Bahini' moved towards Habiganj through Madhabpur and on their way, they, by launching attack, committed the killing of Shahjahan Chairman, tortured a civilians Nayeb Ali and had also committed wanton destruction of private property belonging to civilians. Cumulative evaluation of evidence provided by the P.W.1, P.W.6 and P.W.9 impels the conclusion that the accused Qaiser and the members of his private outfit 'Qaiser Bahini' were with the group of army and they actively welcomed their movement towards Habiganj through Madhabpur from Shahajibazar.

138. The learned prosecutor went on to argue that 'presence' of the accused Qaiser with the attackers at the crime sites together with his role and position by itself speaks a lot. Why had he and his accomplices accompanied the gang of army on 27 April when it became known even to the world that the Pakistani army by carrying out the mayhem 'operation search light' on 25 March 1971 had killed thousands of innocent Bangalees in Dhaka and other towns of Bangladesh? It is really very hard indeed to suppose that the accused Syed Md. Qaiser was a Bengali. The accused Qaiser not only started collaborating with the Pakistani army

since its rolling into Habiganj, rather he instantly started contributing and facilitating them actively and knowing the consequence, as a servile follower of the army in carrying out criminal activities directing civilians. He, instead of attempting to keep the civilians around his locality unaffected, opted to act as a henchman of the Pakistani occupation army. The evidence presented proves it beyond reasonable doubt that the accused Qaiser culpably and actively accompanied the Pakistani army the principals in committing the murder of Shahjahan Chairman, torturing civilian and devastating destruction of property of civilians which was detriment to fundamental rights of non combatant civilians and thereby he incurred liability of abetting, contributing and facilitating the actual commission of crimes.

139. Conversely, Mr. SM Shahjahan the learned defence counsel argued that the prosecution failed to prove this charge. The witnesses the prosecution relies upon made discrepant version on material particular. Relative of victim Shahjahan could be the best witness to the fact of killing Shahjahan. But no relative of victim Shahjahan has been examined to prove the fact of his killing as narrated in the charge. It was not practicable to see the group of attackers launching attack and killing Shahjahan as alleged. Defence denied what the witnesses have stated on dock. Prosecution claims that P.W.1 and P.W.19 witnessed the event of attack. But their testimony suffers from inconsistencies and improbability

140. The Tribunal notes that on rational evaluation, it stands evinced that P.W.1 saw the group formed of members of 'Qaiser Bahini' and Pakistani army guided by accused Qaiser marching towards the village Islampur and at a place nearby Islampur the army man gunned down Shahjahan to death, following Qaiser's instruction. How the accused instructed and encouraged the army that he had accompanied? It divulges from testimony of P.W.1 that on seeing Sahhjahan, accused Qaiser shouted saying – "***He [Shahjahan] is a pro-liberation man, shoot him***". It also stands proved that the accused Qaiser actively and consciously aided and accompanied the Pakistani army with his private outfit in carrying out atrocious

activities by launching attack directing the civilian population of the crime locality.

141. Defence could not controvert the pertinent testimony of P.W.1 so far as it relates to marching the group formed of Qaiser Bahini and Pakistani army guided and accompanied by accused Qaiser towards Islampur village, killing Shahjahan chairman, following instruction of Qaiser and then causing torture to one farmer Nayeb Ali [P.W.19], on their way to Kazibari village and causing wanton destruction to the houses of Kabiruddin[P.W.1] and other pro-liberation civilians of village Kazibari, in any manner. Even this pertinent part of P.W.1's testimony does not appear to have been denied specifically. Defence simply suggested that he [P.W.1] stated all these for the first time before the Tribunal. P.W.1 denied it.

142. Defence, presumably intended to create an impression that his [P.W.1] statement made in Tribunal contradicts to that he made to IO. We reiterate that 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" [**Appellate Division Judgment: Abdul Quader Molla, 17 September 2013, Page 196**].

143. P.W.19 Nayeb Alo has corroborated the fact of marching the group of attackers accompanied by the accused Qaiser towards the crime villages and on their way, he was tortured by the Pakistani army, on order of accused Qaiser. This material version as to giving rise to a fair indication of accused's presence at the crime site with the group of attackers remained unshaken.

144. The version made by P.W.6 also offers corroboration to the fact of moving the group of attackers formed of men belonging to Qaiser Bahini and Pakistani occupation army towards Madhabpur bazaar and that they had carried out devastating act of destruction of private property

belonging to civilians. P.W.6 claims to have witnessed the men of Qaiser Bahini accompanying the army and committing the act of looting and plundering shops at Madhabpur Bazar. A person acquainted with the formation of Qaiser Bahini by the accused Qaiser had reasonable opportunity to identify the members of Qaiser Bahini participating in such destructive activities. Presence of members of Qaiser Bahini realistically suggests accused's presence too with the principal perpetrators, the army men at the crime sites and this presumption gets assurance from the testimony of P.W.1 who had occasion of having seen the accused Qaiser accompanying the troops moving towards Madhabpur Bazar.

145. The unimpeached testimony of P.W.14 so far as it relates to his knowledge about the event of killing Shahjahan Chairman who was gunned down to death by the army, inflicting injury to Nayeb Ali [P.W.19] and burning down the house of Kazi Kabiruddin [P.W.1], during the attack launched inspires credence and lends corroboration as well to the hearsay testimony of P.W.7, P.W.12, P.W.14 and P.W.17.

146. Marching of the Pakistani army towards Madhabpur aiming to take Habiganj under control, with the guidance and assistance of Qaiser and his private outfit, on 27 April 1971 became an anecdote as by such marching the army was in their beginning move towards Habiganj. Therefore, hearsay testimony of P.W. 7, P.W.12, P.W.14 and P.W.17 carries probative value particularly when it is taken into evaluation together with the testimony of P.W.1, P.W.6 and P.W.19, the material witnesses who had occasion to see the group of attackers, accompanied by accused Qaiser and his accomplices, moving through the crime sites Madhabpur, Islampur and Kazibari.

147. Defence does not deny it. And it could not be controverted in any manner by the defence. Thus, learning the events of killing, wanton destruction and causing physical harm to civilian, as narrated in the charge framed, stands quite credible.

148. P.W.14 also corroborates P.W.1 in respect of the fact of approaching the Pakistani troops accompanied by Qaiser and his 'Bahini' towards Madhabpur on 27 April. The version of P.W. 17 provides corroboration to the fact of wanton destruction while the Pakistani army was heading towards Habiganj through Madhabpur.

149. The Pakistani army first rolled into Madhabpur on 27 April aiming to eventually occupy Habiganj with the assistance of local collaborators i.e the accused Qaiser and his loyal accomplices belonging to his private outfit. It was the first entry of the army around that locality. Thus, this fact testified even by hearsay witness carries probative value which gets corroboration as well from the P.W.1 and P.W.19.

150. The unimpeached testimony of P.W.12 together with P.W.1 and P.W.19 impels an unerring conclusion that the accused Qaiser actively assisted and guided the Pakistani army in approaching towards Madhabpur Bazaar where they perpetrated devastating destruction of property belonging to civilian population. Approaching towards Madhabpur Bazaar was thus an 'attack' directing civilians that resulted in causing grave detriment to normal and peaceful occupation and livelihood of defenceless civilians constituting the offence of 'other inhuman act', committed in violation of international humanitarian law. Such wanton destructive activities were carried out not for any necessity. The accused Qaiser by welcoming and guiding the Pakistani occupation army in moving towards Habiganj through Madhabpur and other localities thus consciously assisted and abetted them even in carrying out such activities detrimental to the fundamental human rights of non combatant civilians.

151. Organised marching of Pakistani troops towards Islampur from Shahbajpur [of B'baria] on 27 April as stated by P.W.7 provides corroboration to the testimony of P.W.1 and P.W.19. The Tribunal notes that as an activist of Habiganj 'Chatra Sangram Parishad' he had reason and opportunity to know the updates about the movement and activities of Pakistani army, particularly during the early part of the war of liberation. He does not seem to have made any embroidery while providing

testimony before the Tribunal. He is believed to be with the truth and stated exactly what he knew and experienced.

152. The Pakistani army was naturally not familiar with the topography and the people of the locality and thus it had to take aid even in marching towards any particular locality within the geographical area of the then Habiganj sub-division. Who aided them in making their move? The evidence of P.W.1 and P.W.19 depicts that Qaiser Bahini a private outfit of accused Qaiser and accused himself accompanied the troop in marching towards the locality of Islampur. In absence of anything contrary, their testimony is quite believable, particularly when it has been found that the accused Qaiser, with intent to prevent the pro-liberation activities and combat the pro-liberation people, formed a private outfit known as ‘Qaiser Bahini’.

153. The accused Qaiser has been indicted for abetting, facilitating and contributing the actual commission of offence of ‘murder’ as crime against humanity. The crimes being dealt with under the Act of 1973 are ‘system crime’ and not isolated crimes. These were committed in a context of war of liberation of Bangladesh. 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. It is to be perceived on rationale 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]

154. The accused did not act as the lone or the principal offender, true. But his act and conduct substantially induced and influenced the principals in committing the crimes, we conclude. The act of abetting encompasses ‘inciting’, ‘soliciting’, ‘inducing’, ‘influencing’, ‘encouraging’ the principal perpetrators in committing the offence. The evidence presented demonstrates that the accused was knowingly with the group of perpetrators, the Pakistani army and he was quite aware of the substantial likelihood of the consequence of his act and conducts that contributed to the commission of killing, torture and indiscriminate destructive doings, in conjunction with the ‘attack’.

155. It is now settled that ‘perpetration’ refers to commission of offence individually (by one person alone and directly), jointly with another person, or through another person. While ‘participation’ refers to act of ordering, soliciting, inducing, aiding, abetting, or otherwise assisting the commission of a crime or the facilitation thereof. The evidence presented impels to conclude that the accused Qaiser ‘participated’ in committing crimes in question, by act of encouragement, assistance and accompanying the principals to the crime sites.

156. The event of launching ‘systematic attack’ against the civilian population stands proved. The group of attackers was formed of Pakistani occupation army, members of Qaiser Bahini and its founder accused Qaiser. It happened in war time. The victims were non combatant civilians. And thus the criminal wrongs done to them were in violation of international humanitarian law. Now the further question that needs to be resolved is whether the accused Qaiser was involved in ‘committing’ the offences with which he has been charged.

157. It is now settled jurisprudence that the phrase “committed” does not intend to suggest that the accused physically perpetrated the crimes

charged personally. In committing a ‘system or group crime’ some members of the group may physically perpetrate the criminal acts constituting the offence of murder, wanton destruction, torture directing civilians and the participation and contribution of the other members of the group is often seems to be substantial in facilitating the commission of the offences in question. We have found it proved that the accused Qaiser, by his act and conduct as revealed from the evidence presented, made it possible for the perpetrators physically to carry out that criminal act constituting the offence of murder and other inhuman act, in violation of International humanitarian law and thus the accused abetted the commission of crimes perpetrated.

158. It is true that the accused Qaiser has not been arraigned to have effected the killing and criminal act as a direct perpetrator. But his act and conduct made the perpetrators possible to effect the ‘killing’ of Shahjahan Chairman and causing harm to Nayeb Ali [P.W.19]. Additionally, the act of accompanying the group of Pakistani army the principal perpetrators unerringly suggests that encouragement and assistance he provided to them was intended to accomplish the devastating destruction of property of civilians. Therefore, the accused Qaiser, as a ‘participant’ was involved in ‘committing’ the crimes perpetrated, in conjunction with the organized attack, sharing common intent. In this regard we may recall the observation of the ICTY Appeal Chamber in the case of *Tadic* that

The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result. [*Tadic Appeals Judgement, para. 196*]

159. It has been found proved beyond reasonable doubt that on being prompted by the accused Qaiser the Pakistani army men with him [Qaiser]

gunned down Shahjahan to death. Also on accused's instigation the army men caused physical torture to Nayeb Ali [P.W.19], on their way to the village Kazibari they targeted for launching *attack*. Thus, there had been a causal connection between the act of accused's instigation and the commission of the crime. Such act of instigation qualifies accused's 'participation' to the commission of the crimes by the principals.

160. It has also been proved from evidence of P.W.1 and P.W.19 that accused Qaiser consciously and culpably facilitated the commission of all the atrocious activities, by his act and conduct and also by the act of accompanying the Pakistani army towards the crime sites. Instead of protecting rights and properties of civilians the accused rather encouraged and facilitated the act of wanton destruction by causing looting and burning their houses and properties. Despite being a local Bengali man of political prominence the accused Qaiser, imbued by the policy and plan of the Pakistani occupation army, had knowingly accompanied and enthused them in carrying out all these activities constituting the offences of murder, torture as crimes against humanity.

161. It has been proved beyond reasonable doubt from the evidence of P.W.19 that in conjunction with the attack, the accused Qaiser, his associates and the Pakistani army also looted and plundered many houses, including theirs, in and around their village Islampur, in Bijoy Nagar of Brahmanbaria. P.W.1 also stated that the group of attackers also committed devastating destruction of private property of civilians including their house at Kazibari village, in course of the attack launched. Such devastating destructive activities obviously caused grave suffering and mental harm and detrimental effect to the peaceful livelihood as well to the affected civilians.

162. Intentional activities of wanton destruction do not seem compatible with the humanity and it is considered as grave violation of international humanitarian law, as it happened during war time. It was rather against humanity and fundamental rights of normal livelihood of civilians. We consider such devastating destructive acts as quite incompatible with the norm of humanity and international humanitarian law. And thus, in

conjunction with the same attack the perpetrators committed the offence of 'other inhuman act' too. The accused by accompanying the group and providing culpable assistance to the principals was thus a part to the attack that resulted in 'other inhuman act' as crime against humanity, in addition to killing of a civilian Shahjahan chairman.

163. On an integrated evaluation of evidence as discussed above it is found proved beyond reasonable doubt that the group of Pakistani army accompanied by the accused Qaiser and his private outfit 'Qaiser Bahini' had attacked the village Islampur on 27 April 1971 when in conjunction with the attack, the army had gunned down one Shahjahan, the chairman of Budunti union council to death, following inciting instigation of the accused; one Naeb Ali[P.W.19] a non combatant civilian was also subjected to physical and mental harm, on accused's instruction, on their way to village Kazibari and finally the attackers committed destructive activities including pillaging of valuables, cattle and burning the houses of pro-liberation non combatant civilians. There can be no clog in finding the accused guilty cumulatively for the offences of 'murder' and 'other inhuman' act as crimes against humanity. Therefore, the accused Syed Md. Qaiser is found guilty for abetting, facilitating and contributing the actual commission of offence of '**murder**' and '**other inhuman acts**' as crime against humanity' as specified in section 3(2) (a) (g)(h) of the Act of 1973 and thus incurred liability under section 4(1) of the Act, for the above offences.

Adjudication of Charge No. 02:

[Other Inhuman acts caused to civilians of Madhabpur Bazar and Kathiara village]

164. Charge : This charge relates to the event of attack on 27 April 1971 in between 05:00 and 06:00 pm, by the group formed of members of Pakistani occupation armed force accompanied by the accused Syed Md. Qaiser and members of 'Qaiser Bahini' directing civilian population of western part of Madhabpur Bazar and adjacent Kathiara village that resulted in looting of 150 shops and households and destructing the same belonging to pro-liberation civilians Kamini Roy, Binod Bihari Modok,

Sachindra Roy, Hirendra Roy, Rati Babu, Ahid Hossain Pathan by setting on fire. Therefore, the accused Qaiser by abetting and facilitating the commission of offence of ‘**other inhuman acts**’ as crimes against humanity as specified in section 3(2) of the Act of 1973 incurred liability under section 4(1) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act and thus the accused incurred liability under section 4(1) of the Act.

Witnesses

165. Prosecution relies upon testimony of P.W.1, P.W.2, P.W.4, and P.W.6, to substantiate this charge. Prosecution considers P.W.1 as a star witness in proving this charge as he had reason and opportunity to see the accused Qaiser accompanying the group moving towards the crime villages, along with his own outfit. The other witnesses, the residents of the crime locality, testified the fact of plundering and looting the private property including shops and houses of numerous civilians, in conjunction with the attack. Their testimony as to accused’s participation in ‘committing’ the criminal act, as an accessory of the army men the principal perpetrators is hearsay in nature. But it however gets corroboration from the evidence of P.W.1, prosecution claims.

Evidence Presented

166. In respect of the event of attack launched on 27 April 1971, **P.W.1 Kazi Kabiruddin** already stated [considered in adjudicating charge no.1] that a group of 30/35 Pakistani army men and 25/30 members of ‘Qaiser Bahini’ started marching towards Islampur [Bmj 19c1] and they [P.W.1 and his co-fighters] started following them secretly. P.W.1 narrated the attack directing the village Kazibari, on the same day and in conjunction with the same attack.

167. What the **P.W.1 Kazi Kabiruddin** stated in respect of the event narrated in charge no.2? P.W.1 stated that after ablazing Uttar Kazibari the group of attackers guided by accused Qaiser started moving towards village Binnighat [19b11U] and they continued to follow them [the group of attackers] secretly. Some moments later, he saw the Pakistani army

shelling targeting Madhabpur *[gvaecij]* Dukbangalow. Simultaneously, another group of Pakistani army under the guidance of accused Qaiser attacked Kathiara *[Kw/qviij]* village and the western side of Madhabpur market where they had burnt down the houses and shops. He saw this event till dusk and afterwards he went to Captain Nasim and Lt. Morshed staying at village Halua Para and made them apprised of what he witnessed.

168. In reply to question put to him by the defence, during cross-examination, P.W.1 stated that they followed the Pakistani army secretly, remaining about 150-200 yards far from them, even when the local people, sensing the arrival of Pakistani army and Qaiser bahini, started running in bewilderment. Thus, seeing the accused Qaiser accompanying the group of Pakistani army towards the crime sites by the P.W.1 seems to have been re-affirmed in cross-examination. There has been no reason to doubt what has been narrated by this witness in respect of carrying out destructive activities at Kathiara *[Kw/qviij]* village and the western side of Madhabpur market.

169. P.W.2 Mohammad Ali Tipu [64] is the son of Advocate Mostafa Ali, MNA from Habiganj-Madhabpur-Lakhai constituency in 1970. P.W.2 himself was actively associated with the student wing of Awami League, in 1971 and had joined the war of liberation. It has been proved by many of witnesses that a control room was set up at their [P.W.2] residence in Habiganj town and it had carried out its activities siding with the war of liberation till the Pakistani army captured Habiganj town.

170. P.W.2 stated that on 12 April they came to know that the Pakistani army had set up their outpost in B'baria. And Qaiser [accused] formed a private outfit under his leadership. On 27 April, 1971 after the dusk, they came to know that the Pakistani army accompanied by 'Qaiser Bahini' arrived at Madhabpur from Shahbajpur of B'baria on that day [27 April] and destructed about 150 shops and houses at the western side of Madhabpur Bazaar and Kathiara village by carrying out indiscriminate looting and the act of setting the same on fire.

171. The above version could not be shaken by the defence. Rather, it has been re-affirmed as the P.W.2, in reply to question put to him by the defence, stated that on 27 April [1971] evening the Pakistani army, Qaiser and his Bahini [outfit] had burnt down about 150 shops and houses at Kathiara village and west side of Madhabpur market.

172. P.W.4 Mohammad Ali Pathan [64] is an advocate by profession and he was the president of Madhabpur Thana Chatra League in 1971. He joined the war of liberation as a freedom fighter. He was a co-fighter of P.W.1 Kazi Kabiruddin and was attached with the 'S' Force. He, with this section, had been at Madhabpur Duktangalow with a special assignment of accumulating information about the activities of Pakistani army around B'baria locality. During their staying there, they came to know that the accused Qaiser keeping contact with the Pakistani army guided them in approaching towards Madhabpur. On getting this information they [P.W.4 and his co-freedom fighters] disengaged the entrance of Madhabpur Bridge to prevent movement of vehicles. They knew it too from their sources that on failing to cross Madhabpur Bridge, the Pakistani army had stationed at WAPDA rest house at the base of Shahbajpur Bridge on the river Titas.

173. P.W.4 also stated that on that day [27 April] at about 10/11 am they saw flame of fire from the village of Islampur, Budunti. On instruction of Major Safiullah and Lt. Ibrahim they started moving towards Moujpur, Montola and some moments later they saw Madhabpur Bazar in ablaze and the people running in bewilderment. They heard frequent gun firing too during the said attack. They heard from the people that many houses were plundered and set on fire by the attackers. P.W.4 and his co-freedom fighters on April 29, 1971 went to Madhabpur bazaar and saw over 200 business establishments, the market and about 50 houses in his village burnt.

174. P.W. 5 Majeda Begum is the victim of sexual invasion done on her, as narrated in charge no.6. She was a resident of village Sultanpur under

police station Madhabpur, sub-division Habiganj in 1971. Apart from narrating the attack and harm caused to her, P.W.5 also stated that Qaiser of Noapara took side in favour of Pakistani army, after the war of liberation ensued and formed a force named 'Qaiser Bahini' intending to collaborate with the army. During the middle part of Bengali month Baishakh [end of April] the Pakistani army came to Madhabpur from Shahbajpur of B'baria being guided by Qaiser[accused] and his Bahini and started devastating activities at Madhabpur Bazaar by burning down many shops at bazaar. At that time she had been at her paternal home at village Belghar where from she could see the flame of fire at Madhabpur.

175. P.W.6 Md. Yakub Ali [65] is a resident of village Madhabpur under police station Madhabpur, the then sub-division Habiganj. He stated that after 25 March 1971, accused Qaiser formed a 'force' after his name and it was known as 'Qaiser Bahini', to assist the Pakistani army. Madhabpur was under control of freedom fighters till 27 April [1971]. P.W.6 further stated that on 27 April at about 01:30 pm he could hear frequent gun firing from the direction of village Islampur and also saw flame of fire. With this he went into hiding at a secret place at Madhabpur Bazar. At about 04:00-04:30 pm he saw from the hiding place that Qaiser's accomplices and Pakistani army started looting and burning the market. He also heard that the Qaiser Bahini committed extensive looting and destroying properties including the shops of Sachindra, Binod Bihari Modok, Kamini Roy , Hirendra Lal Roy and others by setting fire at village Kathiara.

Deliberation and Finding with Reasoning

176. Mr. Rana das Gupta argued that the event of attack as narrated in this charge was continuance of criminal activities described in charge no.1 for which the accused Qaiser has been indicted for abetment and contribution to the commission of crimes by the perpetrators, the Pakistani army. Evidence depicts that the accused Qaiser continued accompanying the Pakistani troops even to the crime sites narrated in this charge. Accused Qaiser had acted as an accessory of the principal perpetrators, by his act of abetment and encouragement he provided to them and thereby he shared common intent, knowing the consequence of the attack to which he was a

part. The indiscriminate destructive activities eventually resulted in grave harm to the livelihood of the affected civilians causing severe detrimental effect to their normal life. Thus, the acts causing the harm to civilians, by committing such destructive activities, constituted the offence of other inhuman act.

177. Conversely, Mr. SM Shahjahan the learned defence counsel argued that contradictory version of witnesses made in respect of time of occurring the events make their testimony tainted by reasonable doubt. No member of victims' family has been examined. It was not possible for the witnesses to see the event from their hiding place which was far from the alleged crime site. Hearsay testimony of witnesses the prosecution relies upon does not carry value in proving this charge.

178. The Tribunal notes, at the out set, that as discussed above, P.W.1 an eye witness affirmed having seen the accused Qaiser accompanying the group of Pakistani army in launching the attack while they were approaching from one village to another village, in conjunction with the event. It is irrelevant whether the accused physically participated in committing the actual commission of the destructive atrocious acts causing severe detriment to normal livelihood of non combatant civilians. The issue is the presence of the accused Qaiser with the troops and not whether he was one of actual perpetrators to the commission of principal crimes at the crime sites. The evidence of P.W.1 so far as it relates to the event of the attack resulting devastating destruction as narrated in the charge does not conflict with the account of other witnesses.

179. The version made by P.W.4 indicates that he had reasonable opportunity to know and even see the horrific atrocities happened in and around Madhabpur locality. Defence could not shake it that P.W.4 along with his section had been in Madhabpur Durbangalow at the relevant time and could know the position and activities of Pakistani army through their 'sources'. The accused Qaiser guided the Pakistani army in approaching towards Madhabpur, keeping contact with them, as stated by P.W.4 inspires credence. After the 'operation search light' on 25 March 1971, the

accused Qaiser had been able to establish his dominance over the pro-Pakistan quarter in and around Habiganj sub-division locality, by virtue of his pro-Pakistan political ideology and also by forming a private outfit of own loyal people. We have already observed it in the preceding segment of this judgment.

180. Especially at the early part of the war of liberation, the Pakistani occupation army invariably had to gain local assistance for the purpose of their movement and activities targeting particular locality and section of civilians or people belonging to particular religion, to further policy and plan. It was not feasible for the Pakistani army to move towards remote places of a sub-division, without the effective guidance on the part of local collaborator[s]. This reality, in view of context, inevitably comes into consideration. Therefore, learning that the Pakistani army being guided by accused Qaiser and his 'Bahini'[outfit] was approaching towards Madhabpur from B'baria , as stated by P.W.4 does not suffer from any improbability and hearsay testimony in this regard carries probative value..

181. P.W.4, as it appears from his account, had been in the locality nearer to the crime sites, at the relevant time. It remained unimpeached. Thus, he had occasion to see the devastating consequence of the attack that resulted in burning and plundering of hundreds of shops and houses belonging to non combatant civilians.

182. Defence simply denied the version made by P.W.5 Majeda begum so far as it relates to the attack at Madhabpur Bazaar that resulted in devastating destruction of private property of civilians. But however, it could not be controverted in any manner. In fact terror inducing situation did not make it practicable for a defenceless civilian to see committing of such devastating activities, as a spectator. Terrorizing climate created by the perpetrators naturally caused frighten to the people. But however, they could know the event as locals even after its commission and also witnessing the consequence of the attack launched. Presumably the P.W.6 had heard what she testified. But we do not see any reason to exclude her

hearsay testimony as it gains corroboration from the evidence of P.W.1 and P.W.6 and also from other circumstances.

183. Defence does not appear to have attempted any effort to refute the testimony of P.W.6, by cross-examining him. It simply denied what has been testified in respect of the attack that resulted in indiscriminate destruction of properties belonging to the civilians of village Kathiara and western part of Madhabpur Bazaar. It divulges from the testimony of P.W.6 that the Pakistani army being aided by accused Qaiser and the members of his private outfit, through launching massive and terrorizing attack on 27 April 1971, took the locality of Madhabpur under their capture and control. The attack included grave destruction of civilians' property that caused massive harm to them. The perpetrators committed such vicious activities intending to create a climate of terror, particularly for the people who took stance in favour of the war of liberation.

184. An unlawful attack on civilians may be defined as (1) an attack that resulted in civilian's deaths, serious injury to civilians, intentional destruction of private property of civilians or a combination thereof; (2) the attack which was willfully directed at the civilian population or individual civilians. The body of evidence before the Tribunal demonstrates that all these elements constituted the 'attack' by the group formed of army, members of 'Qaiser Bahini' and the accused Qaiser had been in guiding position of the group by accompanying it to the crime site. The wanton destruction of private property was not justified, for any kind of necessity for the group consisting of army men. The accused Qaiser by his act of accompanying the group substantially assisted and facilitated this atrocious act.

185. The group of attackers was formed of Pakistani army and Qaiser Bahini a private outfit of the accused Qaiser. All the persons forming the group were thus equally involved with the indiscriminate destructive activities including looting and plundering the properties of civilians. The members of the group of perpetrators, therefore, were united in their common intention. The accused Qaiser who had acted as a guide to the

troop is thus held criminally responsible as an abettor to the crime in question as an accessory of the principals.

186. ‘Other inhuman acts’ is a residual category in the crimes against humanity as specified in the section 3(2) of the Act of 1973. The intentional act of destruction of houses and shops by plundering and burning inevitably was an attack to human dignity, right to live in happiness and it caused grave suffering to the victims of the attack.

187. Destruction of civilians’ property by launching attack, in furtherance of policy and plan, indubitably had detrimental effect on individuals’ fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims. The civilians were non combatants. They did not take any corporal part in any kind of armed hostility. Then why the Pakistani army being guided by the accused Qaiser and his private outfit Qaiser Bahini opted to destruct shops and houses by setting fire? The object was to terrorize the innocent civilians, which eventually constituted the offence of ‘other inhuman act’ as it substantially affected their fundamental right to property and safety, in violation of international humanitarian law.

188. Mental harm may include, but is not necessarily restricted to, acts of torture or inhuman or degrading treatment. Harm need not cause permanent and irremediable harm, but it must involve harm to a person’s ability to lead a normal and constructive life. Causing harm by plundering and burning properties of civilians indeed involved serious despondency to the victims of the attack. Physical injury or harm might not have caused to any individual by such extensive destruction. But weight is to be given to the malicious intent behind such destructive activities. Destruction of hundreds of shops and houses by launching such organised attack was indeed express great contempt for the people and their normal livelihood.

189. The act of looting and plundering private property, in furtherance of common policy, was not with the wellbeing of humankind and as such it is considered as ‘other inhuman act’ that eventually resulted in grave

suffering and mental harm to the affected civilians. Keeping the context into account it may be legitimately presumed that there had been a nexus between the destruction or devastation and the backdrop of the ‘attack’ in which the accused ‘participated’ consciously and knowing the consequence, by actively accompanying and guiding the group of army men.

190. In light of the testimony of the witnesses, we further find, beyond reasonable doubt, that the guidance the accused provided encouraged and substantially facilitated the principals [the Pakistani army] in carrying out the devastating destruction constituting the ‘other inhuman act’ at the village Kathiara and Madhabpur Bazar causing untold sufferings and mental harm to the affected civilians. Since the accused Syed Md. Qaiser was one of a ‘group’ in launching the attack directing civilians he is liable for the crime committed by the group in the same manner as if it were done by him alone. Therefore, the accused Sayed Md. Qaiser is held liable under section 4(1) of the Act of 1971 for the offence of ‘**other inhuman act**’ as crime against humanity as specified in section 3(2) of the Act of 1973 and thus is held criminally liable under section 4(1) of the Act.

Adjudication of Charge No. 03

[Killing of 04 civilians and causing mental & physical harm to pro-liberation civilians at village Krishnanagar]

191. Charge : On **27 April 1971** at about **07:00 pm** the accused Syed Md. Qaiser being accompanied by the members of ‘Qaiser Bahini’ and a group of Pakistani army men by launching ‘attack’ directing pro-liberation civilians of village *Krishnanagar*, police station Madhabpur, the then sub-division Habiganj , half kilometer far from Madhabpur Bazar looted households and destructed 40-45houses by arson and at a stage following accused’s instruction the army men, on chasing , **killed 04 civilians Ohid Pathan, Cherag Ali, Jonab Ali and Madhu sweeper by gun shot.** Therefore, accused Syed Md. Qaiser has been charged for abetting, facilitating and contributing the actual commission of offence of ‘**murder as crime against humanity**’ or in the alternative, for abetting,

facilitating and contributing the actual commission of offence of **‘other inhuman acts as crime against humanity’** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus he has incurred liability under section 4(1) of the Act.

Witnesses

192. Prosecution relies upon P.W.1 Kazi Kabiruddin, P.W.4 Mohammad Ali Pathan, P.W.6 Yakub Ali, and P.W.14 Nayeb Ali. Of these four witnesses, P.W.14 claims to have witnessed the alleged event of attack. The other three witnesses heard the event from P.W.14 and one Kadir Master. It is pertinent to note that the attack narrated in this charge allegedly happened within couple of hours following the attacks launched at some other villages by the same group of perpetrators, the Pakistani occupation army who were on march towards Madhabpur, on the same day i.e. on 27 April 1971 as narrated in charge nos. 1 and 2. Thus, naturally the relevant facts as found proved in the preceding charge [charge no.2] impact substantially in adjudicating this charge as well.

Evidence Presented

193. P.W.1 Kazi Kabiruddin a valiant freedom fighter belonging to ‘S’ force commanded by the then Major Shafiullah had been around the localities of Habiganj at the relevant time, during the war of liberation in 1971. He stated that on 28 April 1971 he had been at village Moujpur with his co-fighters. And on that day, after the dusk one Kadir master of village Panihata and Nayeb Ali [P.W.14] of Madhabpur came to them and informed of the event of looting, destruction and killing of Ohid Hossain Pathan an organiser of war of liberation and the father of Mohammad Ali Pathan [P.W.4] and three other civilians committed at village Krishnanagar by Pakistani army, Qaiser Bahini and Qaiser [accused].

194. P.W.1 also stated that later on they moved towards village Krishnanagar where they found the houses and shops ablaze and saw dead body of Ohid Pathan and three other civilians. Mohammad Ali Pathan [P.W.4] identified his father’s dead body and burst into tears.

195. The above version relating to hearing the incident and on the following day, seeing the dead bodies of victims and mark of devastating destruction of private property of civilians at Krishnanagar village when they went there remained unshaken and undenied, in cross-examination.

196. P.W.4 Mohammad Ali Pathan was a co-freedom fighter of P.W.1 Kazi Kabiruddin and had been with him at the locality of Moujpur at the relevant time. P.W.4 stated that on 28 April after dusk he first heard that the Pakistani army, Razakar and Qaiser Bahini had killed his father Ohid Ali Pathan and many others on 27 April. He further stated that after the army had left Madhabpur on 29 April he accommodated by Kazi Kabiruddin[P.W.1], Nayeb Ali [P.W.14] and others came to Madhabpur and saw about 50 houses including their one burned. They also found dead bodies of his father and Cherag Ali, Jonab Ali and Madhu sweeper lying at the intersection at a place Chargopat [at village Krishnanagar]. Then they buried his father's body and after independence they reburied it at their family graveyard.

197. The above piece of version remained uncontroverted and undenied too by the defence. This version in fact relates to his post event experience and confirms the commission of the attack at village Krishnanagar. On cross-examination P.W.4 stated that the Pakistani army rolled into Madhabpur on 27 April 1971 and they got information when they had been at Madhabpur Duktangalow that the accused Qaiser guiding the army was on move towards Madhabpur along with them.

198. P.W.6 Yakub Ali is a resident of Madhabpur. He is a hearsay witness. On 27 April 1971 he had been at his house. In addition to narrating the attacks described in charge nos.1 and 2 he stated that he also heard on the same day after 07:00 pm from the local elders that the accused Qaiser and the members of his Bahini had killed Ohid Pathan, Cherag Ali, Madhu sweeper and Jonab Ali at village Krishnanagar. He also heard the event from Nayeb Ali [P.W.14] on 28 April and then they went to Moujpur where they informed of the event to Kazi Kabiruddin [P.W.1], Mohammad Ali Pathan [P.W.4] and others.

199. The above unshaken piece of hearsay testimony provides corroboration to what has been stated by P.W.1 and P.W.4, in respect of hearing the event from P.W.14 Nayeb Ali.

200. P.W.14 Nayeb Ali a valiant freedom fighter and he had been at the crime locality at the relevant time. He claims to have had witnessed the event of attack and killing. In addition to narrating the events of attack at Madhabpur, Islampur, Kathiara villages he also stated that after changing his hideout wherefrom he saw the attack launched at Madhabpur bazaar, he at about 07:00 or 07:30 pm next saw the accused Qaiser and his Bahini [private outfit] setting 40-45 houses on fire at village Krishnanagar at northern part of Madhabpur bazaar. Qaiser and his cohorts and Pakistani army had attacked the house of Mohammad Ali Pathan [P.W.4] and with this Ohid Ali Pathan, father of Mohammad Ali Pathan and Cherag Ali, Jonab Ali and Madhu sweeper who had been at that house attempted to escape by fleeing. But Qaiser and his cohorts started chasing them and at a place about 500 yards far from the house the Pakistani army gunned them down to death, on instruction of Qaiser [accused]. He [P.W.14] saw this event remaining in hiding. After Qaiser and his cohorts had left the site he [P.W.14] came out of hiding place and he accompanied by some persons went to the killing site and found none alive.

201. Defence simply denied the above pertinent version. It could not impeach his testimony so far as it relates to the commission of the killing of four civilians and destruction of civilians' property by setting on fire by the attackers formed of Pakistani army, accused Qaiser and the members of his private outfit, by launching attack at village Krishnanagar on the date and time alleged.

202. P.W.14 further stated that on 28 April he went to village Sandhyadil where he found Yakub [P.W.6], Kadir Master whom he apprised the event of killing and destruction. On the same day at about 08:00-08:30 pm they went to village Moujpur and narrated the event to Kazi Kabiruddin [P.W.1], Mohammad Ali Pathan [P.W.4] and on the following day i.e on 29 April they came to crime village Krishnanagar and found the dead

bodies of four civilians including the father of Mohammad Ali Pathan and also saw the mark of intense destruction around the village.

203. The above piece of relevant fact that provides corroboration to hearsay testimony of P.W.1, P.W.4 and P.W.6 remained even undenied, in cross-examination.

Deliberation and Finding with Reasoning

204. The learned prosecutor Mr. Rana Das Gupta argued that P.W.14 saw the event of attack at Madhabpur Bazaar on the same day at 05:00 pm, as narrated in charge no.2. He also narrates that the same group of attackers accompanied by Qaiser Bahini afterwards also attacked the village *Krishnanagar* at about 07:00 pm that resulted in destruction of 40-45 houses by setting fire and killing of four including Ohid Ali Pathan the father of Mohammad Ali Pathan[P.W.4]. Other witnesses are hearsay. P.W.1 and P.W.4 heard the event from P.W.14 Nayeb Ali and one Kadir Master of village Panihata. P.W.6 learnt the incident from P.W.14 Nayeb Ali on 28 April and then he and Nayeb Ali rushed to Moujpur where they informed P.W.1 and P.W.4 of the event. P.W.4 on the following day coming to his village found dead body of his father and three others and also found 50 houses including their one burnt into ashes.

205. The learned prosecutor further submitted that seeing the dead body of four civilians and destruction of private property on 29 April is a fact relevant to prove the commission of the atrocious attack that resulted in actual commission of killing and destruction of civilians' property by looting and burning at village *Krishnanagar* on 27 April, in the evening. Prosecution has been able to prove accused's act of assistance that provided substantial abetment and facilitation to the Pakistani army and the members of his own squad 'Qaiser Bahini in committing the actual crimes by launching the attack. Finally, it has been submitted that the document a book titled *Ømtj tU MYnZ'ïØ, ZvRj Bmj vg, cØv 272*, corroborates the fact of killing the four civilians including the father of Mohammad Ali Pathan [P.W.4].

206. The learned defence counsel Mr. SM Shahjahan, conversely, argued that the P.W.4 and P.W.6 do not name the accused Qaiser implicating him with the commission of the offence alleged. None of witnesses saw the accused participating physically to the actual commission of the alleged killing and the act of destruction at Krishnanagar village. The narration made by P.W.14 suffers from improbability as it was not practicable to see and identify any member of the group of perpetrators from hiding place, particularly after the dusk. The learned defence counsel went on to submit that the fact of killing the victims is not disputed. Defence does not dispute the authoritativeness of information contained in the book titled *Ômîj #U MYnZ`iÓ, ZıRj Bmj ıg, cÔı 272*, in relation to killing of four. But however, the prosecution utterly failed to prove accused's involvement with its commission, in any manner. It would be evident that the alleged attack was carried out by the 'Qaiser Bahini' and the Pakistani occupation army. That is to say, accused Qaiser was not with the group of attackers, at the relevant time.

207. The above submission advanced by the learned defence counsel makes the task of evaluation of prosecution evidence significantly easier indeed. However, we consider it just to make an integrated and rational assessment of evidence presented to arrive at decision as to commission of the offences first and then accused's complicity or liability therewith.

208. The Tribunal notes that killing of four civilians including Ohid Ali Pathan the father of Mohammad Ali Pathan is not disputed. It has already been proved, in the deliberation made on adjudication of charge nos.1 and 2, that on 27 April 1971 the Pakistani occupation army being accompanied by the accused Qaiser and his accomplices was on organised move towards Habiganj and on the way they committed wanton destruction of private property and killing of civilians, on discriminatory ground. During their first rolling into Habiganj the Pakistani army obviously had no idea about the localities, the ways through which they needed to move to a targeted place and the people of pro-liberation ideology who were to be targeted.

209. The charge framed alleges that the accused by act of abetting the army men substantially facilitated the commission of the actual offence of killing. The act of abetment need not be tangible one. It is to be inferred from circumstances and relevant facts including the act and conduct of the accused. It has been held by the ICTY Trial Chamber in the case of *Simic, Tadic, and Zaric* that

“The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.”

**[*Simic, Tadic, and Zaric*, (Trial Chamber),
October 17, 2003, para. 162]**

210. P.W.1 is a hearsay witness. Source of his knowledge about the event narrated in this charge was Nayeb Ali and Kadir master. Of them, Nayeb Ali has been examined as P.W.14. Similarly P.W.4 and P.W.6 are also hearsay witnesses. They have testified what they heard about the event. They also testified what they saw at village Krishnanagar, at the post-attack phase. Their hearsay testimony cannot be excluded, particularly if it gets corroboration from other evidence. This is now settled.

211. It transpires that in reply to question put to him by the defence, during cross-examination, P.W.1 stated that on 28 April 1971 he had been at village Moujpur with their confrontation. Thus, it has been re-affirmed that P.W.1, on 28 April, had been at Moujpur village. Defence does not even deny the fact of learning the event occurred at village Krishnanagar from Nayeb Ali and Kadir Master, as stated by P.W.1.

212. P.W.4 also stated that on 29 April he along with others including P.W.1 came to his village when he saw the mark of devastating destruction of numerous houses and shops belonging to civilians. And they also found dead bodies of his father Ohid Ali Pathan, Cherag Ali, Jonab Ali and Madhu sweeper lying at a place nearer to their house. It transpires from evidence of P.W.14 Nayeb Ali that at the relevant time Cherag Ali, Jonab Ali and Madhu sweeper had been at the house of Ohid Ali Pathan and they were caught on chase by accused Qaiser and his

accomplices when they attempted to escape and then on instruction of Qaiser the Pakistani army gunned them down to death there. P.W.14 saw this event remaining in hide out about 200-250 yards far from the place where the victims were gunned down.

213. Defence is found to have made it re-affirmed by cross-examining P.W.4 Mohammad Ali Pathan that on 27 April the army started moving towards Madhabpur being guided by accused Qaiser and his private outfit. In absence of anything contrary, it thus may be legitimately presumed too that the accused Qaiser and his loyal accomplices were also with the army men in carrying out atrocious activities and killing, by launching attack against the civilians even at village Krishnanagar, in addition to attack launched at other villages as narrated in charge nos. 1 and 2, on the same day.

214. The learned defence counsel argued that seeing the event of killing by P.W.14 from a distance of 200-250 yards far from the crime site was improbable and thus his testimony deserves exclusion from consideration. We cannot agree with this argument, considering the memory factor of human being. First the distance between the hiding place and the killing site may not be exactly 200-250 yards and in reality it is not possible to state it accurately, particularly long four decades after the event. Second, this statement alone does not make his evidence fallible in its entirety. Mere inaccuracy in detailing distance or time, due to lapse of long passage of time never affects the 'core essence' and 'fundamental feature' of a witness's testimony.

215. It is to be borne in mind that a witness cannot be expected to give exact and accurate precision about distances, heights, times, direction, number of perpetrators *et cetera*, particularly long more than four decades after the event occurred. Keeping this indispensable reality in mind we are to focus on the 'essence' of witness's testimony. What is the 'essence' of his testimony? He witnessed the event of attack by accused, his accomplices and the army men who on chase killed the four civilians by gun shot on accused's order—this is the 'core essence' of his testimony.

Defence does not seem to have been able to impeach it by cross-examining this witness.

216. Seeing the event of killing the four, as stated by the P.W.14 remained unshaken. Defence simply denied it. But mere denial of what has been stated by a witness in examination-in-chief is not sufficient to exclude his sworn version unless it is tainted by any reasonable doubt. We do not find any reason to disbelieve his testimony.

217. It has been proved beyond reasonable doubt that P.W.1, P.W.4 [son of victim Ohid Ali Pathan] and P.W.14 came to the crime village Krishnanagar on 29 April and found the mark of grave destruction of private property, by indiscriminate looting and torching and dead body of Ohid Ali Pathan and three other civilians. It remained undenied and uncontroverted too. Additionally, the information contained in the prosecution document the book titled *Ówmtj tU MYnZ'vÓ, ZvRjy Bmj vg, cÔv 272* lends corroboration to the fact of killing four civilians, the victims of the event narrated in this charge. Defence does not dispute this information and authoritativeness of this book.

218. Tribunal notes that the defence does not dispute the killing of four civilians of village Krishnanagar and destructive activities carried out. But it however simply denies accused's complicity and participation with the attack, in any manner. Defence also asserts that no witness claims to have seen the accused participating physically to the actual commission of killing.

219. Taking the evidence presented into account and keeping the defence submission in view we conclude that in absence of anything contrary as to date, time and the group participating to the commission of atrocities it stands proved that the four civilians were brutally gunned down to death on the date, time and at the place by the group of Army men.

220. The accused has been charged for abetting and facilitating the principals in carrying out the atrocious activities described in this charge framed. Now in order to hold the accused responsible for the offences

committed it is to be adjudicated how and by which act or conduct the accused Qaiser assisted and facilitated the principal perpetrators in accomplishing the crimes.

221. The Tribunal is dealing with the offence of crimes against humanity. The *actus reus* of aiding and abetting in committing such crimes requires assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. It is now settled that the act of assistance need not have caused the act of the principal; it could be an act that took place before, during, or after the commission of the crime. The accused Qaiser allegedly accompanied the group of army men and remained present at the crime sites, along with his loyal men belonging to 'Qaiser Bahini'. Accompanying the principal perpetrators to the crime site itself is a culpable act. Why he accompanied the principal perpetrators to the crime site? How he joined them? How he and his accomplices had acted in providing assistance to the principals?

222. On cross-examination, P.W.1 also stated that he became aware from Tipu one of their sources that on 29 April, in the evening, Qaiser and the Pakistani army had attacked the Shaestaganj silo. He heard it also from Nayeb Ali and Kadir master. It suggests unerringly that the accused started acting as a potential aide of Pakistani army since their rolling into Habiganj. Thus, naturally this piece of relevant version divulged in his cross-examination indicates accused's complicity even with the attack launched on 27 April, only two days prior to launching attack to Shaestaganj silo.

223. The evidence and circumstances demonstrate indisputably that the atrocities including killing at village Krishnanagar took place at a stage of their designed movement towards Madhabpur and prior to this attack as narrated in charge no.3 the same group of perpetrators committed atrocious activities in some other localities as narrated in charge nos. 1 and 2. All the attacks took place during the course of planned movement of Pakistani troops from Shahbajpur under the guidance of accused Qaiser and the loyal members of his 'Qaiser bahini'.

224. The Pakistani army had started their first move towards Habiganj through Madhabpur, from Shahajibazar on 27 April 1971. Naturally, the Pakistani army men moving towards Madhabpur were not familiar with the localities, people and the way through which they had to move. Obviously guidance and assistance provided by accused Qaiser and his accomplices had played key role not only ensuring their targeted movement but substantially contributed to the accomplishment of criminal activities constituting the offence of killing and other inhuman acts as well, in course of their movement.

225. It is to be noted that the learned defence counsel by advancing argument conceded the fact of launching attack that resulted in killing civilians. But he however submitted that accused Qaiser was not with the group of attackers formed of army men and members of Qaiser Bahini. Thus, the defence does not dispute the fact that the army men were accompanied by the members of Qaiser Bahini. Be that as it may, it may be concluded unerringly that accused Qaiser the founder of the Qaiser Bahini was also with the troops, the attackers. It cannot be even imagined that simply the members of Qaiser Bahini accompanied the group of army men without physical guidance and knowledge of their 'leader' accused Qaiser. Presence of members of Qaiser Bahini by itself proves accused's presence too at the crime site, with the group of perpetrators.

226. The learned prosecutor did not make any submission citing evidence of P.W.3, P.W.7 and P.W.12 who have testified relevant and pertinent fact that deserves consideration together with the testimony of witnesses which it considered to be relied upon, in support of this charge. To prove the crucial fact of moving the Pakistani army being accompanied by accused Qaiser and his private outfit towards Madhabpur from Shahbajpur, B'baria on 27 April 1971, testimony of these witnesses lends further assurance.

227. P.W.7 Shah Hasan Ali, son of martyred Shah Firoz Ali of Habiganj stated that on April 27, 1971 he heard that Qaiser and his cohorts were marching towards Habiganj with the Pakistani army from B'baria.

228. P.W.12 Gour Prasad Roy, a platoon commander during the Liberation War stated that Qaiser [accused], as a member of Habiganj Peace Committee, an anti-liberation force, was assigned to communicate with the Pakistani army and he formed Razakar Bahini. He [accused] also formed 'Qaiser Bahini' with his loyalists. On April 26, 1971, Qaiser [accused] welcomed Pakistani army at Shahbajpur in B'baria and asked them [army] to enter Madhabpur in Habiganj.

229. It is thus evinced from the above uncontroverted testimony of P.W.7 and P.W.12 that the accused Qaiser and his loyal cohorts accompanied and effectively guided the Pakistani troops moving towards Madhabpur on 27 April and thus it impels the conclusion that the atrocities including killing four civilians at village Krishnanagar, was committed by this group of perpetrators, on the way of their move.

230. It has been found proved too from evidence of **P.W.3 Tajul Islam**, a member of Qaiser Bahini that accused Qaiser accompanied by 15-16 members of Qaiser Bahini welcomed the Pakistani troops and guided them in moving towards Madhabpur from Shahbajpur on 27 April, 1971.

231. Thus, the defence argument that the accused Qaiser was not with the group of Pakistani army while they were on move towards Madhabpur on 27 April does not sustain. Of course, by choosing to be present with the Pakistani troops, the accused Qaiser took a positive step which contributed to the commission of crimes. The act of accompanying the group of perpetrators and remaining present at the crime site made the accused Qaiser consciously 'concerned' with the killing and destructive activities constituting the offence of other inhuman acts.

232. Act of 'abetting' involves no more than 'encouraging', or being 'sympathetic' to the commission of a particular act. The acts of abetting

need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime. Thus, focus should be put on the accused's conduct as a manifestation of willingness to be associated with activities carried out by the principal perpetrator of the crimes. As a potential local aide accused Qaiser and his accomplices belonging to his private outfit provided substantial assistance and encouragement to effect the actual commission of the crimes, evidence presented demonstrates. Thus, accused Qaiser had acted as an accessory of the principals.

233. The learned defence counsel argued that the unspecified and inadequate testimony of P.W.14 does not prove accused's complicity with the alleged offence of killing of four civilians including Ohid Ali Pathan, although he claims to have witnessed the event of killing. P.W.4 Mohammad Ali Pathan does not name the accused involving him with the event alleged

234. It is to be kept in mind that the criminal jurisprudence does not require the prosecution to prove the impracticable. All that it requires is to establishment of such a degree of probability that a man of prudence may, on its basis, believe the existence of a fact in issue involved in a case prosecuting an individual for the offence of crimes against humanity. Thus, often legal proof is nothing more than a prudent man's estimation as to the probabilities of the case. What we get from what has been testified by P.W.14? Does his testimony offer unerring and sufficient indication to believe the existence of a fact in issue?

235. It transpires, beyond reasonable doubt, from the evidence of P.W.14 that the accused and his accomplices accompanying the troops caught the four including Ohid Ali Pathan when they attempted to escape and on 'order' of Qaiser the army men gunned down them to death. Ohid Ali Pathan was an organiser of war of liberation and the father of freedom fighter Mohammad Ali Pathan [P.W.4]. Defence does not dispute it. Seemingly this was the reason of targeting him and his three other companions, at the relevant time. Was it likely for the army men who were on their first move to that locality in getting the pro-liberation people

identified? Of course it was impracticable. This reality provides strong assurance to what has been stated by P.W.14 in respect of seeing the accused Qaiser providing active support, encouragement and facilitation constituting the act of abetment to the army men in committing the killing four non combatant civilians. The victims could not save their lives despite an attempt of fleeing they made. On identification and instruction by the accused Qaiser the army men shot them to death. Accused Qaiser, by his act and conduct as a participant as well, prompted the principal perpetrators substantially, in committing the killing civilians and thereby incurred liability for this crime in the same manner as if it was done by him alone.

236. Accused's conduct of guiding the Pakistani troop, encouraging them to kill pro-liberation civilians and remaining present at the crime sites were thus manifestation of a culpable mindset of being associated with a crime and his active support to the principal perpetrator of the crime. It constituted the act of abetment and substantial contribution to the commission of crimes, we conclude. He and his private outfit 'Qaiser Bahini' collaborated with the army by effectively assisting them in carrying out criminal activities that resulted in devastating destruction, terror inducing climate and killing of civilians while moving towards Habiganj on 27 April 1971.

237. The unimpeached testimony of P.W.14, an eye witness demonstrates beyond reasonable doubt that the attackers formed of Pakistani army, accused Qaiser and the members of his private outfit 'Qaiser Bahini' had launched organised attack at village *Krishnanagar* on the date and time alleged. It is evinced too from testimony of this witness that at a stage of such systematic attack, the attackers had chased the four victims and on instruction of accused Syed Md. Qaiser the army men gunned them down to death. Such culpable act of accused remaining present at the crime site formed part of 'attack'. We are forced to conclude that accused Syed Md. Qaiser not only accompanied the attackers or remained present with them at the crime site but he had played crucial and active role as a 'participant' as well that substantially induced and facilitated the army men, the

principals in killing the civilians by gun shot. And thereby the accused Syed Md. Qaiser incurred liability under section 4(1) of the Act of 1973 for the offence of ‘**murder**’ as crimes against humanity as enumerated in section as specified in section 3(2)(a)(g)(h) of the Act of 1973 .

Adjudication of Charge No. 4 **[Killing 15 civilians at Madhabpur Bazaar]**

238. Charge: On **28 April 1971** in between **10:00 am and 02:30 pm** accused Syed Md. Qaiser being accompanied by a group of 10/15 members of ‘Qaiser Bahini’ and 30/35 men of Pakistani occupation armed force by launching attack at the north-east part of Madhabpur Bazaar under Madhabpur police station, the then sub-division Habiganj with indiscriminate gun firing **killed 15 civilians including Sattar, Barkat Ali** and also destroyed about 150-200 shops and houses of civilians by looting and setting fire. Therefore, the accused has been arraigned for abetting, facilitating and contributing the actual commission of the offence of ‘**murder**’ 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) of the Act.

Witnesses

239. Prosecution relies upon testimony of P.W.1 Kazi Kabiruddin, P.W. 2 Mohammad Ali Tipu, P.W.6 Md. Yakub Ali, P.W.8 Shah Hossain Ali , P.W.12 Goura Prasad Roy and P.W.14 Nayeb Ali, as submitted by the learned prosecutor Mr. Rana Das Gupta. Of them P.W.6 Md. Yakub Ali and P.W.14 Nayeb Ali claim to have witnessed that attack. According to prosecution’s argument, the other witnesses testified what they heard in respect of the event of attack that resulted in killing of civilians including the fact of movement of the army envoy accompanied by Qaiser Bahini towards Habiganj. Now let us see what these witnesses have testified before the Tribunal.

Evidence Presented

240. P.W.1 Kazi Kabir Uddin, a potential freedom fighter, testified that on 28 April 1971 he along with his fellow freedom fighters had been at

village *Moujpur*. On that day, after the dusk , Nayeb Ali[P.W.14] of Madhabpur and Kadir Master of village Panihata came to them and informed that the Pakistani army, accused Qaiser and the members of his 'Bahini[Qaiser Bahini] burned down numerous shops at north-east part of Madhabpur Bazaar and had killed 15-20 civilians. P.W.1 is thus hearsay witness. Sources of his knowing the event were Nayeb Ali and Kadir Master.

241. P.W.2 Mohammad Ali Tipu stated that on 28 April, at night, he heard that during day time on 28 April the Pakistani army, accused Qaiser and the members of his 'Bahini[Qaiser Bahini] looted and burned down 150-200 houses and shops at north-east part of Madhabpur Bazaar and had killed 15 civilians. P.W.2 is thus anonymous hearsay witness. He does not state the source of his knowledge.

242. P.W.8 Shah Hossain Ali, a freedom fighter, stated that they continued their resistance till 27 April [in the locality of Habiganj sub-division]. But pursuant to attack of the Pakistani army they retreated on 28 April and in the evening, contacting their control room set up at Habiganj he became aware that on 27 and 28 April the Pakistani army accompanied by accused Qaiser and the members of 'Qaiser Bahini', by attacking Madhabpur Bazar, carried out indiscriminate looting, burning and mass killing. P.W.8 does not state with specificity about the event of killing in question. His source of knowledge was the 'control room' set up at Habiganj.

243. P.W.6 Md. Yakub Ali a resident of Madhabpur village claiming to have had witnessed the attack stated that on 28 April at about 11:00-11:30 am the Pakistani army and Qaiser Bahini burned down about 200 shops at the eastern part of Madhabpur bazaar while he had been at one Sadat's house, one kilometer far from his own house at Madhabpur. He stated further that he went into hiding in a jungle when the army and Qaiser Bahini were moving towards their village. They [the attackers] looted their house and burned it down and also killed 10-15 civilians by

indiscriminate firing. Of them, he could recognise Lal Mia, Jabar Mia, Sattar and Rajab Ali.

244. P.W.12 Goura Prasad Roy stated that on 27 April 1971, the Pakistani army accompanied by Qaiser [accused] and his Bahini [Qaiser Bahini] came to Madhabpur bazaar and stayed till 28 April and had carried out devastating looting and burning down the numerous houses at Madhabpur bazaar and had killed civilians.

245. It is not clear whether P.W.12 is a hearsay witness or he himself witnessed the event. Besides, his testimony does not state with specificity about the event of attack that allegedly resulted in killing 15 civilians.

246. P.W.14 Nayeb Ali a resident of village west Madhabpur stated that on 28 April at about 10:00-10:30 am he presumed from feared and spreading movement of people that Qaiser, his Bahini and Pakistani army had launched attack. With this, being feared he took shelter at Bhuyian Bari at village Krishnanagar wherefrom he could see Qaiser, his Bahini and the army looting and burning 150-200 shops of north-east Madhabpur including the house of Yakub Ali and that of his own, on Qaiser's instruction.

247. After the dusk on the same day P.W.14 returned to his village and informed Kadir Master and Yakub Ali the event of attack he witnessed and at about 8:00-08:30 pm he along with Kadir Master and Yakub Ali [P.W.6] went to village Moujpur where they found Md. Ali Pathan [P.W.4], Kazi Kabiruddin [P.W.1], Harun and Lt. Helal Morshed whom they apprised of the event.

248. P.W.14 further stated that on the following day i.e on 29 April they visited the village Madhabpur Bazaar and found dead body of 15 civilians including Sattar, Liakat Ali and Lalu Mia lying scattered. In cross-examination, P.W.14 in reply to question put to him by the defence replied that Krishnanagar village was about 600 yards far from Madhabpur village.

Deliberation and Finding with Reasoning

249. Mr. Rana Das Gupta the learned prosecutor, during summing up, argued that the event of attack has been narrated by P.W.6 and P.W.14. They are eye witnesses to the attack and they have proved that accused Qaiser, his accomplices accompanied the group of attackers formed of army men. P.W.1 heard the event from Nayeb Ali [P.W.14] and P.W.6 Md. Yakub Ali was with Nayeb Ali when he described the event to P.W.1 and his co-fighters at village Moujpur. It has been proved beyond reasonable doubt that 15 civilians were killed, during the attack and these witnesses found their dead bodies lying scattered at Madhabpur Bazaar. P.W.2, P.W.8 and P.W.12 are hearsay witnesses and their testimony seems to have been corroborated by the direct testimony of eye witnesses

250. Mr. SM Shahjahan the learned defence counsel argued that the prosecution relies mostly upon hearsay witnesses. Prosecution however claims P.W.6 to have seen the event. But this witness does not implicate accused Qaiser with the alleged event of attack. According to him it was the 'Qaiser Bahini' who accompanied the Pakistani army towards the alleged crime site in committing the alleged atrocity. Further, the documents relied upon by the prosecution to substantiate this charge do not carry any relevance in respect of the alleged event, in any manner. P.W.1 and P.W.2 claim to have heard the event, later on, from Kader Master and Nayeb Ali [P.W.14]. But said Kader Master has not been examined. Additionally, testimony of P.W.14 Nayeb Ali does not inspire credence as he had no probable opportunity of seeing the event. It was impracticable for P.W.6 to see the event of attack and the attackers remaining in hiding place, one kilometer far from the crime site Madhabpur Bazaar. Similarly, seeing the event and accused Qaiser accompanying the troops by P.W.14 was quite improbable as admittedly he had been in hiding at another village Krishnanagar, far from the crime scene, at the relevant time.

251. Defence does not appear to have cross-examined the witnesses, on material particular. It simply denied what they have testified in

examination-in-chief. However, it does not necessarily mean that their testimony shall be readily considered as gospel truth, merely for this reason. Their testimony requires rational evaluation. At the same time prosecution is burdened to prove that there had been an 'attack', accused Qaiser and his 'force' were with the army, the principal attackers and that in conjunction with the attack they [attackers] committed killing of 15 civilians at north-east part of Madhabpur bazaar.

252. Hearsay testimony of P.W.8 and P.W.12 goes to show that on 28 April the Pakistani army accompanied by accused Qaiser and the members of 'Qaiser Bahini', by attacking Madhabpur Bazar, carried out indiscriminate looting, burning and killing of unarmed civilians. However their hearsay testimony does not provide anything as to specificity of the attack, attackers and killing of civilians. The essence of their hearsay testimony simply involves the fact of launching attack at Madhabpur Bazaar on 28 April 1971. They remained silent as to source of their knowledge as to hearing that the group of attackers was accompanied by accused Qaiser and the members of 'Qaiser Bahini. That is to say their testimony may be termed as 'anonymous hearsay evidence'.

253. It is now well settled that even 'anonymous hearsay' evidence is admissible and is considered for arriving at a decision if it is corroborated by 'some other evidence'. It is to be noted that the phrase 'some other evidence' includes circumstance, relevant fact and eye witness's testimony. Therefore, if the anonymous hearsay evidence is found to have been corroborated, it cannot be excluded from consideration, treating it having probative value.

254. The Tribunal notes that an event of attack that results in criminal acts constituting the offences of crimes against humanity does have many phases. In a context of committing the offence of crimes against humanity, witnesses may not have opportunity to see all the phases of the attack or event of atrocity. In fact collectivity of relevant facts revealed from evidence presented leads to the conclusion in respect of the attack, the attackers, criminal activities carried out, and victims of the attack and

the role of perpetrators. Therefore, it is not correct to say, without integrated evaluation, that the hearsay testimony of P.W.8 and P.W.12 carries no probative value as it lacks of specificity in respect of killing civilians and accused's involvement. We are to see whether it gets corroboration from any other evidence.

255. It transpires from the evidence of P.W.14 that only after visiting Madhabpur Bazaar the crime site on the following day i.e. on 29 April he [P.W.14], P.W.1, P.W.6 and Kadir Master found that 15 civilians had been killed at Madhabpur Bazaar. Be that as it may, how P.W.1 could know from Nayeb Ali [P.W.14] on the day of incident [28 April], after the dusk that 15 civilians were killed at Madhabpur Bazaar. P.W.14 too does not claim that before visiting the crime site on 29 April he found 15 dead bodies of civilians at Madhabpur Bazaar. That is to say, P.W.6 and P.W.14 did not opportunity to see the dead bodies of victims by visiting the crime scene on the date of event. Thus, P.W.1 and P.W.6 appear to have exaggerated in narrating their post-killing experience.

256. The ancillary fact of causing destructive activities is found to have been proved and it indicates sufficiently the act of launching 'attack' at the relevant date and time. On the basis of the fact of discovering dead bodies of 15 civilians including Sattar, Liakat Ali and Lalu Mia lying scattered at Madhabpur Bazaar, as stated by P.W.14 it stands proved that the perpetrators committed the killing, during the attack.

257. The charge narrates the act of looting and burning down the civilians' property as ancillary to the event of killing, the principal act constituting the offence of murder. The charge framed arraigns the accused Qaiser for abetting, facilitating and contributing in committing the killing of 15 civilians including Sattar and Barkat constituting the offence of 'murder' as crimes against humanity.

258. First, the commission of crime in question is to be proved. Second, the group of perpetrators is to be identified. Finally, it is to be determined what was accused's role and involvement with the commission of crime

alleged or whether he participated in committing the crime and in which manner.

259. The Tribunal notes that P.W.1 claims that he heard about killing of 15-20 civilians, during the attack by Qaiser, his Bahini and the army, from P.W.14 Nayeb Ali. But Nayeb Ali [P.W.14] does not state anything with specificity as to killing of civilians, during the attack. It is found from cross-examination of P.W.14 that Madhabpur bazaar was 600 yards far from his hiding place [Bhuyian Bari] at village Krishnanagar. Was it practicable to see that his [P.W.14] house at village Madhabpur was attacked, looted and burned down by accused Qaiser, Qaiser Bahini and the army, from the alleged hiding place?

260. However, it appears that P.W.14 stated that he went into hide at Bhuyian bari at Krishnanagar village, being feared by the attack that was launched by Qaiser Bahini and the army on 28 April morning and from his hiding place he could see that Qaiser Bahini and the army looting and burning down the shops and houses including the house of Yakub Ali [P.W.6], on Qaiser's [accused] instruction. What is the basis of saying that the act of looting took place on Qaiser's 'instruction'? We consider it unsafe to assume that since the Qaiser Bahini participated in launching the attack, naturally it [Qaiser Bahini] had acted on their boss's [Qaiser] instruction. But the charge states categorically that accused Qaiser accompanied the group of perpetrators to the crime site and had abetted and facilitated the commission of crimes alleged. Thus, in absence of any reliable and reasonable evidence it cannot be readily speculated that accused Qaiser too was with the group.

261. P.W.14 Nayeb Ali first stated that on 28 April at about 10:00-10:30 am Qaiser, his Bahini and Pakistani army had attacked their village, he guessed it sensing feared and spreading movement of people. But was it really possible to guess the identity of attackers merely on sensing feared movement of people? At best it could have been guessed that an attack was launched directing the village. Thus, this piece of testimony proves the act of launching attack and not the identity of attackers.

262. What the P.W.6 Md. Yakub Ali stated? Prosecution claims him to be an eye witness. According to him on 28 April at about 11:00-11:30 the Pakistani army and Qaiser Bahini burned down about 200 shops at the eastern part of Madhabpur bazaar while he had been at one Sadat's house, one kilometer far from his own house at Madhabpur. Naturally, seeing the group of attackers committing destructive activities and killing civilians from a distance of one kilometer remaining in another's house was considerably impracticable. However, seeing post attack consequence, after the attackers had left the site was possible.

263. Was it really possible to see the attackers moving towards their house, from hiding place? Where he found the dead bodies of alleged Lal Mia, Jabar Mia, Sattar and Rajab Ali? It is not clear from his evidence. The other witnesses did not say anything about the identity of victims.

264. P.W.6 Md. Yakub Ali had been at a place one kilometer away from his own house at village Madhabpur when the Pakistani army and the men of Qaiser bahini had attacked their village and burned down their and his neighbours' houses and had killed 10-15 civilians by indiscriminate gun firing. Of them, he could recognise Lal Mia, Jabar Mia, Sattar and Rajab Ali amongst the victims.

265. First, at the time of launching attack P.W.6 had been at a place one kilometer away from the village Madhabpur. Second, he does not implicate accused Qaiser with the act of launching attack. Third, he did not see the attackers killing civilians. Fourth, presumably P.W.6 had occasion to see the four civilians dead after the event of killing. Additionally, was it really possible to see the attackers moving towards their house, from such a distanced hiding place? Where he found the dead bodies of alleged Lal Mia, Jabar Mia, Sattar and Rajab Ali? It is not clear from his evidence. The other witnesses as well did not say anything about the identity of victims.

266. According to P.W.14 he and P.W.6 Yakub, on 28 April, after the dusk, informed P.W.1 Kazi Kabiruddin staying at village Moujpur about the event and on 29 April they visited the crime site Madhabpur when they found 15 dead bodies of civilians lying scattered. But P.W.6 does not corroborate the fact of visiting crime site on 29 April. If P.W.1 and P.W.14 are believed, when P.W.6 saw dead bodies of four civilians at Madhabpur Bazaar? P.W.6 states nothing clearly about it. On integrated evaluation, evidence of P.W.6 so far as it relates to the event carries little probative value.

267. Prosecution did not dare to cite and produce any relative of alleged victims' [killed] family or eye witness, in support of this charge. We are constrained to observe with disappointment that investigation on the event of killing as narrated in charge no. 4 suffers from infirmity and inefficiency as well. The Investigation officer should have fixed her due and rigorous attention on collecting appropriate evidence on this event.

268. The anonymous hearsay testimony of P.W.8 and P.W.12 seems to have not been corroborated by 'other evidence' and it lacks specificity as well. Besides, the document the book titled 'Associates of Pakistan Army 1971' [book's relevant page 93] relied upon by the prosecution merely shows the act of looting and burning down Yakub Ali's [P.W.6] house. It does not describe the event of killing 15 civilians. The page 93 of this book does not demonstrate any indication as to killing of 15 civilians on 28 April at north-east part of Madhabpur Bazaar. It is not understood as to why the investigation officer and the prosecution as well considered this book relevant in support of this charge.

269. However, on evaluation of oral testimony so far as it relates to post-killing experience of witnesses examined and keeping the information contained in the book titled 'Associates of Pakistan Army 1971' [book's relevant page 93] aside, we arrive at a decision that it has been found proved beyond reasonable doubt that Madhabpur Bazaar locality was systematically attacked by the group of army men directing civilians and they had killed 15 civilians and carried out destructive activities, in

conjunction with the attack. Defence by cross-examining the P.W.1, P.W.6 and P.W.14 could not refute the fact of attack and killing perpetrated during the attack on 28 April 1971 at Madhabpur Bazaar. Evidence of these witnesses so far as it relates to post attack consequence they witnessed lends sufficient and reasonable assurance to it.

270. But the testimony of P.W.6 and P.W.14 so far as it relates to seeing the accused Qaiser accompanying the group of perpetrators or the role of accused, in launching attack or during the attack does not inspire reasonable credence. Their testimony suffers from glaring improbability.

271. Assumption based on mere fact that the accused Qaiser accompanied the Pakistani army on moving towards Habiganj on 27 April, as found proved in charge nos. 1,2 and 3, does not give rise to speculation *ipso facto* that he[accused] continued accompanying the troops even in launching the attack on 28 April as narrated in charge no.4. Speculation cannot take the place of proof. Therefore, accused's presence at the crime site becomes reasonably doubted and we do not consider it safe and just to hold him criminally liable for the offence of murder of 15 civilians. Benefit of such doubt goes in favour of the accused Qaiser. Accordingly, accused Syed Md. Qaiser is found not liable for the offences.

Adjudication of Charge No.5

[Killing of 07 civilians detained at Shaestaganj food godown]

272. Charge: On 29 April 1971 at about 01:00-01:30 pm accused Syed Md. Qaiser being accompanied by a group of members of 'Qaiser Bahini' arriving at the food godown at Shaestaganj under police station Shaestaganj, Habiganj [now district] caused physical torture to the employees and officers of the godown and kept them detained there under armed guard for about one month, and that on 29 May 1971 at about 03:30 pm accused Syed Md. Qaiser being accompanied by a group of members of 'Qaiser Bahini', peace committee members and members of Pakistani occupation armed force came to the godown wherefrom they brought 07 of confined persons under the rail-bridge over the river *Khoai* and then following accused's instruction the army men gunned them down to death. The people standing nearby the bridge witnessed the event.

Therefore, accused Syed Md. Qaiser has been charged for substantially aiding abetting, facilitating and contributing the actual commission of killing of 07 unarmed civilians constituting the offence of **‘murder as crime against humanity’** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus the accused incurred liability under section 4(1) of the Act.

Witnesses

273. This charge narrates two events. The first one relates to unlawful captivity of the employees of Shaestaganj food godown under armed guard for one month, inside the silo since 29 April 1971. The second one involves the act of taking 07 employees so kept in captivity out of the godown and causing their death by gun shot at a place under the rail-bridge over the river *Khoai*. The second event of killing occurred on 29 May, 1971, the charge framed alleges. In accomplishing both the chained events, accused Qaiser allegedly accompanied and assisted the group of perpetrators and on his instruction, the army men whom he accompanied to the crime site gunned the 07 employees of the silo down to death.

274. Prosecution relies upon P.W.1, P.W.2, P.W.s 7-9, P.W.11, & P.W. 12. Of these seven witnesses, some are hearsay witnesses and two are sons of one victim who had occasion to witness some matters which were substantially and directly related to the act confinement of victims and actual commission of their killing. P.W.2 and P.W.12 are alleged to have testified some facts materially related to the first part of the event.

275. The context prevailing at the relevant time obviously did not keep unbarred opportunity for the mass people to see such a barbaric and systematic offence of killing seven civilians. Admittedly, the seven victims were the employees of Shaestaganj food godown. Defence does not dispute their killing. Defence simply attacks the testimony of witnesses so far as it relates to the accused’s association with the Pakistani army, the principal perpetrators and his role in committing the crime by the principal perpetrators. However, let us see and assess what the witnesses relied upon have testified before the Tribunal..

Evidence Presented

276. P.W.1 Kazi Kabiruddin [65] had been around locality of Habiganj during the first part of the war of liberation, with his co-freedom fighters belonging to ‘S’ force. He naturally had opportunity to see and know many atrocities committed by the Pakistani army being aided by the local collaborators, around the geographical area of Habiganj sub-division and Nasirnagar police station under B’baria sub-division.

277. P.W.1 stated that on 30 April he had been at Moujpur area and he knew that on 29 April, in the evening, Qaiser, his Bahini and Pakistani army attacked the food godown, Shaestaganj and had beaten up the officers and employees of the godown.

278. P.W.2 Mohammad Ali Tipu [64] was an activist of Chatra League [student wing of Awami League] in 1971. He is the son of local eminent Awami League leader Advocate Mostafa Ali. On 29 April 1971, he along with others had been at Shaestaganj silo for collecting food grains for providing the same with the freedom fighters. In testifying the first part of the event, he stated that on 29 April at about 12:00 am Syed Qaiser [accused] and his accomplices came to the silo by a jeep that stopped in front of the silo and after a short while he [Qaiser], without telling anything to any body, just returned back. But at about 02:00-02:30 pm he [P.W.2] saw again Qaiser, his accomplices and the army coming towards the godown by chanting slogan ‘Pakistan Zindabad’ [long live Pakistan]. With this they went into hide behind the silo where from he saw accused Qaiser asking the OC[LSD] on whose order they [godown authority] opened the silo to bring food grains out and OC[LSD] replied that they did it on Manik Chowdhury’s instruction, showing a letter sent by him, P.W.2 added. Qaiser [accused] then told him shouting –“**Pakistan army’s rule is going on now. No food grain can be taken out without my [Qaiser] order and none of you [the employees of the silo] shall move here from**”. P.W.2 stated that he could hear what the accused Qaiser told loudly, even from the hiding place.

279. P.W.2 also stated that subsequently when he had been around Chunarughat-Bahubal locality with his co-fighters, he knew that the

persons detained at Shaestaganj LSD godown were eventually killed on Qaiser's instruction under the railway bridge over the river *Khoai* and their dead bodies were thrown down to the river. This piece of hearsay testimony relates to the event of killing that took place about one month after the victims were kept detained inside the silo.

280. P.W.7 Shah Hassan Ali [59] is a resident of Village Mokambari, Barabahula under police station and now district Habiganj. He stated that after the historic speech of Bangabandhu on 07 March, 1971 in Dhaka a control room in Habiganj town was set up at the residence of Advocate Mostafa Ali where the local Awami League leaders and elites used to assemble. He [P.W.7] also used to go there often.

281. The above version remained unshaken in his cross-examination. Thus, it is reasonably believable that the P.W.7 had opportunity to remain aware of the control room-centered activities of the local Awami League leaders.

282. P.W.8 Shah Hossain [63] was one of them who had been engaged in collecting food grains for freedom fighters on 29 April, 1971, from the Shaestaganj storehouse. He narrated the version similar to that of P.W.2 Mohammad Ali Tipu, in respect of the attack directing the civilian employees at the silo by the army and members of Qaiser Bahini under the guidance of accused Qaiser at about 02:30 pm on 29 April. On sensing their [attackers] movement towards the storehouse by chanting slogan 'Pakistan Zindabad', he[P.W.8] and 2/3 others went to a house located at jungle at village Lanjapara, to take hideout.

283. P.W.9 Mostafa Ali [66] is the son of Shaheed [late] Md. Majat Ali who had been serving as a guard at Shaestaganj food godown. He along with his younger brother Nowshad [P.W.11] used to carry food for his father from their village residence. He stated that accused Qaiser accompanied the Pakistani army in setting up camp at Shaestaganj Dukbangalow, on 29 April at about 12:00-12:30 pm. On that day Mostafa Shaheed and his followers had come to the godown for collecting food grains for the freedom fighters. And he [P.W.9] was also present at the godown at that time. At about 01:00-01:30 pm [on 29 April] Qaiser and

his 3-4 accomplices came to the godown by a jeep and staying for a short while they had left the place.

284. P.W.9 states that afterwards [on the same day] accused Qaiser had come again there with the group of members of peace committee, Pakistani army with frequent chanting of slogan ‘Pakistan Zindabad’[long live Pakistan] and dragged 07 officers/employees including his [P.W.9] father out of the godown. At that time he and his younger brother had been inside the godown premises. Qaiser[accused] charged the dragged out people namely Abdul Aziz[sub-divisional food controller] Abdul Khalek [Chief Inspector], Rejaul Karim [officer in charge], Abdur Rahman [guard], Gedaula [guard], Tara Mia [handling contractor] by saying– ‘ **on whose order the food grains are being supplied?**’ The officer in charge [of the godown] replied—‘Commandant Manik Chowdhury has sent his men, freedom fighters are in crisis of food at the house of Mostafa Ali Saheb and thus food grains have to be supplied’. Then Qaiser [accused] threatened by saying – ‘**no food grain is to be taken out and none of you is allowed to go outside of the godown and continue your work here till further order**’. After staying there for half an hour Qaiser had left the godown with the army for Shaestaganj Durbangalaw, keeping some army men there [storehouse]. On seeing it he [P.W.9] along with his younger brother returned back their village house.

285. P.W.11 Md. Nawshad Ali [54] is the younger brother of P.W.9 Mostafa Ali. Their father had been working as a guard at Shaestaganj food godown in 1971. P.W.11 was with his elder brother P.W.9 on 29 April 1971 when they came to the godown carrying food for their father, as stated by P.W.9. He saw the Pakistani army and many others coming forward to the silo by chanting slogan Pakistan Jindabad, on 29 April 1971. P.W. 11 stated too that he knew from his brother P.W.9 that Qaiser and his accomplices dragging 07 employees of the godown including his father out scolded and threatened them not go out of the silo and imitated their captivity under armed vigilance and then they[P.W.11 and his brother] returned back to their village home. This version relating to the first attack initiating the victims’ confinement at the silo remained totally unshaken. Even the defence did not deny it specifically.

286. P.W.11 next stated, in respect of the second part of the event. He stated that one morning, few days after [after 29 April], he and his brother [P.W.9] again went to the silo and saw taking his father and other employees to another building which was duck Bungalow[at Shaestaganj]. His maternal uncle's house was adjacent to that building wherefrom, after Johor prayer time, they saw taking the 07 employees including his father towards Khoai River. They started following them secretly and remaining in hiding inside a sugarcane field nearer to the river saw that the seven detainees were made stood in a line and on signal from Qaiser [accused] the Panjabees [army men] gunned them down to death and then threw down their dead bodies to the river and he never had trace of his father.

287. Defence could not refute the above version that relates to second part of the event by cross-examining the P.W.11. It does not seem to have been denied too. P.W.9 however denied the suggestion put to him that he testified being tutored by the opponent of accused Qaiser and Qaiser was not involved with the alleged incident.

288. P.W.12 Gour Prasad Roy[68] a resident of Shaestaganj Puran Bazaar stated that as per the decision of All Party Movement Committee, he along with Mostafa Shaheed, a member of the then Pakistani Provincial Assembly, Tipu[P.W.2] , and few others went to Shaestaganj Food Godown to collect food for freedom fighters on April 29. Around 12:30 pm, on the same day, Qaiser [accused] and his brother Faisal and three or four other cohorts arrived in the storehouse premises and had left within a few minutes, but after sometime, the accused again came there with Pakistani army that forced them to take hideout, stated P.W.12 Gour. He saw that on direction of Qaiser, his accomplices dragged seven employees out of the godown and Qaiser scolded them, stated P.W.12. Qaiser and the army had left the place directing the employees to remain inside the silo by engaging 4-5 army men there to guard them.

289. P.W.12 further stated that he used to pass his days inside a big sugarcane field and at night inside the house, after the event [initiating detention of employees inside the silo] occurred on 29 April, adding that

there was an army tent near railway bridge over the river Khoai which was 400/500 yards away from the house wherefrom he often used to observe the activities of the army. Around 4:30 pm on May 29, 1971 [one month after the first part of the event], he saw Qaiser standing at the approach of the bridge and the seven employees of the storehouse [Shaestaganj] were made stood in a line under the bridge, on the bank of the river and then, Qaiser provided some signal with his hand and with this the Pakistani army gunned them [the lined up detainees] down to death. Later the cohorts of Qaiser had dumped their [victims] bodies in the river. P.W.12 stated that he knew the victims since earlier and they were sub-divisional food controller Abdul Aziz, chief Inspector Abdul Khalek, OC [LSD] Rejaul Karim, Guards Geda Mia, Abdur Rahman, Majat Ali and carrying contractor Tara Mia.

290. In cross-examination, P.W.12 stated in reply to question put to him by the defence that the distance between the sugarcane fields where he used to remain in hiding and the 'Akhra' was about 100 yards. With this the fact of P.W.12's remaining in hiding inside the sugarcane field, at the relevant time wherefrom he claims to have had seen the event of killing has been re-affirmed. After the first phase of the event, the act of confining the victims at the silo on 29 April 1971 which the P.W.12 has occasion to see he went into hid and used to remain inside sugarcane field, during day time wherefrom he could observe he often used to observe the activities of the army. This piece of testimony remained unshaken and we find no reason whatsoever to disbelieve it. He [P.W.12] also saw the army men accompanied by accused Qaiser taking the victims towards the rail bridge over the river Khoai on 29 May 1971 where they were gunned down to death on signal of accused Qaiser. He [P.W.12] could observe it from his hiding place. The killing took place during day time and the distance between P.W.12's hiding place and the crime site was not too far that could made P.W.12 prevented to observe the event. Besides, defence could not impeach this crucial version. Therefore, we find credence in the evidence of P.W.12 if it is viewed rationally and together with that of P.W.9. As a result testimony of P.W.9 gets corroboration from evidence of P.W.12.

291. P.W.12 thus appears to have testified the role of accused Qaiser in initiating the employees' captivity inside the silo. He had occasion to witness it. At the same time he testified how the employees were killed, one month after such captivity, on accused Qaiser's substantial assistance and guidance, as claimed by him.

Deliberation and Finding with Reasoning

292. Mr. Rana Das Gupta the learned prosecutor argued that this charge rests on the evidence of P.W.s 1,2,7,8,9,11 and 12 of whom P.W. 9 Mostafa Ali, P.W.11 Md. Nawshad Ali and P.W.12 Goura Prasad Roy testified both parts of the event, as eye witnesses to the facts directly related to the principal event. The other witnesses are hearsay witnesses whose testimony shall seem to have been corroborated by the evidence of direct witnesses. Defence could not refute what the eye witnesses narrated before the Tribunal, on material facts. Their testimony proves it beyond reasonable doubt that the accused Qaiser abetted and participated too, by his conscious culpable acts, in committing the principal offence of killing 07 civilians the employees of Shaestaganj food godown as they had acted in support of the pro-liberation section and the war of liberation. Accompanying the principal perpetrators, the group of army to the crime site, shows that the accused Qaiser consciously assisted the principals in committing the crime and as such he participated to its commission, sharing common intent of the principals.

293. On contrary, the learned defence counsel Mr. SM Shahjahan argued that it was impracticable to aver that the 07 employees of Shaestaganj silo were kept there detained for long one month. The witnesses particularly P.W.9 and P.W.11 the sons of one of victim employee remained silent as to how and wherefrom their father got his diet, even during his alleged protracted detention there. Defence does not dispute the attack launched. But it however was launched by the army and the accused had no complicity or link with it, defence claims. P.W.2 and P.W.9 describes inconsistent time of accused's alleged coming at the silo on 29 April 1971. If it is assumed to be true that the freedom fighters, at the relevant

time, had been at Shaestaganj silo for collecting food grains for freedom fighters naturally they would have resisted the accused Qaiser, on seeing him there first. But it did not happen. Thus, seeing Qaiser at the silo for few minutes when the freedom fighters were engaged in collecting food grain stands untrue.

294. The learned defence counsel went on to argue that the narration made in the book titled *Ógnyhky nveMÄ trjw* which has been relied upon by the prosecution and marked as **Exhibit-Gha** differs from what has been described in the charge framed, in respect of manner of commission of the principal event of killing . Seeing the event by P.W.9 was quite improbable and as such his statement cannot be relied upon.

295. Having regard to submission made as above by both sides, the Tribunal notes, at the out set, that the context prevailing at the relevant time obviously did not keep unbarred opportunity for the mass people to see such a barbaric offence of killing seven defenceless civilians. Admittedly, the seven victims were the employees of Shaestaganj food godown. Defence does not dispute their killing. Defence simply attacks the testimony of witnesses so far as it relates to the accused's association with the Pakistani army, the principal perpetrators and his alleged role in committing the crime by the principal perpetrators. .

296. It is to be noted that the facts materially related to the act of keeping the employees in captivity at the Shaestaganj silo, under armed guard for one month have been testified particularly by P.W.9, P.W.11 and P.W.12. It concerns the first segment of the charge framed. Now, it is to be determined whether the accused Qaiser had role constituting the act of 'participation' in committing this illegal act. The act of keeping 07 employees confined had a causal link with the principal event of killing, occurred one month later.

297. P.W.1 stated that on 30 April he had been at Moujpur area and he knew that on 29 April, in the evening, Qaiser, his Bahini and Pakistani army attacked the food godown, Shaestaganj and had beaten up the officers and employees of the godown.

298. This piece of testimony has been re-affirmed in his cross-examination as P.W.1, in reply to question put to him by the defence stated that their source named Tipu [P.W.2] had informed them of the fact that Qaiser and his cohorts had attacked the Shaestaganj food godown on 29 April, 1971. The hearsay testimony of P.W.1 cannot be termed as anonymous hearsay evidence. It is based on explicit 'source of knowledge' and as such it carries` probative value.

299. Defence simply denied what has been testified by P.W.2. The version of P.W.2 so far as it relates to the first part of the event concerning the act of the accused Qaiser in facilitating and initiating the captivity of the employees of the silo and learning the event of killing remained totally unrefuted, in his cross-examination.

300. The fact of coming accused Qaiser at the Shaestaganj LSD godown , as stated by P.W.2 rather seems to have been re-affirmed as he stated in reply to question put to him by the defence that on 29 April[1971] accused Qaiser had come to Shaestaganj godown from Noapara direction. Thus, it remains uncontroverted that at the relevant time, on 29 April 1971, P.W.2 had opportunity to see the activities carried out at the silo by the group of attackers formed of accused Qaiser, his accomplices and the army men.

301. Testimony of P.W.2 in respect of threatening utterance that the accused Qaiser had made directing the OC [LSD], on 29 April gets corroboration even from the evidence of P.W.9, another eye witness who is a son of one of victims. It provides valid indication as to the unlawful confinement of the employees inside the silo under armed observation that ended with the act of taking them out to the crime site intending to put them to death, one month after initiating such captivity.

302. Accused Qaiser , as it reveals especially from evidence of P.W.9, actively assisted and accompanied the group of army in taking the hostages at the crime site where they were gunned down to death, on Qaiser's instruction. The role the accused Qaiser had played in accomplishing the crime in question suggests an unerring conclusion that he not only abetted the perpetrators but actively 'participated' in committing the act of killing, by sharing common intent of the principals.

303. P.W.7 too stated that on 29 April at about 11:00-11:30 am he learnt that Qaiser, his private outfit Qaiser Bahini and Pakistani army arrived at Shaestaganj and had set up their camp at Shaestaganj Durbangalow. It remained unshaken. Thus, it stands proved that on 29 April 1971 the Pakistani occupation army made them stationed at Shaestaganj and as such presumably they being imbued and guided by accused Qaiser and his 'squad' the Qaiser Bahini had moved first to the silo to initiate it's employees' unlawful captivity, under threat and coercion, on the same day. Indisputably, killing of the hostages took place on 29 May 1971 by taking them out of the silo, one month after initiating the act of their captivity,

304. P.W.7 did not state anything directly related to either part of the events narrated in the charge framed. However, we have got from his unshaken version that the accused Qaiser, his private outfit and Pakistani army rolled into Shaestaganj on 29 April 1971 and they had set up a camp at the Durbangalow there. Thus, on that day accused Qaiser was with the army stationed at Shaestaganj. It relates to the fact of accused's coming to the Shaestaganj godown on the same day and threatening the officer in charge of the godown to remain there until his [accused] order. This relevant fact lends assurance to what has been stated by the P.W.2 in respect of his seeing the accused Qaiser and his cohorts first at the godown, and then also along with the Pakistani army. Presumably, after arriving at Shaestaganj, the Pakistani army being guided by the accused and his private outfit attacked the godown and had beaten up it's officers and employees, on 29 April 1971 and thus they initiated their coercive captivity that continued for one month under armed vigilance.

305. The testimony of P.W.9 so far as it relates to the fact of coming of the accused Qaiser at the godown first at around 01:00 pm with his accomplices and leaving the place after a short while provides corroboration to P.W.2 and P.W.8. What the P.W.9 states as regards the attack by the group of members of Qaiser Bahini and the Pakistani army guided by the accused Qaiser that made the employees hostages under armed surveillance ?

306. P.W.9 is the elder son of victim Majot Ali a guard of the store house, Shaestaganj. On 29 April he[P.W.9] along with his younger brother[P.W.11] came to the silo for providing food, brought from village home, to his father. This made an opportunity for him to see the attack directing the employees of the silo by the accused Qaiser, his accomplices and the army. He remaining in hideout saw the accused Qaiser scolding the OC [LSD] for his act of allowing taking food grains out of the silo and eventually initiated, with threat, their unlawful confinement there under armed surveillance. Defence could not refute this piece of evidence of ocular witness, in any manner. Already it stands proved that the accused Qaiser being a potential aide of Pakistani occupation army assisted their arrival at Shaestaganj on 29 April and it stationed its troops at Shaestaganj Duktangalaw.

307. We disagree with the argument extended by the learned defence counsel that since there is no evidence to show as to how the detained employees got their diet during protracted detention the fact of keeping them captive there, as alleged stands untrue. Defence does not appear to have cross-examined P.W.9 or put any suggestion to him especially on this point.

308. The evidence of P.W.9 and P.W.12 collectively divulges that the 07 employees of the storehouse remained detained there for long one month. Defence could not impeach it. Besides, in absence of anything contrary as to date of their taking to the crime site for their annihilation it stands proved that they were kept in captivity at the silo for one month under surveillance of army men.

309. By narrating almost similar version, P.W.11 the younger brother of P.W.9 has corroborated his elder brother [P.W.9] that while [on 29 April] they had been in the godown they saw the group of members of Qaiser Bahini and Pakistani army guided by accused Qaiser attacking the godown, threatening the employees and keeping them including their father confined inside the godown under armed guard.

310. Defence did not deny the above version made by the P.W.11 before the Tribunal, in any manner. It simply suggests that he [P.W.11] stated it for the first time before the Tribunal and had not stated anywhere else. P.W.11 denied it blatantly. Understandably, defence intended to show inconsistency and between his sworn testimony and statement made to IO. But It has already been settled by the Appellate Division, in the case of *Abdul Quader Molla* that the contradiction can be drawn from the statement 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 Abdul Quader Molla Judgment of the Appellate Division**]. Besides, 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.

311. P.W.9 and P.W.11 are the sons of victim employee of the silo, defence does not dispute. Their father had been working there as a guard and used to stay at silo premises. Their consistent testimony mirrors that on 29 April[1971] they had gone to the silo providing food for their father when they saw the accused Qaiser and his cohorts threatening the employees to remain inside the silo until further order and thus the accused made the employees confined there under armed guard. Why the accused had acted in such horrific and coercive manner?

312. Evidence of P.W.9, a direct witness, provides that utterance made by accused Qaiser, directing the employees of the silo, during the initial phase of the attack, was ---**'on whose order the food grains are being supplied?'** And then ordering them Qaiser said – **'no food grain is to be taken out and none of you is allowed to go outside of the godown and continue your work here till further order'**. Deployment of armed surveillance at the silo was inevitably intended to keep the employees confined there, we conclude. The tone and intent behind the coercive utterance that the accused had made was to initiate their unlawful captivity as they were considered to be the civilians in favour of the war of liberation. It stands proved.

313. It thus appears from the evidence of P.W.9 that on that day, when the accused first came to the silo he found the freedom fighters taking food grains out of the godown for providing it to the freedom fighters. Presumably, it prompted his pro-Pakistan mindset showing extreme anger to the employees working at the silo, during his later visit at there, on the same day. This conduct of accused Qaiser leads to the conclusion that he did it intending to collaborate with the Pakistani occupation army who on that date just made them stationed at Shaestaganj Duktangalow, in carrying out terror inducing and criminal activities, directing pro-liberation civilians, to further policy and plan.

