

International Crimes Tribunal-1
Old High Court Building, Dhaka, Bangladesh.

ICT-BD [ICT-1] Case No.08 of 2018

[Arising out of Investigation Agency's compliant register serial no. 65 dated 22.03.2016]

Present:

Justice Md. Shahinur Islam, Chairman

Justice Md. Abu Ahmed Jamadar, Member

Justice K.M. Hafizul Alam, Member

The Chief Prosecutor

Vs.

(1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[**absconding**] (4) Md. Saleque Miah @ Sayek Miah and (5) Sabbir Ahmmed[**absconding**]

For prosecution:

Mr. Golam Arief Tipoo, Chief Prosecutor

Mr. Syed Haider Ali, Prosecutor

Mr. Mokhlesur Rahman Badal, Prosecutor

Mr. Md. Sultan Mahmud, Prosecutor

Ms. Rezia Sultana Begum, Prosecutor

Mrs. Sabina Yesmin Khan, Prosecutor

Mr. Tapas Kanti Baul, Prosecutor

For defence:

Mr. Abdus Sattar Palwan, Advocate, Supreme Court of Bangladesh: **Engaged counsel** for two (02) accused detained in prison (1) Md. Jahed Miah @ Jahid Miah and (2) Md. Saleque Miah @ Sayek Miah.

Mr. Mohammad Abul Hassan. Advocate, Supreme Court of Bangladesh: **State Defence Counsel** for one [01] accused detained in prison (3) Md. Tajul Islam @ Fokan

Mr. Gaji M.H Tamim, Advocate, Supreme Court of Bangladesh: **State Defence Counsel** for two [02] absconding accused (4) Md. Shafi Uddin Moulana and (5) Sabbir Ahmmed

Date of delivery of Judgment: 30 June 2022

JUDGMENT

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

I. Opening words

1. On wrapping up of trial today we are going to render the judgment in this case. This will be the 47th judgment. Five accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] (4) Md. Saleque Miah @ Sayek Miah and (5) Sabbir Ahmmed [absconding] have been prosecuted and tried in this case. The case involves the offences enumerated in the International Crimes (Tribunals) Act, 1973 allegedly committed in the

localities of village-Muriauk under police station-Lakhai of District (now) Habiganj in 1971 during the war of liberation.

.

2. Of five accused two Md. Shafi Uddin Moulana and Sabbir Ahmmed have been absconding and trial against them took place in abesntia after due compliance of legal formalities and by appointing state defence counsel to defend them at the cost of government as required in the Act of 1973.

3. At the beginning we extend our appreciation for the worthy and proficient effort made on part of the learned prosecutors and the learned defence counsels and state defence counsels during trial, on pertinent factual and legal aspects involved in the case.

4. The accused persons indicted have been tried not for any isolated crime but for committing internationally recognized crimes i.e. crimes against humanity which are among the most egregious harms detrimental to human dignity perpetrated in 1971 in the territory of Bangladesh, during the War of Liberation, under the International Crimes (Tribunals) Act, 1973.

5. Now, having regard to 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-1 (ICT-1) hereby renders and pronounces the following **unanimous** judgment.

II. Introductory Words

6. The Tribunal [ICT-1] has been set up on 25 March 2010 to come out from the culture of impunity by bringing the offenders of crimes committed in 1971 in violation of international law and the laws of war to justice. The notion of fairness and due process have been contemplated in the Act of 1973 and the Rules of Procedure, 2010 (ROP) formulated by the Tribunal [ICT-1] under the powers conferred in section 22 of the principal Act.

7. Object of establishing this domestic judicial forum under the Act of 1973 is to be viewed with reference to the national need of coming out from the culture of impunity and to ensure justice to the victims of the horrendous atrocities committed during the war of liberation in 1971. This object of forming this judicial forum goes on with the internationally recognized norms and jurisprudence evolved.

8. The Act XIX enacted by our sovereign parliament in 1973 which 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.

9. It is to be noted that the ICTY, ICTR and SCSL the adhoc Tribunals backed by the United Nations (UN) have been constituted under their respective retrospective Statute. Only the International Criminal Court (ICC) is founded on prospective Statute [Rome Statute].

10. The Act of 1973 of Bangladesh portrays the merit and means of ensuring the standard of safeguards recognized universally to be provided to the person accused of crimes against humanity.

III. Jurisdiction of the Tribunal

11. The Act of 1973 contemplates provision 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’[as amended with effect from 14.7.2009].

12. It is patently 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.

13. We reiterate that the Tribunal set up under the Act of 1973 is absolutely a domestic judicial forum but meant to try internationally recognized crimes or ‘system crimes’ as enumerated in section 3(2) of the Act of 1973 committed in violation of international humanitarian law in 1971 during the war of liberation in the territory of Bangladesh.

IV. Brief Historical Background

14. Horrific atrocities constituting the offences of genocide and crimes against humanity were perpetrated in 1971 during the nine-month-long war of liberation in the territory of Bangladesh. Pakistani occupation army and their local collaborators including the members of auxiliary forces formed continued committing unlawful criminal acts directed against the unarmed civilian population and protected groups.

Finally, in exchange of incalculable sacrifice the nation achieved independence and the motherland of the Bangalee nation-- **Bangladesh.**

15. In portraying the historical background, in succinct, that ensued the war of liberation of the Bangalee nation in 1971 we consider it imperative to reiterate that in August, 1947 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.

16. 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, to get freed from untold disparity. The language movement of 1952 is now observed worldwide as the International Mother Language Day since 1999 as

declared by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

17. The history goes on to portray that in the general election of 1970, the Awami League under the leadership of Bangabandhu Sheikh Mujibur Rahman the Father of the Nation became the majority party of Pakistan. But defying the democratic norms Pakistan Government did not pay heed to value this overwhelming majority. As a result, movement started in the territory of this part of Pakistan and Bangabandhu Sheikh Mujibur Rahman the Father of the Nation in his historic speech of 7th March, 1971, called on the Bangalee nation to start struggle for independence if people's verdict is not respected.

18. But the history testifies that Pakistani occupation army started its monstrous 'mayhem' in the early hour of 26th March, in grave breaches of Geneva Convention, 1949. Following the onslaught of "Operation Search Light" by the Pakistani Military, Bangabandhu declared Bangladesh independent immediately before he was arrested by the Pakistani authorities.

19. The 'operation search light' was designed to resist, disarm and liquidate Bangalee policemen, soldiers and military officers, to arrest and kill nationalist Bangalee politicians, soldiers and military officers, to arrest and kill and round up professionals, intellectuals, civilians belonging to Hindu community and students.

20. Afterwards, criminal actions conducted in concert with its local collaborator militias, Razakars, Al-Badars and the key pro-Pakistan political organisation Jamat E Islami (JEI) were intended to stamp out the pro-liberation Bangalee civilians and protected groups and to squash the national feelings and aspirations of the Bangalee nation. Indisputably we take this settled history in judicial notice.

21. The Pakistan government and the military formed Peace Committee as an 'associate organization' and number of 'auxiliary forces' such as the Razakars, the Al-Badar, the Al-Shams etc, essentially to act as a squad with the Pakistani occupation army in identifying and eliminating all those who were perceived to be people of pro-liberation ideology, individuals belonging to minority religious groups especially the Hindus, political groups belonging to Awami League and

Bangalee intellectuals and unarmed civilian population of Bangladesh.

22. After the independence achieved in exchange of huge sacrifice, the government of Bangladesh enacted the International Crimes (Tribunals) Act,1973 for investigation, prosecution and punishment of the perpetrators of those crimes. But no judicial forum under the said Act could be formed due to military coup followed by the brutal assassination of the Father of the Nation and his family members.

23. Explicit inaction on part of the military rulers who unlawfully captured state power rather added endorsement to the culture of impunity. It made the nation ashamed and stunned. Presumably, the perpetrators of horrific crimes committed in 1971 taking advantage of such unconstitutional endorsement remained untouched for years together and many of them got rehabilitated.

24. Despite enacting the statute in sovereign parliament the perpetrators of the heinous crimes could not be brought to book, and this left a deep scratch on the country's political

awareness and the whole nation. The impunity the potential perpetrators enjoyed held back political stability, saw the rise of militancy, and destroyed the nation's Constitution.

25. We must keep it in mind that incontrovertibly the ways to self-determination for the Bangalee nation was grueling, swabbed with enormous blood, strive and sacrifices. In the present day world history, conceivably no nation paid as extremely as the Bangalee nation did for its self-determination and independence. The nation is indebted to their unprecedented and heroic sacrifices.

26. We deem it expedient to note ardently that the verdicts of the Tribunal, a court of law in cases under the Act of 1973 is not only meant to render the decision on adjudication of arraignments brought. Rather, the truth and the context behind the commission of horrendous atrocities carried out in 1971 directing the Bangalee civilian population have been painted in its verdicts based on evidence adduced.

27. We reiterate that the truth unveiled in each verdict rendered by the Tribunal shall create youth quake to march forward with the spirit of the war of liberation and it also shall

make space to them and the global community as well of knowing what extent of diabolical mass atrocities constituting the offence of crime against humanity and genocide were committed directed against the Bangalee civilians in 1971, we believe firmly.

V. Brief Account of Accused Persons

28. Before we move to determine the events arraigned in the charges framed we deem it essential and relevant to focus on brief portrayal of the ideology, stance and status the accused persons had in 1971.

(1). Md. Shafi Uddin Moulana (Absconding)

Accused Md. Shafi Uddin Moulana, the son of late Md. Mutiur Rahman alias Motiur Rahman and late Eingraj Bibi of village- Manpur, Police Station-Lakhai, District [now]- Habiganj was born on 01.07.1937(as per his NID). Accused Md. Shafi Uddin Moulana was the secretary of central committee of East Pakistan Nezam-e- Islam and he participated in the Election of Provincial Assembly as its candidate. In 1971, he took stance against Independence of Bangladesh and worked as a close associate and collaborator of Pakistani Occupation Army. He was also known as a leader of peace committee and Razakar Bahini of Lakhai

Police Station. Accused Md. Shafi Uddin Moulana after recruiting Razakars sent them to Lakhai Army Camp set up at Lakhai Police Station Thana Township and Development Centre (TT & DC) for training. He used to provide lists of Pro-Liberation unarmed civilians, leaders and activists of Awami League, freedom fighters and members of Hindu community to Pakistani Army. During the War of Liberation he participated in committing atrocious activities in the localities under Lakhai Police Station, prosecution alleges.

(2) . Md. Tajul Islam alias Fokan

Accused Md. Tajul Islam alias Fokan, the son of late Atab Ullah alias Mahtab Uddin (Shudin) and late Most. Madhu Mala of village-Muriauk, Police Station-Lakhai, District (now)-Habiganj (previously Sub- Division) was born on 04.10.1937 (as per his NID). In 1970 he was an active follower of accused Md. Shafi Uddin Moulana. In 1971 he joined in locally formed Razakar Bahini and got armed training at Pakistani Occupation Army Camp situated at Thana Township and Development Centre (TT & DC) of Lakhai Police Station. During War of Liberation he participated in the commission of atrocious activities along

with other Razakars in the localities under Lakhai police station, prosecution alleges.

(3) Md. Jahed Miah alias Jahid Miah

Md. Jahed Miah alias Jahid Miah, son of late Ashuk Ullah alias Ashak and late Lal Banu of village-Zirunda, Police Station-Lakhai, District- Habiganj (Previously Sub-Division) was born on 23.08.1955 (as per his NID). In the general election of 1970 he was an active supporter and worker of Md. Shafi Uddin Moulana who was a candidate from Nezam-e-Islam party. During War of Liberation accused Jahed Miah joined in the locally formed Razakar Bahini and received armed training from the Pakistani occupation army camp situated at Thana Township and Development Centre (TT & DC) at Lakhai Police Station. In 1971 he participated in commission of different offences and atrocious activities along with other Razakars in different places of Lakhai Thana area, prosecution avers.

(4) Md. Saleque Miah alias Sayek Miah

Accused Md. Saleque Miah alias Sayek Miah is the son of late Abdul Sattar @ Abu Sattar and Most. Shajara Bibi of

village-Zirunda under police station-Lakhai of District (now) Habiganj. He was born on 03.07.1943(as per his NID). He was an active supporter of Nezam-e-Islam Party and in Provincial Assembly Election of 1970 he worked for accused Md. Shafi Uddin Moulana. During the war of liberation he got enrolled in locally formed Razakar Bahini and received armed training from Pakistani Occupation Army Camp set up at Thana Township and Development Centre (TT & DC) of Lakhai Thana. In 1971 he participated in commission of atrocious activities being accomplice of other Razakars in different places of Lakhai Thana area, prosecution alleges.

(5) Sabbir Ahmmed (Absconding)

Accused Sabbir Ahmmed is the son of late Nur Hossain and late Pyara Begum of village-Manpur, Police Station-Lakhai, District-Habiganj (previously Sub-Division). He was born on 05.05.1957 (as per his NID). As cousin of accused Md. Shafi Uddin Moulana he was an active supporter of Nezam-e-Islam Party. In 1970 in Provincial Assembly Election he worked for Md. Shafi Uddin Moulana. During the War of Liberation he got enrolled in the locally formed Razakar Bahini and received armed training from Pakistani Occupation Army Camp set up at Thana Township and Development Centre

(TT & DC) of Lakhai Thana. In 1971 he participated in committing atrocious activities along with other Razakars in different places of Lakhai Thana area, prosecution alleges.

VI. Procedural History

Pre-trial stage

Initiation of Investigation

29. The investigation Agency of the Tribunal formed under the Act of 1973 started investigation pursuant to compliant register serial no. 65 dated 22.03.2016, in respect of commission of offences enumerated in section 3(2) of the Act of 1973 allegedly perpetrated by (1) Md. Tajul Islam @ Forkan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [**absconding**] (4) Md. Saleque Miah @ Sayek Miah and (5) Sabbir Ahmmed [**absconding**].

Prayer seeking arrest of three suspected accused

30. During investigation, the IO prayed for necessary order of issuing warrant of arrest for causing arrest of 03 suspected accused (1) Md. Tajul Islam @ Forkan (2) Md. Jahed Miah @ Jahid Miah and (3) Md. Shafi Uddin Moulana through the Chief Prosecutor, for the purpose of proper and effective investigation. Tribunal rendered order issuing warrant of arrest as prayed for.

Two suspected accused arrested

31. In execution of warrant of arrest issued by the Tribunal 02 accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah were produced before the Tribunal on 23.11.2017 when they were sent to prison. Accused Md. Shafi Uddin Moulana could not be arrested.

Interrogation of two suspected accused at the Central Jail

32. Considering the prayer made on 28.11.2017 on part of investigation agency through the Chief Prosecutor Tribunal permitted to interrogate those two[02] suspected accused and accordingly they have been interrogated at the Central Jail, Keraniganj on 07.01.2018 and 08.01.2018, maintaining necessary safeguard to which the accused is entitled.

Submission of report on conclusion of investigation

33. On conclusion of investigation, the IO submitted its report together with documents and materials collected and statement of witnesses, before the Chief Prosecutor on 21.03.2018 recommending prosecution of three[03] accused persons.

Sending back the report for submitting it afresh

34. The Chief Prosecutor on examination of the investigation report and documents submitted therewith considered that two[02] more suspected accused needed to be prosecuted and thus the prosecution on 10.05.2018 sent back all documents including the report to the Investigation Agency to go on with further investigation and to submit report afresh.

Submission of investigation report afresh

35. Investigation Officer, afterwards on holding further investigation submitted its report on 04.07.2018 recommending prosecution against in all five [05] accused (1) Md. Tajul Islam @ Forkan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana (4) Md. Saleque Miah @ Sayek Miah and (5) Sabbir Ahmmed.

Issuance of warrant of arrest

36. In execution of warrant of arrest issued by the Tribunal another accused Md. Saleque Miah @ Sayek Miah was produced before the Tribunal on 14.08.2018 when he was sent to prison.

Submission of Formal Charge

37. On the basis of the report and documents submitted therewith by the Investigation Agency, placed the 'Formal

Charge' on 06.08.2018 under section 9(1) of the Act of 1973 before this Tribunal alleging that the five[05] accused persons had committed the offences of crimes against humanity including abetting and also for complicity to commit such crimes narrated in the formal charge during the period of War of Liberation in 1971 around the localities under Police Station-Lakhai, District[now]-Habiganj.

Taking cognizance of Offences

38. The Tribunal, under Rule 29(1) of the Rules of Procedure, took cognizance of offences as mentioned in section 3(2) read with section 4(1) of the Act of 1973 on 24.09.2018, by application its judicial mind to the Formal Charge and materials and documents submitted therewith before the Tribunal.

Holding proceeding in Absentia in respect of 02 accused

39. Out of five [05] accused two [02] accused i.e. Md. Shafi Uddin Moulana and Sabbir Ahmmed could not be arrested. After having the report in execution of warrant of arrest issued against them the Tribunal, for the purpose of holding proceeding in absentia against them ordered publication of notice in two national daily news papers. But these two accused did not turn up and as such treating them absconded

Tribunal by its order dated 14.11.2018 appointed **Mr. Mohammad Abul Hassan, Advocate, Supreme Court of Bangladesh** as state defence counsel for one [01] present accused (1) Md. Tajul Islam @ Forkan and **Mr. Gaji M.H Tamim, Advocate, Supreme Court of Bangladesh** as state defence counsel to defend two [02] absconding accused (4) Md. Shafi Uddin Moulana and (5) Sabbir Ahmmed, at the cost of government and fixed 07.01.2019 for hearing on charge framing matter.