314. Therefore, on integrated evaluation of evidence as discussed above it stands proved beyond reasonable doubt that under active and culpable assistance, guidance and abetment that the accused had provided to the perpetrators, the members of Pakistan occupation army made it possible to keep seven employees hostages at the storehouse of Shaestaganj, under armed vigilance.

315. Next part concerns the event of taking the seven employees detained in the silo for one month under the rail bridge of river Khoai wherein they were gunned down to death. This part of criminal act was linked with the part of keeping the victims in captivity at the silo. Who perpetrated this brutal 'group crime' that resulted in death of seven unarmed civilians? Had the accused Qaiser played role in committing this killing?

316. The crimes so allegedly committed in context of war of liberation. The charge framed narrates that the Pakistani army men were the principal perpetrators. Why they opted to annihilate these civilians? Who enthused and encouraged them in accomplishing their killing?

317. It appears that one month after keeping confined at the silo, the victims were brought out and taken to the crime site, near the rail bridge of river *Khoai* when accused Qaiser accompanied the group of Pakistani army who gunned them down to death on accused's instruction, the charge framed alleges. P.W.9 claims to have had occasion to witness the

act of killing. Other witnesses have testified some facts directly related to the principal event. Now, let us have a look to what account the witnesses have made before the Tribunal.

318. P.W.8 Shah Hossain, a physically-challenged freedom fighter stated that the freedom fighters had taken control over with heavy security walls before the Pakistan occupation army and its local associate accused Qaiser along with his private outfit invaded Habiganj on April 30, 1971. He heard this information from their Habiganj secret control room. It remained unshaken. Thus, it reveals that stationing of the Pakistani army at Shaestaganj on the preceding day i.e on 29 April stands proved.

319. P.W.9 Mostafa Ali is the son of victim Majot Ali who had been working as a guard at the Shaestaganj silo at the relevant time. Already we have made deliberation in respect of the first part of the event on the basis of evidence of this witness together with other evidence. He testified the second part of the event concerning taking his father and other detained employees of the silo towards the crime site where they were gunned down to death by the Pakistani occupation army.

320. P.W.9 Mostafa Ali stated that on 29 May [1971] at about 10:00-10:30 am on getting information from his uncle that Qaiser, his cohorts and the army again had gone to the silo he and his younger brother [P.W.11] rushed to the silo and from a house nearby it he found Qaiser, his cohorts and Pakistani army taking 07 employees including his father towards Shaestaganj Duck bungalow, from the godown. They started following them keeping distance and arriving at a place nearer to the Duck bungalow[at Shaestaganj] they saw the 07 victims kept detained there and also saw Qaiser having conversation with the Army men at the Duck bungalow premises and after a short while they [Qaiser and army men] entered inside the Duck bungalow. At about 02:00-2:30 pm he saw them taking 07 detained employees towards Shaestaganj Puran Bazaar and with this he and his brother started following them secretly. They saw that the detained employees were taken under the railway bridge over the river *Khoai* where they were made lined up and then on signal from

Qaiser[accused] the army men gunned them down to death and threw their dead bodies to the river and they never had trace of their father. On seeing this he and his brother, being feared, returned back to their house. **[at this stage of making deposition, P.W.9 started shedding tears].**

321. Defence does not appear to have made effort to refute the above piece of material version directly related to the event of killing by cross-examining the P.W.9. Defence however, simply suggested that what he stated implicating the accused Qaiser with the event was not true. P.W.9 denied it. There has been no reason to inspire us to exclude his testimony terming unreliable.

322. In cross-examination, P.W.9 stated that his father [victim Majot Ali] used to stay at the quarter of the silo. In reply to question elicited to him by the defence P.W.9 stated that on the house wherefrom he had witnessed the activities inside the silo, 29 May [1971], was adjacent east to the silo. Thus, it was quite probable to observe the affairs happened inside the silo from the said house where P.W.9 remained in hiding. At the same time seeing the affairs happened inside the silo at the relevant time becomes re-affirmed as well. P.W.9 also stated that his father [victim Majot Ali] used to serve even under Qaiser' father. Thus, it is inferred safely that P.W.9 had reason to know the accused Qaiser even since prior to the event and it made him justifiably able in identifying the accused Qaiser at the silo and with the army.

323. The unimpeached testimony of P.W.9 the son of victim Majot Ali [guard of Shaestaganj silo] demonstrates it indisputably that 29 May 1971, 07 employees including his father were first taken to Shaestaganj Duck Bungalow from the silo where they were kept detained for one month under armed guard. Accused Qaiser was with the army men there and had conversation with them and afterwards the detained civilians were brought near the rail bridge over river *Khoai* by the army and accused accompanied them towards the crime site. It transpires too that on signal of accused Qaiser the army men gunned the detained employees brought there down to death and their dead bodies were thrown to the river and none had any trace of them.

324. From the argument advanced by the learned defence counsel it appears that the event of the killing is not disputed but the accused Qaiser was not with them, at any phase of the attack. We have already concluded that the first segment of the charge relating to victims' captivity at the silo was chained to the event of killing that took place one month later. Accused's participation with the act of keeping the victims in coercive captivity, as already found proved, is sufficient to establish his concern and nexus even with the acts constituting the offence of murder of detainees, if initiation of such coercive confinement had effect in completing victims' killing.

325. In proving the offence of murder as crimes against humanity being not an isolated crime, recovery of dead body is not necessary, considering the context and pattern of committing the crime. P.W.9 had reason to know accused Qaiser as he [P.W.9] saw his [P.W.9] father serving under Qaiser's father. It remained unshaken. Defence failed to show that the father of P.W.9 had been elsewhere at the relevant time. Rather, it has been re-affirmed that his father used to stay at the quarter of Shaestaganj silo. We have found from the evidence of P.W.9 that the silo was not surrounded by boundary wall and as such it was reasonably possible to observe what was happening inside its premises, even from either side of its boundary or from any place or house adjacent to its either side.

326. The learned defence counsel argued that Exhibit-Gha the book titled *Ógŷhŷk nŷMÄ tRj ŵ* differs from what has been testified by the witnesses, in respect of the manner of the event of killing. Such difference excludes accused Qaiser's complicity with the event of confinement followed by killing 07 employees of the silo.

327. The Tribunal notes that the narration made in the book titled *Ógŷhŷk nŷMÄ tRj ŵ* [Exhibit-Gha] relied upon by the prosecution does not narrate in detail, as has been made in the charge framed and found in the evidence presented by the prosecution, in respect of the manner of the event, though

it reflects the event of killing of employees of the silo. The book narrates that

০.....GwCj i i i t Z t k i c y G e s m t j t U
 m s N u J h x i c i A e v i c v K e m n b x i A v M g b N t U
 n i e M t A | A b u Z w e j t x ^ Z v i v ~ v b x q f i t e ~ v c b K t i
 K ' v x u | c w i K i b v K i t Z ~ v t K M Y n Z ' v m s N U b t i |
 Z v t ' i m v n v t h " G w M t q A v t m g y n j g j x t M i m f v c u Z
 A v e ` j y e w i G w t f v t K U , m q ` K v g i " j n v m v b , m q `
t g v n v x \$ K v q m v i [A v m g j] , g i u g m q ` m C ` D w i l b I
t g v n v x \$ A v a j - v n | g y p h x i
 b q g m a t i G i v n i e M A k n i t K c w i Y Z K t i G K
 w e f x w l K v i
 i v R t Z j | g y p t h v x t ` i L v ` "
m i e i n K i v i K v i t Y k v t q - M A L v ` , ` v t g i c o i x ,
t K i w b G e s I . m . t K (G j . G m . M) n Z ' v K i v i c i
 n i e M A g n K g v L v ` " K g R Z v t K a t i u b t q w M t q Z v i v
 n Z ' v K t i | [g y p h x n i e M A t R j v , c o k o x - N , e B t q i
c o p - 1 6 9]

328. Defence does not attack the authoritativeness of the book. The information narrated therein clearly indicates that--

- (i) the accused Qaiser started providing assistance to the occupation army since its rolling in Habiganj, being associated with them;
- (ii) the employees of Shaestaganj silo had been killed
- (iii) the reason of targeting them was that they were engaged in supplying food to the freedom fighters.

329. It is true that the book does not describe the event of killing with specificity, as regards manner and perpetrators. But it however demonstrates the role the accused had played during the war of liberation in facilitating the commission of recurrent atrocities by the occupation army in and around Habiganj. It appears that author of the book himself acknowledged his limitation in portraying the detail exactitude in respect of the event of killing the employees. And thus the narration made in this book cannot be treated as the whole truth. Merely for this inadequacy the book relied upon cannot be kept aside in its entirety, we conclude. Rather, the narration, on some material facts, made therein however provides strong corroboration to the commission of the killing of employees of Shaestaganj silo.

330. We have already concluded that the accused Qaiser had played a culpable and active role in keeping the employees detained at the silo, under threat and coercion. It was conduct and act of the accused Qaiser prior to the actual event of killing that took place one month after their detention. The utterance the accused made on 29 April directing the employees to remain inside the silo till further order demonstrates accused Qaiser's potential influence and active participation in materializing such unlawful and coercive act that eventually ensued the next phase of the event, the killing. The primary purpose of such unlawful act of keeping them hostages was to spread terror among the civilian population which was violation of international humanitarian law and the laws or customs of war.

331. In order for responsibility for the deaths of seven unarmed civilians to be imputable to accused Qaiser, it is to be seen whether he by accompanying the group had been able to *predict* this result, together with his prior act and conduct that facilitated victims' captivity at the silo. We have found it proved that accused Qaiser consciously accompanied the group of army in taking the detainees first at Shaestaganj Dukkangalaw and then the perpetrators being accompanied by accused Qaiser took them to the crime site. Thus, accused was closely associated with the chained criminal acts and as such he was in position to predict the 'risk' of such chained criminal activities that eventually resulted in death of seven civilians, we conclude.

332. The crime in question was a 'group crime' committed by the gang formed of army men, members of Qaiser Bahini and the accused Qaiser. Accused Qaiser is not alleged to have had acted physically in killing the victims. He being a member of the 'group' of attackers and founder of 'Qaiser Bahini', a private outfit substantially abetted and facilitated the principals in committing the crime, the charge alleges.

333. Thus, not only are principals guilty but also the accused Qaiser as an accessory, who took a consenting part in the commission of crime or was connected with the enterprises involved in its actual commission, as he abetted crime, and he belonged to the group engaged in the commission of

crime, in furtherance of common purpose. Now, all legal authorities agree that where a common design of a group of attackers exists and the group has carried out its purpose, then no distinction can be drawn between the ‘finger man’ and the ‘trigger man’. This view finds support from the observation made by the ICTY Appeal Chamber, in the case of *Tadic*, that

—

“Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), 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.”[**ICTY Appeal Chamber, Tadic Case No.: IT-94-1-A, Judgment 15.7.1999, para 191**]

334. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case. The facts of the present case examined in light of the above principles do not leave any doubt that all the members of the group of perpetrators including the accused Qaiser had a common intention in commission of this brutal crime. Each one of them actually participated in the crime, facts and evidence presented lead to conclude it. The facts of the present case examined in light of the above principles do not leave any doubt that all the members of the group of perpetrators had a common intention in committing this brutal crime.

335. The chain of facts that led to the event of killing suggests that the entire event starting from the act of confining the employees at the storehouse happened pursuant to an understanding between the perpetrators. It is now settled jurisprudence that the arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them to commit that particular criminal act.

336. The role the accused Qaiser had played in initiating victims' confinement, in collaboration with the Pakistani army, bringing the victims to the army camp, one month later, having conversation with the army men at the army camp, accompanying the group of army towards the killing site unequivocally indicates that the accused Qaiser was calculatingly 'concerned' with each phase of acts pursuant to agreement formed between him and the principal perpetrators the army men. Thereby each one of them 'participated' in the crime. From this point of view the accused Qaiser is found to have had participated in a JCE [basic form] to eliminate the unarmed 07 civilians, sharing common intent.

337. The unshaken evidence of P.W.9 forces us to conclude that it has been proved beyond reasonable doubt that the accused Syed Md. Qaiser accompanied the group of army in taking the 07 employees to Shaestaganj Duck Bungalow, from the godown wherein they remained in captivity for long one month. Why the accused Qaiser, even at this phase, accompanied the army men? The material facts as depicted from the evidence it stands obvious that accused Qaiser sharing common intent of the principal perpetrators opted to accompany them, to further common purpose. The accused was found present and had conversation with the army men, before the detained civilians were brought towards the railway bridge over the river Khoai, the crime site, as stated by P.W.9. It thus proves beyond reasonable doubt that the accused Qaiser consciously and substantially aided and abetted the group of perpetrators, the army men in committing the actual crime, knowing the consequence of his act.

338. After the first phase of the event, the act of confining the victims at the silo on 29 April 1971 which the P.W.12 had occasion to see when he went into hid and used to remain inside sugarcane field, during day time wherefrom he could observe, he often used to observe the activities of the army. The above piece of testimony remained unshaken and we find no reason whatsoever to disbelieve it.

339. He [P.W.12] also saw the army men accompanied by accused Qaiser taking the victims towards the rail bridge over the river Khoai on 29 May 1971 where they were gunned down to death on signal of accused Qaiser.

He [P.W.12] could observe it from his hiding place. The killing took place during day time and the distance between P.W.12's hiding place and the crime site was not too far that could made P.W.12 prevented to observe the event. Besides, defence could not impeach this pertinent version. Therefore, we find credence in the evidence of P.W.12 if it is viewed rationally and together with that of P.W.9, a direct witness to facts materially related to the principal event of killing.

340. It is immaterial to argue that the accused Qaiser had no direct participation in operation of killing the 07 employees. It is to be principally seen how the accused had acted even prior to the commission of murder and whether it had substantial effect in accomplishing the crime in question by the perpetrators. It has been already found that at all the phases accused Qaiser had visibly played a culpable and deliberate role that facilitated and prompted the army in accomplishing the act of the killing.

341. Keeping the employees in forcible captivity ended with their killing, one month later. Accused's explicit and culpable act in initiating their coercive confinement at the silo together with his subsequent act, as found proved, forming part of attack leading to the act of killing, the principal offence indicates beyond reasonable doubt that accused Qaiser was knowingly 'concerned' even with the ending phase of the event, causing death of victim employees, as a 'participant'. He had acted having a firm mindset to collaborate with the principals. Thus, his act as has been found in respect of the entire attack narrated unerringly mirrors that he intended to facilitate the principals in committing the offence of killing unarmed civilians.

342. Finally, on integrated evaluation of evidence presented and circumstances divulged it has been found proved beyond reasonable doubt that the accused Syed Md. Qaiser not only personally contributed to each criminal act at all phases, but rather he provided a significant contribution to the common purpose and that each of the criminal acts for which he is held responsible as such contribution formed part of that purpose.

Accused Syed Md. Qaiser is therefore found criminally liable under section 4(1) of the Act of 1973 for substantially aiding abetting, facilitating and contributing the actual commission of killing of 07 unarmed civilians constituting the offence of **‘murder’ as crime against humanity** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.6

[Killing of Dr. Salehuddin and Hirendra Chandra Roy at Laskarpur]

343. Charge: On 29 April 1971 at any time after 03:30-04:00 pm at a place of ‘Puran Bazaar’ point at Shaestaganj, [under the then Habiganj sub-division] accused Syed Md. Qaiser asked the members of Pakistani armed force to intercept the Jeep by which Dr. Salehuddin and Hirendra Chandra Roy were on the way towards Indian border to take refuge in India. With this, stopping the jeep the army men dragged them to the premises in front of the native house of former Chief Justice Syed AB Mahmud Hossain at Laskarpur through the bank of river ‘*Khoai*’ where they were hanged with a tree and were subjected to torture and after the dusk they were gunned down to death and their dead bodies were left abandoned near the house of one Ramjan Ali alongside Laskarpur rail line. Therefore, accused Syed Md. Qaiser has been charged for substantially abetting, facilitating and contributing the actual commission of killing of 02 unarmed civilians constituting the offence of ‘murder as crime against humanity’ as specified in section 3(2) (a) (g) (h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus he incurred liability under section 4(1) of the Act.

Witnesses

344. Prosecution, in support of this charge, relies upon P.W.2, P.W.8 and P.W.12 as they have testified on some relevant facts that significantly connect the accused with the commission of the principal offence of killing the captured victims Dr. Saleh and Hirendra Roy, prosecution claims. These witnesses had opportunity of seeing the act of capture of victims by the group of perpetrators accompanied by the accused Qaiser, as alleged.

Evidence Presented

345. P.W.2 Mohammad Ali Tipu [64] is the son of Advocate Mostafa Ali, a prominent Awami League leader in Habiganj who was elected Member of National Assembly in 1970. P.W.2 was an active worker of the student wing of Awami League since 1970. He stated that on 29 April 1971 at about 10:15 am he, Goura Prasad Roy [P.W.12], Hossain Ali Sabu[P.W.8] and MPA Mostafa Shaheed arrived at Shaestaganj storehouse, from Habiganj for collecting food grains for freedom fighters and on their way, they heard that Qaiser had started moving towards Habiganj, with his own outfit and Pakistani army.

346. P.W.2 further stated that at about 2:00-2:30 pm [on 29 April, 1971] they could see the accused Qaiser, his Bahini and Pakistani army coming towards the godown by chanting slogan '*Pakistan Zindabad*'[long live Pakistan]. With this they including Mostafa Shaheed went into hiding at a place behind the godown where from they could hear Qaiser asking the officer in charge of the godown as to on whose order he allowed to take the food grains out of godown by making it opened. Officer in charge replied that he did it on instruction of MNA Manik Chowdhury, by showing the letter given by him. Hearing it, Qaiser reacted and told that '*Pakistani army-rule is going on. No food grain can be taken out without my order and anyone of you [officers and employees] must not move form here*'.

347. The above facts chiefly relate to charge no.5 involving the event of attack leading to coercive captivity of the employees of the silo under armed surveillance. The attack was made at about 2:00-2:30 pm on 29 April 1971 and the act of capture of Dr. Saleh and Hirendra, intercepting their jeep at Shaestaganj rail gate as narrated in charge no.6 occurred at about 03:00-4:00 pm on the same day, just immediately after the attack at Shaestaganj silo.

348. P.W.8 Shah Hossain Ali [63] and Goura Prasad [P.W.12] a platoon commander[of freedom fighters] who had been at Shaestaganj silo, at the relevant time for collecting food grains have corroborated the

above facts testified by P.W.2, by making consistent version. On seeing the attack at Shaestaganj store house, P.W.8, Abdun Nur and 1-2 other went into hid at an abandoned house inside a jungle at village *Uddapara Lanjapara*, at the eastern side of Shaestaganj railway station. The Shaestaganj-Sylhet railway line and Habiganj-Chunarughat road were within the sight from their hiding place.

349. Similarly, according to P.W.12, being forced by the sudden attack at Shaestaganj silo he took hideout wherefrom he saw the accused Qaiser and Pakistani army arrived at the food godown and on Qaiser's order his accomplices dragged out seven employees of the godown and Qaiser threatened them. He [P.W.12] also saw that afterwards Qaiser and the army men left the place of storehouse for Dukbangalow [at Shaestaganj], leaving few army men to keep the employees under surveillance.

350. In respect of charge no.6, P.W.8 stated further that one hour later, they could see a jeep approaching to Shaestaganj from Habiganj. Afterwards, he heard from the locals that Qaiser and his cohorts and the army prevented the said jeep at a place southern to Shaestaganj Puran bazaar railway gate and they forced Dr. Saleh and Hirendra Roy to get down from their jeep and were physically humiliated and at a stage they were dragged towards *Khoai* river rail bridge through the rail line on foot, by the accused Qaiser and his accomplices. P.W.8 further stated that they saw the group taking the captured civilians through the rail line, from their hiding place.

351. The above piece of evidence demonstrates that P.W.8, from their hiding place, saw a jeep approaching to Shaestaganj from Habiganj. He heard from the locals that Dr. Saleh and Hirendra Roy who were moving by the said jeep were forced to get down from the jeep and were brought towards Khoai River Railway Bridge by the accused and his accomplices. This part of evidence is hearsay. Next, they saw the captured victims taking through the rail line.

352. On cross-examination, P.W.8 stated that the inmates of the abandoned house at village Lanjapara where they remained in hiding took shelter to another house opposite to the road, in fear of Pakistani army and

Razakars. And the road was about 50-60 'haat' (mZ) [25-30 yards] far from their hiding place. With this the fact of their remaining in hiding at this place has been re-affirmed by the defence. And also the road was within the sight of their hiding place. In reply to question put to him by the defence P.W.8 relied that he did not feel it necessary to know the name of the owner of the said abandoned house as they had to take efforts of saving their own lives, at that time. P.W.8 also stated, during cross-examination, that the Pakistani army made their entry at Shaestaganj and in Habiganj on 29 April and 30 April respectively.

353. What occurred finally? P.W.8 stated that on the same day [29 April] after the dusk they heard that the captured victims were subjected to torture by hanging with a tree in front of the house of Justice Syed AB Mahmud Hossain at village Laskarpur. Afterwards, at about 09:00-10:00 pm some people came and informed them that after the dusk, perhaps the captured victims were killed as they heard gun firing. On the following morning, the people came and informed further that they saw the dead body of victims by the side of rail line nearer the house of one Ramjan Ali. This part of testimony relating to causing torture and causing death of victims is hearsay from the locals.

354. P.W.12 stated that at around 4:30 pm [on the same day, almost immediately after the attack occurred at Shaestaganj silo], when he hid himself inside a bush near his house at Shaestaganj Puran Bazar, he saw Qaiser and Pakistani army who were on move by a jeep from Dukbangalow[Shaestaganj]direction intercepted a jeep approaching from Habiganj to Chunarughat. The jeeps were about 200-250 yards far from his hiding place. He further saw that Qaiser and his cohorts dragged out two persons from the jeep.

355. What the identity the victims had? P.W.12 stated that they were Awami League leaders Saleh Ahmed and Hirendra Nath Roy. The Pakistani army started assaulting them physically following a signal of Qaiser and then they took them towards the eastern direction through rail line on foot and thus they disappeared from his sight. Defence simply

denied the above material version. But it could not be controverted in any manner, by cross-examining P.W.12.

356. Thus, P.W.12 claims to have seen accused Qaiser and Pakistani army intercepting the jeep of victims coming from Habiganj, assaulting them there, dragging them towards eastern direction through the rail line. P.W.12 does not claim to have seen the event of killing.

357. P.W.12 also stated that later on, he heard from the people moving through the road adjacent to the sugarcane field where he had been in hiding that Dr. Saleh and Hiru Babu [Hirendra Roy] were subjected to torture by hanging with a tree in front of the house of Justice Syed A.B Mahmud Hossain and then were gunned down to death near one Ramjan Ali's house at village Laskarpur.

Deliberation and Finding with Reasoning

358. Mr. Rana Das Gupta, the learned prosecutor argued that the testimony of P.W.2, P.W.8 and P.W.12 sufficiently proves that the victims were killed by the group of perpetrators who brought them to the crime site, on capture. The accused Qaiser accompanied the group in taking the victims forcibly towards the site where they were gunned down to death. The evidence of these three witnesses proves that on being prompted by accused Qaiser the army men caught the victims and dragged them towards the Khoai River bridge through the rail line and it was practicable for the witnesses to see it even from the place of their hiding as it was not so far from the place where the jeep of the victims was intercepted by the group of army accompanied by accused Qaiser.

359. The learned prosecutor went on to argue that the principal fact of killing the victims at the place at Laskarpur on the date and time remains undisputed. Prosecution is not required to prove that the accused directly participated to the commission of the killing. His act and conduct are reasonably sufficient to establish his 'concern' and 'participation' with the commission of the killing, as an accomplice. Defence could not dislodge the testimony of these witnesses so far as it relates to seeing the taking of

victims forcibly through the rail line, on capture by the group of army, on being prompted by accused Qaiser. His act and conduct of providing 'endorsement' and 'assistance' substantially facilitated and contributed to the actual perpetrators in committing the principal offence of killing and thus the accused incurs responsibility under section 4(1) of the Act of 1973.

360. Conversely, the learned defence counsel Mr. SM Shahjahan argued that there has been no evidence whatsoever to connect the accused with the commission of the offence alleged. None of these three witnesses claim to have seen the event of killing. Seeing the act of capture of victims, on signal of the accused, as alleged was quite impracticable remaining in hiding at a place far from the road. The learned defence counsel chiefly attacking the probability of what has been stated by the witnesses argued that taking the victims, on capture from the place near the rail gate of Shaestaganj towards the killing site was done by the army and the accused was not with them. Citing the prosecution documents **Exhibit Ja** and **Exhibit- Gha** it has been further submitted that these documents, relied upon by the prosecution, go to show something different. In respect of the manner of occurring the event of capture followed by killing narrated in these documents contradicts to the testimony of witnesses. And as such the testimony so far as it relates to complicity of the accused is improbable and deserves exclusion from consideration.

361. At the out set, it would be significant to note that the event of capturing Dr. Saleh and Hirendra took place at Shaestaganj rail gate, instantly after the attack launched at Shaestaganj storehouse, on the same day, by the group of army accompanied by accused Qaiser and his cohorts and during this attack accused Qaiser took active part in initiating coercive captivity of the employees of the silo under armed surveillance. This attack relates to charge no.5. Already it has been found proved that accused Qaiser's substantial role and act substantially facilitated and contributed the commission of such unlawful confinement of civilians leading to their killing. This proved fact that occurred instantly before the

act of capture of Dr. Saleh and Hirendra indisputably impacts on determining accused Qaiser's presence with the group of army, as materially relevant.

362. The charge alleges that the accused Qaiser accompanied the group of Pakistani army in taking the victims to the crime site, on capture as asked by the accused, from a place of 'Puran Bazaar' point at Shaestaganj by stopping the jeep by which the victims were approaching towards Chunarughat intending to cross Indian border. It allegedly happened on 29 April at any time after 03:30-04:00 pm. The principal perpetrators were thus the army men. The accused allegedly facilitated the principals in accomplishing the act of victims' capture and their killing by forcibly taking them to the site in front of the native house of the former Chief Justice Syed AB Mahmud Hossain at Laskarpur through the bank of river *Khoai*.

363. Before we evaluate the evidence presented by the prosecution, we reiterate that the case relates to trial of internationally recognised crimes committed in violation of customary international law. The offences are alleged to have been committed in context of war of liberation in 1971. Section 22 of the Act of 1973 provides that provisions of the Criminal Procedure Code, 1898(V of 1898), and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under the Act of 1973. Thus, in the case in hand, if we keep the provision of section 22 together with section 19 of the Act of 1973 in mind it would be clear that the task of determination of culpability of a person accused of offences enumerated in section 3 of the Act of 1973 involves a quite different jurisprudence. Proof of all forms of criminal responsibility, through participation in any manner can be given by direct or circumstantial evidence. It is now settled jurisprudence.

364. We have got from testimony of P.W.2 and other witnesses that Habiganj town remained free till 29 April 1971. Presumably, till the Pakistani occupation army's entrance. Predictably the Dr. Saleh and Hirendra, local potential Awami League leaders sensing the immediate

entry of Pakistani army in Habiganj town decided to cross Indian border and thus were on the way towards Chunarughat when they were caught by stopping their jeep, at Shaestaganj rail gate. It was not at all possible to know the identity of the victims by the army men who were just at initiation stage of their entry to Habiganj town. The group of army obviously had to borrow idea and assistance from some local collaborator in causing forcible capture of the victims Dr. Saleh and Hirendra. Who was that man who provided such assistance to the perpetrators?

365. In addition to the three witnesses who have narrated the facts materially related to the event we consider the hearsay testimony of P.W.1 Kazi Kabiruddin who had been around Habiganj locality during the first part of war of liberation, with his co-freedom fighters belonging to 'S' force. He naturally had opportunity to see and know the many atrocities committed by the Pakistani army being aided by the local collaborators, around the geographical area of Habiganj sub-division and Nasirnagar police station under B'baria sub-division. On 30 May he had been at Moujpur area when he knew from the sources deployed by them that Qaiser, his 'Bahini' and Pakistani army, on their way to entrance in Habiganj town, had killed one Dr. Saleh and Hirendra.

366. Additionally, we have already found from evidence of P.W.3 Tajul Islam a member of Qaiser Bahini that accused Qaiser continued accompanying the Pakistani occupation army in rolling into Habiganj from B'baria and they entered Habiganj town on 30 April 1971. Entry of the Pakistani army in Habiganj on 30 April 1971 has been re-affirmed in cross-examination of P.W.8. Thus, the hearsay testimony of P.W.1, though anonymous, carries value as it gets corroboration from the evidence of other witnesses.

367. It appears that the act of capture of Dr. Saleh and Hirendra happened just immediate after the above event and at Shaestaganj railway gate area when the victims were approaching towards Chunarughat by a jeep. In absence of anything contrary, it may legitimately be presumed that accused Qaiser did not keep him distanced from the group of army even

instantly after the event of attack at Shaestaganj silo. And thus, accused Qaiser and his cohorts were with the group of army while intercepting the jeep of the victims, we conclude.

368. Defence does not dispute the killing of Dr. Saleh and Hirendra, the local Awami League leaders. The crucial fact as testified by the P.W.12 depicts that the accused Qaiser was with the group of perpetrators who were taking the victims to the execution site, on capture. This fact together with the hearsay testimony of P.W.12 so far as it relates to the killing of the captured victims if considered cumulatively, an irresistible conclusion deserves to be drawn that the accused Qaiser had substantially facilitated and abetted the killing of the captured victims.

369. It is immaterial to show that the accused himself had gunned down the victims or he remained physically present at the crime site. His act and conduct, as found from evidence, just prior to the actual accomplishment of the offence of forcible capture of victims followed by their killing make him responsible even for the principal offence, as a potential accessory.

370. The Tribunal notes that the Pakistani occupation army, for obvious reason, was not at all acquainted and familiar with geographical location of certain places, language and people belonging to pro-liberation ideology. The history says that the local collaborators actively aided the army of being acquainted with these which were essentially required for carrying out atrocious attack directing the civilians.

371. Accused Qaiser, on knowing and seeing taking food grains out of the store house by the pro-liberation activists and the local leaders of Awami League, came to the godown with his own outfit and Pakistani army to resist it and 'threatened' the officer in charge of the godown not to move there from. All these happened on 29 April at about 03:00 pm just before the event narrated in charge no. 6 occurred.

372. It has already been proved, in adjudicating the attack and accused's role[as narrated in charge no.5] that the accused Qaiser appeared at the food godown, for second time on 29 April at about 03:00 pm and he was then in guiding position of the group formed of members of Qaiser Bahini

and Pakistani army. Presumably, on seeing the activities of pro-liberation civilians in collecting food grains from the godown the accused Qaiser with the group of army had marched towards the godown, by chanting slogan 'Pakistan Zindabad'. And accused did it deliberately in collaboration with the Pakistani army and the members of his private outfit [Qaiser Bahini].

373. The unimpeached version of P.W.12 as discussed above also demonstrates the reason that forced him [P.W.12] and others engaged in collecting food grains in taking hide out, leaving the food godown. It has been proved that these witnesses had been at the Shaestaganj storehouse. Sensing the attack at Shaestaganj silo by the group of Qaiser Bahini and Pakistani army guided by accused Qaiser naturally made them frightened and eventually they were forced to go into hiding. Testimony of P.W.2, P.W.8, and P.W.12 also demonstrates it consistently.

374. On evaluation of evidence of P.W.12 it transpires that the part of his testimony so far as it relates to the act of capture of victims, by stopping their jeep approaching towards Chunarughat from Habiganj prompts us to conclude that this witness had reasonable opportunity of seeing the act of capture of Dr. Saleh and Hirendra who were coming from Habiganj by a jeep and they were then dragged towards the *Khoai* railway bridge through the rail line, following instigation and substantial encouragement of accused Qaiser.

375. P.W.12 Gour Prasad Roy saw the Pakistani army started assaulting the victims physically following a signal of Qaiser at a place where their jeep was intercepted. He further saw them [the group of attackers] taking the captured victims towards the eastern direction through rail line and thus they disappeared from his sight. It was natural. Defence simply denied the above material version. But it could not be controverted in any manner, by cross-examining P.W.12. We do not find any reason to exclude this piece of pertinent evidence that unerringly provides indication of accused Qaiser's 'concern' and 'participation' to the criminal acts leading to the event of killing.

376. Seeing the jeep coming from Habiganj, at the relevant time as stated by the P.W.8 is quite believable as Shaestaganj-Sylhet railway line and Habiganj-Chunarughat road were within the sight from their hiding place. P.W.12 was a platoon commander [of freedom fighters] during the Liberation War. The act of capturing the victims, by intercepting their jeep at Shaestaganj rail gate took place during day time. Accused Qaiser was a man of local prominence as he was a leader of Convention Muslim League, a pro-Pakistan political party. P.W.12 had thus fair reason of knowing accused Qaiser even since prior to the event. According to P.W.12 he could observe the group accompanied by accused Qaiser taking the victims forcibly towards the crime site, at the relevant time, from his hiding place.

377. It is to be kept in mind that in war time situation, no individual is expected to come closer to the crime site, for seeing the event. Normally, the atrocious activities could be seen by the people chiefly from hiding place. Defence could not dislodge what P.W.8 and P.W.12 have testified on material and relevant facts. We do not find any reason to ditch their unshaken testimony merely on argument of a fishy character, advanced by the learned defence counsel.

378. Dr. Saleh and Hirendra Roy were the leading people belonging to local Awami League. It remains undisputed. Thus, this admitted fact provides sufficient hint as to the reason of capture and killing of Dr. Saleh and Hirendra Roy. Objective of targeting the pro-liberation Bengali civilians was to wipe out them to resist and defy the war of liberation which was the core policy of the Pakistani occupation armed forces. It is the history of which the Tribunal takes judicial notice.

379. There has been no reason to say that the army men were familiar with the victims' identity, at the initial stage of their entry in Habiganj. The evidence, relevant facts inevitably suggest to conclude that it was the accused Qaiser who deliberately guided the group in getting the victims identified that led to their capture. Indisputably, such act of accused Qaiser made it possible in taking the victims forcibly towards the execution site Laskarpur village through the rail line. Accused's

antagonistic encouragement forming part of attack thus substantially contributed and abetted the actual commission of the brutal killing of victims who were with the war of liberation.

380. P.W.8 does not seem to have made any exaggeration. If really he had intention to make embroidery, he could state that he had witnessed the act of preventing the jeep by which Dr. Saleh and Hirendra Roy were coming towards Shaestaganj, by the accused Qaiser and his accomplices and the army. But he, we believe, was with the truth. And thus he simply stated that he heard the fact of capture of the victims by the accused Qaiser and his cohorts and army from the locals. This part of hearsay testimony if viewed together with the fact of taking the victims, on capture through the rail line as evinced from testimony of P.W.12 rather strengthens credibility of P.W.8.

381. The act of capture of two victims, potential Awami League leaders of Habiganj, took place almost immediately after the attack at the Shaestaganj silo, integrated evaluation of evidence proves it. Even the books [**Material Exhibits- Ja and Gha**] demonstrate it that the victims were so captured by the group of army, by stopping their jeep by which they were about to approach towards Indian border through Chunarughat from Habiganj. The books do not speak of accused Qaiser's presence with the army, true. But since the act of capture of victims carried out instantly after the attack at the Shaestaganj storehouse by the group formed of accused Qaiser, his accomplices and the army men it may be validly and irresistibly presumed that the accused did not keep him distanced from the group of army men even at the time of effecting capture of Dr. Saleh and Hirendra Roy, on their way to Chunarughat by a jeep.

382. The book titled *Ómtj tU MYnZ'v*, authored by Tajul Islam ,2nd edition 2005 , Sahitya Prakash, Dhaka [**Material Exhibit-Ja, relevant page 170**] narrates the information about the killing of Dr. Saleh and Hirendra at Shaestaganj on 29 April, on capture. Information narrated at page 289 of the book speaks too that Dr. Saleh and Hirendra Roy were killed at Shaestaganj on 29 April while they were on the way to India.

383. Defence does not attack the authoritative nature of the above information. Thus it stands undisputed that the victims were so captured at Shaestaganj. Who captured them? And at which place they were gunned down to death? The book does not narrate it specifically. But the criminal act was perpetrated by the group of Pakistani occupation army-- the information made in this book together with the evidence of witnesses impels it clearly. Defence does not dispute it.

384. Page 171 of the book [**Material Exhibit-Ja**] also narrates that ----

*ও নিম্নোক্ত বিবরণে বর্ণিত ঘটনা-মৃত্যু-মৃত্যু
 ঘটনার পরে কয়েকজন গুরুত্বপূর্ণ কর্মকর্তা
 নিহত হন। এই ঘটনা কয়েকজন মৃত্যু, জীবিত
 মৃত্যু ঘটনা কয়েকজন মৃত্যু, জীবিত মৃত্যু
 ঘটনা কয়েকজন মৃত্যু, জীবিত মৃত্যু
 ঘটনা কয়েকজন মৃত্যু, জীবিত মৃত্যু*

385. The above undisputed narration indicates that the perpetrators who had captured the victims at Shaestaganj were the Pakistani army men. Next, numerous Bengali civilians had been killed under the bridge over the river *Khoai*, since April to December 1971 by the Pakistani occupation army. Thus, the place under the bridge over the river *Khoai* was used as the 'killing field'. In absence of anything contrary, the account made by P.W.8 and P.W.12 therefore safely leads to the conclusion that the Dr. Saleh and Hirendra Roy too were killed at this site, after taking them there, on capture from Shaestaganj.

386. The another book titled *গণহত্যা নিম্নোক্ত বিবরণে* authored by Sheikh Fazle Elahi, first edition 2011, Ityadi Grontho Prokash, Dhaka[**Material Exhibit- Gha**, relevant page 134] narrates that Dr. Sale and Hirendra were caught at Shaestaganj rail gate and then they were killed after causing inhuman torture. Defence does not attack authoritative nature of this book. It is true that this book too does not narrate the detail manner and place of the event of killing. However, the information so made therein corroborates the fact that the victims were so captured at Shaestaganj rail

gate and before causing their death they were subjected to barbaric torture. Inadequacy of detail information as to manner and place of causing torture followed by death does not create any reasonable doubt as to the manner and killing site, particularly when it has been proved by evidence provided by P.W.8 and P.W.12, in respect of facts materially related to the principal event of killing.

387. Defence does not dispute that the criminal act of such forcible capture was carried out by the group of army men. It rather, taking advantage of the narration made in the books [**Material Exhibits- Ja and Gha**], took pain to argue that the captured victims were gunned down to death at the place where their jeep was resisted by the army men. The Tribunal notes that a book's narration may not always reflect the full truth. The narration made therein does not appear to have been based on information provided by any of witnesses examined before the Tribunal or any of victims' relatives. Fanciful flight of imagination due to mere inadequacy of information in narrating the event of victims' capture in the book does not render the sworn testimony of witnesses unreliable and also does not make the direct and circumstantial evidence reasonably doubtful, as argued by the defence.

388. The learned defence counsel submitted that accused's alleged involvement with the event of capture followed by killing of victims shall seem to be reasonably doubted and thus benefit thereof goes in favour of the accused. Having regard to such submission, it is to be noted that only 'reasonable doubts' belong to the accused. Otherwise any practical system of justice will then break down and loses credibility with the community. Mere shadowy doubts and marginal mistakes, or other, can not deter the court from holding an accused criminally responsible for the crime. In **Dharam Das Wadhvani Vs. State of U.P. (1974) 4 SCC 267**) it has been observed that

“The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct.”

389. P.W.8 and P.W.12 testified some material facts significantly related to the event of killing. However, they do not claim to have seen the actual commission of the crime. They heard from locals that the captured victims were gunned down to death at village Laskarpur. Their hearsay testimony so far as it relates to the killing is to be considered together with the circumstances and relevant material facts depicted from their evidence. Hearsay evidence is admissible and the court can act on it in arriving at decision on fact in issue, provided it carries reasonable probative value. This view finds support from the principle enunciated in the case of *Muvunyi* which is as below:

“Hearsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.” [*Muvunyi*, (ICTY Trial Chamber), September 12, 2006, para. 12]

390. The act of keeping the employees of Shaestaganj silo in captivity under armed surveillance[first part of the event narrated in charge no.5] and forcible capture of Dr. Saleh and Hirendra, the potential Awami League leaders and causing their death happened on 29 April the day the Pakistani army had stationed at Shaestaganj. We have already got it re-affirmed in cross-examination of P.W.8 that the Pakistani army made their first entry at Shaestaganj and in Habiganj on 29 April and 30 April 1971 respectively. Thus, it was rather not possible for the army to be aware about the identity of the victims, particularly before their entry in Habiganj, without the aid and assistance on part of local pro-Pakistan people. In absence of any rational indication whatsoever, unerring inference stands that accused Qaiser continued the act of accompanying the troops even in resisting the jeep of the victims coming from Habiganj direction, even about two hours later.

391. The above inference gets corroboration from the evidence of P.W.12 who had occasion to see, from hiding place, the accused Qaiser, the army

men and his accomplices moving towards the killing site taking the captured victims with them. It further suggests accused's concern and participation in committing the killing.

392. Defence does not claim that not the group of army that had attacked the Shaestaganj silo but another group of army had captured Dr. Saleh and Hirendra, stopping their jeep at Shaestaganj rail gate. We do not find any indication that after the event of attack at Shaestaganj silo, accused Qaiser had kept him distanced from the group of army. Be that as it may, we are forced to conclude that the same group of army accompanied by accused Qaiser had accomplished the act of their capture at a place of 'Puran Bazaar' point at Shaestaganj rail gate, occurred on the same day.

393. Murder as a crime against humanity under section 3(2) of the Act of 1973 does not require the Prosecution to establish that the accused Sayed Qaiser personally committed the killing. Accused Qaiser by urging the attackers the army men with him to target Dr. Saleh and Hirendra Roy by preventing their jeep and finally assisted and guiding the principals in taking the captured victims to the site where they were gunned down to death had knowingly acted in perpetration of the offence of killing. It is now settled that a crime can be committed individually or jointly with others, that is, there can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.

394. It is to be noted that the crime alleged was a 'system crime', not an isolated one and there had been a 'context' in committing such crime directing the civilians. Thus, the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with 'aiding' or 'abetting' and substantially contributing to the commission of a crime.

395. There are three basic requirements for establishment of the guilt of an accomplice: an offence of crime against humanity must have been committed; the accomplice must have contributed in a material way to the crime; the accomplice must have intended that the crime be committed or

have been reckless as to its commission. Accused Qaiser had deliberate complicity with the commission of the principal crime, the murder of two unarmed civilians. His culpable act and conduct forming part of 'attack' providing substantial contribution to the principals constituted such 'complicity'.

396. 'Participation' encompasses 'approval' or 'instigation' or 'encouragement' or 'aiding' or 'abetment'. The accused Qaiser who started providing express aid and assistance as a potential aide having prominent pro-Pakistan profile to the Pakistani occupation army since its rolling into Habiganj. It stands proved. In this way, accused Qaiser made him knowingly associated with the perpetrators by substantially contributing to the commission of numerous offences described in the preceding charges including the one as narrated in this charge as well, by his culpable act and conduct that amounted to 'participation' and 'abetment' too.

397. The act of accompanying the principals taking the victims towards the crime site, on capture by itself indicates accused's conscious decision to participate by aiding and abetting in committing the crime by the principals. Accused Qaiser did it with knowledge of the perpetrators' act. That is to say, being aware of the intent of the principals, accused Qaiser had acted recklessly in encouraging and facilitating the act of killing the victims.

398. It is to be noted too that 'concerned in the killing' does not mean that a man actually had physically acted in effecting the act of killing. The accused Qaiser is found to have had aided and substantially guided the principals by accompanying them taking the victims, on capture, to the killing site to be killed there and thus he was 'concerned in the killing'. We conclude it validly, on having regard to the materially relevant facts proved by evidence and circumstances, as discussed above.

399. It is now settled jurisprudence that 'proof' does not mean rigid mathematical formulae since 'that is impossible'. However, 'proof' must

mean such evidence as would induce a reasonable man to come to a definite conclusion. By using the yard-stick of probability and on due appreciation of the intrinsic value of evidence presented before us, in respect of facts materially related to the principal event, we arrive at a finding that the prosecution has been able to prove beyond reasonable doubt that the accused Syed Md. Qaiser, by his act and conduct forming part of attack directing non combatant civilians, substantially contributed and facilitated the principals in committing the offence of killing Dr. Saleh and Hirendra Roy, local potential Awami League leaders. The accused Syed Md. Qaiser, as has been proved beyond reasonable doubt, had actively guided the group of army in this regard, particularly at the verge of their entry into Habiganj town. Pro-liberation identity of the victims made the army inspired taking them to the crime site, on capture and to gun them down to death, on accused Qaiser's explicit guidance and abetment. Accused Syed Md. Qaiser is therefore found criminally liable under section 4(1) of the Act of 1973 for substantially abetting, facilitating and contributing the actual commission of killing of 02 unarmed civilians constituting the offence of '**murder as crime against humanity**' as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.7

[Other Inhuman acts caused to civilians at Habiganj Town]

400. Charge : On 30 April 1971 in between 10:00-10:30 and 04:00-04:30 pm the 10-15 members of 'Qaiser Bahini led by accused Syed Md. Qaiser being accompanied by the Pakistan occupation army arriving at Habiganj town created horror by launching attack and indiscriminate gun firing and started looting of households of 40-45 civilians including Advocate Mostafa Ali MNA, Latifur Rahman @ Manik Chowdhury MNA, Dr. Abul Hashem MPA, Anil Kumar Roy, Iswar Paul, Roby Roy, Thakur Jhee, Sajib Ali, Surjakanta Babu, Rajaram, Upendra Paul and then with intent to destroy their property, set their houses and shops on fire. Therefore, accused Syed Md. Qaiser has been charged for abetting, facilitating and contributing the actual commission of the offence of 'other inhuman acts as crime against humanity' as specified in section 3(2) (a) (g)(h) of the

Act which are punishable under section 20(2) read with section 3(1) of the Act.. And thus he incurred liability under section 4(1) of the Act.

Witnesses

401. Prosecution relies upon testimony of three witnesses who have been examined as P.W.2, P.W.7 and P.W.8. Of them, PW.2 Mohammad Ali Tipu is the son of Mostafa Ali a potential local Awami League leader and was elected MPA. He saw the perpetrators attacking their house in Habiganj town, on signal of accused Qaiser, prosecution claims. Apart from oral testimony, prosecution relies upon the narration made in the book titled *গণহত্যা নিমিত্ত তরঙ্গ : তকল দরতজ গজিন* [Material Exhibit-Gha, book's relevant pages-108-109].

Evidence Presented

402. On April 29 1971 **PW.2 Mohammad Ali Tipu** a freedom fighter and other pro-liberation activists had been at Shaestaganj storehouse where they remained engaged in distributing food grains around midday. But in the afternoon, on the same day, they had to go into hid as accused Qaiser, his cohorts and Pakistani army attacked the storehouse. It has already been proved, in adjudicating charge nos. 5 and 6. Now, let us see what he stated in relation to the event happened on 30 April, 1971 in Habiganj town as narrated in this charge

403. P.W.2 stated that later on [after the attack at Shaestaganj silo], however he and Mostafa Shaheed returned back in Habiganj at about 09:00-9:30 pm [on 29 April]. But finding none at home they spent the night at the house of neighbour Ashraf Uddin. On 30 April at about 10:-10:30 am he saw an army convoy of 4/5 army vehicles coming in front of their house. Qaiser [accused] and 2-3 army men got down from the front vehicle. 2-3 unknown Bengali people were also with them. Qaiser signaled to their house and with this Pakistani army getting down from other vehicles entered their house being accompanied by Qaiser. The house was one storied building where the control room of all parties' movement was set up. Within a short while he[P.W.2] heard sound of breaking the doors and windows of the building and saw it set on fire and

half an hour later the perpetrators had moved towards the town. P.W.2 stated that he saw the event from the first floor of his neighbor's house [where he spent the night, as stated].

404. P.W.2 further stated that 45 minutes later he saw the flame of fire from the house of Manik Chowdhury. Being feared they did not come out of the house till the convoy of the army had left Habiganj town at about 04:00-04:15 pm. The house of their own and that of their neighbour situated beside the entry road to Habiganj. In the evening, after the convoy had left Habiganj they came out of the house and heard from the people assembled in front of their house that the houses of Mostafa Shaheed, Anil Roy the father-in-law of Major C.R Dutta [later on Major General and was awarded 'Bir Bikram'], Dr. Hashim MPA, Umesh Bhaban, shops and numerous houses of civilians had been looted and burned down. The perpetrators however did not burn down the house of Mostafa Shaheed as his father Dr. Abdul Haque requested not to set it on fire. Later on Abdul Haque also narrated the event of attacking their house.

405. Defence could not refute the above version, in any manner. It simply denied what the P.W.2 stated implicating accused Qaiser with the event of attack by the group of army. In cross-examination, P.W.2 stated in reply to question put to him by the defence that on 30 April 1971 the Pakistani army burned down many houses including their one but he could not say since when they kept the town under their occupation as he had left the town on 01 May 1971. Thus, it becomes re-affirmed that the Pakistani army had launched attack in Habiganj town and had carried out destructive activities including burning down civilians' houses.

406. P.W.7 Shah Hasan Ali stated that Qaiser had formed "Qaiser Bahini" on 27 April 27, 1971 he heard that Qaiser and his cohorts were marching towards Habiganj with the Pakistani army from Brahamanbaria. On April 29, they set up camp at Shaestaganj Rest House.

407. P.W.7 further stated that around 11:00am on April 30, Qaiser, his cohorts, and the Pakistani army attacked Habiganj town and looted houses

of the Hindus and Awami Leaguers and burnt those down. The house of the local member of the Pakistan National Assembly Mostafa Ali was also looted and torched. He [P.W.7] could witness the act of looting and arson from his house, which was adjacent to Mostafa Ali's house.

408. Defence suggested P.W.7 that it was not true that accused Qaiser was with the Pakistani army when they looted and burned down the houses of Advocate Mostafa Ali, Manik Chowdhury, Awami League leaders and Hindu civilians and Umesh Bhaban [in Habiganj town]. P.W.7 denied it. But however, by putting this suggestion defence has rather admitted the act of attack by the Pakistani army that resulted in destructive activities of looting and burning down pro-liberation civilians of Habiganj town.

409. P.W.8 Shah Hossain Ali [63] was a pro-liberation activist. At the early part of the war of liberation he was also engaged in carrying out the activity of collecting food from Shaestaganj silo, on 29 April 1971. Due to the attack launched at the silo on that day by the army, Qaiser Bahini accompanied by accused Qaiser, he [P.W.8] went into hid, P.W.8 stated. Accused's complicity with this attack [narrated in charge no.5] has already been proved.

410. In respect of the event of attack launched in Habiganj town, P.W.8 stated that at about 08:00-09:00 am on 30 April they knew that Pakistani army accompanied by Qaiser Bahini and Qaiser started heading towards Habiganj from Shaestaganj.. After the dusk on the same day [30 April] they started moving towards Habiganj and on their way they heard at about 10:00-11:00 am on that day that Pakistani army, Qaiser Bahini and Qaiser looted and burned down numerous houses including the one of Mostafa Ali.

411. Defence simply denied the above version, by putting suggestion. It however could not refute it, in any manner. Rather, in cross-examination P.W.8 replied to question put to him by the defence that the Pakistani army got them stationed at Shaestaganj on 29 April and on 30 April[1971] they entered Habiganj . With this the fact of rolling of Pakistani army into Habiganj town on 30 April has been re-affirmed.

Deliberation and Finding with Reasoning

412. Mr. Rana Das Gupta, the learned prosecutor argued that two direct witnesses namely P.W.2 and P.W.7 had occasion to see the attack and the accused Qaiser accompanying the group of attackers, the Pakistani army, on 30 April 1971 in Habiganj town. Evidence of these witnesses including that of P.W.8 the hearsay witness remained unshaken. **Material Exhibit-Gha** the book titled *গণহত্যা নিরীমা তরঙ্গ : তল দরত্জ গ্জ মন* also corroborates the event of attack that resulted in massive destruction of civilians' property constituting the offence of 'other inhuman acts' as crimes against humanity. The role of accused in forming a private outfit after his name and the fact of accompanying the Pakistani troops in heading towards Habiganj from B'baria also lends support of his potential and culpable association with the army, in carrying out numerous atrocious activities including the event narrated in this charge.

413. The learned defence counsel Mr. SM Shahjahan submitted that the prosecution relies upon P.W.2, P.W.7 and P.W.8. But the testimony of P.W.2 suffers from inherent inconsistencies and improbabilities and as such he made untrue version in respect of seeing the event narrated in this charge. P.W.7 claims that at the relevant time he had been at his house and as such he had no practicable opportunity of seeing the accused accompanying the Pakistani troops in launching attack that resulted in devastating destruction, by looting and setting the houses of local Awami League leaders on fire, committed in Habiganj town. P.W.8 is a hearsay witness. Defence does not dispute the authoritative nature of the information described in the book **Material Exhibit-Gha** in respect of the attack launched on 30 April directing the pro-liberation and Awami League leaders in Habiganj town. The learned counsel went on to submit that the prosecution document **Material Exhibit Gha** does not state that the accused Qaiser was with the attackers, the army, although it narrates only the event of attack and not the involvement of accused therewith.

414. It has been re-affirmed in cross-examination of P.W.2 and P.W.7 the eye witnesses to the act of destructive activities forming part of the attack

that on 30 April 1971, in morning, the Pakistani troops entered in Habiganj town and had carried out wanton destruction of civilians' property, by looting and burning down houses and shops.

415. Now the pertinent question that requires adjudication is whether accused Qaiser and his private outfit 'Qaiser Bahini' accompanied the Pakistani army in carrying out the criminal acts forming attack.

416. P.W.2 and P.W.7 had been in their respective houses, at the relevant time and as such they had fair occasion to see the event that occurred in the morning of 30 April 1971, they stated before the Tribunal. P.W.8 is hearsay witness and he heard the event from locals after the dusk when he was on the way to Habiganj from hiding place at Shaestaganj, P.W.8 claims.

417. The testimony of P.W.2 demonstrates that he saw the act of destructing and burning down their house in Habiganj town, forming part of attack, as at the relevant time he had been at his neighbor's house. P.W.2 heard the other activities carried out in conjunction with the same attack in Habiganj town, later on, after the group of attackers the Pakistani army had left the town in evening. We find no reason to exclude his ocular testimony so far as it relates to the act of carrying destructive activities at their house by the Pakistani army being accompanied by accused Qaiser.

418. Why their [P.W.2] house was so targeted? The reason is clear. A control room of all parties' movement committee was set up at their house intending to keep the organizers of war of liberation vigilant about all the affairs. Obviously, the army was not acquainted at all with this matter and thus they had to carry out the act of burning this house, by borrowing some one's assistance and signal.

419. It is pertinent to note that focus should be put on the accused's conduct as a manifestation of a willingness to be associated with a crime and his support of the principal perpetrators of the crime. Conduct of the accused Qaiser as demonstrated from the unshaken evidence of P.W.2 and

P.W.7 fans the flames of grave inducement on commission of wanton destruction in Habiganj town, by accomplishing the act of looting and burning down houses of non combatant civilians.

420. The evidence of P.W.2 and P.W.7, in relation to this charge, and the role and activities of accused Qaiser as found proved, in adjudicating charge nos. 5 and 6 together suggests indisputable conclusion that accused Qaiser, as a local potential aide of the army, had guided them too in targeting the houses of prominent pro-liberation civilians of Habiganj town, for carrying out wanton destruction intending to induce massive terror.

421. P.W.8 is a hearsay witness. He heard the event from the locals when he was on the way to Habiganj from Shaestaganj on 30 April, after the dusk, on hearing the movement of Pakistani army towards Habiganj on 30 April morning. Defence could not impeach it. According to settled jurisprudence of International Law ‘hearsay evidence’ is not inadmissible *per se*, even when it is not corroborated by direct evidence. Even the Tribunal can safely act even on anonymous hearsay evidence without any corroboration. It gets support from the case of *Lubanga* [*Lubanga* (ICC Pre-Trial Chamber) January 29, 2007, para 106]. We have found that his hearsay evidence remained unshaken and seems to have been corroborated by the evidence of P.W.2 and P.W.7. Thus, it too carries value in establishing accused’s involvement and participation in committing the criminal acts leading to devastating destruction of civilians’ property constituting the offence of ‘other inhuman acts’ as crimes against humanity. .

422. The above discussion based on evidence and other facts materially relevant it has been thus proved that accused Qaiser was with the Pakistani troops while it launched attack in Habiganj town on 30 April 1971 and presumably, it was he on whose identification and endorsement the principals, the army committed the act of looting and burning down the houses of potential pro-liberation civilians and people belonging to

Hindu community, to further policy and plan of the Pakistani occupation army.

423. The event of attack relates to wanton destructive activities directing civilians' property causing mental harm by terrorizing the normal livelihood of non combatant civilians, violating the laws and customs of war, constituting the offence of 'other inhuman act' as crimes against humanity. It occurred on 30 April 1971. Already it has been proved that the Pakistani occupation army first rolled into Habiganj on 30 April, the day following 29 April when the criminal acts of initiating coercive confinement of seven employees of Shaestaganj silo under armed surveillance [charge no.5] and killing of Dr. Saleh and Hirendra Roy the two notable pro-liberation personalities of Habiganj [charge no.6] had been accomplished by the group of army being aided, assisted and substantially abetted by accused Qaiser.

424. It has already been proved that the group of Pakistani occupation army got stationed at Shaestaganj on 29 April and accused Qaiser actively accompanied and guided the troops coming there from B'baria. Sequences of activities carried out by the troops, during their moving into Shaestaganj aiming to take Habiganj town under their occupation, as found in adjudicating the preceding charges, demonstrate that accused Qaiser did not make him distanced from the companionship of the troops, even for once. This circumstance leads us to impeccable inference that even during rolling of the army into Habiganj on 30 April accused Qaiser continued to remain with them and he did it, as one of their local potential aide, aiming to provide guidance and assistance. Being enthused by antagonistic attitude towards pro-liberation Bengali civilians accused sided with the Pakistani occupation army, to further their policy and plan.

425. Narration made in the book titled *গণহত্যা নিম্নের তরঙ্গ: তকল দরত্জ গজিন* [Material Exhibit-Gha, book's relevant page- 108-109] speaks of the horrific attack carried out in Habiganj town on 30 April describing the identity of the affected civilians. Defence does not attack the authoritativeness of this pertinent information that lends substantial

crime sites. The learned defence counsel however argued that non disclosure of accused Qaiser's name in the book **Material Exhibit-Gha** as an accomplice of the principals the army makes his involvement with the attack untrue.

428. Having regard to above defence argument we are of view that the author of the book **Material Exhibit-Gha** might have failed to collect adequate information or source that naturally resulted in non narrative of accused's act and conduct in facilitating the attack. But merely for this reason or due to author's limitation in describing the full truth we are not convinced to exclude the direct evidence in respect of accused Qaiser's presence with the principals the army at the time of launching attack in Habiganj. In this regard, Tribunal notes that judicial testimonies made under oath or solemn declaration tend, as a general rule, to demonstrate greater reliability than non-judicial narratives.

429. Besides, we have already found it proved that accused Qaiser continued accompanying the Pakistani army in committing the crimes by carrying out attacks at Shaestaganj on 29 April 1971 till evening and he substantially assisted them in getting stationed at Shaestaganj Dukbangalow on 29 April, 1971, the day preceding to the event of attack occurred in Habiganj town. It may thus be validly inferred that even in heading towards Habiganj town on the following morning, accused Qaiser did not keep him distanced from the Pakistani troops, rather he accompanied them, to further policy and common purpose. Therefore, inadequacy of information in the book [**Material Exhibit-Gha**, page 108-109] does not override the above legitimate and rational inference based on direct evidence.

430. The above finding on accused Qaiser's presence and participation, as an accessory, in committing the criminal acts forming part of attack based on direct evidence gets further strength from some other relevant facts portraying accused's profile and the role he had played intending to collaborate with the Pakistani army since inception of its rolling towards Habiganj from B'baria. It may also be validly presumed that at war time

situation, in 1971, a civilian was not expected to be actively affiliated with the Pakistani occupation army to collaborate and assist them unless he was a part of policy and plan, in furtherance of common purpose. The role and profile of accused Qaiser, as already found proved, provides conclusion that he was part of atrocious activities committed by the Pakistani occupation army, in furtherance of policy in and around Habiganj, in 1971 during the war of liberation.

431. P.W.7 stated that on April 27, 1971, Qaiser accompanied by 15 or 16 of the Qaiser Bahini members greeted the Pakistani occupation army at Shahbajpur and brought them to Madhabpur. P.W.1 Kazi Kabiruddin too stated that he heard on April 15 that Qaiser formed 'Qaiser Bahini' with 400/500 villagers from the locality Madhabpur in Habiganj. Qaiser had also formed a Peace Committee in Madhabpur and become its president.

432. P.W.3 Tajul Islam is a direct and star witness as regards formation of 'Qaiser Bahini'. He was a member of this private outfit. His testimony lends potential support to what has been testified by P.W.1 and P.W.2, in respect of formation of 'Qaiser Bahini' as accused's private outfit. P.W.3 Tajul Islam stated that he was present when the Qaiser raised Qaiser Bahini with 500 or 600 members at a meeting at his Noapara house on April 15, 1971. He too joined the Qaiser Bahini. All these unimpeached material facts too provide adequate assurance of accused's presence in Habiganj, with the troops in launching the attack on 30 April.

433. We are not persuaded by the argument advanced by the learned defence counsel that staying of P.W.2 in Habiganj town, at the relevant time, returning from Shaestaganj on 29 April at night was improbable and thus what he stated in respect of witnessing the event of attack is untrue. It appears to us that defence could not bring anything, by cross-examining P.W.2 that may legitimize this mere speculative argument.

434. We have already found, in adjudicating chargeno.6, that after the attack launched at the Shaestaganj silo at about 2:30-3:00 pm on 29 April, P.W.2 and others engaged in collecting food there from went into hid.

And it is not disputed that Shaestaganj was not too far from Habiganj town. Besides, P.W.8 in reply to question put to him by the defence, in cross-examination, stated that Shaestaganj Dukbangalow was about 07 miles far from Habiganj. Thus, and distance of few miles did not make his return from Shaestaganj to Habiganj town at 9:00 pm on 29 April improbable at all. Therefore, P.W.8 cannot be termed as unreliable witness.

435. Defence does not challenge the fact, by cross-examining P.W.2 and P.W.7, that they knew the accused Qaiser even since prior to the event. Unshaken testimony of P.W.2 and P.W.7 rather implies that they knew the accused Qaiser. Knowing a person does not always necessarily refer personal acquaintance. The facts, context and habitation of the witnesses around the geographic area of Habiganj sub-division rather made it likely for the witnesses to 'know' the accused Qaiser due to his pro-Pakistan political prominence in the local community, even since earlier. We are thus satisfied that the witnesses did not make an attempt to mislead the Tribunal by saying that they saw accused Qaiser accompanying the group of army, in carrying out the attack. It is to be noted that it is the physical recognition of the accused rather than personal acquaintance which is most pertinent. The evidence suggests that the witnesses who could identify accused Qaiser, were aware of the physical appearance of the accused since prior to seeing them at the crime sites.

436. The attack in question included grave destruction of civilians' property that caused massive harm to them. The perpetrators committed such vicious activities intending to create a climate of terror, particularly for the people who took stance in favour of the war of liberation, in furtherance of policy and plan.

437. We have already recorded our finding, in adjudicating preceding charge no.2, that the wanton destruction of private property was not justified, for any kind of necessity for the group consisting of army men. The accused Qaiser by his act of accompanying the group, along with his private outfit, substantially facilitated this atrocious act. We reiterate the

finding made in our preceding deliberation on charge no.2 that causing harm by plundering and burning properties of civilians indeed involved serious despondency and disadvantage to the victims of the attack. Physical injury or harm might not have caused to any individual by such extensive destruction. But weight is to be given to the malicious intent behind such destructive activities.

438. The massive and malicious intentional destruction of homes and property of civilian population detracts their customary livelihood and it is recognized as a blatant denial of their fundamental rights. Such terror inducing destructive acts were aimed to intimidate the non combatant pro-liberation civilians, by launching attack in Habiganj town.

439. It has been found proved beyond reasonable doubt that as a local potential aide and a man of strong pro-Pakistan ideology accused Qaiser sided with the Pakistani occupation army not only since its beginning of rolling towards Habiganj from B'baria but also in attacking the civilians in Habiganj town on 30 April 1971. Naturally, the Pakistani army was unfamiliar with the layout of Habiganj town and locations of residences of the targeted pro-liberation civilians and Hindu people. It was accused Syed Md. Qaiser who not only accompanied the group of army men but also with malicious intention guided, substantially contributed and abetted them in accomplishing the act of wanton destruction, as proved beyond reasonable doubt by the evidence of P.W.2 and P.W.7. Therefore, accused Syed Md. Qaiser is found criminally liable under section 4(1) of the Act of 1973 for abetting, facilitating and contributing the actual commission of the offence of '**other inhuman acts**' as '**crime against humanity**' as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.08

[Committing Rape upon Hiramoni at Chanpur Tea garden]

440. Charge: On **11 May 1971** at about **10:00 am** accused Syed Md. Kaiser accompanied a group of Pakistani occupation army towards Chanpur tea garden under Chunarughat police station of the then Habiganj

sub-division and on arriving there the group started causing torture to the garden labourers and dwellers belonging to Hindu community and at a stage, entered into the dwelling hut of one Santal woman Hiramoni and on accused's showing and asking 2-3 army men committed rape upon Hiramoni. Therefore, accused Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of sexual ravishment upon one *santal* woman constituting the offence of '**rape as crime against humanity**' which was part of attack against civilian population as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus accused incurred liability under section 4(1) of the Act.

Witnesses

441. Prosecution, as perceived from its argument, relies upon P.W.18 and P.W.20 to prove this charge involving the event of sexual violation committed in conjunction with the attack directing the Chanpur tea garden under Chunarughat police station. Prosecution could not however bring and examine the victim as she is not in position to move due to her severe ailment. P.W.18 Basu Santal [55] is the brother's son of the victim Hiramoni. Husband of victim Hiramoni was a tea garden labourer. Prosecution also relies upon **P.W.20 Abdul Motaleb** as he testified how Pakistan army men raped an indigenous woman at her house inside a tea garden in Chunarughat, Habiganj as the accused Syed Mohammad Kaiser led them to her house during the Liberation War in 1971. P.W.20 saw the accused Kaiser, the two other army men and the two unidentified Bangalees marching towards a labourer's house inside the tea garden. **P.W.20 Abdul Motaleb** had been around the locality of the crime site as an informer for freedom fighters, at the relevant time. The relevant facts as stated by P.W.20 offers sufficient indication as to commission of the offence and accused's substantial role to its accomplishment, prosecution alleges.

Evidence Presented

442. P.W.18 Basu Santal[55] stated that one day during the last part of Bengali month *Baishakh*, possibly on 11 May in 1971 he had been at their house with his grand father Bipin Santal and his 'pishi' Hiramoni Santal [father's sister], at the relevant time his 'pisha'[husband of pishi Hiramoni] had been in the tea garden. It was around 10:00 morning. He was in their courtyard. Suddenly he saw two Bengali people named Gafur and Abdul Haque [now dead] accompanied by two army men and one white-dressed unknown Bengali man entered into their house. With this he went into hid in a nearby bush wherefrom he saw the white-dressed man by giving signal prompted the army men to enter into his 'pishi's [victim Hiramoni] shed which was used as residing shed and cooking shed as well. Instantly after the army men entered into the shed, his pishi Hiramoni started out crying seeking help to save her. With this his 'Thakurda' [father-in-law of Hiramoni] Bipin attempted to rush to the shed but the white-dressed man, Gafur and Abdul Haque caught him and started beating him up. Some times later, he could not hear any sound [screaming] from his pishi's shed. One hour after, the two army men and their three Bengali accomplices went back, he saw from his hiding place.

443. P.W.18 went on to state further that his *Pisha* [husband of the victim] came back from his work and then he[P.W.18] came out of the hiding place and he and his pisha then entering into his pishi's shed found her in worsen condition. His pishi [victim Hiramoni] told her husband that the army men violated her. He, in evening on the same day narrated the event to his brother Nakul Santal and his mother in presence of neighbours and elders when they too told that they also saw the men coming to their [P.W.18] house accompanied by a white-dressed man who was Qaiser[accused] of Noapara and they knew him.

444. P.W.18 finally stated that about 10-11 years after the independence, Qaiser participated election as a nominee of Jatio Party and during his election campaign he saw him and could recognise that he was the man who prompted the Pakistani army to sexually violate his pishi[Hiramoni].

445. P.W.20 Abdul Motaleb, a resident of *Ekartali* under Chunarughat police station in Habiganj, stated that in the first week of May, 1971, he was tasked as an informer for the freedom fighters. He used to supply information about the Pakistan army and their local collaborators to a camp set up inside territory of India. On May 11 or 12 of 1971, when he was on his way to the camp, he saw Pakistan army Major Yusuf, Yusuf's subordinate Sher Bahadur, Qaiser and two unidentified Bangalees beside an army vehicle near Dolna Tea Garden. He knew Yusuf and Sher Bahadur as they had stayed in their bungalow during the India-Pakistan war in 1965. When he [P.W.20] was nearer to the vehicle, Sher Bahadur called him and when he approached the vehicle, Qaiser identified him [P.W.20] as a freedom fighter and asked him to give them information about freedom fighters. When he refused to do so, he was put inside the vehicle on Qaiser's instruction, although the army officers disagreed with Qaiser on the matter, P.W.20 added.

446. P.W.20 Abdul Motaleb went on to state that two other Pakistan army men rode with them inside the vehicle. When they reached an area near Chanpur Goat Market in Chunarughat, Yusuf [Major] let him [P.W.20] go while Qaiser, the two other army men and the two unidentified Bangalees marched together towards a worker's house inside the tea garden.

447. After he was let to go, he hid inside another worker's house nearby from where he heard the screams of a woman. He saw Qaiser and the two Bangalee men beating an elderly man who was attempting to save the woman. After 40 to 45 minutes, when the Pakistan army men and Qaiser had left, he [P.W.20] went there and learnt the name of the victim and other details about the incident from the elderly man and others.

Deliberation and Finding with Reasoning

448. The learned Prosecutor Mr. Rana Das Gupta argued that an offence particularly relating to sexual violence committed during war time cannot be expected to have taken place in presence of witness. It is true that the victim could be the best witness in narrating the horrific coercive act of

ravishment committed upon her. But P.W.18 the son of victim's brother stated that now the victim is 80 years old and not in position to move and talk normally.

449. The learned prosecutor went on to submit that P.W.18 and P.W.20 testified the unlawful entrance of the group forming two army men, accused Qaiser and his two other unknown Bengali accomplices to the dwelling place of the victim Hiramoni. This fact together with other relevant and material facts as stated by these witnesses unambiguously goes to prove that on active facilitation and assistance the two army men committed the beastly sexual violation upon the victim, an indigenous woman. Hearing victim's screaming and preventing elderly family inmate who was heading to the crime shed for rescuing the victim, as heard and seen by these witnesses from the place they remained in hiding lawfully suggest that the victim woman was sexually violated by the army men and it happened at the active assistance and facilitation on part of the accused Qaiser as he was with the group and had been waiting at the courtyard, after entrance of the principal offenders inside the crime shed. Therefore, mere non-examination of the victim for valid reason does not render the commission of offence and complicity of the accused therewith doubtful in any manner.

450. The learned defence counsel mainly argued attacking probability of what has been stated by P.W.18 and P.W.20. It has not been claimed that accused Qaiser accompanied the principal perpetrators to the house of the victim. P.W.16 rather stated that a white dressed man was with the principal offenders. The version made by P.W.20 that the accused and two army men along with some other army men came at the place nearer the crime site by 5 vehicles was improbable as this place was very much nearer to the Indian border. P.W.20 did not clarify as to wherefrom the two army men joined the accused and his two Bengali accomplices.

451. The learned defence counsel finally argued that the prosecution, without any valid reason, failed to produce and examine the victim Hiramoni Santal who could be the best witness to prove this charge.

Recently the victim and some other women have been honoured ceremonially in Habiganj in recognition of their role during the war of liberation and it has been reported in the daily Prothom Alo 26 June 2014 issue. And as such it is not true that she was not in position to move. Defence denied the version made by these two witnesses implicating the accused. Additionally, mere failure to refute their version, by cross-examination, does not make it readily true, the learned defence counsel argued. Their statement is to be evaluated by preponderance of probability.

452. According to the charge framed, the perpetrators committed sexual violation upon the victim Hiramoni Santal, by making their unlawful entry to her dwelling shed and it happened during day time. Accused Qaiser allegedly accompanied two army men, the principals to the crime site and substantially encouraged them in committing the barbaric act of rape. Thus, the facts in issue the prosecution requires to prove are- **(a)** unlawful entry of the army men into the house of victim Hiramoni Santal on the day and at the relevant time **(b)** accused Qaiser accompanied the army men to the crime site **(c)** commission of the offence of rape by the army men and **(d)** how the accused abetted and facilitated the commission of the crime in question

453. Defence, as it appears, does not dispute the event of sexual invasion committed on Hiramoni on the day, time and in the place as described by P.W.18. It remained unshaken too that the group formed of two army men and two Bengali people Gafur and Abdul Haque and one white-dressed man entered into their house and from signals of white dressed man the army men entering into the shed of victim Hiramoni ravished her. It may be presumed that the offenders preferred the time of accomplishing the criminal act designed as a part of attack when the capable male inmates had been at their work place, not at home.

454. It is undisputed too that P.W.18 Basu Santal is the son of victim's brother. It transpires from his evidence that he had been at his pishi's

[Hiramoni Santal] house at the relevant time and had occasion to witness the sudden unlawful entry of the group of attackers to their house.

455. P.W.18 who had been at the house of Hiramoni at the relevant time narrated consistently what activities he saw, carried out by the group formed of one white-dressed Bengali man, two other Bengali people and two army men. The above version of P.W.18 so far as it relates to seeing the act and presence of white-dressed man along with two other Bengali people at the courtyard when the two army men entered into Hiramoni's dwelling shed, violently intercepted and beating the father-in-law of Hiramoni when he attempted to rescue her by the three members of the group standing at the courtyard remained unshaken. And defence did not deny it even.

456. Defence however disputes that the white-dressed man accompanying the two army men to the crime site i.e the dwelling place of the victim and her family inmates was not the accused Qaiser and the P.W.18 had no reason to know the identity of the white-dressed man accompanying the group of offenders.

457. But the neighbouring elderly people who came to their house in the evening on the same day, on hearing the incident told that they also saw the 'group' coming to their [P.W.18] house and the white-dressed man accompanying the group was Qaiser of Noapara. Defence could not shake this version and even it remained undenied too. This hearsay testimony so far as it relates to knowing the identity of the 'white dressed man' carries probative value, if considered together with the next part of his testimony.

458. Seeing the accused Qaiser in his election campaign as a candidate of jatio Party nominee, few years after the independence, as stated by the P.W.18 remained unimpeached and defence does not appear to have denied it. P.W.18 claims that seeing Qaiser engaged in his election campaign he could recognise that he was the man who was in white-dress, at the time of the attack that resulted in sexual violation of his *pishi* Hiramoni. Claim of recognizing accused Qaiser even few years after the

incident as one of accomplices of the principal perpetrators cannot not be brushed aside as the P.W.18 had fair occasion to observe the group entering into their house and the army men getting them entered into the shed of the victim, on signal of the white-dressed man.

459. Testimony of P.W.20, an informer for the freedom fighters, consists of two parts. First part relates to his meeting with the Pakistan army Major Yusuf, Yusuf's subordinate Sher Bahadur, Qaiser and two unidentified Bangalees beside an army vehicle near Dolna Tea Garden on May 11 or 12 of 1971, when he was on his way to the camp. Qaiser identified him [P.W.20] as a freedom fighter and he was then put inside the vehicle as per Qaiser's orders. Two other Pakistan army men rode with them inside the vehicle. When they reached an area near Chanpur Goat Market in Chunarughat, Yusuf [Major] made him [P.W.20] free while Qaiser, the two other army men and two unidentified Bangalees marched towards a worker's house inside the tea garden.

460. Why the army official allowed P.W.20 to go away? He knew Yusuf [Major] and Sher Bahadur since earlier as they had stayed in their bungalow during the India-Pakistan war in 1965, P.W.20 stated and it remained unchallenged. Presumably prior acquaintance inspired the army officials to let him free.

461. However, the above unimpeached version of P.W.20 proves it unambiguously that he saw the group formed of two army men, accused Qaiser and two unidentified Bangalees[presumably accomplices of Qaiser] marching towards a worker's house inside the tea garden, being distanced from the army vehicle.

462. The second part of P.W.20's testimony involves seeing the activities done by this group inside Hiramoni Santal's house, from one worker's house where he had kept himself hid. This part of his testimony indisputably proves that the accused Qaiser accompanied the group of two army men and two unidentified Bengali people towards the house of the victim, inside the tea garden the crime site. Unimpeached version of P.W.20 lends assurance that the 'white dressed man' accompanying the group was accused Qaiser.

463. The testimony of P.W.20 also proves patently that the accused Qaiser accompanied the group of two army men and two unidentified Bengali people arrived at the house of the victim, inside the tea garden the crime site. Apart from this, P.W.20 had occasion to see, presumably out of curiosity remaining in hiding, the accused and his two other Bengali accomplices beating up one elderly man as he attempted to save the woman who started screaming after the army men entered inside her shade.

464. Preventing an elderly inmate of victim's family by beating him up indicates adequately that the accused Qaiser and his two other Bengali men deliberately facilitated the commission of the act of rape by the army men upon the victim. It gets corroboration from what has been stated by P.W.18, another eye witness to the attack by the group of which accused Qaiser was a member.

465. Naturally, P.W.20 was not familiar with the identity of the victim woman. He did not claim it too even. After 40 to 45 minutes, when the Pakistan army men and Qaiser had left, he [P.W.20] went there and learnt the name of the victim and other details about the incident from the elderly man and others, he stated. It remained unshaken. The Tribunal notes that the P.W.20 is with the truth. On rational evaluation, his testimony does not appear to have been suffered from any embroidery.

466. Defence could not impeach the testimony of P.W.20, on material particular, in any manner. Rather P.W.20 stated, on cross-examination, that the house wherefrom he could hear screaming of Hiramoni Santal was surrounded by bamboo fencing and he could not say who owned the house wherefrom he could hear Hiramoni's screaming. Thus, hearing screaming of Hiramoni Santal by P.W.20 from hiding place has been re-affirmed. P.W.20 also stated in reply to question elicited to him by the defence that he did not make Yusuf Saheb[Major Yusuf] informed of the event of rape upon Hiramoni. With this the fact of committing rape upon Hiramoni has also been re-affirmed.

467. It is to be kept in mind that the criminal act of sexual invasion committed upon the victim in the backdrop of war of liberation by the members of the Pakistani occupation armed force at the behest of accused Qaiser could be reasonably established even by the relevant facts as heard and seen by the surrounding people .

468. The accused Qaiser himself did not commit the act of rape, true. But by virtue of being present at the scene of the crime and in exercise of guiding influence, he encouraged sexual violence to take place. It is now jurisprudentially settled that the ‘assistance’ and ‘encouragement’ may consist even mere presence. An individual may abet by providing practical assistance, encouragement or moral support to the principals, in accomplishing the crime. We have found that accused Qaiser was not merely present at the courtyard of the dwelling shed of victim but he even deliberately prevented, by inflicting physical assault to the elderly inmate of victim’s family who came forward to rescue the victim.

469. Conduct and act of accused Qaiser as divulged from evidence of P.W.18 and P.W.20 must lead even a man of normal prudence to the only conclusion that the accused consciously and substantially facilitated and contributed to the principals, in committing the mass rape upon the victim. Accused’s act and conduct were thus ‘specifically directed’ to the actual commission of the criminal act constituting the offence of mass rape.

470. Why the accused opted to encourage the army men in perpetrating such a barbaric and unholy act of ravishment upon an indigenous woman? Presumably, accused Qaiser by providing such malicious assistance intended to earn trust of the Pakistani army, aiming to boost the morale of Pakistani army and also to induce massive intimidation to the community and civilians, in furtherance of policy and common purpose.

471. It is now settled that in war time, the soldiers assume the use of rape as an effective weapon of launching attack not simply against an individual, but against social and gender stigmas aiming for the advancement of societal break-down. Rape as a weapon of war

demoralizes and destabilizes the community and the ties between the victims and the society. When rape is used as a weapon instead of a bullet, the weapon continues to exert its effect beyond the primary victim.

472. Thus, the culpable act and role the accused Qaiser had done and played in facilitating the commission of the sexual invasion upon the victim Hiramoni Santal had a serious detrimental effect not only upon the victim, but her family, village and community. Accused Qaiser, by his act and conduct, eventually outraged the civility. Undeniably family is the center of a community and women are the center of a family, so by ravishing the women, attackers were one step closer to wiping out their opponent.

473. The accused Qaiser is thus found to have had substantially contributed and instigated in committing rape (crime against humanity) upon an indigenous woman by the army men, the principals. And in carrying out this unholy act accused Qaiser consciously accompanied them to the crime site, the dwelling shed of the victim and he along with his two other Bengali accomplices remained at the courtyard to keep the criminal act of invasion uninterrupted, evidence presented proved it. What a perverted man the accused Qaiser was! It is indeed hard to believe that the accused Qaiser was a Bengali Muslim.

474. Defence argued that the victim was quite fit to move as she attended the ceremony in Habiganj in the month of last June [2014]. The report published on 21 June 2014 in the daily Prothom Alo speaks it. But she did not come before the Tribunal to depose. It creates doubt as to truthfulness of the event alleged.

475. We cannot accept the above argument. P.W.18 has stated that now the victim is 80 years old and cannot walk, talk and hear well. Besides, attending a ceremony held in Habiganj nearer to her place and narrating the traumatized experience coming to the Tribunal are quite two different things. One does not match with another. Therefore, it cannot be said that the victim deliberately abstained from coming to the Tribunal and it

indicates untruthfulness of the barbaric act committed upon her. Besides, report published on 21 June 2014 in the daily Prothom Alo relied upon by the defence in order to refute prosecution's claim that the victim was not in position to move during trial, due to her old age complications, on the other hand, establishes the physical invasion and mental trauma the victim sustained due to the untold attack committed upon her.

476. During trial, defence submitted a written objection, in relation to an application filed by the prosecution under section 19(2) of the Act praying for admitting the statement of the victim Hiramoni Santal made to IO into evidence as she is now not in position to move, along with a report published on 21 June, 2014 in the daily Prothom Alo.

477. The Tribunal did not consider the prayer of the prosecution. Since the defence relies upon this report we deem it necessary to have a look to what the report contends. The report has been published along with a photo as well. It appears that on 21 June 2014 some six brave women including the victim Hiramoni have been honoured in recognition of the highest sacrifices they laid for the cause of our independence in 1971. The victim Hiramoni Santal was one of the honoured women. Sacrifice of self-worth is indeed a bravery too for which Hiramoni has been so honoured. Thus, in other words, it lends further assurance as to the commission of the barbaric physical invasion upon the victim.

478. On totality of evidence, commission of the offence of mass rape stands proved. Defence does not dispute it. In adjudicating accused's culpability prosecution is required to prove that accused Qaiser was with the army men the principals and had substantially contributed and assisted in committing the crime in question.

479. The army men committed the beastly act inside victim's dwelling shed. Integrated evaluation of testimony of P.W.18 and P.W.20 leads us to the conclusion that accused and two other cohorts accompanied the principals and remained present outside the crime shed intending facilitate commission of the crime. The evidence presented does not give light that

the victim knew the accused since prior to the event or she could identify the accused Qaiser as an accomplice of the principal perpetrators.

480. Thus, mere failure to examine the victim does not render the event untrue. It has been proved beyond reasonable doubt that the accused Qaiser, being a potential aide of the Pakistani occupation army, had acted as an agent of a systematic attack leading to the principal act of mass rape and he consciously and being quite aware about the consequence and risk of his act and conduct provided substantial aid and contribution to the perpetrators. ,

481. Besides, due to social ostracism, victim might not have intended to speak about the trauma she sustained. Act of rape imprints an unending and life-long horror that continues to attack victim's cerebral entity.

Gabriela Mischkowski rightly pointed that

“in practice, rape survivors are more or less routinely accepted as “vulnerable” rather than “threatened” for mainly two reasons: they are either perceived as too shameful to talk about “such things” in front of a public audience, or based on a less prejudiced and more enlightened understanding of rape and its social implications—they are to be protected from public stigmatising.”

[Source: **Gabriela Mischkowski**, Medica Mondiale, Cologne, Germany: *The trouble with rape Trials: Bangladesh Genocide and the Issue of Justice*, a paper presented in the International conference held at Heidelberg University, Germany 4-5 July, 2013, publication of Liberation War Museum, Bangladesh, page 98].

482. Tajul Islam an accomplice of accused Qaiser testified as P.W.3 and provided the details of the atrocious activities of accused Qaiser committed in Habiganj in 1971, during the war of liberation. He narrated the misdeeds of his ‘boss’ Qaiser who collaborated with the Pakistani occupation army after forming a private outfit with 500 or 600 members which was known as ‘Qaiser Bahini’. Tajul Islam also joined the Qaiser Bahini following advice from Qaiser, P.W.3 stated.

483. The above pertinent fact as described by an accomplice of the accused remained undislodged. Be that as it may, we may arrive at an unerring conclusion that the accused was a man of extreme antagonistic

attitude to the pro-liberation civilians and also by using his local pro-Pakistan political prominence he made him affiliated with the Pakistani occupation army and used to provide active assistance by accompanying them even in moving towards the remote and unknown locality under Habiganj sub-division.

484. The criminal act of sexual invasion committed upon the victim in the backdrop of war of liberation by the members of the Pakistani occupation armed force at the behest of accused Qaiser could reasonably be established even by the relevant facts as heard and seen by the surrounding people, we are of firm view .

485. Hearing screaming of the victim from the dwelling shed after the offenders entered there is an inevitable indication of causing forcible and coercive act by the perpetrators that resulted in victim's violation. Besides, preventing the elderly inmate of the family by the accused and his two Bengali accomplices when he was about to rescue the victim on hearing screaming, as proved by corroborative testimony of P.W.18 and P.W.20 also offers indisputable conclusion that the invasion committing upon the victim by the principals was simply under coercion and unlawful force. Thus, the accused's act formed part of attack that eventually resulted in causing forcible and mass sexual violation upon the victim.

486. In the case in hand, we have already found that the accused enthusiastically accompanied and assisted the Pakistani occupation army in Habiganj and B'baria, in committing numerous atrocious activities. The closer affiliation of the accused with the Pakistani occupation army leads us to believe that the accused even did not refrain from doing anything necessary for finding favour in the eyes of the Pakistani occupation army. The accused Qaiser despite being a Bengali man drastically prompted and encouraged principal offenders even to the accomplishment of the offence of sexual ravishment upon a helpless woman.

487. In order to prove an individual's liability in committing the offence of rape as crime against humanity, it is sufficient to show that he was

knowingly part of the design of the group of offenders and consciously assisted and abetted them in committing the actual offence.

488. The proven fact of accompanying the group towards the crime site provides rational indication that the accused Qaiser led and guided the group in furtherance of an evil design. The army men the principal offenders were not at all familiar with the locality and it was the accused who as a collaborator of the Pakistani occupation army guided them consciously and actively towards the house of the victim intending to facilitate the offenders in accomplishing their lust which was indeed an attack directing civilians.

489. The accused Qaiser is thus found guilty of rape (crime against humanity) as he is found to have had instigated its commission on an indigenous woman and also by consciously accompanying the principals to the crime site the dwelling shed of the victim. The Tribunal thus concludes that the rape that took place was a direct consequence of Qaiser's instigation and facilitation due to his closeness in time and space between the instigation and the actual commission of the beastly act of sexual ravishment upon the victim. Accused's act and conduct together with his presence outside the crime shed after facilitating smooth entrance of the principal offenders the two army men inside the shed thus had a significant legitimizing or encouraging effect on the principal in carrying out the principal criminal act of mass rape.

490. In light of above integrated evaluation of evidence and circumstances we conclude that it has been proved beyond reasonable doubt that a group formed of two army men and three Bengali men including the accused Qaiser who was in white dress attacked the residing place of the victim Hiramoni Santal on the date and time as stated in the charge framed and accused substantially contributed and prompted the army men to effect their entrance into the shed of the victim who was brutally violated by them, for about one hour. It was the accused Qaiser who and his two other Bengali accomplices made it possible for the principals in carrying out such barbaric activities.

491. The act of the accused forming part of the ‘attack’ eventually resulted in committing the offence of ‘mass rape’ upon the victim Hiramoni Santal. It was indeed more than a murder commission of which was substantially facilitated by the accused Qaiser. It is immaterial to say that the accused did not take part physically in committing the offence of rape. Prosecution is not required to prove it. In order to prove an individual’s liability in committing the offence of rape as crime against humanity, it is sufficient to show that he was knowingly part of the design of the group of offenders and consciously assisted and abetted them in committing the actual offence.

492. It has been proved beyond reasonable doubt that physical invasion upon victim Hiramoni Santal was carried out only on substantial assistance and contribution provided on part of accused Syed Md. Qaiser to the principals. It may be validly presumed that the accused Qaiser intended this act to be carried out and knew that it was part of attack on the unarmed civilian population. The accused Syed Md. Qaiser is thus found criminally liable for abetting the act of ‘rape’ of the victim Hiramoni Santal as ‘**crime against humanity**’ as specified in section 3(2) of the Act of 1973 and is found to have incurred liability under section 4(1) of the Act of 1973.

Adjudication of Charge No. 09
[Killing of 08 civilians of village Lohaid]

493. Charge: On **15 May 1971** in between **10:00-10:30 am and 01:00-01:30 pm** accused Syed Md. Qaiser the leader of ‘Qaiser Bahini’, being accompanied by his 10-15 companions, Razakar force and a group of 30 members of Pakistani armed force headed towards the village ‘Lohaid’ under Madhabpur police station, the then Habiganj sub-division where the group by launching attack apprehended pro-liberation civilians namely **(1) Abdul Aziz (2) Abdul Gafur (3) Jamiruddin (4) Azimuddin (5) Etimunnesa (6) Nur Ali (7) Alamchan Bibi (8) Abdul Ali** from their houses and then following accused’s instruction the army men caused their death by charging bayonet and gun shot. In conjunction with the

event the group of perpetrators committed looting of Rahimuddin's house and then set it on fire. Therefore, accused Qaiser has been charged for abetting, consciously facilitating and substantially contributing the actual commission of killing of 08 unarmed civilians constituting the offence of **'murder as crime against humanity'** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus liable under section 4(1) of the Act. And thus he incurred liability under section 4(1) of the Act.

Witnesses

494. Prosecution relies upon testimony of P.W.17 Md. Ful Mia a freedom fighter under 'S' force commanded by sector commander the then Major Safiullah. At the relevant time P.W.17 had been within the territory of the then sub-division Habiganj and was assigned with the task of collecting information through sources attached with their team. He since 29 April 1971 was stationed at the eastern part of Rajarmar Dighi, between village Lohaid and Vandaroa Jamalpur. And as such he had occasion to witness the attack that resulted in killing of civilians, prosecution claims.

495. The relevant material facts as stated by this P.W.17 reasonably connect the accused Qaiser with the killing of eight civilians as narrated in the charge, as he saw the accused accompanying the group of perpetrators to the crime site, prosecution avers. Prosecution also relies upon P.W.21 Md. Omar Ali and P.W.22 Md. Lokman Hossain terming them eye witnesses to the event of attack. Now let us see what the P.W.s stated on dock.

Evidence Presented

496. P.W.17 Md. Ful Mia [63] was a freedom fighter under the 'S' force of sector no.3. He was closely associated with the activities of freedom fighters organised at Teliapara. From their 'sources' they got information about formation of peace committee by accused Qaiser, on holding meeting at the house of Manjur Ali at village Guniauk [*ibqDK*]. And the accused Qaiser formed a 'force' after his own name and it was known as

‘Qaiser Bahini’ and Qaiser decided to bring the Pakistani troops to Madhabpur from B’baria.

497. P.W.17 further stated that on 27 April a team formed of 20 freedom fighters including him was sent inside the territory of Habiganj subdivision and thus they started staying at different places, for collecting information about activities of Pakistani army. At a stage, on 14 May 1971 he and his team removed 54 mines from Noahati-Dharmagar [ṭḅiq̣uṇẉ-ag̣ṃi] road, with the assistance of two mine defusing experts. One Abdul Hamid who was crippled in a limb saw them when they were defusing the recovered mines at a place near the rail crossing of Shahpur rail station at village Lohaid [ṭj̣ṃḄ]. He knew the said Hamid since earlier and he [Hamid] attempted to come closer to them and as such he [P.W.17] doubted his movement.

498. P.W.17 went on to state that on the following day [**15 May, 1971**] at about 08:00 am he accompanied by his 5 accomplices took position at the eastern part of Rajarmar Dighi [ịṚṿig̣i ̣ẉ] between village Lohaid and Vandaroa Jamalpur for collecting information whether any more mine was implanted there. At about 10/10:30 am he saw one army and one civil vehicle coming at the north side of the broken culvert on the Noahati-Dharmagar [ṭḅiq̣uṇẉ-ag̣ṃi] road. He saw 15/16 army men and 10/12 persons wearing brown coloured uniform and two civilians getting down of the vehicles. The group started following the two civil dressed people of whom one was ‘lengra’ [lame: j̣ ̣ṣọ] Hamid. Another man with the group was in white dress. He saw the group entering into the house of Hamid adjacent to the house of his [P.W.17] Phupa Abdul Aziz [one of victims], from the bank of Rajarmar Dighirpar [ịṚṿig̣i ̣ẉ] and he became sure that the white dressed man was Qaiser. Some moments later, he could hear gun firing from the direction of the house of his Phupa [father’s sister’s husband] Abdul Aziz and Jamiruddin. He also heard frequent gun firing from the end of middle part of village Lohaid which continued for about one hour. Afterwards, the army men, brown colour uniformed men belonging to Qaiser Bahini and the white dressed man

came back to the road and had left the place towards northern direction by their vehicles.

499. The above is the description about the attack launched by the group formed of army men, members of 'Qaiser Bahini' as guided by the accused Qaiser and 'lengra' Hamid. Defence could not bring any indication, by cross-examining the P.W.17, that it was impracticable of having seen the group of attackers marching towards the crime site. Therefore, and since the above narration remained unshaken it inspires credence. The rest of testimony of P.W.17 so far as it relates to killing of civilians as narrated in the charge is based on what he heard from Omar Ali[P.W.21] and Lokman Hossain[P.W.22], after the group of perpetrators had left the crime site.

500. P.W.17 further stated that the Pakistani troops had left the crime site at about 01:00 pm and afterwards, he saw Omar Ali [P.W.21], Lokman Hossain [P.W.22] and Ali Ahammad of Lohaid village moving hurriedly towards *Simna* border and on their way, they informed that the Pakistani army being accompanied by Qaiser and 'lengra' Hamid had killed Abdul Aziz, Abdul Gafur, Jamiruddin, Azimuddin and his wife Etimunnesa, Noor Ali Chowdhury, Alam Chan Bibi and Abdul Ali. On hearing it, he along with his co-fighters and Omar Ali [P.W.21], Lokman Hossain [P.W.22] came to the crime village Lohaid and found dead bodies of those civilians lying scattered. They then buried the bodies in two graves near the shrine of Shahnur Saheb, after funeral ceremony. Mahbubuddin Chowdhury a potential organiser of war of liberation and his two fellow men attended the funeral ceremony and told them that he too, remaining in hiding at the mango garden situated at the south of Rajarmar Dighir par, saw the army men being accompanied by Qaiser entering into village Lohaid and carrying out the attack directing civilians that resulted in mass killing.

501. In respect of above piece of version, defence merely suggested P.W.17 that he made it disclosed first before the Tribunal. P.W.17 denied it. However, defence does not seem to have made effort to cross-examine

this P.W.17 on what he stated in his examination-in-chief, on material particulars.

502. P.W.21 Omar Ali [60-62] a resident of village Lohaid [crime site] is a relative of victim Noor Ali Chowdhury. In describing the event he deposed that on 14/15 May 1971, at about 10:00-10:30 am, he was eating with Haji Noor Ali at his home when Noor Ali told him that it was not safe to stay there and advised to shift at a safe place as the Pakistani army already arrived at Madhabpur. Instantly after this conversation, his [P.W.21] accomplice Abdul Khaleque came and told them that the Pakistani Army had already entered their village. After being aware of it he saw the Pakistani army and accused Qaiser entered inside their house and on seeing them he quickly hid himself behind a big rice container [house's granary] kept beside the room wherefrom he [P.W.21] observed Qaiser [accused] and 14/15 army men standing at courtyard of their house. And seeing it, Noor Ali exchanged 'salam' with Qaiser. But suddenly on having hint from Qaiser Pakistani army man gunned down Noor Ali to death and also fired his paralytic sibling *khalu* [mother's sister's husband] Akram Ali Chowdhury standing at the door on taking support of his wife. Accused Qaiser remained present at the courtyard of their house at that time.

503. P.W.21 further stated that as the army and Qaiser left their locality he came out of hiding place at about 01:00 pm and found the dead body of Noor Ali Chowdhury at the courtyard. He being panicked, along with Abdul Khalek and Lokman Hossain [P.W.22] started moving towards *Simna* border and on the way they met freedom fighter Ful Mia [P.W.17] along with his 5-6 comrades-in-arms at 'Rajarmar Dighir par'. On learning the event, they all rushed to their village, along with them to get informed about the event. As they returned to their village, they heard from locals that seven civilians were killed, during the attack.

504. In addition to his [P.W.21] 'bara baba's [Noor Ali Chowdhury] body, they found dead bodies of Abdul Aziz, Abdul Gafur, Jamiruddin, Etimunnesa, Abdul Ali and his mother, P.W.21 stated. On instruction of freedom fighter Ful Mia [P.W.17] they buried the bodies excavating two

holes, one for male and the other for women at a place adjacent to Shahnur Saheb's shrine near the border. And afterwards, crossing the border, he along with others had taken refuge at Motai camp in India.

505. Apart from the event of attack and killing, P.W.21 also stated that he knew Qaiser [accused] since earlier as he contested 1970 election and used to make election campaign around their locality. Qaiser intended to hold meeting at their house too. But his [P.W.21] 'bara baba' [Noor Ali Chowdhury] objected as he was supporter of Awami League. This was the reason why Qaiser [accused] prompted the army to kill him [Noor Ali Chowdhury] by gun shot. P.W.21, at this stage of his deposition made before the Tribunal, became extremely emotion choked and started shedding tears.

506. P.W.22 Lokman Hossain [60-61], a resident of Lohaid village under Madhabpur police station, stated that the locals started to flee the village on **May 14 of 1971**, hearing that the Pakistani Army men entered their village. Hearing gunshots, he went into hid in a bush on the southwest part of their house wherefrom he saw some Bangalees and Pakistani army men beating up Abdul Gafur and at one stage the army men shot him to death when Qaiser Saheb [accused] was present there.

507. P.W.22 also stated that when the army left the area around 1:30pm, he went to the spot and saw Gafur's body lying there. And on hearing a scream from Gafur's house, he went inside and found the body of Gafur's father Abdul Aziz. When he returned home, he assumed that the Pakistan army men and Qaiser Bahini had looted their house as he found everything scattered.

508. Defence, during cross-examination, simply suggested that Qaiser was 'not involved' in any such crimes and he [P.W.22] had given 'false testimony being influenced'. P.W.22 denied it emphatically.

Deliberation and Finding with Reasoning

509. Mr. Rana Das Gupta, the learned prosecutor in advancing his argument, submitted that this charge involves killing of 08 unarmed civilians of village Lohaid under police station Madhabpur. Prosecution relies upon P.W.17 Md. Ful Mia, P.W.21 Md. Omar Ali and P.W.22 Md. Lokman Hossain. They, as eye witnesses, testified some pertinent facts related to the principal event of killing. Their testimony proves the attack was launched by the gang formed of Pakistani army, members of Qaiser Bahini and accused Qaiser and this attack resulted in causing death of 08 unarmed civilians.

510. It has been further submitted that P.W.22 testified that he saw the killing of victim Gafur by the army when the accused was with them. P.W.21 Omar Ali saw the army men gunning down Noor Ali Chowdhury to death at the courtyard of their house, on signal of accused Qaiser. The unimpeached testimony of these witnesses, on material particulars, proves it beyond reasonable doubt that the accused was with the gang of attackers and consciously abetted and substantially contributed to the principals in perpetrating the actual crimes. Defence could not bring anything in their cross-examination that may lead to disbelieve what they have testified on oath.

511. Conversely, the learned defence counsel Mr. SM Shahjahan submitted that of the three prosecution witnesses, P.W.17 did not see the actual commission of killings. He simply narrates that he saw the troops accompanied by accused Qaiser and members of Qaiser Bahini moving to the crime village as guided by one 'lengra' Hamid. But it is not clear as to what was the basis of pretending identity of the 'white dressed man' as Qaiser, accompanying the gang at the relevant time. And it was not even likely to recognise a particular person from a distance of one kilometer, as he stated. Thus, his testimony is tainted by reasonable doubt.

512. The learned defence counsel went on to argue that another witness P.W.21 does not state that Qaiser Bahini was with the group of attackers that entered into the courtyard of their house. This version contradicts P.W.17. Besides, it was improbable to observe the attackers and their activities from hideout. Citing testimony of P.W.1 Kazi Kabiruddin the

learned counsel submitted that since the Madhabpur locality remained free till 26 June 1971, occurring the event on 15 May 1971 as narrated in this charge seems to be doubtful. The event of killing of eight civilians might have taken on some other date and in some other manner with which the accused had no complicity.

513. Now, we are to determine who perpetrated the crimes? The charge framed arraigns that the accused Qaiser accompanied the gang of army men in committing the crimes. On the other hand, from the suggestion put to the witnesses by the defence it is claimed that Qaiser was not at all involved with the attack. Thus, we are to find out whether the accused actually accompanied the principals to the crime site and what was his conduct and activities.

514. The evidence of P.W.21 the resident of the village Lohaid demonstrates that they had witnessed the group of army men accompanied by accused Qaiser launching the attack. P.W.21 saw the act of killing his 'bara baba' Noor Ali Chowdhury by gun shot at the courtyard of their house when accused Qaiser was with the principals.

515. Testimony of P.W.22 another resident of the crime village goes to show that he too saw the accused Qaiser accompanying the group of army men who killed Gafur by gun shot.

516. Killing of eight civilians of village Lohaid village on the date and time took place in conjunction with the same attack. It remained unshaken. Defence simply denies accused's involvement with the event. Besides, the unshaken fact of burial of dead bodies near the shrine of Shahnur Saheb as stated by all the three P.W.s adds further corroboration in respect of the killing of civilians of village Lohaid.

517. However, during summing up, the learned defence counsel emphasized that the event of killing of eight civilians might have taken on some other date and in some other manner with which the accused had no complicity. Thus, first the killing of eight civilians of village Lohaid becomes admitted. But none of the witnesses has been suggested, as

specific defence case, that the event took place on some other date and in some other manner. There has been nothing before us in favour of such argument. Besides, defence could not bring any inconsistency in this regard, by cross-examining the P.W.s. Thus, in absence of anything contrary, it stands proved that an 'attack' was launched directing civilians of village Lohaid on the date and time as testified by the attackers and in conjunction with the attack eight civilians were killed.

518. Now, we are to determine who perpetrated the crimes? The charge framed arraigns that the accused Qaiser accompanied the gang of army men in committing the crimes. On the other hand, from the suggestion put to the witnesses by the defence it is claimed that Qaiser was not at all involved with the attack. Thus, we are to find out whether the accused actually accompanied the principals to the crime site and what was his conduct and activities, amid or prior to the actual act of killing..

519. Before we evaluate the evidence provided by the witnesses, in respect of this charge, the Tribunal considers it indispensable to note that even due to lapse of long passage time a witness may be capable in narrating the 'core essence' of the event he witnessed and it happens because of the nature of the events. But however in making account of the 'essence' and 'fundamental elements' of the event by the witness, the trauma he or she sustained may be found to have been sandwiched with the memory that may result incapability in portraying 'detail precision'. But it never affects the 'fundamental feature' of his or her testimony.

520. On careful appraisal of facts and circumstances related to the principal fact constituting the offence we conclude that failure to make detail precision, as a result of lapse of long passage of time does not necessarily impugn one's evidence given in relation to the 'central facts' involving the principal crime. Long more than four decades after the crimes committed a witness is not always reasonably expected to memorize detail and accurate precision. The ICTR in the case of *Nyiramasuhuko* has considered this issue by observing that –

“Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision.”

[ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Judgement, 24 June 2011, para. 179]

521. The witnesses came on dock, more than four decades after the commission of offences, to describe what they witnessed and experienced, in relation to the events constituting the offences for which the accused has been indicted. Naturally they cannot be expected to give detailed and accurate information about distances, heights, times, direction, number of perpetrators *et cetera*. Keeping this indispensable reality in mind we are to focus on the ‘fundamental features’ of witness’s testimony.

522. P.W.17 a freedom fighter had been around the village Lohaid along with his co-fighters. It stands proved. Because, in cross-examination, P.W.21 admits the suggestion put to him by the defence that the Pakistani army might have attacked their village and thus the freedom fighters of their village had preparation to resist them. This suggestion put to P.W.21 by the defence, in other words, lends corroboration to the fact of presence of P.W.17 a freedom fighter and his co-fighters around the crime village Lohaid, at the relevant time. It gets corroborate ion from the evidence of P.W.21 and P.W.22.

523. The evidence of P.W.17 divulges that he saw the Pakistani troops accompanied by Qaiser and ‘lengra’ Hamid moving towards the village Lohaid. Why ‘lengra’ Hamid, a local person was with the troops? We have found from evidence of P.W.17 that on 14 May 1971 he and his team removed 54 mines from Noahati-Dharmagar [تہقنول-اگہی] road, with the assistance of two mine defusing experts. One Abdul Hamid who was crippled in a limb saw them when they were defusing the recovered mines at a place near the rail crossing of Shahpur rail station at village Lohaid

[tj mB`]. He knew the said Hamid since earlier and his [Hamid] attempt of coming closer to them created doubt in their mind.

524. The ‘conduct’ of ‘Hamid’ as revealed from above statement provides indication that he despite being a local Bengali people took stance in support of the army and their local collaborators. P.W.17 knew ‘Lengra’ Hamid since earlier, he stated. Evidence of P.W.17 also reflects that his Phupa Abdul Aziz’s house was adjacent to the house of lengra Hamid. Thus, seeing Hamid, white dressed man and the army men moving to the house of Hamid, as stated by P.W.17, leads to presume that Hamid culpably opted to assist the army and their accomplices in identifying the locality, freedom fighters and the people who were in favour of freedom fighters and the war of liberation, to facilitate the operation of wiping them out. Lengra Hamid thus had acted as the ‘spy’ of the perpetrators. Remaining in hiding at Rajarmar Dighirpar, as stated by P.W.17, stands reaffirmed in cross-examination. Cross-examination of P.W.17 does not give any hint even that it was impracticable to see the group of perpetrators moving towards the house of ‘lengra’ Hamid at village Lohaid. Thus, seeing Hamid accompanying the army towards village Lohaid as stated by P.W.17 inspires credence.

525. P.W.17 does not claim that he saw the event of attack and act of killing. He, remaining at a place at Rajarmar Dighirpar saw the gang formed of army and accompanied by Hamid and one white dressed man moving towards the crime site. Who was this white dressed man? It transpires from the evidence of P.W.17 that it was accused Qaiser and he [P.W.17] became sure of it when the gang of army entered into the house of lengra Hamid. It also transpires from the evidence of P.W.17 that the gang of army, ‘brown colour’ dressed members of Qaiser Bahini and white dressed Qaiser had left the site at about 01:00 pm by vehicles. It remained unshaken. We have got from evidence of P.W.3 Tajul Islam a member of ‘Qaiser Bahini’ that the members of ‘Qaiser Bahini’ were provided with brown colour uniform.

526. Thus it stands proved that the members of Qaiser Bahini also accompanied the army men in launching the ‘attack’ and lengra Hamid who had acted as an ‘informer’ too significantly assisted them. A ‘white dressed man’ was with the army men, P.W.17 stated. Defence could not refute it. Be that as it may, in absence of anything contrary, we conclude too that the white dressed man was none but accused Qaiser. The members of Qaiser Bahini certainly would not have accompanied the army men either without the knowledge of their ‘boss’ Qaiser or his physical presence and guidance at the crime site.

527. The event of killing eight civilians about which the witnesses came on dock to testify occurred more than four decades before the trial. Discrepancies attributable to the lapse of time do not necessarily affect the credibility or reliability of the witnesses, we have already observed. In narrating the horrific event and experience of trauma the witness, on oath, may make detail precision which he might not have disclosed earlier. Consistency between the ‘essence’ and ‘fundamental feature’ of the testimony made before a court of law and earlier statement, if any, is to be looked into. A witness is not supposed to testify exactly what he or she stated to the investigating officer. In this regard we recall the observation of the Appellate Division, in the case of *Abdul Qauder Molla* that

When a person gives evidence in a court of law under oath, obviously he is much more cautious and formal. He does not necessarily follow the same pattern of exactitude and rectitude while he makes informal statement to an I.O. who is not like a court. He may take it rather casually and hence some omissions during his statement to an I.O. can not be taken to be fatal, though a direct contradiction or even a discrepancy many have sinister bearing. In fact absolute consistency may raise doubt as to tutoring and may not sound natural.”

[Justice AHM Shamsuddin Chowdhury, Appellate Division Judgment in the case of Abdul Qauder Molla, page 719]

528. It appears that defence suggested many of witnesses, in cross-examination, that they narrated particular fact[s] for the first time before the Tribunal. The witnesses denied it. First, defence, for the reason of the Apex Court’s decision made in the case of *Abdul Qauder Molla*, could not assert it that he [witness] did not make it disclosed to IO, by drawing

attention to the relevant part of his or her statement made in court. Second, recording statement of witness by the IO is not mandatory, according to the Statute [Act of 1973]. Third, the IO might not have recorded exactly what the witness stated to him, during investigation. In the case of *Abdul Qauder Molla* the Appellate Division observed, in this regard that

“Even if it is assumed that contradiction of the statements witnesses can be drawn in the manner provided under section 145 of the Evidence Act, it may best be said that the witnesses omitted to make some statements before the investigating officer as they were not asked properly, and those omissions cannot altogether be treated or witnesses can be drawn in the manner provided under section 145 of the Evidence Act, it may best be said that the witnesses omitted to make some statements before the investigating officer as they were not asked properly, and those omissions cannot altogether be treated or termed as contradiction within the meaning of sub-rule (ii) of rule 53 of the Rules. The contradiction can only be drawn from statements made by the witnesses in course of their examination-in-chief. [Appellate Division Judgment in *Abdul Qauder Molla Case*, Page 198,199]

529. Also let us have a look to the jurisprudence evolved in *ad hoc* tribunals. In the case of *Akayesu* it has been observed by the ICTR that

The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony. [*Akayesu* case, ICTR note 5, para. 140]

530 Therefore, in addition to the observation of our Apex Court’s decision made in the case of *Abdul Qauder Molla*, on the issue of ‘contradiction’, the jurisprudence as propounded as well does not suggest to readily disbelieve witness’s sworn testimony merely on ground of inaccuracies between it and earlier statement.

531. It is to be noted that the Code of Criminal Procedure is not applicable in a case dealt with under the Act of 1973, a special Statute. Under the general law, for the purpose of terming any part of statement made by witness contradictory, omission of it in earlier statement is to be proved first. For proving omission, first, attention is to be drawn to particular

statement the witness makes before the court and he should be questioned whether he made such account to the IO. If the witness admits that he did not state so, no further proof of the omission is necessary. But when the witness answers in affirmative, during examination of the Investigating Officer later on he should be asked if the witness has stated before him any such statement. If the IO answers in the negative, it is only then the omission can be deemed to have been proved. But due to non applicability of the Code of Criminal Procedure, the defence does not get any such statement contradicted by the IO when he comes on dock.

532. Therefore, we are of the view that simply putting suggestion that he/she [witness] did not state particular fact[s] or matter[s] elsewhere, prior to deposing it before the Tribunal does not allow us making comparison between sworn testimony and earlier statement. Besides, in view of decision of the Appellate Division made in the case of *Abdul Qauder Molla* witness's account cannot be contradicted with his or her earlier statement made to IO. As a result, putting a mere suggestion that the witness narrates any particular fact for the first time before the Tribunal is an impermissible and futile effort to attack credibility of the witness and it deserves exclusion from consideration.

533. Additionally, if we consider the issue of contradiction 'jurisprudentially', we may safely conclude that simply a mere improvement, if it is really found, made in respect of detail of the event does not tantamount to 'contradiction', if it is found to have related to the 'fundamental feature' or 'essence' of his sworn testimony. In the case of *Kulesh Mondal Vs. State of West Bengal* [AIR 2007 SC 3228], the Indian Supreme Court held that—

“Normal discrepancies are those which are due to normal errors of observation, of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, which are always there, however honest and truthful a witness may be”.

534. The Tribunal notes that the Pakistani occupation army, for obvious reason, was not at all acquainted and familiar with geographical location

of certain places, language and people belonging to pro-liberation ideology. The history says that the local collaborators actively aided the army of being acquainted with these which were essentially required for carrying out atrocious attack directing the civilians. It happened too in launching attack directing the pro-liberation civilians of village Lohaid, we validly infer. Local mighty person accused Qaiser along with his private outfit known as 'Qaiser Bahini' actively guided and assisted the gang of army men in carrying out their 'killing mission', evidence of P.W.21 and P.W.22 unequivocally proves it.

535. It is now settled that in committing an internationally recognized crime, there can be several perpetrators where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence. The offence of murder of eight civilians at village Lohaid as already proved was a 'system crime', not an isolated one and there had been a 'context' in committing such crime directing the civilians.

536. We have already recorded our finding, in adjudicating the preceding charges, that the accused Qaiser had actively guided the army even since their initial entry into Habiganj town. And the army men had carried out atrocious activities as guided and being accompanied by Qaiser. The evidence presented in relation to this charge [charge no.9] even demonstrates accused Qaiser's active and culpable association with the army men the principal perpetrators. Presence of accused Qaiser, a local pro-Pakistan political leader of prominence, at the crime site with the principal perpetrators obviously had an encouraging or approving effect on the physical perpetrators that, depending on the circumstances, may also amount to instigating or aiding and abetting. The act of the accused Qaiser, by its consequences, objectively formed part of attack.

537. The offence of murder as a crime against humanity as enumerated in the Act of 1973 does not require the Prosecution to establish that the accused personally committed the act of killing. Personal commission is merely one of the modes of responsibility. An accused can also be found guilty of a crime enumerated in the Act of 1973 on the basis of his act and

conduct constituting the act of approval, encouragement and abetment that substantially facilitated the commission of crime.

538. Rational and integrated evaluation of evidence provided by these three witnesses reflects, beyond reasonable doubt that accused Syed Md. Qaiser's 'participation' to the attack as an accessory that resulted in killing of eight non combatant civilians. Accused's conduct and presence at the crime site, along with the army men the principal perpetrators, as evinced indisputably, signifies his active, conscious and substantial assistance in carrying out the criminal acts constituting the offence of '**murder**' as '**crimes against humanity**'. The accused Syed Md. Qaiser who had acted as a potential guide to the troop is thus held criminally responsible, as an abettor to the crime in question, under section 4(1) of the Act of 1971 for the offence of murder as crimes against humanity as specified in section 3(2) of the Act of 1973.

Adjudication of Charge No. 10

[Killing of Shah Firoz Ali and Torture to Shah Hossain Ali at army camp at R&H Duck bungalow, Shaestaganj]

539. Charge: On 13 June 1971 at about 2:00-03:00 pm on instruction of accused Syed Md. Qaiser being the leader of 'Qaiser Bahini', members of Qaiser Bahini and Razakar force forcibly picked up local organiser of liberation war Shah Firoz Mia from his house at *Mokambari* locality under Habiganj police station district Habiganj and on capture he was first brought to Habiganj police station where he was kept confined for one night and on the following day he was brought to Shaestaganj R&H Duck bungalow where accused Syed Md. Qaiser handed him over to the Pakistani army.

On getting information[about father's abduction], Shah Hossain Ali son of the abducted and confined victim Shah Firoz returned home on 16 July 1971 from India. On the very night of his return, he too was apprehended by 'Qaiser Bahini' and Razakars and was brought to Habiganj police station. And on the following day he was handed over to the Pakistani army at R&H duck bungalow at Shaestaganj wherein he was

kept detained for 20-25 days and during this period the army men inflicted severe torture causing grave bodily injury to him leading to amputation of his left leg and he was however released at the end of August 1971. But his father Shah Firoz Ali handed over earlier to the army, on capture, to cause his death could not be traced even.

Therefore, accused Syed Md. Qaiser has been charged for abetting, facilitating and contributing the actual commission of killing of 01 unarmed civilian constituting the offence of ‘murder’ as ‘crime against humanity’, or in the alternative, for abetting, facilitating and contributing the actual commission of offence of ‘torture as crime against humanity’ which was part of attack against civilian population as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus the accused incurred liability for the above offences under section 4(1) of the Act

Witnesses

540. Prosecution relies upon P.W.7 Shah Hassan Ali and P.W.8 Shah Hossain Ali, to prove this charge. They are the sons of martyred Shah Firoz Ali. At the time of occurring first part of the events involving the abduction and handing over their father to the Pakistani army on 13 June 1971, P.W.8 had been in India as he joined war of liberation and was undergoing training as freedom fighter. P.W.7 Shah Hassan Firoz Ali allegedly saw the act of forcibly taking his father, on capture, first at the local police station and then was handed over to the army at Shaestaganj camp by accused Qaiser, the charge alleges.

541. Abduction of P.W.8 Shah Hossain Ali took place on 16 July 1971, on his return from India. He as the victim narrated the inhuman torture caused to him in prolonged confinement at the army camp where he was handed over on abduction by the members of Qaiser Bahini and Razakars, prosecution claims. P.W.7 testified the act of his brother’s abduction, as eye witness.

542. In addition to testimony of above two witnesses, prosecution relies upon the information narrated in the book titled *ওঁমত্জ তু MYnZ`v, ZvRjy Bmj vg, ঐZxq ms`ib* [Material Exhibit-Ja, book’s relevant page 263] to

substantiate that Shah Firoz Ali was the father of a freedom fighter[P.W.8] and embraced martyrdom on 13 June 1971.

Evidence Presented

543. P.W.7 Shah Hasan Ali [59], son of martyred Shah Firoz Ali and brother of P.W.8 Shah Hossain Ali testified why and how his father was forcibly picked up by the group of members belonging to Qaiser Bahini and Razakars. P.W.7 was a class-IX student and an organiser of Habiganj Chhatra Sangram Parishad during the war of liberation. He also narrated how Qaiser's cohorts had handed his freedom fighter brother over to the Pakistani army and also in respect of release of his brother from captivity for 20-25 days after enduring untold torture.

544. In narrating backdrop of forcible capture of his father and handing over him to the army P.W.7 Shah Hasan Ali stated that in late May, 1971, Qaisar held a meeting at their village with his accomplices, members of Jamaat-e-Islami, Barek Mukhter, a top Convention Muslim League Leader of Habiganj, Soleman Razakar, and Abul Thikader. Before the meeting, through a megaphone, guardians of freedom fighters were asked to attend the meeting along with their family members and make the freedom fighters surrender. Although his father did not attend the meeting, but one of his uncles and a cousin did, P.W.7 stated. At the meeting, Qaisar and Barek said that the family members of freedom fighters should be killed and their houses should be burnt down, P.W.7 testified quoting his uncle and cousin. Defence simply denied the above version. But it however remained unshaken.

545. P.W.7 Hasan stated that on June 12, 1971, Qaisar held another meeting with the members of local Peace Committee, an anti-liberation organisation, at Barek's Habiganj house where it was decided that his [P.W.7] father would be detained as his freedom fighter brother Shah Hossain Ali[P.W.8] did not surrender. He [P.W.7] had learnt about the meeting from at least three people who were forced to join the meeting and make a list of local freedom fighters.

546. Defence simply denied that on 12 June 1971 there had been a meeting at the house of Berek Mukhter which was attended by accused Qaiser. But defence is not found to have made effort to impeach the essence of this version, by cross-examining P.W.7.

547. Next P.W.7 stated that the following day [13 June 1971], Soleman Razakar, Abul Thikader and several other people on laying blockade to their home asked his [P.W.7] father to go Berek's home for having talk to Qaisar and others. His father refused to go with them and thus they dragged him out. He [P.W.7] was inside the home at that time. His uncles and relatives followed Soleman Razakar and Abul Thikader, who took his father to Habiganj Sadar Police Station instead of Berek's home.

548. P.W.7 stated further that his uncles Shah Nur Ali, Shah Abdul Hai and Babar Ali went inside the police station and appealed Qaisar and Berek to release their brother. But Qaisar[accused] and Berek told his uncles to bring in their nephew[freedom fighter son of captured Shah Firoz Ali] and make him surrender his arms and only then they would release their brother[victim Shah Firoz Ali], or else, they would hand him over to the Pakistani army, P.W.7 stated quoting his uncles.

549. The above piece of evidence is hearsay. But the defence merely denied it and it however could not controvert this pertinent version that materially relates accused's complicity with the act of victim's capture and the reason of such criminal act.

550. P.W.8 Shah Hossain Ali, freedom fighter son of victim Shah Firoz Ali narrated what he heard from his brother [P.W.7] and uncles about his father's abduction, handing over to army, on his return from India on 16 July 1971. He stated that on the following day [14 June], in evening, his father was taken towards Sreemangal by jeep from the army camp at Shaestaganj by a group of army accompanied by accused Qaiser and his father never returned. He [P.W.8] heard it from his uncle and brother.

551. In respect of the event of his [P.W.8] abduction, confinement and enduring torture at the army camp P.W.8 stated further that at 09-10 pm [on 16 July], after being acquainted of his father's abduction from his uncles, as stated above when he was about to dine, Soleman Razakar, Ramiz Razakar and Sahfique of their village came and started knocking the door. With this he and his younger brother went into hid under the cot in their room. But they[attackers] entering into the room by breaking the door dragged him out , made him blindfolded, started causing torture, asked to go with them to police station as ordered by Qaiser and then they forcibly brought him to police station .

552. What happened in the police station? P.W.8 stated that at the police station they removed his blindfold when he saw there 9-10 other detainees. Some times after, he saw accused Qaiser Barek Mukhter, Ramiz and Soleman meeting the officer-in charge of the police station and then he was taken there where the OC and Qaiser [accused] started grilling him. They asked him when he returned from India and what information he had about other freedom fighters. He [P.W.8] replied that he did not go to India. With this Qaiser and Barek Mukhter told – “**join Razakar force, if you want to survive**”. He [P.W.8] responded—“I shall never join the Razakar force even I die”.

553. P.W.8 went on to state that afterwards he was handed over to the Pakistani army camp stationed at Shaestaganj wherefrom later on he was taken to Shahajibazar army camp by train, where he endured torture in confinement for 20-25 days before being released. At the army camp at Shaestaganj he saw the accused Qaiser and his cohorts coming on 17 July and insisted to extract information about freedom fighters even by causing torture.

554. At the Shahajibazar army camp, the army men and Qaiser's cohorts used to cause brutal torture upon him recurrently, during captivity, P.W.8 stated. One day, 20-25 days after his captivity, one army Major Bahadur Shah became sympathised on seeing signs of brutal torture on his body decided to make him released and he[army Major] thus took him and a

co-detainee out of protracted captivity and had left him at a place near Shaestaganj station[railway] taking him there by his jeep. It was about 09:00 pm, P.W.8 stated. The co-detainee was also left freed at Shaestaganj. Spending night at Shaestaganj station, on the following day at early morning he returned his house by a rickshaw and since then he remained in hid here and there and started getting medical treatment of the injuries he sustained from village doctors, till independence.

555. P.W.8 stated that he had to amputate his leg, as the wounds did not heal even after seven or eight years of treatment. P.W.8 at this stage of his deposition burst into tears and started uttering—“thanks to Allah as even 43 years after, I have got opportunity to speak on the event I faced and the barbaric torture caused to me by Qaiser and Qaiser Bahini’.

556. P.W.7 Shah Hassan Ali the younger brother of P.W.8 testified the event of his brother’s forcible capture and taking him to police station first and then to the Shaestaganj army camp and finally handing him over to Shahajibazar army camp corroborating P.W.8. P.W.7 heard about the torture endured by his brother in protracted detention at the army camp. His brother’s left leg had to be amputated eventually despite prolonged medical treatment.

557. Thus, P.W.8 the victim of confinement and barbaric torture stated how he was forcibly taken first to police station where he saw accused Qaiser and his cohorts including the facts of handing him over to the army at Shaestaganj army camp by them[Qaiser and his cohorts] and later on to another army camp at Shahajibazar.

558. In cross-examination, defence simply denied what has been narrated on material facts involving accused Qaiser’s complicity with the criminal acts forming part of attack upon a non-combatant freedom fighter [P.W.8]. But it however could not impeach the version so made by him in any manner.

Deliberation and Finding with Reasoning

559. Mr. Rana Das Gupta the learned prosecutor, during summing up of case, submitted that this charge involves killing of Shah Firoz Ali and abduction and causing torture of his son Shah Hossain Ali, a freedom fighter at the army camp. P.W.7 Shah Hassan Ali the son of Shah Firoz Ali testified all the facts relevant to prove his father's abduction, confinement at `Shaestaganj army camp as handed over by the accused Qaiser. They could not have trace of his father after he was brought towards Sreemangal, from the army camp with the assistance of Qaiser. His testimony sufficiently proves accused's concern and contribution to the commission of the offence of Shah Firoz Ali.

560. The learned prosecutor added that P.W.7 heard from his uncles who saw the accused Qaiser present at the police station when his father was brought there first, on capture and he heard from his uncle that he [his uncle] saw accused Qaiser present at the army camp at Shaestaganj Dukbangalow where his father was taken later on. It indicates that accused Qaiser had close association with the army and he substantially abetted and contributed to carry out the criminal activities constituting the offence his father's killing.

561. The learned prosecutor went on to argue that P.W.8 Shah Hossain Ali a freedom fighter and another son of Shah Firoz Ali, on returning from India one month after the abduction and killing of his father heard the event from P.W.7, his brother and his uncles. He also narrated how he [P.W.8] was forcibly captured and finally taken to army camp at Shahajibazar, with the aid and assistance of accused Qaiser. He also testified how he got release from the camp, after captivity of 20-25 days. Testimony of these two pertinent witnesses does not suffer from any infirmity. Defence could not refute their version. It merely denied it. The authoritative book titled *Ômîj ðU MYnZ"v, ZvRj Bmj vj, 10Zxq ms"ib* [Material Exhibit- Ja, book's relevant page 263] demonstrates too that Shah Firoz Ali the father of freedom fighter was killed. His dead body could not be traced yet.

562. The learned defence counsel Mr. SM Shahjahan questioning the credibility of P.W.7 and P.W.8 the two sons of Shah Firoz Ali upon whose testimony the prosecution depends argued that P.W.7 does not claim that accused Qaiser or his 'Bahini' physically participated in forcibly taking his father. There has been glaring inconsistencies between the version of P.W.7 and P.W.8, on material particular. If it is assumed that grievance of the attackers was against P.W.8 Shah Hossain Ali, a freedom fighter and as such finding him [P.W.8] not available in the locality the attackers had picked up his father and eventually killed him the narrative of his [P.W.8] having been released long three weeks after alleged captivity at Shahajibazar army camp does not inspire any rational likelihood.

563. It has been further argued that the prosecution document the book titled *মত্ৰী তু ময়নজ'ব, জিৰ্য্ৰী বম্ৰী ব্ৰ, ঐজীক মস'দী ব* specifies '13 June' 1971 as the date of killing of Shah Firoz Ali which is contradictory to the account made by these two witnesses. None of these two witnesses claims to have seen the actual commission of the killing of their father. However, defence does not dispute the killing of their father. But the accused Qaiser was not concerned with it in any manner. The prosecution document, a book **[Prosecution documents volume page 146]** does not narrate accused's contribution and concern with the event of their father's killing, in any manner. The information narrated in this book is based on account made by Shah Hossain Ali [P.W.8].

564. The Tribunal notes that the charge involves two parts. The first part alleges that act of abduction of Shah Firoz Ali, on forcible capture and handing him over to the army at the camp at Shaestaganj. The abduction allegedly took place on 13 June and the victim was first brought to local police station where he was kept confined one night. On the following day [14 June] the victim was allegedly handed over to the army at their camp at Shaestaganj.

565. P.W.7 testified the fact of keeping confined his father at the police station, taken there on abduction. He had learnt what happened to his father, on the following day, from his uncle who allegedly went to the

army camp at Shaestaganj to have his father's trace. Since handing over him to the army they could not have his trace even. Presumably he was killed later on. Naturally there has been no evidence as to how, where and by whom the act of his killing was perpetrated. Defence however, does not dispute the killing of Shah Firoz Ali.

566. It is now settled that act of accused, amid, prior or subsequent to the commission of the principal offence may constitute the notion of 'concern' or 'participation' in committing the offence, if such act or conduct is found to have had substantial effect on its commission. Murder as crime against humanity is a 'system' or 'group' crime and not isolated one. In commission this nature of crime, in violation of international humanitarian law, many actors might have played many and distinct roles forming part of attack.

567. In the case in hand, therefore, we are to see what role the accused Qaiser had played in accomplishing the principal offence and whether his act and conduct had substantial effect in committing the principal offence by the perpetrators. It is not required to show that accused himself physically participated to the actual commission of murder or even it is not required to get the actual perpetrators identified.

568. We are to assess the evidence and circumstances to infer whether the principal act constituting the offence of murder would not have occurred if acts of accused Qaiser had no substantial contribution and assistance. The charge framed does not allege that the victim was abducted by any member of armed force or kept detained first at police station at their instance or within their knowledge.

569. The coercive urge of accused Qaiser made in a meeting held in late May 1971 at their village, depicted from the evidence of P.W.7 reflects (a) accused's antagonistic attitude to the freedom fighters and pro-liberation civilians; (b) an organised effort of threatening the local civilians to make their freedom fighters family members surrender and (c) accused Qaiser as a potential participant to the meeting had explicitly provided endorsement in making such 'threatening urge' which was not only

inciting but it had naturally terrorized the civilians of the locality and the people attended the meeting.

570. The act and conduct of accused Qaiser that he had done, as found from above unshaken version of P.W.7, was chained to the subsequent criminal acts that eventually resulted in commission of the principal crime. Accused's such act or conduct thus formed part of attack leading to subsequent act of abduction of victim Shah Firoz Ali.

571. It also transpires from the testimony of P.W.7 that an unholy design was orchestrated under the direct and effective guidance of accused Qaiser in a meeting held on 12 June 1971 with the members of local Peace Committee, an anti-liberation organisation, at Barek's Habiganj house. Presumably, accused's participation with such culpable design and his act, forming part of attack, later on facilitated forcible capture of victim Shah Firoz Ali from his house. Accused Qaiser was thus a potential part of chained criminal acts constituting the offence of his murder.

572. P.W.7 stated how his father Shah Firoz Ali was forcibly taken by accused's accomplices. It is found from evidence of P.W.7 that his father Shah Firoz Ali was forcibly picked up by Soleman Razakar, Abul Thikader and several other people, in the name of taking him to Barek's home. But he was not taken there. We have already found from testimony of P.W.7 that Soleman Razakar, Abul Thikader were part of the 'coercive urge' of accused Qaiser made in a meeting held in late May 1971 at their village. Thus, it stands proved that these two men were close cohorts of accused Qaiser and they being incited by such 'coercive urge' carried out the act of forcible capture of Shah Firoz Ali. Be that as it may, it is immaterial to argue that accused Qaiser had no concern with the act of such abduction.

573. Victim Shah Firoz Ali was taken to police station, on capture. It stands proved. Accused Qaiser was present there and was appealed by the relatives for victim's release. But he did not. Rather, the accused and his accomplice Barek told his[P.W.7] uncles to bring in their nephew[

freedom fighter son of captured Shah Firoz Ali] and make him surrender his arms and only then they would release their brother[victim Shah Firoz Ali], or else, they would hand him over to the Pakistani army. It is thus clear why Shah Firoz Ali was so forcibly captured.

574. The act and conduct of accused Qaiser that he had done in the police station after taking the victim there on capture was significantly linked to the urge the accused had made in meeting held in late May 1971 and orchestrating the culpable design in a subsequent meeting held on 12 June 1971 to capture and detain Shah Firoz Ali as his freedom fighter son Shah Hossain Ali [P.W.8] did not yet surrender.

575. The evidence if P.W.7 further demonstrates that the accused Qaiser and his cohort Barek and others were found present even at the army camp at Shaestaganj, on the following day [14 June]. P.W.7 heard it from his uncles who went to that camp for having trace of his [P.W.7] father. This part of hearsay testimony carries probative value as it is found well linked with accused's prior culpable act and conduct, proved by the direct evidence.

576. 'Qaiser Bahini' a locally formed private squad was founded by accused Qaiser. Objective of forming such local *militia* outfit was to collaborate with the Pakistani army, to further policy and plan and thus any activities carried out by members of Qaiser Bahini were supposed to be within his knowledge. Local Razakar members were also with this Bahini. Thus they including the members of Qaiser Bahini would not have carried out any activity without accused's approval and thus the accused incurred criminal responsibility as an 'approving spectator' which did not require his actual presence at the time of capture of the victim from his house. It may legitimately be inferred that the group accompanied by Barek had acted on accused's approval, in taking the victim to the police station, on capture.

577. P.W.7 went on to state that his father was tortured at the police station the whole night. When they went to the police station, on the

following morning, they saw Qaisar, Barek and some others taking his father to Shaestaganj on two cars.

578. The act of instruction need not be tangible one. It may be well inferred from circumstances and chain of relevant facts. Qaiser's presence at the police station has been proved. He and his cohorts took his [P.W.7] detained father towards Shaestaganj. It impels the conclusion that the act of taking the victim to police station, on capture and later on handing over him to the army had been carried out on accused's explicit instruction. It gets further assurance from his act and conduct prior and subsequent to such capture of Shah Firoz Ali.

579. What happened next? It has been found proved from unimpeachable testimony of P.W.7 that afterwards, from the police station, his captured father Shah Firoz Ali was handed over to the army stationed at Shaestaganj. After sometime, the Pakistani army took his father and other detainees towards Sreemangal and his father never returned. P.W.7 became so emotion-choked, at this stage, in narrating the event.

580. It divulges from evidence of P.W.7 that in the afternoon[on the same day], his[P.W.7] uncle Shah Nur Ali went to Shaestaganj and from a distance, saw his father and several others tied to pillars inside the army camp. His uncle saw Qaisar and Barek there too. P.W.7 heard it from his uncle. This piece of hearsay evidence is found to have been corroborated by the relevant material facts relating to accused Qaiser's participation and approval in accomplishing the act of victim's capture, his detention at police station and taking him afterwards to the army camp stationed at Shaestaganj. Thus, though hearsay in nature, it carries probative value. Besides, defence could not refute it in any manner.

581. In view of discussion based on evidence of P.W.7 the son of victim Shah Firoz Ali and other chained facts accused Qaiser's complicity and participation in carrying out forcible capture of victim, keeping him detained at the police station, taking him later to the army camp and

handing him over to the army are found to have been proved beyond reasonable doubt.

582. What happened to the detained victim next? His dead body could not have been traced. Killing of Shah Firoz Ali remains undisputed. Victim's relatives could not have his trace since he was handed over to the army at their camp at Shaestaganj. The killing which was a 'group crime' had been perpetrated in a context of war and in an organised and systematic way. It was not an isolated murder and it did not happen in times of normalcy, although the event relates to killing of single civilian. It is thus inappropriate to apply rules of national systems that require the production of a body as proof to death. The fact of victim's death can be unerringly inferred circumstantially from all of the evidence presented provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused.

583. It has been settled by the **ICTY** Appeal Chamber in the case of *Kvočka* [Judgment, February 28, 2005, para. 260] that all that is required to be established is the only reasonable inference from the evidence that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible.

584. The organised chained acts and conduct of accused Qaiser indicate how high connection he had with the police administration and the Pakistani occupation army in Habiganj. We have already got it proved, in adjudicating preceding charges, that accused Qaiser used to maintained close affiliation with Shaestaganj army camp. The accused, as it transpires, locally had a mighty pro-Pakistan political prominence and it together with his extreme hostile attitude against the pro-liberation Bengali civilians made him able in committing such criminal acts violating the international humanitarian law, in 1971. But at the end of day, such mighty position failed to drape his horrific misdeeds.

585. Learned defence counsel argued that none of the two witnesses claims to have seen the actual commission of the killing of Shah Firoz Ali

and they do not claim that accused Qaiser physically participated in forcibly taking their father. Therefore, accused Qaiser cannot be held liable for the murder in question.

586. We are not with the above argument. First, the killing of Shah Firoz Ali is not disputed. And next, predominantly we are to see how accused's acts formed part of chained criminal acts and whether it had any substantial effect on the actual commission of murder of Shah Firoz Ali and torture upon P.W.8 Shah Hossain Ali in captivity. Thus, it is immaterial to argue that the accused was not the actual perpetrator or he himself did not physically participate to the commission of the crimes in question.

587. It is now well settled that an individual accused of the offence of crimes against humanity which is 'group crime' need not participate in all aspects of the criminal acts that eventually resulted in commission of the offence. Even a single act or conduct of the accused, amid, prior or subsequent to the principal offence may form part of the 'attack' if it had substantial effect in perpetrating the offence. We have observed in the case of *Muhammad Kamaruzzaman* that –

“The acts of the accused do not always need to be committed in the midst of the attack provided that if they are sufficiently connected to the attack. This view finds support from the decision of Trial Chamber, ICTY in the case of **Limaj**[November 30, 2005, para 189]. The judicial pronouncements of *ad hoc* tribunals have established that the accused himself need not have participated in all aspects of the alleged criminal conduct. The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated.

[**Chief Prosecutor v. Muhammad Kamaruzzaman**, ICT-BD-2 Case no. 03 of 2013, judgment 09 May 2013, para 525]

588. Taking the victim Shah Firoz Ali to the army camp at Shaestaganj and handing him over to the army is well linked to the event of his capture and killing. Accused Qaiser had 'concern' and 'participation' in all phases of these acts. The army later on took the victim and other detainees

towards Sreemangal and since then the victim could not have been traced. Therefore, accused's act substantially contributed and abetted the army the principal perpetrators to wipe out the victim who was captured as he failed to ensure his son's [freedom fighter] surrender. The causal connection between accused's act and the murder of the victim impels the conclusion that accused Qaiser, with malicious purpose, handed the victim over to the army, taking him to the army camp, on forcible capture.

589. Now, is it lawful to conclude that accused Qaiser had concern with the principal offence of killing? The answer is 'yes', we conclude. The facts materially related to the killing indisputably offer valid indication that the accused had conscious 'concern' and 'participation' in committing the act of killing as well and thus he is found responsible for the commission of the murder in question. In this regard, we may recall the observation of the ICTY Trial Chamber, in the case of Tadic that-

“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question”

[Prosecutor v. Tadic, ICTY Trial Chamber, Case No. IT- 94-1-T, Judgment 7 May, 1997, paragraph 692]

590. We are of view that for an accused to incur criminal responsibility, pursuant to section 4(1) of the Act of 1973, it must be shown that his participation had substantially contributed to, or had a substantial effect on the completion of a crime under the Act. It is not alleged that the accused had direct participation to all aspects of the events to complete the principal crime of murder. He however participated by act of 'abatement' that involved prompting or endorsing the principal perpetrators to commit the offence in question. The act of handing over the victim, on capture obviously had a substantial effect on actual commission of victim's murder. Such culpable act was rather an act of 'abetment' which is liable

to be punished as there had been a 'causal connection' between such act of 'abetment' and the actual commission of the crime.

591. On integrated evaluation of evidence and material facts we eventually come to the conclusion that the act and conduct of accused Qaiser, as already found, substantially triggered the actual perpetration of victim's killing. The accused cannot absolve of liability even for the commission of principal offence of killing. His culpable and deliberate acts indisputably suggest that he knowingly wished to assist and facilitate the commission of the crime by the army as the organised act of handing over the victim to the army made the commission of the principal offence possible. In this way, accused Qaiser not only abetted and facilitated to the commission of the principal offence but he consciously participated to its commission as well.

592. Now let us have a look to the event of abduction and causing barbaric torture to P.W.8, in protracted confinement. P.W.8 is the elder son of Shah Firoz Ali. The essence of testimony of P.W.8 relates to accused Qaiser's presence and activities both at the police station and then at the army camp at Shaestaganj and purpose of his detention and torture, on capture was to extract information about freedom fighters, by grilling and causing torture. There has been no earthly reason to exclude his testimony. Rather the narration made on dock by him, shading tears, shocks the humankind.

593. The act of keeping P.W.8 in protracted detention at Shahajibazar army camp and causing barbaric physical torture upon him gets corroboration from the undeniable fact of amputating one of his legs affected by such torture despite prolonged medical treatment. Amputation one of legs undeniably indicates the horrific extent of recurrent torture that P.W.8 sustained at the army camp during his captivity.

594. P.W.8 did not see accused Qaiser at Shahajibazar army camp, during his captivity. He rather stated that mainly the army men used to torture him physically and Qaiser's accomplices joined the act. However, absence of accused Qaiser at this camp does not absolve the accused of liability of

the criminal acts done to P.W.8 at this camp. For his detention and torture caused upon him at this army camp formed part of chained activities including the act on part of the accused.

595. Unlawful bringing the victim P.W.8 at this army camp and keeping him there detained was the phase that happened after his confinement at Shaestaganj army camp. And it is found that accused Qaiser and his cohorts had active part in grilling P.W.8 here. Before shifting him there accused Qaiser was found present at the police station where he maliciously grilled the detained victim, to extract information about freedom fighters. Presumably on failure to dig out any information eventually P.W.8 was handed over to the army camp at Shahajibazar. Thus detaining the victim P.W.8 first at the police station and then at the army camp at Shaestaganj and finally at the army camp at Shahajibazar were chained to each other forming part of attack directing a civilian who at the time of his capture was a non combatant freedom fighter.

596. We cannot accept the defence argument that release of the victim P.W.8 as stated by him does not inspire credence as usual event, in context prevailing in 1971 and no one would have been so released from captivity at the army camp. Naturally P.W.8, a detainee could not come out of the camp of his own. We have found from testimony of P.W.8 that one army Major Bahadur Shah who on seeing him brutally tortured became sympathised and took him and another detainee out of the camp by his jeep.

597. The Shahajibazar army camp of course was not controlled and guided by accused Qaiser and his cohorts. They simply might have aided or abetted the army men at the camp in carrying out criminal activities. Thus, the acts and conduct of accused Qaiser, prior to handing over Shah Hossain Ali at the army camp at Shahajibazar, facilitating his [P.W.8] forcible capture instantly after his return from India on 16 July 1971 does not go on air merely for the reason of his release there from. Already we have found that accused Qaiser and his cohorts had active role in abducting and detaining P.W.8 first at the police station and then at

Shaestaganj army camp and therefore his[P.W.8] subsequent detention at another army camp was the outcome of accused's active and culpable endorsement, act and conduct, we conclude.

598. Why P.W.8 was forcibly captured and handed over to the army? We have already found from the evidence so far as it relates to the event of abduction and missing of Shah Firoz Ali the father of P.W.8 that Shah Firoz Ali was so captured and handed over to the army as he failed to ensure surrender of his freedom fighter son [P.W.8].

599. P.W.8 was abducted and handed over to the army when he returned from India on 16 July 1971, on getting information about his father's abduction and missing. It transpires that the local collaborators the accomplices of accused Qaiser almost immediately after his return from India captured him from his house and brought him to accused Qaiser staying at the police station where he was grilled antagonistically and then handed over to the army camp at Shaestaganj..

600. On integrated evaluation of chained facts as revealed from evidence it has been proved beyond reasonable doubt that accused Qaiser by his act and conduct substantially contributed to the act of abduction and confinement of Shah Hossain Ali [P.W.8] that facilitated his protracted confinement at the Shahajibazar army camp where he endured recurrent barbaric physical torture.

601. Thus, the event of abduction of P.W.8 and causing recurrent brutal torture in captivity at the army camp was linked to the event of his father's[Shah Firoz Ali] abduction, handing over him to the army who took him towards Sreemangal, as found from cumulative evaluation of evidence and circumstances.

602. Abduction, confinement and murder of Shah Firoz Ali and afterwards abduction of his freedom fighter son P.W.8 Shah Hossain Ali and handing him over to the army camp unerringly lead to the conclusion that the accused Syed Md. Qaiser and his cohorts were extremely

antagonistic to the freedom fighters and pro-liberation civilians. We have already found that accused Qaiser, by virtue of his local pro-Pakistan political prominence and position over the Qaiser Bahini a locally formed private outfit under his leadership, used to provide explicit and active assistance to the Pakistani occupation army stationed in Habiganj subdivision in 1971, to further policy and plan.

603. Finally, it has been proved that in respect of both the events as narrated in the charge accused Syed Md. Qaiser had active ‘concern’ and ‘participation’, by his act and conduct forming part of ‘attack’. Such culpable act encompasses ‘abetment’ and ‘facilitation’ in committing the principal offence. Accused Syed Md. Qaiser’s close affiliation with the occupation army made him accomplished and ‘concerned’ in effecting the deliberate criminal acts to constitute the offence of murder of Shah Firoz Ali and abduction and confinement of Shah Hossain Ali [P.W.8] followed by barbaric torture endured by him in captivity at the army camp.

604. The culpable acts of accused Qaiser for which he is found, beyond reasonable doubt, to have had ‘concern’ to the commission of the principal offences encompass ‘abetment’ and ‘facilitation’ indisputably had substantial effect on commission of the principal offences of ‘murder’ and ‘abduction’, ‘confinement’ and torture’ which were chained together and were perpetrated to further same purpose. Accused Syed Md. Qaiser is therefore found criminally liable under section 4(1) of the Act of 1973 for substantially abetting, facilitating and contributing, by his act and conduct forming part of attack, the actual commission of killing of 01 unarmed civilian constituting the offence of **‘murder’ as crime against humanity**’ and also the commission of **‘abduction, confinement and of torture’ as crimes against humanity**’, specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No.11

[Murder, abduction, torture & other inhuman acts at village Haripur, Gutma and Purbabhag under police station Nasirnagar]

605. Charge: On 23 June 1971 at about 10:30-11:00 am a group of 40-50 armed members of 'Qaiser Bahini' and Razakar force led by accused Syed Md. Qaiser by attacking the house of Golam Nur, an organiser of liberation war of village *Haripur* under police station Nasirnagar, subdivision Brahmanbaria, looted the household and set the house on fire and abducted Golam Rouf there from and brought him at his [Qaiser] house at *Noapara* and kept him detained there for one week where he was subjected to torture. He was released in exchange of Taka 8,000/00. But Golam Rasul Master died two weeks after the severe torture caused to him at the time of abducting Golam Rouf.

On the same day [23 June 1971], in conjunction with the same transaction of criminal activities, at about 02:00-02:30 pm the group led by accused Syed Qaiser also attacked the village *Gutma* about two miles far from village *Haripur* and looted house holds of one Gobinda Karmakar and set the house on fire and abducted Givendra Roy and kept him detained at his [Syed Qaiser] house wherefrom he managed to flee after 20-22 days' confinement..

On the same day [23 June 1971] and in conjunction with the same transaction, the group of perpetrators led by accused Syed Qaiser moved towards the village *Purbabhog*, two miles far from *Gutma* village and at about 04:00-04:30 pm by launching attack looted and destructed the house of Sayedul Haque, an organiser of liberation war and set his house on fire.

Therefore, accused Syed Qaiser has been charged for participating, abetting, facilitating and contributing the actual commission of killing of 01 unarmed civilians constituting the offence of '**murder**' as **crime against humanity**, or in the alternative, for participating , abetting, facilitating and contributing the actual commission of offence of '**other inhuman act**' as **crime against humanity**' which was part of attack against civilian population as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus he incurred liability under section 4(1) of the Act, for the above offences.

Witnesses

606. The charge narrates three distinct events occurred in three villages [*Haripur, Gutma and Purbabhag*] but in conjunction with the same transaction of activities carried out by the same group of perpetrators led by accused Qaiser, on the same day but at different time and at three sites which are neighbouring villages under police station Nasirnagar.

607. First part of the charge framed concerns the event of causing severe torture to Golam Rasul Master who subsequently, two weeks after the event, died due to such torture and the act of abduction and confinement of Golam Rouf. This event allegedly happened at village *Haripur*.

608. Second part of the charge involves the act of looting the house holds of one Givendra Karmakar at village *Gutma* and setting his house on fire and also abduction and confinement of one Givendra Roy from the same village.

609. Third fraction of the charge alleges the act of looting and destructing the house of Sayedul Haque, an organiser of liberation war of village *Purbabhag* and setting his house on fire.

610. Accused Syed Qaiser has been indicted for participating, abetting, facilitating and contributing the actual commission of killing of 01 unarmed civilian [Golam Rasul Master] and the offence of other inhuman acts. He allegedly accompanied and led the group of perpetrators in committing the crimes.

611. In light of argument advanced by the learned prosecutor, this charge rests on evidence of P.W.3 Tajul Islam, P.W.15 Nishamon, P.W.13 Golam Nur, P.W.16 Abdul Matin, P.W.31 Azharul Huq and P.W.1 Kazi Kabiruddin. Of them P.W.3 was accused's cohort and belonged to the Qaiser Bahini. P.W.15 is the wife of abducted victim Golam Rouf [now dead] who had opportunity to see the event narrated as the first part of the charge framed. P.W.13 Golam Nur is the brother of Golam Rouf. He had learnt the event from family members including P.W.13, brother and his

mother. Their evidence chiefly relates to the first part of the charge involving the event occurred at village *Haripur*, prosecution avers.

612. P.W.31 Azharul Huq testified the last part of the charge that involves the event of looting and destruction of house of one pro-liberation civilian at village Purbabhag. P.W.1 Kazi Kabiruddin is a heresy witness in respect of all the three events narrated in the charge. P.W.16 too testified mainly what he learned from locals. He is a resident of village Guniauk.

Evidence Presented

613. P.W.15 Nishamon [70] wife of Golam Rouf Master testified how her husband was forcibly taken away and her father-in-law Golam Rasul was tortured. P.W.15 stated that on the 8th of Bangla month Ashar [corresponds to June 23, 1971] Qaiser and the members of 'Qaiser Bahini' came to their house at Haripur around 11:00 am and Qaiser instructed his cohorts to apprehend her husband and with this his accomplices caught her husband when he tried to escape and then the attackers had asked for the whereabouts of her brother-in-law Golam Nur[P.W.13], who was a freedom fighter, and started torturing her husband, as he could not give the information. P.W.15 further stated that she knew Qaiser since earlier and he was in white dress and his cohorts were in brown colour dress when they attacked their house. She also knew Tajul [P.W.3] one of Qaiser's cohorts and he was with the gang in directing the attack. Tajul was the man who had guided the gang identifying their house.

614. P.W.13 also stated that when the members of Qaiser bahini started torturing her husband, her father-in-law came forward to save him when Qaiser asked for the whereabouts of Golam Nur and instantly they started beating him up too. She and her mother-in-law begged to spare her husband and father-in-law but Qaiser pushed her down and the attackers had set their house and cow shed on fire, burning eight cows alive. Qaiser and his men had also forcibly taken away her husband.

615. In respect of post event affairs P.W.13 stated that when she, immediately after the event, informed the matter to her father at village

Chitna , her father rushed to Qaiser's maternal uncle Manjur Ali's house at village Guniauk, about one and half kilometer far from her father's house , on the same day. But her father failed to have trace of her husband there.

616. P.W.15 next stated that her father and maternal father-in-law had again gone to Qaiser at village *Noapara* the next day and requested to release her [P.W.13] husband Golam Rouf, but the accused demanded Tk. 10,000 in ransom. Later, on the next day they had given Tk 8,000 together with a letter obtained from Qaiser's maternal uncle Manjur Ali to Qaiser and got her husband Golam Rouf released. After his return, she had seen torture marks on her husband's body, stated P.W.15, adding that her father-in-law Golam Rasul died after 16 days due to the torture caused to him.

617. P.W.13 Golam Nur [65] a freedom fighter and brother of victim Golam Rouf [husband of P.W.15] is a heresy witness. He stated that he had heard from India in the last part of June that Qaiser [accused] along with his cohorts attacked their houses and looked for him. They had tortured his elder brother Golam Rouf and father Golam Rasul before burning their houses, during the attack. P.W.13 also stated that he had joined Bangladesh army in November[1971], received training in India and returned to Bangladesh and subsequently his village in February 1972.

618. In respect of learning the event, P.W.13 stated that he had learned from his mother, brother [Rouf] and sister-in-law [wife of Rouf] that Qaiser and his accomplices stormed and burned their houses down around 10:30 am on June 23. They also tortured his brother and father. They had also taken away his brother Golam Rouf, adding, when his [Golam Rouf] maternal father-in-law and father-in-law had gone out to look for him, they learnt that Rouf was taken to Qaiser's house at *Noapara* in *Madhabpur, Habiganj*.

619. P.W.13 further stated that his relatives had gone to Qaiser's house the following day and requested him to release Rouf. But it was in vain. After five to six days, his relatives went to Manjur Ali [Qaiser's maternal uncle] and requested him to take step for Rouf's release and then Manjur Ali had given a letter to Qaiser. Then Qaiser released his brother Golam Rouf after his relatives had given him Tk 8,000 and the letter from his [Qaiser] uncle Manjur Ali. Noor further stated that he had learned from his family that his father died due to the torture caused to him, two weeks later.

620. P.W.3 Tajul Islam [83] was a close associate of accused Qaiser. He belonged to the 'Qaiser Bahini' a private outfit of accused Qaiser. He claims to have accompanied the accused Qaiser and the members of Qaiser Bahini in committing the criminal acts at the house of Awami League leader Golam Nur at village Haripur.

621. P.W.3 stated that on June 23[1971] at about 10:00-11:00 am , he accompanied by Qaiser, about 100 members of Qaiser Bahini had gone to the home of Haripur Awami League leader Golam Nur and burned down his houses, on Qaiser's instruction. When Golam Nur's brother Golam Rouf tried to escape, Qaiser ordered his force to catch him. With this, they tied down his hands instantly. Golam Rouf's wife and father came forward and requested Rouf's release. But Qaiser pushed them down on the ground. Later Rouf was taken first to his [Qaiser] maternal uncle Manjur Ali's house at village Guniauk. Thereafter, Rouf was taken to village Gutma wherefrom along with picked up one Givendra Kumar, on capture he was brought to Qaiser's house at village Noapara.

622. P.W.3 further stated that Rouf's maternal uncle Siru Mia and maternal grand-father Tota Mia requested Qaiser to release Rouf and he [P.W.3] himself too made such request. But Qaiser refused. Subsequently, Qaiser released Golam Rouf on getting a letter from his maternal uncle Manjur Ali and in exchange of Tk 8,000. P.W.3 also stated that he could not find Givendra [captured from village Gutma], after release of Golam Rouf.

623. P.W.16 Abdul Matin [[63] a resident of village Guniauk under police station Nasirnagar, the then sub-division B'baria narrated what he heard from the locals in respect of the event of attack and criminal activities carried out at the house of Golam Nur at village *Haripur* and the reason of launching such attack that took place on June 23, 1971 at about 10:00-10:30 am. According to his hearsay testimony Golam Rouf was first brought to the house of Manjur Ali at village Guniauk, on capture. He knew Golam Rouf who was a primary school teacher

624. Apart from the above hearsay version, P.W.16 then stated that he had seen Qaiser and his men bringing Golam Rouf to Manjur Ali's house [at village Guniauk], from his [P.W.16] house. Later, he saw them taking Golam Rouf towards northern direction.

625. P.W.16 also stated that he saw, from a secret place at his house, Qaiser and his cohorts moving towards northern direction [at village *Gutma*] along with Golam Rouf. Later on he heard that at about 02:00 pm they, on their way, had attacked the house of Badal Karmakar when they looted and burned down his house and Givendra Karmakar the brother of Badal Karmakar was kept tied down with a mango tree, on capture and then Golam Rouf and Givendra Karmakar were sent to his [Qaiser] house at Noapara by his accomplices. He also heard that along with some other accomplices Qaiser, on the same day at about 04:00 pm, had attacked the house of Awami League leader Sayedul Haque [now minister] and looted and destructed houses of eight families including Sayedul Haque.

626. P.W.31 Azharul [61], brother of Mozammel Haque, who was elected as a provincial assembly member in 1970's election from Brahmanbaria, stated that Qaiser formed Peace Committee, an anti-liberation platform, holding a meeting at his maternal uncle's home at Guniauk in Brahmanbaria in the last part of April 1971. Later, he also founded 'Qaisar Bahini'. On June 23, he saw fume from his neighbouring village and heard from the people who were fleeing the village that Qaisar and members of 'Qaisar Bahini' set fire to the houses of Awami League leader Sayedul Haque, now the fisheries and livestock minister

627. P.W.1 Kazi Kabiruddin, a potential freedom fighter. He had been around the locality of Habiganj adjacent to B'baria in 1971. He is a hearsay witness. He stated that on 24 June 1971 he got information that Qaiser and the members of his 'Bahini' had looted and burnt down the house of Awami League leader Golam Nur of village Haripur and on the same day the group also looted and burn down the house of Sayedul Haque [now minister] at village Purbabhag and that of Badal Karmakar at village Gutma.

Deliberation and Finding with Reasoning

628. The learned Prosecutor Mr. Rana Das Gupta argued that in support of the first part of this charge P.W. 15 Nishamon testified as an eye witness. Defence could not shake her testimony so far as it relates to capture of her husband Golam Rouf, on instruction of Qaiser and assaulting her father-in-law Golam Rasul who succumbed to death two weeks after the event. This witness has also testified how they got Golam Rouf back, one week after his capture in exchange of money. P.W.3 Tajul Islam a member of 'Qaiser Bahini' accompanied the accused Qaiser and the gang testified how Golam Rouf was forcibly brought from his house. His testimony provides corroboration to P.W.15 and P.W.16. Hearsay testimony of P.W.31 Azharul Huq, P.W.13 Golam Nur, P.W.1 Kazi Kabiruddin and P.W.16 Abdul Matin gets corroboration from the evidence of eye witnesses. P.W.16 also testified the other part of the charge involving the act of looting the house of Givendra Karmakar and destruction of house of Sayedul Haque at village Purbabhag, by looting and burning down the same. Defence could not impeach what these witnesses have testified on material particular.

629. In respect of the role and participation of accused Qaiser, the learned prosecutor submitted that it has been proved beyond reasonable doubt that the accused physically participated in launching the attack being accompanied by the members of his private outfit ; that the abducted Golam Rouf was kept detained, on capture, under control of accused Qaiser for a week and that on the same day and the same gang accompanied by accused Qaiser carried out grave destructive activities at

villages *Gutma* and *Purbabhag* , by looting and burning down private properties constituting the offence of ‘other inhuman acts’. Therefore, the accused Qaiser incurred liability for participating, abetting and contributing to the actual commission of all these offences.

630. The learned defence counsel Mr. SM Shahjahan argued that the prosecution failed to prove the allegation of ‘murder’ as alleged in this charge. Evidence of P.W.15 Nishamon and P.W.3 Tajul Islam shall appear to be contradictory in respect of causing assault to the father-in-law of P.W.15. Golam Rasul died two weeks after the attack that resulted in inflicting physical harm, the charge framed alleges. But he could have been killed at the time of launching the attack if really had the gang intent do so. The distance between *Haripur* the crime village and *Noapara* where the abducted Golam Rouf was allegedly taken by the gang was nine miles and as such it was improbable of committing other criminal activities, in conjunction with the same attack or event, at villages *Gutma* and *Purbabhag*, on the way to Noapara as alleged in the charge.

631. It has been further argued by the defence that P.W.3 Tajul Islam who was allegedly a member of ‘Qaiser Bahini’ does not state to have witnessed the other parts of the ‘attack’. Testimony of P.W.16 in respect of seeing forcibly taking the victim Golam Rouf by the accused and his accomplices is not credible as it contradicts to the facts narrated by other witnesses. The charge framed alleges that the victim was released one week after his capture. But the version of P.W.15 states something different. According to her statement the victim got release on 25 June i.e. two days after the event. Thus, her testimony deserves exclusion from consideration. The attack causing destruction of Sayedul Haque’s house at village *Purbabhag* does not appear to have been testified by any witness excepting P.W.16. Prosecution has failed to establish accused’s complicity with any phase of the entire events that allegedly happened on 23 June 1971 at villages *Haripur*, *Gutma* and *Purbabhag*.

632. At the outset the Tribunal notes that the charge framed narrates destructive act of looting and burning down of houses of civilians at three

villages e.g. *Haripur*, *Gutma* and *Purbabhag*. All these occurred on the same day and by the same gang of perpetrators, as alleged.

633. In addition to such destructive activities, the gang allegedly inflicted physical assault to Golam Rasul the father of Golam Nur at village *Haripur* and then forcibly abducted Golam Rouf the brother of P.W.13 Golam Nur. This incident happened first, during the attack. And then on the same day they carried out devastating and terror inducing activities at village *Gutma* wherefrom one Givendra Karmakar was also abducted and finally they attacked the house of one pro-liberation leader Sayedul Haque's house at village *Purbabhag*, the charge alleges.

634. None is alleged to have been killed, during the attack. But the first part of the charge alleges that Golam Rasul died two weeks after the event of attack due to physical assault inflicted to him by the perpetrators. It would be convenient to make deliberation first on the incident that allegedly took place at the house of Golam Rasul at village *Haripur*.

635. P.W.3 Tajul Islam a member of 'Qaiser Bahini' was with accused Qaiser when the gang attacked the house of Golam Nur. P.W.15 Nishamon, wife of Golam Rouf [brother of P.W.13] corroborates it. She knew Tajul Islam since earlier. These two witnesses had occasion to see the activities carried out at the house of Golam Nur. Why the perpetrators had attacked the house of Golam Nur? From the evidence of P.W.15 Nishamon it is evinced that target was Golam Nur [P.W.13] as he joined the war of liberation as a freedom fighter. According to these two key witnesses, members of 'Qaiser Bahini' led by accused Qaiser had launched the attack. Accused Qaiser was physically present with the gang. It stands proved.

636. Golam Rasul the elderly father of Golam Rouf died two weeks after the event of attack that had launched by the 'Qaiser Bahini' led by accused Qaiser. It does not appear to have been disputed. Accused Qaiser has been indicted for participation and contribution to the commission of the offence of 'murder' of Golam Rasul. The charge framed alleges that

Golam Rasul's death was caused due to physical torture inflicted two weeks back, at the time of the attack.

637. First part of the charge framed alleges that on the face of the request made by the elderly father [Golam Rasul], mother of Golam Nur and Nishamon [P.W.15] accused Qaiser pushed Golam Nur's elderly father down on ground.

638. According to P.W.15 Nishamon accused Qaiser asked for the whereabouts of Golam Nur and the members of Qaiser Bahini started her father-in-law Golam Rasul beating and with this he was screaming lying on the ground.

639. P.W.15 Nishamon [70] wife of Golam Rouf could identify accused Qaiser who was in white dress and P.W.3 Tajul, an accomplice of Qaiser whom she knew since earlier, at the time they had attacked their house. P.W.15 also stated that accused cohorts were in brown colour dress. We have already got it proved particularly from evidence of P.W.3 Tajul Islam that the members of Qaiser Bahini were provided with brown colour dress. Defence could not impeach this version and as such identification of accused and his accomplice, as stated by P.W.15 cannot be termed mistaken identity in any way.

640. P.W.13 Golam Nur a freedom fighter heard the event subsequently from his family inmates including his brother's wife P.W.15 Nishamon. According to him, the armed members of Qaiser Bahini led by accused Qaiser, during the attack, had brutally tortured his brother Golam Rouf and father [Golam Rasul].

641. But P.W.3 Tajul Islam who was with the gang, as an accomplice of accused Qaiser, testified that on the face of request to release Golam Rouf, Qaiser pushed him and his wife and Nishamon back on the ground. P.W.3 is a star witness in this case. He was at the crime site with the gang and accused Qaiser. But he does not say that Golam Rasul was brutally assaulted by the members of Qaiser Bahini. Thus the statement of P.W.13

in respect of beating up Golam Rasul by the accomplices of Qaiser glaringly contradicts to the account made by P.W.3.

642. Besides, it is very hard to presume even that Golam Rasul's death was due to any culpable act or conduct of any of perpetrators, during the attack. For Golam Rasul, according to the charge framed, died two weeks after the alleged incident. He was an elderly man. The perpetrators would have killed him instantly and during the attack if really they intended. Mere act of pushing him down, as stated by P.W.3 does not reflect the intention of causing his death.

643. It may however be presumed validly that Golam Rasul and his family members had to face resistance on part of the perpetrators when they were about to pick up Golam Rouf forcibly from their house. And it surely might have caused severe 'harm' not only to Golam Rasul but to all. Falling down, being pushed back by Qaiser or any of his cohorts, as stated by P.W.3 surely had caused mental 'harm' and 'trauma' to Golam Rasul, an elderly man. On integrated evaluation of evidence of P.W.3 and P.W.13 it stands proved that psychological assault was inflicted to Golam Rasul on the face of request on his part for release of his son Golam Rouf who was forcibly taken away finally.

644. Thus, the harm caused to Golam Rasul, during the attack, was an act constituting the offence of 'other inhuman act' and not 'murder'. It is now settled that an intentional act causing serious mental or physical suffering constitutes a serious attack on human dignity. Beating and causing mistreatment amounted to infliction of severe physical pain and it included 'other inhuman act'. There has been nothing to show that such torture alone facilitated his death, two weeks after the incident. In absence of any proof and reasonable circumstances it cannot be thus concluded that the act or harm done to him, during the attack, itself and alone resulted in Golam Rasul's death, even two weeks after the event.

645. However, it has been proved beyond reasonable doubt from the evidence of P.W.3, P.W.15 and P.W.13 that the gang of attackers formed

of members of Qaiser Bahini and led by accused Qaiser by launching attack caused 'harm', mental and physical, to Golam Rasul and his family members, destructed and burned down their house and forcibly took away Golam Rouf, the brother of Golam Nur [P.W.13].

646. It is evinced too that the perpetrators, in conjunction with the attack, caused harm by looting and burning properties belonged to Golam Rasul's family which indeed involved serious despondency and disadvantage to the victims of the attack. Indisputably there had been malicious intent behind such destructive activities. And it was committed intending to intimidate the family inmates to get whereabouts of Golam Nur a freedom fighter and presumably, on failure, the gang had picked up Golam Rouf finding him available at home at the relevant time.

647. We have already recorded our finding, in adjudicating charge no.2 that destruction of civilians' property by launching attack indubitably had detrimental effect on individuals' fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims. The civilians were non combatants. The object of such destructive activities was to terrorize the innocent civilians, which eventually constituted the offence of 'other inhuman act' as it substantially affected their fundamental right to property and safety.

648. Harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary despondency and it must be such nature of harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life.

649. Already it has been proved that Golam Rouf was forcibly taken away by the gang led by accused Qaiser. The reason was that his brother Golam Nur was a freedom fighter. Where Golam Rouf was taken? How he got release and when? It is evinced from testimony of P.W.15 Nishamon that after abduction of Golam Rouf her relatives first moved to the house of Manjur Ali the maternal uncle of accused Qaiser at village Guniauk.

650. It reveals from the evidence of P.W.16 that he had seen Qaiser and his men bringing Golam Rouf to Manjur Ali's house [at village Guniauk].

Later, he saw them taking Golam Rouf towards northern direction. Presumably relatives of Golam Rouf first moved to Manjur Ali's house to have his trace there. But they could not have his trace there. P.W.16 knew Golam Rouf even since earlier. Defence could not refute all these pertinent facts, by cross-examining the witnesses. That is to say, till arriving at village Gutma captured Golam Rouf had been under the grip of the gang led by accused Qaiser.

651. What happened next? P.W.3 Tajul Islam an accomplice of accused Qaiser who had been with the gang, during the attack, stated that Golam Rouf was taken first to his [Qaiser] maternal uncle Manjur Ali's house at village Guniauk. Thereafter, Rouf was taken to village Gutma wherefrom along with picked up one Givendra Kumar, on capture he was brought to Qaiser's house at village Noapara.

652. P.W.16 heard that at about 02:00 pm , on the day of attack, the gang of perpetrators accompanied by accused Qaiser, on their way, had attacked the house of Badal Karmakar when they looted and burned down his house and Givendra Karmakar the brother of Badal Karmakar was kept tied down with a mango tree, on capture and then Golam Rouf and Givendra Karmakar were sent to his [Qaiser] house at Noapara by his accomplices.

653. This piece of version, though hearsay, inspires credence as it is found to have been corroborated by the direct evidence of P.W.16 that he saw the gang moving along with captured Golam Rouf towards northern direction of village Gutma. Capture of Givendra Karmakar from village Gutma seems to have been corroborated by P.W.3 Tajul Islam an accomplice of accused Qaiser who also physically participated in launching the attack

654. The version of P.W.3, a star witness, provides strong corroboration to P.W.15 and P.W.16 in respect of taking Golam Rouf first at village Guniauk, then village Gutma and finally at Qaiser's village at Noapara, along with another civilian Givendra Kumar, on capture from village

Gutma. Therefore it stands proved that Golam Rouf was kept unlawfully confined at accused Qaiser's house at village Noapara, till his release and accused actively and physically participated in accomplishing this unlawful act constituting the offence of 'confinement'.

655. In respect of destructive activities carried out at village Purbabhag, on the same day and in conjunction with the same attack by the same gang of attackers, P.W.16 Abdul Matin a resident of village Guniauk under police station Nasirnagar, the then sub-division B'baria stated that he heard that at about 04:00 pm, the gang had attacked the house of Awami League leader Sayedul Haque [now minister] and looted and destructed houses of eight families including Sayedul Haque

656. Seeing fume from his neighbouring village and hearing from the people who were fleeing the village that Qaisar and members of 'Qaisar Bahini' set fire to the houses of Awami League leader Sayedul Haque, now the fisheries and livestock minister, on June 23 1971, as stated by P.W.31 Azharul carries probative value and it gets corroboration from what has been testified by P.W.16, in respect of the destructive activities carried out at village Purbabhag.

657. Cumulative evaluation of evidence of P.W.3, P.W.16 and P.W.31 it stands proved too that in conjunction with the attack and on the way of taking Golam Rouf on capture to Qaiser's house at Noapara, the gang of attackers led by accused Qaiser had opted to accomplish destructive activities by looting and burning houses of civilians and the gang had also taken away Givendra Karmakar, on capture from village Gutma.

658. Prosecution alleges that Golam Rouf was kept detained at the house of accused Qaiser and he got release on intervention of his maternal uncle Manjur Ali and also in exchange of money. The fact of his being released shall by itself be sufficient to prove the fact of his unlawful confinement and accused Qaiser's participation to such unlawful act. In respect of Golam Rouf's release, prosecution relies upon P.W.15 the wife of the victims and P.W.3 an accomplice of accused Qaiser.

659. According to P.W.15, on the day of event her father first rushed to Qaiser's maternal uncle Manjur Ali's house at village Guniauk for having trace of Golam Rouf. Next day they moved to Qaiser at village *Noapara* the next day and requested to release her [P.W.13] husband Golam Rouf, but the accused demanded Tk. 10,000 in ransom. Later, on the next day they had given Tk 8,000 together with a letter obtained from Qaiser's maternal uncle Manjur Ali to Qaiser and got her husband Golam Rouf released.

660. The learned defence counsel argued that the above version contradicts to what has been narrated on the charge framed. For the charge framed alleges that Golam was kept detained for 07 days.

661. We disagree with the above argument. The P.W.15 came on dock to speak the horrific experience that she got about four decades back. Due to lapse of long passage of time one's memory may be faded, particularly in narrating date, distance, number, height *et cetera*. Thus discrepancy in narrating successive facts may naturally occur. However, we as the trier of fact are to see the core 'essence' and fundamental feature of witness's testimony.

662. Keeping the above reality in mind we find that defence could not controvert the fact of getting Golam Rouf back through intervention of accused's maternal uncle Manjur Ali and also in exchange of Taka 8,000. This is the 'essence' of the version P.W.15 has made before the Tribunal. Release of Golam Rouf happened four days after his capture, according to P.W.15's statement, true. But it does not make the core fact of his release from captivity at the house of accused Qaiser at village *Noapara* does not go on air. It is immaterial to show the accuracy of estimation of days of his being in confinement

663. On totality of evidence produced it has been proved beyond reasonable doubt that accused Syed Md. Qaiser and his accomplices initiating the attack forcibly took away Golam Rouf, caused physical and mental harm to his father Golam Rasul, kept Golam Rouf detained for

days together and finally set him free in exchange of ransom money. It has been proved too that on the same day while taking the victim Golam Rouf, on capture the accused Syed Md. Qaiser and his group had carried out destructive activities at villages Gutma and Purbabhag causing detriments to the fundamental rights of civilians. By such act and activities accused Syed Md. Qaiser committed, abetted and facilitated the offence of 'abduction', 'confinement' and 'other inhuman act' as crimes against humanity as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus he incurred liability under section 4(1) of the Act, for the above offences.

Adjudication of Charge No.12:

[Committing mass rape upon Majeda Begum at the army camp at Jagadishpur High School]

664. Charge: On any day of mid August of 1971[end of Bangla month Sravan] at noon accused Syed Md. Qaiser accompanied by the members of 'Qaiser Bahini' and Razakar force, brought Majeda Begum, her father Atab Mia and uncle Ayub Mia to the army camp set up at Jagadishpur High School under Madhabpur police station, on capture from their house and then accused Syed Md. Qaiser handed Majeda Begum over to the army for their entertainment, despite protest on her father's part. The army men thus committed recurrent rape upon Majeda, during night for 8/10 days and later on, physically and mentally devastated Majeda was left abandoned at a place near *Temunia* Primary School wherefrom she managed to return home somehow and received necessary medical treatment and few days later she felt her pregnancy that resulted from the forcible sexual invasion caused to her at the army camp. Therefore, accused Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of committing forcible sexual ravishment constituting the offence of '**rape' as crime 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 thus the accused incurred liability under section 4(1) of the Act.

Witnesses

665. Majeda Begum the courageous victim came on dock to speak the trauma she sustained. She testified as P.W.5. The criminal act of alleged physical invasion resulted in her forced pregnancy and eventually the victim gave birth of a daughter child who is P.W.10 Shamsun Nahar, the war baby and the secondary victim of the alleged beastly criminal act. Crossing the hurdles of social ostracism both have testified their trauma and pains they have been still carrying with them. Apart from them, P.W.1 Kazi Kabiruddin testified what he heard about the event at a mediation that allegedly took place after the independence, over the conflict between Majeda Begum and her husband Alai Mia. Prosecution thus relies upon these three witnesses, in support of this charge.

Evidence Presented

666. P.W.5 Majeda Begum [60] victim of the offence of mass rape at the army camp testified how she along with her father and uncle were forcibly brought to the army camp. She was a resident of village Sultanpur under police station Madhabpur, the then sub-division Habiganj. She got married to one Alai Mia, about one month before the war of liberation ensued.

667. P.W.5 Majeda Begum stated that at the relevant time she had been at her paternal home at village Belghar. During her staying there she heard from the elders that Qaiser used to loot and attack the houses of freedom fighters of the locality and hand over the women at the army camp.

668. In narrating the event of their capture, P.W.5 Majeda Begum stated that at the end of Bangla month Sravan [corresponding to the mid of August 1971], at noon, when they were about to take their meal along with her father and uncle Ayub Ali, a group of 10-12 members of 'Qaiser Bahini' and Razakar Bahini entering into their house asked whereabouts of her [P.W.5] uncle Matin. Her father replied he did not know and with this the members of 'Qaiser Bahini' and Razakar force started beating up her father with gun. She [P.W.5] started crying and then they [attackers] forcibly brought her, her father and uncle Ayub Ali to the army camp at

Jagadishpur High School where she found Qaiser present as they were produced before him [Qaiser].

669. The above is how the victim along with her father and uncle Ayub Ali were forcibly brought to the army camp at Jagadishpur High School where she was produced before accused Qaiser. Defence simply denied it, in cross-examination. But it could not impeach this version in any manner.

670. P.W.5 went on to state that she found 7/8 women detained there under armed surveillance of Qaiser Bahini and Razakar force. Qaiser handed her [P.W.5] over to the army men and asked her father and uncle about whereabouts of Matin [uncle of P.W.5]. But her father and uncle could not say Matin's whereabouts and with this Qaiser asked the members of 'Qaiser Bahini' and Razakar force for digging a ditch by them [father and uncle of P.W.5]. After digging a ditch by her father, uncle and 10-15 others she was kept inside it under surveillance of two Razakars. She was not spared despite appeal made to Qaiser by her father. Her father knew Qaiser since earlier. Qaiser, under death threat, compelled her father and uncle to quit the camp.

671. P.W.5 further stated that after the dusk when the rain started she was dragged out of the ditch and made her entered in a room of the army camp. Since then the army men started committing beastly invasion upon her. She could hear screaming of other women detained at the camp. The army used to push cloth inside her mouth when she did shout and cry due to beastly torture upon her. The army men continued causing recurrent torture upon her, at that room, for 8-10 days. At a stage of her captivity at the camp, she heard Qaiser asking his accomplices to abandon her at a place nearer to Temunia Jagadishpur Primary School by dragging her out there from as she became sick and distressed. Later on, members of Qaiser Bahini and Razakar force had left her there. At that time stormy rain started. Her entire body was coated with blood and her wearing apparel was torn. She spent the whole night there under the open sky. She could understand moving of ants and insects on her body. At about dawn, she somehow by crossing about half mile way arrived at her paternal home.

672. P.W.5 next stated that her uncle Ayub Ali took her to doctor at Chatian bazaar for having necessary medical treatment and then she was taken to her phupa's home at that village. Her *phupu* [father's sister] used to provide her with nursing and care as she could not sit and stand even due to swelling of her urinary tract. One month later, she started feeling a bit better. But on seeing her vomiting tendency her phupu, mother and maternal grandmother guessed that she became pregnant. She herself too could understand that she became pregnant due to 'torture' caused upon her by the army men. She stayed at her phupu's home till independence and afterwards she came to her paternal home and there from her husband took her to his home. But his husband sensing her forced pregnancy returned her back to her paternal home and since then he [victim's husband] stopped taking inquiries about her well being.

673. In respect of mediation over taking the victim back to her conjugal home, P.W.5 stated that her uncle Advocate Matin asked her husband through freedom fighters Farid, Awal Chowdhury and Kazi Kabiruddin [P.W.1] of Madhabpur, Mahbubuddin Chowdhury of Chatian and many other elderly men for taking her back. But her husband told he would take her back after delivery [of child] by her. At the end of Bangla month Baishakh 1972 [corresponding to mid May of 1972] she gave birth of a daughter child whom she named 'Shamsun Nahar' [P.W.10]. Two years after the birth of the baby, her husband took her back to his home. But the baby she gave birth of was being brought up by her uncle Advocate Matin.

674. P.W.1 Kazi Kabiruddin corroborating P.W.5 stated that on his return to his native village, two years after the independence, Mahbub Uddin Chowdhury and Advocate Matin came to meet him and narrated the event of mass rape committed upon Majeda Begum at the army camp at Jagadishpur High School due to which she became pregnant and after the independence gave birth of a daughter child and thus Majeda's husband Alai Mia did not intend to take her back. On being requested by Mahbub Uddin Chowdhury, one day he in presence of 2-1 elders requested Alai Mia and tried to make him convinced and with this Alai Mia agreed to

take his wife Majeda back. Now Alai Mia is dead. But Majeda and her daughter are still alive.

675. Finally P.W.5 Majeda Begum stated the fate of her daughter Shamsun Nahar [war baby]. She stated that her daughter Shamsun Nahar got married to one Aksir Mia son of Shamsu Mia of village Amrut under police station Chunarughat, as arranged by her [victim Majeda] father and uncles when Alai Mia [husband of victim Majeda] was shown as the father of Shamsun Nahar, in the *kabinnama*. After the death of her [victim Majeda] husband Alai Mia, mother-in-law of Shamsun Nahar had left her at her [victim Majeda] house as they heard from the villagers that Alai Mia was not the father of Shamsun Nahar. And since then they did not return her daughter back and Aksir Mia later on got married again.

676. P.W.10 Shamsun Nahar stated too that she went to her conjugal home as she got married to Aksir Mia. But at a stage, her husband came to know that she was the ‘daughter of Pakistani army’ and not of Alai Mia and was given married to him showing Alai Mia as her father. With this her in-laws started causing torture on her and few days later her husband sent her back to her maternal grandfather. During her staying there her mother’s husband Alai Mia died and then she was brought to her mother and since then she has been staying there.

677. P.W.10 stated too that as she was growing up she asked her maternal grandfather and maternal grandmother why she could not go to her paternal home. They told that she was the child of Pakistani army. P.W.10 also stated that she heard how her mother was handed over to the army at Jagadishpur army camp and how she was subjected to recurrent ravishment by the army men. P.W.10 next stated that she was brought up by her maternal grandfather Matin and got married to Aksir Mia of village Amrut as arranged by him.

Deliberation and Finding with Reasoning

678. The learned prosecutor Mr. Rana Das Gupta submitted that the rape victim Majeda Begum [P.W.5] and the ‘war baby’ [daughter of victim P.W.5] Shamsun Nahar [P.W.10] came on dock to narrate the traumatic

event of sexual violence committed upon Majeda. Both of them have been examined in camera. This is the first case before this Tribunal in which a rape victim and a 'war baby' testified their tragic and traumatic experience. Majeda got married to one Alai Mia just before the War of liberation. The incident happened during the mid of August 1971. First, she and her father and uncle were brought to the army camp at Jagadishpur High School by the accused's accomplices and at a stage they released her father and uncle but she was handed over to the army camp by the accused Qaiser that substantially endorsed and contributed to the commission of forced sexual violence upon her, keeping detained at the camp for couple of days. After her release there from she became sick and pregnant as result of sexual violence committed upon her and in the end gave birth of a daughter child Shamsun Nahar [P.W.10].

679. The learned prosecutor further submitted that on knowing the fact of being pregnant by the army, victim's husband abandoned her. But she continued in brining up the child Shamsun Nahar. P.W.1 Kazi Kabiruddin testified a relevant fact of arranging a mediation over the dispute involving conjugal complexity between Majeda and her husband Ali Mia that took place after the independence. This relevant fact materially lends assurance to the fact that the victim was subjected to mass rape at the army camp that resulted in her forced pregnancy.

680. Conversely, the learned defence counsel Mr. SM Shahjahan submitted that accused Qaiser had no complicity with the act of abduction of victim and he had no connection with the army camp. The evidence of P.W.5 in respect of picking her, her father and uncle suffers from doubt. Victim does not claim that Qaiser himself directly violated her. But P.W.1 claims to have learnt from victim Majeda that accused Qaiser too also violated her at the camp. There has been no evidence to show that accused Qaiser was with the group that had picked up Majeda, her father and uncle from their house as alleged.

681. At the out set, let us have a glance on the extent and pattern of physical invasion upon the women and girls in 1971, during the war of

liberation. **Lisa Sharlach**, *University of California, Davis* in the article titled **'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda'** published in the journal *New Political Science, Volume 22, Number 1, 2000* [Published online: 18 Aug 2010] narrates [at page 94 of the journal] that-

Pakistani soldiers raped between 200,000 and 400,000 Bangladeshi women and girls [P.C.C. Raja, "Pakistan's Crimes Against Humanity in Bangladesh," FBIS-NES-97-351, "India: Commentary Raps Pakistan for Crimes Against Bangladeshis," December 19, 1997. Originally broadcast by Delhi All India Radio General Overseas Service in English, December 17, 1997]"

682. The author of the article further narrates [at page 95 of the journal] that-

A newspaper columnist in Calcutta, India, Amita Malik, describes the surrender of West Pakistani troops to the Indian army, which intervened in the conflict. Malik writes that a West Pakistani soldier said:

"Hum ja rahe hain. Lekin beej chhor kar ja rahe hain." ("We are going. But we are leaving our Seed behind.") He accompanied it with an appropriately coarse gesture. Behind that bald statement lies the story of one of the most savage, organized and indiscriminate orgies of rape in human history: rape by a professional army, backed by local armed collaborators. **It spared no one, from elderly widows to schoolgirls not yet in their teens, from wives of high-ranking civil officers to daughters of the poorest villagers and slum dwellers. Senior officers allowed, and presumably encouraged, the forced confinement of innocent girls for months inside regimental barracks, bunks and even tanks.**

[Source: Malik, *The Year of the Vulture*, p. 154.]

683. The above sourced information portrays a horrific extent of atrocities leading to mass rape which may be termed as 'genocidal rape', committed in 1971 during the war of liberation in the territory of Bangladesh. Members of the Pakistani occupation armed force were the principal perpetrators and they had carried out such untold barbaric organised

activities, violating international humanitarian law, with the substantive aid and assistance of local collaborators.

684. The charge no. 12 framed against the accused Qaiser involves the act of mass rape upon Majeda at the army camp, keeping her under protracted captivity, and substantial assistance and aid provided by accused Qaiser who was a potential loyalist of the Pakistani occupation army stationed in Habiganj sub-division allegedly made such criminal act constituting the offence of recurrent sexual invasion possible.

685. Gabriela Mischkowski rightly pointed that

“in practice, rape survivors are more or less routinely accepted as “vulnerable” rather than “threatened” for mainly two reasons: they are either perceived as too shameful to talk about “such things” in front of a public audience, or- based on a less prejudiced and more enlightened understanding of rape and its social implications—they are to be protected from public stigmatising.”

[**Gabriela Mischkowski**, Medica Mondiale, Cologne, Germany: *The trouble with rape Trials: Bangladesh Genocide and the Issue of Justice*, a paper presented in the International conference held at Heidelberg University, Germany 4-5 July, 2013, publication of Liberation War Museum, Bangladesh, page 98].

686. But we see in the case in hand that the rape victim Majeda Begum [P.W.5], as a brave woman, came on dock to speak the trauma she sustained which was worse than death, overcoming all vulnerabilities. The recurrent act of rape committed upon hundreds of thousand of women in context of situation existing in 1971 still remains undisclosed. The charge narrates that the victim Majeda Begum was so ravished at the army camp stationed at Jagadishpur High School as she was handed over to the army by accused Qaiser. She was kept confined for days together at that camp. The act of rape eventually resulted in her forced pregnancy and eventually she gave birth of a daughter child [war baby]. The war baby Shamsun Nahar has also came on dock and testified in camera as P.W.10

687. Defence does not dispute that Shamsun Nahar is not the daughter of Majeda Begum. It does not claim too that Shamsun Nahar’s father was

Alai Mia. Rather, it divulges from testimony of victim Majeda Begum and P.W.1 Kazi Kabiruddin that Majeda's husband Alai Mia refused to keep Majeda with him when he knew that the baby daughter that she gave birth of was the outcome of sexual ravishment caused on her by the army. It was another attack indeed on Majeda.