Trial Stage

Hearing on charge framing matter and order on it

40. Hearing on charge framing matter took place on 07.01.2019 when the Tribunal heard submission advanced by both sides and fixed 07 February, 2019 for order. On 07.02.2019 Tribunal rendered its order framing two counts of charges which were read over and explained to the three present accused when they pleaded not guilty and claimed to be tried according to law and Tribunal fixed date 24.03.2019- for opening statement and examination of prosecution witnesses.

Opening statement and Examination of prosecution witnesses

41. Prosecution placed opening statement on 24.03.2019 and started examining witnesses. At this phase of trial prosecution in all adduced and examined in all 09 witnesses including the Investigation Officer (IO). Since defence declined to adduce and examine witnesses date 27.02.2022 was fixed for placing summing up.

Summing Up

42. Prosecution started placing summing up on 29.03.2022 and then after placing summing up on part of defence this phase of proceeding concluded on 17.05.2022 and the case was kept on CAV i.e. for delivery and pronouncement of judgment.

VII. Summing up

43. **Mr. Sultan Mahmud**, the learned prosecutor submitted that the accused persons have been indicted in two counts of charges. Charge no.1 relates to the arraignment of committing devastating destruction of civilians' property by looting and arson. The accused persons in exercise of their affiliation in local Razakar Bahini participated in launching the attack arraigned. Unimpeached testimony of direct witnesses

explicitly proves accused persons' involvement with the criminal acts arraigned in charge no.01.

44. The learned prosecutor next argued drawing attention to the testimony of direct witnesses chiefly that of P.W.01 and P.W.05 that at the relevant time some unarmed freedom-fighters had been staying at their home at village-Muriauk under police station Lakhai of District(now) Habiganj and it may be inferred that on getting this information the same gang being accompanied by the accused persons, the local collaborators had launched the attack at the same village Muriauk and forcibly captured fathers of P.W.01 and P.W.05, two freedom-fighters and took them away and finally the detainees were gunned down to death at the swamp.

45. The learned prosecutor also argued that the accused Md. Shafi Uddin Moulana is the key perpetrator and main player of the attack and he had acted pursuant to the design and policy of the Pakistani occupation army and the other accused persons belonging to local Razakar Bahini aided and substantially facilitated in accomplishing the crimes arraigned. Defence could not controvert the narrative

recounted by the ocular witnesses in any way by cross-examining the witnesses.

46. **Mr. Abdus Sattar Palwan**, the learned counsel defending the two accused persons present before Tribunal submitted that the accused persons did not belong to Razakar Bahini and prosecution could not prove it by adducing any reliable document. The learned defence counsel also argued that the events arraigned allegedly happened in night and thus it was not practicable of seeing the alleged attacks and the perpetrators involved therewith. Testimony of witnesses thus does not inspire credence. In respect of alleged presence of accused persons the testimony of witnesses is inconsistent and thus prosecution could not prove alleged involvement of accused persons with the alleged events arraigned in both counts of charges.

47. **Mr. Mohammad Abul Hassan**, the learned state defence counsel for accused Md. Tajul Islam @ Fokan echoing the submission made on part of two other accused detained in prison submitted that this accused did not belong to locally formed Razakar Bahini; that he was not involved with the commission of any of offences arraigned; that evidence

presented by prosecution does not credibly connects this accused with the events alleged in both counts of charges.

48. Mr. Gazi M.H Tamim, the learned state defence counsel defending two absconding accused Md. Shafi Uddin Moulana and Sabbir Ahmmed submitted that these accused did not belong to Razakar Bahini and there is no credible evidence in support of it. Evidence adduced by prosecution does not connect these accused with the alleged crimes. The accused Sabbir Ahammed was a minor boy in 1971 and thus he had no eligibility of being enrolled in Razakar Bahini. Besides, one document, the list under signature of the Upazila Nirbahi officer does not contain the name of this accused as Razakar. P.W.01 Elias Kamal, the son of one victim Idris Ali initiated a complaint case before Habiganj Judicial Magistrate Court where this accused was not named as an accused. All these cumulatively lead to the conclusion that the accused Sabbir Ahmmed is not guilty and he has been implicated without any lawful basis. Investigation in respect of this accused is flawed and suffers from lack of lawful evidence. The IO failed to get the due basis of recommending the accused Sabbir Ahmmed to be prosecuted.

VIII. What status and affiliation of accused persons had in 1971?

49. Before adjudicating each count of charges the Tribunal feels itself imperative to analyze, on the basis of evidence presented, the role and status the accused persons had in 1971 during the war of liberation.

50. The crimes arraigned attributed to the accused persons are not the outcome of individual action but they are the upshot of collective criminality. Thus, understanding the position and status of the accused persons on the basis of which they formed part of the group of attackers becomes significantly relevant.

51. Prosecution avers that the accused persons indicted belonged to local Razakar Bahini and accused Md. Shafi Uddin Moulana had played the leading role in carrying out atrocities around the village-Muriauk under police station-Lakhai of District Habiganj. Documentary and oral evidence as well reasonably prove his affiliation in local Razakar Bahini.

52. On contrary, it has been argued on part of defence that the accused persons did not belong to Razakar Bahini; that accused Sabbir Ahmmed was a minor boy in 1971 and the witnesses testified falsely implicating the accused persons with the event arraigned and that out of local rivalry they have been indicted in this case.

53. Before we move to resolve the question we need to reiterate that not only any person having affiliation in any auxiliary force but even an individual too is permitted to be prosecuted and tried under the Act of 1971 if he is found that he was engaged in accomplishing the offences enumerated in the Act of 1973. Well, now let us focus on facts unveiled which we may take into account as relevant to resolve the issue.

54. It appears that defence does not dispute that accused Md. Shafi Uddin Moulana was the secretary of central committee of East Pakistan Nezam-e- Islam and he participated in the Election of Provincial Assembly as its candidate in 1970.

55. Prosecution alleges that in 1971, this accused took stance against independence of Bangladesh and started working as a

close associate and collaborator of Pakistani occupation army and had acted also as a leader of local peace committee and Razakar Bahini of Lakhai Police Station.

56. We got it proved from uncontroverted testimony of P.W.04 that accused Md. Shafi Uddin Moulana was a central leader of Nijam E Islami and in 1971 and he was the leader of Lakhai peace committee and Razakar camp was set up at his house. Thus, it stands proved that this accused was explicitly affiliated with the local Razakar Bahini with dominance by setting up its camp at his home, in exercise of his leadership in peace committee. Pro-Pakistan political profile that this accused had in 1971 provides assurance as to his unambiguous and dominant link and affiliation with the local Razakar Bahini and its activities.

57. P.W.08 also stated that accused Md. Shafi Uddin Moulana of their village was the vice-president of Nijam E Islami's central committee and he contested 1970 election as its nominated candidate. Defence does not appear to have disputed it.

58. Uncontroverted narrative of P.W.04 and P.W.08 demonstrates unerringly that accused Md. Shafi Uddin Moulana in exercise of his position in local peace committee had potential dominance even over the locally formed Razakar Bahini.

59. P.W.08 also stated that Moulana Shafi Uddin was the chairman of Lakhai Thana peace committee and commander of Razakar Bahini and a camp and torture cell was set up at his house.

60. Defence could not impeach the above piece of crucial fact as testified by P.W.08. Thus, it adds assurance to the fact that the accused Md. Shafi Uddin Moulana had played prominent role in forming Razakar camp at his house and he used to act as its commander. In 1971, peace committee had played significant role in forming Razakar Bahini. Thus, the accused Md. Shafi Uddin Moulana being the leader of local peace committee substantially contributed in forming Razakar Bahini over which he had *de facto* control and dominance, we deduce.

61. The narration made in the book titled **০hyciva tciÖZ** **esj 4` k0** speaks of role of peace committee in forming and

organizing the ‘Razakar’ force. The relevant narration is as below:

ivRvKvi ewnbx mvaviYfvte kwišÍ KngwUi
tbZZyaxb wQj | cÖZwU ivRvKvi e“vP ŪUfbsõ
Möbi ci kwišÍKngwUi `vbxq cöb Zv` i kc_
Möb Abövb cwiPvj bv Ki†Zb| GB Abövb
mwiexfvte `Úvqgvb ivRvKvi† i tKvib kixd
Otg AvbM†Z`i kc_ Möb KivZ| Zv` i gj- KvR
n†q `vavq Mög M†Ä AZ“vPvi , wbhvZb Ges
mvgwi K ewnbxi AMöZ© c_
cÖkK|.....tg Rly gv†m kwišÍKngwUi
D†“v†M cÖ†ki meŪ ivRvKvi ewnbx MV†bi ci
tK`†q kwišÍKngwUi tbZe,, GB ewnb†K mi Kvix
`xKwZ. cÖ†bi Rb“ mvgwi K miKv†i i Kv†Q
Av†e` b Rvb†Z _v†Kb| Ó

[m† t hyciva tÖZ eisj†`k , Aa“vcK Avey
mBwq` , cÖkK mPc†, cÖkKvj : cÖg cÖk
tddpix 2008, cöy, 73-74: See also
judgment of M.A Alim; ICT-BD-2
Case No.01 of 2012; 09 October 2013;
para 169]

62. It may be thus validly inferred that ‘Razakar’[volunteer] force was also formed simultaneously with the formation of ‘peace committee’ and the accused Md. Shafi Uddin Moulana as its influential leader contributed in organising the

formation of local 'Razakar Bahini' too over whom he had substantial dominance and control. Thus, the accused Md. Shafi Uddin Moulana is considered to be a person who had a position of authority even over the local 'Razakars'.

63. Testimony of P.W.02 depicts that the group of attackers came back to Shafi Uddin Moulana's house by boat taking freedom-fighter Elias Kamal's (P.W.01) father Idris Mia and Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05), tying them up.

64. The above pertinent fact remained unimpeached. It thus indicates unerringly that accused Md. Shafi Uddin Moulana was the key player of the criminal squad formed of Razakars and army men in accomplishing the attacks arraigned. It also adds assurance that this accused was a Razakar of huge dominance.

65. P.W.08 also stated that Md. Shafi Uddin Moulana was the chairman of Lakhai Thana peace committee and commander of Razakar Bahini and a camp which was rather a torture cell was set up at his house. Defence could not impeach it. It is

historically settled that in 1971 peace committee played the key role in forming Razakar Bahini.

66. P.W.08 stated another pertinent fact that relates to affiliation of other accused persons with the local Razakar Bahini. Testimony of P.W.08 demonstrates that in the mid of June in 1971 Razakar commander Md. Shafi uddin Moulana coming to Madrasa picked up 50/60 students including him (P.W.08) and took them away to Lakhai army camp by boat when he saw there the accused persons. It was rather an attempt to force those 50/60 Madrasa students including P.W.08 to get affiliated in Razakar Bahini.

67. The above fact remained uncontroverted. It rather reasonably proves that accused Salek Mia @ Sayek Mia, Jahed Mia and Tajul Islam @ Fokon too were affiliated with local Razakar Bahini. Such affiliation made them active to act under leadership of their commander accused Md. Shafi Uddin Moulana.

68. P.W.08 in stating the above fact implicated also the accused Sabbir Ahmmed. But we cannot keep reliance on it. It seems to be exaggeration as at the relevant time this

accused was a minor boy of 14 years as per NID card relied upon by the prosecution. However, merely for such exaggeration testimony of P.W.08 cannot go into air in its entirety. Besides, in adjudicating the arraignments brought in charges framed it may be well resolved whether the accused Sabbir Ahmmed despite being a minor boy in 1971 remained present with the gang at the crime site and with what intent.

69. Presence of the three accused Saleque Mia @ Sayek Mia, Jahed Mia and Tajul Islam @ Fokan with the group of attackers is strong indicia about their affiliation in locally formed infamous Razakar Bahini. The witnesses knew these accused before hand as they were from the neighbouring localities and were engaged in election campaign in favour of accused Md. Shafi Uddin Moulana in 1970.

70. In view of above we arrive at the conclusion that the three other accused Md. Tajul Islam @ Fokan, Md. Jahed Miah @ Jahid Miah and Md. Saleque Miah @ Sayek Miah being sturdy followers of accused Md. Shafi Uddin Moulana got affiliated in locally formed Razakar Bahini and had acted being imbued by the policy of Pakistani occupation army. It can hardly be believed that the accused persons' such

affiliation with the locally formed Razakar Bahini was forced one. Rather, the facts unveiled tend to the conclusion that they were actively and knowingly engaged and affiliated with this auxiliary force.

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

71. Before we move to the task of adjudication of charges framed, we consider it expedient to focus on the crucial settled factors necessary to go on with appraisal of evidence adduced before Tribunal as the case involves the offences of ‘crimes against humanity’ which are known as internationally recognised crimes and not the isolated crimes.

72. In the case in hand, all the five [05] accused persons have been tried for ‘group crimes’ or ‘system crimes’ committed in violation of international humanitarian law and the laws of war, in the territory of Bangladesh in 1971 during the war of liberation.

73. The accused persons indicted in this case allegedly in exercise of their affiliation in locally formed Razakar Bahini, a para militia force actively collaborated with the Pakistani

occupation army in carrying out atrocious activities, to further policy and plan.

74. The present case chiefly rests upon ocular evidence presented by the prosecution. It appears that mostly the sufferers and direct witnesses came on witness dock to recount what they experienced and observed which are materially related to the commission of principal crimes arraigned.

75. Since the horrific crimes were perpetrated in context of war of liberation in 1971 those were not isolated crimes. Section 23 of the Act of 1973 expressly 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.

76. Further, Section 19(1) of the Act of 1973 provides that the Tribunal shall not be bound by technical rule of evidence and it shall adopt and apply to the greatest possible extent non-technical procedure and may admit any evidence which it deems to have probative value.

77. The task of determination of accountability of an individual accused of offences enumerated in section 3(2) 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 hearsay or circumstantial evidence. It is now well settled jurisprudence.

78. The Tribunal notes that the context of committing such system crimes and totality of its horrific contour prevailing in war time situation naturally left little room for the people to witness all the criminal acts forming part of attack arraigned. In assessing the evidence of witnesses it must be kept in mind.

79. It is to be noted that the testimony of even a single witness on a material fact does not, as a matter of law, require corroboration. The established jurisprudence makes it clear that corroboration is not a rule of requirement for a finding to be rendered. Testimony of even a single witness if it seems to be credible may be acted as the basis of arriving at decision.

80. Onus squarely lies upon the prosecution to establish the commission of the events of attack and accused persons'

presence, acts and conducts forming part of attack resulted in commission of the offences of 'crimes against humanity' as enumerated in section 3(2) of the Act of 1973 for which the accused persons have been arraigned.

81. Core of witness's testimony is to be considered and weighed. It is now internationally settled jurisprudence that—

"The presence of inconsistencies within or amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable"

[Muhimana, ICTR Appeal Chamber, May 21, 2007, para. 58]

82. We reiterate that in dealing with the offence of crime against humanity which is known as 'group crime' it would be significantly immaterial to argue that an accused was not the actual perpetrator or he himself physically participated to the commission of the criminal acts.

83. Finally, it is now well settled too that even hearsay evidence is not inadmissible *per se*. However, mere admission of hearsay evidence does not render it carrying probative

value. Such hearsay evidence is to be weighed and assessed in the context of its credibility, relevance, and circumstances and also together with other evidence tendered.

84. One of key objectives of criminal trial involving the offences enumerated in the Act of 1973 is to unfold the truth. In seeking to establish the truth in its judgment, the Tribunal does have jurisdiction to rely as well on indisputable settled facts and on other authoritative elements relevant to the case even if these were not specifically tendered in evidence by either party during trial.

85. We require separating the grains of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon, in determining accused's accountability.

X. Applicable laws to be considered in adjudicating the charges

86. Tribunal restates the settled and the universally recognised principle that until and unless the accused persons are found guilty they shall be presumed innocent. Assessment of the evidence presented is to be made on the basis of the

totality of the evidence presented in the case before us and also considering the context prevailing in 1971 in the territory of Bangladesh. Credibility of evidence adduced is to be weighed in context of its relevance and circumstances.

87. Provisions as contemplated in the International Crimes (Tribunals) Act, 1973 and the Rules of Procedure (ROP) formulated by the Tribunal [ICT-1] under the powers conferred in section 22 of the Act are applicable to the proceedings before the Tribunal.

88. The Tribunal may admit any evidence which it deems to have probative value [Section 19(1) of the Act] and relevant to resolve the matters involved. The Tribunal shall have discretion to consider hearsay evidence by weighing its probative value [Rule 56(2)]. Tribunal notes that evidence, which appears to be “second-hand”, is not, in and of itself, inadmissible. Rather, it is to be assessed, like all other evidence, considering its credibility and its relevance.

89. The defence shall have liberty to cross-examine prosecution witness questioning credibility of what is stated in examination-in-chief 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] in support of defence, if any. It is to be noted that both the Act of 1973 and the Rules (ROP) have adequately ensured the universally recognised rights of the defence.

90. Additionally, the Tribunal, in exercise of its discretion and inherent powers as contained in Rule 46A of the ROP, has adopted numerous practices for ensuring fair trial by providing all possible and recognized rights of the accused.

91. We reiterate that it is now well settled proposition that the testimony even of a single witness on a material fact does not, as a matter of law, require corroboration. This view finds support also from the decision in the case of **Kordic and Cerkez**, wherein it has been observed that, ---

“The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence”.

[Kordic and Cerkez ICTY Appeal Chamber December 17, 2004, para. 274]

92. Since the Act of 1973 is meant to prosecute and try the persons responsible for the offences of crimes against

humanity, committed in violation of international humanitarian law, the Tribunal however is not precluded from seeking guidance from international reference and relevant jurisprudence evolved, if needed to resolve legal issues related to adjudication of arraignments and culpability of the accused.