688. Victim Majeda Begum is the best and sole witness to the act of rape committed upon her. No women would prefer to bring a false accusation that stamps stigma on her life, and makes her social and family life shattered. We find no reason to disbelieve her [P.W.5] testimony. The relevant fact, as has been proved, that her husband, on being aware of the matter of her having been ravished by the army, refused to accept her provides further indication as to the truthfulness of her version.

689. Victim Majeda's uncle was freedom fighter Advocate Matin. Defence does not dispute it. The group of attackers, before they picked up Majeda, her father and uncle Ayub Ali on forcible capture, wanted to know the whereabouts of Advocate Matin, a freedom fighter. But having no response, the attackers forcibly brought them to the army camp at Jagadishpur High School. We are thus forced to infer that the attackers' target was freedom fighter Matin. But getting no whereabouts about him the gang forcibly took them to the army camp.

690. The charge narrates that accused Qaiser was with the group when the victim Majeda, her father and uncle were forcibly picked up from their house. But P.W.5 does not implicate the accused Qaiser with the act of taking them forcibly on capture. However, P.W.5 stated that the group of abductors formed of 10-12 members of 'Qaiser Bahini' and Razakar Bahini took them to the army camp on capture.

691. We have already found that accused Qaiser was the founder and used to act as the 'boss' of 'Qaiser Bahini', a locally formed private outfit. Naturally, the members of Qaiser Bahini would not have acted without knowledge and approval of accused Qaiser. The group of abductors thus had acted them on accused Qaiser's approval and indication, we may

safely conclude. Mere non implication of accused Qaiser with the group of adductors does not render accused's role in perpetrating the act of their forcible capture.

692. At the army camp, Qaiser was found present, as stated by P.W.5 Majeda. P.W.5 knew the accused Qaiser since earlier. It is believable as the accused was a man of local prominence and had founded a private outfit after his name. In the preceding charges we have already found that accused Qaiser used to maintain active affiliation with the army stationed at different places of Habiganj, intending to collaborate with them in carrying out atrocious acts, in furtherance of policy and plan. The matter of founding 'Qaiser Bahini' a private out fit of accused Qaiser naturally became an anecdote around the locality.

693. Further, finding the accused Qaiser present at the army camp when the victim, her father and uncle were brought there on capture too indisputably proves that the accused Qaiser had active link with the act of picking them on forcible capture from their house.

694. The act and conduct the accused Qaiser had shown at the army camp substantially facilitated victim's detention there. We have found from evidence of P.W.5 the victim that accused Qaiser consciously handed her over to the army men. He did it knowing the consequence of his act, we conclude.

695. P.W.5 described the extremely traumatic experience that she sustained at the army camp in 1971 that eventually resulted in her forced pregnancy. Defence could not dislodge the testimony of P.W.5, on material particular. Her testimony also demonstrates that at the said army camp she found many other women detained. It suggests that the camp was used as a 'rape camp' with which the accused had active affiliation.

696. Testimony of P.W.5 the victim demonstrates further that the army men continued causing recurrent 'torture' upon her, keeping her detained in a room at the camp, for 8-10 days. At a stage of her detention, she heard Qaiser asking his accomplices to abandon her at a place nearer to Temunia

Jagadishpur Primary School as she became sick and distressed. Accordingly, later on, members of Qaiser Bahini and Razakar force had left her there abandoned.

697. In cross-examination P.W.5 stated that her husband Alai Mia died 10 years back. That is to say, since last ten years Shamsun Nahar [the war baby] has been staying with her mother Majeda Begum as she was left abandoned by her husband Aksir Mia when he knew that she was not the daughter of Alai Mia the husband of Majeda Begum. The above version of P.W.5 gains corroboration to what has been stated by her daughter P.W.10.

698. It remained undenied that the victim Majeda Begum gave birth of daughter child [P.W.10 Shamsun Nahar] in mid May of 1972. However, in cross-examination P.W.5 admits that the date of birth of Shamsun Nahar has been shown 10 January 1972 in her voter ID card. But mere showing such a date of her birth, in the voter ID card, does not taint the undenied version of victim Majeda Begum in this regard. Mother is the best witness about the date and time when she gives birth of her child. Besides, for various reasons, it has become a practice in our society showing different date of birth, for various purposes.

699. We have found it proved too that two years after the birth of the baby, victim's husband took her back to his home. But the baby she gave birth was being brought up by her [victim Majeda] uncle Advocate Matin. Presumably, due to social ostracism Shamsun Nahar [P.W.10] the war baby was made deprived of her mother's affection and nourishment. Next, Shamsun Nahar's conjugal life too became stormy, at a stage, and she was pushed back to her mother when already Alai Mia the husband of victim died. What a tragedy! What a tragic experience a traumatized woman and her daughter the war baby have made unfolded in a court of law! Their bravery deserves salute. Their trauma shakes the humanity indeed.

700. The unimpeached evidence of P.W.5 speaks of another trauma. Alai Mia the husband of victim Majeda Begum did not intend to take her back

as she became pregnant as result of sexual violation committed upon her. The reason was clear. Alai Mia understood that the baby in the womb of his wife was not lawfully begotten.

701. Later on, pursuant to mediation and with the intervention of P.W.1 Kazi Kabiruddin and other elderly men, Alai Mia agreed to take his wife back. But the baby [P.W.10 Shamsun Nahar] had to stay with her maternal grandfather and grandmother.

702. The above pertinent post event relevant facts provide strong corroboration to the fact of victim's being prey of recurrent ravishment at the army camp that resulted in her forced pregnancy. Statement of victim P.W.5 in respect of barbaric misdeed done to her in protracted captivity at the army camp could not be impeached by the defence in any manner.

703. Now the question is how the accused Qaiser facilitated the commission of the offence. The victim stated that she was handed over to the army by accused Qaiser. Defence could not dislodge this crucial version. We have found that the victim, her father and uncle were brought to the camp first, on capture by the members of Qaiser Bahini and Razakar force, as approved by Qaiser. The victim found the accused Qaiser present at the camp. It lends support too that they were so brought there, on capture as ordered by accused Qaiser.

704. To ensure capture of freedom fighter Matin the uncle of the victim, the accused Qaiser and his cohorts thought it necessary to keep the victim in captivity at the army camp, even after releasing her father and uncle, circumstances and relevant facts suggest to this valid inference. It was accused Qaiser on whose indication, approval and encouragement the victim was so kept in captivity at the army camp where the army men committed rape upon her for days together.

705. No doubt, the accused Qaiser being enthused by extreme perverted mindset did not spare even a rural newly married woman and thereby he handed her over to the army. In this way he substantially facilitated and

contributed to the commission of horrific act of sexual ravishment upon her by the army men. The act of such endorsement and approval inevitably makes him [accused] responsible for the commission of the offence. Accused Qaiser's presence at the army camp and his act and conduct eventually made the army able to keep the victim Majeda Begum detained there for days together and thus the accused consciously provided substantial contribution to the commission of physical invasion upon the victim P.W.5.

706. Ms. Tureen Afroz the learned prosecutor approached towards the issue for war rape. She chiefly portrayed the historically known fact showing how the helpless women were systematically captured, detained and sexually violated, particularly at the rape camps in 1971, during the war of liberation. Defying the Article 27 of fourth Geneva Convention providing war time protection to women, the Pakistani occupation army and their local collaborators had committed indiscriminate sexual violence upon the helpless women and many of them had to invite 'forced pregnancy'.

707. The learned prosecutor further submitted that Majeda Begum [P.W.5] is a victim not only of sexual violence but of 'forced pregnancy' too. She was violated by the army men at army camp set up at Jagadishpur School where she was kept in captivity for couple of days, as she was handed over to the army by the accused Qaiser. The camp may thus be termed as a 'rape camp'. Because, victim Majeda's evidence divulges that there had been some other women detained at that camp who were also subjected to sexual violation. Sexual violence committed upon Majeda resulted in her forced pregnancy and eventually she gave birth of a daughter child [P.W.11 Shamsun Nahar]. The child Shamsun Nahar the 'war baby' is now 42 who is in true sense another victim of the crime of rape.

708. Testimony of victim P.W.5 victim Majeda Begum demonstrates that she could hear screaming of other women detained at the camp, during her protracted captivity there. It could not be shaken. Yes, the army camp

where the victim had to spend in captivity for 8-10 days was thus a 'rape camp' with which accused Qaiser had a visible association.

709. The research on war time rape shows that in war time, the soldiers assume the use of rape as an effective weapon of launching attack not simply against an individual, but against social and gender stigmas aiming for the advancement of societal break-down. When rape is used as a weapon instead of a bullet, the weapon continues to exert its effect beyond the primary victim and it eventually outrages the civility, we have already observed in our deliberation made on charge no.8 that involves another event of mass rape. Rape as a weapon in war time thus affects not only the rape victim, but her family, village and community.

710. The accused Qaiser himself did not commit rape upon Majeda. He is alleged to have had provided substantial assistance and contribution to its commission by the army and as such he was concerned with the accomplishment of the offence, we conclude.

711. The evidence demonstrates patently that accused Qaiser by his conscious act and conduct assisted, abetted and substantially contributed to the accomplishment of such barbaric act of recurrent rape upon Majeda Begum by the army at the army camp at Jagadishpur High School. Accused's act thus formed part of attack directed not only on the body of the victim but it aimed to cripple the integrity of a family, a community and the society.

712. It has been found that the act of rape abusing human rights of victim Majeda Begum, in war time, was most grave and justifiably proscribed. It was not an isolated incident of rape. It formed an attack against women, in order to send a message of intimidation to the pro-liberation Bengali civilians. The perpetrators had carried out the act of sexual violence as an instrument of threat to the civilians who took stance in favour of war of liberation.

713. The mother of a child born of rape faces a lifetime of turmoil over the conception, regardless of her decision to raise the child, give the child up for adoption or terminate the pregnancy. A mother who keeps and gives the child, born of rape, up remains tormented for rest of her life.

714. In war time, a woman is raped intending to dehumanize and defeat the morals of counterpart and it leaves the society with long-term suffering as well. The curse of rape as a weapon, affects not only the life of an individual, but the entire family and community in which she lives. The severely affected life of victim Majeda Begum is a glaring example of the post rape effect. After the crime committed upon her, she lost her normal life, husband's affection, conjugal bondage with her husband.

715. Shamsun Nahar [P.W.10] the war baby is the secondary victim of the rape committed upon her mother Majeda Begum [P.W.5]. She also has been deprived of her normal life and rights including social recognition. Majeda Begum the mother of 'war baby' Shamsun Nahar testifies her daughter's suffering and that of her own which, in the end, illustrates the extreme effects of secondary victimization that results in re-traumatizing of the sexual assault done upon her.

716. In the case in hand, we see that victim Majeda Begum [P.W.5] gave birth of child who since last ten years, after being abandoned by her husband, has been staying with her mother [P.W.5]. And they both have been still fighting for survival and recognition. An adviser for the International Rescue Committee in Rwanda made the following statement:

“Did you ever see the look in a woman's eyes when she sees a child of rape? It's a depth of sadness you cannot imagine. Mass rape forces the victims to live with the consequences, the damage, the children.”

[Landseman, Peter 2005, A Woman's Work. The New York Times, September 15, 2002].

717. The effects of rape as a weapon of war do not cease, once the rape is over, or once the physical wounds are healed. The wounds of rape never heal, and they leave permanent scar on victims, their families, communities, nations and even the humanity too. Testimony of victim

P.W.5 Majeda Begum and her daughter the war baby Shamsun Nahar[P.W.10] is a mere part of horrific scenario of physical invasion committed upon the countless women in the territory of Bangladesh in 1971, during the war of liberation by the Pakistani occupation army and their local collaborators.

718. A crime against humanity involves the commission of certain prohibited acts committed as part of attack directed against a civilian population. The act of abetment as appears in the Act of 1973 is punishable. And the act of abetment encompasses ‘approval’, ‘encouragement’, ‘assistance’ or support’ that contributes substantially to the accomplishment of the actual crime. The acts of the accused Qaiser was “part of”—and not simply coincide with—the attack [systematic] directed against a civilian population that resulted in mass sexual invasion upon the victim Majeda Begum. The accused’s act was thus significantly related to the attack that resulted in victim’s confinement at army camp where she was subject to recurrent sexual invasion

719. Physical invasion committed upon Majeda Begum was thus an attack to the Bengalee entity by extending horror of the war in the person of victim Majeda Begum. It is need less to say that the mother who gives birth of a child as a consequence of forced pregnancy resulted by rape committed upon her in war time also lives with immense grief of separation and loss. A social stigma is also placed on the child born as a result of the use of rape as a weapon of war and it amplifies the trauma and impoverishment of her mother too.

720. War time rape victims cannot be viewed as a mere woman who lost her chastity. In fact they fought by laying their highest self-worth, for the cause of our independence. Time has come to unlock our collective voice to recognise and honour our great mothers and sisters, the war heroines. Social ostracism particularly against village women living in economically down trodden condition acts as the main barrier in digging out the forgotten narratives of sexual invasion committed upon them, in 1971 during the war of liberation.

721. In the case in hand, we have found that Majeda Begum a brave mother of the soil has shown courage in making narratives of her immense trauma still she is carrying, by overcoming the vulnerability. Not only she, but her daughter the war baby Shamsun Nahar has also testified her post-birth trauma. We consider their valor as a battle against the existing social ostracism. They deserve salute. The society, the nation, the state and the humanity must and must value their tormenting sacrifice, breaking silence.

722. It has been proved beyond reasonable doubt that the accused Syed Md. Qaiser knowing the consequence of his act deliberately assisted and contributed to the actual commission of the crime by the army. Act of handing over the victim to the army is quite adequate to conclude that the accused Syed Md. Qaiser significantly aided, abetted and contributed the principals in committing the horrific act of recurrent sexual violence upon Majeda Begum constituting the offence of '**rape**' as crimes against humanity as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and as such he incurs liability under section 4(1) of the Act .

Adjudication of Charge No.13

[Killing of 03 civilians at Nalua Tea garden killing Field]

723. Charge: That on **18 August 1971** in between 09:00-09:30 am and 03:00-03:30 pm a group of 15-20 Razakars and peace committee members led by accused Syed Md. Qaiser by launching attack apprehended Abdus Shahid and three other civilians of village Narapati under police station Chunarughat district Habiganj and brought them to peace committee office set up at the house of Rajendra Poddar @ Lichu Poddar where on your instruction they were subjected to torture and forced to disclose information about the arms they had. At a stage of causing torture, they were brought to army camp, one mile far from the peace committee office and then the accused and the group brought the detained persons to the killing field adjacent to Nalua tea garden by army vehicle where they were killed. Therefore, accused Syed Md. Qaiser has been charged for participating, abetting, facilitating and contributing the actual commission of killing of 03 unarmed civilians constituting the offence of '**murder as**

crime against humanity' which was part of attack against civilian population as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus the accused incurred liability under section 4(1) of the Act.

Witnesses and Documents

724. Prosecution adduced three witnesses in support of this charge and they have been examined as P.W.23, P.W.24 who are near relatives of the victims and they have testified, as eye witnesses, some relevant and material facts which show close nexus of the accused with the commission of the principal act of killing the victims who were brought from their house forcibly, by the cohorts of accused Qaiser who substantially led the perpetrators in effecting their forcible capture, as alleged. P.W.25 Md. Anaiullah has been tendered by the prosecution and defence declined to cross-examine him. In order to establish the fact that the accused Qaiser, as potential aide, had culpable association with the Pakistani that was stationed at Chunarughat, prosecution relies upon the information narrated in the book titled *Ógy³ hÿi BwZnułmi tLvtR : ZvRj tgvnı²ş, cKıKıj 2001, cöı-127[e´cÖkÖxS ınııte PııZ]*

Evidence Presented

725. P.W.23 Ambia Khatun[63], daughter of victim Abdus Shaheed, from village *Madhyam Narapati [ga`g bicıZ]* under police station Chunarughat in Habiganj, testifying before the Tribunal claims that she had seen Qaiser directing his cohorts to torture four detainees to glean information[about freedom fighters].

726. P.W.23 stated that on 01 of Bangla month Bhadra in 1971, at about 08:00-)9:00 am locals Firoz Miah[vice chairman], Isad Ali, Manphor, Muslim Chairman, Hurai Chowkider and Khalek Chowkider had come to their house and ordered her father and others to come out and asked to go with them to Lichu Poddar's house as instructed by Qaiser who had been at that house. Then the group brought her father and three others on capture to Lichu Poddar's house. She, her mother, wife of Askar Ali

[victim] and one of her uncles arrived there, following them but they were not allowed to enter Lichu Poddar's house.

727. P.W.23 next stated that from a nearby place behind that house, they had seen Qaiser [accused] questioning her father and others about arms, but the detainees said they had not gone to India and had no arms. Then Qaiser ordered Firoz Miah and other Razakars to bring a piece of rope to tie them up and torture them to get information, said P.W.23 Ambia, adding, then they started torturing them and at one stage, Qaiser and his accomplices had taken them towards the shrine of Shah Gadar Hossain and then to a nearby Pakistani army camp.

728. P.W.23 further stated that on the following night at about 08:00-09:00 pm Hamdu Miah, a Razakar of the village, had come to their house the following night and informed that the detainees had been killed inside Nalua Tea Garden and their bodies were dumped inside a well there. Hamdu also told them that Qaiser and his accomplices had asked him [Hamdu Razakar] to shoot the detainees, but he refused as they were acquainted with him since childhood, said P.W.23 Ambia, adding, then the Pakistan army, who were accompanied by Qaiser, killed her father and others on Qaiser's instruction.

729. P.W.24 Anwara Begum, wife of victim Askar Ali made almost similar description about the event of forcible capture of her husband and three others. P.W.24 stated that at the end of Bangla month Asarh her husband went to India and on the first day of Bangla month Bhadra [in 1971] at the time of *fazar* prayer returned home and after a short while he had gone to the house of his friend Shahid [father of P.W.23]. Then few minutes later she had gone there and asked her husband to come and next she saw Firoz Mia, Manphor, Khalek Chowkider and others besieged the house of Shahid. At that time her husband Askar, Shahid, Zahir Hossain and Mohibullah had been at that house. Firoz Mia and his accomplices brought them forcibly to the camp at Lichu Poddar's house. They started following them and from a place behind that house they could see a white

dressed man grilling that detainees by saying—“when have you returned from India, what arms you have brought with you”

730. Almost by making similar description P.W.24 stated that on the following night at about 08:00 pm Hamdu Razakar of their village whom she knew since earlier came to them and informed that her husband had been killed and dumped in a well at a place near Nalua tea garden. Hamdu also informed that Qaiser [accused] ordered him to shoot the detainees but he did not as they were his fellow villagers, P.W.24 stated, adding that the detainees were killed on instruction of Qaiser by his accomplices. The said Hamdu Razakar is now dead.

731. Defence does not appear to have been able to impeach the above version corroborating what has been testified by the P.W. 23 on material fact linked directly to the principal even of killing. Defence simply denied the above testimony.

Deliberation and Finding with Reasoning

732. The learned prosecutor Mr. Rana Das Gupta citing testimony of P.W.23, P.W.24 and P.W.25 argued that the event narrated in this charge and accused's complicity has been proved beyond reasonable doubt. P.W.25 has been tendered and defence declined to cross-examine him. Of these three witnesses P.W.23 is the daughter of victim Abdus Shaheed and P.W.24 is the wife of victim Askar Ali. They are eye witnesses of the event victims' forcible capture and finally taking to the crime site. They however heard the act of actual commission of the killing of four victims. Their corroborating testimony relates to the fact of taking the victims forcibly, on capture, by the accomplices of the accused Qaiser to the peace committee camp at Lichu Poddar's house where they saw the accused ordering his accomplices to beat the detained victims. They also saw the accused and his accomplices taking the captured victims towards Shah Godar shrine. On the following day they heard from one Hamdu Razakar an accomplice of the group of perpetrators that the victims had been killed by the Pakistani army, on instruction of accused Qaiser, under a banyan tree near the Nalua tea garden.

733. Why the victims were so targeted? The learned prosecutor went on to submit that defying the asking of local Razakars they rather joined the war of liberation as freedom fighters and on the date of the event, on having information about their return from India in the locality, the local Razakars and accomplices of accused Qaiser apprehended them forcibly. It was an attack against non combatant civilians. Defence could not controvert what P.W.23 and P.W.24 have narrated on material particular indicating unerringly that the accused was actively involved with the act of forcible capture of victims followed by the act of their killing. Accused Qaiser substantially assisted and contributed to the accomplishment of the crime and as such incurred liability under section 4(1) of the Act of 1973.

734. The learned defence counsel Mr. SM Shahjahan submitted that the prosecution relies upon testimony of P.W.3 Ambia Khatun and P.W.24 Anwara Begum. These witnesses claim to have had witnessed the event alleged. But their testimony, on material particular, shall seem to be contradictory and the story they narrated in respect of their presence at Lichu Poddar's house where the victims were allegedly brought on capture was inherently improbable. Accused's presence at Lichu Poddar's house which was nearer to Indian border did not match with the reality. In respect of killing, P.W.23 stated that she heard from Hamdu Razakar, later on, that Qaiser ordered the army men to kill the victims. While P.W.24 stated that she heard from said Hamdu Razakar that on order of Qaiser his three cohorts gunned down the victims to death. Such infirmity of testimony, in respect of killing, makes their hearsay testimony reasonably doubtful and it taints their credibility too.

735. The learned defence counsel went on to argue that it has not been proved that the group of perpetrators that brought the four victims to the peace committee office at Lichu Poddar's house was led by accused Qaiser, as alleged in the charge framed. The killing of four is not disputed. However, it might have taken place somewhere else. Accused Qaiser was not involved with the commission of the crime alleged in any manner.

736. Killing of four unarmed civilians, the principal offence was a part of chained criminal acts. The chain formed of forcible capture of the victims immediately after their return from India, causing torture keeping them in captivity at the peace committee office, afterwards bringing them to the army camp and finally the act of taking them to a place nearby Nalua tea garden where they were gunned down to death.

737. Testimony of P.W.23 in respect of a material fact that unambiguously indicates the reason of forcible capture of four civilians remained totally undenied. P.W.23 stated that at the end of Bangla month Asarh[mid of July] in 1971 Firoz Mia[vice chairman], Isad Ali, Hurai Chowkider and Khalek Chowkider came to their house and asked her father and others to join Razakar force, if they intended to save their own lives. But they refused the proposal. And afterwards her [P.W.23] father and three others e.g. Zahir Hossain, Askar Ali [husband of P.W.24] and Mohibullah of their village went to India, contacting Manik Chowdhury [an organiser of war of liberation].

738. In cross-examination, in reply to question put by the defence P.W.23 states that Askar Ali [husband of P.W.24] was their co-villager and his house and her father's house was intervened by a pond. Thus it has been re-affirmed that in cross-examination. Besides, it is found too from the evidence of P.W.24 that her husband victim Askar was a neighbour of Shahid the father of P.W.23

739. The relevant and pertinent fact that occurred prior to the event of forcible capture of four civilians proposing them to join the Razakar force which they refused, as stated by P.W.23 has neither been refuted nor denied, in cross-examination in any manner. This undenied act on part of four victims had sown the seed of antagonistic attitude in the mind of local collaborators towards them that eventually resulted in their forcible capture and killing on their return from India, we may validly conclude.

740. From integrated evaluation of evidence of P.W.23 and P.W.24 it transpires that the father of P.W.23, husband of P.W.24 and two others of

the same village, under threatened pressure to join the Razakar force, had opted to go India to join the war of liberation and the event of their capture on the first day of Bangla month Bhadra took place on their return from India. Presumably the victims were kept under vigilance, since they refused to join the Razakar force. Joining the war of liberation instead of being the members of the Razakar force was thus the reason of directing attack on them, on their return from India.

741. The corroborative and unimpeached testimony of P.W.23 and P.W.24 the near ones of two victims who had occasion to see carrying out criminal acts till the detainees were taken to the army camp at a place nearby Lichu Poddar's house speaks a lot about the chained criminal acts. However, they naturally had no opportunity to see what happened next to taking the detainees at the army camp. It stands proved beyond reasonable doubt from their evidence that-

(a) First, the victims were forcibly taken to Lichu Poddar's house, on capture. The local Peace Committee office was situated at that house. The act of capture of victims was done by some cohorts of accused Qaiser, on his instruction, as stated by P.W.23.

(b) Second, the detainees, in captivity, were grilled under coercion and torture, for extracting information about the freedom fighters and arms. Accused Qaiser was there and led the act of grilling torturing the detainees, as stated by P.W.23 and P.W.24.

(c) Third, on failure to extract information, the detainees were brought to the army camp which was one mile far from Lichu Poddar's house. Accused Qaiser led the group in taking the detainees to the army camp, as stated by P.W.23.

(d) Finally, the detained victims were gunned down to death at a place near the Nalua tea garden, One Razakar Hamdu Mia was with the group of perpetrators and after accomplishing the act of killing he, on the following day, informed the relatives of victims about their tragic fate. P.W.23 and P.W.24 testified it, corroborating each other on fundamental feature.

742. The above material facts proved by direct evidence impel us to conclude that the accused Qaiser actively participated in carrying out the coercive act of grilling the detainees at the peace committee office and that afterwards he accompanied the group in taking the detainees to the nearby army camp. Concern or involvement of the accused Qaiser with the final phase of the event that resulted in killing the detainees naturally no one could witness. The witnesses, on the following day, heard of it from one Hamdu Razakar an accomplice of the group of perpetrators. What about accused's involvement in respect of the act of forcible capture of victims from their house? None of two witnesses claim to have seen the accused accompanying the group of local Razakars while they forcibly took away the victims, true. The learned defence counsel argued that since prosecution failed to prove accused's involvement with the initial phase of the event he cannot be held connected with the act of killing.

743. We disagree with the learned defence counsel. It transpires that the total event consisted of four phases. And the final phase was the execution phase with which the event ended. Accused Qaiser is found to have had physically present at all phases excepting the phase of forcible capture of the victims. According to settled jurisprudence any act or conduct of an individual amid or prior of after the event of principal offence connects him responsible for the principal act, if such act or conduct had substantially facilitated the commission of the principal offence and thus an individual need not be shown to have participation in all phases of the event.

744. The charge framed alleges that the accused Qaiser led the gang formed of Razakars and members of peace committee forcibly abducted the victims and brought them to the local peace committee office at the house of one Lichu Poddar. But the evidence of P.W.23 does not speak of physical presence of accused Qaiser with the group at the time of forcible capture of the victims, true.

745. Leading the gang in capturing the victims has not been substantiated by the witnesses, the learned defence counsel submitted adding that as a

result accused's involvement stands falsified. The accused was not concerned with the act of alleged forcible capture of four persons.

746. It is found from the evidence of P.W.23 that the members of peace committee and Razakars forming the group asked her father and three others to go with them as instructed by Qaiser to the local peace committee office. It indicates sufficiently that the group initiated their attack in accomplishing the act of victims' abduction on instruction of accused Qaiser. Who can instruct and lead a group in carrying out a criminal act of abduction? The word 'leading' does not imply physically leading a group. Even without being present at the crime site an individual may act in leading it over which he does have some kind of substantial influence and guidance.

747. Accused Qaiser is the founder of 'Qaiser bahini', a private outfit. He was also associated with the peace committee. Razakar was an auxiliary force and it was placed under the control of the Pakistan armed force, for static and operational purpose. Accused Qaiser and his private outfit were not distanced from the objective of Razakar force and peace committee. Rather, we have already found that the accused along with his 'force' formed of his loyal men actively and culpably assisted the army, in furtherance of common policy and plan. The history as well says that all these [forces] used to act and collaborate with the Pakistani army jointly in carrying out atrocious activities.

748. Additionally, according to P.W.3 Tajul Islam a pistol, a wireless set and a bag for keeping bullets were given to Qaiser. Qaiser had gone on to form Razakar Bahini, another auxiliary force of the Pakistan army, following the advice of the Shanti Committee and gave them necessary training at Niyaz Park in Brahamanbaria. This pertinent narration of P.W.3 Tajul Islam an accomplice of accused Qaiser adequately reflects accused's influence and culpable affiliation not only with the Pakistani army but also with the Razakar force and peace committee.

749. The information narrated in the book titled *Ógnyhxi Biznami tLutR : ZvRj tgvnrš, cKvkKij 2001, cŷv-127 [e-‘cŪkŌx-S in#mte WPyZ]* speaks that the notorious collaborator Syed Md. Qaiser had assisted the army coming and setting its camp at Chunarughat. It demonstrates how potential and loyal aide the accused Qaiser was of the occupation army. It is historically known that in 1971 during the war of liberation, all the groups or forces formed of local collaborators and pro-Pakistan people stood on same platform, in furtherance of common purpose and their policy was to wipe out the pro-liberation Bengali civilians and the freedom fighters whom they termed as ‘miscreants’.

750. It is found that at the peace committee office when the captured four civilians were brought they were grilled under coercion and torture on active instruction of accused Qaiser to extract information about the freedom fighters and their arms. Thus, the reason of bringing them there on capture stands clear. Presumably on failure to get any information they were brought to the nearby army camp and there from to the crime site where the army men gunned them down to death, on accused Qaiser’s instruction. At the time of forcible capture, the victims were non combatant. Accused Qaiser’s act forming part of attack against the non combatant civilians eventually led to the act of their killing in committing which he consciously participated.

751. An individual is termed as a ‘leader’ when his activity aims and involves establishing a common purpose by sharing the vision with others so that they will follow or obey him willingly. Leadership is a process whereby an individual influences a group of individuals to achieve a common objective. Leadership is a process by which a person influences others to carry out an organizational objective. Accused Qaiser is alleged to have had led the gang in picking up the four victims forcibly to the peace committee camp.

752. Even without being in any formal or informal superior position of the attackers an individual may order or instruct them in carrying out unlawful act, by dint of his potential alliance with them to further the

common object. The Tribunal notes that 'leading' the gang does not necessarily mean that the accused must physically accompany the group and present at the crime site. Even by act of guiding the group, remaining far from the crime site one may be said to have had led the gang, by his act, conduct and potential position.

753. Taking the above position into account we thus may reasonably conclude that the accused Qaiser, a local potential aide of the Pakistani army, had influence and *de facto* authority to guide and regulate even the local Razakars and members of peace committee. It has been found from evidence that the detained civilians were first brought to the peace committee office at Lichu Poddar's house where accused Qaiser grilled them under coercion and torture. Therefore, and the evidence of P.W.23 impels the conclusion that the group had acted under the active guidance of the accused in forcible bringing the victims to him and thereby the accused led the group in carrying out the action of forcible capture of four victims who were in support of the war of liberation.

754. P.W.23 and P.W.24 do not claim that they had witnessed the event of actual commission of killing. They stated that they learnt it, on the following day, from one Hamdu Razakar, an accomplice of the group of perpetrators. The fact of such learning about the killing remained unshaken. The hearsay testimony of these witnesses so far as it relates to presence of accused Qaiser at the crime site and providing approval to gun down the victims to death remained unimpeached. It is immaterial to prove actually which member of the group of attackers gunned them down to death. Besides, the witnesses who lost their dear ones came on dock long four decades after the horrific event committed. Naturally, it is impracticable to memorize exactitude what they heard from Hamdu Razakar about the event of killing.

755. In cross-examination, knowing the fact of victims at a place near the Nalua tea garden from Hamdu Razakar, as stated by P.W.23 does not appear to have been denied or refuted. Be that as it may it becomes re-affirmed that Hamdu Razakar was with the group of perpetrators at the

crime site and had occasion to see the act of killing. Thus the hearsay testimony in respect of the role of accused Qaiser in effecting the killing at the crime site inspires credence. Besides, seeing the accused Qaiser approving and encouraging his accomplices causing coercion and torture to the victims at the peace committee office also adds assurance to accused's concern and participation even in committing the principal offence of murder.

756. We cannot accept the argument made by the learned defence counsel on the issue of credibility of P.W.23 and P.W.24. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses. It would be mistaken and unjust to treat forgetfulness as being synonymous with giving false testimony. We are to make rational evaluation and comparison of the testimony of each witness with the testimony of other witnesses and also with the surrounding circumstances and other relevant facts divulged from their evidence. Thus, it would be jurisprudentially logical if, in the process of appraisal of evidence, we separate the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon.

757. The act of forcible capture was the first phase of the whole and chained criminal enterprise. The accused Qaiser is found to have had part and concern in all the phases of chained criminal acts constituting the offence of murder. The evidence presented and the argument advanced by the learned prosecutor inspire us to conclude that on having information about their return from India in the locality, the local Razakars and accomplices of accused Qaiser apprehended the victims and took them forcibly at the peace committee office. And inevitably it was an organised attack against non combatant civilians.

758. It has been proved beyond reasonable doubt that the accused Qaiser, at the peace committee office, ordered to coerce and mistreat them. Such act coupled with the act of his presence there and also at the killing site validly suggests that accused Qaiser had conscious approval and

endorsement and participation in committing the principal act of killing the defenceless detainees.

759. We have already recorded the settled proposition, in adjudicating charge no.9 that ‘murder’ as a crime against humanity as enumerated in the Act of 1973 does not require the Prosecution to establish that the accused personally committed the act of killing. Personal commission is merely one of the modes of responsibility. An accused can also be found guilty of a crime enumerated in the Act of 1973 on the basis of his act and conduct constituting the act of ‘participation’ by way of providing express approval and encouragement that substantially facilitated the commission of crime. The entire event as depicted from the chronology of chained criminal acts was the outcome of a planned attack orchestrated to which accused Qaiser was a part, knowing the consequence and sharing the intent of the principal perpetrators, the army men. Accused Syed Md. Qaiser is therefore found criminally liable under section 4(1) of the Act of 1973 for participating, abetting, facilitating and contributing the actual commission of killing of 04 unarmed civilians forming part of attack against the civilian population constituting the offence of ‘**murder**’ as **crime against humanity** as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act.

Adjudication of Charge No. 14

[Killing of 04 civilians at Sonai River Bridge on capture from village Moujpur]

760. Charge: That on 29 September 1971 in between 05:00-05:30 am and 02:00-02:30 pm a group of 40- 45 Razakar members, peace committee members and member of Pakistani occupation armed force attacked the house of freedom fighter Seraj Ali at village Moujpur under Madhabpur police station district Habiganj and on instruction of accused Syed Md. Qaiser **(1)** Akkas Ali, **(2)** Abdus Sattar, **(3)** Wahed Ali and **(4)** Seraj Ali were captured and your companions and the army started causing torture to them. Afterwards, the captured persons were brought to the bridge over the river *Sonai*, about 03 kilometers far from Moujpur village where they

were gunned down to death by accused, his companions and the army and their dead bodies were thrown to the river. Therefore, accused Syed Md. Qaiser has been charged for participating, facilitating and contributing the actual commission of killing of 04 unarmed civilians constituting the offence of ‘**murder as crime against humanity**’, as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. And thus the accused incurred liability under section 4(1) of the Act.

Witnesses

761. Prosecution relies upon P.W.26 Majeda Khatun @ Jamila Khatun, daughter of Akkas Ali, one of four victims and P.W.27 Renu Mia the son of another victim freedom fighter Seraj Mia. They claim to have seen the event of abduction followed by the act of killing of their dear ones who were allegedly taken away, on forcible capture, to the bank of river Sonai. P.W.1 Kazi Kabiruddin is a hearsay witness. Prosecution also relies upon the book titled *Óm!j #U MYnZ`v: ZvRj Bmj vg tgunv\$ Ó* [Material Exhibit-Ja, published in 1989, book’s relevant page 273] to substantiate the killing of two victims.

Evidence Presented

762 P.W. 26 Majeda Khatun @ Jamila Khatun[74] , a martyred freedom fighter's daughter in giving a first-hand account testified that 12th day of Aswin [corresponding to 29 September 1971] her father Akkas Ali , Seraj Mia, Wahed Ali, Sattar had been sleeping at the house of their neighbour Renu Mia, the son of Seraj Mia. As they heard the next morning that Panjabees [Pakistani army] had gone to that house in search of freedom fighters, they rushed there and found Alauddin of Sultanpur and Rawshan, one from their village with the Panjabees [Pakistani army] . When 20/25 people were taking her father and his father’s friends away, she saw a man in ‘white shirt-pant’--his name was Qaisar Razakar and he had a pistol on his waist, stated P.W.26 Majeda. They [attackers] then took her captured father and his friends towards Jagadishpur army camp.

With this she, Nil Banu the mother of Renu [wife of captured Seraj Mia], Renu Mia [P.W.27] and 5-7 of their neighbours started following them.

763. P.W.26 stated further that when her father and his friends were being tortured in front of Jagadishpur camp [army camp], they attempted to go near. But Razakar Qaisar intercepted them and pushed them down. They saw, afterwards, that the detainees were taking towards the southern direction and they again started following them and finally the detainees were taken at the bank of river Sonai where they found many army men and Razakars. They begged for the life of the detainees touching the feet of Qaisar Saheb [accused], but he pushed them aside. They saw the detainees made to stand in a line and the Pakistani army men gunned them [04 detainees] down to death, on signal of Qaiser and dumped their bodies into the river, stated P.W.26 Majeda. When Qaisar and his accomplices had left the crime site, they tried to find out the bodies but found none.

764. In respect of reason of recognizing the accused Qaiser, P.W.26 stated that she knew Qaiser since prior to the event as she had occasion to see him[accused] when he used to come their locality[before the war of liberation ensued] in connection with the election campaign. Qaiser could not be traced after the independence as he fled away, P.W.26 added.

765. Defence could not bring anything, by cross-examining the P.W.26, which can visibly controvert what has been testified by her. It simply denied what has been narrated in examination-in-chief.

766. P.W.27 Renu Mia [58] the son of a martyred freedom fighter Seraj Mia, a neighbor of P.W.26, testified corroborating P.W.26, how his father and 03 others were abducted and killed. He stated that his father and the three of his fellow freedom fighters had been sleeping at their house on the night of the 11th of Bangla month Aswin [corresponding to the end of September]. The next morning, he came out of their house as he heard shouting of people and saw many people in 'khaki' dress and 'brown dress' in the village and around 20/25 brown-dressed people entered their home and dragged his father and the three out. He could identify Alauddin

and Rawshan of their village, who had also entered their house with the 20/25 men. When his father and the three others were taking to Jagadishpur camp, he, his mother and Majeda followed them.

767. P.W.27 also stated that at Jagadishpur camp they saw brown-uniformed people and a man in 'white dress' torturing the four and when he inquired about the identity of the white-dressed man, locals said it was Qaisar. They [locals] also told him to approach Qaisar to get his father released. Then he went to him [Qaisar] and appealed to release his father and the other detainees. But he [Qaisar] did not respond; rather a man in 'khaki' dress started beating them up following his [Qaisar's] signal.

768. P.W.27 next stated that half an hour later, the four detained freedom fighters were taken to the bank of Sonai River and they also arrived there by following them and saw them made 04 detainees queued up on the bridge. And a brown-dressed man gunned them down to death following the signal of white-dressed Qaisar [accused]. As they fell on the ground, several brown-dressed men kicked their bodies into the river, P.W.27 stated. Later they searched for the bodies but could find none. They returned back home and in night they had gone to Katlamara refugee camp in India and later going to freedom fighters' camp informed Kazi Kabiruddin[P.W.1, a valiant freedom fighter] of the event of killing.

769. P.W.1 Kazi Kabiruddin [65], a valiant freedom fighter stated that his co-freedom fighters of village Moujpur informed him that on 29 September [1971], in early morning Pakistani army accompanied by Qaisar and his private outfit 'Qaisar Bahini' had killed freedom fighters Sattar, Wahed Ali, Akkas, Razzak at the bank of river Sonai by taking them there forcibly by raiding the house of Akkas.

Deliberation and Finding with Reasoning

770. This charge involves murder of 04 civilians occurred on 29 September 1971, as a result of systematic attack, the learned prosecutor submitted, adding that the prosecution relies upon P.W.26, P.W.27 and P.W.1, to prove this charge. Of these three witnesses, P.W.26 is the

daughter of victim Akkas Ali and P.W. 27 is the son of victim Seraj. All the four victims were freedom fighters. At the relevant time they had been staying at the house of Seraj the father of P.W.27 Renu, returning from India. Presumably, they were apprehended for their strong pro-liberation distinctiveness. P.W.26 and P.W.27 described how the victims were forcibly taken by the accomplices of accused Qaiser, on capture first to the army camp at Jagadishpur High School where the witnesses made appeal to accused Qaiser for release of their dear ones. But accused Qaiser had hurt them without paying heed to it and there from the captured victims were taken towards the bank of the river Sonai where on instruction of accused Qaiser the detained victims were gunned down to death, the witnesses saw.

771. The learned prosecutor submitted that defence could not dislodge the version made by these two witnesses, on material particular and there has been no reason to disbelieve them. Defence however, simply denies the involvement of accused with the event. But mere denial is not at all sufficient to exclude what has been testified by traumatized witnesses. The event once again proves that freedom fighters and pro-liberation people of the locality were the targets of the accused and he to further the policy and plan of the Pakistani occupation army, formed a private outfit after his name and started collaborating the army since their rolling into Habiganj sub-division, in carrying out atrocious activities in 1971, during the war of liberation.

772. On contrary, the learned defence counsel Mr. SM Shahjahan submitted that this charge involves the event of killing of 04 civilians near Sonai River Bridge where they were allegedly brought on capture by the perpetrators on instruction of accused Qaiser. Prosecution relies upon the P.W.26 and P.W.27 who claim that the victims were first brought to Jagadishpur army camp. But the charge framed does not allege so. P.W.26 does not claim that accused Qaiser himself killed the victims. P.W.27 stated that brown colour uniformed men had killed the victims on signal of Qaiser. Such inconsistency, on material particular makes their testimony unreliable. These two witnesses, the learned defence counsel

submitted, do not allege that accused Qaiser was with the group while it had picked up the victims forcibly. The event of killing did not take place in the manner and on the date alleged. Accused Qaiser was not at all involved with the commission of the crime alleged.

773. The charge involves the act of forcible abduction of 04 civilians from the house of victim Seraj Mia [father of P.W.27] and the event of killing them by taking to the bank of river Sonai. Both the phases happened successively and on the same day and in conjunction with the same attack.

774. Prosecution requires proving the commission of offences first and then needs to establish how the accused Qaiser had acted to make him 'concerned' in facilitating the commission of the principal offence of murder of 04 civilians. Prosecution solely depends upon oral testimony of two witnesses, the near relatives of two victims.

775. P.W.26 is the daughter of victim Akkas Ali. Another victim Seraj Mia was their neighbour. They and two others i.e. Wahed Ali, Sattar had been sleeping at the house of Seraj Mia [the father of P.W.27 Renu Mia], at the relevant time. Seraj Mia and other victims were freedom fighters, as stated by P.W.27. Presumably this was the reason of the attack against them that resulted in their forcible capture followed by brutal killing.

776. The learned defence counsel chiefly argued that the accused was not involved with the criminal acts, in any manner. The witnesses do not allege that accused Qaiser was with the group while it had picked up the victims forcibly. The event of killing did not take place in the manner and on the date alleged.

777. The essence of argument as advanced by the learned defence counsel leads us to presume that the forcible capture of victims is not disputed and however it claims that the event of killing happened on some other date and in manner. But any specific defence case in the form of suggestion, in this regard, does not appear to have been found place in the cross-

examination of any of two witnesses who had occasion to see the abduction and taking them to the bank of river Sonai, the crime site

778. The learned defence counsel further submitted that according to P.W.s the captured victims were taken first at the Jagadishpur army camp. But the charge framed does not allege so. Such narration on a fact not described in the charge framed makes the testimony of the witnesses untruthful and thus they cannot be relied upon.

779. We are not with the above argument. The principal event was causing death of captured victims by gunning them down at the bank of river Sonai. There can be no bar in narrating ancillary fact which has not been described in the charge framed but materially related to the principal offence. The charge does not require narrating the entire scenario of a 'group crime'. Before commission of the principal crime of murder as crimes against humanity, many other matters might have happened that did not require to be necessarily described in the charge framed.

780. The witnesses made first hand account of abducting the victims, their near ones and also of taking them to the bank of Sonai river, the crime site where the victims were gunned down to death. The witnesses do not allege that the captured victims were kept detained at Jagadishpur School camp. Within half an hour after taking them at the camp they were taken to the killing site, as found from the evidence of P.W.s. In fact, the victims were taken to the crime site, the bank of river Sonai *via* the said camp, as understood. Mere non disclosure of it in the charge framed does not cause any prejudice to the defence, in true sense.

781. We are to mainly adjudicate whether the victims were so forcibly captured and finally gunned down to death at the bank of Sonai River. At the same time it is to be determined, on the basis of evidence and material facts as to who the physical perpetrators were and whether accused Qaiser had acted in any manner in accomplishing the principal offence of killing 04 non combatant freedom fighters.

782. From evidence of P.W.26 it transpires that the victims were freedom fighters and had been sleeping at the house of Seraj Mia, the father of P.W.27. In early morning, on the day of the event, a group of 20-25 perpetrators accompanied by brown-dressed men by launching attack apprehended the victims. It stands proved by the corroborative evidence of P.W.26 and P.W.27.

783. Indisputably the reason of taking away the victims on forcible capture was to wipe them out as they were freedom fighters whom the Pakistani army and their local collaborators termed as ‘miscreants’, in furtherance of policy and plan. At the time of effecting victims’ forcible capture they were non combatant and thus the attack launched was directed against ‘civilian population’.

784. Defence does not challenge the authoritativeness of the book titled *Ómııj tU MYnZ`v: ZıRjı Bmjıg tıgıvııŞ Ó* [**Material Exhibit-Ja**, published in 1989, book’s relevant page 273] relied upon by the prosecution. The information as regards the martyrdom of Akkas Ali [father of P.W.26] and Seraj [father of P.W.27] finds place at page 273 of this book. The pattern of narrative recorded in this book also lends support that the victims’ dead body could not be traced even. It rather lends assurance that after killing, the bodies of victims were dumped to the river Sonai.

785. In cross-examination, in reply to question elicited by the defence, P.W.26 stated that prior to going to the camp at Jagadishpur School, on the day of incident, she had never gone there. With this the act of taking the victims, on capture, to that camp and that P.W.26 and others had gone there have rather been re-affirmed. It lends credence to the testimony of P.W.26. Testimony made by this P.W.26 on material particulars remained unimpeached. Besides, in cross-examination, defence simply put suggestion that accused Qaiser was ‘not involved’ in any such incidents and she had made ‘false testimony’. P.W.26 denied it.

786. P.W.26 and P.W.27 claim to have seen the act of taking the victims on capture and they started following the group moving towards

Jagadishpur army camp. Naturally, P.W.27 too had occasion to see the 'white dressed' accused Qaiser with the group while they forcibly picked up 04 victims. But P.W.27 does not state so. However, mere omission to state it does not make his [P.W.27] statement inconsistent with that of P.W.26 and it does not give rise to any doubt as to the presence and concern of accused Qaiser at the time of carrying out the act of forcible capture of victims, the first phase of chained events if other facts are found suffice to connect the accused with it. .

787. Accused Syed Md. Qaiser was found present both at the Jagadishpur army camp and at the bank of river Sonai, the killing site, as well. Running after the perpetrators to get their dear ones released was natural. It is found from the evidence of P.W.26 and P.W.27 that the group who had abducted the victims formed of brown-dressed men, apart from khaki uniformed men [army].

788. Who were those brown-dressed men? We have got from evidence of P.W.3 Tajul Islam a member of Qaiser Bahini that the private outfit known as Qaiser Bahini was provided with 'brown coloured' dress and accused Qaiser founded this force. Thus, presumably the men in 'brown-dress' the P.W.s saw accompanying the Pakistani army in all aspects of the event were the members of 'Qaiser Bahini', a private outfit formed locally by accused Qaiser.

789. Now the question is whether the members of such private outfit would have participated in carrying out any criminal activity without knowledge of accused Qaiser who was its leader and founder. The answer is simply 'no'. Be that as it may, we may safely conclude that the members of Qaiser Bahini actively collaborated with the army in accomplishing the act of forcible capture of victims, on approval and endorsement of accused Qaiser. It gets further strength when the accused is found present at Jagadishpur army camp where he had caused torture to the detainee victims, as stated by P.W.s.

790. The charge framed alleges that on accused Qaiser's instruction the group formed of Army and local collaborators had committed the act of abduction 04 victims by forcible capture. It is now settled that an accused may take part to the commission of an offence even by remaining distanced from the crime site, by providing instruction or by any culpable act. The act of instruction may not always be tangible one. It is to be inferred from facts and circumstances.

791. We have got from evidence of P.W.26 and P.W.27 that 'brown-dressed' men [members of Qaiser Bahini] accompanied the group in launching the attack at village Moujpur securing forcible capture of victims. Obviously, the members of Qaiser Bahini had acted, by accompanying and assisting the army men, in accomplishing the act of abduction, on their founder and leader accused Qaiser's approval that was indistinguishable to 'instruction'.

792. The context and pattern of the attack offers indisputable conclusion that the group accompanied by the members of Qaiser Bahini was with the mission within knowledge of accused, their leader. And the leader need not be physically present at the crime site for providing 'instruction' or 'order' to the principal offenders. Act of accused subsequent to the act of abduction, as found proved once again leads us to conclude that the victims were abducted on forcible capture on accused's instruction and approval.

793. Presence of 'brown-dressed' men [belonging to Qaiser Bahini] at the killing site remained unshaken. It by itself lends support too to the fact of accused's presence there. It is to be noted that without being locally collaborated and abetted the Pakistani occupation army could not get it identified as to who were the freedom fighters and where they had been staying. Qaiser Bahini, under the guidance and leadership of accused Qaiser had successfully collaborated with the army in targeting the pro-liberation Bengali civilians and freedom fighters whom they used to term as 'miscreants', to further policy and purpose of their annihilation.

794. It is found that P.W.26 and P.W.27 accompanied by others had followed the perpetrators to the Jagadishpur army camp and then to the bank of river Sonai, the killing site. They have testified what they had witnessed in relation to the facts linked to the principal event of killing. Thus, naturally one may say that their testimony made before the Tribunal must be fully consistent to each other. But in reality it is not practicable. Non description of accused's presence with the group while abducting the victims forcibly does not readily render accused's 'concern' with the act of abduction committed. Description narrated by one is based on his own observation. Besides, due to lapse of long passage of time one's memory may be faded. At the relevant time, P.W.27 was a boy of 13 years of age while P.W.26 was an adult woman. Thus, P.W.27 might have failed to recall detail precision that resulted in non description of accused's participation to the act of abduction. But however, he corroborated that the group was formed of many 'brown-dressed' men [members of Qaiser Bahini]. Naturally, in making description, discrepancy between witnesses' versions may occur. But merely for this reason their testimony cannot be turned down terming contradictory or unreliable.

795. P.W.1 Kazi Kabiruddin is a hearsay witness. He had been in India, at freedom fighters' camp. According to him he had learnt from his co-freedom fighters of Moujpur village [the village wherefrom the victims were forcibly captured] that on 29 September [1971] Pakistani army accompanied by Qaiser and the members of Qaiser Bahini had committed the act of forcible capture of victims followed by their killing at the bank of river Sonai. It stands proved that the perpetrators had abducted the victims, on capture from village Moujpur. Naturally the villagers might have known the event. Thus, learning the event from co-freedom fighters of Moujpur village was quite natural, particularly when the victims were also freedom fighters. Besides, his hearsay testimony gets corroboration from the evidence of P.W.26 and P.W.27.

796. It is to be noted that the Evidence Act does not have applicability in a trial under the Act of 1973[section 23 of the Act of 1973]. Even the Tribunal shall not be bound by technical rules of evidence [section 19(1)

of the Act of 1973]. But we are to keep in mind the fundamental principle of weighing the probative value of evidence presented. And in doing so the core essence and fundamental feature of witness's testimony is to be viewed with caution and the conclusion to be drawn thereupon is to be irresistibly inconsistent with the innocence of accused.

797. P.W.26 and P.W.27 made discrepant version as to the actual perpetrator of the act of killing. Yes, according to P.W.26, army men gunned down the victims to death, on signal of Qaiser. When P.W.27 stated that he saw 'brown-dressed' men gunning down the victims to death on Qaiser's signal. It is quite immaterial to argue who actually had killed the victims taken at the bank of river Sonai. Both the witnesses who had seen the event of killing taking place saw accused Qaiser present there. Their version in this regard remained unshaken and we find no reason to exclude it from consideration. Accused's presence at the crime site together with his act and authority over the members of Qaiser Bahini accompanying the principals is suffice to prove his 'participation', substantial contribution and abetment on the commission of the killing, to further common purpose and design..

798. In view of above reasoned discussion based on evidence presented, we are of the view that even if we exclude the evidence of P.W.26 and P.W.27 so far as it relates to accused Qaiser's presence with the group of attackers at the time of forcible picking up the victims, on ground of discrepancy, accused Syed Md. Qaiser's act and 'concern', as found proved, makes him responsible, beyond reasonable doubt, for the act of abduction, particularly when his act subsequent to the abduction unambiguously proves his 'concern' , 'participation' and substantial contribution in accomplishing the actual offence of killing 04 civilians.

799. Accused Syed Md. Qaiser is therefore found criminally liable under section 4(1) of the Act of 1973 for participating, abetting and substantially contributing, by his act and conduct forming part of attack, the actual commission of killing of 04 unarmed civilian constituting the offence of **'murder' as crime against humanity** as specified in section 3(2) (a)

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

Adjudication of Charge No. 15

[Killing of Md. Nazamuddin at army camp at Shahajibazar Biddut Kendra]

800. Charge: On any day during mid of the month of October 1971, in the evening, a group of Razakars and members of 'Qaiser Bahini' following instruction of the accused Syed Md. Qaiser apprehended Md. Nazim Uddin from his house at about 05:00 pm and brought him to accused Syed Md. Qaiser at Shahpur road wherefrom accused Qaiser picking him up to his jeep brought him to his house where he was kept detained and tortured by accused for one day and then was brought to army camp at Shahajibazar Biddut Kendra where he was kept detained for 20 days and was subjected to torture and eventually he was brutally killed by 'Qaiser Bahini' led by accused Qaiser, Razakars and Pakistani army and his dead body was buried behind the Biddut Kendra. Therefore, accused Syed Md. Qaiser has been charged for **participating, abetting, facilitating and substantially contributing** the actual commission of killing of **01** unarmed civilian constituting the offence of '**murder**' as **crime against humanity**' as specified in section 3(2) (a) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act and thus incurred liability for the above offences under section 4(1) of the Act.

Witnesses

801. Prosecution relied upon P.W.1 Kazi Kabiruddin a gallant freedom fighter to prove this charge. He narrated facts materially related to the event, prosecution alleges. Additionally, prosecution also relies upon the narrative made in the book titled '**Associates of Pakistan Army**' authored by ASM Samsul Arefin [published in December 2008] and a report published in the **Daily Janakantha**, 02 February issue of 2001 intending to substantiate the fact of killing the victim Nazimuddin a member of guerilla group. The event of his abduction on capture from his house took

place on any day during the mid of the month of October 1971, the charge framed arraigns.

Evidence Presented

802. P.W.1 Kazi Kabiruddin [65] is a gallant freedom fighter. At the relevant time he had been around the locality of Nasirnagar. He stated what he saw in respect of forcible capture of Nazimuddin a member of guerilla group. He stated that he assisted a group of 21 guerillas coming to Nasirnagar locality, on instruction of his commander Captain Nuruzzaman on 11 October 1971. After causing stationing of the group there, on his way of return in the early morning he saw Nazim a member of the guerilla group who became detached from the group as he came out to respond call of nature and was standing inside the *saal* forest, missing the way to back. With this he [P.W.1] took him to their camp.

803. P.W.1 stated further that on the following day, he along with Nazim and co-freedom fighters moved towards Shahpur to capture Qaiser. Taking position at a place he [P.W.1] sent Nazim for knowing Qaiser's location.

804. P.W.1 stated that at a stage, he, through the binocular with him, could see, from a small hill inside the *saal* forest, that some men had caught Nazim and some times later Qaiser arrived there by a jeep and getting down of the jeep he slapped Nazim and inquired of some information. P.W.1 stated that next Qaiser lifting Nazim there from had left the place by the jeep towards Noapara. It was about 04:00 or 05:00 pm. After taking Nazim on capture they [P.W.1 and his co-fighters] retreated and took position at a secret place inside the tea garden and after the dusk they started for their camp.

805. P.W.1 also heard the event from the father of Nazimuddin, after the independence when he [P.W.1] came back to his native home. He stated that Nazim's father Afsar Uddin Mahalder told him that Nazim came to home as he was sent by him [P.W.1]. On getting information Qaiser and

his accomplices had picked up Nazim, on capture, from their house and took him to Qaiser's home at village Noapara where he was subjected to torture. Later on, Nazim was handed over to the army camp at Shahajibazar WAPDA rest house where he was kept in captivity for 20 days and eventually tortured to death.

Deliberation and Finding with Reasoning

806. The learned prosecutor submitted that in order to prove this charge, prosecution relies only upon P.W.1 Kazi Kabiruddin a valiant freedom fighter who had been around the locality wherefrom victim Nazimuddin was abducted forcibly, at the relevant time. Victim Nizamuddin was a member of guerilla group and was with P.W.1 on the date, up to a certain time. After releasing the victim, by P.W.1, from their secret position inside the 'Sal forest' [kvj eMhb] for collecting information, P.W.1, some times later, saw through his binocular the accused Qaiser and his cohorts taking away the victim on capture. After independence, P.W.1 also heard from the father of the victim that he was so captured and brought to the army camp at Shahajibazar Biddut Kendra where he was tortured to death, in captivity.

807. The learned prosecutor further argued that the defence does not dispute the killing of Nazimuddin at the army camp at Shahajibazar, in captivity. Defence failed to cross-examine P.W.1 on material particular. However, it simply denies accused's complicity with the event, in any manner. But the ocular evidence of P.W.1 together with what he heard subsequently from the father of the victim impels beyond reasonable doubt that the accused Qaiser who was extremely antagonistic to the freedom fighters and pro-liberation people and his accomplices had picked the victim up and took him to the army camp. This culpable act of the accused that he had done in furtherance of common purpose and object makes him responsible for substantial contribution to the actual commission of the offence of murder of a non combatant freedom fighter Nazimuddin.

808. Conversely, the learned defence counsel Mr. SM Shahjahan argued that the prosecution failed to prove this charge involving killing of Nazimuddin that allegedly happened at the army camp at Shahajibazar. Prosecution relies only upon P.W.1 Kazi Kabiruddin who did not claim to have had seen the event of killing. Evidence of P.W.1 in respect of seeing the accused Qaiser and his cohorts picking up the victim forcibly, through binocular from inside the *saal* forest was inherently impossible. Besides, this piece of testimony contradicts to what he heard, later on, from the father of the victim, in respect of alleged abduction. Prosecution could not prove the place of forcible capture of victim Nazimuddin. Thus, accused's involvement with any phase of the event does not stand at all. Besides, the charge framed does not allege that accused Qaiser was with the group that allegedly abducted the victim. Near relative of victim or any of his family inmates could be the best witness, to prove this charge. But prosecution failed to bring and examine any such witness.

809. Let us have a look first to the narratives made in the books relied upon by the prosecution. The information narrated in the book titled '**Associates of Pakistani Army**' [Material Exhibit-Ga, book's page 93] provides assurance to the fact of killing Nazimuddin. This book further narrates that -

"Freedom fighter Nazim was arrested from a hide out by Kaiser Bahini and taken to his camp. He was tortured for 21 days, then shot to death."

810. On the event of killing Nazimuddin another narrative made in the book titled '**Sei Razakar**' [Material Exhibit-Kha, at page 224 states that-

ÒkvnRxeiRvi we`ž Drcv`b tKt`f Af`šfi i cwiK tmbv I
ivRvKvi†`i Av`lvv Dov†bvi Rb` bwiRg I Zvi mv_x divi†K
civ†bvi n†j ¶zavZ`bwiRg fvZ Lvl qvi Rb` evox hvq| G Lei
†c†q ÒKvqmi evmbx† bwiRg†K a†i kvnRxeiRvi K`††ú†q hvh|
†mLv†b GKUv†v 21 † b Agv†††K †bhvZ†b Pw†††q bwiRg†K †ij K†i
nZ`v Kiv nq| Ó

811. Forcible capture and killing of Nazimuddin, a non combatant freedom fighter is not disputed. Rather, it stands proved even from the narratives made in the above books. But the book titled '**Associates of**

Pakistani Army' [book's page 93] narrates that Nazim was taken to the camp of 'Qaiser Bahini', on capture from a 'hide out'. This narration does not go with the testimony of P.W.1. The other book titled '**Sei Razakar'** narrates that Nazim was caught from his 'paternal home'[not from a 'hide out'] by the members of Qaiser Bahini and he was taken straight to the 'army camp at Shahajibazar' and finally he was shot to death there during captivity.

812. The narratives made in the books seem to be conflicting so far as it relates to the place of Nazim's capture and the place where he was forcibly taken. The book titled '**Associates of Pakistani Army'** narrates that on capture Nazim was taken to the camp of Qaiser Bahini' where he was tortured for 21 days and then shot to death. But the another book titled '**Sei Razakar'** speaks that on capture by the members of Qaiser Bahini the victim was straight taken to the army camp at Shahajibazar.

813. Although P.W.1 stated that he heard from Nazim's father that Nazim was first taken to Qaiser's house at Noapara by a group accompanied by accused Qaiser. Thus, the narrative made in either book does not show that accused Qaiser was with the group of attackers who allegedly abducted Nazim. Additionally, version of P.W.1 does not conform to the narrative of the above books, on material particular.

814. P.W.1 narrated how he could see, from inside the '*saal*' forest, the accused Qaiser and his accomplices taking away the victim Nazimuddin forcibly by a jeep. But how P.W.1 could 'see' and 'hear' that Qaiser inquired of some information from Nazim? What was the distance between the place where from he allegedly saw the accused taking away Nazim on forcible capture and the place where accused Qaiser arrived by a jeep? Was it possible to see all these taking position inside a '*saal*' forest? Testimony of P.W.1 suffers from absence of clarity on these crucial matters which are inevitably necessary in assessing credibility of his version. P.W.1 did not clarify all these pertinent matters.

815. On evaluation of the evidence of P.W.1 so far as it relates to seeing the act of Nazim's abduction it transpires that after sending Nazim for knowing the position of accused Qaiser, P.W.1 could see, through the binocular with him, that Nazim was caught by some men and accused Qaiser arrived there by a jeep and then they took Nazim away forcibly by that jeep towards Noapara. That is to say, according to P.W.1 Nazim was so captured from a 'place' and not from his 'house' which is contradictory to what P.W.1 heard from Nazim's father, after the independence.

816. Prosecution produced and cited none of Nazim's relatives or family inmates who could be the best witness for proving the fact of Nazim's capture. The Investigating Officer could have done smarter task, for the purpose of determining accused Qaiser's liability with any of phases of the event. We are not convinced that P.W.1 had reasonable and practicable opportunity of seeing the act of forcible capture of Nazimuddin from the place in the manner he stated. Besides, this part of his testimony does not conform to what he subsequently heard from Nazim's father in respect of the manner of Nazim's abduction and Qaiser's concern with it.

817. The narratives made in the above mentioned two books that the prosecution intended to rely upon do not appear to be consistent with the manner and place of abduction and forcible taking of the victim and accused Qaiser's participation therewith. However, it has been proved from the evidence of P.W.1 that the event took place after he [P.W.1] allowed Nazimuddin to move for collecting information about Qaiser's position.

818. The Tribunal, on integrated evaluation of context, proved role of the accused and the evidence before it is satisfied that the event of capture of Nizamuddin took place after P.W.1 allowed him to move for collecting information. But P.W.1 does not claim that Nizamuddin, before going to his home, was so captured.

819. If we accept the hearsay testimony of P.W.1 to be true, it may be presumed that the victim might have gone to his house first wherefrom he

would have been picked up. And in that case P.W.1, remaining inside the *saal* forest, had no practicable occasion of seeing the act of Nazim's forcible taking, through the binocular from inside the *saal* forest, as claimed by him

820. In view of above rational evaluation of evidence and circumstances revealed, we are of the view that the event of abduction of Nazimuddin on forcible capture and the fact that subsequently he was shot to death stands proved. But the divergence in the statements of P.W.1 in respect of accused Qaiser's participation to the commission of the act of victim's abduction and the place wherefrom the victim was so captured creates reasonable doubt as to his seeing victim's forcible capture.

821. Apart from this, the glaring inconsistency on material particular, narrated in the above discussed two books also creates reasonable doubt about accused Syed Md. Qaiser's involvement with the criminal act leading to Nazim's killing. The first book speaks that the victim was taken to the camp of 'Qaiser Bahini' where he was killed. But the second book narrates that he was shot to death at the Shahajibazar army camp during his captivity. It is to be borne in mind that mere speculation cannot take the place of 'proof'. In absence of any direct and reliable evidence even in the form of circumstances, the above inconsistent narration made in two books, on the same event, in other words, creates reasonable doubt as to accused's involvement. The law says, benefit of such doubt goes in favour of the accused Syed Md. Qaiser. And as such he is found **not liable** for the **murder** of Nazimuddin constituting the offence of crimes against humanity as enumerated in section 3(2) of the Act of 1973.

Adjudication of Charge No.16

[Genocide or in the alternative 'extermination' at 22 villages under Nasirnagar police station]

822. Charge: That on 15 November 1971, during the period of war of liberation, in between 07:00-07:30 am and 03:00-03:30 pm accused Syed Md. Qaiser led a group of members of Razakars, peace committee members, 'Qaiser Bahini' and the members of Pakistani armed force in

launching attack directing civilians of villages *Daura* [দৌরা], *Nishcintapur* [নিশচিন্তাপুর] and twenty other villages under Nasirnagar police station district Brahmanbaria created horror by indiscriminate gun firing around the crime sites, setting houses on fire, looting households of civilians, with intent to destroy the Hindu religious community, either whole or in part. In conjunction with the horrendous event, accused and other perpetrators killed 108 unarmed civilians, as listed in the narration made in paragraph 10:18 of the formal charge, belonging to Hindu community of crime villages.

Therefore, accused Syed Md. Kaiser has been charged for participating, abetting, facilitating and substantially contributing the actual commission of killing of 108 unarmed civilians belonging to Hindu community constituting the offence of ‘**genocide**’, or in the alternative, for participating, abetting, facilitating and substantially contributing the actual commission of offence of ‘**extermination**’ as crime against humanity’ as specified in section 3(2) (a) (c) (g)(h) of the Act which are punishable under section 20(2) read with section 3(1) of the Act. You are thus liable for the above offences under section 4(1) of the Act.

Witnesses & Documents

823. In order to substantiate this charge involving allegation of genocide or in the alternative 'extermination', prosecution relied upon testimony of P.W.16 Abdul Matin, P.W.31 Md. Azharul Haque, P.W.3 Tajul Islam, P.W. 1 Kazi Kabiruddin and P.W. 13 Golam Nur. Of these five witnesses, P.W.16 and P.W.31 saw the facts relevant to the attack launched and they also testified post event experience, as alleged. P.W.1 and P.W.13 are hearsay witnesses. P.W.3 Tajul Islam a member of 'Qaiser Bahini' allegedly accompanied the group of perpetrators who testified the attack, prosecution alleges. In addition to oral evidence, prosecution to prove the attack that resulted in mass killing of civilians relied upon the narratives made in the books titled *ÓgyPhj* efgbewoqv: Rq`j tnrmb; cŭg cKvk 20-111* [**Material Exhibit-Chcha**, Book's page 162,189-193] and the book titled

amongst the pro-liberation civilians, in the name of preserving solidarity of Pakistan.

827. As regards joining the war of liberation and returning back, on being trained in India, P.W.16 stated that he joined the war of liberation and received training in Agartala and then he was assigned as a trainer at Gokulnagar Jubo Shibir and then he was placed under Major Shafiullah of sector headquarter 3 at Meghalaya[India]. Later on, he was placed under captain Nasim who, at the end of September 1971, sent a team under his [P.W.16] leadership inside Bangladesh. They, crossing Kasba border arrived Nasirnagar through Belabo-Bhairab-Sarail and captain Subid Ali Bhuyan helped them moving by providing sources. Arriving at Nasirnagar they were stationed at the house of the then MPA Mozammel Haque @ Kaptan Mia and started collecting information through sources. At a stage, they got information that Qaiser, his Bahini and Pakistani army had planned to carry out an operation at Nasirnagar. With this they [P.W.16 and his co-fighters] assembled at the house of Kaptan Mia and being divided into groups went into different safe positions at the locality, considering the strength of the number of Pakistani army and their collaborators. He along with 5-6 fellow fighters took shelter at the house of Jitu Mia at village Chitna [wPZbv]. Aaur Rahman Chutu Mia [now dead] was with him, P.W.16 added.

828. The above is thus how P.W.16 knew accused Qaiser, what he experienced as to anti-liberation activities of Qaiser, when he joined the war of liberation and received training in India, when and how he returned back to Bangladesh at the end of September 1971 and where he had been staying till the event of attack narrated in the charge framed. Defence could not refute what has been testified by P.W.16 on these relevant facts. Rather, it has been re-affirmed in his cross-examination that P.W.16 was a freedom fighter as he replied to question put to him by the defence that 60-62 people of Nasirnagar including himself joined the war of liberation and received training on operating arms.

829. P.W.16 Abdul Matin, next stated that in the night of 14 November 1971 they got information through sources that on that date Qaiser and his accomplices by holding a secret meeting at the house of Manjur Ali [maternal uncle of Qaiser] at Guniauk had planned that on 15 November they along with the Pakistani army would carry a massive operation at different localities of Nasirnagar.

830. Defence merely denied the above piece of version that materially related to the designed and planned attack. Designing plan may not be tangible act. But it may be well inferred from circumstances and relevant facts. This piece of evidence relating to holding secret meeting at the house of accused's maternal uncle Manjur Ali sufficiently offers the conclusion that before launching the attack there had been orchestration of a plan to which the accused Qaiser was a part too.

831. P.W.16 went on to state further that in the early morning at about 06:00 am[on the date of event] one Kutub Raja a pro-liberation civilian of their village rushed to them and informed that 1000-1200 army men and Qaiser Bahini assembled at the house of Manjur Ali preparing to launch attack. And at about 07:00-07:30 am they could see the column of fume and could hear frequent gun firing from the end of village Daura [ʌDiʌ] which was about 2 miles far from village Chitna [where he and his fellow fighters were stationed]. With this they feeling insecure, went into hid at a crematorium, east to village Chitna, in disguise and leaving Jitu Mia's father at the house.

832. P.W.16 next stated that at about 09:00-09:30 am they saw accused Qaiser and his 40-50 accomplices coming towards village Chitna by chanting slogan 'Naraye Takbir', 'Allah Akbar', 'Pakistan Jindabad'. The group was followed by 40/50 Pakistani army. The group stopped at a place Deujori the outlet of the river *Khasti* [Lwʌ] and this place was about 150 feet far from their hide out. They could identify Tajul [P.W.3] of Haripur, Joj Mia and some other Razakars of their locality. Then the group was divided into two and one was sent to village west **Burunga** and another led by Qaiser moved towards village **Chitna**.

833. P.W.16 also stated that half an hour later, at about 12:30 pm he could hear frequent gun firing and see the column of fume of fire from the end of village **Chitna**. Some times later, they could hear gun firing from the end of village **Burungi** too. With this, they went to the nearer cultivable land where they remained laid down inside the crops and one hour later when gun firing stopped they heard from the fleeing people that Qaiser and his accomplices were on move towards **Nasirnagar**. Afterwards, at about 04:00 pm they took shelter at a bushy place at Bibir Darga, east to village Gutma and spent the night there.

834. Thus, this piece of evidence together with that P.W.16 made in respect of seeing accused Qaiser moving towards village Chitna demonstrates that after carrying out atrocious activities at **Chitna** accused and his accomplices had moved towards **Nasirnagar**.

835. P.W.16 stated that in the early morning of the following day [16 November] they went to Jitu Mia's houses at village **Chitna** and heard about the horrific event and then he and his fellow freedom fighters along with Jitu Mia and his father secretly visited the villages **Chitna, Burungi, Gutma, Nishchintapur and Daura** and saw the wanton destruction carried out there and saw **31 civilians were killed in 05 villages**. Later on, they stayed at the house of Ramij Ali of village Laxmipur where from the freedom fighters assembled there and they had learnt that on the same day [15 November] Qaiser, members of his Bahini and Pakistani army by launching simultaneous attack to **22 villages** of Nasirnagar police station killed about more than hundred civilians. Most of the victims belonged to Hindu religion and the villages attacked were predominantly Hindu populated.

836. The above piece of evidence relating to learning the simultaneous organised attack on the same day and by the same group of attackers directing 22 villages which were predominantly Hindu populated that resulted more than hundred civilians is hearsay. Defence could not impeach it by cross-examining the P.W.16 in any manner. From the reply made by P.W.16 to question put to him, in cross-examination, goes to

show that the crime villages **Chitna, Gutma, Nishchintapur** were closely located.

837. In cross-examination, P.W.16 also stated that the some of 31 civilians killed at 05 villages left behind child babies and some had no child and he could not say whether any of their heirs are still alive

838. P.W. 31 Md. Azaharul Huq [61] a resident of village Nurpur under police station Nasirnagar of the then B'baria sub-division was a student of HSC class of B'baria Government College in 1971. He is a freedom fighter. After receiving training in India he returned back Bangladesh during the last part of September 1971 through Teliapara tea garden and started staying at the house of one Abdul Hamid at village Dharmondol, P.W.31 stated.

839. P.W.31 next stated that on 14 November [1971] after the dusk he came to the house of Bachchu chairman of village Fandauk and became aware from sources that the Pakistani army, Qaiser and the members of his Bahini and Razakars had planned to launch a massive operation in the locality of Nasirnagar police station on 15 November[1971]. Being aware of this information he along with his 10-12 co-fighters came to his house where he found many people including freedom fighters who took there shelter there. During the night, he along with his 10-12 companions [freedom fighters] took position at a bushy place by the bank of Kukuria canal, one kilometer far from his house.

840. In narrating the attack under adjudication, P.W.31 stated that on 15 November [1971] at about 08/09 in morning, he saw through the binocular with him that a group of members of Qaiser Bahini, Razakar force and about 150 Pakistani army moving towards their village[**Nurpur**] from southern part. Entering into the village the attackers started indiscriminate gun firing and with this the civilians of the village being panicked started fleeing. He also saw the army taking position on the roof of their house and they burned down the tin shed at the north courtyard of their house. And next the Qaiser Bahini, Razakar members and the army set the

houses of Hindu civilians on fire. Seeing this, he [P.W.31] went into hid inside a crop field at the southern part of their village [Nurpur]. And at 04:00-04:30 pm he saw Qaiser [accused], his Bahini and the army exiting through the road at the east of the village.

841. Next, the P.W.31 narrated what he heard about the attack from his family inmates and the local people. He stated that returning his house he found his mother seriously sick and knew from her that she was beaten up by rifle by the members of Qaiser Bahini and they killed his *bhagina*[sister's son] Azizul Haque. The local elders buried him and on their advice they took shelter at the bank of *Kukuria* canal. On the following morning, returning to his village he came to know that on 15 November, during the attack, **10-11 were killed** including **Torab Ali, Sukkud Ali, Azizul Haque, Siru Mia, Jummat Ali** etc. He also had learnt that, during the attack, **Kalpana** the daughter of Dr, Chunilal was beastly tortured to death, P.W.31 added.

842. P.W.31 stated that during the attack launched on 15 November [1971] the attackers had killed 108 civilians of 22 villages and had burned down 400 houses. Most of the victims belonged to Hindu religion. In respect of knowing accused Qaiser, P.W.31 stated that he knew Qaiser since 1970 as he contested the provincial assembly election [1970] from Madhabpur.

843. P.W.3 Tajul Islam [83] a member of Qaiser Bahini and local peace committee is a star witness in the case in hand. He stated that accused Qaiser used to come to the army camp and Razakar camp set up at the Zaminder house at Haripur [village] and had consultation with the army and Razakars.

844. In respect of the attack as narrated in charge no.16, P.W.3 stated that on 15 November 1971 at about 08:00 morning Pakistani army, Razakar force, Qaiser[accused] and members of Qaiser Bahini besieged 21/22 villages including villages **Korgaon, Burunga, Chitna, Alagpur, Laxmipur, Tilpapara** and started indiscriminate gun firing , set some

villages on fire. He [P.W.3] was with the attackers, P.W.3 added. The atrocious attack continued till 03:00 pm and the villages were Hindu and Muslim populated area.

845. P.W.3 also stated that on the following day he heard that the attack resulted in death of 108 civilians. 15-20 days after the event of this attack they learnt that Qaiser had gone to London and then they [P.W.3 and his accomplices] abandoned the uniform and arms at Qaiser's house and had gone to wherever they liked.

846. P.W.1 Kazi Kabiruddin is a freedom fighter. He is hearsay witness, in respect of the event narrated in charge no.16. He stated that in the night of 15 November 1971 they got information that the Pakistani army, Razakar force, Qaiser and his Qaiser Bahini besieging 22 Hindu populated villages had killed 108 civilians, especially belonging to Hindu religion and also looted and burned down civilians' property.

847. P.W.13 Golam Nur [65] is a freedom fighter. He was a resident of village Haripur. He stated that on returning from India he came to know that on 15 November 1971 at about 7:00-7:30 morning the Pakistani army, Razakar force, Qaiser and his Qaiser Bahini simultaneously attacking 22 villages of Nasirnagar police station had killed 108 civilians' and looted and burned down civilians' property. Most of the victims belonged to Hindu religion.

848. Defence could not refute what has been testified by P.W.1 and P.W.13 in respect of hearing the event of attack that resulted in death of 108 civilians of 22 villages.

Deliberation and Finding with Reasoning

849. The learned prosecutor Mr. Rana Das Gupta argued that the prosecution chiefly depends upon P.W.3, P.W. 16 and P.W.31 to prove this charge involves the event of calculated mass killing aiming the Hindu community of 22 villages under Nasirnagar Police Station occurred on 15

November, 1971. Victims of the mass killing mostly were Hindus. Prosecution could not produce the relatives of Hindu victims before the Tribunal for obvious reason of their being pervaded by a sense of insecurity. However, the three witnesses examined have testified the attack that resulted in death of hundreds of civilians belonging to Hindu religion. The description they narrated in respect of their seeing the post event devastation and numerous dead bodies around the crime villages proves the commission of the event of massacre that continued till the evening starting from morning.

850. The learned prosecutor further argued that P.W.3 Tajul Islam was a member of Qaiser Bahini who testified that he too accompanied the gang of perpetrators and the accused Qaiser was also with them at the time of launching the attack. Defence could not controvert this pertinent piece of evidence of P.W.3. The planned attack caused death of 108 civilians. The nature and extent of the havoc obviously did not allow any civilian to witness actually who killed whom. The event of killing 108 civilians remained undisputed. The fact of causing death mostly of Hindu civilians suggests unerringly that target of the perpetrators was the Hindu population, the residents of crime villages.

851. The learned prosecutor also submitted that the testimony of P.W.3 Tajul Islam, an accomplice of accused Qaiser indisputably proves that the accused Qaiser and his 'force' were with the Pakistani army and had actively participated in launching the attack that resulted in death of civilians and wanton destruction of property by setting some villages on fire. P.W.16 and P.W.13 being the residents of crime villages had opportunity to see the mayhem, remaining in hiding. They have corroborated the fact that the group of perpetrators was accompanied by the accused Qaiser.

852. Finally, the learned prosecutor submitted that integrated evaluation of evidence of these three witnesses proves it beyond reasonable doubt that on the date the Pakistani army accompanied by the accused Qaiser and his 'force' [Qaiser Bahini] had carried out the horrific mayhem, by

launching a systematic and planned attack in and around 22 villages mainly aiming the Hindu population that resulted in death of 108 civilians and it constituted the offence of 'genocide' or in the alternative the offence of 'extermination' involving a mass killing.

853. The learned prosecutor also argued that the nature of the attack suggests that it was in furtherance of common object and design to which the accused Qaiser was a part and he consciously and knowing the consequence and sharing the intent of the principals accompanied the group of perpetrators to the crime sites. Therefore, he incurs liability under section 4(1) of the Act of 1973 and under the theory of JCE [basic form] as well.

854. Conversely, the learned defence counsel Mr. SM Shahjahan argued that the IO visited only few villages out of 22 crime villages and she[IO] despite recording statement of 38 members of victims' family submitted that of 08 witnesses only. Investigation was thus perfunctory. And the prosecution produced and examined only one as P.W.31. Withholding material witnesses leads to presumption adverse to the prosecution.

855. It has been further submitted by the learned defence counsel that the documents the books relied upon by the prosecution do not match the date of event as alleged in the charge framed. The plan as stated by P.W.16 and P.W.31 could not be proved by any evidence. Mere hearing about it from people, as they stated, does not make it proved to be true. P.W.3 Tajul Islam, allegedly a member of Qaiser Bahini, was with the Qaiser Bahini, not with accused Qaiser, he stated. Besides, he did not see any of killings. Finally, he submits that the event alleged does not constitute either the offence of 'genocide' or that of 'extermination'. It falls under the definition of 'murder'.

856. At the out set, we cannot agree with the defence argument that in absence of any proof as to physical participation of accused with any of killings he cannot be held responsible. 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. Then we are to see whether the accused had concern and common agreement with the attack, in any manner. It is to be noted that act of an individual amid or after or prior to the event forms part of attack if it is found to have had substantial effect to the commission of crime, pursuant to the attack.

857. The charge framed arraigns that the massacre causing large scale killing took place in 22 villages, on the same day and in conjunction with the same attack and it occurred pursuant to premeditated plan. Long more than four decades after the event it is indeed impracticable to prove with detail precision which individuals forming the group of perpetrators attacked which villages and who killed whom. Even it was challenging for the IO as well to identify all these matters, during investigation. The essence of argument advanced on part of the defence is that the accused did not take part to the commission of the event of massacre.

858. In view of above we are to determine-

- (i) the fact of launching simultaneous organised and planned attack directing 22 villages
- (ii) the group of attackers formed of members of Qaiser Bahini, Razakar force and the Pakistani occupation army
- (iii) accused Qaiser accompanied the group of perpetrators
- (iv) accused took '*consenting part*' in the commission of the crime, by launching attack
- (v) the accused was '*connected*' with plans or enterprise
- (vi) the accused belonged to the 'Qaiser Bahini' a private outfit of his own forming part of the group of attackers.

859. It is not correct to say that the event could have been well proved only by the relatives of Hindu victims. It appears that some of Hindu people, the relatives of victims, have been cited as witnesses. But the prosecution could not produce and examine any of them. The reason the learned prosecutor has argued justifying failure to bring any of those witnesses does not devoid of substance. Sense of insecurity on part of a witness, particularly belonging to Hindu community is indeed a challenge for the prosecution, considering the context of atrocities committed in 1971.

860. It is true that the prosecution, during trial, did not raise any such challenge before the Tribunal. But however, now the argument advanced by the prosecution justifying non production of any of those witnesses cannot be brushed aside readily. Non examination of those witnesses does not necessarily establish falsehood of the event alleged. And at the same time, without focusing on it, we are to see how far the prosecution has been able to prove the arraignment brought against the accused by the evidence of P.W.3, P.W.16 and P.W.31.

861. P.W.16 is a direct witness to a part of the attack. His evidence demonstrates that from a hiding place at a crematorium, east to village **Chitna**, at about 09:00-09:30 am on 15 November he and his co-freedom fighters saw accused Qaiser and his 40-50 accomplices coming towards village Chitna by chanting slogan '*Naraye Takbir*', '*Allahu Akbar*', '*Pakistan Jindabad*'. The group was followed by 40/50 Pakistani army. The group stopped at a place Deujori the outlet of the river *Khasti* which was about 150 feet far from their hiding place. They could identify Tajul [P.W.3] of Haripur, Joj Mia and some other Razakars of their locality accompanying the gang. Then the group was divided into two and one was sent to village west **Burunga** and another led by Qaiser moved towards village **Chitna**.

862. The above unimpeached evidence shows accused Qaiser's active participation to the attack that was launched in collaboration with the Pakistani army as he accompanied the group. It was quite possible to identify the accused Qaiser and others from a distance of 150 feet, remaining in hiding inside a jungle, as P.W.16 knew him and others since earlier.

863. On a covert visit, later on, to the villages **Chitna, Burungi, Gutma, Nishchintapur and Daura** P.W.16 saw the wanton destruction carried out there and also saw 31 civilians were killed in these 05 villages. This post event narrative as made by P.W.16 proves the fact of mass killing and wanton destruction carried out by launching organised attack which

was linked to seeing the accused, his cohorts and the army moving towards village **Chitna** and other villages.

864. P.W.16 also heard that the same group of attackers had made concurrent organised attack on the same day directing 22 villages that resulted in death of more than hundred of civilians. Defence could not impeach it by cross-examining the P.W.16 in any manner. The reply made by P.W.16 to question put to him, in cross-examination, goes to show that the crime villages **Chitna, Gutma, Nishchintapur** were closely located. Thus, launching concurrent planned attack directing many of villages located closely was practicable.

865. In case of such a massive attack directing 22 villages no individual was expected to witness the entire event happened alongside around numerous villages. Only subsequent to the event the people could learn and see the post event consequences. Therefore, the hearsay testimony of P.W.16 so far as it relates to learning the attack directing 22 villages on the same day and killing 31 civilians at 05 villages inspires credence and it offers the conclusion too of designed attack directing civilian population of many villages.

866. The testimony of P.W.31 demonstrates that his village Nurpur was also attacked by the group of members of 'Qaiser Bahini', Razakar force and Pakistani occupation army and during the attack, they had carried out devastating activities including killing of his *bhagina* Azizul Islam. On the following morning he learnt that 10-11 civilians including **Torab Ali, Sukkud Ali, Azizul Haque, Siru Mia and Jummat Ali** were killed during the attack. He also heard that the perpetrators killed 108 civilians of 22 villages and had burned down 400 houses, during the attack on 15 November and most of the victims belonged to Hindu community.

867. Thus P.W.31 witnessed a part of the simultaneous attack on 15 November [1971] at about 08/09 in morning as he had occasion to see, through the binocular with him, a group of members of Qaiser Bahini,

Razakar force and about 150 Pakistani army moving towards their village[Nurpur] from southern part. It remained unshaken.

868. P.W.31 does not say that he saw the accused Qaiser with the group moving towards their village Nurpur in the morning. According to him, members of Qaiser Bahini had been with the group of attackers. But P.W.31 also stated that at about 04:00-04:30 pm he saw Qaiser [accused], his Bahini and the army exiting [from the crime site(s)] through the road at the east of the village. It remained unimpeached.

869. That is to say, accused Qaiser had been with some other group in the morning when the concurrent attack directing many villages happened. Obviously many groups were involved with such parallel attacks. But the fact of seeing the accused Qaiser departing the sites along with his Bahini and the army at about 04:00-04:30 pm irresistibly forces to conclude that accused Qaiser was actively ‘concerned’ with the entire designed attack directing many villages. This conclusion gets assurance even from the fact that in the morning accused Qaiser and his cohorts and army moved towards village **Chitna** where they had carried out mayhem and killing, as proved by evidence of P.W.16.

870. Tajul Islam [P.W.3] a member of Qaiser Bahini also accompanied the gang in launching attack. This materially relevant fact stands proved. P.W.3 stated that the atrocious attack continued till 03:00 pm [on 15 November 1971]. Therefore, the proved fact of seeing the accused Qaiser, his cohorts and the army exiting the crime site[s], after carrying out atrocious activities including killing civilians that continued for couple of hours, as stated by P.W.31 indisputably proves accused Qaiser’s ‘participation’ and ‘concern’ with the perpetration of crimes in question.

871. Thus launching attack in a planned way directing civilians of villages under police station Nasirnagar stands proved. P.W.31 does not claim that he saw the accused Qaiser accompanying the group of attackers moving towards Nurpur. But it does not render Qaiser’s concern and participation to the attack directing several sites simultaneously. Participation of

members of Qaiser Bahini is by itself sufficient to infer that accused Qaiser too accompanied the group of attackers. P.W.31 might not have had seen him with the group moving towards village Nurpur. It has been found that at a stage, the perpetrators being divided into groups moved towards the villages and had launched simultaneous attack. It reveals from evidence of P.W.16 that he saw accused Qaiser moving towards village Chitna along with his accomplices and the army men. This act was a part of the same attack. At a time one cannot have scope of accompanying all the groups moving towards many villages.

872. Unimpeached testimony of P.W.3 Tajul Islam who was a member of Qaiser Bahini also demonstrates that accused Qaiser accompanied the group of attackers, at the time of launching simultaneous attack directing 21-22 villages. According to him, the attackers besieging 21/22 villages including villages **Korgaon, Burunga, Chitna, Alagpur, Laxmipur, Tilpapara** started indiscriminate gun firing, set some villages on fire. Defence could not controvert this version. P.W.3 was with the attackers, he stated. Naturally, even the P.W.3 Tajul Islam a member of Qaiser Bahini might not have occasion to participate and witness the criminal activities carried out in all the villages attacked. But the fact of launching simultaneous attack directing many of villages once again stands proved.

873. There has been no reason to disbelieve P.W.3 who was also with the perpetrators at the time of launching attack. P.W.3 might not have occasion to see the actual commission of the killing civilians. The event in question involves a 'group crime' and was not committed by a single or few numbers of individuals. It transpires that the gang formed of many of hundreds of perpetrators participated to the attack. In such attack the members of the group incurred liability for the act and conduct they played individually in accomplishing the actual crimes.

874. It cannot be said that since P.W.3 did not see the act of killing civilians his version claiming present with the group of perpetrators, in launching attack is untrue. It appears that P.W.3 witnessed the initiation of the organised attack when he was with the attackers and it stands proved

that the attack eventually resulted in large scale killing. The atrocious attack continued till 03:00 pm and the villages were Hindu and Muslim populated area, P.W.3 added. Rational appraisal of testimony of P.W.3 provides that –

- (i) an organised and planned attack was launched in the morning of 15 November 1971, directing many villages;
- (ii) the gang of attackers formed of members of Qaiser Bahini, accused Qaiser and Pakistani army;
- (iii) P.W.3 Tajul Islam a member of Qaiser bahini was with the gang and he witnessed the accused Qaiser accompanying the gang in launching the attack;
- (iv) the attack directing many villages continued for couple of hours starting from morning;
- (v) the attack eventually resulted in death of hundreds of civilians, P.W.3 heard it later on.

875. P.W.1 had been in different localities of Habiganj, during the war of liberation. P.W.13 at a stage of war of liberation returned back to Bangladesh from India. And as such they had occasion of being remained apprised of the activities of Pakistani army and their local collaborators, thorough their sources. From this point of view knowing the event, as stated by them cannot be turned down merely terming their testimony ‘anonymous hearsay evidence’. Large scale killing of hundreds of civilians of many villages occurred on a single day is not disputed. The horrific event of massacre thus naturally became an anecdote around the locality. As a valiant freedom fighters P.W.1 and P.W.13 therefore had fair opportunity of being aware about such a mass killing that took place just one month before the victory.

876. In view of above discussion based on evidence it is found that an organised and simultaneous attack was launched directing civilians of 22 villages, the attack continued till 03:00 pm, the group of attackers was formed of members of Qaiser Bahini, Razakar force, accused Qaiser and Pakistani occupation army. Presumably, being divided into groups the perpetrators accomplished the instantaneous attack to the villages. Most of the victims belonged to Hindu community.

877. We consider that in the context of ‘large-scale killing’, direct and physical perpetration need not mean physical killing. Other acts of an individual accompanying the perpetrators to the crime sites can constitute direct participation if it was aimed to further plan and common purpose.

878. It is now settled that the prosecution requires showing, for holding responsible, that the accused must have acted intentionally and with the awareness that he was contributing to the crimes, including all its material elements. Accused’s act of arriving at a place near the village **Chitna** along with the group of attackers by raising slogan and then moving towards village Chitna and then to another village obviously formed part of attack, in furtherance of plan, common purpose and understanding. Accused being the ‘boss’ and ‘founder’ of Qaiser Bahini a private outfit was in position to foresee the consequence of his culpable act.

879. It is to be noted that even a single act of an individual that has substantial effect to the actual commission of crime forms part of attack. It stands proved from the evidence that the attackers divided in groups simultaneously attacked the crime villages. Pakistani army and members of Qaiser Bahini allegedly perpetrated the crime.

880. Evidence of P.W.16 as divulged merits pertinent attention of the Tribunal. It transpires that the accused Qaiser was aware that an attack would be launched, in furtherance of premeditated plan and design orchestrated on the preceding day. It becomes proved on integrated evaluation of evidence and circumstances..

881. Additionally, we reiterate that the members of Qaiser Bahini would not have participated in any mass atrocity without approval and endorsement on part of their ‘boss’ accused Qaiser, the founder of this private outfit. Thus, even remaining distanced from all other villages under attack, accused Qaiser cannot absolve of liability of the large scale killing of hundreds of civilians occurred in 22 villages. Moreover, the evidence demonstrates that the accused Qaiser was seen present and active along with his accomplices around the crime villages when the attack was

launched simultaneously that eventually resulted in death of hundreds of civilians. We may thus safely conclude that the accused Qaiser knew that his presence even with a particular group at the relevant time would have an encouraging effect on the entire criminal actions of the perpetrators including the members of Qaiser Bahini.

882. Prosecution avers that the event of mass killing was implemented in execution of a plan and it was of pattern of selective mass killing. Conversely, the learned defence counsel argued that the plan as stated by P.W.16 and P.W.31 could not be proved by any evidence. Mere hearing about it from people, as they stated, does not make it proved to be true.

883. The Tribunal notes that an act of designing plan usually not tangible and cannot be explicitly known to persons other than the persons involved with it. So it is quite immaterial to ask for proof to establish as to where, when, who and how the plan was designed. It is fairly assumed that without a common and premeditated plan such organized pattern of collective attack in accomplishing the act of mass killing targeting pro-liberation civilians of 22 villages, by the squad of hundreds of perpetrators, could not have been initiated and executed.

884. Direct evidence is not required to prove the act of designing ‘plan’ and abetment provided pursuant to it. In this regard we may recall the decision of ICTY Trial Chamber decision in the case of *Prosecutor v. Milan Milutinovic & others* [ICTY Trial Chamber, Case No. IT-05-87-T, Judgment 26 February 2009, para 91] which is as below:

The accused may aid and abet at one or more of three possible stages of the crime or underlying offence—“planning, preparation or execution”—and the lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs. No evidence of a plan or agreement between the aider and abettor and the physical perpetrator or intermediary perpetrator is required

[Tadić ICTY Appeal Judgement, para. 229; Brđanin ICTY Appeal Judgement, para. 263; Simić, ICTY Trial Judgement, para. 162.]

885. The charge framed alleges that the attack was simultaneously launched directing 22 villages under Nasirnagar police station. Naturally it involved group of large number of perpetrators. From the evidence of P.W.16, a freedom fighter it is found that prior to the launching attack on 15 November 1971 there had been a plan orchestrated on the preceding day by the accused Qaiser, his Bahini and the Pakistani army. P.W.16 got this information through their sources. In the morning of 15 November seeing the accused Qaiser moving with his accomplices and army men towards village Chitna, as stated by P.W.16, is a fair and unerring indication that the accused Qaiser had connection with designing plan.

886. Presumably, the plan involved action which was part of ‘murderous enterprise’ in which a large number of individuals mostly belonging to Hindu religion were systematically killed. The accused Qaiser has been found to have had ‘*understanding*’ and ‘*connection*’ with plan and activities involving the commission of the entire attack directed against civilians, by his culpable acts, participation to the attack and presence at the crime sites.

887. It stands proved once again beyond reasonable doubt, from the evidence of P.W.3 that the accused Qaiser used to maintain active and culpable association with the army stationed at different localities of the then Habiganj sub-division and he earned trust of the army that enabled him even to have had consultation with them. It signifies accused’s substantial and culpable bondage with the army.

888. All the above materials facts, conduct and act of accused Qaiser together with his position over the Qaiser Bahini, his private outfit offer an unambiguous conclusion that he was connected with the plan designed in execution of which the atrocious attack was launched directing civilians of many villages, on the same day. The mass killing was thus committed in execution of premeditated plan to which accused Qaiser was a part.

889. Tribunal notes that even a single act or conduct may form part of attack facilitating and abetting the actual commission of a crime. Section

4(1) refers to Joint Criminal Enterprise [JCE]. For joint criminal enterprise [JCE-form I] liability an accused can participate in a joint criminal enterprise by passive, rather than active conduct. Participation may occur in different ways. Not necessarily that the accused is to be shown to have participated in all aspects of the criminal acts. Accused Qaiser's presence with a group or groups at either or all of the crime villages on the day of launching attack is sufficient to conclude that he was consciously concerned with the commission of the crimes in question, to further common plan and purpose, sharing intent of the principal perpetrators.

890. The narratives made in the book titled *Ógy²h²i c⁰ek¹P¹ íbh¹Z²b I MYnZ¹v : Rq¹ j¹ tn¹mb: c⁰g c⁰kk tde¹vix 2007* [Book's relevant page 50-53] show that on 11/12 November 1971 the Pakistani army with the aid of local collaborators had attacked many villages under Nasirnagar police station including the villages **Daura, Gutma, Nishchintapur, Burunga** and accused Qaiser and some other members of peace committee and Razakar force had acted as accomplices of the army in carrying out atrocious activities and killing of civilians most of whom belonged to Hindu community. It has been found proved from evidence of P.W.16 and P.W.3 that accused Qaiser had active concern in launching attack directing the village **Burunga**. Narrative made at page 51 of the above mentioned book states:

*Ónb¹š¹cy Ges tM¹Ug¹vq j Y¹c¹vU, A¹M¹ms¹th¹vM I nZ¹vK¹v¹Ūi
mgq h¹v¹v c¹vK¹em¹bx¹i m¹n¹th¹vMx ũj Z¹v¹ i g¹ta¹
Gj¹vK¹ve¹mx m¹ŕ¹ h¹v¹ i b¹vg R¹v¹v tM¹Q Z¹v¹v n¹tj¹v : gay
i¹vR¹vK¹i, Ave¹ vj ũgqv (k¹v¹š¹ K¹v¹ũi m¹ m¹), A¹vZ¹ve A¹vj x,
K¹v¹q¹m¹i ũgqv (K¹v¹q¹m¹i e¹mb¹x¹i c¹ŕ¹b) c¹ŕ¹y|Ū*

891. The learned defence counsel argued that the narrative made in this book relied upon by the prosecution does not conform to the charge framed. According to the charge framed the event of attack took place on 15 November 1971. But the book narrates 11/12 November [1971] as the date of event.

892. The Tribunal notes that the defence does not dispute the commission of the atrocious activities and killing of civilians of many villages under police station Nasirnagar. There has been no case on part of the defence that not on 15 November but on some other day the event happened. Thus author's mere inability or limitation in narrating the exact date of the event does not render the evidence produced before the Tribunal unreliable. Besides, narrative made in a book cannot override the sworn testimony made in a court of law. The author may have limitation in collecting exact information on all matters. But since the narrative made in this book in respect of killing numerous civilians of villages remained unchallenged it rather provides corroboration to the 'fact of launching attack' directing the civilians of villages under police station Nasirnagar on 15 November, 1971 that resulted in death of pro-liberation civilians of whom many belonged to Hindu community.

893. We have found from evidence of P.W.16 Abdul Matin that the group of attackers guided by accused Qaiser was moving towards village **Chitna** one of crime sites, on the date of launching attack, by raising slogan 'Naraye Takbir, Allah Akbar, Pakistan Jindabad' [Raise voice that Allah is great, long live Pakistan]. It remained unshaken.

894. Was the act of killing unarmed civilians by raising such slogan, infringing their fundamental rights, reigning coercive climate causing physical and psychological harms including mass killing, in furtherance of common design and plan attuned to the spirit of 'Islam' and 'humanity'? The holy religion 'Islam' never endorses such barbaric atrocities and violent stance to be shown towards human being. But the perpetrators accompanied and actively guided by accused Qaiser did it, in the name of preserving Pakistan. The attack was, in true sense, against the humanity.

895. The evidence leads us to conclude safely and beyond reasonable doubt that the accused Qaiser consciously participated in launching the planned attack and he knew that his presence along with his private outfit

‘Qaiser Bahini’ would have an encouraging effect on the criminal actions of the principal perpetrators.

896. It is now settled that the offence of ‘extermination’ as crime against humanity involves killing within the context of a widespread or systematic attack against the civilian population, and the requirement of the offence of ‘extermination’ is that the killings occur on a ‘mass scale’. In order to give practical meaning to the offence of ‘extermination’, as distinct from ‘murder’, there must in fact be a ‘large number’ of killings, and the attack must be directed against a ‘group’ of civilians.

897. 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 and most of them belonged to Hindu religion. Already we have found it proved. But merely for this reason the offence cannot be termed as ‘genocide’. We have found from evidence of P.W.16 and P.W.31 that many of victims belonged to Muslim religion. However, the intent of the perpetrators was to accomplish ‘large scale killing’ of civilians belonging to ‘pro-liberation’ class of the targeted villages.

898. In the case in hand, in light of discussion as made above it has been found proved that the perpetrators, pursuant to premeditated plan, caused death of hundreds of civilians of 22 villages by launching an integrated attack. 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.

899. We agree with the learned defence counsel that ‘exterminate’ signifies to expel beyond the boundary (of life), that is out of existence. It is used only in regard to such things of existence. But we disagree with the argument advanced by the learned defence counsel that the event alleged does not constitute either the offence of ‘genocide’ or that of

‘extermination’--it falls simply under the definition of ‘murder’. It is to be noted that in fact ‘extermination’ is the aggravated form of ‘murder’ and the only distinguishable element necessary to constitute ‘extermination’ is ‘large scale’ killing of a civilians belonging to particular class or group.

900. Here we see that the attackers planned to expel the pro-liberation civilians beyond the boundary of their lives, by causing their death and the barbaric atrocious attack eventually resulted in death of 108 civilians many of whom belonged to Hindu community. Thus, the argument advanced by the defence that the event does not constitute even the offence of ‘extermination’ does not stand on legs.

901. It has been argued on part of the defence that there has been no proof showing killing of 108 civilians and none of victims’ family has been adduced and examined. The Tribunal notes that number of victims is not material to constitute the offence of ‘extermination’. It is to be seen whether the perpetrators intended to carry out ‘large scale killing’. The witnesses testified the number of civilians killed during the attack. In reality, it is very hard to meet the challenge of procuring documented evidence in support of the number of victims, particularly four decades after the event occurred. The witnesses presumably have testified what they had learnt about it immediately after the event as the matter became anecdote around the locality. Besides, the offence of ‘extermination’ may be constituted even where the number of victims is limited. It is now settled that a lower number of victims would disqualify that act as ‘extermination’ as a crime against humanity, nor does it suggest that such a threshold must necessarily be met.

902. It has been found proved particularly from the evidence of P.W.16 and P.W.31 that many civilians were killed. P.W.3 an accomplice of the accused Qaiser who accompanied the gang towards the crime sites testified that on the following day he had learnt that 108 civilians were killed, during the attack. It remained unshaken. It is to be noted that ‘while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited [*Krstic, ICTY*

Trial Chamber, August 2, 2001, para. 501]. Therefore, it is immaterial to prove by any documented evidence that 108 civilians were the victims of ‘mass killing’.

903. The narratives made in the books relied upon by the prosecution, as already discussed together with the testimony of P.W.s prove it beyond doubt that a ‘large number’ of civilians were killed and this crime was perpetrated in execution of designed plan by attacking many villages simultaneously. On integrated evaluation of evidence and circumstances before us we are of the view that the perpetrators intended to kill civilians on a ‘massive scale’ or to create conditions of life that lead to the death of ‘large numbers’ of individuals and the accused Qaiser shared this intention consciously and knowing the consequence. The pattern of the attack, size and number of the groups of attackers, members of the groups clearly indicate that the intent of the perpetrators was to kill civilians on massive scale which was carried out in the sites near to each other for couple of hours, with similar pattern of killings.

904. No witness referred the direct commission of killing of civilians[s] by the accused Qaiser, nonetheless his direct participation to the planned action has been proved and by this way criminal responsibility of accused Qaiser stands affirmed. Accused Qaiser’s act, conduct and presence with the principal perpetrators leading to the main 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. This will be considered as evidence tending to prove accused Qaiser’s knowledge that his act was part of a systematic and planned attack against a civilian population of crime villages under Nasirnagar police station.

905. The Tribunal is convinced to record its finding that the accused Syed Md. Qaiser, for his participation to the attack in question and also for his acts, conduct and culpable association with the group of 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 Syed Md. Qaiser, 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 Nasirnagar of the then B’baria sub-division. Therefore, the accused Syed Md. Qaiser who was a part of collective criminality and the criminal enterprise 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) of the Act of 1973 which are punishable under section 20(2) read with section 3(1) of the Act.

XII. Mode of Liability

Is the accused liable under the doctrine of Civilian Superior Responsibility?

906. Mr. Tapas Kanti Baul, another learned prosecutor assisting the prosecution team argued that the accused Qaiser incurred liability also under the theory of ‘superior responsibility’ that refers to section 4(2) of the Act of 1973 as he had significantly influenced and induced the principal perpetrators in committing crimes. Liability under the doctrine of superior responsibility may be taken into account as an aggravating factor, in awarding sentence.

907. Mr. SM Shahjahan the learned defence counsel argued that neither of 16 charges alleges that the accused incurred liability under the theory of superior responsibility that corresponds to section 4(2) of the Act of 1973. The evidence produced does not show that the accused Qaiser had effective control over the perpetrators including the Pakistani occupation army. And as such the argument advanced on part of the prosecution that the accused incurred liability also under section 4(2) of the Act of 1973 does not sustain.

908. Taking the status and profile of accused Syed Md. Qaiser and the pattern of group of attackers together with the mode of accused’s

participation into account, argument as regards incurring liability under the doctrine of superior responsibility does not match with the facts and circumstances narrated in the charges. The charges framed do not arraign the accused to have had incurred liability also under section 4(2) of the Act that refers to the theory of superior responsibility.

909. It is evinced that the principal perpetrators were the Pakistani occupation army. Accused Qaiser was a local civilian having pro-Pakistan political prominence. Qaiser Bahini was a 'squad' founded locally by the accused. It has been established that the accused and his private outfit [Qaiser Bahini] assisted, guided, prompted and contributed in various manner in carrying out atrocities including murder, rape, extermination, other inhuman acts and terror inducing acts around the localities of Habiganj and part of the then B'baria sub-division.

910. It is now settled that superior-sub-ordinate relationship, either *de facto* or *de jure*, needs to be established for holding a person liable under the doctrine of 'superior responsibility'. Prosecution could not show that there had been any such relationship between the accused Qaiser a civilian and the organised armed force. Despite his local political prominence and close affiliation with the army the accused cannot be said to have had 'authority', either *de facto* or *de jure*, over the army. Of course the Army was not under command of accused Qaiser, a civilian.

911. Only a superior, either *de jure* or *de facto*, military or civilian, who is clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of the principals may incur liability under the doctrine of superior responsibility. Effective control test applies to all superiors, whether *de jure* or *de facto*, military or civilian [*Aleksovski* Appeal judgment, para 76] But we are not satisfied that inspite of substantial influence, he used to exercise in carrying out criminal activities, accused Qaiser merely as the founder of 'Qaiser Bahini' was in superior position of the army.

912. There has been no indication whatsoever that the accused Qaiser had ‘effective control’ or ‘material ability’ to control the Pakistani occupation stationed at different places in the then Habiganj sub-division. Accused Qaiser was not a person who had either *de jure* or *de facto* part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of the Pakistani occupation army. Nevertheless, it is evinced that the accused consciously and actively aided and abetted the army the principals in committing the crimes against the unarmed civilians. But it is incorrect to say that since the accused was a man of local political prominence and his Bahini substantially assisted, guided, encouraged the army in committing crimes, he had ‘material ability’ and ‘authority’ to control the army or the army had acted under his[accused] command or directives. Therefore, we find no substance in what has been argued, on the issue of incurring liability under the doctrine of superior responsibility.

Accountability of the Accused under the doctrine of JCE [Form I and Form II]

913. Mr. Tapas Kanti Baul, the learned prosecutor next emphasized by arguing that the accused Qaiser incurred liability also under the doctrine of Joint Criminal Enterprise [JCE] as he had acted sharing intent of the group of perpetrators the Pakistani army which had acted as a criminal enterprise, knowing the consequence of his act, in furtherance of common purpose, plan and design. The accused is liable under the basic form of JCE and the systematic form of JCE as well. The evidence has established that the accused was part of the army camps set up at Shaestaganj Durbangalow, Jagadishpur High School, Shahajibazar Biddut Kendra and the peace committee camp at the house of Lichu Poddar, the learned defence counsel submitted. The Shaestaganj silo too was transformed into a concentration camp where 07 employees of the silo were kept detained for one month. The accused had close nexus with these camps and thus for the system crimes committed there the accused is responsible under the theory of JCE form-2[systematic form]

914. We are not in agreement with the argument advanced in respect of JCE form-2[systematic]. The evidence presented does not demonstrate

that the accused had control or command over those ‘camps’. Only from three indictments it would appear that the accused had allegedly handed over the captured victims to the army camps at Shaestaganj Durbangalow, Jagadishpur High School, and Shahajibazar Biddut Kendra. But the evidence does not show that the accused was part of recurrent system criminal activities carried out there upon the civilians detained for protracted period of time. There has been no evidence that the accused was involved with the recurrent commission of criminal activities there.

915. Besides, Shaestaganj silo was not a concentration camp. Prosecution has not been able to show that accused Qaiser too had nexus with and substantial influence and authority over the same group of perpetrators in committing recurring barbaric pattern of system criminal acts at the same execution sites [army camps]. The accused did not have ‘authority’ over those camps. It could not be shown that the accused actively contributed in the enforcement of the system, by his act and conduct and in exercise of his position of authority.

916. We have found that seven employees of Shaestaganj silo were asked not go outside and in this way they were kept there detained for one month under armed vigilance . Such conduct of accused in fact was to provide aid and assistance to the Pakistani army the principals. Thus, the accused, merely for this reason, cannot be held liable under the theory of systematic form of JCE.

917. Now let us focus on the Basic form of JCE. We agree that the liability mode contained in section 4(1) of the Act of 1973 refers to ‘common plan of collective criminality’ which corresponds to JCE [form I]. It is now settled that the expression ‘common purpose’, ‘awareness of foreseeable consequence’ of act or conduct, ‘intent’ are the key factors involved with the notion of JCE liability. It is to be noted that the accused has already been held responsible under section 4(1) of the Act of 1973 for the crimes proved.

918. This mode of liability need not involve the physical commission of a specific crime by all the members of JCE but may take the form of assistance in, or contribution to, the execution of the common purpose [Stakic’ (IT-97- 24-A), ICTY Appeals Chamber, 22 March 2006, para. 64] Thus, ‘once a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carry out the common plan or purpose [Krnojelac (IT-97-25-A), Appeals Chamber, 17 September 2003, para 81].

919. The concept of JCE [form I] incorporates three elements: (i) plurality of persons (ii) the existence of a common plan, design or purpose and (iii) participation of the accused in the common design. **Professor Antonio Cassese** in the case of **Kaing Guek Eav alias Duch** [ECCC Pre-trial Chamber, Case No. 001/18-07-2007-ECCC/OCIJ (PTG 02), Date of Document, 27 October 2008] made an Amicus Curiae Brief on ‘Joint Criminal Enterprise’ [JCE] doctrine. **Paragraph 30-32 of the brief** relates to ‘the import of JCE theory in international criminal law’. **Paragraph 32 of the ‘brief’** states that

“To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law of protecting the community from deviant behavior that causes serious damages to the general interest. This damage is often all the more severe in the context collective criminality. JCE doctrine, as the systematization of principles of customary international law in existence since the post-World War II period, is a vehicle of accountability against such harm.”

920. In line with the recognized principles almost common to all legal systems, a person who takes ‘consenting part’ in the commission of the crime or who is found to be ‘connected with plans or enterprise’ involved in the commission of crime or who is found to ‘belong a squad or force or group’ engaged in the activities of committing crime, is guilty together with the ‘principals’. The act of ‘consenting part’ in the commission of the crime alleged and ‘connection’ with plans or enterprise or activities

involving commission of crimes can be well inferred and perceived from circumstances.

921. Accused Qaiser organised a private outfit, consisting of his loyal followers and/or cadres. This ‘force’ had acted as a *para militia* force. P.W.3 Tajul Islam a member of said outfit known as Qaiser Bahini described that the force was provided with fire arms and specific uniform. The ‘squad’ was aimed to assist the Pakistani army in carrying out its criminal activities and terror inducing acts, around the localities of Habiganj sub-division, directing unarmed pro-liberation Bengali civilians, to further the policy, plan and common purpose. The Qaiser Bahini led by the accused Qaiser continued this type of culpable activities for the same reasons, on a larger scale and in recurrent and systematic manner.

922. The history says that the policy involved the commission of crime as a means of bringing the common plan to fruition. Thus the policy eventually resulted in the commission of crimes, including murders, mass killing, rape, other human acts, forced pregnancy and attacks against human dignity. The accused Qaiser, by his act of close affiliation with the Pakistani army was thus a part of such ‘common purpose’ adopted aiming to ensure its achievement, by carrying out barbaric atrocities.

923. The evidence presented before us establishes that a plurality of persons, including the accused the leader of the Qaiser Bahini, shared a common purpose to implement the plan and policy of Pakistani occupation army designed to annihilate the pro-liberation Bengali civilians and freedom fighters in 1971. Accordingly accused Syed Md. Qaiser incurred liability also under the doctrine of JCE form-I for the offences proved, we conclude.

XIII. The context prevailing in 1971 in the territory of Bangladesh that made the ‘Attack’ systematic

924. We reiterate that the offence of crimes against humanity is considered as ‘group crime’ and it is not perpetrated by a single

individual. But however, an individual may participate to the actual commission of the principal crime by his act or conduct, before or midst or after the crime committed.

925. It is now settled through jurisprudential development that the 'Crimes against Humanity' must be committed as a part of the attack or had occurred as a consequence of the attack. And the 'attack' is 'systematic' when it refers to a deliberate pattern of conduct. Since the specific offences of 'Crimes against Humanity' which were committed during 1971 are being tried under 1973 Act, it is obvious that they were committed in the context of the 1971 war of liberation. "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'.

926. The case of *The Prosecutor v. Goran Jelusic*, ICTY (Trial Chamber), December 14, 1999 shows that in order to prove that the attack was widespread or systematic, the court must consider various factors, including,

- (i) the existence of an acknowledged policy targeting a particular community,
- (ii) the establishment of parallel institution meant to implement this policy,
- (iii) the involvement of high-level political or military authorities, resources military or other,
- (iv) the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population, etc. (paragraph 53)

927. 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.

928. In the case in hand, accused Syed Md. Qaiser has been indicted to have had acted, by abetment, contribution and participation forming part

of 'attack' directed against the civilian population, in collaboration with the Pakistani occupation army in 1971 during the war of liberation that resulted in killing, mass killing, mass rape, abduction, confinement, torture and other inhuman acts, in furtherance of policy and plan. Even the accused being imbued by extreme antagonistic attitude formed a local private out fit which was known as 'Qaiser Bahini' and this 'squad' was provided with uniform and firearms by the army headquartered in Habiganj. Objective of founding such a local out fit was to collaborate with the Pakistani occupation army, to further policy and plan.

929. 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

930. The above context is undeniable and it is part of the history as well. This 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. Presumably, such criminal acts forming 'systematic' attack were carried out in furtherance of common policy of annihilation of pro-liberation civilians and non-combatant freedom fighters.

931. Under section 19(1) of the 1973 Act, the Tribunal even can take judicial notice of the above context that must prompt a person of common prudence that the offences of crimes against humanity as mentioned in section 3(2)(a), committed in the geographical area of the then sub-division Habiganj and that under police station Nasirnagar of the then sub-

division B'baria were inevitably the effect of part of 'widespread' or 'systematic' attack.

XIV. Investigation Procedure

Procedure

932. Mr. SM Shahjahan questioning the fairness of investigation procedure argued on some points. The learned defence counsel submitted 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.16. Despite examining 38 members of victims' family, during investigation, the IO submitted statements of merely 08 witnesses and of these 08 witnesses only one has been examined as P.W.31. Investigation done on the event narrated in charge no.16 was thus perfunctory as the IO admittedly did not visit all the crime villages. The IO purposefully omitted to submit statements of witnesses she examined. The books 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 Syed Md. Qaiser formed 'Qaiser Bahini' of his loyal men.

933. 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 entire investigation and in no way affects the merit of the case. 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. The 'report' submitted by the Investigator arraigning the accused Syed Md. Qaiser does not relate to the offences under the normal Penal Law.

934. The accused has been arraigned for the offences known as 'group crimes' or 'system crimes'. In fact the Investigation Officer had to deal with the alleged offences of crimes against humanity occurred in 1971 during the war of liberation, in violation of customary international law

together with the matter of unearthing *prima facie* involvement of the accused therewith. Naturally, with the passage of time and particularly with the rehabilitation of pro-Pakistan quarters in national politics after 15 August 1975 the documents favouring brutal atrocities committed in 1971 might have been destroyed. Facing this reality the Investigation Agency of the Tribunal have been carrying out its challenging task of investigation

935. At the out set, let us portray how the investigation officer had done the job of investigation, in brief. P.W.32 Monowara Begum, an Investigation Officer [Assistant Superintendent of Police and now retired] of the Investigation Agency constituted under section 8(1) of the Act of 1973 was entrusted with the assignment of investigation. As stated by P.W.32, she initiated investigation against the accused Syed Md. Qaiser pursuant to the complaint register serial no. 12 dated 28.3.2012. During investigation, she he had gone through various sources, books, documents and visited the crime sites, examined the witnesses, local organizers and affected persons, seized books , documents, materials from different organisations by preparing seizure lists on various dates.

936. On 12.5.2013, during investigation, P.W.32 prayed through the Chief Prosecutor for detention of the accused Syed Md. Qaiser for the purpose of effective and proper investigation. She interrogated the accused at his home as ordered by the Tribunal on her prayer made through the Chief Prosecutor on 25.8.2013. On conclusion of investigation she [P.W.32] submitted report in the office of the Chief Prosecutor as required under Rule 11 of the ROP on 22.9.2013.

937. Rule 2(6) of the ROP defines; ‘complaint’ on the basis of which investigation is to be done. Under Rule 2(6) a ‘compliant’ 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. 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.

938. 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 IO (P.W.32) accordingly has done the task of investigation. The 'report' arraigning the accused Syed Md. Qaiser 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.

939. During the summing up of case, the learned defence counsel chiefly questioned that fairness of investigation on the event mass killing occurred in 22 villages under Nasirnagar police station of the then B'baria sub-division as narrated in charge no.16. Defence doubted the investigation on this event on the ground that the IO admittedly examined 38 persons of whom only 08 have been cited as witnesses. The event involved alleged killing of 108 civilians.

940. The charge involving the event of killing 108 civilians in many villages has already been adjudicated by recording the reasoned findings. Thus without going into merit of the event narrated in this charge we simply prefer to see whether non-citing all the witnesses the IO examined has caused any prejudice to the defence or taints the task of investigation in any manner.

941. It appears that the IO [P.W.32] admits in cross-examination, on being questioned by the Tribunal, that many of victims' family did not intend to face the examination due to fear. The IO further stated that she visited in

all 08 of affected villages and examined in all 38 persons belonging to victims' family and submitted statements of 08 recorded by her to the Chief Prosecutor.

942. First, the people living around the localities of crime sites may not be available due to lapse of long passage of time. Second, we agree for obvious reason that sense of fear made the persons belonging to victims' family unintended to face the IO. Next, the Tribunal notes that it was not necessary to visit all the 22 villages to ascertain the *prima-facie* truthfulness of the event of attack directing all those villages. For the purpose of identifying the crime sites the IO was not required to visit all those 22 villages.

943. Similarly, non examination of the members of all the victims does not render the investigation done on the event unfair and ineffective. 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 many villages. Since, already it has been adjudicated based on evidence produced by the prosecution that the event of mass killing occurred in many villages, as narrated in charge no.16 it is quite immaterial to question non submission of statements of some of witnesses the IO examined during investigation. Besides, it was not the responsibility of the IO to decide which and how many witnesses were needed to be examined, to prove a particular charge. Therefore, we do not agree with what has been submitted by the learned defence counsel. The investigation done by the IO [P.W.32] cannot be termed 'unfair' and 'ineffective' causing any prejudice to the defence.

944. Fundamentally, investigation under the Act of 1973 relates to the process of procuring documentary evidence, recording statement of witnesses if found available and 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.

945. On total appraisal, we do not find anything flawed in the investigation task. The Tribunal notes that the Investigation Officer [P.W.32] , in compliance with the norms and provisions contemplated in the Act of 1973 and the ROP, carried out its investigation on completion of which he duly submitted ‘report’ before the Chief Prosecutor.

Acceptability of evidence of P.W.3 Tajul Islam [a member of Qaiser Bahini]

946. Defence argued that since P.W.3 Tajul Islam was an ‘accomplice’ of the accused, as claimed, he too should have been prosecuted and brought to justice for his act of accompanying the accused Qaiser and his Bahini in carrying out atrocities. But the investigation agency refrained from prosecuting him. Thus, reliance cannot be placed upon the testimony of P.W.3.

947. Ms. Tureen Afroz the learned prosecutor has made submission on question of acceptability of testimony of P.W.3 an accomplice of the accused Qaiser. She argued that section 8 of the Act of 1973 restricts the right of silence of a person. But the proviso of sub-section (5) of section 8 provides protection to a person if his statement made to the Investigation Officer, during investigation, incriminates or tends to incriminate him. This statutory safeguard as extended in the proviso of section 8(5) of the Act of 1973 is further protected by Article 47A (2) of the Constitution of Bangladesh. P.W.3 was not an accused and investigation was not going on against him. He was examined as a witness under the statutory protection. And as such, his eligibility to depose before the Tribunal as a witness cannot be questioned and narrowed down, if it inspires credence.

948. It has already been established that P.W.3 Tajul Islam was a member of ‘Qaiser Bahini’ a private outfit of the accused Qaiser as well as a member of local peace committee. He narrated the misdeeds of accused Qaiser committed in 1971 around Habiganj. As an accomplice P.W.3 accompanied the accused and his ‘Qaiser Bahini’ to the crime sites, P.W.3

admitted. At the end of his testimony, P.W.3 however expressing sincere remorse threw him to the mercy of the victims and the nation for his disinclined connection with the 'Qaiser Bahini'. P.W.3 is a star witness in this case. Defence could not dislodge the fact that he belonged to the 'Qaiser Bahini' and used to accompany the accused and his Bahini towards the crime sites in accomplishing criminal atrocities by the Pakistani army, directing civilian population.

949. At the out set, let us have a glance to sub-section (5) of section 8 of the Act of 1973 which provides that –

“Such person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such person :

Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding.”

950. The Act of 1973, a special Statute deals with the investigation, prosecution and trial of acts constituting the offences as crimes against humanity. Sub-section (5) of section 8 of the Act of 1973 clearly speaks that a person if examined by an investigation officer in connection with any offence enumerated in this Act shall be bound to answer even the answer to any such question incriminates or tends to incriminate him directly or indirectly.

951. 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. Purpose of examining a person by the investigation officer is to identify the truth and citing and presenting him before the Tribunal to

testify it. If an accomplice is permitted to be examined during investigation he of course could be cited and presented as a witness before the Tribunal. It is to be noted that an ‘accomplice’ may not disclose the truth if he feels ‘unguarded’. 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.

952. In view of above, we are not in agreement with what has been argued by the defence as regards eligibility of P.W.3 Tajul Islam as a prosecution witness. 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. Next, since there has been no bar in citing a person as a witness even if his statement made to the investigation officer seems to incriminate or tends to incriminate him. 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.

953. 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. We further observe, viewing disagreement, that merely for the reason that P.W.3 Tajul Islam was an accomplice of the accused and thus the statement made by him carries no value and he should have been rather prosecuted, instead of having been cited as prosecution witness.

XV. Conclusion

954. In the case in hand, the evidence led by the prosecution depicts that the group of perpetrators formed of accused Syed Md. Qaiser, members of ‘Qaiser Bahini’, peace committee members, Razakars and the Pakistani occupation army stationed at different parts of the then Habiganj sub-division perpetrated the atrocious events narrated in most of charges

framed. Accused Syed Md. Qaiser was the 'boss' of 'Qaiser Bahini' formed after his name. It was a locally formed private outfit and was guided and controlled by the accused, already it has been proved. Accused Syed Md. Qaiser is also found to have had physically accompanied the group of perpetrators. In relation to some charges proved, the accused is found to have had participated, abetted and substantially contributed, by his act or conduct, to the commission of the crimes.

955. Despite lapse of long four decades the testimony of P.W.s most of whom had fair occasion to see and experience actual commission of criminal event including the acts and conducts of accused, and the activities carried out by the principal perpetrators. Some of P.W.s also testified on substantial facts including post-event experience which are relevant and material to the event of atrocities and culpability of the accused Qaiser. Their testimony does not appear to have been suffered from any material infirmity that may smash their credibility.

956. 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.

957. We have already resolved in our foregoing deliberations that 'accused Syed Md. Qaiser was a potential man of political prominence around the localities of Habiganj. He was also associated with the local peace committee. The accused achieved significant trust of the army stationed in Habiganj sub-division for his loyalty to them and extreme antagonistic mind set towards the war of liberation and the people associated and sided with it.

958. 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 Syed Md. Qaiser, at the relevant time had acted as an atrocious and potential individual and also as

the founder of 'Qaiser Bahini' a locally formed private outfit to the actual accomplishment of the crimes proved beyond reasonable doubt. Accused'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.

959. As a result, we have already concluded that the accused Syed Md. Qaiser 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, 5,6,7,8,9,10,11, 12, 13, 14 and 16[in all 14 charges]** for which he has been indicted.

960. The offences for which the accused Syed Md. Qaiser has been found criminally responsible were the part of horrendous atrocities against the civilian population committed in context of the war of liberation 1971 in the territory of Bangladesh, in collaboration with anti-liberation and antagonistic political organisations namely Jamat E Islami, Muslim League, Convention Muslim League, Nejam E Islami, group of pro-Pakistan people with objective to annihilate the Bengali nation by resisting in achieving its independence.

961. According to section 4(1) of the Act of 1973 the accused Syed Md. Qaiser, being equally responsible, has incurred individual criminal liability for the commission of crimes already proved. It also stands proved that the accused, in committing some atrocities took the members of Qaiser Bahini with him. Objective of founding such private outfit was to provide effective aid to and collaborate with the occupation Pakistani army and also to induce a climate of terror amongst the local civilians.

962. It has been already proved that accused Qaiser actively aided and substantially contributed the principals the army in committing the offence of mass rape [**charge nos. 8 and 12]** which was an attack not on

the person of women but also to their family, community, society and the entire humanity. He is also found to have had participation to phase or phases of the event constituting the principal crimes, by handing over the captured civilians to the army. In respect of some events of brutal killing of civilians it has been found proved that the accused Sayed Md. Qaiser consciously and knowing the consequence accompanied the group of army towards the killing sites.

963. Accused Syed Md. Qaiser started accompanying the Pakistani occupation army since its first moving towards Habiganj from B'baria. It has been proved. Accused Qaiser was actively concerned in launching attack that resulted in mass killing in many villages, in execution of plan [**charge no.16**] –already has been proved. He physically participated in abducting civilians and kept them confined and caused torture for the purpose of extracting whereabouts of freedom fighters [**charge no.11**]. It has been proved too that the accused Qaiser by accompanying the group of army made them effectively able in getting the pro-liberation civilians and the local Awami League leaders identified and captured [**charge no. 6**]. On his identification, the army had carried out massive and wanton destruction of civilians' property causing grave detriment to non combatant civilians' fundamental right and mental harm to them as well [**charge nos. 2 and 7**]. Accused Qaiser was involved in picking up civilians on forcible capture and handing them over to the army leading to their murder, confinement and torture [**charge no.10**]. This proved indictment also shows accused's close and culpable affiliation with the army. In carrying out some activities, accused Qaiser is found to have had 'consenting part' that made him liable for the actual commission of killing pro-liberation civilians [**charge nos. 9 and 14**]. It has been proved too that in respect of all other events constituting the offences proved, the accused Qaiser knowingly and culpably aided, substantially contributed the actual perpetrators in accomplishing the crimes.

964. We have already found that the accused Syed Md. Qaiser incurred liability under section 4(1) of the Act of 1973 and also under the doctrine of JCE[Basic Form] as he is found to have had shared common intent and

purpose of the principal perpetrators. However, at the same time we have recorded our reasoned disagreement with the submission advanced by the prosecution that the accused incurred liability also under the doctrine of civilian superior responsibility that refers to section 4(2) of the Act of 1973. Accordingly, the accused is held criminally responsible under section 4(1) of the Act of 1973 and also under the doctrine of JCE- Form-I for the commission of crimes proved as listed in **charge nos. 1, 2,3,5,6,7,8,9,10,11,12,13,14,and 16 [in all 14 charges]**.

XVI. VERDICT ON CONVICTION

965. For the reasons recorded in our Judgement and having considered all evidence and arguments advanced by both sides, we find the accused Syed Md. Qaiser-

[Charge No.1]: GUILTY of the offence of abetting, facilitating and contributing the actual commission of offence of **'murder'** and **'other inhuman acts'** as **crime against humanity'** as specified 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.2]: GUILTY of the offence of 'encouraging' and 'substantially facilitating' the commission of **'other inhuman act'** as **crime against humanity** as specified in section 3(2) 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 inducing' and 'facilitating' the commission of **'murder'** of 04 civilians as **crimes against humanity** as enumerated in section as specified 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]: NOT GUILTY of the offence of 'abetting', 'facilitating' and 'contributing' the actual commission of **'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.5]: GUILTY of the offence of substantially ‘aiding’ ‘abetting’, ‘facilitating’ and ‘contributing’ the actual commission of killing of 07 unarmed civilians constituting the offence of **‘murder’ as crime against humanity** as specified 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.6]: GUILTY of the offence of ‘substantially abetting’, ‘facilitating’ and ‘contributing’ the actual commission of killing of 02 unarmed civilians constituting the offence of **‘murder’ as crime against humanity** as specified 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’ and ‘contributing’ the actual commission of the offence of **‘other inhuman acts’** as **‘crime against humanity’** as specified 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]: GUILTY of the offence of ‘abetting’ the act of **‘rape’** on the victim Hiramoni Santal as **‘crime against humanity’** as specified 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.9]: GUILTY of the offence of ‘abetting’ **‘murder’** of 07 civilians as **‘crimes against humanity’** as specified 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.10]: GUILTY of the offence of ‘abetting’, ‘facilitating’ and ‘contributing’ the actual commission of killing of 01 unarmed civilian constituting the offence of **‘murder’ as crime against humanity** and also the commission of **‘abduction’, ‘confinement’ and ‘torture’ as crimes against humanity**, specified in section 3(2) (a) (g)(h) of the Act and he be **convicted** and sentenced under section 20(2) of the said Act.

[Charge No.11]: GUILTY of the offence of ‘abetting’ and ‘facilitating’ the commission of the offences of ‘**abduction**’, ‘**confinement**’ and ‘**other inhuman act**’ as crimes against humanity, specified in section 3(2) (a) (g)(h) of the Act and he be convicted and sentenced under section 20(2) of the said Act.

[Charge No.12]: GUILTY of the offence of ‘significantly aiding’, ‘abetting’ and ‘contributing’ the commission of ‘**rape**’ as ‘**crime against humanity**’, specified 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.13]: GUILTY of the offence of ‘participating’, ‘abetting’, ‘facilitating’ and ‘contributing’ the actual commission of killing of 04 unarmed civilians constituting the offence of ‘**murder**’ as **crimes against humanity**, specified 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.14]: GUILTY of the offence of ‘participating’, ‘abetting’ and ‘substantially contributing’ the commission of the ‘**murder**’ of 03 civilians as **crimes against humanity**, specified 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.15]: NOT GUILTY of the offence of ‘participating’, ‘abetting’, ‘facilitating’ and ‘substantially contributing’ the commission of ‘**murder**’ of 03 civilians as **crimes against humanity**, specified in section 3(2)(a)(g)(h) of the Act of 1973 and he be **acquitted** thereof.

[Charge No.16]: GUILTY of the offence of ‘abetting’, ‘facilitating’ and ‘participating’ the commission of ‘large scale killing’ of civilians constituting the offence of ‘**extermination**’ as **crimes against humanity**, specified 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.

XVII. VERDICT ON SENTENCE

966. Mr. Rana Das Gupta and Ms. Tureen Afroz, the learned Prosecutors finally submitted that accused **Syed Md. Qaiser** should face the highest sentence, being a sentence of death, as he is proved to have had abetted, substantially facilitated and participated to the commission of horrific criminal acts constituting the offences of causing brutal torture, mass rape, abduction, confinement and large scale killing of civilians, by launching systemic and planned attack in collaboration with the Pakistani occupation army headquartered in the then Habiganj sub-division.

967. The learned prosecutors went on to submit that the extent of notoriety the accused had shown in committing, abetting and substantially contributing to the actual perpetration of crimes in question including the mass rape on defenceless women must enhance his liability. Besides, horrific pattern of killing of pro-liberation non combatant civilians especially the mass killing in many villages under Nasirnagar police station [**charge no.16**], killing of 07 employees of Shaestaganj silo [**charge no.5**], killing of Dr. Saleh and Hirendra [**charge no.6**], killing of Shah Firoz Ali [**charge no.10**], committing mass rape upon Hiramoni Santal and Majeda Begum [**charge nos. 8 and 12**] and causing forced pregnancy to victim Majeda Begum by committing mass sexual violation deserves to be considered as ‘aggravating factor’ in awarding the highest sentence. Only the highest sentence would be just and appropriate to punish those crimes causing incalculable torment to the victims, particularly the victims of mass rape that justifiably corresponds to their overall magnitude. At the same time ‘compensation’ or ‘reparation’ may justifiably be awarded, in addition to the sentence, particularly to the victims of mass rape [**charge nos. 8 and 12**]

968. On contrary, defence, in respect of punishment, simply submitted that the accused Syed Md. Qaiser was not with any such criminal activities in any manner for which he has been indicted 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 Syed Md. Qaiser deserves acquittal.

969. Defence further submitted the Statute itself does not provide any provision of awarding ‘compensation’ together with the sentence as punishment. The learned defence counsel submitted too that the provision as contained in the ROP, in this regard, cannot override the Statute. Thus the Tribunal does not have jurisdiction of awarding any such ‘reparation’ or ‘compensation’.

970. During rebuttal, the learned prosecutor Ms. Tureen Afroz made detail submission justifying imposition of ‘reparation’ or ‘compensation’ to the war rape victims. The learned prosecutor emphatically submitted that in addition to sentence to be awarded an order for ‘reparation’ or ‘compensation’ should be made, considering the gravity of offence of mass rape committed upon Hiramoni Santal and Majeda Begum [victims of charge nos. 8 and charge no.12] although the statute does not explicitly provides it. However, the ROP of the Tribunal empowers the Tribunal in awarding such ‘reparation’ or ‘compensation’, considering the gravity of crimes. The phrase *‘or such other punishment proportionate to the gravity of the crimes’* as contained in section 20(2) of the Act of 1971 rationally permits awarding ‘reparation’ or ‘compensation’.

971. We prefer to address first the submission advanced by the learned prosecutors in respect of imposing ‘reparation’ or ‘compensation’ to the victims of war time mass rape.

‘Reparation’ or ‘Compensation’

972. We consider the case in our hand a unique one as it involves the events of mass rape in war time. One occurred at the dwelling shed of victim Hiramoni Santal, an indigenous woman and another happened at the army camp, keeping victim Majeda in protracted captivity. Hiramoni Santal could not come on dock to narrate her trauma due to her old age complications. However, her near relative who had opportunity to see the ‘attack’ and one witness testified the facts materially relevant to prove culpability of the accused. Mass rape at the army camp upon Majeda made her pregnant and eventually she gave birth of a daughter baby. The baby is still alive but as a war baby.

973. Victim Majeda Begum [P.W.5] and the war baby Shamsun Nahar [P.W.10] have been still struggling for survival. But they both came on dock and narrated the trauma, ignoring social ostracism. They are brave women indeed. Their testimony is a mere part of horrific scenario of physical invasion committed upon the countless women in the territory of Bangladesh in 1971, during the war of liberation by the Pakistani occupation army and their local collaborators. **Umme Wara** in her article titled **“Breaking silence of War Heroines: A Bangladesh Perspective”** rightly observed that-

“The Pakistani Army knew that if the dignity of *Bengalee* womanhood could be throttled down, the psychological spirit of the Bengalee nationalism will collapse. So, they extended the horror of the war in the person of the woman. In this sense, the Pak Army used the woman’s body to ravish and rampage the *Bengalee* entity. It was thought that this in turn will appear as a cultural, political and religious catastrophe in the mindset of the *Bengalee* nation.”

[Source: **Umme Wara**, ‘**Breaking silence of War Heroines : A Bangladesh Perspective**’ a paper presented in the international conference, Heidelberg University, Germany: 4-5 July, 2013: published in the journal ‘**Bangladesh genocide and the Issue of Justice**’, Liberation War Museum, Dhaka, page 106 of the journal]

974. Therefore, we are of the view that war time rape upon women can be seen as raping the body of the whole community. In the case in hand, rape victims Hiramoni Santal and Majeda Begum belonged to pro-liberation culture and community. The perpetrators’ intention was to do severe wrong with their entire community, by committing mass rape upon them. Keeping it in view it can be concluded that the mass rape committed upon Hiramoni Santal and Majeda Begum was ‘genocidal rape’.

975. A recent report titled **“saving war babies”** published in the **Daily Star of 03 December 2014** issue speaks how the **Cappuccino** representing Canadian philanthropic organisation ‘Friends for the Families in Canada’ saved lives of 15 fragile and premature war babies. The report states:

“Having read about the liberation war of Bangladesh and its aftermath in news papers they decided to try to save war babies, who were

unwanted here given the social context of the newly emerged country.”

976. Before handing over the documents that had legalized adoption of the war babies by Canadian couples **Cappuccino** said ‘most of the babies were premature, born at seven to eight months, and so they were fragile and weak’. The report says that on July 19, 1972, Bonnie Cappuccino accompanied 15 war babies on a special Air India flight from Dhaka’s Tejgaon (old) airport to Canada.

977. The above inspiring noble initiation made the sacrifice of our brave mothers in 1971 more graceful. It was recognition to our war of liberation through which the nation achieved its independence. We do not know whether any such humanitarian effort was taken by our social and national organisations to save, nourish and rehabilitate the war babies born as result of sexual violence against Bangalee women.

978. The core submission advanced by Ms. Tureen Afroz the learned prosecutor, on the issue of awarding ‘reparation’ or ‘compensation’, relates to the logic that the wealth and honour of the rape victims that has been snuffed out cannot be compensated--but however, the ‘reparation’ or ‘compensation’ will at least provide some solace to the grave wound they sustained and the accused Qaiser who actively facilitated and aided in committing the sexual invasion, in war time, is justifiably obliged to compensate the brutal misdeed he committed.

979. Modern approach of victimology acknowledges that a crime victim has right to be adequately compensated, rehabilitated and repaired. From humanitarian point of view, there has been no scope to disagree that the victims of crimes especially the victims of war time rape must have something like ‘reparation’ or ‘compensation’ that can reduce their continuing sufferings and trauma, as emphasized by the learned prosecutor. But does the Act of 1973 empower the Tribunal in making order imposing ‘reparation’ or ‘compensation’ in addition to the sentence awarded to the convicted person?

980. The phrase ‘*or such other punishment proportionate to the gravity of the crimes*’ as contained in section 20(2) of the Act of 1971 relates to body or person of the convicted accused upon whom sentence other than the sentence of ‘death, is awarded. The phrase ‘or such other punishment’ does not signify ‘reparation’ or ‘compensation’ or ‘fine’. Rule 46(3) of the ROP provides that

“Proportionate to the gravity of the crime, in sentencing the accused, the Tribunal may also impose fine and or pass reparation order which is deemed to be fit and proper”.

981. First, the ROP has been formulated by the Tribunal under the power conferred in section 22 of the main statute of 1973. Chiefly the ROP relates to procedure. Second, the ROP so formulated cannot override the main statute. Third, imposing or awarding ‘reparation’ or ‘compensation’ or ‘fine’ is a substantive matter that does not find place in the statute. Thus, without statutory back up an order on such ‘reparation’ or ‘compensation’, merely in exercise of power given in the ROP, in our view would be without jurisdiction.

982. But however we must say that the state cannot ignore designing program removing the stigma of rape by honoring and compensating the victims for the supreme sacrifice they laid and also to provide long-term support to them aiming to see that the ripple effects do not continue to haunt our society and community in the days to come. Mothers and sisters of this land contributed the supreme wealth of their own for the cause of our independence. But in absence of explicit provision and in view of above discussion, we, going beyond the provision of the Act of 1973, cannot order for ‘reparation’ or ‘compensation’ in addition to sentence to be awarded as urged on part of the prosecution.

983. However, the Government may take immediate initiative of forming ‘Reparation/ Compensation Scheme/Board for war time rape victims who sacrificed their supreme self-worth for the cause of our independence. And it may act awarding compensation to cover costs of their livelihood, funeral expenses, and loss of earnings, mental stress and trauma, aiming to

provide special care for ensuring honour and peace in carrying livelihood and also for narrowing the incalculable loss they sustained in 1971.

984. To conclude the issue, we prefer to add the observations of our own so that the state, society and non government organisations come forward to hold the war time rape victims close ensuring their socio-economic-psychological rehabilitation.

985. Already more than four decades have been elapsed. But the war rape victims and the war babies who are still alive, we presume, have been suffering from long-term psychological effects of rape that often include many types of disorders, such as, panic attacks, flashbacks, feeling of shame and dishonour, sense of insecurity and many other disorders affecting normal livelihood. These effects can last even lifelong if the victims and war babies born as a result of sexual violence does not get support and care from the society and the state.

986. Hundreds of thousands of rape survivors remained socially ostracized and unattended. The nation must raise a collective voice that they are war heroines. They are brave **‘freedom fighters’** as they too sacrificed their supreme self-worth, for the cause of our independence. We recall with laudable appreciation that the father of the nation Bangabandhu Sheikh Mujibur Rahman, in recognition of their glorified sacrifices, honoured them as ‘war heroines’ [*eniv/buj*], immediately after the independence. After the War of Liberation, Bangabandhu Sheikh Mujibur Rahman pleaded with his countrymen to give due honor and dignity to the women oppressed by the Pakistani army [**Bangladesh Observer, February 28, 1972, p.1**]. In 1972, the Bangladesh Government established the Women’s Rehabilitation Board to institutionalize women’s rehabilitation project, with the Central Women’s Rehabilitation Organization coordinating the Government’s post-war policies. But After the assassination of Sheikh Mujib [the father of the nation], the rehabilitation programme was effectively closed, the records were seized and all the Dhaka and district centres were turned over to the Women's Directorate.

[SCHOLTE, MARIANNE, ‘*Liberating the Women of 1971*’, Forum (Volume 05 Issue 03), **The Daily Star**, March 2011]

[See the link: <http://archive.thedailystar.net/forum/2011/march/liberating.htm>]

987. The war time rape victims are our great mothers and sisters. We cannot shut our eyes any more. The nation, the society must come forward to recognise and salute their sacrifices, to heal their wound, to compensate the barbaric wrongs done to them. The victims of sexual violence including the victims before us need redress in the form of social-service packages with a view of contributing to their rehabilitation and psycho-social permanence. Many of rape victims have already died. They deserve posthumous honour that may reduce the pains and trauma of their dear and near ones.

988. The society and the nation as well must keep it in mind that war time rape victims like Majeda Begum and her daughter Shamsun Nahar the ‘war baby’, the secondary victim are ‘**freedom fighters**’. Despite absence of any honour and recognition on part of the society and the nation for their highest sacrifice, Majeda and the war baby Shamsun Nahar are still on the way of pulling on their traumatized lives, carrying stigma with them. Victims of war rape should be honoured as ‘**freedom fighters**’ and their untold pain must and must not be ignored.

989. War time rape victims are the greatest mothers and sisters of the soil indeed. They are the integral part of our war of liberation. They are our pride. They fought for our independence, by laying their supreme self-honour and bravery. The nation salutes them, their sacrifices. It is true that the trauma they sustained can never be minimized. But however, they should never be left unattended and uncared as it makes the society, the nation, the humanity and our conscience seriously humiliated.

990. Shamsun Nahar [P.W.10] is a child born to Majeda Begum [P.W.5] brutally exploited by the Pakistani occupation army with the substantial assistance and aid of accused Qaiser. Shamsun Nahar is the symbol of the

trauma the nation as a whole went through. She is the child who constitutes evidence of the physical invasion committed upon her mother. Not only Majeda Begum, it has been proved that her daughter the war baby too, the secondary victim of the physical invasion have been facing denial in the form of rejection, abuse or abandonment by immediate and extended family members. The war babies have been fighting since their birth. We find it visible in the case in hand. In a sense, they have surrendered to the silence, identity crisis, social ostracism and rejection. “Children born as a result of sexual violence need to be raised free from neglect, discrimination and ostracism. The fate of these children needs to be researched and appropriate assistance and protection provided them”. [Lindsey, Charlotte. 2001. *Women Facing War*. Geneva: ICRC.].

991. The Ministry of Liberation War Affairs, Ministry of Social Welfare, social organisations and non government organisations are expected to initiate prompt and necessary steps first, in coordinated way, to identify the war time rape victims and ‘war babies’ the secondary victims of rape and then to formulate effective program aiming to honour them, reducing their disorders resulted from trauma and stigma they sustained and also to make an arrangement of providing monthly honoraria with them. It is to be done to remove the scar imprinted not only to rape victims but to society and the nation. Therefore, much greater and systematic attention is now needed for their psycho-social protection, we emphasize.

Circumstances considered in awarding Sentences

992. Now let us record our reasoned view in respect of awarding sentence for the other offences proved. We reiterate that in awarding sentence, the Tribunal, must eye on the nature and extent of the offences committed, their scale, the role the convicted accused 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.

993. In assessing it, eyes should also be kept concentrated to the preamble of the Act of 1973. The accused Syed Md. Qaiser has been found

criminally responsible not for committing any isolated offence punishable under the normal Penal Law. Commission of offences as specified in the Act of 1973 itself portrays enormity, gravity and diabolical nature of the crimes. It has been found too that accused Syed Md. Qaiser was a man of extreme notoriety around the localities of the then Habiganj sub-division in 1971.

994. In the case in hand, it has been proved beyond reasonable doubt that the accused Qaiser participated, abetted, substantially contributed the atrocious criminal activities in collaboration with the Pakistani occupation army that resulted in **(i)** murder of numerous civilians and non combatant freedom fighters; **(ii)** mass killing,; **(iii)** detaining civilians unlawfully; **(iv)** Inhuman torture on numerous detainees ; **(v)** creating humiliating conditions by creating climate of terror; **(vi)** rape upon women; **(vii)** handing over the captured civilians to the army leading their killing, in furtherance of common purpose and design. Accused Syed Md. Qaiser has already been found **guilty** as against **in all 14 charges**, as discussed above.

995. Tribunal notes that rape or sexual violence, either in war time or in peace time, is a revolting act of robbery that takes the thing that cannot be given back. Mass rape is graver than murder. **“Rape, as with all terror-warfare, is not exclusively an attack on the body- it is an attack on the ‘body-politic’. Its goal is not to maim or kill one person but to control an entire socio-political process by crippling it. It is an attack directed equally against personal identity and cultural integrity”**. [Nordstrom, C, 1991, *“Women and war: observations from afeild”*, Minerva: Quarterly Report on Women and the Military, 9] Therefore, only the highest penalty is justified for this Pattern of crime.

996. It has been proved beyond reasonable doubt that the accused Syed Md. Qaiser, as a potential and trusted aide of the Pakistani army headquartered in Habiganj sub-division consciously, and actively assisted and facilitated them in committing mass rape upon the defenceless women, at their house and also at the army camp. It was not only rape but a premeditated attack to the community the women belonged. The harm

caused to them by the act of mass sexual violence was intended to intimidate and destroy their community, to further policy and common purpose. The way the accused participated and facilitated the commission of the crime inevitably aggravates his liability. We fail to understand how the accused Qaiser being a Bengali Muslim actively aided, abetted and facilitated the commission of such beastly physical invasion upon the women which was worse than murder. Did it match to any political ideology and humanity?

997. It is true too that punishment to be awarded to the wrongdoers does not restore to the victim Majeda Begum of war rape anything comparable to what the victim has lost. But it however gives a kind of recognition for the sacrifice the victim Majeda Begum had laid and the tears still she is shading and also for showing courage in exposing Shamsun Nahar, a war baby' as her child whom she gave birth of due to forced pregnancy caused by recurrent sexual violence upon her, during war time in 1971.

998. Accused Qaiser was not a low-level 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 founding a private outfit [Qaiser Bahini] and getting actively involved with the local peace committee accused Qaiser was visibly intended to collaborate with the Pakistani occupation army since its rolling into Habiganj, in carrying out horrific killing, confinement, torture, other inhuman acts, mass killing, mass rape, with extreme notoriety. The mode and degree of the participation of the accused Qaiser, as already found proved, aggravates his culpability in accomplishing the crimes. Convicted accused Qaiser was an active and willing participant in the massive criminal operation carried out in the villages under Nasirnagar police station, already found proved. He was a willing participant in all the brutal attacks upon non combatant civilians as narrated in the charges proved. We consider it just to take all these factors into account too for weighing the aggravating circumstances.

999. Law does not use its pen as firing arm. But Majeda Begum and Hiramoni Santal the victims of war rape [**charge 12 and charge 8**] had been beastly wronged, and now objectively this wrong needs to be righted so that we can uphold the letters of law. Therefore, the accused Syed Md. Qaiser the wrongdoer deserves appropriate punishment for his act of substantially contributing , facilitating and abetting the principals in carrying out the mass rape upon Majeda Begum that eventually resulted in her ‘forced pregnancy’. Nevertheless, any form of punishment and/or compensation do not make what the victim has lost returned.

1000. 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’. [**Persecution as a Crime under International Criminal Law: Fausto Pocar**, Judge, International Criminal Tribunal for the former Yugoslavia (2000-present) and President of the Tribunal (2005-2008). This article is based on a paper presented to the faculty of the University of the Pacific, McGeorge School of Law, on April 3, 2008]. The crimes for which the accused Syed Md. Qaiser has been found guilty not only inflicted wounds or death, but were relentlessly aggravated by the voluntary, calculated and wanton violation of the dignity of civilians killed and suffered.

1001. A sense of closure to the darkest chapter in the history of Bengali nation needs to be brought to end impunity for the barbaric atrocities committed in 1971, for strengthening the rule of law and also to set an example. The events involving killing of civilians, mass killing and mass rape on women were enormously appalling indeed. However, mode of participation of the accused **Syed Md. Qaiser**, as has been found proved, deserves justifiable consideration, in awarding sentence particularly in respect of the offence of murder as listed in **charge nos. 3, 5,6, 10, and 16** and also in respect of the offences of mass rape as listed in **charge nos. 8 and 12**. The offences as listed in these charges **indubitably** fall within the kind of such gravest crimes which trembles the collective conscience of mankind. ‘**Qaiser Bahini**’--a ‘**pack of wolves**’ had collaborated with the

Pakistani occupation army with extreme ferocity in carrying out appalling activities directing pro-liberation civilians, under the infamous ‘**headship**’ of accused Syed Md. Qaiser.

1002. 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 Syed Md. Qaiser 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 **Syed Md. Qaiser (73)** @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser son of late Syed Saiduddin Ahmed and late Begum Hamida Banu of village- Itakhola [Noapara] Police Station- Madhabpur District- Habiganj [at present house no. 21, road no. 06, block-C, Flat no. 3B, Banani, Dhaka, Dhaka Metropolitan Police(DMP), Dhaka] found **guilty** of the offences of ‘**murder**’, ‘**abduction**’, ‘**confinement**’, ‘**torture**’ and ‘**other inhuman acts**’ as ‘**crimes against humanity**’ enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 1,2,7,9,11,13 and 14 [07 charges]**. Accordingly, he be convicted and condemned to the **sentence as below for these seven 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.1;**

Sentence of **imprisonment for 10[ten years]** for the crimes as listed in **charge no.2;**

Sentence of **imprisonment for 07[seven] years** for the crimes as listed in **charge no.7;**

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.9;**

Sentence of **imprisonment for 05[five] years** for the crimes as listed in **charge no.11;**

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.13;**

AND

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.14;**

The sentence of imprisonment so awarded above **in respect of charge nos. 1, 2,7,9,11,13 and 14** shall run **concurrently**.

The accused **Syed Md. Qaiser (73)** @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser is also found **guilty** of the offence of **'murder', 'mass rape' and 'mass killing[extermination]'** as **'crimes against humanity'** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 3,5,6,8,10,12 and 16**. Accordingly, he be convicted and condemned to the **sentence as below**:

'Sentence of death' for the crimes as listed in **charge no.3** 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.5** 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.6** 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.8** 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.10** 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.12** 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.16** 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. 3, 5,6,8,10,12 and 16** will get merged.

However, as the convict **Syed Md. Qaiser** has been condemned to **'sentences of death'**, as above, the **'sentences of imprisonment'** awarded in respect of charge nos. **1,2,7,9,11,13 and 14** will get merged into the **'sentences of death'**. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused **Syed Md. Qaiser** is found **not guilty** of offences in respect of charge **nos. 4 and 15** 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 Md. Mozibur Rahman Miah, Member

1003. I have had the privilege to go through the judgement to be delivered by my learned brothers, Obaidul Hassan, J and Md. Shahinur Islam, j. I am in agreement with the adjudication my learned brothers have prepared as regards to charge no.1,2,3,4,5,6,7,8,9,10,12,13,14,15 and 16. I do also agree with the findings of conviction and sentence they propose in respect of those charges but still, I pen my independent views and give observation on adjudicating those charges concurring with my learned brothers. But, I regret, I could not subscribe to the observation and findings my learned brothers propose as regards to charge no.11. Hence, I put across my own views and reasoning which I find myself pertinent in adjudicating charge no.11. It is worthwhile to mention here that, at the summing up hearing, Defence did not raise any legal submission on the maintainability of the instant proceedings calling for no necessity of any discussion on such point here to reopen non-contentious issue. Besides, our Hon'ble Appellate Division by pronouncing its land mark judgement dated.17-09-2013 in Criminal Appeal no.24-25 of 2013 as well as judgement dated.12-12-2013 in Criminal Review Petition nos.17-18 of 2013 (both in Abdul Quader Molla's Case) has settled both substantive

and procedural issues enumerated in various section in the Act of 1973 so evolved before us during the trial proceeding relieving us to look for the observations, decisions of various hybrid Tribunals set up at different parts of the globe backed by the United Nations while adjudicating the crimes that have been envisaged in section 3 of our Act of 1973 and undoubtedly, those Foreign Tribunals where proceedings against Crimes against humanity are being proceeded may use as reference of the decision on various legal point already established by our Hon'ble Appellate Division as well as this Tribunal. I strongly believe The International Crimes Tribunal Act (Act no.XIX of 1973) is absolutely a self-contained enactment passed by our sovereign Parliament far back in 1973 and the *ratio decidendi* already settled by our Hon'ble Appellate Division on various legal issues in the aforesaid appeal and review make the said Act of 1973 more resourceful and transparent particularly question of applicability of diverse provision of Evidence Act in prosecuting the offenders for perpetrating crimes against humanity. In such a legal parlance, I am not inclined to harp on the observation and decision of the trial chamber or appeal chamber of such hybrid Tribunals on each and every issue as the provisions so laid down in different sections of our act is sufficient enough to address any contentious point and the latest judgements of the Hon'ble Appellate Division has dispelled all the controversy that may have cropped up in future between the parties on any legal issues. Keeping in view of such legal proposition, I hereby pronounce my following installment where I adjudicate the charges chronologically and address other ancillary points evolved during the course of trial proceedings:

1004. Adjudication of Charge no.1

(Murder of Shahjahan Chairman and Other inhuman acts)

Charge Framed : By this charge accused Syed Md. Quaiser has been arraigned for leading "Kaiser Bahini" and a group of Pakistani Occupation forces at Islampur Polioce Post under Islampur Police station of the then Bramhanbaria sub-division on April 27, 1971 in between 1:30 pm and 3:00 pm and at the instruction of accused the Pakistani Army gunned down one Shahjahan Chairman and then moved towards 'Kazi bari'

locality and on their way the Army caused torture to one Nayeb Ali-a pro liberation civilian at the order of the accused and launched attack directing civilian in the locality by looting households of 15 civilians and destroyed properties by setting those fire and by that, Syed Md. Kaiser has been charged for abetting, facilitating and contributing the actual commission of offence of murder as crime against humanity or in the alternative for abetting, facilitating and contributing the actual commission of offence of other inhuman acts as Crime against humanity, as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act,1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1005. Evidence of Prosecution Witnesses:

At the trial prosecution has relied upon the oral testimony of several witnesses claiming them to be sighted as well as hearsay witnesses. Among them, **Pw-1, Kazi Kabiruddin** claimed to be an ocular witness has deposed in his examination –in-Chief (hereinafter referred to as “Chief”) that, while Pakistani Army personnel led by accused Syed Md. Kaiser(hereinafter referred to as ‘Kaiser’) had reached near Islampur at around 2:30 pm, on the date of event, Shahjahan,-the then Chairman of Budunti Union Parishad and resident of Islampur village came out of his house when accused hurled abuse terming him as supporter of Independence and ordered the accompanying Pakistani Army to shoot. At this, being petrified with fear, Shahjahan Chairman then by knelling on the ground with folded hands started begging mercy for his life but paying no heed to such prayer a Pakistani Army then gunned him down. After that, Kaiser accompanied by his ‘Bahini’ and Pakistani Army moved towards ‘Kazibari’- the resident of this Pw and on their way, one Nayeb Ali greeted him but without responding his greetings he ordered his accomplices to inflict torture and instantly his ‘Bahini’ started beating him leaving him critically injured - this Pw has further added.

1006. Thereafter, Kaiser and his Bahini reached ‘Kazi Bari’ and looted household goods including cattle’s from the houses of ‘Kazi Bari’ and set many houses on fire. He claimed to have witnessed all those atrocities

keeping himself 150-200 yards away from the position of Pakistani Army by holing up in a secret place- pw continued.

1007. In Cross examination (Shortly “Cross”), learned defence counsel put certain questions to this Pw in a bid to shake the event but the reply given by this Pw has rather exposed the very mission of this Pw as well as the atrocities of Kaiser and his accomplices who asserted to had followed the position as well as the movement of the Pakistani Army. In reply to another question in cross, this Pw further described the location as well as surroundings of the house of slain Shahjahan Chairman. Aside from that, drawing attention to the incriminating portion of the chief some general suggestions disentangling the accused from the allegations have been put to this Pw –which he flatly denied.

1008. One **Nayeb Ali** has also deposed as **Pw-19** supporting the charge. In a nutshell, he described in his chief that, on hearing the scream some time after Zohar prayer on Baishakh 13, 1971 he came out of his house and got to know that Shahjahan Chairman had been shot dead. At this, he moved towards the village road and saw people nearby were fleeing to and fro when accused Kaiser accompanied by his ‘Bahini’, Pakistani Army and members of local peace committee were approaching towards north by chanting slogan ”Pakistan Zindabad”, “Naraye Takbir, Allahu Akbar”. Having been seen Kaiser he greeted him but he branded him as the ‘man of Mujib’ and instantly one Pakistani Army beat him with his rifle butt and shoved him beside the road leaving him senseless.

1009. He further stated to know accused Kaiser before, as he used to trade cattle’s at Noapara cattle market owned by Kaiser’s family. Kaiser along with his Bahini then moved towards ‘Kazi Bari’ and after looting the household goods including cattle’s they set the houses on fire resulting 15/16 houses gutted - he continued to depose. After such destruction, Kaiser and his accomplices then looted his (Pw) houses and also set 12/14 houses on fire and went away with his ‘Bahini’ towards north with cattle’s looted from ‘Kazi Bari’.

1010. Defence has duly cross examined this Pw and took the location of the house of deceased Shahjahan Chairman as well as the distance of

‘Kazi Bari ‘ and ‘Miah Bari’ from that of the house of victim Shahjahan Chairman. No question has been put to this Pw with regard to his enduring torture caused by the accomplices of Kaiser or those of looting and burning of houses - he asserted in chief. As of earlier occasion, learned Defence Counsel has put some general suggestions to this PW claiming the accused to have not committed any offence as alleged in the chief- which the Pw denied flatly.

1011. Then another **Nayeb Ali** testified as **Pw-14** in his chief has mostly described the movement of Pakistani Army from Bramhanbaria towards Madhabpur as well as the active collaboration of accused Qaiser and his ‘Kaiser Bahini’ with the Pakistani occupation forces in accompanying the invading forces in marching towards Madhabpur and launching attack and carrying out destruction in different locations on their way to Madhabpur. He in his chief stated to have known from a source of Kazi Kabiruddin that, Shahjahan Chairman of Islampur had been killed by the Pakistani Army, at around 2:00pm on April 27,1971 while Nayeb Ali (PW-19) had been injured and the houses of Kazi Kabiruddin were also set on fire in same transaction.

1012. Pakistani Army and ‘Kaiser Bahini’ came under serious offensive by the freedom fighters when they had reached at Islampur village on their way to Madhabpur and there had been traded heavy gun fire there, as he had heard the sound of such gunshot staying at his house in Madhabpur located hardly 3 kilometer away from Islampur- the Pw added further.

1013. In reply to cross this Pw has further stated that, there were some culverts as well as a bridge over the river *Titash* at Shahbazpur point on the road run from Bhrammanbaria to Madhabpur. No question has been put to this Pw in a bid to shake his testimony related to the event other than taking denial from this witness on giving general suggestion on drawing the attention of the incriminating part of the chief as the learned counsel for the Defence did in respect of other Pw’s.

1014. **Mohammad Ali Pathan** as **Pw-4** in his chief has also described the very movement of Pakistani Army towards Madhapur from

Brhammanbaria led by accused Kaiser. He has further stated to had witnessed the flame and smoke billowing from Budunti, Islampur and other villages on April 27, 1971 when there had been mortar shelling that fell on in the vicinity of Madhabpur Dak Bunglaw which rest him assured that Pakistani Army had been marching towards Madhabpur. Defence has just put suggestion on the above testimony of the Pw alleging those statements were not true - which this Pw denied.

1015. Prosecution also adduced **Md. Yakub Ali** who has deposed as **Pw-6** and in his chief he stated that, at around 1:30 pm on April 27, 1971 there had been fighting at Islampur and he witnessed the flame in the sky billowing from Islampur direction staying at his Madhabpur residence. Here also the Defence did not ask any question about what he stated in chief related to the event save and except taking denial on putting suggestion on material part of the chief.

1016. Md. Ful Mia claiming to had actively participated in the liberation war in Joydebpur, Kisharganj, Habiganj and Bhrammanbaria areas and came across several sector commanders of the war of Liberation deposed as **Pw-17**. While describing the tale of horror he encountered during 9 months long war he stated that, on April 27, 1971 he had been posted at *Surma* and *Goasnagar* area by Captain Motin for collecting information when he witnessed flame billowing from the direction of Kazi Kabiruddin's house.

1017. To this Pw, even no suggestion has been put by the defence to the contrary of what he stated in the chief in relation to the event. Prosecution has also relied upon the testimony of **Tajul Islam, Gour Prashad Roy** and **Shah Hasan Ali** all deposed as **Pw-3, Pw-12 and Pw-7** respectively but on close scrutiny of their respective testimonies I do not find anything they stated, to be relevant for the charge.

1018. Submission advanced by the Prosecution at summing up:

Mr. Rana Das Gupta, the learned Prosecutor at the very outset of his submission has taken us to the respective areas of the evidences of the prosecution witnesses stood for this charge and avers that, they have been able to prove the charge beyond any shadow of doubt. Pointing to the

killing of Shahjahan Chairman, learned prosecutor submits that, it is Pw1 who had witnessed the said brutal killing so perpetrated by the Pakistani Army following the direction of accused Kaiser. He further submits that, in cross examination this very pw asserted that, on April 27, 1971 he was directed by his commanding Officers, Major Shafiullah and Captain Nasim to look in to the position of Pakistani Army and as per their command, this Pw was running after the movement of Pakistani Army keeping himself 150-200 yards away from them on concealing him at safe distance.

1019. By eliciting this very reply on cross, the defence has rather affirmed the mission of this Pw and witnessing the killing event of Shahjahan Chairman which appears quite possible. Apart from that, in reply to the cross this Pw has also given a vivid description about the surroundings of the house of the slain, Shahjahan Chairman through which he made it clear that it was quite possible for him to view the killing incident- learned prosecutor added.

1020. So far as it relates to torturing Nayeb Ali and burning of his (Pw) houses as well as looting household goods including cattle's there from cannot be shaken in cross examination rather the burning and looting of the houses have been asserted, as in reply to cross, this Pw has categorically stated that, at the time of those atrocities there were none in their houses-learned prosecutor further argued.

1021. In this charge there has been another victim testified, named Nayeb Ali (Pw-19) who had been subject to brutal torture on branding him as the 'people of Mijib' by accused Kaiser. This Pw has also given a clear description about how accused Kaiser and his 'Bahini'(Forces) had burnt Kazi Kabiruddin's houses and of himself to ashes before looting all belongings there from making no deviation by the Defence- in cross-learned Prosecutor submits. He next submits that, though this Pw did not witness the very killing of Chairman Shahjahan but he had heard it from the panicked stricken fleeing civilians who were running helter-skelter for their life and his very source of information could not be impeached in any manner by the defence in cross, leaving the testimony of this witness

as regards to the killing of Shahjahan Chairman undisputed that clearly corroborates the testimony of sole live witness, Kazi Kabiruddin(Pw-1).

1022. While pointing out to the evidences of other witnesses namely, Pw-4, Pw-6, Pw-14 and Pw-17 learned Prosecutor argues that, all those witnesses in their respective testimony have stated to have either heard or seen the very killing of Shahjahan Chairman as well as flame and smoke billowing from the direction of Islampur village. All those witnesses have concurred in one point, it is, about the movement of Pakistani Army from Brhammanbaria to Madhabpur on the date of event as alleged in the charge so led by none but the accused Kaiser and his notorious ‘Kaiser Bahini’ and kept causing destruction on their way and the massacre at Islampur point just bore sign of such atrocities perpetrated at the direction of accused Kaiser and his accomplices having not been refuted by the defence in cross -learned prosecutor further added .

1023. At this, attention was drawn to the learned prosecutor pointing to the views of the learned Defence Counsel, saying, since defence has given suggestion to the Pw’s on its incriminating part of the chief, such suggestion would be suffice in treating the accused not committed the offence so alleged by the respective Pw in his chief having no necessity to put further question to shake or impeach the alleged accusation- Pw’s leveled against the accused.

1024. Clearly contradicting such view of the Defence, learned Prosecutor asserts that, until and unless the defence can create any doubt by putting questions, about the event, related to the charge so narrated by the Pw in his/her respective chief such testimony of the Pw favouring the charge would be regarded proved. Mere putting suggestion to the Pw and taking denial there against in a mechanical manner would never absolve the defence in discharging its responsibility towards the accused and accused would not derive any benefit out of that unless the assertion of Pw’s about the accusation against the accused could be waned—learned Prosecutor concluded.

1025. Contention of Defence :

In contradicting to what the learned Prosecutor submits, Mr. SM Shahjahan, the learned defence Counsel contends that, in the alleged killing of Shahjahan Chairman there is no eye witness except Pw-1- who as per him, is not a credible witness as he has given testimony covering almost all the charges leveled against the accused in this case. In his second thought, learned Counsel submits that, Pw-1 being a valiant freedom fighter could not have followed the Pakistani Army from behind keeping him at a safe distant and in some times keeping him holed up in a bush rather should have faced them in front fighting. In such perspective, the testimony of Pw1 devoid of any trustworthiness-learned Defence counsel asserts.

1026. Learned Counsel goes on to submits that, no relations of slain Shahjahan Chairman even turned out to depose supporting the alleged killing implicating the accused though from the cross examination of the Investigation Officer (hereinafter referred to as “IO”) deposed as Pw-32 has readily stated that, she examined the widow and children of Slain Shahjahan Chairman who declined to testify before the Tribunal which also cast serious doubt in the prosecution case.

1027. Learned Counsel further contends none, other that Pw-1 and Pw-19 has alleged about the killing of Shahjahan Chairman out of whom Pw-19 is mere a hearsay witness and pointed general public as his source of knowledge of the alleged killing which suffers from absurdity. In regard to alleged torture of Nayeb Ali(Pw-19) and looting as well as burning down the houses of Pw-1 and of himself(Pw-19)-there remains no witnesses who had ever seen the alleged incidents and it would be fatal if the accused be found guilty for the commission of alleged crime relying upon the incredible evidences of those two witnesses(Pw-1 & Pw19) without any corroboration-learned Counsel argued.

1028. In the last leg of his submission Mr. Shahjahan found it improbable to commit the alleged offence by the accused when Madhabpur thana area went under the control of Pakistani Army on 28/04/1971- as found by the IO during her investigation while replied in cross . Had it been so, there cannot be any earthly reason to launch any attack by the accused on accompanying his alleged Bahini and Pakistani Army on April 27, over

the areas remained well guarded by the freedom fighters and the entire allegation made out in the charge is absolutely fabricated one-learned counsel concluded.

1029. Analysis of Evidences and Deliberation :

In this particular charge three distinct offences that form 'crimes against humanity' alleged to have committed by the accused in a single transaction. And Prosecution is thus liable to prove all the three counts of allegation independently. In doing so, prosecution has mostly relied upon the evidences of two victims testified before us as Pw-1 and Pw-19. Admittedly, in this charge no close relatives of slain Shahjahan Chairman who alleged to have gunned down by the accompanying Pakistani Army of accused Kaiser has turned up before this Tribunal though fact remains, they came across the IO during investigation. In this charge Pw-1 is being called victim in the sense that his houses were set on fire while Pw-19 sustained torture at the behest of accused Kaiser. Apart from that, other witnesses standing for proving this charge claimed to had heard the killing of Shahjahan Chairman, torture of Nayeab Ali(Pw-19) as well as witnessed flames emitting from the direction of Islampur Village.

1030. In such a posture of allegations, the paramount question remains, whether testimony of those witnesses are worthy enough to prove the charge consisting of three distinct crimes. Admittedly, defence did not dispute the killing of Shahjahan Chairman rather than the involvement of the accused. Here, only Pw-1 claimed to have witnessed the killing of Shahjahan Chairman perpetrated at the direction of accused and he also heard such direction.

1031. On the other hand Pw-19 corroborated the killing claimed to have heard from the panic-stricken people fleeing for their lives. In cross examination, defence could not deviate these two witnesses from their very assertion. I am in full agreement with the submission of the prosecution that- the very reply of Pw-1 in cross affirmed the killing of Shahjahan Chairman. He asserted to have followed the movement of Pakistani Army keeping himself 150-200 yard away has definitely affirmed the killing of Shahjahan Chairman because it was quite natural

for the PW-1 to hear the direction of accused and witness the killing scene from 150-200 yard away.

1032. Further, this Pw in his next breath of reply to cross added, the people were then fleeing helter-skelter for the sake of their lives. This averments prevailing at that horrific juncture, so witnessed by Pw-1 has also echoed by Pw-19 in his assertion while replying in cross about the killing of Shahjahan Chairman. As in his chief, Pw-19 also categorically stated to have heard the killing of Shahjahan Chairman from the fleeing people when he had also seen accused Kaiser, his Bahini and members of Pakistani Army marching towards north. It would not be hard to grasp from such movement of the accused and Pakistani Army to whose instance such killing had been perpetrated.

1033. As it is found from the trend of cross examination that, other than giving suggestion to the Prosecution witnesses on their incriminating part of the chief learned counsel for the Defence did not make any headway in eliciting anything that could make controversy to the prosecution case or their assertion made in the chief. Though, it has not come any aid for the defence or in other words, the defence has derived nothing from taking such denial from the Pw's replied out of the suggestion. Be that as it may, on careful analysis of the evidences, I am of the view that, prosecution through convincing evidences has been able to prove the murder of Shahjahan Chairman so perpetrated at the direction of the accused.

1034. In so far it relates to causing torture on Nayeb Ali(Pw-19), the victim seems to be the most pertinent witness. On close scrutiny of his testimony it appears to me that, had the accused Kaiser identified him as 'the man of Mujib' Pakistani Army would not have tortured him so brutally. Now question naturally crop up, what prompted Pakistani Army to inflict torture at Pw-19 with rifle butt and kicked him through their boots, the answer suggest, because they(Pakistani Army) knew they were in Bangladesh to eliminate 'man of Mujib'-whom are antagonistic to them and such 'man of Mujib' were fighting against Pakistani invading forces for their emancipation where accused Kaiser had just played a pivotal role to implement their (Pakistani Army) such evil design and in

that score, Kaiser had just showed her utmost loyalty to Pakistani Army by identifying Pw-19 as their target.

1035. The narration so made by Pw-19 about offering greetings to Kaiser and then enduring torture by the Pakistani Army has been well corroborated by Pw-1. The defence did not make any sorts of deviation from their assertion other than taking mechanical denial from the Pw's on putting suggestion to them, the resultant upshot; the defence derived nothing thereby as I have observed in the foregoing paragraph. In that count also, prosecution has succeeded to prove the accusation against accused Kaiser.

1036. It is the case of the Prosecution that accused Kaiser had guided Pakistani Army rolling on to Madhabpur from Brammhanbaria and on their way they looted the houses of 'Kazi Bari' and eventually set those on fire. In proving such event Pw-1 whose houses were also set ablaze has narrated the ordeal having been witnessed such destruction on holing up in a safe place. Pw-19 has supported the statement of the victim(Pw-1) who stood as the eye witness of the event. In addition of those two vital witnesses who corroborated each other regarding the incident of looting and burning the houses, there have been other witnesses namely, Pw-4, Pw-6, Pw-14 and Pw-17 who in their respective testimony stated to have seen flame coming out from village Islampur.

1037. Their testimony creates strong circumstantial basis to the prosecution case alleged for setting the houses on fire in Islampur Village. From the testimony of Pw-1 and Pw-19 it stands prove that, the houses of those Pw's located in Islampur were set ablaze ignited by Pakistani Army, accompanied by Kaiser. Curiously enough, by cross examining Pw-1, Defence has rather asserted the very looting as well as burning his houses, as in reply to cross, Pw-1 has expressed his ignorance regarding the whereabouts of their looted cattle's after having been burnt of their houses on asserting further that, there were none in their houses when those were burnt down. In view of the above, there is no gainsaying of fact that, Prosecution has very assertively proved the allegation of looting and burning the houses with the testimony of Pw-1 against the accused too.

1038. Learned Defence Counsel has raised a point that in spite of having close relatives of slain Shahjahan Chairmen Prosecution has failed to produce them before the Tribunal who would have been the most reliable witnesses in proving the charge but in failing to produce them as witness Prosecution has rendered the charge doubtful. But I find such contention of the learned Defence counsel lack material substance. There could be many tacit reason for a victim family for not turning out as a witness before a court of law for seeking redress for their grievance, but mere non production of such relatives as witness does not *epsofacto* denote as a failure of a particular charge should the evidences of other witnesses be found credible and plausible in proving the charge.

1039. From the foregoing discussion it has been found that the prosecution has squarely proved the case by adducing competent witnesses. Hence, mere non production of the relatives of slain victim as witness can never be considered as fatal in the case.

1040. Mr. Shahjahan has made another point, softly lambasting the role of Pw-1 as a Valiant Freedom Fighter and doubted his alleged assertion he narrated in his testimony. As per learned Counsel, as a freedom fighter Pw-1 was supposed to take on in front fighting with the Pakistani Army instead of cowardly following them from behind and thus questioned the credibility of his testimony. The very contention suffers from sheer absurdity and fallacy like argument, as what a freedom fighter would venture in the war of liberation is absolutely of their war strategy designed by their commandant and definitely Pw-1 did what he had been assigned.

1041. In the warfare many strategic plan has to be adopted and from his (Pw-1) testimony we find that, it was the command upon him by his commanding officer to follow the movement of Pakistani Army who had just carried out such command. What is important to be considered here, whether Pw-1 has been able to prove the charge beyond any reasonable doubt and his testimony is credible one on the face of attending circumstances prevailing at that crucial juncture but what the Pw-1 might have been done or not cannot be the basis to discard the evidence that proved the charge. So the submission of learned Defence counsel raising the probability of seeing the event by Pw-1 clearly falls through.

1042. Mode of liability accused incurred :

On critical analysis of the un-impeached and irrefutable testimony of the witnesses it clearly and palpably impel me to believe that, accused Kaiser actively participated in the commission of the offence of murder as well as other inhuman acts on the Victims and thus it proves, the accused abetted, facilitated and contributed the perpetrator to commit the crime of murder and other inhumane acts to unarmed civilians constituting the offence of Crimes against humanity as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1043. Verdict on Conviction : Considering all evidences and submissions of learned Advocate of the parties I find accused Syed Md. Kaiser **Guilty** of the offence of complicity to commit ‘murder’ and ‘other inhuman acts’ as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1044. Verdict on Sentence: While sifting the evidences of Pw-1 and Pw-19 both victims, I find accused Syed Md. Kaiser’s grievous hatred towards the freedom loving people. His vision and mission was to destroy those who stand for the independence for their motherland else, he could not have hurled abuses and ordered to torture Pw-19 so disdainfully and killed Shahjahan Chainman gruesomely because their fault was they wholeheartedly wanted to have their motherland liberated from the invading forces and adored Sheikh Mujib-as its architect .

1045. This accused had not only committed ghastly destruction to numerous villages, causing torture to Pw-19 apart from murdering Shahjahan Chainman but demonstrated a perfidious mentality against the birth of this country through his vile conduct. In perpetrating the atrocities this accused Kaiser took a pivotal role only to earn loyalty as well as have grace from notorious Pakistani Army even in his native areas and in my view, such sorts of gruesome killing, brutal torture and horrific atrocities perpetrated towards the an unarmed victims- pro-liberation civilians, the accused deserves no leniency in awarding

punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for Life for the crimes of murder, torture and other inhuman acts, under section 20(2) of International Crimes (Tribunals) Act, 1973

1046. Adjudication of Charge no.2

(Inhumane acts caused to Civilians at *Katiara* Village, Madhabpur)

Charge Framed : in this charge accused Syed Md. Kaiser has been indicted for leading ‘ Kaiser Bahini’ and members of Pakistani Army in launching attack targetting civilian population at western part of Madhabpur Bazar and its adjacent *Katiara* village around 05:00 to 06:00pm on April 27, 1971 and looted 150 shops and households and thereby destroyed the same by setting those ablaze belonging to pro-liberation civilians named Kamini Roy, Binod Beheri Modok, Shachindra Roy, Hirandra Roy, Roti Babu, Ahid Hossain and by that, Syed Md. Kaiser has been charged for abetting, facilitating and contributing the actual commission of offence ‘**other inhumane acts**’ as ‘crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act,1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1047. Evidences of Prosecution Witnesses:

To support the event, prosecution has relied upon the oral testimony of both ocular witnesses as well as hearsay witnesses. In the first place, I would like to figure the testimony of live witnesses. While narrating the incident so propounded in the charge, **Kazi Kabiruddin** appearing as **Pw-1** in his chief has stated that, a group of Pakistani Army led by accused Kaiser had torched the houses and shops on the western part of Madhabpur Bazar claiming that he had witnessed those destructive atrocities remaining there till evening on the date of event and subsequently reported those horror-struck events to Captain Nasim and Lieutenant Morshed who were then staying at *Haluapara* Village of Madhabpur then.

1048. In cross examination, Defence quizzed him as regards to the whereabouts of Captain Nasim, Lieutenant Morshed and other Officers

specifying 27th and 28th April, 1971 when this Pw in his reply has asserted that, all of them were staying in Madhabpur. Apart from that, defence has put no question to this Pw except giving general suggestion on drawing attention to the incriminating part of his chief claiming those to be untrue-which this pw denied.

1049. Mohammad Ali Pathan, hails from Madhabpur also a valiant freedom fighter has turned out as **Pw-4** in this case. While giving testimony in regard to the event this Pw amongst others has stated that, sometime after 10:00/11:00am on the date of event he saw smoke coming out from the direction of Madhabpur Bazar and panic-stricken people fleeing helter-skelter though blaze had been inflamed throughout the day when he also heard gunshot. The passerby has informed him that by such attack valuables of many shops and dwelling houses had been looted before being burnt them down-he continued to state. Apart from their cotton shop he has also named Shacindra Roy, Kamini Roy, Binad Modok whose business establishment at Madhabpur Bazar had also been set on fire stating further, nearly 200 shops had been burnt in the arson. Even then, no question in the form of suggestion has been put to this Pw regarding the event he narrated in the chief in cross examination by the Defence.

1050. Another Witness named **Md. Yakub Ali** claimed to had noticed the event from a hideout at Madhabpur Bazar deposed as **Pw-6** and stated that at around 4:30pm on the date of event he saw Kaiser, his Bahini and member of Pakistani Army looting and torching the houses at Madhabpur Bazar whereby the houses of Shachindra Babu, Binad Beheri Modok, Kamini Roy, Hirendra Lal Roy were burnt. He had also heard, the notorious accomplices of accused Kaiser opened indiscriminate gun fire at *Katiara* Village and set the houses of fishermen lived there ablaze and looted the valuables there from and with these horrifying attack the entire village turned in to devastation –Pw added.

1051. This Pw was also cross examined by the Defence but no question has been put to this Pw except giving general suggestion on drawing attention to the incriminating part of his chief claiming those to be untrue-which this pw denied.

Md. Nayeb Ali appeared as **Pw-14** in his chief gave almost same account of ordeal as of Pw-6 claiming to have witnesses all the atrocities perpetrated at Madhabpur Bazar and *Kotiara* Village staying at *Modok Patty* at the Bazar perpetrated at about 5:00pm or quarter past 5:00pm on the date of event.

1052. He also reiterated the testimony of Pw-6 regarding looting and burning the houses of Shachindra Babu, Binad Beheri Modok, Kamini Roy, Hirendra Lal Roy adding further that, accused Kaiser, his Bahini and member of Pakistani Army had also torched 100-150 shops located on the western part of Bazar.

1053. In reply to cross examination by the defence, this Pw has also given current particulars of four victim businessmen whose houses had been burnt in the atrocities committed on the date of event. Apart from that, a general suggestion has been made to this pw on drawing attention to the incriminating part of his chief claiming those to be not true- which this pw denied.

1054. Then comes **Md. Ful Mia** deposed as **Pw-17** who in his chief claimed to have seen smoke and heard gunshot from western part of Madhabpur *Bazar*(market) and *Katiara* Village at about 5:00pm or 5:30pm staying at *Surma* and *Goasnagar* village with a 20 member team so posted by Captain Matin to collect information. He further added that, sensing the danger of gunshot and arson attack they shifted their position and reported such atrocities to Captain Matin at night who was then staying at *Shimna* camp. This Pw has also narrated the distance of place of event from that of their hideout as well as other establishments located therein.

1055. On going through the entire cross examination I do not find any questions even in the form of suggestion having been put by the defence to this Pw over the event so described in the chief.

Besides, Prosecution has placed its reliance upon the oral testimony of some witnesses who have heard the event. Amongst those, **Mohammad Ali Pathan** has turned up before this Tribunal and deposed as **Pw-2**. In his chief, he stated to have learnt that, around 10:00 to 11:00am following

April 27, 1971 accused Kaiser, 'Kaiser Bahini' and member of Pakistani Army torched in the western part of Madhabpur *Bazar* and *Kotiara* Village on arriving there from Brahmanbaria via Shahbazpur that left 150 shops and households gutted by fire and they also committed myriad looting in the houses and shops therein. Madhabpur Bazar used to be predominantly Hindu dominated area in 1971 - the Pw further added.

1056. On the part of defence a suggestion has been made to this Pw to the effect that, on April 27, 1971 houses at Madhabpur *Bazar* were set ablaze that had originated out of the mortar shelling launched by Pakistani Army which the Pw disagreed and asserted to have learnt that, accused Kaiser, his 'Bahini' and Pakistani Army torched about 150 houses and shops located in the western part of Madhabpur *Bazar* and *Kotiara* village. Apart from that, no question has been asked to this Pw on that event.

1057. To support the charge Prosecution has produced another witness named **Majeda Begum** who has deposed as **Pw-5** stating that, in the middle part of the Bengali month, *Baishakh* Kaiser *Shaheb*, his 'Bahini' had brought in the Pakistani Army to Madhabpur Bazar and started destruction whereby they torched numerous shops and killed innocent people there. She was then staying at her father's house at *Belghar*, Madhabpur and heard many gunshot and witnessed the flame. This witness too has not been asked any question by the defence on what she has stated in her chief incriminating the accused with the commission of crime.

1058. Now comes one **Shah Hossain Ali** who has deposed as **Pw-8** to support the charge. In his chief he has stated that on April 28 he came to learn from the control room of Habiganj that, Pakistani Army, accused Kaiser, 'Kaiser Bahini' and Rajakar had launched a synchronized attack in Madhabpur Bazar causing large scale looting, carrying out arson that resulted in 150-200 shops and houses burnt and killed mass people in the area.

1059. Defence has put no question to this Pw related to the event he made in his chief in a bid to shake its precision except giving general suggestion on drawing attention to the incriminating part of his chief whereby he has

implicated the accused with the commission of offence claiming those to be untrue- which this pw denied.

1060. In proving the charge Prosecution has lastly produced **Gour Prashad Roy** who testified as **Pw-12**. In his chief he has stated that, on April 27, 1971 at about 5:30pm Kaiser accompanied by his Bahini and members of Pakistani Army reached at Madhabpur Bazar and stayed there till April 28 and with that period they caused colossal destruction by killing many civilians, looting households and setting innumerable houses on fire.

1061. As did to other Pw's, here in this case also Defence has not put any question to this Pw on his assertion related to the charge except giving general suggestion on drawing attention to the incriminating part of his chief claiming those to be untrue- which this pw denied.

1062. Though Prosecution has claimed **Pw-3 Tajul Islam** and **Pw-7, Shah Hassan Ali** to have supported the charge but on careful analysis of their respective testimony I do not find anything having any nexus with this particular charge though their description indicates, both had closely been following the movement of Kaiser and his accomplices towards Madhabpur from Brammanbaria through *Shahbazpur*.

1063. In regard to the Documentary evidences Prosecution has Produced relevant page from a book titled "*Associates of Pakistan Army 1971*" authored by A.S.M. Shamsul Alam as well as "*Shei Razakar*" where there have been mentioned the incident of looting at Madhabpur Bazar and the house of Victim,Pw-6 and burning those to ashes by Kaiser and his accomplices on April 27, 1971.

1064. Submission advanced by the Prosecution at Summing up :

Learned Prosecutor very vehemently argues that, all the prosecution witnesses have proved the event by convincing evidences where defence has hopelessly failed to shake or impeach their testimony in any manner. Pointing to the corroborative assertion of as many as five live witnesses namely Pw1, Pw-4,Pw-6, Pw-14 and Pw-16 learned Prosecutor very assertively submits that, all those witnesses had seen the atrocities

perpetrated at Madhabpur *Bazar* and adjacent *Katiara* Village staying at a short distance of the place of event spotting accused Kaiser, his Bahini as well as Pakistani Army committing the crime.