XI. The way of adjudicating the charges

93. The alleged crimes happened about five decades back, in 1971 and as such memory of live witness may have been faded. Invaluable documents could have been destroyed. Thus, collecting and organizing evidence was indeed a valid challenge for the investigation agency.

94. In the case in hand, it appears that the evidence produced by the prosecution in support of the arraignments brought is mainly testimonial. Some of prosecution witnesses allegedly directly experienced the dreadful events and material facts relating to the event of attack and they have narrated it before the Tribunal. The trauma they sustained naturally could have an impact on their testimonies. We must keep, it in mind.

95. The Tribunal notes too that it is required to examine whether the alleged facts constituted the offences alleged and involvement of the accused therewith in a most dispassionate manner, keeping it in mind that the accused is presumed innocent till he is found guilty. In this regard the Tribunal (ICT-1) recalls the provisions contemplated in section 6(2A) of the Act of 1973.

96. Prosecution, in the light of the nature and pattern of the events arraigned in charges framed, is squarely burdened to prove-(**i**) commission of the crimes alleged (**ii**) mode of participation of the accused in committing any of crimes alleged (**iii**) how the accused persons acted in aiding or providing facilitation, encouragement or moral support or approval to the commission of any of crimes arraigned (**iv**) the accused persons indicted had acted being part of Joint Criminal Enterprise[JCE] (**v**) context of committing the alleged crimes (**vi**) the elements necessary to constitute the offence of crimes against humanity (**vii**) liability of the accused.

XII. Adjudication of Charges

Adjudication of Charge No.01 [05 accused indicted]

['Looting', 'arson' and 'other inhumane acts' constituting the offences of crimes against humanity committed at the village-Muriauk under Police Station-Lakhai of District-Habiganj (Previously Sub- Division)]

97. Charge: That on 31.10.1971 at about 2:00 A.M. a group formed of accused (1) Md. Shafi Uddin Moulana (Absconding), (2) Md. Tajul Islam alias Fokan, (3) Md. Jahed Miah alias Jahid Miah, (4) Md. Saleque Miah alias Sayek Miah and (5) Sabbir Ahmmed(Absconding), 20/25 armed Razakars and 10/15 Pakistani occupation army by launching a systematic attack at village-Muriauk under Police Station-Lakhai of District(now)-Habiganj deliberately carried out 'looting' at the houses of local M.N.A Mostafa Ali, his full brothers and 10/12 other houses and set those houses on fire by spreading gun powder.

Therefore, the accused (1) Md. Shafi Uddin Moulana (Absconding), (2) Md. Tajul Islam alias Fokan, (3) Md. Jahed Miah alias Jahid Miah, (4) Md. Saleque Miah alias Sayek Miah and (5) Sabbir Ahmmed (Absconding) by such criminal acts forming part of systematic attack directing non combatant civilian population, to further policy and plan of the Pakistani occupation army participated, facilitated, abetted, aided and substantially contributed to the commission

of the offences of **‘looting’**, **‘arson’** and **‘other inhumane acts’** as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the said Act of 1973.

Evidence of Witnesses Examined

98. This count of charge involves the horrific criminal activities that resulted in aggravated destruction of civilians’ property by committing ‘pillaging’ and ‘arson’. The event of attack happened in midnight at village-Muriauk under police station Lakhai of District Habiganj.

99. The witnesses, the neighbouring residents had opportunity of seeing the attack remaining in hiding. Prosecution relies upon the witnesses, the residents of the village attacked who narrated what they experienced in course of the event of attack conducted. However, now let us see what the witnesses testified before Tribunal in respect of the event arraigned in this count of charge.

100. P.W.01 Md. Elias Kamal (66) is a resident of village-Muriauk under police station- Lakhai of District (now)

Habiganj. He is a freedom-fighter. He stated that after the war of liberation ensued he went to India at the end of April for receiving training to join the war of liberation. On completion of training at the end of June he came to Sector Head Quarter no.03 led by Major Shafiullah.

101. P.W.01 stated that in the second week of October in 1971 he along with 50/60 freedom-fighters being equipped with arms came to their localities under police station Lakhai and started fighting at different localities being divided into groups.

102. P.W.01 next stated in respect of the event of attack arraigned in charge no.01 that he and freedom-fighters Shafiqul Alam had been staying at their home. Freedom-fighter Mafizul had been staying at his home along with freedom-fighter Saleh Uddin and freedom-fighter Shahjahan remained stayed at his own home with ammunitions.

103. P.W.01 continued stating that on 30 October (31 October) 1971 in mid night at 02:00 A.M a group formed of Razakars Md. Jahed Mia, Md. Tajul Islam @ Fokan, Md.

Saleque Mia and Sabbir Ahmed and their armed accomplice Razakars led by local Razakar commander Moulana Shafi Uddin and 15/20 Pakistani army men attacked the house of their neighbour the then MNA Mostafa Ali and 8/10 neighbouring houses and conducted looting and set those houses ablaze. With this his (P.W.01) mother made him awaken and asked to quit and then they went into hiding inside the bush, east to their house.

104. In respect of reason of knowing the accused persons P.W.01 stated that in 1970's election Moulana Shafi Uddin was a candidate nominated by Nezam-E-Islami and the Razakars he named were engaged in his election campaign when they used to visit their village and that is why he knew them beforehand.

105. In cross-examination done on part of accused Saleque Mia @ Sayek Mia P.W.01 stated in reply to question put to him that his writing and narrative have been published in various journals. But he could not say in such statement he implicated whose names. P.W.01 denied the defence suggestion that in the case lodged on allegation of killing Tara

Mia and the father of this accused he was accused and that thus he testified falsely implicating this accused; and that this accused was not a Razakar.

106. P.W. 04 Emdadul Haque Chowdhury (73) is a resident of village- Jirunda under police station-Lakhai of District (now)- Habiganj. P.W.04 stated that after the war of liberation ensued he started assisting the freedom-fighters in various ways. On 30 October at about 08:00 P.M Moulana Shafi Uddin, Razakar Sayek, Razakar Sabbir along with their accomplice Razakars besieged their house and on sensing it he ran away. Razakars finding him not available on search returned back to Moulana Shafi Uddin's house and there after taking their meal moved to village-Muriauk along with Pakistani army men.

107. In addition to testifying the facts related to the event arraigned in charge no.02 he testified when and what he heard about the event of arson and looting as arraigned in charge no.01.

108. P.W.04 at the end of his testimony stated that on the day after the event arraigned in charge no.02 he heard from

people that the Razakars he named and Pakistani army carried out attack at village-Muriauk when they burnt down 10/12 houses including the house of MNA Mostafa Ali.

109. In cross-examination the above hearsay version does not seem to have been denied even by any of accused indicted in charge no.01.

110. P.W.05 Md. Shahjahan (67) of village-Moriauk Paschimpara under police station-Lakhai of District (now) Habiganj is the son of one victim (**of charge no.02**) Abdul Jabbar. P.W.05 is a freedom-fighter. He had been with P.W.01, his co-freedom-fighter at the time of the event of attack as arraigned in the charge no.01. He is a direct witness to facts connected with the upshot of the attack alleged.

111. P.W.05 stated that on having training in India he along with 50/60 co-freedom,-fighters entered inside Bangladesh in the mid of October 1971 and got stationed at different places being divided into groups and started fighting.

112. P.W.05 in respect of the attack arraigned stated that on 30 October 1971 he had been at his home. He got awaken at

03:00 A.M to have 'Sahri' as the month was Ramadan and then he could see the house of MNA Mostafa ablaze. Seeing this he instantly moved to freedom-fighter Mafizul Islam's house where he found freedom-fighter commander Md. Elias Kamal (P.W.01) and Salah Uddin. They then went into hiding inside bush adjacent to Elias Kamal's house where from they could see Razakar Moulana Shafi Uddin, Razakar Jahid Mia, Razakar Tajul Islam @ Fokon, Razakar Sabbir Ahmed, Razakar Saleque Mia and their accomplice Razakars and army men committing attack at the house of Elias Kamal.

113. In cross-examination defence simply denied what the P.W.05 stated in respect to facts related to the event arraigned in charge no.01.

114. P.W.06 Md. Jitu Mia (71/72) is a resident of village-Muriauk under police station-Lakhai of District (now) – Habiganj. He is a direct witness to the event arraigned in charge no.01. He also testified some facts that he saw subsequent to this event which relate to the event arraigned in charge no.02.

115. In respect of the event arraigned in charge no.01 P.W.06 stated that on 30 October in 1971 at about 02:00 in night they got awoken to have *Sahari*. Few minutes later he heard screaming and shouting of people with saying that 'Panjabees are coming'. Then they moved to the place near the house of MNA Mostafa Ali when he saw the Pakistani army and armed Razakars destructing the houses. He then remaining in hiding inside a bush adjacent to that house saw them setting the house on fire. With the flame of fire he could recognize peace committee leader Shafi Uddin Moulana, Razakars Jahed Mia, Tajul Islam, Saleque Mia and Sabbir Ahmed who were accompanied by some other Razakars.

116. P.W.06 next stated that Pakistani army and Razakars moved back toward the house of freedom-fighter Elias Kamal, after setting 10/12 houses on fire.

117. In cross-examination done on part of accused Tajul Islam P.W.06 stated in reply to defence question that he could not say whether any case was initiated over the event he testified after independence; that many other villagers also saw the event when he remaining in hiding saw the event he testified.

118. In cross-examination done on part of two absconding accused Shafi Uddin Moulana and Sabbir Ahmed P.W.06 stated in reply to defence question that after the independence he did not see these accused and accused Shafi Uddin Moulana had quitted the locality and since then he did not see him.

119. In cross-examination done on part of accused Md. Saleque Mia P.W.06 stated in reply to defence question that the event he testified happened in the mid of Bangla month Kartik .

120. In cross-examination done on part of accused Jahed Mia P.W.06 stated in reply to defence question that after independence this accused went into hiding.

121. P.W.06 denied defence suggestions put to him on part of all the accused persons that the accused persons were not involved with the event alleged; that he did not see the event and that what he testified implicating the accused persons was untrue and tutored.

122. P.W.08 Md. Abdul Hannan (60) a resident of village-Manpur under police station-Lakhai of Distract (now)-Habiganj is a hearsay witness in respect of the event alleged in charge no.01. He chiefly testified what criminal activities he saw in accomplishing the event arraigned in charge no.02.

123. P.W.08 stated that he heard from the people that the Razakars Saleque Mia, Sabbir Ahmed, Jahed Mia and Tajul Islam led by Razakar commander Shafi Uddin Moulana on the preceding night had carried out looting at 10/12 houses including the houses of MNA Mostafa Ali and freedom-fighter Shahjahan Mia and set those on fire. He knew the Razakars Shafi Uddin Moulana and Sabbir Ahmed who were from their village and the rest Razakars he named were from neighbouring villages and thus he knew them beforehand.

124. In cross-examination defence simply denied the above hearsay version made by the P.W.08. No substantial cross-examination is found to have been made intending to shake the above hearsay version of the P.W.08.

Finding with Reasoning on Evaluation of Evidence

125. Mr. Sultan Mahmud, the learned prosecutor drawing attention to the evidence of witnesses examined in support of this charge submitted that the horrendous act of reckless devastating activities that resulted in rampant arson and looting of numerous houses of civilians of the vicinity attacked has been proved. Unimpeached evidence of witnesses demonstrates culpable and active presence of the accused persons indicted with the criminal gang and their explicit and substantial assistance and contribution constituted their ‘participation’ in accomplishing the prohibited acts of looting and arson.

126. It has been further argued by the learned prosecutor that such prohibited criminal acts detrimental to normal livelihood of civilians indisputably caused untold mental harm and pain to civilians affected which constituted the offence of ‘**other inhumane act**’. Defence simply denied the event arraigned and alleged participation of the accused persons with the event occurred. But defence could not controvert what the witnesses testified in respect of the event arraigned, by cross-examining the witnesses in any manner, the learned prosecutor added.

127. **Mr. Abdus Sattar Palwan**, the learned counsel defending the two accused detained in prison Md. Jahed Miah @ Jahid Miah and Md. Saleque Miah @ Sayek Miah argued that these accused were not involved with the alleged event; that prosecution could not prove it by credible evidence; that the alleged event happened in mid night and thus it was not practicable of seeing the event alleged and recognizing the perpetrators; that none of witnesses claim to have seen how and which accused participated in accomplishing the alleged acts of arson and looting and thus they cannot be held liable for the alleged criminal acts.

128. **Mr. Mohammad Abul Hassan**, the learned state defence counsel for accused Md. Tajul Islam @ Fokan detained in prison submitted that since the alleged event happened in mid night the residents of the locality including the witnesses had no reason and opportunity of seeing as to who were with the gang of attackers; that it could not be proved that this accused himself participated in perpetrating the offences arraigned in this count of charge. Testimony of witnesses is inconsistent which creates reasonable doubt as to this accused's presence at the site when alleged event occurred, the learned counsel added.

129. Mr. Gazi M.H Tamim, the learned state defence counsel defending two absconding accused Md. Shafi Uddin Moulana and Sabbir Ahmmed argued that the accused Sabbir Ahmmed was admittedly a minor boy in 1971 and thus testimony implicating him with the event alleged is not at all credible; that none of witnesses could testify as to how these accused participated in committing the criminal acts ; that it was not practicable of seeing and recognizing the perpetrators of the event as it allegedly happened in mid night and thus these accused persons cannot be held guilty of the offences arraigned in this charge.

130. This count of charge arraigns the event of systematic attack conducted by the group formed of Pakistani occupation army, the accused persons and their accomplice Razakars. The alleged attack resulted in arbitrary and aggravated destruction of civilians' property by committing looting and arson which were severely detrimental to normal livelihood of civilian population of the site attacked.

131. The event of attack happened in mid night directing the houses of pro-liberation civilians of village-Muriauk under police station-Lakhai of District Habiganj. Tribunal notes that just in continuation of this event the same group had conducted attack arraigned in charge no.02.

132. The witnesses relied upon in support of this count of charge allegedly saw the devastating activities carried out and could recognize the accused persons accompanying the criminal squad with the flame of fire that was set to numerous houses.

133. In view of the arraignment brought in this count of charge we require resolving that--

(i) The event of attack arraigned was systematic and was conducted to further policy and plan of the Pakistani occupation;

(ii) The accused persons indicted formed part of the gang of attackers, sharing common intent and purpose; and

(iii) The attack resulted in wanton destruction of civilians' property by reckless looting and arson.

134. In this case P.W.01 and P.W.05 are the star witnesses in respect of the events arraigned in both counts of charges. They are freedom-fighters and at the relevant time they had been staying at the village attacked along with two co-freedom-fighters. Defence does not seem to have disputed it.

135. It is evinced from unimpeached testimony of P.W.01 and P.W.05 that a number of freedom-fighters including them (P.W.01 and P.W.05) were from village- Muriauk under police station-Lakhai of District (now)-Habiganj. At the relevant time they had been staying at their house at village- Muriauk adjacent to the house of MNA Mostafa Ali.

136. Presumably, to further policy of Pakistani occupation army the gang accompanied by the accused persons having affiliation in local Razakar Bahini being aware of staying of freedom-fighters in the locality had intended to send horrific message to the pro-liberation civilians of the vicinity attacked by conducting wanton and reckless destruction of civilians' property. Without the active assistance of the collaborators having affiliation in auxiliary force forming part of the group the event of attack would not have been possible

to be launched only by the army men, we deduce. It may be inferred that accused Md. Shafi Uddin Moulana played the key role in locating the target and site to be attacked.

137. It is not disputed that MNA Mostafa Ali was the neighbour of P.W.01. It is evinced from testimony of P.W.01 that on 30 October (31 October) 1971 in mid night at 02:00 A.M the group formed of Pakistani occupation army and the armed Razakars carried out the attack.

138. Testimony of P.W.01 demonstrates that Razakars Md. Jahed Mia, Md. Tajul Islam @ Fokan, Md. Saleque Mia and Sabbir Ahmed and their armed accomplice Razakars led by local Razakar commander Md. Shafi Uddin Moulana conducted wanton looting and then destructed the house of MNA Mostafa Ali and 8/10 neighbouring houses by setting those on fire.

139. That is to say, according to testimony of P.W.01 all the five accused indicted committed the criminal acts arraigned in charge no.01. This part of testimony of P.W.01 relating to participation of all the five accused indicted requires to be assessed with other facts unveiled. At the same time it is to be

kept in mind that the event arraigned in charge no.01 was chained to the event arraigned in charge no.02 and the same group of attackers had conducted both events of attack, in continuation of the first attack.

140. Hearsay testimony of P.W. 04 Emdadul Haque Chowdhury depicts that three accused including accused Sabbir Ahmmed indicted were engaged in conducting the attack when the invaders burnt down 10/12 houses including the house of MNA Mostafa Ali.

141. It is alleged that the group of attackers formed of a number of perpetrators including the five accused persons indicted. It happened in mid night. The witnesses, the neighbouring residents claim to have witnessed the devastating activities conducted, with the flame of fire, remaining in hiding. Naturally, all the witnesses might not have equal opportunity of seeing all the perpetrators and this is the reason why testimony of someone connects three accused and testimony of other witnesses connects four or all the five accused indicted with the event arraigned.

142. The presence of such inconsistencies in the evidence does not, per se, require a reasonable court of law to reject the entire evidence as being unreliable. For mere inconsistency arising out of this rational reason does not create any degree of doubt as to presence and participation of the accused persons indicted in committing the criminal activities, in course of the event of attack launched, if the testimony in this regard seems to be credible.

143. Besides, long more than four decades after the crimes committed a witness may not always be reasonably expected to memorize detail and accurate precision. Therefore, argument advanced by the learned defence counsel on inconsistencies between witnesses does not stand on legs. The ICTR in the case of *Nyiramasuhuko* has considered this issue by observing that –

“..... 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**]

144. P.W.05 Md. Shahjahan, a co-freedom-fighter of P.W.01 also had been staying at the village-Muriauk at the relevant time. Defence does not dispute it. P.W.05 too at about 03:00 A.M at the time of launching attack arraigned got awaken and saw the house of MNA Mostafa Ali ablaze and then he went into hiding inside the bush adjacent to Elias Kamal's (P.W.01) house. Thus, it is evinced that P.W.05 too experienced the reckless destructive activities conducted directing civilians' property. It could not be controverted.

145. Testimony of P.W.05 further depicts that remaining in hiding inside the bush P.W.05 could see Razakars Moulana Shafi Uddin, Jahid Mia and their accomplice Razakars accompanying the Pakistani army men apprehending the father of P.W.01 .

146. The above crucial fact is chained to facts stated by P.W.01. Seeing the gang participating in apprehending the father of P.W.01 as testified by P.W.05 also proves accomplishment of destructive activities as arraigned in charge no.01. However P.W.05 testified implicating only two

accused whom he could see present with the gang at the crime site.

147. It is also evinced that remaining in hiding inside a bush adjacent to that house P.W.06 the neighbour of MNA Mostafa Ali saw the gang setting the house on fire. According to testimony of P.W.06 he could recognize all the five accused i.e. peace committee leader Shafi Uddin Moulana, Razakars Jahed Mia, Tajul Islam, Saleque Mia and Sabbir Ahmed accompanying their accomplice Razakars as well, with the flame of fire.

148. The event of attack happened in night directing the houses of pro-liberation civilians. Some of witnesses relied upon in support of this charge allegedly saw the gang carrying the devastating activities and could recognize the accused Md. Shafi Uddin Moulana, Jahed Mia, Tajul Islam, Saleque Mia accompanying the criminal gang with the flames of fire that was set to numerous houses.

149. We have already stated that it stands proved that four freedom-fighters including P.W.01 and P.W.05 got stationed at village- Muriauk, at the houses of P.W.01 Elias Kamal and

P.W.05 Shahjahan. This fact unveiled in testimony of witnesses could not be controverted in any manner.

150. What happened next to staying of freedom-fighters at their homes at village Muriauk? Version of P.W.01 and P.W.05 the key witnesses to the event arraigned in both counts of charges proves that the same group had carried out both the attacks arraigned consecutively and the witnesses examined allegedly experienced the criminal activities conducted in course of both attacks. The event of attack arraigned in charge no.02 was the continuation of attack arraigned in charge no.01.

151. Before we look to the intent and purpose of launching attack at the village-Muriauk we consider it expedient to reiterate that in 1971 pro-Pakistan political parties were indulged in indiscriminate massacre of their political opponents belonging to Bangalee nation, in the name of liquidating '*miscreants*', '*infiltrators*' in materializing which the Razakars used to play the potential role in collaboration with the Pakistani occupation army.

152. In the case in hand, the events of attacks as arraigned in both counts of the charges framed were carried out just few days prior to the victory of Bangalee nation achieved. It may be legitimately inferred that the fact of staying some freedom-fighters at their house at village-Muriauk made the devilish Pakistani occupation army and their local collaborators extremely aggressive against the pro-liberation civilians and thus they by forming group launched systematic attack at the village- Muriauk.

153. Carrying out destructive activities by looting and arson (as arraigned in charge no.01) certainly offer the conclusion that the perpetrators got information about staying of freedom-fighters there and they thus intending to execute the plan of combating the freedom fighters had launched the attack.

154. The arraignment brought in the charge framed tends to say that staying of freedom fighters got leaked and the Pakistani army then in collaboration with the local Razakars led by accused Md. Shafi Uddin Moulana in a designed way had launched attack. Intention was to get the freedom-fighters captured. In accomplishing the object of the attack first the

invaders carried out aggravated destruction by looting and arson of civilians' property.

155. All the five accused have been indicted in both counts of charges. Most of witnesses also claim to have seen them accompanying the gang at the crime site when alleged criminal acts were carried out.

156. But it has been argued on part of accused Sabbir Ahmed that in 1971 this accused was a minor boy and he was not made accused in the complaint case initiated in Habiganj Judicial Magistrate Court in 2015 by the P.W.01 over the events arraigned. But now the P.W.01, P.W.04 and P.W.06 testified by making glaring exaggeration implicating the accused Sabbir Ahmed too with the alleged events.

157. Tribunal notes that in each case we require to appraise as to what extent the evidence adduced is worthy of acceptance, and merely because in some respects the Tribunal considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

158. Making exaggerations during the course of evidence by a witness is not uncommon. But merely because of any such exaggerations, improvements and embellishments the entire prosecution story should not be doubted. The testimony of a witness cannot be discarded in its entirety merely due to the presence of embellishments or exaggerations

159. The doctrine "false in one thing, false in everything" is thus held inapplicable. We need to sift the chaff from the grain and find out the truth from the testimony of the witnesses examined. Total repulsion of the evidence on ground of exaggeration is unnecessary.

160. Now, let us resolve the issue agitated on part of accused Sabbir Ahmmed. It appears that the IO (Investigation Officer) on conclusion of investigation first submitted report recommending prosecution of three accused i.e. accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah and (3) Md. Shafi Uddin Moulana. But accused Md. Saleque Miah @ Sayek Miah and Sabbir Ahmmed were not recommended to be prosecuted.

161. However, on having the investigation report returned back from the office of the Chief Prosecutor the IO submitted the investigation report afresh recommending prosecution of in all 05 accused adding name of accused Md. Saleque Miah @ Sayek Miah and accused Sabbir Ahmed.

162. It appears from the photocopy of reports dated 26.10.2015 published in the daily Janakantha, the Daily Star and daily Manab Jamin (**Prosecution Documents volume page nos. 18-20**) that Freedom-fighter Elias Kamal (Testified as P.W.01 in the case before Tribunal) initiated a compliant in Habiganj Senior Judicial Magistrate Court against four accused (1) Md. Tajul Islam @ Forkan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek Miah.

163. The IO P.W.09 Md. Nur Hossain BPM admits in cross-examination that the instant complaint register's basis is the said CR Case initiated in Habiganj Judicial Magistrate Court.

164. Elias Kamal (P.W.01) is the son of one victim Idris Mia (of the event arraigned in charge no.02). P.W.01 claims to have witnessed the event of attack arraigned, remaining

stayed in hiding inside the nearer bush and also claims that he had seen all the five accused accompanying the gang of attackers at the crime site when the crimes were happened. If it is so, why the compliant initiated in Habiganj Judicial Magistrate Court the basis of the complaint registrar serial no.65 dated 22.03.2016 of the investigation agency of Tribunal did not implicate this accused as one of alleged perpetrators? Prosecution failed to explain it. Thus, it creates reasonable doubt as to involvement of accused Sabbir Ahmmed with the events arraigned in the case in hand.

165. P.W.01 Elias Kamal in his sworn testimony made in Tribunal claims to have witnessed the event arraigned. But if really he saw the accused Sabbir Ahmmed too accompanying the gang of perpetrators at the relevant time obviously it would have been alleged in his compliant initiated in Juridical Magistrate Court, Habiganj in 2015. But Elias Kamal (P.W.01) did not do it.

166. In view of above we may deduce that the testimony of P.W.01, P.W.04 and P.W.06 so far as it relates to alleged involvement of accused Sabbir Ahmmed with the event arraigned does not carry credence and creates reasonable

doubt as to his alleged complicity and participation to the accomplishment of the attacks.

167. Accused Sabbir Ahmmed was not a Razakar as his tender age in 1971 did not permit him to get enrolled in Razakar Bahini. Be that as it may, testimony of P.W.01 and other witnesses implicating him with the event arraigned terming 'Razakar' simply does not carry any value. It seems to be significant exaggeration and embellishment. However, such exaggeration itself does not taint the testimony of witnesses in its entirety.

168. For the same reason testimony of other witnesses too on this matter i.e. testimony implicating the accused Sabbir Ahmmed does not seem to be credible at all. Testimony of P.W.01 and other witnesses implicating this accused seems to be subsequent embellishment and deliberate exaggeration and thus their testimony in this regard deserves to be kept aside from consideration.

169. Mere parrot like saying that accused Sabbir Ahmmed was present at the crime site with the gang does not lead to

the unerring conclusion that despite being a tender aged boy he had been at the crime site intending to participate or facilitate the object of attack, sharing intent of the gang.

170. On due appraisal of evidence of witnesses of whom most are direct witnesses we arrive at decision that prosecution has been able to prove that the gang formed of Pakistani army, three accused having affiliation in local Razakar Bahini and their accomplices led by accused Md. Shafi Uddin Moulana conducted the attack in systematic manner. Pattern of the attack was enormously aggressive.

171. According to the prosecution documents including the NID, date of birth of accused Sabbir Ahmmed is 05.05.1957 which speaks that in 1971 at the relevant time he was 14 years 5 months old. That is to say in 1971 this accused was a minor boy and even he was not eligible of being enrolled in Razakar Bahini.

172. Yes, this accused Sabbir Ahmmed has been absconding. Absconsion may be taken into account as an incriminating fact but of course together with other credible and lawful evidence. Already we have concluded that testimony of

P.W.01 and other alleged direct witnesses implicating this accused does not carry value and credence and thus now his mere absconsion alone cannot be taken into account for holding him liable.

173. It is not clear as to on the basis of which evidence or document Investigation Agency came to decision to submit report also against the accused Sabbir Ahmmed as well.

174. An alleged list containing simply the name of five accused persons showing them Razakars has been proved by the IO (P.W.09) as **Exhibit-2 (prosecution documents volume page no.10)**. But the IO did not make effort in finding the basis and source of information contemplated in this list. IO admits it.

175. Besides, another list dated 23.05.2017 under the signature of Upazila Nirbahi Officer, Lakhai, Habiganj forming part of prosecution document shows the name of 10 Razakars and collaborators including four accused who had acted in committing atrocities around the localities under police station Lakhai. But the name of accused Sabbir Ahmmed does not find place in this list. Surprisingly prosecution for reasons best known to them avoided to get

this document (**prosecution document volume page-12**) exhibited by the IO who has been examined as P.W.09. But this document carries much value than the list which has been marked as **Exhibit-2**.

176. It is now well settled that just on the basis of mere presence of an individual at the crime site it cannot be concluded that he sharing common purpose of the criminal enterprise facilitated and contributed to the commission of criminal acts. At best it may be said that he was a mere spectator having no culpability, particularly in absence of lawful and credible evidence that reasonably points his participation to the commission of criminal acts.

177. In view of oral testimony of witnesses together with the **Exhibit-2** and the document (**prosecution document volume page-12**) and the fact that in 1971 accused Sabbir Ahmmed was a minor boy of 14 years it may be concluded indisputably that this accused had no affiliation in local Razakar Bahini and he cannot be held liable for the offences alleged even it is believed that he was seen present at the crime site.

178. Mere seeing a person at the crime site itself does not make him an associate of the perpetrators. In such case barely it may be presumed that this accused was so seen present at the crime site as a mere spectator. Therefore, based on cumulative appraisal of facts and evidence discussed above the accused Sabbir Ahmmed cannot be found liable for the offences arraigned merely on the basis of his presence, even if it is accepted to be true.

179. However, on careful appraisal of evidence eventually we arrive at decision that it is found reasonably proved that four accused indicted, excepting accused Sabbir Ahmmed were knowingly engaged in conducting the horrific devastating acts directing civilians' property with extreme aggression. Accused Md. Shafi Uddin Moulana had the key role in perpetrating the criminal acts which resulted in aggravated destruction of civilians' property, facts revealed tend to this conclusion.

180. Commission of prohibited act of widespread arson directing civilians' property does not seem to have been controverted. The act of '**arson**' refers to the destruction of property by setting fire to the property of civilians. A person is said to commit arson when he knowingly intending to

smash up another person's property by means of fire. In the case in hand, it stands proved that the gang of attackers accompanied by the four accused indicted had carried out aggravated arson by setting 10/12 houses on fire. These four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[**absconding**] and (4) Md. Saleque Miah @ Sayek Miah knowingly participated in conducting such grave prohibited acts, facts unveiled suggest to infer it unerringly.

181. Defence could not impeach the event of attack that resulted in looting and arson as arraigned in charge no.01. It appears that in cross-examination done on part of accused Md. Saleque Mia P.W.06 stated in reply to defence question that the event he testified happened in the mid of Bangla month Kartik. With this the event arraigned in this count of charge has been rather affirmed.

182. It also depicts from version made by P.W.06 in cross-examination, in reply to defence question that after independence the accused Jahed Mia went into hiding. Such questioning act signifies that the accused Jahed Mia had the culpable stance against the war of liberation which imbued

him to get involved with the atrocious acts and thus he opted to go in hiding to keep him absolved of liability for the criminal activities he committed in 1971.

183. It is now well settled that '**plunder**' should be understood as encompassing acts traditionally described as '**pillage.**' '**Looting**' is likewise a form of unlawful appropriation of property in armed conflict and is therefore embraced within '**plunder**'.

184. Indisputably the reckless destruction or devastation was carried out directing civilians' property intentionally, with the knowledge of the proscribed result. Devastation of civilians' property by launching attack indubitably had detrimental consequence on individuals' fundamental right to maintain normal and smooth livelihood and thus it caused enormous mental harm to the victims, the protected civilians.

185. Therefore, the upshot of devastating activities by act of 'looting' and 'arson' as found proved causing severe mental harm and grave detriment to the normal livelihood of the affected residents and relatives of victims constituted the offence of '**other inhumane act**' as crime against humanity.

186. Based on evidence adduced in this regard we may deduce it justifiably that the residents of the site attacked had to readily face huge panic and intimidation expanded by such aggravated arson. It stands proved too that act of pillaging was also carried out in course of the attack. Thus, the prohibited act of destruction was not only grave breach of Geneva Convention but it rendered myriad suffering to the civilians, the victims attacked which constituted the offence of '**other inhumane act**' as crime against humanity. Act of looting followed by arson committed constituted aggravated form of destruction of civilians' property which is prohibited by international humanitarian law.

187. Facts and pattern of the event happened lead to the conclusion that the intention of the perpetrators was to inflict serious mental suffering by committing such destructive acts. Serious mental injury caused by such prohibited act was without doubt an '**inhumane act**'. In this regard we recall the observation rendered by the ICTY in the case of **Naletilic and Martinovic** *that ---*

“.....Inhumane acts are ‘[...] acts or omissions intended to cause deliberate mental or physical suffering to the individual.’ As constituting crimes against humanity, these acts must also be widespread or systematic.”

[Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 247]

188. Act of aggravated destruction does not conform to the fundamental principle of humanity. In the case in hand defenceless pro-liberation civilians of the vicinity attacked had to watch their homes being reduced to ashes. Devastation was carried out in front of eyes of the civilians and the owners of the homes damaged. In this way by accomplishing colossal damage to civilians’ property rather serious **‘inhumane treatment’** was inflicted.

189. Facts and circumstances unveiled lead us to conclude that the four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [**absconding**] and (4) Md. Saleque Miah @ Sayek Miah indicted knowingly collaborated with the Pakistani army in materializing the object of the criminal mission by

substantially contributing and aiding in causing such inhuman treatment. Criminal acts they conducted deliberately were gravely detrimental to human rights and it increased magnitude of aggression of the criminal gang to which the accused persons were conscious and active part, sharing intent.

190. Act of unlawful appropriation of civilians' objects, by carrying out intentional and arbitrary pillaging and arson tantamount to grave contempt for the civilians. In respect of effect of such devastating activities Tribunal-2[ICT-2] in the case of **Md. Mahidur Rahman & Md. Afsar Hossain @ Chutu** observed that--

“Causing harm by plundering and burning down the 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 numerous houses and belongings of innocent civilians by launching such organised attack was indeed express great contempt for the people and their normal livelihood.”

[Md. Mahidur Rahman & Md. Afsar Hossain @ Chutu, ICT-2, Judgment 20 May, 2015, para 222]

191. The criminal acts committed in conjunction with the event of attack arraigned in this count of charge were not isolated in nature. Rather, these were accomplished in context of war of liberation directing pro-liberation civilians. We are of the view that the attack was systematic and designed, to further policy and plan of Pakistani occupation army and the four accused persons indicted knowingly and sharing intent and common purpose of the squad participated in perpetrating the crimes, being part of the criminal enterprise.

192. It is found proved that all these four accused were with the criminal gang when it was engaged in committing the acts of looting and arson directing civilians' property. Thus, it is not required to show which accused in which manner committed the criminal act.

193. It is now well settled that 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. That is to say, the offence of crimes against humanity is often the cumulative outcome of conducts and acts of individuals.

194. Presence of the accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek Miah at the crime site with the gang was not for any pious purpose. It was rather intended to facilitate and contribute to the commission of crimes, sharing intent of the gang. That is to say, it is to be seen whether the presence and conduct of the accused persons contributed in accomplishing the crimes by the group of attackers. In this regard it has been observed by 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.”