1065. Though other witnesses claimed to have heard the destructive atrocities of the accused and his notorious accomplices from various sources but their such knowledge about the event having not been found any inconsistencies from those of the evidences of ocular witnesses making the event proven-learned Prosecutor submits.

1066. Defence could not create any iota of doubt about the presence and carrying out arson and looting so perpetrated by the accused Kaiser and his accomplices at Madhabpur Bazar and *Katiara* Village on the date so mentioned in the charge. And had it been so, the corroborative testimony of Prosecution witnesses stood proved-learned prosecutor steadfastly asserts. Taking us to the testimony of Pw-6 and Pw-14 learned Prosecutor further submits that, both the witnesses in a chorus asserted the destruction carried out in shops and houses of four pro-liberation civilians mentioned in the charge. There have been no deviation in their respective testimony consequently, prosecution has succeeded in proving the charge – learned Prosecutor contends further.

1067. In an oblique reference to the mode of cross examination by the defence, learned Prosecutor avers that, claiming certain incriminating facts of the pw so revealed in chief as untrue by cross examining the pw on giving mere suggestion will not *ipsofacto* disprove the prosecution case nor it will absolve the defence in refuting the allegations levelled against the accused.

1068. Further, the documentary evidence produced by the Prosecution in support of the charge has further been reinforced the oral testimony of the witnesses and made the event true and credible- learned Prosecutor argues finally.

1069. Defence Contention :

In countering the above submission so advanced for the Prosecution, Mr. S.M. Shahjahan , learned Defence Counsel very robustly contends that,

he did not dispute the commission of event as alleged in the charge but accused Kaiser had got no involvement whatsoever with the crime. He next argues that, though PW-1 and Pw-6 claimed to be ocular witnesses and have supported the charge but fact remains, Madhabpur was under the Control of freedom fighters on the alleged date of event making it impossible to commit any offence by the accused Kaiser and therefore, no question can at all arise to witnesses such event by those witnesses.

1070. He goes on to submits that, though Pw-4 and Pw-17 in their respective testimony has claimed to be eye witnesses but they deposed nothing implicating the accused with the commission of alleged offence nor did Pw-2 , Pw-3 and Pw-5 say anything about any involvement of accused Kaiser with the event.

1071. Furthermore, None of the Victims of alleged atrocities so mentioned in the charge turned out as witness before this Tribunal to support the event though fact remains they are still alive which render the charge brought against the accused totally baseless-learned counsel finally argues.

1072. Analysis of Evidences and Deliberation :

In this charge only point is left to be decided as to whether any incident of arson attack and looting had ever been perpetrated on the western part of Madhabpur Bazar and its adjacent *Katiara* Village on the date and time alleged in the charge and accused Kaiser had led such atrocities accompanying 'Kaiser Bahini' and Pakistany Army. While discussing the evidences of as many as 11 witnesses I find 5 witnesses claimed to have noticed the incident as eye witnesses. Amongst those, Pw-6 and Pw-14 have stated to have directly witnessed the incident of looting and devastating fire keeping themselves concealed in places closer to the crime spot. Both the witnesses had spotted accused Kaiser in committing the atrocities on accompanying 'Kaiser Bahini' and Pakistani Army.

1073. Aside from that, Pw-1, Pw-4 and Pw-17 in their respective testimony have collectively substantiated on one point that is, of witnessing smoke so emitted from the direction of Madhabpur *Bazar* on the date of event staying at Madhabpur *Duc Banglaw* as well as *Surma*

and *Goasnagar* village respectively though Pw-1 himself had witnessed the said catastrophe while following the accused and his accomplices keeping himself in a safer place.

1074. All other witnesses except Pw-3 and Pw-7 have described the event as of hearsay witness by elaborating their source of such knowledge in consonance with the evidence given by the eye witnesses. As earlier observed, Prosecution has also relied upon some documentary evidences in addition to the oral testimony of the Pw's for substantiating the charge. The Defence though did not raise any point about the authentication or correctness of the contents of those documents but still, upon careful examination of the documents produced, I find material substance in the documents supporting the charge.

1075. The defence has pointed out some variation with the Pw's testimony regarding time of event alleged in the charge, as Pw-2 in his chief has described the crime to have been committed at 10:00 to 11:00 in the morning. But apart from such slightest inconsistencies, these witnesses could not be deviated from his stance of very date of event or of crime spot as specified in the charge by cross examining him

1076. Now, let me consider as to whether any crime as has been described in the charge has ever been proved against accused Kaiser with the evidence discussed above. On careful scrutiny of the evidences it can safely be construed that western part of Madhabpur Bazar and its adjacent *Katiara* Village were set on fire on the date of event and before the shops and houses were being burnt down in the crime spots, widespread looting was carried out in that area. In arriving a decision to the effect that, the evidence led supporting the charge is true and credible one in that case, complete reliance can be made to the irrefutable testimony of Pw-6 and Pw-14. These two witnesses have given a vivid description how looting and arson attack were carried out in two crime spots by none but at the behest of accused Kaiser who (Pw's) mentioned the name of the victims suffered in the atrocities.

1077. Prosecution is obliged to prove its own case having no responsibility of the defence to prove the innocence of the accused. Here

in this charge, none of the witnesses could be impeached or waned to what they have asserted in their respective chiefs implicating the accused with the commission of offence leaving their testimony related to the charge proved.

1078. As I have observed before, apart from the eye witnesses there have been some hearsay witnesses whose evidences are also found to have corroborated with the testimony of eye witnesses in the perpetration of the incident by explaining the sources of their knowledge. Even in this case also, Defence has utterly failed to make any deviation to their assertion.

1079. Defence has raised a point of not producing the alleged Victims to prove the charge though they are found to be alive from the testimony of Pw-14 and submits, the evidence of the Pw's being partial one cannot be believed. But such submission clearly lacks any substance when prosecution has been able to prove the evidences of those Pw's credible and trustworthy. And so far as it relates to the variation of time of event as pointed out by the Defence to have been occurred in the testimony of Pw-4 doesn't matter most.

1080. Because human memory may have faded after long 43 years of the event where only paramount consideration in adjudicating the existing cases under ICT Act would be whether the crimes characterized in section 3 of the Act had at all been perpetrated and it has been proved that the accused participated in it as alleged in the charge.

1081. Mode of Liabilities accused incurred :

On careful assessment of the evidence on record, it appears to me that, nothing contrary to the charge have ever been proved rather Prosecution has successfully proved the participation of the accused in the crime as alleged in the charge beyond any iota of doubt. And accused Kaiser actively participated in the commission of the offence of looting and destruction of properties on carrying out arson attack constituting other inhumane acts on the Victims. It is thus proves, accused Kaiser abetted, facilitated and contributed the perpetrator to commit the crime of other inhumane acts to unarmed civilians constituting the offence of Crimes against humanity as enshrined in section 3(2)(a)(g)(h) of the Act

of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1082. Verdict on Conviction : Considering all evidences and submissions of learned Advocate of the parties I find accused Syed Md. Kaiser **Guilty** of the offence of complicity to commit other inhumane acts as “ Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1083. Verdict on Sentence: It has been abundantly proved that accused Kaiser had direct participation in looting the households and shops located at Madhabpur *Bazar* and its adjacent *Katiara* Village and setting those on fire belonging to pro-liberation Civilians. These sorts of crimes is no less than severe than that of committing murder as by that, a group of unarmed Civilians had been uprooted from their hearth and home which they had built from their heard earned earnings toiling from day after day. The motive behind such ghastly atrocities also reflects his revengeful lust towards pro-liberation civilians. For perpetrating the horrific atrocities towards the unarmed victims- pro-liberation civilians, justice demands that, appropriate punishment should meted-out to the accused. Therefore, the accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for 10(Ten) years for the crimes of other inhuman acts, under section 20(2) of International Crimes (Tribunals)

1084. Adjudication of Charge no.3

(Killing of 4 Civilians at Village, *Krishnanagar*)

Charge Framed : in this charge accused Syed Md. Kaiser has been implicated for leading ‘ Kaiser Bahini’ and a group of Pakistani occupation armed forces in launching attack at about 7:00pm on April 27, 1971 targetting pro-liberation civilians of village Krishnanagar, Police station–Madhabpur, District-Habiganj- located half Lilometer away from Madhabpur *Bazar* and looted households and destructed 40-45 houses by arson and then at your instruction the Pakistani Army Killed four Civilians named Ohid Pathan, Cherag Ali, Jonab Ali and Madhu Sweeper by firing shot and by that, Syed Md. Kaiser has been charged for abetting,

facilitating and contributing the actual commission of offence of ‘**murder as crimes against humanity**’ or in the alternative, for abetting, facilitating and contributing the actual commission of offence of ‘**Other inhumane acts as Crimes against humanity**’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1085. Evidence of Prosecution Witnesses:

Four Prosecution Witnesses have been testified to grill the accused with the charge of which one appears to be a sighted witness and other being the son of one of the 4 deceased though deposed as hearsay witness. Apart from that, Prosecution has also relied upon two documentary evidences, one a paper clipping of “*Daily Janakantha*” dated. 2nd February, 2001 and other a Book titled “*Sylhet E Ganahatta*” authored by Tajul Islam.

1086. Now let me start with the testimony of sole live witness in this charge named **Md. Nayeb Ali** deposed as **Pw-14**. This witness has stated that, he hails from village west Madhabpur and was a student of class Ten at the time of liberation war at *Andiura Ummatannessa* High School. He claimed to have witnessed arson and looting committed at Madhabpur *Bazar* at around 5:00 pm On April 27, 1971. After that, he noticed accused Kaiser and his Bahini had been rolling on to *Krisnanagar* Village and set 40-45 houses there on fire.

1087. Besides, Kaiser and his accomplices, Pakistani Army had launched an attack to the house of Ohid Hossain Pathan- the father of Mohammad Ali Pathan(Pw-4) and sensing the danger Ohid Hossain Pathan on accompanying Cherag Ali, Jonab Ali, and Madhu Sweeper who had come to visit his house fled the house and reached 500 yard distance to save their lives but accused Syed Md. Kaiser and his Pakistani cohorts made a pursuit to them and at one stage he ordered his accompanying army to fire at them and instantly they opened fire and gunned them down and this Pw had witnessed this horrific scene keeping him concealed at *Daptari Bari*-200-250 yards away from the crime spot- pw narrated.

1088. In the event of cross examination, this Pw has replied that, at the time of liberation war his father was not alive and though his mother was alive but she and his full brothers and sisters had stayed at his maternal uncle's house at *Khatura* Village from March, 27 till April 30, 1971 which was nearly 7 kilometer away from his own Village, Madhabpur.

1089. He also denied a suggestion of the defence that during that period his family member had been staying in their Madhabpur Village. Besides, general suggestion has been made by the defence to this pw on drawing attention to the above incriminating part of his chief whereby he has implicated the accused with the commission of murder to 4 un-armed Civilians claiming such allegations to be untrue- which this pw denied.

1090. Now the deposition of **Mohammad Ali Pathan** son of Martyr Ohid Ali Pathan (victim) who has appeared as **Pw-4** is taken for discussion. In his Chief he has stated that, he had been a student of B.Com, first year at Brahammanbaria College and president of Chhatra League at Madahbpur Thana in 1971 and had joined the Liberation war as a freedom fighter. He added further that, he was staying at *Mouzpur* village on April 28, 1971 when he came to learn that member of Pakistani Army, Razakar and the people of Kaiser Shaheb, who had guided the Pakistani Army rolling on to Madhabpur had killed his father and many more. This Pw has further stated that, having been assured that Pakistani Army had left Madhabpur he along with Kazi Kabiruddin, Nayeb Ali (Pw-14) and many others first came to Madhabpur where he saw many household including his house had been burnt down, then he approached towards *Krishnanagar* and in the midway he found 14/15 dead bodies lying.

1091. When the dusk fell upon he spotted his father's dead body together with three others at the east- northern corner of his house who were Cherag Ali, Janab Ali and Madhu Sweeper of his native village, Madhabpur. This Pw has continued to narrate that- he then draped his father's dead body with his rain coat and buried it with the soil collected from nearer farm land. He has further stated that, after liberation he collected the remains of his father's corpse and reburied it in their family graveyard.

1092. In cross examination this Pw vehemently denied a suggestion that-accused Kaiser or his Bahini had not been involved with the killing of his father and many others nor Kaiser and his cohorts had guided the Pakistani Army and Rajakar in the killing spot. No other questions have been put to this Pw ostensibly with regard to the allegation pw made in the chief related to the charge.

1093. Then comes **Kazi Kabiruddin** testified as **Pw-1** who in his chief has stated that, after dusk following April 28, 1971 Kader Master of *Panihata* village and Nayeb Ali of Madhabpur and Captain Nasim who were then staying at Mouzpur Village had informed him that, Members of Pakistani Army, accused Kaiser and his Bahini had torched many shops at the north eastern part of Madhabpur *Bazar* and killed 15-20 civilians. They (Kader Master and Nayeb Ali) had further told him that around 7:30 and 8:00 at night following 27th April Kaiser and his notorious accomplices had looted houses at *Krishnanagar* village and set those on fire when they had also killed Ohid Hossain Pathan-an organizer of liberation war and the father of Mohammad Ali Pathan - pw has added further.

1094. Learned Defence Counsel has very extensively cross examined this Pw. In such endeavour he has tried his best to shake his credibility by quizzing him about his personal account rather than concentrating on the factual event- the Pw has deposed as regards to the charge-mode of cross examination reveals so. Upon a question, this Pw has replied that- on April 27 and 28, 1971 Captain Nasim and Lieutenant Morshed were staying at Madhabpur. On close scrutiny of entire cross examination, it has not caught my sight that any question even in the form of Suggestion has ever been made to this Pw relating to the killing of Ohid Hossain Pathan and three others as alleged by the prosecution and has disclosed by this Pw in his chief.

1095. Lastly Prosecution has adduced one **Md. Yakub Ali** testified as **Pw-06** who hails from Madhabpur and had been a student of Class X in 1971. In his chief amongst others, he stated that, after 7:00 pm on April 27, 1971 he came to learnt from the village elders that the member of 'Kaiser Bahini' killed Ohid Hossaion Pathan, Cherag Ali and Madhu

Sweeper by gun shot at the northern side of the village near the canal. This Pw has further stated that in the evening of April 28, 1971 he left his village and went to *Shandhadil* Village where he met Nayeb Ali (Pw-14) who had told him that Kaiser Bahini and member of Pakistani Army killed Ohid Hossain Pathan at *Krishnanagar*.

1096. He continued to state that, while calming down the situation he along with Kazi Kabiruddin, Mohammad Ali Pathan, Kadir Master, Nayeb Ali and Harun came to Madhabpur Bazar on April 29, 1971 and found Madhabpur *Bazar* in a devastating state. They then proceeded towards *Krishnanagar* and on reaching a narrow road (*Chargopat*) they spotted the dead body of Ohid Hossain Pathan and three others inside a canal when Mohammad Ali Pathan draped his father's dead body with his rain coat and all present there covered the dead body with soil- Pw has concluded.

1097. Defence has cross examined this Pw. This Pw though did not claim to have seen the killing of Ohid Hossain Pathan and three others even then, Defence while cross examining this Pw has made suggestion to the effect that- it was not true the member of Kaiser Bahini gunned Ohid Hossain Pathan, Cherag Ali, Jonab Ali and Madhu Sweeper down in a narrow road (*Chargopat*)- which Pw has denied. Aside from that, this Pw has not faced with any other question from defence side regarding what he has stated in his chief.

1098. In the Documents so produced by the prosecution, it figures the name of numerous deceased including 4 victims made out in the charge who had been gunned down incriminating accused Kaiser and his 'Kaiser Bahini' with such killing in conjunction with other atrocities that accused and his Bahini perpetrated at Madhabpur area during liberation war.

1099. Submission of the Prosecution at Summing up :

Mr. Rana Das Gupta, learned Prosecutor at the outset has taken us to the respective portion of evidences of four prosecution witnesses chronologically where the witnesses have individually implicated the accused with the commission of crime envisaged in the charge plus pointed out the reply elicited on cross examination by the Defence and then

submits that, the testimony of the witnesses palpably shows that accused Kaiser was involved in committing the crime.

1100. He next submits that, in this particular charge imputation has been leveled against accused Kaiser for directing the Pakistani Army personnel to kill 4 Civilians and it is Pw-14, Nayeb Ali who had witnessed such gruesome killing led by accused Kaiser by making a harrowing description in his testimony which remained un-rebutted. This witness in his chief has vociferously outlined how those 4 hapless civilians who were fleeing from Ohid Hossain Pathan's house fearing their lives had been gunned down at the direction of the accused and fired by the member of notorious Pakistany Army on chasing . This witness has also made it clear from where he had witnessed the barbaric scene.

1101. The testimony of Pw-4 Mohammad Ali Pathan –the son of deceased Ohid Hossain Pathan sounds heartrending episode though he had no occasion to witness his father's killing but what he did upon finding his father's dead body touches the soul of any human being- learned prosecutor submits adding further that, he(Pw-4) had got the message of his father's killing in the evening following April 28 so perpetrated by Kaiser Bahini and Pakistani Army and went to see his father on April 29 accompanied by many including Nayeb Ali(Pw-14) who himself had witnessed the killing scene and vividly deposed about the gristly attack and the name of the murderers of those 4 victims.

1102. The un-impeached testimony of Pw-14 has dispelled all confusion about the involvement of the accused in the murder he has been charged with vis-a vis it does not make any loopholes to the prosecution case for not witnessing such murder by Pw-4 himself which sometimes might not be possible and sounds unrealistic as the killer would not kill a father on informing his son, core point is whether the involvement of the accused has been proved -learned Prosecutor argues further.

1103. While making submission on the testimony of Pw-1 learned Prosecutor contends that, though this very witness in his chief has claimed to hear the event of killing 4 civilians and revealed the sources of such knowledge by mentioning the name of Nayeb Ali(Pw-14) and Kadir

Master in that regard and since Defence could not shake the veracity of such knowledge in such a posture, his testimony about the murder of four civilians and the involvement of accused with such murder stood proved.

1104. On making point regarding the evidence of Pw-6, Md. Yakub Ali learned Prosecutor submits that, though this witness is a hearsay one but his testimony has outweighed the testimony of an ocular witness if his testimony be evaluated in its proper perspective. Justifying his such submission learned Prosecutor then argues that, this Pw has though claimed to had heard about the killing of 4 civilians from the elders of his locality but his such knowledge has subsequently been proved true as he met Nayeb Ali (Pw-14) who confirmed the killing of Ohid Hossain Pathan and then reached the killing spot at Krishnanagar accompanied with Mohammad Ali Pathan, Nayeb Ali, Kadir Master and many others and found all the four dead bodies there.

1105. This witness has also corroborated to what Pw-4 has narrated in his chief about his accomplishment when he had found his father's dead body inside a canal having no earthly reason to disbelieve the evidence of this Pw as well as the involvement of the accused in the killing when Defence has given such a suggestion to this Pw as if, this Pw himself had witnessed the killing of Ohid Hossaion Pathan, Cherag Ali, Jonab Ali and Madhu Sweeper – learned prosecutor finally avers.

1106. Quoting from the respective portion of the documents produced, so mentioned at the beginning, learned Prosecutor submits that, those very write up has portrayed the brutality of accused Kaiser and his Bahini in Madhabpur and Brahmmanbaria area and the name of numerous deceased including the victims of this charge who had been targeted and killed at the behest of accused Kaiser. In fine, learned Prosecutor concludes by craving that, prosecution has left no stone unturned to prove the charge by most reliable and convincing evidences that deserves accused to be convicted.

1107. Defence Contention :

Mr. S.M. Shahjahan, learned Defence counsel in his endeavour to prove the accused innocence and to refute the assertion of the prosecution of its

charge at first draws our attention to the testimony of Pw-4. He contends that, though this Pw is the son of one of the Victims- Ohid Hossain Pathan but he is mere a hearsay witness and nowhere in his entire testimony he has ever implicated the accused with the alleged killing or other atrocities like arson.

1108. Learned Counsel with reference to the evidence of Pw-6 then argues that, this Pw himself did not see the event and from whom he had heard the alleged killing did not also specify, in absence of which his testimony cannot be taken into consideration. And furthermore, this Pw in his testimony has implicated 'Kaiser Bahini' with the killing nor accused Kaiser having no reason to implicate the accused with the commission of alleged offence.

1109. In his last leg of argument Mr. Shahjahan attacks the credibility of the evidences so made by Pw-14- who in his chief claimed to have witnessed the alleged killing of 4 civilians. In this context he submits that, admittedly this witness was a student of Class X at the relevant time of committing offence and all his family members had gone to his maternal uncle's house and had it been so, then it is next to believe and possible for a boy of nearly 15 years old to stay alone at his home only to see the alleged atrocities of accused.

1110. In his second thought, learned Counsel submits that, as per the charge the alleged killing had committed at about 7:00 in the evening and if the said timing is taken to be true for arguments sake, then it was not possible for the Pw to recognize accused Kaiser or his Bahini in the darkness. So what this Pw has stated in his testimony can never be believed-learned Counsel concludes.

1111. Analysis of Evidences and Deliberation :

In the backdrop of above arguments advanced by both the Prosecution and the defence one thing has been made clear to me that, on the date of event four civilians had been killed. It further appears to me, all the four prosecution witnesses in their respective testimony have been able to prove that, killing had been perpetrated as alleged in the charge and Defence could not create any dispute or doubt about the date, time and

place of killing even the identity of the deceased. The core point now requires to be assessed as to whether such testimonies could ever link the accused with such killing.

1112. Accused has been charged for instructing his accompanying Pakistany Army to gun four civilians down on chasing them who had been fleeing for their lives. Next question naturally ensue, whether it was possible for Pw-14 to hear the instruction of accused and witness such murder from his place of stay as deposed in his chief.

1113. On examination of his chief, I find that this Pw was 200-250 yards away from the crime scene. It is not improbable to hear the order of any person staying in such a distance and also quite natural to recognize army personnel as well as the person leading those troops, as it was quite practicable for any individual to distinguish the members of Pakistany army and civilians during the war of liberation. Further, on going through the particulars of both the accused and this Pw I find both of them hails from Madhabpur. So, it is obvious this Pw knew accused very well.

1114. Now let me evaluate the testimony of Pw-4, the son of victim Ohid Hossain Pathan who admittedly was away from his house when his father and three others had been chased and then killed. From his testimony I find that, this Pw was at the war field and was in operation at *Mouzpur* area under the command of 'S' force when his father was killed. His testimony has two episodes, one he heard about his father's killing that had perpetrated by the member of Pakistani Army whom had been guided by Kaiser Bahini and Rajakars and second, he found the dead body of his father and three others when he had reached the killing spot along with Nayeb Ali, Kazi Kabiruddin and others.

1115. Perhaps Defence has found a case that this Witness did not name the accused and implicate him with the killing. But if the testimony of this witness is assessed, there appears no ambiguity to perceive that, he has ever excluded accused Kaiser from 'Kaiser Bahini' or Kaiser was not present in the event of killing. Since 'Kaiser Bahini' had been formed after the name of accused Kaiser, invariably the entire liability of

atrocities committed by 'Kaiser Bahini' naturally rests upon accused Kaiser.

1116. In other words, If existence of 'Kaiser Bahini' is found to have committed any crime accused Kaiser individually would be held liable apart from his Bahini for committing that crime no matter, he had remained present in the crime scene or not. But herein, the evidence of pw-4 clearly denotes the presence of accused Kaiser at the crime scene and his participation in the killing of four civilians is rather vivid which dispel all controversies surrounding his involvement in the killing as Pw-14 himself found accused Kaiser in the crime scene making instruction of killing 4 civilians who later accompanied Pw-4 there with no deviation in the testimony by the defence.

1117. The testimony of other two witnesses (pw-1 and Pw-6) are also found to have corroborated fully with the evidences of Pw-14 and Pw-4. These two witnesses have claimed to hear the event from some sources and they have disclosed such sources of knowledge in their respective chief and their common source was Pw-14, Nayeb Ali. As, after the barbaric killing was committed both had visited the crime scene with Nayeb Ali and Mohammad Ali Pathan(Pw-4)-the son of victim Ohid Hossain Pathan and found four dead bodies there. On critical analysis of the evidences of these two witnesses I find that, the defence could not refute or shake the assertion of any of those 2 witnesses in any manner whatever they stated about the involvement of accused Kaiser in committing the crime leaving their respective evidences unquestionable too.

1118. Defence has raised pleas about the credibility of Pw-14 and termed his evidences improbable one. But the contention put forwarded by the Defence itself is self contradictory one as none can be allowed to blow hot and cold water in the same pot –as the argument of the Defence counsel sounds so, as he in one breath is disbelieving the very stay of Pw-14 at his village home at the time of event and in the next breath is expressing doubt of seeing accused Kaiser in the darkness.

1119. Be that as it may, In my view a student of class X was competent enough to stay at his village home without his parents during liberation war and it was prevalent at that crucial juncture of war when most of the family members of a family had gone away to a safer place and it is more than believable one. Thus, the very sighting of accused Kaiser and Pakistani Army chasing Ohid Hossain Pathan and three others by Pw-14 and eventually gunned them down when the dusk fall upon was quite possible.

1120. In addition to the above oral testimony prosecution has also banked upon some documents in support of this charge which I have meticulously perused. Those documents depicts the horrendous atrocities unleashed by accused Kaiser , his Bahinis, Rajakars and the notorious Pakistany Army at different areas of Habigang and Brahmanbaria District during the war of liberation and those atrocious act and the name of the deceased related to the charge found place in the said documents.

1121. Defence did not raise any plea regarding the credibility or authenticity of the documents and considering the manner of writing and time of publishing of those documents I am of the view that, those are authoritative one that supports the event.

1122. Mode of Liabilities accused incurred :

Regard being had to the above discussion it is proved, accused Kaiser actively participated in the commission of the offence of murder on the unarmed Victims. It is thus proves, accused abetted, facilitated and contributed the actual commission of offence of murder that constituting the offence of ‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1123. Verdict on Conviction: Considering all evidences and submissions of learned Advocate of the contending parties, I find accused Syed Md. Kaiser **Guilty** of the offence of murder as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1124. Verdict on Sentence: The irrefutable evidences of four witnesses coupled with documentary evidences clearly suggests how ferocious and cruel accused Kaiser was when he had ordered his Pakistani cohorts to shoot his natives and killed four innocent unarmed civilians like a bird hunting. This repulsive avenger directed against none but his (accused Kaiser) natives who just wanted to see an independent Bangladesh which was perhaps their only fault.

1125. Such sorts of offender deserve no leniency in awarding sentence rather an exemplary punishment should be meted out to such perverse cool blooded murderer. It has abundantly proved, accused Kaiser has committed crime of murder to as many as four un-armed Civilians. The motive behind such ghastly killing also portrays his revengeful lust towards patriotic pro-liberation civilians. Considering the enormity of crime accused committed through his Pakistani cohorts, justice demands, he should be punished severely. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of murder as ‘Crimes against humanity’ under section 20(2) of International Crimes (Tribunals) Act, 1973

1126. Adjudication of Charge no.4

(Killing of 15 Civilians at Madhabpur Bazar)

Charge Framed : Charge has been arraigned against accused Syed Md. Kaiser for launching attack at the north-eastern part of Madhabpur *Bazar* accompanied by Kaiser Bahini numbering 10-15 persons and 30-35 member Pakistani Army personnel in between 10:00am and 2:30pm on 28 April, 1971 and killed 15 civilians including Sattar, Barkat Ali by indiscriminate gunshot and destroyed 150-200 shops and houses belonging to civilians by looting and setting those on fire and by that act, Syed Md. Kaiser has been charged for abetting, facilitating and contributing the actual commission of killing of 15 unarmed civilians constituting the offence of ‘**murder as crime against humanity**’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal

Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1127. Evidence of Prosecution Witnesses:

To prove the charge prosecution has relied upon the oral testimony of 5 witnesses and some documents have also been produced. First of all, let me have a glance to the testimony of **Kazi Kabiruddin** deposed as **Pw-1**. In his chief he has stated that, at 10:00 in the morning on April 28, 1971 while he was staying at *mouzpur* village he saw the blaze in the shops and houses located at the east-northern part of *Madhabpur Bazar*. Later, in the evening Kadir Master of *Panihata* Village and Nayeb Ali of *Madhabpur* had made him assured that accused Kaiser and the members of his Bahini in collaboration with Pakistany Army had set numerous shops at *Madhabpur Bazar* ablaze and killed 15-20 civilians.

1128. The defence has duly cross examined this witness but on going through the entire cross examination I do not find any question even in the form of giving suggestion to have been put to this Pw.

1129. To buttress the charge Prosecution has adduced one **Mohammad Ali Tipu**, testified as **Pw-2**. While deposing as regards to the event, he stated that, on April 28, 1971 he came to learn that accused Kaiser, his Bahini and member of Pakistani Army had looted 150-200 shops and houses located at the north eastern part of *Madhabpur Bazar* and destroyed those by setting on ablaze and in the same transaction they had also killed nearly 15 civilians. This Pw has claimed to have gathered those information staying at Habiganj Control room.

1130. Upon scanning the cross examination I find a single suggestion to has been made by the Defence to this Pw on the event so narrated in the Chief. This Pw has denied a suggestion that accused Kaiser was not involved in the arson attack perpetrated by Pakistany Army in the north-eastern part of *Madhabpur Bazar* on April 28, 1971. Apart from that this Pw has not been asked any question related to the charge.

1131. Then comes **Md. Yakub Ali** to whom Prosecution has claimed to be an eye witness deposed as **Pw-6**. On this particular count he has initiated

his description stating that, at around 10:00 to 11:00 in the morning member of Pakistani Army and 'Kaiser Bahini' had set 200 shops so located in the eastern part of Madhabpur *Bazar* on ablaze when he was staying at 'Sadat Bari' -1 kilometer away from Madhabpur *Bazar*. When they(Kaiser Bahini and Pakistani Army) started approaching towards his Village he then fled his hideout and took shelter in a nearby jungle when they had torched his 6 houses and neighbor's house and fired indiscriminately resulted in killing 10-15 civilians that includes Lal Mia, Zabbar Mia, Sattar and Rajab Ali - pw could recognize.

1132. Defence has put no question to this Pw related to the event he made in his chief in a bid to shake its precision except giving general suggestion on drawing attention to the incriminating part of his chief whereby he has implicated Kaiser Bahini and Pakistani Army with the commission of offence arson claiming those to be untrue- which this pw denied.

1133. Now let me discuss the evidence of **Shah Hossain Ali** , Prosecution adduced who deposed as **Pw-08**. This Pw has simply stated that in the afternoon he came to learn upon making communication to Habiganj Control room that, accused Kaiser, his Kaiser Bahini, Pakistani Army and Rajakars had made widespread looting, arson and committed genocide at Madhabpur *Bazar* on April 27 and 28, 1971 destroying 150-200 shops by setting those on fire. From the deposition it construe that this Witness had been staying in Habiganj when he gathered such information of the alleged atrocities in Madhabpur Bazar.

1134. Defence has put no question to this Pw related to the event he made in his chief in a bid to shake its precision except giving general suggestion on drawing attention to the incriminating part of his chief whereby he has implicated accused Kaiser, Kaiser Bahini and Pakistani Army with the commission of offence of arson, looting and genocide claiming those to be untrue- which this pw denied.

1135. As of last prosecution witness concerning this charge Prosecution has adduced one **Gour Proshad Roy** who testified as **Pw-12**. His mode of deposition shows, he is a mere hearsay witness. Amongst others he has stated in his chief, at around 5:30 pm on April 27, 1971 Kaiser and his

Bahini had guided the Pakistani Army rolling on to Madhabpur *Bazar* and on arriving there, they started making colossal destruction at Madhabpur *Bazar* till April 28, 1971 by killing many civilians and looting household as well as setting innumerable houses and shops on fire.

1136. To this Pw a question related to the charge has been put in reply to which he answered that, on 27/28th April, 1971 Pakistani Army took control of Madhabpur but he expressed his ignorance whether in such taking over Pakistani Army ever charged mortar shelling. Apart from that, general suggestion has been made on drawing attention to the incriminating part of his chief whereby he(Pw) has implicated, accused Kaiser, Kaiser Bahini and Pakistani Army in committing widespread destruction at Madhabpur *Bazar* till April 28,1971 claiming those to be untrue- which this pw denied.

1137. Apart from that, Prosecution has also relied upon documentary evidence, a paper clipping of “*Daily Janakantha*” dated. 2ndFebruary, 2001 where have been description of numerous atrocities unleashed by accused Kaiser, his ‘Kaiser Bahini, Razakars and Pakistani Army at different parts of Habiganj and Brahmanbaria during the war of liberation together with the interviews given by political personalities also found place there.

1138. Submission advanced by the Prosecution at summing up :

Learned Prosecutor after pointing out the respective portion of the evidence of the witnesses deposed related to the charge submits that, they have all proved the allegation against the accused without any shadow of doubt. Attaching emphasis to the evidences of Pw-6, Md. Yakub Ali learned Prosecutor then goes on to submits that, this very witness himself is a victim whose houses had also been gutted by fire after looting all the food grains stored therein perpetrated by accused Kaiser and his Bahini.

1139. He further submits that this Pw himself had witnessed gun firing holing up in a jungle that left 10-15 civilians killed mentioning the name of some deceased –when Defence could not be able to impeach his such assertion.

1140. Similarly, Pw-1 Kazi Kabiruddin has also echoed what Pw-6 stated in his chief although he himself has not witnessed the event but claimed to hear it from Kadir Master and Nayeb Ali though Defence could not be able to shake his testimony so far it relates to his source of knowledge about knowing the event-learned Prosecutor added. Learned Prosecutor next submits that, this witness has unequivocally implicated accused Kaiser, his Bahini as well as Pakistany Army with the commission of arson and murder.

1141. On quoting the testimony of Pw-2, Mohammad Ali Tipu and pw-8, Shah Hossain Ali, Mr. Gupta argues that, though they are hearsay witness but both had sourced information from Habiganj Control room and has corroborated the testimony of live witnesses, Pw-6 in regard to arson, Looting and killing of unarmed civilians categorically specifying the date, time and number of deceased as well as gutted houses devastated in the arson on incriminating accused Kaiser and his Bahini with those gristly offence creating no doubt by the defence.

1142. In reference to the evidence of Pw-12, Gour Proshad Roy, learned Prosecutor avers that, though this witness in his deposition did not specify the time and approximate number of shops and houses that came under attack and devastated with the atrocities unleashed by accused Kaiser and Kaiser Bahini nor the figure of victims murdered in such attack but a clear picture has been surfaced with his short testimony supporting the charge.

1143. Drawing attention to the respective paragraph of the report published in "*The Daily Janakantha*" dated 02-02-2001 under the caption "*Ashongkho Khun Dharshan O Luter Hota Hobiganjer Kaiser Ekhan Shilpapati O Rajnaitik Neta*" learned Prosecutor argues that, in that report looting and burning to the Houses of Pw-6, Md. Yakub Ali and his neighborhood has clearly been mentioned in it which as per the counsel, made the charge as well as the evidence came out from the witnesses credible and trustworthy.

1144. Defence Contention :

Mr. S.M. Shahjahan, the learned Defence Counsel on the contrary argues that, all the Prosecution witnesses have miserably failed to prove the

charge brought against the accused. Elaborating his such contention, learned counsel then goes on to submits that, except Pw-6 Prosecution has termed all other 4 witnesses as hearsay witnesses. Though none of those witnesses has ever supported the charge as regards to the number and name of the Victims claimed to have been killed in the alleged event. When charge itself speaks of killing 15 Civilians specifying the name of two deceased but even Pw-6 claimed to be an ocular witness in his chief has disclosed such a name which has not been mentioned in the charge.

1145. Learned counsel with reference to the testimony of Pw-6 next submits that, this witness nowhere in his chief ever found accused Kaiser in the crime scene and had it been so, then his implication with the commission of alleged looting, arson or killing of civilians cannot be sustained. Apart from this Pw-6, all other 4 witnesses have also stated about the incidents. But if their statements are assessed carefully, it would be proved to be anonymous one having no source or basis to link their such Knowledge.

1146. Curiously enough, none of those witnesses could ever say the name of any deceased in their respective testimony alleged to have been killed in the event so mentioned in the charge let alone they could say the exact figure of the deceased-learned Defence counsel contended.

1147. Adverting to the submission with regard to the '*Janakantha*' report dated 02-02-2001 that prosecution has relied upon, learned Defence counsel simply argues that such report is totally unrelated with the charge and thus couldnot carry any evidentiary value. In fine, none of the witnesses have proved the prosecution case by their respective testimony in terms of the charge which is beset with vast inconsistencies and lack of corroboration which has made the charge absolutely doubtful, learned Defence counsel concludes.

1148. Analysis of Evidences and Deliberation :

Accused Kaiser has been charged with the commission of crime "murder" of 15 unarmed Civilians. It is the prosecution which is duty bound to prove the charge up to the hilt when it is immaterial whether defence has been able to prove the accused innocent or not. From the plain reading

of the Charge I find it is totally silent in whose firing 15 unarmed Civilians had been killed although attack is said to have been made by accused Kaiser, his Bahini and a group of Pakistany Army and the killing had been perpetrated by indiscriminate firing.

1149. Prosecution appears to have placed its total reliance on the testimony of Pw-6 terming it as live witness. On close scanning of his evidence I am not convinced that he could be termed as an eye witness and believe his testimony as well. His testimony (Chief) depicts he was 1(One) Kilometer away from the crime scene staying inside a house (*Sadat Bari*). It is not humanly possible to witness the blazing of 200 shops and reckoned so keeping 1 Kilometer away from the crime scene.

1150. He in his chief also claimed to have seen indiscriminate firing that left 10-15 civilian killed and out of them he had recognized 4 deceased. As per his version gun firing was made in the vicinity of his house when his house was burnt then he must have known all the civilians killed in the gun shot. More so, commonsense does not suggest a person will leave his place of abode leaving 15 dead bodies uncared-for who happens to be his neighbors in absence of any case of having any threat of his staying there.

1151. Further, none of other four witnesses have ever stated any name of 15 deceased as mentioned in the charge nor their whereabouts. All of the witnesses in their respective chief have made evasive statements of hearing about the killing on the date of event which absolutely disprove the charge. Even Pw-12 in his chief did not disclose from where he had heard about the incidents he narrated.

1152. So far as it relates to the documentary evidence I am of the view that, the respective information so relied upon by Prosecution published in "*The Daily Janakantha*" has got no relevancy with the Crime for which accused is being prosecuted.

1153. Reverting to the Charge which denotes crime of murder of 15 Civilians and accused Kaiser is being prosecuted for committing the crime. In the charge though it has not been made clear the nature of involvement of Kaiser or in other words, what liability Kaiser had incurred in committing the murder. But if the Prosecution could be able to

prove that those 15 Civilians had been killed out of the firing of Kaiser Bahini or member of Pakistany Army accompanied by Kaiser then certainly accused Kaiser could be held liable for perpetrating such murder but evidence led, has not proved so rather silent in that aspect.

1154. In order to prove the crime of murder there also should be corroborative evidence as regards to the name and identity of the victims apart from the participation of murderer. But none of the witnesses have ever mentioned the name and identity of the victims in their respective testimony even name of the two so have specified in the charge. BY and large, prosecution has utterly failed to discharge its duty to prove the charge and failed to incriminate the accused with the commission of murder.

1155. Conclusion:

Given the above circumstances, it is my considered view that Prosecution has hopelessly failed to discharge the burden of proving its case. Hence, accused Syed Md. Kaiser is found **not guilty** of the offence of Murder of 15 Civilians as Crimes against humanity as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore ,he be acquitted of the charge.

1156. Adjudication of Charge no.5

(Killing of 7 Civilians who kept detained at Shaestaganj Food Godown)

Charge Framed : Charge has been levelled against accused Syed Md. Kaiser who being accompanied by member of ‘ Kaiser Bahini’ on arriving at *Shaestaganj* Food Godown at about 01:00 to 1:30pm on April 29, 1971 caused physical torture to the staffs and officers of the godown and kept them detained there under arm guard for about one month and thereafter, on May 29, 1971 at about 3:00 pm accused Kaiser having been accompanied by the members of ‘Kaiser Bahini’, peace Committee and Pakistany army on arrivng the godown brought out 7 confined civilians and made them walk towards beneath the rail bridge over the river *Khoai* and the Pakistani Army personnel gunned them down following the instruction of Kaiser and by that act, Syed Md. Kaiser has been

charged for abetting, facilitating and contributing the actual commission of killing of 7 unarmed civilians constituting the offence of ‘**murder as crimes against humanity**’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act,1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1157. Evidence of Prosecution Witnesses:

Prosecution has been able to adduced as many as 7 witnesses and produced a document to prove the charge. Of those 7 witnesses 4 have claimed to be ocular witnesses including two being the sons of one of the seven deceased and remaining 3 are hearsay witnesses. In such a scenario, let the evidences of eye witnesses be taken up for discussion first. At the outset, it has been stated, two sons of a diseased, Md. Majat Ali have turn out as prosecution witnesses named Mostofa Ali and Md. Nawshed Ali deposed as Pw-9 and Pw-11 respectively.

1158. Mostofa Ali (Pw-9) who was about 23/24 years old at the relevant time of the event had been a farmer. In his chief he stated that, his father had been a guard at *Shaestaganj* Food Go-down, District-Habiganj and everyday his younger brother and he would carry food for his father from their village home. At 11:00 – 11:30am on April 29, 1971 Mostofa Shaheed together with a host of freedom fighters came to the Food Go-down for taking delivery of food grains for the freedom fighters. At 1:00pm on that day accused Kaiser accompanied by 3-4 persons came to the go-down riding on a jeep who upon roaming there for sometime returned towards Puran Bazar.

1159. After a short while, accused Kaiser accompanied by member of peace Committee, Pakistani Army again came back to the go-down by chanting slogan ‘Pakistan Zindabad’ and dragged seven staffs and officers including his father from inside the go-down and then Kaiser asked Officer-in-charge of the go-down the reason of supplying food grains to the Freedom fighters. Having been informed, Kaiser then threatened him not to supply any food from the go-down and then kept all the seven detainees hostage inside the go-down and then Kaiser went away towards *Shaestaganj* Duc Banglow keeping some Pakistani Army on guard to

those detainees at the Food Go-down. Sensing the danger, this Pw along with his younger brother then returned to their village home.

1160. This Pw goes on to narrate that, on May 29, 1971 at 11:00 – 11:30 am on being informed from his maternal uncle about the visit of Kaiser at Shaestaganj Food go-down he along with his younger brother again went to *Shaestaganj* Food Go-down and followed the situation concealing themselves to a house near Food Go-down and saw, Kaiser, his cohorts and Pakistani Army were taking those 7 detainees towards *Shaestaganj* Duc Banglow . There from, at about 2:00pm they made all the seven detainees walk towards *Shaestaganj* *Puran Bazar* when he and his brother had been following them hiding themselves inside a sugarcane field from where he could see that, those seven detainees were lined up beneath the railway bridge over the river of *Khoai* and as soon as accused Kaiser signalled a hint, the Pakistani Army gunned all the seven down. At that moment, the Pw started wailing on the dock.

1161. Defence has extensively cross examined this Pw. In reply to a question this Pw has stated that, the house where he and his brother had been hiding and following what was happening inside the go-down on May 29, 1971 was adjacent east of the go-down and that house belonged to his distant maternal uncle. In another reply this Pw has also elaborated the location of different establishment in the boundary of *Shaestaganj* *Duc Banglow*. In the chief though this Pw has specifically mentioned the name of 7 deceased including his father but in reply to cross he further asserted that, Sub-Divisional Food Controller Abdul Aziz and Chief Inspector Abdul Khaleque though had resided and discharged their duties at Habiganj Office but they had regularly come to *Shaestaganj* Food go-down for inspection.

1162. Another son of deceased Majat Ali named **Md. Nawshad Ali** who was 10/11 years old at the time of killing of his father has deposed as **Pw-11**. In his chief he gave same account of ordeal of his father's killing like his elder brother, Pw-9 implicating accused Kaiser with such murder.

1163. In reply to cross examination this Pw stated that, he was born in the year of 1960 and the distance of *Shaestaganj* Food go-down from his

native village, *Lenjapara* is about one mile while *Shaestaganj Duc Bunglow* is on the east but not much far. Apart from those, Defence has drawn attention to this Pw to some portion of his chief claiming that, those statements have been made for the first time in the tribunal - which he denied.

1164. Prosecution has then adduced one **Mohammad Ali Tipu** who testified as **Pw-2**. In his chief he amongst others has stated that, on 29th April, 1971 in order to distribute food grains among the freedom fighter he came to Mostofa Shaheed MPA carrying a letter from Manik Chowdhury and on accompanying Mostofa Shaheed, Gour Proshad Roy and Hossain Ali Sabu he reached *Shaestaganj* LSD Food Go-down at 10:15am and upon going through the letter of Manik Chowdhury and seeing Mostofa Shaheed with him, the Officer- in –Charge of the go-down opened it.

1165. While he and others were supervising the distribution of the Food grains by the laborers, accused Kaiser with some of his accomplices riding in a jeep came in front of the go-down at 12:30pm and upon staying there some time he turned back towards north. At about 2:00 to 2:30pm accused Kaiser, his Bahini and member of Pakistani Army again came to the Go-down by chanting slogan ” Pakistan Zindabad” when Mostofa Shaheed, he, and others hid in a secret place behind the go-down. Kaiser then threatened the Officer-in-charge of the go-down not to supply any food grains or to move from the Go-down without his permission and he (pw-2) could hear such loud conversation from his hideout - Pw has further added.

1166. This Pw continued to state that, while he was staying at *Chunarughat Bahubal* area in the last part of the month of July he came to learn that the staffs whom had been interned in the Food go-down had subsequently been gunned down beneath the rail bridge over the river *Khoai* following the order of Kaiser on May 29, 1971.

1167. In cross examination this Pw has replied a slew of questions asked by the Defence over the event. Amongst others, he has replied that, on riding a jeep he on 29th April, 1971 went to *Shaestaganj* food go-down

from Habiganj carrying a letter from Manik Chowdhury when there remained only one road to go to *Shestaganj* Food go-down from Habiganj which would usually take 30-40 minutes. From *Shestaganj* food go-down he had distributed food grains at different areas through tractor, rikshaw and pull cart and at the time of distributing food grains there remained 10-15 party men present apart from four of them .

1168. In reply to cross he further stated that, apart from north side other three side of the go-down were open specifying those of the establishments in each side in 1971 adding further that, on April 29, 1971 accused Kaiser had come to *Shaestaganj* Food go-down from *Noapara* direction .

1169. One **Shah Hossain Ali** whom Prosecution has termed as eye witness deposed as **Pw-8**. One going through his chief it reveals, his house was nearer to Mostofa Ali (father of Pw-2) who had witnessed the holding of discussion among the leaders at his(Mostofa Ali) house on April 29, at around 9:00 to 9:30 am centring the scarcity of food grains prevailing among the freedom fighters and also accompanied Mostofa Shaheed, Mohammad Ali Tipu(Pw-2), Gour Proshad Roy(pw-12) and 7-8 others to Shaestaganj Food go-down carrying a letter of Commandant Manik Chowdhury where he had also supervised the distribution of food grains.

1170. He has also made same account of subsequent presence of accused Kaiser at the food go-down on that day as described by Pw-9 though he had fled the go-down moment after arrival of accused Kaiser and his accomplices there and took shelter in a vacant house inside a jungle at *Lenjapara Uddakhola* village.

1171. In reply to cross examination this Pw has stated that, at *Shaestaganj* food go-down there were 30-35 Freedom fighters apart from general people and accused Kaiser at first waited in front of the go-down for 10-15 minutes. He further stated in reply to cross that, the distance from Habiganj to Shaestaganj was about 7 miles in road and there is only one road run from Habiganj to *Shestaganj*. Besides, on drawing the incriminating part of the chief where Pw has stated about the arrival of

Kaiser at *Shaestaganj* Food go-down Defence has put suggestion claiming the statements to be not true - which this Pw denied.

1172. Prosecution has then relied upon the testimony of **Gour Proshad Roy** terming him as an eye witness too who deposed as **Pw-12**. On going through his chief, it depicts, he on accompanying Mostofa Shaheed, Pw-2, Sabu and others had gone to *Shaestaganj* Food go-down and started lifting food grains on to two trucks parked there earlier when at about 12:00pm to 12:30pm accused Kaiser, his brother Faisal and members of Kaiser Bahini had reached there riding in a jeep and upon roaming around the go-down for 8-10 minutes they went away towards *Shaestaganj* puran bazar.

1173. This Pw has also gave similar description as of Pw-2 of subsequent return of Kaiser accompanied with Pakistani Army around 1:30pm adding that, he then fled the go-down and took refuge in a bush located at the eastern side of the go-down from where he had seen that, the Razakar members of Kaiser lined up seven staffs in the yard of the go-down on dragging them from inside when accused Kaiser had been threatening them and ordered to stay inside the go-down and then left the go-down and moved towards Duc-Banglow with Pak army and members of Kaiser Bahini keeping 4-5 Pak Army men on guard to those seven staffs.

1174. This pw in his chief has further narrated that, around 4:30pm on May 29, 1971 he found accused Kaiser standing on the approach road of the rail bridge and seven staffs of the go-down were made lined up in the bank of the river beneath the rail bridge and as soon as Kaiser hinted something by his hand, the Pakistany Army gunned all the seven down opening brush fire at them when he was staying in the sugarcane field located on the opposite bank of the river *Khoai*, 400-500 yards south of the bridge.

1175. Afterwards, razakar members of accused Kaiser had pushed the dead bodies of seven deceased towards the deep water of the river, he continued. He in his chief has also mentioned the name of all those seven deceased claiming to know them earlier for having his business of crushing wheat.

1176. Defence has cross examined this Pw on taking in to account of the statements he narrated in chief related to the charge. In reply to cross he stated that, in 1971 he lived in the village *Shaestaganj Puran Bazar* and *Shaestaganj* food go-down was 1.5 kilometer west of his house, while railway bridge over the river *Khoai* was 1.5 kilometer east of *Shaestaganj* food go-down.

1177. He further stated that, the *Akhra*(makeshift thatched house, Pw stayed at night) was located on the eastern bank of river *Khoai* and nearly 100 yards away from the place he had been staying during day time in sugarcane field. Besides, Defence has drawn the attention of the Pw relating to the event both dated 29th April as well as 29th May, 1971 he narrated in his chief imputing accused Kaiser and suggested those statements to be not true - which this pw denied.

1178. Prosecution has though relied upon the testimony of Pw-1, Kazi Kabiruddin and Pw-7, Shah Hasan Ali but on going through their evidences I do not find anything in their respective chief, that could ever relate the charge. Further, Prosecution has relied upon a page (page no.169) of a book named “*Sylhyt-E-Ganahotta*” authored by Tajul Mohammad (**Material Exhibit- Ga**) as of documentary evidence where there has been description of killing guards, Clerks and Officer in Charge(LSD) of *Shaestaganj* food go-down.

1179. Submission advanced by the Prosecution at Summing up:

Given the above deposition of the Prosecution witnesses, learned Prosecutor submits that, all the above witnesses by their respective testimony have proved the charge implicating accused Kaiser with the killing of seven staffs of *Shaestaganj* Food go-down. There is no iota of any doubt that those seven civilians had not been employed at *Shaestaganj* Food go-down and at first they had been made captive on 29th April, 1971 at the Go-down and thereafter taken to the bank of the river *Khoai* beneath the rail bridge on 29th May, 1971 where they were shot dead by the Pakistani Army- learned Prosecutor argued.

1180. Pointing to the corroborative evidence of Pw-9 and Pw-11, two siblings of deceased Md. Majat Ali, learned Prosecutor then submits that,

there cannot be any earthly reason to disbelieve their testimony as they had witnessed the most pathetic and cruelest scene so perpetrated on their father's life keeping in close range of him which can never be erased from their memory so long they are alive as both of them had lost their most revered father and become fatherless at their tender age.

1181. It goes without saying that, these two brothers (Pw-9 and Pw-11) be regarded as most vital and credible witnesses who had seen the very commission of event and remained panicked thinking of the fate of their father's life as and when he had been interned by the accused and so, what they have stated in their respective testimony concerning the event incriminating accused Kaiser be taken as most credible and worthy one - learned Prosecutor further added.

1182. Clarifying of his contention learned Prosecutor continues that, all other witnesses have categorically supported the evidence of Pw-9 and Pw-11 in to to in their respective testimony about the event so committed on 29th April and of 29th May, 1971 making the charge against accused Kaiser proved. Again, quoting to the testimony of Pw-9 and Pw-12 learned Prosecutor submits that, these two witnesses have palpably corroborated each other about the presence and culpable role of accused Kaiser before being killed of those seven staffs and their dead bodies were disposed of by the Pakistani Army in the river *Khoai* even specifying the name of seven deceased slain on 29th May, 1971 creating no doubt by the defence on cross examination.

1183. In the same manner, visiting of Pw-2, Pw-12 and Mostofa Shahid at *Shaestaganj* Food go-down for collecting food grains for the Freedom Fighters on April 29, 1971, Presence of accused Kaiser there for two occasions on that very day, hurling rage upon the staffs of the Go-down for supplying food grains and interning seven staffs inside the go-down have indubitably been proved by all the prosecution witnesses-learned Prosecutor robustly averred.

1184. On the point of Defence to be able to make any deviation in the evidence of the prosecution witnesses by cross examination, Learned Prosecutor argues that, in the charge, allegations have been made against

accused Kaiser of interning seven staffs at Shaestaganj food go-down and then actively participating in the killing by bringing those persons in the bank of the river *Khoai* but from the very pattern of cross examination by the defence it shows, not a single question has been put on material particular to any of Pw-9, Pw-11 or Pw-12 who alleged to have witnessed those events to shake the veracity of their assertion.

1185. Drawing attention to the demeanor of Pw-2 while he was giving deposition before the tribunal and his very naive revelation about what his father did to the accused when he was child – clearly portrays the event true, learned Prosecutor concluded.

1186. ontention of Defence :

In contrast, the learned Counsel for the defence at the outset contends that, accused did neither go to *Shaestaganj* Food go-down nor to the bank of river *Khoai* on the dates alleged, having no reason to commit offence by him so leveled against him in the charge. To substantiate his such arguments learned counsel submits that, Pw-8 in reply to cross found 30-35 Freedom fighters in front of the food go-down and had it been so, it is next to believe that, accused Kaiser dared to confine 7 staffs inside the go-down rather, Kaiser was supposed to be captured by the Freedom fighters.

1187. In his second leg of argument learned Defence Counsel further contends that, though Pw-2 and Pw-8 claimed to have remained present at the Food go-down on April 29, 1971 but they did not support the charge of keeping seven staffs confined in the go-down, meaning subsequent event of taking those seven staffs to the bank of river *Khoai* from the go-down and killed them there remained disproved.

1188. Learned Defence Counsel lastly submits that, though prosecution has alleged in the charge that seven un-armed civilians were killed and Pw-9 and Pw-12 have mentioned the name of those 7 deceased but apart from Pw-9 and Pw-11, two sons of alleged victim, Md. Majat Ali, none of the relative of any of the remaining six alleged deceased turn out to testify as witness to seek grievance for the alleged killing of their dear ones for which the charge cannot be said to have been proved.

1189. Analysis of Evidences and Deliberation :

We have heard the contention of both the parties at length and perused the evidence on record and have taken in to account of the demeanor of the witnesses too while they testified before us. It is to be noted that, the ultimate charge arraigned against accused Kaiser is for actively participating in the killing of seven un-armed civilians who were the employees of *Shaestaganj* food go-down. But there are two segments in the charge which appears correlated in accomplishment of the crime.

1190. While perusing the evidences of the witnesses, it reveals, all the witnesses turn out for defending the charge found accused Kaiser present at the food go-down on April 29, 1971 when Pw-2, Pw-12, Mostofa Shaheed , Sabu and others were there for lifting and distributing Food grains among the freedom fighters. Its true accused Kaiser committed no crime by mere appearing in the go-down even by accompanying his Kaiser Bahini and Pakistani Army. But his subsequent action on that day if proved to have link in the killing of the staffs, in that case he will certainly be held liable for the crime.

1191. On careful perusal of the evidences, I find that out of 5 eye witnesses deposed in this charge, (Pw-9,Pw-11, Pw-12 , Pw-2 and Pw-8) all but Pw2 and pw-8 have specifically stated, accused Kaiser had confined seven unarmed Civilians inside the go-down on the first event dated April 29, 1971. These Pw-2 and Pw-8 had heard from their respective hideout, nearer to the go-down that, Kaiser had been threatening the staffs for their fault of supplying food grains to the freedom fighters by reminding them the regime of Pakistani Army was put in place. Other three (Pw-9, Pw-11 and Pw-12) witnesses testified to have seen the very confinement of the seven employees in the go-down after threatening.

1192. So, there appears no variation in the testimony among those witnesses over the very threatening and the reason for such threatening. Now what consequence would follow if Pw-2 and Pw-8 did not witness the capture of those 7 employees? It's simple answer would be that, the very capture of 7 employees would not be held untrue for mere not seeing by those two Pw's as from their respective testimony it is found that, they

were on the run for their lives and took shelter in a hideout from where they might not have seen all the incidents perpetrated on the victims including the internment of those 7 employees but fact remains, it has been found from their testimony that accused Kaiser had threatened the staffs of the go-down for supplying foods to the freedom fighters and had it been so it can easily be perceived they(7staffs) had not been allowed to go scot-free .

1193. In the subsequent event of killing of those seven hapless Civilians none but Pw-9 and Pw-11 be considered as the most vital and reliable witnesses. The irrefutable testimony of Pw-09 is enough to held the accused liable for committing the crime of murder keeping aside other testimony of the witnesses as record shows Pw-11 was admittedly a child of 10/11 years at the time of killing of his father and he may not have recalled the brutalities perpetrated on his father at such age but still what he has stated from his fading memory is suffice to prove the charge.

1194. I am least concerned as to whether Defence could succeed in proving accused innocence rather it is incumbent upon the Prosecution to prove the guilt of the accused without any shadow of doubt which is the settled jurisprudence in the Criminal justice system. Even then, here in this case, the defence, has put certain questions to Pw-9 and Pw-12 such as, about the crime spots, distance thereof from their respective hideouts reply of which has certainly gone in favour of the Prosecution and proved it possible the very commission of crime by the accused.

1195. Be that as it may, in their respective evidences Pw-9, Pw-11 and Pw-12 elaborated how those seven staffs had been made walk towards the bank of river *Khoai* from the go-down escorted by accused Kaiser and Pakistani Army on May 29, 1971 while they (Pw's) had been following keeping them aloof and eventually gunned all the seven down to death by Pakistani Army following the visible hint given by accused Kaiser. I do not find any divergence in the evidences of those three Pw's on this core point.

1196. Further, on careful analysis of the evidences of prosecution witnesses I also find that, prosecution has indefeasibly proved that,

accused Kaiser had remained present both at the *Shaestaganj* Food go-down on April 29 and Kept 7 civilians captive there inside the go-down as well as accomplishing the killing of those Civilians at the bank of the river *Khoai* on May 29, 1971 by ordering Pakistani Army through a visible hint. And in both the occasions accused Kaiser had taken a pivotal role ultimate consequence of which led to eliminate 7 Bangalee civilians for none but for safeguarding the interest of Pakistani evading forces else, lives of seven innocent civilians had not been ended at the whim of accused Kaiser.

1197. Naturally a question may prop up about the demise of other six employees of Food go-down in absence of any evidence from those victim's family. True, that prosecution has not produced any witnesses in that regard but mere non production of witnesses supporting the killing of remaining six civilians can never vitiate the charge to any extent when no contrary evidence came up claiming those had not been killed. Under the provision of this very special statute it is not incumbent upon the prosecution to prove each and every killing by producing witness there against individually.

1198. The paramount consideration as to whether crime had ever been perpetrated on such number of civilians and prosecution has proved so and accused was involved with the crime. Here in this case, prosecution has vividly proved the murder of 7 Civilians with convincing and corroborative evidence by most competent witnesses who has implicated the accused with the murder leaving it unnecessary to adduce the relatives of other victims as witnesses.

1199. Mode of Liability accused incurred :

In view of the foregoing discussion it is proved, accused Kaiser actively participated in the commission of the offence of murder on the 7 (seven) unarmed Victims. It is thus proves, the accused abetted, facilitated and actively contributed the actual commission of offence of murder that constituting the offence of 'Crimes against humanity' as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1200. Verdict on Conviction: Considering all evidences and submissions of learned Advocate of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of murder as “ Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1201. Verdict on Sentence: Evidence on record clearly proves, the motive behind the killing of those seven civilians was for supplying the food grains to the freedom fighters as accused Kaiser had kept all those staffs confined in the go-down after threatening them for that purported fault taking it as very grave one. The killing of seven civilians who were mere staffs of the go-down portrays how cruel he could be towards his natives for showing utmost allegiance, slavery to notorious invading forces to appease them to gain petty interest. No remorse or repention had at all been aroused in the mind of accused Kaiser while giving order to even kill a petty security guard who had just followed his superiors order and eked out a living by serving there having no political mission or vision.

1202. Testimony of Pw-9 reflects how his deceased father had served under the family of accused Kaiser and adored him by taking him in his lap when he was a child but nothing sorts of those fond memory desist accused Kaiser from budging him in committing heinous crime towards his own men. Such sorts of monster deserves no leniency in awarding sentence.

1203. As found earlier, accused Kaiser has committed crime of murder to as many as seven un-armed Civilians. The motive behind such ghastly killing also portrays his revengeful lust towards patriotic pro-liberation civilians. Considering the severity of crime accused participated, he should be punished in an appropriate manner. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of murder as Crimes against humanity under section 20(2) of International Crimes (Tribunals) Act, 1973.

1204. Adjudication of Charge no.6

(Killing of Dr. Salehuddin and Hirendra Chandra Roy at Laskarpur)

Charge Framed : In precise accused Syed Md. Kaiser has been implicated for instructing the Pakistani Army in intercepting a jeep at ‘Puran Bazar Point’, *Shaestaganj* around 3:30 to 4:00 pm on April 29, 1971 that was carrying Dr. Salehuddin and Hirendra Chandra Roy towards Indian boarder intending to take refuge there when the Army men dragged the duos from the car and made them walk through the bank of river *Khoai* to reach in front of the native house of former Chief Justice Syed AB Mahmud Hossain at *Lashkarpur* where they were hanged with a trees and after dusk they were gunned down to death and their dead bodies were dumped near the house of one Ramjan Ali beside rail line and by that act, Syed Md. Kaiser has been charged for abetting, facilitating and contributing the actual commission of killing of 2 unarmed civilians constituting the offence of ‘**murder** ‘ as crime against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act,1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1205. Evidence of Prosecution Witnesses:

To substantiate the charge, Prosecution has adduced as many as four witnesses and also produced certain documents. Of those four Witnesses three claimed to be the eye witnesses and one of them is **Mohammad Ali Tipu** who deposed as **Pw-2**. In his chief this Pw has stated that, around 3:00-3:30pm on April 29, 1971 while he along with Mostofa Shaheed, and Gour Proshad Roy were moving towards the house of Mostofa Shaheed he heard some gunshots and somehow reached near *Shaestaganj Puran bazaar* point when he saw a jeep was heading towards *Chunarughat* direction from *Habiganj*. At the same time he could also see some cars were coming towards *Shaestaganj Puran bazaar* crossing from west side and put barricade to that jeep and accused Kaiser and member of Pakistani Army then got down from one of the car when accused Kaiser ordered the member of Pakistani army to drag the persons from inside the Jeep and they did so to whom he (Pw) had recognized as Dr. Saleh Ahamed and Hirandranath Roy- both of local Awami league leaders.

1206. This Pw has further stated, the member of Pakistani Army then caught hold of them by their collar and made walking towards the rail

bridge alongside the river *Khoai* when accused Kaiser had accompanied them. At this, Mostofa Shaheed and he on hiding themselves started moving towards Mostofa Shaheed's house and on their way he had heard from local people in the evening that, accused Kaiser and member of Pakistani army had tortured both Dr. Saleh Ahamed and Hirendra Roy by hanging them from a tree in front of the house of former Chief Justice Syed AB Mahmud Hossain and afterwards gunned them down near the house of one Ramjan Ali and left the dead bodies abandoned there - Pw concluded.

1207. While cross examining this Pw Defence has put only one question in the form of suggestion on the event he described in the chief. In doing so, Defence suggested that, accused Kaiser had no complicity with the murder of Dr. Saleh Ahamed and Hirendra Roy and what he has stated implicating accused with such murder is tutored one- which this Pw denied emphatically.

1208. Pw-8, Shah Hossain Ali has made same account as of Pw-2 about the event except capturing of Dr. Saleh Ahamed and Hirendra Roy by the accused and his accompanying Pakistani Army from a jeep and assaulted them and he claimed to have heard this very segment of event from local people though he claimed to have witnessed subsequent event from his hideout when both the captives were made walking alongside the river *Khoai* towards the rail bridge cordoned by accused Kaiser and his cohorts Kaiser Bahini. He continued to state that, after dusk he came to learn that, both had been tortured by hanging from a tree in front of the house of former chief Justice AB Mahmud Hossain at *Laskarpur* village and in the morning on April 30 local people had informed him to have found two bullet hit dead bodies lying near the house of one Ramjan Ali beside *Laskarpur* rail line.

1209. In cross examination Defence has made suggestion to this Pw terming Dr. Saleh Ahamed and Hirendra Chandra Roy to be the leader of Awami League which he asserted true. Apart from that, upon drawing attention to the incriminating part of the chief defence has suggested those to be not true-which this Pw denied.

1210. Then comes **Gour Proshad Roy** who has deposed as **Pw-12**. This Pw has also given same account as of Pw-2 in respect of capture and causing torture to Dr. Saleh Ahamed and Hirendra Chandra Roy as well as made them walk subsequently down to the rail line and he claimed to have seen such event by hiding him in a nearby bush. He further stated to have learnt from the passerby who had been passing through the sugarcane field in where he had taken shelter that, both Dr. Saleh Ahmed and Hirendra Chandra Roy were tortured and left abandoned in front of the house of former Chief Justice AB Mahmud Hossain but to ensure their death both were subsequently taken in front of the house of one Ramjan Ali where they were gunned down to death leaving the dead bodies there.

1211. In cross examination learned Defence Counsel has drawn the attention of this Pw in respect of his statement made in the chief where he had claimed to have seen the capture and causing torture of the victims suggesting those not to be true- which this Pw denied. But no question even in the form of suggestion has been put on the segment - this Pw claimed to have heard from the passerby regarding the killing of Dr. Saleh Ahamed and Hirendra Chandra Roy.

1212. Prosecution has also placed its reliance on the oral testimony of **Pw-1, Kazi Kabiruddin**. This Pw in his chief claimed to have stayed in *Mouzpur* Village on April 30, 1971 and while he was staying there, he got information from his source that, accused Kaiser, his Bahini and member of Pakistani Army killed Dr. Saleh Ahamed and Hirendra Chandra Roy while they (Kaiser and his accomplices) were on their way to Habiganj. On perusal of entire cross examination of this Pw I do not find any question that Defence has put to him about what he stated in the chief on the event.

1213. To substantiate the charge Prosecution has also relied upon a book named "*Sylhyt-E-Ganahotta*" authored by Tajul Mohammad (**Material Exhibit- Ga**). Prosecution has mainly pointed out page no.170, and 289 of this book where there has been mentioned the political identity of Dr. Saleh Ahamed and Hirendra Chandra Roy, their capture by the Pakistani Army on April 29, 1971 near Shaestaganj on their way to India, their

murder and subsequent publication of their name as martyred freedom fighters.

1214. Same ordeal so perpetrated on Dr. Saleh Ahamed and Hirendra Chandra Roy has also been depicted in the book titled “*Muktejuddehe Habiganj*” authored by Sheikh Fazle Elahi (**Material Exhibit- Gha**). In this particular book Prosecution has pointed out page no.133, 134 and 256 where their political identity, their very capture by Pakistany Army and subsequent killing have been figured.

1215. Submission advanced by the Prosecution at Summing up :

Drawing attention to the relevant portion of the evidences described by the Pw’s on the event related to the charge learned Prosecutor submits that, all of them have categorically stated that, under the order of accused Kaiser both the victims were captured by the member of Pakistani Army on their way to India and were forcibly taken to the crime scene when accused accompanied. Learned Prosecutor then submits, It’s accused Kaiser in whose behest these two innocent civilians had been killed as the Pakistani Army were not supposed to recognize these two civilians, knew their political identity as well as their role in the war of liberation.

1216. Learned Prosecutor further submits that, Kaiser knew it very well that keeping both the victims alive his mission to exert dominance over his own area and to appease the notorious Pakistani invading force would never be materialized. Learned Prosecutor goes on to submits that, though none of the Pw’s have ever claimed to have witnessed the killing of those two victims but circumstances strongly suggests, it is none but accused Kaiser who had actively participated in the killing mission of those two hapless civilians as he had lastly seen with those two captives having no iota of doubt about his involvement in the ghastly killing.

1217. Learned Prosecutor further argues that, Dr. Saleh Ahamed and Hirendra Chandra Roy could not feel it secure to stay in the area for the devastation, atrocities unleashed by accused Kaiser and his Bahini and it has been proved that for the fear of their own life they were fleeing to India thinking it safe place for supporting the cause of freedom fighters

there but sensing their such tacit agenda accused Kaiser nipped their desire in the bud by taking their lives.

1218. Referring to the documentary evidences learned Prosecutor contends that, in the respective writings it has further been established that both Dr. Saleh Ahamed and Hirendra Chandra Roy were killed by the Pakistani Army in *Shaestaganj* which has reinforced the oral testimony of the Pw's and established the prosecution case as well. In the end, learned Prosecutor submits, Defence has not put any question to any of the 4 Pw's on the material particulars and thus utterly failed to impeach their assertion supporting the charge.

1219. Defence contention :

In refuting the above submission, Learned Defence Counsel on the other hand contends that, Prosecution has not been able to prove that accused Kaiser was at all involved in the alleged killing of Dr. Saleh Ahamed and Hirendra Chandra Roy. Expounding the above, learned Counsel then adds that, though pw-2 and Pw-12 alleged in their respective testimony, they had seen victims were being paraded towards rail bridge escorted by Pakistani Army and accused Kaiser upon descending them from the jeep following the order of Kaiser but none of them ever claimed to have seen the killing of those two victims not to speak about the involvement of Kaiser and had it been the case, the charge cannot be said to have been proved.

1220. In the same vein, it cannot be proved from the documents so produced by the prosecution that, Kaiser was involved in the alleged killing of those two victims-learned Defence Counsel concluded.

1221. Analysis of Evidences and Deliberation :

I have heard the learned Advocates of the contending parties, perused the evidence on record and given my anxious thought over the matter. Specific charge of murder of Dr. Saleh Ahamed and Dhirendra Chandra Roy have been brought against accused Kaiser fixing his liability of substantially abetting, facilitating and contributing such heinous offence that constitutes 'Crime against humanity'. It is found from the evidence of

Pw-2 and Pw-12 that, they had seen the capture of those two victims by the Pakistani Army following the order of accused Kaiser on intercepting their jeep who made the victims walking towards rail bridge over the river *Khoai*.

1222. On the other hand, Pw-8 claimed to have heard the very capture of the victims from local people though he had seen the victims when they were being paraded towards the rail bridge. All those witnesses found accused Kaiser and his accomplices, Pakistani army when the victims were being taken towards the rail bridge. Although Pw-1 in his testimony just claimed to have heard from his source that Kaiser, his Bahini and the member of Pakistani Army had killed the victims when they (Kaiser and his accomplices) were on their way to Habiganj. None of the above Pw's ever claimed to have witnessed the very killing of those two victims but heard the event.

1223. Now, the oral testimony of Pw-2, Pw-8 and Pw-12, clearly indicates, they are the live witnesses to the extent of capturing the victims as well as taking them away towards the rail bridge alongside the rail line. All these Pw's had witnessed the event keeping them concealed in a safe place and no confusion can be made by the defence to the contrary. So it has been abundantly proved that, Kaiser was very much there when the victims were apprehended and were made walking towards rail bridge.

1224. Again, no one dispute the killing of those two victims too and from the testimony of the witnesses it is found that dusk fell upon when the victims surrounded by accused and Pakistani Army had been crossing the rail bridge on the date of event. It is quite natural for any human being not to follow combatant forces with an intention to see the fate of the victims risking their own life and the Pw's had perfectly shown such natural human conduct by taking their own way escaping from imminent danger.

1225. But only for that, accused Kaiser by no means could be absolved from the liability of killing those two civilians as it was not possible for the Pakistani Army personnel to walk through a totally unknown area in the dark and kill victims at a selective place if Kaiser had not

accompanied them. Now question may crop up why the victims had not been killed instantly after their capture rather accused preferred the night for eliminating the victims upon torture.

1226. It is evident that, those two victims were not ordinary civilians, but diehard Awami league supporter and served the freedom fighters in the war of liberation. This had inevitably led Accused Kaiser to inflict ruthless torture to those victims first in order to glean important information about the Freedom fighters but since he failed from extract any information as expected, he then decided to eliminate them. So, it can legally be perceived from the above circumstance that, Kaiser directly participated in the killing of Dr. Saleh Ahamed and Hirendra Chandra Roy having no doubt of it.

1227. It has been found that accused Kaiser had formed an infamous private militia outfit with the name and style “Kaiser Bahini” comprising all anti-liberation aliments with an aim to eliminate pro-liberation forces regardless of Hindu and Muslim and wherever and whenever he and his Bahini had moved to cause devastation, Pakistani Army were always with him.

1228. Now question remains, why the victims had become the target of accused Kaiser. It is worthwhile to note that, during our war of liberation the mission of the anti-liberation forces and their local collaborators like accused Kaiser and his cohorts was to root out the pro-liberation forces and minority group and to establish their hegemony over Bangalee population as well as to appease their notorious mentor, Pakistani Army and as a part of such common policy and plan accused Kaiser had launched such systematic killing throughout the whole period of war of liberation against those pro-liberation forces and minority group and Dr. Saleh Ahamed and Dhirendra Chandra Roy have easily fallen prey of his such ghastly targets.

1229. So far as it relates to the Documentary evidence (Books) produced, where it has been penned that, those two victims were killed by the Pakistani Army having no involvement of the accused therein. Now question revolves how the Pakistani Army could recognize these two

Awami leaguers (Victims) and who had made them known to the Pakistany Army for annihilation. The answer invariably points at accused Kaiser who had designed about who would have to be liquidated in his area and the Pakistani Army had just carried out his such plan. Perhaps the writer has not been well-informed about that factum when he had gathered information about the killing of the victims.

1230. Fact remains there having no dispute over the very killing nor the event narrated in the books is brushed aside for not mentioning the presence of accused Kaiser in the event of killing in the book. In such a posture, the write up over the incident of the killing would never outweigh the judicial testimony made by the Pw's before this Tribunal. But the killing of those two civilians have since been proved perpetrated within the vicinity of *Shaestaganj*, obviously accused Kaiser could not be absolved from the criminal responsibility of such killing as Pakistani Army could never dare to kill any civilians without his(Kaiser) consent and in that score, the very writing penned in the books over the event has further reinforced the evidences of Pw's implicating accused with the killing of the victims and accused Kaiser is thus held liable of the charge of murder of two civilians .

1231. Reverting to the hearsay evidence of Pw-1, Kazi Kabiruddin who testified to have learnt about the killing of those two victims from his sources. In the foregoing discussion I find this Pw a valiant freedom fighter who had maintained a close link with several sector commanders at the time of war of Liberation and certainly he would have to maintain sources as a common strategy of war and there is nothing wrong about it or to raise any dispute about the deployment of such sources to collect information about the position of the invading forces and their local collaborators.

1232. It is to be considered here whether the testimony of Pw-1 ever proves those two victims had been killed at the behest of accused Kaiser. Since from the testimony of live witnesses, it has been proved accused Kaiser was involved with the killing of two civilians, his (Pw-1) very knowledge through his sources and testimony given thereby has thus proved true and credible one.

1233. Mode of Liability accused incurred :

Regard being had to the above reasoned observation it is proved, accused Kaiser actively participated in the commission of the offence of murder on the 2 (two) unarmed Civilians. It is thus proved, accused abetted, facilitated and actively contributed the actual commission of offence of murder that constituting the offence of ‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1234. Verdict on Conviction: In view of what has been stated above, in regard to the evidences and submissions of learned Advocate of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of murder as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1235. Verdict on Sentence: With the testimony of the Prosecution witnesses I find the personal account of those two hapless civilians, Dr. Saleh Ahamed and Hirendra Chandra Roy who were not inimical to anybody but had to embrace death while they were under the captivity of accused Kaiser. Even, these two civilians had also got no enmity with accused Kaiser nor they possessed any threat to the life of Kaiser. Rather, evidence on record suggests, for fear of life both of them had been fleeing to India. Their only fault, they wanted a liberated Bangladesh free from all sorts of deprivation and persecution coercively imposed by the occupation forces.

1236. Apart from that, the victims belonged to pro-liberation forces and supported the freedom loving people from their core of heart to whom they had been serving covertly that might have enraged Kaiser to take revenge. It has been found out that Dr. Saleh Ahamed had put on an apron with a stethoscope around his neck when Hirendranath Hiru being an Awami leaguer just accompanied him when they were being dragged from the Jeep.

1237. These very doctor and minority person were born to serve the nation and the humanity but inhumane Kaiser had not only annihilated these two humanists from the world physically even deprived the nation from their noble service they could have served the humanity for long.

1238. The dreadful and dastardly act of inhumane torture followed by brutal killing perpetrated upon two innocent civilians could in no way be taken compassionately rather accused Kaiser obviously deserves highest punishment for such monstrous crime. Above all, accused Kaiser has found to have committed the crime of murder to two un-armed Civilians and it has been proven out-rightly. The motive behind such ghastly killing also portrays accuser's revengeful lust towards patriotic pro-liberation civilians. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for X-----for the crimes of murder as Crimes against humanity under section 20(2) of International Crimes (Tribunals) Act, 1973.

1239. Adjudication of Charge no.7

(Other inhumane acts caused to Civilians at Habiganj Town)

Charge Framed : Accused Syed Md. Kaiser has been indicted for launching attack on arriving Habiganj town and looted households of 40-45 civilians including the house of Advocate Mustofa Ali MNA, Latifur Rahman @ Manik Chowdhury MNA, Dr. Abul Hashem MPA, Anil Kumer Roy, Iswar Paul, Roby Roy, Thakur Jhee, Sajib Ali, Shurjakanto Babu, Rajaram, Upendra Paul and set their houses on fire on April 30, 1971 in between 10:00 – 10:30am and 4:00– 4:30pm with 10-15 member Kaiser Bahini led by him being accompanied by Pakistani army and by that act, Syed Md. Kaiser has been charged for abetting, facilitating and contributing the actual commission of the offence of “ Other inhumane acts as Crime against humanity” as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1240. Evidence of Prosecution Witnesses:

To buttress the above charge prosecution has relied upon the oral testimony of three witnesses claiming them as live witnesses apart from

producing a book titled "*Muktajuddehe Habiganj Zila*" authored by Sheikh Fazle Elahi as documentary evidence.

In the first place, one **Mohammad Ali Tipu** has turned up to depose as **Pw-2**. While testifying on the event, he stated that, on the night preceding April 30, 1971 Mostofa Shaheed and he had reached his house but finding no one in his house they spent the night at his neighbour's house, Ashrafuddin. On the following morning around quarter past 10:00 or 10:00am he could hear the sound of vehicles and through the window he then saw a convoy and 5-6 Army vehicles standing in front of his house out of whose accused Kaiser and 2-3 members of Pakistany Army got down from a car.

1241. On descending, Kaiser gave signals towards his house and instantly other Army personnel who were waiting in their cars, stormed in to his house and started ransacking the valuables and at one point set the house on fire and he then saw smoke billowing from his houses. After staying there for half an hour they (Kaiser and his accomplices) went away towards the town and he witnessed his own devastation staying at the first floor of his neighbour's house – pw continued with choking back tears.

1242. This Pw further stated that, near about 45 minutes of Kaiser's leaving he saw smoke also billowing from the direction of Manik Chowdhur's house. At 4:00-4:15pm he could see all the vehicles and convoy leaving Habiganj town though Mostofa Shaheed and he had not come downstairs for the whole day for fear of lif, Pw added further.

1243. At sundown, people of the neighborhood assembled in front of his house who had been saying that, the house of Mostofa Shaheed, Father-in-Law of Major CR Dutta, Anil Roy, Dr. Hashim MPA, Umesh Bhaban and many houses and shops were burnt-pw further added. After dusk, they left for the village home of Mostofa Shaheed and on arrival, his father narrated the arson attack and looting carried out in his own house and others- Pw concluded.

1244. This Pw was duly cross examined by the defence. In reply to a specific question put to him about the date Pakistany Army took control over Habiganj Town, this pw stated that, on April 30, 1971 member of

Pakistani Army set his house including the houses of other inhabitants at Habiganj town ablaze but could not say from when Pakistani Army put Habiganj town under their control. Besides, no suggestion has been put by the Defence to this Pw on the material particulars he narrated in his chief implicating the accused with the event.

1245. Shah Hasan Ali who was staying at his house in Habiganj town on the date of event deposed as **Pw-7** and has given similar description as of Pw-2 about the arson and looting accused Kaiser, his Bahini and member of Pakistany Army committed in the house of Advocate Mostofa Ali MNA, Commandant Manik Chowdhury, Umesh Bhaban and other Awami league leaders and Hindus on entering Habiganj town on April 30, 1971 around 10:00- 11:00am .

1246. In his chief he stated that- his house was adjacent to the house of Advocate Mostofa Ali(Father of Pw-2) and he had heard the sound of ransacking perpetrated to the house of Mostofa Ali and saw the flame billowing from that houses when his family members except his father, uncle, Nur Ali and cousin, Shah Monaf left the village, Bahula Mokambari and took refuge elsewhere out of fear. Around 100-150 family of his village had also left their house on that day out of fear of their lives-Pw concluded.

1247. At cross, this Pw denied a suggestion asked for to the effect that- his house was 1.5 Kilometer away from the house of Advocate Mostofa Ali. Apart from that, Defence drew the attention of this Pw to the incriminating part of his chief and suggested those to be not true- which the Pw denied.

1248. Another witness named **Shah Hossain Ali alias Sabu(Brother of Pw-7)** has testified as **Pw-8**. In his chief he stated that, around 8:30 - 09:00am on April 30, 1971 he came to learn from his hide out(from a vacant house in a bush at *Lenjapara Uddakhola* Village) that accused Kaiser, his Bahini and member of Pakistani Army had moved towards Habiganj from Shaestaganj and he could see their movement from his hide out. He further stated that in the evening he started for Habiganj from his hideout and in the midway he heard that Kaiser, his Bahini and

member of Pakistani Army looted and burnt down the houses of Mostofa Ali and many others in Habiganj town at 10:00 – 11:00am on that day when all his family members lived in village home went away elsewhere to save their lives.

1249. No question has been put to this Pw with regard to the event he stated in his chief as a hearsay witness but, like Pw-7 Defence drew the attention of this Pw to the incriminating part of his chief and suggested those to be not true- which the Pw denied.

1250. Prosecution has also placed his reliance to the book titled “*Muktejuddehe Habiganj*” authored by Sheikh Fazle Elahi (**Material Exhibit- Gha**). In this particular book Prosecution has pointed out page no.108 and 109 where ransacking, looting and arson attack in the houses and shops of Awami League leaders, members of Hindu Community, Umesh Bhaban all at Habiganj town by the combatant Pakistani Army and their local collaborators has been described.

1251. Submission advanced by the Prosecution at Summing up:

Upon taking us to the relevant portion of the evidences of the Pw’s stands for this charge, learned Prosecutor submits that all those witnesses in their respective testimony have proved the implication of the accused with the commission of crime. Pointing to the testimony of Pw-2 who has been victim of the arson and looting committed in his own house found accused Kaiser in the crime scene with his cohorts, Pakistani Army and under the instruction and direct participation of Kaiser his house had been looted and then burnt down.

1252. Learned Prosecutor then argues that, Pakistani Army was not supposed to know the house of this Pw-2 but it is the accused Kaiser under whose policy, plan and design those army had acted and accused Kaiser had targeted his house as the same belonged to an Awami League leader-Advocate Mostofa Ali MNA-father of this Pw. From the testimony of this very Pw alone there could not be any doubt that accused Kaiser accompanied by Pakistani Army had looted and then burnt the house of this Pw even though nothing to the contrary has been come out from the cross by the defence.

1253. On explaining the testimony of Pw-7 learned Prosecutor then submits that, this Pw- being the neighbor of Pw-2 and an eye witness to the event has given similar accounts of atrocities accused Kaiser and his accomplices, members of Pakistani Army unleashed not only in the house of Pw-2 but the houses of other Awami league leaders and members of Hindu Community in Habiganj town.

1254. Again, Pw-8 could not be termed merely a hearsay witness to the event as he stated to have followed the movement of accused Kaiser and Pakistani Army towards Habiganj from Shaestaganj staying at his hideout and his such notice could not be shaken by cross examining this Pw-learned Prosecutor added further. Mr. Prosecutor continued that, the subsequent knowledge of this Pw about the devastation perpetrated in Habiganj town to the houses and shops of renowned Awami League leaders, members of Hindu Community proved that his notice about the movement by accused Kaiser accompanied by Pakistani Army towards Habiganj in the morning was true and thus proved under the direct participation of accused Kaiser.

1255. So far as it relates to the book titled “*Muktejuddehe Habiganj*” authored by Sheikh Fazle Elahi (**Material Exhibit- Gha**) Learned prosecutor submits that, horrific atrocities of looting and arson attack to the houses and shops of renowned Awami league leaders and members of Hindu Community in Habiganj town had been carried out by Pakistani Army and that has been figured in page no.108 and 109 of that book specifying the date of event and name of the victims which has added further proof of the event -learned Prosecutor concluded.

1256. Defence Contention at Summing up:

Countering the above submission of the learned Prosecutor, learned Defence Counsel then argues that, if the entire deposition of Pw-2 and Pw-7 are closely examined then it would be revealed, no crimes as has been alleged in the charge had at all been committed on the alleged date of event and therefore, involvement of accused with the commission of alleged event cannot be arise then.

1257. Clarifying his such contention learned Defence counsel pointed out that, in reply to cross examination Pw-2 has stated that he could not say from when Pakistan Army took control of Habiganj town whereas Pw-7 in reply to cross has stated that, until April 30, 1971 Habiganj Town was under the control of Freedom Fighters and had it been so, then it cannot be believed Accused Kaiser accompanied by Pakistani Army had led looting and arson attack in different houses and shops in Habiganj town when it remained well guarded by the freedom fighters.

1258. In regard to the testimony of Pw-8, learned Defence counsel submits that he is a mere a hearsay witness and his testimony cannot be believed because he did not divulge his source of knowledge failure of which his evidence has become redundant.

1259. Analysis of Evidences and Deliberation :

Heard the learned Counsels and perused the evidence on record meticulously. Precisely, in the charge accused Kaiser has been implicated for leading Pakistani Army in looting and burning houses and shops of some 40-45 Civilians at Habiganj town on April 30, 1971. In terms of the said charge evidence of three witnesses have been discussed above including documentary evidence. Of the three witnesses Pw-2 has turn out as the only victim here who claimed to have seen the harrowing event perpetrated by Pakistani Army in his own house so spearheaded by accused Kaiser.

1260. On going through his ordeal, he narrated in his chief, there could not be any hesitation not to believe so as it is opposed to natural human conduct that one can tell lie about the devastation he himself endured. Moreover, the house so burnt down was not unknown to accused Kaiser rather it was his targeted house for burning as the same belonged to a renowned Awami league leader and the then MNA from Awami League, Advocate Mostofa Ali who was belligerent to accused Kaiser.

1261. Though by cross examination, Defence could not discard his assertion even not in the slightest even then, from the plain reading of his irrefutable testimony and his remorseful utterance while being testified in the dock make me believe, it is unreasonable to prove the event through

further corroborative evidences. Still, Pw-7 who being the neighbor of this Pw-2, has not only supported the event caused to the house of this victim(Pw-2) but corroborated him in the destruction and looting in the houses and shops mostly belonged to Awami League leaders and members of Hindu Community at Habiganj town unleashed by accused Kaiser and members of Pakistani Army.

1262. Furthermore, I find Pw-8 (brother of Pw-7) has proved the movement of accused Kaiser and his notorious accomplices, Pakistani Army to Habiganj town to have occurred in the morning and by that proved the subsequent event of looting and arson attack perpetrated in the house of Mostofa Ali at Habiganj town. Certainly, he could exaggerate by telling the name of other victims whose houses and shops went under arson attack and looting on the day of event but he could not do so, as what he had heard he stated before this Tribunal which has proved true and made his assertion trustworthy.

1263. Again, I do not find it improbable for this Pw-8 to follow the movement of accused Kaiser and Pakistani Army keeping in the hideout even though Defence could make any doubt of it or shake such assertion. Further, it is not indispensable for any witness to utter the name of all victims in the testimony in terms of charge framed. The veracity of the event can even be weighed from the testimony of a single witness if the same is found to be credible one or came out from strong circumstances having probative value.

1264. From the testimony of Pw-2 and Pw-7 I find common name of victims whose houses and shops were looted and set on fire. And by their such corroborative testimony it can legally be inferred other houses so left out in the testimony of the Pw's- mentioned in the charge had also been destroyed in the same manner as of those victims-deposed by Pw's by the accused and Pakistani Army. So, in view of the above, accused would not derive any benefit nor it would be fatal for the prosecution for not coming out all the names of victims in the testimony of the Pw's whose houses and shops had been looted and burnt down nor the charge can be vitiated thereby.

1265. Defence has raised a point about the probability of committing the alleged event on the date mentioned in the charge on citing the testimony of pw-7 who stated in cross that, Habiganj Town was under the control of Freedom Fighter until April 30, 1971 leaving it impossible to Pakistan Army or accused Kaiser to let loose any atrocious act in Habiganj town on that day. I have gone through the said statements of Pw-7. By that very statement, there is no reason to come to any definitive conclusion that no occurrence had perpetrated as has been charged and such stray statements would *ipsosfacto* falsify the corroborative testimony.

1266. Because, his very statements shows- what he has stated, it is out of his imagination and secondly, nothing could be fathomed from his such utterance about how long the freedom fighters had kept the Town under their control. Moreover, it is absolutely impracticable to think the combatant Pakistani Army and Kaiser could not have perpetrated atrocities in the fear of freedom fighters, as it is found, no one could withstand in Habiganj area against mighty Kaiser during the liberation war on forming ‘Kaiser Bahini’ and joining Pakistani Army to his mission had further intensified his atrocities to a manifold where presence of Freedom fighter had there be any, did not matter most for him in unleashing his atrocities on the date of event. So the plea taken by the defence just falls through.

1267. Prosecution has produced a book named “*Muktejuddeh Habiganj*” authored by Sheikh Fazle Elahi and has drawn out attention in its page no.108, 109 where there has been harrowing destruction perpetrated by Pakistani Army at different houses and shops predominantly owned by prominent Awami League leaders and members of Hindu Community at Habiganj Town specifying the name of victims. The author though did not mention the name of accused Kaiser by involving him with the atrocities of destruction perpetrated, but it can easily be comprehended without the design and plan of accused Kaiser, Pakistani Army was not supposed to identify the houses and shops of renowned Awami League leaders and prominent Hindu families figured at page no.109.

1268. There might be many tacit reasons for a writer of not mentioning the name of a main perpetrator over the event written, but his such write

up siding any name of mastermind to the atrocious event would never overshadow the testimony of a live witness who testified on oath before this Tribunal. But still, the description depicted, appears to me of authentic one as the atrocities and name of the victims suffered on the date of event has elaborately and specifically been described in that page making the charge proved.

1269. Mode of Liability accused incurred :

In view of, what has been stated above, it is proved, accused Kaiser actively participated in the commission of the offence of looting and arson attack to the houses and shops of unarmed Civilians. It is also proves, accused abetted, facilitated and actively contributed the actual commission of offence of looting and arson attack that constituting the offence of 'Other inhumane acts' as "Crimes against humanity" as enumerated in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1270. Verdict on Conviction: Given the above discussions based on the evidence on record and submissions of learned Advocate of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of 'Other inhumane acts' as "Crimes against humanity" and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1271. Verdict on Sentence: From the severity of destruction so perpetrated by accused Kaiser in association with the member of Pakistani Army it is unerringly proved that, he had targeted the houses and establishments of the prominent Awami League Leaders as well as members of Hindu Community in his area. Accused Kaiser envisioned an undivided Pakistan that coincided the self imposed political theory of the ruler of the then West Pakistan who had started brutal crackdown on Bangalee civilians branding 'Operation search light' in dead of night following 25 March, 1971 for denouncing such suicidal theory disdainfully by the patriotic Bangalees of the then East Pakistan and with this end in view, accused Kaiser had founded "Kaiser Bahini" and then

Pakistani Occupation Army extended their wholehearted support to fulfill his ominous mission for eliminating the pro-liberation elements.