[ICTY Trial Chamber, Tadic, Trial Judgement, para. 692: 7 May 1997]

195. Tribunal finds on appraisal of ocular testimony of witnesses that the squad accompanied by the four accused (1)

Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[**absconding**] and (4) Md. Saleque Miah @ Sayek Miah instilled intense horror in the village-Muriauk by launching systematic attack. Through their presence and actions, these four accused persons being part of collective criminality had acted together with other members of the criminal squad, knowing consequence. Thus, all these four accused persons incurred liability for the reckless destructive acts which presumably intended to spread horror and panic amongst the pro-libration civilians of the locality.

196. The event of 'attack' resulted in looting and setting houses on fire causing grave detriment to normal and peaceful occupation and livelihood of defenceless civilians of village-Muriauk which constituted the offence of 'other inhumane act'. Such deliberate destructive activities were carried out not for any necessity.

197. Based on facts and circumstances divulged from evidence that the four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek

Miah knowingly assisted and guided the Pakistani army in approaching towards the crime site village-Muriauk where they perpetrated aggravated destruction of property belonging to civilian population, we conclude.

198. Finally, it is found that the prosecution has been able to prove beyond reasonable doubt that culpable and deliberate act of four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[absconding] and (4) Md. Saleque Miah @ Sayek Miah indubitably encompasses ‘abetment’ and ‘facilitation’ in committing the principal offences which were perpetrated to further common purpose and therefore they are found criminally liable under section 4(1) of the Act of 1973, for committing offences of ‘looting’, ‘arson’ and ‘other inhumane acts’ 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 02

[05 accused indicted]

[Abduction, confinement, looting, arson, torture, other inhumane acts and murder of 02 [two] civilians on forcible capture from the village-Muriauk under Police Station-Lakhai of District-Habiganj (Previously Sub-Division)]

199. Charge: That in continuation of the event of attack narrated in charge no.1 on 31.10.1971 at about 03:00 A.M a group formed of the accused (1) Md. Shafi Uddin Moulana (Absconding), (2) Md. Tajul Islam alias Fokan, (3) Md. Jahed Miah alias Jahid Miah, (4) Md. Saleque Miah alias Sayek Miah and (5) Sabbir Ahmmed (Absconding), 20/25 armed Razakars and 10/12 Pakistani occupation army by launching attack at the house of Elias Kamal of village-Muriauk under Police Station- Lakhai of District-Habiganj (Previously Sub-Division) forcibly captured Md. Idris Miah, father of Elias Kamal and kept him confined at the house of Md. Ismail Moulana when Elias Kamal managed to escape, sensing the attack.

In conjunction with the attack the accused persons and their accomplices attacked the house of the freedom fighter Md. Shahjahan and apprehended his father Abdul Jabbar and brought him also at the house of Md. Ismail Moulana.

Around 10.00/11.00 A.M on the same day the accused persons took the detained victims away to the house of the accused Md. Shafi Uddin Moulana where they were subjected to torture. Around 04.00 P.M on the same day the accused

persons and their accomplices started moving towards the army camp taking the detainees with them and on reaching at Uzadar Bil the detainees Md. Idris Miah and Abdul Jabbar were killed and their dead bodies were thrown in the swamp.

Therefore, the accused (1) Md. Shafi Uddin Moulana (Absconding), (2) Md. Tajul Islam alias Fokan, (3) Md. Jahed Miah alias Jahid Miah, (4) Md. Saleque Miah alias Sayek Miah and (5) Sabbir Ahmmed (Absconding) have been charged for participating, facilitating, abetting, aiding and substantially contributing to the commission of the offences of **'abduction', 'confinement', 'torture', 'murder' and 'other inhumane acts'** as crimes against humanity as enumerated in section 3(2)(a)(g)(h) read with section 4(1) of the International Crimes (Tribunals) Act, 1973 which are punishable under section 20(2) of the said Act of 1973.

Evidence of Witnesses Examined

200. The event arraigned in this count of charge happened by the same group of attackers which was engaged in conducting attack that resulted looting and arson at village-Muriauk **as arraigned in charge no.01**. Five accused have been indicted.

201. This count of charge rests upon testimony of 07 witnesses of whom two i.e. P.W.01 and P.W.05 are the sons of victims. These two witnesses are freedom-fighters and at the relevant time they had been staying at their home at village-Muriauk under police station Lakhai of District (now)-Habiganj. The rest 05 witnesses too had occasion of allegedly seeing the facts materially chained to the principal crimes, the killing of two unarmed civilians who happened to be the father of two freedom-fighters P.W.01 and P.W.05. Before we weigh what has been testified by the witnesses let us first see what they have recounted in Tribunal, in respect of the event arraigned in this count of charge.

202. P.W.01 Md. Elias Kamal (66) is a freedom –fighter. His father is one of victims who was forcibly captured and taken away by the group formed of Razakars and Pakistani army men which conducted atrocities and devastating activities as arraigned in charge no.01. P.W.01 is a direct witness to facts crucially related to the event of attack that resulted in abduction, torture, confinement and murder of two unarmed civilians including Md. Idris Miah the father of P.W.01.

203. The event arraigned in charge no.02 allegedly happened just after the event of devastating atrocities carried out at the same village as arraigned in charge no.01. It appears that the same group of attackers allegedly conducted both the attacks directing civilian population.

204. In recounting the event arraigned in charge no.01 P.W.01 Md. Elias Kamal already stated that after the war of liberation ensued he went to India at the end of April, 1971 for receiving training to join the war of liberation. On completion of training, at the end of June 1971 he came to Sector Head Quarter no.03 led by Major Shafiullah. In the second week of October in 1971 he along with 50/60 freedom-fighters being equipped with arms came to their localities under police station Lakhai and started fighting at different localities being divided into groups.

205. It has also been testified by P.W.01 that he and freedom-fighter Shafiqul Alam had been staying at their home. Freedom-fighter Mafizul had been staying at their home along with freedom-fighter Saleh Uddin and freedom-fighter

Shahjahan (P.W.05) remained stayed at his own home with ammunitions.

206. P.W.01 narrated that half an hour after the event (**as arraigned in charge no.01**) he remaining in hiding saw with the flame occurred from the fire set at neighbouring houses that the Razakars he named in testifying the event arraigned in charge no.01 (Razakars Md. Jahed Mia, Md. Tajul Islam @ Fokan, Md. Saleque Mia, Sabbir Ahmed and Razakar commander Moulana Shafi Uddin) and Pakistani army men entered inside their house. Their house was about 20/25 hands far from the hiding place where from he saw the Razakars he named dragging out his mother, father, brothers and sisters and made them detained at the courtyard. Seeing this he intending to get his co-freedom-fighter Shafiqul Alam and 03 other freedom-fighters assembled moved to Mafizul Islam's house, on the west bank of the pond where they were staying . There from he went into hiding at the place behind their (P.W.01) house, taking freedom-fighters Mafizul Islam, Saleh Ahmed and Shahjahan (P.W.05) with him. Then they could see with the light of Hurricane kept at veranda of their house that the Razakars he named bringing Nur Mia (now dead),

Sagar Ali (now dead) and Rakam Ali (now dead) to their (P.W.01) house from their neighbouring houses.

207. What happened next? P.W.01 continued stating that in the same night at about 04:00/04:30 A.M he also saw the Razakars he named and Pakistani army men taking away the three detainees to the house of peace committee member Ismail Moulana, about 100 yards far from their (P.W.01) house. Seeing this they went into hiding inside the bush, north to Ismail Moulana's house. There from they saw the Razakars he named and a group of army men moving toward the house of freedom-fighter Shahjahan.

208. P.W.01 next stated that in the morning at about 07:00 A.M he saw bringing Abdul Jabbar the father of freedom-fighter Shahjahan, tying him up to Ismail Moulana's house. Seeing this they remained in hiding inside the paddy field, 50/60 yards far. They then started following them (group) maintaining safe distance and in this way they arrived at Banoi landing stage of boats and there from the Razakars and Pakistani army men took away his(P.W.01) father and Abdul Jabbar toward Manpur locality by two boats.

209. In respect of reason of knowing the accused persons P.W.01 stated that in 1970's election Moulana Shafi Uddin was a candidate nominated by Nezam-E-Islami and the Razakars he named were engaged in his election campaign when they often used to visit their village and that is why he knew them beforehand.

210. In cross-examination done on behalf of accused Md. Saleque Mia P.W.01 stated in reply to defence question that he did not see the event of killing his father and Uncle Abdul Jabbar and that he knew him since the 1970 election.

211. In cross-examination done on part of accused Md. Shafi Uddin Moulana and Sabbir Ahmed P.W.01 denied defence suggestions that these accused were not Razakars and that they were not involved with the event he testified and that he did not see and heard the events he testified.

212. In cross-examination done on behalf of accused Md. Jahed Mia P.W.01 stated in reply to defence question that Ismail Moulana died in the hands of freedom-fighters before the independence achieved; that a group of freedom-fighters

had killed Ismail Moulana as he had killed his (P.W.01) father.

213. P.W.02 Md. Abdul Wadud (66) is a resident of village-Manpur under police station-Lakhai of District (now) Habiganj. He is a direct witness to facts materially chained to the ending phase of the attack arraigned **in charge no.02**. Before recounting the event P.W.02 narrated some facts related to activities of local Razakars, after forming Razakar Bahini in the locality.

214. P.W.02 stated that he was an agriculturist. In 1971 Shafi Uddin Moulana of their village was affiliated with Nijam-E-Islami and under his headship local peace committee and Razakar Bahini were formed. One day Razakar Saleque Mia, Sabbir and Sayed (now dead) called him to Razakar camp set up at the house of Moulana Shafiuddin. The Razakars Jahed Mia @ Jahid Mia, Tajul Islam @ Fokan and 8/10 Razakars were present there when Moulana Shafi Uddin asked him to join in Razakar Bahini which he refused and with this they started beating him. Later on his mother and uncle took him back there from.

215. In respect of the event arraigned **in charge no.02** P.W.02 stated that on 30 October in 1971 at the time of dusk he had been at home when he saw the Razakars he named, their accomplice Razakars and 10/15 Pakistani army men coming to the house of Shafi Uddin Moulana by a big boat. In night at 11:00/12:00 Razakar Shafi Uddin Moulana, the Razakars he named and the army men moved back toward north by boats.

216. P.W.02 next stated that on the following day at about 02:00/02:30 P.M they (group of attackers) came back to Shafi Uddin Moulana's house by boat taking freedom-fighter Elias Kamal's father Idris Mia and Abdul Jabbar the father of freedom-fighter Shahjahan with them, tying them up. He (P.W.02) and some of relatives of detainees then moved to Shafi Uddin Moulana's house and appealed for release of the detainees. But they did not respond to it.

217. P.W.02 finally stated that on the following day freedom-fighter Elias Kamal (P.W.01) came to his sister's house when he disclosed the event he experienced. At that time P.W.02 also heard from him the event of attack conducted at the house of MNA Mostafa Ali. P.W.02 stated that the Razakars

he named were from their neighbouring villages and thus he knew them beforehand.

218. In cross-examination done on behalf of two absconding accused Md. Shafi uddin Moulana and Sabbir Ahmed P.W.02 stated in reply to defence question that after the independence achieved these accused had not been in the locality and 1/1.5 year after independence they returned back in the locality. P.W.02 denied the defence suggestion that these accused were not Razakars and they were not involved with the crimes arraigned and that what he testified was untrue and tutored.

219. In cross-examination done on behalf of accused Jahed Mia @ Jahid Mia P.W.02 stated in reply to defence question that he knew Ismail Moulavi the peace committee leader of their locality. P.W.02 denied the defence suggestion that peace committee leader Ismail Mia killed Idris Mia the farther of freedom-fighter Elias Kamal or that for that reason Elias Kamal and his co-freedom-fighters had killed Ismail Mia during the war of liberation; that this accused was not Razakar and that he was not involved with the event alleged.

220. In cross-examination done on behalf of accused Tajul Islam @ Fokan P.W/02 stated in reply to defence question that he could not say whether this accused was detained in prison in connection with any criminal case; that he (P.W.02) saw that one eye of this accused was blind. P.W.02 denied defence suggestion that this accused was not a Razakar and was not involved in committing the alleged crimes and that what he testified was untrue and tutored.

221. On cross-examination done on behalf of accused Md. Saleque Mia @ Sayek Mia P.W.02 stated in reply to defence question that Elias Kamal was not his relative; that an army camp was about three miles far from their house. P.W.02 denied the defence suggestion that he testified implicating this accused out of village rivalry.

222. P.W.03 Md. Lafu Mia (70) a resident of village Manpur under police station-Lakhai of District (now)-Habiganj is a hearsay witness in respect of the event arraigned in charge no.02. He came to know the event when he was forced to work as a cook at the Razakar camp set up at the house of accused Shafi Uddin Moulana.

223. P.W.03 stated that in the mid of Bangla month Ashwin in 1971 at about 03:00/04:00 P.M a group formed of Razakars Saleque Mia, Sayed Ali (now dead), Sabbir, Jahid and Fokan led by Razakar commander Shafi Uddin Moulana came to their house and asked his mother to provide me to work as a cook at the Razakar/army camp. His mother did not agree with it and he too disagreed to go to Razakar camp. With this on order of Shafi Uddin Moulana Razakar Saleque , Sabbir started beating him and took him away to the Razakar camp set up at the house of Shafi Uddin Moulana. There from he was taken to Razakar and army camp at Lakhai Township where he was forced to continue working at kitchen.

224. P.W.03 next stated that in the mid of Bangla month Kartik in 1971 Razakar commander Shafi Uddin Moulana and the Razakars he named after holding a meeting at Lakhai Township Razakar and army camp moved toward east by boat along with 10/15 Pakistani army and 8/10 accomplice Razakars. On the following day at the time after dusk they returned back to camp and then the Razakars had left the camp leaving Razakar Sayed Ali.

225. P.W.03 continued stating that in the night Razakar Sayed Ali informed him that they (Razakars & army men) burnt down 10/15 houses at village-Muriauk and apprehended Abdul Jabbar the father of freedom fighter Shahjahan and Idris Mia the father of freedom-fighter Elias Kamal and gunned them down to death, by taking them at the Ujadur swamp. P.W.03 stated that on hearing this event, in the following night he managed to escape from the camp and returned back home, informed the event to his mother and came to Dhaka. P.W.03 stated that the Razakars he named were from their neighbouring localities and thus he knew them beforehand.

226. On cross-examination done on behalf of accused Saleque Mia @ Sayek Mia P.W.03 in reply to defence question put to him stated that in 1971 escaping out from Lakhai Township camp he first came to home and then moved to Dhaka and got engaged to work as a cook of a hotel at Thathari Bazar.

227. On cross-examination done on part of accused Shafi Uddin Moulana and Sabbir Ahmmed P.W.03 stated that he heard that just since after independence Shafi Uddin Moulana

had been in jail; that he did not see the accused Sabbir Ahmed and he could not say what work he used to do.

228. P.W.03 denied defence suggestions that accused persons were not Razakars and they were not involved with the event he testified; that he did not see or hear the event alleged and that what he testified implicating the accused persons was untrue and tutored.

229. P.W.04 Emdadul Haque Chowdhury (73) is a resident of village- Jirunda under police station-Lakhai of District (now) Habiganj. In addition to testifying the facts related to the event arraigned in charge no.02 P.W.04 stated some crucial facts relating to the formation of Razakar Bahini in the locality and accused person's affiliation therewith.

230. P.W.04 stated that accused Moulana Shafi Uddin was a central leader of Nijam E Islami and in 1971 he was the leader of Lakhai peace committee and a Razakar camp was set up at his house.

231. Next, P.W.04 stated that after the war of liberation ensued, he (P.W.04) started providing assistance to freedom-fighters secretly and in different manner. On 30 October at

about 08:00 P.M in 1971 Moulana Shafi Uddin, Razakar Sayek, Razakar Sabbir and their accomplice Razakars besieged their house and sensing the attack he (P.W.04) quitted home. Razakars on conducting search did not find him and thus they returned back to Moulana Shafi Uddin's house. Then on having dinner there they along with Pakistani army moved toward village-Muriauk.

232. P.W.4 next testified what he experienced in respect of the event arraigned in charge no.02. P.W.04 stated that on the following day i.e. on 31 October at the time of johar prayer (afternoon) Abdul Jabbar and Idris Mia were taken to Moulana Shafi Uddin's house on capture by Moulana Shafi Uddin with the assistance of his accomplice Razakars and Pakistani army. On hearing it he (P.W.04) at about 04:00 P.M on the same day coming near the Tobaria Senior Madrasa saw Moulana Shafi Uddin, Razakars Sabbir, Sayek and Pakistani army taking away detained Abdul Jabbar and Idris Mia toward Ujadur swamp by boat and arriving at the end of west of the swamp they gunned down two detainees to death and dumped their dead bodies into the swamp. In respect of reason of knowing or recognizing the accused persons P.W.04

stated that they were from their localities and thus he knew them before hand.

233. In cross-examination simply it has been denied that P.W.04 did not see the act of taking away the two detainees toward the swamp where they were gunned down to death and that what he testified implicating the accused persons was untrue and tutored. But the version on this aspect made by P.W.04 could not be controverted in any manner by cross-examining him. Even the other facts testified by this witness could not be denied even by defence.

234. P.W.05 Md. Shahjahan (67) of village-Moriauk Paschimpara under police station-Lakhai of District (now) Habiganj is the son of one victim Abdul Jabbar. He is a freedom-fighter.

235. P.W.05 already stated that seeing the house of MNA Mostafa Ali ablaze (as arraigned in charge no.01) he moved to freedom-fighter Mafizul Islam's house where he found freedom-fighter commander Md. Elias Kamal (P.W.01) and Salah Uddin. They then together went into hiding inside a bush adjacent to Elias Kamal's house.

236. In narrating the next event as arraigned in charge no.02 P.W.05 stated that remaining in hiding inside the bush adjacent to Elias Kamal's (P.W.01) house they saw Razakars Moulana Shafi Uddin, Jahid Mia, their accomplice Razakars and Pakistani army men apprehending Idris Mia the father of freedom-fighter Elias Kamal, his family inmates, Nur Mia (now dead), Sagar Ali (now dead) and Rokom Ali of the village. He (P.W.05) also saw the Razakars he named and Pakistani army keeping detained Idris Mia, Nur Mia, Sagor Ali, Rokom Ali confined at the house of Ismail Moulana.

237. P.W.05 continued stating that they also saw the Razakars he named looting their houses and burning out those into fire and bringing his detained father Abdul Jabbar to the house of Moulana Ismail, tying him up. In morning at about 10:00/10:30 A.M the Razakars he named made the detainees Nur Mia, Sagor Ali and Rokom Ali free but they took away his detained father Abdul Jabbar and Idris Mia the father of Elias Kamal toward Bamoi locality. They saw the Razakars taking away the detainees, tying them up to the house of Shafi Uddin Moulana of village Manpur by boat.

238. What happened next? P.W.05 stated that on the same day after dusk they came to know that at about 04:00 P.M the Razakars he named gunned down his father and detained Idris Mia to death, taking them to Ujadur swamp by boat and their dead bodies were dumped into the swamp. They did not have trace their dead bodies. P.W.05 finally stated that he knew the accused persons beforehand as they were from their village and neighbouring localities.

239. In cross-examination done on behalf of absconding accused Moulana Shafi Uddin and Sabbir Ahmed P.W.05 stated in reply to defence question that he did not initiate any case over the event he testified after independence; that accused Sabbir is now member of Awami League; that Moulana Ismail was the chairman of Lakhai peace committee.

240. In cross-examination done on part of other accused persons P.W.05 denied defence suggestions that he did not know the accused persons; that he did not see and hear what he testified; that the accused persons were not Razakars and were not involved with the event alleged.

241. P.W.06 Md. Jitu Mia (71/72) is a resident of village-Muriauk under police station-Lakhai of District (now) – Habiganj is a direct witness to the event arraigned in charge no.02. He also testified the event arraigned in charge no.01.

242. In narrating the event alleged in charge no.01 P.W.06 stated that Pakistani army and Razakars moved back toward the house of freedom-fighter Elias Kamal after setting 10/12 houses on fire (**event arraigned in charge no.01**).

243. What happened next? P.W.06 next started recounting the facts which relate to the event alleged in charge no.02. P.W.06 recounted that he started following them (gang of perpetrators) secretly when he saw the mother of Elias Kamal (P.W.01) crying. Few minutes later he saw the Pakistani army and the Razakars he named taking away Idris Mia the father of freedom-fighter Elias Kamal on forcible capture to the house of peace committee leader Moulana Ismail. Keeping Idris Mia detained at that house some Pakistani army men and some of the Razakars he named then moved to the house of freedom-fighter Shahjahan and set the house ablaze and then half an hour later he (P.W.06) saw them bringing Abdul

Jabbar the father of freedom-fighter Shahjahan (P.W.05) to the house of Moulana Ismail.

244. What happened next to keeping two civilians detained at the house of Moulana Ismail? P.W.06 stated that remaining in hiding at the west to the house of Moulana Ismail in morning at about 10:0/11:00 A.M. he saw the Razakars he named and the Pakistani army men taking away the detained Idris Mia and Abdul Jabbar with torture and beating toward village-Bamoi wherefrom the detainees were taken to Moulana Shafi Uddin's house by boat.

245. In respect of the ending phase of the event that resulted in killing the detainees P.W.06 is a hearsay witness. P.W.06 finally stated that on the following day he heard from people that detained Idris Mia and Abdul Jabbar were gunned down to death, taking them at Ujadur swamp and their dead bodies were dumped into the swamp. Their dead bodies could not be traced even.

246. In respect of reason of knowing the accused persons the P.W.06 stated that they accused Jahed Mia was from their village ; that he saw him and accused Sabbir and Saleque as they got engaged in election campaign around the locality in

support of Shafi Uddin Moulana and thus he knew them beforehand.

247. In cross-examination defence simply denied what the P.W.06 testified in relation to the event alleged in charge no.02 i.e. detention, abduction, torture and killing two unarmed civilians, by launching systematic attack. No effective effort seems to have been made on part of defence to impeach credibility of narrative made by the P.W.06.

248. P.W.08 Md. Abdul Hannan (60) after stating some facts relating to formation of local Razakar Bahini and accused persons' affiliation therewith narrated what he experienced in course of conducting the attack arraigned in charge no.02.

249. P.W.08 stated that on 31 October in 1971 at the time of Johor prayer (afternoon) Razakar commander Shafi uddin Moulana being accompanied by his accomplice armed Razakars and some Pakistani army men came to his house taking two detained civilians with them. Then he(P.W.08) along with some others moved to the house of Shafi Uddin

Moulana when he saw that Abdul Jabbar and Idris Mia of village Muriauk were being beaten.

250. P.W.08 also stated that on the same day at about 04:00 P.M Shafi Uddin Moulana and his accomplice Razakars and army men took away the detainees toward Lakhai Thana army camp by boat. They then started following them through the bank of the canal and heard some gun firing from the end of Ujadur swamp and saw throwing the dead bodies of detainees in the swamp.

251. P.W.08 finally stated that he knew the accused persons beforehand as they were from their village and some of them were from neighbouring localities and he saw them being engaged in election campaign in 1970 around the locality.

252. In cross-examination P.W.08 denied defence suggestions that he is a man of evil character; that he is an interested witness; that due to rivalry with the accused persons he testified falsely implicating the accused persons with the event alleged; that the accused persons were not Razakars and they had no involvement with the event alleged.

Finding with Reasoning on Evaluation of Evidence

253. Mr. Sultan Mahmud, the learned prosecutor drawing attention to the evidence presented argued that the event arraigned in this count of charge could not be accomplished without explicit assistance and contribution of the accused persons having prominent affiliation with Razakar Bahini. It has been also argued that after committing looting and arson by conducting attack the same group of attackers then started getting unarmed civilians forcibly captured and the gang took away the fathers of two unarmed freedom-fighters and eventually the detainees were gunned down to death by taking them at the swamp and their dead bodies were dumped there . The P.W.01 and P.W.05 are the sons of victims. At the time of the event happened they had been staying at their home being unarmed. Thus, naturally they could not initiate any kind of encounter in resisting the perpetrators.

254. The learned prosecutor also argued that it has been proved from the consistent and corroborative testimony of direct witnesses including sons of the victims that the accused persons knowingly participated in perpetrating the criminal acts and defence could not taint the narrative they recounted

in any manner, by cross-examining them. Even in absence of any direct proof the act of killing and complicity and involvement of the accused persons therewith may be well deduced from facts and circumstances. The accused persons knowingly and culpably assisted aided and substantially contributed in accomplishing the object of the attack, the killing of two civilians who were the father of two unarmed freedom-fighters P.W.01 and P.W.05.

255. Mr. Abdus Sattar Palwan, the learned defence counsel for two accused Md. Jahed Miah @ Jahid Miah and Md. Saleque Miah @ Sayek Miah. detained in prison submitted that it could not be testified as to how and by which act these accused allegedly participated and facilitated in committing the crimes arraigned. Prosecution could not bring any evidence to connect these two accused with the perpetration of killing alleged. Testimony of witnesses relied upon by the prosecution in support of this charge is inconsistent and incredible.

256. Mr. Mohammad Abul Hassan, the learned state defence counsel for one (1) accused detained in prison Md. Tajul Islam @ Fokan also submitted that involvement and

complicity of this accused could not be proved beyond reasonable doubt as the witnesses have narrated inconsistent testimony in prospects of this accused. Evidence implicating him does not inspire credence and the witnesses had no reason of recognizing him at the alleged crime site.

257. **Mr. Gazi M.H Tamim**, the learned state defence counsel defending two absconding accused Md. Shafi Uddin Moulana and Sabbir Ahmmed submitted that the accused Sabbir Ahmmed could not be held liable for the offences arraigned as at the relevant time he was a minor boy and it could not be shown that he was a Razakar. A minor boy was not eligible of being engaged in Razakar Bahini. The other accused Md. Shafi Uddin Moulana was not engaged in effecting the killing alleged; that there is no evidence to connect him with the act of killing arraigned and that he has been implicated in this case simply out of political rivalry.

258. In adjudicating this count of charge involving the offences of abduction, confinement, torture and murder of two unarmed pro-liberation civilians who were 'protected persons', we are to determine that --

(a) The attack was systematic and the commission of murder of abductees happened as the upshot of the act of their forcible abduction;

(c) That the accused persons indicted aided, participated, culpably facilitated and contributed to the commission of the principal crime as co-perpetrators agreeing the purpose and plan of the group of attackers i.e. the criminal enterprise.

259. Already we have rendered reasoned decision that the accused Sabbir Ahmmed has been found not guilty of offences arraigned in charge no.01. Thus, and since the event arraigned in charge no.02 allegedly happened by the same group of invaders in continuation of the attack arraigned in charge no.01 we require to see the commission of offences arraigned in charge no.02 and whether the four accused excepting accused Sabbir Ahmmed who have been found guilty of offences arraigned in charge no.01 also allegedly participated in accomplishing the crimes arraigned in charge no.02.

260. This count of charge involves the deliberate and designed attack and on failure to get the targeted civilians, the unarmed freedom-fighters the invaders forcibly captured the father of two freedom fighters (P.W.01 and P.W.05), tortured

them and took them away toward the army camp and on finally on reaching at Ujadar swamp the detainees Md. Idris Mia and Abdul Jabbar were killed and their dead bodies were thrown in the swamp.

261. It depicts that at the relevant time sensing the attack P.W.01 remained in hiding at the place behind their (P.W.01) house, taking his co-freedom-fighters Mafizul Islam, Saleh Ahmed and Shahjahan (P.W.05) with him. They saw the accused Razakars and Pakistani army men taking away the three detainees to the house of the peace committee Member Ismail Moulana, about 100 yards far from their (P.W.01) house. They also saw the gang moving there from toward the house of freedom-fighter Shahjahan (P.W.05).

262. It is depicted that the accused Razakars as residents of the locality were acquainted with the identity of the freedom-fighters and their houses. It may be lawfully inferred too that on substantial contribution and assistance of the accused persons the criminal activities were carried out by launching systematic attack. It may be inferred that facts of staying of freedom-fighters at their homes at village Muriak got

somehow leaked and thus the gang being accompanied by the accused persons designed to launch the attack. Object of the designed attack was to get the unarmed freedom-fighters apprehended who had been stationed at their home at village-Muriauk, facts unveiled lead to this conclusion.

263. What happened next to staying of unarmed freedom-fighters at their homes at village-Muriauk? Ocular version of P.W.01 and P.W.05 the key witnesses to the event arraigned in charge no.02 proves that eventually on 31 October, 1971 the civilians of the village-Muriauk had to face the systematic attack.

264. It is evinced from testimony of P.W.01 that in the morning at about 07:00 A.M he saw the invaders bringing Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05), tying him up to Ismail Moulana's house.

265. Presumably, due to horrific situation created by the group formed of a number of Razakars and army men the freedom-fighters including P.W.01 and P.W.05 were not in position to resist the invaders despite seeing them taking their fathers away on forcible capture.

266. It is evinced from testimony of P.W.01 and P.W.05 that they started following them (group) maintaining safe distance and in this way they arrived at Banoi landing stage of boats when they saw the Razakars and Pakistani army men taking away his(P.W.01) father and Abdul Jabbar toward Manpur locality by two boats.

267. P.W.05 corroborating P.W.01 also stated that in the morning at about 10:00/10:30 A.M the accused Razakars made the detainees Nur Mia, Sagor Ali and Rokom Ali free but they took away his detained father Abdul Jabbar and Idris Mia the father of Elias Kamal (P.W.01) toward Bamoi locality. They saw the accused Razakars taking away the detainees, tying them up to the house of Shafi Uddin Moulana of village Manpur by boat.

268. P.W.01 admits that Ismail Moulana died in the hands of a group of freedom-fighters before the independence achieved as he had concern in killing his (P.W.01) father. Thus, it has been affirmed that Idris Mia the father of P.W.01 was killed and in accomplishing the killing Ismail Moulana too provided active assistance to the gang.

269. It has been affirmed too that Ismail Moulana was also involved and concerned with the event as it depicts from testimony of P.WS.01 and P.W.05 that on forcible capture the victims were first taken to the peace committee leader Ismail Moulana's house and there from they were taken away toward the swamp. But it does not lead to deduce that Ismail Moulana alone was responsible for the event arraigned which ended in killing two civilians, the father of two freedom-fighters.

270. P.W.02 saw the accused Razakars, their accomplice Razakars and 10/15 Pakistani army men arriving at the house of accused Md. Shafi Uddin Moulana by a big boat and then P.W.02 saw the gang moving back toward north by boat. Afterward, they the invaders came back to Md. Shafi Uddin Moulana's house by boat taking freedom-fighter Elias Kamal's (P.W.01) father Idris Mia and Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05), tying them up.

271. The above fact of keeping the victims detained at the house of accused Md. Shafi Uddin Moulana suggests the unerring inference that accused Md. Shafi Uddin Moulana was the key designer of the attack. He being assisted by his

accomplice accused Razakars substantially contributed and facilitated the commission of the killing, the upshot of the attack.

272. How the attack eventually ended? It depicts from unimpeached account made by P.W.02 that the Razakars and Pakistani army men took away the two detainees toward the army camp by boat and few times later he heard 4/5 gun firing from the end of Ujadur swamp.

273. It appears that nobody had seen the event of actual killing. But the fact of hearing gun firing just immediate after taking away the victims toward the Ujadur swamp was chained to the act of killing. At the same time the accused persons who actually accompanied their accomplices and army men forming the gang were equally responsible for the act of killing as they remained stayed with the gang since inception of the attack launched.

274. The above ocular narrative of P.W.02 leads to the conclusion that pursuant to common intent of the squad the detained victims were taken away to the swamp where they were gunned down to death. The victims were the fathers of

two freedom-fighters. It stands proved that at the relevant time these two freedom-fighters and their two-co-freedom-fighters had been staying at the village attacked. But the invaders could not find them as they went into hiding and thus presumably they being extremely aggressive opted to get the fathers of two freedom-fighters forcibly captured and to annihilate them.

275. It has been affirmed in cross-examination of P.W.02 that accused Md. Shafi uddin Moulana had not been in the locality for 1/1.5 year after independence achieved. Why he remained aloof from his residential locality for long time? We assume that he intending to keep him safe from the grudge of people for the evil deeds he and his accomplices committed during the war of liberation had kept him far from the locality. It was indeed an incriminating fact that adds to his culpability and concern with the offences arraigned in this count of charge.

276. Before we look to the intent and purpose of launching attack at the village-Muriauk we consider it expedient to reiterate that in 1971 pro-Pakistan political parties were indulged in indiscriminate massacre of their political opponents belonging to Bangalee nation, in the name of

liquidating 'miscreants', 'infiltrators' in materializing which the Razakars used to play the potential role in collaboration with the Pakistani occupation army.

277. In the case in hand, the events of attacks as arraigned in both counts of charges framed were carried out just few days prior to the victory of Bangalee nation achieved. The fact of staying some freedom-fighters at their house at village-Muriauk made the devilish Pakistani occupation army and their local collaborators extremely antagonistic against the pro-liberation civilians and thus they by forming group launched systematic attack at the village- Muriauk where some unarmed freedom-fighters had been staying at their homes.

278. Carrying out destructive activities by looting and arson **(as arraigned in charge no.01)** certainly offer the conclusion that the perpetrators got information about staying of freedom-fighters there and they thus intending to execute the plan of combating the freedom fighters had launched the attacks.

279. It transpires that P.W.01 Elias Kamal, son of victim Idris Mia and P.W.05 Md. Shahjahan, the son of another victim Abdul Jabbar saw the gang conducting the attacks being accompanied by the accused Razakars led by local Razakar commander Md. Shafi Uddin Moulana who conducted criminal acts of **'looting'** and **'arson'** (**as arraigned in charge no.01**) and also the act of apprehending the victims (**as arraigned in charge no.02**) . Defence could not impeach it in any manner.

280. P.W.02 Md. Abdul Wadud and P.W.03, one hearsay witness in testifying the event exaggerated by stating affiliation of accused Sabbir Ahmmed with Razakars who formed part of the group of attackers.P.W.04 also made exaggeration by stating that accused Sabbir Ahmmed too accompanied the gang when it took away the detained victims away toward the swamp.

281. Testimony of P.W.02 and P.W.03 implicating the accused Sabbir Ahmmed with the event arraigned in charge no.02 which was conducted by the same group and just after the event alleged in **charge no.01** happened seems to be

glaring exaggeration. Already in determining the charge no.01 we have rendered our reasoned finding in this regard.

282. For the same reasons testimony of P.W.04 so far it relates to implication of accused Sabbir Ahmmed does not inspire credence and rather it seems to be exaggeration and embellishment. Already accused Sabbir Ahmmed one of five accused indicted in **charge no.01** has been found not guilty of offences arraigned, based on reasoned finding.

283. But for the above reason testimony of P.W.04 in respect of other facts shall not go on air. It however stands proved from evidence of P.W.04 that the four accused, their accomplices and Pakistani army men took away the detained victims toward the Ujadar swamp where they were gunned down to death.