1272. And as a part of said policy and plan accused Kaiser started destructing the houses and shops of those pro-liberation Bangalee Civilians to destroy their morality. Accused Kaiser Knew those houses and shops before and materialized the devastation through the Pakistani Army remaining present at all crime scenes. **1273.** No doubt, accused Kaiser has committed nefarious crime by demolishing shops and homesteads to innumerable civilians in his own neighbourhood who even caused no harm to him but only for safeguarding his personal petty interest and show loyalty to a brutal and barbaric forces of an enemy country he stood against his natives and destroyed their hearth and home leading to shattered their hopes. The vengeful act of looting and burning of shops and houses to a targeted group demonstrates his lust and cruelty towards patriotic pro-liberation civilians. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for 7(Seven) years for the crimes of ‘Inhumane act’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

1274. Adjudication of Charge no.8

(Committing Rape upon Hiramoni Santal at *Chandpur* Tea Garden)

Charge Framed : Accused Syed Md. Kaiser has been arraigned for accompanying a group of Pakistani Army towards *Chandpur* Tea garden under Chunarughat Police station, Habiganj on May 11, 1971 at about 10:00 am and started causing torture to the labourers of the tea garden on arriving there and at one stage entered a dwelling hut of one *Santal* woman named Hiramoni and on showing her to Army men for to enjoy, 2-3 Army men committed rape upon Hiramoni and by that act, Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of sexual ravishment upon a *Santal* woman constituting the offence of **rape** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal

Act,1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1275. Evidence of Prosecution Witnesses:

In proving the said charge, prosecution has adduced two witnesses claimed them to be live witnesses though no document has been produced. In such endeavor, prosecution has produced **Basu Santal**, deposed as **Pw-18** who claimed to be 12 years old at the time of event and being the nephew of the rape Victim, Hiramoni Santal. He stated in his chief that, on May 11, 1971 at about 10:00 am he and his grandfather, Bipin *Santal* were gossiping at the courtyard of their house after having breakfast when his aunt Hiramoni *Santal*(Victim) was working at the kitchen and uncle(husband of Hiramoni) was at work in the tea garden. At this, two Bangalees named Gafur and Abdul Huq (Both dead) on accompanying two Pakistani Army and one white dressed unknown Bangalee entered their house and upon seeing them he out of fear sneaked away and took shelter inside a bush near his house.

1276. From his hide out he could see that, the white dressed unknown person made the two army men entered the kitchen by giving them a hint and as soon as the army men entered, his aunt started screaming saying 'save me,' 'Save me'. As his grandfather, Bipin was about to rush towards the kitchen to rescue Hiramoni then Gafur, Abdul Huq and white dressed man started beating and pushed him down when he cried out of torture. He goes on to state that, after some time he could not hear any sound of his aunt from the kitchen and after an hour he could further see from his hideout that two Pakistani Army accompanied by three Bangalees were leaving.

1277. At that time his Uncle Lakhwan *Santal* (husband of Hiramoni) returned from his work and upon accompanying him he (Pw) then entered the kitchen and found his aunt in a devastating state who then revealed that, Pakistani Army had outraged her modesty-Pw continued. At around 5:00 pm on that day, the elders of the locality came round their house and told, they had seen the persons who had come to and returned from the

house adding further, the person who was clad in white dress is Kaiser of Village *Noapara* whom they knew- Pw continued.

1278. Day after the said incident, they (Pw and all his family members) all went to the *Belchara* refugee camp in India for fear of life and returned to Bangladesh after liberation. After 10-11 years of their such return, Kaiser contested an election from Jatiya Party with the Symbol 'Plough' and came to their tea garden for seeking vote when he could recognize Kaiser well who made his aunt, Hiramoni Santal raped by the Pakistani Army- Pw continued further. Hiramoni *Santal* is an elderly woman who turned above 80 years and could neither move nor hear and has now been staying abandoned in the house with various ailments-Pw concluded.

1279. This Pw was cross examined. On going through the entire cross examination I do not find Defence has made any question to this pw on material particulars that is to say, statement he has given related to the event. Instead, upon drawing attention to certain portion of chief where the Pw has implicated the accused with the commission of crime, Defence has suggested those to have been disclosed for the first time before this Tribunal- which Pw flatly denied. In the same fashion, Defence has also given suggestion about what the Pw stated in his chief about the recognition of accused Kaiser claiming those to be not true-which the Pw denied too.

1280. Then comes one **Abdul Motaleb** who testified as **Pw-20**. In his chief he claimed to be 27-28 years old at the time of liberation war and used to be a source of Captain Motiur Rahman and would supply information to him about the movement and activities of Pakistani Army and Razakar forces in his locality at '*Khoai Kachamati Camp*' in India which was around 1.5 Kilometer off his village home. In regard to the event he described that, tentatively on May 11 or 12, 1971 at around 9:00 in the morning he reached near a banyan tree at *Dargabil* point in *Dolna* tea garden when he saw five Army Vehicles there standing in the road.

1281. Of those five vehicles, four drove towards *Dolna* Tea garden and the rest one was stopped there from which he saw Sher Bahadur, Syed Kaiser, Major Yusuf and other two unknown Bangales getting down. On

finding him there, Sher Bahadur called him but when he came near to Sher Bahadur, Kaiser introduced him as the informer of freedom fighters and asked him to supply the information of freedom fighters but Sher Bahadur then interrupted Kaiser saying he was good man and during India-Pakistan War in 1965 they (Sher Bahadur and other Pakistani Army) had stayed at his thatched house.

1282. He goes on to describe that after some time, the Army men picked him to one of their five vehicles wherein Major Yusuf and Kaiser boarded and drove towards Chandpur. At one point, their car stopped at a place which was 300 yard away from *Chandpur-Chagalbazar* when two Army men approached them. Accused Kaiser on accompanying those two Pakistani Army and two un-known Bangalees then set out to a nearby house of a tea labourer. After that, he asked Major Yusuf Khan what would he do, when Major Yusuf permitted him to go away but when he was going past the house of Hiramoni Santal, whom he did not know before, heard scream from behind the fence who was shrieking of having outraged and lamented not to live any longer .

1283. He heard such shrieking for about 7-8 minutes when an elderly person came forward to rescue Hiramoni, but Kaiser and two un-known Bangalees then beat him and pushed him down in the ground. After 40-45 minutes, major Yusuf blew whistle from the road when accused Kaiser and all his accomplices came out from the house and went away towards Noapara riding the car. This Pw further stated that, at the time of event Kaiser was dressed in white trouser and shirt with a pistol in his waist. This Pw continued that, after leaving accused Kaiser and his accomplices, he went inside the house and found a woman indisposed who was crying and then came to learn her name as 'Hiramoni Santal'.

1284. He further learnt from the elderly person whom Kaiser and his two accomplices tortured when he attempted to rescue Hiramoni that, on being shown by Kaiser, two Pakistani Army forcibly outraged her chastity on entering the kitchen. He knew accused Kaiser before as a cattle trading was held at *Noapara* in every Friday where Kaiser would come and they(Kaiser's family) had also a brick field at *Nalua* where Kaiser used

to go, and apart from that, he himself contested the election in 1970 with a Symbol “Elephant” -Pw-concluded.

1285. This Pw was extensively cross examined. It appears from the cross examination certain questions have been put by the Defence to this pw so far as regards to the event he described in his chief. Amongst others, he replied in cross that, four sides of the house of Hiramoni Santal were encircled by bamboo fence from where he was hearing her scream and there remained houses of other labourers in the neighborhood of Hiramoni. He did not recollect who belonged to the house from where he was hearing the scream of Hiramoni Santal and the car of Yousuf Khan was standing around 150 yard away of that house. He did not disclose the incident of ravishment caused upon Hiramoni to Yusuf Shaheb as his life was then at stake. Besides, drawing attention to the incrimination portion of chief, suggestion has been given both in the form of disclosing such event by pw as of first time before the Tribunal as well as the fact described by the pw is not true – though the Pw denied both count of suggestion.

1286. Submission advanced by the Prosecution at Summing up

Learned Prosecutor while making his submission supporting the charge very robustly contends that, prosecution has overwhelmingly proved the charge by most competent and credible witnesses who remained present at the crime scene finding the accused very much there. Quoting the testimony of Pw-18, Basu Santal learned Prosecutor then submits that, there is no iota of any reason to disbelieve the testimony of this vital witness who has given a vivid description as to how, by whom and by whose instance his aunt, Hiramoni Santal was sexually ravished. Again, from the trend of the cross so derived, defence could not be able to prove that, this Pw was not there in the crime scene when the alleged event was perpetrated nor he had got any relationship with the victim nor Kaiser did accompany the Army men to his house and showed them Hiramony to enjoy – learned Prosecutor argued further.

1287. It is fact, this Pw could not recognize accused Kaiser moment he entered in the premises of their house accompanied with Pakistani Army

and two un-known Bangalees but his subsequent recognition of the accused on that very date from the elders of his locality and after certain years of the event when he(accused) contested the election cannot be held unnatural and brushed aside- as accused was not supposed to come across such type of indigenious impoverished family members frequently-learned Prosecutor added. In the same vein Abdul Motaleb as Pw-20 has testified implicating the accused with the crime who did not have much pain to recognize accused Kaiser as Kaiser himself introduced him(pw) with Pakistani Army as the supporter of Freedom Fighter- learned Prosecutor then submits.

1288. At the same time, no doubt can be created by the Defence in recognizing the victim, Hiramoni Santal by this Pw as he admitted in the initial part of the chief that, he did not recognize the victim before rather after she went through the worst horror of her life. Basically, it is quite justifiable for any sensible human being to see a victim after he was savagely tormented if it is perpetrated with in his very knowledge and presence and definitely her name will crop up then- learned Prosecutor averred. Learned Prosecutor goes on to submits further, by putting certain questions to the Pw, defence has rather affirmed the commission of crime by the accused on taking location and manner of boundary of the house of Hiramoni Santal and her neighbourhood and that of the place where the car of Major Yusuf remained stand by as well as asking question as to disclosing the event to Major Yusuf.

1289. At the fag end of the Chief, Basu Santal, Pw-18 has described the physical condition of his aunt, Hiramoni Santal and with reference to his such testimony learned Prosecutor then submits that, they left no stone unturned to have her (Victim) deposition recorded by this Tribunal and accordingly she had been made witness in this case but her fragile health eventually desist them from producing her before this Tribunal for avoiding eminent risk of her life but what Pw-18 and Pw-20 as eye witnesses have deposed elaborating the horror the victim sustained is suffice to prove the charge-learned Prosecutor wrapped up.

1290. Defence Contention at Summing up :

In contrast, learned Defence counsel finds it totally improbable to commit such event as has been alleged in the charge. To substantiate his such proposition learned Counsel then submits that, in reply to cross examination Pw-20 readily replied that, '*Khoai Kacha Matir Camp*' housed inside India was just 500 yard away from Bangladesh boarder having no structures within that range and in such a topographical position, no Pakistani Vehicles could have dared to move near the border area and thus such alleged assertion is beyond the ground reality.

1291. Learned Defence counsel next submits that, the alleged ravishment to Hiramoni by two Pakistani Army men soon after they met with Kaiser without prior acquaintance and even in presence of accused Kaiser is absolutely doubtful. Lastly, Learned Defence Counsel submits that, Since Hiramony is claimed to be a rape victim and she has been listed as witness by the Prosecution and lately, it has been reported in '*Daily Prothom Alo*' dated.21-06-2016 that, she had received financial assistance in Habiganj in recognition of her contribution in the liberation war as a '*woman Freedom Fighter*' so, in spite of having physical ability prosecution did not produce her before this Tribunal and her such non-examination before this Tribunal has made the prosecution case totally doubtful.

1292. Analysis of Evidences and Deliberation :

In the previous judgements adjudicating the offences of Crimes against humanity, delivered by this Tribunal we have discussed the historical background of the emergence of our motherland where we amongst others observed, more than Quarter million of women had been sexually ravished by the occupation Pakistani Army and local collaborators during nine month long war of Liberation. Perhaps Hiramoni Santal is one of such brave woman who has still been enduring the stigma of having been ravished for the noble cause of achieving a country of her own. Given the above testimony by the witnesses and the submission and counter submission of the parties one thing has been proved true that, Hiramoni Santal had been sexually ravished by two perverted Pakistany soldiers.

1293. Defence did not dispute Hiramony's such terrible ordeal rather they dispute the alleged involvement of accused Kaiser. It is true, in this

Charge, Kaiser has not been arraigned for directly ravishing the victim rather he has been charged for substantially abetting and aiding the Pakistani soldiers in committing such heinous crime on an innocent woman. Now question can erupt whether it has been proved, Kaiser had accompanied two Pakistani soldiers to the house of the Victim and showed them at her that led to such ravishment and both the soldiers had outraged sexual violence on the victim keeping Kaiser on guard the house for uninterrupted accomplishment of their carnal desire.

1294. It is evident, Basu Santal(Pw-18) had just witnessed the very ingress of Kaiser at the compound of their house on accompanying two soldiers and two un-known Bangalees while he was gossiping with his grandfather, Bipin Santal after having breakfast, whereas Abdul Motaleb (Pw-20) who accompanied Kaiser riding in a car had witnessed him heading for that Santal's house flanking by two Pakistani Army and two un-known Bangalees. So, there is no confusion about the very arrival of Kaiser to the house of Hiramoni Santal accompanied by two Pakistani Soldiers and two un-known Bangalees. It appears from the testimony of Pw-20, he was set free by Major Yusuf after Kaiser and his accomplices had reached the house of that tea labourer (house of Hiramoni Santal).

1295. This Pw then started walking towards his house sneaking through the sugarcane field and heard the scream of the Victim while passing the said house as by then, Pakistani soldiers had already started outraging Hiramoni on entering her room. On the other hand, Pw-18 as one of the family member of victim could see from his nearby hideout how two Pakistani soldiers were made inroad in to the room of Hiramoni upon a hint by accused Kaiser shown to the Pakistani Soldiers and subsequent screaming of Hiramony out of pain as naturally such sorts of outrage is perpetrated in sly.

1296. In fact, Pw-18, Basu Santal did not see or know the accused before but his very recognition of accused Kaiser subsequently by the elders of his locality who came over there after the event was perpetrated as well as Kaiser's seeking vote for him as the candidate of Member of Parliament afterwards could in no way be shaken or discarded by the Defence, meaning he could rightly recognize the accused.

1297. So, on cumulative observation it can legally be deduced that, accused Kaiser remaining present at the house of Hiramoni on the date and time paved two Pakistani soldiers the way in perpetrating ghastly event. Now, on careful analysis of the evidence led, I feel it urged to address another point as to what prompted accused Kaiser to let those two army soldiers unleashed upon an indigenous woman and why his presence was so required at the house of victim when those two army soldiers had been violating an innocent woman.

1298. The obvious answer appears to me that, accused Kaiser considered it as his sacred duty to harbour the invading Pakistani forces and to that end, make all out effort to appease them whatever might be their demand, otherwise his own existence at that juncture of warfare would be at stake and keeping this end in view, he was bound to obey what the Pakistani soldiers wish for even to meet their carnal desire and it is the contributing factor to have Hiramoni sexually ravished by those two army men.

1299. Clearly, Pakistani Army was not supposed to know Hiramoni Santal or her place of abode and they should not have bother for that, their only demand to meet their sexual desire by Bangalee woman and Kaiser was made instrumental to fulfill so and Kaiser had ultimately materialized so like their most obedient service giver by bringing them to a selective home whom he knew before, as a native of that area.

1300. Furthermore, Kaiser knew it very well those two army soldiers might be disturbed or prevented by the local people or by the inmates of the victim when they (Pakistani soldiers) would go to enjoy the victim and foreseeing such eventuality he even made a car standing on the road keeping major Yusuf there and he himself along with two Bangalees stood guard at the house of Hiramoni to ensure their uninterrupted enjoyment.

1301. Notably, subsequent event of Kaiser proved such apprehension correct as on hearing the scream of Hiramoni, Bipin Santal (father-in-law of Victim) tried to rescue her which was foiled by Kaiser and his two Bangalees upon thrashing him and this very cruel scene had been witnessed by both the Pw's from their respective hideouts corroborating each other in to to in their chief having not been shaken in cross

examination. The very ruthless attack on Bipin Santal need no explanation to comprehend the culpable intention of Kaiser in accomplishing the crime of rape upon Hiramoni Santal by two Pakistani soldiers.

1302. Further, Pw-20 though did not know the Victim before but it is quite natural, her name had surfaced in the conversation among her dear ones after the ordeal was over and they, including this Pw went to see the tormented victim finding her in a distress state. Be that as it may, the cardinal point is that, from the corroborative testimony of the Pw's it has been proved beyond any shadow of doubt, both the Pw's had found Kaiser in the house of victim when she was being sexually ravished perpetrated by two Pakistani Army and they heard the scream of Hiramoni, found her in a devastated state and saw Kaiser and all his notorious accomplices leaving Hiramoni's house upon accomplishing the heinous crime of rape.

1303. Defence amongst others has raised a plea for not producing the victim before this Tribunal in spite of living at her village home and further claimed to have taken monetary assistance as a woman freedom fighter from a program arranged in Habiganj and in support of its such contention defence has annexed a paper clipping of "*Daily Prothom Alo*" dated.21-06-2014 with a petition that was filed opposing the prosecution's application made under section 19(2) of the Act of 1973 to receive the statement of the victim as evidence. By that, Defence tried to impress upon this Tribunal that, the entire prosecution case has become doubtful since Victim has not turned out to testify herself before the Tribunal.

1304. But, such contention does not hold water at all rather by producing the very paper clipping, Defence has alternatively admitted the painful event; victim had endured by the Pakistani Army as has been charged. As, it is now wellknown who has been recognized as "Woman Freedom Fighter" in our country. Indubitably, those brave women who had been tormented by the Pakistani Army and local Collaborators during our nine month long struggle for emancipation. To show respect and honour to their invaluable and supreme sacrifice for the birth of this nation those Victims of the war has been awarded and still being awarded by various functionaries specially by the State and private organization.

1305. So, from the report published in “*Daily Prothom Alo*” in which Defence has relied upon, transpires Hiramoni had subjected to sexual ravishment by the Pakistani Army for which she has been recognized as “Woman Freedom Fighter” and amongst other five Woman Freedom Fighters he had also been given monetary assistance as a token of honour by a private local organization named “*Chetonay ’71 Habiganj*” –which in my view, has definitely reinforced the prosecution case.

1306. It is worthwhile to mention here that, from the testimony of Basu Santal (Pw-18) we find Hiramoni has now more than 80 years old and beset with numerous old age ailments and could not move. In that perspective, I find it appropriate to note that, moving to Habiganj town from her village home which is under Habiganj District with the help of her family members for just joining a program for a certain period of time and moving to Dhaka for staying uncertain period cannot be taken as same deal for an impoverished elderly patient risking imminent danger to her life. So the alleged contention of the defence that since the victim attended the Program in Habiganj so he could have come to Dhaka for testifying herself does not bear out such contention from attending circumstances derived from irrefutable evidence of Pw-18.

1307. In such a panorama, I am of the view that, since the testimony of Pw-18 and Pw-20 is found to be credible and trustworthy that palpably supported the prosecution case, and then the very appearance of the Victim enabling the Tribunal to hear her ordeal from her own mouth cannot be viewed indispensable under this vey Act. Again, the alleged contention of the Defence about the probability of committing the crime by the accused within a short distance from Indian border clearly suffers from absurdity too.

1308. Mode of Liability accused incurred:

Regard being had to the above observations, it is proved, accused Kaiser actively participated in the commission of sexual ravishment to an indigenous, innocent Santal women by two Pakistani Soldiers and thereby substantially abetted, facilitated and actively contributed the actual commission of offence of ‘rape’ that constituting the offence of

‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1309. Verdict on Conviction: Having regard to the above discussions based on the evidence and materials on record and submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of ‘rape’ as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1310. Verdict on Sentence: In the world history of warfare, unabated ravishment on women is being spread unabated which is used as a weapon to wane the morale of soldiers who fight for liberating their own country from their enemy forces. The other side of such ravishment of the occupation forces to gain vigour for fighting in the battle field upon satisfying their carnal desire treating the women as commodity and to sow seeds for producing an illegitimate generation in the war-torn country which in the long run turn out a curse to that state.

1311. Perhaps, accused Kaiser knew this very hideous theory for being applied on the women of his own country by the invading forces. It has been found accused Kaiser very nakedly sided with the notorious Pakistani forces and did not even care to hand over his own native women to the soldiers of the enemy country for their enjoyment. But this Hiramoni Santal is lucky enough that she could save her life by fleeing to India day after she had been outraged as many women had to be laid down their lives by the Pakistani soldiers or their local collaborators in cruelest manner when they became incapable of being ravished upon deliberate gang rape for days together.

1312. It can resolutely be said that, if our local collaborator or its leader like accused Kaiser had not handed over our innocent women to the invading Pakistani soldiers such a large number of women in our country would not have been raped and murdered. No doubt, accused Kaiser has committed inexorable crime in savagely tormented an indigenious and impoverished woman by two Pakistani soldiers making her life cripple

and destitute only for safeguarding his petty personal interest and show blind loyalty to a brutal and barbaric forces of our enemy country. Accused Kaiser has perpetrated the ruthless act and cruelty on an innocent village woman having no fault of her. Justice is said to have been dispensed appropriately should accused Kaiser is awarded with highest punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of ‘rape’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

1313. Adjudication of Charge no.9

(Killing of 8 Civilians of Village Lohaid)

Charge Framed : Accused Syed Md. Kaiser has been indicted for launching attack on May 15, 1971 in between 10:00 – 10:30am and 1:00 – 1:30 pm leading “Kaiser Bahini” accompanied by Rajakar forces and 30 member Pakistani Armed Forces in the village ‘Lohaid’ under Madhabpur Police station , District- Habiganj and apprehended pro-liberation Civilians namely **1. Abdul Aziz, 2. Abdul Gafur, 3. Jamiruddin, 4. Azimuddin, 5. Etimunnessa 6. Nur Ali, 7. Alanchan Bibi and 8. Abdul Ali** from their houses and following the instruction of Kaiser, accompanying army caused those apprehended persons death by charging bayonet and gun shot and by that act, Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of killing 8 un-armed Civilians constituting the offence of **murder** as ‘ Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1314. Evidence of Prosecution Witnesses :

Prosecution has relied upon the oral testimony of three witnesses whom it claimed to be sighted witnesses though no documents have been produced. Of the three witnesses one **Md. Ful Miah** has deposed as **Pw-17** who was serving as labour in a textile Mill at Tongi in 1970 but returned to his village home at *Madhabpur* before 1970 election and

joined the election campaign in support of Awami league candidates who had contested for provincial assembly as well as National Assembly and subsequently joined in the war of liberation under sector commander, Major Shafiullah of Sector no.3.

1315. Amongst others, he stated as regards to the event that, duty was assigned upon him to sweep mine at the eastern part of *Rajar mar Dighi* (pond) and in order to accomplish such duty he along with other co-freedom fighters went there to search the area on May, 15, 1971. Around 8:00 am and some time later, he saw two vehicles carrying 15/16 Pakistani Soldiers and 10/12 beige dressed civilians including 2(two) casual dressed men getting down at the point of *Vanga*(demolished) culvert.

1316. He goes on to state that, out of two casual dressed men, one clad with *Lungi* whom he recognized as *Lengra*(handicapped) Hamid and other man wearing white attire along with their accomplices then moved towards the house of *Lengra* Hamid and as soon as they entered the house of *Lengra* Hamid he could also recognize white dressed man as accused Kaiser and he kept spotting them staying himself and his co-freedom fighters at a top place of *Rajar mar Dighi*

1317. He stated further, moment after that, he had heard the gunshot from the house of his uncle, Abdul Aziz next to that of *Lengra* Hamid and so also in the middle part of the village, *Lohaid* and such gunshot continued for an hour- pw added. Around 1:00 – 1:30 pm he could further see Kaiser and his accomplices coming back to their Vehicles parked before and driven towards north getting on it when *Lengra* Hamid was not with them.

1318. At this, he also saw Lokman Hossain, Ali Ahamed and Omar Ali all of Village *Lohaid* running towards *Simna* border and finding him on the way, they then disclosed that, Pakistani Army whom Kaiser accompanied at their Village had killed his (Pw's) uncle, Abdul Aziz, Cousin Abdul Gafur, uncle Zamiruddin, cousin Azimuddin and his wife Etimunnessa, Nur Ali Chowdhury, Alam Chand Bibi and Abdul Ali as pointed by *Lengra* Hamid –Pw continued further.

1319. On hearing such monstrous killing, he along with his co- freedom fighters then thronged inside the Village, *Lohaid* and found six dead bodies (5 men and 1 woman) lying scattered and after putting all the dead bodies together and on informing the relatives of those deceased they then buried the dead bodies near *Hazrat Shah Noor Mazar* by digging two graves- Pw added further. He knew accused Kaiser before the election held in 1970 – Pw concluded.

1320. In reply to cross examination, this Pw stated that the house of *Lengra Hamid* was 1Kilometer north off *Vanga Culvert* and the very *Vanga Culvert* was around 1 Kilometer west-north off *Rajar Mar Dighi* which (Culvert) was located beside *Vandaura* village. In another question, this Pw replied that, there remained no houses in between *Rajar Mar Dighi* , where they(Pw and his co-freedom fighters) were hiding and *Vanga Culvert* as well as *Simna* camp was straight 1 Kilometer north from *Rajar Mar Dighi*.

1321. This Pw denied a suggestion that, there remained bushes around *Rajar Mar Dighi* in 1971. This Pw has also denied another suggestion put to him to the effect that, there remained only one road to enter *Lohaid* Village from *Madhabpur* in 1971. Apart from that, no question or suggestion has been put to this Pw relating to the event.

1322. Then comes one **Omar Ali**, testified before the Tribunal as **Pw-21** who stated to be 17-18 years old in 1971 and hails from village, *Lohaid* where the alleged murderous atrocities had been perpetrated on the date of event. In his chief he stated that, tentatively on May 14 or 15 around 10:00 to 10:30am he was staying at the house of his uncle, *Hazi Nur Ali* when Kaiser accompanied by Pakistani Army entered the house. As soon as he saw them he hid himself under a paddy stack from where he could see that Accused Kaiser and 14/15 Pakistani Army standing at the courtyard and as his uncle *Hazi Nur* came forward to greet Kaiser he made a hint and instantly a Pakistani Soldier shot him dead- Pw continued.

1323. He further stated that, he came out from his hide out at around 1:00pm when Kaiser and Pakistani Soldiers left the area and found the dead body of his uncle, *Hazi Nur Ali* in the courtyard. Apprehending

Kaiser and Pakistani Soldiers might return again, then Abdul Khaleque, Lokman Hossain and he started moving towards *Shimna* border and on their way they met freedom fighter, Ful Miah together with 5/6 armed freedom fighters at *Rajar Mar Dighi* – Pw stated further.

1324. His subsequent descriptions are similar to what Pw-17, Md. Ful Mia has narrated in his chief. So far as relates to recognition of accused Kaiser, this Pw has stated that, he knew Kaiser before as he had contested the election in 1970 with a symbol ‘elephant’ and used to come to his area for holding meeting . Pw goes on to state that, in one occasion he (Kaiser) wanted to hold a meeting at their house but as they were the supporter of Awami league his uncle Hazi Nur Ali did not let him permission and out of avenge, accused Kaiser made his uncle killed by the Pakistani army-pw concluded.

1325. This Pw has been cross examined by the Defence. While replying in cross, this Pw stated that, there were four corrugated tin shed house of his uncle (*Bara Bap*) in 1971 and of those, he lived at the west house where there remained a store room of paddy stretching half portion of that house though hay stack was just north to the living house of his uncle.

1326. He replied further that, May 14/15 of 1971 is a month of English Calendar year which corresponded to Bengali month, Baishakh but could not say the corresponding Bengali year. Besides, drawing attention to the incriminating portion of the chief Defence suggested those to have been disclosed for the first time before the Tribunal and is not true -when Pw flatly denied both the suggestions.

1327. Then another witness named **Md. Lokman Hossain**, testified before the Tribunal as **Pw-22** who stated to be 17 years old in 1971 and hails from village, *Lohaid* where the alleged killing had been perpetrated on the date of event. In his chief he stated that, around 09:00 to 09:30 in the morning on May, 15, 1971 he went out his house in search of his maternal uncle, Abdul Zabber when he saw people were running towards east, the Indian boarder when he heard gunshot from north-western side.

1328. He further stated that, he then hid himself under a hay stack at the south western corner of his house from where he saw accused Kaiser

accompanied by some Pakistani soldiers and Bangalees standing in front of the house of Gafur when some bangalees and Pakistani Soldiers had been beating Gafur indiscriminately and at one stage Pakistani soldiers shot him dead in presence of accused Kaiser. He goes on to state that, at this he heard wailing coming out from different parts of the village and after calming down the situation he came out of his hideout and went in front of Gafur's house and found his dead body there while the dead body of his (Gafur) father, Abdul Aziz lying in the courtyard .

1329. He then set out towards Indian boarder and on his way he saw the dead body of Zamiruddin, Etimunnessa, Nur Ali Chowdhury at different point of his village-Pw continued. This Pw further stated to have meet Omar Ali(Pw-21), Abdul Khaleque, and Ali Ahamed at *Rajar Mar Dighi* Point who were also heading for Indian boarder. This Pw also gave similar descriptions to what Pw-17, Md. Ful Mia and Pw-21 Omar Ali have narrated in their respective chief about the subsequent event of going back to Village *Lohaid* altogether, converged all the dead bodies at one place and buried those in two separate graves at *Hazrat Shah Noor Mazar*.

1330. In regard to the recognition of accused Kaiser this Pw in his chief further stated that, in 1970 Kaiser had contested election in their area with the Symbol 'Elephant' though his rival candidate was Mowlana Asad Ali who had contested with the Symbol 'boat' and sometime in such election campaign Kaiser wanted to hold a meeting at Nur Ali's house but he(Nur Ali) and the elders of the locality did not let him permit to hold such meeting upon apprising Kaiser that they already extended their support in favour of Mowlana Asad Ali concluding that he had seen Kaiser to the house of Nur Ali intended for holding meeting there.

1331. In reply to cross examination this Pw stated that he could not say how many houses therein in-between his house and the bank of *Rajar Mar Dighi* though the distance was hardly half kilometer from his house. Pw further stated that, there remained *Mirza Bari* and *Miah Chan Bari* in extreme south and extreme north corner of his house respectively. Aside from that, drawing attention to the incriminating portion of the chief of this Pw, Defence on pointing some portion thereof suggested that, those have been disclosed for the first time before the Tribunal as well as

remaining portion has not been true when Pw flatly denied both the suggestions.

1332. Submission advanced by the Prosecution at Summing up:

Given the above testimonies of the witnesses, learned Prosecutor steadfastly submits that all the three witnesses being cited witnesses corroborated each other supporting the charge. Espousing his such contention, he then argues that, both Pw-21 and Pw-22 hails from same village where the gruesome killing of their near ones had been perpetrated, whereas pw-17 being a freedom fighter and as a part of his duty so assigned as well as an inhabitant of nearer village got the occasion to witness the barbaric killing.

1333. It's true, Pw-17, Ful Mia did not witness the killing scene perpetrated in the village, *Lohaid* but he together with his co- freedom fighters had followed the movement as well as very entrance of accused Kaiser and his cohorts comprising both Pakistani soldiers as well as Kaiser Bahini to the village from his hide out, *Rajar Mar Dighi* and heard the heavy gunshots moment they entered the village and also saw very return of Kasiser and his accomplices around 1:00-1:30pm- which is suffice to hold that none but accused Kaiser and his notorious cohorts had accomplished the brutal killing –learned Prosecutor further averred.

1334. Then again, from the corroborative testimony of all the three witnesses it has been found that they had gathered as many as six dead bodies soon after the horrible killing in the village perpetrated and then they buried the corpses in two different graves- having no question being put by the Defence on this vital material particulars leaving the assertion on the event unquestionable- learned Prosecutor added further.

1335. Even, Pw-21 and Pw-22 had witnessed how their close relatives, Hazi Nur Ali and Abdul Gafur killed brutally by the Pakistani Army at the instance of accused Kaiser when their testimony in that respect can in no way be discredited by the Defence rather upon taking the location of living room of the deceased as well as the distance of killing spot from that of their hide outs of both the Pw's from where they were witnessing the killing, Defence has rather affirmed the event as well as ensure it

possible for the Pw's to observe such killing with such distance-learned Prosecution added.

1336. In the same vein Pw-17 has also found his Uncle (*Fupa*) Abdul Aziz, three of his close relatives and four co-villagers dead in such dreadful operation spearheaded by accused Kaiser and Defence had failed to make out any case through cross examination that his close relatives had not lived in that village, *Lohaid* and had it been the case, there is no earthly reason not to take his testimony otherwise but true-learned Prosecutor continued.

1337. It is *Langra* Hamid who had brought in Kaiser and Pakistani Army to the village, *Lohaid* and shown the targeted people to accused Kaiser for liquidation and it is Pw-17 who only could recognize him (*Langra* Hamid) from *Razar Mar Dighi* which was possible as Pw-17 knew him as he saw him earlier at *Gate Ghar*(railway crossing) moving there suspiciously when Defence could not shake his such recognition nor prove it improbable even in spotting accused Kaiser or Pakistani Army entering the village staying at *Rajar Mar Dighi*- learned Prosecutor argued further.

1338. Learned Prosecutor also submits that, in the chief Pw-17 asserted to have seen accused Kaiser and Pakistani Soldiers entering the house of *Lengra* Hamid first from his hide out at *Rajar Mar Dighi* and since no question or suggestion has been put to this Pw-17 about the distance in between *Rajar Mar Dighi* and the house of *Lengra* Hamid, then certainly it can legally be perceived that, it was possible for Pw-17 to recognize both *Lengra* Hamid and accused Kaiser from *Rajar Mar Dighi*.

1339. Moreover, all the three witnesses in their respective testimony asserted to have known Kaiser since election held back in 1970 in the then East Pakistan. Of those three witnesses Pw-17 stated to have campaign in favour of Awami League candidate, Mowlana Asad Ali, contested in his area for a member of Provincial assembly while his rival candidate was accused Kaiser whose Symbol was 'Elephant' and in that election Mowlana Asad Ali, won by a landslide victory.

1340. By that, perhaps there could be any reason to disbelieve his previous acquaintance with accused Kaiser as the facts he asserted about the candidature of Kaiser are historically truth and totally based on materials on record. Again, whatever Pw-21 and Pw-22 have stated with regard to recognizing accused Kaiser is identical even circumstances prevailed at that time in their area proved their testimony true but still in all the three aspects of recognizing Kaiser, Defence has utterly failed to prove otherwise- learned Prosecutor concluded.

1341. Defence Contention at Summing up:

To counteract the above assertion of the Prosecution learned Defence counsel at the very outset has assailed the alleged recognition of Pw-17 to accused Kaiser. In that regard learned Counsel with reference to his(Pw-17) testimony argued that, had he knew Kaiser since the Election held in 1970 then he would not have been recognized him anew on seeing Kaiser with white dress and thus what this Pw stated in his chief about Kaiser is totally concocted story .

1342. Learned Defence Counsel goes on to submits that, though Pw-21 claimed to have seen the killing of his uncle, Hazi Nur Ali keeping himself beneath paddy stack but it was not humanly possible to remain there. Finally learned Defence counsel took a view that, since they have denied the allegation leveled against the accused by giving proper suggestion to the Pw's it would be considered as discarding the accusation made against the accused.

1343. Analysis of Evidences and Deliberation :

In a nutshell, as per charge, Kaiser has been incriminated with the crime for instructing the Pakistani soldiers to kill as many as 08 civilians at the village named '*Lohaid*' at the given time and date so mentioned in the charge. Now question remains to be adjudged whether Kaiser was involved in those killing in the light of oral testimony of three witnesses discussed above. If the testimony of those three witnesses proves the presence of accused Kaiser while those killing had been perpetrated, then he would certainly be held liable for the crime.

1344. It is evident, these three witnesses are the relatives of the victims (deceased) and out of them, Pw-21 and Pw-22 claimed to have seen the dreadful event of their dear ones keeping themselves in close range of the crime scene. Even though Pw-17 was not in the crime scene as of Pw-21 and Pw-22 but he claimed to have seen Kaiser, *Lengra Hamid* and Pakistani Army rolling in to the village '*Lohaid*' where his close relatives had lived whom he found dead moment after Kaiser and his said notorious accomplices carried out carnage there.

1345. While Pw-21 and Pw-22 testified before this Tribunal both very assertively stated to have found Kaiser in their respective abode while Pakistani Army killed the Victims, even Kaiser had hinted Pakistani soldiers before killing to Hazi Nur Ali as revealed from the testimony of Pw-21. Prosecution has rightly pointed out that no question (other than giving suggestion) has been put to any of those two sighted witnesses on this very vital point of killing those two civilians and certainly non-quizzing to those eye witnesses on core point made their respective testimony true and credible one.

1346. Even, if any question would put by the Defence on these material points then the veracity of their testimony would not have been shaken as Kaiser is found to have gone to the village on the date of event and he had long drawn animosity with the victims and others of that village who stood against him in the election held in 1970 and he had just taken revenge out of that insulting as well as defeat in the election by taking heavy toll on 8 unarmed civilians.

1347. Further, I find it possible from the testimony of Pw-17 that he had rightly recognized accused Kaiser from his hideout at *Rajar Mar Dighi* as out of two casual dressed person since one being handicapped, (*Lengra Hamid*) then he (Pw-17) was not supposed to face any difficulty to figure out the other one when it sounds immaterial whether Kaiser clad with white dress or not. Though Defence clearly abstained from putting any question about the probability for Pw-17 to spot accused Kaiser from his hideout. So by all account, it has abundantly proved that, at the instruction of accused Kaiser as many as 8 Civilians had been killed at the village, *Lohaid*.

1348. Generally, a question may erupt, all the three witnesses have found 6 dead bodies and as per their corroborative testimony they had buried those 6 dead bodies in two graves when charge itself speaks of killing 8 Civilians, so what had occurred to the fate of remaining two civilians. The obvious answer is, on the date of event the remaining two dead bodies had not been found either and both Pw-21 and Pw-22 left for India on that very day for saving their life and came to learn subsequently from India that, dead body of Alam Chand Bibi and his son Abdul Ali were found on the next day of event in the village and was buried at the corner of pond of Alam Chand Bibi and all these assertion has been come out from the testimony of Pw-22- which also remain uncontroverted.

1349. Finally, I take the point of recognition of Kaiser by the Pw's. Evidence led both by Pw-21 and Pw-22 denotes, they saw Kaiser when he came to their locality for seeking vote in his favour in the election held back in 1970 who contested the election with a Symbol "Elephant". Their second case is that, Kaiser had sought permission to Hazi Nur Ali (Uncle of Pw-21) for holding a meeting at his house which he was denied.

1350. From the personal account of both the witness so depicted from the respective evidences I find both were 17-18 years old at the time of voting. They certainly could recount at that age what happened in the election including that of refusal Kaiser in holding meeting, as they claimed to be the supporter of Awami League and voted for his (Kaiser) rival, Mowlana Asad Ali.

1351. And very important episode is that, the very brutal killing of their villagers including their near and dear ones had been perpetrated in the subsequent year of such voting having no reason to erase such notable event and its mastermind, Kaiser from their memory. So, there could be no reason for these Pw's not to recognize accused Kaiser joust one year on developing animosity among them and both the Pw's very perfectly has linked the accused with the killing of their relatives for not concurring him permission to hold meeting in their locality as well as for belonging to opposite political ideology.

1352. The testimony of Pw-17 figured, he belonged to same constituency of Kaiser and as a labour leader at that juncture he had actively participated in the campaign for the candidacy of Mowlana Asad Ali, an Awami league nominee against whom accused Kaiser contested as an independent candidate in the Provincial election held in 1970. Those very facts are admitted one and it is also admitted, this Pw-17 is a valiant freedom fighter and took a leading role in the warfare in 1971 in his own area at the time of event.

1353. Furthermore, The man who had been instrumental in snatching victory against his rival (Kaiser) in the election held in 1970 and fought tooth and nail against his imminent killer(Kaiser) and his notorious 'Bahini' in his own area braving his life would have to recognize him anew - it is quite unnatural and unbelievable and thus, what he stated about Kaiser is enough to recognize him which is natural and based on reality, I think. In view of the above, there is no dearth of any reason to make any doubt about the recognition of accused Kaiser by those Witnesses.

1354. Mode of Liability accused incurred

Over and above, in view of the corroborative evidence discussed above and on weighing their credibility and cumulative consideration thereof, it is my considered view that, Prosecution has succeeded in proving accused Kaiser actively participated in the killing of 08 unarmed Civilians by Pakistani Soldiers and thereby substantially abetted, facilitated and actively contributed the actual commission of offence of 'murder' that constituting the offence of 'Crimes against humanity' as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1355. Verdict on Conviction: In view of what has been discussed above, basing on evidence and submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of 'murder' as "Crimes against humanity" and he is liable to be convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1356. Verdict on Sentence: Evidence led me to believe that, all the 8(eight) victims had just fallen prey to the revengeful lust of accused Kaiser and he himself orchestrated the gruesome killing to be carried out by Pakistani Army. Facts reveals, accused Kaiser had been driven out by the villagers of village, *Lohaid* in the election held in 1970 and faced a debacle and this very shameful defeat made him ferocious and since then he was looking for a suitable opportunity to take avenged against those people who humiliated him in the election and prevented him in holding meeting there and eventually he got the occasion during war of liberation and in a cowardice manner carried out his long cherished lust by liquidating as many as 8 innocent civilians who is in no way be comparable with his stature.

1357. Even, these 8 civilians had no previous enmity with accused Kaiser nor they made any harm to him (accused) but in spite of that, they had been killed by none but their own native who lived just next to their village only because these 8 civilians had belonged to Awami League and for this, Kaiser resorted to such dastardly killing which portrays his perfidious role in eliminating pro-liberation Civilians. The fault of those 8 unarmed and innocent civilians were that, they had just belonged to a political Party that led our Liberation war and achieved independence.

1358. Indubitably, Accused Kaiser committed very despicable crime by savagely killing 8 unarmed civilians by Pakistani soldiers for nothing but showing blind loyalty to that brutal and barbaric forces of our enemy country which was proved premeditated. The person under whose instance such sorts of barbaric act and cruelty perpetrated must deserve highest punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for Life for the crimes of ‘murder’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

1359. Adjudication of Charge no.10

(Killing of Shah Firoz Ali and Torture to Shah Hossain Ali at Army Camp at R&H Duck bungalow, Shaestaganj)

Charge Framed: Precisely accused Syed Md. Kaiser has been arraigned for instructing “Kaiser Bahini” and Razakar forces to capture one Shah

Firoz Ali,(Victim)a local organizer of Liberation War from his residence, *Mokambari* under Police station and District-Habiganj who forcibly picked up the Victim on June 13, 1971 around 2:00 – 3:00 pm and was brought to Habiganj Police station first and on confining there for one night he was then brought to *Shaestaganj Duc bungalow* from where Syed Md. Kaiser handed him (victim) over to Pakistani Army. Thereafter, on getting information, son of the victim Shah Hossain Ali returned home on July, 16, 1971 and on that very night of his return he was also interned by “Kaiser Bahini” and Razakars and brought to Habiganj Police station and on the following day he was too handed over to Pakistani Army at Roads and High ways *Duc bungalow* at *Shaestaganj* wherein he was kept detained for 20-25 days during which period he went under severe torture leading to amputation of his left leg and though released at the end of August, 1971 but his father Shah Firoz Ali could not be traced ever and by that, Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of killing of 01 unarmed Civilian constituting the offence of **murder** as ‘Crimes against humanity’ or in the alternative abetting, facilitating and contributing the actual commission of offence of **torture** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1360. Evidence of Prosecution Witnesses :

Prosecution has adduced two sons of Victim, Shah Firoz Ali claiming them as eye witnesses in addition producing a book named “*Sylher-E-Ganahatta*” as documentary evidence to prove the charge. Out of those two witnesses, Shah Hossain Ali himself claimed to be a victim of torture in this charge who also deposed as Pw-8.

1361. Shah Hasan Ali who claimed to be a student of class nine during liberation war has testified before this Tribunal as **Pw-7** and deposed that, he had formed “*Chhatro sangram Parishad*” comprising the students and youth of his area on being inspired by the historical Speech of Bangabandhu on March 7, 1971 and started taking training to fight against Pakistani invading forces. While describing the event he stated

that, on June 13, 1971 around 2:30–3:00pm his father, Shah Firoz Ali was conversing with his mother in their house when Soleman Razakar, Abul Thikeder and others came in and asked his father to accompany them to the house of Berek Mukter saying Kaiser was waiting for him.

1362. As his father showed reluctance to go, they dragged him and pulled on to a *Rikshaw* and moved away when he and his uncles followed them but they brought his father to Habiganj Sadar Police station. There, he could see Kaiser, Berek Mukter, Soleman Razakar, Abul Thiteder and others sitting in the veranda of the Police station. Then his three uncles Shah Nur Ali, Shah Abdul Hye and Babar Ali approached Kaiser and craved him to release his father but Kaiser got furious and asked them to hand over their two freedom fighters nephew as well as their arms to him as a precondition to release his father or else he (father of Pw) would be handed over to Pakistani army.

1363. This Pw further stated that, on the following morning he along with his uncles again went to the Police station and saw Kaiser, Berek Mukter, Abul Thikeder and two other beige dressed men bringing his father towards *Shaestaganj* by riding two jeeps and while informed, his uncle, Shah Nur Ali then went to *Shaestaganj* looking for his father but returned unsuccessful in the afternoon and informed that, he saw his father fastening with a pillar in the veranda of the *Duc bungalow* with folded eyes and Kaiser, Berek Mukter and many others sitting around there.

1364. His uncle further informed him to have seen his father and many other captives of that *Duc Bungalow* being taken towards *Sreemangal* when local shopkeepers conversed themselves that, the persons who were once taken to that direction did never return and so far, his father has not return-Pw continued.

1365. Pw goes on to state that, suddenly on July 16, 1971 his elder brother freedom fighter, Shah Hosain Ali came to the house and heard details of capturing his father from him and his uncles when his mother was serving him with dinner. At that moment, the member of Kaiser Bahini led by Soleman Razakar surrounded their house and started calling him but as

his brother did not respond they caught hold him by breaking open the door and forcibly brought him to Habiganj Police station.

1366. He continued, on the following morning, his brother was first brought to *Shaestaganj Duc bungalow* and then to *Shahajibazar* torture cell of Pakistani Army where he was subject to severe torture for 20-25 days by the Pakistani army resultantly his left leg had to be amputated adding further that, he had heard such ordeal from his brother after his release.

1367. Pw further stated that, on December 17, 1971 just day after liberation, he went to *Sreemangal WAPDA* colony in search of his father's dead body where he saw dead bodies of innumerable men and women but nowhere he could find his father's dead body as by then dead body had turned in to skeleton. He continued further, he could though find a sword there smear with blood that had used for the killing which he brought in home as commemoration concluding that he has been so tormented his tears has become dried up-Pw sobbed.

1368. On going through the entire cross examination of this Pw, I do not find Defence has put any question on the material particulars of the event rather, drawing attention to the entire incriminating portion of the chief of this Pw, Defence suggested that, those descriptions so revealed in the chief have not been true - which Pw flatly denied.

1369. Prosecution has then adduced **Shah Hossain Ali** deposed as **Pw-8**. In the onset of his deposition he amongst others, stated that he is now a disabled freedom fighter though had been a member of *Sharbodolio Shangram Parishad* that was formed in his area after Bangabandhu made his historical speech on March 7, 1971 and during liberation war he took part in the war of Liberation and till first week of May, 1971 he struggled many front fighting against Pakistani invading forces and local collaborators like Kaiser Bahini, named after accused Kaiser and Razakar forces in different parts of Habiganj under the command of the then local prominent Awami league leaders namely, Manik Chowdhury, MNA and Mostofa Shaheed, MPA .

1370. But failing to withstand against the oppression, the combatant Pakistani forces launched, he left for India and started taking training there at '*Baghai camp*'. On the event, this Pw stated that, tentatively on July 4 or 5, 1971 he came *Khoai* town where he met Anser Commander Yunus Chowdhury of his area who then informed him that, at the direction of accused Kaiser and Barek Mukter their men had handed his father over to Pakistani Army on June 13, 1971 and having been so informed he started for his village on getting permission from his commander in India on July 10 or 11, 1971 and reached home in the evening on July 16, 1971. This pw then narrated the entire anecdotes to what his younger brother (Pw-7) stated in his chief with exception to the pathetic ordeal he himself had endured for 20-25 days by the Pakistani Army on keeping him confined after capturing him by the cohorts of Kaiser and Barek Mukter, as Pw-7 described in the chief to what he had heard from him.

1371. As of Pw-7, this time around, Defence has not put any question on the material particulars of the event this Pw stated in his chief while cross examination this Pw rather, suggestion has been made on drawing attention to the incriminating portion of the chief claiming those descriptions so divulged in the chief have disclosed for the first time before the tribunal and those have not been true - though Pw denied both the suggestions. As pointed out, Prosecution has produced a book titled "*Sylhet-E-Ganahatta*" (*Exhibit-Ga*) where at page 263 the name of Shah Firoz Ali (father of both Pw-7 and Pw-8) has figured as martyr being slain on June 13, 1971.

1373. Submission advanced by the Prosecution at Summing up :

Upon taking us to the relevant portion of the testimony of Pw-7, learned Prosecutor at the very outset submits that, this very witness as a son of the deceased, Shah Firoz Ali and younger brother of the victim, Shah Hossain Ali (Pw-8) had witnessed how they were apprehended by the cohorts of accused Kaiser from his house and taken to police station at Habiganj and then *Shaestaganj Duc bunglaw* where he found accused Kaiser sitting to whom his uncles craved for the release of his father and how disdainfully he (uncles of Pw-7) had been driven away and later handed both over to

Pakistani Army by accused Kaiser and his such testimony in capturing the victims as well as seeing the accused can in no way be disbelieved in the sense of reality even though Defence has hopelessly failed to shake the assertion.

1373. The testimony of Pw-8 so far as relates to his father's (victim Shah Firoz Ali) capture, confinement, torture, bringing him towards *Sreemangal* and Kaiser's involvement with such event though would not outweigh the testimony of Pw-7 as he stood a sighted witness to those event but still his(pw-8) all out corroboration has made the charge and kaiser's involvement proved-learned Prosecutor argued.

1374. In the same token, it is Pw-8 whose testimony as regards to his own ordeal be termed as most acceptable over his younger brother as his younger brother has described to what he heard from his elder brother,Pw-8 though corroborated in to to and there should not be any confusion about the brutal torture Pw-8 went through perpetrated at the behest of accused Kaiser which resulted in amputating his left leg leaving him crippled and depended to the mercy of others for the rest of his life-Learned Counsel further added.

1375. Testimony depicts, these two witnesses have taken very proactive role in mobilizing youth in their area to stand against the notorious invading Pakistani forces including anti liberation elements on the aftermath of their crackdown against innocent Bangalee civilians and they themselves fought back those combatant forces and their local collaborators in many front fighting as valiant Freedom fighters and their such position in the warfare naturally do not necessitates to recognize accused Kaiser anew as he admittedly took stand in favour of the brutal forces even though Defence abstained from making any point on that score in cross examination-learned Prosecutor added further.

1376. So far as regards to the murder of Shah Firoz Ali, learned Prosecutor then averred that, it has been revealed from the testimony of Pw-7 how his father was inhumanly brought to Habiganj Police station, craving to Kaiser by his uncles to set him free, then handing his father over to Pakistani Army by Kaiser who brought him to *Shaestaganj Duc*

banalow where Kaiser was sitting and finally brought him towards *Sreemongol* from where he never returned all clearly indicates Shah Feroz Ali was Killed so designed by accused Kaiser only for the fault of joining his two sons in the war of liberation as freedom fighters and the document it produced has substantiated the murder when Defence failed to discard the corroborative evidences regarding the participation of the accused with such murder –learned Prosecutor concluded.

1377. Defence Contention at Summing up:

In controverting the above submission Mr. SM Shahjahan, learned Defence Counsel contends that in the charge two distinct incidents have been depicted making the accused involved with the commission of alleged crimes but since Kaiser had been living in Madhabpur he was not supposed to stay at Habiganj Police station when Shah Firoz Ali and Shah Hassan Ali were allegedly brought there.

1378. In his second thought, learned Counsel further added that, as per Prosecution’s version Pw-8, Shah Hasan Ali was the instrumental for his father, Shah Firoz Ali’s alleged capture and disappearance but since Pw-8 had been set free then the charge of murdering Shah Firoz Ali involving the accused with such crime does not stand.

1379. And finally, quoting from the Book titled “*Muktejuddher Etehasher Khoje*”(Prosecution Documents page.145-146) learned counsel further argued that, in those two pages a horrific description of killing of Shah Firoz Ali has been figured having no presence of accused therein which proves that Prosecution has leveled false accusation against Kaiser out of political vendetta.

1380. Analysis of Evidences and Deliberation:

Perused the Evidences of two full brothers testified as Pw-7 and Pw-8 discussed above at threadbare and considered the thought provoking submission and counter submission of the learned Counsels for the parties. Charge reveals two distinct crimes that encompass Crimes against humanity have been perpetrated upon two unarmed civilians. In the commission of killing of Shah Firoz Ali, father of both Pw-7 and Pw-8

there appears no ocular witness save and except his capture, detention and taking away to the direction of *Sreemangal* that had witnessed by Pw-7 and his uncle Shah Nur Ali. But so far as it relates to causing torture upon Pw-8, Shah Hossain Ali himself described the heart wrenching ordeal he suffered.

1381. It is evident from the testimony of Pw-7 that how his father was forcibly brought before accused Kaiser and relentless endeavour of his uncle to let him free on craving to accused, Kaiser. In two very crucial moments for the victim's family accused Kaiser was seen, one at Habiganj Police station as well as in the veranda of *Shaestaganj Duc Bangalow* when Shah Firoz Ali was handed over to Pakistani Army. Now question will certainly erupt why the victim had to be handed over to Pakistani army and what was their mission in the war. It is obviously to eliminate and stop the voice once for all to those patriotic and heroic Bangalee Civilians who took stand against the barbarous atrocities of Pakistani Army.

1382. There is no denying of the facts that, as depicted from the irrefutable testimony of Pw-7, accused Kaiser threw a proposal of freeing the Victim in exchange of returning his two freedom fighters' sons from the warfare and of their arms but Victim Shah Firoz Ali had shown his immense heroism by not bowing down to such unsavory proposal rather found it more dignity to sacrifice his own life for the cause of achieving an independent motherland.

1383. This Shah Firoz Ali had also mobilized pro-liberation civilians in Habiganj area to fight back the Pakistani invading forces soon after the historical speech of Bangabandhu Sheikh Mujibur Rahman and became one of the organizers of Struggle of Independence and members of *Sarbadaliyo Sangram Parishad* which had substantially propelled accused Kaiser to liquidate him from this world to be carried out by the Pakistani army.

1384. Perhaps it has been very ridiculous argument so advanced by the Defence saying, since Kaiser was not present at the time of killing of the Victim so he would not be held responsible for the murder. In effect, by

this, Defence has alternatively admitted his(Kaiser) role of ordering capture of the victim , detention at Habiganj Police station and *Shaestaganj Duc Bangalow* and finally handing over to Pakistani Army.

1385. Defence has also made another ludicrous submission saying that, since Pw-8 had eventually been come out set free who was being considered instrumental for the capture of his father, victim Shah Firoz Ali, so prosecution's case of his(Shah Firoz Ali) murder then does not lie. By these, it has entrenched both the events of torturing Pw-8 as well as killing of his father, Shah Firoz Ali and none but accused Kaiser has played a pivotal role in perpetrating those crimes.

1386. While adjudicating earlier cases by the Tribunal filed for crimes against humanity we many a times has observed that to perpetrate crimes and to hold any person responsible for committing crime so characterized in section 3(2) of the Act of 1973 it is not indispensable for the perpetrator to always remain present at the crime scene, rather the offender would invariably be held responsible if circumstances came out from the evidences strongly suggest his involvement with the crime.

1387. As observed hereinbefore, we found accused Kaiser present in every step in handing over the Victim, Shah Firoz Ali to Pakistani Army and what was their mission I have also viewed. So by all account, it can legally be perceived that accused, Kaiser had orchestrated the killing of Shah Firoz Ali to be carried out by Pakistani Army as he had last seen at the *Shaestaganj Duc Bangalow* when Pakistani Army brought him to *Sreemangal* direction.

1388. Most importantly, accused Kaiser had got absolute authority to even prevent the killing of Shah Firoz Ali as he had made proposal to set him free in exchange for handing over his two freedom fighter's son. As observed earlier, Shah Hasan Ali as Pw-8 gave his own ordeal of brutality he went through during his captivity for 25 days and he found Kaiser in his room, exclaiming Pakistani Army for inflicting harsher torture on him who instantly carried out that order resulted in amputating his left leg out of such torture and to say the least, squarely proved the involvement of accused Kaiser with the crime perpetrated upon this Pw-8

and since his brother as Pw-7 has corroborated him to whatever he heard from his brother has further consolidated the case of the prosecution.

1389. And last but not the least, these two freedom fighter brothers wailed while testifying before this Tribunal repenting that only for their active participation in the War of liberation they lost their father and their such demeanor in conjunction with corroborative evidences also led me believe that, prosecution has amply proved the charge by most competent and reliable witnesses making the charge proved.

1390. Mode of liability accused Kaiser incurred :

By and large, the evidence led and on critical analysis of the arguments made by the learned Counsels of the parties it is my considerate view that, Prosecution has succeeded in proving accused Kaiser actively participated in the commission of killing of 01 unarmed Civilian named, Shah Firoz Ali as well as causing inhuman torture to the son of the above deceased, Shah Hasan Ali both by Pakistani Soldiers by picking them up from their house through his notorious accomplices and thereby substantially abetted, facilitated and actively contributed the actual commission of ‘murder’ and ‘torture’ respectively that constituting the offence of ‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1391. Verdict on Conviction: In view of what has been discussed above, basing on evidence and submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of ‘murder’ and ‘torture’ respectively as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1392. Verdict on Sentence: In the foregoing paragraph it has deliberately been held that accused Kaiser had very nakedly sided with Pakistani Army and started wrecking on the peace loving pro-liberation Bangalees unarmed Civilians to thwart the dream of achieving an independent state free from long deprivation of the Bangalees imposed by the Military junta of the then West Pakistan. Shah Firoz Ali as an Organizer of the war of

liberation and a member of “*Sharbadaliya Shangram Parishad*” proved to have taken a very fierce role against Pakistani invading forces, Razakars and local militia outfits like ‘Kaiser Bahini’ named after accused Kaiser by mobilizing youths to fight back the invading forces as freedom fighter which inevitably made him target for liquidation by Kaiser and Pakistani soldiers.

1393. Further, two sons of the deceased Shah Firoz Ali took part in the war of Liberation as freedom fighters and all such alarming indicators for accused Kaiser made him nervous for his existence keeping it in mind the perfidious role, he was playing then against the pro-liberation forces. Further, circumstances clearly speaks, It become obvious for Kaiser to annihilate all the three of that family- the mission and vision the anti liberation forces had adopted at that juncture and the return of Shah Hasan Ali alive from the clutches of Pakistani army was just a miracle not the mercy of accused Kaiser but the life of this hapless disabled freedom fighter he has now passing through is simply excruciating.

1394. To conclude, Kaiser has totally ruined a family by taking a life of an organizer of liberation war and crippled a valiant freedom fighter physically by the notorious Pakistani Army. The dastardly act perpetrated upon two firebrand freedom loving people to whose sacrifice we brag to identify ourselves as the proud son of this soil can in no way be taken casually. It proved, accused Kaiser had taken stand against the very birth of this nation now we live in and in that direction he eliminate Shah Firoz Ali and also wanted to eliminate Pw-8 which has been proved premeditated. The person under whose instance such sorts of barbaric act and cruelty perpetrated must deserve highest punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of ‘murder’ as well as ‘torture’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

1395. Adjudication of Charge no.11

(Murder, abduction, torture ad other inhumane acts at village Haripur, Gutma and Purbavag under police station- Nasirnagar, District- BrahmanBaria)

Charge Framed: Accused Syed Md. Kaiser has been implicated for launching attack by leading a group of 40-50 armed members of ‘Kaiser Bahini’ to the house of one Golam Nur of village-*Haripur* under Police station-Nasirnagar, District-Brahammanbaria, on June 23, 1971 around 10:30-11:00 am and looted the household and set the house on fire and abducted Golam Rouf Master and brought him at his(Syed Kaiser’s) house of *Noapara* where he was kept detained for one week where he underwent torture and finally set free in exchange for Tk. 8,000/= though Golam Rasul Master died due to severe injuries he sustained from torture after two weeks. On the same day at about 02:00 – 02:30pm accused Syed Md. Kaiser by leading the same group launched an attack to the village *Gutma* around 2 miles off village *Haripur* and looted the household of one Gobinda Karmaker and also set his house on fire though abducted him and kept him detained at the house of *Noapara* where he managed to flee after 20-22 days. And at about 04:00- 04:30pm on the same day accused Syed Md. Kaiser by leading the same group launched another attack to the village *Purbavag* 2 miles off village *Gutma* and looted and destructed the house of Saedul Huq and set his house on fire and by that, Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of killing of 01 unarmed Civilian constituting the offence of **murder** as ‘Crimes against humanity’ or in the alternative for participating, abetting, facilitating and contributing the actual commission of offence of “Other inhumane acts” as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1396. Evidence of Prosecution Witnesses :

To support the charge, Prosecution has relied upon the oral testimony of as many as four witnesses of whom two claimed to be ocular and the other two hearsay witnesses. **Tajul Islam** who hails from village, *Haripur*, police station-Nasirnagar and claimed to be one of the members of ‘Kaiser Bahini’ deposed before this Tribunal as **Pw-3**. In his chief, amongst others narrated that, following the direction of accused Kaiser he along with nearly 100 members ‘Kaiser Bahini’ led by accused Kaiser marched

towards the house of Golam Nur, an Awami League leader at *Haripur* on June 23, 1971 and torched his house resulted in the house burnt in to ashes when Golam Rouf Master, the brother of Golam Nur, was trying to escape but Kaiser then directed to apprehend him when he(pw) caught hold of him and tied his hand behind the back.

1397. At this, the father, mother and sister-in-law of Golam Rouf Master came over and started craving Kaiser to set him free but Kaiser shoved all of them and brought him (Golam Nur) to the house of Manjur Ali of village *Guniaok* and there from to the house of Gibanda Kumer of village *Gutma* and on apprehending Gibanda Kumer, Kaiser then moved back to his house at *Noapara* when he(pw) accompanied Kaiser- pw continued. Thereafter, one Mostu Mia, the father- in- law of Golam Rouf, his maternal uncle and maternal grandfather met Kaiser and handed him over a letter and an envelope sent by his (Kaiser) maternal uncle, Monjur Ali of *Guniaok* and then Kaiser set Golam Rouf free-Pw went on to state.

1398. On drawing attention to the aforementioned incriminating part of the chief, Defence has just given suggestion claiming those to be not true in the form of cross examination- which this Pw denied.

1399. Next, one **Nisha Mon**, the wife of the victim, Golam Nur turned up as **Pw-15** stated to had a baby daughter of one and a half years old and was pregnant at the time of event. While testifying on event she stated that, in the month of Ashwer 8, 1971 she along with her husband, Golam Rouf Master were sitting in the veranda after having breakfast when Kaiser and the member of 'Kaiser Bahini' entered their house and ordered his man to apprehend her husband but as he tried to run away, the member of Kaiser Bahini caught hold of him. At this, Kaiser asked the whereabouts of his brother, Golam Nur, but as he declined to give the information, Kaiser then beat him black and blue-Pw continued.

1400. She further stated that, when he(accused) and his 'Kaiser Bahini' had entered her house accused Kaiser clad in white attire while the member of his Bahini dressed in beige coloured outfits with red scrap in their heads adding that she knew Kaiser before as the house of her father's maternal uncles' was also there at *Guniaok* where Kaiser often

came. She Continued to state that, when her father-in-law, mother-in-law and she approach to rescue Golam Rouf Master, Kaiser also severely beat her father-in-law and pushed her off in the ground and torched their four houses and by this, their four houses were burnt in to ashes and eight cattle's were charred to death when she along with her mother-in-law with her baby took shelter in the nearby pond.

1401. She went on to state that, Kaiser and his Bahini then brought her husband by folding his eyes when she went out to her father's house at *Chitna* leaving her injured father-in-law in the house and described the terrible incidents to her father who accompanied by her maternal uncle went to the house of Kaiser at *Noapara* on the next day and craved him to release Golam Rouf who (Kaiser) then demanded tk.10,000/= as ransom for his release and ultimately released him while an amount of Tk.8,000/= and a letter addressed to him by his(Kaiser) maternal uncle, Manju Mia of *Guniaok* was handed over to him by her father and maternal uncle on the next day. She finally stated, after 16 days of the event her father-in-law died due to sustain severe torture by Kaiser.

1402. Like Pw-3, this Pw-15 has also been given suggestion by the defence in the form of cross examination on drawing attention to the abovementioned incriminating part of the chief, claiming those to be not true - which this Pw denied.

1403. Then comes one named **Md. Azharul Huq**, a Freedom Fighter testified as **Pw-31** who claimed to be a H.S.C. student during liberation war and has been the younger brother of Kaptan Mia, an elected member of provincial assembly contested from Awami League in the election held in 1970. In his chief he amongst others, stated that, around 4:00pm on June 23, 1971 he saw smoke billowing at the direction of the house of Saydul Huq of village, *Purbavag* which was nearly 1 mile off his house and came to learn from the fleeing people of that village that Kaiser and the member of his 'Bahini' torched the house of Saydul Huq.

1404. He stated further that on the next morning he went to the house of Saydul Huq and found his house burnt in to ashes and came to learn from the people present there that, Kaiser and the member of Kaiser Bahini also

set the houses of Golam Nur of *Haripur* and Karmaker Bari of *Chitna* on fire. Hearing so, he then moved on to the house of Golam Nur of *Haripur* and found his house burnt and his elderly father bedridden with severe bodily injury where he was appraised by his family members that Kaiser and his Bahini on apprehending Golam Rouf kept him detained at the house of Kaiser at *Noapara*- Pw added further. Nearly one and half months of such event he along with many others went to India-Pw concluded.

1405. On going through the cross examination I do not find this Pw has been asked any question on the material particulars even no suggestion has been given thereof other than quizzing him about the distance of different villages he described in his chief.

1406. Next, **Golam Nur** turned out to depose as **Pw-13**. In his chief he stated that he was involved in student politics and associated with the then '*Purba Pakistan catra league*' and had become the general secretary of "Surjashen Hall" unit of Dhaka University and being emboldened with the historic speech of Bangabandhu on March 7, 1971 he organized local youths and students of his village and formed '*Chhatra Sangram Parishad*' to wage in the liberation war. Having been learned that Pakistani Army reached Brhammanbaria in mid April, he as a leader of Chhatra league as well as local organizer of youth did not feel it secure to stay in his area and went to India by crossing *Katlamara* boarder on April 27, 1971.

1407. So far as regards to event, he stated to have heard from two different sources. **First**, while he was staying in India he came to learn from the people visiting there from Bangladesh about the torture so perpetrated on his father and brother, Golam Rouf Master as well as of burning of their houses by accused Kaiser and his Bahini when his pregnant sister-in-law (Pw-13) and mother had craved for setting them free. And **second**, he referred the source of his knowledge by stating that, his mother, brother and sister-in-law (Pw-13) described the event sometime after his return from India tentatively, in the last part of the

month of January or 1st part of the month of February, 1972 adding further that, he knew Kaiser well before as he contested the election held in 1970.

1408. As did earlier, defence in this Pw also has just given suggestion on drawing attention to his entire incriminating part of the chief in the form of cross examination, claiming those to be not true - which he denied.

1409. Another witness named **Abdul Matin alias Jamal** has testified before this Tribunal as **Pw-16** who hails from Village-*Guniaok*, Nasirnagar was a student of twelfth grader during liberation war. This Pw is out an out a hearsay witness. In his chief what he stated concerning the event occurred on June 23, 1971 he claimed to have heard. Defence has just given suggestion to this Pw on drawing attention to his entire incriminating part of the chief in the form of cross examination though he claimed to have heard it, claiming those to be not true - which pw denied.

1410. Prosecution then adduced **Kazi Kabiruddin** as of last witness in support of this charge who deposed as **Pw-1**. On going through his entire testimony, it appears, he did not state much on the event. What he stated in the chief, only as regards to the burning and looting of the houses of Awami League leader Golam Nur of village *Haripur*, another Awami League leader and incumbent Minister Sayedul Huq of village *Purbavag* as well as Badal Karmaker of Village *Gutma* and ravaged those houses which he claimed to have been informed and occurred on June 24, 1971.

1411. In reply to cross, on the event, he stated to have heard those from one Freedom Fighter named, Chuttu Mia though in another question he could not say the distance of *Gutma* from that of village *Haripur*.

1412. Submission advanced by the Prosecution at Summing up:

At the very outset, learned Prosecutor submits that, all the witnesses it examined, has proved the charge by convincing evidences and defence has utterly failed to dislodge their assertion on cross examination. Giving much stress to the testimony of Pw-3 learned Prosecutor argues that, he is the most credible witness as he as an accomplice of accused Kaiser saw the atrocities perpetrated on the victim and what he stated as regards to

torture of Golam Rosul Master, abduction of Golam Rouf, his subsequent release and arson attack to their houses is more than trustworthy and there has been no reason to disbelieve his such testimony.

1413. With reference to the testimony of Pw-15, Nisha Mon Learned Prosecutor goes on to submit that, she as the only female member of the Victims has elaborately described the terrible ordeal her husband and her father-in-law went through in conjunction with the arson attack that ravaged their entire households on the day of event having no deviation from the Defence. Apart from that, the testimony of Golam Nur who stood the instrumental of all the devastation clampdown on his family by accused Kaiser and his notorious cohorts ‘Kaiser Bahini’ can in no way be outweighed as he clearly corroborated to what his sister-in-law (Pw-15) narrated in her chief and proved the prosecution case, learned Prosecutor argued further.

1414. So far as relates to the evidence of Pw-31, Pw-16 and Pw-1 though all are hearsay witness but they all supported the testimony of two ocular witnesses and even pw-31 visited the gutted houses of both Sayedul Huq and Golam Nur on the very next morning of occurring the event and found proof of what he had heard and seen and thereby proved the charge leveled against the accused –learned Prosecutor finally averred.

1415. Defence Contention at Summing up:

In refuting the alleged assertion of the prosecution, learned Defence counsel on the other hand, contents that, though prosecution claimed Pw-3 and Pw-15 as eye witnesses but there appear vast inconsistencies in their testimony they made about the alleged event. First of all, learned Counsel argued that, though pw-15 in her testimony claimed that her elderly father-in-law, Golam Rasul Master died due to assault caused by Kaiser when he came forward to rescue his son, Golam Rouf. There appears no proof in her entire testimony that could ever support that she had undertaken any measure for the treatment of her father-in-law after the alleged assault, and since it is not there, her entire testimony in that direction will not help much to prove her contention learned Defence counsel contends further.

1416. Learned Counsel next argued that, from the testimony of Pw-15 it has also not been proved that her husband Golam Rouf Master was released on receiving Tk.8,000/= by Kaiser, as Pw-3 who claimed to remain present in the crime scene did not support so. Moreover, charge speaks, Golam Rouf had been detained for 7 days but both Pw-3 and Pw-15 gave totally different views on this vital point which makes the charge completely doubtful-learned Defence counsel went on further.

1417. So far as relates to the alleged looting and torching the houses of Gibanda Karmaker of village *Gutma* and Saedul Huq of village *Purbavag* Prosecution has utterly failed to prove those events as Pw-3 though claimed to have gone to the house of Gibanda Karmaker along with Kaiser but did not utter a single word about torching their houses which disprove the charge in its entirety –learned Defence counsel concluded.

1418. Analysis of Evidences and Deliberation :

Heard the submission of learned Counsels for both the parties very meticulously and perused the evidence on record. Two distinct crimes that are murder and other inhumane acts have been arraigned against accused Kaiser to be occurred on three different segments and dimensions. Now, I would like to evaluate the evidences led in support of such three different events by turn. First of all, it has been alleged that, on the date of occurrence Kaiser accompanied by 40-50 armed member of ‘Kaiser Bahini’ launched attack in the house of Golam Noor and took away his elder brother Golam Rouf to the house of Kaiser at *Noapara* and kept him detained there for 7 days where he had been subjected to torture and eventually Kaiser set him free on receiving taka 8,000/=.

1419. I find Pw-3 who claimed to have accompanied Kaiser to the house of Golam Nur as well as Pw-15, the wife of Golam Rouf who remained present therein the house at the time of perpetrating the atrocities to be sighted witnesses. But on careful perusal of their respective testimony, I do not find it has ever proved that, Golam Rouf had at all been detained for seven days under the captivity of Kaiser at his *Noapara* house, let alone any torture to have been perpetrated upon him.

1420. Now, the very question of giving taka 8,000/= to the accused Kaiser as ransom to set Golam Rouf free has also been propped up. In this regard only Pw-15 has given a detail description about how her husband, Golam Rouf got rid of the captivity of Kaiser, that is to say, earn freedom in exchange for tk. 8,000/=. Admittedly, from her testimony it could not be found that his father had ever disclosed her, (Pw-15) that Kaiser had demanded him tk.10,000/= as ransom as a precondition to set him(Golam Rouf) at liberty or he had gone to Manju Mia of *Guniok* for collecting a letter alleged to have addressed to Kaiser.

1421. Had it been the case, question naturally ensue how she (Pw-15) could grasp that she would have to go to her father's house with Tk. 8,000/= and handed it over to her father that would require for her husband's release even if I leave aside her ability in gathering such a big amount of money at that juncture when as per her own testimony all his belongings had been gutted in the fire. So with such an unsubstantiated testimony of Pw-15 it creates reasonable doubt on getting her husband released in exchange for tk. 8,000/= which has certainly waned the prosecution case.

1422. Prosecution has also brought charge of murder against Kaiser making allegation that due to causing assault to Golam Rosul Master he died. Prosecution tent to argue by referring the testimony of Pw-15, that due to severe injury inflicted to her father-in-law by accused Kaiser he died two weeks after the incident. But two witnesses who claimed to have noticed this very incidents gave totally different version in their respective testimony over such incidents, as Pw-3 deposed that, while elderly father, mother and wife of Golam Rouf came forward to rescue him, Kaiser pushed them off while Pw-15 testified that, Kaiser had beat her father-in-law when he declined to give any information to Kaiser about the whereabouts of his Freedom Fighter's son, Golam Nur.

1423. Moreover, if the house of Golam Nur would have fully ravaged out of fire ignited by Kaiser then how Pw-15 had lived there from the very next day of the event, arranged the above money and treated his injured Father-in-law simply remain shrouded in mystery. From the above testimony of Pw-3 and Pw-15, if I take it to be true that Golam Rosul

Master was assaulted for preventing kaiser from taking away his son but still, by that, it does not simply prove, such assault had resulted in the death to Golam Rosul Master though fact remains, there appears stark contradictory statement between those two sighted witnesses over such assault as I observed earlier. Even, no witnesses other than Pw-15 have uttered a single sentence in support of what she described with regard to the assault caused to her father-in-law, Golam Rosul Master.

1424. With the cumulative observation of the above testimonies I very reasonably can come to a conclusion that, Prosecution has absolutely failed to support the charge of looting, arson, torture, abduction of Golam Rouf and that of murder of Golam Rosul Master by convincing evidences.

1425. Apart from what I find above, Prosecution has also indicted accused Kaiser of looting the households of Gobinda Karmaker and then set his house ablaze when he also abducted one Givendra Roy and Kept him detained at the house of Kaiser at *Noapara* from where he managed to flee after 22 days. In the very beginning I suppose that, Pw-3 be considered as most pertinent witness in proving the instant charge as he alleged to have accompanied accused Kaiser in accomplishing the atrocities, though his evidence indicates he remained mere a silent spectator when the atrocities were being committed, even then, I do bestow much value of his testimony over others.

1426. In such a posture, it appears from his testimony he has not stated anything about the looting and burning of the house of 'Gobinda Karmaker, as the only cited witness among 6 witnesses deposed in support of this charge. Further, from the testimony of Pw-15, it appears to me, that she as a hearsay witness has just made a sweeping statements about burning of 'Karmaker Bari' not named the house of 'Gobinda Karmaker' so mentioned in the charge claiming to have heard from her father though refrained from mentioning anything about the fate of Givendra Roy who alleged to have apprehended from the house of Gobinda Karmaker making her entire statement untrue.

1427. While pw-16, Abdul Matin claimed to have heard about the looting and arson in the house of one 'Badal Karmaker' (not named in the charge)

as well as fastening Gribendra Karmaker with a mango tree at his house but curiously enough, this Pw did not mentioned from whom he heard so. It is thus held that, any anonymous hearsay statements that lack any sorts of sources and having no strong circumstantial basis thereof will carry no evidentiary value.

1428. The last segment of this charge relates to looting and burning the household of Saedul Haque of *Purbavag*. But to prove the segment of the event Pw-31 and pw-16 hails from separate villages stand witnesses and gave testimonies to that effect though mere hearsay one. But neither any ocular witness came forward to support this charge nor any authenticated sources have been referred in their respective testimony from whom these two witnesses have heard the incident of such arson attack.

1429. Again, out of those two witnesses, Pw-31 claimed to have heard from the fleeing people of that village when Pw-16 did not even mention his source of knowledge from whom he had heard the very looting and burning of the house of Saedul Huq. So, in such a posture, no reliance can be placed to the testimony of anonymous hearsay witnesses. yet, prosecution could have produced any inhabitant of that particular Village where the alleged arson and looting in the house of victim had been perpetrated or could produce the person or persons who Pw-31 claimed to have accompanied in visiting the house on the following day of committing the incident making the statement acceptable but since they failed, this segment of charge also cannot be said to have been proved.

1430. Conclusion :

Given the above circumstances, it is my considered view that, Prosecution has utterly failed to discharge the burden of proving its case. Hence, accused Syed Md. Kaiser is found **not guilty** of the offence of killing of 01 unarmed Civilians constituting the offence of ‘murder’ as “Crimes against humanity” or in the alternative, for participating, abetting, facilitating and contributing the commission of offence of ‘Other inhumane acts’ as “Crimes against humanity” as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore ,he be acquitted of the charge.

1431. Adjudication of Charge no.12

(Committing rape upon Majeda at Army Camp at Jagadishpur High School)

Charge Framed: Accused Kaiser has been indicted for bringing one Majeda Begum, her father Aftab Mia and uncle Ayub Mia to the army camp set up at *Jagadishpur* High School under Madhabpur Police station on leading ‘Kaiser Bahini’ and Rajakar Forces on any day of mid August, 1971 and handed Majeda over to the Army for their enjoyment despite protest of her father when army men committed successive rape upon Majeda, during night for 8/10 days that leading to Majeda devastated physically and mentally and was left abandoned at a place near Temunia Primary School wherefrom she managed to return home somehow and received necessary medical treatment and few days later she felt her pregnancy that resulted from the forcible sexual invasion to her at the army camp and by that, Syed Md. Kaiser has been charged for substantially abetting, facilitating and contributing the actual commission of committing forcible sexual ravishment to an innocent girl constituting the offence of **rape** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1432. Evidence of Prosecution Witnesses :

In order to prove the charge Prosecution has produced three witnesses including rape victim and her daughter who was born out of sexual ravishment-it alleged. First of all the deposition of rape victim, **Majeda Begum** who deposed as **Pw-5** and was recorded in camera be taken up. It depicts from her chief, she has initially given her brief personal account before divulging terrible ordeal of her life as well as atrocities of accused Kaiser during the war of liberation which is summarized as under:

1433. This Pw has now eking out her life as a day labourer at a nursery and during liberation war she was a girl of 15/16 years and got married one month before starting war of liberation. She heard, Accused Kaiser sided with the Pakistani Army soon after the war of liberation and formed ‘Kaiser Bahini’ with the cooperation of Pakistani Army and started

devastation at Madhabpur Bazar on receiving Pakistani army from Brhammanbaria. An army Camp at *Jagadishpur* High School was then set up. When the killing, arson attack of Pakistani Army and 'Kaiser Bahini' compounded manifold in her area, she ran away from her father's house to her husband's house at *Sultanpur* in the last part of the month of *Ashwar*, 1971 for the sake of her life but could not stay there any longer for the looting and arson attack launched by Kaiser and his 'Kaiser Bahini' there also and eventually her uncle, Freedom Fighter, Matin brought her to her father's house at *Belghar*.

1434. After returning her father's house she would have to hole up at different crops field as she learned from the elders, Kaiser had also been handing over the women to different Pakistani Army camp. In narrating the event she stated in her chief that, around noon in the last part of the month of *Srawan* her father and uncle, Ayub Ali were having lunch when 10-12 member 'Kaiser Bahini' entered to their house and asked the whereabouts of her uncle, Matin but as her father expressed his ignorance, member of Kaiser Bahini and Razakars then started beating him up ; hearing the scream of her father she also cried out inside her house when the accomplices of Kaiser apprehended all of them and brought to Army camp at *Jagadishpur* High School where she found Kaiser there.

1435. She also found 7-8 women kept detained there guarded by Razakars and members of Kaiser Bahini with arms. At this, Kaiser handed her over to Pakistani Army and ordered his Bahini to get a hole dug by her father and uncle and on completion, she was brought there with two razakars on guard but when dusk fell over they(father and uncle) craved Kaiser for her release but Kaiser drove them away from the camp on threatening their life – she continued. She further added, after dusk, rain started falling when member of Kaiser Bahini brought her to a room of the camp when members of Pakistani Army started ravishing her by turn when she also heard the scream of other women.

1436. She stated further that, when she was groaning out of pain, the army men at outraged had stuffed her mouth with cloths. She went on to lament that, she became indisposed and disabled for having been raped

continually by the Pakistani army for 8-10 days and upon seeing her precarious condition Kaiser asked his Bahini and Razakars to dump her elsewhere, but when they enquired about the place to be dumped her, Kaiser then retorted near *Temunia Jagadishpur* Primary School and accordingly, the member of Kaiser Bahini and Razakar dumped her at night by picking her on shoulder, when she had sense and could grasp their conversation.

1437. She continued, at the time of dumping, there started thunderstorm when all her attire was torn out and entire body was smeared with blood though stayed abandoned there over night and before dawn, she somehow started for her father's house by toddling. After reaching the house, her father started wailing on seeing her devastated condition when her uncle took her to a doctor at *Satian Bazar* on taking her on his shoulder -she narrated so on breaking down in tears. She then started receiving treatment staying at her aunt's (*Fupu*) house at *Satian* but as time goes by, she felt she had been conceived on repeated rape by the Pakistani Army and ultimately returned to her father's house after liberation.

1438. She went on to state her painful ordeal that, soon after liberation her husband came her father's house and brought her back to his house but again sent her back to her father's house sensing his pregnancy. She continued to state that, in the last part of the month of *Baishakh*, 1972 she gave birth to a baby girl whose name is Samsun Nahar and after two years of the birth, her husband accepted her to his house. The member of 'Kaiser Bahini' had not only handed her over to Pakistani army and made successive rape upon her but they had picked up many women and made them ravished by Pakistani soldiers-Pw added further.

1439. What offence she had occurred to Kaiser as he handed her over to Pakistani Army for their repeated ravishment, even having been a native to her when she has now become ostracized, her daughter could not call anybody father having no father and became unwanted in the society - by threw a question to everyone present in the Tribunal and wrapped up her chief breaking down in tears -when the tribunal turned out deep silence.

1440. Defence has extensively cross examined this Victim. In reply to cross she stated that she did not go to the house of Kaiser but she saw Kaiser when he had come to different houses of her area seeking vote as he contested the election with the symbol 'elephant' before liberation war was started and afterwards he had also contested the election with the symbol 'sheep of paddy'.

1441. She also replied that, Kazi Kabiruddin(Pw-1) was a freedom Fighter like his uncle Advocate Matin and both of them had maintained good relations. On several times Kazi Kabiruddin contested the election as like as accused Kaiser. She expressed doubt whether her uncle Advocate Matin had campaigned in favour of Kazi Kabiruddin in the election. Besides, Defence has given suggestion in the form of cross examination on drawing attention to the entire incriminating part of the chief, claiming those to be not true - which this Pw denied vehemently.

1442. Prosecution then adduced **Shamsunnahar**, the daughter of Pw-5, deposed as **Pw-10** also in camera. While narrating her personal account in the beginning of the chief, she stated that, after growing older she could know she is the offspring of Pakistani Army and failed to divulge her father's name though she stated to have been residing now with her mother. She stated further that, her maternal grandfather and grandmother married off her mother to one Alai Mia of *Sultanpur* village one month before liberation war.

1443. With emotion choked voice she then started narrating that, when she grew up she asked her maternal grandfather and grandmother why she could not go to her father's house, then they told her that, she is the offspring of Pakistani Army elaborating further that, Kaiser had handed her mother over to Pakistani army at *Jagadispur* Army camp who kept her detained at the camp for 8-10 days and one day the accomplices of Kaiser dumped her mother on the road and during her captivity at Army camp, Pakistani army outraged her successively leaving her seriously ill and after receiving treatment she felt, she become pregnant. She went on to state that, after liberation she was born at the house of her maternal grandfather and afterwards upon a reconciliation her mother was sent to

her husband's house while she was kept living under the supervision of her *nana*, (uncle of her mother) Advocate Matin,.

1444. She stated further that, upon nourishing , her *nana* got her married to one Aksir Mia of Village *Amrut*, police station *Chunarughat* but their marital tie did not last any longer as at one stage, her husband came to learn that she was the offspring of Pakistani Army and Alai Mia was not her real father and impersonating Alai Mia as her father she was married off and eventually she was driven out to her maternal grandfather from where her mother brought her husband's house at *Sultanpur* and since then she has been staying with her mother and ever since her husband stopped communicating her.

1445. Finally, Pw lamented that, she could not have embraced such an ill fate today had Kaiser not handed her mother over to Pakistani Army and demanded his exemplary punishment on reprimanding Kaiser because of Kaiser she became the offspring of Pakistani soldiers and unwanted in the society.

1446. This Pw has been asked several questions by the defence with regard to her identity, age and marriage. In reply to such question she stated that she used to cast her vote since long and she also voted in the election held in 2008 and 2014 and in the voter list her husband's name has been mentioned as Aksir Mia as they have not yet been separated. She stated further that, she could not know whether her father's name has been mentioned as Alai Miah in the Birth Registry as her mother had registered so and then denied a suggestion that, for the first time in Tribunal she mentioned as 'unknown' when she was asked about her father name adding that her grandfather married her off showing Alai Mia as her father.

1447. She found it true of a defence suggestion that, her marriage was solemnized ceremonially upon consent of both the family at the house of Alai Mia. She also denied a defence suggestion that she had still been leading a conjugal life with her husband. Apart from that, Defence has given suggestion in the form of cross examination on drawing attention to

the entire incriminating part of the chief, though she claimed to have heard so claiming those to be not true - which this Pw also denied.

1448. As of last witness in this charge Prosecution has adduced **Kazi Kabiruddin** a valiant Freedom Fighter and fought in the liberation war who testified as **Pw-1**. While narrating the event he stated that, two years after liberation when he came back to his village home one of the accused of Agartala Conspiracy case named Mahabubuddin Chowdhury met him and introduced Freedom Fighter, Abdul Matin and disclosed the terrified ordeal of his (Matin) niece, Mazeda caused by Kaiser on handing her over to Pakistani Army for their enjoyment and requested him to take initiative for settling the dispute as the husband of Mazeda did not accept her.

1449. On hearing, he sat with the elders of the area including the husband of Mazeda, Alai Miah and upon a fruitful reconciliation, Alai Miah agreed to take her back and started leading a conjugal life. On going through the cross examination it does not appear Defence has made any question to this Pw on this Particular event, even in the form of giving suggestion.

1450. Submission Advanced by the Prosecution :

Learned Prosecutor has initiated his submission by drawing attention to the hair raising portion of the testimony where rape victim Majeda has narrated her horrific ordeal she went through 42 years ago. Learned Prosecutor then argued that, though 42 years has elapsed since the despicable crime had perpetrated on the victim but she very robustly narrated how Kaiser had unleashed torturous ambiance in the entire area of Madhabpur during liberation war for which panic haunted her all the times to save her modesty for which she had even to take shelter at different villages and crops field but eventually she lost her battle to the lust of accused Kaiser who in order to appease his mentor, notorious Pakistani Army handed over her for satisfying their carnal desire.

1451. Learned Prosecutor goes on to submits that, the victim has narrated saddest episode of her life which she endured because of accused Kaiser and prosecution has manifestly proved the charge against him through

her naïve but steadfast utterance as no one can be regarded more dependable and trustworthy witness than that of this victim.

1452. Referring to the valedictory part of the chief of the victim learned Prosecutor then averred that, the very interrogatories she threw to the conscience of the Tribunal for her current social ostracism she faces all the times, deprivation of her daughter to name anybody as her father pointing Kaiser for all their present distressed position and adversaries they have continuously been encountered with and subsequent heart wrenching lamentation are suffice to consider her testimony as true and trustworthy and to find Kaiser liable for perpetrating heinous crime on victim, Majeda.

1453. Claiming Shamsunnahar, the daughter of victim, Majeda who deposed as Pw-10 as the burning proof of the devastation Majeda met in her life by the Pakistani Army, learned Prosecutor submits that, hadn't Kaiser Bahini Picked up Majeda and Kaiser handed her over to Pakistani Army for their sexual ravishment this Pw-10 would not have been born with lifelong stigma. The testimony of Pw-10 has reflected how she has been bearing the brunt of her mother's terrible ordeal that even crumbled her marital tie and now leading a life worst than an orphan because of accused Kaiser-learned Prosecutor submits further.

1454. Giving reference to the testimony of Pw-10, learned Prosecutor argued that, no doubt this Pw-10 is the creation of sexual invasion upon Pw-5, Majeda even though, whatever she stated in her chief about the horrendous ordeal perpetrated on her mother, she readily stated to have heard from her maternal grandfather and grandmother, though it has fully corroborated with the testimony given by her mother, Pw-5.

1455. Apart from that, it has come out from the testimony of Pw-1 how he had mediated strained relationship between Majeda and Alai Mia that had erupted for sexually ravishing Majeda by Pakistani Army so handed over by Kaiser and with that, what Pw-5 Majeda has stated in her testimony about the reunion with her husband on the aftermath of liberation war has been fully corroborated and proved true-learned Prosecutor concluded.

1456. Defence Contention at Summing up:

Learned Defence Counsel while countering the submission of the Prosecution at the very outset submits that, Kaiser was not at all involved in any manner, with the commission of alleged rape on Majeda and Prosecution has failed to produce any independent witness to support the unilateral testimony of the victim leaving the same untrustworthy. In his second thought of arguments learned Counsel then submits that, Since Pw-5 in her testimony stated that, at the time of committing crime, it was last part of the month of *Ashwer*, meaning it was neither possible for Kaiser Bahini to bring Victim to *Jagadishpur* High School from *Belghar* nor the victim could come *Belghar* from *Sultanpur* as the distance between these two villages were 7-8 Kilometers.

1457. Lastly, learned Counsel submits that since there has been no proof about the exact or putative date of birth of Pw-10, so prosecution case has not been proved that she is the creation of sexual ravishment perpetrated during war even though, Kaiser had in no way involved in such crime.

1458. Analysis of Evidences and Deliberation :

Precisely, Accused Kaiser has been arraigned on the charge of handing victim, Majeda over to Pakistani Army at an Army camp set up at *Jagadishpur* High School, where Majeda had been subjected to successive sexual ravishment by the Pakistani Army for 8-10 days. Also, in the initial part of the charge, it has implicated 'Kaiser Bahini' for picking up Majeda along with her father, Atab Mia and uncle, Ayub Mia to the camp. Though not mentioned in the charge, but Majeda in her chief, has stated that after sexual invasion, on her by the Pakistani Army randomly for about 8-10 days she lain numb, though her sense did work then and at that moment, she could hear the conversation between Kaiser and his cohorts 'Kaiser Bahini' who (Kaiser) had ordered the member of his Bahini to dispose of her near *Temunia* Jagadishpur Primary School and accordingly, she had been dumped there.

1459. This Victim in her chief has also very affirmatively stated that, after bringing them at *Jagadishpur* Army Camp by the member of 'Kaiser Bahini' Kaiser had ordered her father and uncle to dig a hole there and on accomplishing so, her father and uncle had craved to Kaiser for Majeda's

release as dusk fell down then but Kaiser drove them away with threatening of their life and right after that, nightmarish came down on her life. So, apart from the excerpt of the charge, I also find the presence of Kaiser in two more occasions while perpetrating the most nefarious event on Majeda from the testimony of the victim.

1460. However, from the trend of cross examination it does not suggest, Defence could make any headway to dislodge the assertion of the prosecution witnesses. Moreover, the heartrending testimony of Majeda illustrating her own terrible ordeal without any deviation by the defence can be considered a cardinal one in dispensing the charge.

1461. Now, a question can crop up, why this Majeda had being picked up and by whose order? Charge depicts, Member of 'Kaiser Bahini' had picked up Majeda and it has already been established that 'Kaiser Bahini' was formed after the name of Kaiser and run under the design, plan and direct command of accused Kaiser, therefore it can certainly, be deduced, victim, Majeda had been picked up as Kaiser desired so to be placed before him and member of 'Kaiser Bahini' has just carried out his order.

1462. Further, Majeda had been chosen, as the perverted Pakistani Army had pressed Kaiser to arrange Majeda like young girl to satiate their lust while Kaiser had to arrange Majeda, else his own life would have at stake. Mentionable, it appears from the irrefutable testimony of Majeda, she was a girl of about 15-16 years during the war of Independence and could know well Kaiser for his fierce anti-liberation stance against the countries long cherished dream of independence and unleashing horrendous atrocities on the civilians in his own area on forming infamous 'Kaiser Bahini' comprising Razakar and other anti-liberation elements collaborating Pakistani Army.

1463. So, she had not required to recognize Kaiser anew and prosecution possibly did not fell it indispensable to ask any question about the recognition of kaiser but it is Defence, who by cross examining her, rather has entrenched such recognition who in a reply to cross asserted to know Kaiser before and after liberation. Here, I would not give any stress as to whether Defence has been able to shake the testimony of this Victim,

Majeda by cross examining her, because, as I observed earlier, aside from giving suggestions on drawing incriminating part of the chief of the Pw's, Defence did not ask any question either to Pw-5 or Pw-10 on material particulars for discarding the assertion made in their respective chief.