284. We got it proved that the same group in continuation of first attack (**as listed in charge no.01**) had launched second attack that resulted in forcible capture of two victims and three others. It has already been proved that four accused formed part of the squad which carried out attack as arraigned in charge no.01. It thus stands proved that the four accused

who have been found guilty for the offences arraigned in charge no. 01 remained stayed with the gang also in conducting the attack arraigned in charge no.02.

285. It is evinced that the gang apprehended Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05) whom the invaders tying up brought to Ismail Moulana's house. There from the Razakars and Pakistani army men took away the father of P.W.01 and Abdul Jabbar the father of P.W.05 toward Manpur locality by two boats.

286. It has been corroborated by P.W.06 Md. Jitu Mia that the Pakistani army and the accused Razakars taking away Idris Mia, the father of freedom-fighter Elias Kamal on forcible capture to the house of peace committee leader Moulana Ismail. Keeping Idris Mia detained at that house some Pakistani army men and some of the Razakars he named then moved to the house of freedom-fighter Shahjahan (P.W.05) and set the house ablaze and then half an hour later he (P.W.06) saw them bringing Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05) to the house of Moulana Ismail. That is to say, the squad on getting the victims

apprehended first made them stationed at the house of Moulana Ismail.

287. It appears that on the following day the detained victims were taken to the house of accused Md. Shafi Uddin Moulana. It is evinced from unimpeached testimony of P.W.02 that on the following day at about 02:00/02:30 P.M the group of attackers came back to Shafi Uddin Moulana's house by boat taking freedom-fighter Elias Kamal's (P.W.01) father Idris Mia and Abdul Jabbar the father of freedom-fighter Shahjahan (P.W.05), tying them up.

288. Testimony of P.W.06 also depicts that the Razakars and the Pakistani army men then took away the detainees with torture and beating toward village-Bamoi wherefrom the detainees were taken to Moulana Shafi Uddin's house by boat.

289. It appears that the P.W.02 and some of relatives of detainees then moved to Shafi Uddin Moulana's house and appealed for release of the detainees. But they did not respond to it. These facts remained uncontroverted and thus the same

lends firm assurance as to abduction of two unarmed civilians, the fathers of P.W.01 and P.W.05, two unarmed freedom-fighters and explicit concern and participation of accused Md. Shafi Uddin Moulana with the event arraigned..

290. The above crucial fact gets corroboration also from ocular testimony of P.W.08. It reveals from their uncontroverted account that some of them moved to the house of Md. Shafi Uddin Moulana for making appeal seeking release of the detainees when they saw that detainees Abdul Jabbar and Idris Mia of village Muriauk were being beaten. Thus, it stands proved that the detainees were subjected to torture keeping them confined at the house of accused Md. Shafi uddin Moulana.

291. It is evinced too that on the same day at about 04:00 P.M accused Md. Shafi Uddin Moulana and his accomplice Razakars and army men took away the detainees toward Lakhai Thana army camp by boat.

292. In this count of charge too all the five accused have been indicted. They being part of the group that conducted the attack arraigned in charge no.01 also had carried out criminal

acts in effecting forcible capture of two victims who were eventually annihilated as arraigned in this charge no.02.

293. But already in adjudicating the charge no.01 accused Sabbir Ahmmed could not be found liable for the offences arraigned merely on the basis of his presence at the site, even if it is accepted to be true. Already on reasoned finding accused Sabbir Ahmmed has been found not guilty of offences arraigned in charge no.01. It has also been viewed that exaggeration in testimony of witnesses in relation to the involvement of accused Sabbir Ahmmed with the event arraigned in charge no.01 does not render the testimony of witnesses unbelievable in its entirety. Total repulsion of the evidence on ground of exaggeration is unnecessary.

294. Making such exaggeration during the course of evidence by a witness is not uncommon. But merely because of any such exaggerations, improvements and embellishments the entire prosecution story should not be doubted. The testimony of a witness cannot be discarded in its entirety merely due to the presence of embellishments or exaggerations. Besides, in the case in hand, there is nothing incredible or incongruous about witnesses' account of the event arraigned.

295. In each case we require to appraise as to what extent the evidence adduced is worthy of acceptance, and merely because in some respects the Tribunal considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

296. However, on careful appraisal of evidence we already arrived at decision that it is found reasonably proved that four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [**absconding**] and (4) Md. Saleque Miah @ Sayek Miah indicted, excepting accused Sabbir Ahmmed were engaged in conducting the horrific devastating acts directing civilans' property with extreme aggression (**as arraigned in charge no.01**). Accordingly, we consider it imperative to assess the testimony of witnesses so far as it relates to the involvement of four other accused indicted in charge no.02.

297. Presumably, the reason of launching attack was to get the freedom-fighters captured by launching attack at village-Muriauk but on failure the gang carried out aggressive

activities directing the non-combatant civilians who sided with the freedom-fighters and the war of liberation. Facts unveiled from evidence tendered suggest this irresistible conclusion.

298. Defence, by cross-examining P.W.01 and P.W.05 could not bring any indication which may lead to disbelieve that these witnesses had fair and coherent reason of knowing the accused persons beforehand.

299. It stands proved that the four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[absconding] and (4) Md. Saleque Miah @ Sayek Miah indicted in this count of charge knowingly accompanied the gang of attackers. Presence and activity of these four accused persons at the crime site accompanying the squad combined with their prominent affiliation in local Razakar Bahini and their knowledge about the object of the attack are considered sufficient to find them equally liable for the crimes committed in course of the event arraigned in charge no.02 which ended in atrocious killing of two unarmed civilans.

300. The phrases ‘knowing the intent’ and ‘sharing intent’ can be well inferred from facts and circumstance as the same are not tangible act. Facts and circumstances unveiled indisputably lead to the inference that they accompanied the gang ‘sharing intent’ of the criminal enterprise. Thus, by accompanying the group of attackers ‘knowing the intent’ of the enterprise and ‘sharing intent’ in perpetrating the crimes arraigned they are said to have had their ‘participation’ in accomplishing the crimes. They were culpably and knowingly associated with the Pakistani occupation army, to further the common object of the criminal mission.

301. It may be justifiably inferred that the planned attack was calculated to combat and capture of freedom-fighters who got stayed at their homes around the locality of village-Muriauk. Finding no target available the gang being accompanied by the four accused and their accomplice Razakars eventually took away two defenceless civilians, the fathers of two freedom-fighters –P.W.01 and P.W.05, on forcible capture. It stands proved chiefly from uncontroverted testimony of P.W.01 and P.W.05, the two direct witnesses and the freedom-fighters sons of victims.

302. The means and system the group of perpetrators used in the course of the attack, the identity of the victims, the discriminatory nature of the attack, the nature of the crimes committed in its course and the status of the accused persons and their affiliation with a militia force, as unveiled are sufficient to conclude that the attack was **‘directed against civilian population’**.

303. Here it is immaterial to see as to how many civilians were targeted of such attack. Devastating activities, grave breach of normal human life, causing mental and physical harm (as arraigned in charge no.01) and unlawful detention and finally the brutal killing of two civilians (as arraigned in charge no,02) by the same group cumulatively impel that the attack was ‘systematic’ and ‘directed against civilian population’ of a particular geographical area. And such attack was carried out just at the ending phase of the war of liberation when the Bangalee nation was about to achieve its long cherished independence.

304. Since the barbaric killing was the upshot of the first phase of the attack that resulted in forcible capture of the victims and since the accused 1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin

Moulana[**absconding**] and (4) Md. Saleque Miah @ Sayek Miah are found to have had active participation in carrying out this phase of attack, knowing the consequence of their act and conduct which substantially facilitated the Pakistani army in detaining the victims they incurred liability also in effecting the act of killing the detained victims. These accused persons despite being aware of the protected status of the victims had acted to accomplish the killings in furtherance of policy and plan of the Pakistani occupation army, the facts unveiled establish it.

305. The liability mode contained in section 4(1) of the Act of 1973 refers to ‘common plan of collective criminality’ which corresponds to JCE’. Therefore, these four accused persons, as ‘participants’ were involved in ‘committing’ the crimes perpetrated, in conjunction with the founding phase of the organized attack and thereby aided, facilitated and contributed the accomplishment of the act of killing of detained victims., sharing common intent.

306. In ordinary language, participation is the action of participating in something. To participate is to “take part or become involved in an activity”. [**Oxford Advanced**

Learner's Dictionary: Encyclopedic Edition, Oxford University Press, Oxford, 1992, p. 653]. The notion of taking part in something or becoming involved in an activity implies that more than one person is involved.

307. In view of above jurisprudence the four accused who are found to have had presence with the gang when it conducted the attack thus need not be shown to have had their physical participation even to the act of killing, the ending phase of the attack. 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.

308. There has been no reason whatsoever that may lead to the conclusion that not the gang that had launched attack and committed looting and arson at village-Muriauk but another group of perpetrators had carried out atrocities at the said village just after carrying out the attack arraigned in charge no.01.

309. Rather, it has been found proved that such ruthless crimes directing civilian population of rural vicinities were

committed on having substantial assistance of the accused Md. Shafi Uddin Moulana and his followers the accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah and (3) Md. Saleque Miah @ Sayek Miah, the local monstrous collaborators belonging to pro-Pakistan political parties and auxiliary force. These accused persons incurred individual criminal liability for the crimes arraigned against them and they in acting in concert with the criminal gang instigated, committed and otherwise aided and abetted in preparation and execution of the crimes charged in the Indictment.

310. Defence in any manner could not undermine credibility of witnesses who consistently recounted the core facts related to the event they observed. It stands proved that the four accused indisputably intended to contribute to the overall and massive outcome of the material elements of constituting the offences arraigned in this count of charge which has been proved.

311. It is explicitly evinced that presence of the four accused indicted (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @

Jahid Miah (3) Md. Saleque Miah @ Sayek Miah and (4) Md. Shafi Uddin Moulana at the crime site till the detained victims were taken away toward the swamp and their culpable act and conduct as unveiled demonstrate it patently that sharing common intent they by providing substantial contribution and facilitation participated in the entire event. And they did it in exercise of their notorious connection with Pakistani occupation army. Thus, culpable act on part of these accused persons had a substantial causal effect which contributed to the commission of the killing as well, we conclude it safely and reasonably, considering the facts unveiled.

312. None had opportunity of seeing the actual act of killing the detained victims and dead bodies could not be recovered even. But mere this fact does not negate the event of killing. It is now settled proposition that to prove the act of killing recovery of dead body is not required as such killing happened in war time situation and constituted the offence of crimes against humanity which was 'group crime and not isolated crime. In *Krnjelac*, the ICTY Trial Chamber in this regard held that:

“Proof beyond reasonable doubt that a person was murdered does not necessarily

require proof that the dead body of that person has been recovered. [T]he fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.”

313. The ICTY Trial Chamber also added that “ a victim's death may be established by circumstantial evidence provided that the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused”. ICTY Trial Chamber also observed in the case of **Tadic** that -

Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death.

[ICTY Trial Chamber: Tadic Trial Judgement, para. 240].

314. In the case in hand, it has been proved that the criminal acts including the abduction and killing happened in war time situation in 1971. The proved facts crucially chained to the events arraigned in both counts of charges indubitably lead to the inference that failure of getting any freedom-fighters staying at village-Muriauk the gang accompanied by the

accused Razakars became extremely belligerent and then they started apprehending civilians including the fathers of two freedom-fighters P.W.01 and P.W.05.

315. It also stands proved that finally, the other detainees got released and the gang took away only two detainees, the fathers of two freedom-fighters (P.W.01 and P.W.05). This fact leaves an unerring inference that the gang intended to wipe out the people who sided with the war of liberation and the freedom-fighters.

316. The four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana[**absconding**] AND (4) Md. Saleque Miah @ Sayek Miah are found responsible for the whole event pregnant of grave prohibited acts and not for only the part to which they were seen present. They may not have presence with the ending touch of the event. But it stands proved that they had played an integral part as members of the criminal endeavor. Therefore, they all are equally liable even for the act of killing two unarmed civilians.

317. P.W.01 and P.W.05 the sons of victims were not in position to encounter the criminal squad in any way as they were non-combatant at the relevant time. Thus, they had to face extreme trauma and pain as they had to witness the monstrous invaders taking away their fathers toward the swamp. Rather, they had to experience the horrific activities which indisputably caused grave mental trauma to them and the residents of the village attacked which constituted the offence of **‘other inhumane acts’**.

318. Tribunal reiterates that system crimes committed in context of war time situation do not result from the criminal propensity of single individual but commission of such offences is rather manifestation of ‘collective criminality’.

319. It is now well settled principle that when two or more persons being part of the group consciously act together to further a common criminal purpose, offences perpetrated by any member of the group may entail the criminal liability of all the members of the group. The accused Md. Shafi Uddin Moulana possessed the intent to kill the detained civilians and the three other accused aided substantially in materializing the

object, by contributing in apprehending the victims, by launching attack.

320. It is not obligatory to show that the accused or an individual himself actually participated in committing the killing constituting the offence of crime against humanity, the upshot of the event of systematic attack. It has been observed by the ICTY Appeal Chamber in the case of Ntakirutimana and Ntakirutimana, that—

“Murder as a crime against humanity under Article 3(a) does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of responsibility.

[Ntakirutimana and Ntakirutimana, (ICTY Appeals Chamber), December 13, 2004, para. 546]

321. The settled jurisprudence makes it obvious to note that liability for participation in committing ‘system crimes’ does not apply only to the executors at the crime scene and those who are found ‘most responsible’. Rather, it may apply to each participant who with mental awareness and sharing intent has provided substantial contribution to the

accomplishment of the crimes arraigned, being active part of the group.

322. The settled jurisprudence makes it apparent that the term ‘committing’ is not limited only to direct and physical perpetration and that other acts even can constitute direct participation in the *actus reus* of the crime. The indiscriminate manner in which the victims were forcibly captured and then taking them away to the swamp where they were gunned down to death establish that the perpetrators being accompanied by the four accused intended to contribute to the overall and colossal result of the attack that ended in killings.

323. Culpable association of the four accused with the group of attackers was such that it is quite likely to draw an unerring inference beyond reasonable doubt that these accused shared the general homicidal intentions of the collective criminality. These accused, by their deliberate culpable acts intended that the two detained civilians be killed, whether or not any of them actually carried out any of those killings himself.

324. Thus, liability can be established by showing that the accused persons had explicit intent to participate in committing the crime and that his act substantially contributed to its commission. Such contribution does not necessarily require 'participation' in the actual commission of the crime, but that liability accrues where it is found that the accused's presence at the crime site with the gang was intentional and culpable. Accordingly, alleged acts of assistance and encouragement of four accused persons as found proved were indeed sufficient to trigger their individual criminal responsibility.

325. Based on facts and circumstances unveiled we deduce that the accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Saleque Miah @ Sayek Miah and (4) Md. Shafi Uddin Moulana continued providing assistance and substantial contribution to the implementation of the strategic plan in the vicinity by launching attack as arraigned in charge No.02. The culpable co-operation the four accused persons knowingly extended to the group was based on the shared ideology and intent with respect to the implementation of the strategic plan, it may be justifiably inferred.

326. Tribunal notes that in resolving the issue of criminal liability we require to keep the settled proposition in mind that to be concerned in the commission of the killing arraigned does not only mean that the accused persons indicted are the persons who in fact directly caused death of detained civilians, by shooting. It also means an indirect form of participation where they had acted as the cog in the wheel of the event leading to the perpetration of the killing.

327. It has been proved beyond reasonable doubt that the four accused (1) Md. Shafi Uddin Moulana, (2) Md. Tajul Islam @ Fokan (3) Md. Jahed Miah @ Jahid Miah and (4) Md. Saleque Miah @ Sayek Miah had participation in designing of the activity of the criminal enterprise and in selecting the targets. Their substantial contribution in accomplishing the killing of two unarmed civilians happened in course of the barbaric aggression against the pro-liberation civilians of village-Muriauk, facts and circumstanced divulged lead to this conclusion.

328. In the case in hand, it stands proved from facts and circumstances revealed that the killing of two unarmed

civilians was a concerted part of the episode of cleansing the pro-liberation civilians. Convicted accused Md. Shafi Uddin Moulana played a vigorous and significant role in the activities of the violent group to which he was an active part in effecting forcible capture of two unarmed civilians. It stands proved that finally the detained civilians were taken away toward the swamp where they were shot to death.

329. The proved acts of accused Md. Shafi Uddin Moulana unerringly give rise to his significant criminal culpability for participating in the execution of a common criminal plan, facts unveiled lead to this conclusion. The three other accused persons too had acted by aiding the gang under control and guidance of him and sharing common intent. Thus, they too incurred liability, as 'aiders'. Thus, it may justifiably be concluded that the act of accomplishing killing indisputably took place under the approval and facilitation of four accused persons.

330. It stands proved that the squad entered the village-Muriauk with grave aggression, looted and torched numerous houses of civilians, and killed two civilians by taking them away on forcible capture. The evidence shows it consistently

that coherent strategy of the criminal squad accompanied by the four convicted accused was to attack the pro-liberation civilians, freedom-fighters who got stayed at the village-Muriauk at the relevant time.

331. Integrated evaluation of evidence of witnesses examined by the prosecution impels, beyond reasonable doubt, to the conclusion that the four accused (1) Md. Shafi Uddin Moulana, (2) Md. Tajul Islam @ Fokan (3) Md. Jahed Miah @ Jahid Miah and (4) Md. Saleque Miah @ Sayek Miah actively guided and assisted the criminal gang in carrying out the systematic and horrific attack directing civilians of village-Muriauk that eventually resulted in killing of two civilians detained in conjunction with the attack --evidence before us unequivocally proves it. Thus, they being active and conscious part of the criminal enterprise aided, abetted and participated by providing substantial contribution to the commission of offences of **abduction**, **confinement**, **torture**, **other inhumane acts** and **murder** 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 they incurred liability under section 4(1) of the Act, for the above offences. The accused

Sabbir Ahmmed is found not guilty of the offences arraigned in this charge.