1464. On the other hand, the presence of Shamsunnaher before this Tribunal and giving testimony as Pw-10, seconding her mother's terrible ordeal, inevitably dispelled all controversy in perpetrating Sexual invasion on her mother and unmasked Kaiser's savagery on the women in her own areas during war of liberation. She herself stands as burning proof of her mother's dreadful ordeal and no other live testimony could overshadow her present existence.

1465. And again, the breaking off her marital tie with Aksir Miah, bore clear indication of her mother's ordeal though she was not supposed to be responsible for such mishap came down in her life, but fact remains, she has now become abandoned and unwanted in our patriarchal society. Generally, It is beyond our social norms and values and in particular against the ground reality, a daughter will tell lie about her mother's modesty where she herself is the product of such misfortune acted on her mother.

1466. Over and above, on cumulative analysis of the testimony of both mother and daughter and their present hapless state, there could not have any earthly reason to think otherwise but to repose absolute trust on their naïve but steadfast narratives they explicitly made before this tribunal by exposing the darkest chapter of their life they have still been putting up with and unraveled the lust of our local monsters like accused Kaiser who did not hesitate even in handing over his sisters like girl to the hands of the enemy for their enjoyment.

1467. The last utterance of Pw-5 made at the fag end of her chief certainly carries a significant message to us that poses "*what offence I did to Kaiser-----*" with tear streaming down her face - is clear indicia how deep her pain, she still put up with for none but because of accused Kaiser for crippling her own life and totally ruined whole life of her daughter too. No one could recoup her such wounds and nothing could be

compensated with what this Pw-5 had lost nor her daughter could stand in the society like other women as Kaiser has smeared stigma on her life with no fault of her, because no human being can be held liable for his/her own berth.

1468. It's true this Mazeda did not go to the warfare and fight against the Pakistani invading forces and notorious local militia like 'Kaiser Bahini' but she herself saw and eventually endured the cruelest perversion Pakistani Army unleashed on her for consecutive 8-10 days and fought relentlessly for her survival from their heinous lust and her such fighting for life is no more worthier than the front fighting, our valiant Freedom fighters waged tooth and nail in achieving this Independent nation and such heroic woman invariably deserves state recognition for her supreme sacrifice but reality is that, she has still been eking out her life just like a beggars with the alms and mercy of the people even from those, who had stood against the very birth of this nation- it's a shame for the nation.

1469. We always brag by saying, this nation has achieved emancipation for the supreme sacrifice of nearly quarter million of women who had sacrificed their most precious wealth of their lives but what could we do for their well being long after 42 years of our independence? For being testified before us, we could find a glaring example, how precarious condition such war hero, a narrowly surviving rape victim and her fatherless daughter –a war baby have been passing through, while Majeda has now reached the threshold of her life.

1470. The nation should be grateful for their supreme sacrifice and by implication, rehabilitate them in the society with due honour and respect which will bring them solace to some extent before being passed away otherwise, future generation will not forgive us and this nation would be regarded ungrateful to those great souls.

1471. Mode of Liability accused incurred :

In view of foregoing discussion and observations, it has unerringly proved, accused Kaiser actively participated in the commission of sexual ravishment to an innocent and a newly married woman by Pakistani Soldiers and thereby, substantially abetted, facilitated and actively

contributed the actual commission of offence of ‘rape’ that constituting the offence of ‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1472. Verdict on Conviction: Having regard to the above discussions based on uncontroverted and irrefutable evidences of a rape victim and her daughter termed as ‘war baby’ and submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of ‘rape’ as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1473. Verdict on Sentence: Before fixing the sentence, accused Kaiser deserves, I would like to focus on his wild mindset he had shown towards victim, Majeda when she was fighting for her life for being deliberately outraged by the Pakistani Army for 8-10 days. It has revealed and proved with the testimony of Majeda, at long last, she had been left abandoned and lain numb at the Army camp as she became incapable of being raped any more, when Kaiser seeing her precarious state, had ordered his notorious member of ‘Kaiser Bahini’ to dump her near *Tebunia Jagadispur* Primary School. This very cruel disposition is enough to fathom how he saw a woman’s life, possibly not worthier than a disposal syringe as she had become useless she was just disposed of like leftovers of a fruit.

1474. Perhaps, Kaiser could think that after dumping she would die and he would be then relieved from further hassle but circumstances turned around which Kaiser could not foresee and for that reason today Majeda is before him. This Majeda in order to save her modesty from the clutches of Kaiser had to run helter-skelter but finally could not escape from Kaiser and met a dreadful eventuality though return from sure death but Kaiser, obviously could have refrained from handing her over to Pakistani Army but he didn’t.

1475. All such indicators clearly demonstrates how brutal Kaiser had emerged at that juncture and how he reckoned the women of our country

only for appeasing the invading forces who took a mission for eliminating Bangalee civilians. Accused Kaiser very nakedly sided with the notorious Pakistani Forces and did not even care to hand over his own native village women to the soldiers of our enemy country for their enjoyment. As many women had to be laid down their lives by the Pakistani soldiers or their local collaborators in cruelest manner when they became incapable of being ravished upon deliberate gang rape for days together and in that sense Majeda could be said lucky for being still alive.

1476. It can resolutely be said that, if our local collaborator or its leader like accused Kaiser had not handed over the women to the invading Pakistani Soldiers such a large number of women in our country would not have been raped and murdered. Accused Kaiser has committed cruelest ever crime by savagely tormented the life of numerous innocent impoverished village women by Pakistani soldiers making their life totally crippled who rendered destitute.

1477. Accused Kaiser resorted to such heinous crime only for safeguarding his petty interest and to show blind loyalty to a brutal and barbaric forces of our enemy country. The ruthless and dastardly act towards an innocent village woman by accused must not be spared by taking any compassionate view rather be meted out with exemplary punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of 'rape' as "Crimes against humanity" under section 20(2) of International Crimes (Tribunals) Act,1973.

1478. Adjudication of Charge no.13

(Killing of three Civilians at *Nalua* Tea Garden Killing field)

Charge Framed:In this particular charge Accused Kaiser has been arraigned for launching attack by leading a group of 15-20 Razakars and peace committee members on August 18, 1971 in between 09:00- 09:30 am and 03:00 -03:30pm and apprehended Abdus Shahid and three other civilians of village *Narapati* under police station-Chunarughat, District-Habiganj and brought them to peace committee office set up at the house

of Rajendra Podder @ lechu Podder where at the instruction of Kaiser they were subjected to torture and eventually they were brought to army camp then Kaiser and his group brought them to the killing field adjacent to *Nalua* tea garden by army vehicles where they were killed and by that, Syed Md. Kaiser has been charged for participating, abetting, and contributing the actual commission of killing 03 unarmed civilians constituting the offence of **murder** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1479. Evidence of Prosecution Witnesses :

To support the above charge prosecution has adduced three prosecution witnesses claimed those are of close relatives of deceased, Victims. Besides it has produced a book named ‘*Muktejuddher Etihasher Khojay*’ authored by Tajul islam as of documentary evidence. Now let me look in to what those three witnesses have deposed. First, one **Ambia Khatun** turned up and testify herself as **Pw-23**, daughter of slain Abdus Shaheed. He stated to be 16/17 years old during liberation war. While narrating the event, she stated that, in the last part of the month of *Ashwer*, 1971 her father along with Zahir Hossain, Asker Ali and Mohibullah upon making contact with Manik Chowdhury of *Bahubal* went to India. On 1st of *Vedro*, 1971 moment after Fazar prayer her father knocked on their door and after opening it by her mother, his father along with Zahir Hossain and Mohibullah entered the house while Akser Ali went back to his house but returned after a short while-she stated further.

1480. She went on to state that, around 8:00-9:00am Razaker Firoz Mia, Esad Ali, Manfar, Muslim Chairman, Hurai Choukider, Khaleque Chukider surrounded their house and ordered all to come out from the house, but as her father wanted to know the reason, then Razakars retorted all would have to go to the house of Lichu Podder where Kaiser was waiting who ordered to place them all before him. Bringing in all the three, the Razakars then marched towards the house of Lichu Podder when she along with the relatives of all those captives followed them and reached that house though they had not allowed to enter the house but

stood near a fence of a latrine from where she could see what was happening inside the house -Pw added further.

1481. Kaiser then got to know from the captives, the whereabouts of the arms they brought in from India but as they begged to be excused in bringing any arms even venture to India, Kaiser then ordered Firoz Chairman and other Razakars to thrash them and instantly, they started inflicting torture but seeing such inhumane torture she could not check her passion and started wailing hysterically on the road, she continued. She further stated that, on fastening the hands of all the captives behind their back, Kaiser along with Firoz Mia, Muslim Chairman, Habibullah Baher, Manfar, Esad Ali and others then moved toward shrine of *Shah Gader Hossain* and at that time accused Kaiser, was dressed with a white trouser with a cap in his head.

1482. Pw stated further, from there, all those captives were brought to Army camp, north side of *Kalarpur* village and on the next day, around 8/9 in the night Razakar Hamdu Mia came to her house and informed that, her father and other captives were no longer alive, as all of them had been killed beneath a banyan tree at *Nalua* tea garden and their dead bodies were dumped in the well. Hamdu Mia further informed her that, Kaiser had ordered him to kill all the four but she regretted, as all those are his childhood friends when Pakistani Army gunned them down following the order of Kaiser-she stated.

1483. After liberation, Hamdu Mia had brought her to that well(a hole sunk in to the ground as a source of water) when it's upper part was covered with iron rod though at the time of dumping the dead bodies of the deceased it was unbolt, but as she (Pw-23) started wailing on arriving there, the nearby people came forward and told that they had witnessed the killing scene and described her so- Pw concluded with tears well up in her eyes.

1484. In reply to cross examination she stated that, she neither could recall her date of marriage nor her own date of birth and those of her children; the house of Lichu Podder was 8 *care* (1 *care*=30 decimals)off her house and upon a suggestion she stated that it is not true Lichu Podder was at his

house during liberation war rather he went to India ; Firoz Vice Chairman, Isad Ali and Hurai Chukider were the inhabitants of south *Narapati* while the house Khaleque Choukider was north *Narapati* . The shrine of *Shah Gader* was 10-15 kilometer east-north off her house while *Kalarpur* Army camp was on the west of shrine of *Shah Gader* but could not say the exact distance. The Banyan tree at *Nalua* tea garden was on the south of *Kalarpur* Army camp-pw replied further.

1485. She went on to reply that, there were two houses of Lichu Podder in the year of 1971. Besides, drawing attention to the incriminating part of the chief where this Pw narrated capturing her father and three others, taking to Lichu Podder's house, torturing there and finally killing them at *Nalua* tea garden-Defence made suggestion claiming those to be untrue and being disclosed for the first time before this Tribunal which Pw denied.

1486. Then comes **Anwara Begum**, wife of one of the deceased, Akser Ali who deposed as **Pw-24**. This Pw in her chief has seconded entire material particulars to what the Pw-23 narrated in her chief in chocking voice. In reply to cross, she could neither specify the date of her first as well as second marriage nor the date of birth of her daughter who was born after liberation. She could not say the date and month either of Bengali year or of English year. She went on to reply that, she could not say who belonged to the houses located on the west and east of the house of Lichu Podder as she did not come out of her house habitually.

1487. In the same vein as Pw-23 did , Defence here also made suggestion to this pw on drawing attention to the incriminating part of her chief claiming those to be untrue which Pw denied too. Finally, Prosecution has adduced **Md. Anaiullah**, the son of deceased Md. Mahibullah as of **Pw-25** but tendered this witness while defence declined to cross examine him. On going through the page no.127 of the Book named '*Muktejuddher Etihasher Khojay*' authored by Tajul Islam so referred by prosecution I do not find anything having nexus to the charge.

1488. Submission advanced by the Prosecution at Summing up:

Giving emphasis to the oral testimony of Pw-23 and Pw-24 learned Prosecutor vehemently argues that both of them are close relatives of two deceased and they had witnessed how their dear ones had been apprehended, tortured and accused Kaiser led in parading them towards the shrine of *Shah Goder* from where they had never returned which palpably proved that accused Kaiser masterminded the killing of those three victims. Learned Prosecutor goes on to submit that, both the Pw's categorically corroborated each other by stating that, they have heard the mode of killing of the deceased from Hamdu Mia who himself had given first hand information as to how the deceased had been gunned down at the direction of accused Kaiser even though, Defence could not shake the assertion of these two Pw's in any manner.

1489. Multifaceted questions have been put to the Pw's concerning the location, distance of the house of Lichu Podder from those of the houses of Pw's. Defence also has also taken reply about the boundary of the Lichu Podder's house and the residents lived therein during liberation war but it has utterly failed to elicit anything to the contrary that could shake their assertion they stood by in their respective chief –learned prosecutor added further.

1490. With regard to very recognition of accused Kaiser both the PW's stated Kaiser, clad in white trouser stayed at Lichu Podder's house when the victims were being tortured there but no question has ever been put by the Defence in that core point leaving their recognition proved beyond any shadow of doubt-learned Prosecutor further argues.

1491. In the end, learned Prosecutor submits that, as *pardanashin* village ladies as well as the members of victim's family they are not supposed to make statements by which their long awited hope in getting justice will be shattered and thusl both the Pw's are considered to be very credible witnesses who have been able to prove the charge and there is no reason to disbelieve their corroborative and irrefutable testimony.

1492. Defence Contention at Summing up :

In countering the above submission of the prosecution, learned Defence Counsel at the very outset contents that, as per reply in cross, Pw-24

categorically asserted that, her area was under the control of Freedom fighters in 1971 and had it been so, then it was quite impossible for Kaiser to commit the alleged crime of killing bringing the victims to *Chunarughat* area on approaching from village *Noapara*. Learned Counsel next submits that, since the alleged Killing Spot was adjacent to Indian boarder, it cannot be believed that, Kaiser would dare to take such life risk in committing the alleged crime knowing it well that freedom fighters were marching alongside the boarder area.

1493. As per charge, Kaiser has been arraigned in launching attack giving lead to Razakars and members of Peace committee but nothing sorts of this have ever proved through evidences- learned Counsel further added. Since Pw-23 and Pw-24 have given totally divergent version on the mode of alleged killing of the deceased, so the entire prosecution case has become doubtful-learned defence counsel concluded.

1494. Analysis of Evidences and Deliberation :

I have given very anxious thought in the submission offered by the prosecution and contention of the defence there against and perused the evidence on record meticulously. It's true, as per testimony of Pw-23 and Pw-24, while apprehending the victims from the house of Abdus Shahid, (father of Pw-23) Kaiser was not there though charge speaks of his presence. It's also true that, apart from Abdus Shahid name of other two victims have not been there in the charge save and except the phrase 'three other civilians'.

1495. Now question naturally ensue whether defence will derive any benefit out of these discrepancies appeared between charge and the testimony of the witnesses and accused will be absolved of the charge even if, he is found guilty by the corroborative testimony of the Pw's adduced? This is certainly a vital point which is required to be addressed first.

1496. Practically, charge against the accused is framed on the basis of formal charge and other ancillary documents placed before the Tribunal by the prosecution followed by their submission and counter submission of the defence. If the tribunal found prima facie proof of involvement of

the accused in committing the crime then it usually goes on to frame charge against the accused.

1497. Hence, in doing so, the Tribunal has to rely on certain documents prosecution produced which were gathered at pre-trial stage and the submission advanced by the contending parties but the trial proceeding starts moment after charge is framed by the Tribunal and in course of such trial what the Witness state before the Tribunal on taking oath and place his/her reliance on documents is regarded as 'Evidence' and that evidence is used in favour or against the person charged, upon evaluation. With the above, it can be concluded that, the evidences so placed before the Tribunal will prevail over to the contents made in the charge.

1498. Now, reverting to the issue in question, both Pw-23 and Pw-24 while testified before this Tribunal in a very clear terms asserted that some Razakars while apprehending the victims on the date of event informed in bringing them in the house of one Lichu Podder confirming that, Kaiser was waiting there for them and both the witnesses too found Kaiser at Lichu Podder's house and hence, these corroborative version can never brush aside for not referring so in the charge nor it can be termed discrepancies, exaggeration or addition rather Tribunal must take in to account of such evidence for adjudication of the involvement of the accused in the commission of crime.

1499. Similar-eventuality will follow for not specifying the name of two other victims in the charge (apart from Abdus Shahid) in as much as, wife and son of those unnamed victims showed up before this Tribunal and supported the substantive charge of Killing of their dear ones when defence utterly failed to create any doubt about their identities. So there cannot be any reason to discredit their testimony only because the name of their slain parents are not there in the charge.

1500. It is obvious from the testimony of Pw-23 and Pw-24, they had not witnessed the killing of their dear ones, but both of them went up to the house of Lichu Podder where they found Kaiser there and Victims had been subjected to torture at the direction of Kaiser but both the Pw's claimed to have heard the subsequent event of killing the Victims from

one Hamdu Mia beneath a banyan tree at *Nalua* Tea garden as per the order of Kaiser.

1501. This very hearsay portion of the evidence about the event of killing of the deceased cannot be disbelieved as Pw-23 asserted in her testimony that, after liberation this very Hamdu Mia had accompanied Pw-23 to the well at *Nalua* tea garden where her father's dead body was dumped after killing and during her such visit, the people in the vicinity asserted her to have witnessed such killing scene which also remained unshaken.

1502. Defence has raised a point in regard to the mode of killing, as Pw-23 in her chief stated to have heard from Hamdu Mia that, following the order of Kaiser, Pakistani Army gunned all the victims down when Pw-24 has referred the name of Firoz Mia and Esad Hazira though order came from Kaiser. So far as regards to the persons, opening fire to the deceased there appears different version on the testimony of Pw's but it should bear in mind that, they had heard it from Hamdu Miah who is now dead and they are narrating the event that occurred 42 years back, so it is quite natural there might have some variation in their hearing but that could not be any point for nullifying the entire event when fact remains, both the witness in a chorus asserted to have heard, Kaiser had ordered to kill the victims which is cardinal here to be adjudged.

1503. Defence has also relied upon a reply of pw-24 and made a point about the probability in committing offence by Kaiser as Pw-24 in reply to cross asserted that, freedom fighters had controlled over their locality in 1971. But solely relying on such stray reply of a pardanashin village lady, whole episode of crime perpetrated on the victims cannot be viewed in negative manner, as control on a certain area by the freedom fighters does not denote their effective control round the clock there.

1504. As Razakers would always look for the chance and choose to sneak to a targeted house and on accomplishing their mission they would make away with their targets in their secret places in a very surreptitious manner. When the case in hand, Kaiser had executed his plan by eliminating the victims not in the area of Pw-24 rather in a remote area far from village *Narapati*. Furthermore, since Defence has declined to cross

examine Pw-25, the son of deceased Md. Mahibullah, who was declared tendered by prosecution, it would transpire that, what Pw-23 and Pw-24 asserted in their respective testimony, he concurred with that and become turned out to be true.

1505. Mode of Liability accused incurred :

Given the above discussion and observations, it has unerringly proved, accused Kaiser actively contributed in the commission of killing of 3 unarmed Civilians and thereby, substantially abetted, facilitated and actively contributed the actual commission of offence of ‘murder’ that constituting the offence of ‘Crimes against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1506. Verdict on Conviction: Having regard to the above discussions based on uncontroverted and unshaken evidences of three close relatives of three deceased followed by submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of ‘murder’ as “Crimes against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1507. Verdict on Sentence: In the foregoing discussion and observation it has been proved that, when the country was at the threshold of gaining independence, Kaiser started intensifying unleashing reign of terror in the entire area of Madhabpur and some parts of Brhammanbaria District with a deep rooted mission to annihilate pro-liberation civilians regardless of their religion so hatched by Military Junta of the then West Pakistan and as a part of their such evil design Kaiser had carried out the plan of his mentor through his cohorts, Razakars and member of ‘Kaiser Bahini’ and killing of three unarmed Civilians, had just portrayed Kaiser’s heinous wrath against the freedom fighters who had just returned home from India to wage battle against the invading forces and local collaborators, It proved.

1508. Kaiser was always terrified about the freedom fighters and the arms they possessed, carried from India, as accused Kaiser knew it well those

arms must be used in eliminating him for his nefarious atrocities he perpetrated against the innocent civilians in his own area and because of that, he at the first instance, enquired about the arms of those three victims. And, as he did not want to invite risk of his own life by keeping those freedom fighters alive, he liquidated the victims through his cohorts bringing them at *Nalua* tea garden-it proved.

1509. There is no doubt about it, Kaiser eliminated three freedom fighters. But before that, Kaiser had hatched a murderous conspiracy to catch the victims first and with that view, called upon them by his Razakars cohorts by giving a false promise that, Kaiser wanted to meet them at Lichu Podder's house which nakedly proved his perfidiousness towards innocent civilians. These three Freedom fighters had not made any harm to Kaiser but they could have contributed for our nation building, though by their premature killing, their family members have become destitute, which Kaiser can never compensate in exchange of anything in the world. Such a great loss to the families and in particular, to the nation can never be fulfilled for which Kaiser is solely responsible.

1510. Accused Kaiser has committed cruelest ever crime by taking away the lives of as many as three freedom fighters only for safeguarding the petty interest and to show blind loyalty to a brutal and barbaric forces of our enemy country. Such sorts of cowardice act towards three innocent unarmed freedom fighters can in no way be taken so leniently who invariably deserves appropriate punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of imprisonment for Life for the crimes of 'murder' as "Crimes against humanity" under section 20(2) of International Crimes (Tribunals) Act, 1973.

1511. Adjudication of Charge no.14

(Killing of four Civilians in the bank of Sonai river upon capture from village Moujpur)

Charge Framed: Succescently, by this charge accused Syed Md. Kaiser has been arraigned for launching attack on leading a group of 40-45 Razakar members, Peace committee members and member of Pakistani soldiers on September 29, 1971 in between 5:00–05:30am and 02:00–02:30pm in the house of freedom fighter, Seraj Ali at village *Moujpur*

under Madhabpur police station, Habiganj and at the instruction of Kaiser 1) Akkas Ali 2) Abdus Satter, 3) Wahed Ali and 4) Seraj Ali were captured and the accomplices of Kaiser and Pakistani Army then started causing torture on the captives and subsequently those captives were brought to the bridge over *Sonai* river, about 03 kilometer far from Moujpur village where they were gunned down to death by Syed Md. Kaiser, his accomplices and the Pakistani Army and their dead bodies were thrown to the river and by that, Syed Md. Kaiser has been charged for participating, facilitating, and contributing the actual commission of killing 03 unarmed civilians constituting the offence of **murder** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1512. Evidence of Prosecution Witnesses :

To buttress the above charge prosecution has relied upon the oral testimony of three witnesses claiming them as sighted witnesses (Eye witnesses). Besides, they have also produced a book titled “*Sylhet-a – Ganahatta*” authored by Tajull Mohammad, publication-1989 as documentary evidence. Now let me see what those witnesses have said in respect of the charge. In such endeavor, Prosecution adduced one **Majeda Khatun alias Jamila Khatun**, the daughter of slain Akkas Ali who deposed as **Pw-26**, as a member of victim family.

1513. While giving her personal account she stated that during war of liberation she had 4 sons and she got married 10-12 years before the war started. One year preceding to liberation war an election was held where Kaiser contested it with a symbol ‘Elephant’ but defeated to Moulana Asad Ali who contested the election with symbol ‘boat’ and in that election both the candidates had come to their village for canvassing, Pw stated again.

1514. In respect of the event she narrated, on 12th *Ashwin*, 1971 she was at her father’s house and at night after having dinner her father, Seraj Mia, Wahed Ali and Satter went to the house of Renu Mia-the son of Seraj Mia for taking sleep there but in the early morning she heard noise as someone

was telling, Panjabi Military had come in search of freedom fighters in the house of Seraj Mia when she rushed there and saw Razakar Kaiser clad in white dress with a pistol in his waist heading towards *Jagadispur* Army camp capturing those 4 civilians.

1515. She went on to state that, seeing this, she, Renu, mother of Renu, Nil Banu and 5-7 neighbors then started following them but on arriving in front of *Jagadispur* Army camp they saw, all the four captives were chained and Kaiser then started causing inhumane torture on her father and his three companions and at one stage those injured captives were made to walk towards the bank of river *Sonai* with eyes folded when she and others also followed them.

1516. On arriving at the bank of river *Sonai* she saw many Pakistani Army and Razakars there and at this, she and the relatives of other captives grabbed the feet of Kaiser and begged for their lives but Kaiser pushed them down and shoved them away –she continued. She then could see all the four captives were lined up and as soon as Kaiser made inkling, instantly Pakistani soldiers gunned them down to death and dumped the dead bodies in the river when she started wailing witnessing most horrible scene of her life-Pw continued further.

1517. After accomplishing such gristly killing of her father and 3 other freedom fighters Kaiser and his accomplices went away and after a short while, she returned near the river to have a glance of her father's dead body when an elderly man standing there, informed them that, the dead bodies were floated in the river and she did never found the dead body of her father- Pw stated further.

1518. After that, she along with other relatives of the deceased then crossed the border and reached at *Katlamara* camp in India where freedom fighter were taking train and met freedom fighter Lieutenant Kabir to whom she informed the brutal killing of her father and his fellow freedom fighters who then rest her assured to take revenge of such killing but after liberation, Kaiser was not found as by then, he fled the country - Pw concluded.

1519. A handful of questions have been put to this Pw but not on material particulars. In reply to a question she stated that *Katlamara* Camp in India where the freedom fighters had taken training was nearly half kilometer away from her husband's house while the bridge over river *Sonai* was situated between *Choumuhuni* and *Montala*. She further replied that, *Mantala* was 3-4 mile away from *Mouzipur* while *Jagadishpur* was 6-7 mile away from *Mantala*. Aside from that, This Pw has given certain suggestion drawing attention to the incriminating part of her chief claiming so to have been disclosed for the first time before this Tribunal which she denied.

1520. Prosecution then adduced one **Renu Mia** son of one of the deceased Seraj Mia deposed as **Pw-27**. It appears from his Testimony, he made totally identical version of what Pw-26 narrated in her chief with exception about the recognition of accused Kaiser. This Pw in his Chief has claimed, he was only 13-14 years old during war of liberation and had worked with his father in household chores.

1521. In recognizing Kaiser, he amongst others stated in his chief that, while a white dressed man had been torturing his father, Seraj Mia and other bringing them at *Jagadishpur* Army Camp he was trying to know the identity of that person torturing when the inhabitants of *Jagadishpur* informed him that, the white dressed person was 'Kaiser Shaheb' and asked this Pw to approach him for his father's rescue and he did so but Kaiser made a hint to one of his accomplices clad in beige coloured outfit who instantly beat him(Pw) black and blue and shoved him away by giving a kick.

1522. In the event of cross examination, Defence appears to have taken a topographical view from this Pw of the places, he has mentioned in his chief as places of events where his father and other captives were brought, subjected to torture and eventually killed. In such question he replied that, *Jagadishpur* was 3-4 mile north from *Mouzipur* and he did not go to *Jagadishpur* via *Montala* rather down to the *haor* (water body became barren land in dry season) and there were some homesteads near *Jagadishpur*.

1523. He further replied that, the river *Sonai* was north to *Jagadishpur* but he did not know its distance though river *Sonai* had been flowing through the middle of villages *Jagadishpur* and *Mouzpur* which was one and half kilometer north of village *Mouzpur*. He went on to reply that, *Katlamara* camp in India was nearly 4-5 mile east of *Mouzpur* and there were homesteads and villages on the way but he could not say the name of the villages. Like Pw-26, this Pw has also given certain suggestions on drawing attention to the incriminating part of his chief claiming so to have been disclosed for the first time before this tribunal which he also denied.

1524. Then comes, **Kazi Kabiruddin** whom Prosecution adduced as hearsay witness deposed as **Pw-1**. What he tried to state in his chief with tearful disposition that after joining in *Panchabati* sub-sector, his co-freedom fighters of that sub-sector who hailed from *Jagadishpur* had informed him, that on September 29, 1971 at dawn accused Kaiser, his Bahini and Pakistani soldiers captured freedom fighter Satter, Razzaque, Wahed Ali and Akkas all of village, *Mouzpur* on be-seizing their house and gunned them down to death on bringing them in the bank of river *Sonai*.

1525. In cross examination, this pw has been given suggestion by the Defence claiming to what he stated in his chief was not true though pw denied such suggestion. Besides, from the book titled “*Sylhet-a-Ganahatta*” authored by Tajull Mohammad, publication-1989, there have been published the name of Akkas Ali and Seraj Ahamed of village, *Mouzpur* as martyrs.

1526. Submission Advanced by the Prosecution:

Quoting to the respective portion of the evidence of two live witnesses who are none but the daughter and son of the deceased, learned Prosecutor at the very onset submits steadfastly that, since they have corroborated each other on core point of capture, causing torture as well as killing of their respective father there cannot be any reason not to find Kaiser guilty with commission of crime as leveled in the charge.

1527. Learned Counsel pointing to the testimony of Pw-26, Majeda Khatun who in a very clear term asserted, “*her father and all his friends*

were the man of Freedom fighter” and then goes on to aver that, Kaiser was hell bent to eliminate the freedom fighters as a part of policy and plan so designed by his notorious mentor, the then Pakistani junta so proved and he had just carried out their such plan when the deceased just fell victim of their collective vicious killing mission.

1528. It is evident from the testimony of those two siblings of deceased Akkas Ali and Searaj Ali that Pw-27 could know accused Kaiser from the villagers of *Jagadishpur* when his father had been tortured mercilessly by Kaiser though Pw-26 knew Kaiser before and she vividly explained how she could know him and such very recognition of Kaiser is absolutely realistic in nature having no reason to be doubted of it –learned Prosecutor argues further.

1529. Pointing to the endeavour of the Defence in taking topographical position of the villages, army camp and river, while cross examining the Pw’s, learned Prosecutor submits that, no deviation can be made on material particulars made in their respective chief on making such question rather reply came out thereof alternatively affirmed the crime to be perpetrated in the crime spots mentioned in the charge.

1530. Finally learned Counsel submits that accused Kaiser had directly participated in the crime as evidence led, he at first captured the deceased from the house of Seraj Mia(also deceased), brought them to *Jagadishpur* Army camp and inflicted torture upon them there and lastly made them gunned down by Pakistani Army bringing them at the bank of river *Khoai* and all these clearly indicates Kaiser in a planned way killed these civilians.

1531. Defence Contention:

Mr. S.M. Shahjahan, the learned Counsel for the Defence in his attempt to refuting the submission of the Prosecution, at first contends, there is nothing in the charge, Kaiser had ever gone to *Mouzipur* village and brought the alleged victims to *Jagadishpur* Army camp and he himself caused torture on the victims and in absence of such vital allegation in the charge, the evidence led in that direction by the Pw’s has got no evidentiary value and thereby prosecution case has been vitiated.

1532. Similarly, in the charge it has clearly been indicated that, the victims were gunned down to death by accused Kaiser, his companions and the army, whereas Pw-26 and Pw-27 who claimed to have witnessed the alleged killing on the other hand, deposed that, at the hint of Kaiser victims were shot dead by Pakistani Army which cast a reasonable doubt about the alleged involvement of Kaiser with the crime and Defence is genuinely entitled to get benefit of such apparent doubt, prevalent.

1533. Learned Defence counsel next argues that, it was not probable for Pw-26 to go and witness the alleged killing of her father at the bank of river *Sonai* because, as per her version in order to go to river *Sonai* from *Moujpur* village it had to be passed through *Mantala* and the distance between *mantala* and *Jagadishpur* was 6-7 miles.

1534. With reference to the reply came out from the cross of Pw-26 who asserted that, ‘during war of Liberation village Mouzpur was the ‘repository of the Freedom Fighters’ and had it been so then it was next to possible for Kaiser or his Bahini or Pakistani Army whatsoever, to venture over that village and capture the deceased –learned Counsel further argues.

1535. Learned Defence Counsel wrapped up his contention by saying that it was absolutely impractical to fathom that, as regular force like Pakistany Army will carry out any order at the hint of mere Civilian, Kaiser by opening gun fire and kill the victims adding that, Prosecution in order to implicate Kaiser with the alleged crime of murder has just invented the story and led the witness thereby.

1536. Analysis of Evidences and Deliberation :

From the trend of submission of the prosecution, it appears to me, they have given optimal stress on the oral testimony of two cited witnesses who happens to be the daughter and son of the deceased Akkas Ali and Seraj Ali respectively. On perusal of the evidences of Pw-26, I find victim Akkas Ali and his three friends were freedom fighters as defence could not discard this very assertion by putting a single question not even making any suggestion on that score. Naturally, question evolves why these persons had become the target of accused Kaiser for liquidation.

1537. It goes without saying, freedom fighters and Pro-liberation Civilians were the main targets of Pakistani invading forces and their local collaborators but as the Pakistani Army were unfamiliar to the freedom fighters and their whereabouts they would have to solely depend on the local collaborators and the man like Kaiser came to their great aid in materializing their evil design. In the foregoing paragraph it has been held that, at the advent of onslaught upon the Bangalee Civilians by the Pakistani Army accused Kaiser had sided with them and started eliminating the proliberation Bangalee Civilians and in that direction unleashed a reign of devastation in his own area, Habiganj and part of Brahmanbaria on forming an anti-liberation militia outfit “Kaiser Bahini” comprising Razakars, peace committee members.

1538. So, the very capture of the freedom fighters and eventually annihilate them from the world was a part of policy and plan designed by the occupation forces where accused Kaiser had been tasked with to carry out their plan. It was vehemently argued by the Defence that, Kaiser has not been named in the charge either in apprehending the victims or causing torture at Jagadispur Army camp but both the Pw’s have testified in that direction going beyond the charge. In this panorama, I have made detailed observation while adjudicating charge no. 13 where I come to a conclusion that, the evidences so placed before the Tribunal will always prevail over to what the contents made in the charge and invariably I do stand by my said decision.

1539. Now, reverting to the evidences of Pw-26 and Pw-27 I find that both the witnesses remained present when their father were first captured by Kaiser from the house of Seraj Mia, they followed their father up to Jagadishpur Army camp where the victims had been subjected to torture again by Kaiser and eventually witnessed most horrible scene of their life when they were gunned down to death at the indication of Kaiser.

1540. On careful perusal of the testimony of Pw-26 and Pw-27 I do not find Defence has put any suggestion to the effect that, those witnesses are not the offspring of the deceased Akkas Ali and Seraj Mia nor it came from the evidences of the Pw’s that those deceased had not been killed during liberation war and more specifically, on the date as mentioned in

the charge and in such a posture, there can not be any shadow of doubt that the victims had been killed at the behest of accused Kaiser as there is no reason to disbelieve the corroborative testimony of Pw-26, and Pw-27 as they are the daughter and son of the deceased and very legitimately be regarded most dependable and credible witnesses.

1541. On close scrutiny of the evidences of Pw-26 and Pw-27 I also find that these two witnesses had hardly faced any ado in recognizing accused, as Pw-26 asserted to have known Kaiser as he(Kaiser) contested the election in the year preceeding to the war of liberation with a symbol 'elephant' which is fact, while Pw-27 was running 13/14 years during liberation war and he sourced the identity of accused from the people hails from village Jagadishpur where his father had been tortured by accused on the date of event.

1542. Their such assertion in identifying or recognizing Kaiser though could not be shaken by the Defence but still, there has been no occasion to disbelieve their such testimony as both have clearly disclosed the very source of their knowledge in identifying accused Kaiser which appears to me trustworthy.

1543. At the same time, whatever Pw-1 has described about the event as a hearsay witness, though in a concise manner, but has corroborated the evidences of Pw-26 and Pw-27 on material point and thereby makes the prosecution case proved. Clearly, the very appearance of the name 'Akkas Ali' showing him martyr in the liberation war in the book titled '*Sylhet A Ganohatta*' so produced by the Prosecution has reinforced the prosecution case though no question has been raised about its authoritativeness by the defence.

1544. In view of the corroborative testimony of both Pw-26 and Pw-27 a question may naturally be crop up about the demise of two other deceased named Wahed Ali and Satter Mia-so named by both the Pw's as nothing could be known about their fate upon capturing as no relatives of these two deceased turned up and testify in support of their killing implicating Kaiser.

1545. It is evident none of the deceased could be traced as their deadbodies had been floated in the river *Khoai* after they were gunned down. It is fact, during war of liberation hundreds of thousands Civilians had fled their homesteads for the fear of life and had to take shelter to different unknown places in the country having no knowledge of their whereabouts by their dear ones who might have been killed by the occupation forces and innumerable dead bodies of such unidentified civilians either had to be dumped in a mass grave as unidentified corpses or had been floated in the river and it was the ground reality at that war-torn juncture and those two deceased, Wahed Ali and Satter Mia had met such cruel eventuality having no knowledge to their family but only for that, there can not be any reason to infer that they had not been killed or vitiate the prosecution case in any manner.

1546. Mode of Liability accused incurred :

Regard being had to the above discussion and observations, it has unerringly been proved, accused Kaiser actively contributed in the commission of killing of 4 unarmed Civilians and thereby, substantially abetted, facilitated and actively contributed the actual commission of offence of ‘murder’ that constituting the offence of ‘Crime against humanity’ as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1547. Verdict on Conviction: In the given discussions based on uncontroverted and unshaken evidences of two blood relations of the deceased in concert with corroborative evidence of one hearsay witness followed by submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of ‘murder’ as “Crime against humanity” and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1548. Verdict on Sentence: It clearly depicts from the heartrending testimony of both the daughter and son of two slain freedom fighters that, they had begged for the life of their respective fathers grabbing Kaiser by the feet but cruel Kaiser kicked and shoved them away. And this very

brutality towards a son and a daughter before the very eyes of their captive's fathers clearly portray how ferocious and unkind Kaiser had emerged during war of liberation for eliminating the freedom fighters. Definitely, Kaiser held the position of authority either to set them free or prevent the Pakistani Soldiers from killing them, else those two offspring of the deceased would not have craved him for their father's life.

1549. His wielding of such enormous position has further been consolidated as the Villegers of *Jagadishpur* present there had asked Pw-27, son of deceased, Seraj Mia to beg Kaiser for his father's release making him assured by saying 'that would work'. Kaiser mulled over the deceased as a threat of his own life for his grievous atrocities he unleashed in the area by harbouring Pakistani soldiers on taking their side and did not spare any time to annihilate them soon after their capture in the cruelest ever manner in the very presence of their daughter and son.

1550. The very killing of four unarmed civilians, had just portrayed Kaiser's abominable wrath against the freedom fighters as he did not think of remaining them alive though it does not appear from the testimony of the Pw's that these four deceased had ever taken any move or conspired of making any harm to Kaiser. By all account, it has abundantly been proved, Kaiser directly participated in eliminating those four freedom fighters through Pakistani Soldiers.

1551. But it is of great shock to the offspring of those deceased, as they had not even been allowed to have a glance of their father's dead bodies after their brutal killing perpetrated right before their eyes. Even, Kaiser did not hesitate to dispose of their dead bodies by floating so in the river *Khoai* so as to, no trail of his barbarity remain left but such deprivation will pain these Pw's for the rest of their life.

1552. Accused Kaiser has committed hideous ever crime in a dastard manner by taking away the lives of four innocent civilians only to appease the brutal and barbaric forces of the then West Pakistan. Justice demands, an appropriate punishment to be meted out to the accused for his barbarous act towards four innocent, unarmed Civilian. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of

imprisonment for life for the crimes of ‘murder’ as “Crimes against humanity” under section 20(2) of International Crimes (Tribunals) Act, 1973.

1553. Adjudication of Charge no.15

(Killing of Md. Nazimuddin at Army Camp at *Shahjibazar Biddut Kendra*)

Charge Framed: By this charge accused Syed Md. Kaiser has been indicted for picking one Nazimuddin in his jeep at Shahpur road and brought him to his house at any day during mid of the month of October, 1971 after 5:00pm and kept him detained and tortured there for one day and subsequently brought the victim to Army Camp at Shahjibazar Biddut Kendra where he was kept detained for another 20 days and was subjected to torture and eventually he was brutally killed by ‘Kaiser Bahini’, Razakars and Pakistani Army led by him, Kaiser and the dead body of the victim was buried behind the Biddut Kendra and by that, Syed Md. Kaiser has been charged for participating, abetting, facilitating, and substantially contributing the actual commission of killing 01 unarmed civilian constituting the offence of **murder** as ‘Crimes against humanity’ as specified in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1554. Evidence of Prosecution Witnesses:

To support the said charge prosecution has relied upon the oral testimony of one Witness and a publication named ‘*Associates of Pakistan Army 1971*’ written by A.S.M. Shamsul Arefin as well as a book titled ‘*Shei Razakar*’- a Janakantha publication as documentary evidences. Prosecution adduced Kazi Kabiruddin who deposed as Pw-1. While giving his personal account he stated to have joined the war of Liberation and fought under the command of ‘S’ force. In narrating the event, he stated that on 11 October, 1971 his Commander Captain Nuruzzaman deputed 21 member guerilla group headed by Shafique Chodhury at Nasirnagar area assigning him to help the said group to reach there and in that very night while he was returning upon making the group get in their destination he came across a guy named Nazim standing in side the forest

upon having been alienated from that guerilla group while he went out to a natural call.

1555. He went on to state that, he then accompanied Nazim to his camp and on the following morning he on accompanying Nazim and his forces moved *Shahpur* area and sent Nazim alone to locate the whereabouts of Kaiser keeping himself waiting at a spot. He further stated that, at one stage, he could see through his binocular from the top of that *sal* forest, some men grabbed hold of Nazim and instantly a jeep carrying Kaiser stopped there and upon getting down from the jeep he started slapping Nazim and at last, upon picking him on the jeep Kaiser drove towards *Noapara*.

1556. He further stated that, after Nazim being apprehended, he and his accompanying forces then fell back and took shelter at a nearby tea garden and after dusk, set off for their camp. Pw further stated that, some time after liberation when he returned home one Afseruddin Mahalder introducing himself as the father of Nazim told him that while his son Nazim had come to his house as per his (Pw) advice, Kaiser and others apprehended him and brought him to Kaiser's house at *Noapara* and inflicted inhumane torture on confining there.

1557. He went on to state that, the father of Nazim had further disclosed him that, a 100 year old grandfather of Nazim went Kaiser and begged Kaiser for his release even in exchange for his own life but it did not work, rather Kaiser handed Nazim over to Pakistani Army at *Shahjibazar* Army Camp where he had been tortured brutally to death on keeping him (Nazim) confined there for 20 days.

1558. Nazim's father had further disclosed him that, Nazim was the student of *Brindaban* College, Habiganj and after liberation a hostel of that college was named after Nazim but the name of Nazim was removed from that hostel after Kaiser became minister, pw concluded breaking down in tears.

1559. On going through the cross examination, it appears that drawing attention to some portion of revelation the father of Nazim told this pw about cruel torture being perpetrated on Nazim, a suggestion has been put

to this Pw claiming those to be untrue which he denied. Besides, on examination of '*Associates of Pakistan Army 1971*'- a publication authored by A.S.M. Shamsul Arefin, it depicts from page 93, freedom Fighter Nazim was tortured to death by Kaiser Bahini on confining 21 days at his camp on apprehending him from a hideout.

1560. Likewise, it is found from the book named '*Shei Razakar*' (at page-223-224 pointed out by the Prosecution) Nazim was second year intermediate student of *Brindaban* College, Habiganj and he went to India for waging in the liberation war and after completion of training he entered in to Bangladesh with freedom fighter, Shafique Chowdhury and took shelter at *Raghunandan* hill. He along with his fellow freedom fighter, Faruque was assigned to blow up the den of Pakistani army and Razakars stationed inside *Shajibazar Biddut Kendra* and were posted there but as he became hungry then, he went to his village home but on getting this information of his arrival, Kaiser Bahini apprehended him and took him to *Shajibazar Biddut Kendra* where he underwent inhumane torture for successive 21 days and at one stage they shot him dead.

1561. Submission advanced by the Prosecution:

On taking us to the relevant portion of the evidence of Pw-1 where he narrated of spotting Nazim inside the sal forest (*Shal bon*) and subsequently sent Nazim to collect the location of Kaiser inside the sal forest when he captured by Kaiser, assaulted him and took him away, learned Prosecutor submits that, these very assertion of Pw-1 can not be disbelieved as he is a sighted witness in the event and being a freedom fighter he(Pw-1) had assigned certain duty to his co-freedom fighter, Nazim and he had naturally followed his(victim) movement.

1562. Learned Prosecutor next argued that, though this Pw heard the subsequent eventuality of Nazim from his father, Afseruddin Mahalder but there is a nexus of his version with that of what he had heard from Afseruddin Mahalder that ultimately culminated with the killing of Nazim and in both the occasions, Kaiser played a pivotal role from capturing to killing of Nazim. Learned Counsel goes on to submit that, though from the testimony of Pw-1 it does not appear, Afseruddin had ever witnessed

the subsequent event of brutal torture being perpetrated upon his son that led to his son's death or craving to Kaiser by his father (Afser's father) for his son's release but attending circumstances suggests, a father at least can not give false statement concerning the death of his son.

1563. Learned Prosecutor with giving reference to the documentary evidences, further argues that, in both the documents produced by the Prosecution supporting the charge, it has been established that, Nazim was a Freedom fighter and 'Kaiser Bahini' had captured him and taken to *Shahjibazar* Army camp where he was shot dead on confining him there for about 21 days and since accused Kaiser had led Kaiser Bahini, there can not be any ambiguity that none but Kaiser had masterminded such killing.

1564. From Cumulative reading of the oral testimony of Pw-1 and of documentary evidences it has manifested, Nazim had been captured and subsequently been killed by accused Kaiser- learned Prosecutor concludes.

1565. Defence Contention at Summing up:

In refuting the above submission, learned Defence Counsel steadfastly contends that, there have been stark contradictions in regard to the very capture of Nazim surfaced in the very testimony of Pw-1, in as much as, in chief Pw-1 stated to have witnessed through his binocular, Kaiser Picking up Nazim from inside the forest but in the chief he also claimed, Nazim's father divulged him (Pw-1) that, Nazim had been captured from his own(Nazim) house whereas, charge speaks 'Kaiser Bahini' had apprehended Nazim from his house and this very glaring contradictions on material particular in one's chief noticeably shifting from that of the charge has definitely made the charge doubtful and invariably, defence is entitled to have the benefit of such doubt.

1566. On pointing the book '*Shei Razakar*' learned Defence counsel next submits that there appears different version about the objective of Nazim in stepping inside the village, as Pw-1 in his chief asserted that, he sent Nazim for collecting information about the location of Kaiser whereas, it figured from page no.224 of that very book, Nazim was sent

to blow out the den of Razakar and Pakistani army stationed inside *Shahjibazar Biddut Kendra* and these very apparent discrepancy in the evidences on cardinal point has undoubtedly proved that, prosecution has failed to led the charge.

1567. Analysis of Evidences and Deliberation:

In the charge accused has been arraigned for instructing his Bahini to capture Md. Nazimuddin from his house and subsequently led the Bahini also in killing the said victim at Army Camp stationed inside *Shahjibazar Biddut Kendra*. From the plain reading of the chief of Pw-1, I find that victim had not been apprehended from his house rather from inside the forest (*Shalbon*). Then, Pw-1 further deposed, Kaiser himself apprehended the victim on spotting him inside the forest and took out him boarding in his car when his younger brother Faisal was with him but the charge speaks otherwise.

1568. Even, the father of Nazim, Afseruddin Mahalder had also disclosed to Pw-1 by saying, while his son was apprehended Kaiser was there revealed Pw-1 further which is plainly opposed to the charge too. Curiously enough, in the publication named "*Associates of Pakistan Army 1971*" I find from page no.93 that, Nazim was arrested from the hideout. Such sorts of glaring anomaly surfaced in the evidences on material particular must have made the prosecution case doubtful.

1569. Moreover it is next to believe, Nazim had followed the order of Pw-1 to let him know the location of a man like Kaiser from an unfamiliar place for him on the very next day of his acquaintance with Pw-1 who as per Him(Pw-1) had been alienated from his 21 guerrilla group. Learned Defence Counsel has raised two very vital points about the conspicuous shortcomings of the Prosecution case which I think appropriate and fully concur with his such contention.

1570. Mentionable, charge speaks, accused Kaiser led 'Kaiser Bahini' in the brutal killing of Nazim, meaning Kaiser directly participated in the killing but no where in the entire evidences either oral or documentary his involvement can be found out. Even, I find totally different version about the fate of Nazim as, it reveals from the testimony of Pw-1 to whom

Afseruddin Mahalder (the father of Nazim) disclosed the episode of his son's ordeal saying 'Kaiser and others had handed his son over to Pakistani Army at Wapda Camp, Shahjibazar where he was tortured to death confining him there for 21 days'.

1571. If I take the revelation of Nazim's father to be true then it clearly denotes, Pakistani Army had killed Nazim. The father of Nazim naturally be regarded as most dependable as well as credible witness as his son had been killed but his such revelation is totally contrary to the prosecution case. . By all accounts, it can legally be perceived that, the evidences of Prosecution witnesses as well as documentary one are riddled with vast contradiction through which it can not be said that, prosecution has been able to prove its case beyond reasonable doubt which is *sine qua non* for the prosecution.

1572. Conclusion:

Given the above glaring loopholes, it is my considered view that, Prosecution has utterly failed to discharge the burden of proving its case. Hence, accused Syed Md. Kaiser is found **not guilty** of the offence of killing of 01 unarmed Civilian constituting the offence of 'murder' as "Crimes against humanity" as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, he be acquitted of the charge.

1573. Adjudication of Charge no.16

(Mass Killing of 108 Hindus in 22 villages under Nasirnagar Police station, Brahamanbaria)

Charge Framed: Accused Syed Md. Kaiser has been indicted for launching attack directing civilians at village Darua Nishchintapur and twenty two other villages under Nasirnagar Police station, District Brahammanbaria by leading a group of members of Razakar, Peace Committee, "Kaiser Bahini" and Pakistani Armed Forces on 15 November, 1971 in between 07:00- 07:30am and 03:00 -03:30pm, 1971 and created horror by indiscriminate gun firing around the crime sites by setting houses on fire, looting households of civilians with intent to eliminate Hindu religious community, either whole or in part and in conjunction with those horrendous event the perpetrators killed 108

unarmed civilians belonging to Hindu Community of those Villages and by that, Syed Md. Kaiser has been charged for participating, abetting, facilitating, and substantially contributing the actual commission of killing 108 unarmed civilians belonging to Hindu Community constituting the offence of **Genocide** or in the alternative for participating, abetting, facilitating, and substantially contributing the actual commission of offence of '**Extermination**' as 'Crimes against humanity' as specified in section 3(2)(a)(c)(g)(h) of the International Crimes Tribunal Act, 1973 on incurring liability under section 4(1) of the Act that are punishable under section 20(2) of the Act.

1574. Evidence of Prosecution Witnesses :

To lead the above charge prosecution has relied upon the oral testimony of 5 witnesses and some documents too. In line with such scheme, Prosecution first adduced one **Abdul Matin alias Jamal** testified as **Pw-16**. This witness hails from Village- Guniaok where Kaiser's maternal uncle named Hazi Manjur's house is also there. He knew Kaiser before as he often came to his maternal uncle's house and in the year 1970 he contested the election as an independent candidate but in that election his contender, Moulana Asad Ali, from Awami League came out victorious. He stated, in the midst of war of liberation he went to India and after taking training there he returned to Bangladesh and fought as a freedom fighter.

1575. He began with the description that, on 15 November, 1971 at 7:00-7:30 in the morning staying at Chitna he saw smoke billowing from the village Daura and heard the gunshot and in such a situation, he at 9:00 - 09:30 am along with his 5-6 member group took refuge at a cremation center from where he also heard gunfire and saw flames lit up the sky from the direction of *Gutma* village. He goes on to state that at this, he could see Kaiser accompanied by his 40-50 member Kaiser Bahini was marching towards village *Chitna* by chanting slogan '*Naraye Takbir Allaho Akbar*' and '*Pakistan Zindabad*' when 40-50 Pakistani Soldiers had followed them who then stopped at the intersection of *Deijuri* of *Khasti* river among whom he could recognize Razakar Tajul, Jadge Mia of Village *Haripur* along with some Razakars of his area.

1576. Bifurcating the accompanying group in two sub-groups, Kaiser then sent one group towards the village, *Burunga* and leading other group he marched towards village *Chitna* and at around 12:30pm he heard the gunshot from *Chitna* direction and saw flames lit up the sky and after sometimes, he also heard the gunshot and saw flames lit up the sky from *Burunga* village also—Pw stated further. The gunshot continued for nearly an hour when he came to learn from the fleeing civilians that, Kaiser and his accomplices were moving towards Nasirnagar when he and his group members came out from the hideout and then took shelter at *Bibir Darga*, east side of village *Gutma* at 4:00pm and stayed there overnight —Pw continued further.

1577. On the following morning, he went to the house of Zitu Mia of *Chitna* and heard horrific atrocities from him and his father and around 7:00am his group, he and Jitu Mia surreptitiously went out to see for themselves the carnage wrecked at village *Chitna*, *Burunga*, *Gutma*, *Nishchintapur* and *Daura* and found 31 civilians killed in those 5 villages and it took around 2 hours to visit those villages—Pw stated further.

1578. Leaving Jitu mia at his house, he together with his group then reached the house of Ramiz Mia of *Laxmipur* where he came to learn from the Freedom fighters assembled there, that on 15 November accused Kaiser, his Bahini and Pakistani Army had launched attack nearly in 22 villages under Nasirnagar Police station and killed more than 100 civilians who predominantly belonged to Hindu religion and those villages were also dominated by Hindu community—Pw concluded.

1579. From cross examination it appears, mainly questions have been put to this Pw about the distance, position and way of communication between six different villages he mentioned in his chief and that of the village, *Guniaok* this Pw and maternal uncle of Kaiser hails. Besides, in reply to another question he mentioned the name of Freedom fighters both of Madhabpur and Nasirnagar area who en-masse went to India for taking training there and subsequently fought as freedom fighters for freeing this country from invading forces on returning from India.

1580. In another reply, he stated that, out of 31 deceased killed in 5 different villages he disclosed in his chief, some of them had children and some of those had none adding further that, he had no idea whether there remain any heir of those off springs of the deceased. Besides, drawing attention to the incriminating part of the chief where this Pw described of launching attack in 6 different villages, killing as many as 31 civilians, Defence has made suggestion claiming those allegations untrue -which pw denied.

1581. Prosecution then adduced **Md. Azharul Huq** who deposed as **Pw-31**. While giving his personal account, he stated that, during liberation war he was a twelfth grader at Brahammanbaria Government College. In the election held in 1970 his elder brother Mozammel Huq alias Kaptan Mia contested for the member of Provincial Assembly and won the election as an Awami League candidate against whom Moulana Ashraf Ali from Nezame Islam contested and in his favour Monjur Ali, maternal uncle of accused Kaiser had campaigned.

1582. He stated further that, in the last part of the month of April, 1971 accused Kaiser held a meeting at the house of his maternal uncle at *Guniaok* and formed 'Peace Committee' and subsequent to that, he also formed "Kaiser Bahini" with the inhabitants of his own village, *Noapara* also staying at the house of his maternal uncle, *Guniaok*. Alike Pw-16, he also went to India for taking training and on completion training there, he returned to Bangladesh in September, 1971 and fought as Freedom fighter.

1583. In narrating the event, he stated that, on returning from India he took shelter at the house of one Abdul Hamid of village *Dharmandal* and after staying there for several days he then went to the house of Bacchu Chairman of village *Fandauk* on 14 November, 1971 from where he came to learn from sources that, Kaiser Bahini, Razakar Bahini and members of Pakistani Army will launch a massive crackdown combindly in Nasirnagar thana area and having been so informed, he along with his 10-12 co-freedom fighters then went to his village home, *Nurpur* and found many civilians including freedom fighters gathered there.

1584. On that very night, he along with his co-freedom fighters then went out his house and reached a place named *Kukuria*, 01 kilometer off his house and took shelter inside a bush in the bank of a canal. This Pw went on to state that, on the following morning around 8:00- 09:00am he could see through his binocular, nearly 150 members of Kaiser Bahini, Razakar Bahini and members of Pakistani Soldiers entering their village and moment thereafter, started indiscriminate gun shots when the villagers kept running helter-skelter.

1585. He could also see the members of Pakistani Army were torching his house and after some times, the accomplices of Kaiser also set the houses of Hindu community lived in his village ablaze resulting in the houses of Roy (*Roy Bari*), Doctor Chunilal's house and numerous house of Hindu community burnt in to ashes-Pw-stated further.

1586. He further revealed that, around 4:00-4:30 pm he saw Kaiser, his Bahini and member of Pakistani army departing through the road run on the eastern side of the village and being assured of their leaving the village he returned his home around 09:00 in the night and found her mother ailing who then informed him that, the member of 'Kaiser Bahini' caused her injuries with the rifle butt and also killed his(pw) nephew(*Vagina*), Azizul Huq and asked him to go elsewhere as the house was not safe for his stay and instantly he again went back to the bank of the canal at *Kukuria* and on the very following morning he returned to his house.

1587. On arrival he came to learn, on the preceding day as many as 10-11 civilians had been killed in his village by the Kaiser Bahini and among them he could remember the name of Torab Ali, Shukkud Ali, Azizul Huq, Shiru Mia, and Zummut Ali and others. He further came to know that, on the very day of devastation the daughter of Chunilal named, Kalpana had been picked up from her house and was killed after being raped and her dead body was dumped at the cremation center- pw stated further.

1588. Pw next stated, on the day of atrocities as many as 108 innocent civilians of 22 villages including his village *Nurpur* had been killed,

burning down nearly 400 houses and all those deceased and burnt houses mainly belonged to Hindu community. He knew Kaiser since 1970 as he contested the election as an independent candidate for provincial assembly from his(Kaiser) area, Madhabpur with symbol 'elephant ' and since Madhabpur was a big business place he used to go there for shopping and came across him-Pw concluded.

1589. It appears from the cross examination, mainly questions have been put to this Pw about the distance, position and way of communication from Nasirnagar to different villages namely Dharmandal, Fandauk, Nurpur, Purbavag, Haripur and those of from Dharmandal to Fandauk as well as from Nurpur to Madhabpur and Noapara he mentioned in his chief. In reply to another question he recollected the name of three co-freedom fighters out of 10-12 freedom fighters he had mentioned in his chief. He replied further that, 95-98% people of his area had supported Awami league in 1971 and there remained many villages in between Nurpur and Haripur.

1590. In reply to another question he stated, in the first part of the year 1971 his nephew, Azizul Huq had run small business staying in Dhaka whose village house was nearer to his house. He then went on to reply that, after coming back from India he stayed nearly one and half month at village *Dharmandal*. Denying a suggestion he asserted that, he had neither gone to India with his two elder brothers instantly after the war of liberation starts nor he returned home from India after war of liberation is over.

1591. Apart from that, drawing attention to the incriminating part of the chief, to the extend of what this Pw described about launching arson attack in his village , causing torture of his mother and killing of his nephew Azizul Huq, Defence has made suggestion claiming those allegations untrue -which pw denied.

1592. Then comes **Tajul Islam** who hails from village, Haripur and claimed to have joined 'Kaiser Bahini' and took part in different atrocious acts as an accomplice of 'Kaiser Bahini' testified as **Pw-3**. While describing the event he stated that, on November 15, 1971 around 8:00 in

the morning Kaiser, his Bahini, Razakars and members of Pakistani Army besieged nearly 21-22 villages that includes village *Kargao, Burunga, Chitna, Alagpur, Laxmipur Tilpara* and started indiscriminate gun fire and set some of those villages on fire which continued till 3:00 pm where he himself participated.

1593. This Pw further stated that, those villages where the atrocities were being perpetrated comprised of both Muslim and Hindu and on the following day he came to learn from the common people, as many as 108 civilians had been killed on such attack.

1594. It depicts, no question on materials particular have been put to this Pw while cross examining him but drawing attention to the incriminating part of the chief Defence has made suggestion claiming the allegations about launching arson attack in 22 different villages, by Kaiser and his accomplices that resulted in 108 civilians dead on involving him with such atrocities to be untrue -which pw denied.

1595. Prosecution next adduced Kazi Kabiruddin who took part in the war of liberation as Freedom Fighter deposed as Pw-1. In his chief he stated that, in the night following 15 November, 1971 he came to learn that, Kaiser, his Bahini, Razakars, Member of Peace Committee and Pakistani Army on surrounding as many as 22 villages under Nasirnagar thana launched an arson attack and killed as many as 108 civilians who were mostly belonged to Hindu religion. In reply to cross examination this Pw stated that, he could not specify the name of all the 22 villages he referred to in his chief except the village *Daora, Fulpur, Nurpur, Nishchintapur, Gutma* which were north to Nasirnagar sadar thana.

1596. To support the case, prosecution has finally adduced **Golam Nur** who hails from village Haripur under police station-Nasirnagar claimed to have gone to India in the last part of the month April, 1971 and returned to Bangladesh in the first part of the month of February, 1972 deposed as **Pw-13**. From his testimony it appears that, he is mere a hearsay witness. As regards to the event he stated that, after coming back to the country he came to know, Pakistani army, Kaiser, his Bahini and Razakars launched a combined attack in 22 villages of Nasirnagar police station on 15

November, 1971 around 7:00-7:30am and looted the house holds, torched the houses of those villages and killed 108 civilians mostly whom belonged to Hindu Community.

1597. Drawing attention to the incriminating part of the chief, that is to say, to what he heard about launching arson attack and killing of 108 civilians implicating Kaiser in committing those crime, Defence has made suggestion claiming those to have been disclosed for the first time before the tribunal -which pw denied.

1598. Besides the oral testimony of those Pw's, Prosecution has also placed its reliance on the book titled '*Muktejuddeh Brahammanbaria*' where at page 162 and 189 there have been description of looting and arson attack perpetrated predominantly in the houses of Hindu community and killing host of civilians in concert with outraging women in different areas of Habiganj and Nasirnagar by 'Kaiser Bahini' that continued from the month of May till 1st week of December, 1971.

1599. Prosecution in its bid to make the prosecution case proved has also relied upon another book titled "*Muktejuddher Sharok Chitra Nirjatan-O-Ganahatta*" authored by Joydul Hossain where elaborate description of horrendous atrocities in particular, looting, arson attack and killing to the members of Hindu community perpetrated combinedly by the Pakistani army, Razakar and Kaiser Bahini in the villages of *Daura*, *Nishchintapur*, *Gotma* and *Burunga* have found place at page 50-52 of that book.

1600. Submission advanced by the Prosecution at summing up:

At the very outset, learned Prosecutor submits that, all the witnesses in their respective testimony have proved the charge beyond any shadow of doubt and suggested the accused has committed 'genocide' and is liable to be punished thereby. Pointing to the evidences of Pw-16 learned Prosecutor further argues that, this very sighted witness has vividly narrated how horrible atrocities have been perpetrated in 6 different villages which he physically visited instantly after carnage took place spotting 31 dead bodies and the Defence has rather affirmed such killing

in cross examining by putting question about the existence of the heirs of those deceased.

1601. Learned Prosecutor goes on to argue that, there have been another ocular witness named Azharul Huq (deposed as Pw-31) in the sense, he had witnessed how Kaiser, his Bahini, Pakistani Army, Rajakars totaling 150 combatant personnel forcefully rolled in to their village and started rampage there. This Pw stands a relative of victim's family as his nephew named Azizul Huq was killed and his elderly mother had been tortured by 'Kaiser Bahini'. In the upshot of horrific crackdown perpetrated in his village *Nurpur*, 11 civilians had been killed and this Pw has specified the name of some of those deceased.

1602. Learned Prosecutor further submits that, this Pw also claimed to have heard the killing of 108 innocent civilians in the said carnage perpetrated in 22 different villages predominantly belonged to Hindu community by combined forces of Kaiser Bahini, Pakistani Army and Razakars. Apart from that, he also described the killing and dumping of Kalpana, daughter of Chuni Lal on being sexually ravished.

16043. Evidence on record shows, defence did not discard any of those allegations referred to above so leveled against the accused other than putting ordinary suggestion in the form of cross examination making the assertion of the Pw with regard to killing of 11 civilians in his village and in particular, 108 civilians in 22 villages true. Because in that suggestion no question and even no suggestion have been put by the defence in regard to the number of villages and figure of death.

1604. Giving much stress to the oral testimony of Pw-3 learned Prosecutor then averred that, his testimony alone proved the truthfulness of the atrocities perpetrated by accused Kaiser for which he stands trial, as this Pw in clear term asserted 'I was with the Kaiser Bahini'. Learned Prosecutor goes on to submit that, the very description of this Pw made in his chief clearly portrayed the brutality of Kaiser and 'Kaiser Bahini' in committing devastation in the villages he moved on the date of event as an accomplice of Kaiser.

1605. On the very acceptability of evidences of two hearsay witnesses namely, Pw-1 and Pw-13 learned Prosecutor argues further that, though they stated to have heard the event but since their respective testimony has corroborated the evidences of the sighted witnesses on perpetration of the event as figured in the charge, thus it can patently be concluded that their testimony is based on fact and prosecution has proved its case by reliable witnesses.

1606. Giving reference to the documentary evidences, learned prosecutor further argues that, the very write up incorporated there in the respective books also bear the testimony of the gruesome atrocities Kaiser and his Bahini perpetrated in 22 villages killing 108 civilians, looting house holds and tearing down innumerable houses which has consolidated the prosecution case.

1607. Defence Contention at Summing up :

Refuting the above arguments so advanced on the part of the Prosecution, learned Counsel for the Defence vehemently contents that, the testimony of Pw-16 absolutely opposed to the reality, as he in his chief claimed to have visited 6 different villages in two hours to see for himself the alleged massacre caused by Kaiser and his accomplices which is totally improbable for any human being and as such, his such testimony can not be believed. Learned Counsel next contends that, it was also next to possible for Pw-16 to identify Kaiser away from 150 feet, though he claimed to have seen Kaiser at *Deujuri* intersection 150 feet off the cremation ground where pw kept himself concealed – which is also beyond reality.

1608. Terming the testimony of Pw-3, Tajul Islam as evasive one, learned Defence counsel then contents that, though he claimed to have participated in the alleged operation as an accomplice of ‘Kaiser Bahini’ but he could not name any deceased or the owner of any gutted house which proves that he is mere a chance witness and his alleged testimony lacks any evidentiary value.

1609. Further, learned Defence counsel contends that, though Pw-31 claimed to have witnessed burning of his village home at *Nurpur* keeping

himself at *Kukuria* through a binocular but how he became certain about the killing of 108 civilians and burning of 400 houses could not be sourced leaving his testimony totally superfluous one.

1610. Referring to the testimony of Investigation Officer (shortly, IO) deposed as Pw-32, learned Defence Counsel pointed out that, as per IO, she recorded the statement of as many as 38 persons representing victim family during her investigation out of which she deposited the statements of only 8 persons to the Prosecution who have been shown as witnesses. But fact remains, only one witness (Pw-31) turned up and deposed before the Tribunal which creates reasonable doubt about the veracity of prosecution case as had the remaining 7 witnesses appeared they would not have supported the prosecution case- learned Defence Counsel argued.

1611. Similarly, it is the prosecution case the alleged massacre has been perpetrated in 22 different villages under Nasirnagar Thana when IO admitted to have visited only 8 villages thereof, then how could she collect the name of 108 deceased and became sure about their death remains unanswered –which prove the charge totally baseless-learned Defence Counsel contended further.

1612. By referring to the Book “*Muktejuddeh Brahammanbaria*”(Produced by Prosecution) learned Defence Counsel contends that, in that book the date of event has been cited on November 10-11, whereas in the charge it has been mentioned on November 15 and such major discrepancies as regards to the date of event has invariably vitiated the prosecution case. Learned Defence Counsel wrapped up his part by submitting that, prosecution has become unsuccessful to lead the charge and certainly failed to link accused Kaiser with the commission of crime either Extermination or Genocide as well.

1613. Analysis of Evidences and Deliberation:

I have given an anxious thought in the invaluable submission of the learned counsel of the parties and perused the evidence on record including the documents so produced by the Prosecution very meticulously and considered their sincere effort with utmost importance.

1614. Precisely, on plain reading of the charge, it appears to me, accused Kaiser has been arraigned for killing 108 civilians mostly belonging to Hindu community by making devastation in 22 villages under Nasirnagar thana (police station) and in line with that, charge of 'genocide' or in the alternative 'extermination' has been leveled against him. On careful examination of the oral testimony, I find Pw-16, Pw-31 and Pw-03 as eye witnesses out of whom Pw-16 and Pw-31 had witnessed the event keeping themselves holed up in hideouts, whereas Pw-3 himself participated in the event as an accomplice of accused Kaiser.

1615. Besides, them Pw-1 and Pw-13 stood as hearsay witnesses who described the event on hearing the same. Aside from that, prosecution has relied upon some documents where event related facts have been illustrated. From the testimony of Pw-16 who hails from *Guniaok*, the village home of Hazi Manjur Ali, maternal uncle of Kaiser I find that, the launching of attack kicked off from there and spread out in different villages. This Pw from his hide out at *Chitna* heard the gunshot and saw flames lit up the sky from the village *Gutma* as well as witnessed the very movement of accused Kaiser towards village *Chitna* on sending out another group at *Burunga* direction and also experienced same crackdown as of village *Gutma* moment after the groups rolled in to those two villages.

1616. He himself saw the devastation visiting five such villages wrecked by Kaiser, his Bahini, Razakars and Pakistani Army spotting 31 dead bodies there. It has been proved, accused Kaiser had led such attack coming out from his maternal uncles house at *Guniok* as it was quite possible for this Pw to recognize Kaiser from his hideout, who stood 150 feet away from his hideout as he knew and saw Kaiser since long though such assertion of the Pw remained totally unshaken by the defence.

1617. It was also fairly possible for this Pw to visit five such villages with in a span of two hours as it depicts from the reply by the pw in cross, all those five villages were stretched with in one and a half kilometer though at the time of such life danger a person will naturally opt for short cut way and will not waste time in the killing spot on making gossip with others. Apart from his personal glimpse on horrible atrocities perpetrated, he also

heard from the freedom fighters gathered at village, Laxmipur similar sorts of wreckage had been committed in 22 villages under Nasirnagar Police station killing more than 100 civilians.

1618. I also do not find any implausibility regarding number of villages, figure of death as well as source of his knowledge because it was not humanly possible to go every villages and to reckon each and every dead bodies at that murderous juncture when mass destruction on the civilians was being carried out but it can simply be deduced the information he (Pw-16) gathered is well founded in comparison to what Pw himself had garnered from five villages.

1619. More over, this Pw though in his chief has not mentioned the identity of 31 deceased he found in 5 different villages on visiting those devastated villages after the carnage is perpetrated but Defence by questioning the existence of their heirs in cross, invited reply thereof and has alternatively affirmed the killing of 31 civilians in 5 villages.

1620. From the testimony of Pw-31 who being the relative of victim's family I find that he only witnessed the devastation perpetrated in his own village, *Nurpur* on staying at the bank of a canal of village *Kukuria*. There is no reason to disbelieve the killing of his nephew, Azizul Huq and causing torture to his elderly mother at that crackdown.

1621. Apart from that, in his testimony he stated to have heard the killing of 10/11 civilians in his village mentioning the name of five such deceased out of them. His very testimony of killing of 10/11 natives at his own village cannot be brushed aside rather be taken as true. Because it is commonly perceived, as an inhabitant, he was supposed to know the name of his co-villagers.

1622. His testimony clearly proves so, as long after 42 years of passing through a terrible ordeal he could even recall the name of 5 such deceased of his village, as naturally memory faded with the passage of time and he is no exception to that ground reality and what he has revealed, it is more than acceptable and I think, by reminiscing the name of five deceased long after four decades this Pw has proved, that 10/11 civilians of his own village had been killed on the date of event.

1623. With the testimony, Pw-31 further claimed to have heard about the killing of 108 civilians in 22 Villages destroying nearly 400 houses which predominantly belonged to Hindu community. I think his testimony got basis. First of all, he did not claim to reckon the deceased or the houses burnt down in the carnage moving around 22 villages and it was not humanly possible at a time when everybody was on the run for saving their own life. In such a critical juncture it is to be deduced the veracity of fact from the surrounding circumstances and I find it's proof from the testimony of Pw-16 who himself visited as many as five different villages and found 31 dead bodies.

1624. Even from the testimony of this Pw I find 11 civilians had been killed in a single village, Nurpur. So if the above statistics are taken in to account and make assessment, the very testimony of this Pw about the figure of death, and number of houses burnt down in 22 villages can not be sound impracticable. More so, the slightest variation with regard to figure of death, the number of houses burnt down will never make the charge redundant and rendered the prosecution case invalidated like the proceeding being proceeded under this act.

1625. I further find that, this pw could recognize accused, Kaiser and what he stated about his source of recognizing him appears to me believable. In fact, on close scrutiny of the entire cross, I simply fail to notice any endeavor, the defence ever made in discarding the assertion of this Pw on material particulars accused has been arraigned for, even on the point of recognizing the accused too.

1626. In the summing up hearing Prosecution has given much emphasis on the testimony of Tajul Islam deposed as Pw-3. This Witness in his chief claimed, he had participated in the devastation perpetrated in 22 different villages as an accomplice of 'Kaiser Bahini.' The Villages where such onslaught had been perpetrated dominated by both Muslim and Hindu-he further claimed. In such devastation 108 civilians had been killed which this Pw claimed to have heard on the following day of the event.

1627. At the fag end of his chief, he also expressed his repentance for being associated with ‘Kaiser Bahini’ and begged apology to the aggrieved family as well as the state for causing them harm, admitting that, on ill-advice of Kaiser he had joined ‘Kaiser Bahini’. If his innocent volition be considered, I am of the view that, by such admission he has even taken risk of being prosecuted at the threshold of his life. The person who holds such bold mentality even at this juncture of life, his such naïve revelation is enough to examine the veracity of his testimony, I opine.

1628. Certainly this Pw is the only person basing on whose testimony Kaiser could be found guilty for committing the despicable crime. He(Pw-3) might have participated in the event but might have had no role in causing the casualties perpetrated. As such what he had heard about the figure of death on subsequent occasion created no impossibility. Defence in a bid to falsify such assertion of this pw, contended that, this Pw failed to disclose any name of the owner of the house gutted in the devastation in spite of remaining present in the crime scene.

1629. Defence such contention sounds absurd because firstly, it is totally immaterial in proving such issue in adjudicating the instant charge under the very act and secondly, the magnitude of crackdown is so grave then no one even any accomplice of the perpetrator group would dare to recount the name of such victim.

1630. In view of the above, the testimony of Pw-3 can be regarded as honest admission of the guilt by which it has ushered to find out the main perpetrator of the event committed. As regards to the hearsay testimony of Pw-1 and Pw-13 it appears to me that, since they have corroborated the evidences of ocular witnesses having no discrepancies among their version, so their such knowledge can well be regarded based on fact and thereby make the charge proved.

1631. Further, It depicts from the documentary evidences, namely “*Muktejuddeh Brahammanbaria*” and “*Muktejuddeh Sharakchitra Nirjatan O Ganahatta*” the accused by forming ‘Kaiser Bahini’ and in association with Razakar and Pakistani Army unleashed reign of horror in

different parts of Habiganj and Brahammanbaria and in such heinous atrocities the pro-liberation civilians and minority religious community of different villages in particular villages under Nasirnagar Police station had fallen prey of his vengeful lust.

1632. In refuting such write up, Defence raised a plea by stating that, in those documents the date of event has been appeared as November, 11/12, 1971 whereas in the charge, it has been mentioned November, 15 and in view of such contradiction, prosecution case has become doubtful-Defence claimed. But such contention does not hold water, as such minor divergence in incorporating the date in the books is very much insignificant in adjudicating the instant charge under the provision of this act as the author usually mentioned the date in their write up after coming to know from some one else whereas Pw's who have come before us and made testimony on oath, witnessed the devastation on physically staying in the vicinity of the crime site risking their own life and their testimonies are no doubt judicial statement and will definitely outweigh to what has been found place in the book.

1633. More over, Defence has raised no question about the authenticity as well as authoritativeness of those two documents and the facts of horrendous atrocities Kaiser and his Bahini had perpetrated in association with Razakar and Pakistani Army in different villages under Nasirnagar police station and therefore, by that, defence has rather accepted those dreadful atrocities that has invariably reinforced the prosecution case as well.

1634. With the above evidences led against Kaiser now question naturally erupts what crime accused Kaiser has perpetrated in killing scores of civilians and destructing numerous houses in so many crime villages. From the evidence led, it does not appear to me that the attack was directed targeting any particular group as characterized protected group in clause (c) of section 3(2) of the Act.

1635. Though Prosecution intends to argue that with the attack, the civilians mostly belonged to Hindu religion have been killed and their houses have been set ablaze. But from the testimony of Pw-3 who proved

to have accompanied Kaiser as the accomplices of 'Kaiser Bahini' and participated in the carnage has categorically admitted that both Muslim and Hindu lived in the villages where the crackdown had been perpetrated.

1636. Even, Pw-16 did not state in his testimony the dead body 31 in number, he found after the carnage, belonged to Hindu community rather from the testimony of Pw-31 I find that, all the deceased he named in his chief belonged to Muslim community. So in view of the above testimony of those sighted witnesses it can be concluded that, no crime of 'Genocide' has been perpetrated with the Killing and monstrous act perpetrated on the date of event.

1637. In contrast, from the evidence of three sighted witness I find that, with a culpable intent to cause colossal destruction Kaiser led a combined forces of Razakar, Pakistani Army and Kaiser Bahini to wipe out Bangalee pro-liberation civilians and in that direction launched a massive attack on several villages and perpetrated widespread as well as large scale killing there on the innocent civilians. Irrefutable testimony of Pw-3, Pw-16 and Pw-31 bears the proof of such mass killing, as all those Pw's testified that over 100 civilians had been killed with such planned crackdown led by Kaiser. Defence argued that, there has been no evidence that led to prove as many as 108 civilians were killed.

1638. In that perspective, I am of the view that, even a single killing would qualify the crime of 'extermination' if it is proved from the evidences and attending circumstances the attack had been designed to commit widespread killing on a large section of unarmed civilians where numerical accuracy, location and number of dead bodies killed and exact number of crime zone will in no way shake the charge like extermination, one of the component of 'Crimes against Humanity'. With the aforesaid observation, it can legally be deduced that crime of 'Extermination' has been perpetrated with the atrocities so led by accused Kaiser.

1639. Mode of Liability accused incurred :

In view of the above discussion and observations, I am of the view that Prosecution has flawlessly proved, accused Kaiser actively contributed in

the commission of mass killing to unarmed Civilians and thereby, substantially participated, abetted, facilitated and substantially contributed the actual commission of offence of 'Extermination' that constituting the offence of 'Crimes against humanity' as enshrined in section 3(2)(a)(g)(h) of the Act of 1973 and therefore, accused **Syed Md. Kaiser** incurs criminal liability under section 4(1) of the Act also.

1640. Verdict on Conviction: Given the above discussions based on uncontroverted and unshaken evidences of three sighted witnesses in concert with corroborative evidence of two hearsay witness, authenticated documents followed by submissions of learned Advocates of the contending parties I find accused Syed Md. Kaiser **Guilty** of the offence of 'Extermination' as "Crimes against humanity" and he is liable to be convicted and sentenced under section 20(2) of International Crimes (Tribunals) Act, 1973.

1641. Verdict on Sentence: Testimony of Pw-16 and Pw-31 suggests on the night proceeding 15 November, 1971 a mass mobilization of Razakars, Pakistani Army and Kaiser Bahini has been there in the house of Monzur Mia at *Guniok*, instilling heavy commotion in the mind of common people under Nasirnagar Police station foreseeing an imminent destruction in the area. Panicked stricken civilian had left their houses for a safer places as Pw-16 and Pw-31 did. But all the tension, excitement and fear came true and came down as nightmarish on the innocent Civilians of the area when the Devastation started on November 15, 1971.

1642. Accused Kaiser led the crackdown by forming several groups comprising Razakar, members of 'Kaiser Bahini' and Pakistani Army and wielded them command to cause mass killing, which depicts from the testimony of Pw-16. The aftermath of such operation ravaging villages after villages has also come out from the testimony of the Pw's. So, what Kaiser did by killing mass people in several villages of particular area having no rivalry with those victims is simply opposed to human civilization.

1643. Accused Kaiser had hatched such evil design to wipe out the Bangalee Civilians from certain area to create the dominance of Pakistani

invading forces and anti- liberation elements who had always surrounded him.

1644. By and large, it has abundantly been proved, Kaiser directly participated in eliminating mass civilians in several villages under Nasirnagar Police station destroying innumerable houses by leading a combined group of Pakistani Army, Razakars and member of Kaiser Bahini and resorted to monstrous killing there. The victim's family suffered out of those shocking felony would somewhat find solace if the accused is meted out with highest punishment. Therefore, accused **Syed Md. Kaiser** be condemned to a single sentence of Death for the crimes of 'Extermination' as "Crimes against humanity" under section 20(2) of International Crimes (Tribunals) Act, 1973.

1645. In course of Summing up hearing so offered by the learned counsel of the parties of the case some legal points have been emerged which needs to be addressed and I do express my view on those points in the following way:

Whether Tajul Islam, deposed as Prosecution Witness no.3 should be prosecuted as an accused by this Tribunal ?:

Question has been evolved about the status of Pw-3 and the evidentiary value of his evidence to be used against accused Kaiser. Evidence on record depicts, Tajul Islam in his testimony identified himself as an accomplice of 'Kaiser Bahini' and claimed to have participated in various atrocities accompanying accused Kaiser and gave description over those event before this Tribunal as Prosecution witness.

1646. The provision of section 9 of the Act of 1973 has laid down how the proceeding against an accused will be commenced. In view of such express provision it become obvious this Tribunal assumes no authority to initiate any proceeding *suo muto* against any individual terming him/her as an accused until and unless prosecution arraign any person for perpetrating crime as enshrined in section 3 of the Act treating him/her as accused on submitting formal charge.

1647. In the instant case, it is totally absent so far as it relates to Tajul Islam. In view of the above, I am of the opinion that, this Tribunal is competent enough to consider the merit and trustworthiness of his testimony he deposed in the light of other materials and evidence on record as well as attending circumstances treating him as a mere prosecution witness like other Pw's and nothing more.

1648. Whether reparation can be awarded to the rape victims of Charge no.8 and 12 in addition to awarding sentence provided in section 20(2) of the Act?

On careful examination of evidence of the victim in charge no.12 (appeared as Pw-5) and that of close relative of victim (Pw-18) in charge no.8 I do not find, they have ever deposed for awarding compensation for the dreadful ordeal they had suffered at the behest of accused. While giving rebuttal, learned Prosecutor Ms. Tureen Afroz for the first time has very robustly argued in awarding compensation to the rape victims of charge no.8 and 12 to be paid by the accused. To substantiate her assertion she also supplied some reference to that effect.

1649. Now, let me evaluate her submission in the light of the present enactment under which the accused is being prosecuted. The provision of awarding sentence has been laid down in section 20(2) of the International Crimes Tribunal Act, 1973 which runs as follows:

“(2) Upon conviction of an accused person, the Tribunal shall award sentence of death or other punishment proportionate to the gravity of the crime as appears to the Tribunal to be just and proper.”

On plain reading of that sub-section it is obvious, it spells out about highest punishment as death and other punishment leaving it to the prerogative of the Tribunal for being considered basing on the gravity of the crime perpetrated by the accused which definitely connotes other physical punishment. Even, this very section has not provided any fine in addition to the sentence generally incorporates in Penal Code or other alike legislations.

1650. Awarding reparation against any offender is inevitably a substantive provision of a statute which the Tribunal can never slap upon any accused found guilty in absence of any specific legislation to that effect. And even under the Provision of rule 46A of the 'Rules of Procedure 2012' which authorizes this Tribunal to exert inherent power, can not award compensation to the victim on exercising that extraordinary power.

1651. In absence of any provision, guidelines, mechanism, regulating authority mere passing order on awarding reparation in favour of the victim would be futile exercise of power and will tantamount to show judicial activism which is not desirable as it is not permissible in law. In view of what has observed above, I am of the view that, the very submission of the Prosecution has got no legal substance and is thus turned down.

1652. Whether facts deposed by a Prosecution Witness in the Tribunal which have not been disclosed earlier to the Investigation Officer (IO) be regarded as Contradiction?

In course of recording testimony we often find that the Witness deposes some facts which have not been there in his/her statement made earlier before the IO during the investigation and in that perspective, Defence try to vent such deposition of the witness as contradiction of his/her earlier statement by drawing attention to those portion of depositions made before the tribunal. In such perspective, to find out the acceptability and upshot of such endeavour of the Defence, let me refer what the statutory provision so laid down in section 19(1) and 23 of the Act of 1973 command the Tribunal:

Section 19(1) : A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and may admit any evidence, including reports and photographs published in newspapers, periodicals and magazines, films and tape recordings and other materials as may be tendered before it, which it deems to have probative value.

Now let me see what the provision of section 23 of the Act provides:

Section 23: The provisions of Criminal Procedure Code, 1898(V of 1898) and the Evidence Act, 1872(I of 1872), shall not apply in any proceedings under this Act.

1653. If we read both the provisions together then there can not be any ambiguity that, the application of certain provision of Evidence Act which generally applies in prosecuting accused under Penal Code or other Special Statues will have no application under this Act. More so, by incorporating *non obstante* clause in section 26 of the Act, the application of Evidence Act has been made redundant.

1654. Further, the Defence will derive nothing by raising plea, that the facts Witness has not disclosed during the investigation has deposed for the first time before this Tribunal in as much as, this Tribunal finds no scope to verify whether the witness has at all abstained from disclosing the fact to the respective Investigation Officer which he/she deposed before the Tribunal or the very Investigation Officer has skipped in reduce in to writing of such statements, he/she obliged so under section 8(6) of the Act of 1973.

1655. Again, Tribunal will certainly take in to account to what a witness has deposed before it on taking oath which is regarded as evidence to come to the finality in its adjudication having no authority to consider whether he/she discloses certain facts to the Investigation officer or not. So, it can plainly be held that, the tactic adopted by the Defence is not supported by the Act of 1973 and thus proves nothing but a futile attempt in proving the accused innocence.

1656. In such a posture, our Hon'ble Appellate Division while adjudicating Criminal Review Petition no.17-18 of 2013 has made exhaustive discussion on the issue taking in to account on various provisions enumerated in Code of Criminal Procedure, Evidence Act and the Act of 1973 and buried all the controversies once for all concerning the evidentiary value, the effect of statement a witness made before Investigation officer and conclusiveness of testimony made by a witness before the Tribunal which I think is equally applicable in deciding the plea under discussion raised by the Defence. May I refer here some important

observations their Lordships held in the Criminal Review Petition nos. 17-18 of 2013 for ready reference:

“Contradicting the statements of a Witness can be drawn subject to the condition that it must be strictly limited to the subject-matter of the examination-in-chief only.”

Their Lordships have also come to a conclusion by holding that:

‘Therefore, there is no scope under the rules of evidence to infer contradiction in the statements of the witness with what they have stated to the investigation officer.’

‘In view of what is stated above, we are of the view that this division has committed no error of law in holding that the cross examination of a witness shall be strictly confined to the subject matter of the statements made in examination-in-chief of a witness.’

1657. From the trend of cross examination it also appears to me, Defence on drawing attention to the entire incriminating part of the chief of a prosecution witness made suggestion claiming those to be untrue which the witness by and large denied. With such suggestions, Defence wants to claim itself that, their such suggestion will qualify the accused innocence and not involved with the alleged event having no necessity to put further question to shake the veracity of testimony he/she made before the Tribunal.

1658. I simply find such contention of the Defence absolutely ludicrous not substantiated by any general principle of law, rules or regulations let alone the Act of 1973 guiding the evidence of a witness. Since by denying such suggestion the witness stand by or maintain to what he stated in the chief incriminating the accused so I am of the view that, by that suggestion, the defence on the other hand, makes room to the witness to reaffirm his/her accusation against the accused and eventually derived nothing in its favour out of that.

1659. Until and unless the credibility of a witness or the veracity of his/her testimony is discarded or shaken in course of cross examination

and if the Tribunal finds the deposition of a witness trustworthy on the face of the testimony recorded and on its evaluation. Hence, such sorts of mechanism generally adopted in the process of adjudication in ordinary Criminal cases will not come any aid to the Defence to prove the accused innocence either.

1660. Sentences awarded to be served out :

I have handed down sentences against respective charges where accused has been found guilty. In meting out so, accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser**, Son of- Late Syed Saiduddin and Late Begum Hamida Banu, Village-Itakhola (Noapara), Police station-Madhabpur, District-Habiganj at present-House no.21, Road no.6, Block-C, Flat no.3B, Banani, Dhaka, Dhaka Metropolitan Police(DMP), Dhaka is found guilty of committing offence of “Crimes against humanity” as enumerated in section 3(2) of the International Crimes (tribunals) Act, and is convicted and sentenced under section 20(2) of International Crimes(Tribunals) Act, 1973.

1661. Now, I do hereby proclaim the following order of sentence accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** will have to undergo against each charge he found guilty as well as order of acquittal **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is found not guilty.

Hence, it is

ORDERED

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer imprisonment for life for committing crimes as listed in **Charge no.1**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer imprisonment for **10(ten)** years for committing crimes as listed in **Charge no.2**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.3**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.5**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.6**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer imprisonment for **7(seven)** years for committing crimes as listed in **Charge no.7**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.8**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer rigorous imprisonment for life for committing crimes as listed in **Charge no.9**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.10**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.12**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer imprisonment for life for committing crimes as listed in **Charge no.13**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to suffer imprisonment for life for committing crimes as listed in **Charge no.14**

Accused **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is convicted and sentenced to Death for committing crimes as listed in **Charge no.16**

Convict **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is found **not guilty** of offences in respect of charge no.4, 11 and 15 so he is acquitted of those charges.

The sentences awarded in respect of charge **no.2 and 7** shall run concurrently.

The sentence of imprisonment for life awarded in respect of charge no.1, charge no.9, charge no.13 and charge no.14 will construe to be served till the natural death of the convict **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser**.

Convict **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is sentenced to Death in charge no.3, charge no.5, charge no.6, charge no.8, charge no.10, charge no.12 and charge no.16 and he be hanged by the neck till he is dead.

Since, convict **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** is sentenced to death in respect of **Charge no.3, 5, 6, 8, 10, 12, and 16** the sentence of imprisonment for life for charge no.1, 10(ten) years for charge no.2, 07(seven) years for charge no.7, imprisonment for life for charge no. 9, imprisonment for life for charge no. 13, and imprisonment for life for charge no.14 will obviously get merged in to the sentence of **Death**.

The sentence awarded herein above shall be carried out in compliance with section 20(3) of the International Crimes (Tribunals) Act, 1973.

Let the convict **Syed Md. Kaiser @ Md. Kaiser @ Syed Kaiser @SM Kaiser @ Kaiser** be sent to the prison with a conviction warrant accordingly.

Let a copy of the judgement be sent to the District Magistrate, Dhaka for information and causing necessary action.

TRIBUNAL'S ORDER ON SENTENCE

SENTENCE

That the accused **Syed Md. Qaiser (73)** @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser son of late Syed Saiduddin Ahmed and late Begum Hamida Banu of village- Itakhola [Noapara] Police Station- Madhabpur District- Habiganj [at present house no. 21, road no. 06, block-C, Flat no. 3B, Banani, Dhaka, Dhaka Metropolitan Police(DMP), Dhaka] found **UNANIMOUSLY guilty** of the offences of '**murder**', '**abduction**', '**confinement**', '**torture**' and '**other inhuman acts**' as '**crimes against humanity**' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 1,2,7,9,13 and 14 [06 charges]**. Accordingly, he be **UNANIMOUSLY** 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.1;**

Sentence of **imprisonment for 10[ten] years** for the crimes as listed in **charge no.2;**

Sentence of **imprisonment for 07[seven] years** for the crimes as listed in **charge no.7;**

Sentence of **imprisonment for life** till death for the crimes as listed in **charge no.9;**

Sentence of **imprisonment for life** till death for the crimes as listed in **charge no.13;**

AND

Sentence of **imprisonment for life till death** for the crimes as listed in **charge no.14;**

The accused **Syed Md. Qaiser (73)** @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser is also found **BY MAJORITY guilty** of the offences of '**abduction**', '**confinement**', and '**other inhuman acts**' as '**crimes against humanity**' enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge no.11** and accordingly, he be convicted and condemned **BY MAJORITY** to the sentence of **imprisonment for 05 [five] years**

The sentence of imprisonment so awarded above **in respect of charge nos. 1, 2,7,9,11,13 and 14** shall run **concurrently**.

The accused **Syed Md. Qaiser (73) @ Md. Qaiser @ Syed Qaiser @ SM Qaiser @ Qaiser** is also found **UNANIMOUSLY** guilty of the offence of **‘murder’, ‘mass rape’ and ‘mass killing[extermination]’** as **‘crimes against humanity’** enumerated in section 3(2) of the International Crimes (Tribunals) Act, 1973 in respect of **charge nos. 3,5,6,8,10,12 and 16**. Accordingly, he be convicted and condemned **UNANIMOUSLY** to the **sentence as below:**

‘Sentence of death’ for the crimes as listed in **charge no.3** 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.5** 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.6** 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.8** 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.10** 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.12** 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.16** 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. 3, 5,6,8,10,12 and 16** will get merged.

However, as the convict **Syed Md. Qaiser** has been condemned to **'sentences of death'**, as above, the **'sentences of imprisonment'** awarded in respect of charge nos. **1,2,7,9,11,13 and 14** will get merged into the **'sentences of death'** as awarded above. This sentence shall be carried out under section 20(3) of the Act of 1973.

Accused **Syed Md. Qaiser** is found **UNANIMOUSLY not guilty** of offences in respect of charge **nos. 4 and 15** 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