XIII. Conclusion

332. Grotesque atrocities in Bangladesh began on the mid-night of 25 March, 1971 with the launch of ‘Operation Searchlight’ and it continued till the nation achieved its long cherished independence on 16 December 1971. The blood-bathed history of the birth of our long cherished motherland—**Bangladesh** portrays untold extent of sacrifices. The atrocities which are found proved in the case in hand encompass fragmented portrayal of the continuing mayhem.

333. It has been found proved that atrocious events of systematic attacks arraigned in both counts of charges were conducted in a designed and methodical way just few days prior to the independence achieved. The attacks were launched directing pro-liberation civilians of rural vicinity of village-Muriauk under Police Station-Lakhai of District Habiganj, in context of the War of Liberation in 1971.

334. Prosecution adduced and examined the residents of the vicinity attacked and the freedom-fighter sons of two victims of the event arraigned in charge no.02. Long about five decades after the events happened, the witnesses came on

dock of Tribunal and recounted their traumatic experience of the events of attacks arraigned. Their sworn narrative does not seem to have been suffered from any material infirmity. Defence case suggested to the prosecution witnesses does not tend to undermine their credibility.

335. The horrific nature and untold extent of atrocities which resulted in looting, arson, torture, abduction, confinement, other inhumane acts and murder of unarmed civilians are found to have been committed in the locality of village-Muriauk under police station-Lakhai of District Habiganj.

336. The offences for which the four accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [**absconding**] and (4) Md. Saleque Miah @ Sayek Miah have been found responsible are the part of appalling atrocities committed in context of the war of liberation 1971 in the territory of Bangladesh, in collaboration with the Pakistani occupation army with objective to annihilate the Bangalee nation by resisting in achieving its independence, in violation of customary international law, during the War of Liberation.

337. Under the above context the offences arraigned in both counts of charges, in the case in hand, were the 'Crimes against Humanity' committed during 1971 independence which patently demonstrate that those were of course the consequence of part of a 'widespread' or 'systematic' attack directed against the unarmed civilian population.

338. Indubitably, the horrific portrayal has been painted in the crimes proved in the case in hand and the three accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Saleque Miah @ Sayek Miah led by accused and (4) Md. Shafi Uddin Moulana knowingly aided and assisted in materializing the object of the criminal mission.

339. It has been proved that in the name of encountering the unarmed 'freedom-fighters' staying at the village-Muriauk at the relevant time the prohibited criminal activities the four accused persons deliberately carried out formed the designed attack directing the unarmed pro-liberation civilians and their property as well and the attacks eventually ended in rampant aggravated destruction of civilians' property and brutal killing of two unarmed civilians, as arraigned in both counts of charges.

340. Cumulative and rational appraisal of evidence presented offers the conclusion that the criminal enterprise to which the four accused were active part carried out the designed attack directing civilian population of village-Muriauk under police station Lakhai of District Habiganj.

341. It stands proved that the plan involved deliberate culpable action which was part of 'murderous enterprise' by which the residents of the vicinity attacked were severely harmed and coerced and two unarmed civilians, fathers of two freedom-fighters were systematically killed. The four accused persons thus do not have any space of being escaped from being punished.

342. The three accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah and (3) Md. Saleque Miah @ Sayek Miah despite being Bangalee had acted as traitors by siding with the Pakistani occupation army and knowing the consequence of their act and conduct they explicitly aided and assisted them in accomplishing the dreadful criminal activities to actuate its object and policy. The other accused Md. Shafi Uddin Moulana substantially guided and

encouraged them to act being part of the criminal enterprise. It stands proved.

343. The above four accused persons' conscious and culpable conduct---antecedent, contemporaneous and subsequent, as have been found explicit---all point to their unerring guilt which is well consistent with their 'concern' and 'participation' in the commission of the crimes proved.

344. These four accused persons were involved in picking up civilians on forcible capture and handing two of them over to the army that eventually resulted in their annihilation by gunshot, taking them to the swamp, it is proved.

345. The Tribunal, in adjudicating both counts of charges, already rendered its reasoned decision based on evidence holding the four (04) accused persons criminally liable under section 4(1) of the Act of 1973 for the commission of crimes proved [offences of 'looting', 'arson'. 'abduction', 'confinement', 'torture', 'other inhumane act' and 'murder' as crimes against humanity .

346. However, at the same time we have recorded our reasoned finding as to failure of prosecution to prove that the

accused Sabbir Ahmmed (absconding) too incurred liability in respect of both counts of charges.

XIV. VERDICT ON CONVICTION

347. In the case in hand, in proving each count of charges brought against the accused persons, the standard has been found to be legitimately met. Prosecution has been able to prove that the four (4) accused **(1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek Miah** are found to have incurred liability for the crimes arraigned.

348. Having coherent and due appraisal of all the evidences presented before us and argument advanced by both sides and based upon the factual and legal findings together with settled legal proposition, the Tribunal [ICT-1] **UNANIMOUSLY** finds---

Four(04) accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek Miah

Charge No.01: GUILTY of participating and culpably facilitating to the commission of the offences of **‘plunder’, ‘arson’** and ‘other

inhumane act’ as ‘crimes against humanity’ as enumerated in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act of 1973 for which they incurred liability under section 4(1) of the Act of 1973, punishable under Section 20(2) of the Act.

Four(04) accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Shafi Uddin Moulana [absconding] and (4) Md. Saleque Miah @ Sayek Miah

Charge No.02: GUILTY of substantially abetting, participating, contributing, facilitating in the commission of offences of **‘abduction’, ‘confinement’, ‘looting’, ‘arson’, ‘torture’, ‘other inhumane acts’ and ‘murder’** as crimes against humanity as part of systematic attack as enumerated in section 3(2)(a)(g)(h) of the International Crimes Tribunal Act of 1973 for which they incurred liability under section 4(1) of the Act of 1973, punishable under Section 20(2) of the Act.

The Tribunal [ICT-1] **UNANIMOUSLY** also **finds---**

One (01) accused Sabbir Ahmmed (absconding)

Charge No.01: NOT GUILTY indicted in this charge [charge no.01]

AND

Charge No.02: NOT GUILTY indicted in this charge [charge no.02]

XV. VERDICT ON SENTENCING

349. Mr. Sultan Mahmud, the learned prosecutor submitted that convict accused Md. Shafi Uddin Moulana was an influential pro-Pakistan political personality of the locality and naturally he was quite aware of human dignity and human civilization. But he intentionally had acted as the ‘lynchpin’ by providing substantial assistance to the Pakistani occupation army in conducting attacks.

350. The learned prosecutor also submitted that the convicted accused persons must face the highest sentence, as they are proved to have had active and culpable participation to the commission of barbaric criminal acts of looting, arson and killing constituting the offences of crimes against humanity. The intrinsic gravity, extent and pattern of criminal acts constituting the offences proved thus deserve to be considered as ‘aggravating factors’ in awarding the highest sentence.

351. Conversely, instead of placing any submission on any mitigating circumstance it has been simply submitted on part

of defence that the accused persons had no manner of participation and concern to the commission of crimes arraigned in both counts of charges and thus they deserve acquittal.

352. Based on reasoned finding we got it proved that four accused (1) Md. Shafi Uddin Moulana (absconding) (2) Md. Tajul Islam @ Fokan (3) Md. Jahed Miah @ Jahid Miah and (4) Md. Saleque Miah @ Sayek Miah are guilty of offences of aggravated destruction of civilians' property and abduction, torture and killing of two unarmed civilians as arraigned in both counts of charges and one accused Sabbir Ahmmed (absconding) has been found not guilty of offences of which he has been indicted.

353. It transpires that the whole episode of attacks arraigned in both counts of charges was a show of power and grave aggression violating recognized human rights. The four convicted accused have been found guilty not for committing any isolated offence as codified in normal penal law and as such the arraignment brought under the Act of 1973 itself portrays magnitude, intrinsic gravity and diabolical nature of the crimes and in the event of success of prosecution in

proving the charges the convicted accused persons must deserve just and appropriate punishment.

354. We reiterate that in a case involving the horrendous crimes against humanity undeniably the punishment to be awarded must reflect both the calls for justice from the persons who have directly or indirectly been victims and sufferers of the crimes, as well as respond to the call from the nation as a whole to end impunity for massive human rights violations and crimes committed during the war of liberation 1971.

355. Thus, we, considering the gravity of offences proved and mode of participation of convicts accused persons, deem it apposite to render our agreed reasoned decision. In the case in hand, gravity and magnitude of offences of which the convicted accused Md. Shafi Uddin Moulana (absconding) has been found guilty does not make any degree of space of attenuating the sentence to be awarded.

356. Convicted accused Md. Shafi Uddin Moulana (absconding) has been found guilty for his leading role in accomplishing designed, deliberate criminal activities forming part of systematic attack that resulted in brutal killing

of two unarmed civilians (fathers of two freedom-fighters) and aggravated destruction of civilians' property.

357. It stands proved that the convicted accused Md. Shafi Uddin Moulana had acted consciously in exercise of his dominance over the local Razakars including the three other convicted accused. Letters of law cannot remain mum in awarding just and appropriate sentence to this convict accused, taking the dominance of this accused over the local Razakars including the three other accused into account.

358. Convict accused Md. Shafi Uddin Moulana has been absconding and trial took place in his absentia. Such absconsion being an incriminating circumstance increases the quantum of aggravating factors, in awarding sentence to him.

359. The three other convicts, as found obvious from circumstances and facts unveiled, were the loyal followers of convict accused Md. Shafi Uddin Moulana (absconding) and they had acted under *de facto* control and guidance of accused Md. Shafi Uddin Moulana, the key designer and potential perpetrator of horrific offences of abduction, confinement, torture, murder and other inhumane acts as crimes against humanity **(as listed in charge no.02)**.

360. The crimes perpetrated and mode of participation of accused Md. Shafi Uddin Moulana therewith indubitably mirrors his extreme antagonistic state of mind to the pro-liberation civilians and unarmed freedom-fighters. Obviously it may also justifiably act as an aggravating factor in awarding punishment for the offences arraigned in this count of charge.

361. The victims of the event arraigned in **charge no.02** were the father of two freedom-fighters. The victims bravely laid their lives for the cause of independence. They deserve due honour and recognition. They and their heroic sacrifice must remain alive.

362. The three other convicted accused (1) Md. Tajul Islam @ Fokan (2) Md. Jahed Miah @ Jahid Miah (3) Md. Saleque Miah @ Sayek Miah were rather the small fishes and perceptibly they got themselves consciously engaged in accomplishing the attacks proved being guided and directed by the convict accused Md. Shafi Uddin Moulana. But it does not diminish their responsibility as it has been proved that they too actively aided, abetted and contributed to the commission of the alleged crimes including the killing of two civilians (**as arraigned in both counts of charges**). We have

rendered reasoned finding on it. However, it may be taken into consideration as a determinative of awarding sentence to these three convicts.

363. Tribunal considers that being confined within the fences of prison till remaining part of life may let these three convicts to sense what grave wrong doings and deliberate criminal acts they had committed as arraigned **in charge no.02**, being part of the collective criminality. In such case imprisonment for remainder of these three convict accuseds' natural life shall refer to shutting the 'outside world' out and shall keep their focus into the world within the fences or walls.

364. Keeping the factors as conversed above in mind we are of **UNANIMOUS** view that justice would be met if the accused (1) Md. Shafi Uddin Moulana, (2) Md. Tajul Islam @ Fokan , (3) Md. Jahed Miah @ Jahid Miah and (4) Md. Saleque Miah @ Sayek Miah who have been found guilty beyond reasonable doubt for the crimes proved (**as arraigned in both counts of charges**) are condemned and sentenced as below, under the provision of section 20(2) of the Act of 1973.

**Hence, it is
ORDERED**

Accused (1) **Md. Shafi Uddin Moulana**, son of late Md. Mutiur Rahman alias Motiur Rahman and late Eingraj Bibi of village- Manpur, Police Station-Lakhai, District [now]-Habiganj, (2) **Md. Tajul Islam alias Fokan**, son of late Atab Ullah alias Mahtab Uddin (Shudin) and late Most. Madhu Mala of village-Muriauk, Police Station-Lakhai, District (now)-Habiganj (previously Sub- Division), (3) **Md. Jahed Miah alias Jahid Miah**, son of late Ashuk Ullah alias Ashak and late Lal Banu of village-Zirunda, Police Station-Lakhai, District- Habiganj (Previously Sub-Division) **AND (4) Accused Md. Saleque Miah alias Sayek Miah**, son of late Abdul Sattar @ Abu Sattar and Most. Shajara Bibi of village-Zirunda under police station-Lakhai of District (now)-Habiganj are found **GUILTY** of the offences of ‘crimes against humanity’ (as listed in charge no.01 and 02), as enumerated in section 3(2) (a)(g)(h) of the International Crimes (Tribunals) Act, 1973.

Accordingly, **four (04) accused (1) Md. Shafi Uddin Moulana(absconding) , (2) Md. Tajul Islam alias Fokan,**

(3) Md. Jahed Miah alias Jahid Miah AND (4) Md. Saleque Miah alias Sayek Miah be convicted and condemned to the sentence as below for the offences arraigned **in charge no.01**, under section 20(2) of the Act of 1973:

‘Sentence of imprisonment for 15 (fifteen) years’ for the crimes as listed in **charge no.01**, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

Three (03) accused (1) Md. Tajul Islam alias Fokan, (2) Md. Jahed Miah alias Jahid Miah AND (3) Md. Saleque Miah alias Sayek Miah be convicted and condemned to the sentence as below for the offences arraigned **in charge no.02**, under section 20(2) of the Act of 1973:

‘Sentence of imprisonment till biological death’ for the crimes as listed in **charge no.02**, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

AND

Accused **Md. Shafi Uddin Moulana** be convicted and condemned to the sentence as below for the offences arraigned **in charge no.02**, under section 20(2) of the Act of 1973:

‘Sentence of death’ for the crimes as listed in **charge no.02** and he be hanged by the neck till he is dead, under section 20(2) of the International Crimes (Tribunals) Act, 1973;

Accused Sabbir Ahmmed (absconding), son of late Nur Hossain and late Pyara Begum of village-Manpur, Police Station-Lakhai, District-Habiganj (previously Sub-Division) is found **NOT GUILTY** of offences arraigned **in both counts of charges** and thus he be acquitted thereof. Recall the warrant of arrest issued against this accused.

Since the convicted accused **Md. Shafi Uddin Moulana** has been absconding the **‘sentence of death’** as awarded above to him shall be executed after causing his arrest or when he surrenders before the Tribunal, whichever is earlier.

The **‘sentence of death’** as awarded above to convicted accused **Md. Shafi Uddin Moulana** under section 20(2) of the International Crimes (Tribunals) Act , 1973 [The Act No.XIX of 1973] shall be carried out and executed in accordance with the order of the government as required under section 20(3) of the said Act.

The sentence of imprisonment as awarded above against the three (03) convicted accused **(1) Md. Tajul Islam alias Fokan, (2) Md. Jahed Miah alias Jahid Miah AND (3) Accused Md. Saleque Miah alias Sayek Miah** shall run concurrently.

The sentence of imprisonment in respect of charge no.01 as awarded against the absconding accused **Md. Shafi Uddin Moulana(absconding)** shall commence from the date of his arrest or surrender as required under Rule 46(2) of the Rules of Procedure, 2010(ROP) of the Tribunal-1.

Three (03) convicted accused **(1) Md. Tajul Islam alias Fokan, (2) Md. Jahed Miah alias Jahid Miah AND (3) Md. Saleque Miah alias Sayek Miah** [present on dock as brought from prison] be sent to prison with conviction warrant.

Let a copy of the Judgment be transmitted together with the conviction warrant to **the Senior Jail Super, Dhaka Central Jail, Keraniganj, Dhaka** for information and necessary action and compliance.

Let a copy of the Judgment also be transmitted together with the conviction warrant against convicted absconding accused **Md. Shafi Uddin Moulana** to **(1) the Secretary, Ministry of**

Home Affairs, (2) the Inspector General of Police, Bangladesh Police, Police Head Quarters, Dhaka for information and due compliance.

The Secretary, Ministry of Home Affairs and the Inspector General of Police [IGP], Bangladesh Police are hereby directed to initiate effective and appropriate measure for ensuring arrest of the **convict absconding accused Md. Shafi Uddin Moulana.**

Let copy of the Judgment also be transmitted the District Magistrate, Dhaka for information and necessary compliance.

Let certified copy of the judgment also be furnished to the prosecution.

The convict accused (1) **Md. Tajul Islam alias Fokan,** (2) **Md. Jahed Miah alias Jahid Miah AND** (3) **Md. Saleque Miah alias Sayek Miah** shall have right to prefer appeal before the Appellate Division of the Supreme Court of Bangladesh within the time stipulated in law. Thus, let certified copy of the judgment be furnished to the convicts at once, free of cost.

If the convict accused **Md. Shafi Uddin Moulana (absconded)** is arrested or surrenders within 30(thirty) days of the date of the order of conviction and sentence he will be provided with certified copy of this judgment free of cost.

Justice Md. Shahinur Islam, Chairman

Justice Md. Abu Ahmed Jamadar, Member

Justice K.M. Hafizul Alam, Member